



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

8.1.10

SEPTEMBER 21, 2021

EFFECTIVE DATE

(09-21-2021)

PURPOSE

- (1) This revises IRM 8.1.10, Appeals Function, Ex Parte Communications.

MATERIAL CHANGES

- (1) This IRM section was revised as follows:

IRM	Brief Description
8.1.10	Updated for editorial changes throughout.
8.1.10.1	Updated and restructured Program Scope and Objectives, and related sections containing information required by IRM 1.11.2.2.5, Address Management and Internal Controls.
8.1.10.1.1	Referenced the Taxpayer First Act of 2019, H.R. 3151, which amended IRC 7803 and established the "Internal Revenue Service Independent Office of Appeals."
8.1.10.1.5	Noted that Appeals officers, including international specialists, are also referred to as Appeals Technical Employees (ATE)
8.1.10.7	Added TBOR content based on guidance from the Division Counsel/Associate Chief Counsel (National Taxpayer Advocate Program) and Branch 3 of the Associate Chief Counsel (Procedure and Administration).
8.1.10.2.1(3)	Added to clarify database inquiries, which include ICS case history entries through the date the case is referred to Appeals, are appropriate.
8.1.10.2.1(3) (Example)	Modified example to clarify appropriate database inquiries involving the case history.
8.1.10.2.1.3 (1)	Noted that while Counsel is not an originating function, they are still subject to the ex parte rules in certain situations; cross referenced IRM 8.1.10.4.4.
8.1.10.4.1.5 (1)	Cited remanded CDP cases as an exception to the ex parte communication rules regarding docketed cases and communications between Appeals and Counsel.
8.1.10.4.1.5 (2)	Updated citation related to communications with Counsel.
8.1.10.4.6(2)	Updated citation related to Post-Appeals Mediation process.

EFFECT ON OTHER DOCUMENTS

This IRM supersedes IRM 8.1.10, dated September 28, 2017..

AUDIENCE

Appeals employees

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8.1.10

Ex Parte Communications

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8.1.10.1
(09-21-2021)
Program Scope and Objectives

- (1) Purpose: This IRM section provides guidance concerning ex parte communications. Revenue Procedure 2012-18 also serves as guidance and contains ex parte communication guiding principles for the following:

- Principles of tax administration
- Appeals' Independence
- Legal advice
- Offering an opportunity to participate
- Ex parte communication exceptions
- Communications with other IRS functions
- Curing breaches of ex parte communication rules
- No creation of substantive rights affecting the taxpayer's liability

Note: To the extent that any instructions, directions or guidance in Part 8 of the IRM conflict with Rev. Proc. 2012-18, the guidance in the revenue procedure shall take precedence.

- (2) The procedures set forth in both the IRM and Revenue Procedure 2012-18 are designed to accommodate the overall interests of tax administration, while preserving operational features that are vital to Appeals' case resolution processes within the structure of the IRS and ensuring open lines of communication between Appeals and the taxpayer/representative.
- (3) Audience: Appeals employees are the audience for this IRM section.
- (4) Policy Owner: Policy, Planning, Quality and Analysis is under the Director of Case and Operations Support.
- (5) Program Owner: Appeals Policy is the program office responsible for providing technical and procedural guidance to the Appeals organization and is under the Director of Policy, Planning, Quality and Analysis.
- (6) Contact Information: Appeals employees should follow established procedures on *How to Contact an Analyst*. Other employees should contact the Product Content Owner shown on the Product Catalog Information page for this IRM.

8.1.10.1.1
(09-21-2021)
Background

- (1) Section 1001(a)(4) of the Internal Revenue Service Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (RRA 98), required the Commissioner to develop and implement a plan to reorganize the Internal Revenue Service to ensure an independent Appeals function. RRA specifically directed that the plan include the prohibition of ex parte communications between appeals officers or settlement officers and other IRS employees to the extent that those communications appear to compromise the independence of Appeals. In accordance with the directive, the Department of the Treasury and the IRS issued guidance in Revenue Procedure 2000-43, 2000-2 C.B. 404.
- (2) Treasury and the IRS issued Notice 2011-62, 2011-32 I.R.B. 126 (Aug. 8, 2011), and Revenue Procedure 2012-18, which amplified, modified and superseded Rev. Proc. 2000-43. Rev. Proc. 2012-18 provides guidance concerning the ex parte communication rules and the application of RRA 98 section 1001(a)(4).
- (3) Consistent with RRA 98 section 1001(a)(4), Rev. Proc. 2012-18 does not adopt the formal ex parte procedures that would apply in a judicial proceeding. It is designed to ensure the independence of the Appeals organization while pre-

serving the role of Appeals as a flexible administrative settlement authority, operating within the IRS's overall framework of tax administration responsibilities.

- (4) The Taxpayer First Act of 2019, H.R. 3151, amended IRC 7803 and established the "Internal Revenue Service Independent Office of Appeals," further re-emphasizing Appeals' independence.

8.1.10.1.2
(09-21-2021)

Authority

- (1) Rev. Proc. 2012-18, effective on May 15, 2012, serves as the authority for Ex Parte Communications.
- (2) The ex parte communication rules in this IRM and Revenue Procedure 2012-18 do not create substantive rights affecting the taxpayer's tax liability or the IRS's ability to determine, assess or collect the tax liability (including statutory interest and any penalties, if applicable).

8.1.10.1.3
(09-21-2021)

Responsibilities

- (1) All IRS employees, including Appeals employees, are responsible for ensuring compliance with the ex parte communication rules. See IRM 8.1.10.6. All employees are encouraged to seek managerial guidance whenever they have questions about the propriety of an ex parte communication.

Note: Examples of prohibited ex parte communications are provided in this IRM as a means of illustrating various concepts or procedures.

- (2) Appeals managers are responsible for monitoring compliance with the ex parte communication rules during their daily interaction with employees, workload reviews and closed case reviews.

8.1.10.1.4
(09-28-2017)

Program Management and Review

- (1) Appeals monitors ex parte communication breaches through the Ex Parte Report System. The system generically describes each breach of the ex parte rules and does not record case or employee specific information.
- (2) Appeals reports the number of ex parte communication breaches in the quarterly Business Performance Review (BPR) to the Commissioner. Appeals Policy is responsible for providing data and information for the report.

8.1.10.1.5
(09-21-2021)

Terms and Definitions

- (1) The following table contains key definitions:

Term	Definition
Ex Parte Communication	Communication that takes place between any Appeals employee and employees of other IRS functions, without the taxpayer/representative being given an opportunity to participate in the communication. The term includes all forms of communications, oral or written. Written communications include those that are manually or electronically generated.

Term	Definition
Appeals Employees	<p>Appeals employees include:</p> <ul style="list-style-type: none"> • Appeals officers, including international specialists; also referred to as Appeals Technical Employees (ATE) • Appeals team case leaders • Appeals tax specialists • Appeals tax computation specialists • Appeals account resolution specialists • Domestic technical specialists • International technical specialists • Appeals appraisers • Appeals economists • Appeals engineers • Appeals managers
Originating Function	<p>An organization within the IRS that makes determinations that are subject to the Appeals process, including:</p> <ul style="list-style-type: none"> • Examination • Collection • Campus (Service Center) functions <p>Note: See also IRM 8.1.10.2.1.3, IRS Functions not Considered an Originating Function, and IRM 8.1.10.4.4, Communications with Counsel.</p>

8.1.10.1.6
(09-21-2021)
Terms and Acronyms

- (1) The table below lists common acronyms used in this section:

Term	Acronym
Alternative Dispute Resolution	ADR
Appeals Technical Employee	ATE
Collection Due Process	CDP
Criminal Investigation	CI
Post Appeals Mediation	PAM
Restructuring and Reform Act	RRA
Taxpayer Advocate Service	TAS

8.1.10.1.7
(09-21-2021)
Related Resources

- (1) Additional Ex Parte program information can be found in:
- Rev. Proc. 2012-18
 - Notice 2011-62, 2011-32 I.R.B. 126 (Aug. 8, 2011)

- (2) The Taxpayer Bill of Rights (TBOR) lists rights that already existed in the tax code, putting them in simple language and grouping them into 10 fundamental rights. Employees are responsible for being familiar with and acting in accord with taxpayer rights. See IRC 7803(a)(3), Execution of Duties in Accord with Taxpayer Rights. For additional information about the TBOR, see <https://www.irs.gov/taxpayer-bill-of-rights>.

