December 27, 2005

Hon. Mark W. Everson
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments on Proposed Regulations Relating to Changes to Collection Due Process Procedures Under Sections 6230 and 6330

Dear Commissioner Everson:

Enclosed are comments on proposed regulations under Internal Revenue Code Sections 6320 and 6330 relating to changes to Collection Due Process Procedures. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

[Signature]

Dennis B. Drapkin
Chair, Section of Taxation

Enclosure

cc: Eric Solomon, Acting Deputy Assistant Secretary of the Treasury (Tax Policy)
Donald L. Korb, Chief Counsel, IRS
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COMMENTS ON PROPOSED REGULATIONS RELATING TO CHANGES TO
COLLECTION DUE PROCESS PROCEDURES

These comments ("Comments") are submitted on behalf of the American Bar Association
Section of Taxation and have not been approved by the House of Delegates or Board of
Governors of the American Bar Association. Accordingly, they should not be construed as
representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Diana Leyden of the
Section of Taxation’s Low Income Taxpayers Committee. Substantive contributions were made
by Leslie Book, Danshara Cords and Joseph Schimmel of the Low Income Taxpayers
Committee, and by Mark Allison, Peter Lowy, Mary McNulty and Josh Odintz, of the Section of
Taxation’s Court Procedure and Practice Committee. The Comments were reviewed by
Elizabeth J. Atkinson, Chair of the Low Income Taxpayers Committee, Thomas J. Callahan,
Chair of the Section of Taxation’s Committee on Administrative Practice and Mary McNulty,
Chair of the Court Procedure and Practice Committee. The comments were further reviewed by
Robert E. Liles, II, Vice-Chair (Regulations) of the Section’s Committee on Government
Submissions, Charles Pulaski, Council Director for the Court Procedure and Practice Committee,
and Sharon Stern Gerstman, Council Director for the Low Income Taxpayers Committee.

Although the members of the Section of Taxation who participated in preparing these comments
have clients who would be affected by the federal tax principles addressed by these comments or
have advised clients on the application of such principles, no such member (or the firm or
organization to which such member belongs) has been engaged by a client to make a government
submission with respect to, or otherwise to influence the development or outcome of, the specific
subject matter of these comments.

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Date: December 27, 2005
EXECUTIVE SUMMARY

Collection Due Process (“CDP”) hearings are relatively new procedures enacted into law as part of the Internal Revenue Service Restructuring and Reform Act of 1998 (P.L. 105-206) (the “’98 Act”). Allowing taxpayers the opportunity to propose alternatives to federal tax liens and proposed federal levies is an important right that we believe has a positive impact on tax administration.¹

However, as the preamble to the proposed regulations indicates, certain taxpayers have used the CDP process to advance frivolous arguments, harass Appeals Division employees and delay collection. While we understand the need to minimize abuse of the CDP process, we are concerned that the proposed regulations may not adequately protect the rights of taxpayers for whom CDP hearings are an important opportunity to open a dialogue with the IRS about more appropriate means to collect tax. Further, we are concerned that portions of the proposed regulations contravene Congressional intent and decisions of the United States Tax Court.

We recommend that the IRS give further consideration to the portions of the regulations discussed in more detail below. Specifically, we recommend that the regulations:

1. Clarify the method for requesting CDP hearings, including by changing Form 12153 and increasing its accessibility to taxpayers (including ESL taxpayers);

2. Permit taxpayers to perfect incomplete CDP hearing requests and to amend complete CDP hearing requests, to assure that all reasonable alternatives to collection are considered;

3. Balance the IRS’s desire to avoid frivolous hearings with the taxpayers’ right to receive a face-to-face conference;

4. Clarify those situations that may lead to Appeals office bias, including ex parte communications;

5. Clarify the scope of the administrative record for judicial review;

¹ We note that taxpayers may request innocent spouse relief and, in certain limited circumstances, a recalculation of part or all of a tax liability (doubt as to liability). IRC §6330(c)(2)(A). Because most good faith CDP hearing requests relate to alternatives to enforced collection and because we believe that the proposed regulations’ main focus relates to consideration of those alternatives, our comments are primarily addressed to those aspects of the CDP hearings.

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6. Conform the scope of judicial review with existing United States Tax Court decisions and Chief Counsel Advice; and

7. Address due process issues arising in connection with joint tax liabilities.

We have included proposed language reflecting many of these recommendations.

**Requesting a CDP Hearing**

Currently, a taxpayer generally requests a CDP hearing by completing Form 12153. Prop. Reg. §301.6320-1, A-C1(ii) and §301.6330-1, A-C1(ii) appear to incorporate the current requirements of this form. We believe that requiring the taxpayer to request a CDP hearing in writing and clearly explain his or her proposed alternative is a good step. However, a majority of taxpayers who file Form 12153 are not represented at the time a CDP hearing is requested. Most of these taxpayers are making a legitimate attempt to resolve their unpaid tax liabilities and not to delay collections or advance frivolous positions. Therefore, for reasons listed below, we recommend that:

- Form 12153 be revised to
  - (a) better assist taxpayers to articulate the proposed alternatives to collection,
  - (b) ask taxpayers whether or not they want a face-to-face conference, and
  - (c) ask taxpayers to choose an Appeals office closest to their home or workplace;
- taxpayers who do not have access to the internet or a phone be permitted to pick up a copy of Form 12153 at a local IRS office or other local government office;
- Form 12153 be high on the list of forms to be translated into other languages, especially Spanish; and
- the time frame for perfecting an incomplete request for a CDP hearing be clearly established and well publicized.

