

Part III

Administrative, Procedural, and Miscellaneous

26 CFR 601.106: Ex Parte Communications Between Appeals and Other Internal Revenue Service Employees

Notice 2011-62

This notice provides a proposed revenue procedure that will update Rev. Proc. 2000-43, 2000-2 C.B. 404, which provides guidance regarding ex parte communications between Appeals and other Internal Revenue Service functions. The proposed revenue procedure sets forth the background concerning the ex parte communication rules, the reasons for updating Rev. Proc. 2000-43, a summary of the proposed changes to Rev. Proc. 2000-43 and the proposed text of the updated revenue procedure. Before issuing an updated revenue procedure addressing the ex parte communication rules, the

Department of the Treasury and the IRS invite comments from the public regarding the proposed revenue procedure. Until an updated revenue procedure is issued with respect to the ex parte communication rules, Rev. Proc. 2000-43 will remain in effect.

Comments should be submitted by August 18, 2011 to:

Internal Revenue Service

Attn: CC:PA:LPD:PR (Notice 2011-62)

Room 5203

P.O. Box 7604

Ben Franklin Station

Washington, D.C. 20044

or hand deliver comments Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk

Internal Revenue Service

Attn: CC:PA:LPD:PR (Notice 2011-62)

1111 Constitution Avenue, N.W.

Washington, D.C. 20224

Alternatively, persons may submit comments electronically via e-mail to the following address: Notice.Comments@irs.counsel.treas.gov. Persons should include "Notice 2011-62" in the subject line. All comments submitted by the public will be available for public inspection and copying in their entirety.

Proposed Rev. Proc. [XXXX-XX]

SECTION 1. BACKGROUND

Section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105–206, 112 Stat. 685 (RRA), required the Commissioner of Internal Revenue to develop and implement a plan to reorganize the Internal Revenue Service. In addition, the RRA specifically directed the Commissioner to “ensure an independent appeals function within the Internal Revenue Service, including the prohibition * * * of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.” RRA section 1001(a)(4). In accordance with that directive, the Department of the Treasury and the IRS issued guidance in Rev. Proc. 2000-43, 2000-2 C.B. 404.

Since the issuance of Rev. Proc. 2000-43 in October 2000, the IRS has made changes to some of its business practices and adopted new ones that did not exist at the time that the revenue procedure was issued. Accordingly, the Department of the Treasury and the IRS are revising Rev. Proc. 2000-43 to address these changed circumstances, as well as to clarify and modify the rules in light of the IRS’ experience working with that revenue procedure. Also, the revenue procedure has been redesigned from a question and answer format to a narrative format to improve usability. In connection with that change, the material has been rearranged and organized under appropriate headings to make it easier to find.

The procedures set forth in this revenue procedure are designed to

accommodate the overall interests of tax administration, while preserving operational features that are vital to Appeals' case resolution processes within the structure of the IRS and ensuring open lines of communication between Appeals and the taxpayer/representative. Consistent with section 1001(a)(4), this revenue procedure does not adopt the formal ex parte procedures that would apply in a judicial proceeding. It is designed to ensure the independence of the Appeals organization, while preserving the role of Appeals as a flexible administrative settlement authority, operating within the IRS' overall framework of tax administration responsibilities.

.01 Highlights. As previously provided in Rev. Proc. 2000-43:

(1) Appeals will retain procedures for:

(a) Returning cases that are not ready for Appeals consideration.

(b) Raising certain new issues.

(c) Seeking review and comments from the originating function with respect to new information or evidence furnished by the taxpayer/representative.

(2) Appeals will continue to be able to obtain legal advice from the Office of Chief Counsel, subject to the limitations set forth in section 2.06(1), below.

(3) The Commissioner and other IRS officials responsible for overall IRS operations (including Appeals), as referenced in section 2.07(5), below, may continue to communicate ex parte with Appeals in order to fulfill their responsibilities.

.02 Significant Changes

(1) Guiding principles have been added to aid in understanding the overall approach to applying the ex parte communication rules.

(2) Definitions for certain terms have been added or clarified.

(3) Transmittals and the permissible content of the administrative file have been clarified.

(4) The application of the ex parte communication rules to collection due process cases, including those CDP cases that are remanded by the Tax Court, has been addressed.

(5) The discussion of Appeals' involvement in multifunctional meetings has been expanded.

(6) The application of the ex parte communication rules in the context of alternative dispute resolution proceedings has been addressed.

(7) The remedies available to taxpayers in the event of a breach of the ex parte communication rules have been clarified.

(8) A statement that the ex parte communication rules do not create substantive rights affecting a taxpayer's liability or the IRS' ability to determine, assess or collect that tax liability has been added.

SECTION 2. GUIDANCE CONCERNING EX PARTE COMMUNICATIONS AND THE APPLICATION OF RRA SECTION 1001(a)(4)

.01 Definitions. For purposes of this revenue procedure and the application of RRA section 1001(a)(4), the terms set forth below are defined as follows:

(1) Ex Parte Communication. An "ex parte communication" is a communication that takes place between any Appeals employee (e.g., Appeals Officers, Settlement Officers, Appeals Team Case Leaders, Appeals Tax Computation Specialists) and employees of other IRS functions, without the taxpayer/representative being given an opportunity to participate in the communication. The term includes all forms of

communication, oral or written. Written communications include those that are manually or electronically generated.

(a) Communications Outside the Scope of the Term “Ex Parte Communication”.

