

## STRENGTHEN THE OFFICE OF THE TAXPAYER ADVOCATE

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### Legislative Recommendation #36

## Clarify That the National Taxpayer Advocate May Hire Legal Counsel to Enable Her to Advocate More Effectively for Taxpayers

### SUMMARY

- *Problem:* In analyzing legal issues that affect taxpayer rights and developing an independent position on matters that affect taxpayers both individually and collectively, the National Taxpayer Advocate often requires independent legal advice. Prior to 2015, the IRS permitted the National Taxpayer Advocate to hire her own attorneys. Since that time, the IRS has prohibited her from hiring attorneys, undermining her ability to do her job effectively.
- *Solution:* Authorize the National Taxpayer Advocate to hire attorneys who report directly to her.

### PRESENT LAW

Pursuant to 31 U.S.C. § 301(f), the General Counsel of the Department of the Treasury is the chief law officer for the Department. The IRS Chief Counsel is an Assistant General Counsel and the chief law officer for the IRS. With few exceptions, Treasury Department Order 107-04 provides that all attorneys in the Treasury Department must work in the Legal Division and report to the General Counsel.<sup>1</sup> Treasury's inspectors general and the Office of the Comptroller of the Currency (OCC) are excluded from this requirement based on specific statutory language in 5 U.S.C. App. III § 3(g) and 12 U.S.C. § 482, respectively, and therefore are authorized to hire and supervise their own attorneys.<sup>2</sup> No law specifically authorizes the National Taxpayer Advocate to hire and supervise attorneys.

IRC § 7803(c) makes clear, however, that TAS is expected to operate independently of the IRS in key respects. IRC § 7803(c)(2)(A) directs TAS to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers have problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(4)(A) requires each local taxpayer advocate to notify taxpayers that its offices “operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.” IRC § 7803(c)(2)(B)(iii) requires the National Taxpayer Advocate to submit reports to Congress directly “without any prior review or comment from ... the Commissioner, the Secretary of the Treasury, the Oversight Board, any other officer or employee of the Department of the Treasury, or the Office of Management and Budget.” This provision is similar to the one that applies to the OCC (12 U.S.C. § 250).

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1 Treas. Order 107-04, states: “With the exception of persons employed by the Treasury Inspector General, TIGTA, SIGTARP, and the Chief Counsel of the Office of the Comptroller of the Currency, all attorneys whose duties include providing legal advice to officials in any office or bureau of the Department are part of the Legal Division under the supervision of the General Counsel.”

2 The Inspector General Act of 1978 (codified as amended at 5 U.S.C. App. III § 3(g)), provides: “Each Inspector General shall, in accordance with applicable laws and regulations governing the civil service, obtain legal advice from a counsel either reporting directly to the Inspector General or another Inspector General.” Similarly, 12 U.S.C. § 482 (2011) provides: “Notwithstanding any of the provisions of section 481 of this title or section 301(f)(1) of title 31 to the contrary, the Comptroller of the Currency shall, subject to chapter 71 of title 5, fix the compensation and number of, and appoint and direct, all employees of the Office of the Comptroller of the Currency.”

When Congress reorganized the IRS in 1998, it recognized that the National Taxpayer Advocate requires independent counsel to advocate for her positions. The version of the IRS Restructuring and Reform Act of 1998 passed by the Senate contained the following authorization: “The National Taxpayer Advocate shall have the responsibility and authority to . . . appoint a counsel in the Office of the Taxpayer Advocate to report directly to the National Taxpayer Advocate.”<sup>3</sup> In explaining the provision, Senator Grassley said: “In order to make the Taxpayer Advocate more independent, which is what this bill does, it logically follows that the Taxpayer Advocate should have its own legal counsel.”<sup>4</sup>

This provision was not included in the final bill. However, the conference report stated that the “conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate.”<sup>5</sup>

## REASONS FOR CHANGE

Since 2004, with the approval of the Commissioner of Internal Revenue, TAS has employed attorney-advisors. The National Taxpayer Advocate requires independent attorney-advisors because she often takes positions, both in working taxpayer cases and in systemic advocacy, that are directly contrary to the position of the IRS and the Office of Chief Counsel.

