

## Part III

### Administrative, Procedural, and Miscellaneous

[26 CFR 601.106]: [Appeals Functions]

Rev. Proc. 2016-57

#### SECTION 1. PURPOSE

This revenue procedure obsoletes Revenue Procedure 2003-41, 2003-1 C.B. 1047, SB/SE—Appeals Fast Track Mediation Procedure, and creates a new fast track mediation program, SB/SE Fast Track Mediation—Collection (FTMC), specifically directed at resolving certain collection cases and issues. FTMC allows taxpayers an opportunity to resolve certain offer-in-compromise (OIC) and trust fund recovery penalty (TFRP) disputes on an expedited basis with an Office of Appeals mediator serving as a neutral party.

#### SECTION 2. BACKGROUND

Consistent with the Internal Revenue Service's goals of improving service to taxpayers and resolving tax controversies at the earliest opportunity on a fair and

impartial basis, in June 2000, the IRS began testing fast track mediation (FTM) procedures for taxpayers who had cases in the Small Business/Self-Employed (SB/SE) Division. Specifically, FTM participants were taxpayers whose cases were being worked in either Examination or Collection, two of SB/SE's operating units. FTM allowed taxpayers the opportunity to expedite resolution of their cases by mediating their disputes with an Appeals mediator acting as a neutral party. FTM was implemented nationwide on June 26, 2002. See IR-2002-80. On June 23, 2003, Rev. Proc. 2003-41, 2003-1 C.B. 1047, was published to formally establish the FTM program.

As set forth in this revenue procedure, the IRS is replacing FTM with FTMC. Taxpayer requests for FTM have been infrequent throughout the life of the program, and became increasingly so after Fast Track Settlement (FTS) was implemented nationwide. See Ann. 2011-5, 2011-4 IRB 430 and I.R.S. News Release IR-2013-88 (November 6, 2013). FTS, however, is only available to taxpayers in Examination and does not provide an expedited Appeals alternative dispute resolution opportunity for taxpayers in Collection. Rather than eliminate FTM, the IRS determined that it would replace FTM with FTMC, which will ensure that taxpayers in Collection continue to be afforded an early opportunity for expedited resolution of their cases via mediation, but limited to certain OIC and TFRP issues and cases worked by Collection, as described in section 3 of this revenue procedure. Other alternative dispute resolution programs, such as FTS, remain available to taxpayers whose cases are being worked in Examination. Similar to FTM, FTMC allows taxpayers the opportunity to resolve certain case and issue disputes on an expedited basis with an Appeals mediator acting as a neutral party. Moreover, the Appeals mediator in FTMC, as in FTM, does not have settlement

authority and cannot render a decision regarding any issue in dispute.

### SECTION 3. CASE ELIGIBILITY AND EXCLUSIONS

.01 *In general.* Collection and Appeals jointly administer FTMC while the case is under consideration by Collection. Although Collection is an operating unit of SB/SE, all collection cases, regardless of type of taxpayer, are handled by Collection. Accordingly, any type of taxpayer may participate in FTMC, provided the taxpayer meets the eligibility requirements set forth in this revenue procedure and the taxpayer's case is being worked in Collection.

FTMC may be used only when all other collection issues are resolved but for the issue(s) for which FTMC is being requested. The issue(s) to be mediated must be fully developed with clearly defined positions by both parties so the unagreed issues can be resolved quickly (usually within 30 or 40 calendar days). Participation in FTMC is optional for both Collection and the taxpayer. See Section 4.02 of this revenue procedure.

.02 *No settlement authority.* FTMC does not create any special authority for settlement by Collection. The Appeals mediator does not have settlement authority and cannot render a decision regarding any issue in dispute.

.03 *Applicability.* FTMC is generally appropriate for:

- (1) Legal and factual issues;
- (2) The following OIC cases or issues, provided all relevant facts are known by both parties:
  - a. The value of a taxpayer's assets, including those held by a third party;
  - b. The amount of dissipated assets that should be included in the overall

determination of reasonable collection potential (RCP) (as described in IRM 5.8.5, Financial Analysis);

- c. Whether the taxpayer meets the criteria for deviating from national and/or local expense standards;
- d. Determination of a taxpayer's proportionate interest in jointly held assets;
- e. Projections of future income based on calculations other than current income;
- f. The calculation of a taxpayer's future ability to pay when living expenses are shared with a non-liable person;
- g. Doubt as to liability cases worked by Collection; and
- h. Other factual determinations, such as whether a taxpayer's contributions into a retirement savings account are discretionary or mandatory as a condition of employment;

(3) The following TFRP cases or issues, provided all relevant facts are known by both parties:

- a. Whether a person was required to collect, truthfully account for, and pay over income, employment or excise taxes;
- b. Whether a responsible person willfully failed to collect, truthfully account for, and pay over such tax, or willfully attempted in any manner to evade or defeat payment of such tax;
- c. Whether a taxpayer properly designated a payment to the trust fund portion of the unpaid tax; and

- d. Whether the taxpayer provided sufficient corporate payroll records to establish that a corporate tax deposit was in the amount required by Treas. Reg. § 31.6302-1(c) and thus was considered a designated payment to be applied to both the trust fund and non-trust fund portions of the employment taxes associated with that specific payroll.

