



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

5.12.10

SEPTEMBER 30, 2015

EFFECTIVE DATE

(09-30-2015)

PURPOSE

- (1) This transmits the revised IRM 5.12.10, Federal Tax Liens, Lien Related Certificates.

MATERIAL CHANGES

- (1) Editorial changes made throughout to update terminology and references; to clarify verbiage and comply with current writing standards; and to correct formatting, structural, and grammatical issues.
- (2) 5.12.10.1. Inserted Note clarifying the use of the term “non-attachment.”
- (3) 5.12.10.2. Added general paragraph regarding distribution of requests and authority for approval.
- (4) 5.12.10.3.3.2. Allowable amounts raised based on HAMP Supplemental Directive 12-02. Note added to allow future changes to amounts based on future Supplemental Directives.
- (5) 5.12.10.3.6. Moved Note regarding PALS appraisal to 5.12.10.7.3. Inserted Reminder regarding arm’s length transactions.
- (6) 5.12.10.4.2. Consolidated information into chart and inserted clarifying instruction.
- (7) 5.12.10.4.5. New subsection on discharge requests involving decedent cases.
- (8) 5.12.10.6.2.2. Rearranged paragraphs for flow.
- (9) 5.12.10.7.3. Inserted Note, previously located in 5.12.10.3.6, regarding PALS appraisal.
- (10) 5.12.10.7.4. Added paragraphs regarding attorney fees and auctioneer fees as reasonable expenses.
- (11) 5.12.10.8. Added sentence to emphasize the officials authorized to approve or deny a request.
- (12) 5.12.10.9. Added guidance about redacting EINs on certificates.
- (13) 5.12.10.10. Revised to incorporate guidance from IGM SBSE-05-0714-0040 on usage of DPC 07.
- (14) 5.12.10.11. Inserted paragraph previously shown in 5.12.10.11.2 regarding the use of Form 3040.
- (15) 5.12.10.13 through 5.12.10.15. Updated to reference new non-attachment form and decision letter. Clarified procedures for use.

EFFECT ON OTHER DOCUMENTS

This material supersedes IRM 5.12.10, dated October 14, 2013; and Interim Guidance Memo SBSE-05-0714-0040, *Change to Definition of Designated Payment Code 07*, dated July 22, 2014.

AUDIENCE

SBSE and W&I Collection, Centralized Lien Operation, and Appeals

Kristen Bailey
Director, Collection Policy
Small Business/Self Employed Division

5.12.10

Lien Related Certificates

Table of Contents

- 5.12.10.1 Purpose
- 5.12.10.2 Certificates Relating to Liens (Overview)
- 5.12.10.3 Discharge of Property
 - 5.12.10.3.1 Property Double the Amount of the Liability, IRC § 6325(b)(1)
 - 5.12.10.3.2 Part Payment, IRC § 6325(b)(2)(A)
 - 5.12.10.3.3 No Value, IRC § 6325(b)(2)(B)
 - 5.12.10.3.3.1 No Value - Short Sales
 - 5.12.10.3.3.2 Home Affordable Programs
 - 5.12.10.3.4 Substitution of Proceeds of Sale
 - 5.12.10.3.5 Right of Substitution of Value, IRC § 6325(b)(4)
 - 5.12.10.3.5.1 Area Counsel Approval
 - 5.12.10.3.5.2 Application for IRC § 6325(b)(4) Discharge
 - 5.12.10.3.5.3 Disposition of Deposit
 - 5.12.10.3.5.4 Civil Action - Substitution of Value
 - 5.12.10.3.5.5 Suspension of Running of the Statute
 - 5.12.10.3.6 General Factors for a Certificate of Discharge
- 5.12.10.4 Discharges in Special Circumstances
 - 5.12.10.4.1 Certificate of Discharge in Bankruptcy Court Sales
 - 5.12.10.4.2 Certificate of Discharge in Foreclosure Proceedings
 - 5.12.10.4.3 Discharge and Subordination Recommendations by Department of Justice
 - 5.12.10.4.4 Certain Government Agency Discharges
 - 5.12.10.4.4.1 Applications for Discharge (VA, SBA, or FHA)
 - 5.12.10.4.4.2 Issuance of Certificate of Discharge (VA, SBA, or FHA)
 - 5.12.10.4.5 Discharge Requests Involving Decedent Cases
- 5.12.10.5 Equitable Subrogation
 - 5.12.10.5.1 Applications for Discharge Involving a Claim of Equitable Subrogation
- 5.12.10.6 Subordination of Lien
 - 5.12.10.6.1 Receive Amount for Lien Interest - IRC § 6325(d)(1)
 - 5.12.10.6.1.1 Subordination to Factoring Agreements
 - 5.12.10.6.2 Facilitating Ultimate Collection - IRC § 6325(d)(2)
 - 5.12.10.6.2.1 Subordination in HAMP and HARP Situations
 - 5.12.10.6.2.2 Subordination to Reverse Mortgages
 - 5.12.10.6.3 When to Issue a Certificate of Subordination
- 5.12.10.7 Applications for Discharge and Subordination Certificates
 - 5.12.10.7.1 Submission of Applications

-
- 5.12.10.7.2 Requests for Additional Information - Actions if Not Received
 - 5.12.10.7.3 Investigation of Discharge and Subordination Applications
 - 5.12.10.7.4 Allowable expenses
 - 5.12.10.7.4.1 Applications for Discharge With Commercial Real Estate Transfer Tax
 - 5.12.10.7.5 Request for Relocation Expense Allowance
 - 5.12.10.7.5.1 Procedures for Consideration of Relocation Expense Allowance
 - 5.12.10.7.6 Form 3033, Investigation of Request for Certificate of Discharge or Subordination
 - 5.12.10.8 Issuance of Discharge and Subordination Commitment Letters
 - 5.12.10.9 Preparation and Issuance of Discharge and Subordination Certificates
 - 5.12.10.9.1 Use of Electronic Signatures on Lien Certificates
 - 5.12.10.10 Designated Payment Codes (DPC) Related to Liens and Lien Certificates
 - 5.12.10.11 OIC Payments and Discharges (or Subordinations)
 - 5.12.10.11.1 Discharge (or Subordination) Before OIC
 - 5.12.10.11.2 Discharge (or Subordination) Simultaneous with OIC
 - 5.12.10.11.3 Discharge (or Subordination) After OIC Submitted
 - 5.12.10.12 Denial of Applications for Discharge or Subordination
 - 5.12.10.13 Certificate of Non-Attachment
 - 5.12.10.13.1 Review of Request for Certificate of Non-Attachment
 - 5.12.10.14 Issuance of Certificate of Non-Attachment
 - 5.12.10.15 Denial of Request for Certificate of Non-Attachment
 - 5.12.10.16 Revocation of Certificate of Non-Attachment
 - 5.12.10.17 Documentation Requirements for Lien-Related Certificates
 - 5.12.10.17.1 Documents Kept In Case Files

Exhibits

- 5.12.10-1 Subordination to Factors - Agreement

5.12.10.1
(09-30-2015)
Purpose

- (1) The purpose of this IRM is to provide instructions on the identification, analysis, recommendations, denial, and granting of lien certificates for discharge, subordination, and non-attachment requests.

Note: The term “non-attachment” may be spelled with or without a hyphen (“nonattachment”). In this IRM, the hyphenated version is used.

- (2) See IRM Exhibit 5.12.1-2, *Glossary of Common Acronyms in IRM 5.12*, for common acronyms used in this section.
- (3) This IRM is for procedural use and does not provide instruction on the use of any system. Consult User Guides as necessary.
 - Automated Lien System (ALS) User Guide: <http://mysbse.web.irs.gov/Collection/collsystems/als/userguide/default.aspx>
 - Integrated Collection System (ICS) User Guide: http://icsweb.web.irs.gov/Docs/HTML/user_guide.htm

5.12.10.2
(09-30-2015)
Certificates Relating to Liens (Overview)

- (1) Internal Revenue Code (IRC) § 6325(a) provides for the release of a lien when a taxpayer has fully satisfied the liability, the statutory period for collection has expired, or a bond is accepted for payment of the liability. (See IRM 5.12.3, *Lien Release and Related Topics*.) Prior to the time when a lien can be released, there are situations in which the effect of the lien on property has to be addressed. Other subsections of IRC § 6325 contain provisions to address these situations.
- (2) Aside from a release, there are four main methods to address the effect of a lien on a specific piece of property. Which method to follow depends on the circumstances of the request.
 - Discharge (IRC § 6325(b)) - removes specific property from the lien. This is most often used when the taxpayer is selling or transferring ownership of a piece of property after the Notice of Federal Tax Lien (NFTL) is filed.
 - Subordination (IRC § 6325(d)) - elevates another creditor's lien to a priority position above the government's lien. This is generally used when a taxpayer is refinancing or obtaining additional financing after a NFTL has been filed.
 - Non-attachment (IRC § 6325(e)) - denotes that a lien does not attach to the property owned by a particular individual or entity. This is generally used when there is a dispute over the attachment of the lien or to clarify that a person having a similar name is not, in fact, the taxpayer named on the NFTL.
 - Withdrawal (IRC § 6323(j)) - removes the effect of the NFTL from public record and abandons the priority of the NFTL under IRC § 6323(a).

Note: See IRM 5.12.9, *Withdrawal of Notice of Federal Tax Lien*, for guidance on withdrawals.

- (3) This section reviews the criteria for discharges, subordinations, and non-attachments and details the procedures for each process. Consult IRM 5.17.2, *Federal Tax Liens*, for issues regarding property ownership and lien priority determinations.
- (4) Requests for lien-related certificates are generally worked through Advisory.

- See Pub 4235, *Collection Advisory Group Addresses*, for a listing of Advisory offices and how lien certificate requests are distributed.
- See IRM 1.2.44.5, *Delegation Order 5-4 (rev. 3)*, for the approval authority for the various lien certificates.

5.12.10.3
(09-30-2015)

Discharge of Property

- (1) A discharge is the process of removing a specific piece of property from the federal tax lien. The discharge process is governed by IRC § 6325(b).
- (2) The types of discharge are described in the chart below.

IRC section	Discharge criteria	Document(s) issued
6325(b)(1)	The remaining property of the taxpayer has a fair market value that is double the sum of the amount of the federal tax lien plus other encumbrances that have priority over the federal tax lien.	Form 669-A, <i>Certificate of Discharge of Property From Federal Tax Lien Under Sec. 6325(b)(1) of the Internal Revenue Code</i>
6325(b)(2)(A)	An amount not less than the value of the government's interest in the property is paid in partial satisfaction of the liability. To qualify the taxpayer must be divested of all interest in the property after the transaction.	Letter 403, <i>Conditional Commitment to Discharge Certain Property from Federal Tax Lien (Value)</i> , and Form 669-B, <i>Certificate of Discharge of Property From Federal Tax Lien Under Sec. 6325(b)(2)(A) of the Internal Revenue Code</i>
6325(b)(2)(B)	It is determined that the interest of the United States in the property to be discharged from the lien has no value. To qualify the taxpayer must be divested of all interest in the property after the transaction.	Letter 402, <i>Conditional Commitment to Discharge Certain Property from Federal Tax Lien</i> , and Form 669-C, <i>Certificate of Discharge of Property From Federal Tax Lien Under Sec. 6325(b)(2)(B) of the Internal Revenue Code</i>
6325(b)(3)	The proceeds of the sale are held as a fund subject to the liens and claims of the government in the same manner and priority as was the property that was discharged. To qualify the taxpayer must be divested of all interest in the property after the transaction.	Form 669-H, <i>Certificate of Discharge of Property From Federal Tax Lien Under Sec. 6325(b)(3) of Internal Revenue Code</i> .
6325(b)(4)	The third-party owner, not the taxpayer, deposits the value of the government's interest in the property in cash or provides an acceptable bond.	Form 669-G, <i>Certificate of Discharge of Property From Federal Tax Lien Sec. 6325(b)(4) of the Internal Revenue Code</i> .

- (3) The instructions for applying for a discharge can be found in Pub 783, *Instructions on how to apply for a Certificate of Discharge of Property from Federal Tax Lien*. Standardized application Form 14135, *Application for Certificate of Discharge of Property from Federal Tax Lien*, is also available for use. Taxpayers may also be directed to a video on the discharge process located at <http://www.irsvideos.gov/Individual/IRSLiens>.

- (4) A discharge request must meet one of the specified conditions of IRC § 6325(b) to be approved. Any agreement to discharge property subject to a federal tax lien that does not ensure that one of the specified conditions under section 6325(b) is met would exceed the Service's discharge authority under section 6325(b).
- (5) After the discharge of specifically described real or personal property from a federal tax lien, the lien continues in full force and effect on all other property or rights to property of the taxpayer.
- (6) Authority to approve discharges is limited to Advisory and Insolvency Group Managers. See IRM 1.2.44.5, *Delegation Order 5-4 (Rev. 3)*.

5.12.10.3.1
(09-30-2015)

**Property Double the
Amount of the Liability,
IRC § 6325(b)(1)**

- (1) A certificate of discharge may be issued if it is determined that the remaining property of the taxpayer has a fair market value that is double the sum of the amount of the federal tax lien **plus** other encumbrances with priority over the federal tax lien.
 - a. Compute the amount necessary to issue a Form 669-A as illustrated in the following example.

Example:

\$10,000	⇒ federal tax lien
\$50,000	⇒ priority encumbrances (senior to the federal tax lien)
<u>+\$1,000</u>	<u>⇒ real estate tax (super priority)</u>
\$61,000	⇒ federal tax lien plus priority encumbrances
<u>x 2</u>	<u>⇒ double the amount per IRC § 6325(b)(1)</u>
\$122,000	⇒ fair market value of remaining property necessary for discharge

- (2) Issuance of a certificate of discharge under this provision should address the best interest of the government.
- (3) An application under IRC § 6325(b)(1) is not considered unless the taxpayer:
 - is in filing compliance,
 - is current with Federal Tax Deposits (FTD) or estimated income tax (ES) payments, and
 - balance due accounts have been addressed (e.g., the taxpayer has made arrangements to pay, submitted an offer in compromise, been deemed uncollectible due to hardship).

5.12.10.3.2
(09-30-2015)

**Part Payment, IRC §
6325(b)(2)(A)**

- (1) Issue Form 669-B covering any part of the property subject to the federal tax lien if an amount is paid in partial satisfaction of the liability secured by the lien. The amount cannot be less than the value of the government's interest in the property to be discharged and the taxpayer must be divested of all interest in the property.

