

2018 GL1 - Lesson 7

RELEASE, DISCHARGE, AND WITHDRAWAL

(June 2018)

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I. INTRODUCTION

This lesson explains the provisions of section 6325. That section provides for the release of the federal tax lien, the discharge of property from the federal tax lien, the subordination of the federal tax lien, and the nonattachment of the federal tax lien. This lesson also explains the provision in section 6323(j) for the withdrawal of notices of federal tax lien.

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II. OBJECTIVES

At the end of this lesson, you will be able to:

- Explain the legal authority for, and the differences between, release, discharge, subordination, nonattachment, and withdrawal; and
- Describe the methods available to taxpayers and third parties for obtaining a release, discharge, subordination, nonattachment, or withdrawal.

III. BASIC CHARACTERISTICS

A. Release

1. A certificate of release is conclusive that the lien referred to in the certificate is extinguished. I.R.C. 6325(f)(1)(A); Treas. Reg. § 301.6325-1(f)(1)(i).
2. A certificate of release does not affect the taxpayer's liability. The liability for the payment of the tax continues until it is satisfied in full or until the statutory period for collection expires. Treas. Reg. § 301.6325-1(a)(1).
3. Except for liens arising under section 6324, releases may be revoked if erroneously or improvidently issued or if issued pursuant to an offer in compromise that is later breached. I.R.C. § 6325(f)(2); Treas. Reg. § 301.6325-1(f)(2).
4. A revoked release reinstates the lien. The reinstated lien is effective on the date notice of revocation is mailed to the taxpayer (but not earlier than notice of the revocation is filed in the appropriate recording office) and has the same force and effect as a lien imposed by section 6321. I.R.C. § 6325(f)(2); Treas. Reg. § 301.6321-1(f)(2)(iii).

B. Discharge

1. Removes the lien from specific property. The lien continues to exist and remains attached to the taxpayer's other property.
2. A certificate of discharge cannot be revoked.

C. Subordination

1. Allows a junior creditor a position ahead of the federal tax lien with respect to any

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part of property subject to the lien. The lien is not otherwise affected.

2. In some cases, subordinations can be terminated if certain conditions are met, such as failure to make payments or failure to abide by the terms of an installment agreement entered into at the same time as the subordination. I.R.M. 5.12.10.6.1.1(11) and (17) (Sept. 30, 2015)

D. Nonattachment

1. A certificate of nonattachment is issued when any person is or may be injured by the appearance that a notice of federal tax lien refers to that person because of similarity of names or otherwise rather than the taxpayer.
2. Certificates of nonattachment can be revoked.

E. Withdrawal

1. A certificate of withdrawal removes the effect of the notice of federal tax lien.
2. A certificate of withdrawal does not affect the underlying statutory lien.

IV. CERTIFICATE OF RELEASE

A. Effect of certificate of release

1. A certificate of release is conclusive evidence that the lien it refers to is extinguished, except when it is revoked or void. I.R.C. § 6325(f)(1).
2. A certificate of release does not have any effect, though, on the taxpayer's underlying liability.. The liability for the payment of the tax continues until satisfaction of the tax in full or until the expiration of the statutory period for collection. Treas. Reg. § 301.6325-1(a)(1); United States v. DeTar, 2009 WL 2252822 (W.D. Mich. 2009) (citing cases).

B. Conditions for release

1. Under section 6325(a), a federal tax lien will be released if any of the following three conditions are met:
 - a) The liability secured by the lien (including interest) has been fully satisfied;
 - b) The liability secured by the lien becomes legally unenforceable; or

- c) The taxpayer furnishes a bond in accordance with the rules under section 7101 that is accepted by the Service and is conditioned on full payment of the assessed amount (plus interest).
2. A federal tax lien is released when an offer in compromise (including any collateral agreements) is accepted and the offered amount has been paid. See Hillsman v. Commissioner, T.C. Memo. 2008-240; I.R.M. 5.12.3.5.3(1) (July 15, 2015).

