**STATE BAR OF CALIFORNIA**

**TAXATION SECTION**

**PROCEDURE & LITIGATION COMMITTEE**

**PROPOSAL TO EXPAND THE SCOPE AND DEFINITION FOR “PERSON” TO ALLOW FOR THIRD PARTIES IN ALTER EGO and NOMINEE CASES/INVESTIGATIONS TO OBTAIN NOTICE OF SUCH POTENTIAL ALTER EGO OR NOMINEE INVESTIGATION PRIOR TO LIENS OR LEVYS BEING FILED AND/OR NOTICE BEFORE LEVY**[[1]](#footnote-1)

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**EXECUTIVE SUMMARY[[3]](#footnote-3)**

When the Taxpayer Bill of Rights was re-enacted in 1998, it failed to provide any type of advance notification or CDP rights for individuals or entities which may be subject to nominee or alter-ego liens or levy action. The IRS under current law, including treasury regulations, fails to give affected third parties a modicum of pre-notification due process or any type of notice before filing a nominee or alter-ego lien or levying on an alleged nominee or alter ego.

This paper proposes issuing amended regulations under IRC Sections 6331, and amending IRC Section 6320 and 6330 (and the regulations thereunder) to afford these individuals and/or entities the same rights as the original taxpayers.

Applying state law nominee or alter ego theories, the IRS is allowed to pursue the third-party’s property as the taxpayer’s nominee or alter ego to collect the taxpayer’s liability.[[4]](#footnote-4) If a third party is determined by the IRS to be a nominee or alter ego of a taxpayer, the third party’s remedies are very limited. These remedies are usually “after the fact” and are time-consuming and/or expensive. These “after the fact” remedies are also frequently ineffective, because the recording of an “alter ego” or “nominee” notice of federal tax lien or the issuance of an “alter ego” or “nominee” levy often economically cripples or destroys the alleged alter ego or nominee. This effectively deprives the alleged alter ego or nominee of the means to challenge the IRS’s determination of alter ego or nominee status.

This lack of notice results in a third party having to defend itself after an IRS investigation has occurred and collection action has ensued.[[5]](#footnote-5) Therefore, if the third party wants to contest the nominee or alter-ego designation, they are essentially left seeking redress in a federal district court, which is a cost that most taxpayers cannot afford.

We first propose to revise IRC §6331 and the regulations thereunder to require that third parties labeled as nominee or alter-ego receive the same 30 day notice before levy that taxpayers receive under §6331(d).

We also propose that sections 6320 and 6330, along with the related regulations, be amended to provide alleged nominees and alter egos the same CDP rights that are given to taxpayers.

Lastly, alternatively to CDP rights, we propose expanding the current CAP rights afforded to third parties labeled as nominee or alter-ego to allow for a meaningful opportunity for the third parties to present their side.

**DISCUSSION**

**I. Background**

The IRS is the primary agency whose mission is to enforce the federal tax laws set forth in the Internal Revenue Code of 1986 (“IRC”), as amended, and the regulations thereunder. Congress has enacted a number of provisions in the IRC which provide the IRS with a number of tools to pursue their alleged interest in a taxpayer’s property for purposes of collecting an assessed tax liability, regardless of whether such tax liability is owed by the person being liened or levied.

Generally, the IRS has to take a number of steps to assure that the taxpayer will be afforded his, her or its due process rights prior to collection action.[[6]](#footnote-6) If a tax liability is due, the IRS must first make the assessment of tax.[[7]](#footnote-7) IRC 6303(a) requires that the IRS to issue a notice and demand for payment of the outstanding tax within 60 days after the tax assessment is made. Once notice and demand has been made, the IRS is now free to use various administrative collection remedies.

The federal tax lien is one administrative collection remedy available to the IRS and indeed as pointed out by OPR, it is used far too often.[[8]](#footnote-8) Section 6321 provides that a federal tax lien arises after a person fails to pay the tax after demand for payment of such tax is made. The federal tax lien relates back to the date of assessment.[[9]](#footnote-9) The lien attaches to the taxpayer’s property and all rights to property owned on or acquired after the date of assessment until the liability either has been fully paid or is legally unenforceable (i.e. the statute of limitations for the liability has expired).[[10]](#footnote-10) The IRS will typically file a Notice of Federal Fax Lien (hereinafter “NFTL”) in the appropriate situs in order to put purchasers, holders of security interest, and creditors on notice and establish the IRS’s priority in a taxpayer’s property. [[11]](#footnote-11) It should be pointed out that the IRS is required under IRC §6320 to notify a taxpayer in writing within five days after it files a NFLT. The IRS has been filing NFTLs with increasing vigor over the last decade.[[12]](#footnote-12)

|  |  |
| --- | --- |
| Year | No. of Notices of Federal tax liens filed |
| 2002 | 482,509 |
| 2003 | 544,316 |
| 2004 | 534,392 |
| 2005 | 522,887 |
| 2006 | 629,813 |
| 2007 | 683,659 |
| 2008 | 768,168  |
| 2009 | 965,618  |
| 2010 | 1,096,376  |
| 2011[[13]](#footnote-13) | 1,042,230  |
| 2012 | 797,768  |

