

## Area of Focus #1 Taxpayers Need More Guidance and Service to Understand and Comply With the Tax Cuts and Jobs Act

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

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

### DISCUSSION

#### Tax Cuts and Jobs Act Implementation Will Be Challenging

On December 22, 2017, Congress passed the Tax Cuts and Jobs Act (TCJA),<sup>2</sup> enacting the most sweeping changes to U.S. tax law since the Tax Reform Act of 1986.<sup>3</sup> For example, for individuals, the TCJA repealed personal exemptions, increased the standard deduction, repealed certain itemized deductions, capped the deductions for state and local taxes, and changed tax rates and brackets.<sup>4</sup> For businesses, it reduced corporate rates, required employers to use new withholding tables, added a deduction for business income from pass-throughs, increased depreciation allowances, repealed the corporate alternative minimum tax, and added a wide range of international tax provisions to bring offshore profits back to the U.S.<sup>5</sup>

Implementing the TCJA will be a major effort in fiscal years (FYs) 2018 and 2019. It requires the IRS to reprogram 140 systems and create or revise about 450 forms, instructions, and publications — twice the number required in a normal year.<sup>6</sup> As of May 29, 2018, the IRS's Tax Reform Implementation Office and Tax Reform Implementation Council (TRIC) had developed a Tax Reform Enterprise Integrated Project Plan containing over 9,000 tasks.<sup>7</sup>

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 at IRC § 7803(a)(3)).

2 Pub. L. No. 115-97, 131 Stat. 2054 (Dec. 22, 2017). We are referencing the short title of the bill, H.R. 1, rather than the law.

3 Pub. L. No. 99-514, 100 Stat. 2085 (1986).

4 Pub. L. No. 115-97 §§ 11001 (individual rates), 11021 (increased standard deduction), 11041 (repeal of personal exemptions), 11042 (limitation on state and local tax deduction), and 11045 (repeal of itemized deductions).

5 Pub. L. No. 115-97 §§ 13001 (corporate rates), 11011 (deduction for business income from pass-throughs), 13201-13206 (depreciation rules), 13101 (Section 179 expensing), 12001-12002 (corporate alternative minimum tax), 14101 *et. seq.* (provisions related to foreign income and repatriation).

6 IRS, *Tax Reform Implementation Office (Q&As), Frequently Asked Questions: Implementing the New Tax Law* (Feb. 8, 2018). However, the IRS plans to spend most of its Tax Cuts and Jobs Act (TCJA) implementation funding for fiscal year (FY) 2018 (\$291 million) on operations support (IT), with smaller increases for services (\$19 million) and enforcement (\$10 million). See IRS, *FY 2018 Section 113 Spending Plan for Tax Reform* (June 1, 2018), [https://online.wsj.com/public/resources/documents/IRSdocumentspending06012018.pdf?mod=article\\_inline](https://online.wsj.com/public/resources/documents/IRSdocumentspending06012018.pdf?mod=article_inline). For additional information on implementation, see Treasury Inspector General for Tax Administration, Ref. No. 2018-44-027, *Tax Cuts and Jobs Act: Assessment of Implementation Planning Efforts* (Apr. 11, 2018).

7 TAS analysis of Tax Reform Enterprise Integrated Project Plan (May 29, 2018).

The IRS and Treasury added 20 TCJA items to the 2017–2018 Priority Guidance Plan — guidance that they have recently issued or planned to issue by June 30, 2018.<sup>8</sup> They hope to release a total of 25–30 items by August 15.<sup>9</sup> As of May 14, the IRS’s tax reform website included 86 items: 27 News Releases, Fact Sheets & Statements; 7 Tax Reform Tax Tips; 6 Frequently Asked Questions (FAQs); 3 YouTube Videos; 5 Publications; 29 Legal Guidance items; and 9 Other Information items.<sup>10</sup>

In addition, the IRS is planning hundreds of outreach events, such as the IRS Nationwide Tax Forums held each summer in five cities around the country.<sup>11</sup> It also plans to work with consumer groups, business groups, the payroll community, and local organizations to educate them and identify their questions and concerns. Although the IRS reviews written comments from its stakeholders, its general approach seems focused on pushing information out rather than engaging in a two-way dialog with taxpayers, an internal focus that increases the importance of TAS’s involvement in the implementation process.

### TAS Will Continue to Assist With Tax Cuts and Jobs Act Implementation and Communication Plans

TAS assists the IRS by attending TRIC meetings to voice the taxpayer’s perspective and will continue to do so in FY 2019, even though the focus of these meetings is on the timeliness (rather than the content) of TCJA implementation. TAS also participates in the IRS’s communications team and plans to offer recommendations concerning the IRS’s TCJA communications plan when it becomes available.

