



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

8.25.2

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EFFECTIVE DATE

(07-23-2020)

PURPOSE

- (1) This transmits revised IRM 8.25.2, *Trust Fund Recovery Penalty (TFRP), Working Trust Fund Recovery Penalty Cases in Appeals*.

MATERIAL CHANGES

- (1) Revised 8.25.2.5, *Conference Guidelines*, paragraph (1) to incorporate Interim Guidance memorandum AP-08-1118-0013, dated November 28, 2018
- (2) Editorial changes were made throughout this manual to update hyperlinks

EFFECT ON OTHER DOCUMENTS

This supersedes IRM 8.25.2, *Trust Fund Recovery Penalty (TFRP), Working Trust Fund Recovery Penalty Cases in Appeals*, dated September 5, 2018. .

AUDIENCE

Appeals

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8.25.2

Working Trust Fund Recovery Penalty Cases in Appeals

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8.25.2.1
(09-05-2018)
Program Scope and Objectives

- (1) Purpose: This IRM contains guidance for working Trust Fund Recovery Penalty (TFRP) cases in Appeals.
- (2) Audience: Appeals Technical Employees (ATEs), Appeals Account Resolution Specialists (AARS) and Appeals Team Managers (ATMs) working TFRP appeals received from Collections.
- (3) Policy Owner: Appeals Policy is under Director, Case and Operations Support.
- (4) Program Owner: Appeals Policy is the program office responsible for providing technical and procedural guidance to the Appeals organization.
- (5) 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.

8.25.2.1.1
(09-05-2018)
Background

- (1) TFRP cases that are sent to Appeals are loaded onto the Appeals Centralized Database System (ACDS) for monitoring, and if appropriate, Appeals' jurisdiction is established.
- (2) This section discusses the actions taken on various TFRP cases once assigned to an Appeals Technical Employee (ATE) to include:
 - Initial contact with the taxpayer
 - Initial TFRP statute verification procedures
 - Case analysis
 - Conference guidelines
 - TFRP settlement options
 - TFRP ACM preparation
 - Closing procedures for the ATE
 - Expedite Closing Actions for the Appeals Team Manager (ATM).

8.25.2.1.2
(09-05-2018)
Authority

- (1) IRC 6672 is the authority for the Trust Fund Recovery Penalty. The TFRP is a penalty against any **responsible** person required to collect, account for, and pay over taxes held in trust who **willfully** fails to perform any of these activities. The TFRP may be imposed for:
 - Willful failure to collect tax,
 - Willful failure to account for and pay tax, or
 - Willful attempt in any manner to evade or defeat tax or the payment thereof.

Note: **Responsibility** is a function of duty, status and authority.

- (2) According to IRC 6672, the TFRP is equal to the total amount of tax evaded, not collected, or not accounted for and paid over. IRC 6672 applies to the employees' portion of employment tax, namely, the withheld income tax and employee's portion of FICA. It does not apply to the employers' portion of employment taxes. The TFRP also applies to **collected** excise taxes.

Note: Section 1411 tax, although called a Medicare tax, is not designated as a Trust Fund tax.

- (3) The Service's policy on assertion of the trust fund recovery penalty is in Policy Statement 5-14 (formerly P-5-60), *Trust Fund Recovery Penalty Assessments*, IRM 1.1.2.6.3.

8.25.2.1.3
(09-05-2018)

Responsibilities

- (1) Appeals is the sole function that may make the final administrative determination for purposes of IRC 6672(b)(3).

8.25.2.1.4
(09-05-2018)

Program Reports

- (1) Planning, Quality and Analysis (PQA) provides trends and data analyses and detailed summary reports for Appeals.

8.25.2.1.5
(09-05-2018)

Terms and Acronyms

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

Terms	Acronym
Appeals Centralized Database System	ACDS
Appeals Generator of Letters and Forms	APGOLF
Appeals Referral Investigation	ARI
Assessment Statute Expiration Date	ASED
Appeals Technical Employee	ATE
Automated Trust Fund Recovery	ATFR
Case Activity Record	CAR
Case Activity Record and Timesheet	CARATS
Case Summary Card	CSC
Collection Statute Expiration Date	CSED
Combat Zone	CZ
Control Point Monitor	CPM
Integrated Collection System	ICS
Fast Track Mediation	FTM
Federal Tax Deposit	FTD
Post-Appeals Mediation	PAM
Potentially Responsible Person	PRP
Refund Statute Expiration Date	RSED
Revenue Officer	RO
Trust Fund Recovery Penalty	TFRP
Work Unit Number	WUNO

8.25.2.1.6
(09-05-2018)
Related Resources

- (1) IRM 8.25.1, *Trust Fund Recovery Penalty (TFRP), Overview and Authority*.
- (2) Account & Processing Support (APS) TFRP card-in procedures are contained in IRM 8.20.5 and APS TFRP closing procedures are located in IRM 8.20.7.
- (3) The Taxpayer Bill of Rights (TBOR), Pub. 1, applies to Appeals employees' interaction with taxpayers. For additional information about *TBOR*, see <http://irweb.irs.gov/AboutIRS/tbor/default.aspx>.

8.25.2.2
(09-05-2018)
Receipt

- (1) Within 45 calendar days of receipt of a newly assigned and/or transferred case, (i.e., date of CR/NR), the ATE will take the following actions:
 - Complete statute verification and initial case review as discussed below
 - Issue Letter 5157, *Nondocketed Acknowledgement & Conference*, along with Publications 4167 and 4227, or make initial contact by telephone

Note: If making initial contact by telephone, the ATE must ensure that the substance of the contact letter is discussed with the taxpayer and documented in the Case Activity Record and Timesheet (CARATS) on the Appeals Centralized Database System (ACDS).

8.25.2.3
(09-05-2018)
TFRP Initial Statute Verification Requirements

- (1) This section:
 - provides information necessary to accurately determine the TFRP statute type and date;
 - clarifies initial statute review standards; and
 - provides procedures for required actions related to the assessment and collection statutes of limitations in TFRP appeals.
- (2) Pre-assessment TFRP appeals, referred to as TBOR2 cases, involve the Assessment Statute Expiration Date (ASED). Post-assessment TFRP appeals, most often claims and claim reconsiderations, involve both the Refund Statute Expiration Date (RSED) and the Collection Statute Expiration Date (CSED).

Note: There are no statutes under Appeals jurisdiction for Fast-Track Mediation, because the case remains with Compliance.
- (3) To verify the statute on a TFRP case and to ensure that the statute is properly monitored by Appeals, the assigned ATE must verify, within forty-five (45) calendar days from the ATE's receipt of the case, that:
 - a. Letter 1153 (DO) was mailed or delivered prior to expiration of the ASED.

Note: This is required on **all** TFRP cases as part of determining the validity of the assessment.
 - b. The protest was timely (if required).
 - c. The protest is valid.
 - d. The power of attorney (Form 2848) is valid.
 - e. All periods listed on Form 2749 for TBOR2 and jeopardy assessment appeals, and all periods on the Form(s) 843 or other claim or reconsideration request are listed on the case summary card and reflect the correct dollar amounts.
 - f. Statute entries on the case summary card are correct.

8.25 Trust Fund Recovery Penalty (TFRP)

Note: This review includes verification of the original statute(s), as well as validation of all extensions.

- (4) The completion of this review must be documented in the case activity record (CAR) including any corrective action taken or initiated and a follow-up date to ensure that any requested corrective action has been taken.

Note: Continuous monitoring of the statute is required on all assigned cases.

8.25.2.3.1 (09-05-2018) Letter 1153 (DO)

- (1) The ATE must verify that Letter 1153 (DO) was mailed or hand-delivered to the taxpayer's last known address prior to the ASED.
- (2) If Letter 1153 (DO) was not issued before the TFRP assessment was made, the assessment is invalid and must be abated. If the ASED has expired by the time the error is discovered, nothing can be done to save the assessment. In most cases, the 60 day protest period the Letter 1153 (DO) allows must also be granted prior to assessment.

Exception: A jeopardy TFRP assessment also requires the previous issuance of Letter 1153 (DO), but the 60 day protest period is shortened, so the taxpayer is given an opportunity for a special post-assessment appeal. Within 5 days of a jeopardy assessment, the IRS is required to send notice and demand to the taxpayer for the amount of the jeopardy assessment as well as notice of jeopardy assessment and appeal rights. The taxpayer is required to pay the liability within 10 days, unless they post a bond pursuant to IRC 6863, which stays collection and suspends the CSED pending the outcome of the appeal.

- (3) A taxpayer's last known address is the address on the taxpayer's most recently filed return unless the taxpayer filed a change of address with the United States Postal Service or gave clear and concise notification to the IRS of a new address. Treas. Reg. 301.6212-2; Rev. Proc. 2010-16

Note: Revenue officers (RO) are directed to date stamp Letter 1153 (DO) with the date of service. The Integrated Collection System (ICS) history for the corporate account is to be documented with the method of delivery. Collection's Automated Trust Fund Recovery (ATFR) program should also reflect the mailing or delivery date of Letter 1153 (DO).

Note: The ENMOD address on IDRS is considered the last known address unless the taxpayer provides proof of filing a change of address or giving notification to the IRS.

- (4) In determining the applicable ASED, consider:
 - IRC 6501 generally requires that any tax be assessed within three years after the return is filed or the due date of the return, whichever is later. IRC 6501(b)(2) adds a special rule for employment taxes. The "presumptive filing date" for returns reporting withheld tax is April 15th of the succeeding taxable year. Based on this section, the trust fund recovery penalty must be assessed within three years from the presumptive filing date or the actual filing date, whichever is later.
 - The initial ASED for the TFRP mirrors the initial ASED for the employment tax returns on which it is based.

Note: For instances of fraud on the employment tax return or where no return was filed, the ASED on the TFRP is unlimited.

Note: A Form SS-10 Consent to Extend the Time to Assess Employment Taxes will extend the TFRP ASED as well..

- The TFRP ASED for a potentially responsible person can also be extended by a properly-executed waiver (Form 2750).

