National Taxpayer Advocate

Public Forum
Washington, DC
Thursday May 17, 2016

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Eric is a partner in Green & Sklarz LLC, a boutique tax firm with offices in Connecticut and New York. The focus of Attorney Eric L. Green's practice is civil and criminal taxpayer representation before the Department of Justice Tax Division, Internal Revenue Service and state Departments of Revenue Services, as well as handling probate matters and estate planning for individuals and business owners and tax planning for closely held businesses. He is a frequent lecturer on tax topics for CCH, the NAEA, the NATP, the ABA Tax Section and the Connecticut Society of CPAs. Attorney Green has served as adjunct faculty at the *University of Connecticut School of Law*. He is the author and lecturer of the *CCH IRS Representation Certificate Program*, and he is a columnist for *CCH's Journal of Practice & Procedure*. He is the chair of *The New England IRS Representation Conference,* and annual conference that brings together tax practitioners from all over the country with IRS and Department of Justice executives for a full day conference on civil and criminal tax representation.

Mr. Green is a contributing author for *Advocating for Low Income Taxpayers: A Clinical Studies Casebook, 3rd Edition*, and has also been quoted in *USA Today*, *Consumer Reports, The Wall Street Journal's Market Watch*, *TheStreet.com*, *The Wall Street Journal* and *CreditCard.com*.

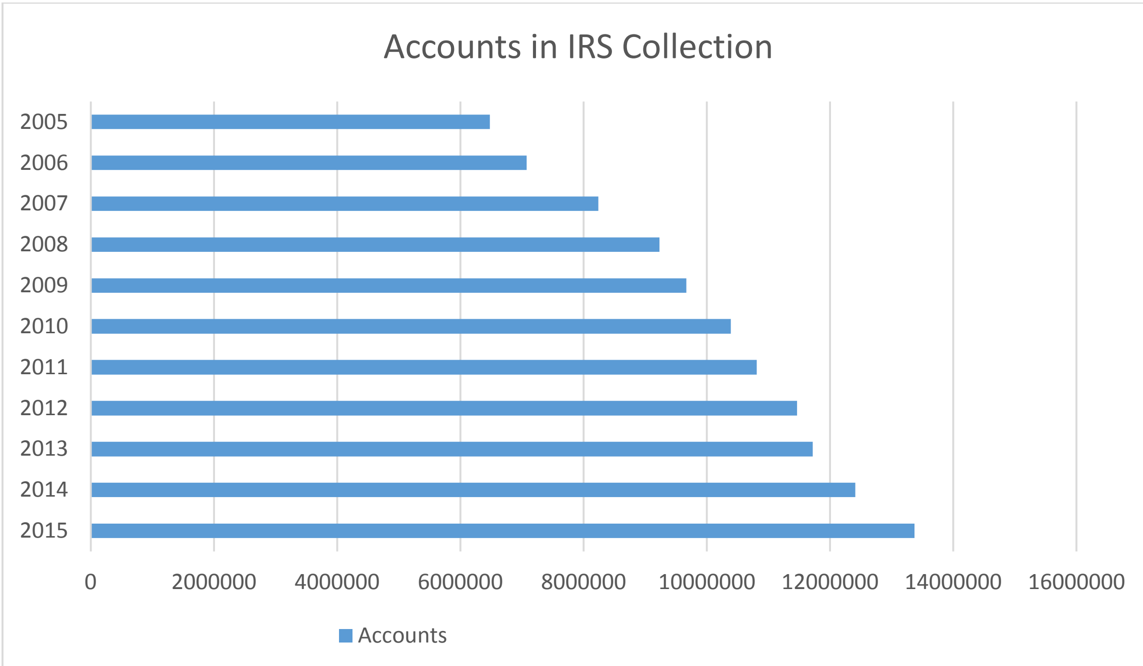
Prior to practicing law Attorney Green served as a senior tax consultant for KPMG and Deloitte & Touche.

