Chapter 13 Objections to Confirmation1

I. Statutory Requirements for a Chapter 13 Plan

A. Applicable Statutory Provisions. 11 U.S.C. § 1325 sets forth the mandatory requirements for confirmation of a Chapter 13 plan. In addition, 11 U.S.C. § 1322 contains both mandatory and permissive provisions for a Chapter 13 plan. Further, 11 U.S.C. § 109 contains rules addressing when an individual may be a debtor and when an individual qualifies for Chapter 13. The requirements and provisions which most frequently apply to tax issues in bankruptcy cases will be discussed in greater detail in other portions of this outline.

B. Eligibility Rules.

1. Chapter 13 Debt Limitation. Only an individual with regular income who owes on the date of filing noncontingent, liquidated, unsecured debts of less than $394,725.00 and noncontingent, liquidated, secured debts of less than $1,184,200.00 may be a Chapter 13 debtor. 11 U.S.C. § 109(e). The debt limitations adjust periodically, with the next adjustment to occur on April 1, 2019.

2. Prior Bankruptcy Case Dismissals. No individual may be a debtor if that individual also was a debtor in a prior bankruptcy pending at any time 180 days before the filing of the subject bankruptcy case if (1) the prior bankruptcy case was dismissed for a willful failure of the debtor to abide by court orders or for a failure to properly prosecute the case, or (2) the debtor obtained a voluntary dismissal of the prior bankruptcy case after a motion for relief was filed. 11 U.S.C. § 109(g).

3. Credit Counseling. An individual may only be a debtor if he or she received credit counseling within 180 days of the bankruptcy filing. 11 U.S.C. § 109(h).

C. Mandatory Requirements for Confirmation. Section 1325 of the Bankruptcy Code sets forth certain requirements that must be met before a chapter 13 plan can be confirmed. *In re Shelly*, 458 B.R. 740, 743 (Bankr. N.D. Ohio 2011) (citing *Shaw v. Aurgroup Fin. Credit Union*, 552 F.3d 447, 455 (6th Cir.2009)).

1. The plan complies with the provisions of the Bankruptcy Code. 11 U.S.C. § 1325(a)(1).

2. The plan must provide for the submission of future earnings or income of the debtor to the Chapter 13 trustee as is necessary for the execution of the plan. 11 U.S.C. § 1322(a)(1), 11 U.S.C. § 1325(a)(1).

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1 The views expressed herein do not necessarily reflect those of the Internal Revenue Service or the Office of the United States Attorney.

3. Priority Claims. The plan must provide for the payment in full and in deferred cash payments of all priority claims, unless the holder of a priority claim agrees to a different treatment. 11 U.S.C. § 1322(a)(2), 11 U.S.C. § 1325(a)(1).

4. If the plan classifies claims, it must treat all claims within the class the same. 11 U.S.C. § 1322(a)(3), 11 U.S.C. § 1325(a)(1).

5. Good Faith. The plan has been proposed in good faith and not by any means forbidden by law. 11 U.S.C. § 1325(a)(3). The debtor filed the bankruptcy petition in good faith. 11 U.S.C. § 1325(a)(7).

6. The value, as of the effective date of the plan, of property to be distributed under the plan to unsecured claimants is not less than the amount that would be paid if the estate was liquidated under Chapter 7. 11 U.S.C. § 1325(a)(4).

7. Secured Claims. A Chapter 13 plan provides for a secured claims one of three ways: (a) the secured creditor consents to the treatment, (b) the plan pays the secured claim, plus interest, and provides that the creditor retains its lien until either the debt is paid in accordance with non-bankruptcy law or the discharge is granted, or (c) the debtor surrenders the property to the secured creditor. 11 U.S.C. § 1325(a)(5).

8. Feasibility. The debtor must be able to make all payments under the plan and comply with the plan. 11 U.S.C. § 1325(a)(6).

9. The debtor must make certain domestic support obligation payments. 11 U.S.C. § 1325(a)(8).

10. Filing of Tax Returns. By the day before the date of the section 341 meeting (unless the trustee holds the meeting open), the debtor must file all tax returns for all taxable periods ending during the 4 year period ending on the date of the bankruptcy filing. 11 U.S.C. §§ 1325(a)(9), 1308.

11. If trustee or holder of unsecured claim objects, the court may not confirm the plan unless, as of the effective date of the plan: (1) the value of the property to be distributed under the plan on account of such claim is not less than the amount of the claim, or (2) the plan provides that all of the debtor's disposable income will be paid into the plan during the plan term. 11 U.S.C. § 1325(b)(1).

12. Above-Median Income Debtors. Plan term may not be longer than 5 years. 11 U.S.C. § 1322(d)(1).

13. Below-Median Income Debtors. Plan term may not be longer than 3 years unless the court for cause approves a longer period which may not exceed 5 years. 11 U.S.C. § 1322(d)(2).

D. Permissive Chapter 13 Provisions. The permissive plan provisions which come up most frequently in tax cases will be briefly discussed.

1. A plan may designate classes of unsecured claims, but may not discriminate against designated classes. However, the plan may treat consumer debts that the debtor is liable for with a co-debtor differently from other unsecured claims. 11 U.S.C. § 1322(b)(1).

2. A plan may modify the rights of holders of secured claims, unless the creditor is secured solely by a principal residence. Rights of unsecured creditors also may be modified. 11 U.S.C. § 1322(b)(2).

3. Plan may provide for the waiving or curing of any default. 11 U.S.C. § 1322(b)(3).

4. Plan may provide for concurrent payments to unsecured and secured claims. 11 U.S.C. § 1322(b)(4).

5. Plan may provide for the curing on any default within a reasonable time and the maintenance of regular payments while the case is pending on any secured or unsecured claim with a last payment due date which falls after the date for the final plan payment. 11 U.S.C. § 1322(b)(5). If a debtor utilizes section 1322(b)(5), the affected debt is not discharged. 11 U.S.C. § 1328(a)(1). Subsection (b)(5) potentially can be used to cure non-defaulted, non-terminated installment agreements.

6. Plan may provide for the payment of section 1305 claims. 11 U.S.C. § 1322(b)(6).

7. Plan may include other appropriate provisions not inconsistent with the Bankruptcy Code. 11 U.S.C. § 1322(b)(11).

II. Chapter 13 Debt Limitations

A. Only an individual with regular income who owes on the date of filing noncontingent, liquidated, unsecured debts of less than $394,725.00 and noncontingent, liquidated, secured debts of less than $1,184,200.00 may be a Chapter 13 debtor. 11 U.S.C. § 109(e). The debt limitations adjust periodically, with the next adjustment to occur on April 1, 2019. If a debtor is over the debt limitations, object to confirmation and move to dismiss. Debtors sometimes attempt to attack a tax claim in excess of a dollar limitation by arguing that it is disputed or unliquidated.

B. Regular Income. The definition of "regular" income is very broad, includes amounts other than wages, and may be viewed prospectively. *See In re Robertson*, 84 B.R. 109, 111 (Bankr. S.D. Ohio 1988). The issue of what constitutes regular income is subject to a variety of interpretations. *Compare In re Bottelberghe*, 253 B.R. 256, 259-61 (Bankr. D.

Minn. 2000) (holding nondebtor spouse's contributions may constitute regular income on part of debtor); *In re Robertson*, 84 B.R. at 111 (holding equipment leases provided regular income), *In re McMonagle*, 30 B.R. 899, 902 (Bankr. D. S.D. 1983) (holding unemployment compensation as regular income); and *In re Taylor*, 15 B.R. 596, 597-98 (Bankr. D. Ariz. 1981) (child support as regular income; citing cases holding welfare payments, social security income, odd jobs, and disability payments as satisfying this requirement); *with In re Donohue*, 81 B.R. 714, 715 (Bankr. S.D. Fla. 1987) (holding that unemployed debtor lacked regular income even though he expected to be employed in the near future).