Note: Check IDRS for TC 971 AC 330 indicating the responsible party signed a waiver

- For additional considerations see IRM 8.25.2.3.2.2(7), *Timely Request - TBOR2 Protest*.

- (5) The table below identifies whether or not a particular action extends the TFRP assessment statute:

If...	Then...
a responsible person filed a bankruptcy petition after October 21, 1994	the statutory period for assessment of the TFRP will not be automatically extended by the bankruptcy filing
a responsible person filed a bankruptcy petition before October 22, 1994	the statutory period for assessment is automatically suspended for the period the automatic stay is in effect, plus 60 days.
the corporation is in a bankruptcy proceeding	the statutory period for assessing the TFRP against potential responsible persons is not automatically extended.
an Offer in Compromise is submitted for the corporate tax liability	the corporate offer does not automatically extend the statute for assessing the TFRP against any responsible corporate officer, employee, or other responsible person.

8.25.2.3.2
(12-12-2012)
Timeliness

- (1) This section describes a variety of deadlines that apply to different types of challenges to the TFRP.

8.25.2.3.2.1
(12-12-2012)
Timely Request - Fast Track Mediation (FTM)

- (1) FTM takes place before a formal protest is filed and must occur within the 60 or 75 day TBOR2 appeal period. It can be initiated by either the taxpayer or Collection, but both must mutually agree to FTM.

8.25.2.3.2.2
(09-05-2018)

**Timely Request - TBOR2
Protest**

- (1) A TBOR2 protest (whether perfected or not) is timely if it is delivered, faxed, properly postmarked or mailed by certified or registered mail, on or before the 60th day (75th day if the letter was addressed outside of the United States) after the date Letter 1153 (DO) was mailed or personally delivered.
- (2) Per IRC 7503, if the 60th day (75th day if the letter was addressed outside of the United States) after the date Letter 1153 (DO) was mailed or personally delivered falls on a Saturday, Sunday, or a legal holiday, the TBOR2 protest is considered timely if it is delivered, faxed, properly postmarked or mailed by certified or registered mail on the next succeeding day which is not a Saturday, Sunday, or a legal holiday. .
- (3) A private postage meter stamp is not evidence of when a request for appeal was mailed; it merely establishes when the request was stamped.
- (4) ROs are directed to date stamp Letter 1153 (DO) with the date of service and document in the Integrated Collection System (ICS) case history for the employers' case, the method of delivery and any discussions with the responsible party related to receipt of Letter 1153 (DO). ATFR program will be updated when Letter 1153 (DO) is personally delivered.
- (5) The ASED is not suspended by TBOR2 if the protest is not timely. If the protest was received late, take the following actions:
 - Close the case as a premature referral.
 - In the remarks section of Form 5402, select the remark: "Due to untimely protest, the ASED is not suspended by TBOR2. Assessment of the TFRP is necessary. The ASED expires (enter date)."
 - Select closing code 20 and the premature referral reason "Appeal not timely."
 - Inform the taxpayer/power of attorney that the case has been returned to Collection Advisory Collection Point Monitor (CPM) for assessment because the protest was not timely filed and that after assessment, they can follow Form 843, Claim for Refund or Abatement of Tax procedures to contest the penalty.
- (6) Field Collection is responsible for determining whether a taxpayer's TFRP protest was timely received. Prior to forwarding a TFRP case file to Appeals, Advisory CPM no longer reviews the case file for timeliness of a protest. See IRM 5.7.6.1.9, **Transmittal of Case to Appeals**, and IRM 5.7.10.5, **Appeals Case Processing**. IRM 5.7.6.1.6, **Receipt of Protest**, paragraph (1) requires the RO to retain the protest mailing envelope (or original faxed document), stamp the protest with the date it was received, and document receipt of the protest in the ICS case history. If the TFRP case contains no evidence of the date the protest was mailed or received:
 - Consider a review of the ICS case history for the business and the responsible party to confirm the date that the protest was mailed or received. Absent unusual circumstances, the history entry should have been made within one week of receipt of the protest or as soon as possible after the RO returned to the office. Collection procedures require that all TFRP protest case files contain a printed ICS and ATFR history.

Caution: If the ICS history contains gratuitous statements or comments added by the revenue officer after receiving the taxpayer's appeal, that are intended to influence Appeals, serve as a

rebuttal to the issues raised in the taxpayer's protest, or attempt to direct what Appeals should/should not consider as part of making its decision, this is considered a prohibited ex parte violation.

- If Collection did not include sufficient information regarding timeliness, call the taxpayer/representative to request proof of timeliness. Allow 14 days from the date of your call for the taxpayer/representative to respond to your request.
- If proof of timeliness is not provided, close the case as a premature referral by following the steps listed in (5) above.

Note: Any actions you take to verify timeliness should not jeopardize the ASER. Advise Collection immediately if the ASER is imminent so that a quick assessment can be made.

Note: Questions about a particular timeliness issue should be referred to Area Counsel.

- (7) IRC 7508 and IRC 7508A postpone certain time-sensitive acts when a person is serving in the armed forces in a combat zone, or there is a presidentially declared disaster. Rev. Proc. 2007-56 includes the 60 day period for appealing the proposed assessment of a trust fund recovery penalty.

Note: Combat Zone (CZ) accounts, identified by a -C freeze, indicate a taxpayer who is or was serving in a designated combat zone area. The -C freeze stays on the account even after the taxpayer is no longer in the CZ. When working an account that contains a -C freeze, additional research is required to determine the taxpayer's CZ status. Research CC IMFOLE for the Combat indicator on Line 11. If Combat indicator is "1", then the taxpayer is still serving in a combat zone. Any compliance activity such as assessing or collecting tax is prohibited. However, if the taxpayer has other issues or requests information, you may work these other issues and contact the taxpayer if needed. If Combat indicator is "2", then the taxpayer is no longer a combat zone participant. Follow normal IRM procedures to work the case. When considering timeliness in a TFRP appeal, combat zone status must be taken into consideration.

8.25.2.3.2.3
(12-12-2012)

Timely Request - Jeopardy Assessment Reconsideration Appeal

- (1) For an administrative review of a jeopardy assessment, the taxpayer must file a written proposal with the Area Director within 30 days from the date of the notice of jeopardy assessment letter.
- (2) If administrative review was requested timely, the taxpayer can have the action reviewed by a federal district court. For this, a suit must be filed within 90 days after the earlier of :
- the day Appeals notifies the taxpayer of its decision on the administrative review, or
 - the 16th day after the taxpayer files their request for administrative review.

8.25.2.3.2.4
(10-14-2014)

**Timely Request for a
Claim**

- (1) There are several different kinds of TFRP claims with different time requirements.
- (2) IRC 6511(a) administrative claims for refund must be filed within two years of the payment to be refunded. For judicial review, the taxpayer must petition the court within 2 years of the date of the Notice of Claim Disallowance.
- (3) IRC 6511(h) provides for exceptions to the two-year statute of limitations for refunds by suspending the statute during the time a taxpayer is unable to handle his or her financial affairs for either of the following reasons:
 - Medically determinable mental or physical impairment that has lasted or can be expected to last for a continuous period of no less than 12 months, or, and is expected to continuously last for not less than twelve months, or
 - Medically determinable mental or physical impairment that can be expected to result in death.
- (4) Under Rev. Proc. 99-21, 1999-1-C.B. 960, there are two written statements that must be submitted with a claim for credit or refund of tax to claim financial disability under IRC 6511(h) . The first required statement is written by a physician (as defined in section 1861(r)(1) of the Social Security Act, 42 U.S.C. 395x(r)), qualified to make the determination, that sets forth:
 - a. the name and a description of the taxpayer's physical or mental impairment;
 - b. the physician's medical opinion that the physical or mental impairment prevented the taxpayer from managing the taxpayer's financial affairs;
 - c. the physician's medical opinion that the physical or mental impairment was or can be expected to result in death, or that it has lasted (or can be expected to last) for a continuous period of not less than 12 months;
 - d. to the best of the physician's knowledge, the specific time period during which the taxpayer was prevented by such physical or mental impairment from managing the taxpayer's financial affairs; and
 - e. the following certification, signed by the physician: "I hereby certify that, to the best of my knowledge and belief, the above representations are true, correct, and complete."

The second required statement is written by the person signing the claim for credit or refund certifying that no person, including the taxpayer's spouse, was authorized to act on behalf of the taxpayer in financial matters during the period described in paragraph (d) above. Alternatively, if a person was authorized to act on behalf of the taxpayer in financial matters during any part of the period described in paragraph (d), the beginning and ending dates of the period of time the person was so authorized.

Note: The second statement is required because this exception is not available if the taxpayer's spouse or other designated party was in control of the taxpayer's finances during the time in question.

Note: If the limitations period is suspended under IRC 6511(h) due to a financial disability of the taxpayer, Appeals should state when the disability began, whether it is ongoing, or when it ceased. The quantity and quality of proof is a matter solely within the discretion of Appeals. See IRM 25.6.1.10.2.9

- (5) Specific to TFRP, IRC 6672(c) prohibits collection by levy or proceeding in court and suspends the CSED if the taxpayer files a claim for refund, pays the portion of the TFRP required to commence a proceeding in court, and furnishes the required bond within 30 days after notice and demand. If the claim for refund is disallowed and the taxpayer files suit for refund within 30 days, the prohibition on collection and suspension of the CSED continue until final resolution of the proceeding.
- (6) If time or payment requirements are not met, but the taxpayer submits a request for a post-assessment appeal, it can be worked as an informal claim for abatement.

Note: A taxpayer may request abatement at any time prior to the CSED. However, for refund claims, the required payment must be made and the claim must be filed prior to the RSED.

Note: Appeals does not accept claim cases if less than 180 days remain on the statute for collection and expiration of the statute could result in loss of a liability.

8.25.2.3.2.5
(12-12-2012)
**Timely Request for
Claim Reconsideration**

- (1) In general, taxpayers have 30 days after a Notice of Claim Disallowance to request Reconsideration by Appeals. The time required for Reconsideration does not extend the time the taxpayer has to request judicial review.

Note: If less than 180 days remain for filing suit in a case involving a claim previously disallowed by a function other than Appeals, acceptance of the Reconsideration case requires approval from the Appeals Area Director.

