



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

4.32.2

JUNE 4, 2018

EFFECTIVE DATE

(06-04-2018)

PURPOSE

- (1) This transmits revised IRM 4.32.2, *Abusive Transactions, The Abusive Transactions (AT) Process*.

MATERIAL CHANGES

- (1) This update addresses changes to processes and procedures, and fixes broken links. Throughout, have changed all references from participant to client. Significant changes to this IRM are reflected in the table below:

Reference	Description
IRM 4.32.2.1	Added Program Scope and Objectives as required by IRM 1.11.2.
IRM 4.32.2.4.2	Added fairness statement and case selection criteria as per interim guidance memo.
IRM 4.32.2.4.3.1.2	Clarifies Office of Tax Shelter Analysis (OTSA) processing of Form 8886
IRM 4.32.2.5	Updates new organizational structure of the Frivolous Return Program. Removes material pertinent only to FRP
IRM 4.32.2.7.3.3	Adds a requirement for the Territory Manager to approve delays beyond 60 days
IRM 4.32.2.7.3.3.3	Corrects the elevation process to reflect the new organizational structures
IRM 4.32.2.8.1	Updates the pre-contact analysis process
IRM 4.32.2.8.1.1	Corrected references to exhibits regarding action plans
IRM 4.32.2.8.1.3	Added information regarding the Abusive Transaction Support Unit (ATSU)
IRM 4.32.2.8.2.1	Updated information regarding commencement of SB/SE investigations
IRM 4.32.2.8.2.5	Identity theft policy and procedures in promoter investigations
IRM 4.32.2.8.3	Updated information regarding promoter interviews
IRM 4.32.2.8.3.2	Additional clarification of third party contact procedures

Reference	Description
IRM 4.32.2.8.7	Clarified information regarding summary and closing conferences
IRM 4.32.2.10.3.1	Clarification of guidelines for pre-referral consultation with Department of Justice
IRM 4.32.2.12.3	Added IRC 6694 - Understatement of Taxpayers Liability
IRM 4.32.2.12.4	Added IRC 6695 - Penalties that May Apply to a Return Preparer
IRM 4.32.2.12.7.2	Corrected promoter appeal rights for IRC 6707 penalties
IRM 4.32.2.13.2	Removed
IRM 4.32.2.13.3.2	Updated information regarding referrals to Office of Professional Responsibility (OPR)
IRM 4.32.2.13 through 13.2.2	Updated information regarding SB/SE Client Lists, added fairness statement and information regarding case selection process as per interim guidance memo.
IRM Exhibits	Replaced Exhibit 1 with new Acronym Table. Removed Exhibits 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18. Replaced with links to MySB/SE website locations.

EFFECT ON OTHER DOCUMENTS

IRM 4.32.2, dated 06-08-2012, is superseded. This version incorporates interim guidance memos SBSE-04-0817-0051 and SBSE-04-0817-0053.

AUDIENCE

This section provides guidance for Small Business/Self-Employed (SB/SE) Examination area office employees, Tax Exempt and Governmental Entities (TE/GE) employees, and Large Business and International (LB&I) examiners.

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4.32.2

The Abusive Transactions (AT) Process

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4.32.2.1
(06-04-2018)
Program Scope and Objectives

- (1) **Purpose-** This IRM section provides guidance to compliance employees for referring potential Abusive Transactions (AT) promoter and preparer leads and outlines procedures for AT investigations, client examinations, and other AT matters.
- (2) This IRM section is a compilation of the IRS' AT policy encompassing operations of the Small Business/Self Employed Lead Development Center (SB/SE LDC), the Office of Tax Shelter Analysis (OTSA), and the Large Business and International (LB&I) Technical Tax Shelter Promoter Committee (TTSPC).
- (3) **Audience-** The procedures are primarily for the use of examiners in SB/SE, LB&I, and Tax Exempt and Government Entities (TE/GE).
- (4) **Stakeholders** - These procedures may also be helpful to employees in Appeals, Criminal Investigation (CI), Counsel, Return Preparer Office (RPO) and the Office of Professional Responsibility (OPR).

4.32.2.1.1
(06-04-2018)
Background

- (1) The SB/SE LDC was established to centralize receipt and development of SB/SE AT promoter and preparer leads, conduct research, build promoter cases, and authorize the initiation of promoter or preparer investigations.
- (2) OTSA was created as part of LB&I (Announcement 2000-12, IRB 2000-12, 835, Disclosure Requirements for Corporate Tax Shelters). OTSA provides information and services to all IRS operating divisions and functions as well as other interested parties, including Treasury and Congress.
- (3) The LB&I Tax Shelter Steering Committee provides leadership and executive oversight in implementing the tax shelter program.
- (4) The LB&I TTSPC is a sub-committee of the LB&I Tax Shelter Steering Committee and approves all LB&I tax shelter promoter and material advisor contacts and investigations. Examiners may NOT contact a promoter or material advisor with respect to a tax shelter or reportable transaction promotion unless approval is first obtained from the LB&I TTSPC.
- (5) TE/GE's Compliance, Planning and Classification (CP&C), Classification and Case Assignment (C&CA) function is responsible for formulating a TE/GE wide approach to abusive transactions within its customer base. C&CA collaborates with SBSE, LB&I, CI, IRS Counsel, and other operating divisions to address abusive transactions.
- (6) C&CA coordinates the dissemination of reports and other activities between the TE/GE functions and the SB/SE LDC and OTSA.

4.32.2.1.2
(06-04-2018)
Authority

- (1) SB/SE Delegation Order 4.60, Functions Related to Potential Promoters/Tax Shelter Cases, delegates authority to approve and refer all SB/SE AT promoter investigations to the SB/SE LDC Program Manager.

4.32.2.1.3
(06-04-2018)
Responsibilities

- (1) The Director, Exam Case Selection is the executive responsible for the authorized SB/SE AT investigations.
- (2) The SB/SE LDC Program Manager is responsible for authorizing all AT investigations for SB/SE & TE/GE.

- (3) The LB&I TTSPC approves all LB&I promoter and material advisor investigations.
- (4) The SB/SE investigations are conducted by specially trained Revenue Agents under the supervision of an SB/SE Field Exam Group Manager.

4.32.2.1.4
(06-04-2018)
Program Review

- (1) **Program Reports-** Monthly reports detailing the current inventory of authorized investigations by Area, their status, and results for the current and past fiscal years are produced and provided to Examination Headquarters staff, Area Directors, TE/GE personnel and select others for monitoring purposes.
- (2) Ad-hoc reports are produced as requested by Exam personnel with appropriate permission.

4.32.2.1.5
(06-04-2018)
Common Terms

- (1) A table of acronyms used throughout this IRM section can be found at Exhibit 4.32.2-1 *Acronyms*.
- (2) Below is a table of common terms.

Defined Terms

Word	Definition
Abusive Transaction	The organization or sale of any plan or arrangement promoting false or fraudulent tax statements or gross valuation misstatements, aiding or assisting in the preparation or presentation of a return or other document to obtain tax benefits not allowed by law, and actions to impede the proper administration of the Internal Revenue Code (IRC).
Authorized	The lead or referral resulted in the LDC Program Manager authorizing the investigation.
Client	A person who pays money to a promoter or preparer for their service or promotional material.
Examiner	The IRS employee assigned to conduct the investigation.
Investigation	The action taken to determine if the allegations in the lead or referral are accurate.
Lead	Information submitted to the SB/SE LDC or OTSA regarding suspected abusive activity.
Preparer	An individual who prepares for compensation, or who employs one or more persons to prepare for compensation, tax returns or claims for refund.
Promoter	An individual who organizes, promotes, sells or assists in the organization, promotion, or sale of an AT activity.
Promoter Investigation	An authorized investigation of a suspected abusive tax promotion, promoter or tax return preparer conducted by trained AT Agents.

Word	Definition
Referral	Information submitted to the SB/SE LDC or OTSA regarding suspected abusive activity (used interchangeably with “lead”).

4.32.2.1.6
(06-04-2018)

Related Resources

- (1) The following are the primary sources of guidance for the AT program:
 - IRM 4.32.1 *Process Guide for Combating Abusive Tax Avoidance Transactions*
 - IRM 4.32.3 *Coordination and Roles of Cross-Functional Units*
 - IRM 4.32.4 *IRC 6707A Penalty for Failure to Include Reportable Transaction Information with Return*
 - IRM 5.20 *Abusive Tax Avoidance Transactions (ATAT)*
 - IRM 20.1.6 *Preparer, Promoter, Material Advisor Penalties*

4.32.2.2
(06-04-2018)

Overview of Abusive Transactions (AT) Program

- (1) The IRS is committed to pursuing investigations of AT promoters to stop the widespread use of abusive promotions that erode the voluntary tax compliance system and result in substantial tax revenue loss. These investigations are designated as priority work. The IRS combats AT promotions by the following:
 - Seeking timely civil injunctions.
 - Asserting civil penalties against promoters and return preparers.
 - Providing published guidance on various promotions.
 - Conducting client examinations.
 - Criminally prosecuting promoters, preparers, or clients.
- (2) The term “promoter” as used throughout this IRM chapter unless specifically noted, includes promoters, material advisors as defined under IRC 6111, and tax return preparers.
- (3) The term “client” as used in this IRM chapter includes all persons who participated in a promotion, purchased a product or service from a promoter, had an interest in a promotion, or received any material aid, assistance, or advice with respect to the promotion. Client includes investors and advisees. Client also includes all persons who paid to have a tax return or tax form prepared or sought tax advice from any individual or firm offering such service or services.

4.32.2.3
(06-04-2018)

Abusive Transactions Defined

- (1) Abusive transactions include the organization or sale of any plan or arrangement promoting false or fraudulent tax statements or gross valuation misstatements, aiding or assisting in the preparation or presentation of a return or other document to obtain tax benefits not allowed by law, and actions to impede the proper administration of the Internal Revenue Code (IRC). This general definition includes both tax shelters as defined in various sections of the IRC and other types of abusive tax promotions.
- (2) IRC 6662(d)(2)(C) broadly defines a “tax shelter” as a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, if a significant purpose of such partnership, entity, plan, or arrangement is the avoidance or evasion of federal income tax.

- (3) AT promotions include, but are not limited to, programs that rely on the following:
- a. False statements about the allowance of tax benefits to clients that are contrary to clearly established law.
 - b. Intentional manipulation or misapplication of IRC sections to improperly claim tax benefits.
 - c. Sham arrangements having no economic significance or business purpose other than the avoidance or evasion of tax.
 - d. Gross valuation misstatements that ascribe a value to an asset or service that is at least twice the correct value and result in a tax reduction.
 - e. Noncompliance with disclosure requirements of IRC 6111, *Disclosure of Reportable Transactions*.
 - f. Noncompliance by material advisors with the list maintenance requirements of IRC 6112, *Material Advisors of Reportable Transactions Must Keep Lists of Advisees Etc.*
 - g. Attempts to impede the proper administration of tax laws.
 - h. Gross overstatement of withholding or refundable credits to obtain false refunds.
- (4) There are many tools available to the IRS to address the promotion of and the participation in an AT activity, including:
- a. Seek injunctive relief under IRC 7402, *Jurisdiction of District Courts*; IRC 7407, *Action to Enjoin Tax Return Preparers*; and/or IRC 7408, *Actions to Enjoin Specified Conduct Related to Tax Shelters and Reportable Transactions*.
 - b. Assessment of civil penalties against promoters under IRC 6700, *Promoting Abusive Tax Shelters, Etc.*; IRC 6701, *Penalties for Aiding and Abetting Understatement of Tax Liability*; IRC 6707, *Failure to Furnish Information Regarding Reportable Transactions*; IRC 6708, *Failure to Maintain Lists of Advisees with Respect to Reportable Transactions*; IRC 6694, *Understatement of Taxpayer's Liability by Tax Return Preparer*; IRC 6695, *Other Assessable Penalties with Respect to the Preparation of Tax Returns for Other Persons*.
 - c. Criminal prosecution of individuals who organize; promote; sell; or assist in the organization, promotion, or sale of an AT activity; and, potentially, clients in the activity.
 - d. .
 - e. Examinations of individuals involved in promotions (i.e., promoters, preparers, clients, etc.).
 - f. Assessment of civil penalties against clients including IRC 6707A, *Penalty for Failure to Include Reportable Transaction Information With Return*, and IRC 6662A, *Imposition of Accuracy-Related Penalty on Understatements with Respect to Reportable Transactions*.
 - g. Office of Professional Responsibility sanctions for those clients, promoters, or preparers who are practitioners defined in § 10.3 of Circular 230, *Regulations Governing Practice Before the Internal Revenue Service*, or otherwise subject to Circular 230.
 - h. Revocation of electronic filing privileges.
- (5) Successful resolution of promoter investigations and client examinations require the combined actions of Collection, Counsel, Criminal Investigation (CI), LB&I, SB/SE, TE/GE, W&I, and the Tax Division of the Department of Justice (DOJ). See IRM 4.32.3, *Coordination and Roles of Cross Functional Units*, for additional information.

4.32.2.3.1
(06-04-2018)

Statutory History and Provisions

- (1) The Tax Reform Act of 1976 (PL 94–455) added IRC 7407, *Action to Enjoin Income Tax Return Preparers*.
- (2) Statutory tools provided in the Tax Equity and Fiscal Responsibility Act (TEFRA) of 1982 (PL 97-248) used to address promotions include the following:
 - IRC 6700, *Promoting Abusive Tax Shelters Etc.*
 - IRC 6701, *Penalties for Aiding and Abetting Understatement of Tax Liability.*
 - IRC 7408, *Action to Enjoin Specified Conduct Related to Tax Shelters and Reportable Transactions.*
- (3) The Tax Reform Act of 1984 (PL 98-369) added additional statutory provisions to the IRC imposing penalties for failure of an organizer or seller of an abusive tax shelter to register that tax shelter or to maintain the required list of investors. See IRC 6111, IRC 6112, IRC 6707, and IRC 6708.
- (4) The American Jobs Creation Act (AJCA) of 2004 added additional statutory provisions to the Internal Revenue Code and amended some existing code sections as follows:

Citation	Description
IRC 6111 <i>Disclosure of Reportable Transactions</i> IRC 6112 <i>Material Advisors of Reportable Transactions Must Keep Lists of Advisees, Etc.</i>	Amended IRC 6111 to require material advisors of reportable transactions to file informational returns identifying reportable transactions and the potential tax benefits expected to result from the transaction and such other information the Secretary may prescribe. IRC 6112 requires material advisors to maintain a client list of investors/advisees and to provide that list to the IRS upon request.
IRC 6662A <i>Imposition of Accuracy-Related Penalty on Understatements With Respect to Reportable Transactions</i>	Imposes a 20 percent penalty for understatements resulting from listed transactions and reportable transactions (other than listed transactions) if a significant purpose of the transaction is the avoidance or evasion of tax. The penalty increases to 30 percent for reportable transactions that are not adequately disclosed.

Citation	Description
IRC 6662(d)(1)(B) <i>Imposition of Accuracy-Related Penalty on Underpayments - Substantial Understatement of Income Tax</i>	Revised to define substantial understatement of income tax for corporations other than an S corporation or a personal holding company as the lesser of 10 percent of the tax required to be shown on the return (or, if greater, \$10,000) or \$10 million.
IRC 6700 <i>Promoting Abusive Tax Shelters, Etc.</i>	Amended to increase the penalty applicable to a person who knowingly makes, or causes another to make, a false or fraudulent tax benefit statement for any material matter pertaining to a tax shelter plan or arrangement to 50 percent of the gross income derived or to be derived from the abusive plan or arrangement.
IRC 6707 <i>Failure to Furnish Information Regarding Reportable Transactions</i>	Amended to impose a penalty on material advisors for failing to timely file an information return or for filing false or incomplete information as required by IRC 6111 for reportable transactions. The penalty equals: <ol style="list-style-type: none"> a. For failures with respect to reportable transactions (other than listed transactions), \$50,000; or b. For listed transactions, an amount equal to the greater of \$200,000 or 50% (75% in the case of an intentional failure) of the gross income derived by such person with respect to aid, assistance, or advice which is provided with respect to the listed transaction before the date the return is filed under IRC 6111.

Citation	Description
IRC 6707A <i>Penalty for Failure to Include Reportable Transaction Information With Return</i>	Imposes a penalty for failing to report certain transactions that have a potential for tax avoidance or evasion (reportable transactions as defined in IRC 6011 and the regulations thereunder) and transactions specifically identified as tax avoidance transactions (listed transactions) as required by 26 CFR 1.6011-4 .
IRC 6708 <i>Failure to Maintain Lists of Advisees With Respect to Reportable Transactions</i>	Amended to impose a daily penalty of \$10,000 on material advisors of reportable transactions who fail to make a list of investors/advisees available as required by IRC 6112 within 20 business days from an IRS written request for the list.
IRC 7408 <i>Action to Enjoin Specified Conduct Related to Tax Shelters and Reportable Transactions</i>	Expanded to allow injunctions to be sought for actions subject to penalty under IRC 6707 or IRC 6708, or violating Treasury Department Circular 230, <i>Regulations Governing Practice Before the Internal Revenue Service</i> .
IRC 6501(c)(10) <i>Limitations on Assessments and Collection—Exceptions</i>	Amended to add an exception to the applicable statute of limitations for assessing underpayments of tax resulting from undisclosed listed transactions. The statute of a taxpayer who participated in a listed transaction remains open until the taxpayer or a material advisor discloses the taxpayer's participation in the transaction. After such disclosure occurs, the statute will remain open for 1 year from the date of that disclosure.
IRC 163(m) <i>Interest</i>	Revised to disallow any deduction for interest paid or accrued on any portion of an underpayment attributable to an undisclosed reportable transaction.

Citation	Description
IRC 7525(b) <i>Confidentiality Privileges Relating to Taxpayer Communications – Section Not to Apply to Communications Regarding Tax Shelters</i>	Amended to extend the denial of privilege for written communications between a tax practitioner and a corporate client to include any individual engaged in a tax shelter activity.
American Jobs Creation Act (AJCA) of 2004 section 821	Amended § 5321(a)(5) of Title 31, United States Code, to increase the penalty for failing to report interests in foreign financial accounts.
AJCA of 2004 section 822	Amended § 330(b) of Title 31, United States Code, to authorize the Secretary to censure and fine an incompetent or disreputable tax advisor who practices before the Department of the Treasury.

4.32.2.4
(06-04-2018)
Lead Identification and Investigation Authorization

- (1) This material provides guidance to all IRS employees for referring potential AT promoter leads and describes the process for authorizing promoter investigations.
- (2) SB/SE and TE/GE investigations are authorized by the SB/SE LDC.
- (3) LB&I investigations are authorized by the TTSPC.

4.32.2.4.1
(06-04-2018)
Identification of Promoter Leads

- (1) All potential leads are sent to the SB/SE LDC or OTSA for development and evaluation. If sent to OTSA, OTSA will make a recommendation to the TTSPC.
- (2) The following is a list of the types of promoter leads reviewed by SB/SE LDC and OTSA. The list is not all-inclusive.
 - Domestic abusive trust promotions
 - Offshore compliance promotions
 - Abusive business entity and deduction promotions
 - Refund and tax credit promotions
 - Frivolous anti-tax positions
 - Exempt organization promotions
 - Corporate tax shelter promotions
 - Arrangements designed to illegally reduce or eliminate employment taxes
 - Compliance issues relating to IRC 6111, *Disclosure of Reportable Transactions*
 - Compliance issues relating to IRC 6112, *Material Advisors of Reportable Transactions Must Keep Lists of Advisees*
 - Collection promotions
- (3) The SB/SE LDC will coordinate with the TE/GE Fraud and Promoter Program Coordinator when developing any lead or referral that involves a TE/GE-related promotion or taxpayer.

- (4) TE/GE contacts and TE/GE Division Counsel will assist with the deconfliction process. De-confliction is a cross-functional process designed to ensure that the beginning of an investigation will not interfere with another operating division's investigation or examination.
- (5) No contact with a known or suspected promoter or third parties should be made prior to receiving authorization from the SB/SE LDC or LB&I TTSPC. Examiners may only conduct passive research on any lead. Examples of passive research are securing marketing or promotion materials from internal or public sources and researching IDRS to identify the suspected promoter's taxpayer identification number (TIN). Any research should be included with the referral package.
- (6) Active research of leads relating to a promoter is not conducted until appropriate approval is obtained from the SB/SE LDC or LB&I TTSPC. Active research includes the following:
 - a. Forwarding promotional materials to Counsel for a formal opinion outside the scope of an ongoing income tax examination.
 - b. Ordering the promoter's tax return.
 - c. Initiating an income tax examination of the promoter.
 - d. Making direct contact with the promoter or third parties.
 - e. Ordering a return of a client not currently under examination or directly related to a return currently under examination.
 - f. Performing IDRS research on clients.
- (7) Promoter lead packages should contain sufficient background information that is readily available to make the referral useful. The following list includes examples of potentially useful information:
 - a. Marketing or promotional materials including legal opinions, secured during an examination or from third parties.
 - b. Information regarding the promoter's network, operations, or marketing strategy.
 - c. A list of any known clients.
 - d. Affidavits, interview notes, correspondence or statements from witnesses or clients.
 - e. A brief overview of examination results (if applicable).
 - f. An estimate of the scope and potential harm to the government.
 - g. Copies of tax returns used in the promotion.
 - h. Names, addresses, and employer identification numbers (EINs) for related and/or sub-promoters.
 - i. Copies of any correspondence between related and/or sub-promoters.
 - j. Years involved.
 - k. Source(s) of information.
 - l. Promoter /material advisor history, if known.

Note: This list is not all inclusive. Your referral may include only some of the items listed, or items not listed. Do not perform research to secure missing items. Send your referral in when it is as complete as possible without concern about missing information.
- (8) Promoter lead packages are forwarded to the SB/SE LDC or OTSA as appropriate.

- (9) For referral forms and additional information on the SB/SE LDC or OTSA referral process:
- For SB/SE—See IRM 4.32.2.4.2, *SB/SE Lead Development Center (SB/SE LDC)*.
 - Form 14242, *Reporting Abusive Tax Promotions and/or Promoters*
 - For LB&I—See IRM 4.32.2.4.3.1, *Role of OTSA*.

4.32.2.4.1.1
(06-08-2012)

**Time Charges for
Promoter Referrals**

- (1) Time charged to SB/SE promoter investigations is non-case specific until the SB/SE LDC formally approves an investigation. Time spent by SB/SE examiners preparing referrals is charged as follows:

Activity Code	Activity
593	Promoter activity under IRC 6700.
594	Aiding and abetting promoter activity under IRC 6701.

- (2) Once the SB/SE LDC authorizes an investigation, time is charged to the specific investigation.
- (3) LB&I examiners and technical specialists must use Activity Code 529 for time spent developing information on lead referrals and for providing assistance to examiners in developing promoter leads before LB&I TTSPC approval. When a promoter investigation is approved, LB&I examiners use Activity Code 593.
- (4) TE/GE examiners should refer to IRM 4.70 for TE/GE-specific procedures for charging time for work on promoter referrals.

4.32.2.4.2
(06-04-2018)

**SB/SE Lead
Development Center
(SB/SE LDC)**

- (1) SB/SE supports administration of tax law by selecting promoters and preparers to investigate. The primary objective in selecting promoters and preparers for investigation is to identify and quickly terminate the abusive promotion or activity and to address the tax implications to clients while making the most efficient use of finite examination staffing and other resources. Employees must exercise their professional judgment, not personal opinions, when making selection decisions. As explained in Policy Statement 1-236, *Fairness and Integrity in Enforcement Selection*, IRS employees are expected to carry out our duties with integrity and fairness.
- To ensure fairness to the taxpaying public, our Examination Workplan provides a balanced approach for return delivery and allocation of resources to address areas of the Tax Gap by taking into account factors such as income levels, geographic locations, and return types.
 - To ensure an equitable process for all promoters and preparers, selection decisions are made utilizing available experience and/or statistics indicating the probability of substantial error. No one individual can control the investigation selection decision-making process. We limit involvement to only those employees whose duties require them to be included.
 - To ensure fairness to each promoter/preparer who is selected for IRC §6700/§6701 investigation, selection decisions are based on the underlying relevant tax law and the following criteria:

- i. The promoter/preparer activity is abusive in nature.
 - ii. Money is exchanged for products and services.
 - iii. Potential harm to taxpayers.
 - Managerial reviews of selection decisions occur during each phase of the selection and assignment process.
- (2) SB/SE Program Level Objective - Ensure examinations are initiated based on indicators of non-compliance or on other criteria (such as selection for the National Research Program), identified in the Internal Revenue Manual. In addition, ensure a review of the decisions to survey a return (i.e., not initiate an examination) are based upon factors outlined in the Internal Revenue Manual and approved by an appropriate level of management.
 - (3) SB/SE Delegation Order 4.60, *Functions Related to Potential Promoters/Tax Shelters Cases*, delegates authority to approve and refer all SB/SE AT promoter investigations to the SB/SE LDC Program Manager.
 - (4) The SB/SE LDC was established to centralize receipt and development of SB/SE AT promoter leads, conduct research, build promoter cases, and authorize the initiation of promoter investigations in coordination with other operating divisions.
 - (5) The SB/SE LDC (under Exam Case Selection) also provides assistance and support to field exam on case development involving all preparer and promoter cases except those promoter cases involving coordinated issues by the AT Group. The LDC will support promoter investigations involving specifically identified coordinated issues when the AT Group and field examiner requests the support.
 - (6) The Abusive Transactions Group (under Exam Quality and Technical Support) provides case development assistance and support on specifically identified promoter investigations involving specifically identified coordinated issues.
 - (7) Leads are submitted to the SB/SE LDC using Form 14242, *Reporting Abusive Tax Promotions and/or Promoters*.
 - (8) The SB/SE LDC will acknowledge receipt of the lead and may contact the referring IRS employee for additional information. Initial classification of each lead is conducted to determine if the lead should be developed further.
 - (9) Each lead is reviewed and uploaded to the LDC Database with an assigned Control Number. Appropriate documentation from the referred lead will be scanned and uploaded to the LDC Database record.
 - (10) If further development by the LDC Revenue Agent (RA) is not recommended, review and concurrence will be made by the SB/SE LDC Group Manager.
 - (11) The SB/SE LDC Group Manager will assign leads for development to LDC Revenue Agents where additional research is completed.
 - (12) SB/SE LDC will develop each lead independently using established criteria to either recommend or not recommend an IRC 6700/6701 investigation:
 - Recommendation memos are reviewed by the LDC Group Manager and the LDC Program Manager.
 - Non-Recommend memos are reviewed by the LDC Group Manager.

- (13) If the LDC receives lists containing multiple leads from both internal and external sources as one referral, the list will be sent to the Abusive Transaction Support Unit (ATSU) for research and development of each lead within the list.
- (14) Leads received at the ATSU will be processed as follows:
- Lists from State Departments of Revenue: Each state list is submitted by the state via a designated shared server. The Revenue Agent will review the documentation submitted and apply the same criteria as the LDC to determine if the information should be submitted as a lead to the LDC on Form 14242, *Report Suspected Abusive Tax Promotions or Preparers*. The decision process and explanations of any non-selects will be recorded directly on the document received from the state. Once the analysis is complete and decisions documented, the list will be saved in the completed list folder on the shared server. The ATSU Group Manager will complete a 5% monthly review of completed lists.
 - Lists submitted by AUR, LDC or other sources: The RA will analyze all lists. A master list of all leads received is stored within the ATSU shared server. Leads meeting LDC criteria will be submitted to the LDC on Form 14242 and recorded on the master list. Leads that do not meet LDC criteria will not be referred and an explanation will be documented on the master list. The ATSU Group Manager will complete a 5% monthly review of the non-selected leads.
- (15) The SB/SE LDC conducts additional research and evaluates the investigation potential. Some factors they consider are:
- Type of promotion
 - Past activity of the promoter
 - Ongoing activity or likelihood of recurrence
 - Size of the promotion
 - Tax impact of the promotion
 - Possible tax law violations
 - Favorable public or compliance impact
 - Existing balance due liabilities including an open Collection assignment.
- (16) If a promoter subject to Circular 230 violates any of its provisions (such as failure to file tax returns or a criminal conviction for financial crimes involving breach of trust), the SB/SE LDC will make a referral to the OPR. A copy of any referral made to OPR by the LDC may be included in the investigation authorization file.
- (17) Once an investigation is authorized, the authorization file is sent to the field. A copy of the authorization memo is sent by e-mail to Collection Policy. The file includes the following:
- a. An investigation authorization memorandum describing the promoter's background and history, the promotion, potential First Amendment concerns, summary of products or services sold, any criminal investigation information, the scope of the promotion, and recommendation for investigation.
 - b. Any promotional or other materials provided by the referring examiner(s) or other lead source.
 - c. Internal or external public records research conducted by the SB/SE LDC.

- (18) An investigation is not limited to the scheme identified in the referral. Approval of the investigation authorizes an examiner to review all potentially abusive activities.
- (19) Approval of a promoter investigation includes the investigation of any entity controlled by the promoter.
- (20) Promoter investigations may be conducted simultaneously with examination of the promoter and related clients. There is no requirement that an income tax examination of the promoter or any of the clients be initiated in development of the promoter investigation. If examinations of the promoter or clients are initiated, it is preferable that one examiner conduct the AT investigation and a different examiner conduct the income tax examination of the promoter and/or clients. However, the examiners should coordinate and share relevant information.

4.32.2.4.2.1
(06-04-2018)
Key or Sub-Promoters

- (1) When a promotion involves multiple promoters, each person involved in the promotion is designated as either a “key” “sub” promoter.
- (2) The primary person or principal organizing or arranging the AT promotion, if known, is designated as the key promoter.
- (3) If the Area where the key promoter resides is not able to complete the investigation, then the LDC will work with the Area PSP offices to determine where the investigation will be assigned.

4.32.2.4.3
(06-04-2018)
Office of Tax Shelter Analysis (OTSA), LB&I Tax Shelter Steering Committee and LB&I Technical Tax Shelter Promoter Committee (TTSPC)

- (1) OTSA was created as part of LB&I (Announcement 2000-12, IRB 835 , 2001-1 C.B. 835, *Disclosure Requirements for Corporate Tax Shelters*). OTSA provides information and services to all IRS operating divisions and functions as well as other interested parties, including Treasury and Congress.
- (2) The LB&I Tax Shelter Steering Committee provides leadership and executive oversight in implementing the tax shelter program.
- (3) The LB&I TTSPC is a sub-committee of the LB&I Tax Shelter Steering Committee, and approves all LB&I tax shelter promoter and material advisor contacts and investigations. Examiners may NOT contact a promoter or material advisor with respect to a tax shelter or reportable transaction **promotion** unless approval is first obtained from the LB&I TTSPC.

4.32.2.4.3.1
(06-04-2018)
Role of OTSA

- (1) OTSA is a centralized clearinghouse for all information related to abusive tax shelter activity and issues of significant compliance risk to tax administration that comes to the attention of the IRS from both internal and external sources. OTSA collects complete and accurate information, timely analyzes the information to identify trends and disseminates the results to those in the position to take the necessary action.
- (2) OTSA is responsible for making recommendations to the LB&I TTSPC regarding tax shelter promoters/material advisors referrals and IRC 6112 letter requests from the technical specialists’ review of Form 8918, *Material Advisor Disclosure Statement*.

- (3) OTSA works with Counsel, headquarters, field personnel and others, including the operating divisions and CI to evaluate the tax treatment of new variations of tax-structured transactions. OTSA works indirectly with Treasury through Counsel.
- (4) OTSA collects information from many sources to support and implement the IRS's tax shelter compliance and behavior strategies, including, but not limited to:
 - Taxpayer and Material Advisor Disclosures of Reportable Transactions
 - Promoter/Material Advisor Investigations
 - Tax Shelter Hotline
 - LB&I Referrals
 - Emerging Issues
- (5) OTSA facilitates technical guidance communication to LB&I examiners on tax shelter issues.

