

Taxpayer First Act and the Independent Office of Appeals

June 2019

Authors: [Kim Marie Boylan](#), [Brian Gleicher](#), [Nicholas Wilkins](#)

The Taxpayer First Act of 2019 (“TFA”)¹ has passed both chambers of Congress and will likely soon be signed into law by the President. The bill has a wide range of provisions affecting and modernizing the Internal Revenue Service. One provision widely hailed as a significant improvement is the establishment of the IRS Independent Office of Appeals, headed by a Chief of Appeals. The bill does provide some concrete improvements in codifying the appeals function, but in other ways the law’s goals are more aspirational than mandatory.

Right of Appeal

Substantively, the TFA provides that the appeal process is a right and “shall be generally available to all taxpayers.”² Procedurally, it provides much stronger due process protections. These changes will likely result in better administrative adjudication of denials of access to administrative appeals, and may make such denials challengeable under the Administrative Procedure Act.

The IRS Office of Appeals was originally created in 1927. The Internal Revenue Service Restructuring and Reform Act of 1998 (“1998 RRA”) made the “independent appeals function within the Internal Revenue Service” a statutory requirement.³ The 1998 RRA provided rights to hearings in the Office of Appeals in specific circumstances (such as when the IRS files a notice of lien⁴) but did not generally provide a “right” to an administrative appeal. Under Rev. Proc. 2016-22, IRS Chief Counsel “will not refer to Appeals any docketed case or issue that has been designated for litigation by Counsel” and will also not refer non-designated cases or issues “if Division Counsel or a higher level Counsel official determines that referral is not in the interest of sound tax administration.”⁵ The “sound tax administration” standard is not defined. Nor does any explanation to the affected taxpayer need to be given.

The TFA, in addition to providing that access to the Independent Office of Appeals is a generally available right, establishes procedures required when the IRS denies a referral to the Independent Office of Appeals. It requires the prescription of procedures for protesting any denial to the Commissioner.⁶ The IRS must provide

¹ H.R. 3151, 116th Congress.

² TFA § 1001(a), providing for new I.R.C. § 7803(e)(4).

³ Internal Revenue Service Restructuring and Reform Act of 1998, PL 105-206, § 1001(a)(4).

⁴ Internal Revenue Service Restructuring and Reform Act of 1998, PL 105-206, § 3401.

⁵ Rev. Proc. 2016-22, 2016-1 C.B. 577, Section 3.03.

⁶ TFA § 1001(a), providing for new I.R.C. § 7803(e)(5)(C).

a written, detailed description of the facts, the basis for the denial, and an explanation of the application of the basis to the facts.⁷ The written notice must also describe the protest procedures.⁸

Access to Case Files

Another concrete improvement to the appeals process made by the TFA is in access to case files. Currently, such case files can be obtained through the Freedom of Information Act, but—despite that law’s statutory deadlines—FOIA requests often take significant amounts of time to obtain documents and in many cases might not be completed before an appeals conference. The TFA requires nonprivileged portions of the case file to be made available to the taxpayer no later than 10 days before an appeals conference.⁹ However, this access is only required for relatively small taxpayers—natural persons with adjusted gross income of no more than \$400,000 and other taxpayers with gross receipts of no more than \$5 million for the year at issue.¹⁰

Independence

One of the key selling points of the TFA was to provide increased independence to the appeals function. The new appeals office is specifically named the *Independent Office of Appeals*.¹¹ The purposes of the office highlight fairness and impartiality.¹²

However, it is unclear precisely how the TFA will accomplish that. After all, the IRS already describes the appeals function as independent. The “Appeals Mission” already includes being “fair and impartial.”¹³ And there is only one provision in the TFA directly providing rules with respect to independence: Chief Counsel staff providing legal assistance and advice to the Independent Office of Appeals shall (“to the extent practicable”) be those staff who were not involved in the case previously and who are not preparing the case for litigation.¹⁴ This provision is helpful, but limited in scope.