IRC § 6331(a) also gives the IRS the authority to levy upon all property and rights to property, if the taxpayer liable to pay taxes fails to pay the tax due within 10 days of notice and demand.[[14]](#footnote-14) The IRS must send the taxpayer written notice at least 30 days in advance prior to a Notice of Levy.[[15]](#footnote-15) Similar to the trend in NFTL filings, the IRS’s use of levies has also increased over the last decade.[[16]](#footnote-16)

|  |  |
| --- | --- |
| Year | Number of Notices of Levy Served on 3rd Parties[[17]](#footnote-17) |
| 2002 | 1,283,742 |
| 2003 | 1,680,844 |
| 2004 | 2,029,613 |
| 2005 | 2,743,577 |
| 2006 | 3,742,276 |
| 2007 | 3,757,190 |
| 2008 | 2,631,038 |
| 2009 | 3,478,181 |
| 2010 | 3,606,818 |
| 2011[[18]](#footnote-18) | 3,748,884 |
| 2012 | 2,961,162 |

Another tool that the IRS has available is the ability to seek judicial determination to collect unpaid taxes. The IRS may bring suit to reduce the tax claim to a judgment, which may allow additional time for the IRS to collect the tax.[[19]](#footnote-19) Additionally, the IRS is able to bring suit to quiet title to property.[[20]](#footnote-20) Under this course of action, IRS may foreclose on the federal tax lien so that the proceeds from the sale of property can pay the tax.[[21]](#footnote-21)

Our focus is on the IRS’s use of the federal tax lien and levy against third parties, specifically under the transferee, nominee or alter-ego theories. It should also be pointed out that Nina Olsen, the head of TAS has called for CDP rights for those persons who are alleged to be a nominee, alter-ego or transferee of the taxpayer.[[22]](#footnote-22)

**II. Collection Due Process (“CDP”) Rights and Background**

As discussed, the law generally requires the IRS provide a Collection Due Process (“CDP”) notice to the taxpayer upon the first NFTL and notify the taxpayer of the IRS’s intent to levy on any property or right to property at least 30 days prior to the levy.[[23]](#footnote-23) The CDP rights provides the taxpayer the opportunity to a CDP hearing in which the taxpayer can raise issues regarding the collection of the tax liability.[[24]](#footnote-24) The IRS Restructuring and Reform Act of 1998 created CDP hearings as part of its protections for taxpayers subject to collection activities.[[25]](#footnote-25) The purpose for the CDP was to afford taxpayers due process upon filing of notice of lien or prior to levy action and give taxpayers an opportunity for a “meaningful hearing before the IRS deprives them of their property” as demonstrated by Congress’s legislative history.[[26]](#footnote-26) “CDP procedures were designed to increase fairness to taxpayers.”[[27]](#footnote-27) The CDP hearing allows the taxpayer to discuss its case with a neutral Appeals or Settlement Officer in order to discuss collection alternatives, any defenses, procedural issues related to the assessment, etc.[[28]](#footnote-28)

**III. Pursuit of Third Parties and the Burdensome Impact to such Third Parties**

 There are circumstances in which the IRS looks to third parties to collect the liability of a taxpayer. Certainly there are situations where the property was fraudulently conveyed to family or friends to avoid a taxpayer’s obligation to pay the tax but there are also a number of cases where such transfers are legitimate.

The IRS will file NFLTs and issue levies against individuals (under the nominee, alter-ego or transferee theories). However, these individuals are not considered taxpayers for purposes of CDP rights under IRC Section 6320 and 6330 and therefore are not entitled to CDP rights. The Taxpayers Bill of Rights enacted in 1998 failed to provide any type of advance notice, CDP hearings and other types of pre-payment judicial reviews given to a person who is deemed the taxpayer under IRC Sections 6320 and 6330. Certainly, if a taxpayer who owes the tax is entitled to CDP rights and other due process protections, a third party who does not even owe the tax should be granted the same, if not greater, rights to protect their property interest rights.

Through the use of the theories below, the IRS may look to third parties for collection of outstanding tax even if a taxpayer’s property is not in the possession or in the name of the taxpayer.