Attorney Green was the 2010 Nolan Fellow of the American Bar Association and has served as Chair of the American Bar Association's Closely Held Businesses Tax Committee. Attorney Green is the current Chair of the Executive Committee of the Connecticut Bar Association's Tax Section. Eric is a Fellow of the *American College of Tax Counsel* ("ACTC").

Attorney Green is also a member of the Connecticut, Massachusetts and New York Bar Associations, as well as the American Bar Association. Attorney Green is admitted to practice in Massachusetts, New York and Connecticut Superior Courts, the United States Tax Court, The Federal Court of Claims and the Federal District Court for Connecticut. Attorney Green received his Bachelor of Business Administration degree in Accounting with a minor in International Business from Hofstra University and is an honors graduate from New England School of Law. He earned a Masters of Laws in Taxation (LL.M.) from Boston University School of Law.

I. *Current Status of Collection*

Despite all efforts by the IRS, the Collection Division inventory continues to increase year-after-year. The inventory of taxpayer accounts in collection in 2015 stands at 13,371,000, a 106.4% increase since 2005.[1]



Despite the IRS's efforts to make the Offer-in-Compromise program easier for taxpayers to use, and to allow more client's to enter into streamlined installment agreements, the inventory continues to grow. It is the author's opinion that the increasing inventory has less to do with the Collection Division's approaches to collection and more to do with the IRS's ability to locate non-filers. As more and more of the information provided to the IRS is electronic, the IRS's ability to match information and identify non-filers has increased significantly.

II. *Changes in 2016*

In March of 2016 the IRS released a new Offer-in-Compromise Form 656, and released its new allowable expense information. The IRS utilizes the allowable expense tables to calculate a taxpayer's Reasonable Collection Potential. The allowable expenses published by the IRS is based upon the Federal Department of Labor statistics, and unlike most years, in 2016 the amounts allowed have

[1] Source: IRS Databooks. The 2015 databook can be located at: https://www.irs.gov/pub/irs-soi/15databk.pdf

fallen across the board. The reduced allowable expenses will make it more difficult for taxpayers to be deemed uncollectable, reach a manageable installment agreement or have an Offer-in-Compromise accepted.

Practitioners should also note that the application fee for Offers-in-Compromise was increased at the end of 2014 to $186 (it used to be $150).

III. Offers-in-Compromise and the Taxpayer's Ability to Pay

The IRS's current policy is that, if a taxpayer shows the ability to full-pay the amount owed over the time remaining prior to the Collection Statute Expiration Date ("CSED") then the IRS will not accept the taxpayer's Offer. The taxpayer should instead get into an installment agreement and pay the balance back, even if it is over a long period time.[2]

The IRM States:

1. The ability to pay determination should be made on the liability(s) due at the time the offer was submitted.
2. The initial calculation should be completed to determine if the taxpayer can full pay through installment agreement guidelines based on submitted substantiation including application of the standards and allowances. It is appropriate to use Decision Point (AOIC) or Decision IA (IRWeb or SERP) to ensure accruals are taken into consideration. This computation should be completed prior to initial financial analysis.[3]

The Taxpayer Advocate Service explored how the rate of collection changes as the number of years since Taxpayer Delinquent Account (TDA) issuance increases. The IRS assigns unpaid liabilities to TDA status after sending the taxpayer a series of notices, usually within six months. Although the IRS has 10 years to collect a liability from its assessment, the collection industry believes that liabilities must be collected within three years to recover any significant amount. Our analysis showed that dollars collected typically decreased by over 50% from the first year to the second year and 30% from the second to the third year.[4]

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[2] IRM 5.8.5.2
[3] Id.
[4] http://www.taxpayeradvocate.irs.gov/Media/Default/Documents/2015ARC/ARC15_Volume2_2-CollectibilityCurve.pdf

In light of the burgeoning inventory, and the fact that we know that collectability will drop significantly once a tax debt becomes greater than 4 years old, the IRS rule about not accepting Offers that can full pay over the life of the statute is self-defeating. This rule basically forces taxpayer's back into the collection division inventory, where it uses more government resources and results in an installment agreement that, statistically, we know will almost certainly default if it is longer than 48 months. The IRS should consider revising this rule to rejecting Offers that show an ability to pay within 48 months.

