

## Strengthen the Office of the Taxpayer Advocate

### #38 CLARIFY THAT THE NATIONAL TAXPAYER ADVOCATE MAY HIRE LEGAL COUNSEL TO ENABLE HER TO ADVOCATE MORE EFFECTIVELY FOR TAXPAYERS

#### Present Law

Per 31 U.S.C. § 301(f), the General Counsel of the Department of the Treasury is the chief law officer for the Department, and the IRS Chief Counsel is the chief law officer for the IRS. In light of the implication that all attorneys in the Treasury Department must report to these officials,<sup>151</sup> 5 U.S.C. App. III § 3(g) and 12 U.S.C. § 482 specifically authorize Treasury’s inspectors general and Office of the Comptroller of the Currency (OCC), respectively, to hire and supervise attorneys.<sup>152</sup> No law specifically authorizes the National Taxpayer Advocate to hire and supervise attorneys.

Internal Revenue Code (IRC) § 7803(c) makes clear, however, that TAS is expected to operate independently of the IRS. IRC § 7803(c)(2)(A) directs TAS to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers have problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(4)(A) requires TAS 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.” IRC § 7803(c)(2)(B)(iii) requires the National Taxpayer Advocate submit Reports to Congress directly “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.” This provision is nearly identical to the one that applies to the OCC (12 U.S.C. § 250).

When Congress reorganized the IRS in 1998, it recognized that the National Taxpayer Advocate requires independent counsel to advocate for her positions. The version of the IRS Restructuring and Reform Act of 1998 passed by the Senate contained the following authorization: “The National Taxpayer Advocate shall have the responsibility and authority to ... appoint a counsel in the Office of the Taxpayer Advocate to report directly to the National Taxpayer Advocate.”<sup>153</sup> In explaining the provision, Senator Grassley said: “In order to make the Taxpayer Advocate more independent, which is what this bill does, it logically follows that the Taxpayer Advocate should have its own legal counsel.”<sup>154</sup>

151 The Treasury Department has formalized this interpretation in Treasury Order 107-04, which states:

With the exception of persons employed by the Treasury Inspector General, TIGTA, SIGTARP, and the Chief Counsel of the Office of the Comptroller of the Currency, all attorneys whose duties include providing legal advice to officials in any office or bureau of the Department are part of the Legal Division under the supervision of the General Counsel.

152 The Inspector General Act of 1978, as amended (codified at 5 U.S.C. App. III § 3(g)), provides:

Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General.

Similarly, 12 U.S.C. § 482 provides:

Notwithstanding any of the provisions of section 481 of this title or section 301(f)(1) of title 31 to the contrary, the Comptroller of the Currency shall, subject to chapter 71 of title 5, fix the compensation and number of, and appoint and direct, all employees of the Office of the Comptroller of the Currency.

153 H.R. 2676, 105th Cong. § 1102(a) (as passed by Senate, May 7, 1998).

154 144 CONG. REC. S4460 (May 7, 1998). The provision was added to the bill as an amendment on the Senate floor sponsored by Senator Grassley.

This provision was eliminated in the conference agreement without explanation. However, the conference report stated that the “conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate.”<sup>155</sup>

### Reasons for Change

Since 2004, with the approval of the Commissioner of Internal Revenue, TAS has employed attorney-advisors. The National Taxpayer Advocate requires independent attorney-advisors because she often takes positions, both in working taxpayer cases and in systemic advocacy, that are directly contrary to the position of the IRS and the Office of Chief Counsel. Once attorneys in the Office of Chief Counsel have adopted a legal position interpreting a law or regulations for purposes of IRS operations, procedures, or litigation, it would be unrealistic to expect that those same attorneys could effectively help the National Taxpayer Advocate develop a legal position that challenges their own interpretation. It would also create an untenable conflict of interest. TAS attorney-advisors enable the National Taxpayer Advocate to develop an independent perspective and advocate for taxpayers as the law intends.

