



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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SMALL BUSINESS/SELF-EMPLOYED DIVISION

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MEMORANDUM FOR DIRECTORS, CAMPUS COMPLIANCE OPERATIONS
(BROOKHAVEN, MEMPHIS)
DIRECTORS, FIELD COLLECTION AREA OPERATIONS
(SOUTH ATLANTIC, GULF STATES, CALIFORNIA)

FROM: Michelle C. Alvarado /s/ *Michelle C. Alvarado*
Acting Director, Collection Policy

SUBJECT: Offer Investigations - Rejections under Not in the Best Interest of the
Government or Public Policy

This memorandum provides interim guidance (IG) for Collection employees working offer in compromise cases. This guidance supplements the procedures found in *Internal Revenue Manual (IRM) 5.8.7.7, Rejection; IRM 5.8.7.7.1, Not in the Best Interest of the Government Rejection; and IRM 5.8.7.7.2, Public Policy Rejection*, and will be incorporated into the next revision of the IRM.

Background

Recently the Office of Appeals has issued IG relative to the investigation of offers in compromise via IG Control No. AP-08-0713-03. This guidance discusses actions taken by Appeal's employees upon receipt of a taxpayer's request for Appeal's consideration of a rejected offer in compromise.

In order to be consistent with Appeal's guidance and provide taxpayers with a more thorough evaluation of their offer in compromise, the investigative actions required on certain offers which are being rejected under the basis of "Not in the Best Interest of the Government" and "Public Policy" is being revised.

Collection Procedures

IRM 5.8.7.7 - Rejection

(4) The most common reason for rejecting an offer based on Doubt as to Collectibility (DATC) is because it has been determined that more can be collected than was offered. In all cases, the taxpayer should be informed prior to the issuance of the rejection letter that an acceptance cannot be recommended. This communication should be by telephone.

The computation of the reasonable collection potential (RCP) should be explained, a copy of the financial analysis provided, if requested, and the taxpayer should be given an opportunity to submit any additional financial information. If no conversation can be held with the taxpayer to convey this information, the OE/OS should send the taxpayer/representative a quick-note to request contact. A PD 3500 may be used, when correspondence is required.

Note: Whether the communication is by telephone or letter, the taxpayer should be informed of the necessity to remain in compliance with their estimated tax or periodic payments while the offer is being investigated to avoid their offer being returned or closed as a mandatory withdrawal. Refer to IRM 5.8.7.2.2.2, *Return for Inadequate Estimated or Insufficient Withholding Tax Payments*, or 5.8.7.4.2, *Mandatory Withdrawal*, which discusses the appropriate closing actions to take if the taxpayer's failure to remain in compliance occurs subsequent to a preliminary rejection letter.

The calculation of RCP should be completed in all instances. This includes offers being rejected under "Not in the Best Interest of the Government" (NIBIG) and "Public Policy".

NOTE: When providing information on the taxpayer's ability to pay prior to the offer being rejected under NIBIG or Public Policy, the taxpayer should be advised, "although the financial information may show the offer might be acceptable under DATC, the offer is being rejected based on the fact it is either not in the best interest of the government or contrary to public policy (also insert specific issues identified, if the taxpayer has not been made aware of the reasons in prior discussions)".

5.8.7.7.1 - Not in the Best Interest of the Government Rejection

1) An offer rejection may also be based on a determination that acceptance of the specific offer at hand is not in the best interest of the government as discussed in *Revenue Procedure 2003-71, SECTION 6.03* which states: "The decision whether and when to accept an offer to compromise a liability is within the discretion of the Service. In keeping with Policy Statement P-5-100, an offer will only be accepted if it is determined to be in the best interest of both the taxpayer and the Service. In addition, criteria discussed in Section 4.02 states "the Service may take into account public policy and tax administration concerns in determining whether an offer to compromise is acceptable."

Rejections under this provision should not be routine and should be fully supported by the facts outlined in the rejection narrative. Offers rejected under this section require the review and approval of the second level manager; that is, Territory Manager for the field or Department Manager for COIC.

(2) Once a determination is made that a rejection under this basis is appropriate, a calculation of the taxpayer's ability to pay should still be computed. The preliminary asset/equity and income/expense tables as discussed in *IRM 5.8.4.7, Initial Offer Actions* should be completed and provided to the taxpayer. The extent of additional verification, if required, should be based on the facts of the case. The preliminary tables and the basis for the rejection should be discussed with the taxpayer/representative to allow for submission of additional information for consideration.

(3) Below are situations that may warrant rejection as not being in the "best interest of the government" (not all inclusive).

