



DEPARTMENT OF THE TREASURY  
INTERNAL REVENUE SERVICE  
WASHINGTON, DC 20224

SMALL BUSINESS/Self-EMPLOYED DIVISION

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4.10.6, 4.10.7, 4.10.8,  
and 4.10.9

MEMORANDUM FOR AREA DIRECTORS, FIELD EXAMINATION

FROM:

Maha H. Williams

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Williams

Date: 2020.09.24 10:29:43 -04'00'

Director, Examination Field and Campus Policy

SUBJECT:

Timing of Supervisory Approval of Penalties Subject  
to IRC 6751(b)

This memorandum issues Field Examination specific guidance for supervisory approval of penalties subject to IRC 6751(b) until the impacted IRMs listed above are published. Please ensure this information is distributed to all affected employees within your organization.

**Purpose:** Guidance is being updated to align with [SBSE-20-0520-0029](#), Interim Guidance on Timing of Supervisory Approval with Respect to IRC 6751(b)(1).

**Background:** Previously, IRS policy required written supervisory approval prior to issuance of the notice of deficiency. However, recent court decisions have required written supervisory approval of penalties subject to IRC 6751(b) prior to issuance of a 30-day letter and in some instances earlier.

**Procedural Change:** See Attachments 1 through 7 for procedural changes.

**Effective Date and Effect on Other Documents:** This guidance is effective immediately and will be incorporated into the impacted IRMs listed above within two years from the date of this memorandum.

**Contact:** Cathy Demetra, Program Manager, Examination Field and Campus Policy, Field Exam General Processes.

Attachments:

[Attachment 1](#) – IRM 4.10.6

[Attachment 2](#) – IRM 1.4.40

[Attachment 3](#) – IRM 4.10.1

[Attachment 4](#) – IRM 4.10.3

[Attachment 5](#) – IRM 4.10.7

[Attachment 6](#) – IRM 4.10.8

[Attachment 7](#) – IRM 4.10.9

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### **IRM 4.10.6.X**

#### **Written Supervisory Approval of Penalties Under IRC 6751(b)**

- (1) Penalties requiring supervisory approval under IRC 6751(b) must be personally approved (in writing) by the immediate supervisor of the individual making the initial determination. An acting supervisor with an approved designation to act (e.g., [Form 10247](#), Designation to Act) is considered an immediate supervisor for the purpose of IRC 6751(b)(1) (see [IRM 20.1.6.9.1\(2\)](#), Centralized Case Processing Functional Procedures). When an acting supervisor signs the Civil Penalty Approval Form on behalf of the supervisor, the actor must sign their name (manually or digitally) “acting for” the supervisor, whose name is listed on the form. See [Signature Guidance for Acting Group Managers](#) for examples.
- (2) Effective May 20, 2020, for all penalties subject to section 6751(b)(1), written supervisory approval required under section 6751(b)(1) must be obtained prior to issuing any written communication of penalties that offers the taxpayer an opportunity to:
  - **Sign an agreement or consent to assessment of a penalty:** A form soliciting a signature, which the IRS relies upon to make an assessment. For example, [Form 870](#), Waiver of Restrictions on Assessment & Collection of Deficiency in Tax & Acceptance of Overassessment; [Form 4549](#), Report of Income Tax Examination Changes; or [Form 5816](#), Report of Tax Return Preparer Penalty Case.
  - **Sign a consent to proposal of a penalty:** A taxpayer may be provided an opportunity to consent to proposal of a penalty by signing an IRS form even though the IRS does not rely on the form to make the assessment. For example, the taxpayer has the opportunity to sign [Form 5701](#), Notice of Proposed Adjustment, even though the IRS does not rely upon [Form 5701](#) to make an assessment.

For penalties not meeting the criteria above, written supervisory approval must be obtained before the case is closed from the group. For example, the taxpayer is not provided an opportunity to sign an agreement, sign a consent to assessment, or consent to proposal of an IRC 6721/6722 penalty case. Therefore, approval must be obtained before the IRC 6721/6722 penalty case is closed from the group.

