

Oklahoma Law Review

Volume 74 | Number 4

A Life's Work: In Memory of Professor Jonathan B. Forman

2022

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Recommended Citation

Leslie Book, T. Keith Fogg & Nina E. Olson, *Reducing Administrative Burdens to Protect Taxpayer Rights*, 74 OKLA. L. REV. 527 (2022), <https://digitalcommons.law.ou.edu/olr/vol74/iss4/3>

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REDUCING ADMINISTRATIVE BURDENS TO PROTECT TAXPAYER RIGHTS

LESLIE BOOK, T. KEITH FOGG & NINA E. OLSON*

Abstract

The tax system designed by Congress imposes significant administrative burdens on taxpayers. IRS decisions regarding how it administers tax laws can add to congressionally imposed burdens. The administrative burdens are consequential and hurt some people, especially lower- or moderate-income individual taxpayers, more than others. While the IRS strives to measure and reduce the time and money taxpayers spend to comply with their tax obligations, it does not consider the effect administrative burdens have on taxpayer rights, including the right to be informed, the right to pay no more than the correct amount of tax, and the right to a fair and just tax system. In this Article, we discuss the concept of administrative burdens and reveal specific examples of how IRS actions—and inaction—have burdened taxpayers and jeopardized taxpayer rights. In addition to identifying and contextualizing these problems, we propose that the IRS conduct Taxpayer Rights Impact Statements on new and existing systems to evaluate when it would be appropriate to reduce, eliminate, or shift burdens away from citizens and onto the government or third parties.

I. Introduction

Consider the following scenarios:

1. *In response to a once-in-a-century pandemic, Congress turns to the Internal Revenue Service (“IRS”) to deliver cash to Americans who are suffering unprecedented hardships.*

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Congress structures the benefits as a refundable credit, known as a Recovery Rebate Credit (“RRC”), that can be claimed on a 2020 tax return, but also directs the IRS to pay an equivalent amount known as an economic impact payment (“EIP”). By January 2021, the IRS issues over 300 million EIPs to eligible individuals, totaling over \$413 billion in emergency financial relief. While most people receive money automatically, the IRS lacks sufficient information on millions of Americans who did not file tax returns. To distribute the full amount of EIPs, the IRS establishes a non-filer portal for people to enter information for themselves and their dependents. For many federal beneficiaries who had not previously filed tax returns, the IRS provides under two weeks to register to receive the full benefits relating to dependents, thus preventing a Social Security disability recipient from receiving assistance that was meant to help his family during a crushing pandemic.

2. *An IRS employee receives a phone call from an individual working two part-time jobs at courier companies. The individual has a tax liability and has received a certified notice that the IRS intends to levy assets or garnish wages. The IRS has access to databases showing a likelihood that the individual may be experiencing financial hardship that would entitle the individual to a delay in enforced collection, but the IRS employee does not mention the possibility of delay, and the individual does not ask for it. Instead, the IRS employee suggests a monthly payment plan, and the individual enters into the agreement thinking that, absent the agreement, the IRS will garnish her wages. The monthly payments leave the individual unable to pay necessary expenses for housing or healthcare.*
3. *An individual claims a refundable credit on her 2020 federal income tax return that would have helped pay back due rent and utilities, but the IRS applies the \$1,800 refund to a 2012 federal tax liability that stemmed from withdrawing \$10,000 from a retirement account when she first lost her job due to struggles with opioid addiction.*

In all these scenarios, individuals engaging in the various stages of tax administration face a variety of barriers. The individual income tax system in the United States is predicated on personal responsibility. From filing tax returns to responding to requests for information or correspondence in an

examination to avoiding enforced collection by demonstrating financial hardship, individuals must affirmatively engage with the government. This requires learning rules and communicating in some fashion with the IRS.

Individual income tax return filing is one such example. People with income over a certain threshold have an obligation to file a tax return with the IRS.¹ On the U.S. federal income tax return itself, the taxpayer identifies sources of income and prior payments and generally must claim specific deductions or credits to compute a tax liability or to request a refund or credit of any overpayment. While third parties like employers and financial institutions are required to send year-end summary information returns to taxpayers and to the government that identify wages, withholdings, dividends, and interest,² the government does not provide taxpayers with a centralized portal through which taxpayers may readily access that information to assist with their return-filing obligations. Instead, individuals have an affirmative obligation to (1) collect the information, (2) organize it, (3) determine whether they must file a tax return, and (4) eventually calculate whether they owe additional money or are entitled to a refund.

To be sure, individuals are not completely on their own. Some, especially those with resources, can rely on third parties like commercial tax return preparers. Others purchase software to avoid reading primary source documents such as statutes, regulations, tax forms, or instructions. But in all cases, the burden is on individuals to find and, in most cases, pay³ for help to calculate their liability or refund and meet their obligation to file an annual individual income tax return.

It is not preordained that our tax system must default to placing burdens on taxpayers. For example, other countries distribute the burdens of individual tax return filing quite differently, with the burden generally

1. I.R.C. § 6012(a)(1)(A) (requiring filing when gross income exceeds the combined amounts of the standard deduction and the personal exemption).

2. *See* 26 C.F.R. § 31.6051-1 (2021).

3. While most taxpayers must self-prepare, often by using computer programs for which they pay or through hiring return preparation experts, some taxpayers use a system of volunteer websites to obtain free return preparation. Getting into the full panoply of return preparation options is beyond the scope of this Article, but the burden of tax preparation, both in time and money, is without question. For a review of one free return preparation program, see TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2016-40-045, BETTER ADHERENCE TO PROCEDURES IS NEEDED TO ACCURATELY ASSESS THE VOLUNTEER TAX RETURN PREPARATION PROGRAM (2016), <https://www.treasury.gov/tigta/auditreports/2016reports/201640045fr.pdf>.

falling on the government.⁴ In pay-as-you-earn systems, such as those in the United Kingdom and Japan, the government calculates withholdings to match the amount of annual tax liabilities, resulting in many individuals not having to file tax returns.⁵ Other countries, like Estonia, take the information from third parties and provide pre-populated returns that taxpayers simply review and verify.⁶ If the information is correct, the individual can confirm the accuracy of the return and, with little effort, verify its status with the tax administrator.

In the United States, individuals themselves bear a heavy burden in their interactions with the IRS.⁷ The burdens taxpayers face are not unique to tax-return filing and can create challenges after a taxpayer submits a return to the IRS.⁸ Consider situations when the IRS believes the taxpayer may

4. Scholars have suggested various measures to reduce taxpayer burden in the filing process, including changes that would increase government involvement. *See, e.g.*, AUSTAN GOOLSBEE, BROOKINGS INST., DISCUSSION PAPER 2006-04, THE ‘SIMPLE RETURN’: REDUCING AMERICA’S TAX BURDEN THROUGH RETURN-FREE FILING (July 2006), <https://www.brookings.edu/wp-content/uploads/2016/06/200607goolsbee.pdf> (proposing the government prepare individuals’ returns); Joseph Bankman, *Using Technology to Simplify Individual Tax Filing*, 61 NAT’L TAX J. 773, 773–74 (2008) (suggesting a variety of ways that policy makers can improve interactions with the tax system); Kathleen DeLaney Thomas, *User-Friendly Taxpaying*, 92 IND. L.J. 1509, 1509, 1540–42 (2017) (recommending, inter alia, that the government prepare individuals’ returns to simplify tax filing). Professor Thomas largely focuses her proposals on reducing burdens as a way to improve voluntary compliance. In contrast, we believe policymakers should consider reducing burdens as a way to reduce the distributional costs of the burdens as an objective separate, though not unrelated to, the effect on future compliance.

5. 2 NAT’L TAXPAYER ADVOC., 2018 ANNUAL REPORT TO CONGRESS, A CONCEPTUAL ANALYSIS OF PAY-AS-YOU-EARN (PAYE) WITHHOLDING SYSTEMS AS A MECHANISM FOR SIMPLIFYING AND IMPROVING U.S. TAX ADMINISTRATION (2018) [hereinafter A CONCEPTUAL ANALYSIS], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/11/ARC18_Volume2_01_PAYE.pdf (overviewing pay-as-you-earn systems around the world, with an analysis of the feasibility and potential benefits of other systems if applied in the United States).

6. *See* Louis Jacobson, *Jeb Bush Says Estonians Can File Their Taxes in Five Minutes. Really?*, POLITIFACT (June 4, 2015), <https://www.politifact.com/factchecks/2015/jun/04/jeb-bush/jeb-bush-says-estonians-can-file-their-taxes-five/>. To be sure, with pay-as-you-earn or pre-populated return systems, the taxable unit is the individual rather than the household, the latter being the case for the United States. That significantly complicates the task of using a true pay-as-you-earn model in the United States. *See* A CONCEPTUAL ANALYSIS, *supra* note 5, at 7–8.

7. *See infra* notes 44–45 and accompanying text.

8. *See, e.g.*, Jacob Goldin, *Tax Benefit Complexity and Take-up: Lessons from the Earned Income Tax Credit*, 72 TAX L. REV. 59, 60 (2018) (discussing informational

have understated her liability on a tax return. If the taxpayer receives automated correspondence from the IRS stating that she has omitted or misreported an item of income subject to third-party reporting, the taxpayer must affirmatively respond to the IRS to avoid an assessment based on the third-party information.⁹ Similarly, if the IRS selects a taxpayer's tax return for audit, the taxpayer generally must provide information to the IRS to justify positions taken on the tax return.¹⁰ The burdens continue if the taxpayer faces an assessed liability. If the IRS assesses a tax liability against a taxpayer and the taxpayer cannot convince the IRS that the assessment is incorrect or that the taxpayer cannot immediately pay the tax debt, the taxpayer must take steps to avoid facing the IRS's considerable administrative collection powers. The taxpayer generally must affirmatively demonstrate that she does not owe the tax; that her financial condition warrants either a delay in collection; or that she is entitled to an alternative to enforced collection, such as an installment agreement or compromise of the liability.¹¹

In all these interactions with the IRS, taxpayers face a variety of burdens in meeting their formal filing responsibilities, proving entitlement to a refund, responding to IRS queries, or demonstrating entitlement to an alternative to enforced collection. The costs of these barriers may even be more consequential when Congress chooses to use tax administration to deliver benefits, especially when the benefits are intended to provide relief from an emergency like the COVID-19 pandemic.¹² While noting that the burdens the tax system imposes on taxpayers are not novel, we provide a

complexity in terms of an individual's difficulty in obtaining informational inputs); Thomas, *supra* note 4 (discussing procedural complexity concepts).

9. See generally *Understanding Your IRS Notice or Letter*, IRS, <https://www.irs.gov/individuals/understanding-your-irs-notice-or-letter> (Feb. 8, 2022).

10. For a discussion of the challenges that taxpayers, especially low-income taxpayers, face when receiving correspondence during a correspondence-based examination, see W. Edward Afield, *Moving Tax Disputes Online Without Leaving Taxpayer Rights Behind*, 74 *TAX LAW*. 1 (2020).

11. An assessment is the prerequisite to the IRS's considerable collection powers. See I.R.C. § 6203. For a discussion of the IRS's collection powers, as well as taxpayer opportunities to avoid enforced collection, see MICHAEL I. SALTZMAN & LESLIE BOOK, *IRS PRACTICE AND PROCEDURE*, chs. 14A, 15 (2d ed., rev. 2022).

12. For a discussion of the inadequate federal safety net that exists to support Americans in the COVID-19 pandemic, including the tax system, see Andrew Hammond et al., *How the COVID-19 Pandemic Has and Should Reshape the American Safety Net*, 105 *MINN. L. REV. HEADNOTES* 154 (2020).

framework for identifying these burdens. We also illustrate how these burdens are consequential and hurt some people—especially lower- or moderate-income individual taxpayers—more than others. While the IRS strives to measure and reduce the time and money that taxpayers spend to comply with their tax obligations,¹³ Congress and the IRS do not adequately consider the distributional effect of these burdens or the effect these burdens have on taxpayer rights, including “the right to be informed,” “the right to pay no more than the correct amount of tax,” and “the right to a fair and just tax system.”¹⁴

In this Article, we claim that the IRS and Congress should be more sensitive to the impact that burdens have on certain classes of taxpayers and on taxpayer rights. Building on the work of public administration scholars

13. For example, the Paperwork Reduction Act (“PRA”), as originally enacted, was intended to minimize the burdens associated with governmental agencies collecting information from individuals and businesses. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521). It was first reauthorized in 1986 and again reauthorized in 1995. *See* Paperwork Reduction Reauthorization Act of 1986, Pub. L. No. 99-591, tit. VIII, §§ 801–812, 100 Stat. 3341–335, 3341–335 to 3341–336; Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 1063. To accomplish its purpose, the PRA “requires agencies to (1) justify, or describe the necessity[] of[,] the information collected; (2) provide estimates of the burden they will impose (i.e., the time and costs required to comply with the collection); and (3) publish notices in the *Federal Register* and otherwise consult with the public to obtain input.” U.S. GOV’T ACCOUNTABILITY OFF., GAO-18-381, PAPERWORK REDUCTION ACT: AGENCIES COULD BETTER LEVERAGE REVIEW PROCESSES AND PUBLIC OUTREACH TO IMPROVE BURDEN ESTIMATES 1 (2018) [hereinafter GAO, PAPERWORK REDUCTION ACT]. To ensure compliance with the PRA, the IRS established the Office of Taxpayer Burden Reduction. *See* IRM 22.24.1 (Jan. 8, 2016). IRS Form 13285-A is used to report ways to reduce the burden. *About Taxpayer Burden Reduction*, IRS (May 28, 2021), <https://www.irs.gov/businesses/small-businesses-self-employed/about-taxpayer-burden-reduction>. We discuss the PRA further at Section III.A.3.

14. *See* I.R.C. § 7803(a)(3) (listing taxpayer rights). The Taxpayer Bill of Rights was officially codified as part of the Consolidated Appropriations Act. *See* Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, 129 Stat. 2242 (codified as amended at I.R.S. § 7803(a)(3)). Scholars have begun exploring the relationship between taxpayer rights and tax administration. *See generally* Richard K. Greenstein, *Rights, Remedies, and Justice: The Paradox of Taxpayer Rights*, 91 TEMP. L. REV. 743 (2019); T. Keith Fogg, *Can the Taxpayer Bill of Rights Assist Your Clients?*, 91 TEMP. L. REV. 705 (2019) [hereinafter Fogg, *Can the TBOR Assist?*]; Leslie Book, *Giving Taxpayer Rights a Seat at the Table*, 91 TEMP. L. REV. 759 (2019) [hereinafter Book, *Giving Taxpayer Rights a Seat*]; Michelle Lyon Drumb, *Tax Attorneys as Defenders of Taxpayer Rights*, 91 TEMP. L. REV. 813 (2019); Afield, *supra* note 10 (proposing better use of digital technology in a variety of post-filing interactions with taxpayers as a way that affirms taxpayer rights).

Pamela Herd and Don Moynihan, we more systematically identify administrative burdens and their direct impact on the most vulnerable taxpayers. It is a fairly noncontroversial claim that the IRS and Congress should strive to reduce taxpayer burdens.¹⁵ While Congress places responsibilities on the IRS for not only collecting revenues but also distributing benefits in the form of credits for things like wage supplements, childcare, housing, health care, and emergency cash assistance in the face of an unprecedented health crisis, over the past decade the IRS budget has declined by over twenty percent in inflation-adjusted dollars.¹⁶ The IRS is struggling to adopt and implement technology, as well as to attract and retain skilled employees.¹⁷ It is not enough to say that Congress and the IRS should reduce burdens without more context. It is our goal in this Article to provide that context. Policymakers need a template or framework to assist them in identifying scenarios when administrative or legislative solutions can reduce, eliminate, or shift the incidence of those burdens. Building on

15. As part of the Regulatory Flexibility Act (“RFA”) Congress mandated that in writing regulations, all government agencies must account for the burden of the regulations on small businesses. See Robert C. Bird & Elizabeth Brown, *Interactive Regulation*, 13 U. PENN. J. BUS. L. 837, 838 (2011). The RFA and its application to the IRS has begun to generate attention among advocates and academics. See, e.g., Keith Fogg, *How Does the Regulatory Flexibility Act Impact Tax Regulations?*, PROCEDURALLY TAXING (Jan. 2, 2020), <https://procedurallytaxing.com/how-does-the-regulatory-flexibility-act-impact-tax-regulations/>. At least one court has considered the RFA’s application to the IRS. *Silver v. Internal Revenue Serv.*, No. 19-CV-247 (APM), 2019 WL 7168625, at *1–3 (D.D.C. Dec. 24, 2019) (considering plaintiffs’ claim that the IRS had failed to comply with the RFA and its mandate). Although the district court in *Silver* determined that the plaintiffs survived the motion to dismiss, it ruled for the IRS at the summary judgment stage, holding that the plaintiffs lacked standing to bring suit under the RFA under these circumstances. See *id.* at *3; *Silver v. Internal Revenue Serv.*, 531 F. Supp. 3d 346, 363–66 (D.D.C. 2021). We discuss the RFA further at Section III.A.2.

16. NAT’L TAXPAYER ADVOC., 2020 ANNUAL REPORT TO CONGRESS, at 12 (2020) [hereinafter ANNUAL REPORT 2020], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/01/ARC20_FullReport.pdf. To be sure, there has been a modest uptick in funding in response to the COVID-19 pandemic. Mark Friedlich, *Senate Joins House in Passing Omnibus Spending Bill Providing Additional IRS Funding; “Extenders” and Other Tax Provisions Not Included*, WOLTERS KLUWER (Mar. 11, 2022), <https://www.wolterskluwer.com/en/expert-insights/senate-joins-house-in-passing-omnibus-spending-bill>. For more on IRS appropriations, see CONG. RSCH. SERV., IF11323, INTERNAL REVENUE SERVICE APPROPRIATIONS, FY2020 (2020), <https://crsreports.congress.gov/product/pdf/IF/IF11323>.

17. See Paul Kiel & Jesse Eisinger, *How the IRS Was Guttled*, PROPUBLICA (Dec. 11, 2018, 5:00 AM EST), <https://www.propublica.org/article/how-the-irs-was-guttled>; see also Leandra Lederman, *The IRS, Politics, and Income Inequality*, 150 TAX NOTES 1329 (2016) (discussing IRS budget cuts).

the insights of legal scholar Cass Sunstein, who refers to a subset of administrative burdens as “sludge” when the burdens themselves are excessive,¹⁸ we describe how the IRS and Congress should strive to reduce excess administrative burdens in the tax system to help ensure that the tax system operates consistently with principles embodied in the statutory Taxpayer Bill of Rights.