After receiving questions from the public about changes to tax laws that had not changed,<sup>12</sup> the National Taxpayer Advocate recommended the IRS create a document or interactive tool to help people determine if the most commonly used tax provisions have changed. Because the IRS declined to do so, TAS created one and posted it on the TAS website.<sup>13</sup>

### TAS Will Continue to Advocate for the IRS to Waive Penalties Due to a Lack of Timely and Reliable Guidance

Taxpayers need guidance quickly to do routine tax planning and to avoid underpayment penalties at year-end,<sup>14</sup> but it takes time to issue quality guidance that addresses the public’s concerns. The IRS has recognized that taxpayers should not be penalized as a result of its delay in issuing guidance. It waived the estimated tax underpayment penalty for “transition tax” payments due on or before January 15, 2018, from certain taxpayers who directly or indirectly own a foreign corporation with deferred foreign

8 Department of the Treasury, *2017–2018 Priority Guidance Plan* (May 9, 2018), <https://www.irs.gov/privacy-disclosure/priority-guidance-plan>.

9 See, e.g., Stephanie Cumings, *Kautter Talks Timelines for TCJA Guidance*, 2018 TNT 94-5 (May 15, 2018).

10 IRS, *Tax Reform*, <https://www.irs.gov/newsroom/tax-reform> (last updated May 10, 2018).

11 IRS, *Tax Reform Implementation Office (Q&As), Frequently Asked Questions: Implementing the New Tax Law* (Feb. 8, 2018).

12 See, e.g., *Washington Journal: Nina Olson on the IRS and New Tax Law* (C-Span television broadcast Jan. 29, 2018), <https://www.c-span.org/video/?440278-4/washington-journal-nina-olson-discusses-irs-implementation-tax-law>.

13 See <https://taxpayeradvocate.irs.gov/taxchanges>.

14 Individuals may generally avoid the estimated tax penalty if their withholding (plus any quarterly estimated tax payments) is at least the lesser of 100 percent of the prior year’s tax liability (110 percent for those with income over \$150,000, except for certain farmers or fishermen) or 90 percent of the current year’s tax liability. IRC § 6654. The IRS updated the Form W-4, *Employee’s Withholding Allowance Certificate*, and its online withholding calculator on February 28, 2018. IR-2018-36 (Feb. 28, 2018).

earnings.<sup>15</sup> However, it has not done so for individuals or small businesses who underestimate what they owe because of uncertainty about the law.<sup>16</sup>

Due to the TCJA, it is easier for taxpayers to inadvertently underpay estimated taxes this year. For example, income tax deductions are taken into account for purposes of computing self-employment taxes, but the TCJA suggests the new 20 percent income tax deduction for pass-through entities might not be allowed for purposes of computing self-employment taxes.<sup>17</sup> As another example, the 20 percent deduction may be limited or unavailable to those in a “specified service trade or business.”<sup>18</sup> If businesses do not know if they are “specified,” they may incorrectly assume they can take the deduction, potentially triggering estimated tax penalties.

To address questions about the TCJA, the IRS has been posting more informal or “soft” guidance on its website (*i.e.*, guidance not published in the Internal Revenue Bulletin and that does not incorporate public comments) than usual.<sup>19</sup> While soft guidance is helpful because it can be issued quickly, IRS examiners are instructed not to rely on it, and the IRS may later delete the postings or change its position.<sup>20</sup> In other words, taxpayers could be wrong about their tax liability, even if they are relying on a reasonable interpretation of an ambiguous law or “soft” guidance from the IRS. Because taxpayers should be entitled to rely on any guidance from the IRS and reasonable interpretations of an ambiguous law, TAS will advocate for the IRS to waive any resulting penalties.<sup>21</sup>

15 Notice 2018-26, 2018-16 IRB 480.

16 In general, there is no “reasonable cause” exception to the estimated tax penalty. See IRC § 6654.

17 IRC § 1402(a), which is in Subtitle A [Income Taxes], Chapter 2 [Tax on Self-Employment (SE) Income] of the Code, provides that with limited exceptions, the term “net earnings from self-employment,” upon which SE taxes are imposed, means the “gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle [Subtitle A – Income Taxes] which are attributable to such trade or business....” Similarly, Treas. Reg. 1.1402(a)-1 (a)(1) says that SE income is reduced by “the deductions allowed by Chapter 1 [of Subtitle A – Income Taxes] of the Code which are attributable to such trade or business.” The 20 percent deduction under IRC § 199A is an income tax deduction allowed by Chapter 1 (of Subtitle A), which would suggest it is deducted for purposes of computing SE tax. However, IRC § 199A(f)(3) says the deduction is **only** allowed for purposes of “this chapter” (*i.e.*, Chapter 1, and not Chapter 2).

