taxnotes®

Volume 153, Number 7 ■ November 14, 2016

Private Debt Collection Arrives at the IRS

By Phyllis Horn Epstein

Reprinted from *Tax Notes*, November 14, 2016, p. 975

Private Debt Collection Arrives at the IRS

by Phyllis Horn Epstein


Phyllis Horn Epstein

Phyllis Horn Epstein is a partner with Epstein, Shapiro & Epstein PC in Philadelphia and chair of the American Bar Association Section of Taxation's Individual and Family Taxation Committee.

In this article, Epstein argues that the IRS's use of private debt collectors creates a new layer of uncertainty in tax administration and could threaten voluntary compliance and fairness in our tax system.

Starting in 2017, the IRS will implement a new program that uses private debt collection agencies to collect past-due taxes when the IRS no longer has sufficient resources to pursue collection.

The program affects every taxpayer, regardless of whether they owe tax, because almost everyone has been personally scammed by callers claiming to be collection agents of the IRS or a local taxing authority. If not, everybody knows someone who has been threatened with collection, incarceration, or worse, becoming victims of those scams and being tricked into sending money that they were told was owed. The introduction of private debt collectors who will be calling for tax debt collection creates a new layer of uncertainty for taxpayers. In the past, tax professionals could assure clients and friends that the IRS would never stalk them by telephone or leave threatening messages on home answering machines. Now it seems that private debt collectors will be legally making those calls, and it appears that there is no program designed to protect taxpayers from scammers or to differentiate the real collectors from the fake. For that you may thank Congress.

Congress mandated the use of private debt collector agencies when it enacted section 32102 of the Fixing America's Surface Transportation (FAST) Act in December 2015.[1] In an announcement issued September 26, the IRS broadcast the implementation of this program with the hope and expectation of informing the public about changes to come (IR-2016-125). Previously, the IRS had abandoned a non-mandatory program authorized by the American Jobs Creation Act of 2004 because the program was considered not to be cost effective. This time the program is mandatory.

As intended, the program requires the IRS to give written notice to each taxpayer and her representative that an account has been transferred to a private debt collector, which should be followed up by a separate letter from the debt collection agency. Critics say that the IRS should give prior notice of its intention to transfer the file before actually doing so because it may inspire payments and avoid the necessity of transferring the file to an outside agency. That might also inspire tax delinquents to become proactive with the IRS and exercise those collection rights that are available when dealing with the IRS and unavailable with a private agency.

The IRS has selected four private contractors to carry out this work. Each contractor must abide by the Fair Debt Collection Practices Act (FDCPA) and respect taxpayer rights. The selected contractors are listed as:

- ConServe, 200 CrossKeys Office Park, Fairport, NY 14450;
- Pioneer, 325 Daniel Zenker Dr., Horseheads, NY 14845;
- Performant, 333 N. Canyons Pkwy., Livermore, CA 94551; and
- CBE Group, 1309 Technology Pkwy., Cedar Falls, IA 50613.

The FDCPA[2] ostensibly protects all consumers from questionable debt collection activities. Taxpayer rights under the FDCPA include the ability to verify and dispute a debt and the right to be free from harassment or false representations. For example, the law prevents collection efforts or calls at "unusual" or "inconvenient" times or places. That prevents collection efforts before 8:00 a.m., after 9:00

[1]P.L. 114-94.
[2]As amended by P.L. 111-203 (2010), 15 U.S.C. sections 1692-1692p.

p.m., or at another time or place the taxpayer identifies to the tax collector as inconvenient, including calling the taxpayer at his place of work.

The statute states that the following conduct indicates harassment:

- the use or threat of use of violence or other criminal means to harm the physical person or the reputation or property of any person;
- the use of obscene or profane language or language whose natural consequence is to abuse the hearer or reader;
- the publication of a list of consumers who allegedly refuse to pay debts, except to a consumer reporting agency or to persons meeting the requirements of 15 U.S.C. section 1681a(f) or 1681b(3);
- the advertisement for sale of any debt in order to coerce payment of the debt;
- causing a telephone to ring or engaging any person in telephone conversation repeatedly or continuously with intent to annoy, abuse, or harass any person at the called number; and
- except as provided in 15 U.S.C. section 1692b, the placement of telephone calls without meaningful disclosure of the caller's identity.[3]

The statute identifies the following conduct as indicating false or misleading representations:

- the representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person or the seizure, garnishment, attachment, or sale of any property or wages of any person unless that action is lawful and the debt collector or creditor intends to take that action;
- the threat to take any action that cannot legally be taken or that is not intended to be taken;
- the false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer; and
- communicating or threatening to communicate to any person credit information that is known or that should be known to be false, including the failure to indicate that a debt is disputed.[4]

The Federal Trade Commission reports that most of the complaints it receives are about private debt collectors.[5] Identity theft complaints are second. Given the industry, it is fair to express concern over handing tax cases to private debt collectors.

[3]15 U.S.C. section 1692e.

[4]15 U.S.C. section 1692f.

[5]Colleen Tressler, ''The FTC's New Hall of Shame — Banned Debt Collectors'' (Feb. 2, 2015), *available at* https://www.consumer.ftc.gov/blog/ftcs-new-hall-shame-banned-debt-collectors.

Should You Be Concerned?

