



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

20.1.13

JULY 13, 2022

EFFECTIVE DATE

(07-13-2022)

PURPOSE

- (1) To transmit the new IRM 20.1.13, Penalty Handbook, Material Advisor and Reportable Transactions Penalties.

MATERIAL CHANGES

- (1) IRM 20.1.13.2 incorporates content moved from IRM 20.1.6.16 regarding Failure to Furnish Information Regarding Reportable Transactions - IRC 6707. The content was reorganized for clarity.
- (2) IRM 20.1.13.3 incorporates content moved from IRM 4.32.4 regarding IRC 6707A Penalty for Failure to Include Reportable Transaction Information With Return. Updated content with current procedures and eliminated obsolete instructions. Replaced templates with citations for applicable forms and letters.
- (3) IRM 20.1.13.3 incorporates Interim Guidance Memorandum SBSE-04-0322-0009, Interim Guidance for IRC 6707A Penalty Approval, issued March 31, 2022 eliminating the penalty approval process beyond the immediate supervisor.
- (4) IRM 20.1.13.4 incorporates content moved from IRM 20.1.6.18 regarding Failure to Maintain Lists of Advisees With Respect to Reportable Transactions - IRC 6708. The content was reorganized for clarity.
- (5) IRM 20.1.13.5 incorporates content moved from IRM 20.1.6.15 regarding Actions to Enjoin Specified Conduct Related to Tax Shelters and Reportable Transactions - IRC 7408. The content was reorganized for clarity.
- (6) Exhibit 20.1.13-1, Acronyms, defines abbreviations used this IRM.

EFFECT ON OTHER DOCUMENTS

This is a new IRM which will supersede IRM 4.32.4. IRM 4.32.4, dated 02-11-2016, will be made obsolete after the effective date of IRM 20.1.13. Content from IRM 20.1.6, dated 10-13-2021, has been incorporated and IRM 20.1.6 will be revised to eliminate duplicate content. This IRM incorporates Interim Guidance Memorandum SBSE-04-0322-0009, Interim Guidance for IRC 6707A Penalty Approval, dated 03-31-2022.

AUDIENCE

All employees who address material advisor and reportable transaction penalties.

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Small Business/Self Employed

20.1.13

Material Advisor and Reportable Transactions Penalties

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20.1.13.1
(07-13-2022)
Program Scope and Objectives

- (1) Purpose: This IRM provides policy and procedures for the application of material advisor and reportable transaction penalties.
- (2) Audience: All operating division employees who address material advisor and reportable transaction penalties.

Note: Some divisional IRMs provide supplemental guidance to address material advisor and reportable transaction penalties.
- (3) Policy Owner: The Business Support Office (BSO) under Operations Support (OS). SB/SE is responsible for overseeing civil penalties.
- (4) Program Owner: The Office of Servicewide Penalties (OSP) is responsible for material advisor and reportable transaction penalty policy.
- (5) Contact Information: To recommend changes or any suggestions to this IRM, email OSP at **Servicewide Penalties Team*. See IRM 1.11.6.5, Providing Feedback About an IRM Section - Out of Clearance.

20.1.13.1.1
(07-13-2022)
Background

- (1) Material advisor and reportable transaction penalties provide the IRS with important tools to enhance voluntary compliance by taxpayers. See IRM 1.2.1.12.1, Policy Statement 20–1 (Formerly P-1-18), Penalties are used to enhance voluntary compliance.

20.1.13.1.2
(07-13-2022)
Authority

- (1) Pertinent IRC sections related to material advisor and reportable transaction penalties include:
 - IRC 6011, General requirement of return, statement, or list
 - IRC 6111, Disclosure of reportable transactions
 - IRC 6112, Material advisors of reportable transactions must keep lists of advisees, etc
 - IRC 6662A, Imposition of accuracy-related penalty on understatement with respect to reportable transactions
 - IRC 6707, Failure to furnish information regarding reportable transactions
 - IRC 6707A, Penalty for failure to include reportable transaction information with return
 - IRC 6708, Failure To maintain lists of advisees with respect to reportable transactions
 - IRC 7408, Actions To enjoin specified conduct related to tax shelters and reportable transactions

20.1.13.1.3
(07-13-2022)
Responsibilities

- (1) The Director, Business Support, is the director responsible for the servicewide civil penalty program.
- (2) IRM 20.1.13 provides servicewide policy for the administration of material advisor penalties and reportable transaction penalties on participants.
- (3) IRS operating divisions/business unit (OD/BU) functions may develop additional guidance or reference materials for their specific OD/BU functional administrative needs. These reference materials should receive approval from OSP prior to distribution and are to remain consistent with the following:

- a. Procedures set forth in this IRM,
 - b. Policy Statement 20-1 in IRM 1.2.1.12.1, and
 - c. Any other guidance relating to civil penalties.
- (4) Overall responsibility for the penalty programs is assigned to OSP. The OSP is charged with coordinating policy and procedures concerning the administration of penalty programs and ensuring consistency with the penalty policy statement.
- (5) Every function in the IRS has a role in proper material advisor and reportable transaction penalty administration. It is essential each function conduct its operations with an emphasis on promoting voluntary compliance.
- (6) Examiners should keep in mind the following objectives when handling each material advisor and reportable transaction penalty case:
 - a. Make the right decision from the beginning. A wrong decision, even though eventually corrected, may have a negative impact on voluntary compliance.
 - b. Give each taxpayer the opportunity to have their interests heard and considered.
 - c. Provide opportunity for incorrect decisions to be corrected.
 - d. Treat each case in an impartial and honest way.
 - e. Use each material advisor and reportable transaction penalty case as an opportunity to educate the taxpayer, help the taxpayer understand legal obligations and rights, assist the taxpayer in understanding procedural rights, and observe the taxpayer's procedural rights.
 - f. Process and resolve each taxpayer's case promptly.
- (7) All actions will be done in accordance with the Taxpayer Bill of Rights as listed in IRC 7803(a)(3).

Note: Additional information may be found at <https://www.irs.gov/taxpayer-bill-of-rights>.

- (8) Taxpayers may express concern about difficulty obtaining a solution to a problem or timely and appropriate response to an inquiry. In these instances, see IRM 20.1.1.1.6.2, Taxpayer Advocate Service (TAS) Guidelines, for more information.

20.1.13.1.4
(07-13-2022)
**Program Management
and Review**

- (1) Every function in the IRS has a role in proper penalty administration. It is essential each function conduct its operations with an emphasis on promoting voluntary compliance. Appropriate business reviews should be conducted to ensure consistency with the Policy Statement 20-1 and its philosophy. Attention should be directed to the coordination of penalty programs between offices and functions to ensure approaches are consistent and penalty information is used for identifying and responding to compliance problems.
- (2) Supervisors should continuously review information for trends which may suggest changes in compliance programs, training courses, educational programs, penalty design, and penalty administration. Supervisors should institute, on an ongoing basis, a quality review system to evaluate the timely and correct disposition of penalty cases and encourages consistent administration of penalties.

20.1.13.1.5
(07-13-2022)

Terms, Definitions, and Acronyms

- (1) Refer to Exhibit 20.1.13-1, for a list of acronyms used within this IRM section.
- (2) Reportable transaction: IRC 6707A(c)(1) states the term “reportable transaction” means any transaction with respect to which information is required to be included with a return or statement because, as determined under regulations prescribed under IRC 6011, IRC 6111, and IRC 6112, such transaction is of a type the Secretary determines as having a potential for tax avoidance or evasion.
- (3) Listed transaction: IRC 6707A(c)(2) states the “listed transaction” means a reportable transaction which is the same as, or substantially similar to, a transaction specifically identified by the Secretary as a tax avoidance transaction for purposes of IRC 6011, IRC 6111, and IRC 6112.

20.1.13.1.6
(07-13-2022)

Related Resources

- (1) Additional resources include:
 - Office of Tax Shelter Analysis (OTSA) https://irssource.web.irs.gov/LBI/Lists/CP_A/DispltemForm.aspx?ID=55
 - Promoter Investigations Guidelines https://irssource.web.irs.gov/LBI/Lists/CP_A/DispltemForm.aspx?ID=17&ContentTypeId=0x01002A4227255A92BA49B566D49AE5D487A5
 - Abusive Transactions Investigations Knowledge Management <https://portal.ds.irsnet.gov/sites/vl011/lists/abusivetransactioninvestigations/landingview.aspx>
 - List of “listed transactions” <https://irssource.web.irs.gov/LBI/003/Forms/AllItems.aspx?RootFolder=%2fLBI%2f003%2fListed%20Transactions>
 - IRM 25.6.1, Statute of Limitations Processes and Procedures
 - IRM 4.7.5, Examination Returns Control System (ERCS)

20.1.13.1.7
(07-13-2022)

Written Supervisory Approval of Penalty Assessments

- (1) IRC 6751(b), Approval of Assessment, provides, in general, no penalty under the Code shall be assessed unless the initial determination of such assessment is personally approved, in writing, by the immediate supervisor of the individual making such determination or such higher-level official as the Secretary may designate. This provision is effective for notices issued and penalties assessed after December 31, 2000. The procedural requirements provided in IRC 6751(b) do not apply to any addition to tax under IRC 6651, IRC 6654, IRC 6655; IRC 6662(b)(9), or any other penalty automatically calculated through electronic means.

