Although alternative dispute resolution (ADR) may feel like a new trend, it is far from a recent phenomenon. Over the last 100 years, federal government ADR has come in and out of fashion several times.1 The current surge of interest started in the 1990s with two acts of Congress and two executive orders that were supposed to save our country from its “culture of litigation.”2 Through it all, however, one ubiquitous federal agency has remained steadfast in its commitment to ADR, arguably expending more time and resources than any other in pursuit of resolving disputes outside the courtroom: the Internal Revenue Service (IRS).

The IRS can trace its ADR roots as far back as the ratification of the Constitution, before we had a federal income tax.3 Today, the IRS Office of Appeals (Appeals) provides the forum for ADR between taxpayers and the government. Appeals exists to “resolve tax controversies, without litigation, on a basis which is fair and impartial to both the government and the taxpayer in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service.”4 This article discusses the history of Appeals, its current workload and continuing attempts at innovation, and its efforts to establish and maintain independence while being located within the heart of the country's tax collector.

History of Appeals
When the federal income tax was in its infancy, tax agents wore the hats of both collector and arbiter. In 1861, Abraham Lincoln signed the first federal income tax into law to raise money for the Civil War. The legislation included a provision whereby regional tax assessors were required to spend at least two consecutive days a month at each county courthouse in their district to hear and summarily determine tax appeals.5 The separation of administrative appeals from tax collection did not happen until more than 50 years later when the Revenue Act of 1918 created the Advisory Tax Board, which consisted of six nongovernmental members appointed by the commissioner of internal revenue and approved by the secretary of the treasury.6 Board members were charged with reviewing tax issues after the taxpayer's examination had concluded, but before collection commenced.

Unfortunately, the Advisory Tax Board was short-lived. Only one year after its creation, its members chose to return to their former occupations. The commissioner subsequently replaced the defunct board with the Committee on Appeals and Review. Under the Revenue Act of 1921, Congress provided taxpayers with the opportunity to appeal their cases directly to the committee prior to the actual tax assessment. The committee soon expanded its reach, establishing a presence west of the Mississippi River and creating a special committee to hear small cases of less than $2,500.

As appeals increased, the government experimented with a specialized judicial forum. In 1924, Congress replaced the committee with the Board of Tax Appeals, an independent executive branch agency that would eventually evolve into the U.S. Tax Court. The board quickly accumulated an overwhelming backlog of 18,000 pending cases. In response, the IRS formed the independent Special Advisory Committee in 1927, the direct precursor to today’s IRS Office of Appeals. Notably, the Special Advisory Committee included 28 revenue agents assigned throughout the country to hold conferences with taxpayers on factual issues. In 1930, its jurisdiction was expanded to include legal issues. The geographic scattering of IRS personnel with the authority to settle based on prospective hazards of litigation remains a defining feature of Appeals today.

In 1933, the Special Advisory Committee was superseded by the ominously named Technical Staff, which had the authority to bind the IRS in matters of $5,000 or less for any one tax year. Over the following decades, the Technical Staff went through several reorganizations, becoming a decentralized independent regional organization called the Appellate Division in 1952. And as the jurisdiction of the Appellate Division increased, its employees changed titles from “technical advisors” to “appellate conferees,” and finally to the current title of “appeals officers” in 1978, the same year the Appellate Division became the Appeals Division.
IRS Appeals Overview

The route to IRS Appeals for many taxpayers starts with an IRS letter proposing a tax deficiency, followed by a written taxpayer protest and then one or more conferences with an appeals officer that could lead to a settlement of the disputed issues. But as the Internal Revenue Code has expanded over the years, so has the jurisdiction of Appeals, creating several different types of cases that may receive an administrative fresh look. The following categories represent the primary cases heard by Appeals outside the courtroom.

2015 Appeals Cases Received by Case Type

Deficiency: Also known as “examination cases,” these cases follow the classic example described above where the taxpayer has appealed an IRS proposed tax deficiency or a change in tax-exempt status. This category includes industry cases and coordinated industry cases, which involve large corporate taxpayers.

Penalty Abatement: A taxpayer may appeal the IRS’s decision not to abate a previously assessed civil penalty such as penalties for failure to file a return or pay tax due. Certain penalties are separately tracked (discussed below in “Other”).

Offers in Compromise/Innocent Spouse: An offer in compromise is an agreement to settle an outstanding tax liability for less than the full amount owed based on the taxpayer’s ability to pay. Innocent spouse relief provides relief from additional tax if the taxpayer’s current or former spouse improperly reported the couple’s tax liability. Taxpayers may seek review of a rejection of an offer in compromise or the denial of innocent spouse relief.