C. Issuance of the Certificate of Release

1. Under section 6325(a), the Service must issue a certificate of release no later than 30 days after a condition for release is satisfied. Treas. Reg. § 301.6325-1(a)(1).
2. A taxpayer may request a release if the Service does not release a lien within 30 days of the conditions for release having been satisfied. Treas. Reg. § 301.6325-1(a)(7). Publication 1450 includes the instructions for how taxpayers may request a certificate of release of a federal tax lien.
3. When an NFTL lists more than one assessment, unless the taxpayer requests a certificate of release with respect to a particular assessment, all of the assessments must be satisfied or become legally unenforceable before the Service will issue a certificate of release. Treas. Reg. § 301.6325-1(a)(6).

D. “Self-releasing” liens

1. Notices of federal tax lien filed on Form 668(Y)(c) show a “last day for refiling.” The form contains a statement that says for each assessment listed on it, unless notice of the lien is refiled by the last day for refiling, the form itself will operate as a certificate of release. This is known as a self-releasing lien. I.R.M. 5.12.3.4.1.1(1) (July 15, 2015). NFTLs are refiled on Forms 668-F, and such forms do not contain certificate of release.
2. The Service developed the “self-releasing” lien to more easily comply with the 30-day requirement for filing certificates of release. The “self-release” provision also reduces the risk that the taxpayer could successfully bring an action for damages under section 7432 against the government for failing to release a lien.

3. The listed “last day for refiling” is not the date the period of limitations on collection expires. If an NFTL is filed within the first ten years after assessment, the listed last day for refiling will be the date the period of limitations is to expire plus thirty days. But if the period of limitations on collection is extended after the NFTL is filed, the listed date for refiling will no longer be the date the period of limitations expires plus thirty days. I.R.M. 5.12.3.3.2(2) (July 15, 2015).
4. When NFTLs are filed in multiple jurisdictions, a release in one jurisdiction means that the lien is released in all jurisdictions. Treas. Reg. § 301.6323(g)-1(a)(1); I.R.M. 5.12.3.14(5) (July 15, 2015). So if one of the NFTLs contains a self-release provision, the self-release in the jurisdiction where that NFTL is filed will lead to the lien being released, and therefore extinguished under section 6325(f), in all jurisdictions where NFTLs have been filed, regardless of whether the other NFTLs contain self-releasing provisions.
5. It is necessary to refile an NFTL if the liability has not been paid in full and the section 6502 statute of limitations for collection has been extended. See, e.g., I.R.C. §§ 6331(k), 6503.

E. Revoking a Certificate of Release

1. Under section 6325(f)(2), the release of a lien imposed by section 6321 can be revoked if it was erroneously or improvidently issued or if issued pursuant to an offer in compromise that is later breached.
2. A certificate of release relating to a lien imposed by section 6324 (special lien for estate and gift taxes) cannot be revoked. Treas. Reg. § 301.6325-1(f)(2)(i).
3. Revocation and reinstatement are not effective until mailed to the taxpayer at his last known address. Treas. Reg. § 301.6325-1(f)(2)(ii).
4. Notice of revocation of a release must be filed in the same office in which the notice of lien was filed, if one was filed. Treas. Reg. § 301.6325-1(f)(2)(ii)(b). The notice of revocation reinstates the lien but it has no retroactive effect against competing interests acquired prior to filing the revocation notice. Treas. Reg. § 301.6325-1(f)(2)(iii)(b). It is also not valid against section 6323(a) creditors until notice of the reinstated lien has been filed. *Id.*
5. To correct an erroneous release where there are multiple NFTLs, the release must be revoked in all jurisdictions where the Service had filed NFTLs, and NFTLs should be refiled in those jurisdictions on Form 668-F. Note that after refiling, the filing date for priority purposes will be the date of refiling, not the date of the original NFTL. Treas. Reg. § 301.6325-1(f)(2)(iii)(b); United States v. Rogers, 558 F. Supp. 2d 774, 789 (N.D. Ohio 2008) (“The language contained in [Treas.

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Reg. § 301.6325-1(f)(2)(iii)(b)], which states that the revocation of the released lien does not retroactively reinstate the Notice of Federal Tax Lien, simply means that the United States cannot step back into the same priority it previously had among secured creditors.”); United States v. Winchell, 793 F. Supp. 994, 996 (D. Colo. 1992) (“[T]he priority of the United States’ lien dates from the filing of the revocation.”).