Note: See IRM 20.1.1.2.3, Approval Prerequisite to Penalty Assessments, for further information.

20.1.13.2
(07-13-2022)

Failure to Furnish Information Regarding Reportable Transactions - IRC 6707

- (1) Material advisors, with respect to any reportable transaction as defined in IRC 6707A(c) and 26 CFR 1.6011-4(b)(1), are required to file a complete Form 8918 (or successor form) with the Office of Tax Shelter Analysis (OTSA) by the last day of the month that follows the end of the calendar quarter in which the advisor became a material advisor with respect to the reportable transaction or in which the circumstances necessitating an amended disclosure statement occur. See 26 CFR 301.6111-3(d) and 26 CFR 301.6111-3(e).
- (2) IRC 6111(b) defines a material advisor as any person:

- a. Who provides any material aid, assistance, or advice with respect to organizing, managing, promoting, selling, implementing, insuring, or carrying out any reportable transaction, and
- b. Who directly or indirectly derives gross income in excess of \$250,000 (\$50,000 in the case of a reportable transaction substantially all of the tax benefits from which are provided to natural persons), or such other amount as may be prescribed by the Secretary, for such material aid, assistance, or advice.

20.1.13.2.1
(07-13-2022)

Effective Date - IRC 6707

- (1) Persons acting as material advisors are required to file a form disclosing they acted as a material advisor with respect to a reportable transaction.
- (2) IRC 6707, as amended by the AJCA, imposes a penalty for a material advisor who:
 - a. Fails to file the required return on or before the date prescribed, or
 - b. Files false or incomplete information with the Secretary with respect to such transaction.
- (3) The penalty under IRC 6707 applies to returns due after October 23, 2004, the date of enactment.

20.1.13.2.2
(07-13-2022)

**Compliance Functional
Guidance - IRC 6707**

- (1) An examiner should not start a material advisor examination without documented approval from the Lead Development Center (LDC) for SB/SE and TE/GE. For LB&I, the examiner will refer information gathered to the Office of Tax Shelter Analysis (OTSA) and the Technical Tax Shelter Promoter Committee (TTSPC) will authorize examination.
- (2) The LDC:
 - Processes material advisor referrals.
 - Evaluates the referral based on established criteria.
 - Authorizes IRC 6707 investigations.
 - Forwards approved investigation case files to Area Planning & Special Programs (PSP) units for assignment.
- (3) With respect to LB&I material advisor investigations:
 - Examiners report suspected cases of material advisor activity to OTSA.
 - Examiners forward their findings and supporting documentation to OTSA.
 - OTSA reviews and develops the referrals.
 - OTSA sends the referrals to the TTSPC that meet established TTSPC criteria.
 - TTSPC reviews the referrals and authorizes a material advisor investigation, as appropriate.

Note: Only the TTSPC authorizes a material advisor investigation in LB&I.

20.1.13.2.2.1
(07-13-2022)

**Penalty Case Control -
IRC 6707**

- (1) Once approval is received potential IRC 6707 penalty cases are established as penalty investigations on ERCS. See IRM 4.7.5.7.1, Requesting ERCS Controls and Incoming Inventory.

Note: The penalty case is not tracked on Audit Information Management System (AIMS)

- (2) To establish ERCS controls:
 - a. Complete Form 5345-D, Examination Request-ERCS Users.
 - b. Check the box "Control Penalty Investigation."
 - c. Source code = 99
 - d. Penalty master file tax (MFT) = PI
 - e. Activity code = 549
 - f. Project and tracking codes = as appropriate for case
 - g. Statute date = enter the applicable 3 years from the later of the due date of the return or the date the return was filed.
- (3) For TEGE led investigations, the penalty case will be tracked by Non-Master File using the following codes:
 - a. Source code = 49 or other appropriate code
 - b. Special project code = 6422
 - c. Activity Code = 505
 - d. Tracking code = 8671

20.1.13.2.3
(07-13-2022)
**Statute of Limitations -
IRC 6707**

- (1) IRC 6707 penalties must be assessed within 3 years of filing Form 8918, Material Advisor Disclosure Statement.
- (2) Penalties may be assessed at any time if a person required to disclose material advisor status failed to file the required forms.

20.1.13.2.3.1
(07-13-2022)
**Consents to Extend the
Statute of Limitations**

- (1) Consents to extend the statute of limitation should be obtained when:
 - The statute of limitations for assessing the penalty will expire within 180 days and there is insufficient time to complete the examination.
 - The material advisor requests an administrative hearing before the IRS Independent Office of Appeals (hereafter referred to as Appeals) and there would be less than 365 days remaining on the statute for assessment, when received by Appeals.
- (2) A separate consent should be obtained for each taxable period under consideration, but the related taxpayer returns for which the penalties are applicable can be included on each consent.
- (3) If a taxpayer refuses to sign a consent, see IRM 4.4.25.7, Quick Assessments on Civil Penalties, Form 8278, Assessment and Abatement of Miscellaneous Civil Penalties, Area Office Group Procedures, for procedures when the assessment statute expiration date (ASED) is less than 60 days and IRM 4.4.25.8, Quick Assessments on Civil Penalties, Form 8278, CCP Procedures. Centralized Case Processing (CCP) prepares Form 2859, Request for Quick or Prompt Assessment.

20.1.13.2.4
(07-13-2022)
**Penalty Computation -
IRC 6707**

- (1) The amount of the penalty under IRC 6707 for failure to furnish information regarding reportable transactions, other than listed transactions, is \$50,000.

- (2) A separate cumulative penalty is assessed in the year the failure is discovered for each type of listed transaction from which an advisor derives income.
- (3) If the penalty is with respect to a listed transaction, the amount of the penalty is the greater of the following:
 - a. \$200,000, or
 - b. 50 percent of the gross income derived by the material advisor with respect to aid, assistance, or advice which is provided before the date the information return is filed under IRC 6111.

Example: An advisor becomes a material advisor to Client X in 2018 with respect to a listed transaction. The advisor derives \$400,000 in gross income from advice given to Client X in 2018 even though the advisor has not yet received the income. The advisor unintentionally does not file a Form 8918. In 2019, the advisor becomes a material advisor to Client Y with respect to the same type of listed transaction. The gross income the advisor expects to receive in 2019 from the advice given to Client Y is \$100,000. The advisor does not become a material advisor with respect to any other client and unintentionally still does not file a Form 8918 with respect to the transaction. In 2020, it is determined during an examination the advisor should have filed Form 8918 for the transactions in 2018 and 2019 and failed to do so by the prescribed date. The advisor is subject to one IRC 6707 penalty in 2020 (the year the failure is discovered) of \$250,000 (50 percent of the gross income [\$400,000 in 2018 and \$100,000 in 2019]) as there was only one type of listed transaction involved during the two years.

- (4) In the case of intentional failure to act, the penalty is 75 percent of the gross income derived by the material advisor with respect to aid, assistance, or advice provided before the date the information return is filed.

20.1.13.2.5
(07-13-2022)
Appeal Rights - IRC 6707

- (1) IRC 6707 penalties have post assessment appeal rights.
- (2) Persons may request, and may be granted, an administrative hearing with Appeals after penalty assessment if there has not been a prior administrative hearing with Appeals. See IRM 8.11.7.5.1, Promoter Rights for IRC 6707 and IRC 6708 Assessments.
- (3) Penalties under IRC 6707 have been designated as appeals coordinated issues (ACI). See IRM 8.11.7, Penalties Worked in Appeals, Abusive Transaction Penalties.
- (4) Taxpayers and material advisors, in general, are entitled to one administrative hearing with Appeals. See 26 CFR 601.106, Appeals functions.

20.1.13.2.6
(07-13-2022)
Penalty Rescission - IRC 6707

- (1) Penalties for reportable transactions, that are not listed transactions, can only be rescinded in exceptional circumstances where rescinding the penalty would promote compliance with the tax laws and effective tax administration.
- (2) The authority to rescind the penalty can only be exercised by the Commissioner or their delegate. See IRM 1.2.2.2.20, Delegation Order 1-23 (formerly DO-193, Rev. 6), Authorization to Perform Functions of the Commissioner.

