§ 83.53 How will the Assistant Secretary determine which re-petition request to consider first?

(a) OFA shall maintain and make available on its website a register of re-petition requests that are ready for active consideration.

(b) The order of consideration of re-petition requests shall be determined by the date on which OFA places each request on OFA's register of requests ready for active consideration.

(c) The Department will prioritize review of documented petitions over review of re-petition requests, except that re-petition requests pending on OFA's register for more than two years shall have priority over any subsequently filed documented petitions.

§ 83.54 Who will OFA notify when the Assistant Secretary begins review of a re-petition request?

OFA will notify the petitioner and those listed in § 83.51(b)(2) when AS–IA begins review of a re-petition request and will provide the petitioner and those listed in § 83.51(b)(2) with the name, office address, and telephone number of the staff member with primary administrative responsibility for the request.

§ 83.55 What will the Assistant Secretary consider in his/her review?

(a) In any review, AS–IA will consider the re-petition request and evidence submitted by the petitioner, any comments and evidence on the request received during the comment period, and petitioners' responses to comments and evidence received during the response period.

(b) AS–IA may also:

(1) Initiate and consider other research for any purpose relative to analyzing the re-petition request; and

(2) Request and consider timely submitted additional explanations and information from commenting parties to support or supplement their comments on the re-petition request and from the petitioner to support or supplement their responses to comments.

(c) OFA will provide the petitioner with the additional material obtained in paragraph (b) of this section, and provide the petitioner with a 60-day opportunity to respond to the additional material. The additional material and any response by the petitioner will become part of the record.

§ 83.56 Can a petitioner withdraw its re-petition request?

A petitioner can withdraw its re-petition request at any point in the process and re-submit the request at a later date within the five-year time limit applicable to the petitioner under § 83.49. Upon re-submission, the re-petition request will lose its original place in line and be considered after other re-petition requests awaiting review.

§ 83.57 When will the Assistant Secretary issue a decision on a re-petition request?

(a) AS–IA will issue a decision within 180 days after OFA notifies the petitioner under § 83.54 that AS–IA has begun review of the request.

(b) The time set out in paragraph (a) of this section will be suspended any time the Department is waiting for a response or additional information from the petitioner.

§ 83.58 Can AS–IA suspend review of a re-petition request?

(a) AS–IA can suspend review of a re-petition request, either conditionally or for a stated period, if there are technical or administrative problems that temporarily preclude continuing review.

(b) Upon resolution of the technical or administrative problems that led to the suspension, the re-petition request will have the same priority for review to the extent possible.

(1) OFA will notify the petitioner and those listed in § 83.51(b)(2) when AS–IA suspends and when AS–IA resumes review of the re-petition request.

(2) Upon the resumption of review, AS–IA will have the full 180 days to issue a decision on the request.

§ 83.59 How will the Assistant Secretary make the decision on a re-petition request?

(a) AS–IA's decision will summarize the evidence, reasoning, and analyses that are the basis for the decision regarding whether the petitioner meets the conditions of §§ 83.47 through 83.49.

(b) If AS–IA finds that the petitioner meets the conditions of §§ 83.47 through 83.49, AS–IA will issue a grant of authorization to re-petition.

(c) If AS–IA finds that the petitioner has not met the conditions of §§ 83.47 through 83.49, AS–IA will issue a denial of authorization to re-petition.

§ 83.60 What notice of the Assistant Secretary's decision will OFA provide?

In addition to publishing notice of AS–IA's decision in the **Federal Register**, OFA will:

(a) Provide copies of the decision to the petitioner and those listed in § 83.51(b)(2); and

(b) Publish the decision on the OFA website.

§ 83.61 When will the Assistant Secretary's decision become effective, and can it be appealed?

AS–IA's decision under § 83.59 will become effective immediately and is not subject to administrative appeal.

(a) A grant of authorization to re-petition is not a final determination granting or denying acknowledgment as a federally recognized Indian tribe. Instead, it allows the petitioner to proceed through the Federal acknowledgment process by submitting a new documented petition for consideration under subpart C of this part, notwithstanding the Department's previous, negative final determination. A grant of authorization to re-petition is not subject to appeal.

(b) A denial of authorization to re-petition is final for the Department and is a final agency action under the Administrative Procedure Act (5 U.S.C. 704).

§ 83.62 What happens if some portion of this subpart is held to be invalid by a court of competent jurisdiction?

If any portion of this subpart is determined to be invalid by a court of competent jurisdiction, the other portions of the subpart remain in effect. For example, if one of the conditions on re-petitioning set forth at §§ 83.47 through 83.49 is held to be invalid, it is the Department's intent that the other conditions remain valid.

Bryan Newland,

Assistant Secretary—Indian Affairs.

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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[TD 10030]

RIN 1545–BP72

Resolution of Federal Tax Controversies by the Independent Office of Appeals

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulation.

SUMMARY: This document contains final regulations that provide guidance on the resolution of Federal tax controversies by the IRS Independent Office of Appeals (Appeals) under the Taxpayer First Act of 2019 (TFA). The final regulations provide that while the Appeals resolution process is generally available to all taxpayers to resolve

Federal tax controversies, there are certain exceptions to consideration by Appeals. The final regulations also address certain procedural and timing rules that must be met before Appeals consideration is available. The regulations affect taxpayers requesting Appeals consideration of Federal tax controversies.

DATES:

Effective date: These regulations are effective on January 15, 2025.

