



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

4.24.9

JULY 16, 2021

EFFECTIVE DATE

(07-16-2021)

PURPOSE

- (1) This transmits a revision to IRM 4.24.9, Excise Tax, Excise Tax Penalties Guidance.

MATERIAL CHANGES

- (1) This IRM has been extensively rearranged and updated. Redundant content was deleted because it is addressed under IRM 20.1, Penalty Handbook.
- (2) The table below identifies the significant changes in content revisions of this IRM.

IRM Section	Description of Change
4.24.9.2 Common Penalty Features	Added content to update Documentation and Managerial Involvement guidance per IRC 6715(b)(1).
New 4.24.9.7 Excise Tax Fraud - General	Added content for Fraud subject matter to address Excise Tax Fraud – General.
New 4.24.9.7.1 First Indications of Fraud	Added content for Fraud subject matter to address First Indications of Fraud.
New 4.24.9.7.2 Firm Indications of Fraud	Added content for Fraud subject matter to address Firm Indications of Fraud.
New 4.24.9.7.3 Criminal Fraud Procedures - General	Added content for Fraud subject matter to address Criminal Fraud Procedures - General.
New 4.24.9.7.3.1 Criminal Fraud Referrals	Added content for Fraud subject matter to address Criminal Fraud Referrals.
New 4.24.9.7.3.1.1 Acceptance of Initial Criminal Fraud Referral	Added content for Fraud subject matter to address Acceptance of Initial Criminal Fraud Referral.
New 4.24.9.7.3.1.2 Referral to DOJ of Accepted Fraud Referral	Added content for Fraud subject matter to address Referral to DOJ of Accepted Fraud Referral.
New 4.24.9.7.3.1.3 Quarterly Conference of Criminal Referrals	Added content for Fraud subject matter to address Quarterly Conference of Criminal Referrals.

IRM Section	Description of Change
New 4.24.9.7.3.1.4 Discontinuance of Accepted Fraud Referral	Added content for Fraud subject matter to address Discontinuance of Accepted Fraud Referral.
New 4.24.9.7.3.2 Declination of Initial Criminal Fraud Referral	Added content for Fraud subject matter to address Declination of Initial Criminal Fraud Referral.
New 4.24.9.7.4 Civil Fraud Procedures	Added content for Fraud subject matter to address Civil Fraud Procedures.
New 4.24.9.7.4.1 Civil Fraud Penalty Rates	Added content for Fraud subject matter to address Civil Fraud Penalty Rates.
New 4.24.9.7.4.2 Civil Resolution of a Criminal Prosecution Case	Added content for Fraud subject matter to address Civil Resolution of a Criminal Prosecution Case.
New 4.24.9.7.5 Miscellaneous Fraud Procedures and Group Definitions	Added content for Fraud subject matter to address Miscellaneous Fraud Procedures and Group Definitions.
New 4.24.9.8 Negligence Penalty	Added content for Fraud subject matter to address Negligence Penalty.
New 4.24.9.9 Assertion of Failure to File Penalty	Added content for Fraud subject matter to address Assertion of Failure to File Penalty.

(3) Editorial changes, such as updates to IRM references, citations and websites have been made.

EFFECT ON OTHER DOCUMENTS

This material supersedes IRM 4.24.9 dated November 21, 2019.

AUDIENCE

This section is for Small Business/Self Employed (SB/SE) revenue agents (excise examiners), excise tax managers (excise managers) and personnel at Campus Exam/Automated Under Reporter Cincinnati (CEAC) who work with penalties specific to excise tax returns (excise returns), excise tax refunds (excise refunds), excise tax claims (excise claims) and other excise tax compliance (excise compliance) activities.

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Small Business/Self Employed

4.24.9

Excise Tax Penalties Guidance

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4.24.9.1
(11-21-2019)
Program Scope and Objectives

- (1) **General Overview** - This IRM provides technical guidance about penalties pertaining to excise returns, excise claims, excise refunds and other excise compliance activities unless otherwise noted in IRM 4.24, Excise Tax.

Note: Criminal penalties are not addressed under this IRM section.
- (2) **Purpose** - This IRM discusses penalties as they pertain to excise returns, excise refunds, excise claims and other excise compliance activities.
- (3) **Audience** - This IRM is for SB/SE excise examiners, excise managers and personnel at Campus Exam/Automated Under Reporter Cincinnati (CEAC) who work with penalties specific to excise returns, excise refunds, excise claims and other excise compliance activities.
- (4) **Policy Owner** - Director, Examination - Speciality Policy is responsible for the administration, procedures and updates related to the technical guidance and information processing steps and methods for penalties specific to excise returns, excise refunds, excise claims and other excise compliance activities.
- (5) **Program Owner** - Director, Examination - Specialty Examination owns Excise Tax Examination operations.
- (6) **Primary Stakeholders** - Appeals, Counsel, Exam Quality and Technical Support (EQTS) and Office of Servicewide Penalties (OSP) are the primary stakeholders for this IRM.

4.24.9.1.1
(11-21-2019)
Background

- (1) For compliance purposes, it is essential managers, senior management officials, excise examiners and personnel at CEAC understand and correctly follow the technical guidance and information processing steps and methods explained in this IRM section to ensure penalties specific to excise tax are administered fairly and consistently.

4.24.9.1.2
(11-21-2019)
Authority

- (1) The most significant penalties affecting excise taxes are listed in the table below and are authorized by the applicable Internal Revenue Code (IRC) Sections.