8.1.10.2
(06-21-2012)

**Communications Not
Considered “Ex Parte”**

- (1) Not all communications are within the scope of the term “ex parte communication.” This section addresses some of the most common communications not considered “ex parte,” namely:

- a. Database inquiries
- b. Communications solely between or among Appeals employees
- c. Communications with IRS functions **not** considered an “originating function”

Note: The Taxpayer Advocate Service (TAS) is **not** considered an “originating function” and therefore communications between Appeals and the TAS are permissible. See IRM 8.1.10.2.1.2, Taxpayer Advocate Service.

- d. Communications with other governmental agencies

- (2) Communications in which the taxpayer/representative is given an opportunity to participate in a discussion between Appeals and an originating function employee are also not considered ex parte communications. This is covered separately in IRM 8.1.10.5, Opportunity to Participate.

8.1.10.2.1
(09-21-2021)

Database Inquiries

- (1) Certain taxpayer data and information is used universally by multiple IRS functions, including Appeals. Routine account inquiries, transcript requests, and other similar inquiries in an electronic environment are not considered “communications” because they do not involve dialogue or interaction between Appeals and an originating function.

- (2) Not all database inquiries are exempt because some databases are used exclusively by an originating function to maintain a record of case activities as part of their efforts to examine or collect tax. For instance, revenue officers enter their collection activities or case histories electronically on the Integrated Collection System (ICS). Even though the revenue officer’s ICS history up to the time the case is referred to Appeals is part of the administrative file, the originating function may not include gratuitous comments in the case history if the substance of the comments would be prohibited if they were communicated to Appeals separate and apart from the administrative file. However, it is permissible for the originating function to maintain and include routine *contemporaneous* comments or statements in the case history that are pertinent to its consideration of the case even if the substance of these comments or statements would be prohibited if they were communicated to Appeals separate and apart from the administrative file. See section 2.03(4)(d) of Revenue Procedure 2012-18, Contents of Administrative File.

Example: A GS-07 revenue officer made a field call to a business taxpayer who said he did not have time to meet with her at that time to complete a financial interview. They agreed to meet again in the IRS office in two weeks at which time the taxpayer promised to bring complete financial documents. The revenue officer advised him that a Notice of Federal Tax

Lien (NFTL) may be filed or enforced collection measures such as levy or seizure may take place if he did not complete the agreed upon actions. The revenue officer contemporaneously documented her ICS case history with the details of the meeting per IRM 5.1.10, Field Collecting Procedures, Taxpayer Contacts.

The taxpayer did not show up for the scheduled follow-up meeting and failed to provide the promised financial information. Again, the revenue officer contemporaneously documented the ICS case history accordingly. The following week, the revenue officer made a field call to the taxpayer's business and, as she drove up to the building, witnessed the taxpayer walking inside. She walked in just a few seconds after the taxpayer and asked the receptionist to see the taxpayer. The receptionist walked back to the taxpayer's office and then came back and told the revenue officer the taxpayer was out on a service call. The revenue officer left her card and requested the taxpayer call her the next day. The revenue officer noted the ICS case history with the details before moving on to her next field call. The taxpayer did not respond to the revenue officer's leaving a card, but the revenue officer was able to reach him by phone a few days later. The taxpayer told the revenue officer he was too busy to update his financial records in order to provide the IRS with the necessary financial statements and abruptly told her, "The IRS will get paid when I get paid." The revenue officer advised the taxpayer that the IRS must file a NFTL and that she would issue a Notice of Intent to Levy. The taxpayer hung up the phone without responding. The revenue officer contemporaneously detailed the exchange in the ICS case history citing the taxpayer's lack of cooperation in providing requested financial information and missing scheduled meetings as the justification for filing the NFTL and issuing the Notice of Intent to Levy per IRM 5.11.1.3.1, Pre-Levy Considerations, and IRM 5.12.2.3.2, Determination Requirements.

Three weeks later, the taxpayer requested a Collection Due Process (CDP) hearing under IRC 6320. The revenue officer assembled the administrative file, including the full ICS case history, and referred the case to Appeals for the requested hearing. Because the revenue officer's contemporaneous ICS case history entries are pertinent to the originating function's consideration of the case, the comments about the taxpayer's lack of cooperation contributing to the filing of the NFTL are permissible communications.

Example: A revenue agent worked with a taxpayer's representative for 15 months before denying a claim for refund. The revenue agent prepared a rebuttal to the representative's protest letter and shared it with the taxpayer and representative. The revenue agent noted in his electronic case history on the date the case was referred to Appeals that he tried resolving the matter, but the representative's incompetence and lack of credibility led to the claim denial. Inserting comments in the case history concerning the originating function's perception of the demeanor or credibility of the taxpayer or taxpayer's representative just prior to transmitting the case to Appeals is prohibited. The comments had no bearing on the originating function's consideration of the issues in the case, and were included in the case history for purposes of attempting to influence Appeals.

Example: A settlement officer reviewed a new CDP case in which the business taxpayer requested an installment payment agreement. After completing the initial review of the administrative file, the settlement officer scheduled the CDP conference to take place 30 days later. Shortly before the CDP conference, the settlement officer accessed the Integrated Data Retrieval System (IDRS) and saw that the taxpayer had made no federal employment tax deposits for the current quarter. This is not considered communication since IDRS is a database used universally by all IRS functions, including Appeals, and there was no dialogue or interaction with the originating function.

- (3) Database inquiries that include history entries up until the date the case is referred to Appeals (e.g., via Form 14461, Transmittal of CDP/Equivalent Request Hearing), which are considered part of the administrative file, are appropriate. In contrast, inquiries that include history entries beyond the referral date are prohibited. See the example below regarding this guideline:

Example: A CDP case was referred to Appeals on July 15, 2021. Upon case assignment, the ATE accesses the Integrated Collection System (ICS) to retrieve the case history through July 15, 2021, the date the case was referred by the originating function to Appeals, and notes that a fraud technical coordinator was consulted on several matters. Thirty days later, the ATE accesses ICS again and views history entries from September 2021, beyond the referral date of July 15, 2021. In doing so, the ATE sees that the fraud technical coordinator has recommended a criminal referral.

The first access of the ICS history is appropriate, because Appeals is entitled to review the contents of the administrative file, including the ICS history entries up to the date the case is referred to Appeals (see Revenue Procedure 2012-18, Section 2.03(4)(d)). The second access of the ICS history constitutes a breach of the ex parte rules because Appeals' independence is compromised. See Revenue Procedure 2012-18, Section 2.03(1).

- (4) For a discussion of the rules applicable to the administrative file, see section 2.03(4) of Revenue Procedure 2012-18, Administrative File, and IRM 8.1.10.4.2 below.
- (5) For a discussion on curing ex parte communication breaches, see IRM 8.1.10.6 below.

8.1.10.2.1.1
(10-01-2012)
**Communications
Between Appeals
Employees**

- (1) Communications between or among Appeals employees are not considered ex parte communications because they do not involve employees from IRS functions outside of Appeals.
- (2) See also section 2.03(12) of Revenue Procedure 2012-18, Review of Coordinated Issues, and IRM 8.7.3, Technical and Procedural Guidelines, Domestic and International Operations Programs, for information on communications by and with Appeals domestic and international technical specialists.

8.1.10.2.1.2
(06-21-2012)
**Taxpayer Advocate
Service (TAS)**

- (1) TAS is not an “originating function.” Appeals may presume that TAS employees are acting at the request and with the consent of the taxpayer. TAS employees may discuss with Appeals the strengths and weaknesses of the parties’ respective positions and may advocate for a particular result in the case. See section 2.07(4) of Revenue Procedure 2012-18, Taxpayer Advocate Service.

Example: Appeals received an income tax case with an associated Operations Assistance Request (OAR) from TAS. The Service Level Agreement (SLA) between TAS and Appeals requires the appeals officer, upon receipt of the case, to provide the TAS case advocate with the estimated decision date. The SLA further requires the appeals officer to provide the TAS case advocate with other information regarding Appeals’ decision prior to closing the case. Those communications with TAS are permissible.

