



# MANUAL TRANSMITTAL

Department of the Treasury  
Internal Revenue Service

25.3.1

SEPTEMBER 8, 2023

## EFFECTIVE DATE

(09-08-2023)

## PURPOSE

- (1) This transmits a revised Manual Transmittal to IRM 25.3.1, Litigation and Judgments, General Guidelines.

## MATERIAL CHANGES

- (1) Editorial changes to update references and web addresses.

## EFFECT ON OTHER DOCUMENTS

This material supersedes IRM 25.3.1, dated August 08, 2022.

## AUDIENCE

SBSE Collection Employees and all Operating Divisions

Rocco A. Steco  
Acting Director,  
Collection Policy  
Small Business / Self-Employed



25.3.1

General Guidelines

## Table of Contents

25.3.1.1 Program Scope and Objectives

25.3.1.1.1 Background

25.3.1.1.2 Authority

25.3.1.1.3 Roles and Responsibilities

25.3.1.1.4 Program Management and Review

25.3.1.1.5 Program Controls

25.3.1.1.6 Terms and Acronyms

25.3.1.1.7 Related Resources

25.3.1.2 Suits by the United States

25.3.1.3 Suits Against the United States

25.3.1.4 Authorization for Filing Suits, Counterclaims or Third Party Complaints

25.3.1.5 Collection Action During Litigation

25.3.1.6 Initiation of Litigation - Service of Process

25.3.1.7 Preserving Electronically Stored Information (ESI) In Litigation Cases

25.3.1.7.1 Background

25.3.1.7.2 What is ESI?

25.3.1.7.3 What ESI is subject to discovery?

25.3.1.7.4 How do I determine what ESI should be preserved?

25.3.1.7.5 When does the duty to preserve ESI begin?

25.3.1.7.6 What is a litigation hold?

25.3.1.7.7 Who is the Service point of contact?

25.3.1.7.8 What are the responsibilities of the Service point of contact?

25.3.1.7.9 What am I required to do if I receive a litigation hold notification?

25.3.1.7.10 What are the procedures for preserving ESI when there is a litigation hold?

25.3.1.7.11 What types of ESI are created in Collection cases?

25.3.1.7.12 What is required of Collection employees to “search” for ESI?

25.3.1.7.13 What is required to “preserve” and “isolate” ESI?

25.3.1.7.14 Whose responsibility is it to isolate ESI?

25.3.1.7.15 Is ESI isolated in every case?

25.3.1.7.16 How do these requirements apply to e-mail messages in particular?

25.3.1.7.17 What should I do if I receive a litigation hold directly from the Tax Division or local U.S. Attorney’s Office?

25.3.1.7.18 When does the obligation to preserve ESI end?

25.3.1.7.19 What are the potential consequences of not preserving ESI?

---

25.3.1.7.20 What if relevant ESI was inadvertently destroyed or cannot be located either before or after the litigation hold notification was received?

25.3.1.7.21 References

25.3.1.1  
(08-08-2022)  
**Program Scope and Objectives**

- (1) There are situations which require the aid of the courts to collect or recover taxes, or provide additional protection to the Government. Taxpayers may also use the courts seeking to obtain relief from Government actions. This Internal Revenue Manual chapter 25.3, Litigation and Judgments, contains procedures for initiating civil judicial actions or defending actions brought against the United States or Internal Revenue Service (IRS) employees.
- (2) **Purpose:** This IRM discusses the types of litigation that may be encountered, provides a general background for litigation, and contains a discussion of requirements for the preservation of electronically stored information (ESI).
- (3) **Audience:** This IRM is used by Collection employees as a contact reference point for litigation issues and the responsibility of each stakeholder.
- (4) **Policy Owner:** Director, Collection Policy. Collection Policy is an organization under Small Business/Self-Employed Division (SBSE), Collection.
- (5) **Program Owner:** SBSE, Collection Policy, Enforcement is the program owner of this IRM.
- (6) **Primary Stakeholders:** The primary stakeholders are the Collection Advisory staff, Chief Counsel, and Department of Justice (DOJ) attorneys.
- (7) **Program Goals:** The goal of the program aligns with IRS Strategic Goal II: Enforce the tax law fairly and efficiently to increase voluntary compliance and narrow the tax gap, and Objective 2: Enhance enforcement efforts to collect unpaid taxes in a fair and impartial manner.

25.3.1.1.1  
(08-08-2022)  
**Background**

- (1) Litigation actions by the government are identified on taxpayer accounts using the Transaction Code (TC) 520 and associated closing codes specified in the following references:
  - Document 6209 searching under *520 Closing Code Chart*.
  - IRM 25.3.8, TC 520 - W Freeze Servicewide Guide.
  - IRM 25.3.6, Open Litigation Control, Monitoring and Closing Actions.
  - IRM 25.3.7, Reconciling Non-Insolvency LAMS Reports. This IRM also contains additional information on the individual closing codes.
- (2) Whether an action is initiated by the IRS, a taxpayer, or a third-party preservation of electronically stored information (ESI) is required. This topic is covered in IRM 25.3.1.7, Preserving Electronically Stored Information In Litigation Cases. See also the following references:
  - IRM 25.3.1.7.1 Background
  - IRM 25.3.1.7.21 References
- (3) There are a number of judicial actions the IRS initiates against taxpayers or third parties and a number of actions brought by taxpayers or third parties against the IRS.

