

Improving Taxpayers' Experience Throughout the Year

COVID-19 is the major issue in tax administration currently, affecting every IRS operation and nearly every interaction taxpayers have with the agency. The pandemic has also had significant impact on TAS. As a result, much of our focus in the Fiscal Year 2021 Objectives Report to Congress is on COVID-19 and related issues. However, even as TAS grapples with the constantly changing situation, we continue to advocate on issues present before the pandemic and those that have emerged as a result of it. TAS continues to engage in transparent and open communications with the IRS, taxpayers, and stakeholders to understand their perspectives and effect change.

Below we outline some of the IRS initiatives and taxpayer issues that TAS will continue to address for the benefit of taxpayer rights and effective tax administration. Many of these issues include ongoing dialogues with the IRS to improve policies, processes, and procedures; however, some are new or emerging issues that TAS anticipates could impact taxpayers. We look forward to examining these issues collaboratively with the IRS and other stakeholders where appropriate.

TAS is working with the IRS in the following areas:

- **IRS Servicewide Multilingual Improvement Strategy:** TAS is working with the IRS to provide meaningful access to tax products and services for taxpayers with limited English proficiency (LEP). We are collaborating on:
 - Monitoring the deployment of materials from the top 20 taxpayer languages for use with LEP taxpayers;
 - Establishing Servicewide policies relative to serving LEP taxpayers;
 - Expanding access to IRS services and information to LEP taxpayers through the translation of IRS applications such as Where's My Refund, Direct Pay, Withholding Calculator, and Online Payment Agreement for Individual and Business Master File taxpayers; and
 - Monitoring and tracking implementation of an LEP indicator to establish taxpayer preference for communicating with the IRS on future issues.
- **IRS Notice Improvement Strategy:** TAS is working with the IRS Office of Taxpayer Correspondence to identify opportunities to improve the clarity and content of IRS notices and correspondence with taxpayers. We are focusing on:
 - Taxpayer notice redesign efforts to establish consistent Servicewide process flows for the creation of new taxpayer correspondence products and the update of current products to ensure all contain the proper elements to educate and inform taxpayers and protect taxpayer rights; and
 - Expansion of Taxpayer Digital Communication channels to facilitate more effective and timely communications between taxpayers and the IRS.
- **Improper Collection Statute Extensions:** The collection statute expiration date (CSED) is the amount of time the IRS is allowed to legally collect a tax balance. Sometimes, administrative errors can result in the CSED being extended beyond the period allowed by statute. We will:

- Monitor collaborative team progress to resolve thousands of incorrect CSEDs causing taxpayers to pay the incorrect amount of assessment; and
 - Track the progress of an Integrated Action Tool programming change that will properly calculate the CSED and correct erroneous accounts.
- **Expanding IRS Service and Outreach to Taxpayers:** We will collaborate with the IRS to educate and provide service to rural taxpayer communities and monitor service delivery options and channels for taxpayer assistance. Our efforts will include:
 - Expanding Virtual Service Delivery to rural locations to supplement service options and service communities that have not had face-to-face service;
 - Expanding collaborative outreach efforts to ensure taxpayers have consistent access to traditional paper and digital products as outlined in the Integrated Digital Experience Act, including Taxpayer Assistance Center locations and hours of operation to support the taxpayer's *right to quality service*;
 - Promoting voluntary compliance through expanding taxpayer access to Volunteer Income Tax Assistance/Tax Counseling for the Elderly services and the use of alternative tax preparation methods, *i.e.*, Free File, in underserved and rural communities; and
 - Developing outreach and educational materials with an emphasis on high schools and LEP.
- **Innovation Lab:** The IRS's strategy is to increase compliance through data-driven, cross-functional projects designed to corporately focus on a specific taxpayer segment, *i.e.*, employment taxes. We will:
 - Deploy notices and other communication options to new business owners through a TAS-sponsored project using behavioral insights to improve employment tax compliance through better education. We will track compliance behavior and analyze the results; and
 - Monitor Innovation Lab projects to determine the effectiveness of Servicewide environmental scans, study modeling results and the impact on compliance of misclassification of employees, along with the impact of linked business entities on enforcement actions and activities.
- **Pre-Refund Wage Verification Cases:** This continues to be an annual issue where taxpayers request TAS to assist with the processing of their refunds. The IRS has designed a number of filters to detect and prevent non-identity theft refund fraud. Despite improvements, this program negatively impacts taxpayers by causing delays in releasing legitimate refunds, high false positive rates, and often inadequate information being sent to taxpayers regarding the reasons for refund delays or steps for taxpayers to take to resolve refund holds. We plan to:
 - Work with Return Integrity Compliance Services (RICS) to analyze filter performance and selection results for opportunities to adjust filter parameters and mitigate adverse impact on taxpayers;
 - Work with RICS to identify enhancements to Return Integrity Verification Operations (RIVO) treatment streams to expedite the release of refunds held as a result of filter selection, which should reverse adverse impact to taxpayers by reducing the false positive rate; and

- Dialogue with RICS to streamline RIVO processes for taxpayers claiming hardship(s) associated with refund verification, thereby reducing TAS case receipts. In the past five years, RIVO case receipts averaged 25 percent of all TAS case receipts annually.¹
- **IRS Expansion of Electronic Filing:** The IRS announced that by late summer 2020, taxpayers will for the first time be able to electronically file their Form 1040-X, Amended U.S. Individual Income Tax Return.² We will:
 - Monitor the deployment and impact of allowing taxpayers to file Form 1040-X electronically.
- **Voluntary Disclosure Practice:** The IRS's long-standing voluntary disclosure practice (VDP) provides taxpayers with criminal exposure a means to come into compliance with the law and potentially avoid criminal prosecution.³ Historically, taxpayers who made a voluntary disclosure could often avoid civil penalties as well.⁴ On November 20, 2018, following the termination of its Offshore Voluntary Disclosure Program (OVDP) — a civil settlement program for those with offshore accounts — the IRS announced changes to its VDP.⁵ These new procedures are effective for all voluntary disclosures — both offshore and domestic — received after September 28, 2018. The new VDP imposes a litany of new taxpayer burdens, risks, and procedures, substantially decreasing the benefits of the VDP, which has been extremely helpful in promoting future compliance over the years. The 2018 memorandum increases the penalties applicable to participants, generally requiring six years of potential adjustments and a 75 percent fraud penalty on the highest year.⁶ Although the program still provides protection from criminal prosecution, it comes at a steep financial cost, and time will tell whether taxpayers continue to use it to voluntarily comply. We intend to:
 - Monitor the effects of the new VDP requirements on taxpayer disclosures and settlements to ensure taxpayer rights are not abridged and consider whether the program still provides sufficient taxpayer benefits to encourage voluntary compliance.
- **The Gig Economy and Its Changing Employee/Contractor Relationships:** California and other states are litigating to reclassify many gig economy workers from contractors to employees. We will:
 - Monitor how the IRS navigates the potential conflict between state and federal worker classification.

1 Taxpayer Advocate Management Information System, fiscal years (FYs) 2015 to 2019. RIVO cases receipts for FY 2020 through May of 2020 are 40 percent of TAS case receipts.

2 IRS, IRS Announces Form 1040-X Electronic Filing Options Coming This Summer; Major Milestone Reached for Electronic Returns, IR-2020-107 (May 28, 2020), <https://www.irs.gov/newsroom/irs-announces-form-1040-x-electronic-filing-options-coming-this-summer-major-milestone-reached-for-electronic-returns>.

3 See Internal Revenue Manual (IRM) 9.5.11.9, Voluntary Disclosure Practice (Dec. 2, 2009).

4 See, e.g., Mark E. Matthews and Scott D. Michel, *IRS's Voluntary Disclosure Program for Offshore Accounts: A Critical Assessment After One Year*, 181 DTR J-1, 4 (Sept. 21, 2010) (noting that before the Offshore Voluntary Disclosure Program, "taxpayers rarely paid any penalties in connection with voluntary disclosures on offshore accounts. Indeed, most taxpayers, relying on the advice of skilled tax professionals, many of whom have decades of prior experience in the Justice Department or IRS, simply filed amended returns and paid the tax and interest. They were never audited. No penalties were ever asserted....").

5 Memo from Deputy Commissioner for Services and Enforcement, LB&I-09-1118-014, Updated Voluntary Disclosure Practice (Nov. 20, 2018), <https://www.irs.gov/pub/foia/ig/spder/lbi-09-1118-014.pdf>.

6 IRC § 6663.

- **IRS Enforcement Strategy:** TAS anticipates an increase in bankruptcy filings given the current economic challenges. To address the expanded impact of bankruptcy filings on compliance efforts and the potential increased requests for offer in compromise (OIC) relief, we will:
 - Monitor how the IRS plans to educate and train employees on taxpayer rights associated with bankruptcy filing(s) and the impact on enforcement action(s); and
 - Continue discussions and interactions with the IRS to gauge the IRS's readiness to handle potential spikes in collection hardship cases and OIC requests.

TAS will continue the pursuit of these and other opportunities to improve tax administration for the benefit of taxpayers.

Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Appeal an IRS Decision in an Independent Forum*
- *The Right to Finality*
- *The Right to a Fair and Just Tax System*

OVERVIEW

In the middle of the tax filing season COVID-19 presented the IRS with an extraordinary challenge: to safeguard the health and safety of taxpayers and employees while administering the tax laws. To further complicate the matter, the IRS was tasked with disbursing Economic Impact Payments (EIPs) during the pandemic. Given the IRS's constraints, the IRS did an impressive job.

The IRS's main obstacles stemmed from its inability to staff core IRS functions due to the lack of portability of duties, such as answering phones, issuing notices, and opening and processing taxpayer correspondence and paper-filed returns. In the early weeks, the IRS announced the People First Initiative, which suspended many enforcement actions and provided taxpayers with much-needed filing and payment deadline postponements until July 15, 2020, among other relief. The IRS diligently issued guidance throughout the pandemic to keep taxpayers informed of its status as well as provide detailed instructions on what they should expect and how to proceed given their particular tax issues.

Despite the IRS's efforts, taxpayers still faced significant challenges. Many taxpayers experienced a sudden change in their financial status and either desperately needed their tax refund to pay bills or suddenly could not pay their tax liabilities. At the same time, taxpayers could not contact the IRS in person or by phone for months, and their mailed correspondence and paper-filed returns sat unopened and unprocessed or were even returned in some instances. In addition, the IRS could not mail notices to taxpayers for months. When it resumed notice production, some backlogged notices included outdated information, requiring the IRS to include informational inserts in the envelopes.

As a result of the complete or partial shutdown of certain core IRS operations, TAS did not have the ability to resolve many taxpayer issues, and the cases will remain outstanding until the IRS resumes operations. From the very beginning of the pandemic, TAS advocated to protect taxpayer rights. We worked with the IRS to ensure that its modified operations minimally impacted taxpayers. We

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

quickly raised issues to the IRS that arose in cases and through submissions to TAS's Systemic Advocacy Management System (SAMS). We will continue to work with the IRS as it resumes operations to ensure that the agency provides as much relief, flexibility, and guidance to taxpayers as possible to minimize taxpayer burden. The COVID-19 impact on the IRS and taxpayers will be significant and long-lasting. Because of the scope of the impact to taxpayers and the IRS, we anticipate that much of fiscal year (FY) 2021 will involve the aftermath of the COVID-19 crisis.

Moving forward, the IRS must plan for the next significant emergency to avoid some of the challenges it faced during COVID-19. The IRS's current arcane computer systems and infrastructure could not handle tax administration remotely, and it has not established across-the-board electronic communication procedures between the taxpayer and the IRS. The IRS needs to improve its infrastructure, hardware, and software to continue its mission-critical operations if another situation arises so that taxpayers do not have to put their lives on hold while the IRS recovers from the effect of the next crisis. As the IRS climbs out of the proverbial operational hole, the National Taxpayer Advocate recommends the IRS consider implementing additional procedures and increase the use of electronic exchange of documents and correspondence with taxpayers, institute the necessary improvements to its telephone systems allowing assistants to handle calls remotely, and continue to upgrade its computer systems to work in a secure remote environment.

DISCUSSION

As the pandemic unfolded, IRS executives, like those in many agencies, weighed the health and safety of taxpayers and its employees as the highest priority in making business and operational decisions. Below, we describe the IRS and TAS responses to the national emergency and discuss its impact to current and anticipated future operations. These operational changes will inevitably result in delays, reevaluation of business priorities, and staffing decisions impacting taxpayers at all stages of tax administration, from pre-filing services through audits, appeals, collection, and litigation.

On March 25, 2020, the IRS announced the People First Initiative, which provided much-needed relief to taxpayers on a variety of issues ranging from postponing filing and payment deadlines to postponing compliance actions.² During the remainder of the COVID-19 pandemic, and as the IRS resumes operations, TAS will continue to assist the IRS and taxpayers to minimize the challenges they face and to ensure that taxpayer rights are protected during this transition period.

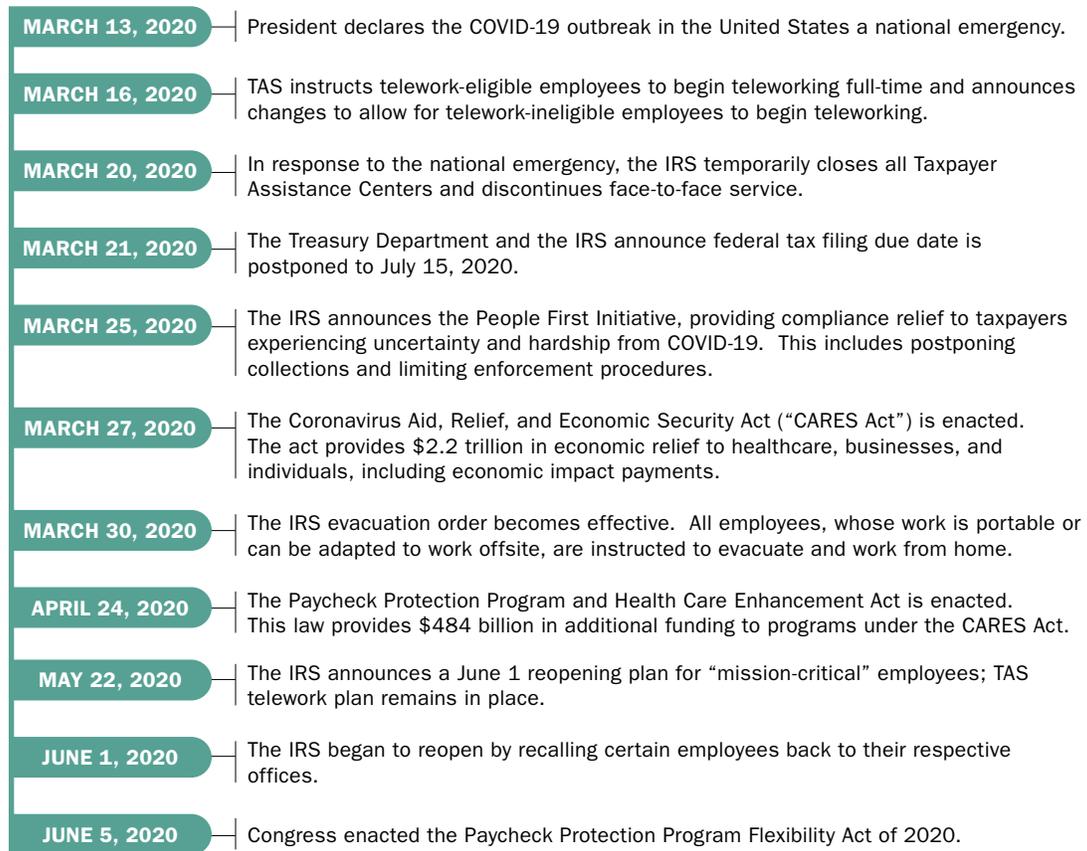
On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act.³ The primary goal of this act was to provide fast and direct economic assistance for American workers, families, and small businesses, including getting cash into the hands of citizens as quickly as possible.⁴ Figure 1.2.1 provides major dates impacting taxpayers and IRS operations.

² IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

³ The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁴ See Systemic Advocacy Objective: *Reducing Burden Resulting From the Implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, *infra*.

FIGURE 1.2.1, COVID-19 Timeline⁵



⁵ Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020); TAS, TAS Takes Measures to Protect Employees and Taxpayers (Mar. 16, 2020); IRS, Taxpayer Assistance Center Statement, <https://www.irs.gov/newsroom/taxpayer-assistance-center-statement> (Mar. 20, 2020); IRS, Tax Day Now July 15: Treasury, IRS Extend Filing Deadline and Federal Tax Payments Regardless of Amount Owed (Mar. 21, 2020), <https://www.irs.gov/newsroom/tax-day-now-july-15-treasury-irs-extend-filing-deadline-and-federal-tax-payments-regardless-of-amount-owed>; IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>; CARES Act, Pub. L. No. 116-136, 134 Stat. 281; IRS, Human Capital Office (HCO), New Work at Home Directive Begins March 30 (Mar. 30, 2020); Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116-139, 134 Stat. 620; TAS, TAS Telework Flexibilities Remain in Place as IRS Offices Begin to Reopen (May 22, 2020). While the IRS officially started recalling some employees on June 1, 2020, some IRS employees returned to their offices before that date.

The IRS's Social Distancing in Response to Presidential Declaration of a National Emergency Negatively Impacted Taxpayer Service and Tax Administration

After the presidential declaration of a national emergency on March 13, 2020, the IRS took steps to maximize social distancing to protect the personal health and safety of taxpayers, employees, contractors, and stakeholders.⁶ As the pandemic increased in severity and spread across the nation, the IRS significantly modified operations through the following actions:

- Closed Taxpayer Assistance Centers (TACs) by ending walk-in and in-person appointments;⁷
- Ceased walk-in services at local TAS offices;⁸
- For mission-critical operations that required employees to work in a campus or IRS office setting, reduced staffing by approximately 50 percent to enhance social distancing;⁹ and
- Subsequently directed all employees to telework if their work duties are portable or could be adapted to work offsite, even if such employees were not telework-eligible.¹⁰

Understandably, as a result of these actions, the operations of many IRS functions temporarily ceased. Although the IRS worked to try to obtain laptops and needed software to give over 14,000 employees the ability to work remotely, telework was not an option for many employees.¹¹ Many employees had to adapt their work duties or were unable to work altogether, as some assignments were impossible to perform at home (*e.g.*, receiving or sending taxpayer correspondences by mail, accessing computer systems, and answering toll-free phone lines). In some instances, these operational adaptations resulted in the partial or complete cessation of core IRS functions throughout the entire country. Like prior government shutdowns, the impact to the IRS's business operations will be felt over an extended period.

Taxpayer Limitations as a Result of the COVID-19 Crisis

For TAS and the IRS to effectively assist taxpayers in resolving their tax issues, it is essential to recognize that the COVID-19 crisis caused taxpayers' lives to significantly change and, as a result, impacted the way taxpayers interact with the agency, including:

- *Unexpected Change in Financial Status.* Between the state and local restrictions imposed on business operations, the sudden spike in unemployment, and the dramatic drop in the stock market during the COVID-19 crisis, many taxpayers had an unexpected change in financial status and were more likely to experience economic hardship. In addition, the crisis caused many businesses to close with all the resulting tax issues.
- *Limited Communication Channels.* For weeks, taxpayers experienced problems communicating with the IRS in person, through the mail, and by phone. The IRS tried to steer taxpayers

6 Proclamation No. 9994, 85 Fed. Reg. 15,337 (Mar. 13, 2020).

7 IRS Commissioner, Protecting You; Protecting the Nation: New Steps to Safeguard Employees (Mar. 19, 2020).

8 *Id.*

9 *Id.*

10 IRS, New Work at Home Directive Begins March 30 (Only Employees Directed by Their Supervisor to Perform Mission Essential Work May Work From an IRS POD) (Mar. 27, 2020), <https://www.irs.gov/newsroom/new-work-at-home-directive-begins-march-30-only-employees-directed-by-their-supervisor-to-perform-mission-essential-work-may-work-from-an-irs-pod>.

11 HCO, Continuity of Operations Meeting (Mar. 12, 2020).

toward online tools to the extent possible; however, not all taxpayers are comfortable interacting with the IRS through this service channel for a variety of reasons.¹² While the IRS encouraged taxpayers to submit documents by fax, not all taxpayers had access to a fax machine while social distancing.¹³ Therefore, it might appear a taxpayer is unresponsive even though he or she made several previous attempts to respond.

- *Access to Requested Documentation.* Due to widespread business closures as well as limited operations at other governmental offices, taxpayers faced obstacles in accessing documentation requested by the IRS. As a result, resolution of tax issues may require thinking “outside the box” to identify acceptable alternative documentation. To effectively assist taxpayers, TAS will continue to work with the IRS to ensure flexibility in the acceptance of alternative documentation given the obstacles taxpayers are facing during the national emergency.
- *Changes in Address.* The state and local mandated “stay-at-home” orders coupled with sudden changes in financial status may have caused taxpayers to quickly change their living arrangements, leaving the IRS or TAS unable to reach them. The National Taxpayer Advocate recommends the IRS consider extending response deadlines before deeming the taxpayer unresponsive and either closing the matter or taking the next compliance action.
- *Increased Anxiety.* The uncertainty surrounding the pandemic causes anxiety for most people. Add in unemployment and tax compliance issues, and it might be too much for many people to handle. Given the prolonged closures of core IRS functions, it is likely that taxpayers have experienced or will experience delays in resolving their tax issues, which will add to this anxiety. The IRS should be patient and increasingly flexible wherever possible while working with taxpayers to help resolve their issues (*e.g.*, accepting alternate documentation, postponing information requests deadlines, etc.).

Lessons Learned From Previous Disasters

Disasters subject taxpayers to a variety of challenges, including compliance with tax filing and payment obligations. These difficulties, in turn, give rise to downstream complications. In the past, taxpayers who have fallen victim to disasters have not always received optimal service from the IRS. The pandemic presents an opportunity for the IRS to learn from mistakes made in the past, protect taxpayer rights, and support those whose filings and payments may have been adversely impacted by the crisis.

After Hurricanes Maria and Irma in 2017, the IRS postponed certain filing and payment deadlines and limited some field examinations to account for the communications disruptions, infrastructure failures, and traumas suffered by individual taxpayers. However, the IRS made assessments against Puerto Rican taxpayers without taking sufficient steps to ensure that they were effectively engaged in

12 IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue, <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue> (last visited May 13, 2020). See National Taxpayer Advocate 2019 Annual Report to Congress 6-7 (Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*).

13 IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue (Apr. 21, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

their audits and that all required notices were in fact delivered.¹⁴ Because of this lack of engagement, audits of these taxpayers had unusually poor outcomes, evidenced by the audit non-response rate that increased by eight percent and the default assessment rate that increased by nine percent following the hurricanes.¹⁵

Going forward, when deciding how to address the COVID-19 pandemic as well as future disasters and pandemics, the IRS must examine and learn from past experiences. The IRS will need to demonstrate understanding and flexibility when conducting compliance initiatives over subsequent months and possibly years. Many taxpayers will unavoidably encounter challenges in accurately reporting their tax obligations and may miss filing and payment deadlines. This reality will inevitably lead to increased enforcement actions against taxpayers whose tax preparers may no longer be available or who may themselves still be living in the wake of tragedy.¹⁶ As the IRS develops further procedures to address the COVID-19 crisis as well as future disasters, TAS will work with the IRS to ensure that taxpayer rights are protected, especially by demonstrating flexibility when conducting compliance initiatives (*e.g.*, flexibility in determining reasonable cause for penalty relief, increased information request deadlines, flexibility in the acceptance of more alternative types of documentation).

How Temporary Adaptations in IRS, Chief Counsel, and Tax Court Operations Impacted Taxpayers

The IRS made significant changes to its operations in response to the COVID-19 crisis. However, the operational changes created challenges for taxpayers as they interacted with the IRS at all stages of their journey through the tax system. The IRS's People First Initiative attempted to address some of the compliance issues, as discussed below.

Taxpayer Service Limitations as a Result of the COVID-19 Crisis

The IRS's operational adaptations in response to the pandemic significantly impacted how it provided taxpayer services. Beginning in March, taxpayers and practitioners had difficulties contacting the IRS in person and on the phone as the IRS maximized social distancing and, as a result, rendered many taxpayer-facing functions partially or completely shut down. In the meantime, the IRS steered taxpayers to use self-help online tools, which is not necessarily accessible or preferred by some taxpayers. The impact of such decline in taxpayer services could have significant downstream consequences for taxpayers.

14 SERP Alert 17A0222, Tax Relief for Taxpayers Affected by Hurricane Harvey, Hurricane Irma, and Hurricane Maria (Aug. 29, 2017, rev. Dec. 6, 2017); IRS, Tax Relief for Victims of Hurricane Maria in Puerto Rico (Sept. 22, 2017), <https://www.irs.gov/newsroom/tax-relief-for-victims-of-hurricane-maria-in-puerto-rico>.

15 IRS Compliance Data Warehouse (CDW), Automated Information Management System (Apr. 2020) for Puerto Rican taxpayers. The audit non-response rate is determined by looking to the number of audits in which taxpayers do not reply to IRS inquiries. The default assessment rate is calculated by looking to assessments made after taxpayers do not pursue their administrative or judicial appeal rights.

16 Examinations, including substitutes for return, can be generated by unfiled returns when third-party information returns cannot be matched to a tax return. Likewise, collection activity can be, and typically is, triggered by late payment of tax liabilities.

LIMITED TELEPHONE SERVICE PREVENTED TAXPAYERS FROM DISCUSSING THEIR TAX ISSUES WITH AN IRS EMPLOYEE

For weeks, taxpayers had extremely limited ability to reach the IRS by phone. The IRS closed all of its Accounts Management (AM) phone lines supported by Customer Service Representatives (CSRs) for both taxpayers and tax professionals beginning on April 1, 2020, and slowly resumed service beginning on April 27, 2020.¹⁷ Automated phone lines remained operational during the crisis, and the IRS encouraged taxpayers and professionals to use online self-help tools.

The Practitioner Priority Service line (PPS) was temporarily closed until May 13, 2020, and the IRS was unable to process third-party authorizations in the Centralized Authorization File (CAF).¹⁸ The IRS encouraged practitioners to use self-help tools, such as e-Services accounts.¹⁹ The IRS e-Services application includes several useful tools for practitioners, such as Transcript Delivery System and Taxpayer Identification Number Matching; however, it does not provide a platform where practitioners can directly discuss taxpayer-specific issues with an IRS employee. In addition, to access the online tool, they must first pass rigorous e-authentication requirements.²⁰

Figure 1.2.2 details the number of call attempts, calls answered by assistors, and level of service for several IRS phone product lines for the week of February 16, 2020, to February 22, 2020 (before the declaration of the national emergency), and for the week of March 15, 2020, to March 21, 2020 (after the national emergency declaration and just as the IRS began to social distance) compared to similar weeks in 2019. The number of call attempts varied by product line in comparison to last year, but the number of calls answered by assistors noticeably dropped as the IRS began to social distance in March.

17 IRS SERP Alert 20A0135, Product Line Closure (Rev. Apr. 1, 2020); IRS SERP Alert 20A0191, TPP Guidance During Continued COVID-19 Closures (Apr. 29, 2020) (TPP line opened on April 27, 2020); IRS SERP Alert 20A0207, Accounts Management to Open Some Phone Lines on Monday May 18, 2020 (May 19, 2020).

18 IRS SERP Alert 20A0201, PPS Phone Line; Processing of Forms 2848/8821 (May 13, 2020). The IRS CAF Unit processes IRS Form 2848, Power of Attorney and Declaration of Representative, and Form 8821, Tax Information Authorization. IRS, The Centralized Authorization File (CAF) – Authorization Rules, <https://www.irs.gov/businesses/small-businesses-self-employed/the-centralized-authorization-file-caf-authorization-rules> (last visited May 19, 2020).

19 IRS SERP Alert 20A0201, PPS Phone Line; Processing of Forms 2848/8821 (May 13, 2020); IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue (Apr. 21, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

20 IRS, FAQs About e-Services and Secure Access, <https://www.irs.gov/individuals/faqs-about-e-services-and-secure-access> (last visited June 4, 2020).

