INTERNAL REVENUE
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IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2022–39
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These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

ADMINISTRATIVE, EMPLOYMENT TAX, ESTATE TAX, EXCISE TAX, GIFT TAX, INCOME TAX

REG-125693-19, page 241.
The proposed regulations provide guidance on the resolution of federal tax controversies by the IRS Independent Office of Appeals (Appeals) under the Taxpayer First Act of 2019. Consideration of a federal tax controversy by Appeals is generally available to all taxpayers. The proposed regulations provide clarification of issues that do not meet the definition of a federal tax controversy, exceptions to consideration by Appeals, and procedural and timing requirements that must be met before Appeals will consider an issue. The proposed regulations also provide requirements a taxpayer that received a notice of deficiency must meet to receive the notice described in section 7803(e)(5) when the taxpayer requests consideration by Appeals and the request is denied.

INCOME TAX

Notice 2022-38, page 239.
The notice publishes the inflation adjustment factor for the carbon oxide sequestration credit under § 45Q for calendar year 2022. Also, the notice informs taxpayers that pursuant to § 45Q(g), as amended by the IRA, 2022 will be the final calendar year for which a taxpayer may claim a § 45Q credit under § 45Q(a)(1) and (2) for qualified carbon oxide that is captured by carbon capture equipment originally placed in service at a qualified facility before the date of enactment of the Bipartisan Budget Act of 2018.

Finding Lists begin on page ii.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

Part III

Credit for Carbon Oxide Sequestration 2022 Section 45Q Inflation Adjustment Factor

Notice 2022-38

SECTION 1. PURPOSE

This notice publishes the inflation adjustment factor for the credit for carbon oxide sequestration under § 45Q of the Internal Revenue Code (§ 45Q credit) for calendar year 2022. The inflation adjustment factor is used to determine the amount of the credit allowable under § 45Q.

This notice also confirms that 2022 will be the final calendar year for which a taxpayer may claim a § 45Q credit under § 45Q(a)(1) and (2) for qualified carbon oxide that is captured by carbon capture equipment originally placed in service at a qualified facility before the date of enactment of the Bipartisan Budget Act of 2018.

SECTION 2. BACKGROUND

Section 45Q was added to the Code by § 115 of the Energy Improvement and Extension Act of 2008, enacted as Division B of Pub. L. 110-343, 122 Stat. 3765, 3829 (October 3, 2008), to provide a credit for the sequestration of carbon dioxide. Section 45Q was amended by § 1131 of the American Recovery and Reinvestment Tax Act of 2009, enacted as Division B of Pub. L. 111-5, 123 Stat 115 (February 17, 2009), § 41119 of the Bipartisan Budget Act of 2018 (BBA), Pub. L. No. 115-123 (February 9, 2018), § 121 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 3051 (December 27, 2020), and § 13104 of Pub. L. 117-169, 136 Stat. 1818 (August 16, 2022), commonly known as the Inflation Reduction Act (IRA). As a result of the modifications made by the BBA amendment, the credit under § 45Q now applies to the sequestration of "qualified carbon oxide," a broader term than qualified carbon dioxide. The amount of the credit is also increased for carbon oxide captured with equipment originally placed in service on or after the date of enactment of BBA.

Section 45Q(a)(1) allows a credit of $20 per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility before the date of the enactment of BBA, (ii) disposed of by the taxpayer in secure geological storage, and (iii) not used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project.

Section 45Q(a)(2) allows a credit of $10 per metric ton of qualified carbon oxide (i) captured by the taxpayer using carbon capture equipment which is originally placed in service at a qualified facility before the date of the enactment of BBA, and (ii) either (I) used by the taxpayer as a tertiary injectant in a qualified enhanced oil or natural gas recovery project and disposed of by the taxpayer in secure geological storage or (II) utilized by the taxpayer in a manner described in § 45Q(f)(5).

Under § 45Q(f)(7), for taxable years beginning in a calendar year after 2009, the dollar amounts contained in § 45Q(a)(1) and (2) must be adjusted for inflation by multiplying such dollar amount by the inflation adjustment factor for such calendar year determined under § 43(b)(3)(B), determined by substituting "2008" for "1990."

Section 43(b)(3)(B) defines the term "inflation adjustment factor" as, with respect to any calendar year, a fraction the numerator of which is the GNP implicit price deflator for the preceding calendar year and the denominator of which is the GNP implicit price deflator for 1990. For purposes of § 45Q(f)(7), for the 2022 calendar year, the inflation adjustment factor is a fraction the numerator of which is the GNP implicit price deflator for 2021 (118.349) and the denominator of which is the GNP implicit price deflator for 2008 (94.421).

Section 45Q(g), as amended by § 13104(f) of the IRA, provides that in the case of any carbon capture equipment placed in service before the date of the enactment of BBA, the credit under § 45Q shall apply with respect to qualified carbon oxide captured using such equipment before the earlier of January 1, 2023, and the end of the calendar year in which the Secretary of the Treasury or her delegate, in consultation with the Administrator of the Environmental Protection Agency, certifies that, during the period beginning after October 3, 2008, a total of 75,000,000 metric tons of qualified carbon oxide have been taken into account in accordance with (i) § 45Q(a), as in effect on the day before the date of the enactment of BBA, and (ii) § 45Q(a)(1) and (2).

SECTION 3. INFLATION ADJUSTMENT FACTOR

The inflation adjustment factor for calendar year 2022 is 1.2534. The § 45Q credit for calendar year 2022 is $25.07 per metric ton of qualified carbon oxide under § 45Q(a)(1) and $12.53 per metric ton of qualified carbon oxide under § 45Q(a)(2).

SECTION 4. TAX CREDIT UTILIZATION

Section 6 of Notice 2009-83, 2009-44 I.R.B. 588, requires taxpayers to file annual reports that provide (among other information) the amount (in metric tons) of qualified carbon oxide for the taxable year that has been taken into account for purposes of claiming the § 45Q credit under § 45Q(a)(1) and (2). The annual reports must be filed with the Internal Revenue Service (IRS) not later than the last day of the second calendar month following the month during which the tax return on which the § 45Q credit under § 45Q(a)(1) and (2) is claimed was due (including extensions).

Pursuant to § 45Q(g), as amended on August 16, 2022, by § 13104(f) of the IRA, 2022 will be the final calendar year for which a taxpayer may claim a § 45Q credit under § 45Q(a)(1) and (2) for qualified carbon oxide that is captured by carbon capture equipment originally placed in service at a qualified facility before the date of enactment of the BBA. Accordingly, 2022 will be the final calendar year for which a taxpayer must file a report under section 6 of Notice 2009-83.

SECTION 5. DRAFTING INFORMATION

The principal author of this notice is Maggie Stehn of the Office of Associate Chief Counsel (Passthroughs & Special Industries). For further information regarding this notice contact Maggie Stehn at (202) 317-6853 (not a toll-free number).

Part IV

Notice of Proposed Rulemaking

Resolution of Federal Tax Controversies By the Independent Office of Appeals

REG-125693-19

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing on proposed rulemaking.

SUMMARY: This document contains proposed regulations relating to the IRS Independent Office of Appeals' resolution of Federal tax controversies without litigation and relating to requests for referral to that office following the issuance of a notice of deficiency to a taxpayer by the IRS. The proposed regulations reflect amendments to the law made by the Taxpayer First Act of 2019. The proposed regulations apply to all persons that request to have a Federal tax controversy considered by that office. This document also provides a notice of a public hearing on these proposed regulations.

DATES: Written or electronic comments must be received by November 14, 2022. Outlines of topics to be discussed at the public hearing scheduled for November 29, 2022, must be received by November 14, 2022. If no outlines of topics are received by November 14, 2022, the public hearing will be cancelled.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-125693-19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-125693-19), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, D.C. 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, Keith L. Brau at (202) 317-5437 (not a toll-free number). Concerning submissions of comments or the public hearing, Regina Johnson, preferably at publichearings@irs.gov or (202) 317-6901 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

I. Overview

This document contains proposed amendments to the Procedure and Administration Regulations (26 CFR part 301) to implement section 7803(e) of the Internal Revenue Code (Code). The proposed amendments (proposed regulations) relate to the resolution by the IRS Independent Office of Appeals (Appeals) of Federal tax controversies without litigation, including guidance regarding requests for referral to Appeals following the issuance of a notice of deficiency. (References in this preamble to "Appeals" include references to the former Office of Appeals where appropriate.)

Since its establishment by the IRS in 1927, Appeals' mission has been to resolve Federal tax controversies without litigation on a basis that is fair and impartial to both the Government and the taxpayer.[1] In doing so, Appeals has independently considered disputed administrative determinations made by the IRS in administering and enforcing the internal revenue laws arising from the IRS's examination or collection activities with respect to a particular taxpayer, and attempted to resolve those disputes without litigation. See House TFA Report, at 29. Appeals generally considers whether to resolve Federal tax controversies without litigation based on the likelihood of either the taxpayer's or the IRS's position prevailing if the Federal tax controversy was resolved before a court. When Appeals resolves a Federal tax controversy, it does so through an administrative settlement of the matter.

The IRS Restructuring and Reform Act of 1998 (RRA), Public Law 105-206 (112 Stat. 685, 689 (1998)) directed the Commissioner to restructure the IRS by establishing and implementing an organizational structure that ensured an independent appeals function within the IRS. Although the Code did not mandate the existence of an independent office within the IRS, provisions of the Code have required the independent administrative review of certain administrative determinations, such as section 6159 regarding terminating an installment agreement, sections 6320 and 6330 regarding notice and an opportunity for a hearing before a levy or upon the filing of a notice of lien, and section 7122 regarding rejections of an offer in compromise (OIC).

For decades the Internal Revenue Manual (IRM) has contained the mission statement of Appeals (Appeals Mission Statement), which is "to resolve [Federal] tax controversies, without litigation, on a basis which is fair and impartial to both the Government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the

[1] See H.R. Rep. No. 39 Part 1, 116th Cong., 1st Session (House TFA Report), 28-29, fn. 4 (2019). The House TFA Report states that Appeals was established and has operated under the general authority of the Secretary of the Treasury or her delegate (Secretary) provided by section 7805 of the Code to interpret the Code, and the authority of the Commissioner of Internal Revenue (Commissioner) provided by section 7803 to, among other things, "administer, manage, conduct, direct, and supervise the execution and application of the internal revenue laws or related statutes and tax conventions to which the United States is a party," and by section 7804 to, among other things, "employ such number of persons as the Commissioner deems proper for the administration and enforcement of the internal revenue laws, and the Commissioner shall issue all necessary directions, instructions, orders, and rules applicable to such person." Sections 7803(a)(2)(A) and 7804(a).

integrity and efficiency of the Service." See IRM 8.1.1.1(1) (10-01-2016) (regarding accomplishing the Appeals mission).

On July 1, 2019, the President signed into law the Taxpayer First Act of 2019 (TFA), Public Law 116-25 (133 Stat. 981 (2019)). Among other things, the TFA added new section 7803(e) to the Code. New section 7803(e)(1) establishes the IRS Independent Office of Appeals "to codify the role of the independent administrative appeals function within the IRS." See House TFA Report, at 29. New section 7803(e)(2) provides rules regarding the appointment, duties, qualifications, and compensation of the Chief of Appeals who is to supervise and direct Appeals, including that the Chief of Appeals is appointed by and reports directly to the Commissioner. In connection with expressly setting forth the role of Appeals, the TFA codified in new section 7803(e)(3) the Appeals Mission Statement, with the additional duty of resolving Federal tax controversies on a basis that "promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws." See section 7803(e)(3)(B).

To meet Appeals' mission, new section 7803(e)(6)(A) provides that all IRS employees working within Appeals are to report to the Chief of Appeals. In addition, new section 7803(e)(6)(B) provides the Chief of Appeals with the authority to obtain legal assistance and advice from the staff of the IRS Office of the Chief Counsel (Chief Counsel) with regard to cases pending at Appeals, which, to the extent practicable, is to be provided by Chief Counsel staff who were not involved in advising the IRS employees directly working on the case prior to its referral to Appeals or in preparation of the case for litigation. See House TFA Report, at 30.

The remainder of this Background describes new sections 7803(e)(4) and 7803(e)(5), which are the primary focus of the guidance provided in the proposed regulations.

II. General Availability of the Appeals Resolution Process

Section 7803(e)(4) of the Code, also enacted by the TFA, provides that "the resolution process [to resolve Federal tax controversies] shall be generally available to all taxpayers." For example, a taxpayer who does not resolve the taxpayer's deficiency case with the IRS examiner assigned to the case usually will receive a 30-day letter of a proposed determination of tax liability that provides the position of the IRS regarding the taxpayer's Federal tax controversy. Generally, receipt of the 30-day letter triggers an opportunity for the taxpayer to request that Appeals consider the taxpayer's Federal tax controversy.

As an alternative to having a court decide Federal tax controversies without litigation (or without further litigation if the taxpayer has petitioned the United States Tax Court (Tax Court)) and to facilitate Appeals' function, Appeals uses one or more dispute resolution methods to settle Federal tax controversies. The Appeals dispute resolution methods may include, but are not limited to, a conference, correspondence, and certain Appeals-provided alternative dispute resolution services. These alternative dispute resolution services include fast-track settlement, fast-track mediation, post-Appeals mediation, Rapid Appeals Process, or early referral of issues to Appeals.

The most frequent type of Federal tax controversy involves a taxpayer disputing a liability that is subject to deficiency procedures under section 6212. In many of these cases the taxpayer requests an Appeals conference after the IRS has made a determination of the taxpayer's liability and sent a preliminary (30-day) letter to the taxpayer. In another group of cases, the taxpayer has received a notice of deficiency and filed a petition in the Tax Court, after which the docketed case may be forwarded to Appeals for consideration.

