

BALANCING EFFICIENT IRS ADMINISTRATION AND TAXPAYER RIGHTS

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I. INTRODUCTION

In 2015, Congress amended section 7803(a) to require the IRS Commissioner to ensure that IRS employees act in accordance with statutory rights to taxpayers, thus formally codifying the list in IRS Publication 1, also known as the Taxpayer Bill of Rights (“TBOR”).¹ This move signified Congressional intent to balance the IRS’s long-standing goal of efficient tax administration with a new focus on fairness and transparency, and has also been lauded as a major step

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¹ Amanda Bartmann, *Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency’s Operations*, 69 THE TAX LAWYER 597, 598 (2016).

forward in pursuing taxpayer compliance.² However, there exists a strong tension between efficiency and fairness. An administration focused purely on efficiency will naturally seek to streamline procedures as much as possible, which may leave important interests such as privacy, confidentiality, appeals, and due process by the wayside.³

In recent years, the IRS has experienced severe budget cuts that have gravely impacted its ability to handle tax matters efficiently and accurately, while still prosecuting tax controversies through due process.⁴ As then-IRS Commissioner John Koskinen stepped down from his position in November 2017, he strongly criticized Congress's underfunding of the IRS.⁵ The outgoing Commissioner noted that chronic underfunding has crippled the agency deeply, highlighting antiquated technology systems and agency understaffing as particular areas of concern.⁶ As Commissioner Koskinen prepared for his retirement from the agency, he made an appeal to the public:

Look, 60 percent of our hardware and 22 percent of our software is out of date . . . We're down 7,000 revenue agents . . . Even our most aggressive critics agree that if you give us money, we'll get you more money back . . . Every 1 percent drop in compliance costs \$33 billion a year. The amount of money the government loses every day by underfunding the IRS is already five to eight times the amount

² *Id.*

³ U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-165, *IRS'S FISCAL YEARS 2017 AND 2016 FINANCIAL STATEMENTS* 29 ("Effective tax administration is the IRS's core responsibility. Providing efficient taxpayer services and enforcing the tax laws are the IRS's primary focuses. In recent years, the volume and complexity of legislative changes to the Tax Code have been a challenge. Often, the IRS must implement these legislative changes within limited timeframes that strain resources and disrupt workload planning.").

⁴ See Alan Rappeport, *Under Trump, an Already Depleted I.R.S. Could Face Deep Cuts*, N.Y. TIMES (Mar. 3, 2017), <https://www.nytimes.com/2017/03/02/us/politics/trump-mnuchin-irs.html>. See also Michael Grunwald, *The IRS is Building a Safe to House Trump's Tax Returns*, POLITICO (Nov. 15, 2017), <https://www.politico.com/magazine/story/2017/11/15/john-koskinen-taxes-215830> (noting that the IRS was down to 80,000 employees in 2017 from a peak of 130,000, and that the IRS has lost \$900 million in funding since 2010).

⁵ Joe Davidson, *IRS Chief Departs, Blasting Congress for Budget Cuts Threatening Tax Agency*, THE WASHINGTON POST (Nov. 7, 2017), <https://www.washingtonpost.com/news/powerpost/wp/2017/11/07/irs-chief-departs-blasting-congress-for-budget-cuts-threatening-tax-agency/>.

⁶ *Id.*; Grunwald, *supra* note 4, at 6 ("[If the IRS were to receive more resources,] first, we'd stop shrinking. We'd upgrade the IT system. We'd provide better service to taxpayers on the phone. We'd hire more revenue agents and criminal investigators—we don't need 20,000 more people, but definitely 5,000 or 6,000 more.").

of money it's saving on the budget.⁷

As the IRS continues to suffer further budget cuts, even in the face of expanded regulatory responsibilities, significant administrative and security concerns grow evermore exacerbated. Entrusted with the sensitive financial information of hundreds of millions of Americans, the IRS must also devote a not insignificant amount of resources to protecting such information from both domestic and international threats.

This Note examines how the IRS's lack of funding has exacerbated the agency's struggles to pursue both efficient tax administration while ensuring that taxpayer rights are respected and upheld. Part I of this Note summarizes the administrative and legislative background of the conceptual Taxpayer Bill of Rights, examining the states of affairs pre and post-2015 codification. Part II more closely examines the rights to taxpayer privacy and confidentiality. Part III details IRS tools and activities in which these rights may be most concerned, and Part IV addresses the IRS's current underfunding and how this underfunding significantly frustrates the IRS's ability to fulfill its mission.

A. *TBOR Overview & Codification in § 7803*

The United States tax system is one of voluntary compliance: individual taxpayers are expected to report and pay their taxes, subject to potential auditing from the IRS.⁸ "Taxpayer charters" are usually statements enumerating certain basic rights and obligations that both taxpayers and their respective tax administrations are expected to adhere to, while in the ordinary course of tax compliance.⁹ Though taxpayer charters have become the norm for most advanced countries, the United States has lagged significantly behind in this regard.¹⁰ Its official Taxpayer Bill of Rights was not issued as IRS Publication 1 until 2014, and remained uncoded until

⁷ Grunwald, *supra* note 4, at 5.

⁸ Encouraging Voluntary Compliance, IRM 20.1.1.2.1 (Feb. 2, 2011). *But see* United States v. Middleton, 246 F.3d 825, 840 (6th Cir. 2001) ("The word voluntary is not the equivalent of optional. To the extent that income taxes are said to be voluntary, they are only voluntary in that one files the returns and pays the taxes without the IRS first telling each individual the amount due and then forcing payment . . .").

⁹ OECD, *Taxpayers' Rights and Obligations – Practice Note*, at 3–4, CENTRE FOR TAX POLICY AND ADMINISTRATION TAX GUIDANCE SERIES (Aug. 2003), http://www.oecd.org/tax/administration/Taxpayers'_Rights_and_Obligations-Practice_Note.pdf.

¹⁰ See generally Keith Fogg & Sime Jozipovic, *How can Tax Collection be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities*, 69 THE TAX LAWYER 513, 539–560 (2016).

late 2015 when Congress incorporated it as Section 7803 of the Internal Revenue Code [“IRC” or “Code”].¹¹

Publication 1 and its section 7803 counterpart are not the first attempts the United States has made to create federal tax charters.¹² A laundry list was previously codified into the Internal Revenue Code in 1988, 1996, and 1998, although their scattered burial in the sea of IRC statutory provisions prevented the average layman from being properly informed of these rights.¹³ When the IRS conspicuously adopted the Taxpayer Bill of Rights (“TBOR”) in 2014, issued Publication 1 to all taxpayers, and posted Publication 1 Notices in IRS offices, information about these rights became drastically more accessible to the average taxpayer.¹⁴ Congress codified the rights listed in Publication 1 in 2015.¹⁵ In accordance with the passage of this legislation, the Internal Revenue Commissioner’s official duties now include ensuring that IRS employees “are familiar with and act in accord with taxpayer rights.”¹⁶

According to Professors Alice Abreu and Richard Greenstein, this codification has the potential to achieve more than simply formalizing these rights; rather, it has several practical effects that significantly advance the interests of taxpayers.¹⁷ Under traditional statutory construction principles, “a statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void, or insignificant.”¹⁸ As such, one should not interpret the TBOR’s addition to section 7803 as a mere formality, but as a clear sign of Congress’ intent to expand the

¹¹ The IRS initially released the TBOR as Publication 1. 1 NAT’L TAXPAYER ADVOCATE 2016 ANN. REP. TO CONG. 98, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1_MSP_05_TBOR.pdf.

¹² *Your Rights as a Taxpayer: The Taxpayer Bill of Rights*, IRS PUBLICATION 1 REV. 9-2017, <https://www.irs.gov/pub/irs-pdf/p1.pdf> (last visited Feb. 2, 2019); IRC § 7803 (2018).