 1) Transferee: This theory covers the situation where the taxpayer at one time held title to property but has attempted to move the property beyond the reach of the IRS by means of an actual transfer. The transferee liability is a tool used by the IRS to collect the transferor taxpayer’s tax liability.[[29]](#footnote-29) This theory is meant to cover taxpayers who have transferred the assets for inadequate consideration or to collect the liability from a third party legally responsible for paying the transferor taxpayer’s liability.[[30]](#footnote-30) Where a NFTL was properly filed before the transfer to the third party (“transferee”), the federal tax lien can be enforced by lien or levy upon the transferee without first making an assessment under IRC 6901 or without filing suit in federal district.[[31]](#footnote-31) In these cases, administrative collection action may be taken against the transferee upon Area Counsel approval.[[32]](#footnote-32)

 2) Nominee: This theory covers the situation where the taxpayer attempts to defeat collection by placing legal title to the property in a corporation, entity or individual who is essentially the taxpayer’s agent.[[33]](#footnote-33) Therefore, the benefit, use or control over the asset remains with the taxpayer in this scenario even though the property is allegedly transferred to this third party.[[34]](#footnote-34) In these cases, Area Counsel’s approval is also required.[[35]](#footnote-35) Once approval is obtained, the IRS may file a lien and proceed to seize assets from the nominee.

 3) Alter Ego: This theory covers the situation where the taxpayer and the third party are so intertwined, that their affairs are not readily separate.[[36]](#footnote-36) In these cases, Area Counsel’s approval is also required.[[37]](#footnote-37)

As mentioned above, the IRS is typically required to provide Collection Due Process (CDP) notice to the taxpayer of the first NFTL filing.[[38]](#footnote-38) Similarly, the IRS is required to provide CDP notice to the taxpayer of its intent to levy.[[39]](#footnote-39) However, the IRS Restructuring and Reform Act of 1998 (RRA 98) failed to provide any type of pre-notice or CDP rights for individuals or entities that may be subject to the above third party theories.[[40]](#footnote-40) Third parties held to fall under any of the three theories above are not considered taxpayers for the purposes of Collection Due Process (CDP) rights under IRC 6320 and 6330.[[41]](#footnote-41) The IRS does not include any of the above third parties in the definition of “person” as described in IRC section 6321 or in 6331.[[42]](#footnote-42) As such, the third party is not entitled to notice of NFTL.[[43]](#footnote-43) Similarly, the third party is also not entitled to a levy notice or CDP notice, which would allow the third party at least 30 days prior to the issuance of the levy.

Therefore, under any of the above theories, the IRS is able to file NFTL and issue levies against the property of these third parties that hold property that supposedly belongs to taxpayers for which an assessment of tax has been made.[[44]](#footnote-44) Generally, the IRS can pursue only specific property to which the NFTL has attached under the first two theories.[[45]](#footnote-45) Under the alter ego theory, the IRS can pursue all of the alter ego’s property to collect the taxpayer’s liability.[[46]](#footnote-46) However, all that the IRS is required to do is seek an opinion from its counsel and the lien or levy is then generated against the third party. What is even more egregious is that IRS counsel in almost 100% of these cases refuses to discuss their opinion with either the third party or their representative.

**IV. The Need for Expansion for the Scope and Definition for “Person”**

 As demonstrated above, according to the IRS data regarding delinquent collection activities, the number of notices of levy and liens has steadily increased throughout the years.[[47]](#footnote-47) Please find a summary of the number of NFTL’s served on third parties under a nominee or alter ego theory over the last five years:[[48]](#footnote-48)

|  |  |  |
| --- | --- | --- |
| Year | Nominee NFTL’s | Alter Ego NFTL’s |
| 2008 | 1,110 | 344 |
| 2009 | 1,248 | 364 |
| 2010 | 1,253 | 520 |
| 2011 | 1,621 | 582 |
| 2012 | 1,287 | 531 |

In the National Taxpayer Advocate’s 2012 Annual Report to Congress, in its most litigated issue section, civil actions to enforce federal tax liens or to subject property to payment was listed. This issue was identified as a Most Litigated Issue in the prior year as well.[[49]](#footnote-49) The National Taxpayer Advocate predicted that there would be more court opinions involving lien enforcement in the coming years due to the increase of cases referred to the Department of Justice by the IRS.[[50]](#footnote-50) This concern was readdressed in the 2013 Annual Report Congress.[[51]](#footnote-51) The National Taxpayer Advocate looked at 33 opinions issued during the period of time of June 1, 2012 through May 31, 2013. Out of the 33 opinions, there were five cases dealing with nominee or alter-ego lien matters.[[52]](#footnote-52)

Simply put, the “[a]dministrative remedies provided to nominees, alter egos, and transferees *post factum*, are inadequate and ineffective because the collection action occurs *before* the IRS hears an explanation from the affected third party.”[[53]](#footnote-53)

In the event that a third party individual or entity receives a courtesy notice of levy or lien, under current law and procedures, their administrative remedies are extremely limited. The only option available for these third parties is to request a CAP hearing. A CAP hearing differs from a CDP hearing in many ways. First of all, a CAP proceeding has an extremely short resolution time especially when compared to the CDP process. The IRS has a goal to complete these CAP cases within 5 business days after appeals have received the case.[[54]](#footnote-54) Since the CAP is an administrative appeal process, the third party is generally not entitled to a face-to-face hearing by statute.[[55]](#footnote-55) Additionally, a CAP hearing is not subject to judicial review under IRC § 6330(d)(1).[[56]](#footnote-56)

This short time frame along with the CAP hearing format does not lend itself to allow the time for the third party individuals or entities to be able to tell their side of the story. In practice, the CAP hearing has been nothing more than a rubber stamp of what the IRS Counsel has considered. The Appeals Officer will generally inform the taxpayer or his representative that IRS Counsel has signed off on the case and there is nothing more to discuss. Adding insult to injury, when the tax practitioner attempts to contact IRS Counsel to discuss what he or she believes to be pertinent facts favoring the taxpayer, IRS Counsel rarely if ever will return the call.

