

MSP
#12**PRIVATE DEBT COLLECTION (PDC): The IRS Is Implementing a PDC Program in a Manner That Is Arguably Inconsistent With the Law and That Unnecessarily Burdens Taxpayers, Especially Those Experiencing Economic Hardship****RESPONSIBLE OFFICIALS**

William Wilkins, Chief Counsel

Mary Beth Murphy, Commissioner, Small Business/Self-Employed Division

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

DEFINITION OF PROBLEM

In 2006, when the IRS began using private collection agencies (PCAs) to collect delinquent tax debt, the National Taxpayer Advocate identified the practice as a serious threat to taxpayer rights.² The private debt collection (PDC) program did not meet IRS expectations or those of Congress, and the IRS discontinued the program in 2009.³ In 2015, however, Congress enacted legislation that requires the IRS

- 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 See National Taxpayer Advocate 2006 Annual Report to Congress 34-61, 458-462 (Most Serious Problem: *True Costs and Benefits of Private Debt Collection* and Legislative Recommendation: *Repeal Private Debt Collection Provisions*); National Taxpayer Advocate 2005 Annual Report to Congress 76-93 (Most Serious Problem: *Training of Private Debt Collection Employees*).
- 3 *IRS Conducts Extensive Review, Decides Not to Renew Private Debt Collection Contracts, IRS Employees More Flexible, More Cost Efficient* (Mar. 5, 2009), <https://www.irs.gov/uac/irs-conducts-extensive-review-decides-not-to-renew-private-debt-collection-contracts>; The Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, Div. D, Title I, § 106, 123 Stat. 524, 636 (providing that none of the funds made available in the Act could be used to fund or administer IRC § 6306 debt collection activities by private collection agencies (PCAs)). For a comprehensive analysis of the earlier Private Debt Collection (PDC) program, see National Taxpayer Advocate 2013 Annual Report to Congress, vol. 2, 97 (Research Study: *The IRS Private Debt Collection Program: A Comparison of Private Sector and IRS Collections While Working the Private Collection Agency Inventory*). See Letter from Nina Olson, National Taxpayer Advocate, to Sen. Ron Wyden, Chairman, Committee on Finance; Sen. Orrin G. Hatch, Ranking Member, Committee on Finance; Rep. Dave Camp, Chairman, Committee on Ways and Means; Rep. Sander Levin, Ranking Member, Committee on Ways and Means; Rep. Charles W. Boustany, Jr., Chairman, Subcommittee on Oversight, Committee on Ways and Means; Rep. John Lewis, Ranking Member, Subcommittee on Oversight, Committee on Ways and Means (May 13, 2014) (National Taxpayer Advocate May 13, 2014 letter to Members of Congress).

to assign certain delinquent tax accounts to PCAs.⁴ The IRS plans to begin assigning delinquent taxpayer accounts to PCAs in Spring 2017.⁵ The National Taxpayer Advocate believes the IRS, in implementing the congressionally-mandated PDC program, could have achieved a better balance between conserving resources and protecting taxpayer rights. However, she acknowledges that the IRS has been forced to make difficult decisions as it developed procedures for assigning accounts to PCAs.

Over the last year, the National Taxpayer Advocate and her staff have negotiated with the IRS about proposed plans to implement the PDC program in ways that are arguably inconsistent with the law and taxpayer rights. Among other proposals, the IRS has considered:

- Assigning to PCAs the accounts of recipients of Social Security Disability Income (SSDI) benefits, who are subject to income limitations and whose recent returns showed median income of \$14,350;⁶
- Assigning to PCAs the accounts of taxpayers who receive Supplemental Security Income (SSI), which averaged \$539 per month and is not available to taxpayers who have more than \$2,000 in assets; the average household income for recipients of SSI was estimated to be no more than \$684 in May 2013;⁷
- Allowing PCAs to offer taxpayers installment agreements (IAs) that exceed five years — notwithstanding a statutory provision that authorizes PCAs to offer IAs for a period “not to exceed 5 years” — and monitor and receive commissions on payments made pursuant to those IAs;
- Allowing PCAs to solicit “voluntary” payments from taxpayers that do not satisfy the liability in full and are not made pursuant to an IA, despite the absence of any statutory language authorizing PCAs to request voluntary or partial payments;
- Not systemically preventing accounts of taxpayers who currently have a case pending in TAS from being assigned to PCAs; and
- Not recalling accounts assigned to PCAs when the taxpayers request assistance from TAS.

4 Fixing America’s Surface Transportation Act, Pub. L. No. 114-94, Div. C, Title XXXII, § 32102, 129 Stat. 1312, 1733-36 (2015) (FAST Act).

5 IRS, *Private Debt Collection* (Sept. 26, 2016), https://www.irs.gov/businesses/small-businesses-self-employed/private-debt-collection?_ga=1.43687392.413551195.1473171905.

6 IRS, Accounts Receivable Dollar Inventory (ARDI), Individual Returns Transaction File (IRTF), Information Returns Master File (IRMF), Compliance Data Warehouse (CDW), recent returns include those for tax year 2014 or later, data accessed Nov. 28, 2016.

7 Social Security Administration (SSA), Research, Statistics & Policy Analysis, *Monthly Statistical Snapshot, November 2016*, Table 3, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/; SSA, *Social Security, A Guide to Supplemental Security Income (SSI) for Groups and Organizations* 11, 12, 16 (Jan. 2016), <https://www.ssa.gov/pubs/EN-05-11015.pdf>; Government Accountability Office, GAO-16-674, *Supplemental Security Income, SSA Provides Benefits to Multiple Recipient Households but Needs System Changes to Improve Claims Management* 52, Table 10 (Aug. 2016).

While some of the above concerns have been resolved, many have not.⁸ Moreover, the IRS's planned implementation of the PDC program unnecessarily burdens taxpayers, particularly those in economic hardship:

- The IRS intends to assign to PCAs the accounts of low income taxpayers who receive Social Security Administration (SSA) or Railroad Retirement Board (RRB) retirement benefits, whose recent returns showed median income of \$19,000;⁹ and
- In assigning accounts to PCAs, the IRS does not consider the federal poverty level, which for a single person in 2016 was approximately \$11,880 and 65 percent of the least amount of the IRS's own allowable living expenses (ALEs) for a single person, which the IRS uses to determine, among other things, whether someone is able to provide for basic living expenses; 250 percent of the federal poverty level is approximately \$29,700.¹⁰

Among the National Taxpayer Advocate's additional concerns:

- PCAs are not required to return to the IRS accounts of taxpayers in economic hardship;
- The IRS does not require transparency of PCAs' calling scripts and training materials;
- The IRS will pay commissions on taxpayer remittances prompted by the initial contact letter from the IRS, rather than PCA action;
- The IRS does not plan to use Referral or Oversight units to facilitate IRS and taxpayer interaction with PCAs and provide oversight of PCAs; and
- Cases the IRS recalls from PCAs will not be worked to completion.

ANALYSIS OF PROBLEM

Background

In determining which tasks the IRS may lawfully assign to PCAs, the threshold question is whether the IRS's authority to outsource tax collection is spelled out primarily in Internal Revenue Code (IRC) § 6306 or whether the IRS has broader authority to outsource the collection of federal tax liabilities to PCAs for collection. This question is critical because IRC § 6306 is very specific and narrow in defining which collection activities the IRS may outsource. Therefore, if the IRS does not have broader authority to refer the collection of federal tax liabilities to PCAs for collection, the IRS may contract with PCAs to do only what IRC § 6306 authorizes. If the IRS has broader authority, then it would be necessary to assess the sources of that additional authority.

Both the Bush administration, which proposed the authorities described in IRC § 6306, and the Congress, which enacted the law, believed the IRS did not have the authority to use PCAs — at least in dealing directly with taxpayers.

⁸ As discussed below, on December 15, 2016, the IRS agreed to exclude the accounts of Social Security Disability Income (SSDI) and Supplemental Security Income (SSI) recipients from Potentially Collectible Inventory, a statutory term discussed below; and to allow PCAs to receive only one voluntary payment from a taxpayer who cannot pay in full within five years.

⁹ IRS, Accounts Receivable Dollar Inventory (ARDI), Individual Returns Transaction File (IRTF), Information Returns Master File (IRMF), Compliance Data Warehouse (CDW), recent returns include those for tax year 2014 or later, data accessed Nov. 28, 2016, 2016.

¹⁰ U.S. Dept. of Health and Human Resources, *Poverty Guidelines* (Jan. 25, 2016), <https://aspe.hhs.gov/poverty-guidelines>. As discussed below, the least amount of Allowable Living Expenses (ALEs) the IRS would have allowed in 2016 was \$18,396.

