

CC-2016-005

January 28, 2016

**Subject:** Discovery Obligations to Preserve  
Evidence, Including Electronically  
Stored Information

**Cancel Date:** Upon incorporation into  
CCDM

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## Purpose

This notice sets out revisions to CCDM 34.5.1, CCDM 34.7.1, CCDM 34.12.1, and CCDM 35.4.6 to reflect updated procedures governing management of litigation holds and evidence subject to discovery, including, particularly, electronically stored evidence. The revised procedures supersede the procedures outlined in Chief Counsel Notice 2012-017 (Update to Procedures for Complying with E-Discovery Obligations), and include new exhibits that replace Exhibit 1 of Chief Counsel Notice 2012-017. These revised procedures reflect important changes to the procedures for imposing litigation holds and the discovery of electronically-stored information (ESI), such as:

- Respective roles of the responsible attorney, Procedure & Administration (Branch 8) (PA Branch 8) and IRS Information Technology;
- Updated guidance on when litigation holds must be issued;
- New process for issuing litigation hold notices, including new email templates;
- Guidance on monitoring litigation holds, including entering custodian names into PA Branch 8's Litigation Hold Custodian List database;
- Revised process for collection of ESI with assistance of PA Branch 8; and
- Updated guidance on when a litigation hold may be released.

Please contact Branch 6 or Branch 7 of Procedure and Administration with legal questions relating to litigation holds and discovery, including legal issues of first impression relating to ESI. Please contact Branch 8 of Procedure and Administration for procedural or technology questions relating to the preservation, collection, and production of electronically stored information.

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Distribute to:	Tax Litigation staff	Tax Litigation staff & Support personnel
	X All Personnel	X Electronic Reading Room

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**Revised section of 34.5.1:**

**34.5.1.1.2.1**

**Essential Elements of a Defense Letter**

- (1) Tax Data. In order to assist, an attorney should include the following information in the defense letter in a way that allows for easy identification of the data:
  - Full name of the taxpayer and any other party to the action
  - Identity of the taxpayer where the party bringing suit is not the taxpayer
  - TIN for the taxpayer and any other party to the action
  - Type of tax (income, employment, excise) and Form number of return
  - Tax period
  - Information about any pending qualified offer pursuant to section 7430(g)
  - Service point of contact for files and updated tax information, including a name, business address, and telephone number
  - Amounts of tax assessed (include current information and state date an attorney obtained information)
  - Date of assessments for each period (include current information and state date an attorney obtained information)
  - Amount of assessment that is unpaid, including accrued interest and penalties (include current information and state date an attorney obtained information)
  - Any applicable statute of limitations
- (2) An attorney can include the tax data in narrative form in the fact section of the letter, in table form in an appendix enclosed with the letter (preferable) or by attaching a Form 4340. If an attorney uses a Form 4340, an attorney should include the accruals of interest and penalties as of a date as close as possible to the date when an attorney sends the defense letter to DJ.
- (3) Opening Statement. In the Opening Statement, an attorney should refer to the court in which the case was filed; the date of the complaint (or petition); the amount of tax, penalty and interest the plaintiff seeks to recover; the type of tax involved; and the years or periods in suit.
- (4) Statement of Issues. An attorney should state the specific issue or issues involved, citing the applicable Code section or Regulation to which it relates and consolidating issues where possible. An attorney can generally find the issues in the taxpayer's complaint, the claim for refund, the revenue agent's or appeals officer's report, if any. An attorney should include any new issues raised by Field Counsel such as jurisdictional defenses and setoffs.
- (5) Operative Facts. Except for abbreviated defense letters, an attorney should always discuss the facts that are pertinent to the substantive issues in the case. If the case involves multiple issues but some facts relate to more than one issue, an attorney should first discuss general facts such as general information about a corporate or individual taxpayer, e.g., date and state of incorporation. An attorney should also include facts pertinent to the burden of proof issue under section 7491.
- (6) Discussion. An attorney should discuss the specific facts after discussing the general facts or, if there are no general facts, after stating the issue or issues. While discussing the facts pertinent to a particular issue, an attorney can incorporate by reference any documents in the file that contain a full recitation of the facts, such as an appeals officer's report or earlier defense letter.

If the administrative file contains an adequate description of the facts, an attorney only has to include a brief summary of these facts and cite the relevant document. An attorney should not postpone writing the defense letter if certain critical facts are missing or otherwise unavailable. He should note, however, the absence of such facts in the letter and recommend that DJ secure the missing facts through discovery or by requesting a supplemental investigation. See CCDM 34.7. If the issues in a suit are purely legal in nature, an attorney only has to minimally discuss the facts and can combine the factual and legal discussions. For example, if a taxpayer claims that he or she is not liable for income taxes because the Federal Reserve Notes that she received in salary did not constitute money, an attorney only has to include a minimal amount of facts.

- (7) Legal Analysis. An attorney should also include a legal analysis of the issues, except in abbreviated defense letters. This will include pertinent Code sections, regulations, rulings, and case law in conjunction with a discussion of the operative facts. An attorney should include the Service's position as to the legal authorities and a conclusion as to the manner in which DJ should dispose of the issue (i.e., defend, concede or settle). An attorney should not write defense letters as if they were briefs and therefore should include the strengths and weaknesses of the Government's case. If another defense letter contains an adequate legal discussion, an attorney may incorporate (i.e., cut and paste) the argument into the defense letter, or refer the DJ attorney to the DJ colleague who worked on a similar case. Attorneys must be mindful of including third party return information in defense letters only when the third party return information meets the item or transaction tests of section 6103(h)(2)(B) or (C).
- a. An attorney should not withhold his recommendation concerning defense, settlement, or concession even if some facts are not available. In some instances, an attorney can make reasonable assumptions about the facts and recommend defense, settlement, or concession subject to verification of such facts. Normally, however, if concession appears likely, an attorney should tentatively recommend defense until the facts warranting the concession can be verified. Unlike a defense recommendation, an attorney may not be able to reverse a concession recommendation. Accordingly, an attorney should recommend concession in only the most clear-cut situations. An attorney can always recommend concession in a supplemental defense letter after verifying all of the facts.
  - b. It may be appropriate to recommend settlement in factual cases that are not continuing in nature and recommend a percentage basis for settlement if the facts have been particularly well developed. If the facts have not been well developed, an attorney may recommend settlement noting the absence of any particular basis for settlement.
  - c. A case may involve an issue that requires coordination with other Associate Chief/Division Counsel offices. In the legal analysis, the attorney can either state the current Service position on the particular issue and explain that the Service is reconsidering the current position or explain why Field Counsel cannot render a current legal opinion. The attorney should then advise DJ that Field Counsel will recommend defense, settlement, or concession of the issue in the near future.
- (8) Miscellaneous. Counterclaim and Third-Party Complaint Authorization. An attorney may include in the defense letter an authorization for a counterclaim or third-party complaint authorization. CCDM 34.5.1.1.2.6.

- (9) Conclusion and Recommendation. The final section of the defense letter is the conclusion and recommendation. Generally, an attorney who has comprehensively discussed the issue or issues will not have to summarize the conclusions or recommendations as to each issue. For example, if an attorney has discussed two issues and has concluded that DJ should defend both issues (or settle both issues), the conclusion can state: "In view of the foregoing discussion, we recommend that this case be defended/settled." An attorney who recommends settlement for each issue, however, can suggest an overall basis for settlement. For example, in some cases where the Service has fully developed the facts, an attorney can recommend that the Government concede Issue No. 1 if the taxpayer would concede Issue No. 2. This specific recommendation would be unusual at the defense letter stage since normally the Government would need to develop more facts. In multiple-issue cases where Counsel has recommended defense for some issues, settlement as to some issues, and concession as to others, an attorney should summarize these positions by issue number but does not have to repeat the reasons for such recommendations.
- a. While an attorney should be cautious in recommending the concession of an issue, he should be more cautious in recommending the concession of an entire case. An attorney should recommend concession for issues at the defense letter stage only in the most clear-cut situations where the Government does not need additional factual development or legal analysis. Merely because we recommend concession of an issue, even in a single issue case, does not necessarily mean that the Government should concede the entire case. It is possible that valid setoffs would reduce or eliminate the amount of the refund. For example, if the period of limitations for assessment is open, new issues could result in a judgment in favor of the Government. Accordingly, before recommending concession of a case, an attorney should consider other factors in addition to the disposition of the issue or issues in suit.
  - b. An attorney should include the classification of a case in the conclusion and recommendation section of the defense letter. See CCDM 34.5.1.1.1.
  - c. At the end of the conclusion and recommendation section, an attorney should generally describe the documents being enclosed. Normally, an attorney will forward the original administrative files received from the IRS Campus (or Area Director/Director of Field Operations in a trust fund recovery penalty case). Prior to forwarding the original file, a duplicate file should be created to keep with the Field Counsel's legal file.
- (10) Since the Tax Division is responsible for analyzing jurisdiction in all cases, an attorney generally does not have to discuss jurisdictional facts in a defense letter. The Field Counsel attorney should determine whether there are obvious jurisdictional defects by carefully reading the complaint and other documents in the administrative file. An attorney should note any obvious jurisdictional defects or note that, after preliminary examination, an attorney has not discovered any obvious jurisdictional defects. If an attorney discovers a jurisdictional defect that will clearly dispose of the plaintiff's claim, he should fully discuss the issue and generally need not discuss the substantive issues. For example, if the taxpayer did not bring suit within the applicable period of limitations, an attorney should generally discuss only this issue and recommend that DJ file a motion to dismiss. Similarly, the attorney may discover that the Service untimely assessed the tax. The attorney should recommend that DJ concede the case regardless of whether the taxpayer has properly raised this issue, or still has time within which to properly raise it.