When do burdens become excessive and trigger additional governmental efforts to reduce, eliminate, outsource, or justify the burden? Our position is they become excessive when two conditions are satisfied: first, when the burdens fall primarily on a subset of taxpayers who are vulnerable,¹⁹ including individuals who are disabled,²⁰ low income,²¹ or underrepresented;²² and second, when the burdens directly impair taxpayer

18. Professor Sunstein distinguishes frictions and all administrative burdens from those which constitute “sludge,” with sludge as a subset of those burdens that are in some way excessive. See Cass R. Sunstein, *Sludge Audits*, BEHAV. PUB. POL’Y FIRSTVIEW, Jan. 6, 2020, at 7 [hereinafter Sunstein, *Sludge Audits*], <https://doi.org/10.1017/bpp.2019.32>. Sunstein notes that the burdens that individuals experience when interacting with the government or non-governmental actors can be “excessive, insufficient, or optimal.” See CASS R. SUNSTEIN, *SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE AND WHAT TO DO ABOUT IT* 7 (2021) [hereinafter SUNSTEIN, *SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE*].

19. We note that precise line-drawing around whether a group is vulnerable and deserves additional protections can be difficult. See David E. Bernstein, *The Modern American Law of Race*, 94 S. CAL. L. REV. 171, 183–84, 187–209 (2021) (discussing the predominant role agencies have played in determining how to define racial and ethnic groups for data gathering, civil rights enforcement, and affirmative action purposes, and noting how those agencies often have enacted arbitrary rules absent from meaningful public engagement).

20. Tax scholars focusing on tax administration have not meaningfully engaged with physical, mental health, intellectual, or cognitive disabilities. It is an area that deserves additional attention. For a systematic study of substantive tax provisions of particular significance to disabled taxpayers, see Theodore P. Seto & Sande L. Buhai, *Tax and Disability: Ability to Pay and the Taxation of Difference*, 154 PENN L. REV. 1053 (2006). For a detailed discussion of one such provision, the “difficulty of care” income exclusion applicable to payments for providing personal care services funded by Medicaid, see Christine S. Speidel, *Difficulty of Care: Aligning Tax and Health Care Policy for Family Caregiving*, 52 LOY. U. CHI. L.J. 503 (2021).

21. For the purposes of this Article, we define a low-income taxpayer as set forth in Internal Revenue Code section 7526. See I.R.C. § 7526(b) (defining low income as income equal to or less than 250% of federal poverty guidelines).

22. For the purposes of this Article, we define an underrepresented taxpayer as someone who either (1) cannot afford representation due to his limited resources or (2) who can afford representation, but the costs of representation are not justified in light of the amount of tax,

rights. As to the first condition, we consider low-income taxpayers as part of a protected group because this group's characteristics (such as limited literacy²³) minimize the likelihood that the taxpayers themselves will be able to overcome barriers on their own.²⁴ We also consider underrepresented taxpayers as worthy of additional procedural protections. While there may be considerable overlap among the first two categories, if the amount of potential tax, penalty, or interest does not justify the cost of paying for the assistance of representatives, then an individual who could afford representation would rationally choose to not incur those fees. That person would be less likely to attain an outcome achievable in the absence of the burdens.²⁵

We note that our trigger for additional government efforts does not overtly identify racial or ethnic groups despite a growing recognition that agency interposition of burdens in an ostensibly race-neutral way may

penalties, or interest at issue. *See generally* I.R.C. § 7811(a)(2) (defining hardship, for purposes of when it is justified to issue a Taxpayer Assistance Order, to include the incurring of significant costs such as “fees for professional representation”).

23. *See generally* JONATHAN ROTHWELL, BARBARA BUSH FOUND. FOR FAM. LITERACY, ASSESSING THE ECONOMIC GAINS OF ERADICATING ILLITERACY NATIONALLY AND REGIONALLY IN THE UNITED STATES 3–4 (2020), https://www.barbarabush.org/wp-content/uploads/2020/09/BBFoundation_GainsFromEradicatingIlliteracy_9_8.pdf (controlling for factors such as age, gender, and ethnicity, and finding a strong relationship between disparities in income among people with varying levels of literacy).

24. Scholars are increasingly focusing on how vulnerable citizens, including low income and underrepresented citizens, may struggle in the face of tax systems that increasingly rely on automation. *See, e.g.*, Sofia Ranchordás & Luisa Scarcella, *Automated Government for Vulnerable Citizens: Intermediating Rights*, WM. & MARY BILL RIGHTS J. (forthcoming) (focusing on how automation raises specific concerns for vulnerable citizens with less access to internet or less facility to interact with technology); *see also* Joshua D. Blank & Leigh Osofsky, *Automated Legal Guidance*, 106 CORNELL L. REV. 179 (2020) (exploring how automated legal guidance may exacerbate the gap in access to taxpayer-favorable legal advice, with low-income taxpayers bearing the costs of simplified online interface).

25. The Tax Court reports that 75% of the petitioners filing in its court are unrepresented. U.S. TAX CT., CONGRESSIONAL BUDGET JUSTIFICATION: FISCAL YEAR 2021, at 22 (2020), https://www.ustaxcourt.gov/resources/budget_justification/FY_2021_Congressional_Budget_Justification.pdf. Not all of these pro se petitioners meet the definition of a low-income taxpayer in I.R.C. § 7526, but most do, and the others who might have the resources to hire professional help generally file pro se because the amount at issue does not justify the cost of representation.

contribute to exacerbating racial inequities.²⁶ We believe that burdens that fall disproportionately on traditionally disadvantaged racial or ethnic groups contribute to perpetuating racial inequity and are worthy of additional agency attention.²⁷ At present, the IRS does not collect racial or ethnic data.²⁸ Following a Biden Administration executive order directing that all

26. See Victor Ray et al., *Racialized Burdens: Applying Racialized Organization Theory to the Administrative State*, J. PUB. ADMIN. RSCH. & THEORY (forthcoming), <https://academic.oup.com/jpart/advance-article-pdf/doi/10.1093/jpart/muac001/42956337/muac001.pdf> (exploring how agencies have used burdens to normalize and facilitate racially disparate outcomes).

27. For a persuasive account as to how race and ethnicity may determine tax enforcement outcomes, despite the IRS's official position, see Jeremy Bearer-Friend, *Colorblind Tax Enforcement*, 97 NYU L. REV. 101 (Apr. 2022). Determining which racial or ethnic groups deserve additional procedural protections or which persons are part of a particular group presents challenges that are outside the scope of this Article, though for a starting point we recommend studying the impact of administrative burdens on Black Americans. See WILLIAM A. DARITY & A. KIRSTEN MULLEN, FROM HERE TO EQUALITY: REPARATIONS FOR BLACK AMERICANS IN THE 21ST CENTURY (2020) (identifying intergenerational effects of the harms of slavery, the Jim Crow regime, and subsequent ongoing mass incarceration, among other factors, as justification for reparations). This challenge is also great for immigrants new to the tax system in the United States. Outreach and education to taxpayers who speak English as a second language ("ESL") is explicitly recognized as a service eligible for federal "Low Income Taxpayer Clinics" grants, so there is at least some government awareness of the challenges this population faces in meeting their tax obligations. See *Information for Potential LITC Grantees*, IRS, <https://www.irs.gov/advocate/low-income-taxpayer-clinics/information-for-potential-litc-grantees> (Mar. 2, 2022). Moreover, the IRS has introduced Form 1040 SP (the Spanish version of the Individual Income Tax Return) as well as Schedule LEP (Form 1040), Request for Change in Language Preferences, allowing taxpayers to designate one of twenty languages in which to receive communications. See Press Release, Internal Revenue Serv., IR-2021-56, IRS Expands Help to Taxpayers in Multiple Languages with New Forms, Communication Preferences (Mar. 16, 2021). Thus, the IRS has taken steps to overcome language barriers of the ESL/immigrant population and can monitor the usage of these forms to identify additional systemic problems. Not so with the Black American taxpayer population.

28. IRS has argued that, by not tracking information related to taxpayer race and ethnicity, the agency does not discriminate on the basis of race or ethnicity. See *2020 Filing Season and IRS COVID-19 Recovery: Hearing Before the S. Comm. on Fin.*, 117th Cong. 34 (2020) [hereinafter *2020 Filing Season Hearing*], <https://www.congress.gov/116/chr/CHRG-116shrg45917/CHRG-116shrg45917.pdf> (statement of Charles P. Rettig, Comm'r, Internal Revenue Serv., in response to questioning from Senator Sherrod Brown).

Commissioner RETTIG. There are no race or geographic issues that come up with respect to audit selection

agencies examine their policies and programs to identify whether and how they perpetuate barriers to equal opportunity,²⁹ the Treasury and IRS are attempting to develop an empirical methodology for analyzing the racial and ethnic equity implications of tax policy and tax administration questions.³⁰ If the IRS can meaningfully gauge the impact of tax administration policy choices on racial and ethnic groups, it should evaluate the impact of administrative burdens on those groups as part of its efforts to reduce structural barriers to people of color and other disadvantaged communities.

The second condition is present when the IRS action or program impairs a defined taxpayer right. As we discuss, when these burdens deprive a protected class of taxpayers of their fundamental taxpayer rights, we propose that the IRS conduct a taxpayer-rights-and-administrative-burden analysis with respect to that protected taxpayer segment.³¹ During that analysis, the IRS would identify the specific administrative burdens present in the program that pose challenges to the population, as well as how those burdens, if left unaddressed, will impair specific taxpayer rights provided in Code § 7803(a)(3).³² That analysis connects this Article's inquiry to taxpayer rights, and in particular to taxpayers who, in the absence of proactive efforts to reduce, eliminate, or shift those burdens, may experience a tax system in tension with those rights.

Senator BROWN. . . . But can you assure me, and assure the American people, . . . that IRS audit rates . . . do not disproportionately hit black and brown people?

Commissioner RETTIG. Yes.

. . . .

Commissioner RETTIG. Senator, I would like to add, we have a zero tolerance in the Internal Revenue Service for issues of discrimination.

Id.

29. Exec. Order No. 13985, 86 Fed. Reg. 7009 (Jan. 20, 2021), <https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01753.pdf>.

30. Wally Adeyemo & Lily Batchelder, *Advancing Equity Analysis in Tax Policy*, U.S. DEP'T TREASURY (Dec. 14, 2021), <https://home.treasury.gov/news/featured-stories/advancing-equity-analysis-in-tax-policy> (noting that, in light of the Biden Administration's executive order on advancing racial equity, the Treasury's Office of Tax Policy is "attempting to develop a general and reliable empirical methodology for analyzing the racial/ethnic equity implications of tax policy and tax administration questions" despite the IRS not collecting racial data).

31. *See infra* Part IV.

32. *See infra* Part IV.

Before progressing to the framework we propose in this Article, we recognize the stark reality that the IRS has, for the better part of the last decade, faced significant challenges related to funding.³³ The goal of identifying and reducing burdens cannot be accomplished in a vacuum, and policymakers must act in a way that is at least sensitive to agency resources, as well as the costs that inaction or action imposes on taxpayers. We do not claim that a consideration of costs and benefits has no place in tax administration; instead, we believe that the IRS and Congress should prioritize efforts that will likely have a greater impact on removing burdens that impede the ability for all taxpayers, especially vulnerable taxpayers, to enjoy the rights both the IRS and Congress have identified in the Taxpayer Bill of Rights. Our approach borrows from progressive critics of cost-benefit analysis, who have emphasized how agency practice that relies exclusively on cost-benefit analysis results in a failure to reflect other values like redistribution³⁴ and values that Congress may specifically identify in organic agency statutes.³⁵ That criticism resonates in the context of tax administration, as Congress has specifically required the Commissioner of the IRS to ensure that its employees “act in accord” with

33. For an interesting discussion of the intersection of declining funding and congressionally imposed additional responsibilities, see Steve R. Johnson, *The Future of American Tax Administration: Conceptual Alternatives and Political Realities*, 7 COLUM. J. TAX L. 5 (2016).

34. See, e.g., Richard L. Revesz, *Regulation and Distribution*, 93 N.Y.U. L. REV. 1489, 1490 (2018) (acknowledging the dominant academic view that regulatory policy should focus on maximizing net benefits and not be concerned with distributive consequences). Revesz traces this back to the influential work of Professors Louis Kaplow and Steven Shavell, who argued that substantive tax policy is a better vehicle for redistributive concerns than legal rules. See *id.*; Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994). Other progressives have attempted to monetize the benefits associated with actions that may promote rights, thus bringing a welfarist perspective to a rights-based agenda. See William J. Aceves, *Cost-Benefit Analysis and Human Rights*, 92 ST. JOHN'S L. REV. 431, 436 (2018) (arguing that while rights are not easily monetized, progressives should reflect the empirical approach to evaluating policy choices to ensure that “states could more accurately consider the net benefits of protecting human rights”).

35. See James Goodwin, *The Progressive Case Against Cost-Benefit Analysis*, CTR. FOR PROGRESSIVE REFORM, <https://progressivereform.org/our-work/regulatory-policy/progressive-case-against-cost-benefit-analysis/> (last visited Mar. 17, 2022) (“Rejecting cost-benefit analysis doesn’t mean turning a blind eye to the effects of regulations To the contrary, it means paying careful attention to the specific instructions that Congress provided to agencies in the statutes that it adopted.”).

essential taxpayer rights.³⁶ Even Cass Sunstein, one of the key proponents of cost-benefit analysis in the regulatory state, has recognized that, at times, distributional concerns should take priority over a purely welfarist approach.³⁷

The approach we suggest does not mean that Congress and the IRS should ignore costs when weighing tax-administration policy decisions.³⁸ Moreover, by requiring that the IRS consider the impact of its actions on taxpayer rights, our proposal assumes that violations of taxpayer rights be treated as costs in any cost-benefit analysis. They are not currently so treated. How those costs are quantified might be left open and subjected to a reasonableness analysis and is a topic worthy of further consideration. To be sure, protecting rights can be costly; however, not protecting rights may

36. I.R.C. § 7803(a)(3).

37. See CASS R. SUNSTEIN, *THE COST-BENEFIT REVOLUTION* (2018) (discussing the concept of prioritarianism and how, at times, even if the costs of a regulation may exceed its benefits, the distributional concerns should take priority over a purely welfarist approach when the benefits of a proposal inure largely to those who are less well-off).

38. Executive Order (“E.O.”) 12866 instructs agencies to select regulatory approaches that maximize net benefits—including economic, distributive, and equity effects—unless a statute requires another regulatory approach. Exec. Order No. 12,866, 58 Fed. Reg. 190, § 1(a) (Oct. 4, 1993). Any regulation that is determined to be “significant” must be submitted to the Office of Information and Regulatory Affairs (“OIRA”) for review, along with an analysis of the costs and benefits of that regulation. See CURTIS W. COPELAND, CONG. RSCH. SERV., RL32397, *FEDERAL RULEMAKING: THE ROLE OF THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS* (2009), <https://sgp.fas.org/crs/misc/RL32397.pdf>. For years, tax administration was largely exempt from the requirements of E.O. 12866 and its successor executive orders, but in 2018 the Treasury and the IRS agreed to adhere to them. Clinton G. Wallace, *Centralized Review of Tax Regulations*, 70 ALA. L. REV. 455, 458–59 (2018). The agreement requires the Treasury to submit quarterly notices of all planned tax regulatory actions to the OIRA and provides that the “OIRA will review any regulatory actions that ‘create a serious inconsistency or otherwise interfere with an action taken or planned by another agency,’ or that ‘raise novel legal or policy issues, such as by prescribing a rule of conduct backed by an assessable payment.’” *Id.* at 479 (quoting Memorandum of Agreement Between the Dep’t of the Treasury and the Off. of Mgmt. & Budget, Review of Tax Regulations Under Executive Order 12866, at 1 (Apr. 11, 2018) [hereinafter Memorandum of Agreement, E.O. 12866], <https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf>). Finally, consistent with its application to other agencies, E.O. 12866 requires the “Treasury to produce a quantified cost-benefit analysis of the proposed regulation and alternatives” for regulatory actions that have “an annual non-revenue effect on the economy of \$100 million or more.” *Id.* (quoting Memorandum of Agreement, E.O. 12866, *supra*, at 1).

be even more costly when calculating the cost of non-compliance resulting from the failure to protect rights and to promote compliance.³⁹

As discussed below, we suggest that the IRS can take actions that minimize agency costs while ensuring that taxpayer rights are promoted and taxpayer burdens are lessened. We recognize that a proposal that shifts the focus away from a direct measuring of agency costs or expands what is currently considered as a cost will likely meet some skepticism (especially from executives within the agency who face most directly decisions that involve difficult resource allocations). Accordingly, the IRS can efficiently reduce burdens by using data proactively or partnering with the private sector (so long as it or the private actor does not violate fundamental taxpayer rights).⁴⁰

The discussion proceeds as follows. Part II explains the Herd/Moynihan framework of administrative burdens. In Part II, we also consider sludge—a subset of administrative burdens that has found an unfortunate home in tax administration. In the first half of Part III, we discuss the current ways of measuring and addressing burdens in the tax system, including reviewing the Regulatory Flexibility Act,⁴¹ the Paperwork Reduction Act,⁴² and the

39. In the 2020 Annual Report to Congress, the National Taxpayer Advocate (“NTA”) lists the IRS’s struggle with funding and its impact on employee hiring, training, and retention as one of taxpayers’ most serious problems. See ANNUAL REPORT 2020, *supra* note 16, at 12–27.

