

**MSP
#18****INDIVIDUAL TAXPAYER IDENTIFICATION NUMBERS (ITINs): IRS Processes for ITIN Applications, Deactivations, and Renewals Unduly Burden and Harm Taxpayers****RESPONSIBLE OFFICIAL**

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TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Each year, approximately 4.6 million taxpayers ineligible for Social Security numbers (SSNs) require Individual Taxpayer Identification Numbers (ITINs) to comply with their tax filing and payment obligations, claim dependents, and receive tax benefits.² Foreign taxpayers rely on ITINs to avoid mandatory withholding on some types of U.S. source income³ and upon the disposition of U.S. real property interests,⁴ or to meet the requirements of third parties such as banks, who request ITINs for information reporting and withholding purposes.⁵ Failure to timely obtain an ITIN can lead to harsh financial consequences such as late filing penalties, higher withholding, and the permanent loss of certain tax credits.

Changes in application requirements, program administration, and insufficient staffing have contributed to delays in obtaining ITINs for thousands of taxpayers.⁶ During the busiest time of the 2016 filing season, the average weekly inventory of unassigned ITIN applications with tax returns was nearly 80,000, reflecting a significant backlog.⁷ ITIN applications and associated return filings have dropped

1 See Taxpayer Bill of Rights (TBOR), 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 See, e.g., IRC § 24(e). For detailed characteristics of Individual Taxpayer Identification Number (ITIN) applicants in recent years, see National Taxpayer Advocate 2015 Annual Report to Congress 198-200.

3 Chapter 3 of the Code generally requires withholding agents to collect the substantive tax liability of nonresident aliens imposed under IRC §§ 871(a), 881(a), and 4948 by withholding on certain payments of U.S. source fixed or determinable annual or periodical income. See IRC §§ 1441-1443. See also IRC §§ 1471-1474 (Chapter 4).

4 Foreign Investment in Real Property Tax Act (FIRPTA) of 1980, Pub. L. No. 96-499, Subtitle C, 94 Stat. 2599, 2682 (1980).

5 See IRC § 6041.

6 See, e.g., National Taxpayer Advocate 2015 Annual Report to Congress 196, 202; National Taxpayer Advocate 2013 Annual Report to Congress 214, 221.

7 IRS, *ITIN Production Reports* (March 5, 2016 through June 11, 2016).

62.5 percent between 2011 and 2015,⁸ suggesting some taxpayers may have stopped filing returns due in part to the difficulty of obtaining an ITIN.

The Protecting Americans from Tax Hikes (PATH) Act of 2015, signed into law in late 2015, made significant changes to the ITIN program, while codifying some existing administrative procedures.⁹ The law includes positive changes, such as expanding the Certified Acceptance Agent (CAA) program¹⁰ and requiring the IRS to study the ITIN application process. However, it creates significant challenges for the IRS, such as the rigid schedule for deactivating millions of ITINs. Some provisions, such as the requirement for an ITIN to be issued by the tax return due date in order to receive the Child Tax Credit (CTC) or American Opportunity Tax Credit (AOTC), could have devastating consequences. The National Taxpayer Advocate is concerned that:

- The IRS's deactivation plans have the potential to create confusion and result in taxpayers not renewing their ITINs in time to file returns timely;
- The IRS has not exercised the flexibility the PATH Act grants for acceptable documentation, thereby leaving a significant number of applicants needing to mail original documents to the IRS;
- Math error procedures for taxpayers whose ITIN applications are rejected or whose ITINs are deactivated infringe on taxpayer rights;
- Taxpayers may not receive the CTC or the AOTC if they do not know to file timely, or if the IRS mishandles or loses their returns; and
- The general requirement for new ITIN applicants to apply during the filing season burdens applicants, creates delays, hampers fraud detection, and exacerbates the other problems ITIN applicants face.

ANALYSIS OF PROBLEM

Background

Purpose of ITINs

Any person required to file a tax return, statement, or other document must include a taxpayer identifying number (TIN).¹¹ A person must also provide his or her TIN to a third party if the IRS requires the third party to include the person's TIN on a return or document.¹² In 1996, the IRS created ITINs to help taxpayers who need a TIN to comply with the law, but who are ineligible for an SSN.¹³ ITINs are "important for the effective operation of the IRS automatic data processing system."¹⁴

8 In processing year (PY) 2011, 2,317,374 ITIN applications (Forms W-7) were received compared to 869,575 in PY 2015. IRS, ITIN Comparative Reports (Dec. 31, 2011) and (Dec. 30, 2015), respectively.

9 Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, Division Q, Title IV (2015) (hereinafter PATH Act).

10 Certified Acceptance Agents (CAAs) were previously referred to and at times still referred to as "Certifying Acceptance Agents" by the IRS. See, e.g., Internal Revenue Manual (IRM) 3.21.263.3.1, *Acceptance Agent (AA) or Certifying Acceptance Agent (CAA)* (Sept. 12, 2016).

11 IRC § 6109(a)(1); Treas. Reg. § 301.6109-1(b).

12 IRC § 6109(a)(2); Treas. Reg. § 301.6109-1(c).

13 Taxpayer Identifying Numbers (TINs), 61 Fed. Reg. 26788 (May 29, 1996) (codified at Treas. Reg. § 301.6109-1).

14 ITINs "improv[e] the IRS' ability to identify and access database records; to match information provided on tax and information returns, statements, and other documents with the proper taxpayers; and to provide better customer service to taxpayers." Taxpayer Identifying Numbers (TIN), 60 Fed. Reg. 30211, 30212 (proposed June 8, 1995) (codified at Treas. Reg. § 301.6109-1).

All United States (U.S.) citizens and persons considered U.S. residents under the Internal Revenue Code (IRC) are required to file and pay U.S. taxes on their worldwide income and need a TIN to do so.¹⁵ Under the IRC, an individual is a resident for tax purposes if he or she is a lawful permanent resident, which is consistent with immigration law.¹⁶ However, an individual is also a resident for tax purposes if he or she is present in the United States a minimum number of days, regardless of immigration status,¹⁷ which creates a tension between tax law and immigration law. In these cases, it is especially important for the IRS to protect a taxpayer's *right to confidentiality*, which generally prohibits the IRS from sharing any taxpayer information with the Department of Homeland Security.¹⁸ If the IRS fails to protect this right, taxpayers may stop filing and paying their taxes out of fear of deportation. The IRS has been able to navigate the difficult balance between the tax law and immigration law through the ITIN program, and the National Taxpayer Advocate believes that any disruption of this balance will undermine voluntary compliance.