- (11) An attorney does not have to discuss attorney's fees if the taxpayer seeks attorney's fees in the complaint or petition. In recommending defense of a case, or in authorizing a counterclaim or third-party complaint, attorneys should consider whether the Government's position may lead to the award of attorney's fees should the taxpayer prevail.
- (12) If a suit against the United States is brought in a state court, the attorney should make an initial determination concerning removal of the case to federal district court. See CCDM 34.5.6.6.
- (13) The attorney should discuss the scope of any litigation hold in the case with the Tax Division and issue any litigation hold prior to drafting the defense letter. The attorney should memorialize the scope of the litigation hold in the defense letter. See CCDM 34.7.1.1.4 for additional information regarding litigation holds.

## **Revised sections of 34.7.1:**

### **34.7.1.1.2**

#### **Document Requests**

- (1) In order to develop a suit for trial, the DJ attorney may make informal requests for the assistance of Service personnel or for tax returns and other documents. See CCDM 34.7.1.2. In evaluating requests from DJ for additional returns, transcripts of account, etc., Field Counsel should always consider whether the material requested can be supplied under section 6103. It is the responsibility of Field Counsel to ensure that disclosure is proper.
- (2) Rather than processing such requests routinely, however, without thought to the time and expense involved, Field Counsel should consider whether the request for assistance is reasonable. Factors to consider in determining whether the request is reasonable are:
  - The time Service personnel must devote to providing the information
  - The expenses involved in gathering the information
  - The amount of tax involved in the suit
  - The precedential value of an opinion in the case
  - The impact on the case should the request not be fulfilled
  - Whether similar requests have been fulfilled in the past
- (3) Field Counsel should resolve doubts as to reasonableness in favor of complying with the request. If the attorney determines that the request is unreasonable, however, the attorney should confer with a supervisor. If the supervisor determines that the request is unreasonable, inform the DJ attorney of that determination and try to modify the request to the satisfaction of both. If no satisfactory modification is reached, arrange a telephone conference with both attorneys and their reviewers.
- (4) If the assigned DJ attorney requests that the Service implement a litigation hold (including a litigation hold for electronically stored information), the Chief Counsel attorney should follow the procedures in CCDM 34.7.1.1.4.

### **34.7.1.1.4**

#### **Discovery Obligations to Preserve Evidence, Including Electronically Stored Information**

- (1) These procedures are designed to assist the Office of Chief Counsel (Counsel) in meeting its discovery obligations to search for, identify, preserve, and collect documents, tangible things, and electronically stored information (ESI) during litigation or in matters that are reasonably anticipated to be litigated. Timely issuance of litigation hold notices and appropriate management of litigation holds will help Counsel and the Service comply with the legal obligation to preserve relevant material.
- (2) The Federal Rules of Civil Procedure (FRCP), the Rules of the Court of Federal Claims, the Tax Court Rules, and case law permit a party to obtain discovery regarding any non-privileged matter that is relevant to a claim or defense. These same authorities also impose obligations on the party that possesses discoverable evidence. This section sets out the specific procedures that Counsel should follow to fulfill obligations respecting discoverable evidence.

- (3) A litigant's basic discovery obligations extend equally to ESI and non-ESI materials, such as paper documents and other tangible things. As a consequence, Counsel attorneys should take steps in all phases of discovery to address any and all forms of relevant information in an employee's possession or under the employee's control, whether the information exists in an electronic format or otherwise. See also CCDM 30.9.1.6, which describes the obligation to ensure that records subject to a retention schedule are not destroyed during the pendency of litigation.
- (4) The potential consequences of failing to preserve relevant evidence may be serious. Examples of potential consequences may include monetary sanctions, attorney fees and costs, the drawing of an adverse evidentiary inference against the Service concerning the material it failed to preserve, evidence or claim preclusion, and charges of contempt.
- (5) For a glossary of the terms used in this section and select legal references see Exhibit 34.12.1-38.

#### 34.7.1.1.4.1

#### **Roles and Responsibilities in Litigation Holds**

- (1) The purpose of a litigation hold is to suspend the normal record retention rules and the disposition or processing of records to ensure such records are preserved for use in litigation. Counsel implements litigation holds by notifying employees who may have relevant evidence that they have an obligation to preserve that evidence during the course of litigation. Implementing a litigation hold helps the Service meet its discovery obligations and helps prevent relevant evidence from being inadvertently destroyed as a result of routine record retention policies. A litigation hold applies to all potentially relevant evidence, including documents, tangible things, and ESI, regardless of whether a privilege applies.
- (2) While litigation holds are implemented by multiple people within the Service and Counsel, the person responsible for determining whether to issue a litigation hold and for implementing such a hold under these procedures is the Counsel attorney responsible for the case (responsible attorney), in conjunction with the attorney's manager. The responsible attorney is typically the field attorney to whom the case has been assigned or the attorney with the primary work load item (WLI) in the case. In a district court case or other court case, there is generally an attorney from the Department of Justice (DOJ), either with the Tax Division or the United States Attorney's Office, assigned to the case as well as an attorney from Counsel who serves as the primary point of contact. For the purposes of these litigation hold procedures, the responsible attorney is the assigned Counsel attorney, not the DOJ attorney.
- (3) Custodians are those employees who create, manage, alter, edit, store, or otherwise possess relevant evidence in any format. Typically, custodians are revenue agents, revenue officers, economists, tax law specialists, and other employees who worked on a case prior to litigation. Custodians can also include Counsel employees. See CCDM 34.7.1.1.4.3.1.3 for additional information on how to identify custodians.

(4) Branch 8 in the Office of the Associate Chief Counsel (Procedure and Administration) (PA Branch 8) is comprised of attorneys, technology specialists, and paralegals. The attorneys are primarily responsible for processing electronic discovery requests for assistance (EDRs) from the responsible attorney and, when requested by the responsible attorney and to the extent that the PA Branch 8 workload permits, providing the first level of document review for ESI. First level review assistance may not be available in all instances and will be assigned based on the priorities listed in CCDM 34.7.1.1.4.3.3(8) and workload capacity in the branch. PA Branch 8 responsibilities include:

- Conducting first level document review of ESI (e.g., review for deliberative or executive privilege, attorney-client privilege, work product privilege, and redactions required by section 6103, based upon instructions from the responsible attorney). See CCDM 34.7.1.1.4.3.4(3)-(4) for guidance on requesting assistance with first level review and on what terms review assistance will be provided;
- Perfecting an EDR so that it can be processed efficiently;
- Consulting with the responsible attorney regarding applicable case deadlines and the priority to be given an EDR relative to other EDRs;
- Notifying the responsible attorney when the EDR has been initially processed and providing a timeframe for delivery of results;
- Tracking EDRs and ensuring that collection is progressing;
- Maintaining and updating the litigation hold custodian database;
- Loading ESI into a review tool and delivering ESI to the responsible attorney;
- Conducting de-duplication of ESI;
- Returning the ESI to the responsible attorney for further review;
- Assisting the responsible attorney with any technology issues prior to production; and
- Notifying appropriate contacts in the Service's office of Information Technology (IRS-IT) of the termination of a litigation hold.

Note: PA technology specialists are separate and distinct from the technology advisors located in the Large Business & International (LB&I) Division Counsel, who also may perform similar functions.

Note: PA Branch 8 is only responsible for ESI aspects of the litigation hold procedures discussed in this section. If the responsible attorney has legal questions regarding any non-ESI litigation hold procedures or ESI litigation hold issues of first impression (e.g., predictive coding and proportionality), the responsible attorney should discuss those issues first with the attorney's manager, and then with the Office of the Associate Chief Counsel (Procedure and Administration, Branches 6 and 7) (PA Branches 6 and 7).

(5) IRS-IT performs the collection and initial processing of ESI. PA Branch 8 works directly with IRS-IT to ensure the responsible attorney can meet all discovery obligations.

#### 34.7.1.1.4.2

#### **Determining Whether a Litigation Hold Is Necessary – Triggering Events**



- (1) When there is a reasonable expectation of litigation or where litigation has commenced, parties must take “reasonable steps” to preserve files and information that are “relevant to any party’s claim or defense.” In some cases, preservation by Counsel is accomplished when the responsible attorney receives the administrative file for the case. In other cases, however, the responsible attorney must take additional steps in order to preserve evidence not contained in the administrative file. If potentially relevant evidence exists outside the administrative file, the responsible attorney must consider whether to issue a litigation hold under these procedures in order to preserve that evidence.
- (2) Counsel does not issue a litigation hold under these procedures in every case in litigation, but Counsel attorneys must consider whether to issue a litigation hold in every case in which the Service has a reasonable expectation of litigation or where litigation has commenced. Litigation is commenced when a petition or complaint is filed with a court or other administrative tribunal, such as the Merit Systems Protection Board. The obligation to consider whether it is appropriate to issue a litigation hold applies to all cases involving the Service or the Commissioner as a party. The responsible attorney should also revisit the need to issue a litigation hold from time to time as the case develops and the claims and defenses in the case become clearer.
- (3) Generally, the obligation to search for and preserve relevant evidence attaches when it is reasonably anticipated that litigation will ensue. The responsible attorney should consider whether to issue a litigation hold notice as soon as litigation is reasonably anticipated. The determination of when litigation is reasonably anticipated should be based upon a good faith and reasonable evaluation of relevant facts and circumstances. Litigation may be reasonably anticipated, for example, when:
  - The taxpayer or taxpayer’s representative has affirmatively represented that the taxpayer will litigate and Counsel has determined that litigation is likely;
  - An issue in the case is designated for litigation at the administrative stage;
  - The taxpayer files a FOIA request for documents and the request causes Counsel to determine that litigation of a matter to which the documents pertain is likely; or
  - The Service has referred a case to Counsel requesting that Counsel initiate suit.
- (4) Prior to the commencement of litigation, the Service adheres to routine record retention policies. Barring situations where litigation is reasonably anticipated, there is no litigation hold in place. For example, a pending examination, collection case, or Freedom of Information Act (FOIA) request does not generally result in the issuance of a litigation hold. Issuing a litigation hold under these procedures should be considered, however, in matters pending at the administrative level when, based upon the facts and circumstances known at the time, the Service reasonably anticipates future litigation, as indicated above. See CCDM 34.7.1.1.4.3.1.1 for more information on the timing of when to issue a litigation hold notice.
- (5) In some cases in litigation, a litigation hold under these procedures may not be necessary. The responsible attorney should discuss the need for a litigation hold with the attorney’s manager. If

the responsible attorney, with a manager's approval, concludes that a litigation hold is not necessary, the responsible attorney should document the reasons for this decision in the legal file.