20.1.13.3
(07-13-2022)

**Failure to Include
Reportable Transaction
Information with Return
- IRC 6707A Penalty**

- (3) There is no right to appeal a refusal to rescind a penalty.
- (4) For further rescission information see IRM 20.1.13.3.6, Penalty Rescission - IRC 6707A Penalties.
- (1) The IRS may assess a penalty under IRC 6707A with respect to each failure to timely and adequately disclose a reportable transaction as required by IRC 6011 and the associated regulations. See 26 CFR 301.6707A-1, Failure to include on any return or statement any information required to be disclosed under section 6011 with respect to a reportable transaction.
- (2) Taxpayers are required to disclose their participation in several categories of reportable transactions. See 26 CFR 1.6011-4, Requirement of statement disclosing participation in certain transactions by taxpayers and IRM 20.1.13.3.4.1, Identifying Reportable Transactions.
- (3) The penalty is asserted in addition to any other penalty asserted against a taxpayer.
- (4) The penalty applies without regard to whether the underlying transaction is ultimately determined to result in an understatement of tax.
- (5) Taxpayers are required to disclose their liability for certain penalties under IRC 6707A if a U.S. Securities and Exchange Commission (SEC) filing requirement under Sections 13 or 15(d) of the Securities and Exchange Act of 1934 exists (for example, publicly traded companies). If a taxpayer has a filing requirement under Sections 13 or 15(d) of the Securities and Exchange Act of 1934, then IRC 6707A requires taxpayers to disclose their liability for certain penalties under IRC 6707A, IRC 6662A(c) and IRC 6662(h) in public reports filed with the SEC. See Rev. Proc. 2005-51, 2005-2 C.B. 296, as well as Rev. Proc. 2007-25, 2007-1 C.B. 761, for additional information. See IRC 6707A(e).
- (6) No reasonable cause exception exists for the IRC 6707A penalty.
- (7) The Commissioner or their delegate may rescind the penalty, in whole or in part, if doing so would promote compliance with the tax code and effective tax administration. This authority applies only to reportable transactions that are not listed transactions. See IRM 20.1.13.3.6, Penalty Rescission - IRC 6707A Penalties.
- (8) A taxpayer may challenge a determination of participation in a reportable transaction or as to the adequacy or timeliness of the disclosure of any transaction with Appeals and in court.
- (9) The IRS is required to submit an annual report to Congress including information on:
 - Application of IRC 6707A penalties,
 - Rescission requests, and
 - Application of certain other penalties.

20.1.13.3.1
(07-13-2022)

**Effective Date - IRC
6707A Penalty**

- (1) The penalty under IRC 6707A applies to returns due after October 22, 2004, AJCA enactment date.

20.1.13.3.2
(07-13-2022)

**Compliance Functional
Guidance - IRC 6707A**

- (1) This section describes IRC 6707A penalty case procedures in compliance field groups.
- (2) Where differences in business unit procedures exist, examiners should follow respective business unit IRMs.

20.1.13.3.2.1
(07-13-2022)

General Information

- (1) The IRC 6707A penalty may be imposed even if an examination results in no-change or if an examination was not opened. Sufficient factual evidence is required to show the taxpayer:
- Participated in a reportable transaction,
 - Had a duty to disclose participation, and
 - Failed to properly disclose participation.
- (2) The examiner does not need to conclude the examination before issuing the 30-day letter for the IRC 6707A penalty. All relevant facts to support the penalty should be established when an IRC 6707A penalty is developed in conjunction with an examination. Likewise, an examiner does not need to conclude the IRC 6707A penalty investigation before issuing the 30-day letter for the examination. If the timing is appropriate, the 30-day letter for both the examination and IRC 6707A penalty cases can be issued at the same time.
- (3) If the penalty relates to a listed transaction and the taxpayer is a publicly traded company:
- a. The examiner sends a copy of the Form 8278, Assessment and Abatement of Miscellaneous Civil Penalties and attachments to OTSA. Contacts can be found at the *ADCCI- CP& A - Office of Tax Shelter Analysis (OTSA) (irs.gov)* website.
 - b. OTSA will review the Form 8278 and attachments to ensure compliance with IRC 6707A(e). For example, disclose to the SEC where a taxpayer has an SEC reporting requirement and participated in a listed transaction.

20.1.13.3.2.2
(07-13-2022)

Penalty Case Control

- (1) Potential IRC 6707A penalty cases are established as penalty investigations on ERCS. See IRM 4.7.5.7.1, Requesting ERCS Controls and Incoming Inventory.

Note: Potential IRC 6707A penalty cases are tracked on AIMS and Reporting Compliance Case Management System (RCCMS).

- (2) To establish the penalty case on ERCS:

- a. Complete Form 5345-D, Examination Request-ERCS Users.

Note: Each spouse with a potential penalty will have a penalty case under their respective taxpayer identification number (TIN), if applicable.

- b. Check the box "Control Penalty Investigation."
c. Source code = 99

- d. Penalty master file tax (MFT) = P5
- e. Activity code = 505
- f. Project and tracking codes = as appropriate for case
- g. Statute date = enter the applicable statute of limitations.

Note: If relying on IRC 6501(c)(10), the statute should reflect alpha code WW. See IRM Exhibit 25.6.23-3, Alpha Codes.

- (3) If Compliance is involved in a concurrent examination with TE/GE, the penalty case file will be assigned to the Compliance examiner. For example, a TE/GE examiner would analyze and document whether a transaction is substantially similar to a listed transaction and the Compliance examiner would analyze whether the taxpayer had a duty to disclose the transaction under 26 CFR 1.6011-4, whether the taxpayer had complied with the applicable disclosure requirement, and whether IRC 6707A was effective for the year(s) at issue.
- (4) Report Generation Software (RGS) can be used to calculate the tax benefit attributable to the reportable transaction. The examiner can use the tax benefit calculated to manually compute the penalty for individuals and C corporations.

20.1.13.3.2.3 (07-13-2022) **Penalty Case Development**

- (1) Examiners should develop a case file containing all relevant documents and other evidence demonstrating the transaction was a reportable transaction and all documents demonstrating the required procedures have been followed. Minimum required documents are listed in IRM 20.1.13.3.2.3.2, Penalty Case File—Documents Required for All Listed and Non-Listed Reportable Transactions but other documents may be required depending on the case. Other documents can include but are not limited to:
 - Transactional documents
 - Emails
 - Other correspondence
 - Opinions about whether the transaction is a reportable transaction
 - Promotional materials
 - Evidence as to why a disclosure is deficient, where applicable
 - Evidence as to the time or manner of filing the Form 8886, where applicable.
- (2) Form 8886 must be filed by the taxpayer in the time and manner prescribed in 1.6011-4(d) and 1.6011-4(e) to meet the required disclosure obligation. The examiner should have sufficient basis to demonstrate the taxpayer participated in a reportable transaction under 26 CFR 1.6011-4.
- (3) Examiners handling an IRC 6707A penalty investigation related to a non-listed reportable transaction should attempt to document facts relating to any potential rescission request as explained in IRM 20.1.13.3.6.1, Factors Weighing in Favor of Rescission.

20.1.13.3.2.3.1 (07-13-2022) **Opening an IRC 6707A Penalty Case**

- (1) When starting examination activities related to an IRC 6707A penalty, all examiners should:

- Contact OTSA to determine whether a Form 8886, Reportable Transaction Disclosure Statement, was filed with OTSA. Contacts at OTSA are listed at the *OTSA website*.
- Determine the date and tax year of such filing.
- Provide OTSA the taxpayer's name, TIN, years, type of transaction, and whether the disclosure was incomplete or not attached to the return. .

Note: LB&I examiners are to contact OTSA when placing a tax return having an attached Form 8886 under examination. See IRM 4.32.2.4.3.1, Taxpayer Disclosures, for further information.

- (2) If the only method to verify the filing of Form 8886 is the original return, request the original return.
 - a. Use Form 5345-D and Source Code 45 to request the original return.
 - b. Use alpha Statute Code "FF" if the statute date has expired or is due to expire within 180 days.
 - c. Make a copy of the original return for the case file and attach the Form 5345-D to the original return, once received.
 - d. Close the original return on ERCS in Status Code 51 with Disposal Code 45.
 - e. Mail the original return to Centralized Case Processing.
- (3) If the return was electronically filed, a graphic image of the return can be requested via IDRS. If the return was filed through Modernized E-File, a PDF file of the return can be obtained through the Employee User Portal.
- (4) The examiner prepares a separate case file for the penalty, once it is determined a taxpayer either has failed to properly disclose a reportable transaction (whether listed or non-listed) on Form 8886 or has not timely filed the Form 8886 with the return or with OTSA, if required.
- (5) Issue Letter 5313, IRC Section 6707A - Opening Letter, if an IRC 6707A penalty is being considered without an associated examination. The Letter 5313 is not required if the IRC 6707A penalty is considered as part of an examination.
- (6) Examiners need to obtain a Form 2848, Power of Attorney and Declaration of Representative, referring to "civil penalties", IRC 6707A penalty, or similar language **only** when the Form 8886 was or should have been filed without being attached to a return. For example, when a transaction has been listed after the taxpayer filed the return and the Form 8886 is required to be filed with OTSA separate from the tax return. If the Form 8886 is included or should have been included with a Form 1040, Form 1120, U.S. Corporate Income Tax Return, or any other tax return, an authorization with respect to the tax return will also authorize the representative for the IRC 6707A penalty. See IRM 4.11.55, Power of Attorney Rights and Responsibilities.

