KPMG LLP
1801 K Street NW
Suite 12000
Washington, DC 20006

Telephone +1 202 533 3800
Fax +1 202 533 8500
kpmg.com

November 14, 2022

VIA ELECTRONIC SUBMISSION

Hon. Douglas O'Donnell
Acting Commissioner
Internal Revenue Service
PO Box 7604, Ben Franklin Station
Washington, DC 20044
ATTN: Keith L. Brau and Regina Johnson
CC:PA:LPD:PR (REG–125693–19)
Room 5203

Dear Acting Commissioner:

KPMG LLP ("KPMG") is pleased to provide the following comments on Treasury Regulations that are proposed to be promulgated under section 7803 of the Internal Revenue Code of 1986, as amended,[1] relating to the resolution of Federal tax controversies by the IRS Independent Office of Appeals ("Independent Appeals")[2] without litigation (the "Proposed Regulations"). Although KPMG represents a wide range of clients that will be affected by the Proposed Regulations, we are submitting these comments in our own name and not on behalf of any client. Accordingly, our comments consider the implications of the Proposed Regulations for taxpayers, tax administration, and effective dispute resolution in general.

I. Introduction

The Proposed Regulations concern portions of section 7803(e), which was enacted as part of the Taxpayer First Act of 2019 ("TFA").[3] As a general matter, we support the notion that, because Independent Appeals is of the utmost importance to sound tax administration, it is appropriate to set out key administrative policies in Treasury Regulations rather than in informal guidance such as the Internal Revenue Manual ("IRM"). Doing so serves to enhance the predictability and stability of

[1] Unless otherwise stated, all references to the "Code," "IRC," "Section," of "§" refer to the Internal Revenue Code of 1986, as amended to date, or to the Treasury Regulations promulgated thereunder.
[2] Herein, we refer to the organization formally referred to in the Taxpayer First Act, P.L. 116-25, 133 Stat. 981 (2019), as "Independent Appeals." Because "Appeals" and "Independent Appeals" are in fact one continuous organization, we use the term "Appeals" when discussing the division generally.
[3] Taxpayer First Act of 2019, Pub. L. No. 116-25, 133 Stat. 981 (2019).

taxpayers' rights, as it prevents modifying such rules through sub-regulatory guidance, e.g., directives, IRM revisions, and website FAQs, that are not subject to the notice and comment process.

While we support that overall approach, we find some aspects of the Proposed Regulations concerning. As explained below, we suggest that certain provisions should be removed or substantially modified, and that additional provisions should be added to the final regulations to better implement Congressional purpose.

As context to our comments, we begin with a brief history of Appeals and its predecessors and discuss the vital role that Appeals plays in efficient tax administration.

II. History & Background of Independent Appeals

For more than 200 years, the Treasury Department has maintained a policy preference to settle tax disputes administratively rather than at trial.[4] For almost half that time, Independent Appeals and its predecessors have carried the primary responsibility for furthering this policy on behalf of the Internal Revenue Service ("the Service" or "IRS"). The longstanding mission of the Appeals organization is to resolve tax controversies, without litigation, on a basis which is fair and impartial to both the government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.[5]

Taxpayers, their representatives, and professional organizations understand the vital importance of the Appeals organization in our federal tax system. Like Treasury, most taxpayers have a general preference to settle their tax disputes administratively rather than through litigation. Administrative settlements offer certainty, flexibility, and generally take less time and expense than litigation.

Furthermore, Appeals provides taxpayers a meaningful opportunity to be heard and present objections to an IRS position. This is important not only for the sake of case outcomes, but also to ensure public confidence in the fairness of tax administration as a whole. Appeals helps the government effectively meet the constitutional due process obligations the United States owes its taxpayers:

> An exaction by the U.S. Government, which is not based upon law, statutory or otherwise, is a taking of property without due process of law, in violation of the Fifth Amendment to the U.S. Constitution. Accordingly, an Appeals representative in his or her conclusions of fact or application of the law, shall hew to the law and the recognized standards of legal construction. It shall be his or her duty to determine the correct amount

---

[4] IRS, HISTORY OF APPEALS 7 (1987). *See* IRM 1.2.1.5.16 (03-26-1979), *Policy Statement 4-40, Early agreement primary objective*; I.R.C. § 7122.
[5] IRM 8.1.1.1 (10-01-2016) *Accomplishing the Appeals Mission.*

> of the tax, with strict impartiality as between the taxpayer and the Government, and without favoritism or discrimination as between taxpayers.[6]