8.25.2.3.2.6
(09-05-2018)
**Timely Request for
Post-Appeals Mediation
(PAM)**

- (1) A request for PAM must be submitted before a case is closed out of Appeals.
- (2) Refer to IRM 8.26.9, *Alternative Dispute Resolution (ADR) Program, Post-Appeals Mediation Procedures for Collection Cases*, for guidance on PAM in TFRP cases.

8.25.2.3.3
(12-12-2012)
Valid Protest

- (1) The requirements for requesting each type of TFRP appeal vary.

8.25.2.3.3.1
(09-05-2018)
**Valid Request - Fast
Track Mediation (FTM)**

- (1) FTM does not require a formal protest. SB/SE submits Form 13369, *Agreement to Mediate*, and a brief summary of issues to Appeals. The taxpayer must provide a written position on the issues.
- (2) Refer to IRM 8.26.3, *Alternative Dispute Resolution (ADR) Program, Fast Track Mediation for Collection Cases*, for FTM guidance in TFRP cases.

8.25.2.3.3.2
(12-12-2012)
**Valid Protest -
Pre-Assessment
(TBOR2) Appeal**

- (1) Letter 1153 (DO) provides instructions that the taxpayer must follow to receive an appeal of the proposed assessment. A Small Case Request is appropriate if the total amount of tax, penalties and interest for each period is \$25,000 or less. If more than one tax period is involved and any tax period exceeds the \$25,000 threshold, a Formal Written Protest for all periods must be filed.

8.25.2.3.3.2.1
(02-08-2011)

Small Case Request

(1) Elements of a small case request:

- Send a letter to the attention of the Person to Contact at the address shown on the top of Letter 1153 (DO).
- Enclose a copy of Letter 1153 (DO) or provide the taxpayer's name, address and social security number on the letter.
- Include a statement requesting an Appeals conference.
- Enclose a list of the disputed issues and the reasons for the disagreement.
- Identify the dates and amounts of any payments in dispute.
- Include a clear explanation of the taxpayer's duties and responsibilities, specifically the duty and authority to collect, account for and pay the trust fund taxes.
- Submit two copies of the small case request.

8.25.2.3.3.2.2
(02-08-2011)

Formal Written Protest

(1) Elements of a formal written protest:

- Send a letter requesting an Appeals conference to the attention of the Person to Contact at the address shown on the top of Letter 1153 (DO).
- List the taxpayer's name, address and social security number on the letter.
- Enclose a copy of the Letter 1153 (DO) or list the date and number of the letter received.
- List the tax periods being protested.
- Enclose a list of the disputed issues and the reasons for the disagreement.
- Identify the dates and amount of any payments in dispute.
- Include specific dates, names, amounts and locations which support his or her position.
- Include a clear explanation of the taxpayer's duties and responsibilities, specifically the duty and authority to collect, account for and pay the trust fund taxes.
- Sign the written protest under penalties of perjury by making the following statement (the jurat): "Under the penalties of perjury, I declare that I have examined the facts stated in this protest, including any accompanying documents, and to the best of my knowledge and belief, they are true, correct and complete."

Caution: If the taxpayer's representative prepares and signs the protest for the taxpayer, the representative must substitute a declaration stating:

1. He or she submitted the protest and accompanying documents.
2. Whether he or she knows personally that the facts stated in the protest and accompanying documents are true and correct.

Note: Collection will send a taxpayer's case to Appeals, even if the taxpayer fails to perfect the protest. This is to ensure that any taxpayer who wishes to appeal will have the opportunity to do so.

8.25.2.3.3.3
(12-12-2012)

**Valid Request -
Jeopardy Assessment
Reconsideration Appeal**

- (1) A written proposal must be filed with the Area Director, requesting redetermination of whether or not:
 - the making of the assessment is reasonable under the circumstances, and/or
 - the amount so assessed or demanded as a result of the action is appropriate under the circumstances.

8.25.2.3.3.4
(10-14-2014)

**Valid Request - Formal
Claim**

- (1) A formal claim must be filed on a Form 843, *Claim for Refund and Abatement of Tax*. A taxpayer must pay one employee's employment tax liability and submit a separate Form 843 for each quarter. A taxpayer can challenge the government's decision on a formal claim in court.
- (2) Advisory and field collection can not reverse an Appeals determination. Therefore, if Appeals made an earlier determination on the TFRP (whether in the form of Letter 1153 protest, claim, doubt as to liability offer in compromise, etc.), the claim is forwarded to Appeals without consideration from Collection Advisory.
- (3) If the ATE determines during initial review that the issue is different or new, close the claim as a premature referral. Use the premature referral reason description, "New Issue-Government's Position Not Established". Collection Advisory will work the claim. If Advisory partially or fully denies the claim, they issue the Claim Disallowance Letter. This letter notifies the taxpayer that they have 30 days to request reconsideration by Appeals and two years to request consideration by a court.
- (4) If the ATE determines during initial review that Appeals has already made a determination on the issue raised, Appeals will work the claim. Follow the guidance in IRM 8.25.2.4.2 (6) and (7) for any new information received.
- (5) When Appeals makes a determination, it must issue the appropriate claim closing letter. If a certified Claim Disallowance Letter has never been issued, and the claim is partially or fully denied, Appeals is responsible for issuing the Claim Disallowance Letter that starts the two-year time frame for the taxpayer to have the claim considered by a court.

Note: If a certified Claim Disallowance Letter has previously been issued by Collection or Appeals, the case is a Claim Reconsideration (see IRM 8.25.2.3.3.5, Valid Request - Claim Reconsideration).

- (6) If the taxpayer has made the required payment, submitted the Form(s) 843, and posted a bond under IRC 6672(c) within 30 days of notice and demand, collection action is stayed and the CSED is suspended until Appeals makes its final determination. If the taxpayer then files a suit for refund within 30 days of denial of the refund claim, the CSED remains suspended until the court reaches its final resolution.

Note: If a refund suit is filed on a TFRP claim being worked by Appeals, see IRM 8.7.1.8.2 , **Refund Suits with Disposition of Pending Claims**.

8.25.2.3.3.5
(10-14-2014)
**Valid Request - Claim
Reconsideration**

- (1) If Appeals has not made a previous determination on the issues raised (through a timely Letter 1153 protest, claim, doubt as to liability offer in compromise, etc.) for the period(s) covered, a formal claim is first worked by Collection Advisory.
- (2) If Collection Advisory denies all or part of the taxpayer's formal claim, it issues a Claim Disallowance Letter, and if the taxpayer indicates that they want an appeal within 30 days, the case is forwarded to Appeals for reconsideration. Appeals can also reconsider claims previously disallowed by Appeals.
- (3) Having Appeals reconsider a claim does not extend the time frame for the taxpayer to file suit.

Note: If the taxpayer provides additional information substantiating the claim after issuance of a final notice of claim disallowance, do not reconsider the claim unless time remains in the taxpayer's two year period of limitations for filing a refund suit under IRC 6532(a)..

Note: If a refund suit is filed on a claim reconsideration being worked by Appeals, see IRM 8.7.1.8.2, **Refund Suits with Disposition of Pending Claims**.

8.25.2.3.3.6
(09-05-2018)
**Valid Request -
Post-Appeals Mediation**

- (1) Both pre-assessment (TBOR2) and post-assessment (claim) TFRP cases are eligible for mediation. See IRM 8.26.9.2.2, **PAM Eligibility - TFRP**.
- (2) Rev. Proc. 2014-63, section 7 provides instructions for taxpayers to formally request mediation. The mediation request must be in writing and contain the following information:
 - a. the taxpayer's name, Taxpayer Identification Number (TIN), address, and the name, title, address and telephone number of a person to contact;
 - b. the name of the ATM and/or ATE
 - c. the tax period(s) involved
 - d. a description of the issue(s) for which the taxpayer requests mediation with sufficient details for what the taxpayer believes should be used to determine the appropriate settlement amount. For TFRP cases, this includes sufficient details to support the taxpayer's position as to why he/she is not responsible, actions were not willful, and/or why the TFRP amount should be changed;
 - e. the request for a non-IRS co-mediator, if desired; and
 - f. a representation that the issue is not excluded in Rev. Proc. 2014-63.
- (3) Refer to Rev. Proc. 2014-63 and IRM 8.26.9, *Alternative Dispute Resolution (ADR) Program, Post-Appeals Mediation Procedures for Collection Cases*, for guidance on PAM in TFRP cases.

8.25.2.3.3.7
(12-12-2012)
Defective Protest

- (1) If the taxpayer's protest is defective:
 1. Contact the taxpayer/representative to request that any defects in the protest be corrected.
 2. If the taxpayer/representative fails to perfect the protest within 30 days of your request, consider the protest withdrawn and close the case.
 3. Select closing code "13" (Unagreed) and resolution reason description "Taxpayer/Representative failed to perfect invalid/defective protest."

Note: TFRP cases should not be closed if the taxpayer or power of attorney made an effort to comply with the Small Case Request or Formal Written Protest requirements by providing most of the required information. However, the Formal Written Protest must be signed under the penalties of perjury.

- (2) Questions about a particular protest should be referred to Area Counsel for advice.

8.25.2.3.4
(12-12-2012)
Valid Power of Attorney (POA)

- (1) A timely protest that is signed by a representative (and not signed by the taxpayer) is still a timely protest even though:
- The representative failed to submit a POA with the protest.
 - The representative submitted a defective POA.
 - The representative is not authorized to represent the taxpayer before Appeals.

Under these circumstances either the taxpayer or the representative must cure the POA for the protest to be timely.

