

Area of  
Focus #9**Recent Legislation Provides Opportunities for Needed Changes to the Individual Taxpayer Identification Number Program, But the IRS Must Ensure Any Such Changes Preserve Taxpayer Rights****TAXPAYER RIGHTS IMPACTED<sup>1</sup>**

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Challenge the IRS's Position and Be Heard*

**DISCUSSION**

Individual Taxpayer Identification Numbers (ITINs) are required for individuals who are ineligible for Social Security numbers (SSNs) but who are required to file tax returns and pay taxes.<sup>2</sup> As discussed extensively in past Annual Reports to Congress, IRS policies have made it difficult for taxpayers to apply for and receive ITINs.<sup>3</sup> Yet, the IRS has not taken necessary steps to alleviate taxpayer burden and has declined to implement many of the National Taxpayer Advocate's recommendations such as allowing ITIN applications from all applicants year-round and providing adequate alternatives to submitting original documents. In recent years, Congress has passed laws that shape the direction of the ITIN program, from prescribing application procedures and ITIN expiration dates to limiting certain tax benefits that ITIN holders can claim. In fiscal year (FY) 2019, TAS will review and advocate based on the IRS's actions in response to legislative changes as well as recent ITIN trends, focusing on:

- How the IRS will adjust ITIN application procedures based on the foreseeable decrease in ITIN applications;
- How the IRS will modify its deactivation schedule based on past renewals and predicted volumes;
- How the IRS will communicate ITIN-related math error adjustments to taxpayers;
- How the IRS intends to use math error authority retroactively after processing returns to recoup refundable credits paid to ITIN taxpayers in error;
- How the IRS can provide existing Spanish versions of IRS publications and correspondence to taxpayers with a communicated preference for Spanish; and
- When the IRS will issue its study on ITIN applications required by legislation.

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 as IRC § 7803(a)(3)).

2 IRC § 6109; Treas. Reg. § 1.6109-1.

3 See, e.g., National Taxpayer Advocate 2016 Annual Report to Congress 239-252 (Most Serious Problem: *Individual Taxpayer Identification Numbers (ITINs): IRS Processes for ITIN Applications, Deactivations, and Renewals Unduly Burden and Harm Taxpayers*); National Taxpayer Advocate 2012 Annual Report to Congress 154-179 (Most Serious Problem: *The IRS's Handling of ITIN Applications Imposes an Onerous Burden on ITIN Applicants, Discourages Compliance, and Negatively Affects the IRS's Ability to Detect and Deter Fraud*).

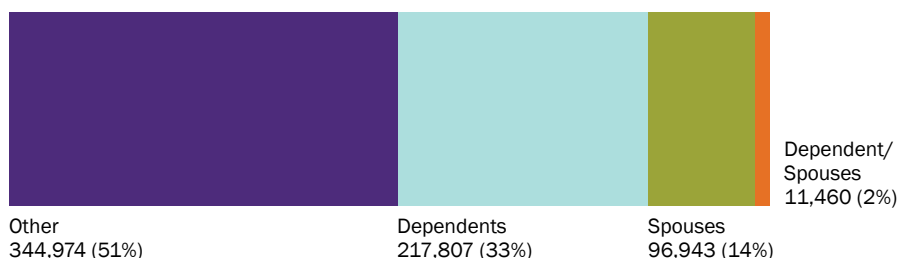
### Recent Legislative Changes and a Likely Decrease in Individual Taxpayer Identification Number Applications and Returns Create an Opportunity to Implement Taxpayer-Friendly Changes to the Program

In 2017, Congress passed the Tax Cuts and Jobs Act (TCJA), which changes certain tax benefits for tax years 2018 through 2025 that were previously available to ITIN holders.<sup>4</sup> The TCJA requires a qualifying child to have an SSN issued by the tax return due date for the taxpayer to claim the Child Tax Credit (CTC), including the refundable portion known as the Additional Child Tax Credit (ACTC); whereas before, a timely-issued ITIN was sufficient.<sup>5</sup> The new law eliminated the dependency exemption, which could previously be claimed for ITIN holders residing in the United States, Canada, or Mexico and meeting other requirements.<sup>6</sup> However, the TCJA creates a nonrefundable \$500 credit for dependents of a taxpayer other than qualifying children, which includes U.S. resident children.<sup>7</sup> The law retains the same rules for the American Opportunity Tax Credit (AOTC), meaning students with ITINs issued by the return due date may still claim this refundable credit.

