

## Lesson 7

### RELEASE, DISCHARGE, AND WITHDRAWAL

(March 2012)

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## I. INTRODUCTION

This lesson will explain the provisions of section 6325, which covers the release, discharge, subordination, and nonattachment of the federal tax lien (FTL). It will also address section 6323(j), which covers withdrawal of notices of federal tax lien (NFTLs).

## II. OBJECTIVES

At the end of this lesson, you will be able to:

- Describe the procedures for obtaining certificates of release, discharge, subordination, and nonattachment of the FTL;
- Explain the difference between the release, discharge, subordination, and nonattachment of the FTL;
- Describe the judicial and administrative remedies available to taxpayers and third parties regarding the release, discharge, subordination, or nonattachment of a FTL; and
- Explain when the Service has legal authority to withdraw a NFTL.

## III. RELEASE VS. DISCHARGE – BASIC DIFFERENCES

A. certificate of release extinguishes the FTL in its entirety. Treas. Reg. § 301.6325-1(f)(1)(i).

B. A certificate of discharge removes the lien from specific property. The lien continues in existence, remaining attached to all other taxpayer property. A discharge of specific property does not extinguish the tax liability, does not remove the tax lien from other encumbered property, and does not preclude the Commissioner from determining additional tax and penalties. See generally E.J. Friedman v. United States, 6 F.3d 1355 (9th Cir. 1993).

C. A certificate of release can be revoked if erroneously or improvidently issued; an example of this is when the certificate of release is issued pursuant to a breached offer in compromise. I.R.C. § 6325(f)(2). The revocation of a certificate of release and the resulting reinstatement of the FTL can only occur if CSED has not occurred. Treas. Reg. § 301.6325-1(f)(2)(i). Revocation and reinstatement are not effective until mailed to the taxpayer at his last known address. Treas. Reg. § 301.6325-1(f)(2)(ii). A certificate of release relating to a lien imposed by section 6324 (special lien for estate and gift taxes) cannot be revoked. Treas. Reg. § 301.6325-1(f)(2)(i)(b).

D. A certificate of discharge cannot be revoked.

E. Notice of revocation of a release must be filed in the same office in which the notice of lien was filed, if one was filed. This reinstates the lien, but it has no retroactive effect against competing interests acquired prior to filing the revocation notice. Treas. Reg. § 301.6325-1(f)(2)(iii)(b). The reinstated lien is not valid against section 6323(a) creditors until notice of the reinstated lien has been filed.

F. I.R.M. 5.17.2.8.3 explains differences between a release and a discharge.

G. The Service has issued final regulations revising, in part, the permanent regulations promulgated under section 6325. 73 F.R. 5741 (2008). The revisions focus on implementation of sections 6325(b)(4), 6503(f)(2), and 7426(a)(4) and (b)(5). Some of the more significant aspects of the revisions are discussed infra.

## **IV. CERTIFICATE OF RELEASE**

### ***A. Section 6325(a) -- standard for release***

Section 6325(a) provides that the Secretary must issue a certificate of release within 30 days of the date on which the Service finds that the liability secured by a NFTL is fully satisfied or becomes legally unenforceable. See also Treas. Reg. § 301.6325-1(a)(1). If the notice of lien secures more than one assessment, all assessments secured by the lien notice must be satisfied before a certificate of release will be issued, unless the taxpayer requests that a certificate of release be issued with respect to particular assessments which have been satisfied in full. Treas. Reg. § 301.6325-1(a)(6).

### ***B. “Self-releasing” liens***

1. Most notices of lien filed after 12/31/82 “self-release” (i.e., they contain a notice that operates as a certificate of release of the underlying lien). The certificate is triggered if the notice of lien is not timely refiled during the refiling period. It is necessary to refile a notice of lien if the liability has not been paid in full and the section 6502 statute of limitations for collection has been extended. See, e.g., sections 6503 or 6331(k). The Service developed the “self-releasing” lien to comply with the section 6325(a) 30-day requirement. Notices of lien refiled on Forms 668-F are not self-releasing.

