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TAXATION SECTION  
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**COMMENTS AND PROPOSED GUIDANCE ON THE IRS'  
REVOCATION OR DENIAL OF PASSPORT IN CASE OF CERTAIN  
UNPAID TAXES UNDER INTERNAL REVENUE CODE  
SECTION 7345**

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<sup>1</sup> The comments contained in this paper are the individual views of the author(s) who prepared them, and do not represent the position of the California Lawyers Association or of the Los Angeles County Bar Association.

<sup>2</sup> Although the authors and/or presenters of this paper 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.

## TABLE OF CONTENTS

EXECUTIVE SUMMARY OF COMMENTS AND RECOMMENDATIONS .....	1
DISCUSSION .....	2
I. BACKGROUND: REVOCATION OR DENIAL OF PASSPORT IN CASE OF CERTAIN TAX DELINQUENCIES.....	2
A. Overview .....	2
B. Seriously Delinquent Tax Debt.....	3
C. Statutory Exclusions from Certification.....	4
D. Discretionary Exclusions from Certification.....	4
E. Identification of Certified Seriously Delinquent Tax Debt.....	5
F. Taxpayer Notification .....	6
G. Judicial Review of Certification.....	6
II. COMMENTS AND RECOMMENDATIONS TO THE IRS PASSPORT PROGRAM .....	7
A. IRS Should Enhance the Quality and Clarity of Taxpayer Notification in Notices CP 508C, CP504, CP523, and LT11 and Letters 3172 and 1058.....	7
B. IRS Should Issue a Pre-Certification Notice to Provide Taxpayers With a Meaningful Opportunity to Contest Certification <i>Before</i> It Occurs .....	11
C. The IRS Should Clarify the Definition of the Term “Pending Installment Agreement and “Pending Offer in Compromise” to Including Timely Filed Appeals .....	13
D. Representatives with a Valid Form 2848 are Not Receiving a Copy of Notice CP 508C.....	16
E. IRS Should Grant a Collection Hold Where A Representative Contacts the IRS and Requests Additional Time to Propose a Collection Alternative .....	17
F. IRS Should Implement a Discretionary First-Time Certification Waiver Where a Taxpayer, with No Prior Compliance Issues, Proposes a Collection Alternative .....	18
G. The IRS Should Include Pending Currently Not Collectible Requests and Collection Due Process Equivalency Hearings Under Its Discretionary Exclusions from Certification.....	18
H. The IRS Should Reverse Certification Where the IRS Grants Administrative Relief Under the First Time Abatement Policy .....	20
I. The Tax Court Should Amend Form 2, Petition to Add an Appropriate Box to Check to show that the Petition is Disputing Notice CP 508C.....	23
III. CONCLUSION .....	24

## **EXECUTIVE SUMMARY OF COMMENTS AND RECOMMENDATIONS<sup>3</sup>**

This paper provides comments and recommendations from practitioners with respect to the Service's implementation of I.R.C. § 7345, revocation or denial of passport in case of certain tax delinquencies.

The authors recognize that the Service must take steps to collect seriously delinquent tax debts and that denying an individual a U.S. passport (or renewal thereof) or revoking any U.S. passport previously issued to an individual can motivate a certain class of taxpayers to take steps to handle their tax compliance issue. However, the authors believe that there are adjustments that the Service could make to the implementation of I.R.C. § 7345 to make this process less onerous on taxpayers, encourage compliance, and enable taxpayers' representatives to work within the system and resolve the collection issue prior to a loss of passport rights.

The authors hope that the Service will take these comments and suggestions into consideration and make appropriate changes to the Internal Revenue Manual § 5.1.12.27 (12-20-2017) (Passport Certification in Case of Certain Tax Debts).

With the foregoing thoughts in mind, the authors provide the following comments and suggestions for consideration.

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## DISCUSSION

### I. **BACKGROUND: REVOCATION OR DENIAL OF PASSPORT IN CASE OF CERTAIN TAX DELINQUENCIES**

On December 4, 2015, as part of the Fixing America's Surface Transportation (FAST) Act<sup>4</sup>, Congress enacted I.R.C. § 7345,<sup>5</sup> which requires the Internal Revenue Service ("IRS") to notify the State Department of taxpayers certifying 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.

#### A. **Overview**

Section 7345 provides that if the Secretary of Treasury receives certification by the Commissioner of the IRS that an individual has a seriously delinquent tax debt, the Secretary shall transmit such certification to the Secretary of State ("State Department") for action with respect to denial, revocation, or limitation of a passport (the "Passport Program").<sup>6</sup> Only the Commissioner, Deputy Commissioner for Services and Enforcement, or the Commissioner of an operating division of the IRS may certify or reverse certification of a seriously delinquent tax debt.<sup>7</sup>

The State Department may thereafter deny or revoke the passport of a taxpayer.<sup>8</sup> Notwithstanding the certification, the State Department may issue a passport "in emergency circumstances or for humanitarian reasons" and may allow travel on a revoked passport for the limited reasons of returning to the United States or issue a limited passport for the sole reason of return travel to the United States.<sup>9</sup>

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<sup>4</sup> Fixing America's Surface Transportation Act, Pub.L. 114-94 (2015).

<sup>5</sup> All references to statutes are to the Internal Revenue Code unless otherwise specified.

<sup>6</sup> I.R.C. § 7345(a).

<sup>7</sup> I.R.C. § 7345(g); I.R.M. 5.1.12.27.1(2) (12-20-2017) (Seriously Delinquent Tax Debt).

<sup>8</sup> 22 U.S.C. §§ 2714a(e)(1)(A) and 2714a(e)(2)(A).

<sup>9</sup> 22 U.S.C. §§ 2714a(e)(1)(B) and 2714a(e)(2)(B).

