

MSP
#14**COLLECTION DUE PROCESS NOTICES: Despite Recent Changes to Collection Due Process Notices, Taxpayers Are Still at Risk for Not Understanding Important Procedures and Deadlines, Thereby Missing Their Right to an Independent Hearing and Tax Court Review****RESPONSIBLE OFFICIALS**

Mary Beth Murphy, Small Business/Self-Employed Division
 Ken Corbin, Commissioner, Wage and Investment Division
 Donna Hansberry, Chief, Office of Appeals

TAXPAYER RIGHTS IMPACTED¹

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

DEFINITION OF THE PROBLEM

Collection Due Process (CDP) hearings are one of the most important taxpayer protections created by the IRS Restructuring and Reform Act of 1998 (RRA 98).² CDP hearings provide taxpayers with an independent review by the IRS Office of Appeals of the decision to file a Notice of Federal Tax Lien (NFTL) or the IRS's proposal to undertake a levy action. If the taxpayer disagrees with the outcome of the CDP hearing, he or she can seek review by the U.S. Tax Court.

Collection due process rights further the *right to privacy*, the *right to a fair and just tax system*, and the *right to challenge the IRS's position and be heard*.³ For instance, during the CDP hearing, the Appeals Officer (AO) must obtain verification that “requirements of any applicable law or administrative procedure have been met.”⁴ The AO also must consider “whether any proposed collection action balances the need for the efficient collection of taxes with the legitimate concern of the person that any collection action be no more intrusive than necessary.”⁵ Taxpayers are given the opportunity to raise a collection alternative, such as an installment agreement or offer in compromise, and in some instances they can contest the underlying liability.⁶

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

2 IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, § 3401, 112 Stat. 685, 746 (1998).

3 For a more thorough discussion of the importance of CDP rights in tax administration, see Nina E. Olson, *Taking the Bull by Its Horns: Some Thoughts on Constitutional Due Process in Tax Collection*, 63 TAX LAWYER 227.

4 IRC § 6330(c)(1).

5 IRC § 6330(c)(3)(C).

6 IRC § 6330(c).

However, as discussed below, the response rate for CDP notices is quite low, between less than one percent and ten percent, depending on the taxpayer's income level and notice type. Many and diverse stakeholders have expressed concerns that CDP rights are communicated poorly to taxpayers.⁷ The Treasury Inspector General for Tax Administration (TIGTA) reports that some taxpayers were denied a CDP hearing because they sent their request for a CDP hearing to the wrong office.⁸ The Tax Court has also noted confusion surrounding the notice of determination.⁹

Given what is at stake in CDP cases, any confusing or inadequate correspondence can have grave consequences for a taxpayer's rights. The National Taxpayer Advocate has the following concerns about the current CDP notices:

- The design and wording in CDP administrative notices underemphasize the importance of CDP rights;
- Important information for exercising CDP administrative rights are not clearly communicated to taxpayers; and
- The defects in the notice of determination may prevent some taxpayers from appealing their cases to Tax Court.

ANALYSIS OF THE PROBLEM

Background

During hearings leading to the enactment of RRA 98, Senator Roth, Chairman of the Senate Finance Committee, explained in 1998:

There is no doubt that the powers of the Internal Revenue Service are extraordinary. The IRS can seize property, paychecks, and even the residences of the people it serves. Businesses can be padlocked, sometimes causing hundreds of employees who are also taxpayers to be put out of work ... This is an awesome amount of power to place in the hands of any government agency. Is it appropriate? Perhaps. But with such power there must be an effective counterbalance of responsibility. Why? Because the greater the power, the more extensive the damage that can be done if that power is abused.¹⁰

Senator Roth's concerns were not far-fetched. To draft RRA 98, legislators heard testimony from taxpayers. Thomas Savage, owner of a construction management company, testified about his experience where a subcontractor he worked with accrued a tax debt. The IRS determined the

⁷ National Taxpayer Advocate 2017 Annual Report to Congress 299-306 (Legislative Recommendation: *Collection Due Process and Innocent Spouse Notices: Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions, and Provide That a Petition Filed by Such Specified Date Will Be Treated As Timely*); Carlton Smith, PROCEDURALLY TAXING, *CDP Notice of Determination Sentence Causing Late Pro Se Petitions*, <http://procedurallytaxing.com/cdp-notice-of-determination-sentence-causing-late-pro-se-petitions/> (Mar. 24, 2016); TAX NOTES TODAY, *Harvard Federal Tax Clinic Provides IRS Reform Recommendations*, 2018 TNT 70-19 (Apr. 17, 2018).

