



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

5.17.2

APRIL 29, 2025

EFFECTIVE DATE

(04-29-2025)

PURPOSE

- (1) This transmits revised IRM 5.17.2, Legal Reference Guide for Revenue Officers, Federal Tax Liens.

MATERIAL CHANGES

- (1) IRM 5.17.2.6.5.4(1): Editorial update to reflect 2025 reference for Rev. Proc. 2024-40, 2024-45 I.R.B. 1100 adjusting yearly amount for calendar year 2025 of, Persons Against Whom a Federal Tax Lien Is Not Valid, regarding personal property purchased in a casual sale to less than \$1960.
- (2) IRM 5.17.2.6.5.7(2): Editorial update to reflect 2025 reference for Rev. Proc. 2024-40, 2024-45 I.R.B. 1100 adjusting yearly amount for calendar year 2025 of, Persons Against Whom a Federal Tax Lien Is Not Valid, regarding mechanic's lien for repair or improvement of certain real property to \$9,790.
- (3) Editorial updates to remove underlining from legal case cites to comply with changes in the Style Guide.
- (4) Editorial updates to correct citations, correct links, and updates related to the Style Guide (section symbols, breaks, citation title italics).

EFFECT ON OTHER DOCUMENTS

This supersedes IRM 5.17.2 dated October 24, 2023.

AUDIENCE

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5.17.2

Federal Tax Liens

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5.17.2.1
(04-29-2025)
Program Scope and Objectives

- (1) **Purpose:** This section first explains how the federal tax lien arises, its duration, and the effect of filing a Notice of Federal Tax Lien (NFTL). The text then discusses the priority disputes between the federal tax and competing liens. The text next discusses the different methods for seeking relief from the federal tax lien, including subordination, releases, and certificates of discharge. The section ends with a discussion of the estate tax lien and the gift tax lien.
- (2) **Audience:** This IRM is used by all IRS personnel seeking information on federal tax liens.
- (3) **Policy Owner:** Director, Collection Policy. Collection Policy is an organization under Small Business/Self-Employed Division (SBSE), Collection.
- (4) **Program Owner:** Collection Policy - Enforcement is the program office responsible for overseeing the lien program and in particular the process and guidance.
- (5) **Primary Stakeholders:** Field Collection, Civil Enforcement Advise and Support Operation (CEASO) Advisory, and Chief Counsel. Other areas that are affected by these procedures or have input to the procedures include Appeals, the Taxpayer Advocate Service (TAS), and Department of Justice attorneys.
- (6) **Program Goals:** The goal of the program aligns with IRS 2018-2022 Strategic Goal II to: *Protect the integrity of the tax system, by encouraging compliance through administering and enforcing the tax code* and Objective 3 to: *Match potential compliance issues to the most appropriate solution informed by behavioral insights*.

5.17.2.1.1
(03-19-2018)
Background

- (1) Congress, through the Internal Revenue Code (IRC), provides several sections governing when the federal tax lien and the estate and gift tax lien arise, how these lien interests compete with the interests of other creditors, and how taxpayers and third parties can seek relief from the effect of these liens. The IRC has been updated over the years to provide additional protections for competing claims and for taxpayer rights.

5.17.2.1.2
(10-24-2023)
Authority

- (1) The authorities for the lien program are found in the following code and regulation sections:

Item	Code Section	Regulation	Description
1	26 USC 6321:	301.6321-1	Lien for taxes
2	26 USC 6322:	no regulation	Period of lien

Item	Code Section	Regulation	Description
3	26 USC 6323:	301.6323(a)-1, 301.6323(b)-1, 301.6323(c)-1, 301.6323(c)-2, 301.6323(c)-3, 301.6323(d)-1, 301.6323(e)-1, 301.6323(f)-1, 301.6323(g)-1, 301.6323(h)-0, 301.6323(h)-1, 301.6323(i)-1, 301.6323(j)-1	Validity and priority against certain persons
4	26 USC 6320:	301.6320-1	Notice and opportunity for hearing upon filing of notice of lien
5	26 USC 6324:	301.6324-1	Special liens for estate and gift taxes
6	26 USC 6324A:	301.6324A-1	Special lien for estate tax deferred under section 6166
7	26 USC 6324B:	no regulation	Special lien for additional estate tax attributable to farm, etc., valuation
8	26 USC 6325	301.6325-1	Release of lien or discharge of property
9	26 USC 6326:	301.6326-1	Administrative appeal of liens
10	26 USC 6327:	no regulation	Cross References
11	26 USC 7425:	301.7425-1, 301.7425-2, 301.7425-3, 301.7425-4	Discharge of Liens
12	26 USC 7426:	301.7426-1, 301.7426-2	Civil actions by persons other than taxpayers
13	26 USC 7432:	301.7432-1	Civil damages for failure to release lien
14	28 USC 2410:	no regulation	Actions affecting property on which United States has lien

(2) The following Policy Statements and Delegation Orders regulate NFTL filing.

Item	IRM	Description
1	IRM 1.2.14.1.2	Policy Statement 5-2 - Collecting Principles
2	IRM 1.2.14.1.13	Policy Statement 5-47 - (1) Notices of lien generally filed only after taxpayer is contacted in person, by telephone or by notice; (2) Notice of lien filing in jeopardy assessment cases; (4) Other notice of lien filing requirements
3	IRM 1.2.44.5	Delegation Order 5-4 (Rev 3) - Federal Tax Lien Certificates

Item	IRM	Description
4	IRM 1.2.65.3.2	Delegation Order SBSE- 1-23-9, Approval of Form 4477, Civil Suit Recommendation

5.17.2.1.3
(03-19-2018)

Roles and Responsibilities

- (1) Roles and responsibilities related to the lien program can be found in IRM 5.12.1.5, IRS Organizations Working Lien Issues, and its subsections.
- (2) IRM 5.12.1.6, Locations of IRM 5.12 Content, identifies topic locations associated with NFTL determinations, filing, withdrawal, maintenance, and release. It is within the specific IRMs that lien program responsibilities, instructions, and procedures are identified.

5.17.2.1.4
(03-19-2018)

Program Management and Review

- (1) **Program Reports:** There are numerous reports that monitor NFTL filings and Automated Lien System (ALS) activity. See the *ALS User Guide Chapter 15, Logs and Reports*, for a complete listing of ALS reports. Additional information on reports can be found with the same *Program Management and Review* subsection in IRM 5.12.7.1.4 and IRM 5.12.1.1.4
- (2) **Program Effectiveness:** The lien program's effectiveness is reviewed and documented in numerous ways. See IRM 5.12.7.1.4 for a listing.

5.17.2.1.5
(03-19-2018)

Program Controls

- (1) Access to systems used in filing NFTLs is controlled following standard access guidelines through Business Entitlement Access Request System (BEARS). See IRM 5.12.7.1.5(2). Delegation Order 5.4 (rev. 3), found in IRM 1.2.44.5, identifies all the parties authorized to approve or sign specified lien documents and take all other lien related actions.
- (2) For closed records associated with the lien program see: Document 12990, Records and Information Management Records Control Schedules, Tax Administration - Collection (RCS 28), in Part IV - Delinquent Accounts, delinquent returns records and office service records (Items 40-94), Item 43, Notice of Federal Tax Lien and Certificate of Release of Federal Tax Lien, Item 44, Non-Judicial Sale and Redemptions Cases, and Item 45, Suits to Foreclose Federal Tax Liens.

5.17.2.1.6
(03-19-2018)

Terms/Definitions/ Acronyms

- (1) Terms and acronyms associated with the lien program include:

Defined Terms

Word	Definition	Explanation
lien	The federal tax lien sometimes referred to as the "statutory lien" or "silent lien".	Sometimes the term lien is confused with the filed notice of the lien's existence (i.e. NFTL).
Notice of Federal Tax Lien (NFTL)	A document, which can list as many as 15 statutory liens and is publicly filed with state and local jurisdictions.	See IRM 5.12.7, Notice of Lien Preparation and Filing

Acronyms

Acronym	Definition
*see IRM 5.12.1-2	Glossary of Common Acronyms in IRM 5.12
ACS	Automated Collection System
ALS	Automated Lien System
BEARS	Business Entitlement Access Request System
BMF	Business Master File
CDP	Collection Due Process
IMF	Individual Master File
IRC	Internal Revenue Code
LLC	Limited Liability Company
MFT	Master File Tax
NFTL	Notice of Federal Tax Lien
RCS	Records Control Schedule
SBSE	Small Business/Self-Employed
SII	Successor-in-interest
SRP	Shared Responsibility Payment
TAS	Taxpayer Advocate Service

5.17.2.1.7
(03-19-2018)

Related Resources

- (1) See IRM 5.12.1, Lien Program Overview, for additional information, websites and job aids related to the lien program.

5.17.2.2
(03-19-2018)

The General Tax Lien

- (1) The law generally defines a lien as a charge or encumbrance that one person has on the property of another as security for a debt or obligation. Essentially, this concept can be reduced to a simple metaphor — i.e., a special “sticker” similar to what a moving company puts on the furniture, boxes, and other contents of a house when it takes the owner’s property from one place to another. The lien (or “sticker”) does not change the ownership or other qualities of the property to which it is affixed; it merely identifies the property as having some kind of claim against it.
- (2) Liens may be divided into three general categories: common-law liens, consensual liens, and statutory liens. This section deals with the statutory liens provided for by the Internal Revenue Code. The principal lien considered in this section is the “general” tax lien, sometimes referred to as the assessment or “secret” lien. The general tax lien is provided for by IRC 6321 and is a very broad lien; it generally encompasses all of the taxpayer’s property or rights to property as security for a tax liability.

- (3) In addition to the general tax lien, there are two special liens for estate and gift taxes which arise at the date of death or the date of the gift, respectively. These liens are provided for by IRC 6324. Special estate tax liens applicable to cases involving certain closely held business or farm or qualified family-owned business property are provided for by IRC 6324A and IRC 6324B. Questions concerning these liens should be referred to Area Counsel. For more information on the Estate Tax Lien, see IRM 5.5.8

5.17.2.2.1
(03-19-2018)
When and How the Tax Lien Arises

- (1) The federal tax lien arises when any “person” liable to pay any federal tax fails to pay the tax after a demand by the IRS for payment. IRC 6321. For federal tax law purposes, a “person” is defined to include individuals, trusts, estates, partnerships, associations, companies, and corporations. IRC 7701(a)(1). The lien is effective from the date the IRS assesses the tax. Thus, if the taxpayer neglects or refuses to pay the assessed tax, then the lien is deemed to relate back to the assessment date. IRC 6322. The IRS is not required to file a NFTL in order for the tax lien to attach. As discussed later in the text, the IRS may need to file a NFTL in order to have priority over the taxpayer’s other creditors.

5.17.2.2.2
(03-27-2012)
Duration of the Federal Tax Lien

- (1) The federal tax lien continues until the liability for the amount assessed is satisfied or becomes unenforceable by reason of lapse of time, i.e., passing of the Collection Statute ExpirationDate (CSED). IRC 6322. Generally, after assessment, the IRS has ten years to collect the tax liability. IRC 6502. However, there are some circumstances which may extend or suspend the ten-year collection period.
- (2) IRC 6502 provides for an extension of the collection period in two situations:
- The statute of limitations was extended at the same time an installment agreement was entered into. In this case, collection action may be taken until the 89th day after expiration of the installment agreement. IRC 6502(a)(2)(A).
- Note:** The IRS only secures extensions on partial payment installment agreements and only in limited situations. See IRM 5.14.2.1.3.
- Release of a levy under IRC 6343 is accompanied by an agreement to extend the statute of limitations to a specific date and that date has not yet passed. IRC 6502(a)(2)(B); Treas. Reg. 301.6343-1(b)(2)(ii)(D).
- (3) IRC 6503 provides for the suspension of the collection period in several situations. The more common situations are the following:
- Issuance of a statutory notice of deficiency, IRC 6503(a).
 - Assets of the taxpayer in control or custody of a court, IRC 6503(b).
 - Taxpayer is outside of the United States for a continuous period of at least 6 months, IRC 6503(c).
 - An extension exists for the payment of an estate tax, IRC 6503(d).
 - A wrongful seizure of property or a wrongful lien on property, IRC 6503(f).
 - A taxpayer bankruptcy filing triggering the automatic stay, IRC 6503(h). Insolvency or Area Counsel can identify whether the automatic stay is in effect for any particular period.

Note: There are other IRC sections whose provisions result in extensions of the Collection Statute Expiration Date (CSED), including, but not limited to, IRC

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6015(e)(2), 6330(e)(1), 6331(i)(5), 6331(k)(3)(B) and 6672(c)(4). See also IRM 5.1.19, Collection Statute Expiration.

- (4) If the United States files suit and reduces the tax claim to judgment, then the collection period does not expire until the judgment has been satisfied. *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970); *United States v. Hodes*, 355 F.2d 746 (2nd Cir. 1966).
- (5) State statutes of limitations cannot affect the duration or existence of the federal tax lien. *Overman*, 424 F.2d at 1147.

5.17.2.2.3
(01-08-2016)

Transfer of Property Subject to Lien

- (1) After the federal tax lien attaches to property, it remains on that property until the lien has expired, is released, or the property has been discharged from the lien. The transfer of property subsequent to attachment does not affect the lien. *United States v. Bess*, 357 U.S. 51, 57 (1958). If property is sold by the taxpayer, the lien attaches to whatever is substituted for it, as it reaches all of the taxpayer's property and rights to property. *Phelps v. United States*, 421 U.S. 330, 334-35 (1975) (lien attached to the cash proceeds of a sale). However, as a practical matter, it may be difficult to enforce a tax lien against cash sale proceeds.

5.17.2.3
(01-08-2016)

Filing Notice of the Federal Tax Lien

- (1) The federal tax lien arises when the IRS meets the requirements of IRC 6321, i.e., an assessment and a notice and demand for payment. However, the law provides that in order for the federal tax lien to have priority against certain competing lien interests, the IRS must file a NFTL pursuant to IRC 6323.
- (2) Prior to filing a NFTL, the IRS should verify the outstanding liability and determine that the filing of the notice of lien is appropriate under the circumstances. See IRM 5.12.2.3, Notice of Federal Tax Lien Filing Determination (Pre-filing Considerations). The criteria for filing an NFTL are set forth in IRM 5.12.2.6, NFTL Filing Criteria.

5.17.2.3.1
(03-19-2018)

Purpose and Effect of Filing Notice

- (1) The filing of a NFTL is not a step required to give rise to or to perfect the lien against the taxpayer. The act of filing protects the IRS's right of priority as against certain third parties, typically a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor. IRC 6323(a). Generally speaking, unless the IRS first properly files a notice of its federal tax lien, the purchaser will have priority over the federal tax lien. Similarly, unless the IRS first files a NFTL, the holder of a security interest, mechanic's lienor, and judgment lien creditor will have priority over the federal tax lien.
- (2) IRC 6323(f)(4) requires that in some states a NFTL filed with respect to real property must be indexed in order to be treated as filed. Indexing will be required in a state in which a deed must be indexed in order to be valid against a later bona fide purchaser. See *Hanafy v. United States*, 991 F. Supp. 794 (N.D. Tex. 1998). If you have any question as to whether IRC 6323(f)(4) applies to your case, contact Area Counsel.

5.17.2.3.2
(03-19-2018)

Place of Filing

- (1) IRC 6323(f) and state law determine the correct place to file a NFTL. If the IRS files the NFTL in the wrong office, then the lien will not have priority over a later purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor.

- (2) Different filing rules apply for real property and personal property. IRC 6323(f) provides that states may designate one office for filing the NFTL for real and personal property.
- For real property, the NFTL is filed in the one office designated by the State where the property is physically located. States generally provide that the one office for filing the NFTL for real property is the county recorder or clerk of the county in which the real property is located.
 - As against personal property, the situs of both tangible and intangible property is the residence of the taxpayer at the time the notice of lien is filed. Again, most states generally provide that the one office for filing the NFTL for an individual's personal property is the county clerk's office in the county in which the individual resides.
 - The residence of a corporation or partnership is deemed to be the place at which the principal executive office is located, which is the office at which the major executive decisions are made. *S. D'Antoni, Inc. v. Great Atlantic & Pacific Tea Co., Inc.*, 496 F. 2d 1378 (5th Cir. 1974). For employment tax and certain excise tax purposes, a single-owner unincorporated business entity is classified as a corporation under Treas. Reg. 301.7701-2(c)(2)(iv) and (v).
 - For purposes of filing a notice of federal tax lien, a taxpayer who resides abroad is deemed to reside in Washington, D.C. Thus, a notice of federal tax lien filed against personal property is to be filed with the Recorder of Deeds for the District of Columbia.
- (3) If a state fails to provide an office or designates more than one office for filing a NFTL, then IRC 6323(f) provides that the NFTL is to be filed in the office of the clerk of the United States District Court for the judicial district in which the property subject to the lien is situated. Currently, Massachusetts, Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands (CNMI), and the Virgin Islands (VI) are the only jurisdictions where the IRS files a NFTL for personal property in federal district court.
- (4) IRC 6323(f)(5) provides that the filing of a NFTL is governed solely by the Internal Revenue Code and is not subject to any other Federal law establishing a place or places for the filing of liens or encumbrances under a national filing system. For purposes of determining whether a state has designated more than one office for filing a NFTL, state law that merely adopts or reenacts a Federal law establishing a national filing system is not counted. IRC 6323(f)(1)(A)(ii). See also Treas. Reg. 301.6323(f)-1(a)(2).

Example: If a state adopts a federal law requiring that liens against airplanes must be filed with a national registry, and state law also provides that liens against personal property must be filed with the county recorder in the county in which the taxpayer resides, the state has designated only one office for the filing of liens against personal property for purposes of IRC 6323(f). The requirement to file liens against airplanes in a national registry does not constitute a second place of filing. Accordingly, a NFTL against an airplane would be filed with the county recorder's office in the county where the taxpayer resides, and not with the United States District Court. Also, the IRS would not file a NFTL with the national registry under IRC 6323(f). See Treas. Reg. 301.6323(f)-1(e), Examples 5 & 6.

- (5) The Revised Uniform Federal Tax Lien Registration Act (1966), which has been adopted by many states, provides, among other things, a clear rule for the personal property of corporations and partnerships: NFTLs should be filed in the Office of the Secretary of State. This rule applies in states that have adopted the Act.

5.17.2.3.3

(01-08-2016)

Refiling of Notice

- (1) All NFTLs must be refiled within the required refiling period to retain priority as of the initial filing date. If this is not done, most NFTLs filed after December 1982 will self release thirty days after the date ten years after the assessment, regardless of any extension or suspension of the CSED.
- (2) The NFTL may be refiled during the one-year period ending 30 days after the expiration of ten years after the assessment date of the tax. IRC 6323(g)(3)(A).

Example: Assume that the IRS assessed T's liability on March 1, 1993. On July 1, 1993, the IRS filed a NFTL, showing a self-releasing date of March 31, 2003. For all of 1998 and 1999, T's bankruptcy case stayed the running of the collection period. The period for refiling began on April 1, 2002, and continued until March 31, 2003. In this case, the IRS timely refiled on January 2, 2003, so the assessment lien and NFTL filed on July 1, 1993, continue to be valid and the lien has priority as of July 1, 1993.

- (3) If the collection period continues to be suspended or extended after the initial refiling, the IRS may have to refile again. This second refiling must be made in the one-year period ending with the expiration of 10 years after the close of the preceding required refiling period. IRC 6323(g)(3)(B).
- (4) Frequently, the NFTL is filed in multiple offices. When the IRS refiles, it must refile in each of the offices in which the prior NFTLs were filed. See IRC 6323(g)(2)(A) and Treas. Reg. 301.6323(g)-1(a)(1). If a taxpayer properly notifies the IRS of a change of residence, the IRS must not only refile in the original offices, but must also file a NFTL in the recording office covering the new residence.
- (5) If a self-releasing NFTL is filed in multiple offices with respect to a particular tax assessment, and the IRS fails to timely refile in each of those offices, the assessment lien releases and the refiling of any other NFTL is rendered ineffective. Treas. Reg. 301.6323(g)-1(a)(1). In other words, even if the NFTL is properly refiled in every office except for one, failure to refile in one office causes the underlying assessment lien to be extinguished and the refiled NFTLs to be ineffective.
- (6) However, neither the failure to refile before the expiration of the refiling period, nor the release of the lien, shall alter or impair any right of the United States to property or its proceeds that is the subject of a levy or judicial proceeding commenced prior to the end of the refiling period or the release of the lien, except to the extent that a person acquires an interest in the property for adequate consideration after the commencement of the proceeding and does not have notice of, and is not bound by, the outcome of the proceeding. Treas. Reg. 301.6323(g)-1(a)(3). This provision is effective for NFTLs filed on or after April 4, 2011. Contact Area Counsel if you have a case involving a lien that is released that attached property or proceeds that are the subject of a levy or judicial proceeding.