If a third party individual or entity is lucky enough to receive a courtesy notice of levy or lien, or collection action has already begun, this may be the first indicator to the third party that the IRS has held them to be a nominee, alter-ego or transferee for the taxpayer. In reality, the third party individual or entity may not be aware of the IRS’s decision to pursue one or all of the above third party theories. Moreover, there is no requirement that the IRS advise the individual or entity as to why the lien or levy was issued. The third party is at a severe disadvantage because they are left to defend themselves usually after an IRS investigation has been completed and collection action has ensued. These third parties may not have the information as to why they are being held to be nominee, transferee, or an alter ego. Additionally, since the IRS, in many cases, will list all the above theories when pursing lien or levy action against a third party, the taxpayer has to spend more time and money to defend itself under each theory since each theory has varying factors and requirements.

The collection action utilizing these third party theories could have a catastrophic effect on the third party. Utilizing any of the above third party theories, a federal tax lien may be foreclosed against property held by a transferee, nominee or alter-ego if the taxpayer is deemed the equitable owner of the property. The IRS may also bring suit to enforce a levy.[[57]](#footnote-57)

If the third party wants to contest the nominee or alter-ego designation, other than a CAP proceeding, they are essentially left seeking redress in a federal district court, which is a costly ordeal that most taxpayers cannot afford. However, even this judicial remedy does not guarantee protection for the third party against levy action by the IRS. Although the IRS provides relief if the IRS wrongfully levies on property of a third party, it only provides for an injunction to prohibit the enforcement of the levy or to prohibit the sale of the property if the levy or sale would cause irreparable injury to that person’s rights and property.[[58]](#footnote-58) Moreover, the wrongful levy suit must be brought within the requisite time limitations from the day of the levy.[[59]](#footnote-59) Since the IRS is only required to notify the person in possession of the property, the third party may not know that a seizure or sale of property for which it has an interest has occurred. Even more concerning is that the third party may not realize the levy has occurred prior to the requisite time to take action against the wrongful levy.

Due to the cost of litigating and/or the time involved with raising any concerns and/or proposing collection alternatives, many innocent third parties are ensnared for liabilities that they should not be held liable for and may lose their property and/or business unjustly. A third party against whom the IRS seeks to take a collection action has limited options since they are without the protections of IRC sections 6320 and 6330. The current remedies available to the third party are time-consuming, costly, and place an undue burden on those who cannot afford the significant expense of litigating in federal district court. As such, the adverse effects of alter ego lien notices and levy action may destroy whatever ability there previously was to contest the IRS’s position.

Setting aside the issue of what in many cases is at best, prohibitive costs in going to District Court, the failure to give notice violates in principle the federal bill of rights. As originally enunciated by Thomas Jefferson:

“A bill of right is what the people are entitled to against every government on earth, general or particular; and what no just government should refuse, or rest on inferences.”[[60]](#footnote-60)

Our federal Bill of Rights guarantees certain rights not set forth in the Constitution, including the right to be free from unreasonable seizures.[[61]](#footnote-61)

“These rights are fundamental to the functioning of our society. Citizens follow the laws because they trust the government to uphold their rights and threat them fairly. Similarly, the federal tax system is based on an unwritten social contract between the government and its taxpayers: taxpayers agree to report and pay the taxes they owe to enable their government to function, and the government agrees to provide the service and oversight necessary to ensure that taxpayers can and will do so.”

The IRC virtually provides third parties with none of the notice requirements that should be guaranteed by the federal Bill of Rights. The IRS is neither required nor does it in practice provide any notice to third parties when the IRS unilaterally asserts that they are entitled to a lien under transferee liability lien or alter-ego theory. What is given to them in practice amounts to nothing less than a kangaroo court hearing which leaves them with the alternative of losing the property or somehow finding the ability to fund a District Court case, which will at least exceed $50,000 if not a lot more, if the case has to proceed to trial.[[62]](#footnote-62) For these reasons it is imperative that the IRS as well as Congress take steps that will afford third parties due process should the IRS assert a levy or lien against any of their property.