IRC Section	Type of Penalty	IRM Reference
IRC 4103	Willful Failure to Pay Fuel Tax/ Additional Persons Liable	IRM 20.1.11.10
IRC 6651(a)(1)	Failure to File	IRM 20.1.2.3.7
IRC 6651(a)(2)	Failure to Pay	IRM 20.1.2.3.8
IRC 6651(f)	Fraudulent Failure to File, Civil	IRM 20.1.2.3.7.5
IRC 6656	Failure to Deposit	IRM 20.1.4
IRC 6662(b)(1)	Accuracy Related Penalty- Negligence	IRM 20.1.5.8
IRC 6663	Civil Fraud	IRM 20.1.5.16
IRC 6672	Trust Fund Recovery	IRM 20.1.11.4
IRC 6675	Excessive Fuel Claims	IRM 20.1.11.5

IRC Section	Type of Penalty	IRM Reference
IRC 6694	Return Preparer Penalty-Understatement	IRM 20.1.6.4
IRC 6695	Return Preparer Penalty-Other	IRM 20.1.6.5
IRC 6715	Dyed Fuel Sold for Use, or Used in Taxable Use	IRM 20.1.11.6
IRC 6715A	Tampering With or Failing to Maintain Security Requirements for Mechanical Dye Injection Systems	IRM 20.1.11.7
IRC 6717	Refusal of Entry	IRM 20.1.11.8.2
IRC 6718	Failure to Display Tax Registration on Vessels	IRM 20.1.11.8.4
IRC 6719	Failure to Register or Reregister Under Section 4101	IRM 20.1.11.8.5
IRC 6720A	Certain Adulterated Fuels	IRM 20.1.11.8.6
IRC 6725	Failure to Report Information Return Under Section 4101 and any failure to include all of the information required to be shown on such return or the inclusion of incorrect information	IRM 20.1.11.8.7
IRC 7270	Failure to comply with the requirements of IRC 4374 , Liability for Tax for the issuance of insurance policies by foreign insurers with the intent to evade tax.	IRM 20.1.11.9
IRC 7272	Failure to Register or Reregister Under Section 4101	IRM 20.1.11.8.3
IRC 7275	Offenses Relating to Certain Airline Tickets and Advertising	IRM 20.1.11.16
IRC 7342	Refusal to Permit Entry or Examination	IRM 20.1.11.8.1

4.24.9.1.3
(11-21-2019)
Roles and Responsibilities

- (1) Overall responsibility for penalty programs is assigned to OSP. OSP is charged with coordinating policy and procedures concerning the administration of penalty programs, ensuring consistency with the policy statement, reviewing and analyzing penalty information, researching penalty effectiveness on compliance trends and determining appropriate actions to promote voluntary compliance. Excise Tax Examination is responsible for developing additional guidance or reference materials for its specific functional administrative needs as they apply to penalties specific to excise tax. Such material must remain consistent with OSP policies and general procedural requirements.

- (2) Director, Examination - Specialty Policy is responsible for Excise Tax Examination policy and procedures.
- (3) Director, Examination - Specialty Examination is responsible for operational examination compliance activities.
- (4) Chief, Estate & Gift/Excise Tax is responsible for ensuring the policies and procedures for penalties specific to excise tax are communicated to and carried out by excise examiners.

4.24.9.1.4
(11-21-2019)
Program Objectives and Review

- (1) **Program Goals** - The program goals provided in this IRM are designed to increase compliance with excise tax laws by applying the tax laws with integrity and fairness and to provide SB/SE taxpayers top quality post-filing services for excise taxes administered by SB/SE.
- (2) **Program Reports** - Information reporting of program objectives are included on Program Manager Monthly Briefings provided to Director, Examination - Specialty Policy.
- (3) **Program Effectiveness** - Program effectiveness is measured by the Exam Quality Review Staff, located in Field and Specialty Exam Quality (FSEQ). FSEQ supports the SB/SE Quality Improvement Program utilizing National Quality Review System (NQRS) to conduct independent case reviews from statistically valid samples of examination case work. National, area and territory trend analysis on the quality attributes are used to establish baselines to assess program performance, identify opportunities to improve work processes, analyze causes for failure, assess the feasibility of possible solutions and measure the success of quality improvement efforts.
- (4) **Annual Review** - Program Manager - Excise Tax Policy is responsible for reviewing annually the information in this IRM to ensure accuracy and promote consistent tax administration.

4.24.9.1.5
(11-21-2019)
**Terms/Definitions/
Acronyms**

- (1) Acronyms and their associated words or phrase used throughout this IRM are listed in the table below.

Term	Definition
CEAC	Campus Exam Automated/Under Reporter Cincinnati
FEA	Fraud Enforcement Advisor
IRC	Internal Revenue Code
NQRS	National Quality Review System
OSP	Office of Servicewide Penalties
SB/SE	Small Business/Self Employed
TBOR	Taxpayer Bill of Rights
TIN	Taxpayer Identification Number

4.24.9.1.6
(11-21-2019)