**Note:** The change to the timing of supervisory approval is a policy change, not a law change, therefore if the taxpayer was offered an opportunity to sign an agreement, sign a consent to assessment, or sign a consent to proposal of a penalty prior to May 20, 2020, and supervisory approval was obtained prior to issuance of the 30-day letter (if applicable) or when the case is closed from the group (whichever occurs first), approval is timely.

- (3) Supervisory approval is not required for: (1) failure to file or pay penalties under IRC 6651, (2) estimated tax penalty under IRC 6654 or IRC 6655, or (3) any other penalty automatically calculated through electronic means.

**Reminder:** As an administrative matter, supervisory approval of the fraudulent failure to file penalty under IRC 6651(f) is required (see [IRM 20.1.2.3.7.5.1\(8\)](#), FFTF Penalty Assessment–Procedural Requirements).

(4) Prior to obtaining supervisory approval, written communication (e.g., list or [Form 5278](#), Statement – Income Tax Changes) reflecting proposed adjustments (including penalties) can be shared with the taxpayer to facilitate discussion during a face-to-face appointment if:

- The written communication does not include language offering the taxpayer an opportunity to sign an agreement, sign a consent to assessment, or sign a consent to proposal of a penalty,
- A letter offering the taxpayer an opportunity to sign an agreement or file a protest requesting a conference with Appeals does not accompany the written communication, and
- The activity record is documented to indicate the date and circumstances under which the written communication was provided.

**Example:** At the conclusion of the fact-finding phase of the examination (during a face-to-face appointment), the examiner determines an accuracy-related penalty applies. Supervisory approval of the penalty has not yet been obtained, so to facilitate discussion of the proposed adjustments and penalty, the examiner prepares [Form 5278](#) and shares it with the taxpayer.

**Reminder:** A report should not be mailed to the taxpayer prior to discussing findings and proposed issues (see [IRM 4.10.7.5.1\(3\)](#), Closing Phase of the Examination).

(5) Generally, written supervisory approval is documented on the Civil Penalty Approval Form (Tab 2 within Lead Sheet 300 in RGS), [Form 8278](#), Assessment and Abatement of Miscellaneous Civil Penalties, or other method which complies with [IRM 20.1.5.2.3.1](#), Documenting Supervisory Approval of Penalties. When using a digital signature, it must contain a graphical image of the signer’s handwritten signature and “Digitally signed by, signer’s name, date and time stamp” in the signature block. Under no circumstances should the form reflect the SEID as the signature. See [IRM 4.10.1.4.4](#), Digital Signatures.

**Reminder:** When documenting supervisory approval on the Civil Penalty Approval Form, an alternative penalty position, if applicable and subject to supervisory approval, must be identified along with the primary penalty position.

(6) The signed Civil Penalty Approval Form must be saved in the RGS case file and should be included as an attachment to any report issued to the taxpayer which includes penalties requiring supervisory approval.

**Reminder:** [Form 8278](#) must not be provided to the taxpayer (see [IRM 20.1.7.5.1\(6\)](#), Field Examination Delinquent Information Return Procedures).

#### 1.4.40.4.11

#### Closing Returns – General

(1) The group manager is responsible for ensuring that quality examinations are conducted. When a case is closed by an examiner, the group manager should review the case to ensure it is procedurally and technically correct. The scope of the review will vary based on the group manager's knowledge of the specific examiner's level of experience and work. At a minimum, the group manager must ensure the examiner:

- Considered, applied, and documented assertion and non-assertion of penalties and timely secured written supervisory approval of penalties when applicable.