Collection Due Process: A collection due process hearing provides the taxpayer with an opportunity to appeal IRS collection actions early in the collection process in response to a notice of federal tax lien or notice of intent to levy.

Other: These cases include certain tax-related and nontax appeals such as interest abatement appeals, practitioner appeals related to findings of the IRS Office of Professional Responsibility, Freedom of Information Act appeals, appeals concerning whether a collection due process hearing request was timely, and appeals concerning specific penalties that are separately tracked by the IRS such as trust fund recovery penalties (I.R.C. § 6672), tax preparer penalties (e.g., I.R.C. § 6694), and tax shelter promoter penalties (I.R.C. §§ 6700, 6701).

In the 2015 government fiscal year, Appeals received and closed over 100,000 cases before 841 appeals officers. In comparison to other federal agency case volume, Appeals thus stands between the 50,000 cases received and closed by the Board of Veterans’ Appeals and the 800,000 hearings received and 680,000 hearings closed by the Social Security Administration. And while the number of new cases received each year by Appeals has seen a fairly dramatic increase over the last 10 years, the number of pending cases at the end of the year has remained relatively stable despite a decrease in the number of appeals officers.

Informality

The IRS has long acknowledged that one of the greatest strengths of alternative dispute resolution is informality. As Commissioner Robert Lucas eloquently stated in 1929, “The taxpayer is privileged to present for consideration all data bearing on his case without fear of technical objection, which might arise if the case proceeded to hearing before the board [i.e., the Board of Tax Appeals], and it has been found in many cases that such documentary evidence proves a determining factor in the settlement thereof.”

In the 2015 government fiscal year, Appeals received and closed over 100,000 cases before 841 appeals officers. In comparison to other federal agency case volume, Appeals thus stands between the 50,000 cases received and closed by the Board of Veterans’ Appeals and the 800,000 hearings received and 680,000 hearings closed by the Social Security Administration. And while the number of new cases received each year by Appeals has seen a fairly dramatic increase over the last 10 years, the number of pending cases at the end of the year has remained relatively stable despite a decrease in the number of appeals officers.
conferences are handled over the phone rather than in person. And Appeals recently rolled out Virtual Service Delivery, an audiovisual teleconferencing program, to provide face-to-face interactions between appeals officers on IRS campuses and taxpayers at regional offices. However, the perceived trend in moving away from actual face-to-face conferences has garnered recent criticism.

**Improvement and Innovation**

After a taxpayer submits a written protest disagreeing with a proposed tax deficiency, jurisdiction of the matter generally moves to IRS Appeals where resolution could take anywhere from 90 days to more than a year. In the face of potentially lengthy processing times and the high case volume described above, Appeals continues to test new pilot programs and scuttle ineffective ones in the hopes of reaching more efficient resolutions, including:

**Early Referral:** In the late 1990s, the IRS rolled out the Early Referral program to much fanfare from taxpayers and trade groups. Under Early Referral, taxpayers (or the IRS with the consent of the taxpayer) send developed issues straight to Appeals while the rest of the matter remains within the jurisdiction of the consenting IRS examination or collection team.

**Accelerated Issue Resolution (AIR) Program:** Available to large corporate taxpayers, an AIR agreement allows the resolution of one issue to be applied to the same or similar issues found in other tax years where returns have been filed.

**Fast Track Programs:** Under Fast Track Settlement (FTS) and Fast Track Mediation (FTM) the appeals officer takes the role of a neutral mediator and attempts to broker a settlement between the IRS and the taxpayer. Both the IRS and the taxpayer must consent to using the Fast Track procedures; however, doing so will not foreclose the taxpayer's other Appeals options. The primary goal of Fast Track is to reach resolution quickly after acceptance into the program: 120 days for large corporate taxpayers, 60 days for other taxpayers, and even shorter for collection matters.

**Post Appeals Mediation (PAM):** If the standard Appeals process is unsuccessful, the taxpayer and Appeals can try mediation. Under this “if all else fails” program, an additional appeals officer acts as a neutral mediator and attempts to bring the parties to resolution (hiring an outside co-mediator is possible).

**Rapid Appeals Process (RAP):** A relatively new program, RAP allows large corporate taxpayers and the IRS the option of attempting issue resolution in a single Appeals conference using mediation techniques. While FTS is available for taxpayers in the examination stage, RAP is available for taxpayers who are already in Appeals.

**Mutually Accelerated Appeals Process (MAAP):** MAAP is primarily a resource allocation program whereby the IRS adds additional staff to the Appeals team in an attempt to shorten the time needed for resolution.