- (2) The Tax Court as well as the Conference and Practice Requirements have applied the law of agency as a supplement to the Code and Regulations. The law of agency provides guidance that protects the taxpayer's right to file a protest and the Service's time to assess the penalty imposed by IRC 6672(a).
- (3) When a taxpayer engages a representative to represent him/her before the Service, an agency relationship is formed. If the representative acts with actual authority by signing the protest, the Service will accept the protest but must attempt to secure a valid Form 2848, *Power of Attorney and Declaration of Representative* (POA), or a protest signed by the taxpayer. The ASER is suspended by TBOR2 until the final administrative determination is made in the case.
- (4) The taxpayer or representative can cure the defective or missing POA by executing a valid Form 2848. The revised Form 2848 should be attached to the original Form 2848 if the original Form 2848 is defective.
- (5) Examples of invalid or defective powers of attorney include:
- The POA lists the name of the business entity instead of the taxpayer's name.
 - The POA has missing periods.
 - The tax form number is incorrect.
 - The representative is not authorized to represent the taxpayer before Appeals.

Perfecting Invalid POAs:

If....	Then....
The POA was not provided or is for the business entity instead of the taxpayer	The taxpayer must provide a valid POA for the representative who signed the protest.

8.25 Trust Fund Recovery Penalty (TFRP)

If....	Then....
The POA is valid, except for missing periods	The taxpayer/representative must provide a corrected POA to include the missing periods. If a corrected POA is not provided, ask Account and Processing Support (APS) to delete the missing periods from the case summary card and create a case summary card for the missing periods. Close the case created for the missing periods.
The POA contains other errors	The taxpayer/representative must correct the POA.
An unauthorized person signed the protest	The unauthorized person cannot represent the taxpayer before Appeals. To receive an appeal, the taxpayer must sign and date the protest.
An authorized representative failed to sign the POA	The POA must be signed and dated by the representative.

- (6) **In all cases, the taxpayer can validate the protest by signing and dating the original protest or signing and dating a copy of the original protest. Attach this copy to the original protest.**
- (7) If, within 30 days of your request, the taxpayer or representative fails to provide or perfect the POA or the taxpayer fails to sign and date the protest (original copy):
- Consider the protest withdrawn and close the case.
 - Select closing code "13" (Unagreed) and the resolution reason code "Taxpayer/Representative failed to perfect invalid or defective POA."
 - In the Remarks section of Form 5402, select the Remark: "The protest is considered withdrawn because the taxpayer did not provide or perfect the POA or sign the protest on his own behalf."
- (8) Refer to IRM 11.3, *Disclosure of Official Information*, and IRM 21.3, *Taxpayer Contacts*, for guidance concerning powers of attorney and who to contact about the defective or missing POA. In most cases, the taxpayer should be contacted in lieu of the representative. Unauthorized disclosure is a concern in these cases.

8.25.2.3.5 (12-12-2012) Periods on Case Summary Card

- (1) The TFRP statute review must include verification that the case summary card (CSC) is correct.
- (2) The CSC for the TFRP appeals shown below must include all periods listed on the corresponding forms:

Reminder: Verify that the proposed/assessed amounts for all listed periods are correct

Type of TFRP Appeal	Form
Fast Track Mediation	N/A (no periods listed on CSC)
TBOR2 and Jeopardy Assessment	Form 2749
Claims and Reconsiderations	Form 843 or other requesting document

Exception: For TBOR2 appeals, If the taxpayer's protest clearly indicates a desire to protest only specific periods listed on Form 2751, *Proposed Assessment of Trust Fund Recovery Penalty*, and his or her agreement with the assessment of the other periods, follow steps listed in (3) below.

(3) To remove agreed periods from CSC:

- Call the taxpayer/representative to verify the desire to appeal specific periods only. Ensure the taxpayer understands that Appeals will release jurisdiction on the periods not being appealed and Compliance will assess the taxes immediately and initiate collection action.
- Ask APS (through your ATM) to remove the periods not appealed from the case summary card and create a case summary card for the periods deleted from the original case summary card.
- Close the second case as a premature referral.
- In the Remarks section of Form 5402, select the Remark: "The taxpayer does not wish to protest the assessment of the following specific periods: (list periods here). Assessment of these periods is necessary. The ASER expires (enter date). Appeals retains jurisdiction of the following related periods: (list periods here)."
- Select closing code "20" and the premature referral reason "Specific periods excluded from taxpayer's protest."

8.25.2.3.6 (12-12-2012) Statute Entries on Case Summary Card

- (1) Appeals will not accept a TFRP case with a late protest unless the TFRP has been assessed and a claim filed. For all post-assessment appeals, verify that the assessment has been made.
- (2) The statute entries for all TFRP cases are based on if they are pre-assessment or post-assessment appeals.
- (3) Pre-assessment appeals should reflect the following statute information:

Category- TFRP not assessed	CSC Statute Entries
Fast-Track Mediation Appeals	<ul style="list-style-type: none"> • Statute Code = <blank> (no periods are listed). • Statute Date = <blank> • TYPE = TFRP
TBOR2 Appeals- Timely filed protest *	<ul style="list-style-type: none"> • Statute Code = TBOR2 • Statute Date = <blank> • TYPE = TFRP

Note: *A case in which the taxpayer signed a Form 2750, *Waiver Extending Statutory Period for Assessment of Trust Fund Recovery Penalty*, falls within this category. However, since Appeals no longer accepts untimely TFRP protests, the Form 2750 would have to have been signed prior to the issuance of the Letter 1153 (DO).

Note: *A timely pre-assessed appeal based on 6020(b) returns (not signed by a Corporate Officer) also falls within this category. However, per IRM 8.20.5.36, the statute code is SUB and there is a feature code of NF.

- (4) Post-assessment Appeals: TFRP Jeopardy Assessment Reconsideration Requests; Claims; and Reconsideration Cases have the following statute entries on the CSC:

Category- TFRP assessed	CSC Statute Entries
<ul style="list-style-type: none"> TFRP Jeopardy Assessment Reconsideration Request Claims Claim Reconsiderations 	<ul style="list-style-type: none"> Statute Code = CSED. Statute Date = the correct CSED date TYPE = TFRP (even though Form 843, or its equivalent, was filed)

Note: A taxpayer may ask Appeals to reconsider a TFRP refund claim disallowed by Advisory. A taxpayer must make this request within the period for bringing suit.

Note: See IRM 8.25.2.3.5 for additional CSC information.

8.25.2.4 (12-12-2012) Case Analysis - Overview

- (1) The administrative file(s) must be reviewed in detail prior to the conference in order to evaluate each potentially responsible person for each quarter at issue. No one piece of evidence is controlling. It is the accumulation of evidence that indicates a person's liability. Facts, job descriptions, acts of responsibility, and willfulness may change over time due to promotions, resignations, changes in job assignments, stock ownership, etc. The courts require that both responsibility and willfulness be evaluated independently by quarter.

8.25.2.4.1 (07-24-2013) Case Analysis - Requesting Additional Documents

- (1) As soon as possible after case assignment, review the administrative file for completeness.
- (2) You can ask the taxpayer to provide any additional information that you (or the taxpayer) believe would be helpful or necessary.

Caution: Never ask the taxpayer for a completed Form 4180, or attempt to complete the Form 4180 during the conference. The Form 4180, *Report of Interview with Individual Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Taxes*, is strictly for use by Collection. If the taxpayer submits a Form 4180 directly to Appeals, it should be given the same consideration as any self-serving statement.

- (3) Do **not** return a TFRP appeal to Collection as a premature referral if the case is not fully developed or if documentation is missing. Make your determination based on the information provided in the file.

Reminder: It is permissible to contact Advisory CPM to obtain a missing proof of timeliness, to benefit the taxpayer. See IRM 8.25.2.3.2.2(6), Timely Request - TBOR2 Protest.

8.25.2.4.2 (09-05-2018) Case Analysis - Evidence

- (1) Local procedures require some offices to prepare a rough draft Appeals Case Memorandum (ACM) prior to holding the conference.
- (2) Other offices allow the use of an in-depth conference or appointment letter.

Note: When issuing any “in-depth” conference or appointment letter, be careful not to suggest prejudgment of the case resolution or any of the specific issues raised by the taxpayer.

- (3) Both methods require a thorough review of the administrative case file to identify all relevant information and determine how the evidence in the file relates to establishing duty, status, authority and knowledge within the corporate structure.
- (4) The ATE should compare the evidence in the file with the responses on the Forms 4180 and/ or with the potentially responsible person’s issues in the protest.
- (5) Any additional evidence required from the taxpayer on specific issues should be identified.
- (6) If relevant new information is submitted on the potentially responsible party’s behalf that in the judgment of the ATE requires investigative analysis, then Appeals will retain jurisdiction of the case and forward the new information via Form 10467 , *Appeals Division Feedback Report and Transmittal Memorandum*, requesting an Appeals Referral Investigation (ARI) to the originating Collection Advisory Group for action. SB/SE will have 45 days to investigate and inform Appeals of their findings. This time may be extended by mutual agreement. These situations should be highly uncommon and Appeals has responsibility for informing the potentially responsible person (PRP) that the information was sent to SB/SE, sharing SB/SE’s response with the PRP and allowing them time to comment.

Note: While the ARI is being worked, apply feature code “RI” (Referral Investigation) and suspend the case in ACDS. Input SU/PI and E/OTH to suspend the case and SU/TO, to take it out once the ARI is complete. The RI feature code will remain on the case after it has been taken out of suspense.

- (7) If the new information is not relevant, or does not require investigative analysis, Appeals will make a determination without ARI issuance. For instance, if the new information solely affects the consideration of hazards, then Appeals will evaluate the probative value of the new information and make a determination

Example: The PRP submits a Form 4180 or affidavit claiming they did not have check signing authority (maybe they even submit a signature card showing they are not listed, or were removed) BUT the TFRP file contains copies of cancelled checks or other evidence indicating that the PRP controlled the payment of bills. Since the new information is refuted by information in the file, the government's position is already established and the weight the courts will give the new information is a hazard determination that must be made by Appeals.

Example: The PRP submits proof that a third party was in control of the disbursement of all funds (bankruptcy trustee or lockbox situation) BUT the file contains evidence indicating that the PRP had the authority to close the corporation and stop the accrual of additional trust fund liability. If the new issue/info doesn't negate willfulness for this responsible party, it is not relevant to Collection's liability determination. In addition, if case law supports a willfulness determination under these specific circumstances and the new issue/info would not affect Appeals' determination (including its broader determination regarding the hazards of litigation), then Appeals does not need the information verified.