IV. *Low-Income Certification*

Taxpayers that meet the low-income certification can file Offers without paying the $186 application fee or 20% deposit (for lump sum Offers). The table is located on page 2 of the Form 656.

Low-Income Certification

Low-Income Certification ***(Individuals and Sole Proprietors Only)***

Do you qualify for Low-Income Certification? You qualify if your gross monthly household income is less than or equal to the amount shown in the chart below based on your family size and where you live. If you qualify, you are not required to submit any payments during the consideration of your offer. Businesses other than sole proprietors or disregarded single member LLCs taxed as a sole proprietor do not qualify for the low income waiver.

☒ **Check this box if your household's gross monthly income is equal to or less than the monthly income shown in the table below.**

Size of family unit	48 contiguous states and D.C.	Hawaii	Alaska
1	$2,475	$2,848	$3,092
2	$3,338	$3,840	$4,171
3	$4,200	$4,831	$5,250
4	$5,063	$5,823	$6,329
5	$5,925	$6,815	$7,408
6	$6,788	$7,806	$8,488
7	$7,652	$8,798	$9,567
8	$8,519	$9,794	$10,650
For each additional person, add	$867	$996	$1,083

Practitioners simply check the box on page 2, and the Offer can be submitted without the application fee or deposit.

V. *Orders-of-Restitution*

In the criminal tax arena there has been a significant upswing since 2010 of federal courts giving orders of restitution to tax defendants found guilty of committing a crime. These Orders of Restitution are then assessed by the IRS as a tax debt,[5] and both the Department of Justice and the IRS will pursue collection of the outstanding debt. The IRS and DOJ have no authority to compromise a court order, hence the taxpayer must full-pay the ordered restitution. Where taxpayer's have other civil IRS debts the order of restitution must be factored into any compromise, which can complicate the process. If a taxpayer is unable to full-pay at least the restitution piece, the taxpayer may find him or herself Offer ineligible.

For example: A taxpayer owes $350,000 to the government, $150,000 of which is an order of restitution from their guilty plea in a tax evasion case, with the remaining $200,000 being other civil tax liabilities. If the taxpayer's Reasonable Collection Potential under the IRS guidelines is $90,000, that taxpayer would need to pay at least the $150,000 order of restitution, regardless of the RCP calculation.[6]

VI. Fixing America's Surface Transportation ("FAST") Act

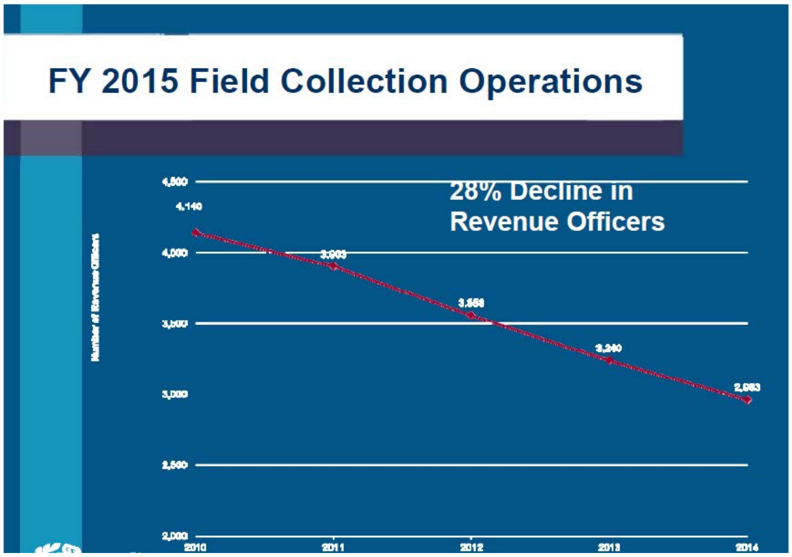
On December 4th President Obama signed the Fixing America's Surface Transportation Act ("FAST") into law. The law, which focuses on improving America's transportation and highways through improved funding has an odd section, Section 32101, Subtitle A, Title XXXII. This section has seemingly nothing to do with highway funding or transportation, but rather amends sections of the Internal Revenue Code to allow the IRS to revoke or deny taxpayers a passport if they owe delinquent taxes to the government, and it requires the IRS to use private debt collectors.