8.1.10.2.1.3
(06-21-2012)
**IRS Functions Not
Considered an
“Originating Function”**

- (1) Appeals must occasionally communicate with IRS employees other than those from “originating functions.” Examples include the Commissioner and other IRS officials with overall supervisory responsibilities for IRS operations, Counsel, Criminal Investigation (CI), Competent Authority, and TAS (see above).

Note: While Counsel is not an originating function, they are still subject to the ex parte rules in certain situations. See IRM 8.1.10.4.4.

- (2) CI is not an originating function because Appeals does not review its determinations. CI may communicate ex parte with Appeals to obtain information or documents in Appeals’ possession that may be relevant to the activities of CI or to ensure that Appeals’ actions will not interfere with any ongoing criminal investigation or be inconsistent with any prior criminal investigation. See section 2.07(2) of Revenue Procedure 2012-18, Criminal Investigation, for additional information.
- (3) See section 2.07 of Revenue Procedure 2012-18, Communications with Other IRS Functions, for details on communications with:
- Outside consultants and experts under contract to the IRS, Appeals, or hired by Counsel in docketed cases
 - United States Competent Authority
 - IRS Commissioner and other IRS officials with overall supervisory responsibilities

8.1.10.2.1.4
(06-21-2012)
**Other Governmental
Agencies**

- (1) Communications with other governmental agencies are not considered ex parte communications because RRA 98 section 1001(a)(4) only applies to communications between Appeals and other IRS employees. Examples of other governmental agencies with whom Appeals communicates include the Department of Justice and the Joint Committee on Taxation. Appeals may communicate with the employees of the Department of Justice, including the U.S. Attorneys’ offices and the Joint Committee or its staff, without offering the taxpayer or representative an opportunity to participate. See section 2.08 of Revenue Procedure 2012-18, Communications with Other Governmental Entities.
- (2) Appeals headquarters employees also routinely communicate with employees from the General Accountability Office (GAO) and Treasury Inspector General - Tax Administration (TIGTA) as part of their audits and reviews of Appeals’

programs, processes or procedures. Employees of GAO and TIGTA are not IRS employees, so the communications are not considered ex parte communications.

8.1.10.3
(06-21-2012)

**Multifunctional Meetings
and Coordinated Issues**

- (1) Appeals must have access to the views and analyses of stakeholders in order to make fully-informed, independent judgments. IRS sometimes develops settlement initiatives in order to address particular issues or types of transactions. Appeals' perspective in the formulation of the terms contained in these settlement initiatives is essential to the IRS's ability to resolve cases without litigation. Therefore, Appeals is permitted to work collaboratively with Compliance and Counsel to assist with the development of these settlement initiatives by providing input to other IRS functions, including originating functions and Counsel, in generic discussions of issues and transactions. Any case-specific discussions are generally prohibited, unless the taxpayer/representative is given an opportunity to participate.
- (2) Appeals may not participate on Issue Management Teams (IMTs), but it has other means to stay current on tax issues and may be briefed by IMTs so long as the discussion remains generic rather than case-specific. See section 2.04(1) of Revenue Procedure 2012-18, Participation in Multifunctional Meetings, General Rule.
- (3) The rules of engagement concerning Appeals' activities in multifunctional settings are as follows:

Rules of Engagement	
Appeals may <i>not</i> participate in:	
<ul style="list-style-type: none"> • IRS meetings or forums discussing specific taxpayer cases • Developing or reviewing audit technique guides • Developing or reviewing Coordinated Issue Papers (CIPs) • Developing or reviewing legal or technical administrative guidance for an originating function or Counsel in multifunctional settings • Identifying or developing specific issues or specific cases in multifunctional settings • Identifying cases for litigation 	
Appeals may:	

Rules of Engagement

- Access discussion boards and forums that are open to IRS employees
- Receive presentations regarding an originating function's views of the factual and legal aspects of an issue provided there is no discussion about a specific taxpayer's case
- Request an originating function to clarify facts relevant to the issue provided there is no discussion about a specific taxpayer's case
- Request an originating function to clarify legal arguments or merits of the issue, but only with respect to their written position (Examples include a redacted Form 5701, Notice of Proposed Adjustment, generic Form 5701, pro forma Revenue Agent Report, CIP, or Chief Counsel opinion to Appeals)
- Attend or host meetings with external stakeholder groups, such as the American Bar Association, American Institute of Certified Public Accountants, National Association of Enrolled Agents, etc., to discuss or obtain information on factual and legal aspects of issues
- Gather inventory information from an originating function for future staffing or training needs

Example: Appeals may independently review and provide feedback on drafts of IRMs, revenue procedures, announcements, etc.

Example: The Examination function and Counsel hold monthly meetings to discuss current developments relating to recently decided court cases dealing with estate and gift tax issues and ways to better develop issues. No open cases are discussed at these meetings. For each case discussed, the estate tax examiner who was originally assigned the case in Exam and the Area Counsel attorney who litigated the case or drafted the defense letter are invited to discuss the subject case including factual development and the court's opinion. Appeals may listen to the discussion of the decided cases between Exam and Counsel, but Appeals will not participate in those discussions.

(4) See also IRM 8.7.3, Technical Guidance and International Programs.

8.1.10.4
(06-21-2012)
**Communications with
Originating Functions**

- (1) Appeals is charged with providing an independent dispute resolution function within IRS. Appeals employees must make fully informed, independent judgments regarding:
 - Strengths and weaknesses of respective positions of both the taxpayer and the government
 - Application of law, regulations, and IRS policies and procedures based on the facts and circumstances of the case
 - Evaluation of hazards of litigation
- (2) Ex parte communications between Appeals employees and employees of originating functions are prohibited to the extent the communications appear to compromise Appeals' independence. See RRA 98 section 1001(a)(4). Appeals may not engage in discussions with the originating function regarding the

strengths and weaknesses of the issues and the parties' positions in cases without providing the taxpayer/representative an opportunity to participate. See section 2.03(3) of Revenue Procedure 2012-18, Prohibited Communications, for examples of communications between Appeals and an originating function that are prohibited unless the taxpayer/representative is given an opportunity to participate.

- (3) See section 2.03(5) of Revenue Procedure 2012-18, Preconference Meetings, and IRM 8.7.11.9, Working Appeals Team Cases, Pre-Conference Meeting, for additional details about preconference meetings.
- (4) See also IRM 8.1.10.5 below for information and guidance regarding providing taxpayers/representatives an opportunity to participate in Appeals' communications with employees of the originating functions.

8.1.10.4.1
(09-28-2017)
**Permissible
Communications**

- (1) Not all communications between Appeals and employees of originating functions are prohibited, even if ex parte. This section outlines instances of permissible communications, specifically:

- a. Ministerial, administrative, or procedural matters
- b. Communications to the originating function from Appeals detailing new information or issues addressed, or other reasons why a case is being returned as a premature referral
- c. Post-settlement conferences

See section 2.03(2)(a) of Revenue Procedure 2012-18 for several examples of permissible communications that are considered ministerial, administrative, or procedural.

- (2) Briefings on generic, noncase-specific discussions of issues, including Appeals' participation in collaborative efforts with Counsel and originating functions in developing Service-wide settlement initiatives are also permissible. See section 2.04 of Revenue Procedure 2012-18, Participation in Multifunctional Meetings, and IRM 8.1.10.3 above for additional details.
- (3) Appeals domestic and international technical specialists may participate in certain communications detailed in section 2.03(12) of Revenue Procedure 2012-18, Review of Coordinated Issues, without offering the taxpayer/representative an opportunity to participate.

8.1.10.4.1.1
(06-21-2012)
**Ministerial,
Administrative, and
Procedural Matters**

- (1) Ex parte communications between Appeals employees and employees of originating functions involving matters that are ministerial, administrative, or procedural are permissible. See section 2.03(2) of Revenue Procedure 2012-18, Ministerial, Administrative, or Procedural Matters, for examples of communications that are considered ministerial, administrative, or procedural in nature.
- (2) IRC 6320 and IRC 6330 require Appeals to obtain verification that the requirements of any applicable law or administrative procedure have been met. Communications seeking to verify compliance with legal and administrative requirements fall within the ministerial, administrative, or procedural matters exception set forth in section 2.03(2)(a)(xi) of Rev. Proc. 2012-18. Similarly, communications with respect to verification of assets/liabilities involving a collection alternative during a Collection Due Process (CDP) hearing fall within the ministerial, administrative, or procedural matters exception and are permis-

sible without providing the taxpayer/representative an opportunity to participate. See also section 2.03(10)(b) of Revenue Procedure 2012-18.