Related Resources

- (1) The IRMs listed below are the primary sources of information for excise examiners, excise managers and personnel at CEAC who work with penalties specific to excise returns, refunds, claims and other excise compliance activities. Together this material forms the responsibilities, operating rules and procedures for penalties.
 - a. IRM 20.1.1, Introduction and Penalty Relief - This section discusses the background and purpose of penalties, penalty relief guidelines and the general structure of IRM 20.1, Penalty Handbook.
 - b. IRM 20.1.2, Failure to File/Failure to Pay Penalties - This section contains policy and instructions with respect to penalties for Failure to File and Failure to Pay under IRC 6651.
 - c. IRM 20.1.3, Estimated Tax Penalties - This section provides policy and service-wide guidelines about the administration of penalties for the underpayment of estimated tax under IRC 6654 and IRC 6655.
 - d. IRM 20.1.4, Failure to Deposit Penalty - This section provides policy and other important information with respect to the penalty for Failure to Deposit under IRC 6656.
 - e. IRM 20.1.5, Return Related Penalties - This section outlines the policy and procedures surrounding return related penalties.
 - f. IRM 20.1.6, Preparer, Promoter, Material Advisor Penalties - This section provides the policies for return preparers, promoters and material advisors.
 - g. IRM 20.1.7, Information Return Penalties - This section is for compliance functional employees responsible for working information return penalties.
 - h. IRM 20.1.9, International Penalties - This section is for compliance functional employees responsible for international penalties.
 - i. IRM 20.1.10, Miscellaneous Penalties - This section provides information about miscellaneous penalties.
 - j. IRM 20.1.11, Excise Tax and Estate and Gift Tax Penalties - This section provides policies and procedures for the application of excise tax and estate and gift tax penalties.
 - k. IRM 4.24.6, Technical Guidance and Information Processing for Excise Tax Examination Issues - This section provides the procedures for the preparation of excise tax workpapers.
 - l. IRM 4.24.10, Appeals Referral Procedures - This section provides information about the referral process for excise cases to Appeals, including whether excise tax penalties are in connection with unagreed tax adjustments or such penalties are the only items at issue.
 - m. IRM 4.24.20, Excise Tax Report Writing Guide - This section provides the procedures for the preparation of excise tax reports.
- (2) The Taxpayer Bill of Rights (TBOR) lists rights that already existed in the tax code, putting them in simple language and grouping them into 10 fundamental rights. Employees are responsible for being familiar with and acting in accord with taxpayer rights. See IRC 7803(a)(3), Execution of Duties in Accord with Taxpayer Rights. For additional information about the TBOR, see <https://www.irs.gov/taxpayer-bill-of-rights>

4.24.9.2
(07-16-2021)

Common Penalty Features

- (1) In general, each penalty is unique and will stand alone unless otherwise indicated. Exceptions and additional information are noted in the discussions of the specific penalties. However, the general procedures listed below will apply.
- (2) Statute of Limitations - In general, the additions to tax, additional amounts, and assessable penalties in IRC 6651 - IRC 6657 and IRC 6671 - IRC 6725 are

assessed, collected and paid in the same manner as taxes. To the extent a penalty or addition to tax pertains to a tax return, the assessment is generally subject to the period of limitation in IRC 6501 and shall be assessed within 3 years after the return was filed (whether or not the return was filed on or after the date prescribed).

- (3) Reasonable Cause Relief - a determination as to whether or not reasonable cause exists must be based on a careful consideration of the facts and circumstances of each case prior to the assertion of a penalty. Excise examiners should consider any reason a taxpayer provides in conjunction with the guidelines, principles and evaluating factors. Refer to IRM 20.1.1.3.2, Reasonable Cause, as well as the applicable IRC Section and Treasury Regulations relating to the specific penalty.
- (4) Abatements - For information on penalty abatements refer to IRM 20.1.1.3.3.2.1, First Time Abate (FTA)..
- (5) Documentation and Managerial Involvement - Excise examiners must use Administrative Lead Sheet E500, Penalty Check Sheet, located in the Forms Library of the Notebook, to document the assertion or non-assertion of penalties. Group manager involvement is not required on automatic penalties such as Failure to File and Failure to Pay. Managerial review and written approval is required on assertion of all other penalties and the non-assertion of IRC 6719 and/or IRC 6725 penalties. Effective May 20, 2020, for all penalties subject to IRC 6751(b)(1), written supervisory 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:** A form soliciting a signature, which the IRS relies upon to make an assessment. For example, Form 2504-E, Agreement to Assessment and Collection of Additional Tax and Acceptance of Overassessment (Excise Tax); Form 5384, Excise Tax Examination Changes and Consent to Assessment and Collection; 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.

4.24.9.3
(08-24-2016)
**IRC 4103 Case Referrals
to Collection Function**

- (1) Excise examiners will use the procedures described below for referring potential IRC 4103 cases to the Collection function.
- (2) Certain additional persons are liable for tax where there is a willful failure to pay the tax imposed by IRC 4041(a)(1) or IRC 4081 . An officer, employee, or agent of the taxpayer, who is under a duty to assure the payment of such tax, and who willfully fails to perform such duty, or who willfully causes the taxpayer to fail to pay such tax shall be joint and severally liable with the taxpayer for the tax for which such failure relates. The determination that additional persons are liable will be made by the excise examiner prior to referring the case to the Collection function.

- (3) The excise examiner will prepare a memorandum to the Advisory Function (Advisory) in Collection. The subject line will state "Referral of Potential IRC 4103 Case."
- (4) The memorandum will be forwarded to Advisory through the territory manager and will contain the following information:
 - a. Excise examiner's name and telephone number.
 - b. Taxpayer's name, taxpayer's identification number (TIN) and current address.
 - c. Tax period(s), statute date(s), abstract number(s) and deficiencies involved.
 - d. Names, titles, TIN's and current addresses of all persons who appear responsible for ensuring payment of the tax.
 - e. The excise examiner's best estimate of the projected disposition of the case.
 - f. An explanation of the proposed adjustments and the facts supporting the excise examiner's determination.
- (5) When Advisory receives a referral from Excise Tax or any other Compliance examination function, the Collection function will make the final determination in assessing the personal liability for excise tax.