Overview of the PATH Act ITIN Changes

The PATH Act establishes requirements for how taxpayers apply for ITINs, what documentation is required, how long an ITIN is effective, how the IRS treats deactivated ITINs, and when an ITIN must be issued to receive certain tax credits. Applicants residing in the United States can apply in person to an IRS employee or CAA, or by mail.¹⁹ Applicants abroad can no longer use a CAA, but can now apply in person to a designated official at a U.S. diplomatic mission or consular post.²⁰ Applicants must submit documentation to prove identity, residency, and foreign status.²¹ The IRS may only accept original documents or “certified copies meeting the requirements of the Secretary,” which allows the IRS to decide what constitutes a certified copy and who can certify copies of which documents.²² The law envisions an expansion of the CAA program, allowing state and local governments, federal agencies, and others authorized by the IRS to be CAAs.²³

The PATH Act will create challenges for taxpayers and the IRS. Under the law, all ITINs issued after 2012 will remain in effect unless the ITIN holder does not file a tax return with the ITIN, or is not

15 See, e.g., IRC § 61. Individuals considered nonresident aliens under the IRC are required to file and pay tax on income derived from sources within the United States. See IRC §§ 1, 2, 871, 7701(b).

16 IRC § 7701(b)(1)(A)(i).

17 To become a resident for tax purposes, an individual must be generally present in the U.S. on at least 183 days during a three year period that includes the current year. See *generally* IRC § 7701(b); Treas. Reg. § 301.7701(b)-1(c).

18 See IRC § 6103. There is a limited exception for sharing information related to criminal or terrorist activities, or emergency circumstances. IRC § 6103(i)(3).

19 PATH Act, § 203(a) (codified at IRC § 6109(i)(1)(A)). This section codifies prior administrative policy.

20 PATH Act, § 203(a) (codified at IRC § 6109(i)(1)(B)). Congress has introduced legislation to clarify that CAAs are available for ITIN applicants outside the United States. See Technical Corrections Act of 2016, S. 2775, 114th Cong. § 2(e)(1) (2016); H.R. 4891, 114th Cong. § 2(e)(1) (2016); Tax Technical Corrections Act of 2016, S. 3506, 114th Cong. § 101(f)(2) (2016); H.R. 6439, 114th Cong. § 101(f)(2) (2016).

21 PATH Act, § 203(a) (codified at IRC § 6109(i)(2)(A)).

22 PATH Act, § 203(a) (codified at IRC § 6109(i)(2)(B)).

23 PATH Act, § 203(c). As part of a required study, the IRS must evaluate ways to expand CAA availability and participation. PATH Act, § 203(d).

included on another's return as a dependent for three consecutive taxable years.²⁴ 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 2020.²⁵

The National Taxpayer Advocate has long advocated for the IRS to deactivate ITINs no longer used for tax administration purposes.²⁶ However, attempts to expedite the deactivations before proper systems are in place could harm taxpayers. Other PATH Act provisions that will harm taxpayers include the law's extension of math error authority²⁷ to situations where the taxpayer uses a deactivated ITIN on his or her return,²⁸ and the prohibition on claiming the CTC and the AOTC if the taxpayer's ITIN was issued after the due date for filing the tax return for the taxable year.²⁹

Overview of IRS Changes in Response to the PATH Act

In response to the PATH Act, the IRS has made significant changes to the ITIN program. For example, the IRS has restricted which passports can qualify as stand-alone documents for dependents³⁰ and has created a list of secondary documents that can be submitted with a passport, which includes identification documents not previously considered.³¹ As discussed below, some of the IRS's changes either partially or fully implement prior National Taxpayer Advocate recommendations.

Changes to the Certified Acceptance Agent (CAA) Program

The National Taxpayer Advocate called attention to the IRS's unreasonably short application season for CAAs, and the IRS announced it will accept CAA applications year round.³² The National Taxpayer Advocate has repeatedly recommended that CAAs be allowed to certify documents for dependents.³³ Although the IRS did not adopt this recommendation fully, it agreed to allow CAAs to review two types of documents for dependents.³⁴ The National Taxpayer Advocate has also encouraged the IRS to solicit

24 PATH Act § 203(a) (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 has introduced legislation to clarify, among other items, that the effective date provision in § 203(f) does not apply to the provisions regarding already issued ITINs. 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).

25 PATH Act § 203(a) (codified at IRC § 6109(i)(3)(B)). But see PATH Act § 203(f), which provides the amendments in § 203 only apply to ITIN applications made after the effective date.

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

27 The IRS is currently authorized to correct mathematical or clerical errors — arithmetic mistakes and the like — and assess any tax increase using summary assessment procedures that do not provide the taxpayer an opportunity to challenge the proposed deficiency in the United States Tax Court before the tax is assessed. See IRC §§ 6213(b)(1), (g)(2).

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

29 PATH Act §§ 205, 206 (codified at IRC §§ 24(e), 25A(i)(6)).

30 “Beginning Oct. 1, 2016, the IRS will no longer accept passports that do not have a date of entry into the U.S. as a stand-alone identification document for dependents from countries other than Canada or Mexico or dependents of military members overseas.” IRS Works to Help Taxpayers Affected by ITIN Changes; Renewals Begin in October, IR-2016-100 (Aug. 4, 2016).

31 If the passport lacks a date of entry, applicants can provide U.S. school records or if over 18 years old, a rental or bank statement or a utility bill (with the applicant's name and U.S. address). *Id.*

32 See National Taxpayer Advocate Fiscal Year (FY) 2017 Objectives Report to Congress 152; IRS, New ITIN Acceptance Agent Program Changes, <https://www.irs.gov/individuals/new-itin-acceptance-agent-program-changes> (last updated Oct. 3, 2016).