Applicability date: The regulations in §§ 301.7803–2 and 301.7803–3 apply to *all requests for consideration by Appeals that are received on or after February 14, 2025.*

FOR FURTHER INFORMATION CONTACT: Joshua P. Hershman at (202) 317–4311 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Authority

This document contains amendments to the Procedure and Administration Regulations under 26 CFR part 301 to implement section 7803(e) of the Internal Revenue Code (Code), which Congress enacted in the TFA (final regulations). The final regulations are issued under section 7805(a) of the Code, which expressly delegates to the Secretary of the Treasury or her delegate (Secretary) the authority to ''prescribe all needful rules and regulations for the enforcement of [the Code], including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue.''

Background

Section 7803(e)(3) provides that it is the function of Appeals to resolve Federal tax controversies without litigation on a basis that is fair and impartial to both the Government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and enhances public confidence in the integrity and efficiency of the IRS. Section 7803(e)(4) states that the resolution process to resolve Federal tax controversies described in section 7803(e)(3) ''shall be generally available to all taxpayers.''

On September 13, 2022, the Treasury Department and the IRS published in the **Federal Register** (87 FR 55934) a notice of proposed rulemaking (REG–125693–19) proposing amendments to implement section 7803(e) (proposed regulations). The proposed regulations proposed to adopt the function of Appeals as stated in section 7803(e)(3) and that the Appeals resolution process is generally available to all taxpayers to resolve Federal tax controversies as stated in section 7803(e)(4). The proposed regulations defined what constitutes a Federal tax controversy involving disputes over administrative determinations made by the IRS and, consistent with the historical practice and functions of Appeals, listed certain additional topics involving disputes over administrative determinations by the IRS that are treated as Federal tax controversies. Proposed § 301.7803–2(c)(1) through (24) also proposed an exclusive list of twenty-four exceptions to consideration of a Federal tax controversy by Appeals, almost all of which existed before the enactment of the TFA. This preamble refers to the exceptions in proposed § 301.7803–2(c), such as proposed § 301.7803–2(c)(1), (2), and (3), for example, as ''Exception 1,'' ''Exception 2,'' and ''Exception 3.''

Additionally, the proposed regulations proposed certain procedural and timing rules that must be met before Appeals consideration is available: the originating IRS office must have completed its review; a taxpayer must have submitted the request for Appeals consideration in the prescribed time and manner; and Appeals must have had sufficient time remaining on the appropriate limitations period for it to consider the matter. Further, if a Federal tax controversy is eligible for consideration by Appeals and the procedural and timing requirements are followed, a taxpayer would generally have only one opportunity for Appeals consideration. The proposed regulations also proposed two special rules for docketed cases. First, if Appeals issued a notice of deficiency, notice of liability, or other determination, without having fully considered one or more issues because of an impending expiration of the statute of limitations on assessment, Appeals may choose to have the Office of Chief Counsel (Chief Counsel) return the case to Appeals for full consideration of the issue or issues once the case is docketed in the United States Tax Court (Tax Court). Second, Appeals and Chief Counsel may determine how settlement authority is transferred between the two offices. Similar prerequisites to Appeals consideration as those described in this paragraph existed before the enactment of the TFA.

Besides soliciting public comments on the rules in the proposed regulations, the Treasury Department and the IRS also solicited public comments in the proposed regulations on whether certain exclusions from Appeals' consideration currently provided in the Internal Revenue Manual (IRM) relating to requests for relief under §§ 301.9100–1 through 301.9100–22 (9100 relief) and requests for a change in accounting method (CAM) should be included in the list of exceptions in the regulations.

Lastly, the proposed regulations proposed requirements to implement section 7803(e)(5). Enacted by the TFA, section 7803(e)(5) requires the IRS to follow the special notification procedures set forth in section 7803(e)(5) if a taxpayer who is in receipt of a notice of deficiency under section 6212 of the Code requests to have the Federal tax controversy referred to Appeals and that request is denied.

The *Summary of Comments and Explanation of Revisions* of these final regulations summarizes the provisions of the proposed regulations, which are explained in greater detail in the preamble to the proposed regulations. In response to the proposed regulations, the Treasury Department and the IRS received fourteen comments. A public hearing was requested and held on November 29, 2022.

After careful consideration of the comments and hearing testimony, the Treasury Department and the IRS adopt the proposed regulations, as modified by this Treasury decision, in response to such comments as described in the *Summary of Comments and Explanation of Revisions.* The final regulations also include minor typographical and editorial edits, including non-substantive clarifications, to the proposed regulations.

Summary of Comments and Explanation of Revisions

I. Proposed § 301.7803–2

A. Intent of the TFA To Grant Authority To Make Exceptions

Numerous comments addressed the scope of the proposed exceptions to Appeals consideration in proposed § 301.7803–2(c) or the authority of the Treasury Department and the IRS to make exceptions that exclude or limit access to Appeals.