- (6) In district court cases, Court of Federal Claims cases, and other cases handled by DOJ, DOJ's policy is to send a formal, written request to preserve relevant evidence. When the responsible attorney receives this request, the responsible attorney should promptly contact the assigned DOJ attorney in order to come to agreement regarding the scope of preservation and the steps needed to identify, preserve, and collect relevant evidence. This agreement should also cover whether the litigation hold procedures described in this subsection should be followed in the case, and, if so, the custodians to whom a litigation hold should be issued, the types of evidence requiring preservation, and the process that should be followed to ensure preservation. The agreement with DOJ on each of these matters should be documented and noted in the legal file and confirmed by incorporation into a letter sent to DOJ (typically, the defense letter). This letter should fully reflect the agreement reached, including the agreed upon custodian list.
- (7) Docketed FOIA cases are a subset of cases handled by DOJ. These cases may not require additional steps to preserve evidence if all evidence relevant to the FOIA request has already been preserved during the processing of the FOIA request at the administrative level. However, in considering the appropriate steps for preservation for the docketed FOIA case, the responsible attorney should consider the need to preserve certain documents other than those documents sought in the FOIA request, as, for example, where the government must defend the adequacy of its search. In all FOIA cases, the responsible attorney should discuss with the attorney's reviewer and the DOJ attorney the necessity of a litigation hold under these procedures and document all preservation efforts in the legal file. When a litigation hold in a docketed FOIA case requires additional preservation beyond that done at the administrative level, the responsible attorney would typically issue litigation holds to disclosure specialists and any other custodians who may have been involved with the handling of the FOIA request.
- (8) Litigation holds will typically not be necessary in many Tax Court cases, such as "S" cases, Automated Underreporting (AUR) Program cases, Automated Substitute for Return cases, and routine collection, bankruptcy, and summons (except designated) cases. These cases often have few relevant records and little, if any, ESI. As a result, all the relevant evidence may be contained in the administrative file. Even if it appears that all relevant evidence is already in the responsible attorney's possession, the responsible attorney should check with any possible custodians in these cases to ensure that custodians do not have any other potentially relevant evidence in their possession.
- (9) Matters handled by the Office of the Associate Chief Counsel (General Legal Services) (GLS) may require following the litigation hold procedures in this section. However, the responsible attorney, with the approval of the attorney's manager, should determine whether unique circumstances apply in these cases to merit alternative treatment and to determine the appropriate level of preservation procedures to apply. All appropriate preservation efforts should be documented and noted in the legal file.

- (10) There may be other docketed Tax Court cases in which it may be appropriate to forego these litigation hold procedures. Generally, those cases would be instances when relevant evidence either does not exist or is not reasonably accessible. For example, if the responsible attorney concludes that discovery is unlikely because the litigated matter presents a pure legal issue, then a litigation hold is not necessary. In cases such as these, the responsible attorney must secure the manager's approval to forego the litigation hold procedures and document the reason for the decision in the legal file.
- (11) If another federal agency contacts a Counsel attorney or the Service regarding a litigation hold for documents related to another agency's case that involves non-tax administration issues, the attorney should contact PA Branches 6 and 7.
- (12) There may be additional circumstances outside of litigation in which these procedures could apply, such as with inquiries from Congress or other oversight bodies. In these cases, the responsible attorney should consult with the attorney's manager to determine the extent to which these procedures apply and document the reason for the decision in the legal file.
- (13) See CCDM 34.7.1.1.4.3.1.1 for more information on the timing of when to issue a litigation hold notice once it is determined that it is appropriate to issue one.

#### 34.7.1.1.4.3

#### **Litigation Hold Procedures**

- (1) Once the responsible attorney, with the approval of the attorney's manager, has determined a litigation hold is necessary, the responsible attorney will undertake the following steps:
  - Issuance (CCDM 34.7.1.1.4.3.1)
  - Maintenance (CCDM 34.7.1.1.4.3.2)
  - Collection (CCDM 34.7.1.1.4.3.3)
  - Processing (CCDM 34.7.1.1.4.3.4)
  - Release and EDR Termination (CCDM 34.7.1.1.4.3.5)
- (2) For a checklist of specific steps a responsible attorney should follow in issuing a litigation hold, see Exhibit 34.12.1-39.

#### 34.7.1.1.4.3.1

#### **Litigation Hold Issuance – In General**

- (1) Once the responsible attorney, with the approval of the attorney's manager, has determined that a litigation hold is necessary, the responsible attorney must notify custodians in writing of the responsibility to preserve relevant evidence. Custodians have the responsibility not to delete or alter documents, ESI, or other materials once they receive a litigation hold notice. See CCDM 34.7.1.1.4.3.1.3 for assistance in identifying potential custodians.

- (2) The responsible attorney should generally issue written litigation hold notices by email at the earliest opportunity, and, in no event, later than 30 calendar days after being assigned the case or following a determination that litigation is reasonably anticipated. If a litigation hold is not issued within 30 calendar days, an explanation of the delay in issuing the litigation hold must be included in the legal file and initialed by the manager. The responsible attorney should place copies of the litigation hold notices in the official legal file.
- (3) Responsible attorneys initiating litigation holds should refer to Exhibits 34.12.1-40 and 34.12.1-41 for templates to use in sending out litigation hold notice emails. The subject line of the email that is used to initiate the litigation hold should generally indicate that the email is a litigation hold and reference the name of the case. In addition, the email should be marked as having “high importance.”
- (4) Once a responsible attorney has sent a litigation hold notice email to a custodian, the responsible attorney should ensure that the custodian responds to the email and provides the requested information within seven business days. If a custodian does not respond within seven days, the responsible attorney should follow up with the custodian and, if necessary, the custodian’s manager or the Service Point of Contact. See CCDM 34.7.1.1.4.3.1.3(4) for additional information on the Service Point of Contact.
- (5) The responsible attorney should work with the attorney’s manager and systems operators to ensure that relevant case-tracking systems (e.g., CASE-MIS and TL-CATS) are updated to document that the responsible attorney has taken reasonable and timely steps to identify and preserve evidence. This includes taking steps to establish appropriate “suspense date” tracking events and ensuring that the aspect code “EDISCV” is added to the case to assist in the tracking of cases involving a request for the preservation and collection of ESI. The responsible attorney and the attorney’s manager should also ensure that needed updates to these systems are made throughout the litigation hold process.
- (6) When the responsible attorney issues a litigation hold that includes a hold on ESI, the attorney should notify PA Branch 8 of the litigation hold by completing the [Litigation Hold Custodian List](#). See CCDM 34.7.1.1.4.3.1.3(8) for additional information about the Litigation Hold Custodian List.
- (7) In cases where a litigation hold has been issued or will be issued, the responsible attorney should consider discussing the potential need for exchange of ESI at the Branerton conference. In cases where Counsel has made a decision not to issue a litigation hold under these procedures, if the opposing party or counsel during the Branerton conference affirmatively signals a desire to obtain ESI, then the initial litigation hold procedures identified above should be reconsidered. In cases litigated by DOJ, the responsible attorney will have discussed the need for ESI together with the assigned DOJ attorney in deciding whether to issue a litigation hold. See CCDM 34.7.1.1.4.2(6) respecting early consultation and agreement with DOJ.

34.7.1.1.4.3.1.1

**Litigation Hold Issuance – Timing of Issuance**

- (1) The responsible attorney should issue a litigation hold notice at the earliest possible opportunity and within 30 calendar days after the assignment of the case to the attorney or following the determination that litigation is reasonably anticipated. The timing of the initial litigation hold is inherently fact-specific and will depend on the type of matter and the circumstances affecting the timely preservation of evidence.
- (2) When suit is filed by the Government and a litigation hold is necessary, a litigation hold should generally be issued no later than 30 calendar days after the manager within Counsel with the authority to authorize suit issues an approval to proceed. In certain circumstances, it may be appropriate to issue a litigation hold at an earlier stage. See CCDM 34.7.1.1.4.2(2).
- (3) When suit is filed against the Commissioner or the Service and a litigation hold is necessary, the responsible attorney, absent unusual circumstances, should generally issue the litigation hold within 30 calendar days of being assigned a case. An example of unusual circumstances would include a case in which the Service failed to provide the administrative file to the responsible attorney within the 30-day time period. In cases handled by DOJ, it is expected that consultation with DOJ regarding the steps needed to identify, preserve, and collect relevant evidence will occur shortly after the case is assigned and, consequently, that the question of the need to issue a litigation hold will be resolved within the 30-day timeframe described above. See CCDM 34.7.1.1.4.2(6) for a description of the required consultation with DOJ. If for some reason the responsible attorney is unable to issue the litigation hold notice within 30 days of the triggering event, the responsible attorney must document the reasons for the delay and have the attorney's manager initial the documentation before placing it in the legal file.
- (4) In certain circumstances, a litigation hold may be necessary before litigation has commenced. The responsible attorney should speak with the attorney's manager regarding whether a litigation hold should be issued prior to the commencement of litigation. The determination of whether to issue a litigation hold at an earlier phase depends on numerous factors, including, but not limited to, affirmative indications of a party's intention to litigate, particular case claims and defenses, positions of the parties, evidence quality, evidence availability, or the potential to lose evidence due to retention policies. A litigation hold may be necessary prior to the issuance of the statutory notice of deficiency if, for example, opposing counsel in the case indicates at the examination or Appeals stage that the taxpayer will take the case to court and Counsel has determined that litigation is likely. See CCDM 34.7.1.1.4.3 for additional information on triggering events giving rise to reasonable anticipation of litigation.
- (5) The responsible attorney should always document in the legal file any discussions about whether to initiate a litigation hold and include information reflecting why the responsible attorney, with the approval of the attorney's manager, did not issue the litigation hold at that time.

