

Area of Focus #10 **TAS Will Continue to Assist Taxpayers in Exercising Their Administrative Rights While They Face Passport Consequences**

TAXPAYER RIGHTS IMPACTED¹

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

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 \$52,000, 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 The law requires only two forms of notice to taxpayers: language in CDP hearing notices and a notice sent "contemporaneously" with the certification the IRS sends to the Department of State.⁴

The statute provides exceptions to passport certification for debts timely paid through installment agreements (IAs) and offers in compromise (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 for debts that:

- Are determined to be in Currently not Collectible (CNC) status due to hardship;
- Result from identity theft;
- 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 due⁵ or an adjustment to the account that reduces the original certification amount below the threshold.⁶

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the Internal Revenue Code (IRC). See 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 Fixing America's Surface Transportation (FAST) Act).

3 IRC § 7345(b)(1). The \$52,000 amount has been adjusted for inflation.

4 IRC §§ 6320(a)(3)(E), 6331(d)(4)(E), 7435(d).

5 Internal Revenue Manual (IRM) 5.19.1.5.19.4, *Discretionary Certification Exclusions* (Dec. 26, 2017) and IRM 5.1.12.27.4, *Discretionary Exclusions from Certification* (Dec. 20, 2017).

6 IRM 5.1.12.27.8, *Reversal of Certification* (Dec. 20, 2017) and IRM 5.19.1.5.19.9 *Reversal of Certification* (Dec. 26, 2017).

As of May 17, 2019, the IRS had sent almost 389,000 certification notices to taxpayers, which includes repeat certifications for taxpayers who were certified, decertified, and then certified again.⁷ Also, as of mid-May 2019, the IRS had decertified about 100,000 taxpayers.⁸ The top three reasons for decertification were taxpayers in a disaster zone, taxpayers with a pending IA request, and taxpayers for whom the statutory period of limitation on collection had expired.⁹ Although the IRS began certifying eligible taxpayers in phases, TAS understands the IRS anticipates being able to certify all eligible individual taxpayer accounts by September 1, 2019.¹⁰

TAS Continues to Help Taxpayers Meet Exclusions From Certification or Become Decertified, Despite the IRS's Refusal to Exclude Already Open TAS Cases

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. However, the IRS continues to certify taxpayers who are already working with TAS, declining to follow the Taxpayer Advocate Directive issued by the National Taxpayer Advocate in 2018.¹¹

Since the start of the passport certification program, TAS has issued over 1,000 Taxpayer Assistance Orders (TAOs) related to passport issues. Almost 800 of these TAOs were issued in early 2018, requesting exclusion from certification for taxpayers with cases already open within TAS. While the IRS complied with these initial TAOs, it has since refused to exclude any taxpayers from certification solely based on their preexisting cases with TAS.

During fiscal year (FY) 2019 through May 31, 2019, TAS issued 342 TAOs related to passport certification, including:

- 128 TAOs requesting exclusion from passport certification based on an already open TAS case;
- 127 TAOs requesting the IRS take an action that would resolve the taxpayer's debt and qualify the taxpayer for decertification;
- 58 TAOs requesting expedited decertification;
- 29 TAOs requesting a manual decertification where a taxpayer was eligible for decertification, but a systemic decertification had not or would not occur.¹²

The IRS expressed concerns that excluding already open TAS cases would allow taxpayers to circumvent the statute and allow cases to stay open for extended periods of time, however, the data simply does not

7 This number also includes taxpayers who were certified for one tax year, then certified for an additional tax year. IRS response to TAS information request (May 23, 2019).

8 This number includes taxpayers who received a certification letter, but whose certification was never sent to the Department of State because they no longer had a seriously delinquent tax debt or met a certification exclusion prior to their name being transmitted to the Department of State. IRS response to TAS information request (May 23, 2019).