Several comments agreed that the TFA generally authorizes the Treasury Department and the IRS to provide exceptions to Appeals consideration. A comment agreed that the statutory text and legislative history of the TFA confirm Congress did not intend for Appeals access to be universally available. This comment supported the proposed regulations' identification of particular situations in which Appeals access should not be available. While disagreeing with Exception 19 (Challenges Alleging That a Treasury Regulation Is Invalid) and Exception 20 (Challenges Alleging That a Notice or Revenue Procedure Is Invalid) and exceptions for 9100 relief and CAMs, another comment generally agreed with

the Treasury Department and the IRS that not every case is appropriate for Appeals consideration. The comment also stated that the TFA did not require that the IRS grant all requests for Appeals to consider any dispute because the Secretary may provide exceptions to Appeals consideration. Another comment stated there was ''ample reason, rooted in logic and past practice, for the majority of [the] proposed exceptions.'' It opined that some of the proposed exceptions, which were not identified, were not necessary to the proper administration of the Appeals process or were not consistent with the statute's mandate that the Appeals process be generally available. Another comment stated that some of the historic exclusions in the proposed regulations should be accepted and specifically mentioned penalties and determinations under sections 6702 or 6682 of the Code. Other comments stated that the proposed exceptions or exceptions framework laid out in the proposed regulations generally ran afoul of the intent of the TFA by limiting access to Appeals, or that certain proposed exceptions such as Exception 18 (Challenges Alleging That a Statute Is Unconstitutional), Exception 19, and Exception 20 did so. These comments gave several reasons in support of their arguments, as described in greater detail in section I.D. of this *Summary of Comments and Explanation of Revisions.* Two comments claimed that providing exceptions to review by Appeals would deny taxpayers a statutory right to Appeals, and two comments claimed exceptions to review by Appeals would inappropriately restrict Appeals access and suggested the proposed regulations should instead expand Appeals access.

As explained in more detail in section I.C. of the proposed regulations' *Explanation of Provisions,* Congress did not provide for an absolute right to administrative consideration by Appeals, which is reflected in the statute and the TFA's legislative history. Rather, Appeals review is ''generally available,'' under section 7803(e)(4) and the Treasury Department and the IRS may provide reasonable exceptions in their discretion, whether existing or new. In addition to this statutory language, TFA's legislative history also reflects the intention of Congress that the Treasury Department and the IRS retain their historical discretion to determine whether the resolution of particular types of disputes is appropriate for the Appeals resolution process, and for the IRS to retain the discretion to determine whether a particular Federal tax controversy is appropriate for the Appeals resolution process:

> Independent Appeals is intended to perform functions similar to those of the current Appeals. Independent Appeals is to resolve tax controversies and review administrative decisions of the IRS in a fair and impartial manner, for the purposes of enhancing public confidence, promoting voluntary compliance, and ensuring consistent application and interpretation of Federal tax laws. Resolution of tax controversies in this manner is generally available to all taxpayers, *subject to reasonable exceptions that the Secretary may provide.* Thus, cases of a type that are referred to Appeals under present law remain eligible for referral to Independent Appeals.

See H.R. Rep. No. 39, Part 1, 116th Cong., 1st Session (House TFA Report), 30–31 (2019) (emphasis added).

Contrary to one comment's suggestion, the Committee reports for the IRS Restructuring and Reform Act of 1998, Public Law 105–206 (112 Stat. 685, 689 (July 22, 1998)), and any earlier version of the TFA that Congress did not enact, are not informative when interpreting the TFA. The legislative history of the TFA reflects Congressional intent that the Treasury Department and the IRS retain their historical discretion to determine whether the resolution of particular types of disputes is appropriate for Appeals, and the discretion of the IRS to determine whether a particular Federal tax controversy is appropriate for the Appeals resolution process. *See* House TFA Report, at 29.

Several comments expressed concern that excluding a matter from Appeals consideration adversely affects the independence or impartiality of Appeals. Some of the comments specifically asserted that prohibiting Appeals from considering validity challenges to a regulation, notice, or revenue procedure as set forth in Exception 19 or Exception 20 undermines its independence. The Treasury Department and the IRS disagree with this comment. Exceptions from review by Appeals do not inhibit the independence or impartiality of Appeals for matters or issues under consideration. If a matter is not reviewed by Appeals, there is no independent analysis to be performed. Appeals still would be free to settle a Federal tax controversy that is referred to it using its own standards and an exception to review by Appeals would have no bearing on the cases or issues that are referred to Appeals.

One comment opined that the proposed exceptions in general are not reasonable or narrowly construed. The Treasury Department and the IRS disagree with this comment. As reflected in the proposed regulations' *Explanation of Provisions* in section I.C., the proposed exceptions are narrowly tailored and are based on reasonable rationales. Additionally, the proposed regulations and these final regulations reinforce the statutory presumption that Federal tax controversies may be considered by Appeals and require a regulatory exception for consideration to be unavailable.

The same comment suggested there would be no ''whipsaw'' if Appeals settles any of the cases or issues outlined in the proposed exceptions because Appeals settlements are not binding on any other taxpayer or on Chief Counsel's litigation position. It is unclear what is intended by this comment. The term whipsaw refers to the situation produced when the Government is subjected to conflicting claims of taxpayers. The issue of whipsaw has no bearing on the Appeals exceptions listed in the proposed regulations nor on the rationales set forth in the proposed regulations that support these exceptions and so the Treasury Department and the IRS do not agree that revisions to the proposed regulations are necessary.

A few comments focused on costs and opined that Congress intended for Appeals to resolve Federal tax controversies without expensive litigation. A comment asserted the establishment of Appeals was an attempt by Congress to make resolving controversies less cost-prohibitive for lower income individuals. Another comment stated the proposed regulations' approach granting exceptions to Appeals consideration would be a waste of resources of the Government and taxpayers. The Treasury Department and the IRS agree that part of Appeals' mission is to resolve Federal tax controversies without litigation, but do not agree that exceptions to review by Appeals will result in a waste of resources. There is no reason to assume that the cost to litigate a particular Federal tax controversy will significantly increase as a result of the proposed regulations, or that litigation expenses will increase at all in circumstances in which an exception existed before the TFA. Appeals consideration will still be available for most cases, which can be resolved without litigation (or without further litigation if the taxpayer has petitioned the Tax Court). The proposed regulations' procedural requirements, timing requirements, and almost all of the exceptions to consideration by

Appeals already exist in previously established guidance regarding Appeals. As in the past, the proposed exceptions are limited in number and scope. The vast majority of taxpayers, including low-income taxpayers, will have the opportunity to have Appeals consider their Federal tax controversies.