In 2015, the IRS for the first time denied a routine TAS request to backfill existing attorney positions due to attrition. It cited Treasury Department General Counsel Directive No. 2, which states: “Except for positions in the Inspectors General offices or within the Office of the Comptroller of the Currency, attorney positions shall not be established outside of the Legal Division” unless the General Counsel or Deputy General Counsel(s) provides a waiver. On November 29, 2016, the National Taxpayer Advocate submitted a nine-page memo to the Acting General Counsel requesting permission to continue to hire attorney-advisors. It asked the Acting General Counsel to modify General Counsel Directive No. 2 to add a carve-out for the Office of the Taxpayer Advocate as it does for the Inspectors General offices. Alternatively, the National Taxpayer Advocate orally requested that a “waiver” be granted, as provided in the directive. In the fall of 2018, TAS submitted another hiring request, and it was again denied by the IRS.

The inability of the National Taxpayer Advocate to hire attorney-advisors extends to announcing higher graded positions for attorneys currently working in TAS. Therefore, TAS is not only barred from hiring new attorneys, but well-performing attorneys cannot be promoted to higher-graded positions. This has accelerated attrition. If the National Taxpayer Advocate is not able to hire attorney-advisors, TAS’s ability to advocate for taxpayers both individually and systemically and the National Taxpayer Advocate’s ability to produce high-quality reports to Congress will rapidly decline.

The National Taxpayer Advocate and her staff have met with the General Counsel and his staff to discuss this issue. The National Taxpayer Advocate believes the conference report language stating that the “conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate” provides a sufficient legal basis for her to hire attorneys that report to her. The General Counsel has disagreed, opining that a statutory change would be required.

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155 H.R. REP. NO. 105-599, AT 216 (1998) (CONF. REP.).

### Recommendation

- Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel that report directly to him or her.<sup>156</sup>

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<sup>156</sup> For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*) (recommending that Congress “[a]uthorize the National Taxpayer Advocate to appoint independent counsel who report directly to the National Taxpayer Advocate, provide independent legal advice, help prepare *amicus curiae* briefs and comments on proposed or temporary regulations, and assist the National Taxpayer Advocate in preparing the Annual Report to Congress and in advocating for taxpayers individually and systemically”); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (same); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (same). The Taxpayer and Fairness Protection Act, H.R. 1661, 108th Cong. § 335 (2003), would have authorized the National Taxpayer Advocate to “appoint a counsel in the Office of the Taxpayer Advocate to report solely to the National Taxpayer Advocate.”

## #39 CLARIFY THE AUTHORITY OF THE NATIONAL TAXPAYER ADVOCATE TO MAKE PERSONNEL DECISIONS TO PROTECT THE INDEPENDENCE OF THE OFFICE OF THE TAXPAYER ADVOCATE

### Present Law

The IRS Restructuring and Reform Act of 1998 (RRA 98) included several provisions to protect TAS's independence from the IRS, such as those that provide the National Taxpayer Advocate with the authority to make independent personnel decisions. Internal Revenue Code (IRC) § 7803(c)(4)(A)(iii) requires local TAS offices to notify taxpayers that they “operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.” To bolster this independence, IRC § 7803(c)(2)(D) provides the National Taxpayer Advocate with the authority to “appoint” Local Taxpayer Advocates in each state and to “evaluate and take personnel actions (including dismissal) with respect to any employee of any local office.” IRC § 7803(c)(2)(C)(iv) also provides that the Commissioner and the National Taxpayer Advocate will “develop career paths for local taxpayer advocates.”

The RRA 98 conference report states that the National Taxpayer Advocate “has the responsibility to evaluate and take personnel actions (including dismissal) with respect to any Local Taxpayer Advocate *or any employee in the Office of the Taxpayer Advocate.*”<sup>157</sup> However, the statutory language does not include the final italicized clause.

### Reasons for Change

IRC § 7803(c) directs the National Taxpayer Advocate to operate independently in advocating for systemic change, as well as in advocating on behalf of specific taxpayers. For example, the National Taxpayer Advocate is required by IRC § 7803(c)(2) to propose administrative and legislative changes to mitigate problems that taxpayers encounter in their dealings with the IRS and to provide “full and substantive” analyses of a wide range of issues in reports to Congress. Moreover, IRC § 7803(c)(2)(B)(iii) requires these reports to be submitted “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.” Thus, the National Taxpayer Advocate is required to hire and retain qualified and independent employees in both her case advocacy and systemic advocacy operations to fulfill TAS's statutory mission.

