

LR #3 OUTSIDE RESEARCH: Expand Opportunities for the IRS to Collaborate With Outside Researchers

TAXPAYER RIGHTS IMPACTED¹

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

PROBLEM

Private sector and academic researchers can help policymakers improve tax administration and achieve public policy goals by studying microdata (*i.e.*, tax data that is not aggregated into summary statistics).² Some are willing to provide cutting-edge research for free. Collaboration with outsiders can also help IRS researchers learn about the latest data analysis techniques. To collaborate, however, the IRS typically must evaluate proposals, help the outsider identify and understand the data, oversee the project, and implement measures to protect the data from unauthorized disclosure.³ Because of the resources this requires, the IRS is not able to accept otherwise worthy proposals. Moreover, uncertainty about whether the IRS will accept good proposals combined with the burden and delay of obtaining microdata likely discourages some outsiders from offering to collaborate.

Finally, the IRS might naturally focus on proposals that fulfill immediate, short-term needs, or that are likely to validate its longstanding views. However, short-term priorities should not crowd out research into unconventional, innovative, and paradigm shifting ideas that are more likely to advance our understanding of taxpayers and their compliance behavior. Unlike other agencies, the IRS does not use an external peer review process to help ensure that it considers the best proposals.

EXAMPLE

University Professor X and her graduate student are interested in using IRS microdata to identify ways to use behavioral science insights to improve compliance with a particular tax provision and to achieve public policy goals. The graduate student would like to pursue the research as part of a dissertation. IRS researchers could learn a lot from Professor X's state-of-the-art research techniques.

- 1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR that was adopted by the IRS are now listed in the Internal Revenue Code (IRC). See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 401(a) (2015) (codified at IRC § 7803(a)(3)).
- 2 See, e.g., Shamik Trivedi, *Increased Microdata Accessibility Will Aid Policymakers*, 2012 TNT 34-4 (Feb. 21, 2012) ("The research conducted from microdata can address a variety of concerns. Research into behavioral responses to specific policies could contribute significantly to structural tax reform, help determine the effects of changing the level and graduation of individual and corporate tax rates and of broadening the individual tax base, help measure compliance, and help inform the use of taxes to address a fiscal imbalance.").
- 3 Statistics of Income (SOI) response to TAS information request (July 7, 2016). For example, the IRS may have to administer contracts with the researchers, conduct background checks, and obtain office space, equipment, software, and technical support for the researchers.

However, it could take more than two years to gain access to the data, as the IRS only solicits proposals under the Joint Statistical Research Program (JSRP) about every two years during a narrow (60-day) window.⁴ X's student would like to graduate within two years. Even after two years, the IRS may decline the project because it does not accept every good proposal. X believes the IRS has other short-term research priorities, despite the fact that this research may point to more effective methods of achieving compliance. Thus, X and her student pursue other research because of the burden and delay of gaining access to IRS microdata and uncertainty about whether the IRS would be interested in the project.

RECOMMENDATIONS

To ensure the IRS has the capacity to accept valuable assistance from outside researchers, and to ensure IRS data is available for studies involving a wide variety of issues, disciplines, and approaches, the National Taxpayer Advocate recommends that Congress:

- (1) Establish an independent Tax Research Review Board (TRRB) to vet and prioritize research proposed by outsiders to ensure that the government pursues important research questions that the IRS might not otherwise pursue; and
- (2) Establish and fund an independent technical staff to support both the TRRB in evaluating proposals and the outside researchers in conducting the research.

PRESENT LAW

Collaboration Requires Resources, Even If the Researchers Are Uncompensated

It is costly for both the IRS and outside researchers to keep microdata confidential. Virtually any information about a taxpayer or his or her return, including the existence of the return, is confidential “return information” under Internal Revenue Code (IRC) § 6103(b)(2), unless it is in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer.⁵ IRC § 6103(a) generally prohibits the improper disclosure of return information by IRS employees and others (including outside researchers).⁶ Unauthorized inspection or disclosure of such information may be punishable by fine or imprisonment, and in the case of federal officers or employees, dismissal from office or employment.⁷ In addition, IRC § 7431 provides for civil damages for unauthorized disclosures.

The IRS is authorized to grant outside researchers access to the microdata needed to conduct research under the Intergovernmental Personnel Act, 5 U.S.C. § 3371 *et seq.*, the Student Volunteer program, 5 U.S.C. § 3111(c), or a contract executed under IRC § 6103(n). The IRS could also grant them access as temporary IRS employees under 5 U.S.C. § 3109, but it generally does not use this authority.⁸ Other government agencies, such as the Census Bureau, are also authorized to receive IRS microdata for specific purposes under IRC § 6103(j)(1)(A).