4.32.2.4.3.1.1

(06-04-2018)

Disclosures of Reportable Transactions

- (1) OTSA is responsible for:
 - a. Monitoring all reportable transactions disclosed by material advisors as required by IRC 6111, as amended by AJCA of 2004, and 26 CFR 301.6111-3 .
 - b. Monitoring all reportable transactions disclosed by taxpayers as required by 26 CFR 1.6011-4 .
 - c. Reviewing and analyzing reportable transactions to detect patterns as well as identifying new promoters and/or promotions.
 - d. Maintaining a centralized and secure document repository of Form 8886, *Reportable Transaction Disclosure Statement*, and Form 8918, *Material Advisor Disclosure Statement*, and associated databases to be used for enterprise-wide issue collaboration, searching, and knowledge management.
 - e. Assigning unique material advisor reportable transaction numbers to each reportable transaction disclosed by a material advisor on Form 8918.
 - f. Identification of potential IRC 6707A penalty cases for non-compliance with disclosure laws and dissemination to appropriate business operating divisions (BODs) for examination.

4.32.2.4.3.1.2

(06-04-2018)

Taxpayer Disclosures

- (1) OTSA receives and evaluates all Form 8886, *Reportable Transaction Disclosure Statements*, (disclosures), which are submitted by taxpayers who have participated in a reportable transaction(s) as defined in 26 CFR 1.6011-4. A taxpayer may have multiple disclosures in their tax return and may disclose the same transaction with different taxable year returns if they participated in the transaction in multiple years. However, only those disclosures that are included in the tax return for the first time are to be submitted to OTSA. The disclosure submitted to OTSA by the taxpayer has to be an exact copy of the disclosure included in their tax return and is to be sent to the Office of Tax Shelter Analysis (OTSA) at the following address:

Internal Revenue Service
 OTSA
 1973 North Rulon White Blvd. Mail Stop 4915
 Ogden, UT 84404

- (2) Forms 8886 received by OTSA during a calendar year are processed and evaluated as follows:
 - OTSA analysts review each disclosure for completeness and determine which disclosures have large, unusual, questionable (LUQ), or Listed Transactions requiring further action or review. Each disclosure is assigned a specific transaction type identification number.
 - All disclosures and supporting documents are scanned and saved in a secure repository. The disclosure data is captured in the OTSA Form 8886 database for further review.
 - For those disclosures requiring further action, additional data from the associated tax return is secured and added to the database.
- (3) Disclosures requiring further action are re-sorted by BOD and disseminated as follows:
 - For SB/SE, W&I and TE/GE BOD disclosures, the OTSA database and disclosures are made available to the SB/SE Abusive Transaction Support Unit (ATSU) or the TE/GE Fraud and Promoter Program Coordinator for further review and to make exam determination.
 - For LB&I BOD disclosures with an associated tax return open in examination, the OTSA analyst notifies the Team Manager of the disclosure and requests their review of the transaction. If OTSA has identified the disclosure as potentially incomplete, the notification will also request consideration of potential penalty under IRC 6707A.
 - For LB&I BOD disclosures with an associated tax return which is not currently under examination, OTSA generally relies on established return risking models identifying and placing higher risk returns on LWIS (LB&I Workload Identification System). OTSA sends a description of the disclosed LUQ issue with appropriate instructions to the case built file for these returns. The remaining disclosures will be made available for appropriate workload identification team review as needed.
- (4) Under the IRC 6011 regulations, disclosure of a reportable transaction (on Form 8886, *Reportable Transaction Disclosure Statement*), is not always made at the same time a tax return is filed.
 - If a transaction is reportable at the time the taxpayer files a return reflecting participation (as described in 26 CFR 1.6011-4) in that transaction, the taxpayer is required to attach a Form 8886 with their filed tax return for each reportable transaction for every year of participation. A taxpayer may report multiple reportable transactions on one form if they are the same or substantially similar. In addition, a copy of the Form 8886 is to be sent to OTSA at the time a Form 8886 is first filed by the taxpayer pertaining to a particular reportable transaction. Failure to comply with these requirements could result in penalties.
 - If a transaction becomes a listed transaction or a transaction of interest after the filing of a taxpayer's tax return reflecting participation in this transaction and before the end of the period of limitations for assessment of tax for any taxable year in which the taxpayer participated in the transaction, then a disclosure statement must be filed with OTSA within 90 days of listing or TOI notice per 26 CFR 1.6011-4(e)(2)(i).
- (5) When placing a tax return under examination that has a Form 8886 attached, LB&I examiners must contact OTSA under the following conditions to verify if a Form 8886 was properly and timely filed:

- The attached Form 8886 has a check in the “Initial year filer” box on line C
- The attached Form 8886 has a check in the “Listed or TOI” box on line 2a
- The attached Form 8886 identifies a year that is potentially open on line 1b.

When contacting OTSA, send an e-mail requesting verification of Form 8886 filing. All examiners should refer to IRM 4.32.4.3.2.1, *Opening an IRC 6707A Penalty Examination*, for further guidance

- (6) For a job aid to assist examiners in determining whether a Form 8886 is required, timely, and complete, see the *Audit Tool Worksheet* on the *OTSA-Disclosures* web page.

4.32.2.4.3.1.3
(06-08-2012)

**Material
Advisor/Promoter
Investigations**

- (1) OTSA serves as a centralized collection point for all leads involving abusive technical tax shelters and reportable transactions. OTSA is responsible for the evaluation of leads, completion of referral packages, and submissions to the LB&I TTSPC for consideration of a LB&I promoter investigation. For additional information, see IRM 20.1.6.13.1, *LB&I, SB/SE and TE/GE Functional Guidelines*.
- (2) Advisee/investor lists are secured through material advisor investigations under the authority of IRC 6112, *Material Advisors of Reportable Transactions Must Keep Lists of Advisees, Etc.*
- (3) These lists secured by LB&I examiners are routed to OTSA in Ogden for input into a database and case building. After input, OTSA forwards the investor or advisee names to the appropriate operating division for examination consideration.

4.32.2.4.3.1.4
(06-04-2018)

Tax Shelter Hotline

- (1) OTSA receives information on potentially improper tax shelter activity from both internal and external sources.
- (2) OTSA is responsible for the evaluation of these leads.
- (3) The IRS Internet website contains contact information for the hotline as follows:

Type of Contact	Contact Information
Mailing address:	Internal Revenue Service Office of Tax Shelter Analysis LB&I:OTSA M/S 4916 1973 North Rulon White Blvd. Ogden, UT. 84201-1000
Fax Number:	801-620-5122 (not toll free)
E-Mail Address:	<i>irs.tax.shelter.hotline@irs.gov</i>

4.32.2.4.3.1.5
(06-04-2018)
Emerging Issues

- (1) OTSA evaluates information on new and emerging transactions which may have potential for strategic importance to the IRS and facilitates various compliance actions such as issuing notices, alerts, pronouncements, or seeking to designate the issue as a listed transaction or a transaction of interest.
- (2) Information regarding reporting an emerging issue of interest to SB/SE can be found at *Report An Emerging Issue*.
- (3) Information on making a referral of a potentially abusive transaction can be found on the *OTSA website* under the “Emerging Issues” program.
- (4) See IRM 4.51.2.3, *LMSB Emerging Issues*.

4.32.2.4.3.1.6
(06-08-2012)
Communications and Guidance

- (1) OTSA facilitates technical guidance communication to LB&I examiners on tax shelter issues.

4.32.2.4.3.2
(06-08-2012)
LB&I Tax Shelter Steering Committee

- (1) The LB&I Tax Shelter Steering Committee makes key decisions in implementing LB&I’s strategic initiative pertaining to abusive tax shelters. Some areas of focus include:
 - Oversight of the LB&I TTSPC, which approves LB&I tax shelter promoter/material advisor investigations.
 - Coordinating and developing consistent approaches addressing abusive tax shelters in LB&I.
 - Sharing information with other operating divisions.
 - Formulating strategies to deal with abusive tax shelter promotions and investors including allocation of resources to these activities in LB&I.
 - Supporting coordination of legislation and published guidance.
 - Establishing studies and task teams.

4.32.2.4.3.3
(06-04-2018)
LB&I Technical Tax Shelter Promoter Committee (TTSPC)

- (1) The LB&I TTSPC is a sub-committee of the LB&I Tax Shelter Steering Committee. Its purpose is to ensure consistency and uniformity in selecting promoter/material advisors for investigation within LB&I. OTSA submits referrals to the LB&I TTSPC for investigation consideration and for their consideration of IRC 6112 letter requests from technical specialists or OTSA.
- (2) The LB&I TTSPC has sole authority to approve LB&I tax shelter promoter/material advisor investigations. No contact may be made with a promoter/material advisor by an LB&I examiner unless approved by the LB&I TTSPC.
- (3) The LB&I TTSPC comprises the following:
 - Industry Director, Financial Services (Chairperson).
 - Industry Director, Field Operations, Financial Services (designated by the Industry Director).
 - LB&I Area Counsel, Financial Services.
 - LB&I Special Counsel, designated by LB&I Division Counsel.
 - Senior Manager, OTSA.
- (4) Representatives from other operating divisions and OPR may be invited to participate in LB&I TTSPC discussions.

4.32.2.4.3.4
(06-04-2018)

**Referrals to the LB&I
TTSPC**

- (1) OTSA analyzes information received on promoters/material advisors to make an initial determination as to whether a formal investigation is warranted.
- (2) OTSA coordinates with other operating divisions to determine if the promoter is already under investigation. In determining if a promoter should be recommended for investigation, OTSA considers many factors such as the following:
 - Past activity of the promoters or material advisors
 - Type of shelter
 - Number of taxpayers
 - Size of the promotion
 - Scope (years involved)
 - Gross income derived from the promotion
 - Amount of tax benefits claimed
 - National impact
 - Specific issues
- (3) If OTSA determines a formal investigation is warranted, the information is presented to the LB&I TTSPC.
- (4) OTSA originates or receives requests from technical specialists for issuance of an IRC 6112 letter subsequent to their review of Form 8918 . OTSA coordinates with the other operating divisions to determine if there is a conflict with OTSA sending the IRC 6112 letter. If it is determined a letter should be issued, the letter request is referred to the TTSPC for their approval prior to sending the IRC 6112 letter.
- (5) Contact the OTSA senior program analyst for tax shelter promotions/material advisor disclosures for questions regarding referrals to the LB&I TTSPC. All referrals to the LB&I TTSPC must be made through OTSA.

4.32.2.4.3.5
(06-04-2018)

Criteria for Authorization

- (1) This section provides guidance on the type of information considered by the LB&I TTSPC in determining whether to approve an investigation. The type of information includes the following:
 - Entities
 - Law firms
 - Individuals

4.32.2.4.3.5.1
(06-04-2018)

Entities

- (1) The following types of information are considered by the LB&I TTSPC in reaching a determination regarding promoter/material advisor activity. This list is not exclusive:
 - Returns filed by material advisors regarding any reportable transaction under IRC 6111 (post-AJCA of 2004).
 - Registration of, or failure to, register a tax shelter under IRC 6111 (pre-AJCA of 2004) with respect to interests sold in such shelters before October 23, 2004.
 - Disclosure statements filed by investors/advisees under IRC 6011.
 - Evidence obtained from investor/advisee income tax examinations or other promoter investigations, including interview statements, indicating that the entity was promoting tax shelters/reportable transactions and/or providing any material aid, assistance or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and directly or indirectly derives gross

income in excess of the threshold amount as defined in 26 CFR 301.6111-3(b)(3). For additional information and definition of terms, see 26 CFR 301.6111-3, *Disclosure of Reportable Transactions*.

- Information received from the IRS Tax Shelter Hotline.
- Written promotional materials or prospectuses discussing the tax benefits of a transaction.
- Confidentiality or nondisclosure agreements between investors and promoters/material advisors.
- Evidence that a known promoter/material advisor created a new entity to facilitate a tax shelter/reportable transaction promotion.
- Evidence of fees received for a tax shelter promotion/material aid, assistance or advice.
- News articles or evidence of seminars, conferences, etc.
- Internet research.
- IDRS or other internal research.

4.32.2.4.3.5.2
(06-04-2018)
Law Firms

- (1) When considering whether a law firm is the promoter or material advisor of a tax shelter, items listed in IRM 4.32.2.4.3.5.1 (1) above should be considered.
- (2) In addition to the items in IRM 4.32.2.4.3.5.1 (1), evidence which may tend to show a law firm was “selling a product” and not providing independent legal advice may include, but is not limited to the following:
 - Information or evidence which suggests that the law firm was involved in the design or implementation of the transaction.
 - Evidence of receipt of compensation or fees for referrals to or from other parties involved in the design or implementation of the transaction.
 - Copies of written opinions discussing the tax implications of participating in a particular transaction, including evidence of multiple “cookie cutter” legal opinions.
 - Copies of fee schedules, particularly those including fees tied to the amount of tax savings derived by investors.
 - Evidence showing that the clients and the law firm are not geographically close.
 - Information showing that the opinion/legal advice was part of a prepackaged tax shelter product or service.
 - Written opinions/legal advice that fail to discuss applicable law.

4.32.2.4.3.5.3
(06-04-2018)
Individuals

- (1) The LB&I TTSPC must approve IRC 6111 and IRC 6112 investigations of individuals. Whether an individual is a material advisor depends on the specific facts and circumstances of each promoter investigation. Examiners should carefully review the facts to determine if an individual is a material advisor.
- (2) IRC 6111 and IRC 6112 were amended by the AJCA of 2004 and the corresponding regulations have been modified several times. It is imperative that examiners carefully consider which rules apply to their investigation and they should contact Area Counsel for guidance.
- (3) Referrals should be made on individuals when the evidence shows or tends to show that:
 - The individual promoted/provided material advice in their individual capacity.
 - The promoter entity was a shell with the intent to avoid or evade the provisions of IRC 6111, IRC 6112, IRC 6707, or IRC 6708.

- (4) Appropriate referrals of individuals with other persuasive facts are encouraged. All the factors listed under IRM 4.32.2.4.3.5.1, *Entities*, are also considered in determining whether an individual should be subject to a promoter/material advisor investigation.

4.32.2.4.3.6
(06-04-2018)

LB&I TTSPC Procedures

- (1) After reviewing the information provided by OTSA, the LB&I TTSPC may take one of the following actions:
 - a. Approve the lead for investigation.
 - b. Reject the lead.
 - c. Send the lead back to OTSA for further development.
 - d. Refer the lead to the LB&I Tax Shelter Steering Committee for guidance if the LB&I TTSPC cannot agree on a course of action.
- (2) All decisions by the LB&I TTSPC are documented in the TTSPC minutes and formalized on a Promoter Investigation Approval/Disapproval form.
- (3) Approval of a promoter/material advisor investigation encompasses all promotions/reportable transactions conducted/advised by that promoter/material advisor.
- (4) Promoter/material advisor investigations may be conducted simultaneously with an income tax examination of the promoter/material advisor and/or investor(s).
- (5) Approved promoter/material advisor investigation cases are forwarded to the LB&I Tax Shelter Promoter Program for assignment.

4.32.2.4.4
(06-04-2018)

**Tax Exempt and
Government Entities
(TE/GE) Referrals**

- (1) If a TE/GE examiner identifies a potential AT or promoter issue involving a TE/GE entity during an examination, the examiner should contact the TE/GE Fraud and Promoter Program Coordinator to discuss the issue. The Coordinator's contact information is included in the *TE/GE intranet page*.
- (2) If the TE/GE Fraud and Promoter Program Coordinator determines a referral warrants further development, the information is forwarded to the SB/SE LDC or OTSA for consideration and authorization.

4.32.2.4.5
(06-04-2018)

**Coordination With
Criminal Investigation
(CI)**

- (1) The SB/SE LDC and OTSA submit deconfliction memoranda to CI advising of their intent to authorize a civil promoter investigation (SB/SE) or present a referral to the TTSPC (LB&I).
- (2) CI will respond that the investigation falls into one of three categories:
 - No CI Activity
 - CI Activity - No Conflict
 - CI Activity - Conflict
- (3) If CI notifies the LDC or OTSA that there is CI activity, the civil investigation is authorized and sent to the local SB/SE or LB&I field compliance group whether there is conflict or not. The examiner is directed to hold a six-way conference with CI before starting any investigative activity (see IRM 4.32.2.7.3, *Six-Way Conference*).

4.32.2.4.5.1
(06-04-2018)

No CI Activity

- (1) If there is no CI activity, the SB/SE LDC or OTSA will proceed with the authorization.

- (2) If CI decides to conduct a criminal investigation after the civil promoter investigation has been authorized, CI is responsible for initiating a six-way conference. See IRM 4.32.2.7.3, *Six-Way Conference*.
- (3) The civil investigation should not be postponed or delayed pending CI's assessment of the criminal potential. See IRM 4.32.2.7, **Parallel Investigations**.
- (4) The decision to temporarily suspend an authorized civil investigation rests with the SB/SE or LB&I field compliance managers. If agreement is not reached between SB/SE or LB&I and CI, the issue will be elevated. See IRM 4.32.2.7.3.3.3, *Resolving Conflicts*.

4.32.2.4.5.2
(06-04-2018)
Open CI Investigation

- (1) If there is an ongoing criminal investigation, CI issues a memorandum to the local CI special agent in charge (SAC) requesting a determination as to whether there would be a conflict between the proposed civil action and the criminal investigation. The determination should be made within 10 days of receipt of the CI memorandum.

4.32.2.4.5.2.1
(06-04-2018)
No Conflict With Parallel Investigation

- (1) A no conflict determination means concurrent civil and criminal promoter investigations (referred to as a parallel investigation) may be pursued. See IRM 4.32.2.7, *Parallel Investigations*.
- (2) A six-way conference is required before initiating the investigation. See IRM 4.32.2.7.3, *Six-Way Conference*.

4.32.2.4.5.2.2
(06-04-2018)
Conflict With Parallel Investigation

- (1) Conflict means a civil investigation would greatly harm an ongoing criminal investigation. The mere existence of a criminal investigation, including a grand jury investigation, does not present a conflict and should **NOT** automatically delay or forestall a civil investigation.
- (2) If CI believes a conflict exists that warrants a halt to a civil investigation, this must be discussed during the six-way Conference. See IRM 4.32.2.7.3, *Six-Way Conference*.

4.32.2.4.6
(06-04-2018)
SB/SE Coordination With Return Preparer Program (RPP)

- (1) The SB/SE LDC also evaluates return preparer leads for investigation. These cases generally fall into one of two categories:
 - Return preparers authorized for civil investigation.
 - Return preparers who have been the subject of a preparer project and who have not corrected their misconduct or have had other compliance measures taken to no avail.
 - Return preparers who have been the subject of other compliance measures and have not corrected their misconduct.
- (2) Return preparers can engage in conduct in violation of IRC 6700, IRC 6701, IRC 6694, and IRC 6695, so coordination between the return preparer program coordinators (RPC) and the SB/SE LDC is important.
- (3) Before the RPC submits a program action case (PAC) request (see IRM 20.1.6.6, *Program Action Cases Overview*), the RPC contacts the SB/SE LDC to determine if a promoter investigation has been considered. See IRM 20.1.6, *Preparer/Promoter/Material Advisor Penalties*, for more information on PACs. The following actions may be taken:

Category	Action
Investigation authorized or pending authorization	RPC will not request PAC
Investigation not authorized-return preparer not engaged in promotional conduct	RPC may initiate a PAC request
Investigation not authorized-return preparer engaged in promotional conduct	SB/SE LDC will assess lead on expedited basis. If authorized RPC will not proceed with PAC.

- (4) If a PAC is approved, the RPC monitors the examinations of the preparer's clients and the assessments of preparer penalties. Depending on the outcome of the PAC or other information regarding the preparer's activities, the RPC may resubmit a new referral to the SB/SE LDC for consideration of an investigation.
- (5) See IRM 20.1.6, *Preparer, Promoter, Material Advisor Penalties*, for more information regarding return preparer penalties and program action cases.

4.32.2.4.7 (06-04-2018)

Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC)

- (1) The Joint International Taskforce on Shared Intelligence and Collaboration (JITSIC) is a multi-country workgroup that originated in 2004 to address cross-border tax avoidance schemes, transactions and structures through use of the bilateral treaty process. In 2014, JITSIC was re-established and opened to all member countries in the Organization for Economic Cooperation and Development (OECD) Forum on Tax Administration (FTA). JITSIC brings together a number of the world's national tax administrations that have committed to more effective and efficient ways to deal with tax avoidance. It offers a platform to enable its members to actively collaborate within the legal framework of effective bilateral and multilateral conventions and tax information exchange agreements – sharing their experience, resources and expertise to tackle the issues they face. Participation in JITSIC enables each country to better target compliance and enforcement efforts to combat abusive transactions. Since its creation, JITSIC has evolved to address issues beyond abusive transactions. This IRM will address only JITSIC's role with abusive transactions.
- (2) The JITSIC role in addressing abusive transactions is to:
 - a. Provide support to the parties through the identification and understanding of abusive transactions and those who promote them.
 - b. Share expertise, best practices and experience in tax administration to combat abusive transactions.
 - c. Exchange information on abusive transactions, in general, and on specific promotions, their promoters, and investors consistent with the provisions of bilateral tax conventions.
 - d. Enable the parties to better address abusive transactions promoted by firms and individuals who operate without regard to national borders.
- (3) One objective of JITSIC is to deter promotion of, and investment in, abusive transactions. Through information exchange and knowledge sharing, the parties:

- Share best practices among the parties' tax administrations for identifying and addressing abusive transactions.
 - Enhance each party's compliance and enforcement efforts through coordinated and "real time" exchanges of tax information consistent with the provisions of bilateral tax conventions.
 - Develop new techniques for early identification of promoters and investors involved in abusive transactions.
 - Identify emerging trends and patterns to anticipate new abusive transactions.
 - Improve parties' knowledge of techniques used to promote abusive tax avoidance transactions cross-border.
- (4) JITSIC representatives have been delegated Competent Authority status for purposes of their JITSIC work and have the authority to exchange information per bilateral tax treaties and disclosure rules.
- (5) Examiners that identify cross-border abusive transactions that involve a JITSIC member country should make referrals directly to JITSIC following instructions on the JITSIC website or through the SB/SE LDC. Examiners may consult with a JITSIC specialist as needed for a list of the current JITSIC member countries and to determine if an identified issue is potentially abusive. All referrals to JITSIC should be clearly referenced with "JITSIC Referral".
- (6) Referrals outside the IRS can be made to JITSIC through OTSA.
- Internal Revenue Service
Office of Tax Shelter Analysis
1973 North Rulon White Blvd.
LB&I:OTSA; M/S 4916
Ogden, Utah 84201
- (7) Examiners should refer to their respective operating division's *Guidance Memorandum* for individuals to contact for further guidance.

4.32.2.5
(06-04-2018)
**Frivolous Return
Program (FRP)**

- (1) This section describes the coordination of the campus FRP with AT investigations. A complete description of the FRP is contained in IRM 25.25.10, *Frivolous Return Program*.
- (2) The FRP identifies individuals or promoters preparing or promoting frivolous returns, claims or documents and educates them on their tax responsibilities. Refund Integrity and Compliance Service (RICS) is responsible for detecting, controlling, processing and examining frivolous activities.
- (3) The FRP takes a proactive approach to frivolous non-compliance by providing outreach education through stakeholders on pertinent program data such as geographic trends of frivolous filings and common frivolous arguments.
- (4) All frivolous documents received in the campuses are processed at the Ogden Campus, RICS.
- (5) The FRP conducts orientations to campus functions involved in processing or examining returns or correspondence to emphasize recognition of frivolous documents and provide appropriate referral instructions.

4.32.2.5.1
(06-04-2018)
**F frivolous Tax
Submission Penalties**

- (6) The program participates in coordinating new systemic identification of frivolous filings wherever possible and makes referrals to affected stakeholders such as OPR, CI, SB/SE LDC, OTSA and Communications and Government Liaison.
- (1) IRC 6702(a) , *Civil Penalty for Frivolous Tax Returns*, imposes a \$5,000 penalty on any taxpayer filing a document purporting to be a return which:
- Does not contain sufficient information to determine the substantial correctness of the self-assessment, or contains information on its face which indicates the self-assessment is substantially incorrect, and
 - Contains a position that the Secretary has identified as frivolous, or reflects a desire to delay or impede the administration of federal income tax laws.
- (2) IRC 6702(b) , *Civil Penalty for Specified Frivolous Submissions*, imposes a \$5,000 penalty on any person who submits a specified frivolous submission. The term “specified frivolous submission” means a specified submission if any portion of such submission:
- Is based on a position which the Secretary has identified as frivolous, or
 - Reflects a desire to delay or impede the administration of federal tax laws.
- (3) The term “specified submission” means:
- A request for hearing upon filing of notice of lien (IRC 6320).
 - A request for hearing before levy (IRC 6330).
 - An application relating to agreements for payment of tax liability in installments (IRC 6159).
 - An application relating to offer-in-compromises (IRC 7122).
 - An application relating to taxpayer assistance orders (IRC 7811).
- (4) The Secretary maintains a list of identified frivolous positions and updates it as necessary. See Notice 2010-33 , **F frivolous Positions**.
- (5) Under IRC 6702(b)(3) , if a taxpayer is notified and subsequently withdraws the frivolous submission within 30 days of notification by the IRS, the penalty will not apply. The amount of the penalty can be reduced if in the opinion of the Secretary it would promote compliance with and aid in the administration of federal tax laws (IRC 6702(d)). See Rev. Proc. 2012-43, and IRM 20.1.10.10.3, **IRC 6702(d) Reduction of Frivolous Submission IRC 6702 Penalties** for additional information regarding the possible reduction of frivolous penalties.
- (6) This penalty can be imposed in addition to other applicable penalties (IRC 6702(e)).

4.32.2.5.2
(06-04-2018)
**Detecting Frivolous
Submissions**

- (1) Identification of frivolous submissions can be made during original return processing, amended return or claim processing, examinations, collection activities, and other contacts with a taxpayer or the taxpayer’s representative. These filings are frequently identified in Submissions Processing (SP), Customer Account Services (CAS) and compliance in the campuses, field offices, and other IRS offices.

(2) Frivolous submissions should be routed to the Ogden Frivolous Return Program. See IRM 25.25.10.3, *Referrals to Frivolous Return Program*.

(3) The Ogden Frivolous Return Program mailing address is:

Internal Revenue Service
1973 N. Rulon White Blvd., M/S 4450
Ogden, UT 84404

4.32.2.5.3 (09-23-2011) **FRP Master Database**

(1) The FRP master database is used to track and monitor frivolous submissions. The database includes current inventory and historical data on accounts not in compliance (return filing or payment of tax) for two consecutive years. It provides a means to identify new AT promotions to make referrals for injunctive actions, civil and criminal investigations, and follow-up monitoring on violations of existing court orders on promoters.

(2) FRP provides reports to SB/SE Communications and Liaison and other affected parties on:

- Emerging promotions.
- Promoters involved in AT promotions.
- Trends in geographic locations of frivolous submissions or specific business affiliations.
- The need for outreach education on specific promotions.
- Any data pertinent to the overall compliance objectives of the IRS.

(3) FRP reports are also used to provide data to examiners conducting related promoter investigations. Examiners should submit requests for FRP database information to the Ogden FRP Senior Technical Advisor.

4.32.2.5.4 (06-04-2018) **Campus Promoter Investigations**

(1) The FRP screens each frivolous submission to determine if it is related to a promotion, specific promoter or return preparer and may submit a referral to the SB/SE LDC for consideration of a promoter investigation.

(2) The SB/SE LDC evaluates and authorizes civil investigations of AT promotions.

(3) The SB/SE LDC determines whether an authorized investigation will be conducted by the FRP or by an SB/SE Area.

(4) If assigned to an SB/SE Area, the examiner should contact the FRP for assistance and to obtain pertinent data related to the promotion.

4.32.2.6 (06-04-2018) **Case Control/Case Assignment Procedures**

(1) All promoter investigation cases (except for Campus Promoter Investigations worked from the FRP and TE/GE investigations) must be input on the Examination Return Control System (ERCS). Promoter investigations are not controlled on AIMS. TE/GE case control procedures can be found on the *TE/GE web page*. See the *ERCS Handbook* for further instructions.

(2) Investigation cases are input on ERCS through the "Control Penalty Investigation" screen option as indicated in the following chart:

Code Section	ERCS MFT Code	Time Charge Activity Code
IRC 6700	P6	593
IRC 6701	P7	594
IRC 6707	P0	549
IRC 6708	P8	595

4.32.2.6.1
(06-04-2018)
**SB/SE Case Assignment
Procedures**

- (1) SB/SE Area Planning and Special Programs (PSPs) establish SB/SE promoter investigations on ERCS as penalty investigations, with a project code and tracking code if applicable. A tracking code is generally assigned after a client list is forwarded to the listkeeper for case building. See IRM 4.32.2.6.6, *SB/SE Tracking Codes*.
- (2) For SB/SE, only the promoter's most current fully completed tax year is established on ERCS.
- (3) SB/SE examiners upon assignment of the investigation should verify that the investigation was established on ERCS by PSP.

4.32.2.6.2
(06-04-2018)
**LB&I Promoter
Investigation
Assignment Procedures**

- (1) Following TTSPC approval per IRM 4.32.2.4.3.6, **LB&I TTSPC Procedures**, LB&I Tax Shelter Promoter Program forwards the OTSA referral package to the Team Manager for field assignment.
- (2) Team Managers set up the administrative ERCS record for the promoter investigation. The tax period used is the year the investigation was approved by the LB&I TTSPC. See IRM 4.32.2.6, *Case Control/Case Assignment Procedures*, for further information on setting up the investigation case on ERCS.

4.32.2.6.3
(06-04-2018)
**TE/GE Promoter
Investigation
Assignment Procedures**

- (1) When it is determined that TE/GE will accept assignment of a promoter investigation, the SB/SE LDC will provide the TE/GE Fraud and Promoter Program Coordinator with a complete copy of the authorization memo and all attachments via the SharePoint.
- (2) If it is determined that TE/GE will be the lead operating division, the TE/GE Fraud and Promoter Program Coordinator will provide the SB/SE LDC with contact information for the TE/GE revenue agent and the TE/GE Division Counsel attorney assigned. If TE/GE determines SB/SE assistance is necessary, TE/GE will contact the SB/SE LDC. The SB/SE LDC will coordinate with the appropriate AT territory manager to provide such assistance.
- (3) If it is determined that SB/SE will be the lead operating division, the SB/SE LDC will provide the TE/GE Fraud and Promoter Program Coordinator with contact information for the SB/SE examiner and SB/SE Counsel attorney assigned. The SB/SE LDC will track promoter investigations involving TE/GE taxpayers or issues and provide monthly reports to TE/GE. See IRM 4.32.3.8.1.8, *Information Sharing*. The TE/GE Fraud and Promoter Program Coordinator will provide SB/SE with the contact information of the TE/GE revenue agent and TE/GE Division Counsel attorney assigned to assist on the investigation.

4.32.2.6.3.1
(06-04-2018)

**Cooperative
Investigations and Case
Coordination**

- (1) TE/GE-led investigations: TE/GE revenue agents will promptly contact TE/GE Division Counsel after receiving the investigation assignment.
 - The TE/GE revenue agent, TE/GE Division Counsel, TE/GE Fraud and Promoter Program Coordinator, and relevant SB/SE personnel (legal, technical, revenue agent, or other) and appropriate management will hold a planning conference within 60 days after the SB/SE LDC coordinates with the appropriate SB/SE AT territory manager to secure assistance for TE/GE.
 - An investigation action plan will be developed within 30 days of the planning conference and shared as appropriate to ensure proper coordination.
- (2) SB/SE-led investigations:
 - SB/SE examiners will promptly contact SB/SE Counsel after receiving the investigation assignment.
 - The SB/SE examiner, SB/SE Counsel, and relevant TE/GE personnel (legal, technical, revenue agent, or other), and appropriate management will hold a planning conference after the TE/GE Fraud and Promoter Program Coordinator and other appropriate TE/GE points of contact have been informed that TE/GE assistance with the investigation is needed.
 - An investigation action plan will be promptly developed after the planning conference and shared as appropriate to ensure proper coordination.
- (3) Additional TE/GE promoter investigation procedures can be found in IRM 4.70 and on the TE/GE intranet page.

