

**MSP
#8****TAXPAYER RIGHTS: The IRS Does Not Effectively Evaluate and Measure Its Adherence to the Taxpayer’s Right to a Fair and Just Tax System****RESPONSIBLE OFFICIALS**

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TAXPAYER RIGHTS IMPACTED¹

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

DEFINITION OF PROBLEM

For many years, the National Taxpayer Advocate urged the IRS to adopt a Taxpayer Bill of Rights (TBOR) and Congress to codify the TBOR.² In 2014, the IRS officially adopted the TBOR, and in late 2015, Congress followed suit by adding the list of fundamental rights to the Internal Revenue Code (IRC or Code).³ IRC § 7803(a)(3) now states: “In discharging his duties, the Commissioner shall ensure that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title, including— .” This section then lists the ten fundamental rights proposed by the National Taxpayer Advocate. The statutory language of IRC § 7803(a)(3) shows Congress’s intent not just to articulate and group taxpayer rights in categories, but to ensure the IRS is held accountable for putting those rights into practice.

The IRS has recently taken some positive steps to revise its policies, procedures, and materials to support the TBOR. For example, the IRS updated an introductory section in the examination part of its Internal Revenue Manual (IRM) to provide excellent explanations of various actions employees can take related to taxpayer rights.⁴ Despite these improvements, the IRS has not yet adequately incorporated the TBOR into its measures or quality review criteria, thus making it difficult to evaluate the extent to which IRS employees are considering a taxpayer’s *right to a fair and just tax system* in their day to day work. The IRS’s description of the *right to a fair and just tax system* states:

- 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, e.g., National Taxpayer Advocate, *Toward a More Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration: Recommendations to Raise Taxpayer and Employee Awareness of Taxpayer Rights* (2013), <https://taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/Toward-a-More-Perfect-Tax-System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf>.
- 3 See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).
- 4 IRM 4.10.1.2, *Taxpayer Rights* (Aug. 24, 2017).

Taxpayers have the right to expect the tax system to consider facts and circumstances that might affect their underlying liabilities, ability to pay, or ability to provide information timely. Taxpayers have the right to receive assistance from the TAS if they are experiencing financial difficulty or if the IRS has not resolved their tax issues properly and timely through its normal channels.⁵

The statutory language of IRC § 7803(a)(3) shows Congress’s intent not just to articulate and group taxpayer rights in categories, but to ensure the IRS is held accountable for putting those rights into practice.

The IRS is not fully complying with the statutory mandate in IRC § 7803(a)(3) regarding the *right to a fair and just tax system* for the following reasons:

- Critical Job Elements (CJEs) do not evaluate employees on whether they consider a taxpayer’s individual facts and circumstances;
- Quality attributes do not measure whether an office or group of employees’ actions are appropriate in light of the taxpayer’s facts and circumstances as part of the quality review process; and
- The IRS’s guidelines for creating performance commitments for managers as well as its fiscal year (FY) 2014-2017 Strategic Plan do not require or encourage managers or employees to protect taxpayer rights.

ANALYSIS

Background

Why it Is Important for the IRS to Evaluate Employees, Measure Quality, and Establish Goals

The criteria used to evaluate employee performance and measure overall case quality and results are key drivers of employee behavior. If the IRS wants employees to act in accord with the TBOR, it must measure to what extent employees take appropriate actions on taxpayer cases. As one behavioral economist has noted, “Human beings adjust behavior based on the metrics they’re held against. Anything you measure will impel a person to optimize his score on that metric. What you measure is what you’ll get. Period.”⁶ In a study of 335 airline pilots across 40,000 flights, economists found two ways to effectively drive intended behavior (in this case, reducing carbon emissions): (1) inform the pilots that their performance was being monitored, and (2) give them personalized performance targets.⁷ In that study, the economists tied most of the gains simply to the awareness of being monitored.

5 IRS, Publication 1, *Your Rights as a Taxpayer* (Sept. 2017), <https://www.irs.gov/pub/irs-pdf/p1.pdf>.

6 Dan Ariely, *You are What You Measure*, HARV. BUS. REV. (June 2010), <https://hbr.org/2010/06/column-you-are-what-you-measure>.

7 Robert Metcalfe, Greer Gosnell, and John List, *Virgin Atlantic Tested 3 Ways to Change Employee Behavior*, HARV. BUS. REV. (Aug. 1, 2016), <https://hbr.org/2016/08/virgin-atlantic-tested-3-ways-to-change-employee-behavior>.

