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Can't Get There From Here: The IRS Travel Ban on Tax Debtors

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CAN'T GET THERE FROM HERE¹

In December 2015, President Obama signed into law the Fixing America's Surface Transportation Act (FAST Act) (Pub. L. No. 114-94). The FAST Act largely addressed long-term funding for federal surface transportation — authorizing over \$305 billion in spending. However, the legislation also included a provision allowing for the revocation or denial of passports for individuals with certain tax debts in excess of \$50,000.

The threat of passport revocation is a serious consequence for any taxpayer who falls behind paying their taxes. The potential restriction on an individual's right to travel will do much more than disrupt summer cruises and holiday ski trips. Losing the ability to cross borders will affect many entrepreneurs, employees, and professionals for whom international travel is a fundamental part of their business. Beyond the specter of losing the privilege of international travel, this apparently straightforward provision introduces additional complexities into the already daunting matrix of statutes, regulations, and other rules that govern Internal Revenue Service collection activity. The requirement of coordination between at least two federal agencies for enforcement of this new penalty adds an additional layer of potential complexity.

In February of this year, the IRS announced its intent to begin certifying tax debts for the purpose of passport revocation. The IRS announcement included informal guidance, which was updated in June, add-

ing new rules not included in the statute.² This summer certain collection notices began including language notifying taxpayers of the possibility of passport denial or revocation.³ Regulations are still pending and, as of this writing, the issuance of new regulations to support the statute in the near term is unlikely.⁴

With so much still undefined and undecided, this article provides an overview of the statutory language in the FAST Act that restricts passports for certain tax debtors and a discussion of the expected, and potentially unexpected, changes that may result from this law. The enacted legislation raises several practical and procedural concerns including the application of new statutory notice requirements, the timing of pending IRS collection activities, interaction with other statutory regimes (such as bankruptcy), and IRS collection actions that are not statutorily based.

This article focuses on when and how the IRS may certify a debt for passport restriction within the con-

² See Revocation or Denial of Passport in Case of Certain Unpaid Taxes, available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes>.

³ The following notice language appeared in an IRS Notice CP504 issued to an individual taxpayer with more than \$100,000 of tax due on July 3, 2017: **"Denial or Revocation of United States Passport.** On December 4, 2015, as part of the Fixing America's Surface Transportation (FAST) Act, Congress enacted section 7345 of the Internal Revenue Code, which requires the Internal Revenue Service to notify the State Department of taxpayers certified as owing a seriously delinquent tax debt. The FAST Act generally prohibits the State Department from issuing or renewing a passport to a taxpayer with seriously delinquent tax debt. Seriously delinquent tax debt means an unpaid, legally enforceable federal tax debt of an individual totaling more than \$50,000 for which, a Notice of Federal Tax lien has been filed and all administrative remedies under IRC §6120 have lapsed or been exhausted, or a levy has been issued. If you are individually liable for tax debt (including penalties and interest) totaling more than \$50,000 and you do not pay the amount you owe or make alternate arrangements to pay, we may notify the State Department that your tax debt is seriously delinquent. The State Department generally will not issue or renew a passport to you after we make this notification. If you currently have a valid passport, the State Department may revoke your passport or limit your ability to travel outside of the United States. Additional information on passport certification is available at www.irs.gov/passports."

⁴ Velarde and Foster, *No Substantive IRS Guidance Coming for a While, Official Says*, Tax Notes Today (Feb. 14, 2017).

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¹ R.E.M., Fables of the Reconstruction (I.R.S. Records 1985).

text of its existing collection practices. This article maps the new legislation and its relationship with existing provisions in the IRS collections arena. Along the way it considers some practical challenges to implementation of the act. The article concludes with a brief discussion of the judicial remedies available to taxpayers facing denial or revocation of their passport.

OVERVIEW OF §7345

The FAST Act was enacted on December 4, 2015, with an immediate effective date.⁵ The act included new §7345⁶ and corresponding amendments to several other sections of the Code.⁷ Section 7345 allows for certification of a seriously delinquent tax debt, reversal of certification, notice of certification, and judicial review of certification.⁸ The legislation also added §2714a to Title 22, Foreign Relations and Intercourse, which grants the Secretary of State the corresponding authority to revoke passports certified by the Commissioner of Internal Revenue.⁹

The primary goal of the new law is front and center. Section 7345(a) authorizes the Secretary of the Treasury to certify certain tax delinquencies as seriously delinquent tax debts.¹⁰ Upon certification, the Secretary “shall transmit such certification to the Secretary of State for action with respect to denial, revocation, or limitation of a passport.”¹¹

The road to certification, however, is not short, straight, or clearly marked.¹² The definition of seriously delinquent tax debt requires careful navigation. We will take a broad look at §7345 as we prepare to embark on this new enforcement path.

Section 7345(b) defines a seriously delinquent tax debt (SDTD) as an assessed, unpaid, legally enforceable individual federal tax liability in excess of \$50,000 for which the IRS has imposed a levy, or a Notice of Federal Tax Lien (NFLT) has been filed, and the taxpayer has exhausted their administrative rights, or those rights have lapsed.¹³

That basic definition is subject to four primary exceptions. An SDTD does not include a tax debt:

⁵ Fixing America’s Surface Transportation (FAST) Act, Pub. L. No. 114-94, §32101(i), 129 Stat. 1312.

⁶ All section references are to the Internal Revenue Code of 1986, as amended, and the regulations thereunder, unless otherwise specified.

⁷ Section 6103, §6320, §6331, and §7508 were all amended to conform to the new Code section.

⁸ §7345.

⁹ 22 U.S.C. §2714a (2017).

¹⁰ §7345(a).

¹¹ *Id.* Section 32101(c) of the FAST Act added §6103(k)(11) to allow the IRS to disclose the taxpayer’s name, social security number, address and the amount of the taxpayer’s SDTD to the State Department.