5.17.2.3.4
(03-27-2012)
**Contents of Notice of
Federal Tax Lien**

- (1) The Secretary of Treasury prescribes the form and content of the NFTL and the NFTL is valid notwithstanding any other provisions of law regarding the form or content. IRC 6323(f)(3). State law may not require that the NFTL be in any particular form or contain any particular items to be recordable. *United States v. Union Central Life Ins.*, 368 U.S. 291 (1961).
- (2) The NFTL can be either a paper form (the IRS uses Form 668(Y)(c)), or a form transmitted electronically, including by fax or e-mail. Regardless of the method used to file the NFTL, it must identify the taxpayer, the tax liability giving rise to the lien, and the date the assessment arose. *Treas. Reg. 301.6323(f)-1(d)(2)*.

5.17.2.3.5
(03-19-2018)
**Effect of Errors in Notice
of Federal Tax Lien**

- (1) Errors appearing on the face of the IRS's filed NFTL often create problems not only in evaluating the validity of the NFTL, but also in determining relative priorities between the IRS's claim and other competing lien claimants.
- (2) A number of controversies concern errors in the name of the taxpayer as it appears on the NFTL. The general rule is that if the name on the notice is not identical to the correct name of the taxpayer, then the NFTL is still valid if the NFTL is sufficient to put a third party on notice of a lien outstanding against the taxpayer. This is known as the substantial compliance test. *United States v. Sirico*, 247 F. Supp. 421 (S.D.N.Y. 1965).
- (3) In applying the substantial compliance test, many courts have upheld NFTLs even when there was an error in the taxpayer's name. See, *Quist v. Wiesener*, 327 F.Supp.2d 890 (E.D. Tenn. 2004) ("Joint Effort" rather than "Joint Effort Productions, Inc."); *Whiting-Turner v. P.D.H. Dev. Inc.*, 184 F.Supp.2d 1368 (M.D.Ga. 2000) ("PDH Development, Inc." rather than PD Hill Development, Inc.); *Kivel v. United States*, 878 F.2d 301 (9th Cir. 1989) ("Bobbie Morgan" rather than "Bobbie Morgan Lane"); *United States v. Polk*, 822 F.2d 871 (9th Cir. 1987) ("Roy Bruce Polk" rather than "Bruce Polk"); *Tony Thornton Auction Service, Inc. v. United States*, 791 F.2d 635 (8th Cir. 1986) (notice filed against "Davis's Restaurant," a partnership, and one partner, "Joe Davis," was sufficient as notice against the other partner, "Mary Davis"); *Richter's Loan Co. v. United States*, 235 F.2d 753 (5th Cir. 1956) ("Freidlander" rather than "Friedlander"); *Brightwell v. United States*, 805 F. Supp. 1464 (S.D. Ind. 1992) ("William S. Van Horn" rather than "William B. Van Horn"); and *United States v. Sirico*, 247 F. Supp. 421 (S.D.N.Y. 1965) ("Sirico, George" and "Sirico, A." rather than "Assunta Sirico"). But see, *Fritschler, Pellino, Schrank & Rosen, S.C. v. United States*, 716 F. Supp. 1157 (E.D.Wis. 1988) ("Alan G. Casey" rather than "Alan J. Casey"); *Haye v. United States*, 461 F. Supp. 1168 (C.D.Cal. 1978) ("Castello" rather than "Castillo"); *United States v. Ruby Luggage Corp.*, 142 F. Supp. 701 (S.D.N.Y. 1954) ("Ruby Luggage Corp." rather than "S. Ruby Luggage Corp."); and *Continental Invs. v. United States*, 142 F. Supp. 542 (W.D. Tenn. 1953) ("W.B. Clark, Sr." rather than "W.R. Clark, Sr.").
- (4) In *re Spearing Tool and Manufacturing Co., Inc.*, 412 F.3d 653 (6th Cir. 2005), cert. denied sub nom. *Crestmark Bank v. United States*, 549 U.S. 810 (2006), is the lead case for upholding a NFTL when lien filing records are electronically searched. In *Spearing Tool*, the Sixth Circuit held that the IRS's identification of a taxpayer in a NFTL was sufficient where the name of the corporation appeared in an abbreviated form of the corporate name registered with the Michigan Secretary of State. A lien search by a secured creditor did not

disclose the NFTLs that had been filed against “Spearing Tool & Mfg. Company, Inc.” The proper name under UCC filing rules was “Spearing Tool and Manufacturing Co.”

- (5) The 6th Circuit found that the secured creditor challenging the validity of the NFTL had failed to conduct a reasonable and diligent electronic search because its search did not take into consideration the following three factors:

- The use of the abbreviation **Mfg.** and the use of an ampersand are common.
- The secured creditor knew that Spearing Tool sometimes used these abbreviations.
- The Michigan Secretary of State’s office recommended to the secured creditor that it undertake a search using the abbreviations.

Note: The 6th Circuit limited its holding to the facts and specifically expressed no opinion about whether creditors have a general obligation to search name variations.

- (6) In summary, when searching for a NFTL in public records, either in a book format or electronic format, the searcher must act reasonably and diligently. The NFTL identifies the taxpayer when it is sufficient to put a third party on notice of a lien outstanding against the taxpayer. Since this is essentially a factual question, however, it is especially important to pay attention to the “details.” Thus, for example, if a person is known or suspected to use any aliases or owns property held for him/her by a nominee, agent or trustee, it is desirable to prepare an individual NFTL for filing in all the necessary names. Area Counsel approval should be obtained before filing a NFTL in the name of a nominee, alter ego, transferee, or successor in interest. IRM 5.12.7.6(8).

5.17.2.4
(01-08-2016)
Collection Due Process

- (1) IRC 6320 gives the taxpayer the right to challenge a NFTL filing, request a Collection Due Process (CDP) hearing with Appeals, and seek judicial review of Appeals’ determination with the Tax Court. The IRS must generally notify the taxpayer within 5 business days after the date of filing the first NFTL for a tax period. The notice of lien must be given in person, left at the taxpayer’s home or place of business, or sent by certified or registered mail to the person’s last known address. The notice must also inform the taxpayer of the amount of the unpaid tax, the taxpayer’s right to request a hearing, the available administrative appeals procedures, and applicable procedures for releasing the lien. IRC 6320(a). For more information, see IRM 5.12.6, Appeals Processes Involving Liens, IRM 5.1.9, Collection Appeal Rights, and IRM 8.22, Collection Due Process.

5.17.2.5
(03-19-2018)
Property to Which the Tax Lien Attaches

- (1) The federal tax lien attaches to all property and rights to property of the taxpayer. This is a very broad concept and includes not only items which are typically thought of as property, e.g., tangible items and “things,” but also intangible items and “rights” which a taxpayer may have, but are not necessarily marketable. The only exception is that the lien does not attach to any interest of a Native American in restricted land held by the United States. Treas. Reg. 301.6321-1.

- (2) The courts have interpreted this very broad language to include property of greatly varying natures, as well as future interests, contingent interests, and executory contracts.
- **Future interests.** The fact that a taxpayer's enjoyment of a "right to property" may be postponed does not prevent attachment. If a taxpayer has an unqualified fixed right, under trust or a contract, to receive periodic payments or distributions of property, a lien attaches to the taxpayer's entire right regardless of when the payments or distributions will be made. Rev. Rul. 55-210, 1955-1 C.B. 544.
 - **Contingent interests.** These are interests which a party will receive only if certain circumstances or events occur. See *Fouts v. United States*, 107 F.Supp.2d 815, 817 (W.D. Mich. 2000) (under state law an expectant beneficiary of an inter vivos trust has a present interest in property that is attachable). But, see, *Dominion Trust Co. of Tennessee v. United States*, 7 F.3d 233 (unpublished table decision) (6th Cir. 1993) (under state law a contingent remainder person did not have an interest in property). An inter vivos trust is sometimes referred to as a "living trust".
 - **Executory contracts.** A lien may attach before performance under a contract. See, *Seaboard Surety Co. v. United States*, 306 F.2d 855, 859 (9th Cir.1962) (a lien attached to the taxpayer's rights under an executory contract which the taxpayer had assigned and, when the taxpayer performed under the contract, the government had a lien on the proceeds). See also, *Randall, Sr. v. H. Nakashima & Co.*, 542 F.2d 270, 274 (5th Cir. 1976) (contract rights under a partially executed contract constituted a right to property because they had a realizable value).
- (3) Once the lien has come into existence, it attaches immediately to any property acquired by the taxpayer during the existence of the lien. In other words, unlike a typical mortgage, the federal tax lien attaches to a taxpayer's after-acquired property.
- (4) If the IRS files a NFTL, the tax lien will generally have priority to a taxpayer's after-acquired property. In *United States v. McDermott*, 507 U.S. 447 (1993), the Supreme Court held that the federal tax lien had priority over a judgment lien on the taxpayer's after-acquired property, to which the judgment lien and the federal tax lien attached simultaneously, even though the judgment lien was filed ahead of the NFTL.

5.17.2.5.1
(01-08-2016)
State Law

- (1) State law is very significant when considering the property and rights to property to which the federal tax lien attaches. The IRS looks to state law to determine a taxpayer's rights in a particular piece of property, but federal law determines whether such interests qualify as property or rights to property. "[One] look[s] to state law to determine what rights the taxpayer has in the property the IRS seeks to reach, then to federal law to determine whether the taxpayer's state-delineated rights qualify as 'property' or 'rights to property' within the compass of federal tax lien legislation." *United States v. Craft*, 535 U.S. 274 (2002); *Drye v. United States*, 528 U.S. 49, 58 (1999).
- (2) State law does not determine whether something is property under the Internal Revenue Code. For example, in many states a liquor license is not property. Under the Internal Revenue Code, however, the question is whether the

taxpayer has rights under state law. Because the taxpayer does have rights under state law, the liquor license is property under the Internal Revenue Code. See, *Drye*, 528 U.S. at 58-59.

- (3) The IRS must look to state law to determine whether a taxpayer has rights in property by virtue of a civil union, domestic partnership, or similar relationship.

5.17.2.5.2
(03-27-2012)
Real Property

- (1) Federal tax lien questions relating to the joint ownership of property generally arise when other parties claim an interest in real property otherwise subject to the federal tax lien. This issue typically arises when the IRS asserts a tax lien against only one of the parties having an interest in real property which, depending on state law, is held in one of the following forms:

- Community property,
- Joint tenancy,
- Tenancy in common, or
- Tenancy by the entirety.

5.17.2.5.2.1
(03-19-2018)
Community Property

- (1) The community property states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Puerto Rico is also a community property jurisdiction. Spouses in Alaska may elect to have statutory community property rules apply to some or all of their property. Alaska St. 34.77.010 et seq. Community property includes both real and personal property.
- (2) In most community property states, only married couples may own property as part of a community. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The community property rules also apply in some states to state-created, formal relationships between non-married couples. For example, California, Nevada and Washington permit domestic partnerships to which each state applies its community property laws.
- (3) Community property law presents special problems concerning the force and effect of the federal tax lien. Questions in that regard should be referred to Area Counsel. Reference may also be made to the State Law Guides on the My SB/SE Counsel website. See *State Law Guides* and IRM 25.18.1 and IRM 25.18.4.

5.17.2.5.2.2
(03-27-2012)
Joint Tenancy

- (1) A joint tenancy may be created when the following conditions are met:
 - Two or more persons become the owners of property in equal and undivided shares.
 - The interest of each tenant is created in the same conveyance at the same time and the interests must be equal.
- (2) Joint tenants generally have a right of survivorship. Under the right of survivorship, when a joint tenant dies, the surviving joint tenants automatically own a greater portion of the property.

Example: Assume A, B, and C own Whiteacre in a joint tenancy. If A dies, B and C automatically own Whiteacre. If B then dies, C automatically is the sole owner.

Note: By statute, some states have abolished the survivorship feature of joint tenancy.

- (3) Generally, where only one of the joint tenants owes taxes, the lien attaches to the taxpayer's property interest and the entire property may be sold pursuant to judicial sale under IRC 7403, although the non-liable joint tenant must be compensated from the sale proceeds. If the IRS enforces the tax lien against a taxpayer's interest in a joint tenancy and sells it, the purchaser acquires the taxpayer's partial interest in property, but most states then treat the joint tenancy as having been converted to a tenancy in common (discussed below). See generally, *United States v. Rodgers*, 461 U.S. 677 (1983).
- (4) In most states, if the individual, against whose property a federal tax lien attaches, dies before any of the other joint tenants, then the lien ceases to attach to the property. However, if the same individual is the last survivor of the joint tenants, the tax lien then attaches to the entire property. In a few states, however, this is not the rule. Wisconsin is an exception to the general rule: if the federal tax lien has attached to the interest of one joint tenant who then dies, the surviving joint tenant takes the property encumbered with the federal tax lien. *United States v. Librizzi*, 108 F.3d 136 (7th Cir. 1997). Connecticut is also an exception to the general rule. Conn. Gen. Stat. 47-14f. See also *Paternoster v. United States*, 640 F.Supp.2d 983 (S.D. Ohio 2009). Accordingly, state law should always be consulted to determine whether there is an exception to the general rule.

5.17.2.5.2.3 (03-27-2012) **Tenancy in Common**

- (1) A tenancy in common is like a joint tenancy in that it creates an undivided interest in property. However, it is different from a joint tenancy in two important aspects:
 - First, the interest of a tenant in common may be transferred to a third party without destroying the tenancy in common.
 - Second, there is no right of survivorship in a tenancy in common.

Example: Assume A and B own Blackacre in tenancy in common, and A dies. B and A's estate would then own Blackacre as tenants in common.

- (2) Applying the above rules to collection, the IRS may levy and sell a taxpayer's interest in a tenancy in common. Alternatively, the IRS may ask a court to foreclose the federal tax lien and sell the entire property, although the non-liable tenant in common must be compensated from the sale proceeds. Also, if a tax lien attaches to one tenant's interest, it will survive the taxpayer's death and continue to encumber the property in the hands of heirs or legatees.

5.17.2.5.2.4 (03-05-2019) **Tenancy by the Entirety**

- (1) Only spouses can hold property in a tenancy by the entirety. A tenancy by the entirety is similar to a joint tenancy in having a right of survivorship. But the tenancy by the entirety has a restriction not found with a joint tenancy: one spouse cannot transfer his or her interest without the consent of the other spouse. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Some states permit real and personal property to be held as a tenancy by the entirety while others only permit real property to be held in such manner.
- (2) For many years there was uncertainty as to whether a federal tax lien could attach to the interest of only one tenant. (If both spouses were liable, the general rule was that a federal tax lien could attach to the tenancy by the

entirety.) In *United States v. Craft*, 535 U.S. 274 (2002), the Supreme Court provided a clear answer, holding that the federal tax lien may attach to the tenancy by the entirety when only one spouse had a federal tax liability. *Notice 2003-60, 2003-39 I.R.B. 643* addressed the application of *Craft* to different situations. In summary, the Notice stated the following:

- a. The federal tax lien attaches to all the property and rights to property of the taxpayer. The Court's decision confirms that a taxpayer's property and rights to property have always included any rights that the taxpayer may have in entireties property under state law. The Court's decision, therefore, does not represent new law and does not affect other law applicable to federal tax liens and federal tax collection. For example, the *Craft* decision does not change any limitation on the ability of the IRS to rescind an accepted offer in compromise or terminate an accepted installment agreement.
- b. As a matter of administrative policy, the IRS will, under certain circumstances, not apply *Craft*, with respect to certain interests created before *Craft*, to the detriment of third parties who may have reasonably relied on the belief that state law prevents the attachment of the federal tax lien.
- c. The administrative sale of entireties property subject to the federal tax lien presents practical problems that limit the usefulness of the IRS's seizure and sale procedures. Levying on cash and cash equivalents held as entireties property is considerably less problematic and will be used by the IRS in appropriate cases.
- d. Because of the potential adverse consequences to the non-liable spouse of the taxpayer, the use of lien foreclosure for entireties property subject to the federal tax lien will be determined on a case-by-case basis. See *United States v. Rodgers*, 461 U.S. 677 (1983) (IRC 7403 authorizes foreclosure sale of entire jointly-owned property for separate tax liability of one spouse, but non-liable spouse is entitled to compensation from sale proceeds for loss of her share of the property).
- e. As a general rule, the value of the taxpayer's interest in entireties property will be deemed to be one-half. Accord, *Popky v. United States*, 419 F.3d 242, 245 (3d Cir. 2005); *United States v. Bar*, 617 F.3d 370, 373 (6th Cir. 2010), cert. denied, 131 S. Ct. 1678 (2011). But see *Pletz v. United States*, 221 F.3d 1114, 1117-18 (9th Cir. 2000) (using actuarial tables). *Craft*, declined to address the valuation of each spouse's individual interest in the property. 535 U.S. at 289.
- f. Where there has been a sale or other transfer of entireties property subject to the federal tax lien that does not provide for the discharge of the lien, whether the transfer is to the non-liable spouse or a third party, the lien thereafter encumbers a one-half interest in the property held by the transferee.

5.17.2.5.2.5
(03-19-2018)

Equitable Conversion

- (1) **Some states recognize** the doctrine of equitable conversion, which provides that a purchaser acquires equitable title to property when the unrecorded contract for sale is executed. Although the seller retains bare legal title to the property, the seller's equity interest is in the right to the balance of the purchase money. The seller holds legal title in trust for the purchaser.
- (2) **Some states extend** the doctrine of equitable conversion to a lender who secures the interest with a mortgage or deed of trust.

- (3) For a discussion of equitable conversion on the priority of the statutory federal tax lien with respect to purchasers and lenders, see IRM 5.17.2.6.1(5), Purchasers, and IRM 5.17.2.6.4(7), Holder of a Security Interest, respectively.

5.17.2.5.3
(03-27-2012)
Personal Property

- (1) Personal property is defined generally as everything that can be owned that is not real property. Tangible property is defined generally as personal property that has physical form and is moveable.
- (2) The IRS takes collection action against a variety of types of personal property, including automobiles, trucks, boats, goods, bank accounts, wages and benefits, interests in trusts, and partnership interests.

5.17.2.5.3.1
(03-05-2019)
Cash and Rights to Cash

- (1) The federal tax lien attaches to a taxpayer's interest in a bank account, even when the bank account is in the joint names of the taxpayer and others. *United States v. National Bank of Commerce*, 472 U.S. 713 (1985). This means that the lien reaches a taxpayer's unqualified right to withdraw all of the money in the account without the consent of the other account holder. However, the right of a taxpayer joint depositor to withdraw funds from a joint bank account is provisional and subject to a later claim by a codepositor that the money in fact belongs to him or her.
- (2) The federal tax lien attaches to a taxpayer's wages as the wages become his property and rights to property. State laws shielding some portion of a debtor's wages from collection do not apply to the IRS, as the collection of federal taxes is a matter of federal supremacy. Compare IRC 6334(a)(9) and IRM 5.17.3.5.7, Property Exempt from Levy, regarding exemption of wages and other property from levy.
- (3) In many situations, the IRS loses its federal tax lien on money when a third party acquires the money in exchange for fair value. This occurs under IRC 6323(b)(1)(A), which provides a superpriority for a purchaser of a security if the purchaser has no actual knowledge of the federal tax lien. Treas. Reg. 301.6323(h)-1(d) defines a security to include negotiable instruments and money.

Example: Taxpayer stops his car at a gasoline station and purchases \$25 of gasoline. The federal tax lien has been stripped from the \$25 paid to the gasoline station because the station has no actual knowledge of the federal tax lien. The superpriority for purchasers of money allows money to flow in commerce without delays for searching for federal tax liens.

