

Navigating the IRS Appeals Office Process: Achieving Settlement, Avoiding Litigation

WEDNESDAY, MARCH 1, 2017, 1:00-2:50 pm Eastern

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Navigating the IRS Appeals Office Process

March 1, 2017

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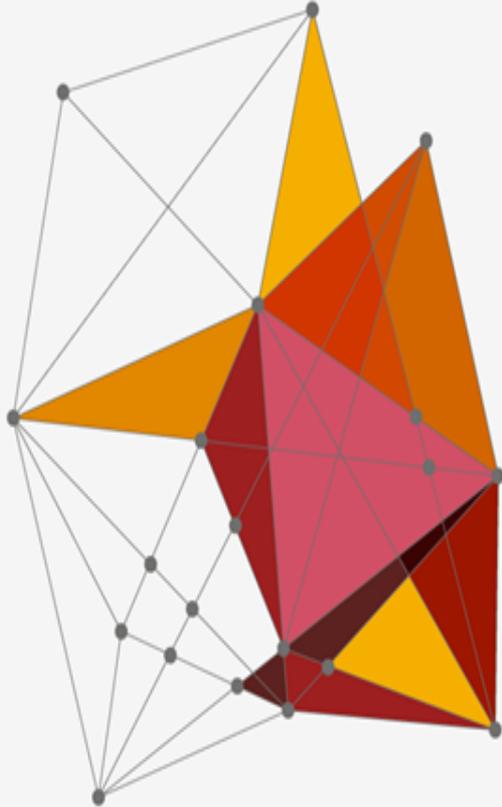
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Presenters

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Washington, DC

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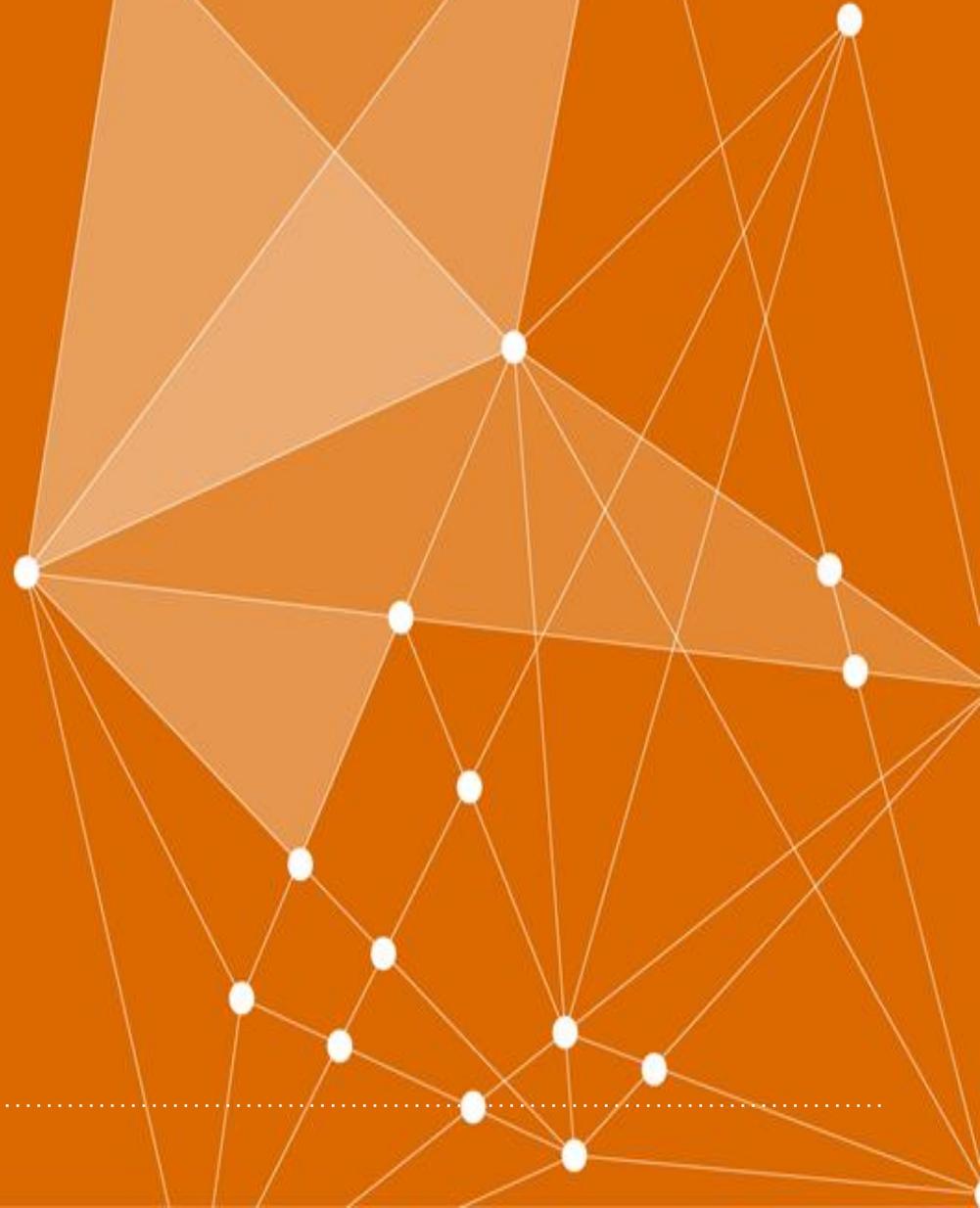
Tax Controversy and Regulatory Services

Washington, DC

Agenda

- **Current State of IRS**
- **Appeals – Traditional Process**
- **Appeals Procedures: International and FBAR Penalties**
- **Alternative Dispute Resolution Processes**

