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MEMORANDUM FOR TAXPAYER ADVOCATE SERVICE EMPLOYEES

FROM: 
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SUBJECT: Interim Guidance on Advocating the Non-filing of
Notices of Federal Tax Lien in Certain Situations

The purpose of this memorandum is to update the guidance issued on March 31, 2010, entitled *Interim Guidance on Recommending the Non-filing of Notices of Federal Tax Lien in Certain Situations*. This update reflects recent Collection Policy Interim Guidance Memoranda (IGMs) changes, and will help you advocate effectively for taxpayers in light of these positive changes.

These changes should result in fewer NFTL determinations and will facilitate the withdrawal of the NFTLs in certain instances. Below are links to these Collection Policy IGMs:

- The dollar criteria of when the IRS is to file the NTFLE increased from \$5,000 to \$10,000. (see [IRM 5.12.2.4.1, Criteria for Filing a NTFLE](#) (Mar. 8, 2012));
- The dollar criteria threshold of In-Business Trust Fund Express Installment Agreements (IBTF Express IA) increased significantly, which should result in fewer cases requiring NTFLE determinations (see [IRM 5.14.5.4, In-Business Trust Fund Express Installment Agreements](#) (Apr. 15, 2011));
- Withdrawal of the NTFLE is now possible in certain Direct Debit Installment Agreement (DDIA) situations (see [Re-Issuance of Interim Guidance for Withdrawal of Notice of Federal Tax Lien in Direct Debit Installment Agreement Situations](#) (Mar. 13, 2012));

- New provisions allow taxpayers to request the withdrawal of the NFTL after lien release (see [Revision to Interim Guidance for Withdrawal of Notice of Federal Tax Lien after Release](#) (Jan. 4, 2012));
- New provisions set a minimum NFTL filing amount for revenue officers (see [IRM 5.12.2.4.1\(2\), Criteria for Filing a NFTL](#)); and
- Streamlined offer in compromise procedures promote greater reliance on internal research, telephonic communication, and additional allowances for expenses and future income calculation (see [Centralized Offer in Compromise Streamline Offer Processes](#) (May 13, 2011));
- Increased the dollar threshold for streamlined IAs from \$25,000 to \$50,000 and expanded the timeframe to full pay from 60 months to 72 months (see [Streamlined Installment Agreements](#) (Jan. 20, 2012); and
- Changed the Five-Year Rule to a Six-Year Rule, allowing all reasonable conditional expenses if the taxpayer can stay current with all paying and filing requirements and full pay the liability in six years (see [Interim Guidance to Change the Five-Year Rule to a Six-Year Rule](#) (Feb. 7, 2012)).

Even with the changes outlined in the interim guidance memoranda and IRM guidance mentioned above, there are still situations described in the IRM that lead employees to automatically file NFTLs without considering individual taxpayer facts and circumstances, and without managerial review.¹ In these situations, TAS employees need to investigate the case and apply the factors described in this memorandum to determine whether the filing of an NFTL is appropriate. TAS employees should advocate for the non-filing of an NFTL when it is appropriate based on the individual taxpayer's facts and circumstances. TAS employees **do not** make the actual NFTL determination.

¹ For example, when IRS places an account in CNC status, the IRM requires IRS to file the NFTL any time both the following conditions exist: the unpaid balance is \$10,000 or more, and the IRS is unable to locate or contact the taxpayer, or the taxpayer is experiencing an economic hardship. See [IRM 5.19.4.5.2\(3\), Lien Filing Determinations](#) (Mar. 14, 2012). [IRM 5.19.1.5.5\(17\), Installment Agreements](#) (Jan. 27, 2012) requires the filing of an NFTL for non-streamlined IA accounts of more than \$10,000. Similarly, the sixth "if/then" scenario appearing in [IRM 5.8.4.13\(5\), Notice of Federal Tax Lien Filing](#) (Apr. 16, 2012) states IRS normally files an NFTL with OICs meeting certain dollar criteria and the offer is being rejected or accepted with deferred payment terms.

Background

Section 3421 of the IRS Restructuring and Reform Act of 1998 (RRA98) provides that, where appropriate, a supervisor must review the proposed lien filing, considering the amount due and the value of the taxpayer's assets.²

In addition, Internal Revenue Code (IRC) § 6323(j)(1) provides the IRS a **discretionary** mechanism for withdrawing the NFTL when one of the following criteria is met:

- (A) The IRS filed the NFTL prematurely or otherwise not in accordance with procedures;
- (B) The taxpayer entered into an installment agreement to satisfy the liability (unless the IA provides otherwise);
- (C) The withdrawal would facilitate collection; or
- (D) The withdrawal is in the best interests of the taxpayer (as determined by the National Taxpayer Advocate) and the United States.³

In these situations, Case Advocates should advocate for the non-filing of a lien by arguing that the IRS should not file an NFTL because it would meet the criteria for withdrawal once filed.

