

**MSP
#14****APPEALS: The Office of Appeals' Approach to Case Resolution Is Neither Collaborative Nor Taxpayer Friendly and Its "Future Vision" Should Incorporate Those Values****RESPONSIBLE OFFICIAL**

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TAXPAYER RIGHTS IMPACTED¹

- *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 Privacy*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

An independent and effective Office of Appeals (Appeals) within the IRS is essential for quality tax administration and meaningful protection of taxpayer rights. Appeals' mission is to resolve tax controversies on a basis that is fair and impartial to both the government and the taxpayer and in a manner that will enhance public confidence in the integrity and efficiency of the IRS.² To the extent that Appeals achieves these goals, the result will be an increase in timely and efficient resolution of disputes between taxpayers and the IRS, a heightened level of trust on the part of taxpayers, and an expansion of overall taxpayer compliance.³

Recently, Appeals has faced significant resource constraints. For example, Appeals' funding has fallen by approximately 11.2 percent, from \$221.1 million in fiscal year (FY) 2013 to \$196.4 million in FY 2016.⁴ Further, the number of Appeals Hearing Officers (Hearing Officers) has been reduced by approximately 24 percent between FY 2013 and FY 2016.⁵

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

2 Internal Revenue Manual (IRM) 8.1.1.1(1), *Accomplishing the Appeals Mission* (Feb. 10, 2012).

3 See, e.g., S. REP. No. 105-174, at 84 (1998); Melinda Jone and Andrew J. Maples, *Mediation as an Alternative Option in Australia's Tax Disputes Resolution Procedures*, 27 AUSTL. TAX F. 525, 528-29 (2012); Erich Kirchler, *THE ECONOMIC PSYCHOLOGY OF TAX BEHAVIOR* (2007); Tom R. Tyler, *WHY PEOPLE OBEY THE LAW* (2006).

4 IRS, *Appeals Business Performance Review (BPR), Fourth Quarter FY16*, 24 (Nov. 7, 2016), <http://appeals.web.irs.gov/stratplan/documents/Appeals-BPR-Q4-2016.doc>, IRS, *Appeals Business Performance Review (BPR), Fourth Quarter FY13*, 24 (Nov. 7, 2013), <http://appeals.web.irs.gov/stratplan/documents/Appeals-BPR-Q4-2013.doc>.

5 Appeals response to TAS supplemental information request (Oct. 28, 2016). The term "Hearing Officer" refers to any Settlement Officer, Hearing Officer, Appeals Account Resolution Specialist, or other employee holding hearings, conferences or who otherwise resolves open case issues in Appeals. It further encompasses individuals who conduct or review administrative hearings or who supervise Hearing Officers. See IRS, *AJAC FAQs*, <http://appeals.web.irs.gov/about/ajac-faq.htm> (updated July 7, 2014).

Appeals has responded to these limitations by implementing policies and procedures, some of which create hardships for taxpayers and detract from Appeals' long-term mission. The National Taxpayer Advocate has expressed concerns regarding a number of approaches adopted by Appeals, including:

- Fostering an inhospitable Appeals environment;⁶
- Limiting taxpayers' right to an in-person conference;⁷
- Reducing the quality of substantive reviews under the Appeals Judicial Approach and Culture (AJAC) project;⁸ and
- Failing to sufficiently protect the rights of taxpayers when conducting Collection Due Process (CDP) appeals and Collection Appeals Program (CAP) hearings.⁹

Appeals' proposed trajectory, which would either exacerbate or ignore many of these concerns, is set forth in its preliminary design for a future vision. This Concept of Operations (CONOPS) is a guiding set of principles that serves as a roadmap for where Appeals would like to be in the next five years.¹⁰ To date, however, Appeals' CONOPS is limited by its reliance on a "one size fits all" model that is primarily bureaucratic- and enforcement-oriented. By contrast, the National Taxpayer Advocate urges Appeals to embrace a future vision premised on a collaborative model of taxation that would more successfully engage taxpayers as participants in the voluntary tax system.