Example: Authenticity of Evidence – PRP submits copies of canceled checks with notations in the memo section that designate the payments to TF. ICS history and IDRS records indicate that the payments were all applied to Non-TF; thus, there is no documentation of the designated payment. Referral to Compliance is appropriate to authenticate the canceled checks (secure copies of the remittances from the financial institution) to verify that the designation was made at the time of payment.

Note: New Information is any item or document related to a disputed issue that the taxpayer didn't previously share with the RO and in the judgment of the ATE requires investigative analysis.

Note: Investigative analysis requires verification with third parties (beyond mere review) and is necessary for Compliance to establish the Government's position on the new information.

Note: Remittance Transaction Research (RTR) is a program is used by Compliance to verify payment information, among other information. See IRM 5.19.2, *Liability Collection, Individual Master File (IMF) Return Delinquency*, for general information on RTR. An ATE should not conduct research on RTR but, instead, should issue an ARI to Collection or request the necessary documentation from the taxpayer.

8.25.2.4.3
(12-12-2012)
Case Analysis - Legal Review

- (1) An important aspect of your TFRP analysis is the statute and its interpretation in relevant case law.
- (2) Common arguments for responsibility and willfulness can be researched through the BNA on the Appeals website or through Lexis or Westlaw.
- (3) If the RO and the taxpayer have presented case law arguments, it is important to research and Shepardize the citations to determine their applicability to the facts of the issue.

Note: When researching case law, query “Federal Courts Tax Cases” as the results will include federal district courts, bankruptcy courts, Federal Claims Court, the Circuit Courts of Appeals, and the US Supreme Court.

- (4) Identify which court the taxpayer would petition to determine where precedent is established:

Where to Find Relevant Case Law for TFRP Issues			
Case Type	Trial Court	Precedent Established by	Span of Influence
CDP	Tax Court	Circuit Court of Appeals where taxpayer resides	Circuits can arrive at different rulings based on similar facts
Claim for Refund (use for TBOR2 also)	District Court		
	Federal Claims Court	Court of Appeals for the Federal Circuit	Nationwide

- (5) Weigh case law according to circuit and/or level of related court:

- The decision of a court that doesn’t generally hear tax cases, such as Bankruptcy Court, may have less weight than a decision from a court that regularly deals with tax issues.
- The Service is not necessarily bound by a decision from the Federal Claims Court.
- A trial court decision, such as the District Court or Tax Court, carries less weight than the Court of Appeals.
- The tax court has to follow decisions on the same issues of the Circuit Court, so precedent for this type of TFRP case is established by the Court of Appeals where the taxpayer resides.
- A Court of Appeals or District Court decision in your specific jurisdiction has greater authority than a Court of Appeals or District Court decision from another jurisdiction.
- The U.S. Supreme Court is the country’s highest court, and its decisions therefore carry the greatest weight.

Note: These decisions still need to be Shepardized because both opinion and legislation can change over time.

- (6) Organize your analysis to clearly state the issues raised by the taxpayer and the RO’s reasoning behind determining the taxpayer to be responsible and willful, as well as how the evidence and case law support these contentions.

8.25.2.4.4
(09-05-2018)
**Case Analysis -
Verification of Trust
Fund Amount**

- (1) Often, TFRP appeals include disputes about the amount of trust fund tax outstanding.
- (2) In certain situations, the taxpayer may claim that the amount of the TFRP is incorrect because FTDs were incorrectly applied.

- (3) There may also be a difference in the application of payments depending on whether the payments are voluntary or involuntary.
- (4) Generally, payments are applied in the best interest of the Government, i.e., oldest liability first.
- (5) To limit personal liability, a taxpayer can designate voluntary payments to the trust fund taxes, but must make this designation at the time of payment. The designation of payments is a frequent issue in TFRP cases.
- (6) Guidelines to follow to determine the application of payments for purposes of determining the trust fund recovery penalty liability can be found in IRM 1.2.1.6.3, *Policy Statement 5-14*.
- (7) In general, the trust fund portion of employment tax is equal to half of the FICA taxes plus all of the withholding.

Exception: The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 reduced the amount of FICA taxes required to be withheld on behalf of the employee. The Temporary Payroll Tax Cut Continuation Act of 2011 temporarily extended the reduction through February 29, 2012. Subsequently, the Middle Class Tax Relief and Job Creation Act of 2012 further extended the reduction through December 31, 2012. As a result, the employee portion of Social Security tax is reduced to 4.2% from 6.2% on Form 941 for all quarters in the calendar years 2011 and 2012 and annual Forms 944 and 943. As a result, when calculating the Trust Fund portion of tax, the FICA-TX-WTHLD amount will be multiplied by 40.3846% for these tax periods.

Exception: The Hiring Incentives to Restore Employment (HIRE) Act was enacted March 18, 2010. It is a tax benefit that is available to employers who hire certain previously unemployed workers, or “qualified employees,” in their trade or business. This is a tax exemption that reduces the employers’ 6.2% share of social security (FICA) tax on wages paid to qualified employees during the second, third and fourth quarters of 2010 (201006, 201009 and 201012). Since this is an adjustment to the employers’ share of FICA, it affects the non-trust fund portion of the tax. This will have to be taken into consideration when applying payments to non-trust fund. There is no change to the tax withheld or the employee’s share of FICA tax.

Exception: Beginning January 1, 2013, employers are responsible for withholding a 0.9% Additional Medicare Tax on an employee’s wages and compensation that exceeds \$200,000, in addition to withholding Medicare tax at 1.45%. There is no employer match for the Additional Medicare Tax. The literal ADDL-MED-WAGE will only display on TXMOD for wages subject to the 0.9% Additional Medicare Tax; the literal will not be present unless there is a value. This amount needs to be taken into consideration when calculating Non-Trust Fund for correct payment application. This corresponds to Line 5d of Form 941 and represents the total Additional Medicare Wages.

Caution: Occasionally, two (or more) potentially responsible individuals are recommended for assessment of the TFRP based on the same Form 941 periods and one (or more) of the responsible individuals does not appeal

the proposed TFRP assessment while another one does file a timely appeal. Following procedures, the TFRP is assessed against the responsible person(s) who did not appeal prior to all the associated files being sent to Appeals to address the protested case(s). While the case is in Appeals, the assessed responsible person(s) makes payments that reduce or satisfy the TFRP assessment. Due to cross-referencing, the Forms 941 on the BMF account will show the payments made on the related TFRP assessment under Transaction Code (TC) 538. These are considered credits and not payments on the business account and are input to reduce the outstanding balance of the module without reducing the tax liability. Likewise, they do not reduce the amount of the proposed TFRP for the case(s) in Appeals that have not yet been assessed. Any potentially responsible person who is later assessed the TFRP will have the TC 538 credit posted to their account as well. The credit is not considered paid until the two year statute for filing a claim for refund on the payment(s) has passed.

8.25.2.4.4.1
(09-05-2018)
**Payment Application -
Federal Tax Deposits**

- (1) Federal tax deposits (FTD) are normally applied in the following order:
 1. The employers' portion of the FICA tax for the period
 2. The trust fund portion of the liability
- (2) In limited situations, an FTD can be applied as a designated payment which can reduce the potential trust fund amount.
- (3) If the taxpayer establishes that an FTD credit was in the amount required by Treas. Reg. 31.6302(c)-1 (with allowance for safe haven rule) for a specific payroll, the credit will be considered to be a designated payment and will be applied to the employers' portion of the FICA, the withheld FICA and the withheld income tax for the payroll period covered by the FTD.
- (4) While Collection personnel follow guidance that stipulates that the FTD must have been timely in order for Collection to allocate it to both the non-trust fund and trust fund portion of the tax due for that pay period, Appeals must consider the litigating hazards of denying the allocation.
- (5) There is case law that supports the allocation regardless of the time the FTD was made, and even some case law that supports allocation of deposits made in the amount of the trust fund portion only, when it can be demonstrated that this was the intent when they were made.
- (6) For Appeals, this is an issue of willfulness and the hazards should be based on the most relevant case law in the applicable circuit.
- (7) If the taxpayer does not provide documentation of the payroll, FICA and income tax liability for the period, FTD payments will be applied to the non-trust fund portion of the tax for the entire quarter, and then the trust fund portion of the tax.

Note: IRC 6656(e) provides that deposits under IRC 6302(c) shall be applied to the most recent period or periods within the specified tax period to which the deposit relates, unless the person making the deposit designates a different period.

8.25.2.4.4.2
(09-05-2018)

Voluntary Payments

- (1) Protests of TFRP frequently contain charges that payments were designated but Collection failed to honor the designation. In order to meet the requirements for a proper designation, two prerequisites must be met:
 - a. The payment must be voluntary.
 - b. The request or designation for the application of the payment must be specific, in writing, and made at the time of the payment.
- (2) This is a factual issue which should be resolved by analysis of the Form 4183, the collection history, Integrated Data Retrieval System (IDRS) transcripts, and other documents in the file.
- (3) A Designated Payment Code (DPC) is used to indicate a payment designation on IDRS. See Document 6209, *IRS Processing Codes and Information*, for a list of Designated Payment Codes.
- (4) While under an approved installment agreement, a business may not designate that its monthly installment payment be applied to the trust fund portion of the tax liability.
- (5) Voluntary corporate payments will be applied first to non-trust fund taxes and next (after June 18, 2000) in the manner described by paragraph (10) of IRM 1.2.1.6.3, *Policy Statement 5-14*, unless they are designated payments.
- (6) Payments made while a corporate Offer in Compromise is pending may be designated for trust fund if the designation is made in writing at the time of the payment. Payments cannot be designated after an OIC is accepted.

8.25.2.4.4.3
(12-12-2012)

Changing Payment Designations

- (1) If you find that the “designation” of a payment was clearly made, but the payment was not applied accordingly, you will need to recalculate the TFRP or ask Collection to recalculate the penalty using the ATFR application.
- (2) You can use the Form 10467, *Appeals Division Feedback Report and Transmittal Memorandum*, (ARI) to ask Advisory to re-compute the correct TFRP, taking into account the designated payment.
- (3) Specify the period during which the payment was made and the date of the applicable TC 650 (Federal Tax Deposit), or TC 670 (subsequent payment) and provide relevant supporting copies to the originating Collection Advisory CPM unit.

