ABA TAX SECTION
CLOSELY HELD BUSINESSES COMMITTEE

AVOIDING AND DEFENDING AGAINST THE TRUST FUND RECOVERY PENALTY

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I. IRC section 6672 Background

a. Duty to Withhold/Remit Trust Fund Portion of Payroll Taxes

Employer has duty to remit to the IRS the employee's portion of FICA/FUTA and the amount of Federal income taxes withheld for the employee ("Trust Fund Taxes"). Employer holds the Trust Fund Taxes in trust for the government. IRC section 7501(a).

Employee is entitled to credit for the Trust Fund Taxes (toward their income tax liability or toward payment into Social Security, etc.) withheld/paid regardless of whether employer actually remits them to the IRS. IRC section 31(a).

b. IRS Recourse for Failure to Remit Trust Fund Taxes to IRS

1. Collect delinquent Trust Fund Taxes from employer; and/or
2. Utilize Section 6672 to assess Trust Fund Recovery Penalty ("TFRP") against one or more responsible persons of the employer

No duty for IRS to attempt to collect from employer first before pursuing assessment against responsible persons using Section 6672

c. General Requirements for IRS to Assess Trust Fund Recovery Penalty under Section 6672

1. Responsibility (Responsible Person)

Only those persons who are responsible for the nonpayment of taxes can be liable for the TFRP under Section 6672. The Code defines "person" to include an officer or employee of a corporation, or a member or employee of a partnership. IRC section 6671(b). The Code does not, however, define "responsible person." That has been left to administrative ruling and case law.

"A responsible person may be an officer or employee of a corporation, a partner or employee of a partnership, a corporate director or shareholder, another corporation, an employee of a sole proprietorship, a surety lender, or any other person or entity outside the delinquent business organization."

The determination of whether an individual is a "responsible person" is a factual question. *See* IRS Policy Statement P-5-60 (IRM 1.2.1.5.14) and IRM 5.7.3.3. A person's title is not controlling – not necessary that person be an officer or even an employee of the company. The touchstones for determining whether one is a "responsible person" are the person's "status, duty, and authority" within the organization. *Mazo v. United States*, 591 F.2d 1151, 1153 (5th Cir. 1979). *See also* IRM 5.7.3.3.

Most commonly, responsibility attaches when a person has the authority to decide which creditors to pay and when such action should occur. The key is power to control finances of company – to control the decision making process as to which creditors are paid and which are not. If person had power over company's finances, he is likely a responsible person. *Purcell v. United States*, 1 F.3d 932 (9th Cir. 1993). *See also* IRM 5.7.3.3.1. It is not necessary that an individual have the final word with regard to payments. *See, e.g.*, *Hochstein v. United States*, 900 F.2d 543 (2d Cir. 1990); *Neckles v. United States*, 579 F.2d 938, 940 (5th Cir. 1978). Thus, a person can be held liable under Section 6672 when one has the requisite authority to make payment to the IRS, yet fails to assert such authority when directed otherwise. *See Caterino v. United States*, 794 F.2d 1, 5 (1st Cir. 1986).[1]

An earlier version of the IRM, in summarizing case law (*e.g., Vinick v. United States,* 205 F.3d 1 (1st Cir. 2000), stated that the following acts performed, authority to perform such acts, or positions held by an individual within the organizational structure tend to indicate "responsibility." IRM 5.7.3.3.1.1.

- The authority to sign checks, and did so;
- Control of the financial affairs of the business;
- Being an officer, director, or shareholder of the corporation;
- One has duties and responsibilities in the corporate by-laws;
- The ability to hire and fire employees;
- The authority to borrow money for the company;
- The authority to sign and file federal tax returns, particularly Form 941s;
- One deals with customers and creditors;
- Control of payroll disbursements;
- The ability to direct payments to creditors;
- The final word as to which bills are paid and when;
- Control of the corporation's voting stock; or
- If one has responsibility for making the federal tax deposits.