¹² It appears that none of the \$305 billion for transportation infrastructure improvements were allocated to the IRS or the Department of State for implementation of the tax provisions in the FAST Act.

¹³ §7345(b)(1). Unlike a lien, the imposition of a levy requires

- (1) that is being timely paid under a §6159 installment agreement,¹⁴
- (2) that is being timely paid under an Offer in Compromise (OIC),¹⁵
- (3) for which collection is suspended because a collection due process hearing is requested or pending,¹⁶ or
- (4) for which an election for innocent spouse relief or separation of liability relief is made or equitable innocent spouse relief is requested.¹⁷

If a tax debt has been certified as seriously delinquent, §7345(c) provides for the reversal of certification when payment has been made or one of the four listed exceptions are met. The Commissioner of Internal Revenue begins the reversal of certification process by giving notice to the Secretary of Treasury, who in turn notifies the Secretary of State.¹⁸ The statute provides specific rules governing the timing of the notice requirement imposed upon the IRS depending upon the reason for reversing the certification.¹⁹ Upon receipt of the notice, the Secretary of State shall remove the certification of the debt from the individual’s record.²⁰

The Code, however, does not govern the actions of the Secretary of State. The provision addressing the actions of the Secretary of State is contained in Title 22 of the U.S. Code, Foreign Relations and Intercourse. The IRS has not issued guidance on the method and frequency with which taxpayer information will be shared with the State Department. The FAST Act also does not indicate the timeframe in which the Secretary of State must act on the individual’s record. Once the State Department receives certification of an individual’s SDTD they are not permitted to issue a passport.²¹ However, the IRS website guidance suggests that the State Department will “hold your application” for 90 days to allow you to: resolve any erroneous certification issues; make full payment; or enter into a satisfactory payment alternative with the IRS.²²

For individuals outside the United States, the State Department *may* allow them to return to the United

the exhaustion of all administrative remedies, including “Collection Due Process.”

¹⁴ §7345(b)(2)(A).

¹⁵ *Id.* Informal IRS guidance adds “a settlement agreement entered into with the Justice Department” to this statutory exclusion. See Revocation or Denial of Passport in Case of Certain Unpaid Taxes, available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes>.

¹⁶ §7345(b)(2)(B)(i).

¹⁷ §7345(b)(2)(B)(ii).

¹⁸ §7345(c)(1).

¹⁹ §7345(c)(2).

²⁰ 22 U.S.C. §2714a(g) (2017).

²¹ §2714a(e)(1)(A).

²² See Revocation or Denial of Passport in Case of Certain Un-

States after the IRS has certified their passport for revocation. Prior to revocation, the State Department may issue a limited passport that only allows return travel to the United States or limit a previously issued passport to only allow return travel to the United States. There also is an exception that allows the State Department to issue a passport for “emergency circumstances” or “humanitarian reasons.”²³

The IRS is required to notify the State Department of the reversal of a certification not later than 30 days after the liability is satisfied, becomes legally unenforceable or a bond is accepted.²⁴ If a taxpayer pays their liability in full by personal check we might expect that the 30-day release period begins 15 days *after* the IRS receives the check.²⁵ There will inevitably be additional delay for processing by the State Department. Under current guidance, it is realistic to expect a month to pass before a taxpayer may have their passport reinstated after fully paying their liability. If a taxpayer submits a request for innocent spouse relief, files an offer in compromise, or an installment agreement is accepted, the IRS must notify the State Department of the reversal within 30 days.²⁶ If certification is found to be erroneous, then the State Department should be notified “as soon as practicable after such finding.”²⁷

The IRS is required to notify the taxpayer contemporaneously of either a certification of an SDTD or the reversal of a certification.²⁸ The meaning of contemporaneous and the method of notice are not specifically defined. Informal IRS guidance suggests that notices will be “by regular mail to your last known address.”²⁹ If the contemporaneous notice is of the certification of an SDTD then the taxpayer must also be notified of the right to judicial review.³⁰ Taxpayers may seek judicial review if the certification is erroneous or the Commissioner has failed to reverse certification of a debt that is no longer enforceable.³¹ As noted above, while certification of an SDTD carries the same immediate right to petition the Tax Court as a Statutory Notice of Deficiency it apparently will not be issued by registered or certified mail.

paid Taxes available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes>. Undoubtedly, some taxpayers will be surprised to find that they might have “applied” for passport restriction.

²³ §2714a(e)(1)(B).

²⁴ §7345(c)(2)(A) (incorporating by reference §6325(a)).

²⁵ IRM 5.12.3.3.1.1(4) (07-15-2015).

²⁶ §7345(c)(2)(B)-(C).

²⁷ §7345(c)(2)(D).

²⁸ §7345(d).

²⁹ See Revocation or Denial of Passport in Case of Certain Unpaid Taxes, available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes>.

³⁰ §7345(e)(1).

³¹ *Id.*

THE DEFINITION OF SERIOUSLY DELINQUENT TAX DEBT

The statutory definition of a seriously delinquent tax debt has six elements. The definition requires certain criteria must be met as well as specific attributes of the debt.

A Seriously Delinquent Tax Debt

First, any tax debt subject to certification as seriously delinquent must first be assessed. Section 6201 gives the Secretary of the Treasury the authority to assess tax. Most assessments are based upon a taxpayer’s own return. Assessments arise in many other contexts where the amounts differ from those reported by a taxpayer. Those assessments can range from simple changes for mathematical errors to disputed income and deductions.³² The former is usually issued administratively, while the latter generally follows an examination, an appeals conference, and/or a trip to Tax Court.

Assessments also can be made when a taxpayer has failed to file a return. When the taxpayer does not file a return the IRS may prepare a substitute for return under §6020(b).³³ The return will be prepared based on the information available to the IRS (usually third-party information reports), and if the taxpayer does not respond to IRS correspondence, the tax may be assessed and ultimately treated as an unpaid tax debt.