In the Administration's fiscal year (FY) 2004 and 2005 Bluebooks, the "Current Law" section of its PDC proposal stated: "Federal tax liabilities generally must be collected by the IRS and cannot be referred to a private collection agency (PCA) for collection."¹¹

Similarly, the House-Senate conference committee report accompanying the American Jobs Creation Act stated: "In general, Federal agencies are permitted to enter into contracts with private debt collection companies for collection services to recover indebtedness owed to the United States [citing 31 U.S.C. § 3718, which authorizes agency heads to enter into contracts with PCAs]. That provision does not apply to the collection of debts under the Internal Revenue Code [citing 31 U.S.C. § 3718(f), which excludes from this authorization the collection of debts owed pursuant to the Internal Revenue Code]."¹² Thus, both the Administration and Congress believed IRC § 6306 was required to authorize the use of PCAs to collect Federal tax debts.

In light of the agreed position that the IRS could not use PCAs to collect Federal tax debts without congressional authorization, it follows that the IRS may only use PCAs to collect Federal tax debts to the extent authorized by Congress.

In 2004, Congress enacted IRC § 6306, which authorizes the IRS to enter into "qualified tax collection contracts."¹³ The term "qualified tax collection contract" is defined in relevant part as a contract "which is for the services of any person (other than an officer or employee of the Treasury Department)":

- (A) to locate and contact any taxpayer specified by the Secretary,
- (B) to request full payment from such taxpayer of an amount of federal tax specified by the Secretary and, if such request cannot be met by the taxpayer, to offer the taxpayer an installment agreement providing for full payment of such amount during a period *not to exceed 5 years*, and
- (C) to obtain financial information specified by the Secretary with respect to such taxpayer.¹⁴

In the conference report accompanying the law, Congress described how it expected collection activity pursuant to "qualified collection contracts" would unfold:

Several steps are involved in the deployment of private debt collection companies. First, the private debt collection company contacts the taxpayer by letter. If the taxpayer's last known address is incorrect, the private debt collection company searches for the correct address. Second, the private debt collection company telephones the taxpayer to request full payment. If the taxpayer cannot pay in full immediately, the private debt collection company offers the taxpayer an installment agreement providing for full payment of the taxes over a period of as long as five years. If the taxpayer is unable to pay the outstanding tax liability in full over a five-year period, the private debt collection company obtains financial information from the taxpayer and will provide this information to the IRS for further processing and action by the IRS.¹⁵

11 Dept. of the Treasury, *General Explanations of the Administration's Fiscal Year 2004 Revenue Proposals* 98 (Feb. 2003); Dept. of the Treasury, *General Explanations of the Administration's Fiscal Year 2005 Revenue Proposals* 151 (Feb. 2004).

12 American Jobs Creation Act, H. REP. NO. 108-755, at 740-41 (2004) (Conf. Rep.).

13 The American Jobs Creation Act of 2004, Pub. L. 108-357, Title VIII, § 881(a)(1), 118 Stat. 1418, 1625-27 (2004) (enacting IRC § 6306).

14 IRC § 6306(b)(1) (emphasis added).

15 H. REP. NO. 108-755, 1782 (2004) (Conf. Rep.).

The IRS intends to assign to private collection agencies the accounts of low income taxpayers who receive Social Security Administration (SSA) or Railroad Retirement Board (RRB) retirement benefits, whose recent returns showed median income of \$19,000.

At the time this proposal was developed, there was significant discussion about what constitutes an “inherently governmental” function that cannot be outsourced as opposed to a ministerial act that can be contracted out. Under the Federal Activities Inventory Reform Act of 1998, any activity that requires the “exercise of discretion in applying Federal Government authority” is “inherently governmental” and must be performed solely by Federal Government employees.¹⁶ When Congress enacted IRC § 6306 in 2004, the IRS generally did not perform a financial analysis when it accepted full payments or IAs not to exceed five years. In considering IAs longer than five years, collection alternatives such as offers in compromise or partial payment IAs, and requests to place a taxpayer’s account into Currently Not Collectible (CNC)-Hardship status, the IRS generally performed a financial analysis to determine the taxpayer’s ability to pay — an assessment that involved the exercise of discretion. By limiting PCAs to requesting full payments or offering taxpayers IAs providing for full payment during periods not to exceed five years and by requiring PCAs to obtain financial information from taxpayers in all other cases and providing it to the IRS for further processing and action, Congress was careful to authorize PCAs to perform activities that are clear-cut and don’t get into areas where discretion is typically exercised. The statute is unambiguous on its face in describing which activities PCAs are authorized to perform.¹⁷

In 2015, over the objections of the National Taxpayer Advocate and many others,¹⁸ Congress amended IRC § 6306 to *require* the IRS to enter into “qualified tax collection contracts” with respect to certain “inactive tax receivables.”¹⁹ In doing so, however, it did not make any changes to provisions described above that delineate the boundaries of what PCAs may do. In September 2016, the IRS entered into contracts with four PCAs to implement the PDC program according to procedures contained in the PCA Policy and Procedure Guide (PPG) which, in our view, provides authorization for the PCAs to take actions beyond the scope of what is authorized by IRC § 6306.²⁰

16 Federal Activities Inventory Reform Act of 1998 (FAIR), Pub. L. No. 105-270 § 5(2)(B) 112 Stat. 2382, 2384-2385.

17 In *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the Court set out a two-step process for the interpretation of regulations: “When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”

18 National Taxpayer Advocate May 13, 2014 letter to Members of Congress; see e.g., Joe Davidson, *Congress Could Make the IRS Use Private Bill Collectors for Your Taxes*, WASH. POST (Nov. 3, 2015) (describing a letter from 16 U.S. senators to congressional leadership voicing opposition to the proposed PDC program; efforts by 11 representatives to remove the provision from the Fixing America’s Surface Transportation (FAST) Act, and attributing opposition to the provision to the National Treasury Employees Union, the National Council of La Raza, and the National Consumer Law Center); Michael Cohn, *NCCPAP Opposes Plan for IRS Private Debt Collection*, ACCOUNTING TODAY (May 27, 2014) (describing opposition by the National Conference of CPA Practitioners).

19 FAST Act, Pub. L. No. 114-94, Div. C, Title XXXII, § 32102, 129 Stat. 1312, 1733-34, (2015) (adding subsections (c) and (h) to IRC § 6306).

20 IRS, *Private Debt Collection* (Sept. 26, 2016), https://www.irs.gov/businesses/small-businesses-self-employed/private-debt-collection?_ga=1.14327154.413551195.1473171905. Section III of the IRS’s contract with PCAs, *Performance Work Statement Tax Collection Services*, in § 3.4 provides: “Contractor shall conduct operations in compliance with the most current version of the PPG [PCA Policy and Procedure Guide].” Unless otherwise noted, references to the PPG are to the October 28, 2016 version.

Certain Aspects of the IRS's PDC Program Are Inconsistent With IRC § 6306

Section ten of the PPG describes three payment options PCAs may pursue in dealing with taxpayers. The first option is to request full payment of the liability (*i.e.*, full payment within 120 days), a course of action clearly authorized by IRC § 6306(b)(1). The second option, however, is available when the taxpayer cannot pay the liability within 120 days but can pay the tax *within the period of limitations on collection* (referred to as the collection statute expiration date or CSED).²¹ In that event, the PCA employee can offer the taxpayer an IA for a corresponding number of years.²² For example, under the current version of the PPG, if the CSED does not expire for eight years, the PCA may offer the taxpayer an eight-year IA. As discussed above, this provision is not authorized by the plain meaning of IRC § 6306(b)(1).

A third option is available when the taxpayer cannot pay the tax within 120 days or within the CSED. In that event, the current version of the PPG states the PCA employee will solicit “voluntary payments.”²³ This means the PCA, without offering an IA or securing any financial information for analysis by the IRS, may periodically contact the taxpayer and secure payments that do not resolve the account. This solicitation, and resulting partial payments, may continue indefinitely, as interest continues to accrue on the unpaid liability.²⁴ This practice of soliciting voluntary payments is a significant departure from the manner in which the IRS Collection function proceeds, described below, and violates taxpayers’ rights.²⁵ Moreover, as discussed below, it also goes beyond the statutory authority conferred by IRC § 6306.

Additionally, neither the current PCA contract nor the PPG authorizes PCAs to collect financial information from taxpayers, one of the required components of a “qualified tax collection contract.” Thus, it is arguable that the IRS’s contracts with PCAs do not constitute “qualified tax collection contracts” within the meaning of IRC § 6306(b)(1) because they do not contain one of the three statutorily specified components of such contracts.²⁶

21 The IRS must generally collect tax within ten years after assessment. See IRC § 6502.

22 PCA Policy and Procedures Guide (PPG) § 11, *PCA Payment Arrangements*. The PCA can offer IAs only where the amount of the assessed tax, penalties, and interest does not exceed \$100,000.