Reminder: Consider all facts and circumstances of the case when determining the amount to be paid, including all other liens and encumbrances with priority over the government's lien.

- (2) Foreclosing mortgagees may use this administrative provision rather than joining the United States as a party in a judicial foreclosure action. The discharge of property from the lien eliminates the government's right of redemption if the United States were joined as a party defendant. See 28 United States Code (U.S.C.) 2410(c).
- (3) In determining the value of the government's interest in property to be discharged from a federal tax lien under IRC § 6325(b)(2), consideration may, in certain situations, be given to the "forced sale value," as distinguished from the "fair market value" of the property.
 - a. Use of forced sale value as a valuation method is encouraged if market conditions, including depressed comparable sales, have resulted in lower values on properties and if taxpayers will be assisted by the discharge of the property from the lien. However, while applicants may suggest use of "forced sale value," it is Advisory's decision if it will be used.
 - b. Document any disagreement with using "forced sale value" in the case history, along with documentation of comparable sales data, prevailing market conditions, or other information that does not support its use as a method for determining the value of the property for the discharge.
- (4) Reasonable and necessary expenses, including fees and taxes that are treated as expenses of sale, are allowed in calculating the amount necessary for discharge of the property from the lien. See IRM 5.12.10.7.4, *Allowable Expenses*, for further details.
- (5) If sale preparation expenses are incurred (sometimes called "staging" expenses by realtors) and it is demonstrated that they either hastened the sale or increased the amount received at sale, then allow the expenses. In particular, if prevailing economic conditions are poor and "staging" assists in selling a property, providing a taxpayer with an avenue to make payment on their taxes, allow these expenses so long as the expense is reasonable and ordinary in the state where the property was, or is being, sold.
- (6) Under no circumstances will the determined interest of the United States, payment of which interest is necessary for issuance of a discharge under IRC § 6325(b)(2)(A), be reduced in order to allow payment to an interest that is junior to the federal tax lien.
- (7) Because making an application and deposit (or providing a bond) under IRC § 6325(b)(4) provides a judicial remedy not available for an application and payment made under § 6325(b)(2)(A), third-party owners of property applying for a certificate of discharge under § 6325(b)(2)(A) must waive, in writing, their rights to make a deposit allowed under § 6325(b)(4) and to file suit for return of the deposit or accepted bond allowed under IRC § 7426(a)(4).
- (8) Unless the waiver has been provided in writing, the Service will treat an application made by an owner of the property (other than the taxpayer) as an application made under § 6325(b)(4) with all funds treated as a deposit. For the required waiver language, see IRM 5.12.10.3.5.2, *Application for IRC § 6325(b)(4) Discharge*.

5.12.10.3.3
(09-30-2015)
**No Value, IRC §
6325(b)(2)(B)**

- (1) Issue Form 669-C when it is determined that the interest of the United States in the property subject to the federal tax lien is valueless.

Reminder: Consider all facts and circumstances of the case when determining the value of the government's interest in the property, including all other liens and encumbrances with priority over the federal tax lien.

- (2) Foreclosing mortgagees may use this administrative provision rather than joining the United States as a party in a judicial foreclosure action. The discharge of property from the lien eliminates the government's right of redemption if the United States were joined as a party defendant. See 28 U.S.C. 2410(c).
- (3) In determining the value of the government's interest in property to be discharged from a federal tax lien under IRC § 6325(b)(2), consideration may be given to the "forced sale value," as distinguished from the "fair market value" of the property.
 - a. Use of forced sale value as a valuation method is encouraged if market conditions, including depressed comparable sales, have resulted in lower values on properties and if taxpayers will be assisted by the discharge of the property from the lien. However, while applicants may suggest use of "forced sale value," it is Advisory's decision if it will be used.
 - b. Document any disagreement with using "forced sale value" in the case history, along with documentation of comparable sales data, prevailing market conditions, or other information that does not support its use as a method for determining the value of the property for the discharge.

5.12.10.3.3.1
(09-30-2015)
No Value - Short Sales

- (1) Applications relative to "short sales" should be considered under IRC § 6325(b)(2)(B). A short sale occurs when the senior lien holder agrees to accept less than the total amount owed as satisfaction for its lien claim.

Example: A bank has a priority mortgage claim for \$600,000, but, due to the significant decline in the real property market, the bank agrees to a sale of the mortgaged property for \$300,000. Because the senior lien attaches to all the equity in the property, generally the lien interest of the United States in short sale properties is valueless.

- (2) To facilitate the sale of the property in these situations, the senior lien holder might negotiate the payment of expenses to be taken from its settlement amount. In certain situations, these expenses might be greater than normal closing costs allowed by the Service and might include creditors that would otherwise be junior to the federal tax lien. This action by the senior lien holder to carve proceeds out of its priority claim to pay these expenses does not create an equity interest on the part of the taxpayer which may be reached by the federal tax lien.
- (3) Provided there is no fraudulent aspect to the payment distribution and the lien interests of the government in other properties of the taxpayer is not being harmed, the Service has no authority to require payment of the sum that otherwise would have gone to the senior lien holder.

Example: A bank has a priority mortgage claim for \$400,000, but the bank agrees to a sale of the mortgaged property for \$300,000. The bank determines that out of the \$300,000 sales price, it will allow \$15,000 of expenses to be paid. Most of the \$15,000 is for normal closing costs, but \$5,000 of it

is for a homeowner's association fee and \$2,000 is for state transfer taxes, both which are junior in priority to the federal tax lien. The Service, as a condition of discharge, cannot demand payment of the amount going to the homeowner's association fee or the state transfer taxes because these are being paid from the proceeds attributable to the bank's priority lien interest and do not impact the interest of the government in the property, which is still valueless.

- (4) Occasionally, the senior lien holder may allow part of its proceeds to be paid to the taxpayer as a form of incentive. If these payments are taken from the senior lien holder's equitable interest, the payment would not have a bearing on calculating the government's interest in the property. This payment to the taxpayer, however, is an asset that may be levied. The decision to levy should be made judiciously based on the facts of the case.

Note: The issue of the levy should have no detrimental effect on the issuance of the discharge. If there is no interest in the real estate, a no equity discharge should be granted upon sufficient proof of closing and transfer. If the proceeds going to the taxpayer are levied, the receipt or non-receipt of those funds would be something to address under levy procedures.

- (5) In normal (non-short) sale situations, where the lien claim of the bank is fully paid and the federal tax lien attaches to surplus proceeds, the government's lien interest must be satisfied in accordance with IRC § 6325(b) before the property can be discharged from the lien. Creditors junior to the government's interest are not entitled to payment from the proceeds that belong, by priority, to the government.

5.12.10.3.3.2 (09-30-2015) Home Affordable Programs

- (1) The Home Affordable Foreclosure Alternatives Program (HAFA), part of the Home Affordable Modification Program (HAMP), was enacted by Treasury Department Supplemental Directive 09-01 to assist individuals behind on their mortgage payments. Property sales conducted under HAFA have certain restrictions that may affect discharge determinations.

Note: Dollar amounts referenced in this subsection are based on Treasury Department directives in effect as of this IRM publishing date. The dollar amounts are subject to change based on the issuance of future Treasury Department Supplemental Directives. See the *Treasury Department website* for more information.

- (2) Payments to junior creditors under HAFA are subject to an aggregate cap established by the servicing mortgage. Also, the payments should be paid in the order of priority and must be reflected on the HUD-1 Settlement Statement.
- (3) An investor (purchaser) can be reimbursed two (2) dollars for every three (3) spent, up to \$8,000, for facilitating the release of subordinate lien holders. In other words, for each three dollars an investor pays to secure release of a subordinate lien, the investor will be entitled two dollars of reimbursement up to a maximum \$8,000. For junior lien holders to qualify for payment and investors to qualify for reimbursement, the junior lien holders must agree to release their liens with respect to the property.
- (4) The seller under HAFA is entitled to an incentive payment of \$10,000 to assist with relocation expenses. To qualify, the property must be the seller's principal residence and the amount must be shown on the HUD-1 Settlement Statement.

- This relocation payment has no bearing on the taxpayer's equity in the property and, therefore, the Service cannot require payment of the sum as a condition of discharge; however, it is a payment that could be levied.

Note: As a matter of policy, the Service will not levy this payment unless flagrant conduct circumstances exist. (See IRM 5.11.6, *Notice of Levy in Special Cases*.) A levy on this relocation allowance must be approved by the Territory Manager.

- Taxpayers who receive a relocation payment through this provision are not eligible to request the relocation expense allowance described in IRM 5.12.10.7.5, *Request for Relocation Expense Allowance*.
- (5) Payments to the seller/taxpayer outside of this provision of HAFA may be income that can be attached by levy. If additional payments are to be made to the taxpayer, investigate the nature of the payment to determine if it can be reached by levy. Consult with management and Area Counsel as needed. If it is an asset that can be levied, you must exercise discretion in determining whether to proceed with levy action.
 - (6) The limitations of HAFA as described above have no effect upon the discharge authority in regular short sale situations. In other words, if the sale is not being conducted under the provisions of HAFA, the Service has no authority to require payment of amounts paid to junior creditors from the senior lien holder's proceeds as a condition of discharge of the subject property. If the sale is subject to the provisions of HAFA, the Service can ensure that the terms are being properly followed, but still cannot require payment of any sum to which we are not entitled.
 - (7) When a discharge application involving a short sale is received and information indicates that proceeds are being provided to a junior creditor, the purchaser, or the taxpayer, contact the mortgage company to determine if it is a loan service provider operating under the provisions of HAFA.
 - a. If the sale is under HAFA, evaluate the distribution according to the HAFA terms described above and notify the mortgage company of any discrepancies found.
 - b. If the sale is not under the provisions of HAFA, process the request following standard procedures outlined in IRM 5.12.10.7, *Applications for Discharge & Subordination Certificates*. Presuming no issues are identified, the discharge application can be approved following existing IRM procedures.

5.12.10.3.4
(09-30-2015)
**Substitution of Proceeds
of Sale**

- (1) Issue a certificate of discharge under IRC § 6325(b)(3) on any part of the property subject to a tax lien if the property is sold and the Internal Revenue Service agrees that the proceeds of the sale are to be held as a fund subject to the liens and claims of the United States in the same manner and with the same priority as such liens and claims had with respect to the discharged property.
- (2) If property has been sold pursuant to a substituted sales agreement with the Service, any third party who claims an interest to all or any part of the funds may, within nine (9) months after the date of the agreement, bring suit in a district court of the United States under IRC § 7426(a)(3).
- (3) Consult Counsel to review any proposed escrow agreements.

- (4) Reasonable and necessary expenses incurred in connection with the sale of the property or administration of the sale proceeds will be paid from the proceeds of the sale before the satisfaction of any claims. See IRM 5.12.10.7.4, *Allowable Expenses*.

5.12.10.3.5
(09-30-2015)

Right of Substitution of Value, IRC § 6325(b)(4)

- (1) A third-party owner has the right under IRC § 6325(b)(4) to receive a certificate of discharge on any property subject to a federal tax lien if the third-party owner:
- deposits an amount equal to the value of the government's interest in the property, as determined by the Service, or
 - furnishes an acceptable bond in a like amount sufficient to cover the government's interest in the property.
- (2) The deposit described in (1)(a) above can be cash, cashier's check, certified funds, or a bond as described in IRM 5.6.1, *Collateral Agreements and Security Type Collateral*.
- (3) All amounts received based on third party applications for the issuance of a discharge are treated as deposits under IRC § 6325(b)(4), unless a written waiver is received.
- (4) For a cashier's check, cash, or other type of certified funds received, take the following steps.
- a. Prepare a memo detailing the circumstances of the case.
 - b. Prepare a posting document and deposit the funds into Account 4730, Miscellaneous Deposit Fund Account.
 - c. Transmit all of the above to the Campus attached to Form 3210, *Document Transmittal*.
 - d. Retain a copy of all documents in Advisory for follow up.
- (5) Follow established procedures for processing and disposition of any bond received (IRM 5.6.1.2.1, *Bonds*). Advisory procedures are found in IRM 5.6.1.5, *Advisory Actions*.
- (6) A control number is assigned by the Campus.
- (7) The third-party owner may request the return of the deposit or a release of the bond on the grounds that the Service's determination of value is incorrect.
- a. If the third-party owner makes such a request, specific reasons for the disagreement with the Service's determination of value must be presented.
 - b. If a request is made, the Service's determination should be reconsidered in light of any arguments or proof presented by the third party.
 - c. If the Service determines that the actual value is less than the prior determination of value, then the deposit should be returned or the bond released in accordance with the reconsidered determination, provided the redetermination is made before the Service applies the amount deposited to the tax liability or collects on the bond.

Note: IRM 5.1.19.3.11, *Wrongful Lien*, provides information regarding wrongful liens and suspension of the running of the period of limitations on collection with regard to IRC § 6325(b)(4)

- (8) Third-party owners have 120 calendar days after the day the certificate of discharge is issued to file a civil suit. If suit is not filed, the Service has sixty (60) calendar days to apply the deposit or collect on the bond, and refund any excess amount. See IRM 5.12.10.3.5.3, *Disposition of Deposit*.
- (9) The applicant should be advised that the judicial provisions of IRC § 7426(a)(4) are the exclusive remedy for seeking the return of funds deposited under IRC § 6325(b)(4). An administrative levy claim or a wrongful levy suit under IRC § 7426(a)(1) are not available. See Rev. Rul. 2005-50.
- (10) When the case is resolved, prepare the necessary documentation to have either all or part of the money refunded to the third party or applied to the taxpayer's account.
- (11) A third party who co-owns property with the taxpayer may request a discharge under this provision; however, the taxpayer may not use this provision.
- (12) Third-party owners of property applying for a certificate of discharge under § 6325(b)(2)(A) must waive, in writing, their rights to make a deposit allowed under § 6325(b)(4) and to file suit for return of the deposit or accepted bond allowed under § 7426(a)(4). Unless the waiver has been provided in writing, the Service will treat an application made by an owner of the property (other than the taxpayer) as an application made under § 6325(b)(4), with all funds treated as a deposit.
- (13) See IRM 5.12.10.3.5.5, *Suspension of Running of the Statute*, for effect on the statutory period of limitations.