¹³ See Omnibus Bill of Rights, Pub. L. No. 100-647, 102 Stat. 3342, 3730 (1988) [hereinafter “TBOR 1”]; Taxpayer Bill of Rights 2, Pub. L. No. 104-168, 110 Stat. 1452 (1996) [hereinafter “TBOR 2”]; Taxpayer Bill of Rights 3, Pub. L. No. 105-206, tit. III, 112 Stat. 685 (1998) [hereinafter “TBOR 3”].

¹⁴ Bartmann, *supra* note 1, at 598 (“Leading up to the IRS’s adoption of the TBOR, taxpayers’ awareness of their rights was significantly lacking. A 2012 survey conducted for the Taxpayer Advocate Service (TAS) found fewer than half of U.S. taxpayers believed they have rights before the IRS, and only 11% said they knew what those rights were.”).

¹⁵ I.R.C. § 7803(a)(3) (2018). See also Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, Div. Q, § 401 (2015).

¹⁶ I.R.C. § 7803(a)(3) (2018).

¹⁷ Alice G. Abreu & Richard K. Greenstein, *Embracing the TBOR*, 157 TAX NOTES 1281, 1282 (Nov. 27, 2017), <https://s3.amazonaws.com/pdfs.taxnotes.com/2017/157tn1281.pdf>.

¹⁸ *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

breadth of the Commissioner's duties.¹⁹ Furthermore, section 7803(a)'s inclusion of the TBOR creates a normative basis for taxpayers to demand legal remedies when their rights are violated.²⁰ Quoting the Supreme Court, Professors Abreu and Greenstein argue that the formal enactment of taxpayer rights naturally supports the taxpayers' pursuit of legal remedies when their rights are violated.²¹ Finally, even though the IRS claims that Publication 1 "takes the multiple existing rights embedded in the tax code and groups them into ten broad categories [to make] them more visible and easier for taxpayers to find," Abreu and Greenstein argue that codification of the TBOR may have created new rights for taxpayers.²² Under the "contentious view" of the taxpayer-government relationship, where "even the most benevolent government poses a constant potential threat to individual liberty," the government's duty to act or refrain from acting in a certain manner may not always or necessarily entail corresponding enforceable rights for individuals.²³ Since the language of section 7803(a) explicitly imposes an affirmative duty on tax officials to respect taxpayer rights, taxpayers no longer bear the burden of showing that these rights create legally binding obligations on the government.²⁴

In addition to Abreu and Greenstein's arguments, it is also important to note that section 7803(a)'s statutory inclusion of the TBOR gives taxpayers clearer access to pursuing legal redress under section 7433.²⁵ In the past, individuals have been quite unsuccessful in litigating violations of their rights as taxpayers.²⁶ Now that the

¹⁹ Abreu & Greenstein, *supra* note 17, at 1290.

²⁰ *Id.* at 1294-95. *See also* IRC § 7803(a).

²¹ *Marbury v. Madison*, 5 U.S. 137, 163 (1803) ("The Government of the United States has been emphatically termed a government of law, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right."); Abreu & Greenstein, *supra* note 17, at 1295.

²² I.R.S. News Release IR-2014-72 (June 10, 2014), <https://www.irs.gov/newsroom/irs-adopts-taxpayer-bill-of-rights-10-provisions-to-be-highlighted-on-irsgov-in-publication-1>.

²³ Abreu & Greenstein, *supra* note 17, at 1299-1300.

²⁴ Abreu & Greenstein, *supra* note 17, at 1301.

²⁵ I.R.C. § 7433 (2017) ("If, in connection with any collection of Federal tax with respect to a taxpayer, any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregards any provision of this title, or any regulation promulgated under this title, such taxpayer may bring a civil action for damages against the United States . . .").

²⁶ This historical lack of success has commonly been associated with failure to comply with pleading requirements, which can in turn be often attributed to lacking awareness of taxpayer rights. *See generally* Guthery v. U.S., 562 F. Supp. 2d 136 (D.D.C. 2008); White v. Comm'r, 899 F. Supp. 767 (D. Mass. 1995) (holding that *pro se* taxpayers' Section 7433 claims were inadequately pleaded, failing to overcome defense of sovereign immunity).

TBOR has been incorporated into the Code, taxpayers may point directly to section 7803(a) when alleging such violations; in turn, this should bring the I.R.S. closer to ensuring that taxpayer rights are respected.

B. The National Taxpayer Advocate

Despite the TBOR's incorporation into Publication 1 and its codification into section 7803, there are still many hurdles to overcome. Over the last few years, the National Taxpayer Advocate's Annual Report to Congress has repeatedly stressed that administrative compliance with TBOR continues to straggle, both with spreading awareness to taxpayers and upholding these enumerated rights in its ordinary operations.²⁷ At the same time, the Taxpayer Advocate Service, known also as the Office of the Taxpayer Advocate (hereinafter "TAS"), has recognized the position that "the TBOR is not made up of performance standards itself," but rather is "used to develop performance standards and identify which performance standards may indicate success in furthering the charter's principles."²⁸

The TAS operates as an independent organization within the IRS "that helps individual and business payers resolve problems that have not been resolved through normal IRS channels and addresses large-scale, systemic issues that affect groups of taxpayers."²⁹ Congress created the TAS when it passed TBOR 2 in 1996, and further expanded its role with TBOR 3 in 1998.³⁰ Today, the TAS operates local chapters throughout the country, which provide guidance to individual taxpayers. The TAS department and its chapters operate under the direction of the National Taxpayer Advocate, who submits annual reports to Congress, advocating for policy and legislative changes on behalf of taxpayer interests.³¹ Since 2007, Nina Olson, the incumbent National Taxpayer Advocate, has called for the IRS to formally adopt, and for Congress to implement, the current iteration of TBOR into the Code.³² Following the 2015 codification, the

²⁷ NAT'L TAXPAYER ADVOCATE, 2016 ANN. REP. TO CONG. 99 (2016), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1.pdf [hereinafter 2016 REPORT].

²⁸ *Id.*

²⁹ Bartmann, *supra* note 1, at 597 n.1.

³⁰ See I.R.C. § 7803(c).

³¹ I.R.C. § 7803(c)(2).

³² Nina E. Olson, *Toward a More Perfect Tax System: A Taxpayer Bill of Rights as a Framework for Effective Tax Administration*, at 1 (Nov. 4, 2013), <http://www.taxpayeradvocate.irs.gov/2013-annual-report/downloads/Toward-a-More-Perfect-Tax->

National Taxpayer Advocate now recommends that the TBOR be adopted as IRC section 1 to further solidify its status as a fundamental part of the Code.³³

Although the TAS is technically a part of the IRS, significant mechanisms exist to protect the TAS from undue influence. An appointee to the office of National Taxpayer Advocate must not have worked for any other part of the IRS for at least two years prior to appointment and may not work for the IRS for another five years upon leaving the office.³⁴ Additionally, the TAS has a standing policy to not disclose taxpayer information to the IRS without due cause.³⁵ This serves several purposes, enumerated in the Internal Revenue Manual:

- A. To strengthen TAS's independence and neutrality;
- B. To encourage taxpayers to trust and seek help from TAS without fear of retaliation by other IRS employees;
- C. To encourage taxpayers to freely communicate with TAS in order to resolve their problems; and
- D. To calm taxpayers' fears that information provided to TAS will be used to the taxpayers' detriment.³⁶

The TAS is specifically designed for the benefit of taxpayers. The position's statutory duties primarily include assisting taxpayers in resolving disputes with the IRS, conducting research to identify areas where taxpayer interests have been compromised or require assistance, and proposing administrative and legislative changes to the IRS and Congress to benefit taxpayers.³⁷ The TAS's role as a taxpayer ombudsman is further reflected by its only two statutory qualifications for the National Taxpayer Advocate: "(1) a background in customer service as well as tax law, and (2) experience in representing individual taxpayers."³⁸

However, TAS's duty of keeping taxpayer confidences is by no

System-A-Taxpayer-Bill-of-Rights-as-a-Framework-for-Effective-Tax-Administration.pdf. See also NAT'L TAXPAYER ADVOCATE, 2015 ANN. REP. TO CONG. 284 (2015), <http://taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC>

/ARC15_Volume1_LR_Introduction.pdf [hereinafter *2015 Full Report*].

