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## MANAGERIAL APPROVAL FOR LIENS: Require Managerial Approval Prior to Filing a Notice of Federal Tax Lien in Certain Situations

### PROBLEM

One of the IRS's most significant powers is its authority to file a Notice of Federal Tax Lien (NFTL) in the public records when a taxpayer owes past due taxes. The NFTL protects the government's interests in a taxpayer's property against subsequent purchasers, secured creditors, and junior lien holders.<sup>1</sup> Unlike most other creditors, the IRS does not need a judgment from a court to file an NFTL.<sup>2</sup> When properly applied, the IRS's lien authority can be an effective tool in tax collection. However, when the IRS uses its authority improperly, NFTLs can needlessly harm taxpayers and undermine long-term tax collection.<sup>3</sup>

Concerned about the serious impact liens can have on a taxpayer's life and the hardship they can cause,<sup>4</sup> Congress enacted § 3421 of the IRS Restructuring and Reform Act of 1998 (RRA 98) to preclude the IRS from "abusively us[ing] its liens-and-seizure authority."<sup>5</sup> The law requires the IRS to adopt procedures in which an employee's determination to file an NFTL would, "where appropriate," be approved by a supervisor and to set out disciplinary actions when such approval is not obtained.<sup>6</sup>

The IRS has deemed that it is rarely "appropriate" to require such approval, because it has made virtually no adjustments to its procedures along the lines of what Congress directed in enacting § 3421 of RRA 98. Instead, the IRS has adopted a collection strategy that often relies on the *broad* use of its lien authority.<sup>7</sup> Notably, the IRS has eased previous restrictions on NFTL filings by allowing lower-graded employees to file NFTLs without managerial approval.<sup>8</sup> The IRS also flipped Congress' intent on its head by requiring employees to obtain managerial approval if they determine *not* to file an NFTL or defer filing in many circumstances.<sup>9</sup> Further, the IRS never established appropriate disciplinary actions for employees who fail to secure managerial approval to file an NFTL when such approval is required (*i.e.*, Revenue Officers below GS-9).<sup>10</sup>

1 Internal Revenue Code (IRC) §§ 6321, 6322, and 6323(a).

2 *Id.* IRS collection actions are either taken by the Automated Collection System (ACS) or Revenue Officers (ROs). ROs work in field offices and can send letters, issue liens and levies, and answer calls. ACS is a computerized inventory system that sends taxpayers notices demanding payment, issues liens and levies, and answers telephone calls in an effort to resolve balance due accounts and delinquencies.

3 See Most Serious Problem: *MANAGERIAL APPROVAL FOR LIENS: The IRS's Administrative Approval Process for Notices of Federal Tax Lien Circumvents Key Taxpayer Protections in RRA 98*, *supra*.

4 IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Finance, 105th Cong., 2d Sess. (1998) (see, e.g., statements of Nina E. Olson, Executive Director of the Community Tax Law Project in Richmond, Virginia).

5 RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 685, 758 (1998). See also S. Rep. No. 105-174, at 78 (1998); Unanimous Consent Request - H.R. 2676, 143 Cong. Rec. S12230-02, at S12231 (statement of Senator Roth).

6 RRA 98, Title III, § 3421(b), Pub. L. No. 105-206, 112 Stat. 685, 758 (1998).

7 Internal Revenue Manual (IRM) 5.12.2.6, *NFTL Filing Criteria* (Oct. 14, 2013).

8 IRM 1.2.44.5 *Delegation Order 5-4* (Rev. 3), (May. 9, 2013); IRM 5.19.4.5.3.4 *When Filing an NFTL Requires Approval* (Jan. 1, 2015).

9 IRM 5.12.2.5.3, *NFTL "Do-Not-File" and Filing Deferral Determination Approvals* (Jan. 1, 2015); IRM 5.19.4.5.2.1, *Do Not File Approvals* (Aug. 4, 2014).

10 See IRS response to TAS research request (Jul. 31, 2014); IRM 5.12.2.5.2, *NFTL Filing Determination Approvals* (Oct. 14, 2013).