⁸ Treasury Inspector for Tax Administration (TIGTA), Ref. No. 2018-10-054, *Review of the Office of Appeals Collection Due Process Program* 6 (Sept. 5, 2018).

⁹ In *Houk v. Commissioner*, the court noted that "people of ordinary intelligence who do not have tax training and who have previously received both a lien notice and a levy notice and have requested CDP hearings for both ... must find [the title of the notice of determination] confusing." *Houk v. Comm'r.*, Order for Supplement to Motion for Entry of Decision, Tax Ct. No. 22140-15L (June 2, 2018).

¹⁰ *Practices and Procedures of the Internal Revenue Service: Hearing Before the S. Comm. on Finance*, 105th Cong. 2 (1998) (opening statement of Senator William V. Roth, Jr.).

subcontractor to be currently not collectible and turned its attention to Mr. Savage. The IRS incorrectly argued there was a partnership between Mr. Savage and the subcontractor. Mr. Savage testified that:

Undaunted by the challenge to provide the authority in support of this fictitious partnership, the revenue officer caused the IRS to issue a 30-day letter which proposed an assessment against the fictitious partnership. We immediately filed a written protest with the IRS appeals officer and eagerly awaited an appeals conference to put the case behind us. As things turned out, we were never given an opportunity to present our case to the appeals office.”¹¹

CDP hearings were designed not to limit the IRS’s awesome collection powers but to serve as a check on abuses of that power. Moreover, CDP hearings ensure taxpayers have an opportunity to raise their concerns to an independent official prior to the IRS taking its first potentially devastating collection action.

CDP Processes and Procedures

The IRS communicates CDP rights during two critical times. First, the IRS communicates the right to request a CDP administrative hearing with notices such as Letter 1058, *Final Notice of Intent to Levy and Notice of Your Right to a Hearing* (notice of intent to levy), or Letter 3172, *Notice of Federal Tax Lien and Your Rights to a Hearing Under IRC 6320* (NFTL).¹² Following the CDP hearing, the IRS communicates its determination to the taxpayer via a notice of determination, such as Letter 3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of the Internal Revenue Code* (notice of determination), which includes the right to appeal the determination to Tax Court.¹³

The IRS provides the taxpayer with 30 days in which to request an administrative CDP hearing.¹⁴ Taxpayers who miss the 30-day deadline to request a CDP hearing may still receive an equivalent hearing within one year from the day after the date of the intent to levy notice or within one year from the day after the end of the five business day period following the filing of the NFTL.¹⁵ It is unclear if missing the deadline to request an administrative CDP hearing in the first place is a matter of jurisdiction for the Tax Court and can be subject to equitable tolling if later litigated.¹⁶

11 *Practices and Procedures of the Internal Revenue Service: Hearing Before the S. Comm. on Finance*, 105th Cong. 83 (1998) (statement of Thomas Savage, business owner).

12 IRS, Letter 1058, *Final Notice Notice of Intent to Levy and Notice of Your Right to a Hearing* (Jan. 2017); IRS, Letter 3172, *Notice of Federal Tax Lien and Your Rights to a Hearing Under IRC 6320* (Mar. 2017). Notice LT11, *Notice of Intent to Levy and Notice of Your Right to a Hearing*, is sent to taxpayers whose cases are in Automated Collection Services (ACS) and Letter 1058 is sent to taxpayers whose cases are assigned to Revenue Officers. This discussion will focus on Letter 1058 for the conversation regarding intent to levy notices.

