U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General | *Washington, D.C. 20530*

June 13, 2019

The Honorable Charles E. Grassley
Chairman
Committee on Financial Services
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We write to provide our views on H.R. 3151, the "Taxpayer First Act." The Department of Justice wishes to inform Congress of several provisions that raise constitutional and policy concerns.

1. The Appointments Clause (sections 1001 and 2101)

Two provisions of H.R. 3151 violate the Constitution's Appointments Clause by allowing for the appointment of potential officers in a manner that would not comply with the Clause.

The Appointments Clause provides the exclusive means for appointing "officers of the United States." An "officer" for purposes of the Clause is one who (i) "occup[ies] a continuing position established by law," and (ii) "exercis[es] significant authority pursuant to the laws of the United States." *Lucia v. SEC*, 138 S. Ct. 2044, 2051 (2018) (internal quotation marks omitted). Whether one's authority is "significant" depends on the importance of one's duties and the discretion one exercises in performing them. *Id.* at 2052. Under the Clause, certain principal officers must be nominated by the President with the advice and consent of the Senate, while the appointment power for "inferior officers" may reside in "the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. A "department," in turn, is a "freestanding component of the Executive Branch, not subordinate to or contained within any other such component." *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010).

H.R. 3151 would create two new IRS positions, the occupants of which may qualify as officers. As the bill is currently written, these positions would be filled by the Commissioner of the IRS. But, as "a subordinate agency within the Treasury Department," *Loving v. IRS*, 742 F.3d 1013, 1015 (D.C. Cir. 2014), the IRS does not qualify as a "department" of its own; thus, the Commissioner would not qualify as a "head of department" who could validly appoint inferior officers.

To remedy this concern, we recommend vesting the appointment power for these positions in the Secretary of the Treasury, rather than the IRS Commissioner, or at least making

the Commissioner's appointments subject to the approval of the Secretary of the Treasury. We discuss the two positions in turn.

a. *The Chief of Appeals of the IRS Independent Office of Appeals*

Section 1001(a) of H.R. 3151 would amend the Internal Revenue Code by establishing the IRS Independent Office of Appeals and provide for the appointment of a Chief of Appeals by the Commissioner of the IRS, subject to certain broad qualifications. Section 1001(a) would give the Chief oversight over a process intended to "resolve Federal tax controversies without litigation" that is "generally available to all taxpayers." While there is already an existing Office of Appeals led by a Chief that is described in the Internal Revenue Manual and referenced elsewhere in the Internal Revenue Code, *see, e.g.*, 26 U.S.C. § 6320(b)(1), this bill would appear to be the first organic statute establishing the Office and describing the duties of the Chief.

While the question is not free from doubt (in part because the relevant duties are described in broad terms), we think it is likely that the Chief of Appeals would qualify as an officer of the United States—i.e., one who occupies a "continuing position" and exercises "significant authority." *Lucia*, 138 S. Ct. at 2051. The Chief of Appeals position is "continuing" because it is permanent and will continue beyond any short-term personnel changes. *See Officers of the United States Within the Meaning of the Appointments Clause*, 31 Op. O.L.C. 73, 112 (2007). And, while we consider the question close, the Chief may also exercise "significant authority" by dint of overseeing an adjudicative process that is binding on taxpayers, and by possessing the binding authority to obtain legal advice from the IRS Office of Chief Counsel. *See id.* at 87 (noting that the ability to "bind third parties, or the government itself, for the public benefit" is paradigmatic of "significant authority").

We note that a recent case, *Tucker v. Commissioner*, 676 F.3d 1129 (D.C. Cir. 2012), concluded that *employees* of the Office of Appeals were not officers for the purposes of the Appointments Clause. But the reasoning of that case has not been embraced by the Supreme Court, and would not necessarily cover the duties of the *Chief* of Appeals as laid out in H.R. 3151. More broadly, we note that this area of law remains uncertain in the wake of the Supreme Court's recent opinion in *Lucia*.

In light of this uncertainty and the attendant litigation risk, we recommend vesting the appointment power for the Chief of Appeals in the Secretary of the Treasury, rather than the IRS Commissioner. This vesting could be accomplished simply by making the appointment subject to the approval of the Secretary.

b. *The IRS Chief Information Officer*

Section 2101(a) of H.R. 3151, meanwhile, would provide that "[t]here shall be in the Internal Revenue Service an Internal Revenue Service Chief Information Officer . . . who shall be appointed by the Commissioner of Internal Revenue."

As with the Chief of Appeals, the Chief Information Officer would arguably be an officer for purposes of the Appointments Clause. The position would be "continuing" because it is permanent and will continue to exist beyond changes in the occupant of the office. And section

2101(a) would vest the CIO with numerous important duties that may rise to the level of significant authority, including managing "the development, implementation, and maintenance of information technology" for the IRS, and developing and implementing "a multiyear strategic plan for the information technology needs" of the IRS. Given the broad nature of those duties, the CIO would likely be authorized to exercise significant discretion and bind other components of the IRS. As with the Chief of Appeals, the CIO would thus potentially qualify as an officer whose appointment by the Commissioner would violate the Appointments Clause.

As a remedy, we suggest vesting the appointment power for the CIO in the Secretary of the Treasury, rather than the IRS Commissioner. The legislation could vest the appointment power in the Secretary simply by making the appointment subject to the approval of the Secretary.

2. The Recommendations Clause (section 2005)

Section 2005 of the bill would require the Secretary of the Treasury to submit a report to Congress assessing whether the government could achieve several specified goals (such as "reducing identify theft tax refund fraud") by "utiliz[ing] new payment platforms to increase the number of tax refunds paid by electronic funds transfer." The mandatory report would be required to "include any legislative recommendations necessary to accomplish [the specified] goals." Section 2005 would violate the Recommendations Clause, which provides that the President "shall from time to time . . . recommend to [Congress's] consideration such Measures as he shall judge necessary and expedient." U.S. Const. art. II, § 3. That Clause implicitly prohibits Congress from "requiring the President to recommend legislation even if he does not consider it necessary and expedient," *Application of the Recommendations Clause to Section 802 of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 40 Op. O.L.C. __ (2016), which is exactly what section 2005 would require. As a remedy, we suggest making the recommendation requirement permissive, by, for example, replacing "shall" with "may."

3. Notification of Suspected Identity Theft (section 2007)

Section 2007 of the bill provides that if the Secretary of the Treasury determines that there may have been an unauthorized use of the identity of any individual, the Secretary shall, "without jeopardizing an investigation relating to tax administration," notify the individual and take other steps. However, it is equally important to protect the integrity of investigations beyond those related to tax administration insofar as identity theft has become a widespread phenomenon used in a variety of fraud schemes. It may be the case that the Secretary will have knowledge of other civil or criminal investigations, which could be equally jeopardized by premature disclosure to the affected individual. In order to extend the protection of the quoted provision to this broader universe of identity theft cases, we recommend that the above-quoted clause be amended to read: "without jeopardizing any civil or criminal investigation related to tax administration, or any other civil or criminal investigation that the Secretary has knowledge of…".

Please do not hesitate to contact this office if we can be of additional assistance regarding this or any other matter. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

Prim F. Escalona
Principal Deputy Assistant Attorney General

CC: The Honorable Ron Wyden
Ranking Member