5.17.2.5.3.2
(03-19-2018)
Partnership and Other Joint Interests

- (1) It is often difficult to determine a partner-taxpayer's interest in a partnership or other joint interest to which a federal tax lien has attached. Generally speaking, a partner-taxpayer's interest in either a partnership or a joint venture is only a share in the equity in the assets; that is, the excess of assets over liabilities. *United States v. Kaufman*, 267 U.S. 408 (1925). Note that a partnership may own both real and personal property in the name of the partnership. If a federal tax lien exists on the partner-taxpayer's property, the federal tax lien would not attach to the partnership's property. See Rev. Rul. 73-24, 1973-1 C.B. 602 (addressing whether partnership account is subject to levy to satisfy tax liability of individual partner).

- (2) Frequent and regular partnership “draws” which are advances or loans on annual profits are subject to a lien (and may be levied as salary or wages). *United States v. Moskowitz, Passman & Edelman*, 603 F.3d 162 (2d Cir 2010).
- (3) Another issue that arises with respect to partnerships is whether the federal tax lien attaches to a general partner’s individual property in connection with an assessment made against the partnership for a partnership tax liability. In *United States v. Galletti*, 541 U.S. 114 (2004), the Supreme Court held that a timely assessment of a partnership’s employment tax liability permits the IRS to collect the liability from the individual partners. Because the partners are derivatively liable for the taxes under state law, the assessment and notice and demand upon the partnership gave rise to the federal lien both on partnership and partner property.

5.17.2.5.3.3
(03-05-2019)

**Trusts and Beneficial
Interests**

- (1) A trust is a state-law created entity where one party holds property for the benefit of another. The following are terms generally used in connection with trusts:
 - The creator of the trust is referred to as the “grantor” or “settlor.”
 - The property held by the trust is called the “res,” “corpus,” “principal” or “remainder.” Income generated by the corpus is called income.
 - The person holding the property for the benefit of the other person is called the “trustee” or “fiduciary.”
 - The person benefitting from the trust is called the “beneficiary.” A beneficiary may only be entitled to income, principal or both, depending on the provisions of the trust.
 - A “revocable” trust is one where under the terms of the trust, the grantor/settlor reserves the right to dissolve the trust and take the property back.
 - An “irrevocable” trust is one that the grantor/settlor cannot dissolve and cannot take the property back.
- (2) If the taxpayer is the grantor or settlor of a trust, the validity of the trust must be determined under applicable state law. If the grantor reserves a substantial interest or unrestricted control over the management of the operations that is not for the benefit of the purported beneficiary, the grantor remains the owner of the property and the trust will be ignored. For example, property in a family trust that is a sham - the grantors attempt to reduce their taxes by putting the property in trust, while retaining the use and benefits of the property - is subject to collection action to satisfy the grantors’ liability. *Whitesel Family Estate v. United States*, 84-2 U.S. Tax Cas. (CCH) ¶ 9890 (S.D. Ohio 1984); *Edwards Family Trust v. United States*, 572 F. Supp. 22 (D. N.M. 1983).
- (3) If the taxpayer is the beneficiary of a trust, a federal tax lien will attach to the taxpayer’s beneficial interest in the trust. This determination is made by reference to the trust instrument itself, with the appropriate state law governing construction of the terms of the instrument or the resolution of any ambiguities in the instrument. In some cases the lien will attach to the corpus of the trust and the income payable to the beneficiary. In other cases the lien will attach only to the income as it becomes payable to the beneficiary, and in a few cases it may not attach to either the income or the corpus. The latter situation may arise where the trustee has the unrestricted power of disposition of the trust income; i.e., where he/she may legally refuse to make any further distribution to the taxpayer-beneficiary and instead make the distribution to other beneficiaries or simply accumulate the income.

- (4) The trust instrument can only determine the property right of the beneficiary (e.g., the taxpayer) in the trust corpus and income; the trust instrument itself cannot determine the effect of the federal tax lien upon that right. Thus, a so-called “spendthrift” trust may by its terms confer certain specific benefits upon a beneficiary and then purport to restrict the rights of creditors to reach those benefits. Such restrictions are not effective to remove those benefits from the reach of the federal tax lien, regardless of whether under the appropriate state law a “spendthrift” trust is regarded as valid in all respects. *Bank One Ohio Trust Co. v. United States*, 80 F.3d 173 (6th Cir. 1996). In any case where doubt exists as to the rights of a beneficiary of any of the many forms of trusts, the opinion of Area Counsel should be sought.
- (5) Because the validity of a trust and the taxpayer’s rights to trust property are highly dependent upon the particular facts of the case, the terms of the trust agreement, and applicable state law, Area Counsel should be consulted whenever these issues arise. General information regarding the rules relating to trusts and how they impact tax collection may be found in the Tool Box provided on the My SB/SE Counsel website *Trusts & Collection Outline*. See also IRM 5.17.3.10.24, Levy and Sale, Trusts, for information on levying on the corpus or income of a trust.

5.17.2.5.3.4
(03-19-2018)
Intangible Property

- (1) Intangible property is personal property which lacks a physical existence but is represented by physical evidence. Items in this category include certificates of stock, bonds, promissory notes, licenses, goodwill, debts owed to the taxpayer, patents, copyrights, trademarks, franchises and “choses in action.”
- (2) A chose in action is a personal right not reduced to possession and recoverable by a suit at law. A plaintiff’s cause of action in tort or contract against a defendant is an example of a chose in action. *United States v. Stonehill*, 83 F.3d 1156 (9th Cir. 1996), cert. denied, 519 U.S. 992 (1996).

5.17.2.5.4
(03-19-2018)
Exempt Property

- (1) With one exception, no property or rights to property belonging to the taxpayer is exempt from attachment of the federal tax lien. Treas. Reg. 301.6321-1 provides “... any interest in restricted land held in trust by the United States for an individual noncompetent Indian (and not for a tribe) shall not be deemed to be property, or a right to property, belonging to such Indian.”
- (2) State laws exempting a debtor’s property from creditors do not affect the reach of the federal tax lien. *United States v. Bess*, 357 U.S. 51 (1958); *Commissioner v. Stern*, 357 U.S. 39 (1958). Similarly, while state law may prevent a beneficiary of a spendthrift trust from transferring his or her interest to third parties, the beneficiary’s interest remains property subject to the federal tax lien.

5.17.2.5.5
(03-27-2012)
Terminable Interests

- (1) Terminable interests are interests a taxpayer may have that, by definition, terminate upon the death of the party holding the interest, such as a life estate in property, or a contract right that will terminate at some time, e.g., an option.
- (2) The federal tax lien may attach to such an interest before it terminates. However, once the interest terminates, the federal tax lien on that interest also terminates. *United States v. Swan*, 467 F.3d 655 (7th Cir. 2006); Rev. Rul. 54-154, 1954-1 C.B. 277.

Example: Assume taxpayer has an option to purchase Whiteacre. The federal tax lien attaches to that option. If the taxpayer, however, never exercises the option, the option will lapse. After the lapse, the federal tax lien no longer attaches to the option.

- (3) Similarly, in the case of a life estate, the federal tax lien clearly attaches to the life tenant's interest and may be enforced against that interest so long as the life tenant lives. However, upon the death of the life tenant, the lien ceases to attach to the property since the IRS's tax lien rights do not exceed the taxpayer's right to the property.

5.17.2.5.6 (03-05-2019)

Property in the Custody of a Court

- (1) When a taxpayer's property is within the jurisdiction of and under the control of a state or federal court, such property is referred to as being in "custodia legis". This is a judicial doctrine. In most situations, courts recognize that a lien may attach to property held in the court's custody. See *Dragstrem v. Obermeyer*, 549 F.2d 20 (7th Cir. 1977).
- (2) There may be situations, however, when the federal tax lien will not attach to property held in the court's custody. For example, if an assessment has not been made prior to the transfer of the taxpayer's property to a state court receiver and the taxpayer has no property interest or rights to property after the transfer, then the federal tax lien will not attach to the property held by the receiver.
- (3) Each state decides whether the taxpayer is divested of his interest upon the transfer.
- (4) The fact that the IRS may not have a lien on property in custodia legis does not prevent the IRS from collecting the tax liability in the judicial proceeding that administers the property. The tax lien will attach to any property of the taxpayer not in the custody of the court and will attach to any property returned to the taxpayer upon termination of the court proceedings, such property being in the nature of after-acquired property.

Note: Generally, a levy should not be used to enforce collection of taxes if assets of the taxpayer are in custodia legis. See IRM 5.17.3.5.4, Custodia Legis, for more information.

- (5) In bankruptcy cases, the discharge of the debtor-taxpayer from a tax liability may prevent the tax lien from attaching to after-acquired property. Area Counsel should be contacted with questions concerning the effect of a bankruptcy discharge.

5.17.2.5.7 (01-08-2016)

Property Held By Third Parties

- (1) Attempting to avoid the imminent attachment of the federal tax lien, taxpayers have transferred their assets to legal entities that they or their friends or relatives control. This maneuver will generally be unsuccessful, because the federal tax lien extends to property held by a third party if that third party is either the alter ego or the nominee of the taxpayer. The factors which are relevant in determining whether such a situation exists are similar to the factors which are used in deciding whether a taxpayer has fraudulently conveyed property to keep it from the reach of creditors.
- (2) This section outlines some of the most significant elements in determining whether the federal tax lien attaches to property held by a taxpayer's alter ego

or nominee. Note that these two doctrines are legally distinct. *Oxford Capital Corp. v. United States*, 211 F.3d 280 (5th Cir. 2000).

- “Alter egos” connote legally distinct entities which are so intermixed that their affairs (and assets) are not readily separable.
- “Nominees” connote readily separable persons or entities, with one holding certain specific property for the exclusive use and enjoyment of the other.

- (3) The terms often interchange or overlap, but “alter egos” are usually corporate and business entities controlled by the taxpayer, whereas “nominees” are usually individuals who clearly have a separate physical identity.

5.17.2.5.7.1
(03-19-2018)
Alter Ego

- (1) Alter ego essentially means a “second self.” It is a doctrine that allows the law to disregard an entity’s separate legal identity in order to extend liability and prevent abuse. Using an alter ego theory, if an individual is the alter ego of a corporate taxpayer or other legally distinct entity, then that individual’s assets may be used to satisfy the debts of the corporate taxpayer. This is sometimes called “piercing the corporate veil.”
- (2) Similarly, if a corporation or other legally distinct entity is the alter ego of a taxpayer, then the assets of that entity may be used to satisfy the debts of the individual taxpayer. This is sometimes called “reverse piercing of the corporate veil.”
- (3) An alter ego generally involves a sham corporation used to avoid legal obligations. To establish an alter ego, such that an alter ego Notice of Federal Tax Lien may be filed, it must be shown that the shareholders disregarded the corporate entity and made it an instrumentality for the transactions of their own affairs.

Note: Counsel’s position is that federal common law, rather than state law, governs alter ego status. See Chief Counsel Notice CC-2012-002 (Dec. 2, 2011). Contact Area Counsel with questions regarding the applicable law.

- (4) No one factor determines whether an alter ego situation is present, but a number of factors taken together may. The following list is neither exhaustive nor exclusive, but alter ego situations typically involve one or more of the following:
- a. Commingling of corporate and personal finances and use of corporate funds to pay personal expenses.
 - b. Unsecured interest-free loans between the corporation and the shareholder.
 - c. The taxpayer is a shareholder, director, or officer of the corporation, or otherwise exerts substantial control over the corporation.
 - d. The corporation is undercapitalized relative to its reasonable anticipated risks of business.
 - e. A failure to observe corporate formalities, e.g. issuance of stock, payment of dividends, director and shareholder meetings, or the maintenance of corporate records.
 - f. A failure to disregard the corporate fiction presents an element of injustice or “fundamental unfairness.”

- (5) In an alter ego case, a special condition NFTL is used, identifying, in the name line of the NFTL before the taxpayer's name, the third party as the alter ego. For example, if the taxpayer is TP, and ABC Inc. is TP's alter ego, then the NFTL name line would read "ABC, Inc., as Alter Ego of TP."
- (6) Area Counsel approval is required prior to filing a Notice of Federal Tax Lien naming an alter ego. See both IRM 5.12.7.6.2, Alter-Ego NFTL, and IRM 5.12.7.6.5, Special Condition NFTL Processing Through eApproval: Request, Review, and Approval.

Note: Generally, an alter ego should not be asserted in transactions involving only individuals.

5.17.2.5.7.2
(03-19-2018)
Nominee

- (1) A "nominee" is someone designated to act for another. As used in the federal tax lien context, a nominee is generally a third-party individual who holds legal title to property of a taxpayer while the taxpayer enjoys full use and benefit of that property. In other words, the federal tax lien extends to property "actually" owned by the taxpayer even though a third party holds "legal" title to the property as nominee. Generally speaking, the third party in a nominee situation will be either another individual or a trust.
- (2) A nominee situation generally involves a fraudulent conveyance or transfer of a taxpayer's property to avoid legal obligations. To establish a nominee lien situation, it must be shown that while a third party may have legal title to the property, it is really the taxpayer that owns the property and who enjoys its full use and benefit. If state law is undeveloped or underdeveloped as to the issue of nominee ownership, contact Area Counsel for assistance.
- (3) No one factor determines whether a nominee situation is present, but a number of factors taken together may. The following list is neither exhaustive nor exclusive, but nominee situations typically involve one or more of the following:
 - a. The taxpayer previously owned the property.
 - b. The nominee paid little or no consideration for the property.
 - c. The taxpayer retains possession or control of the property.
 - d. The taxpayer continues to use and enjoy the property conveyed just as the taxpayer had before such conveyance.
 - e. The taxpayer pays all or most of the expenses of the property.
 - f. The conveyance was for tax avoidance purposes.
- (4) The IRS's NFTL in a nominee situation is identical to the standard NFTL, except that the nominee is identified as the name of the taxpayer. For example, if the taxpayer is TP, and My Brother-In-Law or My Trust is TP's nominee, then the name of the taxpayer on the nominee NFTL would be "My Brother-In-Law or My Trust, Nominee of TP."
- (5) Unlike the alter ego situation, nominee situations usually involve specific pieces of a taxpayer's property that were conveyed to the nominee. Since the federal tax lien only attaches to property actually "owned" by the taxpayer, it may not reach all property that is, in fact, actually owned by the nominee. Therefore, the NFTL in a nominee situation will usually contain a notation on its face that the lien is filed to attach specifically to certain identified property. This property must be specifically identified and described in the NFTL.

- (6) Area Counsel approval is required prior to filing a nominee lien. See both IRM 5.12.7.6.1, Nominee NFTL, and IRM 5.12.7.6.5, Special Condition NFTL Processing Through eApproval: Request, Review, and Approval, for more information.

5.17.2.5.8
(01-08-2016)
**Disclaimers and
Renunciations**

- (1) State laws generally provide that a recipient does not have to accept a gift or transfer. Such transfers are generally inheritances, devises, bequests, gifts, and marital interests upon divorce or death of a spouse. To avoid the transfer, state law allows the recipient to “disclaim” or “disavow” or “renounce” such transfers. Typically, the operation of state law can create a legal fiction that the recipient of such transfers never received the property in question by retroactively treating the disclaimer as having occurred prior to the receipt of the property.
- (2) The issue is whether a taxpayer-recipient’s disclaimer will prevent the federal tax lien from attaching to the property. In *Drye v. United States*, 528 U.S. 49 (1999), the Supreme Court held that such a disclaimer will not prevent a federal tax lien from attaching to the property. Similarly, even though a spouse’s renunciation of a marital interest may be treated as retroactive under state law, that state-law disclaimer does not determine the spouse’s liability for federal tax on her share of community income realized before the renunciation. *United States v. Mitchell*, 403 U.S. 190 (1971).
- (3) “Retroactive” or “relation-back” state laws also do not prevent a federal tax lien from attaching to property. *Treas. Reg. 301.6323(h)-1(a)(2)(B)*; *Brent v. Commissioner*, 630 F.2d 356 (5th Cir. 1980); *Daine v. Commissioner*, 168 F.2d 449 (2nd Cir. 1948); *Eisenberg v. Commissioner*, 161 F.2d 506 (3d Cir. 1947), cert. denied, 332 U.S. 767 (1947).

5.17.2.5.9
(03-19-2018)
**Same-sex Marriage and
Legally-Recognized
Relationships**

- (1) The recognition of same-sex marriage and the creation of formal relationships other than marriage may give taxpayers property rights they previously did not have. Federal tax liens will attach to these property rights and the IRS will be able to levy on these rights. Some states allow opposite and same-sex couples to enter into other formal, legal relationships that confer rights and benefits similar to those provided by marriage. These relationships include civil unions, registered domestic partnerships, reciprocal beneficiaries, and designated beneficiaries. Among the rights conferred on members of the state-created legal relationships are:

Relationship Table Part 1

Item	Description
1.	Inheritance rights. Upon the death of one spouse or member of a legally-recognized relationship, the survivor may be entitled to inherit certain property under the state’s intestacy law. Alternatively, the surviving member may have a right to property as a beneficiary under the decedent’s will. Instead of taking under a will, or in the event of unjustifiable disinheritance or omission from the will, the survivor may be entitled to claim an elective share.
2.	Community property rights. See IRM 5.17.2.5.2.1.
3.	Tenancy by the entirety. See IRM 5.17.2.5.2.4.

Item	Description
4.	Tort claims. A member of a legally-recognized relationship may have the right to bring a cause of action in connection with the death or injury of the other member of the legally-recognized relationship. A federal tax lien attaches to tort claims. <i>United States v. Hubbell</i> , 323 F.2d 197 (5th Cir. 1963).
5.	Insurable interest. A member of a legally-recognized relationship may have an insurable interest in the life of the other member of the legally-recognized relationship. A delinquent taxpayer in one of these legally-recognized relationships may be the beneficiary under an insurance policy upon the death or disability of the other member.
6.	Retirement plans. A liable taxpayer may be entitled to receive survivor benefits or the balance of a retirement account from a retirement plan in which his or her deceased spouse or member of a legally-recognized relationship was a participant. If a liable taxpayer has been divorced, he or she may be entitled to benefits or the account balance from a retirement plan in which his or her divorced spouse or member of a legally-recognized relationship is or was a participant.

Relationship Table Part 2

Item	Continuation of Retirement Plans
6a	ERISA-qualified plans. The Employment Retirement Income Security Act (ERISA) governs most retirement plans and if ERISA-qualified, state law rules do not apply. For a defined benefit plan (plan funded by an employer that pays participants a specific monthly benefit at retirement), the surviving spouse of participant is eligible for a monthly benefit unless the participant and spouse elect against it. For a defined contribution plan (e.g., 401(k), IRA, profit-sharing plan), a spouse is entitled to the balance of the account unless the participant and spouse elect against it. In the absence of a spouse, the named beneficiary may be a registered domestic partner or member of another legally-recognized relationship.
6b	Non-ERISA plans. Governmental plans, many church plans and section 403(b) plans are not covered by ERISA. These plans may provide for survivor benefits for a spouse or member of a legally-recognized relationship upon the death of the participant.

5.17.2.6
(03-19-2018)

Priority of Tax Liens: Specially Protected Competing Interests

- (1) After notice and demand for payment, the federal tax lien arises and relates back to the assessment date. Congress recognized that it was difficult to conduct business when creditors were unaware of the IRS's assessment lien. Consequently, Congress enacted the forerunner of IRC 6323(a) to provide that a NFTL must be filed in order to have priority over certain creditors. Today, IRC 6323(a) provides, in part, that "[the] lien imposed by section 6321 shall not be valid as against any purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor until notice thereof ... has been filed ...".
- (2) IRC 6323(a) applies to the IRS in a variety of situations including interpleaders and lien foreclosures. In lien priority disputes, the IRS must determine which claims against the taxpayer's property will be satisfied first, which second, and so on down the order of priority until the value of the property is exhausted. If a purchaser, holder of a security interest, mechanic's lienor, or judgment lien creditor with a claim to the taxpayer's property perfects its claim prior to the filing of a NFTL, then that claim is entitled to priority over the tax lien.