2. If notices of a lien are filed in multiple jurisdictions, the release of the lien in one of the jurisdictions means that the lien is released in all the jurisdictions. Therefore, if one of the notices contains a self-releasing provision, the self-release in the jurisdiction where that notice is filed will lead to the lien’s being released, and therefore extinguished under section 6325(f), in all jurisdictions where notices have been filed, regardless of whether the other notices contain self-

releasing provisions. The release must be revoked in all jurisdictions where the Service had filed notices of lien and notices of lien should be refiled in those jurisdictions. The NFTL can then be refiled, but the filing date for priority purposes will be the date of refiling, not the date of the original NFTL. See, e.g., United States v. Wilson, 445 Fed. Appx. 141, 144 n.2 (10<sup>th</sup> Cir. 2011).

3. A taxpayer may request a release if the liability secured by the notice of lien is fully satisfied or legally unenforceable. For a description of what the request must contain, see Treas. Reg. § 301.6325-1(a)(7).

4. If the underlying tax liability has not been satisfied (or is not legally unenforceable), the taxpayer is not entitled to release of the lien. See Beeler v. Commissioner, T.C.M. 2009-266 (2009), vacated on other grounds, 434 Fed. Appx. 41 (2011); United States v. DeTar, 2009 WL 2252822 (W.D. Mich., July 28, 2009).

5. At least one authority indicates that a FTL should be released when all payments have been made on an offer in compromise. See Hillsman v. Commissioner, T.C.M. 2008-240 (2008).

### **C. Acceptance of bond**

1. The Service must release a lien within 30 days of accepting a bond conditioned upon payment not later than 6 months before the expiration of the statute of limitations. I.R.C. § 6325(a)(2); Treas. Reg. § 301.6325-1(a)(2). See I.R.C. §§ 7101 and 7102 for the rules governing bonds.

2. A surety bond must be executed with satisfactory surety. See Treas. Reg. § 301.7101-1(b) (defining satisfactory surety). Under section 7101(2), in lieu of a surety bond, United States bonds or notes may be deposited with the Service.

3. The satisfactory surety test is always met by a surety company holding a certificate of authority from the Secretary as an acceptable surety on Federal bonds. In all other situations, at the discretion of the area director, a bond may be executed with a satisfactory surety if it is--

- a) executed by a corporate surety;
- b) executed by two or more qualified individual sureties (see Treas. Reg. § 301.7101-1(b)(2)(ii) and (3));
- c) secured by a mortgage on real or personal property;

- d) secured by a certified, cashier's, or Treasury check or money order;
- e) secured by corporate bonds or stock, or bonds issued by a state or political subdivision of recognized stability; or
- f) secured by any other acceptable collateral, e.g., a letter of credit, deposit with the Service or responsible financial institution (as escrow agent). Treas. Reg. § 301.7101-1(b)(2).

#### ***D. Failure to release – section 7432***

1. Under section 7432, if a Service officer or employee knowingly or negligently fails to release a lien under section 6325, the taxpayer may bring a suit for damages in district court within two years after the date on which the right of action accrues. See also Treas. Reg. § 301.7432-1.
2. The statute provides that only the taxpayer has standing to sue under section 7432. See I.R.C. § 7432(a). See also Parker v. U.S., 2010 WL 3894977 (S.D. Cal., Sept. 29, 2010).
3. The amount awarded is based on the actual, direct economic damages sustained by the taxpayer due to the Service's failure to release the lien, plus the costs of the action. Costs of the action do not include attorney's fees and similar litigation expenses recoverable under § 7430. Treas. Reg. § 301.7432-1(c)(2).
4. The taxpayer must exhaust any administrative remedies available within the Service before bringing suit. I.R.C. § 7432(d)(1). These include filing a written claim with the Service that meets the requirements in Treas. Reg. § 301.7432-1(f). Treas. Reg. § 301.7432-1(e). A claim meeting the regulatory criteria constitutes the notice to the Service to release the lien required by section 7432(e). Treas. Reg. § 301.7432-1(g). Some courts have held that exhaustion of administrative remedies is not a jurisdictional prerequisite to bringing suit under section 7432. See, e.g., Combs v. United States, 767 F. Supp. 2d 758 (E.D. Mich. 2011).
5. The amount of the damages awarded under section 7432(b)(1) is reduced by the amount of such damages which could have reasonably been mitigated by the taxpayer. I.R.C. § 7432(d)(2).
6. A taxpayer may not challenge the merits of the underlying tax (or interest) in a 7432 action. PCCE, Inc. v. United States, 159 F.3d 425 (9th Cir. 1998).
7. Note that the damage remedy under section 7432 does not apply if the Service fails to release a lien that was erroneously filed under section 6326. See Miller v.