³³ NAT'L TAXPAYER ADVOCATE, NAT'L TAXPAYER ADVOCATE PURPLE BOOK: COMPILATION OF LEGISLATIVE RECOMMENDATIONS TO STRENGTHEN TAXPAYER RIGHTS AND IMPROVE TAX ADMINISTRATION 5-6 (2017), https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_PurpleBook.pdf [hereinafter *Purple Book*].

³⁴ I.R.C. § 7803(c)(1)(B)(iv).

³⁵ IRM 13.1.5.3(4) (Feb. 2, 2011) (Other Federal Laws or Policies Relevant to TAS's Disclosure of Taxpayer's Information When Working a TAS Case).

³⁶ *Id.*

³⁷ I.R.C. § 7803(c)(2)(A).

³⁸ I.R.C. § 7803(c)(1)(B)(iii).

means absolute. It is not required to keep confidentiality of taxpayer's information from the IRS; instead, this is maintained "at the taxpayer advocate's discretion."³⁹ While TAS policy generally favors non-disclosure, this policy is superseded in instances where the TAS is required to make certain disclosures for standard procedure, emergencies, or health and safety reasons.⁴⁰

Furthermore, TAS employees (as well as any other federal employee) are required to report criminal or fraudulent violations of Internal Revenue laws to both the Secretary of the Treasury and the IRS Commissioner.⁴¹ This duty to report arises after the taxpayer refuses to cooperate with the TAS in complying with Internal Revenue laws in a timely manner.⁴² It is also important to note that the TAS's duty of keeping taxpayer confidences under §7803 applies primarily to prevent regular disclosures to the IRS. The TAS is still bound to adhere to requests under the Freedom of Information Act, subpoenas, and court orders.⁴³

C. Administrative Deference and Chevron

Under a principle articulated in *Zimmerman v. Commissioner* in 1978, many practitioners considered the TBOR in Publication 1 to be merely persuasive and not binding law.⁴⁴ Even with statutory codification, practitioners still debate as to whether this problem has been fully resolved.

Further, many still wonder as to how the IRS, as an administrative agency, should be allowed to interpret and enforce these rights.⁴⁵ Generally, administrative law doctrine draws a distinction between legislative rules, are legally binding, and non-legislative or interpretive rules, which have no such effect.⁴⁶

³⁹ I.R.C. § 7803(c)(4)(A)(iv).

⁴⁰ IRM 13.1.5.4(1) (Feb. 2, 2011).

⁴¹ Treas. Reg. §301.7214-1 (1960).

⁴² IRM 13.1.5.3(3)(C) (Feb. 2, 2011).

⁴³ IRM 13.1.5.5(5) (Feb. 2, 2011); *see also* I.R.C. § 7803(c)(4)(A)(iv).

⁴⁴ *Zimmerman v. Comm'r*, 71 T.C. 367, 371 (1978), *aff'd* 614 F.2d 1294 (2d Cir. 1979) ("[a]uthoritative sources of Federal tax law are in the statutes, regulations, and judicial decisions and not in . . . informal publications [of the IRS]."). *Accord* *Weiss v. Comm'r*, 147 T.C. 179, 196 (2016) ("The IRM lacks the force of law and does not create rights for taxpayers."); *see* Stephen W. Mazza & Tracy A. Kaye, *Taxpayer Rights in the United States: Balancing Taxpayer Protections and Compliance*, in *THE CONFEDERATION FISCALE EUROPÉENNE AT 50 YEARS*, at 279 (2013).

⁴⁵ *See* Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1538 (2006).

⁴⁶ Richard E. Levy & Robert L. Glicksman, *Agency-Specific Precedents*, 89 TEX. L. REV. 499, 516 (2011).

Legislative rules such as United States Treasury regulations are evaluated under the *Chevron* two-step test for administrative deference. For over twenty years following *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, the circuits were split over whether *Chevron* deference should apply to judicial review of Treasury regulations.⁴⁷ In *United States v. Mead Corporation*, the Supreme Court held that administrative regulations may be entitled to either mandatory *Chevron* deference or the more discretionary *Skidmore* deference but did not comment specifically on which level of deference applied to Treasury regulations.⁴⁸ Practitioners called for more specific clarification, which the Supreme Court provided in a later 2011 case, *Mayo Foundation for Medical Education and Research v. United States*. In *Mayo*, the Supreme Court affirmed that Treasury regulations, insofar as they are used to promulgate the IRC, are accorded *Chevron* deference.⁴⁹

Under the *Chevron* doctrine, in a case involving a controversy over a federal statutory scheme, courts apply a two-step analysis: (1) if Congressional intent with regard to the matter has been unambiguously expressed, then this ends the matter; (2) if, however, Congress has not addressed the issue, then the court “may not substitute its own construction of a statutory provision for a reasonable interpretation made by [the agency entrusted with promulgation of the statute in question].”⁵⁰ In its rationale, the Supreme Court explained that where Congress leaves an explicit statutory gap or ambiguity, “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation”; as long as an administrative interpretation is not “arbitrary, capricious, or manifestly contrary to the statute,” the interpretation will control.⁵¹

The IRS Manual distinguishes between legislative and interpretive rules, stipulating that “[where] Congress simply provided end result[sic], without any guidance as to how to achieve the desired goal, then regulations promulgated to achieve that goal are considered to be legislative,” whereas “[i]f Congress provided specific rules and merely left gaps for the Secretary to fill,

⁴⁷ *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984); Hickman, *supra* note 45, at 1538.

⁴⁸ *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).

⁴⁹ *Mayo Found. for Med. Educ. & Research v. U.S.*, 562 U.S. 44, 56 (2011); *see e.g.*, Hickman, *supra* note 45 at 1538.

⁵⁰ *Chevron*, 467 U.S. at 842-44.

⁵¹ *Id.* at 844.

regulations filling those gaps are considered interpretative.”⁵² Accordingly, the APA section in the Internal Revenue Manual (“IRM”) specifically notes: “IRS/Treasury regulations have the force and effect of law even though they are interpretative regulations.”⁵³

Unlike legislative statutes or administrative regulations, however, IRS publications and fact sheets are agency policies, and are not on their own considered legally-binding.⁵⁴ Furthermore, the IRM is considered to be a document that only governs the internal workings of the IRS, and “does not have the force of law and does not confer rights upon taxpayers.”⁵⁵ When the IRM was first introduced in 2014, the modern TBOR existed only in an IRS Publication and the IRM itself, but not in any Treasury Regulation that would give it legal force and effect.⁵⁶ However, after the TBOR’s was codified into section 7803, the IRS is now bound by more than its own impetus to uphold taxpayer rights.⁵⁷

II. TAXPAYER RIGHTS

A. *The Right to Privacy*

The IRS has adopted the right to privacy in its formalized TBOR, stipulating:

Taxpayers have the right to expect that any IRS inquiry, examination, or enforcement action will comply with the law and be no more intrusive than necessary, and will respect all due process rights, including search and seizure protections and will provide, where applicable, a collection due process hearing.⁵⁸

The right of privacy is largely a negative right against the IRS, where in the event of a tax controversy, taxpayers may expect that the IRS

⁵² IRM 32.1.1.2.8 (Aug. 21, 2018).

⁵³ IRM 32.1.5.4.7.5.1 (Aug. 21, 2018).