F. Administrative Appeal of Erroneous NFTL Filing

1. Under section 6326(a), any person who alleges that an NFTL was erroneously filed against that person’s property or rights to property may appeal for the release of the lien.
2. The appeal must be requested within one year after the taxpayer becomes aware of the erroneously filed notice of federal tax lien. Treas. Reg. § 301.6326-1(d)(3).
3. Under Treas. Reg. § 301.6326-1(b), there are only four permitted bases for an appeal:
 - a) the tax liability was satisfied before the NFTL was filed;
 - b) the assessment was in violation of the section 6213 deficiency procedures;
 - c) the assessment was in violation of the bankruptcy stay; or
 - d) the statute of limitations for collection expired before the NFTL was filed.
4. The appeal may not be used to challenge the underlying deficiency that led to the imposition of the lien. Treas. Reg. § 301.6326-1(a).
5. Under section 6326(b), if it is determined that the NFTL filing was erroneous, the Service must act expeditiously and must issue a certificate of release within 14 days, if practicable. The certificate of release must include a statement indicating that the NFTL was erroneously filed. Section 5.12.3.9 of the IRM provides additional guidance regarding erroneous NFTL filings and administrative appeals under section 6326.
6. Damages are not available under section 6326. See Miller v. United States, 763 F. Supp. 1534, 1540 (N.D. Cal. 1991) (noting that the legislative history of sections 6326 and 7432 show that section 6326 provides an appeal mechanism focusing “only on the removal of an erroneously filed notice of lien” while section 7432 grants taxpayers a right to bring an action for damages resulting from the wrongful failure to remove a lien); Treas. Reg. § 301.6326-1(f).

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G. Civil action for damages for failure to release lien

1. In General: Under section 7432(a), if any officer or employee of the Service knowingly or negligently fails to release a lien under section 6325, the taxpayer may bring a suit for damages against the United States in federal district court.
2. Standing to Bring Suit: Only the taxpayer has standing to bring an action for damages for failure to release a lien. See Parker v. United States, 2010 WL 3894977 (S.D. Cal. Sept. 29, 2010) (collecting cases).
3. Calculating the Amount of Damages: Under section 7432(b), if it is found that the government failed to release a lien, the government is liable to the taxpayer in an amount equal to the sum of:
 - a) Actual, direct economic damages sustained by the taxpayer due to the Service's failure to release the lien, plus
 - b) the costs of the action (not including attorney's fees and similar litigation expenses recoverable under section 7430).
4. Limitations on the taxpayer's ability to bring suit for damages
 - a) Exhaustion of administrative remedies
 - (1) Section 7432(d)(1) requires the taxpayer to exhaust any administrative remedies available within the Service before bringing suit. These include filing a written claim with the Service that meets the requirements in Treas. Reg. § 301.7432-1(f).
 - (2) Some courts have held that exhaustion of administrative remedies is not a jurisdictional prerequisite to bringing suit under section 7432. See, e.g., Law Offices of Scott E. Combs v. United States, 767 F. Supp. 2d 758 (E.D. Mich. 2011).
 - b) Mitigation of damages: Section 7432(d)(2) reduces the amount of damages awarded by the amount of the damages the could have reasonably been mitigated by the taxpayer.

- c) Period for bringing suit: Section 7432(d)(3) specifies that an action for damages for failure to release a lien may be brought only within two years after the date the right of action accrues. Section 301.7432-1(i)(2) of the Treasury Regulations specifies that a cause of action accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.
- d) Liability must be satisfied: A taxpayer will not prevail in an action under section 7432 if the underlying tax liability has not been satisfied. See McIver v. United States, 650 F. Supp. 2d 587 (N.D. Tex. 2009).
- e) Liability can't be challenged: A taxpayer may not challenge the merits of the underlying tax (or interest) in a section 7432 action. PCCE, Inc. v. United States, 159 F.3d 425 (9th Cir. 1998).

