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#11**NOTICES OF FEDERAL TAX LIEN (NFTL): The IRS Files Most NFTLs Based on Arbitrary Dollar Thresholds Rather Than on a Thorough Analysis of a Taxpayer's Financial Circumstances and the Impact on Future Compliance and Overall Revenue Collection****RESPONSIBLE OFFICIALS**

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TAXPAYER RIGHTS IMPACTED¹

- *The Right to Challenge the IRS's Position and Be Heard*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

DEFINITION OF PROBLEM

Notices of Federal Tax Lien (NFTLs) establish priority of the government's interest in a tax debtor's property with respect to certain creditors by putting the public, including third-party creditors, on notice of an existing statutory lien.² Several TAS studies show that NFTLs can unnecessarily harm taxpayers and reduce their ability to become or remain compliant with their federal tax filing obligations.³ NFTLs also generate significant downstream costs for the government, often without attaching to any tangible assets.⁴ The IRS files most NFTLs based on an arbitrary dollar threshold of the unpaid liability, with over 21 percent of NFTLs filed without human involvement in determining lien filings,⁵ rather than a thorough analysis of the taxpayer's individual circumstances and financial situation or consideration of the NFTL's impact on future compliance and collected revenue. Even when the taxpayer attempts to initiate contact with the IRS by calling the number provided on the majority of notices, only about one in three taxpayers can get through to the IRS to make payment arrangements prior to the NFTL filing.⁶

1 See Taxpayer Bill of Rights, available at www.TaxpayerAdvocate.irs.gov/taxpayer-rights.

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

3 In fiscal years (FYs) 2009-2012, TAS Research & Analysis investigated the IRS's use of NFTLs and their impact on the compliance behavior of delinquent taxpayers. See National Taxpayer Advocate 2012 Annual Report to Congress vol. 2, 105-30 (TAS Research Study: *Investigating the Impact of Liens on Taxpayer Liabilities and Payment Behavior*); National Taxpayer Advocate 2011 Annual Report to Congress vol. 2, 91-111 (TAS Research Study: *Estimating the Impact on Liens on Taxpayer Compliance Behavior and Income*); National Taxpayer Advocate 2010 Annual Report to Congress vol. 2, 89-100 (*Estimating the Impact of Liens on Taxpayer Compliance Behavior: An Ongoing Research Initiative*); National Taxpayer Advocate 2009 Annual Report to Congress vol. 2, 1-18 (TAS Study: *The IRS's Use of Notices of Federal Tax Lien*).

4 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 (Most Serious Problem: *Changes to IRS Lien Filing Practices Are Needed to Improve Future Compliance, Increase Revenue Collection, and Minimize Economic Harm Inflicted on Financially Struggling Taxpayers*).

5 IRS Collection Activity Report (CAR), NO-5000-25, *Lien Report, September, FY 2015*. In FY 2015, there were 515,247 liens filed, including 4,918 refiled liens, with 202,127 arising in the Automated Collection System (ACS). Approximately 47 percent of ACS NFTLs are filed manually. Small Business/Self-Employed (SB/SE) response to TAS information request (Oct. 19, 2015); IRS CAR, NO-5000-25, *Lien Report, September, FY 2015*.

6 IRS Joint Operations Center (JOC), *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2015) (specifying that 37 percent level of service for the installment agreement line).

The National Taxpayer Advocate has repeatedly expressed concerns regarding the negative impact of the IRS's NFTL filing policies on taxpayers and on future compliance.⁷ The IRS can significantly increase the effectiveness of NFTL filings without needlessly harming taxpayers by replacing the current policy with a cost-efficient algorithm for making NFTL filing determinations incorporating:

- meaningful contact with the taxpayer to obtain financial information and establishing a payment plan;
- thorough analysis of the taxpayer's financial situation, including whether the NFTL will attach to tangible property; and
- the impact of the NFTL on future compliance.

ANALYSIS OF PROBLEM

Background

The IRS's ability to file a NFTL, which protects the government's interest in property against subsequent purchasers, secured creditors, and junior lien holders, is a power unlike that of other creditors, since the IRS does not need to obtain a judgment to file a NFTL.⁸ The filing of a NFTL can significantly damage the creditworthiness of a taxpayer, which can negatively impact the ability to obtain financing for a home or other major purchases, find or maintain a job, secure affordable rental housing or insurance, and pay the tax debt.⁹

Congress recognized the unique nature of a NFTL and, when enacting the IRS Restructuring and Reform Act of 1998 (RRA 98), it precluded the IRS from "abusively us[ing] its liens and seizure authority."¹⁰ Upon assessment of a tax liability, notice to the taxpayer, demand for payment, and the taxpayer's failure to pay, a lien in favor of the United States attaches to the taxpayer's property.¹¹ This statutory lien, known as a "secret lien" because the taxpayer does not usually know it has arisen, attaches to all of the taxpayer's property and rights to property, both real and personal, and to any future property acquired by the taxpayer.¹² However, this "secret lien" does not provide the IRS with priority over other creditors that do not have actual knowledge of the secret lien; thus, the IRS must file a NFTL to establish priority of the