Current State of IRS

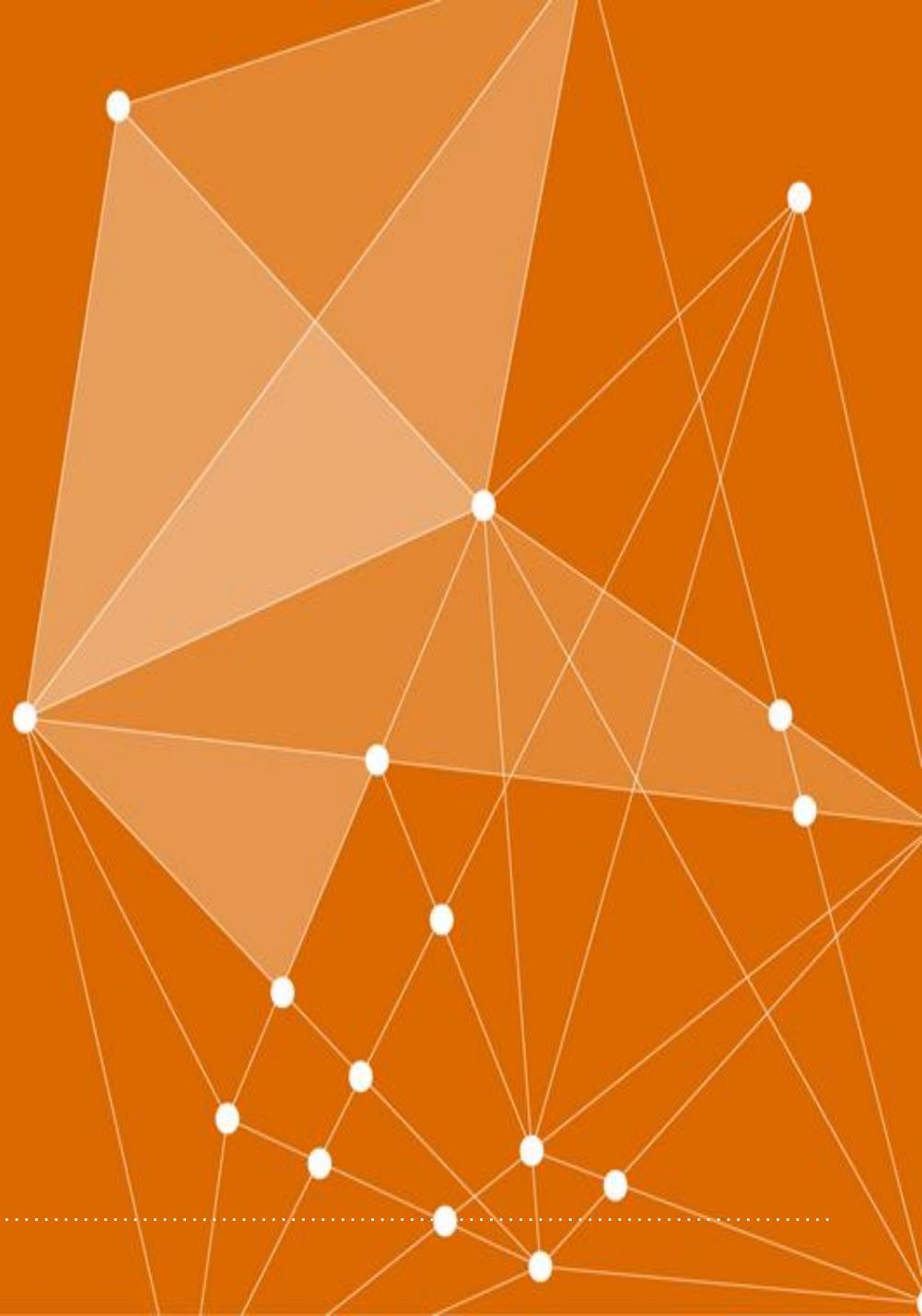


Current State of the IRS

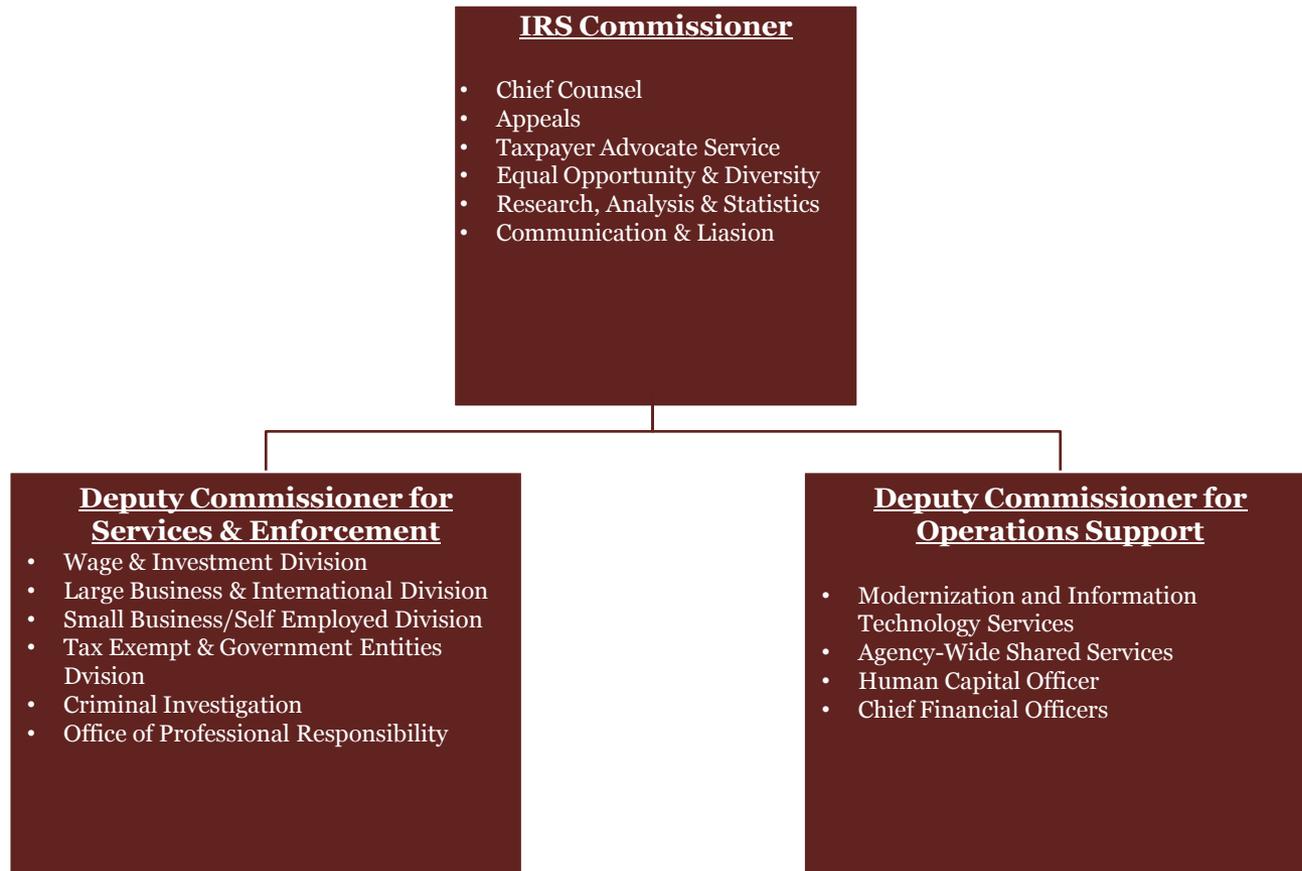
Doing Less with Less

- FY 2015 IRS budget was \$10.9B – lowest since 2007, over \$1B in cuts since 2010
- FY 2016 – Slight funding increase (to \$11.24 billion) allocated to customer service/telephone assistance, fraud detection, cybersecurity
- FY 2017 – Operating under a Continuing Resolution at FY 2016 level
- Essentially operated under a hiring freeze for last 4 – 5 years
- Overall staffing down from 100,000 in 2010 to less than 85,000 in 2016
 - 25% of overall workforce eligible to retire in 2016 – increases to 40% by 2019
 - 41% of managers and 61% of executives were eligible to retire in 2016
- Revenue Agent and Revenue Officer staffing down by 15-18% since 2010
- Appeals staffing has fallen by 20% since 2010
- IRS audit rate lowest since 2004 – the number of large business audits has declined 22 percent since last year