34.7.1.1.4.3.1.2

**Litigation Hold Issuance – Scope and Timeframe of the Litigation Hold**

- (1) Once the responsible attorney has determined that a litigation hold under these procedures is necessary, the responsible attorney should consider the scope of the litigation hold. The proper scope of the litigation hold is guided by general principles of reasonableness and proportionality based upon the totality of the circumstances. The responsible attorney should consider “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1).
- (2) A litigation hold could be for paper files and tangible evidence only, but it could also include ESI. Most cases in which a litigation hold under these procedures is necessary will likely include ESI. See CCDM 34.7.1.1.4.3.1.4 for a description of various types of ESI. The responsible attorney should direct custodians to IRM 1.15 or CCDM 30.9.2 for additional information on case file management.
- (3) The responsible attorney should also consider the relevant time period to which the litigation hold should apply. The litigation hold notice should clearly specify the timeframe in which relevant information was created. Rarely will the timeframe extend beyond the date litigation begins, which typically is when the petition or complaint is filed. In a very limited number of cases, however, a litigation hold obligation may extend to a point in time beyond the filing date. In these cases, the responsible attorney, with the approval of a manager, may include in the litigation hold relevant evidence created subsequent to the date the petition is filed in the Tax Court or a complaint is filed in another court. In DOJ cases, the responsible attorney should discuss with DOJ whether it is necessary to extend the litigation hold beyond the date that the petition or complaint is filed. Examples of cases in which a litigation hold time period may extend beyond the commencement of litigation include:
  - Cases in which the taxpayer has other years in dispute which will likely lead to litigation over related issues;
  - Cases in which parties or entities related to the taxpayer have ongoing litigation;
  - Cases in which the Service is considering a referral to Criminal Investigation for related years or taxpayers;
  - Cases with related whistleblower claims; and
  - Cases involving employment disputes.
- (4) The responsible attorney may need to discuss the case with custodians before determining the scope and timeframe of the litigation hold.

34.7.1.1.4.3.1.3

**Litigation Hold Issuance – Identifying Custodians**

- (1) In order to send the litigation hold notice, the responsible attorney must first identify potential custodians of relevant documentary and physical evidence and ESI. In most cases, custodians are Counsel and Service employees (either current or former) who were involved in some aspect of the case before litigation commenced, such as a revenue agent or revenue officer.
- (2) For most docketed tax cases, the simplest way to identify custodians is to review the relevant case files and any documents filed by the taxpayer or opposing party. Revenue agents and revenue officers involved in a case will typically be able to identify other potential custodians. In some cases, the responsible attorney may need to do additional research to determine who was assigned to a case. Additionally, once the responsible attorney issues an initial litigation hold notice, custodians may suggest additional custodians to whom the litigation hold notice should be sent. The responsible attorney should discuss this search with the attorney's manager to ensure the responsible attorney identifies all potential custodians. With respect to custodians possessing significant relevant evidence, such as the lead agent or officer assigned to the case, the responsible attorney should consider also calling the custodian to reinforce the need to preserve evidence, especially if the custodian plans to leave the Service or change positions within the Service.
- (3) The duty to preserve extends to information in the possession, custody, or control of the parties and could potentially include information previously sent to the Federal Records Center or maintained by third parties, such as experts or contractors. Where a custodian is an outside contractor (e.g., economist, industry expert, etc.), the responsible attorney should promptly request that the contractor self-collect all relevant evidence, including ESI, and promptly produce it to the responsible attorney for preservation.
- (4) Once the responsible attorney has identified potential custodians, the responsible attorney should determine which of the potential custodians from the Service will be the Service Point of Contact. The Service Point of Contact is the Service employee who is most familiar with the case and who, as a consequence, would likely have additional knowledge about other Service employees (both current and former) who may also possess relevant evidence. The responsible attorney will send the litigation hold notice to the Service Point of Contact and ask the Service Point of Contact to provide information about other, potential custodians. See CCDM Exhibit 34.12.1-40 for the sample notice letter the responsible attorney is to send to the Service Point of Contact. Note that there may be a need for more than one Service 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.
- (5) Once the Service Point of Contact provides the responsible attorney with a list of potential custodians, as well as the other information requested in the litigation hold notice email, the responsible attorney should send a litigation hold notice email to all potential custodians. See CCDM Exhibit 34.12.1-41 for the sample notice letter language outlining what the responsible attorney should send to all potential custodians who are not the Service Point of Contact.

- (6) If the custodian identified as the Service Point of Contact responds to the Service Point of Contact email indicating that he or she is not the appropriate Service Point of Contact, the responsible attorney should ask the custodian if there are other potential custodians who should be designated as the Service Point of Contact. If a Service Point of Contact is not identified, the responsible attorney should issue the litigation hold directly to Service employees who may possess relevant ESI.
- (7) If a responsible attorney has insufficient information to determine whether a potential custodian should be issued a litigation hold, the responsible attorney should send the litigation hold notice email to that custodian and make a determination whether to include a custodian in the litigation hold based on the custodian's response. Responsible attorneys, in conjunction with their managers, should use reasonable judgment in determining the breadth and scope of a litigation hold in light of the relevance of the information a particular custodian may possess or control. In making this determination, the responsible attorney should consider the likely scope of discovery in the case.
- (8) When the responsible attorney issues a litigation hold that includes a hold on ESI, the attorney should notify PA Branch 8 of the litigation hold by completing the [Litigation Hold Custodian List](#). This form uploads relevant information to a PA Branch 8 database, which is used to track custodians and assist with collection.
- (9) When DOJ requests that Counsel issue a litigation hold, often the DOJ attorney assigned to the case does not know who the appropriate custodians are. The responsible attorney should make recommendations about who the appropriate custodians are and why. Once the responsible attorney and DOJ have agreed to a custodian list, the responsible attorney should document that list in both the legal file and in a letter to DOJ.
- (10) See CCDM 34.7.1.1.4.3.2 regarding litigation hold maintenance and what to do if a custodian notifies the responsible attorney that the custodian will be leaving the Service or Counsel, changing positions or organizations within the Service or Counsel, or if the attorney learns that a custodian may have lost or possibly destroyed relevant evidence.

#### 34.7.1.1.4.3.1.4

#### **Litigation Hold Issuance – Identifying Sources of Evidence**

- (1) Documents and other tangible evidence are often found in files associated with a particular taxpayer or other party who has had some involvement in the matter that is in litigation (e.g., administrative files, legal files, personnel files, etc.). In tax cases, the administrative file should contain most, if not all, of the relevant, non-ESI evidence. The responsible attorney should always ask custodians if there might be any other non-ESI evidence relevant to the litigation that is not in the responsible attorney's possession.
- (2) ESI is data generated by custodians and maintained in a form accessible through use of an electronic device. The most common of these sources (also referred to as repositories) are



desktops, laptops, and removable media, as these types of computerized equipment are what custodians most frequently use. Other types of ESI repositories maintained by IRS-IT are network drives and email repositories such as Outlook. Additionally, Service business units often maintain relevant ESI in database-type repositories such as Appeals Centralized Database System (ACDS), Audit Information Management System (AIMS), Issue Management System (IMS), Integrated Collection System (ICS), Integrated Data Retrieval System (IDRS), Shared Folders, SharePoint, and Report Generation Software (RGS). Other repositories of ESI are listed in the definition of ESI in the Glossary.

- (3) Although some data within the Service and Counsel is maintained on servers managed by IRS-IT, some data is not backed up to servers and is maintained with the custodians. Data not backed up to the IRS-IT-managed servers is known as custodian-maintained data. Email is one type of ESI that is maintained both on servers and by custodians. Email maintained on IRS-IT-managed servers are subject to a 500 megabyte file size limitation and to retention policies imposed by IRS-IT. A custodian may also have a local personal storage table (.pst file), however, which holds certain emails and accompanying attachments and can then be stored in any number of locations. In some cases, multiple versions of the same file may be located in more than one place. The responsible attorney should, through discussions with custodians, try to discern the various places where relevant data, such as email, could be located.
- (4) The Federal Records Act requires Counsel and the Service to make and preserve records containing adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency in order to protect the legal and financial rights of the Government and of persons directly affected by the agency's activities. Such records may take a number of forms, and not all forms are listed here. The responsible attorney should ensure, through discussions with custodians, that all relevant records are identified, even if the type of record is not listed in this section.
- (5) If a custodian indicates that personal email accounts were used to conduct official business for the case, although this practice is prohibited, the responsible attorney should immediately direct the custodian to forward all relevant emails to the custodian's work email account to ensure those documents are preserved in the work email account. If the custodian used personal equipment or devices to conduct official business related to the case, the responsible attorney should contact PA Branch 8 immediately to determine how best to preserve that evidence.
- (6) If the responsible attorney learns that a custodian possesses sensitive evidence, including grand jury material, secret or top secret material, or Congressional records, or learns that a custodian who possesses evidence is also subject to an unrelated investigation by TIGTA, the responsible attorney should immediately contact PA Branch 8 for guidance on how best to handle discovery with respect to that evidence.
- (7) See 34.7.1.1.4.3.2 for additional information on what the responsible attorney should do if a custodian indicates an imminent reason to collect relevant evidence, such as a change in job or equipment malfunction.