***References for the Principal Types of Actions the IRS Initiates***

| IRM Number | IRM Title  |
|------------|--|
| IRM 25.3.2 | Litigation and Judgments, Suits by the United States                   |
| IRM 5.17.4 | Legal Reference Guide for Revenue Officers, Suits by the United States |

| IRM Number  | IRM Title   |
|-------------|---|
| IRM 5.17.14 | Legal Reference Guide for Revenue Officers, Fraudulent Transfers and Transferee and Other Third-Party Liability |

***References for the Principal Types of Actions Initiated by Taxpayers and Third Parties***

| IRM Number | IRM Title   |
|------------|---|
| IRM 25.3.3 | Litigation and Judgments, Suits Against the United States and Claims for Damages under IRC 7433 |
| IRM 25.3.4 | Litigation and Judgments, Suits against IRS Employees   |
| IRM 5.17.5 | Legal Reference Guide for Revenue Officers, Suits Against the United States                     |

- (4) Advisory is responsible for internal control of and actions pertaining to most litigation by and against the United States.

***Actions Where Advisory Does Not Generally Maintain a Case Control***

| Type of Litigation | References   |
|--------------------|--|
| Bankruptcy         | Bankruptcy actions are controlled by Specialty Insolvency, which uses IRM 5.9, Bankruptcy and Other Insolvencies, IRM 5.17.8, General Provisions of Bankruptcy, IRM 5.17.9, Chapter 7 Bankruptcy (Liquidation), IRM 5.17.10, Chapter 11 Bankruptcy (Reorganization), IRM 5.17.11, Chapter 13 Bankruptcy (Individuals with Regular Income) and Chapter 12 Bankruptcy (Family Farmers or Fishermen with Regular Income), and IRM 5.17.13, Insolvencies and Decedents' Estates. |
| Tax Court          | Tax Court litigation is controlled by Appeals or in some cases Area Counsel. This would include IRC 7345, Passport litigation, when filed in Tax Court.  |
| Refund Litigation  | Wage & Investment refund litigation coordinations control these cases. Use IRM 3.17.243.8.2, Refund Litigation Campus Contacts, to find appropriate campuses and contacts.<br><b>Exception: Advisory controls refund litigation involving trust fund recovery penalties.</b>   |

25.3.1.1.2  
(08-08-2022)  
**Authority**

- (1) The United States Code, Title 26, Subtitle F, Chapter 76, Subchapter A, Civil Actions by the United States, Sections 7401 through 7410 control civil actions that may be filed by the United States (US) in US District Courts.

***Civil Actions by the US***

| Code     | Regulation        | Title                           |
|----------|-------------------|---------------------------------|
| IRC 7401 | 26 CFR 301.7401-1 | Authorization                   |
| IRC 7402 | no regulation     | Jurisdiction of district courts |

| Code     | Regulation        | Title   |
|----------|-------------------|---|
| IRC 7403 | 26 CFR 301.7403-1 | Action to enforce lien or to subject property to payment of tax                         |
| IRC 7404 | 26 CFR 301.7404-1 | Authority to bring civil action for estate taxes  |
| IRC 7405 | no regulation     | Action for recovery of erroneous refunds  |
| IRC 7406 | 26 CFR 301.7406-1 | Disposition of judgments and moneys recovered   |
| IRC 7407 | no regulation     | Action to enjoin tax return preparers   |
| IRC 7408 | no regulation     | Actions to enjoin specified conduct related to tax shelters and reportable transactions |
| IRC 7409 | 26 CFR 301.7409-1 | Action to enjoin flagrant political expenditures of section 501(c)(3) organizations     |
| IRC 7410 | no regulation     | Cross references  |

- (2) The United States Code, Title 26, Subtitle F, Chapter 76, Subchapter B, Proceedings by Taxpayers and Third Parties, Sections 7421 through 7437 control civil actions filed in US District Court against the US (i.e., in which the United States will be the defendant).

***Civil Actions Against the US***

| Code     | Regulation   | Title  |
|----------|--|--|
| IRC 7422 | 26 CFR 301.7422-1  | Civil actions for refund   |
| IRC 7423 | 26 CFR 301.7423-1  | Repayments to officers or employees  |
| IRC 7424 | 26 CFR 301.7424-1  | Intervention   |
| IRC 7425 | <ul style="list-style-type: none"> <li>• 26 CFR 301.7425-1</li> <li>• 26 CFR 301.7425-2</li> <li>• 26 CFR 301.7425-3</li> <li>• 26 CFR 301.7425-4</li> </ul> | Discharge of liens   |
| IRC 7426 | <ul style="list-style-type: none"> <li>• 26 CFR 301.7426-1</li> <li>• 26 CFR 301.7426-2</li> </ul>   | Civil actions by persons other than taxpayers  |
| IRC 7428 | no regulation  | Declaratory judgments relating to status and classification of organizations under section 501(c)(3), etc. |
| IRC 7429 | <ul style="list-style-type: none"> <li>• 26 CFR 301.7429-1</li> <li>• 26 CFR 301.7429-2</li> <li>• 26 CFR 301.7429-3</li> </ul>                              | Review of jeopardy levy or assessment procedures   |
| IRC 7430 | 26 CFR 301.7430-0  | Awarding of costs and certain fees   |
| IRC 7431 | no regulation  | Civil damages for unauthorized inspection or disclosure of returns and return information                  |
| IRC 7432 | 26 CFR 301.7432-1  | Civil damages for failure to release lien  |