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United States, 763 F. Supp. 1534 (N.D. Cal. 1991); Treas. Reg. § 301.6326-1(f).

8. A taxpayer will not prevail in his action under section 7432 if the underlying tax liability has not been satisfied. See McIver v. United States, 650 F. Supp. 2d 587 (N.D. Tex. 2009).

## ***E. Certificate of Discharge***

Publication 783 has instructions on how to apply for a certificate of discharge. Under section 6325(b), there are five bases for issuing a certificate of discharge. As indicated below, one such basis specifically applies only to the situation in which a party other than the taxpayer owns property subject to a tax lien.

### **1. Property worth double value - § 6325(b)(1).**

Any part of the property may be discharged if the fair market value of the taxpayer's remaining property subject to the lien is at least double the sum of the tax liability and all other liens with priority over the tax lien. I.R.C. § 6325(b)(1). See, e.g., Treas. Reg. § 301.6325-1(b)(1)(i).

### **2. Government paid partial value - § 6325(b)(2)(A).**

### **3. Government's interest has no value - § 6325(b)(2)(B).**

a) In determining the value of the government's interest under section 6325(b)(2)(A) and (B) and section 6325(b)(4), the Service may consider the forced sale value, not merely fair market value. Treas. Reg. § 301.6325-1(b)(6). However, for purposes of section 6325(b)(1), it is still fair market value.

b) In determining the value of the government's interest, the Service allows the expenses of sale normally borne by a seller because of their relation to the value of the property.

c) On a related matter, the Service has issued interim guidance on certificates of discharge in situations involving short sales. SBSE-05-1011-084 (October 4, 2011).

#### **4. Property Sold and Proceeds Subject to FTL - § 6325(b)(3); Treas. Reg. § 301.6325-1(b)(3).**

- a) The property may be discharged if it is sold and, pursuant to a written agreement, the sale proceeds are to be held subject to the FTL, with the lien retaining the same priority it had against the property to be discharged.
- b) This type of arrangement is often proposed when a dispute exists as to the FTL's priority, but the parties do not want to pass up an impending sale that would be financially advantageous.
- c) The sale proceeds can be deposited (in an interest-bearing account) with an escrow agent pending judicial determination of the priorities. Only the funds in dispute need be placed in escrow.
- d) The substitution of sales proceeds provision gives the Service greater flexibility in handling difficult collection problems.

5. Before issuing a certificate of discharge for any of the foregoing reasons, the Service requires that the taxpayer has been or will be divested of all right, title, and interest in the property. If the taxpayer reacquires the property after issuance of the certificate of discharge, the lien attaches to the reacquired property as in the case of after-acquired property generally. Treas. Reg. § 301.6325-1(f)(3).

### ***F. Certificate of Discharge - Third Parties***

#### **1. Third Party Standing to Obtain Discharge – *Williams***

In Williams v. United States, 514 U.S. 527 (1995), the Service assessed tax liabilities against Jerrold Rabin (the husband). Subsequently, in anticipation of divorce, husband and wife divided their marital property, with the husband deeding his tax-encumbered interest to the wife. The Service then filed a NFTL. When the wife attempted to sell the residence, the NFTL hindered the sale. To effect the sale, the wife authorized a disbursement from the sale proceeds to the Service. The Service later denied the wife's refund claim and she filed a refund suit under 28 U.S.C. § 1346. The Supreme Court held that the wife had standing to bring a refund suit under section 1346, because she was the party who paid the tax. The Court noted that holding otherwise would leave such third parties without a meaningful remedy, as they could not bring a wrongful levy suit (without levy), a quiet title action may not be expeditious, and the Service was not obligated to enter into a lien substitution agreement under section 6325(b)(3).

