



**Section of Taxation**

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February 1, 2018

The Honorable David Kautter  
Acting Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20024

Re: Comments on Rev. Proc. 99-21

Dear Acting Commissioner Kautter:

Enclosed please find comments in response to the notice and request for comments in the Federal Register on October 17, 2017 with respect to Revenue Procedure 99-21 (the "Comments"). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been 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 will be pleased to discuss the Comments with you or your staff.

Sincerely,

Karen L. Hawkins  
Chair, Section of Taxation

Enclosure

cc: William M. Paul, Acting Chief Counsel and Deputy Chief Counsel (Technical),  
Internal Revenue Service  
Dana L. Trier, Deputy Assistant Secretary (Tax Policy), Department of the Treasury  
Thomas West, Tax Legislative Counsel, Department of the Treasury  
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**AMERICAN BAR ASSOCIATION  
SECTION OF TAXATION  
COMMENTS ON INFORMATION COLLECTION UNDER  
REVENUE PROCEDURE 99-21**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been 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 Caleb B. Smith. Substantive contributions were made by members of the Pro Bono and Tax Clinics Committee, including Bruce A. McGovern and Christina Thompson. Additional contributions were made by Megan Sullivan, Vivian Ho, and Jennifer Liguori. The Comments were reviewed by Christine Speidel, Chair of the Pro Bono and Tax Clinics Committee. The Comments were further reviewed by Joseph Barry Schimmel of the Section’s Committee on Government Submissions; Sheri Dillon, Council Director for the Pro Bono and Tax Clinics Committee; and Julian Y. Kim, the Section’s Vice Chair (Government Relations).

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the federal income tax principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: February 1, 2018

## EXECUTIVE SUMMARY

Under section 6511<sup>1</sup> a taxpayer generally has only three years from the time a return is filed, or two years from the time the tax is paid, to claim a refund of taxes. Responding to the perceived unfairness of this section as applied to the taxpayers in *United States v. Brockamp*,<sup>2</sup> Congress enacted section 6511(h). Under this section, the time for a taxpayer to claim a refund is tolled so long as the taxpayer is “financially disabled.” In defining financial disability, Congress used statutory language nearly identical to that used in Social Security Disability determinations. Congress also explicitly provided that the Treasury Secretary could determine the form of proof necessary to show financial disability. The Internal Revenue Service (the “Service”) detailed the form of proof necessary to show financial disability in Revenue Procedure 99-21 (“Rev. Proc. 99-21”)<sup>3</sup>.

On October 17, 2017, the U.S. Department of the Treasury (the “Treasury”) and the Service issued a notice and request for comments in the Federal Register inviting comments on continuing information collection practices under Rev. Proc. 99-21.<sup>4</sup> Since its publication in 1999, there have been no other formal requests for comments by either the Treasury or the Service regarding Rev. Proc. 99-21. These Comments address issues arising from the requirements set out in Rev. Proc. 99-21. Because of the importance of the subject and lack of prior opportunity to formally comment, these Comments are not strictly limited to information collection practices under Rev. Proc. 99-21.

The members of the Section of Taxation providing substantive contributions to these Comments all work at Low Income Taxpayer Clinics funded through the Service under section 7526. It is largely our work at Low Income Taxpayer Clinics and the individuals we have assisted firsthand that inform our recommendations for Rev. Proc. 99-21. However, we also believe it is particularly timely to provide comments because of the recent decision in *Stauffer v. IRS*,<sup>5</sup> which raises serious questions about the continued viability of Rev. Proc. 99-21. The circumstances we have encountered in working with traditionally unrepresented and vulnerable taxpayers dovetail with the concerns expressed by the court in *Stauffer*. Specifically, Rev. Proc. 99-21 may unreasonably limit the evidence acceptable to show financial disability.

These Comments rely on the legislative history of section 6511(h) as the conceptual lodestar for our recommendations for revisions to Rev. Proc. 99-21. Our primary concerns are with Rev. Proc. 99-21’s definition of a physician and what is asked of the physician to show financial disability. Our recommendations are written with the goal of providing administrative workability for the Service, while also ensuring that

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<sup>1</sup> References to a “section” are to a section of the Internal Revenue Code of 1986, as amended (the “Code”), unless otherwise indicated.

<sup>2</sup> 519 U.S. 347 (1997).

<sup>3</sup> 1999-1 C.B. 960.

<sup>4</sup> 82 Fed. Reg. 48,314 (2017).

<sup>5</sup> No. 15-10271-MLW, 2017 WL 4330241 (D. Mass. Sept. 29, 2017) (denying the Service’s motion to dismiss a claim for refund not in compliance with Rev. Proc. 99-21).

taxpayers like those in *Brockamp* receive the protections of section 6511(h). Specifically, we recommend that the Service:

1. Expand the definition of physician to include psychologists, as many taxpayers who can reasonably be considered financially disabled suffer primarily from psychological ailments, and interact primarily with psychologists;
2. Limit the role of the physician to providing medical details of the ailment and how it affects the taxpayer rather than providing a medical opinion that the taxpayer is unable to manage their financial affairs over a specified period of time;
3. Consider all credible evidence regarding the taxpayer's ability to manage financial affairs after a medically determinable ailment has been established; and
4. Publish a list of medical conditions that the Service will consider sufficient to meet the physical or mental impairment requirement of section 6511(h).

## **DISCUSSION**

The Section appreciates the opportunity to provide comments on Rev. Proc. 99-21. Rev. Proc. 99-21 sets out procedures for the administration of the “financial disability” standard, which tolls the period of limitations to request tax refunds under Internal Revenue Code section 6511(h).

In these Comments, we first examine the cases and events that led Congress to add a tolling provision to section 6511. We then compare the statutory language and administrative procedures of section 6511(h) with similar provisions in other sections of the Code and in the Social Security Act. These comparisons expose puzzling differences which lead to difficulties for taxpayers and may frustrate the intent of section 6511(h). Finally, we make recommendations as to how the Service can revise its financial disability procedures to address these problems.

### **Background of Section 6511(h)**

Prior to 1998, section 6511 did not have a tolling provision for financial disability. In a series of cases decided between 1990 and 1997, taxpayers who had failed

to comply with the limitations periods of section 6511 made a three-part argument:<sup>6</sup> (1) under the U.S. Supreme court's 1990 decision in *Irwin v. Department of Veterans' Affairs*,<sup>7</sup> federal courts can, as a matter of equity, toll all limitations periods that run in favor of the federal government, including the limitations periods of section 6511; (2) there exists a subset of taxpayers who are unable to comply with section 6511's limitations periods for reasons such as mental incompetence,<sup>8</sup> severe alcoholism,<sup>9</sup> or imprisonment;<sup>10</sup> and therefore (3) courts should equitably toll section 6511's limitations periods for the period during which the taxpayers were unable to comply and treat their administrative claims for refund as timely filed. The federal courts of appeals divided on the proper analysis of this argument. In 1997, the U.S. Supreme Court resolved the dispute when it held in *Brockamp*<sup>11</sup> that Congress had not intended to permit tolling of section 6511's limitations periods.