5.12.10.3.5.1
(10-14-2013)

Area Counsel Approval

- (1) Area Counsel must approve all third party requests for discharge under IRC § 6325(b)(4) prior to issuance of the certificate.

5.12.10.3.5.2
(10-14-2013)

Application for IRC § 6325(b)(4) Discharge

- (1) Follow procedures outlined in IRM 5.12.10.3 and Publication 783 when providing information regarding applications for discharge of property under IRC § 6325(b)(4).
- (2) Inform third-party property owners of the requirement of a written waiver of their rights under IRC § 6325(b)(4) and § 7426(a)(4) if they elect to request a discharge under § 6325(b)(2)(A). The signed and dated waiver must state:

"I understand that an application and payment made under § 6325(b)(2)(A) does not provide the remedy available under § 7426(a)(4). In making such an application/payment, I waive the option to have the payment treated as a deposit under § 6325(b)(4) and waive the right to request the return of funds and to bring an action under § 7426(a)(4)."

5.12.10.3.5.3
(09-30-2015)

Disposition of Deposit

- (1) The Service will refund (with interest at the prevailing overpayment rate) the amount deposited, and release the bond, to the extent the Service determines that:
 - the unsatisfied liability giving rise to the lien can be satisfied from a source other than such property, or
 - the value of the government's interest in the property is less than the Secretary's prior determination.

- (2) If the third-party owner takes no action under IRC § 7426(a)(4) within 120 calendar days after the certificate is issued, then the Service will, within sixty (60) calendar days thereafter:
 - apply the amount deposited or collect on the bond to satisfy the liability secured by the lien, and
 - refund with interest (at the prevailing overpayment rate) any amount that is not used to satisfy the liability.
- (3) Use established procedures for processing any overpayments.

5.12.10.3.5.4
(09-30-2015)
**Civil Action -
Substitution of Value**

- (1) If a certificate of discharge is issued to a third-party owner under IRC § 6325(b)(4), the third-party owner may, within 120 calendar days of the certificate being issued, bring a civil action against the government in a district court of the United States for a determination of whether the value of the government's interest in the property is less than the value determined by the Secretary.
- (2) No other action may be used for this determination.
- (3) If the court decides that the Secretary's determination of the value in the property exceeds the actual value of the government's interest in the property under IRC § 6325(b)(4), then the court will grant a judgment ordering:
 - a refund of the amount deposited that exceeds the government's interest, and
 - a release of a bond to the extent that the aggregate amount exceeds the value determined by the court.

5.12.10.3.5.5
(09-30-2015)
**Suspension of Running
of the Statute**

- (1) IRC § 6503(f) directs that the running of the period of limitations under IRC § 6502 is suspended for the period beginning on the date the person becomes entitled to a certificate of discharge and ending on the date that is thirty (30) calendar days after the earlier of:
 - the earliest date on which the Secretary no longer holds any amount as a deposit or bond under § 6325(b)(4) by reason of such deposit or bond being used to satisfy the unpaid tax or is being refunded or released, or
 - the date the judgment secured under IRC § 7426(b)(5) becomes final.
- (2) The running of the statute of limitations is suspended only with respect to the amount of the assessment equal to the value of the interest of the government in the property plus interest, penalties, additions to tax and any additional associated amount.

5.12.10.3.6
(09-30-2015)
**General Factors for a
Certificate of Discharge**

- (1) As indicated above, there are several provisions for issuing a certificate of discharge. Although each is different, some factors should always be considered.
- (2) Follow guidance outlined in this IRM and Pub 783 when providing information regarding applications for discharge of property from the federal tax lien.
- (3) Conduct full compliance checks when applications for discharge are submitted by taxpayers. If taxpayers are not in full compliance with filing and payment requirements, request returns be filed and balance due accounts paid;

however, process discharge applications regardless of compliance check outcomes unless information received indicates that the discharge itself is not in the best interest of the government.

Exception: For applications under IRC § 6325(b)(1), taxpayers must be in compliance. For third-party applications under any section, a compliance check on the taxpayer is not required.

- (4) Field Revenue Officers receiving applications for discharge relative to cases in their inventory should take the actions described below.
 - a. Conduct full compliance check as described in (3) above. There is no prohibition on processing discharges if taxpayers are not in compliance with paying and filing requirements, but use the application as an opportunity to fully explore the taxpayer's compliance. Set deadlines for payment and filing if appropriate.
 - b. Bring Advisory into the investigation early. Work with Advisory on property valuation, as needed, and to ensure the investigation is being worked in accordance with established policies and procedures.
- (5) When making discharge determinations in states that allow "entireties" ownership and the lien is only against one of the owners, the government's interest is generally determined to be one half of the value of the property. For example, under IRC § 6325(b)(2)(A), the taxpayer generally must pay the Service one-half the proceeds of the sale in partial satisfaction of the liability secured by the federal tax lien.
- (6) Calculating the interest of the government in a discharge situation generally begins with the fair market value (FMV) of the property. FMV is often described as what a willing buyer offers to pay a willing seller in an "arm's length" transaction; however, other factors may be present that inappropriately impact that definition, such as a relationship between the buyer and seller, an attempt to quickly sell the property to defeat the efforts of a creditor, etc. FMV is best determined by considering at least one appraisal by a disinterested third party along with other sources of valuation deemed appropriate by the approving official.

Reminder: A transaction that is not at arm's length is not automatically disqualified from discharge consideration. Other factors to consider include, but are not limited to, whether the property is being transferred for FMV, the government is receiving the value of its interest in the property, and the taxpayer will no longer have any interest in, or control of, the property.

- (7) Approval of discharges is delegated to Advisory and Insolvency Group Managers. See IRM 1.2.44.5, *Delegation Order 5-4 (rev. 3)*.

5.12.10.4
(09-30-2015)
**Discharges in Special
Circumstances**

- (1) Occasionally, discharge applications are received from the taxpayer or third-party applicant that involve special circumstances. This subsection addresses some of those situations.

5.12.10.4.1
(09-30-2015)
**Certificate of Discharge
in Bankruptcy Court
Sales**

- (1) The bankruptcy court has inherent power to sell property within its jurisdiction free and clear of liens. Therefore, when a sale is made upon the order of a bankruptcy court, its purchaser takes the property unencumbered by the federal tax lien, and the federal tax lien should be considered transferred to the proceeds of the sale.

Note: The bankruptcy court order should provide that all liens attach to the sales proceeds with the same priority they had in the property prior to the sale. See IRM 5.17.8.12, *Use, Sale, or Lease of Property*. If the court's order does not include the federal tax lien or does not provide that the federal tax lien attaches to the proceeds with the same priority as to the property prior to the sale, consult Area Counsel.

(2) When property is sold upon the order of a bankruptcy court and the purchaser applies for a certificate of discharge of property from the federal tax lien, advise the purchaser or other interested party to submit an affidavit to Advisory that contains a:

- statement of the facts concerning the sale,
- legal description of the property, and
- properly certified copy of the court order.

(3) If it is determined that the application is sufficient, issue a certificate using the appropriate form.

5.12.10.4.2
(09-30-2015)
**Certificate of Discharge
in Foreclosure
Proceedings**

(1) A request for a certificate of discharge may be received from a taxpayer, mortgage holder, or other third party in conjunction with a foreclosure action. Among other issues, consideration should be given to the following factors:

- Discharge requests are less costly than litigation proceedings for all parties
- Discharge requests after the foreclosure action has commenced must be coordinated among the parties and the court
- The issuance of a certificate of discharge eliminates the government's right of redemption

(2) The actions needed on a discharge request involving a foreclosure depends on factors such as the specifics of the sale, when the request is made, and what the government's interest is in the property. The following chart summarizes common situations and the actions generally needed when a discharge request is received.

Type of Foreclosure	Timing of Request	Situation	Action
Judicial or Non-Judicial	Before foreclosure initiated	Lienholder takes title to the property in lieu of foreclosure or property is sold to third party to avoid foreclosure	Process discharge request following standard procedures.
Judicial	After foreclosure initiated	Property is sold to third party prior to the foreclosure sale	Notify the U.S. Attorney's office of the situation and coordinate the processing of the discharge request with the U.S. Attorney's office. Incorporate the assistance of Area Counsel as needed.
		Property is sold at foreclosure sale	Do not issue certificate of discharge. Advise the purchaser of release of right of redemption process.

Non-Judicial	After foreclosure initiated	Property is sold to third party prior to the foreclosure sale	Process discharge request following standard procedures.
		Property sold at foreclosure sale	Do not issue certificate of discharge. Advise the purchaser of release of right of redemption process..

Caution: The above scenarios presume that the IRS was properly joined as a party to the foreclosure litigation (judicial) or adequately noticed of the sale (non-judicial). In situations where these presumptions do not occur, the federal tax lien follows the property and a request for discharge is needed to remove the property from the lien. See IRM 5.12.10.5.1, *Applications for Discharge Involving a Claim of Equitable Subrogation*.

- (3) Consult IRM 5.12.4, *Judicial/Non-Judicial Foreclosures*, and IRM 5.12.5, *Redemptions*, for more information on the foreclosure process. As needed, refer taxpayers to Pub 487, *How to Prepare Application to Release Property Secured by Federal Tax Lien*.

5.12.10.4.3
(09-30-2015)
Discharge and Subordination Recommendations by Department of Justice

- (1) Occasionally, Advisory receives a recommendation for discharge or subordination from the Department of Justice (DOJ) in relation to a case they are litigating.
- (2) Advisory may provide feedback to DOJ as needed; however, because of DOJ's settlement authority over the litigation, Advisory must take any discharge or subordination action as directed by DOJ. See IRM 25.3.6, *Open Litigation Controls, Monitoring and Closing Actions*.

5.12.10.4.4
(09-30-2015)
Certain Government Agency Discharges

- (1) To reduce litigation costs and make property readily marketable, the Veterans Administration (VA), Small Business Administration (SBA), and Federal Housing Administration (FHA) have agreed to accept title to property subject to a junior federal tax lien, provided the payment (if any) required to secure a discharge of property from the tax lien does not exceed the increased cost which would be incurred by them if a mortgagee elected to foreclose by a judicial, rather than by a non-judicial, proceeding.
- (2) Upon receipt of such requests, the Service will cooperate in discharging from junior federal tax liens property acquired by these agencies in connection with their Loan Guaranty or Direct Loan Salvage operations.
- (3) The procedures described in this section apply only to applications received from the VA, SBA, or FHA requesting discharge of property from a junior federal tax lien which has been or is to be acquired by one of those agencies.
- (4) Issue a certificate of discharge if a federal agency has foreclosed non-judicially and given adequate notice when the agency considers the NFTL to be a cloud on the title.
- (5) These procedures do not apply when the United States has already been joined as a party to a judicial foreclosure proceeding or when the insured mortgagee forecloses and has not assigned the mortgage or deed of trust to the VA, SBA or FHA.

5.12.10.4.4.1
(09-30-2015)

**Applications for
Discharge (VA, SBA, or
FHA)**

- (1) Applications for certificates of discharge may be submitted by the VA, SBA, or FHA when they have been notified that the mortgagee has acquired the property and has conveyed it or elected to convey it to the VA, SBA or FHA.
- (2) The property will have been appraised by a designated or staff appraiser of the appropriate agency based on the market value of the property at the time of foreclosure. Accept the appraisal as the fair market value of the property in determining the government's interest under the federal tax lien. A Field investigation is not required.
- (3) The amount shown in the concluding paragraph of the application serves only to place a ceiling on the amount the particular agency may pay for the issuance of a discharge. If it is determined that the federal tax lien interest has value in excess of the amount which the agency is legally permitted to pay, advise the applicable agency and close the discharge application file.
- (4) In accordance with an agreement with VA or FHA, when it has been determined that a notice of lien had been filed more than thirty (30) calendar days prior to a non-judicial sale, an application for the discharge of the property will be made. No notice will be given under IRC § 7425 in these cases.

5.12.10.4.4.2
(09-30-2015)

**Issuance of Certificate
of Discharge (VA, SBA,
or FHA)**

- (1) If it is found that the interest to which the federal tax lien attaches is valueless, deliver Form 669-C to the VA, SBA, or FHA.
- (2) If it is determined that the interest to which the federal tax lien attaches has value, Advisory prepares a statement stating the exact amount required for the requested discharge. The original and two copies of the statement are sent to the VA, SBA, or FHA.
- (3) When a statement signed by the responsible agency official is received, stating that the amount required for the issuance of the discharge is satisfactory, deliver Form 669-B. No payment is made at the time of delivery, but is deferred until the certificate is filed with the proper recording official.
 - a. After the certificate is properly filed, the VA, SBA, or FHA remits payment in the form of a U.S. Treasury Check to the Advisory Group Manager.
 - b. If payment is not received within sixty (60) calendar days after the date the certificate was delivered, follow up to determine when payment will be remitted.
- (4) In the event the VA, SBA, or FHA does not acquire the property or agree to accept it from the mortgagee, the certificate will be returned to Advisory for cancellation. Associate the canceled certificate with the application for discharge.

5.12.10.4.5
(09-30-2015)

**Discharge Requests
Involving Decedent
Cases**

- (1) When a discharge request is received for property owned by a deceased taxpayer, determine when the statutory lien arose, when the NFTL was filed, and what the status of the property was when the NFTL was filed.
 - a. If the assessment was made before the death of the taxpayer, the federal tax lien attaches to the property owned by the taxpayer and follows that property into the estate or the hands of the transferee. The government's priority position is determined based on the filing date of the NFTL.
 - b. If the assessment was made after the death of the taxpayer, the federal tax lien attaches to any probate property in the estate at the time of as-

assessment. The federal tax lien would not reach any property that passed to the heirs automatically at the time of death.

Note: See IRM 5.5.3.6, *Notice of Federal Tax Lien*, and IRM 5.17.13.9.1, *Administrative Collection*, for detailed information about liens on decedent property.

- (2) A discharge request for a decedent's property that is subject to the federal tax lien should be processed following standard discharge procedures.
- (3) Expenses related to the decedent's estate are known as "administrative expenses." When determining allowance for administrative expenses consider the factors outlined in IRM 5.5.2.6.1.1, *Necessary Administrative Expenses*.