.04 *Inapplicability*. FTMC is not appropriate for:

- (1) Issues requiring assessment of the hazards of litigation or use of the Appeals mediator's delegated settlement authority;
- (2) Cases referred to the Department of Justice;
- (3) Cases worked at an SB/SE Campus site;
- (4) Collection Appeals Program (CAP) cases;
- (5) Collection Due Process (CDP) cases;
- (6) Frivolous issues, such as, but not limited to, those identified in Rev. Proc. 2016-2 § 4.04, 2016-1 I.R.B. 102, or any succeeding revenue procedure;
- (7) Collection cases in which the taxpayer has failed to respond to IRS communications or failed to submit documentation to Collection for consideration;
- (8) The following OIC cases:
  - a. Cases in which the unadjusted financial information submitted by the taxpayer demonstrates the taxpayer has the ability to pay in full, except where an Effective Tax Administration OIC is based on economic hardship and the assessed liability is less than \$250,000. See Delegation Order 5-1, To Accept, Reject, Return, Terminate or

Acknowledge Withdrawals of Offers in Compromise;

- b. Cases in which the taxpayer declines to amend or increase the offer despite having no specific disagreement with the valuations, figures, or methodology used by Collection in determining RCP;
- c. Cases in which the disputed issue is explicitly addressed by IRS guidance or authority, including but not limited to regulations, published guidance, the Internal Revenue Manual, forms or instructions. For example, the Form 656 Offer in Compromise Booklet explicitly states that the IRS will not consider expenses for tuition for private schools, college expenses, charitable contributions, and other unsecured debt payments as part of the OIC expense calculation. Therefore, FTMC is not available with respect to whether any of these expenses will be considered in evaluating the taxpayer's offer; and
- d. Cases in which Delegation Order 5-1 requires a level of approval higher than that of the Collection Group Manager;

(9) Issues for which mediation would be inconsistent with sound tax administration; and

(10) Issues that have otherwise been identified in subsequent published guidance issued by the IRS as excluded from FTMC.

#### SECTION 4. APPLICATION PROCESS

.01 *When to request FTMC.* A request for participation in FTMC should be initiated after an issue has been fully developed and before Collection has made a final determination regarding the issue.

.02 *FTMC is optional.* Either the taxpayer or Collection may initiate a request to participate in FTMC. However, Appeals will not accept an issue for FTMC unless both parties agree to participate in the process, as evidenced by a Form 13369, Agreement to Mediate, which is signed by both parties. If the parties are interested in FTMC and need assistance in determining if the issue is appropriate for FTMC, they may contact the appropriate Appeals Team Manager.

.03 *How to request FTMC.*

(1) *Signed Form 13369.* To request FTMC, a Form 13369 must be signed by both the Collection Group Manager and the taxpayer, or the taxpayer's authorized representative, if applicable. If the Form 13369 is signed by a person pursuant to a power of attorney (Form 2848, Power of Attorney and Declaration of Representative), the power of attorney executed by the taxpayer must be attached to the Form 13369.

(2) *Completing the FTMC request.* A FTMC request includes the following:

- a. One Form 13369 for all OIC or TFRP issues in a taxpayer's case that are being submitted for FTMC, signed by both parties.
- b. The taxpayer's written summary of his or her position with respect to the disputed issues. This summary is not treated as a formal protest, and a formal protest is not required.
- c. Collection's written summary of its position with respect to the disputed issues, as well as a full RCP computation for an OIC case, which will generally consist of the Income/Expense and Asset/Equity Tables (IET and AET), or a full trust fund computation in a TFRP case.

.04 *Submission of the FTMC request.* Collection will send the completed FTMC request (i.e., Form 13369 and all supporting documentation) to the appropriate Appeals office. Collection will also provide a copy of the completed FTMC request to the taxpayer.

.05 *Review of the FTMC request.* The Appeals Team Manager will review the FTMC request and confer with the Appeals Office of Tax Policy and Procedure regarding whether the FTMC request will be approved.

(1) *Request approved.* If Appeals approves the FTMC request, the Appeals Team Manager will inform the taxpayer and the Collection Group Manager that the case has been accepted for FTMC, and will schedule a pre-mediation conference, which may include a representative from the Appeals Office of Tax Policy and Procedure to discuss the FTMC process.