The pre-*Brockamp* cases in which taxpayers asserted they had failed to file timely claims for refund because they were unable to manage their affairs followed a common fact pattern. The taxpayer typically deposited tax in the form of withholding from wages, estimated tax payments, or unspecified payments remitted to the Service, and then failed to file a return. Ultimately, either the taxpayer or a representative such as a conservator or the administrator of the taxpayer's estate made a refund claim by filing a late return for the year in question.<sup>12</sup> The facts of *Brockamp* followed this pattern. In *Brockamp*, taxpayer Mr. McGill, who was ninety-three years old, mailed a check for \$7,000 to the Service on April 15, 1984, accompanied by an application for automatic extension of time to file his 1983 income tax return.<sup>13</sup> The taxpayer died in 1988 without ever having filed that return. The taxpayer's daughter, Mrs. Brockamp, was appointed administrator of his estate on January 4, 1989. During the administration of the estate, Mrs. Brockamp discovered the \$7,000 payment to the Service and sought a refund by filing an income tax return for 1983 on March 27, 1991. The return reflected that the taxpayer's actual income tax liability for 1983 was \$427.

Even before the Supreme Court's decision in *Brockamp*, the highly publicized decisions of the courts of appeals on the tolling issue had led to the call for a legislative solution. Simultaneously with the Solicitor General's request for a writ of *certiorari* in *Brockamp*,

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<sup>6</sup> See generally Bruce A. McGovern, *The New Provision for Tolling the Limitations Periods for Seeking Tax Refunds: Its History, Operation and Policy, and Suggestions for Reform*, 65 Missouri L. Rev. 797 (2000). With the author's permission, certain excerpts from this article appear in these comments.

<sup>7</sup> 498 U.S. 89 (1990).

<sup>8</sup> See, e.g., *Wiltgen v. U.S.*, 813 F. Supp. 1387 (N.D. Iowa 1992); *Johnsen v. U.S.*, 758 F. Supp. 834 (E.D.N.Y. 1991).

<sup>9</sup> See *Scott v. U.S.*, 847 F. Supp. 1499 (D. Haw. 1993), *aff'd*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,557 (9th Cir. 1995), *rev'd*, 519 U.S. 347 (1997).

<sup>10</sup> See *Henderson v. Backaric*, 95-2 U.S. Tax Cas. (CCH) ¶ 50,329 (D. Kan. 1995).

<sup>11</sup> 519 U.S. 347 (1997).

<sup>12</sup> See, e.g., *Marco v. U.S.*, 98-1 U.S. Tax Cas. (CCH) ¶ 50,337, at 83,837 (D. Conn. 1998); *First Interstate Bank of Nevada v. U.S.*, 874 F. Supp. 286, 287, 290 (D. Nev. 1994), *rev'd*, 108 F.3d 1185 (9th Cir. 1997); *Wiltgen v. U.S.*, 813 F. Supp. 1387, 1388-89 (N.D. Iowa 1992); *Johnsen v. U.S.*, 758 F. Supp. 834, 835-36 (E.D.N.Y. 1991).

<sup>13</sup> See *Brockamp*, 859 F. Supp. at 1284. Mrs. Brockamp argued that when Mr. McGill was senile when he erroneously sent the \$7,000 check to the IRS.

the Clinton Administration directed the Treasury Secretary to craft a solution.<sup>14</sup> Members of Congress also took notice of the issue. In March 1996, Representative Jennifer Dunn, a member of the House Ways and Means Committee, considered offering a legislative proposal<sup>15</sup> as an amendment to the Taxpayer Bill of Rights 2, which was then working its way through Congress.

In response to the *Brockamp* decision, as part of the Internal Revenue Service Restructuring and Reform Act of 1998,<sup>16</sup> Congress added to the Code new section 6511(h). Section 6511(h) provides as follows:

(h) Running of Periods of Limitation Suspended While Taxpayer Is Unable to Manage Financial Affairs Due to Disability. --

(1) In General. -- In the case of an individual, the running of the periods specified in subsections (a), (b), and (c) shall be suspended during any period of such individual's life that such individual is financially disabled.

(2) Financially Disabled. --

(A) In General. -- For purposes of paragraph (1), an individual is financially disabled if such individual is unable to manage his financial affairs by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months. An individual shall not be considered to have such an impairment unless proof of the existence thereof is furnished in such form and manner as the Secretary may require.

(B) Exception Where Individual Has Guardian Etc. -- An individual shall not be treated as financially disabled during any period that such individual's spouse or any other person is authorized to act on behalf of such individual in financial matters.

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<sup>14</sup> A statement issued by the White House Office of the Press Secretary on January 31, 1996, provides:

Today, the Solicitor General filed with the Supreme Court petitions for certiorari in two Ninth Circuit cases interpreting the tax code's rules about how long a taxpayer has to seek a refund for overpayment of taxes. The President recognizes the necessity of applying the current law to pending cases, and that is the position of the government in these two cases. In reviewing the policies at issue in these cases, however, the President has concluded that the law at times may produce harsh results. . . . Accordingly, he has directed the Secretary of the Treasury promptly to make recommendations to him concerning whether and how the law should be changed to avoid such unfair results.

TAX NOTES TODAY (Feb. 2, 1996) (Doc. No. 96-3438), available in LEXIS, Fedtax library, TNT file.

<sup>15</sup> See *Ways-Means Approves Taxpayer Rights 2 Measure, Adds Intermediate Sanctions*, DAILY REPORT FOR EXECUTIVES, Mar. 22, 1996, at G56, available in LEXIS, Legis library, Drexec file.

<sup>16</sup> Pub. L. No. 105-206, 112 Stat. 685.

Because section 6511(h) was a response to the *Brockamp* decision, we recommend that administrative guidance issued pursuant to section 6511(h) should: (1) take into account the types of circumstances in which the taxpayer in *Brockamp* and taxpayers in earlier cases were precluded from obtaining federal tax refunds; and (2) be implemented in such a way as to give effect to congressional intent that taxpayers in such circumstances be permitted to obtain tax refunds when they have been unable to manage their financial affairs.

## **The Elements of Section 6511(h)**

The language of section 6511(h) makes clear that Congress intended Treasury and the Service to have wide latitude in promulgating administrative guidance. The statute provides that a taxpayer “shall not be considered to have [the requisite] impairment unless proof of the existence thereof is furnished *in such form and manner as the Secretary may require.*” (emphasis added). The statute neither prescribes the type of proof that taxpayers must provide nor imposes restrictions on the Treasury regarding the administrative guidance to be issued.