8.25.2.4.4.4
(10-14-2014)

Involuntary Payments

- (1) Involuntary payments are applied in the best interest of the Government.
- (2) Involuntary payments are those received by the Government as the result of an action other than that of the taxpayer. Typically, this would be distraint action such as a levy by Collection.
- (3) Refund offsets are considered involuntary, as are payments made through an approved installment agreement.
- (4) The courts have supported the Service in that involuntary payments, procured by Collection, can be applied in the best interests of the Government.
- (5) The Service also views monies received as the result of a court order or other legal action to which the Service is a party as involuntary payments. This view is not always supported by the courts.

Example: The Supreme Court in *United States v. Energy Resources Co., Inc.*, 495 U.S. 545 (1990), stated that the bankruptcy courts' equitable powers included sufficient authority to approve a Chapter 11 reorganization plan that required plan payments by the debtor to the IRS to be first allocated to the trust fund portion of the IRS' claim, where necessary to ensure the success of the plan. Nevertheless, few bankruptcy plans actually dictate the allocation of payments toward trust fund taxes. If the issue arises, you would need to secure proof that the plan mandated designation of payments.

Caution: See *In re Harper*, 1996 Bankr. LEXIS 1317 (Bankr. W.D. Va. 1996) for potential limits to the application of the Supreme Court's view.

- (6) In *J.J. Re-Bar Corp. v. United States (In re J.J. Re-Bar Corp.)*, 644 F.3d 952, (9th Cir. 2011), the Circuit Court of Appeals determined that Bankruptcy courts don't have jurisdiction to enjoin the IRS from collecting the TFRP from responsible persons of the debtor (the employer). Even if the debtor/employer files a bankruptcy petition, the service is not prohibited from assessing the TFRP.
- (7) Proceeds from an offset or a levy on a contract are applied to the liability incurred during the period of the contract even though the application may not serve the best interests of the government.

Note: For assistance with payments from court proceedings, i.e., bankruptcy, insolvency, or decedents, contact Counsel.

8.25.2.5 (07-23-2020) Conference Guidelines

- (1) Appeals conducts conferences using a number of techniques. While the vast majority of issues are resolved over the telephone, via correspondence, or by other technologies (for example, WebEx videoconferencing software and Virtual Services Delivery), some taxpayers prefer an in-person conference. If the taxpayer and/or representative requests an in-person conference and the assigned Appeals employee's office cannot accommodate in-person conferences, the case will be sent to an Appeals office that can accommodate the request. . Appeals will use its best efforts to schedule an in-person conference on a date and at a location that is reasonably convenient for the taxpayer/representative and Appeals. Appeals' ability to hold the conference in the taxpayer's preferred location may be limited due to regulatory requirements or resource constraints, including the availability of Appeals employees with subject matter expertise and the level of case inventories at the preferred location. **Appeals Conference Procedures**, and IRM 8.6.1 , **Conference and Issue Resolution**.
- (2) Refer to IRM 8.6.1, *Conference and Issue Resolution*, for general conference guidelines and procedures. The general in-person conference procedures for Appeals found in IRM 8.6.1 also apply to TFRP TBOR2 and claim cases.
- (3) If Appeals cannot resolve a case easily and it requires an in-person conference, the case may be transferred to the Appeals office nearest to the taxpayer.
- (4) To reduce the length of time a case is in Appeals, it is important to initiate the transfer of appropriate cases as quickly in the overall Appeals process as practicable.

8.25 Trust Fund Recovery Penalty (TFRP)

- (5) In general, Appeals will not grant a transfer request made after the taxpayer has participated in substantive discussion/negotiations with the ATE.
- (6) After review, if required locally, the ATE will prepare a rough draft ACM following the format outlined in IRM 8.6.2, *Appeals Case Memo Procedures*, and focus on the "Discussion and Analysis" section. A well organized rough draft will ensure discussion of all relevant issues during the conference.
- (7) Within 45 calendar days from the ATE's receipt of the case, the ATE must send to the taxpayer and/or representative contact Letter 5157, **Nondocketed Acknowledgement & Conference**, located in APGOLF 2.0, or another approved contact letter. Letter 5157 meets all of the uniform acknowledgment letter requirements currently specified in the IRM. Besides providing written documentation concerning the date, time and place for the scheduled Appeals conference, this letter may be used to:
- request clarification of issues;
 - explain the law concerning the trust fund recovery penalty; and
 - request documentation such as payroll records, proof of designation of payments, etc., that may be necessary.

Note: The ATM or delegate will **not** issue Letter 4141, Uniform Acknowledgement Letter (UAL), (or any substitute letter) within 30 days of receipt for nondocketed cases or upon assignment for docketed cases. **The UAL is no longer required and Letter 4141 is obsolete.** The ATE will not verify that a UAL was issued upon receipt of a newly assigned and/or transferred case.

Note: ATMs will be reasonable in extending the contact time frame if circumstances (e.g., leave, workload, case complexity or other priorities) prevent the ATE from meeting them. If the ATM extends the time frame, the ATE will document this decision and the agreed upon timeframe in the CARATS on ACDS. **The statute verification time frame shall not be extended beyond 45 days.** If the contact time frame is extended beyond 75 days then the ATM will contact the taxpayer/representative by correspondence providing a status of the case and to whom the case is assigned.

- (8) In lieu of issuing Letter 5157 or other approved contact letter, the ATE may make initial contact by telephone. During such contact, the ATE must ensure that the substance of the contact letter is discussed with the taxpayer and documented in CARATS on ACDS.
- (9) Alternatively, if a conference is not appropriate, the ATE will not send Letter 5157 or another approved contact letter. Instead, within a reasonable time frame, the ATE will:
- a. for a premature referral because the taxpayer did not make a timely appeal, follow the guidance in IRM 8.25.2.3.2.2(5), *Timely Request - TBOR 2 Protest*, or IRM 8.25.2.3.3.4, *Valid Request - Formal Claim*
 - b. for a premature referral because the taxpayer provided different or new information in a claim case, follow IRM 8.25.2.3.3.4(3), *Valid Request - Formal Claim*
 - c. when appropriate, prepare Letter 5209, *Appeals Referral to Examination*, secure any additional documentation (if applicable)

- d. document these actions in the CARATS by inputting AC-OD
 - e. submit the case to the ATM for closing
- (10) For full concession cases, the ATE will not send Letter 5157 or another approved contact letter. Instead, within a reasonable time frame, the ATE will notify the taxpayer/representative (if appropriate), prepare the appropriate closing letter/documents, and submit the case to the ATM for closing. The ATE will document this action in the CARATS by inputting DM.
- (11) If there are several potentially responsible parties requesting appeal, the ATE should consider the possible benefit of holding a combined conference, especially if the parties dispute who was responsible, but be mindful of potential disclosure issues while composing the conference letter and in planning for the conference.
- (12) If multiple appellants, or witnesses are present, get disclosure agreements from all parties involved.
- (13) In order to make a ruling based on all of the facts in the case file and all of the taxpayer's statements given during the conference, remain neutral. Each statement should be considered and weighed for relevance. Do not try to defend or strengthen either position.
- (14) Listen closely to the taxpayer's statements during the Appeals conference to evaluate both credibility and admissibility.

Caution: Inadmissible statements will often lead to admissible evidence.

- (15) Even if the statements are self-serving (not worthy of belief or not supported by evidence) or partially inadmissible, courts defer to competent, uncontroverted taxpayer statements as long as they're not inconsistent or incredible. The rule is well-established that if witness testimony is unimpeached, uncontradicted and inherently credible, it will carry substantial, if not conclusive, weight with the court.
- (16) Consider what weight the testimony will be accorded by asking yourself:
- Has the taxpayer given contradictory statements?
 - Does other evidence support the statements?
 - Are the statements believable?
 - Is the taxpayer articulate, sincere and self-assured?
 - Is the taxpayer biased?
 - Is the taxpayer trustworthy, or, is there a history of dishonesty?
 - Does the taxpayer have a bad memory?
- (17) Under the exclusion for admissions, statements made during the Appeals conference by the taxpayer (or the taxpayer's representative) are not hearsay, but constitute out-of-court statements, even if being offered for the truth of the matter asserted, if they are offered against the taxpayer.
- (18) Address all issues raised by the taxpayer.
- (19) The taxpayer should be advised of any additional appeal rights, including the right to judicial review if available.

- (20) If agreement/settlement does not appear likely, explain mediation where applicable.

8.25.2.6
(09-05-2018)

**Settlement
Considerations for TFRP
TBOR2 and Claim Cases**

- (1) The TFRP is one of the most litigated statutory provisions of the Internal Revenue Code. ATEs need to consider settlement of appropriate cases when evaluating the TFRP . See IRM 8.6.4.1, **Fair and Impartial Settlements Per Appeals Mission**, IRM 8.6.4.1.1, **Mutual-Concession Settlements**, and *Policy Statement 8-47* in IRM 1.2.1.9.6 .
- (2) Appeals will not consider nuisance settlements or the litigating expense when making determinations. See Policy Statement 8-47, IRM 8.6.4.1 (2). When considering settlement, do not take into account such factors as equity, individual hardship, inability to pay or similar collection matters which do not have a direct bearing on the merits of the issues and the hazards of litigation. Collection and the Department of Justice both use collectibility when considering the merits of a TFRP. This element was purposefully removed from Appeals consideration. Appeals has the sole authority to make the final administrative determination on responsibility and willfulness
- (3) In addition to the variety of TFRP appeals previously discussed in this section, TFRP issues can also be raised as a Doubt as to Liability (DATL) offer in compromise, which is considered an informal claim, or through a Collection Due Process (CDP) or Equivalent hearing, if liability can be raised. The taxpayer can only seek judicial review through a formal claim for refund or a timely CDP case. Determining the correct amount of the assessment(s), as discussed earlier, and the applicable hazards of litigation are paramount in resolving the case at the earliest possible time. The settlement of cases, where appropriate, is beneficial to both the government and the taxpayer.
- (4) Appeals has categorized trust fund recovery penalty settlements into the following three types:
 - Factual settlements;
 - Allocation settlements; and
 - Hazards settlements .