5.12.10.5
(09-30-2015)
Equitable Subrogation

- (1) The doctrine of equitable subrogation is expressly recognized by IRC § 6323(i)(2), to the extent it exists under state law. Although laws vary from state to state, the following statements can generally be made about subrogation.
 - It substitutes one person in place of another with respect to a lawful claim or right.
 - It arises when a junior creditor or lien holder pays off, on a dollar for dollar basis, an encumbrance senior to the NFTL in order to protect its interests. This may include refinanced mortgages by the same or different financial institutions.
 - There is no certificate that needs to be issued for the subrogation. It is by operation of law and is defined in each state's law, where applicable. See *Local Law Guides* on the Chief Counsel web site.
 - Subordination of the tax lien is not necessary if a creditor meets the requirements of subrogation; however, financial institutions usually want a certificate of subordination in these situations so questions of lien priority are addressed in the public record.
- (2) Advisors must be familiar with applicable state laws and consult with Area Counsel, as needed, in order to determine the government's interest in property when a claim of equitable subrogation is made.

Note: See IRM 5.17.2.7.1.17, *Subrogation*, for additional information regarding issues of subrogation.

5.12.10.5.1
(09-30-2015)
Applications for Discharge Involving a Claim of Equitable Subrogation

- (1) Applications for discharge under IRC §§ 6325(b)(2)(A), 6325(b)(2)(B), or 6325(b)(4) are sometimes submitted by third parties who either purchased property without having discovered a previously recorded NFTL or who purchased property at a foreclosure sale without the government having been properly noticed under IRC § 7425. These buyers may claim a right of equitable subrogation to the extent of encumbrances they paid that had priority over the federal tax lien prior to the sale.
- (2) Few third parties meet the definition of a party entitled to rights of subrogation as defined by any state's law. However, courts are highly inclined to expand the definition if it can be shown that a failure to do so will result in the unjust enrichment of one party at the expense of another. Therefore, unless the facts do not support an argument for equitable subrogation, or where such argument is clearly not supported by state law, claims of equitable subrogation in these cases will be recognized when calculating the government's lien interest unless, based on local law, Area Counsel advises otherwise.

- (3) If a third party purchases a property without recognizing the attachment of the lien as described above, follow the general guidelines in this subsection to determine what the government's interest would have been had the Service been involved in the transaction.
- (4) When an application has been received for property that was not transferred through foreclosure, take the actions described below.
- Calculate the amount that would have been required for a discharge had an application been submitted prior to sale.
 - From the forced sale value deduct the amount of the prior encumbrance(s) paid by the purchaser. Do not deduct expenses of sale.
 - Compare the calculations of (a) and (b). The calculation that results in the higher amount, if any, is the government's interest that must be paid in order for a discharge to be issued. Accepting a lesser amount for the certificate than would have been required had the application been made prior to the sale would inappropriately reward the applicant for not taking action to obtain a discharge certificate until after the property was sold.

Example: One month after the sale of property the purchaser discovers that a NFTL in the amount of \$50,000 against the seller was recorded prior to the sale. The property sold for its fair market value of \$100,000. Prior encumbrances and reasonable expenses of sale totaled \$70,000 and \$10,000 respectively.

- If the application for discharge had been made at the time of the sale, a payment of \$20,000 ($\$100,000 - \$70,000 - \$10,000 = \$20,000$) would have been required in order for a discharge certificate to be issued.
- If the government foreclosed the lien and the property sold for a forced sale value of \$75,000, and assuming counsel advised that the purchaser would likely be granted subrogation rights equal to the \$70,000 prior mortgage that was paid when the property was purchased, \$5,000 would be realized ($\$75,000 - \$70,000 = \$5,000$).
- Since a foreclosure sale was not involved, the higher payment of \$20,000 must be paid in order for a discharge certificate to be issued.

- (5) When an application has been received for property that was transferred through foreclosure without the government having been properly noticed under IRC § 7425, take the actions described below.
- Using the forced sale value, deduct the amount of the prior encumbrance(s) paid by the purchaser.
 - The resulting calculation is the amount of the government's interest that must be paid in order for a discharge to be issued.

Example: At its own foreclosure sale a bank bids \$95,000 (the amount of the delinquent mortgage) and purchases property with a fair market value of \$100,000 and a forced sale value of \$80,000. The bank then discovers that proper notice of the foreclosure was not given to the government leaving a NFTL undisturbed. The bank applies for a discharge. Since the forced sale value of the property is less than the amount of the mortgage that had priority over the NFTL, a discharge certificate may be issued without requiring any payment.

Example: Same facts as the above example but the delinquent mortgage was \$70,000 and that is the amount paid for the property at the foreclosure

sale. A payment of \$10,000 (\$80,000 - \$70,000 = \$10,000) must be made in order for a discharge certificate to be issued.

5.12.10.6
(09-30-2015)
Subordination of Lien

- (1) Subordination is the process of allowing a junior creditor a position ahead of the federal tax lien with respect to any part of property subject to the federal tax lien. The subordination process is governed by IRC § 6325(d).
- (2) The types of subordination are described in the chart below.

IRC section	Subordination criteria	Document(s) issued
6325(d)(1)	There is paid over to the Service an amount, on a dollar for dollar basis, not less than the amount of the interest of the NFTL or interest to be subordinated.	Letter 4053, <i>Conditional Commitment to Subordinate Federal Tax Lien</i> , and Form 669-D, <i>Certificate of Subordination of Property of Federal Tax Lien</i>
6325(d)(2)	It is determined that the interest of the United States in any part of the property covered by the NFTL will ultimately be increased by the subordination and collection of the outstanding liability will thereby be facilitated.	Letter 4053, <i>Conditional Commitment to Subordinate Federal Tax Lien</i> , and Form 669-D, <i>Certificate of Subordination of Property from Federal Tax Lien</i> .
6325(d)(3)	It is determined that the United States will be adequately secured after subordination of a lien imposed by IRC § 6324B.	Form 669-F, <i>Certificate of Subordination of Federal Estate Tax Lien</i>

- (3) The Service is not required to issue a subordination but may do so when it is in the best interest of the government.
- (4) The instructions for applying for a subordination can be found in Pub 784, *How to Prepare an Application for a Certificate of Subordination of Federal Tax Lien*. Standardized application Form 14134, *Application for Certificate of Subordination of Federal Tax Lien*, is also available for use. Taxpayers may also be referred to a video on the subordination process at <http://www.irsvideos.gov/Individual/IRSLiens>.
- (5) Typically, the NFTL would be subordinated to a lender loaning money to the taxpayer and securing the loan with a mortgage or deed of trust.
- (6) In the case of entireties property, the Service generally treats the value of the taxpayer's interest as one-half of the value of the entireties property.
- (7) When the outstanding liability is not assigned to another IRS work unit and it is determined that collection will be facilitated by the subordination, the Advisory employee should secure the taxpayer's proposal to pay the balance of the tax liability (or evidence of such a proposal to another function) and make a determination on the proposal's collection impact along with the recommendation for acceptance/denial of the request.
- (8) If a taxpayer seeks a certificate of subordination for a mortgage (or security interest) used to purchase property and that mortgage qualifies for priority over

a previously filed NFTL (as explained in Revenue Ruling 68-57), provide the taxpayer with Pub 785, *Purchase Money Mortgages, Purchase Money Security Interests, and Subordination of the Federal Tax Lien*. This pub explains why a certificate of subordination is not needed and will not be provided if requested.

- (9) Procedures for handling requests for subordination of a federal estate tax lien under IRC § 6325(d)(3) can be found in IRM 5.5.8, *Estate Tax Liens*.

5.12.10.6.1
(10-14-2013)

Receive Amount for Lien Interest - IRC § 6325(d)(1)

- (1) This type of subordination is generally used when the taxpayer is obtaining financing to pay toward the tax liability.

Example: The taxpayer wants to secure a second mortgage against his property and use the proceeds to pay toward the NFTL.

Example: The taxpayer has a mortgage that is senior to the NFTL. The taxpayer wants to refinance the mortgage and increase the amount owed. He proposes to pay the Service the amount that the mortgage is increased.

- (2) If a taxpayer seeks a certificate of subordination for the purpose of obtaining cash or paying other debts not secured by a senior lien on the property (for example, in the case of a home equity loan), apply IRC § 6325(d)(1) guidelines. Generally, payment of junior liens or non-secured debts is not allowed in the subordination process unless the payment ultimately enhances collection of the tax liability.

5.12.10.6.1.1
(09-30-2015)

Subordination to Factoring Agreements

- (1) A factoring agreement is an arrangement between a business and a third-party agent whereby the agent assumes the rights regarding the account receivables for the business. Generally the agreement provides for the agent to deduct a percentage of what is collected from the receivables on an on-going basis, but it may also involve a lump sum payment to the business. The business normally enters such an agreement to improve their cash flow. Prior to entering into the agreement, the business must address the lien's attachment to the accounts receivable.

- (2) A subordination of the government's lien interest in accounts receivable to the security interest of a lender is permitted in accordance with IRC § 6325(d)(1) or (d)(2).

- (3) Granting a subordination on accounts receivable should be limited to the accounts receivable (AR) existing on the issuance date of the subordination certificate but may include those coming into existence during the specified period of the subordination.

- (4) The subordination must be for a period no longer than one (1) year. If the subordination is for an in-business taxpayer that has not paid the preceding quarterly trust fund tax, the period cannot be for longer than ninety (90) calendar days.

- (5) Any request for extension must be treated and worked as a new application. All subordination requests must meet standard approval criteria.

- (6) Documentation provided by the taxpayer and histories noted in the file must clearly show that subordination of the government's priority will facilitate collection of the taxes due.

- (7) Since periodic payments are involved, a signed installment agreement (Form 433-D) must be secured in conjunction with the subordination and be subject to the normal termination and default provisions.
- This must include a requirement to make timely Federal Tax Deposits if the taxpayer has an open Form 941 filing requirement.
 - This must also include a requirement to make timely Form 1040ES payments if the taxpayer is self-employed.
 - These provisions also apply to the subordination.
 - The installment agreement provisions may be modified by Advisory if the amount received from the subordination is less than the monthly amount on the installment agreement; however, if the amount received is more than the amount called for by the installment agreement this is not necessary.
- (8) The description of the assets included in the subordination certificate must read, “*all [or specific] accounts receivable belonging to [taxpayer name] in existence on mm/dd/yyyy and coming into existence prior to mm/dd/yyyy.*” If only specific accounts receivable are subject to a factoring agreement, describe the specific accounts receivable to be included on the subordination certificate.

Note: The federal tax lien will likely have priority on unlisted accounts receivable.

- (9) For cases assigned to Field Collection (“field”) revenue officers, the following must be completed or in process before granting an in-business installment agreement as outlined in IRM 5.14.7, *BMF Installment Agreements*:
- Investigation of the taxpayer’s ability to pay; and
 - Trust Fund Recovery Penalty (TFRP) investigation.

Note: A condition of the installment agreement should be to update financial information annually if a request to extend the subordination is anticipated.

- (10) For applications to subordinate to a factor on taxpayer trust fund accounts not assigned to a revenue officer, Advisory initiates a TFRP investigation. Advisory may issue an OI to Field Collection on cases for which field actions are necessary. These OIs sent by Advisory are mandatory OIs for the field.
- a. Field Collection forwards to Advisory the information and any recommendations on the TFRP investigation, along with any information on an installment agreement.
 - b. Advisory follows the direction in IRM 5.7.3.2(4), *Automated Trust Fund Recovery (ATFR) Program*, regarding completing TFRPs on cases that cannot be loaded to the ATFR, i.e., non-status 26 cases.
- (11) Make an attachment to the Form 669-D to list the terms of the subordination, including termination for failure to make payments or failure to live up to the terms of the installment agreement.
- Standard IA termination procedures will be followed, including allowing time for the taxpayer to appeal. See IRM 5.14.11, *Defaulted Installment Agreements, Terminated Agreements and Appeals*.
 - The factoring agent must be given written notification of the termination of the subordination. The factoring agent is not entitled to any appeal rights if the subordination is terminated.

- (12) If the taxpayer wishes additional clarification of the terms of the agreement, Exhibit 5.12.10-1, *Subordination to Factor - Agreement*, provides a “forbearance agreement” that may be used in addition to (but not in lieu of) the Form 669-D.

Note: The use of this agreement is not required by the Service. Similar Forbearance Agreements approved by any Area Counsel may be used in lieu of the one provided in the exhibit.

- (13) Regardless of whether the subordination application was processed by Advisory or the Field, process installment agreements associated with subordinations to factors normally. Use the closure method for the installment agreement specified by IRM 5.14. If the taxpayer is in business and there are trust fund taxes owed, close the installment agreement as an IBTFIA and send it to Centralized Case Processing (CCP) for monitoring.
- (14) Payments should be made directly from the factor, where possible. Request that factors send the payments to the local Advisory address that approved the subordination.
- (15) Advisory closes its OI once the subordination is approved and opens a new “other/misc 148” OI to monitor and:
- receive and post payments,
 - ensure the taxpayer is in compliance with the subordination, and
 - ensure timely 1040ES payments are made if the taxpayer is self-employed.
- (16) If it is a CCP monitored agreement, CCP monitors:
- payments by seeing them post on IDRS, and
 - the case for FTDs and any other criteria provided in IRM 5.14.
- (17) Subordinations can be terminated for failure to make payments, but they cannot be revoked. Ensure a full copy of the subordination certificate and termination notice are retained in the advisory case-file and the ICS history is documented regarding any termination action.
- (18) While the lien interest in listed receivables is subordinated, the lien is not subordinated on other assets such as real property, bank accounts, machinery and equipment, and vehicles, unless specifically stated.

5.12.10.6.2
(09-30-2015)
**Facilitating Ultimate
Collection - IRC §
6325(d)(2)**

- (1) This type of subordination is generally used when the taxpayer is entering financing but is not making an immediate payment toward the tax liability. It is intended that this authority is used in situations similar to those in which an ordinary, prudent businessman would subordinate rights in a debtor's property in order to secure long-run benefits.
- (2) Issuance of a subordination under this section is allowable if it can be shown that:
- doing so will ultimately result in an increase in the amount realizable by the U.S. in the property (or any other property owned by the taxpayer), and
 - that the ultimate collection of the tax liability will be facilitated by the subordination.

- (3) The Service applies this section for taxpayers seeking subordination of the federal tax lien in connection with a “dollar for dollar” refinancing of a senior lien. Any such requests though must still demonstrate a benefit to the government.

