

MSP
#2**IRS USER FEES: The IRS May Adopt User Fees to Fill Funding Gaps Without Fully Considering Taxpayer Burden and the Impact on Voluntary Compliance****RESPONSIBLE OFFICIALS**

Karen Schiller, Commissioner, Small Business/Self-Employed Division
 Debra Holland, Commissioner, Wage and Investment Division
 Sunita Lough, Commissioner, Tax Exempt and Government Entities Division
 Douglas W. O'Donnell, Commissioner, Large Business and International Division
 Kirsten Wielobob, Chief, Appeals
 William J. Wilkins, Chief Counsel
 Jeffrey S. Wallbaum, Acting Chief Financial Officer

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Quality Service*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Between fiscal years (FY) 2010 and 2015, the IRS's appropriation declined by about ten percent (from \$12.15 billion to \$10.95 billion), and its user fee revenue increased by about 34 percent (from \$290 million to \$391 million).² The IRS is actively considering user fee increases that would mitigate cuts to its appropriation.³ The IRS's need for user fee revenue heightens the importance of requiring employees to:

- Avoid fees that impair its service-oriented mission, voluntary compliance, or taxpayer rights;
- Estimate the effect of the fee on demand for service; and
- Publish its user fee analysis and address any comments from internal and external stakeholders before adopting or increasing a fee.

Even user fees that seem reasonable to the IRS in a vacuum may seem outrageous to taxpayers when added to the costs of recordkeeping, filing and paying taxes, and paying professionals for help in navigating complicated rules and procedures that the government created. They may seem even more outrageous

1 See Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

2 Treasury Department, *Congressional Justification* (FY 2010-2016), available at <http://www.treasury.gov/about/budget-performance/Pages/cj-index.aspx>; IRS response to TAS information request (May 20, 2015); IRS response to TAS information request (Oct. 22, 2015).

3 IRS response to TAS information request (Oct. 22, 2015). For a discussion of the effect of these cuts, see, e.g., National Taxpayer Advocate 2014 Annual Report to Congress 20-39 (Most Serious Problem: *The IRS Desperately Needs More Funding to Serve Taxpayers and Increase Voluntary Compliance*).

The IRS is not a business selling rights only to those willing to pay.

when combined with the IRS's plans to reduce services it previously provided for free, shifting more tax compliance burdens to taxpayers.⁴

Shifting compliance burdens to taxpayers is inconsistent with the IRS mission and taxpayer rights, and may reduce voluntary tax compliance. The IRS's mission is to “[p]rovide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and enforce the tax law with integrity and fairness to all.”⁵ User fees discourage taxpayers from obtaining services that could help them “understand and meet their responsibilities.”

User fees may also erode taxpayer rights, such as the *right to quality service*. This “right” to quality service may be inconsistent with requiring taxpayers to pay a fee for it. The IRS is not a business selling rights only to those willing to pay. If some are able to pay and others are not, then the fee may also erode the *right to a fair and just tax system*.

In addition, IRS services often promote voluntary compliance.⁶ Thus, if a fee discourages taxpayers from using services, it may erode tax compliance, particularly if it combines with other burdens to make them lose interest in trying to comply.

ANALYSIS OF PROBLEM

The IRS Has Discretion in Setting User Fees

The Independent Offices Appropriation Act of 1952 (IOAA) generally requires federal agencies to establish user fees at “full cost” for services that convey “special benefits.”⁷ However, fees must be “fair” and based, in part, on the “public policy or interest served,” and agencies can seek a waiver of this requirement from the Office of Management and Budget (OMB).⁸ Various other laws give the IRS discretion to set a “reasonable” fee for specific items.⁹ Thus, the IRS does not have to impose user fees that have undesirable consequences.

The IRS Seems to Prioritize User Fee Revenue

It took the IRS the 43 years between 1952 and 1995 to charge any fees based on the IOAA. In 1995, after Congress allowed it to retain some of its user fee revenue,¹⁰ the IRS imposed a new \$43 user fee to

4 See, e.g., Most Serious Problem: *Taxpayer Access to Online Accounts: As the IRS Develops an Online Account System, It May Do Less to Address the Service Needs of Taxpayers Who Wish to Speak with an IRS Employee Due to Preference or Lack of Internet Access or Who Have Issues that Are Not Conducive to Resolution Online*, *infra*.

5 Internal Revenue Manual (IRM) 1.1.1.2, *IRS Mission* (June 2, 2015).

6 See, e.g., Dept. of Treasury, *Reducing the Federal Tax Gap a Report on Improving Voluntary Compliance* (Aug. 2, 2007), available at http://www.irs.gov/pub/irs-news/tax_gap_report_final_080207_linked.pdf.

7 31 U.S.C. § 9701.

8 *Id.*; OMB, Circular A-25, 58 Fed. Reg. 38,142 (July 15, 1993) (hereinafter “Circular A-25”) (directing that an agency may apply for a user fee exception based on anything that “in the opinion of the agency head or his designee, justifies an exception.”).

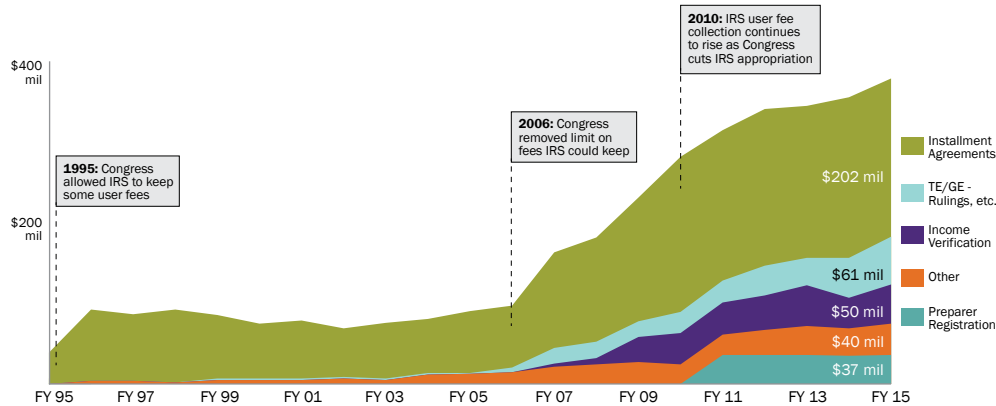
9 See, e.g., Internal Revenue Code (IRC) § 6103(P) (reproduction of returns and the disclosure of return information, such as a U.S. Residency Certification, Income Verification Express Service (IVES), and copies); IRC § 7528 (letter rulings, opinion letters, determination letters, art valuation, and similar requests); IRC § 6104 (copying and mailing exempt organization (EO) materials and returns); IRC § 6108 (statistical studies); 5 U.S.C. § 552(a)(4)(A) (FOIA document search, duplication, and review); IRC § 6110(k) (reproduction of Chief Counsel Advice); 29 U.S.C. 1202a (Employee Plan Compliance Resolution System); IRM 1.32.19.21, *Types of User Fees* (Nov. 8, 2012). The IRS must also collect a \$500 user fee from any person claiming a deduction for a historical preservation easement. See IRC § 170.