When is an NFTL Determination required?

[IRM 5.19.1.5.5, *Installment Agreements*](#) (Jan. 27, 2012) describes the four types of installment agreements that TAS employees have the delegated authority to accept: (1) streamlined (up to \$25,000), (2) non-streamlined (up to \$100,000), (3) guaranteed (up to \$10,000), and (4) in-business trust fund express (up to \$10,000).⁴ An NFTL determination is not required for

² See RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 685, 758 (1998), [IRM 5.19.4.5.2, *Lien Filing Determinations*](#) (Mar. 14, 2012), [IRM 5.12.2.5.2, *The Manager's Review Process*](#) (Oct. 30, 2009), and the National Taxpayer Advocate 2009 Annual Report to Congress vol. 1, 23-26 (*One-Size-Fits-All Lien Filing Policies Circumvent the Spirit of the Law, Fail to Promote Future Tax Compliance, and Unnecessarily Harm Taxpayers*).

³ See IRC § 6323(j); Treas. Reg. § 301.6323(j)-1

⁴ See [IRM 5.19.1.5.5.1\(1\), *Installment Agreement Requirements In-Business Trust Fund Express Agreement*](#) (Oct. 5, 2011). Beginning March 1, 2011, SB/SE CSCO, ACS/ACSS and Field Assistance employees were able to offer In-Business Trust Fund Express Agreements to small businesses who had an unpaid balance of assessment of \$25,000 or less. W&I Accounts Management (AM) employees (and TAS) have authority to establish IBTF Express Agreements up to \$10,000 in unpaid balance of assessments.

installment agreement types (1), (3), and (4), but a lien determination is required for non-streamlined installment agreements (NSIAs). [IRM 5.12.2.4.1\(1\), Criteria for Filing a NFTL](#) (Mar. 8, 2012) states that NFTLs should be filed when placing an account into Currently Not Collectible (CNC) status if the balance owed is over \$10,000. Similarly, [IRM 5.8.4.13\(5\), Notice of Federal Tax Lien Filing](#), (Apr. 16, 2012) states that a NFTL will be filed in OIC cases meeting certain dollar criteria when the offer results in rejection or acceptance with deferred payment terms.

Determining when to advocate for the non-filing of an NFTL

In situations where the taxpayer's individual facts and circumstances meet the criteria in [IRM 5.12.2.4.2\(1\)-\(8\), Criteria for "Do-Not-File" or Deferring the NFTL](#) (Mar. 8, 2012) for not filing or deferring an NFTL, or one of the IRC § 6323(j)(1) requirements for an NFTL withdrawal, Case Advocates should advocate against the filing of an NFTL.⁵

When making the decision to request that the operating division refrain from filing an NFTL, you must carefully evaluate all of the facts and circumstances including the following:

- **Compliance History.** Has the taxpayer had prior balances due? If so, how recently? Is the taxpayer current with all estimated tax payments or Federal Tax Deposits? Would the NFTL filing jeopardize the taxpayer's ability to comply with the tax laws in the future? The fact that a taxpayer has never had a delinquent tax account before or has not had a delinquent account in recent years should support a determination to refrain from filing an NFTL.
- **Reasons for Noncompliance.** Is the taxpayer's noncompliance attributable to a one-time unusual or catastrophic event, such as a heart attack, a natural disaster (e.g., an earthquake, hurricane, tornado, or flood), or a loss of job? Are there extenuating circumstances that may contribute to the noncompliance? The following situations are examples of such extenuating circumstances: after a stroke, the taxpayer fell behind in estimated tax payments, or after the loss of a job, the taxpayer incurred a ten percent penalty for early withdrawal from an IRA. In such situations, where the taxpayer has been historically compliant except for a one-time catastrophic event, filing of an NFTL will harm the taxpayer's ability to repay his or her tax liability and remain compliant in the future.

⁵ Under [IRM 5.12.2.4.2\(9\), Criteria for "Do-Not-File" or Deferring the NFTL](#) (Mar. 8, 2012), a taxpayer may also submit a faxed request for non-filing of the NFTL if the revenue officer has contacted the taxpayer by phone or in person. Such a request may include the reasons why the taxpayer wishes the NFTL not to be filed, which the RO should note in the case history.