(2) *Request denied.* If Appeals denies the FTMC request, the Appeals Team Manager will notify the taxpayer and the Collection Group Manager and return all paperwork to the Collection Group Manager. The decision not to approve a FTMC request is final and not subject to administrative appeal or judicial review.

.06 *Disclosure.* To participate in FTMC, the taxpayer must consent under section 6103(c) to the disclosure by the IRS of the taxpayer's returns and return information incident to the mediation to any participant identified in the initial list of participants and to any participants subsequently identified in writing by the parties. The consent to disclose and the list of participants must be set forth on the Form 13369. If the Form 13369 is signed by a person pursuant to a power of attorney executed by the

taxpayer, that power of attorney must clearly express the taxpayer's grant of authority to the representative to sign the Form 13369 and to consent to disclose the taxpayer's returns and return information by the IRS to third parties. A copy of that power of attorney must be attached to the Form 13369. Any observer for the taxpayer or the government may require the taxpayer (or the taxpayer's representative) to sign an additional disclosure consent form.

## SECTION 5. MEDIATION PROCESS

.01 *Jurisdiction.* During FTMC, the case remains exclusively under Collection's jurisdiction.

.02 *Selection of mediator.* After the case is accepted into FTMC, an Appeals Team Manager will assign an Appeals employee, who has been trained in mediation, to be the Appeals mediator for the case. The taxpayer does not have the option to select a mediator.

.03 *Role of Appeals mediators.* All Appeals mediators must be neutral. Appeals mediators in FTMC serve as facilitators, assist in defining issues, and assist Collection and the taxpayer to reach a mutually satisfactory resolution consistent with applicable law. Appeals mediators will inform and discuss with the parties the rules and procedures pertaining to the mediation process. Appeals mediators in the FTMC process do not have settlement authority and cannot render a decision regarding any issue in dispute. The taxpayer and Collection retain full control over the decisions made for all issues considered under the mediation process.

## SECTION 6. MEDIATION SESSION

.01 *Starting the session.* The Appeals mediator will hold the mediation session

at a time and place that is mutually agreeable to the Appeals mediator and the parties. At the beginning of the mediation session, the Appeals mediator will advise the parties and other participants of the procedures and establish ground rules. The Appeals mediator may modify the rules and procedures during the session to adapt to changes in circumstances. The mediation session may include joint sessions with both parties, sessions where the mediator meets separately with a party, or any combination of joint and separate sessions, as determined appropriate in the sole judgment of the Appeals mediator.

.02 *Presentation of positions.* Both the taxpayer and Collection will be given ample opportunity to present their respective positions. The Appeals mediator may also ask either party for additional information if deemed necessary for a full understanding of the issues being mediated. A copy of any submission for the mediation session must be provided to the Appeals mediator, who will provide a copy of the submission to the other party.

.03 *Participants.* During the mediation session, the taxpayer and Collection participants will meet with the Appeals mediator. Each party must have at least one participant with decision-making authority present during the mediation session. Any person engaged in practice before the IRS, as defined in Publication 216, Conferences and Practice Requirements, and acting in a representative capacity must have a power of attorney from the taxpayer to participate in the mediation session. The parties are encouraged to include, in addition to the required decision-makers, those individuals with information and expertise that may be useful to the decision-makers and the mediator. The Appeals mediator may ask the parties to limit the number of participants

(and any other observers) to facilitate the session.

*.04 Postponement or termination.* If it is determined that meaningful progress toward resolution of the issues has stopped, the Appeals mediator may terminate the mediation session. Further, the Appeals mediator may, but is not required to, terminate or postpone the session if: (a) either party presents new information or new issues during the mediation session; (b) the taxpayer wishes to submit a substantial amount of additional documentary information; (c) the taxpayer wishes to present new witnesses, including experts; or (d) for other good cause. If the mediation session is terminated, the Appeals mediator will notify both parties in writing. Any issue that is the subject of a terminated mediation session is treated as mediated for purposes of determining post-appeals mediation eligibility. See Rev. Proc. 2014-63 § 4.04(9). If the Appeals mediator postpones a mediation session, the Appeals mediator will communicate and coordinate his or her decision with both parties. A decision by the Appeals mediator that postponement is necessary may result in a longer period for completion of the FTMC process.

*.05 Withdrawal.* Either party may withdraw from FTMC at any time before reaching an agreement on the issue(s) by notifying the other party and the Appeals mediator in writing. If either party withdraws from FTMC prior to the start of the mediation session, the taxpayer will not be treated as having participated in FTMC for purposes of determining post-appeals mediation eligibility. See Rev. Proc. 2014-63 § 4.04(9).

*.06 Resolution recommendation.* The Appeals mediator may recommend to the parties a possible resolution of one or all of the issues considered in FTMC based on

the Appeals mediator's analysis of the issues. Any recommendation made by the Appeals mediator does not bind the parties and is not a decision regarding any issue in dispute.