10 31 U.S.C. § 3302(b) (requiring user fees to be deposited with the Treasury, absent specific statutory authority); Treasury Postal Service and General Government Appropriations Act of 1995, Pub. L. No. 103-329, § 3, 108 Stat. 2,382 (1994) (codified at IRC § 7801 (note)) (allowing the IRS to retain certain user fee receipts).

enter into an installment agreement (IA).¹¹ In 2006, Congress removed the limit on the amount of fee revenue the IRS could keep.¹² User fee receipts immediately increased, and the IRS has acknowledged that with the reductions in enacted appropriations beginning in FY 2011, it has increasingly relied on user fees for funding, as shown in Figure 1.2.1.¹³

FIGURE 1.2.1

IRS User Fee Revenue



Between FYs 2010 and 2015, the IRS’s appropriation declined by about ten percent (from \$12.15 billion to \$10.95 billion), and its user fee revenue increased by about 34 percent (from \$290 million to \$391 million).

Between FYs 2010 and 2015, the IRS’s appropriation declined by about ten percent (from \$12.15 billion to \$10.95 billion), and its user fee revenue increased by about 34 percent (from \$290 million to \$391 million).¹⁴ Although user fees were historically used, in large part, to fund services, beginning in FY 2015, the IRS shifted user fee revenue expenditures from taxpayer service to operations support, primarily information technology infrastructure to implement the Affordable Care Act (ACA).¹⁵ User fees applied to service expenditures declined by 75.4 percent (from \$183 million in FY 2014 to \$45 million in FY 2015), while user fees applied to operations support expenditures increased by 77.0 percent (from \$222 million in FY 2014 to \$393 million in FY 2015), and the IRS plans to allocate more user fee revenue to operations support than to services in FY 2016, as shown in Figure 1.2.2.¹⁶

11 T.D. 8589, 60 Fed. Reg. 8298 (Feb. 14, 1995); Treas. Reg. § 300.0-300.2.
 12 Pub. L. No. 109-115 § 209, 119 Stat. 2439 (2006) (codified at IRC § 7801 (note)). OMB Circular A-25 also requires agencies to update user fees every two years.
 13 IRS response to TAS fact check (Nov. 13, 2015). Even though user fee revenue has been rising, the IRS has spent more of its user fee collections every year since FY 2010 (spending \$481,882,027 in FY 2015 (planned), up from \$148,124,769 in FY 2010), causing the carryover balance in its user fee account to decline from its high-water mark of \$352,928,852 at the beginning of FY 2013 to \$193,074,529 as of September 30, 2015. *Id.*
 14 Treasury Department, *Congressional Justification* (FY 2010-2016), available at <http://www.treasury.gov/about/budget-performance/Pages/cj-index.aspx>; IRS response to TAS information request (May 20, 2015); IRS response to TAS information request (Oct. 22, 2015).
 15 The House Ways and Means Committee expressed concern about this shift. House Ways and Means Committee, *Majority Staff Report, Doing Less with Less: IRS’s Spending Decisions Harm Taxpayers*, 114th Cong. (Apr. 22, 2015).
 16 IRS response to TAS information request (Oct. 22, 2015).

FIGURE 1.2.2, User Fee Spending by Account¹⁷

Account	FY 2013		FY 2014		FY 2015		FY 2016 (Plan)	
Taxpayer Services	\$191 mil	48.3%	\$183 mil	43.6%	\$45 mil	9.7%	\$97 mil	22.9%
Enforcement	\$20 mil	5.2%	\$15 mil	3.5%	\$21 mil	4.5%	\$10 mil	2.4%
Operations Support	\$184 mil	46.6%	\$222 mil	52.9%	\$393 mil	85.8%	\$316 mil	74.7%
Total	\$396 mil		\$419 mil		\$459 mil		\$423 mil	

The IRS's reliance on user fee revenue to offset cuts creates a conflict of interest. This conflict is stronger when the IRS appropriation declines. Agencies are supposed to reevaluate user fees every two years, but the IRS has asked its business units (BUs) to reevaluate them more often in the last few years due to its declining appropriation.¹⁸

User Fees Can Undermine the IRS Mission, Voluntary Compliance, and Taxpayer Rights

If fees discourage taxpayers from using IRS services, they may undermine the IRS mission, voluntary compliance, and taxpayer rights. For example, in addition to penalties and interest for late payments, the IRS charges taxpayers a fee to set up an IA, which it increased from \$105 to \$120 in 2014.¹⁹ It is considering further increases to the IA fee.²⁰ If this fee discourages taxpayers who cannot pay in full from making arrangements to pay, then it:

1. Reduces voluntary compliance, potentially prompting the IRS to issue more wage levies or classify more accounts as uncollectible;
2. Is inconsistent with the IRS mission to help taxpayers “meet their tax responsibilities;”²¹ and
3. Is inconsistent with the taxpayer’s *right to privacy*, *i.e.*, that enforcement be “no more intrusive than necessary.”²² Paying in installments would be less intrusive than a levy. It may also be inconsistent with the *right to a fair and just tax system*, which requires the tax system to “consider facts and circumstances that might affect ... ability to pay.”²³ Similarly, it may be inconsistent with the idea that *quality service* is a fundamental taxpayer right, which should not be subject to a fee.²⁴

17 IRS response to TAS fact check (Nov. 13, 2015). The FY 2016 projections are preliminary and subject to change. The IRS increased the user fees allocated to operations support, in large part, to implement the ACA. IRS response to TAS information request (Oct. 22, 2015).

18 Circular A-25 § 8(e) (two years). The IRS held its biennial user fee review process in 2007, 2009, 2011, 2013, and 2015, as well as an out-of-cycle review in 2014. IRS response to TAS information request (May 20, 2015). The IRS also sought revenue-raising ideas in connection with a resource realignment effort in early 2015.

19 T.D. 9647, 78 FR 72016 (2014); Treas. Reg. § 300.1 (IA fee).

20 IRS response to TAS information request (Oct. 22, 2015) (FY 2015 Biennial Review of User Fee Charges, Attachment 2).

21 IRM 1.1.1.2, *IRS Mission* (June 2, 2015).

22 IRS Pub 1, *Your Rights as a Taxpayer* (2014).

23 *Id.*

24 *Id. Cf., Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966) (holding unconstitutional a state-imposed \$1.50 poll tax) and *Bullock v. Carter*, 405 U.S. 134 (1972) (holding unconstitutional a state-imposed filing fee of between \$1 and \$8,900 to register as a candidate in the primary election, even as to fees that were limited to less than ten percent of the candidate’s gross income). If an IA fee does not actually discourage any taxpayers from obtaining an IA, then it should not be imposed under existing criteria, because it is not really voluntary. See, e.g., IRM 1.32.19.20, *Review and Implementation of New User Fees* (Nov. 8, 2012). Moreover, the National Taxpayer Advocate questions whether an IA or offer in compromise (OIC) is actually a “special” service, as some people will simply not be able to pay and the IRS will need to deal with them in some way.

