5.12.2.4.2 (06-09-2005)
Criteria for Not Filing the NFTL

1. When considering the non-filing of a NFTL determine if the taxpayer is in filing and payment (Federal Tax Deposits, estimated tax payments, notice accounts, etc.) compliance. You should also consider:

    A. The use of a *collateral agreement*(see IRM 5.6.1 for additional information).

    B. The *subordination of the lien* (for loan and financing situations)

    C. The *discharge of the property* (for removing specific property from the Federal Tax Lien)

    in lieu of not filing a NFTL (see IRM 5.12.3).

2. In general, liens should not be filed when:

    A. The taxpayer is a defunct corporation whose assets have been previously liquidated.

    B. The taxpayer is deceased and there are no known assets in an estate.

    C. The taxpayer resides abroad and has no known assets in the United States.

3. Liens should not be filed in the following circumstances:

    A. The taxpayer is a corporate entity that has gone through a liquidating bankruptcy or receivership regardless of dollar amount. Document the proceeding number in the case history.

    B. When a non-paying officer has been assessed the Trust Fund Recovery Penalty (TFRP) and an adjustment to the TFRP is pending because the assessment has been paid by another officer.

    C. There is an indication that the liability has been satisfied or that credits are available to satisfy the liability.

    D. The taxpayer is a financial institution under control of the Resolution Trust Corporation (RTC). See the section on "Withdrawal of Filed Notice of Federal Tax Lien" if a NFTL has been filed.

    E. The taxpayer is in bankruptcy and the NFTL relates to liabilities incurred before the taxpayer filed for bankruptcy. Section 362(a) of the Bankruptcy Code imposes an automatic stay that prohibits all creditors from taking certain collection actions against debtors in bankruptcy. A NFTL may be filed once the stay is lifted. In some circumstances, a NFTL may be filed for liabilities incurred after the taxpayer filed for bankruptcy. Consult Counsel to determine if a NFTL may be filed.

    F. There is genuine doubt as to the validity of the liability. But the revenue officer must document the taxpayer’s justification and the method of resolution (payment tracer, amended return, credit transfer etc.).

4. A decision may be made to defer or not file a NFTL when the revenue officer can document a *reasonable certainty* that filing the NFTL will hamper collection.

    Example:

Following are examples of when it **is appropriate** to delay or not file a NFTL:

A. During a field visit on 5/01/2003 to a "Not for Profit" taxpayer you are asked not to file a NFTL and consider an in-business installment agreement. It is explained that if a NFTL is filed, state funding, which is the principle funding source for the entity will be eliminated and they will not be able to make installment payments. You agree to delay filing the NFTL and request appropriate documentation from the entity be sent to you by 05/12/2003 and you will consider the IA or a NFTL will be filed. On 05/09/2003 you receive the documents and are able to document a reasonable certainty that the NFTL would hamper collection of the liability and determine not to file the NFTL and place the taxpayer in a manually monitored IA. You inform the taxpayer of the IA and the condition that a NFTL will be filed if they default on the installment agreement.

B. During a field visit to a taxpayer who is in the business of selling vacation time shares, you determine that the tax liability cannot be paid immediately and that in all likelihood an installment agreement may resolve the unpaid balance. However, in order to obtain the funds to make the installment payments and pay other operating expenses, the taxpayer must sell accounts receivable to a factor on a weekly basis. The factor also requires that the taxpayer gives a security interest in all current and future accounts receivable. Filing a NFTL in this case would end the factoring arrangement. You agree to withhold the filing of the NFTL provided the taxpayer **provides a copy of the contract, and remains cooperative and compliant**while the installment agreement is being considered. You inform the taxpayer that not complying with the provisions will result in your immediate filing of the NFTL.

Example:

Below are examples of when it is **not appropriate** to delay or not file a NFTL:

A. During a field visit a taxpayer asks that you do not file a NFTL because it will negatively affect their credit. You ask if they can prove that the negative affect on their credit rating will "hamper" their ability to pay the liability. They inform you that they cannot prove that it will. In this situation filing the NFTL would be appropriate.