Similarly, two comments asserted that Exception 18, Exception 19, and/or Exception 20 waste taxpayer and Government resources. As discussed in more detail in sections I.D.11.a. and 12. of this *Summary of Comments and Explanation of Revisions,* in contrast to a single decision by Appeals that is applicable and communicated only to one taxpayer, a final decision from a Federal court is publicly available and applied consistently to all taxpayers. As a result, these exceptions promote efficiency rather than wasting taxpayer and Government resources. Furthermore, even if Appeals were to review the matter covered by these exceptions, there is no guarantee that Appeals would settle or resolve it.

One comment recommended that the Treasury Department and the IRS should take a conservative approach to Appeals exceptions because recent Supreme Court decisions such as *CIC Services, LLC* v. *Internal Revenue Service,* 593 U.S. 209 (2021) and *Boechler, P.C.* v. *Commissioner,* 596 U.S. 199 (2022) defined limits on the IRS's contentions concerning its prerogatives under the Administrative Procedure Act (APA), equitable tolling, and Tax Court jurisdiction. The Treasury Department and the IRS disagree with the premise of this comment that a more conservative approach is needed or that the referenced cases are relevant in construing section 7803(e). The exceptions in these regulations are reasonable and narrowly tailored to achieve their purposes. None of the cited cases addressed the meaning of section 7803(e) or the availability of Appeals review. Instead, these cases address different issues and have no bearing on these regulations.

Another comment noted that litigation arguing that the TFA provides taxpayers with access to Appeals is pending in the *Hancock* and *Rocky Branch* cases in the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit), implying that the regulations should be withheld due to the litigation. The Treasury Department and the IRS disagree that these two cases serve to limit or prevent the publication of regulations. Neither case is pending any longer. In *Hancock,* the U.S. District Court for the Northern District of Georgia held that the taxpayer had no absolute right to Appeals consideration under the circumstances. The Eleventh Circuit upheld the decision on Anti-Injunction Act grounds (*see* section 7421 of the Code), and the Supreme Court denied certiorari. *See Hancock County Land Acquisitions LLC, et. al.* v. *United States,* 553 F. Supp. 3d 1284, 1294 fn. 9 (N.D. Ga. 2021), *aff'd* 130 AFTR 2d 2022–5529 (11th Cir. Aug. 17, 2022), *cert. denied* 143 S.Ct. 577 (January 9, 2023). *Rocky Branch* has facts similar to the facts in *Hancock,* and as in *Hancock* the Eleventh Circuit upheld the decision on Anti-Injunction grounds, and the Supreme Court denied certiorari. *See Rocky Branch Timberlands LLC, et. al.* v. *United States,* 129 AFTR 2d 2022–2137 (N.D. Ga. 2022), *aff'd* 132 AFTR 2d 2023–5788 (11th Cir. Sept. 6, 2023), *cert. denied* 144 S.Ct. 812 (Feb. 20, 2024).

One comment asserted that some of the exceptions in the proposed regulations, in particular, Exception 3 (Whistleblower Awards); Exception 4 (Administrative Determinations Made by Other Agencies); Exception 7 (Denial of Access Under the Privacy Act); and Exception 14 (Authority Over the Matter Rests With Another Office) leave a taxpayer without any administrative recourse. The comment suggested an interagency discussion over how and whether administrative appeals processes, whether residing in the IRS Independent Office of Appeals or outside of the IRS, could be developed for these types of cases. The Treasury Department and the IRS agree with the comment's premise that the language of section 7803(e) does not cover Exception 3, Exception 4, and Exception 7, or cover Exception 14 with respect to referrals to the Department of Justice (Justice Department). *See* sections I.D.2., 3., 4., and 8. of this *Summary of Comments and Explanation of Revisions.* The disputes involved in Exception 3, Exception 4, and Exception 7 are not Federal tax controversies, and Appeals lacks settlement authority after a referral of a case to the Justice Department, as described in Exception 14. The inclusion of Exception 3, Exception 4, Exception 7, and Exception 14 in the list of proposed exceptions in proposed § 301.7803–2(c) was to clarify these points. These exceptions to Appeals consideration all existed before the TFA. Expanding the role of Appeals as suggested is not administratively feasible and is outside the scope of these regulations and section 7803. Furthermore, lack of consideration by Appeals does not leave the taxpayer without an administrative option to resolve a controversy as issues can always be resolved during an examination. Accordingly, these final regulations do not adopt this comment.

B. Definition of a Federal Tax Controversy: Proposed § 301.7803–2(b)(2)

Section 7803(e)(3) provides that the function of Appeals is ''to resolve Federal tax controversies without litigation,'' without defining the term ''Federal tax controversy.'' Proposed § 301.7803–2(b)(1), consistent with the statutory text of section 7803(e)(4), provides that the Appeals resolution process is generally available to all taxpayers to resolve Federal tax controversies. Proposed § 301.7803–2(b)(2) defined a *Federal tax controversy* as a dispute over an administrative determination with respect to a particular taxpayer made by the IRS in administering or enforcing the internal revenue laws, related Federal tax statutes, and tax conventions to which the United States is a party (collectively referred to as internal revenue laws) that arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws.

