

Legislative Recommendation #24**Protect Retirement Funds From IRS Levies, Including So-Called “Voluntary” Levies, in the Absence of “Flagrant Conduct” by a Taxpayer****PRESENT LAW**

The IRS has wide discretion to exercise its levy authority. IRC § 6331(a) provides that the IRS generally may “levy upon all property and rights to property,” which includes retirement savings. Some property is exempt from levy pursuant to IRC § 6334.

As a policy matter, the IRS has decided not to levy on a taxpayer’s retirement savings unless it determines that the taxpayer has engaged in “flagrant conduct.”¹ Neither the IRC, the regulations, nor internal IRS guidance defines the term “flagrant conduct” for purposes of this analysis.²

REASONS FOR CHANGE

Congress has provided significant tax incentives to encourage taxpayers to save for retirement. There are strong public policy reasons to encourage retirement savings – and to shield retirement savings from IRS levies. Almost all workers eventually retire, and they require retirement savings for support. In addition, retired taxpayers who do not have sufficient savings are more likely to experience economic hardship and qualify for public assistance, which other taxpayers pay to provide.

The IRS has taken certain steps to protect retirement savings by requiring a specialized analysis prior to levy, including a determination of whether the taxpayer engaged in “flagrant conduct.” However, recent changes in IRS procedures have eroded these protections. Specifically, the IRS has adopted procedures that allow taxpayers to request or agree to “voluntary” levies on retirement accounts.³ If a taxpayer agrees to a “voluntary” levy, the IRS bypasses the determination of “flagrant conduct.”⁴

As a result, taxpayers who have not engaged in “flagrant conduct” in their tax matters and who therefore would have been shielded from levies on their retirement accounts in the past may agree to “voluntary” levies out of fear or anxiety, and thus may find themselves in economic hardship during retirement.

Under IRC § 6334, the IRS is prohibited from levying on certain sources of payment, such as unemployment and child support. These exceptions reflect policy determinations. For example, Congress has determined that the IRS should not levy on child support payments because doing so would likely harm the children who rely on those benefits for support. To better protect retirement savings, the National Taxpayer Advocate believes that retirement savings should be added to the list of exempt property, absent “flagrant conduct,” and that the term “flagrant conduct” should be defined in the statute.

1 Internal Revenue Manual (IRM) 5.11.6.3(5), Funds in Pension or Retirement Plans (May 26, 2021).

2 The IRM provides examples of flagrant conduct. See IRM 5.11.6.3(6), Funds in Pension or Retirement Plans (May 26, 2021). However, the IRM does not provide a definition of the term and it can be changed at any time.

3 IRM 5.11.6.3(3), Funds in Pension or Retirement Plans (May 26, 2021).

4 The IRS will still verify that the taxpayer has received collection due process rights, consider collection alternatives, and analyze whether the taxpayer relies on funds in the retirement account (or will in the near future) for necessary living expenses. IRM 5.11.6.3(3), (4), and (7), Funds in Pension or Retirement Plans (May 26, 2021).

RECOMMENDATIONS

- Amend IRC § 6334(a) to include qualified retirement savings as a category of property exempt from levy unless it is determined that the taxpayer has engaged in “flagrant conduct.”
- Amend IRC § 6334 to define “flagrant conduct” as willful action (or failure to act) that is voluntarily, consciously, and knowingly committed in violation of any provision of chapters 1, 61, 62, 65, 68, 70, or 75 and that appears to a reasonable person to be a gross violation of any such provision.⁵

5 For legislative language generally consistent with this recommendation, see John Lewis Taxpayer Protection Act, H.R. 3738, 117th Cong. § 203 (2021); Taxpayer Protection Act, H.R. 4912, 114th Cong. § 203 (2016); and Taxpayer Rights Act, S. 2333 and H.R. 4128, 114th Cong. §§ 306 & 307 (2015).