



## APPEALS

**Despite Some Improvements, Many Taxpayers and Tax Professionals Continue to Perceive the IRS Independent Office of Appeals as Insufficiently Independent**

### WHY THIS IS A SERIOUS PROBLEM FOR TAXPAYERS

The lack of independence and operational efficiency in the IRS Independent Office of Appeals (Appeals) process undermines taxpayer trust and prolongs dispute resolution. When taxpayers are unable to resolve their issue in Appeals or question the impartiality of Appeals, they may opt for costly litigation instead, adding financial and emotional strain. These issues erode confidence in the tax system, are burdensome, and compromise the taxpayer's statutory *right to appeal an IRS decision in an independent forum*.

### EXPLANATION OF THE PROBLEM

Appeals is an essential forum for taxpayers to administratively resolve IRS disputes. Independence and operational efficiency are twin pillars that support a thriving Appeals function. While Appeals is dedicated to these principles, the National Taxpayer Advocate has concerns about Appeals' current operations and structure. These include:

- Not all Appeals decisions are autonomous and transparent;
- The perception exists that Chief Counsel attorneys attend Appeals conferences to develop issues for trial;
- Proposed regulations limit Appeals' independence;
- Taxpayers experience significant delays scheduling in-person conferences;
- A compliance culture lives within the Appeals organization;
- Appeals needs to use the Alternative Dispute Resolution (ADR) program to its full potential; and
- Appeals needs to do additional work to ensure its independence.

## ANALYSIS

### Background

A process for administratively appealing an IRS decision has existed in one form or another since 1927.<sup>1</sup> The Taxpayer First Act of 2019 (TFA) marked a significant legislative effort to modernize the IRS and enhance taxpayer rights by codifying the formal establishment of Appeals.<sup>2</sup> This provision sought to provide taxpayers with a fair and impartial forum for resolving tax disputes, thereby reducing the need for costly and time-consuming litigation.<sup>3</sup> While the TFA aimed to make the tax dispute resolution process more efficient and less burdensome for taxpayers,<sup>4</sup> challenges related to scheduling conferences, resource limitations, and a prevailing compliance culture within Appeals hinder effectiveness. On a positive note, in May 2020, the IRS Commissioner appointed Andrew Keyso as the Chief of Appeals. The National Taxpayer Advocate applauds his efforts to listen to internal and external stakeholders to improve the independence and functionality of Appeals. But the culture and operations are slow to change. The National Taxpayer Advocate is optimistic that with the additional Inflation Reduction Act funds, the Chief of Appeals will be able to hire the necessary staff to improve the organization and provide better service for taxpayers. But some of the challenges are unrelated to funding.

### Not All Appeals Decisions Are Autonomous and Transparent

Recent data and observations indicate that Appeals Officers (AOs) often lack autonomy in making settlement decisions based on the hazards of litigation.<sup>5</sup> This is contrary to the intended role of AOs to independently assess the hazards of litigation and guide the settlement process. This perceived lack of autonomy undermines the integrity of the Appeals process and erodes taxpayer confidence in the system.

In a typical case, a taxpayer interacts with an AO who has the authority to settle a case. Appeals also employs specialists, such as subject matter experts and technical guidance coordinators, who work behind the scenes on coordinated issues.<sup>6</sup> These specialists often approach cases differently than AOs and are not as accessible to taxpayers as an AO. While AOs aim to resolve cases based on a taxpayer's unique facts and circumstances, their settlement authority can be limited on cases involving Appeals specialists and coordinated issues.<sup>7</sup>

We have heard from taxpayers and practitioners that they are frustrated as Appeals specialists often inform AOs and taxpayers that they cannot approve a settlement that deviates from undisclosed, nationwide settlement parameters for a coordinated issue or industry.<sup>8</sup> This lack of transparency hinders meaningful

1 H.R. REP. NO. 116-39, pt. 1, at 28 n.5 (2019).

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

3 H.R. REP. NO. 116-39, pt. 1, at 29 (2019). Congress enacted this provision to “foster confidence in the integrity of the IRS and the independence of its administrative proceedings and to encourage voluntary compliance [by way of] an independent administrative appeals function within the IRS.”

4 In February 2023, the Treasury Inspector General for Tax Administration (TIGTA) determined that Appeals personnel were not always notifying taxpayers of their IRC § 7803(e)(7) case file access rights or documenting their case management system with the specific coding or history narrative as directed by internal guidance. Further, when Appeals personnel sent case files, they did not always provide them to the taxpayer more than ten calendar days before the Appeals conference, as required by statute. TIGTA, Ref. No. 2023-15-010, *Actions Have Been Taken to Implement Taxpayer First Act Provisions Related to the IRS Independent Office of Appeals; However, Some Improvements Are Still Needed* (2023), <https://www.tigta.gov/reports/audit/actions-have-been-taken-implement-taxpayer-first-act-provisions-related-irs>.

5 Appeals Technical Employees have varying official titles, such as AO, Settlement Officer, and Appeals Team Case Leader. For simplicity, this Most Serious Problem refers to the basket of titles collectively as “Appeals Officers” or “AOs,” and these should be read as including Settlement Officers and Appeals Team Case Leaders.