The term “ex parte communication” does not include the following (not an exhaustive list):

(i) Database Inquiries. Account inquiries, transcript requests and other similar inquiries conducted in an electronic environment are not considered communications because they do not involve a dialogue or interaction between two or more individuals. This exception does not apply to the administrative file, which may be maintained electronically in whole or in part. For a discussion of the rules applicable to the administrative file, see section 2.03(4), below.

(ii) Communications Solely Between or Among Appeals Employees. These are not considered ex parte communications because they do not involve employees from IRS functions outside of Appeals.

(iii) Communications with IRS Functions Other than Originating Functions. Special rules apply to communications between Appeals employees and employees of certain IRS functions other than originating functions, as defined in section 2.01(2), below. Employees in other IRS functions include those in Counsel, Criminal Investigation, Competent Authority, and Taxpayer Advocate Service, and the Commissioner and other IRS officials with overall supervisory responsibilities. For a discussion of communications with those functions, see 2.06, 2.07(2), 2.07(3), 2.07(4) and 2.07(5), respectively.

(iv) Communications with Other Governmental Entities. These are not

considered ex parte communications because RRA section 1001(a)(4) only applies to communications between Appeals and other IRS employees and the persons with whom Appeals is communicating at other governmental entities do not fall into that category. See section 2.08, below, for examples.

(v) Communications in Which the Taxpayer/Representative Is Given an Opportunity to Participate. These are not considered ex parte communications because the taxpayer/representative is offered a chance to be involved in the communication. Even if the taxpayer/representative chooses not to participate in the communication, the ex parte communication rules do not apply.

(2) Originating Function. An “originating function” is an organization within the IRS that makes determinations that are subject to the Appeals process. For purposes of this revenue procedure, the term includes the Examination, Collection and Service Center (Campus) functions, or their successor organizations. For a discussion of communications with Criminal Investigation or Counsel, see sections 2.07(2) and 2.06, respectively. For a discussion of communications with other IRS functions or other governmental entities, see sections 2.07 and 2.08, respectively. None of those functions are originating functions.

(3) Opportunity to Participate.

(a) Oral communications. The phrase “opportunity to participate” means that the taxpayer/representative will be given a reasonable opportunity to attend a meeting or be a participant in a conference call between Appeals and the originating function when the strengths and weaknesses of the facts, issues or positions in the taxpayer’s case are discussed. The taxpayer/representative will be notified of a scheduled meeting or

conference call and invited to participate. If the taxpayer/representative is unable to participate in the meeting or conference call at the scheduled time, reasonable accommodations will be made to reschedule it. See also section 2.01(3)(d), below.

(b) Written communications. A taxpayer/representative is considered to have been given an “opportunity to participate” with respect to a written communication that is received by Appeals if the taxpayer/representative is furnished a copy of the written communication and given a chance to respond to it either orally or in writing.

(c) Waiver. If the taxpayer/representative is given an opportunity to participate in a discussion but declines to participate, Appeals should proceed with the discussion or meeting but should document the taxpayer/representative’s declination. A taxpayer/representative has the option of granting a waiver on a communication-by-communication basis or a waiver covering all communications that might occur during the course of Appeals’ consideration of a specified case. If a taxpayer/representative provides a blanket waiver with respect to a particular case, the taxpayer/representative may revoke that waiver at any time effective with respect to communications occurring subsequent to the revocation.

(d) Unreasonable delay. The IRS will not delay scheduling a meeting for a protracted period of time to accommodate the taxpayer/representative. Facts and circumstances will govern what constitutes a reasonable delay. If the taxpayer/representative seeks to unreasonably delay a meeting or conference call, Appeals should proceed with the discussion or meeting but should document the reason for proceeding without the taxpayer/representative. Appeals should share with the taxpayer/representative the substance of the discussion, as appropriate, and give the

taxpayer/representative a reasonable period of time within which to respond.

.02 Guiding Principles. Except as specifically addressed in other provisions of this revenue procedure, the following guiding principles govern communications between Appeals and other IRS functions, including Counsel.

(1) Principles of Tax Administration. It is the role of the IRS, and those employees charged with the duty of interpreting the law, to determine the reasonable meaning of various Code provisions in light of the Congressional purpose in enacting them; to apply and administer the law in a reasonable and practical manner; and to perform this work in a fair and impartial manner, with neither a government nor a taxpayer point of view. See Rev. Proc. 64-22, 1964-1 C.B. 689.

(2) Appeals Independence. Appeals serves as the administrative dispute resolution forum for any taxpayer contesting an IRS compliance action. It has long been Appeals' mission to "resolve tax controversies, without litigation, on a basis that is fair and impartial to both the Government and the taxpayer in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Service." IRM 8.1.1.1(1). RRA section 1001(a)(4) established a statutory basis for Appeals' independence by requiring that the Commissioner "ensure an independent appeals function within the Internal Revenue Service" Rather than establish an external appeals function (as suggested in some legislative proposals), RRA maintained Appeals within the IRS while seeking to significantly reinforce its independence. Consequently, despite their distinct roles within tax administration and required adherence to policies set by the Commissioner, Appeals and other IRS functions, including Counsel, share a responsibility to interact – in all circumstances – in a manner

that preserves and promotes Appeals' independence. To further this independence, Appeals must continue its practice of impartial decision making while coordinating with other IRS functions to carry out the Commissioner's policies on tax administration.