9 *Id.*

10 *Id.*

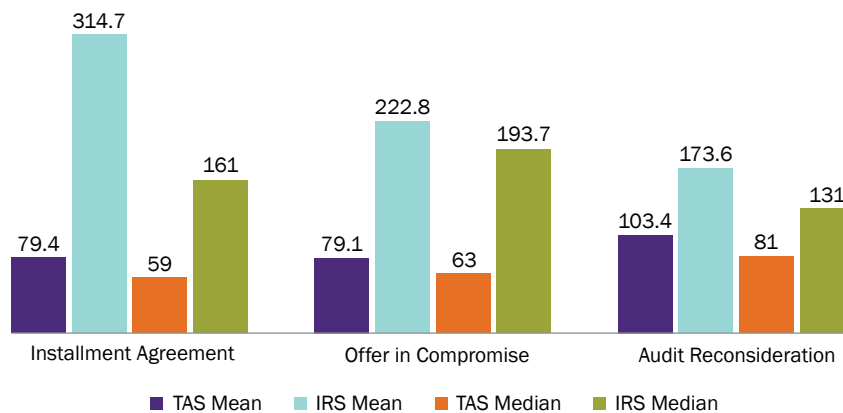
11 See National Taxpayer Advocate Fiscal Year (FY) 2019 Objectives Report to Congress 87-113 (Appendix A: *Taxpayer Advocate Directive 2018-1, TAS Passport Exclusion*).

12 An example of a situation where a systemic decertification would not occur would be if the taxpayer's liability was reduced through an audit reconsideration to below the \$52,000 threshold, but not eliminated completely.

bear this out. In cases where taxpayers resolved their debts, TAS taxpayers accomplished debt resolution, which is the fundamental purpose of the passport statute, significantly faster than those working on their own with the IRS, as shown in figure 4.10.1.

FIGURE 4.10.1¹³

Cycle Times (in Days) for TAS Cases vs. Non-TAS Cases



In terms of already certified taxpayers, of 919 cases TAS closed during the first half of FY 2019, TAS achieved decertification for approximately one-third of taxpayers, with the most common reasons being an IA and CNC hardship status, as shown in Figure 4.10.2.¹⁴

13 Accounts Receivable Dollar Inventory for Individuals and the Individual Master File for FY 2018 as of week 8 of 2019; Enforcement Revenue Information System Audit Reconsideration database (Jan. 2019). These cycle times are for all taxpayers, not just those with a seriously delinquent tax debt. In the case of installment agreements (IAs) and offers in compromise (OICs), the IRS cycle time captures the time from when a case was assigned by the IRS to collection status (Automated Collection System or the field) to when the case was placed in IA or OIC status. For the IA and OIC cycle times for TAS cases, the cycle time measures the length of time between when the taxpayer opened the TAS case and when the case was placed in IA or OIC status.

14 The 919 cases included all cases that were closed during FY 2019 through the end of February involving a taxpayer whose seriously delinquent tax debt had been certified.

FIGURE 4.10.2, Resolved TAS Passport Certification Cases by Type of Resolution

Resolution	Percentage
Installment Agreement	26%
Currently Not Collectible	24%
Other	19%
Audit Reconsideration	10%
Offer in Compromise	7%
Full Pay	6%
Amended Return	4%
Collection Due Process	2%
Bankruptcy	1%
Innocent Spouse	1%
Identity Theft	1%

TAS will continue advocating and issuing TAOs requesting individual taxpayers already working with TAS be excluded from passport certification.

TAS Helps Taxpayers Become Decertified, Who Often Are Not Aware of the Passport Certification Until After They Are Certified and Need to Travel

As explained above, the law only requires two forms of notice to affected taxpayers: a contemporaneous notice issued to the taxpayer at the time of the certification or reversal and language included in the taxpayer's CDP notice. The contemporaneous notice, issued within days of the certification, does not provide taxpayers with an opportunity to come into compliance before the IRS makes the certification and in fact advises the taxpayer that the certification has already occurred.