ANALYSIS OF PROBLEM

Appeals' CONOPS Is Partially Driven by Declining Operating Budgets in Recent Years

Reductions in funding and additional demands to demonstrate return on investment have put pressure on the IRS, including Appeals, to increase revenues and lower costs.¹¹ The number of Appeals cases has dropped slightly, but then stabilized over the last few years. During that time, however, the number of Hearing Officers has sharply declined. These trends can be seen in the following figure:

FIGURE 1.14.1, Appeals Workload by Fiscal Year¹²

Fiscal Year	Case Receipts Settlements	Hearing Officers
FY 2013	123,113	924
FY 2014	113,608	852
FY 2015	113,870	768
FY 2016	114,362	705

6 National Taxpayer Advocate 2015 Annual Report to Congress 82-90.

7 National Taxpayer Advocate 2014 Annual Report to Congress 46-54.

8 National Taxpayer Advocate 2015 Annual Report to Congress 82-90.

9 National Taxpayer Advocate 2014 Annual Report to Congress 185-96; National Taxpayer Advocate 2015 Annual Report to Congress 91-99.

10 IRS, *Appeals Business Performance Review (BPR), Fourth Quarter FY15*, 2 (Nov. 16, 2015), <http://appeals.web.irs.gov/stratplan/documents/Appeals-BPR-Q4-2015.doc>. Subsequently, Appeals has renamed this initiative "Appeals' Future State." The term CONOPS, however, will be retained herein for the sake of brevity.

11 IRS, *Office of Appeals Concept of Operations (CONOPS)*, 4 (Aug. 31, 2015) (on file in TAS archives).

12 Data for this figure was drawn from the Appeals response to TAS supplemental information request (Oct. 28, 2016).

During this same period, however, the percentage of Examination-based Appeals cases that are docketed in the United States Tax Court (known as “docketed Appeals cases”) has increased in comparison to non-docketed Appeals cases.¹³ This increase of approximately 12 percent, which is shown below, may mean that taxpayers’ procedural rights to an appeal are being abridged, or that they are growing increasingly impatient regarding the timeliness of reviews available via the standard administrative process.¹⁴ This explanation could account for why an increasing percentage of taxpayers are finding it necessary to take their cases to courts, which, in turn, send the cases back for Appeals’ consideration, a circumstance causing both delay and expense for taxpayers and the IRS.

FIGURE 1.14.2, Non-Docketed Versus Docketed Appeals Cases by Fiscal Year

Fiscal Year	Non-Docketed Case Receipts	Docketed Case Receipts	Non-Docketed Percentage	Docketed Percentage
FY 2013	33,101	23,577	58%	42%
FY 2014	28,144	24,703	53%	47%
FY 2015	26,009	25,203	51%	49%
FY 2016	26,421	23,812	53%	47%

Over time, the number of Hearing Officers has decreased significantly more than the amount of work they are required to perform. This need to do more with less presents challenging issues that underlie Appeals’ CONOPS, and the National Taxpayer Advocate understands Appeals’ concerns regarding resources. Appeals’ need for operational efficiency and cost-effectiveness, however, is not, in the long run, best served by such steps as limiting access to in-person or geographically proximate conferences, or reducing the quality of substantive review. Rather, taxpayers who choose to engage in dialogue with the IRS through participation in the Appeals process should be encouraged, educated, and welcomed as partners in the voluntary tax system.

Appeals’ CONOPS Does Not Yet Address Many of the Core Taxpayer Service Issues Currently Existing Within Appeals

Appeals’ CONOPS is inevitably impacted by the resource challenges to which Appeals is currently subject. Nevertheless, CONOPS also presents an exceptional opportunity to improve the taxpayer experience within Appeals. To date, however, Appeals’ CONOPS is primarily amorphous and aspirational.¹⁵ It begins with an examination of Appeals’ current state, based on which Appeals identifies six challenges and associated changes that will inform its future vision. These issues relate to inefficient

13 Examination-based cases represent the best data set for observing trends in this context, as Collection-based cases overwhelmingly give rise to nondocketed appeals (approximately 99.9%). Appeals response to TAS supplemental information request (Oct. 28, 2016). If taxpayers file a valid petition for review in the U.S. Tax Court, the case often is referred back to Appeals for possible settlement if they have not previously had an opportunity to present their case to Appeals. See IRM 8.4.1.4(1), *Appeals Authority Over Docketed Cases*, (Oct. 26, 2016).