| Code      | Regulation   | Title   |
|-----------|--|---|
| IRC 7433  | <ul style="list-style-type: none"> <li>26 CFR 301.7433-1</li> <li>26 CFR 301.7433-2</li> </ul> | Civil damages for certain unauthorized collection actions   |
| IRC 7433A | no regulation  | Civil damages for certain unauthorized collection actions by persons performing services under qualified tax collection contracts |
| IRC 7434  | no regulation  | Civil damages for fraudulent filing of information returns  |
| IRC 7435  | no regulation  | Civil damages for unauthorized enticement of information disclosure   |
| IRC 7436  | no regulation  | Proceedings for determination of employment status  |
| IRC 7437  | no regulation  | Cross references  |

25.3.1.1.3  
(08-08-2022)

#### Roles and Responsibilities

- (1) IRM 5.17.1, Legal Reference Guide for Revenue Officers, General Information, provides a list of the parties with an explanation of their role with suits.

25.3.1.1.4  
(08-08-2022)

#### Program Management and Review

- (1) **Program Reports:** There are no specific reports associated with this IRM, however, they are identified as appropriate in the other sections within the IRM 25.3 series. Litigation holds are controlled by Counsel (see IRM 34.7.1.1.4.3, Litigation Hold Procedures, and IRM 34.12.1-39, Litigation Hold Checklist.
- (2) **Program Effectiveness:** Whenever litigation involving collection matters is pending or the institution of affirmative legal action to effect collection is under consideration, revenue officers will, in the main, be investigators of facts. Advisors will advise, review, and coordinate. IRS management will consult and support. Counsel will provide or decline authorizations to move into the judicial arena, and the DOJ will represent the IRS in the judicial arena. Each stakeholder relies on the other stakeholders to communicate effectively in order to achieve the appropriate outcome for any one case.

25.3.1.1.5  
(08-08-2022)

#### Program Controls

- (1) Collection Advisory maintains a copy of any suit documentation until the suit is closed. After case closure - see Document 12990, Records and Information Management Records Control Schedules, under section Internal Revenue Service Records Control Schedule (RCS) 28, Tax Administration Collection, in:
- PART III - Administrative Records - All Collection Functions, item number 38, Litigation Files.
  - PART IV - Delinquent Accounts, Delinquent Returns, And Office Services Records, item 45, Suits to Foreclose Federal Tax Liens, item 53, Civil Suit Recommendation, Form 4477, and in item 54 (a), Special Procedures Function Case Files.
- (2) Preserving electronically stored information is covered in:



- IRM 25.3.1.7, Preserving Electronically Stored Information In Litigation Cases
- IRM 25.3.1.7.21, References
- Chief Counsel Notice *CC-2016-005*, Discovery Obligations to Preserve Evidence, Including Electronically Stored Information
- IRM 34.7.1.1.4, Discovery Obligations to Preserve Evidence, Including Electronically Stored Information

25.3.1.1.6

(08-08-2022)

(1) The table lists commonly used acronyms and their definitions:

**Terms and Acronyms**

| Acronym       | Definition   |
|---------------|--|
| CCDM          | Chief Counsel Directives Manual  |
| CSED          | Collection Statute Expiration Date   |
| Discovery     | The formal process of exchanging information between the parties about the witnesses and evidence for presentation at trial. |
| DOJ           | Department of Justice  |
| eDiscovery    | The process of discovery in civil litigation that is carried out in electronic formats.                                      |
| ESI           | Electronically Stored Information  |
| ICS           | Integrated Collection System   |
| IRS           | Internal Revenue Service   |
| IRC           | Internal Revenue Code  |
| IRM           | Internal Revenue Manual  |
| RCS           | Records Control Schedules (Internal Revenue Service)   |
| RO            | Revenue Officer  |
| SB/SE or SBSE | Small Business / Self-Employed Division  |
| TAS           | Taxpayer Advocate Service  |
| TBOR          | Taxpayer Bill of Rights  |
| TFRP          | Trust Fund Recovery Penalty  |
| Treas. Reg.   | Treasury Regulation  |
| US or U.S.    | United States  |
| USC or U.S.C. | United States Code   |

25.3.1.1.7  
(09-08-2023)

