MANUAL TRANSMITTAL

5.12.4

Department of the Treasury
Internal Revenue Service

JUNE 3, 2016

EFFECTIVE DATE

(06-03-2016)

PURPOSE

(1) This transmits revised IRM 5.12.4, *Judicial and Non-Judicial Foreclosures*.

MATERIAL CHANGES

(1) Editorial changes made throughout. Updated terminology and references; revised wording for clarification and compliance with writing standards; restructured subsections to improve flow and comprehension; and corrected formatting issues. Significant additions or deletions to the text are noted as follows.

(2) 5.12.4.1. Added Note that the Centralized Lien Operation may process DOJ requests instead of Advisory. Deleted generic information about the economy's impact on foreclosures. Moved information about power of sale clauses to 5.12.4.3.

(3) 5.12.4.3.1 Inserted paragraphs regarding the power of sale clause and the delegations of authority relative to non-judicial sales.

(4) 5.12.4.4. Added paragraph about personal delivery services and note about the use of Form 14497.

(5) 5.12.4.5.1 Inserted cross-reference to perishable goods seizures.

(6) 5.12.4.6. Updated to incorporate language from Interim Guidance Memo SBSE-05-0714-0040.

(7) 5.12.4.6.1. Added note about the use of Form 14498.

(8) 5.12.4.7.1. Updated to incorporate language from Interim Guidance Memo SBSE-05-0714-0040.

(9) 5.12.4.8. Deleted subsection as it contains information in other subsections.

(10) Exhibit 5.12.4-1. Deleted exhibit because letter is now a published document.

EFFECT ON OTHER DOCUMENTS

This material supersedes IRM 5.12.4 dated June 11, 2010, and Interim Guidance Memo SBSE-05-0714-0040, titled *Change to Definition of Designated Payment Code 07*, dated July 22, 2014.

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5.12.4
Judicial/Non-Judicial Foreclosures

Table of Contents

5.12.4.1 Foreclosure Overview
- 5.12.4.1.1 Investigation Guidelines for Judicial/Non-Judicial Sales
- 5.12.4.1.2 Discharge Consideration During Foreclosure Investigation
- 5.12.4.1.3 Mortgage Forgiveness

5.12.4.2 Judicial Foreclosures
- 5.12.4.2.1 Judicial Foreclosure Case Responsibility
- 5.12.4.2.2 Judicial Foreclosure Activities and Tasks
- 5.12.4.2.3 Right to Redeem Property Sold at Judicial Sale

5.12.4.3 Non-Judicial Foreclosures
- 5.12.4.3.1 Investigation Elements and Responsibilities for Non-Judicial Foreclosures

5.12.4.4 Notice of Non-Judicial Sale
- 5.12.4.4.1 Determining the Date of Non-Judicial Sale
- 5.12.4.4.2 Review of IRC 7425 Notice
- 5.12.4.4.3 Adequacy of IRC 7425 Notice
- 5.12.4.4.4 Acknowledgment of Notice
- 5.12.4.4.5 Disclosure of Adequacy of Notice

5.12.4.5 Non-Judicial Sale of Perishable Goods
- 5.12.4.5.1 Definition of Perishable Goods
- 5.12.4.5.2 Notice of Non-Judicial Sale of Perishable Goods
- 5.12.4.5.3 Non-Judicial Perishable Sale Proceeds

5.12.4.6 Consent to Sale of Property Free of Lien
- 5.12.4.6.1 Application for Consent
- 5.12.4.6.2 Processing Applications
- 5.12.4.6.3 Form of Consent

5.12.4.7 Non-Judicial Sale Activities and Tasks
- 5.12.4.7.1 Surplus or Excess Proceeds from Non-Judicial Sales
- 5.12.4.7.2 Right to Redeem Property Sold at Non-Judicial Sale
  - 5.12.4.7.2.1 Redemption Investigations
    - 5.12.4.7.2.1.1 Upset Bidding
    - 5.12.4.7.2.1.2 Upset Price

5.12.4.1
(06-03-2016)
Foreclosure Overview

(1) A foreclosure is the process by which an owner's right to a property is terminated, the foreclosing party's interest is liquidated, and junior creditor interests on the property are extinguished. This IRM contains instructions and information related to third party foreclosures. It does not address suits initiated by the IRS to foreclose its lien interests. (See IRM 25.3.2, *Suits by the United States*)

(2) There are two types of foreclosures discussed in this IRM.

- Judicial foreclosures, as referenced in 28 USC § 2410 and 26 USC § 7425(a)
- Non-judicial foreclosures, as referenced in 26 USC § 7425(b)

(3) State law determines the type of foreclosure a creditor must use to enforce its interest-- judicial or non-judicial. The location of the property being foreclosed determines which state's laws are followed. See the *Local Law Guides* for information about each state's laws.

