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**REPRESENTING THE INNOCENT SPOUSE, Practical Tax Strategies, May 2016**

*INNOCENT SPOUSE*

## REPRESENTING THE INNOCENT SPOUSE

*Tax practitioners representing clients who are claiming innocent spouse relief should be aware of the changes related to the [Section 6015](#) proposed regulations.*

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The Code requires each individual to file a federal income tax return based on his or her filing status, and makes each individual liable for tax attributable to his or her return. The Code also allows an individual to elect to file a joint return with his or her spouse. **1** Filing a joint return with one's spouse makes each spouse jointly and severally liable for the tax shown due on the return and any deficiency, penalties, or interest determined with respect to the joint return. **2** To alleviate the undesirable consequences that might befall one spouse due to the bad conduct of the other spouse, Congress enacted a set of rules that allow a requesting spouse to obtain relief from joint and several liability.

The rules are set forth in [Section 6015](#), the corresponding Regulations, and [Rev. Proc. 2013-34](#). **3** Also, on 11/20/15, the Treasury and the IRS published [Section 6015](#) proposed regulations. **4** These proposed regulations clarify several provisions that allow a requesting spouse to obtain relief from joint and several liability. In addition, they reflect the changes in the law that have been enacted since the initial Regulations were promulgated in 2002. This article discusses changes to the innocent spouse provisions as a result of the proposed regulations and key issues in representing a putative innocent spouse before the IRS.

## Overview of the innocent spouse provisions

**Section 6015** provides relief from joint and several liability under certain conditions. In general, a joint filer may obtain innocent spouse relief under: (1) **Section 6015(b)** and **Reg. 1.6015-2** , when the requesting spouse did not have actual or constructive knowledge of the understatement of tax on a return and it is inequitable to hold the requesting spouse liable for the tax; (2) **Section 6015(c)** and **Reg. 1.6015-3** , when the requesting spouse is no longer married to the other joint filer or the taxpayers are legally separated or not living together and the requesting spouse did not have actual or constructive knowledge of the understatement of tax on a joint return; or (3) **Section 6015(f)** and **Reg. 1.6015-4** , when the requesting spouse is not eligible for relief under **Sections 6015(b)** or (c) and, in light of all of the facts and circumstances, it would be inequitable to hold the requesting spouse liable for the tax. Similarly, **Section 66(c)** provides relief for a spouse who: (1) did not file a joint return in a community property state; and (2) did not include in gross income an item of community income that would be

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attributable solely to the nonrequesting spouse but for the operation of state community property law. **5** These general rules present many nuances with which practitioners should be familiar.

## Joint and several liability requires a joint return

The threshold question that practitioners must answer when presented with a potential innocent spouse case is whether a joint return exists. This is because there can be no joint and several liability without a joint return. The Code requires certain individuals to file a federal income tax return. **6** The Code allows an individual to file a joint return with his or her spouse to take advantage of the favorable tax treatment offered to married joint filers, as a matter of convenience, to claim certain tax credits, or for various other reasons.

Whether an income tax return is a joint or separate return is a question of fact. **7** To file jointly, both spouses must intend to make a joint return. **8** In evaluating intent, the Tax Court has considered whether the nonsigning spouse filed a separate return, whether the nonsigning spouse objected to the joint filing, and whether prior filing history indicates an intent to file jointly. **9**

In general, to be a joint return, the return must be signed by both spouses. This rule does not apply when one spouse authorizes the other spouse to sign the return on his or her behalf. **10** Additionally, courts have found that the requisite intent for a joint return exists when one spouse tacitly consents to the filing of a joint return. **11** Finally, a return signed under duress is not a joint return for **Section 6013** purposes. **12** Thus, a spouse who signs a return under duress will not be held jointly and severally liable for the tax shown due on the return or any deficiency determined to be due with respect to the return. **13** For a spouse to prove that he or she signed a return under duress, the spouse must show that he or

she: (1) was unable to resist the demands to sign the return, and (2) would not have signed the joint return absent the constraint applied to his or her will. [14](#)