**International Penalty Accelerated Appeals Consideration:** This program allows certain qualifying taxpayers the chance to have Appeals review international reporting and record-keeping penalties after assessment but before payment. Depending on the value of the taxpayer’s assets and when the penalties were assessed, the taxpayer may qualify for accelerated consideration.

**Appeals Arbitration:** Under this program, the taxpayer and Appeals agree to enter binding arbitration. The arbitrator could be another appeals officer or a non-IRS third party. In 2015 the IRS abandoned this program after only two settlements were ever reached during the program's 14-year run.

**The Perception Challenge**

As with any alternative to courtroom litigation, a major challenge is getting people to use it. The government therefore goes to great lengths to ensure that appeals officers are independent of the IRS agents that summon taxpayer records and assess deficiencies. In 1998, legislation was enacted that required the IRS to develop and implement a plan to prohibit ex parte communications between appeals officers and other IRS employees to the extent that such communications appear to compromise the independence of Appeals. Similarly, last year Congress codified the IRS's “Taxpayer Bill of Rights,” which includes the “right to appeal an IRS decision in an independent forum.”

These legislative solutions may be more branding than substance. The ex parte rules adopted by the IRS are complex, contain several exceptions, and state that they do not create any substantive rights affecting the taxpayer's tax liability or the IRS's authority. Likewise, the Taxpayer Bill of Rights is not phrased to create any concrete taxpayer remedies, making it little more than required reading for the commissioner and IRS employees.

In terms of substantive operational changes, the IRS recently adopted a new policy regime called Appeals Judicial Approach and Culture (AJAC). With the stated goal of “enhancing internal and external customer perceptions of a fair, impartial, and independent Office of Appeals,” AJAC attempts to insulate the appeals officer from the work of IRS examination agents. For example, under AJAC, the appeals officer is no longer a fact-finder and is required to attempt to settle a case on factual hazards even when the case is not fully developed by Exam. In addition, appeals officers are not to raise new issues or reopen issues on which the taxpayer and the IRS are already in agreement.

Whether AJAC has been successful largely depends on who you ask. IRS leadership has expressed careful praise, concluding that the policy strengthens a taxpayer's right to an independent review. The National Taxpayer Advocate, the ombudsman for federal taxpayers, has a different take: “Although AJAC’s aspirations are commendable, its practical implementation is eroding the very perceptions of fairness and objectivity that it claims to bolster.” In her 2015 report to Congress, National Taxpayer Advocate Nina Olson identified several problem areas—including taxpayer intimidation from examining agents now pressured to fully exhaust their fact-finding function and taxpayers being ping-ponged between offices while the case is developed—that contribute to a more adversarial environment.

Beyond AJAC, there is recent criticism regarding the IRS's decision to deny certain cases from ever proceeding to Appeals by designating these cases for litigation. If the IRS determines that a case presents recurring, significant legal issues affecting large numbers of taxpayers, it may designate the case for litigation; opting for a public court opinion as opposed to publishing guidance or working with the Treasury to promulgate a new regulation. Some practitioners have noted a recent increase in such designations.

While designating a case for litigation may serve a useful purpose in certain instances, the apparent increase seems to have garnered a legislative backlash. Two recently introduced bills would give taxpayers an absolute right to a hearing before Appeals. An additional proposal would require the IRS to at least identify the types of cases
it intends to designate for litigation. And a number of proposals require that the IRS geographically assign at least one appeals officer to each state.

Looking Ahead
IRS Appeals has continued to close over 100,000 cases a year since 2004. Those numbers speak to an apparent necessity to have an independent nationwide ADR program for federal tax disputes. And while congressional interest in Appeals is also evident, such interest is belied by bills like the Financial Services and General Government Appropriations Act that, according to the White House, would reduce the IRS’s budget to levels not seen since the early 1990s.

Separately, the impact of other legislative action on Appeals, such as the recently enacted FAST Act, which requires the IRS to use private debt collection agencies, remains unclear. Still, many of the Appeals programs discussed above were either established, spurred on, or inspired by the IRS Restructuring and Reform Act of 1998. As we near the 20th anniversary of that Act and talks of tax reform gain steam, threshold momentum to enhance one of America’s largest and longest running ADR programs may be achieved.

Andrew Strelka is counsel and Sean Morrison is an associate in the tax department of Miller & Chevalier Chartered in Washington, D.C. Strelka previously served as chair of the FBA Section on Taxation. The authors wish to recognize Lowell E. Mann, whose 1976 article, “Administrative Appellate Procedure Before the IRS,” served as an inspiration for this piece.