For example, the TFA is silent on *ex parte* communications between the Independent Office of Appeals and the examination team; the current *ex parte* rules appear to remain in effect. A prohibition on *ex parte* communications “to the extent that such communications appear to compromise the independence of the appeals officers” has been required since the passage of the 1998 RRA.¹⁵ The Internal Revenue Manual and a revenue procedure provide guidelines on communications between Appeals staff and examination teams.¹⁶ Communications are not considered *ex parte* if the taxpayer or representative are provided an “opportunity to participate.”¹⁷ For written communications, that opportunity is satisfied if the taxpayer or representative is “furnished a copy of the written communication and given a chance to respond to it.”¹⁸ In practice, this sometimes means that Appeals will forward to the taxpayer a lengthy, substantive email chain between Appeals and the examination team that the taxpayer may have been unaware was taking place at the time. Thus, the taxpayer’s opportunity to respond may come only after extensive back-and-forth between Appeals and the examination team.

Similarly, the TFA does not address the conduct of appeals conferences themselves, seeming to leave unaffected recent shifts toward more participation in those conferences by examination teams. In May 2017, Appeals began a “pilot” program to routinely have examination team personnel attend appeals conferences (in

⁷ TFA § 1001(a), providing for new I.R.C. § 7803(e)(5)(A)(i).

⁸ TFA § 1001(a), providing for new I.R.C. § 7803(e)(5)(A)(ii).

⁹ TFA § 1001(a), providing for new I.R.C. § 7803(e)(7)(A). The taxpayer can elect to expedite the conference by agreeing to receive the case file by the date of the conference rather than 10 days before. TFA § 1001(a), providing for new I.R.C. § 7803(e)(7)(B).

¹⁰ TFA § 1001(a), providing for new I.R.C. § 7803(e)(7)(C)(i).

¹¹ TFA § 1001(a), providing for new I.R.C. § 7803(e)(1).

¹² TFA § 1001(a), providing for new I.R.C. § 7803(e)(3)(A).

¹³ I.R.M. § 8.1.1.1(1).

¹⁴ TFA § 1001(a), providing for new I.R.C. § 7803(e)(6)(B).

¹⁵ Internal Revenue Service Restructuring and Reform Act of 1998, PL 105-206, § 1001(a)(4).

¹⁶ I.R.M. § 8.1.10; Rev. Proc. 2012-18, 2012-1 C.B. 455.

¹⁷ I.R.M. § 8.10.10.5.

¹⁸ Rev. Proc. 2012-18 § 2.01(3)(b).

addition to the traditional “pre-appeals” conference).¹⁹ The National Taxpayer Advocate, in its 2017 report to Congress, raised concerns that in doing so “Appeals is changing the power dynamic and jeopardizing its role as an unbiased decision maker.”²⁰ Nevertheless, the IRS recently announced an extension to the pilot program.²¹

These are just a couple examples of concerns over Appeals independence that are not directly addressed by the TFA. It is possible that the implementation of the TFA will result in truly increased independence of the appeals function in the form of the Independent Office of Appeals. However, the form and extent of such implementation remains to be seen, as the statute itself requires little.

White & Case LLP
701 Thirteenth Street, NW
Washington, District of Columbia 20005-3807
United States
T +1 202 626 3600

In this publication, White & Case means the international legal practice comprising White & Case LLP, a New York State registered limited liability partnership, White & Case LLP, a limited liability partnership incorporated under English law and all other affiliated partnerships, companies and entities.

This publication is prepared for the general information of our clients and other interested persons. It is not, and does not attempt to be, comprehensive in nature. Due to the general nature of its content, it should not be regarded as legal advice.

¹⁹ <https://www.irs.gov/pub/irs-utl/atclfaqs.pdf>

²⁰ Taxpayer Advocate Service, 2017 Annual Report to Congress, Executive Summary at 39.

²¹ Andrew Velarde, Tax Notes, “ABA Section of Taxation Meeting: Appeals Conference Pilot Will Be Extended to 2020.” May 19, 2019.