McDermott Will & Emery

Internal Revenue Service Alternative Dispute Resolution Techniques

April 2012

Table of Contents

Chapter 1: Pre-Audit Techniques 1

I. Letter Rulings 1

II. Pre-Filing Agreements 4

III Advanced Pricing Agreements 8

IV. Industry Issue Resolution Program 11

V. Compliance Assurance Program 12

Chapter 2: IRS Examination Procedures 15

I. Limited Issue Focused Examination ("LIFE") Program 15

II. Fast Track Dispute Resolution Program: Fast Track Settlement 16

III. Fast Track Dispute Resolution Program: Fast Track Mediation 18

IV. Early Referral Procedures 20

V. Accelerated Issue Resolution ("AIR") Program 21

VI. Technical Advice 23

VII. Delegation Order No. 4-24 25

VIII. Delegation Order No. 4-25 25

IX. Competent Authority Assistance 26

Chapter 3: IRS Appeals Techniques 30

I. Mutually Accelerated Appeals Process 30

II. *Ex parte* Communications 30

III. Post Appeals Mediation 31

IV. Appeals Arbitration 33

V. Simultaneous Appeals/Competent Authority Procedure 34

VI. Tax Exempt Bond Mediation Pilot Program 34

Chapter 4: Tax Court Alternative Dispute Resolution 36

I. Tax Court Arbitration 36

II. Tax Court Mediation 36

Chapter 1: Pre-Audit Techniques

I. Letter Rulings

A. IN GENERAL. Rev. Proc. 2012-1, 2012-1 I.R.B. 1, sets forth the procedure for seeking private letter rulings.

1. Prior to filing a return, taxpayers may request a letter ruling from an Associate Office to determine the tax status or tax effects of their acts or transactions.

2. A letter ruling interprets the tax laws and applies them to the taxpayer's specific set of facts. Only the requesting taxpayer may rely upon a letter ruling. A letter ruling may be issued with a closing agreement.

3. A letter ruling may be issued in response to a request to change a taxpayer's method of accounting or period.

4. If the taxpayer's situation involves multiple issues, the Service will typically issue a single letter ruling. The Service may issue separate letter rulings for each issue if the taxpayer clearly requests.

B. LETTER RULING ISSUES.

1. ELIGIBLE ISSUES. Letter rulings are available on issues within the jurisdiction of all the Associate Offices.

2. EXCLUDED ISSUES. The Service may not issue letter rulings on issues concerning Alcohol, Tobacco, and Firearm taxes, or Employee Plans and Exempt Organizations.

3. The Service will ordinarily not issue letters in the following circumstances:

   a. If the request involves an issue under examination or consideration or the issue is in litigation;

   b. On part of an integrated transaction;

   c. On which of two entities is a common law employer;

   d. To business associations or groups;

   e. On issues failing to address the tax status, liability, or reporting obligations of the taxpayer;

   f. To foreign governments;

   g. On federal tax consequences of proposed legislation;

   h. Before issuance of a regulation or other published guidance;

   i. On frivolous issues;

   j. On issues that are clearly and adequately addressed by statute, regulations, court decisions, or authority published in the Internal Revenue Bulletin;

   k. On alternative plans or hypothetical situations;

l. On property conversion after a return is filed.

C. LETTER RULING PROCEDURE AND PROCESSING.

1. REQUESTING A LETTER RULING. A letter ruling must contain the following:

   a. A description of the taxpayer's business operations;

   b. A statement of the business reasons for the transaction;

   c. A detailed description of the transaction;

   d. True copies of all documents pertaining to the transaction, including balance sheets and profit and loss statements if the request concerns a corporate distribution, reorganization or similar transaction;

   e. All relevant parts of foreign laws, including statutes and regulations;

   f. Analysis of the material facts;

   g. Statement of Authorities supporting the taxpayer's views;

   h. Statement of Authorities contrary to the taxpayer's views;

   i. Statement identifying pending legislation that would affect the issue.

2. TIME OF REQUEST. An Associate Office will issue a letter ruling on a proposed transaction or a completed transaction if the letter ruling request is submitted before the return is filed for the year in which the transaction is completed.

3. CONSULTATION WITH TAXPAYER.

   a. INITIAL CONTACT. Once a letter ruling is requested, a branch representative of the Associate Office contacts the taxpayer within 21 days to discuss the ruling. If the ruling appears to be adverse to the taxpayer, the branch representative will determine if the transaction may be modified to obtain a favorable ruling, but is not bound by any informal opinion expressed. The representative may request additional information, which must be submitted within 21 days. If the taxpayer fails to comply with timely submission, the letter request is closed.

   b. OPPORTUNITY TO WITHDRAW. Before a letter ruling is officially issued, a Service officer will advise the taxpayer of the Service's conclusions and will offer the taxpayer an opportunity to withdraw the letter if the results are adverse to the taxpayer.

4. LETTER RULING CONFERENCES. Taxpayers by right are permitted one conference and may be granted additional conferences at the Service's discretion. During the conference, the Service may make tentative recommendations on substantive issues.

5. PRE-SUBMISSION CONFERENCES. Taxpayers may also schedule a pre-submission conference to discuss substantive or procedural issues related to a transaction. Any discussion of substantive issues is not binding on the Service.

6. USER FEE.

   a. IN GENERAL. The user fee for most letter rulings is $18,000. User fees are payable in advance. Ordinarily, the fee is nonrefundable unless the Associate Office declines to issue a ruling.

   b. FEE CATEGORY. User fees fall into categories or subcategories established by the Secretary and determined after taking into account the average time for, and difficulty of, complying with request. If a request dealing with one transaction involves more than one fee category, the highest fee applies to each of the categories involved.

   c. EXEMPTION FROM USER FEE. User fees do not apply to certain requests, including requests for a change in accounting period or method of accounting permitted by a published automatic change revenue procedure.

   d. FEE SCHEDULE

      (1) Letter ruling requests involving Accounting Periods

         (1) $2,700

      (2) Letter ruling requests involving Changes in Accounting Methods

         (1) $7,000 (Application for Change in Accounting Method); $8,000 (Extension of Time to File)

      (3) Letter ruling requests for relief under § 301.9100-3

         (1) $10,000

      (4) All other letter ruling requests

         (1) $18,000

7. RETURN FILING REQUIREMENTS. A taxpayer who receives, prior to filing a return, a letter ruling about any consummated transaction related to the return must attach a copy of the letter ruling to the return.

8. EXPEDITED HANDLING.

   a. IN GENERAL. The Service generally processes requests in the order received. In rare and unusual circumstances, the Service may expedite a request.

   b. RARE AND UNUSUAL CIRCUMSTANCES. The Service may expedite a request when factors outside of the taxpayer's control create a real business need to obtain a letter ruling before a certain date to avoid serious business consequences.

      (1) Meeting a court or governmental agency deadline for the completion of a transaction or avoiding a business emergency (such as a hostile takeover) are examples stated in the Revenue Procedure as factors outside of the taxpayer's control creating a real business need.

      (2) The scheduling of a transaction's closing date, a board of directors or shareholders' meeting, or stock price fluctuation are insufficient reasons to expedite a request.

9. TRANSACTIONS UNDER § 368 AND § 355. The Service will expedite letter ruling requests to determine whether a transaction constitutes a reorganization under § 368 or a distribution under § 355. The Service will endeavor to issue the letter ruling within ten weeks of receiving the request.

10. SEPARATE LETTER RULINGS. The Service generally issues separate letter rulings for substantially identical letter ruling requests, with the exception of related § 301.9100 requests for extension of time to file an entity classification election.

11. REVOCATION AND MODIFICATION. Letter rulings are subject to revocation if in error regarding material facts or due to a change of law. Letter rulings revoked or modified on material changes in fact generally apply retroactively. Otherwise, letter rulings are not generally revoked or modified retroactively.

12. WITHDRAWAL. A taxpayer may withdraw a letter ruling request at any time before it is signed by the Service. In the event of a withdrawal, the Service will not return any correspondence or exhibits related to the request. Any conclusions generally may be used by Service officials in later examination of the return unless the taxpayer submits a written statement that the transaction has or will be abandoned and if the Associate Office has not already formed an adverse opinion.

II. Pre-Filing Agreements

A. IN GENERAL. Rev. Proc. 2009-14, 2009-3 I.R.B. 324, *superseding* Rev. Proc 2007-17, 2007-4 I.R.B. 368, Rev. Proc. 2005-12, 2005-3 I.R.B. 311, makes the program for pre-filing agreements ("PFAs") announced in Notice 2000-12, 2000-09 I.R.B. 727, permanent. PFAs allow for resolution, prior to filing a tax return, of issues likely to be disputed in post-filing audits. *See also* I.R.M. 4.30.1 (1/09/2002).

B. ELIGIBILITY AND ADMINISTRATION. Participation in the program is limited to taxpayers under the jurisdiction of the Large Business and International Division ("LB&I"). LB&I administers this program.

C. ELIGIBLE TAXABLE YEARS. An eligible taxpayer may request a PFA for the current taxable year, for any prior taxable year for which the return is not yet due (including extensions) and is not yet filed, and for the four taxable years beyond the current year. However, if the PFA relates to an approved change in the method of accounting, then a PFA may not issue for future taxable years, except that a determination of the amount of the § 481(a) adjustment shall apply to another taxable year for which such amount is taken into account.

D. DESCRIPTION AND CONTENT OF PFA. A PFA that makes determinations for the current year or any prior year is a closing agreement under § 7121 relating to one or more specific issues arising from transactions entered into by the taxpayer during a taxable period ending prior to the date of the agreement. The form of a PFA that is a closing agreement must comply with Rev. Proc. 68-16, 1968-1 C.B. 770. A PFA that makes a determination for one or more future taxable years as well as for the current year or any prior year is not a closing agreement but is still a binding contract between the Service and the taxpayer. There is no specific form for such a non-statutory agreement. A non-statutory agreement may condition its determinations on the continued validity of one or more "stated assumptions" (any fact related to the taxpayer, a third party, an industry, or business and economic conditions whose continued existence is material to the determinations of the PFA), such that if at any time a stated assumption is no longer valid, the agreement will terminate on the first day of the taxable year in which the stated assumption is no longer valid. Any PFA is confidential under § 6103(b)(2)(D).

E. SUBJECT MATTER OF PFA. PFAs are intended to resolve factual issues and apply settled legal principles to those facts. Rev. Proc. 2009-14 only applies to well-settled principles of law. The Service may also consider PFAs regarding the methodology used by a taxpayer to determine the appropriate amount of an item of income, allowance, deduction, or credit. The Service may consider entering into a PFA on an issue under the jurisdiction of an operating division of the Service other than LB&I, but only with the concurrence of that other division. PFAs may not be used to resolve the interpretation of legal rules or disagreements over the correct

application of the tax laws (except as authorized under Delegation Order Nos. 236 and 4-25 (the renumbered version of Delegation Order No. 247)). *See* IRS Examination Procedures §§ VIII, IX, infra.

F. ELIGIBLE ISSUES. Rev. Proc. 2009-14 does not contain a list of eligible issues; any issue that requires either a determination of facts or application of well-established legal principles to known facts that is not excluded by this revenue procedure is *likely* suitable for a PFA. The Service will generally consider entering into a PFA on factual issues and well-established law or on the methodology used by a taxpayer to determine the appropriate amount of an item of income, deduction, credit, or allowance. Issues under the jurisdiction of an operating division of the Service other than LB&I are generally eligible for consideration, subject to the other requirements of Rev. Proc. 2009-14 and only with the concurrence of the other operating division. The Service may refuse to address an issue in a PFA based on considerations of sound tax administration. The Service must coordinate and consult with the Associate Chief Counsel having subject matter jurisdiction over any issue before making any decision to proceed with the taxpayer's request for a PFA.

1. ELIGIBLE INTERNATIONAL ISSUES REQUIRING ASSOCIATE CHIEF COUNSEL (INTERNATIONAL) CONCURRENCE IN EXECUTION. Rev. Proc. 2009-14 contains a list of international issues that are likely suitable for a PFA but also require that the Associate Chief Counsel (International) concur with the acceptance of the issue into the PFA program. The eligible issues are:

   a. Whether a unit of the taxpayer's trade or business is a qualified business unit within the meaning of § 989(a) and the regulations promulgated thereunder;

   b. Whether the taxpayer is engaged in a trade or business within the United States (excluding questions under § 864(b)(2));

   c. The amount of gross income that is effectively connected with the conduct by the taxpayer of a trade or business within the United States (*See* Rev. Proc. 2008-31, 2008-23 I.R.B. 1133 (Advance Pricing Agreement));

   d. Factual determinations concerning the extent to which, under § 882(c), deductions are connected with income that is effectively connected with the taxpayer's conduct of a trade or business within the United States; and

   e. Whether the taxpayer has a permanent establishment in the United States for purposes of a bilateral income tax convention to which the United States is a party and, if so, what profits are attributable to that permanent establishment. *See* Rev. Proc. 2008-31.