Example: The taxpayer has a mortgage that is senior in priority to the NFTL. The taxpayer is having difficulty making his mortgage payments and wants to refinance the mortgage to a lower interest rate, and thus lower payments. The taxpayer cannot borrow any additional funds at this time to apply toward the NFTL. Refinancing will allow the taxpayer to retain the equity in his property and will enhance his ability to make payments on the tax liability.

- (4) A subordination of the government’s lien interest in current and/or future accounts receivable to the security interest of a lender is allowable under IRC § 6325(d)(1) or (2).

5.12.10.6.2.1
(09-30-2015)

**Subordination in HAMP
and HARP Situations**

- (1) The Home Affordable Modification Program (HAMP) is for homeowners who are behind in their principal residence mortgage and in danger of foreclosure. It is a no cost mortgage modification to decrease the amount of the monthly payment by lowering the interest rate and/or extending the payment term. In some cases, a portion of the debt may be forgiven.
- (2) Qualifications for a HAMP include all the following:
- The home is the primary residence
 - The mortgage is less than or equal to \$729,750
 - The mortgage was obtained before January 1, 2009
 - Borrower’s housing payment including principal, interest, property taxes, homeowner’s association dues, and insurance exceeds 31% of gross (before tax) monthly income
 - There is a documentable hardship -- either a significant reduction in income or increase in expenses that was beyond the borrower’s control -- and there is a stable source of income sufficient to make a modified payment.
- (3) The HAMP is generally a two-step process.
- If the borrower qualifies, there is usually a trial period testing whether the lower mortgage payment can be maintained.
 - Only after a successful trial period is the HAMP finalized.
- (4) HAMP provides for loan modifications rather than refinances. It does not provide cash back to the borrower or increase the loan amount. Also, there is no set requirement throughout the country to record the modified loan documents. So even if a NFTL is filed the Service may or may not be aware of a HAMP modification.
- (5) Presuming the modification does not affect the seniority of the NFTL or the amount of money senior to it, then a subordination is generally not required. If the lender or taxpayer intends to record the HAMP, then issuance of a subordination certificate may be needed to ensure an accurate title record.

Note: A subordination under these circumstances follows Internal Revenue Code (IRC) Section 6325(d)(2). Avoiding foreclosure helps maintain the value of the property the lien attaches to and reduced mortgage payments assist taxpayers to ultimately pay their tax liabilities.

Note: If a taxpayer fails with their HAMP, the next step may be requesting a discharge due to a short sale.

- (6) The Home Affordable Refinance Program (HARP) is a refinance for creditworthy homeowners who are “underwater” on the value of their home but are not behind in their mortgage(s). The purpose of the program is to lower the interest rate to the allowable minimum.
- (7) Qualifications for a HARP include the borrower:
 - owns a one to four-unit home,
 - has a mortgage that is owned or guaranteed by Fannie Mae or Freddie Mac,
 - has no late mortgage payments (i.e., more than thirty (30) days late) in the last twelve (12) months, and
 - owes no more than 125% of the value of the home on the first mortgage (combined loan-to-value ratio can be higher).

Note: Only the first mortgage is refinanced.

- (8) HARP does not provide any cash back to the borrower (i.e., the taxpayer) nor increase the loan amount, but it is a refinance so the taxpayer should request a certificate of subordination.

5.12.10.6.2.2 (09-30-2015)

Subordination to Reverse Mortgages

- (1) A subordination of the government’s lien interest to a loan that pays a stream of payments back to the owner of a property (aka a reverse mortgage) may be permitted in certain circumstances under IRC § 6325(d)(2).
- (2) Prior to consideration of a subordination of this type, first consider requesting that the taxpayer borrow the maximum amount of equity on the property and apply for a subordination of the federal tax lien under IRC § 6325(d)(1). If the taxpayer is unable to borrow on the property or the government will receive more by subordination to a reverse mortgage, then approval of a subordination to the reverse mortgage is possible.
- (3) All payments made by lenders from reverse mortgages must be paid to Service.

Note: If a taxpayer is wanting to borrow to improve or maintain the property, this will likely not meet the definition of a reverse mortgage. The request should be processed as a regular subordination request.

- (4) Document the ICS case history regarding the factors considered prior to agreeing to subordinate the government’s interest to a reverse mortgage. Documentation must clearly show that subordination of the government’s priority will facilitate collection of the taxes due. Other criteria for subordination must also be met.
- (5) The time frame of these subordinations is equal to the time frame of the reverse mortgage.
- (6) The description of the note to which the government’s interest is subordinated must be clearly described in the application. Lenders generally include some form of unrealized “interest due” in notes that secure reverse mortgages. This is permitted because otherwise lenders have no financial incentive to approve these loans.

- a. Ensure the interest rate charged for the loan is reasonable considering prevailing rates, market conditions, taxpayer credit history, amount of loan, term of loan, and other relevant factors.

Note: Variable rate reverse mortgages should not be approved.

- b. Ensure the amount secured by the note for payment of interest and other allowed expenses does not exceed the amount of interest that would accrue given the stated interest rate of the loan.
 - c. Reasonable expenses, including closing costs, are allowed for these loans.
 - d. Ensure the total amount of expenses is not exceeded.
 - e. Explain any discrepancies in the ICS case history.
- (7) Request that lenders make the payments on these reverse mortgages and that they be sent to the local Advisory office that approved the subordination.
 - (8) Since periodic payments are normally involved, a signed installment agreement (Form 433-D) must be secured in conjunction with the subordination and will be subject to the normal termination and default provisions.
 - This must include a requirement to make timely Federal Tax Deposits if the taxpayer has an open Form 941 filing requirement.
 - This must also include a requirement to make timely Form 1040-ES payments if the taxpayer is self-employed.
 - These provisions also apply to the subordination.
 - (9) For cases assigned to field revenue officers, a complete investigation of the taxpayer's ability to pay and the TFRP investigation must be completed or in process before granting an in-business installment agreement as outlined in IRM 5.14.7, *BMF Installment Agreements*.
 - (10) For applications to subordinate to reverse mortgages on trust fund accounts not assigned to a field revenue officer, Advisory initiates a TFRP investigation and may issue an OI to the field, if necessary. These OIs sent by Advisory are mandatory OIs for the field.
 - a. Field Collection forwards to Advisory the information and any recommendations on the TFRP investigation, along with any information on an installment agreement.
 - b. Advisory follows the direction in IRM 5.7.3.2(4), *Automated Trust Fund Recovery (ATFR) Program*, regarding completing TFRPs on cases that cannot be loaded to ATFR (non-St 26 cases).
 - (11) Regardless of whether the subordination application was processed by Advisory or the field, process installment agreements normally. Use the closure method for the installment agreement specified by IRM 5.14. If the taxpayer is in business and there are trust fund taxes owed, close the installment agreement as an In-business Trust Fund Installment Agreement (IBTFIA) and send it to Centralized Case Processing (CCP) for monitoring.
 - (12) Once the note is signed and filed, include a copy of the recorded note, with all filing notations (i.e. book, page, recordation number) with the subordination case file. The case file remains in active inventory until the full terms of the subordination are met.

- (13) Advisory closes their OI once the subordination is approved and opens a new "other/misc 148" OI to monitor and:
 - receive and post payments,
 - ensure the taxpayer is in compliance with the subordination, and.
 - ensure timely 1040ES payments are made if the taxpayer is self-employed.
- (14) If it is a CCP monitored agreement, CCP monitors:
 - payments by seeing them post on IDRS, and
 - the case for FTDs and any other criteria provided in IRM 5.14.
- (15) Subordinations cannot be revoked for failure to make payments, nor for failure to make federal tax deposits; however, installment agreements associated with the subordinations may be terminated if their terms are not met.
- (16) While the lien interest in listed receivables is subordinated, the lien is not subordinated on other assets such as real property, bank accounts, machinery and equipment and vehicles, unless specifically stated.
- (17) The federal tax lien remains on the property, subordinated only in the amount specified by the subordination, and subordinated only to the instrument specified in the subordination certificate.

5.12.10.6.3
(09-30-2015)
**When to Issue a
Certificate of
Subordination**

- (1) Subordination is a discretionary act. Generally, subordinations are issued only when it is in the best interest of the government.
- (2) Follow guidance outlined in this IRM and Pub 784, *How to Prepare an Application for a Certificate of Subordination of Federal Tax Lien*, when providing information regarding applications for subordinations.
- (3) Conduct full compliance checks when applications for subordination are submitted. If taxpayers are not in full compliance with filing and deposit requirements, request returns be filed and payments be current. Compliance checks should also include the taxpayer's proposal for resolving the outstanding tax liability.

Note: There is no prohibition on processing subordination requests if taxpayers are not in compliance with filing and paying requirements; however, non-compliance issues would be a factor in considering the best interest of the government.

- (4) Field Revenue Officers receiving applications for subordination relative to cases in their inventory should take the actions described below.
 - a. Conduct full compliance check as described in (3) above. Use the application as an opportunity to fully explore the taxpayer's compliance. Set deadlines for payment and filing if appropriate.
 - b. Bring Advisory into the investigation early. Work with Advisory on property valuation, as needed, and to ensure the investigation is being worked in accordance with established policies and procedures. See IRM 5.12.10.7.3, *Investigation of Discharge and Subordination Applications*.
- (5) Approval of subordinations is delegated to Advisory and Insolvency Group Managers. See IRM 1.2.44.5, Delegation Order 5-4 (rev. 3).

5.12.10.7
(09-30-2015)
**Applications for
Discharge and
Subordination
Certificates**

- (1) Any person desiring a certificate of discharge or subordination must submit a written application executed under penalties of perjury. The form and content of the applications are contained in their associated publications.
 - Discharge - Pub 783, *Instructions on how to apply for a Certificate of Discharge of Property From Federal Tax Lien*
 - Subordination - Pub 784, *How to Prepare an Application for a Certificate of Subordination of Federal Tax Lien*
 - Subordination of Estate Tax Lien - Pub 1153, *How to Apply for Certificate of Subordination of Estate Tax Lien Under IRC § 6325(d)(3)*
- (2) To assist taxpayers with the process, application forms are also available from the internet. The use of these forms is not mandatory, but should be strongly encouraged.
 - a. Form 14135, *Application for Certificate of Discharge of Property from Federal Tax Lien*.
 - b. Form 14134, *Application for Certificate of Subordination of Federal Tax Lien*.
- (3) Also available to assist applicants is a video on the IRS website titled "Selling or Refinancing When There Is an IRS Lien." See <http://www.irsvideos.gov/Individual/IRSLiens>.

5.12.10.7.1
(09-30-2015)
**Submission of
Applications**

- (1) Applications for certificates, together with all necessary documentation, should be directed to the Revenue Officer assigned the taxpayer's case, if applicable, or directly to the Advisory Group Manager for the state where the property is located.
- (2) Use ICS to control and monitor the case.
 - a. Revenue officers document their activity as part of their assigned bal due.
 - b. Advisory opens an NFOI under 141 Discharge or 142 Subordination within seven (7) calendar days of receiving the application in the group.
- (3) Document the date that the application was received when the case is opened on ICS.
- (4) Upon receipt, examine each application for completeness. If the application is incomplete or improper, the applicant should be contacted no later than twenty-one (21) calendar days from receipt of the package.
- (5) Do not reject applications for incompleteness unless the missing information will not allow for a thorough investigation. Every effort should be made to accept the application for processing, provided the information submitted would enable a proper investigation to be conducted.
- (6) The Advisory Group Manager may waive the appraisal requirement if other acceptable evidence of the value of the property is submitted.

Note: If a market valuation has been done on the subject property by a Property Appraisal and Liquidation Specialist (PALS), it may be considered as an appraisal for the FMV determination.
- (7) See IRM 5.5.8, *Estate Tax Liens*, for guidance on evaluating discharge and subordination applications relating to estate tax liens.

- (8) In situations involving a foreclosure proceeding where a sale is pending, a recommendation for acceptance or denial should be made within fourteen (14) calendar days of receipt in the group of the complete application. In all other situations, the recommendation should be within thirty (30) calendar days, unless more expeditious action is necessary.
- (9) Document any cause of delay in the ICS history.

5.12.10.7.2
(09-30-2015)

**Requests for Additional
Information - Actions if
Not Received**

- (1) Upon receipt of an application, complete a thorough analysis to determine if there is a need for additional information.
- (2) When additional information is needed to make a determination on the application, contact the applicant no later than twenty-one (21) calendar days from receipt of the initial package. Depending on the extent of the information needed, any time constraints, and other factors, the additional information may be requested verbally or in writing. Letter 4025 or 4027 should be used for this purpose. Whether verbally or in writing, a deadline for response should be clearly communicated.

Reminder: When a verbal request for additional information is made, it is best to follow up the conversation with a letter to ensure expectations and deadlines are clearly communicated.

- (3) Generally, response deadlines should be thirty (30) calendar days; however, time-frames for action should be consistent with the facts of the case. For example, if a sale is pending, document the history regarding this fact, including the date of sale and schedule a timely follow-up action.
- (4) If additional information is not received by the established deadline, the application and case may be closed for insufficient information.
- (5) Should the taxpayer provide the additional information subsequent to the closing of the application, open a new control for the case and resume processing the application.

5.12.10.7.3
(09-30-2015)

**Investigation of
Discharge and
Subordination
Applications**

- (1) Advisory should use all available resources to determine whether to issue a certificate of discharge or subordination. If additional information is needed, the applicant should be contacted no later than twenty-one (21) calendar days from the receipt in the group of the initial package.
- (2) Verify the information submitted in the application by contacting any of the following, as needed:
 - Service employee assigned the delinquent account
 - Applicant
 - Applicant's representative
 - Taxpayer
 - Taxpayer's representative
 - Real estate firms
 - Title companies
 - Holders of encumbrances
 - Any other person or entity that might have relevant information.
- (3) For applications received directly in Advisory, initiate an OI if it is determined that a field investigation is required before a final decision can be made to discharge the property or to subordinate the lien.

- a. If the application relates to a foreclosure proceeding, flag the application to indicate that the revenue officer's report must be returned to Advisory within seven (7) calendar days.
- (4) Applications which require a field investigation must be investigated promptly by a revenue officer.
 - a. The RO should investigate and verify each item contained, or that should have been contained, in the application.
 - b. The RO fills out a Form 3033, *Investigation of Request for Certificate of Discharge or Subordination*, for each investigation completed.
- (5) Unless there is evidence the process might not involve an arm's length transaction, the appraisals submitted should normally be accepted and a separate investigation to determine the value of the property is not needed.

