



Volume 20 (2022) | ISSN 1932-1821 (print) 1932-1996 (online)
DOI 10.5195/taxreview.2022.167 | <http://taxreview.law.pitt.edu>

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CAN THE IRS YET ACHIEVE THE RESTRUCTURING COMMISSION'S VISION?

*Armando Gomez**

The National Commission on Restructuring the Internal Revenue Service (the Restructuring Commission) was established by Congress to review the present practices of the Internal Revenue Service (IRS) and to make recommendations for modernizing and improving its efficiency and taxpayer services.¹ After a year of hearings, the Restructuring Commission released a report in June 1997 making recommendations relating to congressional oversight and executive branch governance; IRS management and budget; IRS workforce and culture; IRS customer service and compliance; technology modernization; electronic filing; tax law simplification; taxpayer rights; and financial accountability.² That report outlined a vision to transform the IRS into a responsive service organization for the twenty-first century. A year later, President Clinton signed into law the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 98),³ legislation approved in bipartisan fashion and with broad expectations from stakeholders that real reform was at hand. Twenty-five years later, the agency still has light years to go if it ever hopes to achieve that vision.

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¹ Treasury, Postal Service, and General Government Appropriations Act, Pub. L. No. 104-52, § 637, 109 Stat. 468, 509 (1995).

² NAT'L COMM'N ON RESTRUCTURING THE INTERNAL REVENUE SERVICE, 105TH CONG., A VISION FOR A NEW IRS (1997) [hereinafter COMMISSION REPORT].

³ Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

What happened, and what can be done, to bring the IRS closer to the vision laid out a quarter century ago? Despite significant effort by well-intentioned appointees and career employees over the years, in my view, the failures are rooted in governance and funding. The Restructuring Commission focused on both of these issues in its report,⁴ but the recommendations in that report were neither fully addressed by Congress nor five successive presidential administrations.

Perhaps since it was first established, the IRS has been a punching bag in Washington. Nobody likes the tax collector, and any miscue can lead to another round of pounding.⁵ Nonetheless, politicians have discovered over the years that the IRS can efficiently implement any number of social and investment programs, and thus the mandates imposed on the agency have grown like kudzu over the years. At the same time, Congress has not provided the IRS with stable funding, forcing agency leaders to stretch resources to be able to address the bare minimum.

⁴ COMMISSION REPORT, *supra* note 2.

⁵ Unfortunately, some of the pounding was in response to self-inflicted wounds. For example, a widely publicized report by the Treasury Inspector General for Tax Administration (“TIGTA”) found that the IRS spent \$4.1 million on a 2010 conference, including producing a Star Trek parody video shown at the conference, and a substantial part of the funding for that conference came from funds originally intended for hiring enforcement employees. TREAS. INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2013-10-037, REVIEW OF THE AUGUST 2010 SMALL BUSINESS/SELF-EMPLOYED DIVISION’S CONFERENCE IN ANAHEIM, CALIFORNIA (2013), <https://www.treasury.gov/tigta/auditreports/2013reports/201310037fr.pdf>. One day after that report was issued, TIGTA issued a report unleashing a far greater scandal. TREAS. INSPECTOR GEN. FOR TAX ADMIN., REF. NO. 2013-10-053, INAPPROPRIATE CRITERIA WERE USED TO IDENTIFY TAX-EXEMPT APPLICATIONS FOR REVIEW (2013) [hereinafter INAPPROPRIATE CRITERIA], <https://www.treasury.gov/tigta/auditreports/2013reports/201310053fr.pdf>. Nearly ten years later, both reports continue to be used in attacks on the agency.

In the past, the IRS has weathered a series of attacks stemming from the apparent leak of vast troves of taxpayer data that have found their way into the hands of *ProPublica* and other outlets. Jesse Eisinger, Jeff Ernsthansen & Paul Kiel, *The Secret IRS Files: Trove of Never-Before-Seen Records Reveal How the Wealthiest Avoid Income Tax*, *PROPUBLICA* (June 8, 2021, 5:00 AM) [hereinafter *Secret IRS Files*], <https://www.propublica.org/article/the-secret-irs-files-trove-of-never-before-seen-records-reveal-how-the-wealthiest-avoid-income-tax>. And more recently, the rhetoric reached fever levels upon the revelation that the tax returns filed by the former director and deputy director of the FBI, both of whom were fired by former President Trump, were selected for audit as part of the “national research program.” Michael S. Schmidt, *Comey and McCabe, Who Infuriated Trump, Both Faced Intensive I.R.S. Audits*, *N.Y. TIMES* (July 6, 2022) [hereinafter *Comey and McCabe*], <https://www.nytimes.com/2022/07/06/us/politics/comey-mccabe-irs-audits.html>. A recent inspector general concluded that both returns were randomly selected for the national research program audits. TREAS. INSPECTOR GENERAL FOR TAX ADMIN., REP. NO. 2023-IE-R002, NATIONAL RESEARCH PROGRAM TAX RETURN SELECTION PROCESS FOR TAX YEARS 2017 AND 2019 (Nov. 29, 2022).

Speaking of agency leaders, there have been significant periods of time over the past twenty-five years without a Senate-confirmed IRS Commissioner or Chief Counsel, and the senior-most tax position in the Department of Justice has been vacant for over eight years now. Moreover, the IRS Oversight Board that was a cornerstone of the Restructuring Commission's recommendations has not had a full complement of members for many years now and appears to be essentially defunct. The absence of Senate-confirmed leaders hampers the ability of the agency to convince Congress to provide the resources it needs, and has left a vacuum to be filled by career executives.

The result of all of this is an IRS that cannot meet the needs of many taxpayers, a workforce that is starved for training and resources, and leaders pulled in different directions such that their efforts to bring the agency forward are often for naught. The solution can be found in the work of the Restructuring Commission. As described more fully below, the following steps can help the IRS get back on track:

- *Focus on governance:* The IRS needs a Commissioner with a deep understanding of both tax administration and the management needs of the executive branch agency that touches more Americans than any other. Although a tax collector at its core, the IRS has become the platform through which many social benefits are delivered to Americans. The relative roles of the political appointees that impact the tax system (the Assistant Secretary for Tax Policy, the Commissioner, the IRS Chief Counsel, and the Assistant Attorney General for the Tax Division) should be clarified, and all four roles need to be filled by Senate-confirmed appointees. And if the IRS Oversight Board is retained, it needs to be populated with a full complement of appointees and empowered to fulfill its mission.
- *Provide appropriate and stable funding:* The IRS needs to finally modernize its technology and customer service apparatus, but cannot do this without long-term, permanent funding. At the same time, investments in technology, training, and workforce are needed so the IRS can make more effective use of data and examinations to address the tax gap. The complex and competing missions of the IRS, as both tax enforcer in a global economy, and provider of social services,⁶ demand significantly increased staffing and

⁶ The tax system has long been used to provide anti-poverty relief to working taxpayers and parents, and to efficiently administer other broad-based social programs. For example, the Earned Income Tax Credit, which was first enacted in 1975, was once described by President Reagan as “the best anti-poverty, the best pro-family, [and] the best job creation measure to come out of Congress.” THOMAS L. HUNGERFORD & REBECCA THEISS, ECON. POLICY INST., THE EARNED INCOME TAX CREDIT AND THE

resources. In response to President Biden’s call to address the need for IRS resources, Congress recently appropriated nearly \$80 billion in funds to be available until September 30, 2031, with the bulk of the funding specified for enforcement and operations support.⁷ To ensure that these resources are deployed effectively, Congress should establish measurable goals that can be objectively measured and reported.