Once attorneys in the Office of Chief Counsel have adopted a legal position interpreting a law or regulation for purposes of IRS operations, procedures, or litigation, it would be unrealistic to expect that those same attorneys could effectively help the National Taxpayer Advocate develop a legal position that challenges their own interpretation or an interpretation adopted by the Chief Counsel organization for which they work. Notably, the Chief Counsel organization requires its attorneys to reconcile disputes internally so that they ultimately all “speak with one voice.”<sup>6</sup> Thus, although the National Taxpayer Advocate sometimes receives legal advice from Chief Counsel attorneys, the advice is not independent from the advice they provide to the rest of the IRS. By contrast, TAS’s own attorney-advisors have enabled the National Taxpayer Advocate to develop an independent perspective and advocate for taxpayers as the law intends.

In 2015, the IRS for the first time denied a routine TAS request to backfill existing attorney positions due to attrition. It cited Treasury Department General Counsel Directive No. 2, which states: “Except for positions in the Inspectors General offices or within the Office of the Comptroller of the Currency, attorney positions shall not be established outside of the Legal Division” unless the General Counsel or Deputy General Counsel(s) provides a waiver. On November 29, 2016, the National Taxpayer Advocate submitted a nine-page memo to the Acting General Counsel requesting permission to continue to hire attorney-advisors. It asked the Acting General Counsel to modify General Counsel Directive No. 2 to add a carve-out for the Office of the Taxpayer Advocate as it does for the Inspectors General offices. Alternatively, the National Taxpayer Advocate orally requested that a “waiver” be granted, as provided in the directive. In the fall of 2018, TAS submitted another hiring request, and it was again denied by the IRS.

3 H.R. 2676, 105th Cong. § 1102(a) (as passed by the Senate, May 7, 1998).

4 144 CONG. REC. S4460 (daily ed. May 7, 1998). The provision was added to the bill as an amendment sponsored by Senator Grassley on the Senate floor.

5 H.R. REP. NO. 105-599, at 216 (1998) (CONF. REP.). In 2003, the House passed legislation with nearly identical language. It would have authorized the National Taxpayer Advocate to “appoint a counsel in the Office of the Taxpayer Advocate to report solely to the National Taxpayer Advocate.” See Tax Administration and Good Government Act, H.R. 1528, 108th Cong. § 306 (2003) (as passed by the House, June 19, 2003). The legislation was sponsored by then-Cong. Rob Portman, who had previously been the lead House sponsor of the IRS Restructuring and Reform Act of 1998. It would have added this language as a new subsection (III) to IRC § 7803(c)(2)(D)(i). Although the authorization was not enacted into law, it bears mention that the Senate in 1998 and the House in 2003 approved virtually identical provisions of the legislation. That suggests the RRA 98 conference report language cited above had significant congressional support.

6 See Chief Counsel Directives Manual (CCDM) 35.4.1.4, Coordination with Other Counsel Offices (Feb. 7, 2013); CCDM 31.1.4.6, Reconciliation of Disputes (Aug. 11, 2004).

The inability of the National Taxpayer Advocate to hire attorney-advisors extends to announcing higher graded positions for attorneys currently working in TAS. Therefore, TAS is not only barred from hiring new attorneys, but well-performing attorneys cannot be promoted to higher-graded positions. This has accelerated attrition. If the National Taxpayer Advocate is not able to hire attorney-advisors, TAS's ability to advocate for taxpayers both individually and systemically and the National Taxpayer Advocate's ability to produce high-quality reports to Congress will be significantly compromised. The National Taxpayer Advocate believes the conference report language stating that the "conferees intend that the National Taxpayer Advocate be able to hire and consult counsel as appropriate" provides a sufficient legal basis for her to hire attorneys that report to her. The General Counsel has disagreed, maintaining that a statutory change is required.

## RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel that report directly to him or her.<sup>7</sup>

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7 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf)) (recommending that Congress "[a]uthorize the National Taxpayer Advocate to appoint independent counsel who report directly to the National Taxpayer Advocate, provide independent legal advice, help prepare *amicus curiae* briefs and comments on proposed or temporary regulations, and assist the National Taxpayer Advocate in preparing the Annual Report to Congress and in advocating for taxpayers individually and systemically"); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*, [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002\\_section\\_two.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf)). The Taxpayer and Fairness Protection Act of 2003, H.R. 1661, 108th Cong. § 335 (2003), would have authorized the National Taxpayer Advocate to "appoint a counsel in the Office of the Taxpayer Advocate to report solely to the National Taxpayer Advocate."