23 In contrast, PPG § 10.2.1, *Voluntary Payments*; PPG § 10.2.2, *Alternative Collection Resolution* provides that the PCA employee “should” inform the taxpayer that alternative collection resolutions (*e.g.*, offer in compromise) are available through the IRS at irs.gov.

24 As discussed below, many taxpayers whose accounts will be assigned to PCAs are already in economic hardship and may agree to make payments they cannot afford. See vol. 2 Research Study: *The Importance of Financial Analysis in Installment Agreements in Minimizing Defaults and Preventing Future Payment Noncompliance*; vol. 2 Research Study: *IRS Should Use Its Internal Data to Determine If Taxpayers Can Afford to Pay Their Tax Delinquencies*.

25 It is also a departure from procedures used in the prior PDC program. PPG § 11.9, *IA Beyond PCA Authority* (2008 version), included among arrangements the PCAs did not have authority to make: “Proposed IA [installment agreement] is for a time period beyond 60 months” and “IA will not result in full payment prior to the expiration of the CSED.” PPG § 11.9.3, (2008 version) provided: “Note: When an IA covering more than 60 months or an IA not providing for full payment by the CSED is accepted by the IRS, the case will be recalled by the IRS.”

26 In contrast, PPG § 11.9.1 *Collection Information Statement* (2008 version), provided: “[t]he PCA employee must attempt to secure financial information for an IA [installment agreement] with any of the following: ...The amount the taxpayer offers to pay will not pay the sum of the aggregate assessed balance due for each tax period within 60 months” or “IA will not result in full payment prior to the expiration of the CSED.”

Allowing PCAs to Solicit “Voluntary” Payments That Do Not Resolve the Liability Violates Taxpayers’ Rights and Is Not Authorized by Statute

Taxpayers who are able to full-pay their liabilities in either a lump-sum or an IA of up to six years ordinarily may do so without providing financial information that must be analyzed by an IRS Collection employee.²⁷ By contrast, an IRS Collection employee generally must become involved where a taxpayer cannot full-pay within that period. For example, if a taxpayer cannot pay any amount, can pay some amount less than the full liability over the CSED, or can full-pay the liability over a period longer than six or seven years, an IRS employee must determine whether the taxpayer should be placed into CNC-Hardship status²⁸ or approved for an offer-in-compromise,²⁹ a partial-payment IA,³⁰ or a non-streamlined IA.³¹ The appropriate resolution is made on the basis of the taxpayer’s financial information, and IRS Collection employees exercise discretion in arriving at the appropriate resolution. These IRS procedures support taxpayers’ *right to a fair and just tax system* by considering facts and circumstances that might affect their ability to pay.

IRS Collection employees are generally *not* free to simply solicit payments from a taxpayer other than as part of an overall plan to fully resolve the liability.³² Rather, they are expected to support a taxpayer’s *right to finality* by fully resolving the account. Taxpayers whose accounts are assigned to PCAs might well qualify for CNC-Hardship status or other collection alternatives, but PCAs have no incentive to provide details about collection alternatives and, despite a clear statutory requirement, the PPG makes no provision for the PCAs to collect financial information that might help taxpayers qualify for those alternatives.³³

27 IRS, *Streamlined Processing of Installment Agreements* (Nov. 10, 2016), https://www.irs.gov/businesses/small-businesses-self-employed/streamlined-processing-of-installment-agreements?_ga=1.48328931.413551195.1473171905. Approval of full-pay IAs of up to six years is generally automatic when the tax liability does not exceed \$50,000, and taxpayers may enter into them online without speaking with an IRS employee or providing their financial information. The IRS is testing streamlined processing for tax liabilities that do not exceed \$100,000 and can be full paid within seven years. Taxpayers seeking any IA must be current with their filing obligations. Internal Revenue Manual (IRM) 5.14.1.4.2, *Compliance and Installment Agreements* (Sept. 19, 2014).

28 See IRM 5.16.1.1, *Currently Not Collectible Overview* (Aug. 25, 2014); IRM 5.16.1.2.9, *Hardship* (Aug. 25, 2014). IRM 5.15.1.16, *Making the Collection Decision* (Nov. 17, 2014), (including among acceptable collection decisions the designation of accounts as CNC due to economic hardship).

29 See IRC § 7122; Treas. § Reg. 301.7122-1(b)(2), authorizing compromises where there is doubt as to collectability, which “exists in any case where the taxpayer’s assets and income are less than the full amount of the liability.”

30 See IRM 5.14.2.1, *Overview* (Mar. 11, 2011)(explaining that “[i]f full payment cannot be achieved by the Collection Statute Expiration Date (CSED), and taxpayers have some ability to pay, the Service can enter into Partial Payment Installment Agreements (PPIAs).”

31 See IRM 5.14.1.4, *Installment Agreement Acceptance and Rejection Determinations* (Sept. 19, 2014).

32 For example, IRM 5.1.10.3.2 *Effective Initial Contact* (Feb. 26, 2016), in paragraph (7), provides: “If the case is not resolved during the initial contact, discuss a realistic plan for case resolution with the taxpayer, establish and document a plan for resolving the case, such as: full pay (FP) by a specified date, installment agreement (IA), etc. This plan may be updated when it changes. For example, a plan to resolve a case as CNC (hardship) may change to FP when significant assets and/or income are discovered.” Similarly, IRM 5.14.1.4, *Installment Agreement Acceptance and Rejection Determinations* (Sept. 19, 2014) directs “If taxpayers do not qualify for Guaranteed, Streamlined or In-business Trust Fund Express installment agreements, determine a plan for resolving the balance due accounts based on the Collection Information Statement (CIS) and supporting documentation provided by the taxpayer (See IRM 5.1.10.3.2 and IRM 5.15). Note: In determining the most appropriate plan for resolving the balance due, consider actions that are least intrusive to the taxpayer and meets the need of the government for efficient collection of the tax, including viable payment options provided in IRM 5.14.1.4.1 or 5.14.2 to ensure the rights of the taxpayers are protected, IRM 5.1.10.7.1.3.”

33 As noted above, the PDC program actually violates eight of the ten taxpayer rights contained in the Taxpayer Bill of Rights.

Congress Did Not Intend to Allow PCAs to Solicit “Voluntary” Payments That Do Not Fully Pay the Liability and Are Not Made Pursuant to an Installment Agreement (IA)

Under the Federal Activities Inventory Reform Act of 1998 (FAIR Act), any activity that requires the “exercise of discretion in applying Federal Government authority” is “inherently governmental” and must be performed solely by Federal Government employees.³⁴ As discussed above, Congress designed the PDC program in a manner that authorized PCAs to perform only limited activities that do not involve the exercise of discretion. For example, to avoid placing PCAs in the position of working with taxpayers whose cases require financial analysis, and thus involve the exercise of discretion, Congress authorized the PCAs only to request full payment or IAs not to exceed five years, and, if the taxpayer says he or she cannot pay the liability in full within five years, to collect financial information from the taxpayer to be forwarded to the IRS for analysis.

The IRS’s Explanation of Why Questioned Procedures Are Permissible Is Unconvincing

TAS requested clarification from IRS Office of Chief Counsel about the apparent departures from the way Congress intended PCAs to proceed. Counsel confirmed that IRC § 6306 does not allow PCAs to offer IAs exceeding five years but stated:³⁵

The contract may, however, provide that, with IRS approval of a taxpayer’s request for an installment agreement of longer than five years, the PCA can retain the account to monitor compliance with the agreement for its entire term. The IRS and PCA may agree on compensation for the performance of these functions, whether as commission on each payment or on some other basis. Nothing in section 6306 would preclude such an arrangement.³⁶

Thus, according to IRS Chief Counsel, by “retaining” an account, a PCA may monitor payments made pursuant to an IA that could only have been organized and entered into by the IRS (or possibly, as discussed below, with assistance from TAS) and receive commissions on those payments.

As for soliciting “voluntary” payments as described above, IRS Chief Counsel notes simply that “there is nothing prohibiting the Service from authorizing a private debt collector to make such a solicitation.”³⁷ Accordingly, the current version of the PPG allows for both monitoring of IAs in excess of five years and acceptance of repeated voluntary payments from taxpayers who cannot pay within five years.