2. SPECIAL PROVISIONS FOR REQUESTS ON INTERNATIONAL ISSUES. In addition to the generally applicable provisions of Rev. Proc. 2009-14, any request for a PFA on an issue having international implications must also comply with the following requirements:

   a. A PFA and any factual information contained in the background files is subject to exchange of information under income tax treaties or tax information exchange agreements in accordance with the terms of such treaties and agreements;

   b. Taxpayers are encouraged to seek competent authority consideration under the mutual agreement procedure of any applicable United States income tax convention; and

   c. Taxpayers may request a PFA for an international issue that is the subject of a previously submitted request for competent authority assistance.

G. EXCLUDED ISSUES. The Service generally will not enter into a PFA in 13 areas, including:

1. Transfer pricing issues addressed under the Advance Pricing Agreement program;

2. Issues relating to a change in method of accounting. However, the Service and taxpayer may enter into a PFA with respect to approved changes in the method of accounting, where the PFA includes determinations described in section 11 of Rev. Proc. 97-27, 1997-1 C.B. 680, or a similar provision or its successor. A PFA under this provision may only apply to the taxable year of change and must include a statement that nothing in the agreement precludes the taxpayer from requesting, or the Service from requiring, a change in the taxpayer's method of accounting for years after the year of change;

3. Issues involving the annual accounting period;

4. Issues of reasonable cause, due diligence, good faith, clear and convincing evidence, or any other similar standard under Subtitle F (Procedure and Administration) of the Code;

5. Issues involving the applicability of any penalty or criminal sanction;

6. Issues that are, or will be, the subject of a pending or completed request for a determination letter, technical advice memorandum, or closing agreement previously issued to or regarding the taxpayer;

7. Issues for which the taxpayer proposes a resolution that is contrary to a private letter ruling, determination letter, technical advice memorandum, or closing agreement previously issued to or regarding the taxpayer;

8. Issues for which the taxpayer proposes a resolution that is contrary to a position proposed by the Service in response to a request for a private letter ruling or determination letter that was withdrawn by the taxpayer;

9. Issues that are the subject of litigation between the Service and the taxpayer with respect to an earlier taxable period;

10. Issues designated for litigation for an earlier taxable year of the taxpayer by the Office of Chief Counsel;

11. Issues involving a tax shelter described in § 6662(d)(2)(C)(ii);

12. Issues that require the Service to determine whether the taxpayer or another entity is the common law employer; and

13. Issues relating to transactions that have not yet occurred, regardless of whether the issue otherwise would qualify as one on which the Service will issue letter rulings or other forms of written guidance as described in Rev. Proc. 2009-1, 2009-1 I.R.B. 1, and successor annual revenue procedures.

H. PFA PROCEDURES AND PROCESSING.

1. REQUESTING A PFA. A taxpayer that is currently under examination by LB&I should submit the request to the LB&I Team Manager. A taxpayer who is not currently under audit should submit the request to the PFA Program Manager in Washington, D.C. either by mail or by fax. A PFA request must include numerous items, including:

    a. A general description about the taxpayer and the taxpayer's business;

b. A description of the issue and summary of all facts that are relevant and material to the issue and, in the case of agreements for future taxable years, any related factual assumptions that may be appropriate;

c. A statement whether it is a "whipsaw" issue;

d. A summary of all relevant legal authorities and a discussion of why the issue is an eligible issue for a PFA;

e. A summary and discussion of any known authorities that may be potentially contrary to the position advanced;

f. A discussion of how the PFA will affect taxable years before or after the years for which the PFA is sought;

g. A description of the proposed methodology;

h. A discussion of whether the issue qualifies for mutual agreement procedure consideration;

i. A statement whether the taxpayer has, for the current taxable year or any prior taxable year, requested a private letter ruling (including a request for consent to a change in method of accounting or a request to adopt, change, or retain an annual accounting period), determination letter, or technical advice on the issue;

j. A discussion of whether the issue can reasonably be resolved by the earliest date on which the taxpayer intends to file any relevant return; and

k. A description of the availability, organization and location of the records and other information that substantiates the taxpayer's proposed position on the issue.

2. USER FEE. The user fee is $50,000 for taxpayers selected to participate in the PFA program. A fee will be assessed for each separate and distinct issue. This fee is generally non-refundable.

3. CRITERIA FOR SELECTION AND NOTICE. LB&I considers many factors, such as the suitability of the issue for the PFA program, the availability of Service resources, and the time remaining until the due date of the return to which the PFA relates, in selecting whether a taxpayer can participate in the PFA program. Within 15 business days after receipt of a request for a PFA, LB&I will contact the taxpayer to acknowledge that the Service has received the request. The taxpayer will be notified in writing whether it has been selected to participate in the program and which issues the Service will consider. The taxpayer is not entitled to appeal a decision not to go forward with the PFA process.

4. CONSULTATION WITH TAXPAYER. Once a taxpayer's request is accepted, the taxpayer and audit team will go through a joint orientation program, which will seek to agree on a proposed time frame, relevant records and testimony, IRS access to records and testimony, and, ultimately, the potential scope and nature of the proposed agreement(s).

5. FACTUAL AND ISSUE DEVELOPMENT. Facts and issues will be developed by the taxpayer and LB&I.

6. ISSUANCE OF A PFA. The issuance of a PFA is discretionary with the LB&I Industry Director. A PFA cannot resolve issues for taxpayers or years outside the jurisdiction of the LB&I.

7. RECOMMENDATION AND REVIEW. After developing the facts and issues, the Team Manager will meet informally with the taxpayer to determine if the parties can reach agreement on a proposed PFA. If the parties reach agreement, then the taxpayer will work with the Service to prepare the initial

draft of the PFA. The taxpayer and the audit team will prepare the PFA with assistance, as necessary from the PFA Program Manager, the Office of Chief Counsel, or other Service personnel. Except with regards to certain international issues, *see supra* § I.D.4, the Associate Chief Counsel having subject matter jurisdiction need not execute or give final approval to the proposed PFA.

8. RETURN FILING REQUIREMENTS, CONTINUATION OF PROCESS. The taxpayer's return filing requirements are not affected by the PFA. The taxpayer must attach the PFA to the tax return if it is executed prior to filing. If the taxpayer and the Service cannot enter into an agreement prior to the filing of the return, then the taxpayer and the Service can continue to attempt to resolve the issue and enter into a PFA. If the filed return is inconsistent with the terms of the PFA, the taxpayer must agree to file an amended return consistent with the terms of the PFA.

9. FAILURE TO AGREE. If the parties cannot execute a PFA, then the taxpayer and the Service can continue the resolution process through a post-filing procedure. If the parties cannot agree through a post-filing procedure, then the taxpayer may pursue an administrative appeal.

10. WITHDRAWAL. At any time prior to the execution of a PFA, the taxpayer or the Service may withdraw from consideration of all or part of the request for a PFA. The withdrawal must be in writing and signed by the party initiating withdrawal.

III Advanced Pricing Agreements

A. IN GENERAL.

1. In Rev. Proc. 2006-9, 2006-2 I.R.B. 1, *superseding* Rev. Proc. 2004-40, 2004-29 I.R.B. 50, the Service issued updated procedures for obtaining Advance Pricing Agreements ("APAs"). The APA process is an advance determination approach, administered by the Associate Chief Counsel (International), applicable to transfer pricing issues. APAs allow the taxpayer and IRS prospectively to avoid transfer pricing disputes under § 482 and relevant income tax treaties to which the United States is a party and also to give the taxpayer certainty of tax treatment. The process allows the taxpayer and the IRS to agree on: (1) the factual nature of the inter-company transaction to which the APA applies; (2) an appropriate transfer pricing method ("TPM") to be applied to any allocation of income, deductions, credits or allowances among two or more controlled organizations; and (3) an expected range of results from applying the TPM to the transactions. The APA Program is designed to promptly and fairly resolve APA requests based on principled and cooperative negotiations between the Service and the taxpayer.

2. The IRS is prohibited by statute from disclosing redacted APAs, so taxpayers must rely on law and accounting firms with prior APA experience to gain insight into advance pricing agreements. An APA, any background information related to the APA, and the taxpayer's request for the APA and return information are confidential under § 6103(b). Rev. Proc. 2006-9 advises that taxpayers should propose a term for the APA of at least five years unless a compelling reason exists for a shorter term.

3. On July 20, 2005, the IRS updated its website to formalize changes in its APA program involving (1) new case management procedures, (2) establishment of issue and industry coordination teams, and (3) new forms to submit with annual APA reports. The new case management procedures are intended to speed processing of APA requests.

4. Rev. Proc. 2008-31, 2008-23 I.R.B. 1 modified Rev. Proc. 2006-9 to expand the types of issues that may be resolved through APAs to include attribution of profits to a permanent establishment, determining effectively connected income, and certain sourcing issues.

B. PROCEDURES.

1. The taxpayer may request a pre-filing conference ("PFC") to explore the suitability of an APA and PFCs are recommended to ensure that the APA request is appropriate and focuses on relevant issues. Discussions center on the covered transactions, the potentially applicable TPMs, the probability of agreement among the competent authorities, and the APA Program's schedule and method for coordinating and evaluating the request. The IRS will clarify what data, documentation and analyses are likely to be necessary. PFCs may be held in either Washington, DC, or in California. The taxpayer may request a PFC on an anonymous basis, if desired. In the case of a PFC regarding a bilateral APA request, a Competent Authority analyst may attend. At least one week in advance of the PFC, the taxpayer must send a brief pre-filing submission outlining the issues and listing the persons attending the PFC (using pseudonyms, first names, or job titles only if on an anonymous basis).

2. After the pre-filing conference, the taxpayer submits a formal APA request supported by relevant data concerning the industry, markets, and countries to be covered by the agreement. It also must include detailed information relating to the parties to the transactions and the proposed TPM, and it must explain the relationship of the covered transactions to other related party transactions that the taxpayer does not intend to cover. If the APA request is unilateral (*i.e.*, it involves only an agreement between the taxpayer and the Service, and no competent authorities), then the taxpayer must provide an explanation of why it is not bilateral. If appropriate, the taxpayer should request competent authority consideration. An APA request will be considered filed on the date the required user fee is paid, provided that a substantially complete APA request is filed with the APA Program within 120 days of the Federal income tax return due date (including extensions) for the first proposed APA year.

3. Having received the APA request, a representative of the APA Program will contact the taxpayer to discuss any preliminary questions or to ask for additional information. The APA Program will establish a team for evaluation of the request. The APA Team evaluates the taxpayer's proposal by analyzing the data supplied by the taxpayer, or requested by the Service, together with other relevant information regarding the taxpayer and its industry. According to the Chief Counsel Directives Manual, APA team leaders should ask officials from the Industry Specialization Program and the IRS Office of Financial Products and Transactions to participate in negotiations if they are also involved in transfer pricing compliance activities involving the taxpayer.

4. The APA Team will arrange with the taxpayer for an initial meeting to take place within 45 days from the assignment of the APA Team Leader. At the initial meeting, the APA Team will review the taxpayer's facts and discuss and clarify the issues. In connection with the initial meeting, the APA Team and taxpayer agree on a Case Plan governing the conduct of the case that lists a schedule for seeking to resolve each issue raised by the initial Service review of the request.

5. Following negotiations, the IRS and the taxpayer may enter into a binding APA setting forth the parties to the agreement, the transactions covered, the agreed-on TPM, and a range of expected arm's length results. Signature by the APA Director and the taxpayer will constitute agreement to the APA.

6. Where any of the parties to a request is entitled to obtain assistance under the mutual agreement provision of a tax treaty between a foreign country and the United States, or under Rev. Proc. 89-8, 1989-1 C.B. 778, *modified by* Rev. Proc. 99-32, 1999-2 C.B. 296, *superseded by* Rev. Proc. 2006-23, 2006-20 I.R.B. 900, the competent authorities may enter into agreements concerning the APA.

7. If the Service proposes to reject the APA request, the taxpayer is granted one conference of right. Other conferences are granted at the Service's discretion.

C. FEE.

1. The fee is generally non-refundable unless the Service believes that refunding it would be appropriate under the circumstances. Except as provided below, the user fee for an APA request is $50,000.

a. Except as provided in subsection "1.c." below, the user fee for an APA renewal request is $35,000. For this purpose, an APA request will be considered an APA renewal request if its subject matter is substantially the same as in a previous APA request by the taxpayer.

b. The user fee to amend an APA request or to amend a completed APA is $10,000. For this purpose, a request to amend will be deemed to occur if a taxpayer requests changes to an APA request or to a completed APA that requires substantial additional work by the APA Team.

c. The user fee for a small business APA request is $22,500. For this purpose, an APA request will be considered a small business APA request if the taxpayer has gross income of less than $200 million or the aggregate value of one covered transaction does not exceed (i) $50 million annually and (ii) $10 million annually with respect to covered transactions involving intangible property. Gross income, for the purposes of Rev. Proc. 2006-9, includes the gross income of all organizations, trades, or businesses owned or controlled directly or indirectly by the same interests controlling the taxpayer. Gross income must be computed for the last full (12 month) taxable year ending before the date the APA request was filed.