C. Disputed Debts. The fact that a debtor disputes a debt does not remove the amount of the debt from the debt calculation. The majority view is that non-contingent, liquidated debts which are subject to a bona-fide dispute are included in the eligibility calculation under ' 109(e). *See Mazzeo v. United States (In re Mazzeo)*, 131 F.3d 295, 304-305 (2nd Cir. 1997); *United States v. Verdunn*, 89 F.3d 799, 802, n. 9 (11th Cir. 1996); *In re Knight*, 55 F. 3d 231, 234 (7th Cir. 1995); *Barcal v. Laughlin (In re Barcal)*, 213 B.R. 1008, 1012-13 (B.A.P. 8th Cir. 1997); *In re Jordan*, 166 B.R. 201, 202 (Bankr. D. Me. 1994); *In re Claypool*, 142 B.R. 753, 755 (Bankr. E.D. Va. 1990). The rationale for this holding is fairly obvious, as to hold otherwise would allow debtors to avoid the '109(e) limits simply by asserting a dispute to the excess claims. *Barcal v. Laughlin*, 213 B.R. at 1012; *In re Vaughan*, 36 B.R. 935, 939 (N.D. Ala.), *aff=d, Vaughan v. Central Bk. of South*, 741 F.2d 1383 (11th Cir. 1984). However, a few courts have held that the existence of a dispute, without more, is sufficient to render a claim unliquidated. *See, e.g., In re Lambert*, 43 B.R. 913, 921 (Bankr. D. Utah 1984) (stating that a dispute as to liability renders the entire debt unliquidated, and that a dispute as to a particular amount renders the disputed amount unliquidated).

D. Liquidated Debts. The term liquidated refers to a claim's value (i.e., the size of the corresponding debt) and the ease with which it can be ascertained. *In re Mazzeo*, 131 F.3d 295, 304 (2nd Cir. 1997). "The concept of liquidation for purposes of section 109(e) relates only to the amount of liability not to the existence of liability." *Mazzeo*, 131 F.3d at 304 (quoting *United States v. Verdunn*, 89 F.3d 799, 802, n.10 (11th Cir. 1996)). A debt is considered to be liquidated if it is subject to ready determination, meaning the amount due is fixed or certain or ascertainable by reference to an agreement or to a mathematical formula. If the value of the claim is easily ascertainable, it is liquidated. *Mazzeo*, 131 F.3d at 304. As stated by one Court:

> Determining the amount due because of this claim does not involve the use of judgment or discretion. While judgment and discretion must necessarily play a role in determining the existence of liability, the amount of any liability will require only simple arithmetic. After determining the debtor=s liability for a multitude of separate events, we need only add up the amount of money involved in each to determine the amount of the claim. This will require only mathematics not the exercise of judgment.

In re Visser, 232 B.R. 362, 365 (Bankr. N.D. Texas 1999) (citations omitted). As stated by the 8th Circuit Bankruptcy Appellate Panel:

> We hold that the key factor in distinguishing liquidated from unliquidated claims is **not** the extent of the dispute nor the amount of evidence required to establish the claim, but **whether the process for determining the claim is fixed, certain or otherwise determined by a specific standard.** This definition is in accord with the early distinction between contract and tort claims addressed in *In re Sylvester*, 19 B.R. 671 (B.A.P. 9th Cir. 1982). There, the court contrasted the unliquidated nature of tort claims with the liquidated nature of contract claims and held that a disputed contract liability was liquidated even though adjudication of the debt required submission of evidence at trial. While tort claims were not fixed as to liability or amount until a juridical award, the court stated that contract claims were subject to A. . . ready determination and precision in computation of the amount due . . . [and] the amount due [was] capable of ascertainment by reference to an agreement or by simple computation. *Id.* at 673.

Barcal v. Laughlin, 213 B.R. at 1014 (emphasis supplied). *See also Gaertner v. McGarry (In re McGarry)*, 230 B.R. 272, 275 (Bankr. W.D. Pa. 1999).

III. Procedure

A. Filing and Service of Chapter 13 Plan and the Confirmation Hearing.

1. A Chapter 13 plan must be filed with the petition or within 14 days of filing the petition. Fed. R. Bankr. P. 3015(b).

2. Service. The plan or a summary of a plan must be served pursuant to Rule 2002 not less than 28 days before the deadline for filing objections to confirmation. Fed. R. Bankr. P. 2002(b), 3015(d). These Rules do not require service in accordance with Rule 7004, which requires service upon the agency, United States Attorney and United States Attorney General. They just require compliance with Rule 2002 service requirements. Under 11 U.S.C. § 342(f)(1), a creditor may designate a notice of address to be used by the bankruptcy court. Universally, the IRS has designated a service address on Rule 5003(e) mailing registers. Fed. R. Bankr. P. 2002(j). Although Rule 2002(j)(3) requires the IRS to be served at its address listed on the mailing register maintained pursuant to Rule 5003(e) and does not require service on the United States Attorney in Chapter 11 cases, Rule 2002 is silent on specifically how the IRS should be served in a Chapter 13. Fed. R. Bankr. P. 2002(j)(3). In such instance, the general service requirements of Rule 2002 and section 342(f)(1) would seem to apply to the IRS. If the IRS files a proof of claim and designates a mailing address, it appears that notice may be sent to the address on the proof of claim. Fed. R. Bankr. P. 2002(g)(1)(A). However, the IRS designates the Rule 5003(e) address as its mailing address on its proofs of claim. The bottom line is that the IRS, and not

the United States Attorney's Office, just has to be served with a Chapter 13 plan in most instances. For agencies other than the IRS, a plan must be served on the agency and the United States Attorney. Fed. R. Bankr. P. 2002(j)(4).

However, a plan may include certain provisions which should require notice in accordance with Rule 7004. Debtors may include certain matters in plans which should be filed as Rule 9014 contested matters or Rule 7001 adversary proceedings. Rule 3012 permits the Court to value the amount of a secured claim upon motion and after notice and a hearing. Debtors may seek to value an IRS secured claim in their plan and many form Chapter 13 plans include such motions. Debtor may also seek to object to a claim, which according to the official comment to Rule 9014 is a contested matter. Contested matters should be served in accordance with Rule 7004 when they are included in a plan. *See* Fed. R. Bankr. P. 9014(b) (stating contested matters shall be served in accordance with Fed. R. Bankr. 7004).

Debtor's also may insert into their plans a determination of the validity, priority and extent of a lien; a determination that a debt was discharged; or the imposition of an injunction, all of which should be filed as adversary proceedings and served in accordance with Rule 7004.

If a Chapter 13 plan contains the following items, object and assert that a separate contested matter or adversary proceeding should be filed, even if the Government is not properly served:

a. Debtor seeks to value the secured claim of the IRS at an amount less than which is stated on the proof of claim (unless the plan was served in accordance with Rule 7004 or contained sufficient information to indicate that the secured claim will be valued at the confirmation hearing).

b. Debtor objects to the IRS's claim and asserts that it is an amount less than that which is stated on the proof of claim. A separate objection to claim is needed.

c. Confirmation of the plan will avoid, strip off or strip down the IRS's lien. This should be filed as an adversary proceeding.

d. The IRS shall apply debtor's refund/overpayment to priority periods, or all post-petition refunds/overpayments shall be paid by the IRS directly to the Chapter 13 trustee. These are an injunction requests which should be filed as an adversary proceeding. The request to pay post-petition refunds to the trustee also may be barred by sovereign immunity.

e. Confirmation of the plan shall enjoin the IRS from collecting taxes from the non-debtor spouse. This is an injunction request which should be filed as an adversary proceeding. The co-debtor stay also does not apply to taxes.

f. Confirmation of the plan will constitute a finding that repayment of a student loan constitutes an undue hardship and that debtor's student loans are dischargeable. This should be filed as an adversary proceeding.

Timely objections to confirmation are crucial in light of the Supreme Court's decision in *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, (2010) (discussed below in Section E) which permitted a Chapter 13 plan to discharge a portion of a student loan liability without the debtor having filed an adversary proceeding and which held that the confirmation of a Chapter 13 plan was entitled to *res judicata* effect. If a creditor has actual notice of the plan, proper service is not necessary for a plan to be binding. *Id.* at 262.

3. Confirmation Hearing. Unless the Court otherwise determines that it should be held earlier and no one objects, a confirmation hearing should be held no earlier than 20 days after and not later than 45 days after the section 341 meeting. 11 U.S.C. § 1324(b).

B. Objections to Confirmation.

1. Time to File. An objection to confirmation shall be filed and served upon the debtor, debtor's attorney, trustee and any other entity the court directs before the confirmation hearing. 11 U.S.C. § 1324(a); Fed. R. Bankr. P. 3015(f). However, local rules typically provide an earlier deadline for filing an objection to confirmation.

2. Notice of Objection. Rule 3015 does not specifically require a notice of objection to be filed with an objection to confirmation, but many local rules do. Fed. R. Bankr. P. 9009 provides that the Official Bankruptcy Forms must be used without alteration. Official Form 20A is a notice of motion or objection form.