Note: If a market valuation has been done on the subject property by a Property Appraisal and Liquidation Specialist (PALS), it may be considered as an appraisal for the FMV determination.

- (6) Escrow funds, a potential payment source, should be considered and accounted for when working discharge investigations. However, if during the course of the investigation it is disclosed that the senior encumbrance(s) exceeds the value of the property, it is not necessary to investigate and verify subsequent encumbrances, even if they were recorded prior to the filing of the NFTL.
- (7) When investigating applications in which the property is encumbered by a home equity line of credit, take the actions described below.
 - a. In cases where the credit line is drawn down after the Notice of Federal Tax Lien is filed, determine if the mortgagee/lender has a security interest in the real property in question. Often, a credit line is approved for a specific amount, but that entire amount is not turned over to the taxpayer. The taxpayer may draw against this amount as he wants. Also, the credit line may be approved for a specific amount and the entire amount was distributed to the taxpayer, but was done so some time ago and the taxpayer has paid down the amount owed. In these cases, the mortgage is recorded showing the encumbrance as the approved amount of the credit line, not the amount actually borrowed.
 - b. Verify the amount of money or money's worth that changed hands. To be a holder of a security interest the mortgagee must first meet the two-pronged test of IRC § 6323(h)(1). See IRM 5.17.2.6.4, *Holder of Security Interest*, for further explanation.
 - c. Determine the timing of disbursements on the line of credit. Although the mortgage or deed of trust may reflect the full amount of the line of credit, only the amount disbursed prior to the period ending forty-five (45) calendar days after the recording of the NFTL (or sooner if actual notice of the lien is given) has priority over the Federal tax lien. A possible exception to the above is when the funds are specifically earmarked for construction or improvement of real property and the agreement was entered into prior to the NFTL filing.
- (8) Evaluate the priority of all liens and judgments to determine the interests of the government in the property. See IRM 5.17.2 for further information on priorities and consult Area Counsel, as needed, for questionable situations.

- (9) If the taxpayer/applicant misses any established deadline, including submitting required documentation and/or payment, the employee takes follow-up action within ten (10) calendar days of the deadline, including closing the case if appropriate.
- (10) The ICS Advisory case file should reflect all actions taken and deadlines established. If documentation and/or payment are received after the ICS NFOI has been closed, create a new ICS NFOI to complete the investigation and make an appropriate recommendation.
- (11) When circumstances dictate, the employee should use problem solving and negotiation techniques, and in so doing consider the taxpayer's, POA's, or third party's perspective when working toward case resolution.

5.12.10.7.4
(09-30-2015)

Allowable expenses

- (1) Certain expenses may be treated as reasonable and necessary expenses for the financial transaction and should be considered in calculating the amount of the government's interest. These expenses, which do not have to be present, may include, but are not limited to, the following items:
 - Fees related to the application process, such as title report and appraisal
 - Fees inherent to the transaction, such as realtor commission or loan origination fee
 - Costs associated with the administration of the proceeds
 - Recordation fees
 - Costs related to the property transfer including *ad valorem* taxes, "document stamp fees", "transfer stamps," and "transfer fees," if their assessment and collection is required on sales in the jurisdiction where the sale occurs

Exception: See IRM 5.12.10.7.4.1 below regarding transfer taxes assessed at closing.

- (2) Allowance of the expenses listed in (1) is prohibited if any of the following conditions are present:
 - Monies were or will be paid to the taxpayer,
 - The fees are not mandated by state, county or other local jurisdictional law,
 - The fees are not applied to all sales of the same type, or
 - The fees are excessive or unusual.
- (3) Attorney fees are allowable expenses if they are incurred as part of the subject transaction or application process and they are reasonable in amount. Attorney fees are not allowable for representation unrelated to the subject transaction (e.g., litigation against third party, representation on other tax matters). The amount of attorney fees is generally considered reasonable if it does not exceed the limitations established under IRC § 7430(c)(1)(B)(iii).

Note: The IRS publishes an inflation-adjusted rate cap on an annual basis. Per Rev. Proc. 2014-61, the attorney fee limitation for fees incurred in calendar year 2015 is \$200 per hour.

- (4) In certain sale situations, the buyer and seller may agree to a slightly higher selling price in exchange for the seller paying additional closing costs. Normally, this is done to facilitate the loan process of the buyer but may also

be used to enhance the marketability of the property. These seller (i.e., taxpayer) paid costs may be allowable as an expense if, among other factors, they:

- were specifically negotiated in the sales contract,
- are reasonable given the selling price and the amount of other normal expenses allowed,
- are in accordance with local laws and standards, and
- do not significantly impact the equitable interest of the government or the amount that might otherwise be realized from the transaction.

- (5) If expenses are incurred (sometimes called “staging” expenses by realtors) and it is demonstrated that they either hastened the sale or increased the amount received at sale, then allow the expenses. In particular, if prevailing economic conditions are poor, and “staging” assists in selling a property, providing a taxpayer with an avenue to make payment on their taxes, allow these expenses so long as the expense is reasonable and ordinary in the state where the property was, or is being, sold.
- (6) Fees for auctioneering services are allowable if they are reasonable and necessary for the sale of the property. If a realtor employs the services of an auctioneer (or similar vendor) to facilitate a sale, the sum total of the realtor and auctioneer fees should not exceed the amount generally allowable for the realtor’s commission alone.
- (7) The determined interest of the United States necessary for issuance of a discharge or subordination should not be reduced in order to allow payment to an interest that is junior to the federal tax lien.

5.12.10.7.4.1
(09-30-2015)

**Applications for
Discharge With
Commercial Real Estate
Transfer Tax**

- (1) Some states have enacted a real estate transfer tax equal to a percentage (e.g., 3.5%) of certain commercial real estate transactions and insist that an amount equal to the prospective tax liability be remitted at closing.
- (2) Such taxes have no priority status under IRC § 6323(b)(6) against the NFTL. The cited section applies to general real property ad valorem taxes, special assessments for public improvements, or the cost of public utilities. As a prospective liability at the time of transfer, a transfer tax has no status as an assessed liability perfected as a security interest with respect to the NFTL.
- (3) A discharge of property from the federal tax lien should not be issued for less than the full value of the government’s claim on the equity in the subject property. The transfer tax is not accorded priority status nor should it be treated as an expense of sale.
- (4) If an application includes a provision for such a transfer tax, disallow the amount claimed.

5.12.10.7.5
(09-30-2015)

**Request for Relocation
Expense Allowance**

- (1) In certain discharge situations, when selling a principal residence, taxpayers are allowed limited funds from sale proceeds to pay relocation costs. Consider payment of these costs if the taxpayer demonstrates a need for this relief.

Reminder: Funds received under the relocation expense allowance provision will not reduce the taxpayer’s tax liability.

- (2) The relocation allowance is deducted from the government's interest in the property. Junior lien holders are not impacted and have no entitlement to the funds.
- (3) Use the following criteria when considering the relocation expenses allowance:
 - The property being sold must be the principal residence.
 - Requests from taxpayers owning multiple pieces of real property generally are not appropriate.
 - Taxpayers must demonstrate an "inability to pay" relocation costs and provide documentation for specific expenses on Form 12451, *Request for Relocation Expenses Allowance*. Relocation expenses are subject to limitations based on the local standard "cost of living" locality tables, for the location of the new residence,
 - The Service must receive a partial payment of the tax liability. "No value" discharges are not subject to a relocation allowance.
 - If the taxpayer is receiving funds for relocation from another lien holder, no consideration is given for this relocation allowance.

5.12.10.7.5.1
(09-30-2015)
**Procedures for
Consideration of
Relocation Expense
Allowance**

- (1) To receive consideration, taxpayers must provide supporting documentation for expenses as an attachment to Form 12451. Supporting documentation may consist of, but is not limited to, the following:
 - Proposed rental agreement
 - Estimates from moving companies
 - Truck rental estimates
 - Utility hookup charges
- (2) Examine Form 12451 and the attached documentation for completeness and contact the taxpayer for any additional information.
- (3) Make a determination whether the taxpayer has sufficient funds available to pay reasonable relocation expenses. Information such as financial statements, recent bank statements, and last filed return can be used in this determination. Generally, cases in Currently Not Collectible status 53 (excluding closing codes 03 and 12) do not require another "hardship" determination.
- (4) The relocation allowance should be calculated by multiplying the Local Standard: Housing and Utilities for the new residence locale and family size by a factor of 2.5. See IRM 5.15.1.9, *Local Standards*, and the Allowable Expenses web page at <http://mysbse.web.irs.gov/Collection/toolsprocesses/AllowExp/default.aspx>.

Note: As a general rule, this is the maximum allowance considered.

Example:

\$1,000	Amount allowed for "Family of 3" from Local Standards Table
x 2.5	<u>Established Factor</u>
\$2,500	Maximum relocation allowance

- (5) The relocation allowance is the lesser of actual relocation expenses approved or the local standard amount determined by the above formula. Adjustments in the maximum allowance may be considered on a case-by-case basis if extenuating circumstances exist, such as age, health, or disability.
- (6) If the taxpayer is moving within the same locale, the 2.5 factor still applies.
- (7) In all instances, there **must** be net proceeds available to apply to the tax liability.

5.12.10.7.6
(09-30-2015)
**Form 3033, Investigation
of Request for
Certificate of Discharge
or Subordination**

- (1) All revenue officer reports of investigation will be promptly entered on Form 3033, *Investigation of Request for Certificate of Discharge or Subordination*. The application should be carefully examined to make certain that the property is adequately and properly described.
- (2) The revenue officer submits the report, together with the copy of the application and all exhibits, to the Advisory Group Manager, for review and approval.
- (3) In the case of an application relating to a foreclosure proceeding, a complete investigation, including initial review and any necessary contact, shall result in a recommendation for acceptance/denial within fourteen (14) calendar days after receipt in the group of the application. In all other cases, recommendation should be made within thirty (30) calendar days unless more expeditious action may be necessary. Document any cause of delay in the ICS history.
- (4) Advisory either completes Form 3033 or summarizes the computation of the government's interest in the ICS history, supported by documentation in the case file.
- (5) After a completed Form 3033 is received, Advisory has ten (10) calendar days to make the recommendation to accept or deny the application for a certificate.

5.12.10.8
(09-30-2015)
**Issuance of Discharge
and Subordination
Commitment Letters**

- (1) Advisory or Insolvency Managers have the authority to approve or deny a discharge or subordination request. ROs, Advisors, or others working a request may, if necessary, advise the applicant of their recommendation regarding a request, but they do not have the authority to approve or deny the request.
- (2) When additional information is requested from the applicant but is not received by the specified deadline, close the case as no response. If the additional information is subsequently received, open a new case on ICS and resume processing.
- (3) Review the completed application and determine if the discharge or subordination proposed by the applicant is appropriate. If there are discrepancies between what is proposed by the taxpayer and what is determined as acceptable by the Service, including the amount of the government's interest in the transaction, contact the applicant and attempt to resolve.

Reminder: Failing to resolve discrepancies prior to issuance of a decision letter could impede the taxpayer's appeal rights.

- (4) Issue the appropriate commitment letter when the application is acceptable and there is a tentative agreement with the applicant regarding the amount of the government's interest.

- Letter 402, *Conditional Commitment to Discharge Certain Property from Federal Tax Lien*
- Letter 403, *Conditional Commitment to Discharge Certain Property from Federal Tax Lien (Value)*
- Letter 4053, *Conditional Commitment to Subordinate Federal Tax Lien*

Note: These letters are available as ICS templates and as PDF fillable forms from the Publishing website. The templates can be modified to include additional text, if needed. The use of local letters as a substitute is not permitted.

- (5) Issue a denial letter when the proposed request is not acceptable or discrepancies in the amount of the government's interest cannot be resolved. See IRM 5.12.10.12, *Denial of Applications for Discharge or Subordination*.
- (6) After the issuance of the commitment letter, take follow-up actions based on the applicant's response as shown in the table.

If within 30 calendar days from the date of commitment to complete the transaction...	Then...
required documentation and payment are submitted by the applicant	issue the appropriate certificate following IRM 5.12.10.9.
required documentation and payment are not submitted by the applicant	close the NFOI on ICS. If documentation and payment are subsequently received and the facts relative to the case have not substantially changed, open a new NFOI and resume processing of the case by issuing the certificate.
the applicant requests an extension of the deadline to submit the required documentation and payment	consider the basis for the request and extend the deadline, if appropriate. Note: Deadlines should generally not be extended more than an additional 30 days. Caution: Extensions may impact the payoff amounts and costs associated with the transaction. Recalculation of the closing statement may be necessary.

5.12.10.9
(09-30-2015)

**Preparation and
Issuance of Discharge
and Subordination
Certificates**

- (1) Prepare the appropriate discharge or subordination form in duplicate. These forms are available as ICS templates or as PDF fillable forms from the Publishing website.
 - a. Reference all applicable NFTL filings on the certificate.
 - b. Block or line out the unused area in the description portion of the form so as to prevent the insertion of a description of other property.
 - c. Do not modify form or content of lien certificates at the request of local recording offices.
 - d. Redact Social Security Numbers (SSNs) that appear on the certificate so only the last 4 digits are shown. Employer Identification Numbers (EINs) should be, but are not required to be, redacted in a similar manner (e.g., xx-xxx1234).

Note: In June 2015, ALS began partially redacting EINs on lien documents that it generates. Programming for other systems (e.g., ICS) will be updated in the future to also partially redact EINs on lien-related documents.

- (2) Upon receipt of the closing documents, ensure the requirements listed in the conditional commitment letter have been met. Generally this includes the actions described below.
 - a. Review the copy of the recorded deed (for discharge) or mortgage (for subordination) for accuracy.
 - b. Review the copy of the final settlement statement and reconcile any differences from the preliminary statement to ensure proper accounting of all funds.
 - c. If applicable, receive payment of the amount specified in certified funds or other acceptable form.
- (3) Deliver the original of executed Form 669 to the applicant after all requirements are met. Advise the applicant of their responsibility to file the document with the appropriate recording office. If any payment received is not by certified funds, withhold issuance of the certificate until it is verified that the payment has cleared.
- (4) Post all payments received in conjunction with certificate applications on the date of receipt.

