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## INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS (ITINs): Amend the Protecting Americans From Tax Hikes (PATH) Act of 2015 to Revise the Expiration Schedule for ITINs

### TAXPAYER RIGHTS IMPACTED<sup>1</sup>

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

### PROBLEM

Taxpayers ineligible for Social Security numbers require Individual Taxpayer Identification Numbers (ITINs) to comply with their tax filing and payment obligations, to claim dependents, and to receive other tax benefits.<sup>2</sup> ITINs are intended to be used only for tax administration purposes, and accordingly, the National Taxpayer Advocate has long recommended that the IRS deactivate ITINs no longer used for such purposes.<sup>3</sup> In late 2015, Congress amended Internal Revenue Code (IRC) § 6109 to specify that ITINs issued after 2012 would not expire unless the ITIN holder does not file a tax return with the ITIN, or is not included on another's return as a dependent for three consecutive taxable years.<sup>4</sup> Under the new law, ITINs issued before 2013 will expire at the earlier of:

- After a period of three consecutive years of nonuse (defined above), with the first deactivations required to have begun the last day of 2015; or
- On the “applicable date,” scheduled between 2017 and 2020.<sup>5</sup>

The IRS is unable to meet the schedule set forth in the Protecting Americans from Tax Hikes (PATH) Act of 2015, and has proposed a new deactivation schedule. Under the IRS's plans, all ITINs not used on a tax return for three consecutive taxable years will expire, beginning in 2017. For ITINs issued prior to 2013, the IRS will begin deactivating these in phases based on the middle digit of the ITIN, if they are not already deactivated due to nonuse.

1 See Taxpayer Bill of Rights (TBOR), [www.TaxpayerAdvocate.irs.gov/taxpayer-rights](http://www.TaxpayerAdvocate.irs.gov/taxpayer-rights). The rights contained in the TBOR 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 For a detailed look at the characteristics of ITIN applicants in recent years, see National Taxpayer Advocate 2015 Annual Report to Congress 198-200.

3 See, e.g., National Taxpayer Advocate 2010 Annual Report to Congress 334.

4 See Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title II, § 203(a) (2015) (containing the Protecting Americans from Tax Hikes Act of 2015) (hereinafter PATH Act) (codified at IRC § 6109(i)(3)(A)). The PATH Act § 203(f) provides that the amendments made in § 203 only apply to ITIN applications made after the effective date for the legislation. Congress introduced legislation to, among other items, clarify that the effective date provision in § 203(f) does not apply to the provisions regarding already issued ITINs. Tax Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e)(3) (2016); H.R. 4891, 114th Cong. § 2(e)(3) (2016); Tax Technical Corrections Act of 2016, S. 3506, 114th Cong. § 101(f)(5) (2016); H.R. 6439, 114th Cong. § 101(f)(5) (2016).

5 IRC § 6109(i)(3)(B).

The rigid and infeasible expiration schedule mandated by the new legislation will result in the following issues that present problems for affected taxpayers and the IRS:

- There will be a discrepancy between when an ITIN is considered expired under the law and when the IRS actually deactivates it;
- The schedule has pressured the IRS to deactivate ITINs without having the proper systems in place to process renewal applications prior to the deactivation;<sup>6</sup> and
- Because of the sheer volume of ITINs requiring deactivation in a short period of time, it is infeasible for the IRS to notify all taxpayers in advance of deactivating their ITINs.

### Example 1

A taxpayer received an ITIN for his child during 2006 and has filed a tax return claiming the child as a qualified child for the Child Tax Credit (CTC) each year since. In 2016, he learned that some ITINs may be expiring and contacted the IRS to learn if his child's ITIN is one of them. The IRS informed him that it would only be deactivating ITINs with the middle digits 78 and 79,<sup>7</sup> and ITINs that have not been used at all on an individual's return during the last three years. The IRS representative advised him that his child's ITIN will not be deactivated by the IRS during 2017, and he may use the ITIN when he files his 2016 return. The taxpayer files his return, claiming the CTC for his child and listing the child's ITIN. The IRS conducts a pre-refund examination and incorrectly determines that the child does not meet the residency requirements for the CTC and thus denies the credit. The taxpayer files a petition in the U.S. Tax Court to challenge Examination's determination. He learns from a tax return preparer that under the PATH Act, all ITINs issued prior to 2008 have expired under the law. The taxpayer is uncertain as to whether he should continue to challenge the disallowance of the CTC since his child's ITIN, which is required in order to claim the CTC, has expired under the law.