3. Effect of Failure to Object. Rule 3015(f) provides that if no objection to confirmation is timely filed, the court may find that the plan is proposed in good faith and not by any means prohibited by law without taking evidence.

C. *Espinosa*.

The United States Supreme Court opined on due process relating to a Chapter 13 plan. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260 (2010), involved a bankruptcy court's confirmation of a plan that provided for the discharge of a student loan obligation. "The creditor argued that due process required that an adversary proceeding be filed to discharge a student loan obligation and, therefore, since an adversary proceeding was not filed pursuant to § 523(a)(8) and Bankruptcy Rule 7001(6), the confirmation order should have been vacated pursuant to Bankruptcy Rule 9024 (incorporating Federal Rule of Civil Procedure 60(b))." *In re Bennett*, 466 B.R. 422, 433 (Bankr. S.D. Ohio 2012); *see also Espinosa* at 266. In rejecting that argument, the Court agreed that § 523(a)(8) and Bankruptcy Rule 7001(6) require that an adversary proceeding be filed to discharge a

student loan obligation and chastised the bankruptcy court for confirming the plan without making a hardship determination pursuant to those provisions. However, the Court held that the bankruptcy court's confirmation of the plan providing for the discharge of the student loan obligation did not deny the creditor due process. *Id.* at 272. The Supreme Court held:

> Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); see also *Jones v. Flowers*, 547 U.S. 220, 225, 126 S.Ct. 1708, 164 L.Ed.2d 415 (2006) ("[D]ue process does not require actual notice ..."). Here, [the creditor] received *actual* notice of the filing and contents of [the debtor's] plan. This more than satisfied [the creditor's] due process rights. Accordingly, on these facts, [the debtor's] failure to serve a summons and complaint does not entitle [the creditor] to relief under Rule 60(b)(4).

Id. at 272. It should be noted that *Espinosa* granted preclusive effect to a confirmation order even when the relief was not granted according to the proper procedure and the bankruptcy court committed a clear legal error. *Id*. at 275. *See also In re Smith Audio Visual, Inc.*, No. 11-42026-11, 2013 WL 1279064 (Bankr. D. Kan. Mar. 28, 2013) (refusing to vacate order confirming Chapter 11 plan which paid less than 1/5 of IRS priority claim, where IRS filed proof of claim and received service of disclosure statement and plan, but United States Attorney's Office was not served in accordance with local rule); *Bennett v. Springleaf Fin. Servs. (In re Bennett)*, 466 B.R. 422, 436 (Bankr. S.D. Ohio 2012) (Chapter 13 plan which provided notice that a secured creditor's claim would be valued satisfied due process requirements). *But see In re Richter*, 525 B.R. 735, 752 (Bankr. C.D. Cal. 2015) ("a plan requires clarity to be binding").

1. Pre-*Espinosa* Law Which Might Still Apply. Prior to *Espinosa*, there were several opinions which held that where a Chapter 13 plan did not give sufficient notice that substantial rights of a creditor were being affected, such plan was not entitled to preclusive effect. It is unclear whether these cases remain good law, but they might be used to argue that notice was not reasonably calculated to apprise the IRS that its rights would be affected as required by *Espinosa*. These prior cases held that a provision of a Chapter 13 plan only has preclusive effect if: a) the notice of the plan is satisfactory under the circumstances and does not deny due process, *Piedmont Trust Bank v. Linkous (In re Linkous)*, 990 F.2d 160, 162 (4th Cir.1993), and b) the pertinent plan provision is clear and unambiguous, *County of Ventura Tax Collector v. Brawders (In re Brawders)*, 325 B.R. 405, 411 (B.A.P. 9th Cir. 2005), *aff'd sub nom.*, Brawders v. Cnty. of Ventura (In re Brawders), 503 F.3d 856 (9th Cir. 2007). *See also Deutchman v IRS (In re Deutchman)*, 192 F.3d 457, 461 (4th Cir. 1999) (Chapter 13 plan's failure to give specific notice to the IRS of taxpayer-debtor's intent to accord the liens less than full protection and to have his plan release the IRS's liens was fatal and would not be given preclusive effect.).

In *In re Millspaugh*, 302 B.R. 90, 102 (Bankr. D. Idaho 2003), the court held that where a plan includes a motion to value claim under Rule 3012, it should be served in accordance with Rule 7004:

> [T]o meet the requirements of the Rules and comply with considerations of due process, a Rule 3012 motion (either within or without a plan) must be served on the affected creditors in accord with Rule 7004. The debtor must file an appropriate certificate of service reflecting compliance with Rule 7004. Simply mailing the plan and notice of confirmation under Rule 2002 will not be sufficient, unless the [Master Mailing List] contains an address for the affected creditor that complies with the requirements of Rule 7004(b).

D. Burden of Proof – A majority of case hold that a debtor bears the burden of proof of demonstrating that a proposed Chapter 13 plan meets the requirements of 11 U.S.C. § 1325, even if an objection to confirmation is filed. *See, e.g., Tillman v. Lombard*, 156 B.R. 156, 158-59 (E.D. Va. 1993) (holding that a "debtor bears the burden of demonstrating that a proposed Chapter 13 plan meets the requirements of 11 U.S.C. § 1325" and that "[t]he interposition of an objection to confirmation surely does not relieve [a] Chapter 13 debtor from the ordinary burden of proving the right to bankruptcy relief"); *In re Blackmon*, 459 B.R. 144, 147 (Bankr. S.D. Fla. 2011) (stating burden of proof is upon a debtor to establish confirmation of a good faith plan); *In re Delbrugge*, 347 B.R. 536, 540 (Bankr. N.D. W. Va. 2006) (holding that a debtor bears the burden of proof in establishing the plan was filed in good faith); *In re Virden*, 279 B.R. 401, 407 (Bankr. D. Mass. 2002) (stating debtor bears burden of demonstrating that Chapter 13 plan was proposed in good faith). However, some courts hold that the creditor who raises an objection to the confirmation of a plan under § 1325(a) should be required to bear the initial evidentiary burden of persuasion to show that competent evidence supports the objection, which then shifts to the debtor. *See In re Mendenhall*, 54 B.R. 44, 46 (Bankr. W.D. Ark.1985).

IV. Failure to File Tax Returns

A. Filing of Tax Returns. By the day before the date of the section 341 meeting (unless the trustee holds the meeting open), the debtor must file all tax returns for all taxable periods ending during the 4 year period ending on the date of the bankruptcy filing. 11 U.S.C. §§ 1325(a)(9), 1308. This is not limited to Form 1040 income tax returns, but includes all other returns, including Form 940 and 941

B. Section 1308(a) requires a debtor to file on the day before the date first scheduled for a section 341 meeting "all tax returns for all taxable periods ending during the 4Byear period ending on the date of the filing of the petition." 11 U.S.C. ' 1308(a). In certain circumstances, section 1308(b) permits a limited extension of the bankruptcy deadline for filing tax returns. 11 U.S.C. ' 1308(b).

If the returns required by section 1308(a) are not timely filed, then the trustee may hold open the meeting of creditors for an additional period of time to allow the debtor to file the tax returns. 11 U.S.C. ' 1308(b)(1). The additional period of time is capped. For delinquent returns, the trustee may hold open the meeting of creditors for up to 120 days. 11 U.S.C. ' 1308(b)(1)(A). For returns not yet due to be filed, the meeting may be held open for a period extending for an additional 120 days or to the date on which the return is required to be filed under the last automatic extension of the filing date to which a debtor is entitled, whichever is later. 11 U.S.C. ' 1308(b)(1)(B). The court may further extend the filing date for a limited period. 11 U.S.C. ' 1308(b)(2). The debtor must demonstrate that the failure to file a return is attributable to circumstances beyond the control of the debtor. *Id*. Any extension granted by the court is limited to 30 days past the extension granted by the trustee for delinquent returns, 11 U.S.C. §1308(b)(2)(A), and to the applicable extended due date for extensions granted by the trustee for returns not yet due under tax law, 11 U.S.C. ' 1308(b)(2)(B). The extension may be granted only after notice and a hearing and upon an order entered before the expiration of the bankruptcy tax return filing deadline. 11 U.S.C. ' 1308(b)(2).