FIGURE 1.2.2, IRS Telephone Service Before and After the IRS Closed the Phone Lines²¹

Phone Line and Measure	Week Ending 2/23/19	Week Ending 2/22/20	% Change From 2019 to 2020	Week Ending 3/23/2019	Week Ending 3/21/20	% Change From 2019 to 2020
Enterprise Call Attempts	5,192,337	4,123,411	-20.6%	2,884,693	2,916,295	1.1%
Enterprise Assistor Calls Answered	783,988	837,537	6.8%	921,440	631,918	-31.4%
Enterprise Level of Service (LOS)	42.6%	54.8%	28.6%	74.8%	50.8%	-32.1%
Accounts Management (AM) Call Attempts	4,735,874	3,579,144	-24.4%	2,453,746	2,413,341	-1.6%
AM Assistor Calls Answered	655,887	701,188	6.9%	739,708	494,658	-33.1%
AM LOS	44.7%	64.1%	43.4%	83.1%	57.8%	-30.4%
Consolidated Automated Collection System (ACS) Call Attempts	276,003	362,724	31.4%	243,550	327,441	34.4%
Consolidated ACS Assistor Calls Answered	62,538	65,862	5.3%	100,653	63,909	-36.5%
Consolidated ACS LOS	25.1%	20.0%	-20.3%	47.4%	21.8%	-54.0%
PPS Call Attempts	55,213	95,943	73.8%	67,142	116,187	73.0%
PPS Assistor Calls Answered	37,489	38,585	2.9%	41,578	39,229	-5.6%
PPS LOS	88.2%	78.8%	-10.7%	80.8%	57.1%	-29.3%

Once the IRS closed the AM and PPS phone lines in April, the number of call attempts and assistor-answered calls dropped, as indicated in Figure 1.2.3. However, both numbers increased as the IRS slowly began to restore service in May.

21 Data includes only calls within a particular week and is non-cumulative for the fiscal year or planning period. IRS, JOC Snapshot Reports: Enterprise Snapshot (weeks ending Feb. 23, 2019; Mar. 23, 2019; Feb. 22, 2020; Mar. 21, 2020). IRS, JOC Snapshot Reports: Product Line Detail (weeks ending Feb. 23, 2019; Mar. 23, 2019; Feb. 22, 2020; Mar. 21, 2020).

FIGURE 1.2.3, IRS Telephone Service After Phone Lines Closed and Slowly Resumed Service²²

Line and Measure	Week Ending 04/20/19	Week Ending 04/18/20	% Change From 2019 to 2020	Week Ending 05/25/19	Week Ending 05/23/20	% Change From 2019 to 2020
Enterprisewide Call Attempts	2,941,224	618,167	-79.0%	2,309,403	3,485,718	50.9%
Enterprisewide Assistor Calls Answered	798,510	53,142	-93.3%	631,382	326,889	-48.2%
Enterprisewide LOS	59.6%	82.7%	38.8%	52.6%	28.8%	-45.3%
AM Call Attempts	2,401,478	474,973	-80.2%	1,852,730	3,184,487	71.9%
AM Assistor Calls Answered	632,267	0	-100.0%	474,284	239,486	-49.5%
AM LOS	66.9%	0%	-100.0%	56.7%	26.1%	-47.3%
Consolidated ACS Call Attempts	367,798	64,433	-82.5%	308,841	212,341	-31.2%
Consolidated ACS Assistor Calls Answered	99,605	35,065	-64.8%	105,848	54,568	-48.5%
Consolidated ACS LOS	29.8%	75.9%	154.7%	38.2%	29.9%	-21.7%
PPS Call Attempts	62,285	32	-99.9%	80,221	76,478	-4.7%
PPS Assistor Calls Answered	42,529	0	-100.0%	47,782	32,492	-32.0%
PPS LOS	87.6%	0%	-100.0%	74.5%	58.0%	-22.1%

While the number of call attempts for the week ending April 18, 2020, dropped significantly compared to the same period in 2019, a large number of taxpayers — over 600,000 during the week ending April 18, 2020 — continued to call the IRS even when it was highly publicized that phone lines were closed, most lines were unanswered, and the IRS steered taxpayers online. It appears that no matter how much the IRS attempts to drive taxpayers to the internet, many taxpayers will still attempt to use their service channel of preference. We will continue to monitor how this crisis impacts call volumes once the IRS fully reopens and determine if we can extrapolate data as to whether the IRS converted more taxpayers to use online tools or if taxpayers reverted to using the more personalized service channels.

CLOSURE OF TAXPAYER ASSISTANCE CENTERS PREVENTED MUCH-NEEDED TAXPAYER IN-PERSON ASSISTANCE

Effective March 19, 2019, the IRS closed all TACs indefinitely. Before the call centers closed, all CSRs who staff the TAC toll-free applications were instructed to stop scheduling TAC appointments. The Taxpayer Protection Program CSRs were also instructed to stop making appointments at TACs for taxpayer identity verification.²³ To deal with pre-scheduled appointments, employees of the IRS

²² Note that where AM answered zero calls, the IRS calculated level of service to be 100 percent, while we calculated it to be zero percent. AM calculated 100 percent because when the lines were closed, the callers just heard an initial upfront message. The calls never made it into the AM LOS calculation, meaning they answered zero of zero calls, or 100 percent. Data includes only calls within a particular week and is non-cumulative for the fiscal year or planning period. IRS, JOC Snapshot Reports: Enterprise Snapshot (weeks ending Apr. 20, 2019; May 25, 2019; Apr. 18, 2020; May 23, 2020) and IRS, JOC Snapshot Reports: Product Line Detail (weeks ending Apr. 20, 2019; May 25, 2019; Apr. 18, 2020; May 23, 2020).

²³ IRS SERP Alert 20A0131, All TAC Locations Closed (Mar. 19, 2020). The IRS Taxpayer Protection Program (TPP) identifies suspicious tax returns as potential identity theft. TPP sends the impacted taxpayer a letter that may instruct the taxpayer to call the TPP toll-free line. IRS, IRS Identity Theft Victim Assistance: How It Works, <https://www.irs.gov/individuals/how-irs-id-theft-victim-assistance-works> (last visited May 17, 2020).

Field Assistance function in the Wage and Investment (W&I) Division were instructed to contact taxpayers with existing appointments and attempt to resolve their issues by phone, if possible.²⁴ As of the date this report went to print, the IRS did not open TACs for face-to-face taxpayer service.²⁵

LIMITED ISSUANCE OF TRANSCRIPTS TO TAXPAYERS

Tax transcripts are often used to validate income and tax filing status for mortgage applications, student loans, and small business loan applications. They can also be useful to taxpayers and preparers in the return preparation process. Under normal circumstances, taxpayers can request transcripts either by mail on Form 4506-T, Request for Transcript of Tax Return, by calling the automated phone transcript service, or through an online application called Get Transcript Online (accessible either as a standalone application or through the Online Account application).²⁶

During the crisis, the IRS stopped processing transcript requests by mail. For those who submitted an online request for the IRS to mail the transcript, the IRS notice distribution centers were not operating, so taxpayers' requests were not honored, at least on a timely basis. Alternatively, taxpayers could download an electronic copy, but that required the taxpayers to pass the stringent e-authentication requirements. This placed many taxpayers in difficult situations without access to their transcripts. Taxpayers could potentially visit a tax professional who could electronically access their transcripts through the Transcript Delivery System on e-Services, an online tool for tax professionals;²⁷ however, a professional is likely to charge for that service. In cases where taxpayers experienced economic hardship and could not access Get Transcript Online, TAS would assist in obtaining their transcripts.²⁸

Postponement of Filing and Payment Deadlines for Certain Returns and Types of Payments

After the President declared a national emergency on March 13, 2020, the IRS quickly provided relief by issuing multiple pieces of guidance to postpone filing and payment deadlines until July 15, 2020.²⁹ While the postponed deadlines certainly provided relief, the American Bar Association (ABA) recommended that the IRS postpone the relief period to the fullest extent authorized by IRC § 7508A. Specifically, the ABA recommended that the IRS postpone deadlines falling on or after January 20, 2020, to the later of (i) July 15, 2020, or (ii) the latest day of the

24 IRS SERP Alert 20A0131, All TAC Locations Closed (Mar. 19, 2020).

25 See IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue (June 8, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

26 See IRS, Welcome to Get Transcript, <https://www.irs.gov/individuals/get-transcript> (last visited May 6, 2020); IRS, Get Transcript FAQs, <https://www.irs.gov/individuals/get-transcript-faqs> (last visited May 6, 2020).

27 IRS, e-Services, <https://www.irs.gov/e-services> (last visited May 6, 2020).

28 Internal Revenue Manual (IRM) 13.1.16.10, Contacts Not Meeting TAS Criteria (Nonfrivolous Inquiries) (Mar. 28, 2017); IRM 13.1.16.11.2 (1), Quick Closure Cases (Mar. 28, 2017). As of June 6, 2020, TAS opened 1,030 transcript request cases in FY 2020, which is down 7.6 percent from the same period in 2019 (1,115 cases). TAS, Year to Date (YTD) Receipts to June 6, 2020 by Primary Core Issue Code and Special Case Code.

29 See IRS Notice 2020-17, 2020-15 I.R.B. 590; Notice 2020-18, 2020-15 I.R.B. 590; Notice 2020-20, 2020-16 I.R.B. 660; Notice 2020-23, 2020-18 I.R.B. 742; Notice 2020-35, 2020-25 I.R.B. 948. The postponement applies to income, estate, and gift taxes, generation-skipping transfer taxes, some excise taxes, and employment taxes. In addition, the IRS postponed judicial and refund claim filing deadlines, as discussed in more detail below.

Incident Period of the federally declared disaster plus 60 days.³⁰ Considering that some Volunteer Income Tax Assistance sites and all Tax Counseling for the Elderly sites were closed due to COVID-19, TAS will work with the IRS to ensure that the agency protects the taxpayer's *right to a fair and just tax system* by encouraging it to apply the maximum amount of flexibility with taxpayers, especially low-income and elderly taxpayers, who miss the postponed filing deadlines (*e.g.*, penalty relief).³¹ In addition, for taxpayers who mailed checks before the IRS campuses closed that the IRS does not attempt to process until months later, TAS will ensure that the IRS does not assess a bad check penalty against those taxpayers.³²

Suspension of Processing Paper Tax Returns Delays the Issuance of Refunds

The IRS suspended the processing of paper tax returns, including amended returns, at the end of March.³³ Of the estimated ten million pieces of mail sitting unopened as of May 16, 2020, it estimates that about half were paper-filed tax returns. (The additional pieces of mail were a combination of taxpayer correspondence, information returns, payment vouchers and payments, etc.).³⁴ While the overwhelming majority of taxpayers file electronically, taxpayers who file paper returns are experiencing extreme delays in processing their returns.³⁵ Those taxpayers who already filed a paper return were discouraged from filing a second tax return.³⁶ While many refund returns are e-filed, those taxpayers who chose to file a paper return are required to wait until the IRS

30 Letter from Tom Callahan, Chair, Section of Taxation, ABA, to Charles P. Rettig, Comm'r, I.R.S., Specific Substantive and Procedural Provisions Impacted by the COVID-19 Emergency (Apr. 29, 2020), <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2020/042920comments.pdf>. The ABA noted that IRC § 7508A(d)(1) mandates a defined postponement period for “qualified taxpayers” from the earliest incident date of the federally declared disaster until the latest incident date plus 60 days. The ABA also noted that every Federal Emergency Management Agency (FEMA) Major Disaster Declaration with respect to the COVID-19 emergency lists January 20, 2020, as the start date of the “Incident Period.” Despite the ABA’s recommendation, the IRS has indicated that it does not plan to further postpone the deadlines. Aaron Lorenzo, *Rettig: No Plans to Further Delay Tax Filing Deadline*, POLITICO (May 18, 2020).

31 IRS, Free Tax Return Preparation for Qualifying Taxpayers, <https://www.irs.gov/individuals/free-tax-return-preparation-for-you-by-volunteers> (last visited May 13, 2020).

32 IRC § 6657.

33 The IRS recently announced that it will begin to accept electronically filed Form 1040-X, Amended U.S. Tax Return, in Summer 2020. IRS, IR-2020-107, IRS Announces Form 1040-X Electronic Filing Options Coming This Summer; Major Milestone Reached for Electronic Returns (May 28, 2020), <https://www.irs.gov/newsroom/irs-announces-form-1040-x-electronic-filing-options-coming-this-summer-major-milestone-reached-for-electronic-returns>.

34 Allyson Versprille, *Virus Fears, Unopened Mail Await IRS Employees Returning to Work*, BLOOMBERG LAW: TAX (June 1, 2020), https://www.bloomberglaw.com/product/tax/document/XF00Q66000000?bna_news_filter=daily-tax-report&jcsearch=BNA%2520000001726082d211a37fed86a38f0001#jcite (citing data provided by the IRS to the U.S. House Committee on Ways and Means in a report titled “Internal Revenue Service Operations (Report on May 27, 2020)”).

35 IRS, Submission Processing, Program Management/Process Assurance, Filing Season Statistics Report for Week Ending May 23, 2020, Cumulative Individual Income Tax Returns as of May 22, 2020.

36 IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue, <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue> (last visited May 13, 2020).

can process paper returns and issue refunds.³⁷ Figure 1.2.4 details the Form 1040-series returns processed by the IRS as of May 22, 2020, compared to the projected number and the number received by that date in 2019. Not unexpected, but the comparison of 2019 filings to 2020 filings is impacted by the postponement of 2020 filing deadlines, which did not occur in 2019.

FIGURE 1.2.4, Total Form 1040-Series Returns Processed as of May 22, 2020³⁸

Filing Method	2019 Actual (mil)	2020 Projected (mil)	2020 Actual (mil)	% Change From 2020 Projected to Actual (mil)	% Change From 2019 to 2020 (mil)
Paper	10.8	10.2	2.7	-73 %	-75%
E-Filed	128.1	130.6	117.0	-10%	-9%
TOTAL	138.8	140.8	119.7	-15%	-14%

Many taxpayers are facing financial hardship associated with the COVID-19 crisis and need the IRS to process their paper-filed returns as soon as possible and release their refunds. In addition, because a taxpayer's return for tax year (TY) 2019 was potentially relevant in determining his or her eligibility for an EIP (as discussed later in this report), the IRS's suspension of paper return processing caused confusion for many taxpayers.³⁹

Furthermore, some taxpayers who initially elected to apply their TY 2019 refund to their TY 2020 tax liability may have had second thoughts, preferring to receive their refunds as soon as possible due to financial hardship brought on by the COVID-19 crisis. Taxpayers cannot reverse an election to apply the 2019 overpayments against the 2020 tax on an *amended* return.⁴⁰ However, if they filed a second return before the filing deadline (*i.e.*, July 15, 2020, or October 15 on extension), the second return "supersedes" the first return. The second (superseding) return is treated as the original filed return, and the taxpayer may elect to receive the overpayment as a refund.⁴¹ During normal economic times, taxpayers usually do not think about revoking this credit election. But this year, some taxpayers who elected to apply 2019 overpayments against 2020 tax did so before the pandemic affected the economy. These taxpayers may have since been rendered unemployed or insolvent, or they may be earning less (taxable) income than they expected. As a result, they may owe less tax

37 As of May 29, 2020, about 1.7 percent (1,632,700) of the total refund returns filed for TY 2019 (91,615,955) have been filed on paper. Through the corresponding cycle in 2019 (as of May 31, 2019), 7.5 percent (8,410,760) of the total TY 2018 returns (111,937,024) were paper returns. Looking only at this data, the number of processed paper refund returns has decreased about 80 percent. While the IRS was expecting paper refund returns to decline to 6,462,900 in calendar year 2020, the number of paper returns filed by this date is only about 25 percent of this projection. Individual Master File (IMF) Customer Account Data Engine; TY 2019 data as of cycle 20202301, TY 2018 data as of cycle 20192301; IRS Publication 6187, Calendar Year Projections of Individual Returns by Major Processing Categories: 2019 Update, Table 3. Calendar Year Projections of the Number of Individual Refund Returns: U.S., IRS Campuses, and Electronically Filed.

38 IRS, Submission Processing, Program Management/Process Assurance, Filing Season Statistics Report for Week Ending May 23, 2020, Cumulative Individual Income Tax Returns as of May 22, 2020.

39 See Systemic Advocacy Objective: *Reducing Burden Resulting From the Implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, *infra*; IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue, <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue> (Apr. 21, 2020).

40 IRM 1.2.1.4.14, Policy Statement 3-14 (Formerly P-2-88), Elections to apply income tax overpayments to estimated tax may be reversed upon showing of undue financial hardship (Oct. 21, 1971).

41 IRM 21.6.7.4.10, Superseding Returns (July 22, 2019).

than they anticipated for 2020, and if so, they need to recover their 2019 tax overpayments now to help meet their basic financial needs.

It is important to note that for individuals, a superseding individual return must be filed on paper and mailed to an IRS processing center.⁴² As noted above, processing centers were closed at the end of March to mitigate the spread of COVID-19, creating a considerable logjam of paper returns and other correspondence that will likely take the IRS months to work.⁴³ Despite these processing delays, filing a superseding return to request the issuance of the refund in 2020 will provide necessary financial relief to taxpayers sooner. In addition, the IRS may be able to manually adjust the taxpayer's account to issue the refund in 2020 upon the taxpayer demonstrating undue financial hardship.⁴⁴ Finally, taxpayers can further speed up the payment by requesting direct deposit rather than a paper check.

Limitations in Options to Authenticate Identity (Taxpayer Protection Program) Prevented Taxpayers From Receiving Timely Refunds

Under normal procedures, when the IRS Taxpayer Protection Program (TPP) flags a tax return as potential identity theft, it sends a letter to the taxpayer to request confirmation of his or her identity.⁴⁵ The IRS suspends processing the refund return until the taxpayer successfully authenticates his or her identity. Based on the type of letter issued by TPP, taxpayers are required to authenticate their identity using either the TPP telephone line, visiting a TAC, or online through the Identity Verification Service.⁴⁶ Because the IRS phone lines were down for weeks and taxpayers could not schedule TAC appointments, the IRS requested that any taxpayers who received one of these letters (issued before the notice production centers closed) confirm their identities online.⁴⁷ Unfortunately, taxpayers must pass rigorous e-authentication requirements to access the online program.⁴⁸ Only after a taxpayer has tried and failed to access the online application would the IRS instruct him or her to fax the required documentation.⁴⁹

42 Erin M. Collins, The Value of “Superseding” Returns and Processing the Additional \$500 Stimulus Benefit for Certain Non-Filers, NTA Blog, https://taxpayeradvocate.irs.gov/news/NTA_Blog_The_Value_of_a_Superseding_Tax_Return (Apr. 29, 2020).

43 IRS, New Work at Home Directive Begins March 30 (Mar. 28, 2020), <https://www.irs.gov/newsroom/new-work-at-home-directive-begins-march-30-only-employees-directed-by-their-supervisor-to-perform-mission-essential-work-may-work-from-an-irs-pod>.

44 IRM 1.2.1.4.14, Policy Statement 3-14 (Formerly P-2-88), Elections to Apply Income Tax Overpayments to Estimated Tax May Be Reversed Upon Showing of Undue Financial Hardship (Oct. 21, 1971).

45 TPP is in W&I's Return Integrity and Compliance Services (RICS) organization.

46 The TPP phone line reopened on April 27, 2020. IRS SERP Alert 20A0135, Product Line Closure (Rev. Apr. 28, 2020). Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2019-40-004, *The Taxpayer Protection Program Includes Processes and Procedures That Are Generally Effective in Reducing Taxpayer Burden* (Oct. 17, 2018); IRS, Identity Verification Service <https://www.irs.gov/identity-theft-fraud-scams/identity-verification> (last visited May 14, 2020).

47 IRS, Identity Verification Service, <https://www.irs.gov/identity-theft-fraud-scams/identity-verification>, last visited May 14, 2020). Limited phone service resumed on the TPP hotline on April 27, 2020. IRS SERP Alert 20A0191, TPP Guidance During Continued COVID-19 Closures (Apr. 24, 2020).

48 See National Taxpayer Advocate 2019 Annual Report to Congress 6-7 (Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy That Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*).

49 SERP ALERT 20A0144, Treatment of TPP Taxpayers Sent to TAC during COVID-19 Shutdown (May 18, 2020).

Suspension of the Timely Issuance of Notices and Correspondences

Due to the pandemic-related closure of notice production centers, the IRS stopped printing notices and correspondence on April 8, 2020, and did not resume until June 1, 2020.⁵⁰ Over 20 million IRS notices were queued up in the system but were not mailed on the date indicated on the letter and taxpayer account. The IRS is working fervently to prioritize the 20+ million IRS notices to be issued. While under normal circumstances the IRS has the capacity to print about four million notices per week, it is unclear when the IRS will completely work through its entire backlog due to uncertainties surrounding staffing levels, vendor support, and the ability to purge certain backlogged notices.⁵¹

The suspension of timely issuance of notice and correspondence has significant consequences to taxpayers at points throughout the tax system. First, taxpayers were not adequately informed of the status of their returns, refunds, or compliance actions, as applicable. Second, many time-sensitive notices were computer-generated with the dates that have since expired (on the letters themselves and on taxpayers' accounts). While the IRS is providing additional time for payment (July 10, 2020 or July 15, 2020), it will still lead to widespread taxpayer confusion about deadlines to take certain actions.⁵²

TAS is working with the IRS as it develops and implements a communications strategy to issue guidance, such as phone line messaging, Frequently Asked Questions (FAQs), social media posts, and notice inserts, to alleviate some of the associated confusion. Taxpayers will find the original notice or correspondence and an additional document (insert) providing specific relief for compliance reflecting the new due date in the same envelope. For example, TAS worked with the IRS as it developed insert language to include with the issuance of backlogged notice and demand letters to explain the postponed deadlines to make payment and the relief provided on the accrual of penalty and interest.⁵³ We also worked with the IRS to develop inserts to include with the issuance of backlogged math error notices, which ensure taxpayers have the full time provided under the law to request abatement of a math error assessment that increases the amount of tax.⁵⁴ As the IRS works through the inventory of backlogged notices, especially time-sensitive notices, and issues appropriate guidance, TAS will ensure that taxpayer rights are protected.

Examinations and Pre-Refund Reviews

The IRS temporarily stopped opening most new examinations as part of the People First Initiative.⁵⁵ However, taxpayers undergoing existing examinations and pre-refund reviews still face challenges.

50 IRS Operations During COVID-19: Mission-Critical Functions Continue (June 8, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

51 CPS Not Mailed Report Cycle 20 for processing year 2020; IRS SERP Alert 20A0158, CRX Letters (Rev. Apr. 10, 2020); COVID-19 Correspondence Recovery Team Meetings (TAS has four representatives on the team) (May 2020).

52 SERP Alert 20A0242, IRS Issuing Backdated Correspondence (June 6, 2020).

53 See, e.g., IRS Notice 1052-A, Important! You Have More Time to Make Your Payment (May 2020), and the corresponding Spanish version, IRS Notice 1052-A (SP) (May 2020).

54 IRS, Notice 1052-B, Important! You Have More Time to Make Your Payment (June 2020). Under IRC § 6213(b)(2)(A), a taxpayer has 60 days after a notice is sent to request abatement of a math error assessment.

55 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

SUSPENSION OF NEW EXAMINATIONS

The IRS announced as part of its People First Initiative that between April 1 and July 15, 2020, it would not start new field, office, and correspondence examinations, unless deemed necessary to protect the government's interest in preserving the applicable statute of limitations.⁵⁶ It also announced the suspension of all in-person meetings in ongoing examinations. Figure 1.2.5 illustrates the number of audits by type that the IRS started at the beginning of the period of the People First Initiative, compared to the same period in 2019.

FIGURE 1.2.5, Examinations Started Between April 1 and June 1, 2020, Compared to the Same Period in 2019⁵⁷

Type of Audit	2019 (Apr. 1 to Jun. 1, 2019)	2020 (Apr. 1 to Jun. 1, 2020)	% Change
Corporations	2,445	716	-71
Employment Tax	1,185	683	-42
Individual Tax	14,188	5,013	-65
Partnership	534	114	-79
Other	1,218	332	-73
TOTAL	19,570	6,858	-65

Between April 1 and July 15, 2020, the IRS has continued to work existing examination cases and refund claims remotely, where possible. The IRS advised taxpayers to continue to respond to any IRS examination notices already received, even if just to explain their inability to fully comply with the IRS's request.⁵⁸ However, with phone lines temporarily closed and mail left unopened at the IRS, taxpayers were limited in the response methods they could use to avoid significant delays. Taxpayers and representatives could respond by e-fax, and as discussed in more detail below, the IRS accepted digital signatures and email in certain circumstances.⁵⁹ Many taxpayers may have trouble obtaining acceptable requested documentation in a timely manner. This leads to delays in examinations, and the IRS may request an extension of the statute of limitations on assessment.⁶⁰ Taxpayers and representatives will have to weigh the pros and cons of signing such statute extensions,

56 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>. In addition, for those taxpayers who meet with examination employees by phone, IRC § 7521 permits taxpayers to make an audio recording of an interview relating to the determination of any tax.

57 IRS, CDW, Examination Returns Control System (June 2020). In a small number of instances, a taxpayer is included in more than one category (e.g., both in a corporate income tax return and in an employment tax return).

58 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>. In addition, for those taxpayers who meet with examination employees by phone, IRC § 7521 permits taxpayers to make an audio recording of an interview relating to the determination of any tax.

59 Memorandum for All Services and Enforcement Employees, (1) Approval to Accept Images of Signatures and Digital Signatures (2) Approval to Receive Documents and Transmit Encrypted Documents by Email, by IRS Deputy Commissioner, Services and Enforcement (June 12, 2020).

60 IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue (June 8, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>. IRC § 6501.

especially where the delay was solely caused by the shutdown in IRS operations. TAS plans to protect taxpayer's *right to challenge the IRS's position and be heard* by ascertaining the status of their audits when the IRS fully reopens and working with the IRS to accept alternative documentation.

DELAYS IN PROCESSING TAXPAYER CORRESPONDENCE AND IMPACT ON OPEN CORRESPONDENCE EXAMINATIONS

Due to the disruption of mail operations and the temporary inability to process correspondence during the pandemic, TAS anticipates taxpayers who mailed correspondence to the IRS during this period will experience significant delays. Once normal operations resume, it will likely take the IRS a significant amount of time to work through the correspondence backlog. Some correspondence sent to IRS offices was even returned to the taxpayer if the recipient office was closed and no one was available to accept delivery.⁶¹ Fortunately, the tide of incoming mail has slowed due to the suspension of opening new examinations. Unfortunately, the taxpayers currently under examination may find that their examinations are taking longer to complete — not only because of the large amount of mail to work through but also because it will take the mail processing functions time to sort the examination mail from the other types of mail accumulated. TAS will protect the taxpayer's *right to challenge the IRS's position and be heard* by working with the IRS to be flexible with those taxpayers who had difficulties timely responding to IRS information requests caused by the crisis.

While the suspension of new examinations and face-to-face meetings affected all IRS examination functions, the closure of IRS campuses has and will have the greatest impact on open examinations. The campuses conduct about 75 percent of all IRS examinations, and these campus exams are conducted almost exclusively through correspondence (ground mail) using an automated system. The automated system generates and mails letters from the examining campus at various phases of the audit, including the initial contact letter informing the taxpayer of the audit and requesting additional information or documentation.⁶² A taxpayer under correspondence examination then mails the requested information to the campus conducting the examination.

With the campus closings beginning in late March, ground mail services were unable to deliver the mail to the campuses because IRS personnel was not available to receive it. This undelivered mail was either returned to the taxpayer or has been accumulating in annexes, alternate locations, and large trailers awaiting the return of campus mail-processing personnel. TAS has estimated that nearly 100,000 taxpayers undergoing a campus correspondence audit could have unprocessed mail.⁶³ This is in addition to the existing 63,000 pieces of mail previously logged by campus correspondence examination prior to the suspension of mail processing awaiting consideration.⁶⁴ In fact, between

61 IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue (Apr. 21, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>; SAMS Issue 42283, USPS Returning Mail to TPs for Andover Stop 360 RP.

62 IRS, 2018 IRS Data Book, Table 9a (May 2019), Examination Coverage: Recommended and Average Recommended Additional Tax After Examination, by Type and Size of Return, Fiscal Year 2018.

63 Extrapolated using the percent of correspondence received in the month following the issuance of an initial contact letter, a 30-day letter, a revised audit report, or a request for additional information. AIMS Centralized Information System (ACIS) Campus Open Case Count by Status Code 201902–202003, and ACIS Campus Open Case Count by Prior Status Code 201903–202004, ACIS Campus Closed Case Monitoring by Disposal Code 201901–202003.