## **B. Seriously Delinquent Tax Debt**

For the purpose of passport certification, seriously delinquent tax debt is the unpaid, legally enforceable federal tax liability, which has been assessed, of an individual totaling more than \$50,000 for which:

- **Notice of Federal Tax Lien**: A Notice of Federal Tax Lien has been filed and all administrative remedies under I.R.C. § 6320 have lapsed or been exhausted, or
- **Levy**: A levy has been issued.<sup>10</sup>

Unless otherwise listed as statutory or discretionary exclusions in I.R.M. 5.1.12.27.3 or I.R.M. 5.1.12.27.4, a seriously delinquent tax debt includes, but is not limited to, tax assessments made under an individual's taxpayer identification number (SSN or EIN) such as U.S. individual income taxes, trust fund recovery penalties, business taxes for which the individual is liable and other civil penalties. This does not include other non-tax liabilities such as:

- ACA assessments, Individual SRP modules (MFT 35 or 65);
- Employer Shared Responsibility Payments (ESRP) modules (MFT 43);
- Criminal Restitution assessments (MFT 31 with unreversed TC 971 AC 102);
- Child Support Obligations (NMF MFT 59). See IRM 3.8.45.6.35, Sub-Pays for Child Support MFT 59; and
- Report of Foreign Bank and Financial Accounts ("FBAR") assessments.<sup>11</sup>

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<sup>10</sup> I.R.M. 5.1.12.27.2 (12-20-2017) (Seriously Delinquent Tax Debt); I.R.C. § 7345(b)(1) (Seriously Delinquent Tax Debt).

<sup>11</sup> I.R.M. 5.1.12.27.2.3 (12-20-2017) (Seriously Delinquent Tax Debt).

### C. Statutory Exclusions from Certification

Section 7345(b)(2) excludes the following tax debt from the determination of seriously delinquent tax debt, even if it meets the criteria in I.R.M. 5.1.12.27.2, Seriously Delinquent Tax Debt:

- **Installment Agreement**: Debt that is being paid in a timely manner under an installment agreement entered into with the IRS under I.R.C. § 6159;
- **Offer in Compromise**: Debt that is being paid in a timely manner under either an Offer in Compromise accepted by the IRS or a settlement agreement entered into with the Department of Justice under I.R.C. § 7122;
- **CDP Hearing under I.R.C. § 6330**: Debt on which collection is suspended because a Collection Due Process hearing under I.R.C. § 6330 is timely requested, or pending, in connection with a levy to collect the debt; or,
- **Innocent Spouse**: Debt on which collection has been suspended because a request for innocent spouse relief under I.R.C. § 6015 has been made.<sup>12</sup>

### D. Discretionary Exclusions from Certification

Section 7345 provides the IRS discretion to exclude categories of tax debt from certification, even if the debt meets the criteria in I.R.M. 5.1.12.27.2, Seriously Delinquent Tax Debt.<sup>13</sup> The following categories of tax debt will be excluded from the determination of seriously delinquent tax debt of the IRS:

- **Currently Not Collectable**: Debt that is currently not collectible (“CNC”) due to hardship (unreversed TC 530 cc 24 - 32);
- **Identity Theft**: Debt that resulted from identity theft (unreversed TC 971 AC 501, 505, 506, 522, 523, and 525),

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<sup>12</sup> I.R.M. 5.1.12.27.3 (12-20-2017) (Statutory Exclusions from Certification).

<sup>13</sup> I.R.M. 5.1.12.27.4 (12-20-2017) (Discretionary Exclusions from Certification).

- **Bankruptcy**: Debt of a taxpayer in bankruptcy;
- **Deceased Taxpayer**: Debt of a deceased taxpayer;
- **Pending Offer in Compromise**: Debt that is included in a pending Offer in Compromise (unreversed TC 480);
- **Pending Installment Agreement**: Debt that is included in a pending installment agreement (unreversed TC 971 AC 043);
- **Full Pay**: Debt with a pending adjustment that will full pay the tax period (unreversed TC 470 AC 90); and,
- **Disaster Zone**: Taxpayers in a Disaster Zone (-O or -S Freeze).<sup>14</sup>

**E. Identification of Certified Seriously Delinquent Tax Debt**

The Internal Revenue Manual sets forth the procedure by which a taxpayer's debt is identified as a certified seriously delinquent tax debt.

- Seriously delinquent tax debt will be identified as certified by an unreversed TC 971 AC 641 on each module of a taxpayer's account eligible for certification.<sup>15</sup>
- Each individual identified as certified is systemically sent a certification Notice CP508C displaying each certified module balance.<sup>16</sup>
- On a joint module where both the primary and secondary taxpayers are identified as certified, each individual will have their own TC 971 AC 641.<sup>17</sup>

The IRS provides taxpayer certifications systemically to State Department on a weekly basis.<sup>18</sup>

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<sup>14</sup> *Id.*

<sup>15</sup> I.R.M. 5.1.12.27.6 (12-20-2017) (Identification of Certified Seriously Delinquent Tax Debt).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

The Internal Revenue Manual states that a certified module is decertified when the TC 971 AC 641 is reversed with a TC 972 AC 641.<sup>19</sup> A certified module is reversed when it meets one of the conditions listed in I.R.M. 5.1.12.27.8, Reversal of Certification.<sup>20</sup>

#### **F. Taxpayer Notification**

The IRS is required to notify the taxpayer in writing at the time the certification of seriously delinquent tax debt is made to the State Department. Notice CP508C services this purpose.<sup>21</sup>

If a taxpayer certified as having a seriously delinquent tax debt applies for a passport or a passport renewal, the State Department will hold the application open for 90 days to allow the taxpayer to resolve any certification issues, make full payment of the tax debt, or enter into a satisfactory payment alternative with the IRS before denying an application for a passport or renewal.<sup>22</sup>

#### **G. Judicial Review of Certification**

A taxpayer whose debt was certified to the State Department as a seriously delinquent tax debt can file suit in the Tax Court or a District Court of the United States to have the court determine whether the certification is erroneous or if the IRS failed to reverse the certification when it was required to do so.<sup>23</sup> If the court determines the certification was erroneous or should have been reversed, it can order the certification reversed.<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> I.R.M. 5.1.12.27.7 (12-20-2017) (Taxpayer Notification); *See, also*, Appendix A (copy of Notice CP508C, pp. 1-2 only).