1. "The statutory language of § 1308(a) 'defines the tax returns which must be filed; and it establishes time limits for their filing.' Section 1308(a) specifically requires that applicable prepetition tax returns are to be filed prior to the first meeting of creditors. This provision applies to all Chapter 13 debtors. The only exceptions are where the trustee holds open the first meeting of creditors to allow the debtor additional time to file any unfiled returns or where extended by the Court pursuant to § 1308(b)(2)(A) or (B)." *In re Lachney*, No. 14-80420, 2014 WL 5339372, at *1 (Bankr. W.D. La. Sep. 3, 2014) (quoting *In re Perry*, 389 B.R. 62, 65 (Bankr.N.D.Ohio, 2008)) (internal citations omitted).

2. "When one reads § 1308(b)(2)(B)—dealing with not-yet—delinquent returns-in conjunction with § 1308(a), it becomes clear that Congress intended to make the filing of tax returns a condition of confirmation. For those debtors who file for Chapter 13 protection between January 1 and April 15 of any given year, Congress intended to require them to have their return for the prior year filed by the date first scheduled for the meeting of creditors, *even if* the return is not yet delinquent under the tax code." *In re Lachney*, No. 14-80420, 2014 WL 5339372, at *2 (Bankr. W.D. La. Sept. 3, 2014) (quoting *In re French*, 354 B.R. 258, 263 (Bankr.E.D.Wis.2006)).

3. <u>Extensions Have No Effect on the Bankruptcy Due Date for a Return</u>. "Irrespective of the date when the tax returns were due to be filed, ' 1308(a) states that the same must be filed on or before the date of the ' 341 meeting." *United States v. Cushing (In re Cushing)*, 401 B.R. 528, 537 (B.A.P. 1st Cir. 2009). The remedy is to ask the trustee to hold open the section 341 meeting. Federal and state tax returns must be filed by the date of the meeting of creditors, notwithstanding that outside of bankruptcy they would have not yet been due. *In re Mascoll*, No. 08-10288, 2008 WL 1869293, at *6 (Bankr. E.D.Va. Apr. 24,

2008). Returns for a prior calendar year must be filed no later than the day before the section 341 meeting even if the return is not due under the Internal Revenue Code. *In re French*, 354 B.R. 258, 263 (Bankr. E.D.Wisc. 2006); *In re Broussard*, No. 09–50009, 2009 WL 1531817, at * 2 (Bankr. W.D.La. May 29, 2009); *In re McCluney*, No. 06–21175, 2007 WL 2219112 at *3 (Bankr. D. Kan. Jun. 22, 2007). "Section 1308 does not speak of debtors who are not required to file *yet*, only of debtors who are required to file at all." *In re French*, 354 B.R. at 263 (emphasis supplied).

4. What is a return for section 1308 purposes? Return includes an Internal Revenue Code section 6020 (a) or (b) return, a written stipulation to a judgment or a final order entered by a nonbankruptcy tribunal. 11 U.S.C. ' 1308(c). Note: a section 6020(b) return is not considered a return for discharge purposes.

5. Hold Open. "In reading the phrase, 'the trustee may hold open,' the Panel agrees that this language requires the trustee to exercise discretion and take an affirmative step to hold the meeting open for a finite period of time." *United States v. Cushing (In re Cushing)*, 401 B.R. 528, 536 (B.A.P. 1st Cir. 2009). "If the trustee opts to hold open the ' 341 meeting of creditors pursuant to ' 1308, a clear statement must be made for the record." *In re Cushing*, 401 B.R. at 538. A trustee does not hold open a meeting of creditors simply because the debtor fails to appear. *In re Forte*, No. 06–15713, 2007 WL 2028894, at *4 (Bankr. E.D.Pa. July 6, 2007). "Under ' 1308(b)(1), it is the case trustee, not the Court, who has the authority to hold open the meeting [of creditors] to allow for the filing of returns. It behooves a debtor who has not filed all returns to advise the case trustee so the meeting can be held open." *In re McCluney*, No. 06–21175, 2007 WL 2219112 at *5 (Bankr. D. Kan. Jun. 22, 2007).

6. If a debtor does not file, no later than the day prior to the meeting of creditors, all tax returns for all taxable periods ending during the 4–year period ending on the date of the filing of the petition, Sections 1325(a)(9) and 1308 provide a basis for denying confirmation. *In re Mitrano*, N. 08-12890, 2008 WL 4280391, at *2 n.1 (Bankr. E.D. Va. Sep. 11, 2008).

7. Returns Filed After Bankruptcy Deadline and Before Confirmation. Debtors can make the argument that the plan still should be confirmed. However, even if the returns are filed after the bankruptcy filing deadline has expired, the case still must be dismissed if a motion is filed. *In re Perry*, 389 B.R. 62, 66 (Bankr. N.D. Ohio 2008) ("It is undisputed that the Debtor did not satisfy the requirement to file an applicable prepetition tax return under ' 1308 within the established time limit and thus dismissal is warranted pursuant to the Service=s motion under ' 1307(e), even though a copy of the subject tax return has now been provided.").

V. Payment of Priority Claims

A. The plan must provide for the payment in full and in deferred cash payments of all priority claims, unless the holder of a priority claim agrees to a different treatment. 11 U.S.C. § 1322(a)(2), 11 U.S.C. § 1325(a)(1).

B. "[A] chapter 13 plan must provide for the payment of priority tax claims in the full amount of the allowed claim, without post-petition interest, in order to comply with the requirements of the Code and satisfy the confirmation standard in § 1325(a)(1)." *United States v. Monahan (In re Monahan)*, 497 B.R. 642, 647-48 (B.A.P. 1st Cir. 2013); *In re Mitrano*, N. 08-12890, 2008 WL 4280391, at *1 (Bankr. E.D. Va. Sep. 11, 2008). A Chapter 13 plan which does not provide for the payment of priority claims is *per se* unconfirmable. *In re Shilling*, No. 11-42452, 2012 WL 1565257, at *2 (Bankr. D.N.J. May 2, 2012).

C. Trust fund recovery assessments must be paid by the debtor and not by the debtor's business. *In re Fitzgerald*, No. 08-60013-LYN, 2008 WL 5412906, at *3 (Bankr. W.D. Va. Oct. 10, 2008). However, the IRS may agree that a portion of a trust fund recovery liability may be paid by another responsible officer or the corporation that owes the Form 941 taxes in limited circumstances. For example, the IRS may agree to allow a responsible officer-debtor pay a portion of his trust fund recovery liability through a Chapter 13 plan if another responsible officer is paying a portion through a related bankruptcy case. In such instance, the plan should provide that the debtor remains liable for the entire amount of the claim, that if the other responsible person defaults on his payment obligations, the debtor will amend his plan to provide for the entire liability, and that if the debtor fails to so amend, there will be a material default under the terms of the plan.

D. Payment Inside the Plan. IRS priority claims must be paid inside, not outside, the Chapter 13 plan. *In re Ballard*, 4 B.R. 271, 278 (Bankr. E.D. Va. 1980); *In re McDonald*, 437 B.R. 278, 284 (Bankr. S.D. Ohio 2010); *In re Driskell*, 2000 WL 1902253 (Bankr. M.D. Ga. Nov. 20, 2000).

E. 1305(a) Claims. A Chapter 13 plan may attempt to pay any post-petition taxes which come due through the plan. However, it is the IRS's choice to seek payment of post-petition taxes through the bankruptcy case. Section 1305(a)(1) provides that "A proof of claim may be filed by any entity that holds a claim against the debtor B . . . for taxes that become payable to a governmental unit while the case is pending. . ." 11 U.S.C. ' 1305(a)(1). Section 1322(b)(6) provides that a plan may propose to pay a section 1305 claim. The decision to file a claim under ' 1305(a) belongs solely to the creditor; neither the debtor nor the trustee may file such a claim on the creditor's behalf. *In re Dickey*, 64

B.R. 3, 4 (Bankr. E.D. Va. 1985); *In re Bryant*, 1998 WL 412632, at * 3 (Bankr. E.D. Va. 1998).

VI. Payment of Secured Claims

A. Secured Claims. A Chapter 13 plan provides for a secured claims one of three ways: (a) the secured creditor consents to the treatment, (b) the plan pays the secured claim, plus interest, and provides that the creditor retains its lien until either the debt is paid in accordance with non-bankruptcy law or the discharge is granted, or (c) the debtor surrenders the property to the secured creditor. 11 U.S.C. § 1325(a)(5).