As proposed in the proposed regulations and consistent with the statute, the definition of a Federal tax controversy is broad. Although the proposed definition does not specifically refer to tax-exempt organizations, it includes an IRS determination that an organization is not tax-exempt because the determination concerns whether the organization has or will have a tax liability in some amount. Similarly, determinations of private foundation or qualified employee plan status and tax-exempt or other tax-advantaged bond status are included in the proposed regulations' definition of a Federal tax controversy because these determinations concern whether there is or will be a tax liability for the foundation; plan, or its participants; or bond issuers or holders. In these final regulations, the Treasury Department and the IRS have modified the definition of a Federal tax controversy to clarify that such determinations are included in the definition.

Consistent with section 7803(e), the definition of Federal tax controversy means that determinations that Appeals historically may not have considered may now be considered by Appeals. These determinations include the classification or reclassification of a non-exempt charitable trust under

section 4947(a)(1) of the Code as described in section 509(a)(3) of the Code; the classification or reclassification of the organization as an exempt operating foundation under section 4940(d)(2) of the Code; relief from retroactive revocation or modification of a determination letter under section 7805(b) of the Code; denials of relief requested under § 301.9100–3 to permit the organization to be recognized and treated as tax-exempt effective as of a date earlier than the date of application; and pursuant to section 7611 of the Code relating to restrictions on church tax inquiries and examinations, revocation of the exempt or church status of an organization that is listed as, or claims to be, a church.

C. Disputes Not Meeting the Definition of a Federal Tax Controversy That Are Treated as Federal Tax Controversies: Proposed § 301.7803–2(b)(3)

Proposed § 301.7803–2(b)(3) provided that notwithstanding the definition of a Federal tax controversy, disputes over administrative determinations made by the IRS with respect to a particular person regarding certain topics listed in proposed § 301.7803–2(b)(3) are treated as Federal tax controversies.

1. Additional Disputes Treated as Federal Tax Controversies: Proposed § 301.7803–2(b)(3)(iv) Through (vi)

As explained previously in section I.B. of this *Summary of Comments and Explanation of Revisions,* the final regulations clarify that the definition of Federal tax controversy includes determinations concerning the status of tax-exempt organizations, private foundations, and qualified plans, and the status of tax-exempt or other tax-advantaged bonds. Accordingly, the final regulations delete these items from proposed § 301.7803–2(b)(3)(iv) through (vi), because inclusion would be unnecessary and duplicative. The final regulations retain the language in proposed § 301.7803–2(b)(3)(vi) referring to arbitrage claims, because such claims do not involve a tax and therefore do not meet the definition of a Federal tax controversy, as defined in § 301.7803–2(b)(2). That language is now included in the final regulations and redesignated as § 301.7803–2(b)(3)(iv).

2. FOIA Cases Treated as Federal Tax Controversies: Proposed § 301.7803–2(b)(3)(ii)

One comment was received on proposed § 301.7803–2(b)(3)(ii) relating to a request under the Freedom of Information Act (5 U.S.C. 552) (FOIA). This comment recommended removing proposed § 301.7803–2(b)(3)(ii) because FOIA does not affect the collection of taxes or the liability for taxes of the FOIA requester. The Treasury Department and the IRS do not adopt this recommendation. Appeals consideration of IRS administrative determinations listed in proposed § 301.7803–2(b)(3), including in proposed § 301.7803–2(b)(3)(ii), is consistent with the historical practice and functions of Appeals as codified in section 7803(e)(3). *See* § 301.7803–2(b)(3)(i) through (vi). As a matter of tax policy and administration, it is important that FOIA requesters have, consistent with past practice, the opportunity for consideration by Appeals. The TFA does not prohibit Appeals from reviewing determinations by the IRS that are not Federal tax controversies, and retaining the ability for review by Appeals is beneficial to the public.

D. Exceptions to Appeals Consideration: Exception 1 Through Exception 24

The Treasury Department and the IRS received several comments concerning the exceptions to Appeals consideration listed in proposed § 301.7803–2(c)(1) through (24). The exceptions that were subject to the greatest number of comments were Exception 19 and Exception 20.

1. Frivolous Position and Penalties Related to Frivolous Positions and False Information: Exception 1 and Exception 2

Two comments were received on Exception 1 and Exception 2. Exception 1 provides that Appeals consideration is not available for an administrative determination made by the IRS with respect to a particular taxpayer in which the IRS rejects a frivolous position. Similarly, Exception 2 provides that Appeals consideration is not available regarding a penalty assessed by the IRS with respect to a particular taxpayer for asserting a frivolous position, for making a frivolous submission, or for providing false information.

One comment agreed with excepting from Appeals consideration penalties and determinations under section 6702 or section 6682 of the Code. A second comment alleged the exceptions would curtail the independence of Appeals by eliminating its right to review determinations of frivolousness because such determinations are not infallible. That comment recommended Appeals should have the option, but not the obligation, to decide whether positions have been wrongly labeled frivolous to strike a balance between its independence and the IRS's need to weed out frivolous arguments.