Research shows that beyond just evaluating employee performance and measuring how that performance achieves quality, it is important for managers to provide positive feedback regarding what employees are doing well, or else risk that employees will stop performing the positive action if it is not acknowledged.⁸ In the case of IRS employees, if managers do not evaluate employees and discuss with them how they have taken actions to support the taxpayer's *right to a fair and just tax system* by considering the taxpayer's facts and circumstances, employees may stop taking these actions.

Performance management, which is informed by both program evaluation and performance measurement, is part of the movement known as New Public Management (NPM), which has changed the way governmental agencies are managed.⁹ NPM principles include: "stating clear program and policy objectives, measuring and reporting program and policy outcomes, and holding managers, executives, and politicians accountable for achieving expected results."¹⁰ The five stages of performance management are relevant to the IRS and its implementation of the TBOR:

1. Formulating clear strategic objectives for organizations, including their programs and policies.
2. Translating these objectives into program and policy designs to achieve those goals.
3. Implementing the program and policy designs by creating or changing organizational structures and processes.
4. Monitoring performance, and measuring, evaluating, and reporting results, leading to consequences for the programs.
5. Returning to the strategic objectives to use findings from the earlier phases to update the objectives.¹¹

The IRS's Strategic Plan, discussed below, provides a mechanism for the first stage of performance management. To understand how the IRS is achieving its strategic objectives, such as protecting taxpayer rights, it must monitor and evaluate employee performance, measure quality results, and apply these findings.

8 Timothy R. Hinkin, and Chester A. Schriesheim, "If You don't Hear from Me You Know You are Doing Fine": *The Effects of Management Nonresponse to Employee Performance*, 45 CORNELL HOTEL & REST. ADMIN. Q., vol. 45, 362-72 (2004), <http://scholarship.sha.cornell.edu/articles/213/>.

9 James C. McDavid, Irene Huse, Laura R. L. Hawthorn, *Chapter 1: Key Concepts and Issues*, PROGRAM EVALUATION AND PERFORMANCE MEASUREMENT: AN INTRODUCTION TO PRACTICE, 5 (2d ed. 2013).

10 *Id.*

11 *Id.*

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How Laws, Internal Guidance, Standards, and Measures May Direct Employees to Consider a Taxpayer's Facts and Circumstances

A multitude of sources and resources impact an employee's ability or willingness to consider a taxpayer's facts and circumstances. These include:

1. **The IRC (or Code)** – The Code is comprised of tax laws that have passed Congress and been signed into law. It is legally binding on the IRS.
2. **Treasury Regulations** – These provide the official interpretation of the IRC by the Department of Treasury and are binding on the IRS.
3. **The Internal Revenue Manual (IRM)** – This is “the primary, official source of IRS ‘instructions to staff’ relating to the organization, administration, and operation of the Service.”¹² Although employees are expected to follow IRM procedures, these procedures are not legally binding.
4. **Critical Job Elements (CJEs)** – CJEs set the standards that the IRS uses to evaluate employees. The IRS defines CJEs as “[a] work assignment or responsibility of such importance that unacceptable performance on the CJE would result in a determination that an employee's overall performance is unacceptable. Regulations require the IRS to establish critical elements and performance standards for employee performance plans and monitor employee progress.”¹³
5. **Quality Attributes** – The IRS measures quality through two systems – the Embedded Quality Review System (EQRS) and the National Quality Review System (NQRS).¹⁴ EQRS is used to evaluate employee performance on cases and rate case actions against quality attributes. NQRS provides independent case review information that is used to determine organizational performance. Many of the same quality attributes are used to review employee performance and assess organizational quality. The Large Business and International Division (LB&I) also has its own quality measurement system (LQMS).
6. **Commitments for Managers and Managerial Officials** – Managers and management officials are rated against critical performance expectations, which are comprised of the statutory Retention Standard for the Fair and Equitable Treatment of Taxpayers,¹⁵ general responsibilities that are common to all managers and management officials,¹⁶ and Commitments. This last component establishes a link between organizational performance and individual performance. Commitments are derived from the Strategic Business Plans, but are specific to each employee, each one providing a distinct action with identified and measurable results.

12 IRM 1.11.6.1.4, *Definition of Terms and Acronyms* (July 28, 2017).

13 IRM Exhibit 6.430.1-1, *Glossary of Performance Management Terms* (June 14, 2011).

14 IRM 5.13.1, *Embedded Quality Administrative Guidelines* (Oct. 28, 2014).

15 The Internal Revenue Service (IRS) Restructuring and Reform Act of 1998 requires all IRS employees to be evaluated on the fair and equitable treatment of taxpayers. Pub. L. No. 105-206, 112 STAT. 722 § 1204(b) (1998). See IRM 6.430.3.2.2.1, *Retention Standard for the Fair and Equitable Treatment of Taxpayers* (Oct. 28, 2011). Congress later amplified and expanded this by setting out the ten taxpayer rights in the Taxpayer Bill of Rights. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).