Of course, the government can also satisfy its constitutional due process obligations through litigation, but as noted above, Treasury eschews litigation whenever possible as a matter of policy and common sense. Appeals also serves as a critical safety valve on IRS enforcement initiatives. A truly independent Appeals function ensures that the IRS is not merely the tax *enforcer*, but instead is a fair and impartial tax administrator.[7]

As the administrative dispute resolution forum within the Service, and self-declared "quasi-judicial" organization, Appeals is uniquely positioned to evaluate evidence, consider hazards of litigation, and settle taxpayer disputes without litigation in a manner that enhances voluntary compliance. Fostering agreement at the earliest opportunity enhances taxpayer service, promotes administrative fairness, and conserves the resources of the IRS and taxpayers alike. The denial of administrative appeal rights, on the other hand, is the equivalent of designating a case for litigation and should not be used as a way of side-stepping the many procedural safeguards for taxpayers set out in the formal designation process.

As the Preamble to the Proposed Regulations notes, the right to independent administrative review is guaranteed by statute in some collection contexts, such as in lien and levy cases[8] and upon the rejection of proposed offer-in-compromise or installment agreements.[9] Until the passage of the TFA, the Code did not, however, provide taxpayers a general right to an administrative appeal,[10] and the Tax Court has held that the Service's internal administrative guidance on Appeals' procedures do not establish substantive rights.[11]

Even prior to the TFA, Congress recognized the importance of the independence of the Appeals function and legislated to protect it. The Internal Revenue Service Restructuring and Reform Act of 1998 directed the Service to develop and implement a reorganization plan. The plan, among other things, was required to:

---

[6] *See* Treas. Reg. § 601.601(f)(1).
[7] *See* Rev. Proc. 64-22, 1964-1 C.B. 689.
[8] I.R.C. §§ 6320, 6330.
[9] I.R.C. § 7122(e).
[10] *Cf.* I.R.C. § 7123 (directing the Secretary to establish Appeals early referral, mediation, and arbitration procedures).
[11] *E.g.* Estate of Weiss v. Commissioner, T.C. Memo. 2005-284.

> Ensure an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of *ex parte* communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of appeals officers.[12]

Treasury Regulation section 601.106 provides the current procedural rules and standards that govern Appeals practice. IRS and Treasury proposed to amend these regulations in 1993, but those proposed regulations have not yet been finalized or withdrawn.[13] Rev. Proc. 2016-33 provides the current practices for the administrative appeals process for cases docketed in Tax Court. Rev. Proc. 2012-18 provides the current guidance on *ex parte* communications between Appeals and other Service employees.

As the statute now says, the purpose of Independent Appeals is to resolve Federal tax controversies without litigation, on a basis that is "fair and impartial to both the Government and the taxpayer[;] promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws[;] and enhances public confidence in the integrity and efficiency of the Internal Revenue Service."[14] Congress required that access to Independent Appeals "shall be generally available to all taxpayers."[15]

III. Concerns about Limiting the Jurisdiction and Independence of Independent Appeals

A. Overall, the Proposed Regulations are not fully consistent with the goals of the Taxpayer First Act

We recognize that the TFA contemplates that certain restrictions on Appeals jurisdiction may be appropriate, and we agree with many of the specific proposals in the Proposed Regulations. We further recognize that, in many cases, the Proposed Regulations simply memorialize pre-existing policies from the IRM into the Treasury Regulations. We agree with this general approach. Nevertheless, in certain contexts, Treasury and IRS proposed limitations that would inappropriately restrict taxpayer access to Independent Appeals and otherwise limit Appeals' independence.

The Proposed Regulations favor administrative policies and practices that will lead to more litigation, which is contrary to the mission of Independent Appeals. The Proposed Regulations do not expand Independent Appeals' current jurisdiction in favor of more administrative resolutions, nor do they adopt taxpayer-favorable policies from the IRM or other published guidance.

---

[12] IRS Restructuring and Reform Act of 1998, Pub. L. 105-206 § 1001(a)(4), 112 Stat. 685, 689.
[13] RIN 1545-AQ18, 58 Fed. Reg. 48802 (Sept. 20, 1993).
[14] I.R.C. § 7803(e)(3).
[15] I.R.C. § 7803(e)(4).