6 See Internal Revenue Manual (IRM) 8.7.3.3, Coordinated Issues (Oct. 1, 2012) (governs when and to what extent Appeals cases engage specialists), [http://www.irs.gov/irm/part8/irm\\_08-007-003](http://www.irs.gov/irm/part8/irm_08-007-003).

7 See IRM 8.7.3.3.2(1), Appeals Coordinated Issues with Review and Concurrence (Dec. 1, 2022) (“An ACI with Review and Concurrence ... is an issue with Service-wide impact or importance, requiring Technical Specialist evaluation to ensure uniformity and consistency nationwide. ... [The AO] must obtain the Technical Specialist’s tentative approval of the settlement proposal and/or settlement range before any settlement options are discussed with the taxpayer.”), [http://www.irs.gov/irm/part8/irm\\_08-007-003](http://www.irs.gov/irm/part8/irm_08-007-003).

8 Discussions with outside stakeholders (Sept. 28, 2023). See IRM 8.7.3.3, Coordinated Issues (Oct. 1, 2012) (governs when and to what extent Appeals cases engage specialists), [http://www.irs.gov/irm/part8/irm\\_08-007-003](http://www.irs.gov/irm/part8/irm_08-007-003).

negotiation and often leads to a breakdown in the settlement process. Taxpayers cannot meaningfully engage in a discussion on case resolution if Appeals makes the decision based on undisclosed settlement standards to which taxpayers are not privy. Many times, taxpayers are not communicating with the decision-maker or do not have access to the decision-maker since a “wizard behind the curtain” exists who is making decisions for the assigned AO in coordinated cases.<sup>9</sup>

Many practitioners perceive the current system as encouraging a “one-size-fits-all” approach to settlements involving coordinated issues, disregarding the unique facts and circumstances of individual cases. This often forces taxpayers into unnecessary litigation, as they think they may receive a more impartial consideration of their unique facts and circumstances in Tax Court. The lack of autonomy and transparency in the Appeals process undermines public confidence in the tax system. Courts base their decisions on the unique facts and circumstances of each case, a practice that practitioners perceive is not consistently followed by the current Appeals process.

———— THE LACK OF AUTONOMY AND TRANSPARENCY ————  
IN THE APPEALS PROCESS  
**undermines public confidence in the tax system.**

The current practice of relying on undisclosed settlement parameters concerning coordinated issues is at odds with the judicial mindset and culture that Appeals should embody. Additionally, because they might lack training, experience, or confidence in their understanding of complex issues, AOs may defer to specialists even if they are not required to do so. This problem is exacerbated for AOs who are new to the role or unfamiliar with the complexity of certain issues they handle. Appeals does not require AOs to have prior litigation experience or a working knowledge of the rules of evidence, which courts often rely upon in reaching a decision.<sup>10</sup> Many AOs face challenges in determining how to correctly assess the hazards of litigation.

Appeals should make it explicit that specialists serve only as consultants. The AO should be the one responsible for understanding the legal issues and facts and for assessing the hazards of litigation independently. Appeals should reevaluate its current list of 48 coordinated issues to determine if Appeals can grant AOs more autonomy in these matters.<sup>11</sup>

At the conclusion of each Appeals case, the AO must draft an Appeals Case Memorandum (ACM) or its equivalent<sup>12</sup> that explains the rationale for the settlement decision. Appeals provides that ACM to the examination division.<sup>13</sup> Independence should require that Appeals share the ACM with the taxpayer at the same time. While AOs are supposed to verbally discuss the rationale for a decision with a taxpayer, these discussions do not always include the same analysis of the hazards of litigation as determined by the AO in the ACM. Taxpayers should not see AOs as being in close association with the IRS function that raised the issue. It is not the job of Appeals to help the IRS in developing its cases or issues; it must remain neutral and be independent.

<sup>9</sup> Discussions with outside stakeholders (Sept. 28, 2023).

<sup>10</sup> See IRS, Standard Position Descriptions for Appeals Officers, SPD Nos. 95758 (Grade 11), 92930 (Grade 12), 92931 (Grade 13), 92932 (Grade 14), and 93207 (Grade 15), none of which require experience in tax litigation or expertise with rules of evidence.

<sup>11</sup> This list identifies issues on which AOs must seek guidance from specialists. It does not provide the settlement standards used by Appeals specialists. For a current list, see IRS, Appeals Coordinated Issues and Appeals Settlement Guidelines (May 5, 2023), <https://www.irs.gov/appeals/appeals-coordinated-issues-and-appeals-settlement-guidelines>. See IRS response to TAS fact check (Dec. 7, 2023) (confirming 48 total coordinated issues).

<sup>12</sup> See IRM 8.6.2.2, Introduction to Appeals Case Memos (ACMs) (Aug. 17, 2017), [http://www.irs.gov/irm/part8/irm\\_08-006-002](http://www.irs.gov/irm/part8/irm_08-006-002). For less complicated matters, the IRM allows for Form 5402, Appeals Transmittal and Case Memo, in lieu of an ACM. See IRM 8.6.2.3.2, Using Form 5402 as the Appeals Case Memo (ACM) (Mar. 16, 2015), [http://www.irs.gov/irm/part8/irm\\_08-006-002](http://www.irs.gov/irm/part8/irm_08-006-002).