(4) Judicial foreclosures are processed either in federal or state courts and are the primary responsibility of the Department of Justice (DOJ). When DOJ requires assistance or information, the request is generally handled through Collection Advisory ("Advisory").

Note: This IRM is written as if Advisory handles the cases, but the procedures apply to any function involved in the foreclosure process. For example, in certain jurisdictions DOJ requests for lien information are handled by the Centralized Lien Operation (CLO).

(5) Non-judicial foreclosures do not require court involvement and can be instigated by any encumbrance holder. Non-judicial foreclosure notices are generally directed to Advisory.

(6) When Advisory requires assistance investigating a foreclosure, a courtesy/other investigation (OI) is issued to the Field. Revenue Officers may also find during routine case investigation that property belonging to an assigned taxpayer is in foreclosure.

(7) There are four classes of participants to keep in mind when working foreclosures.

- Foreclosing party (i.e., the lender or lienholder)
- Foreclosed party (i.e., the borrower)
- Creditors (e.g., IRS, secondary mortgages, judgment holders)
- Foreclosure sale purchaser

(8) Each participant has differing responsibilities or needs during the process. When working foreclosures, the IRS employee may need to apprise the participating parties of the applicable federal statutes pertaining to their part of the foreclosure process.

- The foreclosing party must provide notice to all interested parties of the foreclosure suit commencement (judicial) or sale (non-judicial).
- The foreclosed party may have tax consequences arising from the process. A portion of their debt may be forgiven which translates to taxable income. See Mortgage Debt Relief Act of 2007 and IRM 5.12.4.1.3, *Mortgage Forgiveness*.
- Creditors such as the IRS must determine whether they were properly noticed, how the foreclosure impacts their interest in the property, whether

there are surplus or excess proceeds in which they may have an interest, and whether redemption from the foreclosure sale purchaser is a consideration.
- The foreclosure sale purchaser should be aware of the government's redemption rights.

(9) See IRM 5.17.5, *Suits Against the United States*, for additional information about foreclosures. See IRM Exhibit 5.12.1-2, *Glossary of Common Acronyms in IRM 5.12*, for common acronyms used in this section.

5.12.4.1.1
(06-03-2016)
Investigation Guidelines for Judicial/Non-Judicial Sales

(1) The purpose of a judicial or non-judicial investigation is to determine first whether the foreclosing party holds an encumbrance senior or junior to the IRS' position.

- If the foreclosing encumbrance is junior to the IRS' position, the federal tax lien remains on the property undisturbed by the foreclosure. The IRS may be asked by the purchaser to discharge the property from the lien.
- If the foreclosing encumbrance is senior to the IRS' position, the federal tax lien will be extinguished from the property after the foreclosure sale, as provided by state law. An investigation may be needed to determine how the equity in the property is impacted by the foreclosure and whether any action is warranted to protect that interest.

(2) Other Investigations (OI) to investigate foreclosures originate in Advisory.

(3) During the course of a judicial or non-judicial investigation, when the applicant, taxpayer, representative, or IRS employee misses a specific deadline, follow-up is based on meeting the Service's requirements to maintain its standing in the proceeding and should be initiated **no later than** fourteen (14) calendar days after the missed deadline. This follow-up includes closing the case if this action is appropriate.

(4) When circumstances dictate, the employee should use problem solving and negotiation techniques, and in so doing consider the perspective of the taxpayer/POA/third party when working toward case resolution.

(5) Any written notification or other communication should address the issue(s) clearly and in a language understandable to someone unfamiliar with IRS terms, acronyms, and jargon.

5.12.4.1.2
(06-03-2016)
Discharge Consideration During Foreclosure Investigation

(1) A foreclosing lienholder should be encouraged to request a discharge of the property from the lien under IRC 6325(b)(2) before initiating the foreclosure action rather than join the United States in a judicial proceeding. It would be to their advantage to eliminate the Government's right of redemption and to the government's advantage to eliminate lengthy litigation.

(2) When a discharge is requested before the foreclosure, review the request following standard discharge guidelines and take the following actions.

a. Furnish a commitment letter to the foreclosing party within thirty (30) calendar days of receipt of a complete and acceptable application.
b. Issue the certificate of discharge after receipt of proof that the taxpayer has been divested of right, title, or interest in the property.

Caution: Do not issue a certificate of discharge during the pendency of litigation without the prior approval of Area Counsel.

(3) In non-judicial foreclosures, a discharge commitment letter should not be issued if adequate notice of sale has been provided as required by IRC 7425 (see IRM 5.12.4.4.3, *Adequacy of IRC 7425 Notice)*. If a discharge is requested, advise the parties of the procedures for requesting the release of the government's right of redemption, as described in Pub 487, *How to Prepare an Application to Release of Property Secured by Federal Tax Lien*.