34.7.1.1.4.3.2

**Litigation Hold Maintenance**

- (1) The responsible attorney should revisit the need for a litigation hold from time to time as the case develops and the claims and defenses in the case become clearer. Additionally, until a litigation hold is lifted, the responsible attorney must routinely send an email to custodians to remind them of their continuing obligation to preserve the material. This reminder notice should be sent, at a minimum, every six months after the initial notice email is sent. See Exhibit 34.12.1-42 for a template of a litigation hold reminder notice that can be sent by email.
- (2) To ensure the reminder notice has been received, the responsible attorney should direct the recipient of the notice to respond within seven business days acknowledging receipt of the email and providing a brief statement as to whether the ESI or other evidence remains preserved and unaltered and where the information is being stored. If the responsible attorney does not receive a response within seven days, the responsible attorney should follow up with the custodian and, if necessary, the custodian's manager or the Service Point of Contact. In addition, the responsible attorney should keep an open line of communication with custodians, by, for example, periodically calling them to ensure that ESI is preserved.
- (3) A "suspense date" reminder in TL-CATS should be created every six months establishing a new reminder date six months hence to ensure the responsible attorney is aware of the obligation to send this reminder notice every six months.
- (4) When custodians notify the responsible attorney that their data might need to be collected immediately, for example, when a custodian is leaving the Service or Counsel, the responsible attorney should promptly contact PA Branch 8 by sending a request for assistance to TSS4510 and also completing an Electronic Discovery Request, also known as an EDR. See CCDM 34.7.1.1.4.3.3 for more information on how to complete an EDR.
- (5) ESI normally located on the custodian's computer equipment is forensically wiped within 30 days after separation from the Service so the responsible attorney should act quickly to ensure no relevant evidence is deleted or destroyed. The responsible attorney should talk with the departing custodian's manager to ensure that all relevant evidence and IT equipment is properly preserved. The responsible attorney should instruct the custodian and the custodian's manager to leave a note prominently attached to the custodian's laptop and other equipment that states (1) the laptop should not be destroyed, wiped, or altered until the data on the laptop is preserved pursuant to an EDR because the computer is subject to a litigation hold and (2) provide contact information for the responsible attorney. The responsible attorney should also notify any departing custodians that they may be called to testify in the future within respect to matters involving litigation holds to which the custodians are subject.
- (6) When custodians notify the responsible attorney that IT equipment failed (e.g., a hard drive malfunction), the responsible attorney should immediately notify PA Branch 8 by sending an

email to TSS4510 requesting preservation of any ESI that may have been lost or damaged as a result of the equipment failure.

- (7) If during the course of maintaining a litigation hold a responsible attorney learns that ESI may have been altered, destroyed, or otherwise compromised, the responsible attorney should immediately notify PA Branch 8 to coordinate an attempt to recover that ESI. See CCDM 34.7.1.1.4.3.4 for a discussion of the role of PA Branch 8 in litigation hold processing.
- (8) If a litigation hold case is transferred to another attorney for any reason, the responsible attorney should ensure that the new attorney understands and resumes the litigation hold responsibilities associated with that case.
- (9) During the maintenance phase, the responsible attorney should be prepared for the potential need to collect, process, and produce relevant evidence. If the responsible attorney needs to have ESI collected, the responsible attorney should consider what evidence opposing counsel may request and whether the responsible attorney is capable of producing such evidence.
  - In DOJ cases, the DOJ attorney assigned the matter will have a conference with opposing counsel to create a discovery plan under FRCP Rule 26(f). The DOJ attorney may discuss at the conference various types of evidence, including ESI. It is imperative that the responsible attorney discuss with DOJ available evidence to prevent the DOJ attorney from making any inaccurate representations to the court about what records the Service possesses. It is also important for the responsible attorney and DOJ to agree on the list of anticipated custodians, file types, and preservation methods. When possible, secure agreement from the opposing counsel on these matters at the earliest opportunity.
  - In Tax Court, the responsible attorney should consider what evidence the attorney may need to produce as part of the informal discovery process under Branerton Corp. v. Commissioner, 61 T.C. 691 (1974), and the Tax Court Rules. Where a litigation hold under these procedures and exchange of ESI are called for, the responsible attorney should secure agreement from the petitioner or opposing counsel on the custodian list and search terms at the Branerton conference or other date mutually agreed upon by the responsible attorney and opposing counsel or petitioner. See CCDM 34.7.1.1.4.3.1(7) for guidance on how to address ESI related issues during the Branerton conference.
- (10) Responsible attorneys are encouraged to include PA Branch 8 early in the matter in order to discuss preservation of ESI. PA Branch 8 can also assist with the determination of search criteria as needed to find the appropriate information necessary to meet discovery obligations. Search criteria include key words, date ranges, and definitions that IRS-IT can use to isolate relevant material within large quantities of ESI. To the extent possible, search terms and other review procedures should be negotiated with and agreed to by DOJ or the opposing party. Search terms should be carefully considered to avoid over-collection of ESI. The use of general terms (e.g., “tax shelter” or “transfer pricing”) should be avoided. General search terms should generally only be used in conjunction with other terms that are more specific to the case. Responsible attorneys should coordinate with their managers, opposing counsel, and PA

Branch 8 in developing search criteria. In order to contact PA Branch 8 at this stage, responsible attorneys should send an email to TSS4510 requesting assistance.

#### 34.7.1.1.4.3.3

### **Litigation Hold Collection**

- (1) After the responsible attorney has issued a litigation hold, the responsible attorney will determine if collection and processing of relevant evidence is necessary. In some cases, collection may never be necessary, especially in cases that settle or are dismissed prior to discovery. In other cases, only some of the potential evidence is collected such as when a custodian is separating from the Service or Counsel. As the responsible attorney (or the DOJ attorney) engages in discovery discussions, either through FRCP Rule 26 or [Branerton](#) conferences, the responsible attorney, with the approval of the attorney's manager, may determine that it is necessary to collect, process, review, and produce to the opposing party or DOJ the relevant evidence that is not in the responsible attorney's possession or that is duplicative of any evidence already in the responsible attorney's possession. In that case, the responsible attorney should first collect all potential evidence contained in files or on paper that is not within the attorney's possession.
- (2) The responsible attorney is often capable of coordinating the collection of paper files or other tangible materials from custodians by simply requesting that custodians mail copies of the various items to the responsible attorney for discovery purposes. Alternatively, the custodian may be able to scan and email the documents to the responsible attorney. If the responsible attorney has questions about how to collect paper files or other tangible evidence, the responsible attorney should discuss any potential issues with the attorney's manager. PA Branch 8 does not assist in the collection of non-ESI evidence.
- (3) It can take several months for IRS-IT to collect ESI. The assigned attorney should begin the ESI collection process as soon as it is determined that ESI will be sought in discovery to ensure that there is sufficient time for review of the data prior to the time it must be produced.
- (4) In order to preserve metadata and original documents, custodians should preserve evidence in its native format.
- (5) If the collecting and processing of ESI is required, the attorney should complete an [EDR](#) to inform PA Branch 8 that collection is required. PA Branch 8 will transmit the EDR to IRS-IT to initiate the collection process.

Note: The responsible attorney should confirm through the [Discovery Directory](#) the information needed to fill out this form, such as the SEID number, title, contact information, business unit, manager, and management level. The failure to include required information, especially the SEID, could delay the collection of ESI.

- (6) PA Branch 8 and IRS-IT need specific information to complete the collection process quickly and efficiently. If the responsible attorney cannot provide certain information to PA Branch 8, the collection process may be delayed. The responsible attorney should be prepared to give PA

Branch 8 the following information at the time the responsible attorney starts the collection process:

- A list of the custodians identified as being in possession or control of relevant evidence (see CCDM 34.7.1.1.4.3.1.3);
- The identifying information (SEIDs) of the custodians as verified through the Discovery Directory (see CCDM 34.7.1.1.4.3.1.3(8));
- The priority level of the case, with justification, such as court deadlines or the date a custodian will separate from employment (see CCDM 34.7.1.1.4.3.3(8));
- A listing of any known ESI repositories used to store relevant evidence (see CCDM 34.7.1.1.4.3.1.4);
- Copies of the complaint, petition, defense letter, or referral letter;
- Copies of statutory notice of deficiency, notice of final partnership administrative adjustment, worker classification, notice of determination, or claim disallowance; and
- Relevant search criteria (see CCDM 34.7.1.1.4.3.2(9)).

(7) After identifying all possible custodians, the responsible attorney should consider whether the role a custodian had in the matter warrants the collection of that custodian's evidence. The litigation hold collection need only cover custodians, who are those individuals likely to have information that is relevant to any party's claim or defense in the case. See FRCP Rule 26(b)(1). A litigation hold need not cover every person who had contact with a case. For example, managers and executives who have only been advised on the status of a case by email and have not responded to the status email may not possess evidence relevant to the claims or defenses in the case.

(8) The priority of requests for ESI communicated through EDRs is based upon an evaluation of various, objective factors. No one factor is entirely dispositive and the weighting of the factors can vary from case to case. The principal, pertinent factors to be weighed in resolving priority include:

- Separation of an employee from the Service or Counsel;
- Imminent discovery requirements or other court-imposed deadlines;
- Importance to tax administration of the case or issues within a case;
- Significance of the amount in controversy;
- Large volume of ESI;
- ESI consisting of sensitive information, such as grand jury material (See CCDM 34.7.1.1.4.3.1.4(6) concerning sensitive evidence); and
- Other circumstances that would require immediate collection or involve a protracted period for collection or processing.