**V. Proposal 1: Revision of IRC** § **6331 and the regulations to account for third parties labeled as nominee or alter-egos to receive notice before levy as prescribed in** § **6331(d)**

 With the rise of collection action along with the National Taxpayer Advocate’s concern for the rise of litigation regarding federal tax liens, revision of IRC § 6331 and the regulations is a necessity. As the law stands now, the third party taxpayers are left with virtually no economically reasonable and viable remedies if they find themselves in a situation where the IRS has determined that any of the above third party theories apply. The current remedy, a filing in District Court, is time- consuming, costly and places an undue burden on the third party, most of whom cannot afford the time and expense to defend themselves.[[63]](#footnote-63)

A first step, but not the solution, in remedying the inherent unfairness and lack of due process to third parties would be to revise the definition of person under § 6331 to include a requirement of notice to third parties. This proposed revision would allow the third parties, a number of whom may truly be innocent, the opportunity to raise concerns and propose collection alternatives before collection action is taken. It provides a small window of opportunity for the parties to try to come to a resolution that will balance the concerns and goals for both parties. This short term solution will allow the third party and the IRS to at least open up a dialogue and work together to resolve the issue. If a levy or a lien would put a third party out of business, then both parties will lose. The IRS will not be able to recover its money, and the third party will lose the ability to pay the IRS if any amounts are in fact due. Even if the IRS determines that the third party is innocent, aggressive collection action may put a viable business or taxpayer out of business. Again, that would be a loss to the IRS of future tax revenue from that taxpayer. Therefore, this proposed change would help the IRS avoid unnecessarily or unintentionally putting someone out of business or suffer a financial hardship. This proposal option would not result in a requirement for a CDP notice, but provide the taxpayer at least 30 day notice prior to levy action.

**VI. Proposal 2: Revision of IRC § 6320 and 6330 to provide notice to third parties labeled as nominees or alter egos under IRC 6320 and 6330**

As discussed above, the revision to provide notice to third parties would be a step in the right direction. However, CDP rights were provided in order to provide taxpayers with due process and the opportunity for meaningful hearing before the IRS levies their property or immediately after the IRS files a NTFL against the taxpayers’ property yet third parties in danger of the same are not afforded these same rights as the original taxpayer. In the National Taxpayer Service’s (NTS) 2012 Annual Report to Congress Volume One, NTS advocated that Congress amend IRC § 6320 and 6330 to extend CDP rights to affected third parties, known as nominees, alter egos, and transferees, who hold legal title to property subject to IRS collection actions.[[64]](#footnote-64) NTS was concerned that without the benefits of the protections under IRC § 6320 and 6330, the collection process for nominees, alter egos and transferees may deny individuals and entities who are innocent third parties the right to state their side of the story and propose collection alternatives *before* collection action is taken.[[65]](#footnote-65)

NTS argued that the affected party, the alleged nominees, transferees, or alter egos, should be provided CDP rights so that they are at least provided with the same amount of due process protection as the taxpayer who is actually responsible for the tax.[[66]](#footnote-66) Providing notice under the first proposal is helpful, but it only provides a small amount of time for which the third party attempts to work with the IRS to come to a resolution. However, this small window of time may not sufficient. For example, the third party may need to obtain the information obtained during the third party investigation via a Freedom of Information Act request. These requests can take many months and the information may not even may accessible by the third party if they truly are an innocent party. Therefore, the 30 day notice window will likely pass before the third party even has access to the information that the IRS has relied on in determining that one of the above discussed theories is applicable. Therefore, it is imperative, that third parties are afforded the same rights as the taxpayers. However, the CDP rights would be afforded only to the third parties deemed to be nominees, transferees, or alter egos. Therefore, this proposal would not be an expansion of CDP rights already afforded to those defined to be the taxpayer as originally defined by IRC § 6321 or IRC § 6331.

Therefore, we propose the following revisions to the statutory framework of IRC § 6320 and 6330.

IRC § 6320(a)(1) states that the Secretary shall notify in writing the “person” described in section 6321 of the filing of a notice of lien under section 6323. Therefore, the definition of “person” as described in IRC § 6321 should be amended to state

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal. If any person who is named a nominee, alter-ego or transferee of a person liable to pay any tax neglects or refuses to pay the same after demand, also neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal.

Therefore, 26 CFR 301-6320-1(a)(2) Q-A7 poses the question whether the IRS gives notification to a known nominee of, or a person holding property of, the taxpayer of the filing of the NFTL. Therefore, 26 CFR 301-6320-1(a)(2) A-A7 should also be revised to answer the following:

Yes. Such person is a person described in section 6321 and, therefore, is entitled to notice, and such persons may have other remedies. See A-B5 of paragraph (b)(2) of this section.

26 CFR 301-6320-1(b)(2) Q-B5 also states the question whether a nominee of, or a person holding property of, the taxpayer entitled to a CDP hearing or an equivalent hearing. 26 CFR 301-6320-1(b)(2) A-B5 will also need to be revised to state the following:

Yes. Such person is a person described in section 6321 and is, therefore, entitled to a CDP hearing or an equivalent hearing (as discussed in paragraph (i) of this section). Such person may also seek reconsideration by the IRS office collecting the tax or filing the NFTL, an administrative hearing before Appeals under its Collection Appeals Program, or assistance from the National Taxpayer Advocate. Such person also may avail himself of the administrative procedure included in section 6325(b)(4) or of any other procedures to which he is entitled.