16 See IRM 6.430.3.2.2.2, *Responsibilities* (Jan. 1, 2007).

7. IRS Strategic Plan – The IRS uses its strategic plan to outline its primary goals and associated objectives for the upcoming four fiscal years.¹⁷

There are situations where the Code, regulations, or IRM may direct the IRS or an employee to consider an individual taxpayer's facts and circumstances. However, in these examples, the IRS's CJE's, quality attributes, managerial commitments, and FY 2014–2017 Strategic Plan fail to set relevant goals, and evaluate and measure whether the IRS is protecting this part of the *right to a fair and just tax system*. To ensure employees are familiar with and act in accord with the *right to a fair and just tax system*, the IRS needs to set standards through its CJE's and evaluate employees with respect to these standards. In addition, the IRS needs to measure how often its employees comply with certain required job actions to meet a quality attribute. Although discussing every instance where an employee should be considering the facts and circumstances is beyond the scope of this analysis, below are three detailed examples of where the IRS is not ensuring its employees consider and take appropriate action: based on a taxpayer's facts and circumstances as it relates to a taxpayer's underlying liability, a taxpayer's ability to pay, and a taxpayer's ability to provide information timely.¹⁸

Underlying Liability: CJE's and quality measures do not evaluate employees and measure quality based on whether employees considered the taxpayer's facts and circumstances when making penalty determinations

One key area where employees must consider facts and circumstances is penalty determination. As shown in Figure 1.8.1 below, the Treasury Regulation and IRM require looking at the facts and circumstances on a case by case basis to determine whether the taxpayer qualifies for reasonable cause. The IRM instructs that a penalty determination cannot be made until the examiner has developed the facts and circumstances and documented how the law applies to these.

¹⁷ See, e.g., IRS Pub. 3744, *Internal Revenue Service Strategic Plan (Fiscal Year (FY) 2014-2017)*.

¹⁸ Because the most frequent opportunities for considering a taxpayer's facts and circumstances as they relate to the liability, ability to pay, and ability to provide information timely are in examination and collection, the discussion will primarily focus on some specific IRMs and job series for employees in these areas.

FIGURE 1.8.1, Law, Guidance, Standards, and Measures Related to Penalty Determination by Revenue Agents

Statute or Regulation	IRM	CJE	Quality Attribute
<p>Treas. Reg. § 1.6664-4 Reasonable cause and good faith exception to section 6662 penalties</p> <p>“The determination of whether a taxpayer acted with reasonable cause and in good faith is made on a case-by-case basis, taking into account all pertinent facts and circumstances.”</p>	<p>IRM 4.10.9.7.8 Workpapers: Documenting Penalties¹⁹</p> <p>“Only after all facts and circumstances surrounding an audit have been developed can a determination be made as to the application of appropriate penalties...The examiner must cite the appropriate regulations, rulings and court decisions that are specific to the case’s facts and circumstances for assertion or non-assertion of penalties.”</p>	<p>Internal Revenue Agent Critical Element III, Customer Satisfaction – Application, 3A: Application of Tax Laws²⁰</p> <p>“Generally: obtains and evaluates the customers’ position and addresses the merits during case development.”</p> <p>Critical Element V, Business Results – Efficiency, 5C: Gathers Information and Develops Facts²¹</p> <p>“Generally:</p> <ul style="list-style-type: none"> ♦ uses appropriate analytical resources and fact finding or innovative techniques to gather and develop facts that are complete, understandable and logically presented; ♦ interprets and follows applicable procedures, guidelines and standards.” 	<p>707: Workpapers Support Conclusions²²</p> <p>“This attribute measures if the examiner used the activity record to document examination activities and time charges throughout the audit. It also measures if the examiner appropriately prepared workpapers (including scope, depth, and techniques used) to support the conclusions in the case.”</p> <p>408: Civil Penalty Determination²³</p> <p>“This attribute measures if the examiner properly considers, correctly computes and adequately documents the assertion or non-assertion of Civil penalties.”</p>

In contrast to the regulation and IRM, the CJE makes no mention of a taxpayer’s specific situation. The CJE on applying the tax law only looks at whether the employee obtains and evaluates the taxpayer’s position, without also considering how the taxpayer’s facts and circumstances affect the liability. As an example, a taxpayer may take the position that he should be allowed certain business expense deductions because his tax preparer misunderstood the law. Although the IRS employee may evaluate the taxpayer’s position and conclude he is not allowed the expenses, the employee should still consider the taxpayer’s facts and circumstances. Such consideration could lead to a determination that the taxpayer had reasonable cause based on reliance on the return preparer and should not receive accuracy-related penalties.