(9) If a dispute about the relative priority of EDRs occurs, PA Branch 8 will resolve the priority of EDRs by consultation with its management and the responsible attorneys involved. Disputes that cannot be resolved by PA Branch 8 will be elevated through the usual reconciliation process. See CCDM 31.1.4.6.

- (10) Once PA Branch 8 receives the EDR, PA Branch 8 assigns the EDR to a PA Branch 8 attorney or technology specialist (PA Branch 8 contact) who will coordinate with IRS-IT, which handles the collection of ESI. The PA Branch 8 contact will contact the responsible attorney promptly and no later than seven calendar days after the EDR submission to ask any necessary questions, to discuss whether the attorney wishes to have PA Branch 8 review the ESI once it is collected, and to discuss the appropriate level of priority. If a case is subsequently reassigned to a different Branch 8 attorney, the new PA Branch 8 contact will send an email to the responsible attorney within three calendar days noting the reassignment.
- (11) The PA Branch 8 contact will notify the responsible attorney when the EDR is submitted to IRS-IT. The PA Branch 8 contact will also provide an estimated time for completion, track the EDR, and give updates to the responsible attorney based upon information from IRS-IT.
- (12) During the course of litigation, events may occur that affect the priority of collection, such as a custodian's imminent separation from employment, the custodian's possession of grand jury information, changes in court-imposed deadlines, and any potential events that could lead to spoliation, such as upgrades to operating software on a custodian's computer or the transfer of the custodian to another business unit of the Service. If events occur that could impact the priority of the responsible attorney's case, the responsible attorney should contact the assigned PA Branch 8 contact who will address the matter with IRS-IT.
- (13) Collection can be accomplished remotely in the case of most desktops, laptops, and network servers, and in the case of removable media. Where remote collection and preservation is not possible, IRS-IT collects the data directly from the custodian and returns it once preservation is complete. Information on the mechanics of the preservation and collection process for user-created files is contained on the [Litigation Hold Information Site](#).

#### 34.7.1.1.4.3.4

#### **Litigation Hold Processing**

- (1) If a litigation hold does not involve ESI, processing of documents and other tangible evidence simply involves following normal discovery procedures to prevent production of certain evidence that is not relevant, is privileged, or contains third party return information as defined in IRC § 6103. Responsible attorneys should discuss with their managers the appropriate review needed before producing paper documents and other tangible evidence to the opposing party or to DOJ in discovery.
- (2) If preservation and collection of ESI are necessary, IRS-IT processes the ESI to remove encryption and applies the search terms and criteria set forth in the EDR. LBI Technical Advisors and PA Branch 8 technology specialists, as appropriate, will load the processed ESI on a review tool for further processing (including de-duplication). PA Branch 8 attorneys are available to assist in further culling the ESI by working with the responsible attorney to narrow search terms and to remove nonresponsive ESI. See CCDM 34.7.1.1.4.3.2(9) for additional

information on the development of search criteria. PA Branch 8 and IRS-IT will then provide responsive ESI, such as emails and attachments, for review by the responsible attorney.

- (3) The responsible attorney is wholly responsible for compliance with discovery obligations and the production of evidence in a Tax Court case or for providing the evidence to DOJ in litigation handled by DOJ. PA Branch 8 attorneys can assist, however, with document review by performing first-level review of documents prior to production to external parties to ensure relevance, preservation of privilege claims, and the protection of third party return information as defined in IRC § 6103. Privileges, privacy, and disclosure issues, as well as any legal issues that arise during discovery, should be coordinated by the responsible attorney with PA Branches 6 and 7. The responsible attorney in a case may request assistance with first-level review from PA Branch 8 by sending a request for assistance to TSS4510.

Note: ESI obtained from a Service or Counsel executive must be reviewed by non-bargaining unit GS-15 attorneys unless otherwise determined.

- (4) PA Branch 8 ESI paralegals, technology specialists, and attorneys are available to assist with all ESI related discovery matters before the United States Tax Court, district court, and other courts. Based upon workload, this assistance may not be available in all instances. The following guidelines apply to Branch 8 assistance in ESI matters:

- If the responsible attorney requests the services of PA Branch 8 for document review, the responsible attorney will be asked to provide enough information about the case to allow the Branch 8 attorney to perform a review for relevance. The responsible attorney may provide this information informally by telephone contact or through a presentation by the responsible attorney on the issues in the case relevant to the discovery request. The responsible attorney and manager will serve as the ultimate reviewer, after PA Branch 8's first-level review.
- First-level review by the assigned PA Branch 8 attorney should generally take place within 14 calendar days after receipt of the information from IRS-IT. In the case of large volumes of ESI, the PA Branch 8 attorney will coordinate a reasonable extension of time with the responsible attorney.
- Once first-level review is complete, the results will be forwarded to the responsible attorney for further review and production. PA Branch 8 will be available to assist with any technological issues prior to production.

#### 34.7.1.1.4.3.5

#### **Litigation Hold Release and EDR Termination**

- (1) Typically the legal requirement to preserve information terminates upon final case disposition, when a final, non-appealable decision or judgment is reached in existing litigation, or when the Service no longer reasonably anticipates litigation. In a Tax Court case, a decision is final when the parties file a stipulated decision entered by the court, when all appeals have been exhausted, or the period for filing an appeal has expired. See IRC § 7481. Similar principles of

finality apply with respect to cases litigated in other courts. Until such time as a matter is final, all evidence should be preserved in a manner exempting it from the normal records retention requirements and policies. When a decision other than a stipulated decision is entered in the case, the responsible attorney should still wait until the appeals period has expired before lifting the litigation hold. In DOJ cases, the responsible attorney should not release a litigation hold without written confirmation from the DOJ attorney responsible for the litigation indicating that it is appropriate to do so. This written notification may take the form of email.

- (2) Once a litigation hold can be released, the responsible attorney should notify custodians that they no longer need to retain evidence for the case. If a litigation hold does not include ESI, the responsible attorney can simply notify custodians by email that they no longer need to retain documents and other tangible evidence related to the case. Normal records retention schedules and policies will resume and control.
- (3) For a litigation hold with ESI, the responsible attorney should send an email to the assigned PA Branch 8 contact to inform PA Branch 8 that the EDR can be terminated. The responsible attorney should notify PA Branch 8 via email within 21 calendar days of receiving notice of a final decision, judgment, or other notification that there is no further legal requirement to preserve the information. This email to PA Branch 8 should include a copy of the decision, judgment, or other document demonstrating final determination.
- (4) PA Branch 8 will remove the case and custodians from the litigation hold custodian database maintained by PA and inform IRS-IT of the litigation hold release. Once IRS-IT receives an EDR termination request, all collected copies of ESI acquired and retained pursuant to an EDR and litigation hold are permanently destroyed, and all account exemptions from retention policy operation are removed. Before a litigation hold is terminated, however, PA Branch 8 will ensure that custodians are not subject to multiple litigation holds, which may involve retaining data past the termination date of a particular litigation hold.
- (5) Because PA Branch 8 regularly maintains the litigation hold custodian database and shares that database with IRS-IT, PA Branch 8 will periodically contact responsible attorneys to determine if litigation holds should be terminated. The responsible attorneys should respond timely to PA Branch 8's requests to review litigation holds and terminate any litigation holds that are no longer necessary.



**Revised sections in 34.12.1:**

**Exhibit 34.12.1-38**

**Glossary of Terms and Legal References**

Note: Because e-discovery is an emerging field, these definitions are the subjects of constant discussion and revision, in case law and among practitioners.

- (1) **Collection:** The process of gathering data (paper, electronically stored information (ESI), and other tangible things) which occurs after a litigation hold notice has been sent to custodians and these individuals have responded with the type and location of information in their possession. In the e-discovery process, collection occurs in two phases performed by IRS-IT. In Phase 1, the ESI is copied and saved to a secured server, but the ESI is not searched. Phase 2 involves culling through the ESI, via key word or Boolean searches, to process and review the data to retrieve ESI responsive to a discovery request or court order to produce relevant ESI. Collection and preservation are interdependent steps in the litigation hold process, but often the responsible attorney does not collect from every person to whom a litigation hold to preserve is issued.
- (2) **Court/courts:** Refers to District Court, Tax Court, Bankruptcy Court, Court of Federal Claims, and may include administrative forums, such as the Merit Systems Protection Board (MSPB), Federal Labor Relations Authority (FLRA), and Equal Employment Opportunity Commission (EEOC). This term may include Congress or other oversight bodies where inquiries from those bodies are determined to require application of the procedures in CCDM section 34.7.1.1.4.
- (3) **Custodian:** A person having possession or control over relevant paper or electronic evidence subject to discovery. The custodian is required to preserve relevant evidence in their custody or control and respond to litigation hold notices. The responsible attorney must take reasonable steps to ensure that custodians do not alter or destroy relevant evidence in a custodian's possession.
- (4) **De-duplication:** The process of searching for and deleting duplicate information. In email chains, for example, multiple copies of the same email would be eliminated.
- (5) **E-discovery:** The process of searching for relevant electronic data in response to a discovery request. The steps include finding, collecting, and producing relevant electronic information wherever stored, subject to applicable privileges.
- (6) **Electronic Discovery Request (EDR):** A written communication prepared by the responsible attorney and submitted to PA Branch 8 for assistance in directing IRS-IT to start the process of searching, preserving, and collecting ESI of custodians. An EDR must be specific and include custodian information, search terms, priority level of the request with justification (e.g., high priority retiring employee or computer issues), and timeframes.