Breaking section 6511(h) down into elements helps demonstrate the breadth of discretion Congress intended regarding administrative guidance. Section 6511(h) can be restated as follows:

If:

1. an individual is “unable to manage his financial affairs,”
2. the inability to manage is due to a “medically determinable physical or mental impairment of the individual,”
3. the physical or mental impairment either:
  - a) is expected to result in death, or
  - b) has lasted or can be expected to last for a continuous period of not less than 12 months, and
4. the individual submits proof of elements 1, 2 and 3 in such form as the Secretary of the Treasury requires,

then:

the periods specified in subsections (a), (b) and (c) [of section 6511] are suspended for the period during which the taxpayer was unable to manage his financial affairs,

unless:

someone was authorized to act on the taxpayer’s behalf in financial matters, in which case the periods in subsections (a), (b) and (c) [of section 6511] are not suspended during the periods when someone was authorized.

The statute provides no guidance on the administrative implementation of elements 1, 2, 3, or 4. It is thus left to Treasury and the Service to provide guidance on

when elements 1, 2, and 3 are satisfied, and what type of proof is necessary to satisfy element 4.

## **Other Statutes Refer to a “Medically Determinable Physical or Mental Impairment” and the Proof Requirements are Less Restrictive**

As mentioned above, the Service detailed the proof requirements of section 6511(h) in Rev. Proc. 99-21. The form and manner of proof so prescribed, however, appear stricter than is required under other statutory provisions that use identical or very similar language as section 6511(h). The two most similar statutory sections are section 22(e)(3), providing the definition for permanently and totally disabled for purposes of the credit for the elderly or disabled, and 42 U.S.C. § 423(d)(1)(A), providing the definition of disability for purposes of claiming Social Security disability insurance (“SSDI”).<sup>17</sup>

The language of section 6511(h) defining the type of impairment that is required is identical to the language in section 22(e)(3) for determining disability: “by reason of a medically determinable physical or mental impairment of the individual which can be expected to result in death or which has lasted or can be expected to last not less than 12 months.” The language in section 22(e)(3), enacted prior to section 6511(h), in turn nearly matches the definition of disability for SSDI purposes.<sup>18</sup> The lineage of section 6511(h) clearly runs parallel to Social Security law on disability determinations.

First, we compare the standards used to determine disability for section 6511(h) to those for section 22(e). The definition of disability set out in section 22(e) is also used in determining whether an individual meets the age test to be considered a “qualifying child” under section 152.<sup>19</sup> The Service’s internal guidance concerning the age test to be treated as a qualifying child applies a far more flexible standard for determining disability than that set out in Rev. Proc. 99-21.

Whether a child is a qualifying child is an issue that is heavily audited, and the issue frequently involves large refunds relative to the taxpayer’s income, because of the interplay of qualifying child status with the earned income credit and the child tax credit.<sup>20</sup> Yet in the Internal Revenue Manual (“IRM”), when the age of a qualifying child is at issue because of disability, examiners are directed to accept as proof “a letter from the child's doctor, *other health care provider, or any social service program or agency* verifying the child is permanently and totally disabled.”<sup>21</sup> This is a far less restrictive means of proving impairment under a section that cross references identical language to

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<sup>17</sup> Sections 72(m), 409A(a)(2)(C), and 529(e)(2) also refer to a “medically determinable physical or mental impairment.”

<sup>18</sup> 42 U.S.C. § 423(d)(1)(A) (providing that the term “disability” means “inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months”).

<sup>19</sup> I.R.C. § 152(c)(3)(B) (providing that the age test shall be treated as satisfied “in the case of an individual who is permanently and totally disabled (as defined in section 22(e)(3))”).

<sup>20</sup> See I.R.C. §§ 32, 24.

<sup>21</sup> I.R.M. 4.19.14.5.6(3).

section 6511(h), and likely involves much larger sums of money (and many more claims made) than does section 6511(h). Nevertheless, Rev. Proc. 99-21 requires a doctor to make the required statement, as opposed to any other health care provider, in order to qualify for the relief.

Second, in comparing to the standards used in the SSDI context, the administrative agency is required to consider “all evidence available” and obtains medical evidence from the applicant’s treating physician “or other treating health care provider.”<sup>22</sup> In contrast to Rev. Proc. 99-21, a psychologist’s opinion is entitled to great weight in the determination.<sup>23</sup>

When determining SSDI eligibility, two questions are asked: (1) whether the individual has a physical or mental impairment; and (2) whether the individual’s impairment prevents her from working. (Under section 6511(h) there is almost the exact same requirement: (1) physical or mental impairment; and (2) the causal relationship of that impairment to the inability to manage one’s finances.<sup>24</sup>) As to the first question for SSDI eligibility, evidence of a physical or mental impairment requires a particular, medically sufficient source which includes licensed physicians, osteopaths, *licensed psychologists*, optometrists, podiatrists, and speech pathologists.<sup>25</sup> The second question (the causal relation of the impairment to the inability to work) can be answered by looking to anything of probative value – it is based on all relevant evidence and not limited to merely a physician statement.<sup>26</sup>

All of this makes the stringent requirements of Rev. Proc. 99-21 even more stark. As just explained, Rev. Proc. 99-21 requires stricter means of proof for section 6511(h) than are required to demonstrate a health impairment or disability in similar contexts. Notably, three areas of contrast stand out and are further illuminated by the case examples discussed below. First, the revenue procedure restricts which health care professionals can certify to an impairment. Second, the revenue procedure requires a physician to directly address the patient’s financial management abilities as well as their medical impairment, and to certify the specific time period in which the patient was financially disabled. Third, the revenue procedure is strictly applied and narrowly written, so that relevant evidence may not be considered. As discussed below, these requirements, whether individually or together, have frequently been a trap for the unwary, or other at times simply unsurmountable. Unfortunately, and in conflict with Congressional intent, those most likely to be detrimentally affected by Rev. Proc. 99-21 also are most likely to resemble *Brockamp*.

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<sup>22</sup> 42 U.S.C. § 423(d)(5)(B).

<sup>23</sup> See *Hill v. Astrue*, 698 F.3d 1153 (9th Cir. 2012).

<sup>24</sup> This procedure is clearly described by Carlton Smith in *Procedurally Taxing, Does Rev. Proc. 99-21 Validly Restrict Proof of Financial Disability*, at <http://procedurallytaxing.com/does-rev-proc-99-21-validly-restrict-proof-of-financial-disability-for-purposes-of-extending-the-refund-claim-sol-to-letters-from-doctors-of-medicine-and-osteopathy-part-2/> (June 25, 2015).

<sup>25</sup> *Procedurally Taxing, supra n. 24. See also* 20 C.F.R. § 404.1513(a).

<sup>26</sup> *Procedurally Taxing, supra n. 24. See also* 20 C.F.R. § 404.1520b.