13 IRS Letter L3193, *Notice of Determination: Concerning Collection Action(s) Under Section 6320 and/or 6330 of The Internal Revenue Code* (July 2018).

14 IRC §§ 6320(a)(3)(B) and 6330(a)(3)(B).

15 Treas. Reg. § 301.6330-1(h)(2)(iv)(Q&A17). The equivalent hearing will be held by Appeals and generally will follow Appeals’ procedures for a CDP hearing. Appeals will not, however, issue a notice of determination, it will issue a decision letter. Also, unlike with a CDP hearing, the IRS may continue collection action while the equivalent hearing is pending, and the taxpayer cannot appeal the decision letter to Tax Court. Treas. Reg. § 301.6320-1(h)(2); Treas. Reg. § 301.6330-1(h)(2).

16 *Kim v. Comm’r.*, T.C. Memo. 2005-96. For a discussion about how the time period for filing a CDP hearing request is not an issue of jurisdiction, see Keith Fogg, *The Jurisdictional Ramifications of Where You Send a CDP Request*, TAX NOTES (Nov. 12, 2018).

However, if the taxpayer disagrees with the IRS's determination after the CDP hearing and wishes to appeal, he or she must file a petition with the U.S. Tax Court within 30 days of the IRS's determination.¹⁷ The Tax Court has held that the 30-day filing deadline to seek judicial review under IRC § 6330(d)(1) is an issue of jurisdiction.¹⁸ Without jurisdiction, the Tax Court cannot hear a case. Furthermore, the deadline is not subject to equitable tolling, meaning the court cannot extend the deadline for any reason.¹⁹

CDP Notices Have a Low Response Rate

Figure 1.14.1 shows the number and response rate (percentage) for CDP notices issued in fiscal year (FY) 2017 by the taxpayer's income.²⁰ Regardless of income, all the notices had a very low response rate. For instance, 162,887 taxpayers who live in poverty received the intent to levy CDP notice during FY 2017. Of the 162,887 such taxpayers who received a levy notice, only 1,733 (approximately one percent) requested a CDP hearing. An additional 267 of those taxpayers requested an equivalent hearing. This is roughly 13 percent of the taxpayers who responded.²¹

There is a small increase in the response rate as the taxpayer's income increases but differs depending on which notice is being considered. The largest response rate is the group of taxpayers who received both a notice of intent to levy and an NFTL, and whose income was above 250 percent of the federal poverty level. In this group, the IRS issued 40,338 notices and the IRS received 4,194 CDP hearing requests, creating a response rate of around ten percent. An additional 797 taxpayers (two percent of the taxpayers) requested an equivalent hearing, which represents nearly 16 percent of the responses.²²

17 IRC § 6330(d)(1).

18 *Weber v. Commissioner*, 122 T.C. 258 (Mar. 22, 2004).

19 *Duggan v. Commissioner*, Tax Ct. Docket No. 4100-15L (order dated June 26, 2015). The Ninth circuit affirmed the 30-day deadline is a matter of jurisdiction. *Duggan v. Commissioner*, 2018 U.S. App. LEXIS 886 (9th Cir. Jan. 12, 2018).

20 The analysis broke down income according to the guidelines found in IRC § 7526(b)(1)(B), which considers eligibility for low income tax clinic (LITC) representation based on a financial breakdown where 90 percent of the clients do not exceed 250 percent of the federal poverty level. However, the IRS will process taxpayers through a low income filter for the purposes of the Federal Payment Levy Program (FPLP) if the taxpayer's income falls below 250 percent of the federal poverty level. IRM 5.19.9.3.2.3, *Low Income Filter Exclusion* (Oct. 20, 2016).

21 The 267 equivalent hearing requests constitute 13 percent of the 2,000 responses to the intent to levy CDP notice (1,733 timely requests and 267 equivalent hearing requests).

22 The 797 equivalent hearing requests constitute 16 percent of the 4,991 responses to both the lien and levy CDP notice (4,194 timely requests and 797 equivalent hearing requests).