**Changes to Form 12153**

Current Form 12153 does not advise taxpayers sufficiently regarding the opportunity to request a face-to-face conference, to choose a location for an Appeals conference, or to request the form in a different language. Further, it does not inform taxpayers of possible collection alternatives. We recommend that Publication 594 or a similar concise, comprehensive, summary of potential collection alternatives accompany the Notice of Federal Tax Lien or Notice of Intent to Levy, and that a list of the same potential collection alternatives be included and highlighted in the instructions to Form 12153. Further, it would be helpful if Form 12153 allowed the taxpayer to request a face-to-face hearing, both in the case of a CDP hearing and an equivalent
hearing, and prompted the taxpayer to indicate the location of the Appeals office the taxpayer prefers to handle the CDP hearing, either by address or by proximity to the taxpayer’s home or workplace.

We are aware that the Appeals Division has started to create Appeals offices at the various campuses. Such offices generally are unable to accommodate face-to-face meetings. To avoid misunderstanding and achieve the efficiencies described in the preamble to the proposed regulations, we recommend that information about the locations of the Appeals offices be included in the instructions to Form 12153, to enable taxpayers to communicate their first and second choices of locations for an appeals conference. In many urban areas, a CDP hearing location near the taxpayer’s workplace or school may be most convenient. If the taxpayer is represented, both the taxpayer and the IRS may be better served by allowing the taxpayer to request a CDP hearing location nearer to the place of business of the representative. See Appendix 1, for suggested language changes to Prop. Reg. §301.6320-1, A-D7 and §301.6330-1, A-D7.

Access to Form 12153

As proposed, the regulations direct a taxpayer to obtain a copy of Form 12153 from the office that issued the CDP notice, by downloading a copy from the IRS web site, or by phoning a toll free number. Although the CDP notice generally includes a copy of Form 12153, in our experience many unrepresented taxpayers lose or misplace Form 12153, lack access to the internet, feel uncomfortable asking for documents by phone, and are unable to locate the office that issued the CDP notice. Because we believe the CDP hearing right is an important taxpayer right, we recommend that the form be made available at local IRS taxpayer assistance centers, local Taxpayer Advocate Offices and other local government offices.

English as a Second Language Taxpayers

Increasingly, Low Income Taxpayer Clinics have been established to educate English as a Second Language (ESL) taxpayers. Accordingly, more and more ESL taxpayers are aware of their rights, including their right to request a CDP hearing. Therefore, we urge the IRS to prioritize the translation of Form 12153 into other languages, especially Spanish, and to provide internet and phone services that provide information to ESL taxpayers about the form.

Perfecting an Incomplete CDP Hearing Request

We applaud the proposed regulations for allowing taxpayers to perfect an incomplete CDP hearing request. Many taxpayers, especially low income taxpayers, do not have professional help to request a CDP hearing and often do not fully provide the information requested on the form. Also, often a professional is asked to assist in preparing the request with only a day or two left to submit the request. Therefore, we support a process that allows a taxpayer to “amend” a request to perfect it. This would be similar to the United States Tax Court.
practice in accepting timely-filed documents that are not in compliance with Tax Court Rules but were intended to constitute petitions. See O’Neal v. Commissioner, 66 TC 105 (1976); Tax Court Rule 41.

However, as currently drafted the proposed regulations do not contain parameters for the time frame for perfecting an incomplete request. We believe it would improve tax administration if a specific time period was stated to allow a taxpayer to perfect, as a matter of right, an incomplete request, and we recommend that the period be prominently displayed in any instructions to the form. In addition, it would be helpful for the Appeals Division to be given discretion to allow amendments to an incomplete CDP hearing request after the period for perfecting it has expired, if the taxpayer can demonstrate that such amendment furthers an alternative to collection. Alternatively, where a taxpayer fails to perfect a CDP hearing request until after the specified period, we recommend that the perfected request be treated as a request for an equivalent hearing.

We also suggest that the IRS adopt a process similar to the Tax Court procedure followed when a taxpayer submits an imperfect Tax Court petition. Specifically, we suggest that the IRS be required to contact the taxpayer by letter, advising the taxpayer (1) that an incomplete request was received, (2) of the information required to perfect the request, and (3) of the deadline for perfecting the request.

The proposed regulations’ changes to Treas. Reg. §301.6320-1, A-C7 and §301.6330-1, A-C7 do not address perfected requests and could be interpreted to imply that a perfected request will not be considered a timely request for a CDP hearing. We believe it would be helpful for this answer to be clarified to allow for a perfected request received after the 30-day period to count as a timely request. See Appendix 1 for proposed language changes to Treas. Reg. §301.6320-1, A-C7 and §301.6330-1, A-C7.