- The taxpayer's offer meets processability criteria. However, the taxpayer has an egregious history of past noncompliance, as evidenced by the taxpayer's failure to voluntarily file correct returns. NOTE: Future collection potential and the ability to secure a collateral agreement should be considerations prior to recommending an offer for rejection under NIBIG.
- An in-business taxpayer compromising employment taxes, where financial analysis indicates the business does not have the ability to fund the offer, remain current with future tax obligations, and meet the business' normal operating expenses.
- Any offer involving deferred payment where financial analysis indicates the taxpayer cannot fund the offer and an acceptable explanation as to where the additional funds may be secured is not provided.
- The taxpayer is the primary responsible party for a related entity, i.e. corporation, partnership, etc., that is not in compliance with its filing and paying requirements.
- The offer is from an ongoing business that appears to be insolvent, will remain insolvent, even if the offer is accepted, and it appears that the government's position would be better protected through a formal insolvency proceeding. Refer to *IRM 5.8.10.2.2.1, Consideration of a Potential Bankruptcy Filing on the Calculation of RCP in an OIC Investigation*.
- The taxpayer does not have the ability to fully pay the liability via an installment agreement, yet based on the evaluation of the taxpayer's financial situation, the amount potentially received through a PPIA approximates the outstanding balance. Refer to *IRM 5.8.4.3(4)*.

In each of the situations listed, a review of the taxpayer's financial situation should be completed prior to a final determination that a rejection under NIBIG is the appropriate course of action.

Exception: In circumstances where the potential for a fraud referral exists, the financial evaluation conducted and verified should be based on the facts and circumstances of the case. Refer to *IRM 5.8.4.18 - Potential Fraud Referrals*.

The taxpayer should also be provided the opportunity to withdraw the offer prior to submission of the offer rejection recommendation, advised of the reason(s) the offer is being recommended for rejection under NIBIG criteria, and alternatives available to the taxpayer.

If the offer is not withdrawn, the offer examiner/offer specialist should proceed with rejection in accordance with *IRM 5.8.7.7.3, Closing an Offer as a Rejection*. The rejection letter will provide the taxpayer appeal rights in accordance with Treasury Regulation 301.7122-1 (f) (5).

5.8.7.7.2 - Public Policy Rejection

(1) *Policy Statement P-5-89 (IRM 1.2.14.1.15)* establishes that offers may be rejected on the basis of public policy if acceptance might in any way be detrimental to the interests of fair tax administration; even though it is shown conclusively that the amount offered is greater than could be collected by any other means, provided no ETA issues exist.

Note: This section should not be confused with *IRM 5.8.11.2.2* under ETA offers.

(2) Offer acceptance reports are open to public inspection in accordance with Internal Revenue Code § 6103(k)(1), so the general public may be aware of any offer acceptance. A decision to reject an offer for public policy reason(s) should be based on the fact that public reaction to the acceptance of the offer could be so negative as to diminish future voluntary compliance. *Decisions to reject offers for this reason should be rare.*

NOTE: Once a determination is made that a rejection under this basis is appropriate, a calculation of the taxpayer's ability to pay is still computed. The preliminary asset/equity and income/expense tables should be completed as discussed in *IRM 5.8.4.7, Initial Offer Actions*.

The extent of additional verification requested from the taxpayer should be based on the facts of the case. The preliminary tables and the basis for the rejection should be discussed with the taxpayer/representative to allow for submission of additional information for consideration.

After discussion with the taxpayer/representative, if the decision to reject the offer is appropriate, the offer examiner/offer specialist should proceed with rejection in accordance with *IRM 5.8.7.7.3, Closing an Offer as a Rejection*. The rejection letter will provide the taxpayer appeal rights in accordance with Treasury Regulation 301.7122-1 (f) (5).

(3) Below are some examples of situations that may warrant rejection based on a public policy decision.

- The taxpayer has in the past, and continues to openly encourage others to refuse to comply with the tax laws. .

- Indicators exist showing that the financial benefits of a criminal activity are concealed or the criminal activity is continuing.
- The taxpayer engaged in a pattern of conduct suggesting intentional dissipation of assets.

Example: The taxpayer, a payroll service provider, has received from its clients payments of employment taxes in the amount of \$10 million. The taxpayer remits to the Service an amount equal to the trust fund portion of the employment taxes and designates the payment for application to the trust fund portion of the tax. The taxpayer pays no more of the employment tax. Meanwhile, the taxpayer dissipates all of its remaining assets, reducing its reasonable collection potential to \$0. The taxpayer then submits an OIC for \$10,000. Because the OIC exceeds reasonable collection potential, the taxpayer would qualify for the OIC on the grounds of doubt as to collectability. Nevertheless, the OIC should be rejected on public policy grounds.

- (4) An offer will not be rejected on public policy grounds solely because:
- It would generate considerable public interest, some of it critical.
 - A taxpayer was criminally prosecuted for a tax or non-tax violation.

(5) The rejection narrative should discuss the specific public policy issues.

(6) Rejections of this type require the approval of the SB/SE Collection Territory Manager (2nd level) in the field or SB/SE Compliance Services Operations Manager for COIC. Refer to *Delegation Order 5-1* for approval authority.

SUMMARY

The guidance provided in this memorandum is meant to allow the offer specialist and offer examiner the ability to make an informed decision on the taxpayer's offer in compromise.

The determination of the taxpayer's ability to pay in all instances provides the investigating employee and approving official with information that assists in making the appropriate decision.

You may direct any questions regarding these procedures to Diana Estey, National Offer in Compromise Program Manager, or a member of your staff may contact Senior OIC Analyst, Thomas B. Moore.

cc Director, Field Collection
Office of Chief Counsel
Chief, Appeals
National Taxpayer Advocate
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