

#54 REQUIRE THE IRS TO SPECIFY THE INFORMATION IT NEEDS IN THIRD PARTY CONTACT NOTICES

Present Law

Internal Revenue Code (IRC) § 7602(c)(1) generally requires the IRS to give taxpayers notice before contacting third parties (*e.g.*, banks, employers, employees, vendors, customers, friends, and neighbors) about them. The IRS may provide this third-party contact (TPC) notice only if it intends to make a TPC during the period specified in the notice, which may not exceed one year. Generally, the IRS must send the notice at least 45 days before making the TPC.

IRC § 7602(c)(3) waives the TPC notice requirement if (i) the taxpayer has authorized the contact; (ii) the IRS determines for good cause that notice would jeopardize the IRS's tax collection efforts or may involve reprisal against any person; or (iii) there is a pending criminal investigation. No law expressly requires the IRS to let the taxpayer know what specific information it needs (or needs to verify) before contacting third parties.

Reasons for Change

The TPC notice requirement was enacted as part of the IRS Restructuring and Reform Act of 1998 (RRA 98). The Senate report accompanying the bill explained that “taxpayers should have the opportunity to resolve issues and volunteer information before the IRS contacts third parties.”²¹⁸ The House-Senate conference report accompanying RRA 98 noted that “in general” the TPC notice could “be provided as part of an existing IRS notice.”²¹⁹ On the basis of the conference report, the IRS believed it could satisfy the TPC notice requirement by including generic language in Publication 1, *Your Rights As a Taxpayer*, even if it sent the taxpayer Publication 1 long before it intended to make a TPC.²²⁰

Section 1206 of the Taxpayer First Act (TFA) amended IRC § 7602(c) to require that the IRS provide the TPC notice only when it intends to make a TPC and that it provide the notice at least 45 days in advance of making the contact.²²¹ In a section entitled “Reasons for Change,” a House report to the TFA quoted testimony from a former IRS official who noted that the then-existing TPC notice requirement was “useless and does not effectively apprise taxpayers that such contact will be made, to whom it will be made, or that the taxpayer can request a third party contact report from the IRS.” The House report said TPCs “may have a chilling effect on the taxpayer’s business and could damage the taxpayer’s reputation in the community.” It said the change would “provide taxpayers more of an opportunity to resolve issues and volunteer information before the IRS contacts third parties.”²²² Indeed, if the TPC notice were included “as part of an existing IRS notice” such as Form 4564, *Information Document Request*, which requests information from the

218 S. REP. No. 105-174, at 77 (1998).

219 H. REP. No. 105-599, at 277 (1998) (Conf. Rep.).

220 Pub. 1 provides, in relevant part, “we sometimes talk with other persons if we need information that you have been unable to provide or to verify information we have received.” The U.S. Court of Appeals for the Ninth Circuit held that Pub. 1 did not satisfy the requirement in the case before it and doubted whether, standing alone, it could ever satisfy the former statutory requirement that the IRS provide “reasonable notice in advance.” *J.B. v. United States*, 916 F.3d 1161, 1172 n.15 (9th Cir. 2019). The court noted: “Congress specifically referred to Publication 1 three times in the 1998 Restructuring Act ... However, it did not refer to Publication 1 by name in § 7602(c).” *Id.* at 1170. The Ninth Circuit also stated that the exceptions to the TPC notice requirement would have been unnecessary if the IRS were not required to reveal enough information to permit the taxpayer to “impede the contact by jeopardizing tax collection efforts, retaliating against third parties, or interfering in a pending criminal investigation.” *Id.* at 1168.

221 Pub. L. No. 116-25, 133 Stat. 981 (2019).

222 H. REP. No. 116-39, at 44-45 (2019).

taxpayer, the new 45-day period would give the taxpayer a realistic opportunity to avoid a TPC that seeks new information by providing the information requested on the form.

However, the IRS does not specify what information it needs with the TPC notice.²²³ Thus, the way the IRS has implemented the provision does not give taxpayers more of an opportunity to volunteer information than before the TFA was enacted. In fact, because the TFA removed a prior requirement that the notice be reasonable, the IRS seems to interpret the TFA as having watered down the notice requirements²²⁴ — which we believe is the opposite of what Congress intended. Consistent with the Senate report accompanying RRA 98, the House report accompanying the TFA, and the taxpayer's *right to confidentiality*, the National Taxpayer Advocate believes the IRS's request for information should be included with the TPC notice, which is how the IRS implemented the requirement for a time after the enactment of RRA 98 for some types of TPCs.²²⁵

Recommendation

- Amend IRC § 7602(c) to clarify that the IRS must tell the taxpayer what information it needs (or needs to verify), if any, and give the taxpayer a reasonable opportunity to provide the information (or verification of it) before contacting a third party, unless doing so would be pointless or an exception applies.

223 See, e.g., IRS, Interim Guidance on Third-Party Contact Notification, SBSE-04-0719-0034 (July 26, 2019).

224 Although the House report suggests Congress intended to strengthen the TPC notice requirement rather than weaken it, we understand the IRS believes it is no longer required to provide “reasonable notice in advance,” as interpreted by the Ninth Circuit, because those words were deleted by the Taxpayer First Act.

225 For further discussion, see National Taxpayer Advocate 2015 Annual Report to Congress 123 (Most Serious Problem: *Third Party Contacts: IRS Third Party Contact Procedures Do Not Follow the Law and May Unnecessarily Damage Taxpayers' Businesses and Reputations*); National Taxpayer Advocate 2018 Objectives Report to Congress 98 (Area of Focus: *IRS Third Party Contact (TPC) Notices Should Be More Specific, Actionable, and Effective*).