Counsel’s interpretation strikes us as a results-oriented end-run around the statute. The IRS has made clear that it is facing extraordinary resource constraints, that it would like the PCAs to do more without requiring IRS involvement, and that it is not asking the PCAs to collect financial information because it does not have the resources to review any such financial information. While we sympathize with the IRS’s position, resource constraints do not justify misapplying an act of Congress. If the PCAs do not collect

34 Pub. L. No. 105-270, § 5(2)(B) 112 Stat. 2382, 2384-2385 (1998) (providing that the term “inherently governmental function” means a function that is so intimately related to the public interest as to require performance by Federal Government employees.” The term includes “activities that require either the exercise of discretion in applying Federal Government authority or the making of value judgments in making decisions for the Federal Government, including judgments relating to monetary transactions and entitlements. An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as (i) to bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise; ... (iii) to significantly affect the life, liberty, or property of private persons.”

35 IRS Chief Counsel response to TAS information request (Nov. 17, 2016).

36 *Id.*

37 *Id.*

Counsel's interpretation strikes us as a results-oriented end-run around the statute. The IRS has made clear that it is facing extraordinary resource constraints, that it would like the private collection agencies (PCAs) to do more without requiring IRS involvement, and that it is not asking the PCAs to collect financial information because it does not have the resources to review any such financial information. While we sympathize with the IRS's position, resource constraints do not justify misapplying an act of Congress.

financial information, any IRS "approval" (to use Counsel's word) of an IA exceeding five years is simply a *pro forma* rubber stamp of a PCA request to offer a taxpayer a longer-term IA — which effectively ignores the statutory language that an IA offered by a PCA must be limited to a period "not to exceed five years."

Allowing PCAs to accept an unlimited number of "voluntary payments" would also constitute an end-run around the statute. The reputation of PCAs for hounding debtors is well documented, including through vast numbers of complaints to the Federal Trade Commission. By restricting PCAs to accepting lump-sum full payments or full payment IAs not to exceed five years, Congress limited the risk that U.S. taxpayers would be subject to endless calls. If a taxpayer agrees to the authorized payment terms, there will be no more calls. If the taxpayer says he or she cannot comply those payment terms, the statute and legislative history together make clear the PCA should take financial information and then forward the information to the IRS, so again there should be no more calls.

But if the IRS now allows PCAs to call taxpayers repeatedly to request partial "voluntary payments," the PCAs may be hounding taxpayers in a manner that Congress did not see fit to authorize. Moreover, the taxpayer will not have the benefit of closure, as he or she would have when dealing with an IRS employee, because an IRS employee can conduct a financial analysis and offer to compromise the debt or place it into uncollectible status if the facts warrant. This would undermine the taxpayer's *right to finality*.³⁸

On December 15, 2016, and again on December 21, 2016, the National Taxpayer Advocate met with the Commissioner of Internal Revenue and other IRS officials, raising her concerns about the appropriateness of these procedures. As a result of these meetings, the Commissioner agreed that PCAs may accept one voluntary payment if the taxpayer says he or she cannot pay in full or within five years, but offers to make a one-time payment toward the debt. The National Taxpayer Advocate applauds the Commissioner's decision, and she and her staff will work with the IRS to ensure the PPG is revised accordingly.

However, the Commissioner agreed with the IRS that PCAs may "monitor" payments where the taxpayer has been referred back to the IRS for acceptance of a six- or seven-year IA (partially consistent with IRS

³⁸ These concerns are not merely theoretical. In studies included in Volume 2 herein, the National Taxpayer Advocate shows that almost 40 percent of taxpayers entering into an IA in 2014 agreed to make installment payments even though their Allowable Living Expenses exceeded their Total Positive Income, and the IRS could and should have systemically excluded a significant percentage of these taxpayers as CNC-hardship. See Research Study: *The Importance of Financial Analysis in Installment Agreements in Minimizing Defaults and Preventing Future Payment Noncompliance*, vol. 2, *infra*; Research Study: *IRS Should Use Its Internal Data to Determine If Taxpayers Can Afford to Pay Their Tax Delinquencies*, vol. 2, *infra*.

internal policies for streamlined IAs, which were recently extended from five to six years)³⁹ and receive 25 percent of all such payments, notwithstanding that it was the IRS itself that placed the taxpayer into an IA.

The National Taxpayer Advocate remains concerned with the “monitoring” of accounts where a taxpayer has entered into an IA that exceeds five years. Where a PCA locates and contacts a taxpayer, but does not enter into an IA, the PCA should be paid a fee for those location and contact services. Under the statute, if the PCA enters into an IA, then the PCA is entitled to receive compensation up to 25 percent of the amounts collected. But there is no statutory authorization for the PCA to receive compensation for tasks performed for IAs exceeding five years in length. If the taxpayer defaults on such a contract, the ensuing contacts and resolution of the taxpayer’s case are far more likely to involve acts that require the exercise of judgment and discretion and therefore cannot be handled by the PCAs.

Moreover, paying PCAs a 25 percent commission for work that was or will need to be accomplished by the IRS constitutes a windfall to the PCAs. It also creates an incentive for the IRS to push taxpayers into six year IAs rather than longer IAs that may be more appropriate for the taxpayer’s specific situation, simply because the IRS itself will retain an additional 25 percent of the collections (in addition to the appropriations and user fees the IRS receives). In that case, not only the debtor taxpayer is harmed, but all taxpayers are harmed because fewer tax dollars are going to the public fisc.

Moreover, a TAS study included in Volume Two of this Report demonstrates that failure to conduct a financial analysis of taxpayers with delinquent accounts can erode current and future tax compliance:

- Many taxpayers initiate IAs even though their incomes are less than their ALEs, meaning that taxpayers are likely forgoing necessities to meet the terms of their IAs;
- Taxpayers are more likely to default on their IAs when their incomes are below their ALEs, suggesting that these taxpayers are entering into IAs they cannot afford;
- Taxpayers become more likely to be noncompliant in the years after they start an IA, suggesting that the terms of IAs are not necessarily realistic from the standpoint of a taxpayer’s ability to pay; and
- The involvement of TAS in IAs increases subsequent payment compliance and decreases the likelihood that taxpayers will default on their IAs. This fact suggests that additional financial analysis will increase the number of successful IAs and reduce subsequent noncompliance.⁴⁰

For all these reasons, the National Taxpayer Advocate recommends that the IRS revise the PCA contract to allow PCAs to monitor only IAs not exceeding five years and further provide for a fee schedule for locating and contacting taxpayers for cases where the taxpayer cannot full pay or enter into an IA up to five years. This approach will ensure PCAs get paid for all work they perform but also protect the public fisc, and it is consistent with the limited statutory authority provided by IRC § 6306.

39 See IRM 5.14.5.2 *Streamlined Installment Agreements* (Dec. 23, 2015). The IRS is currently conducting a pilot under which taxpayers may enter into installment agreements of up to seven years without the need for a financial analysis. For details, see <https://www.irs.gov/businesses/small-businesses-self-employed/streamlined-processing-of-installment-agreements>.

40 See Research Study: *The Importance of Financial Analysis in Installment Agreements in Minimizing Defaults and Preventing Future Payment Noncompliance*, vol. 2, *infra*.

The IRS's Planned Implementation of the Private Debt Collection (PDC) Program Unnecessarily Burdens Taxpayers, Particularly Those in Economic Hardship

As discussed above, IRC § 6306(c) generally requires the IRS to assign to PCAs all “inactive tax receivables,” described as any “tax receivable” that meets any one of three criteria.⁴¹ A “tax receivable” for purposes of the statute is an account the IRS includes in its “potentially collectible inventory” (PCI).⁴² Potentially collectible inventory is an undefined term — that is, no provision of the IRC, the Treasury Regulations, or the Internal Revenue Manual (IRM) provides a definition of PCI. However, the Office of Chief Counsel has advised the National Taxpayer Advocate that PCI does not include accounts designated as CNC due to the economic hardship of the taxpayer.⁴³

The IRS is required by statute and by Treasury regulation to take certain actions when it knows taxpayers are experiencing economic hardship. IRC § 6343 requires the IRS to release a levy when it “has determined that such levy is creating an economic hardship due to the financial condition of the taxpayer.”⁴⁴ Economic hardship “exists when a levy will cause an individual to be unable to pay his or her reasonable living expenses.”⁴⁵ In the *Vinatieri* case, the U.S. Tax Court held that when the IRS sustains even a proposed levy on a taxpayer it knows is in economic hardship, it abuses its discretion.⁴⁶ In light of the *Vinatieri* case, the IRS adopted procedures that require its employees to consider, before proceeding with a levy, whether the levy would create economic hardship for the taxpayer.⁴⁷ The same concerns apply with respect to PCAs — it is inappropriate to assign cases for collection knowing there is a great risk of economic hardship if collection — even voluntary payments — proceeds. The IRS should not be placing taxpayers at risk of not being able to meet their basic living expenses in order pay their taxes.