7 See, e.g., National Taxpayer Advocate 2014 Annual Report to Congress 225-36 (Most Serious Problem: *Managerial Approval for Liens: The IRS's Administrative Approval Process for Notices of Federal Tax Liens Circumvents Key Taxpayer Protections in RRA 98*); National Taxpayer Advocate 2012 Annual Report to Congress 403-25 (Most Serious Problem: *Although the IRS "Fresh Start" Initiative Has Reduced the Number of Lien Notices Filed, the IRS Has Failed to Determine Whether Its Lien Policies Are Clearly Supported by Either Increased Taxpayer Compliance or Revenue*); National Taxpayer Advocate 2011 Annual Report to Congress 109-28 (Most Serious Problem: *Changes to IRS Lien Filing Practices Are Needed to Improve Future Compliance, Increase Revenue Collection, and Minimize Economic Harm Inflicted on Financially Struggling Taxpayers*).

8 IRC §§ 6321, 6322, and 6323(a).

9 See National Taxpayer Advocate 2014 Annual Report to Congress 225; see also Heather Struck, *A Bad Credit Score Affects a Lot More Than Credit*, FORBES, Jul. 20, 2011, available at <http://www.forbes.com/sites/heatherstruck/2011/07/20/credit-score-fico-can-hurt-you/>; written response from Vantage Score® (Sept. 17, 2009).

10 RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 758 (1998). See also S. REP. No. 105-174, at 78 (1998); Unanimous Consent Request – H.R. 26767, 143 Cong. Rec. S12230-02, at S12231 (statement of Senator Roth).

11 IRC §§ 6321 and 6322. IRC § 6201 authorizes the IRS to assess all taxes owed, and IRC § 6303 provides that within 60 days of the assessment, the IRS must provide notice and demand payment to any taxpayer liable for an unpaid tax.

12 *Id.* Internal Revenue Manual (IRM) 5.12.1.3, *Creation and Duration* (Oct. 14, 2013). The NFTL is effective as of the date of assessment and continues until the liability is either paid in full or is legally unenforceable. The IRS must release the lien within 30 days after the underlying liability is satisfied or becomes legally unenforceable. IRC § 6325(a)(1). Because the NFTL is a statutory lien — or "secret" lien — third parties have no knowledge of the existence of the underlying debt. IRC § 6321.

The filing of a Notice of Federal Tax Lien (NFTL) can significantly damage the creditworthiness of a taxpayer, which can negatively impact the ability to obtain financing for a home or other major purchases, find or maintain a job, secure affordable rental housing or insurance, and pay the tax debt.

government's interest in the property against subsequent purchasers, secured creditors, and junior lien holders.¹³

In 2011, in response in part to the National Taxpayer Advocate's continued concern over NFTL filing and withdrawal policies, the IRS announced a new effort to help financially struggling taxpayers get a "fresh start."¹⁴ The "Fresh Start Initiative" resulted in several positive changes in how the IRS files and withdraws NFTLs, including increasing the Automated Collection System (ACS) NFTL filing threshold from \$10,000 to \$25,000.¹⁵ However, the IRS continues to file NFTLs automatically based on that threshold, with little management review and without attempting meaningful contact with a taxpayer, doing a financial analysis, or considering the impact on future compliance.¹⁶

Current NFTL Filing Policy Is Based on an Arbitrary Dollar Threshold of the Unpaid Liability Rather Than Focused on Meaningful Contact with the Taxpayer

As stated above, the IRS generally files NFTLs if the aggregate unpaid balance of assessment is over \$10,000, or for accounts in ACS, if the assessment is over \$25,000.¹⁷ Contrary to congressional intent, only the decision to *not* file an NFTL requires managerial approval in most circumstances.¹⁸ Prior to the filing of an NFTL, the IRS must make "reasonable efforts" to contact the taxpayer to "advise [the taxpayer] that an NFTL may be filed if full payment is not made when requested."¹⁹ However, the Internal Revenue Manual (IRM) provides that "reasonable effort" includes "issuance of the statutory assessment notices and the balance due notices sent during

13 See IRC § 6323(f); Treas. Reg. § 301.6323(f)-1; IRM 5.12.1.4, *Purpose and Effect of Filing a Notice of Federal Tax Lien (NFTL)* (Oct. 14, 2013). The IRS must file the NFTL in the correct county or jurisdiction where the taxpayer's property is located.

14 IRS, Media Relations Office, *IRS Announces New Efforts to Help Struggling Taxpayers Get a Fresh Start; Major Changes to Lien Process*, IR-2011-20 (Feb. 24, 2011).

15 National Taxpayer Advocate 2012 Annual Report to Congress 408. The IRS implemented this change through a policy decision that reprogrammed ACS to file NFTLs only where the unpaid balance of assessment is over \$25,000. However, the IRS did not update the IRM or issue interim guidance reflecting this change.