The IRS's decision to ignore Congress's directive and rely on a broad NFTL filing policy has had significant consequences for both the IRS and taxpayers and compromises a taxpayer's rights to *privacy* and *to a fair and just tax system*.<sup>11</sup> As illustrated by the findings in several significant Taxpayer Advocate Service (TAS) research studies, these expanded NFTL filing policies have not only been ineffective in collecting revenue, but impair current and future payment compliance and the taxpayer's earnings. These policies have particularly damaging effects on taxpayers whose accounts the IRS has classified as "currently not collectible" (CNC) because of economic hardship.<sup>12</sup>

## EXAMPLE

A taxpayer was assessed a tax liability of \$15,000 and placed in CNC (hardship) status because he has no assets and collection action would render him unable to pay his basic living expenses. However, since the liability is over \$10,000, the IRS Automated Collection System (ACS) automatically files an NFTL, which is never reviewed by an ACS supervisor.<sup>13</sup> This NFTL filing damages the taxpayer's credit report, making it difficult for him to find an apartment to rent (many landlords check a potential tenant's credit and have policies against renting to an individual with a poor credit rating or unpaid debt).

## RECOMMENDATIONS

To ensure that NFTLs are given due consideration before being filed, the National Taxpayer Advocate recommends that Congress:

- Codify § 3421 of RRA 98 to require IRS employees to obtain managerial approval prior to filing an NFTL where it is likely that the NFTL will cause a hardship, will do little to protect the government's interest in the taxpayer's property or rights to property, or will impair the taxpayer's ability to pay the tax, including the following three categories:
  1. The taxpayer's income falls below 250 percent of the federal poverty level;
  2. The taxpayer's account has been placed in currently not collectible status due to economic hardship; or
  3. The taxpayer has entered into an installment agreement (IA) with the IRS.
- Require the IRS supervisor, as part of the managerial approval process, to consider the following:
  1. Whether the NFTL would attach to property;
  2. Whether the benefit of filing an NFTL for the government would outweigh the harm to the taxpayer; and
  3. Whether the NFTL filing will jeopardize the taxpayer's ability to comply with the tax laws in the future.

11 See IRS, Taxpayer Bill of Rights, available at <http://www.irs.gov/Taxpayer-Bill-of-Rights> and Publication 1, Your Rights as a Taxpayer (June 2014).

12 See National Taxpayer Advocate 2012 Annual Report to Congress, vol. 2, 105-29 (*Investigating the Impact of Liens on Taxpayer Liabilities and Payment Behavior*); National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 91-111 (*Estimating the Impact of Liens on Taxpayer Compliance Behavior and Income*); National Taxpayer Advocate 2009 Annual Report to Congress vol. 2, 1-18 (*The IRS's Use of Notices of Federal Tax Lien*). See also IRM 1.2.14.1.14 *Policy Statement 5-71* (Nov. 19, 1980). Taxpayer accounts are reported as currently not collectible when the taxpayer has no assets or income, which by law, are subject to a levy.

13 IRM 5.19.4.5.3.2 (3), *Currently Not Collectible* (Jan. 1, 2015). In general, an NFTL is filed when BOTH of the following conditions exist: The aggregate assessed balance is at or above \$10,000 and the account is being closed using unable to locate, unable to contact, or hardship provisions.

- Require the IRS take disciplinary action against employees who fail to secure managerial approval prior to filing an NFTL in the situations required by law.

