

## Area of Focus #2 **The IRS's Certification Program Related to Denial or Revocation of Passports Impairs Taxpayer Rights**

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

- *The Right to Be Informed*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to a Fair and Just Tax System*

### DISCUSSION

#### Background

In 2015, Congress passed the Fixing America's Surface Transportation (FAST) Act, which among other items, requires the Department of State (DOS) to deny an individual's passport application and allows the DOS to revoke or limit an individual's passport if the IRS has certified the individual as having a seriously delinquent tax debt.<sup>2</sup> The law provides an exception allowing the DOS to issue a passport to a certified individual in emergency circumstances or for humanitarian reasons.<sup>3</sup> A seriously delinquent tax debt is an "unpaid, legally enforceable federal tax liability of an individual," which:

- Has been assessed;
- Is greater than \$50,000;<sup>4</sup> and
- Meets either of the following criteria: (1) a notice of lien has been filed under Internal Revenue Code (IRC) § 6323 and the Collection Due Process (CDP) hearing rights under IRC § 6320 have been exhausted or lapsed; or (2) a levy has been made under IRC § 6331.<sup>5</sup>

The statute provides the following exceptions to the term "seriously delinquent tax debt":

- A debt that is being timely paid through an installment agreement (IA) or offer in compromise (OIC);
- A debt for which collection is suspended because the taxpayer requested a CDP hearing or a CDP hearing is pending; and
- A debt for which collection is suspended because the taxpayer has requested relief from joint liability (known as innocent spouse relief).<sup>6</sup>

If a certification is found to be erroneous, the debt is fully satisfied, or it ceases to be a seriously delinquent tax debt due to a statutory exception, the IRS must reverse the certification and notify the

1 See Taxpayer Bill of Rights (TBOR), [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights). The rights contained in the TBOR are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified as IRC § 7803(a)(3)).

2 Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, Div. C, Title XXXII, § 32101, 129 Stat. 1312, 1729-32 (2015) (codified as IRC § 7345) (hereinafter FAST Act). The law allows the Department of State (DOS) to limit an individual's passport for only return to the United States or issue a limited passport for only return to the United States. FAST Act, § 32101(e)(2)(B).

3 FAST Act, § 32101(e)(1)(B).

4 This amount will be adjusted for inflation after calendar year 2016. FAST Act, § 32101(f).

5 FAST Act § 32101(a) (codified as IRC § 7345(b)).

6 FAST Act § 32101(a) (codified as IRC § 7345(b)(2)).

DOS.<sup>7</sup> The IRS must notify the taxpayer of any certification or reversal at the same time as it transmits the certification or reversal to Treasury. The notice must include an explanation of the taxpayer's right to bring suit in U.S. Tax Court or a U.S. district court to determine whether the certification was erroneous or whether the IRS has failed to reverse it.<sup>8</sup> The statute also requires the IRS to include in its CDP hearing notices, information about the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports.<sup>9</sup>

The IRS plans to initially certify the seriously delinquent tax debts of one percent (estimated to be between 3,500 and 4,000) of the entire population of taxpayers eligible to be certified when it begins implementation during 2017.<sup>10</sup> After monitoring the response to the certifications and evaluating the resources needed, the IRS will then proceed to certify the rest of the eligible population over time. Initially, the DOS will only be denying passport applications for certified individuals. TAS understands the IRS is still developing plans to determine for which taxpayers it will recommend the DOS revoke passports. Since the IRS began planning for implementation of the passport provisions, the Small Business/Self-Employed (SB/SE) Division has held periodic conference calls with TAS to update TAS on its progress, answer TAS's questions, and provide documents such as correspondence and Internal Revenue Manual (IRM) sections for TAS review. This collaboration has been very effective in allowing TAS to raise concerns and in providing TAS with information it needs to plan for and respond to future taxpayer issues.

### The IRS Has Not Exercised Its Broad Discretion by Excluding Already Open TAS Cases and Collection Due Process Equivalent Hearing Cases From Certification

Notwithstanding the willingness of the IRS to work with TAS on this program, the IRS has failed to address several of the National Taxpayer Advocate's significant concerns. For example, the National Taxpayer Advocate has repeatedly raised to the Commissioner of Internal Revenue the need to exclude taxpayers with already open TAS cases from the inventory of taxpayers whose tax debts the IRS will certify as seriously delinquent.<sup>11</sup> As acknowledged by IRS Chief Counsel, the IRS has significant discretion to choose which taxpayers are excluded from certification.<sup>12</sup> For example, the IRS has decided to exclude taxpayers whose tax debt is currently not collectible (CNC) due to the taxpayer's inability to pay<sup>13</sup> and taxpayers whose tax debt is included in a pending IA under IRC § 6159 or OIC under IRC § 7122.<sup>14</sup> As a policy matter, taxpayers with already open TAS cases should likewise be excluded.