As noted above, the RRA 98 conference report expressed congressional intent to give the National Taxpayer Advocate personnel authority over “any employee” in the Office of the Taxpayer Advocate. However, IRC § 7803(c)(2)(D) grants the National Taxpayer Advocate personnel authority only over employees of “any local office.” It does not grant the National Taxpayer Advocate the authority to make independent personnel decisions with respect to TAS's senior leadership, TAS attorney-advisors, employees of TAS's systemic advocacy and research functions, and other national office employees, even though those employees are also charged with engaging in independent advocacy on behalf of taxpayers and are subject to the same potential conflicts and potential retaliatory personnel actions by the IRS leadership that Congress sought to address in 1998.

### Recommendation

- Amend IRC § 7803(c)(2)(D) to clarify that the National Taxpayer Advocate has the responsibility to evaluate and take personnel actions with respect to all employees of the Office of the Taxpayer Advocate.

<sup>157</sup> H.R. REP. NO. 105-599, at 214 (1998) (Conf. Rep.) (emphasis added). The report states that the conference committee adopted the Senate amendment with respect to the National Taxpayer Advocate provisions, except as modified. H.R. REP. NO. 105-599, at 216 (1998) (Conf. Rep.). Because this provision was not modified, the language quoted above reflects the conference agreement.

## #40 CLARIFY THE TAXPAYER ADVOCATE SERVICE'S ACCESS TO FILES, MEETINGS, AND OTHER INFORMATION

### Present Law

Internal Revenue Code (IRC) § 7803(c)(2) requires TAS to assist taxpayers in resolving problems with the IRS, identify areas in which taxpayers are experiencing problems in their dealings with the IRS, make administrative and legislative recommendations to mitigate those problems, and annually report to Congress. IRC § 6103 generally prohibits the disclosure of tax returns or return information, but IRC § 6103(h) provides that “returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.”

Because TAS employees are required to review tax return information to fulfill their statutory duties, they are authorized by IRC § 6103(h) to do so. In furtherance of their duties, they may also need to attend meetings between taxpayers or their representatives and other IRS employees, and obtain other information from the IRS. Similarly, the National Taxpayer Advocate needs information to analyze systemic problems and provide Congress with a “full and substantive analysis” of such problems in her annual reports to Congress, as required by IRC § 7803(c)(2)(B). However, the law does not expressly state that the National Taxpayer Advocate is authorized to access return information, attend meetings with other IRS employees, or obtain other information from the IRS.

### Reasons for Change

In general, the National Taxpayer Advocate has significant access to IRS systems and data both in the context of specific cases and systemic advocacy; however, the IRS periodically has declined to provide TAS with access to: (1) audit files of taxpayers with cases open in TAS; (2) meetings between the IRS and taxpayers with cases open in TAS, even when the taxpayer has requested TAS's attendance; (3) advice that Counsel has provided to other business units; and (4) information required by the National Taxpayer Advocate to enable her to analyze systemic problems for purposes of the Annual Report to Congress.

### Recommendations

- Amend IRC § 7803(c) to clarify that the National Taxpayer Advocate (and authorized TAS employees) shall have access to tax returns, return information, and legal advice provided by Counsel to any IRS employee with respect to cases open and pending in TAS, and shall have the right to participate in meetings between taxpayers and the IRS when asked to do so by a taxpayer.
- Clarify that, in furtherance of her tax administrative duties, the National Taxpayer Advocate (and authorized TAS employees) shall have access to all data, statistical information, legal advice provided by Counsel to any IRS employee, and documents necessary to perform a “full and substantive analysis” of the issues, as required by IRC § 7803(c)(2)(B).<sup>158</sup>

<sup>158</sup> For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 34-36 (Special Focus: *Reinforce the National Taxpayer Advocate's Right of Access to Taxpayer and IRS Information and to Meetings Between the IRS and Taxpayers*). Under the Taxpayer First Act of 2019, the Secretary is now required to provide the National Taxpayer Advocate with “statistical support” for the Annual Report to Congress. Pub. L. No. 116-25, § 1301(b), 133 Stat. 981 (2019). However, this requirement only encompasses statistical studies, compilations, and the review of information already obtained by TAS. It does not address TAS's broader need for access to information, including the right to review case files and attend taxpayer meetings. The Taxpayer Rights Act, H.R. 4128, 114th Cong. § 403 (2015) and S. 2333, 114th Cong. § 403 (2015), would have granted TAS access to case-related files and meetings, but it did not address TAS's need for access to information required to report on systemic issues.