The Business Results CJE focuses on developing complete facts, which is important, but it does not adequately measure the *right to a fair and just tax system* because of its sole focus on facts without regard to the personal circumstances of the taxpayer. An example of how this shortcoming harms taxpayers is an individual who failed to report income resulting from cancellation of indebtedness that was reported on a Form 1099-C, *Cancellation of Debt*. It may be a fact that the taxpayer received debt forgiveness but most taxpayers do not know the consequences of cancellation of debt, including that it is taxable unless exceptions apply. If the revenue agent were to consider the taxpayer’s facts and circumstances, he or she would ask about whether the insolvency exception applied, directing the taxpayer to the insolvency worksheet in the IRS Publication 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments*,

19 IRM 4.10.9.7.8, *Workpapers: Documenting Penalties* (Aug. 11, 2014).

20 IRS, Performance Plan for Internal Revenue Agent GS-0512 (July 2001).

21 *Id.*

22 IRS, Document 12354, *Field Compliance Embedded Quality, Field & Office Examination Job Aid* (Oct. 2012).

23 *Id.*

and possibly helping the taxpayer complete it. If the taxpayer did not qualify for the exception, the employee could consider the taxpayer's education and understanding of the consequences of debt forgiveness to determine whether the taxpayer may meet the reasonable cause exception to the penalty.

The quality attribute related to the workpapers focuses on the scope and depth of the case, but not whether the facts and circumstances of the taxpayer's specific situation were considered in determining the result. While the quality attribute for penalty determination requires documentation of the assertion or nonassertion of the penalty, there is nothing to ensure the employee thoughtfully considered the taxpayer's specific situation, as opposed to simply following prescribed procedures in computing and asserting the penalty.

Not included in the chart above, the CJEs for Revenue Agent Reviewer and Tax Law Specialist Reviewer do evaluate employees on whether the employee "conducts appropriate amount of research based on the facts and circumstances of each case."²⁴ However, this standard goes to whether the employee is taking the appropriate amount of time on the examination based on the facts and circumstances, not whether the employee is analyzing and applying the facts and circumstances to determine the liability. Another CJE for the Revenue Agent Reviewer requires that the employee "analyzes case file and other data to become familiar with issues" and "analyzes financial information to work toward effective case resolution."²⁵ This CJE could be strengthened by requiring the employee to analyze the case file and other data not to just become "familiar with issues" but also to understand the facts and circumstances of the taxpayer's situation.

Ability to Pay: CJEs and quality attributes do not ensure employees consider the facts and circumstances when determining the correct amount of basic living expenses

The consideration of facts and circumstances required by the *right to a fair and just tax system* also applies to determining a taxpayer's ability to pay. As shown in Figure 1.8.2, the IRC and Treasury regulations require considering the facts and circumstances when determining a taxpayer's basic living expenses, which are used to conclude how much a taxpayer can pay for an offer in compromise (OIC).

While the quality attribute for penalty determination requires documentation of the assertion or non-assertion of the penalty, there is nothing to ensure the employee thoughtfully considered the taxpayer's specific situation, as opposed to simply following prescribed procedures in computing and asserting the penalty.

²⁴ IRS, Performance Plan for Revenue Agent Reviewer GS-0512 and Tax Law Specialist Reviewer GS-0987 (Dec. 2007).

²⁵ *Id.*

FIGURE 1.8.2, Law, Guidance, Standards, and Measures Related to Determining Ability to Pay by Revenue Officer Advisors and Related Positions