16 National Taxpayer Advocate 2014 Annual Report to Congress 225-36 (Most Serious Problem: *Managerial Approval for Liens: The IRS's Administrative Approval Process for Notices of Federal Tax Liens Circumvents Key Taxpayer Protections in RRA 98*).

17 See IRM 5.12.2.6(1) (Oct. 14, 2013); IRM 5.19.4.5.3, *NFTL Filing Decisions* (Aug. 4, 2014); see also *supra* note 15 (noting that the \$25,000 threshold is not listed in the IRM nor in interim guidance but is an established policy decision); SB/SE response to TAS information request (June 10, 2015) (stating that on April 15, 2011, the "ACS Systemic Lien threshold was increased to \$25,000").

18 National Taxpayer Advocate 2014 Annual Report to Congress 226, 229. As described in the 2014 Annual Report, despite the congressional direction that the IRS adopt procedures in which an employee's determination to file a NFTL would, "where appropriate," be approved by a supervisor in RRA 98 § 3421, the IRS's current policy is to only have those reviews take place when the determination is to *not* file a NFTL or if the Revenue Officer is below a full performance level of GS-9. See RRA 98, Title III, § 3421, Pub. L. No. 105-206, 112 Stat. 758 (1998); Memorandum from Assistant Commissioner (Collection) (July 30, 1998) (concluding that RRA 98 § 3421 does not require supervisory review of all collection actions but allows the IRS the discretion to determine where such review would be appropriate); IRM 5.12.2.5.2(1) (Oct. 14, 2013). Furthermore, IRM 5.12.2.5.3(2) (Nov. 9, 2015) provides that managerial approval is required for the *non-filing* or deferral of an NFTL filing when the "known aggregate assessed or to be assessed balance will be greater than \$10,000," there are ten or more modules open, or the "NFTL filing is deferred or not filed for more than 120 days from initial or last [taxpayer] contact," including "situations when the Revenue Officer is waiting for either actions by or documentation from a taxpayer." The only exceptions to managerial approval are limited to cases in which the balance is less than \$2,500, there has previously been a non-filing or deferral approval in the case and circumstances remain the same, the case meets the Streamline Installment Agreement criteria under IRM 5.14.5.2, or the case meets the criteria for specifically not filing an NFTL under IRM 5.12.2.4.2(2) or 5.12.2.4.2(3). IRM 5.12.2.5.3(1) (Nov. 9, 2015).

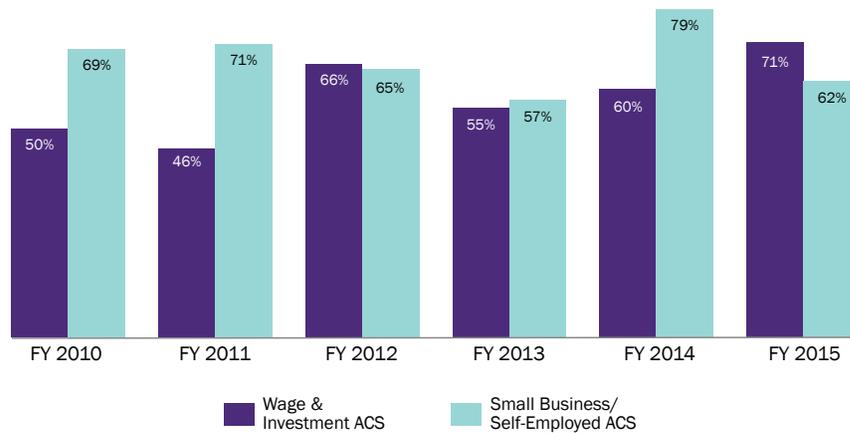
19 IRM 5.12.2.2(1) (Nov. 9, 2015).

the collection process”²⁰ This guidance suggests the IRS is simply “checking the box” on contacting taxpayers without actually attempting meaningful contact to resolve the tax liability.

Under current procedures, the request for an NFTL filing or the appropriate non-filing documentation must be prepared within ten calendar days of the initial attempted contact or the initial actual contact with the taxpayer or his or her representative.²¹ A “contact,” as defined in the IRM, is made by either a field contact, the preferred method for Revenue Officers; a telephone call; or mailing a notice or letter to the taxpayer’s last known mailing address.²² As Figure 1.11.1 below illustrates, a majority of these attempted telephone calls by ACS using predictive dialers do not result in actual contact with the taxpayers.²³

FIGURE 1.11.1²⁴

Percentage of Predictive Dialer Outbound Calls in the Automated Collection System (ACS) That Resulted in “No Contact”



This ten-day timeframe is an incredibly short period to allow any “meaningful contact” to occur, let alone enable the taxpayer to provide the IRS with a clear picture of his or her current financial situation. The IRS does not take into account the amount of time it takes for the taxpayer to contact the IRS and gather and send the necessary financial information or for the IRS to process and deliver that information.²⁵

20 IRM 5.12.2.2(1) (Nov. 9, 2015).

21 IRM 5.12.2.3.2(1) (Oct. 14, 2013). The NFTL determination is separate from the NFTL filing consideration. The ten-day pre-filing consideration is a process of deciding whether to file, defer, or not file, an NFTL. IRM 5.12.2.3(1) (Oct. 14, 2013).