64 IRS, W&I, Refundable Credit Examination Operations (RCEO), RCEO Weekly Mail Report for TAS (May 25, 2020).

April 4 and May 30, 2020, the IRS received about 205,000 pieces of correspondence, which is about 14 percent of the correspondence it received during the same period of FY 2019 (almost 1.5 million).⁶⁵

Examiners also experienced difficulties working on open correspondence examinations in which the IRS received and processed the information and documentation submitted by taxpayers and representatives. Campus examiners do not have remote access to case files because casework is largely based on paper documents housed at the campus and, at least initially, campus examiners did not have laptops to take home. W&I Refundable Credits Examination Operations prioritized TAS hardship cases, and managers went to the Atlanta campus to convert paper documents or faxes into an electronic format before examiners could address them while teleworking.⁶⁶

IN MANY CASES, TAXPAYERS WHOSE RETURNS WERE BEING SUBJECTED TO WAGE VERIFICATION OR THE EARNED INCOME TAX CREDIT AND ADDITIONAL CHILD TAX CREDIT REVIEW WERE UNAWARE THEIR REFUND WAS BEING HELD AND WHAT STEPS WERE NECESSARY TO ACHIEVE THE RELEASE OF THEIR REFUND

Due to the suspension of notice production,⁶⁷ in certain circumstances, taxpayers were not aware that the Pre-Refund Wage Verification Hold (PRWVH) program was holding their refunds and that they may need to provide the IRS with documentation verifying information on the return (*e.g.*, wages and withholding) or submit an amended return to get their refunds released.⁶⁸ Additionally, if a taxpayer's return was transferred to another IRS treatment stream because it was unable to verify information on the return, the receiving office was not able to send an initial contact letter.⁶⁹ In many cases, taxpayers were unaware as to why their refunds were held or what they could do to get them released.

Pursuant to the People First Initiative, the IRS postponed taxpayer response deadlines until July 15, 2020, for taxpayers who received notices requesting additional documentation to verify information on their return or claiming of the Earned Income Tax Credit (EITC) or Additional Child Tax Credit (ACTC) and had deadlines that fell after April 1, 2020. The IRS encouraged taxpayers to exercise their best efforts to obtain and submit all requested information, and if unable to do so, instructed taxpayers to provide any reason such information is unavailable. It advised taxpayers that “[u]ntil July 15, 2020, the IRS will not deny these credits for a failure to provide

65 IRS, Joint Operations Center, Enterprise Adjustments – Fiscal Year Comparison, 2nd Planning Period – April through May 30, 2020 (FY 2019 and FY 2020).

66 W&I, RCEO Employees Keep the Work Moving During the COVID-19 Pandemic, W&I Offline, Atlanta Campus 4 (May/June 2020).

67 IRS Operations During COVID-19: Mission-Critical Functions Continue (June 8, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

68 IRS Notice CP 05, We're Holding Your Refund Until We Finish Reviewing Your Return; IRS Letter 4464C, Questionable Refund Letter (Dec. 2019).

69 The Return Integrity Verification Operations (RIVO) of W&I manages the Pre-Refund Wage Verification Hold Program (PRWVH), which relies on a number of filters to screen returns for possible refund fraud. When returns are selected into the PRWVH, the IRS seeks to verify information on the return, namely wages and withholding. This verification process is done by either confirming the information on the return by comparing it to W-2 data provided by the Social Security Administration, or by contacting the taxpayer's employer(s) to verify the wages. If the wages cannot be verified, they will be assigned to one of three treatment streams: Wage and Withholding Only, Automated Questionable Credit, or Exam. Which treatment stream it will be assigned to depends upon whether or not the EITC or ACTC has been claimed on the return.

requested information.”⁷⁰ However, to fairly enforce this postponed response deadline, the IRS will need to account for the delays in processing taxpayer correspondence.

In addition to the extension of these deadlines, the IRS established an e-fax number for taxpayers receiving notice CP 05A, *We’re Holding Your Refund Until We Finish Reviewing Your Tax Return*, to submit requested documents.⁷¹ On cases where the taxpayer was experiencing extreme hardship, TAS encouraged the IRS to accept alternative documentation, resulting in the earlier release of the refund.

Despite these modifications to the IRS’s normal procedures, taxpayers’ refunds continue to be frozen during the extension, and in some cases, taxpayers still don’t know the reason for the refund hold. In fact, both EITC audits and PRWVH issues continue to be the top two issues in TAS case receipts in FY 2020 through June 6, 2020.⁷²

WELCOME CHANGE: DIGITAL ACCEPTANCE AND TRANSMISSION OF DOCUMENTS AND DIGITAL SIGNATURES

Between March 27, 2020, and December 31, 2020, IRS employees can accept documents and transmit documents via email using an established secured messaging system. Employees are permitted to accept images of signatures (scanned or photographed) and digital signatures on documents related to the determination or collection of a tax liability.⁷³ TAS issued similar guidance regarding digital communications and transmission of documents in connection with open TAS cases.⁷⁴ This change is good for tax administration and, in fact, TAS has previously encouraged the IRS to digitally communicate with taxpayers. Historically, however, the IRS has resisted electronic communication due to authentication and security concerns.⁷⁵ In light of COVID-19 and closing IRS offices across the country, the IRS temporarily created an exception to its communication procedures. The National Taxpayer Advocate strongly recommends the IRS prioritize, evaluate, and determine the feasibility of extending the practice beyond 2020, and consider utilizing electronic

70 IRS, IR-2020-59, *IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program* (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

71 SERP Alert 20A0148, *R Freeze with RIVO Involvement – RIVO Notice CP 05A Issued New E-FAX Option* (Mar. 27, 2020).

72 In FY 2020 through June 6, 2020, TAS received 50,866 PRWVH cases, and 7,188 open EITC audits. TAS, *YTD Receipts to June 6, 2020*, by PCIC and Special Case Code.

73 The IRS accepted digital signatures on the following exam-related documents: extensions of statute of limitations on assessment, waivers of statutory notices of deficiency and consents to assessment; and any other statement or form needing the signature of a taxpayer or representative traditionally collected by IRS personnel outside of standard filing procedures (e.g., a case-specific Power of Attorney). Memorandum for All Services and Enforcement Employees, (1) *Approval to Accept Images of Signatures and Digital Signatures* (2) *Approval to Receive Documents and Transmit Encrypted Documents by Email*, by IRS Deputy Commissioner, Services and Enforcement (June 12, 2020).

74 Deputy National Taxpayer Advocate, *Interim Guidance, Digital Signatures and External Email Communications* (Apr. 13, 2020), https://www.irs.gov/pub/foia/ig/tas/tas-13-0420-0009_digital_signatures_and_external_email_communications.pdf.

75 See National Taxpayer Advocate, *Fiscal Year 2019 Objectives Report to Congress* vol. 2, at 36 (*IRS Responses and National Taxpayer Advocate’s Comments Regarding Most Serious Problems Identified in the 2017 Annual Report to Congress: Recommendation 3-3*).

communication procedures and exchange of digital documents after COVID-19 for all functions within the IRS.⁷⁶

PENALTY RELIEF

The IRS should revisit certain penalty regimes that, in times of disaster, can cause unduly harsh outcomes for taxpayers. For example, penalties arising when taxpayers fail to respond to notices of unfiled or incomplete international information returns can accumulate to \$50,000 or more if taxpayers are unresponsive.⁷⁷ Taxpayers affected by disasters like COVID-19 may have legitimate reasons to be unresponsive to initial notices, and the IRS should consider suspending or waiving the application of these continuation penalties for impacted taxpayers. The IRS suspended the original deadline for filing many international information returns in case of disaster, and it would be a sensible measure to bring the treatment of the continuation penalty into line with this practice of extending time-sensitive deadlines during a disaster.⁷⁸ Accordingly, to the extent that the IRS has requested that taxpayers produce any delinquent information during this pandemic, the period for doing so should be extended beyond the 90-day window provided by the statute.⁷⁹

Collection

As part of the IRS's People First Initiative, the IRS announced widespread changes to its normal collection procedures between April 1, 2020, and July 15, 2020, to help taxpayers face the challenges of COVID-19.⁸⁰ However, the IRS's near-shutdown placed taxpayers undergoing collection actions in a difficult position, especially if they were attempting to resolve their tax debts. Taxpayers faced significant issues due to mail stoppage, suspension of notices, and inability to interact with the IRS in person and by phone. In the meantime, the interest and penalties continued to accrue on their debts. Once normal collection activities resume, the IRS will find taxpayers in even worse financial shape due to unemployment and business closures. Pursuant to the People First Initiative, taxpayers will be expected to be compliant by July 15, 2020, and many may not have financially recovered by then.

Figure 1.2.6 illustrates that the dollars posted from taxpayer delinquency accounts (TDAs) during the initial months of the national emergency were significantly less than during the same period in 2019.⁸¹ With the challenges to many businesses and the level of unemployment encountered due to COVID-19, TAS anticipates a higher rate of delinquent accounts in the foreseeable future and

76 See also Taxpayer First Act (TFA), Pub. L. No. 116-25, § 2302, 133 Stat. 1013 (2019) (Mandating the IRS to publish guidance within six months of enactment establishing uniform standards and procedures for the acceptance of taxpayers' digital signatures for powers of attorneys and disclosure authorizations.); Sally P. Schreiber, *AICPA Recommends Changes to e-Signature Requirements*, JOURNAL OF ACCOUNTANCY (June 8, 2020), <https://www.journalofaccountancy.com/news/2020/jun/aicpa-recommends-changes-to-irs-e-signature-requirements.html>.

77 See, e.g., IRC § 6038D. This code section imposes an initial \$10,000 penalty for failure to file complete international information returns. Upon notice of the penalty, taxpayers are given 90 days to provide the delinquent information. They are subject to an additional continuation penalty of \$10,000 for each 30-day period in which they do not comply, up to a maximum of \$50,000.

78 See IRS, Notice 2020-23, 2020-18 I.R.B. 742 (cross referencing Rev. Proc. 2018-58, 2018-50 I.R.B. 990).

79 IRC §§ 6038(b)(2), 6038A(d)(2), 6038C(c)(2), 6038D(d)(2), 6677(a), 6679(a)(2).

80 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

81 A Taxpayer Delinquency Account (TDA) is a case assigned to or awaiting assignment to Collection personnel.

will monitor the impact to taxpayers moving forward and assist those seeking help resolving their collection issues.

FIGURE 1.2.6, Dollars Collected From TDAs, March Through May 2020⁸²

	March	April	May
FY 2019	\$1.069 bil	\$851 mil	\$901 mil
FY 2020	\$1.125 bil	\$300 mil	\$330 mil
Percent Change From 2019 to 2020	5.2%	-64.8%	-63.3%

INSTALLMENT AGREEMENTS

The IRS suspended payments due on existing installment agreements (IAs) between April 1, 2020, and July 15, 2020; however, interest continues to accrue on any unpaid balances.⁸³ Taxpayers who had existing IAs or planned to apply for a new IA were impacted as follows:

- **Direct Debit Installment Agreements (DDIAs).** To stop automatic withdrawals on DDIAs, IRS FAQs instructed taxpayers to contact their bank directly to suspend direct debits. However, the FAQs also note that if taxpayers stop payments on DDIAs, they should provide enough notice to the bank to resume payments after July 15 to avoid a possible default of the IA.⁸⁴ This is a potential source of taxpayer confusion and could result in unintended IA defaults for taxpayers who simply forgot to timely resume payments.
- **Streamlined IAs.** Between April 1 and July 15, taxpayers who were eligible for streamlined IAs were still able to enter into those agreements online. Currently, the term for such streamlined IAs is up to 72 months.⁸⁵ To provide economic relief to taxpayers impacted by the COVID-19 crisis, the IRS could make a policy call to extend the term of streamlined IAs to up to 84 months. A streamlined 84-month IA would speed up the application process and eliminate the need for the taxpayer requiring a longer payoff term to submit financials on a Collection Information Statement.⁸⁶
- **Application for Non-Streamlined IAs.** Taxpayers who want to enter into an IA but are not eligible for a streamlined IA can mail Form 9465, Installment Agreement Request, as directed in the form's instructions and begin (and continue) to make payments until the IRS responds to

82 IRS Collection Activity Report 5000-1, FY 2020 (Apr. 2, 2020; Apr. 28, 2020; May 26, 2020), FY 2019 (Apr. 1, 2019; Apr. 30, 2019; May 28, 2019). Percentage change based on actual (non-rounded) dollars collected.

83 IRS, People First Initiative FAQs: Installment Agreements/Payment Plans, <https://www.irs.gov/newsroom/people-first-initiative-faqs-installment-agreements-payment-plans> (last visited June 14, 2020).

84 IRS, Installment Agreement Direct Debit Frequently Asked Questions, <https://www.irs.gov/newsroom/installment-agreement-direct-debit-frequently-asked-questions> (last visited May 8, 2020).

85 See IRS, Streamlined and Expanded Installment Agreements, <https://www.irs.gov/businesses/small-businesses-self-employed/streamlined-processing-of-installment-agreements> (last visited May 8, 2020). The availability of streamlined IAs is limited to: (1) individuals and out-of-business sole proprietors with an assessed balance of tax, penalties and interest up to \$50,000; (2) out-of-business taxpayers with assessed balances up to \$25,000; and (3) in-business taxpayers with income tax only assessed balances up to \$25,000.

86 IRM 5.19.1.6.4(11), Installment Agreements (IAs) (Sept. 26, 2018). Taxpayers whose debts were transferred to a private debt collection agency are already offered the option to enter 84-month IAs. IRC § 6306. See Caleb Smith, *Payment Alternatives in the COVID Era: A Humble Plea for Easier Access to Installment Agreements*, PROCEDURALLY TAXING BLOG, <https://procedurallytaxing.com/payment-alternatives-in-the-covid-era-a-humble-plea-for-easier-access-to-installment-agreements/> (May 6, 2020).

the Form 9465.⁸⁷ Due to the backlog of mail and taxpayer correspondence, processing of such applications will be delayed.

- Modifications of IAs.** Taxpayers whose financial circumstances have changed since setting up an IA may find it difficult to adhere to its terms. These taxpayers can attempt to modify their IAs. If the taxpayer has an assigned revenue officer (RO), he or she can work with the RO. For cases without an assigned RO, the taxpayer can attempt to modify the IA online. If the taxpayer requests a new monthly payment amount that does not meet the minimum required payment amount, the taxpayer will need to complete and submit IRS Form 433-F, Collection Information Statement. Unfortunately, the IRS will experience significant delays in processing these paper forms. In the meantime, the taxpayer should continue to pay to the extent possible. The taxpayer may need to wait until the IRS resumes operations to renegotiate the terms of the IA, including potentially converting from a full pay IA to a partial pay IA, if eligible.⁸⁸

Figure 1.2.7 shows the impact such changes have had on the dollars collected from IAs during the initial months of the national emergency compared to the same period in FY 2019.

FIGURE 1.2.7, Dollars Collected From IAs, March 2020 Through May 2020, Compared to Same Period in 2019⁸⁹

Year	March	April	May
FY 2019	\$1.302 bil	\$1.029 bil	\$980 mil
FY 2020	\$1.324 bil	\$778 mil	\$846 mil
Percent Change From 2019 to 2020	1.7%	-24.4%	-13.7%

OFFERS IN COMPROMISE

The People First Initiative provides the following relief for taxpayers with pending offer in compromise (OIC) requests and accepted OICs:⁹⁰

- Pending OICs.** The initiative permits taxpayers with pending OICs to provide requested additional information to support the OIC until July 15, 2020.⁹¹ Pursuant to the initiative, the IRS would not close any pending OIC requests before July 15, 2020, without the taxpayer’s consent. In addition, the IRS would not default a pending OIC for a taxpayer who has not filed 2018 or 2019 tax returns before July 15, 2020. TAS will assist eligible taxpayers who experience difficulty or extreme delays submitting such documentation for pending OICs.

87 IRS, Apply Online for a Payment Plan, <https://www.irs.gov/individuals/online-payment-agreement-application> (last visited May 11, 2020).

88 IRS, Additional Information on Payment Plans, <https://www.irs.gov/payments/payment-plans-installment-agreements#changeplan> (last visited May 9, 2020).

89 IRS Collection Activity Report 5000-5, FY 2020 (Apr. 2, 2020; Apr. 28, 2020; May 26, 2020), FY 2019 (Apr. 1, 2019; Apr. 30, 2019; May 28, 2019).

90 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

91 Note that the IRS has permitted the limited acceptance and transmission of documents electronically. Memorandum for All Services and Enforcement Employees, (1) Approval to Accept Images of Signatures and Digital Signatures (2) Approval to Receive Documents and Transmit Encrypted Documents by Email, by IRS Deputy Commissioner, Services and Enforcement (June 12, 2020).

- **Accepted OICs.** The initiative gives taxpayers with accepted OICs the option to suspend all payments until July 15, 2020, although interest will continue to accrue on any unpaid balances. Taxpayers can expect to experience delays and confusion as they try to navigate the extension. Payments need to commence once the suspension period ends, which could create a hardship for which the taxpayer is not prepared. Taxpayers wishing to communicate with the IRS about these payments might experience delays getting through the phone lines. In addition, the IRS will not default an OIC for taxpayers who have not filed their delinquent TY 2018 return during this period. However, the IRS warned that they need to file their TY 2019 return (if not on extension) and any delinquent TY 2018 returns to prevent the IRS from defaulting their OIC after July 15, 2020. While the initiative provides temporary relief to taxpayers, they are still responsible for making payments after July 15, which may prove difficult if a taxpayer lost a job or had a reduction in income during this time and is unable to make payments. TAS will monitor the OIC default rate, SAMS submissions, and individual TAS cases to determine how taxpayers are impacted after July 15, 2020.

LIENS

The IRS suspended most liens initiated by field ROs and new automatic systemic liens between April 1, 2020, and July 15, 2020.⁹² Thus, the IRS generally did not file Notices of Federal Tax Lien (NFTLs) from April 1 through July 15, 2020. However, the IRS emphasized that ROs would continue to pursue high-income non-filers and perform other similar activities where warranted.⁹³

Due to mail disruptions in Florence, Kentucky, the IRS did not process mailed certificate applications for lien discharges, withdrawals, and subordinations. Until normal mail operations commenced, the IRS encouraged taxpayers to submit such certificate applications by fax.⁹⁴

LEVIES

The IRS's People First Initiative provided relief to taxpayers by suspending levies between April 1, 2020, and July 15, 2020.⁹⁵ However, taxpayers still faced challenges getting releases on levies issued before April 1, 2020, as discussed below.

- **Suspension of New Levies.** The IRS suspended levies (including any seizure of personal residence) initiated by field ROs during the People First Initiative period. However, the IRS emphasized that field ROs would continue to pursue high-income non-filers and perform other similar activities where warranted. In addition, the IRS suspended automated levies like the Federal Payment Levy Program and the State Income Tax Levy Program, and the Automated

92 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>. Note that some NFTLs were filed in April and May 2020.

93 *Id.*

94 IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue (May 11, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

95 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

Collection System suspended issuing new paper levies.⁹⁶ Because the associated IRS notices are typically computer-generated in advance, some taxpayers may still have received them. TAS is currently monitoring the list of IRS backlogged notices to identify post-levy notices that were generated by automated levies that were stopped yet notices appeared to have generated. If a levy was issued before April 1 and the due date for requesting an administrative collection due process (CDP) hearing falls on or after April 1, 2020, and before July 15, 2020, under the relief provided in Notice 2020-23, that due date was postponed to July 15, 2020. Because the notices provided a different date than the postponed due date, it may cause taxpayers confusion.⁹⁷

- **Release of Levies.** The IRS did not automatically release levies issued before April 1, 2020. Taxpayers can request a release of a levy if they can demonstrate that the levy is causing an economic hardship (*i.e.*, the levy is preventing the taxpayer from meeting basic reasonable living expenses). To submit such a request, the taxpayer should work with the assigned RO, if any; call the number on the notice of levy; or fax the request.⁹⁸ Taxpayers can experience delays making such requests, and if the taxpayers' attempts are unsuccessful, TAS could assist them in obtaining a release.

Taxpayers also have limited ability to request a collection alternative to stop a levy (*e.g.*, IA, OIC). However, once the IRS resumes operations, taxpayers should determine whether they qualify for a return of levy proceeds.⁹⁹

OFFSET BYPASS REFUNDS NOT AVAILABLE DURING CRISIS

The IRS has the authority to offset a taxpayer's overpayment against any outstanding federal tax liability before issuing a refund.¹⁰⁰ The IRS has made a policy decision to bypass such offset if the taxpayer can demonstrate hardship.¹⁰¹ For nearly a week in April, while all campuses were closed, W&I did not have the ability to process Offset Bypass Refund (OBR) requests.¹⁰² When the function resumed operations, taxpayers might have had difficulty obtaining the documentation necessary to establish a hardship. Therefore, recognizing each taxpayer's fact and circumstances are unique, TAS recommends the IRS to be flexible in working with taxpayers and the type of documentation it deems acceptable.

96 IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

97 IRS, Filing and Payment Deadlines Questions and Answers, <https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers> (last visited June 9, 2020).

98 IRS, IRS Operations During COVID-19: Mission-Critical Functions Continue (May 11, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

99 IRC § 6343(b).

100 IRC § 6402(a).

101 See IRM 21.4.6.5.11.1, Offset Bypass Refund (OBR) (Nov. 8, 2017). Hardship for this purpose means economic hardship within the meaning of IRC § 6343 and the regulations thereunder.

102 The Ogden campus was the last manual refunds center to close and the first to reopen (remotely). As a result, manual refunds were not available from April 6, 2020 to April 10, 2020.

Once an offset has occurred, the IRS can only reverse the offset and issue a refund if a clerical error prevented the processing of the OBR request.¹⁰³ The IRS Office of Chief Counsel has opined that the closure of an IRS campus that processes manual refund requests does not constitute a clerical error for purposes of OBRs.¹⁰⁴ Therefore, if a taxpayer's refund was offset during the office closure, currently there is no way to reverse it, and the overpayment is applied to outstanding liabilities. The National Taxpayer Advocate recommends the IRS reconsider its decision and reverse the offset when the relevant OBR processing campus was closed during the time of the offset and the taxpayer can document (or the Local Taxpayer Advocate can attest to) a hardship. The closure of the IRS campus was out of the taxpayer's control and should not have impacted the hardship analysis for him or her to receive an OBR.

LIMITED ABILITY TO QUALIFY FOR PASSPORT DECERTIFICATIONS

During the period of the People First Initiative, the IRS suspended new passport certifications to the State Department for taxpayers who have "seriously delinquent tax debt."¹⁰⁵ This generally applies to taxpayers who owe more than \$53,000 (adjusting for inflation) in tax, interest, and penalties and who do not qualify for one of several exceptions, including taxpayers under an existing IA or OIC.¹⁰⁶ Certification to the State Department prevents taxpayers from receiving or renewing passports.

The People First Initiative did not impact existing certifications, which remain in place. The IRS has indicated that the emergency decertification procedures are currently unavailable to taxpayers.¹⁰⁷ Taxpayers with existing certifications face difficulty qualifying for a non-emergency decertification if they experience problems resolving their tax liabilities due to the delays in getting an amended return processed or an IA reviewed.¹⁰⁸

LIMITED RELIEF FOR TAXPAYERS WITH DEBTS FORWARDED TO PRIVATE COLLECTION AGENCIES

Pursuant to the People First Initiative, the IRS did not forward any new delinquent accounts to private collection agencies (PCAs) during the period of the People First Initiative.¹⁰⁹ PCAs are refraining from making outgoing calls to taxpayers with the exception of when the taxpayer has

103 IRM 13.1.24.6.2, *Advocating for Taxpayers Seeking Offset Bypass Refunds* (May 11, 2020); IRM 3.17.79.3.16(5), *Offset Bypass Refunds* (Mar. 22, 2020); IRM 21.4.6.5.11.1, *Offset Bypass Refund (OBR)* (Nov. 11, 2017). There is nothing in the Code or the Treasury regulations that gives the IRS the authority to reverse the offset when there is no longer any overpayment. A doctrine known as "clerical error," however, has been relied upon as authority for the IRS to reverse certain errors. See, e.g., *Crompton-Richmond Co. v. United States*, 311 F. Supp. 1184 (S.D.N.Y. 1970); *Bugge v. United States*, 99 F.3d 740 (5th Cir. 1996).

104 TAS, *Guidance on Offset Bypass Refund Requests During COVID-19* (Apr. 16, 2020).

105 IRS, IR-2020-59, *IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program* (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

106 IRC § 7345; IRM 5.1.12.27.4, *Discretionary Exclusions From Certification* (Dec. 20, 2017) (providing a discretionary exception for pending OICs).

107 The law provides that the Department of State may issue a passport to a certified taxpayer in emergency circumstances or for humanitarian reasons. Fixing America's Surface Transportation (FAST) Act Pub. L. No. 114-94, Div. C, Title XXII, § 32101(e)(1)(B), 129 Stat. 1312, 1729-32 (2015); IRS, *IRS Operations During COVID-19: Mission-Critical Functions Continue* (May 11, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

108 IRC § 7345.

109 IRS, IR-2020-59, *IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program* (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

requested that the PCA return his or her call and have suspended the mailing of missed/late payment reminders. Further, when a taxpayer indicates he or she is not able to pay because of the effects of the pandemic, the PCA will place a hold on the account through July 15, 2020, and the PCAs will not terminate or modify existing payment arrangements during the suspension period.¹¹⁰ It is not clear if this suspension period will be extended beyond July 15, 2020, and if the PCAs will be instructed to follow these more flexible guidelines in the months to come. We recommend that the IRS consider instructing the PCAs to follow these guidelines at least through the end of 2020.

IRS Independent Office of Appeals

As part of the People First Initiative, the IRS suspended in-person conferences.¹¹¹ IRS Notice 2020-23 provided relief to taxpayers by postponing the deadlines to request CDP hearings.¹¹²

SUSPENSION OF APPEALS IN-PERSON CONFERENCES

Throughout the pandemic, employees of the IRS Independent Office of Appeals continued to work their cases. However, as part of the People First Initiative, the IRS announced that Appeals would not hold in-person conferences with taxpayers between April 1, 2020, and July 15, 2020. Instead, conferences would be held over the telephone or by videoconference.¹¹³ We will advocate that Appeals provide the taxpayer the option of postponing conferences until in-person meetings can be conducted safely. We acknowledge that this will often lead the IRS to request an extension of the statute of limitations on assessment, of which taxpayers and practitioners need to balance the pros and cons of such approach.

While the IRS was justified in canceling in-person conferences to protect the health and safety of taxpayers, representatives, and employees, we encourage the IRS Independent Office of Appeals to resume in-person conferences as soon as it is safe to commence normal operations to protect the taxpayer's *right to appeal an IRS decision in an independent forum*. For years, TAS has stressed the importance of in-person conferences to both taxpayers and the IRS Independent Office of Appeals.¹¹⁴ An in-person conference can be essential to properly explaining and settling a controversy, particularly for cases involving factual or legal complexity, credibility of witnesses, or hazards of litigation settlements.¹¹⁵

¹¹⁰ IRS, Filing and Payment Deadlines Questions and Answers, <https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers> (last visited June 10, 2020).

¹¹¹ IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

¹¹² IRS, Notice 2020-23 2020-18 I.R.B. 742.

¹¹³ IRS, IR-2020-59, IRS Unveils New People First Initiative; COVID-19 Effort Temporarily Adjusts, Suspends Key Compliance Program (Mar. 25, 2020), <https://www.irs.gov/newsroom/irs-unveils-new-people-first-initiative-covid-19-effort-temporarily-adjusts-suspends-key-compliance-program>.

¹¹⁴ See, e.g., National Taxpayer Advocate 2017 Annual Report to Congress 197-202 (Most Serious Problem: *Appeals: The IRS Office of Appeals Imposes Unreasonable Restrictions on In-Person Conferences for Campus Cases, Even As It Is Making Such Conferences More Available for Field Cases*).

¹¹⁵ We also continue to support the expansion of virtual conferences. Taxpayers should have the option to choose the type of conference.

COLLECTION DUE PROCESS HEARINGS

Under IRC §§ 6330 and 6320, the first time the IRS issues an NFTL or an intent to levy notice to a taxpayer, it must provide the taxpayer with an opportunity to request a CDP hearing. Under normal circumstances, the taxpayer has 30 days to timely request a CDP hearing with Appeals.¹¹⁶ In a CDP hearing, the taxpayer can raise (1) appropriate spousal defenses, such as innocent spouse claims; (2) challenges to the appropriateness of the NFTL filing; or (3) offers of collection alternatives, which may include posting of bond, the substitution of other assets, an IA, or an OIC.¹¹⁷ In certain instances, the taxpayer can also challenge the existence or amount of the tax liability that arose provided the taxpayer has not otherwise had an opportunity to do so.

If the deadline for requesting an administrative CDP hearing falls on or after April 1, 2020, and before July 15, 2020, the IRS postponed that deadline to July 15, 2020.¹¹⁸ Even with this temporary relief, it is crucial for taxpayers to keep a proof of such filing to preserve their rights, especially considering the delays in processing such requests. Also, if the taxpayer has a pending CDP hearing, his or her facts and circumstances may have changed substantially as a result of COVID-19-related issues. If a taxpayer's financial circumstances have changed drastically, he or she should consider supplementing his or her existing collection proposal. This could include a lower IA payment or OIC.

