

[4830-01-p]

DEPARTMENT OF THE TREASURY

26 CFR Part 301

[Reg-107366-00]

RIN 1545-AY08

Civil Cause of Action for Damages Caused by Unlawful Tax Collection Actions, Including Actions Taken in Violation of Section 362 or Section 524 of the Bankruptcy Code

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to civil causes of action for damages caused by unlawful collection actions of officers and employees of the IRS and the awarding of costs and certain fees. The proposed regulations reflect amendments made by the Taxpayer Bill of Rights 2 and the Internal Revenue Service Restructuring and Reform Act of 1998. The proposed regulations affect all persons who suffer damages caused by unlawful collection actions of officers or employees of the IRS.

DATES: Written comments and requests for a public hearing must be received by May 6, 2002.

ADDRESSES: Send submissions to: CC:ITA:RU (Reg-107366-00), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered to: CC:ITA:RU (Reg-107366-00), room 5226, Internal Revenue Service, 1111 Constitution Avenue NW., Washington DC. Alternatively, taxpayers may submit comments electronically via the Internet by

selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at www.irs.gov/regs.

FOR FURTHER INFORMATION CONTACT: Concerning the regulations, Kevin B. Connelly, (202) 622-3630 (not a toll-free number).

SUPPLEMENTAL INFORMATION:

Background

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) relating to civil actions for damages caused by unlawful collection actions of officers or employees of the IRS. The Taxpayer Bill of Rights 2 (TBOR2), Public Law 104-168 (110 Stat. 1465), amended section 7433 of the Internal Revenue Code of 1986 (Code) by increasing the maximum amount of damages a taxpayer may be awarded for unlawful collection actions from \$100,000 to \$1,000,000. TBOR2 also eliminated the jurisdictional requirement that administrative remedies be exhausted before a court may award damages; TBOR2 authorized the court, however, to reduce damages if it determined that the plaintiff did not exhaust administrative remedies. These TBOR2 provisions were effective for actions of IRS officers or employees after July 30, 1996. The Internal Revenue Service Restructuring and Reform Act of 1998 (RRA 1998), Public Law 105-206 (112 Stat. 685), although retaining the pre-existing authorization for an award of damages in the case of reckless or intentional disregard of the Code or regulations, amended section 7433 by providing that taxpayers may file actions for damages caused by the negligent disregard of the Code or regulations. In addition, this amendment provided that an

action for damages could be brought for the IRS's willful violation of section 362 (relating to the automatic stay) or section 524 (relating to the effect of discharge) of the Bankruptcy Code. The maximum amount of damages that may be awarded for negligent disregard is \$100,000. The maximum amount of damages that may be awarded for reckless or intentional disregard or for willful violations of section 362 or 524 of the Bankruptcy Code is \$1,000,000. RRA 1998 also reinstated the requirement under section 7433 that the plaintiff must exhaust administrative remedies before a court may award damages. These RRA 1998 provisions are effective for actions of IRS officers or employees after July 22, 1998.

RRA 1998 also added new subsection (h) to section 7426, which authorizes persons who bring wrongful levy actions under section 7426 to sue for damages caused by the reckless or intentional, or negligent, disregard of any provision of the Code, plus costs of the action. Consistent with section 7433, damages awarded under section 7426(h) are limited to \$1,000,000 for reckless or intentional disregard and \$100,000 for negligent disregard. In addition, a plaintiff must exhaust administrative remedies before a court may award damages under section 7426(h). The provisions of section 7433 relating to mitigation and the period for bringing an action also apply to actions brought under section 7426(h).

Explanation of Provisions

§301.7426-2

RRA 1998 added a new subsection (h) to section 7426. Subsection (h) authorizes persons to sue the United States in federal district court for damages due to

a wrongful levy caused by the reckless or intentional, or negligent, disregard of a provision of the Code. Plaintiffs are entitled to recover the lesser of actual direct economic damages and costs of the action or \$1,000,000 (\$100,000 in the case of negligence). The amendment also provided that the rules of section 7433(d) relating to exhaustion of administrative remedies, mitigation of damages and the period for bringing an action shall apply. The proposed regulations thus adopt rules like those promulgated under section 7433 that plaintiffs must mitigate damages and no damages may be awarded unless the court determines that the plaintiff has exhausted administrative remedies available within the IRS, e.g., by filing an administrative claim for damages. The proposed regulations also provide that any action for damages under this section must be brought within 2 years after the date the action accrues. This two-year limitations period is independent of the nine-month period after the wrongful levy during which the IRS may return, or the third party may make a claim for, wrongfully levied property.

