



INDEPENDENT OFFICE
OF APPEALS

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

September 14, 2022

Control No. AP-08-0922-0011
Expiration Date: 09/14/2024
Affected IRMs: 8.1.1

MEMORANDUM FOR IRS INDEPENDENT OFFICE OF APPEALS EMPLOYEES

FROM: Steven M. Martin /s/ *Steven M. Martin*
Director, Case and Operations Support

SUBJECT: Interim Guidance for Cases in which Taxpayers Raise Arguments
Regarding the Validity of a Treasury Regulation or Procedural
Validity of an IRS Notice or Revenue Procedure

This memorandum ensures consistent treatment of cases in which taxpayers argue that a Treasury regulation is invalid or that an IRS notice or revenue procedure published in the Internal Revenue Bulletin (IRB) is procedurally invalid.

Purpose: This interim guidance provides that in settling cases, the IRS Independent Office of Appeals (Appeals) will not apply litigating hazards to arguments raised by a taxpayer regarding the validity of Treasury regulations or procedural validity of IRB notices or revenue procedures. The preceding sentence does not apply if there is an unreviewable decision from a federal court holding the regulation, IRB notice, or revenue procedure invalid. Appeals will review the taxpayer's case based on other arguments, including how the guidance applies to the taxpayer's facts and circumstances.

Background: The IRS Independent Office of Appeals is reviewing its current policies in light of the Taxpayer First Act's provisions regarding access to Appeals. See 26 U.S.C. §7803(e)(4). Appeals reviews most taxpayer disputes arising from the IRS's examination and collection activities, offering administrative settlements to resolve the dispute in a manner that is fair and impartial to the taxpayer and the government.

Appeals is seeing an increase in cases in which a taxpayer, in support of their challenge of an IRS Compliance determination, asserts that a Treasury regulation is invalid or an IRB notice or revenue procedure is procedurally invalid. These challenges tend to raise administrative law questions distinct from the administrative tax determinations most commonly heard in Appeals.

Treasury regulations are approved within the Department of the Treasury's Office of Tax Policy, after the review and concurrence of senior officials within Treasury, the

IRS, and sometimes other federal agencies. Treasury regulations generally have the force and effect of law, thereby binding the IRS and its employees. In addition, the procedural validity of IRB notices and revenue procedures is approved at senior levels of IRS and Treasury.

A federal court, however, can invalidate a Treasury regulation, IRB notice, or revenue procedure, and the judicial process is the appropriate forum for addressing taxpayer challenges regarding the validity of Treasury regulations or procedural validity of IRB notices and revenue procedures in the first instance. Accordingly, Appeals will not settle cases on the basis of validity challenges if a court has not yet held that the regulation in question is invalid or that the IRB notice or revenue procedure in question is procedurally invalid.

Effect on Other Documents: This guidance will be incorporated into IRM 8.1.1, Appeals Function, Appeals Operating Directives and Guidelines, within two years from the date of this memorandum.

Effective Date: This guidance is effective as of the date of this memorandum and applies to cases closed on or after September 14, 2022.

Procedural Change: See attachment.

Contact: Appeals employees should follow existing procedures to elevate questions through their management chain and follow established procedures on [How to Contact an Analyst](#).

Distribution
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IRM 8.1.1.2.1, Some Exceptions to Appeals Authority

(1) **Add: e.** In settling cases, Appeals does not apply litigating hazards to arguments raised by a taxpayer regarding the validity of Treasury Regulations or procedural validity of IRS notices or revenue procedures published in the Internal Revenue Bulletin (IRB). The preceding sentence does not apply if there is an unreviewable decision from a federal court invalidating the regulation as a whole or the provision in the regulation that the taxpayer is challenging or holding the IRB notice or revenue procedure to be invalid. For this purpose, an unreviewable decision means the decision can no longer be appealed to any federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was filed. Appeals can, however, apply litigating hazards to other arguments for that issue and may also settle other issues in the case based on litigating hazards. Examples of validity challenges include assertions that:

- The Treasury regulation, IRB notice, or revenue procedure did not comply with the Regulatory Flexibility Act, the Paperwork Reduction Act, or the notice-and-comment requirements of the Administrative Procedure Act, as applicable.
- The Treasury regulation is contrary to the statute or exceeds the scope of the statute.