**#41 AUTHORIZE THE NATIONAL TAXPAYER ADVOCATE TO FILE AMICUS BRIEFS****Present Law**

Internal Revenue Code (IRC) § 7803(c)(2)(A) requires the Office of the Taxpayer Advocate to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers experience problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems.

IRC § 7803(c)(2)(B)(ii)(XI) directs the National Taxpayer Advocate in her annual reports to Congress to “identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes.”

Although the National Taxpayer Advocate must report on litigation and recommend legislative changes to address problems that give rise to litigation and that litigation creates, 28 U.S.C. § 516 provides that only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Similarly, 5 U.S.C. § 3106 provides that the head of an executive department may not employ an attorney or counsel for the conduct of litigation in which the United States is a party, except as otherwise authorized by law. IRC § 7452 specifies that the Secretary of the Treasury “shall be represented by the Chief Counsel” or his delegate in litigation before the U.S. Tax Court.

Under 5 U.S.C. § 612(b), the Small Business Administration (SBA) Chief Counsel for Advocacy is statutorily authorized to represent the interests of small businesses by appearing in litigated cases as an *amicus curiae*. By contrast, the National Taxpayer Advocate, who is often referred to as “the voice of the taxpayer” both within the IRS and before Congress, is not authorized to represent the interests of taxpayers by appearing in litigated cases as an *amicus curiae*.

**Reasons for Change**

While the conduct of trials is best left to trial lawyers equipped to advocate zealously on behalf of clients to win individual cases, precedential issues that could potentially affect many taxpayers sometimes come before the judiciary with no one representing the interests of taxpayers in general.

Just as the SBA Chief Counsel for Advocacy may file briefs to help ensure the federal courts are informed about the impact of regulations on small businesses, TAS could be more effective in protecting taxpayer rights if the National Taxpayer Advocate were granted comparable authority to file *amicus curiae* briefs in cases implicating taxpayer rights. It is anticipated that this authority would be used sparingly, as is the case with the SBA Chief Counsel for Advocacy.

**Recommendation**

- Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to submit briefs in federal litigation as an *amicus curiae* on matters relating to the protection of taxpayer rights.<sup>159</sup>

<sup>159</sup> For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*). See also Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), [https://www.irs.gov/pub/iranoa/pmta00566\\_7189.pdf](https://www.irs.gov/pub/iranoa/pmta00566_7189.pdf).

## #42 REQUIRE THE IRS TO ADDRESS THE NATIONAL TAXPAYER ADVOCATE’S COMMENTS IN FINAL RULES

### Present Law

Internal Revenue Code (IRC) § 7805(f) requires the Secretary of the Treasury to submit certain proposed or temporary regulations to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment regarding the impact such regulations may have on small businesses and to discuss any response to such comments in the preamble to the final regulations. Yet despite the fact that the National Taxpayer Advocate is required by IRC § 7803(c)(2)(A) to assist taxpayers in resolving problems with the IRS and to identify administrative and legislative solutions, there is no comparable provision that requires the Secretary to seek comments from the National Taxpayer Advocate on proposed or temporary regulations or to discuss any response to such comments in the preamble to the final regulations.

### Reasons for Change

The requirement that the IRS solicit and respond to comments from the SBA benefits tax administration because it forces the agency to consider and respond to the SBA’s concerns about the impact of regulations on small businesses. Similarly, tax administration would benefit if the IRS were required to consider and respond to the National Taxpayer Advocate’s concerns about the impact of regulations on taxpayer rights and taxpayer burden. While the National Taxpayer Advocate currently provides comments to the IRS on an informal basis, a requirement that the IRS provide a written public response would ensure the agency considers the National Taxpayer Advocate’s comments carefully, and would be informative for the public and interested stakeholders.