## PRESENT LAW

During the RRA 98 legislative process, it became evident that Congress and leaders in the tax community were concerned about how the IRS was using its lien authority and its impact on taxpayers. Specifically, the Joint Committee on Taxation observed “the imposition of liens, levies, and seizures may impose significant hardships on taxpayers” and “that extra protection in the form of an administrative approval process is appropriate.”<sup>14</sup> Leaders in the tax community, such as the National Association of Enrolled Agents, recommended that Congress restrict IRS employees’ ability to file NFTLs without proper managerial reviews, thereby ensuring these actions were appropriate and suitable.<sup>15</sup>

To address these concerns, Congress enacted § 3421 in RRA 98.<sup>16</sup> Under this provision, where deemed appropriate, a determination by an employee to file a lien would be approved by an IRS supervisor who would:

- Review the taxpayer’s information;
- Verify that a balance is due; and
- Affirm that the action proposed is appropriate in light of the taxpayer’s circumstances, considering the amount due and the value of the property or right to property.<sup>17</sup>

Failure to follow these procedures should result in appropriate disciplinary action against the responsible supervisor or employee.<sup>18</sup> This section became effective upon passage of the Act with one exception; it did not apply to actions taken under the IRS ACS until January 1, 2001.<sup>19</sup>

## REASONS FOR CHANGE

As mentioned above, the NFTL filing negatively impacts a taxpayer’s credit history,<sup>20</sup> having the potential of reducing a taxpayer’s credit score by 100 points,<sup>21</sup> and has a long-lasting effect on the taxpayer’s financial viability. For example, the existence of the NFTL filing, and the information contained in the

14 Joint Committee on Taxation, *General Explanation of Tax Legislation Enacted in 1998*, JCS-6-98 (Nov. 24, 1998). See also RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 695, 758 (1998). See also S. REP. No. 105-174, at 78 (1998); Unanimous Consent Request - H.R. 2676, 143 CONG. REC. S12230-02, at S12231.

15 *Exploring the Development of Taxpayer Bill of Rights Legislation, Hearing Before the House Comm. On Ways and Means*, 104th Cong. (1995) (statement of Joseph F. Lane, Enrolled Agent). See also IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Finance, 105th Cong., 2d Sess. 375 (1998) (statement of Bruce Strauss, Enrolled Agent) (suggesting among other things that tax liens filings “must all be reviewed by an independent IRS quality review function prior to implementation of the decision.”).

16 RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 685, 758 (1998).

17 RRA 98, Title III, § 3421(b), Pub. L. No. 105-206, 112 Stat. 685, 758 (1998).

18 RRA 98, Title III, § 3421(a)(2), Pub. L. No. 105-206, 112 Stat. 685, 758 (1998).

19 RRA 98, Title III, § 3421(c), Pub. L. No. 105-206, 112 Stat. 685, 758 (1998).

20 It is difficult to speculate as to the degree to which an NFTL will affect a taxpayer’s credit score, because every individual’s situation is different, and there are many different credit-scoring systems. Therefore, the impact on one system could be very different from another because the numeric scales are different. See Experian, *A World of Insight*, available at <http://www.experian.com/ask-experian/20080903-tax-liens-and-credit-scores.html> (last visited Dec. 12, 2014). However, a recent IRS study conducted by Experian found that NFTLs have a minimal impact on a consumer’s credit score in certain situations. See IRS and Experian Decision Analytics, *Federal Tax Lien Impact Study* (Mar. 31, 2014).

21 Written response from Vantage Score® (Sept. 17, 2009). The impact of the NFTL filing is greatest upon the initial filing and diminishes over time.

notice, are included in the consumer (credit) reports<sup>22</sup> and therefore can impair a taxpayer's ability to obtain financing,<sup>23</sup> find or keep a job,<sup>24</sup> and secure affordable housing or insurance.<sup>25</sup> It can also hamper the taxpayer's ability to stay compliant and obtain credit needed to pay preexisting tax debts.<sup>26</sup>

The taxpayer may experience effects of the NFTL filing in the long term, because an NFTL filing will remain on a taxpayer's credit report for years, or even indefinitely. Specifically, "paid tax liens" appear on credit reports for seven years from the date of payment,<sup>27</sup> and unpaid liens may remain on the report indefinitely, even when the underlying lien becomes legally unenforceable (*e.g.*, because the statutory limitations period for collection has expired and the lien self-released or the lien is legally satisfied as a result of an accepted offer in compromise (OIC) or the IRS accepts a bond).<sup>28</sup> When a taxpayer has little or no ability to pay and no assets from which to collect, an NFTL filing may further damage his or her financial viability and generate significant downstream costs for the government.<sup>29</sup>

