



November 14, 2022

Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

RE: 87 FR 55934, "Resolution of Federal Tax Controversies by the Independent Office of Appeals"

Comments and Request to Speak at Public Hearing Scheduled for 11/29/2022

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, we write with comments on your notice of proposed rulemaking (NPRM) and notice of public hearing on proposed rulemaking published in the Federal Register on September 13, 2022, "Resolution of Federal Tax Controversies by the Independent Office of Appeals."¹ We appreciate the opportunity to comment on several aspects of the NPRM.

NTU is the nation's oldest taxpayer advocacy organization, founded in 1969 to achieve favorable policy outcomes for taxpayers with Congress and the executive branch. For nearly as long, our experts and advocates have engaged federal policymakers on important questions surrounding taxpayer rights and due process, the Office of Appeals (both prior to and after its codification as the Independent Office of Appeals in the Taxpayer First Act of 2019), and alternative dispute resolution (ADR) for use in federal tax controversies.

As we noted in a 2017 communication to the House Ways and Means Subcommittee on Oversight:

"...NTU has led efforts in support of Congressional legislation to improve operations of the Internal Revenue Service (IRS) and provide greater balance in the tax enforcement process. During the late 1970s and 1980s, NTU informed Congress of taxpayers who experienced IRS maladministration firsthand, as well as organized a large coalition of civil liberties organizations that successfully persuaded Congress to enact the first 'Taxpayers' Bill of Rights' as part of the Technical and Miscellaneous Revenue Act of 1988."²

NTU served on the National Commission on Restructuring the IRS in 1996 and 1997, which later became the basis for the 1998 IRS Restructuring and Reform Act (RRA), and helped craft the codified taxpayer bill of rights included in the 2015 Protecting Americans from Tax Hikes (PATH) Act. More recently, we provided significant technical assistance to Congress for what became the Taxpayer First Act (TFA) of 2019, and worked

¹ Federal Register. "Resolution of Federal Tax Controversies by the Independent Office of Appeals." Published September 13, 2022. Retrieved from: <https://www.federalregister.gov/documents/2022/09/13/2022-19662/resolution-of-federal-tax-controversies-by-the-independent-office-of-appeals> (Accessed November 9, 2022.)

² Sepp, Pete. "IRS Reform: Resolving Taxpayer Disputes." National Taxpayers Union, September 13, 2017. Retrieved from: <https://www.ntu.org/publications/detail/irs-reform-resolving-taxpayer-disputes#> (Accessed November 9, 2022.)

with stakeholders across government to ensure its enactment into law – especially its provisions codifying the Independent Office of Appeals at the IRS.³

In its rulemaking, the Service asserts that:

“In addition to the statutory language of section 7803(e)(4), the House TFA Report also reflects the intention of Congress that the Treasury Department and the IRS retain after the enactment of the TFA their historical discretion to determine whether the resolution of particular types of disputes is appropriate for the Appeals resolution process, or the discretion of the IRS to determine whether a particular Federal tax controversy is appropriate for the Appeals resolution process.”

This reading of TFA’s intent, and by extension RRA’s intent, omits other historical observations in House and Senate committee reports that bear repeating here.

During Congressional committee consideration of the IRS Restructuring and Reform Act of 1998, it was clear that Congress wished appeal rights, alternative dispute resolution, and other non-judicial methods of interaction between taxpayers and the IRS be pursued. The following language from the Senate Finance Committee’s report on RRA indicates this broad approach:

“The Committee believes that the IRS should be statutorily bound to follow the procedures that the IRS has developed to facilitate settlement in the IRS Office of Appeals. The Committee also believes that mediation, binding arbitration, early referral to Appeals, and other procedures would foster more timely resolution of taxpayers’ problems with the IRS. In addition, the Committee believes that the ADR process is valuable to the IRS and taxpayers and should be extended to all taxpayers. The Committee believes that all taxpayers should enjoy convenient access to Appeals, regardless of their locality.”⁴

In the 114th Congress, the House Committee on Ways and Means’ report on an early version of the Taxpayer First Act tellingly commented on the provenance of the Independent Office of Appeals:

“In RRA 98, Congress directed the agency to create an independent process for taxpayers to appeal tax disputes. While the IRS initially established an independent process, over time the agency has exercised its discretion to prevent certain taxpayers from accessing the review process. Currently, some taxpayers do not trust that the IRS’s independent review process is truly independent or accessible.”⁵

Since the passage of TFA, we have urged Congress to rigorously monitor the implementation of the IRS Independent Office of Appeals – and shared concerns that the newly codified Office may be under-resourced in