**Legislative Recommendation #37****Clarify the Authority of the National Taxpayer Advocate to Make Personnel Decisions to Protect the Independence of the Office of the Taxpayer Advocate****SUMMARY**

- *Problem:* To protect the independence of TAS, the tax code provides the National Taxpayer Advocate the authority to take independent personnel actions with respect to employees of local TAS offices. The tax code does not provide this authority with respect to national office TAS employees, yet national office TAS employees who advocate for systemic changes in IRS practices and policies are most likely to take positions in conflict with the IRS leadership and require personnel protection.
- *Solution:* Clarify that the National Taxpayer Advocate has the authority to take independent personnel actions with respect to all TAS employees.

**PRESENT LAW**

The IRS Restructuring and Reform Act of 1998 (RRA 98) included provisions to protect TAS's independence from other IRS functions. For example, IRC § 7803(c)(4)(A)(iii) requires local TAS offices to notify taxpayers that they “operate independently of any other Internal Revenue Service office and report directly to Congress through the National Taxpayer Advocate.” To bolster this independence, IRC § 7803(c)(2)(D) provides the National Taxpayer Advocate with the authority to “appoint” local taxpayer advocates in each state and to “evaluate and take personnel actions (including dismissal) with respect to any employee of any local office.”

The National Taxpayer Advocate's authority to make independent personnel decisions is discussed in the legislative history of RRA 98. The conference report states that the National Taxpayer Advocate “has the responsibility to evaluate and take personnel actions (including dismissal) with respect to *any local Taxpayer Advocate or any employee in the Office of the Taxpayer Advocate.*”<sup>1</sup> Thus, there is an inconsistency between the conference report and the statute. The conference report states the statute gives the National Taxpayer Advocate the authority to make independent personnel decisions regarding all TAS employees, while the statute confers that authority only regarding employees of TAS's local offices.

**REASONS FOR CHANGE**

IRC § 7803(c)(2)(A) assigns the National Taxpayer Advocate two principal responsibilities: (i) to advocate for taxpayers in specific cases (case advocacy) and (ii) to advocate for administrative and legislative changes to resolve problems that affect groups of taxpayers or all taxpayers (systemic advocacy). Although the conference report language indicates Congress intended to give the National Taxpayer Advocate independent personnel authority over employees engaged in both case advocacy and systemic advocacy functions, the statute as written only covers employees of local offices, who primarily are engaged in case advocacy. The National Taxpayer Advocate currently does not have independent personnel authority over TAS's senior leadership, TAS attorney-advisors, employees of TAS's systemic advocacy and research functions, and other national office employees, even though those employees are also charged with engaging in independent advocacy on behalf

<sup>1</sup> H.R. REP. NO. 105-599, at 214 (1998) (CONF. REP.) (emphasis added). The report states that the conference committee adopted the Senate amendment with respect to the National Taxpayer Advocate provisions, except as modified. H.R. REP. NO. 105-599, at 216 (1998) (CONF. REP.). The Senate bill and report contained the same inconsistency as the conference bill and report. See H.R. 2676, 105th Cong. § 1102 (as passed by the Senate, May 7, 1998); S. REP. NO. 105-174, at 23 (1998).

of taxpayers, have the same potential conflicts, and face the same potential retaliatory personnel actions by the IRS leadership that Congress sought to address in 1998.

The rationale for giving the National Taxpayer Advocate the authority to make independent personnel decisions for TAS's national office employees is, in key respects, even stronger than the rationale for giving her that authority for local office employees. National office employees primarily advocate for systemic change, which often places them in direct conflict with senior officials in other parts of the IRS.

This concern is not merely theoretical. In recent years, peer executives at the IRS have reviewed and approved performance ratings for senior TAS leaders. This creates the potential for TAS leaders perceived as “team players” to receive better performance reviews and bonuses than TAS leaders who are perceived to be more aggressive in seeking changes in IRS policies or actions. For the same reasons that it would be inappropriate for IRS leaders to evaluate and make salary and bonus determinations for employees of the Treasury Inspector General for Tax Administration, the IRS's ability to affect the salary or bonuses of TAS's national office employees has the potential to undermine TAS's independent advocacy.