(4) If a Federal agency has foreclosed non-judicially and given adequate notice, but thinks the lien remains a cloud upon the title, a certificate of discharge should be issued as an accommodation to that agency.

5.12.4.1.3
(06-03-2016)
Mortgage Forgiveness

(1) The subject of mortgage forgiveness may be encountered when working foreclosure cases. The information provided here is for an awareness of a taxpayer's potential tax consequence arising from foreclosure.

(2) When lenders foreclose and sell a borrower's property or restructure the borrower's loan, the lender may forgive or cancel portions of the loan. A lender may use this as an alternative to, or in conjunction with, a deficiency judgment against the borrower for the balance remaining on the loan after the foreclosure sale. The tax code treats the amount forgiven as income to be taxed. The following are typical scenarios where loan forgiveness may be encountered.

- Lender modifies loan reducing the principal balance of loan and the borrower keeps house
- Property is sold and deeded back to the lender
- Lender forecloses and the property sells for less than the amount of the loan

(3) Cancellation of debt may impact the IRS' decision to discharge or subordinate a lien interest related to a foreclosure investigation. Asking the lender or borrower whether a portion of the debt will be cancelled should be added to the foreclosure investigation questions for those parties.

(4) The amount forgiven is all or a portion of the remaining amount on the original loan minus the new loan or minus the sale amount of the property. This forgiven amount becomes cancellation of debt income (COD) to the taxpayer. COD income must be included as ordinary income on the taxpayer's return unless exclusion is allowable.

(5) The Mortgage Forgiveness Debt Relief Act of 2007 increased incentives for borrowers and lenders to work together when the foreclosure involves the borrower's principal residence. The law lessens the income tax burden created by debt forgiveness, resulting from mortgage restructuring or foreclosure, by allowing taxpayers to secure lower mortgage payments without facing higher taxes or at least not having a higher tax bill because of a foreclosure. See the documents below for additional information on this topic::

- IRS FAQs – Mortgage Forgiveness Debt Relief Act found at *https://www.irs.gov/uac/Home-Foreclosure-and-Debt-Cancellation*
- Form 982, *Reduction of Tax Attributes Due to Discharge of Indebtedness (And Section 1082 Basis Adjustment*
- Pub 4681, *Canceled Debts, Foreclosures, Repossessions, and Abandonments (for Individuals)*
- Pub 544, *Sales and Other Dispositions of Assets*

5.12.4.2
(06-03-2016)
Judicial Foreclosures

(1) Section 2410 of Title 28 of the United States Code is the authority under which the United States consents to be sued in suits to quiet title, foreclose a mortgage or other lien, partition, condemn, or interplead a claim, or suits in the nature of an interpleader with respect to property on which the United States has, or claims, a mortgage or other lien.

(2) When the foreclosure action is by an encumbrance holder that is junior to the federal tax lien, the sale of the property shall be made without disturbing the federal tax lien. However, if the United States agrees that the property be sold free and clear of its liens, the proceeds from the sale are distributed according to the priorities of the interests of the various parties involved.

(3) When the foreclosure action, to which the United States has been made a party, is by an encumbrance holder that has priority over the federal tax lien, the sale extinguishes the federal tax lien on that particular property. The sale has the same effect on the Government's lien as it would on any other junior lien under local law in the place where the property is situated.

(4) See IRM 5.17.5.19.1, *Judicial Foreclosures,* for additional information.

5.12.4.2.1
(06-03-2016)
Judicial Foreclosure Case Responsibility

(1) The Department of Justice (DOJ) through the U.S. Attorney's office is responsible for working 28 USC Section 2410 foreclosures. DOJ requests assistance from Advisory as needed when working these cases but case priority is dependent on DOJ resources.

(2) Assistance required by DOJ of the IRS may include the following:

- Determination of the IRS lien priority
- Determination regarding surplus or excess proceeds
- Redemption investigation
- Other information as requested

5.12.4.2.2
(06-03-2016)
Judicial Foreclosure Activities and Tasks

(1) When the IRS is joined in a foreclosure action, the Assistant U.S. Attorney's office (AUSA) forwards a copy of the summons and complaint, along with a request for the information needed to prepare an answer, to the Advisory office.

(2) Promptly screen the request against the Notice of Federal Tax Lien (NFTL) files and determine the balance due on the liens involved in the proceedings. Provide information to the AUSA so they can take the legal action deemed appropriate.

a. If there is no outstanding liability, advise the AUSA so that a disclaimer can be filed on behalf of the United States.
b. If there is an outstanding liability for NFTLs involved in the proceedings, furnish any information requested by the AUSA that may be obtained without a formal investigation (e.g., payoff information).

Note: Payoff information may be provided through a standard IRS letter such as Letter 3640-C, *Lien Payoff for Judicial Foreclosure*, or another format agreed to by the local AUSA.