As another example, the Private Letter Ruling (PLR) fee increased from \$10,000 to \$28,300 in 2015 for an exempt organization (EO) with gross income of \$1 million or more.²⁵ If only some taxpayers who need guidance can afford a PLR, the PLR fee is inconsistent with the taxpayer *right to a fair and just tax system*, which includes the right to expect the tax system to “consider facts and circumstances that might affect their underlying liabilities.”²⁶ Although lower PLR fees apply to those with lower gross income, when combined with the amount taxpayers have to pay to an advisor to help with a PLR submission, the PLR fee may discourage taxpayers from obtaining the information they need (*i.e.*, a PLR) to voluntarily comply. According to some practitioners, for the first time in history the \$28,000 PLR filing fee may now exceed the legal costs of preparing the PLR request.²⁷

The Internal Revenue Manual (IRM) Provides Limited Guidance About How to Evaluate User Fees

The IRM requires IRS employees to consider the following factors in setting user fees:

- The voluntary nature of the user fee activities. The IRS does not charge taxpayers for special services that they do not request.
- The benefit must be identifiable to a specific taxpayer.
- The cost of administering the user fee, as this cannot be a substantial amount of the fee.
- The impact of the user fee on low income taxpayers.²⁸

The IRM does not require employees to consider the effect of user fees on the IRS’s service-oriented mission, voluntary compliance, taxpayer burden, or taxpayer rights.²⁹ Nor does it require them to estimate the effect of fees on the demand for service or downstream costs so that they can make better informed decisions about these effects.³⁰

User fees that seem reasonable to the IRS in a vacuum may seem outrageous to taxpayers when added to the costs of recordkeeping, filing, and paying taxes, and paying professionals for help in navigating complicated rules and procedures that the government created. They may seem even more outrageous when combined with the IRS plans to reduce services it historically provided for free, shifting even more

25 Previously, the fee for PLRs from Tax Exempt/Government Entities (TE/GE) was a flat \$10,000 for all organizations. Rev. Proc. 2014-8, § 6.08, 2014-1 I.R.B. 242 (2014). In form, the 2015 fee for PLRs from IRS Counsel only increased from \$19,000 to \$28,300 for EOs with gross income of \$1 million or more. Rev. Proc. 2015-1, App’x A(3), 2015-1 I.R.B. 1 (2015). However, due to an IRS realignment in 2014, EOs seeking PLRs now pay the rates applicable to IRS Counsel. Rev. Proc. 2015-8, § 6, 2015-1 I.R.B. 235 (2015). As a result, the fee effectively increased from \$10,000 to \$28,300. EOs with high gross income may have little net income with which to pay a fee. They may also divert funds to pay the user fee that would otherwise be used to provide important services to the public.

26 IRS Pub 1, *Your Rights as a Taxpayer* (2014). Although the fee is lower for those with lower gross income, there is no low income waiver for PLRs. See, e.g., Rev. Proc. 2015-1, App’x A(3), 2015-1 I.R.B. 1 (2015).

27 Paul Streckfus, EO Tax Journal, *Email Update 2015-102* (May 27, 2015) (quoting comments by Rob Wexler at an American Bar Association Tax Section meeting).

28 IRM 1.32.19.20(1), *Review and Implementation of New User Fees* (Nov. 8, 2012). In 2007, the National Taxpayer Advocate reported the IRS did not have a consistent methodology for determining whether to charge a fee. National Taxpayer Advocate 2007 Annual Report to Congress 66-82. The IRS subsequently documented the process for setting fees.

29 As noted above, however, 31 U.S.C. § 9701 generally requires user fees to be “fair” and based, in part, on the “public policy or interest served,” and OMB Circular A-25 provides that an agency may apply for a user fee exception based on anything that “in the opinion of the agency head or his designee, justifies an exception.”

30 The IRS generally estimates the impact of fees on demand for services only after they are imposed or increased. TAS midpoint call with responsible officials (Sept. 17, 2015). It does not isolate the effect of the fee from other factors that may affect demand. *Id.*

of the burden of tax compliance to taxpayers.³¹ In such cases, they may be even more likely to discourage taxpayers from using IRS services.

IRS Employees Sometimes Consider the Downstream Effects of Fees

In its biennial user fee reviews, the IRS sometimes considers the effect of a fee increase on service and compliance.³² For example, in the FY 2011 Biennial Review the Small Business/Self-Employed Division (SB/SE) recommended retaining the existing IA fee, which was below full cost, because, among other things:

- Keeping the present rates encourages taxpayers to enter into an IA and pay down the current liability; and
- Increasing the rate may discourage taxpayers from using the IA process, age our accounts receivable and move us closer to the statute expiration date without resolution of the account.³³

In the FY 2013 Biennial Review, the IRS's National Public Liaison (NPL) office — an office that facilitates communications between the IRS and external stakeholders — opposed a user fee for the Nationwide Tax Forums, in part, because there is “significant value in providing a national platform for education and outreach activities.”³⁴ Similarly, the Large Business and International Division (LB&I) opposed a fee for the Compliance Assurance Process (CAP) because CAP encourages voluntary compliance and benefits the IRS.³⁵ It also opposed increasing the \$50,000 fee for Pre-Filing Agreement (PFAs) to the IRS's full cost of \$265,475.³⁶ LB&I reasoned that PFAs “enhance compliance,” and as part of its mission to provide taxpayer service, it believes the PFA program helps to prepare taxpayers to become a part of CAP.³⁷

Without express guidance that IRS employees should consider the effect of fees on service, the IRS mission, taxpayer rights and burden, and voluntary compliance, they may feel pressure to ignore these considerations.

In the 2011 review, the Tax Exempt and Government Entities Division (TE/GE) opposed charging full cost to issue a PLR to individuals who need guidance about Roth IRA recharacterizations.³⁸ It reasoned that the fee can be prohibitive for individuals and negatively affect retirement savings. In the 2009 review, it also recommended a less-than-full-cost fee for approving

31 See, e.g., Most Serious Problem: *Taxpayer Access to Online Account System: As the IRS Develops an Online Account System, It May Do Less to Address the Service Needs of Taxpayers Who Wish to Speak with an IRS Employee Due to Preference or Lack of Internet Access or Who Have Issues that Are Not Conducive to Resolution Online*, *infra*.

32 IRS response to TAS information request (May 20, 2015) (attachments A and G).

33 *Id.* (attachment G). SB/SE used a similar justification to avoid increasing the fee for OICs in the FY 2011 Review. *Id.*

34 IRS response to TAS information request (May 20, 2015) (attachment A); IRM 1.1.11.4, *Office of National Public Liaison* (Feb. 12, 2015).

35 CAP is a program that allows large businesses under continuous audit to, in effect, have the IRS audit the return before it is filed, increasing voluntary compliance and reducing the burden of post-filing examinations for both the IRS and taxpayers. See, e.g., IRM 4.51.8 (June 15, 2012).

36 IRS response to TAS information request (May 20, 2015) (attachment A).

37 Similarly, LB&I argued that Advanced Pricing Agreements (APAs) are deliberately set at 50 percent of their total cost because they help reduce enforcement costs while providing a benefit to taxpayers. IRS response to TAS information request (May 20, 2015) (attachment A). In the 2011 review, LB&I also “considered but rejected a user fee for Qualified Intermediaries because the IRS wants to encourage foreign intermediaries to become qualified intermediaries and a user fee would have a negative impact on this process.” IRS response to TAS information request (May 20, 2015) (attachment G). As the Business Units (BU) proposed to increase the APA and PFA fees in 2015, LB&I either did not voice these concerns or they were minimized in the latest review. IRS response to TAS information request (Sept. 22, 2015) (Executive Summary).