14 This increase of approximately 12 percent is based on data provided by Appeals in its response to TAS supplemental information request (Oct. 28, 2016). The percentages shown in the following table are calculated through dividing the non-docketed and docketed case receipts, respectively, by total case receipts, shown in Figure 1 above.

15 In response to an information request, Appeals provided TAS with an Aug. 31, 2015 document discussing Appeals’ CONOPS. According to Appeals, all subsequent materials are in internal pre-decisional phases and are not yet available for release. Appeals’ response to TAS information request (June 6, 2016). Given the period of time elapsed, it is somewhat difficult to tell whether Appeals has created additional Future State documents that it is affirmatively withholding pending an ongoing pre-decisional process, or whether there simply has been little-to-no progress on Appeals’ Future State (other than the name change) since the August 31, 2015 draft, which TAS was provided.

resolution pathways sometimes chosen by taxpayers, workload predictability, technology, Appeals workforce skillsets, attrition, and case management.¹⁶

Appeals' CONOPS then briefly articulates the principles, features, and initiatives intended to address these challenges. To this point, Appeals' CONOPS deals primarily in broad generalities and provides few specifics. It alludes to a tailored Appeals path in which cases would receive a particular treatment based on the issue or taxpayer type.¹⁷ It also briefly discusses transparent and consistent communications with taxpayers regarding the Appeals process.¹⁸ Nevertheless, Appeals' CONOPS does not yet furnish a detailed plan for achieving these or any other goals.

The pathway outlined by Appeals' CONOPS is too indistinct to allow for in-depth analysis. However, some of its features, such as those that contemplate accepting only cases that have an "actual disagreement" and adopting a process that provides taxpayers with only "one opportunity to settle their case in Appeals" are concerning in that they could exacerbate the problems already created by the manner in which AJAC has been implemented.¹⁹ Also, Appeals' CONOPS's idea of making alternative dispute resolution (ADR) available earlier in the tax controversy process is encouraging, but if it is not combined with a more systemic revision of the IRS's overall ADR program, it likely will continue to receive only tepid interest and minimal use.²⁰

From a broader, more fundamental perspective, Appeals' CONOPS appears to be focused primarily on internal Appeals logistics, such as technology, training, career paths, case management, and communications, all of which are worthy candidates for systemic enhancement. Nevertheless, to be truly significant and effective, Appeals' CONOPS should center on the taxpayer experience and seek to improve the case resolution environment via engagement with the taxpayer.

Taxpayers who choose to engage in dialogue with the IRS through participation in the Appeals process should be encouraged, educated, and welcomed as partners in the voluntary tax system.

TAS Urges Appeals to Adopt a Future Vision That Is More Collaborative and Taxpayer Friendly

To the extent that Appeals is willing to expand the current focus of CONOPS beyond primarily internal issues, Appeals has the opportunity to establish a more welcoming environment for taxpayers and to facilitate streamlined case resolutions. For example, taxpayers and tax practitioners often feel that a live meeting with a Hearing Officer is an important element in the proper presentation and clear understanding of their case.²¹ Moreover, an in-person meeting can sometimes be crucial for the accurate communication of ideas and can assist Hearing Officers in gauging credibility and assessing the strength of the taxpayer's case.²² The absence of in-person conferences "... puts taxpayers and their representatives

16 IRS, *Office of Appeals Concept of Operations (CONOPS)*, 8 (Aug. 31, 2015) (on file in TAS archives).

17 *Id.* at 12.

18 *Id.* at 15.