B. During a field visit, the taxpayer informs you that they are planning to purchase a new car or possibly lease one to replace their current vehicle and the filing of the NFTL will negatively affect their credit. They ask you not file the NFTL. You ask if the car is essential to generate income to assist in the payment of the liability. The taxpayer informs you that the car is not essential for them to generate income. It would be appropriate to file a NFTL in this case.

C. During a field visit on 4/1/2003 a taxpayer informs you that he/she has applied for a loan to pay the liability and other operating expenses of the business and requests that you do not file a NFTL. He/she explains that the loan agreement has a clause which indicates any additional lien filings will cause the proposed agreement to be null and void. You agree to delay filing a NFTL if the taxpayer supplies you with back up documentation for the completed financial statement and loan agreement from his financial institution by 4/15/2003 and become current with all FTD deposits. You also inform the taxpayer that if the documents are not received by the 15th, you will file the NFTL. You return to your office on 4/2/2003 and document your case history with the reason why you delayed filing the NFTL and indicate a follow up date of 4/15/2003. On 4/16/2003 you still have not received the documentation from the taxpayer or confirmation of the FTD payments. Since the taxpayer did not meet the specified deadline it is appropriate to file the Notice of Federal Tax Lien at this time without further contact with the taxpayer.

D. After returning to the office from a field visit the previous day you have determined to file a NFTL because the taxpayer did not make full payment and they were not in compliance. The taxpayer calls you and asks that you not file the lien because they are selling their current home to full pay the liability and avoid enforcement actions. You tell the taxpayer that the lien is going to be filed to protect the Government’s interest in the home. The taxpayer tells you that the sale will not go through because of the lien. You then tell the taxpayer that a Release of Lien can be issued at the time full payment is made at the sale.

E. After your initial analysis of a BMF taxpayer you plan to visit in the field tomorrow, you determine that they have not file several 941 returns and has not made federal tax deposits (FTD) for the current quarter. During your field visit the taxpayer informs you that they are currently under contract to sell their rights to a patent for a product they developed and the sale will more than pay the liability and the amount they estimate will be owed for the delinquent returns. They tell you that part of the agreement for sale is that there can be no liens associated with the patent and ask that you do not file a NFTL, at least until after the sale in 15 days. You review the contract and confirm the taxpayer's claim. You tell them that you will delay the filing of the NFTL if they file all delinquent returns and pay all delinquent FTD within 10 days. On the tenth day you receive all delinquent returns but do not receive any of the funds promised for the FTD. Filing the NFTL in this situation would be appropriate due to the taxpayer's non compliance and failure to meet the deadline set.

F. During a field visit to the Power of Attorney's office, the POA informs you that filing a NFTL will embarrass the taxpayer in their business community. In this case it would be appropriate to file the NFTL, unless the POA can prove that the NFTL would hamper the payment of the liability.

G. During a field visit to an IMF taxpayer you request full payment of the $200,000 liability. The taxpayer tells you that they are in negotiations to sell their home (primary residence) but there is only $100,000 of equity in the home so they can't full pay even with the sale. They ask that you not file the NFTL because it will ruin the sale. You ask the taxpayer to supply you with the appropriate documents (these may vary by location) to confirm their statement. They say that they cannot. In this situation it would be appropriate to file the NFTL and inform the taxpayer that they may request a *discharge of the specific property* when they are prepared to go to sale.

5. The filing of a NFTL may affect a taxpayer's credit rating, and in and of itself, this is not sufficient reason to withhold filing the NFTL.

6. When a revenue officer determines not to file a NFTL temporarily, the action must be supported by an Integrated Collection System (ICS) history entry that clearly states why filing a NFTL is not proper at that time. The entry must also include a follow-up date by which the revenue officer will receive the requested information and/or payment, or the date the NFTL will be filed.

7. The revenue officer will withhold filing the NFTL if the taxpayer has entered into a collateral agreement with the Service as provided in IRM 5.6. Revenue officers should document their case files and consult with Technical Services to ensure legal sufficiency.

8. A taxpayer may submit a faxed request for non-filing of the NFTL if the revenue officer has made contact with the taxpayer by phone or in person. The revenue officer should document the case history with the date of contact and note the reasons why the taxpayer wishes the NFTL not to be filed. The revenue officer should also include the faxed document in the case file.