33 See, e.g., National Taxpayer Advocate 2015 Annual Report to Congress 196, 212.

34 CAAs can now review birth certificates and passports for dependents. IRS, *New ITIN Acceptance Agent Program Changes*, <https://www.irs.gov/individuals/new-itin-acceptance-agent-program-changes> (last updated Oct. 3, 2016).

comments regarding expansions to the CAA program,³⁵ and the IRS recently sought public comments on CAA eligibility and ways to increase participation.³⁶

Implementation of a Deactivation Program

The IRS has initiated a deactivation and renewal program for ITINs. The agency faces barriers to deactivating the volume of ITINs required within the timeframe specified in the PATH Act and has come up with an alternative plan. Accordingly, all ITINs that have not been used in the last three years will be deactivated at the start of 2017, regardless of when they were issued.³⁷ ITINs issued prior to 2013 that have been used in the last three years will be deactivated on a rolling basis, starting with ITINs with the middle digits 78 and 79, which the IRS issued between 1996 and 2000.³⁸ Only taxpayers who have filed in the last three years will receive a letter telling them to renew.

Of the approximately 11 million Individual Taxpayer Identification Numbers (ITINs) planned to be deactivated in January 2017, the IRS only sent letters to 440,000 taxpayers whose ITINs were used on a return during the last three years, telling them they need to renew.

Applicants needing to renew their ITINs were able to file renewal applications starting October 1, 2016.³⁹ Unlike most new ITIN applications, renewal applications can be submitted without a tax return.⁴⁰ The IRS accepts ITIN applications during the renewal period from all family members claimed on the return so long as at least one family member needs to renew due to having the numbers 78 or 79. During the renewal period, identification documents will be returned within 60 days.⁴¹ Although the IRS will acknowledge receipt of the ITIN application and identification documents, the renewal application cannot be approved and the ITIN reissued until early 2017 because of the time required to reprogram the necessary databases and systems.⁴²

The National Taxpayer Advocate expressed concern about the need for formal IRS guidance regarding the consequences of using a deactivated ITIN on a third-party information return.⁴³ For these returns, examples of which include Forms 1099-INT (used to report interest income) and 1099-DIV (used to report dividends and stock distributions), the third-party financial institution may require the taxpayer to provide a TIN to open the account, even though the taxpayer may not have a U.S. return filing requirement. The IRS has now clarified that taxpayers with ITINs that have expired according to the PATH Act but are only being used on information returns filed by third parties do not need to renew their ITINs unless they need to

35 See National Taxpayer Advocate FY 2017 Objectives Report to Congress 151.

36 IRS Notice 2016-48, *Implementation of PATH Act ITIN Provisions*, IRB 2016-33 (Aug. 15, 2016).

37 IRS response to TAS Information request (Nov. 29, 2016).

38 The IRS's approach is to start deactivating ITINs with the oldest issuance dates, determined by the middle two digits of the ITIN. The IRS limited deactivations to these groups of ITINs "due to a lack of the necessary resources to service requests for ITIN renewals for the impacted population of approximately 20 million users." IRS response to TAS Information request (Nov. 29, 2016).

39 IRS Notice 2016-48, *Implementation of PATH Act ITIN Provisions*, IRB 2016-33 (Aug. 15, 2016).

40 Following the National Taxpayer Advocate's objections to the IRS requiring renewal applications to be submitted with a tax return, the IRS agreed to allow all renewal applicants (including those who had not filed a tax return in the last three years) to apply for renewal without submitting a tax return and outside of the filing season. See National Taxpayer Advocate comments on Notice 2016-48, *Implementation of PATH Act ITIN Provisions* (July 26, 2016); email from Debra Holland, Commissioner, Wage & Investment Division (W&I) to National Taxpayer Advocate (July 28, 2016) (on file with TAS).

41 IRS Notice 2016-48, *Implementation of PATH Act ITIN Provisions*, IRB 2016-33 (Aug. 15, 2016).

42 Conference call between TAS and W&I (Oct. 3, 2016); IRS Response to TAS information request (Nov. 29, 2016); IRS response to TAS fact check (Dec. 20, 2016).

43 See National Taxpayer Advocate FY 2017 Objectives Report to Congress 158-59.

file an individual return.⁴⁴ Further, the IRS will not penalize third parties under IRC §§ 6721 and 6722 solely because they have listed an expired ITIN on an information return.⁴⁵

Requirement for Claiming the Child Tax Credit (CTC) or American Opportunity Tax Credit (AOTC) With an ITIN

The National Taxpayer Advocate has also expressed concerns about how the IRS will implement § 205 of the PATH Act, which requires an ITIN to be issued before the tax return due date in order to receive the CTC or AOTC. The IRS announced “[t]he issuance date of a renewed ITIN is the date the ITIN was originally issued, not the renewal date.”⁴⁶ Thus, § 205 should have no effect on renewal applicants. For new ITIN applicants, starting March 14, 2017, when programming changes are in place, the ITIN will be deemed to be issued on the date the ITIN application and associated tax return (if attached) are received.⁴⁷ As long as the applicant timely files and is otherwise entitled to the credits, a delay in processing the ITIN should not prevent the applicant from receiving the CTC or AOTC per § 205.

The IRS’s Deactivation Plans Will Create Taxpayer Confusion and Lead to Taxpayers Not Renewing Their ITINs in Time to File Returns Timely

Although tying the deactivation to the middle digits of the ITIN provides simplicity for taxpayers, the National Taxpayer Advocate is concerned some taxpayers will not be notified that their ITINs will expire and others may be confused about the status of their deactivated ITINs that are still being used on third-party information returns. Of the approximately 11 million ITINs planned to be deactivated in January 2017, the IRS only sent letters to 440,000 taxpayers whose ITINs were used on a return during the last three years, telling them they need to renew.⁴⁸ The IRS identified 440,000 taxpayers whose ITINs were used recently and sent approximately 309,000 letters, taking into account that some households have multiple ITIN holders with the digits 78 or 79, and sending only one letter to each household.⁴⁹

The IRS’s decision not to notify taxpayers who did not file a return in the last three years impairs a taxpayer’s *right to be informed* by excluding those who temporarily had no filing requirement.⁵⁰ Taxpayers required to renew who did not receive a letter may be confused about whether their ITINs are expiring and if they must wait until the filing season to apply for an ITIN with a tax return (which

44 IRS Notice 2016-48, *Implementation of PATH Act ITIN Provisions*, IRB 2016-33 (Aug. 15, 2016).

45 *Id.*

46 *Id.*

47 Under the current procedure for new applications, an ITIN is deemed to be issued on the date the ITIN is assigned. IRS response to TAS information request (Nov. 29, 2016); IRS response to TAS fact check (Dec. 20, 2016).