Second, the debt must be unpaid. When a return is accompanied by full payment, the taxpayer’s account will be annotated and the assessment created by filing of the return will be satisfied. When the tax determined on the return is not paid in full there is an unpaid tax debt. When the assessment is based on something other than a return filed by the taxpayer the debt is unpaid after the period for responding to a notice and demand has expired.³⁴

Third, the tax debt must be legally enforceable. A tax may be assessed but still not legally enforceable. For example, an assessed tax for which the 10-year period for collection has lapsed is not enforceable.³⁵ The period for collection after assessment may be paused by certain actions of the taxpayer, including some that constitute exceptions from seriously delinquent debts under §7345.³⁶ A stay or discharge in bankruptcy is another common example of when a

³² After assessment, the IRS should give notice, stating the liability amount and demand for payment, to each person liable for unpaid tax within 60 days. §6303(a). The IRS is required to deliver notice and demand for payment to the taxpayer’s dwelling or place of business or, as is usually the case, by mail to the taxpayer’s last known address. *Id.* However, the failure to give notice within 60 days does not invalidate the notice. Reg. §301.6303-1(a).

³³ §6020(b).

³⁴ See n. 31, above.

³⁵ §6502(a)(1).

³⁶ §6502(a)(2); Reg. §301.6502-1.

properly assessed tax liability may be legally unenforceable.³⁷

Fourth, the debt must be an individual tax liability. Corporate, estate, excise, and other federal tax liabilities are not subject to the statute. This stands to reason, as the privilege subject to restriction (use of a passport) is also personal. However, taxpayers should be aware of certain business tax liabilities that can convert into individual tax liabilities. For example, unpaid payroll taxes that would not otherwise fall within the scope of §7345 will convert into individual tax liabilities, and potentially, seriously delinquent tax debts upon application of the Trust Fund Recovery Penalty.³⁸

Fifth, the assessed tax liability must be greater than \$50,000. The statute simply describes a federal tax liability greater than \$50,000. The legislative history suggests that the \$50,000 threshold may be inclusive of interest and penalties and the IRS's informal guidance suggests the same.³⁹ While there is authority for the proposition that penalties may be considered a "tax" for collection purposes,⁴⁰ it remains an open question whether interest may also be considered part of a "tax liability" for purposes of calculating the trigger on a serious enforcement mechanism like a passport restriction without statutory authority. Whatever the composition, the \$50,000 threshold will be adjusted for inflation beginning January 1, 2017.⁴¹

Finally, in order to be a seriously delinquent tax debt, the assessed tax must have been subject to an IRS levy, or a notice of federal tax lien has been issued, and any administrative rights related to the lien have been exhausted and/or lapsed. If all of these requirements are met then the tax liability may be subject to certification as an SDTD.

When a Tax Debt Is Not Seriously Delinquent

There are four statutory exceptions when tax debts that would otherwise be seriously delinquent should

³⁷ 11 U.S.C. §524; for further discussion of potential bankruptcy issues see nn. 125–127, below.

³⁸ §6672.

³⁹ "A seriously delinquent tax debt generally includes any outstanding debt for federal taxes in excess of \$50,000, including interest and any penalties, for which a notice of lien or a notice of levy has been filed. This amount is to be adjusted for inflation annually, using calendar year 2014 as a base year, and a cost-of-living adjustment." 114th Cong., Joint Explanatory Statement of the Committee of the Conference on H.R. 22, Fixing America's Surface Transportation Act (FAST Act) 39 (U.S. Govt. Print. Off. at 39 (Nov. 20, 2015).

⁴⁰ Reg. §301.6659-1(a). "Except as otherwise provided in the Code, any reference in the Code to "tax" shall be deemed also to be a reference to any addition to the tax, additional amount, or penalty imposed by chapter 68 of the Code with respect to such tax. Such additions to the tax, additional amounts, and penalties shall become payable upon notice and demand therefor and shall be assessed, collected, and paid in the same manner as taxes." *Id.*

⁴¹ §7345(f). For calendar year 2017, the amount remains \$50,000. Rev. Proc. 2016-55, 2016-45 I.R.B. 707, §3.53.

not be certified for enforcement. These exceptions provide some options for relief and certain procedural protections to taxpayers facing certification.

An SDTD does not include a tax debt that is being timely paid under an installment agreement.⁴² A tax debt that is subject to a completed Offer in Compromise is not seriously delinquent.⁴³ An SDTD does not include a debt for which collection is suspended because a collection due process hearing is requested or pending.⁴⁴ A tax debt is not seriously delinquent when there is a pending election for innocent spouse relief or equitable innocent spouse relief is requested.⁴⁵

Timing can be a critical factor in determining when and if one of the exceptions applies. The first two exceptions, which reference the statutory provisions for installment agreements and offers in compromise, apply to "agreements to which the individual is a party."⁴⁶ We might gather from this language that the exception only applies if one of these two collection alternatives is fully executed, i.e., accepted by both the IRS and the taxpayer.⁴⁷ The latter two exceptions referencing collection due process and innocent spouse relief protect taxpayers from certification while requests are pending.

The timing of certain actions is also important for taxpayers seeking reversal of existing certified tax debts. For instance, the statute suggests that a taxpayer with a revoked passport would be able to reverse that action by filing for innocent spouse relief.⁴⁹ The same could not be accomplished with a request for collection due process as there are notice requirements that proceed the availability of those procedures. Likewise, it seems that a request for an installment agreement or an offer in compromise will not forestall or reverse certification until a final agreement is reached.⁵⁰ Taxpayers are protected from levy actions while an installment agreement or OIC request are pending, but it is unclear whether the same forbearance will be granted to SDTD certification.⁵¹

UNPACKING THE EXCEPTIONS TO SERIOUSLY DELINQUENT DEBT

The four primary exceptions to the definition of seriously delinquent tax debt all involve aspects of the

⁴² §7345(b)(2)(A).

⁴³ *Id.*

⁴⁴ §7345(b)(2)(B)(i).

⁴⁵ §7345(b)(2)(B)(ii).