<sup>22</sup> *Id.*

<sup>23</sup> I.R.M. 5.1.12.27.9 (12-20-2017) (Appeals Process and Judicial Review of Certification).

<sup>24</sup> *Id.*



## II. COMMENTS AND RECOMMENDATIONS TO THE IRS PASSPORT PROGRAM

This paper provides the following comments and recommendations with respect to the revocation of denial of a passport in the case of certain unpaid taxes.

### A. IRS Should Enhance the Quality and Clarity of Taxpayer Notification in Notices CP 508C, CP504, CP523, and LT11 and Letters 3172 and 1058

For a Notice of Federal Tax Lien (“NFTL”) and certain Notices of Intent to Levy, and prior to the issuance of the CP508C, the Code now requires “in simple and nontechnical terms . . . the provisions of section 7345 relating to the certification of seriously delinquent tax debts and the denial, revocation, or limitation of passports of individuals with such debts pursuant to section 32101 of the FAST Act.”<sup>25</sup> The language contained in these notices, which has the potential for passports to be revoked or denied, is wholly inadequate to properly educate and advise taxpayers of the parameters of I.R.C. § 7345: a key in how to avoid certification and ways to seek assistance.

Significantly, the passport language is typically tucked in the middle of an already lengthy notice and, generally, reads as follows:<sup>26</sup>

#### **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 a seriously delinquent tax debt. Seriously delinquent tax debt means an unpaid, legally enforceable federal tax debt of an individual totaling more than \$52,000 that has been assessed and for which a Notice of

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<sup>25</sup> I.R.C. §§ 6320(a)(3) and 6331(b)(4)(G).

<sup>26</sup> IRS Notice CP504, Notice of Intent to seize (levy) your property or rights to property (*emphasis added*).

Federal Tax Lien has been filed and all administrative remedies under IRC Section 6320 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 \$52,000 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 the United States. Additional information on passport certification is available at [www.irs.gov/passports](http://www.irs.gov/passports).

The language found in the IRS Notice LT11 and the NFTL contains an additional statement notifying the taxpayer that if he or she does not make alternate arrangements to pay or request a Collection Due Process (“CDP”) hearing by the CDP date for the NFTL or levy, the State Department may be notified that the debt is seriously delinquent. It is important to note that the CDP hearing is for purposes of appealing the NFTL or Notice of Intent to Levy, and not the passport denial or revocation itself.<sup>27</sup>

The language contained in the CP504, CP523, Letter 3172, Letter 1058 and LT11 (the “Notices”) is the only forewarning from the IRS a taxpayer currently receives prior to the receipt of Notice CP508C, which arrives when the tax debt is already certified as being seriously delinquent to the State Department. For those taxpayers who have already received the notices prior to the implementation of the passport program, the only notification that the taxpayer will currently receive is the Notice CP508C itself.

The amount of information contained on any one notice is overwhelming for an average taxpayer and most do not get past the initial language concerning the lien or levy itself. For a taxpayer who fails to read the notice in its entirety, the information concerning the passport program fails to sufficiently educate the taxpayer as to how the program operates, the

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<sup>27</sup> I.R.C. §§ 6320(a)(3)(B) and 6631(d)(4)(C).

potential means by which to avoid certification to the State Department, and potential remedies once certification occurs.

While the passport language contained in the NFTL, Notice CP504, and Letter LT11 notices indicates that the taxpayer can make alternative arrangements to pay, there is no explanation as to what payment arrangements exist and how to enter into those arrangements with the IRS.

Furthermore, the language concerning the CDP hearing set forth in the passport program section of the NFTL and Letter LT11 can easily mislead a taxpayer into believing the CDP hearing is for the passport program as opposed to the lien or proposed levy. Even the use of the term “certification” may be confusing insofar as there is no explanation as to what that means in context of the passport program.

The passport program language also fails to provide a taxpayer with options for obtaining help, other than providing a web address to obtain additional information. It should not be assumed by the IRS that every taxpayer has access to the Internet. A toll-free passport number exists, but that number is not provided until certification actually takes place and is found on Notice CP 504C. This phone number should be made available to taxpayers on any notification concerning the passport program prior to the issuance of the CP 504C. Moreover, the hotline needs to be sufficiently staffed so as to avoid extensive wait times, its representatives need to be trained on State Department policies and collection alternatives, and translators need to be accessible for those taxpayers for whom English is not a first language.

In order to properly advise a taxpayer on the passport program, the taxpayer must know that he or she must take steps to resolve the underlying liability *before* certification to the State Department. The language of the notice needs to explain to the taxpayer in clear, layman’s terms all options which will prevent certification to the State Department. For example, the notice needs to explain that certification will not take place so long as the taxpayer is in a pending installment agreement or pending offer in compromise status. It should be clarified that in the event the CDP hearing is unsuccessful for whatever reason, and the underlying tax liability remains unresolved, that certification may take place.

The notice also needs to contain information on State Department exceptions, such as emergency circumstances or humanitarian reasons, procedurally how one may obtain decertification from the IRS and that expedited decertification is available in certain circumstances. Finally, the notice needs to provide information on the Taxpayer Advocate Service (“TAS”) and under what circumstances TAS may provide assistance to the taxpayer related to the passport program.

The information necessary to properly educate the taxpayer on the passport program would make already lengthy notices daunting and incomprehensible to the average taxpayer. It is the position of the authors that in order to adequately advise taxpayers of all aspects of the passport program, they should be sent a separate, standalone notice limited to the details of the passport program, collection alternatives, and how to obtain assistance prior to certification and the issuance of the CP508C notice. The standalone notice should contain the following information:

- In simple, non-technical language, the applicable provisions of the FAST Act and the potential to have a passport revoked or application denied;
- An explanation of the mandatory and discretionary grounds to avoid certification;
- Acceptable payment options and how to enter into a payment arrangement with the IRS;
- Information on TAS;
- Website address and passport program phone number to call to obtain additional information and assistance;
- An explanation of State Department exceptions such as humanitarian reasons and emergency circumstances;
- An opportunity for the taxpayer to appeal; and,
- A provision that grants the taxpayer sufficient time to take action to avoid certification.