38 IRS response to TAS information request (May 20, 2015) (attachment G).

User fees that seem reasonable to the IRS in a vacuum may seem outrageous to taxpayers when added to the costs of recordkeeping, filing, and paying taxes, and paying professionals for help in navigating complicated rules and procedures that the government created.

certain (master and prototype volume submitter) employee plans.³⁹ It reasoned that because these pre-approved plans are ultimately adopted by thousands of employers, they help TE/GE manage its workload by reducing requests for plan approvals.

In some cases the IRS also recommended that fees depart from its full-cost estimates when those estimates were in flux. The IRS's cost estimates depend on assumptions about what overhead costs should be included and how many taxpayers use the service (*e.g.*, when more taxpayers use a service, unit costs decline).⁴⁰ Taxpayers should not have to pay excessive user fees simply because there are not enough other taxpayers using a service to lower unit costs, particularly when demand for the service is in flux, or fixed or indirect costs seem excessive.⁴¹ For example, if PLR unit costs increase because fewer taxpayers request them (*e.g.*, because the IRS has increased the fee), the IRS should not use its increased unit costs to justify increasing the fee even further. In such cases, employees should be required to recommend fees based on either the maximum demand expected for the service or on marginal costs, as they may have done in some cases.

Without Additional Guidance, the IRS May Not Consistently Evaluate User Fees, Resulting in Disparate Treatment of Taxpayers

Without express guidance that IRS employees should consider the effect of fees on service, the IRS mission, taxpayer rights and burden, and voluntary compliance, they may feel pressure to ignore these considerations.⁴² Alternatively, they may ignore them in some cases and not others, resulting in disparate treatment of taxpayers. For example, the fees for CAP, which is used by the largest businesses may be below cost because LB&I employees raised concerns about voluntary compliance, whereas the fee for regular IAs may be at full cost because SB/SE employees did not.⁴³ The IRS may also begin to charge full costs for services, even when excessive overhead is included, a service is underutilized, or volume estimates are in flux. As noted above, the pressure to ignore or minimize these considerations is likely greater now that the IRS budget is constrained and it relies on user fees to replace its reduced appropriation.

39 IRS response to TAS information request (May 20, 2015).

40 "Full cost" fees can seem disproportionate to the value provided because they include direct and indirect costs such as "salaries and fringe benefits such as medical insurance and retirement.... Physical overhead, consulting ... material and supply costs, utilities, insurance, travel, and rents or imputed rents on land, buildings, and equipment." Circular 25-A, § d(1).

41 We understand the IRS's costs estimates spread start-up costs over a multi-year period. TAS midpoint call with responsible officials (Sept. 17, 2015). Nonetheless, the IRS's resulting full-cost estimates may still seem disproportionate and discourage taxpayers from utilizing a new or underutilized service.

42 Such considerations are consistent with OMB Circular A-4 (Sept. 17, 2003).

43 It is possible that SB/SE's concerns in this regard may not have been documented.

The IRS Does Not Fully Disclose What It Considers

When IRS employees analyze user fees, they do not fully disclose their analysis to the public (*e.g.*, the biennial review documents).⁴⁴ Discussing the rationale for and computation of proposed increases in public before they are adopted would ensure the IRS is better informed about the consequences. Stakeholders can provide relevant and helpful information about the impact of the fees on taxpayers and practitioners. The IRS should disclose everything it considers in connection with its user fee reviews and ask the public for comments before deciding to increase fees.

CONCLUSION

Rather than reactively applying user fees to fill a short-term funding deficit, the IRS should consider whether new and existing fees will discourage voluntary compliance, burden taxpayers excessively, or impair the IRS's service-oriented mission. If the IRS makes compliance too difficult or expensive, then compliance will decline. If a fee for service or a lack of service erodes compliance, the IRS will have to accept more noncompliance or spend more resources on (expensive) enforcement activities.⁴⁵ The IRS should quantify and explain these considerations and disclose them to the public.⁴⁶

It may be less expensive in the long run (for the government but not necessarily the IRS) to provide IRS services without a fee, even if that means the IRS needs to reduce the resources it devotes to enforcement activity. About 98 percent of all revenue the IRS collects results from voluntary compliance, as compared to about two percent in enforcement revenue.⁴⁷ Moreover, Congress obviously intended for the IRS to focus on service, as it has reduced the IRS's budget for enforcement more severely than its budget for services in recent years.⁴⁸ Congress has long urged the IRS to focus on service. In 1998, it went so far as to direct the IRS to “restate its mission to place a greater emphasis on serving the public and meeting taxpayers' needs.”⁴⁹

44 See, *e.g.*, Government Accountability Office, GAO-12-193, *User Fees: Additional Guidance and Documentation Could Further Strengthen IRS's Biennial Review of Fees* 18-19 (Nov. 2011) (“IRS officials consider factors other than cost recovery in setting fee rates. However, we found that IRS has not thoroughly documented these factors, corroborated anecdotal support with data analysis, or studied the effect of user fees on taxpayer behavior.”); T.D. 9647, 78 Fed. Reg. 72016 (2014) (briefly referencing the goal of “encouraging the use of installment agreements”); Rev. Proc. 2015-8, § 6, 2015-1 I.R.B. 235 (2015) (no discussion of the basis for master and prototype volume submitter plan fees; no discussion of basis for Roth IRA recharacterization fee); Rev. Proc. 2015-1, App'x A(3), 2015-1 I.R.B. 1 (2015) (same); Rev. Proc. 2006-9, § 4.12, 2006-1 C.B. 278 (no discussion of basis for APA fee). The IRS did not publish the biennial reviews described above or any similarly detailed analysis.

45 Department of Treasury, *Congressional Justification for Appropriation and Annual Performance Report and Plan*, IRS-7 (2015) (“By assisting taxpayers with their tax questions before they file their returns, the IRS helps prevent inadvertent noncompliance and reduces burdensome post-filing notices and other correspondence from the IRS.”).

46 This recommendation is generally consistent with OMB Circular A-4 (Sept. 17, 2003).

47 In FY 2015, the IRS collected total tax revenue of about \$3.3 trillion. Of that amount, it collected \$54.2 billion through enforcement actions. GAO, GAO-16-146, *Financial Audit: IRS's Fiscal Years 2015 and 2014 Financial Statements* 25 (Nov. 2015), available at www.gao.gov/assets/680/673614.pdf.

48 Compare Department of Treasury, *Congressional Justification for Appropriation and Annual Performance Report and Plan*, Table 2.3 (2011) (reflecting an appropriation of \$2,278,830,000 for service and \$5,504,000,000 for enforcement for FY 2010), with Department of Treasury, *Congressional Justification for Appropriation and Annual Performance Report and Plan*, Table 2.3 (2016) (reflecting an appropriation of \$2,156,554 for service and \$4,860,000 for enforcement for FY 2015).