- *Modernize the dispute resolution process:* Despite recent efforts to reinvigorate the independence of the Appeals function, the dispute resolution process is not effectively resolving as many cases as it should. Moreover, the time to resolve cases continues to grow and can be exacerbated by an outdated Joint Committee on Taxation (JCT) review process. And in the context of the agency’s social services mission, the current administrative process is ill-suited to resolve what are often akin to family law and domestic relations matters.⁸

These three recommendations may not be a panacea for all of the IRS’s problems. But we have to start somewhere if the agency is to have any hope of ever achieving the vision laid out by the Restructuring Commission twenty-five years ago.

I. SOLVING THE GOVERNANCE CONUNDRUM

The Restructuring Commission concluded that the problems facing the IRS “cannot be solved without focus, consistency, and direction from the top.”⁹ To facilitate the development and implementation of consistent long-term strategy and priorities, the Restructuring Commission proposed a comprehensive set of reforms including more coordinated congressional oversight, the establishment of a board of directors to enhance the governance and oversight of the IRS and providing the Commissioner with a

CHILD TAX CREDIT: HISTORY, PURPOSE, GOALS, AND EFFECTIVENESS, ISSUE BRIEF #370, at 1 (2013). I.R.C. § 32. The Child Tax Credit, which was first enacted in 1997, was significantly expanded for tax year 2021 in an effort to substantially reduce child poverty, but the expanded version of the credit was allowed to lapse after just one year. I.R.C. § 24. Separately, the IRS administers numerous other social programs, including the premium subsidies provided under the Affordable Care Act.

⁷ Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 10301, 136 Stat. 1818, 1831.

⁸ For example, disputes regarding qualification for “head of household” filing status or as a “dependent”—which can then impact the qualification for certain deductions and credits—can require in depth examinations of family living arrangements. Particularly when multiple generations of a family live together, sorting through how the applicable tax rules apply can be particularly daunting.

⁹ COMMISSION REPORT, *supra* note 2, at 1.

five-year term and greater control over personnel decisions. Only some of these recommendations were adopted by Congress, and as discussed below, the change has not been lasting.

To be sure, much of the problem with governance is not the fault of those who have accepted the challenge to serve our government. Rather, the biggest drivers have been features of the larger system that are unlikely to change. Convincing multiple congressional committees to coordinate their efforts was a laudable goal, but this recommendation never stood a chance.¹⁰ Variations on the other governance proposals from the Restructuring Commission were enacted, but the positions have not always been filled. It may be impossible to know why certain positions have been vacant for extended periods, but it's almost certain that the Senate confirmation process has been a major, if not proximate, cause.

Solving the governance conundrum is not impossible, but it will take a concerted effort from a President who is willing to make this a priority. The starting point is understanding the roles that need to be filled and then convincing qualified candidates to fill them.

A. Understanding the Four Key Roles

There are four key tax roles in the executive branch: the Assistant Secretary for Tax Policy, the Commissioner, the IRS Chief Counsel, and the Assistant Attorney General for the Tax Division. Each has separate responsibilities, and together they establish rules and regulations for the tax system, administer the tax laws, interpret the tax laws, and litigate tax disputes.

1. Assistant Secretary for Tax Policy

The Treasury Department's Office of Tax Policy is responsible for developing and implementing tax policies and programs; reviewing regulations and rulings to administer the Internal Revenue Code (Code); negotiating tax treaties; providing economic and legal policy analysis for

¹⁰ The initial bill introduced to implement the Restructuring Commission's recommendations only sought to expand the reporting duties of the Joint Committee on Taxation. H.R. 2292, 105th Cong. § 402 (1997). And even that modest provision did not make it past the Committee on Ways & Means.

domestic and international tax policy decisions; and providing estimates for the President’s budget, fiscal policy decisions, and cash management decisions.¹¹ The Assistant Secretary for Tax Policy, a position appointed by the President and subject to Senate confirmation, is the head of the Office of Tax Policy.

The Office of Tax Policy generally does not involve itself with specific tax cases,¹² but it does take the lead for the Administration on setting the regulatory direction for the federal tax system. The final decisions on all tax regulations and published guidance (sometimes referred to as sub-regulatory guidance)¹³ are vested exclusively in the Assistant Secretary for Tax Policy.¹⁴ That seems clear enough, but history has shown that regulations and published rulings are not the only way in which the government can signal to the public how they believe the law should be applied and administered. For example, the IRS routinely publishes “frequently asked questions” or “FAQs” on its website in which it describes how the agency will apply certain tax rules. The Office of Chief Counsel regularly issues nonprecedential memoranda that IRS agents and lawyers then cite in support of positions they pursue in specific tax cases.¹⁵

Of course, there are good reasons for the issuance of FAQs. As Professors Blank and Osofsky observe, the IRS uses FAQs in an effort to

¹¹ See U.S. DEP’T OF THE TREAS., TAX POLICY, <https://home.treasury.gov/about/offices/tax-policy> (last visited Aug. 21, 2022).

¹² Notably, § 7217 prohibits the President, the Vice President, any employee in the executive office of the President or Vice President, and any individual other than the Attorney General serving in a position specified in 5 U.S.C. § 5212 from requesting, directly or indirectly, any officer or employee of the IRS to conduct or terminate any audit or other investigation of a particular taxpayer with respect to the tax liability of such taxpayer. By its terms, this prohibition does not apply to the Assistant Secretary for Tax Policy or others in the Office of Tax Policy, but by tradition those serving in the Office of Tax Policy generally do not involve themselves in specific tax cases.

¹³ The Treasury Department has defined “subregulatory guidance” to mean revenue rulings, revenue procedures, notices, and announcements published in the Internal Revenue Bulletin. DEP’T OF THE TREAS., POLICY STATEMENT ON THE TAX REGULATORY PROCESS 2 n.1 (2019).

¹⁴ U.S. DEP’T OF THE TREAS., TREAS. ORD. 111-01 (1981), *aff’d*, Feb. 8, 2022.

¹⁵ Section 6110(k)(3) generally provides that “written determinations” may not be used or cited as precedent. For this purpose, § 6110(b)(1)(A) defines “written determination” to mean a ruling, determination letter, technical advice memorandum or “Chief Counsel advice,” and § 6110(i)(1)(A) generally defines “Chief Counsel advice” as any written advice or instruction, under whatever name or designation, prepared by any national office component of the Office of Chief Counsel.