⁵⁴ STEVE JOHNSON ET AL., CIVIL TAX PROCEDURE 25 (Paul L. Caron et al. eds., 3rd ed. 2016) (“Although the press release calls these rights ‘cornerstone,’ ‘fundamental,’ and ‘important,’ they are matters of administrative policy only and are not judicially enforceable.”).

⁵⁵ *Fargo v. Comm’r*, 447 F.3d 706, 713 (9th Cir. 2006).

⁵⁶ *Your Rights as a Taxpayer: The Taxpayer Bill of Rights*, IRS PUBLICATION 1 REV. 9-2017, <https://www.irs.gov/pub/irs-pdf/p1.pdf> (last visited Feb. 2, 2019).

⁵⁷ I.R.C. § 7803(a)(3) (2017). *See also*, Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, Div. Q, § 401 (2015); Abreu & Greenstein, *supra* note 17, at 1290.

⁵⁸ *Taxpayer Bill of Rights #7: The Right to Privacy*, IRS FACT SHEETS FS-2016-15 (March 2016), <https://www.irs.gov/newsroom/taxpayer-bill-of-rights-the-right-to-privacy> (last visited Feb. 2, 2019).

will not unnecessarily encroach upon their private lives.⁵⁹ In a fact sheet published in 2016, the IRS elaborates further on these limits, which relate to procedures in both tax collections and disputes, stating that, with regard to collection, the IRS may not garnish the entirety of a taxpayer's wages.⁶⁰ Prior to the 2017 Tax Cuts and Jobs Act ("TCJA"), administrative levies could not collect on an amount greater than the sum of the standard deduction plus the personal exemption, or about \$10,400; from 2018 onward, this number has been increased to \$12,000 for individuals and \$24,000 for married couples.⁶¹ In a similar vein, the IRS must first obtain court approval before administratively seizing a taxpayer's personal residence, through a burdensome showing of "no reasonable alternative to collection of tax debt."⁶² Section 6334 details extensive restrictions on the IRS's ability to impose levies on taxpayers, lending additional statutory protection.⁶³

There are also positive aspects to taxpayers' right to privacy. For example, taxpayers need not submit additional financial documentation when applying for an Offer-in-Compromise ("OIC") when there is a doubt as to liability.⁶⁴ According to Treasury Regulations, "doubt as to liability exists where there is a genuine dispute as to the existence or amount of the correct tax liability under the law."⁶⁵ In addition, the IRS is usually required to accept an offer in compromise "when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential."⁶⁶ In reading the OIC acceptance requirement in conjunction with the taxpayer right to privacy, one reaches the logical conclusion that a taxpayer may seek to settle a disputed tax liability with the IRS solely on the merits of the settlement offer and facts surrounding the controversy without the need to submit additional financial information that might unduly influence the IRS's decision to accept the offer.⁶⁷ As mentioned above, should the

⁵⁹ *Id.* See also Abreu & Greenstein, *supra* note 17, at 1301.

⁶⁰ *Id.*

⁶¹ *Id.* The personal exemption has since been repealed, and the standard deduction has been increased accordingly. Tax Cuts and Jobs Act, H.R. 1, 115th Cong. § 1003 (2017).

⁶² *Id.*

⁶³ I.R.C. § 6334.

⁶⁴ *Taxpayer Bill of Rights #7: The Right to Privacy*, IRS FACT SHEETS FS-2016-15 (March 2016), <https://www.irs.gov/newsroom/taxpayer-bill-of-rights-the-right-to-privacy> (last visited Feb. 2, 2019).

⁶⁵ Treas. Reg. § 301.7122-1(b)(1) (2002).

⁶⁶ IRM 5.8.1.2.3 (May 5, 2017).

⁶⁷ *Taxpayer Bill of Rights #7: The Right to Privacy*, IRS FACT SHEETS FS-2016-15 (March 2016), <https://www.irs.gov/newsroom/taxpayer-bill-of-rights-the-right-to-privacy>

IRS overstep its bounds and infringe on a taxpayer's right to privacy while pursuing a collection action, Section 7433 provides a statutory vehicle for such taxpayers to pursue civil damages.⁶⁸

The right to privacy is ostensibly meant to guarantee taxpayers assurance that information about their financial situation will not be intruded upon without due cause; however, the IRS currently remains far from full compliance with this right. Over the past several years, Nina Olson's Annual Congressional Report has detailed various complications, wherein the IRS's current administrative practices fail twofold: (1) taxpayers are not always informed of the rights they enjoy under TBOR, and (2) IRS employees may sometimes violate this right to privacy in the interest of expediency, despite their best intentions.⁶⁹

For instance, the IRS uses a mechanism dubbed the "Pre-Refund Wage Verification Program" to automatically freeze or withhold tax refunds when it "detects potentially false wages and withholding" from the taxpayer.⁷⁰ Although the program is useful for vetting out potentially-fraudulent filers and eases the administrative burden on IRS employees, it is also prone to identifying false positives, which can result in withholding refunds from legitimate taxpayers; this in turn requires taxpayers to actively pursue the IRS to obtain their rightful refunds.⁷¹ To verify that their returns are indeed accurate, taxpayers may be required to open their books and allow the IRS to investigate further into their private lives than is normally necessary for ordinary returns.⁷² In response to the TAS's recommendation that the IRS take steps to improve the detection of false positives and perform regular reviews of the program for maintenance, the IRS has begun implementing regular reviews of the program and its false detection rate and has pledged to periodically share this information with the TAS.⁷³

B. The Right to Confidentiality

Throughout Donald Trump's presidential campaign and his

(last visited Feb. 2, 2019).

⁶⁸ I.R.C. § 7433 (2018).

⁶⁹ See e.g., NAT'L TAXPAYER ADVOCATE, 2015 ANN. REP. TO CONG. REP. CARD, at 11, 44, 55-57, 63, 90 (2015), https://www.irs.gov/pub/tas/2015arc_reportcard.pdf [hereinafter *2015 Report Card*] (listing various administrative practices that actually or potentially infringe taxpayers' rights to privacy).

⁷⁰ *Id.* at 11.

⁷¹ NAT'L TAXPAYER ADVOCATE, *supra* note 69, at 11.

⁷² I.R.C. § 7602 (2018).

⁷³ NAT'L TAXPAYER ADVOCATE, *supra* note 69, at 11-12.

presidency to this point, great controversy has arisen over his refusal to release his tax returns for public scrutiny, breaking with years of presidential tradition.⁷⁴ Despite the political backlash of this action, the IRS has consistently upheld President Trump's right to confidentiality, refusing to comment on any of his tax affairs.⁷⁵ In an interview with *Politico Magazine*, then-Commissioner John Koskinen refused to confirm or deny whether the IRS was auditing the President's tax returns:

I had no authority to look at anybody's returns. Nobody can, unless you're authorized for the process of examination . . . Anyone who looks at anyone's return is subject to termination. We take this stuff seriously . . . But people need to be confident in that. Even with our limited resources, we'll do a million audits this year.⁷⁶

The right to confidentiality enjoys substantial statutory entrenchment: in addition to section 7803's mandate, section 6103 also directs that taxpayer returns and return information be generally kept confidential, subject to certain exceptions.⁷⁷ Generally, this means that the IRS may not disclose a taxpayer's information with third parties without the taxpayer's permission, except as otherwise permitted by law.⁷⁸

In addition to mere nondisclosure of taxpayer returns and return information, IRS employees are also bound from contacting third parties (such as one's employer, neighbors, or bank) in connection with adjustment or collection activities without providing "reasonable notice in advance" to the taxpayer.⁷⁹ According to the IRS's fact sheet:

Taxpayers have the right to expect that any information they provide to the IRS will not be disclosed unless authorized by the taxpayer or by law. Taxpayers have the right to expect appropriate action will be taken against employees, return preparers, and others who wrongfully use or disclose taxpayer

⁷⁴ *Here's What We Do and Do Not Know About President Trump's Tax Returns*, USA TODAY (Mar. 15, 2017, 6:44 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/03/14/heres-what-we-know-about-trumps-tax-returns/99192032/>.