Example: Settlement officer Stone reviewed a new CDP levy case involving an IRC 6702 penalty. Stone was concerned about whether proper managerial approval was secured prior to the civil penalty being assessed, so she contacted the IRS Frivolous Return Program (FRP) unit and asked for a copy of the Form 8278, Assessment and Abatement of Miscellaneous Civil Penalties. This was a permissible communication necessary for settlement officer Stone to obtain verification that the requirements of applicable law or administrative procedures were met.

Example: Settlement officer Pike was conducting a CDP hearing involving an in-business taxpayer that owed employment tax. Pike received an installment payment proposal. Pike issued an Appeals Referral Investigation (ARI) to the local revenue officer group to complete the financial verification requirements of IRM 5.14.7.4, In-Business Trust Fund Installment Agreements Requiring Financial Analysis and Determining Ability to Pay. In the ARI, Pike stated he wanted the revenue officer to conduct complete real and personal property record checks, including motor vehicles, but did not indicate the reason why the record check was needed. The revenue officer conducted full checks of real and personal property records and submitted a report to Appeals with the results. The revenue officer did not offer any comments or opinions about how Appeals should resolve the case. This was a permissible communication necessary for settlement officer Pike to properly consider the merits of the taxpayer's installment payment proposal.

- (3) See IRM 8.1.10.7 below for documentation requirements for ministerial, administrative, or procedural ex parte communications.

8.1.10.4.1.2
(09-28-2017)
Premature Referrals

- (1) Cases that were improperly sent to Appeals or that are not ready for Appeals consideration will be returned for reasons described in:
- IRM 8.2.1.5, Returning a Case to Examination - ATE
 - IRM 8.2.1.7.2, Verification of New Material or Request for Further Development - ATE
 - IRM 8.22.5.2.4, Premature Referrals
 - IRM 8.23.2.4, Premature Referral Issues
 - IRM 8.24.1.2, Collection Appeals Program (CAP)
 - IRM 8.25.2, Working Trust Fund Recovery Penalty Cases in Appeals
- (2) Appeals may communicate an explanation of the reason(s) why the case is being returned, but must be mindful to not engage in a discussion beyond ministerial, administrative, or procedural matters. See section 2.03(6) of Revenue Procedure 2012-18, Premature Referrals.
- (3) When returning a case to the originating function, Appeals must promptly notify the taxpayer/representative. See section 2.03(6) of Revenue Procedure 2012-18. .

Example: Review IRM 8.22.5 for instructions on improper referrals if Collection referred a CDP case to Appeals even though no CDP notice was issued and thus there was no right of appeal.

- (4) The originating function may not communicate *ex parte* with Appeals while re-considering the case, other than with respect to ministerial, administrative, or procedural matters, without offering the taxpayer or representative an opportunity to participate in the discussion because Appeals may ultimately review the case.
- (5) If a case is later returned to Appeals, ensure that the originating function shared the supplemental report reflecting the additional development with the taxpayer/representative in the same manner as described in sections 2.03(4)(b) and (c) of Revenue Procedure 2012-18, Administrative File, Transmittal, and Rebuttal to Protest.

8.1.10.4.1.3
(09-28-2017)

**New Information
Received or New Issues
Raised**

- (1) Appeals will follow the general principles in IRM 8.2.1.7.2, Verification of New Material or Request for Further Development - ATE, and section 2.03(7) of Revenue Procedure 2012-18, Submission of New Information, if new information or evidence is received from the taxpayer/representative. The results of the originating function's review of the new information must be shared with the taxpayer/representative.
- (2) Appeals will follow the general principles in IRM 1.2.1.9.2, Policy Statement 8-2, and IRM 8.6.1.7.2, General Guidelines, regarding raising new issues. Communications with the originating function on new issues must be in accordance with the guidance on communications with other IRS functions in section 2.02(6) of Revenue Procedure 2012-18, Communications with Other IRS Functions.
- (3) Refund claims filed with Appeals during the Appeals process generally are referred to the originating function with a request for expedited review. Referral of these refund claims to the originating function should not involve any discussion about the strengths and weaknesses of the issue and, thus, falls within the ministerial, administrative, or procedural matters exception set forth in IRM 8.1.10.4.1.1 above. Appeals must timely notify the taxpayer/representative when the refund claim is referred to the originating function. See IRM 8.7.7, Claim and Overassessment Cases, and IRM 8.20.5.10.1, Receipt of Claim Cases, Overassessment Cases, or Net Rate Netting Claims/Requests, for further guidance.

8.1.10.4.1.4
(06-21-2012)

**Post-Settlement
Conferences**

- (1) A post-settlement conference may be held with an originating function *after* the Appeals case is closed. A discussion of Appeals' resolution of the issues for the closed tax period(s) helps the originating function understand the rationale for the settlement or case decision and affords Appeals the opportunity to discuss the potential for Examination to apply Delegation Order 4-24 (see also IRM 1.2.2.5.20), or subsequent delegation orders (i.e., settlement by Examination consistent with a prior Appeals settlement with the same or related taxpayer).

Note: "Closed" for *ex parte* communication purposes means Appeals rendered its decision in the case and issued the necessary closing documents formalizing that decision, and no additional changes may be made by Appeals.

- (2) The originating function cannot influence Appeals' decision on a closed tax period. Therefore, post-settlement conferences do not compromise Appeals' independence and are permissible without offering the taxpayer/representative an opportunity to participate. Discussions between Appeals and the originating

function, however, must be limited to results in the closed tax period(s). Discussion is limited to the issues in the closed case. Avoid discussing matters such as the originating function's perception of the demeanor or credibility of the taxpayer or representative, or issues presented in the cases that remain open.

- (3) See section 2.03(11) of Revenue Procedure 2012-18, Post-Settlement Conference, for further details.

8.1.10.4.1.5
(09-21-2021)
Docketed Cases

- (1) The ex parte communication rules do not apply to communications between Appeals and Counsel with respect to cases docketed in the United States Tax Court, with the exception of remanded CDP cases (see note below). Cases under the jurisdiction of the Department of Justice are also exempt because the ex parte communication rules only apply to communications between Appeals and other IRS employees.

Note: See section 2.03(10)(c) of Revenue Procedure 2012-18, Collection Due Process, Remand By Tax Court, and IRM 8.1.10.4.5 below for an exception with regard to docketed CDP cases remanded to Appeals by the Tax Court.

- (2) Communications between Appeals and the originating function involving docketed cases are still subject to the ex parte communication rules if the case is within Appeals' settlement jurisdiction, such as with cases being considered by Appeals under section 2.06 of Revenue Procedure 2012-18, Communications with Counsel..
- (3) See section 2.06(2) of Revenue Procedure 2012-18, Communications with Counsel, Docketed Cases, for further details.

8.1.10.4.2
(11-13-2014)
Administrative File

- (1) If a taxpayer appeals the decision made by an originating function, that function transmits the administrative file to Appeals. The administrative file is not considered to be an ex parte communication within the context of Revenue Procedure 2012-18. However, the originating function is precluded from placing in the administrative file notes, memoranda or other documents not normally generated in the ordinary course of developing the case, *if* the reason for including the material is to influence Appeals. Examples may include:
 - A transmittal memorandum, T-Letter or similar document used to transmit the administrative file, if the document contains recommendations concerning what Appeals should consider or how Appeals should view or resolve an issue
 - Gratuitous comments in the case history if the comments would be prohibited if they were communicated to Appeals separate from the administrative file (see Examples in IRM 8.1.10.2.1 , Database Inquiries, above)
 - A rebuttal memorandum or summary in the case history made by the originating function that serves as the originating function employees' rebuttal to newly identified issues contained in the taxpayer's protest that the originating function investigated or considered after receiving the taxpayer's protest, **unless** the rebuttal memorandum or result of the additional investigation was shared with the taxpayer/representative by the originating function at the time the case was sent to Appeals. See section 2.03(4)(c) of Revenue Procedure 2012-18, Administrative File, Rebuttal to Protest.

