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## MATH ERROR AUTHORITY: Authorize the IRS to Summarily Assess Math and “Correctable” Errors Only in Appropriate Circumstances

### TAXPAYER RIGHTS IMPACTED<sup>1</sup>

- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS’s Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

### PROBLEM

The IRS has the authority to correct math or clerical errors — arithmetic mistakes and the like — on a return using summary assessment (or “math error”) procedures.<sup>2</sup> When it makes a summary assessment, taxpayers cannot obtain judicial review before paying, unless they can determine whether and how to respond to an often-confusing IRS notice more quickly than under regular deficiency procedures.<sup>3</sup> The IRS has had problems using its summary assessment authority to address discrepancies and mismatches that go beyond simple arithmetic mistakes.<sup>4</sup> Yet, the Administration has proposed legislation that would allow the Treasury Department to expand the IRS’s summary assessment authority to other “correctable” errors by regulation — without specific authorization from Congress — where:

1. The information provided by the taxpayer does not match the information contained in government databases;
2. The taxpayer has exceeded the lifetime limit for claiming a deduction or credit; or
3. The taxpayer has failed to include with his or her return documentation that is required by statute.<sup>5</sup>

1 See Taxpayer Bill of Rights, available at [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights).

2 Internal Revenue Code (IRC) §§ 6213(b), (g)(2).

3 Compare IRC § 6211(a) with IRC § 6213(b)(2).

4 See, e.g., National Taxpayer Advocate 2014 Annual Report to Congress 163; National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 91-2; National Taxpayer Advocate 2011 Annual Report to Congress 74; National Taxpayer Advocate 2006 Annual Report to Congress 311; National Taxpayer Advocate 2003 Annual Report to Congress 113; National Taxpayer Advocate 2002 Annual Report to Congress 25, 186; National Taxpayer Advocate 2001 Annual Report to Congress 33. See also *Hearing on Improper Payments in the Administration of Refundable Tax Credits Before the Subcommittee on Oversight, Committee on Ways and Means*, 112th Cong. (May 25, 2011) (statement of Nina E. Olson, National Taxpayer Advocate); *Hearing on Complexity and the Tax Gap, Making Tax Compliance Easier and Collecting What’s Due Before the Committee on Finance*, 112th Cong. (June 28, 2011) (statement of Nina E. Olson, National Taxpayer Advocate); *Hearing on The National Taxpayer Advocate’s 2014 Annual Report to Congress, Before the House Subcomm. on Gov’t Ops., Comm. on Oversight and Gov’t Reform*, 114th Cong. (Apr. 15, 2015) (statement of Nina E. Olson, National Taxpayer Advocate).

5 Department of the Treasury, *General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals*, February 2015, at 245-246, available at [http://www.treasury.gov/resource-center/tax-policy/Pages/general\\_explanation.aspx](http://www.treasury.gov/resource-center/tax-policy/Pages/general_explanation.aspx). For concerns about this proposal, see, e.g., *Hearing on The National Taxpayer Advocate’s 2014 Annual Report to Congress, Before the House Subcomm. on Gov’t Ops., Comm. on Oversight and Gov’t Reform*, 114th Cong. (Apr. 15, 2015) (statement of Nina E. Olson, National Taxpayer Advocate).

This proposal would allow the IRS to assume a taxpayer's return is wrong and assess a tax deficiency based on circumstances that are more complicated than they appear.

If the IRS uses summary assessment procedures to address complex issues that require additional fact finding, the assessments are more likely to be wrong, and confusing math error notices are likely to become even more difficult to understand.<sup>6</sup> Confusing notices may prevent some taxpayers, particularly low income taxpayers, from responding timely. Those who miss the deadline lose the right to challenge the adjustment in court before paying. The IRS also wastes resources when its assessments are inaccurate because it has to review additional documentation, process abatement requests and amended returns, try to respond to calls and letters, and potentially even attempt to collect inaccurate assessments from taxpayers who are entitled to the benefits they claimed. Thus, expanding summary assessment procedures into more complicated areas could erode the *rights to quality service, to pay no more than the correct amount of tax, to privacy, to challenge the IRS's position and be heard, to appeal an IRS decision in an independent forum, and to a fair and just tax system*, while wasting IRS resources.

## EXAMPLES

### Example 1: Unreliable Database Mismatches Could Trigger Math Error Authority

Not all government databases are reliable for tax purposes. The IRS has the authority to assess tax using math error procedures when a taxpayer claims the Earned Income Tax Credit (EITC) for a child who is shown on the Federal Case Registry (FCR) as being in someone else's custody.<sup>7</sup> A study that Congress required the Treasury Department to undertake with the National Taxpayer Advocate found that *about 39 percent* of the returns selected solely based on FCR data mismatches were actually correct.<sup>8</sup> Because FCR data is not sufficiently reliable, the IRS has adopted the National Taxpayer Advocate's recommendation not to assess math errors based on mismatches between returns and FCR data.<sup>9</sup>

### Example 2: Mismatches Could Allow the IRS to Make Summary Assessments Based on the IRS's Estimate of the Mere Probability of an Error

The IRS's "Dependent Database" (DDb), combines unreliable data from the FCR with other more reliable government data (*e.g.*, the Social Security Administration's Kidlink data, which links a child's Social Security number (SSN) to its mother's SSN, and in many instances, the father's SSN).<sup>10</sup> The IRS runs each return that claims a dependent or other family-status benefit through DDb filters (*e.g.*, EITC,

<sup>6</sup> See, *e.g.*, National Taxpayer Advocate 2014 Annual Report to Congress 163.