48 “The 11 million ITINs deactivating in January represent ITINs not present on a tax return at least once in the last three consecutive tax years. Approximately 440,000 ITINs have the middle digits 78/79 and have been used on a tax return within the last three consecutive tax years.” IRS response to TAS fact check (Dec. 20, 2016). See also IRS response to TAS information request (Nov. 29, 2016). As of September 13, 2016, the IRS has issued 273,000 (of an anticipated 309,000 letters). IRS internal communication, *IRS Announces Important Individual Tax Identification Number Program Changes* (Sep. 19, 2016) (on file with TAS), <http://win.web.irs.gov/articles/2016/ITIN-policy-changes.htm>.

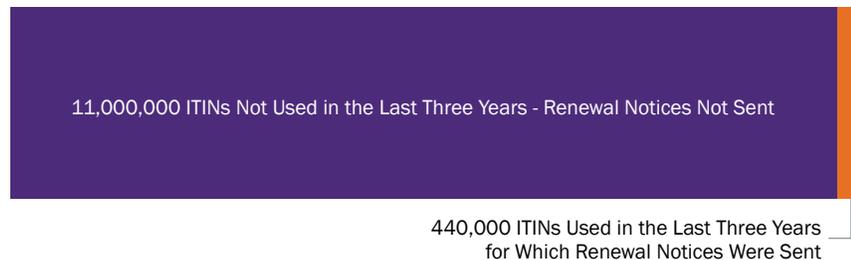
49 IRS response to TAS information request (Nov. 29, 2016); IRS response to TAS fact check (Dec. 20, 2016).

50 The IRS anticipates more than 300,000 of the approximately 11 million ITIN holders subject to deactivation who have not filed a return in the past three years to apply for renewal in 2017. IRS response to TAS information request (Nov. 29, 2016).

is unnecessary).⁵¹ As shown in Figure 1.18.1, the IRS attempted to notify by mail only 4 percent of taxpayers whose ITINs the IRS will deactivate on January 1, 2017.⁵²

FIGURE 1.18.1

ITINs to Be Deactivated in 2017; Limited Renewal Notices



The response rate to the ITIN renewal letters has been only 16 percent, despite the IRS's expectation that all of the approximately 440,000 ITIN holders subject to deactivation who filed a return in the last three years will be renewing their ITINs.⁵³ This low rate indicates the IRS's communication strategy has not been effective in reaching the taxpayers who need to renew early.⁵⁴

Another major issue is the length of time between when a renewal application is filed (starting October 1, 2016) and when a renewal request is processed and an ITIN issued (beginning January 3, 2017).⁵⁵ During this period, the IRS inspects and returns the original documents (corresponding if the application or documents were deemed insufficient),⁵⁶ and promises to notify taxpayers if they may use their ITINs at a date in the future, no earlier than February 21, 2017.⁵⁷ The IRS is unable to process the actual

51 See Instructions for Form W-7, 4 (Sept. 2016).

52 See IRS response to TAS information request (Nov. 29, 2016). The 440,000 ITINs comprise those with middle digits 78 and 79 that have been used within the last three tax years; the approximate 11 million ITINs comprise all ITINs that have not been used within the last three tax years. The IRS sent a renewal notice to the primary taxpayer if any of the ITINs listed on that taxpayer's prior returns are one of the 440,000 recently used. Because multiple such ITINs may have been listed on a single taxpayer's return, the IRS only sent one notice to each primary taxpayer, which resulted in 309,000 notices being sent.

53 *Id.* When told by a reporter that the response rate to the letters telling ITIN holders to renew was 16 percent, the IRS Commissioner said it did not surprise the IRS. *Tax Analysts Exclusive: Conversations: Koskinen Looks to Future of Tax Administration, IRS Budget*, 2016 TNT 240-2, TAX NOTES TODAY (Dec. 14, 2016). The IRS later told TAS it expects the entire population of approximately 450,000 ITIN holders with middle digits 78 and 79, who have filed a return in the past three years, to renew their ITINs. Email from W&I to TAS (Dec. 1, 2016) (on file with TAS). *Id.*

54 See David van den Berg, *Taxpayer Response to ITIN Expiration Letters is Slow So Far*, 2016 TNT 241-5, TAX NOTES TODAY (Dec. 15, 2016) ("Most ITIN renewal applications will occur during and after tax season, which will cause significant delays for much-needed tax refunds for already cash-flow-challenged working families." (quoting Francine Lipman, William S. Boyd Professor of Law, University of Nevada, Las Vegas)).

55 See Letter 5872 (Sep. 2016), Internal Management Document (IMD) review 3607.

56 During this time, "[c]orrespondence may be sent to the applicant when the Form W-7 and/or submitted documents are insufficient to successfully renew the ITIN. In addition, the Form W-7 and identification document information is captured into a simulated database. In January 2017, [the IRS] will begin transferring the data from the simulated database into the ITIN-RTS [Real Time] system to begin processing the renewal applications in order of receipt." IRS response to TAS fact check (Dec. 20, 2016). The IRS sent notices to approximately 23,000 renewal applicants whose applications were insufficiently documented or complete. IRS, *ITIN Production Report* (Dec. 17, 2016).