5.17.2.6.1
(03-19-2018)
Purchasers

- (3) The parties listed in IRC 6323(a) are protected against unfiled NFTLs, notwithstanding actual knowledge of the statutory assessment lien. Rev. Rul. 2003-108, 2003-2 C.B. 963.
- (1) If a NFTL has not been filed prior to the sale of a taxpayer's property, a purchaser takes the property free of the federal tax lien. IRC 6323(a).
- (2) A purchaser is a person who, for adequate and full consideration in money or money's worth, acquires an interest (other than a lien or security interest) in property which is valid under local law as against subsequent purchasers without actual notice. IRC 6323(h)(6).
- (3) A purchaser must acquire the property pursuant to a sale. The amount paid must bear some reasonable relationship to the value of the property acquired. However, this requirement of full and adequate consideration does not preclude a bona fide bargain purchase or a purchaser who has not completed performance of his/her obligation, such as the completion of installment payments.
- (4) A purchaser is also one who has acquired a lease of property, an executory contract to purchase or lease property, one who has an option to purchase or lease property or an interest in it, or one who has an option to renew or extend a lease on property, if the interest acquired is not a lien or security interest.
- (5) **Some states recognize** the doctrine of equitable conversion, which provides that a purchaser acquires equitable title to property when the unrecorded contract for sale is executed. Equitable conversion is only relevant where the contract for sale is executed before the NFTL is filed but recordation occurs after the NFTL is filed or not at all. Even in states that recognize equitable conversion, the purchaser will not take the property free of the federal tax lien unless they qualify as a "purchaser" under IRC 6323(h)(6). *Ruggerio v. United States*, 2005-2 USTC ¶ 50,645 (4th Cir. 2005), cert. denied, 549 U.S. 811 (2006). In *Ruggerio*, which is a Maryland case, an assessment lien attached to the taxpayer-seller's real property. Subsequently, the taxpayer-seller contracted to convey the real property to buyer. The IRS filed a NFTL before the closing date on the real property. The Fourth Circuit held that buyer took the real property with the federal tax lien attached to it, because the IRS filed a NFTL before the buyer qualified as a purchaser under IRC 6323(a).

Reminder: *State Law Guides* contain information on equitable conversion and its impact on the priority of the federal tax lien in relation to purchasers.

5.17.2.6.2
(03-27-2012)
Judgment Lien Creditor

- (1) If a NFTL has not been filed prior to a creditor perfecting a judgment lien, the judgment lien has priority over the federal tax lien. In order to be a judgment lien creditor, the creditor must obtain a valid judgment in a court of record and of competent jurisdiction for the recovery of specifically designated property or for a certain sum of money. Treas. Reg. 301.6323(h)-1(g).
- (2) In the case of a judgment for the recovery of a certain sum of money, a claimant must have a perfected lien on the property involved. This requires:
- the identity of the lienor,
 - the property subject to the lien, and
 - the amount of the lien be established.

- (3) If state law requires a recording of the judgment before there is a lien on the real property good against third parties, the creditor does not qualify as a judgment lien creditor until that recordation date. If state law requires a levy or seizure of personal property before there is a lien on the personal property that is good against third parties, then there must be a levy or seizure of the personal property before the notice of federal tax lien is filed in order for a judgment lien creditor to have priority.

5.17.2.6.3
(03-19-2018)

Mechanic's Lienor

- (1) If a NFTL has not been filed prior to a creditor perfecting a mechanic's lien, the mechanic's lien has priority over the federal tax lien.
- (2) IRC 6323(h)(2) defines a mechanic's lienor as a person who, under local law, has a lien on real property (or on the proceeds of a contract relating to real property) for services, labor or materials furnished in connection with the construction or improvement of the property.
- (3) For priority purposes, the lien arises on the earliest date such lien becomes valid under local law against subsequent purchasers of the property without actual notice of the tax lien but not before the mechanic begins to furnish the services, labor or materials. Thus a mechanic's lienor, who takes all of the requisite action under local law to perfect and enforce such lien, has a mechanic's lien from a date no earlier than the day on which the mechanic began to furnish the services, labor or materials on the job to which the lien relates.

5.17.2.6.4
(03-19-2018)

Holder of a Security Interest

- (1) If a NFTL has not been filed prior to a creditor perfecting a security interest, the security interest has a priority over the federal tax lien. IRC 6323(h)(1) defines a security interest as any interest acquired by written contract for the purpose of security (payment, performance, indemnity) in existing property for which the holder paid money or money's worth and which has priority under local law over subsequent judgment liens arising out of unsecured obligations.
- (2) If a federal tax lien is invalid against an initial holder of a security interest, it is also invalid against another party that acquires the security interest, whether by purchase or otherwise.
- (3) A security interest must be in existence to prime a federal tax lien. A security interest exists at any time -
 - a. if, at such time the property is in existence and the security interest has become protected under local law against a subsequent judgment lien and
 - b. to the extent that, at such time, the holder has parted with money or money's worth. See Treas. Reg. 301.6323(h)-1(a)(1).
- (4) Thus, where a creditor fails to perfect its security interest as required by the Uniform Commercial Code, the federal tax lien will attach to the property and will be entitled to priority over the creditor. *United States v. Trigg*, 465 F. 2d 1264 (8th Cir. 1972), cert denied, sub nom, *First State Bank of Crossett, Arkansas v. United States*, 410 U.S. 909 (1973).
- (5) Local law distinguishes real property from personal property. This is important because the actions required under local law to establish the priority of the security interest against a subsequent judgment lien may differ depending on whether the property involved is real or personal property.

- (6) State law permitting relation back to perfect a state lien cannot affect the priority of the lien. Treas. Reg. 301.6323(h)-1(a)(2)(B).
- (7) In **some states**, equitable conversion provides a lender priority over a NFTL filed before the lender records. Equitable conversion is only relevant where the mortgage instrument or deed of trust is executed before the NFTL is filed, but recordation occurs after the NFTL is filed or not at all. Equitable conversion provides that a lender acquires equitable title when an unrecorded mortgage or deed of trust is executed. In some states, priority is established when the mortgage or deed of trust is executed because the lender's equitable interest is protected under local law against a subsequent judgment lien arising out of an unsecured obligation. IRC 6323(h)(1); *Susquehanna Bank v. United States*, 2014-2 USTC ¶ 50492 (4th Cir. 2014). In *Susquehanna Bank*, the NFTL was filed after the deed of trust securing the loan was executed, but before the deed of trust was recorded. The Fourth Circuit found that the lender's unrecorded security interests had priority over the federal tax lien, even though the NFTL had been filed, because an equitable security interest is protected under Maryland law against subsequent judgment-lien creditors.

Reminder: *State Law Guides* contain information on equitable conversion and its impact on the priority of the federal tax lien in relation to holders of a security interest.

5.17.2.6.5
(03-27-2012)
Superpriorities

- (1) The Internal Revenue Code provides special protection for limited interests by giving them priority over the federal tax lien even though the interests come into existence after the filing of a NFTL. IRC 6323(b). These special interests are called "superpriorities."
- (2) There may be some overlapping among categories of "superpriorities" in which event federal law provides protection if any category applies even though another may also be relevant. Should two categories of "superpriorities" apply to an interest, then the IRS should use that category which gives the greatest protection to the private interest.

5.17.2.6.5.1
(03-27-2012)
Securities

- (1) This "superpriority" protects the purchaser or the holder of a security interest in a "security" who at the time of purchase or at the time the security interest came into existence did not have actual notice or knowledge of the existence of the federal tax lien. IRC 6323(b)(1). The Code defines securities to include money, stock, bonds, debentures, notes, negotiable instruments, and various other types of interests. IRC 6323(h)(4).
- (2) A subsequent holder of a security interest is also protected if the prior holder did not have actual notice or knowledge at the time the security interest came into existence. An illustration of the intent of this paragraph is the case where "P", without actual notice or knowledge of the existence of a tax lien, purchases a security from "T", the taxpayer, after a notice of lien has been filed. "P" is protected under the provisions of this paragraph. If "P" thereafter sells the security to "C", who at the time of such sale has actual knowledge of the existence of the lien, "C" is also protected against the tax lien. See Treas. Reg. 301.6323(b)-1(a)(2), Examples (1) and (2).

5.17.2.6.5.2
(03-27-2012)
Motor Vehicles

- (1) This “superpriority” protects the purchaser of a motor vehicle if, at the time of purchase, —
 - a. the purchaser did not have actual notice or knowledge of the existence of the federal tax lien; and
 - b. before the purchaser has actual notice or knowledge, the purchaser has actual possession of the motor vehicle and has not thereafter relinquished actual possession to the seller or his/her agent. IRC 6323(b)(2).

5.17.2.6.5.3
(03-27-2012)
**Personal Property
Purchased at Retail**

- (1) This “superpriority” protects the purchaser of tangible personal property purchased at a retail sale unless at the time of purchase the purchaser intends the purchase to (or knows the purchase will) hinder, evade or defeat the collection of the federal tax. IRC 6323(b)(3).
- (2) “Retail sale” means a sale made in the ordinary course of the seller’s trade or business of tangible personal property of which the seller is the owner. It includes a sale in the customary retail quantities by a seller who is going out of business but not a bulk sale or an auction sale in which goods are offered in quantities substantially greater than are customary in the ordinary course of the seller’s trade or business or an auction sale where the owner is not in the business of selling such goods. Treas. Reg. 301.6323(b)-1(c)(2).

5.17.2.6.5.4
(03-05-2019)
**Personal Property
Purchased in Casual
Sale**

- (1) This “superpriority” protects a purchaser of household goods, personal effects or other tangible personal property exempt from levy under IRC 6334(a). It encompasses items purchased (other than for resale) in a casual sale for less than \$1,960 (as of January 1, 2025). IRC 6323(b)(4). This amount is adjusted annually for inflation. See Rev. Proc. 2024-40, 2024-45 I.R.B. 1100. *Rev. Proc. 2024-40, 2024-45 I.R.B. 1100.* These sales include “garage sales” or “tag sales.”
- (2) A casual sale is a sale not made in the ordinary course of the seller’s trade or business. Protection is afforded only if the purchaser does not have actual notice or knowledge of the existence of the federal tax lien or that the sale is one of a series of sales which means that the seller plans to dispose of, in separate transactions, substantially all of his/her household goods, personal effects and other tangible personal property. See Treas. Reg. 301.6323(b)-1(d)(2). This exception applies only to tangible personal property (e.g. household goods, personal effects, wearing apparel, firearms, furniture, etc.) as defined in Treas. Reg. 301.6334-1.

5.17.2.6.5.5
(03-27-2012)
**Personal Property
Subject to Possessory
Lien**

- (1) This “superpriority” protects someone in possession of tangible personal property subject to a lien under local law securing the reasonable price of the repair or improvement of that property. IRC 6323(b)(5).
- (2) Thus, for example, if state law gives an automobile mechanic a lien for the repair bill and the right to retain possession of the repaired automobile as security for payment of the repair bill, and the mechanic retains continuous possession of the automobile, a federal tax lien which has attached to the automobile will not be valid to the extent of the repair bill.

5.17.2.6.5.6
(03-27-2012)
**Real Property Tax and
Special Assessment
Liens**

- (1) This “superpriority” protects certain specified state and local tax liens against real property. IRC 6323(b)(6) applies if state or local law entitles such liens to priority over security interests in such property which are prior in time, and such lien secures payment of one of the following three types of taxes or charges:
 - a. A tax of general application levied by any taxing authority based upon the value of such property. For example, real estate tax.
 - b. A special assessment imposed directly upon such property by any taxing authority, if such assessment is imposed for the purpose of defraying the cost of any public improvement. For example, sewers, streets, or sidewalks.
 - c. A charge for utilities or public services furnished to such property by the United States, a state or political subdivision thereof, or an instrumentality of any one or more of the foregoing.
- (2) If real estate taxes (whenever they accrue) are ahead of mortgages under local law, they will also be ahead of federal tax liens. The result will be the same if a special assessment lien arises after the federal tax lien is in existence. The same priorities apply in the case of charges for utilities or public services.
- (3) This superpriority category does not include other state and local tax liens arising for personal property taxes, state or local income taxes, franchise taxes, etc.

5.17.2.6.5.7
(03-05-2019)
**Residential Property
Subject to a Mechanic’s
Lien for Certain Repairs
and Improvements**

- (1) This “superpriority” protects lienors whose liens arise from the repair or improvement of certain real property. IRC 6323(b)(7).
- (2) The property must be a personal residence containing not more than four dwelling units with the owner occupying one of the units and the total contract price being \$9,790 or less (as of January 1, 2025). This amount is adjusted annually for inflation See Rev. Proc. 2024-40, 2024-45 I.R.B. 1100. *Rev. Proc. 2024-40, 2024-45 I.R.B. 1100.*

5.17.2.6.5.8
(03-19-2018)
Attorney’s Liens

- (1) This “superpriority” protects an attorney who, under local law, holds a lien upon, or a contract enforceable with respect to, a judgment or other amount in settlement of a claim or cause of action, to the extent of reasonable compensation for obtaining the judgment or procuring the settlement, even if the attorney has actual notice or knowledge of the filing of the notice of lien. IRC 6323(b)(8). There is a limitation upon this absolute priority that arises with respect to a judgment or amount in settlement of a claim or a cause of action against the United States, to the extent that the United States sets off such judgment or amount against any liability of the taxpayer to the United States.
- (2) Even in those cases where the attorney’s lien enjoys the priority over the federal tax lien, it is limited to reasonable compensation. Generally, reasonable compensation means the amount customarily allowed under local law for an attorney’s services for litigating or settling a similar case or administrative claim. See *North Carolina Joint Underwriting Assn. v. Long, et al.*, 2008-1 USTC ¶ 50,183 (E.D.N.C. 2008). Nevertheless reasonable compensation shall be determined on the basis of the facts and circumstances of each individual case. The priority does not apply to an attorney’s lien which may arise from the defense of a claim or cause of action against a taxpayer, except to the extent

such a lien is held upon a judgment or other amount arising from the adjudication or settlement of a counterclaim in favor of the taxpayer. See Treas. Reg. 301-6323(b)-1(h)(1).

5.17.2.6.5.9
(03-27-2012)

**Certain Insurance
Contracts**

- (1) This “superpriority” protects an insurer in a life insurance, endowment or annuity contract with a taxpayer. IRC 6323(b)(9).
- (2) This “superpriority” applies under the following situations:
 - a. If an insurer makes a policy loan on a life insurance policy after a notice of lien has been filed with respect to the property of the insured, the insurer is protected as against the tax lien if such insurer did not have actual notice or knowledge of the existence of the tax lien at the time the policy loan was made.
 - b. The insurer, after actual notice or knowledge of a federal tax lien, will still have priority but only with respect to advances (including contractual interest) required to be made under an agreement entered into prior to such actual notice or knowledge.
 - c. Thus, although an insurer will not have priority for policy loans made after the insurer has actual notice or knowledge that the policy is subject to a tax lien, the insurer may nevertheless continue to make automatic premium loans to maintain the contract in force and have priority over the federal tax lien with respect to such loans, if the agreement to make the automatic premium loans was entered into before the insurer had actual notice or knowledge.

5.17.2.6.5.10
(03-19-2018)

Deposit Secured Loans

- (1) This “superpriority” protects certain institutions, including banks and building and loan associations with regard to a loan, if the loan is secured by an account with the bank. IRC 6323(b)(10). The following requirements apply:

Note: The provisions of IRC 6323(b)(10) apply to financial institutions described in IRC 581 and 591.

- a. The bank must make the loan without any actual notice or knowledge of the existence of the tax lien.

Example: Assume John Doe asks Bank C for a loan and offers his savings account at the bank as collateral. Bank C does a credit check, discovers a NFTL filed against John, but still makes the loan. Bank C will not qualify for the IRC 6323(b)(10) superpriority because it had actual notice or knowledge of the NFTL prior to the loan.

- b. IRC 6323(b)(10) requires that the security interest be valid under state law. Under the Uniform Commercial Code (UCC) adopted in all 50 states, a bank cannot obtain a security interest in an account if the loan is made for a consumer transaction, i.e., it is not a business loan. UCC 9-109(d)(13) (excluding consumer loans from the scope of Article 9).

Example: Assume Bank C made a loan to John Doe so that he could purchase a television. Because the loan was made for a consumer transaction, Bank C does not meet the state law requirements, and consequently fails to qualify under IRC 6323(b)(10).

- (2) A superpriority is not a defense to a levy. Therefore, if a bank does qualify for an IRC 6323(b)(10) superpriority, it should either:
 - honor the levy and seek a timely return of wrongfully levied property under IRC 6343(b), or
 - the bank may promptly request the IRS to release the levy.
- (3) If the bank timely proves that it has a IRC 6323(b)(10) superpriority, the IRS will generally release the levy. See Rev. Rul. 2006-42, 2006-2 C.B. 337.

5.17.2.6.5.11
(03-19-2018)

**Purchase Money
Security Interest (PMSI)**

- (1) A purchase money mortgage or security interest is defined under state law as a mortgage or security device taken to secure the performance of an obligation incurred in the purchase of real or personal property.
- (2) While the Internal Revenue Code does not give a PMSI priority status, pursuant to Rev. Rul. 68-57, 1968-1 C.B. 553, the IRS recognizes that a PMSI will have priority over the IRS's NFTL if the PMSI is valid under local law.
- (3) With respect to personal property, Revised Article 9 of the Uniform Commercial Code defines the creation and perfection of a PMSI. State law must be checked to determine whether a valid PMSI exists.
- (4) Creating the PMSI--Pursuant to a security agreement under UCC 9-103, a PMSI arises when a creditor advances money or credit to enable the debtor-taxpayer to purchase goods (new tangible personal property), and the money loaned is actually used to acquire these specific goods. The newly purchased goods will serve as collateral for the loan. Generally, the PMSI arises in one of the following situations.
 - a. Seller advances credit—Buyer obtains possession of the goods, giving seller a security interest in the goods pursuant to a security agreement. Seller has not received full payment.
 - b. Bank/finance company advances money—Bank/finance company loans money to purchase goods after debtor-taxpayer signs security agreement with bank/finance company. Seller is fully paid. The burden is on the bank/finance company to prove that the money was actually used to purchase the goods. *First Interstate Bank v. IRS*, 930 F.2d 1521, 1526 (10th Cir. 1991). Typically, a bank/finance company meets this burden by drafting a check payable to the seller of the goods. If the bank/finance company cannot carry its burden, then it has a regular security interest, not a PMSI.

Example: Bank loaned money to debtor-taxpayer to buy a tractor. Debtor-taxpayer misrepresented facts; debtor-taxpayer already owns a tractor. Instead, Debtor-taxpayer used the loan to purchase a trip to Europe. Here, Bank does not have a PMSI, so Rev. Rul. 68-57 does not apply.

- (5) Perfecting the PMSI - In order to prime a NFTL, a creditor must perfect its PMSI. *First National Bank v. Coxson*, 76-1 USTC 9450 (D.N.J. 1976). This is generally not a burden for a PMSI in consumer goods: the PMSI is automatically perfected by the security agreement. There is no filing requirement. It's an entirely different situation for a PMSI in business goods, which must be perfected within a short period from the date that the debtor-taxpayer obtains the collateral. See UCC 9-317(e), 9-324(a) and (b). Questions regarding whether a creditor has timely perfected should be referred to Area Counsel.

- (6) Losing a PMSI in consumer goods - Some states have adopted a transformation rule for consumer goods, i.e., a creditor may lose its PMSI in consumer goods if it allows the debtor-taxpayer to refinance or consolidate its debts. The reasoning behind the rule is that the debt restructuring transforms the “old” loan to a “new” loan with a security interest encumbering the debtor-taxpayer’s old assets. The debtor-taxpayer does not acquire any new goods with the new loan. Thus, the new loan could not create a PMSI, because, by definition, a PMSI exists only if the debtor-taxpayer acquires new goods.

Example: Transformation Rule: Assume NFTL filed on January 2, 2006. Also assume finance company loans debtor-taxpayer funds to purchase a television for his personal use on February 2, 2006, and pursuant to the security agreement, finance company acquires a PMSI in the television. On April 1, 2006, because of debtor-taxpayer’s financial problems, finance company restructures the loan agreement, reducing monthly payments but extending the payment period. In some states, under the transformation rule, this would be a new loan agreement. The debtor-taxpayer did not use the new loan to acquire new consumer goods. Consequently, the creditor’s security interest under the new loan is only a regular security interest, not a PMSI. The PMSI from February 2, 2006 has been extinguished by the new agreement. Accordingly, in a lien priority dispute on June 1, 2006, the NFTL primes the finance company’s regular security agreement on the television.

- (7) The transformation rule does not apply to a PMSI in nonconsumer goods under UCC 9-103(b). Instead, a different rule, the dual status rule, applies. The dual status rule preserves the original PMSI in a restructuring or refinancing for the original PMSI goods. After the restructuring or refinancing, the creditor has both a PMSI in the original goods and a regular security interest in other existing goods.