The IRS generally designates an account as CNC hardship after considering financial information the taxpayer provides and taking into account expenses the IRS would routinely allow — namely, ALEs.⁴⁸ Accounts that do not actually bear the CNC hardship designation, however, are not exempt from assignment to PCAs even though the taxpayer may be in economic hardship.⁴⁹

41 IRC § 6306(c)(2)(A) provides that “[t]he term ‘inactive tax receivable’ means any tax receivable if (i) at any time after assessment, the Internal Revenue Service removes such receivable from the active inventory for lack of resources or inability to locate the taxpayer, (ii) more than 1/3 of the period of the applicable statute of limitation has lapsed and such receivable has not been assigned for collection to any employee of the Internal Revenue Service, or (iii) in the case of a receivable which has been assigned for collection, more than 365 days have passed without interaction with the taxpayer or a third party for purposes of furthering the collection of such receivable.”

42 IRC § 6306(c)(2)(B).

43 IRS response to TAS fact check (Dec. 13, 2016). A number of conditions may cause the IRS to designate an account as currently not collectible (CNC), such as the inability to locate or contact the taxpayer, where the statutory period for collecting the tax has expired, where the amount owed is below tolerance levels, or where the taxpayer is in economic hardship. See IRM 5.16.1.2, *Currently Not Collectible Procedures* (Jan. 1, 2016). In addition, some tax receivables are statutorily excluded from eligibility for assignment to PCAs. IRC § 6306(d) provides that a tax receivable is not eligible for assignment to a PCA if it “(1) is subject to a pending or active offer-in-compromise or installment agreement, (2) is classified as an innocent spouse case, (3) involves a taxpayer identified by the Secretary as being (A) deceased, (B) under the age of 18, (C) in a designated combat zone, or (D) a victim of tax-related identity theft, (4) is currently under examination, litigation, criminal investigation, or levy, or (5) is currently subject to a proper exercise of a right of appeal under this title.”

44 IRC § 6343(a)(1)(D).

45 Treas. Reg. § 301.6343-1(b)(4).

46 *Vinatieri v. Comm’r*, 133 T.C. 392 (2009).

47 See IRM 5.11.1.3.1, *Pre-Levy Considerations* (Aug. 1, 2014) which provides that when determining if a levy is appropriate, revenue officers are to consider “the taxpayer’s financial condition, including information discussed in IRM 5.1.12.20.1.1 related to economic hardship determinations,” and noting that “if the Revenue Officer can verify from the information available that the levy will cause an economic hardship, the levy will not be issued, because if there is economic hardship, the levy must be released under IRC 6343(a)(1)(D).”

48 See IRM 5.16.1.2.9, *Hardship* (Aug. 25, 2014).

49 Letter from Scott Prentky, Director, Collection to Chi Chi Wu, Staff Attorney, National Consumer Law Center (Sept. 12, 2016).

TAS Research identified almost 380,000 taxpayer accounts the IRS intends to assign to PCAs in the first phase of assignments scheduled for 2017.⁵⁰ Of these taxpayers, more than 273,000 filed a recent tax return:⁵¹

- Median income shown on the returns was about \$32,000;⁵² and
- More than a third of the returns showed income of less than \$20,000.⁵³

The *least* amount of ALEs the IRS would have allowed in 2016 was approximately \$18,000 for a single person. Thus, the expenses of some of these taxpayers actually exceeded their incomes, even assuming a single person household.⁵⁴ A TAS study included in this report found that almost 40 percent of taxpayers entering into IAs in 2014 agreed to make installment payments even though their ALEs exceeded their Total Positive Income (TPI).⁵⁵

The IRS Interprets the 2015 Legislation As Requiring It to Assign Accounts the IRS Itself Has Made a Policy Decision to Not Collect Because There Is a Great Risk of Causing Economic Hardship

Because the phrase “potentially collectible inventory” is not defined by statute or Treasury regulation and is not explained in the IRM or other IRS guidance, the National Taxpayer Advocate believes Congress intended to provide the IRS with some administrative flexibility in its definition of PCI. Thus, the National Taxpayer Advocate urged the IRS to exclude from its definition of “potentially collectible inventory” some accounts that the IRS itself does not subject to certain levies on the ground that these taxpayers would likely experience economic hardship.

The IRS Adopted a Proxy for Economic Hardship for Purposes of the Federal Payment Levy Program (FPLP)

IRC § 6331(h) authorizes the IRS to impose continuing levies on certain federal payments, including SSA and RRB retirement benefits, and the FPLP is the IRS’s automated program that carries out these levies.⁵⁶

50 There are 379,576 such accounts. IRS ARDI, CDW, data accessed Nov. 28, 2016. The IRS is in the process of identifying additional accounts eligible for assignment in 2017. IRS response to TAS information request (Nov. 18, 2016).

51 IRS ARDI, IRTF, CDW, data accessed Nov. 28, 2016, showing there were 273,105 such taxpayers. Recent returns include those for tax year 2014 or later. Not all taxpayers whose accounts are included in potentially collectible inventory had a 2015 filing requirement. See, e.g., IRC § 1; IRS Publication 501, *Exemptions, Standard Deduction, and Filing Information 2* (2015). For example, a single person under age 65 at the end of 2015 was not required to file a 2015 return unless his or her gross income was \$10,300 or more.

52 IRS ARDI, IRTF, CDW, data accessed Nov. 28, 2016, showing that median income reported on these returns was \$31,842.

53 *Id.*, showing that 38 percent of these returns reported income of less than \$20,000.

54 The lowest amount allowed for monthly housing and utilities in 2016 for a taxpayer under 65 was \$736, which is the amount allowed for taxpayers who live in Wade Hampton, AK. The lowest amount of monthly operating costs for one vehicle (not including ownership costs) was \$173, the amount allowed for taxpayers who live in Seattle, WA. The national standard for monthly food and clothing was \$570 and for health care it was \$54. Thus, the least amount of monthly ALE for a hypothetical taxpayer who was under 65, lived in Wade Hampton, AK but used the vehicle operating cost for Seattle, WA was \$1,533. Total annual expenses for this hypothetical taxpayer would be \$1,533 X 12 = \$18,396. IRS ALE (Mar. 28, 2016), <http://mysbse.web.irs.gov/Collection/toolsprocesses/AllowExp/Standards/default.aspx>.

55 See Research Study: *The Importance of Financial Analysis in Installment Agreements in Minimizing Defaults and Preventing Future Payment Noncompliance*, vol. 2, *infra*.

56 See IRM 5.11.7.2, *Federal Payment Levy Program* (Sept. 23, 2016).

The IRS generally does not subject SSA and RRB payments to FPLP levies when the recipient's income is less than 250 percent of the federal poverty level, a measure that serves as a proxy for economic hardship.⁵⁷

Of the almost 380,000 taxpayers whose accounts the IRS intends to assign to PCAs in the first release of 2017:

- About 39,000 — or 10 percent — were recipients of SSA or RRB benefits in 2015;⁵⁸
- The recent returns of these 39,000 SSA or RRB recipients showed median income of about \$19,000;⁵⁹
- Of these 39,000 taxpayers, 14,300 filed recent returns showing income equal to or less than 250 percent of the federal poverty level.⁶⁰ The IRS would therefore generally not impose FPLP levies on these taxpayers' SSA or RRB benefits, yet it considers their accounts eligible for assignment to PCAs;
 - The median income of these 14,300 taxpayers was about \$9,700;⁶¹ and
 - 9,000 of the 14,300 taxpayers (or 63 percent) were actually living at or below the poverty level.⁶²

The IRS Excludes Social Security Disability Income Payments from FPLP Levies, Yet Recipients' Accounts May Be Assigned to PCAs

The IRS refrains from imposing FPLP levies on federal benefits paid to recipients of SSDI (without considering ALEs or applying a proxy for economic hardship).⁶³ In order to receive SSDI, taxpayers generally cannot earn over \$1,130 per month.⁶⁴ Of the almost 380,000 taxpayers whose accounts the IRS intends to assign to PCAs in the first release of 2017:

- About 11,000 — or three percent — were SSDI recipients in 2015.⁶⁵ The IRS would not impose FPLP levies on these taxpayers' SSDI benefits, yet it considers their accounts eligible for assignment to PCAs; and
- The median income shown on the recent returns filed by these taxpayers was \$14,350.⁶⁶

57 IRM 5.19.9.3.2.3, *Low Income Filter (LIF) Exclusion* (June 23, 2014). For a description of the TAS model to estimate the income and expenses of taxpayers whose SSA, RRB, and SSDI income had been subject to Federal Payment Levy Program (FPLP) levies, which led to the adoption of the 250 percent proxy for economic hardship, see National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 48 (Research Study: *Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*).