57 The IRS will notify taxpayers of their ITIN application status seven weeks (nine to eleven weeks if application is submitted during the filing season or from overseas) from January 3, 2017 or from the mailing date of the ITIN application, whichever is later. IRS response to TAS fact check (Dec. 20, 2016); Letter 5872 (Sept. 2016).

applications until early 2017 because it did not have sufficient time to reprogram the required databases and systems.⁵⁸ If taxpayers change addresses during this time, it could lead to them failing to receive their ITIN notifications, or worse, their identities being stolen if they no longer reside at the address where the notification is sent. Taxpayers who do not receive a notification will create more work for the IRS in the form of phone calls to find out if an ITIN has been processed.

For taxpayers with deactivated ITINs that are still being used on third-party information returns, there may be confusion when they need to file an individual return. If they have not filed an individual return or been included as a dependent on one in the last three years, these taxpayers will not be notified that their ITINs have expired and may mistakenly believe their ITINs are still valid because they are actively being used.

Another issue is the treatment of ITINs that have expired under the law, but which have not been deactivated by the IRS. The PATH Act provides that ITINs issued prior to 2008 will no longer be in effect,⁵⁹ but the IRS is only deactivating ITINs that have not been used in the last three years or contain the middle digits 78 or 79 (issued between 1996 and 2000).⁶⁰ Thus, ITINs issued after this time but prior to 2008 that have been used in the last three years will expire under the law on January 1, 2017, but not be deactivated by the IRS at this time.

FIGURE 1.18.2, ITINs Requiring Deactivation under the PATH Act, ITINs Planned to be Deactivated by the IRS in 2017⁶¹

PATH Act Requires Deactivation of 20 Million ITINs



20 Million ITINs That Have Expired Or Will Expire by January 1, 2020 Under the PATH Act

Although presumably the IRS will process a return filed with such an ITIN as if the ITIN is currently valid, a problem could arise if the IRS disallows or adjusts items on the return, and the taxpayer wishes to challenge the disallowance in court. If the ITIN had expired under the law, the Court would have to disallow any exemptions or credits for which an ITIN is required, even if the IRS had told the taxpayer the ITIN was valid and they did not need to renew.⁶² Having the systems in place to allow all applicants

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

59 PATH Act § 203(a) (codified at IRC § 6109(i)(3)(B)). But see PATH Act § 203(f), which provides the amendments in § 203 only apply to ITIN applications made after the effective date.

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

61 See IRS response to TAS information request (Nov. 29, 2016). “We estimate we will expire more than 11 million ITINs in January 2017, all of the unused ITINs as well as those with middle digits of 78 and 79 that are still in use.” The IRS estimates an “impacted population of approximately 20 million.” *Id.*

62 In this scenario, the Tax Court would have to have knowledge of the ITIN’s issuance date in order to determine when the ITIN expired under the law. 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).

to renew their ITINs, even if there was no impending deactivation for those ITINs by the IRS, would mitigate this problem, but not fully solve it.⁶³

The IRS Has Not Exercised the Flexibility the PATH Act Grants for Acceptable Documentation, Thereby Leaving a Significant Number of Applicants Needing to Mail Original Documents to the IRS

Although the IRS has finally permitted CAAs to review passports and birth certificates for dependents,⁶⁴ many dependents may still need to mail in their original documents. As shown in the table below, a significant number of dependents need to use other identification documents.

FIGURE 1.18.3, Most Common Dependent Documents Submitted With ITIN Applications during Processing Years 2015 and 2016⁶⁵

Type of Identification Document	December 31, 2015	September 30, 2016
Civil Birth Certificate	180,297	73,366
Passport	175,957	70,042
School Records	81,139	31,933
Medical Records	52,924	20,163
Foreign Voters Registration Card	34,781	16,438

The PATH Act gives the IRS latitude to provide alternatives to accepting only original documents or copies certified by the issuing agency.⁶⁶ In addition to allowing CAAs and Taxpayer Assistance Centers (TACs) to certify all identification documents for all applicants,⁶⁷ the IRS could determine other types of documents also meet the requirements of a “certified copy.”⁶⁸ Yet, the IRS has failed to exercise this discretion and has not identified additional types of certified copies. Furthermore, the IRS should consider accepting notarized copies as certified copies when from specific jurisdictions where a notary is considered a public officer and is authorized to verify the content of documents.⁶⁹

63 See Legislative Recommendation: *Individual Taxpayer Identification Numbers (ITINs): Amend the Protecting Americans from Tax Hikes (PATH) Act of 2015 to Revise the Expiration Schedule for ITINs*, *infra*.

64 See Instructions for Form W-7 (Sept. 2016).

65 IRS Response to TAS information request (Nov. 29, 2016) (citing the Compliance Data Warehouse (CDW) Tables Form_W7, Form_W7_VISA, retrieved Oct. 27, 2016). The IRS acknowledges this data may be incomplete. *Id.*

66 See IRC § 6109(i)(2)(B).

67 In late 2016, the IRS expanded the list of documents a TAC can certify for primary or secondary taxpayers to 11 documents. For dependents, TACs can only certify three types of documents. There are currently 179 TACs that can verify ITIN documents. IRS response to TAS information request (Nov. 29, 2016). CAAs can only verify passports and birth certificates for dependents. Instructions for Form W-7 (Sept. 2016).

68 For example, copies could be certified by state or other Federal agencies other than the issuing agency or clerks of courts, and or copies could be properly apostilled and authenticated by U.S. diplomatic missions abroad. See U.S. Department of State, Authentications and Apostilles, <http://travel.state.gov/content/travel/en/legal-considerations/judicial/authentication-of-documents/notarial-and-authentication-apostille.html> (last visited on Sep. 26, 2016).

69 For example, in France, a notary is a public officer, acting on behalf of the State, appointed by the Minister of Justice. He or she authenticates instruments, which includes a guarantee as to the content and date of the instrument, giving the instrument the legal status of a final judgment. Notaires de France, *The role of the Notaire*, <http://www.notaires.fr/en/role-notaire> (last visited Oct. 26, 2016).