Amending CDP Hearing Requests

The Preamble to the proposed regulations states that in many cases significant time is spent identifying nonfrivolous issues. If a CDP hearing request appears to raise frivolous issues (particularly if nonfrivolous issues are also raised), it would be helpful for the IRS’s response letter to provide a clear and concise list of available collection alternatives (and the information or evidence generally required for each collection alternative) and frivolous issues that will not be considered, and to invite the taxpayer to narrow the issues prior to the CDP conference. For this reason, we recommend that the regulations also authorize taxpayers to amend CDP hearing requests to withdraw collection alternatives or other issues. See Appendix 1 for proposed language changes to Treas. Reg. §301.6320-1, A-C1 and §301.6330-1, A-C1. In all events, we recommend that the taxpayer be permitted to supplement a CDP request prior to the conference with the Appeals Division.
Face-to-face Conferences

Discretion to Grant a Face-to-Face Conference

We agree that too many taxpayers have used the CDP hearing procedures to advance frivolous arguments. We further agree that the face-to-face conferences in such cases do not serve the important purpose of assisting a taxpayer to communicate alternatives to collection. The difficulty, however, is in distinguishing between taxpayers who purposefully assert frivolous positions and those who are unable to clearly articulate collection alternatives. However, according to the preamble, roughly one in twenty CDP and equivalent hearing cases involves taxpayers raising only frivolous issues. Therefore, we recommend that any changes in the regulations be carefully drawn so that a taxpayer who could raise nonfrivolous issues or collection alternatives will not be precluded from having a face-to-face conference.

To reduce the risk that taxpayers who could raise nonfrivolous issues are inadvertently classified as advancing solely frivolous positions and denied a face-to-face conference, we suggest that the IRS continue to publish on its website and to begin including in the instructions to Form 12153 the positions it deems frivolous.

Under Prop. Reg. §301.6320-1, A-D7 and §301.6330-1, A-D7, a taxpayer who presents relevant, non-frivolous reasons for disagreement with the proposed levy “will ordinarily be offered an opportunity for a face-to-face conference…” (emphasis added). This language raises concern because it exceeds the purpose of the regulations to address taxpayer advancement of frivolous arguments at CDP hearings. Rather, we recommend that a face-to-face meeting be guaranteed for a taxpayer who raises any relevant, non-frivolous argument. Further, we believe it would be helpful for this provision to be coordinated with any regulation permitting taxpayers to perfect or otherwise amend or supplement CDP hearing requests.

In addition, as each exercise of discretion provides an additional basis for appeal, it is in the interest of the IRS to limit discretion when possible. If the regulations are not amended to guarantee face-to-face meetings in those circumstances, we recommend that the regulations address (and include examples of) circumstances in which an Appeals officer could deny a face-to-face meeting.

For taxpayers who are genuinely trying to advance alternatives to collection, we believe that a face-to-face conference is an important opportunity. Less articulate or low-literacy taxpayers may need an Appeals officer to assist them to request appropriate alternatives to collection (including requests for spousal relief or liability issues). We are concerned that the following language in Prop. Reg. §301.6320-1, A-D8 and §301.6330-1, A-D8 may inadvertently deny deserving taxpayers the right to a face-to-face conference:
“A face-to-face conference concerning a collection alternative, such as an installment agreement or an offer to compromise liability, will not be granted unless the alternative would be available to other taxpayers in similar circumstances.”

The positive tax administration goal achieved by a face-to-face conference is to determine whether the requesting taxpayer should be granted alternative collection and it is very difficult in many circumstances to determine this without a face-to-face meeting. For example, a taxpayer who has submitted a Form 433-A that shows some ability to pay may in fact have other extraordinary expenses or needs that are not apparent on the form and can only be adequately articulated in a meeting. Further, a taxpayer may not have filed a return for a particular tax year because no return was required, or may not have made estimated tax payments for similar reasons. Such a taxpayer may need to discuss expanding collection alternatives. In the experience of some of our members, the appropriateness of a collection alternative can only be determined if the taxpayer and his or her representative have the opportunity for meaningful dialogue with the Appeals officer. See Appendix 1 for proposed language changes to Prop. Reg. §301.6320-1, A-D8 and §301.6330-1, A-D8.

Additionally, under Prop. Reg. §301.6320-1, A-D8 and §301.6330-1, A-D8, with respect to taxpayers who raise legitimate arguments but have had prior experience with Appeals officers or employees at the closest location, Appeals will offer face-to-face meetings at an alternate location if, in its discretion, it would have offered a face-to-face meeting at the closest location (under A-D7). This provision further emphasizes the need to clarify the “ordinary” provision of A-D7. We recommend that a taxpayer who qualifies under §301.6320-1 A-D7 and §301.6330-1 A-D7 for a face-to-face meeting not be penalized for prior consideration by the same Appeals office on other issues.

**Locations of Face-to-Face Conference**

As proposed, the regulations limit face-to-face conferences to Appeals offices closest to the taxpayer’s residence or in the case of a business, closest to the principal place of business. Given the competing demands on many taxpayers, the Appeals office nearest to the taxpayer’s workplace or school may be most convenient. For represented taxpayers, the Appeals office closest to the professional’s place of business may be most convenient. We recommend that these also be included as options for the face-to-face meeting. See Appendix 1 for proposed language changes to Prop. Reg. §301.6320-1, A-D7 and §301.6330-1, A-D7.

**Potential Appeals Officer Bias**

In clarifying when an Appeals office or officer has had prior involvement, Prop. Reg. §301.6320-1 A-D4 and §301.6330-1 A-D4 would provide that such involvement exists “only when the taxpayer, the tax liability and the tax period at issue in the CDP hearing” (emphasis added) were previously at issue. The preceding sentence refers to “the tax and tax period.” We
recommend that this list not be treated as exclusive, as there are other situations where an Appeals officer might have prior involvement, e.g., where an Appeals officer has participated in examinations-level mediation.