B. Section 1325 of the Bankruptcy Code sets forth certain requirements, including the requirement that secured tax claims be provided for, that must be met before a chapter 13 plan can be confirmed. *In re Shelly*, 458 B.R. 740, 743 (Bankr. N.D. Ohio 2011) (citing *Shaw v. Aurgroup Fin. Credit Union,* 552 F.3d 447, 455 (6th Cir. 2009)). The requirements of 11 U.S.C. § 1325(a)(5)(B) are mandatory and not discretionary and a court cannot confirm a plan which proposes only to pay part of a secured claim. *Barnes v. Barnes (In re Barnes)*, 32 F.3d 405, 407 (9th Cir. 1994).

C. Consent to the Plan – 11 U.S.C. § 1325(a)(A). The IRS rarely consents to a treatment of its claims other than what the payment option requires. However, the IRS may agree to do this in limited circumstances. For example, the IRS may agree to allow a responsible officer-debtor pay a portion of his trust fund recovery liability through a Chapter 13 plan if another responsible officer is paying a portion through a related bankruptcy case. In such instance, the plan should provide that the debtor remains liable for the entire amount of the claim, that if the other responsible person defaults on his payment obligations, the debtor will amend his plan to provide for the entire liability, and that, if the debtor fails to so amend, there will be a material default under the terms of the plan. In all cases where the IRS consents, it should file a written notice expressing its consent so as to prevent the court implying consent when a notice is not filed in another case.

D. Payment of Secured Claim and Retention of Lien – 11 U.S.C. § 1325(a)(B). The Plan must provide the following three requirements:

1) Retention of Lien
   a. Holder of secured claim retains the lien securing the claim until the earlier of:
      i. The payment of the underlying debt determined by nonbankruptcy law, or
      ii. A section 1328 discharge is granted; and
   b. If the case is converted or dismissed before the plan is completed, the lien shall be retained in accordance with nonbankruptcy law.

11 U.S.C. § 1325(a)(5)(B)(i).

2) Payment in Full

a. The value, as of the effective date of the plan, of property to be distributed under the plan on account of the secured claim is not less than the allowed amount of the claim.

11 U.S.C. § 1325(a)(5)(B)(ii).

3) Periodic Payments

a. If

i. Property to be distributed to pay the claim is in the form of periodic payments, such payments shall be in equal monthly amounts, and

ii. The holder of the secured claim is secured by personal property, the amount of such payments shall not be less than an amount sufficient to provide adequate protection during the period of the plan.

11 U.S.C. § 1325(a)(5)(B)(iii).

1. Retention of Lien. The lien must be retained until the liability secured by the lien, including post-petition penalties and interest, is paid in full in accordance with tax law, or until a Chapter 13 discharge is granted. 11 U.S.C. § 1325(a)(5)(B)(i)(I). Beware of and object to plan provisions will seek to release liens upon confirmation or upon payment in accordance with the plan. Also, check with IRS counsel in your area to determine if liens securing the unpaid portion of nondischargeable taxes should be released upon payment in accordance with the plan and entry of a discharge order.

2. Payments must be equal monthly payments per the statute. 11 U.S.C. § 1325 (a)(5)(B)(iii)(I).

3. A Chapter 13 plan must provide for the payment in full of IRS secured tax claims with interest. *In re Mitrano*, N. 08-12890, 2008 WL 4280391, at * 1 (Bankr. E.D. Va. Sep. 11, 2008).

4. Lump-Sum Payments. A plan which proposes to pay minimal monthly payments followed by a lump sum payable in the 60th month of the plan violates the requirement that a secured claim be paid in full within the term of the plan in equal regular monthly payments with interest, pursuant to 11 U.S.C. §1325(a)(5)(B)(iii). *See In re Henning*, 420 BR 773, 788-790 (Bankr.W.D. Tenn. 2009) (concerning payment of mortgage debt secured only by principal residence); *In re Wagner*, 342 B.R. 766, 771-772 (Bankr. E.D. Tenn. 2006) (same). BAPCPA amended § 1325(a)(5)(B) by requiring that, with respect to every allowed secured claim provided for by the plan, periodic payments be made in equal monthly amounts and therefore prohibits balloon payments. *Hamilton v. Wells Fargo Bank, N.A. (In re Hamilton)*, 401 B.R. 539, 543 (B.A.P. 1st Cir. 2009); *but see In re Cochran*, 555 B.R 892, 896-98 (Bankr. M.D. Ga. 2016) (finding balloon payments are not prohibited by Section 1325(a)(5)(B)(iii)(I)).

5. Attempt to Pay Secured Tax Claims in Excess of Plan Term. A proposed Chapter 13 plan may not modify a secured tax claim into a debt payable over a period

longer than the term of a Chapter 13 plan. *Pierrotti v. United States (In re Pierrotti)*, 645 F.3d 277, 281 (5th Cir. 2011).

6. When Do Payments Start? There is a split of authority. One line of authority holds that a Chapter 13 plan must provide for secured creditors to receive equal monthly payments beginning with the first distribution post-confirmation and the payment amount must be sufficient to provide adequate protection during the period of the plan. *In re Kirk*, 465 B.R. 300, 304-05 (Bankr. N.D. Ala. 2012); *In re Williams*, 385 B.R. 468, 474-75 (Bankr. S.D. Ga. 2008). The other line of authority holds that equal monthly payments required by § 1325(a)(5)(B)(iii)(I) mean payments must be equal once they begin, not that such equal monthly payments must begin at the first post-confirmation distribution. *In re DeSardi*, 340 B.R. 790, 805 (Bankr.S.D.Tex.2006).

7. Payments of Secured Claim by Trustee or Directly by Debtor. Generally, the IRS prefers that secured claims get paid through a Chapter 13 plan and not directly by a debtor. The trustee normally makes distributions to creditors of the payments made under the plan by the debtors. 11 U.S.C.A. §§ 1325(a)(6), 1326(b), (c). Authority is sparse as to whether IRS secured claims should be paid inside or outside of a Chapter 13 plan. *In re Sanford*, 390 B.R. 873 (Bankr. E.D. Tex. 2008), held that the IRS secured claims in that case should be paid through the plan. In so doing, the court set forth a 21 factor test, noted that the IRS vehemently objected to being paid outside the plan and noted that the debtor failed to provide a justification for direct disbursement. *Id.* at 879-80. On the other hand, the case of *In re Evans*, 66 B.R. 506, 509-10 (Bankr. E.D. Pa. 1986), held that IRS secured claims could be paid outside of a Chapter 13 plan.

E. Surrender of Property – 11 U.S.C. § 1325(a)(5)(C). Sometimes, debtors will seek to surrender personal or real property, some of which may be exempt from IRS levy. The IRS does not agree to this. The IRS's lien attaches to all real and personal property owned by a taxpayer. 26 U.S.C. § 6321. First, exempt property may not be surrendered to the IRS because it is not subject to levy and the IRS would have to file a judicial action to foreclose its lien or to get judicial approval to levy. Second, surrender requires a mutual agreement. Third, a taxpayer-debtor cannot realistically surrender all of their property. Fourth, partial surrender is not an effective surrender.

1. Background of IRS Levy Exemptions. Section 6321 of the Internal Revenue Code provides for the imposition of a federal lien on "all property and rights to property" belonging to a delinquent taxpayer. 26 U.S.C. § 6321. Pursuant to Section 6322 of the Internal Revenue Code, such a tax lien arises automatically upon assessment and attaches to property owned or subsequently acquired by the taxpayer. 26 U.S.C. § 6321, 6322; *Glass City Bank v. United States*, 326 U.S. 265, 267-68 (1945). The scope of Internal Revenue Code Section 6321 "is broad and reveals . . . that Congress meant to reach every interest in property that a taxpayer might have." *United States v. Nat'l Bank of Commerce*, 472 U.S. 713,

719-720 (1985). As the Supreme Court noted in *Glass City Bank v. United States*, 326 U.S. 265, 267 (1945): "[s]tronger language could hardly have been selected to reveal a purpose to assure the collection of taxes."

A federal tax lien is not self-executing. *Nat'l Bank of Commerce*, 472 U.S. at 720. There are two principal ways the United States may seek to collect a tax liability secured by a federal tax lien. *Id*. First, the United States through the Attorney General and at the request of the Secretary of the IRS may file a civil action in district court to enforce a tax lien securing a delinquent tax liability or to subject any property to the payment of such tax liability. *Id*.; 26 U.S.C. § 7403(a). Second, the IRS may seek to collect delinquent taxes through administrative levy. *Nat'l Bank of Commerce*, 472 U.S. at 720; 26 U.S.C. § 6331(a). Levy under the Internal Revenue Code includes the power of distraint and seizure. 26 U.S.C. § 6331(b).