7 FAST Act § 32101(a) (codified as IRC § 7345(c)(1)). There are various statutory timeframes for when the IRS must notify the Secretary of Treasury of a reversal of certification. FAST Act § 32101(a) (codified as IRC § 7345(c)(2)). A taxpayer may qualify for expedited decertification if the taxpayer is eligible for decertification, has foreign travel scheduled within 45 days, and has a passport application pending. IRM 5.19.1.4.19.5.1, *Expedited Decertification* (draft version shared with TAS dated Nov. 16, 2016) and IRM 5.1.12.27.6, *Reversal of Certification* (draft version shared with TAS dated Nov. 16, 2016).

8 FAST Act § 32101(a) (codified as IRC § 7435(d)).

9 FAST Act § 32101(b) (codified as IRC §§ 6320(a)(3)(E), 6331(d)(4)(E)).

10 Conference Call with TAS and Small Business/Self-Employed (SB/SE) Division (Mar. 6, 2017).

11 See, e.g., Email from National Taxpayer Advocate to Commissioner of the IRS (Mar. 7, 2017) (on file with TAS).

12 The statute states: "If the Secretary receives certification by the Commissioner of Internal Revenue that an individual has a seriously delinquent tax debt..." FAST Act § 32101(a) (codified as IRC § 7345(a)).

13 The IRS removes taxpayer accounts from the collection inventory when they are reported as currently not collectible (CNC). Accounts can be reported as CNC for a variety of reasons, such as collection would create a hardship and leave the taxpayer unable to meet necessary living expenses or the IRS cannot locate the taxpayer. See *generally* IRM 5.16.1, *Currently Not Collectible* (Jan. 1, 2016).

14 IRM 5.19.1.4.19.2.4, *Discretionary Certification Exclusions* (draft version shared with TAS dated Nov. 16, 2016) and IRM 5.1.12.27.4, *Discretionary Exclusions from Certification* (draft version shared with TAS dated Nov. 16, 2016).

As of May 3, 2017, there were 2,411 open TAS cases where the liability exceeded \$50,000, which is approximately 6.6 percent of all open TAS cases.<sup>15</sup> Almost by definition, taxpayers with delinquent tax debts who have open cases in TAS are trying to resolve their debts. Pursuant to IRC § 7803(c)(2), Congress has charged TAS with helping taxpayers resolve their problems with the IRS. TAS accepts cases only when taxpayers who have *significant hardship*<sup>16</sup> come to TAS for help, and TAS only keeps cases open as long as taxpayers are working with us to achieve a resolution.<sup>17</sup> In the context of passport revocation or denial, taxpayers may have sought TAS assistance because they are having difficulty providing proper documentation and proving they qualify for CNC status; they may need assistance completing financial statements and submitting an OIC; or they may believe they do not owe the tax. Neither the law nor sound tax administration principles require certifying these taxpayers while they are working with TAS to resolve their tax debts. Indeed, doing so would exacerbate any hardship they may be experiencing and undermine taxpayer rights, most notably the *right to challenge an IRS position and be heard* and the *right to a fair and just tax system*.

Although initially there were logistical concerns about whether it was feasible to identify open TAS cases, these concerns have now been resolved. TAS has created a mechanism for systemically identifying and excluding open TAS cases from the Private Debt Collection program, and the IRS can use the same mechanism to identify and exclude TAS cases from passport certification. More specifically, all modules of taxpayers with cases in TAS have a Transaction Code and an Action Code, which can be used to identify and remove them from the inventory of taxpayers whose seriously delinquent tax debt the IRS plans to certify.