We believe that the addition of the word “liability” raises improperly a distinction between the issues of liability and collectibility, and we therefore recommend that the word “liability” be omitted.

The proposed regulations do not specifically address ex parte communications between Appeals employees and other IRS personnel. Ex parte communications are prohibited under Rev. Proc. 2000-43, 2000-2 CB 404, which implemented section 1001(a)(4) of the ’98 Act. The Tax Court has determined that ex parte communications may violate collections due process. See Drake v. Commissioner, 125 T.C. No. 9 (October 12, 2005). We recommend that the regulations specifically address the treatment of ex parte communications.

Administrative Record

Prop. Reg. §301.6230-1, A-F6 and §301.6330-1, A-F6 would limit the record for any court review to the “case file” and any other documents or materials relied upon by the Appeals officer or employee in making the determination.

The proposed regulations provide two separate definitions of “case file.” Prop. Reg. §301.6230-1, A-D7 and §301.6330-1, A-D7 state that the case file “includes the taxpayer’s request for a CDP hearing, any other written communications from the taxpayer or the taxpayer’s authorized representative, and any notes made by Appeals officers or employees of any oral communications with the taxpayer or the taxpayer’s authorized representative.” Alternatively, Prop. Reg. §301.6230-1, A-F6 and §301.6330-1, A-F6 state that the case file includes (apparently without limitation) “written communications and information from the taxpayer or the taxpayer’s authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer’s authorized representative and memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under Section 6330(c)(3)” In addition, Prop. Reg. §301.6230-1(d)(3), Example 5 and §301.6330-1(d)(3), Example 5 imply that the case file may also include “the Appeals case file concerning [a] prior CAP hearing,” and Prop. Reg. §301.6230-1(e)(1) and §301.6330-1(e)(1) imply that the case file includes the Appeals case file concerning a previous CDP hearing. There appears to be no reason for multiple definitions of the “case file.”

We recommend that the proposed regulations codify the Tax Court’s decision in Robinette v. Commissioner, 123 T.C. 85 (2004), which held that the court was not bound by the
contents of the administrative record on an appeal of a CDP determination, rather than attempt to overrule the decision.

Additionally, the proposed regulations, which, for example, attempt to limit the administrative record’s inclusion of oral statements only to the extent that the Appeals officer chooses to memorialize them, are impractical. Many taxpayers who participate in CDP proceedings are pro se and unsophisticated, and would not understand the significance of developing the administrative record for purposes of possible appeal. The value of a face-to-face conference is limited, where the Appeals officer has discretion to exclude oral statements from the administrative record. Moreover, the proposed regulations grant the Appeals officer substantial discretion over the contents of the administrative record (for example, in choosing to take notes of an oral statement or giving consideration to a particular written statement), resulting in the unintended consequence of opening the door to questions of bias and credibility of the Appeals officer.

Further, imposing limitations on the extent of the administrative record does not advance the stated purpose of the proposed regulations—to minimize the resources necessary to combat taxpayer abuses during the CDP process. The Tax Court’s consideration of the administrative record does not impact the resources expended at a CDP hearing. Indeed, if anything, it is likely that more IRS resources would be expended under the proposed regulations because the courts would be forced to address both the correctness of the Appeals officer’s determination and any dispute as to the extent of the administrative record (including, as addressed above, what issues were properly raised with the Appeals officer and what evidence was presented or arguments made). The results of the proposed regulations would be to risk wasting judicial resources and to undermine Congressional intent to allow full judicial review of the Appeals officer’s determination as to the appropriateness of collection activity. See H.R. Conf. Rep. No. 599, 105th Congress, 2d Sess. (“The amount of the tax liability will . . . be reviewed by the appropriate court on a de novo basis. Where the validity of the tax liability is not properly part of the appeal, the taxpayer may challenge the determination of the appeals officer for abuse of discretion.”).

Also, the proposed regulations provide few safeguards for the taxpayer dealing with the rare Appeals officer who is unwilling to receive or consider information on a particular topic. Tax administration and taxpayers would both be better served by a requirement that the Appeals officer include in the notice of determination a listing of the items that the Appeals officer believes are included in the record. This would permit a taxpayer receiving an unfavorable determination to evaluate whether judicial review would be beneficial. Moreover, in cases where the taxpayer seeks judicial review, inclusion of this information in the notice of determination would permit the IRS and the courts to more efficiently determine whether the Appeals officer had abused his or her discretion. Such inclusion would also permit the taxpayer to identify situations where the Appeals officer may have violated the ban on ex parte communications. See Drake.
Judicial Review

Judicial Review of the Validity of the CDP Notice

Prop. Reg. §301.6320-1 (e)(1) and §301.6330-1 (e)(1) give the Appeals officer the authority to determine the validity of the CDP notice. Since notice is required by Sections 6320(a) and 6330(a), we recommend that the regulations clarify that this authority does not in any way alter or limit the authority of the courts to consider the validity of the CDP notice.