While a levy is authorized by Internal Revenue Code Section 6331, Section 6334 of the Internal Revenue Code provides for certain exemptions from levy. 26 U.S.C. § 6334. Common exemptions for personal and real property will be discussed. Internal Revenue Code Section 6334(a)(1) provides for an exemption from levy for items of wearing apparel and school books that are necessary for a taxpayer or the members of the taxpayer's family. 26 U.S.C. § 6334(a)(1). Internal Revenue Code Section 6334(a)(2) exempts up to $6,250.00 in fuel, provisions, furniture, personal effects in the taxpayer's household, and arms for personal use. 26 U.S.C. § 6334(a)(2). A principal residence, within the meaning of 26 U.S.C. § 121, is exempt from levy except to the extent provided by Section 6334(e) of the Internal Revenue Code. 26 U.S.C. § 6334(a)(13)(B)(1). Under Section 121(a) of the Internal Revenue Code, gain from the sale or exchange of property is excluded from gross income if such property was owned and used by the taxpayer as the taxpayer's principal residence two out of five years preceding the sale or exchange date. 26 U.S.C. § 121(a). Thus, property is a principal residence for Internal Revenue Code Section 6334 purposes if a taxpayer owned and utilized it as his or her principal residence for two out of the five years preceding the levy.

Internal Revenue Code Section 6334(e) provides that a levy on a principal residence must be approved by a United States District Judge or a United States Magistrate Judge and grants United States district courts exclusive jurisdiction to approve a levy. 26 U.S.C. § 6334(e)(1).

2. Exempt Property May Not Be Surrendered. A "proposal to surrender . . . property that the IRS cannot levy on and cannot otherwise collect without resort to litigation does not constitute a 'surrender' under 11 U.S.C.A. § 1325(a)(5)(C)." *Internal Revenue Service v. White (In re White)*, 487 F.3d 200, 201 (4th Cir. 2007) (case involving proposed surrender of exempt personal property). *See also In re* Reitberger, 456 B.R. 406, 407 (Bankr. D. Minn. 2011) ("Federal tax liens are not subject to the surrender provisions of 11 U.S.C. § 1325(a)(5)(C).").

In *White*, the debtors proposed to surrender to the IRS their apparel and a number of household goods. *Id*. at 206. The Fourth Circuit Court of Appeals noted:

> The [Internal Revenue Code ("IRC")] exempts this property from administrative levy by the IRS. *See* 26 U.S.C.A. § 6334(a) (West 2002 & Supp.2006) (exempting from administrative levy "wearing apparel ... necessary" for the taxpayer and his family and "fuel, provisions, furniture and personal effects [up to] $6,250 in value"). In other words, while the IRC grants the IRS the power to obtain a federal tax lien over "all property" of a debtor, *see* 26 U.S.C.A. § 6321 (West 2002 & Supp.2006), the IRS cannot convert that lien into payment through levy on the exempted property that the Whites purport to surrender. The net result is that, in the absence of actual delivery or turnover of the property to the IRS, the Whites will retain the very property that they "surrendered" because, as the district court noted, the IRS faces "substantial legal obstacles" to collecting the property. [*Internal Revenue Service v. White (In re White)*, 340 B.R. 761, 766 (E.D.N.C. 2006)].

Id. (emphasis added). In *White*, the debtors conceded that the IRS could not levy on the property proposed to be surrendered, but argued that the IRS could bring an action to enforce its lien rights and convert the property to pay its claim. *Id*. at 206. In rejecting this argument, the Fourth Circuit reasoned:

> While the Whites are correct that nothing bars the IRS from seeking judicial enforcement of the tax lien, the fact that the IRS can potentially collect the value of the property only through judicial enforcement underscores why, in the absence of actual physical turn-over of the property, the Whites' proposal is not a "surrender" under the statute. By insisting that the IRS is not foreclosed from obtaining the property by way of *adversarial litigation*, the Whites are all but conceding that their proposed surrender would not result in their relinquishment of all of their legal rights to the property, including the rights to possess and use it. Normally, "[w]hen a debtor surrenders the property [securing a claim], a creditor obtains it immediately, and is free to sell it and reinvest the proceeds." *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962, 117 S.Ct. 1879, 138 L.Ed.2d 148 (1997). Under the Whites' proposed plan, however, the Whites would not immediately turn the property over to the IRS. Instead, the Whites would retain the purportedly "surrendered" property until the IRS obtained a court judgment subjecting the exempted property to payment of the IRS's secured claim or, according to the Whites, until plan confirmation removed the bar to administrative levy on the property, thus allowing the IRS to levy against the property.

> The IRS certainly would not immediately, or even with minor delay, obtain the property so that it could sell it. The Whites' retention of property that is legally insulated from collection is inconsistent with surrender.

[The IRS cannot levy the principal residence without obtaining an order, and this precludes the debtor from surrendering that residence. Turning over the property would not be a surrender because the property is exempt from the IRS levy.]

Id. at 206-07 (emphasis added) (footnote omitted). As the *White* court reasoned: "If a secured creditor is *legally foreclosed* from *immediately* obtaining the property that a debtor proposes to surrender and the debtor does not in fact voluntarily relinquish all rights in the property, including the right to possession, to the secured creditor, then the debtor can in no way be said to have 'surrendered' any of his rights in the property." *Id*. at 207 (emphasis added).

3. Surrender Must Occur at or Before Confirmation. Under Section 1325(a)(5)(C), a surrender must be completed at or before the confirmation of the plan. *White*, 487 F.3d at 207 (citing *Chrysler Fin. Corp. v. Nolan (In re Nolan)*, 232 F.3d 528, 533 n.8 (6th Cir. 2000)).

4. No Partial Surrender. Although a court could confirm a Chapter 13 plan which (1) surrenders collateral to a creditor pursuant to Section 1325(a)(5)(C), or (2) allows a creditor to retain its lien while being provided with periodic payments pursuant to Section 1325(a)(5)(B), a debtor does not have the option of combining these two alternatives by surrendering a portion of collateral while making payments under a plan based upon the value of the remaining retained collateral. *Williams v. Tower Loan of Miss., Inc. (In re Williams)*, 168 F.3d 845, 847 (5th Cir. 1999). *See also In re Schwartz*, No. 96-18913 DWS, 1998 WL 37551, at *3 (Bankr. E.D. Pa. Jan. 22, 1998) (In a case involving the IRS, holding "The plain language of this subsection requires the surrender of all and not just a part of the collateral securing a claim"). *Contra*. *In re McCommons*, 288 B.R. 594, 597 (Bankr. M.D. Ga. 2002) (holding that the alternatives in Section 1325(a)(5) are mutually not exclusive and that, if a secured creditor does not accept the Chapter 13 plan, then a debtor may use a combination of Sections 1325(a)(5)(B) and 1325(a)(5)(C) in its treatment of the secured claim).

The *Williams* court found the Supreme Court's discussion of how to determine value relative to a Chapter 13 "cram-down" in *Assocs. Commercial Corp. v. Rash*, 520 U.S. 953 (1997), as instructive on the interpretation of Section 1325(a)(5). The *Williams* court observed that:

> In *Rash*, the [Supreme] Court stated that "A plan's proposed treatment of secured claims can be confirmed if *one of three* conditions is satisfied: the secured creditor accepts the plan, see 11 U.S.C. § 1325(a)(5)(A); the debtor surrenders the property

> securing the claim to the creditor, see 11 U.S.C. § 1325(a)(5)(C); or the debtor invokes the so-called 'cram down' power, see 11 U.S.C. § 1325(a)(5)(B)." [520] U.S. [953, 956-57], 117 S.Ct. 1879, 1882-83, 138 L.Ed.2d 148 (1997). (Emphasis added). The Court also stated that "If a secured creditor does not accept a debtor's Chapter 13 plan, the debtor has *two options* for handling allowed secured claims: surrender the collateral to the creditor ... or, under the cram down option, keep the collateral over the creditor's objection and provide the creditor with the equivalent present value of the collateral." [520] U.S. [953, 962], 117 S.Ct. 1879, 1885, 138 L.Ed.2d 148 (1997). (Emphasis added). This language strongly indicates that a debtor cannot combine subsections (B) and (C) to create a fourth option.