19 *Id.* at 12. Among other things, TAS's concern regarding these reasonable-sounding goals is that they could be code words for further decreasing substantive reviews and increasing case transfers to Compliance. See discussion *infra*. See also National Taxpayer Advocate 2015 Annual Report to Congress 82-90.

20 IRS, *Office of Appeals Concept of Operations (CONOPS)*, 15 (Aug. 31, 2015) (on file in TAS archives). For a more in-depth discussion of ADR and how it might be expanded by the IRS, see Most Serious Problem: *Alternative Dispute Resolution (ADR): The IRS is Failing to Effectively Utilize ADR as a Means of Achieving Mutually Beneficial Outcomes for Taxpayers and the Government*, *infra*.

21 TAS conference call with practitioners associated with the American Bar Association (ABA) Tax Section (Apr. 28, 2016).

22 *Id.*

at a great disadvantage,” and “... substantially increases professional fees and extends the timeline in which to resolve cases.”²³

Appeals, however, has expanded the number of states without any Hearing Officers possessing case responsibilities by 33 percent (from nine to 12) between 2011 and the present.²⁴ Although taxpayers living in these states without an Appeals presence, or in portions of other states not located near an Appeals office, may still be able to obtain an in-person conference, they generally are left with the option of waiting until a Hearing Officer “rides circuit” in their area, or traveling sometimes substantial distances and incurring significant costs to obtain their desired meeting.

Further, Appeals has taken affirmative steps to clarify that in-person conferences are a matter of discretion for the Hearing Officer, not a matter of right for the taxpayer, and will be considered only under specific circumstances.²⁵ “By putting in place business rules around when Appeals provides in-person conferences, the changes shift the decision from the taxpayer to Appeals.”²⁶ Several taxpayer representative groups have expressed objections that this approach may decrease the fairness and ultimate number of case resolutions reached in Appeals.²⁷ Moreover, the issue of how this new policy will be applied in the case of CDP appeals remains an open and troubling question.²⁸

The National Taxpayer Advocate raised concerns about these policies to Appeals leadership in a Spring 2016 meeting.²⁹ Appeals justified the move away from in-person conferences by explaining that:³⁰

- Approximately 59 percent of taxpayers requesting an in-person conference, which has the effect of shifting a case from Campus Appeals to Field Appeals, do not ultimately hold the requested conference;
- Field-based Hearing Officers complain that, because of these in-person conference requests, they are asked to handle lower-graded cases, such as those relating to the Earned Income Tax Credit (EITC) and itemized deductions;
- Field-based Hearing Officers assigned to cases involving in-person conferences often are not experts in the applicable subject matter; and
- Campus facilities are not designed to accommodate in-person conferences, while Field appeals (which is where such cases are transferred) are substantially more expensive to conduct.

23 Dave R. Stubblefield, Michael D. Williams, CPA, Kenneth M. Horwitz, JD, *Growing Concerns of Appeals’ Face-to-Face Meetings*, Texas Society of Certified Public Accountants (Jan. 25, 2016), <http://tscpafederal.typepad.com/blog/2016/01/growing-concerns-of-appeals-face-to-face-meetings.html>. See also Letter from Texas Soc’y of Cert. Pub. Accts. to John Koskinen, Comm’r of IRS (May 13, 2016) (on file in TAS archives).

24 These states are comprised of Alaska, Arkansas, Delaware, Idaho, Kansas, Montana, North Dakota, New Mexico, Rhode Island, South Dakota, Vermont, and Wyoming. The territory of Puerto Rico also lacks a permanent Appeals office. Appeals response to TAS information request (June 6, 2016). See also National Taxpayer Advocate 2014 Annual Report to Congress 46.