Limitation on Judicial Review

Prop. Reg. §301.6330-1, A-E2 may deny taxpayers an opportunity for pre-collection judicial review in cases where Congress has intended for taxpayers to have such an opportunity. Section 6330(c)(2)(B) provides that in cases where there was no prior opportunity to dispute the underlying tax liability, taxpayers may contest the underlying liability in a CDP hearing and receive pre-collection de novo judicial review. Thus, taxpayers have an opportunity for judicial review before collection, either through the deficiency procedures or, in non-deficiency procedure cases, through the CDP process. Prop. Reg. §301.6330-1, A-E2 appears to contravene the statutory right to pre-collection judicial review, because the regulations provide that “[a]n opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals.” In stating that an opportunity to go to IRS Appeals (e.g., the right to a collections appeal conference) is sufficient to constitute an opportunity to dispute the underlying tax liability, the regulations suggest that the opportunity for pre-collection judicial review need not be afforded. We recommend that both Prop. Reg. §301.6320-1, A-E2 and §301.6330-1, A-E2 be clarified to reflect that the taxpayer will have the right to judicial review of the underlying tax liability in cases when that right has not previously been afforded to the taxpayer.

We recommend that the regulations adopt the position set forth in Chief Counsel Notice CC-2006-005 (November 21, 2005), by clarifying that self-reported tax liabilities may be disputed in a CDP hearing.

Additionally, we recommend that the regulations clarify that an opportunity for a conference with Appeals that has been conditioned upon extending the statute of limitations on assessment (e.g., where the Section 6672 trust fund penalty has been proposed, but insufficient time remains under Section 6672(b)(3) for Appeals consideration) will not constitute an opportunity to dispute the underlying tax liability.
Issues Raised on Appeal of a Notice of Determination

Prop. Reg. §301.6230-1, A-F5 and §301.6330-1, A-F5 would limit the taxpayer’s right to raise issues before the Tax Court that were not properly raised during the taxpayer’s CDP hearing. We respectfully submit that the IRS does not have the authority to limit the issues that may be reviewed by either the Tax Court or a district court.

First, under Section 6330(d)(1), a taxpayer has the right to appeal “such determination” of the Appeals office. Thus, the statute does not provide any limitations on the issues that may be raised in an appeal of a CDP determination.

Second, the proposed regulations would provide that an issue is not properly raised if the taxpayer “fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence.” (emphasis added). We recommend that the regulations clarify that specific evidence requested by Appeals is not required, so long as “any” evidence is provided. For example, where a taxpayer is unable to produce specific evidence with respect to an issue (e.g., receipts for certain expenses), other evidence of such expenses may be acceptable. In addition, where the case file already contains evidence with respect to an issue, we recommend that additional evidence not be required.

Third, as the Tax Court has indicated, a taxpayer has the right to raise new issues and it is within the purview of the court to determine whether or not it can consider such new issues. See Robinette v. Commissioner, 123 T.C. 85 (2004). The Tax Court in Robinette held that the Administrative Procedure Act did not restrict the court’s de novo procedures, and that it was within the court’s discretion to consider any issues or evidence whether or not raised during the CDP hearing. Respectfully, we recommend that the proposed regulations codify the Tax Court’s decision, rather than attempt to overrule it. See, e.g., Neal v. U.S., 516 U.S. 284 (1996); Bankers Trust New York Corp. v. U.S., 225 F.3d 1368 (Fed. Cir. 2000). We recommend that the standard for a taxpayer to raise new issues in a Tax Court proceeding be at least the same as the standard applied to a taxpayer raising new issues at a CDP hearing under Section 6330(c)(2).

CDP Hearings for Joint Tax Liabilities

Joint liabilities that are the result of an income tax return filed by husband and wife present particular challenges to tax administration, especially with respect to requests for CDP hearings. We are concerned that the proposed regulations may not adequately protect the rights of both spouses with respect to proposed collection actions for joint liabilities. In particular, we are concerned about (1) how both spouses are notified that a CDP hearing request has been made; (2) how CDP hearing requests signed under duress are handled; (3) the process for allowing a spouse who did not originally sign a CDP hearing request but later determines it is necessary to participate to do so; and (4) situations in which only one spouse participated meaningfully in a

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prior Appeals conference or judicial proceeding (within the meaning of Sections 6015(g)(2) and 6330(c)(4)(B)). We recommend that the regulations address due process issues arising in connection with joint tax liabilities.

**Conclusion**

The CDP process provides taxpayers with due process rights to propose alternatives to IRS collection actions. Although the existing process has undoubtedly been subject to abuse, the proposed regulations should be revised to set a more appropriate balance between the potentials for use and abuse. As we have discussed, we recommend that the final regulations be structured to assist taxpayers in the timely and appropriate exercise of their right to request CDP hearings and, when appropriate, to obtain judicial review.
Appendix 1.

Prop. Reg. §301.6320-1

(c)

(2)

A-C7. If the taxpayer does not request a CDP hearing in writing within the 30-day period that commences on the day after the end of the five business day notification period, or fails to perfect or affirm any timely request pursuant to A-C1(iii) or (v), when applicable, within a reasonable period of time, the taxpayer foregoes the right to a CDP hearing under section 6320 with respect to the unpaid tax and tax periods shown on the CDP Notice. If the request for CDP hearing is received after the 30-day period (or if a timely request is not perfected or affirmed pursuant to A-C1(iii) or (v) within a reasonable period of time), the taxpayer will be notified of the untimely request and of the right to an equivalent hearing. See paragraph (i) of this section.

