

Area of
Focus #6**Some IRS Procedures for the Certification Program Related to Denial or Revocation of Passports Ignore Legislative Intent and Impair Taxpayer Rights****TAXPAYER RIGHTS IMPACTED¹**

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

DISCUSSION

In early 2018, the IRS began implementing the legislatively-directed program to certify taxpayers' seriously delinquent tax debts to the Department of State.² Under the law, the Department of State must deny an individual's passport application and may revoke or limit an individual's passport if the IRS has certified the individual as having a seriously delinquent tax debt. This term refers to an "unpaid, legally enforceable federal tax liability of an individual," which has been assessed, is greater than \$51,000, 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 § 6331.³

Although the IRS began by certifying only about 1,500 taxpayers in February, it had certified 9,356 taxpayers as of May 4, 2018.⁴ The IRS will increase certification by five to ten percent each week until it certifies all taxpayers meeting the criteria.⁵ After that, certifications will occur systemically on a weekly basis. Although the number of taxpayers eligible for certification fluctuates, as of April 2018 there were approximately 436,400 taxpayers who met certification criteria and did not meet a discretionary or statutory exclusion.⁶ TAS has been working with the Small Business/Self-Employed (SB/SE) division to ensure the IRS's plans and procedures support the purpose of the statute and protect taxpayer rights.

1 See Taxpayer Bill of Rights (TBOR), 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 Pub. L. No. 114-94, Div. C, Title XXXII, § 32101, 129 Stat. 1312, 1729-32 (2015) (codified at IRC § 7345) (hereinafter FAST Act).

3 FAST Act § 32101(a) (codified as IRC § 7345(b), 32101(f)).

4 TAS conference call with the Small Business/Self-Employed Division (Feb. 22, 2018); IRS response to TAS information request (May 15, 2018).

5 IRS response to TAS information request (May 15, 2018).

6 *Id.*

The IRS Does Not Provide Taxpayers With a Stand-Alone Notice Prior to Passport Certification, and Its Certification Notice and the Department of State's Notice Lack Key Information

Under the statute, the IRS must notify the taxpayer of a certification or decertification when it transmits it to the Department of State.⁷ It must also include in its CDP hearing notices information about the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports.⁸ As discussed in the National Taxpayer Advocate's 2017 Annual Report to Congress, the IRS's refusal to provide any additional notice beyond these requirements impairs the taxpayer's *rights to be informed and to challenge the IRS's position and be heard* because taxpayers may not learn the IRS has certified their tax debts until after certification.⁹

Additionally, the IRS's passport certification notice is inadequate because it provides only two options for taxpayers to prevent the Department of State from denying, revoking, or limiting a taxpayer's passport: full payment of the liability or alternate payment arrangements, such as an installment agreement (IA) or offer in compromise (OIC). The notice lacks any language about other situations where tax debts may be excluded from the program, such as if the taxpayer is a victim of identity theft or qualifies for currently not collectible (CNC) hardship status. Of the 316 decertifications the IRS had sent to the Department of State as of May 4, 2018, one of the top three reasons for decertification was the taxpayer receiving CNC hardship status.¹⁰ The notice also fails to inform taxpayers that if they have emergency or humanitarian reasons for needing to travel, the Department of State can make an exception, and the taxpayer should contact the Department of State directly.

Likewise, the letter the Department of State sends to notify certified taxpayers that it is holding their passport applications also omits information about the emergency and humanitarian exception, as well as information about TAS.¹¹ If a taxpayer has been trying to work with the IRS unsuccessfully or is suffering from a significant hardship, the taxpayer should be directed to TAS, not the IRS.

TAS Will Continue to Advocate for the IRS to Exclude Already Open TAS Cases From Passport Certification, Like Other Exclusions That Promote Compliance and Protect Taxpayer Rights

The statute provides exceptions to passport certification for debts timely paid through IAs and OICs and for debts for which collection is suspended because the taxpayer has a requested or pending CDP hearing or has requested relief from joint liability (known as innocent spouse relief). Additionally, the IRS has exercised its discretion to create exceptions that promote taxpayer compliance, protect taxpayer rights, and treat taxpayers fairly. These exceptions include debts that:

- Are determined to be in CNC status due to hardship;
- Result from identity theft;

7 The statute requires "contemporaneous notice." The notice must explain 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. FAST Act § 32101(a) (codified at IRC § 7435(d)).

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

9 National Taxpayer Advocate 2017 Annual Report to Congress 73-83 (Most Serious Problem: *Passport Denial and Revocation: The IRS's Plans for Certifying Seriously Delinquent Tax Debts Will Lead to Taxpayers Being Deprived of a Passport Without Regard to Taxpayer Rights*).

10 IRS response to TAS information request (May 15, 2018). In addition to currently not collectible (CNC) hardship status, the two most common reasons for decertification were pending installment agreements and expiration of the statutory limitations period for collecting the tax.

11 Dept. of State, Letter 695 – *Debts, Clearance Holds, 06 - IRS – Seriously Delinquent Tax Debt* (May 20, 2015).

- Belong to a taxpayer in a disaster zone;
- Belong to a taxpayer in bankruptcy;
- Belong to a deceased taxpayer;
- Are included in a *pending* OIC or IA; and
- For which there is a pending claim, and the resulting adjustment is expected to result in no balance due.¹²

However, this list omits a key exception for taxpayers with already open TAS cases at the time of certification. The passport certification program was intended to help the IRS collect the unpaid tax debts of recalcitrant taxpayers and to increase compliance.¹³ The reasoning behind the passport certification program is not to penalize taxpayers for their unpaid debts but to “serve as an incentive to individuals wishing to obtain passports to comply with their tax obligations, thus reducing the level of tax delinquencies and promoting compliance.”¹⁴

TAS has taken a proactive approach with its cases involving taxpayers who owe or may soon owe greater than \$51,000 by informing taxpayers about the potential for passport certification and assisting them in resolving their tax debts or correcting their accounts to avoid certification occurring.¹⁵ Approximately three months prior to the implementation of the passport program, TAS identified about 750 taxpayers who met the criteria for certification and was able to fully resolve 121 (about 16 percent) of these cases preemptively before the IRS began certifying taxpayers.¹⁶

The number of TAS cases with taxpayers potentially eligible for certification fluctuates as taxpayers resolve their liabilities, meet an exclusion, or otherwise have their TAS cases closed. From the beginning of fiscal year (FY) 2018 through April, TAS received approximately 4,900 cases where the taxpayer owed more than \$51,000.¹⁷ Of these cases, approximately two-thirds involved a collection or exam issue, with over half involving more than one issue.¹⁸ These numbers are similar to FY 2017, where 75 percent of the approximately 4,200 closed TAS cases with balances due over \$50,000 involved exam or collection issues.¹⁹ TAS closed 70 percent of the FY 2017 cases (approximately 2,700) with full or partial relief.²⁰

12 Internal Revenue Manual (IRM) 5.19.1.5.19.4, *Discretionary Certification Exclusions* (Dec. 26, 2017).

13 “The Committee is aware that the amount of unpaid Federal tax debts continues to present a challenge to the IRS. The Committee is also aware that a significant amount of unpaid Federal tax debt is owed by persons to whom passports have been issued... The Committee believes that tax compliance will increase if issuance of a passport is linked to payment of one’s tax debts.” S. REP. NO. 114-45, at 57 (2015).

14 Government Accountability Office, GAO 11-272, *Federal Tax Collection: Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes* (Mar. 2011), <http://www.gao.gov/new.items/d11272.pdf>.

15 As discussed later in this section, the National Taxpayer Advocate has issued an Interim Guidance Memorandum with instructions on how her employees should advocate and use Taxpayer Assistance Orders with respect to passport cases.

16 Taxpayer Advocate Management Information System (TAMIS) (data extracted Nov. 27, 2017 and May 18, 2018). Full relief was determined when an account was closed prior to January 17, 2018, and the taxpayer issues related to audit reconsideration, levy, identity theft, amended returns, automated underreporter reconsiderations, and various other issues were fully resolved. Full relief does not necessarily mean the taxpayer’s liability was adjusted below the certification threshold or that the taxpayer met a certification exclusion. Thus, some of these taxpayers may be certified in the future.

17 This reflects TAS case receipts from October 1, 2017 through April 30, 2018. TAMIS (data extracted by TAS May 25, 2018); Accounts Receivable Dollar Inventory (ARDI) and Individual Master File (IMF) data (includes data posted by Apr. 26, 2018).

18 *Id.* ARDI and IMF data (includes data posted by April 26, 2018).

19 The approximately 4,200 closed TAS cases excludes accounts previously reported as CNC hardship by the IRS and therefore not subject to certification.

20 This reflects TAS case receipts from October 1, 2017 through April 30, 2018. TAMIS (data extracted by TAS May 25, 2018); ARDI and IMF data (includes data posted by April 26, 2018).

This fiscal year, TAS has achieved a resolution that would avoid certification or qualify the taxpayer for decertification in many of the cases where taxpayers were potentially eligible for certification. TAS has closed approximately 2,750 cases so far where a taxpayer was potentially eligible for certification. Of these cases, about 28 percent of the taxpayers no longer have a liability, and another approximately 14 percent were closed due to an IA, OIC, CNC hardship status, or pending innocent spouse request.²¹ TAS achieved full or partial relief for two-thirds of these cases.²²

Recognizing the significant rights that may be abridged when a person's passport is taken, Congress intended for passport certification to occur only once a taxpayer's administrative rights have been exhausted or lapsed. Taxpayers working with TAS are exercising important administrative rights – rights expressly granted to them by Congress. As part of the *right to a fair and just tax system*, taxpayers have the right to seek assistance from TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.²³

In January 2018, the National Taxpayer Advocate issued almost 800 Taxpayer Assistance Orders (TAOs) to the IRS, requesting it exclude from passport certification those taxpayers who met the criteria for certification but who had an already open TAS case. After initially appealing the TAOs, the IRS ultimately agreed to exclude from certification only those TAS taxpayers for whom the TAOs were issued. The IRS indicated that it would not exclude taxpayers who are eligible for certification but who have an open TAS case after the initial implementation of the passport program, unless they meet another exclusion criterion under the statute or the Internal Revenue Manual (IRM). Since the initial TAOs were issued, TAS has opened 30 new cases with taxpayers it has identified as potentially eligible for passport certification.²⁴ The National Taxpayer Advocate followed up by issuing a Taxpayer Advocate Directive to the Commissioner of SB/SE on April 6, 2018, directing the IRS to exclude from certification all taxpayers with an open TAS case at the time of proposed certification, until they no longer have an open TAS case. Appendix A includes the original Taxpayer Advocate Directive, the response from the Commissioner of SB/SE, the response from the National Taxpayer Advocate, and the response from the Deputy Commissioner for Services and Enforcement. The National Taxpayer Advocate has elevated this issue to the Acting Commissioner and has requested a meeting with him so he can review the IRS's position.