4.24.9.4 (08-24-2016)

Nontaxable Delinquent Returns

- (1) A nontaxable delinquent excise tax return has \$0 liability. It is filed administratively by IRS for a specific taxpayer to establish the tax period in order to make an assessment.
- (2) Nontaxable delinquent excise tax returns may be filed for which there is additional tax developed as the result of an examination. Since the returns as filed are nontaxable, they are processed without considering the delinquency features or without securing from the taxpayer any statement of reasonable cause for delay in filing.
- (3) In such cases the excise examiner will, after considering the statement of the taxpayer, recommend assertion or non-assertion of the delinquency penalty in the examination report. Any appropriate comments regarding a penalty recommendation will be incorporated into the report.
- (4) For reasonable cause criteria refer to IRM 20.1.1.3.2, Reasonable Cause.
- (5) To determine whether reasonable cause relief can be considered for the penalty being considered, excise examiners should refer to IRM Exhibit 20.1.1-1, Penalty Relief—Application Chart, at <http://irm.web.irs.gov/Part20/Chapter1/Section1/IRM20.1.1.aspx#20.1.1-1>.

4.24.9.4.1 (10-26-2012)

Penalties Applicable to Delinquent Returns Secured by Excise Examiners

- (1) The excise examiner's recommendation for assertion or non-assertion of the failure to file or pay penalty will accompany each delinquent return.
 - a. For reasonable cause criteria, refer to IRM 20.1.1.3.2, Reasonable Cause.
 - b. To determine whether reasonable cause relief can be considered for the penalty being considered, refer to IRM Exhibit 20.1.1-1, Penalty Relief—Application Chart, at <http://irm.web.irs.gov/Part20/Chapter1/Section1/IRM20.1.1.aspx#20.1.1-1>.

- (2) These requirements preclude affording appeal rights prior to assessment of the penalties. In these cases, the taxpayer should be advised that an appeal may be initiated by filing Form 843, Claim for Refund and Request for Abatement, for the amount of penalties upon payment of the penalties.
- (3) An excise examiner securing a delinquent return may examine the return to determine whether the tax reported is correct. Such examination should be made as soon as possible after the return is received, and to the extent deemed necessary.
- (4) A "No-Change" report will be issued if the excise examiner determines that the tax is correctly reported. Refer to IRM 4.4.9.5.14.1, No Change to Original Return, for more information regarding no-change case processing.
- (5) If the excise examiner finds that the tax is incorrect, an examination report will be prepared covering proposed changes to the tax reported on the return, and to the delinquency penalty, if applicable.
- (6) If the additional tax is unagreed, normal appeal procedures apply.
- (7) For more information, refer to IRM 4.4.9, AIMS Procedures and Processing Instructions, Delinquent and Substitute for Return Processing.
- (8) For guidance on processing delinquent returns and substitutes for returns (SFRs) refer to Excise Tax Knowledge Base Home page for Closing an Examination located at <https://portal.ds.irsnet.gov/sites/vl037/lists/book31/landingview.aspx>.

4.24.9.5
(08-24-2016)
**Penalties Applicable to
Substitutes For Return**

- (1) The excise examiner will recommend assertion or non-assertion of penalties.
- (2) The excise examiner will also explain the basis for the recommendation and comment on the taxpayer's statement in the case file.
 - a. For reasonable cause criteria refer to IRM 20.1.1.3.2, Reasonable Cause.
 - b. To determine whether reasonable cause relief can be considered for the penalty being considered, refer to IRM Exhibit 20.1.1-1, Penalty Relief—Application Chart, at <http://irm.web.irs.gov/Part20/Chapter1/Section1/IRM20.1.1.aspx#20.1.1-1>.
- (3) The excise examiner will compute any penalty recommended on the total tax due for the period involved.
- (4) Appeals procedures apply.

4.24.9.6
(11-21-2019)
**IRC Section 6020(b)
Certification Procedures
for Non-Filed Excise Tax
Returns**

- (1) IRC 6020(b) certification procedures are required to impose the IRC 6651(a)(2), Failure to Pay Tax Penalty, when a taxpayer fails to file an excise tax return.
- (2) For information about situations where a taxpayer fails to file an excise tax return and the application of the IRC 6651(a)(2) is warranted, refer to IRM 20.1.2.3.10.2, Processing When Deficiency Procedures Do Not Apply.
- (3) IRC 6651(g)(2) provides that for purposes of IRC 6651(a)(2) a return prepared by the excise examiner under IRC 6020(b) is treated as a return filed by the taxpayer. IRC 6020(b) return requirements are met in a case where the excise examiner has processed as a return, documents that:

- Identify the taxpayer.
- Provide a basis for the taxpayer's tax computation.
- Are signed by the excise examiner who has been delegated the authority to sign IRC 6020(b) returns.

(4) Instructions for applications of IRC 6020(b) are listed below and found in IRM 20.1.2.3.10.1(6), Processing When Deficiency Procedures Apply:

- Complete and attach Form 13496, IRC 6020(b), Certification, to the source document for assessment of tax under IRC 6020(b).
- Attach the report summarizing excise examination changes or equivalent report of adjustments.
- Attach Form 886-A, Explanation of Items, appropriate issue lead sheet, or similar form.