## **RECOMMENDATION**

- Amend IRC § 7803(c)(2)(D) to clarify that the National Taxpayer Advocate shall have the responsibility to evaluate and take personnel actions with respect to all employees of the Office of the Taxpayer Advocate.

**Legislative Recommendation #38****Clarify the Taxpayer Advocate Service's Access to Files, Meetings, and Other Information****SUMMARY**

- *Problem:* The IRS has occasionally refused to provide the National Taxpayer Advocate with information she requires to do her job of advocating for taxpayers and prevented TAS employees from attending IRS conferences with taxpayers who have open TAS cases and have requested TAS attendance.
- *Solution:* Require the IRS to give the National Taxpayer Advocate and her staff access to all IRS information relevant to TAS's duties and require the IRS to allow TAS case advocates to participate in taxpayer conferences when requested to do so by taxpayers.

**PRESENT LAW**

IRC § 7803(c)(2) requires TAS to assist taxpayers in resolving problems with the IRS, identify areas in which taxpayers are experiencing problems in their dealings with the IRS, make administrative and legislative recommendations to mitigate those problems, and annually report to Congress. IRC § 6103 generally prohibits the disclosure of tax returns or return information, but IRC § 6103(h) provides that “returns and return information shall, without written request, be open to inspection by or disclosure to officers and employees of the Department of the Treasury whose official duties require such inspection or disclosure for tax administration purposes.”

Because TAS employees must review tax return information to fulfill their statutory duties, they are authorized by IRC § 6103(h) to do so. In furtherance of their duties, they may also need to attend meetings between taxpayers or their representatives and other IRS employees and obtain other information from the IRS. Similarly, the National Taxpayer Advocate requires information to analyze systemic problems and provide Congress with a “full and substantive analysis” of such problems in her annual reports to Congress, as required by IRC § 7803(c)(2)(B). However, the law does not expressly state that the National Taxpayer Advocate is authorized to access return information, attend meetings with other IRS employees, or obtain other information from the IRS.

**REASONS FOR CHANGE**

In general, the National Taxpayer Advocate has significant access to IRS systems and data. However, the IRS has sometimes declined to provide TAS with access to (1) audit files of taxpayers with cases open in TAS; (2) meetings between the IRS and taxpayers with cases open in TAS, even when the taxpayer has requested TAS's attendance; (3) advice that the Office of Chief Counsel has provided to other business units; and (4) information required by the National Taxpayer Advocate to enable her to analyze systemic problems for reports to Congress.

**RECOMMENDATIONS**

- Amend IRC § 7803(c) to clarify that the National Taxpayer Advocate (and authorized TAS employees) shall have access to tax returns, return information, and legal advice provided by the Office of Chief Counsel to any IRS employee regarding cases open and pending in TAS, and may participate in meetings between taxpayers and the IRS when asked to do so by a taxpayer.

- Clarify that, in furtherance of her tax administrative duties, the National Taxpayer Advocate (and authorized TAS employees) shall have access to all data, statistical information, legal advice provided by Counsel to any IRS employee, and documents necessary to perform a “full and substantive analysis” of the issues, as required by IRC § 7803(c)(2)(B).<sup>1</sup>

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<sup>1</sup> This recommendation is not intended to create a waiver of privilege with respect to information the IRS may lawfully keep confidential. When TAS receives information from the IRS, it protects the information from disclosure if the IRS asserts it is privileged. For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 34-36 (Special Focus: *Reinforce the National Taxpayer Advocate's Right of Access to Taxpayer and IRS Information and to Meetings Between the IRS and Taxpayers*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf#page=34](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf#page=34). Under the Taxpayer First Act of 2019, the Secretary is now required to provide the National Taxpayer Advocate with “statistical support” for the Annual Report to Congress. Pub. L. No. 116-25, § 1301(b), 133 Stat. 981 (2019). However, this requirement only encompasses statistical studies, compilations, and the review of information already obtained by TAS. It does not address TAS’s broader need for access to information, including the right to review case files and attend taxpayer meetings. The Taxpayer Rights Act of 2015, H.R. 4128, 114th Cong. § 403 (2015) and S. 2333, 114th Cong. § 403 (2015), would have granted TAS access to case-related files and meetings, but it did not address TAS’s need for access to information required to report on systemic issues.