8.25.2.6.1
(12-12-2012)

Factual Settlements

- (1) Factual settlements are based on your analysis of the facts of the case. A factual settlement can result in fully sustaining the penalty; full concession by the Government or settlement for an amount less than originally proposed. The latter would be based on a factual consideration.
- (2) Taxpayers frequently challenge the application of payments in Appeals. This is a factual issue that must be addressed. Refer to IRM 8.25.2.4.4(1) above for a detailed discussion of payments.
- (3) Changes in duty, status, authority, and knowledge can occur during the relevant time periods, as people change positions, leave or join the organization, or the organization itself changes.

8.25.2.6.2
(12-12-2012)

Allocation Settlements

- (1) Appeals may settle a trust fund recovery penalty case by allocating the trust fund liability among the responsible individuals. However, the ATE must secure certified payment of the entire trust fund liability and agreement forms such as the Form 2751-AD , *Proposed Assessment of Trust Fund Recovery Penalty*, or closing agreements which state that the taxpayer(s) will not file a claim for

refund. The agreement form(s) and the subsequent assessment(s) should be for the amounts of the liabilities each responsible individual is paying. Appeals will not allocate the liability unless the entire corporate trust fund liability is paid by certified funds and the appropriate agreement forms are secured.

8.25.2.6.3
(12-12-2012)
Hazards of Litigation Settlements

- (1) A litigating hazard is a substantial uncertainty about the outcome of a case should the taxpayer petition the court, based on:
 - How the courts would interpret and apply the law (the decision-maker);
 - What facts the court would find (factual complexities); or
 - The admissibility of, or weight that would be given to a specific item of evidence.
- (2) Some examples of factual and evidential hazards are:
 - All the facts of the case may not be known
 - Even after full development, there may be some dispute as to certain facts, and the weight they should be given
 - Lack of evidence to support allegations asserted in the file
 - Inability to obtain required evidence to support the issue or the inadmissibility of evidence
 - The availability of witnesses
 - The credibility of witnesses
- (3) Consider all the known facts, divide them into those that are for and those that are against responsibility and willfulness, and weigh each one carefully to determine:
 - If the government should concede;
 - If the case is strong enough to support full assessment; or
 - an acceptable settlement range.
- (4) A settlement that is acceptable to all parties is preferable to a trial. Because of this, we emphasize a range of settlement values versus arriving at a precise amount for a hazards settlement.

Reminder: Your judgment is different than anyone else's. So, your settlement range will differ from that of another ATE.

8.25.2.6.3.1
(09-05-2018)
Burden of Proof

- (1) In cases where hazards of litigation exist, it is important to determine an appropriate settlement range which fairly and impartially reflects the merits of the case after considering the facts, the law, the Service's position, and the litigating hazards.
- (2) In order to arrive at a settlement range, you need to understand how the court is likely to weigh the facts in the case. For this, you need to understand the burden of proof in the applicable court.
- (3) Burden of proof is the obligation assigned to either the government or the taxpayer to persuade the court that they are entitled to relief.

Caution: If no evidence is presented on an issue, the party having the burden of proof will lose the issue. In a TFRP claim, if that issue determines responsibility or willfulness, they will also lose the litigation.

8.25 Trust Fund Recovery Penalty (TFRP)

- (4) To establish the validity of the assessment, the Government always bears the burden of proof that all legal and procedural requirements pertaining to the assessment of an IRC 6672 penalty were met.
- (5) Once validity is established, the burden of disproving the TFRP claim of the IRS always rests with the debtor/taxpayer by preponderance of evidence. This means the taxpayer must provide sufficient evidence proving that it is more likely than not that they are not liable, i.e., not a willful or a responsible person. *In re Frank*, 322 B.R. 745, (BC MD NC 2005). *In re Frank*, 322 B.R. 745, (BC MD NC 2005).

Note: This is true regardless of if the taxpayer files a claim or a counterclaim. *Ruth v. United States*, 823 F.2d 1091, (7th Cir. 1987).

- (6) When considering hazards for a potential settlement, knowing who carries the burden of proof on an issue helps clarify how specific evidence, or the lack of specific evidence, might influence the outcome should litigation occur.

Example: When disputing willfulness by claiming all available funds were encumbered, the taxpayer bears the burden of proving that no unencumbered funds were available for payment. So, they must show by preponderance of evidence that the business was legally obligated to use their funds for purposes other than payment of trust fund liabilities, and that the legal obligation had priority over the IRS's interest. In the case where a taxpayer contends that the funds in the business bank account were encumbered and subject to a lender bank's superior security interest, they have the burden of proving by a preponderance of evidence the existence of the superior lien. The burden of proof is not met where there is no evidence that the lender bank restricted the business' ability to use funds to satisfy pre-existing tax obligations. In addition, if the taxpayer was the one who entered the business into the agreement that allowed the control of the business accounts to pass to a third party, they can still be found liable for the non-payment of trust fund taxes, even if there is evidence that the third party restricted the business' ability to use funds to satisfy the tax. *Commonwealth Nat'l Bank v. United States*, 665 F.2d 743, (5th Cir. 1982).

8.25.2.6.4
(09-05-2018)

Closing Agreements

- (1) When appropriate, either Appeals or the taxpayer can make a settlement proposal. If both Appeals and the taxpayer agree, you need to determine if the assessment should be closed with finality by initiating a closing agreement.

Note: Form 2751, *Proposed Assessment of Trust Fund Recovery Penalty*, and Form 2751-AD, *Trust Fund Recovery Penalty-Offer of Agreement to Assessment and Collection*, are agreement forms but the courts have determined that they do not have finality.

- (2) For determining TFRP liabilities with finality, Form 866, *Agreement as to Final Determination of Tax Liability*, is used.
- (3) IRC 7121(b) provides: "If such agreement is approved by the Secretary (within such time as may be stated in such agreement, or later agreed to) such agreement shall be final and conclusive, and except upon a showing of fraud or malfeasance, or misinterpretation of material fact - (1) the case shall not be reopened as to the matters agreed upon or the agreement modified by any

officer, employee, or agent of the United States, and (2) in any suit, action, or proceeding, such agreement, or any determination, assessment, collection, payment, abatement, refund, or credit made in accordance therewith, shall not be annulled, modified, set aside, or disregarded”.

- (4) Special agreement forms, like the Form 866, differ from the Form 870 type of general agreement in several ways. The following table compares the two categories of forms:

Closing Agreement Characteristics	
Special Agreement Forms	General Agreement Forms
Pledges no reopening	No pledge
Effective upon acceptance by or on behalf of Commissioner	Effective when received
Suspension interest under IRC 6601(c) is controlled by date form becomes effective	Suspension interest is controlled by the date received
Example: Form 866, <i>Final Determination of Tax Liability</i> .	Example: Form 2751, <i>Proposed Assessment of Trust Fund Recovery Penalty</i>

Note: Form 2751-AD, although considered a special agreement pledging no reopening, does not specifically mention IRC 7121, so is not considered a final determination of tax by the court.

- (5) Form 2751-AD, may be used in any case in which each responsible person agrees with the proposed settlement. In certain cases a closing agreement may be used instead of a Form 2751-AD. See IRM 8.13, *Closing Agreements*. This is usually done if the taxpayer or the Service desire finality and it would not be disadvantageous to the other party.
- (6) In related TFRP cases where all responsible parties are not in agreement with an Appeals settlement based on hazards of litigation, a Form 2751 should be secured from the agreeing responsible person(s). Inform the agreeing responsible person(s) by closing letter that the case can be reopened if the Department of Justice decides to join all potentially responsible persons in a refund suit before the assessment limitation period expires. A refund suit in the Court of Federal Claims, as opposed to in a district court, does not permit the government to join other putative responsible persons. The government can either file a counterclaim or wait until the Court of Federal Claims proceeding ends before filing a collection suit elsewhere against all potentially responsible persons.
- (7) If Appeals determines that the agreed upon settlement should be closed with finality:

8.25 Trust Fund Recovery Penalty (TFRP)

- a. Select the Agreement or TFRP category found in APGOLF in ACDS
- b. Select Form 866, and then be sure to select the radio button to include the TFRP language. This format follows the pattern agreement in IRM Exhibit 8.13.1-8 . Your local closing agreement reviewer can assist you with any questions you may have.
- c. Once the draft form is prepared, it is transmitted along with Form 4222 and a draft ACM to the closing agreement reviewer;

Note: Since the Form 866 closing agreement determines tax liability, the Appeals Case Memorandum (ACM) must comment on all significant matters involved in the case, whether changed or unchanged by the Service, the reasons for recommending the closing agreement; and what the parties intend to accomplish by it .

- d. If the reviewer finds the agreement acceptable, s/he will so indicate and return the agreement and the Form 4222 to you
- e. At this point, you send the form to the taxpayer for original signature of all three copies;

Note: For additions to tax of \$250,000 or less, the Form 2751 as well as the Form 866 can be accepted by fax if taxpayer contact has been made and the case history documents the date of contact and the desire to submit the waiver/agreement by fax.

- f. Upon receipt of the signed copy, stamp the date received from the taxpayer on the reverse of all copies of the agreement, sign it as the receiver, and forward it, along with the Form 4222, to your reviewer for final review
- g. Once the closing agreement reviewer has again reviewed the form it may be submitted along with the case to the ATM for final approval.
- h. Delegation Order 8-3 (formerly DO-97, Rev. 34) gives authority to ATMs to sign closing agreements.
- i. The date the agreement is signed by an official on behalf of the Commissioner is the date the agreement becomes effective; therefore it is important that the date on the closing agreement match the date on the Form 5402, *Appeals Transmittal and Case Memo*.
- j. The date the agreement is signed on behalf of the Commissioner must be shown.
- k. If an attorney or agent signs the agreement for the taxpayer, the power of attorney (or a copy) authorizing that person to sign must be attached to the agreement.
- l. One of the blocks at the top of Form 5402 and ACM is checked where a closing agreement is executed in the case.
- m. The following is sample wording for a TFRP closing agreement - Pattern Tax Liability Agreement Reflecting Trust Fund Recovery Penalty Assessment of Unpaid Federal Employment Taxes for Use on Form 866: See also IRM Exhibit 8.13.1-8:

<p>The liability described and agreed to herein is the unpaid Federal employment taxes withheld or that should have been withheld from wages of employees of _____ (name and EIN of employer) for the taxable periods listed below.</p>			
Taxable Period	Kind of Tax or Penalty	Chapter Number and Subchapter Letter of Internal Revenue Code	Total Tax Liability for Period
Calendar Quarter Ending September 30, 1987	Section 6672 Assessable Penalty	68B, I.R.C.	\$ 982.16
Calendar Quarter Ending December 31, 1987	Section 6672 Assessable Penalty	68B, I.R.C	\$ 964.84
(Pattern language only. Not a complete document.)			