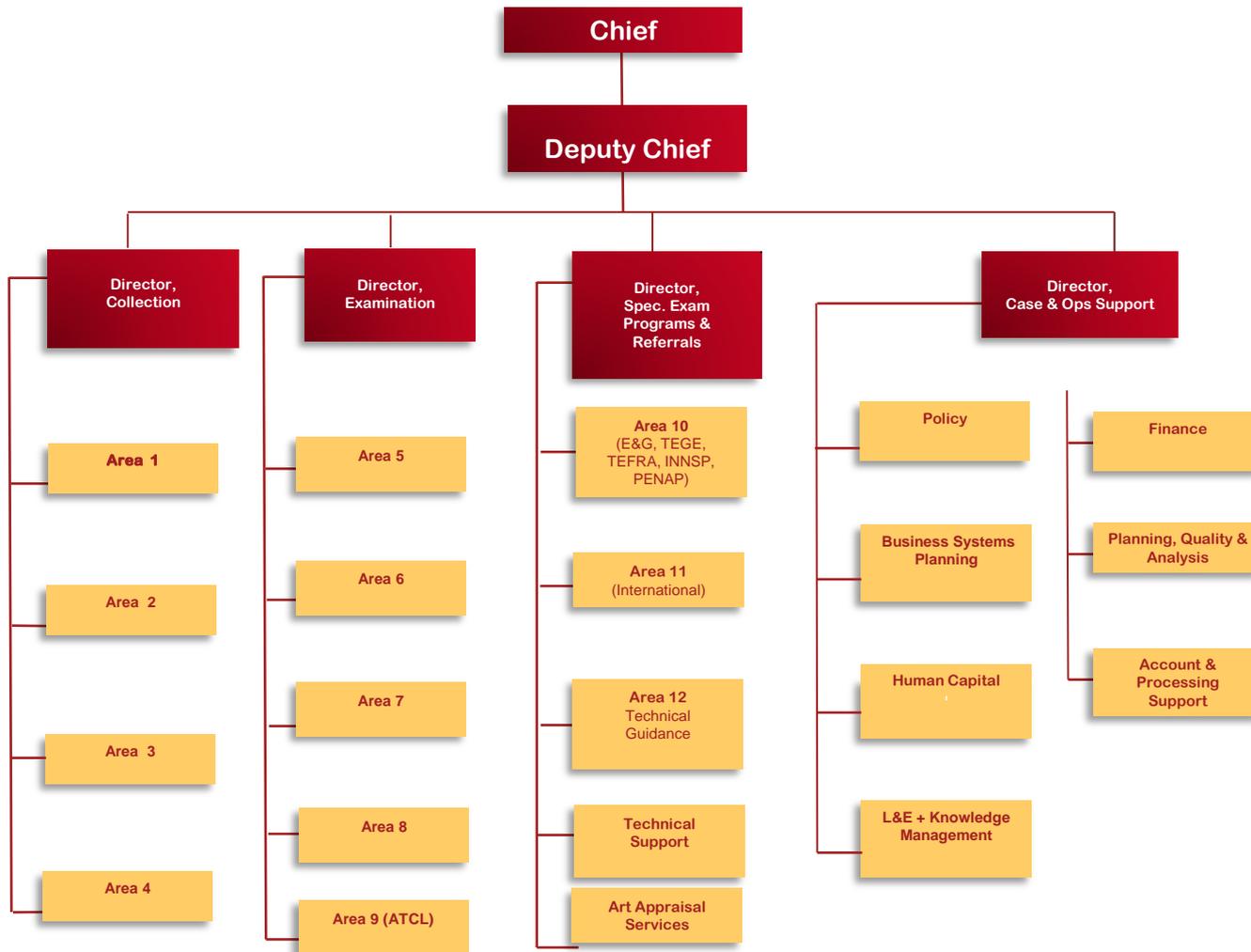
Appeals – Traditional Process



IRS Organization Structure



Appeals' Structure, as of 10/2/2016

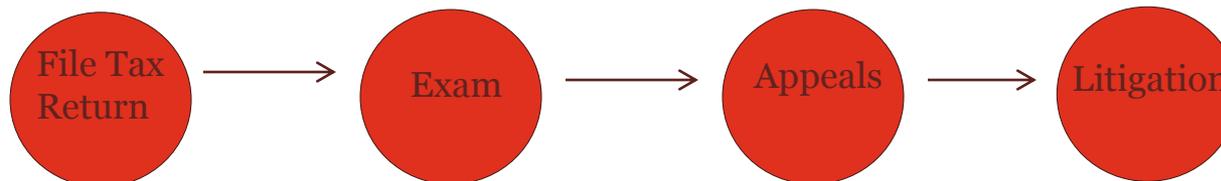


Highlights of New Appeals Structure

New structure announced October 2016:

- Staffing decrease of almost 21% between 2012 and 2015
- Three core functions – Collection, Examination, Specialized Examination Programs
- Specialized Examination includes the following:
 - International issues
 - Tax Computations
 - Innocent Spouse
 - TEFRA/partnership issue
 - Penalty Appeals
- Fourth function – Case and Operations Support Function (covers all support operations).

Life Cycle of an Audit Tax Controversy



Taxpayer files tax return. IRS may open an audit of a return. Time to open an audit is constrained by the period of limitations for assessment under Section 6501.

The return is audited by the appropriate Exam Division (i.e. LB&I, SB/SE, TEGE, or W&I). If the IRS and taxpayer do not reach a resolution in Exam...

...taxpayer has the right to appeal the decision of Exam to the Office of Appeals. If a resolution is not reached in Appeals...

...taxpayer may look towards Federal courts to resolve the tax issue. Taxpayers may file a deficiency suit in the U.S. Tax Court. Taxpayers may file a refund suit in the local District Court, or the Court of Federal Claims.

Appeals overview

Mission: Resolve tax controversies, without litigation, on a basis which is fair and impartial to both the government and the taxpayer and in a manner that will enhance voluntary compliance and public confidence in the integrity and efficiency of the Internal Revenue Service

Independence

- Prohibition of “ex parte communications”
- Rev. Proc. 2012-18: Current guidance on communications between Appeals and other IRS divisions
- IRM 8.1.10.1: Ex parte is defined as communication between any Appeals employee and employees of other IRS functions, without the Taxpayer/representative being given an opportunity to participate in the communication.
- Communication not considered ex parte: database inquiries and communication with employees not considered an originating function, i.e. Criminal Investigation and Taxpayer Advocate.
- Ex parte rules do not apply in Post-Appeals Mediation

Appeals overview (continued)

IRS Policy Statement P-8-47

A fair and impartial resolution is one that reflects, on an issue-by-issue basis, the probable result in the event of litigation or one that reflects mutual concessions for the purpose of settlement based on the relative strength of opposing positions where there is substantial uncertainty of the result if litigated

- This “hazards of litigation” settlement authority is unique to Appeals
- Appeals is charged with:
 - ▶ Making an independent and informed judgement on the strengths and weakness of the respective positions, both Exam and Taxpayer, and
 - ▶ Application of law, regulations and IRS policies and procedures based on the facts and circumstances
- Appeals may defer action or decline to settle some cases or issues, for example issues with national suspension – tax shelter issue – to achieve greater uniformity and enhance overall voluntary compliance with the tax laws.

Appeals overview (continued)

What can be appealed?

- Income Tax Issues – Individual and Corporate
- Employment and Excise Tax
- Estate and Gift Tax
- Abatement of Interest
- Penalties
- Collection Issues – Trust Fund, Offers in Compromise
- Collection Due Process – Liens, Levies, Installment Agreements
- International Issues – Withholding, Penalties, Transfer Pricing

Appeals – Process overview

- Obtaining Appeals “rights”
 - ▶ 30-Day Letter
 - ▶ Certain penalty notices (i.e. Trust Fund Recovery Penalty, certain collection notices, etc.)
- Submit to Appeals formal written protest concerning unagreed issues; Publication 1 outlines requirements of a protest
- Conference with Appeals officer
- Ex parte conference with Exam (or Rapid Appeals Process)
- Coordinated issues in Appeals
- Coordinated issues are subject to “review and concurrence” – An issue specialist holds final approval over settlement of the issue in any Appeals case

“Quick Look” process – Appeals campus

August 2014: To expedite resolution of cases where issues are easily resolvable

Highlights

- Mandatory – penalty and examination cases
- Optional for field cases
- New process
 - ▶ 5 business days for screening
 - ▶ 40 – 45 days (calendar) phone contact with taxpayer or representative required
 - ▶ Tracking required
- Effective 10/1/2014

Updated Appeals Policies and Practices: ***Appeals Judicial Approach and Culture Project (AJAC)***

Purpose

- Return Appeals to a quasi-judicial approach in case management
- Appeals will not raise new issues nor will it open closed issues
 - ▶ A “new issue” is any adjustment to or change to an item that affects tax liability that was not included in the 30-Day Letter or the Notice of Deficiency
 - ▶ Appeals may consider new issues raised in pleading and new evidence developed by compliance or counsel
 - ▶ Policy will apply to all Appeals review, including collection and compliance review of both docketed and non-docketed cases
 - ▶ New cases or authorities on same application are not new issues
 - ▶ New theories or alternative legal arguments that support original argument are not new issues

Updated Appeals Policies and Practices: Appeals Judicial Approach and Culture

Quasi-judicial approach to the settlement of cases

- Appeals officers are not investigators or examiners
- Officers are tasked with appraising the facts, law, and litigating prospects
- Officers are to weigh the merits of both Examination's position and the taxpayer's position
- Again, independence and impartiality are key

Settlement limitations

- No equity hardship issues (collection & innocent spouse exceptions)
- No Constitutional, religious, or similar objections
- No issues or cases "designated for litigation"
- No nuisance settlements

Updated Appeals Policies and Practices: Appeals Judicial Approach and Culture

Highlights

- Returning a case to Examination from Appeals
- New information – additional guidance
 - ▶ Dependent on when information first requested
 - ▶ Impact on other appealed issues
- New issue – additional considerations/may require release back to Examination
- New theory/alternative argument – case not released/but position provided to Examination for review/comment
- Statute of limitations considerations

Updated Appeals Policies and Practices: ***Settlement Authority***

Appeals **was** considering whether to change the settlement authority of some Appeals Officers.