Whether a joint return exists can become a tricky question for taxpayers contemplating or pursuing a divorce. One spouse may not be willing to sign joint returns for years during which he or she was married. However, the obligation to file income tax returns does not disappear just because spouses are getting divorced. In some states, a court may order one spouse to execute joint returns. [15](#) A question arises as to whether a spouse's signature signed on order of the court signifies his or her intent to file a joint return. Some courts have held that this does not necessarily constitute an intent to file a joint return. [16](#) Thus, practitioners must evaluate divorce documents and other papers filed incident to a divorce to determine whether the purported innocent spouse actually manifested his or her intent to file a joint return.

Therefore, before practitioners evaluate the merits of an innocent spouse claim, they must first determine whether there was a joint return and joint and several liability. To the extent that it is not clear that a joint return was filed, practitioners should attack the claim of joint and several liability for the taxes due.

## **Can an attorney represent both spouses?**

Conflicts of interest abound in cases in which innocent spouse is at issue. Therefore, practitioners need to take additional steps to properly guard against conflicts of interest. Once it has been determined that a client has a valid joint return and that joint and several liability may exist, the next step is for the practitioner to identify any conflict

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of interest that may exist between the spouses. As a threshold matter, practitioners should recognize that some conflicts cannot be waived, and take the steps necessary to protect the clients.

The rules of professional responsibility, Circular 230, and the Tax Court Rules of Practice and Procedure all require a practitioner who represents a couple in a potential innocent spouse case to withdraw from representing one of the spouses and secure independent counsel for the other spouse, or alternatively, to obtain the informed consent of each spouse as to the conflict of interest. [17](#) Despite the presence of a conflict of interest among spouses in an innocent spouse case, a practitioner may represent both spouses if: (1) the practitioner has a reasonable belief that he or she is able to provide competent and diligent representation; (2) representation is not prohibited by law; (3) each spouse signs a written, informed consent to waive the conflict no later than 30 days after the practitioner learns of the conflict; and (4) the practitioner retains the consent for 36 months after the conclusion of the representation. [18](#)

The conflict waiver must specifically reference the parties' written retainer and clearly and unambiguously disclose that: (1) a conflict may arise from joint representation of both parties; (2) the

parties may have differing independent interests in the outcome of the representation; (3) the consequences to each party may be disproportionate; (4) the practitioner may submit a request for relief from joint and several liability under [Section 6015](#) ; (5) a successful request for relief from joint and several liability will result in the nonrequesting spouse being solely liable for the tax; (6) although the practitioner will attempt to not advocate for one party over the other, it may not be possible to do so; and (7) it may not be possible to maintain confidentiality of information between the spouses.

Because of the inherent conflict that arises from representing spouses who filed a joint return, a valid conflict waiver should be obtained before proceeding with the representation. Considering the subject matter that is relevant to a request for relief from joint and several liability, it is especially important to obtain a conflict waiver that clearly delineates that confidentiality may not be possible.

## Innocent spouse or injured spouse?

Once a practitioner has determined that a valid joint return was filed and has advised of (and resolved) any conflicts of interest, he or she must then examine whether the spouse is an innocent spouse or an injured spouse. Innocent spouse status relieves a requesting spouse of the responsibility to pay taxes that may then be collected from the nonrequesting spouse. By contrast, injured spouse status involves obtaining a refund of a spouse's interest in an overpayment that has been offset under [Section 6402](#) .

[Section 6402](#) authorizes the IRS to offset certain unpaid debts, including federal tax liabilities, past due child support, past due debts owed to other federal agencies, and past due legally enforceable state income tax obligations. When a married couple files a joint federal income tax return, each spouse has a separate interest in the jointly reported income and in any overpayment. When both spouses are liable for a debt described in [Section 6402](#) , the entire overpayment may be offset.