Despite the new and retained tax benefits for ITIN holders, there will likely be a sizable decrease in dependent ITIN applications because of the termination of the dependency exemption and the restriction on the CTC. In processing years (PYs) 2014 through 2017, the IRS received an average of 218,000 dependent ITIN applications and 97,000 applications for spouses, together comprising about half of all ITIN applications, as shown in Figure 3.9.1.<sup>8</sup>

**FIGURE 3.9.1**<sup>9</sup>

**ITIN Applications, Average for Processing Years 2014-2017**



4 This bill was introduced as the Tax Cuts and Jobs Act but was passed under a different title. Pub. L. No 115-97, 131 Stat. 2054 (2017) (hereinafter TCJA).

5 TCJA § 11022 (codified as IRC § 24(h)(7)).

6 TCJA § 11041(a) (codified as IRC § 151(d)(5)).

7 The children's ITINs must be issued by the tax return due date. TCJA § 11022 (codified as IRC § 24(h)(4)).

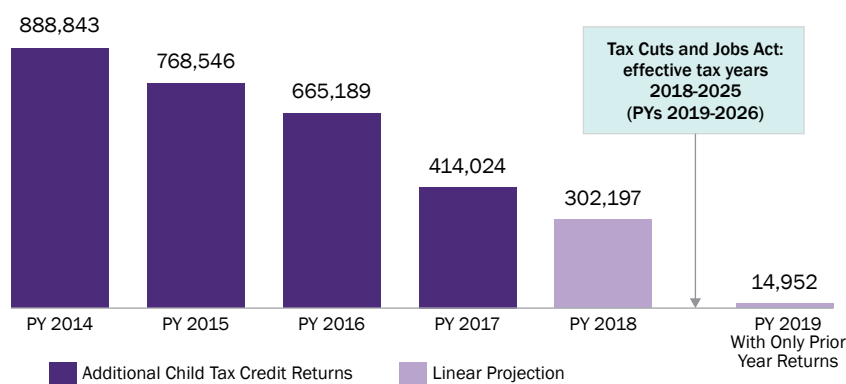
8 Compliance Data Warehouse (CDW) (data retrieved by TAS Research Mar. 15, 2018). During processing years (PYs) 2014–2017, the IRS received an average of 217,807 ITIN applications for dependents, 96,943 for spouses, and 11,460 for applications for individuals who were either a dependent or spouse, totaling 326,210 applications. The IRS received an average of 671,184 total ITIN applications per year during PYs 2014–2017.

9 CDW (data retrieved by TAS Research Mar. 15, 2018).

We can expect these numbers, especially for dependents, to drop sharply as a result of the tax law changes. Returns claiming the ACTC for only children with ITINs have already been declining in recent years — from approximately 889,000 in PY 2014 to about 414,000 in PY 2017.<sup>10</sup> Without the benefit of the CTC and ACTC for children with ITINs, we expect returns claiming these credits for children with ITINs to plummet, as shown in Figure 3.9.2.

**FIGURE 3.9.2<sup>11</sup>**

**Additional Child Tax Credit Returns With Individual Taxpayer Identification Number Children Only, Filed in Processing Years (PYs) 2014-2017, and Projected Returns for PYs 2018-2019**



As a result, many of these ITINs are likely to expire for lack of use. An even greater number of ITINs have been used to claim the dependency exemption in recent years – an average of 1.3 million during the last four processing years.<sup>12</sup> Thus, the recent provision eliminating the dependency exemption is likely to cause a further decline in new ITIN applications as well as an increase in ITINs expiring for non-use. Although ITIN holders may still claim the refundable education credit known as the AOTC, far fewer ITIN holders claim the AOTC (an average of 62,000 during the last four processing years) relative to the ACTC or dependency exemption.<sup>13</sup> In addition, the new nonrefundable credit for qualifying dependents may not help taxpayers who have sufficient withholding and no tax liability to be reduced.