D. COMPETENT AUTHORITY CONSIDERATION. The Service will initiate coordination among the taxpayer, the Service, and the competent authorities of treaty partners at the earliest possible stage of consideration of an APA request including, when appropriate, the pre-filing stage. If the competent authorities are unable to reach an agreement or the taxpayer does not accept the competent authority agreement, the taxpayer may withdraw its request or, at its discretion, the Service may negotiate a unilateral APA with the taxpayer.

E. ROLLBACKS. The taxpayer can request that the APA be applied to tax years prior to those covered by the APA. The Service maintains discretion of whether to grant the rollback request.

F. ADMINISTERING THE APA.

1. ANNUAL REPORTS. For each year covered by the APA, the taxpayer must submit an annual report describing the taxpayer's actual operations for the year and demonstrating compliance with the APA. The report will include any requests to renew, modify, or cancel the APA. Failure to timely file the annual report is grounds for canceling the APA.

2. PRIMARY AND SECONDARY ADJUSTMENTS.

a. If the taxpayer's actual transactions do not comply with the TPM, the taxpayer must nonetheless report its taxable income in an amount consistent with the TPM (an APA "primary adjustment").

b. An APA primary adjustment requires a "secondary adjustment" in order to conform the taxpayer's accounts, which may result in tax consequences.

c. If a taxpayer makes a primary adjustment, the taxpayer and its related foreign entity may elect APA revenue procedure treatment and avoid the possible adverse tax consequences of a secondary adjustment. Revenue procedure treatment involves the application of Rev. Proc. 99-32, 1999-2 C.B. 296, which allows the taxpayer to establish an account receivable from, or payable to, its related foreign entity in the amount of the APA primary adjustment.

3. REVISING THE APA. If there is a change in a critical assumption, or a material change in governing case law, statute, regulation, or a treaty, then the APA Director and the taxpayer will discuss revising the APA. In the event of the failure of a critical assumption, the taxpayer must notify the APA Director and provide documentation and a statement that revision appears appropriate.

4. RENEWING THE APA. The taxpayer requests a renewal by following the form and procedures that apply to initial APA requests. The APA Program endeavors to expedite the processing of a renewal APA.

G. SPECIAL RULES FOR SMALL BUSINESS TAXPAYERS AND SMALL TRANSACTIONS. Rev. Proc. 2006-9 provides special APA rules for taxpayers with total gross income of $200 million or less ("SBTs") and for taxpayers with gross income of more than $200 million when the APA covers a "small transaction" (as defined *supra* in section II.C.1.c.). These rules are designed to reduce the administrative burden, time, and cost of entering into a standard APA. At the request of an SBT, the IRS may do any of the following:

1. Hold a pre-filing conference before a filing fee is paid by the SBT and commence due diligence analysis at the beginning of the process to accelerate the conclusion of the APA negotiations;

2. Negotiate the reduction or elimination of specific elements otherwise required under the APA procedures;

3. Hold all meetings at a place convenient to the SBT; or

4. Reasonably assist the SBT in the selection and evaluation of comparables or the computation of adjustments to comparables under Treas. Reg. § 1.482-1(e).

H. ADVANCE PRICING AND MUTUAL AGREEMENT PROGRAM. Effective February 26, 2012, the APA program and those Competent Authority Assistance requests (see Chapter 2, Part IX) regarding transfer pricing, permanent establishment, and allocation issues will be addressed by the newly created Advance Pricing and Mutual Agreement ("APMA") program.

1. The APMA program will be within LB&I Division of the IRS rather than the Office of the Associate Chief Counsel. Therefore, APA requests and requests for Competent Authority assistance should be sent to the Deputy Commissioner of the LB&I division.

2. In Announcement 2012-38, the IRS announced its plan to seek public comment before revising the existing published guidance with respect to requests for APAs and Competent Authority assistance. Taxpayers are advised to continue to follow and rely upon Rev. Proc. 2006-9, 2006-1 C.B. 1133 with respect to requests for APA's and Rev. Proc. 2006-54, 2006-2 C.B. 1035 with respect to requests for Competent Authority assistance.

IV. Industry Issue Resolution Program

A. IN GENERAL. In Rev. Proc. 2003-36, 2003-18 C.B. 859, *superseding* Notice 2002-20, the IRS describes the procedures under the Industry Issue Resolution ("IIR") Program, which it initially announced in Notice 2000-65, 2000-65 I.R.B. 1. *See also* I.R.M. 32.4.3 (8/11/2004). The IIR Program attempts to identify frequently disputed or burdensome tax issues that are common to a significant number of business taxpayers. While the pilot IIR Program was restricted to large businesses under the jurisdiction of LB&I, the Program now includes all business taxpayers and therefore the Small Business and Self Employed Division ("SB/SE") of the Service shares responsibility. Notice 2005-59, 2005-35 I.R.B. 443 provides new criteria for considering IIR submissions involving employer reimbursements of equipment expenses.

B. ISSUES UNDER THE IIR PROGRAM.

1. ISSUES APPROPRIATE FOR THE PROGRAM. Appropriate issues for consideration have two or more of the following characteristics:

a. The proper tax treatment of a common factual situation is uncertain;

b. The uncertainty results in frequent, often repetitive examinations of the issue;

c. The uncertainty results in taxpayer burden;

d. The issue is significant and impacts a large number of taxpayers; and

e. The issue requires extensive factual development, and an understanding of industry practices would assist the Service in determining the proper tax treatment.

2. ISSUES NOT APPROPRIATE FOR THE PROGRAM. Issues that (i) are unique to a small number of taxpayers; (ii) are under the jurisdiction of a Service Division other than LB&I or SB/SE; (iii) involve transactions that lack a bona fide business purpose; or (iv) involve transfer pricing or international tax issues are inappropriate for the IIR Program.

3. EXAMPLES OF ISSUES RESOLVED. The issues resolved through IIR include: (1) providing restaurateurs with a safe harbor method of accounting for the cost of "smallwares;" (2) clarifying how properly to record a loan as a "loss asset" under the bad debt conformity method of accounting; (3) providing auto dealerships a simple way to determine the amount to include in employees' pay for use of demo vehicles; (4) allowing golf course land improvement costs to depreciate; (5) depreciating cable television systems under § 168; (6) determining the tax treatment of preproduction costs of creative property; (7) substantiating the amount of expenses for meals furnished by child care providers; and (8) providing auto wholesalers, manufacturers, and dealers the proper treatment of the dollar-value, LIFO inventory method for pooling purposes of crossover vehicles.

C. SUBMISSION PROCESS. While the Service does not require any particular form for submissions, it does require that the submission include a statement of the issue and why it is appropriate for the IIR Program. The submission must also include an explanation of the need for guidance and the estimated number of taxpayers affected by the issue. The submission may include a recommendation as to how the Service should resolve the issue. The submission should include contact information for the parties submitting the issue for consideration but should not include confidential or taxpayer-specific information, as the submission may be made available for public inspection. Interested parties may submit issues at any time during the year.

D. RECOMMENDATION PROCESS. The LB&I and SB/SE Divisions will recommend that particular submitted issues be included on the Treasury Department's and the Service's Guidance Priority List for the upcoming year

E. SELECTION PROCESS. A recommendation does not guarantee that the issue will be selected for the Guidance Priority List. If the Service selects a recommended issue for published guidance, it will establish an IIR Team to assist in analyzing the issue. The IIR may request that the submitter or other taxpayers voluntarily meet to provide information, including providing the Service access to their books and records. The Service encourages interested parties to submit helpful information in reaching an appropriate resolution of the issue.

F. FORM OF GUIDANCE. When the Service issues guidance, it may be in any form, but most likely will be in the form of a revenue ruling or revenue procedure that permits taxpayers to adopt a recommended treatment.

V. Compliance Assurance Program

A. GENERAL.

1. Announcement 2005-87, 2005-50 I.R.B. 1144 provides the procedure for the compliance assurance program ("CAP").

2. On January 21, 2005, the LB&I Division Commissioner announced CAP as a new pilot program to give LB&I taxpayers certainty before filing tax returns. The IRS made CAP permanent on March 31, 2011. The new Internal Revenue Manual section outlining the expanded and permanent program are found at: http://www.irs.gov/businesses/corporations/article/0,,id=237816,00.html

3. "Frequently Asked Questions" regarding the program and any changes present in the permanent program are addressed at: http://www.irs.gov/businesses/corporations/article/0,,id=237730,00.html.

4. While not intended to replace post-filing examinations, the CAP aims to audit a return so that the return as filed is substantially correct. CAP does not provide participating taxpayers with guidance on or resolving prospective or incomplete transactions outside of existing procedures. In written testimony before the Senate Finance Committee on compliance issues affecting large and midsize businesses, former IRS Commissioner Mark Everson described the CAP program as a "win-win program [that] greatly reduces taxpayers' compliance burden and their need for contingent book tax reserves, while increasing currency and allowing for more efficient use of our resources." I.R. 2006-94.

B. PRE-CAP PROGRAM. Taxpayers interested in participating in CAP are able to first participate in the Pre-CAP program, under which they are provided with a set of requirements for gaining entry into the CAP. The purpose is to help the taxpayer qualify for CAP. The taxpayer works with a Team Coordinator to develop an action plan to close all transition years except for one open and one unfiled year—a requirement to participate in CAP.

C. CAP PROCEDURE.

1. ACCOUNT COORDINATOR. The Service assigns an account coordinator to each taxpayer participating in CAP. The account coordinator serves as the primary point of contact with the Service for issue resolution. The account coordinator reviews the taxpayer's audit history and prior tax issues in order to become familiar with relevant industry trends and current business practices of the taxpayer. The account coordinator may consult with Service specialists, Appeals personnel, and Chief Counsel advisors.

2. TAXPAYER REPRESENTATIVE. A taxpayer must designate personnel to act as the primary contact for the account coordinator.

3. SERVICE REQUESTS. The Service has asked taxpayers in CAP to provide the following:

a. An industry overview

b. Current organizational charts reflecting all related entities and the flow of relevant information involving those entities

c. Financial performance information

d. An outline of any anticipated significant events that will affect reporting for the tax year

e. Access to accounting records and systems

f. The necessary resources for disclosure of information

4. MEMORANDUM OF UNDERSTANDING. The parties enter into a standardized memorandum of understanding ("MOU"). The MOU contains the ground rules for the CAP and is signed by the taxpayer and account coordinator. The MOU defines specific objectives for the program, sets parameters for the disclosure of information, and describes the methods of communication. The Service may remove a taxpayer from the program for failure to comply with the MOU.

5. ISSUE RESOLUTION. The taxpayer and account coordinator work together to identify and resolve issues. As issues are resolved, the taxpayer and account coordinator enter into Issue Resolution Agreements.

    a. The parties may use existing issue resolution methods to resolve issues.

    b. After the close of the tax year, the account coordinator incorporates the Issue Resolution Agreements in Form 906 closing agreements.

D. OUTCOMES. There are three possible outcomes in CAP:

1. ALL ISSUES RESOLVED. If all identified issues are resolved through closing agreements, then the Service provides the taxpayer with written conformation that, subject to the completion of a post-filing review, it will accept the taxpayer's return if it is filed consistent with the closing agreements.

2. OPEN ISSUES REMAIN. If the parties cannot resolve all identified issues prior to the filing of the tax return, the Service provides the taxpayer with written confirmation that, subject to the completion of a post-filing review, it will accept the taxpayer's return as to the resolved issues if the return is filed consistent with the closing agreements. The Service will thereafter examine the disputed issues.

3. TERMINATION. Termination results where either the taxpayer or LB&I withdraws from the process, resulting in a standard examination of the return.

4. JOINT POST-FILING REVIEW. After the return is filed, the Service and taxpayer participate in a joint post-filing review to confirm that all resolved issues were reported as agreed. The review is to be completed within 90 days of the filing of the return. The Service may examine all inconsistent or inadequately disclosed issues. The taxpayer retains the right to seek review in Appeals of any disputed issues.

E. COMPLIANCE MAINTENANCE PROGRAM. In general, the Compliance Maintenance Program allows for exam teams to conduct a pre-file review and post-file examination at a significantly reduced depth and scope. It is intended for taxpayers who have participated in the CAP, and who have low risk transactions, good internal controls, and a history of working transparently and cooperatively with the Service. A taxpayer may transfer between the CAP and Compliance Maintenance Program at any time, dependant upon the complexity and/or volume of transactions.