Example: Dual Status Rule: Using the preceding example with some changes, assume that debtor-taxpayer purchases the television to entertain customers at his restaurant. In this situation, the television is not a consumer good; instead, it is business equipment. When the debtor-taxpayer restructures his loan agreement on April 1, 2006, the new security agreement gives creditor a security interest in the television as well as existing tables and chairs. In a lien priority dispute on June 1, 2006, under the dual status rule, the creditor has a PMSI in the television that primes the NFTL, but the creditor has only a general security interest in the chairs and tables. The NFTL primes the general security interest in the chairs and tables.

- (8) Identifying the PMSI property - Even if a creditor establishes that a PMSI was created, in a lien priority fight the creditor must be able to identify the original property encumbered with the PMSI or traceable to the original property. E.g., *Citizens Savings Bank v. Miller*, 515 N.W.2d 7 (Iowa 1994).

5.17.2.6.6
(03-27-2012)

**Protected Interests
Arising from Certain
Financing Agreements**

- (1) In limited situations, IRC 6323(c) and (d) provide that certain claims may prime an earlier filed NFTL and act substantially in the same manner as superpriorities.

- (2) IRC 6323(c) has three different subsections that deal with different transactions. There are, however, prerequisites that apply to all three subsections. In order for any creditor to qualify for any of the protections in section 6323(c), the creditor must show the following:
 - a. The security interest is in “qualified property.” The definition of qualified property differs in each of the three subsections.
 - b. There is a written agreement entered into before tax lien filing, which constitutes a commercial transactions financing agreement, a real property construction or improvement financing agreement, or an obligatory disbursement agreement.
 - c. The security interest is protected under local law against a judgment lien arising, as of the time of the tax lien filing, out of an unsecured obligation.

5.17.2.6.6.1
(03-19-2018)
**Commercial
Transactions Financing
Agreements**

- (1) IRC 6323(c)(2) provides protection for commercial transactions financing agreements. Generally, these are loans to a taxpayer to operate a business. The creditor and the taxpayer, in the course of trade or business, agree that loans to the taxpayer will be secured by taxpayer’s commercial financing security. Security can include, but is not limited to, accounts receivable, mortgages on real property, and inventory. The agreement must be entered into before the NFTL is filed; however, priority will extend to commercial financing security acquired before the 46th day after the NFTL is filed and to advances made within 45 days of filing (or sooner if the creditor gains knowledge of the NFTL).
- (2) Alternatively, a commercial transactions financing agreement could be the purchase of commercial financing security, other than inventory, acquired by the taxpayer in the ordinary course of the taxpayer’s trade or business. Note that both the lender/purchaser and the debtor-taxpayer must have entered into the loan/sale within the ordinary course of business. This protection exists, however, for a limited time period. To be protected, the creditor must loan the funds or purchase the property from the taxpayer within 45 days of the filing of the NFTL, or (if earlier) before the lender or purchaser had actual notice or knowledge of the notice of lien filing.
- (3) The term “commercial financing security” is defined as (i) paper of a kind ordinarily arising in commercial transactions, (ii) accounts receivable, (iii) mortgages on real property, and (iv) inventory. General intangibles, such as patents or copyrights, are not included. IRC 6323(c)(2)(C). In the case of loans to the taxpayer, commercial financing security also includes inventory. Inventory consists of raw material and goods in process, as well as property held by the taxpayer primarily for sale to customers in the ordinary course of business. Treas. Reg 301.6323(c)-1(c)(1).
- (4) Examples of commercial financing security priority disputes (See also Exhibit 5.17.2-1):
 - a. **45-day rule:** Assume T, a tool manufacturer, on June 14, 2013, gives Bank a security interest in its accounts receivable and inventory for a loan of \$10,000, and Bank files its security interest on that date. IRS files a NFTL on July 5, 2013. On that date, Bank’s security interest would have priority over a judgment lien arising on July 5, 2013. On August 1, 2013, without knowledge of the NFTL, Bank loans \$7,000 to T. On August 2, 2013, Bank learns of the NFTL, but still loans T \$2,000. On October 31, 2013, Bank loans T \$1,000. Lien priority is as follows:

Example: Below table contains the details.

Item	Description
i.	The loan made on August 1, 2013, for \$7,000 has priority over the NFTL because it met all of section 6323(c)(2) prerequisites. T and the Bank entered into the loan in the ordinary course of business. The Bank's security interest would have had priority over a judgment lien as of July 5, 2013. The Bank made the loan without actual knowledge of the NFTL. The loan was made within 45 days of filing of NFTL.
ii.	The NFTL has priority over the \$2,000 loan made on August 2, 2013, because the bank had actual knowledge of the NFTL. The Bank fails to qualify under section 6323(c)(2) for a commercial financing security.
iii.	The NFTL has priority over the \$1,000 loan made on October 31, 2013, because the bank had knowledge of the NFTL and the loan was made after the 45th day. The Bank fails the 45-day rule.
iv.	The 45-day rule also governs what inventory is included in the priority. For the loan made on August 1, 2013, the Bank has priority with respect to inventory acquired by the taxpayer before the 46th day after the NFTL was filed. This is because the inventory qualifies as commercial financial security to which the priority of the Bank extends for loans it made to T before having actual knowledge (August 2, 2013) of the NFTL filing. See IRC 6323(c)(2)(B) and 6323(c)(2)(C).

- b. **Purchaser under section 6323(c)(2):** On June 14, 2013, T, a tool manufacturer, and P, a business entity that purchases accounts receivable and inventory, agree in writing that T will sell 1/4 of its accounts receivable and inventory to P each month. Pursuant to state law, P records the sales contract on June 14, 2013. On July 5, 2013, the IRS files a NFTL against Taxpayer T. On August 1, 2013, P makes its monthly purchase of T's accounts receivable and inventory without any actual knowledge of the NFTL. Lien priority is the following:

Example: Below table contains the details.

Item	Description
i	P's purchase of the existing accounts receivable primes the NFTL under section 6323(c)(2) requirements. T and P entered into the contract in the ordinary course of business before the filing of the NFTL. Also, section 6323(c)(2)(A)(ii) defines a commercial transactions financing agreement as including an agreement to purchase commercial financing security (other than inventory) acquired by the taxpayer in the ordinary course of business. Finally, P made the purchase within 45 days of the filing of the NFTL.
ii	The NFTL primes P's purchase of the inventory. Section 6323(c)(2)(A)(ii) explicitly excludes the purchase of inventory from the protection given to a purchaser of commercial transaction financing security. Accordingly, P purchased the inventory encumbered with the federal tax lien.

5.17.2.6.6.2

(12-12-2014)

**Real Property
Construction or
Improvement Financing
Agreement**

- (1) IRC 6323(c)(3) provides protection for interests arising from written real property construction or improvement financing agreements entered into before a NFTL is filed and which interests are given priority under state law against a judgment lien creditor as of the time of the filing of the NFTL. This protection applies to 3 different situations:
- a. the owner's construction or improvement (including demolition) of real property;
 - b. a contractor obtains financing, usually a bank loan, to construct or improve real property; or
 - c. the raising or harvesting of a farm crop or the raising of livestock or other animals.

- (2) The first subsection addresses a taxpayer's financing and lien for construction or improvement of the taxpayer's home or business. IRC 6323(c)(3)(A)(i). Pursuant to such a financing agreement, the lender takes a mortgage/lien on the taxpayer's property undergoing construction and agrees to make distributions in the future to finance the construction.
- a. There is no 45-day rule, i.e., disbursements can be made more than 45 days after the filing of the NFTL and the lender's lien will still prime the NFTL.
 - b. Actual knowledge of the NFTL will not disqualify the lender, provided the written agreement predated the filing of the NFTL.

Example: Assume Taxpayer and Lender, by contract, on January 3, 2013, agree to a mortgage for a total of \$100,000 to finance construction on Taxpayer's building. The mortgage lien is recorded on January 4, 2013. On February 1, 2013, the IRS files a NFTL. On June 3, 2013, with actual knowledge of the existence of the NFTL, Lender makes a disbursement of \$100,000 to taxpayer pursuant to contract. On August 1, 2013, there is a lien priority dispute. Lender's mortgage for \$100,000 primes the NFTL because Lender meets all of the requirements of section 6323(c)(3). There was a written agreement prior to the filing of the NFTL that created a mortgage which would have primed a judgment lien creditor on the filing date of the NFTL. Actual notice of the NFTL does not disqualify the lender.

- (3) The second subsection addresses a contractor's financing for a construction project. IRC 6323(c)(3)(A)(ii).
- a. There is no 45-day rule, i.e., disbursements can be made more than 45 days after the filing of the NFTL and the lender's lien will still prime the NFTL.
 - b. Actual knowledge of the NFTL will not disqualify the lender, provided the written agreement predated the filing of the NFTL. In return for financing on the construction project, the lender acquires a security interest in the contract proceeds, not the real estate.

Note: There is a difference between section 6323(c)(3)(A)(i), a financing agreement for construction on real property, and section 6323(c)(3)(A)(ii), an agreement to finance a construction contract. In the former situation, the lender's lien is on the real property undergoing construction. In the latter situation, the lender's lien is on the proceeds of the construction contract only.

- (4) The third subsection addresses a farmer's financing to raise or harvest a crop/livestock. There is no 45-day rule, i.e., disbursements can be made more than 45 days after the filing of the NFTL and the lender's lien will still prime the NFTL.
- Actual knowledge of the NFTL will not disqualify the lender, provided the written agreement predated the filing of the NFTL.
 - This subsection is relatively generous to the lender because it protects the lender's interest in not only the crop or livestock raised, but also in any of the taxpayer's property existing as of the filing date of the NFTL, assuming that property was listed in the security agreement.

Example: Assume that on January 2, 2013, Farmer and Lender sign a financing agreement in which Lender agrees to a loan of \$10,000 to buy seed and fertilizer. Farmer gives Lender a lien on crops and all of Farmer's current and future property. A financing statement is properly filed on January 2, 2013. On May 1, 2013, the IRS files a NFTL. On May 15, 2013, with actual knowledge of the NFTL, Lender makes a \$10,000 distribution to Farmer. On October 1, 2013, Farmer buys a tractor. Lien priority is the following:

Item	Description
i.	Lender has lien priority on Farmer's crops and all of Farmer's property held as of May 1, 2013, the filing date for the NFTL.
ii.	The NFTL primes Lender's lien on the tractor. Farmer did not own the tractor as of May 1, 2013, the filing date of the NFTL.

5.17.2.6.6.3
(03-27-2012)

Obligatory Disbursement Agreement

- IRC 6323(c)(4) provides protections for interests arising from an obligatory disbursement agreement, which generally requires a lender to make a payment because someone other than a taxpayer has relied on that obligation. The lender must have entered into the obligatory disbursement agreement in the course of his trade or business. A general obligatory disbursement agreement requires that on the filing date of the NFTL, the lender's security interest must be protected against a hypothetical judgment lien creditor. Also, the taxpayer and the lender's written agreement must provide that the lender's duty to pay is triggered by the claim of a third party. In other words, the lender is typically paying a third party for property/services provided to the taxpayer. Under a general obligatory disbursement agreement, the protected security interest covers only two categories:
 - all of the taxpayer's property as of the filing date of the NFTL and
 - after the filing date, any property traceable to the lender's payment.
- A letter of credit is a classic example of an obligatory disbursement agreement. A bank issues a letter of credit (a promise to pay the holder of the letter of credit) to Taxpayer. The IRS then files a NFTL. Taxpayer later purchases property by giving the seller the letter of credit. The seller later presents letter of credit to the bank to obtain payment. The bank will have priority over the

FTL with respect to all of Taxpayer's property existing as of the date of the filing of the NFTL and the property purchased with the letter of credit after the filing of the NFTL.

- (3) Section 6323(c)(4) provides extra protection to surety agreements. A surety agreement is a special type of obligatory disbursement agreement: The surety agrees to perform a contract if the taxpayer fails to perform. The taxpayer and the surety must meet all of the procedural requirements imposed on a general obligatory disbursement agreement. For example, there must be a written contract; the duty to perform must be triggered by the claim of a third party; and prior to the filing of a NFTL, the security interest must be perfected against the claim of a hypothetical judgment lien creditor.
- (4) Sureties receive extra protection because section 6323(c)(4) expands the categories of collateral. Unlike a general obligatory disbursement that creates only two categories of collateral, a surety can look to four categories for collateral:
 - a. All of the taxpayer's property as of the filing of the NFTL (similar category for general obligatory payment).
 - b. After the filing date, any of taxpayer's property traceable to the surety's payment (similar category for general obligatory payment).
 - c. The proceeds of the contract for which performance was insured (an additional category).
 - d. If the contract is to construct or improve real property, to produce goods, or to furnish services, any tangible personal property used by the taxpayer in performing the insured contract (an additional category).
- (5) **Example:** Prior to the filing of the NFTL, Taxpayer and Surety agreed that, if Taxpayer defaulted, Surety will have a security interest in all of Taxpayer's property in exchange for Surety's agreement to complete construction of the building, if needed. The IRS files a NFTL. Taxpayer bought a bulldozer, began work, and then defaulted on the building construction. Surety completed the construction contract. Surety primes the NFTL as to all of Taxpayer's property existing prior to the NFTL, proceeds of the construction contract arising after the filing of the NFTL, and the bulldozer, which Taxpayer also acquired after the filing of the NFTL.

5.17.2.6.6.4
(03-27-2012)
IRC 6323(d)

- (1) IRC 6323(d) protects a creditor's security interest for disbursements made within 45 days after the filing of the NFTL or before the lender acquires knowledge of the NFTL, if before the 45th day. As discussed below, section 6323(d) is similar to section 6323(c)(2) in some ways, but is different in other ways.
- (2) The section 6323(d) and section 6323(c)(2) commercial transaction financing protections are similar in that they both require the following:
 - Prior to the filing of the NFTL, the taxpayer and the lender must sign a written agreement that creates a security interest in the encumbered property.
 - As of the filing date of the NFTL, the lender's security interest must prime a hypothetical judgment lien creditor.
 - After the filing of the NFTL, the lender must not have any actual knowledge of the NFTL when it makes the loan.

- Such loan must be made within 45 days of the filing of the NFTL. If, within the 45 day period, the lender acquires knowledge of the NFTL before making the loan, then the 45 days is shortened to the day on which the knowledge is acquired.

- (3) Section 6323(d) and section 6323(c)(2) differ as to the types of property and the time when the taxpayer acquired the property. Specifically, section 6323(d) applies to all of the taxpayer's property as of the date of the filing of the NFTL. In contrast, section 6323(c)(2) applies to specific property acquired by the taxpayer before the 46th day after the filing of the NFTL. Section 6323(d) applies to a larger pool of property; section 6323(c)(2) may apply to property acquired after the NFTL is filed.

5.17.2.6.7
(03-27-2012)

Priority of Interest and Expenses

- (1) Interest and certain expenses may enjoy the same priority as the lien or security interest to which they relate. This is the case if under local law they are added to and become a part of the lien or security interest. The types of interest listed in IRC 6323(e) are the following:
- Interest or carrying charges (including finance and service charges) on the obligation secured by a lien or security interest.
 - Reasonable expenses of an indenture trustee (such as a trustee under a deed of trust) or agent holding a security interest.
 - Reasonable expenses incurred in collecting by foreclosure and enforcing a secured obligation (including reasonable attorney's fees).
 - Reasonable costs of insuring, (fire and casualty insurance for instance) and preserving or repairing the property subject to the lien or security interest.
 - Reasonable costs of insuring payment of the obligation secured (such as mortgage insurance).
 - Amounts paid by the holder of a lien or security interest to satisfy another lien on the property where this other lien has priority over the federal tax lien.
- (2) An example of this last situation would be if both a security interest and a statutory lien for state sales taxes have priority over a federal tax lien. In that situation, the holder of the protected security interest may discharge the sales tax lien and increase the amount so expended, even though under local law he/she is not subrogated to the rights of the holder of the sales tax lien. However, if the holder of the security interest is, under local law, subrogated to the rights of the holder of the sales tax lien, he/she may also be entitled to any additional protection afforded by IRC 6323(i)(2). Treas. Reg. 301.6323(e)-1(d).

5.17.2.7
(03-19-2018)

**Priority of Tax Liens:
The Competing Choate Lien**

- (1) IRC 6323 does not cover all of the competing lien interests that could attach to a taxpayer's property, e.g., a state tax lien. To resolve the competing priority claims of these other interests, a court will use the choateness test, which was developed by Supreme Court case law. This test arises under federal law and applies federal rules to determine lien priority, not state rules.
- (2) The choateness test follows the general rule for resolving lien priorities: the lien that is "first in time" is "first in right." The federal tax lien is choate as of the assessment date. (The filing of the NFTL is irrelevant under the choateness test.) However, to be considered first in time, the nonfederal lien must be

“choate,” that is, sufficiently specific, when the federal lien arises. A state-created lien is not choate until the following three elements are all established:

1. the identity of the lienor,
 2. the property subject to the lien, and
 3. the amount of the lien.
- (3) *United States v. City of New Britain*, 347 U.S. 81 (1954). Failure to meet any one of these conditions forecloses priority over the federal lien, even if under state law the nonfederal lien was enforceable for all purposes when the federal lien arose.
- (4) In cases involving state and local tax liens, the Supreme Court has indicated that a state or local tax lien which attaches to “all property and rights to property” may be sufficiently choate so as to obtain priority over a later arising federal tax lien. *United States v. State of Vermont*, 377 U.S. 351 (1964). Therefore, state, county and municipal tax liens may be regarded as choate when: the identity of the lienor is known; the amount of the lien has been finally fixed; and the lien has attached to the taxpayer’s property by virtue of statute or ordinance so as to authorize enforcement by the state or local taxing authority without substantial further administrative remedy being available to the taxpayer. If the state or local tax lien meets these criteria, the rule of first in time, first in right, should then be applied to determine priorities.
- (5) Today, most choateness litigation arises in lien priority disputes with states. Remember, choateness is a federal law test, not a state law test. In *re Priest*, 712 F.2d 1326 (9th Cir. 1983), mod, 725 F.2d 477 (1984) (holding a state law ineffective which stated that a tax lien arose when the tax return was “due and payable”, or on the date the return was required to be filed). A state-created lien arises when the state takes administrative steps to fix the taxpayer’s liability - mere receipt of a tax return does not make the state tax lien choate. *Minnesota v. United States*, 184 F.3d 725 (8th Cir. 1999), cert. denied, 528 U.S. 1075 (2000).

5.17.2.7.1
(03-27-2012)
**Lien Priority Disputes
Arranged by Topic**

- (1) The following subsections, arranged alphabetically, demonstrate how to determine the relative priorities between the federal tax lien and other competing liens/claims.

5.17.2.7.1.1
(03-27-2012)
Assignments

- (1) An assignment is a transfer of intangible property, frequently an account receivable. An assignee, the party receiving the assigned rights, may meet the requirements of the definition of a purchaser under IRC 6323(h)(6). Whether an assignee is a purchaser within the meaning of the above subsection is a federal question. See *United States v. Gilbert Associates*, 345 U.S. 361 (1953). An assignee who fails to qualify as a purchaser may try to argue that it has a security interest under IRC 6323(h)(1).

5.17.2.7.1.2
(12-12-2014)
Attachment Liens

- (1) An attachment lien, provided for under most state statutes, may arise upon the filing of a creditor’s suit and, under state law, will be taken as of the time the attaching creditor acquired a lien on the debtor’s property. This is done by the doctrine of “relation-back” which relates the subsequently acquired judgment lien back to the date of the attachment lien. This relation back doctrine does not apply to priority disputes with the federal tax lien. *United States v. Security Trust and Savings Bank*, 340 U.S. 47 (1950).

- (2) In cases involving the determination of priority between a federal tax lien and such an attachment lien, the attachment lien is deemed inchoate until perfected by a final judgment.

Example: Assume a creditor files suit in January 2013 seeking a judgment against the taxpayer and acquires an attachment lien; the IRS files a NFTL in July 2013; and the creditor receives a judgment in November 2013. In this case, the NFTL has priority over the judgment lien because the judgment lien does not relate back to January 2013 for federal tax lien priority disputes.