20.1.13.3.2.3.2
(07-13-2022)

**Penalty Case File
Documents for All Listed
and Non-Listed
Reportable Transactions**

- (1) The following list outlines documents required to be included in penalty case files for all listed and non-listed reportable transactions:
 - a. Documents describing the transaction(s) for which disclosure is required and an explanation of the category of reportable transaction (such as listed transaction, confidential transaction, transaction with contractual protection, loss transaction, or transaction of interest).

- b. Statement of facts and explanation for the conclusion the taxpayer participated in a reportable transaction.
- c. Statement of facts for whether or not a Form 8886, Reportable Transaction Disclosure Statement was timely and adequately filed.

Note: If Form 8886 was not timely or adequately filed, the statement of facts needs to include how the form was deficient and deemed not timely.

- d. Information on associated flow through entities. (For example, Schedule K-1).
- e. Copy of associated tax return giving rise to the reporting obligation, if applicable. (For example, where the disclosure was required with the tax return)
- f. Other information necessary to identify the related cases.
- g. Penalty calculation, including detailed computation schedules.
- h. Case activity record.
- i. Documentation of supervisory approval of penalty.
- j. A copy of letters and forms issued and received during the investigation, including but not limited to:
 - Form 872
 - Form 2848
 - Letter 5313
 - 30-Day Letter
 - Signed Form 895
 - Completed Form 8278, in its current version
 - Form 886-A

20.1.13.3.2.3.2.1
(07-13-2022)

**Penalty Case File
Additional Documents
for Non-Listed
Reportable Transactions
Only**

- (1) Include any information relevant to the presence or absence of the rescission factors from 26 CFR 301.6707A-1(e)(3).
- (2) Negative findings of rescission factors should be documented. See 26 CFR 301.6707A-1(e)(4).

20.1.13.3.2.3.3
(07-13-2022)

**Penalty Case
Determination Issuing
the 30-Day Letter**

- (1) After securing written supervisory approval, the examiner should prepare and send the taxpayer the 30-day letter, Letter 4143, 30-Day Letter for Section 6707A Penalty, and enclosures:
 - a. Form 4549-A, Income Tax Discrepancy Adjustments manually prepared
 - b. Form 870, Waiver of Restrictions on Assessment and Collection of Deficiency in Tax and Acceptance of Overassessment
 - c. Form 886-A, Explanation of Items
 - d. Computation workpapers
 - e. Pub 1, Your Rights as a Taxpayer
 - f. Pub 5, Your Appeal Rights and How to Prepare a Protest if You Disagree
 - g. Pub 594, The IRS Collection Process
- (2) In general, the 30-day letter for the penalty case should be issued with at least 15 months remaining on the period of limitations on assessment. This will allow sufficient time for the taxpayer to respond to the 30-day letter; potentially request a 30-day extension of time to prepare a protest; and for the examiner

to send the case to Appeals while still ensuring Appeals receives the case file with 365 days remaining on the period of limitations on assessment. This also allows time for Appeals to consider and assess the penalty as appropriate.

20.1.13.3.2.3.4
(07-13-2022)

**Closing an IRC 6707A
Penalty Case**

- (1) The following chart is intended to aid the examiner in the penalty case file closure based on the conclusion reached;

If the penalty case conclusion is	And	Then the examiner will
No-change	the case was established on ERCS and no taxpayer contact was made	<ul style="list-style-type: none"> • Complete Form 8278 for the penalty amount of zero under PRN 648. • Complete Form 3198 for no-change and penalty amount of zero. • Close ERCS Disposal code 02. • Transfer ERCS status to 51 CCP. • Follow normal closing procedures to CCP to have TC 240 PRN 648 assessed for zero.
No-Change	the case was established on ERCS and taxpayer contact was made	<ul style="list-style-type: none"> • Complete the items above. • Issue Letter 5315, IRC 6707A No change to the taxpayer.

If the penalty case conclusion is	And	Then the examiner will
Agreed	the taxpayer has not yet signed the waiver	<ul style="list-style-type: none"> • Request the taxpayer sign Form 870. • Complete Form 8278 indicating the amount of the penalty to assess. • Close ERCS with status 51 to CCP and disposal code 03. • Complete Form 3198 special instructions indicating CCP to use Form 8278 for assessment. • Close the case with normal agreed closure procedures to CCP.
Unagreed	the taxpayer requests appeal with time remaining on the statute	<ul style="list-style-type: none"> • Follow IRM 20.1.13.3, closing to Appeals.
Unagreed	the taxpayer requests appeal without time remaining on the statute	<ul style="list-style-type: none"> • Without extending the statute, advise the taxpayer the assessment will be made and post assessment appeals provided. • Follow instructions for Quick Assessment Processing. <p>See IRM 20.1.13.3.2.3.4.1</p>

If the penalty case conclusion is	And	Then the examiner will
Unagreed	the taxpayer does not request appeal before the assessment	<ul style="list-style-type: none"> • Complete Form 8278 indicating the amount of the penalty to assess. • Close ERCS with status 51 to CCP and disposal code 12. • Complete Form 3198 special instructions indicating CCP to use Form 8278 for assessment. • Follow normal closing to CCP for assessment.

20.1.13.3.2.3.4.1
(07-13-2022)

**Quick Assessment
Closing Procedures for
IRC 6707A Penalty
Cases**

- (1) Obtain a transcript after final posting of the taxpayer's account and identify the document locator number (DLN) associated with Transaction Code (TC) 240 and Penalty Reference Number (PRN) 648. (If necessary, the examiner can use the assessment (23C) DLN provided on the Form 3210 when CCP confirmed the assessment.)
- (2) Place a Form 3198 on the case file. In the "Special Features" section, check the box for "Other Instructions" and include the language: **IRC 6707A Penalty Case File—Associate with Penalty Assessment under DLN** (and input the DLN identified from the transcript or 23C DLN in item 1). Use Status Code 41 (PSP) and Disposal Code 12 on Form 3198.
- (3) Attach a signed Form 895, Notice of Statute Expiration, on the front of the case file.
- (4) Ensure the penalty case file includes the required documents. See IRM 20.1.13.3.2.3.2, Penalty Case File Documents for All Listed and Non-Listed Reportable Transactions.
- (5) Send the case file for manager review and approval.
- (6) Close case on system.
- (7) Send the case to files following business unit closing procedures. The closed case must be associated with the DLN of the quick assessment with the TC 240 and PRN 648.

20.1.13.3.3
(07-13-2022)

Statute of Limitations-General Information

- (1) The general period of limitations with respect to IRC 6707A is three years from the date of the filing of the return to which the disclosure should have been attached.
 - Under the IRC 6011 regulations, disclosure of a reportable transaction on Form 8886, Reportable Transaction Disclosure Statement, is not always made with the taxpayer's return.
 - If a disclosure is not required with a return, then no limitations period applies to assessment of the IRC 6707A penalty. See IRM 20.1.13.3.3.1, Statute of Limitations When Disclosure Is Required With a Return and IRM 20.1.13.3.3.2, Statute of Limitations When Disclosure Is Required Without a Return, for further information.
- (2) Form 872, Consent to Extend the Time to Assess Tax secured for the underlying tax does not extend the period of limitations for assessment of the IRC 6707A penalty unless the form includes specific language addressing the penalty. IRM 25.6.22.6.17.10, Assessable Penalties.
- (3) Examiners should also consult IRM 25.6.22.2.1, Assessment Statute Extension, which requires a managerial approval for the examiner to solicit a consent and IRM 25.6.22.3, Notification of Taxpayer's Rights, requiring the examiner to advise the taxpayer of their right not to extend the statute.

Note: IRM 25.6.22.2.1, Assessment Statute Extension, provides a consent should be solicited within 180 days of the statute expiring.