(7) **Electronically Stored Information (ESI):** Any data, whether stored on a computer, network servers, or any peripheral storage device, that is in electronic form. ESI may include but is not limited to: electronic files, communications, including email, instant messages, and voicemail (sent or received), data produced by calendar software, and information management software. In addition to specific data that are electronically stored and readily retrievable, ESI includes data that may not be visible that is generated by a computer hard-drive, email and instant messaging, information management software, handheld computer devices (e.g., Blackberry), telecommunications devices, and back-up storage devices. ESI may be stored on different electronic devices and removable devices (e.g., internal and external drives, smart phones, servers, laptops, backup tapes, thumb drives, CDs, DVDs).

(8) **Evidence:** Includes all records, whether electronic or paper form, created, received, or maintained on behalf of the Service or in the transaction of official Service business.

(9) **IRS Information Technology (IRS-IT):** IRS-IT is responsible for initiating and managing the EDR collection process, conducting initial searches using EDR search terms and date parameters, and engaging in a multi-step process to reduce ESI data from a large data set to a manageable amount for review. This group is also responsible for removing all ESI encryptions and password protections and delivering the collected documents, emails, and spreadsheets to a results folder.

(10) **Litigation hold:** The temporary suspension of the normal record retention policies to ensure relevant evidence is preserved for use in litigation. This process requires searching, identifying, isolating, and preserving such evidence (whether in paper, electronic, or other tangible form) when litigation is reasonably anticipated or has already commenced.

(11) **Litigation hold notice:** A written notice to custodians alerting them of existing or reasonably anticipated litigation, directing them to preserve relevant evidence, and requiring them to provide information in response to the notice. A litigation hold notice notifies the custodians receiving it of their obligation not to destroy or alter relevant documents. See Exhibits 34.12.1-40 and 34.12.1-41.

(12) **Metadata:** Information about a particular data set or document that describes how, when, and by whom it was created, accessed, and modified, as well as how it was formatted.

(13) **Native format:** The preservation of a document in its original format. For example, Microsoft Word file will be preserved as a Microsoft Word file with a file extension such as .doc, .docx, or .rtf.

(14) **Predictive coding:** A form of computer-assisted review that allows parties in litigation to reduce the time and costs associated with traditional, manual review of large volumes of documents. Computers are programmed to predict the relevance of documents to a discovery request and identify which documents may or may not be responsive. The parties apply search criteria such as keywords, dates, custodians, and document types to a sample of documents and utilize programs to recognize patterns of relevance and identify relevant documents. The parties then further review the identified relevant documents, instead of the entire universe of documents, for issues such as privilege and relevance. See Dynamo Holdings Ltd. Partnership v. Commissioner, 143 T.C. 183 (2014).

(15) **Preservation:** The process of locating, isolating, and maintaining relevant information (paper, ESI, and other tangible evidence) and ensuring that the information is not destroyed or altered. The duty to preserve is generally triggered when litigation is reasonably anticipated or has actually commenced. The litigation hold and issuance of the litigation hold notice are the initial steps in the preservation process. The preservation process is initially accomplished by the custodians, and collection of relevant evidence may occur later during the litigation hold process. Preservation and collection are interdependent steps in the litigation hold process.

(16) **Production:** The process of delivering to another party, or making available for that party's review, documents deemed responsive to a discovery request or court order.

(17) **Proportionality:** An emerging recognition of the practical reality in the world of electronic discovery that one size does not fit all. The mandate to preserve does not necessarily translate into a mandate to collect and process everything. It allows for consideration of reasonable costs and burdens to one party relative to the needs of the other in making decisions regarding ESI searches, isolation, preservation, collection, and production. It requires acting reasonably and in good faith. See proposed amendments to FRCP 26(b)(1).

(18) **Removable media:** CDs, DVDs, thumb drives, floppy disks, and other portable data storage devices, including government cell phones.

(19) **Repositories:** The type of equipment on which ESI may be stored. Examples include computers, network drives, email servers, external storage devices, CD ROMs, DVD ROMs, external hard drives, thumb drives, and cell phones.

(20) **Responsible attorney:** The Counsel attorney assigned as the lead attorney in a case where litigation is reasonably anticipated or has already commenced. In Federal District Court and Court of Federal Claims cases involving the Service, an attorney from the Department of Justice or the Office of United States Attorney represents the government, but for purposes of litigation hold procedures, the assigned Counsel attorney remains the responsible attorney.

(21) **Sanctions:** Punishment imposed by the court to deter future improper behavior. Examples of potential sanctions which may result from spoliation include monetary sanctions in an amount to cover reasonable expenses, the drawing of an adverse evidentiary inference against the Service concerning the material it failed to preserve, evidence or claim preclusion, adverse determination, and charges of contempt. See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

(22) **Service Point of Contact:** The Service employee who is most familiar with the case, and who would have knowledge of other Service employees who may also possess relevant paper records, ESI, and other tangible evidence. This person may also provide information about relevant Service electronic repositories that need to be accessed to preserve relevant ESI.

(23) **Spoliation:** The destruction, alteration, or suppression of relevant evidence where the party in possession had an obligation to preserve the evidence at the time it was destroyed,

altered, or suppressed. Spoliation may result in a negative evidentiary inference imposed by a third party adjudicator and may support the imposition of sanctions.

(24) **Triggering event:** An event that gives rise to the obligation to preserve relevant evidence. Federal rules look to when a party should reasonably anticipate litigation as the triggering event. The commencement of litigation through court filings is always a triggering event, but the duty to preserve may arise before that time.

**Exhibit 34.12.1-39 – Litigation Hold Checklist**

- I. Issuance (CCDM 34.7.1.1.4.3.1)
  - Discuss with your manager and, where appropriate, DOJ, whether a litigation hold should be issued.
  - Consider whether ESI should be discussed with the opposing party at the Branerton conference (Tax Court only).
  - Document decisions regarding determination of whether to issue a litigation hold in the legal file, and, if necessary, in a letter to DOJ.
  - Identify Service Point of Contact.
  - Send initial litigation hold notice email to Service Point of Contact.
  - Identify custodians.
  - Send litigation hold notice email to other custodians.
  - Confirm receipt of litigation hold notice email by the Service Point of Contact and the custodians within 7 days.
  - Place copies of notice emails and responses in the legal file.
  - Determine likely sources of evidence based on custodian responses.
  - Submit Litigation Hold Custodian List Form.
  - Work with manager to ensure all case-tracking systems are updated.
  
- II. Maintenance (CCDM 34.7.1.1.4.3.2)
  - Discuss discovery needs (including possible search terms) in Branerton conference or with DOJ attorney.
  - Send reminder emails every six months. List dates of reminder emails below:  

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 Confirm receipt of reminder emails by custodians. List date of receipt confirmed for all custodians below:  

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 Notify PA Branch 8 through TSS4510 of any changes to collection priority or case assignments.
  
- III. Collection (CCDM 34.7.1.1.4.3.3)
  - Instruct custodians to send all paper files to attorney.
  - Fill out Electronic Discovery Request form for PA Branch 8 and send TSS4510 request for assistance.
  
- IV. Processing (CCDM 34.7.1.1.4.3.4)
  - Work with PA Branch 8 on first level review (if applicable).
  - Review potential evidence for relevance, privileges, and IRC § 6103 information.
  - Produce evidence to opposing party or DOJ.
  
- V. Release and EDR Termination (CCDM 34.7.1.1.4.3.5)
  - Determine that litigation hold may be released based on final decision/judgment or notification from DOJ.
  - Notify custodians by email that the litigation hold may be released.
  - Notify PA Branch 8 that litigation hold may be released.
  - Work with manager to ensure relevant case-tracking systems are updated.

**Exhibit 34.12.1-40 — Notice Email Template for Service Point of Contact**  
**You are required to promptly forward this notice to your immediate manager.**

We have identified you as the Service Point of Contact and the employee most likely to have information regarding the matter described below:

*<name of case and description of the issue, including timeframe>.*

Please read this email carefully. The Office of Chief Counsel is issuing a litigation hold in this matter. Until directed otherwise, you are required to preserve all records, including electronically stored information (ESI), that you have relating to the issues in this matter. **You must respond to this email with the following information within seven days.**

**WHAT A LITIGATION HOLD MEANS FOR YOU:**

A litigation hold imposes a legal duty to preserve relevant evidence in anticipation of litigation and suspends the normal record retention policies to ensure certain records are collected and preserved for use in litigation. The potential consequences of failing to preserve relevant evidence are serious and may result in sanctions against the IRS and you personally. The Office of Chief Counsel needs your help in ensuring no relevant evidence is damaged, altered, lost, or destroyed.

**ONGOING RESPONSIBILITIES AND ADDITIONAL INFORMATION:**

There is no need to collect, copy, or produce any materials at this time, however, please take all steps necessary to ensure that materials are not damaged, altered, lost, or destroyed. ESI should be preserved in its originally created format. This preservation order applies to, and supersedes, all actions scheduled or required as part of normal record retention and disposition procedures under the Federal Records Act.