#### Related Resources

- (1) For procedural guidelines on recommending, working, and responding to suits and claims for damages both for and against the United States, see:
  - a. IRM 4.10.3.3.6, Requests to Audio Record Interviews.
  - b. IRM 5.1.12.3, Taxpayer Recording of Interviews.
  - c. IRM 5.17.4, Suits by the United States.
  - d. IRM 5.17.5, Suits Against the United States.
  - e. IRM 5.17.12, Investigations and Reports.
  - f. IRM 5.17.14, Fraudulent Transfers and Transferee and Other Third Party Liability.
  - g. IRM 25.3 series, Litigation and Judgments.
  - h. For ESI resources see IRM 25.3.1.7.21.
  - i. IRM 25.3.2.4.4, Required Forms, which can also be found searching the Publishing catalog, *Civil Suit Forms*.
  - j. IRM 34.7.1.1.4.3, Litigation Hold Procedures.
  - k. IRM 34.12.1-39, Litigation Hold Checklist.
  - l. *Knowledge Management Suit Forms page* under, Other Related Resources, click either option located there to open the page *Suits - Resources/ Examples*. On this page are the form User Guides, suit package examples, and additional items.
  - m. *eApproval* suit recommendation electronic submission platform with accompanying User Guides and SHOTS videos for user assistance. *eApproval* is a controlled site and access must be requested.
- (2) The Taxpayer Bill of Rights (TBOR) lists rights that already existed in the tax code, putting them in simple language and grouping them into 10 fundamental rights. Employees are responsible for being familiar with and acting in accord with taxpayer rights. See IRC 7803(a)(3), Execution of Duties in Accord with Taxpayer Rights. For additional information about the TBOR, see *Taxpayer Bill of Rights*, Taxpayer Bill of Rights (TBOR).

25.3.1.2  
(08-08-2022)

#### Suits by the United States

- (1) Because it is less expensive and time consuming to collect taxes by using administrative processes, bringing a judicial action should usually be a last resort. See IRM 25.3.2, for criteria for bringing civil actions. The success of such an action should not be measured only in the dollar amount of the tax collected. (See IRM 31.1.1.1.3(1), Principals of Litigation).
- (2) Once the decision is made to proceed by judicial action, timely and thorough preparation of the case is essential to ensure successful litigation.
- (3) See IRM 5.17.4, Legal Reference Guide for Revenue Officers, Suits by the United States, for additional information regarding the most common types of suits that can be brought by the United States for effecting or assisting in the collection of taxes.
- (4) See IRM 5.17.12, Legal Reference Guide for Revenue Officers, Investigations and Reports, for additional guidance on:
  - conducting investigations and gathering evidence to support recommendations for initiation of suits by the United States, and
  - preparing reports to support suit recommendations.
- (5) See the following IRM sections for information about specific types of suits:
  - IRM 5.17.3, Levy and Sale.
  - IRM 5.17.7, Liability of Third Parties for Unpaid Employment Taxes.

- IRM 5.17.13, Insolvencies and Decedents' Estates.
- IRM 5.17.14, Fraudulent Transfers and Transferee and Other Third Party Liability.
- IRM 5.1.14, Field Collection Techniques and Other Assignments (includes guidance regarding holding sureties liable for unpaid withholding taxes, and liability of third parties paying wages or supplying funds for payment of wages under IRC 3505.
- IRM 5.10.2, Securing Approval for Seizure Actions and Post-Approval Actions.
- IRM 5.10.3, Conducting the Seizure.
- IRM 5.21.3, Collection Tools for International Cases.

25.3.1.3  
(08-08-2022)  
**Suits Against the United States**

- (1) There is statutory authority for bringing different types of suits against the United States, such as suits for the recovery of damages for failure to release a lien or for unauthorized collection actions. See IRC 7426(h), IRC 7432, IRC 7433, and Pub 5390, Instructions for Preparing Administrative Claims for Damages Under Sections 7426(h), 7432, and 7433(a-d), and Request for Costs under Section 7430 Related to these Sections. The United States may also be named in a suit that involves real or personal property that is encumbered by a federal tax lien. See *28 USC 2410*.
- (2) IRM 5.17.5, Legal Reference Guide for Revenue Officers, Suits against the United States, and IRM 25.3.3, Suits Against the United States, contain guidance regarding these types of actions and other principal types of judicial actions that may be brought against the United States.
- (3) IRS employees may also be named in judicial actions. See IRM 25.3.4, Suits Against IRS Employees, for procedural guidance.

25.3.1.4  
(08-08-2022)  
**Authorization for Filing Suits, Counterclaims or Third Party Complaints**

- (1) The authority for the United States to commence a court action for the collection or recovery of taxes is set forth in IRC 7401.
- (2) If additional liabilities are asserted after a suit to collect a tax has been referred to the DOJ, Area Counsel must issue a supplemental letter to DOJ to request inclusion of the additional liabilities so that the judgment will cover all outstanding obligations of the taxpayer.

**Note:** Amending a complaint to include new or omitted liabilities may be looked upon with disfavor by the courts. Accordingly, if liabilities were omitted from the complaint or additional liabilities are asserted after a suit has been filed, consult Advisory or Area Counsel because it may be advisable to attempt collection of the new or omitted liabilities by non-suit methods; or, if the amounts are de minimis, to ignore them for purposes of the suit.