III. Limitation on Access to the Appeals Resolution Process

As discussed in more detail in section I.C. of the Explanation of Provisions, the TFA did not require that the IRS grant all requests for Appeals to consider any dispute regarding a Federal tax controversy. The Secretary of the Treasury or her delegate (Secretary) may provide exceptions that allow the IRS to deny requests for Appeals consideration of a Federal tax controversy. In general, it has been the historic practice of the Treasury Department and the IRS to publish limitations on the access to the Appeals resolution process in IRS guidance such as regulations, revenues procedures, and the IRM.

Although the TFA does not prohibit the IRS from denying requests for Appeals consideration for Federal tax controversies, the TFA did add new section 7803(e)(5) to the Code. After the enactment of the TFA, the IRS must follow the special notification procedures set forth in section 7803(e)(5) if a taxpayer who is in receipt of a notice of deficiency requests to have the Federal tax controversy referred to Appeals and that request is denied. In such a case, the IRS is required to provide the taxpayer a written notice containing a detailed description of the facts involved in the controversy, the basis for the decision to deny the request, a detailed explanation of how the basis for the decision applies to such facts, and the procedures for protesting the decision to deny the request.

Explanation of Provisions

Proposed §§301.7803-2 and 301.7803-3 would implement section 7803(e) as explained in sections I and II of this Explanation of Provisions, respectively. Proposed §301.7803-2 implements section 7803(e)(3) and (4) regarding the resolution of Federal tax controversies by Appeals. Proposed §301.7803-3 implements the special notice procedures of section 7803(e)(5) to be followed by the IRS upon denying taxpayer requests to have Federal tax controversies referred to Appeals for those taxpayers in receipt of a notice of deficiency.

I. Appeals Resolution of Federal Tax Controversies Without Litigation

A. Proposed §301.7803-2(a): Functions of Independent Office of Appeals

As previously mentioned in the Background, in addition to establishing the IRS Independent Office of Appeals in section 7803(e)(1) to codify the role of the independent administrative appeals function and providing rules in section 7803(e)(2) regarding the supervision of Appeals by the Chief of Appeals, the TFA

codified in section 7803(e)(3) the Appeals Mission Statement to resolve Federal tax controversies with respect to taxpayers without litigation.[2] Section 7803(e)(3) provides that "[i]t shall be the function of [Appeals] to resolve Federal tax controversies without litigation on a basis which (A) is fair and impartial to both the Government and the taxpayer, (B) promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and (C) enhances public confidence in the integrity and efficiency of the [IRS]." These functions are consistent with the historical functions of Appeals prior to the enactment of the TFA. As further indication that Congress intended Appeals to generally maintain its functions as they existed at the time the TFA was enacted, the legislative history provides that "Independent Appeals is intended to perform functions similar to those of the current Appeals." See House TFA Report, at 30. Accordingly, proposed §301.7803-2(a), consistent with the statutory text of section 7803(e)(3), provides that Appeals resolves Federal tax controversies without litigation on a basis that is fair and impartial to the Government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and enhances public confidence in the integrity and efficiency of the IRS.

B. Proposed §301.7803-2(b): Consideration of Federal Tax Controversies by Appeals Generally Available to All Taxpayers

Section 7803(e)(4) provides that the Appeals resolution process described in section 7803(e)(3) to resolve Federal tax controversies without litigation "shall be generally available to all taxpayers." Proposed §301.7803-2(b)(1), consistent with the statutory text of section 7803(e)(4), provides that the Appeals resolution process is generally available to all taxpayers to resolve Federal tax controversies.

The statute does not define the term "Federal tax controversy." Consistent with the excerpts of the House TFA Report described in the Background, proposed §301.7803-2(b)(2) defines a "Federal tax controversy" as a dispute over an administrative determination with respect to a particular taxpayer made by the IRS in administering or enforcing the internal revenue laws, related Federal tax statutes, and tax conventions to which the United States is a party (collectively referred to as internal revenue laws) that arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws. Under these proposed regulations, Appeals generally continues to resolve a Federal tax controversy based on the likelihood the taxpayer's or the IRS's position with respect to the administrative determination made by the IRS would prevail if the Federal tax controversy was resolved by a court, as it did before enactment of the TFA. In doing so, Appeals continues to independently consider disputed administrative determinations made by the IRS in administering or enforcing the internal revenue laws with respect to a particular taxpayer arising from the IRS's examination, collection, or execution of other activities with respect to the particular taxpayer and attempts to resolve the disputes without litigation.

Consistent with the practice of Appeals prior to the enactment of the TFA, the Appeals resolution process is also available to persons who seek review of certain administrative determinations made by the IRS with respect to such persons that do not directly involve their tax liabilities, penalties, or additions to tax. Even though such matters are not within the definition of a Federal tax controversy in proposed §301.7803-2(b)(2), proposed §301.7803-2(b)(3) provides that disputes over administrative determinations made by the IRS with respect to a particular person regarding the listed topics are treated as a Federal tax controversy. Appeals consideration of such administrative determinations made by the IRS is consistent with the historical functions of Appeals prior to the enactment of the TFA, which Congress intended to codify in section 7803(e)(3). Specifically, the legislative history states: "Independent Appeals is intended to perform functions similar to those of the current Appeals." See House TFA Report, at 30. For example, Appeals considers determinations involving initial or continuing tax exemption or foundation classification of particular organizations, and initial or continuing qualification of particular employee plans, unless the issue underlying that determination is addressed by Chief Counsel through a technical advice issued by the office of an Associate Chief Counsel (Associate Office). See proposed §301.7803-2(b)(3)(iv) and (v); sec. 12.01 of Rev. Proc. 2022-2 (2022-1 I.R.B. 120) (relating to use of technical advice); §601.106(a)(1)(v)(a) of the Statement of Procedural Rules (26 CFR part 601) (same). In addition to the topics listed in proposed §301.7803-2(b)(3)(i) through (vii), proposed §301.7803-2(b)(3)(viii) includes any other topic that the IRS determines can be considered by Appeals. This proposed rule, therefore, allows Appeals to consider administrative determinations made by the IRS with respect to a particular person that are not Federal tax controversies within the meaning of proposed §301.7803-2(b)(2) but that Appeals has historically considered and attempted to resolve without litigation. Based on its limited resources, the only disputes that are not Federal tax controversies as defined in proposed §301.7803-2(b)(2) that Appeals has historically considered and continues to consider are those categories of disputes with respect to a particular person specified in proposed §301.7803-2(b)(3)(i) through (vii). This proposed rule also allows the addition of new categories of administrative determinations made by the IRS with respect to a particular person that in the future may become evident as appropriate to fulfill the function of Appeals. See proposed §301.7803-2(b)(3)(viii).

[2] The TFA's codification of the Appeals Mission Statement was generally consistent with Appeals Mission described in the Internal Revenue Manual at the time the TFA was enacted. IRM 8.1.1.1(1) (10-1-2016).

C. Proposed §301.7803-2(c): Exceptions to Consideration by Appeals

When the TFA was enacted, the Appeals resolution process was subject to exceptions and requirements that could limit use of that process. Congress recognized these limits, and the statute and legislative history demonstrate that the IRS retains discretion to have appropriate limits following the statutory codification of the role of an independent appeals function within the IRS (that is, Appeals). As mentioned previously, section 7803(e)(4) provides that "[t]he [Appeals] resolution process . . . shall be *generally* available to all taxpayers." Section 7803(e)(4) (emphasis added). In choosing to use the words "generally available" in section 7803(e)(4), Congress made clear that the statute does not impose an unqualified requirement that the Appeals resolution process become a forum for any dispute with the IRS.

In addition to the statutory language of section 7803(e)(4), the House TFA Report also reflects the intention of Congress that the Treasury Department and the IRS retain after the enactment of the TFA their historical discretion to determine whether the resolution of particular types of disputes is appropriate for the Appeals resolution process, or the discretion of the IRS to determine whether a particular Federal tax controversy is appropriate for the Appeals resolution process:

> Independent Appeals is intended to perform functions similar to those of the current Appeals. Independent Appeals is to resolve tax controversies and review administrative decisions of the IRS in a fair and impartial manner, for the purposes of enhancing public confidence, promoting voluntary compliance, and ensuring consistent application and interpretation of Federal tax laws. Resolution of tax controversies in this manner is generally available to all taxpayers, *subject to reasonable exceptions that the Secretary may provide*. Thus, cases of a type that are referred to Appeals under present law remain eligible for referral to Independent Appeals.

See House TFA Report, at 30-31 (emphasis added).

The House TFA Report also explains that Congress knew the existing backdrop of Appeals exceptions when it passed the TFA: "The Committee is aware that the Code does not currently require that all taxpayers be provided an opportunity to contest an administrative decision in Appeals, although most taxpayers are afforded that opportunity." See House TFA Report, at 29. The House TFA Report noted some of the existing exceptions:

> Exceptions occur, and include cases in which inadequate time remains on the limitations period for assessment and collection or those in which the only arguments raised by the taxpayer are frivolous positions. Similarly, if a case has reached a point at which litigation is initiated, the availability of consideration by Appeals may be limited. First, authority to settle cases referred to the Department of Justice for defense or initiation of litigation rests solely with that Department. Therefore, such cases are not eligible for referral to Appeals. The terms under which a case pending in the [United States Tax Court] may be referred to Appeals are described in published guidance that centralizes the decision to withhold a case from Appeals to assure consistent standards are applied.

See House TFA Report, at 29 (footnotes omitted). The footnote to the last quoted sentence cites the guidance in Rev. Proc. 2016-22 and §601.106 of the Statement of Procedural Rules (26 CFR part 601) that sets out some of these exceptions, stating: "Exceptions to the general rule in favor of requiring Appeals consideration include cases that are withheld in the interests of sound tax administration, among other reasons." See House TFA Report, at 29, fn. 8.

Proposed §301.7803-2(c) sets forth the exceptions to consideration of a Federal tax controversy by Appeals. These exceptions, which are listed in proposed §301.7803-2(c)(1) through (24), generally predate the enactment of the TFA. The proposed exceptions to consideration by Appeals involve Federal tax controversies, or issues arising in these controversies, that are excepted from consideration by Appeals and matters or issues that are otherwise ineligible for consideration by Appeals because they are not Federal tax controversies as defined in proposed §301.7803-2(b)(2) nor treated as Federal tax controversies in proposed §301.7803-2(b)(3). To the extent that a matter or issue not eligible for consideration by Appeals is present in a case that otherwise is eligible for consideration by Appeals, the ineligible matter or issue will not be considered by Appeals in the resolution of the case.

The Treasury Department and the IRS request comments on the scope and rationale for the exceptions described in proposed §301.7803-2(c)(1) through (24). To the extent any of the proposed exceptions may differ from prior Appeals practice, comments are requested on the effects of such differences and whether the objectives of such exceptions could be accomplished by alternative means while still allowing Appeals to function in accordance with section 7803(e)(3). Comments are also requested on whether any additional exceptions to Appeals consideration are warranted.

1. Frivolous Positions

Proposed §301.7803-2(c)(1) provides that Appeals consideration is not available for an administrative determination made by the IRS with respect to a particular taxpayer in which the IRS rejects a frivolous position, which includes any case solely involving the failure or refusal of the taxpayer to comply with the tax laws because of frivolous moral, religious, political, constitutional, conscientious, or similar grounds. A frivolous position includes a position the IRS has identified as frivolous for purposes of section 6702(c) of the Code (regarding listing of frivolous positions). A list of positions that the IRS has determined to be frivolous under section 6702(c) can be found in Notice 2010-33 (2010-17 I.R.B. 609 (April 26, 2010)). Proposed §301.7803-2(c)(1) codifies the pre-TFA practice of the IRS of denying the request of a taxpayer for Appeals resolution of frivolous arguments, including cases based solely on frivolous moral, religious, political, constitutional, conscientious, or similar grounds.

This approach is also consistent with the restriction in section 7803(e)(5)(D), also added by the TFA, that the notice and protest procedures under section 7803(e)

(5) do not apply to an Appeals referral request if the issue is frivolous within the meaning of section 6702(c). Appeals consideration of frivolous positions would facilitate the abuse of the tax system by allocating IRS and Appeals resources to a secondary review of positions that have already been designated as frivolous. Similar existing restrictions precluding the consideration of frivolous positions by Appeals can be found in §601.106(b) of the Statement of Procedural Rules (26 CFR part 601) (regarding appeal procedures not extending to cases involving solely the failure or refusal to comply with tax laws because of frivolous moral, religious, political, constitutional, conscientious, or similar grounds), IRM 5.14.3.3(1) (10-20-2020) (relating to installment agreement requests made to delay collection action), and IRM 8.22.5.5.3 (11-08-2013) (relating to frivolous issues).

2. Penalties Related to Frivolous Positions and False Information

Similarly, proposed §301.7803-2(c)(2) provides that Appeals consideration generally is not available regarding a penalty assessed by the IRS with respect to a particular taxpayer for asserting a frivolous position, making a frivolous submission, or for providing false information. Examples of such penalties include sections 6702 relating to frivolous tax submissions and 6682 relating to false information with respect to withholding. See IRM 8.11.8.2(1), (3) (10-28-2013) (relating to a section 6702 penalty for frivolous tax submissions); IRM 8.22.8.10.4(1) (08-26-2020) (relating to a frivolous tax submission penalty under section 6702 and a false Form W-2, "Wage and Tax Statement," penalty under section 6682). These penalties are immediately assessable. The IRS notifies the taxpayer of the penalty assessment and makes a demand for payment. See sections 6703(b), 6671(a), and 6682(c) (relating to penalty assessment). A taxpayer seeking judicial review must first pay the entire penalty and then file a claim for refund with the IRS within two years of the date of payment. These penalties are designed to deter frivolous behavior or improper conduct by a taxpayer. If Appeals does not consider the merits of the taxpayer's frivolous position, it follows that Appeals should not consider the IRS's assessment of the penalty with respect to the taxpayer as well.