Independence, therefore, is one of Appeals' most important core values, and the RRA statutory prohibition on ex parte communications "to the extent that such communications appear to compromise the independence of the appeals officers" is a significant component of Appeals' independence. The guidance set forth in this revenue procedure is designed to accommodate the overall interests of tax administration while ensuring that Appeals is adequately insulated from influence (or the appearance of influence) by other IRS functions, thereby providing Appeals with an unencumbered working environment within which to objectively and independently evaluate the facts and law that are relevant to each case and quantify the hazards of litigation based on that evaluation.

(3) Legal Advice.

(a) In General. The Chief Counsel is the legal adviser to the Commissioner and the IRS' officers and employees on all matters pertaining to the interpretation, administration and enforcement of the internal revenue laws and related statutes. I.R.C. § 7803(b)(2)(A). As reflected in the Chief Counsel mission statement, the IRS mission statement and section 2.02(1), above, attorneys in the Office of Chief Counsel are expected to provide legal advice based on an independent determination of the "correct and impartial interpretation of the internal revenue laws" and by applying "the [tax] law with integrity and fairness to all." The fact that various attorneys in the Office of Chief Counsel may be simultaneously engaged in multiple activities, including some activities

involving an advocacy role, does not diminish the responsibility of each to exercise independent judgment in rendering legal advice.

(b) Appeals. Appeals employees generally are not bound by the legal advice that they receive from the Office of Chief Counsel with respect to their cases. Rather, the legal advice is but one factor that Appeals will take into account in its consideration of the case. Appeals employees remain ultimately responsible for independently evaluating the strengths and weaknesses of the issues in the cases assigned to them and making independent judgments concerning the overall strengths and weaknesses of the cases and the hazards of litigation. Accordingly, Appeals may obtain legal advice from the Office of Chief Counsel consistent with this revenue procedure without compromising Appeals independence.

(4) Opportunity to Participate. As provided in section 2.01(1) and (3), above, by definition, if the taxpayer/representative is given an opportunity to participate with respect to a communication, that communication is not ex parte, and thus, the communication is permissible under the ex parte communication rules.

(5) Exceptions. Not all communications between Appeals employees and employees of other IRS functions are prohibited, even if ex parte. For example, as described in more detail in section 2.03(2), below, communications regarding ministerial, administrative or procedural matters are permissible. Similarly, as described in more detail in section 2.04, below, Appeals may listen to or be briefed on generic, noncase-specific discussions of issues without violating the ex parte communication rules.

(6) Communications with Other IRS Functions. To fulfill its role of providing an

independent dispute resolution function within the IRS, Appeals must be able to make fully informed, independent judgments regarding the strengths and weaknesses of positions and to properly evaluate the hazards of litigation in cases within its jurisdiction. To accomplish these tasks, Appeals stays abreast of relevant legal and tax administration developments, including the views and analysis of stakeholders, as well as the Commissioner's policies and operational goals. One effective and efficient way of obtaining some of this information is for Appeals to participate in generic, noncase-specific discussions with other IRS functions, including Counsel, such as participation in multifunctional meetings. Hence, Appeals' participation in these discussions or meetings is permissible under the ex parte communication rules, as described in more detail in section 2.04, below.

In general, Appeals may not engage in discussions of the strengths and weaknesses of the issues and positions in cases with the originating function without providing the taxpayer/representative an opportunity to participate. Similarly, the taxpayer/representative normally must be given an opportunity to participate in any case discussion with the originating function regarding matters other than ministerial, administrative or procedural matters. For a fuller discussion of these rules, see section 2.03, below.

(7) Curing a Breach of Ex Parte Communication Rules. Most breaches of the ex parte communication rules may be cured by timely notifying the taxpayer/representative of the situation, sharing the communication or information in question and affording the taxpayer/representative a reasonable period of time within which to respond. The specific administrative remedy that may be made available in any particular case is

within the sole discretion of Appeals.

(8) No Substantive Rights. The ex parte communication rules set forth in this revenue procedure do not create substantive rights affecting the taxpayer's tax liability or the IRS' ability to determine, assess or collect that tax liability, including statutory interest and any penalties, if applicable.

.03 Communications with Originating Function

(1) General Rule. Ex parte communications between Appeals employees and employees of originating functions are prohibited to the extent the communications appear to compromise Appeals' independence. See RRA section 1001(a)(4). As discussed more fully below, not all ex parte communications are prohibited.

(2) Ministerial, Administrative or Procedural Matters. Communications between Appeals and an originating function regarding ministerial, administrative or procedural matters during any stage of a case are permissible without involving the taxpayer/representative. If communications with the originating function extend beyond ministerial, administrative or procedural matters in that the substance of the issues in the case is addressed, those communications are prohibited unless the taxpayer/representative is given an opportunity to participate.

(a) Examples. Communications regarding ministerial, administrative or procedural matters include, but are not limited to, the following:

(i) Communications about whether certain information was requested and whether it was received.

(ii) Communications about the availability of a document referred to in the workpapers that the Appeals Officer cannot locate in the file.

(iii) Communications to clarify the content of illegible documents or writings.

(iv) Communications regarding case controls on the IRS's management information systems.

(v) Communications relating to tax calculations that are solely mathematical in nature.

(vi) Communications about whether any closed cases exist that involve or affect the taxpayer or a related party, or other information about a closed case (including the terms on which a closed case was resolved), that do not extend beyond what is in the public or administrative record. Examples of these closed cases include, but are not limited to, cases involving bankruptcy, innocent spouse, TEFRA partnership or criminal investigation issues. Any discussion about the substance of a closed case extending beyond what is in the public or administrative record is prohibited unless the taxpayer/representative is given an opportunity to participate. For purposes of the preceding sentence, any information contained in the administrative file for the closed case or any of the IRS' databases is considered to be part of the administrative record. Moreover, the public or administrative record limitation described in this paragraph does not apply to discussions between Appeals and the originating function in connection with a post-settlement conference or equivalent communication. For a discussion of post-settlement conferences, see section 2.03(11), below. Additionally, this paragraph is limited to closed cases and does not apply to communications with respect to the case that Appeals is reviewing. For a discussion of communications relating to other pending cases that involve or affect the taxpayer or a related party, see section 2.03(13), below.