22 IRM 5.12.2.2(2) (Nov. 9, 2015). The IRS does not systemically track how often each “contact” method is utilized. See SB/SE response to TAS information request (Nov. 6, 2015).

23 SB/SE response to TAS information request (June 10 and Oct. 19, 2015).

24 *Id.* This does not include the limited number of “manual outbound calls” initiated by an ACS employee working an ACS case.

25 Over half of Accounts Management correspondence inventories are in “overage,” meaning they have not been handled in the established timelines. See IRS, Customer Account Services Accounts Management Paper Inventory Reports, *Inventory Age Report – All Programs* (week ending Sept. 30, 2015) (noting that 54 percent of Individual Master File Correspondence is in “overage”).

And, all this assumes the taxpayer receives correspondence about the NFTL and it is not returned to the IRS as undeliverable mail.²⁶

Additionally, even if the taxpayer receives a notice or a phone message and attempts to call the IRS back at the number provided on the majority of notices, it is unlikely he or she will get through to the IRS to make payment arrangements prior to going into ACS. In fiscal year (FY) 2015, the level of service (LOS) for the Installment Agreement/Balance Due phone number was less than 40 percent.²⁷ Because of the poor level of service on the payment phone line, the IRS may view taxpayers as being unwilling to pay when they were actually trying to reach the IRS to set up payment plans. Consequently, given the short timeframes for taxpayer response, the IRS files NFTLs against taxpayers who are trying to reach the IRS but cannot. This situation not only harms taxpayers but also erodes trust in the IRS and can undermine future compliance.

The IRS Could Learn From Meaningful Contact Practices in the Financial Industry and Other Tax Administration Agencies

The National Taxpayer Advocate has continuously discussed the importance and usefulness of meaningful contact, specifically personal contact, rather than simply mailing letters and providing taxpayers with information regarding their payment options.²⁸ In the private sector, creditors routinely use early intervention as a pre-collection mechanism.²⁹ It has become a standard in the mortgage industry for loan servicers to contact borrowers at least twice within the first 45 days of delinquency to discuss potential loss

26 See National Taxpayer Advocate 2013 Annual Report to Congress 157; National Taxpayer Advocate 2010 Annual Report to Congress 221-32 (Most Serious Problem: *The IRS Has Not Studied or Addressed the Impact of the Large Volume of Undelivered Mail on Taxpayers*).

27 IRS JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2015). The customer service representative (CSR) level of service for the Installment Agreement/Balance Due phone number in FY 2015 was approximately 37 percent. *Id.* Overall, taxpayers have to wait a significant amount of time on hold to actually speak with an assistor, and almost 18 million callers were disconnected via a “courtesy disconnect” message. See IRS, JOC, *Custom Report RRC 2015-1623* (including weekly data on the number of courtesy disconnects from FYs 2011 to 2015) (noting that 4,853,347 courtesy disconnects occurred in the “individual category” alone for FY 2015). The SB/SE ACS number, 800-829-3903, and the W&I ACS number, 800-829-7650, do have a significantly higher level of service, over 70 percent, but the taxpayer is not provided this number until after he or she has entered into ACS and the NFTL may have already been filed by ACS. IRS JOC, *Snapshot Reports: Enterprise Snapshot* (week ending Sept. 30, 2015). For ACS incoming calls in FY 2015 the average handle time was 16.2 (W&I) to 16.5 (SB/SE) minutes and an average queue time of 12.8 (SB/SE) to 14.5 (W&I) minutes. SB/SE response to TAS information request (Oct. 19, 2015).

28 National Taxpayer Advocate 2011 Annual Report to Congress 336-47 (Most Serious Problem: *The IRS Does Not Emphasize the Importance of Personal Taxpayer Contact as an Effective Tax Collection Tool*); National Taxpayer Advocate 2010 Annual Report to Congress vol. 2, 40-70 (TAS Research Study: *An Analysis of the IRS Collection Strategy: Suggestions to Increase Revenue, Improve Taxpayer Service, and Further the IRS Mission*); National Taxpayer Advocate 2009 Annual Report to Congress 17-40 (Most Serious Problem: *One-Size-Fits-All Lien Filing Policies Circumvent the Spirit of the Law, Fail to Promote Future Tax Compliance and Unnecessarily Harm Taxpayers*); National Taxpayer Advocate 2008 Annual Report to Congress 114-25 (Most Serious Problem: *Navigating the IRS*); National Taxpayer Advocate 2006 Annual Report to Congress 62-82 (Most Serious Problem: *Early Intervention in IRS Collection Cases*), 83-109 (Most Serious Problem: *IRS Collection Payment Alternatives*), 110-29 (Most Serious Problem: *Levies*), 141-56 (Most Serious Problem: *Collection Issues of Low Income Taxpayers*); National Taxpayer Advocate 2004 Annual Report to Congress 226-45 (Most Serious Problem: *IRS Collection Strategy*). The National Taxpayer Advocate has also discussed in detail the impact of future compliance with meaningful contact in her prior reports. See National Taxpayer Advocate 2014 Annual Report to Congress 225-35 (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*); National Taxpayer Advocate 2012 Annual Report to Congress 403-25 (Most Serious Problem: *Although the IRS “Fresh Start” Initiative Has Reduced the Number of Lien Notices Filed, the IRS Has Failed to Determine Whether Its Lien Policies Are Clearly Supported by Either Increased Taxpayer Compliance or Revenue*).