Following the CDP hearing, the IRS informs the taxpayer of its decision on a notice of determination, which also notifies the taxpayer of the right to appeal the determination to the U.S. Tax Court.¹¹⁹ As discussed below, the IRS and the Tax Court postponed this filing deadline. Once a taxpayer petitions the Tax Court, he or she will often go back to Appeals to resolve the case. Many cases do not actually get litigated in court. However, it is crucial to timely file the petition to preserve the right to go to court. It is crucial that taxpayers are educated of the importance to file a timely petition even if the case will eventually be resolved through negotiation.

Office of Chief Counsel Diligently Worked to Issue Much-Needed Guidance

The IRS Office of Chief Counsel acted quickly to issue guidance to taxpayers as the COVID-19 crisis unfolded. The Families First Coronavirus Response Act (FFCRA) enacted on March 18, 2020, and the CARES Act enacted on March 27, 2020, generated guidance projects for Counsel requiring immediate attention.¹²⁰ As of June 8, 2020, over 35,500 hours had been billed to those projects with 42 pieces of guidance issued and 40 more identified for issuance.¹²¹ However, the issuance of some guidance in the format of FAQs creates potential issues. The tolling of judicial filing deadlines in

¹¹⁶ IRC §§ 6320, 6330(a), and (b).

¹¹⁷ IRC § 6330(c)(2).

¹¹⁸ IRS, Notice 2020-23 2020-18 I.R.B. 742; Keith Fogg, *Further Thoughts on Notice 2020-23*, PROCEDURALLY TAXING BLOG, <https://procedurallytaxing.com/further-thoughts-on-notice-2020-23/> (Apr. 14, 2020). The IRS informs the taxpayer of the right to request a CDP administrative hearing on notices such as Letter 1058, Final Notice of Intent to Levy and Notice of Your Right to a Hearing (notice of intent to levy), or Letter 3172, Notice of Federal Tax Lien and Your Rights to a Hearing Under IRC 6320.

¹¹⁹ See, e.g., IRS Letter 3193, Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code (notice of determination).

¹²⁰ FFCRA, Pub. L. No. 116-127, 134 Stat. 178 (2020); CARES Act, Pub. L. No. 116-136, 134 Stat. 281 (2020).

¹²¹ Information Provided by Division Counsel/Associate Chief Counsel (National Taxpayer Advocate Program) (June 13, 2020).

IRS Notice 2020-23 was supplemented by FAQs to account for the uncertainty surrounding the date on which the U.S. Tax Court will reopen.

THE PROS AND CONS OF INFORMAL GUIDANCE

In an effort to issue guidance quickly in the face of widespread closures of core IRS functions as well as the enactment of the FFCRA and CARES Act, the IRS issued guidance in the form of FAQs.¹²² FAQs do not rise to the level of “published guidance,” and taxpayers cannot rely on them to establish substantial authority to avoid penalties for inaccurate reporting.¹²³ Actual reliance on an FAQ, however, is a factor in determining whether the taxpayer took a tax position with reasonable cause and in good faith so as to avoid a penalty. We will work to protect the taxpayer’s *right to be informed* by encouraging the Office of Chief Counsel to issue more formal guidance for legally significant issues. However, we acknowledge that the time to draft, review, and allow for public comment is lengthy, which will not allow for formal guidance to be issued before temporary relief measures have expired. Nevertheless, formal guidance is necessary for substantive issues.

In the meantime, taxpayers and practitioners are understandably concerned about relying upon the FAQs published by the IRS. To alleviate this concern, TAS will encourage the IRS to publicly state that they will follow the FAQs issued during the COVID-19 pandemic. TAS will encourage the IRS to publish a statement in the *Federal Register* that says (1) the IRS must number and provide effective dates for all FAQs and will be prohibited from deleting previously issued guidance from its website even if it has changed its position (indicating when an FAQ is obsolete, if applicable), and (2) for penalty relief purposes, taxpayers can rely on FAQs as authority for returns filed for taxable periods ending before an FAQ is obsoleted.¹²⁴ The former will add permanence and prevent the IRS from changing an FAQ without leaving any evidence.¹²⁵ If the IRS decides to change an FAQ, it should add to the FAQ instead of deleting it. For example, if the IRS changes its position with respect to the guidance included in FAQ 10, it will provide the effective dates of FAQ 10, and add FAQ 10.1 with the new position and applicable effective dates. The IRS should also consider moving obsolete FAQs to a taxpayer-accessible archive, which can be used for historical purposes, but would be presented in a way that would not confuse taxpayers as to which rule is applicable.

122 See, e.g., IRS, Filing and Payment Deadlines Questions and Answers, <https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers> (last visited May 12, 2020).

123 Taxpayers can sometimes avoid penalties with respect to tax return positions that are supported by “substantial authority” even if the IRS disagrees with the positions. IRC § 6662(d)(2)(B); Treas. Reg. §§ 1.6662-4(a) and -4(d). For this purpose, “authorities” include, among other sources, the IRC, Treasury regulations, other guidance published in the Internal Revenue Bulletin (IRB), and “IRS information or press releases.” Treas. Reg. § 1.6662-4(d)(3)(iii). FAQs are not always published in the IRB and the scope of “IRS information” is undefined. Therefore, taxpayers cannot be sure that they can treat FAQs posted to an IRS website as “authority” for the purpose of avoiding penalties.

124 Alternatively, the IRS could clarify that FAQs are equivalent to “IRS information” under Treas. Reg. § 1.6662-4(d)(3)(iii).

125 Currently, the lack of permanence for FAQs leads many practitioners to print or take screen shots of every FAQ upon which they rely. However, this practice is burdensome and is not intuitive for unsophisticated taxpayers. Nina E. Olson, *IRS Frequently Asked Questions Can Be a Trap for the Unwary*, NTA Blog, <https://taxpayeradvocate.irs.gov/news/irs-frequently-asked-questions-can-be-a-trap-for-the-unwary> (July 16, 2017).

TOLLING OF JUDICIAL DEADLINES

IRS Notice 2020-23 postponed until July 15 deadlines for filing petitions or complaints with the U.S. Tax Court that expire on or after April 1 and before July 15, 2020.¹²⁶ The IRS has also stated that taxpayers can take full advantage of the relief provided by Notice 2020-23 as well as the relief provided in *Guralnik v. Commissioner*.¹²⁷ Thus, taxpayers have until the later of the agency's postponed deadline or the Court's reopening date to file their petitions.¹²⁸ Because the Court's clerk office closed on March 19, 2020, the relief period recognized by the IRS is extended to start on March 19, per *Guralnik*, rather than April 1, per Notice 2020-23. It is also possible that *Guralnik* will extend the end date of the relief beyond July 15, depending on the date the clerk's office reopens.¹²⁹

Considering that the deadline to file a petition with the U.S. Tax Court has serious legal consequences, the ABA Section of Taxation suggested that the relief in Notice 2020-23 did not go far enough. The ABA recommended tolling judicial filing deadlines between January 20, 2020, and July 14, 2020, until 60 days after the later of (1) July 15 or (2) the date on which the relevant court clerk's office opens, in accordance with IRC § 7508A(d)(1)(B).¹³⁰ To protect the taxpayer's *right to appeal an IRS decision in an independent forum*, TAS plans to encourage the Office of Chief Counsel to explore the feasibility of further tolling the judicial filing deadlines to the full extent authorized by IRC § 7508A.

FLEXIBILITY WITH TAXPAYERS WHO MISS DEADLINES

Given the uncertainty inherent in the U.S. Tax Court closure, taxpayers who do not diligently check the Court's website might miss notification of its opening. While the Court will not have jurisdiction on a case if the associated petition is untimely filed, TAS will encourage the Office of Chief Counsel and the IRS to exercise flexibility by continuing to work with those taxpayers who no longer have a prepayment forum for judicial review.¹³¹ For example, the IRS and Office of Chief Counsel could continue to work with the taxpayer to find an administrative remedy, such as educating the taxpayer about the audit reconsideration process rather than forcing the taxpayer to pay the liability and sue for a refund.

¹²⁶ Specifically, Notice 2020-23 postpones the deadlines for the time for filing all petitions with the Tax Court, for review of a decision rendered by the Tax Court, filing a claim for credit or refund of any tax, and bringing suit upon a claim for credit or refund of any tax. IRS Notice 2020-23 2020-18 I.R.B. 742.

¹²⁷ *Guralnik v. Comm'r*, 146 T.C. 230 (2016). This relief includes the time for filing all petitions with the Tax Court, or for review of a decision rendered by the Tax Court, filing a claim for credit or refund of any tax, and bringing suit upon a claim for credit or refund of any tax. In *Guralnik*, the Tax Court held that its jurisdictional court filing deadlines cannot elapse on days when the court is unavailable. In *Guralnik*, the problem had been a blizzard, whereas now it is the pandemic.

¹²⁸ The Tax Court has indicated that the court will post an announcement on its website about reopening its building and mailing address as early as possible in order to avoid a sudden *Guralnik* deadline, if applicable. Nathan J. Richman, *IRS Embraces Later Tax Court Filing Deadlines*, 167 TAX NOTES TODAY 879 (May 4, 2020).

¹²⁹ IRS, Filing and Payment Deadlines Questions and Answers, <https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers> (last visited May 12, 2020).

¹³⁰ The ABA chose January 20, 2020 as the beginning of the recommended relief period because every FEMA Major Disaster Declaration related to the COVID-19 emergency lists January 20, 2020 as the start date of the "Incident Period." Letter from Tom Callahan, Chair, Section of Taxation, ABA, to Charles P. Rettig, Comm'r, I.R.S., Specific Substantive and Procedural Provisions Impacted by the COVID-19 Emergency (Apr. 29, 2020), <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2020/042920comments.pdf>.

¹³¹ IRC § 6213.

U.S. Tax Court

The U.S. Tax Court closed its doors and canceled trial sessions in response to COVID-19 but has encouraged the parties to continue to address pending issues.¹³² The Virtual Settlement Days program is aimed at accomplishing the resolution of cases before litigation, albeit remotely.¹³³

CANCELED TRIAL SESSIONS AND MAIL DISRUPTION

The Tax Court closed on March 19, 2020, and canceled trial sessions from March 16, 2020, through June 30, 2020.¹³⁴ On May 29, 2020, the Court adopted procedures for conducting Court proceedings remotely. These procedures will be in effect until further notice.¹³⁵

For those taxpayers and practitioners who attempted to file documents with the Tax Court after it closed, the court did not open mail and, in some cases, the mail was returned as undeliverable. The Tax Court's website instructed taxpayers to resend any returned documents, including the original envelope, to the court as soon as possible after the court announces it has resumed receiving mail. Returned mail will likely cause anxiety for taxpayers. It is crucial that taxpayers keep a copy of the submitted document, proof of timely mailing through a designated delivery service, and an original envelope, if applicable, to preserve important judicial appeal rights.¹³⁶

VIRTUAL SETTLEMENT DAYS

The Tax Court press releases canceling the trial sessions state that the court expects that parties will continue to work together to exchange information and address pending issues.¹³⁷ The IRS Office of Chief Counsel recently announced that the Virtual Settlement Days program will continue remotely enabling unrepresented taxpayers to work toward resolving their pending Tax Court cases despite “stay-at-home” orders in many jurisdictions. Virtual Settlement Days are a coordinated effort to resolve Tax Court cases by giving *pro se* taxpayers the opportunity to receive free tax advice and possible representation from Low Income Taxpayer Clinics (LITCs) or other *pro bono* organizations. The program is geared to help unrepresented taxpayers receive free assistance in discussing a potential fair settlement of their tax disputes in an informal setting without the need for further litigation or a trial in the Tax Court. Taxpayers can discuss their cases and other federal tax issues with members of the IRS Office of Chief Counsel, Appeals, and Collections.

132 U.S. Tax Court, Press Release (Mar. 11, 2020); U.S. Tax Court, Press Release (Mar. 13, 2020); U.S. Tax Court, Press Release (Mar. 18, 2020); U.S. Tax Court, Press Release (Mar. 23, 2020); U.S. Tax Court, Welcome, <https://www.ustaxcourt.gov/> (last visited May 12, 2020).

133 IRS, IR-2020-87, IRS Retools Settlement Days Program in Response to COVID-19 Pandemic; Allows Unrepresented Taxpayers to Settle Their Cases Virtually and Reach Finality (May 5, 2020), <https://www.irs.gov/newsroom/irs-retools-settlement-days-program-in-response-to-covid-19-pandemic-allows-unrepresented-taxpayers-to-settle-their-cases-virtually-and-reach-finality>.

134 U.S. Tax Court, Press Release (Mar. 11, 2020); U.S. Tax Court, Press Release (Mar. 13, 2020); U.S. Tax Court, Press Release (Mar. 18, 2020); U.S. Tax Court, Press Release (Mar. 23, 2020); U.S. Tax Court, Welcome, <https://www.ustaxcourt.gov/> (last visited May 12, 2020).

135 U.S. Tax Court, Administrative Order No. 2020-02, https://www.ustaxcourt.gov/admin_orders/Admin_Order_No_2020-02.pdf (June 2, 2020). Public access to the Court's remote proceedings will be made available via real-time audio with dial-in information for each session posted on the Court website.

136 U.S. Tax Court, Welcome, <https://www.ustaxcourt.gov/> (last visited May 12, 2020).

137 See, e.g., U.S. Tax Court, Press Release (Mar. 23, 2020).

The first Virtual Settlement Days events were held in May in Detroit and Atlanta. Between both offices, more than 50 taxpayer cases were resolved. As a result of the program's success, the Office of Chief Counsel expanded Virtual Settlement Days to other offices and will host events more frequently. Additional offices scheduled to participate in the program include Los Angeles and Washington, D.C., as well as more events in Atlanta.¹³⁸

TAS plans to work with the other participating organizations to have an official role in the initiative.¹³⁹ TAS can assist taxpayers in resolving tax issues relating to tax years not yet before the court. By having TAS present with the Office of Chief Counsel, Appeals, Collection, and LITCs, the Virtual Settlement Days program can truly provide a one-stop resolution experience for taxpayers in a remote environment.

Impact of the COVID-19 Crisis on TAS Operations

TAS took early action to ensure its employees were telework-ready. By the time the IRS mandated that employees work at home, TAS had already made all of its employees telework-eligible and asked them to work remotely, allowing TAS operations to continue with fewer disruptions than most other IRS functions.¹⁴⁰ While TAS was in a better position than many IRS functions to quickly adapt to working remotely, moving all employees out of the offices did have serious consequences to our operations and advocacy efforts. Despite all the obstacles, TAS employees continued to assist taxpayers. In addition, TAS created a COVID-19 Rapid Response Team to address systemic issues by identifying emerging tax problems caused by the pandemic, raising the issues to the relevant IRS functions, and monitoring progress toward resolution.¹⁴¹

Inability to Access Paper Case Files and Send or Receive Mail

TAS employees, including employees in the Case Advocacy function in the local offices, could not access paper case files while teleworking. In addition, they could not receive or send mail for many weeks during the crisis. Initially, designated TAS employees would visit the offices to open and scan incoming mail as well as print correspondence and mail letters to taxpayers and representatives.¹⁴² However, this practice quickly stopped as state and local governments imposed stay-at-home restrictions on individuals and business operations across the country, and the IRS ultimately ceased most mail processing and ordered employees to telework. As the IRS is beginning to reopen offices and resume mail service, TAS is sending designated employees into those offices to process the mail

138 IRS, IR-2020-112, IRS Chief Counsel Goes Virtual With National Settlement Days; Helps Dozens of Taxpayers Settle Their Tax Court Cases (June 4, 2020), <https://www.irs.gov/newsroom/irs-chief-counsel-goes-virtual-with-national-settlement-days-helps-dozens-of-taxpayers-settle-their-tax-court-cases>.

139 IRS, IR-2020-87, IRS Retools Settlement Days Program in Response to COVID-19 Pandemic; Allows Unrepresented Taxpayers to Settle Their Cases Virtually and Reach Finality (May 5, 2020), <https://www.irs.gov/newsroom/irs-retools-settlement-days-program-in-response-to-covid-19-pandemic-allows-unrepresented-taxpayers-to-settle-their-cases-virtually-and-reach-finality>.

140 TAS Special Edition, TAS Takes Measures to Protect Employees and Taxpayers (Mar. 16, 2020); TAS Interim Guidance Memorandum (IGM), TAS-13-0320-0006, Interim Guidance – Advocating for Taxpayers While Preventing the Spread of COVID-19 (Mar. 17, 2020).

141 Taxpayer, practitioners, and other IRS employees submit systemic COVID issues through TAS's Systemic Advocacy Management System (SAMS).

142 TAS Special Edition, TAS Takes Measures to Protect Employees and Taxpayers (Mar. 16, 2020); TAS IGM, TAS-13-0320-0006, Interim Guidance - Advocating for Taxpayers While Preventing the Spread of COVID-19 (Mar. 17, 2020).

and send correspondence to taxpayers. TAS employees still do not have regular access to review critical paper case files necessary to take action on cases, causing delays in certain cases.

NTA Toll-Free Line Closure and Negative Impact on TAS Centralized Case Intake Operations

Taxpayers seeking TAS assistance can reach TAS by phone by either calling the National Taxpayer Advocate Toll-Free (NTATF) phone line or by calling the local TAS office phone lines. The NTATF phone line is staffed by W&I, which initially screens the calls to determine if the case meets TAS case criteria and then directly transfer the calls to TAS's Centralized Case Intake (CCI) function. While teleworking, TAS CCI employees could not initially take direct transfer calls from the NTATF phone line.¹⁴³ To address this issue, TAS negotiated workaround procedures with W&I to enable CCI employees to receive referrals electronically. These workaround procedures were short-lived due to the temporary closure of the phone line on March 23, 2020.¹⁴⁴ Without W&I answering calls on the NTATF line, the only way for taxpayers to contact TAS about their tax problems was for them to call their local TAS office, leading to a spike in call volumes on those local lines, as discussed below. TAS quickly reassigned CCI Intake Advocates to assist with retrieving messages and returning taxpayer calls from the local phone lines. In the interim, TAS partnered with the IRS to provide its CCI employees with the capability to remotely answer phone calls from a telework location. When W&I reopened the NTATF line on May 18, 2020, TAS was immediately able to resume answering calls transferred directly from the NTATF line, even while teleworking, and ensure continued service to taxpayers in need of TAS assistance.¹⁴⁵

Increased Call Volumes on TAS Local Office Lines

The COVID-19 crisis occurred during the 2020 filing season, a time when TAS was already experiencing high call volumes on our phone line.¹⁴⁶ During the period that the IRS closed the phone lines supported by CSRs, the IRS began administering EIPs.¹⁴⁷ Many taxpayers and congressional offices directed their EIP questions to the local TAS office because they did not have anywhere else to call to talk to an IRS employee. The NTATF line was not staffed by W&I during initial distributions of EIPs, resulting in taxpayers calling their local TAS office, causing a spike in the calls the local offices receive and overwhelming their voice messaging systems. Due to the lack of an IRS process to address EIP issues, TAS could not work those cases.¹⁴⁸ TAS instituted a gating process on its local office phone lines to direct taxpayers with EIP questions to the IRS website. To

143 TAS Special Edition, *TAS Takes Measures to Protect Employees and Taxpayers* (Mar. 16, 2020); TAS IGM, *TAS-13-0320-0006, Interim Guidance - Advocating for Taxpayers While Preventing the Spread of COVID-19* (Mar. 17, 2020).

144 TAS, *Daily CCI/NTATF*, as of Monday 3/23/2020 (Mar. 24, 2020).

145 IRS SERP Alert 20A0204, *W&I Will Staff NTA Applications on May 18, 2020* (May 15, 2020).

146 For example, on Monday, March 16, the NTATF line received 5,055 calls and, of those calls, 2,359 calls were transferred to CCI. TAS, *Daily CCI/NTATFL*, as of Monday 3/16/2020 (Mar. 17, 2020). In addition, the local office phone lines received 2,164 calls (the local office call volumes were manually collected based on the contact records entered in TAMIS).

147 On May 18, 2020, the IRS began to add about 3,500 customer service representatives on the phones to answer EIP common questions. IRS, *IR-2020-97, IRS Adds Phone Operators to Answer Economic Impact Payment Questions* (May 18, 2020), <https://www.irs.gov/newsroom/irs-adds-phone-operators-to-answer-economic-impact-payment-questions>. See Systemic Advocacy Objective: *Reducing Burden Resulting From the Implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, *infra*.

148 See Systemic Advocacy Objective: *Reducing Burden Resulting From the Implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act*, *infra*.

best serve taxpayers, we further gated calls between taxpayers with an existing TAS case and those looking to open a new case to enable TAS to efficiently respond to taxpayers. As noted above, while the NTATF line was closed, CCI staff assisted with retrieving messages and returning taxpayer calls to the local phone lines.

Figure 1.2.8 details the number of calls to the local TAS phone lines during the initial months of the national emergency across the United States, compared to the same period in 2019.

FIGURE 1.2.8, Calls Answered by Local TAS Office¹⁴⁹

Week Ending	Total Calls Answered on Local Lines 2020	Total Calls Answered on Local Lines 2019	% Change From 2019 to 2020
March 9, 2020	2,404	2,168	10.9%
March 15, 2020	2,164	1,959	10.5%
March 22, 2020	2,033	2,036	-0.1%
March 29, 2020	3,571	1,762	102.7%
April 5, 2020	5,748	1,749	228.6%
April 12, 2020	6,355	2,028	213.4%
April 19, 2020	6,545	1,908	243.0%
April 26, 2020	9,017	1,987	353.8%
May 3, 2020	8,074	1,711	371.9%
May 10, 2020	7,514	1,920	291.4%
May 17, 2020	6,507	2,048	217.7%
May 24, 2020	4,085	2,027	101.5%
May 31, 2020	3,144	1,646	91.0%

Closure of IRS Functions Limited Ability to Send Operations Assistance Requests

When a taxpayer seeks assistance from TAS but TAS lacks the statutory or delegated authority to resolve the taxpayer's problem, it works with the responsible IRS business operating division (BOD) or function to resolve the issue. For example, if a taxpayer seeks a penalty abatement based on reasonable cause, TAS can perform all the necessary research and analysis to determine if the taxpayer qualifies for such abatement, but it cannot make the adjustment, so it advocates for the taxpayer by issuing an Operations Assistance Request (OAR) requesting the IRS abate the penalty. Generally, TAS completes IRS Form 12412, Operations Assistance Request (OAR), to request the IRS take the specified action on a taxpayer's account.¹⁵⁰ To effectively advocate for taxpayers in the continuously evolving environment, TAS employees were required to triage case workload to assist those taxpayers experiencing an economic burden where TAS had the ability to take actions

¹⁴⁹ TAS BOE Report (weeks ending Mar. 9, 2020, through May 31, 2020, and weeks ending Mar. 9, 2019 through June 1, 2019). The call volumes were manually collected based on the contact records entered in TAMIS. Because these calls were manually collected, they reflect only a small percentage of the number of calls received by TAS. For example, for the week ending May 31, 2020, TAS manually collected a total of 3,144 calls. However, a systemic collection showed a total of 28,493 of which only 41 percent (11,771) were calls requesting TAS assistance. TAS Application Summary (week ending May 31, 2020).

¹⁵⁰ IRM 13.1.19.1, TAS OAR Process Overview (Nov. 14, 2014).

to resolve the taxpayer’s issue.¹⁵¹ Many IRS operations were completely closed and unable to receive or process OAR requests. Others were working with significantly reduced staffing. Because the status of IRS functions changed on a daily basis, TAS developed and continually updated an internal online tool, the COVID-19 Case Processing Changes site, to enable employees to easily determine the status of IRS functions in different offices, including any special instructions or limitations on the work the functions could perform. Case Advocacy employees used this online tool to determine how to handle cases and where to send OARs. TAS met weekly with representatives from the IRS BODs to identify new ways to resolve taxpayer issues. As part of the discussions, TAS determined the types of work the IRS could perform while teleworking, the IRS units that have staff returning to specific locations (even if staffing is reduced), and resources available to perform the work. When an IRS function resumed operations and began processing OARs, TAS prioritized its cases to first send to the BOD or function the OARS for taxpayers experiencing the most extreme hardships.¹⁵²

TAS recognized the need to manage expectations and provide information to taxpayers. To accomplish this, TAS created a Coronavirus (COVID-19) Tax Relief page on the TAS website to keep taxpayers updated. The webpage provides TAS customers case-related alerts.¹⁵³

Decline in Case Receipts and Closures

Prior to the COVID-19 crisis, in FY 2020, TAS case receipts had increased nine percent when compared to the same period in FY 2019.¹⁵⁴ However, during the pandemic, despite the increase in phone calls to the local lines, TAS receipts dropped by eight percent through May 2, 2020, compared to the same period in FY 2019.¹⁵⁵ Figure 1.2.9 shows that TAS received nearly 50 percent fewer cases in April 2020 compared to April 2019. Figure 1.2.9 shows that TAS case closures dropped by 17 percent when comparing April 2020 to April 2019, due mainly to the inability of IRS functions to take actions to resolve the tax issues. TAS is closely monitoring IRS operations for reopening to initiate actions needed to assist taxpayers.

FIGURE 1.2.9, TAS Receipts and Closures, April 2019 and 2020¹⁵⁶

	Receipts	Closures
April 2019	28,253	24,149
April 2020	14,256	20,096
Percent Change	-49.5%	-16.8%

151 TAS IGM, TAS-13-0320-0008, Interim Guidance – Strong Advocacy in the COVID-19 Environment (Mar. 27, 2020).

152 *Id.*

153 TAS, Coronavirus (COVID-19) Tax Relief, <https://taxpayeradvocate.irs.gov/get-help/taxupdates> (last visited May 31, 2020).

154 Through March 14, 2020, TAS received 84,741 cases compared to 77,677 cases for the same period in FY 2019. Data obtained from TAMIS.

155 Through May 2, 2020, TAS received 115,109 cases compared to 125,258 cases for the same period in FY 2019. Data obtained from TAMIS (May 3, 2019; May 3, 2020). TAS did not take EIP cases during the initial months. Memorandum from Deputy National Taxpayer Advocate for Taxpayer Advocate Service Employees: Interim Guidance – Economic Impact Payments and TAS Case Acceptance (May 14, 2020).

156 Data obtained from TAMIS (May 1, 2019; May 1, 2020).

The COVID-19 crisis has had a significant impact on how TAS received new cases. While taxpayers previously accessed TAS assistance through various means, their options were temporarily limited. In FY 2019 through April 2019, 63 percent of TAS case receipts were referrals from IRS BODs and 18 percent came from calls to the NTATF Line. With the closure of IRS offices and the shutdown of toll-free telephone operations, including the NTATF Line, cases received through those methods dramatically dropped. The impact on TAS case receipts is shown in Figure 1.2.10. Comparing April 2019 to April 2020, case receipts from IRS BOD referrals decreased by 97 percent. Cases received through calls to the NTATF Line decreased by 77 percent, and cases received through calls to the TAS CCI line decreased by 99 percent. At the same time, cases received from calls to TAS local offices increased by 286 percent and cases received through congressional calls increased by 433 percent.¹⁵⁷

FIGURE 1.2.10, TAS Case Receipts by Method Received, Percent Change From April 2019 to April 2020¹⁵⁸

How Received	Percent Change April 2019 to April 2020
Form 911 or Correspondence	23.5%
NTA Toll-Free	-76.8%
IRS Referral	-97.0%
TAS Phone Call	286.3%
Congressional	433.4%
TAS Walk-In	-93.8%
Centralized Case Intake	-98.7%
TOTAL	-49.5%

Inability to Conduct Face-to-Face Training

During the COVID-19 crisis, TAS suspended all face-to-face training classes, including sessions with On-the-Job Instructors for new hires. While TAS diligently develops virtual training, the temporary suspension of training has impacted and will continue to impact the readiness of employees, especially new hires, during the remainder of the 2020 filing season as well as post-filing season when examination and collection cases increase.¹⁵⁹

Inability to Conduct Face-to-Face Outreach

All face-to-face taxpayer and tax practitioner outreach and education activities, including the TAS Mobile Outreach Van, were canceled during the COVID-19 crisis to maximize social distancing and comply with state and local orders. Even though face-to-face outreach is an effective way to inform taxpayers of their rights as well as the availability of TAS assistance in resolving tax problems with the IRS, COVID-19 left us no choice but to cancel.¹⁶⁰ TAS moved to a virtual outreach model and

¹⁵⁷ Data obtained from TAMIS (May 1, 2019; May 1, 2020).

¹⁵⁸ *Id.*

¹⁵⁹ TAS, TAS Transitioning to Virtual Training During COVID-19 (Apr. 22, 2020).