**B. IRS Should Issue a Pre-Certification Notice to Provide Taxpayers With a Meaningful Opportunity to Contest Certification Before It Occurs**

Take for example Taxpayer, who has unpaid individual income taxes for the tax year ended December 31, 2014, in the amount of \$95,000. Taxpayer, believing that he is in an installment agreement, voluntarily begins making payments of \$5,000 per month to the IRS. Unbeknownst to Taxpayer, there is no installment agreement entered with the IRS under I.R.C. § 6159, and Taxpayer eventually receives a Notice CP 508C. Surprised, Taxpayer immediately contacts the IRS but is unable to enter into an installment agreement until 180 days later. Taxpayer's passport is revoked, he must now apply for decertification.

This example illustrates that, had the IRS simply issued a pre-certification notice to the taxpayer (*e.g.*, a stand-alone notice), the taxpayer would have been able to enter into an installment agreement without being certified.

A similar process already exists with respect to a levy. For example, I.R.C. § 6330(a) requires the Secretary to send a written notice to the taxpayer of the amount of unpaid tax and of the taxpayer's right to a I.R.C. § 6330 hearing at least 30 days before the levy has begun. In this case, the IRS may issue a Letter 1058, *Final Notice, Notice of Intent to Levy and Notice of Your Right to a Hearing*; and at that point, the taxpayer has the right to file a request for a Collection Due Process Hearing and ultimately petition Tax Court.<sup>28</sup> The administrative procedures ensure that a taxpayer is given sufficient time to handle his or her tax compliance issue prior to levy.

As it presently stands, a taxpayer's sole remedy is to file a civil action in court and a taxpayer may not go to IRS Appeals. IRS Notice 2018-1 explains, in part:<sup>29</sup>

Generally, the sole remedy for a taxpayer who believes that a certification is erroneous, or that the Commissioner or specified delegate incorrectly failed to reverse a certification because the tax debt is either fully satisfied or ceases to be a seriously

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<sup>28</sup> I.R.C. § 6330.

<sup>29</sup> IRS Notice 2018-1 (IRS Revocation, Limitation, or Denial of Passport in Case of Certain Tax Delinquencies), I.R.B. 2018-3, 299, January 16, 2018.

delinquent tax debt by reason of section 7345(b)(2), is to file a civil action in court under section 7345(e). The taxpayer may not go to IRS Appeals to challenge the certification or the decision by the Commissioner or specified delegate not to reverse a certification. However, the taxpayer may contact the phone number in the Notice CP508C to request reversal of the certification if the taxpayer believes that the certification is erroneous.

Significantly, if the taxpayer in the hypothetical example above applies for a passport or passport renewal, the taxpayer must act quickly because the State Department will hold the taxpayer's application for only **90 days** to allow the taxpayer to resolve any certification issues. The Internal Revenue Manual discusses the 90-day period and provides, in part:

If an individual certified as having a seriously delinquent tax debt applies for a passport or a passport renewal, **the State Department will hold the application of a certified taxpayer open for 90 days to allow the taxpayer to resolve any certification issues**, make full payment of the tax debt or enter into a satisfactory payment alternative with the IRS before denying an application for a passport or renewal.<sup>30</sup>

In this case, the IRS recommends that a taxpayer contact the IRS and resolve the matter within **45 days** so that the IRS has adequate time to notify the State Department.

When a certified taxpayer applies for a passport, the State Department, in general, will provide the applicant with 90 days to resolve their tax delinquency (such as by making full payment, entering into an installment agreement under section 6159, or IRS acceptance of an offer in compromise under section 7122) before denying the application. **If a taxpayer needs their passport to travel within those 90 days, the taxpayer must contact the IRS and resolve the matter within 45 days from the date of application so that the IRS has adequate time to notify the State Department.**

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<sup>30</sup> I.R.M. 5.1.12.27.7 (12-20-2017) (Taxpayer Notification). *Emphasis added.*

*Emphasis added.*<sup>31</sup>

There is little dispute among experienced tax professionals that a mere 45-days is insufficient time to handle a tax collection matter and obtain an adequate case resolution. For example:

- Taxpayer needs time to complete a Form 433-A, gather the necessary substantiating documents to support the information, and fax or mail the information to the IRS;
- Taxpayer needs time to negotiate an installment agreement or offer in compromise; there is often back-and-forth communication requiring more than one telephone call and/or fax transmission;
- If the case has been assigned to an IRS Revenue Officer, contacting the IRS Practitioner Priority Service (the professional support telephone number) will not work; the taxpayer must speak directly with the Revenue Officer, who may be busy working other collection cases, and consequently, the taxpayer is forced to wait in line, until the Revenue Office has time to work the case; and,
- If the IRS Revenue Officer determines that the taxpayer can full pay and denies the installment agreement, the likely outcome is that the taxpayer will lose his passport.

In short, the IRS should issue a pre-certification notice that gives the taxpayer sufficient time to resolve any certification issues, make full payment of the tax debt, or enter into a satisfactory payment alternative with the IRS before denying an application for a passport or renewal. If at that point the case remains unresolved, the IRS can proceed with issuing a Notice CP508C.

**C. The IRS Should Clarify the Definition of the Term “Pending Installment Agreement and “Pending Offer in Compromise” to Including Timely Filed Appeals**

Consider another example, where Taxpayer has unpaid individual income taxes for the tax year ended December 31, 2014, in the

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<sup>31</sup> *Id.*

amount of \$105,000. Taxpayer submits a Form 9465, *Installment Agreement Request*, to the Revenue Officer working the case along with a completed Form 433-A, *Collection Information Statement for Wage Earners and Self-Employed Individuals*. The Revenue Officer determines that Taxpayer can full pay and denies the proposed agreement. Taxpayer asks to speak with the Revenue Officer's manager but is unable to resolve the issue with the field office. Taxpayer timely appeals the rejection of the installment agreement. IRS issues a Notice CP 508C, while the appeal is pending. Taxpayer is only granted appeal rights to the denial of the installment agreement and not the certification.