First, this lack of notice raises due process concerns by depriving taxpayers of a notice and an opportunity to be heard prior to their fundamental right to travel being infringed.¹⁵ Second, it leads to an unnecessary strain on resources—including those of TAS, the IRS, and Department of State, who must process certifications and decertifications for taxpayers who may have resolved their liabilities prior to being certified if they were notified in advance.

In one TAS case during 2018, the IRS reinstated the taxpayer's IA after the taxpayer had stopped paying due to a serious health problem, but the Revenue Officer neglected to input the IA into the system.¹⁶ The taxpayer first learned of this failure not with a pre-certification notice that would have allowed the taxpayer to alert the IRS to the problem, but instead with a notice that the taxpayer's debt had already been certified to the Department of State, despite the taxpayer meeting a statutory exception to certification. In another TAS case, the taxpayer, who also had serious health problems, had paid the liability in full. However, the payment was not input in the system until eight days later due to computer system limitations, and this was the same date the taxpayer's account was pulled by the IRS

15 See Nina E. Olson, NTA BLOG, *The IRS's New Passport Program: Why Notice to Taxpayers Matters (Part 1 of 2)* (June 7, 2017), <https://taxpayeradvocate.irs.gov/news/the-irs-s-new-passport-program-why-notice-to-taxpayers-matters-part-1-of-2?category=TaxNews>.

16 In this example, as well as the one directly following it, TAS received written consent from the taxpayers to discuss publicly the facts of their individual cases.

for certification. A full two weeks after the account showed a zero balance, the IRS sent a passport certification notice to the taxpayer.¹⁷

In many cases, the unnecessary certifications require extra resources for the IRS to process expedited decertifications for taxpayers with impending travel. Since the implementation of the passport program, the IRS has issued 969 expedited decertification requests. A 30-day notice sent prior to certification could mitigate these issues.

TAS continues to hear from practitioners concerned about the IRS's inability to provide the passport certification and decertification notices to taxpayers' representatives. Our understanding is that currently, due to restrictions based on how the notices are generated, the IRS does not send passport notices to any representatives at all, even if they have a valid power of attorney on file that includes all the tax years that comprise the seriously delinquent tax debt. TAS advocated for the IRS to update the CP508 Certification Notice to make this clear to taxpayers by stating "You will need to contact your POA directly since this notice will not be sent to your POA." While the IRS agreed to make this change, we understand the work order to complete this change will not be completed until the beginning of 2020. TAS will continue to explore what steps can be taken to allow the passport certification and decertification notices to be sent to representatives where such disclosure is authorized under the law.

TAS has noted in some cases certified taxpayers are not aware of the certification when they come to TAS for assistance. Although TAS pulled a representative sample of its own cases to gauge how widespread the lack of knowledge was, there was difficulty in determining from the case files whether taxpayers knew of the certification. TAS will research this problem further and try to pinpoint potential causes, including lack of notice to Powers of Attorney (POAs), undelivered mail, and timing of the notice.

TAS Is Limited in Which Taxpayers It Can Assist With Expedited Decertification Due to IRS Requirements

Although not required by statute, the IRS has created an expedited decertification procedure for taxpayers who live abroad or have plans to travel within 45 days. Although this process has proven highly beneficial to a number of taxpayers, including those working with TAS, there is a major limitation. Expedited decertification is only available to taxpayers with a pending passport application, despite the fact that taxpayers who are certified and have current passports run the risk of having their passports revoked under the statute at any time.

In one TAS case, a certified taxpayer was stranded abroad, needing to return to the United States to obtain an equity loan to pay his federal tax balance.¹⁸ The consulate in the foreign country confiscated the taxpayer's passport when he applied for renewal and refused to issue him a limited passport for return only to the United States. Although the taxpayer worked with TAS to meet a criterion that qualified him for decertification, the consulate initially refused to process the taxpayer's passport application (and thus provide a pending passport application number) until he could provide proof that he had resolved his IRS issue. At the same time, the IRS refused to grant the taxpayer's request for an expedited decertification until the taxpayer could supply a passport application number. Although the

17 Although TAS understands that in this case the IRS was able to prevent the actual certification to the Department of State from occurring, the taxpayer nonetheless received a letter stating that he or she had been certified, creating unnecessary anxiety and further communication with the IRS to confirm the taxpayer was not actually certified.