<sup>7</sup> In 2001, Congress authorized the IRS to use of summary assessment procedures to deny EITC, beginning in 2004, where data from the FCR of Child Support Orders indicates the taxpayer claiming a child is actually the non-custodial parent. *Economic Growth and Tax Relief Reconciliation Act of 2001*, Pub. L. No. 107-16, § 303(g), 115 Stat. 38, 56-57 (2001) (codified at IRC § 6213(g)(2)(M)). The House Conference Report requested a study of the FCR database by the Department of Treasury, in consultation with the National Taxpayer Advocate, of the accuracy and timeliness of the data in the FCR; the efficacy of using math error authority in this instance in reducing costs due to erroneous or fraudulent claims; and the implications of using math error authority in this instance, given the findings on the accuracy and timeliness of the data. H.R. Conf. Rep. 107-84 at 147 (2001). See also National Taxpayer Advocate 2002 Annual Report to Congress 189 (Legislative Recommendation: *Math Error Authority*).

<sup>8</sup> See IRS, Federal Case Registry Final Report, Project 5-02-12-3-005 (CR-39) (July 2003) ("almost 39% of the FCR children were allowed per examination... With the exclusion of no reply cases... the rate of FCR children that are allowed per examination increases to 53.5%").

<sup>9</sup> It is not clear that the IRS would have conducted the FCR study without a mandate to do so.

<sup>10</sup> For a description of the DDb, see Internal Revenue Manual (IRM) 4.19.14, *EITC/Revenue Protection Strategy* (Jan. 1, 2015). Exam receives a majority of its EITC work from the DDb. IRM 4.19.14.1, *Earned Income Tax Credit (EITC) Revenue Protection Strategy (RPS)* (Jan. 1, 2015).

dependent exemptions, filing status, Child and Dependent Care Credit, Child Tax Credit, and education benefits, etc.).<sup>11</sup>

The IRS assumes that the more inconsistencies (or “mismatches”) there are between the return and the DDb (or the more “rules” it breaks) the more likely the return is to contain errors.<sup>12</sup> In other words, the IRS uses the DDb to infer the probability of error, but it is not a binary (yes/no) determination. TAS has seen instances where a return has broken all of the rules contained in the DDb and the taxpayer is still eligible for the exemption or credit claimed. It would be unprecedented to give the IRS summary assessment authority based on some unstated *probability* that it is correct. Yet, because the DDb is a government database that the IRS may consider to be inconsistent with a return, there is a potential it could be used in this way under the correctable error proposal.

### Example 3: The IRS Does Not Try to Reconcile Inconsistencies Before Charging a Math Error

The IRS may assess tax using math error procedures when a taxpayer claims a dependent, but does not include the dependent’s correct taxpayer identification number (TIN).<sup>13</sup> Because a TIN is a long string of numbers, taxpayers sometimes enter them incorrectly. A TAS study of math errors on dependent TINs found that the IRS subsequently reversed at least part of these math errors on 55 percent of the returns with incorrect TINs.<sup>14</sup> The study also found that the IRS could have resolved 56 percent of these errors using information already in its possession (*e.g.*, the TIN listed on a prior year return), rather than assessing tax using math error procedures and asking the taxpayer to explain the apparent discrepancy.<sup>15</sup>

Even when the taxpayer did not respond and the IRS did not reverse the math error, the TAS study found that the IRS should have reversed it in 41 percent of the cases based on information in its files, and thus, it deprived taxpayers of benefits to which they were entitled.<sup>16</sup> The IRS’s failure to review information in its files before assessing tax using math error procedures is inconsistent with general direction from Congress that the IRS should use information in its possession to avoid using the summary assessment process, rather than resolving uncertainty against the taxpayer.<sup>17</sup> In other words, in a large percentage of

11 The IRS also uses the DDb filters to detect potential identity theft. As of November 26, 2015, the DDb filters used by the IRS’s Taxpayer Protection Program (TPP) had a “false positive” rate of 38.2 percent during calendar year 2015. See IRS, Return Integrity & Compliance Services (RICS), *Update of the Taxpayer Protection Program (TPP)* 9 (Dec. 2, 2015). According to the IRM, the TTP “is responsible for handling potential Identity Theft (IDT) cases that are scored by a set of IDT models in the DDb or selected through a query in the Electronic Fraud Detection System (EFDS) or selected by Integrity & Verification Operation (IVO) tax examiners during the daily screening process.” IRM 25.25.6.1, *Taxpayer Protection Program* (May 26, 2015).