Note: For CDP and CAP hearing requests, refer to paragraph (4) below.

Example: A revenue agent received an appeal from a taxpayer protesting a proposed deficiency involving a Child Tax Credit issue. The revenue agent prepared a Form 4665, Report Transmittal, containing instructions to the appeals officer stating the only truly questionable aspect in this case is whether the taxpayer meets the support requirements and therefore Appeals should not even consider the taxpayer's positions regarding the relationship, residency or age tests. This was a prohibited communication because the revenue agent's transmittal memorandum was not generated in the ordinary course of developing the case and was intended to influence Appeals by containing recommendations on what Appeals should consider and how it should approach its decision in the case.

Example: A revenue officer received an appeal from a taxpayer protesting a proposed Trust Fund Recovery Penalty (TFRP). The revenue officer determined the protest contained no new information or issues and made an entry into the case history indicating the protest was received but contained no new information or issues, and forwarded the case to Appeals. The revenue officer's case history entry was a permissible communication because it contained no discussion about the substance of the issues raised in the taxpayer's protest.

Example: An offer in compromise (OIC) specialist received an appeal from a taxpayer protesting the rejection of her OIC. The taxpayer raised a new issue in the protest letter. The OIC specialist conducted additional investigation of the newly identified issue and determined that the decision to reject the OIC remained appropriate. The OIC specialist contacted the taxpayer by telephone, fully discussed the results of his additional investigation, documented the case history with the details of the discussion, and submitted the case to his manager for review and approval. No rebuttal memorandum was prepared. The Collection manager concurred with the OIC specialist's supplemental determination and forwarded the case to Appeals. There was no ex parte communication violation in this instance. The OIC specialist shared the results of his supplemental investigation with the taxpayer and documented the details of his discussion with the taxpayer about his supplemental findings. Alternatively, if the OIC specialist had been unable to contact the taxpayer, the Collection group manager would have been required to issue a letter to the taxpayer explaining the final determination before sending the case to Appeals.

Example: Same circumstances as the above example except the OIC specialist did not contact the taxpayer nor did the Collection group manager send the taxpayer a letter sharing the results of the supplemental investigation of the new issue raised by the taxpayer in the protest. Entering the results of the additional investigation in the case history without sharing those results with the taxpayer prior to sending the case to Appeals violated the ex parte communication rules because: 1) the OIC specialist's case history documenting investigation of the newly identified issue served as the originating function's rebuttal to the taxpayer's protest; 2)

the case history documenting the additional investigation could influence Appeals; and 3) the results of the additional investigation were not shared with the taxpayer/representative by the OIC specialist or group manager at the time the originating function sent the case to Appeals. Per IRM 8.1.10.6, the Appeals manager contacted the manager of the Collection employee regarding the violation of the ex parte communication rules.

- (2) The originating function is permitted to include in the transmittal a neutral list of unagreed issues, without discussion, and to indicate which ones, if any, are coordinated issues.

Example: A revenue agent received a letter of appeal from taxpayer's representative protesting the decision made in an income tax case. The revenue agent prepared a rebuttal to the protest and sent copies to both the taxpayer and representative. The administrative file contained the revenue agent's work papers, computations, reports, copies of all correspondence issued to and received from the taxpayer/representative and the revenue agent's proposed determination. As part of transmitting the case file to Appeals, the revenue agent prepared a transmittal memorandum that listed the three specific issues that are the subject of the dispute. The revenue agent identified one of the issues as a coordinated issue but did not include any comments about the disputed issues. The administrative file in this case contained no prohibited communication because: 1) the revenue agent's work papers, computations, reports and proposed determination were all generated in the ordinary course of developing the case; 2) the rebuttal was shared with the taxpayer/representative by the revenue agent at the time the case was sent to Appeals; and 3) the revenue agent's listing of the disputed issues in the transmittal memorandum did not contain any discussion of the issues.

- (3) It is permissible for the originating function to contemporaneously include in the administrative file statements or documents that are pertinent to their consideration of the case after the taxpayer requests Appeals' consideration, even if the substance of those comments, statements, or documents would be prohibited if they were communicated to Appeals separate and apart from the administrative file. See section 2.03(4)(d) of Revenue Procedure 2012-18, Administrative File, Contents of Administrative File. Actions taken and documented in accordance with the originating function's established procedures are considered part of the administrative file and do not violate the ex parte communication rules.
- (4) When a taxpayer requests Appeals' review of an action or decision by Collection, the action or decision is generally limited to a particular issue or to a particular tax and period. Collection is not prohibited by this review from continuing to collect unpaid taxes for the tax period(s) subject to Appeals' review (except the making of a levy in the case of a timely-requested IRC 6330 hearing) or for other tax periods that are not the subject of the appeal. Unlike the Examination function, which evaluates liability for each tax period separately, Collection must evaluate the taxpayer's financial condition as a whole, including sources of enforced collection, when considering how best to collect a taxpayer's unpaid taxes. Evaluation of a taxpayer's financial condition, for example, is important when considering collection alternatives, whether the taxpayer is eligible for a Currently Not Collectible status based on hardship, or

whether the taxpayer is eligible for a levy release or withdrawal of a Notice of Federal Tax Lien. Appeals is similarly required to evaluate a taxpayer's financial condition and therefore statements or documents added to the administrative file by Collection after the taxpayer requests Appeals' review may be relevant to Appeals' decision. Statements or documents contemporaneously added to the administrative file by Collection do not violate the ex parte communication rules **if** they are made in connection with Collection's continued efforts to work with the taxpayer to resolve the tax debt(s) or further evaluate the taxpayer's financial condition **and** are in accordance with established procedures.

Example: A revenue officer received a Form 12153, Request for a Collection Due Process or Equivalent Hearing, requesting a CDP hearing under IRC 6330. The taxpayer checked the "Proposed Levy or Actual Levy" and "Installment Agreement" boxes on the Form 12153. The revenue officer contacted the taxpayer and attempted to reach an agreement on a monthly payment amount and contemporaneously documented her case history throughout her discussions with the taxpayer. They were not able to reach an agreement on a monthly payment amount so the revenue officer included in the case history a list of documents and neutral statements regarding the actions taken, and forwarded the case to Appeals. There were no ex parte communication violations in this example because the revenue officer's case history entries were made contemporaneously and were pertinent to Collection's consideration of the case, so they were considered part of the administrative file.

Example: A revenue officer received a Form 12153 requesting a CDP hearing under IRC 6330. The taxpayer checked the "Proposed Levy or Actual Levy" and "Installment Agreement" boxes on the Form 12153 and attached a letter requesting an installment payment agreement for \$101/month. The revenue officer continued to work with the taxpayer by securing and evaluating financial information and contemporaneously documenting his case history. The revenue officer and the taxpayer were not able to agree on a monthly payment amount, so the CDP hearing request was sent to Appeals. There were no ex parte communication violations in this example because the revenue officer's case history entries, even those made after receipt of the Form 12153 regarding his evaluation of the taxpayer's financial information and installment payment agreement proposal, were made contemporaneously and were pertinent to Collection's consideration of the case, so they were considered part of the administrative file.

- (5) See sections 2.01(1)(a)(i), 2.03(2)(a)(vi), and 2.03(4) of Revenue Procedure 2012-18 for additional information on the administrative file.
- (6) For a discussion on curing ex parte communication breaches, see IRM 8.1.10.5 below.

8.1.10.4.3
(06-21-2012)
**Taxpayer with Multiple
Open Cases**

- (1) Taxpayers occasionally have more than one case or issue pending with different IRS functions, including Appeals. This typically occurs with large corporate taxpayers. See generally section 2.03(13) of Revenue Procedure 2012-18, Taxpayers with Multiple Open Cases.

- (2) Taxpayers may also have multiple cases involving the same issue pending with Appeals in both docketed and nondocketed status, in which case the ex parte communication rules apply differently.
- (3) Because the ex parte communication rules may apply differently depending on the status of the case, Appeals employees considering cases involving taxpayers with multiple open cases must carefully follow the ex parte communication guiding principles in section 2.02(6) and the operative rules detailed throughout this IRM and sections 2.03, 2.06, 2.07, and 2.08 of Revenue Procedure 2012-18.