(3) In all cases where the government has a lien interest, take the following actions

a. Open a Non-Field Other Investigation (NFOI) 146, Judicial Foreclosure, on ICS no later than seven (7) calendar days after receipt.
b. Document the receipt date of the notice of judicial foreclosure.
c. Establish a case file.

(4) If a redemption investigation is needed, follow up with the AUSA or the court for the date of sale.

(5) When the property is sold for an amount greater than the balances due on the foreclosing instrument plus other liens senior to the federal tax lien, take action to obtain the surplus (or excess) proceeds for application to the taxpayer's account.

(6) Each area is responsible for establishing the time frame and methodology for following up on foreclosure case issues. However, during the course of an investigation, when the applicant, taxpayer, representative, or IRS employee misses a specific deadline, follow-up is based on meeting the Service's requirements to maintain its standing in the proceeding and should be initiated **no later than** fourteen (14) calendar days after the missed deadline. This follow-up includes closing the case, if appropriate. Established procedures should strive to provide a minimum of ninety (90) calendar days remaining available to conduct a redemption investigation.

(7) When a revenue officer is assigned to investigate a foreclosure, the RO should provide the following to Advisory by the date specified on the Courtesy Investigation:

- A completed Form 4376, *Report of Investigation (IRC 7425 or 2410 USC)*, or a memorandum detailing the situation
- The original history documentation, if not on ICS
- Any other information requested by the U.S. Attorney

5.12.4.2.3
(06-03-2016)
Right to Redeem Property Sold at Judicial Sale

(1) The United States has the right to redeem property sold at foreclosure and resell it. This redemption process and redemption investigations are more fully covered in IRM 5.12.5, *Redemptions*.

(2) 28 USC 2410(c) provides that where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have 120 calendar days from the date of sale (or the period allowed by state law, if longer) to redeem the property. This gives time to investigate and determine whether it would be to the advantage of the United States to redeem the property.

(3) Redemption provides the IRS an opportunity to resell the foreclosed property for more than the cost of redemption with the resulting benefit to the Government. A principal consideration in such an investigation entails a determination as to whether the value of the property sold in the foreclosure proceeding is reasonably in excess of the amount required to effect the redemption.

(4) When a courtesy investigation is necessary to determine whether to exercise the right of redemption, it is generally issued by Advisory within thirty (30) calendar days before or after the scheduled date of sale, thus allowing the maximum amount of time to complete the redemption process.

(5) In cases where it appears that redemption may be feasible, the assigned employee retains the Courtesy Investigation and the original Form 4376. A

copy of the Form 4376 and any other information requested by the U.S. Attorney is returned to the Advisory GM by the due date of the OI.

5.12.4.3
(06-03-2016)
Non-Judicial Foreclosures

(1) Encumbrance holders may foreclose on property without court involvement, if allowed by state law.

- Non-judicial foreclosures are possible for lenders with mortgages or deeds of trust when a ″power of sale″ clause exists in the loan documents. This clause pre-authorizes the sale of the property by the lender outside of a court's jurisdiction to pay off the balance on the loan if the borrower defaults.

(2) Notification of the non-judicial foreclosure must meet the requirements of IRC 7425; however, the sale process is determined by state statutes. Advisors and Revenue Officers must be aware of the foreclosure statutes in the state where the property is located.

(3) To the extent provided by state law, property is discharged from the tax lien when the holder of a superior encumbrance forecloses non-judicially under IRC 7425(b)(2) and properly notices the IRS. Foreclosure by a lienholder junior to the federal tax lien does not disturb the tax lien (IRC 7425(b)(1)).

(4) See IRM 5.17.5.19.2, *Nonjudicial Foreclosures of Non-Perishable Goods*, for additional information.

5.12.4.3.1
(06-03-2016)
Investigation Elements and Responsibilities for Non-Judicial Foreclosures

(1) The elements of a non-judicial foreclosure investigation can generally be divided in two categories:

- Notification of the foreclosure sale
- Foreclosure sale and subsequent activities

(2) The responsibility for the investigation can generally be divided by the elements.

Responsible office	Investigation action
Advisory	• Determine adequacy of Notice of Non-Judicial Sale (IRC 7425(c)(1)) • Determine lien priority • Provide Consent to Sale (IRC 7425(c)(2)) • Issue OI to the Field for assistance
Advisory or Field	• Monitor foreclosure sale • Determine availability of surplus (or excess) sale proceeds • Research state law and pursue surplus sale proceeds • Address CDP notification related to tax liabilities associated with claims for surplus sale proceeds • Initiate redemption investigation

Note: The responsibilities and actions shown in the chart are general statements and may vary based on case facts and availability of resources.

(3) The positions authorized to determine the adequacy of notice and consent to the sale is addressed in IRM 1.2.44.5, *Delegation Order 5-4 (Rev. 3)*.