18 The taxpayer in this case has signed a written consent allowing TAS to discuss publicly the facts of his individual case.

consulate ended up accepting a tax transcript as proof that the taxpayer had resolved the issue, this case demonstrates the problems with requiring a pending passport application for expedited decertification.

In addition to the above example, TAS is aware of numerous instances of taxpayers with seriously delinquent tax debts having their passports revoked, such as certified taxpayers who sought consular services for replacement pages for a passport or for registering the birth of a child. For example, merely contacting the Department of State to ask about the ability to use one's passport can result in revocation of the passport and removal from an airplane. Clearly, there is a need for taxpayers with current passports to receive expedited decertification if they have imminent travel planned. TAS will continue to request expedited decertification for any taxpayers with an urgent need to travel.

Taxpayers Are Reporting Difficulty Requesting the Emergency and Humanitarian Exception

The law provides that the Department of State may issue a passport to a certified taxpayer in emergency circumstances or for humanitarian reasons.¹⁹ However, TAS has heard from multiple taxpayers expressing frustration with the ability to request this exception. Taxpayers have reported to TAS receiving inconsistent information from Department of State employees, for example, that the emergency/humanitarian exception applied only to "officers" who need to travel back to the United States or it does not apply if the family member one is visiting is not a U.S. citizen. Other taxpayers have reported simply that the Department of State employee they spoke with was unfamiliar with the exception.

The IRS has acknowledged that it "has the discretion to request a decertification for other reasons [in addition to the statutory provisions requiring decertification]."²⁰ However, the IRS has not created a discretionary exclusion formally listed in the IRM for emergency and humanitarian purposes. For taxpayers who are in regular contact with the IRS and working on resolving their tax liabilities, creating a formal IRS administered decertification exception for emergency and humanitarian purposes could prevent irreparable harm to taxpayers who are being prevented from traveling in an emergency. The IRS could prevent taxpayers from taking improper advantage of this exception by subsequently making a revocation recommendation for any taxpayers who were temporarily granted an emergency or humanitarian exception, but no longer should be excluded from passport certification.

CONCLUSION

In implementing the passport provisions of the Fixing America's Surface Transportation (FAST) Act, the IRS has been proactive in some areas by taking actions not required by Congress to protect taxpayer rights. For example, the IRS created discretionary exceptions to passport certification and an expedited decertification process. However, there are some longstanding problems that the IRS has not addressed, such as the lack of a stand-alone notice prior to passport certification, the refusal to exclude already open TAS cases, and the inability for representatives to receive copies of passport correspondence. Additionally, the IRS is missing opportunities to protect taxpayer rights by ensuring expedited decertification is available to all taxpayers who have a need for it.

19 FAST Act § 32101(e)(1)(B).

20 IRM 5.19.1.5.19.9, *Reversal of Certification* (Dec. 26, 2017).

FOCUS FOR FISCAL YEAR 2020

In fiscal year 2020, TAS will:

- Update technical guidance to TAS employees working cases to take into account revised expedited decertification and revocation recommendation procedures;
- Compile detailed TAS case data regarding cycle time, outcomes, taxpayer notification, and other metrics on passport cases for certified and not yet certified taxpayers;
- Further research the limitations that prevent the IRS from issuing the passport notices to authorized representatives and make recommendations for how the IRS could address this problem;
- Meet with the Department of State to discuss taxpayer problems in requesting the emergency/humanitarian exception, updates to the expedited decertification process, and the possibility of including TAS language on the Department of State passport notices;
- Issue a Taxpayer Rights Impact Statement proposing categories for an IRS administered emergency/humanitarian exception that would qualify a taxpayer for decertification;
- Continue to issue TAOs requesting exclusion from passport certification for already open TAS cases; and
- Assist taxpayers in having their accounts timely decertified to the Department of State.