8.1.10.4.4
(10-01-2012)
**Communications with
Counsel**

- (1) The Chief Counsel is the legal adviser to the Commissioner and all IRS officers and employees, including Appeals, on all matters pertaining to the interpretation, administration and enforcement of the internal revenue laws and related statutes. Appeals employees are generally entitled to obtain legal advice from Office of Chief Counsel attorneys and are permitted to do so under the ex parte communication rules. However, Appeals employees should not communicate ex parte regarding an issue in a case pending before them with a field attorney if the field attorney personally provided legal advice regarding the same issue in the same case to the originating function or personally served as an advocate for the originating function regarding the same issue in the same case. This restriction generally does not apply to reviewers and national office attorneys. However, if those persons are essentially functioning like a field docket attorney, then the restriction on ex parte communications applies to them. See also section 2.06 of Revenue Procedure 2012-18, Communications with Counsel. The rules and limitations are illustrated by the following examples:

Example: A settlement officer is considering a taxpayer's Collection Appeals Program (CAP) appeal of the IRS's planned seizure of nonresidential real property. The property at issue is located in Idaho and owned jointly by a married Idaho couple. The tax liability at issue is a substitute for return assessment against the husband only. The taxpayer argues the federal tax lien attaches only to his one-half interest in the property, but the revenue officer plans to also seize and sell the nonobligated spouse's interest based on Idaho's community property laws. After researching the Idaho community property statutes, the settlement officer was unclear about how the internal revenue laws and the federal tax lien applied to the nonobligated spouse's community property interest. It is permissible for the settlement officer to seek legal advice from a Chief Counsel attorney.

Example: Same circumstances as above except Field Attorney Smith previously provided legal advice to the revenue officer concerning the federal tax lien and the nonobligated spouse's interest in the property. Because the settlement officer is performing her duties of evaluating the strengths and weaknesses of the issue, the settlement officer may not communicate ex parte with Field Attorney Smith on the issue. Counsel must assign an attorney who had not previously provided advice to Collection on the same issue in the same case, or Appeals must offer the taxpayer an opportunity to participate in the settlement officer's discussion with Field Attorney Smith.

Example: Same circumstances as the second example except Field Attorney Smith previously provided legal advice to the revenue officer concerning a different issue in a different case. It is permissible for the settlement officer to seek legal advice from Field Attorney Smith.

Example: Same circumstances as the second example except Field Attorney Smith previously provided legal advice to the revenue officer concerning the same issue but in a different case involving a different taxpayer. It is permissible for the settlement officer to seek legal advice from Field Attorney Smith.

Example: Same circumstances as the second example except Field Attorney Smith previously provided legal advice to the revenue officer concerning a different issue in the same case involving the same taxpayer. It is permissible for the settlement officer to seek legal advice from Field Attorney Smith.

Example: Same circumstances as the second example except a Chief Counsel attorney in the National Office previously issued Chief Counsel Advice to Field Attorney Smith concerning the federal tax lien and the nonobligated spouse's interest in the property. Issuing Chief Counsel Advice is a traditional National Office function. The settlement officer may communicate with the National Office attorney because Appeals is entitled to obtain legal advice from Chief Counsel attorneys and because the restriction on ex parte communications that applies to Field Counsel in the second example does not apply to the National Office attorney in this example.

- (2) IRM 8.6.3.5, Conference and Settlement Practices, Requests for Legal Opinion, along with the following sections in Revenue Procedure 2012-18 contain guidance on communications with Counsel:
 - 2.02(3) - Guiding Principles, Legal Advice
 - 2.03(10)(c) - Collection Due Process, Remand by Tax Court
 - 2.03(13) - Taxpayers with Multiple Open Cases
 - 2.04 - Participation in Multifunctional Meetings
 - 2.06(1) - Communications with Counsel, General Rule
 - 2.06(2) - Communications with Counsel, Docketed Cases
- (3) Appeals employees generally are not bound by the legal advice that they receive from the Office of Chief Counsel. Appeals employees independently evaluate the strengths and weaknesses of the specific issues in the cases assigned to them and make an independent judgment concerning the overall strengths and weaknesses of the cases they are reviewing and the hazards of litigation. Legal advice is but one factor that Appeals will take into account in its consideration of the case. See IRM 8.6.4.1, Fair and Impartial Settlements per Appeals Mission, and IRM 8.6.2, Conference and Settlement Practices, Appeals Case Memo Procedures.
- (4) The restriction on Counsel communicating ex parte with Appeals only applies while Appeals is performing its duties of evaluating the strengths and weaknesses of the specific issues in specific cases and the overall hazards of litigation for those cases. If an Appeals employee is not functioning in that capacity, for example, if an Appeals employee is preparing a statutory notice of deficiency, this restriction on ex parte communications does not apply. At this

stage of the case, the Appeals employee has concluded that the case will be closed as unagreed and is no longer attempting to settle the case. Therefore, Appeals may seek legal advice from Counsel in connection with the review of the draft statutory notice of deficiency, even if the Counsel attorney previously provided advice to Examination regarding one or more of the same issues in the same case.

- (5) The ex parte communication rules generally do not apply to communications between Appeals and Counsel in connection with cases docketed in the United States Tax Court. See section 2.06(2) of Revenue Procedure 2012-18.
- (6) See IRM 8.1.10.4.5 and section 2.03(10)(c) of Revenue Procedure 2012-18 concerning communications with Counsel in docketed CDP cases.

8.1.10.4.5
(06-21-2012)
Collection Due Process

- (1) Discussions between Appeals employees and originating function employees involving CDP cases must be held in accordance with the ex parte communication guiding principles found in section 2.02 of Revenue Procedure 2012-18, Guiding Principles.
- (2) IRC 6320 and IRC 6330 contain specific requirements relating to Appeals hearing officers conducting CDP hearings. Communications pertaining to the following fall within the ministerial, administrative, or procedural matters exception per section 2.03(2)(a)(xi) of Revenue Procedure 2012-18 and are permissible without providing the taxpayer/representative an opportunity to participate:
 - Verifying compliance with legal and administrative requirements
 - Verifying assets/liabilities involving a collection alternative
 - Deadlines relating to a remanded CDP case
- (3) Although the ex parte communication rules generally do not apply to docketed cases, CDP cases that are remanded by the Tax Court for either further consideration or reconsideration by Appeals fall into a different category. IRC 6320(b)(3) (liens) and IRC 6330(b)(3) (levies) require that the Appeals employee assigned to the remanded CDP case be impartial in his/her review of the remanded issue. This, in turn, requires application of similar considerations to the ex parte communication rules for nondocketed cases.
- (4) When a case is remanded to Appeals, the Counsel attorney who handled the CDP case in Tax Court will prepare a memorandum containing the following:
 - a. Reason(s) why the court remanded the case to Appeals
 - b. Issues the court has ordered Appeals to address on remand
 - c. Any special requirements in the court's Order (see examples below)
- (5) Examples of special requirements the Counsel memorandum might detail include:
 - Whether and to what extent a new conference should be held
 - Whether the case must be reassigned to a different Appeals employee than the one who issued the original determination
 - Whether there are any materials Appeals is prohibited from reviewing
- (6) The Counsel attorney's memorandum may include legal analysis or legal advice to the extent necessary to fully explain the court's instructions, but should not include a discussion about the credibility of the taxpayer or the

accuracy of the facts presented by the taxpayer. Per section 2.03(10)(c)(i)(A) of Revenue Procedure 2012-18, Counsel will provide a copy of the memorandum to the taxpayer/representative.

Example: Appeals issued a Notice of Determination stating the taxpayer did not provide requested financial information and therefore was not eligible for consideration of collection alternatives. The Tax Court, however, remanded the case to Appeals because the settlement officer did not give the taxpayer a sufficient amount of time to submit the required information. The Counsel attorney prepared a memorandum summarizing the Tax Court's reason for remanding the case to Appeals and the court's requirement that Appeals give the taxpayer another chance to submit financial information necessary to determine eligibility for collection alternatives. Counsel sent a copy of the memorandum to the taxpayer. This memorandum is not a prohibited ex parte communication because (1) it limits itself to the topics addressed above, and (2) a copy was provided to the taxpayer.