- (4) Proceed to assessment as described in IRM 20.1.13.3.2.3.4.1 and offer the taxpayer a post-assessment appeal consideration if the taxpayer refuses to extend the statute. See IRM 20.1.13.3.5.2, Sending the Case to Appeals-Post Assessment Consideration, for additional information.

Note: If the taxpayer refuses to extend the period of limitations on assessment for a case involving a listed transaction, and the case is not sufficiently developed to assess the penalty, the examiner should consult with Counsel to determine whether the period in which to assess the tax (and the penalty) is extended under IRC 6501(c)(10).

- (5) The limitation period for assessing the penalty against an S corporation or partnership depends on when the entity was required to disclose its participation and is not controlled by the associated shareholders' or partners' statute.
- (6) The statutory notice of deficiency suspends the time to assess a deficiency (during the 90-day period to file a petition with the Tax Court, while the case is before the Tax Court, and an additional 60 days after the Court's decision is final) but does not suspend the time to assess the IRC 6707A penalty, so the examiner needs to ensure the penalty is assessed timely.

20.1.13.3.3.1
(07-13-2022)

Statute of Limitations When Disclosure Is Required With Return

- (1) General period of limitations: When the Form 8886 is required to be filed with a return, the assessment of the IRC 6707A penalty for a failure to timely and or properly disclose a reportable transaction generally must be made within three years of the date of filing the underlying return pursuant to IRC 6501, Limitations on Assessment and Collection.

- (2) Disclosure is required with a return when a transaction is listed or otherwise reportable at the time the return is filed. The period of limitations on assessment of the IRC 6707A penalty begins on the date the return to which the disclosure should be attached is deemed filed.
- (3) There is an exception to the general three-year period of limitations for listed transactions. For listed transactions only, IRC 6501(c)(10) provides additional time to make an assessment of the penalty if the disclosure is not made with the return. IRC 6501(c)(10) provides the period to assess tax with respect to a listed transaction the taxpayer failed to disclose in accordance with IRC 6011 shall not expire before one year after the earlier of the following:
 - The date the taxpayer provides the information required under IRC 6011, or
 - The date a material advisor meets the requirements of IRC 6112.
- (4) After first following instructions in IRM 20.1.13.3.3, Statute of Limitations - General Information, see Rev. Proc. 2005-26, 2005-1 C.B. 965, for further guidance on IRC 6501(c)(10) and consult Counsel to determine the applicability of this provision.

20.1.13.3.3.2
(07-13-2022)

**Statute of Limitations
When Disclosure Is
Required Without a
Return**

- (1) Applicable to transactions of interest entered into on or after November 2, 2006 and to listed transactions entered into on or after August 3, 2007, 26 CFR 1.6011-4(e)(2)(i) requires taxpayers to file a disclosure with OTSA within 90 calendar days of the date a transaction is listed or identified as a transaction of interest (TOI) by the IRS, if the taxpayer participated in the transaction and reported tax benefits from it on a previously filed return for which the period for assessing tax remains open.

Note: Prior to August 2007 taxpayers were required to file disclosure statements for later listed transactions within 60 days, unless otherwise provided in the guidance identifying the transaction as a listed transaction.

- (2) Because the return on which the taxpayer took the tax benefits of the transaction was already filed and at the time of filing there was no requirement to make the disclosure, the three-year period for assessing tax on a return is not the appropriate limit of the period within which to assess the penalty for failing to file a stand-alone statement. In this situation, no limitations period to assess the IRC 6707A penalty should apply.

20.1.13.3.4
(07-13-2022)

**Penalty Computation
Overview - IRC 6707A**

- (1) The amount of the penalty is “75 percent of the decrease in tax shown on the return” as a result of the reportable transaction (or which would have resulted from such transaction if such transaction were respected for federal tax purposes), subject to the maximum and minimum limits.
 - a. The maximum penalty in the case of a listed transaction is \$100,000 for a natural person and \$200,000 for all other taxpayers. In the case of a non-listed reportable transaction, the maximum penalty is \$10,000 for a natural person and \$50,000 for all other taxpayers.
 - b. The minimum penalty for each reportable transaction (listed or non-listed) is \$5,000 for a natural person and \$10,000 for all other taxpayers.

Note: The Bipartisan Budget Act (BBA) provisions do not affect partnerships for IRC 6707A purposes. Partnerships are treated as non-taxable entities for purposes of IRC 6707A.

- (2) A taxpayer who fails to disclose a reportable transaction with a return (including an amended return or application for tentative refund) and who fails to provide a copy of the form as required to OTSA will only be subject to a single penalty under 6707A for failure to make those disclosures. The penalty is also applicable if the taxpayer complies with only one of these two requirements. See 26 CFR 301.6707A-1(c)(1) and IRM 20.1.13.3.4.2, IRC 6011-Overview of Disclosure Requirements, for a discussion of when the Form 8886, Reportable Transaction Disclosure Statement, is sent to OTSA.
- (3) The following two examples from 26 CFR 301.6707A-1(c) illustrate the application of the IRC 6707A penalty for failure to comply with the requirement to file a reportable transaction disclosure statement:
 - a. Example 1—Taxpayer T is required to attach a Form 8886 to the 2008 return and send a copy of the Form 8886 to OTSA at the time the return is filed. Taxpayer T fails to attach the Form 8886 to the return and fails to send a copy of the Form 8886 to OTSA. Taxpayer T is subject to a single penalty under IRC 6707A for failure to disclose because Taxpayer T failed to comply with the disclosure requirements of IRC 6011 as described in 26 CFR 1.6011-4(d) and 26 CFR 1.6011-4(e). A penalty under IRC 6707A also would apply if Taxpayer T had failed to comply with only one of the two requirements.
 - b. Example 2- Same as Example 1, except Taxpayer T also subsequently files an amended return for 2008 reflecting Taxpayer T's participation in the reportable transaction described in Example 1. Taxpayer T fails to attach a Form 8886 to the amended return as required by Treas. Reg. 1.6011-4(e)(1). Taxpayer T is subject to an additional penalty under IRC 6707A for failing to disclose a reportable transaction on the amended return for 2008.
- (4) Filing an amended return with a disclosure will not cure the failure to file a disclosure with the original return.

Exception: The amended return is filed before the due date of the original return (including extensions).

Example: Taxpayer's extended due date is August 15. On June 1, the taxpayer files a return but fails to include the required disclosure. On September 1 (in other words, after the extended due date of the return), an amended return is filed with the disclosure. The taxpayer is still liable for the penalty. It does not matter if an attempt was made to correct the problem or whether an attempt to do so was before or after the IRS discovered the participation. If, however, Taxpayer filed the amended return before August 15, the amended return would be considered a "superseding return" which is treated as the original return. Because this superseding return was filed with the required disclosure before the due date (as extended), taxpayer is not liable for the IRC 6707A penalty.

- (5) IRC 6707A penalties can apply at both the entity and the individual levels. Each entity must be separately analyzed to determine if it is required to disclose participation in a reportable transaction, and file Form 8886 with its return, and if necessary, with OTSA. See IRM 20.1.13.3.4.2, IRC 6011

Overview of Disclosure Requirements, for a discussion of when the Form 8886 is sent to OTSA.

- (6) The IRC 6707A penalty will not be imposed in instances when the disclosure statement is due with a return, until the taxpayer files a return. In other words, where a disclosure is due with the return, an IRC 6707A penalty will not be imposed where a taxpayer has not yet filed a return, even if the due date for the return has already passed or where the taxpayer files a late return that includes the required disclosure statement (and the required copy to OTSA, if required). In instances where the disclosure statement is not due with a return, such as when a transaction is listed after the taxpayer files a return reflecting participation and is required to provide a disclosure statement to OTSA within 90 days of publication of the listing notice, the penalty is applicable after expiration of the 90-day period.

20.1.13.3.4.1
(07-13-2022)
Identifying Reportable Transactions

- (1) 26 CFR 1.6011-4(b) currently lists five types of reportable transactions:
 - a. Listed transactions
 - b. Confidential transactions
 - c. Transactions with contractual protection
 - d. Loss transactions
 - e. Transactions of interest
- (2) Examiners are to evaluate a taxpayer's participation in a reportable transaction and the terms of the listing notice in determining the applicability of IRC 6707A penalty. See 26 CFR 1.6011-4(c)(3)(i)(A) - (3)(i)(G).
- (3) The definition of reportable transaction varies greatly depending on which version of the regulations applies to the transaction. It is imperative to look to the actual language of the regulations.
- (4) Examiners reviewing a transaction should consult the regulations and Counsel to determine if a disclosure requirement may apply to the transaction.
- (5) Generally, a transaction will not be considered a reportable transaction if the Commissioner makes a determination, by published guidance, the transaction is not subject to the reporting requirements.