For taxpayers who are already certified prior to opening a TAS case, TAS will work with them to resolve their tax debts or submit documentation to show they meet one of the other exceptions, such as identity theft or CNC hardship status. Additionally, TAS will be assisting taxpayers in meeting decertification criteria by exploring whether a certification was erroneous, or by having a liability recalculated to reflect the taxpayer never owed the seriously delinquent tax debt. In April, the National Taxpayer Advocate issued an Interim Guidance Memorandum to TAS employees instructing them to issue TAOs for taxpayers with already open TAS cases who are eligible for certification but have not been certified, and for taxpayers who were certified prior to coming to TAS but who will meet decertification criteria as a result of the requested action.²⁵

21 This reflects TAS case receipts from October 1, 2017 through April 30, 2018. TAMIS (data extracted by TAS May 25, 2018); ARDI and IMF data (includes data posted by April 26, 2018).

22 *Id.*

23 See IRS Publication 1, *Your Rights as a Taxpayer* (Sept. 2017).

24 From January 17, 2018 through April 30, 2018, TAS opened 30 cases with the primary or secondary issue code 930, Passport Revocation/Denial.

25 Memorandum from Nina Olson, National Taxpayer Advocate to Taxpayer Advocate Service Employees (Apr. 26, 2018), https://www.irs.gov/pub/foia/ig/spder/tas-13-0418-0001_passport_igm.pdf.

Due to the phased-in schedule for certifying seriously delinquent tax debts, only 73 (1.5 percent) of the TAS cases potentially eligible for certification at some point during FY 18 have actually been certified thus far, and only 64 remain certified.²⁶ For the seven cases where TAS worked with a taxpayer to become decertified, TAS was able to have the taxpayer's account reflect decertification within an average of 11 weeks from the time the case was opened to when the decertification code was added to the IRS account, although this does not include additional time to transmit the decertification to the Department of State and have the Department of State's systems updated.²⁷ TAS has only been able to definitively identify seven taxpayers who opened a TAS case after being certified.²⁸

In addition to an exclusion for already open TAS cases, TAS will explore the need for additional discretionary exclusions, such as the potential for excluding taxpayers whose liability results from a mixed entity or scrambled Social Security number (SSN). These cases may occur if two returns are filed by different taxpayers with the same SSN.²⁹ TAS will work with the IRS to research the feasibility of excluding these taxpayers and other potential reasons for exclusion that arise through TAS casework.

As Taxpayers Become Eligible for Decertification, the IRS Must Ensure Decertifications Are Transmitted Timely to the Department of State

If a certification is found to be erroneous, the debt is fully satisfied, it becomes legally unenforceable, or it ceases to be a seriously delinquent tax debt due to a statutory exception, the IRS must reverse the certification and notify the Department of State and the taxpayer.³⁰ The IRS will systemically send certifications and decertifications to the Department of State on a weekly basis, with decertifications required by law to generally be sent within 30 days of a taxpayer meeting the criteria.³¹ The Department of State will hold passport applications of certified taxpayers open for 90 days before denying them to allow the taxpayers to resolve their tax debts. However, this period may not provide relief for taxpayers, who either need a passport during this time or who are unable to resolve their tax debts and have their accounts decertified in time. During FY 2018 through May 19, the IRS answered only 52 percent of calls on its balance due line, with an average wait time of over 27 minutes.³²

Although the IRS has developed an expedited decertification procedure for taxpayers with pending passport applications who are abroad or have travel planned within 45 days, it may not provide relief

26 This reflects TAS case receipts from October 1, 2017 through April 30, 2018. TAMIS (data extracted by TAS May 25, 2018); ARDI and IMF data (includes data posted by April 26, 2018).

27 TAMIS (data extracted by TAS May 25, 2018); ARDI and IMF data (includes data posted by April 26, 2018). The average amount of time between when a taxpayer's account reflects a basis for decertification (e.g., all certified modules have been marked as CNC hardship, etc.) and when the decertification is transmitted to the Department of State is approximately two weeks. The IRS does not delay inclusion in the file sent to the Department of State to match the timing of the taxpayer's reversal notice. IRS response to TAS information request (May 15, 2018).

28 TAS Research identified ten cases where we could not discern whether the case was opened before or after certification because of the difficulty of comparing a weekly cycle to the timing of a certification notice and related posting on the IMF. TAMIS (data extracted by TAS May 25, 2018); ARDI and IMF data (includes data posted by April 26, 2018).

29 In a scrambled Social Security number (SSN) case, two taxpayers file a return with the same SSN, and the correct SSN for each taxpayer cannot be determined. In a mixed entity case, there may be an inadvertent taxpayer error, tax preparer error, or processing error. IRM 3.13.5.26, *Scrambled TIN Cases* (Jan. 1, 2016); IRM 3.13.5.27, *Mixed Entity/Multiple Filing Conditions* (Jan. 1, 2015).

30 FAST Act § 32101(a) (codified at IRC § 7345(c)).

31 *Id.* (codified at IRC § 7345(c)(2)). An erroneous certification requires the decertification notice to be sent to the Department of State as soon as practicable. *Id.* See IRM 5.19.1.5.19.8, *Certification Process* (Dec. 26, 2017); IRM 5.19.1.5.19.9, *Reversal of Certification* (Dec. 26, 2017).

32 IRS, Joint Operations Center, *Snapshot Reports: Product Line Detail Snapshot* (week ending May 19, 2018).

for some taxpayers.³³ TAS understands based on a small number of cases so far that the IRS has been able to manually send expedited decertifications to the Department of State very quickly on a case-by-case basis. However, the IRS is limited due to the restriction on who can make the decertification. IRC § 7345(g) restricts both certifications and decertifications to only the Commissioner of Internal Revenue, the Deputy Commissioner for Services and Enforcement, or the Commissioner of an operating division. It is foreseeable that the number of expedited decertification requests could increase significantly as the IRS proceeds to full implementation of the passport program by certifying all eligible taxpayers, and this could affect the IRS's ability to handle these cases quickly on an individual basis. TAS will be closely monitoring the timelines achieved for expedited decertifications and will revisit whether changes are necessary to the expedited procedures once the program is fully implemented. Additionally, TAS will advocate for taxpayers who may not meet the expedited criteria but who have another urgent need for a passport to be decertified expeditiously.

The IRS and the Department of State Do Not Adequately Inform Taxpayers About the Exception for Emergency and Humanitarian Circumstances

As discussed above, neither the IRS passport certification notice nor the Department of State passport hold notice includes information about the exception for emergency and humanitarian travel. Both the IRS webpage and the Department of State webpage on passport action as a result of a seriously delinquent tax debt lack information about this exception.³⁴ Although the IRM includes instructions for IRS employees to refer taxpayers who may have emergency or humanitarian needs to the Department of State,³⁵ TAS will also identify taxpayers in our casework and refer them directly to the Department of State. TAS will also be seeking further information from the Department of State about how this exception has been administered historically for other persons denied passports³⁶ and will advocate for both the Department of State and the IRS to make this exception more public by placing information on their websites and notices.

The IRS Recently Proposed Expanding a Treasury Regulation to Allow the Department of State to Share Taxpayer Information With Contractors

The IRS issued a notice of proposed rulemaking in March 2018 that would add the Department of State to the list of agencies who may share taxpayer information with contractors for the purposes of tax administration.³⁷ Under the current regulation to which the Department of State would be added, there are a number of safeguards.³⁸ Among other provisions, disclosure is limited to when and to the extent necessary to reasonably, properly, or economically perform the contract; there are penalties for unauthorized inspection or disclosure of the returns or return information by the contractors or subcontractors; and the contract shall be made available to the IRS before it is executed. TAS plans to request from the IRS a copy of any Department of State contracts that it reviews to determine whether they comply with the Taxpayer Bill of Rights, specifically the *right to confidentiality*.

33 See IRM 5.19.1.5.19.9.1, *Expedited Decertification* (Dec. 26, 2017).

34 Department of State, <https://travel.state.gov/content/travel/en/News/passports/passports-and-seriously-delinquent-tax-debt.html> (last visited Mar. 23, 2018); IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes> (last visited Mar. 23, 2018).

35 IRM 5.1.12.27.7, *Taxpayer Notification* (Dec. 20, 2017); IRM 5.19.1.5.19.8, *Certification Process* (Dec. 26, 2017).

36 See, e.g., 22 U.S.C. § 2714, which requires passport revocation and denial for convicted drug traffickers but provides an exception allowing the Department of State to issue a passport in emergency circumstances or for humanitarian reasons.

37 The FAST Act authorizes the IRS to disclose taxpayer identity information and the amount of a taxpayer's seriously delinquent tax debt to the Department of State for the purposes of carrying out the program for denying, revoking, or limiting an individual's passport due to a seriously delinquent tax debt. FAST Act § 32101(c) (codified at IRC § 6103(k)(11)).