58 IRS, ARDI, IRTF, IRMF, CDW, data accessed Nov. 28, 2016, showing that of the 379,576 taxpayers whose accounts the IRS intends to assign to PCAs in the first release of 2017, 38,619 received SSA benefits. TAS designed syntax to identify delinquencies being sent to the private debt collection companies based on information provided by the IRS; however, the IRS could neither verify or disprove the results.

59 *Id.*, showing that the median income shown on returns filed by these taxpayers was \$18,984.

60 *Id.*, showing 14,265 taxpayers filed returns for tax year 2014 or later.

61 *Id.*, showing that median income for these 14,265 taxpayers was \$9,727.

62 Because incomes were estimated using the most recent total positive income of tax years 2014 and 2015, the federal poverty level for the corresponding year was used to determine whether taxpayers were below the federal poverty level. *Id.*, showing that of the 14,265 taxpayers, 8,999 were living at or below the poverty level.

63 SB/SE-05-1015-0067, *Federal Payment Levy Program - Exclude SSA Disability Insurance Payments* (Oct. 7, 2015).

64 See SSA, *Update 2016* (Jan. 2016), <https://www.ssa.gov/pubs/EN-05-10003.pdf>.

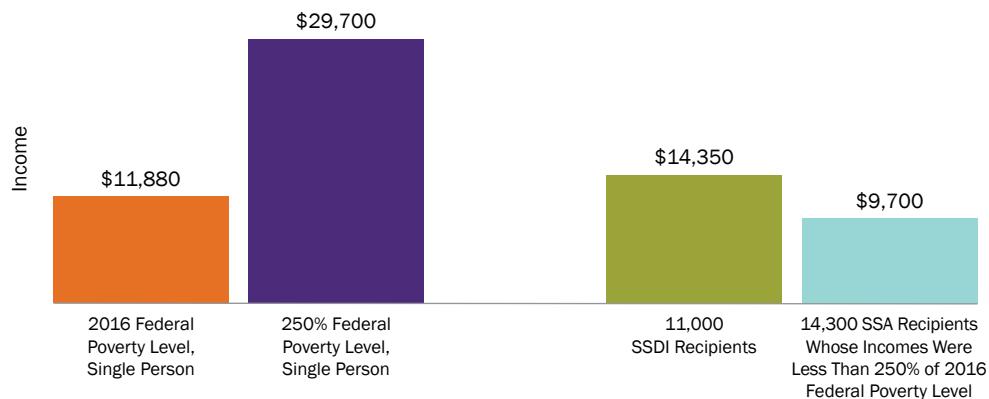
65 IRS, ARDI, IRTF, IRMF, CDW, data accessed Nov. 28, 2016, showing that of the 379,576 taxpayers whose accounts the IRS intends to assign to PCAs in the first release of 2017, 10,947 received SSDI benefits.

66 *Id.*, showing that of the 10,947 taxpayers who received SSDI benefits in 2015, 5,345 filed tax returns in 2014 or 2015. The median income shown on these returns was \$14,350.

This data is shown in Figure 1.12.1. Once these accounts are assigned to PCAs, these taxpayers may agree to make payments they cannot afford, which may mean they will not have sufficient funds left to pay for basic living expenses such as rent, utilities, food, medication, or medical treatment.⁶⁷

FIGURE 1.12.1

Median Income Shown on Returns of Taxpayers Whose Accounts the IRS Would Not Itself Collect Through Federal Payment Levy Program (FPLP) Levies But Intends to Assign to PCAs in 2017, Compared to 2016 Federal Poverty Level



The IRS Excludes Supplemental Security Income (SSI) Payments from FPLP Levies and Is Statutorily Prohibited From Imposing Non-FPLP Levies on SSI Payments, Yet Recipients' Accounts May Be Assigned to PCAs

Elderly, blind, or disabled persons may receive SSI. In order to receive SSI in 2016, a single person could not have:

- Earned income of more than \$1,551 per month;
- Unearned income of more than \$753 per month; or
- Assets worth more than \$2,000.⁶⁸

67 The 2008 TAS study also found that more than one-quarter of FPLP taxpayers who paid their tax liability, entered into an IA with the IRS, or were subject to an ongoing FPLP levy had incomes at or below the federal poverty level. National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 48, 49 (Research Study: *Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*).

68 SSA, *Social Security, A Guide to Supplemental Security Income (SSI) for Groups and Organizations* 11, 12, 16 (Jan. 2016), <https://www.ssa.gov/pubs/EN-05-11015.pdf>.

The highest federal SSI payment to a single person in 2016 was \$733 per month.⁶⁹ The average SSI payment was \$539 in November of 2016.⁷⁰ The average household income for recipients of SSI was estimated to be no more than \$684 in May of 2013.⁷¹ For these reasons, the IRS itself refrains from subjecting SSI benefits to FPLP levies and is prohibited by law from subjecting SSI payments to non-FPLP levies.⁷² Of the taxpayers whose accounts the IRS intends to assign to PCAs, some are undoubtedly recipients of SSI, although systemic limitations have made it difficult to identify the number.⁷³

On December 15, 2016, the National Taxpayer Advocate met with the Commissioner of Internal Revenue and other senior IRS leaders to discuss the exclusion of these three taxpayer categories. The National Taxpayer Advocate reasoned that because the IRS had already made a determination under the FPLP that collecting from these taxpayers would create an economic hardship, it is very likely that these taxpayers are not collectible. However, all of these populations — the low income, elderly, and the disabled — are disproportionately vulnerable to pressure, as is evidenced by many of them falling victims to tax and other types of scams.⁷⁴ Moreover, TAS research studies reported in this Annual Report show that taxpayers agree to pay IRS debts even where they cannot afford to pay their basic living expenses, perhaps largely out of fear.⁷⁵ Thus *any collection contacts* with respect to taxpayers in these population groups place their health and welfare at risk.

Commendably, the IRS Commissioner agreed that SSDI and SSI taxpayers should be excluded from the PCA population because of the high risk that they would experience economic hardship. Because of the IRS's prior refusal to exclude these taxpayers, however, IRS personnel say this decision came too late in the process to implement the necessary programming to exclude these taxpayers. Thus, the IRS is saying that a portion of almost 11,000 SSDI taxpayers and an unknown number of SSI taxpayers will be included in at least the first batch of PCA cases. This unfortunate situation will continue unless and until the IRS completes the required programming to exclude these taxpayers, creating a substantial risk of harm.

The National Taxpayer Advocate was not successful in convincing the IRS Commissioner to exclude the accounts of taxpayers who receive Social Security retirement benefits and have income at or below 250

69 SSA, *Social Security, A Guide to Supplemental Security Income (SSI) for Groups and Organizations* 7 (Jan. 2016), <https://www.ssa.gov/pubs/EN-05-11015.pdf>. As the guide notes, some states provide supplemental benefits and “[i]f Social Security runs the state’s supplemental payment, one check is paid to the beneficiary each month that combines the federal and state SSI benefits. States may change the payment amounts based on where, and with whom, people live. Also, some states might not count other income.”

70 SSA, Research, Statistics & Policy Analysis, *Monthly Statistical Snapshot, November 2016*, Table 3, https://www.ssa.gov/policy/docs/quickfacts/stat_snapshot/; Government Accountability Office (GAO), GAO-16-674, *Supplemental Security Income, SSA Provides Benefits to Multiple Recipient Households but Needs System Changes to Improve Claims Management* 52, Table 10 (Aug. 2016).

71 GAO-16-674, *Supplemental Security Income, SSA Provides Benefits to Multiple Recipient Households but Needs System Changes to Improve Claims Management* 52, Table 10 (Aug. 2016), reporting that where multiple household members receive SSI, the estimated average amount of earned and unearned income for the household is \$622, with a range of between \$560 and \$684 at the 95 percent confidence level. In one-recipient households, the estimated average monthly earned and unearned income is \$457, with a range of between \$440 and \$473 at the 95 percent confidence level.

72 IRM 5.11.7.2.1.1(e), *IRS/BFS Interagency Agreement - Federal Payments Subject to the FPLP* (Sept. 23, 2016); SSI payments are exempt from levy under IRC § 6334(a)(11), except as provided in IRC § 6331(h) for FPLP levies.

73 Because SSI payments are not reported to the IRS, IRS databases do not identify taxpayers with federal tax debt whose SSI payments are exempt from levy.

74 See, e.g., IRS, *Phone Scams Continue to be Serious Threat, Remain on IRS “Dirty Dozen” List of Tax Scams for the 2015 Filing Season* (Jan. 22, 2015), <https://www.irs.gov/uac/newsroom/phone-scams-continue-to-be-serious-threat-and-remain-on-irs-dirty-dozen-list-of-tax-scams-for-the-2015-filing-season>, (warning taxpayers that scammers “prey on the most vulnerable people, such as the elderly, newly arrived immigrants and those whose first language is not English”).