Although the statute excludes debt for which collection is suspended due to a pending CDP hearing, the IRS has concluded that an Equivalent Hearing (EH) does not meet the criteria for this statutory exception and has not made a discretionary exception.<sup>18</sup> EHs hold the same purpose as CDP hearings — to provide the taxpayer with the opportunity to raise any relevant issues related to the unpaid tax, the lien, or the proposed levy, including the appropriateness of the collection action, collection alternatives, spousal defenses, and under certain circumstances, the underlying tax liability.<sup>19</sup> Because taxpayers only have one year after the date of the CDP hearing notice to request an EH, providing an exception for EHs would not create significant delay. Proceeding to certify taxpayers with a pending EH may lead to taxpayers being unable to effectively raise collection alternatives or even challenge the underlying liability before the IRS makes a passport certification.

15 The 2,411 cases include open TAS cases with an aggregate assessed account balance exceeding \$50,000 as of May 3, 2017. IRS, *Account Receivable Dollar Inventory File* (May 3, 2017). Because some of these cases may meet the criteria for a statutory or discretionary exception to passport certification, not all of the taxpayers in these cases would necessarily be certified.

16 “The term significant hardship means a serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the revenue laws are being administered by the IRS. Significant hardship includes situations in which a system or procedure fails to operate as intended or fails to resolve the taxpayer’s problem or dispute with the IRS. A significant hardship also includes, but is not limited to: (A) An immediate threat of adverse action; (B) A delay of more than 30 days in resolving taxpayer account problems; (C) The incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or (D) Irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.” Treas. Reg. § 301.7811-1(a)(4).

17 TAS cases originate from contacts made by taxpayers themselves or on behalf of taxpayers by taxpayer representatives, third parties, congressional representatives, or IRS Operating Divisions or Functions employees. IRM 13.1.16.3, *Receipt of Potential TAS Cases* (Feb. 1, 2011), IRM 13.1.21.1.3.19, *No or Partial Reply from Taxpayer* (Feb. 2, 2011).

18 FAST Act § 32101(a) (codified as IRC § 7345(b)(2)(B)(i)). IRM 5.19.1.4.19.2.4, *Discretionary Certification Exclusions* (draft version shared with TAS dated Nov. 16, 2016).

19 IRC § 6330(c)(2). IRM 5.19.8.4.3, *Equivalent Hearing (EH) Requests and timeliness of EH Requests* (Nov. 1, 2007).

### The IRS Is Infringing on Taxpayer Rights by Not Notifying All Affected Taxpayers Prior to Certification in a Stand-Alone Notice

As explained above, the statute only requires two forms of notice to affected taxpayers: a contemporaneous notice issued to the taxpayer at the time of the certification or reversal of a certification, and notice via text inserted in the taxpayer's CDP notice. The contemporaneous notice, issued within days of the certification, does not provide taxpayers with an opportunity to come into compliance before the IRS makes the certification and in fact advises the taxpayer that the certification has already occurred.<sup>20</sup> The IRS should provide notice at least 30 days prior to certification to warn taxpayers of the consequences, creating an incentive for taxpayers to act quickly in order to avoid those consequences.

While including the passport information in the CDP notice is important because of the opportunity for an administrative and judicial hearing, this should not be the taxpayer's only direct notice prior to certification. The issue of resolving the tax debt to avoid certification may be lost in the broader CDP letter, which spans at least four pages and includes other information such as how to request a CDP hearing, other actions the IRS may take (such as a lien or levy), and interest and penalty charges.<sup>21</sup> Furthermore, taxpayers who have already received their CDP notices prior to the implementation of the passport provisions did not have the passport information included in their CDP notices and will not be notified until the certification is taking place. The failure to notify these taxpayers at all prior to the government taking their right to travel violates the Taxpayer Bill of Rights.

Furthermore, because “[t]he right of a citizen to travel is a part of the ‘liberty’ of which he cannot be deprived, except by due process of law,” the failure to notify taxpayers prior to certifying the tax debt weakens taxpayers’ right to due process, guaranteed under the Fifth Amendment of the U.S. Constitution.<sup>22</sup> Although the IRS’s efforts to communicate the passport provisions to taxpayers in a general way through a forthcoming published notice and a press release<sup>23</sup> are useful, these forms of notice are too general and fail to communicate to taxpayers that the government will soon be taking or limiting their passports. The IRS is violating taxpayers’ *right to be informed* and *right to challenge the IRS’s position and be heard* by not providing them with adequate notice and time to protest before the government initiates a taking of the right to travel.<sup>24</sup>

TAS understands that once the DOS receives notification of a seriously delinquent tax debt from the IRS, it will provide a 90-day period during which a taxpayer may resolve his or her seriously delinquent

20 IRS, CP508C, *Passport Denied or Revoked Due to Serious Tax Delinquency*. Placing the relevant transaction code and activity code on the taxpayer's account systemically generates the notice to the taxpayer. IRS, *The Fixing America's Surface Transportation (FAST) Act, Passport Certification Training* (undated training document, on file with TAS). The IRS systemically informs the DOS of newly certified taxpayers on a weekly basis. IRM 5.19.1.4.19.3, *Certification Process* (draft version shared with TAS dated Nov. 16, 2016).