V. CERTIFICATE OF DISCHARGE

A. General Overview

1. There are five reasons why the Service may issue a certificate of discharge. They are:
 - a) The fair market value of the property that will remain subject to the lien is at least double the amount of the liability and all other liens with priority over the tax lien;
 - b) There has been a partial payment of the liability;
 - c) The value of the government's interest in the property has no value;
 - d) The property has been sold and the proceeds become subject to the lien; and
 - e) The owner of the property is someone other than the taxpayer and deposits with the Service an amount equal to the value of the government's interest in the property or furnishes a bond acceptable to the Service for that amount.
2. For any of the first four reasons, before the Service will issue a certificate of discharge, it requires that the taxpayer has been or will be divested of all right, title, and interest in the property. If the taxpayer reacquires the property after issuance of the certificate of discharge, the lien attaches to the reacquired property as in the case of after-acquired property generally. Treas. Reg. § 301.6325-1(f)(3).
3. After the discharge of specifically described real or personal property from a lien, the lien continues in full force and effect on all other property or rights to property

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of the taxpayer. The discharge does not extinguish the tax liability and does not preclude the Service from determining additional tax and penalties. See generally E.J. Friedman Co. v. United States, 6 F.3d 1355 (9th Cir. 1993).

4. Publication 783 has instructions on how to apply for a certificate of discharge.

B. Specific reasons for discharging property

1. Property worth double value – § 6325(b)(1)
 - a) Under section 6325(b)(1), a certificate of discharge may be issued for any part of the property if the fair market value of the property still subject to the lien is at least double the sum of the tax liability and all other liens with priority over the tax lien.
 - b) The regulations provide that, in general, fair market value is the amount that one ready and willing but not compelled to buy would pay someone who is ready and willing but not compelled to sell the property. Treas. Reg. § 301.6325-1(b)(1)(i).
2. Partial Payment – § 6325(b)(2)(A)
 - a) Under section 6325(b)(2)(A), a certificate of discharge may be issued if an amount not less than the value of the government's interest in the property being discharged is paid in partial satisfaction of the tax liability.
 - b) For the purpose determining the value of the property under this provision, the Service may consider the forced sale value of the property, not merely the fair market value. Treas. Reg. § 301.6325-1(b)(6). The Service may also consider certain sale preparation expenses in calculating the amount necessary for discharge. See IRM 5.12.10.3.2 (Sept. 30, 2015).
3. Government's interest has no value – § 6325(b)(2)(B)
 - a) Under section 6325(b)(2)(B), a certificate of discharge may be issued if the Service determines that the government's interest in the part of the property to be discharged has no value.

- b) In determining the value of the government's interest, the Service considers the value of the property and the amount of all liens and encumbrances on the property that have priority over the tax lien. In determining the value of the property under this provision, the Service may consider the forced sale value of the property, not merely the fair market value. Treas. Reg. § 301.6325-1(b)(6).
 - c) Section 5.12.10.3.3.1 (Sept. 30, 2015) of the IRM provides guidance on the issuance of certificates of discharge in short-sale situations. In those situations, the value of the government's interest in the subject property is zero because a senior lien attaches to all the equity in the property. To facilitate the sale of property in these situations, the senior lien holder might negotiate the payment of expenses to be taken from the settlement amount. In certain situations, these expenses might be greater than the 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 the priority claim to pay expenses does not create an equity interest on the part of the taxpayer that can be reached by the federal tax lien. Provided that there is no fraudulent aspect to the payment distribution and the lien interests of the government in other properties belonging to the taxpayer isn't harmed, the Service has no authority to require payment of the sum that otherwise would have gone to the senior lien holder.
4. Property Sold and Proceeds Subject to Lien – § 6325(b)(3)
- a) Under section 6325(b)(3), the property may be discharged if it is sold and, pursuant to a written agreement, the sale proceeds are to be held subject to the lien, with the lien retaining the same priority it had against the property to be discharged. For this provision to apply, the sale must divest the taxpayer of all right, title, and interest in the property to be discharged. Treas. Reg. § 301.6325-1(b)(3).
 - b) This type of arrangement is often proposed when a dispute exists as to the lien's priority, but the parties do not want to pass up an impending sale that would be financially advantageous. It also gives the Service greater flexibility in handling difficult collection problems.
 - c) The sale proceeds can be deposited (in an interest-bearing account) with an escrow agent pending judicial determination of the priorities. Only the funds in dispute need be placed in escrow. According to IRM 5.12.10.3.4(3) (Sept. 30, 2015), Counsel will review any proposed escrow arrangements.
 - d) Relationship between partial-payment and substitution-of-proceeds-of-sale provisions: In Hannon v. City of Newton, 820 F. Supp. 2d 254 (D. Mass. 2011), rev'd, 744 F.3d 759 (1st Cir. 2014), the district court discussed, at