§301.7430-8

Section 7430 provides that reasonable administrative costs may be awarded to the prevailing party in an administrative proceeding brought by or against the United States in connection with the determination, collection, or refund of any tax, interest, or penalty under Title 26. Because, prior to the amendments in RRA 1998, taxpayers generally were not entitled to recover costs for administrative proceedings in connection with collection matters, the current regulations exclude such collection matters, including proceedings under sections 7432 and 7433, from the definition of

administrative proceedings. To reflect the RRA 1998 amendments, the proposed regulations expand the definition of an administrative proceeding to include any administrative action for damages under section 7433(e) and any procedure or action brought before the IRS seeking relief with respect to a violation by the IRS of section 362 or 524 of the Bankruptcy Code.

The proposed regulations provide that the prevailing party is a party who establishes that, in connection with the collection of his or her federal tax, the IRS has willfully violated a provision of section 362 or 524 of the Bankruptcy Code. The only administrative costs that may be awarded are those incurred after the date of the bankruptcy petition that gave rise to the section 362 stay or section 524 discharge injunction.

A claim with the IRS for administrative costs must be filed within 90 days after the date the IRS mails its decision on the taxpayer's administrative claim for damages under §301.7433-2(e) or claim for relief from a violation of section 362 or 524 of the Bankruptcy Code.

§301.7433-1

Section 3102 of RRA 1998 amended section 7433(a) of the Code by providing that a taxpayer may sue the United States in a district court of the United States for damages caused by the negligent disregard of the Code or regulations in connection with the collection of the taxpayer's tax liability. Section 801 of TBOR2 amended section 7433(b) by increasing the maximum amount of damages that a taxpayer may recover for damages caused by the reckless or intentional disregard of the Code or

regulations from \$100,000 to \$1,000,000. Section 3102 of RRA 1998 caps the amount of damages that a taxpayer may recover for negligent disregard at \$100,000. The proposed regulations under §301.7433-1 reflect these changes.

§301.7433-2

RRA 1998 also amended section 7433 by adding a new subsection (e).

Subsection (e) gives taxpayers the right to petition the bankruptcy court to recover damages if, in connection with the collection of a federal tax, any officer or employee of the IRS willfully violates section 362 or 524 of the Bankruptcy Code or any regulation promulgated thereunder. Damages in connection with a claim under section 7433(e) are recoverable under section 7433(b) and are subject to the limitations imposed by section 7433(d).

Section 362 relates to the automatic stay, which arises by operation of law when a debtor files a bankruptcy petition. The stay prohibits certain collection actions against the debtor, the debtor's property, and the property of the bankruptcy estate. Prior to enactment of section 7433(e), individuals injured by the IRS's willful violation of the automatic stay could only sue to recover actual damages, including costs and attorneys' fees, under Bankruptcy Code section 362(h). Section 7433(e) provides an alternative cause of action to recover damages, but still permits an individual to recover damages under section 362(h) of the Bankruptcy Code, in lieu of an action under section 7433(e). However, section 7433(e) explicitly provides that administrative and litigation costs incurred in pressing a claim under section 362(h) of the Bankruptcy Code may only be paid pursuant to, and subject to the conditions described in, section

7430 of the Code. Section 7430 authorizes the payment of administrative and litigation costs only if a taxpayer exhausts administrative remedies. The proposed regulations provide that in order to qualify for an award of administrative and litigation costs in an action under section 362(h) of the Bankruptcy Code, a taxpayer must (as in the case of damages actions under section 7433(e)) file an administrative claim with the IRS relating to the violation of the automatic stay.