5.17.2.7.1.3
(03-27-2012)
Circular Priority

- (1) Circular priority describes a situation where A's lien is senior to the federal tax lien; the federal tax lien is senior to B's lien; but state law makes B's lien senior to A's lien.
- (2) In *United States v. City of New Britain*, 347 U.S. 81(1954), the Supreme Court resolved the circular priority problem by providing:
- first, that the portion of the fund for which federal law creates a lien superior to that of the IRS's tax lien is set aside;
 - second, the federal tax claim is paid; and
 - third, the reserved portion of the fund is distributed among competing claimants according to state law.
- (3) Today, circular priority situations generally arise in lien priority disputes with secured creditors under the UCC. Most potential circular priority issues were eliminated when the IRC 6323(b) superpriority provisions were enacted.

5.17.2.7.1.4
(03-27-2012)
Dower and Curtesy

- (1) The wife's right of dower and the husband's right of curtesy are limited estates in the real property of the respective spouses which some states still recognize at common law.
- (2) Many states have abolished the common law dower and curtesy in favor of a statutory right of dower in either surviving spouse as to both real and personal property.
- (3) Some states treat dower and curtesy as creating a property right as of the marriage: a spouse's dower or curtesy interest or statutory rights cannot be defeated by the other spouse's conveyances or alienations after the marriage or by a lien in favor of the other spouse's creditors that becomes effective after the marriage. In these states, if the marriage occurred before the IRS assesses the tax liability of one spouse, then the federal tax lien is junior to the non-lie spouse's dower/curtesy interest. Rev. Rul. 79-399, 1979-2 C.B. 398.

5.17.2.7.1.5
(03-19-2018)
Foreclosure Costs

- (1) As discussed in IRM 5.17.2.6.7, if the holder of a security interest or lien has priority over a federal tax lien, then certain expenses also will have priority, provided such expenses are "reasonable" and also would have priority under local law. IRC 6323(e).
- (2) In effect, both direct expenses of sale, such as advertising, auctioneer's expenses and any other necessary expenses of the sale and items of cost which are included in IRC 6323(e), which are not normally direct expenses, will

have priority over the federal tax lien if the original obligation is a lien or security interest and has priority over the tax lien.

5.17.2.7.1.6
(12-12-2014)
Forfeited Property

- (1) Most states have laws providing that property used in connection with the commission of a crime shall be seized; and if the accused is convicted of the criminal charge, the property is to be forfeited. IRC 6323(i)(3) provides that a forfeiture under local law of property seized by a law enforcement agency of a state, county, or other local governmental subdivision shall relate back to the time of the seizure, except that this paragraph shall not apply to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the state, county, or other local governmental subdivision in the property.
- (2) For example, assume that a state seizes taxpayer's car in January 2013; the IRS makes an assessment against taxpayer in February 2013, and the state obtains an order of forfeiture in August 2013. Also assume that under local law the holder of an intervening claim or interest would not have priority over the state's interest in the car. In this situation, the forfeiture relates back to the seizure, so essentially the state owned the car as of January 2013 and the car would no longer be property of the taxpayer to which the federal tax lien would attach as of February 2013.

5.17.2.7.1.7
(03-27-2012)
Home Equity Line of Credit or Open-end Mortgage

- (1) An "open-end" mortgage or home equity line of credit is different from a typical mortgage. Frequently, these mortgages provide for an initial loan at the time that the parties sign the mortgage, and the borrower has the discretion to request future advances after the mortgage is recorded.
- (2) If the IRS files a NFTL and the lender makes a future advance within 45 days of the filing of the NFTL, the lender may be entitled to protection under IRC 6323(d). *Bank of America v. Fletcher*, 342 F.Supp.2d 1009 (N.D. Okl. 2004).

5.17.2.7.1.8
(03-19-2018)
Insurance Loans

- (1) In the discussion of superpriorities, it was stated that a lien is not valid against life insurance, endowment or annuity contracts as against the insurer at any time before the insurer had actual notice or knowledge of the lien. Even if the company had such notice or knowledge, it could still make advances for automatic premium loans to maintain the contract if the agreement to make the advances was entered into before the insurer had actual notice or knowledge of the lien. In addition, if a levy had been served on the insurer and the levy was satisfied, the insurer would have priority for subsequent policy loans until a new notice of levy was served on the insurer.
- (2) Policy loans are those loans made to an insured by an insurance company without causing the policy to be terminated. Automatic premium loans are loans for the payment of premiums made against the cash surrender value of the insured's policy, but which the company is required to make by the terms of the contract of insurance itself by reason of the insured's default in premium payments.
- (3) Policy loans will prime the federal tax lien if they are made by the insurance company before the insurer has actual notice or knowledge of the existence of the federal tax lien. IRC 6323(b)(9)(A).

- (4) Automatic premium loans will prime the federal tax lien if the agreement to make advances was entered into before the insurer had actual notice or knowledge of the lien. IRC 6323(b)(9)(B).
- (5) If the IRS serves a notice of levy on the insurer and that levy is satisfied by the insurer, then that notice of levy will not constitute a notice of a lien until the IRS delivers a new notification of the lien to the insurance company. IRC 6323(b)(9)(C). The notification may take any form but delivery will only be effective from the time the insurer actually receives the notification.

5.17.2.7.1.9
(03-19-2018)

Landlord's Liens

- (1) State law generally gives landlords and lessors a statutory lien for unpaid rents against their tenant's or lessee's property located on the leased premises. When a landlord's lien competes with a federal tax lien for priority, IRC 6323(a) generally does not apply. Instead, the priority dispute is resolved under the "choateness test."
- (2) In the case of *United States v. Scovil*, 348 U.S. 218 (1955), the Supreme Court held that the landlord did not have a choate lien until the landlord recovered a judgment. Prior to obtaining a judgment, the landlord's lien was inchoate because the amount of the secured debt was not certain, i.e., the secured debt could increase as time progressed and the secured debt could be reduced by the landlord's breach of contract. To have priority over a federal tax lien, a landlord would have to recover a judgment and then perfect the judgment lien on the personal property prior to the NFTL filing.

5.17.2.7.1.10
(03-19-2018)

Limited Liability Companies (LLCs)

- (1) An LLC is a form of business created under state law. LLCs may be either multi-member or single member. Treas. Reg. 301.7701-3 explains the federal taxation of LLCs. If an LLC is a multi-member, the members may elect to have the LLC taxed as a corporation. If the members do not make the election, then the LLC is treated as a partnership by default. Note, however, that if under state law the members of an LLC are not liable for the debts of the LLC, generally the IRS may not collect the LLC's federal tax liabilities from the members. Rev. Rul. 2004-41, 2004-1 C.B. 845. A single-member LLC may also elect to be taxed as an association. If the election is not made, then by default the single member LLC will be disregarded, i.e., the single-member owner is the taxpayer.
- (2) Treasury regulations affect the treatment of single-owner disregarded LLCs. See Treas. Reg. 301.7701-3. The single-owner disregarded LLC is liable for excise taxes as of January 1, 2008; the single-owner disregarded LLC is liable for employment taxes as of January 1, 2009. Treas. Reg. 7701-2(c)(2)(iv) and (v).

5.17.2.7.1.11
(03-19-2018)

Maritime Liens

- (1) The Federal Maritime Lien Act provides that any person furnishing repairs, supplies, towage or other necessities for a vessel shall have a lien upon the vessel for payment. Maritime liens arise under 46 USC 31342. Although the Internal Revenue Code does not provide a priority for maritime liens, courts have generally given maritime liens priority over the federal tax lien.
- (2) Maritime liens have, throughout history, enjoyed a peculiar sort of priority because of the very nature of a ship, its usage and needs, and the needs of its crew. For example, taking on provisions in a foreign port will give rise to a lien against the ship, generally entitled to seniority over any non-maritime lien against the ship, whether arising prior to or subsequent to the maritime lien.

- (3) The source of problems in this area is that federal law has created both maritime liens and the federal tax liens. Currently, the courts have generally taken the view that the maritime lien should prevail over both prior and subsequent federal tax liens, regardless of whether the IRS has filed a NFTA. *National Bank of North America v. S.S. Oceanic Ondine*, 335 F. Supp. 71 (S.D. Tex. 1971), *aff'd*, 452 F.2d 1014 (5th Cir.1972); *United States v. Flood*, 247 F.2d 209 (1st Cir. 1957).

5.17.2.7.1.12
(12-12-2014)
Mechanics' Liens

- (1) All state statutes provide liens for laborers (mechanics) and material suppliers (materialmen) for work performed or materials supplied with respect to real property. Local law governs the method by which such liens are perfected and their duration. Generally, a mechanic's lien must be enforced within a certain specified time or it will be lost. Generally, a mechanic's lien attaches to the real property under construction and the proceeds of the construction contract. In determining lien priority disputes under IRC 6323(a), one must look to the definition of mechanic's liens in IRC 6323(h)(2), which limits the relief provided to persons who have a lien on real property under local law for services, labor, or material furnished in construction of the real property. IRC 6323(h)(2) also provides that a mechanic's lien arises on the later of –
- The date on which the mechanic's lien first becomes valid under local law against subsequent purchasers of the real property without actual notice, or
 - The date on which the mechanic's lienor begins to furnish the services, labor, or materials.

- (2) The following example demonstrates how to apply the above rules for determining the date that a mechanic's lien arises under IRC 6323(h)(2):

Example: Assume that on February 1, 2013, Taxpayer A signs a contract for construction on his office building on property owned by him. On March 1, 2013, in accordance with Treas. Reg. 301.6323(f)-1, a notice of lien for delinquent federal taxes owed by A is filed. On April 1, 2013, B, a lumber dealer, delivers lumber to A's property. On May 1, 2013, B records a mechanic's lien against the property to secure payment of the price of the lumber. Under local law, B's mechanic's lien is valid against subsequent purchasers of real property without notice from February 1, 2013, which is the date the construction contract was entered into. Because the date on which B's mechanic's lien is valid under local law against subsequent purchasers is February 1, and the date on which B begins to furnish the materials is April 1, the date on which B becomes a mechanic's lienor within the meaning of this paragraph is April 1, the later of these two dates. Under paragraph (a) of Treas. Reg. 301.6323(a)-1, B's mechanic's lien will not have priority over the Federal tax lien, even though under local law the mechanic's lien relates back to the date of the contract.

- (3) In addition to the above, issues may arise as to whether a payment is the taxpayer's property. In many cases a subcontractor asserts a mechanic's lien on construction payments in the main contractor's possession. A main contractor may fail to pay both his federal tax liability and the subcontractors on a construction project. If the IRS and the subcontractors make claims on construction payments, the first step in resolving this priority dispute is determining whether the funds in the general contractor's possession are the

general contractor's property or rights to property. In many situations the funds will not be the property or rights to property of the general contractor because state law does not give the general contractor any interest in the funds when subcontractors have not been paid.

- (4) In two landmark cases, the United States Supreme Court annunciated the now famous "no property" rule. *Aquilino v. United States*, 363 U.S. 509 (1960), and *United States v. Durham Lumber Company*, 363 U.S. 522 (1960). The "no property" rule means that in approaching any priority determination, the first question must be: "Does the taxpayer have any property to which the lien will attach?" The fundamental thrust of this inquiry is that if there is no property interest to which the federal tax lien attaches, then there is no need to even consider the question of priorities.
 - a. In *Aquilino*, the Supreme Court remanded the case for a determination of whether the taxpayer-prime contractor, by virtue of a New York statute, held the funds against which the federal tax lien was asserted in trust for the payment of laborers and material suppliers.
 - b. In *Durham Lumber Company*, the prime contractor-taxpayer, by virtue of the law of North Carolina, was held to have no property interest in funds due from the owner except in any surplus that might remain after the payment of the subcontractors.

5.17.2.7.1.13

(03-27-2012)

Miller Act Cases and Sureties

- (1) Subcontractors and suppliers who agree to provide labor and materials to a prime contractor take the risk that they will not be paid by the contractor. To protect these subcontractors and suppliers, Congress enacted the Miller Act, codified at 40 USC 3131-3132 in 1935. Specifically, the Miller Act requires that the prime contractor on all federal construction projects purchase both a performance and a payment bond.
- (2) The Miller Act, however, does not set forth the priorities as between any claim of the surety and any IRS claim. In *United States v. Munsey Trust Co*, 332 U.S. 234, 239 (1947), the Court first held that the IRS, like any creditor, has the right to setoff amounts owed to a debtor against amounts the debtor owes to the IRS.
- (3) The Court also stated that if the surety completed the job, the surety would be entitled to the "retained moneys in addition to progress payments," as otherwise a surety would rarely agree to complete a job if it knew that, by doing so, it would lose more money than if it had allowed the IRS to proceed. *Munsey Trust*, 332 U.S. at 244.
- (4) Subsequently, lower courts have cited *Munsey Trust*, to contrast a surety's payments made pursuant to a payment bond with payments made pursuant to a performance bond. If the surety makes a payment pursuant to a payment bond, then the IRS has the right to setoff. *Dependable Ins. Co., Inc. v. United States*, 846 F.2d 65, 67 (Fed. Cir. 1988); *United States Fid. & Guar. Co. v. United States*, 475 F.2d 1377, 1383 (Ct. Cl. 1973); *Barrett v. United States*, 367 F.2d 834 (Ct. Cl. 1966). If a surety makes a payment pursuant to a performance bond, then the IRS does not have the right to setoff. See *Aetna Cas. & Surety Co. v. United States*, 845 F.2d 971, 976 (Fed. Cir. 1988); *Aetna Cas. & Surety Co. v. United States*, 435 F.2d 1082 (5th Cir. 1970); *Trinity Universal Ins. Co., v. United States*, 382 F.2d 317, 321 (5th Cir. 1967), cert. denied, 390 U.S. 906 (1968).

5.17.2.7.1.14
(12-12-2014)
Receivers

- (1) A “receiver” is a disinterested third party (similar to a trustee) appointed by a court to receive and preserve property funds in litigation. In general, in determining the priority of the federal tax lien over court appointed receivers, the threshold consideration is determining the nature of the receiver’s interest in the insolvent’s property. Of course, if the taxpayer is divested of title prior to the time the federal tax lien arises, there is no property belonging to the taxpayer in the hands of the receiver to which a federal tax lien will attach. *SEC v. Levine*, 881 F.2d 1165 (2d Cir. 1989). If, however, the lien arises prior to the passing of title to the receiver, the property will pass burdened with the lien. See also IRM 5.17.13.10, Receiverships.

5.17.2.7.1.15
(03-27-2012)
Right of Setoff

- (1) Setoff may be defined as the discharge or reduction of one demand by an opposite one. Practically speaking, this question usually arises in the case where a bank has loaned money to a taxpayer who also is the bank’s customer. If the customer/borrower fails to meet the required loan repayments, the bank will often assert a right of setoff against any funds the customer has on deposit.
 - a. If the federal tax lien attaches to a taxpayer’s property prior to setoff, then the bank takes funds encumbered with a federal tax lien. The IRS may levy on the bank to obtain the encumbered funds. *United States v. Donahue Industries, Inc.*, 905 F.2d 1325 (9th Cir. 1990). Alternatively, the IRS may file suit under IRC 7403 to foreclose the tax lien on the property. *United States v. Cache Valley Bank*, 866 F.2d 1242 (10th Cir. 1989).
 - b. If the bank setoff occurs prior to creation of the assessment lien, then the tax lien will not attach to the funds because the money no longer belongs to the taxpayer.

Note: See also IRM 5.17.2.6.5 regarding the superpriority under IRC section 6323(b)(10) for deposit secured loans.

5.17.2.7.1.16
(03-19-2018)
State and Local Tax Liens

- (1) Unlike the property tax, which has a superpriority status under IRC 6323(b)(6), a state, county, or municipal lien for taxes (e.g., sales taxes, income taxes, franchise taxes, etc.) can achieve priority over the federal tax lien only on the basis that such lien is a choate lien prior in time to the federal tax lien arising, which occurs when the federal tax liability is assessed. Then the doctrine of “first in time, first in right” is applicable. *United States v. City of New Britain*, 347 U.S. 81 (1954).
- (2) State and local liens may not achieve priority over a federal tax lien by being characterized by the local law as some interest in addition to a lien. Thus, the U.S. Supreme Court rejected the characterization by the New Hampshire Supreme Court of a municipal tax lien as constituting a judgment lien, thus bringing the lienor within the protection of IRC 6323. *United States v. Gilbert Associates, Inc.*, 345 U.S. 361 (1953).
- (3) Similarly, a state’s characterization of its lien for taxes as an expense of sale in a mortgage foreclosure action was unavailing and the federal tax lien was held entitled to priority over the subsequent liens of the state on a first in time, first in right basis. *United States v. Buffalo Savings Bank*, 371 U.S. 228 (1963). Also, in determining the relative priorities of federal tax liens and state and local liens for taxes, the state’s characterization of its liens as choate is not conclusive for federal tax purposes. *Illinois v. Campbell*, 329 U.S. 362 (1946).

- (4) The question of what constitutes “perfection” is particularly significant in this area. States vary in terms of how local tax liens are perfected. Generally speaking, state and local tax liens arise either at the time notice and demand is issued (similar to federal tax liens), or after administrative appeal procedures to contest the lien are exhausted. See *Minnesota v. United States*, 184 F.3d 725 (8th Cir. 1999) (holding that a state-created lien arises when the state takes administrative steps to fix the taxpayer’s liability); *Monica Fuel, Inc. v. IRS*, 56 F.3d 508 (3d Cir. 1995), cert. denied, 528 U.S. 1075 (2000) (holding state tax liens to be choate when the time period to administratively appeal the lien expires).
- (5) In any event, the principal inquiry in these cases is that of “perfection” of the competing state or local tax lien. If there is “nothing more to be done” in order for the state to enforce its tax lien prior to the attachment of the federal tax lien, which occurs when the federal tax liability is assessed, then the state or local tax lien will have priority. However, if the state must still take administrative action to establish a taxpayer’s liability after the federal tax lien arises, then the federal tax lien will have priority. This means that the state/local lien must be “choate” or “perfected” with respect to the property at issue prior to the time the federal tax liability is assessed.

5.17.2.7.1.17
(03-27-2012)
Subrogation

- (1) The doctrine of subrogation involves the substitution of one person in the place of another with respect to a lawful claim or right. IRC 6323(i)(2) allows creditors to argue subrogation in federal tax lien priority disputes. Specifically, IRC 6323(i)(2) provides that where, under local law, one person is subrogated to the rights of another with respect to a lien or interest, such person shall be subrogated to such rights for purposes of any lien imposed by IRC 6321 (relating to lien for taxes) or IRC 6324 (relating to special liens for estate and gift taxes). In lien priority disputes, subrogation issues arise when a lien that is junior to the federal tax lien pays off a lien that is senior to the federal tax lien.

Example: Assume that Bank has the first mortgage of \$10,000 on Taxpayer’s property, the federal tax lien is second in the amount of \$25,000, and Credit Union has the third lien of \$30,000. Next, assume that Credit Union entirely pays the Bank’s first mortgage. If Credit Union meets the local law definition of subrogation and Taxpayer’s property is sold for \$50,000, then Credit Union gets the first \$10,000 because it stepped into the shoes of the Bank. The IRS gets the next \$25,000, and the Credit Union gets the last \$15,000

- (2) There is no universal definition of subrogation under state law. Whenever a lienor claims the right of subrogation, state law must be carefully examined to determine if such a claim meets the state definition of subrogation. Consult with Area Counsel on questions regarding applicable state law. State definitions of subrogation may differ. For example, under California law, courts (e.g., *United States v. Han*, 944 F.2d 526 (9th Cir. 1991)) apply a five-factor guideline for determining equitable subrogation:
 - a. Payment was made by the subrogee to protect his own interest.
 - b. The subrogee has not acted as a volunteer.
 - c. The debt paid was one for which the subrogee was not primarily liable.
 - d. The entire debt has been paid.
 - e. Subrogation would not work any injustice to the rights of others.

Note: Do not confuse subrogation with subordination. Subordination is the act or process by which one person's rights or claims are moved voluntarily to a position ranked below those of other claimants. This differs from the principal of subrogation, in which a creditor moves ahead of another claimant by operation of law. See IRM 5.17.2.8.6, below, for additional discussion of subordination.

5.17.2.7.1.18
(03-19-2018)
**Uniform Commercial
Code (UCC) Security
Interest**

- (1) Many lien priority disputes arise between the lien as secured by the NFTL filing and UCC security interest holders. In order to determine priority, you need to understand the creation and perfection of a security interest under Revised Article 9 of the UCC.