49 The IRS Restructuring and Reform Act of 1998 (RRA 98), Pub. L. No. 105-206, 112 Stat. 722, Title I, § 1002 (1998).

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Revise the IRM to require the IRS to avoid adopting (or retaining) a fee that would:
 - Have a significant negative impact on the IRS's service-oriented mission, voluntary compliance, or taxpayer rights and burden (including other compliance burdens taxpayers may face, such as the costs of hiring preparers or other third parties); or
 - Include fixed or indirect costs when demand for a service is in flux or that make the fee disproportionate to the value received.
2. Before establishing or raising any user fee, estimate the effect of the fee on demand for service, as needed to determine if the fee would impair the IRS mission, voluntary compliance, or taxpayer rights. This analysis should also demonstrate that the proposed fee does not pass along indirect or fixed costs or combine with other costs that would make it seem excessive from the taxpayer's perspective.
3. Publish the user fee analysis (described above) and address any comments from internal and external stakeholders before adopting or increasing a fee.

User Fees Memo

In the memo below, the National Taxpayer Advocate analyzes the most recently proposed fee increases under the principles described in the Most Serious Problem. However, the IRS has requested the redactions shown below.



YOUR VOICE AT THE IRS



THE OFFICE OF THE TAXPAYER ADVOCATE OPERATES INDEPENDENTLY OF ANY OTHER IRS OFFICE AND REPORTS DIRECTLY TO CONGRESS THROUGH THE NATIONAL TAXPAYER ADVOCATE.

December 4, 2015

MEMORANDUM FOR JOHN A. KOSKINEN
Commissioner of Internal Revenue

FROM: Nina E. Olson
National Taxpayer Advocate

SUBJECT: IRS User Fee Increases

You recently received recommendations to increase various user fees, which were developed by IRS business units (BUs) in connection with the IRS's FY 2015 Biennial User Fee Review. Particularly in light of the current budget situation, I am concerned that the BUs have not quantified or sufficiently considered:

- The indirect costs that are likely to result from fee increases;
- The effect of fee increases on taxpayer rights or burden;
- Any resulting reductions in voluntary compliance; or
- Any impairment of the IRS mission to “[p]rovide America’s taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.”¹

Although the sections below discuss TAS’s concerns with each of the major user fee proposals, other internal and external stakeholders may have additional concerns. Thus, the IRS should engage in an open dialog with the public before determining whether to submit fee increases for approval, or at least before they are approved.

¹ See, e.g., IRS, Publication 1, *Your Rights as a Taxpayer* (2014); IRM 1.1.1.2, *IRS Mission* (June 2, 2015). In addition, if TAS (rather than the taxpayer) requests or orders the IRS to provide a service (e.g., under IRC § 7811) on the basis that the taxpayer would otherwise suffer a significant hardship, it is not clear that the IRS would be authorized to withhold service if the taxpayer did not pay the fee. For example, to avoid a significant hardship, a taxpayer may need Appeals to expedite calculations or for Collection to withdraw a Notice of Federal Tax Lien (NFTL), but the IRS is considering fees for these services, as described below.

User Fees Memo

Offer in Compromise Fee Increase

[REDACTED] When the IRS determines a taxpayer is unlikely to be able to repay a delinquent tax debt, it may accept an offer to compromise the debt based upon “doubt as to collectibility.”³ The goal of the OIC program is for the IRS to collect what is reasonably collectible at the least cost and at the earliest possible time, and to promote future compliance by providing taxpayers with a “fresh start.”⁴ An accepted OIC also provides an extra incentive to report and pay future tax liabilities by requiring, as a [REDACTED] condition of the OIC [REDACTED] [REDACTED] the IRS’s mission to help taxpayers “meet their responsibilities.” It is also consistent with the taxpayer *right to finality, to quality service, and to privacy*, which includes the right to expect that enforcement action will “be no more intrusive than necessary.”⁶

When combined with the requirement for applicants to submit a down payment with an OIC,⁷ the substantial OIC fee increase being considered — [REDACTED] — will almost certainly reduce utilization of the OIC program, thereby reducing voluntary compliance and impairing the IRS mission.⁸ Because taxpayers generally have to fund an offer by selling illiquid assets that the IRS could not otherwise reach or convincing a non-liable party to pay, they are unlikely to make this effort unless they are sure the IRS will accept the offer. They cannot be sure the IRS will accept the offer up front when the fee is due.

As the IRS has acknowledged, “the fee for an offer in compromise could dissuade a low-income taxpayer from making an offer because the taxpayer cannot be assured of reaching an agreement.”⁹ The OIC fee could also dissuade taxpayers in every other income category from making offers. [REDACTED]

[REDACTED] Indeed, when the IRS first imposed a \$150 OIC fee in 2003, OIC submissions declined by over 20 percent among taxpayers at every income level.¹⁰ Further, in FY 2016 the Administration proposed to repeal the OIC down payment requirement based its conclusion that repealing the requirement

2

3 See IRC § 7122; Treas. Reg. § 301.7122-1; Form 656, *Offer in Compromise* (2015).

4 Policy Statement P-5-100, *reprinted at*, IRM 1.2.14.1.17, *Policy Statement 5-100* (Jan. 30, 1992).

5 Form 656, *Offer in Compromise* (2015). An IRS study found that about 80 percent of taxpayers in its sample with accepted OICs remained substantially compliant during the requisite period. Small Business/Self-Employed (SB/SE) Payment Compliance and Office of Program Evaluation and Risk Analysis (OPERA), *IRS Offers in Compromise Program, Analysis of Various Aspects of the OIC Program*, 6 (Sept. 2004).

6 See, e.g., IRS, Publication 1, *Your Rights as a Taxpayer* (2014).

7 Section 509 of the *Tax Increase Prevention & Reconciliation Act of 2005 (TIPRA)*, PL. 109-223, effective July 16, 2006, imposed a requirement to submit a down payment with offer submissions.

8 Further, such a steep fee increase seems inconsistent with the Conference Report for the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA98), which states “the conferees believe that the IRS should make it easier for taxpayers to enter into offer-in-compromise agreements.” H.R. REP. NO. 105-599, at 288-89 (1998) (Conf. Rep.).

9 T.D. 9647, 78 F.R. 72016, 72017 (Dec. 2, 2013).

10 The Treasury Inspector General for Tax Administration (TIGTA) has concluded that the \$150 OIC user fee, imposed in November 2003, was responsible for reducing OIC submissions by 28 percent overall. See TIGTA, Ref. No. 2005-30-096, *The Implementation of the Offer in Compromise Application Fee Reduced the Volume of Offers Filed by Taxpayers at All Income Levels* (June 2005). The smaller \$36 increase in 2014 (from \$150 to \$186) would be less likely to trigger a significant reduction in OICs. See T.D. 9647, 78 F.R. 72016 (Dec. 2, 2013).

User Fees Memo

would raise revenue by improving access to the OIC program, which is less costly than other collection avenues.¹¹

The IRS should estimate the effect of a [REDACTED] increase on demand for OICs, the resulting decline in future compliance, and the costs of trying to collect these debts (and future debts, which will continue to accrue) in some other way before considering an OIC fee increase. Any such analysis would probably find that it is less costly and burdensome to eliminate the OIC fee altogether than to increase it. The IRS should use such projections to help justify a full OIC fee waiver from the Office of Management and Budget (OMB).

