



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

SMALL BUSINESS/Self-EMPLOYED DIVISION

September 28, 2022

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Expiration Date: 12-31-2023
Impacted IRMs: 4.10.3, 4.10.6, and
4.10.9

MEMORANDUM FOR AREA DIRECTORS, FIELD EXAMINATION

FROM: Lori L. Caskey /s/ *Lori L. Caskey*
Director, Examination Field and Campus Policy

SUBJECT: Reissue Interim Guidance (IG) for 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: Reissue IG SBSE 04-0920-0054 dated September 24, 2020, which requires written supervisory approval of penalties subject to [IRC 6751\(b\)](#) prior to issuance of a 30-day letter and in some instances earlier.

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 3 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 by December 31, 2023.

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

Attachments:

[Attachment 1](#) – IRM 4.10.6 [Attachment 2](#) – IRM 4.10.3 [Attachment 3](#) – 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 [IRC 6751\(b\)\(1\)](#), written supervisory approval required under [IRC 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:

- Failure to file or pay penalties under [IRC 6651](#),
- Estimated tax penalty under [IRC 6654](#) or [IRC 6655](#),
- Any overstatement of the deduction provided in [IRC 170\(p\)](#) under [IRC 6662\(b\)\(9\)](#),
- Any other penalty automatically calculated through electronic means. See [IRC 6751\(b\)\(2\)](#).

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 Independent Office of Appeals (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).

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:

- Failure to file or pay penalties under [IRC 6651](#),
- Estimated tax penalty under [IRC 6654](#) or [IRC 6655](#),
- Any overstatement of the deduction provided in [IRC 170\(p\)](#) under [IRC 6662\(b\)\(9\)](#), or
- 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 4.10.9.7.8.2

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.