21 IRS, Letter 1058, *Notice of Intent to Levy and Notice of Your Right to a Hearing* (Jan. 2017).

22 *Zemel v. Rusk*, 228 F. Supp. 65, 69 (D. Conn. 1964), *aff'd*, 381 U.S. 1 (1965). See also *Aptheker v. Sec'y of State*, 378 U.S. 500, 505-06 (1964); *Kent v. Dulles*, 357 U.S. 116, 125 (1958). Article 13 of the Universal Declaration of Human Rights states “Everyone has the right to leave any country, including his own, and to return to his country.” United Nations, *Universal Declaration of Human Rights*, GA Res. 217A (III), UN Doc A/810 (1948).

23 The notice and press release will be published approximately 15-30 days prior to the implementation. Email from SB/SE to TAS (May 1, 2017) (on file with TAS).

24 See *Weinstein v. Albright*, 2000 WL 1154310 at 5 (S.D.N.Y. 2001), *aff'd*, 261 F.3d 127 (2nd Cir. 2001) (finding the statute and regulations requiring denial of a passport in the case of unpaid child support did not violate the Due Process Clause because the statute provides for notice and an opportunity for the person to be heard before a state agency certifies the unpaid child support to the federal government).

tax debt before the DOS will deny the passport application.<sup>25</sup> However, in the case of a taxpayer who already has a passport, TAS is not aware of any similar grace period for a taxpayer to protest the certification or resolve the tax debt prior to the DOS immediately revoking the taxpayer's passport. Furthermore, 90 days may not provide enough time for taxpayers to resolve their tax debts. During the 2017 filing season, the level of service on the IRS's Balance Due phone line was only 40 percent and the average hold time was 47 minutes.<sup>26</sup> Taxpayers may be desperately trying to resolve their debts, but unable to reach the IRS.

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**In order to protect taxpayers' right to be informed, the IRS should expand the notices sent to taxpayers, warning them of the consequences if they do not take action regarding their seriously delinquent tax debts.**

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Regardless of whether the taxpayer received or will receive a CDP notice with the passport information included, the IRS should provide an additional notice immediately before it certifies the seriously delinquent tax debt. This stand-alone notice would focus on the actual tax debt and the specific consequences, such as a restriction on the right to travel, that will occur should the taxpayer not resolve it. Such a notice, issued approximately 30 days before the certification, would get taxpayers' attention and prompt taxpayers to take immediate action. This notice should explain that the IRS may certify their seriously delinquent tax debts, leading to the DOS revoking or denying their passports, and provide a date by which the taxpayer must act to avoid the certification. For taxpayers residing abroad, the IRS should issue the notice 90 days prior to certification, which provides an additional 60 days, similar to the extra time allotted taxpayers abroad for petitioning Tax Court following a statutory notice of deficiency.<sup>27</sup> Providing adequate notice to taxpayers abroad is even more important because if these taxpayers lose their passports, they will be overseas with limited ability to travel.

### **The IRS Must Ensure Certified Taxpayers Whom the IRS Refers to a Private Collection Agency (PCA) Have an Opportunity to Resolve Their Tax Debts Through Collection Alternatives**

TAS understands the IRS may refer taxpayers whose tax debts the IRS has certified as seriously delinquent to a Private Collection Agency (PCA) pursuant to IRC § 6306.<sup>28</sup> Currently, PCAs, unlike IRS employees, do not secure financial information and do not have authority to determine whether the taxpayer should be placed in CNC hardship status, or considered for an OIC, a partial payment IA, or a non-streamlined IA.<sup>29</sup> Because PCAs can solicit a voluntary payment from a taxpayer (*i.e.*, a payment that does not satisfy the liability and is not made pursuant to an IA), the National Taxpayer Advocate was initially concerned that a certified taxpayer may feel pressured to make a payment (which may even reduce the tax debt to or below \$50,000), without entering into an IA or OIC that would reverse the

25 "After 90 days, a new passport application and fee payment will be required." DOS, <https://www.usa.gov/passport-problems> (last updated Feb. 28, 2017). See also IRS, *Revocation or Denial of Passport in Case of Certain Unpaid Taxes*, <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes> (last updated Feb. 6, 2017).