4.32.2.6.4
(06-04-2018)

**Invalid or Unidentified
Promoter TINs**

- (1) If a valid TIN was not identified for the promoter, the PSP AT Coordinator assigns a temporary TIN.
- (2) When the promoter's correct TIN is identified or a permanent TIN is secured, the ERCS record is updated with the correct information. See IRM 4.32.2.6.4.2 (4).

4.32.2.6.4.1
(06-04-2018)

**SB/SE PSP AT
Coordinator
Responsibilities**

- (1) PSP AT Coordinators are responsible for obtaining temporary TINs for promoter investigation cases without valid TINs before sending the investigation to a field group.
- (2) Command Code AMTIN7 is used to assign a new temporary number. See IRM Exhibit 2.8.8-3, *Command Code AMTIN7*, for the input display for Command Code AMTIN7.
- (3) If an income tax examination is to be conducted as well as the promoter investigation:
 - a. Establish a Non-Master File (NMF) record on AIMS using Form 5354, *Examination Request Non-Master File*. See IRM 4.4.9.4.2, *AIMS Control When TP Does Not Have a TIN*, for additional information.
 - b. Use Command Code AMNON to establish the dummy number on AIMS. See IRM Exhibit 2.8.8-1, *Command Code AMNON*, for the input display for Command Code AMNON.

4.32.2.6.4.2
(06-04-2018)

**Examiner
Responsibilities**

- (1) Examiners will attempt to identify a promoter's valid TIN during their investigation.
- (2) If a promoter does not have a valid TIN, examiners will request the promoter to acquire a TIN as follows:

For a Social Security Number (SSN):

TIN Type	TIN Source	Form
Social Security Number (SSN)	Social Security Administration via https://www.ssa.gov	Form SS-5, <i>Application for a Social Security Number</i>
Individual Taxpayer Identification Number (ITIN)	See IRM 3.21.263.4.4, <i>How to Obtain Application and Where to File</i>	Form W-7, <i>Application for IRS Individual Taxpayer Identification Number</i>
Employer Identification Number (EIN)	Internal Revenue Service via https://www.irs.gov	Form SS-4, <i>Application for Employer Identification Number</i>

- (3) If a promoter does not have a valid TIN and refuses to obtain one, examiners should contact the PSP AT Coordinator to secure a valid TIN from the campus.
- (4) Once a valid TIN has been determined or obtained, the promoter examiner should update ERCS from the temporary TIN with the valid TIN. Use the Correct or Display option from the ERCS Main Menu and select "Change a Non-Master File Return to a MasterFile Return."
- (5) If a promoter is not located, the promoter investigation is closed as discontinued before contact. See IRM 4.32.2.12.10, *Penalty Case Processing Procedures*, for investigation case closing procedures. For LB&I promoter investigations, the LB&I:Financial Services DFO Manhattan's approval must be obtained before discontinuing a promoter investigation.
- (6) If an income tax examination is conducted on the promoter and a valid TIN has been determined or obtained, both ERCS and AIMS must be updated as follows:
 - a. ERCS is updated as described in paragraph (4) above.
 - b. The Non-Master File return is deleted from ERCS and replaced with the MasterFile return by completing a Form 5345-B, *Examination Request Non-ERCS Users*. This is done at the group level if the user has Command Code AMSOC permissions. Two command codes are generated to update AIMS: a MasterFile requisition (AM424) and a Non-Master File deletion (AMSOC).
 - c. If a substitute for return (SFR) is required, wait until a valid TIN is received before sending the SFR for processing. When the return is converted on ERCS and if an SFR is to be generated at the same time, input Push Code 036. If an SFR is not to be generated at the same time as the AIMS opening, update the push code on ERCS to 036 when the SFR is to be generated.

4.32.2.6.4.3
(06-04-2018)
**SB/SE LDC
Responsibilities**

- (1) The SB/SE LDC updates the database with the temporary/valid TIN as applicable.
- (2) If a valid TIN is received, the LDC should be notified so that their records can be updated with the correct TIN.

4.32.2.6.5
(06-08-2012)
**Transferring Promoter
Investigations**

- (1) There may be instances where the promoter investigation is transferred from one compliance area to another. For example:
 - The promoter has relocated or the promotional activity is concentrated in another compliance area. It may be more efficient to transfer the investigation to the other area office.
 - The receiving area office may be unable to conduct a civil promoter investigation due to staffing limitations or other considerations.
 - The promoter is related to another investigation and it would be more efficient to have one area or examiner work all the related investigations.

4.32.2.6.5.1
(06-04-2018)
**Field Compliance
Responsibilities**

- (1) Examiners prepare , the *SB/SE LDC Field Closure Form* explaining the reasons for the transfer. A copy of the Field Closure Form should be sent to the SB/SE LDC by secure e-mail at the **LDC mail box* or faxed to 877-477-9135.
- (2) Update the promoter investigation on ERCS to Status Code 41 using Disposal Code 30.
- (3) Send the administrative investigation case file to the SB/SE Area PSP AT Coordinator or LB&I PSP using Form 3210, *Document Transmittal*.
- (4) Transfers of LB&I promoter investigations must be coordinated through the LB&I Promoter Penalty Program Manager.

4.32.2.6.5.2
(06-04-2018)
**PSP AT Coordinator
Responsibilities**

- (1) The transferring Area PSP AT Coordinator:
 - a. Notifies the SB/SE LDC or LB&I Financial Services that the promoter investigation is being transferred to another area office. Notification may be made electronically
 - b. Transfers the administrative case file per the area office's standard case transfer procedures.
 - c. Case is updated to Status Code 90 on ERCS and short closed.
- (2) The receiving Area PSP AT Coordinator:
 - a. Ensures that the promoter investigation is established on ERCS.
 - b. Assigns the promoter investigation to the field.

4.32.2.6.6
(06-04-2018)
SB/SE Tracking Codes

- (1) A tracking code will be assigned to an authorized investigation by the AT Listkeeper at the time client examinations are approved for case building, either at the local level or through the formal case building process. The AT Listkeeper will notify the assigned Agent and the Area PSP AT Coordinator of the tracking code assigned. See IRM 4.32.2.14, *Client/Investor/Advisee Lists*, for more information on client cases.
- (2) Locally defined project or tracking codes should not be used since the locally defined codes are not reflected in national reports or tables.

- (3) If a different tracking code was previously assigned to a related promoter investigation or client examination case, contact the AT Listkeeper to update. Group managers should contact the AT listkeeper for advice on how to resolve the tracking code conflict.
- (4) The tracking code is added to all related cases including any in-process cases. The examiner will need to coordinate with other examiners and PSP to ensure related cases are properly coded. Examiners conducting the investigation or PSP AT coordinators should review related ERCS inventory lists for missing or incorrect tracking codes particularly for prior, subsequent or related entity pickups by requesting an ERCS inventory list by tracking code as well as periodically obtaining a list by TIN to verify coding for multiyear and related pickups.
- (5) Use of the same tracking code on all the promoters and clients in a promotion helps the key case examiner compute an estimate of harm to the government. It also allows the case-building unit to coordinate client examinations.
- (6) Tracking code updates can typically be made until the case moves to status code 80. Related cases that were not properly coded prior to the status 80 update will need to be tracked manually. Existing tracking codes can only be changed at the Area PSP level. If there is not an existing code, the group clerk can add it to the case.

4.32.2.7
(09-23-2011)

Parallel Investigations

- (1) The Internal Revenue Code contains both civil and criminal provisions to address AT promotions. Examiners may conduct civil investigations before, during or after criminal investigations of a promoter.
- (2) Parallel investigations are simultaneous, yet separate, civil and criminal investigations of a common individual or entity.
- (3) Parallel investigations are *not* joint investigations. Each operating division conducts a separate investigation. Significant coordination is required throughout the investigation and litigation processes. While regularly scheduled coordination meetings are required, Criminal Investigation (CI) must not direct the examiner's actions in the civil investigation.

4.32.2.7.1
(06-04-2018)

Policy Statement 4-26

- (1) IRM 1.2.13.1.11, *Policy Statement 4-26 (Formerly P-4-84)*, provides guidance on taking civil enforcement action when the subject is also involved in a criminal investigation. This statement, effective October 5, 2005, encourages civil enforcement action in all investigations where the promotion is ongoing and harm to the government is significant. This compliance strategy is intended to stop the promotion quickly, prevent additional loss of tax revenue and foster voluntary compliance by the clients.
- (2) If criminal and civil operating divisions cannot agree on how to proceed, Policy Statement 4-26 (P-4-26) describes procedures for resolving the matter. Refer to IRM 4.32.2.7.3.3.3, *Resolving Conflicts*.

4.32.2.7.2
(06-04-2018)

**Commencement of
Parallel Investigation**

- (1) CI is notified of all proposed investigations prior to authorization by the SB/SE LDC or OTSA. CI will provide feedback whether the commencement of a civil investigation may pose a potential conflict with a criminal investigation. See IRM 4.32.2.4.5, *Coordination with Criminal Investigation (CI)*, for additional discussion.

- (2) If CI has an open subject or related investigation or is interested in initiating a criminal investigation, civil and criminal examiners are required to follow parallel investigation procedures to ensure proper coordination between the operating divisions. Communication is essential for a successful parallel investigation.

4.32.2.7.3
(06-04-2018)
Six-Way Conference

- (1) A six-way conference is held to determine the appropriate course of action to achieve the IRS's objective of stopping the AT promotion as quickly as possible and establish ongoing communication between the operating divisions to foster information sharing to the extent allowable and to avoid any actions which could undermine or negatively impact each respective investigation. Conference participants should discuss the legal implications and coordination aspects of a parallel investigation.
- (2) A six-way conference is required for all investigations where CI has an open investigation or is interested in pursuing an investigation. The conference should be held within 20 days after assignment of the investigation to an examiner.
- (3) A pre-conference meeting with the examiner, Counsel and other meeting participants to discuss the investigation and objectives of the six-way conference is advised.

4.32.2.7.3.1
(06-04-2018)
Conference Participants

- (1) The following individuals should participate in the six-way conference:
 - Examiner
 - Group/Team manager
 - Counsel
 - Special agent
 - Supervisory special agent
 - Criminal Tax (CT) Counsel
- (2) If there is an Assistant United States Attorney (AUSA) or DOJ attorney assigned to the criminal investigation, that attorney can participate. If that attorney cannot participate, it is imperative that he or she is fully apprised of the nature of the discussion and decisions made with respect to the coordination of the civil and criminal investigations.
- (3) Territory managers, a representative from Collection, and an AT senior program analyst (SPA) may also participate as appropriate. If there is a referral to DOJ already in place which is usually on the criminal case by CI, then the DOJ civil/criminal coordinator should be invited.

4.32.2.7.3.2
(06-04-2018)
Discussion Topics During Six-Way Conference

- (1) The goal of a parallel investigation is to ensure the IRS effectively uses all available enforcement tools, both civil and criminal, to achieve maximum compliance and stop the AT promotion.
- (2) Discuss and evaluate potential conflicts and establish a plan of action to handle them.
- (3) During the conference, each operating division should share all non-grand jury information about the promotion. The discussion should include:
 - a. Identification of the subject(s) or entities of the investigations.
 - b. The types of evidence available and the source of such evidence.

- c. Information known with respect to clients.
 - d. The tax theories or positions of each respective investigation.
 - e. Any limitation on CI sharing information with the civil side because of Federal Rules of Criminal Procedure Rule 6(e) regarding grand jury secrecy. See, e.g., IRM 4.32.2.7.7(4) & (5), **Information Sharing**.
 - f. The importance of the civil side disclosing all information and documents to CI.
- (4) See *Six-Way Conference Discussion Job Aid*, which is available on MySB/SE, *Parallel Investigations*. This document may be used during the six-way conference. This job aid is intended to be used as a guide to help facilitate the discussion. It should be modified as appropriate, and may be used to document the outcome of the meeting.
- (5) The following factors are considered in determining whether or when the IRS should proceed with a parallel investigation:
- a. Scope and size of the promotion in terms of potential loss of tax revenue, geographic location, number of promoters, clients or returns involved.
 - b. Rate of growth and extent of marketing.
 - c. Potential for civil injunction.
 - d. Deterrence value of civil versus criminal actions.
 - e. Potential impact on criminal investigation.
 - f. Efficient and effective use of resources.
 - g. Amount of time to complete the civil or criminal investigations.
 - h. Ongoing or planned undercover operations or search warrants.
 - i. Identification, potential examination, and deterrence of promotion clients.
- (6) At the conclusion of the six-way conference, determinations should be made with respect to:
- a. Concurrence on commencement of a parallel investigation.
 - b. Any proposed restrictions as to the extent or timing of the civil investigation.
 - c. Contacts with investigation subjects and witnesses.
 - d. Compliance actions with respect to identified clients.
 - e. Sharing of all non-grand jury materials.
 - f. Ongoing civil or criminal coordination.

4.32.2.7.3.3
(06-04-2018)
**Outcomes of Six-Way
Conference**

- (1) The six-way conference may result in several different outcomes:
- Conduct a parallel investigation.
 - **Temporarily** delay any overt steps of the civil investigation (e.g., do not contact the promoter or third parties). Any delay over 60 days must be approved by the Territory Manager with responsibility for the AT investigation. This should be a one-time only delay and cannot be extended without approval from the Territory Manager.
 - Commence only a civil investigation.
 - Proceed with only a criminal investigation which should rarely happen. This also must be approved by the Territory Manager with responsibility for the AT investigation.

4.32.2.7.3.3.1
(06-04-2018)
Delay of Civil Action

- (1) Delay of overt civil actions should only occur in investigations where CI shows that civil enforcement would seriously harm or impair the criminal investigation.

- (2) Suspension of overt civil action should be limited to a short time frame (any delay over 60 days as mentioned above must be approved by the Territory Manager) to allow CI to complete a specific task (e.g., undercover activity or search warrant). When the agreed-upon period for suspending overt civil action expires, another six-way conference should be held to discuss whether the suspension should continue and, if so, for how long. Any extension that delays the civil investigation beyond a 60-day period would require approval of the Territory Manager with responsibility for the AT investigation.
- (3) Field compliance and CI should agree on extensions of time beyond the originally agreed time frames. If there is no agreement among field compliance and CI, the impasse should be elevated. See IRM 4.32.2.7.3.3.3, *Resolving Conflicts*.
- (4) If an agreement is made to temporarily delay the civil investigation, the investigation may be suspended at the group level until civil actions can proceed. The examiner should carry out any actions that are not prohibited by the suspension. Allowable actions may include conducting internal and public information research, review of non-grand jury records in CI's possession, securing or developing a client list, gathering information from client audits and preparing injunction referral reports. If there is no further action that the examiner can carry out until the suspension is lifted, then the case should be suspended in the group by updating the case to Status Code 16 on ERCS. This is an indicator to anyone analyzing the group's inventory that there are no further actions possible until CI removes the suspension. This is the only allowable use of Status Code 16.
- (5) Compliance actions with respect to clients who are not subjects or potential subjects of the criminal investigation, should not be delayed. Examiners must coordinate with CI in securing client information to ensure no inappropriate contact with CI witnesses occurs while timely civil examinations are conducted with respect to clients. The government's interests need to be protected whether the client is a witness or not.

4.32.2.7.3.3.2
(06-04-2018)
**No Civil Action
Determination**

- (1) In SB/SE promoter investigations, if a decision is made to proceed only with a criminal investigation, the promoter administrative file is returned to the SB/SE LDC through the local PSP ATTI Coordinator. See IRM 4.32.2.9.3, *Discontinuations*.
- (2) In LB&I, any decision not to open an investigation that was approved by the LB&I TTSPC must be communicated to the Industry Director, Financial Services, with a copy to OTSA. The Industry Director, Financial Services, makes the final determination regarding the investigation.

4.32.2.7.3.3.3
(06-04-2018)
Resolving Conflicts

- (1) The existence of a criminal investigation should not automatically delay a civil investigation. A key objective of a promoter investigation is to stop the promotion expeditiously, preventing additional loss of tax revenue to the government and the civil investigation process is the first step towards accomplishing this objective. .
- (2) If at any point during the civil investigation, a decision is made to limit, delay, or not proceed with the civil investigation, or CI discontinues their investigation, examiners must advise Counsel, the SB/SE LDC or Industry Director, Financial

Services. The Area Territory Manager responsible for promoter investigations must agree to any recommendations regarding delays or any decision not to proceed with the civil investigation.

- (3) Examiners should seek assistance in resolving parallel investigation issues from Counsel, the SB/SE LDC, or Industry Director, Financial Services both at the inception of the investigation and throughout the investigation process.
- (4) It is not appropriate to delay a civil investigation unless CI can demonstrate that the civil investigation will harm or impair the criminal investigation. Examples include a planned undercover operation or imminent search warrant. See IRM 1.2.13.1.11, Policy Statement P-4-26.
- (5) If CI requests a suspension or extended delay, the examiner or group manager should contact the LDC SPA assigned to their investigation prior to agreeing to a suspension or delay in the civil investigation and obtain the Area Territory Manager's concurrence. The SPA will help determine if the request for suspension of civil actions is appropriate.
- (6) If an agreement cannot be reached between the civil and criminal divisions of IRS and DOJ/US Attorney's Office (USAO) (if referral has been made), Policy Statement P-4-26 directs that the matter is to be elevated for resolution. Elevation is through the respective chains of command of CI and the civil examination.
- (7) The examiner and the special agent will prepare separate memoranda for the appropriate territory manager (TM) and special agent in charge (SAC). The memoranda should summarize the facts of the investigation, the investigation status, the projected plan of action and the reason(s) the civil investigation should proceed or not proceed without delay. The special agent memo should also address the potential harm to the criminal investigation if the civil investigation proceeds.
- (8) The steps of the elevation process are as follows:
 - a. TM and SAC meet to discuss resolution of any civil or criminal conflicts.
 - b. If the TM and SAC are unable to reach an agreement, the TM immediately prepares a memorandum (with LDC SPA assistance) describing the nature of the conflict and reasons CI believes civil actions will harm the criminal investigation. The memo is provided to CI to officially document the civil position.
 - c. CI should provide a response within 5 days. As mandated in P-4-26 (13), the SAC must prepare a memo at the same time, officially documenting CI's position. See IRM 1.2.13.1.11, **Policy Statement 4-26 (Formerly P-4-84)**.
 - d. If an agreement still is not reached, the SB/SE Examination Area Director or LB&I Director of Field Operations (DFO) will attempt to resolve the issue with the CI Director of Field Operations (DFO).
 - e. If agreement is still not reached, the next elevation level involves the SB/SE Director, Exam Operations and the CI Deputy Chief.
 - f. The final level for resolution is the SB/SE Commissioner and the CI Chief.

Note: The organizational steps in the elevation process reflect current changes in organizational structures and titles which may not be reflected yet in the Policy Statement noted above.

- (9) There is a job aid available. See *Elevation of Parallel Investigation - Record of Actions*. The *Parallel Elevation Record of Action* job aid can be found on MySB/SE, *Parallel Investigations*.

4.32.2.7.4
(06-04-2018)
**Quarterly Coordination
Meetings (Six-Way
Conferences)**

- (1) Civil and criminal examiners must regularly communicate regarding their investigative efforts, but CI should not direct civil actions. Investigation status meetings are required to be held every quarter until the civil proceedings are complete. These required conferences should not be waived. If there is little to discuss, the meeting can be short and can be done via telephone.
- (2) The purpose of the quarterly investigation status meeting is to communicate investigation developments and facilitate information sharing between the civil and criminal divisions. AT staff should not assume that CI is well versed in the parallel process. The AT GM should be prepared to explain the process and the steps that will be taken by the civil (AT) side to protect the criminal case while still accomplishing the work in the civil investigation.
- (3) Participants in the status meeting should include the examiner, special agent, their respective managers, and the respective Area and CT Counsel. If a civil or criminal matter has been referred to DOJ, the assigned criminal DOJ attorney can participate in these investigation status meetings along with the DOJ civil/criminal counsel coordinator. Examiners and special agents should not wait until the next quarterly status meeting to communicate information about any significant developments in their respective investigations.
- (4) Use of special investigative techniques, such as undercover operations or the active pursuit of a search warrant should be communicated to the civil operating division. The timing of actions in the civil examination, investigation or proceeding may affect special agent safety during a special investigative technique or the execution of a search warrant. Therefore, close coordination and communication is necessary when CI utilizes these techniques. Any decisions on how and when to proceed should be weighed in the favor of special agent safety concerns.
- (5) Any concerns or objections raised during the investigation process should be resolved by consultation among the civil and criminal investigators and their supervisors, and Area and CT Counsel. When the promoter has been referred civilly or criminally, DOJ must be included in the decision-making process. See IRM 4.32.2.7.3.3.3, *Resolving Conflicts*.

4.32.2.7.5
(06-04-2018)
**Coordination of Tax
Positions**

- (1) Civil and criminal examiners and their respective Counsel should carefully consider whether any tax theories or positions taken in their respective investigations (civil injunction and criminal prosecution) and related client examinations are inconsistent. However, CI may not direct civil actions in promoter investigations or client examinations.

4.32.2.7.6
(06-04-2018)
Interviews

- (1) Examiners must advise the special agent assigned to the criminal investigation prior to contacting the promoter or witnesses. CI may request that no contact be made with the promoter and that is generally not a roadblock for the civil investigation. An interview of the subject (promoter) is not mandatory, and in some instances is not useful in terms of gathering evidence.
- (2) Neither IRC 6700 or IRC 6701 mandate an initial appointment letter be sent or interview of the promoter be conducted, so examiners may proceed with the

development of the civil investigation without contacting the promoter. Counsel should be involved in any decision to conduct an investigation without contacting the promoter.

- (3) Generally, CI informs promoters of their Fifth Amendment rights before the examiner initiates contact or conducts an interview. If an interview is held after CI has contacted the promoter, examiners should explain to the promoter that they are conducting a civil investigation but the information provided will be shared with CI.
- (4) If a promoter inquires about criminal implications or whether the promoter is the subject of a criminal investigation before CI has contacted the promoter, examiners must be careful to provide accurate information and never mislead or misrepresent the facts to the promoter. CI should provide the AT Agent with information regarding how to answer any such questions during the initial six-way conference.
- (5) When interviewing a subject or witnesses, examiners and special agents should clearly explain the purpose of their respective investigations, their roles in the investigations, and the potential impact of cooperation by the subject. AT Agents must be sure that the subject or witness clearly understands that anything they share could potentially be shared in any criminal proceeding.
- (6) Examiners must not mislead the promoter regarding the existence of a criminal investigation nor conduct a criminal investigation under the guise of the civil investigation. See *United States v. Tweel*, 550 F.2d 297 (5th Cir. 1977). Refer to IRM 25.1, *Fraud Handbook*, for further information.
- (7) There is no specific prohibition on conducting joint interviews of promoters. However, examiners and special agents must clearly identify themselves and their roles at these meetings and prepare a joint memorandum of the interview. Examiners should keep a copy of their interview notes and provide the original notes to the special agent.
- (8) IRC 7602(c)(3)(C) provides for an exception to the third party notification requirements. Accordingly, if CI requests no civil contact with a promoter, the third party notification letter (Letter 3164-P, *Third Party Notification for IRC 6700/6701 Investigations*) is not required. See IRM 4.32.2.8.3.2, *Third Party Contacts*.

4.32.2.7.7
(06-04-2018)
Information Sharing

- (1) Sharing information among examiners, special agents, and government attorneys assigned to the investigation is a key ingredient in developing civil and criminal investigations simultaneously and efficiently.
- (2) Special agents should develop as much evidence as practical administratively before using the grand jury process. This can be done through summonses, search warrants, witness interviews, and undercover operations. This process allows CI to share information with the civil operating division.
- (3) Examiners are permitted access to all non-grand jury information obtained during the criminal investigation. Generally, not all records obtained in the criminal investigation are grand jury materials. Records that constitute "matters occurring before the grand jury" depends upon the law of the particular judicial circuit. Examiners should consult with CT Counsel and the LDC SPA assigned to their investigation with questions related to access to records in grand jury cases.

- (4) A grand jury investigation in a parallel investigation does not prohibit a civil investigation; however, Federal Rule of Criminal Procedure 6(e) does limit the use of grand jury materials to the enforcement of criminal law.
- (5) Information sharing between civil and criminal functions is appropriate unless prohibited under grand jury secrecy rules of Rule 6(e) of the Federal Rules of Criminal Procedures and disclosure provisions of IRC 6103, *Confidentiality and Disclosure of Returns and Return Information*. Judicial districts and appellate courts have diverse rulings on what constitutes grand jury information. The grand jury process can never be used to perfect a civil investigation. Refer to IRM 9.3.1.4.1, *Grand Jury Secrecy (Federal Rules of Criminal Procedure Rule 6)*, and *Chief Counsel Directives Manual (CCDM) 38.2.2, Review of Criminal Tax Cases -Grand Jury Procedures*, for further information about the grand jury secrecy rules of Rule 6(e).
- (6) IRC 6103 permits the disclosure of tax information between civil and criminal functions to the extent permitted by IRC 6103(h) as long as there is a “need to know” to accomplish official duties relating to tax administration, and there are no grand jury prohibitions.
- (7) In grand jury investigations, concurrence of the DOJ attorney assigned to the criminal investigation must be secured prior to releasing or allowing civil examiners access to any records in CI’s possession to avoid inadvertent release of grand jury information. Examiners should contact CT Counsel and the LDC SPA assigned to their investigation if the DOJ attorney will not allow access or release records that are not grand jury materials.
- (8) IRC 6103(h)(2) allows disclosure to DOJ attorneys as long as a referral to DOJ has been made by either the civil or criminal divisions. However, grand jury information cannot be shared with a civil DOJ attorney unless a Rule 6(e) order has been secured from the court.
- (9) Examiners must provide CI access to all available information in the civil examination and attorney files. Sharing information should be an ongoing process throughout the parallel investigation to avoid unnecessary delays. Criminal attorneys have a mandatory obligation to disclose certain information to criminal defendants. This includes documents, interview notes and any other information obtained in the civil investigation. See *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972) and *Jencks Act, Demands for Production of Statements and Reports of Witnesses* (18 USC § 3500).

4.32.2.7.8
(06-04-2018)
**Undercover Operations
and Search Warrants**

- (1) Any overt civil actions are temporarily stayed if CI is conducting an undercover operation or developing probable cause to execute a search warrant in the near future. Benefits of an undercover action or search warrant should be weighed against the need to enjoin a promoter quickly.
- (2) Information obtained through a search warrant is generally not grand jury information. Search warrant information obtained during the grand jury process can be made available to civil examiners if no grand jury information was included in the affidavit for the search warrant. Although not yet addressed by the courts, if grand jury information is included in the affidavit, the materials seized during the search may be disclosed even if the affidavit is not subject to disclosure. If the affidavit supporting the warrant has been sealed by the court, sharing of the information seized in the search with civil examiners or attorneys

may result in the unsealing of the affidavit. Examiners should seek the guidance of CT Counsel for direction in these circumstances.

- (3) Use of search warrant and undercover evidence must be approved by the assigned DOJ attorney. Requests should be coordinated with CI, CT Counsel, and DOJ. Examiners should consult with CT Counsel with questions or issues related to release of this information.

4.32.2.7.9
(06-04-2018)
**Administrative
Summons**

- (1) IRC 7602(d) does not allow a summons to be issued or enforced with respect to any person if a Justice Department referral is in effect with respect to such person. This does not impact a promoter investigation as defined in (5) below.
- (2) A Justice Department referral is defined as an IRS recommendation of a grand jury investigation or criminal prosecution of the taxpayer or a criminal investigation request initiated by DOJ pursuant to IRC 6103(h)(3)(B) .
- (3) IRC 7602(d)(3) specifies that each taxable period and type of tax be treated separately for purposes of determining what constitutes a referral. Administrative civil summonses are generally permitted with respect to taxable periods for other types of tax **not included** in a criminal investigation referral.
- (4) An IRC 6700 or IRC 6701 penalty, while deemed to be a tax pursuant to IRC 6671, is not included in the criminal referral for a grand jury investigation with respect to the promoter's **income** tax liabilities.
- (5) 26 CFR 301.7602-1(c)(4)(ii), Example (5) describes the issuance of an administrative summons, related to a promoter investigation, where a referral has been made to DOJ for a grand jury investigation with respect to the promoter's income tax liability. In this example, a summons is allowed in conjunction with the promoter investigation because the IRC 6700 penalty is not the same as the promoter's income tax liability included in the criminal referral for a grand jury investigation.
- (6) If CI has made a criminal referral to DOJ and the referral involves a conspiracy theory, widespread false return preparation or interference with administration of the tax laws, then seek Counsel's advice prior to the examiner issuing a summons with respect to the civil promoter investigation.
- (7) If an administrative summons in a civil promoter investigation is proposed and CI has made a referral to DOJ for grand jury investigation or criminal prosecution, examiners must discuss this matter with Counsel and CT Counsel along with any DOJ attorney assigned to the investigation before issuing a summons. See IRM 4.32.2.8.5, *Summonses*.

4.32.2.7.10
(06-04-2018)
Assessment of Penalties

- (1) Assessment of promoter and preparer penalties are suspended pending completion of the criminal investigation. Penalties will reject if there is a 914 freeze on the promoter's account. See IRM 4.32.2.9.2.2, *Penalty Assessment – CI Parallel Investigation*, for more information.
- (2) A prompt assessment may be made without delay when collection appears to be at risk. The intention is to proceed with collection action immediately following the 10-day period for Notice and Demand. See IRM 5.1.4.5, **Prompt Assessments**. A jeopardy assessment should be considered when a promoter is planning to flee the United States, dissipate assets or property or place assets beyond the reach of the US Government. Examiners should consult

with Area Counsel, the DOJ attorney, Collection and CI. See IRC 6862 , **Jeopardy assessment of taxes other than income, estate, gift, and certain excise taxes** and IRC 7429 , **Review of jeopardy levy or assessment procedures**. Also see IRM 3.17.244.3, *Quick, Prompt, Jeopardy and Termination Master File Assessments*, for additional information.

- (3) If after the assessment is made, it is discovered that the promoter is planning to flee the United States, dissipate assets or property or place assets beyond the reach of the US Government, see IRM 5.11.3, *Jeopardy Levy without a Jeopardy Assessment*.
- (4) Refer to IRM 4.32.2.12.10, *Penalty Case Processing Procedures*, for more information on case closure procedures.

4.32.2.7.11
(06-04-2018)
Suspension of Penalty Assessment

- (1) After the civil investigation is complete, including the litigation process, and if the penalty assessment is suspended pending completion of the criminal investigation, the investigation is updated to Status Code 16 and suspended in the group. The investigation should be completed to the point where penalties can be easily assessed once CI has completed its criminal investigation. TE/GE examiners should refer to IRM 4.70.

4.32.2.7.12
(06-04-2018)
Client Lists

- (1) Examiners assigned to parallel investigations should request a client list from CI and consider whether to build cases for examination locally, send the list to the AT Listkeeper for case building if necessary, or conduct witness interviews from the list. IRM 4.32.2.14, **Client/Investor/Advisee Lists**.
- (2) . If the assigned examiner hasn't secured a client list and CI does not have a client list readily available, the examiner should consider using available non-grand jury information such as search warrant documents or bank records to construct a client list. See IRM 4.32.2.7.7, **Information Sharing**.
- (3) Civil agents should ask CI to review the client list and exclude those clients who may be considered potential criminal subjects in their investigation.

4.32.2.7.13
(06-04-2018)
Coordinating Client Examinations

- (1) If it is determined that examinations are needed, examinations of client returns should be initiated as soon as possible. Always check to see the past history of audits in the years preceding the investigation as this is often a good place to start. CI should be kept apprised of all civil compliance actions with respect to clients.
- (2) Special agents must be mindful of the civil statute of limitations and the potential loss of tax revenues to the government. Special agents should make every effort to provide the civil examiner with all information or potential sources of information to identify clients in a timely manner.
- (3) CI may ask to postpone contact or examination of a limited number of clients who are being considered as potential criminal subjects as part of their investigation. CI should not prohibit civil compliance actions on clients just because the client is a witness in the criminal case.
- (4) Any tax theories or positions advanced in the client examinations should be consistent. See IRM 4.32.2.7.5, *Coordination of Tax Positions*.