Similarly, under proposed §301.7803-2(c)(2) Appeals consideration is not available regarding the IRS's assessment of a penalty with respect to a particular taxpayer who submits false information. Appeals consideration of an administrative determination made by the IRS to impose a penalty that stems from the particular taxpayer's improper conduct of submitting false information would be inconsistent with the purpose of the penalty, which is designed to disincentivize the taxpayer from engaging in this improper conduct and to encourage voluntary compliance.

Although penalties assessed by the IRS under sections 6702 and 6682 with respect to particular taxpayer generally are excepted from Appeals consideration, proposed §301.7803-2(c)(2) recognizes that Appeals may obtain verification that the assessment of the penalties with respect to a particular taxpayer complied with sections 6203 (relating to method of assessment) and 6751(b) (relating to approval of assessment) of the Code in a collection due process (CDP) hearing. See section 6330(c)(1), section 6330(c)(4)(B), and IRM 8.22.8.10.4(1) and (11) (relating to Appeals review of certain limited issues in a CDP action). Appeals also may consider a non-frivolous challenge to an administrative decision made by the IRS in assessing a penalty under section 6702 or section 6682 with respect to a particular taxpayer in a CDP hearing. An example of such a non-frivolous argument that Appeals could consider is the argument that a section 6702 penalty was erroneously assessed by the IRS because the return the taxpayer filed does not fall within section 6702. For instance, if a taxpayer properly reported the taxpayer's income tax liability but included a statement objecting to pay the amount of reported liability that would otherwise go to the military and as a result the taxpayer is assessed a section 6702 penalty, Appeals could consider the taxpayer's non-frivolous argument that the IRS erroneously assessed the penalty because the return filed does not fall within section 6702.

3. Whistleblower Awards

Proposed §301.7803-2(c)(3) provides that Appeals consideration is not available for any administrative determination made by the IRS under section 7623 relating to awards to whistleblowers. The IRS Whistleblower Office provides awards of up to 30 percent of the amount recovered in tax enforcement actions to individuals who provide credible evidence of tax fraud to the IRS. A whistleblower files a claim providing information of alleged tax fraud involving a taxpayer. The IRS Whistleblower Office notifies the whistleblower that it has received the claim, that it will use the information to determine whether to pursue an investigation, and that it will inform the whistleblower as to whether the information meets the criteria for paying an award. If the IRS Whistleblower Office subsequently evaluates the whistleblower's claim and determines that it does not meet the criteria for an award, Appeals consideration is not available to the particular whistleblower for the administrative determination made by the IRS under section 7623. Proposed §301.7803-2(b)(2) defines a Federal tax controversy as a dispute over an administrative determination with respect to a particular taxpayer made by the IRS in administering or enforcing the internal revenue laws, related Federal tax statutes, and tax conventions to which the United States is a party (collectively referred to as internal revenue laws). An administrative determination made by the IRS is only with respect to a particular taxpayer and arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws. In a whistleblower case, the whistleblower's Federal tax liability is not at issue and Appeals is not reviewing a determination by the IRS in its examination, collection, or execution of other activities with respect to the whistleblower's Federal tax liability. Consequently, a whistleblower claim does not fall within the definition of a Federal tax controversy, and it is excepted from Appeals consideration consistent with Appeals' pre-TFA procedures. See sec. 4 of Rev. Proc.

2016-22 (2016-15 I.R.B. 577) (relating to practices for the administrative appeals process in Tax Court). It also is not treated as a Federal tax controversy under proposed §301.7803-2(b)(3), which identifies certain matters with respect to a particular person subject to Appeals review that do not arise from the examination, collection, or execution of other activities concerning a taxpayer's Federal tax liability or directly involve the taxpayer's Federal tax liabilities, penalties, or additions to tax.

4. Administrative Determinations Made by Other Agencies

Proposed §301.7803-2(c)(4) provides that Appeals consideration is not available for an administrative determination issued by an agency other than the IRS. An example is a determination by the Alcohol and Tobacco Tax and Trade Bureau (TTB) concerning an excise tax administered by and within the jurisdiction of TTB. Such taxes include an excise tax imposed by Chapter 32 (relating to firearms and ammunition); by Subtitle E (relating to alcohol, tobacco, and certain other excise taxes); or by Subchapter D of Chapter 78 (relating to U.S. possessions) of the Code, to the extent it relates to Subtitle E. This exclusion relating to the excise taxes administered by the TTB is currently found in §601.106(a)(3) of the Statement of Procedural Rules (26 CFR part 601). Proposed §301.7803-2(c)(4) is consistent with the statute and the definition of a Federal tax controversy in §301.7803-2(b)(2) because the Appeals resolution process is available only for consideration of administrative determinations made by the IRS with respect to a particular taxpayer. Neither section 7803(e) nor the House TFA Report refers to any agency other than the IRS or contemplates Appeals consideration of a decision by any agency other than the IRS. See House TFA Report, at 31. Similarly, §301.7803-2(b)(2) defines a Federal tax controversy as a dispute over an administrative determination with respect to a particular taxpayer made by the IRS in administering or enforcing the internal revenue laws, related Federal tax statutes, and tax conventions to which the United States is a party (collectively referred to as internal revenue laws). An administrative determination made by the IRS is only with respect to a particular taxpayer and arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws. Appeals therefore will not consider an administrative determination of a tax that is not administered by or within the jurisdiction of the IRS.

5. Taxpayer Assistance Order

Proposed §301.7803-2(c)(5) provides that Appeals consideration is not available for a decision made by the IRS not to issue a Taxpayer Assistance Order (TAO) under section 7811 of the Code (relating to TAOs) with respect to a particular taxpayer if the taxpayer submits a request for Taxpayer Advocate Service assistance. This clarification in the proposed rule is consistent with the general definition of a Federal tax controversy in proposed §301.7803-2(b)(2) because the Office of the Taxpayer Advocate (commonly referred to as the Taxpayer Advocate Service) is an independent part of the IRS, and its decision not to issue a TAO is a process separate and distinct from an administrative determination made by the IRS with respect to a particular taxpayer that arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws. .

6. Material to Be Deleted from a Written Determination

Proposed §301.7803-2(c)(6) provides that Appeals consideration is not available for any decision by the IRS concerning material to be deleted from the text of a written determination with respect to a particular taxpayer pursuant to section 6110 of the Code (relating to public inspection of written determinations) unless the written determination is otherwise being reviewed by Appeals. Appeals did not consider these types of matters before the TFA was enacted, and these proposed regulations continue this exception. See sec. 4 of Rev. Proc. 2016-22. Like whistleblower awards, disputes under section 6110 do not involve the type of controversy that Appeals has traditionally handled, that is, reviewing an administrative determination made by the IRS with respect to a particular taxpayer that arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws. A section 6110 dispute does not involve the resolution of a Federal tax controversy but rather is a dispute limited to whether particular information in a written determination to be issued by the IRS to the taxpayer is information that must be redacted before the written determination is released to the public as required by section 6110.

Proposed §301.7803-2(c)(6) permits a disagreement concerning material to be deleted under section 6110 from the text of a written determination to be taken up at an Appeals conference that is otherwise scheduled regarding a taxpayer's determination. If Appeals is already considering the substantive content of the determination, minimal resources and time would be required to also review the redactions. See sec. 13.04 of Rev. Proc. 2022-5 (2022-1 I.R.B. 256) (relating to exempt organization and private foundation status). This review would not require the analysis of an entirely new dispute by Appeals, which would require significant resources.

7. Denials of Access Under the Privacy Act

Similarly, proposed §301.7803-2(c)(7) provides that Appeals consideration is not available for any dispute regarding a determination of the IRS resulting in denial of access under the Privacy Act (5 U.S.C. 552a(d)(1)) (relating to access to records) to a particular person. Like a dispute involving section 6110, a dispute involving the denial of access under the Privacy Act does not involve the type of controversy that Appeals has traditionally handled. Rather than involving a controversy regarding an administrative determination

made by the IRS with respect to a particular taxpayer that arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws, such a dispute involves whether the Privacy Act prevents disclosure of records. In addition, 5 U.S.C. 552a(d)(2) and (3) creates administrative review rights for an agency's refusal to amend a record accessed under the Privacy Act, but there is no similar statutory authority to obtain administrative review, including by Appeals, of a denial of access under the Privacy Act. Rather, 5 U.S.C. 552a(g) provides that a civil action may be brought in certain cases.

8. Issues Settled by a Closing Agreement

Proposed §301.7803-2(c)(8) provides that Appeals consideration is not available for any issue that the IRS and a particular taxpayer have resolved in an agreement described in section 7121 of the Code regarding closing agreements and for any decision by the IRS to enter into or not enter into such agreement. Proposed §301.7803-2(c)(8) further provides that Appeals may consider the question of whether an item or items are covered by a closing agreement, and how the item or items are covered. Closing agreements are binding on the IRS and the taxpayer in accordance with section 7121. Under section 7121(b), a closing agreement between the IRS and a taxpayer is final unless fraud, malfeasance, or misrepresentation of a material fact can be shown; the case cannot be reopened as to the matters agreed upon or the agreement modified by any officer, employee, or agent of the United States. Therefore, any issue that is resolved by a closing agreement under section 7121 is statutorily precluded from being considered by Appeals.

9. The IRS Erroneously Returns or Rejects an OIC

According to section 7122(f) of the Code, if an OIC is not rejected within 24 months after submission, it shall be deemed to be accepted. An offer under section 7122 will not be deemed to be accepted if it is rejected or returned as nonprocessable or no longer processable within the 24 months. See sec. 1.07 of Notice 2006-68 (2006-31 I.R.B. 105 (July 31, 2006)) (relating to OICs). Proposed §301.7803-2(c)(9) provides that Appeals consideration is not available when the IRS erroneously returns or rejects a taxpayer's OIC submitted under section 7122 as nonprocessable or no longer processable and the taxpayer requests Appeals consideration on the basis that the OIC should be deemed to be accepted under section 7122(f). This exception includes, for example, the claim that the IRS's mistaken rejection or return was in bad faith. Because the IRS returned or rejected the offer without making a determination regarding the OIC, there is no administrative determination made by the IRS for Appeals to review.

10. Criminal Prosecution is Pending Against Taxpayer

Proposed §301.7803-2(c)(10) provides that Appeals consideration is not available for a Federal tax controversy with respect to a taxpayer while a criminal prosecution or a recommendation for criminal prosecution is pending against the taxpayer for a tax-related offense other than with the concurrence of Chief Counsel and the Department of Justice, as applicable. Appeals consideration therefore may be temporarily unavailable, and it may come later if the other requirements in proposed §301.7803-2 are met. This proposed exception to Appeals consideration avoids any interference or even the appearance of any interference with a criminal prosecution or an investigation that has been recommended for criminal prosecution. A similar existing exception can be found in §601.106(a)(2)(vi) of the Statement of Procedural Rules (26 CFR part 601) (relating to the exclusion of review while a recommendation for criminal prosecution is pending).

11. Branded Prescription Drug Fee and Health Insurance Providers Fee

Proposed §301.7803-2(c)(11) provides that consideration by Appeals is not available for issues relating to the allocation among different fee payers of the branded prescription drug fee found in section 9008 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148 (124 Stat. 119 (2010)), as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010 (HCERA), Public Law 111-152 (124 Stat. 1029 (2010)), and the health insurance providers fee found in section 9010 of PPACA, as amended by section 10905 of PPACA, and as further amended by section 1406 of HCERA. The Further Consolidated Appropriations Act, 2020, Division N, Subtitle E, section 502, Public Law 116-94 (133 Stat. 2534 (2019)), repealed the section 9010 fee for calendar years beginning after December 31, 2020 (fee years after the 2020 fee year). Thus, Appeals will not consider issues involving the branded prescription drug fee and the section 9010 fee because these disputes do not involve tax issues with respect to a particular taxpayer, but issues concerning how a statutory fee is allocated amongst multiple fee payers.

Each allocated fee in sections 9008 and 9010 (when it was in effect) has a built-in corrections process that allows fee payers an opportunity to address errors and other problems before the final fee is determined. Allowing the regular Appeals process to be available with respect to one fee payer would be inconsistent with the process of calculating the allocated fees, under which adjusting one fee payer's fee affects the fees payable by all other fee payers. Comparatively, the built-in corrections process allows for each fee payer's liability to be determined in a relatively short time. Appeals consideration therefore is not appropriate given the nature of the allocated fee process and the impracticality of, and lack of time for, Appeals consideration. Furthermore, the regulations provide that all fee determinations by the IRS are final. See 26 CFR §51.7(d) (relating to the finality of the branded prescription drug fee calculation process) and 26 CFR §57.6(c) (relating to the finality of the health insurance providers fee calculation process). Proposed §301.7803-2(c)(11) promotes efficient and fair tax administration and enforcement of the internal revenue laws, leading to the consistent resolution of issues and conserving IRS and taxpayer resources.

12. IRS's Automated Process of Certifying a Seriously Delinquent Tax Debt

Proposed §301.7803-2(c)(12) provides that consideration by Appeals is not available for the certification or issuance of a notice of certification of a seriously delinquent Federal tax debt of a particular taxpayer to the Department of State (State Department) under section 7345 of the Code (relating to the revocation or denial of a taxpayer's passport in the case of serious tax delinquencies). The IRS relies on automated systems to identify every electronic taxpayer record on an individual's account with an unpaid assessed tax liability that is not statutorily excepted from the definition of seriously delinquent tax debt or otherwise in a category excluded from certification. Once all eligible unpaid liabilities have been identified, the systems aggregate the amount of unpaid liabilities. If the total is more than the statutory threshold, the taxpayer is identified as having a seriously delinquent tax debt, and the relevant transaction code is posted to the electronic taxpayer records. The Commissioner of the IRS's Small Business/Self-Employed Division then certifies that the identified individuals each have a seriously delinquent tax debt, and the IRS sends a list of all certified individuals to the State Department. The taxpayer receives Notice CP508C, "Notice of certification of your seriously delinquent Federal tax debt to the State Department," informing the taxpayer to contact the IRS at the phone number in that notice to request reversal of the certification if the taxpayer believes the certification is erroneous.