<sup>13</sup> See IRM 8.6.2.2.2, Types of Appeals Case Memos (ACM) (Mar. 16, 2015), [http://www.irs.gov/irm/part8/irm\\_08-006-002](http://www.irs.gov/irm/part8/irm_08-006-002); IRM 8.6.2.2.1, Four Major Sections of an Appeals Case Memo (ACM) (Mar. 16, 2015), [http://www.irs.gov/irm/part8/irm\\_08-006-002](http://www.irs.gov/irm/part8/irm_08-006-002).

If Appeals continues to share the ACM with Compliance, the National Taxpayer Advocate recommends that Appeals share a copy with the taxpayer at the close of every case to protect a taxpayer's *right to be informed* about the rationale behind an Appeals decision.<sup>14</sup>

### **The Perception Exists That Chief Counsel Attorneys Attend Appeals Conferences to Develop Issues for Trial**

The presence of IRS Chief Counsel attorneys at initial conferences in large and certain coordinated cases appears to compromise Appeals' independence, thereby affecting the quality of settlements and overall taxpayer confidence in the Appeals process.<sup>15</sup> Practitioners report a concern with the presence of Chief Counsel attorneys as it is seen as geared toward developing issues for trial for the benefit of the IRS. This atmosphere discourages taxpayers and impedes the likelihood of reaching a fair and impartial settlement.

The Office of Chief Counsel is the chief legal advisor to the IRS on all matters pertaining to the interpretation, administration, and enforcement of the internal revenue laws (as well as all other legal matters). Counsel attorneys provide legal guidance and interpretive advice to the IRS. As such, Counsel attorneys "speak with one voice" and might not provide independent advice to AOs on evaluating the hazards of litigation.

The National Taxpayer Advocate recommends that Appeals engage external experts to assist on complex matters to properly assess hazards of litigation in valuation issues, difficult cases, or issues of first impression. The ability to use external experts would provide an additional level of independence. This would also ensure the Appeals process focuses on achieving a fair and impartial settlement.

### **Proposed Regulations Limit Appeals Independence**

There are proposed regulations implementing the Taxpayer First Act that potentially undermine the independence of Appeals.<sup>16</sup> They prohibit Appeals from considering a taxpayer's argument that a Treasury regulation, IRS notice, or revenue procedure is invalid unless there is an unreviewable decision from a federal court. The proposed regulations define an unreviewable decision as "a decision of a Federal court that can no longer be appealed to any Federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was taken."<sup>17</sup>

The regulation also excepts from Appeals consideration arguments a taxpayer raises that the IRS asserts is a frivolous position (*e.g.*, "constitutional" issues).<sup>18</sup> However, there are situations in which the IRS wrongly proposes a frivolous return penalty for constitutional issues. For example, a taxpayer may properly assert a valid Fifth Amendment privilege against self-incrimination. If the IRS proposes a frivolous return penalty, the

14 IRC § 7803(a)(3)(A).

15 Although no formal definition of a "large case" within Appeals exists, we use the term to mean cases involving organizations with assets of \$10 million or more and cases with specified coordinated issues.

16 Prop. Reg. §§ 301.7803-2 and 301.7803-3, 87 Fed. Reg. 55,934 (Sept. 13, 2022) (Resolution of Federal Tax Controversies by the Independent Office of Appeals), <https://www.federalregister.gov/documents/2022/09/13/2022-19662/resolution-of-federal-tax-controversies-by-the-independent-office-of-appeals>. See also Jeffrey S. Luechtefeld, *Proposed Regs Limit the Independence of the Office of Appeals*, Tax NOTES, Oct. 17, 2022, at 373, <https://www.taxnotes.com/lr/resolve/tax-notes-today-federal/proposed-regs-limit-the-independence-of-the-office-of-appeals/7f737>.

17 Prop. Reg. § 301.7803-2(c)(18), 87 Fed. Reg. 55,934, 55,942 (Sept. 13, 2022).

18 Prop. Reg. § 301.7803-2(c)(1), 87 Fed. Reg. 55,934, 55,937 (Sept. 13, 2022).

[The Proposed Regulation] provides that Appeals consideration is not available for an administrative determination made by the IRS with respect to a particular taxpayer in which the IRS rejects a frivolous position, which includes any case solely involving the failure or refusal of the taxpayer to comply with the tax laws because of frivolous moral, religious, political, *constitutional*, conscientious, or similar grounds. (emphasis added).



AO will not be able to judge the hazards of litigation on that issue. Under the proposed regulation, Appeals cannot consider the case, thereby requiring these taxpayers to litigate the issue without an administrative appeals review.<sup>19</sup>

In other words, the proposed regulations state that an AO cannot consider the hazards of litigation on an issue that questions the validity of an official agency interpretation where the IRS may still appeal a judicial decision on that interpretation, even if the original decision was in the taxpayer's favor.<sup>20</sup> This would effectively tie the AO's hands, forcing them to align with the IRS's official position rather than making an independent assessment of the probability of a taxpayer succeeding in challenging a regulation, notice, or revenue procedure even if a court has already found in the taxpayer's favor.