40. As an example of a private sector partnership that successfully reduced burdens, the Treasury and the IRS worked with Code for America to facilitate the delivery of advanced child tax credit payments that were temporarily available during the calendar year 2021. See *Readout: Treasury, White House, and Code for America Host Call to Discuss Collaboration and Launch of New Bilingual and Mobile-Friendly Sign-Up Tool for Advance Child Tax Credit*, U.S. DEP’T TREASURY (Sept. 1, 2021), <https://home.treasury.gov/news/press-releases/jy0341>; Press Release, Code for Am., Code for America Launches Free Mobile-Friendly GetCTC Portal Available in English and Spanish (Sept. 1, 2021), <https://codeforamerica.org/news/code-for-america-launches-free-mobile-friendly-getctc-portal-available-in-english-and-spanish/>. Partnerships between the IRS and nonprofit organizations to minimize taxpayer burdens is a topic worthy of additional consideration beyond the scope of this Article. See generally *Finance Republicans Raise Privacy Concerns with IRS Collaboration*, MIKE CRAPO: U.S. SEN. FOR IDAHO (Dec. 16, 2021), <https://www.crapo.senate.gov/media/newsreleases/-finance-republicans-raise-privacy-concerns-with-irs-collaboration> (presenting the security concerns of several Senate Finance Committee members for the IRS collaboration with Code for America).

41. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended in scattered sections of 5 U.S.C.).

42. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521).

Privacy Act.⁴³ The current measurements are not tax specific but apply to agencies across the federal government. In the second half of Part III, we discuss the specific burdens the tax system can impose on taxpayers and how the taxpayer-rights legislation provides a source for identifying taxpayer-specific burdens the IRS should address.

Part IV turns prescriptive and provides a framework for reducing administrative burdens through mandating that the IRS prepare and release taxpayer-rights impact statements. Part IV also explores how placing framework oversight in the Office of the Taxpayer Advocate can ensure that the IRS measures and proactively reduces the burdens that prevent taxpayers from realizing essential taxpayer rights. In Part V, we return to scenario one in this Introduction and apply our framework. In doing so, we reveal how applying our approach can lead to a tax system that (1) prioritizes identifying and eliminating burdens before they harm taxpayers and (2) allows for redirecting agency efforts to mitigate burdens that may inadvertently or intentionally impinge on taxpayer rights. In Part VI, we conclude our discussion.

II. Administrative Burdens and Sludge

A. The Herd/Moynihan Administrative Burden Framework

The IRS defines taxpayer burdens as “the time and money taxpayers spend to comply with their federal tax obligations.”⁴⁴ The IRS itself estimates the tax compliance burden approximates seventy-one percent of the entire annual federal paperwork burden.⁴⁵ Researchers estimate the aggregate cost of federal tax compliance exceeds \$200 billion annually, though estimates fail to account for post-filing costs, such as time and money spent on (1) audits, (2) requests for information arising from misreporting items subject to third-party information returns, and (3) collection matters.⁴⁶

43. Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a).

44. *About Taxpayer Burden Reduction*, *supra* note 13.

45. See Sam Batkins, *Evaluating the Paperwork Reduction Act: Are Burdens Being Reduced?*, AM. ACTION F. (Mar. 29, 2017), <https://www.americanactionforum.org/testimony/evaluating-paperwork-reduction-act-burdens-reduced/>.

46. See JASON J. FICHTNER ET AL., BIPARTISAN POL’Y CTR., TAX ADMINISTRATION: COMPLIANCE, COMPLEXITY, AND CAPACITY 6 (2019), <https://bipartisanpolicy.org/download/?file=/wp-content/uploads/2019/04/Tax-Administration-Compliance-Complexity-Capacity.pdf>. These estimates also fail to reflect the time that taxpayers spend attempting to access the

While researchers and the IRS have attempted to quantify the costs of federal tax compliance, public administration scholars Professors Pamela Herd and Don Moynihan have examined in greater detail the types of costs individuals experience when interacting with government. Their holistic burdens framework reveals a truer picture of the burdens that taxpayers face throughout tax administration. In *Administrative Burden: Policymaking by Other Means*, Herd and Moynihan define administrative burden as the learning, compliance, and psychological costs that citizens experience when they interact with government.⁴⁷ Learning costs are the costs people encounter when searching for information about government-provided services.⁴⁸ Compliance costs are costs arising from complying with a program's rules and regulations.⁴⁹ Psychological costs are costs related to the stress, lack of autonomy, or stigma associated with having to learn about a program or comply with its requirements.⁵⁰

Herd and Moynihan describe how burdens can arise inadvertently or intentionally. Inadvertent burdens can arise due to officials' lack of awareness, especially when there may be a chasm between administrators and the circumstances of the people they regulate.⁵¹ Administrative burdens also are tools that political actors can use to achieve ideological goals that undermine the essential goals of the programs and harm some of our nation's most vulnerable citizens.⁵² In these instances of intentionally

IRS, either in person or by telephone. For example, the NTA reports that in FY 2020, the IRS received more than 100 million phone calls to its toll-free line, but the agency was only able to answer approximately twenty-four million of those calls. See ANNUAL REPORT 2020, *supra* note 16, at vi.

47. PAMELA HERD & DONALD P. MOYNIHAN, *ADMINISTRATIVE BURDEN: POLICYMAKING BY OTHER MEANS 2* (2018).

48. *Id.*

49. *Id.*

50. *Id.*

51. See *id.* at 16–17. See generally Leslie Book, *Bureaucratic Oppression and the Tax System*, 69 TAX LAW. 567, 569 (2016) (citing Edward L. Rubin, *Bureaucratic Oppression: Its Causes and Cures*, 90 WASH. U. L. REV. 291, 300 (2012)); Michael Lipsky, *Bureaucratic Disentitlement in Social Welfare Programs*, 58 SOC. SERV. REV. 3, 13 (1984) (describing burden disentitlement).

52. HERD & MOYNIHAN, *supra* note 47, at 8–9. As one example of this, Herd and Moynihan discuss the Trump Administration's broad efforts to impose work requirements on the receipt of a wide range of public benefits, including for recipients of Medicaid and the Supplemental Nutrition Assistance Program (food stamps). See *id.* at 116, 143. A related concept to administrative burdens is racialized burdens, which explores the experiences of how learning, compliance, and psychological costs contribute to racial inequality. See *id.* at

created burdens, the presence or creation of administrative burdens can act as an indirect method to undermine policy goals, masking objections to policies that might otherwise promote equity or racial justice.⁵³

By adopting as a starting point the individual experience with government rather than agency rules or procedures, the Herd/Moynihan framework focuses on the distributional impact of burdens, emphasizing “the individual experience of burden is distinct from the rules and process.”⁵⁴ This starting point is significant because it highlights that burdens are not equally distributed:

They are targeted toward some groups more than others. Thus, although interactions with the state can alter people’s civic skills, their ability to negotiate those interactions will also be influenced by their existing skills. Human capital—such as education, money, social networks, intelligence, psychological resources, and health—matter to how people cope with administrative burdens.⁵⁵

2. Scholars such as Herd and Moynihan and Victor Ray explore how policymakers can use these burdens to normalize and reinforce racial inequality, even in the absence of explicit or overtly racist rules or actions. *See id.* at 6; Ray et al., *supra* note 26 (manuscript at 11–12).

53. With respect to burdens directly related to issues of racial justice, see Ray et al., *supra* note 26 (exploring the intersection of burdens that directly frustrate essential individual citizenship rights and the perpetuation of disparate racial outcomes). To be sure, we do not mean to suggest that the presence of intentional burdens within the tax system always or primarily originates with politically appointed Treasury officials attempting to achieve policy objectives that Congress or other political actors have rejected. In the tax system, it is more likely that interjecting burdens between taxpayers and their statutory rights (such as the right to a hearing in the collection process) is a result of executive but nonpolitical employee decisions that emphasize minimizing short-term costs associated with collecting assessed liabilities. On the other hand, the decision to fund the IRS at inadequate levels so that the IRS is facing difficult resource decisions and to contribute to dissatisfaction with the tax system generally may be a more macro-level policy decision to generally make interactions between taxpayers and the government less pleasant and weaken the IRS. *See generally* Kiel & Eisinger, *supra* note 17. We also acknowledge that the tax system is not immune to pressure from politically appointed officials, which could trigger burdens that fall on vulnerable taxpayers. *See* Leslie Book, *Tax Administration and Racial Justice: The Illegal Denial of Tax-Based Pandemic Relief to the Nation’s Incarcerated Population*, 72 S.C. L. REV. 667, 669–70 (2021) [hereinafter Book, *Tax Administration and Racial Justice*] (discussing the Treasury Inspector General’s report of the IRS’s unexplained switch to denying COVID-19 pandemic benefits for the incarcerated).

54. HERD & MOYNIHAN, *supra* note 47, at 22.

55. *Id.* at 30.

What may be inconsequential for one individual or class of individuals may be significant for others:

[I]ndividual decisions depend on how individuals construe the world, not on objective measures of costs and benefits. This construal is shaped by contextual factors that frame burdens and interact with individual psychological processes, including cognitive biases that generate a disproportionate response to burden. This basic insight explains why burdens that seem minor and defensible when designed by the administrator can exert dramatic negative effects when experienced by a citizen.⁵⁶

Moreover, Herd and Moynihan discuss the uneven distribution of human capital across society.⁵⁷ Those with resources often have the time and money either to navigate the burdens on their own or to pay third parties to avoid the direct impact the administrative burdens present.

Not only is human capital unevenly distributed, but the stresses of poverty may exacerbate the burdens' effects. For example, people experiencing financial stress and other disruptions associated with poverty may make poorer decisions than when they are not facing stress or experiencing hardships.⁵⁸ Research that Herd and Moynihan draw on explores how the effects of poverty can lead to a scarcity of cognitive bandwidth that can prevent or hinder completion of tasks or lead to poorer decisions and outcomes.⁵⁹

Related to bandwidth concerns is the concept of clustering. As Professors Wolf and De-Shalit explore, when several conditions are present

56. *Id.* at 17.

57. *Id.* at 30.

58. Researchers have conducted studies on scarcity and cognitive impact. *See* Pub. Int. Gov't Rels. Off., Am. Psych. Ass'n, *The Psychology of Scarcity: How Limited Resources Affect Our Decisions and Behaviors* (n.d.) (fact sheet), <https://www.apa.org/advocacy/socioeconomic-status/scarcity-fact-sheet.pdf>; Ernst-Jan de Bruijn & Gerrit Antonides, *Poverty and Economic Decision Making: A Review of Scarcity Theory*, 92 *THEORY & DECISION* 5 (Mar. 9, 2021); Jirs Meuris & Carrie R. Leana, *The High Cost of Low Wages: Economic Scarcity Effects in Organizations*, 35 *RSCH. ORGANIZATIONAL BEHAV.* 143 (2015).

59. *See, e.g.*, SENDHIL MULLAINATHAN & ELДАР SHAFIR, *SCARCITY: THE NEW SCIENCE OF HAVING LESS AND HOW IT DEFINES OUR LIVES* 47, 163 (2013) (using term bandwidth to refer to cognitive capacity and the ability to pay attention and make good decisions, and emphasizing that when studying and understanding poverty, "we must recognize that [the poor] focus and they tunnel and they make mistakes; that they lack not only money but also bandwidth").

simultaneously (such as poverty and concomitant stress), “[d]isadvantages and risks compound each other and cluster together.”⁶⁰

Simply put, for people with lower incomes, lower levels of education, cognitive problems, and language barriers, administrative burdens may delay or prevent access to benefits and “exacerbate inequality.”⁶¹

While denying or delaying access to benefits may be the immediate consequence of burdens, there are costs beyond the essential loss of the benefit. When burdens impede individuals from receiving a benefit, people may sense that the government does not serve their interests. This can alienate individuals, undermine faith and trust in government,⁶² and lead the poor to feel shame about their condition.⁶³ This too can exacerbate the effect of the burdens to the loss of the benefit in question.

Herd and Moynihan are not the first to detail the concept of administrative burdens or to single out varying types of costs arising when individuals interact with the government, but they do so across a wide range of policy areas, including voting rights, Medicare, and Supplemental Nutritional Assistance Program (“SNAP,” commonly referred to as “food

60. JONATHAN WOLFF & AVNER DE-SHALIT, *DISADVANTAGE* 9–10 (2007) (proposing that governments wishing to improve the lives of the least advantaged should strive to decluster disadvantages by searching for disadvantages that compound to become corrosive disadvantages).

61. *See* HERD & MOYNIHAN, *supra* note 47, at 4, 31. An important part of Herd and Moynihan’s book is how political actors may deliberately construct administrative burdens as a complement or alternate mechanism to achieve policy goals, looking to barriers to vote and assorted work requirements in benefits provisions. *See id.* at 8–9. While politically constructed burdens are less relevant in the tax system, Herd and Moynihan do discuss the relationship between administrative capacity and the political process. *See id.* at 3–4. In particular, congressional budgeting decisions and sheer capacity are important elements for any agency. *Id.* at 31–32 (discussing congressional cuts to the IRS budget).

62. The distributional impact of additional burdens on lower income individuals is likely to contribute to recognition gaps, or “disparities in worth and cultural membership between groups in a society.” Michèle Lamont, *Addressing Recognition Gaps: Destigmatization and the Reduction of Inequality*, 83 *AM. SOCIO. REV.* 419, 421–22 (2018). Lamont recognizes the working poor may feel stigmatized in an increasingly downwardly mobile society. *Id.* at 422. Putting additional, and at times insurmountable, barriers between those individuals and benefits they are eligible to receive but not actually receiving likely contributes to disparities between socioeconomic groups. *See id.*

63. American journalist Sarah Smarsh movingly describes that poor people may blame themselves for their economic insecurities. SARAH SMARSH, *HEARTLAND: A MEMOIR OF WORKING HARD AND BEING BROKE IN THE RICHEST COUNTRY ON EARTH* 134–38 (2018) (describing the shame associated with the increased scrutiny and work requirements surrounding welfare “reform”).

stamps”).⁶⁴ Their approach has its roots in the public administration literature surrounding red tape but differs in one key respect. Red tape refers to rules, regulations, or procedures that generate a compliance burden but may not, in fact, advance a legitimate purpose the rules were intended to serve.⁶⁵ In contrast, at times administrative burdens are necessary to protect important political values, such as targeting benefits to families with household earnings under a certain amount or encouraging a more efficient use of agency resources. The IRS can justify many, although not all, of the burdens that taxpayers experience by citing to a legitimate policy objective, such as compliance or integrity.⁶⁶

B. Sludge and Sludge Audits

Related to the concept of administrative burden is “sludge,” a term coined by Professor Richard Thaler and further developed by Professor Cass Sunstein.⁶⁷ To understand sludge, it is necessary to start with its cousin, “nudge.” Thaler and Sunstein, in their popular book *Nudge: Improving Decisions About Health, Wealth, and Happiness*, refer to nudges as “any aspect of the choice architecture that alters people’s behavior in a predictable way without forbidding any options or significantly changing their economic incentives.”⁶⁸ The idea generally was to focus on low-cost ways to improve human health and happiness through things like helpful text reminders of appointments, default rules, and good signage. More recently, Sunstein refers to nudges as “private or public initiatives that steer people in particular directions but that also allow them to go their own way.”⁶⁹

64. See *supra* note 47 and accompanying text.

65. BARRY BOZEMAN, BUREAUCRACY AND RED TAPE 12 (2000).

66. See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., REP. NO. 2021-30-051, THE EARNED INCOME TAX CREDIT EXAMINATION COMPLIANCE STRATEGY CAN BE IMPROVED (2021), <https://www.treasury.gov/tigta/auditreports/2021reports/202130051fr.pdf> (emphasizing the difficulty the IRS has in verifying on an ex ante basis whether taxpayers are eligible for claimed credits).

67. See generally Richard H. Thaler, Editorial, *Nudge, Not Sludge*, 361 SCI. 431, 431 (2018) [hereinafter Thaler, *Nudge, Not Sludge*] (coining “sludge”).

68. CASS SUNSTEIN & RICHARD THALER, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 6 (2008).

69. Cass R. Sunstein, *Misconceptions About Nudges*, 2 J. BEHAV. ECON. FOR POL’Y 61, 61 (2018).

In 2018, Thaler, in a brief article in the journal *Science*, coined the term “sludge” to refer to “activities that are essentially nudging for evil.”⁷⁰ Sunstein builds on the term in two articles, *Sludge and Ordeals*⁷¹ and *Sludge Audits*.⁷² In *Sludge and Ordeals*, Sunstein refers to sludge as “the kind of friction, large or small, that people face when they want to go in one or another direction.”⁷³ Sludge can arise in experiences with a wide range of actors, including banks, universities, and, of course, government agencies.⁷⁴ Defined in this fashion, sludge could, in theory, be used to help, as in imposing waiting periods for gun purchases or marriage licenses or requiring an additional confirmation before nonrefundable purchases in online shopping.⁷⁵ In the later *Sludge Audits*, Sunstein slightly modifies the term sludge to shift it from its status as a subset of nudges by focusing more squarely on burdens that are either deliberately or unintentionally imposed and that “have a negative valence.”⁷⁶ Burdens that inhibit people from acting recklessly or impulsively should be characterized as helpful nudges, not as sludge. In distinguishing the term sludge from nudge, Sunstein acknowledges and cites Herd and Moynihan’s work and their discussion of

70. Thaler, *Nudge, Not Sludge*, *supra* note 67.

71. Cass R. Sunstein, Essay, *Sludge and Ordeals*, 68 DUKE L.J. 1843 (2019) [hereinafter Sunstein, *Sludge and Ordeals*].

72. Sunstein, *Sludge Audits*, *supra* note 18, at 1. It is also the topic of his book. See SUNSTEIN, *SLUDGE: WHAT STOPS US FROM GETTING THINGS DONE*, *supra* note 18.

73. Sunstein, *Sludge and Ordeals*, *supra* note 71, at 1850. After defining the term in this way, Sunstein drops a footnote. *Id.* at 1850 n.25. He notes the possible difficulty in cleanly distinguishing between sludges and nudges:

I am bracketing here the precise relationship between nudge and sludge. It is most useful to see both terms as descriptive rather than normative. It should be clear that nudges can be for good or for bad; on the bad, see George Akerlof & Robert Shiller, *Phishing for Phools* (2015) (describing, among other examples, the strategies that Cinnabon founder[s] Rich and Greg Komen developed to push people to making the “unhealthy” decision to eat a Cinnabon). It should also be clear that sludge can be for good or for bad. It is reasonable to see sludge as a kind of nudge, in the form of increased friction, which can nudge people in a helpful or unhelpful way. If people are nudged to choose healthy over unhealthy food, through good choice architecture, they might face sludge when they seek unhealthy food. To be sure, more work remains to be done on definitional issues. My hope is that the examples will be sufficient for purposes of the current discussion.

Id.