Endnotes
3Unless otherwise noted, all references to the history of the IRS Office of Appeals come from IRS Document 7225, “History of Appeals” (Nov. 1987).
4All IRS data in this article come from current and prior editions of the IRS Data Book, an annual electronic publication available at www.irs.gov. The case types discussed herein consist of so-called “non-docketed” cases where no petition has been filed in the U.S. Tax Court. In docketed cases, Appeals also can play a role in settlement. See Rev. Proc. 2016-22, 2016-15 I.R.B. 577. The full jurisdiction of appeals is more specifically set forth in an assortment of statutes, regulations, and administrative guidance. See generally I.R.C. §§ 6015(c)(4)(B), 6320, 6330, 6404(c), 6863, 7122(d), 7123, 7429; Treas. Reg. §§ 301.7122-1, 601.106; Rev. Proc. 2016-2, 2016-1 I.R.B. 102; IRM Part 8.
5In government fiscal year 2015, the Board of Veterans’ Appeals received 52,509 new hearings and issued 55,713 decisions from 63 Veterans Law Judges. Board of Veterans’ Appeals Annual Report Fiscal Year 2015 at 4-5. In government fiscal year 2014, the Social Security Administration received 810,715 hearings and disposed of 680,963 hearings from 3,111 administrative law judges. Social Security Annual Statistical Supplement to the Social Security Bulletin 2015 at Table 2.F8, 2.F9.
9Letter from Kirsten Wielobob, Chief, IRS Office of Appeals, to Tax Notes Editor, 151 Tax Notes 1879 (June 27, 2016) (discussing phone conference effectiveness); IRM Exhibit 8.6.1-1 (06-25-2015).
10National Taxpayer Advocate, Annual Objectives Report to Congress at 19 (July 7, 2016) (collecting public forum comments).
11IRS Hearing on Early Referral, 94 Tax Notes 19-26 (Jan. 28, 1994). See also I.R.C. § 7232(a).
17IR 2000-42 (June 27, 2000).
21The IRS developed a marketing campaign using YouTube videos and podcasts to espouse the independent culture of Appeals. See https://www.irs.gov/individuals/online-videos-and-podcasts-of-the-appeals-process (last visited Aug. 23, 2016); see also IRS Publication 3408.
25I.R.C. § 7803(a)(3).
26IRS, Memorandum on Implementation of the Appeals Judicial Approach and Culture (AJAC) Project (July 18, 2013).

continued on page 35
Patent Invalidity
In patent disputes, the party accused of infringement often challenges the validity of the asserted patents. An invalidity challenge may be based on prior art, meaning that the patented invention was disclosed in (or an obvious advance over) prior patents, technical publications, or actual devices. An invalidity challenge may also allege that a patent is invalid because the patent claims are indefinite or the patented invention is not adequately or sufficiently described in the patent itself. Often, a validity challenge is used by an accused infringer to rein in the scope of the patent to support a noninfringement defense. The accused infringer proposes a narrow claim construction and further argues that if the patent were construed more broadly, it would be invalid over the prior art. If this is the likely strategy, then the parties may wish to specify in the arbitration agreement that questions of infringement, validity, and claim construction should be decided together.

On the other hand, if the invalidity challenge is expected to be an independent attack on the asserted patents, then the parties may agree that invalidity based on prior art will be submitted to the U.S. Patent and Trademark Office (USPTO) through its post-grant proceedings, such as inter partes review proceedings (IPR) before the Patent Trial and Appeal Board. Such an agreement would greatly simplify the arbitration and leave the question of patent invalidity to the experts at the USPTO. Another option would be to stage resolution so that the question of infringement is decided first. If infringement is found, then the arbitration proceeds with resolving the question of invalidity and, if appropriate, damages.

The foregoing are just some of the issues parties should consider when drafting an arbitration agreement. Careful, up-front thought will avoid an arbitration free-for-all and thereby provide for a relatively inexpensive dispute resolution process for patent disputes.

Steven Katz is an attorney in the Boston office of Fish & Richardson. He has more than 20 years of experience with litigating and resolving patent disputes. He has been with Fish & Richardson since 1998, and from 1996-1998, Katz was a judicial clerk for Hon. Alan D. Lourie of the U.S. Court of Appeals for the Federal Circuit. He can be reached at katz@fr.com. © 2016 Steven Katz. All rights reserved.

Endnotes
2. Parties are generally free to craft their own arbitration agreements for patent disputes, which are fully enforceable in federal court. See, e.g., 9 U.S.C. § 9.

IRS Appeals continued from page 31
30See supra n.12.
31National Taxpayer Advocate, Annual Report to Congress at 10 (Dec. 31, 2015).
32IRM 33.3.6.1 (08-11-2004).
33Marie Sapirie, News Analysis: The Increase in Cases Designated for Litigation, 2016 Tax Notes 49-3 (March 14, 2016).