Similarly, IRC § 6330 looks to IRC § 6331(a) to determine the person who is entitled to pre-levy or post-levy CDP notice. Therefore, under our proposal, similar to the proposed revisions to the lien statutes, the definition of person pursuant to IRC § 6331(a) should be revised to the following language:

If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section [6334](http://www.law.cornell.edu/uscode/text/26/6334)) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. If any person who is named a nominee, alter-ego or transferee of a person liable to pay any tax neglects or refuses to pay the same after demand, also neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal. Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d)) of such officer, employee, or elected official. If the Secretary makes a finding that the collection of such tax is in jeopardy, notice and demand for immediate payment of such tax may be made by the Secretary and, upon failure or refusal to pay such tax, collection thereof by levy shall be lawful without regard to the 10-day period provided in this section.

The regulation discussing levies, 26 CFR 301.6330-1(a)(3) A-A2, when discussing notice rights for nominees or other third parties should also be revised to state the following:

Yes. Such a person is a person described in section 6331(a)(1), and such persons may have other remedies. See A-B5 of paragraph (b)(2) of this section.

Therefore, 26 CFR 301.6330-1(b)(2), A-B5 should also be revised to state the following:

Yes. Such person is a person described in section 6331(a) and is, therefore, entitled to a CDP hearing or an equivalent hearing (as discussed in paragraph (i) of this section). Such person may also seek reconsideration by the IRS office collecting the tax, assistance from the National Taxpayer Advocate, or an administrative hearing before Appeals under its Collection Appeals Program.”

These revisions to the above sections are necessary especially in light of the increasing levy and lien action by the IRS. The current state of the law for alleged nominees, alter egos or transferees is unfair and could produce unjust results where an innocent third party has no CDP rights, yet the taxpayer actually responsible for the tax debt has more protection and administrative tools available to resolve the liability. What reasonable tax system affords more rights to the guilty than the innocent?

**VI. Proposal 3: Expansion of the current CAP hearing regime to better accommodate cases for third parties labeled as nominees or alter egos under IRC 6320 and 6330**

In the alternative, instead of a legislative fix, the solution may lie with the IRS. As discussed above, currently the only administrative option available to these third parties is to request a CAP hearing. However, the CAP hearing structure, as currently set up, essentially results in nothing more than a rubber stamp of what IRS Counsel has considered.

Therefore, the CAP hearing could be expanded solely in the context of these third parties to allow more time before the CAP proceeding is assigned to an Appeals Officer to allow the third party time to prepare their presentation. A face-to-face CAP hearing should be permitted in this context. Therefore, IRM 8.24.1.2(5) (12-17-2013) should be revised as follows:

Given the CAP program is an administrative appeal process, taxpayers are not entitled to a face-to-face hearing by statute. There may be situations in which a face-to-face hearing request should be granted to reach account resolution. These situations will more than likely be rare, but if requested, the employee and their manager should consider the facts and circumstances in making the determination to approve or deny the request. However, in the case of third parties deemed to be nominee, transferee or alter ego of a taxpayer, such third party will be entitled to a face-to-face hearing.

Additionally, IRS Counsel or Appeals should provide the third party with the information that was relied upon to determine that such third party is a deemed nominee, transferee or alter ego of the taxpayer prior to the CAP hearing. In practice, this may be a more realistic solution to address the issues raised above. Such solution also utilizes the current structure in place by the IRS with some minor expansions to allow the third party to have a meaningful opportunity to present their side of the story.

**VIII. Conclusion**

Therefore, we recommend that the CDP rights in this third party context parallel the CDP rights currently afforded to the taxpayer under IRC 6330 and 6320, or in the alternative, that the CAP hearings be expanded in this limited subject matter. In either proposal, an independent and impartial Appeals or Settlement Officer would review the facts presented by the taxpayer and determine whether the IRS’s proposed action balances the need for efficient collection of taxes with the legitimate concern of the taxpayer that any proposed collection action be “no more intrusive than necessary.”[[67]](#footnote-67) Additionally, the Appeals or Settlement Officer would verify that the IRS has met all the applicable laws and administrative procedures.[[68]](#footnote-68)

Or at the very least, we recommend that section 6331 be revised to include a notice requirement to third party alleged nominees, transferees, and alter-egos to allow them at least 30 days to present their case to the IRS and/or arrange for collection alternatives.