Statute	Regulation	IRM	CJE	Quality Attribute
<p>IRC § 7122(d)(2) Allowances for basic living expenses</p> <p>The IRS “shall develop and publish schedules of national and local allowances designed to provide that taxpayers entering into a compromise have an adequate means to provide for basic living expenses.” The IRS’s guidelines shall provide that IRS employees “shall determine, on the basis of the facts and circumstances of each taxpayer, whether the use of the schedules published under subparagraph (A) is appropriate and shall not use the schedules to the extent such use would result in the taxpayer not having adequate means to provide for basic living expenses.”</p>	<p>Treas. Reg. § 301.7122-1(c)(2)</p> <p>“[t]he determination of the amount of such basic living expenses will be founded upon an evaluation of the individual facts and circumstances presented by the taxpayer’s case.”</p>	<p>IRM 5.8.12.2, Role of the Independent Administrative Reviewer²⁶</p> <p>“The IAR is responsible for reviewing the facts and circumstances of each case to determine if the proposed rejection is reasonable.”</p> <p>IRM 5.8.12.6.1, The Review²⁷</p> <p>“If supporting documents indicate any circumstances that could impact either future earning potential or allowable expenses the documentation in the case file must support the decision to exclude or include assets, expenses, and/or income relating to the taxpayer’s circumstances.”</p>	<p>Revenue Officer Advisor/Reviewer and Revenue Officer/Independent Administrative Reviewer, Critical Element II, Customer Satisfaction – Knowledge, 2B: Case Analysis²⁸</p> <p>“analyzes case file and other data to become familiar with issues; analyzes financial information to work toward effective case resolution; determines ability to pay by verifying ownership, value and equity in assets.”</p> <p>Critical Element II, Customer Satisfaction – Knowledge, 2A: Taxpayer Rights²⁹</p> <p>“informs taxpayers of their rights; ensures that taxpayer’s rights are observed and protected throughout the collection process; protects the confidentiality of taxpayer return and case related information.”</p>	<p>432 – Verify/Analyze Ability to Pay³⁰</p> <p>“Use this field to identify if the employee properly evaluated the thoroughness and accuracy of the financial information secured and determined the taxpayer’s ability to pay”</p> <p>426 – Review Procedures³¹</p> <p>“Use this field to identify if the employee followed appropriate Advisory review procedures.” “Rate this attribute “Yes,” if the employee made a determination that resulted in either the correct decision to sustain the rejected IA/OIC based on the circumstances, or a correct and sufficiently documented decision not to sustain the rejection and return the case for further development.”</p> <p>607 – Taxpayer Rights³²</p> <p>“Use this field to determine if the employee advised the TP/POA of all rights.”</p>

26 IRM 5.8.12.2, *Role of the Independent Administrative Reviewer* (Oct. 28, 2014).

27 IRM 5.8.12.6.1, *The Review* (Oct. 28, 2014). Although there are many IRMs related to ability to pay, here we focus on two that guide employees to consider a taxpayer’s facts and circumstances.

28 IRS, Performance Plan for Revenue Officer Advisor/Reviewer and Revenue Officer/Independent Administrative Reviewer GS-1169 (Mar. 2006). This CJE is the same for Revenue Officers. IRS Performance Plan for Revenue Officer, GS-1169 (July 2001). There are also additional positions that make ability to pay determinations such as Offer-in-Compromise Examiners and Revenue Officer Offer Examiners.

29 IRS, Document 12359, *Field Compliance, Embedded Quality, Field Collection (FC)* (Sept. 2017).

30 IRS, Document 12739, *Embedded Quality Advisory Function Lien Job Aid* (Aug. 2016).

31 IRS, Performance Plan for Revenue Officer Advisor/Reviewer and Revenue Officer/Independent Administrative Reviewer GS-1169 (Mar. 2006). This CJE is the same for Revenue Officers. IRS Performance Plan for Revenue Officer, GS-1169 (July 2001).

32 IRS, Document 12359, *Field Compliance, Embedded Quality, Field Collection (FC)* (Sept. 2017).

Congress provided a specific directive as to how the *right to a fair and just tax system* would be realized in the context of collection activity. IRC § 7122(d) directs that employees shall determine, based on the facts and circumstances of the taxpayer, whether it is appropriate to use established schedules for calculating living expenses, which are designed to ensure taxpayers have adequate means to provide for basic living expenses. ... Yet, IRS measures focus on formulas and rules, instead of applying judgment and discretion to the individual facts and circumstances.

To its credit, the IRS procedures, outlined in the IRM, provide for an independent administrative review of all proposed OIC rejections. However, the CJE's for independent administrative reviewers and revenue officers say nothing about looking at a taxpayer's individual facts and circumstances, especially as it relates to determining allowable expenses. To meet the CJE criterion, an employee merely needs to verify ownership, value and equity in assets, without looking at individual facts, such as if the forfeiture of assets would create an economic hardship. Similarly, the quality attribute for ability to pay asks if the employee properly verified that the financial information provided by the taxpayer was thorough and accurate, but does not emphasize looking at individual facts and circumstances that may be unique to the taxpayer and which might alter the analysis.