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## **2. Third Party Standing to Obtain Discharge -- Legislation**

a) Responding to Williams, Congress, in the IRS Restructuring and Reform Act of 1998 (RRA 1998), enacted sections 6325(b)(4) and 7426(a)(4) to provide a remedy. In 2008, the Service issued final regulations incorporating the provisions added by RRA 1998.

b) Under section 6325(b)(4), the Service must issue a certificate of discharge to the owner of property subject to the tax lien if such owner:

- deposits with the Service an amount of money equal to the value of the property as determined by the Service, or
- furnishes a bond acceptable to the Service equal in amount to the value of the property as determined by the Service. I.R.C. § 6325(b)(4)(A).

c) The owner must be someone other than the taxpayer whose liability gave rise to the lien at issue. I.R.C. § 6325(b)(4)(D). The 2008 final regulations specify, however, that a person who co-owns property along with the taxpayer may avail himself of the RRA 1998 remedy. Treas. Reg. § 301.6325-1(b)(4)(i).

d) The Service must refund the amount deposited (with interest) or release the bond if the Service determines that (i) the liability giving rise to the lien can be satisfied from other sources; or (ii) the value of the lien interest in the property is less than previously determined. I.R.C. § 6325(b)(4)(B).

## **3. Third Party Standing to Obtain Discharge – Regulations**

Under regulations issued in 2008, the issuance of a refund or the release of a bond must be preceded by a written request on the part of the third-party owner, but the Service is not required to make the requisite determination simply because the third-party owner so requests. See Treas. Reg. § 301.6325-1(b)(4)(iii). The regulations, in addition, specify that the liability referred to in section 6325(b)(4)(B)(i) is the entire unsatisfied tax liability giving rise to the lien, not just the portion of the liability equal to the government's interest in the third-party owner's property. Treas. Reg. § 301.6325-1(b)(4)(iv).



#### **4. Challenging IRS Value Determination**

Under section 7426(a)(4), the third-party owner of the property receiving the certificate of discharge under section 6325(b)(4) may challenge the Service's determination of value by bringing an action in district court within 120 days after the day upon which the certificate was issued. If the court determines that the Service's determination of value exceeds the actual value of the government's lien interest in the property, the court will order the excess amount deposited (with interest) to be refunded to the holder of the certificate or the release of the bond to the extent it exceeds the actual value of the lien interest in the property. I.R.C. § 7426(b)(5). The regulations emphasize that section 7426(a)(4) constitutes the sole means available to a third-party owner whose property is subject to a FTL to obtain a refund of a deposit or a release of a bond in exchange for a discharge of the lien from the property. Treas. Reg. § 301.7426-1(a)(4). The regulations also state that the 120-day period for bringing suit is not tolled by an administrative request made under section 6325(b)(4)(B). Treas. Reg. § 301.6325-1(b)(4)(iii).

#### **5. Third Parties, Discharge and the Collection Statute**

The statute of limitations on collection is tolled by a person's becoming entitled to a certificate of discharge under section 6325(b)(4), pursuant to section 6503(f)(2), added to the Internal Revenue Code by RRA 1998.

#### **6. Cause of Action for IRS Improper Conduct**

Under section 7426(h) (enacted as part of RRA 1998), the third-party owner of the property may, notwithstanding the remedies provided in section 7426(b)(5), recover damages if any Service officer or employee has recklessly, intentionally, or negligently disregarded any provision of the Internal Revenue Code, which caused the damages.

- a) The damages are limited to the lesser of \$1 million (\$100,000 in the case of negligence) or the actual, direct economic damages sustained by the plaintiff as a result of the Service's conduct, plus the costs of the action (reduced by the amount awarded under section 7426(b)(5)).
- b) The rules set forth in section 7433(d) regarding the exhaustion of administrative remedies and the mitigation of damages apply. I.R.C. § 7426(h)(2).

## **7. Third Party Standing to Obtain Discharge - Government Position**

On July 25, 2005, before the final regulations incorporating the RRA 1998 provisions were issued, the Service issued two revenue rulings addressing Williams-related issues:

- a) Revenue Ruling 2005-49 (2005-30 I.R.B. 125) – the government’s position is that Williams does not apply in wrongful levy situations.
- b) Revenue Ruling 2005-50 (2005-30 I.R.B. 124)-- Given that Congress enacted a remedy for third parties in a Williams type situation, the government's position is that third parties may no longer file Williams refund suits under 28 U.S.C. § 1346.

## **8. IRM Provisions on Third Parties and Discharge**

Examples of IRM provisions reflecting the provisions added by RRA 1998 are IRM 5.17.2.8.1, 5.17.2.8.3, 5.17.3.4.3.1(6), and 5.17.5.17.6.