Why this provision was included is unclear. It is not authority the IRS asked for and, with regard to private debtor collectors, has in the past proven harmful to tax compliance. Instead of properly funding the IRS – by allowing the hiring of properly trained and qualified revenue officers – FAST appears to be pushing a discredited and troubling "outsourcing" political policy. I fear that we are setting up taxpayers to be caught in a morass of bureaucratic red tape and cross agency confusion.

The lack of funding has created a significant drop in IRS Field Enforcement personnel. According to the IRS there has been a 28% decline on Revenue

[5] Chief Counsel Notice 2011-018
[6] The author has several of these pending, and the IRS Office of Appeals has stated they are just now seeing these for the first time and are not sure what they will do with them.

Officer numbers for the IRS, which clearly impacts the services ability to collect the back taxes owed to the United States.



Use of Private Debt Collectors

We've been here before. In 2004, Congress passed the American Jobs Creation Act, which granted the IRS the authority to contract out collection of past due taxes to private collection agencies. The intent was to address the buildup of potentially collectible inventory that was not being worked by the IRS. The private collection agencies would help collect the aging receivables in exchange for commissions based on the amounts they actually collected.

In September 2006, the IRS began assigning taxpayer accounts to the private debt collectors but the private debt collector's authority to work these cases was limited, given that certain actions are considered inherently governmental and therefore would not be delegated to private entities. For instance, the private debt collectors could not determine or negotiate the amount of a taxpayer's liabilities, and the only cases they could resolve were those in which the amount was not in dispute. The private debt collectors have no authority to take any enforcement action. In essence, all they could do was take money from taxpayers who were willing to pay.

The Private Debt Collection (PDC) program continued for nearly three years before the IRS ended it. In total, the IRS placed about $1.8 billion (357,449 tax modules) of outstanding tax liabilities with the PCAs for collection. Upon ending the program, the IRS committed to working the tax modules recalled from the private debt collectors.[7]

The National Taxpayer Advocate reviewed the IRS's use of private debt collectors and found the following:

	Private Debt Collectors	**IRS**
Receipt Date	$1,581,918,726.00	$1,514,951,108.00
+ 6 months	$1,049,362,723	$1,468,992,774
+ 1 year	$574,351,356	$1,422,894,453
+ 1.5 years	$287,589,003	$1,380,819,526

The private debt collectors initially collected money, probably from all the easy targets who could pay. However, once the "low-hanging fruit" was worked the private debt collector's inability to take any enforcement action or negotiate a debt inhibited their ability to collect, whereas the IRS in general collected 40% more within 6 months, 148% more within one year and 380% more a year-and-a-half out from the cases being transferred to the private debt collectors.

It seems that, despite the proven history that the dollars invested in the IRS repay themselves back many times, Congress is determined to try and collect what it can without investing resources back into the only agency that actually makes money for the government.

The Revocation or Denial of Passports in Certain Unpaid Tax Cases

The new act creates IRC § 7345 "Revocation or Denial of Passport in Case of Certain Tax Delinquencies". What IRC § 7345 does is empower the IRS to inform the United States Secretary of State of those taxpayers who owe "seriously delinquent taxes," defined as those taxpayers who owe more than $50,000 in back taxes. The purpose of the information being transmitted to the Secretary of State is so the State Department may revoke the passports of those taxpayers owing back taxes or deny the issuance of a passport to taxpayers applying for one that owes back taxes.