The sole remedy of a taxpayer who believes that a certification is erroneous or that the IRS incorrectly failed to reverse a certification because the tax debt is either fully satisfied or ceases to be a seriously delinquent tax debt is to file a civil action in court under section 7345(e). Although a taxpayer can challenge the certification in a Federal district court or the Tax Court, the taxpayer cannot challenge the underlying liabilities because the amounts of the liabilities that constitute a seriously delinquent tax debt are not at issue in the certification process. See *Ruesch v. Commissioner*, 154 T.C. 289 (2020). In a docketed case, Appeals consideration is not appropriate given the automated nature of the IRS's process for identifying and certifying individuals with seriously delinquent tax debts and because the certification of a taxpayer will have been verified by the assigned Counsel attorney in answering the docketed case. Consequently, there are no issues for Appeals to consider. An existing exception similar to this proposed rule can be found in Notice 2018-01 (2018-2 I.R.B. 299 (January 16, 2018)) (relating to revocation, limitation, or denial of a passport in the case of certain tax delinquencies).

13. Issues Barred from Consideration in CDP Cases

Proposed §301.7803-2(c)(13) provides that consideration by Appeals is not available for any issue that is statutorily prohibited from being considered during a CDP hearing in accordance with section 6320 regarding notice and opportunity for a hearing upon the filing of a notice of lien, section 6330 regarding notice and opportunity for a hearing before levy, the corresponding regulations, or any other administrative guidance related to CDP hearings. For example, in a CDP case a taxpayer is precluded from requesting relief under section 66 relating to community property and section 6015 relating to relief from joint and several liability on a joint return if the Commissioner has already made a final determination as to spousal defenses in a statutory notice of deficiency or final determination letter. See §§301.6320-1(e)(2), 301.6330-1(e)(2); §§301.6320-1(e)(3) Q&A-E4, 301.6330-1(e)(3) Q&A-E4. In this example, a taxpayer may request relief, and receive a second final determination, only if one of the exceptions provided in §1.6015-5(c) (relating to effect of a final administrative determination) or IRM 25.15.17.7 (03-05-2019) (relating to issuing second preliminary and final determinations for the same relief request) apply. In another example, if a taxpayer received a prior CDP notice under section 6320 or 6330 for the same tax liability and taxable period, the taxpayer has had an opportunity to dispute the existence and amount of that liability and may not challenge it in a subsequent CDP hearing, regardless of whether the taxpayer requested a CDP hearing in response to the prior notice. See §§301.6320-1(e)(3) Q&A-E7, 301.6330-1(e)(3) Q&A-E7. The Procedure and Administration Regulations (26 CFR part 301) provide that a taxpayer whose CDP hearing request is untimely is not entitled to a CDP hearing under section 6320 or section 6330 but may receive an "equivalent hearing." See §§301.6320-1(i)(1), 301.6330-1(i)(1). Proposed §301.7803-2(c)(13) also applies to equivalent hearing requests.

14. Authority Over the Matter Rests with Another Office

Proposed §301.7803-2(c)(14) provides that consideration by Appeals is not available for any case, determination, matter, decision, request, or issue with respect to a particular taxpayer that Appeals lacks the authority to settle. There is no reason for Appeals to expend resources considering a Federal tax controversy that it cannot ultimately resolve.

Proposed §301.7803-2(c)(14)(i) through (v) provides a non-exclusive list of examples illustrating this rule. Appeals does not have authority to resolve an issue with respect to a particular taxpayer in a docketed case after a referral has been made to the Department of Justice. For instance, Appeals lacks the authority to settle a tax claim in a bankruptcy court where the taxpayer has filed a petition in the bankruptcy court and objected to the Government's proof of claim and requested that the court determine tax liability. Section 7122(a) provides that settlement authority resides with the Department of Justice after a referral is made.

Appeals also lacks authority over decisions that are delegated exclusively to other offices within the IRS. For example, Appeals cannot consider a competent authority case under a United States tax treaty that is within the exclusive authority of the United States Competent Authority. The term Competent Authority is defined in U.S. tax treaties as the Secretary or her delegate. The Secretary has delegated this authority to the Commissioner, who has redelegated it to the Commissioner of the Large Business and International (LB&I) Division of the IRS, the Deputy Commissioner of LB&I, and specified officials within LB&I with respect to particular matters. See IRM 1.2.2.5.11 (06-09-2021)

(Delegation Order 4-12 (Rev. 4)). The United States Competent Authority has exclusive authority over a competent authority issue it accepts for consideration or a competent authority resolution that was previously accepted by the taxpayer. Therefore, Appeals generally does not have authority to review these matters. See sec. 6.04(1) of Rev. Proc. 2015-40 (2015-35 I.R.B. 236) (regarding procedures for requesting competent authority assistance under U.S. tax treaties).

In another example, Appeals lacks authority over the discretionary decision of the Commissioner or the Commissioner's delegate whether to rescind a section 6707A penalty for a non-listed reportable transaction. See section 6707A(d) (relating to the Commissioner's authority to rescind the penalty); §301.6707A-1(e) (relating to rescission authority); and IRM 8.11.7.6.8(2) (10-29-2013) (relating to rescission requests).

Similarly, Appeals lacks authority over an issue when a requesting spouse seeks relief under section 6015 relating to relief from joint and several liability on a joint return and a nonrequesting spouse is a party to a docketed case in the Tax Court and does not agree to granting full or partial relief under section 6015. See Chief Counsel Notice 2013-011 (June 7, 2013) (relating to litigating cases that involve claims for Innocent Spouse relief under section 6015). As explained in Chief Counsel Notice 2013-011, the IRS, which includes Appeals, is legally prohibited from providing section 6015 relief or settling with the requesting spouse if the non-requesting spouse is a joint petitioner or an intervenor in a Tax Court case and is not a party to the settlement. See *Corson v. Commissioner*, 114 T.C. 354 (2000). In that case, authority to resolve the issues rests solely with the Tax Court.

Appeals also lacks authority over a criminal restitution-based assessment under section 6201(a)(4) of the Code relating to certain orders of criminal restitution and restriction on challenge of assessment.

15. Certain Technical Advice Memoranda

Proposed §301.7803-2(c)(15) provides that Appeals consideration is not available for certain adverse actions related to the initial or continuing recognition of tax-exempt status, an entity's classification as a foundation, the initial or continuing determination of employee plan qualification, or a determination involving an obligation and the issuer of an obligation under section 103. The proposed exception regarding the recognition of tax-exempt status, foundation classification, plan qualification determination, or determination involving an obligation and the issuer of an obligation under section 103 applies only if the adverse action is based upon a technical advice memorandum (TAM) issued by an Associate Office before an appeal is requested. Appeals may request that the Associate Office reconsider the TAM. See sec. of 12.01 Rev. Proc. 2022-2 regarding Appeals submitting a proposed disposition of an issue contrary to a TAM as a request for a new TAM.

A TAM is advice furnished by an Associate Office in a memorandum that responds to any request for assistance on any technical or procedural legal question involving the interpretation and proper application of any legal authority that is submitted in accordance with an applicable revenue procedure. See Rev. Proc. 2022-2 (defining the term "Associate office" and explaining when and how an Associate Office provides technical advice, conveyed in technical advice memoranda). Chief Counsel has jurisdiction over legal questions. See section 7803(b)(2). If a TAM is furnished concerning an organization's exempt status or foundation classification, or concerning an employee plan's status or qualification, Chief Counsel's decision with respect to those issues is the final position of the IRS and therefore excepted from Appeals consideration. See §601.106(a)(1)(v)(a); IRM 8.1.1.2.1(1)(c.) (02-10-2012) (relating to exceptions to Appeals authority). Accordingly, an IRS field office must process the taxpayer's case in accordance with the conclusions in the TAM. See sec. 12.01 of Rev. Proc. 2022-2. Similarly, if a TAM provides conclusions involving an obligation and the issuer of the obligation under section 103, the field office must apply the conclusions to the issuer and any holder of the obligation unless a new TAM is issued on behalf of the holder for the same issue addressed in the initial TAM. See sec. 12.01 of Rev. Proc. 2022-2. As in the guidance referenced in this paragraph, proposed §301.7803-2(c)(15) provides that when these issues and determinations are the subject of a TAM from an Associate Office, they are excepted from Appeals consideration because Chief Counsel has exclusive authority to resolve these issues.

16. Technical Advice from an Associate Office in a Docketed Case

For the same reasons as explained in section C.15. of this Explanation of Provisions, proposed §301.7803-2(c)(16) provides that Appeals consideration is not available for any case docketed in the Tax Court if the notice of deficiency, notice of liability, or final adverse determination letter is based upon an Associate Office TAM in that case involving an adverse action described in §301.7803-2(c)(15). Like the exception in proposed §301.7803-2(c)(15), the exception in proposed §301.7803-2(c)(16) relates to the initial or continuing recognition of tax-exempt status, an entity's classification as a foundation, the initial or continuing determination of employee plan qualification, or a determination involving an obligation and the issuer of an obligation under section 103. When these issues and determinations are the subject of a TAM from an Associate Office, they are final and excepted from Appeals consideration. See §601.106(a)(2)(iii) (relating to an exception if a notice of deficiency, notice of liability, or final adverse determination letter is based upon specified ruling or technical advice); sec. 12.01 of Rev. Proc. 2022-2.

17. Letter Rulings Issued by an Associate Office

Proposed §301.7803-2(c)(17) provides that Appeals consideration is not available for a decision by an Associate Office whether to issue a letter ruling or the content of a letter ruling. A taxpayer requests a letter ruling by submitting a request that meets the requirements of the revenue procedure that describes the letter ruling process, which is updated annually. The most recent update is Rev. Proc. 2022-1.

As explained in section 2.01 of Rev. Proc. 2022-1, a letter ruling is a written determination issued to a taxpayer by an Associate Office in response to the

taxpayer's inquiry, filed prior to the filing of returns or reports that are required by the tax laws, about its status for tax purposes or the tax effects of its acts or transactions. A letter ruling interprets the tax laws and applies them to the taxpayer's specific set of facts. An Associate Office issues a letter ruling when appropriate and in the interest of sound tax administration. A voluntary request for a letter ruling is not an administrative determination that is part of the IRS's compliance function. The taxpayer is not required to file a return consistent with the letter ruling. The letter ruling program is not designed to present a position of the IRS for Appeals to consider. The program is designed instead to provide taxpayers with information regarding whether the IRS will accept a position to be taken on the taxpayer's return. An exception similar to the exception in proposed §301.7803-2(c)(17) already exists in section 10.02 of Rev. Proc. 2022-1.

However, proposed §301.7803-2(c)(17) provides that *the subject of the letter ruling* may be considered by Appeals if all other requirements in proposed §301.7803-2 are met. For example, assume that a taxpayer submits a letter ruling request pursuant to Rev. Proc. 2022-1 and an Associate Office issues a letter ruling adverse to the taxpayer's request. If the taxpayer files a tax return contrary to the adverse letter ruling and a Federal tax controversy arises that involves the subject of the adverse letter ruling, Appeals could consider the subject of the letter ruling in the dispute if all other requirements in proposed §301.7803-2 are met.

18. Challenges Alleging that a Statute is Unconstitutional

Proposed §301.7803-2(c)(18) provides that Appeals consideration is not available for any issue based on a taxpayer's argument that a statute violates the United States Constitution unless there is an unreviewable decision from a Federal court holding that the cited statute is unconstitutional. An argument that a statute violates the United States Constitution includes an argument that a statute is unconstitutional on its face or as applied to a specific person. For purposes of the proposed regulations, an unreviewable decision is a decision that can no longer be appealed to any Federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was filed, such as a final determination under section 7481 of the Code. Once there is an unreviewable decision, no further action can be taken in the case by any court. In fulfilling its function of considering hazards of litigation based upon the possibility that an administrative determination made by the IRS with respect to a particular taxpayer would be reversed in a court proceeding, Appeals may consider such an unreviewable decision. Proposed §301.7803-2(c)(18) further provides that this exception does not preclude Appeals from considering a Federal tax controversy based on arguments other than the constitutionality of the statute, such as whether the statute applies to the taxpayer's facts and circumstances, and settling the Federal tax controversy weighing the likelihood a court would agree with the position of the taxpayer or the Government.

Appeals is not an appropriate forum to consider constitutional challenges to Federal tax statutes. Whether the actions taken to enact a Federal tax statute comport with the Constitution is initially determined by Congress and the President. Questions regarding the constitutionality of a duly enacted statute are determinations of general applicability resolved at the highest levels of the Treasury Department and the IRS, in consultation with the Office of Legal Counsel of the Department of Justice. Such a determination is not appropriate for Appeals to consider.

In addition, one of the statutory duties of Appeals is to resolve cases on a basis that "promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws." See section 7803(e)(3)(B). A Federal court's unreviewable decision is a determination by the judicial branch on the merits of the constitutional challenge that may reject the determinations made by Congress, the President, the Treasury Department, or the IRS with regard to the constitutionality of a Federal tax statute, thereby providing a basis for Appeals to consider constitutional challenges to the Federal tax statute that is the subject of the taxpayer's dispute. Unlike a Federal court's unreviewable decision, which is publicly available to all taxpayers, an Appeals resolution relates only to a single Federal tax controversy and, by law, the outcome generally can only be communicated by the IRS to the taxpayer. Any constitutional determination with respect to a Federal tax law should be communicated and applied consistently to all taxpayers. Accordingly, the Treasury Department and the IRS believe that it would be inappropriate for Appeals to consider challenges to the constitutionality of a statute in the absence of an unreviewable decision from a Federal court holding the statute to be unconstitutional.

The Treasury Department and the IRS request comments on this proposed exception.