38 Treas. Reg. § 301.6103(n)-1.

FOCUS FOR FISCAL YEAR 2019

In fiscal year 2019, TAS will:

- Advocate that the certification notice the IRS sends to the taxpayer includes information about all certification exclusions and information about the emergency and humanitarian exception;
- Contact the Department of State to find out more information about the exception for emergency and humanitarian circumstances and whether TAS may forward requests directly to the Department of State;
- Request the Department of State add information about TAS to its passport hold notice;
- Conduct an analysis and prepare a Taxpayer Rights Impact Statement, identifying all taxpayer rights and risks associated with the program and submit to the IRS and the Department of State with recommendations;
- Assist taxpayers in meeting decertification criteria by resolving their tax debts, meeting a certification exception, or proving the certification was erroneous or the taxpayer did not owe the underlying liability;
- Assist taxpayers in having their accounts decertified timely to the Department of State; and
- Request from the IRS and review contracts allowing the Department of State to disclose taxpayer information to contractors to ensure the contracts protect taxpayer rights.

APPENDIX A: TAXPAYER ADVOCATE DIRECTIVE 2018-1, TAS PASSPORT EXCLUSION



YOUR VOICE AT THE IRS



THE OFFICE OF THE TAXPAYER ADVOCATE OPERATES INDEPENDENTLY OF ANY OTHER IRS OFFICE AND REPORTS DIRECTLY TO CONGRESS THROUGH THE NATIONAL TAXPAYER ADVOCATE.

April 6, 2018

Response Due: April 16, 2018

Completed By: June 5, 2018

MEMORANDUM FOR MARY BETH MURPHY
COMMISSIONER, SMALL BUSINESS/SELF-EMPLOYED
DIVISION

FROM: Nina E. Olson 
National Taxpayer Advocate

SUBJECT: Taxpayer Advocate Directive 2018-1, Exclude TAS Cases From Certification as a Seriously Delinquent Tax Debt When the Taxpayer Comes to TAS Before Certification and Continue Excluding these Cases While They Remain Open in TAS

TAXPAYER ADVOCATE DIRECTIVE

Delegation Order No. 13-3 grants the National Taxpayer Advocate the authority to issue a Taxpayer Advocate Directive (TAD) “to mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment or provide an essential service to taxpayers.”¹

Internal Revenue Manual (IRM) 13.2.1.6.1 (July 16, 2009) provides that in advance of issuing a TAD, the National Taxpayer Advocate shall attempt to work with and communicate with the owners of the process to correct the problem. In my Fiscal Year 2018 Objectives Report to Congress, I discussed the IRS’s refusal to exclude TAS cases that were in TAS prior to certification, from certification of a seriously delinquent tax debt for the purposes of passport denial, revocation, or limitation.² I repeatedly made my request for the exclusion of all

¹ Internal Revenue Manual (IRM) 1.2.50.4, *Delegation Order 13-3 (formerly DO-250, Rev. 1)* (Jan. 17, 2001). See also IRM 13.2.1.6, *Taxpayer Advocate Directives* (July 16, 2009).

² National Taxpayer Advocate Fiscal Year 2018 Objectives Report to Congress 36-42.

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already open TAS cases to John Koskinen, the then Commissioner of Internal Revenue and to you as the Commissioner, Small Business / Self Employed division (SB/SE).³ In September 2017, you responded to my request in writing, outlining the factors considered in the IRS's decision not to exclude TAS cases from passport certification.⁴ In my 2017 Annual Report to Congress, I listed as one of the Most Serious Problems, "The IRS's Plans for Certifying Seriously Delinquent Tax Debts Will Lead to Taxpayers Being Deprived of a Passport Without Regard to Taxpayer Rights."⁵ On January 25, 2018, I posted a blog on my website about the IRS's implementation of the passport certification program and its refusal to exclude from certification those cases that are already open in TAS prior to certification.

Finally, I issued almost 800 Taxpayer Assistance Orders (TAOs) to you in January of this year, requesting that you exclude from passport certification those taxpayers who met the criteria for certification but who had an already open TAS case. You appealed the TAOs to Kirsten Wielobob, Deputy Commissioner for Services and Enforcement, who ultimately agreed to exclude from certification those TAS taxpayers for whom the TAOs were issued, except for those who were duplicates, who met another exception, or who could not be located in the IRS systems. However, Kirsten Wielobob stated in her TAO response that after implementation of the passport program she would not exclude taxpayers who are eligible for certification and who have an open TAS case originating prior to the taxpayer's certification, unless they met another exclusion criterion under the statute or the IRM. My reports to Congress, my written requests to IRS leadership, my blog, and the TAOs serve as a formal memorandum issued to the responsible operating area within the meaning of IRM 13.2.1.6.1.2 (July 16, 2009). Therefore, all procedural requirements for issuing this TAD have been satisfied.⁶

For the reasons detailed below, pursuant to the authority provided by Delegation Order 13-3, I direct you to take the following actions with respect to the certification of seriously delinquent tax debts for the purposes of passport denial, limitation, or revocation:

1. Exclude from certification all taxpayers with an open TAS case at the time of certification (*i.e.*, taxpayers who came to TAS before certification). This can be accomplished by programming an exclusion for all taxpayer

³ See *e.g.*, Email from National Taxpayer Advocate to Commissioner of the Internal Revenue (Mar. 7, 2017); email from National Taxpayer Advocate to Commissioner, Small Business / Self Employed division (SB/SE) (July 28, 2018).

⁴ Email from SB/SE Commissioner to National Taxpayer Advocate (Sept. 20, 2017)

⁵ National Taxpayer Advocate 2017 Annual Report to Congress 73-83.

⁶ See IRM 13.2.1.6.1.3, *Issuing TADs* (July 16, 2009).

accounts with a transaction code (TC) 971 Action Code (AC) 154 that has not been reversed or removed.⁷

2. Continue to exclude taxpayers identified as having a TC 971 AC 154 at the time of certification for the entire time their cases remain open in TAS, until the TC 971 AC 154 is reversed or removed.
3. Reverse the certification for any taxpayers identified by TAS as having had an open TAS case at the time of certification and who still have an open TAS case, identified by a TC 971 AC 154.

If you decide to comply with this TAD, the above actions must be taken by no later than June 5, 2018.⁸ If you decide to appeal this TAD, within 10 days please provide a written response with a detailed explanation of your reasons as to why the proposed action cannot or will not be implemented on or before June 5, 2018.⁹ If you need an extension of time to respond, please request one from me before April 16, 2018.

I. Issues

The passport certification program was intended to help the IRS collect from recalcitrant taxpayers who have substantial tax debts and to increase compliance.¹⁰ The reasoning behind the passport certification program is not to penalize taxpayers for their unpaid debts, but to “serve as an incentive to individuals wishing to obtain passports to comply with their tax obligations, thus reducing the level of tax delinquencies and promoting compliance.”¹¹

Recognizing the significant rights that may be abridged when a person’s passport is taken, Congress intended for passport certification to occur only once a taxpayer’s administrative rights had been exhausted or lapsed. Taxpayers working with TAS are exercising important administrative rights – rights expressly

⁷ This transaction code and action code exclude open TAS cases from being referred to a Private Collection Agency and can similarly be used to exclude open TAS cases from being certified to the Department of State for passport action.

⁸ TAS estimates that if the volume of cases is manageable, a manual process could be used to look up and remove the applicable accounts within a couple weeks. For the cases to be excluded systemically by adding the relevant transaction code / action code to the program, TAS estimates that the IRS could accomplish this in 60 days if it is prioritized and expedited due to the urgency of the situation.

⁹ See IRM 13.2.1.6.2, *TAD Appeal Process* (July 16, 2009).

¹⁰ “The Committee is aware that the amount of unpaid Federal tax debts continues to present a challenge to the IRS. The Committee is also aware that a significant amount of unpaid Federal tax debt is owed by persons to whom passports have been issued... The Committee believes that tax compliance will increase if issuance of a passport is linked to payment of one’s tax debts.” S. Rep. No. 114-45, at 57 (2015).

¹¹ Government Accountability Office, GAO 11-272, *Federal Tax Collection: Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes* (Mar. 2011), <http://www.gao.gov/new.items/d11272.pdf>.

granted to them by Congress. As part of the *right to a fair and just tax system*, taxpayers have the right to seek assistance from TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.¹² Certifying taxpayers who have already come to TAS before the IRS certifies them and are actively working to resolve their tax liabilities would harm taxpayers who are voluntarily trying to come into compliance.

I have written extensively about how excluding already open TAS cases from passport certification does not frustrate the purpose of the statute, and in fact, serves the purpose intended by Congress by allowing TAS to assist taxpayers in coming into compliance and resolving their unpaid tax debts.

II. Procedural History

On January 16, 2018, I issued almost 800 Taxpayer Assistance Orders (TAOs) to you, which requested the IRS exercise its discretionary authority to exclude from passport certification the taxpayers that TAS had determined were eligible for certification, did not meet a certification exclusion, and currently had an open TAS case. On January 19, 2018, you responded to the TAOs, stating you were appealing them. On January 25, 2018, I sustained the TAOs and issued a memorandum to Kirsten Wielobob, Deputy Commissioner for Services and Enforcement, reiterating my order for the taxpayers to be excluded.

On February 15, 2018, Kirsten Wielobob responded to the TAOs, agreeing to exclude from certification the taxpayers with already open TAS cases who did not meet another exclusion. However, she stated the exclusion of open TAS cases would not apply prospectively to any new TAS cases. She stated it is public information that the IRS has begun passport certification, and taxpayers with new TAS cases could circumvent the law by seeking TAS assistance. Additionally, she reiterated arguments made in the past for not excluding TAS cases – that these taxpayers would be systemically decertified upon meeting another exclusion and they would receive the benefit of the 90-day period in which the Department of State will hold their applications open.

I plan to issue an Interim Guidance Memorandum (IGM) to my employees, instructing Local Taxpayer Advocates (LTAs) to issue TAOs ordering the IRS to exclude from certification all taxpayers they identify as eligible for certification, who do not meet another exclusion, and who have an open TAS case at the time of certification. Additionally, this IGM will instruct the LTAs to issue TAOs for taxpayers who were certified prior to coming to TAS, requesting the IRS take actions that will result in the taxpayer meeting a criterion for decertification. I am also instructing the LTAs to issue TAOs requesting expedited decertification where the taxpayer qualifies for decertification, has an urgent need for a passport, and meets the expedited criteria set out in the IRM.