This is not a purely academic concern. For example, multiple cases<sup>21</sup> have held IRS notices invalid because of the agency's violation of the Administrative Procedure Act (APA).<sup>22</sup> Yet, under the proposed regulations, AOs are prohibited from considering the legal hazards concerning the IRS's compliance with the APA during the period in which the IRS has appealed or still could appeal such decisions. What then is the role of the Independent Office of Appeals? Is it an arm of the IRS, or is it independent? These proposed regulations restrict Appeals' ability to act independently in resolving cases without litigation.<sup>23</sup>

The IRS should revisit the proposed regulations implementing the TFA that limit the AO's ability to independently consider all the hazards of litigation, even those contrary to the IRS's official position when the IRS is actively appealing a judicial decision. This is one reason why Appeals needs its own independent legal counsel rather than relying on the "one voice" of counsel.

### Taxpayers Experience Significant Delays Scheduling In-Person Conferences

The foundation of an effective Appeals process is the opportunity for taxpayers to engage directly with the decision-maker.<sup>24</sup> Yet, current scheduling practices and operational constraints undermine the value of in-person meetings, leading to resolution delays and in some cases, forcing taxpayers to opt for litigation instead of the Appeals process.

Taxpayers report significant delays in scheduling Appeals conferences, particularly for coordinated issues. Some taxpayers face wait times of nine to 12 months, which is sometimes longer than obtaining a Tax Court date.<sup>25</sup> Some practitioners attribute this to the current work arrangement where some AOs are in the office only one day a week, leading to a bottleneck of face-to-face conference requests.<sup>26</sup> This delay is counterproductive to the resolution process, undermines the purpose of the Appeals system, and is contrary to the taxpayer's *right to quality service*.

19 See *Youssefzadeh v. Comm'r*, No. 14868-14 L (T.C. Nov. 6, 2015) (order distinguishing a taxpayer's Fifth Amendment invocation for portions of Schedule B from a refusal to file a meaningful tax return on constitutional grounds).

20 Prop. Reg. § 301.7803-2(c)(18)-(20). See also IRS, Interim Guidance Memorandum AP-08-0922-0011, Interim Guidance for Cases in Which Taxpayers Raise Arguments Regarding the Validity of a Treasury Regulation or Procedural Validity of an IRS Notice or Revenue Procedure (Sept. 14, 2022), <https://www.irs.gov/pub/foia/ig/appeals/ap-08-0922-0011.pdf>.

21 See, e.g., *Green Valley Invs., LLC v. Comm'r*, 159 T.C. 80 (2022); *CIC Servs., LLC v. IRS*, 141 S.Ct. 1582 (2021); *Mann Constr., Inc. v. United States*, 27 F.4th 1138 (6th Cir. 2022).

22 5 USC § 551, et seq.

23 See Jeffrey S. Luechtefeld, *Proposed Regs Limit the Independence of the Office of Appeals*, TAX NOTES, Oct. 17, 2022, at 373, <https://www.taxnotes.com/lr/resolve/tax-notes-today-federal/proposed-reg-limit-the-independence-of-the-office-of-appeals/7f737>.

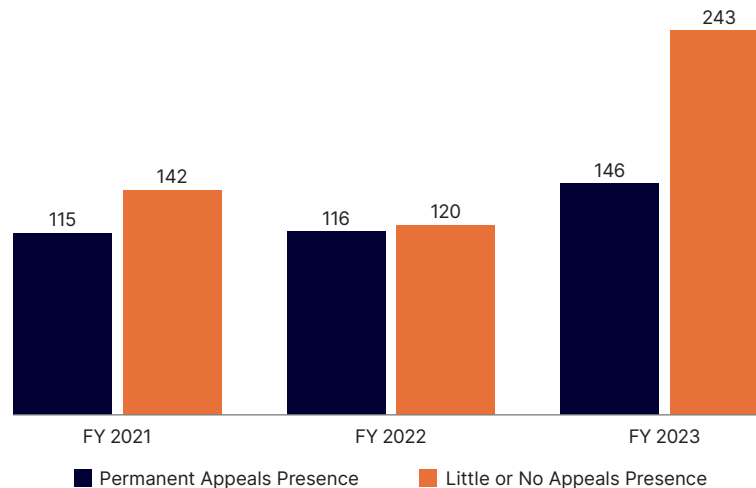
24 "Conferences are a key way in which Appeals hears the taxpayer's position, understands the law and facts in dispute and proposes a resolution [...]. During the conference, the Appeals officer will engage with taxpayers in discussing potential settlements. At the conclusion of their appeal, they should understand exactly how and why their case was resolved." IRS News Release, IR-2023-101, Improving Nationwide Access to IRS Appeals; Public Input Wanted (May 11, 2023), <https://www.irs.gov/newsroom/improving-nationwide-access-to-irs-appeals-public-input-wanted>.

25 Discussions with outside stakeholders (Sept. 28, 2023).

26 *Id.*

**FIGURE 2.10.1**

**Average Number of Days for a Taxpayer to Get an Appeals Conference  
Once the IRS Assigns an Appeals Officer**



Currently, Appeals does not have a permanent presence in every state, but it must continue to provide in-person conferences in all states to meet the needs of taxpayers. For fiscal year (FY) 2021 to FY 2023, there were 11 states with little to no Appeals presence.<sup>27</sup> All other states, including the District of Columbia, have at least one permanent Appeals office.