Aware of the serious impact and hardship NFTLs can cause in a taxpayer's life,<sup>30</sup> Congress enacted § 3421 of RRA 98 to preclude the IRS from "abusively us[ing] its liens-and-seizure authority."<sup>31</sup> However, relying

22 The term "consumer report" is defined in the Fair Credit Reporting Act (FCRA), § 603(d), 15 USC § 1681a(d). Hereinafter, we will use the more commonly used term "credit report."

23 Some lenders decline to extend credit to a taxpayer if the IRS has filed an NFTL against the taxpayer's property. Others will charge substantially higher rates, even if the lien is subordinated. See, *e.g.*, GMAC Factoring Agreement, available at <http://contracts.onecle.com/arbinet/gmac.factor.2003.02.01.shtml> (last visited Dec. 13, 2014).

24 Some licensing boards require members to maintain a clean credit history and some employers require employees to do so as a condition of employment. See, *e.g.*, Form U4, *Uniform Application for Broker-Dealer Registration*, Q14M (May 2009), available at <http://www.finra.org/web/groups/industry/@ip/@comp/@regis/documents/appsupportdocs/p015112.pdf> (last visited Dec. 13, 2014).

25 See also IRS Publication 594, *What You Should Know About the IRS Collection Process* 4 (Apr. 2012) (recognizing the taxpayer may not be able to obtain a loan to buy a house or a car, get a new credit card, or sign a lease as result of the NFTL filing).

26 See, *e.g.*, IRC § 6323(d) (providing that security protection only extended to the lender for disbursements made within 45 days after the filing of the NFTL, or until the lender is provided actual notice of the NFTL); IRC § 3505(b) (holding a lender providing funds for the ongoing operation of a business potentially liable for unpaid withholding taxes if certain criteria are met).

27 FCRA, § 605(a)(3), 15 USC § 1681c(a)(3). See also Federal Trade Commission, Statement of General Policy or Interpretation; Commentary on the FCRA, 55 Fed. Reg. 18804, 18818 (May 4, 1990). The filing of a release will be noted on the credit report but does not necessarily impact the credit score in a significant way.

28 As a matter of policy, Experian keeps unpaid tax liens on a credit report for 15 years while Equifax and Transunion credit reports reflect them indefinitely. See <http://www.transunion.com/personal-credit/credit-issues-bad-credit/what-affects-your-credit-score.page>; <http://www.experian.com/blogs/ask-experian/2007/05/16/how-long-public-records-stay-on-your-credit-report/>; <http://blog.equifax.com/credit/faq-how-long-does-information-stay-on-my-credit-report/> (last visited on Dec. 13, 2014). For example, most NFTLs are self-releasing, *i.e.*, the notice indicates that unless the IRS re-files it by the listed date, the notice operates as a certificate of release under IRC § 6325(a). IRC § 6325(a) also provides for a release of liens because the underlying liability became legally unenforceable or the IRS accepted a bond.

29 See T. Keith Fogg, *Systemic Problems with Low-Dollar Lien Filing*, 2011 TNT 194-9 (Oct. 6, 2011); National Taxpayer Advocate 2011 Annual Report to Congress 109-28. A further consequence of a lien's damage to a taxpayer's financial viability may be a need for unemployment benefits, food stamps and the like, thus increasing societal cost.

30 *IRS Restructuring: Hearings on H.R. 2676 Before the S. Comm. on Finance*, 105th Cong., 2d Sess. (1998) (see, *e.g.*, statement of Nina E. Olson, Executive Director of the Community Tax Law Project in Richmond, Virginia).