4.24.9.7

(07-16-2021)

Excise Tax Fraud - General

- (1) Fraud is deception by misrepresentation of material facts, or silence when good faith requires expression, which results in material damage to one who relies on it and has the right to rely on it. Simply stated, it is obtaining something of value from someone else through deceit. See IRM 25.1.1.3, Definition of Fraud.
- (2) Fraud requires both an underpayment of tax and affirmative acts by the taxpayer that demonstrate intentional wrongdoing with the specific purpose of evading a tax that the taxpayer knows or believes to be due. To sustain a charge of fraud in a tax case successfully, it is necessary to:
 - Establish an understatement of tax,
 - Establish that all or part of the excise tax liability is due to a false, material representation of facts by the taxpayer,
 - Show that the taxpayer had knowledge of the false representations made, and
 - Show that the taxpayer intended those false representations to be acted upon or accepted as the truth.

4.24.9.7.1

(07-16-2021)

First Indications of Fraud

- (1) First indications of fraud serve as a sign that a taxpayer may have taken actions for the purpose(s) of deceit, subterfuge, camouflage, concealment, attempting to color or obscure events, or to make things seem other than they are. First indications alone do not establish fraud.
- (2) First indications of fraud, also known as "badges of fraud," are mere suspicions of fraud. When discrepancies are identified, excise examiners must ask the taxpayer, the preparer, the representative, or any other involved party for explanations to resolve them. Questions should also be asked to determine the taxpayer's intent. Examples of fraud indicators can be found in IRM 25.1.2.3, Indicators of Fraud.
- (3) At the first indication of possible fraud, the excise examiner should review IRM 25.1.1, Fraud Handbook - Overview/Definitions. Investigative techniques can be found in IRM 25.1.2.4, Investigative Techniques.
- (4) The excise examiner will use their judgment to determine audit techniques necessary to help resolve the badges of fraud. To be effective, examination techniques should be designed to disclose not only errors in accounting and application of law, but also irregularities, such as backdated or forged documents. It is not suggested that fraud exists in every assigned return or

case, but excise examiners must be cognizant of the badges of fraud and address them in cases where they do exist.

- (5) The excise examiner will document the first indications of fraud in the workpapers and discuss the case with their manager. If the manager concurs that there is a possibility of fraud, a conference (either in person or over the phone) will be held between the excise examiner, the group manager, and the Fraud Enforcement Advisor (FEA).
- (6) The FEA serves as a resource person for compliance employees to assist in fraud investigations and offer advice on matters concerning tax fraud in all the business organizations.
- (7) When the excise examiner, the excise examiner's manager, and the FEA agree that there is a potential for fraud, the case controls must be updated to Status Code (SC) "17" (fraud development). This decision must be documented in the case file. Form 11661, Fraud Development Recommendation - Examination, is used to document FEA involvement as well as the decision to update the case to SC "17". See IRM 20.1.5.16.3, Penalty Referral.

Note: The FEA should be notified if a decision is made in the field to return the case to SC "12". See IRM 25.1.2.2, Fraud Development Procedure (6) and (10).

- (8) A plan of action should be developed to establish and document the affirmative acts or firm indications of fraud. Refer to IRM 25.1.1.4, Indicators of Fraud vs. Affirmative Acts of Fraud, for information on the minimum plan for case development. The excise examiner should continue the audit being alert for other badges of fraud and follow up on initial suspicions of fraud. See IRM 20.1.5.16.1, Indications of Fraud, for a list of common badges of fraud.

4.24.9.7.2 (07-16-2021) **Firm Indications of Fraud**

- (1) Firm indications of fraud, or affirmative acts, establish that a taxpayer deliberately took actions with the purpose of deceit, subterfuge, camouflage, concealment, attempting to color or obscure events, or to make things seem other than what they are.
- (2) Fraud may exist where a taxpayer willfully attempts to underreport taxes or does not pay taxes. For a taxpayer to be guilty of a crime in which willfulness is an element, that individual must have acted deliberately, knowingly, and with the specific intent to violate the law.
- (3) A "firm indication" of fraud must be distinguished from a "first indication" of fraud. A firm indication of fraud is a factual determination that can only be made on a case-by-case basis. Discussions with the group manager and the FEA will help the excise examiner determine when they have firm indications of fraud warranting development for a civil fraud penalty or a referral to Criminal Investigation (CI) for criminal fraud development. However, under no circumstances shall excise examiners or managers obtain advice and/or direction from CI for a specific case that is under examination. In addition, if a referral is being considered, an excise examiner must not solicit an agreement or solicit and receive delinquent returns prior to the submission of a fraud referral.
- (4) When the group manager, FEA, and the excise examiner agree firm indications of fraud are present, a decision must be made regarding whether the case will

be referred for criminal prosecution or will be developed for the assertion of the penalty. Excise examiners are cautioned not to carry the investigation beyond the point where a valid indication of fraud is adequately supported by the workpapers.

- (5) If the case does not meet the guidelines for a criminal referral, the excise examiner will document the reasons in the case file and proceed with development of the case and the civil fraud penalty. The excise examiner will continue to work with the FEA to ensure complete development of the facts to support assertion of the civil fraud penalty. See IRM 4.24.9.7.3, Criminal Fraud Procedures - General.
- (6) If the case warrants a criminal referral, the excise examiner will prepare Form 2797, Referral Report of Potential Criminal Fraud Cases. See IRM 4.24.9.7.3.1, Criminal Fraud Referrals.