## The Population Affected by Rev. Proc. 99-21 is Among the Most Financially Vulnerable

It is difficult to quantify the characteristics of the population that is “financially disabled,” as financial disability is not a medical term of art or generally used elsewhere in law. Drawing on information that is available for individuals who qualify for SSDI or are considered disabled under the Americans with Disabilities Act (ADA), however, is instructive.<sup>27</sup> When reviewing the statistics some general characteristics of the affected population begin to emerge.

First, it is clear that a disabled individual is far more likely to be impoverished than the general population. An individual who meets the ADA definition of disabled is twice as likely to be impoverished than a non-ADA disabled individual.<sup>28</sup> An increased likelihood of being impoverished holds true for those considered disabled under SSDI, with poverty rates being roughly twice that of the general population.<sup>29</sup>

Second, disabled individuals are likely to be out of the workforce: those that meet the ADA definition of disabled are less than half as likely to be employed as a non-disabled individual.<sup>30</sup> This holds true under the SSDI definition of disabled as well, as a condition of SSDI is that you must not be able to be substantially gainfully employed.<sup>31</sup>

It is also important to note that the population of “financially disabled” individuals under Rev. Proc. 99-21 is likely a *smaller* subset with even more dire financial conditions than the general ADA pool. This is because the ADA statute more broadly defines disability than does Rev. Proc. 99-21, and many in the ADA pool would likely not be found financially disabled.<sup>32</sup> Therefore, ADA and SSDI statistics may well describe a *more* functional and affluent population than that population which qualifies for financial disability.

All of this is to say that the likely population of financially disabled individuals have a compelling need for their tax refunds. They are likely to be in extraordinarily precarious financial situations.<sup>33</sup>

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<sup>27</sup> As noted, earlier, the language of section 6511(h) tracks with the statutory language for Social Security Disability in 42 U.S.C. § 423(d)(1)(A).

<sup>28</sup> See U.S. Senate Committee on Health, Education, Labor and Pensions, *Fulfilling the Promise: Overcoming Persistent Barriers to Economic Self-Sufficiency for People with Disabilities*, retrievable at <https://www.help.senate.gov/imo/media/doc/HELP%20Committee%20Disability%20and%20Poverty%20Report.pdf>.

<sup>29</sup> See Center on Budget and Policy Priorities, *Chartbook: Social Security Disability Insurance*, retrievable at <https://www.cbpp.org/research/social-security/chart-book-social-security-disability-insurance> (last retrieved 12/5/2017).

<sup>30</sup> See Senate Committee on Health, Education, Labor and Pensions, *supra* n. 28.

<sup>31</sup> 42 U.S.C. § 423(d)(2)(A).

<sup>32</sup> See 42 U.S.C. § 12102. Note that the physical or mental impairment under the ADA must substantially limit one or more major life activities, not necessarily including being able to manage one’s finances.

<sup>33</sup> By some calculations the median net worth of individuals eligible for SSDI is \$200. This figure is cited in a letter from Senator Elizabeth Warren to the United States Treasury on October 7, 2016, made available by Tax Analysts. Retrievable at <https://assets.documentcloud.org/documents/3224102/Warren-Irs-Letter.pdf>.

## **Problems Experienced by Taxpayers with Rev. Proc. 99-21**

The members of the Section of Taxation contributing to these Comments have extensive experience in representing low-income taxpayers, through nonprofit or academic Low-Income Taxpayer Clinics funded by the Service under section 7526 (LITCs). The following is a sampling of the issues Section members have seen in financial disability cases.<sup>34</sup>

### *Mr. Smith: Interaction with Wrong Type of Professional*

Mr. Smith was a long time SSDI recipient who was frequently heavily medicated because of severe mental health issues. The effects of his medications were so unpleasant that Mr. Smith often did not take them - sometimes at the risk of major mental episodes. A payee was set up to handle Mr. Smith's finances, as he frequently failed to make rent payments. Mr. Smith's condition would improve and regress at times: during stable periods, he would successfully petition to have the payee removed and even begin trial work periods (as is allowed and encouraged for SSDI recipients).

These trial work periods resulted in small amounts of wages with federal withholding that exceeded his tax liability. However, Mr. Smith routinely failed to file tax returns while wrestling with his mental impairments. When his tax returns were prepared much later, most of the years were time-barred. The LITC believed section 6511(h) would apply and sought a letter in compliance with Rev. Proc. 99-21. The social workers and psychologists that Mr. Smith regularly interacted with could speak with certainty on the time periods Mr. Smith was unable to manage his financial affairs. The psychiatrist, however, was mostly limited to an understanding of the side-effects of the drugs that had been prescribed, as well as the social security records that sporadically removed Mr. Smith's payee (thus seeming to indicate he could manage his financial affairs). Because of the psychiatrist's limited interaction with Mr. Smith and the spotty information made available to him, he was not able to sign a statement that would meet the requirements of Rev. Proc. 99-21. Although Mr. Smith would clearly have been able to produce probative evidence that he was unable to manage his financial affairs, his treating "physician" had insufficient personal knowledge to make that determination. Because of this, Mr. Smith was unable to recoup the withholding he overpaid on small amounts of wages over multiple years.

### *Mr. Jones: A Homeless Truck Driver with Poor Records*

Mr. Jones was a truck driver with largely untreated bipolar disorder, deep depression, and no permanent address. Over time, his mental health deteriorated such that he lost his ability to work, lost his truck (where he had slept) and became homeless. A transitional living facility helped him apply for SSDI and provided tax return preparation assistance for his many outstanding years. On balance he would be due a refund on his

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<sup>34</sup> All names and any identifying material have been changed to protect the identity of the individuals.

delinquent returns, but because some of the refund years were “closed,” all the refunds from “open” years went to offset earlier years with liabilities. Accordingly, he received no refunds at all.

The LITC assisting Mr. Jones believed that he might be eligible for some of the otherwise time-barred refunds under section 6511(h). However, while Mr. Jones was in the throes of his disabilities, he did not keep good track of the various doctors he saw. It was only later, when he was in the transitional living facility, that he had regular contact with social workers and psychologists - none of whom were eligible to write a letter under the Rev. Proc. 99-21 “physician” requirements. Attempts at procuring letters from psychiatrists and medical doctors were also fruitless: they did not have enough contact with Mr. Jones during his life in the previous years to form a medical opinion that he was “unable to manage his finances.” Thus Mr. Jones, a man who had lost what little he had not because of the economy but because of his deteriorating mental condition, was unable to recoup the overpayment in federal income tax that he desperately needed.

*Mr. Peterson: Homeless Veteran*

Mr. Peterson was a Vietnam veteran who worked as a day-trader in the mid-2000s. The lingering effects of exposure to Agent Orange (as well as other health problems) severely affected his ability to function - including filing tax returns. The Service filed substitute returns that showed massive stock gains and corresponding tax liabilities. In truth, Mr. Peterson never made much money for the years at issue, and the supposed gains were from the Service assuming \$0 basis in the sold stock. As Mr. Peterson’s ability to function on his own rapidly deteriorated, he stopped paying the mortgage and his home was foreclosed. Much of the sale proceeds went to the Treasury for the liabilities reported on the substitute returns. For the next few years, at the height of his impairment, Mr. Peterson was homeless with little contact with medical professionals. To the extent that he did interact with doctors, he could not later recall with whom or where the interactions took place.