“translate a maze of complex statutes and regulations into language that is accessible to the general public.”¹⁶ Because FAQs can be drafted quickly and posted on the IRS website, they can be issued promptly to address pressing questions.¹⁷ However, the National Taxpayer Advocate has found that information provided to taxpayers through FAQs is often “unclear and vague.”¹⁸ The National Taxpayer Advocate has also found that some FAQs “provided no justification or rationale as to how the IRS” reached its conclusions.¹⁹ If FAQs are merely explaining current law, and not establishing binding rules, then perhaps they are not subject to the requirements of the Administrative Procedure Act, including the requirement that final rules be accompanied by a “concise general statement of their basis and purpose.”²⁰ Nonetheless, the shorthand approach of using FAQs can often leave taxpayers and their advisors befuddled.

As for “written determinations,” the Office of Chief Counsel needs to provide advice to its client, or even to other lawyers within the office. There is nothing unusual or untoward in that regard. But when “written determinations” stake out novel or controversial positions that are then used by IRS agents and lawyers to support challenges to taxpayers’ returns, it is a fair question to ask whether the positions should have instead been developed and published through the formal rulemaking process.²¹

There do not appear to be any delegation orders or other formal procedures requiring the IRS or the Office of Chief Counsel to coordinate with the Office of Tax Policy before issuing FAQs or written determinations.

¹⁶ Joshua D. Blank & Leigh Osofsky, *Simplicity Lost*, 20 PITT. TAX REV. 105, 108 (2022).

¹⁷ For example, on May 6, 2020, the IRS posted FAQs addressing the availability of “economic impact payments” authorized by the Coronavirus Aid, Relief, and Economic Security Act, which was signed into law on March 27, 2020. *See* Ballard v. U.S. Dep’t of Treasury, 129 A.F.T.R.2d 1050 (E.D.N.C. 2020).

¹⁸ NAT’L. TAXPAYER ADVOC., ANNUAL REPORT TO CONGRESS 2021, at 86 (2021).

¹⁹ *Id.* at 87.

²⁰ 5 U.S.C. § 553(c) (1966).

²¹ *Compare* Christopher v. Smithkline Beecham Corp., 567 U.S. 142, 156 (2012) (finding that regulated parties should be provided “fair warning” of the standard of conduct to which they will be held), *with* Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 170–71 (2007) (finding no “unfair surprise” when agency issued rules in compliance with the notice-and-comment procedures required by the Administrative Procedure Act).

Yet, in my experience, those documents are regularly used in specific cases in an effort to support a particular outcome. Clearly, the Office of Tax Policy cannot review each and every such document before it is issued—at least not without a massive increase in staffing—but when such documents are issued in lieu of regulations or published rulings, the delegation order granting primacy to the Office of Tax Policy on tax policy matters is effectively circumvented.²²

So, what can be done to restore the proper order when it comes to establishing tax rules? I would suggest the following:

- The Commissioner and the Chief Counsel should provide a report to the Assistant Secretary at least once per calendar quarter of all newly issued or modified FAQs, written determinations, or other internal directives addressing how the agency or its lawyers intend to interpret or apply particular provisions of the Code or regulations. The Office of Tax Policy should then respond within ninety days with an indication of whether any such documents should be reviewed for possible republication as sub-regulatory guidance, or whether regulations should be issued or amended to address the topics addressed in such documents. Any documents so identified by the Office of Tax Policy would then be automatically suspended until such time as the Office of Tax Policy either approves new regulations or sub-regulatory guidance or informs the Commissioner and Chief Counsel that it does not believe that further regulatory action is needed on the topics addressed in such documents.
- Congress should amend § 7803(e), or the Commissioner should instruct the Chief of Appeals that, in evaluating any case that is referred to the IRS Independent Office of Appeals, no weight should be given to any FAQs, written determinations, or other internal directives addressing how the agency or its lawyers intend to interpret or apply particular provisions of the Code or regulations. That is, in evaluating the relative hazards of litigation, such documents would be given no more weight than the taxpayer's written protest. This would ensure that the Commissioner and Chief Counsel are not able to "create law" without pursuing the development of regulations or sub-regulatory guidance through the Office of Tax Policy.²³

²² Perhaps the Office of Tax Policy will be able to increase its staffing now that Congress has appropriated an additional \$104.5 million to the Office of Tax Policy as part of the ten-year funding for the IRS in the Inflation Reduction Act. § 10301(3), 136 Stat. 1833.

²³ This approach would also be consistent with the notion set forth in the March 2019 Treasury Policy Statement that the Treasury Department and IRS will not argue that subregulatory guidance has the force and effect of law. See DEP'T OF THE TREAS., *supra* note 13, at 2 n.1.

2. Commissioner of Internal Revenue

Including the most recent incumbent—whose term expired in November 2022—there have been forty-nine Commissioners of Internal Revenue since 1862.²⁴ Section 7803(a)(2)(A) provides that the Commissioner shall have the power to administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party.²⁵ Section 7803(a)(1)(A) provides that the President's appointment of a Commissioner, by and with the consent of the Senate, shall be made from individuals who, among other unspecified qualifications, have a demonstrated ability in management.²⁶

For many years leading up to the enactment of RRA 98, the Commissioner was an attorney with deep experience in the tax laws. That changed when Charles O. Rossotti was appointed to the role in November 1997 by President Clinton. Commissioner Rossotti was neither a lawyer nor a tax expert. Rather, he was a co-founder and chief executive officer of a major technology and management consulting firm. At a time when the IRS had been heavily criticized for its failure to make progress with its massive technology modernization effort, the choice of a proven technology executive like Rossotti made sense to many observers. During his tenure, Commissioner Rossotti led the agency's implementation of RRA 98 and oversaw the reorganization of the agency into four major operating divisions.

The next three Commissioners after Rossotti continued the trend of putting command of the agency in individuals with no meaningful background in tax law or administration.²⁷ Thus, for twenty years, setting aside periods where a vacancy in the Commissioner position was filled by a career IRS executive, the agency responsible for administering and enforcing

²⁴ I.R.S., Previous IRS Commissioners, <https://www.irs.gov/about-irs/previous-irs-commissioners> (last visited Jan. 17, 2023).

²⁵ I.R.C. § 7803(a)(2)(A).

²⁶ I.R.C. § 7803(a)(1)(A).

²⁷ Commissioner Douglas H. Shulman, who served from March 2008 through November 2012, had a law degree and served on the staff of the Restructuring Commission. However, he did not otherwise have any prior experience in tax administration.

the internal revenue laws did not have a tax professional at the helm. This changed in October 2018 when Charles P. Rettig, an experienced tax attorney, took office as the forty-ninth Commissioner.

The IRS is a massive government agency with approximately 80,000 employees²⁸ that is responsible for collecting over \$4.1 trillion per year to fund the federal government. During fiscal year 2021, the agency spent \$13.7 billion to administer and enforce the tax laws.²⁹ Serving as the chief executive of an agency so large certainly requires an individual with a demonstrated ability in management, as § 7803(a)(1)(A) specifies.³⁰ But does the Commissioner need to have a deep understanding of tax law and the tax system too?