74. See Sunstein, *Sludge Audits*, *supra* note 18, at 15.

75. See Sunstein, *Sludge and Ordeals*, *supra* note 71, at 1868–69.

76. See Sunstein, *Sludge Audits*, *supra* note 18, at 7.

administrative burdens.⁷⁷ According to Sunstein, the concept of administrative burdens is “much broader” than sludge.⁷⁸ Administrative burdens may be “excessive, insufficient or optimal.”⁷⁹ In contrast, “sludge is bad by definition; it consists of *excessive* frictions.”⁸⁰

As Sunstein acknowledges,⁸¹ though does not fully explore, the term that does a great deal of work in the definition is “excessive.” Because burdens may serve important goals, such as eligibility screening in a program that targets benefits to those with certain characteristics (such as income or household composition), it is not necessarily clear that the presence of a burden is objectionable. This leads to a normative question: what justifies the burden? After all, reasonable people could differ on whether a burden that deterred some eligible people from receiving a benefit was justified if it in fact contributed to deterring or detecting ineligible recipients.⁸²

Despite not resolving that question in all instances, Sunstein prescribes as a necessary first step that government agencies, universities, and private actors must conduct regular “sludge audits,” with the goal of improving the experiences of people with whom they interact.⁸³ Rather than provide a detailed roadmap for how to conduct those audits, and whether in all instances the actor should remove or reduce the sludge, Sunstein provides a fairly high-level description to at least generate heightened awareness that sludge may be present: “I have noted that Sludge Audits can take both formal and informal forms. They might involve a great deal of quantification, or they might be more qualitative. In either case, three reforms would do a great deal to improve the current situation.”⁸⁴

In acknowledging that a pure balancing of burdens’ costs and benefits is both practically difficult and may not lead to an answer to the normative question as to whether the burdens are excessive, Sunstein argues the audit

77. *Id.* at 4.

78. *Id.*

79. *Id.* at 5.

80. *Id.*

81. *Id.* at 4–5.

82. Interestingly, in expanding on this notion, Sunstein uses the Earned Income Tax Credit system to illustrate the challenge with determining whether a burden is excessive or justified in light of its ability to help separate eligible from ineligible claimants. *Id.* at 14–15. We expand on sludge and the Earned Income Tax Credit later in this Article. *See infra* note 178.

83. Sunstein, *Sludge Audits*, *supra* note 18, at 15–17.

84. *Id.* at 16.

itself can help focus on the burdens' proportionality.⁸⁵ Moreover, the very act of auditing burdens itself may produce a benefit in that, in Sunstein's view, it would be "*information forcing*" and create incentives to more properly measure impact and to create an awareness that "the existing level of sludge is not in [public and private institutions'] interests."⁸⁶

III. IRS Approaches to Measure and Address Privacy Intrusions and Burdens

Having provided some context for how scholars outside the tax system both define administrative burden and suggest a framework for reducing excessive burdens, in Section III.A we discuss current laws requiring federal agencies to address burdens on the public and how the IRS handles those provisions. Because of the tax system's scope, some of these broad-based burden provisions have a direct—if not necessarily significant—impact on the tax system. Of the current broad-based burden-protection provisions, the provisions governing privacy offer the closest model to the system we propose for appropriately targeted reductions to the burdens of the tax system. We address these provisions first, in Section III.A.

After describing the current framework for burden protection and how it applies to the IRS, in Section III.B we demonstrate the current framework's failure to capture and to provide a means for reducing the full measure of

85. Sunstein, like Herd and Moynihan, focuses on the distributive impact of burdens: As a practical matter, the burden of sludge is often borne principally by poor people, and that is a burden that they cannot readily bear. A central reason for this is that poor people must focus on a wide range of immediately pressing problems. If a private or public institution is asking poor people to navigate a complex system or to fill out a lot of forms, they might give up. But the problem is hardly limited to the poor. When programs are designed to benefit the elderly, sludge might be especially damaging, at least if the population suffers from reduced cognitive capacity. Something similar can be said for immigrants or for people who suffer from a language barrier. For different reasons, the problem of sex equality deserves particular attention. Because women do a disproportionate amount of administrative work—running the household, arranging meals, taking care of children—a significant reduction in sludge could address a pervasive source of social inequality, with ramifying effects on other areas of life.

Id. at 12; *see also id.* at 4 (“[Sludge audits] can promote economic development and growth. In many contexts, efforts to reduce sludge will have disproportionate benefits for the most disadvantaged members of society; they can be an engine of opportunity.”).

86. *Id.* at 16.

administrative burdens. The primary failure of the non-tax-specific burden-reduction provisions stems from the need, missing from the broad-based burden-reduction provisions, to address burden reduction through the lens of taxpayer rights.

A. Existing Approaches for the IRS

1. Privacy Act and Privacy Impact Assessments

Unlike the Regulatory Flexibility Act (“RFA”)⁸⁷ and the Paperwork Reduction Act (“PRA”)⁸⁸ described in sections 2 and 3 below, the statutory provisions designed to protect privacy do not address burden reduction so much as they do intrusion reduction. The congressional concerns regarding privacy result from the same urge to protect citizens from an overly intrusive government;⁸⁹ however, the focus and the system of assessment with the privacy provisions approach the problem from a slightly different angle. Two provisions, the Privacy Act and Privacy Impact Assessments (“PIAs”), provide protection broadly across government agencies.⁹⁰ The Privacy Act operates on an individual level, while PIAs operate on a broader, systemic level. These provisions provide the closest model for the proposal in this Article for development of a system to protect taxpayer rights.

The Privacy Act of 1974 is a companion provision of the Administrative Procedure Act (“APA”) complementing the Freedom of Information Act (“FOIA”).⁹¹ The Privacy Act has roots in the Bill of Rights. The preface to

87. Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended in scattered sections of 5 U.S.C.).

88. Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812 (codified as amended at 44 U.S.C. §§ 3501–3521).

89. *See generally* U.S. DEP’T JUST., OVERVIEW OF THE PRIVACY ACT OF 1974, at 1 (2020 ed.) [hereinafter OVERVIEW OF THE PRIVACY ACT], https://www.justice.gov/Overview_2020/download (“In the words of the [Privacy Act] bill’s principal sponsor, Judiciary Chairman Senator Sam Ervin, ‘[i]f we have learned anything in this last year of Watergate, it is that there must be limits upon what the Government can know about each of its citizens.’” (second alteration in original)).

90. The disclosure provisions of I.R.C. § 6103 do provide specific guidance to the IRS regarding the safeguarding of taxpayer information, but they seek to address a slightly different issue, one that is both broader and narrower than the issue addressed by the Privacy Act and PIAs. *See generally* I.R.C. § 6103.

91. *See* Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified as amended at 5 U.S.C. § 552a).

the Senate Committee’s “Legislative History of the Privacy Act” source book stated that

[t]he Bill of Rights guarantees to each American protections which we equate with specific rights of citizenship in a free society. This legislation is a major first step in a continuing effort to define the “penumbra” of privacy which emanates from specific guarantees in the Bill of Rights and which helps to give them life and substance as recognized in *Griswold v. Connecticut*.⁹²

As applied to the IRS, the Privacy Act seeks to regulate the IRS’s recordkeeping and disclosure practices. In passing the Privacy Act, Congress’s goal was

curbing the illegal surveillance and investigation of individuals by federal agencies that had been exposed during the Watergate scandal [and the] potential abuses presented by the government’s increasing use of computers to store and retrieve personal data by means of a universal identifier—such as an individual’s social security number.⁹³

The Privacy Act establishes “fair information practices” that require the IRS to (1) maintain only such information “about an individual that is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute”,⁹⁴ (2) “collect information to the greatest extent

92. S. COMM. ON GOV’T OPERATIONS & H. COMM. ON GOV’T OPERATIONS, 94TH CONG., LEGISLATIVE HISTORY OF THE PRIVACY ACT OF 1974, S. 3418 (PUBLIC LAW 93-579): SOURCE BOOK ON PRIVACY at v (2d Sess. 1976) [hereinafter SOURCE BOOK ON PRIVACY] (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)). This language also appears in the Internal Revenue Manuals, with a discussion of the Privacy Act as interpreted by the IRS. See IRM 10.5.6.1.1 (Jan. 31, 2020). The Senate’s source book provides a legislative history of the Privacy Act. The Department of Justice archives suggest that because this bill passed on the final week of the Ninety-Third Congress with no conference committee convened to reconcile the differences in the bills of the two chambers, the original reports may provide limited assistance in understanding the final statute, and a more reliable source of legislative history exists in a staff-prepared document entitled “Analysis of House and Senate Compromise Amendments to the Federal Privacy Act.” OVERVIEW OF THE PRIVACY ACT, *supra* note 89, at 4 (citing 120 CONG. REC. 40,405–09, 40,881–83 (1974), reprinted in SOURCE BOOK ON PRIVACY, *supra*, at 858–68, 987–94).

93. *Overview of the Privacy Act*, U.S. DEP’T JUST. ARCHIVES, <https://www.justice.gov/archives/opcl/policy-objectives> (Feb. 24, 2021).

94. 5 U.S.C. § 552a(e)(1).

practicable directly from the [taxpayer]”;⁹⁵ and (3) maintain the records it uses in making a determination concerning a taxpayer “with such accuracy, relevance, timeliness and completeness as is reasonably necessary to assure fairness to the individual in the determination.”⁹⁶

To carry out its responsibilities and process requests under the FOIA and the Privacy Act, as well as the specific limitations placed on maintaining the privacy of taxpayer information pursuant to I.R.C. § 6103, the IRS has adopted procedural regulations and established a separate disclosure organization dedicated to these issues.⁹⁷

Section 208 of the E-Government Act of 2002 requires agencies to conduct PIAs for electronic information systems and collections of information.⁹⁸ The concept of impact assessments arose in the 1970s with the Environmental Impact Statement.⁹⁹ The PIA is a systematic method of guiding government agencies through a process of assessing privacy risks during the early stages of developing a new system of information technology that seeks to collect new information or seeks to handle collections of personally identifiable information, as well as throughout IT

95. *Id.* § 552a(e)(2).

96. *Id.* § 552a(e)(5).

97. *See* 26 C.F.R. § 601.702; IRM 10.5.6.1 (Jan. 31, 2020). Authority to make FOIA determinations about records under their jurisdiction is given to “[t]he Director, Governmental Liaison, Disclosure, and Safeguards (GLDS) and their delegate.” *See* IRM 11.3.13.1.2 (Oct. 5, 2021). As with the matters covered by the FOIA, disclosure and the Privacy Act, the PIA is housed in the Privacy, Policy and Compliance (“PPC”) office of the Privacy, Governmental Liaison, and Disclosure (“PGLD”) office. *See* IRM 10.5.6.1 (Jan. 31, 2020) (“The PPC office, under PGLD, is the program office responsible for oversight of the Servicewide Privacy Act policy, recordkeeping matters, access and amendment matters, accounting for disclosures program, and personnel records matters. PGLD’s Disclosure office is responsible for operational casework related to requests for access to and disclosure of Privacy Act information via the Central Processing Unit.”). *See generally* IRM 10.5.6.3.1 (Jan. 31, 2020) (detailing PPC’s responsibilities). The PIA and IRS Privacy and Civil Liberties Impact Assessment (“PCLIA”) process is housed under the Privacy Compliance Assurance program, for which the Director of the PPC is responsible. *See* IRM 10.5.2.1.3 (Jan. 24, 2020); IRM 10.5.2.2 (Jan. 24, 2020). The specific creation of PCLIA (which is the term the IRS seems to prefer for PIAs) falls to a PCLIA preparer who is designated by the System Owner, and that starts the process. *See generally* IRM 10.5.2.2.3 (Jan. 24, 2020). The full chain of creation/approval is listed in IRM 10.5.2.2.3. *See id.* The IRS has stated that the PPC is responsible for conducting and publishing PCLIA. INTERNAL REVENUE SERV., U.S. DEP’T OF TREASURY, PUB. NO. 5499, PRIVACY PROGRAM PLAN 5–6 (2020).

98. E-Government Act of 2002, Pub. L. No. 107-347, § 208(b), 116 Stat. 2899, 2922.

99. Roger Clarke, *Privacy Impact Assessment: Its Origins and Development*, 25 COMPUT. L. & SEC. REV. 123, 125 (2009).

systems development.¹⁰⁰ This process enables agencies to determine how a project will affect individuals' privacy and whether the project's objectives can be met while also protecting privacy.

The PIA has three main goals:

1. ensure conformance with applicable legal, regulatory, and policy requirements for privacy;
2. identify and evaluate risks of privacy breaches or other such incidents; and
3. identify appropriate privacy controls to mitigate unacceptable risks.¹⁰¹

Through enforcement of the Privacy Act and assessment of systems using PIAs, government agencies provide protection from unwarranted intrusion of individual information. The goals of information assessment as carried out in PIAs provide a model for the goals of assessing how a provision protects—or fails to protect—taxpayer rights.

2. *Regulatory Flexibility Act*

Congress recognized the burdens that regulations can impose on small businesses. Without giving sufficient thought to the special circumstances of small business, regulation writers within administrative agencies could make assumptions, based on their experience with larger entities, that could have a crippling impact on small businesses. To address this concern, Congress passed the RFA to force the writers of regulations to consider and address small-business concerns in writing regulations that will impact small entities.¹⁰² The RFA defines “small entities” to include small businesses, small organizations, and small governmental jurisdictions.¹⁰³

100. See OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, M-03-22, OMB GUIDANCE FOR IMPLEMENTING THE PRIVACY PROVISIONS OF THE E-GOVERNMENT ACT OF 2002 (2003), <https://www.justice.gov/opcl/page/file/1131721/download>.

101. See *id.*

102. See generally Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (codified as amended in scattered sections of 5 U.S.C.).

103. 5 U.S.C. § 601(6). Small businesses include businesses that satisfy the Small Business Administration's size standards. *Id.* § 601(3); see also 15 U.S.C. § 632 (“[A] small-business concern . . . shall be deemed to be one which is independently owned and operated and which is not dominant in its field of operation.”). Most businesses likely will be classified as “small” under those standards. Typically, this group would include business entities with under \$25 million in annual gross receipts. See generally Regulations

When an agency makes a regulation available for public comment, it must make an initial regulatory flexibility analysis.¹⁰⁴ When publishing the final rule, the agency must publish a final regulatory flexibility analysis.¹⁰⁵ Through the initial and final regulatory flexibility analyses, the agency must describe the rule's effect on small businesses, analyze alternatives that might minimize adverse economic consequences, and make its analyses available for public comment.¹⁰⁶ The RFA contains an exception that relieves an agency of performing a regulatory flexibility analysis if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."¹⁰⁷

Legislative history of the Small Business Regulatory Enforcement Fairness Act of 1996¹⁰⁸—an amendment to the RFA—reflects congressional concerns regarding agencies "neglecting their duties under the RFA through casual agency certifications of non-applicability or insufficient analyses."¹⁰⁹ Judicial review exists for certain RFA provisions.¹¹⁰ If the agency takes the position that a regulation will not have a significant impact on small business entities, it must attach a statement of the factual basis supporting that conclusion.¹¹¹ The RFA "requires nothing more than that the agency file a [final regulatory flexibility analysis]

Regarding the Transition Tax Under Section 965 and Related Provisions, 84 Fed. Reg. 1838, 1873 n.1 (Feb. 5, 2019) (codified at 26 C.F.R. pt. 1) (defining a "small business" as "a multinational corporation with less than \$25 million in gross receipts").

104. 5 U.S.C. § 603(a).

105. *Id.* § 604(a).

106. *Id.* § 603(a)–(d); *id.* § 604(a)–(b).

107. *Id.* § 605(b).

108. Contract with America Advancement Act of 1996, Pub. L. 104-121, 110 Stat. 847 (1996) (enacting the Small Business Regulatory Enforcement Fairness Act of 1996).

109. *W. Va. Chamber of Com. v. Browner*, No. 98-1013, 1998 U.S. App. LEXIS 30621, *11 (4th Cir. Dec. 1, 1998).

110. 5 U.S.C. § 611(a). Although judicial review is possible, the *Silver* case demonstrates the limits of judicial review. *See Silver v. Internal Revenue Serv.*, 531 F. Supp. 3d 346 (D.D.C. 2021). After denying the IRS's motion to dismiss a taxpayer's challenge to a regulation based on the RFA, the district court granted summary judgment to the IRS because the taxpayer failed to meet the standing test by showing a concrete interest that could have been better protected had the IRS met the procedural requirements of the RFA. *Silver v. Internal Revenue Serv.*, No. 19-CV-247 (APM), 2019 WL 7168625, at *3 (D.D.C. Dec. 24, 2019); *Silver*, 531 F. Supp. 3d at 363–66.

111. *See* 5 U.S.C. § 605(b).

demonstrating a ‘reasonable, good-faith effort to carry out [RFA’s] mandate.’”¹¹²

3. Paperwork Reduction Act

The Paperwork Reduction Act (“PRA”) is another broad-based burden-reduction provision that also applies to the IRS.¹¹³ Because of the nature and scope of the IRS’s work, the PRA plays a much greater role in its operations than does the RFA.

The PRA seeks to “ensure the greatest possible public benefit from and maximize the utility of information created, collected, maintained, used, shared and disseminated by or for the Federal Government.”¹¹⁴ Another goal of the PRA is to “improve the quality and use of Federal information to strengthen decisionmaking, accountability, and openness in Government and society.”¹¹⁵ The burden of meeting the PRA’s goals falls on the federal agencies seeking to collect information.¹¹⁶ To meet those goals, the agencies should devise systems that effectively collect information and make it available to users inside and outside of the federal government.¹¹⁷

In seeking to satisfy the requirements of the PRA, agencies must meet two primary responsibilities prior to engaging in information collection: (1) providing the public with an opportunity to comment on the information-gathering activity and (2) submitting the proposal for collection of

112. U.S. Cellular Corp. v. FCC, 254 F.3d 78, 88 (D.C. Cir. 2001) (second alteration in original) (quoting Alenco Commc’ns, Inc. v. FCC, 201 F.3d 608, 625 (5th Cir. 2000)).

113. For more detailed discussion of the PRA, see Adam M. Samaha, *Death and Paperwork Reduction*, 65 DUKE L.J. 279 (2015) (collecting articles on the history and application of the PRA in footnote 11). Professor Samaha begins his article by pointing out that in 2014, the IRS estimated that “individual taxpayers would spend 1.9 billion hours preparing their federal tax returns.” *Id.* at 280.