The Treasury Department and the IRS do not adopt this recommendation to give Appeals the option to consider whether the IRS has mistakenly labeled a taxpayer's position as frivolous or wrongly imposed a frivolous filing penalty. Referring every frivolous argument to Appeals upon the request of a taxpayer, for Appeals to then determine whether or not to grant consideration, would be unnecessarily resource intensive and inconsistent with the historic, reasonable limitations on access to Appeals. Section I.C.1. of the proposed regulations' *Explanation of Provisions* identified similar existing restrictions precluding the consideration of frivolous positions by Appeals that can be found in § 601.106(b) of the Statement of Procedural Rules (26 CFR part 601) (regarding appeal procedures not extending to cases involving solely the failure or refusal to comply with tax laws because of frivolous moral, religious, political, constitutional, conscientious, or similar grounds), IRM 5.14.3.3(1) (10–20–2020) (relating to installment agreement requests made to delay collection action), and IRM 8.22.5.5.3 (11–08–2013) (relating to frivolous issues). There are sound policy reasons for these historic limitations. As explained in sections I.C.1. and 2. of the proposed regulations' *Explanation of Provisions,* Appeals consideration of frivolous positions would facilitate abuse of the tax system by allocating IRS and Appeals resources to reviewing positions that have already been designated as frivolous. Penalties imposed under section 6702 or section 6682 are designed to deter frivolous behavior or improper conduct by a taxpayer. If Appeals does not consider the merits of a taxpayer's frivolous position, it follows that Appeals should not consider the IRS's assessment of a penalty with respect to the taxpayer as well. The exceptions are consistent with the restriction in section 7803(e)(5)(D) that the notice and protest procedures under section 7803(e)(5) do not apply to a request if the issue is frivolous within the meaning of section 6702(c). Also, as explained in section I.A. of this *Summary of Comments and Explanation of Revisions,* excluding a matter from Appeals consideration has no bearing on its independence.

2. Whistleblower Awards: Exception 3

Two comments were received on Exception 3, which provides that Appeals consideration is not available for any administrative determination made by the IRS under section 7623 of

the Code relating to awards to whistleblowers.

The first comment suggested creating an interagency administrative review process, and it is discussed in section I.A. of this *Summary of Comments and Explanation of Revisions.*

The second comment asserted that the authority relied upon for Exception 3 is the proposed definition of Federal tax controversy in the proposed regulations and alleged that the language of the TFA authorizes Appeals to review whistleblower matters. The Treasury Department and the IRS do not adopt this comment. The exception for whistleblower awards under section 7623 in Exception 3 is a historic exception that has existed before the enactment of the TFA. For example, section 7623 was one of the exclusions listed in section 4 of Rev. Proc. 2016–22, 2016–15 IRB 577 (April 11, 2016), which provides procedures for Chief Counsel referrals of cases docketed in the Tax Court to Appeals for settlement. Its inclusion in the list of proposed exceptions was to clarify the point that section 7803(e) does not cover whistleblower awards because they do not involve a Federal tax controversy. In a whistleblower case, the IRS determination involves whether the whistleblower is entitled to an award. The whistleblower's tax liability is not at issue, and Appeals is not reviewing a determination by the IRS in its examination, collection, or execution of other activities with respect to the whistleblower's tax liability. This award determination is separate and distinct from a determination of tax liability.

3. Administrative Determinations Made by Other Agencies: Exception 4

One comment concerned Exception 4, which provides that Appeals consideration is not available for an administrative determination issued by an agency other than the IRS. An example is a determination by the Alcohol and Tobacco Tax and Trade Bureau (TTB) concerning an excise tax administered by and within its jurisdiction. The comment suggested creating an interagency administrative review process, and it is discussed in section I.A. of this *Summary of Comments and Explanation of Revisions.*

4. Denials of Access Under the Privacy Act: Exception 7

One comment was received on Exception 7, which provides that Appeals consideration is not available for any dispute regarding a determination of the IRS resulting in denial of access under the Privacy Act (5 U.S.C. 552a(d)(1)) (relating to access to records) to a particular person. The comment suggested creating an interagency administrative review process, and it is discussed in section I.A. of this *Summary of Comments and Explanation of Revisions.*

5. IRS Erroneously Returns or Rejects an Offer in Compromise: Exception 9

Exception 9 provides that Appeals consideration is not available regarding the application of section 7122(f) of the Code when the IRS erroneously returns or rejects a taxpayer's offer in compromise (OIC) submitted under section 7122 as nonprocessable. As explained in section I.C.9. of the proposed regulations' *Explanation of Provisions,* Exception 9 includes, for example, the claim that the IRS's mistaken rejection or return was in bad faith. Because the IRS returned or rejected the offer without making a determination regarding the OIC, there is no administrative determination made by the IRS for Appeals to review.

Two comments were received concerning OICs. The first comment recommended that Appeals should be authorized to review when the IRS erroneously returns or rejects a taxpayer's OIC as nonprocessable or no longer processable. The comment stated that such a return or rejection is an administratively reviewable determination, that not allowing Appeals review is a significant loss of rights for the taxpayer including low-income taxpayers in particular, that excepting this issue from Appeals review circumvents section 7122(f), and that Appeals review would promote consistency.

The Treasury Department and the IRS do not adopt this comment. Appeals has not historically reviewed such returned or rejected OICs. Exception 9 is narrow, and it is consistent with the pre-existing OIC regulations. Section 301.7122–1(f)(5)(ii) states, in part, that if an OIC is returned following a "determination" that the offer was nonprocessable, that return of the OIC "does not constitute a rejection of the offer for purposes of this provision and does not entitle the taxpayer to appeal the matter to appeals under the provisions of this paragraph (f)(5) . . ." Also, the comment's recommendation is not consistent with the function of Appeals, which is to weigh litigation hazards in applying the law to specific facts. Reviewing the completeness of an OIC is not a weighing of hazards. There would be no hazards of litigation for Appeals to consider or merits to weigh—either the OIC request is complete or not complete. Further, the recommendation, if adopted, would conflict with the OIC regulations. The return of an OIC as nonprocessable is an example of a premature review in § 301.7803–2(d)(1) because the originating IRS office has not completed its action. It has been a longstanding practice of the IRS to return incomplete or otherwise nonprocessable OICs that taxpayers fail to perfect. *See* for example, sec. 5 of Rev. Proc. 2003–71, 2003–36 I.R.B. 517 (September 8, 2003) (relating to offers in compromise).