## **9. Decisions on Third Parties and Discharge**

Several courts have addressed issues related to implementation of the provisions added by RRA 1998:

- a) In City of Richmond, Ky. v. United States, 348 F.Supp. 2d 807 (E.D. Ky. 2004), a district court held a party who voluntarily paid another’s tax liability could not sue for refund under 28 U.S.C. § 1346(a)(1) without exhausting administrative remedies under I.R.C. § 6325(b).
- b) In EC Term of Years Trust v. United States, 550 U.S. 429, 127 S. Ct. 1763, 167 L. Ed. 2d 729 (2007), the Supreme Court held that a party who failed to file a lawsuit under section 7426(a)(1) was precluded from seeking a refund under section 1346(a)(1). See also First American Title Ins. v. United States, 520 F.3d 1051 (9th Cir. 2008).
- c) In Four Rivers Investments v. United States, 77 Fed. Cl. 592, 601-603 (2007), the court held that the RRA 1998 amendments arguably reveal Congress’s intent to create an exclusive remedy for third-party property owners, and that section 1346(a)(1) accordingly does not provide jurisdiction for refund suits brought by third-party real property owners

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who have not pursued a remedy under section 6325.

d) In Munaco v. United States, 522 F.3d 651 (6th Cir. 2008), the Sixth Circuit upheld a district court's holding that the amendments to section 6325 added by RRA 1998 precluded the plaintiff from making a claim under Williams and that, accordingly, the court did not possess subject matter jurisdiction over the claim.

e) In Wagner v. United States, 545 F.3d 298 (5th Cir. 2008), the Fifth Circuit held that a party that neither paid tax nor obtained a certificate of discharge cannot bring a refund suit.

## **V. RELEASE AND DISCHARGE - MISCELLANEOUS ISSUES**

### ***A. Certificate of Subordination***

Under section 6325(d), a FTL may be subordinated to another interest if----

1. an amount equal to the amount of the lien or interest to which the certificate subordinates the tax lien is paid; or
2. the Service believes that subordination will ultimately result in an increase in the amount realized by the government from the property subject to the lien and will facilitate the ultimate collection of the liability.
3. Examples:
  - a) A security interest is given priority over the FTL to facilitate making improvements on the subject property.
  - b) A security interest is given priority to facilitate the harvesting of a crop.
  - c) In each example, the value and marketability of the property subject to the lien is increased. See Treas. Reg. § 301.6325-1(d)(2)(ii).
4. Finally, the lien under section 6324B may be subordinated if the Service believes the government will be adequately secured after the subordination. Treas. Reg. § 301.6325-1(d)(3).
5. Procedures for applications for certificates of subordination are provided in

IRM 5.12.3.14. See Pub. 784, How to Prepare an Application for a Certificate of Subordination of Federal Tax Lien, and Pub. 1153, How to Apply for Certificate of Subordination of Estate Tax Lien.

6. In a collection due process hearing in which the taxpayer has requested subordination, Appeals must determine whether subordination would ultimately facilitate collection of the tax liability. See Alessio Azzari, Inc. v. Commissioner, 136 T.C. No. 9 (2011).

## ***B. Certificate of Nonattachment***

Under section 6325(e), a certificate of nonattachment is issued where any person other than the taxpayer may be injured by the appearance through similarity of names that a notice of lien refers to such person. See IRM 5.12.3.24. See also Pub. 1024, How to Prepare an Application for a Certificate of Nonattachment of Federal Tax Lien. A certificate of nonattachment may be revoked in the same manner as a certificate of release. I.R.C. § 6325(f)(2).

## ***C. Requests for Discharge in Bankruptcy***

The bankruptcy court has inherent power to sell property under its jurisdiction free and clear of liens, with the liens attaching to proceeds in the same order of priority. Notwithstanding recordable court orders to this effect, purchasers frequently request discharges. IRM 5.12.3.16.1 provides that discharges can be issued in these situations.

## ***D. Exceptions to Statutory Discharge Procedure***

Statutory conditions of discharge are not necessarily followed when a settlement is entered into by the Attorney General, which provides that a certificate of discharge is to be issued as a condition of the settlement.

## ***E. Special Provisions for Other Federal Agencies***

Special provisions exist for the Veterans Administration, the Small Business Administration, and the Federal Housing Administration to obtain discharges of junior FTLs to reduce litigation costs and make the property readily marketable.