Due to the lack of free and accessible alternatives, including TACs,⁷⁰ some applicants may still have to mail in original documents. As one taxpayer explains:

So, imagine if I take your wallet and I put it in the postal box and say, “Hey, wait, it’s going to come back to you.” It’s the same when the IRS tells them, “I’m sending it back to you,” but you’re going to put that in a box and not have anything to say who you are. It’s not an easy thing to do.⁷¹

Mailing original documents results in lost documents and additional work for the IRS.⁷² The IRS will only return documents by expedited mail if the taxpayer has provided a prepaid envelope or TAS makes a request based on significant hardship.⁷³ In 2015, the IRS returned 5,839 passports to embassies when it could not find a better address.⁷⁴ Compounding this problem is the PATH Act’s elimination of the ability for CAAs to review documents for applicants abroad.⁷⁵ The IRS has not authorized any designees at diplomatic or consular posts abroad to receive ITIN applications due to limited resources cited by the Department of State. However, until a recent meeting on December 2, 2016, which may have been prompted by TAS’s inquiries, the IRS had not met with the Department of State regarding this topic since May 2015, prior to the passage of the PATH Act.⁷⁶

Finally, requiring original documents leads to a high rejection rate, with almost a third of applications rejected during the past three years.⁷⁷ In recent years, the number one reason for suspending ITIN applications was that documentation did not meet IRS criteria.⁷⁸ By requiring that original documents be mailed, the IRS is discouraging applicants from using documents like passports or birth certificates in favor of more informal documents like school records, which may not meet the IRS’s narrow requirements for those documents.⁷⁹

70 The IRS had reported that Taxpayer Assistance Centers can offer ITIN services only on Tuesdays and Thursdays, but has since clarified “[w]hile Accounts Management assistors will continue to schedule the majority of ITIN service appointments on Tuesdays and Thursdays, we will closely monitor the traffic to determine if this service should be offered on additional days.” IRS, *Taxpayer Assistance Center (TAC) Locations Where In-Person Document Review is Provided*, <https://www.irs.gov/uac/tac-locations-where-in-person-document-verification-is-provided> (last updated Sept. 1, 2016); IRS response to TAS fact check (Dec. 20, 2016). See National Taxpayer Advocate FY 2017 Objectives Report to Congress 150-51.

71 Statement of German Tejada, Senior Director, Income Policy Food Bank for New York City, Public Forum, Hostos Community College, Bronx, New York (Mar. 18, 2016).

72 See National Taxpayer Advocate FY 2017 Objectives Report to Congress 152.

73 See Internal Revenue Manual (IRM) 3.21.263.4.10, *Taxpayer Advocate Service (TAS) Assistance* (Oct. 19, 2015), IRM 3.21.263.5.3.4.2.4, *Returning Original Supporting Identification Documents to Applicant* (Oct. 19, 2015).

74 The IRS does not track the number of lost original documents. IRS response to TAS information request (Nov. 29, 2016).

75 See Legislative Recommendation: *Certified Acceptance Agents (CAAs): Amend the PATH Act to Authorize CAAs to Certify Individual Taxpayer Identification Number Applications for Taxpayers Residing Abroad*, *infra*. See also Letter from Richard M. Reedman, President, Nat’l Ass’n of Enrolled Agents, to John A. Koskinen, Commissioner, Internal Revenue Service (Dec. 13, 2016) (on file with TAS) (expressing opposition to the IRS terminating the contracts of CAAs operating abroad).

76 IRS response to TAS fact check (Dec. 20, 2016). In response to TAS’s information request, the IRS stated it is working to set up another meeting with the Department of State to ask for assistance in some key countries due to the PATH Act’s elimination of CAAs abroad. IRS response to TAS information request (Nov. 29, 2016). Currently, there are 275 U.S. consulates and embassies that provide a similar service for Social Security number applicants. See email from Department of State governmental liaison to TAS (Sept. 9, 2015) (on file with TAS); email from Social Security Administration governmental liaison to TAS (Sept. 23, 2015) (on file with TAS).

77 IRS, *ITIN Comparative Reports* (Dec. 3, 2016, Dec. 30, 2015, and Dec. 31, 2014).

78 National Taxpayer Advocate 2015 Annual Report to Congress 208.

79 For example, a school record “must be dated and contain the student’s name, course work with grades (unless under age 6), date of grading period(s) (unless under age 6), and school name and address.” Instructions for Form W-7 (Sept. 2016).

Math Error Procedures for Applicants Whose ITIN Applications Are Rejected or Whose ITINs Are Deactivated Infringe on Taxpayer Rights

After the IRS rejects an ITIN application, it forwards the paper tax return to be processed, stripping the return of the persons without SSNs or valid ITINs and denying associated exemptions and deductions.⁸⁰ The IRS uses its math error procedure to recalculate the tax. In 2015 and 2016 the IRS denied approximately 400,000 personal exemptions during return processing, due to a problem with the Taxpayer Identification Number (TIN), which includes both incorrect SSNs and incorrect ITINs.⁸¹ Letters notifying taxpayers that the IRS has disallowed their personal exemptions for ITIN related reasons often lack a clear explanation of the reason for disallowance. Stating “We didn’t allow your personal exemption because your ... ITIN ... is missing” is confusing because of course the ITIN was missing on the return — the taxpayer was not allowed to apply for the ITIN prior to filing the return.⁸² Instead of telling the taxpayer that the ITIN is “missing”, the IRS notice should acknowledge the ITIN application, explain that the IRS denied it, and clearly explain to the taxpayer the reason for the denial. This notice infringes upon the taxpayer’s *right to be informed*.

The Protecting Americans from Tax Hikes (PATH) Act gives the IRS latitude to provide alternatives to accepting only original documents or copies certified by the issuing agency. ... Yet, the IRS has failed to exercise this discretion and has not identified additional types of certified copies.