FIGURE 1.14.1, CDP Notices Issued in FY 2017 and Hearing Requests by Income Level²³

Income Group	CDP Notice Type	TPs mailed Notices	Appeal Requested	Equivalent Hearing Requested	Notice of Determination Issued
In Poverty	Levy only	162,887 (75%)	1,733 (1%)	267 (<1%)	1,361 (1%)
	Lien only	41,058 (19%)	1,413 (3%)	226 (1%)	1,096 (3%)
	Both Levy and Lien	14,041 (6%)	1,064 (8%)	197 (2%)	802 (6%)
	Subtotal	217,986	4,210 (2%)	690 (<1%)	3,259 (1%)
Above Poverty to 250% Federal Poverty Level	Levy only	261,658 (88%)	2,767 (1%)	396 (<1%)	2,228 (1%)
	Lien only	25,207 (8%)	1,128 (4%)	168 (1%)	908 (4%)
	Both Levy and Lien	10,647 (4%)	867 (8%)	155 (2%)	643 (6%)
	Subtotal	297,512	4,762 (2%)	719 (<1%)	3,779 (1%)
Above 250% of Federal Poverty Level	Levy only	641,469 (83%)	9,144 (1%)	1,472 (<1%)	7,393 (1%)
	Lien only	94,046 (12%)	5,789 (6%)	794 (1%)	4,721 (5%)
	Both Levy and Lien	40,338 (5%)	4,194 (10%)	797 (2%)	3,225 (8%)
	Subtotal	775,853	19,127 (2%)	3,063 (<1%)	15,339 (2%)
Overall Total TPs	Total	1,291,351	28,099 (2%)	4,472 (<1%)	22,377 (2%)

Additionally, many taxpayers navigate the CDP process (including litigation in Tax Court) without representation. In fact, for the period between June 1, 2016 and May 31, 2017, there were 568 Tax Court petitions filed in CDP cases.²⁴ Of those, 335 petitions were filed by *pro se* taxpayers, meaning that approximately 59 percent of taxpayers who appealed a CDP determination were unrepresented.²⁵

23 Compliance Data Warehouse, Individual Returns Transaction File, Information Returns Master File. A single taxpayer could have received CDP notices for more than one module. A tax module is a combination of a type of tax and the tax period when it was originally due. A total of 72,215 taxpayers were categorized into the “in poverty” group because for tax year 2017 they did not file a return and there were no third-party reports of income for them. It is possible that some of these taxpayers may have had unreported income. This data does not include information from businesses.

24 Data pulled from Tax Litigation Counsel Automated Tracking System (TLCATS) and Counsel Automated Systems Environment – Management Information System (CASE-MIS) (July 26, 2018).

25 *Id.*

To Address Practitioners' Criticisms, TAS Reviewed CDP Notices

TAS started an ongoing review of CDP-related notices in FY 2018. As part of this review, TAS first reviewed the legal requirements for each notice. According to IRC § 6330, the notice of intent to levy must:

- Include notice of the taxpayer's right to a CDP hearing before a levy is made;²⁶
- Include the following information in "simple and nontechnical terms":
 - a) The amount of unpaid taxes;²⁷
 - b) The right to request a CDP hearing during the 30-day period;²⁸
 - c) The proposed IRS action and the rights of the taxpayer with respect to such action, including a brief statement setting forth:
 - i. The Code provisions relating to levy and sale of property;
 - ii. Levy and sale of property procedures;
 - iii. Available administrative appeals and associated procedures;
 - iv. Available alternatives that could prevent the levy (including installment agreements); and
 - v. Provisions of this title and procedures relating to redemption of property and release of liens on property.²⁹

The NFTL notice has similar legal requirements under IRC § 6320(a)(3).