Note: As stated in the conditional commitment letter, issuance of the certificate is conditioned upon the taxpayer's agreement that payments will be applied in the best interest of the government as determined by the Service.

- (5) It is the responsibility of the applicant to record the certificate unless a particular recording agency only records certificates presented by the Service. If Advisory must record the certificate, no recording fee need be collected from the applicant.

5.12.10.9.1
(09-30-2015)
**Use of Electronic
Signatures on Lien
Certificates**

- (1) Neither the Internal Revenue Code (IRC) nor Treasury regulations address the method in which lien certificates are to be signed; however, they both address the Secretary's authority to develop procedures associated with the use and acceptability of electronic signatures on forms and other documents.
- (2) Approval of documents must always be in accordance with Delegation Order 5-4 (IRM 1.2.44.5).
- (3) Lien-related certificates and their associated letters and forms may be signed by the approving official via electronic means or by authorized stamp when a physical signature is not feasible.
- (4) To sign a document electronically, the document must be converted to a Portable Data Format (PDF) using Adobe Acrobat and the approving official must create a signature file. The format of the electronic signature should adhere to certain standards.
 - The signature should not contain the email address, logo, location or other unnecessary information.
 - The signature should preferably be an actual/graphic signature file of the approving official or at the minimum should show the name of the approving official. It should not be the Standard Employee Identifier (SEID) as that is for internal use only.
 - The approving official should validate the signature so that the PDF question mark does not appear.

- (5) Approval must be granted on a case by case basis. The ICS history must be documented by the approving official to indicate the electronic or facsimile signing of the lien certificate and associated correspondence.
- (6) A printed copy of the electronically signed certificate must be retained as part of the case file for appropriate record keeping.
- (7) Some recording offices may be reluctant to accept electronically signed lien certificates; however, they cannot refuse to record the documents as the Service dictates the form and content of lien certificates. Recording offices may be referred to Pub 1468, *Guidelines for Processing Notice of Federal Tax Lien Documents*, for more information.
- (8) Facsimile signatures must be protected in accordance with established IRS procedures.
 - a. Physical signature stamps are designated "High Security." Store signature stamps in accordance with IRM 10.2.15.3(1)(b), *Protected Items/Data*, with reference to Exhibits 10.2.15-1 and 10.2.15-2. See also IRM 1.4.6, *Managers Security Handbook*.
 - b. All systems capable of reproducing electronic or PDF generated signatures for lien certificates must be official IRS computer systems and be password protected.
 - c. Ensure a record of approval is available for electronically generated, PDF generated, and stamped signatures.

5.12.10.10
(09-30-2015)

**Designated Payment
Codes (DPC) Related to
Liens and Lien
Certificates**

- (1) IRM 5.1.2.8.1, *Designated Payment Codes*, provides detailed instructions on the use of DPCs and who may use them.
- (2) Generally, employees should use one of the following DPCs, depending on the basis for the payment:
 - 07 - Full or partial payoff of the NFTL

Note: DPC 07 is used when the payment received is expressly for full or partial payoff of the NFTL, as evidenced by accompanying NFTL payoff letter (e.g., L-3640, L-3640A, L-3641), copy of the NFTL, or statement of the taxpayer or third party as documented in appropriate history.

- 53 - discharges
- 55 - subordinations
- 56 - NFTL withdrawals
- 57 - judicial and non-judicial foreclosures
- 58 - redemptions and releases of right of redemption
- 59 - estate tax liens and payments as the result of the filing of a proof of claim in a probate proceeding.

5.12.10.11
(09-30-2015)

**OIC Payments and
Discharges (or
Subordinations)**

- (1) Sometimes taxpayers request that payments received based on discharges or subordinations also be applied to offers in compromise (OICs). In these situations Advisory and OIC units must be aware of the policies and procedures provided in this section to ensure consistent processing.
- (2) Work cases involving OICs and discharges (or subordinations) along with Centralized Offer in Compromise (COIC) personnel or the assigned Field Specialist. Locate the appropriate COIC unit, which is based on the state in

which the taxpayer resides, by going to the IRS intranet SERP page. Procedures for OIC personnel are in IRM 5.8.10.6, *Discharge and Subordination Requests*.

- (3) The Tax Increase Prevention and Reconciliation Act of 2005 (TIPRA) requires taxpayers to submit a portion of the proposed offer amount, unless a waiver applies. This initial TIPRA payment is in addition to the application fee. Taxpayers may request that proceeds derived from discharges or subordinations be used to pay the TIPRA or the **non**-TIPRA portion of their offer payment. Never apply proceeds from a discharge (or subordination) to the application fee.
- (4) When a payment is received from processing a discharge (or subordination) request and the taxpayer requests the payment be applied as a deposit to a pending OIC, require the taxpayer to execute a Form 3040, *Authorization to Apply Offer in Compromise Deposit to Liability*.
 - a. In the signature block, have the taxpayer write the word "irrevocable" so that the taxpayer cannot request a refund of the amount if the OIC is denied or withdrawn.
 - b. Submit a copy of the Form 3040 to the appropriate COIC site and retain the signed Form 3040 in the case file.
- (5) Use the guidance in the following sections to process a discharge (or subordination) request related to an OIC. Also see IRM 5.8.10.6, *Discharge and Subordination Requests*, and IRM 5.8.1.9.4, *Payments*, for further details.

5.12.10.11.1
(09-30-2015)
**Discharge (or
Subordination) Before
OIC**

- (1) Use the procedures in this section when:
 - the application for discharge (or subordination) was approved,
 - the certificate was issued,
 - the proceeds were applied (with a discharge/subordination DPC), and then
 - the taxpayer submits an offer in compromise showing an offer amount that includes the equity in the real property that no longer exists because of the discharge (or subordination).
- (2) Do not use the proceeds from the discharge (or subordination) as any part of the offer payment. The equity received from the property was applied to reduce the tax liability and it is not in the government's interest to apply the previously posted proceeds to an OIC. See IRM 5.8.1.9.3, *Amount Offered*.
- (3) If the offer amount relies on the equity from property that no longer exists because of a prior discharge, advise the taxpayer that the amount of the offer, and amount of the mandatory initial TIPRA payment, should be reduced to exclude the equity in the discharged property.

5.12.10.11.2
(09-30-2015)
**Discharge (or
Subordination)
Simultaneous with OIC**

- (1) Use the procedures in this section when the taxpayer simultaneously:
 - submits an application for discharge (or subordination) and an OIC, and
 - requests that the discharge (or subordination) proceeds be included in the OIC amount.
- (2) TIPRA provides that Service must make decisions on OICs within two (2) years from the "received date." If the Service does not make a decision on the OIC after two years, the OIC is automatically accepted. To ensure the govern-

ment's interest is protected, Advisory and OIC managers ensure cases involving both OICs and discharges (or subordinations) are worked timely.

- (3) Date stamp the offer "received."
- (4) Within one (1) business day, prepare Form 657, *Offer in Compromise/Revenue Officer Report*. Write "Discharge/Subordination Request" in red ink at the top of the Form 657. This alerts COIC not to consider the OIC a "solely to delay collection" case.
- (5) Forward the Form 657 with a copy of the application for discharge (or subordination) and all offer documents (e.g., Form 656, Form 433A/B, Form 656A, support documents, and payments, if applicable) to the appropriate COIC site via overnight mail. See additional guidance in IRM 5.8.1.8.1 , *Initial Receipts of Offers Received Elsewhere in the Service*, and IRM 5.8.10.6 , *Discharge and Subordination Requests*.
- (6) Review the discharge (or subordination) application within one week of receipt. If additional documentation or information is needed request it immediately.
- (7) Recommend acceptance or rejection of the discharge (or subordination) application following normal procedures.
 - a. If the discharge (or subordination) is rejected, promptly notify COIC and the taxpayer.
 - b. If the discharge (or subordination) application is approved, apply payment from the discharge (or subordination) using the appropriate DPC code.
- (8) If during the review of the discharge (or subordination), notification is received that the OIC is not processable or rejected, continue the review to completion. Contact the taxpayer to notify them that any proceeds from the discharge (or subordination) will be applied to the tax liability.

5.12.10.11.3
(09-30-2015)

**Discharge (or
Subordination) After OIC
Submitted**

- (1) Use the procedures in this section when the taxpayer requests a discharge (or subordination) :
 - while an offer is pending, or
 - after an offer in compromise has been accepted but before the payment terms have been met, and
 - the taxpayer intends to include the proceeds in the offer amount.
- (2) Upon initial review of the discharge (or subordination) application if it is determined the taxpayer has a pending OIC, contact the taxpayer to verify if they intend to use the proceeds of the discharge (or subordination) as payment toward the offer amount.
 - a. If the taxpayer wants the proceeds used toward the offer amount, follow the procedures in 5.12.10.11 above.
 - b. If the taxpayer does not want the proceeds used toward the offer amount, work the discharge (or subordination) independent of the OIC. Apply any proceeds received following standard procedures.
- (3) Contact COIC and inform them of the taxpayer's decision regarding the inclusion of the proceeds in the offer amount. Contact COIC again after the funds are applied and/or the investigation is complete so they may resume processing of the OIC.

- (4) Upon initial review of the discharge (or subordination) application if it is determined that an Offer in Compromise has been accepted, contact the OIC unit to find out the terms of the agreement. Apply the proceeds of the discharge toward the offer amount.
 - a. If the taxpayer wants to apply the proceeds in another manner including keeping the proceeds, the discharge should be denied. If the taxpayer agrees to apply the proceeds to the offer amount, complete the investigation and notify the OIC monitoring unit when the proceeds are received.
 - b. If the proceeds for the discharge full pay the offer amount, consult with OIC in issuing a release of lien instead of a discharge.
 - c. If the proceeds for the discharge exceed the balance remaining on the OIC, a discharge is not appropriate. Since the government is bound by the payment terms of an accepted OIC, the taxpayer should be advised upon receipt of the remaining balance of the offer amount, the NFTL will be released. Discussion with MOIC may be appropriate to coordinate the receipt of funds and release of the NFTL.

5.12.10.12
(09-30-2015)
**Denial of Applications
for Discharge or
Subordination**

- (1) Advisory or Insolvency Managers have the authority to approve or deny a discharge or subordination request.
- (2) When working toward case resolution, employees should, to the extent appropriate, use problem solving and negotiation techniques and consider the taxpayer's, POA's, or third party's perspective. After a complete application has been received and agreement cannot be reached on the amount of the government's interest and/or other terms of the discharge or subordination, the application must be denied.
- (3) A determination to deny an application for discharge or subordination may be communicated verbally to the applicant; however, the determination to deny must also be communicated to the applicant in writing.
- (4) Use the following letters to communicate the denial determination:
 - Letter 4025, *Letter Advising of Action on Application for Discharge of Property From Federal Tax Lien*, or
 - Letter 4027, *Advising of Action on Application for Subordination of Federal Tax Lien*

Note: Letters are available from the ICS templates or as PDF fillable forms on the Publishing Services website. The letters are multipurpose and contain checkboxes to indicate the determination made. The use of local letters, as a substitute for these letters, is not permitted.

- (5) Letters 4025 and 4027 contain an additional blank field which may be used to provide further details regarding the denial. If it is necessary to relay additional information to taxpayers beyond what is available in the letter template, include an attachment to the applicable letter. Additions to letters require group manager approval.

Reminder: When communicating the determination, provide the customer with technical guidance that is accurate and communicated in a clear, concise, professional, easy to understand manner. Any explanation or guidance should address all relevant issue(s) clearly in language understandable to someone unfamiliar with service terms, acronyms and jargon.

- (6) Enclose Pub 1660, *Collection Appeal Rights*, with the determination letter.
- (7) Document the case history with the reason(s) for denial.
- (8) Advisory closes its NFOI control on ICS ten (10) calendar days after sending the denial letter.
- (9) Process any appeal requests received from the taxpayer in accordance with standard appeal processing. See IRM 5.1.9, *Collection Appeal Rights*.

5.12.10.13
(09-30-2015)
**Certificate of
Non-Attachment**

- (1) IRC § 6325(e) provides for the issuance of a certificate of non-attachment when any person, because of similarity of names or otherwise, is or may be injured by the appearance that a federal tax lien attaches to their property.

Note: The term “non-attachment” may be spelled with or without a hyphen (“nonattachment”). In this IRM, the hyphenated version is used.

- (2) A certificate of non-attachment (sometimes referred to as “CNA”) is most commonly requested when a third party has a name similar to that of the taxpayer named on the NFTL; however, it may also be requested when there is a question over the attachment of a lien on certain property.

Example: The taxpayer, John Q. Public, owes BMF taxes as a sole proprietor. A NFTL is filed showing the name of John Q. Public dba Public Services. Another person, Jonathan Q. Public, resides in the same area but has no relation or involvement to the taxpayer or his business. If the lien against the taxpayer presents problems for Jonathan Q. Public, he may apply for a certificate of non-attachment.

Example: The taxpayer, John Doe, owed income taxes individually and a NFTL was filed. The taxpayer married Jane Doe and they jointly purchased real property at 123 Main Street. Prior to the marriage, Jane had inherited a different parcel of real estate at 456 Elm Street and she retained sole ownership through their marriage. John did not provide anything for the maintenance of Jane’s property. John and Jane Doe are now divorced. Jane is attempting to borrow money using the real estate at 456 Elm Street as collateral. Although John Doe had no interest in the property under state or local law, the title company questions the attachment of the lien to the property. Jane Doe may apply for a certificate of non-attachment.

- (3) A certificate of non-attachment indicates that the NFTL is filed against the taxpayer and that the third party and their property identified in the certificate are not encumbered by the Federal tax lien.

Caution: A withdrawal of a filed NFTL is not a substitute for a certificate of non-attachment. A withdrawal removes the effects of the NFTL from all property belonging to the taxpayer, but indicates the taxpayer still owes the liability and could detrimentally impact the government’s interest on other property. See IRM 5.12.9, *Withdrawal of Notice of Federal Tax Lien*, for withdrawal procedures.

- (4) Often inquiries are received from individuals whose address appears on the NFTL as it was the last known address of the taxpayer. In these situations:
 - a. Explain that the address on the NFTL is only a mailing address for the taxpayer and that the lien would only attach the property at the address if

the taxpayer has an interest in the property or had an interest when the lien arose. Sample wording of the key paragraph for that letter could be as follows:

Sample Wording: *A federal tax lien attaches to all property in which the named taxpayer has an interest. The address shown on the notice of federal tax lien is only present for mailing purposes and does not mean that the property at that address is subject to the lien. If the taxpayer does not now have, nor ever had, a legal interest in the property at that address, the lien should not attach to that property.*

You may present this letter to any financial institution or other creditor to clarify the matter. If there are still questions about the notice of lien affecting your property, you may request a certificate of non-attachment by following the procedures in the enclosed Publication 1024.