**Reminder:** If written supervisory approval of penalties subject to IRC 6751(b) was not obtained timely, impacted penalties must be removed from the report and the examiner must issue a corrected report (without impacted penalties) to the taxpayer prior to the case closing from the group. To be considered timely, effective for cases where the initial report was issued prior to May 20, 2020, written supervisory approval of penalties must have been secured prior to the issuance of a 30-day letter (e.g., [Letter 915](#), Examination Report Transmittal; [Letter 950](#), 30-Day Letter – Straight Deficiency). Effective for cases where initial reports are issued May 20, 2020, or later, written supervisory approval must be obtained prior to issuing any written communication of penalties that offers the taxpayer an opportunity to sign an agreement, sign a consent to assessment, or consent to proposal of a penalty.

- Made required follow-up attempts to contact the taxpayer if the taxpayer did not respond to the initial contact letter ([IRM 4.10.2.8.3](#), No Response/No Show Procedures).
- Considered and documented prior/subsequent year and related returns.
- Properly completed and documented the minimum income probes.
- Reconciled the tax and taxable income on the examination report to current TXMODA information.
- Followed proper procedures to solicit payment if there is an unpaid deficiency and the case is agreed.
- Reconciled the time on ERCS to [Form 5344](#), Examination Closing Record.

#### 1.4.40.4.11.3

#### Agreed Closing Procedures

(1)(b) Penalties have been considered and applied when applicable and supervisory approval has been documented under IRC 6751(b). If approval was not timely, penalties under IRC 6751(b) must be removed from the report and the examiner must issue a corrected report (without impacted penalties) to the taxpayer following the guidance in [IRM 4.10.8.14](#), Corrected Reports, prior to the case closing from the group.

#### 1.4.40.4.11.5

### Unagreed Closing Procedures

(4) A fully developed case should contain an easy to follow audit trail and the evidence needed to support the adjustments proposed in the examination report. At a minimum, the workpapers should:

- Address the facts, law and argument for each issue
- Indicate that any court cases cited by the taxpayer were reviewed
- Clearly reflect the dollar-amounts allowed and disallowed
- Contain an alternative position, if applicable.

**Note:** If an alternative penalty is subject to IRC 6751(b), it is subject to the same supervisory approval requirements as a primary position.

(5) The group manager must review an unagreed case file and return it to the examiner if:

- a. Penalties were not timely approved under IRC 6751(b). If approval was not timely, penalties under IRC 6751(b) must be removed from the report and the examiner must issue a corrected report (without impacted penalties) to the taxpayer prior to the case closing from the group; or,
- b. The issues were not adequately developed.

**Note:** If the case is being closed to Appeals, see [IRM 4.10.8.12.9.3\(2\)](#), Request for Appeals Conference, for guidance on adequacy of formal written protests and small case requests.

(6) The group manager's actions must be documented on [Form 9984](#), Examining Officer's Activity Record, or its RGS equivalent.

**4.10.1.2.1.3**

**Right to Pay No More than the Correct Amount of Tax**

(2) To protect the taxpayer's "Right to Pay No More than the Correct Amount of Tax", examiners:

- a. Should consider whether the taxpayer qualifies for penalty relief based on "reasonable cause" ([IRM 20.1.1.3.2](#), Reasonable Cause).
- b. Must abate any portion of any penalty attributable to erroneous written advice furnished by an officer or employee of the IRS acting in their official capacity (IRC 6404(f)).
- c. Can discuss penalties verbally or propose penalties on a report. If penalties requiring supervisory approval are proposed, do not issue a report until approval is obtained. To facilitate discussion, written communication (e.g., [Form 5278](#), Statement – Income Tax Changes) reflecting proposed adjustments (including penalties) can be shared during a face-to-face appointment.

**4.10.3.17.8**

**Penalty Consideration**

(2) It is the examiner's responsibility to identify, document and accurately calculate appropriate penalties. This responsibility remains the same even when examinations are conducted by correspondence. See [IRM 4.10.6](#), Penalty Considerations, for additional guidance. However, written supervisory approval is required for certain penalty determinations. IRC 6751(b) states certain penalties may not be assessed unless the initial determination of the assessment is personally approved, in writing, by the immediate supervisor of the person making the penalty determination. Supervisory approval is not required for: (1) failure to file or pay penalties under IRC 6651, (2) estimated tax penalty under IRC 6654 or IRC 6655, or (3) any other penalty automatically calculated through electronic means.