The second comment opined that Exception 9 is too loosely defined and its focus should be limited to those taxpayers who are abusing the process such as by creating undue delay. This comment is not adopted. Exception 9 is narrowly limited to a case in which the IRS erroneously returns or rejects an OIC as nonprocessable or no longer processable and the taxpayer requests Appeals consideration to assert that the OIC should be deemed to be accepted under section 7122(f). This exception is narrowly defined to sufficiently meet the administrative goals of the rule.

6. Criminal Prosecution Is Pending Against Taxpayer: Exception 10

One comment was submitted on Exception 10, which provides that Appeals consideration is not available for a Federal tax controversy with respect to a taxpayer while a criminal prosecution or a recommendation for criminal prosecution is pending against the taxpayer for a tax-related offense other than with the concurrence of Chief Counsel and the Justice Department, as applicable.

The comment recommended that the final regulations should limit Exception 10 to only cases in which the pending criminal matter pertains to the same subtitle of the Code and that Exception 10 not be applied to matters within a single subtitle that are completely unrelated to each other and do not involve common facts or tax transactions. The Treasury Department and the IRS do not adopt this comment. Exception 10 allows for Appeals consideration with the concurrence of Chief Counsel and the Justice Department, as applicable. Such concurrence is fact-based and case specific and would accommodate the situations addressed in the comment because if they were to arise, Chief Counsel and/or the Justice Department could determine whether concurrence would be appropriate under the facts and circumstances of the particular case. Limiting the exception as suggested in the comment could require that Appeals consideration be afforded, when such consideration could interfere

with a pending criminal matter. It would also be contrary to regulations under 26 CFR part 601, which provide general procedural rules for Appeals functions and limit Appeals' authority to act in a case in which criminal prosecution is recommended, except with the concurrence of Chief Counsel. *See* § 601.106(a)(2)(vi).

7. IRS's Automated Process of Certifying a Seriously Delinquent Tax Debt: Exception 12

One comment was received on Exception 12, which provides that consideration by Appeals is not available for the certification or issuance of a notice of certification of a seriously delinquent Federal tax debt of a particular taxpayer to the Department of State (State Department) under section 7345 of the Code (relating to the revocation or denial of a taxpayer's passport in the case of serious tax delinquencies). According to the comment, if Appeals consideration is not available for certification or issuance of a notice of certification of a seriously delinquent tax debt, the taxpayer lacks an important check on the automated system and does not have an opportunity to contest whether the statutory requirements for passport certification have been met under section 7345(b).

The Treasury Department and the IRS do not adopt this comment. In the event of a mistake in the automated process, a taxpayer has the opportunity to contact the IRS personnel identified in the notice, which provides a check on the automated process. Specifically, the taxpayer receives Notice CP508C, *Notice of certification of your seriously delinquent Federal tax debt to the State Department,* informing the taxpayer to contact the IRS at the phone number in that notice to request reversal of the certification if the taxpayer contends the certification is erroneous. The role of Appeals is to review administrative determinations and to weigh the hazards of litigation, not to provide a backstop to an automated process. This exception existed before the TFA. *See* Notice 2018–1, 2018–3 I.R.B. 299 (January 16, 2018).

The comment also alleged Exception 12 violates the Taxpayer Bill of Rights (TBOR). *See https://www.irs.gov/taxpayer-bill-of-rights.* The Treasury Department and the IRS do not adopt this comment; this exception is consistent with the TBOR. The TBOR does not grant new enforceable rights but instead it obligates the IRS to ensure that its employees are familiar with and act in accord with rights established in other Code provisions. *See Facebook, Inc.* v. *Internal Revenue Service,* 2018 WL 2215743, at *13–14 (N.D. Cal. 2018). *See also Hancock County Land Acquisitions LLC, et. al.* v. *United States,* 553 F. Supp. 3d 1284, 1296 n. 11 (N.D. Ga. 2021). As discussed in section I.A. of this *Summary of Comments and Explanation of Revisions,* section 7803(e)(4) does not confer an absolute right to Appeals consideration.

8. Authority Over the Matter Rests With Another Office: Exception 14

One comment was received on Exception 14. Exception 14 provides that consideration by Appeals is not available for any case, determination, matter, decision, request, or issue with respect to a particular taxpayer that Appeals lacks the authority to settle. Proposed § 301.7803–2(c)(14)(i) through (v) provides a non-exclusive list of examples illustrating this rule, including the example in proposed § 301.7803–2(c)(14)(i) that Appeals does not have authority to resolve an issue with respect to a particular taxpayer in a docketed case after a referral has been made to the Justice Department. The comment suggested creating an interagency administrative review process, which is discussed in section I.A. of this *Summary of Comments and Explanation of Revisions.* The settlement authority for any litigation under the jurisdiction of the Justice Department already vests with the Justice Department.