20.1.13.3.4.2
(07-13-2022)
IRC 6011 Overview of Disclosure Requirements

- (1) The application of IRC 6011 reportable transaction disclosure regulations requires the taxpayer meet the definition of participation in a reportable transaction as those terms are defined in the relevant versions of the regulations, as well as other requirements of the applicable regulations described below.
- (2) Whether a taxpayer was required to disclose under the IRC 6011 regulations depends on what version of those regulations was in effect when the taxpayer entered into the transaction.
- (3) The version of the regulations applicable to a transaction at the time the transaction was entered into by the taxpayer will remain applicable to the taxpayer, even if the regulations are subsequently modified. When the IRC 6011 regulations do not impose a disclosure requirement, the IRC 6707A penalty cannot apply. Therefore, as explained more fully below, even if a taxpayer files a tax return after October 22, 2004, reflecting participation in a listed or non-listed

reportable transaction and fails to file a Form 8886, the taxpayer may not be subject to the IRC 6707A penalty; further analysis is required before imposing the IRC 6707A penalty.

Note: While the language below states the general rules for a taxpayer's disclosure of participation in a reportable transaction, published guidance identifying a transaction as a listed transaction or transaction of interest may provide alternative disclosure rules.

- a. Transactions entered into **on or after** January 1, 2003: All taxpayers who are required to file a tax return are subject to the disclosure rules with respect to all reportable transactions, including listed transactions. See T.D. 9017, 2002-2 C.B. 815, T.D. 9046, 2003-1 C.B. 614, T.D. 9108, 2004-1 C.B. 429, T.D. 9295, 2006-2 C.B. 1030, and T.D. 9350, 2007-38 IRB 607 for more details.

Caution: Review guidance identifying the transaction to confirm the correct disclosure rule.

- (4) Form 8886, Reportable Transaction Disclosure Statement, is used by taxpayers as the disclosure statement required under IRC 6011 and the regulations.
- (5) Under 26 CFR 1.6011-4(e), the Form 8886 must be attached to the taxpayer's tax return (or amended return) for each taxable year for which a taxpayer participates in a reportable transaction.
- (6) A taxpayer filing a Form 8886 with a return for the first time is required to file a duplicate copy of Form 8886 with OTSA at the same time the disclosure statement is first filed by the taxpayer. The requirement to file a duplicate disclosure statement with OTSA applies only with respect to the initial year the Form 8886 is filed.
- (7) When a taxpayer fails to file a required Form 8886 in the year the participation in a reportable transaction begins, the requirement to file a duplicate copy with OTSA arises with the earliest filing of a tax return that incorporates the requisite Form 8886. This requirement exists regardless of the duration of the taxpayer's participation in a reportable transaction prior to filing of the Form 8886 with a tax return.
- (8) There are special rules relating to the filing of a disclosure statement for transactions which become listed transactions or transactions of interest after the taxpayer has filed a return reflecting the taxpayer's participation in the transaction. See IRM 20.1.13.3.4, Penalty Computation Overview - IRC 6707A.
- (9) When a taxpayer participates in more than one reportable transaction, a separate Form 8886 must be filed with respect to each reportable transaction unless the reportable transactions are substantially similar, in which case one Form 8886 may be filed.

20.1.13.3.5
(07-13-2022)
**Appeals Request - IRC
6707A Overview**

- (1) Taxpayers have pre-assessment Appeals consideration of any proposed IRC 6707A penalty. See IRM 20.1.13.3.5.1, Sending the Case to Appeals—Pre-Assessment Consideration, for more information.

- (2) A taxpayer is offered post-assessment appeal consideration where the IRC 6707A penalty must be assessed before the Government can offer the taxpayer an opportunity to seek pre-assessment Appeals consideration. See IRM 20.1.13.3.5.2, Sending the Case to Appeals—Post-Assessment Consideration.
- (3) The taxpayer must submit a timely written request (regardless of the total amount of the proposed assessment) in response to the 30-day letter or the post-assessment notice, and follow the standard protest procedures for Appeals consideration. See IRM 8.11.7.6, IRC 6707A Penalties Overview.
- (4) See IRM 4.10.8.12.9.3, Request for Appeals Conference, for managerial and examiner actions when an Appeal request is received.

20.1.13.3.5.1
(07-13-2022)
Sending the Case to Appeals—Pre-Assessment Consideration

- (1) An IRC 6707A penalty case should not be submitted to Appeals unless there will be 365 days remaining on the statute of limitations when the case is received in Appeals.
- (2) Compliance should send the 6707A case to Appeals upon receipt of the valid protest and not “hold” the case pending receipt or completion of any examination case.

Reminder: When the case is transferred to Appeals, jurisdiction and case responsibility, including protecting the statute of limitations and submitting assessment documents, where appropriate, will be transferred to Appeals. See IRM 8.21.1, General Statute Responsibility.

- (3) Ensure the penalty case file contains all the documentation described in IRM 20.1.13.3.2.3.2, Penalty Case File—Documents Required for All Listed and Non-Listed Reportable Transactions and IRM 20.1.13.3.2.3.2.1, Penalty Case File—Additional Documents Required for Non-Listed Reportable Transactions Only, as well as a rebuttal to the taxpayer’s protest, if any.

20.1.13.3.5.2
(07-13-2022)
Sending the Case to Appeals—Post-Assessment Consideration

- (1) When there is less than 365 days remaining on the statute and the examiner cannot secure a consent to extend the period of limitation, the examiner should request a quick assessment of the IRC 6707A penalty under the procedures described in IRM 20.1.13.3.2.3.4.1, Quick Assessment Closing Procedures for IRC 6707A Penalty Cases.
- (2) The examiner should notify the taxpayer of the assessment and the ability to seek post-assessment Appeals consideration at the same time the assessment documents are submitted. The examiner should include a copy of the report and a computation of the penalty, and should allow 30 days for response. The examiner should ensure a copy of this letter is included in the case file.
- (3) If the taxpayer submits a timely and valid Appeal request in response to the notification of assessment, See IRM 4.7.5.7.3, Transfers and Closings, the examiner should:
 - 1. Transfer the case to Appeals as the IRC 6707A penalty is not controlled on the Audit Information Management System (AIMS).
 - 2. Prepare a Form 3198 listing Status Code 90 and Disposal Code 07 (Appeals).
 - 3. Retain a copy of the Form 3198.

4. Send the complete penalty file to the appropriate Appeals Processing Section (APS) location. For additional information about where to send the file, refer to the <https://organization.ds.irsnet.gov/sites/APPEALS-PQCS/SitePages/WorkRepository.aspx>
5. Update the ERCS record to Suspense Type 203, "Civil Penalty Case In-Transit to Appeals." The ERCS record will remain in Status Code 12.

Reminder: The status will not be confirmed as transferred to Appeals until confirmation of receipt comes back from Appeals.

- (4) Ensure the penalty case file contains all the documentation described in IRM 20.1.13.3.2.3.2, Penalty Case File-Documents Required for All Listed and Non-Listed Reportable Transactions, and IRM 20.1.13.3.2.3.2.1, Penalty Case File-Additional Documents Required for Non-Listed Reportable Transactions Only. The case file should also include a rebuttal to the taxpayer's protest. The examiner must provide the taxpayer and representative, if any, with a copy of any rebuttal.
- (5) If, after 10 days, confirmation of receipt is not received, contact the receiving Appeals APS unit for confirmation the case was received.
- (6) Once confirmed as received in Appeals update ERCS to Status Code 90, Disposal Code 07, and enter the penalty amount.
- (7) If the IRC 6707A penalty case is on the Report Generation Software (RGS) generic workcenter, the examiner will move it to the server and the manager will send it to archives.
- (8) At the same time the case is being sent forward to Appeals, the examiner will provide the taxpayer's name and TIN to the appropriate *Abusive Transactions - Contacts*, who will work directly with Collection to ensure collection efforts are suspended appropriately during Appeals consideration.
- (9) If the penalty case file is missing relevant information, the Appeals officer will prepare Form 10467, Appeals Division Feedback Report and Transmittal Memorandum, and return the penalty case file as a premature referral to the examination group. Appeals will update Appeals case management systems to return responsibility for the case file to the field.
- (10) If Appeals returns a premature referral, the case will be reopened from closed Status Code 90 into active examination group Status Code 12 and the manager will reassign to the examiner.
- (11) The examiner will complete the development of the case and then re-close to Appeals.

20.1.13.3.6
(07-13-2022)

Penalty Rescission - IRC 6707A Penalties

- (1) Non-listed reportable transactions are eligible for total or partial penalty rescission.
- (2) Listed transactions are not eligible for rescission consideration.
- (3) A taxpayer must have exhausted the administrative remedies available within Appeals regarding the proposed or assessed penalty.

