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October 25, 2021

Hon. Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Comments on IRS Form 911

Dear Commissioner Rettig:

Enclosed please comments on IRS Form 911. These comments are submitted on behalf of the Section of Taxation and have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss these comments with you or your staff.

Sincerely,

Julie A. Divola
Chair, Section of Taxation

Enclosure

cc: Hon. Lily Batchelder, Assistant Secretary (Tax Policy), Department of the Treasury
Mark Mazur, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
William M. Paul, Acting Chief Counsel, Internal Revenue Service
Erin Collins, National Taxpayer Advocate, Internal Revenue Service

AMERICAN BAR ASSOCIATION
SECTION OF TAXATION

Comments Concerning Form 911, Request for Taxpayer Advocate Service Assistance (And Application for Taxpayer Assistance Order)

These comments ("**Comments**") are submitted on behalf of the American Bar Association Section of Taxation (the "**Section**") and have not been reviewed or approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Les Book and Caleb Smith of the Section's Pro Bono & Tax Clinics Committee. These Comments have been reviewed by James Steele III, of the Pro Bono & Tax Clinics Committee, Joseph Barry Schimmel of the Committee on Government Submissions, and Kurt L. Lawson, Vice-Chair for Government Relations for the Tax Section.

Although members of the Section may have clients who might be affected by the federal tax principles addressed by these Comments, no member who has been engaged by a client (or who is a member of a firm or other organization that has been engaged by a client) to make a government submission with respect to, or otherwise to influence the development or outcome of one or more specific issues addressed by, these Comments has participated in the preparation of the portion (or portions) of these Comments addressing those issues. Additionally, while the Section's diverse membership includes government officials, no such official was involved in any part of the drafting or review of these Comments.

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Date: October 25, 2021

I. INTRODUCTION

These Comments are submitted in response to the Notice and Request for Comments published by the U.S. Department of the Treasury ("**Treasury**") and the Internal Revenue Service (the "**Service**") on August 24, 2021 (the "**Notice**").[1] The Notice requested comments on IRS Form 911, which is used by taxpayers to request relief from a significant hardship which already might have occurred or is about to occur if the Service takes or fails to take certain actions.

The Section is making a single recommendation: to provide a checkbox and related instructions on Form 911 specifically pertaining to taxpayer requests for an "Offset Bypass Refund" ("**OBR**"), and expedited procedures for handling a Form 911 where the checkbox is checked. We are limiting our comments to this single issue to highlight its critical importance.

II. BACKGROUND

When a taxpayer owes back-due federal taxes, generally any refund the taxpayer is due is applied automatically ("offset") against those back-taxes. The Service has discretion under section 6402(a)[2] to "bypass" this offset and disburse some or all of the refund to the taxpayer.[3] The Service exercises this discretion through an OBR when the taxpayer demonstrates that by failing to receive the refund the taxpayer will experience financial hardship.[4]

The Section previously has raised the importance of OBRs in comments to Treasury and the Service. To wit, the Section raised OBRs as an important issue in comments pertaining to relief for taxpayers during the ongoing pandemic,[5] and most

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[1] Proposed Extension of Information Collection Request Submitted for Public Comment; Comment Request on Burden Related to Form 911, Request for Taxpayer Advocate Service Assistance (and Application for Taxpayer Assistance Order), 86 Fed. Reg. 47,367 (Aug. 24, 2021).

[2] Unless otherwise indicated, references to a "section" are to the Internal Revenue Code of 1986, as amended (the "**Code**" or "**I.R.C.**").

[3] *See* I.R.M. 21.4.6.5.11.1 (Nov. 8, 2017).

[4] While generally the taxpayer must affirmatively request relief and demonstrate hardship to the Service, it should be noted that recently the Service provided a form of blanket OBR relief for the I.R.C. § 6428 recovery rebate credits claimed on 2020 tax returns. *See NTA Blog: Update on Offset of Recovery Rebate Credits: The IRS Has Agreed to Exercise Its Discretion to Stop Offsets of Federal Tax Debts* (Mar. 15, 2021), *available at* https://www.taxpayeradvocate.irs.gov/news/nta-blog-update-on-offset-of-recovery-rebate-credits-the-irs-has-agreed-to-exercise-its-discretion-to-stop-offsets-of-federal-tax-debts/.

[5] *See Response to Comment Request Concerning Review of Regulatory and Other Relief to Support Economic Recovery* (Jan. 15, 2021), *available at* https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2021/011521comments.pdf.

recently in the Section's recommendations for the 2021-2022 Priority Guidance Plan.[6] The concerns raised in those comments remain salient today.