75 See Research Study: *IRS Should Use Its Internal Data to Determine If Taxpayers Can Afford to Pay Their Tax Delinquencies*, vol. 2, *infra*.

percent of the federal poverty level. The IRS argued that these taxpayers may have significant assets that would enable them to make payments from income (notwithstanding that the IRS itself has long excluded these taxpayers' accounts from FPLP levies). The National Taxpayer Advocate pointed out that the IRS could create a filter or algorithm (as TAS had done in past research studies) to identify taxpayers whose Form 1099 documents indicate the existence of assets above a certain value.⁷⁶ The Commissioner decided that for the first six months of the program, these taxpayers would be included in the PCA inventory; during that time, the IRS could explore how to screen for SSA recipients with incomes below 250 percent of the federal poverty level who also have substantial assets.

The National Taxpayer Advocate, while pleased with the exclusions of SSDI and SSI recipients, continues to be concerned about the harm to low income recipients of SSA retirement payments. The future earnings of low income retirees are generally quite limited, so if they pay more than they can reasonably afford in response to PCA pressure — as some inevitably will do — they may end up in economic hardship and remain unable to pay basic living expenses for extended periods of time. Therefore, TAS is developing outreach materials for Local Taxpayer Advocates as well as stakeholder groups and nonprofits who serve these populations. In this way, taxpayers or their caretakers or representatives will learn they do not have to pay the IRS — or PCAs — where the taxpayer is experiencing economic hardship.

The IRS's Private Debt Collection (PDC) Program Undermines TAS and Jeopardizes Taxpayer Rights

The IRS Does Not Intend to Systemically Prevent Accounts of Taxpayers Who Currently Have Cases Pending in TAS From Being Assigned to PCAs

Under IRC § 7811, the National Taxpayer Advocate has the authority to issue a Taxpayer Assistance Order (TAO) if she determines the taxpayer is suffering or is about to suffer a significant hardship as a result of the manner in which the IRS is administering internal revenue laws.⁷⁷ “Significant hardship” means:

- (A) an immediate threat of adverse action;
- (B) a delay of more than 30 days in resolving taxpayer account problems;
- (C) the incurring by the taxpayer of significant costs (including fees for professional representation) if relief is not granted; or
- (D) irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.⁷⁸

Once TAS opens a case, it works *all* of the taxpayer's issues to completion pursuant to procedures that have been in place since TAS's inception.⁷⁹ TAS does not close the case until all the issues have been resolved, which may culminate in the issuance of a TAO. For example, a taxpayer who is currently in

76 See National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 48 (*Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*). Moreover, the IRS does not always insist that a taxpayer demonstrate a lack of income-generating assets from which to pay a tax liability. See Rev. Proc. 2015-57, 2015-51 I.R.B. 863, which allows certain taxpayers whose Federal student loans are discharged to exclude the discharged amount from gross income. The guidance notes that most borrowers whose loans are discharged “would be able to exclude from gross income all or substantially all of the discharged amounts based on fraudulent misrepresentations made by the colleges to the students, the insolvency exclusion, or another tax law authority.” However, “determining whether one or more of these exceptions is available to each affected borrower would require a fact intensive analysis of the particular borrower's situation to determine the extent to which the discharged amount is eligible for exclusion under each of the potentially available exceptions. The Treasury Department and the IRS are concerned that such an analysis would impose a compliance burden on taxpayers, as well as an administrative burden on the IRS, that is excessive in relation to the amount of taxable income that would result.”

77 See IRC § 7811(a)(1).

78 See IRC § 7811(a)(2).

79 See e.g., IRM 13.1.19.5.4, *Case Advocate OAR Responsibilities* (May 5, 2016).

Paying private collection agencies (PCAs) a 25 percent commission for work that was or will need to be accomplished by the IRS constitutes a windfall to the PCAs.

the collection queue may need assistance with requesting penalty abatement or audit reconsideration, which may eliminate or significantly reduce a balance due. Typically, TAS works with the taxpayer to gather and submit the necessary documentation and analysis with an Operations Assistance Request (OAR) to the IRS operating division that controls the case. If a balance due remains, TAS case advocates have the delegated authority to place taxpayers into streamlined IAs (*i.e.*, IAs up to six years in length).⁸⁰ If the taxpayer does not qualify for a streamlined IA but may qualify for a non-streamlined IA, TAS works with the taxpayer to gather the taxpayer's financial information and then submits the information to the IRS with an OAR, requesting the IRS enter into a non-streamlined IA. TAS case advocates follow similar procedures for handling CNC-Hardship cases and Offers in Compromise based on doubt as to collectability. If necessary, the National Taxpayer Advocate or her delegates issue TAOs to resolve these cases. Thus, there is no reason to assign active TAS cases to PCAs — TAS has all the tools to resolve the cases efficiently and effectively, as is required by IRC § 7803(c).

Additionally, assigning open TAS cases to PCAs means taxpayers may be contacted by PCAs while they are working with TAS. This will create confusion for taxpayers and more work for the IRS and TAS as taxpayers contact the IRS and TAS for information about how to proceed. Taxpayers will feel angry at being “shuttled” from TAS to a PCA, especially when they have been assured that collection activity will cease while the case is pending in TAS, a practice that has existed between the IRS and TAS since TAS's inception in 1998. Moreover, assigning open TAS cases to PCAs may mean that PCAs may receive commissions on payments taxpayers make as a result of TAS's and the IRS's work — resulting in a windfall for PCAs and a drain on the public fisc.

To avert these inefficiencies, and to avoid undermining taxpayer confidence in TAS and the IRS, TAS requested that the IRS assign a transaction code for open TAS cases. The transaction code could be used to systemically prevent a TAS case from being included in PCA inventory for the period of time the case is open in TAS. TAS would adopt procedures to ensure the code would be placed on the account when the case is first opened in TAS, and removed when TAS closes the case. Thus, if the collection issue is closed unresolved in TAS, or if the taxpayer is unresponsive or uncooperative, the account could be returned to the pool of PCA-eligible accounts. At the time this report goes to print, there is general agreement to exclude TAS cases from PCA inventory, yet despite two meetings with the Commissioner and other senior IRS officials, there is no agreement as to whether the IRS will use a transaction code for TAS cases. The National Taxpayer Advocate and her staff will continue to press the IRS to move forward with programming this transaction code and developing procedures and training for both PCAs and TAS employees.

The IRS Has Not Provided Adequate Guidance to PCAs on When to Refer a Taxpayer to TAS and Does Not Intend to Recall Accounts From PCAs When the Taxpayers Request Assistance From TAS

As discussed below, PCAs are required to refer a taxpayer to TAS when the taxpayer “indicates” that payment of the balance due immediately or through a payment arrangement would leave him or her unable to pay necessary living expenses.⁸¹ Alternatively, a taxpayer whose case has been assigned to a PCA may independently contact TAS or the IRS. TAS will open a case for that taxpayer if a TAS

⁸⁰ See IRM 13.1.4.2.3.9, *Installment Agreements* (Oct. 31, 2004). Streamlined installment agreements, generally available for individual taxpayers when the total tax liability is \$50,000 or less, do not require a financial statement. See IRM 5.14.5.2, *Streamlined Installment Agreements* (Dec. 23, 2015).