¹⁶⁰ See TAS Research: *Identifying Prospective TAS Taxpayers, infra*; *Case Advocacy and TAS Business Objectives: Efforts to Improve Advocacy, infra.*

will continue to conduct virtual outreach to the extent possible, including congressional outreach and other online resources.

PREPARATION FOR THE NEXT SIGNIFICANT EMERGENCY

Once the IRS resumes normal operations, it is crucial to evaluate the challenges the agency faced in providing taxpayer services and conducting mission-critical functions including compliance initiatives during the COVID-19 crisis. The IRS must prepare for the next national emergency, based on the lessons it learned from this crisis. While the circumstances of the next incident will differ, the IRS can take actions now to ensure that the agency's core operations will continue in the face of similar challenges. This will require each function taking a hard look at what worked and what did not in the face of this unexpected and unprecedented event.

IRS BODs and functions that were able to quickly adapt to teleworking and transact digitally with each other and with taxpayers were more adaptable than those with operations that were less portable. Improved technology (both hardware and software) and the ability to work and interact digitally will allow the IRS to be flexible and agile and move its operations between offices or even to remote locations when a disaster hits an area. Not all operations will function seamlessly in a remote environment, but the IRS will be better positioned if it is not such a paper-based organization. Accordingly, the National Taxpayer Advocate recommends that the IRS prioritize the modernization of its technology as well as increase the use of digital communications and the electronic production of documents in a secure environment. While we continue to believe that the IRS should provide taxpayer services in an omnichannel environment, it must have the ability to continue operations should one or more of the service channels shut down through no fault of the agency. The IRS should analyze all of the core functions to determine how to improve technology to make the duties more portable in the future. While the next crisis will certainly present different challenges, the IRS will be in a better position to address it if it takes the steps now rather than as the crisis unfolds in the future.

OBJECTIVES FOR FISCAL YEAR 2021

In fiscal year 2021, TAS will:

- Work with the IRS to reduce taxpayer burden as it develops further procedures to address the COVID-19 crisis as well as future disasters, especially by demonstrating flexibility when conducting compliance initiatives (*e.g.*, accepting alternative documentation, extending information request response deadlines, relaxing the definition of reasonable cause for penalty relief, postponing time-sensitive deadlines to the extent authorized under IRC § 7508A, etc.);
- Work with the IRS to alleviate taxpayer confusion resulting from the backlog of time-sensitive notices;
- Encourage the IRS to prioritize, evaluate, and determine the feasibility of extending the use of electronic communications, including emails, the exchange of digital documents, and digital signatures beyond 2020 for all functions within the IRS;

- Encourage the IRS to extend the term of streamlined IAs to up to 84 months. A streamlined 84-month IA would speed up the application process and eliminate the need for the taxpayer requiring a longer pay-off term to submit financials on a Collection Information Statement;
- Encourage the IRS Office of Appeals to resume in-person conferences once it is safe to do so to protect the taxpayer's *right to appeal an IRS decision in an independent forum*;
- Encourage the Office of Chief Counsel to issue more formal guidance for legally significant issues occurring during the COVID-19 pandemic. TAS will encourage the IRS to publish a statement in the *Federal Register* that says (1) the IRS must number and provide effective dates for all FAQs and will be prohibited from deleting previously issued guidance from its website even if it has changed its position (indicating when an FAQ is obsolete, if applicable), and (2) for penalty relief purposes, taxpayers can rely on FAQs as authority for returns filed for taxable periods ending before an FAQ is obsoleted;
- Encourage the Office of Chief Counsel to explore the feasibility of further tolling judicial filing deadlines to the full extent authorized by IRC § 7508A to protect the taxpayer's *right to appeal an IRS decision in an independent forum*;
- Encourage the Office of Chief Counsel and the IRS to exercise flexibility by continuing to work with those taxpayers who missed the judicial filing deadlines and thus no longer have a prepayment forum for judicial review; and
- Utilize TAS's COVID-19 Rapid Response Team and other mechanisms to address disaster-related systemic issues by monitoring and identifying emerging tax problems associated with disasters of all sorts and raise these issues with the IRS.

Reducing Burden Resulting From the Implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

OVERVIEW

While the IRS did an impressive job implementing the provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act — particularly under these unprecedented circumstances — there have been several issues in implementing the CARES Act’s most significant provisions. Although the IRS has issued nearly 160 million Economic Impact Payments (EIPs), many individuals as of June 3, 2020, for a variety of reasons, have either not received the full EIP amount to which they are entitled or received an EIP at all. In most cases, these individuals will have to wait until 2021 to receive either their EIP or the full amount. Because these individuals are likely experiencing financial distress *now*, the National Taxpayer Advocate recommends the IRS continue to work on solutions and alternatives to ensure that all individuals receive the EIP in its entirety in 2020 rather than having to wait until 2021 when they file their 2020 income tax returns.

The Employee Retention Credit (ERC) is a complex refundable tax credit that employers can claim. Several of these complexities come from the determination of when a trade or business was fully or partially suspended by government order; an employer’s number of full-time employees; what are qualified wages; if a business’s post-COVID-19 operations are comparable to its pre-COVID-19 operations; and the application of aggregation rules.

To address these complexities, the IRS has provided considerable guidance on when and how to claim the ERC; however, several areas demand further clarification. If clarity is not provided, taxpayers will be more likely to make errors when claiming the credit, possibly resulting in an audit. Having to untangle these issues in an audit environment would drain the limited resources of both the IRS and businesses affected by COVID-19. Thus, TAS will continue to advocate that the IRS is as transparent and clear as possible regarding when and how employers should claim this credit.

Another area of complexity is the Paycheck Protection Program (PPP). If businesses meet certain requirements, loans administered through the PPP will be forgiven. To ensure this did not create a taxable event, Congress excluded forgiveness of this loan from taxable income. Thus, the question

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

became whether employers could still deduct expenses paid with this loan when the loan was forgiven and no cancellation of debt income was generated.² Issues such as this will cause taxpayer confusion, increasing the likelihood that taxpayers will make mistakes when they file returns, possibly resulting in an IRS examination, and causing yet another drain on the resources of both taxpayers and the IRS.³

Other provisions of the CARES Act are designed to provide relief by allowing businesses to utilize Net Operating Losses (NOLs) to offset prior taxable income and in some cases provide them access to refunds. For businesses to determine the optimal application of the CARES Act NOL provisions, they may need to develop complex models involving multiple tax years. The guidance the IRS has provided in the form of frequently asked questions (FAQs), while timely, is not authoritative or binding on the IRS.

The following discussion will examine these concerns in more detail and provide recommendations regarding how the IRS should address these issues.

DISCUSSION

On March 27, 2020, the President signed into law the CARES Act.⁴ The primary goal of this act was to provide fast and direct economic assistance for American workers, families, and small businesses. This was to relieve economic distress due to the many restrictions put in place to slow the spread of COVID-19. [For an overall discussion of the tax administrative impact of COVID-19, see Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services.*]

Among other things, this Act:⁵

- Offered an advance recovery rebate credit (hereafter referred to as “economic impact payments” or EIP)⁶ for individuals;⁶
- Created an ERC for employers;⁷

² IRC § 265(a)(1) and Treas. Reg. § 1.265-1 provide that no deduction is allowed to a taxpayer for any amount otherwise allowable as a deduction to such taxpayer that is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by subtitle A of the Code.

³ Colleen Murphy, *Loan Program Raises Fraud Worries for IRS*, BLOOMBERG TAX (June 3, 2020). Adding to this challenge is the IRS’s major concern that the PPP is being exploited by individuals fraudulently applying for PPP loans. “With just the sheer amount of money that’s going out, we know that when this type of situation happens, fraudsters are on high alert and ramp up all of the efforts they possibly can to get money from the government,” said Don Fort, Chief of the IRS Criminal Investigation Division. *Id.*

⁴ The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁵ *Id.* Section 2302 of the CARES Act provides that employers may defer the deposit and payment of the employer’s portion of Social Security taxes and certain railroad retirement taxes. Section 2302(a)(3) of the CARES Act provides that section 2302 will not apply if the taxpayer “has had indebtedness forgiven under section 1106 of the CARES Act.”

⁶ CARES Act, Pub. L. No. 116-136, § 6428, 134 Stat. 281 (2020) (2020 Recovery Rebates for Individuals). When discussing the EIP, we will use the term “individual(s)” as not all recipients filed a tax return to receive the EIP. In the remaining sections of the piece, we will use the term “taxpayer(s).”

⁷ CARES Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281 (2020) (Employee Retention Credit for Employers Subject to Closure due to COVID-19).

- Created the PPP;⁸ and
- Allowed taxpayers with NOLs to carry them back to offset income in prior years and obtain refunds.⁹

During the pandemic, the primary concern of the IRS's leadership was the health and safety of its employees, and to that end, the IRS shut down many of its operations that could not be conducted remotely, including the temporary closing of IRS campuses and the shutdown of all IRS taxpayer assistance phone lines.¹⁰ These steps, although necessary and something the IRS could not prepare for due to the crisis's unexpected nature, created an extremely challenging environment for the IRS to implement the provisions set out in the CARES Act.¹¹ This situation was further aggravated by years of crippling budget cuts, cumbersome paper-based systems, and the challenges of teleworking.¹² Despite these challenges, the IRS has performed admirably and has overall successfully worked to swiftly distribute much-needed EIPs to individuals while providing comprehensive guidance on how to obtain all the tax benefits provided by the CARES Act and other legislation passed to address the effects of the pandemic.¹³

Additionally, the IRS implemented an outreach campaign, working with partners in both the public and private sectors, to ensure that all eligible individuals — particularly vulnerable individuals such as the elderly, disabled, veterans, and those with limited English proficiency — were aware of the EIP and what, if anything, they needed to do to receive it. This included providing outreach materials in more than two dozen languages.¹⁴ The IRS is continuing its outreach programs to identify and send payments to these underserved populations.¹⁵

8 CARES Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281 (2020) (7(a) loan program).

9 CARES Act, Pub. L. No. 116-136, §§ 2303 and 2206, 134 Stat. 281 (2020) (Modifications for Net Operating Losses and Modification of Limitation on Business Interest) (codified at IRC §§ 172(b)(1) and 163(j)).

10 See Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*. See also SERP Alert 20A0135, Product Line Closure (Mar. 24, 2020). All IRS phone lines were shut down April 1, 2020.

11 See Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*. To implement these provisions in addition to provisions in the Families First Coronavirus Response Act (FFCRA), and in order to prevent, prepare for and respond to Coronavirus generally, the CARES Act appropriated \$250,000,000 to remain available to the IRS through September 30, 2021. CARES Act, Pub. L. No. 116-136, § 15001, 134 Stat. 246 (2020).

12 National Taxpayer Advocate 2019 Annual Report to Congress 15 (Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*); National Taxpayer Advocate 2019 Annual Report to Congress 23 (Most Serious Problem: *IRS Funding: The IRS Does Not Have Sufficient Resources to Provide Quality Service*).

13 As of June 10, 2020, the IRS issued 273 FAQs which addressed the following topics: Employee Retention Credit (94 FAQs); Filing and Payment Deadlines Questions and Answers (40 FAQs); COVID-19-Related Tax Credits: Special Issues for Employees and Additional Questions FAQs (67 FAQs); Economic Impact Payment Information Center (62 FAQs); and Carrybacks of NOLs for taxpayers who have had Section 965 inclusions (10 FAQs). There is additional guidance in the Internal Revenue Bulletin. See, e.g., <https://www.irs.gov/irb>. Additionally, the IRS created two EIP portals, *Get My Payment* and a portal for nonfilers to file a "simple return."

14 IRS, IR-2020-96, IRS Expands Partner Materials for Economic Impact Payments; Continues Sweeping Effort to Share Details in Multiple Languages (May 15, 2020), <https://www.irs.gov/newsroom/irs-expands-partner-materials-for-economic-impact-payments-continues-sweeping-effort-to-share-details-in-multiple-languages>.

15 Despite these outreach efforts, some in Congress have asked that the IRS take steps to expand its outreach efforts in a way that does not fully rely on the Internet and will get EIP information to those taxpayers who do not have internet access. *Lawmakers Call for IRS Guidance for Those Without Internet*, 2020 TNTF 113-29 (June 8, 2020).

This piece examines the IRS's implementation of the provisions of the CARES Act and issues that arose during that implementation, such as issues that have delayed or prevented individuals from receiving their EIPs, and when or how other benefits set out in the CARES Act should be claimed. Throughout this discussion, TAS considers these issues and proposes recommendations as to how the IRS can address these problems moving forward.

Economic Impact Payments

The EIP generally mirrors the Economic Stimulus Act of 2008, as the CARES Act made the EIP an advance refundable credit against a taxpayer's 2020 tax for eligible individuals with adjusted gross income (AGI) below the phase-out thresholds.¹⁶ As of June 3, 2020, nearly 160 million individuals had received EIPs totaling more than \$267 billion.¹⁷ The CARES Act provides up to \$1,200 per qualifying individual, or up to \$2,400 for married couples filing jointly, and up to an additional \$500 per eligible dependent.¹⁸

Individuals Began Receiving Economic Impact Payments by Mid-April

Pursuant to the CARES Act, the IRS acted quickly to get payments to eligible individuals by assessing which individuals it could immediately distribute EIPs to based on available IRS information, such as a 2019 or 2018 return with direct deposit information.¹⁹ Getting payments to some other individuals posed more challenges.²⁰ The law provided that the IRS could use Form SSA-1099, Social Security Benefit Statement, or Form RRB-1099, Social Security Equivalent Benefit Statement, to determine a taxpayer's AGI if it did not have a 2018 or 2019 return on file.²¹ But these forms did not give the IRS direct information about the qualifying children of these individuals or their deposit information. Additionally, the IRS did not have information on recipients of Supplemental Security Income (SSI) or veterans benefits, since the IRS does not receive data on these

16 The Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 101(e)(3), 122 Stat. 613, 614 (2008); CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020) (explaining the term "eligible individual": "[t]his includes 'any individual other than (1) [a] non-resident alien ... (2) an individual with respect to whom a deduction under section 151 is allowable to another taxpayer ... and (3) an estate or trust.'").

17 IRS, IR-2020-111, 159 Million Economic Impact Payments Processed; Low-Income People and Others Who Aren't Required to File Tax Returns Can Quickly Register for Payment with IRS Non-Filers Tool (June 3, 2020), <https://www.irs.gov/newsroom/159-million-economic-impact-payments-processed-low-income-people-and-others-who-arent-required-to-file-tax-returns-can-quickly-register-for-payment-with-irs-non-filers-tool>.

18 CARES Act Pub. L. No. 116-136, § 2201, 134 Stat. 281 (2020). There is no limitation on the number of dependents when calculating the EIP if the dependent is 16 or younger on December 31, 2020, and possesses a Social Security number (SSN) or an Adoption Taxpayer Identification Number (ATIN). Further, for the purpose of the EIP, the term "qualifying child" has the same meaning as that for the child tax credit (*i.e.*, the meaning provided by IRC § 24(c)). The total EIP for single filers whose adjusted gross incomes (AGIs) exceed \$75,000, married couples filing jointly whose AGIs exceed \$150,000, and heads of household whose AGIs exceed \$112,500, and including the additional \$500 amount for each qualifying child, will be reduced by \$5 for every \$100 above their AGI cap. All taxpayers including qualifying children, must have a valid SSN as defined by IRC § 24(h)(7). There are two exceptions: for joint returns, only one taxpayer has to have a valid SSN if one of the taxpayers is a member of the Armed Forces, and qualifying children can have an ATIN. *Id.* at § 2201(a).

19 CARES Act Pub. L. No. 116-136, § 2201, 134 Stat. 281 (2020); IR-2020-58, Tax Day Now July 15: Treasury, IRS extend filing deadline and federal tax payments regardless of amount owed (Mar. 21, 2020). Since the filing deadline was postponed to July 15, 2020, a number of taxpayers had not yet filed their 2019 return at the time the EIPs were being issued.

20 CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020).

21 *Id.*

types of benefits.²² Further, there are individuals who were eligible for the EIP but do not have a tax filing requirement and do not receive Social Security or veterans benefits.²³

To ensure that all eligible individuals received their EIPs as seamlessly as possible, the IRS took several steps:

1. Created a *Get My Payment* portal that allowed individuals to check on the status of their EIP and provide bank account information for direct deposit;²⁴
2. Established agreements with the Social Security Administration (SSA) and the Veterans Administration (VA) to share data regarding recipients of SSI and veterans benefits and ensure that these recipients would receive, at a minimum, a \$1,200 EIP;²⁵
3. Created the *Non-Filers: Enter Payment Info Here* tool, allowing individuals who did not otherwise have a filing requirement to file what the IRS referred to as a “simple return,”²⁶ essentially providing the IRS with the information it needed to issue an EIP, including information for direct deposit. This portal also allowed SSI and veterans benefits recipients to claim qualifying children (the SSA/VA data does not contain data on dependents) and provide their direct deposit information, so the eligible individuals would not have to wait to receive the EIP funds through the mail; and
4. Modified existing policies and procedures to assist individuals who typically do not have filing requirements and are not familiar with the filing process by authorizing the Low Income Taxpayer Clinic (LITC) Program Office a limited safe harbor for LITCs to assist low-income and English as a second language taxpayers eligible to receive EIPs with preparing 2019 returns.²⁷

22 Forms 1099 are not issued to the IRS for SSI or veterans benefits.

23 See CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020); Chuck Marr, et al., *Aggressive State Outreach Can Help Reach the 12 Million Non-filers Eligible for Stimulus Payments*, CENTER ON BUDGET AND POLICY PRIORITIES, (June 11, 2020). CBPP estimates that 12 million people who are eligible for an EIP must file a simple return using the IRS’s *Non-Filers: Enter Payment Info Here* tool, to claim the funds. These individuals have until October 15, 2020, to submit a simple return.

24 See IRS, *Get My Payment Frequently Asked Questions*, <https://www.irs.gov/coronavirus/get-my-payment-frequently-asked-questions> (last visited May 12, 2020) (“To help protect against potential fraud, the tool ... does not allow people to change direct deposit bank account information already on file with the IRS. If we issue a direct deposit and the bank information is invalid or the bank account has been closed, the bank will reject the deposit. We will then mail your payment as soon as possible to the address we have on file for you, and we will update Get My Payment to reflect the date your payment will be mailed. Typically, once the payment is mailed, it will take up to 14 days to receive the payment, standard mailing time.”).

25 IRS, *IR-2020-75, Veterans Affairs Recipients Will Receive Automatic Economic Impact Payments; Step Follows Work Between Treasury, IRS, VA* (Apr. 17, 2020). Initially the IRS did not intend to automatically send EIPs to SSI and veteran’s benefits recipients, but after mounting public pressure, the IRS entered into data-sharing agreement with SSA and the VA, providing them with information about who receives these benefits, and allowing them to automatically issue them EIPs. See also Lorie Konish, *Social Security Beneficiaries Do Not Have to File Tax Returns to Receive Stimulus Checks*, CNBC (Apr. 1, 2020), <https://www.cnbc.com/amp/2020/04/01/social-security-beneficiaries-do-not-have-to-file-tax-returns-to-receive-coronavirus-stimulus-checks.html>.

26 See Rev. Proc. 2020-28, 2020-19 I.R.B. 792.

27 Memorandum from Commissioner of Internal Revenue to National Taxpayer Advocate, *Safe Harbor for Low-Income Taxpayer Clinics (LITCs) Preparing Returns in Light of COVID-19 Pandemic* (Apr. 13, 2020).

Despite initial problems with the portals, such as long wait times, error messages, and the lack of recognition of foreign addresses for American citizens living abroad,²⁸ subsequently, more than 70 million people successfully verified the status of their payments,²⁹ and as of April 23, 2020, about 23 million people provided bank or financial account information to accelerate receipt of their EIPs — which is no small feat.³⁰ Additionally, for the same time period, about 3.7 million individuals used the *Non-Filers: Enter Payment Info Here* tool to file a “simple return.”³¹

The IRS mailed EIPs to individuals’ addresses on their most recent tax returns, addresses provided to the IRS in the interim, or addresses on file with the United States Postal Service (USPS).³² Because of the pandemic, IRS employees were unable to open and process mail from about the end of March through the end of May, so taxpayers who needed to update their mailing addresses with the IRS were unable to do so.³³ Thus, the EIPs were possibly mailed to outdated addresses and returned to the IRS as undeliverable. In future circumstances, the IRS should consider opening a phone line solely devoted to updating taxpayers’ mailing address changes.³⁴

On May 19, 2020, pursuant to an agreement with the Bureau of the Fiscal Service, which had a preexisting agreement with MetaBank, the IRS began issuing debit cards preloaded with COVID-19 stimulus payments.³⁵ The primary objective of issuing prepaid debit cards is to get EIPs to taxpayers

28 Bernie Becker, *One Big Grab Bag*, POLITICO (May 13, 2020), <https://www.politico.com/newsletters/morning-tax/2020/05/13/one-big-grab-bag-787574>; Rey Mashayekhi, *Couldn’t Track Your Stimulus Check? Errors and Long Waits Plague IRS Portal Rollout*, FORTUNE (Apr. 15, 2020), [https://fortune.com/2020/04/15/irs-stimulus-check-portal-get-my-payment-status-tracker-errors-not-available-wait-number/amp](https://fortune.com/2020/04/15/irs-stimulus-check-portal-get-my-payment-status-tracker-errors-not-available-wait-number/). The IRS worked quickly to resolve these and other issues.

29 IRS Integrated Customer Communications Environment (ICCE) Authentication report (Apr. 23, 2020).

30 IRS Compliance Data Warehouse (CDW), IMF (Apr. 23, 2020).

31 ICCE Authentication report (Apr. 23, 2020).

32 IRM 21.6.3.4.2.13.2, Economic Impact Payments – Refund Inquiries (June 5, 2020).

33 Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, supra; Lisa Rein, *As the Backlogged IRS Struggles to Open Mail and Answer the Phone, Taxpayers Face Long Delays*, WASH. POST (May 20, 2020); Allyson Versprille, *Virus Fears, Unopened Mail Await IRS Employees Returning to Work*, BLOOMBERG LAW: TAX (June 1, 2020) (citing data provided by the IRS to the U.S. House Committee on Ways and Means in a report titled “Internal Revenue Service Operations (Report on May 27, 2020)”). Even though employees had been called back to IRS campuses as of June 1, 2020, only a fraction of the staff was working when compared to pre-pandemic levels, meaning that the opening and processing of correspondence will likely be happening at a much slower rate.

34 Letter from American Bar Association (ABA) Tax Section Office to IRS Commissioner, *Delivery of Economic Impact Payments to Low-Income and Vulnerable Individuals* (Apr. 13, 2020) (“Finally, the Service could consider the feasibility of a dedicated telephone line for taxpayers without internet or email access to call and report a change of address or direct deposit information through oral testimony, as prescribed in the Internal Revenue Manual Section 3.13.5.29.”); IRM 3.13.5.29, Oral Statement/Telephone Contact Address Change Requirements (Sept. 16, 2019). Currently taxpayers can call the IRS and orally provide an address change. This recommendation would create a distinct line for individuals to submit such changes.

35 See U.S. Department of the Treasury Press Release, *Treasury Is Delivering Millions of Economic Impact Payments by Prepaid Debit Card* (May 18, 2020), <https://home.treasury.gov/news/press-releases/sm1012>. The EIP Card is part of Treasury’s U.S. Debit Card program, which provides prepaid debit card services to federal agencies for the electronic delivery of non-benefit payments. MetaBank was selected as Treasury’s financial agent for the U.S. Debit Card program in 2016, following a competitive selection process conducted by the Treasury’s Bureau of the Fiscal Service. See also *Status of Economic Stimulus Payments, Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. 13 (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate). In 2008, during the prior economic stimulus payment distribution, TAS made a similar recommendation that stimulus payments be loaded onto prepaid debit cards.

more quickly.³⁶ Another benefit of using debit cards is they can be used in the future in the event Congress authorizes more stimulus payments. Unfortunately, it seems that the IRS's outreach efforts to inform individuals that some EIPs would be issued in the form of prepaid debit cards did not reach everyone, as some recipients destroyed or disposed of the card, fearing it was a scam. These individuals will have to have their preloaded debit cards reissued. Fortunately, an arrangement was reached with MetaBank, and it is offering the first reissuance of a debit card at no cost to the cardholder.³⁷ To avoid these issues going forward, TAS recommends that the IRS develop a more comprehensive outreach plan to inform and educate vulnerable individuals, such as the elderly, disabled, veterans, or those who have limited English proficiency, that they may receive debit cards and how to activate and use them.³⁸

Most individuals received their EIPs without any problem, but certain small groups of individuals have either not received their EIP or not received the entire amount. Individuals experienced many of the same problems during the issuance of the 2008 Economic Stimulus Payments, specifically:

- Delay of stimulus payments for taxpayers who purchased Refund Anticipation Loans (RALs) or Refund Anticipation Checks (RACs) to receive their tax refunds;
- Stimulus payments being deposited into the wrong bank accounts;
- Individuals not receiving stimulus payments for qualifying children; and
- Issues that resulted in incorrect, delayed, or unexpectedly reduced stimulus payments.³⁹

During this most recent stimulus payment distribution, the major issues that individuals have encountered are variations on these problems.

36 IRS, Economic Impact Payment Frequently Asked Questions, FAQs #46, *Can I Have My EIP Issued on a Debit Card?*, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#receiving> (May 20, 2020). "The determination of which taxpayers receive a debit card will be made by the Bureau of the Fiscal Service (BFS), another part of the Treasury Department that works with the IRS to handle distribution of the payments. BFS is sending nearly four million debit cards to taxpayers starting in mid-May."

37 IRS, IR-2020-105, IRS Economic Impact Payments Being Sent by Prepaid Debit Cards, Arrive in Plain Envelope; IRS.gov Answers Frequently Asked Questions (May 27, 2020); Money Network FAQs, <https://www.eipcard.com/faq> (June 1, 2020) ("Your first reissued Card will be free and then a \$7.50 fee will be applied for each additional reissued Card"). See also IRS, Economic Impact Payment Frequently Asked Questions, FAQs #50, *What Do I Do If My Prepaid Debit Card Was Lost or Destroyed?*, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#receiving> (June 4, 2020) ("Any initial reissuance fee charged to a customer from an earlier date will be reversed").

38 Lee Rood, *What Should You Do If You Threw Out or Destroyed That Stimulus Card? Members of Congress Want to Know, Too*, DES MOINES REGISTER (May 26, 2020), <https://www.desmoinesregister.com/story/news/2020/05/26/stimulus-visa-cards-iowans-seek-answers-after-many-throw-out-federal-payments/5261414002/>.

39 *Status of Economic Stimulus Payments, Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. 13 (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate).

Individuals Who Had Previously Purchased Refund Anticipation Loans or Refund Anticipation Checks Saw Their Payments Sent to Inactive Virtual Accounts

The IRS suppressed issuance of EIPs to virtual accounts established when a taxpayer purchases a RAL or RAC, since these accounts no longer exist after the tax refund is transferred to the taxpayer, and then mailed the EIP to the taxpayer at his or her last known address.⁴⁰ Despite the RAL indicators on taxpayer accounts, the IRS did not suppress EIPs in all situations. Nearly 800,000 individuals who purchased RALs and RACs had their EIPs deposited to closed virtual accounts; following the deposits, banks returned the funds to the IRS, which subsequently mailed those EIPs to the individuals.⁴¹ When these taxpayers checked the status of their EIPs, the *Get My Payment* portal indicated that the IRS had already sent the payments. Taxpayers were confused by the status on the portal, as the original information said the IRS would not send EIPs to virtual accounts set up through the purchase of a RAL or RAC. After the IRS processed the returned payment, it updated the portal to reflect that the bank had returned the EIP and that the IRS would mail it to the taxpayers weeks later.

Individuals Who Receive Social Security Income or Veterans Benefits May Not Receive Credit for Their Qualifying Children Until 2021

The IRS was able to secure SSI and veterans benefits data from both the SSA and VA, allowing it to issue EIPs to SSI and veterans benefits recipients the way they normally receive their benefits (*i.e.*, via direct deposit, Direct Express debit card, or paper check). As mentioned above, the data did not contain information regarding dependents, so these individuals only received their share of the EIP.

Individuals needed to update their information on the IRS's *Non-Filers: Enter Payment Info Here* tool to claim the EIP for their qualifying children. The IRS was concerned that once it issued individuals an EIP, it did not have the authority or a process to issue additional amounts. However, it is TAS's understanding that there are no legal constraints on the IRS's authority to issue additional EIP amounts in 2020; thus, the decision to not do so is purely a business one.⁴² To balance this decision against individuals needing more time to update their information, the IRS held off issuing the EIPs to SSI recipients until the middle of May, giving these individuals until May 5 to go onto the *Non-Filers: Enter Payment Info Here* tool and update their number of dependents.⁴³ After May 5, 2020, SSI and veterans benefits recipients could no longer use the portal to update the number of their dependents and are not able to receive the \$500 per qualifying child until they file a 2020 return on which they will reconcile the EIP.