**Note:** Any collection activities by the IRS during the pendency of the suit must be cleared in advance with Advisory, Area Counsel and the DOJ.

- (3) Under IRC 7401, the IRS can also authorize the filing of a counterclaim in a suit filed against the United States. In order to file a counterclaim, there must be an unpaid assessment against the taxpayer for tax, penalty, or interest, and the counterclaim must relate to the same type of tax that is the subject of the existing suit. For example, if the subject of the existing suit is an unpaid assessed tax of a particular type, the counterclaim must be for an unpaid assessed tax of the same type.

- (4) The need to file a counterclaim arises most frequently in a Trust Fund Recovery Penalty (TFRP) refund suit filed by the taxpayer. If the taxpayer has not fully paid the assessed amount, the United States will file a counterclaim to reduce the unpaid TFRP balance to judgment with its answer.

**Note:** The United States may also join other persons against whom related TFRP assertions were made with respect to the same employer by filing third party complaints in the same action.

- (5) Because the authority to authorize the DOJ to bring civil actions for the collection or recovery of taxes or to enforce a lien is delegated to the Chief Counsel (see 26 CFR 301.7401-1(a) and 26 CFR 301.7403-1), there is no legal requirement that Collection provide a Form 4477, Civil Suit Recommendation, or other authorization for *counterclaims*, although such authorization may be sought in individual cases. Field Collection must provide to Area Counsel, through Advisory, any information and documentation needed to support the filing of a counterclaim in a given suit.
- (6) Because a *third party complaint* involves the addition of a party who is new to the existing suit, Field Collection should provide Form 4477, Civil Suit Recommendation, for the third party complaint.

#### 25.3.1.5 (08-08-2022)

#### Collection Action During Litigation

- (1) When a recommendation to collect a Federal tax liability through litigation is referred to the DOJ, the collection of the liability is under the control of the DOJ. Do not take enforced collection action on any liability of a taxpayer involved in a case in which a suit recommendation has been forwarded to Area Counsel without prior discussion with and concurrence of Advisory, Area Counsel, and, if appropriate, the DOJ.
- (2) Report any account balance changes on modules in your inventory that are involved in litigation to Area Counsel through Advisory.
- (3) IRC 6331(j), with certain exceptions, prohibits levy or suit to collect the unpaid portion of a divisible tax, such as the Trust Fund Recovery Penalty (TFRP), that is the subject of a refund suit from the plaintiff or plaintiffs in that suit. Consequently, in refund litigation cases involving the TFRP or other divisible taxes, collection action must be suspended unless jeopardy is found or another exception applies. This provision and the related restrictions of IRC 6672(c) are discussed further in IRM 25.3.3.7.1, Suits Against the United States, Trust Fund Recovery Penalty (TFRP) Refund Litigation - Advisory Actions.
- (4) Occasionally, Area Counsel or the DOJ may request that collection action against entities not involved in litigation be suspended while a test case or a related case is being litigated. In such situations, request written notification from Area Counsel or the DOJ to document the request and the reason for suspending collection action against these entities. Advise Area Counsel if there is an imminent Collection Statute Expiration Date (CSED) or if collection against the related entities is in jeopardy. If necessary to suspend the statute of limitations, request that the related entities be joined in the litigation or a suit to reduce their liabilities to judgment be initiated. Note that an additional Form 4477, Civil Suit Recommendation, may be needed to authorize additional legal action.
- (5) When collection is being withheld, Advisory will monitor the progress of the litigation to ensure that the case is being pursued.

25.3.1.6  
(08-08-2022)  
**Initiation of Litigation -  
Service of Process**

- (1) A suit is commenced by the filing of a complaint with the court. A copy of the complaint, accompanied by a summons, must be served by the plaintiff upon each person named as a defendant in the action. This is referred to as “service of process.”

**Note:** The party bringing the suit is known as the “plaintiff.” The parties against whom the action is brought are called “defendants.”

- (2) Service of process by the United States when it is the party bringing the suit (i.e., the plaintiff) is discussed further in IRM 25.3.2, Suits by the United States.
- (3) Service of process against the United States as a defendant is discussed further in IRM 25.3.3, Suits Against the United States.

25.3.1.7  
(08-08-2022)  
**Preserving Electronically  
Stored Information (ESI)  
In Litigation Cases**

- (1) This section provides background and instructions on electronically stored information and its use in litigation cases.

25.3.1.7.1  
(08-08-2022)  
**Background**

- (1) While electronically stored information (ESI) has always been subject to discovery in litigation, the Federal Rules of Civil Procedure (FRCP) were amended in 2006 to specifically include references to and requirements for the discovery of ESI. In January 2010, the Tax Court Rules were amended to include essentially similar provisions with regard to ESI. The Office of Chief Counsel has issued guidelines to IRS attorneys for complying with the amended rules regarding electronic discovery. See Chief Counsel Notice CC-2016-005, Discovery Obligations to Preserve Evidence, Including Electronically Stored Information.. In order to fulfill its obligations to comply with electronic discovery requests, the IRS must preserve ESI whenever litigation is initiated or can be reasonably anticipated. This section provides guidance for Collection employees regarding their responsibilities for preserving ESI.