⁸¹ PPG § 12.3, *Unable to Pay* (discussed below).

case acceptance criterion is met (*e.g.*, the taxpayer is experiencing economic harm or is about to suffer economic harm).⁸²

Our first concern is that the PPG violates both IRC §§ 6306 and 7811 by adopting a narrow definition of when a case should be referred to TAS. Taxpayers are eligible for TAS assistance when they are experiencing or are about to experience significant hardship, as defined by IRC § 7811, the regulations thereunder, and the related TAS IRM.⁸³ Significant hardship includes both economic and systemic burdens, and contemplates more than just being unable to meet one's basic living expenses. Moreover, IRC § 6306 provides that a qualified tax collection contract "prohibits each person providing such services under such contract from committing any act or omission which employees of the Internal Revenue Service are prohibited from committing in the performance of similar services."⁸⁴ By not providing guidance and training to PCA employees on the full definition of significant hardship (and required referrals to TAS), the IRS operates in a manner not authorized by IRC § 6306 and also violates taxpayers' *right to a fair and just tax system*, which includes the "right to receive assistance from the Taxpayer Advocate Service if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels."⁸⁵

Our second concern relates to what happens to PCA cases once the taxpayer is referred to TAS. TAS requested that the IRS adopt procedures to recall these TAS cases from the PCAs, as its contract with PCA permits.⁸⁶ PCAs should not receive windfall compensation attributable to work that is actually done by TAS or the IRS (as is the case where an OAR is issued). If the IRS does not honor the National Taxpayer Advocate's request to recall cases from PCAs when they seek assistance from TAS and TAS opens a case, the National Taxpayer Advocate may issue TAOs to the IRS and PCAs to achieve that result.⁸⁷

Provisions in the IRS's Contracts With Private Collection Agencies (PCAs) Burden Taxpayers and Tax Administration

The following aspects of the planned PDC program compromise taxpayer rights and increase burden on both taxpayers and tax administration:

- PCAs are not required to return to the IRS accounts of taxpayers in economic hardship. The PPG provides that a PCA *may* return an account to the IRS if the PCA deems the taxpayer is unable to pay and has exhausted all reasonable collection efforts, but the guide does not elaborate on what

82 IRM 13.1.7.2, *TAS Case Criteria* (Feb. 4, 2015).

83 IRC § 7811(a)(2); Treas. Reg. §301.7811-1(a)(4); IRM 13.1.2.3.3, *Significant Hardship* (Jan. 27, 2009).

84 IRC § 6306(b)(2).

85 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. See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

86 The contract with the PCAs, in Section III, *Performance Work Statement Tax Collection Services*, in part 4.3.9.1, includes "Taxpayer Advocate Service (TAS)" among the reasons why the IRS would recall an account. The other examples of reasons why the IRS would recall an account are those enumerated in IRC § 6306(d) as accounts not eligible for assignment to PCAs (*e.g.*, because there is a pending or active installment agreement or offer in compromise, a pending request for innocent spouse relief, the taxpayer is deceased, under age 18, the victim of identity theft, in a designated combat zone, etc.).

87 The 2004 legislation that gave the IRS authority to use PCAs also amended IRC § 7811 to provide that the National Taxpayer Advocate's Taxpayer Assistance Order (TAO) authority extends to PCAs. IRC § 7811(g), added by the American Jobs Creation Act of 2004, Pub. L. 108-357, Title VIII, § 881(c), 118 Stat. 1418, 1626-7 provides: "Application to persons performing services under a qualified tax collection contract. Any order issued or action taken by the National Taxpayer Advocate pursuant to this section shall apply to persons performing services under a qualified tax collection contract (as defined in section 6306(b)) to the same extent and in the same manner as such order or action applies to the Secretary." IRC § 6306(k)(2) was also added, cross referencing IRC § 7811(g).

the PCA employee should consider when determining if a taxpayer is unable to pay.⁸⁸ Because PCAs will earn a commission on those payments, PCA employees have no incentive to inquire into the taxpayer's economic condition.

- The IRS does not require transparency of PCA procedures. The IRS has committed to providing PCA calling scripts to TAS for review, but it remains to be seen whether that commitment will include providing operational plans or other information that contains materials, such as calling scripts, that provide the framework for PCAs' contacts with taxpayers.⁸⁹
- The IRS will pay commissions on taxpayer remittances prompted by IRS action rather than PCA action. PCAs may not contact taxpayers or receive commissions on payments made by taxpayers for ten calendar days after the PCA receives the account.⁹⁰ In the ten-day interim period, the IRS notifies the taxpayer that it assigned the account to a PCA. The letter from the IRS, rather than any action by the PCA, may trigger payments by taxpayers, yet the PCA will receive a commission on the payments as long as they are received after the ten-day period.
- Unlike during the 2006-2009 iteration of the PDC program, the IRS will not use a Referral Unit to facilitate interactions with PCAs, and there is no clear procedure for penalizing PCAs for conduct that generates taxpayer complaints.⁹¹ This means there will be no assistance from the IRS in determining whether a taxpayer should be treated as unable to pay. Moreover, taxpayers requesting penalty abatement, audit reconsiderations, or military deferment will likewise be directed to file a request directly with the IRS, in which case the PCA will suspend collection activity for 60 days while the IRS considers the abatement or deferral request. For FY 2016, it took 91 days on average for the IRS to respond to correspondence from individual taxpayers.⁹² Thus, the taxpayer may need to make multiple contacts with the PCA just to extend the 60-day period. This burden could be avoided by the IRS simply by recalling the case pending the outcome of the audit reconsideration or other determination.
- Cases recalled from PCA inventory will not be worked to completion. After a taxpayer requests not to work with PCAs, his or her account will be returned to the same inactive status from which it originated, thus "potentially contributing to a perception that ignoring tax collection may be a successful strategy."⁹³ Taxpayers may conclude that the IRS, although it alerted them to their tax debt and placed their account with a PCA, is not actually interested in working with them to resolve it.

88 PPG § 12.3, *Unable to Pay*.

89 Letter from Scott Prentky, Director, Collection to Chi Chi Wu, Staff Attorney, National Consumer Law Center (Sept. 12, 2016).

90 Section 5.3, *Initial Contact Letters* PCA Policy and Procedures Guide; Section 4.1 of PCA contracts (providing "[t]he Contractor shall receive commission on any payment received 11 calendar days or more after the date the account is transferred to the Contractor.>").

91 Section 1203 of the IRS Restructuring and Reform Act of 1998 specified ten acts or omissions (known as the "10 Deadly Sins") for which an IRS employee is to be fired, most of which involve mistreatment of taxpayers. IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. 105-206, § 1203, 112 Stat. 685, 720-721. As the GAO has noted: "Most, but not all, of the acts or omissions involve mistreatment of taxpayers." GAO, GAO-04-1039R, *IRS' Efforts to Evaluate the Section 1203 Process for Employee Misconduct and Measure Its Impacts on Tax Administration 1* (2004). There is no statutory or contractual requirement that PCAs fire employees who are found to have mistreated taxpayers.

92 IRS, Joint Operations Center (JOC), *Adjustments Inventory Reports: CIS Closed Case Cycle Time* (FY 2016).

93 National Taxpayer Advocate 2008 Annual Report to Congress 328, 331 (Status Update: *The IRS's Private Debt Collection Initiative is Failing in Most Respects*).

CONCLUSION

The IRS, in carrying out the congressional mandate that it outsource collection of certain tax debts, is implementing a program that is inconsistent with the statutory definition of which activities the PCAs are authorized to conduct. Moreover, the IRS is not taking adequate measures to prevent PCAs from receiving the accounts of taxpayers against whom the IRS would not normally seek to collect through automatic levies because they are likely to be experiencing economic hardship. The IRS also is not adequately training PCA employees on TAS referral criteria, or adopting adequate procedures for recalling cases from the PCAs where a taxpayer is accepted into TAS.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Revise the PPG to allow PCAs to offer IAs of up to five years — rather than for the period that remains on the collection statute expiration date — to comply with the law.
2. Revise the PPG to clarify that PCAs are not authorized to monitor IAs arranged by the IRS or TAS, and are not entitled to commissions on payments taxpayers make pursuant to those IAs.
3. Revise the PPG to remove the option of soliciting voluntary payments that do not satisfy the liability and are not made pursuant to an IA in order to comply with the law.
4. Revise the PPG to provide that PCAs must refer taxpayers to TAS where the taxpayer so requests, where payment of the balance due immediately or through a payment arrangement would create a significant hardship, including long term or adverse impact, where the taxpayer is unable to pay necessary living expenses, or where the taxpayer is experiencing systemic burden in resolving his or her issue.
5. Assign a Master File code to open TAS cases and systemically prevent open TAS cases from being assigned to PCAs.
6. Recall cases from PCAs when taxpayers request assistance from TAS and TAS opens a case.
7. Implement the necessary programming as soon as possible to remove recipients of SSDI or SSI payments from the population of accounts that are eligible for assignment to PCAs.
8. Adopt an interpretation of “potentially collectible inventory” that excludes the accounts of taxpayers whose SSA and RRB retirement benefits are not subject to FPLP levies because their incomes are less than 250 percent of the federal poverty level and develop a filter to identify those who appear to have significant assets.
9. Revise the contract with PCAs to require PCAs to disclose all materials that impact taxpayers’ contacts with PCAs, including operational plans, training materials, instructions to staff, the content and format of taxpayer letters, and calling scripts.
10. Include in required training for all PCA employees the National Taxpayer Advocate’s taped training on taxpayer rights.
11. Send taxpayers whose accounts will be assigned to PCAs the IRS initial contact letter at least 14 days before transferring their accounts to PCAs and do not pay commissions to PCAs on any payments received after the initial IRS contact letter is sent and before the first PCA contact with the taxpayer.
12. Designate a group of Collection employees to work to completion cases that are recalled from PCAs.