(vii) Communications regarding general information about related cases, such as the number of other pending cases involving the same or substantially similar type of transaction or issue, e.g., tax shelter transactions, industry-wide issues, etc., and the aggregate amount of money in dispute in those cases. This paragraph also includes communications about the existence or status of related cases, such as cases involving a promoter, material advisor, or tax return preparer. For a discussion of communications with respect to closed cases that involve or affect the taxpayer or a related party, see section 2.03(2)(a)(vi), above. For a discussion of communications relating to other pending cases that involve or affect the taxpayer or a related party, see section 2.03(13), below.

(viii) Communications regarding the status of the case that Appeals is reviewing, such as whether the case or an issue in the case has been resolved or when a case is expected to be closed. This does not include any discussion of the terms of the resolution of an issue prior to the case being closed or the issue resolved with finality, such as by the parties entering into a closing agreement. Permitted communications concerning the status of the case should be limited to a direct, narrow exchange of information without any surrounding discussion. They are not intended to provide the originating function or other IRS function a chance to discuss the strengths and weaknesses of the case or position in the case, advocate for a particular result, object to a potential resolution, or otherwise attempt to influence Appeals' decision in any way.

(ix) Communications regarding mathematical errors affecting the proposed tax liability discovered upon computational review. These errors should be discussed with both the taxpayer/representative and the originating function before the correction is

made, but the discussions may be held separately. If the error involves the interpretation of a legal principle or application of the law to a particular set of facts, however, the taxpayer/representative should be given an opportunity to participate in any scheduled meetings with the originating function to discuss this type of discrepancy. In some cases, Appeals may choose to return the case to the originating function for further development and correction.

(x) Communications referring a refund claim filed during the Appeals process to the originating function for consideration. See section 2.03(9), below.

(xi) Communications in connection with a CDP hearing to verify compliance with legal or administrative requirements; communications with respect to verification of assets/liabilities involving an offer in compromise submitted as an alternative payment option during a CDP hearing; or communications regarding deadlines relating to a remanded CDP case. See sections 2.03(10)(b) and (c)(i)(B), below.

(3) Prohibited Communications. Examples of communications between Appeals and an originating function that are prohibited unless the taxpayer/representative is given an opportunity to participate include, but are not limited to, the following:

(a) Discussions about the accuracy of the facts presented by the taxpayer and the relative importance of the facts to the determination.

(b) Discussions of the relative merits or alternative legal interpretations of authorities cited in a protest or in a report prepared by the originating function.

(c) Discussions of the originating function's perception of the demeanor or credibility of the taxpayer or taxpayer's representative.

(d) Discussions of the originating function's views concerning the level of

cooperation (or lack thereof) of the taxpayer/representative during the originating function's consideration of the case.

(e) Discussions regarding the originating function's views concerning the strengths and weaknesses of the case or the parties' positions in the case.

(f) Communications from the originating function to advocate for a particular result or to object to a potential resolution of the case or an issue in the case.

(4) Administrative File

(a) In General. The administrative file transmitted to Appeals by the office that made the determination that is subject to the Appeals process (the originating function) is not considered to be an ex parte communication within the context of this revenue procedure. The administrative file, which contains, among other things, the proposed determination and the taxpayer's protest or other approved means of communicating disagreement with the proposed determination, sets forth the boundaries of the dispute between the taxpayer and the IRS and forms the basis for Appeals to assume jurisdiction.

(b) Transmittal. The transmittal memorandum, a T-Letter, or any similar document that the originating function uses to transmit the administrative file (transmittal) should not include statements or comments intended to influence Appeals' decision-making process. This includes recommendations concerning what Appeals should consider and how Appeals should resolve the case. In contrast, it is permissible to include in the transmittal a neutral list of unagreed issues, without discussion, and to indicate which ones, if any, are coordinated issues. If the transmittal includes the type of statements or comments described in the second sentence of this paragraph, or

includes other prohibited communications in a document that is either placed on top of the administrative file as a transmittal or inserted into the administrative file in conjunction with preparing the case for transmission to Appeals, the document must be shared by the originating function with the taxpayer/representative at the time that the administrative file is sent to Appeals .

(c) Rebuttal to Protest. If a rebuttal to the taxpayer's protest is prepared by the originating function, it must be shared with the taxpayer/representative by the originating function at the time that it is sent to Appeals.

(d) Contents of Administrative File. The administrative file shall be compiled and maintained by the originating function in accordance with the established procedures within that function or as otherwise directed by the reviewer(s) assigned to the case. The originating function, however, shall refrain from placing in the administrative file any notes, memoranda or other documents that normally would not be included in the administrative file in the ordinary course of developing the case if the reason for including this material in the administrative file is to attempt to influence Appeals' decision-making process. For example, the originating function should not include gratuitous comments in the case history, a memo to the file or a transmittal document, such as a T-Letter, if the substance of the comments would be prohibited if they were communicated to Appeals separate and apart from the administrative file.