Chapter 2: IRS Examination Procedures

I. Limited Issue Focused Examination (“LIFE”) Program

A. IN GENERAL. In October 2002, the LB&I Division Commissioner announced the Limited Issue Focused Examination (“LIFE”) program. The program began in December 2002. *See* IR 2002-133. The IRS has not published guidance for the LIFE program. *But see* I.R.M. 4.51.3 (1/1/2007). The LIFE program is intended to narrow issues under examination by establishing a materiality threshold below which neither the Service nor the taxpayer will pursue claims. “Materiality” is an accounting concept and may be measured in terms of its value and relationship to other items of income, deduction, etc. *See* I.R.M. 4.51.3.3.4 (1/1/2007).

B. PROCEDURE. A taxpayer may request LIFE for any LB&I examination. The team manager conducts a full risk analysis and identifies compliance issues. If the taxpayer and IRS agree to use LIFE, then the IRS and taxpayer must sign a Memorandum of Understanding (“MOU”) outlining key aspects of the examination and determining the materiality threshold. Generally, the taxpayer will have obligations to (1) deliver computations for agreed and rollover items; (2) file claims for refund by agreed-upon dates; (3) respond to IDRs by agreed-upon dates; (4) discuss Notices of Proposed Adjustments when issued; and (5) commit to communicating regularly with the examiner. The LB&I Team Manager, likewise, must agree (1) not to examine issues below the materiality limit; (2) to participate in the planning process with the taxpayer’s personnel; (3) to act on information the taxpayer supplies in response to IDRs; and (4) to use appropriate issue resolution techniques. The Service offers a Model MOU on its website. *See* Memorandum of Understanding, *at* http://www.irs.gov/pub/irs-utl/life_mou_041220061.pdf (last revised August 1, 2003). *See also* I.R.M. Exh. 4.51.3-1. A taxpayer may qualify for LIFE even after the audit process is underway, but it is better for a taxpayer to initiate LIFE at the beginning of the audit cycle so that both sides can agree on the terms of the audit up front. Either the taxpayer or the IRS can withdraw from LIFE. Undisclosed transactions or tax shelters can result in the termination of the MOU and LIFE.

C. WHEN USED. LIFE is the “gold-card treatment with regard to taxpayers who want to be cooperative and professional in sharing documents,” said former LB&I Division Commissioner Larry Langdon in October 2002.

1. CRITERIA FOR USING LIFE. The Service should consider LIFE in every LB&I examination, and the program is most appropriate when one or more of the following characteristics are present: (*See* I.R.M. 4.51.3.2.1 (1/1/2007))

a. The risk analysis identifies a limited number of material items;

b. Prior experience indicates the taxpayer is capable and willing to meet the commitment required in the MOU;

c. Workload demand exceed resources available and require scope limitation;

d. Special project cases where primary issue is identified;

e. Out-of-cycle returns when there is an issue requiring examination for tax administration purposes;

f. There is no prior examination history with the taxpayer, but the interaction to date indicates the taxpayer is capable and willing to meet the commitments required in the MOU;

g. Improved currency is primary concern and the taxpayer is reasonably compliant, even if there have been issues in the past; or

h. The taxpayer has a complex tax return and the MOU will provide the needed structure for a limited scope examination.

D. WHEN NOT USED. The Service has identified the following characteristics as providing sufficient grounds to decline to offer LIFE: (*See* I.R.M. 4.51.3.2.1 (1/1/2007))

a. Taxpayer history of substantial noncompliance, such as aggressive positions or the use of marketed tax products;

b. Taxpayer history of failing to consistently meet agreed upon Information Document Request ("IDR") response times;

c. Average IDR response times that will most likely impede efficient examination;

d. A tax shelter transaction that was not properly disclosed as required by Service guidance;

e. A large number of material issues which render scope limitation unreasonable;

f. An indication of taxpayer fraud; or

g. The taxpayer is unable or unwilling to meet the commitments required in the MOU.

II. Fast Track Dispute Resolution Program: Fast Track Settlement

A. IN GENERAL.

1. Rev. Proc. 2003-40, 2003-25 C.B. 1044, contains the procedure for Fast Track Settlement (FTS), which offers LB&I taxpayers the opportunity to mediate their disputes with an Appeals Official serving as a neutral party. *See also* I.R.M. 8.26.1 (03/31/2009).

2. Pursuant to Notice 2001-67, 2001-49 I.R.B. 544, the IRS commenced a one-year trial designed to expedite case resolution at the lowest level within the LB&I organization. The IRS made the Fast Track program permanent on April 4, 2003, in IR 2003-44, 2003 I.R.B. LEXIS 130. In early 2005, IRS Commissioner Everson signed Delegation Order 4.25, giving the SB/SE authority to participate in FTS. On August 8, 2006, the IRS published Announcement 2006-61, 2006-36 I.R.B. 390, which announced that the FTS program for SB/SE would be tested in three cities (Chicago, Houston, and St. Paul) for 6 months beginning on September 5, 2006. The program was open to SB/SE taxpayers who had at least one open tax year under examination. The Announcement explained that the SB/SE Fast Track program would utilize the procedures of Rev. Proc. 2003-40. Subsequent to the Announcement, the IRS added section 8.26.2 to its Internal Revenue Manual providing internal guidance on how the SB/SE Fast Track program is to operated. *See* I.R.M. 8.26.2 (10/26/2007).

3. FTS is essentially a mediation technique and is intended to resolve issues within 120 days of acceptance into the program.

4. FTS is optional for the taxpayer. The Appeals Official will first attempt to facilitate an agreement between the parties, and if that fails, the Official may make a recommendation regarding the settlement of any or all issues (both factual and legal). If the settlement proposal is acceptable to both parties, it may be adopted.

B. TIMING FOR FTS. FTS can be initiated only after (1) an issue has been fully developed; (2) the Service has issued a Notice of Proposed Adjustment (Form 5701) but has not issued a 30-day letter; and (3) the taxpayer has issued a written response to the Notice of Proposed Adjustment.

C. ELIGIBLE ISSUES AND PARTIES. FTS is generally available for all cases within LB&I jurisdiction where the number of issues is "manageable" and is anticipated to be completed within 120 days. Non-LB&I taxpayers may also be accepted upon agreement of the Fast Track Program Managers and the Service Operating Division other than LB&I.

D. INELIGIBLE ISSUES. FTS is not available for: (1) issues that are designated for litigation; (2) issues that are under consideration for designation for litigation; (3) issues for which the taxpayer has submitted a request for competent authority assistance; (4) issues for which the taxpayer has requested simultaneous Appeals/Competent Authority procedure; (5) issues outside LB&I jurisdiction, except as provided above; (6) whipsaw issues; (7) issues for which mediation would be inconsistent with sound tax administration, e.g., issues governed by closing agreements, by res judicata, or by controlling precedent; and (8) issues that have been identified by Chief Counsel Notice or equivalent publication as excluded from FTS.

E. PROCEDURES FOR FTS.

1. INITIATING FTS. Either the taxpayer or the LB&I Team Manager may suggest participation in the FTS program. The parties can apply to the program if they both agree, with the assistance of the Fast Track Program Managers, that the issue is appropriate for FTS. The parties must submit the following documents as part of the application: (1) a completed and executed LB&I Fast Track Agreement form; (2) a Notice of Proposed Adjustment (Form 5701); (3) the taxpayer's written response. The LB&I Team Manager coordinates preparation and submission of the application package.

2. APPROVAL. All applications to the FTS program must be approved by Fast Track Program Managers. If the Fast Track Program Manager approves an application, then the FTS Appeals Official notifies the taxpayer and LB&I Team Manager. If the Fast Track Program Manager does not approve the application, then the Appeals Fast Track Program Manager must notify the LB&I Team Manager within 10 days of receipt of the application. The LB&I Team Manager must notify the taxpayer of the rejection. The decision not to approve an application for the FTS program is final and not subject to administrative appeal or judicial review.

3. TIMING. The process is designed to be completed within 120 days.

4. SITE, DATE, AND AGENDA. The session is held at a date and location that is agreeable to the parties. Prior to the session, the Appeals representative advises the participants of the procedures and establishes ground rules. The FTS Appeals Official prepares an FTS Session Report. The Session Report includes a list of all issues approved for the FTS program, a description of the issues, the amounts in dispute, conference dates, a plan of action for the FTS session, and other information useful to the process as determined by the parties and the FTS Appeals Official. The FTS Appeals Official also prepares an Agenda, which guides the communication, sets the order of issue discussion, poses questions to clarify the issue, and guides the meetings. The FTS Appeals Official must provide copies of the Session Report and Agenda to the parties during the session.

5. PARTICIPANTS. When meeting with the Appeals representative, each of the parties, the taxpayer and the LB&I representatives, must include a representative with decision-making authority.

6. CONFIDENTIALITY. FTS is a confidential process.

7. *EX PARTE*. The prohibition on *ex parte* communications between Appeals Officers and other IRS employees does not apply to communications arising in the FTS process because Appeals personnel are facilitating an agreement between the taxpayer and LB&I and are not acting in their traditional Appeals settlement role.

F. RESOLUTION OF ISSUES. If an agreement is reached on all or some issues through FTS, established closing procedures will be used including the use of a specific matters closing agreement. The parties must sign the FTS Session Report, acknowledging the basis of settlement. The FTS Appeals Official then drafts the appropriate settlement document to reflect the agreed upon treatment of the issues.

G. WITHDRAWAL. The taxpayer may withdraw from FTS at any time by notifying the LB&I Team Manager and the Appeals representative in writing. LB&I or the FTS Appeals Official may terminate the process if meaningful progress toward resolution of the issues has ceased.

H. APPEALS. If there are unresolved issues after the FTS process, the taxpayer retains all the usual rights to request Appeals consideration. The FTS Appeals Official sends a letter to both the taxpayer and LB&I with a list of any unresolved issues.

III. Fast Track Dispute Resolution Program: Fast Track Mediation

A. IN GENERAL.

1. Fast Track Mediation ("FTM") was originally part of the Fast Track Pilot Program. The IRS made FTM permanent in Rev. Proc. 2003-41, 2003-25 I.R.B. 1. *See also* I.R.M. 8.26.3 (10/24/2007). In its final form, FTM is only available to SB/SE taxpayers.

2. FTM involves an FTM Appeals Officer using mediation techniques to expedite case resolution. The Appeals representative acts as a mediator between the taxpayer and the SB/SE audit team. The goal of FTM is to facilitate communication and to help the parties resolve factual issues within an average of 30 to 40 days from the initial joint discussion between the FTM Official and the parties. The mediator lacks settlement authority and does not render a decision regarding any issue subject to Fast Track.

B. ELIGIBLE ISSUES. FTM is generally available for all non-docketed cases and collection source work over which SB/SE has jurisdiction, including offer in compromise ("OIC"), trust fund recovery penalty ("TFRP"), and collection due process ("CDP") cases.

C. INELIGIBLE ISSUES AND CASES. FTM is generally not available when resolution of an issue will depend on an assessment of the hazards of litigation and which will require the FTM Appeals Official to use delegated settlement authority. In addition, the following issues and cases are not eligible for FTM: (1) issues designated for litigation; (2) issues under consideration for designation for litigation; (3) issues for which there is an absence of legal precedent; (4) issues for which there are conflicts between circuit courts of appeal; (5) issues included in the Technical Advisor Program or in the Appeals Technical Guidance Program; (6) issues for which the taxpayer has submitted a request for competent authority assistance; (7) issues for which a taxpayer has requested Simultaneous Appeal/Competent Authority procedure; (8) whipsaw issues; (9) cases worked at a Campus site in which a penalty was proposed, except those involving special electronic fund deposit penalties; (10) cases worked at a Campus site in which an offer-in-compromise was made; (11) Collection Appeals Program cases; (12) Automated Collection System cases; (13) frivolous issues; (14) issues for which mediation would not be consistent with sound tax administration, e.g., issues governed by closing agreements, by res judicata, or by controlling precedent; (15) cases in which the taxpayer has failed to respond to Service communications and no documentation has been previously submitted for consideration by the examiner; (16) issues within the scope of Rev. Proc. 2002-18, 2002-1 C.B. 678 (accounting methods); (17) issues that have been identified in a Chief Counsel Notice, or an equivalent publication, as excluded from the FTM process; and (18) issues in cases, other than those described in (9) and (10), worked at the Campus sites.

D. PROCEDURES FOR FTM.

1. INITIATING FTM. Either the taxpayer or the SB/SE Team Manager may suggest participating in FTM, but only after an examination/collection determination has been concluded. The parties must complete an Agreement to Mediate. A copy of the form is attached as Exhibit 1 to Rev. Proc. 2003-41. SB/SE prepares a brief Summary of Issues and a tentative tax computation to submit with the Agreement to Mediate to the appropriate Appeals Office. The taxpayer can submit a summary of the issues. All parties have access to the submitted documents.

2. APPROVAL. An application requires the approval of an Appeals Manager before acceptance into FTM. If the Appeals Manager approves the application, the Appeals Manager notifies the parties. If the case is not accepted, then the Appeals Manager notifies the parties and returns all paperwork to SB/SE. The decision not to approve an application for the FTM program is not subject to administrative appeal or judicial appeal.