Years later, Mr. Peterson was given housing and medical support from the Veterans Health Administration (“VA”). Over the course of his time being treated by the VA his medical records were extensive, but for the years he was homeless no such records existed. The LITC consulted with an expert in the hopes of procuring a Rev. Proc. 99-21 compliant letter and recouping the large sum of money Mr. Peterson had lost on the foreclosure of his home. The expert agreed that Mr. Peterson was certainly “unable to manage his financial affairs” from the time he checked into the VA and medical records began to be kept. However, the expert was unwilling to give a medical opinion regarding specified dates prior to checking into the VA (i.e., when the Mr. Peterson was homeless) because there were no medical records for that period. Because the dates the expert was willing to attest to financial disability did not stretch back far enough, Mr. Peterson was unable to file a refund claim. He lost his home and essentially all of the equity he had accumulated in the property was taken to pay taxes he did not owe.

### *Mr. Simons: Assault Victim with Medical Doctor's Opinion*

While on vacation, Mr. Simons was the victim of a brutal physical assault suffering severe trauma to the head. Police charges were filed, and medical records stemming from the incident were kept. Prior to that harrowing event, Mr. Simons always timely filed a tax return and always received a refund for over-withholding. After the event, however, Mr. Simons struggled to file his tax returns or hold a steady job. His field of work was high-paying, however, and to the extent that he did work his income was not insubstantial.

Years later, Mr. Simons sought assistance and filed all his old tax returns. As had always been the case, he was due a refund for each year because of his over-withholding. Many of the refunds were time-barred absent the application of section 6511(h). Because Mr. Simons had been seeing a regular doctor for his condition, that doctor agreed to write a letter in compliance with Rev. Proc. 99-21 specifying the time frame that Mr. Simons was “financially disabled.” The Service examiner (and the Office of Appeals), however, denied the claim because they disagreed with the doctor’s assessment that Mr. Simons could not manage his financial affairs: after all, Mr. Simons had worked (and been compensated at a decent amount) for most of the years at issue. Therefore, even with a Rev. Proc. 99-21 compliant letter, the Service was able to substitute its own judgment for being “unable to manage financial affairs” for that of a physician.<sup>35</sup>

### **Likelihood of Being Found Financially Disabled**

In reviewing 38 federal cases that cited to Rev. Proc. 99-21, the results showed a low likelihood of taxpayer success in litigation. Of the 38 cases, 36 resulted in dismissal of the taxpayer’s suit on the basis of the taxpayer failing to meet the requirements of Rev. Proc. 99-21.<sup>36</sup> Several of these cases involve taxpayers with letters from medical providers, whose cases were dismissed for failure to strictly comply with Rev. Proc. 99-21.<sup>37</sup>

We note that it is possible that the Service frequently resolves section 6511(h) cases administratively in favor of the taxpayer. However, anecdotal evidence, as well as a review of the court cases that do arise, strongly suggests otherwise.

One of the cases that found for the taxpayer is an unpublished district court decision, *Walters v. U.S.* In *Walters* the taxpayer provided a doctor’s letter that related, in great detail, the conditions of the taxpayer husband and wife: the husband suffering from

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<sup>35</sup> The facts of this incident are distinguishable from those of *Estate of Rubinstein v. U.S.* 119 Fed. Cl. 658 (2015), *aff'd*, 654 F. App'x 481 (Fed. Cir. 2016). Unlike *Rubinstein*, at no point in this instance did the Service cite to improper analysis or contradicting claims of the physician. Rather, Service Appeals denied the claim because on a “facts and circumstances” analysis- they did not believe that Mr. Simons was unable to manage his financial affairs even with a valid, Rev. Proc. 99-21 compliant letter.

<sup>36</sup> One of the cases that found for the taxpayer is an unpublished decision, *Walters v. U.S.*, 2009 WL 5062391 (W.D. Penn). The other (*Stauffer v. IRS*) is discussed in detail *infra*.

<sup>37</sup> See, e.g., *Estate of Kirsch v. U.S.*, 2017 WL 2992214 (W.D.N.Y.); *Pleconis v. U.S.*, 2011 WL 3502057 (D.N.J.); *Peck v. Commissioner*, T.C. Summ. Op. 2016-45.

clinical depression, the wife from a progressive neurological disease.<sup>38</sup> The doctor concluded that it was his medical opinion that the husband failed to file his tax returns because of his condition. The government argued this was not in strict compliance with Rev. Proc. 99-21 because it did not specifically contain language from the doctor that said the husband was “unable to manage his financial affairs.”

The taxpayer later submitted a supplemental doctor’s note with that specific language from the doctor. Still, the government did not relent, arguing that the initial defect could not be cured. This narrow and unbending interpretation of Rev. Proc. 99-21 by the Service comports with our experience. In *Walters*, however, the court was not so narrow and unbending. Instead, the court found for the taxpayer because the “clear import of [the original doctor’s] letter” was that the medical condition caused financial disability.<sup>39</sup>

Similarly, in *Stauffer v. IRS*, the taxpayer provided a detailed note from a psychologist who had been treating the disabled individual regularly for years.<sup>40</sup> The letter from the psychologist met every other substantive aspect of Rev. Proc. 99-21 and could not have been provided from a more qualified professional to speak of personal contact with the client. Nevertheless, the Service denied the refund claim as untimely because the statement was not provided by a “physician” as defined in Rev. Proc. 99-21. It appears based on published cases as well as practitioner experience that the Service does not allow clearly disabled individuals to depart even slightly from the strictures of Rev. Proc. 99-21 and be granted relief.

## **Legal Issues with Rev. Proc. 99-21**

Many of the case anecdotes demonstrate the practical difficulties for taxpayers in complying with Rev. Proc. 99-21. The cases similarly demonstrate the reticence of the government to work with taxpayers on even the smallest technical issues in complying with Rev. Proc. 99-21, which we view as at odds with Congress’ desire to provide relief. Although we recognize the need for clear and consistently applied rules generally, the rigidity with which the Service seems to insist on strict compliance with Rev. Proc. 99-21 is particularly troubling given that it so frequently affects the most vulnerable and least sophisticated taxpayers. We believe that the guidance, and the Service’s application of that guidance, can and should incorporate discretion in compelling cases.

