**TESTIMONY OF MARK GUIMOND**

**ON BEHALF OF**

**THE TAX PROBLEM RESOLUTION SERVICES COALITION**

**FOR THE CONSIDERATION OF S. 708  
BEFORE THE CALIFORNIA SENATE**

**COMMITTEE ON BANKING AND FINANCIAL INSTITUTIONS**

**APRIL 27, 2011**

Mr. Chairman, I am Mark Guimond and I am presenting this testimony on behalf of the Tax Problem Resolution Services Coalition (TPRSC). The TPRSC represents the efforts of a broad spectrum of the industry including CPAs, attorneys and enrolled agents, located throughout the United States. Its mission is to promote and ensure the protection of taxpayers from unfair and deceptive advertising claims by unscrupulous delinquent tax debt representation providers.

**HARMONIZATION OF S. 708 WITH THE “TELEMARKETING SALES RULE”**

The Federal Trade Commission (FTC) recently enacted “debt relief service” amendments to the Telemarketing Sales Rule (TSR) to reign in the practices of debt settlement, debt management, debt resolution and credit counseling agencies. Without any prior notice to the industry, nor any discussion or input from the industry, the FTC announced that the TSR’s “debt relief” amendments applied to tax resolution services.

According to the FTC’s commentary on compliance with the “debt relief” provisions of the TSR:

“The definition of “debt relief service” covers all types of unsecured debts. If the debts you settle are unsecured – for example, medical debts or tax debts owed to the government – you’re covered by the new Rule.”

With the new amendments, the TSR defined a “debt relief service” as a program that claims directly, or implies, that it can renegotiate, settle, or in some way change the terms of a person’s debt to an unsecured creditor or debt collector – including tax debts. This includes reducing the balance, interest rate or fees a person owes.

The TSR also now defines “telemarketing” as a “plan, program, or campaign…to induce the purchase of goods or services” involving more than one interstate telephone call. The TSR encompasses all forms of advertising including internet, web pages, television, radio and direct mail.

The TSR contains specific requirements for debt relief providers related to the charging of fees before providing any services. It specifies that fees may not be collected until:

· the debt relief service successfully renegotiates, settles, reduces, or otherwise changes the terms of at least one of the consumer’s debts;

· there is a written settlement agreement, debt management plan, or other agreement between the consumer and the creditor, and the consumer has agreed to it; and

· the consumer has made at least one payment to the creditor as a result of the agreement negotiated by the debt relief provider.

**FTC TREATS CERTAIN TAX DEBTS AS “UNSECURED”**

The FTC was abundantly clear in its written “Guide for Business” wherein it stated:

“If the debts you settle are unsecured – for example… debts owed to the government – you’re covered by the new Rule.”

The FTC again reiterated its position regarding tax debts in a mid-October 2010 “Consumer Alert” which reads:

“Starting October 27, 2010, amendments to the FTC’s Telemarketing Sales Rule prohibit companies that sell debt relief services on the phone — including promoters of tax relief and settlement services — from charging or collecting a fee before they settle or reduce a customer’s unsecured debt.”

The sole statement that the FTC has provided to the tax resolution industry to help provide guidance in this matter is one unofficial quote in the press that is:

“The new rules [TSR] do apply to unsecured tax debts, but not if they have been secured by a tax lien, says Allison Brown, an FTC senior attorney.”

**FTC’S TREATMENT OF TAX DEBT AS “UNSECURED” CONTRADICTS FEDERAL TAX LAW**

The conclusion that the FTC has created is that all tax debts are “unsecured” unless “secured by a tax lien”. This position is in direct contradiction to the Internal Revenue Code, Internal Revenue Manual, Treasury Regulations and the opinion of the Office of Chief Counsel for the IRS. Consistent with the tax law of the United States, there are simply no “unsecured” federal tax debts.

The extensive treatment of this issue by tax authorities clearly shows that tax debts are secured from the moment that the tax is assessed – a position in complete disagreement with that espoused by the FTC.

**INTERNAL REVENUE CODE’S TREATMENT OF TAX DEBT**

There are two primary sections of the Internal Revenue Code (IRC) that are concerned with tax liens relevant to this matter: section 6321 and 6322. We recognize that there are additional provisions relating to liens, but these two are the most directly on-point for the conclusion that all tax debt is inherently secured.