31 RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 685, 758 (1998). See also S. Rep. No. 105-174, at 78 (1998); Unanimous Consent Request - H.R. 2676, 143 Cong. Rec. S12230-02, at S12231 (statement of Senator Roth).

on the word “appropriate” in § 3421, the IRS has made virtually no adjustments to its procedures along the lines of what Congress directed. Specifically, since Congress enacted § 3421, the IRS has:

1. Restated its policy that only ROs below the GS-9<sup>32</sup> level must receive managerial approval prior to filing an NFTL.<sup>33</sup> The IRS said the costs and administrative burden of expanding the § 3421 protection to other situations outweighed the taxpayer’s interest.<sup>34</sup> This approval requirement for ROs below the GS-9 level applies to only less than one percent of ROs.<sup>35</sup>
2. Eased managerial approval requirements for lien filings. Specifically, despite the fact that Congress gave the IRS more than two years to determine how to implement § 3421 of RRA 98 for ACS,<sup>36</sup> the only change the IRS made was to grant ACS employees in grades as low as GS-6 the authority to file NFTLs without managerial review.<sup>37</sup> This change was contrary to Congress’s directive and more lax than prior ACS guidance, which required GS-7 employees and below to obtain approval from either a senior RO or a manager to file an NFTL.<sup>38</sup> Presently, ACS files about one third of NFTLs and very few require managerial approval<sup>39</sup> (*i.e.*, less than 6.2 percent of ACS employees are below GS-6).<sup>40</sup>
3. Required all ACS employees and ROs, regardless of grade level, to obtain managerial approval if they determine not to file a lien in cases that meet specified criteria.<sup>41</sup>
4. Never established disciplinary action for employees who fail to secure managerial approval where required.<sup>42</sup>

Essentially, the IRS ignored a congressional directive and elected to adopt an even broader NFTL filing policy, rather than one that emphasizes review of taxpayers’ particular facts and circumstances to ensure the NFTL will attach to assets and not cause hardship. The IRS files many NFTLs systemically, pursuant to “business rules” that require automatic NFTL filing or lack substantive human review.<sup>43</sup> This systemic filing has contributed to a significant increase in the number of NFTLs over the last 15 years. For

32 The General Schedule (GS) classification and pay system covers the majority of civilian white-collar federal employees (about 1.5 million worldwide) in professional, technical, administrative, and clerical positions. U.S. Office of Personnel Management, <http://www.opm.gov/policy-data-oversight/pay-leave/pay-systems/general-schedule/> (last visited on Dec. 4, 2014). Within the Collection function, a “GS-9” employee is relatively junior.

33 IRM 5.12.2.5.2, *NFTL Filing Determination Approvals* (Oct. 14, 2013).

34 Memorandum from Assistant Commissioner (Collection) (July 30, 1998) (concluding section 3421 does not require supervisory review of all collection actions but allows the IRS discretion to determine where such review would be appropriate); Memorandum to Counsel to the National Taxpayer Advocate from Chief, Branch 1, General Litigation Division, Ref. No. GL-122444-98 (Dec. 23, 1998) (same).

35 IRS Human Resources Reporting Center on Revenue Officers (Aug. 13, 2013). As of July 26, 2014, less than one percent of ROs were below the GS-9 level. GS-8 and lower revenue officers totaled two out of 3,742 ROs. Also, the NFTLs issued by ROs below the GS-9 level may still not be reviewed by a manager. The IRM permits a manager to assign the lien review responsibility to another RO at an “appropriate” grade level. (emphasis added). See IRM 5.12.2.7, *Approval of Lien Notice Filing* (Oct. 14, 2013).

36 RRA 98, Title III, § 3421(a)(2), Pub. L. No. 105-206, 112 Stat. 758 (1998).

37 IRM 1.2.44.5, *Delegation Order 5-4 (Rev. 3)* (May. 9, 2013); IRM 5.19.4.5.3.4, *When Filing an NFTL Requires Approval* (Jan. 1, 2015).

38 Email from former IRS Chief Compliance Officer to the National Taxpayer Advocate (Nov. 2, 2009) (on file with TAS).

39 IRS No 5000-25, Lien Report, FY 2013 and 2014. ACS filed 204,279 and 198,682 liens out of 602,005 and 535,580 total lien filings for FY2013 and FY2014, respectively.