For instance, the Proposed Regulations include none of the assurances currently provided in subregulatory guidance regarding the *ex parte* rules;[16] limitations on compliance or Appeals raising new issues;[17] conference rights;[18] or the longstanding policies regarding the reopening of mutual concession cases.[19] All of these provisions are structurally critical to taxpayers' right to a pre-litigation settlement forum that is independent in fact and in appearance. If the IRM's independence-restricting provisions are worthy of adopting as regulations, we see all the more reason to adopt the IRM's independence-enhancing provisions – especially in light of Congress's clear emphasis on independence in the TFA. Indeed, Treasury's regulatory response to § 7803(e) should, if anything, err on the side of promoting and solidifying the independence of Independent Appeals *vis-a-vis* the IRS enforcement divisions. Instead, the initial approach of the proposed regulations creates tension with the TFA's requirement to "enhance[] public confidence in the integrity and efficiency of the Internal Revenue Service."[20]

B. Independent Appeals should not be barred from evaluating the validity of Treasury Regulations, Revenue Procedures, and Notices

The most striking proposals in the Proposed Regulations are two new, broad carveouts from Independent Appeals' jurisdiction. Proposed Regulation section 301.7803-2(c)(19) would prohibit Independent Appeals from considering: "[a]ny issue based on a taxpayer's argument that a Treasury regulation is invalid unless there is an unreviewable decision from a Federal court invalidating the regulation as a whole or the provision in the regulation that the taxpayer is challenging." Proposed Regulation section 301.7803-2(c)(20) would similarly foreclose Independent Appeals' consideration of "[a]ny issue based on a taxpayer's argument that a notice or revenue procedure published in the Internal Revenue Bulletin is procedurally invalid unless there is an unreviewable decision from a Federal court holding it to be invalid."[21] We believe these proposals are problematic and respectfully submit that they should not be adopted.

---

[16] Rev. Proc. 2012-18, 2012-1 C.B. 455; IRM 8.1.10 (09-21-2021), *Ex Parte Communications*. *See also* I.R.C. § 7803(e)(6).
[17] IRM 1.2.1.9.2 (08-13-2014), *Policy Statement 8-2 (Rev. 1) (Formerly P-8-49), New issues not to be raised by Appeals*.
[18] IRM 8.6.1 (07-01-2020), *Conference and Issue Resolution*.
[19] IRM 1.2.1.9.3 (01-05-2007), *Policy Statement 8-3 (Formerly P-8-50), Mutual concession cases closed by Appeals will not be reopened by Service except under certain circumstances*.
[20] I.R.C. § 7803(e)(3)(C).
[21] We read the use of the phrase "procedurally invalid" with respect to subregulatory guidance, in contrast to the use of the single word "invalid" with respect to regulation validity challenges to mean that taxpayers remain free—as always—to argue before Independent Appeals the substantive hazards on subregulatory guidance. *See, e.g.,* Grecian Magnesite Mining v. Commissioner, 149 T.C. 63 (2019), *aff'd*, 926 F.3d 819 (D.C. Cir. 2019), *rejecting reasoning of* Rev. Rul. 91-32, 1991-1 C.B. 107.

First and foremost, these proposals run counter to Congressional purpose regarding taxpayer access to Independent Appeals. The TFA was enacted to establish and clarify taxpayers' rights to independent review of IRS determinations. The TFA was not an invitation from Congress for Treasury and the IRS to create novel restrictions on taxpayers' access to independent administrative review. To the contrary, the legislative history provides: "cases of a type that are referred to Appeals under present law remain eligible for referral to Independent Appeals."[22] Cases involving challenges to the validity of a regulation, notice, or revenue procedure can be referred to Appeals under present law: neither the current Treasury Regulations nor the IRM impose any such limitation on Independent Appeals' jurisdiction.

While the statute contemplates that limited exceptions to Appeals' jurisdiction may be appropriate, neither the statute nor legislative history empower Treasury to carve out entire classes of argument that are not susceptible to review. Legislative history reflects just the opposite:

> In the IRS Restructuring and Reform Act of 1998 (RRA 98), Congress directed the agency to create an independent process for taxpayers to appeal tax disputes. While the IRS initially established an independent process, over time the agency increasingly exercised its discretion to withhold certain taxpayers from accessing the review process. The provisions in this section seek to ensure that generally all taxpayers are able to access the administrative review process, allowing for their cases to be heard by an independent decision maker. For the first time, this provision codifies the IRS Independent Office of Appeals and provides for additional Congressional oversight over decisions to withhold taxpayers from the administrative review process.[23]