⁴⁶ §7345(b)(2)(A).

⁴⁷ While the statute is silent on certification while a request for installment agreement or offer in compromise are pending, the language "being paid in a timely manner pursuant to" further suggests that the statute contemplates an executed agreement. Likewise, a "settlement agreement" with the Justice Department referenced in the online IRS guidance might also be presumed to be a fully executed agreement, not simply an offer accepted by the taxpayer.

⁴⁸ §7345(b)(2)(B).

⁴⁹ §7345(c)(1), §7345(b)(2)(B)(ii).

⁵⁰ §7345(c)(1), §7345(b)(2)(A).

⁵¹ §6331(k).

IRS's collection regime. Each of the four collection processes referenced in the statute — installment agreements, offers in compromise, innocent spouse relief, and collection due process hearings — are governed by their own set of statutory, regulatory, and administrative rules. The FAST Act amended those rules around the edges, discussed below, but the prospect of debt certification and passport revocation are intrinsically linked to the existing enforcement framework for IRS collections. This is further complicated because the specific language of §7345 intersects with each of these collection processes at different points in the procedural timeline posing potential for confusion, misinterpretation, and timing foot faults in the certification process.

Installment Agreements

A tax liability that is being timely paid under a formal installment agreement is not subject to certification as a seriously delinquent tax debt.⁵² However, there are several types of payment agreements available to taxpayers that are not necessarily installment agreements of the type described in the Code.

Section 7345 provides an exception for installment agreements under §6159. These are often referred to as formal installment agreements and are required for taxpayers with tax debts in excess of \$50,000. The IRS also offers streamlined installment agreements for debts of less than \$50,000⁵³ and guaranteed installment agreements for tax debts of less than \$10,000.⁵⁴ These plans generally are processed more quickly and with minimal review from the IRS.⁵⁵ Guaranteed installment agreement are provided for under §6159(c)(1) but streamlined installment agreements are not, and this raises interesting questions regarding tax debt certification.

⁵² §7345(b)(2)(A).

⁵³ Streamlined installment agreements may be approved for taxpayers with a total unpaid balance of assessments of \$50,000 or less. They do not require financial statements or managerial approval. IRM 5.14.5.2 (12-23-2015). “Accrued” penalties and interest are not included when determining whether a taxpayer qualifies for a streamlined installment agreement (less than \$50,000). “The aggregate unpaid balance of assessments (the SUMRY balance) is \$50,000 or less. The unpaid balance of assessments includes tax, assessed penalty and interest, and all other assessments on the tax modules. It does not include accrued penalty and interest.” IRM 5.14.5.2(1)(1).

⁵⁴ Guaranteed installment agreements provide qualified taxpayers who have a one-time account delinquency of \$10,000 in tax or less a statutorily guaranteed installment agreement under §6159(c). IRM 5.14.5.3 (12-23-2015). The dollar limit for guaranteed installment agreements (\$10,000) only applies to tax. §6159(c)(1); IRM 5.14.5.3(3). “[T]he aggregate amount of such liability (determined without regard to interest, penalties, additions to the tax, and additional amounts) does not exceed \$10,000.” §6159(c)(1).

⁵⁵ IRM 5.14.5.1 (05-23-2014) (“These agreements reduce taxpayer burden because they are processed quickly and without securing a collection information statement. The Service benefits from these agreements through more efficient case processing.”).

The formal installment agreement process begins with the submission of a Collection Information Statement by the taxpayer.⁵⁶ The IRS reviews the income and expenses reported by the taxpayer. The IRS also verifies the reported expenses by reviewing the taxpayer’s income tax returns and other third-party reports.⁵⁷ Taxpayers may be required to substantiate income and expenses with bank and credit card statements, canceled checks, leases, mortgage information, and even court orders.⁵⁸ The IRS also reviews the taxpayer’s assets for ability to pay the tax liability without entering into a formal installment agreement.⁵⁹ It is not uncommon for an IRS revenue officer to ask for verification that a taxpayer cannot secure a home equity line of credit from their bank to satisfy the tax debt, even after a federal tax lien has been filed.⁶⁰

If the IRS rejects a formal installment agreement proposal, the taxpayer has 30 days to file an appeal under the Collection Appeals Program (CAP).⁶¹ Unless they believe collection of the tax liability is at risk, the IRS suspends collection action as a matter of policy once a taxpayer files a CAP appeal.⁶² The FAST Act amendments do not address the CAP appeal process, so certification of a tax debt pending the appeal of a rejected installment agreement is unclear.

Guaranteed installment agreements for tax debts under \$10,000 do not require this level of taxpayer documentation or IRS involvement. As the name suggests, the installment agreement is guaranteed if the taxpayer’s tax debt (without regard for interest penalties or additions to tax) falls below the \$10,000 threshold and the taxpayer is otherwise in compliance.⁶³

The streamlined installment agreements for taxpayers with tax debt in excess of \$10,000 but less than

⁵⁶ IRM 5.14.1.2(3) (01-01-2016).

⁵⁷ IRM 5.15.1.3(8) & (9) (11-17-2014).

⁵⁸ IRM 5.15.1.3(7) (11-17-2014).

⁵⁹ The IRM instructs revenue officers to analyze assets to resolve balance due accounts:

- A. Request immediate payment if the taxpayer has cash equal to the total liability.
- B. Identify key sources of funds.
- C. Identify liquid assets which can be pledged as security or readily converted to cash. (For example, equipment or factoring accounts receivable.)
- D. Consider unencumbered assets, equity in encumbered assets, interests in estates and trusts, and lines of credits from which money may be borrowed to make payment.
- E. Consider taxpayer’s ability to get an unsecured loan. Determine the priority of the NFTL when considering whether to allow or disallow payments to other creditors. See IRM 5.17.2.6, *Priority of Tax Liens: Specially Protected Competing Interests*.

IRM 5.15.1.2(2) (11-17-2014).

⁶⁰ IRM 5.15.1.30(3) (11-17-2014).