12 See generally IRM 4.19.14, *EITC/Revenue Protection Strategy* (Jan. 1, 2015).

13 IRC § 6213(g)(2)(H).

14 National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 114, 117 (Research Study: *Math Errors Committed on Individual Tax Returns – A Review of Math Errors Issued on Claimed Dependents*).

15 *Id.* at 119-20.

16 *Id.* at 120.

17 H.R. REP. No. 94-658, at 290 (1976) (“...care should be taken to be sure that what appears to be an error in addition or subtraction is not in reality an error in transcribing a number from a work sheet, with the final figure being correct even though an intermediate arithmetical step on the return appears to be wrong... It is expected that the Service will check such possible sources of arithmetical errors before instituting the summary assessment procedures.”). *Id.* at 291 (“[T]he taxpayer has the obligation of showing that he or she is entitled to the number of exemptions claimed. However, this summary assessment procedure is not to be used where the Service is merely resolving an uncertainty against the taxpayer.”). The 1976 committee report provided detailed direction from Congress about how it generally expected the IRS to apply the math error rules, however, the IRS was not expressly authorized to use the math error procedure to address the omission of a dependent’s TIN on a return until 1996. See Small Business Job Protection Act of 1996, Pub. L. No 104-188, § 1615, 110 Stat. 1853 (1996); H.R. REP. No. 104-737, at 319-20 (1996).

math error cases the IRS imposed a burden on taxpayers, generating phone calls and letters it could not timely handle, triggering interest charges and denying tax benefits to those entitled to them, rather than investing a few minutes of research at the front end. Under the correctable error proposal, the IRS could burden taxpayers and waste more resources in this way.

#### Example 4: It May Be Difficult to Determine What Documentation Is Attached

Congress authorized the IRS to use math error authority to deny the First-Time Homebuyer Credit (FTHBC) to taxpayers who did not attach a “settlement statement,” as required.<sup>18</sup> Initially, the IRS accepted a settlement statement as sufficient only if it showed all parties’ names and signatures, the property address, sales price, and date of purchase, as provided on the Form HUD-1. After learning that not all states required a settlement statement to include a complete address or both parties’ signatures, the IRS reversed its position.<sup>19</sup>

The IRS’s continued use of math error authority in this circumstance would have been very costly and burdensome.<sup>20</sup> To make determinations about the sufficiency of a settlement statement, an IRS employee would have to read papers attached to the return and explain any problems to the taxpayer (or summarily assess the liability without providing a good explanation). Accordingly, the National Taxpayer Advocate recommended the IRS be permitted to use math error authority only when a return does not contain a document that purports to be a settlement statement (*i.e.*, a simple yes/no determination), and required to use normal deficiency procedures to address facts-and-circumstances determinations concerning the *sufficiency* of a settlement statement.<sup>21</sup> Yet, under the correctable error proposal, after promulgating regulations, the IRS could summarily assess tax related to any return that did not attach sufficient documentation in similarly ambiguous circumstances.

18 See Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, § 11, 123 Stat. 2984, 2991-92 (2009), *amending* IRC § 36(d) and *adding* IRC § 6213(g)(2)(P).

19 The IRS’s handling of FTHBC issues in the 2011 filing season delayed processing of an estimated 128,000 returns and led to a sharp increase in related TAS cases (from 669 through April 30 of fiscal year (FY) 2010 to 4,299 for the same period in FY 2011). National Taxpayer Advocate FY 2012 Objectives Report to Congress 28-36. IRS SERP Alert 100290 (May 25, 2010); IRM 21.6.3.4.2.11.6(4) (May 7, 2012) (“The settlement statement may or may not contain the buyer(s) and seller(s) signatures.”). See also IRS SERP Alert 100066 (Feb. 12, 2010); IRS Instructions for Form 5405, *First-Time Homebuyer Credit and Repayment of the Credit 2* (Mar. 2011) (acknowledging that not all taxpayers will have a signed HUD-1).

20 It would also have been inconsistent with concerns expressed by Congress in 1976. See H.R. REP. No. 94-658, at 292 n.1 (1976) (“[D]isputes as to the adequacy of the schedule that the taxpayer submits are to be dealt with under normal administrative procedures and not by use of the extraordinary summary assessment procedure.”).

21 See, e.g., National Taxpayer Advocate 2011 Annual Report to Congress 524-30 (Legislative Recommendation: *Mandate That the IRS, in Conjunction with the National Taxpayer Advocate, Review Any Proposed Expanded Math Error Authority to Protect Taxpayer Rights*).