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length, its view of the differences between subsections (b)(2)(A) and (b)(3) of section 6325, ultimately concluding that when the Service discharges property pursuant to subsection (b)(2)(A) rather than (b)(3), the Service gives up its priority claim to the proceeds of the sale of the discharged property. On appeal, the First Circuit adopted the government's position and explained that subsection (b)(3) is not the exclusive means for maintaining liens on the proceeds of a sale; rather, it creates a procedure to facilitate the sale of encumbered property when there is a dispute as to the priority of federal tax liens. But see Candor v. United States, 1 F. Supp. 3d 1076 (S.D. Cal. 2014) (adopting the district court's analysis in Hannon).

- e) I.R.M. section 5.17.5.17.5 (Dec. 14, 2007) provides background on discharges issued under section 6325(b)(3) and how claimants can bring a claim under section 7426(a)(3) for the surplus proceeds.

5. Discharge of property owned by someone other than the taxpayer - § 6325(b)(4)

- a) Basis for this provision – United States v. Williams, 514 U.S. 527 (1995)

- (1) The Service made an assessment against the taxpayer that gave rise to a federal tax lien on all of his property—including the house he co-owned with his wife. In anticipation of divorce, the taxpayer deeded his interest the house to his wife. The Service filed an NFTL. The wife attempted to sell the house. But the NFTL hindered the sale; the purchaser threatened to sue the wife if the sale didn't go through. So the wife authorized a disbursement from the sale proceeds to the Service. The wife filed a refund claim, which the Service denied. The wife then filed a refund suit under 28 U.S.C. § 1346.
- (2) The government argued that only the taxpayer can sue for refund. But the Supreme Court held that the wife had standing to bring a refund suit under section 1346, because she was the party who paid the tax even though the liability had not been assessed against her. The Court noted that holding otherwise would leave such third parties without a meaningful remedy, as they could not bring a wrongful levy suit (without levy), a quiet title action may not be expeditious, and the Service was not obligated to enter into a lien substitution agreement under section 6325(b)(3).
- (3) Congress enacted sections 6325(b)(4) and 7426(a)(4) in response to Williams.

- b) Obtaining a discharge under section 6325(b)(4)

- (1) In response to Williams, Congress enacted sections 6325(b)(4) and 7426(a)(4) as part of the IRS Restructuring and Reform Act of 1998.

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- (2) Under section 6325(b)(4)(A), the Service must issue a certificate of discharge to the owner of property subject to the tax lien the owner:
 - (a) deposits with the Service an amount of money equal to the value of the interest of the United States in the property as determined by the Service, or
 - (b) furnishes a bond acceptable to the Service equal in amount to the value of the interest of the United States in the property as determined by the Service.
- (3) The owner must be someone other than the taxpayer whose liability gave rise to the lien at issue. I.R.C. § 6325(b)(4)(D). But someone who co-owns property along with the taxpayer may seek a discharge under section 6325(b)(4). Treas. Reg. § 301.6325-1(b)(4)(i).
- (4) The Service must refund the amount deposited (with interest) or release the bond if it determines that
 - (a) the liability giving rise to the lien can be satisfied from other sources (Treas. Reg. § 301.6325-1(b)(4)(ii) specifies that this is the entire tax liability, not just the portion equal to the government's interest in the property); or
 - (b) (i) the value of the lien interest in the property is less than previously determined. I.R.C. § 6325(b)(4)(B).
- (5) The issuance of a refund or the release of a bond must be preceded by a written request on the part of the third-party owner. See Treas. Reg. § 301.6325-1(b)(4)(iii).
- (6) Under section 6503(f)(2), the statute of limitations on collection is tolled by a person becoming entitled to a certificate of discharge under section 6325(b)(4).
- (7) For property subject to a federal tax lien, the government's position is that section 6325(b)(4) provides the sole remedy available to third parties who seek to discharge the property from the lien. See Revenue Ruling 2005-49 (2005-30 I.R.B. 125) (Williams does not apply in wrongful levy situations) and Revenue Ruling 2005-50 (2005-30 I.R.B. 124) (third parties may no longer file Williams refund suits under 28 U.S.C. § 1346).