Section 524 sets forth the effect of a discharge under the Bankruptcy Code. A discharge operates as an injunction against the commencement or continuation of any action to collect a discharged debt as a personal liability of the debtor. Prior to enactment of section 7433(e), a debtor who believed the IRS had willfully violated the discharge injunction could request the Bankruptcy Court under Bankruptcy Code section 105 to hold the IRS in contempt and seek to recover damages under that Bankruptcy Code provision. Section 7433(e) now provides the exclusive remedy for the IRS's willful violation of the discharge injunction.

The proposed regulations set forth procedures relating to these claim and damage allowance provisions. Damages recoverable under section 7433(e) for a violation of the automatic stay or the discharge injunction are limited to (1) the actual, direct economic damages sustained by the taxpayer (and the taxpayer has a duty to mitigate those damages), plus (2) costs of the action. The maximum damage award is \$1,000,000. No petition for damages under section 7433(e) may be filed in a bankruptcy court unless the taxpayer first exhausts administrative remedies within the IRS.

Similar to rules previously adopted with respect to other wrongful collection actions, the proposed regulations define direct, economic damages as actual, pecuniary damages sustained by the taxpayer as a result of the willful violation of section 362 or 524 of the Bankruptcy Code. Injuries such as inconvenience, loss of reputation, and emotional distress, are not compensable except to the extent they result in actual pecuniary loss.

The proposed regulations define costs of the action that are recoverable as damages under section 7433(e) as: (1) fees of the clerk and marshal; (2) fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and copies of paper necessarily obtained for use in the case; (5) docket fees; and (6) compensation of court appointed experts and interpreters. Costs of the action do not include any costs other than those enumerated in this paragraph.

Reasonable administrative and litigation costs, including attorneys fees, are not recoverable as direct economic damages. These costs are recoverable, if at all, under section 7430. The taxpayer generally will be entitled to reasonable litigation costs under section 7430 if the taxpayer (1) files an administrative claim with the IRS, (2) establishes that the IRS willfully violated either the automatic stay under Bankruptcy Code Section 362 or the discharge injunction under section 524, (3) substantially prevails with respect to the amount of damages in controversy, and (4) meets the requirements of sections 7430(c)(4)(A)(ii) regarding net worth.

A petition for damages under section 7433 may not be filed in a bankruptcy court

unless the taxpayer first files an administrative claim for damages with the IRS. The claim must be made in writing to the Chief, Local Insolvency Unit for the judicial district in which the bankruptcy was filed. The claim must include: (1) the claimant taxpayer's name, taxpayer identification number, current address, current home and work telephone numbers and any convenient times to be contacted; (2) the court and case number of the bankruptcy case in which the violation occurred; (3) a description, in reasonable detail, of the violation (with copies of any available substantiating documentation or correspondence with the IRS); (4) a description of the injuries incurred by the taxpayer filing the claim (with copies of any available substantiating documentation or evidence); (5) the dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (along with any available substantiating documentation or evidence); and (6) the signature of the taxpayer or any duly authorized representative.

The proposed regulations provide that, after an administrative claim for damages has been filed, a petition for damages under section 7433 may not be filed in a bankruptcy court until the earlier of (1) the time a decision is rendered on the claim or (2) six months from the date the administrative claim is filed. Because a taxpayer must petition the bankruptcy court for damages within two years after the cause of action accrues, the proposed regulations contain an exception for claims filed in the last six months before the two-year limitation period expires. In those circumstances, taxpayers may file petitions for damages at any time after they file their administrative claims and before the period of limitations expires. A cause of action accrues under

this section when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

Special Analyses

It has been determined that this notice of proposed rulemaking is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and because the regulation does not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply. Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments that are submitted timely (preferably a signed original and eight (8) copies) to the IRS. Alternatively, taxpayers may submit comments electronically to the IRS Internet at www.irs.gov/regs. All comments will be available for public inspection and copying. The IRS and Treasury request comments on the clarity of the proposed rules and how they may be made easier to understand or to implement. A public hearing may be scheduled if requested in writing by a person that timely submits written comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the

Federal Register.**Drafting Information**

The principal author of these regulations is Kevin B. Connelly, Office of Associate Chief Counsel (Procedure and Administration), Collection, Bankruptcy & Summons Division, CC:PA:CBS, IRS. However, other personnel from the IRS and the Treasury Department participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301 is proposed to be amended as follows:

PART 301--PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 301.7426-2 is added to read as follows:

§301.7426-2 Recovery of damages in certain cases.