3. TIMING. The process is designed to be completed within 30 to 40 days.

4. MEDIATION PROCESS. After acceptance into the program, an Appeals Manager assigns the case to the FTM Appeals Official. The taxpayer does not have the option of using a non-IRS employee as a mediator. The FTM Appeals Official serves as a neutral participant and assists the SB/SE and the taxpayer in understanding the nature of the dispute. The goal is to reach a mutually satisfactory resolution consistent with applicable law. The FTM Appeals Official may also recommend to the parties a resolution on the merits based on the FTM Appeals Official's analysis of the issues. The FTM session is held at a date and location mutually agreeable to the parties. Prior to the mediation, the FTM Appeals Official advises the parties of the procedures and establishes ground rules. The FTM Appeals Official may change the rules and procedures during the session to adapt to changes in circumstances. The FTM sessions may include joint sessions with all parties, separate meetings, or both, as determined by the FTM Appeals Official. Both parties have a chance to present their respective positions. At the conclusion of the FTM, the FTM Appeals Official prepares a brief written report (Fast Track Mediator's Report) and submits a copy to each party.

5. POSTPONEMENT OR TERMINATION OF MEDIATION. The FTM Appeals Official may postpone or terminate the session if: (1) either party presents new information or new issues during the mediation; (2) the taxpayer wishes to submit a substantial amount of documentary information; or (3) the taxpayer wishes to present witnesses.

6. PARTICIPANTS. While meeting with the FTM Appeals Official, each of the parties must include a representative with decision-making authority.

7. CONFIDENTIALITY. FTM is a confidential process.

8. *EX PARTE*. The prohibition on *ex parte* communications between FTM Appeals Officials and other IRS employees does not apply to communications arising in the FTM process because Appeals personnel are facilitating an agreement between the taxpayer and SB/SE and are not acting in their traditional Appeals' settlement role.

E. RESOLUTION OF THE ISSUES. Because the FTM Appeals Official does not have settlement authority, the taxpayer and SB/SE must agree to resolve the issues. The parties must comply with SB/SE's established case closing procedures. If any issues remain unresolved at the conclusion of FTM, the taxpayer retains all of its otherwise applicable appeal rights.

F. WITHDRAWAL AND TERMINATION. Either party may withdraw from the mediation process at any time by notifying the other party and the FTM Appeals Official in writing. The FTM Appeals Official may terminate the mediation process by notifying the taxpayer and SB/SE in writing if it is determined that meaningful progress toward resolution of the issues has stopped.

IV. Early Referral Procedures

A. IN GENERAL. Under Rev. Proc. 99-28, 1999-29, I.R.B. 109, *superseding* Rev. Proc. 96-9, 1996-2 I.R.B. 15, the Early Referral procedures allow any taxpayer to request the early referral to Appeals of a fully developed, unagreed issue arising from an audit while Examination continues its field work to develop other issues in the audit cycle. *See also* I.R.M. 8.26.4 (10/26/2007). In contrast, under Rev. Proc. 96-9, Early Referral was available only to CIC taxpayers. There is no user fee for early referral requests.

B. APPROPRIATE ISSUES. Appropriate issues for Early Referral include issues that (1) if resolved, can reasonably be expected to result in quicker resolution of the entire case; (2) both the taxpayer and the District agree should be referred early to Appeals; (3) are fully developed; and (4) are part of a case where the remaining issues are not expected to be completed before Appeals could resolve the early referral issue. Industry Specialization Program ("ISP") issues may also be referred to Appeals for early resolution.

C. EXCLUSION. Excluded from Early Referral are issues (i) for which a 30-day letter has been issued; (ii) that are not fully developed; (iii) that are not expected to be resolved before remaining exam issues are completed; (iv) designated for litigation; (v) for which the taxpayer has or intends to file a request for competent authority assistance; and (vi) that are part of a "whipsaw" transaction.

D. PROCEDURES.

1. The taxpayer submits a request in writing to the case manager setting forth the issues and positions of both the taxpayer and the IRS.

2. The Case/Group Manager will, where feasible, notify the taxpayer of the decision to accept or reject an issue in the request within 14 days of receiving the request. There is no formal appeal in the event that the request is denied, but the taxpayer may request a conference with the IRS supervisor of the case manager who denied the request. The taxpayer retains the right to pursue an administrative appeal of any proposed deficiency with respect to an issue denied for early referral.

3. Generally within 30 days from the date it accepted the request, Exam issues a Notice of Proposed Adjustment (Form 5701), or an equivalent form, describing the issue and explaining the proposed adjustment.

4. Within 30 days from the date the proposed adjustment is sent to the taxpayer, the taxpayer must submit a response. This response serves the same purpose as an Appeals protest.

5. The Early Referral file is sent to Appeals for consideration.

E. EARLY REFERRAL AGREEMENT.

1. If an agreement is reached with Appeals, a specific matters closing agreement (Form 906) is prepared. The closing agreement will be used to compute the corrected tax as a partial agreement prior to, or concurrently with, the resolution of any other issues in the case.

2. If an agreement is not reached, the taxpayer may generally request mediation for the issue. If mediation is not requested, Appeals will close the Early Referral file and return jurisdiction over the issue to Exam. Appeals will not reconsider an unagreed Early Referral issue if the entire case is later protested to Appeals unless there has been a substantial change in circumstances regarding the Early Referral issue.

3. If the only unagreed upon issues remaining in a taxpayer's case at the time the examination is concluded are issues that were sent to Appeals on early referral and subsequently sent back to Exam, a 90-day letter will be issued (as opposed to a 30-day letter in other cases).

F. CERTAIN EARLY REFERRAL PROCEDURES. Rev. Proc. 99-28 contains special procedures for early referral of issues involving a change in method of accounting, employment tax, collections, and EP/EO.

1. CHANGE IN ACCOUNTING METHOD. The procedure outlined above generally applies to early referral of Service-initiated changes in accounting method. Examples of appropriate issues for early referral include whether: (1) the taxpayer's practice is a method of accounting; (2) the IRS is precluded from changing the taxpayer's method of accounting because, for example, the taxpayer obtained audit protection by initiating a voluntary change; (3) the taxpayer's present method of accounting clearly reflects income under § 446; (4) the method of accounting proposed by the IRS clearly reflects income under § 446; or (5) the methodology used by the IRS to compute the § 481(a) adjustment is appropriate.

2. EMPLOYMENT TAX EARLY REFERRAL. The general procedures outlined above apply to employment tax issues, which include (1) the classification of a worker as an employee or independent contractor; (2) liability issues, including whether § 530 applies; and (3) other issues, including whether a payment constitutes "wages" and whether certain services constitute "employment."

3. COLLECTION EARLY REFERRAL. Appropriate collection issues for early referral include proposed: (1) notices of federal tax liens; (2) levies; (3) seizures; and (4) denials or terminations of installment agreements. Unlike under the due process procedures described in § 6320 for liens and § 6330 for levies, under the early referral procedures, denial of relief will not be reviewable in the Tax Court or in a U.S. District Court.

4. EMPLOYEE PLANS/EXEMPT ORGANIZATIONS EARLY REFERRAL. The general early referral procedures outlined above apply to EP/EO issues. Certain issues are excluded, however, including: (1) procedural issues relating to matters that may be eligible for Administrative Policy Regarding Self-Correction, or submitted under VCR, Walk-in CAP, or the Audit Closing Agreement Program; (2) issues relating to excise taxes in § 4975; or (3) issues concerning plan qualification if such issues are not covered by published precedent or are issues for which there may be nonuniformity between offices. In addition, certain exempt organization issues are excluded from the program, including: (1) issues subject to § 7428; (2) issues arising in Church tax inquiries and examinations subject to § 7611; (3) issues relating to excise taxes in § 507 and Chapters 41 and 42 of the Code; or (4) issues relating to the revocation of exempt status.

V. Accelerated Issue Resolution ("AIR") Program

A. IN GENERAL. Under the Accelerated Issue Resolution ("AIR") program, resolved issues in the current audit cycle of a CIC taxpayer can be extended to all years for which returns have been filed. *See* Rev. Proc. 94-67, 1994-2 C.B. 800. *See also* I.R.M. 4.46.5.6.8 (3/1/2006). The program offers the advantage of ensuring that later case managers will follow the earlier settlement.

B. AIR AGREEMENTS. An AIR agreement is a closing agreement under § 7121 between the Service and a CIC taxpayer relating to one or more specific issues arising from an audit of a CIC taxpayer for taxable periods ending prior to the date of the agreement.

C. SCOPE.

1. An AIR agreement may be entered into for (1) any issue under the jurisdiction of the District Director, or (2) related specific items affecting other taxable periods.

2. AIR agreements will not include:

a. Issues that are subject to an Advance Pricing Agreement ("APA");

b. Issues under the jurisdiction of the Assistant Commissioner (Employee Plans and Exempt Organizations);

c. Partnership items as defined in § 6231 or any other issues subject to the procedures set forth in §§ 6221-6233;

d. Any issue if its resolution is contrary to a private letter ruling, technical advice memorandum, or closing agreement previously issued to or entered into with the taxpayer, or is contrary to any proposed position indicated by the Service with respect to a private letter ruling request that was withdrawn following notification by the Service that it would take a position adverse to that sought by the taxpayer; or

e. An issue that is designated for litigation by the Office of Chief Counsel.

3. Some issues require consent from another agency, office, or Service function before an AIR agreement may occur, including: (i) issues coordinated through the Industry Specialization Program; (2) Appeals Coordinated Issues and Appeals Industry Specialization Program issues; (3) issues currently under competent authority consideration, or for which the taxpayer intends to seek relief from double taxation under a treaty, or for which the taxpayer has previously obtained competent authority assistance; (4) issues within the jurisdiction of the Department of Justice; (5) issues controlled by a Regional Commissioner; or (6) issues in multi-district cases.

D. PROCEDURE.

1. The taxpayer submits a written request to the case manager. The submission must state the issues for which the AIR agreement is sought, the taxable periods to which the issues relate, a discussion of the facts and legal analysis, and a statement regarding relief from double taxation. Upon the Service's request, contracts and other documents pertinent to the request must be provided.

2. The District Direction will notify the taxpayer of acceptance or rejection of any issue. If the Director accepts the issues, then the Director will contact the taxpayer to discuss factual questions the Service has. The Director must submit the proposed AIR agreement to District Counsel for review.

3. The Director may grant the request for an AIR agreement where: (1)(a) there appears to be an advantage in having the issues permanently closed for the years covered, or (b) the taxpayer shows good and sufficient reasons for desiring a closing agreement and the Commissioner determines that the United States will sustain no disadvantage through the consummation of the agreement; and (2) the law is properly applied to the facts without taking into account the hazards of litigation, or the provisions of Delegation order No. 236 are applicable and are satisfied.

4. There is no appeal if the Director rejects all or part of the request.

E. WITHDRAWAL. Either the taxpayer or the Director may withdraw at any time prior to the execution of the AIR agreement.

F. INTERACTION WITH COMPETENT AUTHORITY REQUESTS. Taxpayers should not execute a closing agreement under the AIR procedure if they also intend to seek relief from double taxation under a treaty. Executing an AIR agreement before the issues are considered under the mutual agreement provisions of a tax treaty could jeopardize double taxation relief. *See* Announcement 95-9, 1995-7 I.R.B. 57, 7.05 (stating that if a taxpayer executes a closing agreement on potential competent authority issues, the U.S. competent authority will endeavor only to obtain correlative adjustments from the treaty country and will not undertake any actions that would otherwise change the agreement).

VI. Technical Advice

A. IN GENERAL. Rev. Proc. 2012-2, 2012-1 I.R.B. 92, sets forth the procedure for seeking technical advice, Technical Advice Memoranda ("TAMs"). The issues that come to National Office counsel for resolution through the Technical Advice process involve areas of the law for which there may be no published guidance on point.

1. TAM. "Technical advice" is advice or guidance in the form of a memorandum (a TAM) furnished by an Associate office upon the request of an area director or appeals area director in response to any technical or procedural question that develops during any proceeding on the interpretation and proper application of tax law, tax treaties, regulations, revenue rulings, notices, or other precedents published by the Associate office to a specific set of facts. Technical advice helps to establish and maintain consistent technical positions throughout the Service.

2. Technical advice does not include any oral legal or any written advice furnished to the field office that is not submitted and processed under Rev. Proc. 2009-2. For example, TAMs do not include the "Generic Legal Advice Memorandum" and "Case-Specific Legal Advice Memorandum" described in the Office of Chief Counsel's May 1, 2006, Report of the Case Specific Advice Task Force.

B. SCOPE. Technical advice may be requested on any issue under the jurisdiction of the Associate offices. However, technical advice must be requested under different procedures for alcohol, tobacco, and firearms taxes, for issues under the jurisdiction of the Office of Division Commissioner, Tax Exempt and Government Entities, (*see* Rev. Proc. 2009-5, 2009-1 I.R.B. 161), or for issues relating to farmers' cooperatives (*see* Rev. Proc. 2009-5 and Rev. Proc. 2009-9, 2009-2 I.R.B. 256). Technical advice may not be furnished for prospective or hypothetical transactions.