## VI. Withdrawal

### ***A. Background***

1. IRC 6323(j) provides that under certain specified circumstances the Service may withdraw a NFTL. Section 6323(j) states that, once withdrawn, the provisions of the Internal Revenue Code “shall be applied as if the withdrawn notice had not been filed.”
2. Section 6323(j)(1) provides that the Service may withdraw a NFTL when: (A) the filing of the NFTL was premature or otherwise not in accordance with administrative procedures; (B) the taxpayer has entered into an installment agreement, unless the agreement provides otherwise; (c) the withdrawal of the NFTL will facilitate the collection of the liability; or (D) with the consent of the taxpayer and the National Taxpayer Advocate, the withdrawal will be in the best interests of the taxpayer and the United States.
3. The withdrawal of a NFTL is discretionary, not mandatory. See Berkery v. Commissioner, T.C.M. 2011-57 (2011); Treas. Reg. 301.6323(j)-1(c). Although a decision to deny a withdrawal request may be reviewable by the Tax Court, the Court will not substitute its judgment for that of the settlement officer who acted on the request. Hughes v. Commissioner, T.C.M. 2011-294 (2011).
4. 6323(j)(2) provides that if the taxpayer so requests, the Service will attempt to notify credit reporting agencies, financial institutions, and creditors of the withdrawal of the NFTL.
5. The IRM provides for withdrawals of NFTLs. See IRM 5.12.3.27 et seq.

### ***B. Recent developments on withdrawal of NFTLs***

1. Withdrawal after release
  - a) Since 2006 the IRM has provided that the Service will not withdraw a NFTL after the underlying lien has been released. The stated reasoning is that issuing a post-release withdrawal “may cause confusion for the person receiving the documents because the withdrawal certificate states that the underlying lien remains in effect while the lien release states it has been released.” IRM 5.12.3.37(3).

b) Increasingly, taxpayers have sought withdrawal of NFTLs after the underlying liens have been released. The rationale is believed to be that the major credit bureaus customarily keep a NFTL on a taxpayer's credit report for years after the NFTL has been filed, regardless of whether the underlying tax liability has been satisfied and the lien released. We understand that a withdrawal of the NFTL has the effect of removing the lien from the credit report. As the economy has worsened, taxpayers have become more vocal about the adverse effect of the presence of NFTLs on their credit reports.

c) In advice issued in late 2009, the Office of Chief Counsel took the position that the Service is not legally prohibited from withdrawing a NFTL after the underlying lien has been released.

2. Interim guidance – In response to concerns about various Service policies restricting availability of NFTL withdrawal, the Service recently issued several pieces of interim guidance pertaining to withdrawing NFTLs.

a) Interim guidance issued 2/2011 – On February 24, 2011, the Service issued the first piece in a series of interim guidance on NFTL withdrawals. The February 2011 interim guidance states that the Service will modify procedures to make it easier for taxpayers to obtain lien withdrawals and that the Service has determined that this approach is in the best interest of the government.

b) Interim guidance issued 6/2011 – On June 10, 2011, the Service issued interim guidance on withdrawal of NFTLs after release. This interim guidance addresses both requests made under section 6323(j)(1)(A), and requests made under section 6323(j)(1)(D). For a request for withdrawal in a situation where the underlying lien has already been released, the taxpayer must have fully satisfied the liabilities on the NFTL; i.e., withdrawal generally will not be permitted in situations where the lien “self-released,” or released by operation of law, rather than because the underlying liabilities were fully satisfied. The taxpayer in this scenario, in addition, must be in compliance with filing requirements. The interim guidance also sets forth procedures for how requests for withdrawal of NFTLs on released liens will be processed.

c) Interim guidance issued 1/2012 – On January 4, 2012, the Service issued interim guidance revising the June 2011 guidance. The January 2012 guidance clarified satisfaction of liability requirements, expanded guidance relative to partial withdrawals, and updated procedures discussed in the previous guidance.

d) As of March 2012, none of the interim guidance had yet been incorporated into the IRM. However, it is expected that interim guidance ultimately will be incorporated into the IRM; therefore, Counsel attorneys should check the most current version of a given IRM provision relating to withdrawal when working lien withdrawal issues.