

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,¹⁵¹ 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.¹⁵² 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.”¹⁵³ 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.”¹⁵⁴

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.”¹⁵⁵

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.

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.¹⁵⁶

¹⁵⁶ 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.”