

## STRENGTHEN THE OFFICE OF THE TAXPAYER ADVOCATE

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### Legislative Recommendation #37

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

### SUMMARY

- *Problem:* In advocating for 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 a 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. However, IRC § 7803(c) makes clear that TAS is expected to operate independently of the IRS in key respects. A few examples:

- 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, SIGPR, or 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. § 403(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 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

Beginning in 2004, with the approval of the Commissioner of Internal Revenue, TAS hired and 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 those same attorneys to 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 independently 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. TAS subsequently 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 44 CONG. REC. 8476 (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 Taxpayer Protection and IRS Accountability Act of 2003, 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, suggesting 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), [https://www.irs.gov/irm/part35/irm\\_35-004-001](https://www.irs.gov/irm/part35/irm_35-004-001); CCDM 31.1.4.6, Reconciliation of Disputes (Aug. 11, 2004), [https://www.irs.gov/irm/part31/irm\\_31-001-004](https://www.irs.gov/irm/part31/irm_31-001-004).

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 barred from both hiring new attorneys and promoting well-performing attorneys 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 collectively 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 who report to her. The General Counsel has disagreed, maintaining that a statutory change is required.<sup>7</sup>

## RECOMMENDATION

- Amend IRC § 7803(c)(2)(D) to expressly authorize the National Taxpayer Advocate to hire legal counsel who report directly to him or her.<sup>8</sup>

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7 As an interim measure, the National Taxpayer Advocate has hired attorneys into a non-attorney job series. While the National Taxpayer Advocate is very proud of the staff she has, TAS's inability to hire attorneys into the attorney-advisor job series has significantly limited the pool of qualified candidates who apply, particularly from leading law firms. The job series the IRS has authorized TAS to use is titled "Legal Administrative Specialist." Many skilled attorneys seeking to maximize their future employment prospects in the legal profession want to work in an attorney-designated position and are reluctant to apply for an "administrative specialist" position. Moreover, individuals searching for attorney positions on USAJobs.gov would be unlikely even to come across a "Legal Administrative Specialist" position.

8 For legislative language generally consistent with this recommendation, see National Taxpayer Advocate Enhancement Act, H.R. 2755, 118<sup>th</sup> Cong. (2023). For more detail, see National Taxpayer Advocate 2016 Annual Report to Congress 37 (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 (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).