³ See, for example: Aiello, Thomas. “NTU Endorses Legislation That Will Codify Taxpayer Rights and Rein-in the IRS.” National Taxpayers Union, July 17, 2017. Retrieved from: <https://www.ntu.org/publications/detail/ntu-endorses-legislation-that-will-codify-taxpayer-rights-and-rein-in-the-irs> (Accessed November 9, 2022); Sepp, Pete. “NTU Urges Congress to Support Taxpayer’s Bill of Rights.” National Taxpayers Union, November 28, 2018. Retrieved from: <https://www.ntu.org/publications/detail/ntu-urges-congress-to-support-taxpayers-bill-of-rights> (Accessed November 9, 2022); Sepp, Pete. “NTU Letter to Congress on the Taxpayer First Act.” National Taxpayers Union, April 2, 2019. Retrieved from: <https://www.ntu.org/publications/detail/ntu-letter-to-congress-on-the-taxpayer-first-act> (Accessed November 9, 2022.)

⁴ Senate Committee on Finance. “Internal Revenue Service Restructuring and Reform Act of 1998: Report to Accompany H.R. 2676.” April 22, 1998. Retrieved from: <https://www.congress.gov/congressional-report/105th-congress/senate-report/174/1> (Accessed November 11, 2022).

⁵ House Committee on Ways and Means. “Taxpayer First Act: Report to Accompany H.R. 5444.” April 13, 2018. Retrieved from: <https://www.congress.gov/congressional-report/115th-congress/house-report/637/1> (Accessed November 11, 2022.)

its mission to fairly and impartially serve both taxpayers and the government.⁶ One such example of our post-TFA communications is this April 2022 letter to the Senate Committee on Finance:

“Both practitioners and the taxpayers they represent have raised concerns that the Independent Office of Appeals created by the Taxpayer First Act of 2019 is under-resourced, and that agency guidance released subsequent to the law’s enactment may be limiting taxpayer access to this critical avenue of redress.”⁷

The bipartisan majorities in Congress that enacted TFA into law clearly intended for Sec. 1001 of the Act, codifying the IRS Independent Office of Appeals, to expand appeals opportunities and accessibility for taxpayers rather than constrict them.

Sec. 7803(e)(4) of the Internal Revenue Code, as amended by Sec. 1001(a) of TFA, codifies the expansive nature of the right of appeal, noting – as the IRS has in its NPRM – that the resolution process is “generally available to all taxpayers.”⁸ Lawmakers outlined only one specific exception to IRS reporting requirements for denials of rights to appeal – “frivolous position[s],” as defined by 26 USC §6702(c).⁹ Congress clearly did not intend to *exclude* or *preempt* additional exceptions to the right of appeal; in fact, page 31 of the House report on TFA clearly indicates that Treasury may provide “reasonable exceptions” to the general availability of the right to appeal outlined in Sec. 7803(e)(4).¹⁰ However, the same report clearly indicates that a codified and robust Independent Office of Appeals was intended to assist and assure taxpayers first and foremost.

As noted on page 29 of the House report (emphasis added):

“To *foster confidence in the integrity of the IRS* and the *independence of its administrative proceedings* and to encourage voluntary compliance, the Committee believes it is advisable to codify the role of an independent administrative appeals function within the IRS and provide new guidelines for procedures that the IRS is to follow in the new office. In doing so, the Committee seeks to *reassure taxpayers of the independence of the persons providing the administrative review*.”¹¹

Congress was also concerned with the Office’s denials of requests for administrative review to taxpayers. As noted on page 30 of the House report (emphasis added; footnote omitted):

“With respect to the latter, the Committee *intends to restrict and provide oversight of the procedures and standards that the IRS must follow in denying requests* for an independent administrative review to taxpayers who receive a notice of deficiency from the IRS. Finally, the Committee *intends to exercise*

⁶ See, for example: Sepp, Pete, and Lautz, Andrew. “14 Recommendations for Congress and the IRS as They Attempt to Narrow the Tax Gap.” National Taxpayers Union, June 9, 2021. Retrieved from:

<https://www.ntu.org/publications/detail/14-recommendations-for-congress-and-the-irs-as-they-attempt-to-narrow-the-tax-gap>

(Accessed November 9, 2022); Wilford, Andrew, Sepp, Pete, and Bishop-Henchman, Joe. “Taxpayers Desperately Need Help with Disastrous Filing Season.” National Taxpayers Union Foundation, February 17, 2022. Retrieved from:

<https://www.ntu.org/foundation/detail/taxpayers-desperately-need-help-with-disastrous-filing-season> (Accessed November 9, 2022.)