114. 44 U.S.C. § 3501(2). For a brief discussion of the PRA and its interaction with the IRS, see Sam Wice, *The Paperwork Reduction Act and Why You May Be Able to File Your Taxes on a Napkin in 2021*, YALE J. ON REGUL.: NOTICE & COMMENT (Oct. 29, 2020), <https://www.yalejreg.com/nc/the-paperwork-reduction-act-and-why-you-may-be-able-to-file-your-taxes-on-a-napkin-in-2021/>.

115. 44 U.S.C. § 3501(5).

116. The PRA applies to almost all but not all federal agencies. The PRA’s scope excludes, inter alia, the Federal Election Commission, the General Accounting Office, the D.C. Government, territorial governments and “[g]overnment-owned contractor-operated facilities.” 44 U.S.C. § 3502(1); see also *Kuzma v. U.S. Postal Serv.*, 798 F.2d 29, 32 (2d Cir. 1986) (holding the U.S. Postal Service exempt from the PRA but not the Postal Rate Commission).

117. 44 U.S.C. § 3506(b).

information to the Office of Information and Regulatory Affairs (“OIRA”) within the Office of Management and Budget (“OMB”).¹¹⁸

The OMB defines “information” as “any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media.”¹¹⁹ The categories of information within this definition clearly include essentially all the information-gathering returns and forms used by the IRS.¹²⁰ The definition of “person” in the PRA statute does not vary greatly from the definition of person in the Internal Revenue Code.¹²¹

Both mandatory and voluntary collection of information is subject to the PRA requirements.¹²² Not all information gathering by agencies triggers the PRA provisions. Certain actions do not count as information gathering, and certain items do not count as information.¹²³ Generally, an agency can gather information in public meetings, including online versions of public meetings, without triggering the PRA.¹²⁴ Case-specific information gathered by agencies does not count as information for purposes of PRA.¹²⁵ So, for example, while the IRS would need approval to establish a return requirement, it would not need approval under the PRA to request information from a specific taxpayer in connection with an audit of that individual.

While the PRA requires agencies to estimate the amount of time it takes to comply with a request for information, the determination of the item

118. For more information on the OIRA and the role it plays in this process, see Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013).

119. 5 C.F.R. § 1320.3(h).

120. *See generally id.* § 1320.3(c). Because the PRA applies identical questions imposed on ten or more persons within a twelve-month period, it is hard to imagine a tax return form that would not be covered.

121. *Compare* 44 U.S.C. § 3502(10) (defining “person” as “an individual, partnership, association, corporation, business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or a political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision”), *with* I.R.C. § 7701(a)(1) (defining “person” as meaning and including “an individual, a trust, estate, partnership, association, company or corporation”).

122. *See* 44 U.S.C. § 3502(3); 5 C.F.R. § 1320.3(c).

123. *See* 5 C.F.R. § 1320.3(c), (h).

124. *See id.* § 1320.3(h)(8).

125. *See id.* § 1320.3(h)(1).

being timed is fairly narrow.¹²⁶ The time measured includes reading instructions; searching for information needed to answer the information request; and filling out, reviewing, and returning the forms.¹²⁷ The PRA calculation of time does not include researching background information such as statutes or regulations, traveling to the government office when necessary, waiting in line, or engaging in similar ancillary actions that may be necessary in order to comply.¹²⁸

For information subject to the PRA, the agency must provide the opportunity for public comment before making the request.¹²⁹ It does this by developing an information-gathering request and publishing the request in the Federal Register sixty days before seeking the information.¹³⁰ The notice must contain certain specific guidance to the public, seeking comment on the necessity of gathering the proposed information, the accuracy of the agency's burden evaluation, the quality and clarity of the information request, and suggestions on how to alter the request to reduce its burden.¹³¹ Once the comment period ends, the agency must review and evaluate the responses it receives to determine if it should alter its request.¹³² At that point, the agency publishes a second notice advising the public that the request has gone to the OMB for review of the request, the comments, and any proposed change.¹³³ This second notice initiates another comment period, providing the public the opportunity to comment to the OMB on the request during the thirty-day period of its consideration.¹³⁴

126. For a discussion of the IRS practice of calculating the burden of the forms it creates, see INTERNAL REVENUE SERV., U.S. DEP'T OF TREASURY, PUBL'N NO. 13315, TAX COMPLIANCE BURDEN (2018), <https://www.irs.gov/pub/irs-soi/d13315.pdf> (prepared by IRS employees from the offices of the Research, Applied Analytics and Statistics Division and the Wage and Investment Tax Forms and Publications Division). See also Samaha, *supra* note 113, at 280–81 (discussing the time and dollar estimates attributed to tax forms and the manner in which the IRS calculates these measures).

127. See 44 U.S.C. § 3502(2).

128. See Samaha, *supra* note 113, at 286–87, 287 n.34.

129. 44 U.S.C. § 3506(c)(2).

130. *Id.* § 3506(c)(1)–(2). Many of the requests will draw few if any comments because of their routine nature or because no party has a sufficient financial or other interest in the information request. See Samaha, *supra* note 113, at 288 (“The latest IRS proposal for individual income tax forms drew a grand total of zero public comments after notice in the *Federal Register*.”).

131. See 44 U.S.C. § 3506(c)(2).

132. *Id.* § 3507(a)(1)(B).

133. *Id.* § 3507(a)(1)(D).

134. *Id.* § 3507(b).

An agency can shorten this process under certain circumstances if the agency can meet the criteria for a generic or expedited review imposed by the OIRA.¹³⁵ These abbreviated procedures recognize that some requests seek routine information that imposes a relatively low burden and that the agency can demonstrate that the specific situation requires exigency.¹³⁶ The OMB review of the information request seeks to ensure that the requested information is necessary to agency goals and gathers the information in the least intrusive manner and at the lowest cost.¹³⁷ In addition to the general review, the OIRA looks at the request to ensure that it follows existing laws and regulations.¹³⁸

B. The Need to Add Protection of Taxpayer Rights to Existing Approaches

The current system, which requires the IRS to determine (1) how its regulations impact small businesses, (2) how it imposes paperwork burdens, and (3) how it intrudes on taxpayers' privacy, does nothing to provide similar guidance to ensure that the IRS complies with taxpayer rights. In I.R.C. § 7803(a)(3), Congress mandates that the Commissioner of the Internal Revenue Service ensure that IRS employees act in accord with the taxpayer rights enumerated in that provision.¹³⁹ However, it provides no mechanism similar to the RFA or the PRA to guide IRS employees toward accomplishment of the goal established by the statute.

Without more concrete guidance, the IRS lacks a systemic approach to ensuring that its actions protect taxpayer rights. The IRS makes decisions in writing regulatory and sub-regulatory guidance, producing forms, and establishing internal guidance. In doing so, the IRS needs a procedural framework for ensuring that its decisions undergo the same type of testing with respect to taxpayer rights as they would in securing the protection of small business or in reducing the paperwork burden. At present, these rights exist as aspirational goals but without a mechanism for requiring the IRS to assess the impact of its decisions on taxpayer rights. Using a rights-based assessment system, the IRS could identify systemic administrative burden

135. *See id.* § 3507(j).

136. *See id.*

137. *See id.* § 3501.

138. *See id.* § 3501(8).

139. I.R.C. § 7803(a)(3).

concerns expressed by Herd and Moynihan, as well as create a basis for the sludge audits suggested by Sunstein.¹⁴⁰

What do we mean by a rights-based analysis? As noted earlier, I.R.C. § 7803(a)(3) requires the Commissioner to ensure “that employees of the Internal Revenue Service are familiar with and act in accord with taxpayer rights as afforded by other provisions of this title” with respect to all the rights afforded taxpayers in title 26 of the Code, including

- (A) the right to be informed,
- (B) the right to quality service,
- (C) the right to pay no more than the correct amount of tax,
- (D) the right to challenge the position of the Internal Revenue Service and be heard,
- (E) the right to appeal a decision of the Internal Revenue Service in an independent forum,
- (F) the right to finality,
- (G) the right to privacy,
- (H) the right to confidentiality,

140. In addition to looking at the RFA and the PRA as models for requiring decisions to consider taxpayer rights, another system that could be analyzed is the statutory structure for allowing agencies to charge user fees. *See* 31 U.S.C. § 9701. This statute sets up a scheme in a setting where cost-benefit analysis collides with administrative burden. *Id.* Federal agencies may establish user fees at “full cost” for services that convey a “special benefit” to a specific recipient. OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB CIRCULAR NO. A-25 REVISED: MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS: USER CHARGES pt. 6.a (2017) [hereinafter OMB USER CHARGES], <https://www.whitehouse.gov/wp-content/uploads/2017/11/Circular-025.pdf>. The fee must reflect the value of the service to the recipient while being fair. 31 U.S.C. § 9701(b)(1), (b)(2)(B). This system is based, in part, on the specific public policy or interest served. *See id.* § 9701(b)(C); OMB USER CHARGES, *supra*, at pt. 6. However, agencies can request a waiver from the full cost requirement from the OMB. *Id.* at pt. 6.c. Agencies must also update their fees every two years. T.D. 9820, 2017-32 I.R.B. 178. As with RFA and PRA, the IRS may not always make an appropriate biennial assessment but must make one that allows an analysis of the factors set out in the statute. *See id.*; 31 U.S.C. § 9701(b). In proposing new fees, the IRS requires its business units to consider the “[e]ffect of the user fee on low-income taxpayers,” the effect “on voluntary compliance, taxpayer burden, and taxpayer rights,” and the “[e]xpected change in demand for the service resulting from the proposed fee.” IRM 1.35.19.15(2)(d)–(f) (Nov. 8, 2012). Thus, if applied correctly, potential user fees identified by the IRS should incorporate an administrative burden analysis, and if that analysis shows the administrative burden to be excessive, the user fee should not be proposed.

- (I) the right to retain representation, and
- (J) the right to a fair and just tax system.¹⁴¹

There has been, and will continue to be, litigation about the remedies available to taxpayers under this section.¹⁴² But at a minimum, these ten rights, along with the explanatory language for each right set out in Publication 1 of the IRS's explanatory document *Your Rights as a Taxpayer*, afford a basis for analyzing whether the IRS's actions create an unacceptable risk that these principles or specific statutory protections will be violated.¹⁴³ By incorporating this analysis into the administrative-burden framework proposed by this Article, IRS employees will be required to identify and address those risks prior to implementing an initiative, as well as to periodically identify and address those risks throughout the initiative's implementation.¹⁴⁴

The order of the ten taxpayer rights in I.R.C. § 7803(a)(3) provides a road map for such analysis. For example, the first right, the *right to be informed* embraces the fundamental principle of due process that the government must provide notice of its actions to affected persons. Thus, if the IRS is to hold taxpayers accountable, it must inform taxpayers what it expects them to do, the manner in which they should do it, and the timeframe within which it expects them to do it. The manner in which the IRS informs taxpayers of its expectations implicates the second right, the

141. I.R.C. § 7803(a)(3).

142. See generally Leandra Lederman, *Is the Taxpayer Bill of Rights Enforceable?* (Ind. Univ. Maurer Sch. of L., Working Paper No. 404, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3365777 (concluding that there is no cause of action for violations of the statutory rights); Fogg, *Can the TBOR Assist?*, *supra* note 14 (discussing several cases in which parties have sought relief based on the Taxpayer Bill of Rights); Alice G. Abreu & Richard K. Greenstein, *The U.S. Taxpayer Bill of Rights: Window Dressing or Expression of Justice?*, 4 J. TAX ADMIN. 25 (2018) (discussing normative remedies available for violations of taxpayer rights).

143. See generally INTERNAL REVENUE SERV., PUBL'N 1, YOUR RIGHTS AS A TAXPAYER (rev. 2017), <https://www.irs.gov/pub/irs-pdf/p1.pdf> [hereinafter IRS PUBLICATION 1]. In Taxpayer Bill of Rights I, Congress required the IRS to prepare a statement of taxpayer rights and IRS obligations and distribute it to taxpayers when contacting them regarding the determination of tax or collection of tax. Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 6227, 102 Stat. 3342, 3731 (Nov. 10, 1988). Publication 1 fulfills that requirement. See generally IRS PUBLICATION 1, *supra*.

144. For a proposal that focuses on rulemaking under the APA as a way to operationalize taxpayer rights, requiring the IRS to consider the impact of proposed regulations and subregulatory guidance on taxpayer rights, see Book, *Giving Taxpayer Rights a Seat*, *supra* note 14.

right to quality service. If the IRS informs taxpayers of its expectations in vague, obscure, or even contradictory language, or via a communication channel that is inaccessible or presents challenges to the affected taxpayer population, the IRS has violated these two rights.¹⁴⁵ A similar violation occurs where the IRS issues notices that are dense, complex, or misleading.¹⁴⁶ Moreover, if the IRS fails to establish timely and accessible processes for taxpayers to obtain clarification about its expectations, including processes that are designed to meet the needs of the specific taxpayer population impacted by the government action, these rights are violated.¹⁴⁷ Thus, a rights-based administrative burden analysis requires the IRS to outline the education, outreach, communication, and taxpayer service requirements for the proposed initiative.

Designing initiatives that comport with the *right to be informed* and the *right to quality service* is a prerequisite to taxpayers exercising other rights, including their *right to challenge the IRS and be heard*. Taxpayers cannot raise their objections to the IRS's actions if they do not know the basis for that action and cannot reach the agency to discuss the matter. This right must be satisfied if taxpayers' *right to pay no more than the correct amount of tax* is not to be undermined. Closely related is the *right to appeal an IRS decision to an independent forum*. The explanatory language in Publication 1 makes clear that the independent forum not only encompasses judicial review, but also the IRS Independent Office of Appeals.¹⁴⁸ Initiatives that

145. See *infra* Section V.A for a discussion of how the IRS's timing and manner of notifying Social Security recipients about their deadline for informing the IRS about eligible dependents for economic impact payments violated the right to be informed.

146. See, e.g., Keith Fogg, *Misleading Taxpayers with Collection Letter*, PROCEDURALLY TAXING (Dec. 2, 2016), <https://procedurallytaxing.com/misleading-taxpayers-with-collection-letter/>.

147. The IRS already struggles to provide accessibility to taxpayers. During the 2021 filing season, the IRS received over 167 million calls on all its lines, up 294% from 2018; only 15.67 million of those calls reached a live assistor. NAT'L TAXPAYER ADVOC., OBJECTIVES REPORT TO CONGRESS: FISCAL YEAR 2022, at 9 (2021) [hereinafter OBJECTIVES REPORT 2022], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/06/JRC22_FullReport.pdf. On the Form 1040 phone line, which is the main phone number for individual income tax assistance, the IRS received approximately eighty-five million calls, up 978% from the 2018 filing season, with only 3% reaching a live assistor. *Id.*

148. See IRS PUBLICATION 1, *supra* note 143. Prior to the Taxpayer Bill of Rights, courts had held that the right to an administrative appeal before the IRS was discretionary. See *Luhring v. Glotzbach*, 304 F.2d 560, 565 (4th Cir. 1962). That has not changed following the codification of the Taxpayer Bill of Rights. *Facebook, Inc. v. IRS*, No. 17-cv-06490-LB, 2018 WL 2215743, at *7 (N.D. Cal. May 14, 2018). However, the official IRS explanation

do not properly inform taxpayers in clear, prominent language of their right to an administrative appeal or to judicial review, and of the time frame and manner of making an appeal, violate this right. A rights-based administrative burden analysis would require the proposed initiative to identify the appeal rights implicated and to describe the communication strategy, materials, notices, and employee training required to protect that right.

The *right to privacy* and the *right to a fair and just tax system* both specifically relate to how the IRS designs and implements its compliance and enforcement initiatives. The *right to privacy* requires such initiatives to incorporate the principle of proportionality—that the IRS’s actions will “be no more intrusive than necessary.”¹⁴⁹ The *right to a fair and just tax system* requires the IRS to consider how taxpayers’ facts and circumstances affect their liability for tax, their ability to pay, or their ability to provide information in a timely manner.¹⁵⁰ Under a rights-based analysis of enforcement initiatives, the IRS must ensure that the information requested and the data utilized are purposeful and strictly necessary for the investigation, that the proposed sanctions are proportional to the noncompliant activity proposed to be addressed, and that taxpayers have the opportunity to raise their specific relevant circumstances (cf. the *right to challenge the IRS and be heard*).¹⁵¹ Finally, the IRS must ensure that taxpayers experiencing (or at risk of experiencing) significant hardship are informed of their right to seek assistance from the Taxpayer Advocate Service.¹⁵² Failure to meet any of these requirements violates these two rights.¹⁵³

of the right to appeal an IRS decision in an independent forum does not take such a narrow view as the courts: “Taxpayers are entitled to a fair and impartial administrative appeal of most IRS decisions, including many penalties, and have the right to receive a written response regarding the Office of Appeals’ decision. Taxpayers generally have the right to take their cases to court.” IRS PUBLICATION 1, *supra* note 143. Although the language acknowledges both a general right to an administrative appeal and to judicial review, Congress recently clarified taxpayers’ access to independent administrative appeals in the Taxpayer First Act and mandated notice, written explanation, and administrative review when access to an administrative appeal is denied. *See* Taxpayer First Act of 2019, Pub. L. No. 116-25, § 1001, 133 Stat. 981, 983–84 (2019).

149. IRS PUBLICATION 1, *supra* note 143.

150. *Id.*

151. *See id.*

152. I.R.C. § 7811 authorizes the NTA to issue a Taxpayer Assistance Order when the taxpayer is experiencing, or about to experience, a significant hardship as a result of an IRS

As discussed above,¹⁵⁴ there is a heightened risk of excessive administrative burden where procedures disproportionately affect underrepresented populations. Thus, proposed or existing IRS initiatives that affect these populations must satisfy the *right to retain representation* by ensuring that IRS employees inform taxpayers that they have the right to seek pro bono assistance from Low Income Taxpayer Clinics (“LITCs”) and provide taxpayers with the contact information of LITCs that serve their geographic area.¹⁵⁵ The procedures must also direct employees to allow time for these taxpayers to contact the LITCs before taking adverse actions that would create significant hardship.