Exception: The taxpayer has agreed, in writing, to the assessment of the penalty and has agreed not to file or pursue a claim for refund or credit of the penalty, administratively or through litigation, other than by requesting rescission.

- (4) A taxpayer does not have to pay the assessed penalties to receive rescission consideration; however, the IRS will not suspend collection efforts solely because the taxpayer has made a request for rescission.
- (5) The business operating division (BOD) Commissioner over the penalty examination is delegated the authority to rescind the penalty in part or in full. See IRM 1.2.2.2.20, Delegation Order 1-23 (formerly DO-193, Rev. 6), Authorization to Perform Functions of the Commissioner.
- (6) The taxpayer must:
 - Request rescission within 30 days of notice and demand or full payment of the penalty, whichever is earlier.
 - Send the rescission request to OTSA for review.
 - Provide additional information requested within 30 days of the request date.
- (7) OTSA, upon receiving a rescission request, will:
 - Review the request to ensure it meets the requirements of Rev. Proc. 2007-21 and 26 CFR 301.6707A-1(d).
 - Return any request not meeting the requirements with a written request to the taxpayer seeking additional information and documents relating to the transaction.
 - Grant an extension of time for additional information to persons showing good cause.
 - Ask the examiner, appeals officer, or other IRS employees involved with the examination to review and comment on the rescission request.
 - Prepare any letters to be issued to the taxpayer for signature.
 - Obtain concurrence for accepted or denied taxpayer rescission requests from the Commissioner or their delegate.

Note: If an agreement is not obtained, the Commissioner or their delegate will resolve any issues prior to securing final penalty approval.

 - Complete a short summary of the penalty amount, basis for assertion, basis for rescission, and recommendation.
 - Monitor the taxpayer account to ensure abatements are posted for granted rescission requests.
 - Notify the IRS BOD having the taxpayer's return under consideration (e.g., Exam, Appeals, or Counsel) of the rescission request determination.
- (8) The Commissioner or their delegate, when applicable, will:
 - Provide concurrence for accepted or denied rescission decisions.
 - Resolve any issues on unagreed requests.
 - Provide final penalty approval.
- (9) The Commissioner or their delegate will:

- Sign the letter prepared by OTSA and mail to the taxpayer
- Retain a copy of the signed letter and summary sheet.
- Send the rescission request package, including the signed letter copy, to OTSA.
- Contact OTSA for additional information needed.
- Notify OTSA of disagreement with the recommendation.
- Maintain a record of the facts and circumstances relating to the violation and determination.
- Retain the amount of penalty rescinded, if any, and the reasons to or not to rescind. See IRM 1.15.2, Records and Information Management, Types of Records and Their Life Cycles.

- (10) The rescission determination is not subject to review by Appeals or by any court.

20.1.13.3.6.1 (07-13-2022)

Factors Weighing in Favor of Rescission

- (1) The following non-exclusive list of factors, from Rev. Proc. 2007-21, Examination of Returns and Claims for Refund, Credit, or Abatement; Determination of Correct Tax Liability, weighing in favor of granting rescission and are relevant to the determination as to whether rescission would promote compliance with the requirements of the Code and effective tax administration.

Note: No one factor is determinative of whether to grant rescission. The Commissioner, or their delegate, weighs all relevant factors, regardless of whether the factor is included in the list.

- (2) A taxpayer filed a complete and proper but untimely, Form 8886 or any successor form, as applicable, as soon as becoming aware of the failure to disclose a reportable transaction. This factor will weigh strongly in favor of rescission, provided the following:
- a. The taxpayer files the Form 8886 prior to the date the IRS first contacts the taxpayer (including contacts by the IRS with any partnership in which the taxpayer is a partner, any S corporation in which the taxpayer is a shareholder, or any trust in which the taxpayer is a beneficiary) concerning a tax examination for the tax period in which the taxpayer participated in the reportable transaction, and
 - b. Other circumstances suggest the taxpayer did not delay filing an untimely but properly completed Form 8886 until after the IRS had taken steps to identify the taxpayer's participation in the reportable transaction in question.
- (3) The taxpayer's failure to properly disclose was due to the existence of an unintentional mistake of fact despite the taxpayer's reasonable attempts to obtain the correct facts with respect to the transaction.
- (4) The taxpayer has an established history of properly disclosing other reportable transactions and complying with other tax laws.
- (5) The taxpayer demonstrates the failure to include on any return or statement any information required to be disclosed under IRC 6011 arose from events beyond taxpayer's control.
- (6) The taxpayer cooperates with the IRS by providing requested information timely.

- (7) The penalty assessment would weigh against equity and good conscience, including whether the taxpayer demonstrates there was reasonable cause for, and the taxpayer acted in good faith with respect to, the failure to timely file or to include on any return any information required to be disclosed under IRC 6011. An important factor in determining reasonable cause and good faith is the extent of the taxpayer's efforts to ensure persons who prepared the taxpayer's return were informed of the taxpayer's participation in the reportable transactions.

Note: This factor will be disregarded if the persons who prepared the taxpayer's return were material advisors with respect to the reportable transaction.

- (8) The list of factors weighing in favor of rescission set forth in Rev. Proc. 2007-21 is very similar to, but not identical to, the list of factors weighing in favor of rescission as set forth in 26 CFR 301.6707A-1(e)(3). To the extent these lists are inconsistent, the list in the Treasury Regulations controls.

20.1.13.3.6.2
(07-13-2022)

Factors Absent and Not Considered in Weighing Rescission

- (1) In determining whether to grant rescission, the Commissioner or their delegate, will not consider doubt as to liability for the penalty, except to the extent doubt as to liability is a factor in determining reasonable cause and good faith. Additionally, in determining whether to grant rescission, the Commissioner or their delegate will not consider doubt as to collectability of the penalties.
- (2) The absence of facts establishing the factors in favor of rescission, described above, weighs against granting rescission; however, the absence of any one of these factors will not necessarily be determinative with respect to rescission.

20.1.13.3.6.3
(07-13-2022)

Continuation of the Examination and IRC 6662A Considerations

- (1) In general, the examination should not be delayed pending consideration of a rescission request. There are situations, however, where the determination of whether the IRC 6707A penalty applies can affect the determination of whether the IRC 6662A penalty applies.
- (2) IRC 6662A, Imposition of Accuracy-Related Penalty on Understatements With Respect to Reportable Transactions, was added by section 812 of AJCA and imposes a 20-percent penalty on an understatement resulting from a properly disclosed reportable transaction (or for which there is no disclosure requirement for the taxpayer but there is an understatement to which IRC 6662A would apply) and a 30-percent penalty on an understatement resulting from a reportable transaction not properly disclosed. The IRC 6662A penalty will not be imposed if the taxpayer adequately disclosed the reportable transaction, and meets other criteria to establish reasonable cause and good faith.
- (3) If Appeals rejects the proposed assessment of an IRC 6707A penalty based on its determination the transaction in question was not a reportable transaction, then the IRC 6662A penalty will not apply. If Appeals rejects the proposed IRC 6707A assessment based on its determination the transaction was reportable but was properly disclosed, the IRC 6662A penalty will be reduced from 30 to 20-percent. For more information regarding the application of the IRC 6662A penalty. See IRM 20.1.5.17, IRC 6662A, Accuracy-Related Penalty on Understatements With Respect to Reportable Transactions.
- (4) For purposes of IRC 6662A, a taxpayer is deemed to have properly disclosed the reportable transaction if the Commissioner or their delegate has rescinded

the IRC 6707A penalty with respect to the transaction. If the Commissioner or their delegate rescinds the IRC 6707A penalty, the IRC 6662A penalty might not apply depending on whether the taxpayer meets the other criteria for relief under the reasonable cause and good faith provisions of IRC 6664. For this reason, the examination case should not be closed until the rescission determination is made when:

- a. The examiner proposes an IRC 6662A penalty with respect to the reportable transaction,
 - b. The taxpayer meets the substantial authority standard in IRC 6664(d)(3)(B), and
 - c. The taxpayer meets the reasonable belief standard in IRC 6664(d)(3)(C).
- (5) If the IRC 6707A penalty is rescinded, the taxpayer is deemed to have properly disclosed the transaction and if the taxpayer met the criteria to demonstrate reasonable cause and good faith, the IRC 6662A penalty does not apply.
- (6) In contrast, if the results of the examination will not be affected by the rescission determination, the case should proceed and can be closed from the group without waiting for the conclusion of the rescission determination. For instance, if there is no proposed IRC 6662A penalty or the taxpayer would be liable for the penalty even if it had adequately disclosed because it failed to meet the other criteria to establish reasonable cause and good faith.