Offset is implicated when spouses file a joint federal income tax return and only one spouse owes a debt described in [Section 6402](#) . In such scenarios, an allocation must be made to determine the liable spouse's interest in the overpayment, the amount that can be offset for the liable spouse's debt, and the amount to be refunded to the nonliable spouse. If the spouse who allegedly does not owe the obligation (injured spouse) files a refund claim for his or her share of the overpayment, the IRS must issue the refund. An injured spouse obtains his or her portion of the underpayment by filing Form 8379, Injured Spouse Allocation. The distinction between an innocent spouse and an injured spouse is subtle, and it is not uncommon for IRS employees and practitioners to confuse the two concepts.

## What are the criteria for relief?

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As explained above, a taxpayer may request relief from joint and several liability under [Section 6015\(b\)](#) , (c), or (f), or as they are more commonly known, full or apportioned relief, proportionate relief, and

equitable relief. This section of the article discusses each type of relief in detail, and how the recently proposed regulations affect requests for innocent spouse relief.

## Full or apportioned relief.

**Section 6015(b)** allows for full or apportioned relief of a joint and several income tax liability to the extent that the understatement of tax was attributable to erroneous items of the nonrequesting spouse. To qualify for relief under **Section 6015(b)**, a requesting spouse must prove that: (1) a joint return was filed for the year in which relief is sought; (2) on the return, there is an understatement of tax attributable to erroneous items of the nonrequesting spouse; (3) at the time the joint return was signed, the requesting spouse did not know and did not have reason to know that there was an understatement of tax; (4) taking into account all of the facts and circumstances, it is inequitable to hold the requesting spouse liable for the deficiency in tax attributable to the understatement; and (5) the requesting spouse sought relief under **Section 6015(b)** within two years of the first collection activity with respect to the liability that gave rise to the understatement.

With respect to the equitable factor, the analysis under **Section 6015(b)** generally follows that of **Section 6015(f)**. While this analysis is set forth in more detail below, it is appropriate to note that the following factors may be examined in determining whether, taking into account all of the facts and circumstances, it is inequitable to hold the requesting spouse liable for the joint and several income tax liability: (1) whether the requesting spouse and nonrequesting spouse are married, divorced, separated, or living apart at the time of the request; (2) whether the requesting spouse would suffer economic hardship if relief was not granted; (3) whether the requesting spouse knew or had reason to know of the item giving rise to the deficiency or understatement; (4) whether the requesting spouse or the nonrequesting spouse is under a legal obligation to pay the outstanding tax liability; (5) whether the requesting spouse significantly benefitted from the deficiency or understatement, directly or indirectly; (6) whether the requesting spouse made a good-faith effort to comply with the income tax laws in subsequent years; (7) whether the requesting spouse was in poor physical or mental health; and (8) whether the requesting spouse has been deserted by the nonrequesting spouse. **19**

As noted, on 11/20/15 the IRS issued proposed regulations that make significant changes to some of the existing innocent spouse regulations. As relevant to relief under **Section 6015(b)**, the proposed regulations make only minor substantive changes, which do not meaningfully affect how to determine whether the requesting spouse is entitled to full or apportioned relief.

## Proportionate relief.

**Section 6015(c)** allows a spouse who is divorced, separated, widowed, or has been living apart from his or her spouse for 12 months to allocate his or her tax deficiency between the spouses as if separate returns had been filed. To qualify for relief under **Section 6015(c)**, a requesting spouse must prove the

following elements: (1) the spouses filed a joint income tax return for the year at issue; (2) when the election for relief was made, the spouses were legally separated or divorced or had not been members of the same household at any time during the previous 12 months; and (3) the election for relief was made after a deficiency was asserted, but no later than two years after the IRS began collection activities.