An NFTL notice must include:

- The amount of unpaid tax;
- The right of the person to request a hearing during the 30-day timeframe beginning five days after the lien is filed;
- The administrative appeals available to the taxpayer with respect to such lien and the procedures relating to such appeals;
- The provisions relating to the release of liens on property; and
- The provisions of IRC § 7345 relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts pursuant to § 32101 of the Fixing America's Surface Transportation (FAST) Act.³⁰

There are requirements for the notice of determination, but most apply to the results of the specific CDP hearing. For instance, the notice of determination must address whether the proposed collection action represents a balance between the need for the efficient collection of taxes and the legitimate concern of

26 This notice requirement does not apply to levies on state tax refunds, jeopardy levies, federal contractor levies, or disqualified employment tax levies. IRC § 6330(a)(1).

27 IRC § 6330(a)(3)(A).

28 IRC § 6330(a)(3)(B).

29 IRC § 6330(a)(3)(C).

30 IRC § 6320(a)(3)(E). Comparable language is not required for intent to levy CDP notices, however, the IRS currently does include it. Such language is required in the levy notice following notice and demand for payment under IRC § 6331(d). IRC § 6331(d)(4)(G).

the taxpayer that any collection action be no more intrusive than necessary.³¹ Most pertinent to this discussion is the requirement that the notice will advise the taxpayer of his or her right to seek judicial review within 30 days of the date of the Notice of Determination.³²

The Design and Wording in CDP Notices Underemphasize the Importance of CDP Rights

The current CDP administrative notices do not inform taxpayers about *why* CDP rights are important to taxpayers. For instance, the intent to levy notice says, “This is your notice of our intent to levy ... and your right to request a Collection Due Process hearing ...” It does not explain what a CDP hearing is, why a taxpayer would want to request one, and does not adequately explain equivalent hearings. Telling a taxpayer why CDP rights are important furthers the *right to be informed*.³³ And from a behavioral science perspective, including an explanation would provide a “nudge” that could increase a taxpayer’s decision to exercise his or her rights. A “nudge” steers people in a particular direction while allowing them to maintain their choice.³⁴

The current Collection Due Process (CDP) administrative notices do not inform taxpayers about *why* CDP rights are important to taxpayers It does not explain what a CDP hearing is, why a taxpayer would want to request one, and does not adequately explain equivalent hearings.

Important information for Exercising CDP Rights Is Not Clearly Communicated to Taxpayers

The Deadline to Request a CDP Hearing May Be Missed By Taxpayers

The intent to levy notice mentions the deadline to request the CDP hearing in the fourth paragraph of the first page. It is not in bold font or otherwise set apart from the rest of the text. Based on behavioral research, we know that plain language helps a reader understand material. However, plain language does not just consist of simple wording. Plain language also means structuring the material so that it flows easily for the reader as well as incorporating typography (bold font, etc.) and white space to guide the reader.³⁵ The current intent to levy notice does not effectively communicate the file-by date by burying it in text and not putting it in bold font to guide the reader’s attention.

The National Taxpayer Advocate is also concerned with how the response due date is communicated to taxpayers who receive an NFTL. According to IRC § 6320(a)(2), the IRS must provide notice to the taxpayer of the NFTL “not more than 5 business days after the day of the *filing* of the notice of lien.” [Emphasis added.] The taxpayer’s 30-day timeframe to request a CDP hearing starts “on the day after

31 Treas. Reg. § 301.6330-1(e)(3)(Q&A E-8).

32 *Id.*

33 IRC § 7803(a)(3)(A).

34 Deloitte Consulting LLP, *Using the Nudge in Tax Compliance: Leveraging Behavioral Insights to Boost Tax Revenue 9* (2017). See also Literature Review: *Improving Notices Using Psychological, Cognitive, and Behavioral Science Insights*, *infra*.

35 Center for Plain Language, *Five Steps to Plain Language*, <https://centerforplainlanguage.org/learning-training/five-steps-plain-language/>. For more information on how plain language can help taxpayers, see Literature Review: *Improving Notices Using Psychological, Cognitive, and Behavioral Science Insights*, *infra*.

the 5-day period” mentioned in IRC § 6320(a)(2).³⁶ However, the IRS considers the NFTL to be filed on the date it *should* be received by the recording office and to determine this date, the IRS adds three days to the NFTL mailing date.³⁷

Here is an example:

1. IRS mails NFTL to the recording office on September 6, 2017.
2. Estimated Filing Date: (+ 3 business days) = September 11.
3. Required notification to the taxpayer: (+ 5 business days) = September 18 (IRS mails NFTL letter to TP, with date on it).
4. File By Date: (30 days from required notification) = October 18.