4.24.9.7.3
(07-16-2021)
**Criminal Fraud
Procedures - General**

- (1) Information about the source or details of evidence relating to a potential criminal case must be safeguarded and withheld to the extent necessary to avoid prejudice to a case. This general rule is applicable not only during the investigation of a case, but also in any action taken with respect to the civil portions of a case having open criminal aspects. When appropriate, excise examiners are expected to coordinate proposed disclosure of information through established channels.
- (2) The following code sections are the most common used by excise examiners when developing criminal fraud cases:
 - a. IRC 7202, Willful failure to collect or pay over taxes
 - b. IRC 7203, Willful failure to file return, supply information, or pay tax
 - c. IRC 7206, Fraud and false statements
 - d. IRC 7212, Attempts to interfere with administration of internal revenue laws
 - e. IRC 7512, Separate accounting for certain collected taxes, etc
 - f. IRC 7215, Offenses with respect to collected taxes (Failure to collect and deposit in a special trust fund account) (IRC 7215 and IRC 7512(b))
- (3) Full cooperation among all levels of operations in the IRS must be maintained to ensure that there is neither duplication in investigations nor unnecessary inconvenience to the public. The excise examiner will review IDRS to determine if any “-Z” freeze (Transaction Code (TC) 914) conditions exist and if other functions are assigned to the taxpayer case. CI or the FEA should be contacted prior to beginning case action whenever an un-reversed TC 914 (or other CI code) is present in any module.

Note: CI transaction codes range from 910 to 919.

- (4) If an excise examiner learns that an assigned case involves a taxpayer who is the subject of a criminal investigation, all activity on the case will be immediately suspended. The excise examiner’s manager will consult with the Supervisory Special Agent in CI relative to the continuance of excise tax activity on the case. If agreement to either continue the suspension or to resume the excise tax activity on the case cannot be reached at the group or territory level, the issue will be decided at the area level. Where more than one area is involved, the Director of Field Operations having jurisdiction over the criminal investigation will resolve the question.

- (5) In income, estate, and gift tax cases in which criminal prosecution has been recommended (except potential jeopardy cases), the Service generally does not authorize assessment of additional taxes and penalties during the time the recommendation for criminal prosecution is under consideration or during the period such cases may be awaiting trial or pending an appeal. The same procedure will be followed with respect to excise tax cases in which criminal prosecution has been recommended.
- (6) Threat of criminal prosecution shall never be made in any case. If a question concerning civil action arises in a case with open criminal aspects, it will be resolved on the basis of whether the criminal case will be prejudiced by the proposed civil action. IRM 1.2.1.5.11, Policy Statement 4-26 (Formerly P-4-84), "Criminal and civil aspects in enforcement," provides that the consequences of civil enforcement actions on criminal investigations for the same taxable periods and same types of taxes must be carefully weighed. Any discussion or negotiation regarding settlement of civil enforcement actions must be guided by this policy and input from the FEA.

4.24.9.7.3.1
(07-16-2021)

Criminal Fraud Referrals

- (1) Cases are referred to CI by using Form 2797, Referral Report of Potential Criminal Fraud Cases. The FEA is available to assist the excise examiner with the preparation of the referral. See IRM 25.1.3, Fraud Handbook - Criminal Referrals, for additional instructions.
- (2) Forward the referral through the referring excise examiner's manager to the FEA for approval by the FEA manager. From there, the referral is sent to CI for approval by the CI Special Agent in Charge (SAC) and the Supervisory Special Agent (SSA) before assignment to a Special Agent (SA).
- (3) The referral should be a detailed, factual presentation of the factors that establish firm indications of fraud. To assist in determining intent and the estimated criminal tax liability, the referral should include, but not be limited to:

- Description of the affirmative act(s) of fraud, and
- The taxpayer's explanation of the affirmative act(s).

Because the referral is made electronically, any additional pages or attachments must be in electronic format. All other items, such as financial statements, public records checks, account transcripts, or a copy of the last filed return may be shared with CI at the ten-day conference. No workpapers or attachments are required with the referral.

- (4) If the excise examiner discovers indications of fraud but all detailed information is not available, the excise examiner will work with the FEA to complete Form 2797 to the extent possible.
- (5) Form 2797 should be prepared for the principal individual or legal entity involved in the suspected fraudulent activity. Only one Form 2797 is needed, even if the suspected fraudulent activity involves multiple entities; the related entities should be identified and discussed in the body of the referral. After concurrence and signature by the manager, the referral will be transmitted to the FEA. The FEA will review the Form 2797 and forward it to their manager for approval. After the Form 2797 is approved by the FEAs manager, the referral will be sent to CI for approval by the CI Special Agent in Charge and the SSA before assignment to a SA.

- (6) The SA will contact the excise examiner to set up an initial meeting within ten business days of receipt, at which time any additional information can be provided to the SA. A second meeting will take place to discuss whether or not the referral will be accepted by CI within 30 business days of receipt of Form 2797.
- (7) Supporting documents and a copy of each referral will be retained in the excise examiner's case file and will not be transmitted with the Form 2797 referral. See IRM 25.1.3.3, Preparation of Form 2797 Referral Report of Potential Criminal Fraud Cases, for further instructions.
- (8) If a case involving a collateral examination results in a fraud referral, the affected territories will coordinate the referrals.

4.24.9.7.3.1.1
(07-16-2021)

**Acceptance of Initial
Criminal Fraud Referral**

- (1) If CI accepts the referral, they will finish completing the excise examiner's original Form 2797 and return it to the FEA. The FEA will retain a copy and forward the original to the referring excise examiner. In most cases, the referring excise examiner will become the cooperating agent on the case. The excise examiner will update the case to SC "18" (Accepted by CI) and maintain controls and responsibilities of the civil case.
- (2) The accepted fraud case can be resolved by CI in two ways:
 1. CI refers the case to Department of Justice (DOJ). See IRM 4.24.9.7.3.1.2, Referral to DOJ of Accepted Fraud Referral.
 2. CI determines to not pursue criminal prosecution, discontinues their involvement, and returns the case to the examiner for civil settlement. See IRM 4.24.9.7.3.1.4, Discontinuance of Accepted Fraud Referral.