Practitioners report no net improvement in the time the IRS assigns a case to Appeals until a first conference in the post-pandemic era.<sup>28</sup> Appeals data confirms this, as the average time for a taxpayer to get an Appeals conference once Appeals receives the case has increased by 27 percent<sup>29</sup> from FY 2021 to FY 2023 in states with a permanent Appeals presence<sup>30</sup> and by 71 percent<sup>31</sup> in the same period for states without a permanent Appeals presence.<sup>32</sup>

In-person meetings are more than a procedural formality; they offer substantive benefits to taxpayers. Being in the same room allows for easier document review, provides an opportunity for the AO to judge credibility of witnesses, and provides more effective communication between taxpayers and the AO. Yet, some practitioners note that this benefit disappears if the AO is physically present but defers the ultimate decision to a specialist who is present only telephonically or virtually.<sup>33</sup>

27 These include Alaska, Arkansas, Idaho, Kansas, Montana, New Mexico, North Dakota, Rhode Island, South Dakota, Vermont, and Wyoming. See IRM 8.6.1.5.1.1, Circuit Riding (Sept. 25, 2019), [http://www.irs.gov/irm/part8/irm\\_08-006-001r](http://www.irs.gov/irm/part8/irm_08-006-001r). As of this report, Appeals also has a presence in Albuquerque, New Mexico. IRS response to TAS fact check (Dec. 7, 2023).

28 Discussions with outside stakeholders (Oct. 10, 2023).

29 We estimate a 27 percent increase (146 divided by 115 minus one) for non-docketed closed examination sourced cases (Primary Business Codes 201-207). These numbers do not include collection work or docketed cases.

30 IRS response to TAS information request (Sept. 7, 2023).

31 We estimate a 71 percent increase (243 divided by 142 minus one) for non-docketed closed examination sourced cases (Primary Business Codes 201-207). These numbers do not include collection work or docketed cases.

32 Appeals uses Process (P) Measure Reports to compute cycle time for the various process measures on non-docketed cases. IRM 8.10.1.10.1.8, Process (P) Measure Report (Oct. 15, 2014), [http://www.irs.gov/irm/part8/irm\\_08-010-001](http://www.irs.gov/irm/part8/irm_08-010-001). The average time for a taxpayer to get an Appeals conference once Appeals receives the case, known as the P4 measure, was 116 days for FY 2021 through FY 2022 in states with a permanent Appeals presence. This increased to an average of 146 days for FY 2023 through July 31, 2023. The P4 measure was an average of 131 days for FY 2021 through FY 2022 in states without a permanent Appeals presence, which increased to an average of 243 days for FY 2023 through July 31, 2023. IRS response to TAS information request (Sept. 7, 2023).

33 Discussions with outside stakeholders (Sept. 28, 2023).

Because of these issues, some taxpayers are bypassing the Appeals process altogether and petitioning the Tax Court, leading to an unnecessary burden on the court system and increased cost for taxpayers.<sup>34</sup> This is contrary to the intended function of Appeals as a mechanism for efficient and fair resolution of tax disputes.<sup>35</sup>

The National Taxpayer Advocate recommends Appeals review and optimize its scheduling process to reduce wait times for taxpayer conferences, particularly for coordinated issues. Appeals' current work-from-home policy should emphasize the prioritization of taxpayer access to in-person conferences.

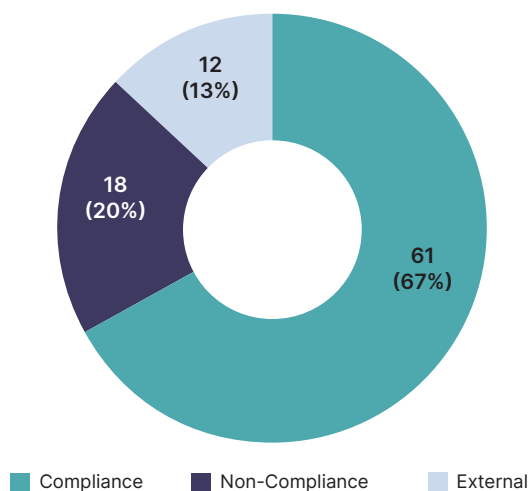
The National Taxpayer Advocate also recommends that Appeals emphasize the importance of the AO as the primary decision-maker. When AOs must rely on the advice of specialists, those specialists should be available in person so taxpayers and their representatives can address their unique facts and circumstances directly with the decision-maker.<sup>36</sup>

### A Compliance Culture Lives Within the Appeals Organization

The prevailing compliance culture within Appeals poses challenges to its independence and effectiveness. Appeals recruits most AOs from IRS Compliance, often leading to a mindset focused on defending Compliance's position rather than impartially assessing the hazards of litigation. This mindset transition can take years and, in some cases, may never completely occur without adequate and ongoing training.<sup>37</sup>

**FIGURE 2.10.2**

**Appeals Officers Hired by Source, FY 2023**



<sup>34</sup> Discussions with outside stakeholders (Sept. 28, 2023).