- (7) Counsel may communicate deadlines relating to the remanded CDP case to Appeals without providing the taxpayer/representative an opportunity to participate because that is a permissible communication within the ministerial, administrative, or procedural matters exception.
- (8) The Appeals employee assigned to the remanded CDP case may seek legal advice in connection with the remanded case from the same Counsel attorney who is handling the Tax Court case.
- (9) The Counsel attorney handling the Tax Court case will review Appeals' supplemental Notice of Determination before Appeals issues it to the taxpayer for the limited purpose of ensuring Appeals has fully complied with the Tax Court's remand Order.
- (10) See also sections 2.03(10), Communications with Originating Function, Collection Due Process, and 2.10(2), Remedies Available to Taxpayers, Collection Due Process Cases, of Revenue Procedure 2012-18.

8.1.10.4.6
(09-21-2021)
**Alternative Dispute
Resolution (ADR)**

- (1) Appeals maintains many different ADR programs. Specifically, Fast Track Settlement and Fast Track Mediation involve Appeals employees serving as mediators or facilitating settlement discussions while jurisdiction of the case is still with Examination or Collection. The prohibition against ex parte communications between Appeals employees and originating function employees does not apply in these ADR programs because the Appeals employees are not acting in their traditional Appeals settlement role. Ex parte communications, such as a private caucus between the Appeals mediator and Examination or Collection employees during the course of the mediation session, is permissible under the ex parte communication rules.
- (2) The ex parte communication rules do not apply in Post Appeals Mediation (PAM) because Appeals is a party to the proceeding and, in that capacity, Appeals is not acting in its traditional settlement role. As part of the PAM process, section 12.01 of Rev. Proc. 2014-63, General Provisions, Communication with IRS and Counsel Permitted, further provides Appeals with the discretion to communicate ex parte with the Office of Chief Counsel or the originating function in preparation for or during the mediation session.

- (3) The ex parte communication rules **do** apply to Appeals' consideration of an issue under the Early Referral process or the Accelerated Issue Resolution program.
- (4) See section 2.05 of Revenue Procedure 2012-18, Alternative Dispute Resolution, for further details.

8.1.10.5
(06-21-2012)
Opportunity to Participate

- (1) Communications between Appeals and an originating function employee are not considered ex parte communications **IF** Appeals provides the taxpayer/representative an opportunity to participate in the communications. If the taxpayer/representative chooses not to participate in the communications, the ex parte communication rules do not apply. See section 2.01(1)(a)(v) of Revenue Procedure 2012-18, Communications in Which the Taxpayer/Representative is Given an Opportunity to Participate.
- (2) If Appeals has a meeting or conference call with the originating function to discuss the strengths or weaknesses of the facts, issues, or positions of the taxpayer's case, the taxpayer/representative must be given a reasonable opportunity to participate. A preconference meeting is an example of this type of meeting. See section 2.03(5) of Revenue Procedure 2012-18, Preconference Meetings, and IRM 8.7.11.11, Working Appeals Team Cases, Pre-Conference Meeting, for additional details about preconference meetings.
- (3) Reasonable accommodations will be made to reach a mutually acceptable date and time for a discussion or meeting. However, the accommodations made shall not unreasonably delay the date and time for which Appeals schedules the discussion or meeting. Facts and circumstances will dictate what constitutes an unreasonable delay. If no agreement can be reached regarding a mutually acceptable date and time for the discussion or meeting or if the taxpayer/representative seeks to unreasonably delay a discussion or meeting, Appeals will proceed with the discussion or meeting.
- (4) The following table contains steps for ensuring Appeals has adequately offered the taxpayer/representative an opportunity to participate (see section 2.01(3) of Revenue Procedure 2012-18, Opportunity to Participate):

If ...	Then ...
A meeting or conference call is scheduled with an originating function and the strengths or weaknesses of the facts, issues, or positions of the case will be discussed	Notify the taxpayer/representative of a scheduled meeting or conference call and invite the taxpayer/representative to participate
The taxpayer/representative is unable to participate in the meeting or conference call at the scheduled time	<ol style="list-style-type: none"> 1. Find out the reason(s) why 2. Ask the taxpayer/representative for an alternative date(s) 3. Base your decision to reschedule on the facts and circumstances of the case, including the reason(s) why the taxpayer/representative is not available for the originally scheduled meeting or conference call and whether the alternative date(s) proposed by the taxpayer/representative is reasonable 4. Document the case activity record

If ...	Then ...
Based on the facts and circumstances of the case, the meeting or conference call is rescheduled	<ol style="list-style-type: none"> 1. Notify the taxpayer/representative and the originating function of the new date and time 2. Advise the taxpayer/representative that the meeting or conference call will not be further rescheduled 3. Document the case activity record
<ol style="list-style-type: none"> a. Based on the facts and circumstances of the case, the meeting or conference call is not rescheduled, or b. No agreement is reached regarding a mutually acceptable date and time for the meeting or conference call 	<ol style="list-style-type: none"> 1. Notify the taxpayer/representative of the date and time of the meeting or conference call 2. Proceed with the meeting or conference call 3. Document the case activity record, including that the taxpayer/representative declined to participate 4. Provide the taxpayer/representative with the substance of the discussion and give him/her a reasonable period of time within which to respond
Appeals receives a written communication from an originating function that addresses the strengths or weaknesses of the facts, issues, or positions of the taxpayer's case that was not generated in the ordinary course of developing the case and the reason for including the material was to influence Appeals	<ol style="list-style-type: none"> 1. Notify your manager of the receipt of the ex parte communication 2. Notify the taxpayer/representative of the receipt of the ex parte communication 3. Provide the taxpayer/representative with a copy of the written communication and give him/her a reasonable period of time within which to respond either verbally or in writing, including their input regarding the appropriate remedy to cure the breach of the ex parte communication rules 4. Document the case activity record

8.1.10.5.1
(06-21-2012)
Waiver

- (1) A taxpayer/representative has the option of granting a waiver on a communication-by-communication basis or a waiver covering all communications that might occur during the course of Appeals' consideration of a specified case.
- (2) When discussing an ex parte communication waiver with a taxpayer or representative, make sure:
 - Both parties are clear about whether the waiver is for a specific communication or covers all communications
 - The taxpayer/representative understands that he/she may revoke the waiver at any time, in which case the revocation would be effective with respect to communications occurring subsequent to the revocation
- (3) A written waiver is recommended but not required. A written waiver signed by the taxpayer or representative provides both the taxpayer/representative and Appeals with a record of the date the waiver was granted and the communication(s) covered, which helps avoid possible misunderstandings or misinterpretations.
- (4) Similarly, a written revocation of the ex parte communication waiver is recommended but not required.

- (5) If a waiver is granted verbally by the taxpayer/representative, document the case activity record with:
 - a. The date (and time, if necessary) the waiver was granted, and
 - b. Whether the waiver is for a specific communication or for all communications

Note: If the verbal waiver is intended to cover *all* communications, Appeals should obtain a written waiver from the taxpayer/representative.

- (6) See section 2.01(3)(c) of Revenue Procedure 2012-18, Opportunity to Participate, Waiver, for additional information.

8.1.10.6
(11-13-2014)
**Curing Ex Parte
Communication
Breaches**

- (1) The ex parte communication rules set forth in Revenue Procedure 2012-18 do not create substantive rights affecting the taxpayer's tax liability or the IRS's ability to determine, assess, or collect the tax liability, including statutory interest and any penalties, if applicable.
- (2) All IRS employees, including Appeals employees, are responsible for ensuring compliance with the ex parte communication rules.
- (3) Appeals managers will consider feedback from other functions and will be responsible for monitoring compliance during their day-to-day interaction with employees, as well as during workload reviews and closed case reviews. Ex parte communication breaches will be addressed in accordance with existing administrative and personnel processes on a case-by-case basis.
- (4) An Appeals employee (see table in IRM 8.1.10.1 (6) above) who discovers an ex parte communication breach shall promptly document the case activity record and notify his/her immediate manager. The Appeals manager will notify the manager of the employee who violated the ex parte communication rules. The information provided by the Appeals manager shall be limited to the specific details of the ex parte communication violation and may not include any discussion of the merits of the appealed case or recommendation of personnel action. The appeals manager will notify the Area Technical Advisor who will enter the information in the Ex Parte Report System set up to monitor breaches. As set forth in Revenue Procedure 2012-18, the system will generically describe the breach of the ex parte rules and will not retain case or employee specific information.
- (5) Prompt disclosure to the taxpayer/representative of the ex parte communication breach is important to promote transparency and preserve the integrity of the Appeals process. Failing to do so could create additional difficulties and added burden for both the taxpayer and Appeals if the breach were to come to light at some later point in time, such as through a Tax Court proceeding.
- (6) Most breaches of the ex parte communication rules may be cured by:
 - a. Timely notifying the taxpayer/representative,
 - b. Promptly sharing the communication or information at issue, and
 - c. Affording the taxpayer/representative a reasonable period of time within which to respond with input, including the requested remedy
- (7) Some breaches may warrant reassignment of the case to a different Appeals employee in order to protect taxpayer rights and preserve Appeals' independence as set forth in RRA 98 section 1001(a)(4).