There are a number of exceptions to the rule. A taxpayer will not have his or her passport suspended/revoked if they are:

- Paying the tax through an installment agreement under IRC § 6159
- Involved in an Offer-in-Compromise under IRC § 7122

[7] National Taxpayer Advocate's Report to Congress, Section 6, 2013

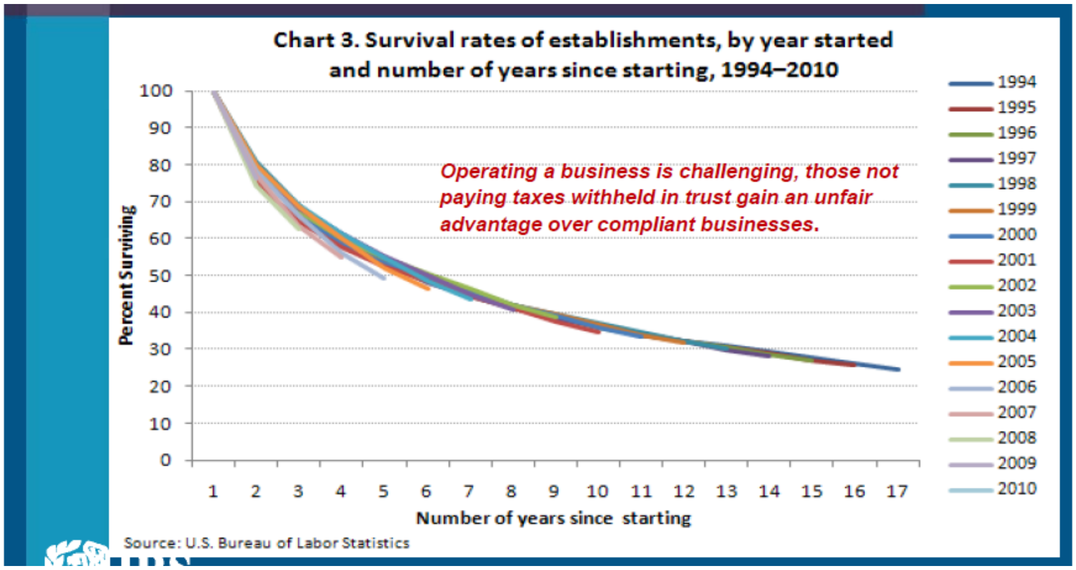
- Has filed a request for a Collection Due Process hearing
- Has filed for innocent spouse relief under IRC § 6015

The obvious thinking behind this strategy is that the suspension or denying of a passport to a taxpayer will force the taxpayer to come in and deal with their federal tax issue. From a collection perspective, this provision raises an issue regarding those taxpayers who have been deemed uncollectable.

A taxpayer will be deemed to be "currently-not-collectable" ("CNC") if they show that their current income is insufficient to cover the allowable living expenses. There are a large number of taxpayers who have proven to the IRS that they cannot make current payments and have been deemed CNC. What does that mean for purposes of the new law? Being CNC is not one of the stated exceptions in the new law, and the law also does not delegate the authority to create regulations. This means that procedures the IRS develops to implement the law will (such as including taxpayers deemed CNC) will not have the full force of law but be merely suggestive. From where the author is sitting, it appears tens of thousands of taxpayers who are unable to pay their taxes due to their current hardship may find their passports revoked, and will have no means of resolving the matter other than through bankruptcy or an Offer-in-Compromise, assuming they are even viable options.

VII. Payroll Tax Initiative

In 2015 the IRS began a new payroll tax initiative. The initiative is designed for the IRS to try and get out ahead of a business's payroll tax problem before it mushrooms into something much larger. The "FTD Alert X Coded Pilot" tests whether accelerating the timing of alerts to taxpayers and the IRS will impact and identify which taxpayers would benefit most from alerts. These began to be implemented by the IRS in April of 2015.



In 2016, the IRS Collection Division began implementing its EFTPS Early Alerts. This modified the payment platform to create a real-time system to identify variances in FTDs that will enable/expand treatment streams.

The goals of these initiatives is to expand early intervention program, educate taxpayers and modify taxpayer behavior to enhance compliance. The hope is that they will improve collection case selection and assignment, and enable data-driven decisions regarding taxpayer contacts.