¹² See IRS Publication 1, *Your Rights as a Taxpayer* (Sept. 2017).

III. Analysis

Seeking assistance from TAS is an important administrative right and a taxpayer right under the Taxpayer Bill of Rights

The legislative history of IRC § 7345 clearly says that Congress intended to “permit revocation of a passport only after the IRS has followed its examination and collection procedures under current law and *the taxpayer’s administrative and judicial rights have been exhausted or lapsed.*”¹³ (Emphasis added.) The right to receive assistance from TAS is one such administrative right. In the Taxpayer Bill of Rights adopted by the IRS (and codified at IRC § 7803(a)(3)), Right #10 is “The Right to a Fair and Just Tax System.” In IRS Publication 1, *Your Rights as a Taxpayer*, “The Right to a Fair and Just Tax System” is defined to include “the right to receive assistance from the Taxpayer Advocate Service.” Therefore, certifying taxpayers who seek assistance from TAS or who have cases pending with TAS is plainly inconsistent with the legislative directive that the IRS act “only after . . . the taxpayer’s administrative and judicial rights have been exhausted or lapsed.”

Taxpayers who come to TAS are trying to resolve their tax liabilities, which serves the purpose of the statute

The passport certification program was intended to assist the IRS in collecting substantial tax debts from recalcitrant taxpayers. As the legislative history cited above makes clear, Congress intended to exclude taxpayers from certification if they are attempting to come into compliance and satisfy their debts. That intent is also reflected in the statutory exceptions to certification. The IRS has recognized that beyond the statutory exclusions, certifying taxpayers with pending Installment Agreements (IAs) and Offers in Compromise (OICs) would not serve the purpose of the statute. Taxpayers who come forward to pursue IAs and OICs, or who have demonstrated that collection would cause them a hardship, are trying to comply and do not represent the recalcitrant taxpayers with significant tax debts that Congress was seeking to help the IRS collect.

Although a taxpayer with a pending payment or a pending offer may not yet be in full compliance, the IRS has determined it will forbear on certifying the tax debt while the taxpayer is taking action to come into compliance. If a taxpayer does not successfully come into compliance (e.g., if the IA or OIC is rejected and thus is no longer considered pending), the IRS can certify the taxpayer’s debt at that time, assuming the taxpayer is currently eligible for certification and does not meet an exception or exclusion.

The same principle applies to cases open in TAS. Forbearing on certifying open TAS cases (i.e., while TAS is developing the taxpayer’s case and attempting to

¹³ H.R. Rep. No. 114-357, at 531-32 (2015).

get the taxpayer into compliance) would be consistent with the other discretionary exclusions to certification that allow a taxpayer to come into compliance. As discussed below, once TAS closes a taxpayer's case, the taxpayer would be subject to certification if he or she did not meet another statutory or discretionary exclusion to the same extent as a taxpayer whose IA or OIC is rejected.

Taxpayers already working with TAS will be harmed if certified while working with TAS

Although the current discretionary exclusions are available to all taxpayers, TAS taxpayers included, the fact that a taxpayer is working with TAS may be evidence that the taxpayer is having difficulty meeting one of the exclusions for which the taxpayer is eligible. A taxpayer may be working with TAS because he or she is having difficulty proving identity theft or because collection would leave the taxpayer unable to pay basic living expenses. If the normal processes are not working for a specific taxpayer and the taxpayer seeks assistance from TAS, as the law authorizes, that taxpayer should not receive a harsher result than a taxpayer who works directly with the IRS. Such an outcome would be inconsistent with congressional intent in creating the Taxpayer Advocate Service as an administrative option for qualifying taxpayers.

Certifying taxpayers who have already been working with TAS may encourage these taxpayers to seek a quick fix to become decertified, without fully resolving their tax issues – the reason they came to TAS. For example, a taxpayer who is having trouble proving eligibility for CNC hardship status and has been working with TAS to provide documentation may feel pressured into a payment plan that leaves the taxpayer unable to pay basic living expenses. Another taxpayer who believes she does not owe the entire liability and is working with TAS to compile documentation for an audit reconsideration may feel pressured to pay the entire liability in order to have the certification reversed immediately. Certifying taxpayers who are already working with TAS will infringe upon the taxpayers' *right to a fair and just tax system, right to challenge the IRS's position and be heard, and right to pay no more than the correct amount of tax.*

There are safeguards in place to ensure taxpayers do not use TAS to circumvent the passport provisions.

Excluding taxpayers who have already been working with TAS to resolve their tax debts prior to certification does not frustrate the statute. Under section 7803(c)(2)(A)(i), one of the statutory functions of TAS is to assist taxpayers in resolving problems with the IRS. If TAS can get the taxpayer into compliance and resolve the taxpayer's issues with the IRS, then the purpose of IRC § 7345 has been satisfied. TAS accepts cases only from taxpayers who meet the statutory and regulatory definition of significant hardship¹⁴ and keeps cases open

¹⁴ IRC § 7811(a)(2); Treas. Reg. § 301.7811-1(a)(4).

only if taxpayers are working to achieve a resolution.¹⁵ If TAS is unable to resolve the taxpayer's account, then when TAS closes its case, the IRS can certify the account if it still qualifies as a seriously delinquent tax debt.

If a taxpayer had the sophistication and foresight to avoid certification prior to it occurring, a taxpayer could do so with many of the exclusions. For example, a taxpayer could request an IA and apply for a passport during the period that it was pending. A taxpayer could also start paying on an IA and stop once a passport was issued. In the same way that a taxpayer would be certified once the IA was rejected or defaulted upon, a taxpayer would be certified once he is no longer working with TAS to resolve the tax debt and TAS closes the case. Deferring certification in these circumstances while providing certification when taxpayers seek assistance from TAS to resolve their tax debts contravenes congressional intent in making TAS a viable option for taxpayers who meet TAS case-acceptance criteria.

Excluding Already Open TAS Cases is in Accord with Current IRS Policy

Excluding already open TAS cases is in accordance with IRS Policy Statements 5-1 and 5-2, which provide that the IRS is responsible for taking all appropriate actions provided by law to compel non-compliant taxpayers to file their returns and pay their taxes and that the IRS is committed to educating and assisting taxpayers who make a good faith effort to comply. When a taxpayer voluntarily comes to TAS for assistance with a tax issue before the account has been certified to the Department of State for passport denial or revocation, the taxpayer is making a good faith effort to comply with the tax laws.

Furthermore, through the process of working with taxpayers, TAS educates them so they remain in compliance. TAS's recent track record supports this position. Of the approximately 4,200 TAS cases with balances due over \$50,000 that were closed in fiscal year 2017 and that were not previously determined by Collection to be currently uncollectible, TAS closed 70 percent of these cases (approximately 2,700) with full or partial relief. Of note, more than 75 percent of these cases involved either exam or collection issues, demonstrating that these are taxpayers who are working to resolve their tax debts. Thus, excluding TAS cases that are already open in TAS prior to certification is in accord with IRS Policy Statements 5-1 and 5-2. Excluding the taxpayers' accounts from certification also will be more efficient for the IRS, because certification is no longer necessary if TAS can get the taxpayers into compliance.

Passport certification is an enforcement action, as evidenced by the amendment to IRC §§ 6220(a)(3)(E) and 6331(d)(4)(G), which now require that passport certification language appear on collection notices. Because the IRS has a policy of generally forbearing on taking collection action while a taxpayer is working with TAS, it should similarly forebear on certifying a seriously delinquent

¹⁵ IRM 13.1.21.1.3.19, *No or Partial Reply from Taxpayer* (Feb. 1, 2011).

tax debt while a taxpayer is working with TAS. To do otherwise makes little sense and would have the effect of treating taxpayers who come to TAS less favorably than taxpayers who work with the IRS directly.

The expedited decertification procedures and the 90-day holding period provided by the Department of State may not provide relief to taxpayers

The IRS has frequently responded to my request for the exclusion of open TAS cases by citing the 90-day holding period provided by the Department of State in which it will delay rejecting a certified taxpayer's passport application. While this period may be helpful to taxpayers with relatively straightforward issues that can be resolved quickly, it will not be useful to many TAS taxpayers.

The average TAS collection case stays open for 86 days from receipt to completion of all actions necessary to resolve the taxpayer's problem. Combining this time with the up-to-10-days required for an expedited decertification to be transmitted to the Department of State (and then additional time for the Department of State to update its systems), the 90-day period will be inconsequential for many TAS taxpayers. Furthermore, taxpayers without upcoming planned travel (and thus who do not qualify for expedited decertification) will be harmed when they do not meet the 90-day time frame and must reapply for a passport, including paying the \$135 application fee a second time.

IV. Requested Actions

For the foregoing reasons, I direct you to take the following actions with respect to the certification of seriously delinquent tax debts for the purposes of passport denial, limitation, or revocation:

1. Exclude from certification all taxpayers with an open TAS case at the time of certification. This can be done by programming an exclusion for all taxpayer accounts with a transaction code (TC) 971 Action Code (AC) 154 that has not been reversed or removed.¹⁶
2. Continue to exclude taxpayers identified as having a TC 971 AC 154 at the time of certification for the entire time their cases remain open in TAS, until the TC 971 AC 154 is reversed or removed.
3. Reverse the certification for any taxpayers identified by TAS as having had an open TAS case at the time of certification and who still have an open TAS, identified by a TC 971 AC 154.

¹⁶ This transaction code and action code exclude open TAS cases from being referred to a Private Collection Agency and can similarly be used to exclude open TAS cases from being certified to the Department of State for passport action.