The Service’s reliance on Rev. Proc. 99-21 may well be a legal weakness. Recent cases have brought facial challenges to the requirements of Rev. Proc. 99-21 where the taxpayer otherwise seems to meet section 6511(h) requirements. In particular, *Stauffer v. IRS* and *Kurko v. Commissioner*<sup>41</sup> explore what we believe are fundamental flaws with Rev. Proc. 99-21, demonstrate weaknesses in continued Service reliance on Rev. Proc. 99-21 in litigation, and provide potential lessons for the Service on how to cure the

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<sup>38</sup> *Walters v. U.S.*, 2009 WL 5062391 (W.D. Penn).

<sup>39</sup> *Walters v. U.S.*, 2009 WL 5062391 (W.D. Penn) at 10.

<sup>40</sup> *Stauffer v. IRS*, No. 15-10271-MLW, 2017 WL 4330241 (D. Mass Sept. 29, 2017).

<sup>41</sup> U.S. Tax Ct. Dkt. No. 24040-13L.

procedural problems facing financially disabled taxpayers. Several of these issues were explicitly raised by the court in *Stauffer v. IRS*, and fall into three broad concerns:

The first issue involves who exactly qualifies as a “physician.” The confusion surrounding the definition results from the imprecise drafting in the revenue procedure. Rev. Proc. 99-21 requires a physician’s statement containing information about the physical or mental impairment. The pertinent language is as follows:

“a written statement by a physician (as defined in § 1861(r)(1) of the Social Security Act, 42 U.S.C. § 1395x(r)), qualified to make the determination...”

Court disagreement on who qualifies as a physician stems from the fact that although Rev. Proc. 99-21 references § 1861(r)(1) (of the Social Security Act), § 1861(r) does not have subsections - it has five definitions labeled as (1), (2), (3), (4), and (5). It is thus unclear if the entire paragraph under 1861(r) is intended or only the first definition listed as (1) - “a doctor of medicine or osteopathy.” The remaining four physician definitions found in Section 1861(r) include doctors of dental, podiatric, optometry, and chiropractic care. Some courts have narrowly interpreted the reference in the Rev. Proc. and restricted the definition to a doctor of medicine or osteopathy.<sup>42</sup> Other courts have referenced the entire paragraph, including those doctors who are listed in definitions (2) – (5).<sup>43</sup> It is unclear if this was an inadvertent drafting error or if it was meant to restrict physician to the first definition listed in § 1861(r). Whatever the reason, Rev. Proc. 99-21 is too narrow, causes confusion in its application, and results in disparate treatment to taxpayers depending on where they reside.

Additional confusion results from the second reference in Rev. Proc. 99-21 to the definition of a physician in 42 U.S.C. § 1395x(r), which contains all five definitions, again with no subsections. Thus, the first part of Rev. Proc. 99-21’s citation to what qualifies as a physician arguably references only definition one (a doctor of medicine or osteopathy), while the second part of the citation references the entire paragraph and all five definitions.<sup>44</sup>

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<sup>42</sup> Indeed, it seems odd that under Rev. Proc. 99-21, a podiatrist or chiropractor could potentially attest to a mental impairment but not a licensed psychologist. In *Stauffer*, the psychologist had treated the taxpayer for more than a decade (from 2001 to taxpayer’s death in 2012). Due to this long history of treatment, the psychologist had an intimate understanding of the taxpayer’s physical and mental impairments. Yet under Rev. Proc. 99-21, a statement from that psychologist - no matter how detailed - would be insufficient simply because a psychologist is not listed as a physician for Medicare purposes. It is doubtful this result would have been reached under an SSA disability determination operating with largely the same statutory language.

<sup>43</sup> *Ibeagwa v. U.S.*, 2009 WL 3172165 (N.D. Ill.) (Unclear if optometrist statement may suffice). *Milton v. IRS*, 2017 WL 2573995 (W.D. Wash.) (Listing all five potential categories, but finding that a “counselor” is not acceptable, and finding it as “fatal error” to not be within that list), and *Green v. Commissioner*, 97 T.C.M. (CCH) 1542 at n.3 (excluding clinical psychologist and listing all five categories).

<sup>44</sup> See *Stauffer*, No. 15-CV-10271-MLW, Magistrate Judge Report and Recommendation on Defendant United States’ Motion to Dismiss, Feb. 14, 2017.

The second issue is whether that limited definition of physician adopted by the Service is appropriate in the first place.<sup>45</sup> The definition relates to (and is taken from) the Social Security law regarding those physicians who can receive Medicare payment.<sup>46</sup> Because of the adoption of the 42 U.S.C. § 1395x(r) physician definition, certain medical professionals such as psychologists were excluded from attesting to financial disability. The exclusion of psychologists seems counterintuitive because, under section 6511(h), “financial disability” can be caused by a mental impairment. Excluding an entire branch of mental health care professionals from attesting to a mental impairment for purposes of Rev. Proc. 99-11 appears arbitrary. In *Stauffer*, the court found that there was no evidence that the IRS considered the implications of its interpretation of the word “physician.”<sup>47</sup> Continuing to use the restrictive definition opens the Service to challenges that its decision is arbitrary and capricious and not entitled to deference by a court.

In *Stauffer*, the court also wrestled with the question of what deference, if any, should be afforded to Rev. Proc. 99-21. The court determined *Chevron* deference was not warranted (as is the norm with revenue procedures) and looked to the *Skidmore* doctrine to determine if Rev. Proc. 99-21 should be afforded any deference. Under *Skidmore*, a revenue procedure is afforded deference only to the extent its interpretations have the power to persuade. The court found that Rev. Proc. 99-21 falls short of this standard. Indeed, it appears that the Service recognizes that psychologists’ statements *can* reasonably establish a taxpayer’s mental impairment.<sup>48</sup>

Furthermore, we find it is surprising that Rev. Proc. 99-21 looks to the definition of “physician” in a Medicare billing provision, and not to sections of the Social Security Act that are more relevant to determining a disability. The Code requires a “medically determinable” impairment, but nowhere specifies that a “physician” (however defined) must determine the impairment. This is particularly troublesome since the statutory language of section 6511(h) essentially mirrors the language for SSDI eligibility, as described above. It is unclear why the more restrictive definition would be necessary in the financial disability context.

The Tax Court noted this discrepancy in *Kurko v. Commissioner*.<sup>49</sup> In *Kurko*, the taxpayer submitted a licensed psychologist’s statement that otherwise met all the requirements of Rev. Proc. 99-21. The court noted that the statement was enough for the Social Security Administration to determine the taxpayer was disabled, but not accepted by the Service to show financial disability. The court was dismayed by this discrepancy,

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<sup>45</sup> Note that other cases have dismissed claims for having a statement provided by a psychologist without addressing the validity of that requirement. See *Pull v. IRS*, 2015 WL 4634761 (E.D. Cal.)

<sup>46</sup> See *Kurko v. Commissioner*, U.S. Tax Court Dkt. No. 24040-13L, Order Served March 23, 2015. (<https://www.ustaxcourt.gov/InternetOrders/DocumentViewer.aspx?IndexSearchableOrdersID=162264>).