40 When a taxpayer purchases a RAL or RAC, a virtual account is established to which the refund is deposited. After the refund is transferred to the taxpayer, the virtual account no longer exists. The IRS receives an electronic indicator when a RAL or RAC is associated with a return, and the IRS was able to program its systems to send paper checks to all taxpayers whose 2019 or 2018 returns were accompanied by one of these indicators.

41 IRS response to TAS fact check (June 23, 2020). Paul Kiel, Justin Elliott, and Will Young, *Millions of People Face Stimulus Check Delays for a Strange Reason: They Are Poor*, PROPUBLICA.ORG (Apr. 24, 2020), <https://www.propublica.org/article/millions-of-people-face-stimulus-check-delays-for-a-strange-reason-they-are-poor>. As of April 23, 2020, the IRS had mailed 745,000 of the nearly 800,000 EIPs to individuals.

42 Email from Special Counsel to the National Taxpayer Advocate to Senior Advisor to the National Taxpayer Advocate (June 10, 2020) (available upon request). There is no legal barrier to paying an additional amount [of EIP] under IRC § 6428(f) based on a TY 2019 return that is filed after an advance payment was already made.

43 IRS, IR-2020-76, Special Alert for Benefit Recipients Who Do Not File a Tax Return and Have Dependents (Apr. 20, 2020).

Because these financially-strapped individuals will have to wait at least nine more months to receive this additional amount, TAS recommends the IRS continue to allow these individuals to either file paper returns or use the *Non-Filers: Enter Payment Info Here* tool to enter information about their qualifying children, and then immediately issue supplemental payments to those individuals.⁴⁴

The CARES Act's Valid Social Security Number Requirement Complicated Individuals' Receipts of the Economic Impact Payments in Certain Circumstances

Similar to other refundable credits such as the Earned Income Tax Credit and Additional Child Tax Credit, individuals and their qualifying children must have valid Social Security numbers (SSNs) to receive the EIP.⁴⁵ The exceptions to these requirements are when an individual is a member of the Armed Forces and files a joint return, only one of the individuals on the return must have an SSN, and qualifying children who have adoption taxpayer identification numbers can still qualify for the EIP.⁴⁶ This means that under the law, eligible individuals who do not have valid SSNs but whose qualifying children do would receive no EIP — not even the amounts attributable to their qualifying children. A class action complaint concerning this issue was filed on May 5, 2020, seeking a declaration that the CARES Act's denial of EIPs to undocumented aliens for their qualifying children who are U.S. citizens is unconstitutional. Further, the complaint seeks payments of up to \$500 for each U.S. citizen child, in accordance with the thresholds in the CARES Act.⁴⁷

Another issue is that an individual who has an SSN eligible for employment in the United States, but filed a joint return in 2019 (or 2018, if the 2019 return has not yet been filed) with an individual who does not have a valid SSN, will not receive an EIP in 2020. The IRS's guidance is that the individuals will have to wait until they file an individual 2020 tax return using married filing separate (MFS) status, thereby omitting the individual who does not have a valid SSN. This means these eligible individuals will not receive their EIP for at least another nine months. For example, if an individual with a valid SSN filed a joint return for 2019 (or 2018, if the 2019 return has not yet been filed) with an individual who does *not* have a valid SSN, the individual with the valid SSN can file MFS for tax year (TY) 2020 and will then receive an EIP for their share and for any qualifying children. (Because there are significant tax consequences to MFS, individuals will need to consider

44 ABA Tax Section, *Recommendations Regarding the Implementation of Various Tax-Related Provisions of the CARES Act* (May 12, 2020). The IRS has indicated that it will not be issuing additional EIP amounts at this time, and taxpayers who believe they are entitled to a larger EIP than what they received will have to wait. The IRS stated it will provide additional details on IRS.gov on the actions taxpayers will need to take in the future. See IRS, Economic Impact Payment FAQ #14, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#collapseCollapsible1589477358225> (last visited May 21, 2020).

45 CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020); IRC § 24(h)(7). To receive the EIP, a taxpayer must include on his or her tax return on file with the IRS the taxpayer identification numbers (TINs) of the taxpayer, their spouse (if filing a joint return), and any qualifying child(ren). For this purpose, a valid TIN is an SSN eligible for employment in the United States or, in the case of a qualifying child legally placed for adoption, an ATIN.

46 CARES Act, Pub. L. No. 116-136, § 2201(g)(3), 134 Stat. 281 (2020).

47 *R.V. et al. v. Mnuchin*, No. 8:20-cv-1148 (D. Md. May 5, 2020). The complaint was filed on behalf of seven U.S. citizen children and with the support of CASA, a D.C.-area immigration non-profit organization. The complaint explains that the CARES Act provides a financial lifeline to millions of people by distributing economic impact payments. However, the CARES Act provides payments solely to taxpayers who file their taxes using an SSN — meaning U.S. citizens and immigrants with work authorization — thereby denying payments to U.S. citizen children of undocumented immigrants who pay their taxes using an individual taxpayer identification number (ITIN). The complaint alleges that the CARES Act provisions deny U.S. citizen children of undocumented immigrant taxpayers the equal protection of the laws guaranteed by the U.S. Constitution.

if giving up certain tax benefits claimed when filing married filing jointly is outweighed by receiving the EIP.)⁴⁸

Individuals in this and other situations could file a superseding return in an effort to obtain the EIP in 2020 rather than having to wait until they file their 2020 tax returns.⁴⁹ However, due to programming limitations, the IRS has stated that filing a superseding return will not result in the issuance of an EIP or an additional EIP amount. TAS is concerned that these individuals who likely need their stimulus money now will have to wait several more months to even claim their EIP. Thus, TAS recommends that the IRS develop a process by which taxpayers in these and other similar situations can take steps to receive their EIPs now rather than having to wait until the 2021 filing season.

Despite Filing an Injured Spouse Claim, a Number of Individuals Had Their Economic Impact Payments Offset Against Their Spouse's Past-Due Child Support

In certain circumstances, a taxpayer's refund can be offset against outstanding tax or non-tax liabilities.⁵⁰ Unlike regular tax refunds, the EIP is only supposed to be offset against an individual's past-due child support.⁵¹ Because the EIP is separately allocated to each eligible individual in the amount of \$1,200, the non-liable spouse's portion of the EIP should not have been offset against the liable spouse's past-due child support. However, about 862,000 individuals had their portion of the EIP offset against their spouse's past-due child support,⁵² including about 26,000 of these individuals who previously identified as an injured spouse and had their portion of the EIP offset against their spouse's past due child support. For the 26,000 non-liable spouses, the IRS has been working since about the middle of April to retrieve their portion of the refunds that were improperly offset against their liable spouse's past-due child support payments, but at the time of this writing, this issue had not been corrected. Further, for the 836,000 individuals where circumstances may not demand the filing of an injured spouse claim, there has been no guidance available instructing them how to proceed.⁵³ TAS recommends that the IRS provide guidance stating that it will retrieve the non-liable

48 The IRS only refers to the recovery rebate credit as an EIP when it is issued as an advance payment in 2020. Otherwise, the taxpayer is claiming the recovery rebate on his/her 2020 tax return and it will be included in their refund along with any other refundable credits to which they might be entitled.

49 A superseding return is when a taxpayer files a second return before the filing deadline — in this case, the postponed filing deadline of July 15, 2020. For a more in-depth discussion as to when a superseding return could assist taxpayers who are experiencing financial distress, see Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*. Individuals who are domestic violence survivors may also be in a similar situation (*i.e.*, the abusive spouse filed a joint return without the surviving spouse's knowledge, retaining the surviving spouse's portion of the EIP). Letter from ABA Tax Section Office to IRS Commissioner, *Delivery of Economic Impact Payments to Low-Income and Vulnerable Individuals* (Apr. 13, 2020). The IRS can mitigate the problem of EIPs going to spousal abusers by suppressing the portion of the domestic abuse survivor's EIP from being issued automatically where there is either a domestic violence indicator on the taxpayer's account or where a Form 8857, Request for Innocent Spouse Relief, has been filed.

50 IRC § 6402.

51 CARES Act, Pub. L. No. 116-136, § 2201(d), 134 Stat. 281 (2020); IRS, Economic Impact Payment Information Center, FAQ #31, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#calculating> (last visited May 13, 2020).

52 IRS CDW, IMF (Apr. 23, 2020). IRS response to TAS fact check (June 23, 2020).

53 Taxpayers would not have needed to file an injured spouse claim when they did not file a return in 2019 or 2018; their 2019 return has not yet been processed; or they did not have a refund and thus had no reason to file an injured spouse claim, but have now learned that their EIP has been offset against their spouse's past-due child support.

spouse's portion of the EIP regardless of whether an injured spouse claim has been filed. If the IRS determines that the non-liable spouse is required to file an injured spouse claim, taxpayers should be allowed to file Form 8379, Injured Spouse Allocation, either electronically or by fax.

Individuals in Limited Circumstances Are Being Asked to Return the Economic Impact Payments

The IRS issued about 965,000 EIPs to deceased taxpayers.⁵⁴ Initially, it seemed these payments would not have to be returned to the IRS, as early guidance said families that received extra stimulus funds for ineligible children did not have to return the funds.⁵⁵ However, on May 6, 2020, the IRS posted an FAQ notifying taxpayers that these payments “should be returned to the IRS...”⁵⁶ Like the 2008 law, there is nothing in the CARES Act that specifically states decedents are ineligible for an EIP.⁵⁷

This issue also came up in 2008, and the IRS posted the following FAQ on this issue:⁵⁸

Stimulus payments will be issued in the name of the individual eligible for payment on a filed 2007 income tax return or to the account designated by the individual on that return. This includes situations where a person dies after filing a return or where the final 2007 income tax return was filed by a personal representative or surviving spouse. Any issues or concerns involving a decedent's filed return or the related stimulus payment should be addressed by the legal representative of the decedent's estate. See Publication 559 for more useful information for survivors and personal representatives.⁵⁹

If stimulus payments were issued to a decedent taxpayer as described in the above FAQ, the IRS in 2008 did not ask that the payment be returned and took no steps to collect the payment from the decedent taxpayer's estate or family.⁶⁰

The 2020 FAQ provides guidance as to when an EIP would need to be returned for a recipient who has passed away. Specifically, the FAQ determination of eligibility is based upon two moving targets: the actual date of death versus the date the EIP is received (*i.e.*, if the date of death is before

54 IRS response to TAS fact check (June 23, 2020). As the EIPS were being issued, the IRS was aware that 837,000 of the 965,000 taxpayers had died but did not program its systems to exclude decedents.

55 IRS, Economic Impact Payment Information Center, FAQ #26, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center> (last visited May 7, 2020).

56 *Id.*

57 CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020) (explaining “[t]his includes ‘any individual other than (1) [a] non-resident alien ... (2) an individual with respect to whom a deduction under section 151 is allowable to another taxpayer ... and (3) an estate or trust.’”). See also The Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 101(e)(3), 122 Stat. 613, 614 (2008).

58 *Status of Economic Stimulus Payments, Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. 13 (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate).

59 Nina E. Olson, *The Uncertainty of Death and Taxes: Economic Stimulus Payments to Deceased Individuals*, PROCEDURALLY TAXING BLOG, <https://procedurallytaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/> (May 11, 2020).

60 See, e.g., *Status of Economic Stimulus Payments: Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate); Nina E. Olson, *The Uncertainty of Death and Taxes: Economic Stimulus Payments to Deceased Individuals*, PROCEDURALLY TAXING BLOG, <https://procedurallytaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/> (May 11, 2020).

the receipt of the EIP, the instruction is the EIP should be returned to the IRS). Based upon the FAQ, an individual who died in May 2020 and whose spouse received an EIP from the IRS in June 2020 would need to send back the portion of the check attributed to the spouse who died (\$1,200).⁶¹ Rather than applying this approach, the statute could be read to deem an individual who dies in 2020 as an “eligible individual,” therefore making them eligible to receive the EIP. Conversely, under the IRS’s interpretation, an EIP that was sent to an individual who died prior to 2020 would be characterized as an improper payment and should be returned to the IRS. However, if the IRS made the payment despite having information in its possession that the individual was in fact deceased, the National Taxpayer Advocate recommends the IRS not spend its resources pursuing enforcement actions against a decedent’s estate or a family member who received an EIP for a decedent.

Similarly, individuals who are incarcerated have been advised by the IRS to return their EIPs.⁶² However, a situation could arise where a taxpayer was incarcerated at the beginning of 2020 but was released in the midst of the pandemic — especially since a number of incarcerated individuals were released to mitigate the spread of COVID-19 in the country’s prison system. Unlike a deceased individual, a released prisoner could return the EIP and then claim it when filing his/her 2020 income tax return. TAS will advocate for the IRS to provide more specific guidance regarding a released prisoner’s eligibility for receipt of an EIP.

Individuals Should Be on Alert for Scams Regarding the Economic Impact Payment

As has become all too common, fraudsters are trying to exploit the current situation for their own personal gain. The Treasury Inspector General for Tax Administration (TIGTA) has warned of the following types of EIP scams:

- Notices sent to individuals through the mail stating they need to send the IRS personal information to receive their EIP, when the IRS does not contact individuals to ask for information to send the payment;
- Requests by third parties to deposit or otherwise exchange EIP Treasury checks for cash, but the checks are subsequently determined to be fraudulent, counterfeit, or stolen;
- Tax preparer theft of EIPs;
- EIPs that have been fraudulently rerouted as a result of an unauthorized USPS address change; and
- EIP payments that were fraudulently rerouted to another bank account.⁶³

61 Frederic Lee and Jad Chamseddine, *IRS Wants Its Money Back From The Dead*, TAX NOTES (May 7, 2020), <https://www.taxnotes.com/featured-news/irs-wants-its-money-back-dead/2020/05/07/2chjz>.

62 IRS response to TAS fact check (June 23, 2020). About 74,000 incarcerated individuals received EIPs. The number of incarcerated taxpayers is based on their 2019 or 2018 tax returns. IRS, Economic Impact Payment Information Center, FAQ #12, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center/#collapseCollapsible1588859690354> (last visited May 13, 2020). See also IRM 21.6.3.4.2.13, Economic Impact Payments (June 5, 2020). It is unclear what the IRS will do if taxpayers do not return the EIP. SERP IRM 21.6.3.4.2.13, Economic Impact Payments (June 5, 2020) specifies, “EXCEPTION: For those taxpayers who received the Economic Impact Payment but were not eligible, advise the taxpayer return or repay the payment.”

63 See TIGTA, *Are You a Victim of an IRS-Related Coronavirus Scam?*, https://www.treasury.gov/tigta/contact_report_treasurycheck.shtml (last visited May 13, 2020). See also TIGTA, *TIGTA-2020-5, TIGTA Urges Taxpayers to Stay Alert and Safeguard Their Economic Impact Payment* (May 14, 2020).

Individuals should be aware of these types of scams, and if they believe they have been victimized or are aware of these scams occurring, TIGTA has asked individuals to notify Treasury via an online form.⁶⁴ The IRS and state Attorneys General have also warned individuals about such scams.⁶⁵ Additionally, if individuals have not received the EIP because they suspect they are victims of identity theft, taxpayers should submit Form 14039, Identity Theft Affidavit, and notate “Stolen EIP” at the top of the form. Unfortunately, the processing of these forms will likely be delayed because IRS campuses have a backlog of correspondence as a result of the temporary closure of the IRS campuses. TAS will continue to work with the IRS to ensure individuals are informed about specific scams related to EIPs and recommend that the IRS prioritize the processing of Forms 14039 bearing an EIP notation.

When Individuals Have Questions and Concerns Regarding Their Economic Impact Payments, They Should Be Able to Easily Access IRS Resources

As the above discussion illustrates, there are several complex situations facing individuals in relation to the EIP. Already, individuals have a number of IRS resources to access online including an expansive list of FAQs that answer many of the simpler questions for individuals who have internet access.⁶⁶ It was not until May 18, 2020, that the IRS announced it had assigned 3,500 telephone representatives to answer common questions about EIPs; however, resources remain limited, and individuals who call these phone lines can expect long wait times.⁶⁷ Once individuals do reach assistors, generally these assistors will be reading the answers to the FAQs, and their responses will likely not go beyond the FAQs posted on IRS.gov. TAS recommends that the IRS ensure that assistors working the IRS phone lines are able to answer more complex questions.⁶⁸ Individuals calling this phone line should also be able to update their mailing addresses.

For its part, TAS is assisting taxpayers by working these issues systemically and is advocating for the IRS to develop procedures that will correct inaccurate EIP amounts and issue missing payments during 2020. TAS has been inundated by taxpayer and congressional requests to assist in these types of cases. However, without an IRS process in place to correct a taxpayer’s payment, TAS is unable

64 See TIGTA, *Are You a Victim of an IRS-Related Coronavirus Scam?*, https://www.treasury.gov/tigta/contact_report_treasurycheck.shtml (last visited May 13, 2020).

65 California Attorney General’s Office, *Attorney General Warns Consumers to Beware of Scams Related to Economic Impact Stimulus Payments*, (May 11, 2020), <http://www.lakeconews.com/index.php/news/community/65293-attorney-general-warns-consumers-to-beware-of-scams-related-to-economic-impact-stimulus-payments>; Kansas Attorney General Warns Public to Watch Out for Stimulus Package Scams, KWCH.com (Mar. 30, 2020), <https://www.kwch.com/content/news/Kansas-attorney-general-warns-public-to-watch-out-for-stimulus-package-scams-569230591.html> (last visited May 13, 2020); IRS, *IRS Issues Warning About Coronavirus-Related Scams; Watch Out for Schemes Tied to Economic Impact Payments*, <https://www.irs.gov/newsroom/irs-issues-warning-about-coronavirus-related-scams-watch-out-for-schemes-tied-to-economic-impact-payments> (last visited May 21, 2020).

66 Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*.

67 IRS, *IR-2020-97, IRS Adds Phone Operators to Answer Economic Impact Payment Questions* (May 18, 2020); IRS, *Operations During COVID-19: Mission-Critical Functions Continue* (May 19, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

68 National Taxpayer Advocate 2009 Annual Report to Congress 4, at 9 (Most Serious Problem: *IRS Toll-Free Telephone Service Is Declining as Taxpayer Demand for Telephone Service Is Increasing*). As was the case in 2008, taxpayers called the toll-free line for the more complex questions, which inevitably take the telephone representatives longer to resolve. TAS suggests that the IRS continue to analyze its call data and base its toll-free assistor staffing decisions on this analysis.

to resolve an EIP issue. Instead, TAS's work has been limited to instances where a problem with a taxpayer's current year return — such as wage verification or identity theft — is holding up the issuance of the EIP.⁶⁹ If the IRS developed a process to correct EIP amounts now, TAS could begin accepting these cases, working with the IRS to resolve them, and getting the money into the hands of eligible individuals.

Employee Retention Credit

The ERC is a significant tax benefit for employers, but its complexity presents opportunities for error. Employers who qualify for the ERC will receive a refundable credit against an employer's 6.2 percent share of Federal Insurance Contribution Act (FICA) wages or Railroad Retirement Tax Act (RRTA) compensation.⁷⁰ An employer can claim a refundable payroll tax credit of up to 50 percent of qualified wages (including health plan expenses) up to \$10,000 per employee, for a maximum credit amount of \$5,000 per employee, paid after March 12, 2020, and before January 1, 2021. As of June 2, 2020, the IRS had received at least 8,700 Forms 7200, Advance Payment of Employer Credits Due to COVID-19.⁷¹

To qualify, an employer must operate a trade or business and:

- Have operations fully or partially suspended by governmental order limiting commerce, travel, or group meetings due to COVID-19 during a calendar quarter, or
- Have experienced a significant decline in gross receipts in a calendar quarter when compared to 2019.

69 Because the IRS was not answering phone lines but TAS local offices were, TAS began experiencing unprecedented call volumes and voice messages from taxpayers with EIP questions. Through May 7, 2020, TAS employees answered 4,226 EIP-related calls from taxpayers. TAS is not staffed to take over the IRS's phone lines when the IRS has shutdown and stopped answering incoming calls, while continuing to assist taxpayers who qualify for TAS assistance. Memorandum from Deputy National Taxpayer Advocate for TAS Employees: Interim Guidance – Economic Impact Payments and TAS Case Acceptance (May 14, 2020). See also Memorandum from National Taxpayer Advocate to TAS Employees: Interim Guidance on Accepting Cases Under TAS Case Criteria 9, Public Policy (June 1, 2020). TAS assistance will not expedite or improve current EIP processing. TAS will not accept cases related solely to EIP issues — even from a congressional office.

70 CARES Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281 (2020) (Employee Retention Credit for Employers Subject to Closure due to COVID-19). IRC § 3111(a) (employer's share of the Old Age, Survivors, and Disability Insurance (social security) portion of FICA tax) and IRC § 3221(a) (employer's share of the social security and Hospital Insurance (Medicare) portions of RRTA tax), along with IRC § 3402 related to Federal income tax withholding, impose employment tax liability on employers. For most employers, this liability is reported on the quarterly Form 941, Employer's Quarterly Federal Tax Return.

71 This data was obtained in an April 21, 2020, email from Senior Technical Analyst, Small Business/Self-Employed Division (available upon request). The IRS received 8,700 eFaxes, but each eFax could have contained multiple Forms 7200, so the total number of forms has yet to be ascertained.

If either of these requirements is met, the taxpayer may be eligible for the ERC.⁷² This credit may appear straightforward, but there are many layers of complexity, such as:

- Determining when a trade or business was fully or partially suspended by government order;⁷³
- Determining the employer's number of full-time employees;
- Determining gross receipts for an exempt organization;
- Determining qualified wages; and
- Applying aggregation rules.⁷⁴

To answer these questions, the IRS has provided nearly 100 FAQs on the ERC. Although these FAQs are helpful to taxpayers and provide answers to many of the simpler questions surrounding the credits, areas of ambiguity remain. For example, the IRS provides that if a business is closed, but the employer is able to continue operations “comparable” to its operations prior to the closure by requiring its employees to telework, there has been no partial suspension.⁷⁵ Specifically, one of the FAQs on the ERC provides this example:

Employer C, a software development company maintains an office in a city where the mayor has ordered that only essential businesses may operate. Employer C's business is not essential under the mayor's order and must close its office. Prior to the order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the order, the company ordered mandatory telework for all employees and limited client meetings to telephone or video conferences. Employer C's business operations are not considered to be fully or partially suspended by the governmental order because its employees may continue to conduct its business operations by teleworking.⁷⁶

72 CARES Act, Pub. L. No. 116-136, § 2301(3)(j), 70 Stat. 281 (2020) (Employee Retention Credit for Employers Subject to Closure due to COVID-19). If an employer receives a Small Business Interruption Loan under the Paycheck Protection Program, authorized under the CARES Act, then the employer is not eligible for the Employee Retention Credit.

73 Only orders, proclamations, or decrees from the Federal government, or any State or local government authorities apply. See IRS, COVID-19-Related Employee Retention Credits: Determining What Types of Governmental Orders May be Taken into Account for Purposes of the Employee Retention Credit FAQs, FAQ #28, <https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-what-types-of-governmental-orders-may-be-taken-into-account-for-purposes-of-the-employee-retention-credit-faqs> (last visited June 9, 2020). See also Letter from Caroline L. Harris, U.S. Chamber of Commerce, to Office of IRS Chief Counsel and Office of the Tax Policy, *Employee Retention Tax Credit (ERTC) Frequently Asked Questions (FAQs): Additional Modifications* (May 19, 2020). The Chamber recommends that the IRS allow eligible employers to claim credit on U.S. based payroll wages paid to U.S. employees with partially suspended activities due to governmental orders of non-U.S. locations.

74 CARES Act, Pub. L. No. 116-136, § 2301(d), 134 Stat. 281 (2020). The CARES Act requires that the aggregation rules under IRC §§ 52 or 414 be applied to taxpayers claiming the employee retention credit. These and other issues have been raised by a number of businesses regarding how to claim the ERC. See Scott Harty, *et al.*, *Into the Unknown: Employee Retention Credit Remains Murky*, Tax NOTES (June 8, 2020).

75 Tony Nitti, *Miss Out on A Paycheck Protection Program Loan? Don't Forget About the Employee Retention Credit*, FORBES (Apr. 30, 2020), <https://www.forbes.com/sites/anthonyнити/2020/04/30/miss-out-on-a-paycheck-protection-program-loan-dont-forget-about-the-employee-retention-credit/>.

76 IRS, COVID-19-Related Employee Retention Credits: Determining When an Employer's Trade or Business Operations are Considered to be Fully or Partially Suspended Due to a Governmental Order FAQs, FAQ #33, <https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employers-trade-or-business-operations-are-considered-to-be-fully-or-partially-suspended-due-to-a-governmental-order-faqs> (last visited May 8, 2020).

The question here is what will be considered “comparable?”⁷⁷ For example, what if the facts in the FAQ above are largely the same, but only 80 percent of the company’s employees are set up to work from home? Would that still be considered “comparable,” or will the taxpayer then have to analyze what operations are performed by employees who are not set up to work from home?

An example of another area of uncertainty is where essential businesses were required to stay open, but the state or local government order required them to implement social distancing practices and imposed restrictions on capacity, or the businesses voluntarily implemented such restrictions in accordance with Center for Disease Control and Prevention (CDC) or Department of Homeland Security (DHS) guidelines to protect their employees.⁷⁸ For example, some grocery stores restricted the number of employees and customers allowed into the store and also reduced their hours of operation. Additionally, meat packing plants, even though deemed essential and required to stay open, often worked with state governments on what steps should be taken to reduce the spread of COVID-19, such as implementing capacity limits or requiring employees who had been exposed to the virus to stay home.⁷⁹ Although there are a number of FAQs that touch on this issue, additional guidance on whether an essential business that remains open would be considered partially suspended because of restrictions due to COVID-19 — whether imposed by a governmental order or voluntarily adopted by an employer to comply with CDC and DHS guidelines — would help taxpayers comply with the credit eligibility rules.⁸⁰

It is TAS’s understanding that the IRS is in the process of addressing these ambiguities in its FAQs. At the time of this writing, TAS had not had an opportunity to review the new or revised FAQs, so it is unclear the extent to which this guidance will provide more clarity to taxpayers so they can confidently move forward with claiming this credit without concern for unintentionally violating a rule resulting in a compliance situation. The IRS will need to determine the amount of resources it wants to devote to auditing and verifying the proper allocation of this credit. It is imperative that taxpayers are prepared to support their position for claiming the credit and the amount they have claimed if contacted for audit.

The IRS has been willing to modify its FAQs in other situations where the FAQs have either been ambiguous or inconsistent with Congress’s intent. For example, in the early release of the FAQs, an issue arose regarding whether an employer may treat health plan expenses as qualified wages

77 See Letter from Caroline L. Harris, U.S. Chamber of Commerce, to Office of IRS Chief Counsel and Office of the Tax Policy, *Employee Retention Tax Credit (ERTC) Frequently Asked Questions (FAQs): Additional Modifications* (May 19, 2020). The Chamber recommends that the IRS either withdraws the FAQs that deals with comparable operations (FAQ #33) or provide specific examples of what is *not* considered “comparable” operations.

78 See Letter from Caroline L. Harris, U.S. Chamber of Commerce, to Office of IRS Chief Counsel and Office of the Tax Policy, *Employee Retention Tax Credit (ERTC) Frequently Asked Questions (FAQs): Additional Modifications* (May 19, 2020). The Chamber recommends that the IRS should clarify that this is a partial suspension for purposes of the ERTC. See also Centers for Disease Control and Prevention, *COVID-19 Ongoing Mitigation Guidance*, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html> (last visited May 14, 2020); Department of Homeland Security, *DHS Responds: Coronavirus (COVID-19)*, <https://www.dhs.gov/coronavirus> (last visited May 21, 2020).

79 Executive Order 13917, *Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (Apr. 28, 2020) (“It is important that processors of beef, pork, and poultry ... in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans.”).

80 ABA Tax Section Office, *Recommendations regarding the implementation of various tax-related provisions of the CARES Act* (May 12, 2020).

when the employees were not working and were not getting paid. Initially, the IRS determined that continued payment of health plan expenses would not be considered *qualified wages* in that scenario for the purpose of the ERC. However, after members of Congress expressed concern regarding this interpretation, the IRS modified its FAQs, allowing the payment of such benefits to be considered *qualified wages*.⁸¹

In addition to the FAQs, the IRS opened a phone line at the beginning of May 2020 to assist taxpayers with their ERC questions.⁸² By providing these resources and clarifying areas of ambiguity, taxpayers can take the steps they need to avoid entanglement in an unnecessary audit that would result in the draining of both taxpayers' and IRS's limited resources.