**Legislative Recommendation #39****Authorize the National Taxpayer Advocate to File *Amicus* Briefs****SUMMARY**

- *Problem:* When a federal court is deciding a case that may affect the taxpayer rights of all or a large number of taxpayers, the court would benefit from hearing and considering the views of the National Taxpayer Advocate as the statutory voice of the taxpayer. Under current law, however, the National Taxpayer Advocate is not authorized to submit a brief in a federal tax case.
- *Solution:* Authorize the National Taxpayer Advocate to submit a brief in federal tax cases on issues pertaining to the protection of taxpayer rights.

**PRESENT LAW**

IRC § 7803(c)(2)(A) requires the Office of the Taxpayer Advocate to assist taxpayers in resolving problems with the IRS, to identify areas in which taxpayers experience problems in their dealings with the IRS, and to make administrative and legislative recommendations to mitigate such problems. IRC § 7803(c)(2)(B)(ii)(XI) directs the National Taxpayer Advocate in her annual reports to Congress to “identify the 10 most litigated issues for each category of taxpayers, including recommendations for mitigating such disputes.”

Under 28 U.S.C. § 516, only officers of the Department of Justice may represent the United States in litigation, except as otherwise authorized by law. Similarly, 5 U.S.C. § 3106 provides that the head of an executive department may not employ an attorney or counsel for the conduct of litigation in which the United States is a party, except as otherwise authorized by law. IRC § 7452 specifies that the Secretary of the Treasury “shall be represented by the Chief Counsel” or his delegate in litigation before the U.S. Tax Court.

Under 5 U.S.C. § 612(b), the Small Business Administration (SBA) Chief Counsel for Advocacy is statutorily authorized to represent the interests of small businesses by appearing in litigated cases as an *amicus curiae*. By contrast, the National Taxpayer Advocate, who is often referred to as “the voice of the taxpayer” both within the IRS and before Congress, is not authorized to represent the interests of taxpayers by appearing in litigated cases as an *amicus curiae*.

**REASONS FOR CHANGE**

While the conduct of trials is best left to trial lawyers equipped to advocate zealously on behalf of clients to win individual cases, precedential issues that could affect all or many taxpayers sometimes come before the courts with no one representing the interests of taxpayers as a group.

For example, in *Facebook, Inc. v. IRS*, the U.S. District Court for the Northern District of California considered Facebook’s claim that it was legally entitled to a hearing before the IRS Office of Appeals.<sup>1</sup> For support, *Facebook* cited the provision of the Taxpayer Bill of Rights (TBOR) that describes “the right to appeal a decision of the Internal Revenue Service in an independent forum.” See IRC § 7803(a)(3)(E). The court rejected Facebook’s position, broadly holding that TBOR “did not grant [taxpayers] new enforceable rights.” The court’s decision may well be correct, but in the rare cases where a court’s decision has the potential to affect the fundamental taxpayer rights of all or a large group of taxpayers, the court would benefit from hearing and considering the position of the National Taxpayer Advocate as the statutory voice of the taxpayer.

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<sup>1</sup> *Facebook, Inc. v. IRS*, 121 A.F.T.R.2d 1752 (N.D. Cal. 2018).

Just as the SBA Chief Counsel for Advocacy may file briefs to help ensure the federal courts are informed about the impact of regulations on small businesses, the National Taxpayer Advocate could be more effective in protecting taxpayer rights if she were granted comparable authority to file *amicus curiae* briefs in cases that affect taxpayer rights. It is anticipated this authority would be used sparingly, as is also the practice of the SBA Chief Counsel for Advocacy.

## RECOMMENDATION

- Amend IRC §§ 7803 and 7452 to authorize the National Taxpayer Advocate to submit briefs in federal litigation as an *amicus curiae* on matters relating to the protection of taxpayer rights.<sup>2</sup>

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2 For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011\\_ARC\\_Legislative-Recommendations.pdf#page=107](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011_ARC_Legislative-Recommendations.pdf#page=107); National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002\\_section\\_two.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf). See also Program Manager Technical Advice 2007-00566 (Oct. 2, 2002), <https://www.irs.gov/privacy-disclosure/legal-advice-issued-to-program-managers-during-2007>.