29 See, e.g., National Service Bureau, *Pre-Collection Services (Early Intervention)*, available at <http://www.nsb.net/early-out-pre-collect> (last visited Dec. 4, 2015).

Because of the poor level of service on the payment phone line, the IRS may view taxpayers as being unwilling to pay when they were actually trying to reach the IRS to set up payment plans. Consequently, given the short timeframes for taxpayer response, the IRS files Notices of Federal Tax Liens (NFTLs) against taxpayers who are trying to reach the IRS but cannot.

mitigation options available.³⁰ The Real Estate Settlement Procedures Act requires that the first contact, which must take place by the 36th day of delinquency, is a “live contact,” or at least a good faith effort for live contact.³¹ Furthermore, tax administration agencies around the world, including Sweden, Australia, Norway, and New Zealand, successfully use reminders, specifically “gentle” reminders, to increase tax payment compliance and prevent enforcement measures.³² For example, New Zealand saw an increase of on-time payments by 12.6 percent between 2010 and 2013 by simply using short message service (SMS) to provide real-time reminders of key payments to a targeted group of taxpayers.³³

Meaningful and personal contact, such as a “soft” letter followed by a telephone call, sends a timely message to a taxpayer. Often a reminder is all that is necessary to resolve past-due debts prior to placing them in full collection. It would be beneficial for the IRS, in terms of saving NFTL filing fees and promoting taxpayer rights and future compliance, to make multiple attempts to *contact* taxpayers by phone and through mailing monthly reminder notices (or SMS) instead of filing an NFTL after just one attempt. The IRS could use technology, such as a predictive dialer system, to reach taxpayers proactively and utilize third-party databases, such as *LexisNexis® Accurint*, to find alternative numbers and addresses associated with taxpayers.³⁴ However, given the current LOS and limited ability for taxpayers to reach the IRS via telephone, the IRS should expand the ten-day time frame to enable it to make meaningful contact with the taxpayer before making lien determinations.³⁵

A Thorough Analysis of the Taxpayer’s Financial Situation Is Necessary to Make an Accurate NFTL Filing Determination

NFTLs are currently filed pursuant to strict business rules as opposed to a thorough review of the taxpayer’s financial situation. It was not until 2013, after consistent criticism from TAS, that the IRS added

30 The Consumer Financial Protection Bureau has incorporated the need for early contact with delinquent debtors in the 2013 updated mortgage servicing rules by requiring loan servicers to contact borrowers at least twice within the first 45 days of delinquency and discuss potential loss mitigation options available, if appropriate. See 12 C.F.R. § 1024.39; Mortgage Servicing Rules Under the Real Estate Settlement Procedures Act (Regulation X), 78 Fed. Reg. 10696, 10787-10807 (Feb. 14, 2013).

31 *Id.*

32 See OECD, *WORKING SMARTER IN TAX DEBT MANAGEMENT* 44 (2014), available at http://www.keepeek.com/Digital-Asset-Management/oecd/taxation/working-smarter-in-tax-debt-management_9789264223257-en#page1. The use of reminders, specifically “gentle” reminders, has proven to be successful in increasing tax payment compliance and preventing enforcement measures in both Sweden and Australia. *Id.* Norway has seen a reduction in the need for “attachments” by 30 percent and a decrease in unsatisfied callers simply by sending gentler reminders.

33 *Id.* at Table 3.3 (2014) (stating that New Zealand saw an increase in on-time payments from 72 percent to 84.6 percent between 2010 and 2013 due to the use of SMS reminders to targeted groups of taxpayers).

34 Predictive dialer is a computer-based system that automatically dials groups of telephone numbers and then passes live calls to available CSRs. See, e.g., SpitFire Predictive Dialers, available at <http://www.tmcnet.com/channels/predictive-dialer/> (last visited Dec. 4, 2015). See also National Taxpayer Advocate 2012 Annual Report to Congress 526-36 (Legislative Recommendation: Amend IRC § 7701 to Provide a Definition of “Last Known Address,” and Require the IRS to Mail Duplicate Notices to Credible Alternative Addresses); LexisNexis® Accurint, available at <http://accurint.com/> (last visited Dec. 4, 2015). The IRM does instruct employees to “research” within 14 days to determine if there is a more current address available for re-issuance of the notice. See IRM 5.19.6.17.4(1) (Oct. 15, 2014).