26 See IRS, Joint Operations Center, *Snapshot Reports: Product Line Detail: Installment Agreement/Balance Due* (week ending April 22, 2017).

27 IRC § 6213(a) requires a taxpayer to petition the U.S. Tax Court within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the IRS mails the notice of deficiency.

28 The IRS has informed TAS that it will not be sending cases over \$50,000 over to Private Collection Agencies (PCAs) until later this fiscal year or early next fiscal year. Email from SB/SE to TAS (Mar. 17, 2017) (on file with TAS).

29 By statute, PCAs can locate and contact the taxpayer, request full payment or an installment agreement (IA) not to exceed five years, and obtain financial information specified by the IRS. IRC § 6306(b)(1)(B). However, the PCA Policy and Procedures Guide (Mar. 2, 2017) allows PCAs to offer IAs for more than five years in some circumstances and does not authorize PCAs to collect financial information from taxpayers.

certification.<sup>30</sup> However, the IRS recently updated the PCA Policy and Procedures Guide to instruct PCAs to direct taxpayers to the Automated Collection System (ACS) and return the case to the IRS if the taxpayer wants to resolve a passport issue but cannot full pay or enter into a payment arrangement.<sup>31</sup> Furthermore, the Guide now instructs PCAs to facilitate expedited passport decertification by contacting the appropriate IRS office when a taxpayer has foreign travel scheduled within 45 days.<sup>32</sup> Ensuring PCAs understand the passport certification provisions and know when to refer taxpayers to the IRS is vital to protecting taxpayer rights.

## CONCLUSION

Under the law, the IRS has broad discretion to exclude cases, and excluding already open TAS cases would be in accordance with both the role Congress assigned to TAS and the spirit of the law on passport certifications, which is to ensure taxpayers work with the IRS to resolve their delinquent tax liabilities. In order to protect taxpayers' *right to be informed*, the IRS should expand the notices sent to taxpayers, warning them of the consequences if they do not take action regarding their seriously delinquent tax debts. TAS will monitor the initial phase of passport certifications to ensure taxpayers receive the customer service needed in order to resolve their seriously delinquent tax debts and are able to have their certifications reversed in a timely manner when eligible.

## FOCUS FOR FISCAL YEAR 2018

In Fiscal Year 2018, TAS will:

- Conduct and prepare a Taxpayer Rights Impact Statement to the IRS, analyzing how the IRS's refusal to provide an additional stand-alone notice prior to passport certification harms taxpayers and infringes on their rights;
- Continue to review and make recommendations to documents related to the passport certification program, including: published and unpublished guidance; IRM sections, and correspondence;
- Quantify the population of certified taxpayers with open TAS cases, including how many are decertified while working with TAS, and prepare a Taxpayer Rights Impact Statement analyzing the harm these taxpayers experience by not being excluded from certification while working with TAS;
- Issue an Interim Guidance Memorandum, providing guidance to TAS Case Advocates on how to assist and advocate for certified taxpayers with:
  - Requesting CNC status, including providing proper substantiating documentation;
  - Submitting an OIC request, including completing financial statements;
  - Submitting a request for innocent spouse relief where appropriate;
  - Challenging a liability if the taxpayer believes he or she does not owe the seriously delinquent tax debt;

30 Paying the liability to or below \$50,000 after the taxpayer is certified does not make the taxpayer eligible for reversal. However, if the IRS reverses a certification (for example, if the taxpayer enters into an IA) and the taxpayer pays the debt below \$50,000, the IRS could not recertify the debt, even if the reason for the reversal is no longer applicable (for example, the taxpayer defaulted on the IA). See IRM 5.19.1.4.19.5, *Reversal of Certification* (draft version shared with TAS dated Nov. 16, 2016) and IRM 5.1.12.27.6, *Reversal of Certification* (draft version shared with TAS dated Nov. 16, 2016).

31 PCA Policy and Procedures Guide 56 (Apr. 4, 2017).

32 *Id.*

- Ensuring the IRS timely decertifies the taxpayer's account when he or she meets one of the statutory or discretionary exclusions; and
- Requesting and receiving expedited decertification when eligible.