### Example 2

A taxpayer received an ITIN in 2010, and used it to file her 2009, 2010, and 2011 returns, for which she had a tax return filing requirement. During 2012 through 2015, the taxpayer primarily stayed at home to care for a family member and did not earn enough income to have a tax return filing requirement. In 2016, she returned to work full-time, earning enough money to require her to file a tax return. In February 2017, the taxpayer files her return with her ITIN, claiming a small refund. The IRS sends her a math error notice, explaining that it has removed the taxpayer's personal exemption from her return because she does not have a valid taxpayer identification number (TIN) and recalculated her tax to reflect a balance due. The taxpayer now applies for an ITIN in the middle of the filing season. She is unable to pay a Certified Acceptance Agent to certify her identification documents, and she is unable to make an appointment at her local Taxpayer Assistance Center to have her documents certified because of limited hours, days, and appointments available.<sup>8</sup> As a result, the taxpayer must mail her original driver's license to the IRS, which is her only form of photo identification.<sup>9</sup> Due to the current backlog of applications during the filing season, the taxpayer has to wait over 11 weeks for the IRS to issue her ITIN, process

6 See Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes for ITIN Applications, Deactivations, and Renewals Unduly Burden and Harm Taxpayers*, *supra*.

7 ITINs have nine digits, beginning with the number 9. Examples of ITINs that will be deactivated are: 9NN-78-NNNN or 9NN-79-NNNN.

8 ITIN applicants must mail to the IRS original identification documents or copies certified by the issuing agency, or have those documents certified by a Certified Acceptance Agent or Taxpayer Assistance Center. Instructions for Form W-7 (Sept. 2016).

9 At least one identification document must include a photo unless the applicant is a dependent under age 14 or a student under age 18. Instructions for Form W-7, 4 (Sept. 2016).

her return with the ITIN, and issue her refund. During this entire time, the taxpayer must drive illegally without her driver's license. Had the taxpayer known her ITIN was going to expire, she would have applied prior to the filing season.

## RECOMMENDATION

Amend IRC § 6109(i)(3)(B) to create a revised schedule for expiring ITINs issued prior to 2013. Such schedule should be developed in consultation with the IRS to ensure that (1) it is feasible for the IRS to deactivate ITINs according to this schedule, (2) the volume and timing of the deactivations allow the IRS to notify all taxpayers in advance of a deactivation, to the extent feasible, and (3) the schedule provides sufficient time for renewal applications to be received and fully processed prior to the deactivations occurring.

## PRESENT LAW

In recent years, the IRS has revised its plans to expire ITINs not used for tax administration purposes. In late 2012, the IRS announced plans to have any ITINs issued in 2013 or later automatically expire after five years, regardless of use.<sup>10</sup> Then in 2014, the IRS revised its policy to deactivate any ITIN not used at all during a period of five consecutive years regardless of when issued, with the first deactivations starting in 2016.<sup>11</sup> IRC § 6109(i)(3)(A) now provides that ITINs issued after 2012 will remain in effect unless the ITIN holder does not file a tax return or is included as a dependent on another individual's return for a period of three consecutive taxable years.<sup>12</sup> If such nonuse occurs, the ITIN will expire on the last day of the third consecutive year.<sup>13</sup> For ITINs issued prior to 2013, the ITIN will expire at the earlier of:

- If three consecutive taxable years of nonuse,<sup>14</sup> on the last day of the third consecutive taxable year; or
- On the “applicable date,” scheduled between 2017 and 2020.<sup>15</sup>

The “applicable date” is as follows:

- January 1, 2017 for ITINs issued before 2008;
- January 1, 2018 for ITINs issued in 2008;
- January 1, 2019 for ITINs issued in 2009 or 2010; and
- January 1, 2020 for ITINs issued in 2011 or 2012.<sup>16</sup>

10 See IRS, *IRS Strengthens Integrity of ITIN System; Revised Application Procedures in Effect for Upcoming Filing Season*, IR-2012-98 (Nov. 29, 2012), <https://www.irs.gov/uac/newsroom/irs-strengthens-integrity-of-itin-system-revised-application-procedures-in-effect-for-upcoming-filing-season>.