Paycheck Protection Program

The CARES Act created another significant benefit to assist employers whose businesses have been affected due to the many restrictions put in place to stem the spread of COVID-19.

The PPP is a loan designed to provide an incentive for small businesses to keep their employees on payroll and to assist in paying other expenses.⁸³ The loan will be fully forgiven if businesses use the funds for certain costs including payroll, interest on mortgages, rent, and utilities.⁸⁴ A number of small businesses are eligible to apply for these loans.⁸⁵

81 See letter from Sen. Chuck Grassley, Sen. Ron Wyden, and Rep. Richard E. Neal to Treasury Secretary Steven T. Mnuchin (May 5, 2020). Senators Grassley and Wyden and Rep. Neal urged Treasury to reconsider that determination, saying it goes against congressional intent and that allowing people to keep their employer-sponsored health plans even while furloughed is important in ensuring that Americans have access to affordable health care during the pandemic. "This decision will encourage employers to help employees keep their health insurance while temporarily furloughed due to the shutdown." *Id.* See also IRS, COVID-19-Related Employee Retention Credits: Amount of Allocable Qualified Health Plan Expenses FAQs, FAQs #64-65, <https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-amount-of-allocable-qualified-health-plan-expenses-faqs> (updated May 7, 2020; last visited June 9, 2020).

82 IRS SERP Alert 20A0198, ACS CRs Responding to BMF Taxpayers Regarding the New Employer Tax Credits (May 8, 2020).

83 CARES Act, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281 (2020). *Small Business Administration (SBA), Paycheck Protection Program: An SBA Loan That Helps Businesses Keep Their Workforce Employed During the Coronavirus (COVID-19) Crisis*; <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited May 19, 2020).

84 CARES Act, Pub. L. No. 116-136, § 1106, 134 Stat. 281 (2020). Payment on mortgages does not include any prepayment or payment of principal on a covered mortgage obligation. Additionally, the CARES Act also defines covered rent obligations and covered utility payments. See, e.g., CARES Act, § 1106(a)(4) and § 1106(a)(5). See also Paycheck Protection Program Flexibility Act of 2020, H.R. 7010, 116th Cong. (June 5, 2020). The PPP Flexibility Act modifies the CARES Act, widening the time frame in which incurred expenses can be covered under the PPP — to either 24 weeks after the origination of the loan or December 31, 2020, whichever comes earlier. Previously, the covered period under the CARES Act was eight weeks following the origination of the loan. Additionally, the PPP Flexibility Act of 2020 modifies the requirement for how the loan should be used. It now requires that eligible recipients use at least 60 percent of the covered loan amount for payroll costs, and may use the remaining 40 percent for any payment of interest on a covered mortgage or for rent or utility obligations. Some have lamented that determining when these loans will be fully forgiven is overly complex. See Neil Hare, *House Passes PPP Loan Forgiveness Bill, Treasury Issues Harsh Forgiveness Regulations—What You Need To Know*, FORBES (June 1, 2020).

85 The eligible businesses that can apply for this loan are: any small business concern that meets SBA's size standards (either the industry based size standard or the alternative size standard); any business, 501(c)(3) non-profit organization, 501(c)(19) veterans organization, or Tribal business concern with the greater of 500 employees, or that meets the SBA industry size standard if more than 500 employees; any business with an NAICS Code that begins with 72 (Accommodations and Food Services) that has more than one physical location and employs fewer than 500 people per location; and sole proprietors, independent contractors, and self-employed persons. See CARES Act, Pub. L. No. 116-136, § 1102(a), 134 Stat. 281 (2020).

As illustrated above, benefits bestowed upon taxpayers during this unprecedented time often create complex tax issues, and the PPP is no different. If businesses meet certain requirements, loans administered through the PPP will be forgiven. To ensure this did not create a taxable event, Congress excluded forgiveness of this loan from taxable income.⁸⁶ This immediately raised questions as to whether taxpayers who received a loan through the PPP that was either expected to be forgiven or was forgiven could deduct expenses paid with this loan.⁸⁷ In Notice 2020-32, the government took the position that no deduction is allowed for an expense that is otherwise deductible because IRC § 265 denies deductions from income of a class that is exempt from tax.⁸⁸ Although this interpretation seems reasonable from a technical perspective, members of Congress took issue with the interpretation, arguing that it blunted Congress's intent to provide economic relief to taxpayers.⁸⁹ Examples such as this will cause taxpayer confusion, possibly resulting in an IRS examination.⁹⁰ Further, considering the complexity and the newness of this program, it is not entirely clear how it will be audited, and the extent to which the IRS will need to commit resources to conduct those audits.

Net Operating Loss Carrybacks and Elections

The CARES Act allows taxpayers to elect to carry back certain NOLs.⁹¹ It also provides for the accelerated recovery of refundable alternative minimum tax credits for corporations.⁹² These provisions provide businesses flexibility to utilize NOLs to offset prior taxable income and reduce the cost of capital as they cope with the economic and business effects of the pandemic. Loss carrybacks generally allow businesses to get refunds of the taxes they paid for earlier taxable years, in some cases, by releasing another tax attribute (*e.g.*, a foreign tax credit, minimum tax credit, or general business credit) in the carryback year that is carried to another year to create an overpayment.⁹³ Taxpayers can obtain refunds by filing a Form 1045, Application for Tentative Refund, or Form 1139, Corporation Application for Tentative Refund, or an amended return (*e.g.*, on Forms 1040X and 1120X). The amount of the refunds depends on both the magnitude of the NOL and the amount of tax paid for the earlier years to which the NOL is applied. Businesses try to estimate and

86 See CARES Act, Pub. L. No. 116-136, § 1106(i), 134 Stat. 281 (2020).

87 IRC § 265(a)(1) and Treas. Reg. § 1.265-1 provide that no deduction is allowed to a taxpayer for any amount otherwise allowable as a deduction to such taxpayer that is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by subtitle A of the Code.

88 IRS Notice 2020-32, 2020-21 I.R.B. 837.

89 See letter from Sen. Chuck Grassley, Sen. Ron Wyden, and Rep. Richard E. Neal, to Treasury Secretary Steven T. Mnuchin (May 5, 2020). See also S.3612 116th Congress 2d Session, *Small Business Expense Protection Act of 2020* (May 5, 2020). Separately, practitioners observed that it would be helpful for the government to clarify that the taxpayer's attributes remain intact upon forgiveness of a PPP loan (*i.e.*, because IRC § 108 is not applicable, the attribute reduction rules of IRC § 108(b) are inapplicable). ABA Section of Taxation, *Tax Implementation of the CARES Act* (May 12, 2020). They also asked for clarification about how the forgiveness should be reported and proper characterization of the loans for purposes of the public support test applicable to nonprofits.

90 Colleen Murphy, *Loan Program Raises Fraud Worries for IRS*, FORBES (June 3, 2020). Adding to this challenge is the IRS's major concern that the PPP is being exploited by individuals fraudulently applying for PPP loans. "With just the sheer amount of money that's going out, we know that when this type of situation happens, fraudsters are on high alert and ramp up all of the efforts they possibly can to get money from the government," said Don Fort, Chief of the IRS Criminal Investigation Division.

91 CARES Act, Pub. L. No. 116-136, §§ 2303 and 2306, 134 Stat. 281 (2020) (codified at IRC §§ 172(b)(1) and 163(j)(10)).

92 See CARES Act, Pub. L. No. 116-136, § 2305, 134 Stat. 281 (2020).

93 See CCA 2020-23006 (Mar. 6, 2020).

compare the value of using the NOL to offset income in future years at future tax rates with the value of carrying the NOL back to offset income at the rates applicable to prior years. They may also consider their immediate cash flow needs, the timing of the refund, and the risk that carrying the loss back will trigger an audit of an earlier year.

Recent Legislative Changes Make Election Decisions and Computations More Difficult

For tax years beginning on or before December 31, 2017, the top corporate rate was 35 percent, and NOLs could generally be carried back two years.⁹⁴ For taxable years beginning after 2017, the Tax Cuts and Jobs Act (TCJA) generally reduced the top corporate rate to 21 percent and eliminated the option to carry back NOLs for most taxpayers.⁹⁵ The TCJA also imposed a new one-time tax (albeit at lower effective rates by virtue of a deduction under IRC § 965(c) and sometimes offset by foreign tax credits) on certain accumulated foreign earnings by *deeming* them to be repatriated (*i.e.*, taxing them whether they were repatriated or not) under IRC § 965. This tax is widely referred to as the “transition tax.” Although the entire transition tax was assessed in the IRC § 965 inclusion year, taxpayers could elect to pay it in eight annual installments without interest under IRC § 965(h).

Section 2303 of the CARES Act requires a taxpayer with an NOL arising in a taxable year beginning in 2018, 2019, or 2020 to carry that loss back to each of the five preceding years unless they elect to waive the carryback, and also provided a two-year carryback of NOLs arising during a taxable year that began in 2017 and ended during 2018.⁹⁶ An election for an NOL arising in a taxable year beginning in 2018 or 2019 must be made no later than the due date, including extensions, for filing the taxpayer’s federal income tax return for the first taxable year ending after March 27, 2020.⁹⁷ This added flexibility means that taxpayers have difficult choices about when to elect to take the losses and whether to amend prior-year returns – choices that are even more complicated because of special rules that apply to those subject to the “transition tax” under IRC § 965(a).⁹⁸

To assist taxpayers, Congress enacted two special rules that apply to a year in which there was an IRC § 965 inclusion (generally 2017, 2018, or both). First, if one or more years in the carryback period are an IRC § 965 inclusion year, taxpayers may elect to exclude all such inclusion years from

94 IRC § 11 (2017); IRC § 172 (2017).

95 Section 13302 of the TCJA, Pub. L. No. 115-97, 131 Stat. 2054 (2017), amended IRC § 172(a) to limit the deduction of NOLs incurred in taxable years beginning after 2017 to 80 percent of taxable income. This limitation applied to all taxpayers. Section 11012 of the TCJA also added IRC § 461(l), which limited the amount of business deductions allowed for a taxable year in excess of business income for such year, applicable to taxpayers other than corporations. The amount of such excess deductions that could be used to offset non-business income was limited to \$250,000 for single filers and \$500,000 for joint filers. Any excess business deductions beyond these limitations were carried forward to the following year as an NOL. Section 12001 of the TCJA repealed the corporate alternative minimum tax (AMT), effective for tax years beginning after December 31, 2017. These technical rules make the carryback election decision more difficult.

96 CARES Act, Pub. L. No. 116-136, § 2303, 134 Stat. 281 (2020) (codified at IRC § 172(b)(1)). For further guidance, see IRS, Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19 (May 1, 2020), <https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19>.

97 Rev. Proc. 2020-24, 2020-18 I.R.B. 750.

98 For further analysis of the complexity involved in the NOL election decisions, see, e.g., Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020); Josiah P. Child, et al., *A Silver Linings Guidebook: Corporate Planning for Coronavirus Losses*, 2020 TNTF 96-15 (May 18, 2020); Amy Chapman, et al., *ATNOL Carrybacks Under the CARES Act*, 167 TAX NOTES FED. 1185 (May 18, 2020); Kittle-Camp, et al., *Insight: Who CARES for Taxpayer Cash Flow? The IRS and Its Quick Refund Fix*, BLOOMBERG L. NEWS DAILY TAX REP. (May 15, 2020).

the carryback period.⁹⁹ If they do not, then a second rule provides that the taxpayers will be treated as having made an election under IRC § 965(n) to not apply the carryback to the amount included in income under IRC § 951(a) (by reason of IRC § 965) for any IRC § 965 inclusion year in the carryback period.¹⁰⁰ This means, for example, that if 2017 is an IRC § 965 inclusion year for a taxpayer, the NOL will not reduce 2017 taxable income attributable to the transition tax. This may help ensure the NOL generates a refund rather than simply offsetting transition tax liability that a taxpayer is already authorized to pay in eight annual installments under IRC § 965(h).¹⁰¹ However, calculating the transition tax may involve so many complexities that some taxpayers might be reluctant to revisit it.¹⁰²

The decision to carryback losses is further complicated if the losses might be subject to the separate return limitation year rules (*i.e.*, rules that limit the use of losses when corporations enter and exit a consolidated group),¹⁰³ or if a purchase agreement was drafted under the assumption that no losses could be carried back. The impact of the NOL carryback on global intangible low-taxed income (GILTI) and the foreign derived intangible income (FDII), which were also enacted as part of the TCJA, may also complicate the analysis. Both GILTI and FDII are taxed at reduced rates by operation of IRC § 250. It might not make sense to use current-year losses to offset income that was taxed at a lower rate or that was already offset by foreign tax credits (FTCs) for taxes paid to other jurisdictions.

In addition, a taxpayer is precluded from claiming an NOL on either Form 1045 or Form 1139 when the carryback of the NOL would release FTCs in the carryback period that normally would then be available to carry forward. The instructions advise taxpayers to file amended returns in these situations instead.¹⁰⁴ Thus, a taxpayer might have to wait for the IRS to process an amended return rather than obtaining a quick refund based on the tentative carryback adjustment procedures. Moreover, some have suggested that sourcing an NOL carryback raises complex questions because the FTC regulations that address the transition between the pre-TCJA and the post-TCJA regime did not contemplate that taxpayers might be able to carry back an NOL from a post-TCJA year into the pre-TCJA regime.¹⁰⁵

99 IRC § 172(b)(1)(D)(v)(I).

100 IRC § 172(b)(1)(D)(iv).

101 See PMTA 2018-16 (Aug. 2, 2018). The IRS's conclusion that it cannot issue a refund for an IRC § 965 inclusion year until the entire liability for that year is satisfied is controversial. See, e.g., National Taxpayer Advocate, IRS Administration of the Section 965 Transition Tax Contravenes Congressional Intent and Imposes Unintended Burden on Taxpayers, NTA BLOG, <https://taxpayeradvocate.irs.gov/news/nta-blog-irs-administration-of-the-section-965-transition-tax-contravenes-congressional-intent-and-imposes-unintended-burden-on-taxpayers?category=Tax%20News> (Aug. 16, 2018); Brian Kittle *et al.*, *Rush for NOL Carryback Cash Hits IRS Roadblock*, 167 TAX NOTES FED. 969 (May 11, 2020). However, the IRS has concluded that it may pay refunds attributable to subsequent years even if the transition tax liability is not fully satisfied. See IRS, Questions and Answers about Tax Year 2018 Reporting and Payments Arising under Section 965, FAQ #3 (Apr. 3, 2020), <https://www.irs.gov/newsroom/questions-and-answers-about-tax-year-2018-reporting-and-payments-arising-under-section-965> ("If you made a section 965(h) election on your 2017 income tax year return, the IRS will apply voluntary payments that are designated as 2018 income tax payments solely against the 2018 income tax liability.").

102 See, e.g., Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020).

103 See Treas. Reg. §§ 1.1502-21 and -22.

104 See, e.g., IRS, Instructions for Form 1045, at 2 (2019); IRS, Instructions for Form 1139, at 2 (2018).

105 See Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020) (citing T.D. 9882).

The Base Erosion and Anti-Abuse Tax (BEAT), which was enacted as part of the TCJA also complicates the analysis. The BEAT is determined in part by the extent to which the taxpayer has made deductible payments to foreign related parties.¹⁰⁶ The CARES Act amended IRC § 163(j) for tax years beginning in 2019 and 2020 by increasing the percentage of adjusted taxable income (ATI) that is used to determine a taxpayer's interest deduction limitation for the year.¹⁰⁷ For taxable years beginning in 2019 or 2020, this percentage is increased from 30 percent to 50 percent.¹⁰⁸ For purposes of BEAT, IRC § 163(j) applies to first reduce deductible third-party interest expense, and only after to related-party interest expense (*pro rata* between foreign related party and domestic related party interest expense). Additional interest expense deductible under the expanded limitation could mean more interest expense is added back to the BEAT modified taxable income calculation.¹⁰⁹ Given all of this complexity, a taxpayer may require complex models to determine the optimal application of the CARES Act provisions to exercise the *right to pay no more than the correct amount of tax*.

Timing of Net Operating Loss Carryback Elections and Refunds

The decision to carryback NOLs and claim refunds may also depend on how quickly taxpayers can obtain refunds.¹¹⁰ Helpfully, the IRS issued Notice 2020-26, which provided a six-month extension to file the application (on Form 1139 or Form 1045) requesting a tentative refund to carry back an NOL with respect to a taxable year that began during calendar year 2018 and ended on or before June 30, 2019.¹¹¹ Although there is generally no easy way to expedite tentative allowance processing, the IRS has temporarily allowed taxpayers to file Forms 1139 and 1045 by fax.¹¹²

Once a taxpayer files a timely Form 1139 or 1045, the IRS has 90 days to perform a limited examination of the application.¹¹³ The scope of this review is very narrow and limited to discovering omissions and errors of computation and to determining the amount of the decrease in the tax attributable to such carryback upon the basis of the application and examination. IRC § 6411 does not authorize any examination of the merits of the loss being carried back nor of the merits of the tax year to which the loss is carried back, and nothing in that section authorizes the IRS to examine the application beyond the 90-day period.

Unless there are material omissions or computational errors, the IRS generally pays the tentative refund by the end of the 90-day period. The IRS often attempts to pay out tentative refunds within 45 days to avoid having to pay interest on the amount refunded.¹¹⁴ Receiving a tentative refund from the IRS is not necessarily the end of the process. In fact, it may just be the beginning. The IRS must determine if it will examine the return or survey the return without an examination. If

106 IRC § 59A.

107 CARES Act, Pub. L. No. 116-136, § 2306, 134 Stat. 281 (2020) (codified at IRC § 163(j)(10)).

108 Taxpayers may elect to use the 30 percent rate instead of the 50 percent rate.

109 For an example, see, e.g., Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020).

110 For a more detailed discussion of practical problems that might arise, see Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency, and Restoring Much-Needed Taxpayer Services*, *supra*.

111 IRS Notice 2020-26, 2020-18 I.R.B. 744.

112 IRS, Temporary Procedures to Fax Certain Forms 1139 and 1045 Due to COVID-19, FAQ #5 (May 1, 2020), <https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19>.

113 IRC § 6411(b).

114 IRC § 6611(e)(2) and (f)(4).

the taxpayer is currently under examination, the exam team may review the carryback as part of the ongoing audit. For taxpayers who are not currently under exam, the IRS can, and often does, conduct intensive examinations (after a tentative refund is paid) of the tax year(s) giving rise to the NOL. The IRS may also examine tax years to which the NOL is carried back.¹¹⁵ Although the examination of the years in the carryback period should not give rise to any increased tax liability for those years, the IRS may determine that unrelated issues in those years reduce or possibly eliminate the amount of the tentative refund paid.

All refunds in excess of \$5 million for corporate taxpayers and \$2 million for all other taxpayers (*e.g.*, individuals, partnerships, trusts, etc.) require additional review by the Joint Committee on Taxation (JCT).¹¹⁶ Unlike a tentative allowance, which can be refunded to the taxpayer prior to reporting the refund to the JCT, amended returns requesting refunds in excess of the JCT threshold are not paid until after JCT review.

Net Operating Loss Concerns

The interplay between the various provisions on complex business returns with tax attributes carrying over and carrying back over a five-year period is ripe for error or differing interpretations of the CARES Act. The IRS has released a set of FAQs that address the interaction of the new CARES Act NOL carryback provisions with taxpayers' IRC § 965(a) "transition tax" liabilities and inclusion years, including how to deal with the carryover of non-NOL attributes into the 965 inclusion year (*e.g.*, foreign tax credits and charitable contributions that are released as a result of carrying back NOLs to years preceding the IRC § 965 inclusion year). FAQ #10 does not explicitly say that taxpayers must file an amended return for their 965 inclusion year but encourages taxpayers to do so for proper accounting of any corresponding reduction to the taxpayers' remaining IRC § 965(h) tax liability.¹¹⁷ A taxpayer might infer, however, that a failure to do so could result in future problems relating to the assessment of a taxpayer's remaining IRC § 965(h) liability – *e.g.*, if the taxpayer believes his or her liability has been reduced by reason of these other attributes but does not adjust the source-year IRC § 965(h) liability through an amended return, the IRS may treat a failure to pay in full a future installment that the IRS systems still reflect as owed at the pre-adjustment amount as an acceleration event.

With the potential issues associated with these large refunds, application of JCT review and the proper application of the new rules, the Large Business and International Division will have tough choices to make as to which returns to examine and how to allocate its resources over the next few years. Taxpayers face uncertainty as the guidance issued via FAQs is non-binding on the IRS. Although we commend the IRS for quickly providing guidance on these issues and getting information out to the public, FAQs can be changed, supplemented, and amended without notice and public comment, unlike regulations. But FAQs, unlike the traditional forms of sub-regulatory guidance, are not "authority" under IRC § 6662, and if the IRS continues issuing and relying on FAQs, the regulations under IRC § 6662 need to be amended to clarify that FAQs can be used

¹¹⁵ IRC § 6501(k).

¹¹⁶ See IRC § 6405(a).

¹¹⁷ IRS, Frequently Asked Questions About Carrybacks of NOLs for Taxpayers Who Have Had Section 965 Inclusions, FAQ #10, <https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns> (last visited June 3, 2020).

to establish reasonable cause for relief from the accuracy-related penalty. Due to the complexity, severity, and size of the resulting refunds, we recommend the IRS also consider providing additional guidance in a binding and authoritative manner.¹¹⁸

OBJECTIVES FOR FISCAL YEAR 2021

In fiscal year 2021, TAS will:

- Advocate for the IRS to allow individuals who received their EIPs through federal benefit programs such as SSI or veterans benefits to either file a paper return or use the *Non-Filers: Enter Payment Info Here* tool to enter information about their qualifying children, and for the IRS to issue supplemental payments to those individuals during 2020;
- Advocate for the IRS to create a process to correct EIP amounts in 2020 rather than requiring taxpayers to wait until they file their 2020 returns in 2021;
- Advocate that the IRS provide guidance stating that it will retrieve a non-liable spouse's portion of the EIP regardless of whether an injured spouse claim has been filed;
- Advocate for the IRS to permit the electronic or fax submission of IRS Form 8379, Injured Spouse Allocation;
- Advocate that the IRS not spend its resources pursuing enforcement actions against a decedent's estate or family member who received an EIP for a decedent and did not return it;
- Conduct comprehensive outreach to external stakeholders regarding specific scams related to EIPs, particularly stakeholders that work with the disabled, elderly, veterans, and those with limited English proficiency;
- Advocate that the IRS prioritize the processing of Forms 14039, Identity Theft Affidavit, that bear the notation "Stolen EIP;"
- Advocate for the IRS to allow taxpayers to update their mailing addresses by calling a phone line devoted to EIP questions;
- Advocate for the IRS to provide clear guidance as to what is considered operations "comparable" to pre-pandemic operations for the ERC;
- Identify potential systemic delays in processing refund claims (*e.g.*, those arising from NOL carrybacks) and work with the IRS on solutions; and
- Advocate for the IRS to issue guidance to clarify the NOL carryback rules or to clarify that taxpayers can rely on FAQs to avoid penalties and to bind the IRS.

¹¹⁸ It should be noted, on May 6, 2020, the IRS updated its manual providing specific guidance for processing Form 1139 or Form 1045 with NOLs, section 965 inclusions, and 100 percent refund of FTCs filed under provisions of the CARES Act. See *generally* IRM 21.5.9.5.10.16, CARES Act of 2020 (PL 116-136, Section 2303, Section 2304, and 2305) Overview – Net Operating Losses (May 6, 2020).

Putting Taxpayers First, Improving Taxpayer Service, and Supporting the Development of a Comprehensive Customer Service Strategy and Related Plans to Implement the Taxpayer First Act

TAXPAYER RIGHTS IMPACTED¹

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

OVERVIEW

In 2019, the President signed the Taxpayer First Act (TFA), which included perhaps the most far-reaching revisions to tax administration since the IRS Restructuring and Reform Act of 1998.² Among other things, the TFA included some 23 provisions previously recommended by TAS. A centerpiece of the TFA is a requirement that the IRS develop four plans: (i) a comprehensive taxpayer service strategy; (ii) a comprehensive plan to redesign the IRS's organizational structure; (iii) a comprehensive employee training strategy that includes training on taxpayer rights and the role of TAS; and (iv) a multi-year plan to meet IRS information technology (IT) needs. Because of COVID-19, the IRS has been delayed, but it expects to deliver its comprehensive taxpayer service strategy to Congress by December 31, 2020. TAS looks forward to our continued involvement with the TFA Office on its development of the IRS's comprehensive customer service strategy and related plans.

While TAS has been working collaboratively with the IRS's TFA Office on implementing many of the TFA's provisions, we remain concerned that (1) the IRS has not properly implemented a provision directing it to establish a single point of contact for identity theft (IDT) victims and (2) it may not properly implement a provision directing it to exclude taxpayers with incomes at or below 200 percent of the Federal Poverty Level from assignment to private debt collection (PDC) agencies after December 31, 2020. Without a single point of contact, IDT victims may have to deal with multiple IRS offices and employees. In addition, when private debt collectors collect from low income taxpayers, they may collect more than the taxpayer can afford. We plan to work with the IRS on these issues in fiscal year 2021.

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

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

BACKGROUND

On July 1, 2019, the President signed into law the TFA with the aim of improving customer service.³ The TFA's major subtitles include: Improved Service, Sensible Enforcement, Organizational Modernization, Cybersecurity and Identity Protection, Development of Information Technology (IT), and Expanded Use of Electronic Systems. It was clearly designed to improve the IRS's interactions with taxpayers — to put taxpayers first. The TFA requires the IRS to develop a comprehensive customer service strategy and related plans for training, reorganization, and IT upgrades. It also includes 42 other provisions that must be implemented by different IRS business units, including 23 recommended by TAS.⁴ Implementation of the TFA's provisions will be a huge undertaking by the IRS with the goal of favorably changing the IRS's interactions with taxpayers and the taxpayers' experience with the IRS. TFA was enacted after congressional hearings on customer service, following the IRS's receipt of a “very poor” ranking on a key customer service benchmark cited last year by the President's Management Agenda.⁵

DISCUSSION

To Improve Taxpayer Service, the Taxpayer First Act Requires a Comprehensive Customer Service Strategy and Related Plans

Customer Service Strategy

Section 1101 of the TFA requires the IRS to deliver to Congress a customer service strategy that includes, among other things: short-term, medium-term, and long-term plans to provide assistance to taxpayers that is secure, designed to meet reasonable taxpayer expectations, and adopts appropriate best practices of customer service provided in the private sector, including online services, telephone call back services, and training of employees providing customer services. The plans must also include metrics and benchmarks for measuring the IRS's progress.⁶

Reorganization Plan

Section 1302 of the TFA requires the IRS to deliver to Congress an organizational plan, which among other things, prioritizes taxpayer services to ensure that all taxpayers easily and readily receive the assistance that they need and streamlines the agency to minimize the duplication of services and responsibilities.⁷ Although the IRS could implement the provision by planning a reorganization, the legislation does not expressly require one.

3 TFA, Pub. L. No. 116-25, § 1101(a)(1), 133 Stat. 981, 985-986 (2019).

4 See National Taxpayer Advocate 2020 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration 1 (Introduction)*; IRS response to TAS information request (May 12, 2020).

5 See National Taxpayer Advocate 2019 Annual Report to Congress 3-14 (Most Serious Problem: *Customer Service Strategy: The IRS Needs to Develop a Comprehensive Customer Service Strategy that Puts Taxpayers First, Incorporates Research on Customer Needs and Preferences, and Focuses on Measurable Results*); H.R. REP. NO. 116-39, Part 1, at 26-28 (2019) (Conf. Rep.).

6 The strategy was originally due to Congress by July 1, 2020. Due to the COVID-19, the IRS expects to issue the IT plan in December 2020.

7 The original plan was to be delivered by September 30, 2020. Due to COVID-19, the comprehensive taxpayer service strategy as well as the plans for reorganization and training will be delivered in December 2020.

Information Technology Plan

Section 2101 of the TFA makes the IRS Chief Information Officer (CIO) responsible for the development and implementation of a multiyear strategic plan for the IT needs of the IRS that aligns with the needs and strategic plan of the IRS. The plan, which must include performance measures (for both the technology and its implementation), must also address integrated enterprise architecture, planned major acquisitions, and resources needed for implementation. In addition, the CIO must update it annually.

Training Strategy and Plans

Section 2402 of the TFA requires the IRS to deliver to Congress a training strategy that includes plans to streamline current training processes; develop annual training regarding taxpayer rights, including the role of the Office of the Taxpayer Advocate; and improve technology-based training.⁸ It also requires the IRS to develop proposals to focus employee training on early, fair, and efficient resolution of taxpayer disputes; ensure consistency of skill development and employee evaluation throughout the IRS; and include an assessment of the funding necessary to implement the training strategy.