The procedures the excise examiner follows are dependent upon the case resolution by CI.

4.24.9.7.3.1.2
(07-16-2021)

**Referral to DOJ of
Accepted Fraud Referral**

- (1) When CI refers a case to DOJ, they will prepare a Notice of Department of Justice Referral memorandum. This memorandum identifies the type of referral made and determines the type of suspense in Technical Services. Upon receipt of the Notice of Department of Justice Referral, the excise examiner will prepare the case for transfer to Technical Services for suspense. If CI:
 - Refers the case for "prosecution recommendation," it is an "administrative fraud suspense case" and the excise examiner will follow procedures in IRM 25.1.4.4.11, Fraud Suspense.
 - Refers the case for "further investigation," it is a "grand jury suspense case" and the excise examiner will follow procedures in IRM 25.1.5.3, Grand Jury Suspense, and IRM 25.1.4.4.11, Fraud Suspense to the extent applicable.
- (2) The Notice of Department of Justice Referral remains in the case file and provides support for the excise examiner's decision to send the case to Technical Services. The excise examiner will update the case to SC "21" and route the case to their local Technical Services, which will maintain controls until criminal investigation/prosecution is concluded. Upon completion, Technical Services will return the case to the group for civil resolution. See IRM 4.24.9.7.4.2, Civil Resolution of a Criminal Prosecution Case.

4.24.9.7.3.1.3
(07-16-2021)

**Quarterly Conference of
Criminal Referrals**

- (1) Quarterly four-way conferences between the excise examiner, group manager, SA, and SSA are required on all criminal fraud referral cases regardless of whether or not the excise examiner is cooperating with CI on the case development. See (5) in IRM 25.1.3.5, Accepted Criminal Referrals. The FEA may be included in these conferences. The quarterly conferences apply to both types of cases, administrative and grand jury. See IRM 25.1.4.4.3, Required Communications, and IRM 25.1.5.4, Cooperating Grand Jury Examiner/Revenue Officer Procedures. These mandatory quarterly conferences continue while the case is in suspense in Technical Services; however Technical Services is not a party to these conferences.

4.24.9.7.3.1.4
(07-16-2021)

**Discontinuance of
Accepted Fraud Referral**

- (1) CI will notify the excise examiner and manager if the case no longer has criminal potential. The notification will include Form 13308, Criminal Investigation Closing Report. If in Fraud or Grand Jury Suspense, the civil case will be returned from Technical Services. The excise examiner will discuss the case with the FEA and manager to determine if the civil fraud penalty will be pursued. See IRM 4.24.9.7.4.2, Civil Resolution of a Criminal Prosecution Case. The excise examiner will update the case to the appropriate status code "17" or "12" and continue with development of the civil case.

4.24.9.7.3.2
(07-16-2021)

**Declination of Initial
Criminal Fraud Referral**

- (1) The Form 2797 and a memorandum of declination will be provided to the excise examiner either before the ten-day meeting or at/after the 30-day meeting if the referral is declined. This memorandum will remain in the case file. See IRM 25.1.3.6, Declined Criminal Referrals. The excise examiner will discuss the case with the FEA and the group manager to determine if civil fraud development will continue. Either the case will remain in SC "17" (civil fraud development) or the excise examiner will update the case back to SC "12". In either situation, if the excise examiner discovers new badges of fraud, they will discuss with the FEA to determine whether to submit a new referral to CI.

4.24.9.7.4
(07-16-2021)

Civil Fraud Procedures

- (1) An assertion of the civil fraud penalty may be made on the development of facts and circumstances of a civil examination or result from a completed criminal prosecution (case returned for civil resolution). See IRM 4.24.9.7.4.2, Civil Resolution of a Criminal Prosecution Case, for additional procedures.
- (2) Assertion of the civil fraud penalty on a case does not require a referral to CI. Determination of the civil fraud penalty is the shared responsibility of the excise examiner, the group manager, and the FEA. See IRM 25.1.6.3, Procedures.
- (3) Recommendations for imposing the civil fraud penalty must receive careful scrutiny to make certain that such penalties are asserted only in appropriate cases. The Service bears the burden of proving civil fraud by clear and convincing evidence in Tax Court. See IRC 7454, Burden of proof in fraud, foundation manager, and transferee cases.

Note: For a discussion on the need for clear and convincing evidence for the assertion of a civil fraud penalty. See IRM 25.1.1.3.1, Requirements of Proof, or IRM 25.1.6.2, Overview.

- (4) The following code sections are the most common used by excise tax examiners when developing civil fraud cases:

- a. IRC 6663, Imposition of fraud penalty (civil fraud)
 - b. IRC 6651, Failure to file tax return or to pay tax (IRC 6651(f), Increase in penalty for fraudulent failure to file)
- (5) IRM 25.1.1, Fraud Handbook - Overview/Definitions, notes several elements that may be indicative of fraud. Excise examiners should remain continually alert for these and other “badges of fraud.”
 - (6) When the group manager, FEA, and excise examiner agree to pursue the civil fraud penalty on a civil examination, the case will remain in SC “17”. If a decision is made that civil fraud is no longer applicable, the excise examiner will document this decision in the case file, update the case to SC “12”, and complete the examination.
 - (7) The final examination report will reflect the civil fraud penalties applied to the appropriate adjustments. See IRM 4.24.9.7.4.1, Civil Fraud Penalty Rates.
 - (8) Cases returned from CI after criminal prosecution or discontinuance of the criminal investigation will be completed as a civil resolution by the referring examiner. See IRM 4.24.9.7.4.2, Civil Resolution of a Criminal Prosecution Case. However, if the excise examiner participated in the grand jury investigation and had access to grand jury information, the case cannot be assigned to the cooperating excise examiner. See IRM 25.1.5.6, Civil Case Resolution.