We believe the CDP proposal or expanded CAP hearings will help alleviate the lack of administrative remedies available to alleged third party taxpayers. However, the notice to third party revisions is a minimum right that should be afforded to third party taxpayers. As stated by the NTS, “[i]t is good government policy, providing extra measures of protection against abuse in the collection arena and increasing fairness and transparency in tax administration, consonant with the legislative intent of RRA 98.”[[69]](#footnote-69)

1. The comments contained in this paper are the individual views of the authors who prepared them, and do not represent the position of the State Bar of California or of the Los Angeles County Bar Association. [↑](#footnote-ref-1)
2. Although the participants on the project might have clients affected by the rules applicable to the subject matter of this paper and have advised such clients on applicable law, no such participant has been specifically engaged by a client to participate on this project. [↑](#footnote-ref-2)
3. Lisa O. Nelson is an associate with The Law Offices of A. Lavar Taylor, APC. The views expressed herein are those of the authors, and do not necessarily reflect the views of The Law Offices of A. Lavar Taylor, APC. The information contained herein is general in nature and is not intended, and should not be construed, as legal, accounting, or tax advice or as an opinion by The Law Offices of A. Lavar Taylor APC or by the Law Office of David Lee Rice APC to the reader. [↑](#footnote-ref-3)
4. But See Office of Chief Counsel Notice 2012-002 where the IRS takes the position that federal common law should apply in determining alter ego status. [↑](#footnote-ref-4)
5. Third parties are entitled to a CAP hearing, but as discussed infra., this is nothing more than a rubber stamp determination previously made by IRS Counsel. [↑](#footnote-ref-5)
6. Public Law 104-168, commonly known as the Taxpayer Bill of Rights 2. Collection Due Process Rights were created under this Bill, and gave taxpayers the right to appeal lien and levy actions. [↑](#footnote-ref-6)
7. IRC 6203. [↑](#footnote-ref-7)
8. See National Taxpayer Annual Report to Congress, IR-2013-3 (January 9, 2013). Also see National Taxpayer Advocate Annual Report to Congress, IR-2011-2 (January 5, 2011). Where Olsen noted that the “IRS collection policies inflict unnecessary harm on financially struggling taxpayers and fail to achieve the IRS’s overriding objective of increasing long-term voluntary compliance with the tax laws.” [↑](#footnote-ref-8)
9. IRC § 6322. [↑](#footnote-ref-9)
10. IRC § 6321; IRC § 6322; IRC § 6502. [↑](#footnote-ref-10)
11. IRC § 6323(a), (f); Treas. Reg. 301-6323(f)-1. [↑](#footnote-ref-11)
12. Data obtained from Internal Revenue Service Data Book FYE 2002-2012. The Taxpayer’s Report for 2011 strongly criticized the IRS for automatically slapping liens against taxpayers, as the damage they can do to someone’s credit does indeed harm taxpayers without necessarily increasing voluntary compliance with the tax system. [↑](#footnote-ref-12)
13. On February 24, 2011, the IRS implemented a “Fresh Start” program, which made changes to the IRS automatic lien filings. Under this program, there must a minimum liability of $10,000 for automatic lien filing (up from $5,000). Additionally, the Fresh Start program provides opportunities for the taxpayer to have a tax lien released even if the balance is not paid in full if they meet certain strict requirements and the balance is under a specific amount. [↑](#footnote-ref-13)
14. IRC § 6331(a). [↑](#footnote-ref-14)
15. 6331(d)(1),(2). [↑](#footnote-ref-15)
16. Data obtained from Internal Revenue Service Data Book FYE 2002-2012. [↑](#footnote-ref-16)
17. Data obtained from Internal Revenue Service Data Book FYE 2002-2012. [↑](#footnote-ref-17)
18. The IRS “Fresh Start” program also made changes to attempt to streamline a taxpayer’s ability to make collection alternative arrangements (i.e. installment agreements). However, there is no minimum liability that must be owed before a levy can be issued once the levy procedural requirements have been met. [↑](#footnote-ref-18)
19. IRC 7402. [↑](#footnote-ref-19)
20. IRC 7402(e). [↑](#footnote-ref-20)
21. IRC 7403. [↑](#footnote-ref-21)
22. See National Taxpayer Advocate Annual Report To Congress 2012, LR#6. [↑](#footnote-ref-22)