18 IRC § 199A(d)(1)(2)(A) (cross referencing IRC § 1202(e)(3)(A)). As of June 4, the IRS had not issued guidance concerning IRC § 199A.

19 See, e.g., IRS, *Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns*, <https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns> (Mar. 19, 2018). For problems with some forms of informal guidance, such as Frequently Asked Questions (FAQs), see Nina Olson, *IRS Frequently Asked Questions Can Be a Trap for the Unwary*, NTA Blog (July 16, 2017), <https://taxpayeradvocate.irs.gov/news/irs-frequently-asked-questions-can-be-a-trap-for-the-unwary>.

20 See Memorandum from Director, Examination – Field and Campus Policy to Area Directors, Examination – Field, SBSE-04-0517-0030, *Interim Guidance on use of Frequently Asked Questions (FAQs) and Other Items Posted to IRS.gov* (May 18, 2017), <https://www.irs.gov/pub/foia/ig/sbse/sbse-04-0518-0022.pdf>. See also Chief Counsel Directives Manual (CCDM) 31.1.1.2.1 (Aug. 11, 2004); Chief Counsel Notice CC-2003-014 (May 8, 2003) (requiring employees to follow guidance published in the Internal Revenue Bulletin (IRB)). The IRS sometimes informs taxpayers they can rely on proposed rules until final rules become effective. See, e.g., Notice 2018-28, 2018-16 IRB 492 (“Before the issuance of the regulations described in this notice, taxpayers may rely on the rules described in sections 3 through 7 of this notice.”). However, we have not seen similar statements in FAQs or Fact Sheets.

21 IRC § 6404(f) provides that the Secretary shall abate any portion of a penalty or addition to tax attributable to erroneous written advice provided by the IRS to the taxpayer. The IRS rarely issues written advice, except using automated systems such as the interactive tax assistants (ITAs) on its website. TAS will consider recommending that IRC § 6404(f) be interpreted or updated to cover written advice provided via automated systems, such as by the IRS’s withholding calculator or the various ITAs on IRS.gov.

## TAS Will Continue to Advocate for the IRS to Do More to Help Taxpayers Avoid Estimated Tax Penalties

It is also more difficult for wage earners to project their tax liability this year. They can adjust their withholding using Form W-4, *Employee's Withholding Allowance Certificate*, but this form is not very transparent.<sup>22</sup> It requires taxpayers to request withholding levels based on the abstract concept of “allowances.” It is difficult to determine how much withholding is associated with each allowance, except through trial and error. To increase transparency and help taxpayers avoid estimated tax penalties even if they cannot project their future tax liability, TAS will advocate for the IRS to allow them to designate a specific amount or a specific percentage to withhold from each paycheck (*e.g.*, the estimated tax penalty safe harbor of 100 percent or 110 percent of the prior year's tax).

## TAS Will Recommend Ways to Improve Service by Phone

In addition to written guidance, taxpayers and practitioners have questions that they need the IRS to answer in person or over the phone. Although over 14 million individual taxpayers do not have internet access in their homes and over 41 million do not have broadband,<sup>23</sup> the IRS has generally been reducing the scope of the questions its customer service representatives will answer.<sup>24</sup> In 2014, it stopped answering most tax law questions after the filing season.<sup>25</sup> Since then, the National Taxpayer Advocate has recommended that the IRS answer both basic and complex tax law questions throughout the year on all service channels — online, in-person, and by phone — and ensure that its customer service representatives (CSRs) have the resources and training necessary to answer them completely.<sup>26</sup> This year the IRS agreed to continue to answer tax law questions related to tax reform after the filing season.<sup>27</sup>

To learn how the IRS presents itself to taxpayers, TAS called the IRS's customer service numbers.<sup>28</sup> We navigated the menu options (generally four or five levels deep) to reach a CSR and posed the types of questions that the IRS is likely to receive. We did not call enough to obtain a statistically representative sample, but wanted to know what a caller might experience. Perhaps because our calls were during off-peak times (avoiding Monday and Friday) and after the filing season, they lasted less than 15 minutes, on average. However, the CSRs often failed to answer our questions. In some cases, our calls were transferred to a recording and disconnected. One recording told us that nobody could answer our

22 Many self-employed taxpayers also earn wages subject to withholding. For tax year 2016 more than nine million taxpayers made estimated tax payments, and most of them (70 percent) also claimed credits for wage withholding. TAS Analysis of Estimated Tax Payments and Withholding (May 31, 2018). However, the W-4 worksheets do not cover those with self-employment income. See Form W-4 (*Deductions, Adjustments and Additional Income Worksheet*, requesting on line 6, “an estimate of your 2018 nonwage income,” but not addressing any associated self-employment tax).