Enhancing the Taxpayer Experience: The Taxpayer First Act Office's Process

The key to improving taxpayer service and promoting taxpayer rights is for the IRS to develop good strategies and implement them effectively. Implementing the TFA is an ongoing agency-wide effort. To facilitate this process, the Commissioner established the TFA Office, comprised of four project directors supported by several subject matter experts, including a senior member of the TAS organization. The TFA Office took primary responsibility for coordinating the required strategies and plans and is leading the integration, communications, program management, and governance activities for the other provisions.

The TFA Office's mission includes "developing a strategy for continuously improving the taxpayer experience," and it refers to its overall strategy as the "taxpayer experience" strategy. It has been gathering the information needed to make improvements, notwithstanding the current challenge of dealing with COVID-19. To assist the TFA Office, TAS provided the IRS with recommendations and comments from stakeholders as discussed below. In fiscal year 2021, TAS will continue to work with the IRS as it develops and finalizes its strategies and to partner with the IRS to implement the changes necessary to improve customer service.

Listening to Taxpayers and the Taxpayer Advocate Service

In developing its taxpayer experience strategy and reorganization plans, the TFA Office has been listening to a wide array of internal and external stakeholders, including tax professionals, IRS leadership, IRS employees, and the National Treasury Employees Union. It put special emphasis on learning more about their needs and ideas they have for improving customer service, employee training, our organizational structure, and communications before designing the strategies to provide

⁸ The training strategy was originally due to Congress by July 1, 2020. Due to COVID-19, the IRS expects to issue the strategy in December 2020.

the best taxpayer experience possible. It conducted town halls, focus groups, interviews, and forums with stakeholders, holding over 150 events to collect feedback and recommendations.⁹

For example, the TFA Office visited Taxpayer Assistance Centers to interview staff and better understand taxpayers' needs. One of the earliest listening sessions the TFA Office held was with TAS leadership and 78 Local Taxpayer Advocates to try and understand the perspective of TAS employees who work every day with taxpayers who are experiencing problems with the IRS. TAS invited the TFA Office to participate in the Low Income Taxpayer Clinic (LITC) annual conference where it held a TFA roundtable discussion with LITC leaders. The TFA Office held two listening sessions with the Taxpayer Advocacy Panel (TAP), a group of 75 citizen volunteers who advise the IRS on how to improve IRS products, services, and customer satisfaction.¹⁰ It also established both internal and external facing mailboxes to receive input, receiving and analyzing over 1,000 communications through these mailboxes.¹¹

Participation by TAS, LITCs, and TAP helped the IRS gather critical information about what taxpayers need. Unfortunately, COVID-19 prevented additional outreach and made communication with individual taxpayers more difficult.¹²

Leveraging Existing Surveys and Research

In addition to outreach, the TFA Office leveraged the information already available. Looking for additional insights, it analyzed 61 different customer satisfaction survey results, research studies, third-party research documents, industry best practices, publications, oversight reports with recommendations (from the Government Accountability Office, the Treasury Inspector General for Tax Administration, and TAS), and case studies.¹³ TAS offered over 200 recommendations to improve service.¹⁴ After absorbing this information, the TFA Office began designing the IRS's plans and strategies in a way that it believes will best position the agency to put taxpayers first.

Training Strategy

The Training Strategy Team received the results of the data collected by the TFA Office, conducted interview sessions with 18 IRS business units including TAS, collected the results of the Federal Employee Viewpoint Survey, and independently researched industry best practices for government and corporate adult learning methodologies and began to identify key issues. The IRS established a core team to complete a series of deep dive sessions on training as a key enabler for a successful taxpayer experience. The team is focusing on increased effectiveness in areas already working well and what they need to achieve goals in areas that are not. The results of the team's analysis and

9 IRS response to TAS information request (May 12, 2020).

10 Appendix 1: *IRS Responses to Administrative Recommendations Proposed in the National Taxpayer Advocate's 2019 Annual Report to Congress*, *infra*.

11 IRS response to TAS information request (May 12, 2020).

12 The IRS recently asked for public comments. See IRS, *Improving Customer Experience (OMB Circular A-11, Section 280 Implementation)*, 85 Fed. Reg. 35698 (June 8, 2020) (requesting comments by July 13, 2020).

13 IRS response to TAS information request (May 12, 2020).

14 See National Taxpayer Advocate 2019 Annual Report to Congress 284-300 (Appendix 1: *Past TAS Recommendations on Taxpayer Service*) (reiterating still-relevant recommendations from 2002 to 2019); National Taxpayer Advocate 2019 Annual Report to Congress 3-14 (offering new recommendations).

synthesis of the data collected will form the basis for the Comprehensive Training Strategy. The goal of the training strategy is to ensure IRS training and development activities support IRS employees' professional development and equip employees with the competencies to provide high quality service to taxpayers and enhance the taxpayer experience. TAS will work collaboratively with the Training Strategy Team to support its goals to provide high quality service to taxpayers and enhance the taxpayer experience.

Organizational Structure

The TFA Office used two methodologies to research and plan for an organizational structure that would support a more robust Taxpayer Experience and ensure that the IRS worked efficiently and functionally. First, the TFA Office designed a Document Research Methodology to gather background research and interview key stakeholders and executive leadership. As part of this process, it gathered information, formed research questions, established a data repository, selected documentation for review, and synthesized key information from the research. Second, the TFA Office used a five-step process to analyze the information captured in interviews, research, and industry best practices, and to draft new organizational structures.

- Identify Design Insights;
- Determine Design Criteria;
- Define Organizational Design Implications;
- Create Proposed Structure Options; and
- Finalize Organizational Structure.

The goal of this process was to identify key organizational design takeaways that could serve as a baseline foundation for shaping the proposed new organizational structure and plan.

Protecting Taxpayer Rights: Implementation Has Begun on Taxpayer First Act Provisions

While the customer service strategy and related plans are still in development, the IRS has been implementing other TFA provisions, in some cases with assistance from TAS. For example, as of this writing, the TFA Office listed the following provisions as implemented:

- Low-income exceptions regarding Offers-In-Compromise (Section 1102);
- Low Income Taxpayer Clinics (Section 1402);
- Taxpayer Assistance Center closures (Section 1403);
- Seizure and sale of perishable goods (Section 1404);
- Whistleblower reforms (Section 1405);
- Information IRS is to provide during phone calls (Section 1406);
- Misdirected tax refund deposits (Section 1407);
- Public-private partnership to address refund fraud (Section 2001);
- Electronic Tax Administration Advisory Committee (Section 2002);

- Information Sharing and Analysis Center (Section 2003);
- Point of contact for identity theft victims (Section 2006);
- Notification of suspected identity theft (Section 2007);
- Improper disclosure by return preparers (Section 2009);
- Limit on re-disclosures of consent-based disclosures (Section 2202);
- Structuring transactions and IRS seizures (Sections 1201 and 1202);
- Clarification of equitable relief from joint liability “Innocent spouse relief” (Section 1203);
- Modification of procedures for issuance of third-party summons “John Doe summonses” (Section 1204);
- Notice to taxpayer of IRS contact with third party (Section 1206);
- Designated summonses (Section 1207);
- Limits on actions by IRS contractors (Section 1208);
- Penalty for failure to file (Section 3201);
- Streamlined Critical Pay Authority (Section 2103);
- Electronic signatures by taxpayers to authorize action by their practitioner (Section 2302);
- Payment of taxes by debit and credit cards (Section 2303);
- Authentication of users of IRS E-Services accounts (Section 2304);
- Repeal of requirements regarding return-free tax system (Section 2401);
- Office of the Taxpayer Advocate (Section 1301);
- Prohibition on IRS rehiring certain fired employees (Section 3001); and
- Notification of unauthorized inspection, etc. of returns (Section 3002).

Working with the IRS, TAS has been heavily involved in the implementation of the following provisions:

- Section 1301 of the TFA, which codified and expanded the Taxpayer Advocate Directive (TAD) appeal process;
- Section 1401 of the TFA, which codified the Volunteer Income Tax Assistance Grant Program (VITA); and
- Section 1402 of the TFA, which clarified that IRS employees may refer taxpayers to a specific LITC.¹⁵

¹⁵ These changes were recommended by TAS. See National Taxpayer Advocate 2019 Purple Book, *Compilation of Legislative Recommendations to Strengthen Taxpayer Rights and Improve Tax Administration* 8-9 (#3 Authorize the Volunteer Income Tax Assistance Grant Program); 14 (#6 Clarify that IRS Employees May Help Taxpayers Locate a Specific Low Income Taxpayer Clinic); 75-76 (#43 Codify the National Taxpayer Advocate’s Authority to Issue Taxpayer Advocate Directives). For a discussion of the VITA and LITC provisions, see IRS Pub. 5066, Low Income Taxpayer Clinics Program Report 2019 10-11 (Dec. 2019), <https://www.irs.gov/pub/irs-pdf/p5066.pdf>.

Improving the Taxpayer Advocate Directive Appeal Process for Elevating Problems

A TAD is a tool that the National Taxpayer Advocate uses to mandate systemic changes to improve a process or to grant relief to groups of taxpayers.¹⁶ While the TAD process has existed since it was first delegated to the National Taxpayer Advocate in 1998, the TFA established statutory procedures and timeframes for TAD appeals.¹⁷ It also clarified that TADs can reach the Commissioner of Internal Revenue. TAS drafted and circulated a new chapter of the Internal Revenue Manual (IRM) to implement these changes and is working with the IRS to finalize them. The new provisions should help the National Taxpayer Advocate elevate and resolve systemic problems for taxpayers.

Expanding Collaboration Between the Taxpayer Advocate Service, Low Income Taxpayer Clinics, and Volunteer Income Tax Assistance Sites

To implement the VITA and LITC provisions, TAS has been working with the IRS to update publications and the IRM that expand collaboration between VITAs and LITCs. TAS has been considering cross-referral procedures, joint outreach, and ways to encourage LITCs to provide technical assistance and training to VITA volunteers.¹⁸ These procedures should make it easier for taxpayers to access services from VITA and LITCs.

Implementation of Some Taxpayer First Act Provisions Falls Short of Congressional Requirements

Although TAS has been collaborating with the IRS to implement various TFA provisions, TAS has the following concerns:

- Section 2006 of the TFA calls for victims of IDT to have a single point of contact, but they still do not always get one; and
- Section 1205 of the TFA requires the IRS to exclude low-income taxpayers from referrals to private collection agencies (PCAs) after December 31, 2020, but some may still be referred.

To Reduce Taxpayer Burden, the Taxpayer First Act Requires Victims of Identity Theft to Have a Single Point of Contact

Tax-related IDT is an invasive crime that has a significant impact on its victims and the IRS. Since 2012, TAS has continued to recommend the IRS designate a single point of contact to assist the IDT victim in navigating his or her way through the various IRS departments.¹⁹ In section 2006 of

¹⁶ IRM 1.2.2.12.3, Delegation Order 13-3 (formerly DO-250, Rev. 1) Authority to Issue Taxpayer Advocate Directives (Jan. 17, 2001).

¹⁷ IRC § 7803(c)(2)(B)(ii)(VIII), (c)(5).

¹⁸ See IRS, Pub. 5066, Low Income Taxpayer Clinics Program Report 11 n. 12 (Dec. 2019) (explaining: “IRS employees are no longer prohibited from directing a taxpayer to a particular LITC and should do so whenever it appears a taxpayer might be eligible and in need of LITC assistance”).

¹⁹ See National Taxpayer Advocate 2017 Annual Report to Congress 218 (Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*); National Taxpayer Advocate 2015 Annual Report to Congress 187 (Most Serious Problem: *Identity Theft (IDT): The IRS’s Procedures for Assisting Victims of IDT, While Improved, Still Impose Excessive Burden and Delay Refunds for Too Long*); National Taxpayer Advocate 2014 Annual Report to Congress vol. 2, at 55 (IDT Case Review Report: *A Statistical Analysis of Identity Theft Cases Closed in June 2014*); National Taxpayer Advocate 2012 Annual Report to Congress 46-47, 67 (Most Serious Problem: *The IRS Has Failed to Provide Effective and Timely Assistance to Victims of Identity Theft*).

the TFA, Congress directed the IRS to offer IDT victims a single point of contact throughout the processing of their cases.

The IRS implemented section 2006 of the TFA by designating the Identity Theft Victim Assistance (IDTVA) unit as the single point of contact.²⁰ However, the IRS recognizes that IDT cases may be complex and may require the assistance of multiple IRS functions.²¹ When such cases are referred to an IRS function outside of IDTVA, that IRS function will control the case, meaning that the IDTVA assistor will no longer serve as the single point of contact with the taxpayer.²² For example, if the Submission Processing function must adjust the IDT victim's account and the Return Integrity & Compliance Services function must release a refund freeze code, the victim will need to interact with a minimum of three individuals to resolve his or her IDT issues.

The National Taxpayer Advocate has concerns about this approach. By denying a single point of contact to IDT victims with complex cases, the taxpayer faces additional and unnecessary burdens of dealing with multiple IRS employees as the IRS has not fully complied with the TFA directive. TAS has recommended (and continues to recommend) that the IRS provide *all* IDT victims with a true single point of contact, including IDT victims with complex issues requiring the assistance of multiple IRS departments — the very taxpayers most likely to have their cases fall between the cracks — and require that single point of contact to coordinate within its own organization.²³

To Reduce Taxpayers Burdens, the Taxpayer First Act Excluded Low-Income Taxpayers From Being Referred to Private Collection Agencies

Section 1205 of the TFA requires the IRS to exclude certain tax debts from the inventory it assigns to PCAs after December 31, 2020.²⁴ Among these debts are those owed by taxpayers whose adjusted gross income (AGI), “as determined for the most recent taxable year for which such information is available,” is at or below 200 percent of the Federal Poverty Level. In applying this provision of the TFA, the IRS plans to use the AGI shown on the taxpayer's most recently filed return, even if the return was filed many years ago. In such cases, the AGI is likely to be inaccurate.

When no return is on file with the IRS, the IRS does not exclude a taxpayer's account from PCA inventory because it believes it cannot establish the taxpayer's AGI. In the context of the Automated Substitute for Return program, however, when a taxpayer does not file, the IRS is authorized to make the return — implicitly including a computation of the taxpayer's AGI — based on third-party

20 According to the Legislative Analysis and Tracking Implementation Services, the IRS implemented this TFA provision on October 15, 2019 (“Assessment has been completed. IRS is compliant with statutory requirements of this provision.”).

21 See IRM 25.23.2.3.1.1, Addressing All Taxpayer Issues (Oct. 1, 2018) (noting that IDT cases “can be complex and involve multiple functions.... In situations where you have multiple controls with another function, you must contact that functional employee or liaison”). IRM Exhibit 25.23.4-4, Identity Theft (IDT) Functional Routing and Referral Chart (Nov. 21, 2018), provides a chart for transfers of IDT cases outside of IDTVA.

22 When a case gets transferred to another function, IDTVA may send the taxpayer a Letter 86C, Taxpayer Inquiry/Forms to Another Office. IRM 25.23.4.3.3, Cases Requiring Routing/Reassignment to Other Functions (Oct. 1, 2017).

23 National Taxpayer Advocate 2017 Annual Report to Congress 218 (Most Serious Problem: *Identity Theft: As Tax-Related Identity Theft Schemes Evolve, the IRS Must Continually Assess and Modify Its Victim Assistance Procedures*).

24 IRC § 6306.

reports of income, such as W-2s or Forms 1099.²⁵ Thus, where no return was filed in the past two years (and the AGI shown on older returns is likely outdated), TAS suggested the IRS determine AGI for purposes of the PDC program on the basis of such third-party reports. TAS Research analyzed this approach in evaluating PCA inventory as of September 12, 2019, and identified almost 380,000 more taxpayers with an AGI at or below 200 percent of Federal Poverty Level, compared to the number of such taxpayers identified using only the AGI shown on the most recent tax return.²⁶

Section 1205 of the TFA also excludes from assignment to PCAs cases in which substantially all the taxpayer's income is attributable to Social Security Disability Income (SSDI) or Supplemental Security Income (SSI) benefits. The IRS is already recalling from PCAs the accounts of SSDI beneficiaries that were previously assigned.²⁷ The IRS was able to identify them because SSDI is reported to the IRS by the Social Security Administration (SSA) on Form 1099. Unlike SSDI benefits, however, SSI benefits are not reported to the IRS. Therefore, the IRS is currently unable to systemically exclude the debts of SSI recipients from assignment to PCAs because it is not able to identify everyone who receives SSI benefits.

The IRS worked with SSA to overcome this lack of information so it could send economic impact payments to SSI recipients.²⁸ TAS will advocate for the IRS to secure a similar data sharing arrangement with SSA for the purpose of excluding SSI recipients from PCA assignment. However, in the event a similar arrangement cannot be reached, TAS will recommend legislation authorizing and requiring such a data sharing arrangement.

OBJECTIVES FOR FISCAL YEAR 2021

In fiscal year 2021, TAS will:

- Collaborate with the IRS as it develops and finalizes the TFA strategies and plans and continue to partner with the IRS to implement changes to improve customer service and the taxpayer's experience with the IRS;
- Work collaboratively with the TFA Office Training Strategy Team to support the goal of providing high quality service to taxpayers and enhancing the taxpayer experience through employee training;

25 When a taxpayer fails to file, IRC § 6020(b)(1) says the Secretary "shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise." See also Treas. Reg. § 301.6020-1(b)(1); IRM 5.18.1.2, Automated Substitute for Return (ASFR) Program Overview (Mar. 11, 2020). Any such return would necessarily require the IRS to determine AGI. Moreover, IRC § 6020(b)(2) clarifies that "[a]ny return so made and subscribed by the Secretary shall be *prima facie* good and sufficient for all legal purposes." One legal purpose is to determine whether to exclude the taxpayer from being referred to a PCA.

26 National Taxpayer Advocate 2019 Annual Report to Congress 97, 99 (Status Update: *Private Debt Collection: Forthcoming Changes to the Private Debt Collection Program Will Better Protect Low-Income Taxpayers and Achieve a Program That More Appropriately Respects Taxpayer Rights*). If there was no third-party data available or a return within the past two years, TAS Research assumed the taxpayer's AGI was at or below 200 percent Federal Poverty Level.

27 See IRS SERP Alert #20A0067, Social Security Disability Insurance (SSDI) Accounts Recalled from Private Debt Collection (PDC) (Feb. 5, 2020).

28 IRS, IR-2020-75, Veterans Affairs Recipients Will Receive Automatic Economic Impact Payments; Step follows work between Treasury, IRS, VA (Apr. 17, 2020).

- Continue to work with the IRS to finalize the TAD IRM;
- Continue to advocate for the IRS to assign a true single point of contact for all victims of identity theft (including taxpayers with complex tax issues requiring adjustments from multiple IRS departments); and
- Continue to advocate for the IRS to secure a data sharing arrangement with SSA for the purpose of excluding SSI recipients from PCA assignment. In the event a similar arrangement cannot be reached, TAS will recommend legislation authorizing and requiring such a data sharing arrangement.

Protecting the Rights of Taxpayers Who Receive “Soft Letters” That Require Them to Provide Support for Their Return Positions and Sworn Statements Outside an Examination

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Privacy*

OVERVIEW

The IRS’s use of “soft letters” to educate, inform, and encourage voluntary compliance is a useful IRS compliance and enforcement tool. However, the IRS’s soft letters have been including language aimed at compliant taxpayers that requires them to produce documents and a detailed supporting statement signed under penalties of perjury. The soft letters, which may cover more than one tax period, request information not included on a return and possibly cover years outside the statute of limitations for assessment. The information requested is akin to an IRS examination but without providing the taxpayer rights and protections afforded by an examination. One example of such a soft letter request is for a taxpayer who had reportable virtual currency transactions (Letter 6173). It is the National Taxpayer Advocate’s position that these intrusive requests violate taxpayers’ rights and should not appear in any soft letters or communications outside the examination process.

DISCUSSION

Over the years, the IRS has issued taxpayers “soft letters” for a variety of issues and purposes, including informing, educating, and encouraging voluntary compliance. However, the IRS has recently begun using some soft letters as a means to bypass the rights and protections of the examination procedures. One such example is Letter 6173, addressed to taxpayers with virtual currency transactions.

The IRS requires taxpayers to report whether they received, sold, sent, exchanged, or otherwise acquired any financial interest in any virtual currency on their annual tax return.² The Large Business and International (LB&I) Division has moved toward issue-based examinations and a compliance campaign process. The taxability of virtual currency is one such campaign that LB&I is focusing on in determining which taxpayers to select for examination.³ In 2019, to combat virtual currency abuses, the IRS sent letters to over 10,000 taxpayers who potentially failed to report income and pay the resulting tax from virtual currency transactions or did not report their transactions

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

2 See IRS Form 1040, Schedule 1, used to file returns for tax year 2019.

3 IRS, IRS Announces the Identification and Selection of Five Large Business and International Compliance Campaigns, IRS News Release (July 2, 2018), <https://www.irs.gov/businesses/irs-announces-the-identification-and-selection-of-five-large-business-and-international-compliance-campaigns>.

properly.⁴ Although we applaud the IRS's efforts involving virtual currency abuses, including increased use of data analytics, we do not believe the IRS should include compliant taxpayers in its soft letter campaign. Currently, there are three virtual currency letter variations: Letter 6173, Letter 6174, and Letter 6174-A.

It is the IRS's position that soft letters come in many varieties, tailored to the sophistication of the audience and issue(s) involved. Each letter specifies options for taxpayer action, if appropriate. Some letters merely inform the taxpayer that the IRS has observed certain information about them and highlights relevant law. The stronger letters result from observations suggesting higher risk of non-compliance on the part of the recipient and urge the taxpayer to respond by a specific date (*e.g.*, file an amended return or statement under oath) or risk further action by the IRS. None of these soft letters constitute the start of an examination, but the response, or lack thereof, will factor into the IRS's next steps intended to bring taxpayers into compliance. The IRS contends that soft letters are a service to the taxpayers who receive them because they are offered an opportunity to comply if they have not or to avoid an examination if they have complied, and it is a service to the broader taxpayer community as reporting and paying compliance increase, thus improving fairness to all. Soft letters may be a useful tool in educating taxpayers and may assist in future compliance. However, as drafted, Letter 6173 is not such a letter and crosses over from educating to imposing onerous taxpayer production burdens outside the arena of an examination.

Compliant Taxpayers

What is disturbing about soft Letter 6173 is that it specifically addresses taxpayers who believe they are compliant and imposes unreasonable burdens on them outside the protection of an examination.⁵ The IRS has stated that Letter 6173 is not an examination and therefore the IRS is not required to follow the examination guidance or provide taxpayers the rights afforded them in an examination. Yet, Letter 6173 fails to inform taxpayers that the letter is not part of an examination and as written appears to be a threat directed at taxpayers who believe they are compliant.

Specifically, for the taxable years 2013 through 2017, the letter instructs taxpayers as follows:

If you believe you followed all tax and information reporting requirements relating to your virtual currency accounts, mail or eFax the following to the address or eFax number shown at the top of this letter.

- A statement of facts explaining your position. Include a complete history of previously reported income from your virtual currency transactions. Explain the actions you took to become compliant with U.S. reporting requirements and provide copies of previously filed documents that confirm your compliance.

4 IRS, IR-2019-132, IRS Has Begun Sending Letters to Virtual Currency Owners Advising Them to Pay Back Taxes, File Amended Returns; Part of Agency's Larger Efforts (July 26, 2019), <https://www.irs.gov/newsroom/irs-has-begun-sending-letters-to-virtual-currency-owners-advising-them-to-pay-back-taxes-file-amended-returns-part-of-agencys-larger-efforts>.

5 See, *e.g.*, IRC § 7605(b) (prohibiting unnecessary or repetitive examinations). See also IRS Pub. 3498, The Examination Process (explaining the examination process and taxpayers' rights before, during, and after an examination). Letter 6173 is not the only IRS letter that solicits an explanation from taxpayers who believe they complied with filing requirements. IRS Letter 6290 contains a similar request with respect to compliance with the Foreign Account Tax Compliance Act. LB&I declined to remove the request from Letter 6290.

- Your contact information, including your telephone number, complete address, and the address where you receive mail (if different).

- The following statements with your signature and date:

I, _____, declare under penalties of perjury that I have examined this entire document, including all attachments and accompanying statements, and that the enclosed is true, correct, and complete.

I also understand with respect to any submission that the IRS reserves the right to make further contacts with me and my representatives to clarify any written explanation or any other documents. Statements and documents sent under this option will be checked against information received from banks, financial advisors, and other sources for accuracy.

The letter instructs and demands that these taxpayers produce documents, together with written factual and legal support for a five-year period. Depending upon the taxpayer's specific facts and the date of the letter's issuance for some of these years the three-year assessment period may have closed.⁶ It should be noted that the IRS has not required the above information to be provided on a tax return. Yet, the soft letter is requiring it. This request is what normally happens during an IRS examination but with the numerous procedural protections of an examination. The Code, Congress, and the IRS have repeatedly acknowledged taxpayers' rights and protections, and this letter not only does not provide them — it undermines them.

The request for an explanation made outside the audit process burdens taxpayers who believe they are *compliant* and undermines their *rights to be informed* and *to privacy*, which includes the right to expect that any IRS inquiry will be no more intrusive than necessary.⁷ Moreover, the taxpayer may find it necessary to hire representation to review his or her records to provide a complete response and then still be subject to an examination later, long after the taxpayer's response, for which the taxpayer may again need representation. Letter 6173 is not consistent with the protections afforded taxpayers.⁸ The request for a sworn written statement should be removed from Letter 6173.

Non-Compliant Taxpayers

Letter 6173, like Letters 6174 and 6174-A, also addresses taxpayers who may have failed to include virtual currency on their return or who incorrectly reported the appropriate virtual currency tax consequences. The letters encourage the taxpayer to file an amended return or file a delinquent return. The letters fail to provide taxpayers with information about the application or assertion of penalties or interest should they ignore — or follow — this encouragement. Although the Code does not require taxpayers to file an amended return, it does encourage taxpayers to correct any incorrect positions set forth on the original return. One such encouragement is the ability to file a qualified amended return (QAR) that prevents the IRS from assessing the accuracy-related

6 See IRC § 6501.

7 TBOR, www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

8 LB&I declined TAS's recommendation to remove the request that compliant taxpayers provide additional information under a sworn statement from Letter 6173.

penalty.⁹ A QAR is an amended return that corrects an error in a previously filed return prior to the IRS contacting the taxpayer regarding an examination of the return.¹⁰ One question that arises is whether after sending Letters 6173, 6174, or 6174-A and then opening an examination, the IRS will contend the letters, although they are not examinations when sent, are a contact regarding an examination of a return, making the taxpayer ineligible for relief from the 20 percent accuracy-related penalty by filing an amended return.¹¹

Another challenge with QARs is the exclusion for amended returns filed after the issuance of a John Doe summons.¹² If the recipients of Letters 6173, 6174, or 6174-A were identified pursuant to a John Doe summons, they are ineligible for QAR penalty relief.¹³ The letters do not provide that information to the taxpayer. As a result, taxpayers may be subject to penalties even if they correct their returns before the IRS opens an examination.

OBJECTIVES FOR FISCAL YEAR 2021

In fiscal year 2021, TAS will:

- Continue to work with LB&I toward removing burdens imposed on taxpayers who believe they are compliant resulting from soft letters such as Letter 6173;
- Work with the IRS and encourage guidance allowing accuracy-related penalty relief when filing a virtual currency amended return in response to Letters 6173, 6174, and 6174-A;
- Encourage the IRS to offer a positive incentive for taxpayers who receive Letters 6173, 6174, and 6174-A to disclose and correct errors by developing an administrative program for virtual currency reporting issues similar to the offshore disclosure initiatives to encourage voluntary compliance; and
- Work with the IRS on future soft letters to eliminate burdens on taxpayers by protecting their rights.

⁹ See IRC § 6662(d)(2)(B); Treas. Reg. § 1.6662-4(f).

¹⁰ See Treas. Reg. § 1.6664-2(c)(3)(i)(A), which includes in the definition of “qualified amended return” an amended return filed before the taxpayer is first contacted by the IRS concerning any examination with respect to the return.

¹¹ See IRC § 6662(a).

¹² See Treas. Reg. § 1.6664-2(c)(3)(i)(D) and (c)(5), Examples 5 and 6.

¹³ See Robert W. Wood and Joshua D. Smeltzer, *IRS Prepares for Battle on Cryptocurrency Reporting*, 166 TAX NOTES FEDERAL 601 (Jan. 27, 2020), which describes a John Doe summons issued to Coinbase that resulted in the release of information about 13,000 Coinbase customers.