20.1.13.3.7
(07-13-2022)

Abatement Procedures - IRC 6707A Penalties

- (1) A penalty can **only** be abated, if the penalty does not legally apply and was assessed in error.
- (2) If the examiner determines an assessment is to be abated in full or in part, the examiner must:
 - a. Obtain managerial approval and ensure the record of approval is associated with the case files. Examiners may use the standard penalty approval form available to record managerial approval of the abatement.
 - b. Use Form 5345-D, Examination Request—ERCS, to establish the penalty on ERCS.
 - c. Complete a Form 8278. In column E (amount abated), enter total dollar amount of penalties to be abated in parenthesis. Ensure the amount abated does not exceed the amount originally assessed. In column F, enter the penalty reason code. See IRM Exhibit 20.1.1-2, Penalty Reason Code Chart, for a list of appropriate penalty reason codes and explanations.

Caution: Always use the most current version of the Form 8278.

- d. Ensure all documents related to the abatement are associated with the case files.
- e. Prepare and send the case for closure from the group following local procedures.
- f. Check the Civil Penalties (Form 8278) box in the “Special Features” section of Form 3198.
- g. Check the “No letter required to be sent by CCP” box on the second page of Form 3198, in the letter instructions for CCP area.

20.1.13.4
(07-13-2022)
**Failure to Maintain Lists
of Advisees with
Respect to Reportable
Transactions - IRC 6708**

- (1) Under IRC 6112(a), Material Advisors of Reportable Transactions Must Keep Lists of Advisees, Etc., each material advisor with respect to a reportable transaction shall (whether or not required to file a return under IRC 6111 with respect to such transaction) maintain a list for each reportable transaction including the following:
 - a. Identities of each person with respect to whom the advisor acted as a material advisor with respect to the reportable transaction, non-listed transaction, and
 - b. Other information as the Secretary may by regulation require.
- (2) If more than one material advisor is required to maintain a list, the advisors may designate a single material advisor to maintain the list or a portion of the list by written agreement. However, the other material advisors are not relieved of their obligation to maintain and furnish lists if the designated advisor fails to do so.
- (3) For OPR referral information, see IRM 20.1.6.12 , Office of Professional Responsibility (OPR)

20.1.13.4.1
(07-13-2022)
Effective Date - IRC 6708

- (1) IRC 6112, as amended by the AJCA, requires a material advisor to maintain a list identifying each person with respect to whom the advisor acted as a material advisor with respect to a transaction (and such other information as required by regulations) and applies to transactions with respect to which material aid, assistance, or advice is provided after October 23, 2004. The availability and retention of information rules of this section also apply to any person who was required to maintain a list under section 6112(a) as in effect before the enactment of the AJCA.
- (2) IRC 6708, as amended by the AJCA, imposes a penalty for a material advisor's failure to maintain a list under IRC 6112 and applies to requests for such lists made after October 23, 2004. This section applies to all requests for lists required to be maintained under IRC 6112, including the lists persons were required to maintain under IRC 6112(a) as in effect before October 23, 2004.

20.1.13.4.2
(07-13-2022)
**Compliance Functional
Guidance - IRC 6708**

- (1) Under no circumstances should an examiner start a material advisor examination without documented approval from the LDC for SB/SE and TE/GE and TTSPC for LB&I.
- (2) SB/SE functional procedures and guidance can be found at <http://portal.ds.irsnet.gov/sites/vl015/lists/sbseexaminationprocedures3/landingview.aspx>.
- (3) SB/SE LDC:
 - a. Processes referrals concerning material advisors.
 - b. Evaluates referrals based on established criteria.
 - c. Authorizes IRC 6708 investigations when warranted.
 - d. Forwards case files to the appropriate area's PSP for assignment to the field.
- (4) LB&I functional guidance and procedures for IRC 6708, material advisor investigations include the following:

- a. OTSA has responsibility for making referrals of suspected promoters of abusive tax avoidance transactions and material advisors to the LB&I TTSPC.
- b. TTSPC, only, can authorize a promoter and or material advisor examination, as appropriate.
- c. Examiners report suspected cases of material advisor and or promoter activity and forward their findings, along with supporting documentation, to the OTSA designated senior analyst.
- d. OTSA will review and develop these referrals; and those meeting the criteria set forth by the TTSPC will be recommended for audit consideration.

20.1.13.4.2.1
(07-13-2022)

Penalty Case Control

- (1) Potential IRC 6708 penalty cases are established as penalty investigations on ERCS. See IRM 4.7.5.7.1, Requesting ERCS Controls and Incoming Inventory.

Note: The penalty case is not tracked on Audit Information Management System (AIMS)

- (2) To establish controls on ERCS:

- a. Complete Form 5345-D, Examination Request-ERCS Users.
- b. Check the box "Control Penalty Investigation."
- c. Source code = 99
- d. Penalty master file tax (MFT) = P8
- e. Activity code = 595
- f. Project and tracking codes = as appropriate for case

20.1.13.4.3
(07-13-2022)

Statute of Limitations - IRC 6708

- (1) There is no statute of limitations on assessment. See IRM 4.32.2.12.8.1, Assessment Statute of Limitations.

20.1.13.4.4
(07-13-2022)

Penalty Computation - IRC 6708

- (1) A material advisor, who fails to make the list available upon written request by the Secretary within 20 business days after the request, will be subject to a penalty of \$10,000 for each day of such failure after the 20th business day.

- (2) Reasonable cause is made on a case-by-case and day-by-day basis.

Note: The penalty does not apply for any day where the failure to comply is due to reasonable cause.

20.1.13.4.5
(07-13-2022)

Appeal Rights - IRC 6708

- (1) Post-assessment appeal rights exist for IRC 6708 penalties.
- (2) Requests for an administrative hearing with Appeals, after assessment, will generally be granted in cases where there has not been a prior administrative hearing with Appeals. See IRM 8.11.7.5.1, Promoter Rights for IRC 6707 and IRC 6708 Assessments and 26 CFR 601.106, Appeals functions.
- (3) Material advisor penalties under IRC 6708 have been designated as ACI.
- (4) Material advisor penalties may be subject to Rev. Proc. 2015-40, Procedures for Requesting Competent Authority Assistance under Tax Treaties and Rev.

Proc. 2017-25, SB/SE—Appeals Fast Track Mediation Procedure. See IRC 6320, Notice and Opportunity for Hearing Upon Filing of Notice of Lien, and IRC 6330, Notice and Opportunity for Hearing Before Levy.

- (5) See IRM 4.32.2.12.9.2, Appeals for IRC 6707 and IRC 6708 Assessments, for additional information on Appeal procedures.

20.1.13.5
(07-13-2022)

**Actions to Enjoin
Specific Conduct
Related to Tax Shelters
and Reportable
Transactions - IRC 7408**

- (1) A civil action may be brought under IRC 7408, Actions to Enjoin Specified Conduct Related to Tax Shelters and Reportable Transactions, to enjoin specified conduct.
- (2) The action may be brought in the U.S. District Court for the district in which the individual:
- Resides,
 - Has their principal place of business, or
 - Has engaged in specified conduct.
- (3) The term “specified conduct” means any of the following actions, or failure to take action:
- a. Subject to penalty under IRC 6707 or IRC 6708, or
 - b. In violation of Treasury Department Circular No. 230, Regulations Governing Practice Before the Internal Revenue Service.
- (4) Any examiner conducting an IRC 6708 investigation should consider whether an injunction should be sought.
- (5) The court may grant injunctive relief against any person if the court finds:
- a. The person has engaged in any specified conduct, and
 - b. Injunctive relief is appropriate to prevent recurrence of such conduct. See IRM 4.32.2.9.1, Injunctions, and IRM 4.32.3.7.1, Steps in an Injunction Case for additional information.

Material Advisor and Reportable Transactions

Penalties 20.1.13

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Exhibit 20.1.13-1 (07-13-2022)

Acronyms

Acronym	Definition
AJCA	American Jobs Creation Act
ACI	Appeals Coordinated Issue
ASED	Assessment Statute Expiration Date
AT	Abusive Transactions
BSO	Business Support Office
BU	Business Unit
CCP	Centralized Case Processing
DLN	Document Locator Number
ERCS	Examination Return Control System
IRC	Internal Revenue Code
IRM	Internal Revenue Manual
IRS	Internal Revenue Service
LB&I	Large Business & International
LDC	Lead Development Center
MFT	Master File Tax
OD	Operating Division
OPR	Office of Professional Responsibility
OS	Operations Support
OSP	Office of Servicewide Penalties
OTSA	Office of Tax Shelter Analysis
PRN	Penalty Reference Number
PSP	Planning & Special Programs
RCCMS	Reporting Compliance Case Management System
RGS	Report Generation Software
SB/SE	Small Business Self Employed
TE/GE	Tax Exempt Government Entities
TTSPC	Technical Tax Shelter Promoter Committee