To comply with privacy rules, the IRS must oversee each project and provide the outside researchers with limited data extracts when broader access is unnecessary.⁹ The outside researchers must pass a background

4 SOI response to TAS information request (May 31, 2016) (SOI Joint Research Program Description).

5 IRC § 6103(b)(2). “Macro” data cannot be associated with or otherwise identify a particular taxpayer, but “micro” data can, unless it is redacted or “perturbed” (*i.e.*, changed to obscure identifying information).

6 See also IRC § 6108(c).

7 See IRC § 7213; IRC § 7213A; 18 U.S.C. § 1905 (the Privacy Act).

8 IRS response to TAS information request (July 7, 2016).

9 *Id.*

check and take annual training on data security.¹⁰ They must also employ the IRS's procedural safeguards to protect the information from disclosure, as required under IRC § 6103(p)(4).¹¹

Although permanent IRS employees may access taxpayer information on IRS equipment from home, the IRS typically does not grant remote access to outside researchers.¹² They generally must work with the data in an approved IRS facility using IRS equipment.¹³ Thus, the IRS is likely to receive proposals primarily from researchers located near an IRS facility, limiting its opportunity to collaborate with a significant number of highly qualified researchers in the U.S. and abroad.

In some cases, however, outside researchers may be able to access a limited amount of data at locations outside the IRS. For example, the IRS may provide microdata to the Census Bureau “to the extent necessary in, the structuring of censuses and national economic accounts and conducting related statistical activities authorized by law” under IRC § 6103(j)(1)(A). Thus, it may be possible for outside researchers to access this data at the Census’s Center for Economic Studies (CES) or at local Research Data Centers (RDCs).¹⁴ There are currently 24 RDC locations that partner with over 50 research institutions.¹⁵ Researchers can access this data by becoming temporary Special Sworn Employees (SSEs) of the Census.¹⁶ However, only a subset of the IRS’s microdata is available through the Census.¹⁷ Moreover, outside researchers often need to collaborate with IRS employees to understand what the data represents and merge it with other relevant data from various IRS databases. Thus, to facilitate outside research, the IRS generally must provide an IRS research partner who has compatible expertise, as well as technical support, office space, and equipment.

Uncertainty and Delay May Discourage Some From Offering to Collaborate

The IRS solicits offers to collaborate on research through its Joint Statistical Research Program (JSRP). Under the JSRP, an outside researcher must submit a proposal with well-defined goals that aligns with the IRS’s research priorities.¹⁸ The IRS only accepts proposals within a 60-day window that opens about every two years. The IRS’s Statistics of Income Division (SOI) develops the IRS’s research priorities in coordination with directors of the IRS’s Research, Applied Analytics, and Statistics (RAAS) function and

10 IRS response to TAS information request (June 3, 2016).

11 See, e.g., IRS Publication 1075, *Tax Information Security Guidelines for Federal, State and Local Agencies* (2015). Similarly, other parts of the federal government may provide contractors with access to confidential information, provided their systems and access procedures comply with the Federal Information Security Management Act of 2002. See 44 U.S.C. § 3541, et seq.

12 IRS response to TAS information request (June 3, 2016) (“There are no legal barriers that prevent researchers who have undergone background checks and obtained PIV cards from accessing IRS data remotely using ... IRS equipment. RAS has maintained a policy of requiring researchers to work in an IRS facility to ensure maximum protection for IRS data. Of particular concern is disclosure by proximity – for example ... having a student inadvertently view the screen. In addition, we believe that working in an IRS facility heightens the researchers’ awareness of data security. IRS does not currently permit users to access data systems using personal devices and employees are forbidden to use personal computer for work by law.”).

13 IRS response to TAS information request (June 3, 2016).

14 We understand National Center for Health Statistics (NCHS) allows researchers to access confidential micro data using four different modes: (1) on-site at the NCHS Research Development Center (RDC), (2) on-site at a Census RDC, (3) remote access, and (4) staff assisted research. See John Czajka et al., *Minimizing Disclosure Risk in HHS Open Data Initiatives*, MATHEMATICA D-25 (2014), https://aspe.hhs.gov/sites/default/files/pdf/77196/rpt_Disclosure.pdf.

15 U.S. Census Bureau, *Research Data Centers*, <http://www.census.gov/about/adrm/fsrdc/locations.html> (last visited Oct. 31, 2016).

16 Agreement for the Review and Approval of U.S. Census Bureau Projects that use Federal Tax Information (June 2012), https://www.census.gov/ces/pdf/IRS_Criteria_Document.pdf.