4.32.2.8
(06-04-2018)
**Promoter Investigation
Guidelines**

- (1) These guidelines provide basic steps for examiners to use. However, each investigation is unique and varies in complexity. Examiners should use all available tools including internal and external sources to address specific investigations.
- (2) The goals of an income tax examination and a promoter investigation are significantly different. The goal of an income tax examination is to determine the substantially correct income tax liability. The goal of a promoter investigation is to gather and evaluate evidence to determine if the activity is abusive. Should the evidence indicate an abusive activity, the examiner will initiate the appropriate action to promote compliance, including addressing the tax implications to clients by:
 - Determining if a promoter has engaged in conduct that violates the applicable civil penalty statutes.
 - Determining if the abuse is recurring or likely to recur and if the promoter should be referred for an injunction.
 - Obtaining client/investor/advisee lists.
 - Ensuring compliance with the requirements of IRC 6111 and IRC 6112.

4.32.2.8.1
(06-04-2018)
Pre-Contact Analysis

- (1) New authorized AT investigation files are sent via Area SharePoint to the Area AT PSP. The PSP Coordinator will establish the investigation on ERCS and transmit the file to the appropriate group for assignment. Each investigation file contains the authorization memo and research conducted by the LDC .
- (2) When a new investigation file is received, the investigation should be started and actively pursued within 45 days of receipt. This will ensure that the information sent in the file doesn't become outdated or need to be redone.
- (3) Before meeting with promoters, examiners should discuss and plan the investigation with the assigned Counsel attorney. Although it is not required, Counsel should review Form 4564, *Information Document Request*, to ensure that it includes "summons ready" language.
- (4) The examiner should meet with the assigned ATAT revenue officer. See IRM 4.32.3.4, *Collection*, for the procedures to have a revenue officer assigned to the investigation. ATAT ROs can provide assistance with locating people, collecting balance due amounts, and assisting with jeopardy determinations or assessments if needed, among other things.
- (5) In some instances, it may be advisable to have a specialist such as an engineer, appraiser, actuary or computer audit specialist assigned to the investigation team. If specialists are needed, examiners should request assistance as early in the investigation as possible. Requests are made using the *Specialist Referral System*.
- (6) Information in the SB/SE LDC or OTSA investigation authorization file should be reviewed and used as a basis for developing the investigation.
- (7) Examiners should research IDRS, financial transactions through the FinCEN Portal, the internet and other sources for current information on the promoter or promotion such as whether First Amendment issues may be present or possible leads regarding clients/investors/advisees, if necessary. In many cases, the investigation authorization file will contain this material. FinCEN requests are made using either Form 10509 , **FinCEN Query (FCQ) Request-** (used to request general FinCEN data such as a Currency Transaction Report,

Form 8300, or the Report of Foreign Bank and Financial Accounts (FBAR)) or Form 10509 A , FinCEN Query SAR Request (used to request Suspicious Activity Report (SAR) data). The forms are sent via secure e-mail to the appropriate *FinCEN SuperUser*.

- (8) If the investigation involves a paid return preparer, an RPVUE for the most recent processing year would normally be included in the investigation authorization file. If not included in the file, examiners should consider securing EFDS and AUR research early in the investigation process. A *research tools job aid* explaining the available research tools and how to secure the research can be found on the SB/SE LDC web page under Resources.
- (9) Examiners should determine whether examinations of clients will be needed and if so, forward the list to the local Area PSP AT Coordinator for case building. If the AT Coordinator concurs with case building, they will contact the AT Listkeeper for assignment of a tracking code.

Note: It is not always necessary to conduct new or additional client examinations to properly develop the investigation, particularly for return preparer investigations. The examiner should initiate third party contacts using clients previously or currently being examined or directly from the client list without any prior exam. Contact the assigned LDC SPA to discuss the merits of each approach given the specific case.

- (10) If the investigation is a parallel investigation, the examiner must initiate a six-way conference. See IRM 4.32.2.7.3, *Six-Way Conference*.

4.32.2.8.1.1
(06-04-2018)

**SB/SE and TE/GE
Pre-Contact Procedures**

- (1) SB/SE examiners are responsible for ensuring investigations are controlled on ERCS using the correct project code and ERCS tracking code (if applicable). TE/GE examiners are responsible for ensuring investigations are controlled on the Reporting Compliance Case Management System (RCCMS) and WebETS using the correct project code and RCCMS tracking code (if applicable). Examiners also will need to be proactive in monitoring coding for related client examinations, particularly for multiple year and related pickups.
- (2) A promoter investigation action plan is a tool that can be used by SB/SE and TE/GE examiners and group managers. It outlines the activities, actions and suggested time frames for SB/SE and TE/GE investigations. Sample action plans are available for both IRC 6700 and IRC 6701 investigations. See , *Sample IRC 6700 Action Plan* and *Sample IRC 6701 Action Plan*.
- (3) SB/SE and TE/GE examiners may conclude during the pre-contact analysis that an investigation should be discontinued before contacting the promoter or that the investigation needs to be transferred to another compliance area. SB/SE examiners should discuss these decisions with the assigned LDC SPA. TE/GE examiners should discuss these decisions with the TE/GE Fraud and Promoter Program Coordinator before they are discussed with the assigned LDC SPA.. See IRM 4.32.2.9, *Investigation Outcomes*, for details on these actions.

4.32.2.8.1.2
(06-08-2012)

**LB&I Pre-Contact
Procedures**

- (1) LB&I Team Managers set up administrative controls, including input on ERCS.

- (2) LB&I examiners should review the OTSA referral package which may include investor disclosure statements, OTSA database spreadsheets, attorney legal opinions, promotional materials, IDRS research, internet research, Q and A's of investors and any other material.
- (3) For LB&I examiners, the investigation/audit plan for promoter penalty cases must be used by examiners involved in promoter investigations.
- (4) LB&I Team Coordinators/Team Managers are responsible for completing the audit plan with estimated completion dates at each stage, including an estimated closing date (ECD). The status summary may be used for monitoring the progress of the investigation.
- (5) LB&I Team Coordinators create activity records and logs to monitor progress for information document requests (IDRs), summonses, third party contacts, interviews, etc.

4.32.2.8.1.3
(06-04-2018)

**The SB/SE LDC, ATSU
and OTSA**

- (1) The SB/SE LDC can assist SB/SE examiners with investigation development by capturing electronic media such as websites and YouTube videos, conducting field surveys, and performing other research requests such as PACER, EFIN, Return Preparer Database, GII, etc. Generally, field surveys are limited to those investigations where the information is critical to developing the investigation. The SPA assigned to the promotion coordinates these survey requests. To request this assistance, complete the *LDC Research Request form*.
- (2) The Abusive Transaction Support Unit (ATSU) can assist SB/SE examiners with their promoter/preparer investigations by obtaining returns, closed administrative files and providing research to assist in their investigation. Examiners must have an approved 6700 or 6701 investigation to request assistance. For specifics regarding the types of research ATSU can assist with, see *Research Tools Job Aid* on the LDC web page.
- (3) OTSA is available to assist LB&I examiners with investigation development by providing information from OTSA disclosure and registration databases and assisting in facilitating field surveys. Generally, field surveys are limited to investigations where the information is critical to developing the investigation. See IRM 4.32.2.4.3.1.1, *Disclosures of Reportable Transactions*.

4.32.2.8.1.4
(06-04-2018)

**AT Senior Program
Analysts (SPAs) and
Technical Advisors (TAs)**

- (1) SPAs (SB/SE) or TAs (LB&I) responsible for specific promotions can provide additional information not in the SB/SE LDC investigation authorization file or OTSA referral package, such as names of other IRS employees investigating the same promotion or similar promotions. SPAs or TAs can assist examiners with national coordination issues related to the promotion.

4.32.2.8.2
(09-23-2011)

**Commencing the
Investigation**

- (1) This section provides procedures for examiners to commence promoter investigations.

4.32.2.8.2.1
(06-04-2018)

**Commencement of
SB/SE Investigations**

- (1) The promoter should be notified of the investigation once a decision is made that the investigation will be pursued. (There are rare occasions when an investigation could be surveyed or discontinued prior to contact with the promoter. All such decisions should be discussed with Counsel and the assigned LDC SPA). Client examinations conducted to develop information regarding harm to the government or develop information supporting penalties applicable to the promoter should not commence until after the promoter has been notified of the investigation and received proper third party notification. An exception to this requirement would be when there is a parallel investigation and Criminal Investigation has requested that no contact be made with the promoter.
- (2) Examiners schedule the initial appointment using Letter 1844, *Initial Interview Letter*, for investigations related to conduct potentially subject to penalties under IRC 6700, IRC 6701, IRC 6694, or IRC 6695. This letter specifies the specific time and place of the initial interview.
- (3) Examiners should send a Pub 1, *Your Rights as A Taxpayer*, with the initial letter. This will serve as the initial notification that it may be necessary to contact third parties during the investigation.
- (4) Examiners should schedule an initial appointment for 14 days from the date Letter 1844 is mailed to the promoter. The appointment should not be rescheduled to a later date unless there is a valid reason. Examiners should be alert for attempts by promoters to delay the investigation. There may be valid business reasons for setting the initial appointment at a date other than indicated above. Such a decision should be made after discussion with the Group Manager and Counsel. Modify Letter 1844 as necessary to address the needs of your particular examination, with approval from Counsel.
- (5) A Notice 609, *Privacy Act Notice*, should be enclosed with the initial interview letter.
- (6) Form 4564, *Information Document Request (IDR)*, must be sent with the initial interview letter. The IDR must be specific and request information relevant to the promotion.
- (7) It is recommended that the IDR include “summons ready” language in the event the promoter fails to cooperate and an administrative summons is issued. Consult Counsel when preparing the IDR, particularly for complex transactions. Examiners should be prepared to serve the summons at the initial interview if they anticipate lack of cooperation by the promoter. See IRM 4.32.2.8.5, *Summonses*. Also see IRM 25.5, *Summons*.
- (8) Letter 1844 may be sent to the promoter/preparer to advise them of the opening of the investigation. If the examiner is not ready to set an initial interview, alter the language of the letter as necessary to reflect when the next contact should be made.

4.32.2.8.2.2
(06-04-2018)

**Commencement of LB&I
Material Advisor
Investigations**

- (1) After the TTSPC approves the opening of a material advisor investigation under IRC 6707, the Team Manager/Team Coordinator issues the appropriate audit letter together with the standard IDR to the material advisor. The Team Manager/Team Coordinator should contact the LB&I:Financial Services Senior Program Analyst for the promoter program for the appropriate audit letter and IDR. The audit letter and IDR, issued by the Team Manager after Counsel review may be modified to fit the specifics of the investigation.

- (2) Notice 609, *Privacy Act Notice*, must be included with the material advisor contact letter.
- (3) The Letter 3164-P, *Third Party Notification for IRC 6700/6701 Investigations*, modified as appropriate, must also be included with the material advisor contact letter.
- (4) Modifications may be made to the standard audit letter and IDR as needed, with the participation of Counsel.
- (5) Central Audit File - All LB&I promoter investigation cases should have a "central audit file" that includes all documentation pertaining to the investigation including workpapers, analyses, correspondence, copies of summonses, taxpayer's responses, etc. All examiners working on the investigation should have access to the central audit file. If the investigation is being worked by examiners in multiple locations and it is not feasible for all examiners to have access to the central audit file, then each examiner should be provided with a complete copy of all of the documents as the investigation progresses. The file should be arranged so that the information needed can be located easily. All examiners are required to have a complete activity record in the file. The central audit file must be separate and apart from the Counsel's file.
- (6) LB&I examiners should send a copy of the potentially abusive transaction material obtained during the examination to OTSA. The identity of all material advisors who helped with the tax shelter promotion should also be sent to OTSA.
- (7) LB&I team managers are required to prepare and submit monthly progress reports on each promoter investigation to the Financial Services Senior Program Specialist for the promoter program. A copy of the monthly report format can be found in Exhibit 4.32.2-3, *LB&I Monthly Progress Report*. If anything significant happens between reporting dates (e.g., serving a summons, enforcement) contact the Financial Services Senior Program Specialist immediately.
- (8) A promoter may not file a qualified amended return after the date any person is first contacted by the IRS concerning an examination of that person under IRC 6700 for an activity with respect to which the taxpayer claimed any tax benefit on the return directly or indirectly through the entity, plan, or arrangement. 26 CFR 1.6664-2(c).

4.32.2.8.2.2.1
(06-04-2018)

Responses to the Audit Letter

- (1) If the promoter's response to the audit letter is adequate:
 - a. Determine if additional staff or other resources are needed to assist in analyzing the documents. If needed, request help from the TM. If additional resources are not available in the territory, the TM should contact the Financial Services (FS) TM having responsibility for tax shelter promotions.
 - b. Index and scan the documents submitted by the promoter;
 - c. Prepare an investor list on the standard OTSA spreadsheet and forward it to the Senior OTSA Analyst for promotions, with a copy to the Financial Services Senior Program Specialist for tax shelters.
 - d. Determine the number of different promotions the taxpayer is involved in and make referrals for assistance from financial products specialists, TAs, international examiners, etc. as appropriate.

- (2) If the promoter's response to the audit letter and IDR is insufficient, consider issuing a summons to compel production of the information. All summonses must be approved by Counsel and enforced as necessary.
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- 4.32.2.8.2.2.2
(06-04-2018)
Issuance of IRC 6112 Letter

- (1) The IRC 6112 letter may only be issued if the Service has a reasonable basis for believing that the recipient is required to comply with IRC 6112. The Team Manager/Team Coordinator, together with Counsel, must evaluate whether such a letter is appropriate and when enough information exists to support the issuance of the IRC 6112 letter.
 - (2) The Team Manager/Team Coordinator issues an IRC 6112 letter by certified or registered mail or hand delivery. Letter 4378, *Multiple Sec. 6112 Request*, may be used to make requests under IRC 6112.
 - (3) Notice 609, *Privacy Act Notice*, must be included with the IRC 6112 letter.
 - (4) Modifications may be made to the standard IRC 6112 letter as needed, with participation of Counsel.
 - (5) SB/SE examiners should discuss procedures with their LDC SPA.
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- 4.32.2.8.2.2.3
(06-04-2018)
Responses to IRC 6112 Letters

- (1) The promoter's response to the IRC 6112 letter is due within 20 business days. If the investor/advisee list is not received or is received after the 20-day response period, the promoter or material advisor is subject to an IRC 6708 penalty unless the reasonable cause exception applies.
 - (2) Extensions to the 20-day time frame can be granted at the Service's discretion, see 26 CFR 301.6708-1(c)(3).
 - (3) If a promoter responds timely, examiners must copy any investor list obtained to the standard OTSA spreadsheet. It is important that the investor list information conform to the OTSA spreadsheet; otherwise it will impede the OTSA database process.
 - (4) If the examiner, together with Counsel, determines that the material advisor's timely response was complete, then the examiner should issue Letter 4376, *Discontinuance Letter for Sec. 6112 Inquiry*, after receiving approval from the LB&I:Financial Services DFO Manhattan.
 - (5) If a promoter does not respond to the IRC 6112 letter request or if the examiner, in consultation with Counsel considers the response incomplete, then the Team Manager/Team Coordinator should send the material advisor a letter stating that the material advisor's submission was not fully responsive and that an IRC 6708 investigation is being opened. The examiner should contact the LB&I:Financial Services Senior Program Analyst for the Promoter Program for the appropriate letter.
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- 4.32.2.8.2.2.4
(06-04-2018)
Reportable Transactions

- (1) A "reportable transaction" is defined in IRC 6707A(c)(1) , and is a type of transaction that the Secretary determines has a potential for abusive tax avoidance or evasion per regulations under IRC 6011. See 26 CFR 1.6011-4. Material advisors are required to disclose reportable transactions (including listed transactions) to the IRS on Form 8918, *Material Advisor Disclosure Statement*. See IRC 6111. Material advisors may be subject to penalties under IRC 6707 for failing to provide the required information. See 26 CFR 301.6111-3 , *Disclosure of Reportable Transactions*.

(2) Reportable transactions include the following categories of transactions:

Category	Description
Listed Transaction	A transaction that is the same as or substantially similar to one of the types of transactions that the IRS has identified by notice, regulation, or other form of published guidance as a listed transaction. See Listed Transaction Web page on irs.gov for updates (https://www.irs.gov/businesses/corporations/listed-transactions)
Confidential Transaction	A transaction offered to a taxpayer under conditions of confidentiality where the taxpayer's disclosure of the potential tax treatment and strategy is limited in any manner, and for which the material advisor is paid a minimum fee. The minimum fee equals: <ol style="list-style-type: none"> \$250,000 if the taxpayer is a corporation or \$50,000 for all other transactions unless the taxpayer is a partnership or trust, all of the owners or beneficiaries of which are corporations (looking through any partners or beneficiaries that are themselves partnerships or trusts), in which case the minimum fee is \$250,000. The agreement or understanding limiting such disclosure can be express or implied.
Transaction With Contractual Protection	The taxpayer or a related party has the right to a full or partial refund of fees if all or part of the intended tax consequences are not sustained, or fees are contingent on the taxpayer's realization of tax benefits.
Loss Transactions	Any transaction resulting in the taxpayer claiming a loss under IRC 165, <i>Losses</i> , of at least the following amounts: <ol style="list-style-type: none"> For C corporations and partnerships that only have C corporations as partners - a \$10 million loss in a single tax year or a \$20 million loss in any combination of taxable years. For individuals and trusts - a \$2 million loss in a single tax year or a \$4 million loss in any combination of taxable years; or a \$50,000 loss in a taxable year if the loss arises with respect to an IRC 988 transaction. For all other taxpayers, a \$2 million loss in a single tax year or a \$4 million loss in any combination of taxable years.

Category	Description
Transactions of Interest (TOI)	A transaction that is the same or substantially similar to one of the types of transaction that the IRS has identified by notice, regulation or other form of published guidance as a transaction of interest. See irs.gov Transactions of Interest web page for a full listing. (https://www.irs.gov/businesses/corporations/transactions-of-interest)

- (3) For returns and statements due after October 22, 2004, and which were not filed before that date, any taxpayer who participates in a reportable transaction and fails to disclose information on Form 8886, as required, is subject to an IRC 6707A penalty.
- (4) Specific exceptions to the requirement to report loss transactions are described in Rev. Proc. 2004-66, 2004-50 IRB 966. Generally, the exceptions include losses from the sale or exchange of assets with a qualifying basis, losses under IRC 165(c)(3), involuntary conversions, certain mark-to-market losses, losses determined by reference to cash payments, and various other losses as described in Rev. Proc. 2004-66, Section 4.03.
- (5) Specific exceptions to the requirement to report transactions with contractual protection are found in Rev. Proc. 2007-20, 2007-7 IRB 517. These exceptions apply to certain contractual protection arrangements for which the fee is related to certain credits. See Rev. Proc. 2007-20, Section 4.02.
- (6) In general, any taxpayer, including an individual, trust, estate, partnership, S-corporation, or other corporation, that participates in a reportable transaction and is required to file a federal income tax return or information return, must file a Form 8886. Tax-exempt entities that engage in a reportable transaction are subject to the Form 8886 filing requirement.
- (7) Regulations requiring disclosures of reportable transactions by clients in those transactions are found under IRC 6011 at 26 CFR 1.6011-4.

4.32.2.8.2.2.4.1 (06-04-2018)

Listed Transactions

- (1) The IRS has alerted taxpayers to transactions that it has determined are abusive tax avoidance transactions and identified these transactions as “listed transactions.”
- (2) Listed transactions are defined as transactions that are the same as, or substantially similar to, one of the types of transactions that the IRS has determined to be a tax avoidance transaction and identified by notice, regulation, or other form of published guidance as a listed transaction. Refer to 26 CFR 1.6011-4(b)(2) and IRC 6707A(c)(2) , as added by the AJCA of 2004.
- (3) In Notice 2009-31, IRB 170, *Listed Transactions*, and subsequent notices the IRS provides a list of certain transactions it has determined to be tax avoidance transactions and classified those transactions as listed transactions. See [irs.gov](https://www.irs.gov), Listed Transactions web page for an up to date listing.
- (4) Organizers, sellers, and material advisors involved with listed transactions must maintain and furnish certain investor/advisee information under 26 CFR 301.6112-1 , *Material Advisors of Reportable Transactions Must Keep Lists of Advisees, Etc.*, for interests sold in these shelters after February 28, 2000.

- (5) After the AJCA amended IRC 6111 effective for transactions with respect to which material aid, assistance, or advice is given with respect to a transaction after October 22, 2004, material advisors must disclose listed transactions by filing a Form 8918.
- (6) Taxpayers must disclose their participation in listed transactions per 26 CFR 1.6011-4 , *Requirement of Statement Disclosing Participation in Certain Transactions By Taxpayers*.
- (7) When a listed transaction is identified during an examination, the issue is raised and developed. Examiners should contact the SPA or TA , or identified coordinator handling the issue. Examiners should provide the name of the taxpayer, taxable period(s) involved, type of listed transaction, and the name of the promoter, if known. LB&I examiners should include the names of the team manager and team coordinator and their telephone numbers. SB/SE examiners should include the name of their group manager (GM) and their telephone numbers. The initial contact may be via e-mail (utilizing secure messaging), fax or telephone. To locate the LB&I employee assigned to the issue, start at the *Practice Networks* web page.
- (8) As a transaction is listed, the SPA or TA, with the assistance of the Counsel attorney assigned to the issue, prepares a coordinated issue paper describing the facts of the issue, questions raised and the best way to address the issue to ensure full development and consistency among taxpayers. Training, reference and resource materials are also provided. The SPA or TA, with the assistance of the Counsel attorney assigned to the issue, develops and proposes a coordinated issue paper (CIP) or similar document, as appropriate. For more information on the process to add a transaction as **listed** see IRM 4.51.2 , *LB&I Administrative Guidance*.
- (9) Examiners should consult with the SPA or TA and Counsel on the development of the issue. Examiners must secure the concurrence of the SPA or TA if their examination deviates from any mandated specific examination techniques proposed for issue development or their proposal for adjustment deviates from any stated legal positions. Examiners must also consult with, and secure the concurrence of, the SPA and Counsel before proposing any resolution other than full concession of the issue by the taxpayer.
- (10) Penalties under IRC 6662, *Accuracy-Related Penalty*, and IRC 6662A , *Imposition of Accuracy-Related Penalty on Understatements with Respect to Reportable Transactions*, must be considered for all listed transactions. Due to the definition of "reportable transaction understatement," the IRC 6662A penalty, unlike the IRC 6662 penalty, may apply even if there is no underpayment of tax on the taxpayer's return. Furthermore, if the taxpayer did not disclose their participation in the transaction as required by 26 CFR 1.6011-4, penalties under IRC 6707A should be considered.

4.32.2.8.2.3
(09-23-2011)
**Responses to Promoter
Fivolous Challenges**

- (1) Examiners should anticipate arguments and questions from the promoter defending the arrangement and questioning the right of the IRS to examine the books and records.
- (2) Examiners also should familiarize themselves with *The Truth about Fivolous Tax Arguments* and the various toolkits located on the IRS internet website at www.irs.gov/.

4.32.2.8.2.4
(06-08-2012)
Powers of Attorney

- (1) Promoters may have an attorney, certified public accountant (CPA), enrolled agent, or other authorized person represent them during the investigation. If so, a Form 2848, *Power of Attorney and Declaration of Representative*, should be secured. The form should indicate the type of tax to be "Civil Penalties" as the type of tax. The tax form number should be marked as "Not Applicable (N/A)." The year(s) or period(s) block should be completed showing the current year and any prior year in which the promotion was ongoing.
- (2) Refer to IRM 21.3.7, *Processing Third Party Authorizations onto the Centralized Authorization File (CAF)*, for additional information regarding powers of attorney including whether the form is complete.

Note: Married filing joint taxpayers - A separate Form 2848 should be secured for each spouse.

4.32.2.8.2.5
(06-04-2018)
Identity Theft

- (1) Identity theft is defined as a fraud that is committed or attempted, using a person's identifying information without authority. See IRM 25.23, *Identity Protection and Victim Assistance* for more information.
- (2) Caution should be taken not to confuse preparer fraud with identity theft. Different actions must be taken depending on whether there is identity theft or return preparer fraud.
- (3) If it is determined that the case is identity theft rather than return preparer fraud, see IRM 4.10.27, *Identity Theft Case Processing for Field Examiners*, for guidance.

4.32.2.8.3
(06-04-2018)
Promoter Interviews

- (1) The primary goals of the initial interview are to:
 - a. Conduct a detailed interview with the promoter.
 - b. Secure promotional materials.
 - c. Secure a complete client, investor, or advisee list.

Note: This is a crucial investigative step, and should be rigorously pursued from the initial contact. Be prepared to take all necessary actions to secure this information, including issuing summons.
- (2) Examiners should prepare a list of interview questions before the interview. Examiners should seek assistance from Counsel, the assigned LDC SPA or technical issue specialists as needed to help formulate the interview questions. Interview questions should cover the following topics:
 - Personal history.
 - Business and professional history.
 - Structure of the organization and role of various parties within the organization.
 - Size of the promotion.
 - Description of tax attributes of the promotion.
 - Sub-promoters, co-promoters, or other related parties.
- (3) Every effort should be made to secure as much information as possible at the initial interview as the promoter may cease to cooperate at any point during the investigation.

- (4) Examiners should consider preparing a summons in advance of the interview to serve on the promoter in the event the promoter fails to comply with the IDR.
- (5) Examiners may provide a Letter 3164-P , *Third Party Notification for IRC 6700/6701 Investigations* at the initial interview, however Letter 3164-P should generally be sent 10 days prior to the initiation of third party contacts, including income tax examinations of clients.
- (6) It is recommended that interviews be conducted in the presence of at least one IRS witness.
- (7) It is recommended that the assigned Counsel attorney attend interviews when you feel Counsel's legal support may be needed. Examples include where issues may surface over First and Fifth Amendment privilege, attorney-client privilege, summons production and other areas where counsel support is critical.
- (8) In parallel investigations, promoters will not be interviewed without coordination with CI and consultation with Counsel. See IRM 4.32.2.7.6, *Interviews*, for procedures regarding special agents attending interviews. See IRM 4.32.2.7, *Parallel Investigations*.
- (9) Consider the best location to hold the interview. If employee safety is a concern, notify TIGTA to request their presence or consider holding the interview inside a government facility.
- (10) For LB&I, court reporters are required for all formal interviews. Examiners should make arrangements for purchase of the interview transcript. Examiners should contact a LB&I Financial Services Senior Program Specialist for assistance.
- (11) For some sample promoter interview questions, see *Sample Interview Questions for Promoters/Preparers*. This document is available on MySB/SE, *Promoter Investigations*.
- (12) See IRM 4.10.3.3, *Interviews: Authority and Purpose*, for the authority for and purpose of conducting interviews.
- (13) See IRM 4.10.3.3.7, *Interview Techniques*, for additional general interviewing techniques.

4.32.2.8.3.1
(06-04-2018)
Recording Interviews

- (1) IRC 7521, *Procedures Involving Taxpayer Interviews*, allows audio recordings of in-person taxpayer interviews by either the taxpayer or the IRS if the party desiring to record provides advance notice. See IRM 4.10.3.3.6, *Requests to Audio Record Interviews*. Advance notice of at least 10 calendar days is required if either the IRS or the taxpayer intends to make an audio recording under the provision in IRM 4.10.3.3.3, *Preparation and Planning for Interviewing*.
- (2) If the promoter audio records the interview or uses a court reporter, the examiner must record the meeting.
- (3) Promoters may fail to provide the IRS with advance notice of their intention to record a meeting. Since time is of the essence in these investigations and recordings of interviews can play a pivotal role in the investigation, examiners should be prepared to audio record all interviews even if the promoter did not

provide 10 days notice. This will allow the meeting to proceed as scheduled, despite the 10 day rule and avoid delaying the investigation.

- (4) Cameras, cell phones with cameras, and videotaping are never allowed. See IRM 25.5.5.4.4, *Right to Make an Audio Recording of the Proceeding*, for additional information.
- (5) Examiners should consider the pros and cons of audio recording all interviews with promoters and clients to document the meetings. See IRM 4.16.1.3.2.2, *Electronic or Verbatim Recording of Interviews*, and IRM 4.10.3.3.6, *Requests to Audio Record Interviews*, and IRM 4.71.1.13, *Verbatim Recordings*. In some cases, the use of audio recording equipment may have a negative effect on the conversation with the promoter or other witness.
- (6) If the examiner has reason to believe that the promoter is recording or intends to record the interview without proper notification, examiners should ask whether the promoter or client is recording the interview, and document the question and the response in the interview notes. The question as to whether a meeting can be recorded without consent of the parties involved is a legal question that varies by state law and examiners are advised to consult Counsel for support.
- (7) Promoters may use a court reporter in their own interview if the court reporter is licensed by the state to record official court proceedings and will make a copy of the transcript available for the IRS to purchase.
- (8) See IRM 25.5.5.4.4, *Right to Make an Audio Recording of the Proceeding*, and Letter 2156, *Audio Recording Interviews*.

4.32.2.8.3.2 (06-04-2018) Third-Party Contacts

- (1) IRC 7602(c) requires the IRS to provide notice to the promoter before contacting third parties. Letter 3164-P, *Third Party Notification for IRC 6700/6701 Investigations*, is used to provide this statutory notification for promoter investigations.
- (2) Examination of clients in an abusive scheme and/or individuals whose returns were prepared by or impacted by a promoter under investigation constitutes a third party contact if the information is being gathered as part of the examination to determine the culpability of the promoter or to determine the extent of harm to the government caused by the promoter activities. Thus the promoter must receive notification of a third party contact prior to contacting clients as part of the promoter exam.
- (3) IRC 7602(c)(3)(C) provides for an exception to the third-party notification requirement with respect to any pending criminal investigation. Accordingly, in parallel investigations where CI has requested **no-contact**, the third-party notification letter (Letter 3164-P) is not required.
- (4) Examiners must give the promoter an opportunity to provide all necessary information before contacting any third parties. Information secured from the promoter will frequently need to be corroborated by a third party. Additionally, witnesses to a promoter or preparer's actions will need to be interviewed in order to fully understand the scheme or activity and determine culpability.
- (5) Tax return information may be disclosed to a third party to the extent necessary for the third party to answer questions. Sufficient information should be included in the file to document the necessity for IRC 6103(k)(6) disclosure

purposes. Further information on disclosures to third parties may be found in IRM 11.3.21.3, *Requirements of Investigative Disclosure*, and in IRC 6103(k)(6) .

- (6) Form 12175, *Third Party Contact Report Form*, should be forwarded to the Area Third Party Contact Coordinator for each third party contact. Use IMF MFT 55 or BMF MFT 13, as appropriate, and the tax period on ERCS for the penalty case when completing Part 10 of Form 12175. If the person contacted has expressed a fear of reprisal, their name is not included on the Form 12175.
- (7) Promoter's requests for third party contact lists must be forwarded to the Area Third Party Contact Coordinator. Before forwarding any such request, the employee receiving the request must secure the promoter's current mailing address.
- (8) Neither promoters or their counsel have a legal right to be present for IRS interviews of any third party witness. However, if the interview is with a former employee of a corporation who exercised managerial responsibility, contact Counsel to determine what questions can be asked of the former employee without taxpayer's counsel present. See also IRM 25.5.5.5.5, *Excluding a Taxpayer or a Taxpayer's Representative From the Interview of a Summoned Third Party*, and IRM 25.5.5.5.7, *Third-Party Witness's Choice of Representative*, for additional information.
- (9) See IRM 4.11.57, *Examining Officers Guide (EOG), Third Party Contacts*, for more information.