With respect to each of the rights articulated in the Taxpayer Bill of Rights, there are scores, if not hundreds, of statutory and administrative protections that align with each of the individual rights articulated in the Taxpayer Bill of Rights. In fact, in 2011 the NTA published a “crosswalk” of existing statutes and administrative procedures that give effect to the Taxpayer Bill of Rights’ protections.¹⁵⁶ As part of a rights-based administrative-burden analysis, IRS employees can research that crosswalk to identify the specific protections that must be available and design the initiative so that these protections are available and accessible to taxpayers, that taxpayers are sufficiently informed about them, and that IRS employees are properly trained to provide and respect these protections.

In the following Part, we provide concrete steps to ensure that the IRS acts consistently with identifying and reducing burdens that may have an adverse impact on taxpayer rights. These steps build upon procedures that

action (or inaction). I.R.S. § 7811(a). Significant hardship “means a serious privation caused or about to be caused to the taxpayer as the result of the particular manner in which the revenue laws are being administered by the IRS.” Treas. Reg. 301.7811-1(a)(4)(ii) (as amended in 2020).

153. One consequence of the violation would be that, having identified such a violation as part of the Taxpayer Rights Impact Statements (“TRIS”) process, the IRS must either remedy that violation or not move forward with the program, just as with a privacy right violation identified via the PIA process.

154. *See supra* text accompanying notes 26–30.

155. I.R.C. § 7803(c)(6) authorizes the Secretary of the Treasury to specifically inform taxpayers about the existence of, and contact information for, LITCs that serve the taxpayers’ locale. *See* Taxpayer First Act, Pub. L. No. 116-25, § 1402, 133 Stat. 981, 997 (2019). Prior to the Taxpayer First Act of 2019, IRS employees could only provide taxpayers with the link to the LITC list on the website.

156. 1 NAT’L TAXPAYER ADVOC., 2011 ANNUAL REPORT TO CONGRESS app. 1, at 513–18 (2011), https://www.irs.gov/pub/tas/irs_tas_arc_2011_vol_1.pdf.

are familiar to, and integrated with, IRS internal administration, but the rights-based analysis required under these procedures ensures that the IRS will consider taxpayer rights up-front and throughout its design of initiatives. It also creates a workable system for measuring burdens in the context of rights.

IV. How a Taxpayer Rights Impact Statement Can Identify and Facilitate Removing Excessive Burdens

In this Part, we propose a way to ensure that the IRS displays a greater sensitivity to taxpayer rights, as well as describe how its actions or inactions may contribute to a tax system that creates or fails to remove administrative burdens that impinge on those rights. Building on elements present in the Privacy Act and the Privacy Impact Assessment, we propose that the IRS systematically consider taxpayer rights and issue Taxpayer Rights Impact Statements (“TRIS”). By conducting a systematic review of the impact of its actions on taxpayer rights and burdens through the TRIS process, our approach highlights taxpayer rights and shifts taxpayer experiences to the forefront of tax administration.

Before addressing the mechanics of a TRIS, it is worth noting that one objection might be that, at times, the IRS has not complied with other legislative provisions meant to provide oversight against improper or burdensome actions, such as the APA,¹⁵⁷ the privacy provisions,¹⁵⁸ the

157. See, e.g., Kristen E. Hickman, *A Problem of Remedy: Responding to Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 76 GEO. WASH. L. REV. 1153 (2008); Kristen E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements*, 82 NOTRE DAME L. REV. 1727 (2007).

158. See, e.g., TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2017-30-075, FISCAL YEAR 2017 STATUTORY REVIEW OF COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT (2017), <https://www.treasury.gov/tigta/auditreports/2017reports/201730075fr.pdf> (finding that the IRS had violated the rights of some taxpayers by not properly disclosing all of the information that should have been made available to them); TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2019-20-062, SOME COMPONENTS OF THE PRIVACY PROGRAM ARE EFFECTIVE; HOWEVER, IMPROVEMENTS ARE NEEDED (2019), <https://www.treasury.gov/tigta/auditreports/2019reports/201920062fr.pdf> (reviewing privacy impact statements and finding some were not updated timely but not criticizing the impact statements themselves and also finding IRS employees were not receiving mandatory privacy awareness training); TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2020-10-038, FISCAL YEAR 2020 MANDATORY REVIEW OF COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT (2020), <https://www.treasury.gov/tigta/auditreports/2020reports/>

PRA,¹⁵⁹ or the RFA.¹⁶⁰ In addition to the importance of compliance with the procedural requirements, the timing of the compliance is also important.¹⁶¹ What good will another set of procedural requirements be if the IRS ignores them either in letter or spirit?

As we discuss below, we believe that placement of the design and oversight of the TRIS with the Office of the Taxpayer Advocate would allow the NTA to report to Congress when the IRS fails to engage meaningfully with the process. NTA reports have spurred congressional action and oversight in the past, showing that Congress does read and react to reports from the NTA.¹⁶² It could also lead a court to conclude that the

202010038fr.pdf (finding, similar to 2017, that the IRS did not properly disclose all of the information it should have disclosed).

159. *See, e.g.*, GAO, PAPERWORK REDUCTION ACT, *supra* note 13; U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-974T, PAPERWORK REDUCTION ACT; INCREASE IN ESTIMATED BURDEN HOURS HIGHLIGHTS NEED FOR NEW APPROACH (2006), <https://www.gao.gov/assets/gao-06-974t.pdf>.

160. In a Government Accountability Office review of 200 tax regulations issued from 2013 to 2015, only two regulations contained preambles that included an RFA analysis. U.S. GOV'T ACCOUNTABILITY OFF., REGULATORY GUIDANCE PROCESSES: TREASURY AND OMB NEED TO REEVALUATE LONG-STANDING EXEMPTIONS OF TAX REGULATIONS AND GUIDANCE 22 (2016), <https://www.gao.gov/assets/gao-16-720.pdf>. In approximately half of the regulations reviewed by the Government Accountability Officer, the Treasury and the IRS claimed that the "RFA's requirements for a regulatory impact analysis did not apply because the regulation does not impose a collection of information requirement on small entities." *Id.*

161. The IRS has been criticized for the length of time PIAs take to review. Although PIAs are required to be updated every three years, the lengthy process and lack of controls results in untimely updates. TREASURY INSPECTOR GEN. FOR TAX ADMIN., REFERENCE NO. 2019-20-062, SOME COMPONENTS OF THE PRIVACY PROGRAM ARE EFFECTIVE; HOWEVER, IMPROVEMENTS ARE NEEDED (2019), https://www.treasury.gov/tigta/auditreports/2019reports/201920062_0a_highlights.html (finding that at end of Fiscal Year 2018, 37 (21%) of the 173 assessments due to expire were not updated timely). Placing the review with the NTA would mean the review has systemic urgency. Creating timeframes for all parties' responses and the procedures for resolving disputes could reduce the review and update period.

162. *See Highlights of the Taxpayer First Act and Its Impact on TAS and Taxpayer Rights*, TAXPAYER ADVOC. SERV. (Nov. 21, 2019), <https://www.taxpayeradvocate.irs.gov/news/ntablog-highlights-of-the-taxpayer-first-act-and-its-impact-on-tas-and-taxpayer-rights/> (listing the twenty-six legislative recommendations made by TAS that Congress included in the Taxpayer First Act and discussing several codified provisions—such as the provisions codifying the authority of the Taxpayer Advocate Directive and requiring coordination with the Treasury Inspector General for Tax Administration—that strengthen the ability of TAS to accomplish changes within the IRS); *see also* NAT'L TAXPAYER ADVOC., 2020 PURPLE BOOK app. 2, at 119–23 (2019), <https://www.taxpayeradvocate.irs.gov/wp-content/uploads/>

IRS's failure to adequately comply with the TRIS process creates an opportunity for review under the APA.¹⁶³ In sum, the proposal's design assumes significant internal agency oversight backstopped by the possibility of direct legislative and judicial oversight.

We recommend the IRS conduct the TRIS with respect to all prospective programs. Additionally, we propose a method for systematic review of existing programs. The term "program" becomes significant in identifying which actions the IRS takes or has taken that require review through the TRIS procedure. We use the term "program" to retain maximum flexibility for applying this analysis.¹⁶⁴ This term encompasses both broad categories of processes, e.g., the offer in compromise program and specific initiatives, such as the use of chatbots in the online installment agreement application. Prospectively, we contemplate the term to cover IRS-proposed initiatives, procedures, and systems relating to taxpayer service, compliance, and enforcement activities that have a taxpayer-facing component. As noted elsewhere,¹⁶⁵ for existing programs, we believe the NTA can designate programs of such impact that they warrant an administrative burden/taxpayer rights analysis. To the extent there is disagreement between the Taxpayer Advocate Service and other functions within the IRS, we recommend that the NTA report directly to Congress if it has identified

2020/08/ARC19_PurpleBook.pdf (listing the NTA legislative recommendations enacted by Congress in whole or in part).

163. See Book, *Giving Taxpayer Rights a Seat*, *supra* note 14, at 781 (proposing that the IRS's failure to consider the impact of its rulemaking on taxpayer rights should lead a court to conclude that the agency's action is arbitrary and capricious under the APA standard at 5 U.S.C. § 706(2)(A)).

For a similar legislative proposal in the context of requiring agencies to publish disparate impact assessments, see Cristina Isabel Ceballos et al., *Disparate Limbo: How Administrative Law Erased Antidiscrimination*, 131 YALE L.J. 370, 456 (2021) (noting that an agency's failure to publish the impact statement might be actionable under the APA).

164. To assist with this, our illustrative examples at the beginning of this Article present scenarios where IRS action or inaction would amount to programs that require review under the TRIS procedure. See *supra* Part I.

We prefer an approach that is standard based and illustrative, mindful that in analogous areas in administrative law there has been significant uncertainty concerning the precise nature of agency action. See generally Ronald M. Levin, *Rulemaking and the Guidance Exemption*, 70 ADMIN. L. REV. 263, 265 (2018) (noting that whether federal agencies can rely on the interpretive and policymaking exceptions to notice-and-comment requirements as rules may constitute "the single most frequently litigated and important issue of rulemaking procedure before the federal courts today").

165. See *infra* Section IV.B.

IRS actions that, in its discretion, should generate a TRIS and the Commissioner were to disagree.¹⁶⁶

The framework and approach discussed above accomplishes several things. First, it requires the IRS, *before programs are implemented*, to (1) identify under-resourced populations that are affected by its actions; (2) articulate how the design of agency programs may undermine taxpayer protections or access to benefits, based on the specific characteristics of the taxpayer segment; and (3) make recommendations to mitigate those burdens. Second, it requires that the IRS's assessment (the TRIS and the related questionnaire, outlined below) is posted on the agency's website so that the public, Congress, and IRS oversight agencies can see how the IRS is conducting the rights-based administrative burden framework. This transparency will enable stakeholders to raise concerns where the analysis provided by the IRS has fallen short, and it provides an important tool to conduct ongoing oversight of the agency. Third, and most important, it is the first step in driving a culture change in the agency, where it recognizes its dual mission as both a revenue collector and a social benefits administrator.¹⁶⁷ The framework analysis will require the IRS to establish

166. As a model for this approach, we note that in the Taxpayer First Act, Congress codified and enhanced the Taxpayer Advocate Directives authority by requiring the NTA to report to Congress any Taxpayer Advocate Directives that the IRS failed to timely honor. Taxpayer First Act, Pub. L. No. 116-25, § 1301(a)(2), 133 Stat. 981, 991 (codified as amended at 26 U.S.C. § 7803(c)(2)(B)(ii)(VIII)). The Commissioner had previously given the NTA authority to mandate administrative or procedural changes "to improve the operation of a functional process or to grant relief to groups of taxpayers (or all taxpayers) when implementation will protect the rights of taxpayers, prevent undue burden, ensure equitable treatment or provide an essential service to taxpayers." I.R.S. Deleg. Order 13-3 (Rev. 1), IRM 1.2.2.12.3 (Jan. 17, 2001).

167. See generally 1 NAT'L TAXPAYER ADVOC., 2010 ANNUAL REPORT TO CONGRESS 16–17, 26 (2010) [hereinafter ANNUAL REPORT 2010], https://www.irs.gov/pub/tas/2010arcms_p2_irsmission.pdf (arguing the IRS mission statement does not reflect the agency's increasing responsibilities for administering social benefit programs and recommending that the mission statement, strategic objectives, and performance measures be revised to reflect these responsibilities); NAT'L TAXPAYER ADVOC., SPECIAL REPORT TO CONGRESS: EARNED INCOME TAX CREDIT 4–7 (2019) [hereinafter SPECIAL REPORT TO CONGRESS], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/10/JRC20_Volume3_Final.pdf (recommending the IRS amend its mission statement to reflect its dual missions of collecting revenue and disbursing social benefits); Nina Olson, *Thinking Out Loud About the Advanced Child Tax Credit – Part 3: The Family and Worker Benefit Unit*, PROCEDURALLY TAXING (July 1, 2021), <https://procedurallytaxing.com/thinking-out-loud-about-the-advanced-child-tax-credit-part-3-the-family-and-worker-benefit-unit/> (proposing the establishment of a dedicated IRS division charged with administering all aspects of family and worker tax

new measures of program success, which in turn will require the agencies auditing its performance to shift their audit focus of these programs solely from measures of revenue collected to measures of taxpayer burden and rights impaired.

Why has a taxpayer-focused perspective been lacking? Tax policy proposals are generally assessed on the bases of efficiency, equity, and administrability.¹⁶⁸ Administrability is often overlooked, and when it is considered, it is from the perspective of the tax agency—whether the agency has the resources to adequately administer the policy initiative. Rarely do policy debates consider the taxpayer’s administrative burden. Yet placing an excessive administrative burden on the taxpayer population that the policy seeks to benefit provides a sure path to failure. This is particularly true for programs benefiting taxpayer populations that are literacy challenged—whether financial, digital, or functional—or that do not have access to representation.

Traditional cost-benefit analysis also underestimates the weight of administrative burden from the taxpayer/beneficiary’s perspective. By focusing solely on the government’s costs and the monetary compliance costs of the taxpayer/beneficiary, this analysis ignores the learning and psychological costs identified by Herd and Moynihan.¹⁶⁹ Moreover, excessive administrative burden can negatively impact taxpayers’ ability to exercise taxpayer rights, which, in turn, can increase perceptions of the illegitimate use of agency power, thereby decreasing voluntary compliance.¹⁷⁰

provisions administered through the Internal Revenue Code). *But see* Kristin E. Hickman, *Pursuing a Single Mission (or Something Closer to It) for the IRS*, 7 COLUM. J. TAX L. 169, 173 (2016) (recommending that, in light of the non-revenue functions the IRS has been charged with performing, Congress should consider “spinning off” non-revenue-raising programs from IRS oversight or splitting up the IRS altogether and distributing its many functions among other new or existing agencies).

168. *See generally* James Repetti & Diane Ring, *Horizontal Equity Revisited*, 13 FLA. TAX REV. 135, 136 (2012) (“[Horizontal equity] in our tax system has generally been thought to require that individuals with the same income should pay the same tax. [Vertical equity] has generally been thought to require a progressive rate structure that imposes progressively higher rates on individuals with higher incomes.”); JOEL SLEMROD & JON BAKIJA, *TAXING OURSELVES: A CITIZEN’S GUIDE TO THE DEBATE OVER TAXES* (5th ed. 2017).

169. *See* HERD & MOYNIHAN, *supra* note 47, at 2.

170. Katharina Gangl et al., *Tax Authorities’ Interaction with Taxpayers: A Conception of Compliance in Social Dilemmas by Power and Trust*, 37 NEW IDEAS PSYCH. 13 (2015) (conceptualizing the distinctions between coercive and legitimate power with reason-based and implicit trust). *See generally* TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

Our proposed rights-based framework acknowledges that where there is evidence of broad-based, systemic noncompliance, developing programs that increase upfront administrative burdens on taxpayers to facilitate downstream compliance may be justified to protect program integrity (and even enable continuation of the program). However, even for a program with a superficially large monetary impact, but where the incidence of noncompliance occurs within a small percentage of taxpayers, the problem may not justify a solution that imposes a disproportionate administrative burden on all taxpayers or a large group of individuals.

The IRS has historically measured burden with respect to the act of tax return filing—an approach reinforced by the Paperwork Reduction Act, which measures the cost of filing compliance.¹⁷¹ This approach ignores other types of costs and other types of burdens, such as downstream burdens including audits, summary assessments, and collection actions.¹⁷² Further, by focusing solely on the act of filing a tax return, the historical approach ignores the burden of the IRS's increasing use of post-filing compliance action as part of the filing process.¹⁷³ The NTA has reported that during the 2020 filing season, the IRS “refund fraud filters selected over 3.2 million refund returns, a 107 percent increase over the 2019 filing season.”¹⁷⁴ Of those returns, approximately sixty-six percent were false positives.¹⁷⁵ *That is, two-thirds of the refund returns that IRS systems labeled as potentially fraudulent turned out to be legitimate.* About twenty-

171. *See supra* Section III.A.3.

172. *See generally supra* Section II.B.

173. For example, taxpayers whose claims for certain tax credits were denied in a previous year must file IRS Form 8862, *Information to Claim Certain Credits After Disallowance*, in order to receive the Earned Income Tax Credit, the Child Tax Credit, the Additional Child Tax Credit, the American Opportunity Tax Credit, the Credit for Other Dependents, or Head of Household filing status in a following year. *See* IRM 21.6.3.5 (Oct. 29, 2020); IRM 4.19.14.7. (Mar. 12, 2021). These returns are then manually reviewed before processing the returns and issuing refunds. For a visual representation of the return filing and controversy roadmap, see INTERNAL REVENUE SERV., PUBL'N 5341, THE TAXPAYER ROADMAP (rev. 2019), <https://www.irs.gov/pub/irs-pdf/p5341.pdf>.

174. ANNUAL REPORT 2020, *supra* note 16, at 230. The Pre-Refund Wage Verification Program, a component of the Return Review Program and administered by the Return Integrity Verification Operation (“RIVO”), freezes returns claiming refunds while the IRS attempts to verify wages and withholding claimed on the return. *See id.* RIVO utilizes “an obsolete case management and screening system called Return Review Program Legacy Component (or Electronic Fraud Detection System), which the IRS has been planning to replace for more than a decade.” *Id.* at 156.