Note: Different versions of Article 9 of the UCC may have been adopted in different states. Consult with Area Counsel on questions regarding applicable state law.

- (2) Creation of a security interest — Under state law, attachment is the term used to describe the creation of a security interest in the debtor's collateral. Under UCC 9-203, attachment generally requires the following three elements:

1. creditor has given value to the debtor,
2. the debtor has rights in the collateral, and
3. an agreement.

Note: The above three elements may occur in any order. However, a security interest does not exist under the UCC until all three elements have been met. The definition of a security interest in IRC 6323(h)(1) includes similar requirements to the above three elements. In short, if a debtor fails the state definition of attachment, the creditor will also fail the IRC 6323(h)(1) definition of a security interest.

- (3) Perfection of a financing statement — Under state law, in order to have priority against other lienors, the security interest not only must attach to the collateral but also must be perfected. UCC 9-301 and the following sections provide that, depending on the facts and type of collateral, steps for perfection may occur under four different methods:

1. filing a financing statement,
2. taking possession of the collateral,
3. for some types of collateral, particularly bank accounts, exercising control over the collateral,
4. in limited situations, usually a purchase money security interest in consumer goods, automatic perfection exists, i.e., attachment of the security interest automatically perfects it. An example is when a store sells a television for personal use, taking a security interest in the television.

- (4) A UCC security interest must have attached and must have been perfected in order to have priority over the IRS's later filed NFTL. Do not assume, however, that a creditor's security interest is perfected just because a financing statement has been filed. The UCC allows a creditor to file a financing statement before the security interest has attached (come into existence), and creditors frequently do so. UCC 9-308. The Official Comments to UCC 9-308, number 2, explain that "If the steps for perfection have been taken in advance,

as when the secured party files a financing statement before giving value or before the debtor acquires rights in the collateral, then the security interest is perfected when it attaches.”

- (5) For corporations, limited liability companies, and other business entities created under state law (registered organizations) do not assume that a UCC security interest is filed at the same location where the NFTL is filed. IRC 6323(f)(2)(B) states that the location of personal property is the taxpayer’s residence, and the residence of a corporation is the principal executive office of the business. In contrast, a UCC security interest for a debtor-corporation is filed in the state of incorporation. For example, a UCC security interest on the inventory of a corporation with a principal executive office in California, which was incorporated in Delaware, would be filed in Delaware.

Reminder: Different states have adopted different versions of the UCC, including Article 9, which deals with Secured Transactions. Check the State Law Guide for your particular state or contact Area Counsel if you have any questions regarding the perfection of a UCC security interest. Also remember to check the local law supplements that Counsel maintains on their web site called *State Law Guides*.

5.17.2.7.1.19
(03-19-2018)
**Unrecorded
Conveyances**

- (1) Unrecorded conveyances can interact with the federal tax lien at differing points in time. The interaction could be:
 - a. After the accrual of the tax but before the tax is assessed;
 - b. After the tax is assessed and the statutory lien arises, but before a Notice of Federal Tax Lien has been filed; or
 - c. After a Notice of Federal Tax Lien has been filed.
- (2) Prior to assessment, a tax lien does not attach to property the taxpayer has conveyed to a third party through a bona fide conveyance which divests the taxpayer’s interest in the property at issue.
- (3) Even where state law provides creditors with certain rights to property if there is an unrecorded conveyance, but all of the taxpayer’s interest in the property was conveyed prior to assessment (i.e. the taxpayer retains no post-conveyance interest), the federal tax lien generally will not attach even if the conveyance is recorded after the lien arises. *Filicetti v. United States*, 2012-1 USTC ¶ 50,214 (D.Idaho 2012).
- (4) In cases involving the determination of priority between a federal tax lien arising after an unrecorded conveyance that extinguishes all of the taxpayer’s interest in the property at issue, generally the federal tax lien does not attach and the lien has no priority position. This issue may come up when reviewing applications for, Certificate of Discharge of Property from Federal Tax Lien, resulting in a “no value” discharge. The issue might also come up reviewing applications for, Certificate of Nonattachment of Federal Tax Lien.

Example: A husband and wife divorce in December 2005.

Filcetti Type Example

The court awards the principal residence to the wife with a contingent contractual right for the husband such that, if the wife sells the residence within three years of the final divorce decree, the wife will split the sale proceeds with the husband.

Under applicable state law, a divorce decree is effective to convey title between the divorcing parties at the time the decree is entered by a court.

The husband does not pay his 2005 taxes. The husband's liability is assessed, the statutory lien arises, and subsequently a Notice of Federal Tax Lien is filed in September 2008.

The wife does not sell the property by the end of 2008 but also does not record the divorce decree containing the real property conveyance until 2010.

Even though the real property conveyance was unrecorded at the time the statutory lien arose and remained unrecorded at the time the Notice of Federal Tax Lien was filed, the federal tax lien, at best, would attach to the husband's personal property interest in the contingent contractual right to monetary proceeds until that right expired.

In this example, the contingent right expired in December 2008 and the federal tax lien never attached to a real property interest in the principal residence.

- (5) The IRS's position on unrecorded conveyances is limited to any bona fide conveyance prior to the assessment and the statutory lien arising that extinguishes all of the taxpayer's interest in the property at issue. A conveyance is not bona fide if the taxpayer retains control over the property or enjoys full use and benefit. Thus, the position on unrecorded conveyances does not apply to a transfer to a nominee or alter ego prior to assessment. If there are fraud indicators associated with a property transfer prior to the assessment and little evidence that the taxpayer controls or enjoys full use and benefit of the property, contact Area Counsel as soon as practicable to discuss making a suit referral to the Department of Justice.

5.17.2.8
(03-27-2012)
**Relief from the Federal
Tax Lien**

- (1) The law provides various mechanisms for relief from the federal tax lien.
 - a. The most common types of relief from the federal tax lien are a discharge of property from the effect of the tax lien issued by the IRS, a foreclosure by a senior competing lienor, and the IRS's release of the tax lien itself.
 - b. The less common types of relief from the federal tax lien are a certificate of non-attachment, a certificate of erroneous lien, the subordination of the lien, and withdrawal of the NFTL.
- (2) The above types of relief are separate and distinct, as discussed below.

5.17.2.8.1
(03-19-2018)
**Discharge of Property
From the Effect of the
Tax Lien**

- (1) A discharge of the property means that the federal tax lien is removed from a particular piece of property. This occurs only in limited situations listed in IRC 6325(b). A *discharge* of the property must not be confused with a *release* of the federal tax lien. When the IRS *releases* the federal tax lien, the underlying tax lien is extinguished on all of the taxpayer's property.
- (2) The Internal Revenue Code provides that the IRS may issue a certificate of discharge of property from the federal tax lien if one of the following conditions is met:

- a. If the fair market value of the taxpayer's property remaining subject to the lien after the discharge is at least double the sum of the tax liability plus all other encumbrances on that property entitled to priority over the IRS's lien. IRC 6325(b)(1).
- b. If the IRS receives payment of an amount equal to the value of the IRS's interest in the property. IRC 6325(b)(2)(A).
- c. If the IRS's interest in the property has no value. IRC 6325(b)(2)(B).

Note: If there is a short sale, meaning the senior lienholder agrees to accept less than the full amount of its lien, the IRS's lien has no value and the IRS cannot require payment of a sum that would have been applied to junior real estate taxes as a condition of discharge. See IRM 5.12.10.3.3.1, No Value - Short Sales.

- d. If all or part of the taxpayer's property is sold, and, pursuant to a written agreement with the IRS, the proceeds of such sale are to be held as a fund subject to the liens and claims of the United States, in the same manner and with the same priority that such liens and claims had with respect to the discharged property. IRC 6325(b)(3). This provision often assists in facilitating the sale of property whenever a dispute exists among competing lienors, including the IRS, concerning their respective rights in the property.
 - e. Under IRC 6325(b)(4), the third-party owner of this property (previously owned by the taxpayer, against which the IRS has a lien and has filed an NFTL) may obtain a certificate of discharge with respect to the lien on that property. The IRS shall issue such a certificate of discharge of property from the federal tax lien if the third-party owner (but, not the taxpayer) either deposits the amount of the IRS's lien interest in the property (as determined by the IRS) or posts an acceptable bond for that amount. IRC 6325(b)(4). The third party then has 120 days to file a court action to determine the value of the IRS's lien interest in the property. IRC 7426(a)(4). If the IRS determines that the taxpayer's liability can be satisfied by other sources, or the value of the property is less than the deposit or bond, then the IRS will refund the deposit (with interest) and/or release the bond. IRC 6325(b)(4)(B). If a Court determines the value of property is less than the IRS's determination, it will order the same. IRC 7426(b)(5). If the third party does not institute proper court proceedings within the 120 days after the IRS issues the Certificate of Discharge, then the IRS has 60 days within which to apply the amount deposited (or collect on the posted bond) to the amount the IRS determined was secured by the lien, and refund (with interest) any remainder to the third party. IRC 6325(b)(4)(C). See also Treas. Reg. 301.6325-1(b)(4), for further procedures. Note that any person who co-owned the property with the taxpayer can also avail themselves of this remedy.
- (3) In all of the above situations, value means either fair market value or forced sale value in appropriate cases and includes the situation where the interest of the IRS in the property sought to be discharged has no monetary value, as in the case of property subject to prior encumbrances in a greater amount than the value of the property.
 - (4) A certificate of discharge is conclusive that the property covered by the certificate is discharged from the lien. IRC 6325(f)(1)(B). However, if the taxpayer reacquires the property that has been discharged, the tax lien will again attach. IRC 6325(f)(3).

5.17.2.8.2
(03-27-2012)
**Foreclosure by Senior
Competing Lienor**

- (1) When a senior lienholder sells a taxpayer's property to enforce its lien, this "foreclosure sale" may discharge a federal tax lien in certain situations. Such foreclosure sales can be either a judicial sale (i.e., pursuant to a judicial proceeding) or a nonjudicial sale.
- (2) See IRM 5.12.4 for more information regarding judicial and nonjudicial foreclosures.

5.17.2.8.2.1
(03-19-2018)
**Discharge of Tax Lien in
Nonjudicial Sale**

- (1) Most controversies involving the priority of the federal tax lien involve nonjudicial sales, which are sales made pursuant to one of the following:
 - a. An instrument creating a lien on the property sold;
 - b. A confession of judgment on the obligation secured by an instrument creating a lien on the property sold; or
 - c. A statutory lien on the property sold.
- (2) Nonjudicial sales include the divestment of a taxpayer's interest in property by operation of law, by public or private sale, by forfeiture, or by termination under provisions contained in a contract for deed, land sale contract, or conditional sales contract. Treas. Reg. 301.7425-2(a). The key point is that a court action is not needed to enforce the creditor's interest and to sell the property.
- (3) The first step in analyzing a nonjudicial sale is determining whether the IRS filed a NFTL more than 30 days before the sale. If the IRS filed more than 30 days before the sale, then notice of the proposed sale must be given to the IRS by the foreclosing party in order for the sale to discharge the federal tax lien. If proper notice is not given to the IRS, then the federal tax lien will remain on the property. If the IRS filed a NFTL less than 30 days before the sale, then the IRS is not entitled to notice of the nonjudicial sale, which will generally discharge the property from the federal tax lien. IRC 7425(b).
- (4) If a senior lienor finds a NFTL and wishes to give notice to the IRS of a pending nonjudicial sale, the Internal Revenue Code and regulations provide that notice of a nonjudicial sale shall be given in writing by registered or certified mail or by personal service, not less than 25 days prior to the date of sale, to the IRS official, office and address specified in IRS Publication 786, "Instructions for Preparing a Notice of Nonjudicial Sale of Property and Application for Consent to Sale," or its successor publication. Treas. Reg. 301.7425-3(a)(1)). The 25-day period is measured from the time of mailing of the notice and applies to the sale of all real and personal property except perishable goods.
- (5) When a scheduled sale for which notice has been given is postponed to a later date, the seller of the property must give notice of the postponement to the appropriate IRS official in the same manner as is necessary under local law with respect to other secured creditors. Treas. Reg. 301.7425-3(a)(2).
- (6) The date of the sale is significant in order to compute the requisite notice period that the seller has to provide the IRS of any anticipated nonjudicial sale of property encumbered by the federal tax lien. Under Treas. Reg. 301.7425-2(b), the "date of sale" for purposes of notice to the IRS arises in one of the following three situations:
 - a. In the case of a public sale which divests junior liens on property, the date of the public sale is controlling.

- b. In the case of a private sale which divests junior liens on property, the date that title to the property is transferred is controlling.
 - c. In all other cases (i.e., where there is a divestment of title or interest not resulting from a private or public sale), the date of sale is deemed to be the date on which junior liens in the property are divested under local law.
- (7) The IRS has authority to consent to a sale of property free and clear of the tax lien or title of the United States in a nonjudicial sale which does not meet the standard notice requirements for such sales. If the IRS consents in the manner prescribed by the regulations, then the sale will discharge or divest the property from the federal tax lien notwithstanding a defect in the original notice of sale. Treas. Reg. 301.7425-3(b).
 - (8) Special rules apply for the notice of sale requirements for perishable goods. These are set forth in Treas. Reg. 301.7425-3(c).

5.17.2.8.2.2
(12-12-2014)
**Discharge of Tax Lien in
Judicial Sale**

- (1) A judicial sale may discharge property from a federal tax lien. 28 USC 2410(c). Under IRC 7425(a), if the IRS files a NFTL prior to commencement of the suit or civil action, the United States must be named as a party in the suit in order to discharge property from the federal tax lien. If the United States is not named as a party, the judicial sale will not discharge property from the federal tax lien. There may be situations in which the United States is not named as a party in the suit because a NFTL has not been filed prior to the filing of the suit, or the filing of a notice of lien is not provided by the IRC, such as in the case of estate or gift tax liens. In these situations, the judicial sale will discharge the federal tax lien as to the property sold.

5.17.2.8.2.3
(03-27-2012)
Redemption

- (1) If either a nonjudicial sale or a judicial sale discharges real property from the federal tax lien, the IRS has the right of redemption. This right enables the IRS to redeem the real property from the party who purchased it at the foreclosure sale, and then sell it. For both judicial and nonjudicial sales, the IRS may redeem the real property within 120 days of the date of sale or the redemption period under state law, whichever is longer. 28 USC 2410(c) (redemption after judicial sales) and IRC 7425(d)(1) (redemption after nonjudicial sales).
- (2) For more information regarding redemptions, see IRM 5.12.5.

5.17.2.8.3
(03-19-2018)
Release of Lien

- (1) There is a fundamental legal distinction between the “release” of a federal tax lien provided for by IRC 6325(a) and the “discharge” of property from the tax lien provided for by IRC 6325(b). The release of a lien extinguishes the federal tax lien itself. In other words, a release goes to the very existence of the federal tax lien. In contrast, a discharge will leave only a particular piece of property unencumbered by the federal tax lien.
- (2) Before the IRS can issue a certificate of release, certain specified conditions must be met. IRC 6325(a); Treas. Reg. 301.6325-1. A certificate of release of the federal tax lien is authorized under each of the following conditions:
 - a. The amount assessed (plus interest) is paid.
 - b. The amount assessed becomes legally unenforceable.
 - c. A bond is furnished that is satisfactory in terms and sufficient in amount to secure the payment of the outstanding assessments plus interest.

- (3) If either of the first two conditions is met and a Notice of Federal Tax Lien has been filed, a certificate of release must be issued. The Area Director may exercise discretion, substitute the bond for the lien, and issue a certificate of release for the third condition. Pursuant to the regulations, a tax lien must be released as soon as practicable, but not later than 30 days, after the Area Director has:

- determined that the liability has been fully satisfied,
- determined that the liability has become legally unenforceable, or
- agreed to accept a bond for the release.

Reminder: All NFTLs filed since December 1982 contain a self-releasing clause stating that the federal tax lien will automatically be released unless the NFTL is timely refiled. Also, the IRS may file a certificate of release prior to the time a NFTL will self-release. In both situations, the release is conclusive that the tax lien referred to in the certificate is extinguished. IRC 6325(f)(1)(A). To prevent the lien from self-releasing, the IRS must refile the NFTL in every office in which a NFTL was originally filed. See IRM 5.17.2.3.3, Refiling of Notice, above.

- (4) If the underlying tax liability has not been satisfied or is not legally unenforceable, the taxpayer is not entitled to release of the lien. See IRC 6322, 6325(a).
- (5) The effect of a release is extinguishment of the underlying statutory assessment lien. IRC 6325(f). The release, in itself, does not extinguish the underlying liability. For example, if a release occurs due to acceptance of a bond or expiration of the collection statute, the liability remains while the assessment lien is extinguished. See also IRM 5.17.2.8.7.1, below, addressing withdrawal of the notice of federal tax lien following lien release.

5.17.2.8.4
(03-27-2012)
**Certificate of
Nonattachment**

- (1) The IRS may issue a certificate of nonattachment of the federal tax lien if it determines that a person (other than the taxpayer) may be injured by the appearance of the IRS's NFTL. IRC 6325(e). This situation typically arises when the name of the taxpayer is similar (or identical) to that of a taxpayer identified on a NFTL. The IRS files this certificate in the same office where the IRS filed the NFTL. It is conclusive that the lien of the IRS does not attach to the property of the person referred to in the certificate. The IRS may also revoke the certificate in the same manner as a certificate of release of lien. IRC 6325(f)(2).
- (2) The certificate of nonattachment is not related to the discharge of property or the release of a federal tax lien. The certificate of nonattachment is used only when, as a matter of fact and law, the federal tax lien never attached to the property involved because the taxpayer did not own it. The owner of certain property may be subjected to unnecessary hardship because of a lien against a taxpayer with a similar name, thus, perhaps, constituting a cloud on the former's title to his/her property.

5.17.2.8.5
(03-19-2018)
Erroneously Filed NFTL

- (1) Treas. Reg. sec. 301.6326-1(b) defines an erroneously filed NFTL as one which is filed during the presence of one of the following conditions:
- a. The tax liability was satisfied prior to the NFTL filing,
 - b. The tax liability was assessed in violation of deficiency procedures in IRC sec. 6213,

- c. The tax liability was assessed in violation of the Bankruptcy Code, or
- d. The statute of limitations for collection expired prior to the filing of the NFTL.

- (2)) In situations where it has been determined that a NFTL was erroneously filed, a specially-worded Form 668(Z), Certificate of Release of Federal Tax Lien, and Letter 544, Letter of Apology - Erroneous Filing of Notice of Federal Tax Lien, will be issued. Pursuant to IRC sec. 6326, the release and letter should be issued within 14 days of the determination, when practical.
- (3) CEASO Advisory is responsible for making erroneous NFTL determinations. When an erroneous NFTL is identified in the field, ACS, or other function, a memorandum outlining the facts and recommending the release should be immediately prepared and forwarded to CEASO Advisory. When circumstances dictate immediate action, the facts of the case may be given to CEASO Advisory by telephone; however, the memorandum must still be prepared and forwarded to CEASO Advisory. See IRM 5.12.3 for additional information.

5.17.2.8.6
(03-19-2018)

Subordination of the Tax Lien

- (1) Subordination is the act or process by which one person's rights or claims are moved voluntarily to a position ranked below those of other claimants. This differs from the principle of subrogation (discussed in IRM 5.17.2.7.1.17), in which a creditor moves ahead of another claimant by operation of law. Under IRC 6325(d), the IRS may issue certificates subordinating a tax lien to another interest if:
 - a. payment is received in an amount equal to the amount with respect to which the tax lien is subordinated, or
 - b. the IRS believes that the subordination of the tax lien to another interest will ultimately result in an increase in the amount realized by the United States from the property subject to the lien and will aid in the collection of the tax liability.
- (2) Subordination provides the IRS with flexibility. In subordination by payment, the tax lien is being subordinated only to the extent the United States receives, on a dollar-for-dollar basis, an equivalent amount. The IRS's interest cannot be injured and a new procedure for collecting taxes is made available.
- (3) In subordination to ultimately aid in the collection of the tax, there is a risk that the subordination will decrease collection. For example, the federal tax lien could be subordinated to a mortgage that would provide funds to repair a dilapidated building. The assumption is that the real estate market will not go down and that the increased value of the building would both satisfy the mortgage and increase the overall payment of the tax liability. The assumption may be incorrect; the real estate market may go down. After the mortgage is paid, the IRS may receive less revenue because of its decision to subordinate.
- (4) The IRS must exercise good judgment in weighing the risks and deciding whether to subordinate the federal tax lien. The IRS's judgment is similar to the decision that an ordinarily prudent business person would make in deciding whether to subordinate his/her rights in a debtor's property in order to secure additional long run benefits.
- (5) Subordination of the tax lien is unnecessary if a creditor meets the requirements of subrogation or qualifies for protection as a purchase money security interest holder. See IRM 5.17.2.6.5.11, Purchase Money Security Interest (PMSI).