17 See Treas. Reg. § 301.6103(j)(1)-1(b).

18 The information in this section is from SOI. SOI response to TAS information request (May 31, 2016) (SOI Joint Research Program Description).

the Department of Treasury Office of Tax Analysis (OTA), but allows applicants to propose additional ideas. RAAS and OTA evaluate the proposals based on factors such as:

- Relevance to tax policy and/or tax administration, with preference given to projects with a direct impact on current tax policy questions;
- Available SOI resources, including data, human capital, and financial resources;
- Degree of SOI employee involvement required by the proposal;
- Importance of the issue to the IRS and OTA; and
- Research team's demonstrated ability to do the work, based on past performance, qualifications, etc.

The IRS does not ask experts outside the agency to help review the proposals. The length of time between solicitations, the uncertainty about whether proposals are likely to be accepted (given the government's sole control over evaluation and decisions), the short period during which they will be considered, and the delay in getting started after acceptance could discourage outsiders from offering to collaborate.

External Peer Review Helps Other Agencies Evaluate Research Proposals

Other agencies that fund research such as the National Institutes of Health (NIH), the National Science Foundation (NSF), the Environmental Protection Agency (EPA), and the National Endowments for the Arts and Humanities (NEH) have long used peer-review systems to assess grant applications.¹⁹ The NIH maintains over 150 chartered federal advisory committees to assist with these reviews.²⁰ NIH generally only funds proposals reviewed and recommended by two peer review groups, which consist primarily of external reviewers.²¹ These groups help assess the likely impact and merit of the proposed research. As a result, NIH is more likely to fund proposals that representatives from both the public and private sector have identified as being the most fruitful and meaningful areas of study.

REASONS FOR CHANGE

Policymakers inside and outside the IRS can benefit from the cutting-edge expertise that outside researchers can offer. Outside researchers cannot be as effective without access to government microdata. The U.S. generally lags behind other countries in making microdata available to researchers who want to help.²² Limited IRS resources constrain its ability to provide outside researchers with access to microdata.

19 Thomas McGarity, *Peer Review in Awarding Federal Grants in the Arts and Sciences*, 9 HIGH TECH. L.J. 1 (1994), <http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1115&context=btlj>; General Accounting Office, *Federal Research: Peer Review Practices at Federal Agencies Vary*, GAO/RCED-99-99 1-2, 6-7 (Mar. 1999), www.gao.gov/products/GAO/RCED-99-99 (discussing the peer review processes used by 12 agencies that accounted for 90 percent of the government's research budget, excluding the Department of Defense).

20 National Institutes of Health (NIH), *Overview of Federal Advisory Committees at the NIH*, https://ofacp.od.nih.gov/about_us/overview.asp (last visited Nov. 2, 2016).

21 42 U.S.C. § 289 *et seq.*; 42 C.F.R. § 52h. For additional detail, see NIH Office of Extramural Research, *Peer Review Process*, http://grants.nih.gov/grants/peer_review_process.htm#Overview (last visited Nov. 2, 2016). Other research agencies have similar procedures. See, e.g., Center for Disease Control, CDC-GA-2002-09, *Peer Review of Research and Scientific Programs* (Sept. 3, 2008), <https://www.cdc.gov/maso/pdf/PeerReview.pdf>.

22 David Card *et al.*, *Expanding Access to Administrative Data for Research in the United States*, National Science Foundation 10-069 call for white papers (2012), <https://eml.berkeley.edu/~saez/card-chetty-feldstein-saezNSF10dataaccess.pdf> ("During the second half of the 20th century, the fields of political science, sociology, and economics were all revolutionized by U.S. researchers using U.S.-based survey data sources. Unfortunately, that dominant position is now at risk as the research frontier moves to the use of administrative data.").

As a result, the IRS can only accept a limited number of proposals. It only accepts them during a 60-day window every two years or so.²³ These delays may discourage some good proposals.

In addition, the IRS has its own research agenda and may not always agree that important projects are worth pursuing, even though it consults with external stakeholders when forming its agenda. For example, Congress and the President have encouraged the IRS to pursue research into behavioral insights and test alternative treatments, which it is pursuing.²⁴ However, because no IRS business unit is accountable for implementing alternative treatments (*i.e.*, alternatives to enforcement) or measuring and reporting the resulting “service” revenues, each of its business units may prefer enforcement-oriented research,²⁵ which they may view as more relevant to their core functions. The IRS and OTA may have other biases that they do not recognize.