- Currently, Appeals Team Case Leaders (ATCLs) have sole settlement authority on cases within their jurisdiction.
 - The ATCL position is unique within the IRS and the Office of Appeals.
 - After initial discussions between the ATCL and their manager, the ATCL has complete control of the case.
 - Although the ATCL will follow review and concurrence procedures for certain issues and involve a technical advisor, the ATCL still holds ultimate settlement authority.
- The issue under consideration was whether the ATCLs would continue having this authority or whether ATCL settlements will require manager approval.
- Appeals has determined not to require managerial approval for ATCL settlements BUT managers must review ATCL settlements and elevate a settlement issue if the manager is not in agreement with the ATCL.

Updated Appeals Policies and Practices: Conferences and Issue Resolution

- Most conferences in Appeals are conducted by telephone and that has become the default method.
- Appeals has issued new internal guidance, effective October 1, 2016, impacting Campus and general Appeals requesting in-person conferences.
- Alternative Conference methods available for Campus Appeals operations include virtual service delivery (VSD) which will be offered for in-person requests where available.

Taxpayer Locations for VSD:

Anchorage Alaska

El Paso, Texas

Little Rock, Arkansas

Pensacola, Florida

Oakridge, Tennessee

Boise, Idaho

Billings, Montana

Miami, Florida

Spokane, Washington

Seattle, Washington

Updated Appeals Policies and Practices: Conferences and Issue Resolution

- Same office requests for an in-person conference will need Appeals Team Manager approval.
- Factors considered in granting an in-person conference:
 - Substantial books and records to review and not easily referenced
 - Need to judge creditability of oral testimony
 - Numerous participants
 - Special needs, i.e. hearing impairment
- Change of location for an in-person conference. Appeals will request case assistance from another Appeals Officer located in the requested office to meet in-person. The original assigned Appeals Officer remains in control and should participate by telephone. The assigned Appeals Officer will continue to make the assessment of facts and legal authorities for the settlement.
- Prior procedures to change location for (1) convenience of the Taxpayers or (2) other transfers within Appeals have been eliminated.

Updated Appeals Policies and Practices: Conferences and Issue Resolution

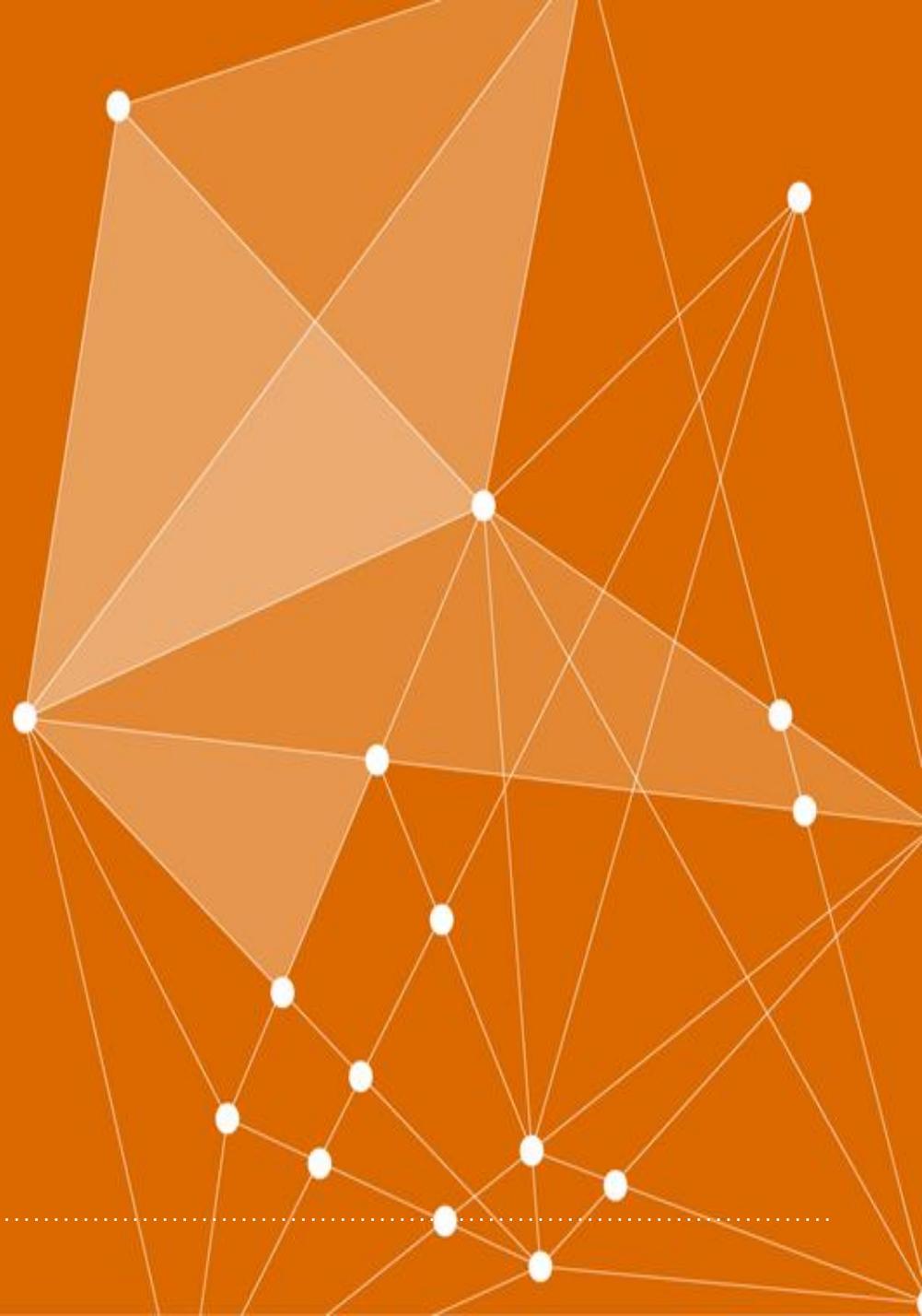
- Appeals has the discretion to invite other participants to Taxpayer Conferences.
- Appeals must not violate ex parte rules.
- Other potential attendees include:
 - Counsel
 - Compliance
 - Experts
- Types of conferences where ex parte rules are not applicable:
 - Fast Track Settlement
 - Post-Appeals Mediation

Updated Appeals Policies and Practices: ***Abuse of Discretion***

New announced policy:

- Affects cases involving denial of elections under Treas. Reg. section 301.9100-1 and requests for a change in method of accounting.
- If a case “solely” involves an abuse of discretion based on a denial of 9100 relief or a denial of a method change request, Appeals will not review the abuse of discretion issue.