40 IRS Human Resources Reporting Center, Position Report Query, ACS employees (no exec), All GSs and GS-5 and less, run date 11/14/2014. As of Nov. 1, 2014, 159 employees out of 2,571 ACS employees were below the GS-6 level.

41 IRM 5.19.4.5.2, *Do Not File Decisions* (Jan. 1, 2015).

42 IRS response to TAS information request (Jul. 31, 2014).

43 IRM 5.19.4.5.3.2, *Filing Criteria* (Jan 1, 2015).

example, NFTL filings rose by about 219 percent from fiscal year (FY) 1999 to 2014,<sup>44</sup> yet the Collection function is collecting slightly more in real 2014 dollars than in 1999.<sup>45</sup>

The ACS function's systemic reliance on its collection action as a means to collect revenue has been particularly ineffective. In FY 2014, ACS collected only about 5.9 percent of the dollars placed in its inventory, took in about 5.5 percent of those inventory dollars through refund offsets,<sup>46</sup> and ultimately transfers much of its inventory to the Queue.<sup>47</sup>

As TAS research studies have shown, the IRS's reliance on its NFTL filing authority was unproductive and negatively impacts future compliance.<sup>48</sup> More importantly, the automatic filing of an NFTL imposes further harm on taxpayers who are already experiencing hardship. When a taxpayer has little or no ability to pay and has no assets from which to collect, an NFTL may further impede his or her financial viability and ultimately can undermine tax revenue and future compliance. In addition, the government has a secondary interest at stake. If the NFTL badly damages the taxpayer and the taxpayer's family by driving up the taxpayer's costs or renders him or her unemployed or underemployed, the government may be forced to provide a social safety net in the form of unemployment benefits, food stamps, and the like, thus increasing societal cost and raising everyone's share of taxes.

However, these considerations have not deterred the IRS from filing NFTLs against taxpayers in CNC status. Taxpayer accounts placed in CNC status because the IRS was either unable to contact or locate the taxpayer, or determined the taxpayer was in economic hardship, will be subject to NFTLs as long as certain requirements are met (*i.e.*, the tax liability is \$10,000 or greater).<sup>49</sup> Such NFTL filing on CNC taxpayers is especially concerning in light of a TAS research study that showed NFTLs were responsible for only \$2 of every \$10 in payments collected from taxpayers in CNC status. Nearly \$6 of every \$10 collected from these taxpayers came from refund offsets, which do not require an NFTL filing.<sup>50</sup> Nonetheless, the same study showed the IRS filed NFTLs against more than 72 percent of CNC taxpayers suffering economic hardship.<sup>51</sup> The study also found CNC hardship taxpayers, on average, ended up owing about 50 percent more to the IRS in 2010 than at the time of lien (or proxy lien) filing.<sup>52</sup>

Thus, Congress should codify § 3421 of RRA 98 in the Internal Revenue Code, because the IRS has largely ignored the directive it set out in RRA 98, and contrary to Congress' directive, has adopted a broad NFTL filing strategy that avoids any managerial oversight in most instances. This strategy has achieved

44 IRS Data Book, Table 16 (Nov. 19, 2014). NFTL filings were 168,000 and 535,580 for FYs 1999 and 2014, respectively.

45 *Id.* When adjusted for inflation (converted to 2014 dollars) the IRS collected about \$32.1 billion in FY 1999 and about \$34.2 billion in FY 2014.

46 In FY 2014, ACS collected \$3,107,887,286, and another \$2,850,701,610 were refund offsets, out of \$52,254,945,879 placed in ACS in FY2014. IRS NO 5000-2, Part 1 - TDAs, ACS/CS TDAs.

47 The Queue is a holding inventory where collection cases sit, based on business rules and available resources, usually after being in ACS, and before being assigned to the Collection Field function or reassignment to ACS.