A-D4. Prior involvement by an Appeals officer or employee includes participation or involvement in an Appeals hearing (other than a CDP hearing held under either section 6320 or section 6330) or proceeding that the taxpayer may have had with respect to the tax and tax period shown on the CDP Notice. Prior involvement exists only when the taxpayer, the tax liability and the tax period at issue in the CDP hearing also were at issue in the prior non-CDP hearing or proceeding, and the Appeals officer or employee actually participated in the prior hearing or proceeding.

A-D7. Except as provided in A-D8 of this paragraph (d)(2), a taxpayer who presents in the CDP hearing request any relevant, non-frivolous reasons for disagreement with the NFTL filing in the CDP hearing request or within a reasonable period of time after being offered the opportunity to supplement the CDP hearing request to provide such reasons will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to taxpayer's residence, workplace, school or other location convenient to the taxpayer or the taxpayer's authorized representative, provided that the taxpayer has identified such location prior to the assignment of the taxpayer's CDP hearing request to an Appeals office. A business taxpayer will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to the taxpayer's principal place of business or other location convenient to the taxpayer or the taxpayer's authorized representative, provided that the taxpayer has identified such location prior to the assignment of the taxpayer's CDP hearing request to an Appeals office. If the Appeals office offered that is not satisfactory to the taxpayer, the taxpayer will be given an opportunity for a hearing by telephone or by correspondence. In all cases, the Appeals officer or employee will review the case file, which includes the taxpayer's request for a CDP hearing, any other
written communications from the taxpayer or the taxpayer's authorized representative submitted
in connection with the CDP hearing, material received by the Appeals officer from within the
IRS relating to the tax and tax period at issue, and any notes made by Appeals officers or
employees of any oral communications with the taxpayer or the taxpayer's authorized
representative in connection with the CDP hearing. If no face-to-face or telephonic conference or
correspondence hearing is held, review of those documents will constitute the CDP hearing for
purposes of section 6320(b).

* * *

A-D8. A taxpayer is not entitled to a face-to-face CDP conference at a location other than as
provided in A-D7 of this paragraph (d)(2) and this A-D8. If all Appeals officers or employees at
the location provided for in A-D7 of this paragraph have had prior involvement with the taxpayer
as provided in A-D4 of this paragraph, the taxpayer will not be offered a face-to-face meeting at
that location, unless the taxpayer elects to waive the requirement of section 6320(b)(3). The
taxpayer will be offered a face-to-face conference at another Appeals office if Appeals in the
exercise of its discretion would ordinarily have offered the taxpayer a face-to-face conference at
the location provided in A-D7. A face-to-face CDP conference concerning a taxpayer's
underlying liability will not be granted if the request for a hearing or other taxpayer
communication indicates that the taxpayer wishes only to raise irrelevant or frivolous issues
concerning that liability. However, the taxpayer may, within a reasonable period of time after
denial of a face-to-face CDP conference, amend the CDP hearing request by withdrawing such
issues and presenting one or more relevant, non-frivolous issues. A face-to-face CDP conference
concerning a collection alternative, such as an installment agreement or an offer to compromise
liability, will not be granted unless the alternative would be available to other taxpayers in
similar circumstances. For example, because the IRS does not consider offers to compromise
from taxpayers who have not filed required returns or have not made certain required deposits of
tax, as set forth in Form 656, "Offer in Compromise," no face-to-face conference will be offered
to a taxpayer who wishes to make an offer to compromise but has not fulfilled those obligations.
However, the taxpayer shall be given reasonable opportunity to submit evidence that the
taxpayer was not subject to such obligations. A face-to-face conference need not be granted if
the taxpayer does not provide the required information set forth in A-C1(ii)(E) of paragraph
(c)(2). See also A-C1(iii) of paragraph (c)(2).

Q-D9. How will Appeals identify issues as being irrelevant or frivolous?

A-D9. An issue will be identified as irrelevant if it is not addressed to the tax and tax period
shown on the CDP Notice. An issue will be identified as frivolous if it is the same as or
substantially similar to one of the types of issues that the Internal Revenue Service has
determined to be a frivolous issue and identified by notice, regulation, or other form of published
guidance as a frivolous issue.

(3) Examples. The following examples illustrate the principles of this paragraph (d):

* * *
Example 6. Self-employed individual I timely requests a CDP hearing concerning a NFTL filed with respect to individual I’s 1998 income tax liability. Appeals employee J previously served as a neutral mediator in an examination issue relating to individual I’s 1998 income tax liability. Because employee J’s prior involvement with individual I’s 1998 income tax liability was in connection with a non-CDP proceeding, employee J may not conduct the CDP hearing under section 6320 unless individual I waives the requirement that the hearing will be conducted by an Appeals officer or employee who has had no prior involvement with respect to individual I’s 1998 income tax liability.

(e) Matters considered at CDP hearing --(1) In general. Appeals has the authority to determine the validity, sufficiency, and timeliness of any CDP Notice given by the IRS and of any request for a CDP hearing that is made by a taxpayer. Prior to issuance of a determination, Appeals is required to obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure have been met. The taxpayer may raise any relevant issue relating to the unpaid tax at the hearing, including appropriate spousal defenses, challenges to the appropriateness of the NFTL filing, and offers of collection alternatives. The taxpayer also may raise challenges to the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute the tax liability. Finally, the taxpayer may not raise an issue that was raised and considered at a previous CDP hearing under section 6330 or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceeding. Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.