IRC Section 6321, which is titled “Lien for taxes”, clearly provides for the creation of a lien at the moment when the tax is demanded. It states:

“If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.” (emphasis added)

Section 6322, titled “Period of lien”, then further clarifies the moment when a lien is imposed for tax debts. Section 6322 provides:

“Unless another date is specifically fixed by law, the lien imposed by section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time. “ (emphasis added)

**IRS’ INTERNAL REVENUE MANUAL**

In addition to the IRC, the IRS also publishes its own “Internal Revenue Manual” (IRM) that serves as the single official source for IRS policies, directives, guidelines, procedures and delegations of authority in the IRS. The IRM contains policy statements, major decisions of the Commissioner and other specified executives that govern and guide personnel in the administration of the tax laws and procedures and guidelines tell IRS employees how to serve taxpayers in administering the nation’s tax laws.

Section 5.17.2.1 of the IRM starts the discussion of the treatment of tax liens as secured by taxpayer property in “Federal Tax Liens Overview”. In this section the IRS:

“first explains how the federal tax lien arises, its duration, and the effect of filing a Notice of Federal Tax Lien (NFTL). The text then discusses the priority disputes between the federal tax and competing liens…”.

The IRM also provides in very expressive and easy to comprehend verbiage the nature and character of a lien and the various names under which a lien may be referenced. The IRM provides:

5.17.2.2 (12-14-2007)  
The General Tax Lien

“The law generally defines a lien as a charge or encumbrance that one person has on the property of another as security for a debt or obligation. Essentially, this concept can be reduced to a simple metaphor — i.e., a special “sticker” similar to what a moving company puts on the furniture, boxes, and other contents of a house when it takes the owner’s property from one place to another. The lien (or “sticker”) does not change the ownership or other qualities of the property to which it is affixed; it merely identifies the property as having some kind of claim against it…”

“…Liens may be divided into three general categories: common-law liens, consensual liens, and statutory liens. This section deals with the statutory liens provided for by the Internal Revenue Code of 1986. The principal lien considered in this section is the “general” tax lien, sometimes referred to as the assessment lien. The general tax lien is provided for by IRC § 6321 and is a very broad lien; it generally encompasses all of the taxpayer’s property or rights to property as security for a tax liability.” (emphasis added)

The IRM then moves into a careful and clearly worded discussion of the moment of creation of a lien at the time of the assessment of the tax. Section 5.17.2.2.1 “When and How the Tax Lien Arises” states:

“The federal tax lien arises when any “person” liable to pay any federal tax fails to pay the tax after a demand by the Government for payment. IRC § 6321. For federal tax law purposes, a “person” is defined to include individuals, trusts, estates, partnerships, associations, companies, and corporations. The lien is effective from the date the Government assesses the tax, even though the notice and demand for payment ordinarily gives the taxpayer an additional 10 days after assessment to pay the tax. Thus, if the taxpayer neglects or refuses to pay the assessed tax, then the lien is deemed to relate back to the assessment date. IRC § 6322. The Service is not required to file a NFTL in order for the tax lien to attach. As discussed later in the text, the Service may file a NFTL in order to have priority over the taxpayer’s other creditors.” (emphasis added)

The IRS in its IRM has clearly and definitively provided guidance and policy as to the moment that a tax lien is created. The IRS has even gone so far in section 5.17.2.3 “Filing Notice of the Federal Tax Lien” to note:

“The federal tax lien arises when the Service meets the requirements of IRC § 6321, i.e., an assessment and a notice and demand for payment. However, the law provides that in order for the federal tax lien to have priority against certain competing lien interests, the Service must file a NFTL pursuant to IRC § 6323.”

The IRS has published two sections of the IRM that bring the entire matter of the treatment of tax debts as a secured lien into perfect alignment. The two sections read together state:

5.17.2.3.1 (12-14-2007)  
Purpose and Effect of Filing Notice

1. The filing of a NFTL is not a step required to give rise to or to perfect the lien against the taxpayer. The act of filing protects the Government’s right of priority as against certain third parties, typically a purchaser, holder of a security interest, mechanic’s lienor, or judgment lien creditor. IRC § 6323(a). Generally speaking, unless the Service first properly files a notice of its federal tax lien, the purchaser will take the property free of the federal tax lien. Similarly, unless the Service first files a NFTL, the holder of a security interest, mechanic’s lienor, and judgment lien creditor will have priority over the federal tax lien.