<sup>35</sup> On May 11, 2023, in coordination with the National Taxpayer Advocate, Appeals sought public comments on how to improve access for taxpayers who do not live near an Appeals office. IRS News Release, IR-2023-101, Improving Nationwide Access to IRS Appeals; Public Input Wanted (May 11, 2023), <https://www.irs.gov/newsroom/improving-nationwide-access-to-irs-appeals-public-input-wanted>. The National Taxpayer Advocate applauds Appeals for its willingness to seek public comments on this important matter, as Appeals data and practitioner comments show there is still work to do concerning taxpayer access to the Appeals process.

<sup>36</sup> Cf. Discussions with outside stakeholders (Sept. 28, 2023).

<sup>37</sup> See National Taxpayer Advocate 2022 Annual Report to Congress 141 (Most Serious Problem: *Appeals: Staffing Challenges and Institutional Culture Remain Barriers to Quality Taxpayer Service Within the IRS Independent Office of Appeals*), [https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22\\_MSP\\_09\\_Appeals.pdf](https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_MSP_09_Appeals.pdf). See also James P. Walsh & Leonidas C. Charalambides, *Individual and Social Origins of Belief Structure Change*, 130 J. Soc. PSYCHOL. 517 (1990), <https://doi.org/10.1080/00224545.1990.9924614> (finding the likelihood of mindset change depends on how self-conscious one is of a current mindset; as the more subconscious filters are hidden, the greater the probability is of rigidity of a prior mindset).

For example, in FY 2023, Appeals hired 91 new AOs.<sup>38</sup> Of those, 87 percent were current IRS employees, and only 13 percent were external hires.<sup>39</sup> Of all the internal hires, 77 percent came directly from IRS Compliance positions and the other 23 percent from other IRS positions.<sup>40</sup> Therefore, many taxpayers and practitioners observe that AOs come to the job with a compliance mindset<sup>41</sup> that sidelines a judicial attitude toward settlement.<sup>42</sup>

The National Taxpayer Advocate recommends that Appeals continue to actively recruit AOs from outside the IRS, possibly offering compensation differentials to attract experienced talent. Additionally, the IRS Human Capital Office must work with Appeals leadership to provide the necessary resources to aid in the expeditious hiring of candidates for Appeals to fulfill its mission. Hiring a mix of candidates would not only bring diverse perspectives to the Appeals process but could reduce the influence of a compliance-centric mindset. To retain external hires and ensure their effective transition into the new AO role, Appeals should allocate resources for increased and ongoing training focused on the impartial assessment of litigating hazards and resulting settlement negotiations.

### Appeals Needs to Use the Alternative Dispute Resolution Program to Its Full Potential

ADR is a tool the IRS uses to resolve tax disputes without litigation (*e.g.*, Fast Track Settlement (FTS), Fast Track Mediation, Post-Appeals Mediation).<sup>43</sup> The IRS designed these programs to expedite the resolution process. When these programs are successful, they expedite resolution of a tax controversy, saving time and money, eliminating the need for litigation, reducing the burden on taxpayers and the IRS, and protecting taxpayer rights: a win-win. The ADR process can also provide the parties an avenue to articulate their positions before a neutral mediator who can provide valuable feedback on the strengths and weaknesses of those positions, triggering additional settlement discussions and possible resolution of the issues.

A 2023 report from the Government Accountability Office (GAO) highlights significant shortcomings in the IRS's management and use of ADR programs.<sup>44</sup> Figure 2.10.3 illustrates the relatively steady decline in ADR cases closed since FY 2013.<sup>45</sup>

38 These were AOs who did not serve in an AO job series immediately prior to their hiring. Other AO hiring consisted of promotions or other transfers from existing AO job series.

39 See Most Serious Problem: *IRS Hiring Recruitment, and Training: Shortcomings in the IRS's Employee Hiring, Retention, Recruitment, and Training Programs Adversely Affect the Quality of Taxpayer Service the IRS Provides and Undermine Effective Tax Administration*, *supra*.

40 IRS, Human Resources Reporting Center, Workforce Planning and Management Reports, Migration Reports, External Hire Report for FY 2023 (Oct. 5, 2023). Compliance positions include Internal Revenue Agent, Internal Revenue Officer, Criminal Investigator, Tax Law Specialist, Tax Examining Technician, and Tax Specialist.

41 Discussions with outside stakeholders (Oct. 10, 2023). Compliance decisions are usually binary in that the decisions are limited to either allowing or disallowing items.

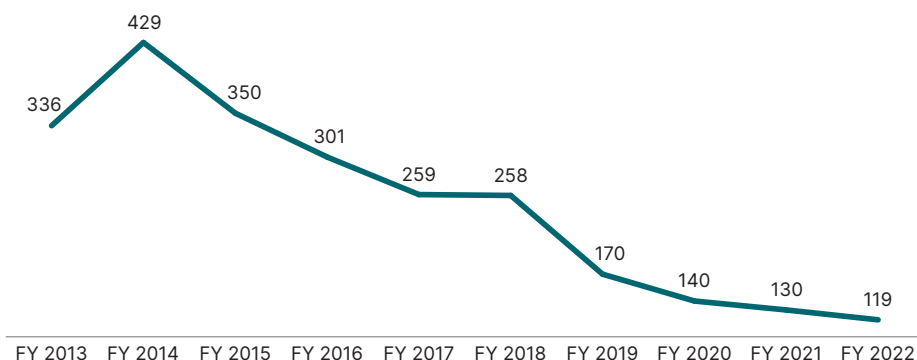
42 Appeals defines judicial attitude toward settlement in IRM 8.6.4.2.5, Judicial Attitude Towards Settlement (June 16, 2020), [http://www.irs.gov/irm/part8/irm\\_08-006-004](http://www.irs.gov/irm/part8/irm_08-006-004).