5.12.4.4
(06-03-2016)
Notice of Non-Judicial Sale

(1) To meet the requirements of IRC 7425(c)(1) , a notice of non-judicial sale must be given:

- in writing,
- by registered or certified mail or by personal service,
- to the Advisory group manager (or other delegated office) for the Field Collection Area where the sale is to be held, and
- not less than twenty-five (25) calendar days prior to the sale.

Exception: Notice for a sale of perishable goods does not have the 25-day requirement. See IRM 5.12.4.5, *Non-Judicial Sale of Perishable Goods*.

(2) For purposes of IRC 7425, “personal service” may be accomplished by the use of personal delivery services (PDS) such as Federal Express and United Parcel Service. For PDS, the date of service is the date of actual delivery, not the date the notice given to the delivery service. For USPS registered or certified mail, the date of service is the mailing date.

(3) Persons seeking information on when or how to submit a notice of non-judicial sale should be directed to IRS.gov for, or furnished a copy of, the following documents:

- Pub 786, *Instructions for Preparing Notice of Non-judicial Sale of Property and Application for Consent to Sale*
- Pub 4235, *Collection Advisory Group Addresses*

Note: Pub 786 includes Form 14497, *Notice of Nonjudicial Sale of Property*, which may be used to provide notice of the sale.. The use of this form is **not** a requirement. The form is available to facilitate a consistent format for foreclosing creditors, especially when they are not familiar with the information required for effective noticing. The form has fields for optional information that would be beneficial to processing, but completion of those fields is not mandatory. The creditors are only required to provide the information mandated by IRC 7425.

(4) In situations where a NFTL has not been filed or has been filed less than thirty-one (31) calendar days before the sale, it is not necessary for the foreclosing party to notify the Advisory group manager of the sale. In these situations, the sale shall discharge the property from the federal tax lien just as it does under local law for other junior liens.

(5) When the sale is postponed, the seller of the property is required to give notice of the postponement to the Advisory group manager in the same manner required under local law with respect to other secured creditors. If the postponed sale date is more than 31 calendar days from the NFTL filing date, notice of sale is required to be given even though such notice was not originally required.

(6) In the case of a forfeiture of a land sales contract, Area Counsel should be consulted to determine if the IRS has a redemption right.

5.12.4.4.1 (06-03-2016) Determining the Date of Non-Judicial Sale

(1) The date of the sale is determined by how the junior liens will be divested from their interest in the property. Determine the date of sale by following the chart below.

If divestment results...	The date of sale is deemed to be the date when...
Directly from a public sale	The public sale is held, regardless of the date under local law on which junior liens on the property are divested or the title to the property is transferred
Directly from a private sale	The property is transferred, regardless of the date junior liens on the property are divested under local law
Not directly from a public or private sale	Junior liens on the property are divested under local law

5.12.4.4.2 (06-03-2016) Review of IRC 7425 Notice

(1) Review the notice of sale for timeliness and adequacy.

(2) If the notice was not submitted timely, the federal tax lien will not be impacted by the pending sale, unless the United States consents to the sale free of the tax lien.. The foreclosing lienholder will be required to either:

- pay the amount of the tax lien in full, or
- request a discharge of the property from the tax lien.

(3) No formal investigation is required when the items to be sold are consumer goods. Provide a copy of the notice of sale to the employee assigned the balance due to decide what further action is required, if any. If the case is not assigned, has been reported currently not collectible, or is assigned to ACS, no further action is needed.

5.12.4.4.3 (06-03-2016) Adequacy of IRC 7425 Notice

(1) Once it has been determined that an investigation is appropriate, open an NFOI -147, Non-Judicial Foreclosure, on ICS no less than seven (7) calendar days prior to the date of sale. Include the receipt date of the IRC 7425 notice in the history.

(2) Review the notice for adequacy. It is considered adequate if it contains all the following information:

- Name and address of the person submitting the notice of sale
- Copy of each Form 668(Y)(c), *Notice of Federal Tax Lien*, affecting the sale or a list containing the name and address(es) of the taxpayer, dates of NFTL filings, and place of filing
- Detailed description of the property to be sold, including the address of the property, the legal description as contained in a title or deed, any distinctions or particularities as can happen with multiple tracts of land, and, if available, a copy of the abstract of title
- Date, time, place, and terms of the proposed sale of the property

- In the case of a perishable property sale as described in IRM 5.12.4.5.1, *Definition of Perishable Goods*, a statement of the reasons the property is believed to be perishable
- Approximate amount of the principal obligation, including interest, due the person selling the property
- Description of other expenses (e.g., legal, selling costs, etc.) which may be charged against sale proceeds

(3) The notice is considered inadequate if it does not contain the information described in (2) above. In that situation, Advisory provides written notification to the submitter via Letter 1840, *Notice of Inadequacy of Nonjudicial Sale Notice*.