5.12.2.1 (03-01-2004)  
Creation and Duration

1. A Federal Tax Lien (FTL) is created by statute and attaches to a taxpayer’s property and rights to property for the amount of the liability. This is the “statutory” or “silent” FTL. Requirements for creating a FTL are contained in IRC 6321. The following must happen:

A. An assessment must have been made.

B. A demand for payment must have been made.

C. The taxpayer must have neglected or refused to pay within 10 days of notification.

**IRS OFFICE OF CHIEF COUNSEL MEMORANDA**

In addition to the black letter law of the Internal Revenue Code and the IRS’ own “Internal Revenue Manual”, the Office of Chief Counsel in the IRS has also written extensively on the subject of IRC Section 6321. While only a few salient quotes of the many available are provided herein, there is no room for doubt that once a tax is properly assessed it is a lien and therefore secured by the taxpayer’s property and future property. The memoranda read:

OFFICE OF CHIEF COUNSEL MEMORANDUM

October 9, 2009

POSTN-133674-09

“The lien that arises upon notice and demand is referred to as the “assessment lien” because it arises upon assessment, notice, and demand, without the need for filing any documents in any public records. It is also referred to as the “secret lien” because there is no public record of the lien. While the assessment lien gives the IRS an interest in the taxpayer’s property that it can enforce through administrative or judicial actions, other creditors such as purchasers and holders of security interests may obtain priority over the IRS unless a NFTL is properly recorded.”

OFFICE OF CHIEF COUNSEL MEMORANDUM

February 12, 2010

POSTN-102647-10

“The general tax lien imposed by section 6321 “upon all property and rights to property” belonging to the taxpayer arises automatically by operation of law at the time the assessment is made and continues “until the liability for the amount so assessed (or a judgment against the taxpayer arising out of such liability) is satisfied or becomes unenforceable by reason of lapse of time.”

**FTC DEFERRED ENFORCEMENT OF THE TSR TO TAX DEBTS**

On October 27, 2010 the FTC issued an enforcement policy on the “debt relief” amendments to the TSR. In its statement, the FTC says that while most companies that sell debt relief services over the telephone are now prohibited from charging fees before settling or reducing a consumer’s credit card or other unsecured debt, it will defer enforcement of the new rule for tax debt relief services.

During the FTC’s education and outreach efforts, some tax debt relief companies expressed uncertainty about whether the Rule applied to them. Specifically, they questioned whether tax debts are “unsecured,” which would make them subject to the Rule. The FTC currently is considering these concerns, and until further notice, will defer enforcing the Rule with respect to “services that represent, directly or by implication, to renegotiate settle, or alter the terms of obligation between a person and a taxing entity (tax debt relief services).”

**S. 708 DOES NOT CLARIFY ITS POSITION ON TAX DEBTS**

Senate bill 708 as it now reads is as confusing and unclear as the TSR and its treatment of tax debts. We believe, however, that the law is unyielding on this subject and that tax debts are not “unsecured” and are not the subject of this legislation.

It is the responsibility of the legislature to consider and enact laws that are clear and precise in the targeting of industries for regulation. S. 708 is neither clear nor precise. We strongly urge the sponsor and this Committee to define for the record that this bill is intended to regulate providers of debt settlement services for individual consumers needing assistance with debts that are entered into contractually and related to credit cards, medical bills and similar unsecured obligations.

Absent some form of amendment that fixes the definitions in this legislation, we have no alternative but to withhold our support of S. 708.

This Committee should not approve a bill that is unclear about which industries it does or does not regulate. If the legislature intends to regulate debt settlement companies then it should do so. If it intends to regulate CPAs, enrolled agents and tax lawyers who negotiate and settle tax debts – then it should do so with proper notice and participation of all the impacted stakeholders.

Our coalition is prepared to discuss the regulation of tax problem resolution services. In fact, we have provided proposed language to this legislature to start the discussion.

Thank you for your consideration of the views of the Tax Problem Resolution Services Coalition.