43 Available ADR programs include FTS for the Large Business and International (LB&I), Small Business/Self-Employed (SB/SE), and Tax-Exempt/Government Entities (TE/GE) Divisions for examination matters; Fast Track Mediation – Collection for collection matters; Rapid Appeals Process available to most LB&I cases or SB/SE estate and gift cases; and Post Appeals Mediation (if IRS Appeals settlement discussions are unsuccessful and the remaining disputed issues are fully developed). See IRS News Release, IR-2023-136, IRS Invites Public Input on Ways to Improve Dispute Resolution Programs; Suggestions Wanted (July 27, 2023), <https://www.irs.gov/newsroom/irs-invites-public-input-on-ways-to-improve-dispute-resolution-programs-suggestions-wanted>.

44 GAO, GAO-23-105552, *IRS Could Better Manage Alternative Dispute Resolution Programs to Maximize Benefits* (2023), <https://www.gao.gov/products/gao-23-105552>. The GAO conducted its study, in part, because of the National Taxpayer Advocate's report "that the use of ADR programs has steadily declined, while resolving disputes through the IRS appeals process is taking longer."

45 Data on ADR usage includes FTS for LB&I, SB/SE, and TE/GE; Fast Track Mediation for Collections; Rapid Appeals Program; and Post Appeals Mediation. Data describe cases that closed in that fiscal year. GAO, GAO-23-105552, *IRS Could Better Manage Alternative Dispute Resolution Programs to Maximize Benefits* (2023), <https://www.gao.gov/products/gao-23-105552>.



**FIGURE 2.10.3****IRS Alternative Dispute Resolution Cases Closed, FYs 2013-2022**

Notably, use of ADR has declined by 65 percent between FY 2013 and FY 2022.<sup>46</sup> This is concerning, especially given the lack of comprehensive data collected to understand the reasons behind the decline.

The decrease in the use of ADR and the lack of sufficient data to track program management make it harder to determine its success or failure. Absent data, objective measures, and taxpayer feedback, it is difficult to evaluate how ADR programs are working and to measure the value of the programs. When taxpayers and the government rely only on the full appeals process (*i.e.*, without first going through ADR), it takes more time and consumes more public and private resources. One recommendation to increase usage would be for Appeals to provide training to both educate and incentivize employees to offer ADR to taxpayers.

The FTS program offers taxpayers a chance to resolve disputes quickly using Appeals as a mediator, even while their case is still in the hands of Compliance. However, some tax professionals note that Compliance often rejects these FTS requests from taxpayers, stating that the taxpayer and the government are “too far apart.”<sup>47</sup> This reasoning is flawed because mediation is especially useful when both sides are far apart and unable to agree. Therefore, the parties being “too far apart” should be a reason to accept a taxpayer’s request for FTS, not to deny it.

Additionally, when Compliance denies an FTS request, it does not inform Appeals or keep records for analyzing trends. This lack of communication and data means Appeals is unaware of the number of FTS requests made, their outcomes, or how Appeals might improve the program. Without this information, Appeals cannot measure how well the ADR programs are working or understand the reasons behind the significant drop in their use.<sup>48</sup> GAO recommended that Appeals implement a system of regular monitoring of taxpayer experiences with ADR and use taxpayer feedback for real-time improvements.

46 According to the Appeals Centralized Database System. See GAO, GAO-23-105552, *IRS Could Better Manage Alternative Dispute Resolution Programs to Maximize Benefits* 10 (2023), <https://www.gao.gov/products/gao-23-105552>.

47 Discussions with outside stakeholders (Sept. 11, 2023). See also IRS response to TAS information request (Nov. 1, 2023), providing the following public comment:

In one anecdotal example, a practitioner was informed that PAM is only appropriate in “close” cases, though the Service employee communicating that information was unable to provide any authority for that rule nor were they able to provide objective parameters regarding what would constitute a “close” case.

Letter from American Bar Ass’n Tax Section, to Danny Werfel, Comm’r, Internal Revenue (Sept. 15, 2023), <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2023/091523comments.pdf>.

48 See Figure 2.10.3, *infra*, showing a drop in ADR cases from 336 in FY 2013 to 119 in FY 2022.

On July 27, 2023, the Chief of Appeals initiated a taxpayer feedback mechanism by requesting public comments on how to improve ADR programs.<sup>49</sup> The National Taxpayer Advocate agrees with the GAO report's findings and recommends that where the case remains under the jurisdiction of Compliance and the IRS denies the taxpayer's ADR request for reasons other than those in the established guidelines (*e.g.*, the parties are "too far apart"),<sup>50</sup> Compliance must share the data with Appeals. Additionally, Appeals should track this and related data to make data-driven decisions on improving ADR programs.