In this hypothetical example, does the Revenue Officer's rejection of the installment agreement make the installment agreement no longer pending? Section 7122(e) gives the taxpayer the right to appeal the Service's rejection of an installment agreement request. This is known as the Collection Appeals Program. Internal Revenue Manual provides, in part:

Taxpayers may appeal many IRS collection actions. There are various appeal procedures available to them. The two main procedures are Collection Due Process (CDP) and Collection Appeals Program (CAP).<sup>32</sup>

Taxpayers file administrative appeals when they are unable to work out an installment agreement with a Revenue Officer. Yet unfortunately, the wheels continue to turn with respect to revocation of a taxpayer's passport, despite the filing of an administrative appeal. The Internal Revenue Manual further provides, in part:

**Although there is no administrative appeals process for certification of a taxpayer's account,** IRS sends taxpayers Notice CP 508C, Notice of Certification of a Seriously Delinquent Tax Debt. The notice includes an IRS phone number the taxpayers can call to resolve their tax issues.

Note:

Taxpayers who do not agree they owe the tax debt, and are subject to collection action, may have appeal rights as described

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<sup>32</sup> I.R.M. 5.19.8.2.1. (03-16-2018) (Collection Appeal Rights Overview).



in IRM 5.1.9.4, Collection Appeals Program (CAP). **However, notice of certification of a seriously delinquent tax debt by the IRS, or denial of an application for a passport or renewal by the State Department, are not collection actions that entitle CAP rights.**<sup>33</sup>

Ultimately, if the taxpayer prevails on the administrative appeal and is granted an installment agreement, the taxpayer is required to go through the process of seeking reversal of certification. The Internal Revenue Manual provides that the IRS will reverse the certification of a seriously delinquent debt where the debt “ceases to be a seriously delinquent tax debt.”<sup>34</sup> A debt that is being paid in a timely manner under an installment agreement is statutorily excluded from certification.<sup>35</sup>

If a taxpayer files a timely request for a Collection Due Process hearing under I.R.C. § 6330, this is considered a statutory exclusion from certification. Consequently, the taxpayer will not face certification while the CDP hearing is pending. Yet a similar exclusion apparently does not exist for appeals of installment agreements under the Collection Appeals Program. The IRS should remedy this issue.

A similar situation exists with respect to an offer in compromise (“OIC”). The Internal Revenue Manual provides that the IRS has discretion to exclude from certification a debt that is included in a “pending Offer in Compromise (unreversed TC 480).”<sup>36</sup> Yet the Manual is unclear whether a “pending Offer in Compromise” includes the situation where a taxpayer files a timely appeal with respect to the denial of an Offer in Compromise:

1. IRC § 7345 provides the IRS discretion to exclude categories of tax debt from certification, even if the debt meets the criteria in IRM 5.1.12.27.2, Seriously Delinquent Tax Debt. The following categories of tax debt will be excluded from the determination of seriously delinquent tax debt of the IRS:

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<sup>33</sup> I.R.M. 5.1.12.27.9 (12-20-2017) (Appeals Process and Judicial Review of Certification). *Emphasis added.*

<sup>34</sup> I.R.M. 5.1.12.27.8 (12-20-2017) (Reversal of Certification).

<sup>35</sup> I.R.M. 5.1.12.27.3 (12-20-2017) (Statutory Exclusions from Certification).

<sup>36</sup> I.R.M. 5.1.12.27.4.1(f) (12-20-2017) (Discretionary Exclusions from Certification).

Debt that is currently not collectible (CNC) due to hardship (unreversed TC 530 cc 24 - 32),

\* \* \*

e. Debt that is included in a pending Offer in Compromise (unreversed TC 480)<sup>37</sup>

Treas. Reg. § 301.7122-1(g)(1) clearly states that the IRS will not levy if a taxpayer has filed a timely appeal of a rejection of an offer in compromise:

The IRS will not levy against the property or rights to property of a taxpayer who submits an offer to compromise, to collect the liability that is the subject of the offer, during the period the offer is pending, for 30 days immediately following the rejection of the offer, **and for any period when a timely filed appeal from the rejection is being considered by Appeals.**<sup>38</sup>

Consistent with the Treasury Regulation, the IRS should revise the Internal Revenue Manual that a pending Offer in Compromise includes the situation where a taxpayer files a timely appeal of a rejected Offer in Compromise.

**D. Representatives with a Valid Form 2848 are Not Receiving a Copy of Notice CP 508C**

Consider a third example, where Rex has unpaid individual income taxes for the tax year ended December 31, 2011, and December 31, 2012, in the amounts of \$50,000 and \$75,000, respectively. The IRS files a notice of federal tax lien. Rex retains a tax professional who files a Form 2848, Power of Attorney and Declaration of Representative with the IRS and subsequently files a request for audit reconsideration. Four months later, Rex receives a Notice CP 508C while on a business trip in Asia, but the representative never receives a copy. When Rex returns from his trip, he discovers the notice in the mail and contacts his representative, who never received the notice.

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<sup>37</sup> *Id.* *Emphasis added.*

<sup>38</sup> 26 C.F.R. § 301.7122-1(g)(1) (emphasis added).

The Internal Revenue Service routinely sends copies of notices and communications to a taxpayer's representative, once a valid Form 2848 is on file. Yet for unknown reasons, representatives are not receiving copies of Notices CP 508C when they are sent to taxpayers. Taxpayers must be informed of their rights and this means their representatives must receive all notices to adequately advise their clients. The IRS should remedy this glitch in the administrative system; or cease the issuance of Notice CP508C until the issue is resolved.

**E. IRS Should Grant a Collection Hold Where A Representative Contacts the IRS and Requests Additional Time to Propose a Collection Alternative**

Now consider a situation where Rick has a balance due of \$75,000 on 2012 Form 1040. Rick's representative telephones the IRS Practitioner Priority Service and states that Rick can full pay the balance due but needs time to borrow funds from a family friend. The IRS representative grants a 120 day hold on any collection action (*e.g.*, levy) but will not stop the issuance of Form CP508C in the upcoming weeks.