The new tax law may also affect how many ITIN returns are filed. For taxpayers who previously claimed tax benefits for children or family members with ITINs, there may be less of an incentive to file a return if the return will not result in a refund. Additionally, the Department of Homeland

<sup>10</sup> CDW (data retrieved by TAS Research Apr. 12, 2018).

<sup>11</sup> *Id.*

<sup>12</sup> The number of returns claiming Additional Child Tax Credit (ACTC) with only ITIN dependents was extracted from the Individual Returns Transaction File on the IRS CDW for the indicated PY on Mar. 15, 2018. For the PY 2018 and PY 2019 projections, TAS estimated the number of ACTC returns using a linear time series projection from PY 2014–PY 2017 data (R-Square = .95) and subtracted the estimated percentage of returns for tax year (TY) 2018 because the ACTC can no longer be claimed for children with ITINs for TY 2018. TAS estimated the percentage of TY 2018 returns at approximately 90 percent based on TY 2016 returns comprising about 90 percent of the returns received in PY 2017. TAS has focused on ACTC data since it is a refundable credit and the volume of returns claiming ACTC has been larger than the number of returns claiming the non-refundable CTC.

<sup>13</sup> TAS Research, CDW (data retrieved by TAS Research Apr. 12, 2018).

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**The Treasury Inspector General for Tax Administration reported that the IRS erroneously deactivated over 130,000 Individual Taxpayer Identification Numbers (ITINs) because of flaws in its systems. Although the IRS systemically reactivated these ITINs and allowed the tax benefits, it only implemented systemic programming to prevent future errors for about 13 percent of the errors.**

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Security has announced it will issue a notice of proposed rulemaking by July of this year, clarifying its definition of “public charge.”<sup>14</sup> Under Section 212(a)(4) of the Immigration and Nationality Act, a person seeking admission to the United States or to adjust permanent resident status is inadmissible if at the time of applying, it is determined that the person is likely at any time to become a public charge.<sup>15</sup> If the Department of Homeland Security determines who is likely to become a public charge by considering among other factors whether an individual has claimed refundable tax credits or has claimed dependents (or been claimed as a dependent on a tax return), such a policy could have a chilling effect.<sup>16</sup> Taxpayers could fear that filing a return and claiming tax benefits to

which they are entitled could ultimately prevent them from receiving permanent resident status.

With the foreseeable drop in ITIN applications, the IRS should reconsider its refusal to adopt several National Taxpayer Advocate recommendations that it had previously declined to implement.<sup>17</sup> For example, it may now be feasible to:

- Return all original documents by certified mail, given the predicted drop in dependent ITIN applicants, who have the most restricted alternatives to mailing original documents;<sup>18</sup>
- Allow Taxpayer Assistance Centers to certify all documents for dependents, given that the new law reduces the incentive to fraudulently obtain an ITIN for a dependent due to the prohibition on claiming the CTC (including the refundable portion);<sup>19</sup> and
- Allow certifying acceptance agents to certify all types of identification documents for dependent ITIN applicants.

### **If the IRS Accelerates Its Previously Planned Deactivation Schedule, It Must Provide Adequate Notice to Taxpayers Prior to Deactivating ITINs**

At the end of 2016, the IRS began implementing the provision of the Protecting Americans from Tax Hikes (PATH) Act that requires the deactivation of ITINs based on age or lack of use.<sup>20</sup> Instead of

14 Department of Homeland Security, Inadmissibility and Deportability on Public Charge Grounds, Regulation Identifier Number (RIN) 1615-AA22, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201710&RIN=1615-AA22> (Fall 2017).

15 8 U.S.C. § 1182(a)(4).

16 See Nicole Narea, *DHS May Exclude Immigrants Who Use Tax Breaks, CHIP*, 2018 Law360 87-184 (Mar. 28, 2018), 8 U.S.C. § 1182(a)(4).