25.3.1.7.2  
(08-08-2022)  
**What is ESI?**

- (1) ESI is electronically stored information or information created, stored, or used with digital technology. It includes, but is not limited to, e-mail and other electronic communications, word processing documents, spreadsheets, electronic calendars, telephone logs, Internet usage files, metadata, voice-mail, text messages, and network access information. In the context of a collection case, ESI would also include, but not be limited to, Integrated Collection System (ICS) histories, results of electronic research, and any other information regarding the case that is either obtained, recorded, or sent electronically.

**Note:** Metadata is data. It contains information about data such as the user who created the data or information, creation date, edit history, and file type. Metadata describes ESI. Like ESI it is a focus of Discovery, which is the process of exchanging information in civil litigation, and for ESI referred to as eDiscovery.

- (2) ESI may be contained on hard drives, optical discs, removable discs or tapes, a device that reads data or pulls data onto a removable disc or tape, and damaged data devices.

25.3.1.7.3  
(08-08-2022)

**What ESI is subject to discovery?**

- (1) All ESI is subject to discovery if it is potentially relevant to the case. For purposes of determining potential relevancy, the nature of the litigation or anticipated litigation, including the time periods involved, the allegations made by the parties, and the subject matter of the litigation, must be considered. While all potentially relevant ESI must be preserved, this does not mean that the information must be or will be produced in litigation. The ESI may not be responsive to the discovery request of the opposing party. Or, the Government may claim that relevant ESI is privileged information protected from discovery requests the same way it claims paper documents are protected. For example, the Government may claim that an e-mail message sent by a collection advisor to an area counsel attorney regarding the merits of a taxpayer's position in litigation is protected by the attorney-client privilege. It is the attorney assigned to the case who determines whether a privilege applies, not the IRS employee(s) who prepared, obtained, or preserved the ESI. Accordingly, even if you believe that certain ESI is covered by a privilege, the information must nevertheless be preserved and isolated for possible production in litigation.

25.3.1.7.4  
(08-08-2022)

**How do I determine what ESI should be preserved?**

- (1) All ESI relating to a particular taxpayer's case must be preserved when litigation is initiated or can be reasonably anticipated (see IRM 25.3.1.7.5 below). This eliminates the possibility of losing ESI that is later determined to be responsive to a discovery request. Whether ESI is potentially relevant to the case is a determination to be made by the attorney assigned to the case.

25.3.1.7.5  
(08-08-2022)

**When does the duty to preserve ESI begin?**

- (1) The duty to preserve ESI arises in suits filed against the Government when the lawsuit is filed or when litigation can be reasonably anticipated. When such litigation can be reasonably anticipated depends upon the facts of the case. In suits brought by the Government, the duty to preserve ESI begins no later than when a decision is made by Chief Counsel to refer a suit to the DOJ.

**Example:** A taxpayer files an administrative claim for damages for unauthorized collection action and indicates that he will pursue the matter in court if his claim is denied. In this situation, litigation can be reasonably anticipated before the suit is even filed.

**Example:** A quiet title action is brought under *28 USC 2410* in state court. The duty to preserve ESI generally would not arise until the IRS receives notice of the litigation because it would not be reasonable for the IRS to anticipate litigation in every case in which a Notice of Federal Tax Lien is filed.

25.3.1.7.6  
(08-05-2013)

**What is a litigation hold?**

- (1) Agency counsel is responsible for issuing a litigation hold when litigation is initiated or reasonably anticipated. The litigation hold informs all IRS and Chief Counsel employees involved in a case to preserve all of their paper and electronic files.
- (2) Depending upon the type of litigation, "agency counsel" may refer to Area Counsel Attorneys, National Office Attorneys, Assistant U.S. Attorneys, or Tax Division Attorneys. Generally, if the agency counsel is an Assistant U.S. Attorney or a Tax Division Attorney, an Area Counsel field attorney will issue the litigation hold on behalf of the Assistant U.S. Attorney or Tax Division attorney to IRS and Chief Counsel employees.



- (3) When a litigation hold needs to be established, Area Counsel will send an e-mail notification to the Service point of contact.

25.3.1.7.7  
(08-05-2013)

**Who is the Service point of contact?**

- (1) The Service point of contact will be the person identified by Counsel as the Service employee who is most familiar and involved in the case and who would have knowledge about other Service or Counsel employees who may possess relevant ESI. In suits brought by the United States, the Service point of contact will generally be the Collection Advisor responsible for the litigation case.
- (2) There may be a need for more than one point of contact as there could be different organizations and program offices involved in a particular case each of which may involve an extensive number of employees. It is also possible that points of contact may need to include those within contractor or Treasury organizations.

25.3.1.7.8  
(08-08-2022)

**What are the responsibilities of the Service point of contact?**

- (1) The Service point of contact will assist the attorney assigned to the case by identifying and contacting all Service employees who may possess potentially relevant ESI that may be subject to the litigation hold. All Service employees who possess potentially relevant ESI are required to preserve this information.