11 IRS, *Unused ITINs to Expire After Five Years; New Uniform Policy Eases Burden on Taxpayers, Protects ITIN Integrity*, IR-2014-76 (June 30, 2014), <https://www.irs.gov/uac/newsroom/unused-itins-to-expire-after-five-years-new-uniform-policy-eases-burden-on-taxpayers-protects-itin-integrity>.

12 IRC § 6109(i)(3)(A).

13 *Id.*

14 “Nonuse” contains the meaning as above — the ITIN holder does not file a tax return or is included as a dependent on another's return for a period of three consecutive taxable years.

15 IRC § 6109(i)(3)(B).

16 *Id.*

Section 203(f) of the PATH Act provides that the amendments made in § 203 apply to ITIN applications made after the date of enactment, December 18, 2015.<sup>17</sup> There is an inconsistency between this provision and the provisions in § 203 that expressly address ITINs issued prior to 2013. Congress has introduced legislation to clarify, among other items, that the effective date provision in § 203(f) does not apply to the PATH Act provisions setting forth the expiration schedule.<sup>18</sup>

If passed, these bills would also slightly adjust the expiration schedule by specifying that the three consecutive taxable years of nonuse for ITINs issued after 2012 must end after the issuance of the ITIN.<sup>19</sup> The legislation would also amend the law to specify for ITINs issued before 2013, at least one of the three consecutive taxable years of nonuse must end after December 18, 2015.<sup>20</sup> For example, if the IRS issued an ITIN in calendar year 2011, and it was not used on an individual's 2012, 2013, or 2014 tax year return, but it was used on a 2015 tax year return, the ITIN would expire under the PATH Act, but would not immediately expire if the Technical Corrections Act was passed.<sup>21</sup> The bills would also change the date on which any ITIN expires for nonuse from the last day of the third consecutive taxable year of nonuse to the day after the due date for the tax return for the third consecutive taxable year of nonuse.<sup>22</sup>

## REASONS FOR CHANGE

The rigid and infeasible expiration schedule has already created problems for the IRS and taxpayers, and will continue to do so. While the IRS is able to deactivate all ITINs not used in the last three years, it has had to adopt an alternative schedule for ITINs that have been used recently, but were issued prior to 2013.<sup>23</sup> Although the legislation requires all ITINs issued prior to 2008 to expire on January 1, 2017, the IRS will only be deactivating ITINs from this group with the middle digits 78 and 79, which were issued between 1996 and 2000.<sup>24</sup> This gives rise to a discrepancy between which ITINs have *expired* under the law and which ITINs the IRS has *deactivated*. The discrepancy creates confusion for taxpayers who do not understand when their ITINs actually expire and when they need to file renewal applications. Taxpayers whose ITINs have expired under the law, but who are told by the IRS they do not need to renew at this time, may worry about the consequences down the road, should they need to challenge an

17 PATH Act § 203(f).

18 Tax Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e)(3) (2016); H.R. 4891, 114th Cong. § 2(e)(3) (2016); Tax Technical Corrections Act of 2016, S. 3506, 114th Cong. § 101(f)(5) (2016); H.R. 6439, 114th Cong. § 101(f)(5) (2016).

19 Tax Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e)(2)(A)(i) (2016); H.R. 4891, 114th Cong. § 2(e)(2)(A)(i) (2016); Tax Technical Corrections Act of 2016, S. 3506, 114th Cong. § 101(f)(3)(A)(i) (2016); H.R. 6439, 114th Cong. § 101(f)(3)(A)(i) (2016).

20 Tax Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e)(2)(B) (2016); H.R. 4891, 114th Cong. § 2(e)(2)(B) (2016); Tax Technical Corrections Act of 2016, S. 3506, 114th Cong. § 101(f)(3)(B) (2016); H.R. 6439, 114th Cong. § 101(f)(3)(B) (2016).

21 The ITIN would still expire in the future based on the earlier of the applicable date or after three consecutive taxable years of nonuse, with one year occurring 2015 or later.

22 Technical Corrections Act of 2016, S. 2775, 114th Cong. §§ 2(e)(2)(A)(ii), 2(e)(2)(B) (2016); H.R. 4891, 114th Cong. §§ 2(e)(2)(A)(ii), 2(e)(2)(B) (2016); Tax Technical Corrections Act of 2016, S. 3506, 114th Cong. §§ 101(f)(3)(A)(ii), 101(f)(3)(B) (2016); H.R. 6439, 114th Cong. §§ 101(f)(3)(A)(ii), 101(f)(3)(B) (2016).