Appeals Procedures: International Penalties and FBARs



International Penalty - Accelerated Appeals

- Accelerated Appeals Process is available for Category 1 Taxpayers **that during an examination** have been assessed an international penalty (IRC § 6038).
- Category 1 Taxpayers are:
 - Taxpayers with assets totaling \$100 million or more or
 - Any other taxpayer with agreement from LB&I to participate.
- Process consists of a pre-payment Appeals conference on section 6038 penalties assessed during the examination process
- Appeals considers the penalty appeal within 120 days while the examination continues
- If Category 1 Taxpayer disagrees with Accelerated Appeal determination - No Second Appeal allowed
- If Accelerated Appeals not offered then normal Penalty Appeals applies

FBAR penalties – Appeals process

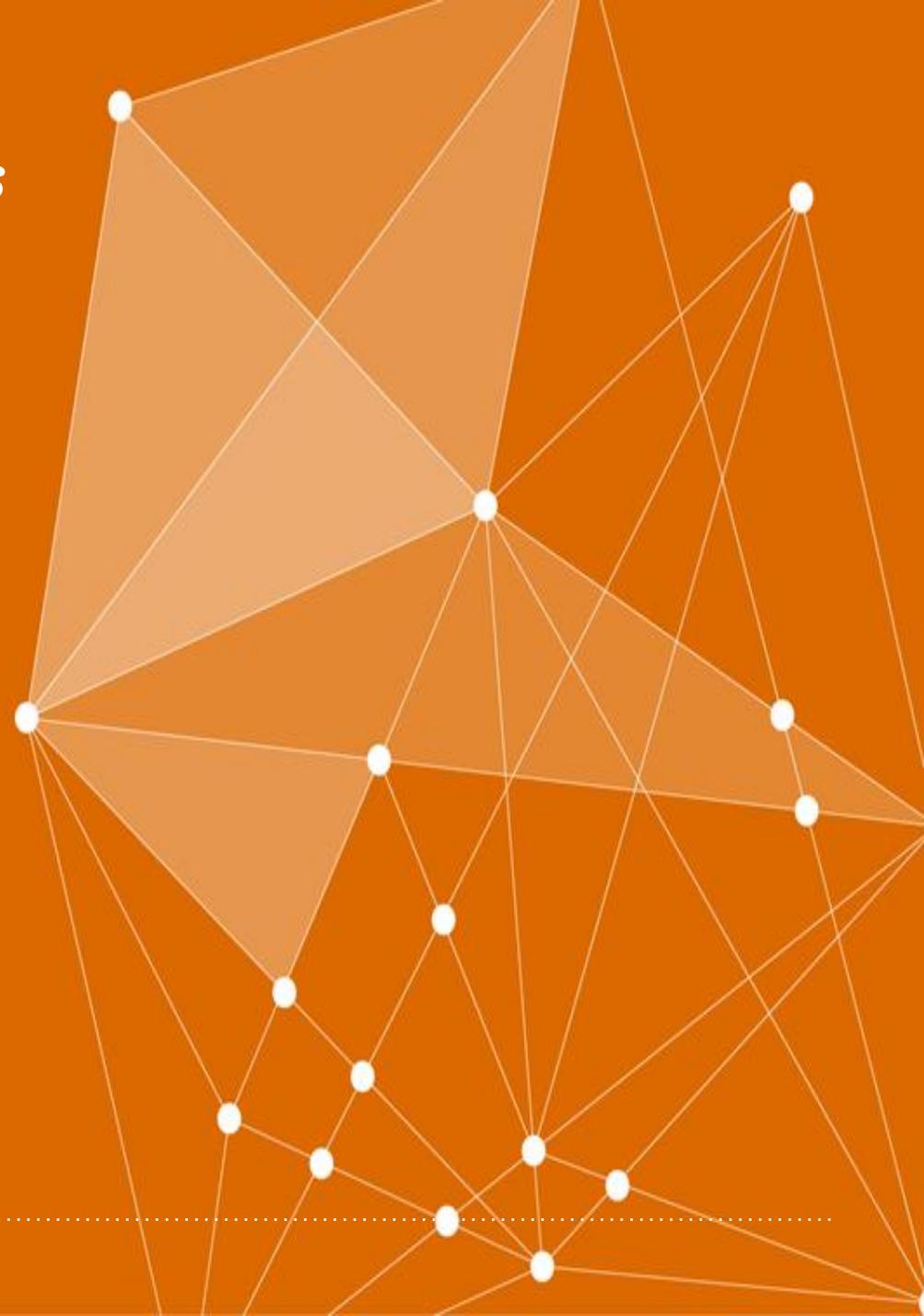
- Fast Track Settlement is available for pre-assessment FBAR penalty cases before the 30-Day letter 3709 has been issued
- FBAR Cases are considered by Appeals in either pre-assessment or post-assessment status
- File protest to the FBAR 30-Day Letter (Letter 3709 for pre-assessment; Letter 3708 for post-assessment)
- FBAR penalty cases are treated as an Appeals Coordinated Issue
 - Review and Concurrence is applied
- Post-assessed FBAR penalties in excess of \$100,000 cannot be compromised by Appeals without approval of the Department of Justice
- ADR rights are not available for post-assessment FBAR penalty cases
- Post Appeals Mediation is not available for FBAR penalties

FBAR penalties – Appeals process (cont.)

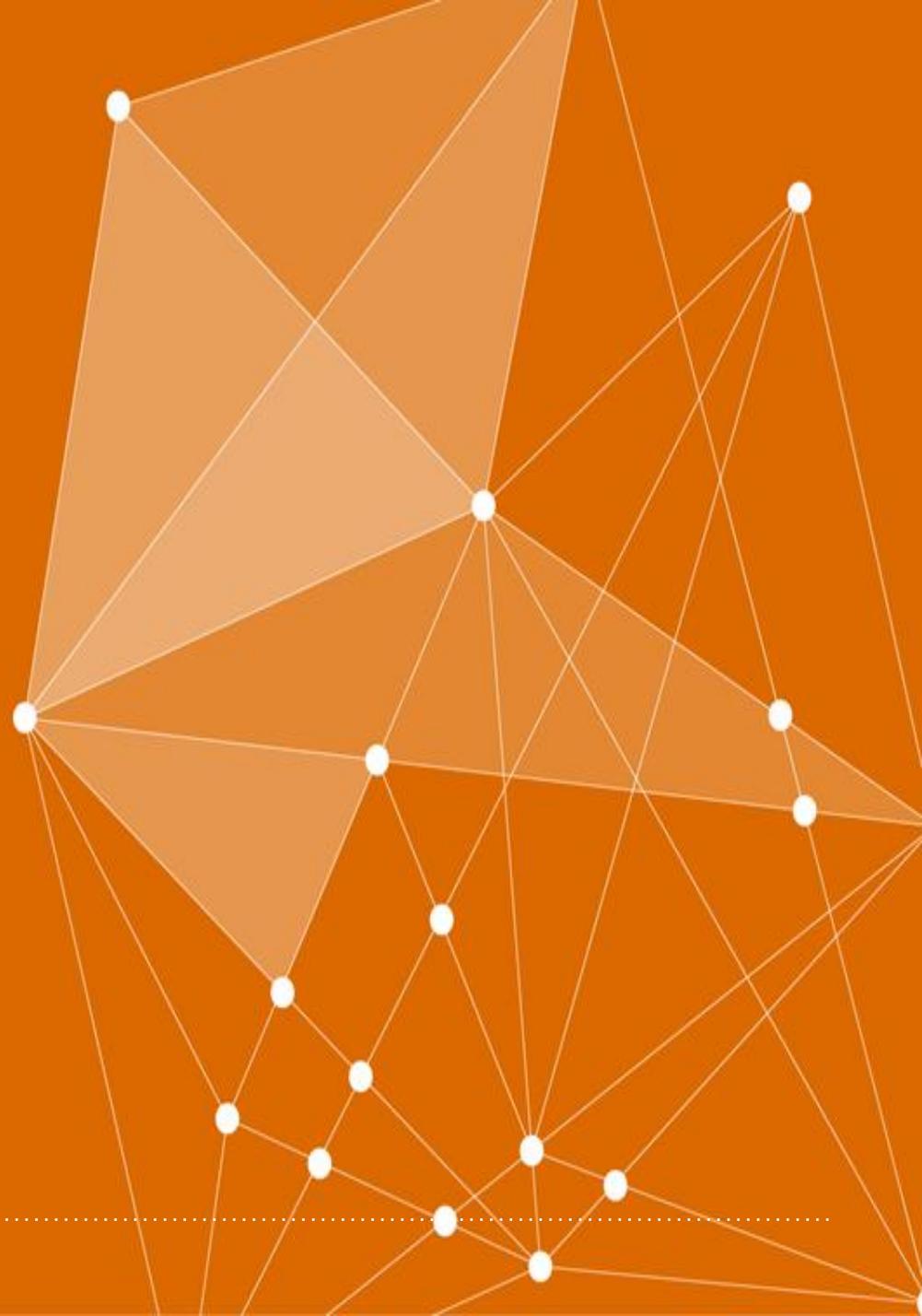
- The venue to challenge FBAR penalty is the United States District Court and the Federal Court of Claims, not the United States Tax Court.
- Taxpayers seeking to challenge a FBAR penalty after it has been assessed may either pay the penalty and file a refund suit or wait until the government files suit in district court to collect the penalty and challenge the assessments.