1. Technical advice only applies to cases under the jurisdiction of a district director or an appeals area director.

2. Technical advice may be requested by a field office on an issue even if Appeals disposed of the same or similar issue for another tax period of the same taxpayer.

3. Technical advice may not be requested on (1) a request for an extension of time for making an election under Treas. Reg. § 301.9100-3 of the Procedure and Administration Regulations; (2) frivolous issues; (3) an issue that is the same issue of the same taxpayer in a docketed case for any taxable year; or (4) collection issues.

4. Technical advice applies only to the taxpayer for whom the TAM was requested.

C. TAXPAYER PARTICIPATION. Participation by the taxpayer, while preferred, is not necessary. A taxpayer's failure to participate in stages that are identified as "material" will constitute a waiver of the taxpayer's right to a conference. If the taxpayer declines the Service's offer to participate in a material stage, the taxpayer also waives its right to participate in the development and issuance of the TAM.

D. PROCEDURES.

1. DECISION TO SEEK TECHNICAL ADVICE. While the field office determines whether to request a TAM on an issue being considered, a taxpayer may request that an issue be referred for technical advice. Because taxpayer participation is generally not required, a taxpayer may not appeal the decision to seek a TAM. Additionally the taxpayer may not appeal the director or LB&I territory manager's decision not to seek a TAM.

2. PRE-SUBMISSION CONFERENCE. Prior to seeking a TAM, the field officer must request a pre-submission conference with the appropriate Associate office. Before scheduling this conference, the taxpayer and field office share and exchange information relating to the facts, issues, and legal analysis that may aid the Associate office in becoming informed regarding the subject matter. Taxpayer

participation is optional for a TAM. However, even when the field office initiates a TAM, it must give the taxpayer the opportunity to participate. The Associate office will contact the field and the taxpayer to arrange a pre-submission conference. The conference should be held within 15, but not more than 30, calendar days after the field office is contacted.

3. CONTENT OF REQUEST. Whether initiated by a taxpayer or by a field office, a request for a TAM must include the facts and the issues for which the TAM is requested along with a written statement of the applicable law (including foreign law in the official language of the country involved, with a certified English translation if that language is not English) and arguments in support of both the Service's and the taxpayer's positions. If the taxpayer initiates the request for a TAM, in addition to the above, the written statement must also include the taxpayer's reasons for requesting technical advice.

4. STATEMENT OF FACTS AND ISSUES. The field offices prepares the memorandum with the assistance of field counsel and sends it to the taxpayer by mail or fax. The taxpayer then will have 5 calendar days from the date of mailing or fax to respond by providing a written statement specifying any disagreement on the facts and issues. After the taxpayer's response has been received by the field office, the parties have 10 calendar days to resolve remaining disagreements. If disagreements continue, both the taxpayer's set of facts and issues and the field's set of facts and issues are forwarded to the Associate Office. The field office will prepare a memorandum for the Associate Office highlighting the material factual differences, and provide a copy to the taxpayer.

5. APPEAL OF DECISION NOT TO SEEK TECHNICAL ADVICE. The taxpayer may appeal the Service's decision not to seek technical advice to the territory manager or appeals area director by written statement of the facts, law, and arguments on the issue and the reasons why the taxpayer believes the matter should be referred to the Associate office within 30 calendar days (with extensions possible at the discretion of the territory manager or the appeals area director) of notice of the denial. The territory manager or appeals area director will determine whether a TAM will be sought.

   If the territory manager or appeals area director proposes to deny the request for a TAM, the taxpayer can choose either to agree or disagree with the denial. The denial is subject to review, but not appeal: The appropriate Division Director will review the proposed denial based solely on the written record, and no conference will occur. The reviewer will notify the field office within 45 days after receiving the written record, and the office will then notify the taxpayer.

6. DELETION STATEMENTS. TAMs are subject to public inspection under § 6110(a), after the Service has deleted certain information. The taxpayer must submit a "deletion statement" indicating the deletions desired. A taxpayer who wants only names, addresses, and identifying information deleted should state this in the deletion statement. The deletion statement must not appear in the request for a TAM but instead, must be made in a separate document.

7. ADVERSE CONFERENCE. If a TAM adverse to the taxpayer is given, the taxpayer is entitled by right to one conference with the Associate office. The adverse conference must be held within 10 calendar days after the taxpayer receives notice of the adverse TAM. Conferences are generally conducted in person, but may be conducted by phone. If, at the conference, the taxpayer offers any additional data, lines of reasoning, precedents, etc., then the taxpayer must furnish this information to the Associate office within 10 calendar days after the conference.

E. ISSUANCE OF TAM. The Associate office does not inform the taxpayer of any tentative conclusions regarding the TAM until the time when the taxpayer schedules the adverse conference. Once the Associate office has received all the necessary information, held the adverse conference of right with the taxpayer, and determined the necessary deletions, it will issue the TAM.

F. CONTENTS OF TAM. The TAM will contain the following information: (1) a statement of the issues; (2) the conclusions of the Associate office; (3) a statement of the facts pertinent to the issue; (4) a statement of the pertinent law, treaties, regulations, revenue rulings, and other precedents; and (5) a discussion of the rationale supporting the office's conclusions.

G. USE OF TAM. The field office will apply the TAM in processing the taxpayer's case.

H. WITHDRAWAL. Only a director may withdraw a request once submitted.

I. RECONSIDERATION. The director may formally request reconsideration of the TAM. The Associate Office will give priority consideration to the request. The taxpayer is not entitled to be informed that a request for reconsideration is being considered.

J. NOTIFICATION OF TAXPAYER. The TAM takes effect when taxpayer receives a copy from the director. The director will furnish the taxpayer with a copy of the TAM and a notice under § 6110(f)(1) to disclose the TAM. The taxpayer may protest deletions not made within 20 calendar days of being notified.

K. LIMITING RETROACTIVE EFFECT. TAMs generally apply retroactively, except when modifying a letter ruling or other TAM previously issued to the taxpayer The taxpayer may apply for relief under § 7805(b) to limit retroactive effect. Normally, a request to limit retroactive effect must be made in the form of a TAM, except where the TAM concerns a continuing transaction and is revoked by subsequent letter ruling or regulation, in which case the request to limit retroactive effect must be in the form of a request for a letter ruling.

VII. Delegation Order No. 4-24

A. IN GENERAL. Delegation Order No. 4-24, allows Exam case managers and LB&I Team Managers to accept settlement offers in CIC cases with respect to any issue where settlement on the merits has been effected by Appeals with respect to the same issue of the same taxpayer, or of another taxpayer who was directly involved in the transaction or taxable event, in a previous, subsequent, or the same taxable period.

B. REQUIREMENTS. The following factors must be present in the tax year under examination.

1. The facts are substantially the same as the facts in the settled period;

2. The issue must have been settled by Appeals on its merits independently of other issues in the settled tax period;

3. The legal authority relating to such issue must have remained unchanged; and

4. The prior Appeals settlement involved the same taxpayer (including consolidated and unconsolidated subsidiaries) or another taxpayer who was directly involved in the transaction or taxable event in the settled tax period.

VIII. Delegation Order No. 4-25

A. Delegation Order No. 4-25 (Rev. 2) supersedes Delegation Order No. 4-25 (Rev. 1),which replaced Delegation Order No. 247, 1996-21 I.R.B. 7. *See also* I.R.M. 1.2.43.26 (10/18/2008).

B. The delegation order extends authority to Appeals Industry Specialization Program ("ISP") Coordinators assigned to coordinated issues in combination with Technical Advisors assigned to the coordinated issues and either Team Managers in LB&I or Territory Managers, Examination Specialization and Technical Guidance/Abusive Schemes in SB/SE. The delegation order authorizes ISP Coordinators to review and approve, prior to finalization, proposed settlement of Technical Advisor ("TA") coordinated issues for which appeals has approved settlement guidelines. ISP Coordinators can also enter into related closing agreements.

C. The delegation order extends authority to Appeals Coordinated Issues ("ACI") Coordinators assigned to the ACI in combination with a TA assigned to the ACI and either Team Managers in LB&I or Territory Managers, Examination Specialization and Technical Guidance/Abusive Schemes in SB/SE. The delegation authorizes ACI Coordinators to review and approve, prior to finalization, the proposed settlement of ACI for which Appeals has approved settlement guidelines. ACI Coordinators can also enter into related closing agreements.

D. The delegation order permits LB&I Team Managers and SB/SE Territory Managers to accept settlement offers, execute closing agreements, and execute settlement agreements, after review and approval by the appropriate coordinators, advisors and managers, on coordinated issues in the TA Program, Appeals ISP Program, and the ACI Program where Appeals has an approved settlement guideline.

IX. Competent Authority Assistance

A. IN GENERAL. U.S. Competent Authority assists taxpayers with respect to matters covered in the mutual agreement procedure provisions of tax treaties in the manner specified in those provisions or, if no procedures are set forth in the treaty, then under Rev. Proc. 2006-54, 2006-49 I.R.B. 1035. Different procedures apply when taxpayers obtain assistance from the U.S. Competent Authority under the provisions of tax coordination agreements entered into between the Service and the tax agencies of American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, the United States Virgin Islands, and Puerto Rico. *See* Rev. Proc. 2006-23, 2006-20 I.R.B. 1. Reflecting a growing trend internationally, treaties with Germany and Belgium and a pending protocol with Canada provide for arbitration procedures to resolve disputes where the competent authorities are unable to reach an agreement.

B. PROCEDURES.

1. LETTER OF REQUEST. The taxpayer requests assistance from U.S. Competent Authority (Deputy Commissioner (International)) in writing at any time after an action results in taxation not in accordance with the provisions of the applicable treaty. This could occur in connection with an APA, during an audit, or at Appeals.

   a. ADDITIONAL FILING. In the case of U.S. initiated adjustments, the taxpayer must also file a copy of the request with the office of the Service where the taxpayer's case is pending.

   b. INFORMATION REQUIRED IN THE REQUEST. Section 4.05 of Rev. Proc. 2006-54 lists 17 items that must be included in the request, including a reference to the specific treaty, the taxpayer's name, a description of the businesses involved, a description of the issues, the years and amounts involved, the relief requested, the IRS office involved, a statement whether the taxpayer is seeking Simultaneous Appeals Procedure, and the impact of any APAs.

   c. There is no fee for a competent authority request unless it relates to a determination on limitations or benefits.

2. SUSPENSION OF ADMINISTRATIVE ACTION. When a request for competent authority assistance is accepted with respect to a U.S.-initiated adjustment, the Service will postpone further administrative action on those issues under competent authority consideration.

3. PRE-FILING CONFERENCE. The taxpayer may request a pre-filing conference with the U.S. competent authority to discuss the mutual agreement process with respect to matters covered under a treaty, including discussion of the proper time for filing, the practical aspects of obtaining relief, and actions necessary to facilitate the proceedings.

4. RESOLUTION. U.S. competent authority will consult with the appropriate foreign competent authority and attempt to reach a mutual agreement that is acceptable to all parties.

5. STANDARDS FOR COMPETENT AUTHORITY CONSIDERATION. (1) There must be a treaty in place. (2) In allocation cases, the U.S. competent authority is guided by the arm's length standard. (3) Only a U.S. person may request competent authority assistance.

6. ACTION BY U.S. COMPETENT AUTHORITY.

   a. Upon receipt of a request for assistance, U.S. Competent Authority must notify the taxpayer whether the facts provide a basis for assistance.

   b. The U.S. Competent Authority generally will not accept a request or will cease providing assistance to the taxpayer if:

      (1) The taxpayer is not entitled to the treaty benefit or safeguard in question or to the assistance requested;

      (2) The taxpayer is willing only to accept a competent authority agreement under conditions that are unreasonable or prejudicial to the interests of the U.S. government;

      (3) The taxpayer rejected the competent authority resolution of the same or similar issue in a prior case;

      (4) The taxpayer does not agree that Competent Authority negotiations are a government-to-government activity that does not include the taxpayer's participation in the negotiation proceedings;

      (5) The taxpayer does not furnish, upon request, sufficient information to determine whether the treaty applies to the taxpayer's facts and circumstances;

      (6) The taxpayer was found to have acquiesced in a foreign-initiated adjustment that involved significant legal or factual issues that otherwise would be properly handled through the Competent Authority process and then unilaterally made a corresponding correlative adjustment or claimed an increased foreign tax credit, without initially seeking U.S. Competent Authority assistance;

      (7) Either (A) The taxpayer fails to comply with the requirements of Rev. Proc. 2006-54; (B) the taxpayer fails to cooperate with the competent authority; or (C) the taxpayer failed to cooperate with the Service during the examination of the periods in issue and such failure significantly impedes the ability of the U.S. competent authority to negotiate and conclude an agreement; or

      (8) The transaction giving rise to the request for competent authority assistance includes either (A) an issue pending in a U.S. Court, or designated for litigation, unless competent authority consideration is concurred in by the U.S. competent authority and the Associate Chief Counsel (International); or (B) involves fraudulent activity by the taxpayer.

c. A denial of assistance or dismissal of a matter previously accepted is final and not subject to administrative review.

d. If the Competent Authorities fail to agree or if the agreement reached is not acceptable to the taxpayer, the taxpayer may withdraw the request for assistance and pursue all rights to review otherwise available. If the authorities fail to agree, no further competent authority assistance remedies are available.