175. *Id.* at 151 n.19.

five percent of the returns that the IRS froze as potentially fraudulent took longer than fifty-six days to be unfrozen and released for processing and appropriate refund issuance.¹⁷⁶ While some of the delay may be attributable to closures during the pandemic, this high false-positive rate associated with non-identity theft refund fraud filters has persisted for years—including seventy-two percent for the 2019 filing season.¹⁷⁷ Traditional cost-benefit analysis, the PRA, and the Privacy Act all fail to measure the administrative burden to taxpayers whose refunds were delayed by these post-filing actions.¹⁷⁸

A. Taxpayer Rights Impact Statement Publication Process

Below is a high-level description of the stages leading to the publication of the proposed Taxpayer Rights Impact Statement.

Step 1: Description of Program/Proposal: Here, the IRS describes what it is doing or proposing to do, and what it hopes to achieve by implementing the initiative both from a narrow tax administration perspective and from a broader public policy one. The agency must identify the statutory authority for the initiative, the public policy purpose for the statute, and how the initiative achieves the underlying public policy goals in carrying out the agency's mission.

Step 2: Program Flow Analysis: Borrowing the term and the concept from the PIA, the process requires that the IRS next map out the actual program proposal: what, specifically, are the actions it is planning to take; by whom will the program be administered and with what group of employees; what training will the employees receive; what customer assistance will be provided, how and by whom; what new notices will be developed; what are the current procedures and how will the IRS modify

176. *Id.* at 231. Roughly 18% took longer than 120 days for refund issuance. *Id.*

177. *Id.* at 151.

178. These numbers are significant and place a heavy burden on those involved in tax return filing—particularly those at the lower end claiming refundable credits and other similar programs for which the IRS has developed return processing filters. For example, in FY 2020, the IRS issued 98,562 math error notices summarily adjusting claims for the Earned Income Tax Credit. INTERNAL REVENUE SERV., DATA BOOK 2020, at 34, 55 (2021), <https://www.irs.gov/pub/irs-pdf/p55b.pdf> (reporting 74,936 notices for tax year 2019 returns processed in FY 2020 and 23,626 notices for tax year 2018 and other prior-year returns). The NTA reports that as of May 22, 2021—the end of the 2021 filing season—the IRS had suspended returns processing of 10.3 million returns for error resolution and 2.1 million for identity theft. OBJECTIVES REPORT 2022, *supra* note 147, at iv–v.

those procedures; and how does the IRS propose to communicate the program and its requirements to the taxpayers? The analysis will also identify those agency divisions and functions that are affected either upstream or downstream by the program/proposal.

Step 3: Identification and Analysis of Impacted Population: The IRS identifies the segments of the taxpayer population affected by the program/proposal. This stage consists of a distributional analysis of taxpayers impacted, including demographic characteristics. Based on this analysis, the agency will identify whether the program disproportionately and unnecessarily impacts a specific taxpayer segment. At this stage, we are not defining a specific group of protected taxpayers. Instead, the goal is protecting taxpayer rights to be universal and potentially include all taxpayers before narrowing to those disproportionately impacted and who might be considered especially vulnerable to harm due to the presence of compliance, learning, and/or psychological costs (administrative burdens as per Herd and Moynihan).

Step 4: Impacted Taxpayer Segment Analysis: The IRS analyzes the characteristics of the impacted taxpayer segments, with a focus on identifying vulnerable taxpayers, that is, segments that include disabled, low-income, and underrepresented taxpayers. The analysis should identify the specific characteristics of the impacted taxpayer segment that might increase the risk of excessive administrative burden.

Step 5: Taxpayer Rights/Administrative Burden Analysis: Having identified the impacted taxpayer segment's specific characteristics that increase the risk of excessive administrative burden, the next step is to conduct a taxpayer-rights and administrative-burden analysis of the program/proposal with respect to that taxpayer segment. Here, the agency identifies the specific administrative burdens present in the program that pose challenges to the population and how those burdens, left unaddressed, will impair specific taxpayer rights, as afforded by the Internal Revenue Code or as listed in I.R.C. § 7803(a)(3). Doing this may require pilot programs or studies to evaluate the actual impact and to measure burdens. Where the analysis identifies an impaired taxpayer protection, including creating excessive administrative barriers to accessing a tax credit, deduction, or benefit, the analysis will identify mitigation strategies to

reduce or eliminate the excessive administrative burden.¹⁷⁹ The completed Taxpayer Rights/Administrative Burden Analysis will be circulated to all entities identified in the questionnaire as having upstream and downstream impact for comment and recommendations. Such recommendations will be noted in the analysis and identified as to the source of the recommendation and whether the recommendation was adopted. Where the program owner does not adopt the recommendation, the program owner must provide a written explanation of its reasons and how it otherwise plans to address the concern raised.

Step 6: Taxpayer Rights Impact Statement: Upon completion of the Taxpayer Rights/Administrative Burden Analysis, the program owner prepares a Taxpayer Rights Impact Statement, which documents the taxpayer rights/administrative burden risks and potential implications to the protected taxpayer segment, describes the concerns raised through the circulation process, and discusses the mitigations proposed to lessen or eliminate those burdens. The TRIS contains all the information that senior agency leaders need to determine whether to proceed with the program, or whether the program should be paused or modified. The TRIS also provides a basis for monitoring the program going forward. As with the PIA, if the agency moves forward with the program, the agency publishes the TRIS on the dedicated webpage of the agency website. The TRIS will enable entities charged with oversight, including the U.S. Government Accountability Office, the Treasury Inspector General Tax Administration, the Taxpayer Advocate Service, and Congress, to assess the actual implementation of the program in terms of taxpayer rights and administrative burden.

B. Issues and Challenges Relating to the TRIS Framework

The rights-based administrative burden framework requires the IRS to expand its horizons and think more holistically about how it interacts with taxpayers. It focuses on the relationship between the IRS and the taxpayer, and it considers the distributional impact of the burdens it imposes,

179. We recommend that the IRS place the IRM section creating the analytical framework under the chapter of the IRM setting out responsibilities for the NTA (IRM Chapter 13). The NTA would determine the procedures relating to the TRIS development and ensure different viewpoints are considered. Because the NTA is charged with protection of taxpayer rights by statute and operates independently of other IRS divisions, they can play this role in managing the process while the Service is responsible for posting the TRIS on its website—that is, the IRS has ownership of the final product, but the NTA has ownership of the process.

minimizing the risk that the IRS's actions are arbitrary.¹⁸⁰ The rights-based framework, however, applies beyond agency actions governed by the APA¹⁸¹ and is not limited to agency rules, nor does it necessarily connect with judicial rights. The framework requires the agency to temper its cost-benefit analysis by recognizing that cost-benefit analysis is insufficient where other considerations and organic statutes—such as the taxpayer bill of rights—are involved, and where rights play a distributional role. Thus, the critical questions are, did the IRS consider taxpayer rights in taking this action? And is the IRS ignoring taxpayer rights by not taking an action?

Our approach applies at earlier stages of the IRS's decision-making process than the APA-driven concept of final agency action.¹⁸² Finality itself is ambiguous, as demonstrated in *Scholl v. Mnuchin*, where the court found that the IRS's use of FAQs to deny an advance refund represented final agency action.¹⁸³ Instead, this Article proposes a test that requires approaching decisions from the perspective of the taxpayer. Finality under this analysis occurs if an agency action deters or dissuades someone from getting access to a benefit even if, from the agency perspective, it may not technically be final under the APA definition.¹⁸⁴

Step 3 of our proposed framework squarely presents the challenge of describing and identifying the taxpayer populations that are affected by excessive administrative burden. As noted above, we identify burdens as excessive where (1) the burden falls primarily on a subset of taxpayers who are disabled, low income, or otherwise underrepresented, and (2) when burdens directly impair the taxpayer rights provided in the Internal Revenue Code as codified in I.R.C. § 7803(a). This approach assists all taxpayers impacted by IRS programs and decisions; however, in any specific situation the impact may fall on a particular subset of taxpayers. For example, the IRS's implementation of identity-theft assistance impacts high/medium/

180. A decision to deny stimulus payments to incarcerated individuals despite the language and history of the legislation provides a recent example of a decision by the IRS that appears arbitrary. *See Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1031–37 (N.D. Cal. 2020).

181. *See generally* Administrative Procedures Act, Pub. L. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

182. *See generally* Beau J. Baumann & Greg Mina, Note, *Clowning Around with Final Agency Action*, 28 CORNELL J.L. & PUB. POL'Y 329 (2018).

183. *See Scholl*, 489 F. Supp. 3d at 1028; *see also* Book, *Tax Administration and Racial Justice*, *supra* note 53, at 697.

184. *See generally* Baumann & Mina, *supra* note 182 (noting courts' struggle to interpret the APA's "final agency action" under 5 U.S.C. § 704).

low-income taxpayers because anyone can fall victim to this fraud. On the other hand, our approach requires an analysis for a particular subset of taxpayers where they are *disproportionately* impacted by the agency's program. If the agency is doing something that affects 75% to 100% of overseas taxpayers but not domestic taxpayers, the overall program may appear appropriate, yet it has a disproportionate impact on one subset of taxpayers. For example, such a burden might occur if the IRS does not have any toll-free overseas lines and does not allow email conversations. That would create an excessive administrative burden given the characteristics of the population of overseas taxpayers.¹⁸⁵

As with section 208 of the E-Government Act of 2002—requiring agencies to conduct PIAs for electronic systems and collection of information¹⁸⁶—the scope of the TRIS is broad. We propose that the IRS conduct a rights-based administrative burden assessment for customer service *and* compliance programs and systems. We define compliance programs and systems to include notices, refund claim freezes, automated matching compliance programs, audits, collection actions, collection alternatives, public filings of notices of federal tax liens, and passport denials. Customer-service programs include (1) online self-service; (2) automated and live telephone assistance; (3) in-person assistance; and (4) outreach and education initiatives, including notices. At the outset, we anticipate this analysis to be conducted on programs that operate across all areas of the IRS. Where regional or local programs propose deviations from the broader program approach, they will be required to conduct a similar review.

Pursuant to the rights-based administrative framework, when the agency proposes a new initiative, the program owner will complete the questionnaire, described in Step 5 above, that assists the agency in

185. A similar issue arises with the availability of notices in languages other than English and interpreter service. *See generally* Exec. Order No. 13,166, 65 Fed. Reg. 50,121 (2000). Executive Order 13166 requires federal agencies to examine the services they provide and identify any need for services to those with limited English proficiency. *Id.* The IRS Office of Equity, Diversity and Inclusion has addressed IRS efforts to comply with Executive Order 13166. *See Language Access for Taxpayers with Limited English Proficiency: Frequently Asked Questions*, IRS (Jan. 2016), <https://www.irs.gov/pub/irs-utl/language-access-taxpayers-limited-english-proficiency-faqs.pdf>. For more on the impact of language barriers and taxpayer rights, see Jennifer J. Lee, *Operationalizing Language Access Rights for Limited English Proficient Taxpayers*, 91 TEMP. L. REV. 791 (2019).

186. E-Government Act of 2002, Pub. L. No. 107-347, § 208, 116 Stat. 2899, 2921–23 (2002).

identifying whether there is a significant likelihood that the program's administrative burden will deprive the protected taxpayer segment of a fundamental taxpayer right, including undermining the program's public policy goal. The completed questionnaire will be circulated to appropriate agency personnel, including the Office of the Taxpayer Advocate and the Office of Chief Counsel, as well as operating divisions that are affected both upstream and downstream by the program proposal. All comments will be addressed by the program owner, with attendant internal discussions as necessary.¹⁸⁷ The Taxpayer Rights/Administrative Burden Analysis, including the risks to fundamental taxpayer rights and discussions of mitigations, will be documented in a TRIS that the IRS will post to its dedicated webpage for public viewing.

As noted above, we recommend that oversight and coordination of the use of TRIS as a tool be placed in the Office of the Taxpayer Advocate.¹⁸⁸ By statute, the NTA is the voice of the taxpayer inside the IRS and is charged with identifying administrative causes of taxpayer problems and

187. We envision a review process similar to the Internal Revenue Manual clearance process described in IRM 1.11.9.2, whereby new or revised IRM sections are circulated to internal entities that may be affected by such procedures. *See generally* IRM 1.11.9.2 (Apr. 17, 2020). IRM 1.11.9.4 describes procedures for obtaining specialized reviews, including by the Office of Chief Counsel and the Office of the Taxpayer Advocate. *See generally* IRM 1.11.9.4.1 (Oct. 1, 2021); IRM 1.11.9.4.3 (Jan. 24, 2017).

188. Another option is placing TRIS oversight in the Office of Burden Reduction in the Small Business/Self-Employed ("SBSE") Operating Division. *See generally* IRM 1.1.16 (Mar. 15, 2022). We decided not to recommend that for two reasons. First, SBSE has become the de facto enforcement arm of the IRS. Between 2004 and 2006, its outreach and education function, Taxpayer Education and Communication, was eliminated, and between 2017 and 2018 its replacement, the Office of Stakeholder Liaison, was moved out of SBSE and into the IRS headquarters Communications & Liaison Office. *See* 1 NAT'L TAXPAYER ADVOC., 2006 ANNUAL REPORT TO CONGRESS 175–78 (2006), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2006_arc_vol_1_cover__section_1.pdf; 1 NAT'L TAXPAYER ADVOC., 2018 ANNUAL REPORT TO CONGRESS, at 244 (2019) [hereinafter ANNUAL REPORT 2018], https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1.pdf. Thus, today SBSE has no organizational unit thinking about taxpayer rights and service needs or about tax administration from the perspective of taxpayers. *See id.* ("[T]here is no outreach function . . . within the SB/SE division."). Second, the Office of Taxpayer Burden Reduction is embedded deep within the management chain of SBSE. *See generally* IRM 22.24.1.1 (Jan. 8, 2016). The NTA, on the other hand, is required by statute to make a direct report to the Commissioner of Internal Revenue and must also report annually directly to Congress. I.R.C. § 7803(c)(1)(B)(i), (c)(2)(B)(i). Thus, placement of TRIS oversight in the Office of the NTA gives the program much greater gravitas and transparency.

making recommendations to mitigate those problems.¹⁸⁹ As with the Privacy, Governmental Liaison, and Disclosure Office and the PIA, because the NTA would have the final say in whether a TRIS protects important taxpayer rights, the NTA would have the ability to stop a new program that did not provide adequate taxpayer protection and would participate closely in determining any necessary programmatic changes needed before implementation. This approach aligns with the NTA's systemic-advocacy mission. Responsibility for legal analysis of a rights-based administrative burden framework could fall under the position currently held by the Counsel to the NTA.¹⁹⁰

While we propose the agency adopt this approach for new programs and initiatives, this analysis should also be applied to existing programs. Because the scope of the IRS's work and its impact on taxpayers is so broad, we propose the Office of the Taxpayer Advocate play a key role in identifying existing programs that would benefit from the taxpayer rights/administrative burden framework. For example, in the Fiscal Year Objectives Report to Congress issued in June each year,¹⁹¹ the NTA could identify five existing programs that would benefit from the rights-based administrative burden framework review, based on our criteria of protected taxpayer segments. The IRS would be required to conduct that review over the next fiscal year and, upon completion, post the TRIS to its website. Oversight agencies could then conduct their own reviews of the analysis and implementation.

V. An Application of Our Framework: The Taxpayer Rights Impact Statement at Work

We started this Article presenting differing scenarios in which taxpayers are required to navigate burdens. In this Part, we return to the first of our

189. I.R.C. § 7803(c)(2).

190. Although the attorney occupying that role is a Chief Counsel executive with a place at the table of Chief Counsel, and IRS leadership, the individual has no programmatic voice. *See generally* IRM 30.3.2.1.2 (Oct. 29, 2020). Their job involves providing advice to the NTA but not necessarily advocating themselves for taxpayer rights as their counterparts might do for programs within SBSE or the Large Business and International Division ("LB&I"). *See generally id.* Placing the legal voice for TRIS with Counsel to the NTA allows that attorney to have a clear voice to offer to the Chief Counsel who could weigh that voice against the enforcement-oriented voices coming from counsel to SBSE and LB&I.

191. NAT'L TAXPAYER ADVOC., *Reports to Congress*, <https://www.taxpayeradvocate.irs.gov/reports/> (last visited Mar. 26, 2022).

scenarios and apply our framework as a means of demonstrating how it can assist with the identification and removal of barriers that frustrate, and at times deter, individuals from receiving needed benefits or escaping from collection actions that can exacerbate financial hardship.¹⁹² We use the first scenario, the delivery of emergency benefits, as a case study on how the specific steps of the TRIS process can drive design improvements and protect taxpayer rights:

In response to a once-in-a-century pandemic, Congress turns to the IRS to deliver cash to Americans who are suffering unprecedented hardships. Congress structures the benefits as a refundable credit, known as a Recovery Rebate Credit (“RRC”), that can be claimed on a 2020 tax return, but also directs the IRS to pay an equivalent amount known as an economic impact payment (“EIP”). By January 2021, the IRS issues over 300 million EIPs to eligible individuals, totaling over \$413 billion in emergency financial relief. While most people receive money automatically, the IRS lacks sufficient information on millions of Americans who did not file tax returns. To distribute the full amount of EIPs, the IRS establishes a non-filer portal for people to enter information for themselves and dependents. For many federal beneficiaries who had not previously filed tax returns, the IRS provides under two weeks to register to receive the full benefits relating to dependents, thus preventing a Social Security disability recipient from receiving assistance that was meant to help his family during a crushing pandemic.

192. Although we highlight instances in which the IRS fails to act in a manner that best protects taxpayer rights, we do not mean to suggest that it always does so. Some of the programs and policies it has adopted would fit well as models for how to approach a problem to reach a taxpayer-friendly result that does not burden tax administration. Without going into significant detail, we suggest the relatively recent decision regarding the need to issue a Form 1099-C resulting from disputed student loan debt provides a good example. See Alex Johnson, *IRS Moves to Prevent Defrauded Borrowers from Massively Overpaying Taxes Through Adoption of a New Revenue Procedure*, PROCEDURALLY TAXING (Mar. 10, 2020), <https://procedurallytaxing.com/irs-moves-to-prevent-defrauded-borrowers-from-massively-overpaying-taxes-through-adoption-of-a-new-revenue-procedure/>. The decision to streamline the method for fixing a failure to redeposit money into an IRA within sixty days also demonstrates the IRS can adopt a taxpayer-friendly approach. See Karla Hunter, *New Rev Proc Waives Drastic Effect of 60-Day Retirement Account Rollover Failure*, PROCEDURALLY TAXING (Sept. 16, 2016), <https://procedurallytaxing.com/new-rev-proc-waives-drastic-effect-of-60-day-retirement-account-rollover-failure/>. In both instances the IRS adopted an approach that benefited tax administration while saving taxpayers from a difficult situation.