The answer to this question might depend on the individual selected by the President. If a Commissioner comes to the job without a background in tax law and tax administration, but is a quick study and surrounds himself or herself with advisors with the requisite tax expertise, perhaps it can work. But I would argue, the experience over the twenty years the agency was not led by a tax expert shows that this is not always a good idea. Over that period, the agency shifted directions multiple times, first focusing largely on improving taxpayer service and technology modernization, and then moving quickly into a period of maximum enforcement. The pendulum has continued to swing and presently seems to hover on the enforcement end of the spectrum.

Why does this matter? Should not the Commissioner be able to set the direction for the agency? Certainly, that should be the case. But the Restructuring Commission found that a leading driver behind the IRS's problems twenty-five years ago was a lack of consistent direction. The establishment of a five-year term for the Commissioner was one measure to address that problem. My concern with a non-tax professional leading the agency is that it necessarily leaves the direction on tax matters to the career executives. If the Commissioner does not have a deep background in the tax law and tax administration, then it can be difficult, if not impossible, for the

²⁸ I.R.S., 2021 DATA BOOK, 73 tbl.2 (2021), <https://www.irs.gov/pub/irs-pdf/p55b.pdf>.

²⁹ *Id.* at 69.

³⁰ I.R.C. § 7803(a)(1)(A).

Commissioner to evaluate whether the direction being set by the career executives is the right direction for the agency to pursue.

For example, if the Commissioner does not have experience in tax law or tax administration, how will he or she be able to evaluate whether resources are being properly allocated? And without a tax background, how will a Commissioner understand the impact on taxpayers of changes in IRS procedures? Of course, with 80,000 (and soon to be significantly more)³¹ employees, the Commissioner has plenty of career tax specialists who can provide the Commissioner with their views. But the career workforce is largely comprised of employees with little or no experience outside of the agency and often is viewed as protecting the bureaucracy. If the Commissioner does not have the background or team to drive change in tax administration, how can they possibly succeed?

One possible solution to this dilemma can be found in the Restructuring Commission's report, which recommended the Commissioner be given flexibility to recruit his or her own management team.³² The Restructuring Commission's rationale for this recommendation was that if the Commissioner is to be held accountable, then he or she must be able to decide who should fill out the management team. This does not mean that each new Commissioner would necessarily replace the senior executive team, or that the individuals selected for those roles would always come from outside of the agency. But ensuring that the Commissioner has the ability to replace senior executives without cumbersome procedures would make it easier for a Commissioner without a substantive tax background to have greater confidence in those advising them on tax matters. Given that President Biden recently nominated an individual without a deep tax background to serve as the next Commissioner,³³ I hope that, if he is confirmed, Mr. Werfel will have the ability to build a management team accountable to him.

³¹ 136 Stat. 1818.

³² COMMISSION REPORT, *supra* note 2, at 8.

³³ On November 14, 2022, the White House announced that President Biden had nominated Daniel I. Werfel to serve as Commissioner of Internal Revenue. THE WHITE HOUSE, NOMINATIONS SENT TO THE SENATE (Nov. 14, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/14/nominations-sent-to-the-senate-87/>. Mr. Werfel had a deep management background and served as Acting Commissioner in 2013, but otherwise does not appear to have substantive tax experience on his resume. The White House, President Biden Announces Key Nominee (Nov. 10, 2022), <https://>

3. IRS Chief Counsel

Section 7803(b) provides that the Chief Counsel for the IRS, who is appointed by the President and subject to Senate confirmation, is the chief law officer for the IRS.³⁴ The Chief Counsel's duties include advising the Commissioner and IRS employees on legal matters, furnishing legal opinions and reviewing rulings and technical advice memoranda, preparing and reviewing proposed legislation, treaties, and regulations affecting the tax laws, representing the Commissioner in cases before the Tax Court, and determining which civil actions should be litigated under the tax laws and to make recommendations to the Department of Justice regarding the commencement of such actions.

By statute, the Chief Counsel has a dual reporting role. Section 7803(b)(3) provides that the Chief Counsel reports to the Commissioner, except that on some matters the Chief Counsel reports to both the Commissioner and the Treasury Department General Counsel. While on other matters, the Chief Counsel reports only to the Treasury Department General Counsel.³⁵ In simpler terms, the Chief Counsel is the Commissioner's lawyer, and like any lawyer, is charged with providing legal advice to the client.

But what really is the role of the Chief Counsel? Revenue Procedure 64-22 instructs that it is the responsibility of those charged with interpreting the tax laws "to try to find the true meaning of the statutory provision and not to adopt a strained construction in the belief that he is 'protecting the revenue.'"³⁶ In other words, the role of the Chief Counsel, and the lawyers in the Office of Chief Counsel, is to provide advice to the Commissioner (i.e., the Chief Counsel's client) as to the correct meaning of the Code and regulations. The revenue procedure reminds us that tax policy is determined

www.whitehouse.gov/briefing-room/statements-releases/2022/11/10/president-biden-announces-key-nominee-3/. On January 3, 2023, the first day of the 118th Congress, the White House announced that Mr. Werfel's nomination had been resubmitted to the Senate. THE WHITE HOUSE, NOMINATIONS SENT TO THE SENATE (Jan. 3, 2023), <https://www.whitehouse.gov/briefing-room/statements-releases/2023/01/03/nominations-sent-to-the-senate-91/>.

³⁴ I.R.C. § 7803(b)(3).

³⁵ *Id.*

³⁶ Rev. Proc. 64-22, 1964-1 C.B. 689.

by Congress, and that the duty of the IRS is to administer the Code “in a fair and impartial manner, with neither a government nor a taxpayer point of view.”³⁷

To be sure, lawyers have a duty to advise their client on how, within the contours of the law, the client can achieve its objective. But in the context of the federal tax system, the Chief Counsel has a higher duty. As Commissioner Caplin articulated in Rev. Proc. 64-22, “[t]he revenue is properly protected only when we ascertain and apply the true meaning of the statute.” Having shown already that the Office of Tax Policy has primacy on determining what will be adopted in regulations and sub-regulatory guidance, and with the Commissioner assigned the duty to administer and enforce the tax laws, the role of the Chief Counsel is to advise both on those subjects. It is not, however, to determine what the law is, or to issue written determinations purporting to decide or change the law.

There have been numerous periods without a Senate-confirmed IRS Chief Counsel. The office was vacant for the first two years of the Trump Administration, and likewise has been vacant for the first two years of the Biden Administration. During these times, the Office of Chief Counsel has been led by career lawyers. As a consequence, there is not an appointed leader for the office who is accountable to the President and Congress. The absence of a Senate-confirmed Chief Counsel makes it more difficult for an Administration to ensure the Office of Chief Counsel is prioritizing matters that are consistent with the overall direction the Administration wants to set. It also facilitates the ability of career lawyers to issue written determinations with a view to deciding or changing the law, contrary to the delegations described above.