35 See *supra* note 27.

the lien determination pre-filing considerations to the IRM to assist employees in deciding whether to file an NFTL.³⁶ The pre-filing considerations include:

- (1) the taxpayer compliance history;
- (2) taxpayer qualification for a determination exception;
- (3) protection of the government's interest, including exigent circumstances, where the filing of an NFTL is necessary to protect those interests; and
- (4) taxpayer's qualification for a determination that a NFTL filing will hamper collection.³⁷

To ensure that the IRS is balancing the need to protect the government's interest with the taxpayer's right that the collection action be no more intrusive than necessary,³⁸ the IRS should complete a thorough analysis of the taxpayer's financial situation when it makes a lien determination.³⁹ At minimum, the IRS should complete a limited analysis of the taxpayer's financial situation, using a form similar to the Form 433-F, *Collection Information Statement*, to determine if the taxpayer has assets currently or will have assets in the foreseeable future.⁴⁰ The IRS files approximately 21 percent of NFTLs automatically without human involvement in determining lien filing.⁴¹ Even in an automated environment, it should develop an automated basic financial analysis for NFTL filing determinations, through the use of credit scoring and automated asset verification, while elevating close call or complex cases to an employee.

Using Technology and Databases to Improve Financial Analyses

The IRS is "one of the largest financial institutions in the world,"⁴² but it is reluctant to implement financial analysis techniques and certain automation techniques used by modern financial institutions, including financial scoring, credit risk analysis, and modeling. Several large credit scoring and credit analysis providers offer solutions to automate collection decisions.⁴³ For example, *LexisNexis® RiskView™ Solutions* and *Accurint® for Collections: Decision Workflow* enables financial institutions and other creditors to access data from thousands of public sources to find court records, assets, and licenses, which can be factored into the determination of ability to repay, eligibility for a repayment plan, and recommendation of payoff amounts based on a comprehensive analysis of credit risk management data.⁴⁴ The IRS can employ new techniques, widely used in the financial industry, to automate analysis and regular monitoring of internal and external sources.

36 IRM 5.12.2.3, *Notice of Federal Tax Lien Filing Determination (Pre-filing Considerations)* (Oct. 14, 2013).

37 IRM 5.12.2.3(3) (Oct. 14, 2013). The IRM does not instruct employees to consider if the taxpayer is attempting to engage with the IRS through correspondence or phone.

38 See Taxpayer Bill of Rights, *The Right to Privacy*, available at <http://www.taxpayeradvocate.irs.gov/taxpayer-rights/right-7>.

39 IRC § 6320; IRM 5.12.2.3(2) (Oct. 14, 2013).

40 Form 433-F, *Collection Information Statement* (Rev. Jan. 2013), Catalog 62053J.

41 See *supra* note 5. The IRS has provided that "lien filing determinations are not tracked," and thus it is not studying the number of lien determinations that are made, and of that number, how many resulted in a lien actually being filed and the length of time between the determination and filing. SB/SE response to TAS information request (June 10, 2015).

42 IRS, *Careers Home*, available at <http://www.jobs.irs.gov/student/accounting-budget-finance.html> (last visited Dec. 4, 2015).

43 See generally Experian, *Financial Stability Risk Score*, available at <http://www.experian.com/business-information/financial-stability-risk-score.html> (last visited Dec. 4, 2015); Rosella, *Credit Risk Analysis and Modeling*, available at <http://www.roselladb.com/credit-risk-analysis.htm> (last visited Dec. 4, 2015); Rapid Insight® Analytics, *Predictive Modeling Software*, available at <http://www.rapidinsightinc.com/products/analytics/> (last visited Dec. 4, 2015).

44 LexisNexis, *RiskView*, available at <http://www.lexisnexis.com/risk/products/riskview-credit-risk-management.aspx> (last visited Dec. 4, 2015); LexisNexis, *Accurint® for Collections: Decisioning Workflow*, available at <http://www.lexisnexis.com/risk/products/collections/accurint-collections-decisioning.aspx> (last visited Dec. 4, 2015).

The IRS should develop a risk-scoring algorithm for meaningful NFTL filing determinations in an automated setting and regularly update these models to reflect actual and up-to-date data. Currently, the IRS does not utilize any risk-scoring system or business rules in determining when to consider the filing of an NFTL.⁴⁵ While there would be an initial investment in terms of programming costs, it would likely result in more efficient lien filing and would save the IRS expenses associated with the filing of liens against nonexistent assets.⁴⁶

Any such model, however, must be built based on the fundamental principal that the IRS is not a business. That is, unlike private creditors, the IRS is not able to pick and choose with whom it wants to “do business.” And unlike a business, the IRS cannot solely focus on the debtor’s current tax debt; it must continue “doing business” with the taxpayer from year to year.⁴⁷ Future compliance is a predominant concern for any IRS risk scoring. Finally, it is vital that any IRS risk-scoring models are constantly updated with actual taxpayer behavior data.