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A-E2. A taxpayer is entitled to challenge the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency or did not otherwise have an opportunity to dispute such liability. Receipt of a statutory notice of deficiency for this purpose means receipt in time to petition the Tax Court for a redetermination of the deficiency determined in the notice of deficiency. An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability. The self-reporting of a disputed tax liability on a taxpayer’s tax return does not preclude the taxpayer from disputing the liability. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the taxpayer had the opportunity to dispute the underlying liability.

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A-E6. Collection alternatives include, for example, a proposal to withdraw the NFTL in circumstances that will facilitate the collection of the tax liability, an installment agreement, an offer to compromise, the posting of a bond, or the substitution of other assets. A collection alternative is not available unless the alternative would be available to other taxpayers in similar circumstances. For example, the IRS does not consider an offer to compromise made by a taxpayer who, at the time of the CDP hearing, has not filed required returns or has not made certain required deposits of tax, as set forth in Form 656, "Offer in Compromise." The collection alternative of an offer to compromise would not be available to such a taxpayer in a CDP hearing. However, the taxpayer shall be given reasonable opportunity to submit evidence that the taxpayer was not subject to such requirements.

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A-F5. In seeking Tax Court or district court review of a Notice of Determination, the taxpayer **can only** may ask the court to consider any issue, including a challenge to the underlying tax liability, that was properly could have been raised in the taxpayer's CDP hearing. An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence.

** * * *

A-F6. The case file, as described in A-D7, including written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative and memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3), will constitute the administrative record in any court review of the Notice of Determination issued by Appeals. The taxpayer may, after timely appeal of the Notice of Determination issued by Appeals, obtain from Appeals a list of the documents constituting such record.

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Prop. Reg. §301.6330-1

ABA Section of Taxation 15
December 27, 2005
A-C7. If the taxpayer does not request a CDP hearing in writing within the 30-day period that commences on the day after the date of the CDP Notice, or fails to perfect or affirm any timely request pursuant to A-C1(iii) or (v) within a reasonable period of time, the taxpayer foregoes the right to a CDP hearing under section 6330 with respect to the unpaid tax and tax periods shown on the CDP Notice. If the request for CDP hearing is received after the 30-day period (or if a timely request is not perfected pursuant to A-C1(iii) or (v) within a reasonable period of time), the taxpayer will be notified of the untimely request and of the right to an equivalent hearing. See paragraph (i) of this section.

A-D4. Prior involvement by an Appeals officer or employee includes participation or involvement in an Appeals hearing (other than a CDP hearing held under either section 6320 or section 6330) or proceeding that the taxpayer may have had with respect to the tax and tax period shown on the CDP Notice. Prior involvement exists only when the taxpayer, the tax liability and the tax period at issue in the CDP hearing also were at issue in the prior non-CDP hearing or proceeding, and the Appeals officer or employee actually participated in the prior hearing or proceeding.

A-D7. Except as provided in A-D8 of this paragraph (d)(2), a taxpayer who presents in the CDP hearing request any relevant, non-frivolous reasons for disagreement with the proposed levy in the CDP hearing request or within a reasonable time after being offered the opportunity to supplement the CDP hearing request to provide such reasons will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to taxpayer's residence, workplace, school or other location convenient to the taxpayer or the taxpayer's authorized representative, provided that the taxpayer has identified such location prior to the assignment of the taxpayer's CDP hearing request to an Appeals office. A business taxpayer will ordinarily be offered an opportunity for a face-to-face conference at the Appeals office closest to the taxpayer's principal place of business or other location convenient to the taxpayer or the taxpayer's authorized representative, provided that the taxpayer has identified such location prior to the assignment of the taxpayer’s CDP hearing request to an appeals office. If the Appeals office offered that is not satisfactory to the taxpayer, the taxpayer will be given an opportunity for a hearing by telephone or by correspondence. In all cases, the Appeals officer or employee will review the case file, which includes the taxpayer's request for a CDP hearing, any other
written communications from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, material received by the Appeals officer from within the IRS relating to the tax and tax period at issue, and any notes made by Appeals officers or employees of any oral communications with the taxpayer or the taxpayer's authorized representative in connection with the CDP hearing. If no face-to-face or telephonic conference is held, review of those documents will constitute the CDP hearing for purposes of section 6330(b).