It is routine practice for representatives to contact the IRS Practitioner Priority Service (a professional support line) and request a temporary hold on collection while the representative works with the taxpayer to propose an alternative to collection action such as an installment agreement, offer in compromise, full pay, or currently not collectable. The IRS generally will grant a collection hold of up to 120 days. Yet, there is no provision in the Internal Revenue Manual for the Practitioner Priority Service representative to also place a hold on the issuance of Notice CP508C.

The Internal Revenue Manual should be updated to include, as one of the discretionary exclusions from certification, the situation where a taxpayer requests a one-time collection hold on the account of up to 120 days.<sup>39</sup>

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<sup>39</sup> I.R.M. 5.1.12.27.4 (12-20-2017) (Discretionary Exclusions from Certification).

**F. IRS Should Implement a Discretionary First-Time Certification Waiver Where a Taxpayer, with No Prior Compliance Issues, Proposes a Collection Alternative**

Now, consider for example Mary, who has unpaid taxes for the tax year ended December 31, 2011, in the amount of \$150,000 resulting from an IRS civil examination, where Mary failed to receive proper representation. Mary has an overall excellent compliance history with the IRS (*e.g.*, no previously assessed penalties for late-payment of tax or late-filing of returns). Given that this is Mary's first incident of noncompliant behavior, Mary should be given the option of contacting the IRS and proposing a collection alternative without the fear of losing her passport.

The IRS should implement a first-time administrative waiver program to allow a taxpayer to obtain a waiver from certification where the taxpayer is a first-time noncompliant taxpayer. Essentially, a taxpayer should be able to file a non-certification request with the IRS that excludes a tax debt from certification. Mechanically, this would occur by a taxpayer's representative contacting the Practitioner Priority Service (a professional support line) and be given up to a 180-day grace period to stop collection action.

It makes no business sense to remove a first-time offender's passport. This class of taxpayers likely wants to take steps to promptly resolve their tax compliance issues, and the IRS should give recognition to their excellent compliance history with the IRS.

From reading the Internal Revenue Manual, it is unclear whether there is such a mechanism for relief. This should be added to the list of discretionary exclusions from certification under I.R.M. 5.1.12.27.4 (12-20-2017).

**G. The IRS Should Include Pending Currently Not Collectible Requests and Collection Due Process Equivalency Hearings Under Its Discretionary Exclusions from Certification.**

Next, consider Sarah who has a total tax liability of \$75,000 of which \$20,000 is attributable to her 2017 Form 1040 and \$55,000 is attributable to her 2016 Form 1040. Sarah received an IRS Notice LT11, *Notice of Intent to Levy and Notice of Your Right to a Hearing*, for the 2017

liability which gives her CDP rights. She had already received the LT11 Notice for the 2016 liability and her opportunity to timely file a CDP request for the 2016 year has expired. Sarah exercises her right to a CDP Hearing for the 2017 liability and requests an equivalency hearing (“EH”) for the 2016 liability at the same time. Sarah requests a collection alternative of CNC status because she does not have sufficient income over allowable expenses or equity in assets with which to currently pay the liability. While Sarah is awaiting Appeals Officer assignment, the IRS sends a Notice CP508C certifying the 2016 liability to the State Department. The 2017 liability is not included because of the timely filed CDP request. The IRS will not reverse certification with respect to the 2016 liability even though Sarah has requested an Appeals hearing for the liability based on CNC status.

While pending CDP hearings relative to lien or levy filings are considered an exclusion to certification, the Internal Revenue Manual carves out an exception for an EH, denying exclusion treatment.<sup>40</sup> In the example above, a portion of Sarah’s liability is subject to a timely CDP request but the other portion (the portion subject to certification) is not. Under the current IRS guidelines, the IRS is permitted to bifurcate the total tax liability for purposes of the passport program, even though Sarah is actively trying to resolve the total amount due.<sup>41</sup>

Certification of Sarah’s tax debt frustrates the purpose of the passport program, which is to encourage taxpayer compliance. Sarah is actively and in good faith trying to resolve her liability with the IRS. While the State Department will allow a taxpayer 90 days to resolve the matter with the IRS, Sarah’s case will not be assigned to an Appeals Officer within that time frame.<sup>42</sup> Even if Sarah is able to get her CNC status approved within the allotted time, she still must wait for decertification before her passport is restored or application approved. Not only is this a significant burden upon Sarah, but it also creates additional, unnecessary work upon the IRS and the State Department.

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<sup>40</sup> I.R.M. 5.1.12.27.3.1(c) (12-20-27) (Statutory Exclusions From Certification).

<sup>41</sup> It is important to note that the IRS requires the taxpayer to include all balances due in any collection alternative, such as an offer in compromise, installment agreement or currently not collectable status, and does not similarly allow the taxpayer to bifurcate by period/year.

<sup>42</sup> I.R.M. 5.1.12.27.7.6 (12-20-2017) (Taxpayer Notification).

It would make far more sense for the IRS to place a stay on certification in all situations where the taxpayer is proactively trying to achieve a collection alternative, such as an EH, to avoid the unnecessary expenditure of time and resources on certification and reversal should the taxpayer be successful.