At the very least, the IRS could replace the mandatory NFTL filing on currently not collectible (CNC) taxpayers and on taxpayers with no assets with a system of automated subsequent filing determinations. These automated subsequent filing determinations would be based on periodic monitoring of whether the taxpayers have acquired assets or their financial situations have improved by developing software that can incorporate analysis of information from *Accurint*® and IRS internal databases. This type of analysis would enable the IRS to continue to protect the government’s interest in any future assets without unnecessarily harming taxpayers. The IRS currently allows employees to refile a NFTL, following extension of the collection statute expiration date, using their judgment rather than an arbitrary threshold amount.⁴⁸ It could also apply this approach to the original NFTL filing.

Updating IRS e-Guides to Incorporate Basic Financial Analysis on Taxpayers Prior to NFTL

Another cost-effective way to operationalize the review of the taxpayer’s financial condition, outside of the ACS lien filing, would be to update the IRS e-Guides with a series of questions determining if the taxpayer has or is likely to have assets to which a lien can actually attach.⁴⁹ The e-Guides would instruct IRS employees not to file a lien if they are unable to locate assets and to refrain from filing an NFTL within the ten-day period if no concerted effort is made to contact and speak directly with taxpayer.

45 SB/SE response to TAS information request (Nov. 6, 2015) (stating that the IRS does not currently use any “risk-scoring system or business rules in determining when to consider filing an NFTL”).

46 In FY 2015, TAS had a closure rate with relief of 65 percent (603 cases) for lien release and approximately 68 percent (629 cases) for lien withdrawal. See TAS Business Performance Management System Report, *Closures – TAS Relief Rate by PCIC by BOD (FYs 2010-2015)*. The IRS has not done a comprehensive study on the costs associated with filing liens, for either individuals or businesses, since 1998, and that study was limited. See North Central DORA, South Texas DORA, *Federal Tax Lien Project, Project 13.14, Profile Report* (Dec. 1998).

47 Unlike a private creditor, the IRS cannot decide to never lend to a debtor again.

48 Upon the collection statute expiration date, the liability secured by lien becomes legally unenforceable. See generally IRC §§ 6325(a)(1) and 6502(a). The NFTL contains the self-releasing language that extinguishes the NFTL and underlying statutory lien. See Form 668(Y)(c), *Notice of Federal Tax Lien* (Rev. Feb. 2004). If the collection statute is extended or suspended on the underlying assessment, beyond the ten-year period, the NFTL must be refiled in the original jurisdiction to keep its priority back to the original filing date. See IRC § 6323(g).

49 E-Guides, or “electronic procedure guides,” have been developed and used by the IRS for many years. They are formal guides for IRS employees that organize the different types of important processes and procedures in an easily accessible and usable way. See IRM 5.19.1.1(6) (Sept. 29, 2014).

The IRS should redefine the use of a Notice of Federal Tax Lien (NFTL) as a powerful collection tool based on meaningful and early contact with taxpayers, automation of financial analysis and asset verification, and the impact of NFTL filing on the taxpayer's financial viability and future compliance.

Current Data Reveals That Early Interventions Drive the Collection of Revenue

TAS Research & Analysis is currently studying how the aging of a delinquency affects dollars collected on Taxpayer Delinquent Accounts (TDAs).⁵⁰ A study, set forth in Volume 2 of this report, examines the Individual Master File (IMF) Accounts Receivable Dollar Inventory (ARDI) to determine how dollars collected fluctuate as time elapses.⁵¹ The study determined that collection decreases as time passes, with dollar collections of over twice as much during the first year as in the second year, and over three times the collections in the third year.⁵² Furthermore, the study found that even within the first year, dollars collected decreased by about one-third after every three-month period elapsed. Not only do raw dollars collected decrease, but the percent of the amount collected declines as time progresses with only about seven percent collected in the third year.⁵³ This study clearly demonstrates the importance of early meaningful contact. The IRS should use the data collected by TAS Research to revise its NFTL filing policies and increase its efforts to make early and frequent taxpayer contacts.

The IRS' Lien Pilot Program May Provide Significant Evidence of What IRS Actions Result in Revenue Collection

In the summer of 2014, the IRS indicated its plan to revert back to the published NFTL filing threshold of \$10,000 for ACS NFTL filings.⁵⁴ After intervention by the National Taxpayer Advocate, the IRS agreed to conduct a lien filing pilot before it makes any changes in ACS filing threshold, to determine whether lowering the ACS NFTL filing threshold to \$10,000 would result in enhanced protection of the government's interest and would facilitate the collection of delinquent tax liabilities. The IRS anticipates starting the Collection Lien Pilot in February 2016. The lien pilot program could become an excellent starting point in the development of a risk-scoring algorithm for meaningful NFTL filing determinations.