[1] Lack of knowledge is not a defense to the responsible person element, though such a fact may assist in negating the second element of "willfulness." That is, an individual who otherwise meets the standards of being a responsible person cannot avoid responsible person classification merely because she did not know taxes were due the IRS.

2. Willfulness

The second criteria that must be met for a person to be held liable for the TFRP is that the individual must have *willfully* failed to collect, truthfully account for, and pay over Trust Fund Taxes. Willful is not defined in the Code, however, case law and the IRM set forth definitions. IRM 5.7.3.3.2 and IRM 8.11.1.8.2.

Note the different standards applied in criminal tax cases and in Section 6672 cases. The standard for willfulness in criminal cases is "a voluntary, intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192 (1991). By contrast, willful conduct for IRC section 6672 purposes merely requires a "voluntary, conscious, and intentional - as opposed to accidental - decision not to remit funds properly withheld to the government." *Kalb v. United States*, 505 F.2d 506, 511 (2d Cir. 1974) (quoting *Monday v. United States*, 421 F.2d 1210, 1216 (7th Cir. 1970)). Neither the criminal nor the civil standard requires bad faith or evil intent, however, the former suggests more purposeful conduct. *Caterino v. United States*, 794 F.2d 1 (1st Cir. 1986) (the presence of an improper motive or specific intent to deprive the U.S. of revenue is not required to demonstrate willfulness). *See also* IRM 5.7.3.3.2(1) and IRM 8.11.1.8.2.

In *Muck v. United States*, 3 F.3d 1378, 1381 (10th Cir. 1993), the Tenth Circuit defined willfulness as follows:

> Willfulness in the context of Section 6672, means a 'voluntary, conscious, and intentional decision to prefer other creditors over the government.' ...[w]illfulness is present when ever a responsible person 'acts or fails to act consciously and voluntarily and with knowledge or intent that as a result of his actions or inaction trust funds belonging to the government will not be paid over but will be used for other purposes.' ...Proof of willfulness does not require proof of bad motive...It is the burden of the responsible person to show that he did not willfully fail to remit taxes. *See also Denbo v. United States*, 988 F.2d 1029 (10th Cir. 1993).

Stated differently, willfulness exists if either (1) the responsible person was aware that the taxes were unpaid and, possessing the power to pay them with funds of the taxpayer entity, signed checks paying another creditor, or (2) the responsible person acted "grossly negligent" or in "reckless disregard" of the fact that the taxes were due and would not be paid. *IRS v. Blais*, 612 F. Supp.

700 (D. Mass. 1985).

Mere negligence, on the other hand, is not considered willful. *Kalb v. United States,* 505 F.2d 506, 511 (2nd Cir. 1974). In determining whether the person's conduct rises to the level of being grossly negligent, courts state that one may not fail "to investigate or to correct mismanagement after having notice that withholding taxes have not been remitted to the government." Such duties to inquire or investigate and to correct mismanagement can make establishing mere negligence difficult. *Id.*

II. Avoiding the Penalty

a. Pay Payroll Taxes/Withholding

If responsible person of company, timely and fully pay the company's payroll/Trust Fund Taxes

If not enough money to pay all creditors currently:

Pay payroll taxes first – reduce payroll, etc.

Pay at least amount of Trust Fund Taxes due and *designate* payments to IRS toward that liability

If a taxpayer submits a payment, whether voluntarily or involuntarily, and fails to clearly instruct the Service how to apply it, the IRS will apply it in a manner that is in the Service's best interests. IRM 5.1.2.3; Rev. Proc. 2002-26, 2002-15 I.R.B. 746. A taxpayer, however, may designate payments when made voluntarily to the IRS. Rev. Proc. 2002-26. Taxpayers should clearly designate payments in writing to the IRS. *IRS v. Kaplan*, 104 F.3d 589 (3rd Cir. 1997).