So what can be done? First, each Administration should prioritize the appointment of a Chief Counsel. Given the inherent delays in the Senate confirmation process, waiting until well into the second year, or later, of a Presidential term to nominate a Chief Counsel, risks having a Senate-confirmed leader for less than half of each President’s term. Second, adopt the recommendation in Part I.A.1. above requiring quarterly reports to the Office of Tax Policy on written determinations, and action by the Office of Tax Policy on those reports. This could help ensure that the lawyers in the

³⁷ *Id.*

Office of Chief Counsel stay in their lane when it comes to not trying to decide or change the tax laws through nonprecedential rulings and memoranda—or worse, through litigation.

4. Assistant Attorney General for the Tax Division

The Assistant Attorney General for the Department of Justice's Tax Division is responsible for enforcing the federal tax laws through civil and criminal tax litigation.³⁸ As explained above, the Office of Chief Counsel represents the IRS in Tax Court, but all other federal tax cases generally are handled by the Tax Division.³⁹

When cases are filed by taxpayers, such as refund suits filed in district court or the Court of Federal Claims, lawyers from the Tax Division are charged with defending the government's interest. Ordinarily, the Tax Division will seek guidance from the IRS on how the agency would like the case to be defended. The Internal Revenue Manual describes the procedures to be followed by Chief Counsel attorneys to prepare and deliver to the Tax Division defense letters.⁴⁰ The Office of Chief Counsel also is required to make recommendations to the Tax Division regarding appeals in federal tax cases.⁴¹ The Tax Division considers those recommendations, but the Department of Justice ultimately makes its own decisions on how to proceed in cases in which it represents the government.

Although the work of the Tax Division is closely connected to the work of the IRS, in the area of criminal tax cases the connection is even tighter. Many criminal tax matters are investigated jointly by the Tax Division and the IRS Criminal Investigation division. Thus, coordination between the agencies is important. As with most things in government, coordination often starts at the top.

Unfortunately, in recent years the Tax Division has been without a Senate-confirmed leader for extended periods. For more than eight years now

³⁸ 28 C.F.R. § 0.70 (2022).

³⁹ There are some exceptions. For example, cases arising in the Southern District of New York and the Central District of California typically are handled by the U.S. Attorneys for such districts.

⁴⁰ General Procedures for Defense Letters, I.R.M. 34.5.1.1(2).

⁴¹ Guiding Principles for Appeals, I.R.M. 36.2.1.1(1).

the position of Assistant Attorney General for the Tax Division has been vacant.⁴² And it was vacant for over three years before the last incumbent took office.⁴³ To ensure that the Tax Division's activities are supervised by an official accountable to the President and Congress, and to better align the coordination between the Tax Division and the IRS, each Administration should prioritize the appointment of an Assistant Attorney General.

B. Can the IRS Oversight Board be Resuscitated?

The Restructuring Commission recommended that Congress create an independent board of directors to oversee the IRS.⁴⁴ This recommendation derived from the Restructuring Commission's view that the agency needed stronger governance to enhance the strategic oversight of the agency. The Restructuring Commission made clear, however, that the board of directors should have no role in tax policy or specific tax cases. But with a board of directors guiding the long-term strategy of the IRS and charged with holding IRS management accountable for implementing that strategy, the expectation was that the board would give Congress more confidence in IRS operations.

A significant point of debate during the work of the Restructuring Commission was whether the board of directors should have the power to appoint and remove the senior leaders of the IRS, including the Commissioner.⁴⁵ Ultimately, twelve of the seventeen members of the Restructuring Commission supported placing overall responsibility for IRS governance in a seven-member board of directors.⁴⁶ The majority report recommended that the board include five members from the private sector who would be expected to bring experience in the management of large service organizations, customer service, information technology,

⁴² U.S. DEPT. OF JUST., ARCHIVES, FORMER ASSISTANT ATTORNEY GENERAL—KATHRYN KENEALLY, <https://www.justice.gov/archives/tax/staff-profile/former-assistant-attorney-general-kathryn-keneally> (last visited Dec. 7, 2022). Keneally served as Assistant Attorney General until June 5, 2014.

⁴³ When Ms. Keneally was sworn in on April 6, 2012, the position had been vacant since Nathan Hochman resigned on January 20, 2009 at the end of the President George W. Bush administration.

⁴⁴ COMMISSION REPORT, *supra* note 2, at 4.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.*

organization development, and the needs and concerns of taxpayers.⁴⁷ The notion was that a board with these different perspectives would help the Commissioner better address the various components under his or her responsibility. The Restructuring Commission members who did not support the recommendation to establish this board of directors agreed, however, that stronger, institutionalized oversight for the IRS was needed.⁴⁸ In fact, as the Restructuring Commission neared the completion of its work, the Treasury Department announced a series of recommendations, including the establishment of a management board composed of high-ranking government officials from relevant executive branch agencies that would provide ongoing oversight of all major IRS decisions, would meet at least monthly and would prepare semi-annual reports to the President and Congress.⁴⁹

Ultimately, RRA 98 amended § 7802 to establish within the Department of the Treasury the IRS Oversight Board.⁵⁰ The statute largely tracks the recommendations of the Restructuring Commission, except that it does not provide the board with authority to appoint or remove the Commissioner. Rather, § 7802(d)(3) charges the IRS Oversight Board with recommending to the President candidates for appointment as Commissioner and recommending the removal of the Commissioner.⁵¹

Section 7802(d) requires the IRS Oversight Board to review and approve strategic plans for the IRS; to review the agency's operational functions, including plans for modernization, outsourcing and training; to review the Commissioner's selection and evaluation of senior executives; to review and approve any plans for major reorganization of the agency; and to review and approve the budget request for the IRS.⁵² In short, the IRS

⁴⁷ *Id.* at 5.

⁴⁸ *See id.* at 59 (statement of Congressman William J. Coyne, dissenting), and 71 (statement of Commissioners Edward S. Knight, Larry Irving, and James W. Wetzler, dissenting).

⁴⁹ Robert E. Rubin, Sec'y, U.S. Dep't Treas., Remarks by Treasury Secretary Robert E. Rubin (May 20, 1997).

⁵⁰ § 1101, 112 Stat. 685, 691.

⁵¹ I.R.C. § 7802(d)(3).

⁵² I.R.C. § 7803(d).

Oversight Board has broad responsibility to oversee the long-term plans and direction of the agency.

Unfortunately, the IRS Oversight Board has not been prioritized by any President since it was established in 1998. Although it was originally populated with a full complement of members in the late 1990s, by 2015, the Board suspended operations because it did not have enough members to conduct business. In 2018, legislation was introduced to revitalize the Board, both by focusing the Board more on management and by shrinking the size of the Board.⁵³ Separate legislation introduced that same year would have eliminated the IRS Oversight Board.⁵⁴ Neither bill advanced, and so while § 7802 remains unchanged, the IRS Oversight Board remains effectively defunct without the necessary quorum of members to conduct business.