In fact, as shown in Figure 1.8.2 above, Congress provided a specific directive as to how the right to a fair and just tax system would be realized in the context of collection activity. IRC § 7122(d) directs that employees shall determine, based on the facts and circumstances of the taxpayer, whether it is appropriate to use established schedules for calculating living expenses, which are designed to ensure taxpayers have adequate means to provide for basic living expenses. Congress believed “the ability to compromise tax liability and to make payments of tax liability by installment enhances taxpayer compliance” and “the IRS should be flexible in finding ways to work with taxpayers who are sincerely trying to meet their obligations and remain in the tax system.”³³ Yet, IRS measures focus on formulas and rules, instead of applying judgment and discretion to the individual facts and circumstances.

The Rating Guide Explanation for the Review Procedures attribute does mention looking at the circumstances, but it only requires a “sufficiently documented decision” if the review results in the rejected offer being sent back for further development.³⁴ The decision to sustain a rejected offer should also be sufficiently documented to show how the taxpayer's circumstances were considered. For example, if the decision to reject the offer was based on a finding that the taxpayer could sell his primary vehicle to pay the tax debt, the consideration of whether the taxpayer had other sources of transportation necessary to continue working in his job should be documented.

33 S. REP. No. 105-174 at 88 (1998).

34 IRS, Document 12739, *Embedded Quality Advisory Function Lien Job Aid* (Aug. 2016).

The catch-all attribute for taxpayer rights, while commendable and beneficial in raising awareness, is not helpful in determining whether an employee's actions were appropriate in light of a taxpayer's circumstances because it is so broad that one cannot ascertain which rights were complied with and which were not.

Ability to provide information timely: Quality attributes related to timeliness may discourage employees from considering a taxpayer's facts and circumstances when deciding whether to allow the taxpayer additional time to provide information in an examination

Although the Treasury Regulations do not expressly state that a taxpayer can receive additional time to provide information in an examination, the IRS has decided as a policy matter to allow additional time based on "reasonable circumstances."³⁵ The IRM provides examples of when this requirement might be met and advises using judgment based on the taxpayer's facts and circumstances. However, as shown in the table below, the CJEs and quality attributes seem to be incompatible with an employee considering a taxpayer's facts and circumstances and providing a taxpayer with additional time if the examination does not involve a complex issue. Figure 1.8.3, below, lists CJEs for revenue agents, even though the IRM advises that a manager or management official must grant the extension of time to provide information in response to a 30-day letter. We discuss managerial commitments below, but here, the CJEs for revenue agents are also relevant because the revenue agent is likely to be the frontline employee who must receive and consider the request for additional time and choose how to present it to a manager.

³⁵ IRM 4.10.8.11.8, *Extension of Time to Respond* (Sept. 12, 2014).

FIGURE 1.8.3, Law, Guidance, Standards, and Measures Related to Extensions of Time to Respond in an Examination

Regulation	IRM	CJE	Quality Attribute
<p>Statement of Procedural Rules 601.105(d)(1) “The 30-day letter is a form letter which states the determination proposed to be made...If the taxpayer does not respond to the letter within 30 days, a statutory notice of deficiency will be issued or other appropriate action taken...”</p>	<p>IRM 4.10.8.11.8 Extension of Time to Respond³⁶ “(1) In general, Statement of Procedural Rules 601.105(d)(1) does not provide for an extension of time to reply to a 30-day letter. However, as a matter of practice, extensions may be granted under reasonable circumstances. (2) Reasonable circumstances include but are not limited to the following: The taxpayer retains a representative and demonstrates a need for more time to prepare a meaningful protest. The taxpayer retains a new representative. Sickness or injury of the taxpayer or representative. Issues are complex and require extensive research.”</p> <p>IRM 4.19.13.9.6, Taxpayer Requests Additional Time to Respond³⁷ “If subsequent time extensions are requested [beyond the automatic 30 day extension], judgment should be used based on the facts and circumstances for the individual case.”</p> <p>IRM 4.46.5.7.2, Key Points to Consider and Verify in Preparing an Unagreed Issue Report³⁸ “The case manager, in collaboration with the issue manager(s), may approve the request [for an extension of time in which to file a protest] based on the facts and circumstances in each case.”</p>	<p>Internal Revenue Agent Critical Element V, Business Results - Efficiency, 5A: Completes Work Timely³⁹ “Generally completes work assignments so that both the total time spent and the time span of the activities are commensurate with the nature and complexity of the work. Generally identifies issues that have significant impact and seldom spends time on items of little materiality.”</p> <p>LB&I Issue Practice Group Coordinator, Issue Practice Group Subject Matter Expert, Knowledge Network Specialist, Senior Revenue Agent, Critical Element V, Business Results - Efficiency, 5A, Planning and Scheduling⁴⁰ “Generally: ♦ plans, schedules, and executes program responsibilities within established time frames; ♦ initiates timely actions without managerial follow-up; ♦ coordinates activities and recommendations to ensure timely action.”</p>	<p>510: Time Span⁴¹ “This attribute measures if the time span of the case is appropriate for the actions taken. Case actions should be completed in the most efficient manner and not result in unnecessary delays during the examination process.”</p> <p>LQMS Technical Standard 2: Execution⁴² “Was the time applied commensurate with the complexity of the Issues?”</p>