Furthermore, the collection alternative Sarah was seeking is CNC status. The IRS has identified a debt that is CNC due to hardship as appropriate for discretionary exclusion from certification.<sup>43</sup> Unlike the exclusions for debt that is included in a pending installment agreement or debt that is included in a pending offer in compromise, there is no similar “pending” component to CNC status.<sup>44</sup> Obtaining IRS approval of a CNC request is not a swift process. Typically, the IRS requires the taxpayer to submit a financial statement, either an IRS Form 433-A, *Collection Information Statement For Wage Earners and Self-Employed Individuals*, or an IRS Form 433-F, *Collection Information Statement*.<sup>45</sup> Often, the IRS requires the taxpayer to submit substantiating documentation to support the income and expenses reported on those forms. The IRS is required to conduct compliance checks and satisfy a variety of prerequisites before granting CNC status.<sup>46</sup>

Obtaining CNC status is a time intensive and lengthy process during which the IRS may certify a seriously delinquent tax debt all because the IRS has not excluded pending CNC requests from certification. Again, in this instance, certification is counterproductive for a multitude of reasons; mainly, it frustrates the taxpayer’s efforts to resolve his or her issues with the IRS, and it is an unnecessary expenditure of IRS resources should the CNC status be granted. This issue is easily remedied through the addition of pending CNC status to the list of discretionary exclusions from certification in the Internal Revenue Manual.

## **H. The IRS Should Reverse Certification Where the IRS Grants Administrative Relief Under the First Time Abatement Policy**

Continuing with these examples, consider Mark, who has a tax liability of \$50,000, of which \$10,000 is attributable to a late-filing penalty

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<sup>43</sup> I.R.M. 5.1.12.27.4.1(a) (12-20-2017) (Discretionary Exclusions From Certification).

<sup>44</sup> I.R.M. 5.1.12.27.4.1(a), (e) and (f) (12-20-27) (Discretionary Exclusions from Certification).

<sup>45</sup> I.R.M. 5.16.1.2.2 (09-18-2018) (Currently Not Collectible Procedures).

<sup>46</sup> See, generally, I.R.M. 5.16.1.2 (09-18-2018) (Currently Not Collectible Procedures).

for his 2017 Form 1040. Mark files a Form 843, Claim for Refund and Request for Abatement, with respect late-payment penalty, and the IRS grants relief because Mark qualifies for the First Time Abatement criteria in I.R.M. 20.1.1.3.3.2.1. Under this procedure the IRS may provide administrative relief from a penalty that would otherwise be applicable under its First Time Penalty Abatement policy. A taxpayer qualifies under this policy if the following three conditions are satisfied: (1) taxpayer did not previously have to file a return or taxpayer has no penalties for the three tax years prior to the tax year in which taxpayer received a penalty; (2) taxpayer filed all currently required returns or filed an extension of time to file; and (3) taxpayer has paid, or arranged to pay, any tax due.<sup>47</sup>

The IRS First Time Penalty Abatement policy is a popular program amongst tax professionals because it provides a relatively straightforward procedure to obtain penalty abatement for taxpayers with an excellent compliance history. The program encourages taxpayers to come forward and resolve their tax compliance issue.

Thus, as to Mark, his tax liability could be reduced to \$40,000. However, while the Form 843 is pending, the IRS sends a Notice CP 508C notifying Mark of certification of a seriously delinquent tax debt. This is troublesome because, even though Mark meets the FTA criteria and the IRS granted relief, the IRS will not reverse certification. To the contrary, the IRS is currently unwilling to consider or even recognize the existence of the policy when it comes to passport revocation, as explained below.

The Internal Revenue Manual states that the IRS has discretion to request a decertification for “other reasons”. The example given is where there is an adjustment to the account that reduces the original certification amount below the threshold for certification. The Internal Revenue Manual provides, in part:

4. The IRS has the discretion to request a decertification for other reasons. The IRS will decertify a previously certified tax debt that ceases to be seriously delinquent tax debt when a discretionary exclusion is met. See IRM 5.1.12.27.4,

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<sup>47</sup> IRS website (Penalty Relief Due to First Time Penalty Abatement or Other Administrative Waiver); and I.R.M. 20.1.1.3.3.2.1 (11-21-2017) (First Time Abate (FTA)).

Discretionary Exclusions from Certification. Examples of discretionary reversal include:

- a. A certified taxpayer who later files bankruptcy (unreversed TC 520 cc 60-67, 81, 83-89).
- b. A certified taxpayer entering a Combat Zone.
- c. A certified taxpayer who is later determined to be currently not collectible due to hardship (unreversed TC 530 cc 24-32).
- d. The Department of State requests the IRS to decertify.
- e. An adjustment to the account that reduces the original certification amount below the threshold for certification in IRM 5.1.12.27.2. The original return has been filed and processed, or the adjustment has posted.<sup>48</sup>

The Internal Revenue Manual provides an example of the discretionary exclusion under 4(e), where a taxpayer reduces a civil penalty based upon reasonable cause. In that case, the Manual provides that the taxpayer is eligible for decertification because the liability is reduced below the threshold for certification. See the example, below.<sup>49</sup>

IRS assesses taxpayer's liability of \$54,000, of which \$9,000 is attributable to a penalty. The taxpayer's seriously delinquent tax debt is certified. The taxpayer requests penalty abatement on the basis of reasonable cause. IRS finds the taxpayer had reasonable cause and abates the penalty, lowering the taxpayer's total liability to \$45,000. Since the liability is reduced below the threshold for certification in IRM 5.1.12.27.2, the taxpayer is eligible for decertification.

Yet the Internal Revenue Manual takes a hardline position for taxpayers who have obtained relief under the IRS First Time Abatement policy and refuses to reverse certification. The Manual provides:

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<sup>48</sup> I.R.M. 5.1.12.27.8.4 (12-20-2017) (Reversal of Certification). *Emphasis added.*

<sup>49</sup> I.R.M. 5.1.12.27.8.4(e) (12-20-2017) (Reversal of Certification).



Not all penalty abatements will result in decertification. For example, a penalty abatement of a certified module due to an administrative waiver under the First Time Abate criteria in IRM 20.1.1.3.3.2.1 will not result in decertification, even if the adjusted total liability is less than the threshold amount indexed for inflation:<sup>50</sup>

Significantly, there is no monetary distinction between a taxpayer who obtains relief based upon reasonable cause and a taxpayer who obtains relief based upon their qualification for an administrative waiver. In both cases, the taxpayer does not owe the penalty and the IRS adjusts the account accordingly and grants relief from the penalties. Yet the IRS draws a distinction where none exists with respect to the IRS passport program.