(a) In general. In addition to remedies related to wrongful levy set forth in §301.7426-1(b), if a district court of the United States finds in any action brought under section 7426 that any officer or employee of the Internal Revenue Service recklessly or intentionally, or by reason of negligence, disregarded any provision of this title, the United States shall be liable to the plaintiff for damages. The plaintiff has a duty to

mitigate damages. The total amount of damages recoverable under this section is the lesser of \$1,000,000 (\$100,000 in the case of negligence), or the sum of--

(1) Actual, direct economic damages as defined in §301.7433-1(b) sustained as a proximate result of the reckless, intentional, or negligent actions of the officer or employee, reduced by the amount of any damages awarded under §301.7426-1(b); and

(2) Costs of the action as defined in §301.7433-1(c).

(b) Administrative remedies must be exhausted. The court may not award a judgment for damages under paragraph (a) of this section unless the court determines that the plaintiff has filed an administrative claim pursuant to paragraph (d) of this section, and has satisfied the requirements of paragraph (c) of this section.

(c) No request for damages in a district court of the United States prior to filing an administrative claim. (1) Except as provided in paragraph (c)(2) of this section, no request for damages under paragraph (a) of this section shall be maintained in any district court of the United States before the earlier of the following dates--

(i) The date the decision is rendered on a claim filed in accordance with paragraph (d) of this section; or

(ii) The date that is six months after the date an administrative claim is filed in accordance with paragraph (d) of this section.

(2) If an administrative claim is filed in accordance with paragraph (d) of this section during the last six months of the period of limitations described in paragraph (f) of this section, the claimant may file an action in a district court of the United States any time after the administrative claim is filed and before the expiration of the period of

limitations.

(d) Procedures for an administrative claim--(1) Manner. An administrative claim for the lesser of \$1,000,000 (\$100,000 in the case of negligence) or actual, direct economic damages as defined in §301.7433-1(b) shall be sent in writing to the Chief, Local Insolvency Unit for the area in which the levy was made.

(2) Form. The administrative claim shall include--

(i) The name, taxpayer identification number, current address and current home and work telephone numbers (indicating any convenient times to be contacted) of the person making the claim;

(ii) The grounds, in reasonable detail, for the claim (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iii) A description of the damages incurred by the claimant filing the claim (include copies of any available substantiating documentation or evidence);

(iv) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available substantiating documentation or evidence); and

(v) The signature of the claimant or duly authorized representative.

(3) Duly authorized representative. For purposes of this paragraph (d), a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the claimant before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue

Service and who has a written power of attorney executed to the claimant.

(e) No liability for damages for any sum in excess of the dollar amount sought in the administrative claim. See §301.7433-1(f).

(f) Period of limitations--(1) Time for filing. A civil action under paragraph (a) of this section must be brought in a district court of the United States within 2 years after the date the cause of action accrues.

(2) Right of action accrues. A cause of action under paragraph (a) of this section accrues when the plaintiff has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(g) Recovery of costs under section 7430. See §301.7433-1(h).

(h) Effective date. This section is applicable on the date final regulations are published in the **Federal Register**.

Par. 3. Section 301.7430-1 is amended by redesignating paragraphs (e), (f) and (g) as paragraphs (f), (g) and (h), respectively, and adding a new paragraph (e) to read as follows:

§301.7430-1 Exhaustion of administrative remedies.

* * * * *

(e) Actions involving willful violations of the automatic stay under section 362 of the Bankruptcy Code--(1) Section 7433 claims. A party has not exhausted administrative remedies within the Internal Revenue Service with respect to asserted violations of the automatic stay under section 362 of the Bankruptcy Code or the discharge provisions under section 524 of the Bankruptcy Code unless it files an

administrative claim for damages or for relief from a violation of section 362 or 524 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the area in which the bankruptcy petition that is the basis for the asserted automatic stay was filed pursuant to §301.7433-2(e) and satisfies the other conditions set forth in §301.7433-2(d) prior to filing a petition under section 7433.