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Please provide a written response to the TAD on or before April 16, 2018 indicating whether you plan to comply with the TAD or appeal it. If you are appealing the TAD, please include in the written response a detailed explanation of your reasons as to why the proposed action cannot or will not be implemented by June 5, 2018. If you are complying with this TAD, the actions above must be taken by no later than June 5, 2018.

cc: Dave Kautter, Commissioner of Internal Revenue
Kirsten Wielobob, Deputy Commissioner for Services and Enforcement



COMMISSIONER
SMALL BUSINESS/SELF-EMPLOYED DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

APR 17 2018

MEMORANDUM FOR KIRSTEN B. WIELOBOB
DEPUTY COMMISSIONER, SERVICES AND ENFORCEMENT

FROM: Mary Beth Murphy *Mary Beth Murphy*
Commissioner, Small Business/Self Employed Division

SUBJECT: Taxpayer Advocate Directive 2018-1, Exclude TAS Cases
From Certification as a Seriously Delinquent Tax Debt
When the Taxpayer Comes to TAS Before Certification
And Continue Excluding these Cases While They Remain
Open in TAS

In accordance with IRM 13.2.1.6.2 (TAD Appeal Process), I appeal the above referenced Taxpayer Advocate Directive (TAD) dated April 6, 2018. The TAD directed the Commissioner, Small Business/Self Employed Division to take the following actions:

1. Exclude from certification all taxpayers with an open TAS case at the time of certification. This can be accomplished by programming an exclusion for all taxpayer accounts with a Transaction Code (TC) 971 Action Code (AC) 154 that has not been reversed or removed¹.
2. Continue to exclude taxpayers identified as having a TC 971 AC 154 at the time of certification for the entire time their cases remain open in TAS, until the TC 971 AC 154 is reversed or removed.
3. Reverse the certification for any taxpayers identified by TAS as having had an open TAS case at the time of certification and who still have an open TAS, identified by a TC 971 AC 154.

I disagree with these directives and appeal all three actions.

The issues raised by the National Taxpayer Advocate in support of the TAD are addressed as follows.

¹ This transaction code and action code exclude open TAS cases from being referred to a Private Collection Agency and can similarly be used to exclude open TAS cases from being certified to the Department of State for passport action.

Seeking assistance from TAS is an important administrative right and a taxpayer right under the Taxpayer Bill of Rights.

Congress clearly defined when a taxpayer has a "seriously delinquent tax debt" in IRC § 7345, and provided only two statutory exceptions to that definition: (1) a liability being paid in a timely manner pursuant to an installment agreement under IRC § 6159 or an agreement under IRC § 7122; and (2) a liability for which collection has been suspended because the taxpayer requested either a CDP hearing under section 6330 or innocent-spouse relief under section 6015. Neither section 7345 nor its legislative history supports a Congressional intent for categorical exclusion from certification for taxpayers who seek assistance from TAS or who have cases pending with TAS. Each certified taxpayer has had the opportunity to exercise Collection Due Process rights prior to certification.

Taxpayers who come to TAS are trying to resolve their tax liabilities, which serves the purpose of the statute.

Taxpayers who seek TAS assistance are not necessarily trying to resolve their entire tax liabilities, but may be seeking assistance to resolve a specific issue related to the tax liability, with no final resolution plan for the entire liability. TAS caseworkers have no IRM obligation to fully resolve a taxpayers' liability before closing a TAS case. TAS noted that a taxpayer with a pending installment agreement or offer may not yet be in full compliance, but the IRS will forbear certifying the taxpayer while the taxpayer is taking action to become fully compliant. TAS stated that this same principle should apply to cases open in TAS, and IRS should forbear certifying open TAS cases while TAS is developing the case and attempting to get the taxpayer into compliance. Taxpayer accounts are not identified as a pending installment agreement or a pending offer if the taxpayer is not in full filing compliance. Therefore, excluding taxpayers assigned to TAS as "TAS works to get the taxpayer into compliance" would not be consistent with the treatment of taxpayers not assigned to TAS. Moreover, if a taxpayer who was excluded due to an open TAS case does not come into compliance and ultimately meet an exception, the purpose of the statute is defeated. That taxpayer could apply for and obtain a passport while their case was pending in TAS.

Taxpayers already working with TAS will be harmed if certified while working with TAS.

All taxpayers, including those with an open TAS case, that meet any of the exclusion criteria will not be certified. For taxpayers with an open TAS case that do not meet the exclusion criteria, TAS can work the case with the business unit, even though the taxpayer's seriously delinquent tax debt has been certified to the State Department. If TAS, the taxpayer, and business unit reach a resolution that qualifies for exclusion, the taxpayer will be decertified. If resolution and decertification occurs within 90 days of the

date the State Department notifies the taxpayer of their passport application denial, the taxpayer's passport application will not be impacted.

Taxpayers seeking assistance from TAS will not receive a "harsher result" than a taxpayer working directly with the IRS. Categorically excluding TAS cases, however, would result in disparate treatment among taxpayers because taxpayers who choose to engage the IRS directly would remain certified while working to come into compliance, whereas taxpayers who choose to seek TAS assistance would not be certified.

There are safeguards in place to ensure taxpayers do not use TAS to circumvent the passport provisions.

We understand that TAS performs an individual assessment of each case received in their inventory, and in doing so, can expedite the status to meet exception criteria if the circumstances warrant. If after such analysis the circumstances do not warrant exception criteria, the IRS would not want the case excluded from certification. Excluding a case from certification without any such analysis or application of criteria would seem arbitrary. Moreover, if a taxpayer who was excluded due to an open TAS case does not come into compliance by meeting an exception, the purpose of the statute is defeated. We understand TAS concerns about taxpayers potentially having the foresight to avoid certification by falsely requesting or entering into an installment agreement only long enough to obtain a passport. We previously committed to TAS that we will continually monitor the processes to determine whether any changes are needed.

Excluding already open TAS cases is in accordance with current IRS policy.

The way in which the IRS will administer the passport program is entirely consistent with the policies enunciated in Policy Statements 5-1 and 5-2.

Categorically excluding all open TAS cases from the certification process would result in the inconsistent application of the law to similarly-situated taxpayers. Under IRC § 7345, all taxpayers have the same ability to qualify for exclusion from certification, for example, by entering into an installment agreement. If, however, all open TAS cases are categorically excluded from the certification process, then section 7345 would apply inconsistently, depending on whether a taxpayer qualifies for TAS assistance.

The expedited decertification procedures and the 90-day holding period provided by the Department of State may not provide relief to taxpayers.

The passport program expedited decertification procedures were designed to provide an accelerated decertification for taxpayers with a pending Passport application with an imminent need to travel. Taxpayers must meet a statutory exception or IRS discretionary exclusion to be decertified. However, if an unusual issue arises, the IRS

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remains committed to working with TAS to address it at that time. Moreover, TAS may assist taxpayers to get expedited relief by putting them in pending OICs or IAs, which are discretionary exclusions. This can be done well under the 90-day period provided by DOS for taxpayers to resolve their seriously delinquent tax debts and under the estimated period that TAS resolves the average case. Cases that take longer than 90 days to resolve will also be decertified, but the taxpayer will need to reapply for a passport.

Based on the reasons set forth above, it would not be appropriate to agree with the National Taxpayer Advocate's directed actions to exclude all open TAS cases from the passport certification process. Therefore, I respectfully appeal all three actions outlined in the TAD. I request you rescind this TAD in accordance with the authority vested in delegation order 13-3.

cc: Nina E. Olson, National Taxpayer Advocate



THE OFFICE OF THE TAXPAYER ADVOCATE OPERATES INDEPENDENTLY OF ANY OTHER IRS OFFICE AND REPORTS DIRECTLY TO CONGRESS THROUGH THE NATIONAL TAXPAYER ADVOCATE.

April 27, 2018

Response Due: May 7, 2018
Completed By: June 26, 2018

MEMORANDUM FOR KIRSTEN WIELOBOB
DEPUTY COMMISSIONER FOR SERVICES AND
ENFORCEMENT

FROM: Nina E. Olson 
National Taxpayer Advocate

SUBJECT: Taxpayer Advocate Directive 2018-1, Exclude TAS Cases from Certification as a Seriously Delinquent Tax Debt When the Taxpayer Comes to TAS Before Certification and Continue Excluding these Cases While They Remain Open in TAS

TAXPAYER ADVOCATE DIRECTIVE

I am writing this memorandum in support of Taxpayer Advocate Directive (TAD) 2018-1, which was issued to the Commissioner, Small Business / Self Employed (SB/SE) Division on April 6, 2018. TAD 2018-1 contained the following directives:

1. Exclude from certification all taxpayers with an open TAS case at the time of certification (*i.e.*, taxpayers who came to TAS before certification). This can be accomplished by programming an exclusion for all taxpayer accounts with a transaction code (TC) 971 Action Code (AC) 154 that has not been reversed or removed.¹
2. Continue to exclude taxpayers identified as having a TC 971 AC 154 at the time of certification for the entire time their cases remain open in TAS, until the TC 971 AC 154 is reversed or removed.
3. Reverse the certification for any taxpayers identified by TAS as having had an open TAS case at the time of certification and who still have an open TAS case, identified by a TC 971 AC 154.

¹ This transaction code and action code exclude open TAS cases from being referred to a Private Collection Agency and can similarly be used to exclude open TAS cases from being certified to the Department of State for passport action.

I requested a response by April 16, 2018. On April 17, 2018, the Commissioner, SB/SE appealed this TAD to you in accordance with IRM 13.2.1.6.2, which states, “The only avenue of appeal, should a functional area disagree with the TAD, is to the Deputy Commissioner for Services and Enforcement.”²

I. Authority

TAD 2018-1 was issued pursuant to Delegation Order No. 13-3, which grants the National Taxpayer Advocate the authority to issue a TAD “to mandate administrative or procedural changes to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment or provide an essential service to taxpayers.”³ This authority may not be redelegated.

II. Issue

The passport certification program was created pursuant to a statutory directive intended to help the IRS collect delinquent tax debts from recalcitrant taxpayers with substantial liabilities.⁴ The reasoning behind the passport certification program is not to penalize taxpayers for their unpaid debts, but to “serve as an incentive to individuals wishing to obtain passports to comply with their tax obligations, thus reducing the level of tax delinquencies and promoting compliance.”⁵

Recognizing the significant rights that may be abridged when a person’s passport is taken, Congress intended for passport certification to occur only after a taxpayer’s administrative rights have been exhausted or lapsed. Taxpayers working with TAS are exercising important administrative rights – rights expressly granted to them by Congress.⁶ Moreover, as part of the *right to a fair and just tax system*, taxpayers have the right to seek assistance from TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.⁷ Certifying taxpayers who are actively working with TAS to resolve their tax liabilities would harm taxpayers who are voluntarily trying to come into compliance.

