

## #49 ESTABLISH THE COMPENSATION OF THE NATIONAL TAXPAYER ADVOCATE BY STATUTE AND ELIMINATE ELIGIBILITY FOR CASH BONUSES

### Present Law

IRC § 7803 describes four positions in tax administration. Subsection (a) establishes the position of Commissioner of Internal Revenue. Subsection (b) establishes the position of Chief Counsel for the IRS. Subsection (c) establishes the position of National Taxpayer Advocate. Subsection (d) describes duties of the Treasury Inspector General for Tax Administration.<sup>156</sup>

The Commissioner of Internal Revenue and the Chief Counsel of the IRS hold positions that generally require them to act in accordance with the policy of the Executive Branch.

The National Taxpayer Advocate and the Treasury Inspector General for Tax Administration hold positions that, by statute, require them to present an independent perspective. IRC § 7803(c)(4)(A)(iii) requires the Office of the Taxpayer Advocate to notify taxpayers that its offices “operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.” Similarly, IRC § 7803(c)(2)(B)(iii) bolsters the National Taxpayer Advocate’s independence by requiring that her Reports to Congress be submitted directly to Congress “without any prior review or comment from … the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget.”

Under the Inspector General Act of 1978, Inspector General offices must be “independent and objective units” and agency directors may not “prevent or prohibit the Inspector General from initiating, carrying out, or completing any audit or investigation, or from issuing any subpoena during the course of any audit or investigation.”<sup>157</sup>

Pursuant to the Inspector General Act of 1978, as amended, the compensation for Inspector General positions established under the Act is “the rate payable for level III of the Executive Schedule under section 5314 of Title 5, United States Code, plus 3 percent.” An Inspector General “may not receive any cash award or cash bonus.” For 2018, the compensation provided under this provision is \$179,735.<sup>158</sup>

Pursuant to IRC § 7803(c)(1)(B)(i), the compensation of the National Taxpayer Advocate is “the same rate as the highest rate of basic pay established for the Senior Executive Service under section 5382 of title 5, United States Code, or, if the Secretary of the Treasury so determines, at a rate fixed under section 9503 of such title.” For 2018, the highest rate of basic pay established for the Senior Executive Service is \$189,600.<sup>159</sup> The rate fixed under 5 U.S.C. § 9503 (so-called “critical pay authority”) is variable and is capped at the salary paid to the Vice President of the United States. For 2018, the Vice President’s salary is \$243,500.<sup>160</sup> The National Taxpayer Advocate is eligible to receive cash bonuses.

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<sup>156</sup> The position of Treasury Inspector General for Tax Administration is established in the Inspector General Act of 1978, as amended. 5 U.S.C. App., Inspector General Act of 1978, § 2(3)(B)(ii).

<sup>157</sup> 5 U.S.C. App., Inspector General Act of 1978, §§ 2 & 3.

<sup>158</sup> Exec. Order No. 13,819, 82 Fed. Reg. 61, 431 (Dec. 22, 2017), <https://www.opm.gov/policy-data-oversight/pay-leave/salaries-wages/pay-executive-order-2018-adjustments-of-certain-rates-of-pay.pdf>. Schedule 5 shows the salary at Level III of the Executive Schedule is \$174,500. The IG salary reflects the three percent addition provided by statute.

<sup>159</sup> *Id.*, Schedule 4.

<sup>160</sup> *Id.*

## Reasons for Change

In advocating for the interests of taxpayers both in individual cases and systemically, the National Taxpayer Advocate often must take positions that run contrary to policy decisions made by IRS management, including by the Commissioner of Internal Revenue, to whom she reports by statute.<sup>161</sup> Under the current compensation rules, pursuant to his evaluation of the National Taxpayer Advocate's performance for the preceding fiscal year, the Commissioner annually sets the compensation of the National Taxpayer Advocate and determines whether the National Taxpayer Advocate will receive a bonus and, if so, the amount of the bonus. The Commissioner's determination may affect the compensation of the National Taxpayer Advocate by tens of thousands of dollars.

Giving the Commissioner such significant control over the National Taxpayer Advocate's compensation places the National Taxpayer Advocate in a position where her statutory mission to advocate independently on behalf of taxpayers conflicts with her personal financial interests.

In enacting the Inspector General Act of 1978, Congress recognized that giving agency heads control over the compensation of inspectors general could undermine their independence, and it provided that inspectors general would be paid at a fixed rate that the head of the agency over which they have audit responsibility cannot change.

The same considerations apply to the position of National Taxpayer Advocate. To enable the National Taxpayer Advocate to focus on advocating for taxpayers without concern about financial retaliation for taking positions that may run counter to the IRS's corporate position, the compensation of the National Taxpayer should be fixed by statute and eligibility for cash bonuses should be eliminated; accordingly, the Commissioner would not be in a position to evaluate the National Taxpayer Advocate's performance of her statutory duties, which at times requires critical analysis of the IRS's activities.

## Recommendation

Amend IRC § 7803(c)(1)(B)(i) to set the compensation of the National Taxpayer Advocate at a fixed amount and to stipulate that the National Taxpayer Advocate may not receive any cash award or cash bonus.<sup>162</sup>

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<sup>161</sup> See IRC § 7803(c)(1)(B)(i).

<sup>162</sup> As a transition rule, we recommend that the prohibition against bonuses take effect immediately and the rate of pay of the incumbent National Taxpayer Advocate be frozen at its current level.