- Hamper Collection. Will the filing of an NFTL hamper the collection of tax? If not filing the NFTL will significantly impair the IRS's ability to collect the tax, this factor should support a determination to file an NFTL.
- Undue Harm to the Taxpayer that Reduces Collection Potential. Consider whether the filing of the NFTL will harm the taxpayer's financial viability, thus reducing collection potential, *i.e.*, the filing prevents the taxpayer from obtaining or retaining employment or obtaining the financing necessary for a business taxpayer to remain in business. If the filing of the NFTL unduly harms the taxpayer and reduces collection potential, this factor should support a determination to refrain from filing an NFTL.
- Payment before the Collection Statute Expiration Date (CSED). Will the proposed Installment Agreement fully pay the taxpayer's balances owed prior to the expiration of the CSED? If the taxpayer can pay in installments before the CSED, this factor should support a determination not to file an NFTL.
- Existence and Value of the Assets. Are there assets, including real and personal property, to which the NFTL can attach? Is the taxpayer likely to acquire assets in the future? If so, determine the net equity in the assets. Research IRS databases and available third-party information concerning the taxpayer's assets, income, and the value of the equity in the assets. Where appropriate, request and review taxpayer financial information, including [Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals](#), or [Form 433-B, Collection Information Statement for Businesses](#). If you have access, search assets on Accurint, a web-based asset locator system. Seek Revenue Officer Technical Advisor (ROTA) assistance if necessary to assist you with an equity evaluation and recommendation. If the NFTL will not attach to property with significant value, or if the taxpayer needs the equity to cover an anticipated, necessary expense, this factor should support a determination to refrain from filing an NFTL.

In analyzing your case, consider all the factors and determine whether the NFTL filing is appropriate. Remember that this is not a complete list of factors, and that you should consider other relevant factors depending on the facts of your case.

Note: If at any time you need assistance in determining whether it is appropriate to request the non-filing of an NFTL or whether the taxpayer owns assets, please contact a ROTA to discuss the individual facts and circumstances of your case. ROTAs have access to Accurint.

Example 1

You advocate for Taxpayer A, who owes \$15,000 in income tax, penalty, and interest for 2008. The compliance history shows that Taxpayer A has been compliant in recent years and any past delinquencies were promptly resolved. A review of the taxpayer's Collection Information Statement (CIS) shows that he can afford \$150 per month. It will take the taxpayer over 72 months to pay the full balance, but the debt will be paid prior to the expiration of the CSED. The CIS also shows that Taxpayer A has no assets except his home, which has a fair market value of \$350,000 and a first mortgage of \$347,000. Thus, there is no equity in the home. The taxpayer has requested a non-streamlined installment agreement to fully pay the tax debt; although Taxpayer A owes less than \$25,000, the liability will not be paid within 72 months.

In general, you should advocate for the non-filing of the NFTL as this taxpayer has been compliant in the past, the account should be paid prior to the expiration of the CSED, and the potential harm to the taxpayer would outweigh the benefit to the government because the taxpayer has no equity to which the lien could attach.

Example 2

The facts are the same as in example 1 above, but the taxpayer has equity of \$200,000 in the house, *i.e.*, sufficient equity against which to borrow. However, the taxpayer does not want to liquidate or borrow against the house and has requested a non-streamlined IA to fully pay the liability; although Taxpayer B owes less than \$25,000, the agreement will not be paid within 72 months.

In these circumstances, the government's interests may outweigh the harm to the taxpayer who refuses to borrow against the property to pay the tax liability. Thus, you conclude based upon an evaluation of all of the facts and circumstances that you cannot recommend that the IRS refrain from filing an NFTL. You will prepare an OAR requesting that the OD make the NFTL determination. The taxpayer will have a right to a CDP hearing if the IRS files the NFTL.

Example 3

The facts are the same as in example 2, but the taxpayer has a special-needs child and must utilize the equity in the house to provide for ongoing medical and other care for the child. In these circumstances, you should advocate that the IRS refrain from filing an NFTL.

Example 4

Taxpayer C, who is self-employed, owns an insurance business with an unpaid combined income and employment tax liability of \$62,500 for tax years 2008 and 2009. The taxpayer filed Form 911 stating that he just received a notice and demand for payment of the outstanding tax liabilities

and is worried about the IRS filing an NFTL. The taxpayer's financial information shows a substantial decline in gross receipts and an increase in unpaid accounts receivable. The taxpayer has requested that the IRS accept an offer in compromise. If the IRS files the NFTL, the taxpayer will lose his employment because the state insurance licensing board requires insurance agents to have a clean credit history. You determine the OIC is acceptable according to the IRM guidelines. You also determine that the NFTL will not be in the best interests of the taxpayer and the United States because it will hamper collection and future tax compliance if the taxpayer cannot retain his employment.