By precluding access to Appeals, proposed subparagraphs (c)(19) and (c)(20) effectively designate an entire class of legal theories for litigation, at least while invalidity challenges play out in court. As recent cases demonstrate, the government faces hazards of litigation on at least some invalidity challenges.[24] Taxpayers should not be forced to litigate just because the government hazards presented in their case stem from an invalidity weakness rather than some other factor. This is particularly true where a final judicial decision invalidates a different regulation or item of guidance germane to a taxpayer's validity challenge. For instance, in *GBX Associates LLC v. United States*,[25] the government conceded on answer that the challenged notice was invalid on the basis of the Sixth Circuit's holding

---

[22] H.R. Rep. No. 115-637 at 30 (2018).
[23] Press Release, Comm. on Ways and Means, U.S. House of Representatives, Jenkins, Lewis Introduce Bipartisan Legislation to Redesign the IRS (Mar. 26, 2018), https://gop-waysandmeans.house.gov/jenkins-lewis-introduce-bipartisan-legislation-redesign-irs/.
[24] *See, e.g.*, Green Valley Investors LLC v. Commissioner, 159 T.C. No. 5 (2022) (invalidating a notice); Liberty Global Inc. v. United States, 129 A.F.T.R.2d 2022-1373, 2022 WL 1001568 (D. Colo. April 4, 2022) (invalidating a regulation).
[25] Answer, GBX Associates LLC v. United States, No. 1:22-cv-401 ECF Doc. # 15 (E.D. Ohio May 20, 2022).

in *Mann Construction Inc. v. United States* that a different notice was invalid.[26] We can see no reason why similarly situated taxpayers should be required to docket such cases instead of submitting them for independent consideration in Independent Appeals.

Second, these proposals misapprehend the nature of "independence" itself. The TFA places a premium on Independent Appeals' independence, which is not just restricted to independence from Revenue Agents and their managers but is meant to be an all-pervading guiding principle for Appeals. The Preamble's primary justification for preventing Independent Appeals from considering validity arguments is that Treasury Regulations, Revenue Procedures, and Notices all undergo extensive review by senior officials. But the identity of the relevant decisionmakers should, under the independence principle embraced by Congress in the TFA, have no bearing on whether taxpayers have access to Independent Appeals. As the discussion above demonstrates, even the most thorough review cannot ensure that the government's position as to the validity of a rule will be sustained in court.

Third, the Preamble expresses concern that the law will not be consistently applied if Independent Appeals is able to exercise independence and settle cases involving invalidity arguments. This does not accord with our experience in Appeals—both before and after the TFA. As practitioners, we find that Appeals Officers are extremely concerned about the uniformity of tax administration and, on many issues, there is formal or informal coordination to ensure that Independent Appeals generally treats similarly situated taxpayers consistently. On something as important as the validity of a regulation, there is little doubt that Independent Appeals could reach a coordinated position—especially if (as the Preamble points out) the underlying hazards do not vary between taxpayers.

Indeed, forcing taxpayers to litigate invalidity challenges will inevitably *decrease* the uniformity of tax administration and frustrate Independent Appeals' statutory mission. Where taxpayers have no administrative recourse within the IRS, the ultimate tax result may hinge solely on the taxpayer's willingness and ability to file a Tax Court petition or refund suit. Indeed, one could envision a scenario where the IRS repeatedly settles or concedes an issue in court without generating an adverse court opinion, which would favor litigant-taxpayers while indefinitely preventing all other taxpayers from achieving similar results in Independent Appeals.[27] Completely withholding an independent administrative review of any issue disfavors taxpayers who lack access to expensive and sophisticated tax counsel, even though the hazards of litigation may completely favor those taxpayers.

---

[26] Mann Construction Inc. v. United States, 27 F.4th 1138 (6th Cir. 2022).
[27] *See, e.g.,* Motion to Dismiss, 35 N. Fourth Street, Ltd. v. United States, No. 2:22-cv-2684, ECF Doc. #12 (E.D. Ohio September 30, 2022) (in moving to dismiss for mootness, government represented that the Service abated the $10,000 section 6707A penalty at issue in the case the day before the government's answer to the complaint was due).

Even if some restraint on Independent Appeals' independence in these areas were justified, we struggle to see why such cases cannot be considered until there is an *unreviewable* decision by a federal court. Litigation, including appellate litigation, can take an extraordinarily long time. For instance, the recent case of *Boechler, P.C. v. Commissioner*[28] did not become "unreviewable" until more than three years after the date the Tax Court first entered its order of dismissal. Similarly, *Altera Corp. & Subs. v. Commissioner*[29] took nearly five years from the date of the Tax Court's unanimous opinion until the Supreme Court denied certiorari and the case became unreviewable.