### Recommendation

- Amend IRC § 7805 to require the IRS to submit proposed or temporary regulations to the National Taxpayer Advocate for comment within a reasonable time and to address any such comments in the preamble to the final rule.<sup>160</sup>

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<sup>160</sup> For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1578, 114th Cong. § 404 (2015) (except, as a timing matter, this bill would require the IRS to solicit comments from the National Taxpayer Advocate *before* publication of proposed or temporary regulations rather than *after* publication of such regulations, as the statute currently requires for SBA comments). For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*).



## #43 AUTHORIZE THE OFFICE OF THE TAXPAYER ADVOCATE TO ASSIST CERTAIN TAXPAYERS DURING A LAPSE IN APPROPRIATIONS

### Present Law

Article I of the Constitution provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>161</sup> The Anti-Deficiency Act implements this provision.<sup>162</sup> Specifically, 31 U.S.C. § 1341(a)(1)(B) forbids any officer or employee of the United States government or the District of Columbia government to involve his or her respective government employer in a contract or obligation for the payment of money before an appropriation is made unless authorized by law. A significant exception to this rule is provided in 31 U.S.C. § 1342, which permits such government activity “for emergencies involving the safety of human life or the protection of property.”

Internal Revenue Code (IRC) § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected individual when the Secretary has determined the levy “is creating an economic hardship due to the financial condition of the taxpayer.”

IRC § 7803(c)(2)(A) directs the Office of the Taxpayer Advocate to “assist taxpayers in resolving problems with the Internal Revenue Service,” among other things. IRC § 7811 authorizes the National Taxpayer Advocate to issue a Taxpayer Assistance Order (TAO) where a “taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary.” Significant hardship includes “an immediate threat of adverse action” and “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.” A TAO may require the Secretary “within a specified time period ... to release property of the taxpayer levied upon.”

### Reasons for Change

Past IRS shutdown contingency plans have interpreted the exception under 31 U.S.C. § 1342 as applicable to activities necessary to safeguard human life or protect the property of the federal government, but not to protect the property of U.S. taxpayers. Thus, lien and levy activities carried out by automation can continue. During both the 2018-2019 and 2013 shutdowns, the IRS issued thousands of notices of levy on financial accounts of individuals and businesses, on wages, and on Social Security and other government benefits because these notices were pre-programmed into the IRS’s computer systems before the shutdown began. During the 2018-2019 shutdown, more than 16,500 scheduled appointments at Taxpayer Assistance Centers were cancelled, approximately 3.8 million calls from taxpayers to the IRS went unanswered, and the IRS received more than five million pieces of taxpayer correspondence.<sup>163</sup>

Yet despite the requirement under IRC § 6343(a)(1)(D) that the IRS release any levy that creates an economic hardship for a taxpayer, and the explicit charge in IRC § 7811(b)(1) that the National Taxpayer Advocate may issue a TAO “to release property of the taxpayer levied upon” where the taxpayer is experiencing significant hardship, no IRS or TAS employee, including the National Taxpayer Advocate, was excepted to work these

<sup>161</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>162</sup> Pub. L. No. 97-258, 96 Stat. 923 (1982).

<sup>163</sup> *IRS Oversight: Treasury Inspector General for Tax Administration, Hearing Before the Subcomm. on Financial Services and General Government of the H. Comm. on Appropriations*, 116th Cong. (Sept. 24, 2019) (statement of J. Russell George, Treasury Inspector General for Tax Administration).



cases during a shutdown.<sup>164</sup> As a result, taxpayers facing economic hardship were unable to obtain assistance from TAS to request or obtain release of these levies.<sup>165</sup> Additionally, because cases that were in TAS's inventory at the time of the shutdown could not be worked, some taxpayers who had requested the assistance of the National Taxpayer Advocate and TAS immediately prior to the shutdown experienced significant hardship and irreparable injury.

### Recommendations

- Clarify that the emergency exception to the Anti-Deficiency Act for the protection of property includes taxpayer property as well as government property.
- Alternatively, clarify that (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing an economic hardship within the meaning of IRC § 6343(a)(1)(D) due to an IRS action or inaction and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any TAO issued pursuant to IRC § 7811.