The question remains whether the IRS Oversight Board should be resuscitated, and if so, can it be done effectively? The original purpose of the Oversight Board was never fulfilled, yet the need remains. The IRS desperately needs clear long-term direction, and as I will discuss below, it needs consistent funding at appropriate levels to meet all of its obligations. The Restructuring Commission envisioned a board of directors populated with the type and caliber of individuals who typically serve on boards of large public corporations. If a President could recruit individuals like those who serve on the boards of global financial institutions and the largest technology companies, the expectation would be that the board would not only provide the IRS with the oversight and direction it needs but that the board would also help the IRS build confidence in Congress. In my view, if that can be done, the board should be resuscitated. Sadly, I am not convinced that it will be done, and thus, I am inclined to believe that the board will remain defunct for the foreseeable future.

C. Reinvigorating the Career Workforce

Addressing top-level governance and senior management will not remedy all of the IRS's problems. The Restructuring Commission found that only five of the seventy-three senior most IRS executives (as of June 1997)

⁵³ S. 3278, 115th Cong. § 101 (2018).

⁵⁴ Eliminate Failed IRS Oversight Board Act, H.R. 5370, 115th Cong. § 2 (2018).

had been at the agency for less than fifteen years.⁵⁵ The longevity of tenures of senior IRS employees has continued to the present day. Commissioner Rettig has stated that close to half of the IRS workforce is at or near retirement age, and less than five percent of its workforce is thirty or younger.⁵⁶ A number of factors surely have played a role in the declining size of the IRS workforce and the agency's inability to recruit and train employees to fill the gaps. The biggest factor is likely funding, which I will discuss below. And the regular bashing of the IRS by Congress and others no doubt makes it difficult to recruit and retain employees.

But there is a broader issue that the IRS, like nearly all federal agencies, faces. That is the inflexibility of the civil service system that makes it difficult for agencies to compete with the private sector for top talent, and to remove ineffective or underperforming workers. This is a problem that the Restructuring Commission explored,⁵⁷ and the original legislation to implement the Commission's recommendations sought to provide a solution by granting the IRS with significant flexibilities under the federal personnel system.⁵⁸

The IRS was not granted the authority envisioned by the Restructuring Commission, and it is uncertain whether such a major experiment would work.⁵⁹ But there are other steps that could be taken to reinvigorate the career workforce. For example, the IRS could take a lesson from the military and many private sector employers, and require regular rotation of senior

⁵⁵ COMMISSION REPORT, *supra* note 2, at 7.

⁵⁶ Jory Heckman, *IRS Commissioner: Aging Workforce 'Lost an Entire Generation' to Hiring Freeze*, FED. NEWS NETWORK (Apr. 10, 2019 3:20 pm), <https://federalnewsnetwork.com/workforce/2019/04/irs-commissioner-aging-workforce-lost-an-entire-generation-to-hiring-freeze/>.

⁵⁷ COMMISSION REPORT, *supra* note 2, at 22.

⁵⁸ Internal Revenue Service Restructuring and Reform Act of 1997, H.R. 2292, 105th Cong. § 111 (1998).

⁵⁹ A draft of the Inflation Reduction Act would have granted significant personnel flexibilities to the IRS, including direct hire authority and the ability to recruit up to 500 individuals at higher compensation levels than otherwise would be permitted. H.R. 5376, 117th Cong. § 10301(b), at 39 (2022) (Inflation Reduction Act as Amended in the Nature of a Substitute (ERN22335) and posted on the website of the Sen. Maj. Leader on July 27, 2022), https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_of_2022.pdf [<https://perma.cc/DN3T-N6HX>]. Those provisions were stricken from the legislation due to the procedural requirements for legislation considered under the budget reconciliation rules.

executives and managers. There are a finite number of senior executive positions in the IRS and the Office of Chief Counsel, and it is often the case that individuals hold their positions until they either retire from government or find another government position to fill. With so few vacancies coming open on a regular basis, up-and-coming leaders often leave the agency, frustrated at the lack of upward mobility. At the same time, the entrenched leaders do not benefit from new ideas and insight that could be provided by new executives—whether they be internally promoted or recruited from the private sector. As the Restructuring Commission observed twenty-five years ago: “While institutional memory is valuable . . . the dearth of outside thinking can limit the IRS management’s ability to bring new perspectives to organizational challenges.”⁶⁰

II. FUNDING THE IRS SO IT CAN DELIVER

The Restructuring Commission recommended that Congress provide the IRS with adequate funding to achieve its mission.⁶¹ One might think that this common-sense recommendation would be adopted. But for a number of years now the IRS budget has been less than half the size it was relative to the economy in 1993.⁶² And over the past three decades, the responsibilities of the agency have multiplied many times over. Among other things, the IRS has been charged with helping to administer the Affordable Care Act, providing support to lower-income individuals and families through the administration of the earned income tax credit, child tax credit, and similar programs, and delivering pandemic relief to individuals and small businesses over the past three years. And during this time, the IRS has been required to implement changes enacted by Congress through dozens of major legislative acts.⁶³

⁶⁰ COMMISSION REPORT, *supra* note 2, at 7.

⁶¹ *Id.* at 16.

⁶² Charles O. Rossotti, *Opinion, Longstanding Funding Shortfalls Fuel Public Perception of the IRS*, BLOOMBERG TAX (Apr. 22, 2022), <https://news.bloombergtax.com/tax-insights-and-commentary/longstanding-funding-shortfalls-fuel-public-perception-of-irs>.

⁶³ *See, e.g.*, Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010); Foreign Account Tax Compliance Act, Pub. L. No. 111-147, 124 Stat. 71 (2010); Pub. L. No. 115-97, 131 Stat. 2054 (2017) (often called the Tax Cut and Jobs Act).

Without the funding it needs, the IRS simply cannot deliver everything that is asked of the agency. The National Taxpayer Advocate has reported that for two years running the agency had a backlog of more than twenty million unprocessed paper tax returns, that it was averaging over eight months to process taxpayer correspondence, and only ten percent of calls to the IRS are actually answered by an IRS employee.⁶⁴ At the same time, the IRS has reported that the tax gap continues to grow, with Commissioner Rettig telling Congress that the agency loses one trillion dollars in unpaid taxes each year.⁶⁵

President Biden proposed to remedy this situation by asking Congress for eighty billion dollars in dedicated funding over the next decade to double the size of the IRS.⁶⁶ Despite concerns expressed by many members of Congress about the continued growth in the federal debt, not to mention the continued anti-IRS rhetoric fueled by the 2013 Tea Party incident,⁶⁷ the unresolved leak of taxpayer data to ProPublica and the questions about the Comey and McCabe audits,⁶⁸ Congress delivered that funding in the Inflation Reduction Act.⁶⁹ The agency now has at its disposal nearly \$80 billion in additional funding that will be available until September 30, 2031.⁷⁰ Of this amount, \$45.6 billion is dedicated for enforcement purposes and \$25.3 billion is dedicated to operations support.⁷¹

So what happens next? The Congressional Budget Office estimated that the \$80 billion in additional funding would raise \$180.4 billion over ten

⁶⁴ NAT'L TAXPAYER ADVOC., OBJECTIVES REPORT TO CONGRESS: FISCAL YEAR 2023, v–vii (June 2022).