I have written extensively about how excluding already open TAS cases from passport certification does not frustrate the purpose of the statute and, in fact, serves the purpose

² IRM 13.2.1.6.2, *TAD Appeal Process* (July 16, 2009).

³ Internal Revenue Manual (IRM) 1.2.50.4, *Delegation Order 13-3 (formerly DO-250, Rev. 1)* (Jan. 17, 2001). See also IRM 13.2.1.6, *Taxpayer Advocate Directives* (July 16, 2009).

⁴ Pub. L. No. 114-94, Div. C, Title XXXII, § 32101, 129 Stat. 1312, 1729-32 (2015) (codified as IRC § 7345). The Senate Finance Committee report explaining this provision stated: “The Committee is aware that the amount of unpaid Federal tax debts continues to present a challenge to the IRS. The Committee is also aware that a significant amount of unpaid Federal tax debt is owed by persons to whom passports have been issued... The Committee believes that tax compliance will increase if issuance of a passport is linked to payment of one’s tax debts.” S. Rep. No. 114-45, at 57 (2015).

⁵ Government Accountability Office, GAO 11-272, *Federal Tax Collection: Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes* (Mar. 2011), <http://www.gao.gov/new.items/d11272.pdf>.

⁶ See IRC §§ 7803(a)(3), 7803(c)(A)(i), and 7811.

⁷ See IRS Publication 1, *Your Rights as a Taxpayer* (Sept. 2017).

intended by Congress by allowing TAS to assist taxpayers in coming into compliance and resolving their unpaid tax debts.⁸

III. Procedural History

On January 16, 2018, I issued almost 800 Taxpayer Assistance Orders (TAOs) to the SB/SE Commissioner, which requested the IRS exercise its discretionary authority to exclude from passport certification taxpayers who TAS had determined were eligible for certification, did not meet a certification exclusion, and currently had an open TAS case. On January 19, 2018, the SB/SE Commissioner responded to the TAOs, stating she was appealing them. On January 25, 2018, I sustained the TAOs and issued a memorandum to you, reiterating my order for the taxpayers to be excluded.

On February 15, 2018, you responded to the TAOs, agreeing to exclude from certification the taxpayers with already open TAS cases who did not meet another exclusion. However, you stated the exclusion of open TAS cases would not apply prospectively to any new TAS cases.

On April 6, 2018, I issued TAD 2018-1, which requested the IRS exclude from certification TAS cases that were already open prior to certification and while they remained open. I also requested that the IRS reverse certification for any taxpayers who were certified while having a case open in TAS. On April 17, 2018, the Commissioner, SB/SE responded, disagreeing with and appealing all requested actions within the TAD.

I plan to issue an Interim Guidance Memorandum (IGM) to TAS employees instructing Local Taxpayer Advocates (LTAs) to issue TAOs ordering the IRS to exclude from certification all taxpayers they identify as eligible for certification who do not meet another exclusion, and who have an open TAS case at the time of certification. Additionally, the IGM will instruct LTAs to issue TAOs for taxpayers who were certified prior to coming to TAS and who will meet an exclusion as a result of TAS's assistance, ordering the IRS take actions that will result in the taxpayer meeting a criterion for decertification. I am also instructing the LTAs to issue TAOs requesting expedited decertification where the taxpayer qualifies for decertification, has an urgent need for a passport, and meets the expedited criteria set out in the IRM.

IV. Analysis

The lack of a statutory exclusion for TAS cases open prior to certification does not negate Congress's expressed intent to exclude taxpayers from certification until their administrative rights have been exhausted or lapsed – and access to TAS is one such right.

⁸ See e.g., National Taxpayer Advocate 2017 Annual Report to Congress 73-83 (Most Serious Problem: *Passport Denial and Revocation: The IRS's Plans for Certifying Seriously Delinquent Tax Debts Will Lead to Taxpayers Being Deprived of a Passport Without Regard to Taxpayer Rights*).

The legislative history of IRC § 7345 clearly says that Congress intended to “permit revocation of a passport only after the IRS has followed its examination and collection procedures under current law and *the taxpayer’s administrative and judicial rights have been exhausted or lapsed.*”⁹ (Emphasis added.) The right to receive assistance from TAS is one such administrative right, which Congress expressly provided when it codified IRC §§ 7803(c)(A)(i) and 7811. IRS Publication 1, *Your Rights as a Taxpayer*, summarizes the Taxpayer Bill of Rights adopted by the IRS (and codified at IRC § 7803(a)(3)) and defines “The Right to a Fair and Just Tax System” to include “the right to receive assistance from the Taxpayer Advocate Service.”

The IRS has created many exclusions from certification that are not directly referenced in the statute or explicitly referenced in the legislative history but that promote taxpayer compliance, protect taxpayer rights, and treat taxpayers fairly.¹⁰ These discretionary exclusions, such as for pending Installment Agreements (IAs) or Currently not Collectible (CNC) hardship status, are supported by the legislative history, which indicates the passport certification program was intended to help the IRS collect the unpaid tax debts of recalcitrant taxpayers and to increase compliance.¹¹ The fact that the statute does not reference a pending IA or CNC hardship status does not mean that these exclusions are not supported by the legislative history. Under similar reasoning, taxpayers who voluntarily seek out TAS assistance *before* certification are trying to resolve outstanding tax issues and are not the recalcitrant taxpayers Congress was seeking to address.

TAS has a proven track record of promoting taxpayer compliance and assisting taxpayers in resolving outstanding liabilities. Therefore, an exclusion for already open TAS cases clearly serves the purpose of the statute and is supported by the legislative history. As noted in TAD 2018-1, TAS closed with full or partial relief approximately 70 percent of fiscal year (FY) 2017 cases with balances more than \$50,000 that were not previously determined by Collection to be currently uncollectible. Furthermore, through the process of working with taxpayers, TAS educates them so they remain in compliance prospectively.

TAS cases often involve multiple issues, and TAS works with taxpayers to try to resolve all their tax issues.

The SB/SE Commissioner’s response to the TAD states that taxpayers who are seeking TAS assistance are not necessarily trying to resolve their entire tax liabilities but may only be seeking to address a single issue related to a liability. This response reflects an ignorance about the breadth and depth of TAS’s work, which I frankly find appalling after 18 years of TAS operations. During fiscal years 2012 through 2017, an average of

⁹ H.R. Rep. No. 114-357, at 531-32 (2015).

¹⁰ See IRM 5.19.1.5.19.4, *Discretionary Certification Exclusions* (Dec. 26, 2017).

¹¹ “The Committee is aware that the amount of unpaid Federal tax debts continues to present a challenge to the IRS. The Committee is also aware that a significant amount of unpaid Federal tax debt is owed by persons to whom passports have been issued... The Committee believes that tax compliance will increase if issuance of a passport is linked to payment of one’s tax debts.” S. REP. NO. 114-45, at 57 (2015).

59 percent of TAS cases involved more than one issue. *TAS Internal Revenue Manual sections (IRMs) require an action plan that addresses every issue in the case as well as a review before the case is closed to ensure every action has been completed and all related issues have been addressed.*¹² These requirements are reinforced through a quality review process and a vigorous system of case reviews.¹³ TAS training materials emphasize the importance of identifying and addressing all of a taxpayer's issues.¹⁴ TAS IRMs also require a case to continue moving toward resolution.¹⁵ When a case stalls because of a taxpayer's unwillingness to provide information, TAS case advocates are expected to inform the taxpayer of the consequences of closing the case without resolution and then, if the taxpayer remains unresponsive, to close the case.¹⁶

The SB/SE response distinguishes taxpayers who receive an exclusion due to a pending IA on the basis that a taxpayer must be in full filing compliance before an IA is considered pending. However, TAS also works diligently to bring taxpayers into full filing compliance. TAS training materials instruct case advocates to make a compliance check prior to closing a case and address any related issues, including missing tax returns, balances due, and account freezes.¹⁷ Furthermore, in FY 17, TAS worked 3,523 cases where the primary issue was getting the taxpayer into an installment agreement. Our average cycle time was 85 days and our relief rate was 75% for these cases. Because of the complexity of some TAS cases, case resolution may take longer than in cases where the taxpayer does not require TAS assistance. As explained in TAD 2018-1, however, such a taxpayer should not receive a harsher result than a taxpayer who works directly with the IRS. To restate a key point: To treat taxpayers seeking TAS assistance more harshly than taxpayers in closely analogous circumstances would undermine Congress's purpose in creating TAS and would undermine the value of "the right to receive assistance from the Taxpayer Advocate Service", which the IRS itself says is a central component of the Taxpayer Bill of Rights, "Right to a Fair and Just Tax System."

The IRS's approach could coerce taxpayers to enter into installment agreements or make payments even if they do not owe the entire liability or are unable to afford basic living expenses.

¹² IRM 13.1.18.2.3, *Develop an Action Plan* (Feb. 1, 2011) and IRM 13.1.21.1.2, *Closing Actions* (May 4, 2016).

¹³ [FY 2018 TAS Program Letter, Advocacy Reviews](#). One of TAS's quality attributes through which it measures case quality is "Resolved all issues," which requires employees to "take all necessary actions to completely and accurately resolve taxpayer's issue prior to case closure."

¹⁴ TAS, Case Advocate Training, Case Processing/TAMIS Module 1 (Student Guide), Training 20219-102 (Apr. 2015).

¹⁵ IRM 13.1.18.6, *Subsequent Actions and Case Resolution* (May 5, 2016).

¹⁶ IRM 13.1.21.1.3.19, *No or Partial Reply From Taxpayer* (Feb. 1, 2011).