Williams, 168 F.3d at 847 (emphasis added). Thus, under Section 1325(a)(5)(C), "'the property securing such claim,' means 'the entire collateral.'" *In re Snyder*, No. 10-62052, 2012 WL 1110119, at *4 (Bankr. N.D.N.Y. Apr. 2, 2102) (quoting *First Brandon Nat'l Bank v. Kerwin (In re Kerwin)*, 996 F.2d 552, 557 (2d Cir. 1993)). Accordingly, to effectuate a surrender, a debtor must surrender all property securing a claim. All real and personal property secures an IRS's secured claim by virtue of the expansive nature of the IRS's tax lien. Since at least some personal property will be exempt from levy, a debtor in every case will be unable to complete a full surrender because the debtor will not be able to surrender exempt property.

5. Surrender Requires a Mutual Agreement. "Under the Bankruptcy Code, the surrender of collateral requires the mutual agreement between the parties and occurs as a result of the consent of both parties." *In re Losak*, 375 B.R. 162, 164 (Bankr. W.D. Pa. 2007) (Chapter 7 case); *In re Service*, 155 B.R. 512, 514 (Bankr. E.D. Mo. 1993). As stated in *In re Service:*

> The Code nowhere defines or elaborates on the meaning of "surrender" as it is used in Chapter 13. However, in explaining the distinction between "abandonment" and "surrender" under the Bankruptcy Code, one Court explained that surrender of collateral requires a mutual agreement between the parties. *In re Robertson*, 72 B.R. 2, 4 (Bankr.D.Colo.1985). In *Robertson*, noting the absence of authority discussing or defining the term "surrender," the court looked to *Black's Law Dictionary* and observed that "surrender" is "a contractual act and occurs as a result of the consent of both parties." *Id. See also, In re Williams*, 70 B.R. 441, 443 (Bankr.D.Colo.1987) (citing with approval the *Robertson* definitions of abandonment and surrender); *In re Rimmer*, 143 B.R. 871, 876 (Bankr.W.D.Tenn.1992) (stating that a debtor could not surrender collateral in a confirmed plan absent consent of the secured creditor).

In re Service, 155 B.R. at 514. *Contra*. *In re Harris*, 244 B.R. 556, 557 (Bankr.D.Conn.2000) ("No court has held that § 1325(a)(5)(C) requires consent of the secured creditor to be effectual, and a number of appellate courts, including the United States Supreme Court, have, albeit in passing, recognized this provision without indicating the consent of the secured creditor was a necessary component."); *In re White*, 282 B.R. 418, 422 (Bankr. N.D. Ohio 2002) (same).

VII. Good Faith

A. Chapter 13 contains two "good faith" requirements. First, subsection (a)(3) of § 1325 requires the bankruptcy court to determine if the *plan* was proposed in good faith and subsection (a)(7), similarly, mandates consideration of whether the *petition* was filed in good faith. 11 U.S.C. §§ 1325(a)(3), (a)(7). *Brown v. Gore (In re Brown)*, 742 F.3d 1309, 1316 (11th Cir. 2014). The standards for confirmation of a Chapter 13 Plan with respect to the good faith of the debtor are established by Section 1325(a)(3) of the Bankruptcy Code: "[T]he court shall confirm a plan if—the plan has been proposed in good faith and not by any means forbidden by law. . . ." 11 U.S.C. § 1325(a)(3). *See also* 11 U.S.C. § 1325(a)(7) (plan may be confirmed if "the action of the debtor in filing the petition was in good faith. . . ."). The issue of good faith comes up both in the context of objections to confirmation and motions to dismiss. The cases deciding good faith in connection with motions to dismiss apply to objections to confirmation.

B. "Congress has nowhere in the statute provided a definition of the term 'good faith.' The legislative history is similarly silent on this point." *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968, 969 (4th Cir. 1982). Courts employ the totality of the circumstances test to decide good faith. *Brown v. Gore (In re Brown)*, 742 F.3d 1309, 1317 (11th Cir. 2014); *Puffer v. Pappalardo*, 674 F.3d 78, 82 (1st Cir. 2012); *Sikes v. Crager (In re Crager)*, 691 F.3d 671, 675 (5th Cir. 2012); *Neufeld v. Freeman*, 794 F.2d 149, 152 (4th Cir.1986); *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983); *Kitchens v. Ga. R.R. Bank & Tr. Co. (In re Kitchens)*, 702 F.2d 885, 888–89 (11th Cir. 1983); *United States v. Estus (In re Estus)*, 695 F.2d 311 (8th Cir. 1982); *In re Lepe*, 470 B.R. 851, 857-58 (B.A.P. 9th Cir. 2012). Some of the factors considered by various courts will be discussed below.

Fourth Circuit

In *Deans*, the Fourth Circuit Court of Appeals set forth a non-exhaustive list of factors that may be considered when determining whether a debtor has proposed a plan in good faith pursuant to Section 1325(a)(3). *Deans v. O'Donnell (In re Deans)*, 692 F.2d 968, 972 (4th Cir. 1982). Noting that "a court must make its determination based on all militating factors," the Court wrote:

> Without attempting to be exhaustive or to establish a criteria check-list, these factors might include, depending on the particular case, not only
> [1] the percentage of proposed payment, but also

> [2] the debtor's financial situation,
> [3] the period of time payment will be made,
> [4] the debtor's employment history and prospects,
> [5] the nature and amount of unsecured claims,
> [6] the debtor's past bankruptcy filings,
> [7] the debtor's honesty in representing facts, and
> [8] any unusual or exceptional problems facing the particular debtor.
> Although the court's discretion in making the good faith determination is necessarily a broad one, the totality of circumstance must be examined on a case by case basis in order to fairly apply the statute as now written.

Id. To this non-exhaustive list, the Fourth Circuit has added the debtor's pre-petition conduct as a factor that may be considered. *See Neufeld v. Freeman,* 794 F.2d 149, 152 (4th Cir.1986). Ultimately, "the totality of circumstances must be examined on a case by case basis...." *Deans,* 692 F.2d at 972. S*ee also Neufeld,* 794 F.2d at 152. Further, "the basic inquiry should be whether or not under the circumstances of the case there has been an abuse of the provisions, purpose, or spirit of [the Chapter] in the proposal or plan...." *Deans,* 692 F.2d at 972 (citations omitted).

Fifth Circuit

The Fifth Circuit employs the following test:

> To determine whether a Chapter 13 plan was filed in good faith, the bankruptcy court applies a "totality of the circumstances" test. Under this test, the court considers such factors as
> (1) "the reasonableness of the proposed repayment plan,"
> (2) "whether the plan shows an attempt to abuse the spirit of the bankruptcy code,"
> (3) whether the debtor genuinely intends to effectuate the plan,
> (4) whether there is any evidence of misrepresentation, unfair manipulation, or other inequities,
> (5) whether the filing of the case was part of an underlying scheme of fraud with an intent not to pay,
> (6) whether the plan reflects the debtor's ability to pay, and
> (7) whether a creditor has objected to the plan.
> In applying this test, the bankruptcy court "exacts an examination of all of the facts in order to determine the bona fides of the debtor."

Suggs v. Stanley (In re Stanley), 224 F. App'x 343, 346 (5th Cir. 2007) (citations omitted).

Eighth Circuit

In *Estus,* the Eighth Circuit noted the following factors as relevant in a good faith analysis:

(1) the amount of the proposed payments and the amount of the debtor's surplus;
(2) the debtor's employment history, ability to earn and likelihood of future increases in income;
(3) the probable or expected duration of the plan;
(4) the accuracy of the plan's statements of the debts, expenses and percentage repayment of unsecured debt and whether any inaccuracies are an attempt to mislead the court;
(5) the extent of preferential treatment between classes of creditors;
(6) the extent to which secured claims are modified;
(7) the type of debt sought to be discharged and whether any such debt is nondischargeable in Chapter 7;
(8) the existence of special circumstances such as inordinate medical expenses;
(9) the frequency with which the debtor has sought relief under the Bankruptcy Reform Act;
(10) the motivation and sincerity of the debtor in seeking Chapter 13 relief; and (11) the burden which the plan's administration would place upon the trustee.

Estus, 695 F.2d at 317. *See also Flygare v. Boulden,* 709 F.2d 1344, 1347–48 (10th Cir.1983) (quoting *Estus,* 695 F.2d at 316–17).

Ninth Circuit

The Ninth Circuit looks to four factors to determine whether a plan had been proposed in good faith:

"(1) whether debtors misrepresented facts in their plan or unfairly manipulated the [Bankruptcy] Code,
(2) the debtors' history of filings and dismissals,
(3) whether the debtors intended to defeat state court litigation, and
(4) whether egregious behavior is present."