48 National Taxpayer Advocate 2011 Annual Report to Congress, vol. 2, 93-112 (*Estimating the Impact of Liens on Taxpayer Compliance Behavior and Income*). For instance, for the full period analyzed by TAS research (2002–2010), NFTL taxpayers were less likely to file required returns, with the increased likelihood of non-filing ranging between about one and three percent.

49 IRM 5.19.4.5.3.2(3), *Currently Not Collectible* (Jan. 1, 2015). Generally an NFTL is filed when BOTH of the following conditions exist: Aggregate assessed balance is at or above \$10,000 and account is being closed using unable to locate (cc03), unable to contact (cc12) or hardship (cc24 through 32) provisions.

50 National Taxpayer Advocate 2009 Annual Report to Congress vol. 2, 1-18.

51 *Id.*

52 National Taxpayer Advocate 2012 Annual Report to Congress, vol. 2, 108-30 (*Investigating the Impact of Liens on Taxpayer Liabilities and Payment Behavior*).

poor collection results, harms taxpayers experiencing economic hardship, and negatively impacts future compliance.

## EXPLANATION OF RECOMMENDATIONS

The IRS was already instructed by Congress in § 3421 of RRA 98 to identify where it would be appropriate to require managerial approval prior to filing an NFTL. The IRS could fulfill Congress' directive administratively, and earlier in this report, the National Taxpayer Advocate provided such administrative recommendations.<sup>53</sup> However, because the IRS has neglected to address Congress' directive over the past 15 years, the National Taxpayer Advocate recommends that Congress codify § 3421 in the IRC and further clarify when managerial approval is required before filing an NFTL.

Congressional clarification requiring managerial approval in specific circumstances will better ensure that a legitimate basis for the NFTL exists, for example, that the NFTL will attach to property or rights to property and will ultimately facilitate collection. Additionally, it also would protect taxpayers' *right to a fair and just tax system* and *right to privacy*, by creating an NFTL policy that considers each taxpayer's individual facts and circumstances, and that IRS actions will be no more intrusive than necessary.<sup>54</sup>

The National Taxpayer Advocate understands requiring managerial approval prior to filing all liens is not feasible, but believes requiring the IRS to mandate managerial approval prior to filing a lien in specific situations would prevent unnecessary and harmful NFTLs. As TAS has illustrated in its research studies on NFTL filings discussed above, NFTLs are particularly damaging to low income taxpayers, and are often less effective than IAs. In light of these findings, it would make sense for managerial approval to be required before filing an NFTL in the following situations:

- **Taxpayer's income falls at or below 250 percent of the federal poverty level:** Prior to filing an NFTL, an employee could review information and determine whether the taxpayer's income falls at or below 250 percent of the federal poverty level.<sup>55</sup> By identifying these taxpayers, the IRS can presume economic hardship (*i.e.*, inability to pay basic living expenses) and consider whether the NFTL will only cause further hardship.<sup>56</sup> The IRS already makes this presumption when identifying low income taxpayers to filter out of the Federal Payment Levy Program (FPLP).<sup>57</sup>

53 See Most Serious Problem: *MANAGERIAL APPROVAL FOR LIENS: The IRS's Administrative Approval Process for Notices of Federal Tax Lien Circumvents Key Taxpayer Protections in RRA 98*, *supra*.

54 IRM 5.11.1.3.1, *Pre-Levy Considerations* (Aug. 1, 2014). The IRS has emphasized the need for such judgment in the context of making a levy determination by instructing ROs to exercise good judgment when making the determination to levy, which means they are to consider the taxpayer's financial condition.

55 To determine a taxpayer's income, employees could review the taxpayer's most recent tax return, or available third-party information, whichever is more recent. See Department of Health and Human Services (DHHS), *The 2014 HHS Poverty Guidelines*, available at <http://aspe.hhs.gov/poverty/14poverty.cfm>. For calendar year 2014, an individual who makes \$11,670 or less is in poverty. This number is then multiplied by 250 percent to determine the 250 percent federal poverty threshold.