17 See, e.g., National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress vol. 2, 116.

18 For a discussion of the problems returning original documents to ITIN applicants, see National Taxpayer Advocate 2015 Annual Report to Congress 203-204.

19 The IRS had previously declined to adopt this policy based on the risk of accepting fraudulent documents. National Taxpayer Advocate Fiscal Year 2017 Objectives Report to Congress vol. 2, 117. Although Certifying Acceptance Agents and Taxpayer Assistance Centers will certify all 13 types of original documents for primary and secondary taxpayers, they will only certify two or three types of documents, respectively, for dependents. IRS, Instructions for Form W-7 (Oct. 2017). See Treasury Inspector General for Tax Administration (TIGTA), Ref. No. 2012-42-081, *Substantial Changes Are Needed to the Individual Taxpayer Identification Number Program to Detect Fraudulent Applications* (July 16, 2012).

20 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV, § 203(d) (2015) (hereinafter PATH Act). The PATH Act requires ITINs to expire after three tax years of non-use or on a staggered schedule based on the year they were issued.

deactivating ITINs based on the PATH Act schedule, the IRS created a slower schedule based on the middle digits of the ITINs, which are roughly correlated to the year issued. In 2016 and 2017, the IRS deactivated 15.2 million ITINs, approximately 1.5 million of which were deactivated solely due to the middle digits and not a lack of use.<sup>21</sup> The IRS based its schedule partly on the resources required to renew the ITINs, but at the end of the 2017 filing season, it had received less than half the projected renewals.<sup>22</sup> The IRS recently agreed to a Treasury Inspector General for Tax Administration (TIGTA) recommendation to speed up the ITIN deactivation schedule. Although expediting the schedule will bring it more in line with the statute, TAS will be closely following any changes to see that the IRS provides adequate notice to taxpayers prior to deactivating new groups of ITINs.

TAS remains concerned about issues with the IRS's deactivation of ITINs for non-use. TIGTA reported that the IRS erroneously deactivated over 130,000 ITINs because of flaws in its systems.<sup>23</sup> Although the IRS systemically reactivated these ITINs and allowed the tax benefits, it only implemented systemic programming to prevent future errors for about 13 percent of the errors. The IRS disagreed with TIGTA's recommendation to modify its methodology for identifying ITINs eligible for deactivation and implemented manual processes to address the rest of the errors. Without a systemic fix, there are likely to be future erroneous deactivations. TAS will review submissions on its Systemic Advocacy Management System to identify issues related to erroneous deactivations and raise them with the IRS. TAS will also advocate for individuals with erroneously deactivated ITINs to have them reinstated and receive tax benefits to which they are entitled.

### **TAS Will Continue to Request Changes to Math Error Notices That Fail to Effectively Inform Individual Taxpayer Identification Number Taxpayers About How to Remedy Related Problems**

The PATH Act authorizes the IRS to disallow credits and exemptions for returns with an expired, revoked, or otherwise invalid ITIN through its math error procedures, which allow the IRS to summarily assess and immediately collect tax without first providing the taxpayer access to the Tax Court unless the taxpayer requests an abatement within 60 days.<sup>24</sup> Current math error notices for expired ITINs do not clearly explain which credits are being denied for which persons or what the taxpayer can do to remedy the problem.<sup>25</sup> Taxpayers receiving these notices may not understand that they can and need to renew the expired ITINs, as only 22 percent of those who had received these notices subsequently renewed the associated ITINs, despite having a tax administration purpose for the ITINs.<sup>26</sup> These inadequate notices impair taxpayers' *rights to be informed* and *to challenge the IRS's position and be heard* because taxpayers may not know to request an abatement. TAS will work with the IRS on improving notice clarity to specify which credits are denied for which ITINs and how taxpayers

21 IRS response to TAS information request (Oct. 12, 2017).

22 The IRS estimated that approximately 450,000 taxpayers would apply to renew ITINs that expired at the beginning of 2017, but had received only about 176,000 renewals as of the week of April 17, 2017. IRS response to TAS information request (Nov. 29, 2016). IRS, Submission Processing (SP), Program Management/Process Assurance (PMPA) Branch, *Filing Season Statistics Report for Week Ending April 22, 2017*, 10. See also TIGTA, *Some Legal Requirements to Deactivate Individual Taxpayer Identification Numbers Have Not Been Met*, 2018-40-011, 8 (Jan. 29, 2018).