The general rule that relief under [Section 6015\(c\)](#) requires any tax deficiency to be allocated between the spouses as if they filed separate returns is subject to four exceptions: (1) an erroneous item that would otherwise be allocated to the nonrequesting spouse is allocated to the requesting spouse to the extent that the requesting spouse received a tax benefit on the joint return; (2) the IRS may allocate any item between the spouses if the IRS establishes that the allocation is appropriate due to fraud by one or both spouses; (3) erroneous items of income are allocated to the spouse who was the source of the income; and (4) erroneous deductions related to a business or investment are allocated to the spouse who owned the business or investment. If both spouses owned an interest in the business or investment, an erroneous deduction item is generally allocated between the spouses in proportion to each spouse's ownership interest in the business or investment. [20](#)

The proposed regulations clarify a number of items with respect to requests for relief

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under [Section 6015\(c\)](#) . First, the proposed regulations explain the difference between full and partial relief under [Section 6015\(c\)](#) . Second, the proposed regulations make several changes to reflect recent case law regarding the [Section 6015\(d\)\(3\)\(B\)](#) tax benefit rule, including examples. For instance, the proposed regulations illustrate that, under the tax benefit rule, the amount of an erroneous item allocated to a requesting spouse may increase or decrease depending on the tax benefit to the requesting and nonrequesting spouses.

Third, the proposed regulations clarify existing regulations by stating that whether relief is available to a requesting spouse under [Section 6015\(c\)](#) is not dependent on the availability of a credit or refund. [21](#) According to the proposed regulations, if a requesting spouse is eligible to allocate the entire deficiency to the nonrequesting spouse, the requesting spouse has received full relief, even if the requesting spouse made payments on the deficiency; the requesting spouse is not entitled to a refund of those payments because of [Section 6015\(g\)\(3\)](#) . Further, the proposed regulations say that the requesting spouse is not eligible to be considered for [Section 6015\(f\)](#) relief for the amount of any paid liability, because one of the prerequisites for [Section 6015\(f\)](#) relief is ineligibility for relief under [Section 6015\(b\)](#) or (c), and in proportionate relief situations, the requesting spouse would have received full relief under [Section 6015\(c\)](#) . However, relief (and a refund) may be considered for a requesting spouse under [Section 6015\(b\)](#) for the amount of any paid liability.

Fourth, the proposed regulations clarify that the requesting spouse's separate ownership of the erroneous item is also a factor that may be relied on in demonstrating that the requesting spouse had actual knowledge of the item. Fifth, to create parity with [Rev. Proc. 2013-34](#) , the proposed regulations

provide that abuse or financial control by the nonrequesting spouse will result in the requesting spouse being treated as not having actual knowledge of the items giving rise to the understatement.

## Equitable relief.

**Section 6015(f)** allows a spouse to obtain equitable relief of a joint and several income tax liability if, taking into account all of the facts and circumstances, it is inequitable to hold the requesting spouse liable. In 2013, the IRS issued **Rev. Proc. 2013-34**, which modified and superseded existing guidelines set forth in **Rev. Proc. 2003-61** for determining whether a putative innocent spouse is eligible for relief from joint and several liability. **Rev. Proc. 2013-34** modified and clarified the criteria for equitable relief under **Section 6015(f)** in three significant ways. First, it broadened the types of tax liabilities for which relief is available. Second, it provided an extended deadline to file the request for innocent spouse relief. Third, it mandated a simpler test for determining relief based on evaluating the number of equitable factors in favor of and against the taxpayer. Most importantly, under **Rev. Proc. 2013-34**, the IRS gave greater deference to the presence of abuse in a marriage than was afforded under the earlier Revenue Procedure.

The proposed regulations add facts and circumstances from **Rev. Proc. 2013-34** to consider in determining whether a purported innocent spouse knew or had reason to know. They also clarify, consistent with **Rev. Proc. 2013-34**, that abuse or financial control by the nonrequesting spouse precludes a finding that the requesting spouse knew or had reason to know of the item giving rise to the understatement.