**Reminder:** Written supervisory approval of penalties proposed under IRC 6751(b) must be obtained timely or related penalties cannot be assessed.

### **IRM 4.10.7.5**

#### **Proposing Adjustments to the Taxpayer and/or Representative**

- (1) Communication with the taxpayer or representative on an on-going and continuous basis is a critical part of the examination process. Generally, the taxpayer should feel more involved in the audit process and will be better informed of the status of the examination. The examiner should discuss the progress of the audit and issues proposed with the taxpayer and/or representative at frequent intervals as the examination continues.
  - a. In office examinations, discuss issues throughout the appointment and summarize issues (including penalties) at the conclusion of the appointment. If penalties requiring supervisory approval are proposed, do not issue a report until approval is obtained. To facilitate discussion, written communication (e.g., a list or [Form 5278](#), Statement – Income Tax Changes) reflecting proposed adjustments (including penalties) can be shared during a face-to-face appointment.
  - b. In field examinations, the examiner should discuss issues as they are concluded. This allows the resolution process to begin as the examination continues. Each issue is discussed as it is completed and resolved so that at the conclusion of field work the status of each issue is known. The examiner can then take the appropriate steps to close the case.

### **IRM 4.10.7.5.1**

#### **Closing Phase of the Examination**

- (5) To facilitate discussion at closing conferences, the examiner may provide the taxpayer with a listing and brief description of proposed adjustments and penalties to be discussed. In lieu of a list, [Form 5278](#) reflecting proposed adjustments (including penalties) can be shared during a face-to-face appointment.
  - a. Over assessment and no-change cases are generally not controversial and, in most instances, there is no need to hold a formal closing conference.
  - b. For agreed cases a closing conference is generally not required as the issues were probably discussed and resolved throughout the audit. However, in some instances, a formal closing conference will be needed. The examiner should discuss the report with the taxpayer and/or representative to ensure that all questions are answered and that payment arrangements are made.
  - c. For unagreed cases, a closing conference will generally be held.
- (7) d. The examiner solicits an agreement from the taxpayer.

**Caution:** If penalties requiring supervisory approval under IRC 6751(b) are proposed, approval must be obtained before a report is issued.

**Note:** When a joint return is examined and only one spouse is present at the

interview, a copy of the examination report must be mailed to the other spouse. If the taxpayers are represented by a power of attorney and he signs the audit report, copies of the audit report will be sent separately to each spouse.

#### **4.10.7.5.2**

##### **Office Examinations Procedures**

- (1) This section provides additional information for the processing of office examination cases. See [IRM 4.10.7.5](#), Proposing Adjustments to the Taxpayer and/or Representative, for general information.
- (2) Generally, examiners should issue a report at the conclusion of the initial face-to-face appointment, unless:
  - a. Income is an issue that needs further development;
  - b. Additional information is needed to work a prior and/or subsequent return concurrently with the year under examination (a focused IDR, using [Form 4564](#), Information Document Request, should be issued to request additional information);
  - c. Penalties requiring supervisory approval under IRC 6751(b) are proposed and approval has not yet been obtained; or,
  - d. The manager is not available to sign the 30-day letter.

**Reminder:** The authority to sign and issue 30-day letters (e.g., [Letter 915](#), Examination Report Transmittal) is delegated to group managers. See Delegation Order SBSE 4.55, Authority to Sign Thirty Day Letters.

**Note:** If the issuance of a report is delayed while the examiner secures the manager's signature on the 30-day letter and/or the penalty approval form, update the ERCS action code to 08, for follow-up in 5 days. Once the report is issued, update the ERCS action code to 04 for follow up (generally in 15 days).