In these circumstances, you should advocate that the IRS accept the OIC and that the IRS refrain from filing an NFTL. The filing of the NFTL will hamper collection, prevent the taxpayer from maintaining employment and staying in business, and jeopardize the taxpayer's ability to comply with the tax laws in the future.

Sending an Operations Assistance Request (OAR)

If after considering all facts and circumstances of your case, you have determined that TAS needs to advocate for the non-filing of an NFTL, elevate the case to your Local Taxpayer Advocate (LTA) and simultaneously forward the OAR to the Operating Division (OD) requesting acceptance of the IA, OIC, or CNC without IRS filing an NFTL. In cases where you are accepting a non-streamlined installment agreement based on delegated authority,⁶ accept the IA, and simultaneously forward the OAR requesting the non-filing of an NFTL. In all cases, the OAR should request an OD manager's review any determination denying TAS's recommendation not to file the NFTL. If the OD does not agree with your recommendation not to file the NFTL in any of these situations, immediately notify your LTA to discuss the case with the OD manager. If the OD manager disagrees with the non-filing of an NFTL, the LTA should promptly consider issuing a Taxpayer Assistance Order (TAO) in accordance with [IRM 13.1.20, TAS Taxpayer Assistance Order \(TAO\) Process](#) (Feb. 1, 2011).

When sending an OAR, request **expedited handling**. Include language in the OAR to support your recommendation and clarify the issue. For example:

Due to the above taxpayer's financial situation, it is TAS's position that [insert - the account be placed into CNC status / the offer in compromise

⁶ Per Delegation Order 13-2 (Rev. 1), TAS has the authority to accept installment agreements under the procedures contained in [IRM 5.19.1.5.5, Installment Agreements](#) (Jan. 27, 2012) (or successor provisions).

be accepted / the IA be accepted]. Due to the amount of the liability, a NFTL determination is required.

Based on a thorough review of the taxpayer's information (including IRS and available third-party information) concerning their assets, income, and the value of the equity in the assets [insert specific facts and circumstances regarding the taxpayer], TAS has concluded that [insert all that applies: the NFTL will not attach to property / the NFTL will hamper collection / the harm to the taxpayer will outweigh the benefit to the government / or the NFTL filing will jeopardize the taxpayer's ability to comply with the tax laws in the future]. Therefore, it is our position that the IRS should refrain from filing an NFTL so long as the taxpayer remains compliant.

*If you do not agree with this recommendation, please have **your manager** immediately contact the **Local Taxpayer Advocate** (Insert name and phone #) to discuss further).*

In cases where after considering the relevant factors, TAS decides not to recommend that the OD refrain from the filing of the NFTL, forward the OAR to the OD to request that the OD make the NFTL determination.

Issuing a Taxpayer Assistance Order (TAO)

If the OD does not agree to refrain from filing the NFTL, evaluate the reasons given in support of filing the NFTL. If you still disagree, elevate the case to the LTA to consider issuing a TAO.⁷ If the LTA decides to issue a TAO, follow the procedures in [IRM 13.1.20, TAS Taxpayer Assistance Order \(TAO\) Process](#) (Feb. 1, 2011). The TAO should order the IRS to refrain from filing the NFTL and must explain why, based on the law and the facts of the case, the filing is not appropriate.

When preparing the TAO, use language such as:

⁷ The LTA may also consider pursuing an appeal under CAP. See [IRM 5.19.4.5.2\(12\)\(b\), Lien Filing Determinations](#) (Mar. 14, 2012), which provides that "if the taxpayer expresses serious objections regarding lien filing and criteria in [IRM 5.19.4.5.2\(11\)](#) or [IRM 5.19.4.5.3](#) do not apply, treat it as Collection Appeal Program (CAP) **BEFORE** filing the lien and follow procedures in [IRM 5.19.8](#)".

Based on a thorough review of the taxpayer's information (includes both IRS and available third party information), the taxpayer meets IRS criteria for not filing a NFTL per [IRM 5.12.2.4.2, Criteria for "Do-Not-File or Deferring the NFTL"](#) (Mar. 8, 2012). [Discuss how the taxpayer established various criteria listed in this IRM in this case.] Therefore, the NFTL should not be filed so long as the taxpayer remains compliant.

Effect on Other Documents

This guidance will be incorporated into a new section of IRM 13.1, *Taxpayer Advocate Case Procedures*.

Contact

If you have any questions, please contact Mara Christian, Chief, Policy Group at (505) 837-5707.