⁷ Sepp, Pete, and Lautz, Andrew. “NTU Submits IRS Reform Recommendations Ahead of Agency’s Budget Hearing.” National Taxpayers Union, April 7, 2022. Retrieved from:

<https://www.ntu.org/publications/detail/ntu-submits-irs-reform-recommendations-ahead-of-agencys-budget-hearing> (Accessed November 9, 2022.)

⁸ 26 U.S.C. §7803(e)(4).

⁹ 26 U.S.C. §7803(e)(5)(D).

¹⁰ House Committee on Ways and Means. “Taxpayer First Act of 2019: Report of the Committee on Ways and Means House of Representatives on H.R. 1957.” April 9, 2019. Retrieved from:

<https://www.congress.gov/116/crpt/hrpt39/CRPT-116hrpt39.pdf#page=39> (Accessed November 9, 2022.)

¹¹ *Ibid*, page 29.

its oversight of the implementation of the new procedures by requiring that the IRS submit annual written reports on the number and type of cases that are denied independent administrative review.”¹²

It is with this legislative record in mind – and NTU’s long-running history and expertise in shaping expansions of federal taxpayer rights – that we express some significant concerns with the NPRM, some of which we feel work against the spirit of TFA, Congressional intent for TFA, and the stated mission of the Office.

The agency asserts that the 24 “exceptions to consideration of a Federal tax controversy by [the Office of] Appeals . . . generally predate the enactment of TFA.” We are concerned, however, that at least two of the 24 exceptions would significantly curtail taxpayers’ rights to appeal: exception 19, “Challenges Alleging That a Treasury Regulation is Invalid,” and exception 20, “Challenges Alleging That a Notice or Revenue Procedure is Invalid.”

In both cases, the agency argues that because the process for developing regulations or sub-regulatory guidance occurs “at the highest levels of the Treasury Department and the IRS,”¹³ Appeals determinations regarding regulations or sub-regulatory guidance “would not be appropriate.” The agency also suggests that their hands are effectively tied with regard to regulations, writing that the requirements of those regulations “apply to Appeals and its employees.”

While we have no doubt that taxpayer appeals challenging the validity of regulations or sub-regulatory guidance present unique challenges to the Office, the agency’s case for excepting *all* such claims from a taxpayer seeking independent review on appeal seem to strike at the heart of the Office’s mission and statutory charter: to “resolve Federal tax controversies without litigation on a basis which is fair and impartial to both the Government *and the taxpayer*”¹⁴ (emphasis added). This also undercuts the number one key focus area for the Office in fiscal year 2023, to “implement a multi-year strategy to improve taxpayer experience.”¹⁵

NTU is not alone in our opinion that proposed exceptions 19 and 20 would represent a significant development for taxpayers interacting with the Office of Appeals. Kirsten Wielobob and John DiIorio of Ernst & Young wrote, in a September update on the agency’s proposed rules, that the proposal to except “the validity of regulations and sub-regulatory guidance” from appeals was a notable development.¹⁶

Three experts at the firm RSM US wrote in a September alert that while the “majority of these [24 exceptions] historically have been excluded from Appeals by other guidance,” exception 19 was “a significant new addition.”¹⁷

McDermott Will & Emery’s Andrew R. Roberson and Kevin Spencer went further in September piece for *The National Law Review*, writing that:

¹² *Ibid*, page 30.

¹³ Or “high levels within the Treasury Department,” in the case of notices or revenue procedures.

¹⁴ Internal Revenue Service. “Fiscal Year 2023 Independent Office of Appeals Focus Guide.” November 4, 2022. Retrieved from: <https://www.irs.gov/pub/irs-pdf/p6511.pdf> (Accessed November 9, 2022.)

¹⁵ *Ibid*.

¹⁶ Wielobob, Kirsten; and Dilorio, John. “Treasury proposes regulations on review of federal tax controversies by IRS Appeals office.” Ernst & Young, September 16, 2022. Retrieved from: <https://taxnews.ey.com/news/2022-1395-treasury-proposes-regulations-on-review-of-federal-tax-controversies-by-irs-appeals-office> (Accessed November 9, 2022.)

¹⁷ Lenius, Marissa; Solodchikova, Alina; and Cardone, John. “IRS proposes guidelines to clarify access to Independent Office of Appeals.” RSM, September 16, 2022. Retrieved from: <https://rsmus.com/insights/tax-alerts/2022/irs-proposes-guidelines-to-clarify-access-to-independent-office-of-appeals.html> (Accessed November 9, 2022.)