⁶⁵ Alan Rappeport, *Tax Cheats Cost the U.S. \$1 Trillion per Year, I.R.S. Chief Says*, N.Y. TIMES (Apr. 13, 2021), <https://www.nytimes.com/2021/04/13/business/irs-tax-gap.html>.

⁶⁶ Jim Tankersley & Alan Rappeport, *Biden Seeks \$80 Billion to Beef Up I.R.S. Audits of High-Earners*, N.Y. TIMES (July 7, 2022), <https://www.nytimes.com/2021/04/27/business/economy/biden-american-families-plan.html>.

⁶⁷ See INAPPROPRIATE CRITERIA, *supra* note 5.

⁶⁸ See *Secret IRS Files & Comey and McCabe*, *supra* note 5.

⁶⁹ § 10301, 136 Stat. 1818, 1831.

⁷⁰ *Id.*

⁷¹ *Id.*

years, for net savings of about \$100 billion.⁷² Having received this massive infusion in appropriations, the pressure will be on the IRS to deliver. And although Congress specified that the increased funding would be available for ten years,⁷³ a future Congress could try to claw back any appropriated amounts that have not yet been spent.⁷⁴ To avoid such a situation, the Senate should quickly confirm the President's nominee for the vacant role of Commissioner, the President should nominate candidates to fill the open positions of Chief Counsel and Assistant Attorney General, and the agency will need to quickly (a) prioritize technology improvements and hiring to remedy the service failings noted by the National Taxpayer Advocate, (b) commit to transparently address congressional concerns regarding the leak of IRS data, and (c) deliver detailed and measurable performance goals that Congress can evaluate to understand whether the new leaders and increased funding are delivering as promised.

III. MODERNIZING THE DISPUTE RESOLUTION PROCESS

It is often said that nobody likes the tax man. For tens of thousands of taxpayers each year, disputes arise as to their taxes. Sometimes the disputes arise due to factual questions or quarrels regarding substantiation. Other times the disputes arise due to disagreements on how the law applies to known facts. Regardless, for taxpayers to have trust in the tax system, and thus in the IRS, they must believe that the tax dispute resolution process treats them fairly and impartially. As with other aspects of the IRS, this is yet another area in woeful need of modernization.

⁷² PHILIP L. SWAGEL, CONG. BUDGET OFF., ADDITIONAL INFORMATION ABOUT INCREASED ENFORCEMENT BY THE INTERNAL REVENUE SERVICE (Aug. 25, 2022), <https://www.cbo.gov/system/files/2022-08/58390-IRS.pdf>.

⁷³ § 10301, 136 Stat. 1818, 1831.

⁷⁴ In fact, on January 9, 2023, the House approved H.R. 23, which would rescind all unobligated amounts of the funding provided to the IRS in the Inflation Reduction Act. On the same date, the White House announced that President Biden would veto H.R. 23 or any other bill having the same effect. THE WHITE HOUSE, STATEMENT OF ADMINISTRATION POLICY (Jan. 9, 2023), <https://www.whitehouse.gov/wp-content/uploads/2023/01/HR-23-S.A.P..pdf>.

A. Making Appeals Truly Independent

Section 7803(e) establishes within the IRS the IRS Independent Office of Appeals (“Appeals”). The function of Appeals is to resolve federal tax controversies without litigation on a basis that is fair and impartial to both the government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the federal tax laws, and enhances public confidence in the integrity and efficiency of the IRS.⁷⁵

Historically, Appeals resolved about eighty-five percent of cases it received.⁷⁶ Taxpayers appreciate the opportunity to resolve tax disputes through Appeals where proceedings are informal and confidential. Although data might be skewed by the pandemic, it does not appear that Appeals is continuing to resolve as many cases as in the past, and the size of the Tax Court docket has increased significantly as a result.⁷⁷

For decades now, practitioners and taxpayers have expressed concerns with the true independence of Appeals. RRA 98 directed the Commissioner “to ensure an independent appeals function” and to prohibit *ex parte* communications between Appeals and other parts of the agency.⁷⁸ Those changes did not assuage the concerns regarding the lack of independence of Appeals. The Taxpayer First Act⁷⁹ codified an “independent” Appeals and established a general right for taxpayers to have their cases heard by Appeals. But calling Appeals independent does not make it so.

What is required to make Appeals independent? To be truly independent, the Appeals function needs to evaluate each case free of influence from the Commissioner and all other officers and employees of the agency, including lawyers in the Office of Chief Counsel. To be truly independent, the Appeals function should not give any weight to sub-

⁷⁵ I.R.C. § 7803(e)(3).

⁷⁶ U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-659, TAX ADMINISTRATION: OPPORTUNITIES EXIST TO IMPROVE MONITORING AND TRANSPARENCY OF APPEAL RESOLUTION TIMELINESS 37 (2018).

⁷⁷ See U.S. Tax Court, Press Release (July 23, 2021), <https://www.ustaxcourt.gov/resources/press/07232021.pdf>; Chief, Independent Off. of Appeals, Dept. of Treas. Memorandum: Guidelines for Docketed Casework (Apr. 19, 2022), https://www.irs.gov/pub/irs-utl/2022_04_19_Docketed%20Casework%20Memo.pdf.

⁷⁸ § 1001(a)(4), 112 Stat. 689.

⁷⁹ Taxpayer First Act, Pub. L. No. 116-25, 133 Stat. 981 (2019).

regulatory guidance or written determinations, FAQs, or internal agency directives. To be truly independent, the Appeals function should impartially evaluate cases, not advocate for government positions or, worse yet, develop novel theories and arguments not presented by the examination function in an effort to support proposed adjustments. To be truly independent, Appeals officers should be granted full authority to resolve cases, without requiring approval from senior executives who do not participate in conferences and have an opportunity to hear directly from the taxpayer or its representatives. These and other steps can provide taxpayers with greater confidence in the ability to obtain a fair hearing and chance for resolving disputes short of litigation.

B. Modernizing the JCT Review Process

Section 6405(a) prohibits the IRS from granting any refund or credit until at least thirty days after the agency submits to the JCT a report on the proposed refund or credit.⁸⁰ This prohibition applies for any refund or credit in excess of two million dollars for individual taxpayers and five million dollars for subchapter C corporations.⁸¹ Although the statute does not provide the JCT with the right to approve proposed refunds—nor could it, as that would violate the separation of powers⁸²—in practice, the IRS will not approve refunds unless the JCT has advised that they do not object.

The JCT refund review process was mandated by Congress in the Revenue Act of 1928 following congressional hearings regarding allegations that Treasury Secretary Andrew Mellon had directed improper refunds be made to certain wealthy individuals and corporations.⁸³ It is understandable that, in the course of its oversight responsibilities, Congress would want to

⁸⁰ I.R.C. § 6405(a).