## RECOMMENDATIONS

To ensure that the IRS's use of summary assessment authority does not impair taxpayers' rights and unnecessarily burden both the taxpayer and the IRS, the National Taxpayer Advocate recommends (and reiterates prior recommendations) that Congress authorize the IRS to summarily assess a deficiency only if:<sup>22</sup>

1. There is a mismatch between the return and unquestionably reliable data (rather than the IRS's estimate about the mere probability of an error).
2. The IRS's math error notice clearly describes the discrepancy and how taxpayers may contest the proposed change.
3. The IRS has researched all of the information in its possession (*e.g.*, information provided on prior-year returns) that could reconcile the apparent discrepancy.
4. The IRS does not have to analyze facts and circumstances or weigh the adequacy of information submitted by the taxpayer (*e.g.*, whether *sufficient* documentation is attached) to determine if the return contains an error.
5. The abatement rate for a particular issue or type of inconsistency is below a specified threshold for those taxpayers who respond.<sup>23</sup>
6. For any new data or criteria, the Department of Treasury, in conjunction with the National Taxpayer Advocate, has evaluated and publicly reported to Congress on the reliability of the data or criteria for purposes of assessing tax using math error procedures.<sup>24</sup> The report should analyze the burdens and benefits of the proposed use of math error authority, considering downstream costs to taxpayers (*e.g.*, time, paperwork, representation) and the IRS (*e.g.*, processing taxpayer calls and letters, requests for audit reconsideration, amended returns, appeals, and TAS intervention).

## PRESENT LAW

### Taxpayers Generally Have the Right to Judicial Review Before Paying an Assessment by the IRS

Before assessing a deficiency (*e.g.*, as a result of an audit), the IRS is legally required to send the taxpayer a Statutory Notice of Deficiency (SNOD), also known as a "90-day letter."<sup>25</sup> This letter explains the basis for the deficiency and gives the taxpayer 90 days to file a petition with the Tax Court.<sup>26</sup> A taxpayer who misses this deadline can only seek judicial review by paying the assessment and filing a claim for refund.<sup>27</sup>

22 See, *e.g.*, National Taxpayer Advocate 2014 Annual Report to Congress 284 (Legislative Recommendation: *Taxpayer Rights: Codify Taxpayer Bill of Rights and Enact Legislation that Provides Specific Taxpayer Protections*); National Taxpayer Advocate 2011 Annual Report to Congress 524-530 (Legislative Recommendation: *Mandate that the IRS, in Conjunction with the National Taxpayer Advocate, Review Any Proposed Expanded Math Error Authority to Protect Taxpayer Rights*); National Taxpayer Advocate 2002 Annual Report to Congress 189 (Legislative Recommendation: *Math Error Authority*).

23 An issue should not be subject to math error simply because the population in question is relatively unresponsive, *e.g.*, because they do not understand the IRS's notices or are transient and do not receive them.

24 As noted above, in 2001 Congress requested a study of the FCR database by the Department of Treasury, in consultation with the National Taxpayer Advocate. H.R. CONF. REP. 107-84, at 147 (2001).

25 Prior to the issuance of the SNOD, the IRS will generally issue a 30-day letter giving the taxpayer the opportunity to file a protest with Appeals. IRS, Publication 556, *Examination of Returns, Appeal Rights, and Claims for Refund* 5 (Sept. 2013).

26 IRC § 6213. The 90-day period becomes 150 days if the notice is addressed to a person outside of the United States.

27 If the claim is denied or if no action is taken on the claim within six months, the taxpayer may file a refund suit in a federal district court or the Court of Federal Claims within the limitations period. IRC §§ 6511, 6532, 7422.

Low income taxpayers are less likely to be able to afford to pay the assessment before disputing it or to navigate these more complicated procedures.

### Taxpayers Do Not Automatically Receive the Right to Judicial Review Before Paying a Math Error Assessment

IRC §§ 6213(b) and (g) authorize the IRS to use its math error authority to assess and collect tax after 60 days without first providing the taxpayer access to the Tax Court. To preserve the right to petition the Tax Court, the taxpayer must request an abatement within 60 days. If the taxpayer does so, the IRS will then work the case through normal deficiency procedures (described above). Although initially limited to situations involving mathematical errors (*e.g.*,  $2+2=5$ ),<sup>28</sup> Congress first expanded the IRS's math error authority to address "clerical errors" (*e.g.*, inconsistent entries on the face of the return),<sup>29</sup> and then expanded it to address other circumstances such as where a taxpayer omits a required TIN or uses an SSN that does not match the one in the Social Security Administration's Numident database.<sup>30</sup>

### Congress Carefully Limited Summary Assessment Procedures

Congress was concerned about substituting summary assessment procedures for deficiency procedures.<sup>31</sup> It generally reserved summary assessment procedures for simple situations where "not only is the error apparent from the face of the return, but the correct amount is determinable with a high degree of probability from the information that appears on the return."<sup>32</sup> Noting that authorizing summary assessment procedures when the taxpayer omitted a required schedule may arguably depart from this general approach, a committee report explained that "disputes as to the *adequacy* of the schedule that the taxpayer submits are to be dealt with under normal administrative procedures and not by use of extraordinary summary assessment procedure."<sup>33</sup> The IRS was not to use summary assessment procedures "where it is not clear which of the inconsistent entries is the correct one" or for "resolving an uncertainty against the taxpayer."<sup>34</sup>