**Legislative Recommendation #40****Require the IRS to Address the National Taxpayer Advocate's Comments in Final Rules****SUMMARY**

- *Problem:* The Treasury Department and the IRS issue a wide range of tax regulations that often affect taxpayer rights, yet there is no requirement that they seek input from the National Taxpayer Advocate on regulations or that they explain why they choose not to adopt the National Taxpayer Advocate's recommendations when provided.
- *Solution:* Require the Treasury Department to submit proposed or temporary regulations to the National Taxpayer Advocate for comment within a reasonable time and to address any comments formally submitted by the National Taxpayer Advocate in the preamble to final agency rules.

**PRESENT LAW**

IRC § 7805(f) requires the Secretary of the Treasury to submit certain proposed or temporary regulations to the Chief Counsel for Advocacy of the Small Business Administration (SBA) for comment regarding the impact such regulations may have on small businesses and to discuss any response to such comments in the preamble to the final regulations. Yet, despite the fact that the National Taxpayer Advocate is required by IRC § 7803(c)(2)(A) to assist taxpayers in resolving problems with the IRS and to identify administrative and legislative solutions, there is no comparable provision that requires the Secretary to seek comments from the National Taxpayer Advocate on proposed or temporary regulations or to discuss any response to such comments in the preamble to the final regulations.

**REASONS FOR CHANGE**

The requirement that the Secretary solicit and respond to comments from the SBA Chief Counsel for Advocacy benefits tax administration because it forces the agency to consider and respond to concerns about the impact of regulations on small businesses. Similarly, tax administration would benefit if the Secretary were required to consider and respond to the National Taxpayer Advocate's concerns about the impact of regulations on taxpayer rights and taxpayer burden.

The National Taxpayer Advocate currently provides comments to the IRS on an informal basis before proposed, temporary, and final regulations are made public and should continue to do so. But when the National Taxpayer Advocate believes a proposed or temporary regulation that has been publicly issued will have a significant adverse impact on taxpayers, the National Taxpayer Advocate should have the authority to submit formal comments to which the Treasury Department and the IRS must respond in the preamble to the final regulation. When the Treasury Department and the IRS decline to adopt the National Taxpayer Advocate's recommendations, the taxpaying public would benefit from knowing why. Such a procedure would strike an appropriate balance between allowing the National Taxpayer Advocate to provide informal comments within the agency and allowing her to raise concerns and compel an agency explanation where significant disagreements cannot be reconciled internally.

## RECOMMENDATION

- Amend IRC § 7805 to require the Secretary to submit proposed or temporary regulations to the National Taxpayer Advocate for comment within a reasonable time and to address any comments formally submitted by the National Taxpayer Advocate in the preamble to final agency rules.<sup>1</sup>

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<sup>1</sup> For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act, S. 1578, 114th Cong. § 404 (2015) (except, as a timing matter, this bill would require the IRS to solicit comments from the National Taxpayer Advocate before publication of proposed or temporary regulations rather than after publication of such regulations, as the statute currently requires for SBA comments). For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37-39 (Special Focus: *Provide the National Taxpayer Advocate the Authority to Hire Independent Counsel, Comment on Regulations, and File Amicus Briefs in Litigation Raising Taxpayer Rights Issues*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16\\_Volume1\\_SpecialFocus.pdf#page=37](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC16_Volume1_SpecialFocus.pdf#page=37); National Taxpayer Advocate 2011 Annual Report to Congress 573-581 (Legislative Recommendation: *Codify the Authority of the National Taxpayer Advocate to File Amicus Briefs, Comment on Regulations, and Issue Taxpayer Advocate Directives*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011\\_ARC\\_Legislative-Recommendations.pdf#page=107](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2011_ARC_Legislative-Recommendations.pdf#page=107); and National Taxpayer Advocate 2002 Annual Report to Congress 198-215 (Legislative Recommendation: *The Office of the Taxpayer Advocate*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002\\_section\\_two.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/arc2002_section_two.pdf). The comment procedure we are recommending is not intended to constitute a waiver of privilege with respect to internal IRS discussions or documents. To avoid ambiguity, we recommend that Congress include language in the statute or legislative history clarifying that no waiver of privilege will occur with respect to internal communications.

**Legislative Recommendation #41****Authorize the Office of the Taxpayer Advocate to Assist Certain Taxpayers During a Lapse in Appropriations****SUMMARY**

- *Problem:* During past government shutdowns, IRS lien and levy activities carried out by automation were permitted to continue, but IRS and TAS employees, including the National Taxpayer Advocate, were prohibited from assisting taxpayers who were experiencing hardships.
- *Solution:* Clarify that during a lapse in appropriations (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing economic hardships and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any Taxpayer Assistance Order (TAO).