Another significant concern is the absence of an obligation for Compliance to provide a substantial explanation as to why it rejected a taxpayer's ADR request. Taxpayers are left without the reasons for the denial and no way forward to contest the decision. This limited transparency can contribute to perceptions that the IRS is not committed to the ADR initiatives and that it bases its decision on convenience to Compliance rather than facts and law.

### Appeals Needs to Do Additional Work to Ensure Its Independence

The statutory establishment of Appeals in 2019 was a deliberate and considered response by Congress to the pressing need for an appeals function within the IRS that was independent from the agency's influence. The emphasis on independence is a recurring theme in the legislative history of the TFA, which underscores Congress's commitment to ensuring fairness and impartiality in the administrative appeals process.<sup>51</sup> The very positioning of this provision as the first section of the TFA demonstrates its fundamental importance to protecting taxpayer rights.<sup>52</sup>

Since the TFA's enactment, there have been commendable strides toward achieving Congress's vision of an independent Appeals office. But there is still work to be done. Congress's vision of an appeals function free of IRS influence is a goal that remains only partially fulfilled. The TFA, as it stands, lays a solid foundation, but the structure built upon it requires further development to fully realize Appeals' independence.

Key to future discussions of the IRS and Congress are proposals that some may view as extreme, yet they remain fundamental in cementing the independence of Appeals. One such topic for future discussion is the provision for Appeals to have its own independent legal counsel. This move would ensure that the IRS appeals process is free of agency influence in both reality and public perception, thereby bolstering taxpayer morale and confidence in the system's impartiality. Another significant topic of discussion is that the Secretary of the Treasury should appoint the Chief of Appeals instead of the IRS Commissioner.<sup>53</sup> This change would further distance Appeals from the agency's influence by ensuring the head of the appeals function is not beholden to the person in charge of IRS compliance. As discussions advance, bold topics such as these are necessary for meaningful discussions on how to fully realize Congress's goal of a truly independent administrative appeals function within the IRS.

49 IRS News Release, IR-2023-136, IRS Invites Public Input on Ways to Improve Dispute Resolution Programs; Suggestions Wanted (July 27, 2023), <https://www.irs.gov/newsroom/irs-invites-public-input-on-ways-to-improve-dispute-resolution-programs-suggestions-wanted>.

50 See IRS, Pub. 5022, Fast Track Settlement – A Process for Prompt Resolution of Small Business Self Employed Tax Issues (Sept. 2021), <https://www.irs.gov/pub/irs-pdf/p5022.pdf>.

51 See, *e.g.*, H.R. REP. NO. 115-637, pt. 1, at 17 (Apr. 13, 2018) (accompanying H.R. 5444).

In order to foster confidence in the integrity of the IRS and the independence of its administrative proceedings, as well as to encourage voluntary compliance, the Committee believes it is advisable to codify the role of an independent administrative function within the IRS and establish a new Independent Office of Appeals. In doing so, the Committee seeks to reassure taxpayers of the independence of the persons providing the administrative review.

52 See Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983 (2019).

53 Discussions with outside stakeholders (Sept. 11, 2023).

## CONCLUSION AND RECOMMENDATIONS

To ensure the taxpayers' *right to appeal an IRS decision in an independent forum*, the Appeals process must operate independently, free from external influence, including influence from the IRS.<sup>54</sup> This independence must exist in both practice and perception to reinforce the taxpayers' *right to a fair and just tax system*.<sup>55</sup> Further, by addressing current operational inefficiencies, Appeals protects the taxpayers' *right to quality service*, resulting in prompt, courteous, and professional assistance in their dealings with the IRS.<sup>56</sup>

### Administrative Recommendations to the IRS

The National Taxpayer Advocate recommends that the IRS:

1. Prioritize in-office availability of AOs to reduce wait times and increase taxpayer access for in-person conferences.
2. Require technical guidance coordinators and other specialists, whose advice the AO relies upon, be available in person if requested so taxpayers can address their unique facts and circumstances directly with those specialists.
3. Provide additional budget to contract outside experts on complex matters and hire attorneys that report to the Chief of Appeals.
4. Revise the Internal Revenue Manual to require Appeals to share all ACMs with taxpayers and establish policies and mandatory procedures to effectively track these efforts.
5. Hire more AOs from outside the IRS who have the necessary qualifications and experience to reduce the influence of a compliance mindset on Appeals' culture.
6. Provide continuous education for all AOs emphasizing a judicial attitude toward settlement to reduce a compliance mindset.
7. In collaboration with Compliance, restructure the current ADR process to provide (a) an ability to appeal the initial determination to Compliance upper management, (b) the creation of a centralized group within Appeals responsible for reviewing Compliance denials of ADR requests, (c) clearer guidance on issues excluded from ADR consideration, and (d) a written explanation to taxpayers citing the basis for the denial.
8. In collaboration with Compliance, collect consistent, reliable data on what happens to taxpayer requests to use ADR as well as the results of each ADR program, such as resolutions achieved for the time and costs invested.

### RESPONSIBLE OFFICIAL

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<sup>54</sup> See IRC § 7803(a)(3)(E).

<sup>55</sup> See IRC § 7803(a)(3)(J).

<sup>56</sup> See IRC § 7803(a)(3)(B).