If taxpayers do not understand the supposed error, they may have difficulty deciding whether to request an abatement (assuming they understand that requesting abatement is an option). They are also less likely to request abatement within the shorter 60-day period applicable to summary assessments. Accordingly,

28 H.R. REP. No. 691, at 10-11 (1926).

29 Pub. L. No. 94-455, § 1206(b), 90 Stat. 1520, 1704 (1976) (defining "mathematical or clerical error" to include (1) errors in addition, subtraction, multiplication, or division shown on any return, (2) an incorrect use of any table provided by the IRS with respect to any return if such incorrect use is apparent from the existence of other information on the return, (3) an entry on a return of an item that is inconsistent with another entry of the same or another item on the return, (4) an omission of information which is required to be supplied on the return to substantiate an entry on the return, and (5) an entry on a return of a deduction or credit in amount which exceeds certain types of statutory limits). The IRS had interpreted "math errors" broadly, but courts had limited its use to arithmetic errors; thus the 1976 legislation formally expanded it to encompass "clerical" errors, while also "restricting" its use by the IRS. H.R. REP. No. 94-658, at 289 (1976).

30 IRC § 6213(g)(2). A "mathematical or clerical error" currently includes 14 categories of errors (in subparagraphs A-N), including (a) an omission of a correct TIN required to be included on a tax return for certain tax credits, and (b) the inclusion of a TIN indicating that the individual's age disqualifies them from certain credits, as discussed above. *Id.*

31 See H.R. REP. No. 94-658, at 289 (1976); S. REP. No. 94-938(I), at 375 (1976); Joint Committee on Taxation (JCT), *General Explanation of the Tax Reform Act of 1976*, JCS 33-76, 372 (1976) (*Assessments in Case of Mathematical or Clerical Errors, Sec. 1206 of the Act and Sec. 6213 of the Code*). Although the IRS originally had the authority to assess EITC overpayments without providing taxpayers an opportunity for judicial review in a pre-payment forum (under former IRC § 6201(a)(4)), Congress specifically granted taxpayers this right in 1988. See Technical and Miscellaneous Revenue Act of 1988 (TAMRA), Pub. L. No. 100-647, § 1015(r), 102 Stat. 3342, 3572 (1988).

32 H.R. REP. No. 94-658, at 292 (1976).

33 *Id.* at n.1 (emphasis added).

34 *Id.* at 291.



Congress also enacted IRC § 6213(b)(1), requiring that “[e]ach notice under this paragraph shall set forth the error alleged and an explanation thereof,”<sup>35</sup> and should “include questions designed to show whether the taxpayer indeed is entitled” to what they claimed on the return.<sup>36</sup>

## REASONS FOR CHANGE

### As the IRS Receives More Data and Fewer Resources, It May Be Tempted to Apply Summary Assessment Procedures to a Wider Range of Situations

As the IRS’s resources have decreased, it has proposed that Congress expand its summary assessment authority as a seemingly cost-effective way to assess deficiencies and protect revenue.<sup>37</sup> This temptation will increase as the IRS receives more data that may be or appear to be inconsistent with a person’s return. The IRS received about 2.1 billion information reporting documents in 2013 (including 47.5 million on paper), and projects a steady increase through 2022.<sup>38</sup> It will also begin receiving new types of information. Notably, the IRS will soon begin receiving information from health insurers and self-insured employers about people’s health coverage;<sup>39</sup> credit card issuers recently started reporting the aggregate amount of reportable payments they process for businesses;<sup>40</sup> and brokerage firms generally must now report the cost bases (as well as gross proceeds) of stock, bond, and mutual fund sales.<sup>41</sup> It should make this data available to taxpayers during the filing season to help them in preparing accurate returns, and use it to inform them of seeming inconsistencies when they file or as soon afterward as possible. However, the increasing availability of tax-related data is likely to prompt the IRS to ask Congress to expand its authority to use math error procedures to assess additional tax when there appear to be inconsistencies between the data and a tax return.

### Congress Should Consider Expanding the IRS’s Summary Assessment Authority Only in Limited Situations

It is appropriate to expand the IRS’s summary assessment authority to cover only one of the situations described in the Administration’s correctable error proposal — where there can be no doubt that the taxpayer has claimed amounts in excess of a lifetime limitation based on information shown on the return.

35 Pub. L. No. 94-455, § 1206(a), 90 Stat. 1520, 1703 (1976).

36 H.R. REP. No. 94-658, at 291 (1976).

37 See generally National Taxpayer Advocate 2012 Annual Report to Congress 180-91 (Most Serious Problem: *The Preservation of Fundamental Taxpayer Rights Is Critical As the IRS Develops a Real-Time Tax System*).