25 IRM 8.6.1.4.1, *Conference Practice* (Oct 1, 2016).

26 Open letter from Kirsten Wielobob, Chief, Appeals (Nov. 16, 2016).

27 See Letter from American College of Tax Counsel to Kirsten Wielobob, Chief, Appeals (Oct. 10, 2016) (on file in TAS archives); Leslie Book, *Technology and the Tax System: A Less Personal Appeals Office Coming Our Way*, PROCEDURALLY TAXING (Oct. 13, 2016), <http://procedurallytaxing.com/technology-and-the-tax-system-a-less-personal-appeals-office-coming-our-way/>. Letter from Texas Soc’y of Cert. Pub. Accts. to John Koskinen, Comm’r of IRS (May 13, 2016) (on file in TAS archives). The ABA Tax Administrative Practice Committee also has an ongoing comment project regarding changes to Appeals processes with respect to in-person appeals. Email from ABA Tax Administrative Practice Committee (Oct. 12, 2016) (on file in TAS archives).

28 IRM 8.22.4.1(2), *Collection Due Process (CDP) Technical IRM Overview* (Mar. 29, 2016).

29 Notes from meeting between the National Taxpayer Advocate and Appeals Executives (May 31, 2016) (on file with TAS).

30 *Id.*

In response, the National Taxpayer Advocate pointed out that many of the requests for in-person conferences likely result from an attempt by taxpayers to obtain a Hearing Officer with knowledge of the local economy, which is a reasonable and appropriate desire that should be accommodated.³¹ To facilitate this local presence and these in-person conferences, Appeals should expand its geographic footprint by strategically moving some Hearing Officers out of campuses and back to permanent postings in states where Appeals is underrepresented, or in many cases, unrepresented.

In answer to the complaints of Field-based Hearing Officers about working lower-graded cases, the National Taxpayer Advocate explained that EITC issues are as complicated as many transactions, are intensely factual, and are often based on the credibility of witnesses.³² Care must be taken not to use CONOPS as a means of disproportionately and unfairly forcing EITC cases, and those of other low-income taxpayers, to campuses. The National Taxpayer Advocate suggested to Appeals leadership that they consider re-grading certain cases and blending higher-graded and lower-graded Hearing Officers within Campus and Field Appeals. This approach would allow a better matching of appropriately graded cases to particular Hearing Officers. It would also more strategically tailor the expertise of particular Hearing Officers to the substantive knowledge requirements of individual cases. Likewise, necessary expertise can be added on a consulting basis, which would have the further benefit of helping Hearing Officers expand their skillsets.³³

Appeals' concerns regarding the additional expense of Field Appeals and the large percentage of cases in which requested in-person conferences are not ultimately held are reasonable. The best solution, however, for taxpayers and Appeals is to increase the trust of taxpayers in the quality of Campus appeals. Further, as previously recommended by the National Taxpayer Advocate, the IRS in general, and Appeals in particular, should continue to expand its implementation of Virtual Service Delivery.³⁴ Increased confidence in Campus appeals, as well as widespread availability of virtual face-to-face conferences, likely would reduce the number of requests for in-person conferences, would keep more cases in the campuses, and would be more cost-effective for Appeals. This increased trust would also have the less tangible, but no less real benefit, of improving the experience that many taxpayers have with Appeals.

A more flexible and taxpayer-friendly approach can be an excellent means of moving the Appeals process toward a collaborative, conversational model, rather than one that, under AJAC, has lately been driven too much by rigid procedures and tight timelines. Appeals has increasingly been pushing taxpayers to “fully cooperate” with Compliance demands, even where those demands may be the subject of good faith disagreement, an approach that is coercive rather than collaborative.³⁵

Last year, the National Taxpayer Advocate published a Most Serious Problem analyzing AJAC and making a number of recommendations, including that AJAC restrictions be loosened to provide Hearing Officers with more discretion in the resolution of cases.³⁶ The IRS responded that Hearing Officers already have discretion to determine whether additional factual development or analysis is needed, at which point cases are sent back to Compliance for additional investigation.³⁷ Nevertheless, under AJAC policy and practice, Hearing Officers are provided with minimal ability to determine when even modest factual investigation

31 Notes from meeting between the National Taxpayer Advocate and Appeals Executives (May 31, 2016) (on file with TAS).

32 *Id.* See IRC § 32.