23. IRC § 6320; IRC § 6330. [↑](#footnote-ref-23)
24. IRC § 6330. [↑](#footnote-ref-24)
25. RRA 98, Pub. L. No. 105-206. [↑](#footnote-ref-25)
26. National Taxpayer Advocate 2012 Annual Report to Congress, “Amend IRC 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Ego, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions,” 2012 Annual Report to Congress, Volume One, page 549 citing S. Rep. 105-174 (1998). [↑](#footnote-ref-26)
27. Id. [↑](#footnote-ref-27)
28. See IRC § 6330(c)(2)(A), (B). [↑](#footnote-ref-28)
29. Internal Revenue Manual (IRM) 4.11.52.2 (1) (Nov. 01, 2004). [↑](#footnote-ref-29)
30. IRM 4.11.52.2(2) (Nov. 01, 2004). [↑](#footnote-ref-30)
31. IRM 5.17.14.1(5A), IRM 5.17.14.4 (January 24, 2012).. [↑](#footnote-ref-31)
32. IRM 5.17.14.1(6) (January 24, 2012). [↑](#footnote-ref-32)
33. IRM 5.17.14.6 (Jan. 24, 2012). [↑](#footnote-ref-33)
34. Id.; IRM 5.17.14.1.4(1)(A) (Jan. 24, 2012). [↑](#footnote-ref-34)
35. Id. [↑](#footnote-ref-35)
36. IRM 5.17.14.14(1)(B) (Jan. 24, 2012). [↑](#footnote-ref-36)
37. IRM 5.17.14.6(2) (Jan. 24, 2012). [↑](#footnote-ref-37)
38. IRC 6320. [↑](#footnote-ref-38)
39. IRC 6330. [↑](#footnote-ref-39)
40. National Taxpayer Advocate 2012 Annual Report to Congress 2012 544; RRA 98, Pub. L. No. 105-206, 3401, 112 Stat. 695, 746 (1998). [↑](#footnote-ref-40)
41. Treas. Reg. 301-6320-1(a)(2), Q&A A7 and (b)(2), Q&A B5; Treas. Reg. 301.6330-1(a)(3), Q&A-A2 and (b)(2), Q&A-B5. [↑](#footnote-ref-41)
42. Id. [↑](#footnote-ref-42)
43. Id. [↑](#footnote-ref-43)
44. IRM 5.17.14.1(5)(A) (Jan. 24, 2012). [↑](#footnote-ref-44)
45. IRM 4.17.14.6 (Jan. 24, 2012). [↑](#footnote-ref-45)
46. Id. [↑](#footnote-ref-46)
47. Internal Revenue Service Data Book. [↑](#footnote-ref-47)
48. National Taxpayer Advocate 2012 Annual Report to Congress 550 (IRS responses to TAS information request) (Sept 7 and Nov. 27, 2012). [↑](#footnote-ref-48)
49. National Taxpayer Advocate 2012 Annual Report to Congress, 560. [↑](#footnote-ref-49)
50. National Taxpayer Advocate 2012 Annual Report to Congress 639. [↑](#footnote-ref-50)
51. National Taxpayer Advocate 2012 Annual Report to Congress 407. [↑](#footnote-ref-51)
52. National Taxpayer Advocate 2012 Annual Report to Congress, Table 9: Appendix III. [↑](#footnote-ref-52)
53. National Taxpayer Advocate 2012 Annual Report to Congress 550. [↑](#footnote-ref-53)
54. IRM 8.24.1.2.4 (Dec. 17, 2013)- acknowledging that lien withdrawals, installment agreements may be quite complicate and/or require verification and will take longer than 5 business days to resolve. However, these cases should normally be resolved within 15 business days. IRM 8.24.1.2.6. [↑](#footnote-ref-54)
55. IRM 8.24.1.2.5 (Dec. 17, 2013) [↑](#footnote-ref-55)
56. Treas. Reg. 301-6320-1(b)(2), Q&A-B5; Treas. Reg. 301-6330-1(b)(2), Q&A-B-5. [↑](#footnote-ref-56)
57. IRC §6332. [↑](#footnote-ref-57)
58. IRC § 7426. [↑](#footnote-ref-58)
59. IRC § 6532(c)(1) states that a wrong levy suit must be brought within nine months from the date of levy except as otherwise provided in this section. [↑](#footnote-ref-59)
60. Also see Taxpayer Advocate Service 2013 Annual Report to Congress, MSP 1, page 7. [↑](#footnote-ref-60)
61. See U.S. Const. Amends. I, IV. [↑](#footnote-ref-61)
62. Even the Organization for Economic Co-operation and Development’s survey regarding their tax system found that the majority of countries gave their taxpayers, the right to be informed, assisted and heard and the right to appeal. See Taxpayer Advocate Service 2013 Annual Report to Congress, MSP 1, page 9. [↑](#footnote-ref-62)
63. National Taxpayer Advocate 2012 Annual Report to Congress 544. [↑](#footnote-ref-63)
64. National Taxpayer Advocate 2012 Annual Report to Congress, “Amend IRC 6320 and 6330 to Provide Collection Due Process Rights to Third Parties (Known as Nominees, Alter Ego, and Transferees) Holding Legal Title to Property Subject to IRS Collection Actions,” 2012 Annual Report to Congress, Volume One, page 545. [↑](#footnote-ref-64)
65. National Taxpayer Advocate 2012 Annual Report to Congress 544. [↑](#footnote-ref-65)
66. National Taxpayer Advocate 2012 Annual Report to Congress 544-5. [↑](#footnote-ref-66)
67. IRC 6330(c)(1) and (c)(3). [↑](#footnote-ref-67)
68. National Taxpayer Advocate 2012 Annual Report to Congress 547. [↑](#footnote-ref-68)
69. National Taxpayer Advocate 2012 Annual Report to Congress 551. [↑](#footnote-ref-69)