4.32.2.8.3.3 (06-04-2018)

Sub-promoters Contacts

- (1) Sub-promoters are involved in promoting the same transaction as the promoter. They may also be organizers, managers or sellers of this transaction. They generally receive fees for their role in the transaction. This category would also include related return preparers working in the same office or franchise, or as an employee of the authorized return preparer.
- (2) A promotion may involve several sub-promoters, such as an accounting firm, financial services/investment boutique firm, investment banker, or law firm. Generally, the entity that gives an opinion on the transaction being promoted is a law firm.
- (3) Some abusive tax promotions are multi-level marketing promotions. Individuals in multi-level marketing promotions pay fees or commissions to whoever recruited them into the promotion, and receive fees or commissions from whomever they recruit into the promotion. Examiners must be alert to the possibility that sub-promoters could have other sub-promoters working under them.
- (4) Sub-promoters may be subject to the same types of sanctions and penalties as the key promoter if evidence supports such.
- (5) Any known related individuals will be identified in the investigation authorization memo. If a related party is identified during the course of the investigation, examiners should contact the SB/SE LDC or LB&I Financial Services Senior Program Specialist to obtain information on related or affiliated promoters. The sub-promoter may have previously, or may be currently, the subject of an investigation. If so, contact should be made with the examiner who conducted or is currently conducting that investigation.

- (6) In LB&I, if the sub-promoter is not under investigation, contact OTSA to find out if any disclosure statements pertaining to the sub-promoter have been filed.
- (7) If the sub-promoter's activities warrant investigation or should be included with the key promoter investigation, the sub-promoter should be referred to SB/SE LDC or OTSA. See IRM 4.32.2.4, *Lead Identification and Investigation Authorization*. Investigation of a sub-promoter or related party requires SB/SE LDC or LB&I TTSPC approval.
- (8) In parallel investigation cases, sub-promoters should not be contacted without coordination with CI. See IRM 4.32.2.7, *Parallel Investigations*.
- (9) Contacts with sub-promoters are considered third-party contacts subject to the notice and record-keeping requirements of IRC 7602(c) , unless they are separately authorized for investigation. See also IRM 4.11.57, *Third Party Contacts*, for additional information
- (10) Examiners may choose to audio record interviews with sub-promoters. See IRM 4.32.2.8.3.1, *Recording Interviews*.
- (11) Interviews with sub-promoters should follow the guidelines contained in IRM 4.32.2.8.3, *Promoter Interviews*, except that third-party interviews are not covered by IRC 7521 and the promoter has no legal right to be present for IRS interviews of any third-party witness. See IRM 25.5.5.5.7, *Third Party Witness's Choice of Representative*, for additional information.
- (12) For some sample sub-promoter interview questions, see *Sample Interview Questions for Sub-Promoters and/or Co-Promoters*, available on MySB/SE, *Promoter Investigations*.

4.32.2.8.3.4
(06-04-2018)
**Promoter or Related
Promoter Income Tax
Examinations**

- (1) Income tax returns should be reviewed for potential tax issues; however, an examination is not mandatory.
- (2) If an examination is warranted, it should be done concurrently with the promoter investigation. It is generally advisable to have one examiner conduct the promoter income tax examination and another examiner conduct the promoter investigation.
- (3) Promoters often utilize their own promotion, and in the absence of known clients, the promoter's income tax examination could reveal the underlying operation of the promotion.
- (4) Examiners should ensure the promoter has made all required disclosures with their individual return. See IRC 6011 and 26 CFR 1.6011-4. If there is noncompliance, appropriate penalties are assessed.

4.32.2.8.3.5
(06-04-2018)
Client Contacts

- (1) Identification and contacts with clients is a critical component in the development of a promoter investigation. Clients can be a good source of information on the promoter and the promotion, providing insight on operations of the promotion, principals or entities involved and the flow of the money through the promotion. Client information can be helpful in determining the tax harm of the promotion.
- (2) In parallel investigation cases, clients are not contacted without coordination with CI. See IRM 4.32.2.7.6, *Interviews*.

- (3) The number of client contacts and the selection of specific clients for interview are determined on a case-by-case basis.
- (4) Consideration should be given to the best method to memorialize the interview. Options include a Memorandum of Interview (MOI), an Affidavit, or a Declaration. An MOI is prepared by the Examiner from the notes taken during the interview and is signed by the examiner. An Affidavit or Declaration is also prepared from the interview notes, but is prepared for signature of the person interviewed. The difference between them is the administration of an oath (affidavit) or attestation of perjury clause (Declaration). Examiners may wish to discuss which method to use with Counsel. See IRM 4.32.2.8.4, *Affidavits and Oral Testimony*.
- (5) Generally, interviews with clients are not recorded but examiners may decide to record interviews with clients. See IRM 4.32.2.8.3.1, *Recording Interviews*.
- (6) For some sample client interview questions, see, *Sample Interview Questions for Clients*, available on MySB/SE, *Promoter Investigations*.
- (7) Examiners should consider reviewing clients' compliance history and current collection status. If there is a need for a revenue officer to assist refer to IRM 4.32.3, *Coordination and Roles of Cross Functional Units*, for current procedures.

4.32.2.8.3.6
(06-04-2018)

Client Tax Examinations

- (1) Client examinations may be conducted simultaneously with a promoter investigation, but these examinations are not mandatory. Examiners should proceed with third-party contacts or other sources of information and not delay or suspend the investigation pending the outcome of any client exams. The AT program makes client exam decisions on a case-by-case basis.
- (2) The investigation authorization file will contain available information about prior examinations of clients to use as evidence for the promoter investigation, if known. If no client list was available at the time the investigation was authorized, this information will need to be secured from the promoter and internal sources. Contact the Area PSP AT Coordinator for assistance.
- (3) Examiners should consider reviewing clients' compliance history and current collection status. If there is a need for a revenue officer to assist, refer to IRM 4.32.3, *Coordination and Roles of Cross Functional Units*, for current procedures.
- (4) In parallel investigations, client income tax examinations are not initiated without deconflicting with CI. See IRM 4.32.2.7.3, *Six-Way Conference*, and IRM 4.32.2.7, *Parallel Investigations*.
- (5) In SB/SE, if client examinations are critical to develop a promoter investigation, the Area PSP office can build a maximum of 30 examination files. If more than 30 is needed, a written request describing the need should be submitted to the AT Listkeeper for consideration. Case building **cannot** be conducted at the group level.
- (6) Clients who fail to disclose information required under IRC 6011 regarding a reportable transaction on a return or statement due after October 22, 2004, may be subject to IRC 6707A penalties.

- (7) Examiners are required to consider the application of other relevant penalties as part of the package audit requirements. See IRM 4.10.5 , *Examination of Returns, Required Filing Checks*, IRM 20.1 , *Penalty Handbook*, and the *Penalties Knowledge Base* for additional information.
- (8) The AJCA of 2004 amended the IRC 7525(b) exception to confidentiality privileges relating to taxpayer communications. This privilege does not apply to any written communication which is in connection with the promotion of the direct or indirect participation of the person in any tax shelter, as defined in IRC 6662(d)(2)(C)(ii) .
- (9) Examiners should be aware that the clients' returns most likely have statute of limitation (SOL) periods different from that of the related promoter penalties. IRC 6700, 6701 and 6694(b) do not have statutes.

4.32.2.8.3.6.1
(06-04-2018)

Releasing Jurisdiction of Taxable Returns to TE/GE to Conduct Supporting Examinations

- (1) Client examinations may be necessary to support promoter investigations. If the promoter is a TE/GE taxpayer, and TE/GE takes the lead on the investigation, TE/GE may request SB/SE's assistance in the examination of related returns under SB/SE jurisdiction. Examples include but are not limited to the result of a revocation or other findings giving rise to a potential tax liability.
- (2) TE/GE will request SB/SE assistance with client examinations by completing Form 6229, Collateral Examination. The Form 6229 should be sent to the SB/SE AT Planning and Special Programs (PSP) territory manager (TM) with jurisdiction for the geographic area of the taxpayer to be examined. See the LDC National Directory of AT personnel that is available on the LDC page on MySB/SE to determine the appropriate office.
- (3) If SB/SE is unable to initiate an examination within 60 - 90 days, TE/GE may request that SB/SE release its jurisdiction over the client. TE/GE should discuss any delays with the LDC TE/GE Liaison and then, if necessary, direct the jurisdictional release request to the appropriate AT PSP TM.
- (4) TE/GE should obtain a release of jurisdiction in writing before opening the return for examination.
- (5) This process does not apply in the case of discrepancy adjustments for Form 1040, U.S. Individual Income Tax Return and Form 1120, U.S. Corporation Income Tax Return without flow-through issues, which are not deemed examinations, and which are already under TE/GE jurisdiction.

4.32.2.8.3.6.2
(06-04-2018)

Client Job Aid

- (1) The examiner working the promoter investigation will prepare a client job aid or "white paper" for use by other examiners working the related client cases. The job aid is forwarded to either the Area PSP AT Coordinator or the Listkeeper along with the client list for case building
- (2) Information provided in the client job aid generally includes:
 - Identifying information on the promoter, including project and tracking codes.
 - Key tax issues and a description of the scheme.
 - Tax law analysis.
 - Suggested audit techniques.
 - Contact information on the promoter examiner and SPA.

- Information from the client audit files to be provided to the promoter examiner.

Optional information that can be helpful includes suggested interview questions and a penalty application addendum.

- (3) The client job aid is intended to provide a brief overview of the promotion and the relevant tax issues, and to facilitate coordination between examiners. Normally, less than 5 pages is sufficient. In some instances where a scheme is more technical or complex, a separate issue paper may be prepared by the SPA .

4.32.2.8.4
(06-04-2018)
**Affidavits and Oral
Testimony**

- (1) Affidavits can be used to document oral statements of the promoter or any other person interviewed during the promoter investigation. Form 2311, *Affidavit* can be used to document the interview.
- (2) Affidavits are used:
 - When other documentary evidence is not available to support the statements of a person.
 - To record the testimony of a person.
 - To discourage a person from later changing his testimony.
 - In certain circumstances as evidence if the person cannot be located for future proceedings.
 - To accurately record and document a person's statements.
- (3) Examiners can administer an oath or affirmation to the person being interviewed, but discuss the merits of this approach with the assigned LDC SPA. The authority for administering oaths is IRC 7602, *Examination of Books and Witnesses*, and IRC 7622, *Authority to Administer Oaths and Certify*, and authority 14 of Delegation Order 25-1 (IRM 1.2.52.2), *Summonses, Oaths, Certifications, and Related Functions*. Contact Counsel prior to administering any oath or affirmation.
- (4) See IRM 20.1.6.20, *Affidavits Overview*, for information to be included in affidavits related to preparer penalty cases.
- (5) There is no set form for an affidavit as long as all of the required information is present. There are four basic types of affidavits:
 - Narrative Affidavit – A verbatim written record of the person's statements or testimony.
 - Summary Affidavit – A summary of the person's statements or testimony.
 - Question and Answer Affidavit – A written record containing the exact question asked, and either the verbatim answer or a summary of the answer given by the witness.
 - Attested Interview Report – A summary of the interview that is not signed by the person but is signed under oath by the examiner and all other IRS employees attending the interview.
- (6) Except for an attested interview, the person giving the affidavit should sign and date the document. If the affidavit is more than one page, the person should initial and date each page. Any typographical errors or other changes to the person's statement must be initialed and dated by the person. If more than one person is interviewed, prepare a separate affidavit for each person.

- (7) If a person refuses to sign the affidavit, but states that it is true and correct, the following statement should be added to the bottom of each page of the document:

"This statement was read by [insert name] on [date], who stated it was true and correct but refused to sign it."

4.32.2.8.5
(06-04-2018)
Summonses

- (1) A summons can be used to require a promoter or witness to appear on a given date to give testimony, or to produce existing books and records, or other data. A summons cannot require the preparation or creation of documents (including tax returns) that do not already exist. If a privilege defense is raised to the production of summoned documents, always involve assigned Counsel in the issue. It is a best practice to describe the elements of the privilege log requested from the witness in the instructions to the summons. See IRM 25.5.5.4.3, *Privileged Communication and Summons*.
- (2) For summonses related to promoter investigations the following language must be included in the summons: *"In the matter of liability of [promoter or preparer's name] under 26 USC Secs. 6694, 6695, 6700, 6701, 6707 and 6708 [use all sections that may be applicable]."*
- (3) The periods on the summons form should say *"From January 1, [year] through date of compliance with this summons"*. The year to be inserted would be the earliest year that the promoter is suspected of having engaged in the abusive transaction.
- (4) The Counsel attorney assigned to the promoter investigation can review summonses before they are issued to make sure they are legally enforceable. An examiner may want Counsel to review the summons prior to issuance if the summons is not routine or has factors that are complex. For LB&I investigations, LB&I Counsel forwards the summons to DOJ for approval after Counsel review through procedures prescribed by LB&I Division Counsel and the CCDM. . Summonses are of particular concern in cases where First Amendment concerns are present. Such summonses must be narrowly tailored to avoid infringing on First Amendment rights and Counsel should be contacted for assistance when this is an anticipated issue.
- (5) In parallel investigations, examiners must deconflict all summonses with CI before issuance. Examiners should be aware that IRC 7602(d) limits the authority of the IRS to issue or enforce summonses when there is a "Justice Department referral" in effect (regarding Grand Jury or criminal matters). See IRM 4.32.2.7.9, *Administrative Summons*. For advice on the meaning of that restriction, examiners should contact Counsel.
- (6) Examiners should continue to develop the promoter investigation during the summons enforcement process and attempt to secure the information from another source.
- (7) Additional requirements for LB&I examiners:
- A summons log must be kept. A sample copy of the summons log is in IRM Exhibit 4.32.2-2, *Sample Summons Log*.
 - Each listed transaction should be shown on a separate summons. All other transactions should be combined on one additional summons.

- c. Team Managers (TM) should sign the summons. It is left to the discretion of the TM whether or not to inform the promoter of the pending summons. If a summons is a third party summons, notice must be given under IRC 7609(a) .

- (8) See IRM 25.5, *Summons*, for additional information on summonses and IRM 1.2.52.2, Delegation Order 25-1, *Summonses, Oaths, Certifications, and Related Functions*.

4.32.2.8.5.1
(06-04-2018)

Summonses for Foreign Records

- (1) Documents related to foreign accounts or entities can often be obtained by use of a summons. Summonses may be issued to individuals or entities who have a presence in the United States (including U.S. territories) and who have control over books and records located abroad. Additionally, see *Chief Counsel Directives Manual (CCDM) 35.4.5, Evidence and Information from Abroad*.

Note: For countries with which the United States has treaties or tax information exchange agreements (TIEAs), examiners generally may request information that is either in the other country's possession or obtainable under the laws of the particular country. For procedures, see IRM 4.60.1.2.1 , *United States-Initiated Specific Requests for Information*.

- (2) If the promoter is acting as agent for an entity or if there is a factual basis for concluding that the promoter controls or possesses foreign-based records (e.g., the promoter is the grantor of a foreign trust or is using a credit card issued by a foreign bank), a court can compel the promoter to produce the summoned books, papers, records, or other data. See *United States v. Wheaton*, 791 F. Supp. 103 (D. N.J. 1992 (the court applied the text articulated in *United States v. Powell*, 379 U.S. 48 (1964))). Other examples of "control" of records abroad include interlocking boards of directors, corporate officers holding positions with each corporation, or direct or indirect ownership.
- (3) Any such proposed summons shall be submitted for pre-issuance review to the appropriate Counsel office. Counsel will then consult with Branches 6 and 7 of the Office of the Associate Chief Counsel (Procedure and Administration). The Office of Associate Chief Counsel (Procedure and Administration) will consult with the Office of Associate Chief Counsel (International), Branch 7, as necessary, particularly in situations where there is a likelihood that the foreign country where the records are located may attempt to "block" compliance or enforcement of the summons (see also, paragraph 6 below). In such cases, the DOJ may also be consulted.
- (4) If the issuance of a summons for foreign information to the taxpayer who has a presence in the United States and who has control over books and records located abroad is unsuccessful, the Service may consider if it is appropriate to obtain foreign information directly in the foreign country by utilizing treaties, conventions and agreements, including tax treaties and TIEAs.
- (5) In situations where the United States has a tax treaty, TIEA or other bilateral or multilateral agreement for the exchange of information with the country where the information is located, the IRS generally will attempt to obtain the foreign information by utilizing such treaty, TIEA or agreement prior to issuance of a summons to a third party for the foreign information. See *Chief Counsel Directives Manual (CCDM) 34.6.3.6.7, Issuance of Summons for Books and Records Abroad*.

- (6) Requests for information to foreign governments under tax treaties and TIEAs must be made through the Office of the Commissioner LB&I. The Commissioner LB&I is the U.S. Competent Authority for treaties and TIEAs and only s/he or those with a delegated authority have the authority to exchange information with a foreign government. Any questions regarding the exchange of information process should be directed to the Manager of Exchange of Information Programs in that office, and any legal questions should be directed to Branch 7 of the Office of Associate Chief Counsel (International). The summoned party may allege that compliance with the summons will violate the law of the country where the books and records are located. In that case, the court will balance the competing interests of the two countries. Field counsel shall coordinate summons enforcement matters with Branch 6 or 7 of Procedure and Administration, and Procedure and Administration will coordinate with Branch 7 of the Office of Associate Chief Counsel (International) with regard to summons enforcement matters involving issues related to tax treaties and TIEAs. See *Chief Counsel Directives Manual (CCDM) 35.4.5, Pre-Trial Activities - Evidence and Information from Abroad*.
- (7) Counsel should be consulted for assistance in preparing summonses to offshore entities that have a presence in the United States. If a foreign trust chooses a foreign branch of a U.S. bank to be its trustee, a summons may be issued to the U.S. bank to produce its branch records. A proposed summons of this type will be subject to review by Counsel.
- (8) A collective entity, such as a corporation or partnership, possesses no Fifth Amendment privilege; therefore, it cannot use that privilege as a defense against production of summoned books, papers, or other data. See IRM 25.5.5.4.1, *Fifth Amendment Privilege Against Self Incrimination*, IRM 25.5.5.4.1.1, *Rights Concerning Partnership and Other Unincorporated Association Books and Records*, and IRM 25.5.5.4.1.2, *Rights Concerning Corporate Books and Records*.
 - a. This applies regardless of the corporation's size, and regardless of whether the summons is addressed to the corporation or to an individual in his representative capacity as a custodian of the collective entity's records. See *Braswell v. United States*, 487 US 99 (1988).
 - b. An agent of a collective entity (including an offshore entity), such as the custodian of corporate records, may not resist a summons for such records on the ground that the act of production will incriminate him in violation of the Fifth Amendment privilege against self-incrimination. See *Braswell*, 487 U.S. at 117-18. Because the agent is acting as the collective entity's representative and not in his individual capacity, the act of production is deemed to be that of the entity, and the government may make no evidentiary use of the "individual act" of production against the individual. See *Braswell*, 487 U.S. at 118.

4.32.2.8.5.2
(06-04-2018)
**Formal Document
Requests**

- (1) A formal document request (FDR) is another method of gathering information from abroad. An FDR is a request issued during an investigation or examination and made after the normal request procedures have failed to produce the requested foreign-based documents. IRC 982(c)(1) . IRC 982, *Admissibility of Documentation Maintained in Foreign Countries*, provides consequences if a taxpayer fails to substantially comply with any FDR for documents.
- (2) IRC 982(c)(1) provides a powerful incentive for a promoter to produce foreign-based documentation. Under specific conditions, see IRC 982(a) , the

appropriate court shall prohibit the introduction of any foreign-based documentation covered by the FDR in a civil proceeding in which the tax treatment of the examined item is an issue. IRC 982 does, however, provide a reasonable cause exception, IRC 982(b) , and allows for a proceeding to quash, IRC 982(c)(2) .

- (3) Examiners should consult with managers and Counsel for the preparation of a FDR and consider issuing a summons concurrently with it. See IRM 4.61.2.1, *Information Reporting and Record Keeping*, and *Chief Counsel Directives Manual (CCDM) 35.4.5.2.1, Formal Document Requests*.

4.32.2.8.5.3
(06-04-2018)

Consent Directives

- (1) An consent directive is a document, signed by a US person, that, without admitting the existence of documents, authorizes and directs a foreign specified person (bank, trustee, or other entity or individual) who has control over documents of the US person, to turn them over to the IRS. A consent directive can only be used to obtain documents located outside the United States. The consent directive says that to the extent the US person has foreign records under the specified person's control the foreign specified person is to release those records to the IRS. A consent directive may be made voluntarily or compelled by court order in a summons enforcement proceeding . A summons issued under IRC 7602 may not be used to compel the taxpayer to execute a consent directive; however, a consent directive may result from summoning the taxpayer to produce the records. Even though the records are not in his possession, the taxpayer does have custody and control over them, and the taxpayer can be ordered to comply with the summons by either producing the books and records himself or by signing a consent directive authorizing the bank to produce the records on his behalf. Should a consent directive be pursued, the IRS should ask that the taxpayer not be released from producing the records until the IRS has received the records from the foreign bank or other record keeper. Consult Counsel before using or accepting an authorization directive.
- (2) The IRS may be able to obtain a court order that compels a promoter to sign a consent directive for releasing foreign bank or trustee records otherwise protected by bank secrecy laws. Consult Counsel for assistance with preparing this document.
- (3) See *Chief Counsel Directives Manual (CCDM) 34.6.3.7, Issuance of Summons for Books and Records Abroad*, for guidance.

4.32.2.8.6
(06-04-2018)

Evidence

- (1) One objective of the investigation is to develop evidence to support whether or not the promoter is harming the Government and their clients. Evidence is generally defined as something that proves a fact and includes properly sworn testimony, documents, photographs, audiotapes and videotapes.
- (2) Knowledge that a promoter's activities are for tax evasion and avoidance purposes is an element of many promoter penalties. Examiners should develop and retain evidence of the promoter's claimed tax expertise.
- (3) Generally, in a court of law, the contents of a document can be proven only by that document, rather than by summaries or testimony about the document. In addition, the original piece of evidence should be produced unless there is a satisfactory explanation why the original cannot be produced. A copy can be provided to the court if properly authenticated. Consequently, great care in handling or preserving information is necessary if it is to be used in court. See

IRM 9.6.4.9, *Admissibility of Evidence at Trial*, for further information.

Examiners should consult with Counsel if questions arise about handling or preserving potential evidence.

- (4) All documents obtained during the investigation should be maintained in the condition in which they were received. For each document received the examiner should record on Form 9984, *Examining Officer's Activity Record*, or its equivalent, the date it was received, from whom it was received, and how it was received (mail, during interview, via fax, etc.).
- (5) Do not make notations or other extraneous marks on any documents received. Examiners are seldom allowed to retain original documents obtained from the promoter, so it is very important to make copies. Mark the back of each copy with the statement "compared to original," then sign and date the document to authenticate it.
- (6) If examiners are allowed to temporarily retain documents for additional examination and/or making copies they should provide a receipt to the promoter for the records. Form 2725-A, *Document Receipt/History and Custody of Documents*, is available for this purpose.
- (7) See IRM 4.10.7.3, *Evaluating Evidence*, for additional information on evaluating evidence.

4.32.2.8.6.1
(06-04-2018)

Seals and Certifications

- (1) IRS records (tax returns or other official documents) must be certified if they are to be used as evidence in court. See IRM 11.3.6, *Seals and Certifications*, for obtaining certified copies of official IRS records. When a record for which certification is requested is located in another office, it is generally preferable to transfer the certification request to the office that has the record, rather than to transfer the record to be certified elsewhere. See IRM 1.2.49.6, *Del. Order 11-5, Rev. 1*, for a list of individuals authorized to certify documents.
- (2) Form 2866, *Certificate of Official Record*, is the cover sheet used for official certifications of documents or records. Attach copies of the certified documents or records to this form.
- (3) Form 4340, *Certificate of Assessments, Payments, Other Specified Matters*, is attached to Form 2866 when certifying transcript information.
- (4) Form 3050, *Certificate of Lack of Record*, can be used in lieu of Form 2866 when certifying a lack of records (for example, no record of a filed return).

4.32.2.8.7
(06-04-2018)

Summary and Closing Conferences

- (1) Summary Conferences:
 - a. A summary conference is a meeting with the promoter held prior to an injunction referral to DOJ. The purpose would be to confirm or clarify IRS's understanding of the facts and ascertain any new defense or rebuttal positions claimed by a promoter.
 - b. If the examiner and Group Manager (in consultation with Counsel if needed) feel that a summary conference would not be worthwhile, one is not required. In addition, in a parallel investigation, if CI has requested no contact with the promoter, then no summary conference should be held.
 - c. If held, possible investigative outcomes can be discussed in general terms, but no definitive statement should be made regarding any final

determinations of the IRS. Discussion of the number or amount of penalties would be deferred until DOJ has had an opportunity to evaluate the injunction referral.

- d. If there are indications of fraud, a summary conference would not normally be held. Examiners should consult the fraud technical advisor (FTA) and make a fraud referral when appropriate.

(2) Closing Conferences:

- a. A closing conference should be offered to the promoter generally at the conclusion of the investigation unless the group manager and Counsel agree that this should not take place. The conclusion means after any injunction action has been taken, after the case has been returned by DOJ or after a decision not to refer it to DOJ has been made. The purpose of this meeting is to discuss penalty assessments, appeal processes and future behavior. LB&I requires closing conferences to be offered in all investigations.
- b. If DOJ accepts the injunction referral, examiners should discuss the timing of assessment of any applicable penalties. In most instances, DOJ recommends suspending penalty assessments until any potential litigation has been finalized.
- c. Examiners send Letter 3829, *Closing Conference Letter for Tax Shelter Promoter Investigations*, to the promoter to offer the closing conference. This letter should be modified to incorporate the specific IRC sections applicable to the investigation. Consider who should attend the closing conference. In some instances, it is advisable to have Counsel attend the closing conference.
- d. If the promoter declines to attend or is nonresponsive to the closing conference letter, the examiner may send the penalty report to the promoter utilizing Letter 5390, *Penalty Explanation*.
- e. Any proposed penalties must be approved in writing by the examiner's immediate supervisor before discussing with the promoter. See IRM 4.32.2.12.1, *Approval of Penalties*.

- (3) Generally, no extension of time shall be granted for scheduled conferences except in extenuating circumstances, although the IRS may at its discretion schedule additional meetings.

- (4) If the promoter declines or fails to attend either the summary or closing conferences, the IRS shall proceed based on the available information.

4.32.2.8.7.1
(06-04-2018)
**LB&I Promoter
Investigations**

- (1) A closing conference is generally scheduled after the examiner and Counsel determines that the evidence establishes that penalties should be asserted or that a suit to enjoin the promoter should be initiated. In making the decision, consider whether:
 - a. All requested documents have been provided by the promoter.
 - b. All documents received have been reviewed by the promoter team.
 - c. All investor lists have been provided.
 - d. Applicable penalties have been determined and computed.
- (2) For LB&I examiners, Form 5701, *Notice of Proposed Adjustment*, should be prepared for the penalty asserted for each transaction. Any proposed penalties must be approved by the promoter team's DFO and subsequently the DFO,

Financial Services, Manhattan, before discussing with the promoter. See IRM 4.32.2.12.1, *Approval of Penalties*.

- (3) Promoters are given the opportunity to present facts or legal arguments as to why a penalty is not appropriate, including “reasonable cause” arguments. The promoter’s position should be obtained in writing, along with any informal protest that the promoter wishes to provide.
- (4) For LB&I IRC 6707 /IRC 6708 investigations, if the investigation is agreed, the promoter team prepares Form 906, *Closing Agreement on Final Determination Covering Specific Matters*. Counsel and the LB&I DFO with jurisdiction over the investigation and LB&I:Financial Services DFO, Manhattan, must be involved in the preparation of this agreement. The agreement finalizes the examination issues permanently. The agreement should also address future compliance of the promoter. The LB&I:Financial Services DFO, Manhattan must execute the agreement on behalf of the IRS.
- (5) For potentially unagreed IRC 6707 and IRC 6708 investigations, examiners may consider the LB&I/Appeals Fast Track Settlement program (Fast Track) if it is applicable to the investigation and the promoter consents. The exam team must receive the approval of the LB&I:Financial Services DFO, Manhattan prior to participating in Fast Track. See IRM 4.32.2.8.7.3, *LB&I Special Procedures - Use of Fast Track*.

4.32.2.8.7.2
(06-04-2018)

LB&I Special Procedures

- (1) Examiners and Counsel attorneys must agree on the appropriate action. Any disagreements must be referred to the respective managers for resolution.
- (2) Examiners, with review by Counsel, prepare a recommendation memorandum to the examiner’s DFO. The DFO’s approval is mandatory for the assertion or non-assertion of promoter penalties. After the DFO’s approval is obtained, the recommendation memorandum is sent to the LB&I Financial Services DFO, Manhattan, for final approval. The memorandum should include:
 - Case Summary and Facts (including the personal history, educational and professional background of the promoter and a discussion of the promotion(s)).
 - Findings (including spreadsheets supporting the penalty calculations, a discussion of the facts that support the promoter’s violation of code provisions and prospects for future compliance, if asserting penalties).
 - Recommendations and conclusions (including the examiner’s and Counsel’s recommendations).
 - Position of the promoter.
 - Appendix of attached exhibits.
 - Other supplemental data.
 - Approval of the Team Manager, Territory Manager, and Industry Director Field Operations (DFO). Digital signatures may be used to document approvals.
- (3) If case is agreed, copies of the Form 906 must be provided for the LB&I:Financial Services DFO Manhattan’s signature.

4.32.2.8.7.3
(06-04-2018)

LB&I Special Procedures - Use of Fast Track

- (1) The exam team may request the use of Fast Track for unagreed IRC 6707 and IRC 6708 examinations. The exam team prepares a memo recommending the resolution of the case using Fast Track and obtains signatures from the Team Manager, Territory Manager and Industry DFO. The memo shall include:

- a. A brief description of the shelter(s), a range of possible penalty resolutions, and support for each resolution position; and
 - b. Recommendation to close the case unagreed if the Fast Track process is unsuccessful.
- (2) The exam team will forward the signed memo and the following documents to the Promoter Program Senior Program Specialist who will submit the package to LB&I:Financial Services DFO Manhattan for review and approval:
 - a. Form 5701
 - b. Form 886-A
 - c. Form 4665
 - d. Promoter's position and exam team's response
 - e. Spreadsheets supporting the penalty computations
- (3) Concurrently with (2) above, the Promoter Program Manager will request Promoter Program Counsel to submit a concurrence memo in support of the exam team's recommendation to the LB&I:Financial Services DFO, Manhattan, via e-mail.
- (4) The LB&I:Financial Services DFO, Manhattan will make the final determination of the recommendations of the exam team. After approval, the LB&I:Financial Services DFO, Manhattan will sign the memorandum and return the documents to the exam team.
- (5) The LB&I:Financial Services DFO, Manhattan shall participate in the mediation or delegate authority to the LB&I:Financial Services Promoter Program Manager.

4.32.2.9
(06-08-2012)

Investigation Outcomes

- (1) Preparer and promoter investigations can result in one or more of the following outcomes:
 - Injunction
 - Assessment of penalties
 - Discontinuation of the investigation
 - Criminal referral
 - Survey

4.32.2.9.1
(06-04-2018)

Injunctions

- (1) During preparer and promoter investigations, examiners gather evidence to determine if false statements were made (promoter) or if the preparer was aiding and abetting in the preparation of an abusive tax return. An injunction referral is warranted if the preparer and/or promoter engages in conduct specified in IRC 7407(b) related to income tax return preparation and/or specified conduct under IRC 7408(c) . In addition, a referral may be appropriate for specified conduct under IRC 7402 for impairing and impeding the proper administration and enforcement of Internal Revenue laws.
- (2) The purpose of an injunction is to stop individuals from further engaging in certain conduct with respect to the preparation of returns or engaging in conduct related to tax shelters and reportable transactions and to prevent the recurrence of the conduct. There is no requirement that the conduct be ongoing but a court may be reluctant to grant the extraordinary remedy of an injunction unless the government can demonstrate that there is a likelihood of recurrence. Factors to consider in assessing the appropriateness of an injunction include:

- Gravity of the harm to the government.
- Extent of the promoter's participation.
- Degree of knowledge.
- Isolated or recurrent nature.
- Promoter's recognition or non-recognition of culpability.
- Likelihood that the promoter's occupation would place them in a position where future violations could be anticipated.