(2) Section 362(h) claims. A party has not exhausted administrative remedies within the Internal Revenue Service with respect to asserted violations of the automatic stay under section 362 of the Bankruptcy Code unless it files an administrative claim for relief from a violation of section 362 of the Bankruptcy Code with the Chief, Local Insolvency Unit, for the area in which the bankruptcy petition that is the basis for the asserted automatic stay was filed pursuant to §301.7433-2(e) and satisfies the other conditions set forth in §301.7433-2(d) prior to filing a petition under section 362(h) of the Bankruptcy Code.

* * * * *

§301.7430-2 [Amended]

Par. 4. In §301.7430-2, paragraph (c)(2) is amended by:

1. Adding the language “except that requests with respect to administrative proceedings defined by §301.7430-8(c) should be made to the Chief, Local Insolvency Unit” at the end of the first sentence.

2. Removing the language “District Director for the district” and adding “Internal Revenue Service office” in its place in the second sentence.

Par. 5. Section 301.7430-3 is amended by:

1. Revising paragraph (a)(4),
2. Paragraph (b) is amended by adding the language “except those collection actions described by section 7433(e)” at the end of the last sentence.

The revision reads as follows:

§301.7430-3 Administrative proceeding and administrative proceeding date.

(a) * * *

(4) Proceedings in connection with collection actions (as defined in paragraph (b) of this section), including proceedings under section 7432 or 7433, except proceedings brought under section 7433(e) and §301.7433-2 or proceedings otherwise described in §301.7430-8(c). See §301.7430-8.

* * * * *

Par. 6. Section 301.7430-6 is amended by adding a sentence at the end of the section to read as follows:

§301.7430-6 Effective dates.

* * * Sections 301.7430-2(c)(2), 7430-3(a)(4) and (b) are applicable with respect to actions taken by the Internal Revenue Service after July 22, 1998.

Par. 7. Section 301.7430-8 is added to read as follows:

§301.7430-8 Administrative costs incurred in damage actions for violations of section 362 and 524 of the Bankruptcy Code.

(a) In general. The Internal Revenue Service may grant a taxpayer’s request for recovery of reasonable administrative costs incurred in connection with the administrative proceeding before the Internal Revenue Service relating to the willful

violation of section 362 or 524 of the Bankruptcy Code only if the taxpayer is a prevailing party.

(b) Prevailing party. A taxpayer is a prevailing party for purposes of this section only if--

(1) The taxpayer satisfies the net worth and size limitations in paragraph (f) of §301.7430-5;

(2) The taxpayer establishes that in connection with the collection of his or her federal tax an officer or employee of the Internal Revenue Service has willfully violated a provision of section 362 or 524 of the Bankruptcy Code; and

(3) The position of the Internal Revenue Service in the proceeding was not substantially justified.

(c) Administrative proceeding. For purposes of this section, an administrative proceeding is a proceeding related to an administrative claim presented to the Internal Revenue Service seeking relief from a violation of section 362 or 524 of the Bankruptcy Code by the Internal Revenue Service or recovery of damages from the Internal Revenue Service under §301.7433-2(e).

(d) Costs incurred after filing of bankruptcy petition. Administrative costs may be recovered only if incurred on or after the date of filing of the bankruptcy petition that formed the basis for the stay on collection under Bankruptcy Code section 362 or the discharge injunction under Bankruptcy Code section 524, as the case might be.

(e) Time for filing claim for administrative costs. (1) For purposes of this section, the taxpayer must file a claim for administrative costs before the Internal Revenue

Service not later than 90 days after the date the Internal Revenue Service mails to the taxpayer, or otherwise notifies the taxpayer of, the decision regarding the claim for relief from or damages relating to a violation of the collection stay or the discharge injunction to the taxpayer.

(2) If the Internal Revenue Service denies the claim for administrative costs in whole or in part, the taxpayer must file a petition with the Bankruptcy Court for administrative costs no later than 90 days after the date on which the denial of the claim for administrative costs is mailed, or otherwise furnished, to the taxpayer. If the Internal Revenue Service does not respond on the merits to a request by the taxpayer for an award of reasonable administrative costs within 6 months after such request is filed, the Internal Revenue Service's failure to respond may be considered by the taxpayer as a denial of an award of reasonable administrative costs.