*.07 Confidentiality.* Returns and return information are confidential under section 6103 and may not be used or disclosed except as authorized under the Internal Revenue Code. In addition, under 5 U.S.C. § 574, any dispute resolution communication (as defined in 5 U.S.C. § 571(5)) is confidential. Therefore, the mediation process, and any information relating to the mediation, is confidential and may not be used or disclosed by any party, mediator, participant, or observer (including any person under contract to the IRS pursuant to section 6103(n)) except as provided by 5 U.S.C. § 574, relating to confidentiality in federal administrative alternative dispute resolution proceedings, or by section 6103 of the Internal Revenue Code.

*.08 Ex parte communications.*

(1) *Generally.* The prohibition against ex parte communications between Appeals personnel and other IRS employees provided by section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998 does not apply to the communications arising in FTMC because Appeals personnel, in facilitating an agreement between the taxpayer and Collection, are not acting in their traditional Appeals settlement role.

(2) *With mediator.* To ensure that one party is not in a position to exert undue influence on the Appeals mediator, communications with the Appeals mediator outside the mediation session are prohibited. This prohibition against communications with the Appeals mediator is intended to apply only

to unsolicited contacts from one of the parties with the Appeals mediator that occur outside the mediation session. The prohibition prevents the Appeals mediator from receiving information or evidence from one party that the other party is unaware of and is unable to respond to or rebut. This provision does not prevent the Appeals mediator from contacting a party outside the mediation session, or a party from answering a question or request posed by the Appeals mediator outside the mediation session. Upon receiving information from one party, the Appeals mediator must make the information available to the other party so that no party is unaware of or unable to respond to or rebut the information.

## SECTION 7. POST-SESSION PROCEDURE

.01 *Appeals mediator's report.* At the conclusion of the mediation session, the Appeals mediator will prepare a brief written report by completing a Form 13370, Fast Track Mediator's Report. Generally, a copy of the report is provided to the taxpayer and the Collection Group Manager at the end of the mediation session. If a copy of the report is not so provided, the parties will receive copies of the report within a week of the end of the mediation session.

### .02 *Closing procedures.*

(1) *Resolved issues.* If the parties resolve any of the disputed issues during the mediation session, Collection will secure the appropriate closing documents from the taxpayer and close the case through Collection's established OIC or TFRP case closing procedures.

(2) *Unresolved issues.*

- a. *Generally.* Collection will close the unagreed case or unresolved issue in accordance with established OIC or TFRP case closing procedures.
- b. *Other Appeals opportunities.* If the parties do not reach an agreement on a mediated issue, FTMC does not eliminate or replace the taxpayer's opportunity to request a hearing before Appeals through the traditional Appeals process. If the taxpayer does request a hearing before Appeals for an unresolved issue, ex parte restrictions will not be imposed on intra-Appeals communications. See Rev. Proc. 2012-18, 2012-10 I.R.B. 455. A taxpayer who participates in an unsuccessful mediation may request that the Appeals mediator not participate in the traditional Appeals hearing. While it is in Appeals' discretion to agree to such a request, Appeals management will take appropriate steps to ensure these cases are handled impartially. Post-appeals mediation is not available for an issue mediated through FTMC. See Rev. Proc. 2014-63 § 4.04(9) and §§ 6.04, 6.05 of this revenue procedure.

*.03 Special closing procedures for certain OIC cases.* Under certain circumstances, the settlement of an OIC case may require a legal opinion from IRS Counsel pursuant to I.R.C. § 7122(b). For an OIC case successfully mediated in FTMC, the case will be forwarded to IRS Counsel for an opinion after the mediation session. Final processing of the OIC case may not occur prior to receipt of the opinion from IRS Counsel.

*.04 No record or recording of mediation session.* The parties to the mediation may not make a stenographic record, audio or video tape recording, or other transcript

of the mediation session.

.05 *Use as precedent.* A settlement reached by the parties through FTMC will not be binding on the parties (or be otherwise controlling) for issues or taxable years not covered by the agreement. Except as provided in the agreement, no party may use such settlement as precedent.

#### SECTION 8. EFFECT ON OTHER DOCUMENTS

Revenue Procedure 2003-41 is obsoleted.

#### SECTION 9. EFFECTIVE DATE

This revenue procedure is effective November 18, 2016.

#### SECTION 10. DRAFTING INFORMATION

The principal authors of this revenue procedure are Chelsey Pearson of the Office of Associate Chief Counsel (Procedure & Administration) and John Gonzalez, Office of Appeals (Tax Policy & Procedure). For further information regarding this revenue procedure contact Ms. Pearson at (202) 317-6832 or Mr. Gonzalez at (415) 281-7837 (not toll free calls).