⁸¹ *Id.*

⁸² See Amandeep S. Grewal, *The Congressional Revenue Service*, 2014 UNIV. ILL. L. REV. 689 (2014) (arguing that even though the statute does not provide an explicit veto over executive branch action, § 6405(a) nonetheless violates the separation of power).

⁸³ See JOINT COMMITTEE ON TAXATION, HISTORY, <https://www.jct.gov/about-us/history/> (last visited Dec. 8, 2022).

have an understanding regarding extraordinarily large tax refunds. But that is not how the provision has been applied in practice.

For the uninitiated, in any case, in which an IRS examination team, or Appeals, believes that a refund in excess of the amounts specified in § 6405(a) should be approved, complex procedures are employed to re-review the entire case file, assemble a package to provide to the JCT, and then wait for the JCT staff to commence their review.⁸⁴ This process can add months to the time it takes for a case to be finalized, and if the JCT staff raises questions, the delays can extend even longer. In extreme cases, the JCT review process has resulted in delays of over a year for refunds to be processed.⁸⁵ Moreover, although § 6405(a) merely requires the IRS to wait thirty days before issuing the proposed refund, in practice when the JCT staff objects to a proposed refund, the agency will not approve the refund.⁸⁶ This can lead to further negotiations with Appeals (to reduce the amount the taxpayer will receive), and if a new agreement cannot be reached, the case will end up in litigation.

Given these concerns, in practice, taxpayers often seek ways to avoid claiming refunds that might trigger JCT review. And it is a common occurrence for Appeals officers to hold firm on settlement amounts so that cases do not need to be sent through this process. Taxpayers often accede to such settlements because they understand that it is expedient, and sometimes resolving the case quickly is worth the increased tax cost. But the notion that a taxpayer will not receive a refund that the IRS approved only because some congressional staffers who the taxpayer never met might disagree with the decision the IRS made can be quite unsettling. It certainly does not help engender goodwill for the agency or the tax system and contributes to the view that the deck is stacked against taxpayers.

So what can be done? Ideally, Congress would repeal § 6405(a) to eliminate the JCT refund review process. Short of that, the process should be

⁸⁴ See Joint Committee Process Overview, I.R.M. 4.36.1, and Joint Committee Cases, I.R.M. 8.7.9.

⁸⁵ Such delays can be costly for both the government and taxpayers. First, the government is required to pay interest on refunds, so the longer it takes to approve refunds, the more interest the government must pay. Second, taxpayers often need the refunds for their business, and must find other sources of financing when the refunds are delayed. Ordinarily, the cost of borrowing for taxpayers is significantly higher than that of the government, meaning that the negative arbitrage results in a drag on earnings for companies awaiting significant tax refunds.

⁸⁶ I.R.C. § 6405(a).

overhauled by (a) increasing the thresholds for triggering review so that only extraordinarily large refunds (say \$50 million for individuals and \$250 million for subchapter C corporations) would be subject to review, (b) imposing strict time limits so that taxpayers are not forced to suffer through lengthy delays to have refunds approved, and (c) clarifying that the role of § 6405(a) is to apprise the JCT of proposed refunds, not to allow the JCT staff to second guess decisions that already have been made by the agency or re-negotiate settlements to which taxpayers have already agreed. After all, the original purpose of § 6405(a) was so that Congress would have an understanding of what goes into extraordinarily large tax refunds, such as those reported to have been approved by Treasury Secretary Mellon in the 1920s. If the statute is reformed to address that purpose, the number of cases subject to JCT review will be significantly curtailed but Congress will still have oversight over extraordinary cases.

C. Is there a Place for Alternative Dispute Resolution in the Tax System?

Taxpayers have numerous choices when it comes to handling tax disputes with the IRS. First, in many cases, taxpayers can seek to resolve cases administratively through the Appeals process. Second, taxpayers can petition the U.S. Tax Court to review IRS determinations on a pre-payment basis. Third, taxpayers can pay the tax claimed to be due and seek a refund through litigation in federal district court or the Court of Federal Claims. The litigation options are public and often take years to get to decision.

Is there a better way? Appeals offers post-Appeals mediation in certain circumstances, and some taxpayers have been able to resolve cases through that process.⁸⁷ In post-Appeals mediation, a specially-trained Appeals officer is brought in as a mediator, and the taxpayer can pay for an outside mediator to serve as co-mediator. Mediations tend to be relatively quick, and when successful can save both parties significant time and resources that would be incurred in litigation. But for mediations to be successful, both sides

⁸⁷ For a time, Appeals also offered post-Appeals arbitration. See I.R.S. Announcement 2000-4, 2000-1 C.B. 317, *modified* by I.R.S. Announcement 2002-60, 2002-2 C.B. 28, *superseded* by Rev. Proc. 2006-44, 2006-2 C.B. 800. This binding arbitration process was utilized exactly two times before the program was cancelled “given the general lack of demand” for arbitration. See Rev. Proc. 2015-44, 2015-38 I.R.B. 354.

must be willing to compromise. Unfortunately, all too often parties are dug in by the time of mediation, and thus the mediations are not successful.

The Tax Court rules contemplate the use of voluntary binding arbitration to resolve cases.⁸⁸ Anecdotal evidence suggests that this process has had limited use over the years. The question remains whether other options would make sense to facilitate more efficient resolution of tax disputes. For example, if Congress authorized taxpayers to make an irrevocable election to resolve a tax dispute through binding arbitration using a traditional three-member arbitration panel (with each party selecting one arbitrator and the two arbitrators then selecting the third member of the panel), perhaps that would be one path toward streamlining the dispute resolution process. And to ensure that the parties do not pursue extreme outcomes, in valuation and transfer pricing disputes, the program might require “baseball” arbitration under which the arbitration panel would be required to select one of the parties’ positions, rather than divining their own resolution somewhere in the middle.⁸⁹ Arbitration will not be right for every case or every taxpayer, but if Congress is serious about streamlining the process and making it easier for tax disputes to be resolved, it merits serious consideration.

IV. CONCLUSION

Will the vision for a taxpayer service-focused, modern, efficient IRS ever be realized? Hope springs eternal. The blueprint issued by the Restructuring Commission twenty-five years ago provides numerous thoughtful recommendations for how to achieve that vision. Although some of the bolder initiatives from that report are unlikely to ever be adopted, I still believe the vision can be achieved. How to get there? Congress has just provided the IRS with a massive infusion in funding. The President should bring in new leaders with fresh ideas who will focus on governance, ensure that each component of the tax system stays in its lane, and hold those leaders accountable for delivering on a long-term strategic plan and modernizing the dispute resolution system. This is not only the recipe for success, and it may not be perfect, but we must start somewhere if we will ever achieve the vision.

⁸⁸ TAX CT. R. PRAC. P. 124.

⁸⁹ The IRS proposed using “baseball” arbitration in Rev. Proc. 2002-67, 2002-2 C.B. 733, and also agreed to its use in the Apple Computer case. See I.R.S. News Release IR-92-20 (Mar. 6, 1992).