The proposed regulations incorporate by reference **Rev. Proc. 2013-34**'s general test. To be eligible for equitable relief under **Section 6015(f)**, the requesting spouse must satisfy each of the following threshold conditions: (1) the requesting spouse filed a joint return for the tax year for which he or she seeks relief; (2) relief is not available to the requesting spouse under **Section 6015(b)** or (c); (3) the claim for relief is timely filed (i.e., when the requesting spouse is applying for relief from a liability or a portion of a liability that remains unpaid, the request for relief must be made on or before the date the limitations period for the collection of the income tax liability expires as provided in **Section 6502**); (4) no assets were transferred between spouses as part of a fraudulent scheme; (5) the nonrequesting spouse did not transfer disqualified assets to the requesting spouse; (6) the requesting spouse did not knowingly participate in the filing of a fraudulent return; and (7) the income tax liability from which the requesting spouse seeks relief is attributable (either in full or in part) to an item of the nonrequesting spouse or an underpayment resulting from the nonrequesting spouse's income. **22**

When a requesting spouse who filed a joint return or a requesting spouse who did not file a joint return in a community property state

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satisfies the threshold conditions, he or she may be entitled to a streamlined determination in favor of



relief from joint and several liability under [Rev. Proc. 2013-34](#) if he or she is no longer married to the nonrequesting spouse, would suffer an economic hardship, and did not know or have reason to know of an understatement or deficiency or that the nonrequesting spouse would fail to pay. If a requesting spouse does not qualify for streamlined relief, the seven factors set forth in [Rev. Proc. 2013-34](#) and [Section 6015\(f\)](#) are balanced to determine whether the requesting spouse is entitled to equitable relief. The proposed regulations adopt the balancing test by reference to [Rev. Proc. 2013-34](#) . [23](#) Thus, as relevant to relief under [Section 6015\(f\)](#) , the proposed regulations make only minor substantive changes which align the proposed regulations to the analysis used by the courts.

## **Other changes under the proposed regulations**

The proposed regulations result in other changes to various aspects of innocent spouse relief.

### **Relief from penalties.**

[Prop. Reg. 1.6015-1\(m\)](#) clarifies that penalties and interest on an underpayment are not separate items from which a requesting spouse can obtain relief under [Reg. 1.6015-4](#) . The proposed regulations instruct that relief from penalties and interest related to an understatement or deficiency is determined based on the proportion of the total erroneous items from which the requesting spouse was relieved. In the situation in which the tax liability is paid in full, a requesting spouse may be eligible for relief from penalties and interest under [Section 6015](#) . The determination is made based on whether the requesting spouse is entitled to relief from the underlying tax.

### **Attribution rules.**

The proposed regulations also address items that are not otherwise erroneous items, but are disallowed solely due to the increase of AGI over a phase-out threshold as a result of an erroneous item attributable to a nonrequesting spouse. The proposed attribution rules are meant to remedy situations in which a nonrequesting spouse's omitted income increases AGI so that the earned income tax credit is phased out. If the understatement is due to erroneous items attributable to both spouses, relief will be granted proportionally.

## **Opportunities to request relief are limited**

Once a practitioner has concluded that a spouse may qualify for relief from joint and several liability, he or she must evaluate whether the purported innocent spouse claim is barred. Under the doctrine of res judicata, when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to the action are bound by every matter that was or could have been offered and



received to sustain or defeat the claim. **24 Reg. 1.6015-1(e)** bars a requesting spouse from relief under **Section 6015** by res judicata for any tax year for which a court of competent jurisdiction has rendered a final decision on the requesting spouse's tax liability in a proceeding in which **Section 6015** relief was at issue, or if the requesting spouse meaningfully participated in that proceeding and could have raised relief under **Section 6015** .

The extent to which res judicata applies has been a subject of great confusion to practitioners. In general, a requesting spouse has not "meaningfully" participated in a prior proceeding if, due to **Section 6015** 's effective date, relief under this section was not available in that proceeding. Also, any final decisions rendered by a court of competent jurisdiction regarding issues relevant to **Section 6015** are conclusive, and the requesting spouse may be collaterally estopped from relitigating those issues.