19. Challenges Alleging that a Treasury Regulation is Invalid

Proposed §301.7803-2(c)(19) provides that Appeals consideration is not available for any issue based on a taxpayer's argument that a Treasury regulation is invalid unless there is an unreviewable decision from a Federal court invalidating the regulation as a whole or the provision in the regulation that the taxpayer is challenging. As explained previously, an unreviewable decision is a decision that can no longer be appealed to any Federal court. As with the exception for constitutional challenges, this exception does not preclude Appeals from considering a Federal tax controversy based on other arguments. For example, Appeals may consider whether the Treasury regulation applies to a taxpayer's facts and circumstances and resolve the Federal tax controversy by weighing the likelihood a court would agree with the position of the taxpayer or the Government.

Questions regarding the validity of a Treasury regulation are determinations of general applicability resolved at the highest levels of the Treasury Department and the IRS. Sections 7801 through 7805 of the Code vest with the Secretary, the Commissioner, and other Treasury Department officials the authority to administer the internal revenue laws, including the power to promulgate regulations. Pursuant to these provisions of the Code and 31 U.S.C. 321(b), the delegated authority to prescribe Treasury regulations is held by the Assistant Secretary of the Treasury for Tax Policy (Assistant Secretary

for Tax Policy) and the General Counsel for the Department of the Treasury (Treasury Department General Counsel). See Treasury Directive 18-02 (9-4-1986) and Treasury Order 107-03 (01-30-1978). The process of reviewing and approving Treasury regulations before they are published is extensive and involves senior officials in numerous offices within the Treasury Department, the IRS, and sometimes other Federal agencies. See IRM Part 32.1 (Chief Counsel Regulation Handbook) for a description of the process for drafting regulations. Before a regulation is published in the **Federal Register** it must be approved by the Associate Chief Counsel responsible for drafting the regulation; a Deputy Chief Counsel; the Deputy Commissioner for Services and Enforcement; multiple individuals in the Treasury Department's Office of Tax Policy, including the Assistant Secretary for Tax Policy; the Treasury Department's Office of General Counsel; the Office of the Executive Secretary; and, in some cases, the Secretary of the Treasury.

In light of the extensive review and approval procedures at senior levels in both the Treasury Department and the IRS, we believe that it would be inappropriate for Appeals to consider arguments regarding the validity of Treasury regulations in the absence of an unreviewable Federal judicial decision holding the regulation invalid. In the absence of an unreviewable Federal judicial decision holding a Treasury regulation invalid, Appeals consideration of such arguments would also be inconsistent with the delegation of the Secretary's authority to prescribe regulations to the Assistant Secretary for Tax Policy and to the Treasury Department General Counsel. Furthermore, unlike the authority to apply the tax laws to a specific set of facts, which, for example, is redelegated to the examination function within the IRS to facilitate examination of a particular taxpayer, the authority and function to promulgate regulations rests with the Assistant Secretary for Tax Policy and the Treasury Department General Counsel. Such a determination would not be appropriate for Appeals to consider until there is an unreviewable decision from a Federal court invalidating the regulation as a whole or the provision in the regulation that the taxpayer is challenging.

Treasury regulations are generally submitted for notice and comment under the Administrative Procedure Act and have the force and effect of law once a Treasury decision containing such regulations is published in the **Federal Register**. Consequently, Treasury regulations are binding on the Treasury Department, the IRS and the public, including all Treasury Department and IRS employees. This means that Treasury Department and IRS employees must follow the regulations until they are revised, removed through the notice and comment process, or invalidated by subsequent legislation or an unreviewable decision of a Federal court. As an office within the Treasury Department and the IRS, these requirements apply to Appeals and its employees.

In addition, as with constitutional challenges to a statute, a determination with respect to the validity of a regulation should be communicated and applied consistently to all taxpayers. Unlike a non-public Appeals settlement, an unreviewable decision by a Federal court is available to all taxpayers and the IRS regarding the validity of a Treasury regulation. A settlement before Appeals is specific to a taxpayer and cannot be disclosed by the IRS unless an exception to section 6103 of the Code applies. Furthermore, unlike most Appeals analysis, which weigh litigation hazards in applying the law to specific facts, considering the validity of a regulation does not involve taxpayer specific facts. A Federal court's unreviewable decision is a determination by the judicial branch on the merits of the validity challenge that may reject the determinations made by other levels of the Treasury Department or the IRS with regard to the validity of a Treasury regulation, thereby providing a basis for Appeals to consider a regulation's validity. Accordingly, the Treasury Department and the IRS believe that it would be inappropriate for Appeals to consider challenges to the validity of a Treasury regulation unless a Federal court has rendered an unreviewable decision holding that the regulation is invalid.

The Treasury Department and the IRS request comments on this proposed exception.

20. Challenges Alleging that a Notice or Revenue Procedure is Invalid

Proposed §301.7803-2(c)(20) provides that Appeals consideration is not available for any issue based on a taxpayer's argument that an IRS notice or revenue procedure published in the Internal Revenue Bulletin is procedurally invalid unless there is an unreviewable decision from a Federal court invalidating the notice or revenue procedure. An unreviewable decision is a decision that can no longer be appealed to any Federal court, as explained previously. However, this proposed rule would not prevent Appeals from considering the likelihood that a court would agree or disagree with the interpretation of the tax law asserted by the taxpayer, even though it may differ from the interpretation described in a notice or revenue procedure. Additionally, the proposed rule would not prevent Appeals from considering a Federal tax controversy based on arguments other than the validity of a notice or revenue procedure. For example, Appeals may consider whether the notice or the revenue procedure applies to the taxpayer's facts and circumstances and resolve the Federal tax controversy weighing the likelihood a court would agree with the position(s) of the taxpayer or the Government.

Similar to Treasury regulations, the process for drafting and publishing notices and revenue procedures is extensive. See IRM Part 32.2 (Chief Counsel Publication Handbook) for a description of the process for drafting published guidance, including notices and revenue procedures. Notices and revenue procedures are approved within the Treasury Department's Office of Tax Policy, involve numerous policy and implementation determinations, and involve the coordination and agreement of many offices within the Treasury Department, the IRS, and sometimes other Federal agencies. The approval process includes consideration of administrative law requirements applicable to such guidance. Furthermore, unlike the application of the tax law to a specific set of facts and circumstances during, for example, an examination, procedural determinations regarding notices and revenue procedures must be approved at high levels within the Treasury Department and are not specific

to the facts of a particular case. Ultimately, whether an IRS notice or revenue procedure is invalid is a determination of general applicability resolved at the highest levels of the Treasury Department and the IRS. Such a determination thus would not be appropriate for Appeals to consider. Furthermore, any determination regarding whether a notice or revenue procedure failed to comply with administrative law requirements, such as notice and comment under 5 U.S.C. 553, should be communicated and applied consistently. As with constitutional and regulation validity challenges, an unreviewable decision of a Federal court is the appropriate means of making information accessible to all taxpayers and the IRS regarding whether a notice or revenue procedure was prescribed in accordance with applicable Federal law. A settlement before Appeals is specific to a taxpayer and cannot be made available to other taxpayers. A Federal court's unreviewable decision is a determination by the judicial branch on the merits of the validity challenge that may reject the determinations made by other levels of the Treasury Department or the IRS with regard to the validity of an IRS notice or revenue procedure, thereby providing a basis for Appeals to consider the validity of an IRS notice or revenue procedure. Accordingly, the Treasury Department and the IRS believe that it would be inappropriate for Appeals to consider challenges alleging that a notice or revenue procedure is procedurally invalid unless a Federal court has rendered an unreviewable decision holding the notice or revenue procedure to be invalid.

The Treasury Department and the IRS request comments on this proposed exception.

21. Case or Issue Designated for Litigation or Withheld from Appeals

Proposed §301.7803-2(c)(21) provides that Appeals consideration is not available for any case or issue designated for litigation, or withheld from Appeals consideration in a Tax Court case, in accordance with guidance regarding designating or withholding a case or issue. Designation for litigation means that the Federal tax controversy, comprising an issue or issues in a case, will not be resolved without a full concession by the taxpayer or by decision of the court. The ability to designate a case for litigation or withhold a Tax Court case from Appeals existed long before section 7803(e) was added to the Code. See, e.g., sec. 3.03 of Rev. Proc. 2016-22 and IRM 33.3.6 (12-10-2010) (relating to designating a case for litigation). See also NHQ-04-0521-0003 (5-24-2021) (interim guidance on designation of cases for litigation). Chief Counsel will not refer to Appeals any case or issue that has been designated for litigation.

Also, Chief Counsel will withhold from Appeals a Tax Court case or one or more issues in a Tax Court case if Chief Counsel determines referral is not in the interest of sound tax administration. For example, Chief Counsel may decide not to refer a Tax Court case to Appeals when the Tax Court case involves a significant issue common to other cases in litigation for which it is important that the IRS maintains a consistent position or when the Tax Court case is related to a case over which the Department of Justice has jurisdiction after referral to the Department of Justice for prosecution or defense.

While the role of Appeals has been to review the IRS's and the taxpayer's positions and consider issues based on the likelihood that the IRS's or the taxpayer's position would prevail if it were resolved by a court, the processes described earlier allow Chief Counsel to strategically manage its cases, fulfilling Chief Counsel's role of ensuring a consistent application and interpretation of the internal revenue laws and aiding in the development of the tax law. See section 7803(b)(2)(E). These processes are intended to serve the tax administration interests of the IRS and taxpayers by improving taxpayers' understanding of and voluntary compliance with the internal revenue laws, leading to more effective and fair IRS enforcement. Unlike an Appeals resolution, a judicial decision in designated or withheld cases will provide notice to all taxpayers of any development in the law, leading to the early resolution of issues and conserving IRS and taxpayer resources.

22. Appeals Issued the Determination that is the Basis of the Tax Court's Jurisdiction

Proposed §301.7803-2(c)(22) provides that except as provided in proposed §301.7803-2(f)(1) (regarding when the Tax Court remands a CDP case for reconsideration), Appeals consideration is not available for any case docketed in the Tax Court if the notice of deficiency, notice of liability, or other determination was issued by Appeals officials. Examples of the cases subject to proposed §301.7803-2(c)(22) include a case under sections 6320 or 6330, section 6404 (relating to abatement of interest), section 7428 (relating to declaratory judgment on the classification of specified organizations), section 7476 (relating to declaratory judgment on qualification of certain retirement plans), section 7477 (relating to declaratory judgment on the value of certain gifts), or section 7479 (relating to declaratory judgment on the eligibility of an estate with respect to installment payments under section 6166 (regarding the extension of time for payment of estate tax where the estate consists largely of an interest in a closely held business)). This proposed rule is reflected in Rev. Proc. 2016-22. See secs. 3.01 and 4 of Rev. Proc. 2016-22. Under the proposed rule, Chief Counsel will not refer a docketed case to Appeals if Appeals previously reviewed the case and issued the correspondence stating its determination. A taxpayer whose case has been reviewed by Appeals cannot request a duplicative or second opportunity to have the same case reviewed by Appeals. It would be a redundant exercise and a significant mismanagement of time and resources for the IRS and Appeals to allow a taxpayer to request consideration by Appeals if Appeals already has considered the same matter.

23. Appeals Consideration is a Prerequisite to the Jurisdiction of Tax Court

Proposed §301.7803-2(c)(23) provides that subsequent Appeals consideration is not available when timely Appeals consideration itself is a prerequisite to Tax Court jurisdiction over an issue. To meet the statutory jurisdictional requirements in cases in which exhaustion of administrative review is a prerequisite to the Tax Court's jurisdiction, and such administrative review includes consideration by Appeals, Appeals consideration must be requested before a petition is filed in the

Tax Court. Such a case is excluded from Appeals at the docketed stage because the taxpayer failed to take advantage of the earlier administrative opportunity to request Appeals review. Failure to request prior Appeals consideration will constitute a failure to exhaust available administrative remedies and the failure cannot be cured while the case is docketed.

Proposed §301.7803-2(c)(23) lists some examples of such cases. Appeals consideration must be requested before a petition is filed in the Tax Court regarding a declaratory judgment request under section 7428 relating to declaratory judgments on the classification of specified organizations. See section 7428(b)(2) (regarding exhaustion of administrative remedies prior to seeking declaratory judgment pursuant to section 7428); sec. 10.05 of Rev. Proc. 2022-5 (regarding the same). Other examples are cases to which section 7476(b)(3) applies regarding exhausting administrative remedies prior to seeking declaratory judgment pursuant to section 7476 relating to declaratory judgment on qualification of certain retirement plans. See §601.201(o)(6)(i) of the Statement of Procedural Rules (26 CFR part 601) (regarding the same); section 7477(b)(2) (regarding exhausting administrative remedies prior to seeking declaratory judgment pursuant to section 7477 relating to declaratory judgment on the value of certain gifts); see §301.7477-1(d)(4)(ii) (regarding the same).

24. An Administrative Determination to Deny or Revoke a CPEO Certification

Proposed §301.7803-2(c)(24) provides that Appeals consideration of an administrative determination made by the IRS to deny or revoke a Certified Professional Employer Organization (CPEO) certification is not available because the IRS has established another independent review process to review the determination. It is excepted from Appeals consideration because review by Appeals would be duplicative when a non-Appeals office has an established process to independently review the matter. The CPEO certification procedures established the IRS Office of Professional Responsibility (OPR) as the independent reviewer of the IRS's decision to deny or revoke a CPEO certification. The CPEO program under sections 3511 (relating to the rules for CPEOs) and 7705 (relating to the definition of CPEOs) of the Code involves the certification of a Professional Employer Organization as having met certain tax status, background, experience, business location, financial reporting, bonding, and other requirements described in statutes and regulations. An applicant for certification that received a notice of proposed denial of certification can request review by OPR. Current procedures are in Rev. Proc. 2016-33 (2016-25 I.R.B. 1034). A CPEO that received a notice of suspension and proposed revocation of certification can also request review by OPR. Current procedures are in Rev. Proc. 2017-14 (2017-3 I.R.B. 426).

D. Request for Comments on Other Exclusions

The list of exclusions in proposed §301.7803-2(c) does not include certain exclusions from Appeals review currently provided in the IRM. The Treasury Department and the IRS are evaluating whether these items, which relate to requests for relief under §§301.9100-1 through 301.9100-22 of the Procedure and Administration Regulations (9100 relief) and requests for a change in accounting method, should be included on the list.