As the Section explained in its previous comments, the Service's administration of OBRs presently is hampered by both a lack of taxpayer-facing guidance and consistent internal processing procedures.[7] The Section also noted that even for those taxpayers or practitioners who are aware of OBRs, there are significant impediments to the Service's efficiently addressing OBR requests. Statistics from the 2021 filing season demonstrate this persistent problem in stark terms. Taxpayers calling Accounts Management or Customer Service Representatives during the filing season could expect to reach a representative only seven percent of the time and three percent of the time, respectively.[8] While technically an OBR can be initiated by the Service without the assistance of the Taxpayer Advocate Service ("**TAS**"), as a practical matter TAS is the only viable avenue for taxpayers to receive assistance.[9] OBRs are by nature time-sensitive, as the request must be received by the Service prior to the posting date of the offset.[10] Once an offset occurs, it generally cannot be "undone." The permanence of the offset makes prompt attention by the Service to an OBR paramount: It provides the only mechanism for relief. Given the aforementioned level of service from Accounts Management and Customer Service Representatives, TAS assistance (via Form 911) is the only reasonable chance a taxpayer has at receiving an OBR.

Even if the Service's level of service increased and taxpayers were able to access Service employees, the general public has little knowledge or understanding of the OBR process. A search of the Service's website (https://www.irs.gov) finds no direct references to either "OBR" or "Offset Bypass."[11] While the Internal Revenue Manual provides guidance to Service employees on processing OBRs, it is not taxpayer-facing and, even if the taxpayer somehow located the guidance, it would be unlikely to be useful for unsophisticated taxpayers. An OBR can provide critical relief to a taxpayer-facing financial hardship—critical relief that could mean the difference between making rent or being evicted. We believe OBRs should not be a hidden form of relief that only well-informed or represented taxpayers (or more often practitioners) can request. Rather, they should be readily advertised by the Service and especially TAS. In addition to making

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[6] *See Recommendations for the 2021-2022 Department of the Treasury and Internal Revenue Service Priority Guidance Plan* (May 28, 2021), *available at* https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2021/052821comments.pdf.

[7] *See supra* note 5.

[8] *See National Taxpayer Advocate Fiscal Year 2022 Objectives Report to Congress*, *at* v (Preface: National Taxpayer Advocate's Introductory Remarks) (June 30, 2021), *available at* https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2021/06/JRC22_Preface.pdf.

[9] *See* I.R.M. 21.4.6.5.11.1(3) (providing instructions to Customer Account Services employees).

[10] *See* PMTA 2013-13 (June 11, 2013), *available at* https://www.irs.gov/pub/lanoa/pmta_2013-13.pdf.

[11] Search terms "OBR" and "Offset Bypass" entered in IRS.gov with no results as of Sept. 17, 2021.

OBRs easier both for the taxpayer to request and for the Service to process, specifically referencing OBRs on Form 911 would increase its publicity.[12]

III. RECOMMENDATIONS TO IMPROVE FORM 911

To address the concerns raised above, we recommend that the Service include a specific checkbox on Form 911 for taxpayers to indicate that they are seeking an OBR (the "OBR Checkbox"). On the current Form 911, the OBR Checkbox could be inserted as line 12c.

Because the term "Offset Bypass Refund" might be confusing to most taxpayers, we recommend that the language accompanying the OBR Checkbox be written in "plain English" without technical tax terminology. Language accompanying the OBR Checkbox could be as follows:

> Check here if you are facing financial hardship, such as an inability to pay for rent, food, or medical expenses, and you need your federal tax refund but are concerned that it will be taken to pay past-due federal tax debts.

We also recommend that additional information pertaining to OBRs be provided in the Instructions to Form 911, rather than on the Form 911 itself. We recommend that the additional information in the Instructions to Form 911 include the following: (1) advice to the taxpayer that the request be filed contemporaneously with the tax return, or as soon as possible thereafter; (2) an explanation that an OBR may only grant relief from other federal tax debts and is inapplicable to non-federal tax debts; (3) an explanation that OBRs are only granted to the extent the taxpayer needs the refund to avoid financial hardship; and (4) an explanation about what information TAS may ask of the taxpayer to demonstrate that they will suffer financial hardship if they do not receive the refund. On this last point (*i.e.*, point (4)), it should be stressed that the Treasury Inspector General for Tax Administration ("**TIGTA**") has found significant nationwide variation on what information TAS requires taxpayers to provide to demonstrate eligibility for an OBR.[13] Instructions that provide uniform requirements for OBR eligibility would assist in providing horizontal equity to the OBR process.

Lastly, we recommend that when TAS receives Form 911 with the OBR Checkbox marked, TAS should provide expedited processing and contact taxpayers within three business days. As detailed above, OBRs are by nature time sensitive and can have irreversible consequences if not promptly resolved. More important, however, is that a taxpayer eligible for an OBR necessarily will suffer financial hardship if they do

[12] While beyond the scope of this request for comments, we also suggest that the Service take additional steps to publicize OBRs online. This could be done by including language about OBRs on the "Where's My Refund?" landing page (https://www.irs.gov/refunds).

[13] *See* TIGTA, *Controls Over Offset Bypass Refunds Processed by the Taxpayer Advocate Service Should Be Improved to Reduce the Risk of Abuse and Allow for More Consistent Treatment of Taxpayers*, Ref. No. 2020-10-069 (Sept. 9, 2020).

not receive the refund. It is, accordingly, paramount that the taxpayer receives the funds as soon as possible, thus warranting expedited service from TAS.