**PRESENT LAW**

Article I of the Constitution provides that, “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”<sup>1</sup> The Antideficiency Act is one of several statutes that implement this provision.<sup>2</sup> Specifically, 31 U.S.C. § 1341(a), among other things, prohibits any officer or employee of the U.S. government or the District of Columbia government from (i) making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation or (ii) involving his or her respective government employer in a contract or obligation for the payment of money before an appropriation is made, unless authorized by law. The Antideficiency Act contains an additional prohibition against the acceptance of voluntary services in 31 U.S.C. § 1342, except “for emergencies involving the safety of human life or the protection of property.”

IRC § 6343(a)(1)(D) requires the Secretary to release a levy and promptly notify the affected person if the Secretary determines the levy “is creating an economic hardship due to the financial condition of the taxpayer.”

IRC § 7803(c)(2)(A) directs the Office of the Taxpayer Advocate (commonly referred to as the Taxpayer Advocate Service, or TAS) to “assist taxpayers in resolving problems with the Internal Revenue Service,” among other things. IRC § 7811 authorizes the National Taxpayer Advocate to issue a TAO where a “taxpayer is suffering or about to suffer a significant hardship as a result of the manner in which the internal revenue laws are being administered by the Secretary.” A significant hardship includes “an immediate threat of adverse action” and “irreparable injury to, or a long-term adverse impact on, the taxpayer if relief is not granted.” A TAO may require the Secretary “within a specified time period . . . to release property of the taxpayer levied upon.”

**REASONS FOR CHANGE**

Lien and levy activities carried out by automation, which do not require the expenditure of additional appropriations, are permitted to continue during a lapse in appropriations. During both the 2018-2019 and 2013 shutdowns, the IRS issued thousands of notices of levy on Social Security and other government benefits as well as levies on wages and financial accounts of individuals and businesses because these notices were preprogrammed into the IRS’s computer systems before the shutdowns began.

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<sup>1</sup> U.S. CONST. art. I, § 9, cl. 7.

<sup>2</sup> Pub. L. No. 97-258, 96 Stat. 877, 923 (1982).

Despite IRC provisions that protect and relieve taxpayers who are experiencing hardship from levies, the IRS Lapse Plan has not allowed IRS or TAS employees, including the National Taxpayer Advocate, to work these cases during a shutdown.<sup>3</sup> Additionally, because cases that were in TAS's inventory at the time of the shutdown could not be worked, some taxpayers who requested the assistance of the National Taxpayer Advocate and TAS immediately prior to the shutdown experienced significant hardships and irreparable injuries.<sup>4</sup>

## RECOMMENDATION

- Clarify that during a lapse in appropriations (i) the National Taxpayer Advocate may incur obligations in advance of appropriations for purposes of assisting taxpayers experiencing an economic hardship within the meaning of IRC § 6343(a)(1)(D) due to an IRS action or inaction and (ii) the IRS may incur obligations in advance of appropriations for purposes of complying with any TAO issued pursuant to IRC § 7811.

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3 See IRS, Servicewide Electronic Research Program Alert 19A0017, Release of Levy and Release of Lien (2019) (“While there is a lapse in funding during the partial shutdown we are not authorized to take this action. We may do so once we are fully opened, so please call us back at that time. Please apologize to the taxpayer and explain we are not authorized to release the levy or lien due to the partial government shutdown. Explain that they may call us back after we are fully reopened.”).

4 For additional discussion of how TAS's statutory authority to assist taxpayers suffering or about to suffer significant hardships was undermined during a shutdown, see National Taxpayer Advocate Fiscal Year 2015 Objectives Report to Congress 79-91 (Area of Focus: *The IRS's Decision Not to Except Any TAS Employees During the Government Shutdown Resulted in Violations of Taxpayer Rights and Undermined TAS's Statutory Authority to Assist Taxpayers Suffering or About to Suffer Significant Hardship*), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/The-IRSs-Decision-Not-to-Except-Any-TAS-Employees-During-the-Government-Shutdown.pdf> and National Taxpayer Advocate Fiscal Year 2020 Objectives Report to Congress 40-44 (*Impact of the 35-Day Partial Government Shutdown on the Taxpayer Advocate Service*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20\\_Volume1\\_GovShutdown.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/JRC20_Volume1_GovShutdown.pdf).