38 IRS Pub. 6961, *Calendar Year (CY) Projections of Information and Withholding Documents for the United States and IRS Campuses* (July 2014), Tables 2 and 3.

39 Notice 2013-45, 2013-31 I.R.B. 116; T.D. 9660, 2014-13 I.R.B. 842 (Mar. 10, 2014). Reporting entities are not subject to penalties for failure to comply with the IRC §§ 6055 and 6056 reporting requirements for coverage in 2014 (including the provisions requiring the furnishing of statements to covered individuals in 2015 with respect to 2014). *Id.* These information returns, which are submitted with new Form 1095-B, *Health Coverage*, are not reflected in the IRS’s information return projections. IRS Pub. 6961, *Calendar Year (CY) Projections of Information and Withholding Documents for the United States and IRS Campuses* (July 2014), Table 2. For a discussion of related problems, see Most Serious Problem: *Affordable Care Act - Individuals: The IRS Is Compromising Taxpayer Rights as it Continues to Administer the Premium Tax Credit and Individual Shared Responsibility Payment Provisions*, *supra*, and Most Serious Problem: *Affordable Care Act (ACA) - Business: The IRS Faces Challenges in Implementing the Employer Provisions of the ACA While Protecting Taxpayer Rights and Minimizing Burden*, *supra*.

40 Pub. L. No. 110-289, Div. C, Title III, § 3091(a), 122 Stat. 2654, 2908 (2008) (codified at IRC § 6050W, applicable to returns for calendar years beginning after 2010). The IRS received about 10.3 million Forms 1099-K, *Merchant Card and Third Party Payments*, in 2013 and expects to receive about 11.6 million in CY 2022. IRS Pub. 6961, *Calendar Year (CY) Projections of Information and Withholding Documents for the United States and IRS Campuses* (July 2014), Table 2.

41 Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, Div. B, § 403(a)(1), 122 Stat. 3765, 3854 (2008) (codified at IRC § 6045(g) and phased in between 2011 and 2013).

For example, in cases where it is clear that a taxpayer has claimed an American Opportunity Tax Credit (AOTC) in excess of a statutory limit, then the summary assessment process may be appropriate. The AOTC is a partially refundable credit for qualified post-secondary education expenditures that is available only for the first four years of a student's post-secondary education.<sup>42</sup> Because the number of years claimed for each student is shown on the face of the return, allowing the IRS to use math error procedures to stop the improper payment of capped claims may be appropriate and cost effective, although probably not as cost effective as alerting the taxpayer to the problem at or before filing.<sup>43</sup>

### Inappropriate Expansion of Summary Assessment Authority Could Unduly Burden Taxpayers While Eroding the Right to Judicial Review

Without adequate safeguards and congressional oversight, the other proposed expansions of summary assessment authority would erode the right to judicial review *before* paying an audit assessment, which is the cornerstone of due process in the U.S. tax system. The taxpayer bears the burden of asking for the right to petition the Tax Court within a 60-day period, rather than automatically receiving that right under normal IRS deficiency procedures.

#### *It Can Be Difficult to Determine If a Particular Document Is Attached*

The correctible error proposal could potentially allow the IRS to “correct” already-accurate returns that do not appear to include required documentation. However, it can be difficult to determine if a particular document is attached to a return, as illustrated by the FTHBC (discussed above).

#### *Accurate Returns May Appear Inconsistent With Government Data*

The correctible error proposal could potentially allow the IRS to “correct” already-accurate returns that do not match the information contained in government databases. There are a wide variety of reasons for why accurate returns may appear inconsistent with government data. As illustrated by the FCR database, third-party data may not be sufficiently accurate.

Moreover, applying data collected for nontax purposes to tax claims is akin to relying on the addresses shown in a telephone directory to deny the home mortgage interest deduction. Even if virtually all of the entries in a directory were accurate, they were compiled for a different purpose, do not disprove eligibility under the tax law, may not be current, and should not deprive a taxpayer of a due process right to present his or her own facts.

Of course, even data collected for tax purposes contains errors. By one estimate, 1.5 percent of information returns have invalid payee data.<sup>44</sup> If other information on these returns is inaccurate at the same rate, the IRS might burden about 31.5 million taxpayers with erroneous assessments (1.5 percent of the 2.1 billion information returns, noted above), if it could make a summary assessment based solely on

42 See IRC § 25A(i).

43 See *Improper Payments in the Administration of Refundable Tax Credits*, Hearing Before the H. Subcomm. on Oversight, Comm. on Ways and Means (May 25, 2011). Both the Government Accountability Office (GAO) and the Treasury Inspector General for Tax Administration (TIGTA) have recommended expanding math error authority to correct returns claiming the Hope Credit (now called the American Opportunity Tax Credit) in more years than allowed by law. See GAO, GAO-10-225, *IRS Met Many 2009 Goals, But Telephone Access Remained Low, and Taxpayer Service and Enforcement Could Be Improved* (Dec. 2009); TIGTA, Ref. No. 2009-30-141, *Improvements Are Needed in the Administration of Education Credits and Reporting Requirements for Educational Institutions* (Sept. 30, 2009).