Communicate with IRS up front about inability to keep current and make payment arrangements. Although the IRS is not required to refrain from asserting the TFRP if the employer has entered into and is maintaining an installment agreement for the delinquent payroll taxes, the IRS has indicated that it will follow that procedure absent statute of limitations problem. IRS Policy Statement P-5-60 (2/2/93). What if business files OIC for delinquent payroll taxes and must make monthly payments on OIC while it is being considered – can it practically also enter into an installment agreement to convince the IRS not to pursue TFRP?

If still cannot pay Trust Fund Taxes, resign (and not just in title only)

b. Before accepting position with company where you will be a responsible person, make sure company is current on payroll taxes.

What if company is current now but was not current in past. Can TFRP be assessed against you for past quarters if you accept position with the company?

Can be liable for TFRP for prior quarters when you were not responsible person for those quarters, if and to the extent the company has unencumbered funds at the time you become a responsible person (because you were just hired or promoted) and the company does not use those funds to pay back Trust Fund Taxes. Thus, not enough to just say you were not employed by company for those quarters, you must use funds available now and in the future to pay these Trust Fund Taxes to avoid Section 6672 liability. Must use all funds available when hired to pay Trust Fund Taxes and designate payments. *Denbo v. U.S.*, 98 F.2d 1029 (10th Cir. 1993).

The law is different if you were a responsible person during the time the company failed to pay its Trust Fund Taxes but only later discovered this failure (*i.e.*, you were not willful at the time the Trust Fund Taxes were not paid). In this case you must use not only the unencumbered funds available at the time you make such discovered but also all future unencumbered funds that the company acquires to pay the back payroll tax liability in order to avoid liability under Section 6672 to the extent unencumbered funds are used for purposes other than to pay the back payroll tax liability. *Honey v. U.S.*, 936 F.2d 1083 (8th Cir. 1992).

"Unencumbered funds" means funds available after paying creditors holding superior security interests over the IRS and the company is restricted by the superior creditor from using the funds to pay the Trust Fund Taxes. *Kenagy v. U.S.*, 942 F.2d 459 (8th Cir. 1991). Therefore, usually no funds a company had available would be considered unencumbered.

State Law – Many states have a statute equivalent to Section 6672 where a persons can be held personally liable for state unpaid payroll taxes. Those statues may vary and cause liability even if a person would not be liable under Section 6672. For example, California may require all future funds be used to pay back state payroll taxes to avoid liability even if the responsible person was just hired by a company.

c. Avoiding Willfulness Requirement - Cannot avoid TFRP by merely looking the other way when there is evidence that Trust Fund Taxes are not being paid. *Wright v. United States*, 809 F.2d 425 (7th Cir. 1987). Once have any indication that Trust Fund Taxes are not being paid, person must take action to correct the problem.

d. Avoiding Responsible Person Status – Delegating the authority to control the company's finances might be enough to prevent a person from being a responsible person. But the delegating party must be able to show that all power and authority had in fact been delegated prior to the period for which taxes are owed. Furthermore, delegation has a better change of succeeding if it is by an owner to an officer of the company or by an employee to his manager. The delegation by the CFO to the company's bookkeeper of the responsibility to pay all bills including taxes might not enough to relieve the CFO of responsible person status. *Brennan v. U.S.*, 85-1 USTC para. 9113 (N.D. Ohio 1984), *Lawrence v. U.S.*, 229 F. Supp. 187 (N.D. Tex. 1969).

III. Defending the Penalty

a. Defense Strategies with Respect to the Responsible Person Element

1. Establish That Individual Did Not Have Status, Duty, or Authority

The most obvious strategy associated with proving one is not a responsible person is establishing that the person lacked the status, duty, or authority to direct the collecting of, accounting for, and payment of Trust Fund Taxes. This burden is not met merely by proving that another had greater power.