Alternative Dispute Resolution Processes

- *Post-Appeals Mediation*
- *Fast Track Settlement*
- *Early Referral to Appeals*
- *Rapid Appeals Process*
- *Comprehensive Case Resolution*



Post-Appeals Mediation



Post-Appeals Mediation

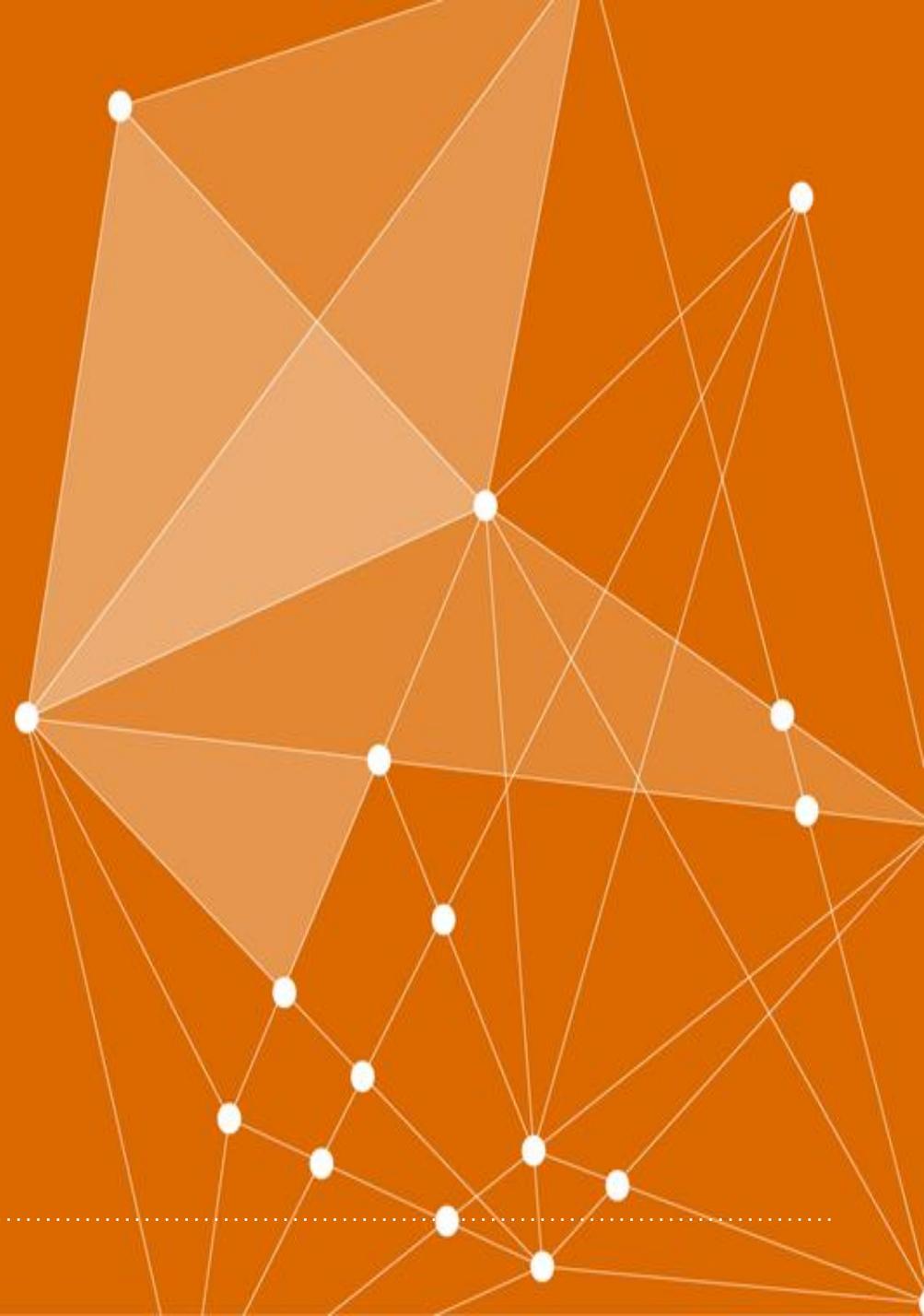
- Rev. Proc. 2009-44 (modified by Ann. 2011-6) provides a mediation procedure for cases in Appeals
 - ▶ Updated address not in Rev. Proc. (999 North Capitol Street, NE, Washington, DC 20003-3903)
- Mediation is a *nonbinding* process that uses a mediator, as a neutral third party, to help Appeals and the taxpayer reach their own negotiated settlement
 - ▶ Mediator acts as a facilitator, assists in defining the issues, and promotes settlement negotiations between the parties
 - ▶ Mediator does not have settlement authority
 - ▶ Mediator will not render a decision regarding any issue in dispute

Post-Appeals Mediation (continued)

- Mediation is only available after Appeals settlement discussions are unsuccessful and prior to issuance of a statutory notice of deficiency
- Must use an Appeals mediator
- Taxpayer has the option to bring in an outside mediator to serve as co-mediator with the Appeals mediator
- Mediation is optional; may be requested by either Appeals or taxpayer
- If mediation is not sought, taxpayer may proceed to litigation

Note: Rev. Proc. 2015-44 eliminated the Post Appeals arbitration due to lack of use.

Fast Track Settlement



Fast Track Settlement (FTS)

- Voluntary, non-binding negotiation process between a taxpayer and Examination with the assistance of an Appeals Officer acting as a neutral party
- Procedures for FTS provided for in Rev. Proc. 2003-40
- LB&I examiners must consider the use of FTS for all unagreed issues
- Use of FTS does not eliminate other dispute resolution options
- FTS allows Examination and the taxpayer to reach a settlement that is facilitated by Appeals' authority to consider hazards of litigation
- FTS is designed to be completed in approximately 120 days (as compared to a year or two long process in traditional Appeals)
- FTS has been expanded to include SBSE cases
- However, not available for Collection or Correspondence/Campus cases

Fast Track Settlement (FTS) (continued)