33 Notes from meeting between the National Taxpayer Advocate and Appeals Executives (May 31, 2016).

34 National Taxpayer Advocate 2014 Annual Report to Congress 154-62.

35 IRS, *Fact Sheet—IRS Clarifies Office of Appeals Policies* (Oct. 1, 2016), www.irs.gov/PUP/individuals/factsheet.pdf.

36 National Taxpayer Advocate 2015 Annual Report to Congress 82-90.

37 National Taxpayer Advocate 2017 Objectives Report to Congress 80-84.

or verification can be done in Appeals. Additional authority and flexibility for Hearing Officers to determine when their own case development could assist case resolution would decrease delay and expense for both taxpayers and the government.

This trend by Appeals of relying on internal IRS procedures as a means of bypassing meritorious arguments of taxpayers and avoiding substantive issues raised by taxpayers or TAS is one that should be reversed by a broader change in Appeals' culture that can start with CONOPS. Appeals' CONOPS should move beyond its present focus on internal processes and be expanded with the goals of improving the taxpayer experience, relying on a collaborative process, and perpetuating a culture of protecting taxpayers and working with taxpayers and TAS to resolve issues.

This more taxpayer-friendly approach would be especially welcome in the Collection context, which perhaps represents Appeals' greatest opportunity and responsibility with respect to taxpayers and the tax system. Toward that end, Appeals should revitalize CAP by allowing Hearing Officers to consider collection alternatives as part of their deliberations and then remand cases to Compliance for further action. Additionally, Appeals should rigorously apply the balancing test to CDP appeals as a means of ensuring that Collection actions are reasonable and are no more intrusive than necessary. Most taxpayers contesting Collection actions, as with those filing Examination-based appeals, wish to be compliant and would welcome the facilitation of Appeals in considering and implementing appropriate case resolutions.

CONCLUSION

The National Taxpayer Advocate and external stakeholders have recently expressed concerns regarding a range of Appeals' programs and policies. These concerns, however, are left unaddressed by Appeals' CONOPS, which sets forth Appeals' projected roadmap over the next five years. To this point, Appeals' CONOPS is so vague and aspirational as to prevent meaningful analysis. It appears, however, to contemplate primarily bureaucratic initiatives and hints at procedural changes that would ignore or exacerbate the problems already existing within Appeals. This limited focus may help clear dockets in the short run, but runs the risk of disadvantaging taxpayers, jeopardizing tax compliance, and increasing the resources needed for tax enforcement in the long run.

Appeals should use the opportunity presented by CONOPS to embrace a future vision premised on working collaboratively with taxpayers to achieve mutually acceptable negotiated settlements. As part of this more taxpayer-friendly process, Appeals should enhance taxpayer trust and dialogue by making in-person conferences available where they are requested in good faith, being mindful of the prevailing geographic and local contexts out of which tax cases arise, and allowing taxpayers access to Hearing Officers with relevant subject matter expertise. Further, Hearing Officers should be provided with the time, authority, and flexibility needed to fully develop cases and to explore potential outcomes with taxpayers. TAS urges an Appeals Future State that recognizes the desire of most taxpayers to be compliant and that is designed to work with them in furtherance of this goal.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Adopt an Appeals future vision in which Appeals adopts policies and organizes itself in a way that makes in-person Appeals conferences readily available to good-faith taxpayers who request a live conference as part of the case resolution process.
2. Adopt an Appeals future vision in which Appeals expands its geographic footprint and strategically reallocates Campus-based and Field-based Hearing Officers to increase the confidence of taxpayers that they will have access to Hearing Officers with requisite local knowledge and substantive expertise, regardless of the assigned location.
3. Adopt an Appeals future vision in which Appeals revises its procedures to allow Hearing Officers additional discretion and time to personally undertake factual development and provide more in-depth substantive review in seeking fair and efficient resolutions of Examination-based and Collection-based Appeals cases.