4.24.9.7.4.1
(07-16-2021)
Civil Fraud Penalty Rates

- (1) IRM 20.1.5.16.2, Penalty Assertion, provides current rates and specific procedures for assertion of the civil fraud penalty under IRC 6663. See IRM 4.24.9.9, Assertion of Failure to File Penalty, for the fraudulent failure to file penalty. See also IRM 20.1.2.3.7.5, Fraudulent Failure to File - IRC 6651(f).

4.24.9.7.4.2
(07-16-2021)
Civil Resolution of a Criminal Prosecution Case

- (1) For civil resolution of a criminal prosecution case, the excise examiner should contact CI to ascertain which criminal statutes the taxpayer was convicted of before attempting to resolve the related civil fraud penalty and/or the fraudulent failure-to-file penalty. The excise examiner should obtain a copy of the plea agreement or judgment notating the applicable criminal statutes and years. The excise examiner will discuss the case with the group manager, FEA, and Counsel to determine if the facts in the case file will support assertion of the fraud penalty. The plea agreement or judgment will be used to support the determination regarding application of the civil fraud penalty and years to which it will apply.
- (2) The case will be updated to SC “17” when the case is returned for civil resolution. The case will be updated to SC “12” if a decision is made not to pursue these penalties. Form 3999, Statute Expiration Report, must be prepared in a barred statute situation due to the determination not to pursue the civil fraud penalty. Refer to IRM 4.2.1.13, Statute Expiration Reports.
- (3) Refer to IRM 25.1.6.3, Procedures, specifically paragraphs (7) through (12), for additional requirements on the civil resolution after the prosecution.
- (4) Excise examiners and managers should be aware of collateral estoppel and the important distinction it can have in civil tax fraud penalty cases. Collateral estoppel is a legal doctrine that prevents a taxpayer, who has been previously convicted of criminal tax evasion under IRC 7201, from asserting a defense to the civil fraud penalty. Refer to IRM 25.1.6.5, Collateral Estoppel, for additional information.

- (5) For civil resolution of a criminal prosecution case, the excise examiner should calculate the proper amount of excise taxes, penalties, and additions to tax separate and distinct from the calculated amounts at issue in the criminal prosecution case or payable as restitution in the criminal prosecution case.

4.24.9.7.5
(07-16-2021)
**Miscellaneous Fraud
Procedures and Group
Definitions**

- (1) While in SC “17” or SC “18”, cycle time will be excluded from monthly “aging” reports to management. As AIMS and ERCS include data from all cases, a manual reconciliation to the aging reports will exclude SC “17” and “18” cases from both the overage category and the overage percentage.
- (2) When closing a civil fraud case, the excise examiner will enter:
 - “C” if the 75 percent fraud penalty was asserted under IRC 6663
 - “F” if criminal prosecution has been successfully concluded, or
 - “B” if both criminal and civil apply, on the appropriate line of Form 5344, Examination Closing Record. Refer to IRM 4.4.12.5.47, Item 38: Fraud.

4.24.9.8
(07-16-2021)
Negligence Penalty

- (1) Excise examiners will recommend the assertion of the accuracy-related penalty for negligence or disregard of rules or regulations under IRC 6662 where appropriate. However, the accuracy-related and civil fraud penalties cannot be asserted on the same portion of the same underpayment, except as an alternative position. Additionally, the Negligence penalty does not apply to SFR non-filer cases. Refer to IRM 20.1.5.3.2, Common Features of Accuracy-Related and Civil Fraud Penalties.
- (2) Unlike the fraud penalty, liability for an accuracy-related penalty does not remove the bar of the statute of limitations on assessment. However, if the Service determines fraud exists, there is no bar to the statute of limitations on assessment for the entire underpayment, including that portion not attributable to fraud.
- (3) Examiners will attach Form 3198, Special Handling Notice, to all case files in which the IRC 6662 penalty is to be assessed. Under Special Handling “Other,” annotate “Penalty computation required under IRC 6662.”

4.24.9.9
(07-16-2021)
**Assertion of Failure to
File Penalty**

- (1) IRC 6651(a)(1) imposes a penalty for the failure to file a tax return by it's required due date (determined with regard to any extension of time for filing). The penalty rate is 5 percent per month or part of month up to maximum of 25 percent, computed on the amount of tax required to be shown on the return. The penalty is assessed unless the taxpayer can show that the failure to file was due to “reasonable cause” and not due to willful neglect. See IRM 20.1.2.3, Failure to File a Tax Return or to Pay Tax – IRC 6651.
- (2) For reduction of the failure to file penalty rate when it is combined with the failure to pay penalty, see IRM 20.1.2.3.7.3, Limitation Under IRC 6651(c)(1).
- (3) IRC 6651(f) provides that if the failure to file is fraudulent, the penalty increases to 15 percent per month or part of month up to a maximum of 75 percent. Refer to IRM 20.1.2.3.7.5, Fraudulent Failure to File – IRC 6651(f).