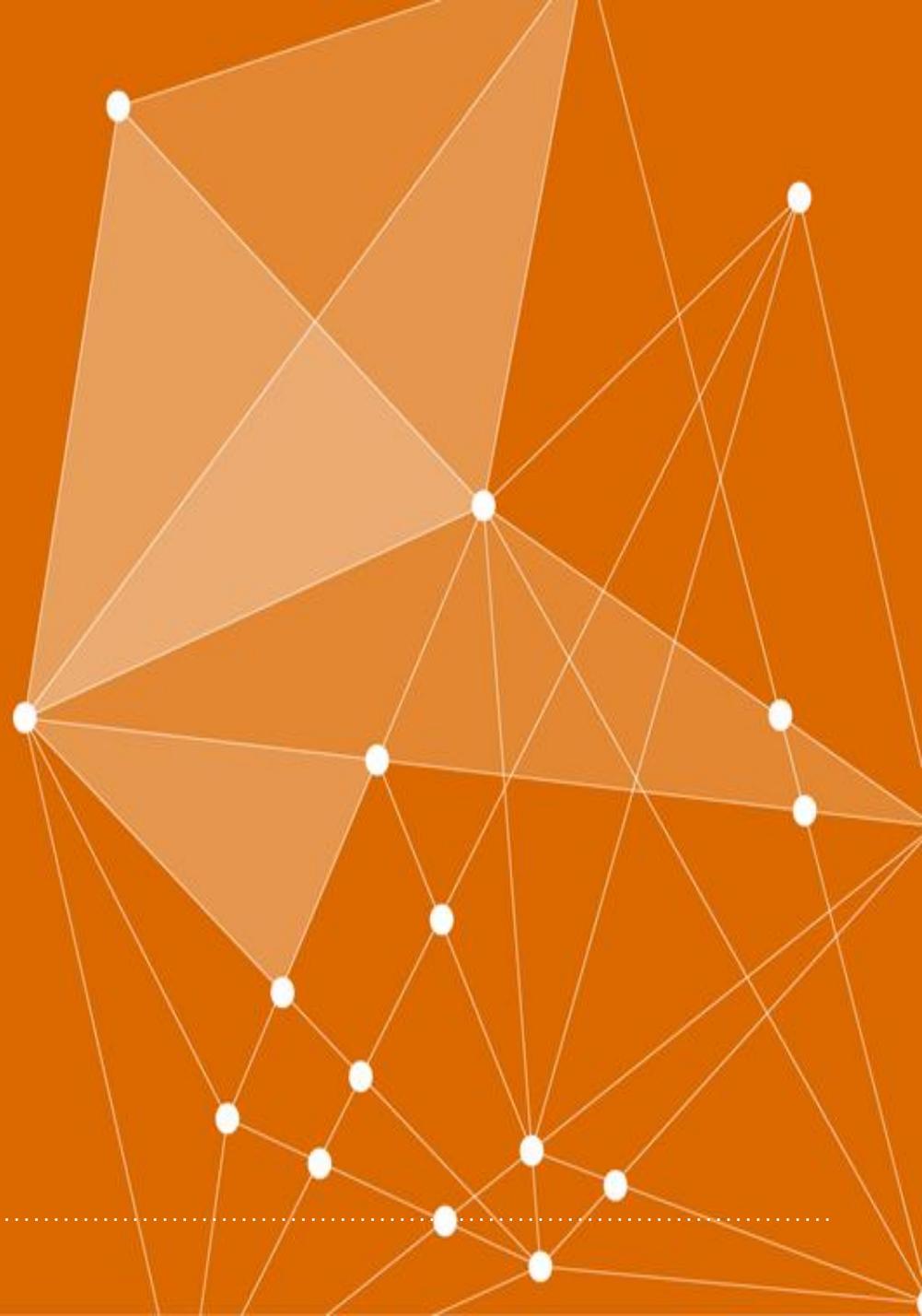
- When can FTS be entered into by parties?
 - ▶ Issue has been fully developed and a Form 5701 (Notice of Proposed Adjustment) has been issued
 - ▶ Taxpayer has provided a written response and position
 - ▶ Prior to the issuance of a 30-Day Letter
 - > Exceptions
- Both a taxpayer and Examination must enter into a “LB&I Fast Track Agreement” to initiate FTS
- If an agreement is reached through FTS, a Form 870 (Consent to Assessment and Collection) or a closing agreement will be prepared and executed

Fast Track Settlement (FTS) (continued)

Benefits of FTS and Action Points

- FTS takes place before the issuance of a 30-Day Letter
 - ▶ Additional 2% hot interest is not attached
- FTS has a high success rate
- Both parties must be agreeable to a settlement
- Decision makers must be present for the FTS session
- Taxpayer and Examination may withdraw at any time
- Appeal rights still available

Early Referral to Appeals



Early referral to Appeals

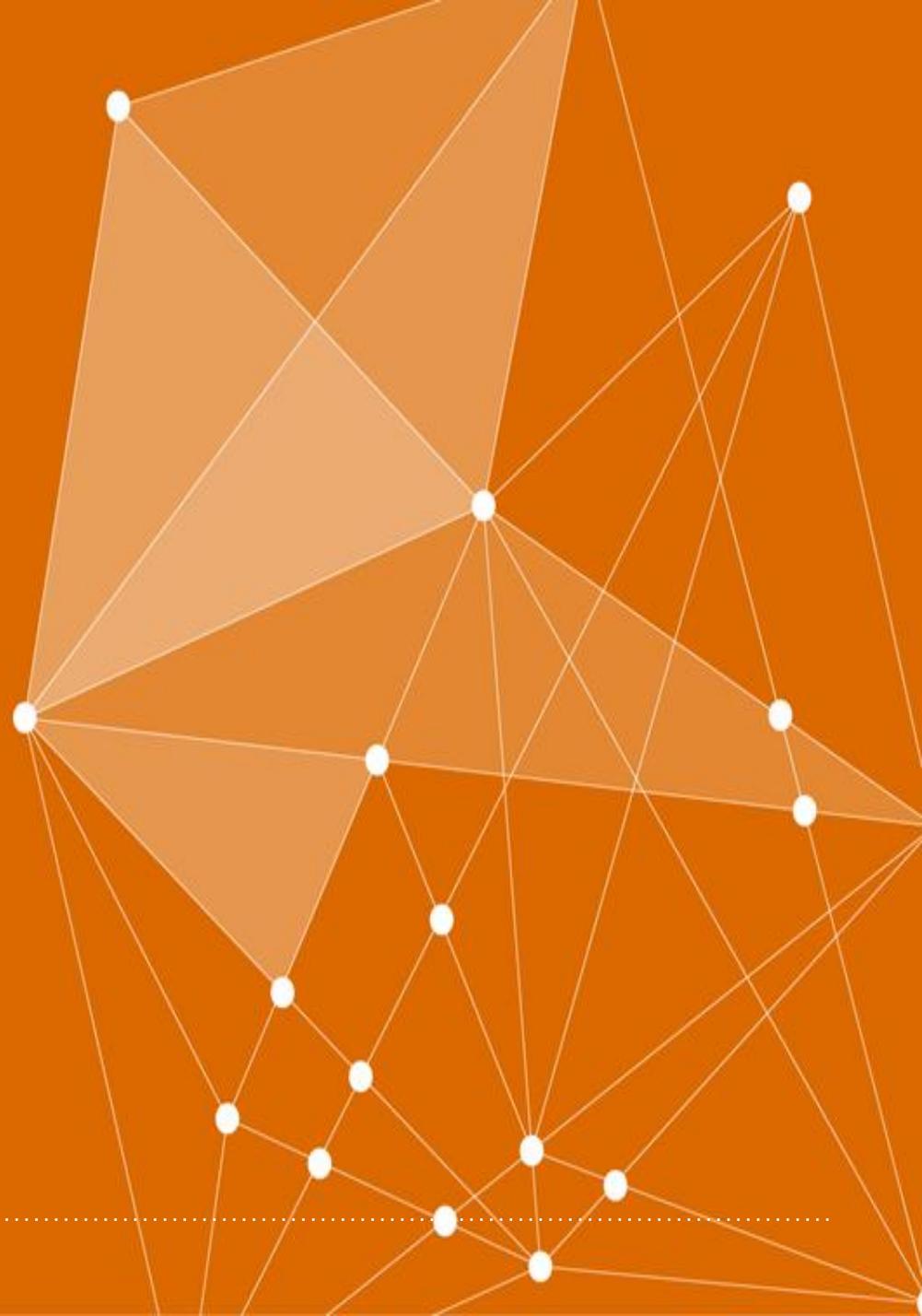
- A taxpayer may request early referral to Appeals of any developed, unagreed issue(s) arising from an exam
- Early referral can resolve cases more expeditiously as Examination and Appeals work simultaneously
- Rev. Proc. 99-28 provides procedures for an early referral request
- Early referral is optional, initiated by the taxpayer, and subject to the approval of both the Director of Field Operations and Appeals Area Director
- If an issue is settled under early referral procedures, a closing agreement is executed with respect to the issue(s)
- If an agreement is not reached, the taxpayer may request mediation or have the issue(s) returned to Examination; unless there is a substantial change in circumstances, Appeals will not reconsider these issues if the case is later protested to Appeals