Each level of litigation brings twists and turns that change the hazards of litigation for similar cases—sometimes favoring the government, sometimes favoring taxpayers. By requiring that a decision be "unreviewable" before Independent Appeals can take it into account, the Proposed Regulations tip the scales all the way in the government's favor *for years*, no matter how much merit taxpayers' positions may have. Moreover, the proposed rule for Appeals contrasts with the general rule for taxpayers that views all court cases as "authority" unless and until they are overruled or modified.[30] Indeed, as worded, the Proposed Regulations would prevent Independent Appeals from reviewing this type of case even if many trial-level courts have uniformly ruled against the government. This rule, if finalized, would not only impair taxpayer rights and slow overall tax administration, but will also have the unfortunate side-effect—ironic, too, given Appeals' mission—of multiplying litigation, as taxpayers would be denied any administrative resolution opportunities and be forced to file their own court cases (if they could afford it). Thus, if the final regulations restrict Appeals' independence in any of these areas, we respectfully suggest that the "unreviewable decision" requirement should be eliminated.

C. <u>The roles and limitations of the IRS Office of Chief Counsel in Appeals cases need greater clarification</u>

As noted in section III.A above, we recommend that the final regulations include substantial portions of the IRM's independence-enhancing, taxpayer-favorable provisions. We further suggest that Treasury and the Service use this regulation project to implement the Congressional mandate set out in section 7803(e)(6) to re-clarify the roles and limitations in the appeals process for attorneys from the IRS Office of Chief Counsel ("Counsel"). These limitations are already clearly stated in current procedural regulations. The problem is that Counsel and Appeals do not always follow these regulations, which may explain why Congress felt the need to address this point. In our experience, the current practical

---

[28] 142 S. Ct. 1493 (2022).
[29] 145 T.C. 91 (2015), *rev'd by* 926 F.3d 1061 (9th Cir. 2019), *cert denied* 141 S. Ct. 131 (2020). *Altera* offers a quintessential example of the lifespan of controversial litigation: the case involved the company's 2004-2007 tax years, with litigation first commencing in 2012 after a multi-year examination.
[30] Treas. Reg. § 1.6662-4(d)(3)(iii). Indeed, the Treasury Regulations provide that a Tax Court case remains authority even after it has been overruled by a court of appeals in a different circuit than the circuit to which the taxpayer has a right to appeal. *Id.*

ambiguities in this area has not only been a source of great contention in recent years, but also has led to non-uniform procedures across the country.

We acknowledge the particular, and sometimes delicate, relationship between Appeals and Counsel. Revenue Procedure 2012-18 summarizes the balancing act the Service tries to maintain between Appeals' independence and the role of Counsel's legal advice in Appeals:

> Appeals employees are entitled to obtain legal advice from attorneys in the Office of Chief Counsel and, except as provided below, are permitted to do so under the *ex parte* communication rules. Appeals employees generally are not bound by the legal advice that they receive from the Office of Chief Counsel. The legal advice is but one factor that Appeals will take into account in its consideration of the case. Appeals employees independently evaluate the strengths and weaknesses of the specific issues in the cases assigned to them and make an independent judgment concerning the overall strengths and weaknesses of the cases they are reviewing and the hazards of litigation.

If the IRS position in a case or on an issue is adverse to the taxpayer (as it almost always is in tax disputes), the current regulations provide that Appeals may nevertheless partially or fully concede the issue based on the litigating hazards.[31] Indeed, this has been a fundamental role of Appeals in our system. Under these regulations, Appeals enjoys the same independence in cases with taxpayer-adverse technical advice from the National Office in the file. "If the technical advice is unfavorable to the taxpayer, the Appeals office may settle the issue in the usual manner under existing authority."[32]

Additionally, the regulations have long provided a path for Appeals to seek reconsideration of a National Office ruling. Treas. Reg. 601.106(f)(9)(i)(d) provides:

> If an Appeals office is of the opinion that a ruling letter previously issued to a taxpayer should be modified or revoked and it requests the National Office to reconsider the ruling, the reference of the matter to the National Office is treated as a request for technical advice…Only the National Office can revoke a ruling letter. Before referral to the National Office, the Appeals office should inform the taxpayer of its opinion that the ruling letter should be revoked.