SEID: [Click here to enter text.](#)

Brief description of your involvement with this matter:

[Click here to enter text.](#)

Names of other employees who were involved in this matter (including former employees and third parties such as contractors or outside experts):

[Click here to enter text.](#)

Names of employees listed above who have left the Service, announced plans to retire or leave the Service in the next six months, or plan to switch positions within the Service in the next six months:

[Click here to enter text.](#)

Types of records you have related to this matter (check all that apply):

Paper files

- Email and attachments
- Microsoft Office documents (e.g., Word, Excel, Power Point)
- PDFs
- Grand Jury information
- Other files created in any other application, system or database (please specify):  
[Click here to enter text.](#)

Location of records you have related to this matter (check all that apply):

- Paper files or boxes
- Hard drive
- Servers
- .pst files
- Windows folder
- Sharepoint site
- USB drive
- CD/DVD
- Cell phone/Blackberry
- Other storage location (please specify):  
[Click here to enter text.](#)

Names of any folders or other storage devices in which you stored ESI for this matter:  
[Click here to enter text.](#)

Any words or abbreviations that you use to describe the ESI for this matter that might help identify relevant information:  
[Click here to enter text.](#)

Any encryption information or passwords needed to access ESI specific to this matter:  
[Click here to enter text.](#)

Check this box if any relevant material may have been stored on devices or in systems which experienced problems which may affect our ability to locate all relevant material (e.g., hard drive malfunction) and provide the date of the incident, the names and contact information of any personnel who were assigned to address the incident:

Click here to enter text.

Check this box if you received a loaner device, and, if so, what type of device: Click here to enter text.

Check this box if you used your personal email, computer, or other accounts or devices at any time to conduct official business related to this matter.

Date you began work on this matter: Click here to enter text.

Date you finished work on this matter: Click here to enter text.

Post of duty during your work on this matter: Click here to enter text.

Manager's name: Click here to enter text.

Check this box to indicate you understand that you may be called upon to testify in this matter, even if you leave the Service.

Type your initials in this box to indicate you understand that you must not alter or destroy any records relevant to this case, whether in hard copy or electronic form.

Click here to enter text.

Check this box to indicate that you believe you are the appropriate Service Point of Contact (see description below).

#### **THE ROLE OF THE SERVICE POINT OF CONTACT:**

The Service point of contact is the IRS employee who is most familiar with this matter, and would have additional knowledge about other IRS employees who may also possess paper files and ESI. As the Service Point of Contact, you are responsible for identifying other employees who may have worked on this matter and assisting the attorneys assigned to this matter in court. If you believe you are not the appropriate Service Point of Contact, please contact <Attorney Name> <Attorney Phone Number> or <Attorney Email Address> immediately.

#### **SEPARATING EMPLOYEES:**

If you are aware that IRS employees who are familiar with this matter are planning to leave the Service or Counsel, or are switching positions within the Service or Counsel, please notify the attorney who issued this notice of this so that their ESI can be promptly collected and preserved. In addition, you should instruct the employees to leave a note prominently attached to your laptop and other equipment that (1) the laptop should not be destroyed, wiped, or altered until the data on the laptop is preserved pursuant to an E-discovery Request (EDR) because the computer is subject to a litigation hold and (2) provide the contact information for the attorney who sent you this notice.

For additional information regarding litigation holds, please see [IRM 25.3.1.7](#) and visit the [Litigation Hold intranet site](#).

Thank you for your prompt attention to this matter. If you have any questions, please contact <Attorney Name> at <Attorney Phone Number> or <Attorney Email Address>.



**Exhibit 34.12.1-41— Notice Email Template for Custodians**

**You are required to promptly forward this notice to your immediate manager.**

We have identified you as someone likely to have information regarding the matter described below:

*<name of case and description of the issue, including timeframe>.*

Please read this email carefully. The Office of Chief Counsel is issuing a litigation hold in this matter. Until directed otherwise, you are required to preserve all records, including electronically stored information (ESI), that you have relating to the issues in this matter. *You must respond to this email with the following information within seven days.*

**WHAT A LITIGATION HOLD MEANS FOR YOU:**

A litigation hold imposes a legal duty to preserve relevant evidence in anticipation of litigation and suspends the normal record retention policies to ensure certain records are collected and preserved for use in litigation. The potential consequences of failing to preserve relevant evidence are serious and may result in sanctions against the IRS and you personally. The Office of Chief Counsel needs your help in ensuring no relevant evidence is damaged, altered, lost, or destroyed.

**ONGOING RESPONSIBILITIES AND ADDITIONAL INFORMATION:**

There is no need to collect, copy, or produce any materials at this time, however, please take all steps necessary to ensure that materials are not damaged, altered, lost, or destroyed. ESI should be preserved in its originally created format. This preservation order applies to, and supersedes, all actions scheduled or required as part of normal record retention and disposition procedures under the Federal Records Act.

SEID: [Click here to enter text.](#)

Name and contact information of manager: [Click here to enter text.](#)

Brief description of your involvement with this matter:

[Click here to enter text.](#)

Names of other employees who were involved in this matter (including former employees and third parties such as contractors or outside experts):

[Click here to enter text.](#)

Names of employees listed above who have left the Service, announced plans to retire or leave the Service in the next six months, or plan to switch positions within the Service in the next six months:

[Click here to enter text.](#)

Types of records you have related to this matter (check all that apply):

- Paper files
- Email and attachments
- Microsoft Office documents (e.g., Word, Excel, Power Point)
- PDFs
- Grand Jury information
- Other files created in any other application, system or database (please specify):

[Click here to enter text.](#)

Location of records you have related to this matter (check all that apply):

- Paper files or boxes
- Hard drive
- Servers
- .pst files
- Windows folder
- Sharepoint site
- USB drive
- CD/DVD
- Cell phone/Blackberry
- Other storage location (please specify):

[Click here to enter text.](#)

Names of any folders or other storage devices in which you stored ESI for this matter:

[Click here to enter text.](#)

Any words or abbreviations that you use to describe the ESI for this matter that might help identify relevant information:

[Click here to enter text.](#)

Any encryption information or passwords needed to access ESI specific to this matter:

[Click here to enter text.](#)

Check this box if any relevant material may have been stored on devices or in systems which experienced problems which may affect our ability to locate all relevant material (e.g., hard drive malfunction) and provide the date of the incident, the names and contact information of any personnel who were assigned to address the incident.

[Click here to enter text.](#)

Check this box if you received a loaner device, and, if so, what type of device: [Click here to enter text.](#)

Check this box if you used your personal email, computer, or other accounts or devices at any time to conduct official business related to this matter.

Date you began work on this matter: [Click here to enter text.](#)

Date you finished work on this matter: [Click here to enter text.](#)

Post of duty during your work on this matter: [Click here to enter text.](#)

Manager's name: [Click here to enter text.](#)

Check this box to indicate you understand that you may be called upon to testify in this matter, even if you leave the Service.

Type your initials in this box to indicate you understand that you must not alter or destroy any records relevant to this case, whether in hard copy or electronic form.

[Click here to enter text.](#)

### **SEPARATING EMPLOYEES:**

If you are planning to leave the Service or Counsel, or are switching positions within the Service or Counsel, please notify the attorney who issued this notice of your plans so that your ESI can be promptly collected and preserved. In addition, you should leave a note prominently attached to your laptop and other equipment that (1) the laptop should not be destroyed, wiped, or altered until the data on the laptop is preserved pursuant to an E-discovery Request (EDR) because the computer is subject to a litigation hold and (2) provide the contact information for the attorney who sent you this notice.

For additional information regarding litigation holds, please see [IRM 25.3.1.7](#) and visit the [Litigation Hold intranet site](#).

Thank you for your prompt attention to this matter. If you have any questions, please contact <Attorney Name> at <Attorney Phone Number> or <Attorney Email Address>.

### Exhibit 34.12.1-42 — Reminder Email Template for All Custodians

On *<date of litigation hold issuance>* , we requested that you maintain all records in your possession regarding *<Case Name><Docket Number>*.

The litigation hold in this case is ongoing. Please continue to preserve all records in this case. You must respond to this email with the following information within seven days.

Has your role in the Service changed in the last six months (e.g., promotion or transfer)?

Yes      No

Are you aware of another employee involved in this case who may have changed roles in the Service or who plans to do so in the future?

Yes      No

If yes, please list the names of those employees below:

[Click here to enter text.](#)

Do you have any information regarding computer or other problems which may have resulted in loss of or damage to evidence in this case?

Yes      No

If yes, please describe:

[Click here to enter text.](#)

Type your initials in this box to indicate you understand that you must not alter or destroy any records relevant to this case, whether in hard copy or electronic form.

[Click here to enter text.](#)

#### SEPARATING EMPLOYEES:

If you are planning to leave the Service or Counsel, or are switching positions within the Service or Counsel, please notify the attorney who issued this notice of your plans so that your ESI can be promptly collected and preserved. In addition, you should leave a note prominently attached to your laptop and other equipment that (1) the laptop should not be destroyed, wiped, or altered until the data on the laptop is preserved pursuant to an E-discovery Request (EDR) because the computer is subject to a litigation hold and (2) provide the contact information for the attorney who sent you this notice.

For additional information regarding litigation holds, please see [IRM 25.3.1.7](#) and visit the [Litigation Hold intranet site](#).

Thank you for your prompt attention to this matter. If you have any questions, please contact *<Attorney Name>* at *<Attorney Phone Number>* or *<Attorney Email Address>*.

**Revised section of 35.4.6:**

**35.4.6.1**

**Introduction; Respondent's Duty**

- (1) Respondent's duty to cooperate with petitioners in preparing cases for trial and to abide by the letter and spirit of the Court's discovery rules is at least as great of that of petitioners.
- (2) The rules and procedures for informal and formal discovery (including admissions) described in CCDM 35.4.3, Gathering Information from the Petitioner, apply to respondent as well as petitioners. While both respondent and petitioners may assert certain defenses to discovery attempts by the other party, particular defenses are unique to respondent. See CCDM 35.4.6.3 and CCDM 35.4.6.7.2. In addition, certain considerations in responding to requests for admission present particular concerns for respondent. See CCDM 35.4.6.2.
- (3) Procedures regarding litigation holds and e-discovery are located in CCDM 34.7.1.1.4.

/s/

\_\_\_\_\_  
Drita Tonuzi  
Associate Chief Counsel  
(Procedure & Administration)