1. 9100 Relief

The IRM currently provides that Appeals consideration is not available for a decision issued by an Associate Office regarding 9100 relief relating to a request for an extension of time for making an election or other application for relief where the decision is reviewable by a court under an abuse of discretion standard. See IRM 8.6.3.11(4) (10-06-2016) (relating to procedures if Appeals conclusion is contrary an IRS position) and IRM 8.6.3.11(4) (10-06-2016) (relating to extension of time for making certain elections). Under this rule, Appeals will not settle any case or matter contrary to the Associate Office's decision to deny the extension request, nor will Appeals consider any hazards of litigation based upon the possibility that Chief Counsel's denial of the 9100 relief would be reversed in a court proceeding. The 9100 relief regulations provide that the decision to grant taxpayers an extension to make a regulatory election is left to the Commissioner's discretion. See §301.9100-1(c) (regarding Commissioner's discretion to grant an extension to make a regulatory election). The Commissioner has delegated this authority to Chief Counsel.

2. Changes of Accounting Method

Section 1.446-1(a)(2) of the Income Tax Regulations provides that no method of accounting is acceptable unless, in the opinion of the Commissioner, it clearly reflects income. See section 446(b). Rev. Proc. 2015-13 (2015-5 I.R.B. 419) provides the automatic and non-automatic procedures to obtain the consent of the Commissioner to change a method of accounting. Section 11.02 of Rev. Proc. 2015-13 states that the Associate Office will deny a request to make a change in method of accounting if the requested change would not clearly reflect income or would otherwise not be in the interest of sound tax administration.

The IRM currently provides that Appeals consideration is not available for a decision issued by an Associate Office regarding a change of accounting method where the decision is reviewable by a court under an abuse of discretion standard. See IRM 8.6.3.3(2) (10-06-2016) (relating to procedures if Appeals conclusion is contrary to Service position) and IRM 8.6.3.10(3) (10-06-2016) (relating to change in accounting practice or method). Thus, Appeals will not settle any case or matter contrary to the Associate Office's decision to deny the method change, nor will Appeals consider any hazards of litigation based upon the possibility that a court would reverse Chief Counsel's denial of the request for a change in accounting method.

When a taxpayer receives a letter ruling approving a change in method of accounting, the IRS and the taxpayer typically enter into a consent agreement regarding the change. The terms of the consent agreement are binding on the IRS and the taxpayer and are not subject to Appeals consideration. See IRM 8.1.1.2.1(1)(d.) (02-10-2012) (relating to some exceptions to Appeals authority).

3. Comments Requested

The Treasury Department and the IRS request comments on whether items relating to requests for changes in methods of accounting and requests for 9100 relief should continue to be excluded from Appeals review. In addition to general comments, comments are specifically requested on the following:

A. whether the binary nature of decisions regarding 9100 relief and changes in method of accounting make these decisions unsuitable for Appeals review,

B. whether a different review standard should apply if Appeals considers 9100 relief or changes of accounting method, and

C. what impact would Appeals review of 9100 relief and changes in accounting method have on later years that are not before Appeals?

E. Originating Office Has Completed Its Review

Proposed §301.7803-2(d)(1) provides a prerequisite requirement that a taxpayer must meet before Appeals may consider the taxpayer's Federal tax controversy. Appeals consideration of a matter or issue is appropriate only after the originating IRS office has completed its action on the Federal tax controversy and issued a final administrative determination or a proposed administrative determination that is accompanied by an offer for Appeals consideration. This requirement is necessary because a case or issue is not ready for Appeals consideration until the originating IRS office has completed its factfinding and developed a position. If the originating office has not set out its position, there is no administrative determination made by the IRS with respect to the particular taxpayer for Appeals to consider. If the originating office has not set out its position regarding the Federal tax controversy, the request for Appeals consideration is premature and the taxpayer may request Appeals consideration after the originating office has set out its position if the other requirements in proposed §301.7803-2 are met.

Circumstances in which Appeals consideration is premature arise in many contexts. For example, Appeals consideration is premature if a taxpayer petitions the Tax Court in a deficiency case under section 6213(a) and raises for the first time a claim for relief under section 6015. Because the issue was first raised in litigation, the IRS does yet not have a position regarding the taxpayer's eligibility for relief under section 6015. In another example, a taxpayer files a claim with the IRS for abatement of interest under section 6404 and after 180 days pass without a determination, the taxpayer files a petition with the Tax Court. Appeals consideration would be premature before the IRS has considered the merits. Another example is a relevant new issue raised during Appeals consideration for which the originating office has not set out its position. Similarly, Appeals consideration is premature if during an examination a decision is made to return an OIC that was submitted by the taxpayer. In yet another example, as part of an examination the IRS requests documents that the taxpayer does not provide, and the IRS refers the matter to the Department of Justice to bring a summons enforcement action. An administrative determination regarding the taxpayer's liability has not been made by the IRS. The decision to bring a summons enforcement action is part of the process that leads to an administrative determination that will be made by the IRS, and Appeals consideration would be premature because the position of the originating office has not been set out.

Proposed §301.7803-2(d)(2) provides that the requirement that the originating office must have completed its review will be treated as satisfied when the person requests to participate in an Appeals early consideration program and such request is granted. Where administrative guidance permits the originating office to engage Appeals prior to completing its action on the case, Appeals may consider the controversy under the terms of that administrative guidance. For example, Appeals may consider the Federal tax controversy in mediation under a fast track settlement program or early consideration of some issues under an early referral program. These programs existed prior to the TFA. See, e.g., Rev. Proc. 2003-40 (2003-25 I.R.B. 1044) (relating to mediation under the LB&I Division Fast Track Settlement Program), as modified by Rev. Proc. 2015-40 (regarding procedures for requesting competent authority assistance under U.S. tax treaties); Rev. Proc. 99-28 (1999-29 I.R.B. 109) (relating to early consideration of some, but not all, issues in case under Early Referral Program). These programs promote a more efficient disposition of a taxpayer's case by leading to the early resolution of issues or developing or narrowing the issues in dispute.

F. Procedural and Timing Requirements are Followed

Proposed §301.7803-2(e) provides the procedural and timing requirements that a taxpayer must meet before Appeals may consider the taxpayer's Federal tax controversy. Specifically, proposed §301.7803-2(e) provides that a request for Appeals consideration must be submitted in the time and manner prescribed in applicable forms, instructions, or other administrative guidance and that all procedural requirements must be complied with for Appeals to consider a Federal tax controversy. These proposed requirements existed prior to the enactment of the TFA. An example of specific procedural requirements are the special claim procedures for penalties under sections 6694(b), 6700, and 6701. For instance, a CP 15 Notice and Demand letter is sent to a promoter upon assessment of the penalties advising the promoter of the special claim procedures pursuant to section 6703(c). Section 6703(c)(1) allows the promoter to pay at least 15 percent of the amount of the penalty within 30 days and file a claim for refund of the amount paid. If the claim for refund is disallowed and a written request for Appeals consideration is received timely, Appeals may consider the claim for refund in the same manner as any other claim for refund. The special claim procedures, including the requirement to pay at least 15 percent, are part of the required claims process. Appeals review is unavailable to a claimant unless the claimant follows the special claim procedures.

Another example of procedural requirements is the refund procedures under section 6402. Appeals review is unavailable to a claimant that submits a claim for refund under section 6402 unless the claimant follows the required claims procedures in section 7422(a) regarding the

requirement to file an administrative claim according to IRS procedures before filing suit and §§301.6402-2 and 301.6402-3 regarding general procedures for making a claim for a refund of income tax. To promote compliance and an orderly process, the proposed rule would ensure that the taxpayer complies with statutory and regulatory requirements and Appeals has sufficient information to consider the taxpayer's claim.

In addition, proposed §301.7803-2(e) provides that there must be sufficient time remaining on the appropriate limitations period for Appeals to consider the matter, as provided in administrative guidance. Consideration of a case by Appeals can take a significant amount of time. Appeals needs to correspond with the taxpayer and in some cases the IRS office that made the administrative determination or proposed administrative determination, understand and evaluate both parties' legal arguments, in some cases negotiate with the taxpayer, and make a determination. This all must be completed with sufficient time for an assessment to be made if a settlement cannot be reached. If there is insufficient time remaining on the assessment limitations period, Appeals will not have time to conduct an independent review before the period expires. This requirement was in place well before the TFA was enacted and is necessary for tax administration. See, e.g., IRM 8.20.5.3.1.3(1) (03-01-2016) (relating to cases not accepted by Appeals); IRM 8.21.2.3(2)b (10-15-2014) (same). Similarly, proposed §301.7803-2(e) also provides that in a case docketed in Tax Court, if Chief Counsel has recalled the case from Appeals or, if not recalled, Appeals has returned the case to Chief Counsel so that it is received by Chief Counsel prior to the date of the calendar call for the trial session, further consideration by Appeals will not be available if there is insufficient time for such consideration. See sec. 3.07 of Rev. Proc. 2016-22.

G. One Opportunity for Consideration by Appeals

Proposed §301.7803-2(f)(1) provides that if a Federal tax controversy is eligible for consideration by Appeals and the procedural and timing requirements are followed, a taxpayer generally has one opportunity for Appeals to consider such matter or issue in the same case for the same period or in any type of future case for the same period. According to proposed §301.7803-2(f)(1), Appeals has considered a Federal tax controversy if the Federal tax controversy was before Appeals for consideration and Appeals issued a determination or made a settlement offer, decided the Federal tax controversy was not susceptible to settlement, or the person who requested consideration failed to respond to Appeals' communications and as a result of that failure Appeals issued or made a determination. Appeals also has considered a Federal tax controversy if the taxpayer notifies Chief Counsel or the IRS that the taxpayer wants to discontinue settlement consideration by Appeals or requests to transfer settlement consideration of a Federal tax controversy that is currently before the Tax Court from Appeals to Chief Counsel. Additionally, a taxpayer with a Federal tax controversy who previously failed to respond to Appeals' communications with respect to that Federal tax controversy is treated as having had a prior opportunity for Appeals consideration. This proposed rule is intended to deter and not reward nonresponsive taxpayers and to avoid wasting Appeals resources.

Appeals therefore generally will consider a Federal tax controversy only once. A taxpayer whose Federal tax controversy has been reviewed by Appeals cannot request a duplicative or second opportunity to have it reviewed by Appeals. Neither section 7803(e) nor its legislative history indicates that Congress intended for a taxpayer whose case already has been considered by Appeals to have multiple opportunities for Appeals consideration. It would be duplicative to allow a taxpayer to request consideration by Appeals if Appeals already has considered the same matter. This one-bite-at-the-apple rule is a practical, longstanding rule that existed prior to the TFA. See secs. 3.01 and 4 of Rev. Proc. 2016-22.

There are several exceptions to this proposed rule. Proposed §301.7803-2(f)(1) provides an exception to the proposed general rule where the Tax Court remands a CDP case for reconsideration. This exception to the general rule accounts for the Tax Court's ability to remand CDP cases for further Appeals consideration. Proposed §301.7803-2(f)(2) provides an exception for a taxpayer that participated in an Appeals early consideration program but did not reach an agreement with Appeals. See, e.g., Rev. Proc. 99-28 (1999-29 I.R.B. 109) (relating to early consideration of some, but not all, issues in case under Early Referral program); Rev. Proc. 2003-40 (2003-25 I.R.B. 1044) (relating to the Large Business and International Division Fast Track Settlement (FTS) program), as modified by Rev. Proc. 2015-40 (2015-35 I.R.B. 236) (regarding procedures for requesting competent authority assistance under U.S. tax treaties); Rev. Proc. 2017-25 (2017-14 I.R.B. 1) (relating to the Small Business/Self-Employed Division FTS program); Rev. Proc. 2016-57 (2016-49 I.R.B. 707) (relating to the FTS program for certain collection cases and issues); and Announcement 2012-34 (2012-36 I.R.B. 334) (relating to the Tax-Exempt and Government Entities Division FTS program). It also provides an exception for a taxpayer that may be able to request post-Appeals mediation under the terms of administrative guidance after a traditional appeal if no agreement was reached between the taxpayer and Appeals. See, e.g., Rev. Proc. 2014-63 (2014-53 I.R.B. 1014) (relating to Appeals mediation).

The exception to the general rule in proposed §301.7803-2(f)(2) that carves out early consideration programs is a critical part of these programs. As previously mentioned, these fast track and early consideration programs promote a more efficient disposition of a taxpayer's case by leading to the early resolution of issues or developing or narrowing the issues in dispute. If a taxpayer who unsuccessfully participated in one of these programs was unable later to have Appeals consider the taxpayer's case, it is unlikely the taxpayer would take advantage of these programs. Similarly, post-Appeals mediation promotes a more efficient disposition of a taxpayer's case.

Proposed §301.7803-2(f)(2) also provides an exception to the general rule in proposed §301.7803-2(f)(1) for taxpayers who provide new information to the IRS and who meet the conditions and requirements for audit reconsideration or

for reconsideration of liability issues previously considered by Appeals. Appeals may consider the new information. See IRM 8.7.7.17 (12-17-2019) (relating to audit reconsideration cases); IRM 8.7.7.16 (12-17-2019) (relating to reconsideration of claims for liabilities previously considered by Appeals).

H. Special Rules

The following are proposed special rules.

1. Appeals Reconsideration

Proposed §301.7803-2(g)(1) provides a special rule that notwithstanding the exception in proposed §301.7803-2(c)(22), if Appeals issued a notice of deficiency, notice of liability, or other determination, without having fully considered one or more issues because of an impending expiration of the statute of limitations on assessment, Appeals may choose to have Chief Counsel return the case to Appeals for full consideration of the issue or issues once the case is docketed in the Tax Court. This is a longstanding rule that existed prior to the enactment of the TFA and can be found in section 3.02 of Rev. Proc. 2016-22. The proposed rule promotes the efficient disposition of cases by leading to the early resolution of issues and developing or narrowing the issues in dispute.