---

[31] *See* Treas. Reg. § 601.106(f)(1).
[32] Treas. Reg. § 601.106(f)(9)(viii)(b).

All of this guidance highlights that Appeals is not bound to the determinations of Counsel, as such a requirement would strike at the very heart of Appeals independence. Section 7803(e)(6) suggests as much. Independence means that Appeals may reach a result that is inconsistent with or even contrary to technical advice or rulings issued by Counsel. As noted above, even Treasury regulations are sometimes invalidated by the courts. Appeals must actively weigh the risks that Counsel's legal advice, rulings, or even published guidance may be discounted or disregarded by a court as one factor that may affect the hazards of litigation. Delegation Order 8-8, outside the context of exempt organization determinations, gives Appeals full settlement authority in Appeals cases, whether or not technical advice is in the file.[33]

The current regulations and policies, summarized above, provide an appropriate balance between IRS Office of Chief Counsel and Appeals. Nevertheless, as a practical matter, Counsel often serves many roles in Appeals cases, some in tension with these regulations and policies. For instance, the IRM currently sets out the following exceptions and additional steps Appeals must now take into account when recommending partial or full concessions adverse to a Service position, due to Counsel involvement in developing that position:

- Appeals will not partially or fully concede an issue in a case where the Associate Chief Counsel office has issued a decision with regard to an issue that a court reviews using an abuse of discretion standard (for example, the denial of non-automatic change of accounting method requests (requested on Form 3115)).
- When full concession of an issue is recommended without offsetting concession, and is contrary to a Service position, Appeals must request and consider the views of the appropriate Associate Chief Counsel office function.
- Appeals must coordinate consideration of the issues listed in CCDM Exhibit 31.1.1-1 with the Associate Chief Counsel office.
- If the taxpayer's facts are distinguishable from the facts upon which the Service based its position, Appeals does not have to obtain the views of the Associate Chief Counsel. Generally, this statement applies to a revenue ruling, private letter ruling, or other Service position that was not issued directly to the taxpayer with regard to the year at issue.[34]

---

[33] Cost-share buy-in adjustments offer perhaps the best recent example of Appeals officers asserting their independence in the face of a well-coordinated, taxpayer-adverse Service position formulated by Counsel. So far, Appeals' assessment of the hazards of litigation on those cases has proved to be reasonable. *See, e.g.,* Tax Notes Today International*, Transfer Pricing Litigation: Where Are We Headed?(Transcript)* (June 29, 2022).

[34] IRM 8.6.3.3 (10-06-2016) *Procedures If Appeals Conclusion is Contrary to Service Position*.

In our view, these current IRM provisions and certain other practices by Counsel[35] all encroach on the independence of Appeals to one degree or another. For that reason, the IRM provisions summarized above should be revised so that they are consistent with section 7803(e)(6) and the current regulations in letter and in spirit. Furthermore, the IRM and internal training for Appeals and Counsel should emphasize the current regulations and policies summarized above, all in service of Appeals independence.

D. Appeals should be given the option to decide if positions have been wrongly labeled "frivolous" by other divisions of the IRS

Proposed section 301.7803-2(c)(1) generally denies Appeals rights to a taxpayer whose position the IRS has rejected as frivolous, and proposed section 301.7803-2(c)(2) likewise generally denies Appeals consideration for penalties assessed by the IRS under sections 6702 or 6682 (relating to frivolous submissions or for providing false information with respect to withholding). These provisions implement section 7803(e)(5)(D), which codifies longstanding administrative practice.

Frivolous arguments pose substantial burdens on tax administration, and we wholeheartedly agree that frivolous arguments should not be entitled to the same procedural rights as legitimate disputes.

In order to strike a balance between Independent Appeals' independence and the IRS's legitimate need to weed out frivolous arguments, we would suggest the final regulations grant Independent Appeals the option—but not the obligation—to screen out and reject frivolous arguments after some minimal amount of due process, rather than prohibit Independent Appeals from reviewing the IRS's frivolousness determinations. This is how Appeals has operated effectively for decades; we see no reason to change that approach now.