- (8) The specific administrative remedy that will be made available in the case is within the sole discretion of Appeals and will be based on the facts and circumstances of the particular case. To assist in determining the appropriate remedy, the Appeals employee shall request input from the taxpayer/representative. In determining the appropriate remedy, Appeals will consider:
- The extent to which the ex parte communication may have impaired, or appeared to impair, the Appeals employee's independence from the originating function,
 - Whether the taxpayer/representative's opportunity to learn about and respond to the ex parte communication has or would fully restore Appeals' appearance of independence, and
 - The remedy, if any, proposed by the taxpayer/representative.
- (9) The Appeals Area Director or equivalent level Appeals manager is the deciding official and his/her decision is not appealable. A description of the remedy will also be recorded in the Ex Parte Report System described above.

Example: Appeals officer Jones received an unexpected telephone call from the revenue agent who had recently referred an income tax case to Appeals that was assigned to Jones. The revenue agent indicated he had a related case involving the same transaction and asked when Jones thought the case might be closed. After providing the revenue agent with an estimated closing date, the revenue agent quickly told Jones he felt the taxpayer was not credible, was likely dissipating assets in anticipation of owing tax and that she should simply disregard the taxpayer's baseless arguments and sustain the proposed assessment. Jones promptly terminated the call, immediately notified her Appeals team manager and documented the case activity record. The Appeals team manager notified the revenue agent's manager of the ex parte communication violation. Jones contacted the representative, notified him of the details of the ex parte communication breach and gave him a reasonable period of time within which to respond with comments including input as to the requested remedy. The representative requested that Jones consider additional information, addressing the revenue agent's ex parte comments, and Jones did so in due course as part of her further consideration of the case. Jones' actions cured the ex parte communication breach.

Example: Settlement officer Salmon was conducting his initial review of an offer in compromise case. The Collection offer in compromise specialist entered in the ICS case history a rebuttal of each position outlined by the taxpayer's protest letter. Salmon noticed that it appeared Collection violated the ex parte communication rules by not sharing the rebuttal comments with the taxpayer concurrent with sending the case to Appeals as required by section 2.03(4)(c) of Revenue Procedure 2012-18, Rebuttal to Protest. The case history did not reflect any discussion of the rebuttal comments with the taxpayer nor a letter from the Collection group manager to the taxpayer. Salmon contacted the representative and confirmed the rebuttal comments were not shared. Salmon promptly notified his Appeals team manager and documented the case activity record. The Appeals team manager notified the offer in compromise specialist's manager of the ex parte communication violation. Salmon shared the rebuttal comments entered in the ICS history with the representative and gave the representative a reasonable period of time within which to

respond with comments, including input as to the requested remedy. The representative requested that Salmon consider additional information, addressing the offer in compromise specialist's rebuttal comments. As Salmon continued to work the case, he considered the information provided by the representative. Salmon's actions cured the ex parte communication breach.

Note: No ex parte communication violation would have occurred in the above example **if** the Collection offer in compromise specialist's ICS case history entry had merely contained a neutral list of unagreed issues, without discussion, with an indication of which issues raised in the taxpayer's protest, if any, were conceded.

- (10) The following table reflects the necessary steps for addressing breaches of the ex parte communication rules discovered while the case is in Appeals' jurisdiction:

Step	Action
1	Notify your immediate supervisor
2	Notify the taxpayer and representative: <ol style="list-style-type: none"> With the details of the breach, That he/she has an opportunity to provide comments, including a recommended remedy, The period of time by which the comments or recommended remedy must be received (no extension of time will be granted absent unusual circumstances), and That Appeals will make the final decision as to the appropriate remedy
3	Document the Case Activity Record with the following: <ol style="list-style-type: none"> A description of the breach of the ex parte communication rules, How you became aware of the breach, When and how you notified your immediate supervisor, and When and how you notified the taxpayer/representative and the date by which his/her comments and remedy input are due

Step	Action
4	<p>After the taxpayer/representative's input is received, document the Case Activity Record with the following:</p> <ol style="list-style-type: none"> The taxpayer/representative's input, The remedy requested by the taxpayer/representative, The final remedy determined by Appeals, and How and when the final remedy determined by Appeals was communicated to the taxpayer/representative <p>If no taxpayer/representative input or remedy request is received within five (5) business days after the date by which the input or remedy request was due, document the Case Activity Record with the following:</p> <ol style="list-style-type: none"> The taxpayer/representative did not provide input or request a remedy within the established time frame, The final remedy determined by Appeals, and How and when the final remedy determined by Appeals was communicated to the taxpayer/representative

- (11) For a discussion of remands by the Tax Court for breaches of the ex parte communication rules in CDP cases, see section 2.10(2) of Revenue Procedure 2012-18, Remedies Available to Taxpayers, Collection Due Process Cases.

8.1.10.7
(06-21-2012)

Documenting Ex Parte Communications

- (1) RRA 98 section 1001(a)(4) prohibits ex parte communications between Appeals employees and other IRS employees "to the extent that such communications appear to compromise the independence of the appeals officers." Because *appearance* is the determinative standard under RRA 98 section 1001(a)(4), it is important to accurately and adequately document ex parte communications with other IRS employees. This section addresses the documentation requirements:
- For both prohibited and permissible communications
 - With both an originating function or another IRS function
- (2) The Appeals technical employee will document all ex parte communications with originating function employees, whether written or verbal, in the case activity record on a contemporaneous basis, as follows:
- The general purpose for either contacting or being contacted by the originating function IRS employee
 - The answer, information or document(s) received from the originating function IRS employee
- Note:** See IRM 8.1.10.6 above for details on when information or documents received from an originating function employee must be shared with the taxpayer or representative.
- Whether the taxpayer or representative provided a waiver covering the ex parte communication in accordance with section 2.01(3)(c) of Revenue Procedure 2012-18, Opportunity to Participate, Waiver

Example: An appeals officer reviewed a new income tax case in which the revenue agent's work papers refer to a certain document that was not included in the administrative file sent to Appeals. The appeals officer called the revenue agent and asked whether the document was still available. The revenue agent advised the appeals officer that the entire administrative file was sent to Appeals and she no longer has the document. Even though this communication regarded a ministerial or administrative matter and thus was permissible, the appeals officer contemporaneously documented the case activity record that he contacted the revenue agent to inquire about the referenced document and the response he received from the revenue agent. Months later, the taxpayer's representative contacted the appeals officer's manager alleging an ex parte communication violation. The Appeals manager reviewed the case file and case activity record and explained to the representative the details of the communication and why it was permissible.

Example: A settlement officer answered an incoming telephone call. It was a Centralized Offer in Compromise (COIC) employee calling to find out when the CDP offer in compromise was expected to be closed. The settlement officer indicated a conference was scheduled for later that week and estimated a date of closing within the next six months. Even though this communication was with respect to a ministerial or administrative matter, and thus was permissible, the settlement officer immediately documented the case activity record indicating she was contacted by the COIC employee inquiring about the anticipated date the CDP offer would be closed and accurately documented the response given to the COIC employee.

- (3) Although not required, it is also a good practice for Appeals employees to document communications with nonoriginating function IRS employees in the case activity record on a contemporaneous basis.

Example: An appeals officer was contacted by CI inquiring about the type of case being considered by Appeals. The appeals officer advised the CI special agent that the case was a reasonable cause penalty abatement request. The special agent told the appeals officer the case before Appeals would not interfere with the ongoing criminal investigation and that Appeals may proceed with considering the taxpayer's penalty appeal. The appeals officer made a general entry of the discussion with the special agent in the case activity record.

