Office of Chief Counsel
Internal Revenue Service
memorandum

CC:SB:ADGregory
GL-123415-12

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to: Marilyn S. Ames
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from: Aaron D. Gregory
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subject: Effect of Late Notice in Chapter 13

This is in response to your recent request for advice regarding the general effect of late and/or no notice to the Service of the commencement of a Chapter 13 bankruptcy case on the dischargeability of the debtor's prepetition tax liabilities. In addition, you have asked for clarification regarding the following related issues: (i) at what point any such notice to the Service will be deemed to be late; (ii) whether the Service is required to take any affirmative action in such late/no notice Chapter 13 cases before treating the debtor's tax liabilities as non-dischargeable; and (iii) to the extent any such affirmative action is required, what is the timeframe within which the Service must act.

As you are aware, the Chapter 13 discharge provision, Bankruptcy Code section 1328, was amended as part of BAPCPA to include debts listed in section 523(a)(3) among the exceptions to discharge generally applicable to Chapter 13 cases. See 11 U.S.C. § 1328(a)(2). Section 523(a)(3), in relevant part, provides an exception to discharge for any debts "neither listed nor scheduled" by the debtor in accordance with Bankruptcy Code section 521 "with the name . . . of the creditor to whom such debt is owed, in time to permit . . . timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing . . . ." Thus, for Chapter 13 cases filed on or after October 17, 2005, the effective date of BAPCPA, these provisions operate to make a Chapter 13 debtor's prepetition tax liabilities non-dischargeable to the extent the Service either was not provided with notice of the bankruptcy or did not have actual knowledge of the bankruptcy "in time to permit" the

Service to file a timely proof of claim.[1] This principle is reflected in various IRM provisions including IRM 5.9.17.15.1(4) and IRM 5.9.18.2(2).

While these provisions make clear, post BAPCPA, that a Chapter 13 debtor's prepetition tax liabilities are non-dischargeable where the Service was not notified of the filing of the bankruptcy petition with sufficient time to participate in the claims filing process, the statutes do not define any minimum notice period required to be given to a creditor to avoid triggering this exception to discharge. Similarly, it does not appear that the case law generally addressing this issue provides any definitive answer as to how much notice constitutes sufficient notice to the creditor for purposes of determining the application of this provision. See e.g. In re Dewalt, 961 F2d 848 (9th Cir. 1992) (explaining that while "the 30-day notice provision of Rule 4007(c) provides a guide to the minimum time within which it is reasonable to expect a creditor to act" for purposes of section 523(a)(3)(B), "[e]ven 30 days notice may not be enough if truly extraordinary circumstances are presented");[2] In re Bateman, 254 B.R. 866 (Bankr. D. Md. 2000)(determining that creditor's actual notice of bankruptcy 26-days prior to bar date for filing complaint to determine dischargeability was sufficient notice for purposes of section 523(a)(3)(B)).

In any event, the exception to discharge would undoubtedly be triggered in Chapter 13 cases where the Service receives no notice of the bankruptcy at all until after the expiration of the proof of claim bar date. For cases where the Service determines that the section 523(a)(3) exception to discharge does apply, we note that no action is required by the Service in order to properly treat the liabilities as non-dischargeable. Rather, consistent with Bankruptcy Code section 523(c)(1), other than for liabilities of the kind set forth in paragraphs (2), (4), or (6) of section 523(a), there is no requirement that a creditor pursue any formal dischargeability determination in connection with the section 523 exceptions to discharge. See In re Fernandez, 112 B.R. 888 (Bankr. N.D. Ohio 1990)(noting in Chapter 7 proceeding that "[d]ischargeability actions are only required in . . . adversary proceedings which are based on fraud, false pretenses, misrepresentation, or a false financial statement, embezzlement or larceny or fraud or defalcation by a fiduciary, or where there is alleged willful and malicious injuries to persons or property").

As for cases where the Service is initially "neither listed nor scheduled" as a creditor but subsequently receives notice prior to the claims bar date, we believe that a determination as to whether such notice provided the Service with a sufficient opportunity to file a timely claim would have to be made on a case by case basis. [redacted]

[1] We note that even prior to the BAPCPA amendment making the section 523(a)(3) exception to discharge applicable in Chapter 13 cases, courts generally held that the debtor did not receive a discharge for debts owed to a creditor not provided with proper notice of the bankruptcy proceeding. See, e.g., In re Hairopoulos, 193 B.R. 889 (E.D. Mo. 1996, aff'd, 118 F.3d 1240 (8th Cir. 1997)(recognizing in part that if "the IRS did not receive proper notice of the proceeding, then its claim cannot be considered to have been provided for by the plan"); Ellet v. Stanislaus, 506 F.3d 774 (9th Cir. 2007).

[2] The court further explained that "a somewhat lesser period may be sufficient where there is clear evidence the creditor has enough advance knowledge of the bar date to file the complaint or request an extension and has purposefully chosen to lie in wait rather than present its claim."

[redacted]

[redacted][3][redacted]

If you have any questions or would like to discuss this matter further, please contact me at (804) 916-3934.

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[3] [redacted].