36 IRM 4.10.8.11.8, *Extension of Time to Respond* (Sept. 12, 2014). See also IRM 4.10.8.12.8, *Extension of Time to Respond (LB&I Examiners only)* (Aug. 11, 2006), which provides similar guidelines for Large Business and International (LB&I) examiners.

37 IRS, Performance Plan for Internal Revenue Agent GS-0512 (July 2001).

38 IRS, Document 12354, *Field Compliance Embedded Quality, Field & Office Examination Job Aid* (Oct. 2012).

39 IRM 4.19.13.9.6, *Taxpayer Requests Additional Time to Respond* (Jan. 1, 2016).

40 IRM 4.46.5.7.2, *Key Points to Consider and Verify in Preparing an Unagreed Issue Report* (Mar. 9, 2016).

41 IRS, Performance Plan for Issue Practice Group Coordinator, GS-0512, Issue Practice Group Subject Matter Expert, GS-0512, Knowledge Network Specialist, GS-0987, Senior Revenue Agent (Mar. 2016).

42 IRS, LB&I Quality Measurement System Technical Standards (Feb. 2016).

Both the Critical Job Elements and the quality attributes focus on efficiency, making sure the amount of time the case stays open is consistent with established timeframes and the complexity of the case. Yet, there may be situations where an examination is not complex, and the documentation requested is straightforward, but the taxpayers needs additional time due to unique facts and circumstances.

Both the CJE's and the quality attributes focus on efficiency, making sure the amount of time the case stays open is consistent with established timeframes and the complexity of the case. Yet, there may be situations where an examination is not complex, and the documentation requested is straightforward, but the taxpayers needs additional time due to unique facts and circumstances. For example, a taxpayer is suffering a medical condition, needs to request documents from abroad, or is unable to take off from a job to obtain the documents immediately.

The LB&I Division uses a checklist for reviewers conducting sample case reviews for its quality measurement system. One checklist item asks: "Were there any delays in the examination? Quality Reviewers consider reasons for delays in responses but rate this area based on the examiner's actions. Did the examiner take into account the taxpayer's not being able to provide information in a timely manner (*e.g.*, if the taxpayer had to get the requested information from a foreign country)?"⁴³ Other IRS operating divisions could use checklists with similar questions to ensure that where an employee did not appear to meet a timeliness measure, the employee's actions may still be appropriate based on the taxpayer's facts and circumstances.

A Discussion of a Taxpayer's Right to a Fair and Just Tax System Is Absent in a Number of CJE's

TAS conducted a review of the CJE's of 21 different positions that are part of four major categories of employees: revenue officers, revenue agents, appeals and settlement officers, and OIC specialists. We identified these positions as ones in which employees have regular contact with taxpayers and likely have the authority to use some discretion. This review showed that each of these 21 positions contained the Retention Standard for the Fair and Equitable Treatment of Taxpayers, required by statute.⁴⁴ In addition, 14 of the 21 positions had at least one CJE that mentioned taxpayer rights, and five of the 21 positions had two CJE's that mentioned taxpayers' rights. Five of the positions had a CJE specifically devoted to taxpayer rights, which required an employee to:

- Educate the taxpayer of their rights throughout the collection process;
- Ensure that taxpayer's rights are observed and protected throughout the collection process;
- Protect the confidentiality of taxpayer return and case related information; and
- Accurately explain the collection process throughout the case progression.

43 TBOR and Quality Reviews of LB&I Cases, IRS response to TAS information request (July 13, 2016).

44 See footnote 15, *supra*.

These are desirable and important elements. However, the CJs for the different positions varied greatly in their coverage of the taxpayer's *right to a fair and just tax system*, with some including multiple CJs focusing on fully developing the relevant facts, and others without a single CJE mentioning the facts of the case or the taxpayer's circumstances. Thus, the IRS should conduct a review of all CJs, identifying where it would be appropriate to specifically incorporate a discussion of the taxpayer's *right to a fair and just tax system*, as well as the other nine rights set out in IRC § 7803(a).