<sup>47</sup> *Stauffer v. IRS*, No. 15-10271-MLW, 2017 WL 4330241 (D. Mass. Sept. 29, 2017) at 12.

<sup>48</sup> In *Stauffer* the Court notes that the Service “does not contest that [the treating psychologist’s] letter establishes that Carlton Stauffer’s impairments constituted a financial disability sufficient to suspend the limitations period” but only that the letter fails to comply with Rev. Proc. 99-21. *Stauffer v. IRS*, No. 15-10271-MLW, 2017 WL 4330241 (D. Mass. Sept. 29, 2017) at 8.

<sup>49</sup> *Kurko v. Commissioner*, U.S. Tax Court Dkt. No. 24040-13L.

and ordered the Service to explain its reasoning.<sup>50</sup> Before the explanation was given, the Service settled the case.

The third issue with Rev. Proc. 99-21 is the requirement that a physician (as narrowly defined) reach a medical opinion about the *causation* of a non-medical condition: that is, being “financially disabled.” As described above, when applying for SSDI a medical professional (more broadly defined than under Rev. Proc. 99-21) must attest to the physical or mental impairment existing, but the causal correlation of that medical condition to the question of whether an individual can work is broadened to include evidence from a variety of sources. It is difficult to see why determining the “ability to manage one’s finances” is different in a medically significant way from determining if one can work. Yet Rev. Proc. 99-21 not only limits the range of medical providers that can attest to the impairment, it asks this limited subset of professionals to make a causal determination on their own. This requirement of Rev. Proc. 99-21, in turn, creates two significant problems in its application.

The first problem is that many physicians are hesitant to provide statement attesting to something beyond a traditional medical diagnosis. The statements that they are willing to provide often do not state a concrete determination of financial disability simply because the medical professional is hesitant to attest something beyond their expertise: that is, that the impairment prevented the taxpayer from managing his or her financial affairs. Yet Rev. Proc. 99-21 demands nothing less than a medical opinion on this question.<sup>51</sup> A physician that does not go beyond her comfort level (that is, beyond her expertise) may provide a statement that doesn’t fully comply with the strict requirements of Rev. Proc. 99-21.<sup>52</sup>

The second problem is that a physician may be hesitant to provide a statement because that physician may not have consistently treated the individual, or may not have treated the individual at the start of the impairment. The very nature of an impairment contemplated by section 6511(h) requires an individual who is unable to manage imperative life responsibilities. It is not unreasonable to assume (and often it is seen in practice) that the individual does not or cannot seek regular medical attention. Many such individuals are homeless, have severe mental illnesses, are elderly with no close family, or have otherwise unstable living situations. In our experience, the likelihood that an individual whose impairment is causing financial disability will consistently see a medical professional throughout that impairment is low.<sup>53</sup>

This problem is compounded by the requirement of Rev. Proc. 99-21 that the physician provide a “specific time period” when the taxpayer was “prevented from

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<sup>50</sup> Order found at:

<https://www.ustaxcourt.gov/InternetOrders/DocumentViewer.aspx?IndexSearchableOrdersID=162264>.

<sup>51</sup> See Rev. Proc. 99-21, 1999-1 C.B. 960 § 4(1)(B).

<sup>52</sup> See, e.g. *Redondo v. U.S.*, 542 Fed. Appx. 908 (Fed. Cir. 2013); *Henry v. U.S.*, 2006 WL 4096772 (N.D. Tex.); *Peck v. Commissioner*, T.C. Summ. Op. 2016-45.

<sup>53</sup> Note that many of the times that these individuals *do* have interactions with professionals, it is with psychologists, therapists, or social workers. These professionals are likely to interact with patients more frequently than are “physicians” as defined in the revenue procedure.

managing their financial affairs.”<sup>54</sup> Note that this goes beyond merely requiring that the physician attest, to the best of their knowledge, when the mental or physical impairment likely occurred: it asks for the specific date range of when that impairment prevented the individual from managing their financial affairs. Taken together, this means that a physician who may have had only limited interaction with the individual (because psychologists are excluded as physicians, and the individual is unlikely to have continuous medical care) is asked to provide a specific date range of when an impairment led to a non-medical outcome (being unable to manage one’s financial affairs). This is simply too big an ask of many reputable physicians, and may in fact detract from the value of the Rev. Proc. 99-21 compliant statements when they are provided.<sup>55</sup>

When looking at these problems in combination, the barriers illustrated in the earlier anecdotes are the inevitable consequences of Rev. Proc. 99-21. In the end, vulnerable taxpayers are required to find a physician (defined in such a way as to rule out many of the professionals with the most direct evidence of the taxpayer’s circumstances) who is asked to certify something well beyond a medical diagnosis, often based on scant records and little direct client contact. Apart from rendering such medical opinions difficult to obtain, it is not clear why they would be particularly useful for the Service as a manner of proof, as opposed to other credible evidence.

The *Stauffer* court questioned why the Service chose the definition for physician that it did and why it chose to exclude psychologist if “mental impairment” is included in the statute. It suggested that the Service’s decisions were without apparent reason and may be arbitrary and capricious. The compelling reasoning of the *Stauffer* court, the inconsistency in the revenue procedure drafting, and a Tax Court judge’s recent questioning of the reason for omitting psychologists all foreshadow potential problems for the Service in relying on Rev. Proc. 99-21. We believe that these legal issues coupled with the inequitable results described above provide a compelling reason for the Service to revise its procedures under section 6511(h).<sup>56</sup>

## Recommendations

We recognize the administrative need for the Service to have a working procedure setting forth the form and manner for proving financial disability. We believe that any

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<sup>54</sup> See Rev. Proc. 99-21, 1999-1 C.B. 960 at Sec. 4(1)(D).

<sup>55</sup> See *Estate of Rubinstein*, 119 Fed. Cl. 658 (2015). *Rubinstein* demonstrates the IRS’s ability to “look behind” a physician statement; it is not an automatic avenue to relief. This should counsel against maintaining such a remarkably high bar for the statement.

<sup>56</sup> It is also worth noting a recent Tax Court case that downplayed the constraints of a revenue procedure in a similar context. In the case of *Trimmer v. Commissioner* 148 T.C. 14 (2017), the Service argued that a taxpayer was not eligible for the “hardship” waiver under section 402(c)(3)(B) for failing to rollover an IRA within 60 days, because the taxpayer did not request the waiver as detailed in Rev. Proc. 2003-16. The Court found that, despite failing to follow Rev. Proc. 2003-16, the Service *could have* reviewed the taxpayer’s hardship waiver request, and its failure to do so was inappropriate. Note that, like section 6511(h) cases, the taxpayer’s case was rooted heavily in equity concerns, as the taxpayer failed to make the rollover while in the throes of depression. Note also that evidence of this depression was established and admitted into evidence on the testimony of a social worker, rather than a medical doctor.