2. Coordination Between Chief Counsel and Appeals

Proposed §301.7803-2(g)(2) provides a special rule that Appeals and Chief Counsel may determine how settlement authority in a Federal tax controversy that is before the Tax Court will be transferred between the two offices. For example, to promote a more efficient disposition of a case in the Tax Court, the case may be transferred from Chief Counsel to Appeals or from Appeals to Chief Counsel by agreement between them. This is a longstanding practice that has been used to efficiently manage resources and respond to developments in litigation. Details regarding this practice are most recently described in Rev. Proc. 2016-22. In another example, if Chief Counsel determines that the case is needed for trial preparation, Chief Counsel may request that Appeals return the case (including settlement authority) to Chief Counsel before Appeals has completed its consideration of the case. See sec. 3.08 of Rev. Proc. 2016-22. Ensuring adequate time to prepare for trial is pragmatic and beneficial to taxpayers and Chief Counsel attorneys. Chief Counsel also may delay forwarding a case to Appeals when Chief Counsel anticipates filing a dispositive motion (for example, a motion for summary or partial summary judgment, or a motion to dismiss for lack of jurisdiction), in which case Chief Counsel will retain the case until the Tax Court rules on the motion. See sec. 3.04 of Rev. Proc. 2016-22. Allowing Chief Counsel and Appeals the flexibility to respond to the needs of specific Federal tax controversies promotes the efficient disposition of a taxpayer's case, including developing or narrowing the issues in dispute.

I. Applicability Date

These regulations are proposed to apply to all requests for consideration by Appeals that are received on or after the date 30 days after a Treasury Decision finalizing these rules is published in the Federal Register. The Treasury Department and the IRS request comments on the proposed applicability date.

II. Requests for Referral to Appeals Following Issuance of a Notice of Deficiency

A. Notice and Protest

If a taxpayer received a notice of deficiency authorized under section 6212, section 7803(e)(5) requires the Commissioner to explain the basis for denying an Appeals referral request and provide procedures to protest the denial. Proposed §301.7803-3(a) implements section 7803(e)(5) and provides that if any taxpayer requests Appeals consideration of a matter or issue and the request is denied, the Commissioner or the Commissioner's delegate must provide the taxpayer a written notice that provides a detailed description of the facts involved, the basis for the decision to deny the request, a detailed explanation of how the basis for the decision applies to such facts, and the procedures for protesting the decision to deny the request if the requirements of proposed §301.7803-3(a) are met. These requirements are listed in proposed §301.7803-3(a)(1) through (5).

1. Notice of Deficiency

Proposed §301.7803-3(a)(1) provides that the taxpayer must have received a notice of deficiency authorized under section 6212 for the notice and protest procedures to apply.

2. Frivolous Positions

Proposed §301.7803-3(a)(2) requires that, for the notice and protest procedures to apply, the taxpayer's issue must not involve a frivolous position. This proposed requirement follows from the restriction on Appeals access in proposed §301.7803-2(c)(1), which makes Appeals review unavailable for frivolous positions. Also, pursuant to section 7803(e)(5)(D), the protest procedures under section 7803(e)(5) do not apply to an Appeals referral request if the issue is frivolous. Like the exception in proposed §301.7803-2(c)(1), this proposed rule prevents taxpayers from continuing to propose frivolous arguments. Allowing a taxpayer to protest the IRS's decision to deny the taxpayer's request for Appeals consideration of frivolous positions would result in wasted IRS time and resources.

3. Multiple Requests for Referral to Appeals

Proposed §301.7803-3(a)(3) requires that the taxpayer must not have previously requested Appeals consideration for the same matter or issue in a taxable year or period for the notice and protest procedures to apply. Thus, when a taxpayer already has requested Appeals consideration and filed a valid protest under section 7803(e)(5), the notice and protest procedures in proposed §301.7803-3(a) do not apply if the taxpayer submits another Appeals referral request concerning the same matter or issue in a taxable year or period. It would be redundant to allow the taxpayer to submit multiple referral requests and protests under section 7803(e)(5), including when the taxpayer's prior protest was

either rejected or allowed in a final decision by the Commissioner or the Commissioner's delegate.

4. Previous Appeals Consideration

Except as provided in proposed §301.7803-2(f)(2), proposed §301.7803-3(a)(4) provides that for the notice and protest procedures to apply, Appeals must not have previously considered the matter or issue in a taxable year or period that is the subject of the request and determined that it could not be settled. This requirement follows from the prerequisite in proposed §301.7803-2(f), which provides that Appeals will consider a Federal tax controversy only once. Since a taxpayer receives only one opportunity for Appeals review, it would be redundant to allow a taxpayer to submit a protest under section 7803(e)(5) if Appeals already has considered the same matter or issue in a taxable year or period and decided that it could not be settled or a settlement offer was rejected.

5. Notice of Deficiency with More Than One Matter or Issue

Proposed §301.7803-3(a)(5) requires that if the notice of deficiency for which the taxpayer requests Appeals consideration includes more than one matter or issue in a taxable year or period, the taxpayer must request referral and submit all matters or issues sought for Appeals consideration at the same time. This proposed rule will ensure the efficient use of Appeals' time and resources and help to prevent unnecessary delays and potential abuse. For example, without this proposed rule, a taxpayer in a case with three issues could potentially seek sequential Appeals consideration for each issue separately, thereby wasting Appeals' time and resources, creating unnecessary delay, and abusing the referral process. Such a piecemeal approach, if allowed, also would undermine the one-bite-at-the-apple rule in proposed §301.7803-2(f)(1).

6. Applicability Date

The regulations in this section are proposed to apply to all relevant requests for consideration by Appeals that are received on or after a Treasury Decision finalizing these rules is published in the **Federal Register**.

Statement of Availability of IRS Documents

For copies of recently issued revenue procedures, revenue rulings, notices, and other guidance published in the Internal Revenue Bulletin, please visit the IRS website at http://www.irs.gov.

Special Analyses

This regulation is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq*.) it is hereby certified that these proposed rules will not have a significant economic impact on a substantial number of small entities.

The proposed rules affect any person who would like to have a Federal tax controversy considered by Appeals, including any small entity. Because any small entity could potentially request consideration by Appeals, these proposed regulations are expected to affect a substantial number of small entities. However, the IRS has determined that the economic impact on small entities affected by the proposed rules would not be significant.

The proposed rules provide procedural and timing requirements for consideration by Appeals. The proposed rules also establish the general availability of consideration by Appeals and exceptions to that consideration. The procedural requirements, timing requirements, and the vast majority of the exceptions to consideration by Appeals already exist in previously established guidance regarding Appeals. The proposed regulations also provide rules regarding certain circumstances in which a written explanation will be provided regarding why Appeals consideration was not provided. None of the proposed rules affect entities' substantive tax liability nor do they affect the process that Appeals follows when it considers an eligible Federal tax controversy. Any significant economic impact on small entities will result from the application of the substantive tax provisions and will not be as a result of the proposed regulations. Accordingly, the Secretary hereby certifies that the proposed rules will not have a significant economic impact on a substantial number of small entities. The Treasury Department and the IRS invite comment from members of the public about potential impacts on small entities.

Pursuant to section 7805(f) of the Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

Comments and Public Hearing

Before these proposed amendments to the regulations are adopted as final regulations, consideration will be given to comments that are submitted timely to the IRS as prescribed in the preamble under the "**ADDRESSES**" section. The Treasury Department and the IRS request comments on all aspects of the proposed regulations, particularly circumstances where Appeals consideration is not available. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at *www.regulations.gov* or upon request.

The public hearing is being held by teleconference on November 29, 2022, beginning at 10 a.m. EST. Requests to speak and outlines of topics to be discussed at the public hearing must be received by November 14, 2022. If no outlines are received by November 14, 2022, the public hearing will be cancelled. Requests to attend the public hearing must be received by 5:00 p.m. EST on November 22, 2022. The telephonic hearing will be made accessible to people with disabilities. Requests for special assistance during the telephonic hearing must be received by November 22, 2022. Announcement 2020-4, 2020-17 I.R.B. 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

The principal author of these proposed regulations is Keith L. Brau of the Office of the Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 301

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

Proposed Amendments to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 301 as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding entries for §§301.7803-2 and 301.7803-3 in numerical order to read, in part, as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.7803-2 also issued under 26 U.S.C. 7803.

Section 301.7803-3 also issued under 26 U.S.C. 7803.

* * * * *

Par. 2. Sections 301.7803-2 and 301.7803-3 are added to read as follows:

§301.7803-2 Appeals resolution of Federal tax controversies without litigation.

(a) *Function of Independent Office of Appeals*. Appeals resolves Federal tax controversies without litigation on a basis that is fair and impartial to both the Government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and enhances public confidence in the integrity and efficiency of the Internal Revenue Service (IRS).

(b) *Consideration of a Federal tax controversy by the Independent Office of Appeals*--(1) *In general*. The Appeals resolution process is generally available to all taxpayers to resolve Federal tax controversies.

(2) *Definition of Federal tax controversy*. For purposes of this section, a *Federal tax controversy* is defined as a dispute over an administrative determination with respect to a particular taxpayer made by the IRS in administering or enforcing the internal revenue laws, related Federal tax statutes, and tax conventions to which the United States is a party (collectively referred to as internal revenue laws) that arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws.

(3) *Other administrative determinations treated as Federal tax controversies*. Notwithstanding the definition of a Federal tax controversy in paragraph (b)(2) of this section, disputes over administrative determinations made by the IRS with respect to a particular person regarding the following topics are treated as Federal tax controversies for purposes of this section:

(i) Liabilities and penalties administered by the IRS that are outside the Internal Revenue Code (Code), such as a liability or penalty pursuant to section 5321 of title 31 of the United States Code (relating to civil Report of Foreign Bank and Financial Accounts or Bank Secrecy Act penalties);

(ii) A request under the Freedom of Information Act (5 U.S.C. 552);

(iii) Application to become, or the sanction of, an Electronic Return Originator or Authorized IRS e-file Provider;

(iv) The initial or continuing qualification of an organization as exempt from tax under section 501(a) (relating to tax-exempt organizations) or section 521 of the Code (relating to tax-exempt farmers' cooperatives), or as an organization described in section 170(c)(2) of the Code (relating to charitable organizations); the classification or reclassification of an organization's foundation status under section 509(a) of the Code (relating to private foundations); and the classification of an organization as a private operating foundation under section 4942(j)(3) of the Code (relating to an operating foundation);

(v) The qualification of an employee plan;

(vi) An IRS proposed determination to a bond issuer that interest on an obligation the bond issuer previously issued is not tax-exempt under section 103 of the Code (relating to interest on State or local bonds), that an issue of bonds fails to qualify for the tax credits for the bondholders or direct payments to the issuer with respect to the bonds under provisions of the Code applicable to tax-advantaged bonds, or that denies a claim for recovery of an asserted overpayment of arbitrage rebate under section 148 of the Code (relating to arbitrage) with respect to tax-exempt bonds or under section 148 as modified by relevant provisions of the Code with respect to other tax-advantaged bonds;

(vii) Administrative costs under section 7430 of the Code (relating to awarding of costs and certain fees); or

(viii) Any other topic that the IRS has determined can be considered by Appeals.

(c) *Exceptions to consideration by Appeals*. The following are Federal tax controversies that are excepted from consideration by Appeals or matters or issues that are otherwise ineligible for consideration by Appeals because they are neither a Federal tax controversy nor treated as a Federal tax controversy under paragraph (b)(3) of this section. If a matter or issue not eligible for consideration by Appeals is present in a case that otherwise is eligible for consideration by Appeals, the ineligible matter or issue will not be considered by Appeals during resolution of the case. The exceptions are:

(1) An administrative determination made by the IRS rejecting a position of a taxpayer that the IRS has identified as frivolous for purposes of section 6702(c) of the Code (regarding listing of frivolous positions) and any case solely involving the taxpayer's failure or refusal to comply with the tax laws because of frivolous moral, religious, political, constitutional, conscientious, or similar grounds.

(2) Penalties assessed by the IRS under section 6702 (relating to frivolous tax submissions) or section 6682 of the Code (relating to false information with respect to withholding) or any other penalty imposed for a frivolous position or false information. Appeals, however, may

obtain verification that the assessment of the penalties complied with sections 6203 (relating to method of assessment) and 6751(b) (relating to approval of assessment) of the Code in a collection due process (CDP) hearing under sections 6320 (relating to a hearing upon filing of a notice of lien) and 6330 (relating to a hearing before levy) of the Code. Appeals also may consider a non-frivolous substantive challenge to a section 6702 or section 6682 penalty in a CDP hearing.

(3) Any administrative determination made by the IRS under section 7623 of the Code (relating to awards to whistleblowers).

(4) An administrative determination issued by an agency other than the IRS, such as a determination by the Alcohol and Tobacco Tax and Trade Bureau (TTB) concerning an excise tax administered by and within the jurisdiction of TTB.

(5) A decision made by the IRS not to issue a Taxpayer Assistance Order (TAO) under section 7811 of the Code (relating to TAOs).

(6) Any decision made by the IRS concerning material to be deleted from the text of a written determination pursuant to section 6110 of the Code (relating to public inspection of written determinations) unless the written determination is otherwise being considered by Appeals.

(7) Any denial of access under the Privacy Act (5 U.S.C. 552a(d)(1)).

(8) Any issue resolved in an agreement described in section 7121 of the Code (regarding closing agreements) that the taxpayer entered into with the IRS, and any decision made by the IRS to enter into or not enter into such agreement. Appeals may consider the question of whether an item or items are covered, and how the item or items are covered, in a closing agreement.

(9) A case in which the IRS erroneously returns or rejects an offer in compromise (OIC) submitted under section 7122 of the Code (relating to compromises) as nonprocessable or no longer processable and the taxpayer requests Appeals consideration to assert that the OIC should be deemed to be accepted under section 7122(f).

