

## STRENGTHEN TAXPAYER RIGHTS BEFORE THE OFFICE OF APPEALS

---

### Legislative Recommendation #36

## Require Taxpayers' Consent Before Allowing IRS Counsel or Compliance Personnel to Participate in Appeals Conferences

### SUMMARY

- *Problem:* The IRS Independent Office of Appeals (Appeals) has adopted a policy, particularly in large cases, of including Counsel and Compliance personnel in taxpayer conferences, even if the taxpayer objects to their participation. When the IRS permits Counsel or Compliance to attend conferences over the objections of taxpayers whose cases are not docketed for litigation, it jeopardizes taxpayer rights and compromises the independence of Appeals.
- *Solution:* Codify the right of taxpayers in nondocketed cases to an administrative appeal without the presence of personnel from Counsel or Compliance.<sup>1</sup>

### PRESENT LAW

As part of the Taxpayer First Act of 2019, Congress codified the IRS's longstanding Appeals function as the "Internal Revenue Service Independent Office of Appeals."<sup>2</sup> The intent of the codification was to "reassure taxpayers of the independence" of Appeals.<sup>3</sup> But present law does not directly address the inclusion of personnel from the IRS Office of Chief Counsel or the IRS compliance functions in conferences held by Appeals.<sup>4</sup>

### REASONS FOR CHANGE

Historically, Counsel and Compliance provided input into Appeals conferences via the case file and, if the case was particularly large or complex, at a pre-conference. The Appeals conference itself generally was devoted to presentation of the taxpayer's case and settlement negotiations between the taxpayer (or the taxpayer's representative) and the Appeals Officer. Counsel and Compliance personnel rarely attended such conferences, leaving taxpayers and Appeals Officers free to develop rapport, seek common ground, and pursue case resolution – consistent with Appeals' mission of operating independently from the rest of the IRS.<sup>5</sup>

In October 2016, Appeals revised provisions of the Internal Revenue Manual (IRM) to allow Appeals Officers to include personnel from Counsel and Compliance in Appeals conferences.<sup>6</sup> Counsel and Compliance are

---

1 We are not recommending this change for cases pending in the U.S. Tax Court. In docketed cases, the taxpayer has already filed a petition in the Tax Court seeking judicial review of an adverse IRS determination, and the Office of Chief Counsel has already become involved with the case in defending the IRS's position.

2 Taxpayer First Act, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019) (codified at IRC § 7803(e)).

3 H.R. REP. NO. 116-39, pt. 1, at 29 (2019) (accompanying H.R. 1957, which was enacted into law without change to this provision as H.R. 3151). In 2012, the IRS published Revenue Procedure 2012-18, which, among other things, places parameters around *ex parte* communications between Appeals and other representatives of the IRS, such as Counsel and Compliance. This guidance is premised on a recognition that Appeals must be unbiased and impartial, both in fact and in appearance.

4 IRC § 7803(e)(6)(B) provides the Chief of Appeals with authority to obtain legal assistance and advice from the staff of the IRS Office of Chief Counsel.

5 For a more detailed discussion of this topic, see National Taxpayer Advocate 2023 Annual Report to Congress 132 (Most Serious Problem: Appeals: Despite Some Improvements, Many Taxpayers and Tax Professionals Continue to Perceive the IRS Independent Office of Appeals as Insufficiently Independent), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23\\_MSP\\_10\\_Appeals.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2024/01/ARC23_MSP_10_Appeals.pdf).

6 IRM 8.6.1.5.4, Participation in Conferences by IRS Employees (Oct. 1, 2016), [https://www.irs.gov/irm/part8/irm\\_08-006-001r](https://www.irs.gov/irm/part8/irm_08-006-001r).

not parties to the settlement discussions, which occur near the conclusion of the conference, but Appeals' procedures nonetheless give these non-parties the opportunity to present an oral argument and question taxpayers and their representatives.

Under these procedures, an Appeals Officer may invite the additional participants regardless of whether the taxpayer agrees or objects to their presence. Appeals has agreed to solicit and consider the views of taxpayers before inviting Counsel and Compliance to attend a conference but has stopped short of making taxpayer consent a prerequisite for such attendance.<sup>7</sup>

Including Counsel and Compliance personnel in nondocketed case conferences without the consent of the taxpayer runs contrary to the purpose of an independent Appeals conference, which is neither to give Compliance personnel another bite at the apple nor to transform Appeals into a mediation forum; the IRS's position is already documented in the case file the Appeals Officer reviews. Instead, the mission and credibility of Appeals rest on its ability to undertake direct and unbiased settlement negotiations with taxpayers and their representatives, independent of the Counsel and Compliance functions.

The expansion of Appeals conferences to include Counsel and Compliance personnel alters the relationship between taxpayers and Appeals Officers. It makes interactions less negotiation-based and transforms the conference into a more contentious and one-sided proceeding. This approach is also seemingly inconsistent with Congress's intent to "reassure taxpayers of the independence" of Appeals.

## RECOMMENDATION

- Amend IRC § 7803(e) to provide that a taxpayer shall have the right to a conference with the Independent Office of Appeals that does not include personnel from the Office of Chief Counsel or the compliance functions of the IRS in cases that have not been docketed in the Tax Court, unless the taxpayer specifically consents to the participation of those parties in the conference.<sup>8</sup>

---

7 IRS Independent Office of Appeals, Appeals Team Case Leader Conferencing Initiative: Summary of Findings and Next Steps (Sept. 2021).

8 For legislative language generally consistent with this recommendation, see Protecting Taxpayers Act, S. 3278, 115th Cong. § 601 (2018). This recommendation is not intended to limit the ability of Appeals to obtain legal assistance and advice from the Office of Chief Counsel, as permitted by IRC § 7803(e)(6)(B).