44 TIGTA, Ref. No. 2011-30-019, *Targeted Compliance Efforts May Reduce the Number of Inaccurate Information Returns Submitted by Government Entities 3-4* (Feb. 15, 2011).



inconsistencies between returns and information returns. Even the government sent out 800,000 incorrect information reporting documents (Forms 1099-A) in the 2015 filing season.<sup>45</sup>

Longstanding IRS matching programs further illustrate how third-party data are often unreliable when used as the sole basis to conclude that the taxpayer's return is wrong. The IRS's automated underreporter (AUR) process adjusts returns where there are mismatches between a tax return and data from third-party information returns, such as Forms W-2 and 1099. For tax years (TYs) 2009-2011, 24.9 percent of these mismatches did not result in an assessment.<sup>46</sup> Thirty-seven percent of the SNODs went unanswered, resulting in default assessments.<sup>47</sup> About 4.6 percent of all AUR assessments (and 16.3 percent of the dollars) were abated.<sup>48</sup> For taxpayers who specifically requested reconsideration of an AUR assessment in FY 2012, the IRS abated at least part of the assessment about 82.9 percent of the time (82.7 percent of the dollars).<sup>49</sup> Thus, even data from information returns is a weak basis on which to conclude that a taxpayer's return is wrong.<sup>50</sup>

Because Congress and the judiciary have recognized that third-party information returns can be unreliable and difficult for a taxpayer to disprove, the IRS is not always entitled to rely on its general presumption of correctness in court when its determination is based on them.<sup>51</sup> In the context of an exam, even the IRS recognizes the unreliability of third-party information and attempts to verify it with the taxpayer.<sup>52</sup> However, the IRS could potentially replace its AUR program with summary assessment procedures under the correctable error proposal, eroding a taxpayer's right to have a court review the determination.<sup>53</sup>

### *“Mismatches” Should Not Trigger an Adjustment If the IRS Can Explain Them*

Not every return that contains a typo or similar error contains an understatement, as illustrated by the TAS study of math errors involving dependent TINs (described above). As that study showed, the IRS imposed a burden on taxpayers in a large percentage of math error cases, generating phone calls and letters it could not timely handle, rather than investing a few minutes of research at the front end. Further, for those who did not respond, the IRS improperly denied tax benefits even when it had the correct TINs in its files.

45 Notice 2015-30, 2015-17 I.R.B. 928; IRS, *Questions and Answers - Incorrect Forms 1095-A and the Premium Tax Credit* (July 6, 2015), available at <https://www.irs.gov/Affordable-Care-Act/Individuals-and-Families/Questions-and-Answers-Incorrect-Forms-1095A-and-the-Premium-Tax-Credit>; IRS SERP Alert 15A0147 (Apr. 6, 2015).

46 Individual Master File (June 11, 2015) (of the 16,242,759 TY 2009-2011 tax modules with mismatches that were assigned to AUR, 4,044,403 did not result in an assessment). In some cases this may have been because the taxpayer explained the reason for the mismatch before a deficiency was assessed, but in others it may have been because the IRS decided not to pursue the discrepancy.

47 IRS response to TAS information request (May 28, 2015). TYs 2009-2011 are the three most recent years for which the IRS has complete data. For these same years, 12 percent of the IRS's SNODs were returned to the IRS as undeliverable. *Id.*

48 IRS Compliance Data Warehouse (CDW), Enforcement Revenue Information System (ERIS) (Dec. 11, 2015) (AUR assessments in TYs 2009-2011).

49 IRS CDW, ERIS (Dec. 11, 2015) (reconsiderations in FY 2012).

50 According to TIGTA, more than two billion information returns were submitted to the IRS in TY 2007, of which almost 31.7 million had invalid payee data (1.5 percent). TIGTA, Ref. No. 2011-30-019, *Targeted Compliance Efforts May Reduce the Number of Inaccurate Information Returns Submitted by Government Entities* 3-4 (Feb. 15, 2011).

51 See, e.g., *Portillo v. Comm'r*, 932 F.2d 1128 (5th Cir. 1991); IRC § 6201(d).

52 See, e.g., IRM 4.10.3.2.1.4(2) (Mar. 1, 2003) (“Information about taxpayers collected from third parties will be verified to the extent practicable with the taxpayer before action is taken.”).