(3) For purposes of paragraphs (e)(1) and (2) of this section, if the 90th day falls on a Saturday, Sunday, or a legal holiday, the 90-day period shall end on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. The term legal holiday means a legal holiday in the District of Columbia. If the request for costs is to be filed with the Internal Revenue Service at an office of the Internal Revenue Service located outside the District of Columbia but within an internal revenue district, the term legal holiday also means a statewide legal holiday in the state where such office is located.

(f) Effective date. This section is applicable with respect to actions taken by the Internal Revenue Service after July 22, 1998.

Par. 8. Section 301.7433-1 is amended as follows:

1. In paragraph (a) introductory text, in the first sentence, the language “, or by reason of negligence,” is added after the language “recklessly or intentionally”. In addition, the language “\$100,000” in the third sentence is removed and “\$1,000,000 (\$100,000 in the case of negligence)” is added in its place.

2. In paragraph (b)(1) the language “, or negligent,” is added after the language “reckless or intentional”.

3. In paragraph (e)(1), in the first sentence, the language “\$100,000” is removed and “\$1,000,000 (\$100,000 in the case of negligence)” is added in its place. In addition, the language “district director (marked for the attention of the Chief, Special Procedures Function) of the district” is removed and “Chief, Local Insolvency Unit in the area” is added in its place.

4. In paragraph (h), in the penultimate sentence, the language “7432(a)” is removed and “7433(a)” is added in its place.

5. Revising paragraph (i).

The revision reads as follows:

§301.7433-1 Civil cause of action for certain unauthorized collection actions.

* * * * *

(i) Effective dates. The portions of this section relating to reckless or intentional acts are applicable to actions taken by Internal Revenue Service officials after July 30, 1996. The portions of this section relating to negligent acts are applicable to actions taken by the Internal Revenue Service officials after July 22, 1998.

Par. 9. Section 301.7433-2 is added to read as follows:

§301.7433-2 Civil cause of action for violation of section 362 or 524 of the Bankruptcy Code.

(a) In general. (1) If, in connection with the collection of a federal tax with respect to a taxpayer, an officer or employee of the Internal Revenue Service willfully violates any provision of section 362 (relating to the automatic stay) or section 524 (relating to discharge) of title 11, United States Code, or any regulation promulgated under the provisions of title 11, United States Code, the taxpayer may file a petition for damages against the United States in federal bankruptcy court. The taxpayer has a duty to mitigate damages. The total amount of damages recoverable under this section is the lesser of \$1,000,000, or the sum of--

(i) Actual, direct economic damages sustained as a proximate result of the willful actions of the officer or employee; and

(ii) Costs of the action.

(2) An action under this section constitutes the exclusive remedy under the Internal Revenue Code for violations of sections 362 and 524 of the Bankruptcy Code. In addition, taxpayers injured by violations of section 362 of the Bankruptcy Code may maintain actions under section 362(h) of the Bankruptcy Code (relating to an individual injured by a willful violation of the stay).

(b) Actual, direct economic damages--(1) Definition. See §301.7433-1(b)(1).

(2) Litigation costs and administrative costs not recoverable as actual, direct economic damages. Litigation costs and administrative costs are not recoverable as

actual, direct economic damages. These costs may be recoverable under section 7430 (see paragraph (h) of this section), or, solely to the extent described in paragraph (c) of this section, as costs of the action.

(c) Costs of the action. Costs of the action recoverable as damages under this section are limited to the costs set forth in §301.7433-1(c).

(d) No civil action in federal bankruptcy court prior to filing an administrative claim--(1) In general. Except as provided in paragraph (d)(2) of this section, no action under paragraph (a)(1) of this section shall be maintained in any bankruptcy court before the earlier of the following dates--

(i) The date the decision is rendered on a claim filed in accordance with paragraph (e) of this section; or

(ii) The date that is six months after the date an administrative claim is filed in accordance with paragraph (e) of this section.