⁷⁵ Grunwald, *supra* note 4.

⁷⁶ Grunwald, *supra* note 4.

⁷⁷ See I.R.C. §§ 6103, 7803 (2018).

⁷⁸ *Taxpayer Bill of Rights: #8, The Right to Confidentiality*, INTERNAL REVENUE SERVICE (March 2016), <https://www.irs.gov/taxpayer-bill-of-rights/taxpayer-bill-of-rights-the-right-to-confidentiality>.

⁷⁹ *Id.*

return information.⁸⁰

Like the right to privacy, the right to confidentiality is a negative right, imposing an affirmative duty upon the IRS to perform in such a manner that does not violate the taxpayer's rights.⁸¹ Section 6103(a) provides an extensive list of parties whose actions are restricted, including federal employees and officers, state employees and officers, government contractors, and other various persons with access to taxpayer return information.⁸²

Under section 6103, the right to confidentiality in this context does not prohibit the IRS from sharing taxpayer return information, as needed, with other parts of the government: state tax agencies may submit requests in writing for their own tax administration purposes; law enforcement agencies may request information when investigating and prosecuting non-tax criminal laws; and other federal employees may request where required to discharge their duties.⁸³ The IRS is also permitted to disclose to the taxpayer's designated legal representative or other individuals with power of attorney or guardianship.⁸⁴ Persons with material interests in the taxpayer's return information may also submit written requests for disclosure from the IRS: in the case of an individual, the taxpayer's spouse or children when filing jointly; in the case of a partnership, members of the partnership at the time of the return; and in the case of a corporation, designees of the board of directors, principal officers, and/or significant shareholders.⁸⁵

Even under the right to confidentiality, the list of persons and organizations to whom the IRS may permissibly disclose an individual's tax return information is extensive. Since most of these exceptions require a militating cause in order to request information, most law-abiding taxpayers need not fret. However, high-profile individuals and large corporations may be more concerned about information leaks or impermissible disclosures, such as where tax preparers or others with access may lack the proper security precautions or even have incentive to disclose sensitive information.⁸⁶

⁸⁰ *Id.*

⁸¹ *See* Abreu & Greenstein, *supra* note 17, at 1301.

⁸² I.R.C. § 6103(a) (2018).

⁸³ I.R.C. § 6103 (2018); *see, e.g.*, I.R.C. §§ 6103(f) (pertaining to Congressional Committees), 6103(g) (pertaining to POTUS and other executive employees), 6103(h) (2018) (pertaining to Departments of the Treasury and Justice).

⁸⁴ I.R.C. § 6103(c), 6103(e)(2), 6103(e)(6) (2018).

⁸⁵ I.R.C. § 6103(e)(1) (2018).

⁸⁶ *See, e.g.*, Gregg Birnbaum, *Who is Leaking Donald Trump's Tax Returns?*, NBC NEWS

Section 7216 stipulates criminal penalties for tax professional who prepare tax returns that violate section 6103's requirements: a misdemeanor conviction, accompanied by a fine of up to \$1,000 and/or a prison sentence of one year.⁸⁷ Section 7213 holds much heavier penalties for government employees, to can be subjected to automatic termination, as well as a \$5,000 fine and/or a five-year prison sentence for a single unauthorized disclosure.⁸⁸ In addition to criminal penalties, section 7431 specifies that such violators may also be liable for hefty civil damages to compromised taxpayers.⁸⁹

III. PURSUING TAX ADMINISTRATION EFFICIENCY AND VOLUNTARY COMPLIANCE

Although the TBOR applies in many different circumstances, many taxpayers are likely familiar with deficiency assessments and collection actions. In addition to the taxpayers' rights to "challenge the IRS's position" and to "a fair and just tax system," taxpayers' rights to privacy and confidentiality may also be implicated when they seek to appeal inaccurate assessments, remedy tax liens, or reach alternative arrangements such as payment plans or settlement offers.

A. *Administrative Tools: Federal Tax Liens and Levies*

After the IRS has assessed a tax deficiency and delivered a notice of deficiency to the taxpayer, a federal tax lien is the IRS's usual first exercise of collecting power in response to non-payment.⁹⁰ The IRS uses three methods to enforce a federal tax lien: (1) administrative wage levy, (2) administrative property seizure, and (3) judicial collection.⁹¹ Though the IRS may seek collection through suit even without creating the lien, the lien is usually preferred for its administrative expediency.⁹²

(Mar. 15, 2017), <https://www.nbcnews.com/news/us-news/who-leaking-donald-trump-s-tax-returns-n733661> (examining the circumstances around the March 14, 2017, leak of President Trump's 2005 tax return).

⁸⁷ I.R.C. § 7216(a)(2) (2018).

⁸⁸ I.R.C. § 7213(a) (2018).

⁸⁹ I.R.C. § 7431 (2018).

⁹⁰ I.R.C. § 6321 (2018). *See also* Mather & Weisman, *Federal Tax Collection Procedure – Liens, Levies, Suits, and Third Party Liability*, 637-2nd T.M., § I: Introduction (Bloomberg Law).

⁹¹ I.R.C. §§ 6321, 6331.

⁹² *U.S. v. Nashville, Chattanooga, & St. Louis Ry.*, 249 F. 678, 685 (6th Cir. 1918) (“[W]here a tax of a fixed percentage is imposed by statute [and its amount or value] can be ascertained and determined, on evidence, by a court, a suit for the tax will lie [with the government], without an assessment.”).

Typically, “the Government may collect taxes of a delinquent taxpayer ‘by levy upon all property and rights to property . . . belonging to such person.’”⁹³ After property has been levied, any person in possession of such encumbered property must surrender it to the IRS.⁹⁴ If, however, the IRS assesses a liability as “fully satisfied” or “legally unenforceable,” Section 6325 requires related property liens to be released within thirty days.⁹⁵ Although the IRS has a wide array of tools available to enforce its collection duties, it must adhere to Collection Due Process and must offer alternative arrangements, such as Offers-in-Compromise, for taxpayers with unique situations.⁹⁶

i. Restriction on Administrative Tools: Collection Due Process (CDP)

The concept of Collection Due Process (CDP) was created in 1998 to provide taxpayers with the right to appeal lien and levy actions from the IRS.⁹⁷ According to National Taxpayer Advocate’s Annual Congressional Report, “Congress intended the IRS to provide meaningful Collection Due Process (CDP) hearings to taxpayers, weighing their concerns that any collection action be no more intrusive than necessary against the government’s need for the efficient collection of taxes.”⁹⁸ Since this balancing test forms the heart of a CDP hearing, TAS has consequently called upon the IRS to adopt a formal policy statement on this CDP balancing test in accordance with congressional intent.⁹⁹

Generally under CDP principles, the IRS must serve a formal

⁹³ United States v. Nat’l Bank of Commerce, 472 U.S. 713 (1985) (quoting I.R.C. § 6331(a)).

⁹⁴ *Id.* See also I.R.C. § 6332(a).

⁹⁵ I.R.C. § 6325(a).

⁹⁶ Should the IRS negligently or knowingly fail to provide proper notice or timely release these liens, taxpayers may seek compensatory damages through section 7432; I.R.C. § 7432 (1988). However, taxpayers have been largely unsuccessful in seeking relief under this provision, often due to their failure to first fully exhaust administrative remedies or because the courts have interpreted fairly wide latitude. See *e.g.*, Hook v. U.S., 624 Fed. Appx. 972 (10th Cir. 2015) (dismissing for failure to exhaust administrative remedies); Clark v. United States, 462 Fed. Appx. 719 (9th Cir. 2011) (dismissing for failure to exhaust administrative remedies); Don Johnson Motors, Inc. v. U.S., 453 Fed. Appx. 526 (5th Cir. 2011) (finding that the IRS properly issued notices of intent to levy and tax lien and taxpayer failed to exhaust remedies).