- (3) Injunction actions are separate and apart from any other civil or criminal actions (such as summons proceedings and criminal trials) brought by the government against promoters.
- (4) An injunction should be considered even if the preparer or promoter is criminally prosecuted and sentenced to incarceration, probation, etc. A criminal sentence is punishment for past criminal behavior while an injunction prohibits future behavior.
- (5) See IRM 4.32.2.10, *Injunctive Actions*, for additional information on injunctions.

4.32.2.9.1.1
(06-04-2018)
**Injunctions - Penalty
Assessment**

- (1) If injunctive action is warranted, penalties would also be applicable. Examiners prepare penalty reports and close an investigation as described in IRM 4.32.2.12.10, *Penalty Case Processing Procedures*.
- (2) It is recommended that penalties not be assessed until after the court has concluded litigation. If an injunction is ordered and an appeal is likely, examiners should discuss the timing of the assessment of any proposed penalties with Counsel.
- (3) In some instances, the timing of the penalty assessment may be done earlier or postponed (e.g., jeopardy assessments or parallel investigations). See IRM 4.32.2.7, *Parallel Investigations*, for additional information on coordinating a penalty assessment in parallel investigations.

4.32.2.9.1.2
(06-04-2018)
**Injunctions - No Penalty
Assessment**

- (1) In some rare instances, an examiner in consultation with the group manager and Counsel may determine that the assessment of penalties is not in the government's best interest. For example, when the promoter is deceased and there are no assets in the promoter's estate or in the case of a defunct entity that is out of business. However, if there is clear penalty conduct that is supported by the evidence, then those clearly supported penalties should be applied absent rare instances such as those described about a deceased taxpayer. In these situations, Counsel should be consulted before determining that penalties should not be assessed, but the group manager has responsibility for the final determination.
- (2) Collectibility is not a basis for non-assessment of penalties. Promoters frequently conceal assets and misrepresent their true financial status, making it difficult to immediately determine true collection potential. IRM 5.20.8.5, *IRC 6700 and IRC 6701 Penalty Assessment*, requires revenue officers to advise examiners that the penalty must be assessed regardless of collectibility.
- (3) The group manager must approve all decisions regarding penalties, whether asserted or not. In an LB&I examination, examiners should coordinate the preparation of the report with the LB&I:Financial Services Promoter Program Manager.

- (4) Investigations with no penalty assessments are closed using penalty processing procedures described in IRM 4.32.2.12.10, *Penalty Case Processing Procedures*.

4.32.2.9.2
(06-04-2018)

Penalty Assessment

- (1) If a preparer or promoter engages in conduct or activity subject to penalties under IRC 6694, IRC 6695, IRC 6676, IRC 6700, IRC 6701, IRC 6707, or IRC 6708, penalties will generally be assessed.
- (2) Examiners may recommend asserting penalties regardless of whether injunctive relief is pursued by the government as long as the evidence demonstrates that the preparer and/or promoter engaged in conduct that violates specific penalty code sections.
- (3) Prior to the AJCA, IRC 6707 and IRC 6708 allowed for a reasonable cause exception if the tax shelter organizer or any other person could establish that the failure to comply was due to reasonable cause. See 26 CFR 301.6707-1T and 26 CFR 301.6708-1T . After the AJCA, the reasonable cause exception only applies to IRC 6708. Persons subject to IRC 6707 are not entitled to reasonable cause consideration, but may request rescission of the IRC 6707 penalty under the procedures set forth in Rev. Proc. 2007-21.
- (4) IRC 6751 requires written managerial approval for the assessment of most penalties, including all penalties covered by this IRM and referenced above, by the immediate supervisor of the individual making the determination to assess the penalty or such higher level official as the Secretary may designate. See IRM 4.32.2.12.1, *Approval of Penalties*, and IRM 20.1.1.2.3, *Managerial Approval for Penalty Assessments*.
- (5) Coordinate with the Area ATAT Collection Coordinator based on the location of the promoter whenever the collectibility of a potential penalty is a concern. For a list of ATAT Collection Coordinators, see the collection contact located on *MySB/SE*.

4.32.2.9.2.1
(06-04-2018)

**Penalty Assessment -
No Injunction**

- (1) If an examiner, in consultation with the group manager and Counsel, does not pursue injunctive relief, penalties may still be assessed.
- (2) Injunctive action generally will not be sought if there is insufficient evidence to demonstrate that the specified conduct is likely to recur. Lack of current or ongoing activity alone should not be the basis for failing to seek an injunction. See IRM 4.32.2.9.1, *Injunctions*, for a discussion of factors to consider in determining the potential for future recurrence of the conduct.
- (3) DOJ may decline to pursue injunctive action against a promoter or the court may deny the government's motion for injunctive relief if there is insufficient evidence to demonstrate a reasonable likelihood of recurrence. In such cases, penalties may still be applicable provided there is evidence to show that the promoter engaged in conduct in violation of one or more of the penalty statutes.
- (4) Examiners must use sound judgment when pursuing only penalties. Preparers and promoters may provide self-serving testimony maintaining that they have voluntarily ceased the conduct when, in fact, they continue to advocate abusive schemes, abusive tax shelters, or reportable transactions. Many promoters modify existing promotions to avoid detection by the IRS or become engaged in a new but equally abusive promotion.

- (5) Examiners prepare penalty reports and close the investigation as described in IRM 4.32.2.12.10, *Penalty Case Processing Procedures*.
- 4.32.2.9.2.2
(06-04-2018)
Penalty Assessment – CI Parallel Investigation
- (1) In parallel investigations, CI may request suspending penalty assessments until the conclusion of the criminal investigation. See IRM 4.32.2.7, *Parallel Investigations*, for additional information on coordination of penalty assessments in parallel investigations.
- 4.32.2.9.3
(06-04-2018)
Discontinuations
- (1) A discontinuation of an investigation may occur before or after promoter contact. If no contact has been made with promoter and less than 10 hours has been applied to the investigation, follow survey procedures outlined in IRM 4.32.2.9.5, *Surveys*.
- (2) SB/SE examiners should consult with their group manager, assigned Counsel, AT SPA and the SB/SE LDC prior to discontinuing an investigation.
- (3) LB&I examiners must contact assigned counsel, the LB&I DFO with jurisdiction over the promoter investigation and LB&I Financial Services, DFO, Manhattan prior to discontinuing an investigation. If the promoter has been contacted, examiner must issue a withdrawal letter when closing the investigation. LB&I examiners do not issue the withdrawal letter until approved by the DFO, Financial Services, Manhattan.
- (4) Circumstances that may warrant a discontinuation of an investigation include:
- The individual or entity identified as the AT promoter is in fact not involved in the activity which is corroborated through evidence such as third party testimony.
 - The activity has been proven not to be abusive in nature, and accordingly, would not be subject to penalty under one of the applicable penalty statutes.
 - The promoter is deceased and the operation is defunct.
- (5) Discontinuing a civil investigation is not a **no change** closure and does not preclude the investigation from being reopened if more information becomes available at a later date. The reopening of a civil investigation is not subject to the reopening requirements of an income tax examination.
- (6) See IRM 4.32.2.12.10, *Penalty Case Processing Procedures*, for investigation discontinuation processing procedures.
- 4.32.2.9.4
(06-04-2018)
Criminal Referral
- (1) The SB/SE LDC or LB&I OTSA coordinates all civil promoter investigation cases with CI prior to approval of the investigation. See IRM 4.32.2.4.5, *Coordination with Criminal Investigation (CI)*.
- (2) Examiners should be alert to indicators of fraud throughout their investigation. A Fraud Technical Advisor (FTA) should be contacted if the investigation reveals indicators of fraud. See IRM 25.1.2, *Recognizing and Developing Fraud*, for more information on fraud development.
- 4.32.2.9.5
(06-04-2018)
Survey
- (1) For SB/SE, the decision to survey a promoter investigation should be discussed with the group manager, Counsel and an LDC SPA. The group manager must approve the reason for the survey. LB&I promoter examinations may not be surveyed.

4.32.2.10
(06-04-2018)

Injunctive Actions

- (2) No survey is allowed if there has been any contact with the promoter or more than 10 hours were charged to the case.
- (1) The goal of a promoter investigation is to gather and evaluate evidence to determine if the activity is abusive. Should the evidence indicate an abusive activity, the examiner will initiate the appropriate action to promote compliance, including addressing the tax implications to the clients. Seeking injunctive relief under IRC 7402, IRC 7407, or IRC 7408 can accomplish these goals.
- (2) Examiners gather information during the investigation to determine if the promoter engaged in conduct or activities subject to one or more penalties under IRC 6700, IRC 6701, IRC 6707, or IRC 6708 and whether the activity is ongoing or likely to reoccur, thereby causing irreparable tax harm to the government.
- (3) The IRS should consider injunction actions in investigations where the evidence shows that the promotion is ongoing or is likely to recur and there is irreparable tax harm to the government, even when a criminal investigation has begun. For coordination between civil and criminal cases, see IRM 4.32.2.7, *Parallel Investigations*.
- (4) Failure to make a referral as early as possible may result in continued harm to the government from the promotion. An injunction referral should be made to DOJ if:
 - Evidence has been developed to prove the promoter's engaging in activities subject to penalties or violation of Circular 230 provisions,
 - Evidence of irreparable harm from current and potential or future activities, i.e., involvement with another scheme or promotion, and
 - Evidence that the promoter's conduct is substantially interfering with the proper administration and enforcement of the Internal Revenue laws.
- (5) In some instances, such as when the evidence demonstrates that the activity has ceased and is not likely to recur, the examiner in consultation with the group manager and Counsel may opt to pursue only penalties. However, penalties alone sometimes do not deter future promotions. Injunction referrals including referrals to obtain consent injunctions should always be considered. See IRM 4.32.2.10.4, *Consent Injunctions*.

4.32.2.10.1
(06-04-2018)

Examiner Injunction Referrals

- (1) *Examiner Injunction Referrals* (EIR) are prepared using a specific format. The referral should include detailed information about the promoter and any related promoters, the mechanics of the promotion, and the basis for an injunction recommendation.
- (2) The EIR is organized into five sections:
 - a. Investigation summary
 - b. Facts and findings
 - c. Exhibits
 - d. Investigative agent data
 - e. Witness list
- (3) If several individuals or entities were investigated, the EIR should discuss the involvement of each person or entity. See IRM 4.32.2.10.2, *Related Promoters*.

- (4) Examples of various *Examiner Injunction Referral (EIR)* are available on MySB/SE, *Promoter Investigations* and *Abusive Return Preparers/Exam Aid web page*.

4.32.2.10.1.1
(06-04-2018)
Investigation Summary

- (1) The investigation summary briefly describes the examiner's findings and recommendations. This section is intended to serve as an executive type summary focusing on the highlights of the promotion and is generally limited to one or two pages. Information may be presented in narrative or outline format.
- (2) The investigation summary must include:
 - a. Name and address of person(s) or entities under investigation.
 - b. Basis for the injunction (e.g., false or fraudulent statements, gross valuation misstatement, aiding or abetting the understatement of tax liability, abusive return preparation or a combination of the above).
 - c. Years involved.
 - d. CI involvement
 - e. Recommendations.

4.32.2.10.1.2
(06-04-2018)
Facts and Findings

- (1) The facts and findings section is a comprehensive discussion of the promotion or scheme and the evidence obtained in the investigation.
- (2) The following information is included in this section:
 - a. Promotion background
 - b. Investigation subjects
 - c. Powers of attorney
 - d. Criminal investigation involvement
 - e. Conduct violations
 - f. Key compliance issues
 - g. Size of promotion
 - h. Tax harm to the Government
 - i. Likelihood of recurrence
 - j. Summary of Findings of the investigation
 - k. Recommendations
- (3) When completing the EIR, refer to *Items for Injunction Referral* and *Sample Injunction Referral Letter* for guidance regarding material DOJ is expecting to see included in the EIR, preferred format, naming conventions, and other details.

4.32.2.10.1.3
(06-04-2018)
Examiner Injunction Referral Exhibits

- (1) Exhibits are used to support material facts included in the referral and should be referenced in the narrative section of the referral.
- (2) While not mandated, using a numbering system such as Bates stamping is an efficient way to organize and refer to specific documents and pages in lengthy documents. Evidence is frequently organized by:
 - Witness
 - Type of information
 - Specific items or documents
 - Page number of documents

(3) It is very important throughout the investigation to document the source of the evidence identifying when, how, and from whom it was received. See IRM 4.32.2.8.6, *Evidence*.

(4) If the amount of information is voluminous, consider scanning the information and placing it on a compact disc (CD) or digital video disc (DVD).

4.32.2.10.1.3.1
(06-04-2018)

Tax Harm

(1) Documentation of potential or future tax harm to the government is a critical component of any injunction action. Examiners should include a preliminary computation of tax harm in the EIR.

(2) The computation can be an estimate and does not require completion of client audits. Examiners should provide a clear explanation of the methodology used and any assumptions made in the computations.

(3) If client examinations have been, or are being, conducted, an exhibit identifying the clients, the examination status, and the proposed or estimated tax deficiency should be included in the EIR. This exhibit should be prepared early in the investigative process and updated as new information is secured or as requested by DOJ during the litigation process.

(4) If a tracking code has been assigned to the investigation, a list of ongoing and closed client examinations should be secured. If a tracking code has not been assigned, research should be done using a list of TINs. Examiners should contact the Area PSP AT Coordinator for assistance in securing this information.

4.32.2.10.1.4
(06-04-2018)

Investigating Agent Data

(1) The investigating agent data list contains the contact information of all IRS personnel who were involved with the investigation, including the examiner(s), their respective manager(s), any specialists, Counsel attorney and the Counsel attorney's supervisor.

(2) In parallel investigations, the contact information should also include the name(s) and contact information of the special agent, the supervisory special agent, Criminal Tax (CT) Counsel and the Assistant US Attorney (AUSA), if one is involved.

4.32.2.10.1.5
(06-04-2018)

Witnesses

(1) Witnesses are a critical component of a successful injunction. An alphabetical list of potential witnesses, their contact information and a description of the nature of their testimony should be included in the injunction report.

(2) Memoranda of interviews, affidavits or declarations of potential witnesses should be included as exhibits in the EIR. It is not necessary to include lengthy narrative in the body of the EIR, rather provide brief descriptions and reference to the corresponding exhibit.

4.32.2.10.2
(06-04-2018)

Related Promoters

(1) It is a best practice to consolidate related promoters in one referral to the extent possible. DOJ may elect to:

- File one injunction suit against all parties.
- File separate suits against specific individuals or entities.
- Decline to file a suit against some or all of the related individuals or entities.

- Request that IRS refer additional parties to be included in the injunction suit.

- (2) The decision to consolidate related promoters in one referral is based on many factors, including when cases are identified or investigated, the related promoter's involvement in the activity, and the strength of the evidence.
- (3) The necessity and appropriateness of any further investigative actions on the related promoter should be discussed with the group manager. For LB&I investigations, the LB&I:Financial Services, Promoter Program Manager should be consulted. The decision may be made to assert penalties based on the best available information, discontinue the investigation or proceed with the investigation, depending on the facts and circumstances of the investigation.

4.32.2.10.3
(06-04-2018)

Counsel Injunction Suit Letter

- (1) After receipt of the EIR, Counsel will prepare an injunction suit letter authorizing DOJ to file an injunction suit on behalf of the IRS or to secure a consent injunction. A referral and injunction suit must be made even if the promoter indicated they are willing to enter into a voluntary consent injunction.
- (2) Counsel shall consult the CCDM on coordination requirements.
- (3) All injunction packages are sent to DOJ Tax Division, Civil Trial Division, Central Region regardless of the location of the promoter
- (4) Copies of the referral are sent by Counsel to:
 - SB/SE Division Counsel assigned to AT schemes (without enclosures).
 - Area Counsel, Area 4 (without enclosures).
 - SB/SE Group Manager (without enclosures).
 - SB/SE Lead Development Center
- (5) Injunction referrals must be handled on an expedited basis. These cases are classified as standard referrals.

4.32.2.10.3.1
(06-04-2018)

Pre-Referral Consultation

- (1) Examiners should work closely with Counsel throughout the investigative process. In some investigations, it may be beneficial to engage DOJ prior to sending a formal referral. Counsel can prepare a consultation injunction referral memorandum seeking DOJ advice or assistance in an ongoing investigation. These memos should only be prepared in cases in which DOJ's advice or assistance is essential for furthering the case. Consult with Counsel for additional information about pre-referral consultation with DOJ.

4.32.2.10.3.2
(06-04-2018)

Summons Enforcement Related to Injunctions

- (1) Examiners should report to Counsel any refusal by the promoter or other summoned party to comply with a summons following the procedures outlined in IRM 25.5.10, *Enforcement of Summons*.
- (2) All recommendations for enforcement of IRS summonses issued in connection with promoter investigations are sent to DOJ Tax Division, Civil Trial Section, Central Region. Examiners should notate this information in their summons enforcement request to Counsel since this practice is different than a summons issued in an audit situation or any situation not related to a promoter investigation.

4.32.2.10.4
(06-04-2018)

Consent Injunctions

- (1) The IRS will consider offers by promoters to enter into consent injunction agreements whereby the promoter agrees to a voluntary permanent injunction.
- (2) An injunction referral must be made to DOJ to initiate the consent injunction process. Examiners should work with Counsel on preparing an expedited referral to DOJ.
- (3) A Form 906, *Closing Agreement on Final Determination Covering Specific Matters*, or any other agreement cannot be used as a substitute for a consent injunction.
- (4) If a consent injunction offer is made by the promoter prior to an injunction referral to DOJ, the information requested in all IDRs (see IRM 4.32.2.8, *Promoter Investigation Guidelines*) should still be obtained in the event the promoter does not execute the consent injunction.
- (5) If DOJ enters into negotiations for a consent injunction subsequent to a referral, Counsel and the group manager will participate in all negotiations.

4.32.2.10.5
(06-04-2018)

First Amendment Considerations

- (1) Promoters may claim that the First Amendment to the US Constitution (freedom of speech) prevents the government from obtaining injunctions against them.
- (2) Federal courts can enjoin promoters without violating their First Amendment free speech rights if it is commercial speech, aids or abets a crime, or incites imminent lawlessness.
- (3) The determination of what is deemed to be protected speech is a complex area of law. Examiners should seek assistance from Counsel on how best to address the promoter's First Amendment assertions.
- (4) The EIR and the corresponding Counsel injunction suit letter to DOJ should clearly explain the reasons why the First Amendment does not protect the promoter's activities.
- (5) For additional information on First Amendment issues, see the MySB/SE, *Promoter Investigations*, under "Issues and Procedures".

4.32.2.10.6
(06-04-2018)

Post Injunction Referral Activities

- (1) The injunction referral to DOJ does not conclude the involvement of the examiner in the investigation. Examiners and Counsel will assist DOJ attorneys throughout the case development and litigation process. Counsel should assist as well when complex legal matters are present.
- (2) Litigation support may include:
 - Securing certified copies of client returns.
 - Interviewing new or potential witnesses.
 - Computing or refining computations of estimated tax loss.
 - Gathering evidence of ongoing promoter activity.
 - Testifying in court proceedings.
- (3) Examiners will execute a sworn declaration prepared with the assistance of the DOJ attorney. The declaration is filed with the initial complaint filed by DOJ.

4.32.2.10.6.1
(06-04-2018)
Litigation Holds

- (4) Examiners should contact their PSP AT Coordinator or an AT SPA for assistance with requests from DOJ that will require extensive research or the gathering of substantial documents. (e.g., certified copies of large numbers of client returns).
- (1) When litigation is initiated or is reasonably anticipated, a “litigation hold” on relevant or potentially relevant documents and electronically stored information (ESI) must be established and the steps taken in this regard must be fully documented.
- (2) The Service’s obligation under a litigation hold is to search, identify, preserve, and isolate all documents including ESI related to specific, predictable and identifiable litigation. This obligation supersedes all records management policies that would otherwise result in the alteration or destruction of ESI.
- (3) Counsel will contact the appropriate Service personnel that may possess potentially relevant ESI when a litigation hold is warranted and provide additional instructions at that time.
- (4) In 2006, the Federal Rules of Civil Procedure were amended to establish procedures applicable explicitly to ESI and provide a framework for dealing with the legal and ethical obligations to preserve evidence. ESI includes, but is not limited to:
 - All e-mails and attachments.
 - Word processing, spreadsheets, graphics presentation documents, images, and text files.
 - Any other information stored on hard drives or removable media, meta-data, databases, instant messages, transaction logs, audio and video files, voice mail, web pages, computer logs, text messages, and backup and archived material.
- (5) The timing of the initial litigation hold will depend on whether the Service is a plaintiff or a defendant in a particular matter. When the Service is a plaintiff, the litigation hold should be implemented no later than when Counsel authorizes the filing of a suit by the DOJ. When the Service is a defendant, Counsel must begin implementing the litigation hold procedures upon receipt of a filed complaint.
- (6) Failure to preserve documents and ESI can result in unfavorable discovery orders, sanctions against the government, disadvantage to the government’s position in litigation or exclusion of evidence in favor of the government’s position. It can also result in monetary or contempt sanctions directly against individuals who failed to take appropriate steps to locate and segregate information subject to a litigation hold.
- (7) All notified personnel must continue to maintain and preserve all documents until notified that the hold has been lifted. This is true even if the examiner transfers the case or leaves the Service. Retiring or separating employees must make arrangements for the preservation of the documents prior to their leaving the Service. While the employee and the group manager are responsible for the preservation, promoter investigation examiners should provide this information to Counsel when they learn of any separating employees.
- (8) Generally, the Service personnel are not required to provide the documents and ESI materials at the time of the litigation hold notification. If documents are

later requested as part of the litigation process, Counsel will coordinate with MITS and the impacted personnel to arrange for delivery and review of the documents to DOJ. This practice of gathering documents differs from a FOIA request where the employee identifies and gathers this information in order to be responsive to the FOIA request.

- (9) For additional information, see *Litigation Hold Website*.

4.32.2.11
(06-08-2012)

Disclosure of Reportable Transactions Provisions

- (1) This section provides an overview of IRC 6111 and IRC 6112.

4.32.2.11.1
(06-04-2018)

IRC 6111 - Overview

- (1) Any person who is a material advisor for a reportable transaction as defined under 26 CFR 301.6111-3(b) must file a return as described in 26 CFR 301.6111-3 . Failure to timely disclose or submitting false or incomplete disclosure statements are subject to penalties under IRC 6707. Material advisors must use Form 8918, *Material Advisor Disclosure Statement*, (or successor form) and the form must be completed in the manner provided for in the regulations and the instructions to the form.
- (2) IRC 6111(b)(1) (as amended by the AJCA) defines a material advisor as any person who provides any material aid, assistance, or advice relating to organizing, managing, promoting, selling, implementing, insuring or carrying out any reportable transaction, and who directly or indirectly derives gross income for the advice or assistance in excess of the threshold amount. See IRC 6111(b)(1)(B) , for threshold amounts. The threshold amounts are:
- For reportable transactions other than list transactions, \$250,000 if all clients in the shelter are corporations (looking through any partnerships or trusts) or \$50,000 for all other taxpayers;
 - For listed transactions, these thresholds are reduced to \$25,000 and \$10,000, respectively.
- (3) See 26 CFR 301.6111-3(d) and (e) for the form and content of material advisor disclosure statement and time for providing disclosure.

4.32.2.11.2
(06-04-2018)

IRC 6112 - Overview

- (1) Each material advisor (as defined in IRC 6111, as amended by the AJCA) of a reportable transaction is required to maintain a list identifying each person for whom the advisor acted as a material advisor with respect to that transaction. Lists are retained for seven years following the earlier of the date the material advisor last made a tax statement relating to the transaction or the date the transaction was last entered into, if known. See 26 CFR 301.6112-1(d) for rules regarding entries that have been dissolved or liquidated prior to the expiration of the seven year period.
- (2) Material advisors must furnish this list when requested in writing by the IRS. The revised penalty under IRC 6708 (as amended by the AJCA) applies to requests made after October 22, 2004, for such lists. A material advisor who fails to make the list available within 20 business days of the request is subject to penalties under IRC 6708, as amended.

4.32.2.12
(06-04-2018)

Promoter Penalties

- (1) This section focuses on promoter penalties and the corresponding post-assessment rights relative to the following penalties:
 - IRC 6694, *Understatement of Taxpayer's Liability by Tax Return Preparer*
 - IRC 6695, *Penalties That May Apply to a Tax Return Preparer*
 - IRC 6700, *Promoting Abusive Tax Shelters, Etc.*
 - IRC 6701, *Penalties for Aiding and Abetting Understatement of Tax Liability.*
 - IRC 6707, *Failure to Furnish Information Regarding Reportable Transactions.*
 - IRC 6708, *Failure to Maintain Lists of Advisees with Respect to Reportable Transactions.*
- (2) Additional guidance on promoter penalties can be found in:
 - IRM 20.1.6, *Preparer, Promoter, Material Advisor Penalties.*
 - IRM 20.1.6.4, *IRC 6694 Understatement of Taxpayer's Liability by Tax Return Preparer*
 - IRM 20.1.6.5, *IRC 6695 Penalties That May Apply to a Tax Return Preparer*
 - IRM 20.1.6.13, *Penalty for Promoting Abusive Tax Shelters - IRC 6700.*
 - IRM 20.1.6.14, *Penalties for Aiding and Abetting - IRC 6701.*
 - IRM 20.1.6.16, *Failure to Furnish Information Regarding Reportable Transactions - IRC 6707.*
 - IRM 20.1.6.18, *Failure to Maintain Lists of Advisees with Respect to Reportable Transactions - IRC 6708.*

4.32.2.12.1
(06-04-2018)

Approval of Penalties

- (1) IRC 6751 requires written managerial approval for the assessment of most penalties, including those under IRC 6700, IRC 6701, IRC 6707 and IRC 6708, by the immediate supervisor of the examiner making the determination to assess the penalty or such higher level official as the Secretary may designate. Documentation of the supervisor's approval must be included in writing in the file.
- (2) Managerial approval should only be granted after the examiner has fully developed the facts, completed the workpapers, and clearly established a basis for penalizing the promoter or material advisor.
- (3) In SB/SE investigations, the group manager may want to discuss the penalty case with Counsel prior to closing for assessment. Counsel does not need to approve the penalty assessment.
- (4) In LB&I, after Counsel reviews the investigation case, it is forwarded to the following officials for their review and approval:
 1. Territory Manager
 2. Director, Field Operations (DFO)
 3. Director, Field Operations, Financial Services, Manhattan (LB&I:Financial Services:DFO:M)
- (5) See IRM 20.1.1.2.3, *Managerial Approval for Penalty Assessments*, for additional information.

4.32.2.12.2
(06-04-2018)

**Collection Statute of
Limitations**

- (1) The 10-year collection statute of limitations begins on the day after the penalty is assessed.

4.32.2.12.3
(06-04-2018)

**IRC 6694 -
Understatement of
Taxpayer's Liability by
Tax Return Preparer**

- (1) This section includes the following:
 - a. IRC 6694(a), Understatement Due to Unreasonable Positions
 - b. IRC 6694(b), Understatement Due to Willful or Reckless Conduct.
- (2) IRC 6694(a) deals with understatements due to unreasonable positions and states:
 1. In general, if a tax return preparer -
 - a. prepares any return or claim of refund with respect to which any part of an understatement of liability is due to a position described in paragraph (2), and
 - b. knew (or reasonable should have known of the position

such tax return preparer shall pay a penalty with respect to each such return or claim in an amount equal to the greater of \$1,000 or 50 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.
- (3) IRC 6694(b) deal with understatements due to willful or reckless conduct and states:
 1. In general - Any tax return preparer who prepares any return or claim for refund with respect to which any part of an understatement of liability is due to a conduct described in paragraph 2) shall pay a penalty with respect to each such return or claim in an amount equal to the greater of -
 - a. \$5,000 or
 - b. 75 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.
- (4) Return preparer penalties assessed as a result of an authorized AT investigation have special procedures. See *Return Preparer Penalty Job Aid* for instructions.
- (5) When considering which penalty applies to the facts and circumstances of an investigation, consideration must be given to all relevant factors including current Court decisions regarding application of the knowledge standard. It may be prudent to discuss which penalty is most fitting to the specific facts of the investigation with assigned Counsel.

4.32.2.12.3.1
(06-04-2018)

**Assessment Statute of
Limitations**

- (1) The statute of limitations on assessment of penalties depends on the applicable code section:
 - a. IRC 6694(a) expires three years from the later of the due date of underlying related return or the date the return was filed.
 - b. There is no statute of limitations on assessment for IRC 6694(b).

4.32.2.12.3.2
(06-04-2018)
Computation of Penalties

- (1) SBWOTA increased the IRC 6694(a) penalty for understatements due to unreasonable positions from \$250 to the greater of \$1,000 or 50 percent of the income derived (or to be derived) by the tax return preparer from the preparation of a return or claim with respect to which the penalty was imposed.
- (2) SBWOTA increased the IRC 6694(b) penalty to the greater of \$5,000 or 50 percent of the income derived (or to be derived) by the tax return preparer with respect to returns, amended returns, and claims for refund prepared on or after May 26, 2007.
- (3) The PATH Act increased the IRC 6694(b) penalty to the greater of \$5,000 or 75 percent of income derived (or to be derived) by the tax return preparer with respect to returns, amended returns, and claims for refund prepared for tax years ending after December 18, 2015.
- (4) If both IRC 6694(a) and IRC 6694(b) penalties apply to tax return preparer, the IRC 6694(b) penalty amount must be reduced by the IRC 6694(a) penalty amount per IRC 6694(b)(3), *Reduction in Penalty*.
- (5) Examiners should ensure that the combined assessment of IRC 6694(a) and IRC 6694(b) penalties against a preparer do not exceed the greater of \$5,000 or 75 percent of the income derived (or to be derived) by the tax return preparer with respect to returns, amended returns, and claims for refund prepared for tax years ending after December 18, 2015.

4.32.2.12.3.3
(06-04-2018)
Appeal Rights for IRC 6694 Penalties

- (1) 26 CFR 1.6694-4(a)(1) allows for pre-assessment appeal rights of IRC 6694 penalties. Although the regulation only relates to IRC 6694 penalties, examiners will follow the same guidelines for IRC 6695 penalties. IRC 6694 and IRC 6695 penalties will have pre-assessment appeal rights.
- (2) Examination sends the return preparer a 30-day letter, Letter 1125, *Transmittal of Examination Report*, with an examination report and Pub 5, *Your Appeal Rights and How to Prepare a Protest if You Don't Agree*. If there is no timely response to the letter, the penalty is assessed. Pre-assessment appeals consideration will be granted if requested.
- (3) Short statute cases - If the statutory period for assessment is about to expire and the preparer will not agree to an extension, the penalty will be assessed. If the preparer has not previously had the opportunity to request a hearing with Appeals, the preparer, upon request, will be provided post-assessment appeal rights in the same way pre-assessment appeals rights would have been provided. Examiners will advise return preparers that the period for filing a claim for refund under IRC 6694(c), *Extension of Period of Collection Where Preparer Pays 15 Percent of Penalty*, is not extended by a post-assessment appeal. Examiners will not submit preparer penalty cases to Appeals if less than 365 remain on the statute of limitations when received by Appeals. In these instances, examiners will first solicit an extension of the statutory period for assessment. See IRM 20.1.6.21, *Statute of Limitations* for additional information.
- (4) Underlying tax cases - Unagreed cases. Some penalties are related to positions taken or items reported on underlying tax returns (the related tax return). In general, an unagreed penalty case will not be sent to Appeals before the related tax return is submitted to Appeals. Examination will include in the preparer case file information on the current status and location of the related return.

(5) See IRM 8.11.3, *Return Preparer Penalty Cases* for additional information.