c) Challenging the IRS's Value Determination

- (1) Under section 7426(a)(4), the third-party owner of the property receiving the certificate of discharge under section 6325(b)(4) may challenge the Service's determination of value by bringing an action in

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district court within 120 days after the day upon which the certificate was issued. This is the sole judicial means available to a third-party owner whose property is subject to a lien to obtain a refund of a deposit or a release of a bond in exchange for a discharge of the lien from the property. Treas. Reg. § 301.7426-1(a)(4).

- (2) It is the Service's position that a person not liable for the underlying tax may not file a refund action. Rev. Rul. 2005-50. This position has generally been upheld by courts that have addressed the issue. See Munaco, 522 F.3d 651; see also EC Term of Years Trust v. United States, 550 U.S. 429 (2007) (holding that wrongful levy action pursuant to section 7426(a)(1) was the claimant's exclusive remedy and declining to expand its holding in Williams); Four Rivers Invs. v. United States, 77 Fed Cl. 592 (2007); City of Richmond, Kentucky v. United States, 348 F. Supp. 2d 807 (E.D. Ky. 2004). In circumstances where a third party has paid the tax liabilities of another under duress, however, courts may assert jurisdiction on a theory of implied contract rather than hearing the case as a refund suit. See Robinson v. United States, 95 Fed. Cl. 480, 488 (Fed. Cl. 2011). A court has also permitted a third party to bring suit under section 1346(a)(1) who attempted to comply with the procedures of section 6325(b)(4) but the Service erroneously issued a certificate of release rather than a certificate of discharge, thus leaving the third party without a remedy. See Streeter v. United States, 150 F. Supp. 3d 82 (D. Mass. 2015).
- (3) Under section 7426(h), the third-party owner of the property may, recover damages if any Service officer or employee has recklessly, intentionally, or negligently disregarded any provision of the Internal Revenue Code, which caused the damages.
- (4) For more information about suits under section 7426, including a discussion of the extent to which the section precludes third-party owners from seeking relief by way of a refund suit, see Lesson 13.

C. Miscellaneous Discharge Issues

1. Requests for discharge in bankruptcy: The bankruptcy court has inherent power to sell property under its jurisdiction free and clear of liens, with the liens attaching to proceeds in the same order of priority. Notwithstanding recordable court orders to this effect, purchasers frequently request discharges. IRM 5.12.10.4.1, *Certificate of Discharge in Bankruptcy Court Sales*, provides that discharges can be issued in these situations.
2. Exceptions to statutory discharge procedures: Statutory conditions of discharge

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are not necessarily followed when a settlement conditioned on the issuance of a certificate of discharge is entered into by the Attorney General.

3. Special provisions for other federal agencies: Special provisions exist for the Veterans Administration, the Small Business Administration, and the Federal Housing Administration to obtain discharges of junior liens to reduce litigation costs and make the property readily marketable. Sections 5.12.10.4.4.1 (Sept. 30, 2015) and 5.12.10.4.4.2 (Sept. 30, 2015) provide more information on these provisions.