23 See National Taxpayer Advocate 2016 Annual Report to Congress vol. 2, 8 (Research Study: *Taxpayers' Varying Abilities and Attitudes Toward IRS Taxpayer Service: The Effect of IRS Service Delivery Choices on Different Demographic Groups*); National Taxpayer Advocate 2017 Annual Report to Congress vol. 2, 62, 63 (Research Study: *A Further Exploration of Taxpayers' Varying Abilities and Attitudes Toward IRS Options for Fulfilling Common Taxpayer Service Needs*).

24 TAS comparison of the 2006 Publication Method Guide with the 2018 Interactive Tax Law Assistant (Feb. 16, 2018) (indicating that 55 more questions were deemed out of scope in 2018); National Taxpayer Advocate 2005 Annual Report to Congress 1, 2 (Most Serious Problem: *Trends in Taxpayer Service*) (indicating that in the last year the IRS “[d]eclared 225 questions ‘out of scope’ for walk-in and 117 questions ‘out of scope’ for toll-free phone assistors.”).

25 National Taxpayer Advocate 2016 Annual Report to Congress 1, 6 (Special Focus: *IRS Future State: The National Taxpayer Advocate's Vision for a Taxpayer-Centric 21st Century Tax Administration*) (“In 2014, the IRS ceased all tax preparation in the TACs and eliminated post-April 15 tax law phone and TAC assistance.”).

26 See, *e.g.*, National Taxpayer Advocate 2017 Annual Report to Congress 22-35 (Most Serious Problem: *Telephones: The IRS Needs to Modernize the Way It Serves Taxpayers Over the Telephone, Which Should Become an Essential Part of an Omnichannel Customer Service Environment*).

27 IRS response to TAS information request (Mar. 2, 2018).

28 We dialed 800-829-1040 and 800-829-4933.

call because of “budget cuts.” If we were lucky, we reached a CSR who transferred us to the “tax law” department where we had to repeat our questions.

When we asked about provisions that had not changed (*e.g.*, the treatment of Social Security), a few CSRs did not know if the provisions had changed and either transferred us to a recording that disconnected us or advised us to search IRS.gov and ended the call.<sup>29</sup> When we asked about provisions that had changed and were addressed by the statute, a few CSRs read us a script that happened to answer our questions (*e.g.*, about the Affordable Care Act). However, a few CSRs insisted the questions could only be answered during the filing season or that our questions (*e.g.*, about the treatment of dependents) could not be answered because they were not related to tax reform. One CSR incorrectly stated that answers to our question had not yet been determined. Others read us scripts that did not answer our questions and referred us to IRS.gov. Finally, when we asked a question that neither the statute nor the IRS had answered, on one occasion we were told that the IRS was not answering tax law questions, and on another we were transferred to a recording and disconnected.

CSRs might have been able to provide better answers if they had (1) more complete knowledge about what has changed and what has not, (2) training on the TCJA changes, and (3) access to the latest guidance from the IRS by topic. At present, guidance is listed in date order on the tax reform landing page on IRS.gov, and one CSR told us he expected to receive training on the TCJA toward the end of the year. In addition to TAS’s continuing advocacy for the IRS to expand its service on the phone, TAS will advocate for it to provide both CSRs and the public with an up-to-date and organized list of the tax law changes that includes links to the most recent guidance by topic.

## FOCUS FOR FISCAL YEAR 2019

In fiscal year 2019, TAS will:

- Review Systemic Advocacy Management System submissions from taxpayers and have Local Taxpayer Advocates conduct outreach, in each case, to learn what taxpayers find confusing and identify areas where clarifying guidance is needed;
- Participate in the tax reform implementation effort (*e.g.*, the TRIC) to help ensure the IRS considers the taxpayer’s perspective;
- Review the IRS’s plans for employee training and taxpayer outreach and education;
- Call the IRS’s customer service lines to develop additional recommendations about how to improve service;
- Advocate for the IRS to allow taxpayers to rely on soft guidance to avoid penalties;
- Advocate for the IRS to waive penalties resulting from a lack of timely guidance on the new law; and
- Advocate for the IRS to make it easier for taxpayers to withhold enough to avoid penalties even if they do not project their liability for the current year.

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<sup>29</sup> TAS subsequently posted a document on IRS.gov to help people determine if the most frequently claimed provisions had changed. See <https://taxpayeradvocate.irs.gov/taxchanges>.