(5) Preconference Meetings. Preconference meetings between Appeals and the originating function without providing the taxpayer/representative an opportunity to participate are an example of the type of communications that the ex parte communication rules were designed to prohibit. These meetings should not be held

unless the taxpayer/representative is given an opportunity to participate.

(6) Premature Referrals. Appeals is the administrative settlement arm of the IRS. If a case is not ready for Appeals consideration, Appeals may return it for further development or for other reasons described in IRM 8.2.1.6. Appeals may communicate with the originating function regarding the anticipated return of the case, including an explanation of the additional development that Appeals is requesting or other reasons why the case is being returned, but generally may not engage in a discussion of matters beyond the types of ministerial, administrative or procedural matters set forth in section 2.03(2), above, as part of a discussion of whether the premature referral guidelines require further activity by the originating function. When the case is returned to the originating function, Appeals must timely notify the taxpayer/representative that the case has been returned to the originating function, in whole or in part, for further development. In addition, the supplemental report prepared by the originating function reflecting the additional development that was done must be shared with the taxpayer/representative.

(7) Submission of New Information. If new information or evidence is submitted to Appeals by the taxpayer/representative, the principles set forth in IRM 8.2.1.9.3 should be followed. In general, the originating function should be given the opportunity to timely review and comment on significant new information presented by the taxpayer. "Significant new information" is information of a nonroutine nature that, in the judgment of Appeals, may have had an impact on the originating function's findings or that may impact Appeals' independent evaluation of the strengths and weaknesses of the issues, including the litigating hazards relating to those issues. Normally, the review can be

accomplished by sending the material to the originating function while Appeals retains jurisdiction of the case and proceeds with resolution of other issues. Alternatively, Appeals may return the entire case to the originating function and relinquish jurisdiction, in its sole discretion, in accordance with the IRM. The taxpayer/representative must be timely notified when a case is returned to the originating function or new material not available during initial consideration has been sent to the originating function. The results of the originating function's review of the new information must be communicated to the taxpayer/representative.

(8) New Issues Raised in Appeals. Appeals will continue to follow the principles of Policy Statement 8-2 and the "General Guidelines" outlined in IRM 8.6.1.6.2 in deciding whether to raise a new issue. Under Appeals' new issue policy, new issues must continue to meet the "material" and "substantial" tests set forth in the IRM. Communications will be in accordance with the guiding principles in section 2.02(6), above.

(9) Refund Claims Filed During the Appeals Process. Refund claims filed during the Appeals process generally are referred to the originating function with a request for expedited review. Referral of these refund claims to the originating function involves no discussion about the strengths and weaknesses of the issue, and thus, fall within the ministerial, administrative or procedural matters exception set forth in section 2.03(2), above. The taxpayer/representative must be timely notified when the refund claim is referred to the originating function. The results of the originating function's review of the refund claim must be communicated to the taxpayer/representative.

(10) Collection Due Process

(a) Collection Cases In General. The principles applicable to discussions between Appeals employees and officials in originating functions apply to cases that originate in the Collection function, such as collection due process (CDP) appeals, collection appeals program cases, offers in compromise, and trust fund recovery penalty cases. These discussions must be held in accordance with the guiding principles in section 2.02(6), above.

(b) Ministerial, Administrative or Procedural Matters. Sections 6320 and 6330 provide that, as part of a CDP hearing, the Appeals officer must obtain verification that the requirements of any applicable law or administrative procedure have been met. Communications seeking to verify compliance with legal and administrative requirements fall within the ministerial, administrative or procedural matters exception set forth in section 2.03(2), above. Therefore, those communications are permissible without providing the taxpayer/representative an opportunity to participate.

(c) Remand By Tax Court. As provided in section 2.06(2)(a), below, the ex parte communication rules do not apply to communications between Appeals and Counsel with respect to cases docketed in the Tax Court. CDP cases that are remanded by the Tax Court for further consideration (or reconsideration) by Appeals fall into a different category, however. Although remanded CDP cases remain under the Tax Court's jurisdiction, the Appeals employee assigned to the remanded CDP case must be impartial in the review of the remanded case within the meaning of section 6320(b)(3) or 6330(b)(3), as applicable, requiring the application of similar considerations to those underlying the ex parte communication rules. Therefore, the following guidelines apply to remanded CDP cases.

(i) Instructions Regarding the Remand

(A) The Counsel attorney who handled the CDP case in the Tax Court should prepare a written memorandum to Appeals explaining the reasons why the court remanded the case to Appeals, any special requirements in the court's Order (e.g., whether and to what extent a new conference should be held; whether the case must be reassigned to a different Appeals employee than the Appeals employee who handled the original CDP case; and what material Appeals is prohibited from reviewing, if any), and what issues the court has ordered Appeals to address on remand. The memorandum should not discuss the credibility of the taxpayer or the accuracy of the facts presented by the taxpayer. Nor should the memorandum contain any legal analysis or legal advice. A copy of the memorandum will be provided by the Counsel attorney to the taxpayer/representative.

(B) Communications to Appeals from the Counsel attorney handling the Tax Court case regarding deadlines relating to the remanded CDP case fall within the ministerial, administrative or procedural matters exception, and thus, are permissible communications that may take place without providing the taxpayer/representative an opportunity to participate.

(ii) Legal Advice

A request by Appeals for legal advice in connection with a remanded CDP case may be handled by the same Counsel attorney who is handling the Tax Court case.

(iii) Review of Supplemental Notice By Counsel. The Counsel attorney handling the Tax Court case should review the supplemental notice of determination before it is issued to the taxpayer. This review is for the limited purpose of ensuring compliance

with the Tax Court's remand Order.