VI. WITHDRAWAL

A. Background

1. Section 6323(j)(1) provides that the Service may withdraw an NFTL under certain circumstances. Once an NFTL is withdrawn, the provisions of the Internal Revenue Code “shall be applied as if the withdrawn notice had not been filed.”
2. An NFTL may be withdrawn in the following circumstances:
 - a) the filing of the NFTL was premature or otherwise not in accordance with administrative procedures;
 - b) the taxpayer has entered into an installment agreement, unless the agreement provides otherwise;
 - c) the withdrawal of the NFTL will facilitate the collection of the liability; or
 - d) with the consent of the taxpayer or the National Taxpayer Advocate, the withdrawal will be in the best interests of the taxpayer and the United States.
3. The Office of Chief Counsel has taken the position that the Service may withdraw an NFTL after the underlying lien has been released on the grounds that the filing was improper or that withdrawal would be in the best interest of the taxpayer. This was not always the case. From 2006 to 2012, the Service would not withdraw an NFTL after the underlying lien had been released because issuing a post-release withdrawal “may cause confusion for the person receiving the documents because the withdrawal certificate states that the underlying lien remains in effect while the lien release states it has been released.” I.R.M. 5.12.3.37(3) (2006). Increasingly, taxpayers have sought withdrawal of NFTLs after the underlying liens have been released. Their rationale is that withdrawal of an NFTL improves the taxpayer’s credit history and potentially increases the public confidence of the taxpayer’s business as a result. They claim that the withdrawal of the NFTL has the effect of removing the lien from the credit report.

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In advice issued in late 2009, the Office of Chief Counsel took the position that the Service is not legally prohibited from withdrawing an NFTL after the underlying lien has been released. Section 5.12.9.9 (Dec. 7, 2015) of the I.R.M. provides guidance on handling requests for withdrawal after release.

4. The withdrawal of an NFTL is discretionary, not mandatory. See Berkery v. Commissioner, T.C. Memo. 2011-57; Treas. Reg. § 301.6323(j)-1(c). Although a decision to deny a withdrawal request may be reviewable by the Tax Court, the Court will not substitute its judgment for that of the settlement officer who acted on the request. Hughes v. Commissioner, T.C. Memo. 2011-294.
5. Section 6323(j)(2) provides that if the taxpayer so requests, the Service will attempt to notify credit reporting agencies, financial institutions, and creditors of the withdrawal of the NFTL.
6. Several parts of the IRM address withdrawals of NFTLs. See, e.g., IRM 5.12.9, Withdrawal of Notice of Federal Tax Lien; IRM 5.17.2.8.7.1, Withdrawal of Notice of Federal Tax Lien After Lien Release; IRM 5.17.2.8.7.2, Withdrawal of Notice of Federal Tax Lien When Direct Debit Installment Agreement (DDIA) is in Effect.

VII. OTHER LIEN-RELATED CERTIFICATES

A. Certificate of Subordination

1. Under section 6325(d), a lien may be subordinated to another interest if—
 - a) an amount equal to the amount of the lien or interest to which the certificate subordinates the tax lien is paid; or
 - b) the Service believes that subordination will ultimately result in an increase in the amount realized by the government from the property subject to the lien and will facilitate the ultimate collection of the liability.
2. The lien under section 6324B may be subordinated if the Service believes the government will be adequately secured after the subordination. Treas. Reg. § 301.6325-1(d)(3).
3. Examples:
 - a) A security interest is given priority over the lien to facilitate making improvements on the subject property.

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- b) A security interest is given priority to facilitate crop harvesting.
- c) In each example, the value and marketability of the property subject to the lien is increased. See Treas. Reg. § 301.6325-1(d)(2)(ii).
- 4. Procedures for applications for certificates of subordination are provided in IRM 5.12.10.7, *Applications for Discharge and Subordination Certificates*. See Pub. 784, How to Prepare an Application for a Certificate of Subordination of Federal Tax Lien, and Pub. 1153, How to Apply for a Certificate of Subordination of Federal Estate Tax Lien.
- 5. In a collection due process hearing in which the taxpayer has requested subordination, Appeals must determine whether subordination would ultimately facilitate collection of the tax liability. See *Alessio Azzari, Inc. v. Commissioner*, 136 T.C. 178 (2011).

B. Certificate of Nonattachment

- 1. Under section 6325(e), a certificate of nonattachment is issued where any person other than the taxpayer may be injured by the appearance, through similarity of names or otherwise, that a notice of lien refers to such person. See IRM 5.12.10.13, *Certificate of Non-Attachment*. See also Pub. 1024, How to Prepare an Application for a Certificate of Nonattachment of Federal Tax Lien.
- 2. A certificate of nonattachment may be revoked in the same manner as a certificate of release. I.R.C. § 6325(f)(2).

2018 GL-1 Instruction Assigned to David Lau (CC:SB)

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Revised (February 2018)