Moreover, because the OIC fee reduces the amount the taxpayer can afford to pay on the offer, the OIC fee may be viewed as an accounting gimmick that elevates form over substance — like a tax shelter — allowing the IRS to retain and use funds that would otherwise return to the U.S Treasury in the form of higher offer amounts. The IRS should avoid giving this impression, which can only reduce respect for the IRS and the government — views which research shows correlate with noncompliance.¹²

If the IRS nonetheless pursues the OIC fee increase, it should minimize taxpayer burden by collecting the fee from the last OIC payment or at least in installments (for OICs structured that way), as it does when collecting the Installment Agreement (IA) fee. It should also waive the fee to the extent it would otherwise exceed the total OIC amount. For example, where the taxpayer can only pay \$500, the fee should not exceed \$500 and the IRS should accept an offer for \$0, rather than rejecting the offer as insufficient or declining to process it because the taxpayer did not pay the fee. Although the OIC fee under consideration would not apply to low income taxpayers, rejecting or refusing to process such an offer would undermine IRC § 7122(d)(3)(A), which provides that “an officer or employee of the Internal Revenue Service shall not reject an offer-in-compromise from a low-income taxpayer solely on the basis of the amount of the offer.”

Installment Agreement Fee Increase

The FY 2015 Biennial Review [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

-
- 11 Department of the Treasury, *General Explanations of the Administration’s Fiscal Year 2016 Revenue Proposals* 237 (Feb. 2015), available at http://www.treasury.gov/resource-center/tax-policy/Pages/general_explanation.aspx (“Requiring nonrefundable payments with an offer-in-compromise may substantially reduce access to the offer-in-compromise program. The offer-in-compromise program is designed to settle cases in which taxpayers have demonstrated an inability to pay the full amount of a tax liability. The program allows the IRS to collect the portion of a tax liability that the taxpayer has the ability to pay. Reducing access to the offer-in-compromise program makes it more difficult *and costly* to obtain the collectible portion of existing tax liabilities.” (Emphasis added)). The administration’s analysis must have applied to high income taxpayers because low income taxpayers are exempt from the down payment requirement. See, e.g., IRC § 7122(c)(2)(C); IRS, Form 656, *Offer in Compromise* (2015).
- 12 See, e.g., National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 1-70 (*Factors Influencing Voluntary Compliance by Small Businesses: Preliminary Survey Results*); National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 33-56 (*Small Business Compliance: Further Analysis of Influential Factors*).
- 13 IRS response to TAS information request (Nov. 9, 2015). [REDACTED]
[REDACTED] *Id.*
- 14 IRS response to TAS information request (Nov. 9, 2015).

User Fees Memo

While an IA fee may seem reasonable on the basis that creditors charge financing fees to allow customers to pay over time, the IRS is not a commercial creditor. For taxpayers who cannot afford to pay their taxes timely and in full, the choice is to either pay their taxes (plus penalties and interest) using an IA or not to pay them. The choice for the IRS is to accept the IA, pursue enforced collection, or collect nothing. If enforced collection (or placing the taxpayer into currently not collectible (CNC) status) is more expensive, the government is the primary beneficiary when taxpayers agree to pay using IAs – at least they agreed to pay.¹⁵

The IRS should not discourage taxpayers from utilizing IAs by charging a fee that is difficult to avoid, particularly when they feel they cannot use the lower cost IA options. For example, some do not have bank accounts they could use to set up an online direct debit IA. Some do not have internet access or the computer literacy that would enable them to use the online IA application.¹⁶ According to the U.S. Census Bureau, more than 50 percent of the U.S. population with household income below \$25,000 had no Internet access in 2013.¹⁷ About 40 percent of the returns the IRS received for tax year (TY) 2013 (or 59.0 million out of 147.4 million) reported adjusted gross income of less than that amount.¹⁸

Even those with access may be concerned about entering their most sensitive financial information into a web application. Security breaches of the IRS’s “Get Transcript” online application and the Office of Personnel Management (OPM)’s federal employee records have likely increased the public’s anxiety in this area.¹⁹

Like offers, IAs promote voluntary compliance, furthering the IRS’s mission to help taxpayers “meet their tax responsibilities.” IAs are also consistent with the *right to quality service* and *to privacy*, which includes the right to expect that enforcement action will “be no more intrusive than necessary,” as enforced collection would be more intrusive than an IA.²⁰

To the extent that IA fees reduce IA utilization, they are likely to reduce voluntary compliance and damage the IRS’s ability to further its mission. In theory, one might construe many routine IRS services as being eligible for a user fee, such as answering the telephone, processing a tax return, or sending a refund. Presumably, the IRS has decided that charging fees for these services does not make sense or would impair its mission. However, the IRS has not analyzed how IA fees make any more sense or impair its mission any less.

Even if the IRS does not believe an IA fee undermines its mission or reduces voluntary compliance, it should nonetheless project the effect of proposed IA fee increases on IA applications, voluntary compliance, and the cost to the IRS of dealing with these delinquencies in some other way before it decides whether to approve them. It could use such analysis to help justify a fee waiver from OMB.

15 Taxpayers sometimes even ask the IRS to levy their wages to avoid the IA user fee.

16 Only about 84 percent of American adults had Internet access in 2015, and those who are minorities, low income, poor, elderly, or who live in rural areas are less likely to have access. See Pew Research Center, *Americans’ Internet Access: 2000-2015* (June 26, 2015), http://www.pewinternet.org/files/2015/06/2015-06-26_internet-usage-across-demographics-discover_FINAL.pdf.

17 U.S. Census Bureau, ACS-28, *Computer and Internet Use in the United States: 2013*, 5 (Nov. 2014), available at <http://www.census.gov/history/pdf/2013computeruse.pdf>.

18 IRS Data Book, Table 1.1, *All Returns: Selected Income and Tax Items, by Size and Accumulated Size of Adjusted Gross Income* (TY 2013), available at <http://www.irs.gov/uac/SOI-Tax-Stats-Individual-Statistical-Tables-by-Size-of-Adjusted-Gross-Income>.

19 IRS, *IRS Statement on the “Get Transcript” Application* (May 26, 2015); OPM, *OPM to Notify Employees of Cybersecurity Incident* (June 4, 2015).

20 See, e.g., IRS, Publication 1, *Your Rights as a Taxpayer* (2014).

User Fees Memo

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

-
- 21 IRS response to TAS information request (Oct. 22, 2015) [REDACTED]
 [REDACTED] 2015 Biennial Review of SB/SE User Fees [REDACTED]
 [REDACTED] *Id.*
 - 22 Program Manager Technical Advice (PMTA) 2009-158 (Oct. 8, 2009), available at http://www.irs.gov/pub/iranoa/pmta_2009-158.pdf (“[t]axpayers seek post-release withdrawals in order to improve their credit. This reason alone would not support a withdrawal under the first three sub-elements of section 6323(j)(1)... withdrawal can be said to be in the United States’ best interests insofar as the improvement in the taxpayer’s credit history assists him with future tax compliance.”)
 - 23 See, e.g., National Taxpayer Advocate 2009 Annual Report to Congress 17, 29-30 (Most Serious Problem: *One-Size-Fits-All Lien Filing Policies Circumvent the Spirit of the Law, Fail to Promote Future Tax Compliance, and Unnecessarily Harm Taxpayers*); PMTA 2009-158 (Oct. 8, 2009).
 - 24 IRM 1.1.1.2, *IRS Mission* (June 2, 2015).
 - 25 IRS response to TAS information request (Nov. 9, 2015). For further discussion of this recommendation, see, e.g., National Taxpayer Advocate 2012 Annual Report to Congress 402-25; National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 108-30; National Taxpayer Advocate 2011 Annual Report to Congress 109-28; National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 91-111; National Taxpayer Advocate 2010 Annual Report to Congress 302-10; National Taxpayer Advocate 2009 Annual Report to Congress 17-40; National Taxpayer Advocate 2009 Annual Report to Congress vol. 2, 1-18.