5.17.2.8.7
(03-19-2018)
**Withdrawal of Notice of
Federal Tax Lien**

- (1) There is an important distinction between “releasing” a federal tax lien and “withdrawing” a filed notice of that lien. The release of a federal tax lien extinguishes the underlying statutory assessment lien. IRC 6325(f). Not all releases occur after the liability has been satisfied. For example, unless an NFTL is timely refiled, the federal tax lien will self-release because all NFTLs filed since December 1982 contain a self-release clause. See IRM 5.17.2.8.3, above. The release does not, in itself, extinguish the underlying liability.
- (2) The IRS has authority to “withdraw” a notice of federal tax lien, in certain circumstances. IRC 6323(j)(1). The withdrawal of the NFTL only withdraws public notice of the lien; it does not extinguish the underlying liability, nor does it release the underlying federal tax lien.
- (3) The IRS may withdraw a notice of federal tax lien if the appropriate official determines that one of the following four conditions is met:
 - a. The IRS’s filing of the NFTL was premature or otherwise not in accordance with administrative procedures. See IRM 5.12.9.3.1 for additional guidance.
 - b. The taxpayer has entered into an installment agreement to satisfy the tax liability, unless the agreement provides otherwise. See IRM 5.12.9.3.2 for additional guidance.

Note: In April 2011, the IRS expanded its policy to allow withdrawals when a taxpayer enters a Direct Debit Installment Agreement and meets certain other conditions as specified in published guidance related to IRM 5.12.9.

- c. The withdrawal of the NFTL will facilitate collection of the tax liability underlying the NFTL. See IRM 5.12.9.3.3 for additional guidance.
- d. The withdrawal of the NFTL would be in the best interest of the taxpayer, as determined by the National Taxpayer Advocate (NTA), and in the best interest of the United States, as determined by the appropriate official. See IRM 5.12.9.3.4 for additional guidance.

Note: The IRS needs the consent of the taxpayer or the NTA to withdraw a notice of federal tax lien as in the best interests of the United States. A withdrawal for one of the other reasons does not require consent. IRC 6323(j)(1).

- (4) The IRS must file its notice of withdrawal of the NFTL at the same office as the withdrawn notice, and must provide a copy of the withdrawal to the taxpayer. Treas. Reg. 301.6323(j)-1. In addition, if requested in writing by the taxpayer, the IRS must make reasonable efforts to give notice of withdrawal of the NFTL to creditors, credit reporting agencies, and financial institutions specified by the taxpayer. IRC 6323(j)(2).

5.17.2.8.7.1
(03-19-2018)
**Withdrawal of Notice of
Federal Tax Lien after
Lien Release**

- (1) IRC 6323(j) is primarily for situations in which the federal tax lien is still in effect; however, the IRS is not legally prohibited from withdrawing the lien’s notice (NFTL) after the lien has been released pursuant to IRC 6325(a). The IRS does not have general authority to withdraw a NFTL outside of the conditions of IRC 6323(j) but whether or not to grant a post-release withdrawal becomes a matter of policy.
- (2) Written requests submitted under IRC 6323(j)(1)(A) (the IRS’s filing of the NFTL was premature or otherwise not in accordance with administrative procedures) will generally be granted after lien release if the taxpayer demonstrates

the original NFTL filing was improper or not otherwise in accordance with IRS procedures. A withdrawal under this provision may be issued whether a certificate of release was issued or the lien self-released.

(3) Post-release NFTL withdrawals under IRC 6323(j)(1)(D) (best interest test) will generally be granted if the following conditions apply:

- a. The taxpayer requests the withdrawal in writing, and
- b. The taxpayer fully satisfied the liabilities on the NFTL.

Note: Fully satisfied is defined here as:

Element	Definition
1	Tax liability was fully resolved by payment or credit offset,
2	Most circumstances where the tax assessment was abated because the taxpayer is no longer liable for the tax (e.g., amended return filed, reconsideration of additional assessment, innocent spouse determination, identity theft, or judicial ruling),
3	Abatement of penalty and/or interest due to reasonable cause resulted in zero balance, or
4	The taxpayer completed terms of an offer in compromise, including any related collateral agreements.

Note: Fully satisfied does not include liabilities that are no longer collectable because of bankruptcy discharge or expiration of the collection statute.

- c. A certificate of release was issued.

Note: Generally, withdrawals will not be granted under IRC 6323(j)(1)(D) for self-releasing liens unless extenuating circumstances are present. See SBSE-05-1212-104 (December 31, 2012) for examples of extenuating circumstances.

- d. The taxpayer is in compliance with filing requirements.

Note: If the taxpayer has an unfiled return for any of the past three years, or appears to be delinquent with FTDs or Estimated Tax Payments, further investigation may be necessary as determined on a case-by-case basis.

Note: The taxpayer will be considered to be in compliance if the return was, or can be, closed for one of the following reasons:

Item	Description
1	Not liable for the tax period;
2	Income below the filing requirement;
3	Little or no tax due or due a refund; and/or
4	No longer liable for filing.

Note: The taxpayer may be requested to supply additional information, as necessary, to complete this determination.

- (4) Liens that self-released in error when the releases are subject to revocation do not qualify for withdrawal under these procedures.

5.17.2.8.7.2
(12-12-2014)

Withdrawal of Notice of Federal Tax Lien When Direct Debit Installment Agreement (DDIA) is in Effect

- (1) A request for lien withdrawal under IRC 6323(j)(1)(B), related to an active DDIA, will generally be approved for the following types of taxpayers:
- Individual Master File (IMF),
 - Business Master File (BMF) income tax only, and
 - Out of Business BMF for any type of tax,
- (2) If the following conditions are met:
- a. Aggregate unpaid balances of assessment and pre-assessed taxes are \$25,000 or less.
 - b. Liability will be full paid in 60 months, or prior to collection statute expiration, whichever comes first.
 - c. The withdrawal request is in writing.
 - d. The taxpayer is in compliance with all other filing and payment requirements.
 - e. At least three consecutive payments have been made on the DDIA and there have been no defaults in payment under this, or any previous, DDIA.
 - f. The taxpayer has no previous lien withdrawals for any modules on the DDIA, excluding withdrawals relating to improper NFTL filing.
 - g. If a taxpayer defaults on making payment under a DDIA after the NFTL is withdrawn, a new NFTL may be filed if appropriate.

Note: If a taxpayer does not meet the criteria for withdrawal under IRM 5.12.9.3.2.1, the IRS must still consider the withdrawal request under the general rule allowing for withdrawal if the taxpayer enters into an installment agreement set forth at IRC 6323(j)(1)(B). See IRM 5.12.9.3.2.

5.17.2.8.8
(03-19-2018)

Revocation of Release of Lien and Nonattachment of Lien

- (1) If the IRS made an error in releasing the federal tax lien or filing a nonattachment of tax lien, that error may be corrected if the collection period is still open. A lien may be found to have been released erroneously or improvidently when the lien self-releases because it was not timely refiled or not timely refiled in all locations where the original NFTL was filed, the IRS erroneously files a certificate of release, or when an offer in compromise has been breached. The IRS may correct such errors by revoking the certificate of release or nonattachment. IRC 6325(f)(2).
- (2) Because a released lien or a lien released pursuant to self-release language in an NFTL releases the underlying statutory lien, a release in one location invalidates any notice of that statutory lien (NFTL) filed elsewhere. There is only one statutory lien but there can be multiple notices filed for that one statutory lien. The revocation reinstates the statutory lien.
- (3) The IRS effects the revocation by mailing a notice of the revocation to the taxpayer's last known address and by filing notice of the revocation in the same office(s) in which the notice of lien to which it relates was filed. If NFTLs or refiled NFTLs were filed in multiple offices, the notices of revocation must also be filed in each of those offices. Any release not cancelled by a revocation filing remains a release of the statutory lien and continues to invalidate any lien notice (NFTL) filed elsewhere.

- (4) The effective date of reinstatement will be the date by which the IRS has both mailed the notice of revocation to the taxpayer and properly filed the notice of revocation. Revocation does not restore the continuity of the original tax lien from the date of assessment, and there is a gap period between the original release and the revocation of that release within which other liens may arise. Other liens arising during the gap period may have priority over the “reinstated” federal tax lien.
- (5) The reinstated lien will have the same force and effect as a general tax lien which arises upon assessment of the tax. IRC 6321. The reinstated lien will not be in existence for a period longer than the period of limitation on collection after assessment of the tax liability to which it relates. The reinstated lien will not be valid against any holder of a lien or interest described in IRC 6323(a) that perfected their lien or interest prior to the filing of the reinstated lien. Treas. Reg. 301.6325-1(f)(2)(iii)(b). The IRS must file a new NFTL pursuant to IRC 6323(a) in every office where it wishes to establish priority.
- (6) If the IRS seeks to issue a notice of revocation of the certificate of release during a taxpayer’s bankruptcy, it should seek relief from the automatic stay of Bankruptcy Code 362 to avoid the question of whether the revocation of a certificate of release constitutes a prohibited creation of a new lien interest while the debtor is subject to the automatic stay.

5.17.2.9
(03-27-2012)
**Special Tax Liens
Applicable to Estates
and Gifts**

- (1) The Internal Revenue Code provides for a special estate tax lien and a gift tax lien, both of which are separate and independent of the general tax lien. IRC 6324. The estate tax lien and the gift tax lien may exist simultaneously with the general lien provided for by IRC 6321 or they may exist independently of the general lien under IRC 6321. The estate and gift tax liens arise automatically, unlike the general tax lien. The following provides a summary of estate and gift tax liens. For more information on the Estate Tax and Gift Tax Liens, see IRM 5.5.8.

5.17.2.9.1
(03-19-2018)
The Estate Tax Lien

- (1) When an individual dies, the estate tax lien automatically arises upon death for the estate tax liability. The IRS does not have to take any action to create the estate tax lien. This means that the estate tax lien is in existence before the amount of the tax liability it secures is even ascertained. *Detroit Bank v. United States*, 317 U.S. 329 (1943).
- (2) The estate tax lien is a function of the amount of the estate tax a decedent’s estate ultimately owes. The lien attaches to the decedent’s entire “gross estate,” exclusive of property used to pay charges against the estate and administration expenses, for a period of ten years from the date of the decedent’s death. IRC 6324(a)(1). The majority of courts have held that the ten-year estate tax lien is of absolute duration and thus, lien foreclosure must be completed before expiration of ten years. See *United States v. Davis*, 52 F.3d 781 (8th Cir. 1995); *United States v. Cleavenger*, 517 F.2d 230 (7th Cir. 1975). The IRS follows this majority rule. On the other hand, an administrative levy is completed once the notice of levy is served or in the case of tangible property, when the notice of seizure is given. Thus, any suit outside the ten-year period to enforce a levy would not be barred.
- (3) The estate tax lien attaches to the “gross estate” of the decedent. The gross estate, arising under federal law, includes certain types of property not included in the probate estate. For example, property held by trusts estab-

lished by the decedent many years before death may be includible in the gross estate by reason of the trust instrument reserving to the decedent certain “powers,” such as the power to revoke the trust, change beneficiaries, etc.

- (4) Under IRC 6324(a)(2), special rules exist for property included in the “gross estate” but not passing through probate. For nonprobate property, if the estate tax is not paid when due, then the spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary of the estate is generally liable for the payment of the estate tax to the extent of the value of the estate’s property held by, or passing to, such person. IRC 6324(a)(2). This means that the estate tax lien will encumber such property in the hands of persons within the above classes without regard to any filing of notice of lien or the need for a separate assessment of tax.
- (5) If a spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary of the estate transfers nonprobate property to a purchaser or holder of a security interest, then that property is divested from the estate tax lien. IRC 6324(a)(2). The IRS, however, may still collect from the spouse, transferee, trustee, surviving tenant, person in possession, or beneficiary of the estate. IRC 6324(a)(2) provides that if a transfer of nonprobate property to a purchaser or holder of a security interest removes the estate tax lien, then a “like lien” shall attach to the transferor’s property.
- (6) The statute of limitations applicable to the personal liability established by IRC 6324(a)(2) is not the 10-year period from the date of death set forth in IRC 6324(a)(1); rather it is 10 years from the date the assessment is made against the estate upon the filing of the estate tax return, in accordance with IRC 6502(a). The section 6324(a)(2) personal liability arises independently of the estate tax lien; accordingly, it may be collected within the ordinary collection period of 10 years from the date of assessment. A separate assessment against the transferees is not required. See *Estate of Mangiardi v. Commissioner*, T.C.M. 2011-24 aff’d, 442 Fed. Appx. 526 (11th Cir., October 12, 2011); *United States v. Bevan*, 2008 WL 5179099 (E.D. Cal. 2008); *United States v. Degroft*, 539 F.Supp.42 (D.Md. 1981).
- (7) If property is included in the estate under IRC 2033 (probate assets), it is divested of the lien upon transfer to a purchaser or holder of a security interest only if the estate’s executor has been discharged from personal liability under IRC 2204. See IRC 6324(a)(3); *United States v. Vohland*, 675 F.2d 1071, 1075 (9th Cir. 1982); *United States v. Estate of Young*, 592 F.Supp. 1478, 1486 (E.D. Pa. 1984). See also Rev. Rul. 69-23, 1969-1 C.B. 302.
- (8) As with the general tax lien, there are some exceptions to the special lien for estate taxes. IRC 6324(c). Thus, the estate tax lien will not be valid as against a mechanic’s lienor and against the superpriorities listed under IRC 6323(b) if the conditions set forth in that section are satisfied. In addition, if a lien or security interest has priority over the estate tax lien, interest and allowable expenses based on the lien or security interest will have priority based on state or local law. Thus, for example, if A has a valid mortgage on B’s real property, A’s priority over the special lien will include not only the amount of the mortgage debt owed but also the amount of interest and allowable expenses.
- (9) IRC 6324A creates a special lien for estate taxes deferred under IRC 6166. The executor of the estate makes an election under IRC 6166 to defer payment of the estate tax for a period of up to 14 years. This period can be extended if the estate requests an extension to make a payment under the

deferral election pursuant to IRC 6161(a)(2)(B). If an estate qualifies and elects to defer the payment of estate tax pursuant to IRC 6166, the IRS must evaluate whether a bond should be required as security for deferral or whether it will require any security at all based on the facts and circumstances of each case. See IRC 6165, *Estate of Roski v. Commissioner*, 128 T.C. 113 (2007); IRM 5.5.5.5. The IRS's decision to require a bond can be appealed to the Tax Court. See IRC 7479(a). See Notice 2007-90, 2007-46 I.R.B. 1003 regarding the factors the IRS will consider in deciding to require security. If the IRS does require security, the estate may elect to provide an IRC 6324A special lien in lieu of the bond.

- (10) IRC 6324B creates a special lien for the pending additional estate tax attributable to the estate's election to use a "special use value" for certain "qualified" property for estate tax calculations. See IRC 2032A (valuation of farm real property and certain real property used in family business).

5.17.2.9.2
(03-19-2018)
The Gift Tax Lien

- (1) Under IRC 6324(b), the gift tax lien comes into existence upon the making of a gift by a donor, if the donor is, in fact, liable for a tax in respect to such gift, or any other in the same taxable year. The gift tax lien, like the estate tax lien, arises automatically, and requires no action by the IRS. Unless the donor files a gift tax return, there is no statute of limitations on the gift and the IRS may examine the gift at any time.
- (2) The gift tax lien attaches only to the property which is the subject of the gift. It does not attach to any of the donor's property. It may attach to the other property of the recipient of the gift in a manner similar to the way an estate tax lien may attach to other property of a decedent's distributees or transferees. See IRM 5.17.2.9.1. This is because the recipient is made personally liable for any gift tax incurred by the donor on a gift, made during the calendar year, to the extent of the value of the property received if the tax is not paid when due.
- (3) A separate assessment against the donee is not required to make the gift tax lien enforceable against the donee's property. Any part of the property which was the subject of the gift that is transferred by the recipient to a purchaser or holder of a security interest will be divested of the lien and, to the extent of the value of such transfer, the lien will attach to the property of the donee, including after-acquired property.
- (4) As was pointed out above, property which comprises the gift or a portion of the gift in issue, which is transferred by the recipient to a purchaser or holder of a security interest is divested of the lien. Likewise the recipient's own property to which the lien shifts, as explained above, is in turn divested of the lien if it is transferred to a purchaser or holder of a security interest. The exceptions for superpriorities applicable to estate tax liens also apply to gift tax liens.

5.17.2.10
(01-01-2016)
Federal Tax Lien and the Affordable Care Act's (ACA) Shared Responsibility

- (1) The **INDIVIDUAL** shared responsibility provision calls for each individual to have minimum essential health coverage (MEC), qualify for a coverage exemption, or make a **Shared Responsibility Payment (SRP)** when filing their Federal income tax return.

- a. SRP assessments post on the taxpayer's account using a Master File Transaction Code (MFT) 35 or the mirrored MFT 65.

Note: MFT 35, tax class 6 is still used on NFM for partnership returns Forms 1065.

- b. The IRC 6321 statutory lien arises on an SRP/MFT 35 and the mirrored MFT 65 assessment. The duration of the statutory lien is for the period described in IRC 6322, (See IRM 5.17.2.2.1 and IRM 5.17.2.2.2).
 - c. An IRC 6323 Notice of Federal Tax Lien shall not be filed on an SRP/MFT 35 or the MFT 65 assessment even though a statutory federal tax lien exists. (See IRC 5000A(g)(2)(B)).
- (2) The **EMPLOYER** Shared Responsibility provisions apply to employers with at least 50 full-time employees (including full-time equivalent employees). An employer subject to the Employer Shared Responsibility provisions will be liable for a **Shared Responsibility for Employer** assessment in two situations.

Example: One situation is where the employer does not offer health coverage to its full-time employees (and their dependents), and at least one full-time employee receives a premium tax credit.

Example: The second situation is where the employer offers health coverage that is not affordable or does not provide minimum value, and at least one full-time employee receives a premium tax credit.

- a. A Shared Responsibility for Employer assessment will post on the employer's account using an MFT 43.
- b. The IRC 6321 statutory lien arises on an MFT 43 assessment. (See IRM 5.17.2.2).
- c. An IRC 6323 Notice of Federal Tax Lien may be filed on an MFT 43 assessment (See IRC 4980H(d)(1) and IRM 5.17.2.3).

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Commercial Transaction Financing Agreement and Commercial Financing Security Example

Table Format for Example in IRM 5.17.2.6.6.1(4)(a)

	June 14	July 5	August 1	August 2	August 19 45 th Day	August 20 46 th Day	October 31
Bank Agreement IRC § 6323(c)(1)(B) IRC § 6323(c)(2)(A)	Loan Agreement for \$10,000 security interest filed		Per Agreement Bank loans \$7,000	Per Agreement Bank loans \$2,000			Per Agreement Bank loans \$1,000
Bank receives from T <i>commercial financing security</i> A/R and Inventory IRC § 6323(c)(2)(C)							
IRS Actions		NFTL filed		Actual notice of NFTL filing provided to Bank			
Priority Loan – v - NFTL			Bank loan has priority	IRS has priority over the \$2000 loan due to actual notice of the NFTL filing			IRS has priority over the \$1000 loan <ul style="list-style-type: none"> After actual notice given of NFTL filing More than 45 days after NFTL filing
Priority On A/R and Inventory Bank – v - IRS	Bank has priority on A/R and Inventory	Bank has priority on A/R and Inventory but priority is now limited by NFTL filing to that acquired by August 19 th	Bank has priority on A/R and Inventory securing \$7000 August 3 rd loan but limited by NFTL filing to that acquired by August 19 th	Bank has priority on A/R and Inventory acquired by August 19 th to secure \$7000 August 1 st loan	Bank has priority on A/R and Inventory acquired by August 19 th to secure \$7000 August 1 st loan	IRS has priority on A/R and Inventory coming into existence from this date forward	IRS has priority on A/R and Inventory coming into existence more than 45 days after NFTL filing