Drummond v. Welsh (In re Welsh), 711 F.3d 1120, 1123 (9th Cir. 2013) (quoting *Leavitt v. Soto (In re Leavitt),* 171 F.3d 1219 (9th Cir.1999)).

Eleventh Circuit

The Eleventh Circuit Court of appeals adopted a non-exclusive list for determining whether a plan is filed in good faith. The factors are:

(1) "the amount of the debtor's income from all sources";
(2) "the living expenses of the debtor and his dependents";
(3) "the amount of attorney's fees";
(4) "the probable or expected duration of the debtor's Chapter 13 plan";

(5) "the motivations of the debtor and his sincerity in seeking relief under the provisions of Chapter 13";
(6) "the debtor's degree of effort";
(7) "the debtor's ability to earn and the likelihood of fluctuation in his earnings";
(8) "special circumstances such as inordinate medical expense";
(9) "the frequency with which the debtor has sought relief under the Bankruptcy Reform Act and its predecessors";
(10) "the circumstances under which the debtor has contracted his debts and his demonstrated bona fides, or lack of same, in dealings with his creditors";
(11) "the burden which the plan's administration would place on the trustee";
(12) "the extent to which claims are modified and the extent of preferential treatment among classes of creditors";
(13) "substantiality of the repayment to the unsecured creditors"; and
(14) "other factors or exceptional circumstances."

Brown v. Gore (In re Brown), 742 F.3d 1309, 1316-17 (11th Cir. 2014) (quoting *Kitchens v. Ga. R.R. Bank & Tr. Co. (In re Kitchens)*, 702 F.2d 885, 888–89 (11th Cir. 1983)).

VIII. Other Issues

A. Designation of Application of Tax Overpayments. Chapter 13 plan may not designate where the IRS applies an overpayment. *In re Packer*, No. 07-10556, 2007 WL 3331534 at *4 (Bankr. D.N.H. Nov. 6, 2007); *In re Lybrand*, 338 B.R. 402, 404 (Bankr. W.D. Ark. 2006). *See also Ewing v. United States (In re Ewing)*, 400 B.R. 913, 917 (Bankr. N.D. Ga. 2008) (Internal Revenue Service's post-confirmation exercise of right of set off in order to reduce tax debt that was being paid through debtor's confirmed Chapter 13 plan did not violate any provision of confirmed plan, which did not, by its terms, prohibit such a setoff.).

B. Interest on Unsecured Claims. If a debtor's assets exceed his liabilities and the plan does not immediately pay all claims upon confirmation, the Chapter 13 plan may have to provide for the payment of interest on unsecured general and priority claims. Section 1325(a)(4) provides: "the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid if the estate of the debtor was liquidated under Chapter 7." 11 U.S.C. § 1325(a)(4). When liquidation will result in full payment of all allowed unsecured claims, a Chapter 13 plan cannot defer payment of the claims without providing interest payments to the creditors. *Hardy v. Cinco Fed. Credit Union (In re Hardy)*, 755 F.2d 75, 78 (6th Cir. 1985); In *re Evans*, No. 10-80446C, 2010 WL 2976165 at *3 (Bankr. M.D.N.C. Jul. 28, 2010).

C. Co-Debtor Stay. The co-debtor stay imposed by 11 U.S.C. § 1301 does not prohibit the IRS from collecting tax liabilities from a non-debtor spouse. Federal tax liabilities are not consumer debts. This has been established by a long line of cases. *See IRS v.*

Westberry, 215 F.3d 589 (6th Cir. 2000); *In re Stovall*, 209 B.R. 849 (Bankr. E.D. Va. 1997); *In re Goldsby*, 135 B.R. 611 (Bankr. E.D. Ark. 1992). This being so, the IRS can collect against a non-debtor spouse with no limitations or restrictions. It also is within the IRS's discretion to decide to withhold collection from a non-debtor spouse for business reasons if it appears that a Chapter 13 plan will pay the IRS's claims promptly.

D. Feasibility under Section 1325(a)(6) and lump-sum payments. To satisfy feasibility, a debtor's plan must have a reasonable likelihood of success, i.e., that it is likely that the debtor will have the necessary resources to make all payments as directed by the plan; this is a factual determination. *1st Nat. Bank of Boston v. Fantasia (In re Fantasia)*, 211 B.R. 420, 422-23 (B.A.P. 1st Cir. 1997) (involving a balloon payment and listing standards for determining when a balloon payment is feasible). Mere speculation as to the source of funding for a plan is not sufficient to satisfy feasibility. *Id*. at 423.

In many instances, debtors seek to fund their plan with lump sum payments from a sale or refinance of their property or by a potential recovery from a lawsuit. If a debtor proposes such a payment, the debtor must establish facts that recovery will occur. *See* In *re Shelly*, 458 B.R. 740, 744-45 (Bankr. N.D. Ohio 2011) (debtors failed to provide Court with any information regarding the likelihood of success of recovery with respect to their malpractice suit); *In re Gavia*, 24 B.R. 573 (B.A.P. 9th Cir. 1982) (plans which called for a single payment to creditors from proceeds of potential sale of residence were not feasible where no evidence of likelihood of sale was presented); *In re Harris*, 199 B.R. 434, 436-37 (Bankr.D.N.H.1996) (plan that provided for large balloon payment at end of 60 months did not satisfy feasibility requirement where debtor provided no evidence that bank would be willing to lend funds for such payment); *In re Hogue*, 78 B.R. 867, 872 (Bankr. S.D. Ohio 1987) (plans dependent upon sale or refinancing of debtors' residences at or near end of plan term were not feasible absent evidence that such sales or refinancings were reasonably likely to occur).

1. Other Grounds for Objecting Based Upon Feasibility. In most jurisdictions, the trustees do an excellent job of raising feasibility objections. However, consider raising such an objection when the plan does not provide for the IRS's claims, the debtor has a history of under-withholding and not paying estimated taxes, the schedules do not budget expenses for withholding or estimated taxes and the budget is tight.

E. Direct Payment of Post-Petition Tax Refunds by IRS to Trustee. In some instances, Chapter 13 plans or confirmation orders will direct the IRS to pay directly to the Chapter 13 trustee post-petition tax refunds due the debtor. Under 11 U.S.C. § 1325(c), the court may order any entity from whom the debtor receives income to pay it to the trustee. A tax refund could constitute income and at least one court has held that the IRS could be compelled to pay tax refunds directly to a Chapter 13 trustee. *See In re Cochran*, 141 B.R. 270 (M.D. Ga. 1992). However, the authority for authorizing payment is section 1325. *See* 11 U.S.C. § 106(a); *In re Knapp*, 294 B.R. 334, 338 (W.D. Wash. 2003) (bankruptcy court could not require IRS to send refunds to trustee because sovereign

immunity was not waived). It is proper for a plan or confirmation order to provide that a *debtor* shall turn over refunds (not overpayments) to the trustee.

F. Payment through an IRS Installment Agreement.

1. A plan may provide for the curing on any default within a reasonable time and the maintenance of regular payments while the case is pending on any secured or unsecured claim with a last payment due date which falls after the date for the final plan payment. 11 U.S.C. § 1322(b)(5). If a debtor utilizes section 1322(b)(5), the affected debt is not discharged. 11 U.S.C. § 1328(a)(1). Subsection (b)(5) potentially can be used to cure non-defaulted, non-terminated installment agreements.

2. After an installment agreement becomes effective, the Internal Revenue Code limits the conditions terminating such an agreement; a bankruptcy petition is not one of them.

3. In *Matter of Gordon*, 217 B.R. 973 (Bankr. S.D. Ga. 1997), the debtor had an IRS installment agreement and the plan provided that the IRS's claims would be paid pursuant to the terms of the installment agreement and section 1322(b)(5). The court rejected the IRS's argument that section applied only to residential mortgages:

> [W]hile it is clear that Section 1322(b)(5) is most frequently applied in situations where debtors are in default on monthly mortgage payment obligations, and permits them to cure the arrearage, maintain future payments, and save their homeplace from foreclosure, the language of 1322(b)(5) is broader. It permits cure and maintenance on "*any* unsecured claim or secured claim on which the last payment is due after the date on which the final payment under the plan is due." 11 U.S.C. § 1322(b)(5) (emphasis supplied). Because the plain meaning of this statute encompasses not only mortgage loans but also obligations such as the [installment agreement to pay taxes] before me, I reject the United States' first contention [that section 1322(b)(5) applies only to residential mortgages].

Id. at 975.