8.25.2.7
(12-12-2012)
Appeals Case Memorandum (ACM) for TFRP cases

- (1) Refer to IRM 8.6.2 for comprehensive guidance on the ACM.
- (2) Although preparation of a Form 3870, is not required on TFRP cases, a detailed explanation of your calculations must be included for the CPM unit that will be responsible for making new assessments and adjusting existing penalty amounts.
- (3) It is important that your ACM provide a complete explanation of the case presented by Collection, the taxpayer's protest and the reason for your decision, especially if the case is not closed with finality through a Form 866.
- (4) This guidance applies even if the taxpayer withdraws the appeal, although the depth of your ACM should be dependant on the issues involved in the withdrawal. For instance, if the underlying business account was full paid, a brief ACM may be adequate.

8.25.2.8
(09-05-2018)
Closing Actions for the Appeals Technical Employee (ATE)

- (1) The ATE working the case will complete the customized Form 5402 and Form 3210 for each responsible person. The revised findings penalty section should reflect the trust fund penalty to be assessed. Update ACDS following the general closing instructions. Address Form 5402 to the Advisory CPM office that sent the TFRP case to Appeals. For withdrawals and protests considered withdrawn due to the taxpayer's failure to respond within 30 days to a request to perfect a defective protest or defective POA, there is no need to secure an ATM signature on Form 5402 or Form 3210 .

8.25 Trust Fund Recovery Penalty (TFRP)

- (2) The Remarks section of Form 5402 contains optional remarks that provide direction for the receiving Advisory CPM. Most of the remarks are self explanatory. The following remarks relate to specific types of pre-assessment appeal (TBOR2) closures:

If...	Then...
The protest was timely filed (TBOR2 case) and the ASED expires 30 days from the date of the ATM's signature approval on Form 5402 or Form 866, Closing Agreement	In the remarks section of the customized Form 5402, select the remark: "Expedite -quick assessment required. ASED expires 30 days from the ATM's signature date."
The protest was not timely filed (the ASED is not suspended by TBOR2)	Close as a premature referral. In the remarks section of the customized Form 5402, select the remark: "Due to untimely protest, the ASED is not suspended by TBOR2. Assessment of the TFRP is necessary. The ASED expires (enter date)."
The taxpayer's protest clearly indicates a desire to protest only specific periods listed on Form 2751 and his or her agreement with the assessment of the other periods	In the remarks section of the customized Form 5402, select the remark: "The taxpayer does not wish to protest the assessment of the following specific periods: (list periods here). Assessment of these periods is necessary. The ASED expires (enter date). Appeals retains jurisdiction under TBOR2 for the following related periods: (list periods here)."

- (3) Take the following actions when closing a TFRP case:

When Closing...	Then...	...and
An Agreed TBOR2 case Note: All pre-assessment TFRP appeals where the taxpayer signed the Form 2751, 2751-AD or Form 866.	Select closing code 03, Agreed, and the appropriate Resolution Reason Description on the customized Form 5402. Place an original Form 2751, Form 2751-AD, or Form 866, agreement in the Collection file. An original copy goes to the Appeals Agreement Reviewer for storage.	Use Letter 5123 (TFRP – Agreement Secured) or Letter 5124 (TFRP – Not Sustained) closing letter. Include an original copy of the agreement form.

When Closing...	Then...	...and
<p>An Unagreed TBOR2 case</p> <p>Note: All pre-assessment TFRP appeals (except premature referrals), where the taxpayer does not sign an agreement.</p> <p>Note: This includes withdrawals and protests considered withdrawn due to the taxpayer's failure to respond within 30 days to a request to perfect a defective protest or defective POA.</p>	<p>Select closing code 13, Unagreed, and the appropriate Resolution Reason Descriptions on the customized Form 5402. For withdrawals and protests considered withdrawn due to the taxpayer's failure to respond within 30 days to a request to perfect a defective protest or defective POA, there is no need to secure an ATM signature on Form 5402.</p>	<p>Use Letter 1536, <i>Closing Letter for Unagreed Employment Tax and Trust Fund Recovery Penalty</i>, or for pre-assessment cases considered withdrawn, prepare a letter to the taxpayer explaining that the protest is considered withdrawn and why. For withdrawals and protests considered withdrawn, the letter can be signed by the ATE. Use Letter 5124 for unagreed, full concession cases since receipt of a Letter 1536 would be confusing to the taxpayer.</p>
<p>Any TFRP case as a premature referral (to include untimely protests and TBOR2 protests when the underlying business liability is satisfied prior to Appeals working the case)</p>	<p>Select closing code 20, Premature Referral and the appropriate Premature Referral Resolution Reason Description on the customized Form 5402</p>	<p>Inform the taxpayer/POA by telephone or letter that the case was returned to Collection and the reason for the return</p>
<p>A Formal TFRP claim or reconsideration disallowed in full</p>	<p>Select claim closing code 14, Full Disallowance, and the appropriate Resolution Reason Description on the customized Form 5402</p>	<p>For a Claim, use: Certified Letter 1364, <i>Notification of Full Claim Disallowance</i>. For a Claim Reconsideration, use: Letter 2681, <i>Full Disallowance After Previous Claim Disallowance</i></p>
<p>A Formal TFRP claim or reconsideration allowed in full</p>	<p>Select claim closing code 15, Full Allowance, and the appropriate Resolution Reason Description on the customized Form 5402</p>	<p>For both a Claim and a Claim Reconsideration use: Letter 2682, <i>Full Claim Allowance</i></p>
<p>A Formal TFRP claim or reconsideration that is partially allowed</p>	<p>Select claim closing code 16, Partial Allowance, and the appropriate Resolution Reason Description on the customized Form 5402</p>	<p>For a Claim use Certified Letter 1363, <i>Appeals Partial Disallowance of Claim</i>. For a Claim Reconsideration use Letter 2683, <i>Partial Disallowance After Previous Claim Disallowance</i></p>

- (4) Appeals' general statute requirements in IRM 8.21, *Appeals Statute Responsibility*, are applicable to TFRP cases. Advise your ATM when closing any short statute case in which the statute will expire within 60 days.
- (5) For TBOR2 TFRP cases meeting the large dollar criteria of IRM 4.4.18, *Large Dollar Cases*, refer to IRM 8.2.1.10.1, *Expedite Processing for Certain Large Dollar Cases*, and follow applicable expedite procedures.

8.25 Trust Fund Recovery Penalty (TFRP)

Note: A case meets the large dollar criteria, if the total amount of a period's "agreed and unpaid deficiency" plus penalties (or overpayment plus penalties) exceeds \$100,000.

8.25.2.9

(09-05-2018)

TBOR2 Expedite Closing Actions for the Appeals Team Manager (ATM)

- (1) The approving ATM, or the approving ATE for cases that are withdrawn or considered withdrawn, can either take these required extra steps in (2), below, or direct the ATE (if applicable) or APS to complete some of them based on local agreement. If local agreement does not specify, or the case arrives in APS for processing without the proof described in step 5 that the assessment documents were received by the CPM, then APS is responsible for ensuring their immediate delivery. For withdrawals and protests considered withdrawn due to the taxpayer's failure to respond within 30 days to a request to perfect a defective protest or defective POA, there is no need to secure an ATM signature on the Form 5402 or Form 3210. If the ATE is authorized to close the withdrawn case, the ATE, and not the ATM, will take the steps outlined in (2), below.
- (2) TFRP cases that are extended by TBOR2 (the ASER will expire 30 days after the ATM's approval signature or the ATE's signature, in cases that are withdrawn or considered withdrawn, on Form 5402 or Form 866,) are closed as follows:
ATM or ATE (as applicable) will:

Step	Action
1)	Sign and date Form 5402 and Form 866, if applicable.
2)	<p>The ATM will enter the Appeals Closing Approval (ACAPDATE) in all cases, regardless of whether the ATM or ATE signed Form 5402, and alert the Account and Processing Support (APS) Team Manager by email that a TFRP case requiring quick or prompt assessment action by Advisory has been sent. This notification should include the WUNO and revised statute date of the approved case.</p> <p>Note: The ATM should ensure that the approval signature dates on Form 5402 and Form 866 (the final administrative determination) are identical to the ACAPDATE.</p>
3)	Confirm the case is flagged EXPEDITE .
4)	Hand-deliver the case to APS, if located on site. If APS is located elsewhere, send the closed case, via overnight mail, to APS. Ensure the case is received in APS within 5 days of the ACAPDATE.

Step	Action
5)	<p>APS will take appropriate actions to ensure the Form 5402 and Form 2749 are provided by email or fax immediately to the responsible Technical Services Advisory Control Point Monitor (CPM) unit manager.</p> <p>Note: ACDS is programmed to remove the TBOR2 statute code when the ACAPDATE is entered by the ATM and to add 30 days to the ACAPDATE. This date is entered in the Earliest Statute Date field and covers all periods.</p> <p>Note: To prevent a TBOR2 case with an ASER greater than 30 days from being systemically identified as a TBOR2 short statute case, the TBOR2 statute code can be removed and the correct earliest ASER input and validated through AIVP. If changed, correct the customized Form 5402. Appeals general expedite statute procedures in IRM 8.21, <i>Appeals Statute Responsibility</i>, are applicable to TFRP cases.</p>