(10) Any case in which a criminal prosecution, or a recommendation for criminal prosecution, is pending against the taxpayer for a tax-related offense, except with the concurrence of the Office of Chief Counsel or the Department of Justice, as applicable.

(11) Issues relating to allocation among different fee payers of the branded prescription drug and health insurance providers fees in section 9008 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111-148 (124 Stat. 119 (2010)), as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010 (HCERA), Public Law 111-152 (124 Stat. 1029 (2010)), and section 9010 of PPACA, as amended by section 10905 of PPACA, and as further amended by section 1406 of HCERA.

(12) A certification or issuance of a notice of certification of a seriously delinquent Federal tax debt to the Department of State under section 7345 of the Code (relating to the revocation or denial of a passport in the case of serious tax delinquencies).

(13) Any issue barred from consideration under section 6320 or section 6330 of the Code, §§301.6320-1 and 301.6330-1, or any other administrative guidance related to collection due process hearings or equivalent hearings.

(14) Any case, determination, matter, decision, request, or issue that Appeals lacks the authority to settle. The following is a non-exclusive list of examples:

(i) A case or issue in a case that has been referred to the Department of Justice.

(ii) A competent authority case (including a competent authority resolution previously accepted by the taxpayer) under a United States tax treaty that is within the exclusive authority of the United States Competent Authority.

(iii) A decision of the Commissioner of Internal Revenue or the Commissioner's delegate to not rescind a section 6707A penalty for a non-listed reportable transaction.

(iv) A request for relief under section 6015 of the Code (relating to relief from joint and several liability on a joint return) when the nonrequesting spouse is a party to a docketed case in the United States Tax Court (Tax Court) and does not agree to granting full or partial relief under section 6015 to the requesting spouse.

(v) A criminal restitution-based assessment under section 6201(a)(4) of the Code (relating to certain orders of criminal restitution and restriction on challenge of assessment).

(15) An adverse action related to the initial or continuing recognition of tax-exempt status, an entity's classification as a foundation, the initial or continuing determination of employee plan qualification, or a determination involving an obligation and the issuer of an obligation under section 103. This exception applies only if the tax-exempt recognition, classification, determination of employee plan qualification, or determination involving an obligation and the issuer of an obligation under section 103 is based upon a technical advice memorandum issued by an Office of Associate Chief Counsel before an appeal is requested.

(16) Any case docketed in the Tax Court if the notice of deficiency, notice of liability, or final adverse determination letter is based upon a technical advice memorandum issued by an Office of Associate Chief Counsel in that case involving an adverse action described in paragraph (c)(15) of this section.

(17) A decision by an Office of Associate Chief Counsel regarding whether to issue a letter ruling or the content of a letter ruling. The subject of the letter ruling may be considered by Appeals if all other requirements in this section are met. For example, if an Office of Associate Chief Counsel issues an adverse letter ruling to a taxpayer, the taxpayer cannot immediately appeal the issuance of the adverse letter ruling. If the taxpayer subsequently files a return taking a position that is contrary to the letter ruling and that position is audited by the IRS, Appeals can consider that Federal tax controversy if all other requirements in this section are met.

(18) Any issue based on a taxpayer's argument that a statute violates the United States Constitution unless there is an unreviewable decision from a Federal court holding that the cited statute is unconstitutional. For purposes of this paragraph, an argument that a statute violates the United States Constitution includes any argument that a statute is unconstitutional on its face or as applied to a particular person. This exception does not preclude Appeals from considering a Federal tax controversy based on arguments other than the constitutionality of a statute, such as whether

the statute applies to the taxpayer's facts and circumstances. For purposes of this section, the term *unreviewable decision* is a decision of a Federal court that can no longer be appealed to any Federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was filed. Once there is an unreviewable decision no further action can be taken in the case by any Federal court.

(19) Any issue based on a taxpayer's argument that a Treasury regulation is invalid unless there is an unreviewable decision from a Federal court invalidating the regulation as a whole or the provision in the regulation that the taxpayer is challenging. This exception does not preclude Appeals from considering a Federal tax controversy based on arguments other than the validity of a Treasury regulation, such as whether the Treasury regulation applies to the taxpayer's facts and circumstances.

(20) Any issue based on a taxpayer's argument that a notice or revenue procedure published in the Internal Revenue Bulletin is procedurally invalid unless there is an unreviewable decision from a Federal court holding it to be invalid. This exception does not preclude Appeals from considering a Federal tax controversy based on arguments other than the validity of a notice or revenue procedure, such as whether the notice or revenue procedure applies to the taxpayer's facts and circumstances.

(21) Any case or issue designated for litigation, or withheld from Appeals consideration in a Tax Court case, in accordance with guidance regarding designating or withholding a case or issue. For purposes of this section, *designation for litigation* means that the Federal tax controversy, comprising an issue or issues in a case, will not be resolved without a full concession by the taxpayer or by decision of the court.

(22) Any case docketed in the Tax Court if the notice of deficiency, notice of liability, or other determination was issued by Appeals unless the exception in paragraph (f)(1) of this section (regarding when the Tax Court remands a CDP case for reconsideration) applies.

(23) A case in which timely Appeals consideration must be requested before a petition is filed in the Tax Court because exhaustion of administrative review, including consideration by Appeals, is a prerequisite for the Tax Court to have jurisdiction, and the taxpayer failed to timely request Appeals consideration. For example, Appeals consideration must be requested before a petition is filed in the Tax Court regarding a declaratory judgment request under sections 7428 (relating to declaratory judgment on the classification of specified organizations), 7476 (relating to declaratory judgment on qualification of certain retirement plans), or 7477 (relating to declaratory judgment on the value of certain gifts) of the Code.

(24) An administrative determination made by the IRS to deny or revoke a Certified Professional Employer Organization certification.

(d) *Originating office has completed its review*--(1) *In general*. Appeals consideration of a matter or issue is appropriate only after the originating IRS office has completed its action on the Federal tax controversy and issued an administrative determination or a proposed administrative determination accompanied by an offer for consideration by Appeals. If the originating office has not completed its action regarding the Federal tax controversy, the request for Appeals consideration is premature. Appeals may consider the Federal tax controversy if the taxpayer requests consideration after the originating office's action is complete and if all requirements in this section are met.

(2) *Exception for early consideration programs*. Where administrative guidance permits the originating office to engage Appeals prior to completing its action regarding the Federal tax controversy, Appeals may consider the Federal tax controversy under the terms of that administrative guidance, such as mediation under a fast track settlement program or early consideration of some issues under an early referral program.

(e) *Procedural and timing requirements are followed*. A request for Appeals consideration of a Federal tax controversy must be submitted in the time and manner prescribed in applicable forms, instructions, or other administrative guidance. All procedural requirements must be complied with before Appeals will consider a Federal tax controversy. In addition, there must be sufficient time remaining on the appropriate limitations period for Appeals to consider the Federal tax controversy, as provided in administrative guidance. In a case docketed in the Tax Court, if the Office of Chief Counsel has recalled the case from Appeals or, if not recalled, Appeals has returned the case to the Office of Chief Counsel so that it is received by the Office of Chief Counsel prior to the date of the calendar call for the trial session, further consideration by Appeals will not be available if there is insufficient time for such consideration.

(f) *One opportunity for consideration by Appeals*--(1) *In general*. If a Federal tax controversy is eligible for consideration by Appeals and the procedural and timing requirements are followed, a taxpayer generally has one opportunity for Appeals to consider such matter or issue in the same case for the same period or in any type of future case for the same period, unless the Tax Court remands for reconsideration in a collection due process case. Appeals has considered a Federal tax controversy if the Federal tax controversy was before Appeals for consideration and Appeals issued a determination or made a settlement offer, Appeals decided the Federal tax controversy was not susceptible to settlement, or the person who requested consideration was issued and failed to respond to Appeals' communications and as a result of that failure Appeals issued or made a determination. Appeals also has considered a Federal tax controversy if the taxpayer notified the Office of Chief Counsel or the IRS that the taxpayer wanted to discontinue settlement consideration by Appeals or requested to transfer from Appeals to the Office of Chief Counsel settlement consideration of a Federal tax controversy that is currently before the Tax Court.

(2) *Exceptions*. Notwithstanding paragraph (f)(1) of this section, taxpayers retain the opportunity for a traditional appeal after participating in an early consideration program as described in paragraph (d)(2) of this section if no agreement was reached between the taxpayer and the IRS originating office. Taxpayers may be able to request post-Appeals mediation under the terms of administrative guidance after a traditional appeal if no agreement was reached between the taxpayer

and Appeals. Notwithstanding paragraph (f)(1) of this section, taxpayers who provide new information to the IRS and who meet the conditions and requirements for audit reconsideration or for reconsideration of issues previously considered by Appeals may have an opportunity for Appeals consideration.

(g) *Special rules*. The following special rules apply to this section:

(1) *Appeals reconsideration*. Notwithstanding the exception in paragraph (c)(22) of this section, if Appeals issued a notice of deficiency, notice of liability, or other determination without having fully considered one or more issues because of an impending expiration of the statute of limitations on assessment, Appeals may choose to have the Office of Chief Counsel return the case to Appeals for full consideration of the issue or issues once the case is docketed in the Tax Court.

(2) *Coordination between Office of Chief Counsel and Appeals*. Appeals and the Office of Chief Counsel may determine how settlement authority in a Federal tax controversy that is before the Tax Court is transferred between the two offices.

(h) *Applicability date*. This section is applicable to requests for consideration by Appeals made on or after [insert date 30 days after a Treasury decision finalizing these rules is published in the **Federal Register**].

§301.7803-3 Requests for referral to Appeals following the issuance of a notice of deficiency.

(a) *Notice and protest*. If any taxpayer requests consideration by Appeals of any matter or issue eligible for consideration by Appeals under section 7803(e)(5) of the Internal Revenue Code (Code) (relating to limitation on designation of cases as not eligible for referral to Appeals) and the request is denied, the Commissioner of Internal Revenue or Commissioner's delegate shall provide the taxpayer a written notice that provides a detailed description of the facts involved, the basis for the decision to deny the request, a detailed explanation of how the basis for the decision applies to such facts, and the procedures for protesting the decision to deny the request if the requirements of paragraphs (a)(1) though (5) of this section are met:

(1) *Notice of deficiency*. The taxpayer received a notice of deficiency authorized under section 6212 of the Code (relating to notice of deficiency).

(2) *Frivolous positions*. The issue involved is not a frivolous position within the meaning of section 6702(c) of the Code (regarding listing of frivolous positions).

(3) *Multiple requests for referral to Appeals*. The taxpayer has not previously requested consideration by Appeals, pursuant to section 7803(e)(5), of the same matter or issue in a taxable year or period.

(4) *Previous Appeals consideration*. Appeals has not previously considered the matter or issue in a taxable year or period that is the subject of the request and determined that the matter or issue could not be settled or a settlement offer was rejected, except as provided in §301.7803-2(f)(2) with respect to a taxpayer participating in an early consideration program.

(5) *Notice of deficiency with more than one matter or issue*. If the notice of deficiency for which the taxpayer requests Appeals consideration includes more than one matter or issue in a taxable year or period, the taxpayer must request referral for Appeals consideration and submit all such matters or issues at the same time.

(b) *Applicability date.* This section is applicable to relevant requests for consideration by Appeals made on or after [insert date of Treasury decision finalizing these rules is published in the **Federal Register**].

Douglas W. O'Donnell,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on September 9, 2022, 11:15 a.m. and published in the issue of the Federal Register for September 13, 2022, 83 FR 55934)

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

Numerical Finding List[1]

Bulletin 2022–39

Announcements:

2022-14, 2022-31 I.R.B. *136*
2022-15, 2022-31 I.R.B. *136*
2022-16, 2022-33 I.R.B. *144*
2022-17, 2022-35 I.R.B. *179*
2022-18, 2022-36 I.R.B. *190*
2022-19, 2022-36 I.R.B. *191*
2022-20, 2022-38 I.R.B. *238*

Notices:

2022-29, 2022-28 I.R.B. *66*
2022-30, 2022-28 I.R.B. *70*
2022-31, 2022-29 I.R.B. *85*
2022-32, 2022-32 I.R.B. *137*
2022-33, 2022-34 I.R.B. *147*
2022-34, 2022-34 I.R.B. *150*
2022-35, 2022-36 I.R.B. *184*
2022-36, 2022-36 I.R.B. *188*
2022-37, 2022-37 I.R.B. *234*
2022-38, 2022-39 I.R.B. *239*

Proposed Regulations:

REG-130975-08, 2022-28 I.R.B. *71*
REG 130675-17, 2022-30 I.R.B. *104*
REG-125693-19, 2022-39 I.R.B. *241*

Revenue Procedures:

2022-25, 2022-27 I.R.B. *3*
2022-28, 2022-27 I.R.B. *65*
2022-26, 2022-29 I.R.B. *90*
2022-32, 2022-30 I.R.B. *101*
2022-30, 2022-31 I.R.B. *112*
2022-29, 2022-33 I.R.B. *141*
2022-34, 2022-33 I.R.B. *143*

Revenue Rulings:

2022-12, 2022-27 I.R.B. *1*
2022-13, 2022-30 I.R.B. *99*
2022-14, 2022-31 I.R.B. *110*
2022-15, 2022-35 I.R.B. *152*
2022-17, 2022-36 I.R.B. *182*

Treasury Decisions:

9963, 2022-34 I.R.B. *145*
9964, 2022-35 I.R.B. *172*
9965, 2022-37 I.R.B. *192*

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2021–27 through 2021–52 is in Internal Revenue Bulletin 2021–52, dated December 27, 2021.

Finding List of Current Actions on Previously Published Items[1]

Bulletin 2022–39

[1] A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2021–27 through 2021–52 is in Internal Revenue Bulletin 2021–52, dated December 27, 2021.

Internal Revenue Service
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INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at *www.irs.gov/irb/*.

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