**Example:** Collection Advisor Tom Smith has been identified as the Service point of contact in a suit to reduce assessments to judgment and to foreclose the tax lien. Area Counsel issues a litigation hold to Advisor Smith. Advisor Smith knows that two different revenue officers worked on this case, and that Appeals handled a Collection Due Process case involving the taxpayer. Advisor Smith will notify the revenue officers and the Appeals officer, with a cc to the Appeals designated Point of Contact (the eDiscovery analyst on the staff of Policy Planning Quality & Analysis), of the litigation hold and request that they preserve any ESI relating to the taxpayer's case. Advisor Smith must receive an acknowledgement from each Service employee that the employee received the litigation hold and will comply with it. Advisor Smith also will notify Area Counsel of the contact information of employees who have ESI related to the litigation and that the employees have received the litigation hold.

25.3.1.7.9  
(08-05-2013)

**What am I required to do if I receive a litigation hold notification?**

- (1) First, confirm receipt of the litigation hold notification. If you determine after a search of your records that you were not involved in any way in the case, provide an e-mail response informing the sender that you were not involved in the case or the subject matter involved in the suit.
- (2) If you were involved in the case, in accordance with the instructions in the e-mail message, provide an e-mail response informing the sender of your involvement and providing the information requested.
- (3) Also, if you are appropriately identified as the Service point of contact, forward the litigation hold notification to all Service employees that you believe may have ESI relating to the case. In accordance with the instructions in the e-mail message, provide contact information for these employees to the sender of the litigation hold notification. If you have questions about serving as the Service point of contact, send an e-mail message to the sender.

25.3.1.7.10  
(08-05-2013)

**What are the procedures for preserving ESI when there is a litigation hold?**

- (1) In general, the agency must take the following steps to comply with a litigation hold:
  - a. Identify the types of ESI that have been created while working the case.
  - b. Search the types of ESI to which you have access for all information that is potentially relevant to the case.
  - c. Preserve the ESI.
  - d. Isolate the ESI.
- (2) Collection employees will only perform the first three steps. Instructions for completing these steps will be provided by Counsel in the litigation hold notification e-mail message that is sent to the Service point of contact. The message must be forwarded by the Service point of contact to all IRS employees who have been identified as possessing ESI.
- (3) The litigation hold notification e-mail message also serves to identify the types of ESI that may have been created, and to determine whether the ESI is readily accessible. If any IRS employees who are identified as possessing ESI are unable to follow the instructions contained in the litigation hold notification e-mail message, they should contact the Counsel attorney who issued the litigation hold notification.

25.3.1.7.11  
(08-05-2013)

**What types of ESI are created in Collection cases?**

- (1) In order to identify and search for ESI, IRS employees must be familiar with the types of electronic records kept in cases that may end up in litigation. The litigation hold e-mail message requests that you specify the types of ESI that were created while you were working on the case. Some of the more common types of ESI that may be created while working on a collection case include the following:
  - E-mail and attachments
  - Word processing documents, such as suit narratives or other exhibits prepared for a suit recommendation
  - Spreadsheets (e.g. showing CSED calculations)
  - ICS case histories
  - Images (e.g. digital pictures of property involved in the litigation)
  - Hard drives (desktops and portable thumb drives)
  - Internet data
  - Backup and archived material
- (2) This list is not all-inclusive. In your response to Counsel's litigation hold notification, you must identify all of the types of ESI that you created while working on the case.

25.3.1.7.12  
(08-05-2013)

**What is required of Collection employees to "search" for ESI?**

- (1) Once you have identified the types of ESI that you created while working the case, you should conduct a preliminary search to identify any ESI to which you have access, including on external media such as CDs or flash drives. For example, you should search your Microsoft Office files (Word, Excel, etc.) or Outlook folders to find all ESI that relates to the litigation. The employee should inform the Service point of contact of the results of the search, including the time frame during which the ESI was created and the employee's post of duty at the time the ESI was created. If there are types of ESI to which you do not have access, inform the Service point of contact. The Service point of contact will inform Counsel so that they can notify Information Technology (IT) of the existence of this ESI.



25.3.1.7.13  
(08-05-2013)

**What is required to “preserve” and “isolate” ESI?**

- (1) Once located, ESI must be preserved and isolated. Preservation of ESI means that it should not be altered or destroyed and must be maintained in its native format throughout the duration of the litigation. Accordingly, all applicable record retention schedules are suspended until such time as the ESI is isolated. ESI is isolated when a mirror image of the ESI in its native format (i.e., electronic format as opposed to paper format) is created and moved to a separate server for storage for the duration of the litigation. Collection employees need not isolate the ESI. The isolation and creation of a mirror image of the ESI in its native format is done by IT personnel.

25.3.1.7.14  
(08-05-2013)

**Whose responsibility is it to isolate ESI?**

- (1) Counsel will coordinate with IT personnel to isolate and preserve the ESI you identified. Do not alter or destroy the ESI until you have confirmed that the ESI has been isolated and preserved by IT and that it is no longer necessary for you to isolate and preserve the ESI.