The IRS' position is at odds with encouraging a taxpayer to handle his tax compliance issue and become compliant. In the example above, a key motivating factor for Mark in filing the penalty abatement request is not only to resolve his tax issue but also to secure his passport. Mark's goal is frustrated by current IRS policy. The IRS should amend the Internal Revenue Manual appropriately.

**I. The Tax Court Should Amend Form 2, Petition to Add an Appropriate Box to Check to show that the Petition is Disputing Notice CP 508C**

Here, for example, Jack receives a Notice CP 508C and files a petition with the United States Tax Court using Form 2 provided on the Tax Court website. Unclear which box to check, Jack checks all the boxes on Line 1 of the Petition. This causes confusion for both the Tax Court and respondent as to what administrative action Jack is petitioning.

The Tax Court has jurisdiction to determine whether certification was erroneous or whether the Commissioner has failed to reverse the certification. Section 7345(e)(1) provides judicial review of certifications, and states, in part:

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<sup>50</sup> *Id.*

*7345(e)(1) In General.* After the Commissioner notifies an individual under subsection (d), the taxpayer may bring a civil action against the United States in a district court of the United States, or against the Commissioner in the Tax Court, to determine whether the certification was erroneous or whether the Commissioner has failed to reverse the certification. For purposes of the preceding sentence, the court first acquiring jurisdiction over such an action shall have sole jurisdiction.

A taxpayer files a certification action under I.R.C. § 7345(e) by filing a petition with the Tax Court. T.C. Rule 351. Form 2, as it currently stands, contains several boxes to make it easy for a taxpayer to inform the Tax Court the basis of the action (e.g., Notice of Deficiency). However, there is no box for certification action under section 7345(e).

To assist taxpayers in filing a proper petition, it would be helpful if the Tax Court revises Form 2 to include a checkbox on Line 1 for a I.R.C. § 7345(e) passport certification action. There is sufficient room on the notice for an additional checkbox.

Alternatively, it would be helpful if the Tax Court modifies the instructions to Form 2 to advise taxpayers to clearly state on Lines 5 that they are filing a “Petition for Certification or Failure to Reverse Certification Action Under Code Section 7345(e)” and to attach a copy of the Notice CP 508C, the notification of certification under I.R.C. § 7345(d). At this point, there is confusion as to whether taxpayers may use Form 2 with respect to certification actions under I.R.C. § 7345(e).

### **III. CONCLUSION**

This paper has attempted to provide a framework for discussion purposes with respect to the IRS’ passport program. The current state of the law creates uncertainty with respect to these matters, and taxpayers need specific and constructive guidance in this area.



Department of the Treasury  
 Internal Revenue Service  
 Attn: Passport  
 P.O. Box 8208  
 Philadelphia, PA 19101-8208

<b>Notice</b>	<b>CP508C</b>
<b>Notice date</b>	January 30, 2018
<b>Taxpayer ID number</b>	NNN-NN-NNNN
<b>To contact us</b>	Phone: 855-xxx-xxxx International: +1-267-xxx-xxxx

Page 1 of 7

TAXPAYER NAME  
 1234 N HARRIS ST  
 HARVARD, TX 12345

**Notice of certification of your seriously delinquent federal tax debt to the State Department**

**Amount due: \$97,978.55**

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 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.

We have certified to the State Department that your tax debt is seriously delinquent. We show that you still owe \$97,978.55. This amount includes penalty and interest computed to 30 days from the date of this notice.

This notice only includes the portion of your tax debt that has been certified to the State Department as seriously delinquent, as defined below. You may have additional tax debt that is not included in this notice.

**Billing Summary**

Amount of seriously delinquent tax debt owed	\$85,099.95
Additional penalty charges	5,000.00
Additional interest charges	7,878.55
<b>Amount due by March 1, 2018</b>	<b>\$97,978.55</b>

**What you need to know**

Seriously delinquent tax debt is tax debt (including penalties and interest) totaling more than \$51,000\* for which:

- We have filed a Notice of Federal Tax Lien and your administrative rights under Internal Revenue Code (IRC) Section 6320 have been exhausted or lapsed, OR
- We have, at any time, issued a levy to collect this debt.

\* The \$51,000 threshold is adjusted yearly for inflation.

If you apply for a passport or passport renewal, the State Department will deny your application and will not issue a passport to you or renew your current passport.



If you currently have a valid passport, the State Department may revoke your passport or limit your ability to travel outside the United States.

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## What you need to do

### If you agree with the balance due

To prevent the State Department from denying, revoking, or limiting your passport, you must:

- Pay the full amount you owe, as shown above.
- Make alternate payment arrangements, such as an installment agreement, that allows you to pay off your debt over time, or an offer in compromise to settle the debt. Visit [www.irs.gov/payments](http://www.irs.gov/payments) for more payment options.

Make your check or money order payable to the "United States Treasury." Write the taxpayer ID numbers (TINs) listed in the "Your billing details" section of this notice on your payment. Return the last page of this notice with your payment.

### If you disagree with the balance due

If you've already paid the tax debt listed above, please send us proof of that payment.

If you don't agree that you owe the tax debt listed above, or want to contest the certification for another reason, you can call us at the phone numbers listed on the first page of this notice. You can also bring a civil action in a district court of the United States or the United States Tax Court to have a court determine if the certification was erroneous or if the IRS has failed to reverse the certification as required by IRC Section 7345(c). You are not required to contact us or otherwise exhaust administrative remedies before filing a civil action.

### If you have a power of attorney (POA)

You will need to contact your POA directly since the information in this notice may not be covered under the POA filed.

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## Your billing details

TIN	Tax period ending	Form number	Amount you owed	Additional interest	Additional penalty	Total
NNN-NN-NNNN	12/31/2013	1040	\$17,258.00	\$2,020.16	\$1,150.00	\$20,428.16
NNN-NN-NNNN	12/31/2015	1040	\$47,842.00	\$4,858.39	\$3,350.00	\$56,050.39
NN-NNNNNNNN	03/31/2015	941	\$20,000.00	\$1,000.00	\$500.00	\$21,500.00