56 IRC § 6343(a)(1)(D) requires the IRS to release a levy when it would create an economic hardship due to the financial condition of the taxpayer. Treas. Reg. § 301.6343-1(b)(4) specifies that an economic hardship exists if a taxpayer cannot pay his or her basic living expenses.

57 The FPLP is an automated system the IRS uses to match its records against those of the government's Bureau of the Fiscal Service (BFS) to identify taxpayers with unpaid tax liabilities who receive certain payments from the federal government. In 2011, the IRS finalized and implemented a low income filter. This filter's design was largely based on a TAS study, which tested a filter model that identified and removed from FPLP low income taxpayers the model showed would experience economic hardship. Largely accepting the findings from the TAS study, the IRS designed a filter that excluded taxpayers from the FPLP whose incomes fall below 250 percent of the federal poverty level. National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 46-72 (*Building a Better Filter: Protecting Lower Income Social Security Recipients from the Federal Payment Levy Program*).

- **Taxpayers in CNC-hardship status:** As shown above, taxpayers in CNC-hardship status are often crippled by tax debt, and filing NFTLs against them does little to protect the government's interest, and often makes the taxpayer's situation even worse.<sup>58</sup> The manager can consider whether the NFTL will actually assist in collecting the tax (*i.e.*, there are assets to which the lien will attach) or it will only further harm the taxpayer.
- **Taxpayers in a non-streamlined installment agreement:**<sup>59</sup> Taxpayers in an IA make significant strides toward paying off their tax debts.<sup>60</sup> Filing a lien against these taxpayers may jeopardize their ability to pay, because the NFTL can hinder their earning potential by damaging their credit rating and ability to secure financing or maintain professional licenses.

By making these recommendations, the National Taxpayer Advocate is not prohibiting the IRS from filing a lien against these taxpayers. Instead, having IRS managers involved will ensure an NFTL does not impose an undue hardship on taxpayers, *i.e.*, that liens will be filed in the appropriate instances. Managers would be responsible for considering whether an NFTL will attach to property, whether the benefit to the government outweighs the harm to the taxpayer, and whether the filing will jeopardize the taxpayer's ability to comply with the tax laws in the future. Managerial involvement will further protect the government's interest in the taxpayer's property or rights to property and can prevent impediments to the taxpayer's ability to pay the tax in the long run.

By requiring the IRS to take disciplinary action against employees who fail to secure appropriate managerial approval prior to filing an NFTL, the IRS will be prompted to provide better employee training on the law and will communicate to employees the gravity of the NFTL filing process. It will also confirm the IRS's commitment to protecting taxpayers' rights.<sup>61</sup>

58 National Taxpayer Advocate 2012 Annual Report to Congress, vol. 2, 108-30 (Research Study: *Investigating the Impact of Liens on Taxpayer Liabilities and Payment Behavior*).

59 See IRM 5.14.5.1, *Installment Agreements Overview* (May 23, 2014). 1) Guaranteed agreements: under IRC § 6159(c) taxpayers who meet certain conditions and who have a delinquency \$10,000 or less are entitled to an installment agreement. 2) Streamlined agreement: streamlined agreement criteria may be secured where the aggregate unpaid balance of assessments does not exceed \$25,000 and may be paid off within a 72-month period. Taxpayers who meet this criterion do not need to provide a financial information statement to the IRS. 3) Non-streamlined agreement: agreements that fall outside the parameters of the guaranteed and streamlined IAs.

60 National Taxpayer Advocate 2012 Annual Report to Congress, vol. 2, 108-30 (Research Study: *Investigating the Impact of Liens on Taxpayer Liabilities and Payment Behavior*).

61 For a detailed discussion of appropriate disciplinary actions see Most Serious Problem: *MANAGERIAL APPROVAL FOR LIENS: The IRS's Administrative Approval Process for Notices of Federal Tax Lien Circumvents Key Taxpayer Protections in RRA 98*, *supra*.