Reminder: Any written notification or other communication should address the issue(s) clearly and in a language understandable to someone unfamiliar with IRS terms, acronyms, and jargon.

(4) The Advisory group manager may, at their discretion, consent to the sale of the property free of the lien or title of the United States even though notice of the sale is not given twenty-five (25) calendar days prior to the sale or is otherwise inadequate.

(5) In any case where the person who submitted a timely notice does not receive written notification that the notice is inadequate more than five (5) calendar days prior to the date of the sale, the notice will be considered adequate.

(6) The Advisory executive will provide an alternative method for the internal tracking of receipts and dispositions where the acknowledgement of the notice or inadequacy of the notice is the only issue such that the case is not entered onto ICS.

5.12.4.4.4
(06-03-2016)
Acknowledgment of Notice

(1) A written request for the acknowledgment of the receipt of a notice of sale should be honored as resources allow. Acknowledgement can be made through the mailing of a duplicate notice or via facsimile as long as the third party is agreeable to the method.

(2) See IRM 1.2.44.5, *Delegation Order 5-4 (Rev. 3)*, for the positions authorized to acknowledge IRC 7425 Notices, and to reject them because of inadequacies.

5.12.4.4.5
(06-03-2016)
Disclosure of Adequacy of Notice

(1) The Advisory group manager is authorized to disclose to any person who has a proper interest whether an adequate notice of sale was given. Disclosure may be made either before or after the sale.

(2) Any person desiring this information should submit a written request to the Advisory group manager that states their name and address, clearly describes the property sold, identifies the applicable NFTL(s), and gives the reasons for requesting the information.

5.12.4.5
(06-03-2016)
Non-Judicial Sale of Perishable Goods

(1) IRC 7425(c)(3) provides for the sale of perishable goods. It defines perishable goods, describes noticing requirements, and stipulates requirements for the distribution of sale proceeds.

5.12.4.5.1
(06-03-2016)
Definition of Perishable Goods

(1) The term “perishable goods” means any tangible personal property which, in the reasonable view of the person selling the property, is liable to perish or become greatly reduced in price or value by keeping, or cannot be kept without great expense.

Note: This definition is the same used by the IRS in its authorization to sell assets pursuant to IRC 6336 (see IRM 5.10.1.6, *Perishable Goods Criteria, Definitions, and Examples*).

5.12.4.5.2
(06-03-2016)
Notice of Non-Judicial Sale of Perishable Goods

(1) Notice of the sale must be given:

- in writing
- by registered or certified mail or by personal service
- to the Advisory group manager before such sale.

(2) The notice of sale of perishable goods shall contain the same information required in IRM 5.12.4.4, *Notice of Non-Judicial Sale*.

(3) In the event of a postponement of the scheduled sale of perishable goods, the seller is not required to notify the Advisory group manager of the postponement.

(4) If notice requirements are met, the sale will discharge the subject property from the lien or title of the United States. The proceeds are not discharged.

(5) For provisions relating to the authority of the Advisory group manager to discharge property where the proceeds of the sale are held as a fund subject to the liens and claims of the United States, refer to IRM 5.12.10.3.4, *Substitution of Proceeds of Sale*.

5.12.4.5.3
(06-03-2016)
Non-Judicial Perishable Sale Proceeds

(1) The proceeds of the sale (exclusive of costs) are held as a fund for not less than thirty (30) calendar days after the date of the sale and remain subject to the liens and claims of the United States. Distribution of the fund is in the same manner and with the same priority as the liens and claims had with respect to the property sold.

(2) If the seller fails to hold the proceeds of the sale in a fund in accordance with the provisions of IRC 7425(c)(3), the seller becomes personally liable to the United States for an amount equal to the value of the interest of the United States in the fund.

(3) The buyer of the perishable property is afforded certain protection. Even if the proceeds of the sale are not held by the seller but all the other provisions are satisfied, the buyer of the property at the sale takes the property free of the liens and claims of the United States.

5.12.4.6
(06-03-2016)
Consent to Sale of Property Free of Lien

(1) A consent to sale by the United States under IRC 7425(c)(2) shall discharge the foreclosed property from the lien or title of the United States. The consent may be granted even if the notice of sale requirements have not been met. Advisory has primary responsibility to determine whether consent should be granted.

Reminder: See IRM 1.2.44.5, *Delegation Order 5-4 (rev. 3)*, for positions authorized to give consent.

(2) Consent to the sale may be given when adequate protection is afforded the lien or title of the United States. Protection is considered adequate if any of the following are present.

- Taxpayer has no equity in the property
- Proceeds of sale are substituted as provided in IRC 6325(b)(3)
- Taxpayer's interest in the property is assigned to the United States
- Assignment of proceeds in excess of prior encumbrances is secured
- Other circumstances that make consent acceptable to the IRS

(3) The consent:

- is effective only if given in writing,
- is subject to such limitations and conditions as may be required by the IRS, and
- may not be given after the date of the sale.