4.32.2.12.4
(06-04-2018)

**IRC 6695 - Penalties that
May Apply to a Return
Preparer**

- (1) Commonly referred to as identification penalties, these are rarely assessed in abusive promoter investigation cases but are available if determined to be applicable.
- (2) This table describes the available penalties and rates, adjusted for inflation:

IRC	Title	Tax Years 2014 & prior (Base Rate)	Tax year 2015	Tax Year 2016	Tax Year 2017	Tax Year 2018
6695(a)	Failure to Furnish Copy to Taxpayer	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$26,000 max
6695(b)	Failure to sign return	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$26,000 max
6695(c)	Failure to Furnish Identifying Number	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$26,000 max
6695(d)	Failure to Retain Copy or List	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,000 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$25,500 max	\$50 per return or claim, \$26,000 max
6695(e)	Failure to File Correct Information Returns	\$50 per return and item in return, \$25,000 max	\$50 per return and item in return, \$25,000 max	\$50 per return and item in return, \$25,500 max	\$50 per return and item in return, \$25,500 max	\$50 per return or claim, \$26,000 max
6695(f)	Negotiation of Check	\$500 per check, no maximum	\$505 per check, no maximum	\$510 per check, no maximum	\$510 per check, no maximum	\$520 per check, no maximum
6695(g)	Failure to Exercise Due Diligence	\$500 per return or item in return, no maximum	\$505 per return or item in return, no maximum	\$510 per return or item in return, no maximum	\$510 per return or item in return, no maximum	\$520 per return or item in return, no maximum

- (3) See IRM 20.1.6.5, *IRC 6695 Penalties That May Apply to a Tax Return Preparer*, for details regarding the application and computation of each penalty.
- (4) See the *Return Preparer Penalty Job Aid* for directions regarding how to process the penalties.

4.32.2.12.5
(06-04-2018)
**IRC 6700 - Promoting
Abusive Tax Shelters**

- (1) IRC 6700, *Promoting Abusive Tax Shelters, Etc.*, permits assertion of penalties against any person who:
 - Organizes or assists in the organization of a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, or
 - Participates (directly or indirectly) in the sale or any interest in an entity or plan or arrangement and
 - Makes or furnishes or causes another person to make or furnish a false or fraudulent statement about any material matter or a gross valuation overstatement.
- (2) Penalties should usually be assessed after the permanent injunction is obtained if there is not an on-going parallel investigation. See IRM 4.32.2.9.2.2, *Penalty Assessment - CI Parallel Investigation*.
- (3) Penalties under IRC 6700 are assessed and collected in the same manner as taxes. See IRC 6671, *Rules for Application of Assessable Penalties*.
- (4) It is not necessary to have a return filed in order to assess IRC 6700 penalties. The activity is the "sale or organization" of a plan or arrangement. Examiners need not prove the promoter's clients actually used the promotion, only that if the client had utilized the promotion, there would have been tax harm to the government. The statute requires potential, not actual, tax harm to the government.
- (5) An IRC 6700 penalty can be imposed in addition to any other penalty, except it cannot be assessed on the same document on which an IRC 6701 penalty is applied.
- (6) See IRM 20.1.6.13, *Penalty for Promoting Abusive Tax Shelters- IRC 6700*, for more information.

4.32.2.12.5.1
(06-08-2012)
**Assessment Statute of
Limitations**

- (1) There is no assessment statute of limitations for IRC 6700. An IRC 6700 penalty can be assessed at any time for each specific act of organizing and/or selling interests in a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement.

4.32.2.12.5.2
(06-04-2018)
**Computation of IRC
6700 Penalties**

- (1) For activities occurring after October 22, 2004, involving material false or fraudulent tax statements, the IRC 6700 penalty is equal to 50 percent of the gross income derived (or to be derived) by the promoter from the following activities:
 - a. Organizing or assisting in the organization of a partnership or other entity, any investment plan or arrangement or any other plan or arrangement.
 - b. Participating (directly or indirectly) in the sale of an interest in any entity, plan or arrangement in a partnership or other entity, any investment plan or arrangement, or any other plan or arrangement.

- (2) For all activities that involve gross valuation overstatements as defined in IRC 6700(b)(1) , the penalty is \$1,000, or if the person establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person for each activity.
- (3) When the penalty is based upon gross income from an activity (i.e., statement described in IRC 6700(a)(2) , examiners must compute the gross income based on the best available information. For example, a promoter's scheme used limited liability companies (LLCs) and trusts to divert income. The examiner can prove the promoter created 40 LLCs, 25 of which were used by known clients in the scheme. The examiner also can prove 4 of the 25 clients paid \$1,000 to the promoter. Gross income to be derived from the scheme was \$40,000 (40 LLCs X \$1,000 minimum per package), so the penalty is \$20,000 (50% of the gross income).

4.32.2.12.6
(06-04-2018)

IRC 6701 - Penalties for Aiding and Abetting Understatement of Tax Liability

- (1) IRC 6701, *Penalties for Aiding and Abetting Understatement of Tax Liability*, permits assertion of penalties against persons who help others understate their tax liabilities. A person who aids, assists in, procures, or advises others regarding the preparation or presentation of any portion of a return, affidavit, claim or other document who knows (or has reason to believe) that the document will be used in connection with any material matter arising under the IRC, and who knows will result in an understatement of another person's tax liability, may be liable for penalties under IRC 6701.
- (2) Consideration should be given as to whether to assert IRC 6701 or IRC 6694(b) given the facts and circumstances of the investigation. There is significant difference in the knowledge standard applied by the Courts to the two penalties, and so a discussion of that factor with Counsel should be held prior to determining which penalty to apply.
- (3) Penalties should usually be assessed after the permanent injunction is obtained if there is not an on-going parallel investigation. Even then, the examiner must ensure that these penalties are well developed because any failure to sustain these penalties could lead to a motion to have the court vacate the injunction because the related penalty conduct could not be sustained by the Government. See IRM 4.32.2.9.2.2, *Penalty Assessment - CI Parallel Investigation*.
- (4) Penalties under IRC 6701 are assessed and collected in the same manner as taxes. See IRC 6671, *Rules for Application of Assessable Penalties*.
- (5) IRC 6701 penalties generally can be imposed in addition to any other penalty, except that the penalty cannot be assessed on the same document for which a penalty under either IRC 6700 or subsections (a) or (b) of IRC 6694 is applied.
- (6) See IRM 20.1.6.14, *Penalties for Aiding and Abetting - IRC 6701*, for more information.

4.32.2.12.6.1
(09-23-2011)

Assessment Statute of Limitations

- (1) There is no assessment statute of limitations for IRC 6701. The penalties can be assessed at any time.

4.32.2.12.6.2
(06-08-2012)
**Computation of IRC
6701 Penalties**

- (1) IRC 6701 imposes a penalty in the amount of:
 - a. General - \$1,000 with respect to each document.
 - b. Corporations - \$10,000 for each document if the return, affidavit, claim, or other document relates to the tax liability of a corporation; S-corporations are not subject to this higher penalty amount.
- (2) IRC 6701 penalties cannot be asserted or assessed if a penalty under IRC 6700 or IRC 6694(a) or IRC 6694(b) is asserted for the same document.

4.32.2.12.7
(06-08-2012)
**IRC 6707 - Failure to
Furnish Information
Regarding Reportable
Transactions**

- (1) For material advisors required to disclose reportable transactions under IRC 6111 (as amended by AJCA) for material aid, assistance or advice given after October 22, 2004:
 - a. IRC 6707, *Failure to Furnish Information Regarding Reportable Transactions*, as amended by the AJCA, permits the assertion of penalties against any person who fails to file an information return with respect to a reportable transaction timely, or files a false or incomplete return, as required by IRC 6111(a). IRC 6707, as amended by the AJCA, is effective for returns the due date for which is after October 22, 2004.
- (2) For tax shelter registrations due before October 23, 2004:
 - a. Pre-AJCA IRC 6707, *Failure to Furnish Information Regarding Tax Shelters*, permits the assertion of penalties against any person who failed to register a tax shelter timely, or filed a false or incomplete registration, as required by pre-AJCA IRC 6111(a).
- (3) IRC 6707 penalties can be applied in addition to any other penalty allowed by law.
- (4) See IRM 20.1.6.16, *Failure to Furnish Information Regarding Reporting Transactions - IRC 6707*, for more information on IRC 6707 penalties.

4.32.2.12.7.1
(06-04-2018)
**Assessment Statute of
Limitations**

- (1) For material advisors required to disclose reportable transactions for advice given after October 22, 2004 (post-AJCA of 2004), IRC 6707 penalties for failing to file an information return timely or for filing false or incomplete information on a return required by IRC 6111(a) must be assessed within three years of the filing of return or the return with the false or incomplete information.
- (2) For tax shelters required to be registered before October 23, 2004 (pre-AJCA of 2004):
 - a. For organizers, IRC 6707(a)(1) penalties for failing to register a tax shelter or for filing a false or incomplete registration are not subject to an assessment statute of limitation.
 - b. For clients, IRC 6707(b)(2) penalties for failing to include a tax shelter registration number on a return must be assessed within three years of filing the return with the missing identification number.

4.32.2.12.7.2
(06-04-2018)
**Computation of IRC
6707 Penalties**

- (1) For material advisors required to disclose reportable transactions for which material aid, assistance, or advice was given after October 22, 2004 (post-AJCA of 2004):

- a. IRC 6707(b)(1) imposes a penalty of \$50,000 for failing to file an information return regarding a reportable transaction (other than a listed transaction) timely or for filing a false or incomplete return.
- b. IRC 6707(b)(2) imposes a penalty for failing to timely file an information return regarding a listed transaction before the date prescribed, or for filing a false or incomplete return. The penalty is the greater of 50 percent (75 percent in the case of an intentional failure) of the gross income derived from any aid, assistance, or advice provided before the date the return is filed regarding the listed transaction or \$200,000.
- c. The term "reportable transaction" is defined in IRC 6707A(c)(1) , and is any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under IRC 6011, such transaction is of a type that the Secretary determines has a potential for tax avoidance or evasion.
- d. The term "listed transaction" is defined in IRC 6707A(c)(2) , and is a reportable transaction which is the same as or substantially similar to a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of IRC 6011.

- (2) See IRM 20.1.6.16, *Failure to Furnish Information Regarding Reportable Transactions - IRC 6707*, for further information on IRC 6707 penalties.

4.32.2.12.8
(06-08-2012)
IRC 6708 - Failure to Maintain List of Advisees With Respect to Reportable Transactions

- (1) For IRS requests made after October 22, 2004, post-AJCA IRC 6708, *Failure to Maintain Lists of Advisees With Respect to Reportable Transactions*, permits asserting penalties for failing to comply with the list-maintenance requirements against:
 - a. A principal organizer, organizer, manager, or seller of a tax shelter who was required to maintain a list of investors under IRC 6112 (prior to amendment by the AJCA of 2004) for interests sold in investments before October 23, 2004; and
 - b. A material advisor with respect to a reportable transaction who was required to maintain a list of advisees under IRC 6112, as amended by AJCA of 2004 for transactions with respect to which material aid, assistance, or advice is provided after October 22, 2004.
- (2) IRC 6708 penalties can be applied in addition to any other penalty allowed by law.
- (3) See IRM 20.1.6.18, *Failure to Maintain Lists of Advisees with Respect to Reportable Transactions - IRC 6708*, for more information.

4.32.2.12.8.1
(06-04-2018)
Assessment Statute of Limitations

- (1) For material advisors required to disclose reportable transactions for advice given after October 22, 2004 (post-AJCA of 2004), IRC 6708 penalties for failing to make available the list of advisees regarding reportable transactions are not subject to a statutory period of limitation for assessment.
- (2) For tax shelters required to be registered before October 23, 2004 (pre- AJCA of 2004), IRC 6708 penalties for failing to maintain a list of clients in potentially abusive tax shelters are not subject to a statutory period of limitations for assessment.

4.32.2.12.8.2
(06-04-2018)
**Computation of IRC
6708 Penalties**

- (1) For advisee lists required to be maintained by material advisors after October 22, 2004 regarding reportable transactions and investor lists required to be maintained by principal organizers, organizers, managers, or sellers before October 23, 2004, for which a request for that list was made after October 22, 2004:
 - a. Failure to make lists of advisees/clients available to the IRS after the date of a written IRS request as required by IRC 6112 is subject to penalty.
 - b. For requests made after October 22, 2004, the penalty is \$10,000 for each day the list is not furnished after the 20th business day of an IRS written request.
 - c. This penalty can be imposed in addition to any other penalty provided for by law.
 - d. The penalty is not imposed if the failure is due to reasonable cause.
 - e. For requests made before October 22, 2004, the penalty is \$50 for each person with respect to whom there is a failure, up to \$100,000.

4.32.2.12.9
(06-08-2012)
Post-Assessment Rights

- (1) This section explains the post-assessment process for promoter penalties and the promoter's rights.
- (2) After assessment of the penalties, promoters receive a penalty assessment notice and demand for payment. If the promoter pays the penalties, then the promoter may file a claim for refund.
- (3) Promoter rights differ depending on whether the penalties are assessed under IRC 6700, IRC 6701, IRC 6707, or IRC 6708.

4.32.2.12.9.1
(06-04-2018)
**Appeals for IRC 6700
and IRC 6701**

- (1) There are no pre-assessment appeal rights for IRC 6700 and IRC 6701 penalties.
- (2) IRC 6703(b) specifically states that deficiency procedures used for income and other types of tax as provided for by Subchapter B of Chapter 63 of the IRC do not apply with respect to the assessment or collection of IRC 6700 and IRC 6701 penalties.
- (3) IRC 6700 and IRC 6701 penalties may be challenged by following the special claim for refund procedures.

4.32.2.12.9.1.1
(06-04-2018)
**Special Claim
Procedures for Penalties
Under IRC 6694(b), 6700
and IRC 6701**

- (1) A CP 15, *Notice and Demand* letter is sent to the promoter upon assessment of the penalties advising the promoter of the special claim procedures pursuant to IRC 6703(c) .
- (2) IRC 6703(c)(1) allows the promoter to pay at least 15% of the amount of the penalty within 30 days and file a claim for refund of the amount paid using Form 6118, *Claim for Refund of Tax Return Preparer and Promoter Penalties*.
- (3) If the claim for refund is disallowed and a written request for Appeals consideration is received timely, Appeals may consider the IRC 6703 claim for refund in the same manner as any other claim for refund, except where the penalty is protested on moral, religious, political, constitutional, conscientious, or similar grounds.
- (4) IRC 6703(c)(2) allows a promoter to begin a proceeding in United States District Court by filing suit within 30 days after the day that a claim for refund is

disallowed or within 30 days after the expiration of 6 months after the day that a claim for refund was filed, whichever is earlier.

- (5) Collection action is suspended pending the final resolution of any court proceeding.
 - a. Under IRC 6703(c) collection by levy activity and the running of the statute of limitation on collection by levy are suspended during the period which the Secretary is prohibited from collecting by levy or a proceeding is in court.
 - b. The examiner assigned the claim will request a transcript (TXMODA or IMFOLT) to validate that TC 470/CC 95 is present to stay collection activity on the Master File Tax (MFT) module 55 for individuals or MFT 13 module for entities. If TC 470 is not present, the examiner will complete Form 3177 for each year and e-mail it to Collection Centralized Case Processing at *CTR PHI CS GCP. The examiner should follow-up in two weeks to ensure the codes have posted and document these actions on the activity record.
 - c. When closing special claims, consideration must be given to the proper time to reverse the collection stay. For an agreed closure, the examiner will complete Form 3177 requesting input of TC 472, CC 95 for each year and e-mail it to Collection Centralized Case Processing at *CTR PHI CS GCP.
 - d. For unagreed special claims, the examiner uses Form 3198, *Special Handling Notice for Examination Case Processing*, to flag the special claim case for the reversal of the TC 470, CC 95. The "Other Instructions" item is checked in the Special Features section and the following explanation should be added: Form 3177, *Notice of Action for Entry on Master File*, with TC 472 CC 95 is to be completed by the function concluding the special claim and e-mailed to Collection Centralized Case Processing at *CTR PHI CS GCP for processing.
- (6) See IRM 4.32.2.12.10.3.2.5, *Claims for Refunds Procedures - SB/SE*, for instructions and additional information on addressing claims for refund.

4.32.2.12.9.2
(06-04-2018)
**Appeals for IRC 6707
and IRC 6708
Assessments**

- (1) Post-assessment appeal procedures apply to IRC 6708 penalties. See IRM 20.1.1.4.1.2, *Post-Assessment Appeals* and IRM 8.11.7, *Penalties Worked in Appeals, Abusive Transaction Penalties*. There are no pre-assessment appeal rights for IRC 6708.
- (2) Pre-assessment and post-assessment appeal procedures apply to IRC 6707 penalties:
 1. 1. Pre-Assessment – Applies to penalties assessed after October 22, 2004, the implementation date of the American Jobs Creation Action (AJCA) of 2004.
 2. 2. Post-Assessment – Applies to penalties before the AJCA.
- (3) Promoters may request from Appeals an abatement of the IRC 6708 penalty for reasonable cause within 30 days of receiving the notice and demand for payment. The request must be in writing. Penalties arising under IRC 6707 for failure to comply with IRC 6111 after October 22, 2004, may not be abated on grounds of reasonable cause. They may be abated on grounds that there was

not a failure to comply with IRC 6111(a) . The penalty can also be rescinded for non-listed reportable transactions. See Rev. Proc. 2007-21, 2007-9 IRB 613.

- (4) Promoters are not required to pay any portion of the IRC 6707 or IRC 6708 penalty before requesting abatement.
- (5) If the penalty is not abated by Appeals, the promoter must make a minimum payment of \$10,000 before filing a claim for refund on Form 6118 *Claim for Refund of Tax Return Preparer and Promoter Penalties*. The claim is assigned to the field for consideration. Promoters may not file a refund suit:
 1. Before 6 months from the date of filing the claim for refund, unless the IRS acts on the claim, nor
 2. After two years from the date of mailing a notice of claim disallowance.

See IRC 6532, *Periods of Limitation on Suits*. Late filed claims will be disallowed in full.

4.32.2.12.10
(09-23-2011)

Penalty Case Processing Procedures

- (1) This section discusses writing a penalty report, case file assembly, and closing procedures for promoter investigations.

4.32.2.12.10.1
(06-04-2018)

Penalty Report

- (1) The penalty report is a narrative summary of the facts and conclusions of the investigation, including which persons or entities are liable for penalties, and the amount of penalties to be assessed against each person or entity.
- (2) In an SB/SE investigation, Form 886-A , *Explanation of Items* may be used for the penalty report following the report-writing guidelines in IRM 4.10.8.12.4 , *Explanation of Items*. If an examiner injunction report (EIR) was prepared, it can be used as the basis for preparing the penalty report removing non-pertinent information and updating for new information secured during the injunction proceedings.
- (3) In SB/SE investigations, examiners can prepare a single, comprehensive report (addressing all subjects of the investigation, all applicable penalties, and all years) and place a photocopy of this report in each related penalty case file.
- (4) In an LB&I examination, examiners should coordinate the preparation of the penalty report with the LB&I:Financial Services Promoter Program Manager.

4.32.2.12.10.1.1
(06-08-2012)

Penalty Computations

- (1) The penalty report must include a detailed penalty computation. The penalty computation must contain enough information and supporting documentation to explain the basis for determining whether penalties are warranted. Keep in mind that this material will be used to defend the penalty assessment in Appeals and possibly in court.
- (2) For each person who will be assessed a penalty, there must be a separate penalty computation for each year, and each computation must agree with the assessment shown on Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*.
 - a. Form 8278 is an adjustment document used for the manual assessment or abatement of miscellaneous civil penalties. The penalty reference number (PRN) from the form is keyed in with the dollar amount to the

proper master file tax account (MFT 13 for BMF, MFT 55 for IMF). The resultant TC 240 with the PRN indicates a miscellaneous civil penalty assessment. The PRN dictates the language in the CP 15 (IMF) or CP 215 (BMF), *Notice of Demand*, that provides an explanation of the penalty being assessed, the amount due, and the taxpayers recourse in contesting the assessment or paying the balance due.

- b. Always use the most current version of Form 8278 available from the electronic publishing website.

4.32.2.12.10.1.2
(06-04-2018)

Notification of Penalty

- (1) There are no pre-assessment appeal rights for IRC 6700 and IRC 6701 penalties, but prior to closing the promoter investigation and assessing the penalties the examiner will either offer the promoter a closing conference using Letter 3829, *Closing Conference Letter for Tax Shelter Promoter Investigations* and provide an explanation of the penalty assessment to the promoter(s) who will be assessed a penalty or send the promoter a penalty report using Letter 5390, *Penalty Explanation*. The timing of the notification will vary depending on the outcome of the investigation. See IRM 4.32.2.12.9.1, *Appeals for IRC 6700 and IRC 6701* and IRM 4.32.2.8.7, *Summary and Closing Conferences*.
- (2) While normal deficiency procedures do not apply to some penalties assessed as a result of the promoter investigations, the examiner should consider any defense or rebuttal positions the promoter may offer. The examiner will generally provide the penalty report and computation to the promoter in advance of the closing conference (if one is held) in order to facilitate that process. If the promoter declines the closing conference or fails to show for it, the examiner will mail the penalty report if not previously provided. For SB/SE investigations, Letter 5390, *Penalty Explanation* may be used to provide the penalty report and computation to the promoter. If no closing conference will be held, the examiner should allow the promoter a reasonable time frame (generally no more than 15 days) to respond.
- (3) For SB/SE examinations, Letter 5390, *Penalty Explanation* may be used to provide the penalty report and computation to the promoter, if no closing conference will be held.
- (4) The timing of this action should take into consideration the needs of all interested parties, such as DOJ and CI. See IRM 4.32.2.9.1, *Injunctions* and IRM 4.32.2.9.2.2, *Penalty Assessment - CI Parallel Investigation*, for additional information.
- (5) Examiners may use the EIR as the penalty report with the following modifications:
 - Delete all references to parallel investigations or other CI involvement. If the promoter was convicted of a crime, this information can remain in the report.
 - Delete confidential informant information, including the existence of an informant.
 - Except with respect to the person who will receive the penalty explanation, remove all tax return information as defined in IRC 6103 of other individuals, including clients.
 - Remove references to other promoters, sub-promoters, or facilitators unless this information is necessary to explain the penalty assessment.

- If the penalty report covers more than one person, review the entire report for other disclosure issues. See IRC 6103, *Confidentiality and Disclosure of Returns and Return Information*.
 - Delete any other sensitive information that should not be disclosed.
- (6) The penalty report must include a computation of the penalty assessment against the specific promoter.
- (7) The penalty report and computations sent to a promoter should not contain the taxpayer identification numbers (SSN or EIN) of any persons other than the person to whom the explanation is sent. Other tax return information (such as full names, addresses, telephone numbers, or other information that can uniquely identify a person) of other persons should be included in the explanation only if an exception to IRC 6103 is applicable and the information is necessary to explain the liability for the penalties. See IRC 6103, *Confidentiality and Disclosure of Returns and Return Information*.

4.32.2.12.10.2
(06-04-2018)
**Investigation Case File
Assembly**

- (1) Investigation case files include the following:
- a. IRC 6700 /IRC 6701 Investigation Workpaper or Form 4318, *Examination Workpapers Index*.
 - b. Form 886-A , *Explanation of Items*.
 - c. Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*.
 - d. Form 3198, *Special Handling Notice for Examination Case Processing*.
 - e. Form 3244-A , *Payment Posting Voucher - Examination* (if applicable).

4.32.2.12.10.2.1
(06-04-2018)
**IRC 6700 / IRC 6701
Investigation Workpaper
or Form 4318,
Examination
Workpapers Index**

- (1) Examiners can utilize the *IRC 6700 Investigation Workpaper* or Form 4318 to summarize the investigation information and applicable penalties.
- (2) Generally, the *IRC 6700 Investigation Workpaper* is better suited than Form 4318 for an SB/SE promoter investigation. This workpaper is available on My SB/SE, *Promoter Investigations*.
- (3) All documents and information gathered during the investigation, internal research conducted, the EIR (if referred to DOJ), litigation documents and detailed penalty computations with supporting documentation for each penalty should be included in the workpapers.

4.32.2.12.10.2.2
(06-04-2018)
**Form 886-A -
Explanation of Items**

- (1) Form 886-A , *Explanation of Items*, should be used to explain the penalty adjustments. The EIR can be used as a base for the penalty report with the proper adjustments to remove information not relevant to the penalties.
- (2) The penalty report should follow the standard format of:
- Issue
 - Facts
 - Law
 - Position of Promoter (if known)
 - Conclusion
 - Exhibits
- (3) See report-writing guidelines in IRM 4.10.8.11.4, *Explanation of Items* for further discussion of format.
- (4) The penalty report should also specify:

- The name of the person or entity the penalty will be assessed upon.
 - The taxpayer identification number (TIN) of that person or entity.
 - The year or period of the assessment.
 - The type of penalty to be assessed.
 - The amount of the penalty.
 - The penalty computation.
- (5) A detailed explanation and computation of the penalties, including a listing of clients and penalties per client or evidence of the gross income derived, or to be derived from the promoter activity, should be included as an exhibit to the penalty report.
- (6) Examiners should number each page of the document with the page number and the total number of pages (e.g., 1 of 5). Page numbers help future users of the reports know whether they have a complete document.
- (7) LB&I examiners should prepare Form 886-A using the following format:
- a. Issue
 - b. Facts
 - c. Law
 - d. Position of Promoter (if known)
 - e. Conclusion
 - f. Exhibits

4.32.2.12.10.2.3
(06-04-2018)

**Form 8278 - Assessment
and Abatement of
Miscellaneous Civil
Penalties**

- (1) Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*, is used for assessment and abatement of miscellaneous civil penalties. Examiners should complete the Form 8278 following the instructions on the form.
- (2) A separate form is required for each type of penalty and each penalty period; however, multiple assessments of the same penalty for a single period may be consolidated.
- (3) For IRC 6700 and IRC 6701 penalties, the tax period is a calendar year period (12/31/XXXX) for all taxpayers, including fiscal year filing taxpayers. The penalty is imposed for actions during the calendar year.
- (4) For IRC 6707 and IRC 6708 penalties, the tax period used on Form 8278 is the period that the registration or disclosure was required to be filed or maintained.
- (5) If a penalty is assessed against an individual, use MFT 55; if it is assessed against a business entity, use MFT 13.
- (6) A statute date should not be entered on Form 8278 unless there is a corresponding statute of limitations for the penalty. See IRM 4.32.2.12, *Promoter Penalties*, and IRM 25.6, *Statute of Limitations*.

4.32.2.12.10.2.4
(06-04-2018)

**Form 3198 - Special
Handling Notice for
Examination Case
Processing**

- (1) Form 3198, *Special Handling Notice for Examination Case Processing*, is attached to the outside cover of the investigation case file.
- (2) A notation "Civil Penalty Assessment IRC xxxx," citing the applicable penalty code section(s) should be made on the Form 3198.

- (3) If the promoter does not pay the aggregate balance due or make satisfactory arrangements to pay, attach a *Special Handling Alert for Abusive Transaction Case with Collection Issue* form on top of the Form 3198. See *MySB/SE Promoter Investigation/Job Aids/Closing the Investigation* for this form. This will ensure the case is properly routed to Collection after it has been processed and the liability has been assessed. The name and address of the Collection AT Coordinator for the Area where the taxpayer resides should be listed on the Special Handling Sheet before closing the case.

4.32.2.12.10.2.5
(06-04-2018)
Form 4665 - Report Transmittal

- (1) Form 4665, *Report Transmittal*, may be used to provide summary information regarding the penalty investigation. For most SB/SE investigations, it is not necessary and can easily be replaced by the **SB/SE LDC Field Closure Form**, which can be found at *Promoter Investigation/Job Aids/Closing the Investigation* on MySB/SE.
- (2) LB&I examiners should include a Form 4665 in all promoter investigation closures
- (3) The information on the Form 4665 should supplement, not duplicate or replace, information in the case file and may include:
 - a. Background on the issue(s).
 - b. Explanation of the disposition of the issue(s).
 - c. A summary of the basis for the penalty.
 - d. Identification of related cases.
 - e. A summary of unagreed issues.
 - f. Other relevant information not suitable for inclusion in the Form 886-A.

Caution: As per Rev. Proc. 2012-18 regarding ex parte communications with Appeals, the Form 4665 or any similar document should not include statements or comments intended to influence Appeals' decision-making process. See Rev. Proc. 2012-18 for a full discussion of ex parte rules.

Note: Report Transmittal forms are routinely shared with taxpayers in FOIA requests, by Appeals and in other similar situations. They are not considered private internal documents.

4.32.2.12.10.2.6
(06-08-2012)
Form 3244-A - Payment Posting Voucher - Examination

- (1) Form 3244-A, *Payment Posting Voucher – Examination*, is used if a promoter makes an advance payment of the penalty.
- (2) Enter the payment as TC 640 and MFT 55 for individual assessments or MFT 13 if assessed against a business entity.
- (3) The tax year is the year for which the penalty will be assessed.
- (4) Send Part 1 of Form 3244-A with the check separately via overnight traceable method to the remittance teller at the aligned Submission Processing Center for your Area using IRM 4.4.24, *Payments and Remittances* procedures. Attach Part 2 of Form 3244-A to the front of Form 8278.

4.32.2.12.10.3
(09-23-2011)
Case Closing Procedures

- (1) Procedures for case closing depend on the type of closure and whether it is an SB/SE or LB&I investigation.

4.32.2.12.10.3.1
(06-04-2018)

Penalty Assessments

- (1) Generally, penalties should be recommended if an injunction has been granted; however, there might be circumstances that warrant non-assertion of the penalties. See IRM 4.32.2.9.1.2, *Injunctions - No Penalty Assessment*.
- (2) Examiners may recommend asserting promoter penalties regardless of whether injunctive relief is pursued by the government so long as sufficient evidence has been obtained to demonstrate that the promoter engaged in conduct subject to penalty under IRC 6694, IRC 6695, IRC 6700, IRC 6701, IRC 6707, or IRC 6708.
- (3) IRC 6751 requires managerial approval of any penalties asserted in promoter investigations.. See IRM 4.32.2.12.1, *Approval of Penalties*, and IRM 20.1.1.2.3, *Managerial Approval for Penalty Assessments*.
- (4) In parallel investigations, CI may request suspending penalty assessment until conclusion of the criminal investigation. See IRM 4.32.2.12.10.3.1.3, *Parallel Investigations*.
- (5) Examiners should prepare a promoter penalty report and a penalty investigative file as discussed in IRM 4.32.2.12.10.1, *Penalty Report*, and IRM 4.32.2.12.10.2, *Case File Assembly*.

4.32.2.12.10.3.1.1
(06-04-2018)

**SB/SE Penalty
Assessment Procedures**

- (1) The group manager must approve the penalty but can consult with Counsel if needed.
- (2) Once the proposed penalty is approved by the group manager, the case file is closed to Centralized Case Processing (CCP) for assessment.
- (3) A copy of the Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*, and the *SB/SE LDC Field Closure Form* is sent to the SB/SE LDC and to the local AT Collection group or AT revenue officer assigned to the investigation.
- (4) CCP assigns a DLN to the investigation and assesses the penalty.
- (5) The disposal code is DC 12 when closing IRC 6700 or IRC 6701 penalties. For procedures to close IRC 6694 or IRC 6695 penalties, see *Return Preparer Job Aid* on MySB/SE.
- (6) Always use the most current version of Form 8278 available from the electronic publishing website. Doing so will ensure that the penalty will be assessed with the correct penalty reference number.
- (7) For step by step instructions, see *Promoter Penalty Case Closing Job Aid Completed Investigation With an Injunction and/or Penalties*, available on MySB/SE, *Promoter Investigations*.

4.32.2.12.10.3.1.2
(06-04-2018)

**LB&I Penalty
Assessment Procedures**

- (1) In LB&I, a promoter investigation must have the approval of the LB&I:Financial Services DFO, Manhattan in order to close.
- (2) The disposal code should reflect whether the case has been closed agreed or unagreed. Disposal Code 12 should be used for withdrawal cases.

4.32.2.12.10.3.1.3
(06-04-2018)

Parallel Investigations

- (1) If CI has requested suspension of the penalty assessment and the examiner has completed all investigation actions, the examiner will assemble the investigative case file, complete the case closing process and give it to the group manager to hold in group suspense..
- (2) The examiner must prepare the penalty report and a detailed penalty computation based on all available information.
- (3) The case is updated to Status Code 16 on ERCS in SB/SE; TE/GE examiners should refer to IRM 4.70. This status code should not be used as a general suspense code and should not be used for non-parallel investigations. The status code should not be updated until the investigative field work and the penalty report have been completed and the file assembled for closing and is with the group manager to be closed once CI is done.
- (4) While the investigation is in group suspense, the examiner should continue to have six-way conferences with CI and monitor the status of the criminal investigation.
- (5) When the decision is made to proceed with closing the investigation and assessing the appropriate penalties, examiners must follow the closing procedures discussed in IRM 4.32.2.12.10, *Penalty Case Processing Procedures*.
- (6) See IRM 4.32.2.7, *Parallel Investigations*, for additional information on parallel investigations.