However, in reality the recording office does not receive the NFTL until September 20, 2017. Based on this date, the IRS would have been required to mail notification to the taxpayer within five business days of September 20, or by September 27. The taxpayer’s 30-day deadline to request a CDP hearing would expire 30 days later, on October 27. The lag time in receiving the notice should have allowed the taxpayer an additional nine days to request a CDP hearing.

While including an exact date to request a CDP hearing based on a projected filing date may allow the IRS to issue large amounts of NFTLs and CDP notices, untold circumstances could prevent the delay of the filing of an NFTL. Since the filing date is critical to the timeframe for requesting a CDP hearing, the taxpayer could have a longer period of time to request a CDP hearing than the NFTL letter indicates, but he or she would not know it.³⁸

CDP Administrative Notices Do Not Clearly Instruct Taxpayers Where to Send Their CDP Hearing Requests

The intent to levy notice instructs the taxpayer to send his or her CDP hearing request to “the above address.” Again, this information is buried in text. Multiple addresses may also appear on the notice, one for a response and one for payment. The harm caused by this confusion is evident in the order issued by the Tax Court in *Zonies v. Commissioner*, where Mr. Zonies sent his CDP request to the wrong office and by the time it arrived at the right office, his 30-day time frame had expired.³⁹ A recent TIGTA report reviewed 70 CDP cases and found that approximately 11 percent of the taxpayers sent their CDP hearing requests to the wrong office.⁴⁰ As mentioned earlier, to help taxpayers read and understand the notice, the IRS needs to place the address early in the notice and set apart by bold font. Moreover, since the CDP notice provides significant, one-time due process rights, the address to make a CDP hearing request should be more prominent than the address for making payments. The CDP notice should prioritize taxpayer rights.

36 IRC § 6320(a)(3)(B).

37 IRM 5.12.6.3.6(3), *CDP Notice Time Frames* (Jan. 19, 2018).

38 TAS is reviewing the data for taxpayers filing lien and levy CDP hearing requests to determine whether a longer time period would mitigate some of the low hearing rates and late filing issues. We may make a legislative recommendation regarding these deadlines in later reports.

39 *Zonies v. Comm’r.*, Docket No. 18711-15L, Order (Feb. 22, 2016). See also Keith Fogg, *Sending Your Collection Due Process Hearing Request to the Correct Address*, *PROCEDURALLY TAXING* (Apr. 26, 2016), <http://procedurallytaxing.com/sending-your-collection-due-process-hearing-request-to-the-correct-address/>; Keith Fogg, *The Jurisdictional Ramifications of Where You Send a CDP Request*, *TAX NOTES* (Nov. 12, 2018).

40 TIGTA, *Review of the Office of Appeals Collection Due Process Program*, Report No. 2018-10-054 6 (Sept. 5, 2018). TIGTA reviewed 70 CDP cases and identified 8 taxpayers who mailed or faxed their CDP hearing request to the wrong office.

Notices Should Include References to TAS and Low Income Taxpayer Clinics

IRC § 6212(a) requires that the notice of deficiency, which is sent to a taxpayer prior to assessment of a liability, include “a notice to the taxpayer of the taxpayer’s right to contact a local office of the taxpayer advocate and the location and phone number of the appropriate office.” However, no such requirement exists for CDP notices. The IRS includes a reference to TAS and Low Income Taxpayer Clinics (LITC) in publications 594, *The IRS Collection Process*, and 1660, *Collection Appeal Rights*. However, the taxpayer may not read to the end of the notice or to read the enclosed publications if he or she does not find the notice easy to read or salient to them.