(11) Post-Settlement Conference. The post-settlement conference with Examination is held after the case has been closed by Appeals. The purpose of the conference is to inform Examination about the settlement of issues to ensure that Examination fully understands the settlement and the rationale for the resolution. The conference provides an opportunity for Appeals to discuss with Examination the application of Delegation Order 236, or subsequent delegation orders (*i.e.*, settlement by Examination consistent with prior Appeals settlement with the same or related taxpayer). The tax periods that are the subject of the post-settlement conference have been finalized and the participants are cautioned to limit discussion to the results in the closed cycle. Any discussion of the resolution of issues present in the closed periods does not compromise the independence of Appeals, and thus, post-settlement conferences between Appeals and Examination are permissible without giving the taxpayer/representative an opportunity to participate. In contrast, any discussion that addresses open cycles in either Examination or Appeals with respect to the same or a related taxpayer is subject to the guidance provided in this revenue procedure relating to communications with the originating function contained in section 2.03, above.

(12) Review of Coordinated Issues

(a) Cases in Compliance's Jurisdiction. Delegation Order 4-25 provides the Compliance function with limited authority to settle certain issues with Appeals' review and approval. Specifically, this limited settlement authority applies with respect to issues that are coordinated, for example, in the Technical Advisor Program (or any successor program), and are the subject of either an Appeals Settlement Guideline

(ASG) or an Appeals Settlement Position (ASP). Under existing procedures, the proposed settlement generally must be approved by the Examination Technical Advisor and the Appeals Technical Guidance Coordinator (ATGC) for the issue in question. The purpose of the required coordination is to ensure that the resolution by Examination is consistent with the analysis set forth in the ASG or ASP. Communications between Compliance employees and the ATGC in connection with satisfying this coordination requirement are permissible without giving the taxpayer/representative an opportunity to participate.

(b) Cases in Appeals' Jurisdiction. Under existing procedures, Appeals settlements involving coordinated issues, including but not limited to issues that are the subject of either an ASG or an ASP, must be approved by the ATGC for that issue. The ATGC serves as a resource person for the Appeals organization. The purpose of the required coordination is to ensure that resolutions of coordinated issues are consistent nationwide. Communications between Appeals employees and the ATGC are entirely internal within Appeals, and consequently, the ex parte communication rules do not apply to those communications. See section 2.01(1)(a)(ii).

(13) Taxpayers with Multiple Open Cases. Special considerations are required when a taxpayer has multiple open cases. This situation may arise, for example, when the taxpayer has cases involving the same issue pending with different IRS functions, including Counsel, which is common with respect to large corporate taxpayers, or the taxpayer has multiple cases involving the same issue pending with Appeals in both docketed and nondocketed status. The IRS has an interest in coordinating the handling of open cases regarding the same taxpayer to ensure that the responsible offices have

complete information to make informed decisions about the cases within their respective jurisdictions.

Discussions held with respect to open cases must be in accordance with the guiding principles in section 2.02(6) and the operative rules set forth in section 2.03, above, as well as sections 2.06, 2.07 and 2.08, below. The ex parte communication rules may not apply to some of the open cases, such as those docketed in the Tax Court or under the jurisdiction of the Department of Justice, see sections 2.06(2) and 2.08(2), below, but may apply to one or more other open cases of the taxpayer.

.04 Participation in Multifunctional Meetings

(1) General Rule. Multifunctional meetings are meetings that include representatives from various IRS components, usually Compliance and Counsel. A meeting of the members of an Issue Management Team (IMT), or its successor type function, is an example of this type of meeting. These multifunctional meetings usually involve general discussions of how to handle technical issues or procedural matters. Appeals does not participate on IMTs but can be briefed by IMTs, as long as the discussion remains generic rather than case specific. Similarly, all participants in any type of multifunctional meeting need to be cognizant of the ex parte communication rules and ensure that taxpayer-specific discussions do not take place while Appeals is present.

As provided in sections 2.02(2) and (6), above, in order for Appeals to make fully-informed, independent judgments, Appeals must have access to the views and analysis of stakeholders. Listening to generic, noncase-specific discussions involving other IRS functions, including Counsel, in the context of a multifunctional meeting provides

Appeals with an important forum in which to meet, in part, these needs, and enables Appeals to effectively serve as the administrative settlement arm of the IRS.

Accordingly, Appeals may attend multifunctional meetings subject to the restrictions in section 2.04(2), below, regarding case-specific discussions.

(a) Settlement Initiatives. To achieve their distinct roles, Appeals, Counsel and Compliance must work collaboratively to satisfy the tax administration policies set by the Commissioner. As part of its effort to address particular issues or types of transactions, the IRS sometimes develops settlement initiatives either through an IMT or otherwise. These settlement initiatives are usually based on generic discussions of issues and transactions rather than on specific cases. The success of these settlement initiatives is dependent in large part on taxpayers' knowledge that the resolution of their case within Appeals does not fall outside of the settlement range unless the taxpayer can establish the existence of atypical facts and circumstances. Appeals' involvement in the formulation of the terms contained in the IRS' settlement initiatives is essential to the IRS' ability to resolve cases without litigation. Therefore, Appeals is permitted to participate in the development of settlement initiatives notwithstanding that Appeals' participation entails having discussions with other IRS functions, including originating functions, regarding the general strengths and weaknesses of positions, litigation hazards, settlement ranges and the applicability of penalties. If the discussion is case specific, these topics continue to be prohibited, unless the taxpayer/representative is given an opportunity to participate.