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<sup>164</sup> See IRS SERP Alert #19A0017, Release of Levy and Release of Lien (Jan. 23, 2019) (“While there is a lapse in funding during the partial shutdown we are not authorized to take this action. We may do so once we are fully opened, so please call us back at that time. Please apologize to the taxpayer and explain we are not authorized to release the levy or lien due to the partial government shutdown. Explain that they may call us back after we are fully reopened.”). In reaching its conclusion that TAS may not assist taxpayers with collection issues during the shutdown, the IRS Office of Chief Counsel reasoned as follows:

My office reviewed the Plan that we discussed in our conference call on Tuesday. We have determined that TAS may continue to issue manual refunds and enter into streamlined installment agreements, because TAS has authority to take these actions on behalf of IRS.

In contrast, there are a number of functions listed in the Plan where TAS acts derivatively, serving as a conduit or advocate for action by other business units. This includes, for example, fixing refund issues and assisting with general collection processes. As to these derivative functions, we have concluded that there is insufficient evidence that Congress intended for the functions to continue during a lapse in appropriations. In reaching this conclusion, we relied on guidance from the Office of Legal Counsel. OLC has stated that there is implied authority for an unfunded function to continue during a lapse if the function is “necessary to the effective execution of” a function that has funding or is excepted, “such that suspension of the [unfunded] function [] ... would prevent or significantly damage the execution of [the funded or excepted] function [].” OLC, *Effect of Appropriations for Other Agencies*, 19 Op. OLC 337, 338 (Dec. 13, 1995). Upon considering TAS's role and its statutory mandates, we do not believe that Congress has implied that suspension of TAS's derivative functions would prevent or significantly damage IRS's execution of its tax collection and refund issuance functions.

Email from Senior Counsel, General Legal Services, to Deputy National Taxpayer Advocate (Jan. 17, 2019).

<sup>165</sup> For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardship was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79-91 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*) and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40-44 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*).

## #44 REPEAL STATUTE SUSPENSION UNDER IRC § 7811(D) FOR TAXPAYERS SEEKING ASSISTANCE FROM THE TAXPAYER ADVOCATE SERVICE

### Present Law

Internal Revenue Code (IRC) § 7811(d) suspends the statutory period of limitations for any action with respect to which a taxpayer is seeking assistance from TAS. The period is only suspended, however, if the taxpayer submits a written application for assistance.<sup>166</sup>

### Reasons for Change

Suspension of the assessment or collection period disadvantages the taxpayer because it gives the IRS more time to take enforcement actions. If the IRS has caused a problem that the taxpayer is working with TAS to resolve, statute suspension effectively punishes the taxpayer for coming to TAS.

Further, there is no compelling reason for the suspension, as evidenced by the fact that the IRS itself has never implemented it. It is unnecessary to protect the government's interests because an application for TAS assistance generally does not prevent the IRS from taking enforcement action while the taxpayer is working with TAS. IRC § 7811(d) is also impossible for the IRS to administer using its existing computer systems.

Moreover, if IRC § 7811(d) were ever to be implemented, it would create an elective trap for the unwary. As noted above, it applies only when a taxpayer submits a written request for TAS assistance. The provision does not apply when taxpayers request TAS assistance by phone, which is the method by which most taxpayers seek TAS's assistance. Thus, this provision — apart from being unnecessary and unutilized — would produce disparate outcomes for taxpayers who, despite lacking any knowledge of this issue, contact TAS by different means.

### Recommendation

- Repeal IRC § 7811(d).<sup>167</sup>

<sup>166</sup> Treas. Reg. § 301.7811-1(e)(4).

<sup>167</sup> For legislative language generally consistent with this recommendation, see Taxpayer Protection Act, H.R. 2171, 115th Cong. § 202 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 202 (2016). For more detail, see National Taxpayer Advocate 2015 Annual Report to Congress 316-328 (Legislative Recommendation: *Repeal or Fix Statute Suspension Under IRC § 7811(d)*). In informal discussions, IRS officials have noted that a Taxpayer Assistance Order (TAO) may direct the IRS to refrain from taking collection action pending resolution of the case and that, as a result, the period of limitations for taking collection action might expire before the TAS case is resolved. We think this concern is unfounded because (i) the IRS has never implemented statute suspension despite having the legal authority to do so and (ii) we are not aware of a single case in which a TAO caused a period of limitations to expire before the IRS could take collection action.