“...historically, taxpayers could at least raise validity challenges to published IRS guidance and have those challenges be heard and considered. Although it is difficult to convince an IRS Appeals Officer to offer a settlement based on such challenges, it has always been possible (and in our experience, has sometimes resulted in settlement by the parties). This possibility no longer exists.”¹⁸

Roberson and Spencer add: “[t]axpayers who have challenged or intend to challenge the validity of regulations or the procedural validity of subregulatory guidance should prepare for a long fight if their tax returns are selected for examination and the issue is identified.”¹⁹ Again, the obstacles the agency proposes to erect around potential challenges to regulations or sub-regulatory guidance – the “long fight[s]” – appear contrary to the spirit of TFA and lawmakers’ intent for the Independent Office of Appeals established by TFA: to expand taxpayer access to independent, fair, and impartial appeals.

Moreover, should the “historic exclusions” outlined by the Service in its proposed rulemaking necessarily be accepted as policy going forward? In NTU’s opinion, some certainly should. Penalties and determinations under Sections 6702 or 6682 are sensibly excluded from taxpayers’ appeal rights because appeals based on frivolous positions or false information would constitute a wasteful diversion of resources from the Independent Office of Appeals that could otherwise impede the timely resolution of honest taxpayers’ legitimate claims.

Other exclusions, however, could bear greater deliberation. For example, an entire cluster of exceptions centers around questions of jurisdiction that neither the legislative nor executive branch seem to have satisfactorily resolved. It may be understandable for an under-resourced agency to wish to avoid controversies involving whistleblower awards, tax determinations from agencies such as the TTB, denials of access under the Privacy Act, and referrals to the Department of Justice, but to taxpayers in these situations, they still find themselves without any administrative recourse.

We believe that taxpayers as well as the government would benefit from a structured interagency discussion over how and whether administrative appeals processes, whether residing in the Independent Office of Appeals or elsewhere, could be developed for these types of cases. If the goal, well-articulated in previous statements of congressional intent, is to provide taxpayers with administrative avenues of dispute resolution that can simultaneously save government agencies the time and expense of court proceedings, then a formal interagency discussion now over appeals jurisdictions is highly worthwhile. In some of these cases, especially Privacy Act access, Congress may need to step in with affirmative statutory intent. The IRS’s congressional liaison team would do a great service to taxpayers and the government to bring “housekeeping” matters such as these to lawmakers’ attention.

In addition, the definition of exception 9, regarding erroneous return or rejection of OIC, is rather loosely defined, to the point where taxpayers who are simply the unfortunate recipients of bureaucratic maladministration (as opposed to taxpayers simply “playing the clock”) could be denied appeal rights. Also, the exception for letter rulings from Associate Offices (17) helpfully makes clear that “*the subject of the letter ruling* may be considered by Appeals if all other requirements in proposed § 301.7803-2 are met.” While NTU is generally wary of carving out exceptions to appeal rights, this particular provision should be strengthened to offer an affirmative safe harbor for appeals for taxpayers who in good faith attempt to fulfill the terms of

¹⁸ Roberson, Andrew R.; and Spencer, Kevin. “IRS Appeals Will Not Consider Regulatory Invalidity and Subregulatory Procedural Invalidity Challenges.” *The National Law Review*, September 21, 2022. Retrieved from: <https://www.natlawreview.com/print/article/irs-appeals-will-not-consider-regulatory-invalidity-and-subregulatory-procedural> (Accessed November 9, 2022.)

¹⁹ *Ibid.*

§ 301.7803-2. By the same token, we believe that granting an exception for an appeal in cases of tax-exempt status where a Technical Advice Memorandum has been issued, would unnecessarily narrow an already small area of appeal rights. Here again, if this is more a matter in need of statutory clarification, all parties would benefit from bringing it to the attention of Congress.

Furthermore, it seems clear that recent decisions in the Supreme Court of the United States (see *CIC Services, LLC v. IRS* and *Boechler v. Commissioner*) are beginning to define limits on the Service's contentions concerning its prerogatives under the Administrative Procedure Act, equitable tolling, and Tax Court jurisdictions, should recommend that the Service take a conservative position on exceptions granted to appeal rights. Here again, it is not only in the best interests of taxpayers, but also efficient government tax administration, to provide appeals mechanisms below the Tax Court level to the widest possible population of taxpayers.

The foregoing are among some of the concerns we would wish to discuss further at the public hearing November 29, 2022.