(2) Case-Specific Discussions. Any discussion of a specific taxpayer's case in connection with a multifunctional meeting should be postponed until such time as it can

be conducted outside of Appeals' presence. The preceding sentence does not apply with respect to post-settlement conferences, as discussed in more detail in section 2.03(11), above.

.05 Alternative Dispute Resolution.

(1) Cases Not in Appeals' Jurisdiction. Certain alternative dispute resolution (ADR) programs, such as fast track settlement, involve the use of Appeals employees to facilitate settlement while the case is still in Examination's jurisdiction. See, e.g., Rev. Proc. 2003-40, 2003-1 C.B. 1044 (Large and Mid-Size Business Fast Track Settlement Program); Announcement 2011-5, 2011-4 I.R.B. 430 (Small Business/Self Employed Fast Track Settlement Program); Announcement 2008-105, 2008-2 C.B. 1219 (Tax Exempt and Government Entities Fast Track Settlement Program); and subsequent published guidance regarding these or similar programs. Private caucuses between the mediator and individual parties are often a key element in the process. The prohibition against ex parte communications between Appeals employees and other IRS employees does not apply because Appeals employees are not acting in their traditional Appeals settlement role. Consequently, Appeals employees may have ex parte communications with an originating function in connection with ADR proceedings. For a discussion of communications between Appeals and Counsel, see section 2.06, below. In contrast, the ex parte communication rules apply in the context of Appeals consideration of an issue under the Early Referral to Appeals process, Rev. Proc. 99-28, 1999-2 C.B. 109, or the Accelerated Issue Resolution program, Rev. Proc. 94-67, 1994-2 C.B. 800 (or subsequent published guidance regarding these programs). Ex parte communications are not an integral part of those types of ADR procedures

because jurisdiction has shifted to Appeals in those cases.

(2) Post-Appeals Mediation. The ex parte communication rules do not apply to communications in connection with Post-Appeals Mediation proceedings. Revenue Procedure 2009-44, 2009-40 I.R.B. 462, describes an optional Appeals mediation procedure that is available after Appeals settlement discussions are unsuccessful and when all other issues are resolved except for the issue(s) for which mediation is being requested. See also Announcement 2011-6, 2011-4 I.R.B.433. Section 6.02 of Rev. Proc. 2009-44 states that “the parties are encouraged to include, in addition to the required decision-makers, those persons with information and expertise that will be useful to the decision-makers and the mediator.” 2009-40 I.R.B. at 463. Section 6.02 further provides that “Appeals has the discretion to communicate ex parte with the IRS Office of Chief Counsel, the originating function, e.g., Compliance, or both, in preparation for or during the mediation session. Appeals also has the discretion to have Counsel, the originating function, or both, participate in the mediation proceeding . * * *.” Id.

.06 Communications with Counsel

(1) General Rule. As provided in section 2.02(3), above, the Chief Counsel is the legal adviser to the Commissioner and his or her officers and employees (including employees of Appeals) on all matters pertaining to the interpretation, administration and enforcement of the internal revenue laws and related statutes. As part of the legal advice process, attorneys in the Office of Chief Counsel exercise independent judgment in addressing the strengths and weaknesses of the parties’ respective positions, the hazards of litigation, the quality and admissibility of the evidence, and how a judge

might react to the evidence or particular arguments.

Appeals employees are entitled to obtain legal advice from attorneys in the Office of Chief Counsel and, except as provided below, are permitted to do so under the ex parte communication rules. Appeals employees generally are not bound by the legal advice that they receive from the Office of Chief Counsel. The legal advice is but one factor that Appeals will take into account in its consideration of the case. Appeals employees independently evaluate the strengths and weaknesses of the specific issues in the cases assigned to them and make an independent judgment concerning the overall strengths and weaknesses of the cases they are reviewing and the hazards of litigation. See IRM 8.6.2.6.4 and 8.6.4.1.

Appeals employees should not communicate ex parte regarding an issue in a case pending before them with a field attorney if the field attorney personally provided legal advice regarding the same issue in the same case to the originating function or personally served as an advocate for the originating function regarding the same issue in the same case. For purposes of this section, in determining whether a field attorney is considered to have personally provided legal advice to the originating function or personally served as an advocate for the originating function, regarding the same issue in the same case, the extent and nature of the field attorney's involvement in the case relating to the issue with respect to which Appeals is seeking legal advice is determinative.

(2) Docketed Cases.

(a) In General. The ex parte communication rules do not apply to communications between Appeals and Counsel in connection with cases docketed in

the United States Tax Court. Communications between Appeals and the originating function in docketed cases are still subject to the ex parte communication rules if the case is within Appeals' jurisdiction.

(b) Collection Due Process Cases. For a discussion of the application of the ex parte communication rules to CDP cases remanded by the Tax Court, see section 2.03(10)(c).

.07 Communications with Other IRS Functions

(1) Outside Consultants and Experts. Outside consultants or experts under contract to the IRS, other than those hired directly by Appeals, are treated as IRS employees for purposes of this revenue procedure. Consequently, communications between Appeals and these outside consultants or experts are subject to the ex parte communication rules. See section 2.02(6). In contrast, communications between Appeals and outside consultants or experts hired by Counsel in docketed cases are not subject to the ex parte communication rules. See section 2.06(2).