23 TIGTA, *Some Legal Requirements to Deactivate Individual Taxpayer Identification Numbers Have Not Been Met*, 2018-40-011, 9-10 (Jan. 29, 2018).

24 PATH Act § 203(e) (codified at IRC § 6213(g)(2)).

25 National Taxpayer Advocate 2017 Annual Report to Congress 188-189.

26 Of the 152,000 tax returns that received a math error for an expired ITIN, taxpayers subsequently renewed the expired ITINs for only 33,056 (22 percent) of these returns. To determine these numbers, TAS assumed a successful renewal occurred if the renewed ITIN was issued in the same or later month when the math error notice was generated. CDW (data retrieved by TAS Research Nov. 14, 2017).

can renew the ITINs. In FY 2019, TAS will be contracting with a graphic design professor to study how people visually read and retain information and will use findings from this study as the basis for future notice changes.

### **The IRS Must Adhere to the Taxpayer Bill of Rights When It Recoups Tax Benefits Paid in Error to Taxpayers Whose Individual Taxpayer Identification Numbers Were Deactivated or Should Have Been Deactivated**

In response to a recent TIGTA report, the IRS has agreed to review and recover tax benefits erroneously paid to 1,298 taxpayers with ITINs that were active but should have been deactivated, and 9,818 taxpayers whose returns included deactivated ITINs but were incorrectly processed.<sup>27</sup> The IRS response does not indicate whether this will be accomplished through examination or math error; however, the IRS has proposed in the past to use math error authority to *retroactively* disallow previously allowed credits for ITIN holders.<sup>28</sup> As discussed in another Area of Focus in this report, the IRS has issued Program Manager Technical Advice that concludes the IRS is authorized to use math error authority after it has processed a return and issued a refund.<sup>29</sup> In addition to the concerns discussed in the Area of Focus, the use of retroactive math error authority is especially problematic for deactivated ITINs because there may be confusion as to whether an ITIN should have been deactivated under the law, was actually deactivated by the IRS, or should have been deactivated but was active when the return was filed. Of the approximate 11,000 taxpayers from whom the IRS agreed to review and recoup benefits, approximately 1,300 had active ITINs at the time, which may lead taxpayers to think that the IRS math error notice itself was issued by mistake.

### **TAS Will Research How the IRS Can Implement a Process to Provide Limited English Proficiency Taxpayers With Existing Spanish Versions of IRS Correspondence and Documents**

The majority of ITIN taxpayers come from Spanish-speaking countries, and over half of Hispanic taxpayers speak exclusively Spanish at home;<sup>30</sup> however, notices to ITIN taxpayers (excluding correspondence specifically related to the ITIN application) are not sent in Spanish except under very limited circumstances.<sup>31</sup> In 2017, the IRS sent out 874,657 ITIN deactivation notices, but only two were issued in Spanish.<sup>32</sup> This finding is directly contrary to the IRS's contention in its response to our 2017 Most Serious Problem recommendation that "In all efforts [to reach ITIN filers], the IRS was responsive to taxpayer language preferences."<sup>33</sup> Despite having foreign language versions for many forms, publications, and correspondence, and having a universal Limited English Proficiency (LEP)

27 TIGTA, *Some Legal Requirements to Deactivate Individual Taxpayer Identification Numbers Have Not Been Met*, 2018-40-011, 10, 12 (Jan. 29, 2018).

28 See TAS Internal Management Document/Single Point of Contact record 5399, 6015 - *Retroactive Claim Notice (PATH) - (short version) Letter* (Sept. 8, 2017).

29 Memo from Deputy Associate Chief Counsel (Procedure & Administration) to National Taxpayer Advocate, POSTS-129453-17, *TIGTA Report/Section 6213 Math Error Assessment Authority* (Apr. 10, 2018). See Area of Focus: *The IRS Has Expanded Its Math Error Authority, Reducing Due Process for Vulnerable Taxpayers, Without Legislation and Without Seeking Public Comments*, *supra*.