- (3) If the taxpayer says he has additional information to consider at the end of the initial meeting, this should generally not delay the issuance of a report. A focused IDR should be issued to request additional information if the information was not previously requested on the initial or a subsequent IDR. The examiner and taxpayer should agree on a mutually acceptable date (generally 15 days) for submission of additional information.

**Note:** The taxpayer should be informed that if relevant information is received, it will be considered and the report will be revised if appropriate.

- (4) Deleted

#### **4.10.7.5.3**

##### **Field Examinations**

- (2) If the desired level of communication and cooperation is not achieved, once the examination is complete, examiners will explain the basis of the proposed adjustments to the taxpayer and/or representative. Examiners should be prepared to cite the law, regulations, rulings, and court decisions on which their conclusions are based and provide the taxpayer with copies of workpapers explaining the proposed adjustments.

**Reminder:** Do not issue a report if penalties requiring supervisory approval under IRC 6751(b)(1) are proposed until approval is obtained. [Form 5278](#) or a written list of proposed adjustments (including penalties) can be shared to facilitate discussion during a face-to-face appointment. The activity record should be contemporaneously documented to indicate the date and circumstances under which the [Form 5278](#) or written list was provided.

#### **4.10.7.5.3.1 Agreed Cases**

- (2) Calculate the deficiency or overassessment.

- **Penalties requiring supervisory approval are proposed:** Do not issue a report until approval is obtained.

**Note:** Prior to obtaining supervisory approval of penalties, [Form 5278](#) or a written list of proposed adjustments (including penalties) can be shared to facilitate discussion during a face-to-face appointment. The activity record should be contemporaneously documented to indicate the date and circumstances under which the [Form 5278](#) or written list was provided. If [Form 5278](#) is provided to the taxpayer, issue [Form 4549](#) after supervisory approval of penalties is obtained.

- **Penalties requiring supervisory approval are not proposed:** Issue [Form 4549](#) if everyone agrees; there is no reason for delay in execution of an agreement.

#### **4.10.7.5.4 Unagreed Cases**

- (1) If agreement can be reached on one or more, but not all issues or years, taxpayers should be encouraged to enter into a partial agreement by executing a waiver such as [Form 870](#), Waiver of Restrictions on Assessment & Collection of Deficiency in Tax & Acceptance of Overassessment, covering the agreed issues or years. When penalties requiring supervisory approval are proposed, do not solicit a partial agreement until approval is obtained.

### **IRM 4.10.8.2.3**

#### **Issuance of Audit Reports**

- (2) Whenever possible, examiners should discuss proposed adjustments (including penalties) with the taxpayer during a face-to-face appointment. If penalties requiring supervisory approval are proposed and the examiner has not yet obtained approval, [Form 5278](#) or a written list of proposed adjustments (including penalties) can be shared to facilitate discussion during a face-to-face appointment. The activity record should be contemporaneously documented to indicate the date and circumstances under which the [Form 5278](#) or written list was provided.
- (3) When a report is mailed, the examiner must prepare and issue the appropriate letter to transmit the report and notify the taxpayer of the examination process and their rights (e.g., [Letter 915](#), [Letter 950](#), [Letter 4121](#), [Letter 5153](#), etc.). See [IRM 4.10.8.2.3.1](#) below for additional guidance on preparing and issuing letters.

**Reminder:** Generally, for deficiency cases, TCOs issue [Letter 915](#) with the first report (in person or by mail).

**Caution:** Written supervisory approval of penalties proposed subject to IRC 6751(b) must be obtained timely or the related penalties cannot be asserted.

- (4) If the issuance of a 30-day letter is delayed while the examiner secures the manager's signature on the letter or the penalty approval form, TCOs must update the ERCS action code to 08, Follow-Up Action.

**IRM 4.10.9.7.8.2**

**Penalties: Supervisory Approval**

(3) Penalties requiring supervisory approval must be approved timely. Approval must be obtained prior to issuing any written communication of penalties that offers the taxpayer an opportunity to:

- Sign an agreement or consent to assessment of a penalty, or
- Sign a consent to proposal of a penalty.