(2) Criminal Investigation. Criminal Investigation (CI) is not an originating function as that term is defined in section 2.01(2), above, because Appeals does not review Criminal Investigation's determinations. Communications between Appeals and CI are generally ministerial in nature. For example, Appeals and CI may confirm the existence of a CI investigation, which would freeze Appeals' action, or Appeals may review a CI closed case to find information relevant to the case that Appeals is reviewing. Similarly, CI may communicate ex parte with Appeals to obtain information or documents in Appeals' possession that may be relevant to the activities of CI or to ensure that Appeals' actions will not interfere with any ongoing criminal investigation or

be inconsistent with any prior criminal investigations. Since these types of communications do not address the strengths or weaknesses of an open case, they are permissible under section 2.02(6), above. For a discussion of communications between Appeals and Criminal Investigation that go beyond the above matters, see section 2.03(13), above.

(3) Competent Authority. The United States Competent Authority is responsible for the timely and effective implementation of tax treaties and tax information exchange agreements. Communications between Appeals and IRS employees at the request or on behalf of the competent authority relating to a taxpayer's request for relief under competent authority procedures, see Rev. Proc. 2006-54, 2006-49 IRB 1035, are permissible. It is presumed that the competent authority is acting at the request and with the consent of the taxpayer. Communications between Appeals and IRS employees that are unrelated to the taxpayer's request for relief under competent authority procedures, however, continue to be subject to the ex parte communication rules.

(4) Taxpayer Advocate Service. Communications with Appeals that are initiated by the Taxpayer Advocate Service (TAS) are permissible. It is presumed that the TAS employees are acting at the request and with the consent of the taxpayer. Due to the nature of their role within the IRS and their relationship with the taxpayer, TAS employees may discuss with Appeals the strengths and weaknesses of the parties' respective positions and may advocate for a particular result in the case.

(5) Commissioner and Other IRS Officials with Overall Supervisory Responsibilities. The Commissioner is responsible for administering, managing,

conducting, directing, and supervising the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party. I.R.C. § 7803(a)(2)(A). In the course of exercising that statutory responsibility, the Commissioner and those officials, such as the Deputy Commissioners, who have overall supervisory responsibility for IRS operations may communicate with Appeals about specific cases or issues and may direct that other IRS officials, including Counsel officials, participate in meetings or discussions about cases or issues without providing the taxpayer/representative an opportunity to participate.

.08 Communications with Other Governmental Entities

(1) Joint Committee on Taxation. Section 6405 requires the IRS to submit a report to the Joint Committee on Taxation concerning any refund or credit in excess of the statutory amount and the IRS must wait at least 30 days after submitting the report before making the refund or credit that is the subject of the report. The Joint Committee or its staff will occasionally question a settlement or raise a new issue. Communications between Appeals and the Joint Committee or its staff are permissible without providing the taxpayer/representative an opportunity to participate. The ex parte communication rules only apply to communications between Appeals and other IRS employees. Since the Joint Committee is part of the Legislative Branch, not the IRS, the ex parte communication rules do not apply to communications with the Joint Committee or its staff.

(2) Department of Justice. Appeals may communicate with employees of the Department of Justice, including the U.S. Attorneys' offices, without giving the taxpayer/representative an opportunity to participate. The ex parte communication rules

only apply to communications between Appeals and other IRS employees. Since the Department of Justice is not part of the IRS, the ex parte communication rules do not apply to communications with the Department of Justice.

.09 Monitoring Compliance. It is the responsibility of all IRS employees to ensure compliance with the ex parte communication rules. All IRS employees will make every effort to promptly terminate any communications not permitted by the ex parte communication rules. To improve understanding of the ex parte communication rules, Appeals and other impacted IRS employees, including Counsel, will receive training on the contents of this revenue procedure and will be encouraged to seek managerial guidance whenever they have questions about the propriety of an ex parte communication. Additionally, managers will consider feedback from other functions and will be responsible for monitoring compliance during their day-to-day interaction with employees, as well as during workload reviews and closed case reviews. Breaches will be addressed in accordance with existing administrative and personnel processes.

.10 Remedies Available to Taxpayers

(1) General Rule. The ex parte communication rules set forth in this revenue procedure do not create substantive rights affecting the taxpayer's tax liability or the IRS' ability to determine, assess or collect that tax liability, including statutory interest and any penalties, if applicable. The IRS takes the ex parte communication rules seriously and will continue its efforts to ensure compliance through training and oversight. Most breaches of the ex parte communication rules may be cured by timely notifying the taxpayer/representative of the situation, sharing the communication or information in question and affording the taxpayer/representative an opportunity to

respond. The specific administrative remedy that may be made available in any particular case is within the sole discretion of Appeals. For a discussion of court directed cures for breach of the ex parte communication rules, see section 2.10(2), below.

(2) Collection Due Process Cases. If the Tax Court determines that a breach of the ex parte communication rules occurred during the course of a CDP hearing in Appeals, the Tax Court may remand the case to Appeals for either a new or a supplemental hearing, depending upon what steps the court concludes is necessary to rectify the breach. See section 2.03(10)(c), above.

Section 3. EFFECT ON OTHER DOCUMENTS

Rev. Proc. 2000-43, 2000-2 C.B. 404, is amplified, modified and superseded.

Section 4. EFFECTIVE DATE

This revenue procedure is effective for communications between Appeals employees and other IRS employees, including Counsel, that take place after **[INSERT DATE OF RELEASE]**, the date this revenue procedure was released to the public.

Section 5. DRAFTING INFORMATION

The principal author of this revenue procedure is Henry S. Schneiderman, Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding this revenue procedure, contact Mr. Schneiderman at (202) 622-3400 (not a toll-free number).