Even though one may be an officer, such as a secretary or treasurer, or have the ability to sign checks, this does not automatically mean one has the authority to make financial decisions relative to paying bills. The full scope of one's status, duty, and authority must be examined. IRM 5.7.3.3; *Heimark v. United States*, 18 Cl. Ct. 15 (1989). *See United States v. Stanton*, 37 AFTR2d (RIA) ¶76-1427 (S.D. Fla. 1976) (corporation's vice president was foreman and had no control over or participation in business or financial decisions); *In re Clifford*, 255 B.R. 258 (D. Mass. 2000) (majority owner kept check-signing vice president and shareholder "in the dark" about finances and retained control over payroll payments). While there is no quantitative standard for responsibility, such as spending more than 50% of one's time is fulfilling the functions mentioned in the previous paragraph, the less status, duty and authority the better.

A person who has the ultimate authority to make the financial decisions generally cannot avoid responsible person status by delegating duties to others. *Kinnie v. United States*, 994 F.2d 279 (6th Cir. 1993). However, if the delegation was so complete as to have rendered the delegator powerless to make financial decisions, such person may avoid responsibility. IRM 5.7.3.3; *Stewart v. United States*, 90-1 U.S.T.C. (CCH) ¶50,002 (Cl. Ct. 1989).

A conflicting line of cases deal with the situation where an otherwise responsible person was so dominated by a family member that their authority was put into question. Compare *In re Aboody*, 250 B.R. 1 (Bankr. D. Mass. 2000) and *Barrett v. United States*, 580 F.2d 449 (Cl. Ct. 1978) (granting relief for women in such situations) with *Luce v. Luce*, 119 F. Supp. 2d 779 (S.D. Ohio 2000) (denying relief).

2. The "Nuremberg Defense" - "I Was Just Following Orders"

Before 1993, one of the most common inequities associated with the Section 6672 penalty occurred with respect to lower level employees who merely prepared the tax returns or signed the checks purely at the direction of someone with decision-making authority. Some courts held such persons responsible (frequently a staff bookkeeper or accounts payable clerk) if they continued to work at the business after discovering the nonpayment. Compare *Howard v. United States*, 711 F.2d 729 (5th Cir. 1983) and *Roth v. United States*, 779 F.2d 1567 (11th Cir. 1986) with *Jay v. United States*, 865 F.2d 1175 (10th Cir. 1989). Fortunately, the IRS has now reversed its position and exonerates such non-owner persons from liability under Section 6672 if they do not exercise independent decision-making authority as to which creditors get paid. Policy Statement P-5-60 (IRM 1.2.1.5.14); IRM 5.7.3.3.1.2.[2]

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[2] One important caveat is that the government's position appears to be limited to non-owners and those who would not otherwise be responsible persons. If one is a responsible person, such as a treasurer, one cannot avoid liability

3. Not a Responsible Person at the Time Taxes Withheld

A person is subject to liability if she was a responsible person at the time the wages were paid and the taxes withheld; the date the employment tax returns are filed is not the critical date. *Davis v. United States*, 961 F.2d 867 (9th Cir. 1992); *Vinick v. United States,* 205 F.3d 1 (1st Cir. 2000). Resignation after the liability arose but before the tax returns were due will not avoid responsible person status. *Long v. Bacon*, 239 F. Supp. 911 (S.D. Iowa 1965). In addition, one who assumes control of a business is a responsible person for accrued taxes outstanding, but only to the extent of unencumbered funds of the business at that time. *Slodov v. United States*, 436 U.S. 238 (1978).

b. Defense Strategies with Respect to the Willfulness Element

Section 6672 cases usually originate in the IRS's Collection Division and are handled by Revenue Officers (RO). ROs are trained in the procedures used to collect taxes, not in the subtleties of the tax law. The element of willfulness requires an understanding of the delicate distinctions between willfulness, gross negligence and "regular" negligence. Consequently, once the Service has decided who are responsible persons, it is not uncommon for them to disregard the willfulness element when asserting the penalty. Thus, a stronger defense frequently can be advanced with respect to a lack of willfulness element than responsible person element since the former may be less developed and investigated by the RO. With that in mind, one should vigorously address themselves to the following defense strategies, where appropriate.

1. Establish That the Responsible Person Was Merely Negligent

A successful defense strategy may be to establish that a person's conduct was merely negligent and not willful.