“form and manner” requirement determined by the Service should result in a finding of financial disability for a taxpayer situated like Mr. McGill in *Brockcamp*, as this case was the motivation behind the enactment of section 6511(h). Any form and manner requirement that would likely deny Mr. McGill’s estate relief would not be consistent with the intent of section 6511(h). Presently, we submit that it is not at all clear that the *Brockcamp* decision would have played out any differently under Rev. Proc. 99-21.

Because we believe that Rev. Proc. 99-21 is subject to legal challenge *and* does not adequately reflect the statutory intent of section 6511(h), we recommend that the Service revise Rev. Proc. 99-21 to comport with other relevant disability standards and provide the intended relief. Accordingly, we make the following recommendations:

- **First Recommendation:** Expand the Definition of Physician to Include Psychologists

The Service should rely on the same medical providers to certify a mental or physical impairment as are used in comparable SSDI determinations. The statutory language of section 6511(h) clearly makes room for psychologists and similar professionals as qualified for determining relevant impairments by explicitly including “mental impairments.” There is, therefore, no underlying reason in the statutory language why the Service cannot include psychologists as qualified physicians. Not only is such treatment permissible under the statute, but we believe it better comports with the statutory language and legislative intent of section 6511(h) than does current Rev. Proc. 99-21.

- **Second Recommendation:** Remove Requirement that the Physician Make a Causal Determination or Certification of the Inability to Manage Financial Affairs

Under this recommendation, the mandatory role of a physician would be limited to certifying a medical diagnosis of the impairment from which the taxpayer . The taxpayer would be required to provide a physician’s statement (“physician” defined as those in Recommendation One) detailing the impairment and the likely time frame for the affliction. The physician could detail symptoms and consequences of the impairment and associated treatments or medications. The physician would not be required to attest that this impairment “causes” the taxpayer to be unable to manage their financial affairs. Instead, the burden would be on the taxpayer to explain why the ailment led to the inability to handle his financial affairs, including the failure to properly file their tax return.

This recommendation comports with procedures to determine disability in Social Security law. Accordingly, additional evidence that is probative in SSDI context could be easily integrated in this approach for use by Service examiners. It avoids the pitfalls of current Rev. Proc. 99-21 because it does not require physicians to reach medical determinations beyond their medical expertise or the records to which they may have access. At the same, time it does not relax the requirements so much that abuse would be prevalent.

The Service would have a screening method for immediately rejecting improper claims (*i.e.*, those that do not have any physician statements (as redefined to include both medical doctors and mental health care providers) and fail the “medically determinable” requirement of the statute). Similarly, the statement required would be limited to facts and determinations that fall within the expertise of the physician, providing a clearer picture of the actual impairment. The Service would retain the right to question the causation demonstrated by the taxpayer based on the probity of the sources of evidence the taxpayer provides to show such causation.<sup>57</sup>

- **Third Recommendation:** Permit All Credible Evidence of Facts and Circumstances to Establish the Elements of Financial Disability After a Health Condition is Established by Medical Evidence

Related to our second recommendation, we recommend that the Service’s procedures clearly permit all facts and circumstances to be taken into account at stage two of the financial disability determination, after a medically-determined impairment is certified. A revised procedure could include a nonexhaustive list of factors for an examiner to consider when reviewing a financial disability claim. These could include age, prior compliance, and other circumstances. For example, in the Simons case described above, the Service could consider the fact that the taxpayer had always filed his returns timely until his brain injury. Also, he had been steadily employed for years before the incident and had frequent changes in employment only after his impairment.

- **Fourth Recommendation:** Publish a List of Conditions that Will Meet the section 6511(h) Physical or Mental Impairment Requirement

Under this recommendation, the Service would publish a list of medically determinable conditions that a taxpayer could rely on as prima facie evidence of a physical or mental impairment of the kind required by section 6511(h). This better allocates the dual requirement of section 6511(h) to show (1) impairment; and (2) causation of impairment with inability to manage financial affairs. Under this recommendation, the impairment requirement is properly segregated from the causation requirement, allowing physicians (as redefined) to focus on their expertise (*i.e.*, diagnoses of medical conditions), and the taxpayers to focus on their facts (*i.e.*, how the medical condition caused them to fail to manage their financial affairs).

Benefits of this recommendation include that it would allow claims by taxpayers who may presently have limited mobility issues or psychological conditions that make subsequent contact with a doctor unreasonable. Similarly, it protects taxpayers whose doctors may have passed away or left the practice. It would allow for these taxpayers to more easily provide proof of an impairment that meets the “medically determinable impairment” threshold, while still leaving the burden on the taxpayer to show the duration of the impairment as well as the causal relationship between this impairment and her financial disability. Lastly, this proposal also promotes administrative ease for the

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<sup>57</sup> As the Service already “looks behind” statements that facially comply with Rev. Proc. 99-21, it is doubtful that this recommendation would add any significant time burden.

Service by allowing a quick screening of cases where the impairment (though “medically determinable”) may not rise to the level needed to show financial disability, or quick resolution of cases where different Service examiners may have different subjective beliefs of what is serious enough of a medical condition to warrant section 6511(h).

## Conclusion

We believe that these recommendations, taken in combination, are closer to the congressional intent and statutory language of section 6511(h) than Rev. Proc. 99-21 in its present form. We also believe that these recommendations balance any administrative concerns the Service may have with greater taxpayer access to entitled relief. Importantly, section 6511(h) deals only with disabled people, and only with the refunds they are otherwise entitled to. The amount of refunds “left on the table” by the typically low-income disabled community is likely to be comparatively small - though extremely important to those to whom it is due.

Moreover, there is generally no rationale for a taxpayer to forego a tax refund due by intentionally missing the deadlines of section 6511(a) and (b). For those that may have a reason to wait (or simply neglect to file), the medical determination requirements embodied in the recommendations are adequate safeguards to separate the neglectful from the truly financially disabled. Further, nothing in these recommendations would preclude the Service from looking behind potentially abusive physician statements, as the Service already does in certain instances.<sup>58</sup>

The history and motivation behind the enactment of section 6511(h) clearly shows that Congress and the Executive branch wanted to remediate unfairness in strict applications of the statutory deadlines for tax refunds. When a taxpayer in a similar situation as that of *Brockamp* fails to timely file for a refund because they were mentally or physically unable to do so, Congress opened the door. Had *Brockamp* arisen after section 6511(h) was enacted, it is unthinkable that Congress would have intended the statute to deny the refund claim as untimely. And yet, it is not clear even today that *Brockamp* would have prevailed given the strict application and requirements of Rev. Proc. 99-21. This assuredly is not an intended consequence of the statute.

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<sup>58</sup> See *Estate of Rubinstein*, 119 Fed. Cl. 658 (2015), *aff'd*, 654 F. App'x 481 (Fed. Cir. 2016); *Haller v. Commissioner*, 100 T.C.M. (CCH) 9, T.C.M. (RIA) 2010-147.