The proposed regulations provide additional guidance on the "meaningful participation" exception to res judicata provided by **Section 6015(g)(2)** , which runs contra positive to **Reg. 1.6015-1(e)** (i.e., the res judicata doctrine does not apply if the requesting spouse's request for relief was not an issue in the prior proceeding or if the requesting spouse did not meaningfully participate in the prior proceeding). The proposed regulations say that a requesting spouse "meaningfully participated" if the requesting spouse was so involved that he or she could have raised the issue of **Section 6015** relief in that proceeding. The proposed regulations state that "meaningful participation" is a facts and circumstances determination, and they provide the following nonexclusive list of acts that would indicate whether the requesting spouse meaningfully participated in the prior proceeding, none of which are outcome determinative: **25**

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- Whether the requesting spouse participated in the IRS Appeals process while the prior proceeding was docketed.
- Whether the requesting spouse participated in pretrial meetings.
- Whether the requesting spouse participated in discovery.
- Whether the requesting spouse participated in settlement negotiations.
- Whether the requesting spouse signed court documents, such as a petition, a stipulation of facts, motions, or briefs.
- Whether the requesting spouse participated at trial (e.g., was the requesting spouse present at or did the requesting spouse testify at the prior proceeding).
- Whether the requesting spouse was represented by counsel in the prior proceeding.

The proposed regulations intend to codify the Tax Court's decision in *Deihl*, **26** in which the court determined that "meaningful participation" excludes scenarios in which the purported innocent spouse was statutorily unable to raise the claim. In other words, **Section 6015(c)** is not treated as at issue if the spouse was not eligible to raise it.

Additionally, the proposed regulations state that the requesting spouse would not be considered to have meaningfully participated in the prior proceeding if the requesting spouse established that he or she

performed any of the acts listed above because the nonrequesting spouse abused or maintained control over the requesting spouse, and the requesting spouse did not challenge the nonrequesting spouse for fear of the nonrequesting spouse's retaliation. **27** All seven of the above factors should be analyzed to determine whether the spouse meaningfully participated in a prior proceeding.

## How does an innocent spouse get relief?

To claim relief from joint and several liability, a requesting spouse must file Form 8857, Request for Innocent Spouse Relief. **28** The requesting spouse may also submit a written statement signed under penalties of perjury that contains the same information as Form 8857. **29** Because Form 8857 may be inadequate, practitioners may include an attachment that explains in detail the reasons a requesting spouse is entitled to innocent spouse relief. Prior to completing the form and any attachments, the practitioner should analyze all of the facts in light of the factors necessary to provide relief. When preparing the Form 8857 and attachments, practitioners should include supporting documentation including divorce documents, sufficient detail with respect to the requesting spouse's financial situation when the request was made, and a sufficient narrative of the facts and applicable supporting case law. **30**

Another way to obtain relief from joint and several liability is to request it after collection efforts have begun through the **Sections 6320** and **6330** collection due process (CDP) procedures. In response to the receipt of a final notice of intent to levy or a final lien notice, a taxpayer may invoke his or her right to a CDP hearing by filing a Form 12153, Request for a Collection Due Process or Equivalent Hearing, with the IRS office taking the collection action. When a hearing is requested, the Appeals officer must comply with the **Section 6330** requirements under which the taxpayer may raise appropriate spousal defenses such as a claim for relief from joint and several liability. **31** The requesting spouse should include a completed Form 8857 with Form 12153, **32** and a request for innocent spouse relief must be made no later than two years from the date of the first collection action taken with respect to the requesting spouse. **33**

There are two noteworthy points on this issue: first, a "collection action" means the specific notice required by **Sections 6320** or **6330**, which offer a taxpayer the opportunity for a CDP hearing before the IRS may begin its collection activities-the final notice of intent to levy, or final lien notice. **34** Second, a collection action does not mean a notice of deficiency. **35** It is important that a taxpayer raise innocent spouse relief in the CDP proceeding, because any issue not raised is deemed to be waived. **36** Finally, a taxpayer can raise the issue of **Section 6015** relief in response to a notice of deficiency and prosecute the claim in Tax Court. This is accomplished by filing a timely petition with Tax Court.