⁹⁷ *Collection Due Process*, PHILIP C. COOK LOW-INCOME TAXPAYER CLINIC, <http://taxclinic.law.gsu.edu/collections-process/collection-due-process/> (last visited Feb. 2, 2019).

⁹⁸ 2015 Full Report, *supra* note 32 at 93.

⁹⁹ 2015 Full Report, *supra* note 32 at 93-94.

notice of a federal tax lien filing on the taxpayer within five business days of filing, pursuant to Section 6320.¹⁰⁰ This notice must be served in a concrete manner which is either in person, left at the taxpayer's dwelling or usual place of business, or sent by certified mail. This notice must also detail the taxpayer's amount of unpaid tax, the taxpayer's right to request an administrative hearing, the process for administratively appealing the lien, and the procedures for curing the lien.¹⁰¹

Similar to the federal tax lien, a property levy is also a powerful and convenient administrative tool that removes the onus of seeking payment from the IRS and transfers the burden upon the delinquent taxpayer to seek redress.¹⁰² To prevent abuse of property levy, the Code imposes notice requirements before it may be used.¹⁰³ Generally, a formal notice of intent to levy must be served on the delinquent taxpayer at least thirty days before a taxpayer's wages or property are levied, and it must include detailed information as to the levy process, availability of administrative appeals, and methods of curing the levy.¹⁰⁴

Interestingly, despite the taxpayer's innate interest in privacy, it sometimes to one's benefit to disclose one's financial condition to the IRS. Following a 2009 Tax Court decision, the IRS is now required to release levies upon determining that such levies would cause a taxpayer undue economic hardship (a point discussed further below), regardless of whether the taxpayer was current on his/her tax returns.¹⁰⁵ Both tax practitioners and the TAS hailed this as a major win for taxpayers. TAS then worked with the IRS to revise the Pre-Levy Considerations section of the IRM to ensure that taxpayers receive their rights to a fair and just tax system.¹⁰⁶ The IRM now specifically requires that IRS employees consider several factors

¹⁰⁰ *Collection Due Process (CDP) FAQs*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/compliance/appeals/collection-due-process-cdp-faqs> (last visited Feb. 2, 2019).

¹⁰¹ I.R.C. § 6320(a) (2018). *See also* I.R.C. § 6326 (2018).

¹⁰² I.R.C. § 6331 (2018).

¹⁰³ I.R.C. § 6331(d) (2018).

¹⁰⁴ I.R.C. § 6331(d)(2) (2018). *See also* I.R.C. § 6331(d)(3) (2018) (removing notice requirements where the Treasury Secretary finds that collection of tax is in jeopardy).

¹⁰⁵ *Vinatieri v. Comm'r*, 133 T.C. 392, 401-02 (2009) (agreeing with IRS finding of economic hardship where petitioner's medical condition imposed significant expenses and permitted only part-time employment, and petitioner's assets totaled less than \$1000). *See also* I.R.C. § 6343(a)(1)(D). *But see* *Link v. Comm'r*, 2013 WL 608396, at *5 (2013) (distinguishing *Vinatieri* and refusing to release levy where reasonable IRS determination disagreed with petitioner's economic hardship claim).

¹⁰⁶ *Bartmann*, *supra* note 1, at 619-20.

before implementing a property levy on taxpayers, including whether such a levy would cause economic hardship due to the taxpayer's known financial condition, the taxpayer's responsiveness to attempts at contact and collection, the taxpayer's compliance history, and the taxpayer's current status and efforts in paying current taxes.¹⁰⁷ An additional note in the Manual further instructs employees to refrain from issuing levies as a way to secure other compliance, such as filing missing tax returns, when the Service determines that the levy would cause economic hardship.¹⁰⁸

Once the IRS has imposed a property levy, the taxpayer generally may not appeal the amount of unpaid tax due without submitting new information that was not previously considered in the initial audit.¹⁰⁹ Instead, the taxpayer must either file for a refund (after paying the amount due to cure the assessed deficiency) or file an "Offer-in-Compromise, Doubt as to Liability."¹¹⁰ The claim for refund begins the administrative review process anew; if the IRS determines that the levy was wrongfully made, it will either return the levied property or the sum of money received in initial satisfaction of the levy.¹¹¹ On the other hand, a pending OIC will forestall the IRS from placing future levies with respect to the liability in question, though it will not prevent potential interest and penalties from accruing.¹¹² In the event that the IRS rejects a taxpayer's OIC, the IRS will further refrain from levying against the taxpayer's property for thirty days following rejection, as well as for the period in which an administrative appeal of the rejection is considered.¹¹³

The TAS has also noted that "[t]he balancing test also validates the taxpayer's right to privacy by taking into account the invasiveness of enforcement actions and the due process rights of the taxpayer."¹¹⁴ Upon review of the IRS's CDP procedures and examination of case law, the TAS found that the IRS Office of Appeals failed to properly account for the CDP balancing test, especially with regard to legitimate taxpayer concerns about the

¹⁰⁷ IRM 5.11.1.3.1(2) (Nov. 9, 2011).

¹⁰⁸ *Id.*

¹⁰⁹ *Collection Due Process (CDP) FAQs*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/compliance/appeals/collection-due-process-cdp-faqs> (last visited Nov. 10, 2017).

¹¹⁰ *Id.*

¹¹¹ *See* I.R.C. § 6343 (2018).

¹¹² Treas. Reg. § 301.7122-1(g)(1) (2002).

¹¹³ *Id.*

¹¹⁴ NATIONAL TAXPAYER ADVOCATE, *supra* note 32, at 93.

intrusiveness of the proposed collection action.¹¹⁵ As a result, the TAS concluded that “lack of detailed and specific procedures describing how to conduct the balancing test, along with inadequate training on how to apply such a test, undermines the congressional intent to enhance taxpayer protections through CDP hearings, and erodes core taxpayer rights.”¹¹⁶

B. Administrative Alternatives to Liens, Levies, and Tax Litigation

i. Offers-in-Compromise (“OIC”)

The OIC program exists as an alternative method of satisfying an unpaid tax liability, particularly where the taxpayer’s financial circumstances may be difficult to gauge or calculate with substantial accuracy.¹¹⁷ Under section 7122, the Treasury Department, and by extension, the IRS, may accept either lump-sum or periodic payment offers-in-compromise as satisfaction of either civil or criminal liability arising from internal revenue laws.¹¹⁸ Before submitting an offer, a taxpayer must first have filed all legally required tax returns, as well as remained up to date on required estimated tax payments for the current tax year.¹¹⁹

According to the Internal Revenue Manual, “[t]he [IRS] will accept an offer in compromise when it is unlikely that the tax liability can be collected in full and the amount offered reasonably reflects collection potential.”¹²⁰ Furthermore, “no offer to compromise may be rejected solely on the basis of the amount of the offer without (first) evaluating that offer,” nor may the IRS “reject an offer-in-compromise from a low-income taxpayer solely on the basis of the amount of the offer.”¹²¹ In submitting an offer to the IRS, the taxpayer must make the request “in writing . . . under penalty of perjury, and must [include] all of the information prescribed or requested. . . .”¹²² Furthermore, a taxpayer must attach at least

¹¹⁵ NATIONAL TAXPAYER ADVOCATE, *supra* note 32, at 93.

¹¹⁶ NATIONAL TAXPAYER ADVOCATE, *supra* note 32, at 93.

¹¹⁷ I.R.C. § 7122 (2018).

¹¹⁸ I.R.C. § 7122 (2018).

¹¹⁹ *Form 656-B Offer in Compromise*, INTERNAL REVENUE SERVICE, <https://www.irs.gov/pub/irs-pdf/f656b.pdf> (last visited April 1, 2019).