4.32.2.12.10.3.2
(06-04-2018)

No Penalty Assessment

- (1) In limited instances, examiners may determine assessment of penalties may not be in the best interest of the government, even if an injunction has been secured. See IRM 4.32.2.9.1.2, *Injunctions - No Penalty Assessment*.
- (2) An investigation may be surveyed or discontinued before or after contacting the promoter. See IRM 4.32.2.9.5, *Survey*, and IRM 4.32.2.9.3, *Discontinuations*, for additional information.
- (3) SB/SE examiners should consult with their group manager prior to closing the investigation without a penalty assessment. As appropriate, Counsel and the assigned SPA may be consulted.
- (4) LB&I examiners must contact Counsel prior to closing the investigation. Approval of the LB&I DFO with jurisdiction over the promoter investigation and the LB&I Financial Services, DFO, Manhattan must be obtained prior to closing the investigation.

4.32.2.12.10.3.2.1
(06-04-2018)

Injunctions - No Penalty Assessment

- (1) Generally, if an injunction has been secured, penalties are proposed since conduct or activity subject to penalties under the various promoter penalty code sections is typically present when seeking an injunction pursuant to IRC 7407 or IRC 7408. However, there may be circumstances when a decision is made not to assess penalties. See IRM 4.32.2.9.1.2, *Injunctions - No Penalty Assessment*, for additional information.
- (2) Examiners must consult with their group manager or the LB&I:Financial Services Promoter Program Manager prior to closing an enjoined promoter investigation without a penalty assessment. As appropriate, Counsel and the assigned SPA may be consulted.

- (3) Form 4665, *Report Transmittal*, is used by LB&I to document the basis for the non-assertion of penalties. A copy of this form is provided to the LB&I:Financial Services DFO, Manhattan. SB/SE examiners use the *SB/SE LDC Field Closure Form*.
- (4) Letter 1866, *Discontinuance Letter*, is not sent to the promoter if an injunction has been secured against the promoter.
- (5) Cases are closed from the field compliance group using DC 12 through CCP when an injunction has been granted but no penalties are assessed.
- (6) Form 8278 is completed and included in the case file. Column {c} is left blank and column {d} of the form for the applicable penalty will reflect the amount of zero (the 3 digit reference code is a mandatory field). CCP must insert a dummy blocking number to establish MFT 55 or 13 modules, as appropriate. CCP processes the zero posting after the MFT is established on Master File.

4.32.2.12.10.3.2.2
(06-04-2018)

Discontinuations

- (1) A discontinued investigation is an investigation, other than a survey, that is closed without an injunction or penalty assessment regardless of whether or not the promoter was notified of the investigation. See IRM 4.32.2.9.3, *Discontinuations*, for additional information.

Note: Only SB/SE has the option to survey an investigation.

- (2) Letter 1866, *Discontinuance Letter*, is required unless:
 - There has been no contact with the promoter, or
 - CI requests that the discontinuation letter not be sent.
- (3) For all discontinued investigations, examiners must close the case through CCP and complete Form 8278, *Assessment and Abatement of Miscellaneous Civil Penalties*. Column {c} is left blank and column {d} of the form for the applicable penalty will reflect the amount of zero (the 3 digit reference code is a mandatory field). The discontinuation will be posted to the penalty module as -0- with an associated DLN assigned. The assignment of a DLN will allow for the subsequent retrieval of the administrative investigation file, if necessary.
- (4) Examiners prepare the *SB/SE LDC Field Closure Form* explaining the reason(s) why the investigation is not being pursued.
- (5) For SB/SE cases, a copy of the completed SB/SE LDC Field Closure Form and the Form 8278 are sent to the SB/SE LDC.
- (6) SB/SE groups should update ERCS to Status Code 51 using an appropriate disposal code.
- (7) LB&I groups should update ERCS to Status Code 90 using Disposal Code 12 after approval by the LB&I Financial Services, DFO Manhattan.
- (8) SB/SE groups follow local procedures to close the case to Memphis CCP using Form 3210, *Document Transmittal*. LB&I groups send the administrative case file to the LB&I:Financial Services DFO, Manhattan for approval using Form 3210. The LB&I:Financial Services DFO Manhattan's approval must be obtained for all penalty determinations for LB&I cases.

- (9) For SB/SE Investigations, see *Promoter Penalty Investigation Case Closing Job Aid/Discontinued Investigation*. This job aid is available on MySB/SE, *Promoter Investigations*.
-
- 4.32.2.12.10.3.2.3
(06-04-2018)
SB/SE Surveys

- (1) An investigation may be surveyed rather than discontinued if the promoter was not contacted and less than 10 hours was applied to the investigation.
 - (2) If more than 10 hours are charged to the investigation, follow closing procedures for discontinuations before contact. See IRM 4.32.2.12.10.3.2.2, *Discontinuations*.
 - (3) Examiners prepare the *SB/SE LDC Field Closure Form* explaining the reason(s) why the investigation is being surveyed. The form is sent to the SB/SE LDC, along with any workpapers created related to the investigation.
 - (4) SB/SE groups update ERCS to Status Code 41 using an appropriate disposal code.
 - (5) For SB/SE, see *Promoter Penalty Investigation Case Closing Job Aid// Survey/No Contact <10 hours*, for instructions. This job aid is available on MySB/SE, *Promoter Investigations*.
-
- 4.32.2.12.10.3.2.4
(06-04-2018)
Transfers

- (1) There may be instances where a promoter investigation is transferred between Areas (e.g., promoter moved, for association with related investigations, or workload management (case brokering)).
 - (2) Examiners should prepare *SB/SE LDC Field Closure Form*, explaining the reasons for transferring the promoter investigation.
 - (3) The promoter investigation must be closed on the ERCS database by the transferring Area and a new ERCS record is established by the receiving Area.
 - (4) For SB/SE cases, see the job aid *Promoter Penalty Investigation Case Closing Job Aid* which is available on MySB/SE, *Promoter Investigations*.
-
- 4.32.2.12.10.3.2.5
(06-04-2018)
**Claims for Refunds
Procedures - SB/SE**

- (1) All IRC 6703 promoter claims are addressed by examiners following the procedures in IRM 4.32.2.12.9.1.1, *Special Claim Procedures for Penalties Under IRC 6700 and IRC 6701*.
 - (2) The IRC 6700 and IRC 6701 penalty claims are sent to the SB/SE LDC for review and assignment to a field compliance group. All attempts are made to secure the original investigation file and associate it with the claim.
 - (3) Detailed instructions for processing promoter penalty claims can be found in *Case Closing Job Aid Promoter Penalty Claim Allowed* and *Case Closing Job Aid Promoter Penalty Claim Disallowed In Full*. They are available on MySB/SE; see *Promoter Penalty Investigation Job Aid Promoter Penalty Claims*, *Promoter Penalty Claims*.
-
- 4.32.2.13
(06-04-2018)
**Post-Injunction
Activities**

- (1) After an injunction is granted and/or penalties are assessed, examiners need to consider additional steps to ensure the maximum compliance impact on the promoter and clients.

- (2) A preliminary injunction granted by the court generally stops a promoter from engaging in unlawful activity. The work and actions of the DOJ attorney will continue, including filing a motion for a permanent injunction and, if necessary, contempt hearings.
- (3) Additional compliance actions to be considered include:
 - Publicizing court actions including injunction.
 - Taking steps to bar the promoter from practicing before the IRS such as making a referral to OPR utilizing Form 8484.
 - Moving client returns into the examination stream.
 - Responding to claims regarding assessed promoter or preparer penalties.
 - Monitoring compliance with court order(s).
- (4) .

4.32.2.13.1
(06-04-2018)
**Publicizing Court
Actions**

- (1) The injunction process allows the IRS to publicize civil enforcement actions taken against a promoter. This publicity informs the public of the government's position regarding the promotion and enforcement actions being taken, and it deters others from participation in abusive promotions.
- (2) Information regarding the government's enforcement actions should have the widest possible dissemination.
- (3) DOJ distributes press releases regarding court actions. The local Office of Communications and Liaison is informed of any pending press releases and assists in any local responses. Examiners and Counsel work closely with DOJ and the local media relations specialist in the Office of Communications and Liaison throughout the litigation process to get the releases to the national and local media as soon as possible.
- (4) Press releases are generally made by DOJ at the:
 - Filing of the injunction suit.
 - Imposition of a temporary restraining order (TRO).
 - Order of a preliminary or permanent injunction.
 - Initiation of any contempt actions.
- (5) In parallel investigations, DOJ coordinates the filing of the injunction with specific criminal actions to foster maximum press coverage. For example, the filing of an injunction may be postponed until a search warrant is executed on the promoter, so that both actions can be included in the press release.

4.32.2.13.2
(06-04-2018)
**Barring a Promoter
From Practice**

- (1) Promoters frequently represent their clients before the IRS. Examiners can take the following actions to bar the promoter from practicing before the IRS:
 - Seek prohibition to practice as part of the injunction process.
 - Make referrals to OPR.
- (2) The action taken is dependent upon the specific provisions which allow the promoter the right to practice before the IRS as well as the circumstances surrounding the injunction.
- (3) If the promoter or the promoter's power-of-attorney also represents clients in their examinations, a potential conflict of interest exists. If this situation occurs,

the examiner should consult with Counsel regarding the appropriate action to take. For additional guidance, see *Representing Clients* on MySB/SE, Parallel Investigations web page.

- (4) Section 10.29 of Circular 230 discusses the rules regarding conflict of interest. It states that a conflict exists if “the representation of one client will be directly adverse to another client” or “there is a significant risk that the representation of one or more clients will be materially limited by the practitioner’s responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.”
- (5) Circular 230 further states that the POA can still represent the client if “each affected client waives the conflict of interest and gives informed consent, confirmed in writing.” Copies of these informed consents must be provided to the IRS upon request. “Informed consent” means more than simply obtaining a client’s consent. There are occasions where, despite a client’s consent, a practitioner cannot reasonably or effectively provide competent and diligent representation to each affected client. When these situations arise during an investigation, Counsel should be consulted. If a suspected conflict of interest(s) occurred/occurs during the investigation, a referral to OPR should be made at the conclusion of the investigation.

4.32.2.13.2.1
(06-04-2018)
**Courts Barring
Promoters From
Practice**

- (1) The injunction court order may include a provision permanently prohibiting individuals from practicing before the IRS.
- (2) This court order has the practical effect of barring an enjoined promoter from practice before the IRS, but it is not a disbarment, suspension, or censure resulting from a Circular 230 proceeding. Historically, a Circular 230 proceeding was the only way that a barred practitioner’s name was publicized. See related discussion in IRM 4.32.2.13.2.2, *Referrals to Office of Professional Responsibility (OPR)*.

4.32.2.13.2.2
(06-04-2018)
**Referrals to Office of
Professional
Responsibility (OPR)**

- (1) OPR has oversight responsibility of all individuals practicing before the IRS in any capacity (refer to Circular 230 at sections 10.2, 10.3, 10.7, 10.8, and 10.36).
- (2) Referrals should be made to OPR as soon as it appears that an individual may be in violation of Circular 230, *Regulations Governing Practice before the Internal Revenue Service*, (Circular 230, section 10.53(a)).
- (3) Form 8484, *Report of Suspected Practitioner Misconduct*, is used to make a referral to OPR.
- (4) Referrals to OPR are mandatory when penalties are asserted under IRC 6694(b) for willful or reckless conduct or when IRC 6700 or IRC 6701 penalties are asserted. For further information regarding referrals to OPR and instructions, see IRM 20.1.6.12.3, *Referral to the Office of Professional Responsibility (OPR)*, for preparer and promoter penalties.
- (5) Referrals to OPR should be made when penalties are asserted under IRC 6707 or IRC 6708 whether or not the promoter agrees to the penalties, See IRM 20.1.6, *Preparer, Promoter, Material Advisor Penalties*, for more information.

- (6) The AJCA of 2004 added IRC 7408(c)(2) to allow injunctive relief to be sought for violations under Circular 230.
- (7) If the statutory requirements of IRC 7408, IRC 7407, or IRC 7402 are met, an injunction referral should be made to DOJ. A referral to OPR should not be used in lieu of an injunction referral to DOJ but rather in addition to the DOJ referral. The injunction is generally a faster means to stop the promoter from engaging in prohibited conduct and is broader in scope. Referrals to OPR and DOJ should be made simultaneously, and on the cover sheet it should be notated that this referral was made to both offices.

4.32.2.13.2.3
(06-04-2018)
Revocation of IRS e-file Participation

- (1) An individual's or firm's participation in the IRS *e-file* program may be revoked as a result of the granting of an injunction.
- (2) The LDC monitors court injunctions and may recommend revocation or other sanctions depending on the prohibitions outlined in a court order.
- (3) See IRM 3.42.10.16.1, *Court Injunctions and Revocation of IRS e-file Participation*, and IRM 3.42.10.16.2, *Court Injunctions and Sanctioning of Authorized IRS e-file Providers*.

4.32.2.13.3
(06-04-2018)
Client Returns

- (1) Considering client returns for examination is an important aspect of AT compliance actions. See IRM 4.32.2.14, *Client/Investor/Advisee Lists*, for information on processing of client lists.

4.32.2.13.4
(06-04-2018)
Claims for Refund

- (1) Post-assessment appeal procedures may apply to promoter penalties. The promoter may file a claim for refund. See IRM 4.32.2.12.9, *Post-Assessment Rights*, for a discussion of promoter post-assessment rights and procedures.
- (2) See IRM 20.1.6.19, *Appeal Rights*, for additional information regarding IRC 6694(a) and IRC 6694(b) penalties.

4.32.2.13.5
(06-04-2018)
Monitoring Compliance

- (1) Monitoring compliance with injunction orders is an important step in the process of stopping abusive activities. The LDC, ATSU and AT Field exam share responsibility for monitoring compliance with injunction orders. Other operations may have a role to assist, including other SB/SE employees, TE/GE, Collection, RPO, DOJ and LB&I. The SB/SE LDC is also responsible for authorizing and tracking contempt investigations and contempt rulings related to previously enjoined promoters in the LDC database.
- (2) IRS employees who learn of any new or continuing unlawful activity by an enjoined promoter must make a referral to the SB/SE LDC or OTSA.
- (3) LB&I examiners should solicit future compliance agreements (Form 906). These agreements include provisions requiring promoters to adopt quality-control procedures to ensure compliance with the IRC 6111 and IRC 6112 requirements and allowing the Service to monitor such procedures.
- (4) Form 906 agreements are generally not used by SB/SE in promoter investigations and never used as a substitute for a referral for injunctive relief when the evidence warrants a referral to DOJ.

4.32.2.13.5.1
(06-04-2018)

Contempt Investigations

- (1) A court order enjoining a promoter from certain activities has the effect of law and monitoring this compliance is important. Violations of a court order can result in civil or criminal contempt sanctions.
- (2) A civil contempt sanction is designed to compel the promoter to comply with the injunction's terms. A criminal contempt sanction is designed to punish the promoter for a violation of the injunction.
- (3) The court's injunction order outlines required actions and any prohibited acts by the promoter. Subject to the specific requirements of the court order, examples of potential violations include:
 - a. Failing to shut down a website or starting a new website.
 - b. Failing to inform clients of the court action.
 - c. Failing to terminate the preparation of income tax returns.
 - d. Continuing to conduct seminars or advertisements that advertise abusive promotions.
 - e. Failing to provide a client list to the IRS.
 - f. Continuing to advise clients of the mechanics of an abusive tax promotion for the same or substantially similar scheme.
 - g. Failing to comply with any portion of the court order.
 - h. Any conduct or activity subject to penalties under IRC 6700, IRC 6701, IRC 6694, or IRC 6695, and violations of IRC 6111 and IRC 6112 subject to penalty under IRC 6707 and IRC 6708.
 - i. Any acts which impair or impede the administration of the Internal Revenue Laws.
- (4) If evidence of violations of the preliminary or permanent injunction order are found and DOJ still has an open litigation case, examiners and Counsel will notify the DOJ attorney and the SB/SE LDC or OTSA.
- (5) If DOJ has closed its case, examiners should contact the SB/SE LDC or OTSA. If sufficient facts can be developed to prove injunction violations, a referral is made through Counsel to DOJ requesting initiation of a contempt proceeding.
- (6) If there is sufficient evidence of contempt, DOJ will ask the court to find the promoter in civil contempt and order monetary fines, incarceration, or both. If the promoter's actions warrant a criminal contempt action, DOJ Tax Division Civil Section makes a referral to the criminal section in the Tax Division.

4.32.2.13.6
(06-04-2018)

Service of Injunction on Related Promoters

- (1) An injunction order against the primary promoter is binding on any individuals acting in concert with the promoter. The order has the effect of law and generally enjoins any sub-promoter or related return preparer. This is true even if the sub-promoter or related subject was not referred to DOJ.
- (2) Examiners, Counsel and DOJ attorneys coordinate their efforts to inform any known related subject not specifically named in the injunction suit of the court action and its effect upon them. Failure to obey the court order may subject the related party to contempt proceedings.
- (3) The injunction must be personally served on the related parties to be legally binding. An IRS employee, US Marshall or private process server may be used for this purpose.

- (4) Examiners should not perform the personal service if the promoter's behavior demonstrates any propensity towards violence. In such cases, a special agent is requested to accompany the examiner, or the US Marshall or a private process server completes the service.
- (5) The original certificate of service is returned to DOJ.
- (6) Any IRS employee who discovers information related to ongoing or new unlawful activity by a sub-promoter or related return preparer so served should contact the SB/SE LDC or OTSA.

4.32.2.13.7
(06-04-2018)
**Injunction Litigation
Appeals**

- (1) Promoters may appeal any type of injunction or restraining order imposed by the courts. Examiners and Counsel continue to assist DOJ during the appeal process. Assistance could be in the form of obtaining evidence on the current actions of the promoter, providing updated calculations on the harm to the government, or other information about compliance with a court order.

4.32.2.14
(06-04-2018)
**Client/Investor/Advisee
Lists**

- (1) This section covers procedures for submitting lists of clients/investors/advisees involved in AT investigations.
- (2) Addressing client non-compliance is a key aspect of AT compliance activities. Examiners should secure or develop a client list as early as possible in the investigation.
- (3) SB/SE and LB&I have different procedures for processing client lists. For SB/SE see IRM 4.32.2.14.2, *SB/SE Client List Procedures*. For LB&I see IRM 4.32.2.14.3, *LB&I Client Procedures*.
- (4) Various compliance actions may be taken by the IRS regarding clients, including, but not limited to:
 - Income tax examinations by field examiners or campus correspondence units.
 - Referrals to revenue officers for promotions involving attempts to impede collection efforts.

4.32.2.14.1
(06-04-2018)
Obtaining Client Lists

- (1) Client lists are solicited from the promoter during the investigation. See IRM 4.32.2.8.2.1, *Commencement of SB/SE Investigations*, and IRM 4.32.2.8.2.2, *Commencement of LB&I Material Advisor Investigations*.
- (2) Client lists should be secured from the promoter or developed from other sources as quickly as possible to allow sufficient time for analysis and selection of returns for examination within the assessment statute of limitations, should a determination be made that client examinations are necessary. Return preparers client lists will be included with the investigation authorization file. Subsequent year lists can be obtained via RPVUE and/or IRC 6107(b) letters. Be prepared to summons a list, if necessary, to secure the client list from an uncooperative promoter.
- (3) The court can order the promoter to provide a client list as part of the injunction litigation or DOJ may obtain a list during the discovery phase of the litigation.
- (4) Client lists may also be constructed from evidence obtained during the investigation such as:

- Bank records.
- Third-party payees, such as credit card companies and Paypal®.
- IDRS.
- RPUVE (for tax return preparers).
- CI search warrants.
- Other federal or state agencies, such as the Securities and Exchange Commission.
- Informants.
- Client lists provided pursuant to IRC 6107(b) for preparers and IRC 6112 for material advisors.

4.32.2.14.2
(06-04-2018)
**SB/SE Client List
Procedures**

- (1) This section describes specific procedures for processing client lists for authorized AT investigations of promoters and preparers.

4.32.2.14.2.1
(06-04-2018)
**Submitting the Client
List Package**

- (1) SB/SE supports administration of tax law by selecting returns to audit. The primary objective in selecting returns for examination is to promote the highest degree of voluntary compliance on the part of taxpayers while making the most efficient use of finite examination staffing and other resources. Employees must exercise their professional judgment, not personal opinions, when making return selection decisions. As explained in Policy Statement 1-236, Fairness and Integrity in Enforcement Selection, IRS employees are expected to carry out our duties with integrity and fairness.
- (2) To ensure fairness to the taxpaying public, our Examination Workplan provides a balanced approach for return delivery and allocation of resources to address areas of the Tax Gap by taking into account factors such as income levels, geographic locations, and return types.
- (3) To ensure an equitable process for all taxpayers, return selection decisions are made utilizing available experience and/or statistics indicating the probability of substantial error. No one individual can control the examination selection decision-making process. We limit involvement to only those employees whose duties require them to be included.
- (4) To ensure fairness to each taxpayer whose return is selected, individual return selection decisions are based on the information contained on the taxpayer's return and/or the underlying relevant tax law. Managerial as well as quality reviews of selection decisions occur during each phase of the selection and assignment process.
- (5) SB/SE Program Level Objective - Ensure examinations are initiated based on indicators of non-compliance or on other criteria (such as selection for the National Research Program), identified in the Internal Revenue Manual. In addition, ensure a review of the decisions to survey a return (i.e., not initiate an examination) are based upon factors outlined in the Internal Revenue Manual and approved by an appropriate level of management.
- (6) Client lists should be submitted to the AT Listkeeper only when case building consideration is requested. Once SB/SE examiners secure a complete client list, a case building request and the client list package should be sent to the headquarters AT SPA using secure e-mail at **ATAT Listkeeper*.
- (7) A copy of the client list should also be sent to the local PSP AT Coordinator.

- (8) The client package sent to the **ATAT Listkeeper* should include:
- Name of promoter.
 - Name and description of the promotion.
 - Background information on the promotion.
 - Description of how the promotion appears on the income tax return.
 - Name and telephone number of the examiner, group manager, and assigned Area Counsel.
 - Clients' names, address (if available), and TINs.
 - Client Job Aid (or white paper). See IRM 4.32.2.8.3.6.2, *Client Job Aid*.
- (9) A client list package must include, at a minimum, the client's name, TIN, form, and tax period. A sample template for compiling the client list is available on MySB/SE, *Participant Lists* web page..
- (10) If examiners are unable to provide the necessary information in the required format, they should contact the headquarters AT SPA by e-mail using secure messaging at **ATAT Listkeeper*. Client TIN research should not be conducted by the examiner or group manager except as necessary to identify clients for third-party contacts in the development of the promoter investigation.
- (11) The AT Listkeeper will review each case building request and research the lists using the available research tools (IDRS, EFDS, CDE, etc.). The starting point of the Listkeeper review is the complete client list for the appropriate processing year. Filters may be applied to the list to determine the returns most appropriate for case building. Filters used to identify returns for AT case building varies on a case-by-case basis. Many facts and circumstances are considered when determining the best filters.
- (12) The AT Listkeeper provides a written summary of the process and filters used as well as the determinations made to the ATSU Manager for approval. The ATSU manager will approve case building requests for lists of 50 or less. Lists over 50 will be forwarded to the Field Case Selection (FCS) and LDC Program Managers for approval.
- (13) Once case building for approved lists is complete, the case-built returns will be classified by a revenue agent or a SPA. Classification results will be documented on the case building list as follows:
- a. **Selected Returns:** Mark the selected returns with an, "S," or similar notation and indicate the Area to be receiving the case (e.g., 201, 202, etc.).
 - b. **Accepted Returns:** Identify the returns accepted as filed with an, "A," or similar notation, and indicate the appropriate reason code from the **ATSU Accepted as Filed Reason Codes** list below.
 1. = Statute too short to examine
 2. = Taxpayer deceased
 3. = No tax liability (applies to Substitute For Returns (SFR) only)
 4. = Return already adjusted
 5. = No LUQs noted
 6. = CI freeze present
 7. = Combat zone freeze present
 8. = Issues present, but tax impact de minimis
 9. = Other (please describe)

- (14) All lists built and classified are subject to a 10 percent mandatory review. Generally, the review will be conducted by the ATSU Manager or other management official. Results of the review will be shared with classifiers and their group managers. As part of the Program Review process, the LDC Program Manager (or designee) ensures that the reviews completed by the ATSU Manager adhere to the examination case selection policy.

4.32.2.14.2.2
(06-04-2018)

**Local Case Building for
SB/SE**

- (1) If it is determined that examinations are necessary for successful development of a promoter or preparer investigation, Areas are authorized to build sample client lists to support their AT investigations at the local Planning and Special Programs level. These lists are limited to no more than 30 clients. The AT revenue agent and group manager will work with the Area AT Coordinator to identify the sample. No case-building activity is to be conducted at the group level.
- (2) Requests for case building above the sample size of 30 should be submitted to the AT Listkeeper.
- (3) All functions are responsible for ensuring that the proper source, project and tracking codes are placed on the selected client tax returns.

4.32.2.14.3
(06-04-2018)

LB&I Client Procedures

- (1) This section describes specific procedures for examinations related to clients in LB&I promoter investigations.

4.32.2.14.3.1
(06-04-2018)

**Client List Processing
Procedures**

- (1) Investor lists are forwarded to OTSA using a standard spreadsheet. Contact Financial Services Promoter SPA for a copy of the spreadsheet. A copy of all investor lists must also be sent to the Senior Program Specialist, Tax Shelters – Financial Services.
- (2) The list should include the following information:
- Investor names and TINs
 - Related entities and TINs
 - Year of investment along with projected tax benefit
 - Names of any sub-promoters or co-promoters
 - Shelter type or listed notice number
- (3) OTSA incorporates the client information in its database, identifies similar or related activity, and coordinates examination activity among the various examination groups.
- (4) OTSA forwards investor information to the appropriate LB&I Industry PSP Analyst(s) and other operating division designated contacts, as necessary.

4.32.2.14.4
(06-04-2018)

**TE/GE Client List
Procedures**

- (1) TE/GE will provide the SB/SE AT Listkeeper with client lists within 30 days of receipt. See IRM 4.32.2.14, Client/Investor/Advisee Lists, for additional information.

4.32.2.15
(06-04-2018)

**Partnership Anti-Abuse
Regulation**

(1) Partnership Anti-Abuse Regulation

- The partnership anti-abuse regulations give the Service the ability to recast transactions which may comply with the literal language of the code and regulations, but which produce tax results never contemplated by Subchapter K. The regulations refer to and incorporate the established judicial doctrines of the business purpose and substance over form. Partnership transactions, like all other business transactions, are subject to those doctrines. The anti-abuse regulations reiterate this point. The anti-abuse regulations are intended to clearly signal that partnerships are not a vehicle for non-economic, tax-motivated transactions. See 26 CFR 1.702-2 .
- Given the Service's broad authorization to recast transactions to reflect the intent of Subchapter K, examiners must follow certain procedures to ensure fair and consistent application of the regulations. Examiners must contact both a partnership expert (LB&I – contact the Partnership Practice Network; SB/SE contact a partnership subject matter expert) and the IRS National Office, Associate Chief Counsel, Pass-throughs and Special Industries. Examiners may not assert the regulations without National Office approval.
- With the exception of the abuse of entity regulations, which were effective December 29, 1994 (see 26 CFR 1.702-2(e)), the partnership anti-abuse regulations became effective May 12, 1994.

Exhibit 4.32.2-1 (06-04-2018)

Acronyms

Acronyms

Acronym	Definition
AT	Abusive Transaction
ATSU	Abusive Transaction Support Unit
AUSA	Assistant United States Attorney
BOD	Business Operating Division
C&CA	Classification & Case Assignment
CI	Criminal Investigation
CP&C	Compliance, Planning & Classification
CT	Criminal Tax
DFO	Director, Field Operations
DOJ	Department of Justice
EGC	Exam Group Code
EIN	Employer Identification Number
EIR	Examiner Injunction Referral
EOG	Examining Officers Guide
FBAR	Foreign Bank & Financial Accounts
FCQ	FinCen Query
FCS	Field Case Selection
FDR	Formal Document Request
FOIA	Freedom of Information Act
FRP	Frivolous Return Program
FTA	Fraud Technical Advisor
GM	Group Manager
IDR	Information document request
IDRS	Integrated data retrieval system
IMF	Individual Master File
IRC	Internal Revenue Code
JITSIC	Joint International Taskforce on Shared Intelligence and Collaboration
LB&I	Large Business & International
LDC	Lead Development Center
LLC	Limited Liability Company
LUQ	Large, unusual or questionable

Exhibit 4.32.2-1 (Cont. 1) (06-04-2018)**Acronyms**

Acronym	Definition
LWIS	LB&I Workload Identification System
MOI	Memorandum of Interview
OPR	Office of Professional Responsibility
OTSA	Office of Tax Shelter Analysis
PA	Program Analyst
PAC	Program Action Case
PATH	Protecting Americans from Tax Hikes Act of 2015
PFTG	Pre-Filing & Technical Guidance
PSP	Planning & Special Programs
RO	Revenue Officer
RPC	Return Preparer Coordinator
RPO	Return Preparer Office
RPP	Return Preparer Program
SA	Special Agent
SAC	Special Agent in Charge
SB/SE	Small Business/Self-Employed
SBWOTA	Small Business and Work Opportunity Tax Act of 2007
SPA	Senior Program Analyst
TA	Technical Advisor
TE/GE	Tax Exempt/Government Entities
TIEA	Tax Information Exchange Agreement
TIN	Taxpayer identification number
TM	Territory Manager and/or Team Manager
TOI	Transaction of Interest
TPC	Third party contact
TRO	Temporary restraining order
TTSPC	Technical Tax Shelter Promoter Committee
USAO	US Attorneys Office
WebETS	Web-Based Employee Technical Time System

Exhibit 4.32.2-2 (06-08-2012)**Sample Summons Log**

No.	Date Issued	Description	Response	Comments	Reference Number
1.	04/23/02	Notice 2002-21, 2002-14 IRB 730, transactions involving the use of loan assumption agreement to claim an inflated basis asset acquired from another party.	Yes – responded by affidavit on 6/14/02	Taxpayer did not enter into any transactions	
2.	04/23/02	Rev. Rul. 90-105. Contribution to qualified cash or defined arrangement.	Partial response 05/12/02.	Will provide remaining response by 06/30/02	

Exhibit 4.32.2-3 (06-08-2012)
LB&I Monthly Progress Report

Monthly Update of Promoter Penalty Case Month Ended: Insert MMY	LB&I FS Industry Director Page 1 of 2
Your PROMOTER's Name:	
NAMES Territory Manager: Team Manager Lead Agent: Team Members: Specialists (Financial Products, IEs, etc.):	TELEPHONE NUMBERS
Soft Letter Sent: Audit Letter Sent:	
ECD if restricted promoter, put R.	
Transactions Promoted and Co-Promoters For listed transactions, please give name and Notice No. or Cite. For unlisted transactions, please give name and note that it is unlisted.	

Transaction	Notice	Co-Promoters
1.		
2.		
3.		
4.		
5.		
6.		

Additional Resources Needed: If Yes, Additional Number of Agents Needed:	Yes/No
Impediments to Case Closing, If Applicable:	

Impediment	YES	NO
Restricted Promoter		
Resource Issue		
Inadequate Responses by promoter/ Summonses to be issued/ Summonses not responded to		
Summons Referred for Enforcement		
Counsel Advice and Support		

Exhibit 4.32.2-3 (Cont. 1) (06-08-2012)
LB&I Monthly Progress Report

Impediment	YES	NO
Other - please indicate the impediment (below)		
Not Applicable		