User Fees Memo

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

- 26 IRS response to TAS information request (Oct. 22, 2015) [REDACTED]
- 27 See IRC § 6109; Treas. Reg. § 301.6109-1(d)(3); Instructions to IRS Form W-7, *Application for IRS Individual Taxpayer Identification Number* (Feb. 2012). For the Bank Secrecy Act requirement, see generally Bank Secrecy Act, 31 U.S.C. §§ 5311-5314, 5316-5322; 12 U.S.C. § 1829(b); USA Patriot Act, § 326, Pub. L. No. 107-56, 115 Stat. 307 (2001); 31 C.F.R. §§ 1010.410, 1010.620, 1022.400.
- 28 IRS, *IRS Strengthens ITIN Application Requirements; Interim Changes Will Protect the Integrity of the ITIN Process*, IR-2012-62 (June 22, 2012), available at <https://www.irs.gov/uac/Newsroom/IRS-Strengthens-ITIN-Application-Requirements;Interim-Changes-Will-Protect-the-Integrity-of-the-ITIN-Process>; National Taxpayer Advocate 2012 Annual Report to Congress 152, 163.
- 29 If the applicant is a dependent (other than a military dependent), the AA will still send the identifying document to Austin. See IRS, *Instructions for Form W-7, Application for IRS Individual Taxpayer Identification Number*, 3 (2014). If the applicant is using anything other than an original passport or national identification card (e.g., a copy of an original document certified by the issuing agency) at least some TACs will still send the document to Austin. See IRS, *Individual Taxpayer Identification Number (ITIN) Authenticating Taxpayer Assistance Centers* (Mar. 12, 2015), available at <http://www.irs.gov/uac/ITIN-Authenticating-TACs-Link> (last visited Nov. 10, 2015).
- 30 IRS, *2012 ITIN Review, Frequently Asked Questions* (Apr. 23, 2015), available at <http://www.irs.gov/uac/2012-ITIN-Review-Frequently-Asked-Questions-1> (last visited Sept. 24, 2015).
- 31 The IRS has a responsibility to ensure it returns these original documents safely and promptly, but returning them by express mail could cost in the range of \$1.2 to \$4.1 million, making it more economical for the IRS to review the documents at a TAC or to allow a AA to review them. Conference call between TAS and IRS W&I, discussing *Authenticating Identification Documents at SPEC, AA and VITA Sites* (Oct. 29, 2015).
- 32 IRS response to TAS information request (Oct. 22, 2015) (Memo from Commissioner, W&I Division to CFO, *Biennial Review of User Fee Charges* (June 19, 2015)).

User Fees Memo

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

- 33 During calendar year 2015 dependents made up 43.8 percent of ITIN applicants, but they cannot use AAs to avoid parting with their documents because, as noted above, the AAs have to mail their original documents to the IRS. IRS, Compliance Data Warehouse, Form W-7 Database (Oct. 2, 2015). Moreover, only 21 countries around the world have AAs, with some big countries like India or Brazil only having one or two. IRS, *Acceptance Agent Program*, available at <https://www.irs.gov/Individuals/Acceptance-Agent-Program> (Oct. 27, 2015).
- 34 See National Taxpayer Advocate 2012 Annual Report to Congress 152, 159. In evaluating the pros and cons of this fee, the IRS acknowledges that it “may reduce voluntary tax compliance.” IRS response to TAS information request (Oct. 22, 2015).
- 35 IRM 1.1.1.2, *IRS Mission* (June 2, 2015).
- 36 IRS response to TAS information request (Oct. 22, 2015) (CFO Briefing).
- 37 IRS response to TAS information request (Oct. 22, 2015) (Memo from SB/SE Commissioner to CFO, *2015 Biennial Review of SB/SE User Fees* (June 18, 2015)). [Redacted]
- 38 IRS, Letter 627, *Estate Tax Closing Letter* (2007) (“This letter is evidence that the Federal Estate Tax Return has either been accepted as filed or has been accepted after an adjustment to which you have agreed. You should keep this letter as a permanent record. You may need it to close probate proceedings, transfer title to property and/or settle state taxes.... We will not reopen or examine this return unless you notify us of changes to the return or there is: (1) evidence of fraud, malfeasance, collusion, concealment, or misrepresentation of a material fact; (2) a clearly defined substantial error based upon established Internal Revenue Service position; or (3) a serious administrative error. (See Revenue Procedure 2005-32, 2005-1 Cumulative Bulletin 1206.)”).
- 39 See, e.g., IRS, Publication 1, *Your Rights as a Taxpayer* (2014).

User Fees Memo

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

- 40 IRS response to TAS information request (Oct. 22, 2015).
- 41 *Id.* The IRS could waive the fee if the government caused a delay that resulted in the need for expedited calculations. *Id.* The IRS has also suggested that the processing time is almost always shorter for low-dollar disputes, obviating the need for an expedite fee. IRS response to TAS fact check (Nov. 13, 2015).
- 42 IRS response to TAS information request (Nov. 9, 2015). According to the IRS, this estimate is an approximation. IRS response to TAS fact check (Nov. 13, 2015).
- 43 IRM 8.1.1.1(1) *Accomplishing the Appeals Mission* (Feb. 10, 2012).
- 44 IRS response to TAS information request (Oct. 22, 2015). Appeals proposed to apply the fee only to examination cases because taxpayers already pay a fee for offers. *Id.* Its revenue estimate assumes the fee would not discourage any taxpayers from mediation. *Id.*
- 45 IRC § 7123(b)(1) (“The Secretary shall prescribe procedures under which a taxpayer or the Internal Revenue Service Office of Appeals may request non-binding mediation on any issue unresolved at the conclusion of— (A) appeals procedures; or (B) unsuccessful attempts to enter into a closing agreement under section 7121 or a compromise under section 7122.”)

User Fees Memo

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

- 46 See IRM 8.1.1.1(1), *Accomplishing the Appeals Mission* (Feb. 10, 2012) (“The Appeals Mission is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.”).
- 47 Rev. Proc. 2015-44, 2015-38 I.R.B. 354 (“Although Appeals arbitration is being eliminated, taxpayers may be eligible to request mediation for unresolved issues that remain after completion of settlement discussions in Appeals. See Rev. Proc. 2014-63, 2014-53 I.R.B. 1014.”)
- 48 Rev. Proc. 2014-63, § 9.01, 2014-53 I.R.B. 1014.
- 49 IRS response to TAS information request (Oct. 22, 2015).
- 50 See Rev. Proc. 2012-31, 2012-33 I.R.B. 256.
- 51 IRS, *FOIA Guidelines* (Appendix B, Fee Schedule), available at [https://www.irs.gov/uac/Freedom-of-Information-Act-\(FOIA\)-Guidelines#Fees](https://www.irs.gov/uac/Freedom-of-Information-Act-(FOIA)-Guidelines#Fees) (last updated Sept. 3, 2015)
- 52 Memo for Distribution from Deputy Commissioner for Operations Support and Deputy Commissioner for Services and Enforcement, *Freedom of Information Act (FOIA) Obligations* (Aug. 24, 2011); IRS, *Routine Access to IRS Records* available at <http://www.irs.gov/uac/Routine-Access-to-IRS-Records> (“If you [taxpayer] are working with an IRS employee on an open case, you may request information from the case file (such as copies of workpapers or other records) directly from the IRS employee assigned to the matter.”). See also IRM 4.26.14.4(2)(b) (July 24, 2012).
- 53 See TIGTA, Ref. No. 2015-30-084, *Fiscal Year 2015 Statutory Review of Compliance With the Freedom of Information Act 12* (Sept. 18, 2015) (showing the FOIA backlog).