## Family law

One of the **Section 6015(c)** conditions for relief is that, at the time of the election, the spouses must be

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legally separated, legally divorced, or must not have been members of the same household at any time during the previous 12 months. [37](#) Practitioners often struggle, however, with how to prove that one of these conditions exists. [38](#) Tax practitioners should be conversant in state family law when representing an alleged innocent spouse, because such law can often offer a mechanism to prove legal separation, legal divorce, or formal separation of housing. Proof of divorce may not always be clear on its face, so practitioners should have a working knowledge of family law and the documents related to it.

For example, in New York, spouses can obtain a decree of divorce or enter into a legal separation agreement of the parties, which should each be regarded as sufficient to satisfy the legal separation or divorce requirements. However, a couple residing in the same house is generally presumed, for federal tax purposes, to be members of the same household. [39](#)

Some states allow spouses to recognize the fact that they are not legally living in the same household. For example, a New Jersey requesting spouse can obtain a judgment of divorce or a judgment of divorce from bed and board, which should each be regarded as sufficient to satisfy the separate household requirement. Thus, a request for innocent spouse relief must be undertaken with a critical evaluation of state law remedies to memorialize the divorce or separation.

## Are there time constraints?

Similarly to most provisions in the Code, there are time limitations to obtain relief. To attain relief under [Sections 6015\(b\)](#) or (c), the requesting spouse must submit a Form 8857 no later than two years from the date of the first collection activity against the requesting spouse with respect to the joint liability. [40](#) To obtain [Section 6015\(f\)](#) relief, the requesting spouse must file the Form 8857 no later than the expiration of the limitations period on collection under [Section 6502](#) (generally ten years). [41](#) A request for relief may be made before any collection activity has commenced. [42](#) For example, a request for relief may be made in connection with the examination of a joint federal return, a demand for payment, or pursuant to a CDP hearing.

## Protecting a client from further abuse

Requesting spouses often fear repercussion from the nonrequesting spouse when they make a claim for relief. [43](#) For example, the requesting spouse may fear physical abuse, mental abuse, or unnecessary disclosure of financial information that may be used in connection with a parallel matrimonial action. Although Congress has afforded protections to nonrequesting spouses to ensure that they receive notice and an opportunity to be heard in Tax Court proceedings, [44](#) no specific legislative protection has yet been afforded for requesting spouses. Form 8857 requires the requesting spouse's personal information, which he or she may prefer to keep from the nonrequesting spouse. Form 8857 states that the IRS will

not provide the nonrequesting spouse with the requesting spouse's personal information, such as the requesting spouse's new name, address, telephone number, employer, or information regarding income or assets.

Practitioners must be mindful that innocent spouse cases often end up in Tax Court, and the nonrequesting spouse may seek to obtain personal information. Affirmative steps should be taken to prevent disclosure. [45](#)

## Conclusion

The innocent spouse rules are intricate, and care must be taken when navigating them. Practitioners must balance the ever present conflicts of interest that arise while maintaining a firm grasp on family law. Practitioners who can interpret and maneuver through this difficult field will provide their clients with beneficial results.

[1 Section 6013\(a\)](#) .

[2 Section 6013\(d\)\(3\)](#) .

[3](#) 2013-43 IRB 397, supersedes [Rev. Proc. 2003-61, 2003-2 CB 296](#) , and is effective for requests for relief filed on or after 9/16/13, or for requests for equitable relief pending on 9/16/13, whether with the IRS, Appeals, or in a case docketed in a federal court. [Rev. Proc. 2013-34](#) , section 7.

[4](#) REG-134219-08.

[5](#) See Agostino, Sannicandro, and Sannicandro, "Litigating an Innocent Spouse Case," 16 J. Tax Prac. & Proc. 25 (August/September 2014).

[6 Section 6012\(a\)](#) .