¹²⁰ IRM 1.2.14.1.17 (Jan. 30, 1992) (emphasis in original). *But see* *Fargo v. Comm’r*, 447 F.3d 706, 713 (9th Cir. 2006) (“[E]ven if the Manual does recommend negotiation, it contains numerous provisions that vest Appeals Officers with the discretion to accept or reject offers-in-compromise.”).

¹²¹ Treas. Reg. § 301.7122-1(f)(3) (2002); I.R.C. § 7122(d)(3)(A).

¹²² Treas. Reg. § 301.7122-1(d)(1) (2002).

twenty percent of the proffered lump sum settlement or an entire monthly payment, and continue to make regular monthly payments while the OIC is under consideration.¹²³ Once the IRS accepts an OIC, the taxpayer is required to continue to timely file, and to pay all required tax returns and estimated tax payments for five years.¹²⁴ Should the taxpayer fail to do so, the IRS considers the OIC to be in default and reinstates the original tax liability with accrued interest and penalties, less payments made.¹²⁵

Generally, there are three broad rationales by which a taxpayer-offeror may seek to offer settlement of tax liability under the OIC: (1) doubt as to liability (DATL), (2) doubt as to collectibility (DATC), and (3) promotion of effective tax administration.¹²⁶

As discussed in Part II(A), DATL requires the IRS to find “a genuine dispute as to the existence or amount of the correct tax liability under the law.”¹²⁷ Here, the right to privacy limits the issue solely to the taxpayer’s liability rather than the taxpayer’s ability to pay, which under collectability is a separate issue.

Under a DATC rationale a taxpayer’s OIC can succeed by showing that “the taxpayer’s assets and income are less than the full amount of the liability.”¹²⁸ Since the taxpayer must demonstrate a financial inability to pay, this inherently requires at least a partial concession of the taxpayer’s right to privacy; nonetheless, the IRS may not unreasonably probe further into the taxpayer’s affairs. The IRS may pierce this right to privacy when there is reason to suspect taxpayer misrepresentation, or a frivolous submission that would impact the acceptance of the OIC.¹²⁹

Finally, a successful OIC “based on promotion of effective tax administration” is dependent on whether “collection of the full liability would cause the taxpayer economic hardship.”¹³⁰ The Treasury Regulations define economic hardship as circumstances in which full or partial satisfaction of the liability would “cause an individual taxpayer to be unable to pay his or her reasonable basic

¹²³ *Form 656-B Offer in Compromise*, *supra* note 120, at 3.

¹²⁴ *Id.* at 6.

¹²⁵ *Id.*

¹²⁶ See 26 C.F.R. § 301.7122-1 (2019); *see also* IRS, *Taxpayer Bill of Rights #10: The Right to a Fair and Just Tax System*, IRS FACT SHEETS FS-2015-18 (Sept. 18, 2017), <https://www.irs.gov/newsroom/taxpayer-bill-of-rights-number-10-the-right-to-a-fair-and-just-tax-system>.

¹²⁷ 26 C.F.R. § 301.7122-1 (b)(1) (2019).

¹²⁸ 26 C.F.R. § 301.7122-1(b)(2) (2019).

¹²⁹ See I.R.C. § 7122(g) (2018); *see also* I.R.C. § 6702(b)(2)(A) (2018).

¹³⁰ 26 C.F.R. § 301.7122-1 § 301.7122-1(b)(3)(i) (2019).

living expenses.”¹³¹ “Reasonable basic living expenses” are determined on a case-by-case basis depending on relevant facts the taxpayer supplied, such as ability to earn, number of dependents, food, clothing, housing, transportation, medical expenses, and local cost of living.¹³² As with DATC, the taxpayer must also submit an effective tax administration or economic hardship OIC and its supplementary information in good faith; falsification of financial information, inflation of expenses or costs, or any other form of material misrepresentation will cause the IRS to reject the OIC.¹³³ Under these statutory rules and administrative policies regarding OIC, the circumstances in which the IRS may reject offers are likely those where misrepresentation occurs, where the IRS deems that the taxpayer is indeed liable for and able to pay the amount in controversy without economic hardship, and where the IRS deems the offer to be inadequate according to prescribed guidelines.¹³⁴

In furthering the IRS’s interest in taxpayer compliance and efficient tax collection, the OIC fundamentally exists as an expedient administrative tool to resolve matters through negotiation and compromise, where fully litigating a tax controversy would be burdensome for both sides.¹³⁵ The OIC program exists primarily to “effect collection of what can reasonably be collected at the earliest possible time and at the least cost to the Government” and to “provide the taxpayer a fresh start toward future voluntary compliance with all filing and payment requirements.”¹³⁶

Inasmuch as the OIC application involves direct communication between Service collection specialists and the taxpayers or their representatives, the taxpayer’s rights to both privacy and confidentiality are once again implicated.¹³⁷ There are several important reasons why taxpayers seeking to settle their tax liabilities may prefer to pursue an OIC: 1) the offer process requires taxpayers to confront and examine their personal finances and tax reporting history; and 2) favorable outcomes may alter taxpayer perceptions in favor of the Service, “not as a villain or a leviathan but as an agency committed to service and support.”¹³⁸

¹³¹ Treas. Reg. § 301.6343-1(b)(4)(i) (1994).

¹³² Treas. Reg. § 301.6343-1(b)(4)(ii) (1994).

¹³³ Treas. Reg. § 301.6343-1(b)(4)(iii) (1994).

¹³⁴ See Treas. Reg. § 301.7122-1(f) (2002); I.R.C. § 7122(d)(1).

¹³⁵ See IRM 5.8.1 (Aug. 1, 2017). See also I.R.C. § 7122.

¹³⁶ IRM 5.8.1.2.4 (Sept. 23, 2008).

¹³⁷ Joseph C. Dugan, *Compromising Compliance? The Service Offer in Compromise Program and Opportunities for Reform*, 70 TAX LAW 609, 612-13 (2017).

¹³⁸ *Id.*

IV. THE CURRENT STATE OF THE IRS

As discussed earlier, both former IRS Commissioner Koskinen and incumbent National Taxpayer Advocate Nina Olson have agreed on the fact that the IRS returns significantly more money in revenue than it takes from its allotted budget. By way of numbers, the IRS collected \$2.86 trillion on a budget of \$11.2 billion in Fiscal Year 2013, amounting to an average ROI of about 255:1.¹³⁹ In Fiscal Year 2017, the IRS collected \$3.4 trillion on a budget of \$12.71 billion.¹⁴⁰ Of these staggering amounts of collected revenue, the TAS estimates that ninety-eight percent comes from timely and voluntary taxpayer compliance, and a mere two percent is derived from IRS enforcement actions.¹⁴¹ Although enforcement actions are important to ensure continued future compliance, they remain grossly inefficient from a purely financial perspective.

A. Five Years of Budget Cuts

Despite the IRS's vital mission, however, it has not received the corresponding support required from Congress. According to the Center on Budget and Policy Priorities, the IRS's 2018 enforcement budget was approximately 23% less than in 2010, after adjusting for inflation.¹⁴² In 2017, the IRS audited only 1 in 161 individual tax returns, down from 1 in 90 in 2011; likewise the IRS audited only 1 in 101 corporate returns in 2017, down from 1 in 61 in 2012.¹⁴³ Commissioner Koskinen estimates that the IRS's inability to conduct its proper auditing activities costs the government approximately \$6 billion in uncollected revenue each year.¹⁴⁴ Furthermore, the IRS's outdated tech systems, some "still running some applications from when JFK was president," present additional logistical and security concerns that hinder the IRS's ability to efficiently fulfill its

¹³⁹ NAT'L TAXPAYER ADVOCATE 2013 ANN. REP. TO CONG. 21, <https://taxpayeradvocate.irs.gov/userfiles/file/2013FullReport/IRS-BUDGET-The-IRS-Desperately-Needs-More-Funding-to-Serve-Taxpayers-and-Increase-Voluntary-Compliance.pdf>. See also GOV'T ACCOUNTABILITY OFFICE, GAO-18-165, IRS'S FISCAL YEARS 2013 AND 2012 FINANCIAL STATEMENTS at 76 (2018).