- b. If the individual insists on a certificate of non-attachment, advise of the application process.
- (5) A person wishing to obtain a certificate of non-attachment should be furnished Pub 1024, *How to Prepare an Application for a Certificate of Non-Attachment of Federal Tax Lien*.
- (6) A certificate of non-attachment is used to assist a third party and generally should only be considered when lien certificates available to the taxpayer (e.g., discharge, subordination) are not appropriate. There are times, however, when another type of lien certificate is issued but a need for a certificate of non-attachment remains. Consideration of a request for a non-attachment is not necessarily precluded by the issuance of other lien documents or certificates.

If the following was previously issued...	Then a non-attachment may be considered if...
Amended Notice of Federal Tax Lien to remove non-liable person (IRM 5.12.7.9.2)	circumstances arise that show the applicant is still harmed by the existence of the NFTL.
Withdrawal of the NFTL against the taxpayer under IRC 6323(j) (IRM 5.12.9)	a third party continues to be harmed by the appearance that a lien remains.
Special Condition NFTL (e.g., nominee/alter ego NFTL)	it has been determined that person/entity is not a nominee/alter ego of the taxpayer or that the special condition NFTL was filed in error.

5.12.10.13.1
(09-30-2015)
**Review of Request for
Certificate of
Non-Attachment**

- (1) Applications are generally referred directly to the Advisory Group for review.
- (2) Advisory should first evaluate if a non-attachment is necessary to resolve the issue (e.g., mailing address confusion, NFTL on former spouse with no property attachment implications). If it does not appear a non-attachment is needed, contact the applicant and attempt to resolve questions. If the applicant insists on a non-attachment, continue processing request.
- (3) Evaluate if there is any attachment of the lien to the applicant's property by considering applicable state and local laws on property ownership. Be alert to factors that indicate the taxpayer is exercising control or authority over the property even though no legal ownership is claimed.
- (4) Determine from the information furnished and from internal sources whether a certificate should be issued. Additional information may be requested from the applicant as needed by using Letter 5603 , *Response to Certificate of Non-*

Attachment Request. An OI may be issued if a field investigation is required and Area Counsel may be asked for an opinion if necessary.

- (5) Advisory controls its work on the request on ICS under NFOI 149, *Certificates of Non-Attachment*.

5.12.10.14
(09-30-2015)

Issuance of Certificate of Non-Attachment

- (1) If it is determined that the applicant is not the taxpayer whose name appears on the NFTL and that the lien did not, or does not now, attach to the applicant's property, Advisory prepares Form 669-N, *Certificate of Non-Attachment of Federal Tax Lien*.
 - a. Redact the SSN that appears on the certificate so only the last 4 digits are shown. EINs should be, but are not required to be, redacted in a similar manner (e.g., xx-xxx1234).

Note: In June 2015, ALS began partially redacting EINs on lien documents that it generates. Programming for other systems (e.g., ICS) will be updated in the future to also partially redact EINs on lien-related documents.

- b. See IRM 1.2.44.5, *Delegation Order 5-4 (rev. 3)*, for the delegation of authority to sign the certificate of non-attachment and IRM 5.12.10.9.1, *Use of Electronic Signatures on Lien Certificates*, regarding electronic approvals of Form 669-N.
- (2) Provide the applicant with the certificate and Letter 5603, which contains instructions to record it unless the applicant requests that the Service perform the recording.

Note: Form 669-N and Letter 5603 are available as PDF fillable forms from the Publishing website. Templates of these documents will be available on ICS as programming is updated.
- (3) If the applicant opts for the Service to record the document, forward the Form 669-N to the Centralized Lien Operation for inclusion in the next scheduled filing with the applicable recording office. See IRM 5.19.12.2.9, *Certificate of Non-Attachment*.
- (4) The cost for recording is not collected from the applicant or the taxpayer. The government absorbs the cost unless the applicant chooses to record the certificate.

5.12.10.15
(09-30-2015)

Denial of Request for Certificate of Non-Attachment

- (1) A determination to deny an application for a certificate of non-attachment may be communicated verbally to the applicant, if necessary; however, it must also be communicated in writing.
- (2) Use Letter 5603 to deny the request. Include a brief description of the reason for the determination.
- (3) The applicant has appeal rights on the denial decision. Enclose Pub 1660, *Collection Appeal Rights*, with the letter.
- (4) Process any appeal requests received from the applicant in accordance with standard appeal processing. See IRM 5.1.9, *Collection Appeal Rights*.

5.12.10.16
(09-30-2015)

**Revocation of Certificate
of Non-Attachment**

- (1) IRC § 6325(f)(2) provides for a revocation of a certificate of non-attachment if it is determined that the certificate was issued erroneously or improvidently. This would generally only occur if information is obtained after issuance of the certificate that shows the applicant was responsible for the liabilities on the NFTL and/or the property specified on the certificate was encumbered by the NFTL.
- (2) There is no form for a revocation of a certificate of non-attachment. Consult with Counsel regarding the wording of the document.
- (3) The revocation is accomplished by:
 - notifying the applicant in writing that the certificate of non-attachment is being revoked; **AND**
 - filing the notification of revocation in the same location where the certificate of non-attachment was filed.
- (4) If appropriate, file a new notice of federal tax lien to ensure the government's interest in the taxpayer's property is protected.

5.12.10.17
(09-30-2015)

**Documentation
Requirements for
Lien-Related Certificates**

- (1) Use ICS to control and monitor lien certificate cases. For field revenue officers, control is through the assigned BAL DUE or OI on ICS. For Advisory, a lien certificate case should be loaded into ICS within seven (7) calendar days of receipt.
- (2) Use ICS to record actions taken on all applications for lien-related certificates. Document histories in a clear and complete manner so that actions relative to the case are readily understood.
- (3) Document the following in ICS histories regarding applications, investigations and issuance of all lien certificates:
 - Date application or request was received
 - The name and title of the advisor or other employee reviewing the application/request/investigation. If, on a particular case, the ICS history entry is completed by an employee other than the employee working the case, then ensure that ALL employees working the case are identified in the history entry. When a case is transferred from one employee to another, ensure the name, title and employee number of the employee conducting the investigation is entered in ICS.
 - Description of type of application, including the form number of the certificate being sought by the applicant
 - Code section under which the application/request was submitted
 - List of attachments and other documentation received
 - If appropriate for the type of certificate and there are other lienholders, an analysis of other lienholders' positions or a completed Form 3033
 - When appropriate, an analysis regarding "best interest of the government" considerations including a computation of the government's interest that shows the amount received is the government's interest
 - Any Counsel advice received, including the name and phone number of the attorney
 - All communications with the applicant regarding the application for the certificate
 - Date certificate or denial letter was issued
 - Name and title of employee issuing the certificate

- The name and title, if applicable (e.g., power of attorney, title agent), to whom the certificate was issued and their relationship to the taxpayer or applicant
- Once a certificate is issued and if payment is received in exchange for the certificate, the amount received. If there is any difference in the amount expected and the amount received, explain and reconcile.

- (4) If delays in case action occur, document the reason in the ICS history.
- (5) Retain full information and documentation regarding approvals/denials of requests in well organized case files, so that all documents can be easily located by any Service employee with a need to access the information. See 5.12.10.17.1 regarding necessary documents to be kept in case files after closure.

5.12.10.17.1
(09-30-2015)

Documents Kept In Case Files

- (1) Keep original or copies of all documents that relate to investigations of lien certificate applications. Specifically, keep the following in case files during investigation of applications and after investigations are complete:
 - Original application and attachments
 - A copy (or facsimile) of the NFTL to which the application or investigation applies
 - Copy of the form or worksheet for distribution of proceeds of a sale, if applicable
 - All documents referenced in the ICS history
 - A copy of the signed certificate or letter issued as a result of the investigation
- (2) Maintain documentation in an orderly manner so it may be consulted if further actions are necessary on the case.
- (3) Retain files as specified in Document 12990, *Records and Information Management Records Control Schedules*.

Exhibit 5.12.10-1 (09-30-2015)

Subordination to Factors - Agreement

Exhibit 5.12.10-1

SUBORDINATION AND FORBEARANCE AGREEMENT

This agreement is entered into by and between [*factoring agent*], hereinafter referred to as the "Factor;" [*taxpayer name*], hereinafter referred to as the "Taxpayer;" and the United States of America, by and through the Advisory Group Manager of Internal Revenue Service, SB/SE Collection, an authorized delegate of the Secretary of the Treasury, hereinafter referred to as the "Manager."

RECITALS

(1) On [*dates when NFTLs recorded*] the Internal Revenue Service (hereinafter referred to as the "Service"), filed Notices of Federal Tax Lien with the [*recording office*], State of [*state name*].

(2) The tax liens attach to all the taxpayer's property or rights to property, including after acquired property, such as the Taxpayer's accounts receivable.

(3) On [*date*] the Factor recorded a UCC financing statement with the [*state name*] Secretary of State, which financing statement included Taxpayer's accounts receivable as collateral for the financing .

AGREEMENT

(4) As consideration for the Service entering into this agreement, the Taxpayer agrees to pay the Service an initial payment (if applicable) in the amount of [*dollar amount written out in words (then repeated in numbers in parentheses)*]; to be received on [*date*].

(5) The Taxpayer further agrees to enter into an installment agreement with the Service. Taxpayer will pay the sum of [*dollar amount written out in words (then repeated in numbers in parentheses)*]; to be received on [*date*] and to be received on the [*XXth*] day of each month thereafter; and will meet all terms and conditions of the installment agreement with the Service that accompanies this subordination agreement, during the period of the subordination, pending approval of the installment agreement.

(6) The installment agreement that accompanies the subordination agreement will be monitored by the IRS Advisory office in conjunction with this subordination agreement and payments will be sent to:

Forbearance Agreement

-1-

Exhibit 5.12.10-1 (Cont. 1) (09-30-2015)
Subordination to Factors - Agreement

Exhibit 5.12.10-1

*[Name, title, ID number, address
and phone number of office/employee
to whom payments will be mailed]*

(7) If the period of the installment agreement extends beyond the period of the subordination, the taxpayer shall apply for a new subordination agreement at least sixty (60) days prior to the end date of the current subordination.

(8) The Taxpayer further agrees to remain current in the filing and paying of all federal taxes during the period of this agreement and will furnish proof of current Federal Tax Deposits bi-weekly.

(9) The Taxpayer further agrees to furnish to the Service each month a listing of its current accounts receivable.

(10) The Taxpayer also agrees to identify which of its current accounts receivable have been pledged to the Factor for collection by the Factor and upon which advances have been made.

(11) The listing in (7) above and information cited in (8) above will be furnished monthly to:

*[Name, title, ID number, address
and phone number of Advisor
to whom listing will be sent]*

(12) The installment agreement that accompanies this subordination agreement will make reference to this subordination agreement, specifically to paragraphs (4) through (11) above.

(13) In consideration of the foregoing, the Manager agrees not to assert the Service's tax lien priority under I.R.C. § 6323(a) or to levy pursuant to I.R.C. § 6331 against the Taxpayer's accounts receivable, which accounts are used as security for advances made by the Factor to the Taxpayer prior to the termination of this agreement.

(14) The failure of the Taxpayer to comply with the terms set forth in paragraphs (4) through (9) above will constitute a default of this agreement and default of the accompanying installment agreement.

(15) Upon failure of the Taxpayer to comply with the terms set forth in paragraphs (4) through (9) above, the Manager or other authorized representative of the Service will notify the

Forbearance Agreement

-2-

Exhibit 5.12.10-1 (Cont. 2) (09-30-2015)
Subordination to Factors - Agreement**Exhibit 5.12.10-1**

1 parties to this agreement in writing by certified mail that a default has occurred. The Taxpayer
2 has thirty (30) days following the mailing of the default notice to cure either the default in the
3 subordination agreement or the default in the accompanying installment agreement. Once
4 notice of the default has been mailed to the taxpayer, the taxpayer may no longer pledge
5 accounts receivable under this agreement until the default has been cured.

6 (16) If the Taxpayer does not cure the default within thirty (30) days of the date of the above-
7 mentioned letter, then this agreement is deemed terminated and the Service will no longer
8 forbear from enforcing its lien rights (including levy) against the Taxpayer's accounts receivable
9 that have not been pledged for advances made prior to the termination of this agreement, as
10 otherwise permitted under the Internal Revenue Code.

11 (17) The failure of the Manager or other authorized representative of the Service to notify the
12 parties of any default will not constitute a waiver of either the default of the installment
13 agreement or the subordination agreement.

14 (18) Pursuant to I.R.C. § 6103(c), the Taxpayer consents to the disclosure of tax return
15 information to the Factor to the extent required to show that this agreement is in default.

16 (19) This agreement concerns only the specific accounts receivable which the Taxpayer has
17 pledged to the Factor as security for the advances made by the Factor to the Taxpayer.

18 (20) Any change to the compensation to the Factor or to the Factor's security interest in the
19 Taxpayer's assets must be approved by Service or the Service will not forbear from asserting
20 its lien priority as to the changed compensation.

21 (21) The period of this subordination shall be [*specify time not exceeding one year*] from
22 the date the Service approves the subordination, as evidenced on the Form 669-D, Certificate
23 of Subordination of Federal Tax Lien, unless terminated under the provisions herein. The
24 agreement may be extended after application by the taxpayer.

25
26 Signatures on Page 4, Attached

27
28

Forbearance Agreement

-3-

Exhibit 5.12.10-1 (Cont. 3) (09-30-2015)
Subordination to Factors - Agreement

1	Exhibit 5.12.10-1	
2		
3	Signature Page	
4		
5	Factor:	Date
6		
7	Name:	
8	Title:	
9		
10	Taxpayer:	Date
11		
12	Name:	
13	Title:	
14		
15	United States of America	
16	Internal Revenue Service	
17	SB/SE Collection	Date
18		
19	By: [Name]	
20	Title: Advisory Group Manager	
21		
22		
23		
24		
25		
26		
27		
28		
	Forbearance Agreement	-4-