* * *

A-D8. A taxpayer is not entitled to a face-to-face CDP conference at a location other than as provided in A-D7 of this paragraph (d)(2) and this A-D8. If all Appeals officers or employees at the location provided for in A-D7 of this paragraph have had prior involvement with the taxpayer as provided in A-D4 of this paragraph, the taxpayer will not be offered a face-to-face meeting at that location, unless the taxpayer elects to waive the requirement of section 6330(b)(3). The taxpayer will be offered a face-to-face conference at another Appeals office if Appeals in the exercise of its discretion would ordinarily have offered the taxpayer a face-to-face conference at the location provided in A-D7. A face-to-face CDP conference concerning a taxpayer's underlying liability will not be granted if the request for a hearing or other taxpayer communication indicates that the taxpayer wishes only to raise irrelevant or frivolous issues concerning that liability. However, the taxpayer may, within a reasonable period of time after denial of a face-to-face CDP conference, amend the CDP hearing request by withdrawing such issues and presenting one or more relevant, non-frivolous issues. A face-to-face CDP conference concerning a collection alternative, such as an installment agreement or an offer to compromise liability, will not be granted unless the alternative would be available to other taxpayers in similar circumstances. For example, because the IRS does not consider offers to compromise from taxpayers who have not filed required returns or have not made certain required deposits of tax, as set forth in Form 656, "Offer in Compromise," no face-to-face conference will be offered to a taxpayer who wishes to make an offer to compromise but has not fulfilled those obligations. However, the taxpayer shall be given reasonable opportunity to submit evidence that the taxpayer was not subject to such obligations. A face-to-face conference need not be granted if the taxpayer does not provide the required information set forth in A-C1(ii)(E) of paragraph (c)(2). See also A-C1(iii) of paragraph C-2.

Q-D9. How will Appeals identify issues as being irrelevant or frivolous?

A-D9. An issue will be identified as irrelevant if it is not addressed to the tax and tax period shown on the CDP Notice. An issue will be identified as frivolous if it is the same as or substantially similar to one of the types of issues that the Internal Revenue Service has determined to be a frivolous issue and identified by notice, regulation, or other form of published guidance as a frivolous issue.

(3) Examples. The following examples illustrate the principles of this paragraph (d):

* * *

Example 6. Self-employed individual I timely requests a CDP hearing concerning a proposed levy for the 1998 income tax liability assessed against individual I. Appeals employee
J previously served as a neutral mediator in an examination issue relating to individual I’s 1998 income tax liability. Because employee J’s prior involvement with individual I’s 1998 income tax liability was in connection with a non-CDP proceeding, employee J may not conduct the CDP hearing under section 6330 unless individual I waives the requirement that the hearing will be conducted by an Appeals officer or employee who has had no prior involvement with respect to individual I’s 1998 income tax liability.

(e) Matters considered at CDP hearing --(1) In general. Appeals has the authority to determine the validity, sufficiency, and timeliness of any CDP Notice given by the IRS and of any request for a CDP hearing that is made by a taxpayer. Prior to issuance of a determination, Appeals is required to obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure have been met. The taxpayer may raise any relevant issue relating to the unpaid tax at the hearing, including appropriate spousal defenses, challenges to the appropriateness of the proposed levy, and offers of collection alternatives. The taxpayer also may raise challenges to the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency for that tax liability or did not otherwise have an opportunity to dispute the tax liability. Finally, the taxpayer may not raise an issue that was raised and considered at a previous CDP hearing under section 6320 or in any other previous administrative or judicial proceeding if the taxpayer participated meaningfully in such hearing or proceeding. Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts and issues involved in the hearing.

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A-E2. A taxpayer is entitled to challenge the existence or amount of the underlying liability for any tax period specified on the CDP Notice if the taxpayer did not receive a statutory notice of deficiency or did not otherwise have an opportunity to dispute such liability. Receipt of a statutory notice of deficiency for this purpose means receipt in time to petition the Tax Court for a redetermination of the deficiency determined in the notice of deficiency. An opportunity to dispute the underlying liability includes a prior opportunity for a conference with Appeals that was offered either before or after the assessment of the liability. The self-reporting of a disputed tax liability on a taxpayer’s tax return does not preclude the taxpayer from disputing the liability. Any failure to agree to an extension of the time for the assessment of any tax shall not be taken into account for purposes of determining whether the taxpayer had the opportunity to dispute the underlying liability.

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A-E6. Collection alternatives include, for example, a proposal to withhold the proposed levy or future collection action in circumstances that will facilitate the collection of the tax liability, an installment agreement, an offer to compromise, the posting of a bond, or the substitution of other assets. A collection alternative is not available unless the alternative would be available to other taxpayers in similar circumstances. For example, the IRS does not consider an offer to compromise made by a taxpayer who, at the time of the CDP hearing, has not filed required
returns or has not made certain required deposits of tax, as set forth in Form 656, "Offer in Compromise." The collection alternative of an offer to compromise would not be available to such a taxpayer in a CDP hearing. However, the taxpayer shall be given reasonable opportunity to submit evidence that the taxpayer was not subject to such requirements.

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A-F5. In seeking Tax Court or district court review of a Notice of Determination, the taxpayer may ask the court to consider any issue, including a challenge to the underlying tax liability, that was properly raised in the taxpayer's CDP hearing. An issue is not properly raised if the taxpayer fails to request consideration of the issue by Appeals, or if consideration is requested but the taxpayer fails to present to Appeals any evidence with respect to that issue after being given a reasonable opportunity to present such evidence with respect to such issue.

A-F6. The case file, as described in A-D7, including written communications and information from the taxpayer or the taxpayer's authorized representative submitted in connection with the CDP hearing, notes made by an Appeals officer or employee of any oral communications with the taxpayer or the taxpayer's authorized representative and memoranda created by the Appeals officer or employee in connection with the CDP hearing, and any other documents or materials relied upon by the Appeals officer or employee in making the determination under section 6330(c)(3), will constitute the administrative record in any court review of the Notice of Determination issued by Appeals. The taxpayer may, after timely appeal of the Notice of Determination issued by Appeals, obtain from Appeals a list of the documents constituting such record.

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