IRS is also requesting comments on proposals outside of the 24 specified appeals exceptions, specifically those surrounding 9100 relief and changes of accounting method. While the latter issue, especially, can have impacts on future years that might involve taxpayer controversies, we do not believe that the binary nature of decisions on these matters should automatically exclude them from appeal. In fact, this nature ought to bring into focus the contentions of taxpayers and the government to the point that they can be resolved expeditiously, with a relatively modest expenditure of time and costs.

At several points in the NPRM, the agency suggests that a lack of budgetary resources is informing its proposed exceptions to appeals rights under TFA.²⁰ We are sensitive to this reality at NTU, and – as noted above – have shared the agency's concerns in recent years that the Office is under-resourced. We believe that additional funding could help the Office of Appeals more effectively and fairly serve taxpayers, and limit the need for the exceptions outlined above. We also believe that additional funding for the Office would be an acceptable and welcome use of a portion of the \$80 billion in funding Congress has appropriated to the agency for use over the next 10 years under the Inflation Reduction Act (IRA) of 2022. In fact, additional spending to expand appeals rights and independent review of tax controversies could ultimately *save* the agency money over the long run, by obviating more expensive and protracted litigation over tax controversies. The agency could also see indirect savings from improved taxpayer compliance, should taxpayers have confidence in a more robust Independent Office of Appeals.

We are at your service to discuss how the agency can best utilize additional funding to expand taxpayer services at the Independent Office of Appeals – and to work with Congress to clear any obstacles to the utilization of IRA funds for use at the Office.

We would also like to echo procedural concerns offered by Roberson and Spencer in their September 2022 *National Law Review* piece, indicating that the agency may have already begun incorporating new exceptions to

²⁰ See, for example: "This review would not require the analysis of an entirely new dispute by Appeals, which would require significant resources" under exception 6; "Proposed § 301.7803–2(c)(11) promotes efficient and fair tax administration and enforcement of the internal revenue laws, leading to the consistent resolution of issues and conserving IRS and taxpayer resources" under exception 11; "There is no reason for Appeals to expend resources considering a Federal tax controversy that it cannot ultimately resolve" under exception 14; and "...a judicial decision in designated or withheld cases will provide notice to all taxpayers of any development in the law, leading to the early resolution of issues and conserving IRS and taxpayer resources" under exception 21. NTU does not necessarily object in whole or in part to these exceptions, but we raise them to note that the agency is preoccupied with resource constraints in proposing exceptions to taxpayers' appeals rights.

appeals rights in their Internal Revenue Manual even as the exceptions outlined in the NPRM are not *supposed* to take effect until 30 days after the publication of a final rule in the Federal Register:

“Despite the applicability date of 30 days after finalization, immediately following the publication of the proposed regulations, the IRS issued an internal memorandum to all IRS Appeals employees that essentially finalizes the proposed regulations with respect to the exceptions for challenges to IRS guidance (Appeals Memorandum). The Appeals Memorandum states that IRS Appeals ‘will not apply litigating hazards to arguments raised by a taxpayer regarding the validity of Treasury regulations or procedural validity of IRB notices or revenue procedures’ unless ‘there is an unreviewable decision from a federal court hold the regulation, IRB notice, or revenue procedure invalid.’”²¹

This is a puzzling position for the agency to take, given the agency and the Treasury Comment have *specifically* “request[ed] comments on” these proposed exceptions – a distinction only afforded exceptions 18, 19, and 20. We urge you to pause on exceptions 19 and 20, at minimum, given the outstanding questions and concerns generated by tax practitioners and experts in the non-governmental community (many of which are outlined above).

Finally, we wish to formally request the opportunity to speak at the agency’s public hearing on the NPRM, scheduled for November 29, 2022. An outline of the topics we wish to discuss includes the following:

- 1) exceptions to appeals rights on challenges to the validity of regulations or sub-regulatory guidance (e.g., exceptions 19 and 20);
- 2) additional exceptions proposed in the NPRM (as outlined above);
- 3) the budgetary constraints that may stand in the Office’s way of reducing proposed exceptions in the NPRM; and
- 4) the current legislative and litigatory environment, whose developments ought to affect the direction of this proposed rulemaking.

Please contact us at president@ntu.org and alautz@ntu.org for additional questions or comments, or regarding our request to speak at the agency’s public hearing. Thank you for your consideration.

Sincerely,

Pete Sepp, President
Andrew Lautz, Director of Federal Policy

CC: Keith L. Brau, Office of the Associate Chief Counsel (Procedure and Administration)

²¹ *Ibid.*