The mandate to use private debt collection agencies covers only older, overdue tax accounts or those tax debts that the IRS cannot pursue because of insufficient resources. The program covers tax debts when (1) they are removed from the active IRS collection inventory because of either the lack of resources to pursue the matter or the inability to find the taxpayer; (2) more than one-third of the collection limitation period has elapsed, and the file has not been assigned to an agent for collection; or (3) the file has been assigned to an agent for collection, but more than one year has passed without any interaction with the taxpayer. Some taxpayer accounts will never be assigned to a private collection agency, including accounts of taxpayers who are:

- deceased;
- under the age of 18;
- in designated combat zones;
- victims of tax-related identity theft;
- under examination, litigation, criminal investigation, or levy;
- subject to pending or active offers in compromise;
- subject to an installment agreement;
- subject to a right of appeal;
- classified as an innocent spouse; or
- in presidentially declared disaster areas and requesting relief from collection.

Who Is at Risk?

The IRS may place some delinquent accounts in a category known as currently not collectible (CNC). This designation applies to the accounts of taxpayers who are economically unable to pay down their tax debts given their lack of assets and income. The IRS has said that those accounts will not be referred for private debt collection as long as there has been a formal CNC account designation, rather than just reluctance by the IRS to pursue collection. The accounts of taxpayers suffering economic hardship and having debts not formally designated CNC by the IRS may be sent to private debt collection.

Even if you don't fit the profile, all taxpayers should understand the program and be on guard for scammers who claim to represent the IRS and seek payment for either real or invented tax obligations. While previously we had to worry only about IRS impersonators, we now must worry about tax debt collection impersonators as well. The IRS is attempting to reassure taxpayers by claiming on its website:

> Even with private debt collection, you shouldn't receive unexpected phone calls from the IRS demanding payment. When people

owe tax, the IRS always sends several collection notices through the mail before making phone calls.

It is important to know that any payment demanded by a collection agency should be made by check payable to the "U.S. Treasury" and mailed directly to the IRS and not the collection agency. To avoid further fraud, prepaid debit cards will not be accepted as payment.[6]

Protection of Taxpayer Rights

Taxpayers who deal with the IRS over tax debts have various rights and opportunities. The rights are codified at section 7803(a)(3). In its most recent report to Congress, the national Taxpayer Advocate Service (TAS) has cautioned that the following rights are most affected by the new law:

- the right to be informed;
- the right to quality service;
- the right to pay no more than the correct amount of tax;
- the right to challenge the IRS's position and be heard;
- the right to finality;
- the right to privacy;
- the right to confidentiality; and
- the right to a fair and just tax system.

Taxpayers with tax debt have systematic opportunities to negotiate that debt with the IRS. Some of the arsenal for dealing with the IRS includes the opportunity to negotiate installment agreements, OICs based on doubt about collectibility, CNC status, the release of levies on property, Social Security checks, or bank accounts when economic hardship is present, as well as the opportunity to eliminate penalties. In fiscal 2015 the IRS abated nearly $8.9 billion in civil penalties and accepted 27,000 OICs. Private collection agencies will not have that authority. Thus, the taxpayer will have fewer rights and opportunities to negotiate a tax debt.

While the IRS often factors economic hardship into the collection process, debt collection agencies have no incentive or requirement to do so. Therefore, the most imperiled taxpayers will be those with the least opportunity to pay. The TAS report concludes, "Thus, [private collection agencies] may end up pursuing taxpayers in financial hardship for tax debts the IRS itself could not collect."

What Can You Do?

It is best to address problems raised by the IRS as early as possible and while the IRS is still involved in the audit, exam, or collection process. Take all IRS correspondence to a qualified accountant or tax attorney so that you can promptly address all issues, exercise all appeal rights, and meet any deadlines for filing with the Tax Court. It is possible to refuse to deal with a private debt collection agency, but you must first write to that agency in protest. Complaints can be registered by calling the Treasury Inspector General for Tax Administration's hotline at 800-366-4484 or visiting TIGTA's website at http://www.tigta.gov. Written complaints may be sent to:

Treasury Inspector General for Tax
Administration
Hotline
P.O. Box 589
Ben Franklin Station
Washington, DC 20044-0589

The IRS further advises: "To report a threat, assault or attempted assault by a private collection agency employee, contact the Treasury Inspector General for Tax Administration (TIGTA) Office of Investigations with responsibility for your geographic area." In the past, under the abandoned private collection program, TAS fought to inject a level of oversight into the collection practices of the private collection agencies. Those agencies resisted sharing their telephone transcripts, countering that those practices were proprietary and protected. There is no assurance now that oversight will be possible even though it is written into the law — as it was in the past.

Effect

Our tax system works because of overwhelming voluntary compliance. The voluntary compliance rate is 81.7 percent. In fiscal 2015 the IRS collected more than $3.3 trillion and processed more than 243 million tax returns and other forms. There is approximately a $458 billion gross tax gap, $387 billion (approximately 85 percent) of which is estimated to result from underreporting on timely filed returns.[7] Our system of voluntary compliance and collection is important to our well-governed society, and yet it is equally important to ensure the rights of all taxpayers, articulated by the recently adopted Taxpayer Bill of Rights. Those rights guarantee the all-important existence of actual and perceived fairness in the implementation of our system of taxation. We await with bated breath Congress's mandate of private tax debt collectors and hope that the dual objectives of our tax system, voluntary compliance and fairness, survive. ■

[6]Information about electronic payment is *available at* https://www.irs.gov/payments.

[7]IRS Publication 1415, *Federal Tax Compliance Research: Individual Income Tax Gap Estimates for 1985, 1988, and 1992* (May 2016).