As mentioned above, numerous courts have found that a taxpayer did not act willfully where she lacked actual knowledge that the liability existed or lacked actual knowledge that the trust fund taxes had not been paid. *See, e.g., Dudley v. United States*, 428 F.2d 1196 (9th Cir. 1970); *Gustin v. United States*, 876 F.2d 485 (5th Cir. 1989).[3] For example, in *Markewich v. United States*, 61-1 USTC (CCH) ¶9241 (S.D.N.Y. 1961), an attorney acting on behalf of the corporation signed checks for employment taxes

simply because of a superior's orders not to pay the tax. *Roth v. United States*, 779 F.2d 1567 (11th Cir. 1986). *See also United States v. Rem,* 38 F.3d 634 (2d Cir. 1994) (the controlling questions are (1) whether the individual firmly believed that his actual authority was limited to following another's orders; and if so (2) was such belief reasonable under the circumstances).

[3] However, one must be careful to distinguish this line of cases from its fraternal twin, *i.e.*, those in which the taxpayer exhibited a reckless disregard of the fact that taxes were not paid.

and entrusted them to the corporate president for delivery. The president failed to deliver the checks. The court held that even though the attorney may have been a responsible person and his failure to ascertain whether the checks were deposited may have constituted negligence, his actions or inaction were not willful.

2. Establish Reasonable Cause

Responsible persons may also be able to avoid liability if they had reasonable cause for not acting. "Reasonable Cause" is a term of art in the Internal Revenue Code. In the context of late filing penalties, for example, if a taxpayer can demonstrate that delinquencies in filing tax returns were due to "reasonable cause," the IRS will abate the penalties.

In the context of the Section 6672 penalty, reasonable cause is not stated as a defense. However, the Second, Third and Fifth Federal Circuits, as well as the Court of Claims, have held that "willfulness" is mitigated if the taxpayer can show "reasonable cause" for the failure to pay. *See, e.g., Winter v. United States*, 196 F.3d 339 (2d Cir. 1999); *United States v. Slattery*, 333 F.2d 844 (3d Cir 1964); *Frazier v. United States*, 304 F.2d 528 (5th Cir. 1962); *McCarty v. United States*, 437 F.2d 961 (Ct. Cl. 1971). For example, one would have reasonable cause where they were advised by counsel that no tax was due (*Cross v. United States*, 204 F. Supp. 644 (E.D. Va. 1962)) or did not need to be paid (*Cash v. Campbell*, 346 F.2d 670 (5th Cir. 1965)) or where others assured them that the tax was paid. *Richard v. United States*, 72-1 USTC (CCH) ¶9267 (C.D. Cal. 1972). Similarly, if the person can establish that "he undertook all reasonable efforts to see that such taxes would in fact be paid," such person is not willful or reckless. *Feist v. United States*, 607 F.2d 954 (Ct. Cl. 1979); *Belcher v. United States*, 6 AFTR 2d (RIA) ¶5495 (W.D. Va. 1960) (taxpayer relied on bookkeeper to pay taxes but bookkeeper deliberately concealed fact of nonpayment).

However, the First, Seventh, Eight and Ninth Circuits, which have explicitly rejected the notion, hold the majority view that reasonable cause or a justifiable excuse negates willfulness under Section 6672. *Harrington v. United States*, 504 F.2d 1306 (1st Cir. 1974); *Monday v. United States*, 421 F.2d 1210 (7th Cir. 1970); *Olsen v. United States*, 952 F.2d 236 (8^{th} Cir. 1991); *Pacific Nat'l Ins. Co. v. United States*, 422 F.2d 26 (9th Cir. 1970). *But see Gray Line Co. v. Granquist*, 237 F. 2d 390 (9^{th} Cir. 1956). Accordingly, these circuits have held that a taxpayer's intentional actions are willful regardless of whether he or she can provide justification for the action. The reasonable cause defense has been rejected in the following situations:

1) The advice and information that the president of a construction company received from the company's accountants and attorneys did not constitute reasonable cause for his failure to account and pay over withheld payroll taxes. *Newsome v. United States*, 431 F.2d 742 (5th Cir. 1970);

2) Mere delegation of responsibility to another does not constitute reasonable cause. *Mazo v. United States*, 591 F.2d 1151 (5th Cir. 1979);

3) Willfulness was not mitigated by [the taxpayer's] fear that failure to pay his creditors would be a criminal offense under state law. *High v. United States*, 506 F.2d 755 (5th Cir. 1975);

4) Reliance on the advice and assurance of [the taxpayer's] banker that a loan would be made available to pay such taxes when the IRS made demand for payment was rejected as reasonable cause why the tax liability was not paid. *Bowen v. United States*, 836 F.2d 965 (5th Cir. 1988);

5) A recommendation by a high level IRS official that the taxpayer write a letter to the IRS explaining [the employment tax problem] to his superior should not have been regarded as the only possible approach to the problem, and thus was not a reasonable cause to for failing to pay the tax. *Howard v. United States*, 711 F.2d 729 (5th Cir. 1983); and

6) Responsible person's belief that there would be sufficient corporate assets to cover liability for federal withholding taxes was insufficient to have given him reasonable cause not to have paid taxes due while corporation was still a going concern. *Hutchinson v. United States*, 559 F. Supp. 890 (N.D. Ohio 1982).

Despite the apparent breadth of the rejection of the defense, the Tenth Circuit, sitting *en banc*, held in *Finley v. United States*, 123 F.3d 1342 (10th Cir. 1997) that the question of liability was for a jury to determine in view of all relevant evidence. In the most favorable opinion to date to those accused, the court held that recognizing reasonable cause (and other defenses) avoids a "strict liability" interpretation of the penalty. The court held that certain factual situations are paradigms that "create an expansive web of liability 'as a matter of law' and significantly ease the government's burden." Nevertheless, the court held that since willful in the Section 6672 context requires "scienter" on the taxpayer's part, all the facts and circumstances should be considered. The court held that the defense should be limited to those situations where the jury concludes (1) the taxpayer made reasonable efforts to protect the trust funds, but (2) those efforts were frustrated by circumstances beyond the taxpayer's control.

3. Establish That There Were No Funds Available at the Time the Person Became a Responsible Person

In *Slodov v. United States,* 436 U.S. 238 (1978), the Supreme Court held that a person who took control of a business became a responsible person with respect to existing tax obligations but only to the extent the business had unencumbered funds at that time available to pay the government. If the business did not possess such funds or possessed only a limited amount of such funds, the use of subsequently generated money to pay other creditors would not violate the willfulness standard, except to the extent of the then-existing unencumbered funds. *Davis v. United States*, 961 F.2d 867 (9th Cir. 1992); *Kenagy v. United States*, 942 F.2d 459 (8th Cir. 1991). This doctrine holds whether the after-acquired money is raised by a contribution to capital or earnings.

Subsequent decisions have limited *Slodov* (*i.e.*, the ability to use after-acquired funds for other debts) to a narrow window. Thus, in light of these cases, the *Slodov* doctrine does not apply if either the person was a responsible person when the liability arose *(Davis v. United States*, 961 F.2d 867 (9th Cir. 1992); *Honey v. United States,* 963 F.2d 1083 (8th Cir. 1992)), or the business possessed funds, which were not encumbered. *Kenagy v. United States,* 942 F.2d 459 (8th Cir. 1991); *Honey v. United States*, 963 F.2d 1083 (8th Cir. 1992); *Huizinga v. United States*, 68 F.3d 139 (6th Cir. 1995). Thus, to fully utilize *Slodov*, the person must be a newly responsible person and all of the business' funds must have been encumbered, or limited, at that time. *In re Bewley*, 191 B.R. 459 (Bankr. Okla. 1996). *See Michaud v. United States*, 40 Fed. Cl. 1 (1997).