7. FEES. User fees are generally not required as a condition to requesting competent authority assistance. However, a user fee of $27,500 will be charged for each entity requesting a discretionary limitation on benefits determination.

C. ACCELERATED COMPETENT AUTHORITY PROCEDURE. The Accelerated Competent Authority procedure is intended to parallel the Accelerated Issue Resolution ("AIR") procedure. *See supra* IRS Examination Procedures § VI. Pursuant to section 7.06 of Rev. Proc. 2006-54, a taxpayer requesting competent authority assistance on an issue may also request that the competent authority attempt to resolve the same issue for subsequent tax years ending prior to the date of the request for competent authority assistance.

1. The U.S. competent authority will consider the request and contact the appropriate IRS field office to consult on whether the issue should be resolved for subsequent taxable periods.

2. A request for accelerated competent authority procedure for future years may be made at the time of filing a request for competent authority assistance or at any time thereafter, but generally before the conclusion of the mutual agreement.

D. SMALL CASE PROCEDURE. To facilitate requests for assistance in small cases, the IRS developed a special simplified procedure. This procedure cuts down on the amount of information that must initially be submitted. This procedure may be used if the total proposed adjustment is not greater than $1,000,000 for a corporation or partnership or $200,000 for an individual or other taxpayer. A request under the small case procedure must include (1) a statement that this is a case subject to the small case procedure, (2) information about the taxpayer, (3) a description of the issue and the relief sought, (4) the taxable years and amounts involved with respect to the issues in both U.S. and foreign currency, (5) the name of the treaty country, (6) a statement of consent to disclosure to the foreign competent authority, and (7) a penalties of perjury statement.

E. SIMULTANEOUS APPEALS/COMPETENT AUTHORITY PROCEDURE ("SAP"). The SAP procedure permits taxpayers to seek simultaneous competent authority assistance and Appeals consideration of an issue. *See* Rev. Proc. 2006-54 § 8. *See also* I.R.M. 4.60.3.1.19 (1/1/2002). Arbitration and mediation are not available for cases in simultaneous appeals procedure. A taxpayer may withdraw its request for SAP at any time. The U.S. Competent Authority, Chief of Appeals, or the appropriate Area Director may decide to deny or terminate the SAP if the procedure is determined to be prejudicial to the mutual agreement procedure or to the administrative appeals process.

F. PROTECTIVE MEASURES. A taxpayer may need concurrently to protect his interests when requesting a competent authority assistance. Protective measures include: (1) filing a protective claim for refund; (2) staying the expiration of any period of limitations on the making of a refund or other tax adjustment; (3) avoiding the lapse or termination of the taxpayer's right to appeal any tax determination; (4) complying with all applicable procedures for invoking competent authority consideration, including applicable treaty provisions dealing with time limits within which to invoke such remedy; and (5) contesting an adjustment or seeking appropriate correlative adjustment with respect to the U.S. or treaty country tax.

1. FILING PROTECTIVE CLAIM FOR CREDIT OR REFUND WITH A COMPETENT AUTHORITY REQUEST. A valid protective claim for credit must meet the requirements of § 6402. A protective claim must (A) fully advise the IRS of the grounds on which the credit or refund is claimed; (B) contain sufficient facts to apprise the IRS of the exact basis of the claim; (C) state the year for which the claim is being made; (D) be on the proper form; (E) be verified by a written declaration made under penalties of perjury; and (F) be timely filed. The Service will treat a request for competent authority assistance as a protective claim even if the taxpayer does not use the form described in Treasury regulation § 301.6402-3, provided that the taxpayer satisfies§ 6402.

2. PROTECTIVE FILING BEFORE COMPETENT AUTHORITY REQUEST.

    a. In some cases, a taxpayer may not be able to file a formal Competent Authority request before the period of limitations expires with respect to the affected U.S. return. The taxpayer should file a protective claim for credit or refund of the taxes attributable to the potential Competent Authority issues.

    b. The taxpayer may make a protective claim in the form of a letter to the competent authority. The letter should include the information otherwise required by a competent authority request, as applicable.

    c. After filing a protective claim, the taxpayer must notify the U.S. competent authority every 12 months whether the taxpayer is still considering filing for competent authority assistance.

    d. Generally, the U.S. competent authority will not consult authorities until the taxpayer files a formal request for competent authority.

G. REALIGNMENT OF PROGRAM. Effective February 26, 2012, the administration of requests for Competent Authority assistance will be shared by two separate units within LB&I division of the IRS—the Advance Pricing and Mutual Agreement ("APMA") program and the LB&I Treaty Interpretation team.

1. The APMA program will address requests for Competent Authority assistance regarding (a) transfer pricing, (b) permanent establishment, or (c) allocation issues.

2. The LB&I Treaty Interpretation team will address requests for Competent Authority assistance regarding non-allocation issues.

3. In Announcement 2012-38, the IRS announced its plan to seek public comment before revising the existing published guidance with respect to requests for APAs and Competent Authority assistance. Taxpayers are advised to continue to follow and rely upon Rev. Proc. 2006-9, 2006-1 C.B. 1133 with respect to requests for APA's and Rev. Proc. 2006-54, 2006-2 C.B. 1035 with respect to requests for Competent Authority assistance.

Chapter 3: IRS Appeals Techniques

I. Mutually Accelerated Appeals Process

A. IN GENERAL. In a news release dated June 27, 2000, IR-2000-42, the IRS announced the Mutually Accelerated Appeals Process ("MAAP") initiative. MAAP is designed to decrease the amount of time it takes to resolve cases in Appeals for CIC taxpayers. Under MAAP, the IRS unilaterally identifies cases where there is a potential for accelerating resolution by adding additional IRS personnel to existing Appeals teams, shifting workload among team members, or creating new teams. After a case has been identified, the IRS will contact the taxpayer to determine the taxpayer's willingness to participate in the initiative.

B. COVERED CASES. MAAP will be used with respect to existing cases. However, the IRS is assessing the potential for using MAAP on new cases.

II. *Ex parte* Communications

A. IN GENERAL. On February 25, 2012, the IRS issued Rev. Proc. 2012-18, 2012-10 I.R.B. 455. The newly issued rules supersede Rev. Proc. 2000-43, and incorporate public comments regarding proposed rules set forth in Notice 2011-62, 2011-32 I.R.B. 126.

B. APPLICATION. The prohibition applies to any *ex parte* communication that appears to compromise the independence of Appeals. An "ex parte" communication is any written or oral communication between any Appeals employee and employees of other IRS functions, without the taxpayer being given an opportunity to participate.

C. OPPORTUNITY TO PARTICIPATE. Appeals must provide the taxpayer with an opportunity to participate in communications with other IRS employees by agreeing on a mutually acceptable date and time for the discussion or meeting. If no agreement can be reached as to an acceptable meeting, Appeals should notify the taxpayer of the date and time of the meeting, and afterwards, disclose the substance of the meeting and give the taxpayer a reasonable time to respond.

D. PROHIBITED COMMUNICATIONS: Communications between Appeals and the originating functions of the IRS (i.e. an organization within the IRS that makes determinations that are subject to the Appeals process, including the Examination, Collection, and Service Center functions) are prohibited to the extent the communications appear to compromise the Appeals' independence. Examples of prohibited communications include, but are not limited to:

1. Discussions about the accuracy of the facts presented by the taxpayer and the relative importance of those facts.

2. Discussions of the relative merits of the legal authority cited in a protest or in an originating function's report.

3. Discussions of the originating function's perception of the taxpayer's credibility.

4. Discussions regarding the originating function's perception of the strength and weaknesses of the case.

5. Communications from the originating function to advocate for a particular result or to object to a potential resolution of the case.

E. EXCEPTIONS. The following communication between IRS employees and Appeals are not prohibited:

1. During the preliminary review of a newly assigned case, Appeals may ask Exam questions that involve ministerial, administrative, or procedural aspects of a case and do not address the substance of the issues or positions taken in the case.

2. Appeals may communicate with Exam regarding an anticipated return of a case, but may not engage in a discussion of the strength and weaknesses of specific issues or positions, or the case as a whole.

3. The prohibition does not preclude Chief Counsel attorneys from advising Appeals of the legal position of Chief Counsel. However, Appeals may not communicate *ex parte* regarding an issue in a case pending before it with a Chief Counsel field attorney who previously gave advice to Exam on the same issue.

4. The prohibition does not apply to cases docketed in the Tax Court. Rev. Proc. 87-24, 1987-1 C.B. 720, will still apply to those cases.

5. The prohibition does not apply to communications between Exam and Appeals ISP Coordinators pursuant to Delegation Order 4-25 (formerly Delegation Order 247).

6. The prohibition does not apply to communications between Appeals and IRS officials considering relief under competent authority procedures.

7. The prohibition does not apply to communications between Appeals and the Taxpayer Advocate Service.

F. REMEDIES. If a breach of ex parte communication rules occurs, the taxpayer must be notified. The taxpayer is thereafter provided an opportunity to advise of a suggested and appropriate remedy. However, a second-level manager in Appeals will make the ultimate decision of the appropriate remedy for a breach.

III. Post Appeals Mediation

A. IN GENERAL. The IRS formally adopted mediation procedures pursuant to Rev. Proc. 2002-44, 2002-26 I.R.B. 10, after a one-year test of its meditation procedure. *See also* I.R.M. 8.26.5 (06/17/2008). Rev. Proc. 2002-44 was superseded by Rev. Proc. 2009-44, 2009-40 I.R.B. 462, which expanded and clarified the types of cases eligible for post Appeals mediation. The newly adopted mediation procedure also clarifies that mediation does not create any special authority for settlement by Appeals. During the mediation process, Appeals will be subject to the procedures that would be applicable if the issue were being considered via the standard Appeals process, including procedures in the Internal Revenue Manual and existing published guidance.

B. DEFINITION. Mediation is a process in which an impartial third party assists disputants in finding a mutually acceptable solution to their conflict. The mediator does not have settlement authority and will not render any decision on the disputed issues.

C. WHEN USED. Mediation may be used (i) to resolve a matter that is within the jurisdiction of Appeals; (ii) only after Appeals settlement discussions have been unsuccessful; and (iii) when all other issues are resolved but for the issue(s) for which mediation is being requested.

D. ELIGIBLE ISSUES. Mediation is appropriate for (1) factual issues, such as valuation, reasonable compensation, and transfer pricing issues; (2) legal issues; (3) issues designed for the Industry Specialization Program (ISP) and Appeals Coordinated Issues (ACI); (4) early referral issues when an agreement is not reached; (5) issues for which the taxpayer intends to seek competent authority assistance provided that a request for competent authority assistance has not yet been filed; and (6) unsuccessful attempts to enter into a closing agreement under § 7121.

E. NON-ELIGIBLE ISSUES. Mediation is not available for (1) an issue designated for litigation or docketed in any court; (2) collection cases; (3) issues for which mediation would not be consistent with sound tax administration; (4) frivolous issues; and (5) cases where the taxpayer did not act in good faith during settlement negotiations.

F. PROCEDURES.

1. MEDIATION REQUEST. The taxpayer seeking mediation must submit a request to the Appeals Team Manager including information about the taxpayer and the issues involved, as well as a representation that the issue is not excluded by this revenue procedure. Generally the Appeals Team Manager will respond within two weeks of receiving the request. A denial is not subject to appeal, but the taxpayer may request a conference with the Appeals Team Manager to discuss the denial.

2. PARTICIPANTS. The parties to the mediation are the taxpayer and Appeals. Absent an agreement to the contrary, the parties must have participants attending the mediation with decision-making authority. Each party must notify the mediator and the other party no later than two weeks before the mediation regarding the participants to the mediation.

3. SELECTION OF MEDIATORS. The taxpayer and the Appeals Team Manager will select an Appeals mediator. A representative from Appeals LB&I Operations, Headquarters Appeals may also participate in this selection process. The mediation procedure requires the use of an Appeals employee. Headquarters pays the expenses associated with the Appeals mediator. The Appeals mediator is chosen from a list of eligible individuals who will be from the same Appeals office or geographic area, but not the same group where the case is assigned.

4. SELECTION OF A NON-IRS CO-MEDIATOR. The taxpayer can elect, at his own cost, to use a non-IRS co-mediator. In this event, the taxpayer and the Appeals Team Manager should make the selection from any local or national organization that provides a roster of neutrals.