(2) When administrative claim filed in last six months of period of limitations. If an administrative claim is filed in accordance with paragraph (e) of this section during the last six months of the period of limitations described in paragraph (g) of this section, the taxpayer may petition the bankruptcy court any time after the administrative claim is filed and before the expiration of the period of limitations.

(e) Procedures for an administrative claim--(1) Manner. An administrative claim for the lesser of \$1,000,000 or actual, direct economic damages as defined in paragraph (b) of this section shall be sent in writing to the Chief, Local Insolvency Unit, for the judicial district in which the taxpayer filed the underlying bankruptcy case giving

rise to the alleged violation.

(2) Form. The administrative claim shall include--

(i) The name, taxpayer identification number, current address, and current home and work telephone numbers (with an identification of any convenient times to be contacted) of the taxpayer making the claim;

(ii) The location of the bankruptcy court in which the underlying bankruptcy case was filed and the case number of the case in which the violation occurred;

(iii) A description, in reasonable detail, of the violation (include copies of any available substantiating documentation or correspondence with the Internal Revenue Service);

(iv) A description of the injuries incurred by the taxpayer filing the claim (include copies of any available substantiating documentation or evidence);

(v) The dollar amount of the claim, including any damages that have not yet been incurred but which are reasonably foreseeable (include copies of any available documentation or evidence); and

(vi) The signature of the taxpayer or duly authorized representative.

(3) Duly authorized representative defined. For purposes of this paragraph (e), a duly authorized representative is any attorney, certified public accountant, enrolled actuary, or any other person permitted to represent the taxpayer before the Internal Revenue Service who is not disbarred or suspended from practice before the Internal Revenue Service and who has a written power of attorney executed by the taxpayer.

(f) No action in bankruptcy court for any sum in excess of the dollar amount

sought in the administrative claim. No action for actual, direct economic damages under paragraph (a) of this section may be instituted in federal bankruptcy court for any sum in excess of the amount (already incurred and estimated) of the administrative claim filed under paragraph (e) of this section, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was filed, or upon allegation and proof of intervening facts relating to the amount of the claim.

(g) Period of limitations--(1) Time for filing. A petition for damages under paragraph (a) of this section must be filed in bankruptcy court within two years after the date the cause of action accrues.

(2) Right of action accrues. A cause of action under paragraph (a) of this section accrues when the taxpayer has had a reasonable opportunity to discover all essential elements of a possible cause of action.

(h) Recovery of litigation costs and administrative costs under section 7430--(1) In general. Litigation costs, as defined in §301.7433-1(b)(2)(i), including attorneys fees, not recoverable under this section may be recoverable under section 7430 if a taxpayer challenges in whole or in part an Internal Revenue Service denial of an administrative claim for damages by filing a petition in the bankruptcy court. If, following the Internal Revenue Service's denial of an administrative claim for damages, a taxpayer files a petition in the bankruptcy court challenging that denial in whole or in part, substantially prevails with respect to the amount of damages in controversy, and meets the requirements of section 7430(c)(4)(A)(ii) (relating to net worth and size

requirements), the taxpayer will be considered a prevailing party for purposes of section 7430, unless the Internal Revenue Service establishes that the position of the Internal Revenue Service in the proceeding was substantially justified. Such taxpayer will generally be entitled to attorneys' fees and other reasonable litigation costs not recoverable under this section. For purposes of this paragraph (h), if the Internal Revenue Service does not respond on the merits to an administrative claim for damages within six months after the claim is filed, the Internal Revenue Service's failure to respond will be considered a denial of the claim on the grounds that the Internal Revenue Service did not willfully violate Bankruptcy Code section 362 or 524.

(2) Administrative costs--(i) In general. Administrative costs, as defined in §301.7433-1(b)(2)(ii), including attorneys' fees, not recoverable under this section may be recoverable under section 7430. See §301.7430-8.

(ii) Limitation regarding recoverable administrative costs. Administrative costs may be awarded only if incurred on or after the date of filing of the bankruptcy petition that formed the basis for the stay on collection under Bankruptcy Code section 362 or the discharge injunction under Bankruptcy Code section 524, as the case might be.

(i) Effective date. This section is applicable to actions taken by the Internal Revenue Service officials after July 22, 1998.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.