[7](#) *Heim*, [27 TC 270](#) (1956), *aff'd*, 251 F.2d 44 [1 AFTR2d 660](#) (CA-8, 1958); *Jones*, 327 F.2d 98 [13 AFTR2d 1821](#) (CA-4, 1964), *rev'g on other grounds* [39 TC 734](#) (1963).

[8](#) See *Lane*, [26 TC 405](#) (1956); *Weber*, [TCMemo 1995-125](#) .

[9](#) See, e.g., *Estate of Campbell*, [56 TC 1](#) (1971); *Heim*, note 7 *supra*; *Howell*, [10 TC 859](#) (1948), *aff'd per curiam*, 175 F.2d 240 [38 AFTR 63](#) (CA-6, 1949).

**10** See, e.g., *Moran*, **TCMemo 2005-66** .

**11** See, e.g., *Hennen*, **35 TC 747** (1961); *Reifler*, **TCMemo 2013-248** .

**12** **Reg. 1.6013-4(d)** .

**13** *Id.*

**14** *Stanley*, **81 TC 634** (1983). See also note 5, *supra*.

**15** *Bursztyn v. Bursztyn*, 879 A.2d 129 (N.J. Super. Ct. App. Div., 2005). The New Jersey court noted the responsibility to consider the tax implications of the equitable distribution of property. Courts in other states point out that ordering parties to execute joint tax returns forces them to forego a right granted to them by the federal government, i.e., the right to elect to file a joint return.

**16** See, e.g., *Shapland*, **TCMemo 1979-300** .

**17** See, e.g., Model Rules of Professional 1.7 (A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client, or by a personal interest of the lawyer.); Circular 230, section 10.29(a) (forbidding a tax practitioner from representing a client before the IRS if the representation involves a conflict of interest, for example, if the representation of one client will be directly adverse to another); Tax Court Rule 24(g) (If any counsel of record ... represents more than one person with differing interests with respect to any issue in a case ... then such counsel must either secure the informed consent of the client ..., withdraw from the case, or take whatever other steps are necessary to obviate a conflict of interest.)

**18** Circular 230, section 10.29. See note 5, *supra*.

**19** **Reg. 1.6015-2(d)** ; see also **Rev. Proc. 2013-34** , section 4.03(2).

**20** **Reg. 1.6015-3** .

**21** **Prop. Reg. 1.6015-3(c)(1)** . **Section 6015(g)(3)** provides that no credit or refund is allowed as a result of an allocation of a deficiency under **Section 6015(c)** .

**22 Rev. Proc. 2013-34** , section 4.01.

**23 Rev. Proc. 2013-34** , section 4.03(2)(g).

**24 Sunnen**, 333 U.S. 591 **36 AFTR 611** (1948); see also *Gustafson*, **97 TC 85** (1991).

**25 Prop. Reg. 1.6015-1(e)(3)** .

**26 134 TC 156** (2010).

**27 Prop. Reg. 1.6015-1(e)(3)(i)** .

**28 Reg. 1.6015-5(a)** .

**29** *Id.*

**30** Note 5, *supra*.

**31 Section 6330(c)(2)(A)** .

**32 Prop. Reg. 1.6015-5(a)(2)** .

**33 Reg. 1.6015-5(b)(1)** .

**34** Reg. 1.6015-5(b)(2)(1).

**35** *Id.*

**36 Giamelli**, **129 TC 107** (2007).

**37 Section 6015(c)(3)(A)(i)(I)** .

**38** Note 5, *supra*.

**39 Reg. 1.6015-3(b)(3)(ii)** .

**40 Reg. 1.6015-5(b) .**

**41** See *Pullins*, Note 38, *supra*.

**42 Reg. 1.6015-5(b)(4) .**

**43** See Note 5, *supra*.

**44 Section 6015(e)(4) .**

**45** The Court is authorized to enter a protective order to prevent the disclosure of personal information under TAX CT. R. PRAC. & PROC. R. 103 and to place certain information under seal pursuant to TAX C T. R. PRAC. & PROC. R. 27(c).