There is no legislative history available to explain why Congress felt that notices of deficiency should include a mention of TAS but CDP notices should not. However, we can glean some understanding from the Joint Committee on Taxation’s explanation of the RRA 98 sections that created the position of the National Taxpayer Advocate. Congress envisioned the newly created National Taxpayer Advocate playing an important role in “preserving taxpayer rights and solving problems that taxpayers encounter in their dealings with the IRS.”⁴¹ Additionally, the Local Taxpayer Advocates were set up to report directly to the National Taxpayer Advocate and not another IRS function.⁴² Including a reference to TAS in the CDP notices will further the National Taxpayer Advocate’s ability to fulfill her duties to taxpayers and Congress. It will also fulfill the taxpayer’s *right to be informed* during a critical juncture of his or her case. Including a reference to the LITC program will also further the taxpayer’s *right to be informed* and the *right to retain representation* during a crucial time in their case.⁴³

Because Collection Due Process (CDP) hearings offer the taxpayer an opportunity to raise alternatives to IRS collection actions, require balancing the government’s interest in the efficient collection of tax with the taxpayer’s interest that such action be no more intrusive than necessary, and in some instances provide taxpayers with an opportunity to challenge the underlying liability, CDP notices should be models of clarity and educate the taxpayer about the importance of the hearing process itself.

Defects in the Notice of Determination May Prevent Some Taxpayers From Appealing Their Cases to Tax Court

Following the CDP hearing with Appeals, the IRS will issue a notice of determination to the taxpayer. Taxpayers have 30 days in which to request Tax Court review of a notice of determination.⁴⁴ Unlike a notice of deficiency, which legally requires a specific date by which the taxpayer must file his or her petition in Tax Court, the IRS is not required to include a specific date in a notice of determination.⁴⁵

41 J. Comm. on Tax’n, *General Explanation of Tax Legislation Enacted in 1998* 32 (Nov. 24, 1998).

42 *Id.*

43 The LITC program provides free representation to low income taxpayers and outreach to taxpayers who speak English as a second language. IRC § 7526.

44 IRC § 6330(d)(1). Treasury regulations stipulate that the “30-day period within which the taxpayer is permitted to seek judicial review of Appeals’ determination commences the day after the date of the Notice of Determination.” Treas. Reg. 301.6330-1(e)(3)(Q&A E-10).

45 IRC § 6213(a).

The IRS chose not to include a date on the notice because Appeals employees date and mail the notice of determination manually. The IRS is concerned that manually calculating a specific date by which the taxpayers must respond would “add complexity and additional time to the processing of letters and any erroneous calculations could result in taxpayers missing the petition deadline through no fault of their own.”⁴⁶ The process for including a date on the notice of deficiency is included in IRM 8.20.6.8.4, which Appeals employees follow. It is unclear why this process could not apply to the notice of determination.⁴⁷

A review of court cases illustrates why the filing deadline needs to be plainly communicated to taxpayers.⁴⁸ The current notice of determination reads, “If you want to dispute this determination in court, you must file a petition with the United States Tax Court within 30 days from the date of this letter.”⁴⁹ This language may confuse taxpayers. For instance, what does the term “within” mean to the non-expert taxpayer? Is the date of the letter day one or day zero? The best way to protect taxpayer rights is to include a specific date by which taxpayers must file their petition in Tax Court. The National Taxpayer Advocate made a legislative recommendation in her 2017 Annual Report to Congress to require a specific response date in CDP notices; others in the tax field have called for similar reform.⁵⁰

This date should be provided in bold and in a prominent place, such as in the upper righthand corner of the notice. Including this information up front and in bold font is not just a matter of convenience. The IRS acknowledges that “much behavior is driven by what we pay attention to. Saliency is the ability to command attention to something by giving it more weight or putting it in a position that will capture attention and influence choices.”⁵¹ The current notice of determination lacks saliency as taxpayers cannot ascertain easily when they need to file their petition. In fact, simply changing the location and presentation of choices in a notice can decrease “cognitive burden.”⁵² With an easier understanding, taxpayers may be more inclined to exercise their CDP rights.