⁶¹ §7122(e).

⁶² IRM 8.24.1.2(10) (12-02-2014).

⁶³ §6159(c).

\$50,000 also require minimal taxpayer documentation and do not need IRS management approval. However, this installment agreement is not provided for under §6159. It is a construct of IRS policy, described in the Internal Revenue Manual, and otherwise without statutory or regulatory authority. The plain language of §7345(b)(2)(A) clearly protects taxpayers from certification who have a formal or guaranteed installment agreement as both are described under §6159. It is unclear whether taxpayers in streamlined installment agreements will be exempt from certification. Obviously, this provision is important to those taxpayers whose tax debt may be hovering in the range of \$50,000. Yet it also raises questions for those taxpayers who may want a quick remedy from certification (without providing the documentation or expending the time to obtain a formal agreement) by paying down existing liabilities to just below the \$50,000 and entering into a streamlined agreement. The guidance published on the IRS website indicates that “the IRS will not reverse the certification because the taxpayer pays the debt below \$50,000.”⁶⁴ It does not address the prospect of a taxpayer doing so in order to enter into the less cumbersome process of a streamlined agreement.

Section 7345 also does not address certification if the IRS terminates an installment agreement. The IRS may terminate an installment agreement if the taxpayer fails to make a scheduled payment on time, fails to pay any other tax liability when it is due, or fails to provide updated financial information upon IRS request.⁶⁵ Termination of an installment agreement also carries CAP rights but, as noted above, it is unclear whether the IRS may certify a seriously delinquent tax debt under these circumstances. So while an installment agreement may provide relief from tax debt certification, attention to detail and vigilance are necessary to preserve that protection.

Offers in Compromise

The other primary collection alternative for taxpayers is the Offer in Compromise (OIC) program. Pursuant to §7345(b)(2)(A), a debt that is being timely paid pursuant to an OIC agreement is exempt from certification as an SDTD. The IRS has up to two years to evaluate and make a determination on an OIC.⁶⁶ When an OIC is initially submitted, the processing examiner will send the taxpayer a 120-day letter, stating the time frame for contact from the appropriate field

⁶⁴ See Revocation or Denial of Passport in Case of Certain Unpaid Taxes, available at <https://www.irs.gov/businesses/small-businesses-self-employed/revocation-or-denial-of-passport-in-case-of-certain-unpaid-taxes>.

⁶⁵ §6159(b)(4).

⁶⁶ §7122(f) (“Any offer-in-compromise submitted under this section shall be deemed to be accepted by the Secretary if such offer is not rejected by the Secretary before the date which is 24 months after the date of the submission of such offer.”).

office.⁶⁷ It often takes longer than 120 days to assign an OIC to an offer examiner, in which case the processing office should notify the taxpayer of the expected assignment date.⁶⁸ Once an OIC is assigned, a number of steps must be taken prior to acceptance of an agreement, including checking the taxpayer’s compliance, verifying collection information, requesting additional documents, and requesting information to explain special circumstances.⁶⁹ In certain circumstances, when the total liability is more than \$50,000, an opinion from a Chief Counsel attorney is required before an offer may be accepted.⁷⁰

It is not uncommon for more than a year to pass between the original submission date and an OIC acceptance. Collection by levy on property owned by the offer taxpayer is prohibited as a matter of law while the OIC and subsequent appeal are pending, unless collection of the tax is in jeopardy.⁷¹ However, the levy prohibition does not require the IRS to release a levy that was served prior to the OIC submission.⁷²

There is no current protection in §7345 for a taxpayer who has filed an OIC and is awaiting a decision. There is nothing in the statute preventing certification of an SDTD while the OIC is pending, if it is filed after levy is made or the taxpayer’s CDP-lien rights have been exhausted. It is unclear whether the IRS will delay certification, as a matter of policy, while an OIC is pending. If SDTD certification mirrors IRS levy enforcement, then taxpayers *may* be able to delay SDTD certification by filing an OIC. However, taxpayers whose tax debts have already been certified for enforcement may have to wait for acceptance of an offer before certification can be reversed under §7345(c)(1).

Innocent Spouse Relief

A seriously delinquent tax debt will not include “a debt with respect to which collection is suspended with respect to the individual because an election under subsection (b) or (c) of section 6015 is made or relief under subsection (f) of such section is requested.”⁷³

Married taxpayers who file a joint income tax return are jointly and severally liable for any tax associated with such return.⁷⁴ However, a taxpayer who qualifies for innocent spouse relief may be relieved of all or part of the joint liability.

A taxpayer can elect traditional innocent spouse relief under §6015(b) from an understatement of tax

⁶⁷ IRM 5.8.3.4(2) (07-28-2015).

⁶⁸ IRM 5.8.4.5 (05-10-2013).

⁶⁹ IRM 5.8.4.6 (07-18-2017).

⁷⁰ IRM 5.8.13 (10-20-2016).

⁷¹ §6331(k)(1). The jeopardy levy provisions are not addressed in this article but note that these actions are also subject to the collection due process provisions referenced in §7345. See §6330(f).

⁷² IRM 5.8.1.14(4) (08-01-2017).

⁷³ §7345(b)(2)(B).

⁷⁴ §6013(d)(3).

that is solely attributable to their spouse or former spouse, provided the taxpayer establishes that he or she did not know, and had no reason to know, of such understatement, and where it would be inequitable to hold the requesting spouse responsible for the deficiency.⁷⁵ The taxpayer must elect innocent spouse relief not later than two years after the IRS begins collection activities with respect to the liability.⁷⁶

A taxpayer who files a joint income tax return and is no longer married, legally separated, or has not been a member of the same household at any time during the prior 12-month period, may elect to limit his or her liability from a joint return to the spouse's allocable portion of the deficiency.⁷⁷ If the requesting spouse had actual knowledge of any item that gave rise to the deficiency at the time the return was signed, they will not qualify to apportion such deficiency.⁷⁸ The only exception for actual knowledge arises when the individual shows that the return was signed under duress.⁷⁹ Like traditional innocent spouse relief, the taxpayer must elect separation of liability relief under §6015(c) within two years after the IRS begins collection activities with respect to the liabilities.