We are concerned that the proposed regulations go a step too far and will curtail the independence of Appeals by completely eliminating Appeals' right to weigh in on frivolousness determinations. Proposed section 301.7803-2(c)(1) denies taxpayers the right to Appeals in *any* instance in which the IRS has determined that the taxpayer's argument was frivolous, and proposed section 301.7803-2(c)(2) similarly denies taxpayers the ability to challenge a section 6702 penalty outside of a Collection Due Process proceeding. Denying access to Independent Appeals effectively eliminates many taxpayers' opportunity for *any* independent review of the IRS's determinations, to the extent a taxpayer lacks resources to litigate. The risk is especially heightened for the section 6702 penalties, which are

[35] For example, Counsel attorneys sometimes argue that the provisions in the IRM requiring Appeals to coordinate "related cases" extends to unrelated taxpayers whose cases share the same technical tax issues. However, in our experience, Appeals Officers do not support that reading of the IRM. The regulations should clarify that the term "related cases" does not include cases whose only commonality is a technical tax issue.

assessable without deficiency procedures. We are aware, for instance, of at least one recent episode where an operating division sought to impose section 6702 penalties on a taxpayer that claimed *bona fide* section 1341 deductions, based upon the incorrect belief that all "claim of right" positions are *per se* frivolous.

While the proposed regulations enhance the laudable goal of efficiently disposing of frivolous claims, they also rest on the assumption that the Service's frivolousness determinations are infallible. Universal correctness, in substance and procedure, does not exist. In all areas of tax law, some portion of the IRS's determinations will be incorrect, whether due to an employee's inadvertence, misunderstandings of fact or law, overzealousness, or—despite the government's many efforts to the contrary—antagonism toward a particular taxpayer or representative.

Proposed sections 301.7803-2(c)(1)-(2) would leave compliant taxpayers without Appeals recourse against overzealous enforcement and erroneous determinations by both field agents and Service Center employees. The proposed regulations' choice to completely foreclose independent review of such determinations is, in our view, not consistent with the Congressional purpose supporting the TFA. And the fact that the proposed limitation would take the form of a regulation, rather than an adaptable informal policy, raises the stakes even further.

III. Appeals Should Have Discretionary Authority to Grant 9100 Relief and Resolve Accounting Method Issues Even when Counsel Denies a Method Change

In the Preamble, Treasury requested comments on whether items relating to requests for changes in methods of accounting and requests for "9100 relief" (i.e., relief provided for at Treas. Reg. § 301.9100-3) should continue to be excluded from Appeals review. In addition to general comments, comments were specifically requested on:

> A. whether the binary nature of decisions regarding 9100 relief and changes in method of accounting make these decisions unsuitable for Appeals review,
>
> B. whether a different review standard should apply if Appeals considers 9100 relief or changes of accounting method, and
>
> C. what impact would Appeals review of 9100 relief and changes in accounting method have on later years that are not before Appeals?

We appreciate that Treasury is considering these issues. Treasury's request tacitly acknowledges that Exam is not the only IRS function whose actions and decisions affect taxpayer rights and that there may be appropriate cases for Appeals to review decisions of other IRS functions, including Counsel.

Although the law grants the IRS considerable discretion in the areas of 9100 relief and accounting method changes, case law demonstrates that the IRS sometimes oversteps its bounds and abuses that

discretion.[36] Judicial review of those decisions is costly and time-consuming for both taxpayers and the IRS alike. Moreover, litigation moves slowly, and typically takes years to reach resolution. This delayed resolution is especially burdensome in the case of 9100 relief for elections and accounting methods, because the underlying issue often affects all intervening tax years. Returns filed while the taxpayer awaits resolution frequently require examination and amendments that would not be necessary if a swifter resolution were possible. Avoiding litigation in these areas would save considerable costs and resources for all parties. Independent Appeals review of taxpayer-specific decisions by Associate Chief Counsel Offices would, in our view, further protect taxpayer rights, reduce litigation, promote impartial resolutions and consistent application of the laws and enhance public confidence in the integrity and efficiency of the IRS.[37] We therefore recommend that Treasury adopt a regulation empowering Independent Appeals to consider cases involving 9100 relief requests as well as cases involving requests for changed methods of accounting.