(4) The right to redeem remains even though a consent to the sale is given.

(5) The consent to a sale under IRC 7425 must be approved by the Advisory group manager or other delegated authority.

(6) Apply all payments directly related to consents to sale to the taxpayer's account using Designated Payment Code (DPC) 57.

5.12.4.6.1
(06-03-2016)
Application for Consent

(1) Any person requesting consent to sell property free of the lien (or title derived from the enforcement of the lien) must submit an original and two copies of the information required in Pub 786. .

Note: Pub 786 includes Form 14498, *Application for Consent to Sale of Property Free of the Federal Tax Lien*, which may be used to request consent. The use of this form is **not** a requirement. The form is available to facilitate a consistent format for foreclosing creditors, especially when they are not familiar with the information required. The form has fields for optional information that would be beneficial to processing, but completion of those fields is not mandatory.

(2) The information required, as stated in Pub 786, can be submitted electronically from an external source (e.g., foreclosure attorney) as long as the electronic transmission includes all of the required information and is submitted under the penalties of perjury declaration.. An electronic signature is acceptable. Internally, the information can be forwarded via secured messaging.

5.12.4.6.2
(06-03-2016)
Processing Applications

(1) As a general rule, consent may be given without a field investigation if the property is:

- of nominal value,
- consumer goods, or
- real property in which the Government's interest is less than the criteria established in IRM 5.12.5.1.2, *Criteria for Working Redemption Investigations*.

(2) If the property is real property in which the Government's interest is more than the redemption investigation criteria, the application for consent should be investigated to determine the most feasible administrative action to take. See IRM 5.12.5.1.1, *Criteria for Working Redemption Investigations*.

5.12.4.6.3
(06-03-2016)
Form of Consent

(1) When consent to a non-judicial foreclosure sale is given, prepare the consent letter which includes the following information.

- Name and address of person requesting consent
- Reference to the authority under IRC 7425(c)(2)
- Detailed description of property to be discharged
- Description of liens to be divested.
- Unpaid balance of the federal tax liens, including accruals
- Date and place NFTL(s) filed.
- Statement that surplus proceeds are subject to the liens of the United States.
- Signature of approving official (normally Advisory Group Manager)

(2) Provide the original and a copy of the consent letter to the requestor. Retain a copy of the letter for the case file.

(3) When it is determined that consent to the sale should not be given, prepare a letter that informs of the non-consent and contains the following information.

- Name and address of requestor
- Reference to IRC 7425(c)(2)
- Recommended alternate procedure (e.g., discharge of property, substitution of proceeds of sale, etc.)
- Signature of the approving official (normally Advisory Group Manager)

5.12.4.7
(06-03-2016)
Non-Judicial Sale Activities and Tasks

(1) Certain situations may warrant investigation by a field revenue officer. Generally, OIs to investigate non-judicial sales originate in Advisory. The decision to issue an OI is contingent upon factors such as the following.

- Geographic feasibility
- Dollar amount of the liability
- Type of property involved
- Economic condition of the particular locality
- Practical impact of local law
- Any other significant factor

(2) Due to the need for immediate assignment of these cases, route the OI directly to the field revenue officer group working the zip code. The Field Group Manager must treat the OI as priority work. The OI must be assigned to a revenue officer expeditiously to ensure that the government's interest is not compromised and that the investigation is completed accurately and timely. Non-judicial foreclosure OIs are exempt from existing case delivery parameters.

(3) The only time Advisory needs to review notices of sale is when the notice meets the criteria in (1) above.

(4) For a notice of sale where an investigation is needed, determine the redemption period applicable under local law, which then determines the time available for a revenue officer to conduct the investigation. Consult Area Counsel, as needed, regarding redemption period questions.

(5) If the foreclosure relates to a case assigned to the field, provide a copy of the Notice of Sale to the assigned revenue officer to decide what further action should be taken. If the case is not assigned, has been reported currently not collectible, or is assigned to ACS, note the history accordingly.

(6) Issue the outgoing OI via ICS no earlier than thirty (30) calendar days prior to the scheduled date of sale. Before issuing the OI, determine if the fair market value of the property in question exceeds the amount required to redeem. Sources from which this information can be secured varies, but examples include the tax assessor's office and the foreclosing creditor's attorney.

(7) The revenue officer need not attend the sale, unless specifically directed by Advisory. Attendance should be requested only in unusual cases. The necessary information may generally be secured from the seller or seller's agent immediately after the sale.

(8) Each Advisory territory is responsible for establishing the time frame and methodology for following up. Established procedures should strive to provide a minimum of ninety (90) calendar days remaining available to conduct a redemption investigation. See IRM 5.12.4.1.1, *Investigation Guidelines for Judicial/Non-Judicial Sales*, for other investigation guidelines.