30 In 2014, 50 percent of ITIN applicants came from Mexico and another seven percent came from Guatemala. National Taxpayer Advocate 2015 Annual Report to Congress 199. Forrester Research, Inc., *The Taxpayer Advocate Service: Hispanic Underserved Analysis*, Q4 2014, 13 (Dec. 2014).

31 See National Taxpayer Advocate 2017 Annual Report to Congress 188.

32 IRS, *Servicewide Notice Information Program* (Nov. 8, 2017).

33 See IRS Responses and National Taxpayer Advocate's Comments Regarding Most Serious Problems Identified in the 2017 Annual Report to Congress: *Individual Taxpayer Identification Numbers (ITINs): The IRS's Failure to Understand and Effectively Communicate with the ITIN Population Imposes Unnecessary Burden and Hinders Compliance*, *infra*.



account indicator, the IRS currently cannot or does not use this indicator to provide LEP taxpayers with documents in their primary language when available.

TAS has initiated a research project to assess the need for Spanish language correspondence and the viability of using the existing LEP account indicator to cause the Spanish version of standard letters and notices to be issued to all taxpayers who have expressed a preference for Spanish communications.<sup>34</sup> The TAS initiative will review IRS research on LEP community needs,<sup>35</sup> the programming required for utilizing the LEP account indicator to generate Spanish letters and notices,<sup>36</sup> and staffing resources for conducting Spanish communications, which the IRS has historically tracked and measured in other operations.<sup>37</sup> This project will alleviate burden for ITIN taxpayers whose primary language is Spanish.

### The IRS Has Not Yet Completed the Study on the Individual Taxpayer Identification Number Application Process Required by the Protecting Americans From Tax Hikes Act

The PATH Act required the IRS to conduct a study on the effectiveness of the ITIN application process. The IRS Research, Applied Analytics, and Statistics office delivered a draft report to internal stakeholders in early 2017, and the IRS provided a draft report to TAS in December 2017. However, the IRS has not provided any additional updates to TAS on when it will complete the report. The study is especially important considering the predicted decreases in ITIN applications and returns as a result of the recent tax reform legislation. It could provide valuable data that may serve as the basis for improvements to the ITIN application process for the 2019 filing season and also enhance the protection of taxpayer rights. TAS will track and review the effect of the tax law changes on ITIN applications and returns during the 2019 filing season and the renewal period preceding it in late 2018.

## FOCUS FOR FISCAL YEAR 2019

In fiscal year 2019, TAS will:

- Review its Systemic Advocacy Management System for issues related to erroneous deactivations to raise systemic problems with the IRS;
- Assist individuals whose ITINs have been erroneously deactivated to reactivate their ITINs and receive tax benefits to which they are entitled;
- Propose changes to the math error notice for deactivated ITINs to clarify which credits are denied for which ITINs and how the taxpayer can remedy the problem by renewing the ITINs;
- Conduct a research project to assess the need for Spanish language correspondence and the viability of using the existing LEP account indicator to cause the issuance of the Spanish version of standard letters and notices to taxpayers who have expressed their preference for Spanish communications; and
- Track and review the number of ITIN applications and ITIN returns received during the 2019 filing season and the renewal period preceding it, which may be affected by the recent tax reform legislation.

34 Systemic Advocacy Management System (SAMS) Information Gathering Project 37056.

35 IRS, *Business Performance Review (W&I) 27* (Aug. 10, 2017) references a Limited English Proficiency (LEP) study.

36 See IRM Exhibit 2.4.19-5, *Command Code FRM77 Input* (Jan. 1, 2016), referencing transaction code 971 and action code 192, which have been available since 2011 but have not been effectively utilized.

37 See generally IRM 1.4.16, *Accounts Management Guide for Managers* (Jan. 1, 2018), and IRM 1.4.19, *Automated Underreporter Technical and Clerical Managers and Coordinators Guide* (Nov. 1, 2017), for IRS directives to document full-time equivalents (or staff years) for Spanish services.