53 For further discussion of the problems with this approach, see, e.g., National Taxpayer Advocate 2012 Annual Report to Congress 180-91 (Most Serious Problem: *The Preservation of Fundamental Taxpayer Rights Is Critical As the IRS Develops a Real-Time Tax System*); Real-Time Tax System Initiative Comments of Keith T. Fogg, Director, Villanova Law School Federal Tax Clinic (Dec. 8, 2011), available at [http://www.irs.gov/pub/irs-utl/t\\_keith\\_fogg\\_aba\\_tax\\_section\\_and\\_low\\_income\\_tax\\_clinic.pdf](http://www.irs.gov/pub/irs-utl/t_keith_fogg_aba_tax_section_and_low_income_tax_clinic.pdf).

### *“Mismatches” Between a Return and a Database That Reflects the Probability of an Error Should Not Trigger an Adjustment*

As described above, the DDb combines unreliable FCR data with other information, which the IRS uses to estimate the probability that a taxpayer has improperly claimed a dependent. It would be a slippery slope to authorize the IRS to assess a tax using summary assessment procedures based on its estimate of the probability that a return contains an error. Under the correctable error proposal, however, Treasury Regulations could essentially define such estimates as “mismatches” that would trigger summary assessment authority. When taxpayers do not understand math error notices or the procedure for disputing the assessment, the resulting delay may cost them the opportunity to contest it in a prepayment forum, or even the opportunity to obtain benefits to which they are entitled.

## EXPLANATION OF RECOMMENDATIONS

The National Taxpayer Advocate presents six broad recommendations that would help ensure the IRS uses math error procedures only in appropriate circumstances. First, the IRS would be permitted to use math error procedures only after reviewing and revising all of its math error notices to ensure they clearly describe what the IRS changed and why, and how to contest the change. For situations that the IRS can or will not clearly describe on a math error notice, it could use normal deficiency procedures.

Second, the IRS would be permitted to use math error procedures only when there is a mismatch between the return and unquestionably reliable data. For example, because the DDb filters combine unreliable data from various sources to create a more reliable estimate of the probability that a taxpayer’s return is inaccurate, this proposal would not authorize the IRS to rely on such filters.

Third, the IRS would be permitted to use math error procedures only after it has researched all of the information in its possession that could help explain the apparent discrepancy so that it does not need to burden the taxpayer by requesting an explanation. For example, if a return contains an inaccurate dependent TIN, the IRS would review the taxpayer’s prior year returns to determine if the error was a typo. If so, it could inform the taxpayer that it had corrected the typo, rather than burdening the taxpayer with an inaccurate tax assessment.

Fourth, the IRS would be permitted to use math error procedures only in situations where it does not have to analyze facts and circumstances or weigh the adequacy of information submitted by the taxpayer to determine if the return contains an error. For example, while the math error process could require the IRS to determine if the taxpayer included an attachment (*i.e.*, a yes/no determination), the proposal would not authorize its use on the basis that the documentation was insufficient (*i.e.*, a facts and circumstances inquiry).

Fifth, the IRS would be permitted to use math error procedures only if the annual abatement rate for a particular issue or type of inconsistency is below a specified threshold for those taxpayers who respond. The IRS would compute and report the abatement rate on an annual basis so that it could respond to changes in the accuracy of its assessments. It would exclude taxpayers who do not respond so as to avoid a bias toward applying math error procedures to populations that are less responsive to IRS notices (*e.g.*, because they are transient or are less likely to understand IRS correspondence).

Finally, the IRS would be permitted to use math error procedures for any new data or criteria only if, the Department of Treasury, in conjunction with the National Taxpayer Advocate, has evaluated and publicly reported to Congress on the reliability of the data or criteria for purposes of assessing tax using math

error procedures. The report should analyze the burdens and benefits of the proposed use of math error authority, considering downstream costs to taxpayers (*e.g.*, time, paperwork, representation) and the IRS (*e.g.*, processing taxpayer calls and letters, requests for audit reconsideration, amended returns, appeals, and TAS intervention).

The GAO has proposed a similar study to evaluate third-party data reliability.<sup>54</sup> As noted above, Congress mandated a similar study before the effective date of the IRS's math error authority to address FCR data mismatches, a study that the IRS would not have undertaken without the mandate. These safeguards would help prevent the IRS from unnecessarily wasting resources and burdening taxpayers by making summary assessments based on conclusions that involve the exercise of judgment, information that is not sufficiently accurate, or estimates of the likelihood of an error. They would also be consistent with the taxpayers' *rights to quality service, to pay no more than the correct amount of tax, to privacy, to challenge the IRS's position and be heard, and to appeal an IRS decision in an independent forum.*

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54 GAO, GAO-11-691T, *Enhanced Pre-Refund Compliance Checks Could Yield Significant Benefits* 9 (May 25, 2011) ("To ensure IRS continues to use MEA [math error authority] only in these limited circumstances [*i.e.*, where the error is "virtually certain"] if given broader authority, Congress could, for example, require IRS to submit a report to it or an entity it designates on a proposed new use of MEA. The report could include how such use would meet the standards or criteria outlined by Congress. The report could also describe IRS's or the National Taxpayer Advocate's assessment of any potential effect on taxpayer rights.").