(9) The revenue officer or Advisory (if no field involvement) prepares Form 4376, *Report of Investigation (IRC 7425 and 2410 USC)*, to provide a recommendation whether to exercise the right of redemption.

5.12.4.7.1
(06-03-2016)
Surplus or Excess Proceeds from Non-Judicial Sales

(1) The primary purpose of the non-judicial foreclosure sale investigation is to determine how much the property sells for in relation to the amount owed on the foreclosing party's encumbrance and the fair market value of the property. A significant difference in either or both may result in action by the IRS.

- If the sale produces an amount in excess of the foreclosing party's prior encumbrance (plus other required costs), a determination is needed regarding the surplus (or excess) proceeds.
- Regardless of the presence of surplus proceeds, if the property sells for less than its fair market value, a determination is needed whether sufficient equity remains for the IRS to exercise its redemption rights.

(2) In the event of surplus proceeds, the employee assigned determines what party handles these funds. It could either be the one that conducted the sale or another party charged with that responsibility by state law.

(3) There are two methods the IRS has to pursue surplus proceeds-- issuing a levy or filing a claim.

(4) Issue Form 668-A(c), *Notice of Levy*, when a Letter 1058, *Final Notice Reply Within 30 Days*, has been issued for all applicable tax periods and the IRS has reason to believe that the **holder** of the surplus proceeds is not disbursing the funds in accordance with the legal requirements or is disbursing them to a creditor junior to the IRS.

- The levy may only include those modules where all Collection Due Process (CDP) appeal rights are extinguished or resolved. If the CDP process has been completed on some but not all modules, issue the levy containing only those modules.
- If the proceeds available will more than full pay the levy and there are remaining liabilities, or if the liabilities have not been through the appropriate CDP process, do not issue a levy. File a claim as described in (5).

(5) If the IRS cannot levy for the excess sale proceeds, the statutory lien remains and the IRS must look to its rights as a creditor under the laws of the state in

which the foreclosure and sale took place. Use Form 10492, *Notice of Federal Taxes Due*, to serve as written notice to the settlement attorney or other third party that the IRS may be entitled to excess proceeds. State law controls how and to whom a claim for the proceeds is submitted.

- Some, but not all, states require the party distributing the proceeds to use the priority order of the junior liens attached to the property prior to the foreclosure sale. Sometimes an interpleader suit is initiated by the party responsible to distribute the funds to determine who has rights to the funds. Address questions to Area Counsel.

(6) The employee's investigation should determine if there is a problem with the distribution of the funds and, if appropriate, recommend involvement of Area Counsel.

(7) Apply all payments directly related to non-judicial sales to the taxpayer's account using Designated Payment Code (DPC) 57.

5.12.4.7.2
(06-03-2016)
Right to Redeem Property Sold at Non-Judicial Sale

(1) IRC 7425(d) provides for the redemption by the Government of real property sold in a non-judicial proceeding when such sale is made to satisfy a lien that is prior to the United States. The period for redemption is 120 calendar days or the period provided by State law, whichever is longer.

(2) If the sale is of real property either the advisor or the revenue officer, based on assignment of the investigation, completes Form 4376 with their recommendation regarding the right of redemption. This process may also require assistance from a Property Appraisal and Liquidation Specialist (PALS). When a revenue officer and/or a PALS is involved in the investigation, it is essential that all required documentation be included when forwarding the results of the investigation to Advisory. The final review and processing of Form 4376 is the responsibility of Advisory.

5.12.4.7.2.1
(06-03-2016)
Redemption Investigations

(1) Procedures for redemption investigations are found in IRM 5.12.5, *Redemptions*. That IRM covers the investigation leading up to the decision to redeem, the redemption itself, and the sale of the redeemed property.

5.12.4.7.2.1.1
(06-03-2016)
Upset Bidding

(1) Upset bidding after a foreclosure sale is allowed in some states like North Carolina. An upset bid is a recorded bid placed after a foreclosure sale has ended. It is higher than the highest bid received at the actual foreclosure sale. This type of bidding can cause confusion when conducting a redemption investigation because it impacts the person from whom the IRS would redeem the property.

(2) An upset bid extends the bidding period but does not change the sale date which IRS uses to start the redemption period. Consult Advisory and Counsel when encountering upset bidding and considering redeeming property.

5.12.4.7.2.1.2
(06-03-2016)
Upset Price

(1) The upset price, also called the judgment amount or minimum bid, is what the lender is owed on the property. This sum usually includes the outstanding loan and any interest and fees accumulated since the start of the foreclosure process. It is a bid made after a judicial sale but before the successful bid at the sale has been confirmed, larger or better than such successful bid, and

made for the purpose of upsetting the sale. It provides the ″upset bidder″ the privilege of taking the property at this bid or competing at a new sale.