Equitable relief under §6015(f) is the broadest and most common type of innocent spouse relief. Section 6015(f) provides relief for taxpayers not eligible to obtain relief under §6015(b) or §6015(c). Under section 6015(f), the IRS may grant relief when it would be inequitable to hold an individual liable for all or part of the unpaid tax or deficiency taking into account all the facts and circumstances. The IRS considers seven factors in determining whether to grant equitable relief.⁸⁰ Unlike the election for traditional innocent spouse relief or separation of liability relief, a taxpayer may request equitable relief from an unpaid liability under §6015(f) any time before the 10-year period of limitation on collection of the income tax expires.⁸¹ It seems that filing a request for equitable relief will often be an option for a married or formerly married taxpayer facing an SDTD based on a joint income tax liability.

Collection Due Process

The interaction between the FAST Act and what has come to be known as collection due process presents the most complex change to the law. In most instances, a taxpayer is notified of collection due process rights prior to the imposition of a federal tax lien or a tax levy. These two processes, while similar, are not identical in procedure or execution. The FAST Act legislation raises significant implications for both.

⁷⁵ §6015(b)(1).

⁷⁶ §6015(b)(1)(E).

⁷⁷ §6015(c).

⁷⁸ §6015(c)(3)(C).

⁷⁹ *Id.*

⁸⁰ The seven factors for consideration are: marital status; economic hardship; knowledge or reason to know; legal obligation; significant benefit; compliance with income tax laws; and mental or physical health. Rev. Proc. 2013-34, 2013-43 I.R.B. 397, §4.03.

⁸¹ Rev. Proc. 2013-34, 2013-43 I.R.B. 397 §4.01(3)(a).

Collection Due Process for Tax Liens

In order to be a seriously delinquent tax debt, the assessed tax must have been subject to an IRS levy, or “a notice of [federal tax] lien has been filed pursuant to section 6323 and the administrative rights under section 6320 with respect to such filing have been exhausted or have lapsed.”⁸²

There are three requirements for the creation of a federal tax lien: (1) assessment of tax; (2) notice and demand for payment; and (3) nonpayment of the tax.⁸³ A federal tax lien may arise at any point after the service of notice and demand for payment. The lien is considered to attach as of the date of assessment,⁸⁴ but the federal tax lien is not valid against any other creditor until the IRS files the lien in accordance with the laws of the state in which the subject property is located.⁸⁵ Actual recordation and attachment of the lien often occurs after the date of assessment.

The IRS is required to notify a taxpayer in writing of the filing of a notice of lien under §6323.⁸⁶ A Notice of Federal Tax Lien (NFTL) must be either given in person, left at the dwelling or usual place of business of such person, or sent by certified or registered mail to such person's last known address. The notice should be sent not more than five business days after the day of the filing of the Notice of Lien.⁸⁷ The IRS is required to include the following information in the Notice of Lien:

- the amount of unpaid tax;
- the right of the person to request a hearing (collection due process) within a 30-day period beginning the day after the 5-day period described in §6320(a)(2);
- the administrative appeal rights available to the taxpayer with respect to such lien and the procedures relating to such appeals; and
- the provisions of §6320 and procedures relating to the release of liens on property.⁸⁸

Pursuant to §6320(a)(3)(B) the taxpayer has a right to request a hearing during the 30-day period after the NFTL is issued to the taxpayer.⁸⁹ If the taxpayer files a timely request for hearing in writing and states the grounds for the requested hearing, the hearing is a CDP hearing.⁹⁰ A taxpayer is entitled to one CDP

⁸² §7345(b)(1)(C)(i).

⁸³ §6321.

⁸⁴ §6321–§6322.

⁸⁵ §6323(a).

⁸⁶ §6320(a)(1).

⁸⁷ §6320(a)(2).

⁸⁸ §6320(a)(3)(A)–§6320(a)(3)(D).

⁸⁹ The IRS typically provides a blank Form 12153, *Request for Collection Due Process or Equivalent Hearing*, with the NFTL.

⁹⁰ §6320(b); Reg. §301-6320-1(c)(1).

hearing with respect to the first filing of a NFTL for each given tax period or periods.⁹¹

An officer or employee of the IRS Office of Appeals who has had no prior involvement with respect to the taxpayer's unpaid tax for the period(s) at issue conducts a CDP hearing.⁹² The taxpayer may raise any relevant issue relating to the unpaid tax liability including applicable spousal defenses, challenges to the appropriateness of collection actions, and offers of collection alternatives.⁹³ The statute of limitations on collection is suspended during the CDP hearing and the judicial appeal process, if any.⁹⁴

Untimely CDP hearing requests filed within the 1-year period after the filing of an NFTL will be granted an equivalent hearing.⁹⁵ While IRS Appeals is instructed to follow the same procedures used for a timely CDP hearing, the taxpayer is not entitled to judicial review of the decision reached in an equivalent hearing.⁹⁶ By definition, an equivalent hearing can only be requested once a taxpayer's CDP rights have lapsed.

Collection action does not have to be suspended while an equivalent hearing is pending and will be determined on a case-by-case basis.⁹⁷ Levy action is generally suspended as a matter of policy on tax periods subject to a pending equivalent hearing but there is no such provision for equivalent hearings following an NFTL.⁹⁸ Accordingly, a taxpayer's liability could be certified as seriously delinquent once the 30-day period to request a hearing has lapsed, even though an equivalent hearing has been requested.

The FAST Act amended §6320 to require notice of §7345 relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts.⁹⁹ The new notice requirements promulgated in the FAST Act present an interesting dilemma for the IRS. Otherwise certifiable SDTD's that received an NFTL or a Notice of Levy under the old statutory regime did not include the notice required under §6320(a)(3)(E).¹⁰⁰ While these individuals presumably received notices in compliance with §6320(a)(3), they almost certainly have not been given notice that their debt may be certified as an SDTD and the potential denial, revocation, or limitation of their passport.

