

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.¹

¹ 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; 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; 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. 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.