Similar to the CDP administrative notices, the notice of determination also does not explain the significance of the right to go to Tax Court and why a taxpayer should file a petition. The right to go to Tax Court is at the heart of the taxpayers’ *right to appeal an IRS decision in an independent forum*; it gives the taxpayer the opportunity to present his or her concerns about the IRS’s proposed action before a fully independent tribunal, and provides important oversight to the IRS’s collection powers. As discussed with the CDP administrative notices, language added to explain why a taxpayer would want to file a petition in Tax Court could “nudge” taxpayers.

46 IRS response to TAS information request (Dec. 6, 2018).

47 *Id.*

48 For instance, see *Duggan v. Commissioner*, Tax Ct. Docket No. 4100-15L 2 (order dated June 26, 2015); *Swanson v. Commissioner*, Tax Ct. Docket No. 14406-15S (order dated Jan. 14, 2016); *Pottgen v. Commissioner*, Tax Ct. Docket No. 1410-15L (order dated Mar. 4, 2016); *Integrated Management, Inc., v. Commissioner*, Tax Ct. Docket No. 27674-16SL (order dated May 31, 2017); *Protter v. Commissioner*, Tax Ct. Docket No. 22975-15SL (order dated Sept. 26, 2017). These cases are not cited for precedent, rather only for the fact patterns showing taxpayers miscalculated the deadline to file.

49 The previous language reads “If you want to dispute this determination in court, you must file a petition with the United States Tax Court within a 30-day period beginning the day after the date of this letter.” IRS, Letter 3193, *Notice of Determination Concerning Collection Actions Under Sections 6320 and 6330* (Dec. 2016).

50 National Taxpayer Advocate 2017 Annual Report to Congress 299-306 (Legislative Recommendation: *Collection Due Process and Innocent Spouse Notices: Amend IRC §§ 6320, 6330, and 6015 to Require That IRS Notices Sent to Taxpayers Include a Specific Date by Which Taxpayers Must File Their Tax Court Petitions, and Provide That a Petition Filed by Such Specified Date Will Be Treated As Timely*); Carlton Smith, *CDP Notice of Determination Sentence Causing Late Pro Se Petitions*, PROCEDURALLY TAXING (Mar. 24, 2016), <http://procedurallytaxing.com/cdp-notice-of-determination-sentence-causing-late-pro-se-petitions>.

51 IRS, *Behavioral Insights Toolkit 24* (2017).

52 *Id.*

CONCLUSION

Correspondence issued by the IRS plays a crucial role in tax administration. If drafted appropriately, it can educate and empower taxpayers. For CDP notices in particular, this may be the first time taxpayers have run into a situation where they need to exercise their due process rights. Because CDP hearings offer the taxpayer an opportunity to raise alternatives to IRS collection actions, require balancing the government's interest in the efficient collection of tax with the taxpayer's interest that such action be no more intrusive than necessary, and in some instances provide taxpayers with an opportunity to challenge the underlying liability, CDP notices should be models of clarity and educate the taxpayer about the importance of the hearing process itself. This education includes filing instructions and deadlines as well as additional resources the taxpayer can use if they have questions.

The IRS's current approach with communications that relate to CDP rights often overlooks some valuable opportunities to maximize the benefits of informing, educating, and interacting with taxpayers. For example, behavioral science shows us that location of text and typography can make a notice easier to read. The important aspects of the notice, such as the deadline to file and address to respond, should be early in the notice and easy to discern from the rest of the text. On a larger scale, taxpayers need to understand why these notices are salient to them and how CDP rights can impact their lives. They need to understand what the IRS proposes to do, what they will experience if they do not respond, and how to exercise their rights.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Include the exact date on the Notices of Determination by which the taxpayer must file a petition in Tax Court.
2. Work with TAS to redesign the CDP notices so that they reflect the principles of visual cognition and processing of complex information. This will include changes such as:
 - (a) Putting clear explanations about the importance of these hearings in terms relating to taxpayer rights and protections;
 - (b) Highlighting deadlines early in the notices and in bold font; and
 - (c) Including references to TAS and the LITC program.
3. Work with TAS to explore methods of more accurate notification of the due date for CDP hearing requests with respect to lien filings.