⁹¹ §6320(b)(2); Reg. §301.6320-1(b)(1).

⁹² §6320(b)(3).

⁹³ §6330(c)(2)(A) (cross-referenced in §6320(c)).

⁹⁴ §6330(e)(1) (cross-referenced in §6320(c)).

⁹⁵ Reg. §301.6320-1(i); IRM 5.1.9.3.2.2(2)(B) (02-07-2014).

⁹⁶ *Id.*

⁹⁷ Reg. §301.6320-1(i)(2)(Q-I4).

⁹⁸ IRM 5.1.9.3.5.1(2) (04-18-2016).

⁹⁹ Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, §32101(b)(1), 129 Stat. 1312.

¹⁰⁰ While this window includes taxpayers who received notices prior to December 4, 2015, it also includes taxpayers who have received notices during the period after that date and before the passport revocation language started appearing in notices in 2017. See n. 3, above.

Any final NFTL issued after December 4, 2015, that does not include the required notice of the provisions of §7345 will not meet the requirements of §6320(a)(3)(E). However, the IRS may release an NFTL by giving the taxpayer simple notice.¹⁰¹ Accordingly, the IRS could withdraw federal tax liens so that it may reissue notices in compliance with the new notice provisions and subject those debts (and the respective taxpayers) to the passport revocation program.

Collection Due Process for the Levy Process

An SDTD will not include "a debt with respect to which collection is suspended with respect to the individual because a due process hearing under section 6330 is requested or pending."¹⁰²

A federal tax lien protects the IRS's interest in the taxpayer's encumbered property. Actually collecting the unpaid taxes requires that the IRS take additional steps. The primary tools the IRS uses to enforce collection is the lien-foreclosure suit¹⁰³ and the administrative levy.¹⁰⁴ The former is infrequently applied but the latter is increasingly common.

The IRS can levy all property and rights to property belonging to the taxpayer or property on which there is a federal tax lien.¹⁰⁵ This includes property that the taxpayer transferred while subject to a federal tax lien.¹⁰⁶ Once a levy is issued to any person in possession of the taxpayer's property or rights to property they must comply with the demand.¹⁰⁷

As its name implies, the administrative levy is available to the IRS without judicial action.¹⁰⁸ However, there are three procedural requirements before an administrative levy can be enforced — the IRS must give the taxpayer: (1) notice and demand for payment; (2) notice of intent to levy; and (3) notice of a right to a CDP hearing.¹⁰⁹ The only exception to these notice requirements is if the IRS determines that collection of the tax is in jeopardy.¹¹⁰

In addition to the 10-day notice and demand period, the IRS must notify the taxpayer in writing at least 30 days before the date of the levy that they intend to levy the taxpayer's property.¹¹¹ The notice of intent to levy must be issued separately from the notice and demand for payment, but the two notices may be issued

¹⁰¹ §6323(j)(1)(A); Reg. §301.6343-3(d)(1)(i).

¹⁰² §7345(b)(2)(B)(i).

¹⁰³ It is unclear what affect, if any, a pending suit under §7403(a) will have on the revocation or denial of passports under §7345.

¹⁰⁴ IRM 5.17.3.1 (01-07-2011).

¹⁰⁵ §6331(a).

¹⁰⁶ Reg. §301.6331-1(a)(1).

¹⁰⁷ §6332(a). Applicable third-party defenses are outside the scope of this article.

¹⁰⁸ IRM 5.17.3.1(2) (01-07-2011).

¹⁰⁹ §6303, §6331, §6330.

¹¹⁰ §6331(a).

¹¹¹ §6331(d)(1).

to the taxpayer simultaneously.¹¹² The notice of intent to levy must be given in person, left at the taxpayer's dwelling or usual place of business, or sent by certified mail to the taxpayer's last known address.¹¹³ The notice must include:

- the statutory provisions and procedures for levy;
- the administrative appeals available to the taxpayer and the procedures relating to such appeals;
- the alternatives available to taxpayers that could prevent levy (including installment agreements); and
- the provisions and procedures relating to redemption of levied property and release of liens.¹¹⁴

As noted above, the FAST Act added §6331(d)(4)(G) requiring notice of the provisions of §7345 relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts.¹¹⁵ While the IRS typically delivers a series of notices to taxpayers with outstanding liabilities, they are only required to issue two notices before instituting a levy: the notice and demand for payment and the notice of intent to levy (including notice of their right to a CDP hearing).¹¹⁶

Like the NFTL, taxpayers are afforded an opportunity for due process prior to enforcement of the levy.¹¹⁷ Taxpayers are given notice of this opportunity only once for the taxable period to which the unpaid tax specified relates.¹¹⁸ A timely request for a CDP levy hearing under §6330(b) suspends collection as a matter of policy.¹¹⁹ A timely request for CDP levy hearing also delays certification of a tax liability that would otherwise be an SDTD, while the hearing is requested or pending.¹²⁰

The new notice requirements promulgated in the FAST Act present the same dilemma for individuals with otherwise certifiable SDTDs that received a Final Notice of Levy under the old statutory regime as those subject to NFTLs.¹²¹ Notices issued under §6331(d)(4) before December 4, 2015, did not include notice of the seriously delinquent debt or passport re-

vocation provisions as required by the FAST Act.¹²² Also like the NFTL, the IRS is authorized to release a levy and return the taxpayer's property if the levy was made without giving the required 30-day notice of the right to a CDP hearing.¹²³ Notices of levy issued after December 4, 2015, that do not include the required notice of the provisions of §7345 do not meet the requirements of §6331(d)(4)(E).