Early referral to Appeals (continued)

Considerations

- The issue transfers to Appeals while the audit continues in LB&I; Simultaneous efforts ongoing
- No 30-Day Letter is issued therefore the attachment of the 2% hot interest does not apply
- Appeals controls the issue and determines the final Appeals position UNLESS there is a significant change in facts and law
- Taxpayer saves time if the early referral issues is the only contested issue and the Appeals settlement concludes before the exam concludes
- Is this the only issue that will end up in Appeals? Taxpayer could be facing two trips to Appeals

Rapid Appeals Process



Rapid Appeals Process (RAP)

- IRM on process published May 2014
- Available to LBI cases assigned to an Appeals Team Case Leader (ATCL)
- The case must already be in Appeals jurisdiction
- All parties must agree to the process
- LBI is part of process and included in Appeals conference
- May also include LBI Technical Specialist at conference
- All unagreed issues are included in the RAP
- Process follows mediation techniques similar to Fast Track
- Goal to complete the Appeal in one conference

Rapid Appeals Process (RAP) (continued)

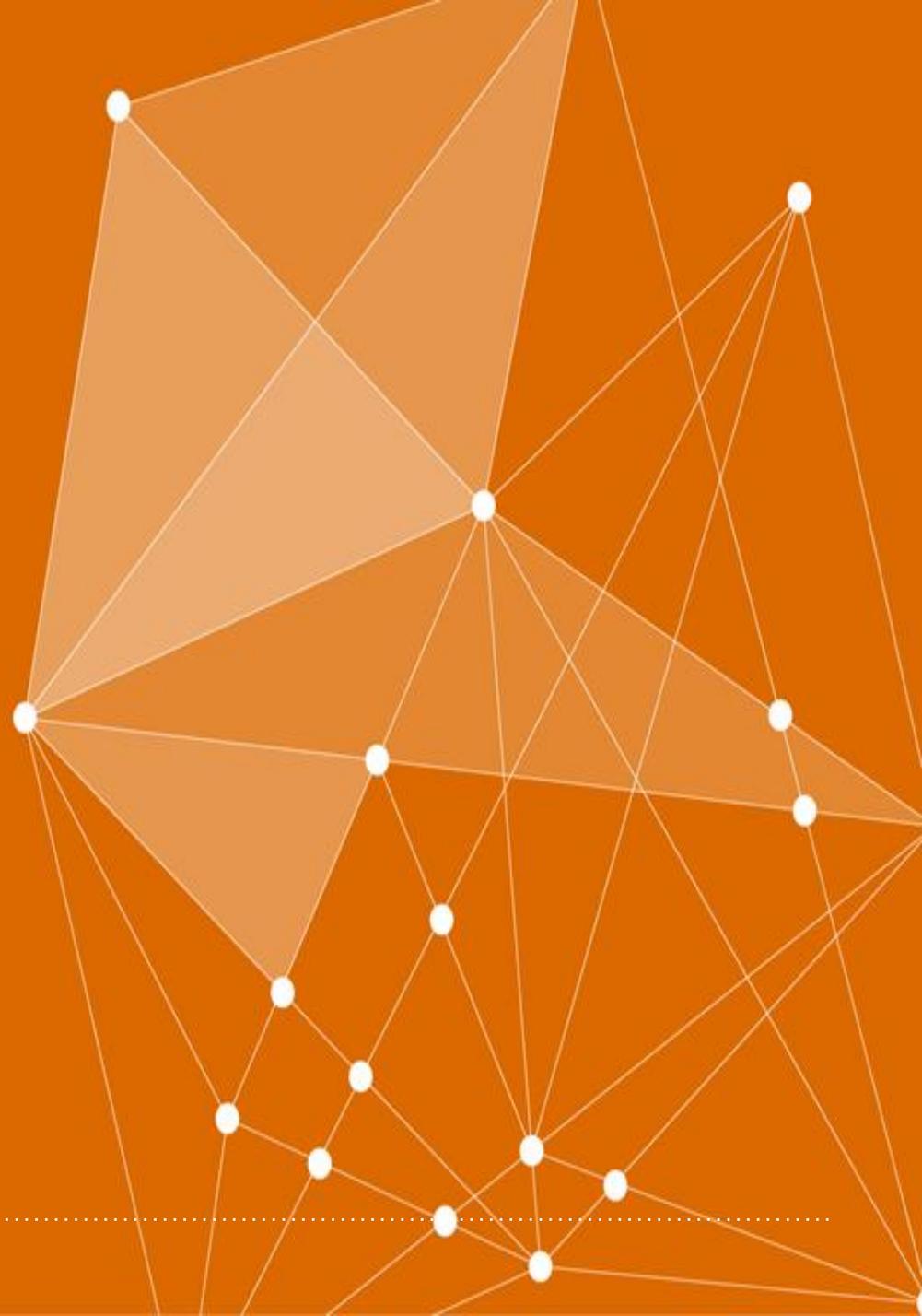
- Appeals will request a waiver of Ex Parte communications
- Any party may request withdrawal from the RAP
- Appeals would then revert to the traditional Appeals process after withdrawal
- Appeals, not Examination, is the IRS decision maker for all issues in dispute
- Case in jurisdiction of Appeals, therefore hot interest applies

Rapid Appeals Process (RAP) (continued)

Considerations of RAP

- Waive ex parte in allowing LB&I to attend taxpayer conference
- Goal to highlight true dispute through discussions and mediation
- Can be similar to FTS...then why not use FTS (no hot interest)
- Potential detriment in LB&I persuading Appeals in discussions
- Not designed to shorten the wait for the opening conference; limits the active conference time in Appeals
- May resolve issue to prevent application of AJAC policies that would require return to examination for development of additional facts and/or new issue review

Comprehensive Case Resolution



Comprehensive Case Resolution (CCR)

Goals

- To help taxpayers that have tax years under examination by LB&I and in Appeals (including docketed cases under Appeals jurisdiction) to resolve all open issues in all such years through a team process
- In some situations it may also be appropriate to include tax years which are docketed before the Tax Court and not under Appeals' jurisdiction
- To enable taxpayers and the IRS to work together to resolve all open issues on all open years currently or previously under examination

Comprehensive Case Resolution (CCR) (continued)

- Notice 2000-43 introduced the pilot program; Notice 2001-13 extended the program
- Available for large business taxpayers (CIC) that have at least one open year in LB&I and one prior year in Appeals
- The exam needs to be substantially complete and in resolution status
- The process will constitute the formal administrative appeal
- The program goal is to resolve all controversies with an aggressive timeline to complete all years within 6-12 months
- Not often used
- Good program for repeat issues that are complex in nature

Comprehensive Case Resolution (CCR) (continued)

- Taxpayers may request participation in writing to LB&I Team Manager
- Taxpayer may withdraw via a written request within the first 30 days of acceptance into the program
- No user fee
- Each function will independently recommend acceptance for the program
- If accepted the IRS will not issue a 30 day letter
- Hot interest under Section 6621(c) will not accrue for the first 12 months
- If not accepted into the pilot program, follow traditional Appeals route

Thank you!