Lastly, accounting method change issues need not to be viewed as "binary." Appeals already frequently avoids litigation of accounting method-related issues when reviewing Exam-initiated adjustments. Under section 6 of Rev. Proc. 2002-18, Appeals has the authority to resolve methods-related disputes in a wide variety of fashions. Appeals may institute method changes on "terms and conditions that differ from those ordinarily applicable," including by: agreeing to a different year for the change; making a method change with a reduced (or zero-dollar) § 481(a) adjustment; changing the spread period for the § 481(a) adjustment; using an alternative timing approach; or using a time-value of money settlement. The Associate Offices and Exam both hold similar levels of discretion over accounting method issues. Independent Appeals should review methods-related decisions consistently across taxpayers; it should not matter whether the originating function was Exam or an Associate Office. Indeed, allowing Independent Appeals to review Associate Office determinations would promote consistency in tax administration, since taxpayers who are before the IRS "seeking permission" would be placed on equal footing with taxpayers who are before the IRS for an identical issue in an enforcement context. We therefore further recommend that Treasury should adopt a regulation permitting Independent Appeals to review Associate Office denials of method change requests, with the same list of settlement tools provided in Rev. Proc. 2002-18.

IV. One of the Exceptions to the "One-Bite-at-the-Apple" Rule Could be Clarified

Proposed Regulation section 301.7803-2(f)(1) sets out a commonsense rule that generally provides taxpayers only one opportunity for consideration by Appeals. We generally understand and agree with the purpose of this rule. Nevertheless, we recommend that the exception to the rule set forth in proposed

---

[36] *E.g.,* Vines v. Commissioner, 126 T.C. 279 (2006).
[37] *See* I.R.C. § 7803(e)(3).

regulation section 301.7803-2(f)(2) be clarified. That exception, in relevant part, currently provides that taxpayers who provide new information to the IRS *and* who meet the conditions and requirements for audit reconsideration or for reconsiderations of issues previously considered by Appeals may have an opportunity for Appeals consideration.

The audit reconsideration standards are set out in section 5.1.15 of the IRM. The standards governing reconsideration of issues previously considered by Appeals are set forth in Policy- Statement 8-3, located at section 1.2.1.9.3 of the IRM. These standards are generously drafted in favor of taxpayers, especially taxpayers who did not have a meaningful prior opportunity to participate.

The one clarification that we respectfully suggest that Treasury and the IRS make with respect to the "reconsideration" exception is to ensure that a new development in the law constitutes "new information" that would allow for Appeals reconsideration of the same matter.[38] Policy Statement 8-3 already provides that a case closed by Appeals on a basis not involving concessions made by both Appeals and the taxpayer may be reopened by the taxpayer by any appropriate means, such as by the filing of a timely claim for refund. Appeals consideration of a claim disallowance should follow as of right, as it always has. Otherwise, Appeals will be powerless to resolve disputes that re-emerge between taxpayers and the IRS following changes in the law. Only those taxpayers who can afford to litigate their refund claims will achieve access to justice in those circumstances, which we believe is inappropriate.

V. Treasury and IRS Should Harmonize the Proposed Regulations with Existing Treasury Regulations

As both the Preamble and the House TFA Report[39] point out—and as we discuss above—the Treasury Regulations already contain provisions discussing taxpayer rights and procedures in Independent Appeals. *See* Treas. Reg. § 601.106. The Proposed Regulations overlap considerably with the existing regulations. However, nothing in the Notice of Proposed Rulemaking indicates Treasury's policy views regarding the existing regulations, which have been in place since 1967.

To the extent that Treasury is not repealing or revising the section 601.106 regulations, we suggest that Treasury take steps to i) ensure that any areas of overlap—including those noted above—are explicitly harmonized, and ii) consolidate all Appeals-related regulations into adjacent sections of the regulations.

---

[38] *See* IRM 8.6.1.7.5 (10-01-2016), Taxpayer Provides New Information (defining "new information" as "any item or document related to a disputed issue that the taxpayer did not previously share with the examiner, and in the judgment of the [Appeals Officer], merits additional analysis or investigative action by Examination.")
[39] H.R Rep. No. 115-637 at 39 (2018).

Spreading rules on the same subject matter across opposite ends of the regulations creates difficulties and uncertainties, for taxpayers and the IRS alike. Allowing different regulations to address the same topic using different language will create unnecessary ambiguity and controversy about the state of the law. Likewise, even if there is no actual or perceived conflict between the various provisions, housing one set of Appeals regulations at section 1.7803-2 and another at section 601.106 will create a trap for the unwary. At the very least, inserting cross-references would be helpful.

VI. Conclusion

We appreciate your consideration of our recommendations on this important topic, and we would be pleased to elaborate on our comments. If you would like to discuss these matters further, please contact Mark Martin at 713-319-3976, Tom Greenaway at 617-988-1221, or Aaron Vaughan at 213-630-2260.

Very truly yours,

KPMG LLP

KPMG LLP