OTHER COLLECTION SCENARIOS

There are other common collection scenarios that may leave a taxpayer in limbo wondering about the status of their tax debt and their passport. For instance, the FAST Act makes no reference to liabilities meeting the requirements for certification that are in currently not collectible status. The IRS can report accounts as currently not collectible and remove them from the active inventory when no current collection potential exists.¹²⁴ At the end of fiscal year 2011, the Government Accountability Office found that \$56.2 billion dollars of individual tax debt were in currently not collectible status.¹²⁵ This represents almost 22% of all individual tax debts owed at the time.¹²⁶

Another commonly occurring situation unaddressed by the FAST Act is taxpayers who have filed for bankruptcy protection. The IRS is automatically stayed from taking any act to perfect or enforce a tax lien or to collect a claim upon filing of the bankruptcy petition.¹²⁷ A discharge in bankruptcy will prevent a creditor from enforcing a dischargeable debt against the taxpayer personally, but the IRS may enforce a pre-petition lien for dischargeable taxes against the taxpayer's exempt property.¹²⁸ Once the bankruptcy is closed any filed lien will once again be legally enforceable. Should the taxpayer expect that it will also be certifiable as an SDTD?¹²⁹

JUDICIAL REVIEW

Once the IRS certifies the taxpayer's SDTD, the IRS is required to send the certification to the State

¹¹² *Id.*

¹¹³ §6323(j)(1)(A); Reg. §301.6343-3(d)(1)(i).

¹¹⁴ IRM 1.2.14.1.14 (11-19-1980). Currently not collectible status can be based on factors such as the IRS's inability to locate the taxpayer, timing of the statute of limitations on collection, or the taxpayer's current financial condition. IRM 5.16.1.2 (01-01-2016).

¹¹⁵ United States Government Accountability Office, *Federal Tax Debts: Factors for Considering a Proposal to Report Tax Debts to Credit Bureaus*, GAO-12-939 at 10 (Sept. 2012).

¹¹⁶ *Id.*

¹¹⁷ 11 U.S.C. §362(a).

¹¹⁸ *In Re Isom*, 901 F.2d 744 (9th Cir. 1990); IRM 5.17.8.14(4) (04-24-2015).

¹¹⁹ Kenneth C. Weil, *Will Bankruptcy Get Your Passport Back?*, Procedurally Taxing (Feb. 22, 2016), available at <http://procedurallytaxing.com/will-bankruptcy-get-your-passport-back-3/> (presenting questions about the intersection of bankruptcy and the FAST Act).

¹¹² §6331(a)(1).

¹¹³ §6331(d)(2).

¹¹⁴ §6331(d)(4)(A)–§6331(d)(4)(F).

¹¹⁵ Fixing America's Surface Transportation (FAST) Act, Pub. L. No. 114-94, §32101(b)(2), 129 Stat. 1312.

¹¹⁶ §6331; I.R.M. 5.11.1.3.2 (08-01-2014).

¹¹⁷ §6330(b).

¹¹⁸ §6330(a).

¹¹⁹ IRM 8.22.4.4(13) (08-09-2017). Collection of the tax by levy is not suspended by law, only as a matter of policy, during a pending CDP Hearing.

¹²⁰ §7345(b)(2)(B)(i).

¹²¹ See n. 100, above.

Department for action with respect to denial, revocation, or limitation of the taxpayer's passport.¹³⁰ The IRS is also required to contemporaneously notify the taxpayer of the certification and their right to judicial review to determine whether the certification was erroneous.¹³¹ The same right of judicial review is available if the Commissioner has failed to reverse the certification of a seriously delinquent tax debt. Taxpayers may seek review in the U.S. Tax Court or the U.S. district courts.¹³² If the court determines that the certification was "erroneous," then the court may order the IRS to notify the State Department that their certification of the liability was erroneous.¹³³

Section 7345 does not provide guidance on filing requirements or about the court's standard of review. However, the lens of collection due process judicial review provides a framework for how things *may* work in Tax Court. For instance, taxpayers appealing a CDP determination have 30 days to appeal the Notice of Determination to the Tax Court, instead of the 90 or 150-day periods afforded to petition a statutory notice of deficiency.¹³⁴ The Tax Court applies an abuse of discretion standard of review to CDP deter-

¹³⁰ Section 32101(c) of the FAST Act added §6103(k)(11) to allow the IRS to disclose to the Secretary of State the taxpayer's name, social security number, address, and the amount of the taxpayer's seriously delinquent tax debt.

¹³¹ §7345(e)(1).

¹³² §6330(d)(1); §7345(e)(1).

¹³³ §7345(e)(2).

¹³⁴ Compare §6330(d)(1) (cross-referenced in §6320(c)), with §6213(a).

minations that deal with issues other than the underlying tax liability.¹³⁵ In order to succeed on the abuse of discretion standard, the taxpayer must show that "the Commissioner exercised this discretion arbitrarily, capriciously, or without sound basis in fact or law."¹³⁶

It is unclear whether the term "erroneous" in §7345(e)(2) indicates a preference for the "clearly erroneous" standard of review applied by appellate courts or whether courts will apply something closer to the "abuse of discretion" standard used for CDP cases. Despite the fact that most collection due process cases go to the Tax Court, the taxpayer's access to a timely hearing of his or her passport revocation may become a key consideration in which judicial forum sees more of these actions.

CONCLUSION

Losing a passport is a serious consequence for not paying taxes. The potential loss of that privilege warrants carefully considered rules for enforcement, particularly when the mechanisms for that enforcement are already exceedingly complex. Those rules are absent from the enacting legislation. It remains to be seen whether there will be authoritative guidance, i.e., regulations and/or revenue procedures, to provide clarity. In all events, taxpayers who value international travel — and their advisors — must now reconsider how they approach delinquent tax liabilities or find themselves stuck at home.

¹³⁵ *Gozza v. Commissioner*, 114 T.C. 176 (2000) (citing H. Conf. Rept. 105-599, at 266 (1998)).

¹³⁶ *Woodral v. Commissioner*, 112 T.C. 19, 23 (1999).