¹⁷ "Prior to closing the case, make a compliance check and address any related issues. This includes any missing tax returns, balances due, and account freezes." TAS, BMF Phase I, Employment Taxes (Student Guide), Training 32610-102 (Mar. 2016). "As an advocate for the taxpayer, all related issues must be addressed on all of the taxpayer's accounts. This following list of related issues is not all inclusive: Advising the taxpayer to file any delinquent tax returns..." TAS, Case Advocate Training, Case Processing/TAMIS Module 1 (Student Guide), Training 20219-102 (Apr. 2015).

The IRS has repeatedly stated that all the exclusions are available to all taxpayers, including TAS taxpayers. However, TAS taxpayers generally seek TAS assistance because the normal channels have not worked, which may mean an exclusion is not equally available to all taxpayers. TAD 2018-1 provided the examples of taxpayers who should qualify for and are trying to prove identity theft or CNC hardship status. If the IRS is refusing to process the taxpayer's identity theft affidavit or is incorrectly computing the taxpayer's basic living expenses, then these taxpayers do not have the same access to these exclusions unless they are able to work with TAS to resolve their issues and have their accounts adjusted accordingly. By refusing to exclude TAS cases open prior to certification, the IRS is impermissibly encroaching on the taxpayer's statutory right to seek assistance from TAS.

As discussed in TAD 2018-1, a taxpayer who has a time-sensitive need for a passport may feel pressured into paying the entire liability or entering into a payment plan, even if she does not owe the entire liability or the payment would prevent her from paying her basic living expenses. In a case where the taxpayer did not owe the entire liability, TAS would need to work with the taxpayer and the IRS to seek a refund of payments. In a case where a taxpayer is forced to pay on an IA that he or she cannot afford, the resulting harm to the taxpayer may be significant and, in some cases, irreversible.

Taxpayers come to TAS in cases where they are unable to resolve their problems with the IRS or the normal procedures are not working.

The SB/SE response to the TAD reflects a continued misunderstanding of TAS case work. The response implies that TAS taxpayers are similarly situated as other taxpayers, and they come to TAS because they are choosing not to work directly with the IRS. This response reflects ignorance of the statute and regulations describing a taxpayer's eligibility for TAS assistance – namely, that the taxpayer must be experiencing, or be about to experience, “significant hardship” as a result of IRS actions or inaction.¹⁸ In reality, taxpayers often come to TAS because the normal procedures are not working, and they have been unable to resolve their problems working directly with the IRS. During the first quarter of fiscal year (FY) 2018, approximately half of all TAS cases were referred to TAS either by the IRS or by a Congressional office,¹⁹ as opposed to a taxpayer reaching out to TAS directly. During the same period, the number one reason for TAS case receipts – comprising 27 percent of incoming cases – was a systemic or procedural failure, precisely the type of problem a taxpayer could not remedy on his or her own by working directly with the IRS. Additionally, 25 percent of TAS cases received during the first quarter of FY 2018 were due to a delay of 30 days or more over the IRS's stated normal processing time.²⁰ To expect a taxpayer who needs a passport to continue working directly with the IRS despite such a delay further violates the taxpayer's *right to a fair and just tax system*.

¹⁸ IRC § 7811(a)(2); Treas. Reg. § 301.7811-1(a)(4)(ii).

¹⁹ TAS Business Performance Review, 1st Quarter FY 2018.

²⁰ TAS Business Performance Review, 1st Quarter FY 2018.

Taxpayers working with TAS may not be able to resolve their cases in 90 days, and even when they can, they may still be negatively affected.

The IRS has frequently cited the 90-day holding period provided by the Department of State as a kind of safeguard, but has never addressed the TAS case data cited in TAD 2018-1, my Annual Report to Congress, and the passport TAOs. When the average cycle time for a TAS collection case is 88 days, from start to completion of all actions necessary to resolve the taxpayer's account, there will likely be taxpayers whose decertifications are not transmitted to and processed by the Department of State within 90 days. In addition, the IRS is incorrect to conclude that if a taxpayer can resolve his or her liability in 90 days and the Department of State does not reject the passport application, then the taxpayer will not have been harmed. There may be taxpayers who need a passport within those 90 days and must delay travel. There may also be taxpayers who need the passport as a form of valid identification or for a background check.

Excluding TAS taxpayers, even if they are later certified, does not frustrate the purpose of the statute.

The IRS has repeatedly argued that excluding taxpayers who have a case open with TAS prior to certification will frustrate the purpose of the statute and allow taxpayers to circumvent it. If a taxpayer who works with TAS does not resolve his or her tax liability and is certified once the case is closed, the purpose of the statute will have been met. Further, the IRS will be honoring the legislative history that indicates a taxpayer should not be certified until after exhausting his or her administrative rights.

As explained in the TAD, if a taxpayer wanted to postpone certification to circumvent the statute, there are other methods for doing this, such as requesting an IA that the taxpayer does not intend to pay. An exclusion for already open TAS cases would be less susceptible to abuse because, as noted, we are not requesting that TAS cases be excluded from certification where a taxpayer seeks TAS assistance after being certified. We are only requesting an exclusion where a taxpayer comes to TAS *before* being certified. Furthermore, TAS accepts cases only from taxpayers who are suffering or are about to suffer a significant hardship, as defined in the Internal Revenue Code and Treasury Regulations,²¹ and only keeps cases open if taxpayers are working with TAS to achieve a resolution.²² To suggest taxpayers would open TAS cases solely to circumvent the passport statute ignores TAS's case acceptance criteria.

At most, that is a theoretical concern – and one that could arise in other areas as well. Since TAS began operating in its present form in 2000, we have closed more than four million cases. We are not aware of any instance at any time on any issue where taxpayers systemically opened TAS cases to circumvent the law. That is not to say no taxpayer has ever done so. But when dealing with millions of taxpayers, policies should not be based on a theoretical risk of abuse in a small number of cases. TAS would be

²¹ IRC § 7811(a)(2); Treas. Reg. § 301.7811-1(a)(4)(ii).

²² IRM 13.1.21.1.3.19, *No or Partial Reply from Taxpayer* (Feb. 1, 2011).

as concerned as the IRS leadership if its services were misused – arguably even more concerned – and if systemic abuses ever arise, we would be the first to address them. We find it unacceptable, however, to create procedures that deny appropriate avenues of relief to large numbers of taxpayers based on possible risks that have not materialized and, based on history, are extremely unlikely to materialize.

V. Requested Actions

For the foregoing reasons, I request that you direct the Commissioner, SB/SE and any other relevant IRS personnel to take the following actions with respect to the certification of seriously delinquent tax debts for the purposes of passport denial, limitation, or revocation:

1. Exclude from certification all taxpayers with an open TAS case at the time of certification. This can be accomplished by programming an exclusion for all taxpayer accounts with a transaction code (TC) 971 Action Code (AC) 154 that has not been reversed or removed.²³
2. Continue to exclude taxpayers identified as having a TC 971 AC 154 at the time of certification for the entire time their cases remain open in TAS, until the TC 971 AC 154 is reversed or removed.
3. Reverse the certification for any taxpayers identified by TAS as having had an open TAS case at the time of certification and who still have an open TAS, identified by a TC 971 AC 154.

Please provide a written response to the TAD on or before May 7, 2018 indicating whether you plan to sustain, modify, or rescind it. If you sustain all or a portion of the TAD, I ask that the actions identified herein be taken by no later than June 26, 2018. If you do not sustain the TAD in full, please provide a written response by May 7, 2018 that explains your reasoning in detail.

CC: Dave Kautter, Acting Commissioner of Internal Revenue
William Paul, Acting Chief Counsel
Janice Feldman, Division Counsel/Associate Chief Counsel (NTA)

²³ This transaction code and action code exclude open TAS cases from being referred to a Private Collection Agency and can similarly be used to exclude open TAS cases from being certified to the Department of State for passport action.



DEPUTY COMMISSIONER

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

May 17, 2018

MEMORANDUM FOR NINA E. OLSON
NATIONAL TAXPAYER ADVOCATE

FROM: Kirsten Wielobob *Kirsten Wielobob*
Deputy Commissioner for Services and Enforcement

SUBJECT: Taxpayer Advocate Directive 2018-1, Exclude TAS Cases From Certification as a Seriously Delinquent Tax Debt When the Taxpayer Comes to TAS Before Certification and Continue Excluding these Cases While They Remain Open in TAS

On April 17, 2018, the Commissioner, Small Business/Self Employed Division appealed the directives in the subject TAD to me, consistent with IRM Section 13.2.1.6.2(1). The subject TAD directed the Commissioner, Small Business/Self Employed Division to take the following actions:

1. Exclude from certification all taxpayers with an open TAS case at the time of certification. This can be accomplished by programming an exclusion for all taxpayer accounts with a Transaction Code (TC) 971 Action Code (AC) 154 that has not been reversed or removed.¹
2. Continue to exclude taxpayers identified as having a TC 971 AC 154 at the time of certification for the entire time their cases remain open in TAS, until the TC 971 AC 154 is reversed or removed.
3. Reverse the certification for any taxpayers identified by TAS as having had an open TAS case at the time of certification and who still have an open TAS, identified by a TC 971 AC 154.

Under Delegation Order 13-3, I am rescinding the subject TAD for the reasons described below.

¹ This transaction code and action code exclude open TAS cases from being referred to a Private Collection Agency and can similarly be used to exclude open TAS cases from being certified to the Department of State for passport action.

Congress's statutory framework protects taxpayers' administrative and judicial rights, providing ample opportunity for taxpayers to address their liability before facing certification.

The Fixing America's Surface Transportation (FAST) Act requires the Department of State to deny a passport application by, and authorizes it to revoke the passport of, any individual that the Internal Revenue Service (IRS) certifies as having a "seriously delinquent tax debt." Pub. L. No. 114-94, § 32101(e), 129 Stat. 1311, 1732 (2015). Internal Revenue Code (IRC) § 7345 governs the IRS's certification process and provides taxpayers a limited right to judicial review.