25.3.1.7.15  
(08-05-2013)

**Is ESI isolated in every case?**

- (1) The decision whether to isolate the ESI in each case will be made by Agency Counsel. The isolation will be done by IT personnel. Once a Collection employee receives a litigation hold, however, the employee must preserve all ESI relevant to the litigation until notified otherwise.

25.3.1.7.16  
(08-08-2022)

**How do these requirements apply to e-mail messages in particular?**

- (1) The general rules for retaining e-mail messages as records are found in IRM 1.15.6. The general rule is that the basic requirements applicable to all records apply to e-mail records as well. If they are not in an approved electronic record keeping system, e-mail messages identified as records must be printed out and placed in the appropriate paper record system.
- (2) Accordingly, when a litigation hold is not in place or litigation is not reasonably anticipated, e-mail messages that are records should be printed, including attachments and transmission information, and placed in the case file or other appropriate official filing system; or, email messages should be forwarded or copied to the appropriate electronic record-keeping system. After the e-mail message is filed in an established paper or electronic record-keeping system, it should be deleted unless it is needed for reference purposes. Saving an e-mail message in an Outlook folder does not eliminate the requirements to print a hardcopy and file it because an e-mail folder is not considered to be part of an official filing system. See IRM 1.15.6-1, Common Questions about E-Mail.
- (3) To the extent that e-mail messages potentially relevant to the case have not been filed and deleted in accordance with applicable retention schedules, they must be preserved once litigation is initiated or is reasonably anticipated. This means that the e-mail messages may not be deleted. Once a litigation hold is in place, IT personnel will isolate the messages and preserve them in their original format. However, before any e-mail messages would be produced in litigation, a determination would be made as to whether they are in fact relevant to the case and whether they contain any privileged information. Remember, it is up to Counsel, and/or the court, to make this determination.

**Example:** Collection Advisor Jim Anson reviewed the suit package prepared by Revenue Officer (RO) Ann Graves and requested additional information from RO Graves to fill in some gaps in the suit narrative. RO Graves e-mailed the information to Advisor Anson. RO Graves saves the sent e-mail message in a personal outlook folder created for this case. Months later, Advisor Anson receives a litigation hold notification from Counsel requesting that ESI be preserved. Because the e-mail message

contains information that is potentially relevant to the case, RO Graves must ensure that this e-mail message and similar e-mail messages sent in this case are not deleted.

25.3.1.7.17  
(08-05-2013)

**What should I do if I receive a litigation hold directly from the Tax Division or local U.S. Attorney's Office?**

- (1) The same procedures, as set forth above, should be followed. If the litigation hold requests that you take any actions that are inconsistent with these procedures, contact your local Area Counsel office and request assistance.

25.3.1.7.18  
(08-05-2013)

**When does the obligation to preserve ESI end?**

- (1) As a practical matter, the litigation hold is in effect until you are notified in writing by Counsel that the litigation hold has been lifted. The obligation to preserve ESI remains in effect for as long as the IRS can reasonably anticipate litigation in a case and for the duration of the litigation and any subsequent appeals. Agency counsel will periodically send an e-mail to remind employees of their continuing obligation to preserve the ESI. The Service point of contact should forward the reminder notification to all identified Service employees. Employees should respond to the reminder notification within five business days, and provide a brief statement as to whether the ESI remains preserved and unaltered and where the information is stored.

25.3.1.7.19  
(08-05-2013)

**What are the potential consequences of not preserving ESI?**

- (1) Failure to preserve documents and ESI could result in unfavorable discovery orders, sanctions against the Government, disadvantage to the Government's position in litigation, or preclusion of any and all evidence in favor of the Government's position.

25.3.1.7.20  
(08-05-2013)

**What if relevant ESI was inadvertently destroyed or cannot be located either before or after the litigation hold notification was received?**

- (1) There is no consequence if any ESI is destroyed prior to the issuance of the litigation hold and before litigation was reasonably anticipated. If an employee cannot locate ESI, the employee should describe the missing ESI in sufficient detail. IT personnel then will conduct a search for the missing ESI. Reasonable steps must be taken to ensure ESI is not destroyed after a litigation hold notification is received. Even inadvertent destruction after receipt of a hold notice could have negative consequences for the Government, although inadvertence may weigh against the court imposing sanctions.

25.3.1.7.21  
(08-08-2022)

**References**

- (1) IRM 1.10.3, Standards for Using E-Mail.
- (2) IRM 1.15.6, Managing Electronic Records.
- (3) IRM 1.15.6.9, Security of Electronic Records.
- (4) IRM 1.15.6.10, Disposition of Electronic Records.
- (5) IRM 1.15.7, Files Management.
- (6) Document 12990, Records Control Schedules.
- (7) Chief Counsel Notice, *CC-2016-005*, Discovery Obligations to Preserve Evidence, Including Electronically Stored Information, and IRM 34.7.1.1.4, Discov-

ery Obligations to Preserve Evidence, Including Electronically Stored Information, supersede the notices listed below.

- a. CC-2009-024,
- b. CC-2010-008, and
- c. CC-2012-017.