The PATH Act will lead to more math error notices because it provides the IRS with math error authority in situations where a taxpayer lists a deactivated ITIN on a return.⁸³ Taxpayers unaware that their ITINs have expired may not find out until they file a return with the deactivated ITIN and receive a math error notice. A taxpayer whose ITIN was deactivated in error and was denied credits to which he or she is entitled will lose the opportunity to challenge eligibility for the credits in the U.S. Tax Court if he or she does not respond timely to the math error notice. This procedure may deprive low income or overseas taxpayers, in particular, of fundamental due process protections and infringe on their *right to challenge the IRS’s position and be heard*.⁸⁴

Taxpayers May Not Receive the Child Tax Credit (CTC) or American Opportunity Tax Credit (AOTC) if They Do Not Know to File Timely or if Their Returns Are Mishandled or Lost

Although the IRS policy regarding when a renewed ITIN is considered to be issued is beneficial to taxpayers, there may still be taxpayers who miss out on the CTC or AOTC if they do not understand the need to file their returns timely. The IRS has not issued formal guidance clarifying that the ITIN resulting from a new ITIN application will be deemed issued on the date the return is received. It is not

80 See IRM 3.21.263.4.5(2), *Internal Revenue Service Number (IRSN)* (Jan. 1, 2015).

81 IRS, Transmitter Control Code Electronic Output Network System Report 480-62-11 (Dec. 29, 2015 and Dec. 1, 2016). See Taxpayer Notice Codes (TPNC) 205 (primary taxpayer), 206 (spouse), and 605 (dependent), described in IRM 3.12.3-2 (Jan. 1, 2016). The notices relate to denied personal exemptions for failure to provide a valid ITIN or SSN. The IRS additionally denied deductions and credits for failure to obtain or provide any TIN. See, e.g. TPNCs 234 and 235.

82 The IRS is developing new explanatory paragraphs to address the denial of CTC and AOTC resulting from expired ITINs. Email from Office of Taxpayer Correspondence (Aug. 24, 2016). For a more detailed discussion of the National Taxpayer Advocate’s concerns about the poor quality of IRS Math Error notices, see National Taxpayer Advocate 2014 Annual Report to Congress 163-71 (Most Serious Problem: *Math Error Notices: The IRS Does Not Clearly Explain Math Error Adjustments, Making It Difficult for Taxpayers to Understand and Exercise Their Rights*).

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

84 See Legislative Recommendation: *International Due Dates: Amend Internal Revenue Code § 6213(b)(2)(A) to Provide Additional Time to Request Abatement of a Math or Clerical Error Assessment to Taxpayers Living Abroad Similar to the Timeframe Afforded to Taxpayers to Respond to a Notice of Deficiency, infra*.

Requiring most new Individual Taxpayer Identification Number (ITIN) applications during the filing season results in less flexibility for applicants, longer wait times for original documents to be returned and an ITIN issued, overburdened Taxpayer Assistance Centers, and a heavier, more concentrated workload for the IRS.

until page 4 of the Form W-7 instructions that taxpayers are warned that failure to timely file a tax return and Form W-7 “may” result in denial of CTC or AOTC.⁸⁵ Furthermore, the IRS’s main ITIN webpage says nothing about the need to file on time to receive the CTC or AOTC.⁸⁶ The IRS should conduct targeted outreach to communities with a high number of CTC claims to ensure taxpayers are aware of this requirement.

Even if they file on time, taxpayers may also be denied CTC or AOTC if their returns are lost or mishandled⁸⁷ and they cannot prove the IRS received the return or ITIN application prior to the due date.⁸⁸ Taxpayers may also face problems if the IRS incorrectly rejects their applications because they will have to reapply, and the IRS has stated “[a]n applicant error that results in a rejected Form W-7 application may impact the assignment/issuance date of the ITIN.”⁸⁹ It is unknown whether the IRS will use the date of the original ITIN application submitted with the return or the date of the second ITIN application.

The General Requirement for New Applicants to Apply for an ITIN During the Filing Season Burdens Applicants, Creates Delays, Hampers Fraud Detection, and Exacerbates the Other Problems ITIN Applicants Face

One of the most significant problems with the ITIN process has persisted for over a decade and exacerbates the other problems discussed above. In 2003, the IRS began requiring most ITIN applications to be filed with a paper tax return.⁹⁰ There are limited exceptions for nonresidents claiming the benefits of a tax treaty and having income, payments, or transactions subject to third-party reporting or withholding.⁹¹ While the recent accommodation for renewal applicants to apply prior to the filing season is very positive, at least for the 2017 filing season the IRS will not be processing the renewal applications and issuing the ITINs until the actual filing season. Furthermore, the accommodation excludes the 800,000 first time applicants who apply annually, unless they are family members of the renewal applicants.⁹² The paper driven process results in applicants waiting up to 14 weeks to receive

85 Instructions for Form W-7 (Sept. 2016).

86 IRS, ITIN, <https://www.irs.gov/individuals/individual-taxpayer-identification-number-itin> (updated Oct. 12, 2016).

87 See National Taxpayer Advocate 2015 Annual Report to Congress, 202. The IRS does not track the number of complaints regarding lost returns. IRS response to TAS information request (Nov. 29, 2016).

88 Although the IRS has stated the ITIN will be considered to be issued on the date the ITIN application and associated return (if attached) are received, the IRS’s internal math error procedures appear to flag a CTC claim or AOTC claim based solely on the date the return is received. See IRM 3.11.3.14.5.5, Line 52 - Child Tax Credit (Schedule 8812) (Sept. 23, 2016); IRM 3.11.3.44.4, *Form 8863, Part III - Student and Educational Institution Information* (Sept. 14, 2016). These IRM references are based on the manual process to address tax year 2015 returns filed in 2016 with new ITIN assignments. Starting Jan. 1, 2017, the math error will be systemically checked. Beginning March 14, 2017, programming changes will be in place to compute the ITIN Assignment Date as the IRS Received Date. IRS response to TAS fact check (Dec. 20, 2016).

89 IRS response to TAS fact check (Dec. 20, 2016).

90 See National Taxpayer Advocate 2003 Annual Report to Congress 60-86 (Most Serious Problem: *Individual Taxpayer Identification Number (ITIN) Program and Application Process*).