IV. Paying the Penalty

a. If responsible/willful person has sufficient assets to pay TFRP and wants to keep business going, can business file offer in compromise ("OIC") and offer to pay just the Trust Fund Taxes portion of the liability (assuming business has no ability to pay any of the back payroll taxes) - then designate payment made by business to Trust Fund Taxes? This should clear up the liability for both taxpayers although the responsible/willful person will still be liable for any accrued interest on the TFRP assessed against him. IRM 563(15).7(1) (5/5/93). If the business pays anything less than the full amount of the Trust Fund Taxes or

fails to designate the payments, the TFRP would not be eliminated. Is there any advantage to both taxpayers filing OIC if using this technique?

If this is done, individual should loan or contribute to capital the funds to the business to pay the Trust Fund Taxes. Normally, TFRP payment is not deductible but if individual makes loan or capital contribution to company to pay Trust Fund Taxes and company later goes under, individual arguably has bad debt deduction or capital loss. *Arrigoni v. Commissioner*, 73 T.C. 792 (1980), *First National Bank of Duncanville v. U.S.*, 481 F. Supp. 633 (N.D. Tex. 1979).

b. TFRP OICs Returned as Nonprocessable

IRS is usually very quick to return OICs filed by either the responsible person or the company if the company is late on any deposit, payment or filing. Since OICs take a very long time to process, being late on any of these items during that period is common and has caused many taxpayers to have OICs return as nonprocessable.

IRS also used to require that company be in compliance for two consecutive quarters prior to filing an OIC. If company was really struggling – and making deposits late – this was hard to satisfy.

Non-compliance should not be an automatic reason to reject OICs as nonprocessable for two reasons:

1) Per IRM section 5.8.3.4.1 "in business taxpayers" must have paid timely deposits, filed and paid all required employment tax returns for the two proceeding quarters prior to filing an OIC and must be current deposits for the quarter in which the offer was submitted. Per this IRM section, however, an individual taxpayer should not be considered an "in business taxpayer" because he owns or controls a corporation that is not in compliance. Therefore, a responsible person's OIC should not be returned as nonprocessable if the company is not in compliance. *See also*, Reg. section 301.7122(e)(1) and *Chavez v. United States*, 2004 WL 1124915 (W.D. Tex 2004) (generally rejecting reasons for the IRS to return an offer as nonprocessable except the reasons specifically stated in the Regulations and noncompliance by business is not in the Regs)

2) Per the 2005 changes in the OIC program – noncompliance by a taxpayer does not automatically result in the OIC being returned as nonprocessable. See IRS new OIC rules Q15/A15 which states: "Compliance will no

longer be a processability criterion for OIC initial submissions. If compliance is the only issue, the offer will be deemed processable. However, IRS will contact the taxpayer by either telephone or correspondence requesting the delinquent return(s), and/or the required estimated tax payment(s). A reasonable amount of time will be provided to the taxpayer to comply."

In investigating OICs made by businesses, IRS practice appears to currently be to request financial and compliance information about officers of business even before the TFRP has been assessed if TFRP investigation has begun.

c. Multiple Responsible Parties - All responsible parties along with employer are responsible for TFRP jointly and severally. IRS goes after all at same time usually without any effort apportion collection.

IRS must tell responsible persons the names of the other persons it determines are liable under Section 6672, its general collection actions against such persons and the amount collected. IRC section 6103(e)(9). A responsible person may contact the IRS and make a written request for this information.

A responsible person who pays more than their share of the TFRP has a right to contribution for the overpayment from co-responsible persons. IRC section 6672(d). This Federal right to contribution was added to the Code by the Taxpayer Bill of Rights 2. The paying responsible person may also have a right to be reimbursed under the bylaws of the corporation or under state law.

If IRS collects more than the TFRP due by way of attempting to collect from all responsible parties simultaneously, the last party to pay has a right to a refund of the excess payment (up to the amount he or she paid).

More efficient for all responsible persons to work together along with the company to pay the Trust Fund Taxes – agree to allocate responsibility and make payment. This saves on legal fees and may result in a fairer outcome.