IRC § 7345(b)(1) sets forth the elements of a "seriously delinquent tax debt," which include a requirement that the liability must exceed \$50,000.² In addition, the IRS must have filed a notice of federal tax lien under IRC § 6323 (with the taxpayer's collection-due-process (CDP) rights under IRC § 6320 having lapsed or been exhausted) or made a levy under IRC § 6331 with respect to the liability for it to be considered a "seriously delinquent tax debt."³ Congress also provided two statutory exceptions to the definition: (1) a liability being paid in a timely manner pursuant to an installment agreement under IRC § 6159 or an agreement under IRC § 7122; and (2) a liability for which collection has been suspended because the taxpayer requested either a CDP hearing under IRC § 6330 or innocent spouse relief under IRC § 6015.

The Conference Report accompanying enactment of the FAST Act indicates that the definition of "seriously delinquent tax debt," as enacted, fulfills Congress's intention to permit revocation only after the IRS has followed its examination and collection procedures under current law and the taxpayer's administrative and judicial rights have been exhausted or lapsed. See H. Rept. 114-357, 531-532.

How the statute operates in practice underscores how well the law, as enacted, operates to protect taxpayer rights. Consistent with the statute, a taxpayer has ample opportunity to respond to IRS balance due notices prior to being certified to the Department of State as having "significant tax debt." To meet passport certification criteria, a tax liability must have been subject to issuance of a levy under IRC § 6331, or a Notice of Federal Tax Lien (NFTL) must have been filed and the taxpayers' right to a hearing on the filing of the NFTL must have been exhausted or lapsed. Both the IRC § 6331 notice of intent to levy and the IRC § 6330 notice of a right to a CDP hearing are generally given at least 30 days before the day of the first levy for that tax liability. The taxpayer then has 30 days to request a CDP hearing with Appeals, during which they can challenge the proposed collection action and request a collection alternative, or challenge the appropriateness of collection activity by claiming they are in a hardship situation. Based on IRC § 6320, taxpayers are entitled to CDP appeal rights for each tax period for which an NFTL has been filed. The taxpayer then has 30 days in which to

² This amount is annually indexed for inflation. For 2018, the amount is \$51,000.

³ A liability will not be considered a seriously delinquent tax debt based on a levy unless pre- or post-levy CDP rights were provided regarding the levy.

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request a CDP hearing. In making a CDP determination, Appeals will verify applicable law and administrative procedures were met, consider relevant issues relating to the unpaid tax, the filing of the NFTL, or the proposed levy; and consider whether the action taken or proposed balances the government's need for the efficient collection of taxes with the taxpayer's legitimate concern that any collection action be no more intrusive than necessary. As a result, the typical case has been in process for 160 days, and possibly longer, by the time a taxpayer faces certification.

Throughout this period, the IRS is willing to work with taxpayers to resolve their tax issues and offers options to taxpayers who cannot pay their balance due. Also throughout this period, taxpayers may seek and receive TAS assistance. Indeed, as part of the administrative process just described, taxpayers receive IRS Publication 1, *Your Rights as a Taxpayer*, which summarizes the Taxpayer Bill of Rights adopted by the IRS (and codified at IRC § 7803(a)(3)) and makes taxpayers aware of the right to a fair and just tax system, which encompasses a right to receive TAS assistance.

The statement in the Conference Report accompanying enactment of IRC § 7345 that a taxpayer's administrative and judicial rights must be "exhausted or lapsed" prior to certification does not clearly support a Congressional intent for categorical exclusion from certification for taxpayers who seek assistance from TAS or who have cases pending with TAS, since a taxpayer may seek and receive TAS assistance at any time. Nor does the statute, with its explicit exception for taxpayers who are exhausting their administrative right to a CDP hearing (a right that attaches on receipt of the NFTL or the final notice of intent to levy and which lapses if the taxpayer does not respond within 30 days), evidence such an intention.

The legislative history emphasizes the importance of ensuring payment of unpaid Federal tax debts, and the IRS has exercised its discretion to provide additional exceptions consistent with that intent.

A report by the Senate's Committee on Finance, relating to the Senate bill that (with some amendments) was enacted as § 7345, provides some clarity on Congress's reasons for requiring IRS certification to the Department of State of seriously delinquent tax debt:

The Committee is aware that the amount of unpaid Federal tax debts continues to present a challenge to the IRS. The Committee is also aware that a significant amount of unpaid Federal tax debt is owed by persons to whom passports have been issued. In 2011, for example, the Government Accountability Office reported that approximately 224,000 persons issued U.S. passports in 2008 owed in aggregate \$5.8 billion. Federal law currently permits the Department of State to refuse an application for a passport or revoke a passport based on the existence of certain debts, including delinquent child support, but does not have authority to consider the existence of tax debt. . . . The Committee believes that tax compliance will increase if issuance of a passport is linked to payment of one's tax debts.

S. Rept. No. 114-45, 57 (2015). The Government Accountability Office (GAO) report that is referenced in conjunction with enactment of the passport certification program states that "IRS enforcement of federal tax laws is vital—not only to identify tax offenders—but also to promote broader compliance by giving taxpayers confidence that others are paying their fair share." GAO, "Federal Tax Collection: Potential for Using Passport Issuance to Increase Collection of Unpaid Taxes," GAO-11-272, 16 (Mar. 2011).⁴

The discretionary exceptions the IRS will apply in determining if a taxpayer has a "seriously delinquent tax debt" are generally consistent with Congress' focus on harnessing certification as a way to incentivize payment of tax debt. For example, the IRS excludes taxpayers who are in pending installment agreements or offers-in-compromise, as these taxpayers have proposed a specific payment amount and are in full filing compliance. The IRS has also exercised its discretion to exclude taxpayers from whom payment cannot reasonably be expected, such as taxpayers who are in bankruptcy, who are deceased, or whose accounts are in currently not collectible status due to hardship (which applies if a taxpayer is unable to pay reasonable basic living expenses).

In contrast, the TAS case acceptance criteria cover economic burden (which is not limited to hardship), systemic burden, and public policy concerns, and many do not relate to the taxpayer's ability to pay. See IRM 13.1.7 (Feb. 5, 2016). In addition, taxpayers working with TAS may never come into compliance. According to TAS case closure procedures, upon resolution of the issue(s) for which the taxpayer sought assistance, the TAS caseworker may advise the taxpayer of the need to file any delinquent returns and of options for paying a balance due, but only upon the taxpayer's request does the TAS caseworker keep the case open to help resolve such outstanding issues. See IRM 13.1.21.1.1 (May 4, 2016); see also IRM 13.1.21.1.3.6, Balance Due (providing guidance for the Case Advocate to address issues such as payment alternatives but only to advise the taxpayer "normal collection procedures may resume if the taxpayer doesn't take steps to address the balance owed."). Excluding such a taxpayer from certification during the entire pendency of the TAS case would allow that taxpayer to apply for and obtain a passport even if they are not in, and never come into, compliance, thus defeating the purpose of the statute.

You raised a concern that taxpayers may have the foresight to avoid certification by falsely requesting or entering into an installment agreement only long enough to obtain

⁴ The GAO report also notes that Federal law already allows the linkage of debt collection with the passport issuance process in certain areas, including for child support enforcement, and states that such currently-operating programs could serve as a starting point in determining the appropriate criteria and safeguards needed for any IRS-Department of State passport certification program. The child support enforcement program denies or revokes passports with respect to individuals with arrears of \$2,500, with each state child support enforcement agency having discretion over whether to allow any exceptions.

agreement only long enough to obtain a passport.⁵ IRS procedures expressly state that the exclusion will not apply if an installment agreement request is made solely to delay collection. See IRM 5.1.12.27.4(1)(F) (Dec. 20, 2017) (referencing IRM 5.14.3.2, Installment Agreement Request Made to Delay Collection (Jun. 12, 2009)). The IRS will continually monitor the process to determine whether any changes are needed.

The IRS has developed processes to implement the passport certification program in a manner that is fair to all taxpayers, including those receiving TAS assistance.

The passport certification procedures are applied consistently to all taxpayers, and taxpayers are free to seek TAS assistance to resolve their underlying tax liabilities at any time. The non-exclusion of TAS cases from certification does not prevent taxpayers from seeking or receiving assistance from TAS.

Taxpayers receiving assistance from TAS will not receive a "harsher result" than a taxpayer working directly with the IRS. Any taxpayer, including a taxpayer with an open TAS case, who satisfies a statutory or discretionary exclusion will not be certified to the Department of State. Even once a taxpayer's seriously delinquent tax debt has been certified to the Department of State, the taxpayer can seek assistance from or continue to work with TAS to address the underlying liability or demonstrate they qualify for an exclusion.

It is important to remember that a taxpayer who has a time-sensitive need for a passport, whether they are working with TAS or not, had previous opportunities to address the liability, including exercising their CDP rights and working with Appeals. If denial of their passport, instead of the certification prerequisite levy issuance or lien filing, was the incentive for the taxpayer to come forward to resolve the liability, the taxpayer may have to quickly submit any required documentation to support their situation. If resolution and decertification occurs within 90 days of the date the Department of State notifies the taxpayer of their passport application denial, the taxpayer's passport application will not be impacted. This 90-day period is in addition to the over 160 days in which a typical case will have already been in process with the IRS.

Categorically excluding all open TAS cases from the certification process, in contrast, would result in the inconsistent application of the law to similarly-situated taxpayers. Under IRC § 7345, all taxpayers have the same ability to qualify for exclusion from certification, for example, by entering into an installment agreement. If, however, all open TAS cases are categorically excluded from the certification process, then IRC § 7345 would apply inconsistently, depending on whether a taxpayer seeks and qualifies for TAS assistance.

⁵ A similar concern would arise with respect to taxpayers seeking TAS assistance as a way to delay or avoid certification, if the IRS were to categorically exclude all TAS cases from certification as the subject TAD requests.

Conclusion

Based on the reasons set forth above, I rescind the Taxpayer Advocate Directive to exclude all open TAS cases from the passport certification process.

cc: Mary Beth Murphy, Commissioner, Small Business/Self Employed Division