5. AGREEMENT TO MEDIATE. The taxpayer and Appeals will enter into a written agreement to mediate. This agreement will be negotiated at an administrative conference or conference call that may include a representative from Appeals LB&I Operations, Headquarters Appeals.

   a. The agreement to mediate should (1) be as concise as possible; (2) specify the issues that the parties wish to mediate; and (3) identify the location and timing of the mediation session.

   b. A model agreement is contained in Rev. Proc. 2009-44.

6. TIMING. The parties will complete the agreement to mediate within three weeks after being notified that Appeals approved the mediation request and proceed to mediation within 60 days after signing the agreement to mediate.

7. DISCUSSION SUMMARIES. Each party will prepare a discussion summary of the issues for consideration by the mediator. These summaries should be provided to the other party and to the mediator two weeks prior to the mediation session.

8. WITHDRAWAL. Either party may withdraw from the mediation process prior to reaching a settlement of the issues being mediated by notifying the other party and the mediator in writing.

9. MEDIATOR'S REPORT. At the conclusion of the mediation process, the mediator will prepare a brief written report and submit a copy to each party.

10. RESOLUTION OF ISSUES. If the parties reach agreement on all or some of the issues through the mediation process, Appeals will use established procedures, including preparation of a specific matters closing agreement (Form 906).

11. FAILURE TO REACH AN AGREEMENT. If the parties do not reach an agreement on an issue being mediated, they may request arbitration for the issue, provided the mediation issue meets the requirements for arbitration.

IV. Appeals Arbitration

A. IN GENERAL. Arbitration is a process by which the parties submit their dispute for decision by an impartial third party. The decision of the third party is binding on both the IRS and the taxpayer. In Rev. Proc. 2006-44, 2006-44 I.R.B. 800, the IRS permanently established an arbitration process within Appeals for unresolved factual issues following settlement discussions. *See also* I.R.M. 8.26.6 (06/17/2008).

B. ELIGIBLE ISSUES. Arbitration may be used for factual issues where all other issues in Appeals have been resolved.

C. INELIGIBLE ISSUES. Arbitration may not be used for (1) legal issues; (2) where not appropriate under 5 USC. §§ 572 or 575; (3) docketed issues; (4) issues designated for litigation; (5) Compliance Coordinated Issues; (6) issues for which Competent Authority Assistance has been filed; (7) collection cases; (8) issues for which arbitration would not be consistent with sound tax administration; (9) whipsaw issues; (10) frivolous issues; (11) cases in which the taxpayer did not act in good faith; and (12) issues otherwise excluded from the arbitration program.

D. AGREEMENT TO ARBITRATE. Appeals and the taxpayer must mutually agree to arbitration. The request for arbitration is submitted to the Appeals Team Manager with a copy to Chief, Appeals in Washington, D.C. If the request is denied, there is no formal appeal procedure; however, a taxpayer may request a conference with the Appeals Team Manager to discuss the denial. If the request is granted, the parties will enter into a written agreement. A model agreement for this purpose is attached to Revenue Procedure 2006-44.

E. TIMING. The parties will complete the agreement to arbitrate within four weeks after the taxpayer is notified that Appeals has approved the arbitration request, and proceed to arbitration within 90 days after signing the agreement to arbitrate.

F. PROCEDURE.

1. The parties to the arbitration process are the taxpayer and Appeals. Appeals may have the Office of Chief Counsel assist in the arbitration.

2. The taxpayer and Appeals select an arbitrator at an administrative conference provided by Appeals Office. Both Appeals and non-IRS personnel may serve as arbitrators.

3. If the parties choose an arbitrator from Appeals, the Appeals arbitrator must be from another region, or from the National Office Appeals and all compensation expenses, fees, and costs of arbitration will be borne by Appeals.

4. If a non-IRS arbitrator is selected, the taxpayer and Appeals will equally share compensation, expenses, fees and costs of the arbitrator.

G. ARBITRATION SESSION. Each party must submit its position to the arbitrator no later than 30 days before the scheduled arbitration session. The arbitrator will look solely to legal guidance identified by the parties. There are to be no *ex parte* communications with the arbitrator and all information submitted is confidential. By mutual agreement, the parties may withdraw from the arbitration process to reach a final Appeals settlement at any time prior to date of the arbitration session.

H. ARBITRATOR'S REPORT. At the conclusion of the arbitration process, the arbitrator will prepare a brief written report and submit a copy to the Chief, Appeals. The report will provide only findings of fact. Neither party may appeal the findings of the arbitrator nor contest the findings in any judicial proceeding.

I. RESOLUTION OF ISSUES. If the arbitrator renders a decision on all or some of the issues, Appeals will use established procedures to close the case, including preparation of a specific matters closing agreement (Form 906).

V. Simultaneous Appeals/Competent Authority Procedure

A. IN GENERAL. Section 8 of Rev. Proc. 2006-54, 2006 I.R.B. permits taxpayers to seek simultaneous Competent Authority assistance and Appeals consideration of an issue ("SAP"). *See also* I.R.M. 4.60.3.1.19 (1/1/2002).

B. APPLICABILITY. A taxpayer can request the procedure in four situations:

1. After Examination has proposed an adjustment with respect to an issue that the taxpayer wishes to submit to competent authority;

2. When the taxpayer files a protest with Appeals and decides to sever the competent authority issue and seek competent authority assistance while other issues are referred to Appeals;

3. When the case is in Appeals and the taxpayer later decides to request competent authority assistance; and

4. After filing for competent authority assistance but before the U.S. position paper is communicated to the foreign competent authority.

C. APPEALS INVOLVEMENT. The Appeals representative assigned to the case will coordinate with the U.S. Competent Authority to resolve the unagreed issue prior to the issue being presented to the foreign competent authority. A tentative resolution will be reflected in the U.S. position paper.

D. RETURNING TO APPEALS. If the competent authorities fail to agree, the taxpayer will be permitted to refer the issue to Appeals for further consideration.

E. APPEALS CONSIDERATION OF NON-COMPETENT AUTHORITY ISSUES. The taxpayer may pursue settlement of other issues without waiting for the resolution of issues in SAP.

VI. Tax Exempt Bond Mediation Pilot Program

A. IN GENERAL. Announcement 2003-36, 2003-1 C.B. 1093, established the Tax Exempt Bond Mediation Dispute Resolution Pilot Program ("TEB Mediation"). The application deadline for the pilot program ended June 3, 2005. On July 5, 2006, the Service extended the pilot program for an additional year commencing on July 3, 2006. *See* Announcement 2006-43, 2006-27 I.R.B. 48. TEB Mediation allows for Issuers (as defined by Rev. Proc. 96-16, 1996-1 C.B. 630) of tax-exempt debt to expedite resolution of cases with the assistance of Appeals.

B. SCOPE. TEB Mediation is an optional process intended to resolve issues within 60 days using a neutral mediator.

1. INCLUDED ISSUES. TEB Mediation is generally available for all cases within the jurisdiction of the Tax Exempt Bond organization in which (1) the issues are fully developed; (2) there are a limited number of unagreed issues; (3) the preliminary adverse determination letter has been issued; and (4) the Issuer has provided a written response to the preliminary adverse determination letter.

2. EXCLUDED ISSUES. TEB Mediation is unavailable for the following issues: (1) legal issues for which there is no precedent; (2) issues designated for litigation; (3) docketed issues; (4) issues for which mediation would be inconsistent with sound tax administration; and (5) issues for which a proposed adverse determination letter has been issued.

C. PROCEDURE.

1. REQUEST FOR MEDIATION. Either the Issuer or the TEB Field Manager may suggest the use of TEB Mediation. To initiate consideration, the Issuer must make a written request to the TEB Field Manager including a description of the issue, a representation that the issue is not excluded by this announcement, and a request to use a non-Service mediator, if desired. A rejected request is final and not subject to administrative or judicial review.

2. PARTICIPANTS. The parties to the mediation are the Issuer and the TEB Field Manager. Each party must have a representative with decision-making authority attending the mediation.

3. SELECTION OF MEDIATORS. The process requires the use of an Appeals Mediator. The Issuer may request, at its own expense, to use a non-Service co-mediator.

4. AGREEMENT TO MEDIATE. If TEB and the Issuer agree that mediation is appropriate, then they must sign an agreement to mediate. The agreement will specify the issues, identify a neutral conference site (usually the Appeals Mediator's office), and project an ending date. An example of a model agreement is attached to Announcement 2003-36.

5. TIMING. The goal of the TEB Mediation Program is to complete the mediation process in 60 days.

6. WITHDRAWAL. Either party may withdraw from the process at any time by notifying the other party and the Appeals Mediator.

7. MEDIATOR'S REPORT. At the conclusion of the mediation process, the mediator will prepare a report summarizing the mediator's findings.

8. RESOLUTION OF ISSUES. If the parties reach agreement on all or some of the issues through the mediation process, TEB will use established closing procedures, including preparation of a specific matters closing agreement (Form 906).

9. FAILURE TO REACH AGREEMENT. If the parties fail to agree on any issues, the Issuer retains the option to request that the issues be heard through the traditional Appeals process.

Chapter 4: Tax Court Alternative Dispute Resolution

I. Tax Court Arbitration

A. IN GENERAL. Tax Court Rule 124 allows binding arbitration of factual issues under the direction of the Tax Court at any time after a case is at issue and before trial. Due to disclosure problems under § 6103 and questions regarding the IRS's authority to delegate to third parties the power to settle tax disputes, arbitration has not been used extensively to resolve disputes between taxpayers and the IRS but has been used for resolution of treaty disputes between treaty partners.

1. Most cases have been valuation disputes.

2. In *Apple Computer v. Comm'r*, No. 2178-90 T.C. (1993), the most high-profile case to be submitted to arbitration under Rule 124, the parties agreed to submit their dispute to a panel of three arbitrators and the parties chose a baseball-type arbitration that required the arbitrator to choose between the two proposed numbers submitted by the parties and did not allow him to split the difference. The panel adopted the government's position.

B. PROCEDURE. The taxpayer and IRS file a joint motion invoking Rule 124 after the case is at issue and before trial. The motion should include a stipulation containing: (i) a statement of the issues to be resolved by the arbitrator, (ii) an agreement to be bound by the arbitrator's findings, (iii) the name(s) of the arbitrator(s) or the procedure to be used to select the arbitrator(s), (iv) the allocation of the arbitration costs, (v) a prohibition on *ex parte* communications, and (vi) such other matters as the parties deem appropriate. The Chief Judge will then assign the case to a judge or special trial judge who will supervise the arbitration.

II. Tax Court Mediation

A. IN GENERAL. Tax Court judges have indicated a willingness to entertain mediation of docketed factual disputes and the IRS recently sanctioned mediation of docketed Tax Court cases under district counsel jurisdiction.

B. PROCEDURES. There is no specific Tax Court mechanism for the use of mediation. However, the taxpayer and the District Counsel should jointly select a mediator pursuant to the Announcement 95-86, 1995-44 I.R.B. 27, guidelines. *See infra* IRS Appeals Techniques (discussing IRS mediation).

C. APPLICABILITY. Mediation generally should not be used (1) if it has been tried unsuccessfully in nondocketed status; (2) for an issue for which the taxpayer has filed a request for competent authority assistance; or (3) for ISP issues, ACI, or other cases or issues designated for litigation.

D. THE UPS CASE. In June 2001, the Eleventh Circuit reversed the Tax Court in *United Parcel Service of America, Inc. v. Comm'r*, 254 F.3d 1014 (11th Cir. 2001), finding that UPS's insurance arrangement did not lack economic substance and remanded to the Tax Court for further proceedings on the IRS transfer pricing determination. The parties agreed to mediate the transfer pricing issue and successfully resolved the case in 2002.

For more information, please contact your regular McDermott lawyer, or:

Robin L. Greenhouse: +1 202 756 8204 rgreenhouse@mwe.com
Michael F. Kelleher: +1 202 756 8230 mkelleher@mwe.com

For more information about McDermott Will & Emery visit www.mwe.com

The material in this publication may not be reproduced, in whole or part without acknowledgement of its source and copyright. *Internal Revenue Service Alternative Dispute Resolution Techniques* is intended to provide information of general interest in a summary manner and should not be construed as individual legal advice. Readers should consult with their McDermott Will & Emery lawyer or other professional counsel before acting on the information contained in this publication.

© 2009 McDermott Will & Emery. The following legal entities are collectively referred to as "McDermott Will & Emery," "McDermott" or "the Firm": McDermott Will & Emery LLP, McDermott Will & Emery/Stanbrook LLP, McDermott Will & Emery Rechtsanwälte Steuerberater LLP, MWE Steuerberatungsgesellschaft mbH, McDermott Will & Emery Studio Legale Associato and McDermott Will & Emery UK LLP. McDermott Will & Emery has a strategic alliance with MWE China Law Offices, a separate law firm. These entities coordinate their activities through service agreements. This communication may be considered attorney advertising. Previous results are not a guarantee of future outcome.

DM_US 33047301-1.T10698.0010