A. Background

On March 27, 2020, in response to the spreading economic harm attributable to the coronavirus pandemic, Congress passed, and the President signed, the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.¹⁹³ The Act provided for advance payments of a refundable credit that could be claimed on eligible taxpayers’ 2020 federal income tax returns.¹⁹⁴ The advance payments, EIPs, were a mechanism for quickly infusing cash into the hands of individuals and families struggling economically as a result of the COVID-19 pandemic.¹⁹⁵ The IRS was instructed to pay EIPs “as rapidly as possible.”¹⁹⁶ The amount of the EIP was based on a taxpayer’s filing status, qualifying children, and adjusted gross income as reported on the taxpayer’s 2019 federal tax return.¹⁹⁷

Because the pandemic hit in the middle of the annual filing season, many taxpayers had not yet filed their 2019 returns, so Congress authorized the IRS to use the 2018 return data where no 2019 return was on record.¹⁹⁸ Further, because many taxpayers have no annual return filing requirement at all—i.e., their incomes are below the filing threshold—Congress instructed the IRS to work with other federal agencies to utilize data on file to determine eligibility for the credit and, implicit in this directive, issue payments automatically.¹⁹⁹ Notwithstanding the IRS’s overall success in delivering EIPs, as discussed below, this latter directive and the IRS’s implementation thereof generated significant criticism of the IRS from

193. Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281.

194. See I.R.C. § 6428(a) (providing for an advance payment of the Rebate Recovery Credit, a refundable credit that is claimed on the 2020 Individual Income Tax Return).

195. *What to Know About the First Stimulus Check*, TAX OUTREACH (Nov. 12, 2021), <https://www.taxoutreach.org/tax-filing/coronavirus/what-to-know-about-the-economic-imp-act-payments-stimulus-checks/>.

196. I.R.C. § 6428(f)(3)(A).

197. Based on filing status and the existence of dependents, the amount of a taxpayer’s adjusted gross income needed to fall below certain ceilings in order for the taxpayer to benefit from the stimulus payment program. High income individuals were left out of the program. *Questions and Answers About the First Economic Impact Payment – Topic A: Eligibility*, IRS, <https://www.irs.gov/newsroom/questions-and-answers-about-the-first-economic-impact-payment-topic-a-eligibility> (Feb. 16, 2022).

198. I.R.C. § 6428(f)(5).

199. See *id.* § 6428(f)(5)(B).

Congress, the media, and advocates, and resulted in major litigation.²⁰⁰ It also illustrates how the agency's failure to consider the impact of the program's administrative burden on vulnerable populations denied them life-sustaining cash.

Through annual individual income tax return filings, the IRS receives a vast trove of financial and family information for about 160 million households.²⁰¹ No other federal agency has this exact compilation of data. Thus, it makes sense for Congress to turn to the IRS to deliver social benefit programs that can be structured as tax credits, and since the 1990s, Congress has increasingly done so.²⁰² But this approach is not without drawbacks, most significantly that these benefit programs are imposed upon an agency that views itself as an enforcement agency with the primary goal of revenue collection.²⁰³ The application for these benefits, made via the income tax return, imposes relatively little burden on the applicant/taxpayer, but post-application processes are notoriously cumbersome and unfriendly for those taxpayers caught up in the IRS fraud-detection and audit programs. Moreover, the return-processing system itself is very inflexible and built on decades-old technology; planning for the next

200. Michelle Singletary, *A Second \$1,200 Stimulus Check Is Likely, but the IRS Still Hasn't Ironed Out All the Glitches from the First One*, WASH. POST (July 27, 2020), <https://www.washingtonpost.com/business/2020/07/27/second-irs-stimulus-check-payment/> (detailing how federal beneficiaries sued the Treasury and IRS for failing to deliver the \$500 stimulus payment intended for individuals with dependent children); *Advocate's EIP Help Called Lacking; McGruder Injunction Filed*, TAX NOTES (Aug. 3, 2020), <https://www.taxnotes.com/tax-notes-today-federal/tax-system-administration/advocates-eip-help-called-lacking-mcgruder-injunction-filed/2020/08/03/2cshn> (detailing the seeking of an injunction against the IRS due to the agency's creation of arbitrary deadlines for providing the information to receive economic impact payments).

201. *Filing Season Statistics for Week Ending December 27, 2019*, IRS (Jan. 16, 2020), <https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-december-27-2019> (publicizing that 155,798,000 returns were received in 2019 filing season).

202. The NTA has called on the IRS to adopt a mission statement that reflects the increasing responsibilities the IRS has in administering social benefits programs. See ANNUAL REPORT 2010, *supra* note 167, at 16–17; see also Nina Olson, *FAWBU and Dispute Resolution Redux: A 12-Step Program for Culture Change at the IRS - Part 1*, PROCEDURALLY TAXING (Oct. 28, 2021), <https://procedurallytaxing.com/fawbu-and-dispute-resolution-redux-a-12-step-program-for-culture-change-at-the-irs-part-1/> (proposing, as the first step of a twelve-step program to bring cultural change to the IRS reflecting the IRS's responsibilities, that the agency adopt “a mission statement that explicitly recognizes the IRS has a dual mission of collecting revenue and disbursing social benefits, framed by the duty to protect taxpayer rights”).

203. See SPECIAL REPORT TO CONGRESS, *supra* note 167, at 5.

year's filing season begins with the opening of the current season, and last-minute changes must be adopted in such a way as to impose minimal risk to the system.

It is in this context that the IRS approached EIP implementation. On March 30, 2020, the IRS declared that all federal benefits recipients whose incomes were below the filing threshold (non-filer federal benefits recipients) had to file a 2019 income tax return to receive the EIP for themselves and their qualifying children.²⁰⁴ This announcement generated a considerable outcry.²⁰⁵ Two days later, the IRS reversed itself and declared that recipients of Social Security and Railroad Retirement benefits would automatically receive their individual EIPs based on data matching.²⁰⁶ Later announcements stated both Supplemental Security Income and certain Veterans' beneficiaries would also receive automated payments.²⁰⁷ For those non-filers who were not federal benefits recipients, the IRS created an online non-filer portal through which they could provide basic information (name, mailing address, email address, social security number) as well as information about their qualifying children.²⁰⁸

On April 20, 2020, the IRS announced through an online press release that Social Security and Railroad Retirement beneficiaries would have to enter their qualifying children into the online portal by noon on April 22, 2020, merely forty hours later, or else they would have to wait until the 2021 filing season to claim the children on a 2020 return and receive the

204. Press Release, Internal Revenue Serv., IR-2020-61, Economic Impact Payments: What You Need to Know (Mar. 30, 2020), <https://content.govdelivery.com/accounts/USIRS/bulletins/2840af7> (original release).

205. See, e.g., Letter from Sen. Margaret Wood Hassan et al. to Steven T. Mnuchin, Secretary, U.S. Dep't Treasury, and Andrew Saul, Comm'r, Soc. Sec. Admin. (Apr. 1, 2020), <https://perma.cc/T3QH-TKLP>.

206. Press Release, U.S. Dep't Treas., Social Security Recipients Will Automatically Receive Economic Impact Payments (Apr. 1, 2020), <https://home.treasury.gov/news/press-releases/sm967>; Press Release, Internal Revenue Serv., IR-2020-61, Economic Impact Payments: What You Need to Know (Apr. 1, 2020) (updated release).

207. Press Release, Internal Revenue Serv., IR-2020-73, Supplemental Security Income Recipients Will Receive Automatic Economic Impact Payments (Apr. 15, 2020); Press Release, Internal Revenue Serv., IR-2020-75, Veterans Affairs Recipients Will Receive Automatic Economic Impact Payments (Apr. 17, 2020).

208. Press Release, Internal Revenue Serv., IR-2020-69, Treasury, IRS Launch New Tool to Help Non-Filers Register for Economic Impact Payments (Apr. 10, 2020).

relevant RRC.²⁰⁹ This demand prompted yet another outcry from Congress, tax professionals, and benefits advocates. Eight senators wrote to the IRS, estimating that one million otherwise qualifying children would be harmed;²¹⁰ advocates noted that the normal safety net of Volunteer Tax Assistance sites and Tax Counseling for the Elderly programs were effectively shut down because of the pandemic, as were the traditional support systems for elderly and disabled individuals, especially those who are low income.²¹¹ The IRS itself had suspended all telephone and in-person assistance on May 11, 2020.²¹²

The IRS doubled down on its position, even after the Government Accountability Office found that the IRS had failed to pay dependent EIPs to approximately 450,000 individuals who had registered their qualifying children through the portal.²¹³ At a congressional hearing on June 30, 2020, the IRS Commissioner stated that the IRS would issue those payments; however, he refused to commit to reopening the portal for any non-filer federal-benefits recipients who had missed the earlier deadlines.²¹⁴ He reiterated that these individuals would have to file a 2020 tax return in 2021 to claim the dependent RRC.²¹⁵ The Commissioner's testimony prompted yet another letter from thirteen senators, demanding that the IRS reopen the portal.²¹⁶

209. See Press Release, Internal Revenue Serv., IR-2020-76, SSA, RRB Recipients with Eligible Children Need to Act by Wednesday to Quickly Add Money to Their Automatic Economic Impact Payment (Apr. 20, 2020).

210. Letter from Sen. Margaret Wood Hassan et al. to Steven T. Mnuchin, Secretary, U.S. Dep't Treasury, and Andrew Saul, Comm'r, Soc. Sec. Admin. 2 (Apr. 23, 2020), <https://perma.cc/A4AX-YD2Z>.

211. See Gabrielle Martins Van Jaarsveld, *The Effects of COVID-19 Among the Elderly Population: A Case for Closing the Digital Divide*, FRONTIERS IN PSYCHIATRY (Nov. 12, 2020), <https://www.frontiersin.org/articles/10.3389/fpsy.2020.577427/full> (explaining that the elderly have been most heavily impacted by the pandemic, in part because they are unable to utilize digital resources for support).

212. Press Release, Internal Revenue Serv., IR-2020-68, IRS Urges Taxpayers to Use Electronic Options; Outlines Online Assistance (May 11, 2020).

213. U.S. GOV'T ACCOUNTABILITY OFF., GAO-20-625, COVID-19: OPPORTUNITIES TO IMPROVE FEDERAL RESPONSE AND RECOVERY EFFORTS 220 (2020), <https://www.gao.gov/assets/gao-20-625.pdf>.

214. See *2020 Filing Season Hearing*, *supra* note 28, at 28–30.

215. *Id.* at 28–29.

216. Letter from Sen. Benjamin L Cardin et al. to Steven T. Mnuchin, Secretary, U.S. Dep't Treasury, and Charles P. Rettig, Comm'r, Internal Revenue Serv. 2 (Apr. 23, 2020), <https://perma.cc/ZMH8-4MPV>.

On July 22, 2020, in light of the IRS's actions, advocates filed a complaint in federal district court, *McGruder v. Mnuchin*,²¹⁷ which sought injunctive and declaratory relief in the form of the IRS allowing non-filer federal benefits recipients to submit their qualifying child information to apply for dependent EIPs and the IRS issuing those additional payments on or before December 31, 2020.²¹⁸ The IRS, represented by the Department of Justice, ultimately capitulated just days before a scheduled hearing, agreeing to open the portal for non-filer federal benefits recipients to enter their qualifying children.²¹⁹ By that time, of course, these eligible individuals had been waiting for four months, during which the pandemic, and its economic consequences, had ravaged their lives.²²⁰

B. TRIS Analysis

The administrative burdens faced by federal benefits recipients are daunting in the best of times. In the context of a pandemic, when all social support systems were closed or operating on a remote basis, and when the recipient was required to navigate an entirely new bureaucracy, the burdens overwhelmed many taxpayers. The non-filer portal, which recipients were directed to use, was only available online; there was no paper-based process by which one could provide their qualifying child information. The portal was not mobile-responsive, so accessing it through a smart phone or tablet was extremely problematic. Before April 28, 2020, it was only available in English; after that date, it was translated into Spanish.²²¹

Had the IRS approached from the outset the challenge of issuing EIPs to non-filer federal-benefits recipients from a rights-based, administrative

217. Complaint, *McGruder v. Mnuchin*, No. 2:20-CV-03590 (E.D. Pa. July 22, 2020). One of the authors of this Article, Leslie Book, was co-counsel for the plaintiffs in the *McGruder* litigation.

218. *See id.* at 40.

219. *See* Press Release, Internal Revenue Serv., IR-2020-180, IRS Takes New Steps to Ensure People with Children Receive \$500 Economic Impact Payments (Aug. 14, 2020); Order That a Hearing on the Motion for Preliminary Injunction Is Scheduled, *McGruder*, No. 2:20-CV-03590 (E.D. Pa. July 22, 2020) (scheduling the hearing for August 17, 2020).

220. For a discussion of the effect of the IRS's actions on the taxpayer who later became a named plaintiff in the *McGruder* case, see Michelle Singletary, *New Data Reveal How Many Poor Americans Were Deprived of \$500 Stimulus Payment for Their Children*, WASH. POST (June 30, 2020), <https://www.washingtonpost.com/business/2020/06/30/new-data-reveal-how-many-poor-americans-were-deprived-500-stimulus-payment-their-children/>.

221. *See* Press Release, Internal Revenue Serv., IR-2020-83, Use IRS Non-Filers: Enter Payment Info Here Tool to Get Economic Impact Payment; Many Low-Income, Homeless Qualify (Apr. 28, 2020).

burden perspective, it would have identified the challenges this population faces during a pandemic and designed approaches that accommodated those challenges. In describing the program under Step 1 of the TRIS analysis (Description of Program/Proposal), the IRS would have correctly identified the need to issue EIPs “as rapidly as possible,”²²² given the urgency of addressing the pandemic’s economic impact. Further TRIS analysis, however, would have demonstrated that goal did not preclude issuing additional EIPs as updated data became available. For example, under TRIS Steps 3 (Identification and Analysis of Impacted Population) and 4 (Impacted Segment Analysis), the IRS would have recognized that federal benefits recipients lacked computer access or did not have social support systems in place during the pandemic, which would have led to the IRS identifying them as vulnerable and worthy of particular attention considering the administrative burdens that might prevent access to their tax-based pandemic benefits.

Having identified key characteristics of the target population that might create challenges in fulfilling the purpose of the program, the IRS’s conduct of the Taxpayer Rights/Administrative Burden Analysis (TRIS Step 5) likely would have resulted in the IRS issuing the automatic \$1,200 payments immediately and then issuing an additional payment for qualifying children as support systems began to reopen. This approach would have lessened the learning burden for those beneficiaries who could navigate the online portal but simply did not learn about it within the forty-hour deadline. The forty-hour deadline was established so the IRS could have a clear cut-off date by which to issue the automated \$1,200 payment.²²³ There is nothing inherently wrong with establishing such a deadline, which helps both the IRS and the taxpayer (by distributing the \$1,200 payment quickly). The problem created by the forty-hour deadline was the failure to accommodate those who could not learn about, access, or navigate the portal in time. This is the type of excessive administrative burden that, once identified, should be addressed and mitigated; the TRIS process provides the mechanism to do so.

Had the IRS signaled to the federal-benefits population and its advocates that it understood their challenges and had strategies in place (or would develop them) to address those challenges, it would have eased the

222. *See generally* I.R.C. § 6428(f)(3)(A).

223. *See* Singletary, *supra* note 220 (“The IRS said it rushed the process to ensure the additional \$500 for dependents was included with \$1,200 adult payments.”).

recipients' psychological burden. As it happened, the IRS's approach heightened the already great anxiety, stress, and uncertainty experienced by this population during the pandemic, depriving them of a cash infusion that could have helped ease that stress. An administrative burden analysis, such as that provided for in TRIS Step 5, would have identified stress as a significant factor in designing a system that allowed for additional payments. Similarly, recognizing that many such recipients lack computer access, or are unable to provide the necessary authentication information required by the portal, the IRS could have devised a paper form for those recipients. Although such an approach could not have been immediately implemented, given that the IRS mail processing had completely shut down, a separate mailbox for these forms could have been established later in the fall, with a dedicated group of employees charged with processing these simple forms. Alternatively, the IRS could have explored creating a phone-based application, since the necessary information was relatively simple to input.²²⁴ As it turned out, the IRS made these additional payments, but it looked grudging and resentful, rather than helpful and understanding. It ended up having to process these additional payments in a time-constrained context rather than planning and implementing them from the beginning and issuing them in an orderly fashion. By not doing the latter, it not only imposed excessive administrative burden on non-filer federal benefits recipients, but also created administrative burden for itself. Had the IRS conducted even a cursory TRIS analysis, acted on its findings, and posted the analysis on its website, it would have eased taxpayer anxiety, delivered additional benefits in an orderly manner, and signaled an understanding of the taxpayer population that increased trust in the tax system.

VI. Conclusion

The design and administration of our tax system often fails to reflect significant burdens that taxpayers experience. The burdens are consequential and result in a tax system that fails to reflect fundamental taxpayer rights, especially for low-income and underrepresented taxpayers. Congress has designed systems for protecting small businesses from overbearing regulations, for seeking to reduce the burden of paperwork, and for protecting privacy. As discussed above, these systems do not work

224. To this end, Congress should specifically appropriate funds to assist the IRS when it tasks the IRS to administer transfer programs in the form of refundable credits.

perfectly, but they do act to provide a measure of protection for individuals from a system that might otherwise pay no attention to these specific problems. These systems seek to protect individuals across government systems and not to specifically protect taxpayers.

This Article presents a system designed for protecting the interest of taxpayers to make sure that the administrative processes adopted by the IRS consider the rights taxpayers have *vis-à-vis* the tax system. With Congress increasingly relying on our tax system to deliver benefits, in addition to its traditional revenue collection function, the failure to account for and reduce those burdens jeopardizes broader societal goals. By adopting a rights-based rubric to overlay systems developed by the IRS, Congress can guide the administrative process to a place better designed to meet the needs of taxpayers.