**Legislative Recommendation #42****Repeal Statute Suspension Under IRC § 7811(d) for Taxpayers Seeking Assistance From the Taxpayer Advocate Service****SUMMARY**

- *Problem:* When a taxpayer requests assistance from TAS in writing, IRC § 7811(d) provides that the period of limitations within which the IRS may assess or collect tax is extended. The provision is intended to protect the IRS's interests, but the IRS has not implemented it since its enactment in 1988. In addition, the provision does not apply when a taxpayer requests assistance from TAS by phone, so if implemented, taxpayers who request TAS assistance in writing and taxpayers who request TAS assistance by phone would be treated differently.
- *Solution:* Repeal IRC § 7811(d).

**PRESENT LAW**

IRC § 7811(d) suspends the statutory period of limitations for any action for which a taxpayer seeks assistance from TAS. The period is only suspended, however, if the taxpayer submits a written application for relief.<sup>1</sup>

**REASONS FOR CHANGE**

Despite the fact that Congress enacted this provision in 1988,<sup>2</sup> the IRS has never implemented it. The intent of the provision was to protect the interests of the government, but the IRS has not seen a need to make use of it. Relatedly, implementation of the rule would require significant technology upgrades and procedural changes that the IRS has chosen not to undertake.

In concept, IRC § 7811(d) aims to ensure that the IRS will not lose the ability to assess or collect tax if the applicable statutory deadlines pass while a taxpayer's case is pending with TAS. Suspension of the assessment or collection period would give the IRS more time to take enforcement actions.

However, statute suspensions are unnecessary to protect the government's interests. The IRS may take enforcement actions against taxpayers with open TAS cases, if necessary, to protect the government's interests.<sup>3</sup>

Moreover, if IRC § 7811(d) were ever to be implemented, it would cause similarly situated taxpayers to be treated differently. By its terms, the provision only applies when a taxpayer submits a written request for TAS assistance. It does not apply when a taxpayer requests TAS assistance by phone, which is the method by which most taxpayers seek TAS's help. Thus, this provision – apart from being unnecessary and unutilized – would produce disparate outcomes for taxpayers who, despite lacking any knowledge of this issue, contact TAS by different means.

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1 Treas. Reg. § 301.7811-1(e)(4).

2 Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6230, 102 Stat. 3342, 3734 (1988).

3 Even if TAS issues a Taxpayer Advocate Order (TAO) directing the IRS to suspend collection, TAS will generally agree to modify the TAO if collection is in jeopardy. And if TAS ever did not agree to do so, the Commissioner or Deputy Commissioner could modify or rescind the TAO. See IRC § 7811(c)(1).

Lastly, despite the IRS's decision not to implement the provision, it has been raised in litigation.<sup>4</sup> The National Taxpayer Advocate recommends this provision be repealed as it has not been used since it was enacted more than 30 years ago, it serves no useful purpose, and its repeal would prevent future litigation in which this provision is cited.

## RECOMMENDATION

- Repeal IRC § 7811(d).<sup>5</sup>

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4 In *Rothkamm v. United States*, 802 F.3d 699 (5th Cir. 2015), *rev'g* 2014 WL 4986884 (M.D. La. Sept. 15, 2014), the U.S. Court of Appeals for the Fifth Circuit held, in relevant part, that IRC § 7811(d) tolled the period for filing a wrongful levy claim, which by operation of IRC § 6532(c)(2) extended the period for filing suit. IRS Action on Decision 2020-03 (Apr. 24, 2020) explains that except for cases appealable to the Fifth Circuit, the IRS will not follow the holding in *Rothkamm* that IRC § 7811(d) suspends the running of the limitations periods for third parties to file wrongful levy claims or suits, and outside the Fifth Circuit, the government will continue to defend its interpretation.

5 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 202 (2021); Taxpayer Protection Act, H.R. 2171, 115th Cong. § 202 (2017); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 202 (2016). For more detail, see National Taxpayer Advocate 2015 Annual Report to Congress 316-328 (Legislative Recommendation: *Repeal or Fix Statute Suspension Under IRC § 7811(d)*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15\\_Volume1\\_LR\\_01\\_Statute-Limitations.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC15_Volume1_LR_01_Statute-Limitations.pdf).