23 The IRS stated “due to a lack of the necessary resources to service requests for ITIN renewals for the impacted population of approximately 20 million users, we are concerned that an inability to provide those ITIN renewals in a timely manner will lead to ineffective tax administration. Seeking to avoid that situation, we developed a plan to meet the goals of the statute while ensuring taxpayers have the opportunity to renew an ITIN in a timely manner.” See IRS response to TAS information request (Nov. 29, 2016).

24 *Id.*

IRS determination in court.<sup>25</sup> If a court was to have knowledge of when a taxpayer's ITIN was issued, it would presumably have to disallow any exemptions or credits that require the taxpayer to provide a TIN, even if the IRS had not actually deactivated the taxpayer's ITIN.<sup>26</sup>

The discrepancy between what the law requires and what the IRS is capable of doing also creates uncertainty for taxpayers. The PATH Act's schedule allows ITIN holders to predict the exact date their ITINs will expire (if expiring based on the year the ITIN was issued as opposed to nonuse). However, under the IRS's alternative schedule, it does not expect to announce the next wave of deactivations (scheduled to occur in 2018) until Summer 2017.<sup>27</sup> Revising the expiration schedule mandated by the law so that the IRS may align its deactivation schedule would remove this uncertainty.

Even though the IRS will be deactivating fewer ITINs during 2017 than required by the PATH Act's schedule, it will still be deactivating approximately 11 million ITINs,<sup>28</sup> which will undoubtedly strain IRS resources. The IRS made a decision to only notify ITIN holders subject to deactivation if they submitted a return in the last three years, citing a reduced ability to contact taxpayers who had not filed recently at their last known address.<sup>29</sup> Although it may be infeasible for the IRS to contact all ITIN holders subject to deactivation prior to their deactivations, a more gradual schedule for deactivating ITINs would provide the IRS with more time and resources to notify taxpayers, not only by sending a notice to their last known address, but also by conducting greater outreach farther in advance.

## EXPLANATION OF RECOMMENDATION

This legislative change would amend IRC § 6109 to revise the schedule for expiring ITINs. To develop the revised schedule, it is helpful for Congress to consult with the IRS to take into account what the IRS is capable of doing based on technology and resource requirements. Congress should consider requesting specific information regarding the time, technology, and resources needed to process renewal applications in order to develop an expiration schedule that provides the IRS with sufficient time to receive and fully process renewal applications prior to the expirations. The schedule should also permit the IRS to notify as many taxpayers as possible who are subject to deactivation at their last known address prior to the deactivation.

This legislative recommendation will remove the discrepancy between when an ITIN expires under the law and when the IRS deactivates an ITIN, providing certainty to taxpayers. It will also provide the IRS with more time to process renewal applications, allowing taxpayers to have their applications processed upon receipt and in advance of the filing season. As such, it will reduce the burden on taxpayers who must currently wait months and delay filing their tax returns during the time between submitting their ITIN renewal applications and receiving confirmation from the IRS that they may use their ITINs. Revising the expiration schedule will provide the IRS with a greater ability to notify taxpayers about the need to renew their ITINs, protecting the taxpayers' *right to be informed*.

25 This scenario could occur in the U.S. Tax Court, a U.S. District Court, or the U.S. Court of Federal Claims. If the taxpayer's exemptions or credits were disallowed during an examination and the IRS issued a statutory notice of deficiency, the taxpayer could challenge the IRS's determination in U.S. Tax Court. See IRC § 6213(a). Alternatively, if the taxpayer paid the tax resulting from the disallowed exemptions or credits, the taxpayer could file a claim for refund and file suit in a U.S. District Court or the U.S. Court of Federal Claims to recover the tax paid. See IRC § 7422. See also 28 U.S.C. §§ 1346; 1491.

26 The IRS maintains information regarding the ITIN date of issuance on its internal system, the ITIN Real Time System. IRM 3.21.263.1, *Overview* (Oct. 4, 2016). A Taxpayer Identification Number (TIN) is required to claim a personal exemption for the taxpayer, taxpayer's spouse, or a dependent, and to claim the Child Tax Credit. See IRC §§ 151(e); 24(e).

27 See email from IRS Wage and Investment Division to TAS (Nov. 18, 2016) (on file with TAS).

28 See IRS response to TAS information request (Nov. 29, 2016).

29 *Id.*