The IRS's guidelines for creating performance commitments for managers as well as its FY 2014-2017 strategic plan do not require or encourage managers or employees to protect taxpayer rights.

In the above example about allowing a taxpayer more time to provide information, the decision rests with a manager or management official, who is not subject to CJs. Managers are evaluated based on whether they meet general responsibilities and specific commitments, which are unique to each management employee and tied to specific accomplishments. At first glance, it may appear difficult to use commitments to drive a behavior that should be ongoing and consistent — considering a taxpayer's specific facts and circumstances.⁴⁵ However, managers could identify specific accomplishments that would drive employees to make this consideration in their daily work. For example, a manager could commit to enhancing the technical knowledge of her direct reports by providing additional training, and state that the commitment will be satisfied if the training includes detailed examples on when a taxpayer's facts and circumstances might lead to a reasonable cause determination. A manager could also commit to reviewing cases where the IRS granted a request for additional time as well as where such requests were denied. This would help the manager determine appropriate timelines for providing additional information in all cases and consider whether employees may be prematurely coming to a determination and issuing a 30-day letter while a taxpayer is still working with examination. The current guidelines for developing managerial commitments are devoid of information about the TBOR or any of the specific rights.⁴⁶ The IRS should update this guidance, with examples, of how commitments can further the protection of taxpayer rights.

The current guidelines for developing managerial commitments are devoid of information about the Taxpayer Bill of Rights or any of the specific rights.

Commitments and other elements of the performance evaluation system are tied to the IRS's strategic goals. The IRS's current strategic plan for FY 2014-2017, contains no information about taxpayer rights outside of a discussion of TAS and the role of non-profit institutions in distributing information about taxpayer rights.⁴⁷ The strategic goals related to organizational excellence miss an opportunity for the IRS to commit to protecting taxpayer rights and reflect a disproportionate focus on enforcement.⁴⁸ At the time of this writing, the IRS had not yet released its Strategic Plan for FYs 2018-2022, but had drafted

⁴⁵ IRM 6.430.3.2.4.1, *Guidelines for Developing Well Constructed Commitments or Objectives* (Oct. 28, 2011).

⁴⁶ *Id.*; IRS, *Writing Performance Commitments, A Reference Guide for Managers and Management Officials* (Aug. 23, 2017).

⁴⁷ IRS, Publication 3744, *Strategic Plan (FY 2014-2017)* (June 2014).

⁴⁸ The associated goals are to “[d]eliver high quality and timely service to reduce taxpayer burden and encourage voluntary compliance” and to “[e]ffectively enforce the law to ensure compliance with tax responsibilities and combat fraud.” IRS, Publication 3744, *Strategic Plan (FY 2014-2017)* (June 2014).

and revised a list of goals, objectives, and activities.⁴⁹ In this document, the IRS states its plans to post the TBOR upfront within the Strategic Plan, which will emphasize taxpayer rights as an important IRS priority. Beyond just posting the TBOR, the IRS needs to create goals and objectives related to taxpayer rights, such as committing to training all IRS employees each year on taxpayer rights. Integrating taxpayer rights throughout the strategic plan would have an effect on other IRS standards and measures, including CJs, quality attributes, and commitments, which flow from the IRS's strategic goals.

CONCLUSION

The above discussion shows the IRS could better evaluate its employees and measure whether their actions are appropriate based on a taxpayer's facts and circumstances. There are likely other examples where the IRS's performance standards and measures either do not account for this part of the taxpayer's *right to a fair and just tax system* or may even be incompatible with it. Although TAS was not able to review individual commitments for managers, the guidance for creating these commitments offers no assurance that managers will take actions or set goals to protect taxpayer rights. Because the Strategic Plan provides a framework for all the IRS's evaluation and measurement systems, it is vital for the specific goals and objectives to provide a link to rights under the TBOR.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Revise its CJs and quality attributes to align with statutory, regulatory, case law, and IRM instructions for employees to consider the specific facts and circumstances that affect taxpayers' underlying liabilities, ability to pay, and ability to provide timely information.
2. Update its guidance for developing commitments to provide examples and emphasize how commitments can further the protection of taxpayer rights.
3. Add information throughout its strategic plan to tie goals and objectives to taxpayer rights under the TBOR and add objectives: (1) to evaluate employees' performance with respect to and in accord with taxpayer rights, and (2) to train all employees on taxpayer rights.
4. Collaborate with TAS in developing and delivering a mandatory annual training on taxpayer rights.

⁴⁹ IRS, *FY 2018–2022 Strategic Plan, Overview of Proposed Strategic Goals and Objectives* (Oct. 2017).