The National Taxpayer Advocate has suggested that the lien pilot program focus on the use of "meaningful contact" with taxpayers prior to the filing of the NFTL, rather than just studying the impact of different dollar thresholds, and examine the impact of NFTLs on future compliance. Specifically, the National

⁵⁰ *IRS Collectibility Curve*, vol. 2, *infra*. In prior Annual Reports, the National Taxpayer Advocate has discussed how many TDAs in the IRS Automated Collection Branch and the Collection Field function are often delinquencies that have existed for many years. The age of IRS TDA inventory is highlighted in the following statistics: (1) 55 percent of the IRS IMF TDA inventory has been in the function assigned the delinquency for at least ten months; however, the delinquency may have been in the TDA status much longer; (2) nearly 70 percent of the IMF TDAs in IRS inventory at the end of FY 2015 are Tax Year 2011 and prior liabilities; and (3) over 22 percent of the TDAs have less than four years remaining on the collection statute, meaning that the delinquency has existed for over six years. IRS CAR, NO-5000-5 (Oct. 3, 2015).

⁵¹ *Id.*

⁵² *Id.* The analysis showed that dollars collected decreased by over 50 percent from the first year to the second year and collection decreased in the third year by over 30 percent from the amount collected in the second year.

⁵³ *Id.* Although the balance of tax due continues to decrease slightly, the amount of assessed and accrued penalties and interest continue to rise.

⁵⁴ See email from John Dalrymple, Deputy Commissioner for Services and Enforcement, to Nina Olson, National Taxpayer Advocate (Aug. 4, 2014). IRM 5.19.4.5.3.2, *Filing Criteria* (Jan. 1, 2015) provides that a NFTL filing threshold is \$10,000, not \$25,000.

Taxpayer Advocate has recommended, and the IRS has accepted, the following four treatment groups for the lien filing pilots, plus a control group:

- Treatment Group 1 will provide for the IRS to file NFTLs on a group of taxpayers with cases in the queue with unpaid liabilities between \$10,000 and \$25,000. TAS has requested that Collection ensure these taxpayers have been advised by someone in ACS that the NFTL will be filed and the pre-lien determination considerations in IRM 5.12.2.3 be used prior to the filing of a lien.
- Treatment Group 2 will receive a reminder notice that the taxes are still owed and that the taxpayers need to contact the IRS to resolve the delinquencies.
- Treatment Group 3 will receive a new notice that also provides more information about payment alternatives that may be available to the taxpayers.
- Treatment Group 4 will receive monthly reminder notices throughout the pilot period.
- The control group will follow the current process without any new treatment.

Using the treatment groups suggested by the National Taxpayer Advocate will result in measuring the impact of various types and frequency of contact with taxpayers instead of an automatic lien filing and would provide a basis for future NFTL filing criteria.

CONCLUSION

The IRS's policy of filing NFTLs based on an arbitrary dollar threshold fails to take into account the taxpayers' ability to repay the liability and future compliance. The IRS needs to utilize data analysis and the results of the lien pilot program to drive its decision on whether to continue using monetary thresholds to trigger NFTLs. The IRS should redefine the use of an NFTL as a powerful collection tool based on meaningful and early contact with taxpayers, automation of financial analysis and asset verification, and the impact of NFTL filing on the taxpayer's financial viability and future compliance. By developing modern, comprehensive, and automated financial analysis and using early intervention tools, including personal contact, the IRS will improve revenue collection and future compliance, and promote taxpayer *rights to a fair and just tax system and to privacy.*

RECOMMENDATIONS

The National Taxpayer Advocate recommends that the IRS:

1. Revise the IRM to require employees to make multiple attempts to initiate a meaningful personal contact with the taxpayer by phone or through mailing notices, instead of filing a NFTL after just one attempt. The IRS should adopt an early intervention policy similar to the new standard in the mortgage industry that requires two contacts, one of which is a person-to-person attempt, rather than simply mailing a letter.
2. The IRS should increase the ten-day timeframe for filing an NFTL to enable taxpayers to reach out to the IRS and provide financial information.
3. The IRS should continue to mail monthly notices to the taxpayers while the account is in the queue, ACS, or the field.
4. In collaboration with TAS, develop criteria for conducting the lien pilot as agreed upon with the National Taxpayer Advocate and refrain from decreasing the NFTL filing monetary threshold until the results of the lien pilot can be examined and discussed.
5. Amend the IRM and related e-Guides and training materials to incorporate rules for NFTL filing determinations. The rules should specify that the following items are needed prior to filing: “meaningful contact;” analysis of the taxpayer’s financial situation, including a hardship determination if needed; consideration of collection alternatives; application of the balancing test, which is to balance the need for efficient collection of the tax with legitimate concerns of the taxpayer that actions be no more intrusive than necessary; and the impact on future compliance.
6. Incorporate credit scoring and automated asset verification into financial analysis for making NFTL filing determinations in ACS, with the provision to elevate close call and complex cases to a manager.
7. For accounts moving from ACS to the queue, revise the IRM to require employees to conduct a limited financial analysis based on a Form 433-F and refrain from filing an NFTL, if the employee has determined there are no assets or reasonable expectation of the taxpayer to acquire assets in the future.
8. Update the e-Guides with a series of questions determining if the taxpayer has or is likely to have assets to which an NFTL can actually attach.