EXPLANATION OF RECOMMENDATIONS

Congress should establish an independent Tax Research Review Board (TRRB) with a staff that could help it set research priorities and fully support collaboration with outside researchers. The TRRB could be comprised of external researchers such as those from think tanks and academia, as well as representatives from the IRS, TAS, and OTA. As some of its members would not be government employees, the TRRB could be established as a federal advisory committee that would make recommendations to the IRS. Such a committee would be subject to the Federal Advisory Committee Act (FACA), which requires, among other things, that certain meetings be announced in the Federal Register and open to the public.²⁶ Alternatively, the TRRB could be given operational responsibility to select which proposals to accept, in which case it would not necessarily be subject to the FACA.²⁷ The IRS Oversight Board is an operational committee.²⁸ It or one or more of its subcommittees could be assigned to function as the TRRB.

By having both outsiders and government employees as members, the TRRB would help the government pursue research that the IRS wants to pursue, as well as innovative research in other areas that it should be pursuing. The TRRB could conduct literature reviews as well as surveys and focus groups of potential submitters to learn what they are interested in and to develop a better sense of the possibilities. It could be required to publish the results of its reviews, surveys, focus groups, and analyses to assure outsiders

23 SOI response to TAS information request (May 31, 2016) (SOI Joint Research Program Description).

24 See, e.g., Exec. Order No. 13707, 80 Fed. Reg. 56365 (Sept. 18, 2015).

25 See, e.g., Most Serious Problem: *Voluntary Compliance: The IRS Is Overly Focused on So-Called “Enforcement” Revenue and Productivity, and Does Not Make Sufficient Use of Behavioral Research Insights to Increase Voluntary Tax Compliance*, *supra*; Most Serious Problem: *IRS Structure: The IRS’s Functional Structure Is Not Well-Suited for Identifying and Addressing What Different Types of Taxpayers Need to Comply*, *supra*.

26 See Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified as amended at 5 U.S.C. App. II §§ 1-16).

27 41 C.F.R. § 102-3.40(k) (“Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing Government decisions or policy. A committee designated operational may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether a committee is primarily operational. If so, it does not fall under the requirements of the Act and this part.”).

28 The Oversight Board is a nine-member independent body charged with operational responsibility to oversee the IRS. IRC § 7802. Seven board members are appointed by the President of the United States and confirmed by the Senate for five-year terms. *Id.* Of the seven, one must be a full-time federal employee or a representative of IRS employees. *Id.* The Secretary of Treasury and the Commissioner of Internal Revenue are also members of the Board. *Id.* The board currently has too many vacancies to operate. IRS Oversight Board, <https://www.treasury.gov/IRSOB/Pages/default.aspx> (last visited Dec. 13, 2016).

that it is open to all good suggestions and can be persuaded to pursue new research areas in the future. Transparency would also help prevent the TRRB from being unduly influenced by commercial interests.²⁹

To ensure the TRRB's independence from the IRS, it should have sufficient public funding so that it does not need to rely on the IRS to fund the selection or collaboration processes. The TRRB's staff could have expertise in disclosure, procurement, and IRS research and databases, so that it could support both the TRRB and the outside researchers whose proposals are selected. The staff could also be available to discuss how to improve prospective proposals.

With a stable source of funding, independent from the IRS, the TRRB could solicit tax research proposals more often (perhaps even on a rolling basis), and avoid rejecting meritorious proposals due to a lack of resources or short-term focus. Congress should also consider where to place the TRRB's staff. To foster independence, the staff could be lodged in an independent organization at the IRS or at the Department of Treasury.³⁰

Both IRS researchers and TRRB staff would have overlapping skills. These skills would enable IRS researchers to work at the TRRB on temporary details. Such details would enable the IRS's research staff to continue to benefit from working with outside researchers.

29 Some have suggested the FACA makes the peer review process overly cumbersome. See, e.g., Gregory Morrison, *Science in the Modern Administrative State: Examining Peer Review Panels and the Federal Advisory Committee Act*, 82 *GEORGE WASH. L. REV.* 1654, at 1655-73 (2014). Indeed, the National Academy of Sciences (NAS) peer review process is exempt from the FACA. See 5 U.S.C. app. 2 § 3(2); 41 C.F.R. § 102-3.180 *et seq.* The NAS is still required to ensure membership is fairly balanced, that members are free from conflicts of interest, and make its reports public, including the names of peer reviewers. 5 U.S.C. app. 2 § 15.

30 If they were lodged in another department, such as the Census Bureau, then the TRRB's staff would not have direct access to IRS employees, data, or databases unless Congress amended the confidentiality rules under IRC § 6103.