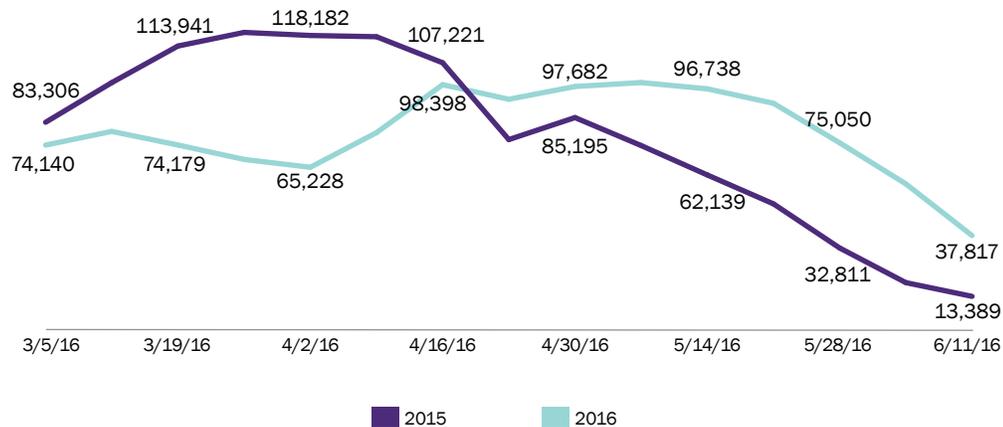
91 See Form W-7 instructions (Sep. 2016). In PY 2015, about 53,900 out of 874,800 ITIN applicants (six percent) claimed an exception for filing without a tax return. IRS, CDW, Form W-7 Database (data drawn Dec. 13, 2016).

92 IRS, *ITIN Production Report* (Dec. 3, 2016). Receipts for the first 11 months of PY 2016 totaled 795,765 applications with returns, 67,423 without returns, and prior year carryover of 31,695.

their tax refunds, compared to the three weeks for taxpayers with SSNs.⁹³ The following chart reflects the increase in the average weekly backlog over the prior year.

FIGURE 1.18.4

Weekly Backlogs of Applications With Returns Awaiting Input



Requiring most new ITIN applications during the filing season results in less flexibility for applicants, longer wait times for original documents to be returned and an ITIN issued, overburdened TACs, and a heavier, more concentrated workload for the IRS. It also prevents applicants from electronically filing their returns, which increases the potential for identity theft, increases the risk of returns being lost or misprocessed, and undermines taxpayers' *right to a fair and just tax system*.⁹⁴ Accepting ITIN applications year round would allow the IRS to identify trends throughout the year and later apply rules to detect fraudulent returns through the enhanced Return Review Program (RRP). It may also help the IRS avoid labor intensive and taxpayer-burdensome compliance initiatives during the filing season that unnecessarily delay refunds.⁹⁵

The National Taxpayer Advocate has previously suggested alternatives to submitting a tax return to prove a tax administration purpose for an ITIN, such as submitting pay stubs or bank statements.⁹⁶ Not only does the IRS accept these to prove income belonged to a person in the case of a Form W-7 and Form W-2 name mismatch,⁹⁷ but the IRS now accepts bank statements to prove residency for the purpose of issuing

93 See *2016 Tax Season Refund Frequently Asked Questions*, <http://www.irs.gov/Refunds/Tax-Season-Refund-Frequently-Asked-Questions> (last updated July 29, 2016).

94 See IRS Publication 4852, *Talkpoints for Managers* (Jan. 2016) (advising federal employees to e-file their tax returns to increase accuracy and avoid mistakes such as math errors and omissions).

95 The IRS's Form 1042S verification project delayed legitimate tax refunds for foreign students due in part to untimely assignment of ITINs. See National Taxpayer Advocate FY 2017 Objectives Report to Congress 80-84 (Area of Focus: *IRS Implementation and Enforcement of Withholding on Certain Payments to Foreign Persons Is Burdensome, Error-Ridden, and Fails to Protect the Rights of Affected Taxpayers*); see also, Most Serious Problem: *Foreign Account Tax Compliance Act (FATCA): The IRS's Approach to International Tax Administration Unnecessarily Burdens Impacted Parties, Wastes Resources, and Fails to Protect Taxpayer Rights*, *supra*. See also Systemic Advocacy Management System (SAMS) 34152.

96 See National Taxpayer Advocate 2015 Annual Report to Congress 212.

97 Form W-7, *Application for IRS Individual Taxpayer Identification Number* (Sept. 2016); Form W-2, *Wage and Tax Statement* (2016). A name mismatch occurs when the taxpayer's name on the Form W-7 is different from the taxpayer's name on Form W-2. See IRM 3.21.263.5.10.8, *Correspondence Inventory Procedures* (Aug. 18, 2014).

the ITIN.⁹⁸ The IRS should “re-evaluate evidence of filing requirements,” as promised in its response to last year’s Annual Report to Congress.⁹⁹

CONCLUSION

The IRS has made some major changes to the ITIN program in response to the PATH Act, but falls short in terms of making it possible for all taxpayers to timely comply with their filing and payment obligations. The National Taxpayer Advocate remains concerned that the IRS has not included TAS in ITIN cross-functional teams nor has it sought TAS’s input regarding the sweeping changes, which fail to protect key taxpayer rights, such as the *right to be informed*, the *right to challenge the IRS’s position and be heard*, and the *right to a fair and just tax system*.¹⁰⁰ While the PATH Act presents significant challenges for the IRS, it also offers the IRS latitude to make much needed changes. Nothing in the legislation prevents the IRS from accepting ITIN applications for all applicants year-round with proof of a tax administration purpose. ITIN applicants will continue to face barriers to filing and paying their taxes until the IRS further revises its ITIN policies and procedures.

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Prioritize and accelerate the programming and implementation of the necessary systems to process ITIN renewal applications and reissue ITINs upon receipt of renewal applications.
2. Identify additional types of documentation that can be considered “certified copies,” such as copies certified by state or other Federal agencies other than the issuing agency, copies certified by clerks of courts, copies properly apostilled and authenticated by U.S. diplomatic missions abroad, and notarized copies from specific jurisdictions.
3. Allow all ITIN applicants to apply for an ITIN at any time of the year without a tax return as long as they provide evidence of a legitimate tax administration purpose for the ITIN.

98 IRS Works to Help Taxpayers Affected by ITIN Changes; Renewals Begin in October, IR-2016-100 (Aug. 4, 2016).

99 See National Taxpayer Advocate FY 2017 Objectives Report to Congress vol. 2, 116.

100 See National Taxpayer Advocate FY 2017 Objectives Report to Congress 148-49.