¹⁴⁰ GOV'T ACCOUNTABILITY OFFICE, GAO-18-165 at 57, IRS'S FISCAL YEARS 2017 AND 2016 FINANCIAL STATEMENTS 57 (2018).

¹⁴¹ *Hearing on IRS FY 2016 Budget Request Before the Subcomm. on Fin. Servs. and Gen. Gov't Comm. on Approps.*, 114th Cong. 1-2, (2015) (statement of Nina E. Olson, Nat'l Taxpayer Advocate).

¹⁴² Emily Horton, *Underfunded IRS Continues to Audit Less*, CENTER ON BUDGET AND POLICY PRIORITIES (Apr. 18, 2018), <https://www.cbpp.org/blog/underfunded-irs-continues-to-audit-less>.

¹⁴³ *Id.*

¹⁴⁴ Grunwald, *supra* note 4.

mission.¹⁴⁵

In her 2017 Congressional Report, Nina Olson noted that underfunding has directly resulted in a situation where “shortcuts have become the norm, and shortcuts are incompatible with high-quality tax administration.”¹⁴⁶ Olson also reiterated the call to provide the IRS with more funding, noting that the 2017 tax reform bill would place even more strain on an overexerted system already struggling to balance administrative efficiency, promotion of taxpayer compliance, and protection of taxpayer rights.¹⁴⁷

In response to regular annual budget cuts of nearly twenty-percent from fiscal years 2010 to 2016, the IRS has implemented a “Future State Plan,” shifting much of its in-person and telephone taxpayer services to online channels and self-service.¹⁴⁸ The IRS Office of Appeals has adopted a policy where most tax appeal conferences are conducted by telephone instead of face-to-face.¹⁴⁹ The TAS has noted that this may damage the taxpayer’s assurance of the right to confidentiality; where multiple participants phone into an appeals conference, the risk of unauthorized disclosure rises steeply.¹⁵⁰ However, the IRS has a strong budget-conscious reason for shifting channels from in-person to phones, and from phones to online services: in 2013, the average customer call to a call center may have cost \$7.50, whereas the same call to an automated interactive voice response system would cost only \$0.32.¹⁵¹

Taxpayers “feel more at ease when speaking with local representatives who fully understand their language and idiomatic expressions.”¹⁵² However, the Future State Plan drastically inhibits the ability for taxpayers to seek in-person communications.¹⁵³ The TAS reports that in instances where telephone or in-person conferences are the preferred method of communication, taxpayers

¹⁴⁵ Grunwald, *supra* note 4.

¹⁴⁶ NAT’L TAXPAYER ADVOCATE 2017 ANN. REP. TO CONG. vii, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2017-ARC/ARC17_Volume1.pdf [hereinafter “2017 Report”].

¹⁴⁷ *Id.*

¹⁴⁸ NAT’L TAXPAYER ADVOCATE 2016 ANN. REP. TO CONG. 64-65, https://taxpayeradvocate.irs.gov/Media/Default/Documents/2016-ARC/ARC16_Volume1.pdf [hereinafter “2016 Report”].

¹⁴⁹ See IRM 8.6.1.4.1 (Oct. 1, 2016).

¹⁵⁰ NAT’L TAXPAYER ADVOCATE, *supra* note 149 at 106.

¹⁵¹ Daniela Yu & John H. Fleming, *How Customers Interact with Their Banks*, GALLUP (May 7, 2013), <http://news.gallup.com/businessjournal/162107/customers-interact-banks.aspx?version=print>.

¹⁵² NAT’L TAXPAYER ADVOCATE, *supra* note 149, at 92.

¹⁵³ NAT’L TAXPAYER ADVOCATE, *supra* note 149, at 66.

“may feel alienated, frustrated, and disengaged from the tax system,” which may cause them to make emotional spur-of-the-moment decisions that they later regret.¹⁵⁴ However, according to the Government Accountability Office’s most recent IRS report, online services are increasingly becoming taxpayers’ preferred medium of interaction with the agency.¹⁵⁵ This represents an important opportunity for the IRS to begin re-expanding its availability and services to taxpayers while operating on a razor-thin budget.

The IRS also began implementing an increasing number of user fees for various services, such as entrance into installment agreements, offers-in-compromise, and private letter rulings.¹⁵⁶ As discussed above, installment agreements and OICs are exercises in taxpayers’ rights to privacy, confidentiality, and a fair and just tax system; accordingly, the TAS has asserted that imposition of the slightest fees on such services infringes on these rights, and has called on Congress to prohibit such practices.¹⁵⁷ While the TAS makes a compelling argument that the IRS may well have overstepped its bounds in requiring taxpayers to pay fees for merely exercising their rights, there is nonetheless a compelling countervailing justification that the IRS might present: these fees are meant to offset associated costs, and to prevent excessive administrative burdens on the IRS by having requesting taxpayers internalize some of the costs.¹⁵⁸ Nonetheless, irrespective of whether such fees are justified, their very imposition reflects the Service’s desperate state and its need for more funding and resources.

V. CONCLUSION

According to the TAS, the prevailing purpose of tax administration is to “enable voluntary compliance which can be achieved by providing services, creating a culture of trust, and

¹⁵⁴ NAT’L TAXPAYER ADVOCATE, *supra* note 149, at 66.

¹⁵⁵ GOVERNMENT ACCOUNTABILITY OFFICE, GAO-18-165, IRS’S FISCAL YEARS 2017 AND 2016 FINANCIAL STATEMENTS at 29 (2018), <https://www.gao.gov/assets/690/689341.pdf>; Grunwald, *supra* note 4 (quoting Commissioner Koskinen: “Now look, we’ve moved more processing online, and we’ve gotten even more efficient . . . [w]e still maintain a huge technology system that processes over 200 million returns a year . . . [a]nd we have to answer the phone when people call. When the budget gets cut, everything suffers.”).

¹⁵⁶ NAT’L TAXPAYER ADVOCATE, *supra* note 147, at 307-08.

¹⁵⁷ NAT’L TAXPAYER ADVOCATE, *supra* note 147, at 307-08.

¹⁵⁸ This is scarcely an isolated situation where fees might be permissibly imposed on exercising legal rights; after all, citizens must pay court fees when seeking judicial remedies. It stands to reason, however, that overly burdensome fees might indeed impermissibly discourage citizens from properly exercising their rights; the solution likely lies somewhere in between balancing these interests.

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promoting an understanding of the role taxes play in a civilized society.”¹⁵⁹ Woefully crippled by budget cuts, while the IRS has taken admirable steps toward this goal, it remains a servant beholden to many masters: taxpayers’ rights, efficient tax collection, and enforcement.

Some have opined that “such a system requires more than the plain statement of rights. Only a system based on actions that follow the defined policy goals can achieve the necessary fairness considerations.”¹⁶⁰ The relatively new introduction of a slew of procedural rights, now codified in law and given legally binding power, has perhaps exacerbated the difficulty of heavy agency budget cuts to the point where some professionals have hypothesized as “what may be taxpayer rights in the eyes of some are procedural burdens in the eye of the tax administrator.”¹⁶¹ The IRS must therefore continue to pursue measures in voluntary compliance if it is to succeed in fulfilling its multiple (and sometimes divergent) responsibilities.

¹⁵⁹ 2016 Report, *supra* note 149, at 102.

¹⁶⁰ Fogg & Jozipovic, *supra* note 10, at 564.

¹⁶¹ Mazza & Kaye, *supra* note 44, at 297.