User Fees Memo

[Redacted]

[Redacted]

[Redacted]

[Redacted]

[Redacted]

Pre-Filing Agreements and Advance Pricing Agreement Fees

[Redacted]

[Redacted] The PFA procedure allows taxpayers under the jurisdiction of the Large Business and International Division (LB&I) to undergo an examination and reach an agreement (a

54 Treas. Reg. §§ 601.702(c)(12)-(c)(13).
 55 IRS response to TAS information request (May 20, 2015).
 56 IRS response to TAS information request (Oct. 30, 2015).
 57 IRS response to TAS information request (May 20, 2015) (attachment G).
 58 IRS response to TAS information request (Oct. 30, 2015) (Memo from Commissioner, TE/GE to CFO, *FY 2015 Biennial Review of User Fee Charges* (July 21, 2015)).
 59 IRS response to TAS information request (Oct. 22, 2015) (FY 2015 Biennial Review of User Fee Charges, Attachment 2).

User Fees Memo

PFA) with the IRS about how specific items should be reported before the returns are filed.⁶⁰ Similarly, the IRS describes the APA program as “a voluntary process whereby the IRS and taxpayers may resolve transfer pricing issues and issues for which transfer pricing principles may be relevant in a principled and cooperative manner on a prospective basis.”⁶¹ In other words, both of these agreement programs further the IRS mission, improve voluntary compliance, reduce controversy, save resources, and implement the taxpayer rights *to be informed, to quality service, to pay no more than the correct amount of tax, to finality, to privacy, and to a fair and just tax system*. Yet, the IRS only offers them to taxpayers willing to pay a very steep fee.

While the taxpayers who use these programs can mostly afford to pay the fees being considered, ability to pay should not be the sole basis for imposing a fee. If it charges a fee, the IRS should articulate a basis for doing so that does not, in essence, charge taxpayers for services that further the IRS mission (*i.e.*, charge them when it is simply doing its job more effectively than usual).

Although only the government can audit returns and sign closing agreements with taxpayers, one potential basis for imposing a fee for these programs may be that the IRS would otherwise compete with tax practitioners and accounting firms, who may also examine a taxpayer’s records and provide opinions about the accuracy/certainty of the tax treatment of the items it reflects.⁶² On that basis it might be reasonable for the government to charge for its fact-finding or examination activities (assuming these taxpayers were not certain to be examined in any event), but not for executing the closing agreement itself, which only the government can do. This might also provide a basis for the IRS to explain to the public why the agreement programs that it charges for (*i.e.*, the PFA and APA programs) are different from a similar agreement program that LB&I does not charge for — the Compliance Assurance Process (CAP).⁶³ Specifically, taxpayers eligible for CAP are already under continuous audit — a function only the government can undertake — making it even less reasonable for the IRS to charge for the audit or fact-finding component of the program. Moreover, the IRS should explain to the public why — aside from its own budget situation — it is suddenly increasing [REDACTED]

[REDACTED]

60 Rev. Proc. 2009-14, 2009-3 I.R.B. 324; IRM 4.60.8.3.4, *IMS Procedures in APA Cases* (June 5, 2014); IRM 4.30.1.1(1) (Jan. 9, 2002) (“The pilot demonstrated that PFAs were cost efficient, they allowed taxpayers to file more compliant tax returns within prescribed time frames, taxpayer burden decreased and both the IRS and taxpayers conserved resources.”).

61 Rev. Proc. 2015-41 § 2.02(2), 2015-35 I.R.B. 263 (also noting “[T]he APA process increases the efficiency of tax administration by encouraging taxpayers to come forward and present all the facts necessary for a proper evaluation of their proposed covered issues and to work towards a resolution of such issues in a spirit of openness and cooperation.”). See also IRM 4.60.8.3.3, *Advance Pricing Agreement (APA) Cases* (June 5, 2014).

62 See National Taxpayer Advocate 2007 Annual Report to Congress 66, 68 (“[W]hen government and private businesses provide the same services, user fees may also help keep the government from stifling private-sector competition.”).

63 CAP is a program that allows large businesses under continuous audit to, in effect, have the IRS audit the return before it is filed, increasing voluntary compliance and reducing the burden of post-filing examinations for both the IRS and taxpayers. See, e.g., IRM 4.51.8, *Compliance Assurance Process (CAP) Examinations* (Sept. 25, 2015).

64 [REDACTED] response to TAS information request (Nov. 9, 2015).

User Fees Memo

[Redacted text block containing multiple paragraphs of blacked-out content]

65 IRS response to TAS information request (May 20, 2015) (attachment A); IRM 1.1.11.4, *Office of National Public Liaison* (Feb. 12, 2015).

66 IRS response to TAS information request (Oct. 22, 2015) (2015 Biennial Review, Attachment 2); IRS response to TAS information request (Nov. 3, 2015).

67 [Redacted text]

68 [Redacted text]

69 [Redacted text]

70 IRM 1.32.19.20, *Review and Implementation of New User Fees* (Nov. 8, 2012).

User Fees Memo

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

[Redacted text block]

71 IRS response to TAS fact check (Nov. 13, 2015).

72 Ann. 2006-74, 2006-2 C.B. 746 (Oct. 16, 2006); IRS, *IRS Income Verification Express Service* (Sept. 14, 2015), available at <https://www.irs.gov/Individuals/Income-Verification-Express-Service>.

73 See, e.g., Form 4506T, *Request for Transcript of Tax Return* (2015); Form 4506T-EZ, *Short Form Request for Individual Tax Return Transcript* (2014).

74 See, e.g., National Taxpayer Advocate 2012 Annual Report to Congress 553-59 (Legislative Recommendation: *Protect Taxpayers and the Public Fisc from Third-Party Misappropriation of Payroll Taxes*); National Taxpayer Advocate 2007 Annual Report to Congress 538-44 (Legislative Recommendation: *Taxpayer Protection From Third Party Payer Failures*); National Taxpayer Advocate 2004 Annual Report to Congress 394-99 (Legislative Recommendation: *Protection from Payroll Service Provider Misappropriation*).

75 The Tax Increase Prevention Act of 2014, Tax Technical Corrections Act of 2014, and Achieving a Better Life Experience (ABLE) Act of 2014, Pub. L. No. 113-295 § 206, 128 Stat. 4010, 4065-4073 (Dec. 19, 2014) (codified at IRC §§ 3511, 7705, 3302, 3303, 6053, 6652, and 7528(b)(4)).

76 IRC § 7528(b)(4).