9. Certain Technical Advice Memoranda and Technical Advice From an Associate Office in a Docketed Case: Exception 15 and Exception 16

One comment was submitted concerning Exception 15 and Exception 16. Exception 15 provides that Appeals consideration is not available for certain adverse actions related to the initial or continuing recognition of tax-exempt status, an entity's classification as a foundation, the initial or continuing determination of employee plan qualification, or a determination involving an obligation and the issuer of an obligation under section 103 of the Code, when the adverse action is based upon a technical advice memorandum (TAM) issued by an Associate Office of Chief Counsel (Associate Office) before an appeal is requested. Similarly, Exception 16 provides that Appeals consideration is not available for any case docketed in the Tax Court if the notice of deficiency, notice of liability, or final adverse determination letter is based upon a TAM issued by an Associate Office in that case involving an adverse action described in Exception 15.

The comment asserted that granting an exception for an appeal in cases of tax-exempt status in which a TAM has been issued would unnecessarily narrow an already small area of appeal rights, and suggested that it would be beneficial to all parties to bring the matter to Congress' attention if this is more a matter in need of statutory clarification.

The Treasury Department and the IRS do not adopt this comment, which suggested a change but did not provide a rationale for a change, refute the rationale given in the proposed regulations, or explain its conclusion that the two proposed exceptions would unnecessarily narrow Appeals review. As reflected in the proposed regulations' *Explanation of Provisions* in sections I.C.15. and 16., these two exceptions are supported by reasonable rationales and are narrowly tailored to achieve their purposes. If the legal issues and determinations in Exception 15 and Exception 16 are the subject of a TAM from an Associate Office, they are excepted from Appeals consideration because traditionally Chief Counsel has exclusive authority over the dispute administratively or upon litigation. A TAM is advice furnished by an Associate Office in a memorandum that responds to any request for assistance on any technical or procedural legal question involving the interpretation and proper application of any legal authority that is submitted in accordance with an applicable revenue procedure. Chief Counsel's decision with respect to the issues related to the initial or continuing recognition of tax-exempt status, an entity's classification as a foundation, the initial or continuing determination of employee plan qualification, or a determination involving an obligation and the issuer of an obligation under section 103 is the legal position of the IRS with respect to the particular facts and circumstances that are the subject of the TAM. These exceptions are important to preserving Chief Counsel's authority to resolve these sensitive legal issues. As noted in section I.C.15. of the proposed regulations' *Explanation of Provisions,* these exceptions are consistent with historical practice as found in § 601.106(a)(1)(v)(*a*) and IRM 8.1.1.2.1(1)(c.) (02–10–2012) (currently found in IRM 8.1.1.3.1 (01–09–2024)). Furthermore, a broad range of tax-exempt status issues are reviewable by Appeals under these final regulations.

10. Letter Rulings Issued by Associate Office: Exception 17

Two comments were received on Exception 17, which excepts from

Appeals consideration a decision by an Associate Office regarding whether to issue a letter ruling or the content of a letter ruling. However, the subject of the letter ruling may be considered by Appeals if all other requirements in § 301.7803–2 are met. For example, if the taxpayer subsequently files a return taking a position that is contrary to the letter ruling and that position is examined by the IRS, Appeals could consider that Federal tax controversy if all other requirements in § 301.7803–2 are met.

The first comment stated that the provision in Exception 17 helpfully makes clear that the subject of the letter ruling may be considered by Appeals if all other requirements in proposed § 301.7803–2 are met, and recommended that this provision should be strengthened to offer an affirmative safe harbor for appeals for taxpayers who in good faith attempt to fulfill the terms of § 301.7803–2. The Treasury Department and the IRS do not adopt this recommendation. The criteria for a ''safe harbor'' would not be practical because meeting some but not all of the requirements would not be sufficient. A taxpayer must comply with all the requirements in § 301.7803–2 in order to have Appeals consider the taxpayer's Federal tax controversy. The second comment on Exception 17 relates to 9100 relief and CAMs and is discussed in section I.H. of this *Summary of Comments and Explanation of Revisions.*

11. Challenges Alleging That a Statute Is Unconstitutional: Exception 18

Exception 18 provides that Appeals consideration is not available for any issue based on a taxpayer's argument that a statute violates the United States Constitution unless there is an unreviewable decision from a Federal court holding that the cited statute is unconstitutional. Exception 18 does not preclude Appeals from considering a Federal tax controversy based on arguments other than the constitutionality of a statute, such as whether the statute applies to the taxpayer's facts and circumstances.

Proposed § 301.7803–2(c)(18) defined the phrase *unreviewable decision* as a decision of a Federal court that can no longer be appealed to any Federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was filed, and no further action can be taken in the case by any Federal court once there is an unreviewable decision. An unreviewable decision means an unreviewable decision of any Federal court, regardless of where the taxpayer resides. The proposed language ''and no further action can be taken in the case by any Federal court once there is an unreviewable decision'' has been deleted in the final regulations because it is inaccurate in certain circumstances. For example, even if a district court grants a motion to dismiss and the decision is appealed and a reversal of that motion becomes unreviewable, the case would have further action such as discovery, dispositive motions, or trial. *See* § 301.7803–2(c)(18).

The Treasury Department and the IRS received several comments on Exception 18. One comment agreed with Exception 18 to not allow Appeals to consider constitutional challenges to Federal tax statutes unless there is an unreviewable court decision. It recommended the final regulations should strengthen the concept of an ''unreviewable decision.'' *See* section I.D.11.a. of this *Summary of Comments and Explanation of Revisions* regarding the phrase *unreviewable decision.*

Two comments objected to Exception 18 as inconsistent with the TFA and recommended Appeals should be allowed to consider constitutional challenges to Federal tax statutes in the absence of an unreviewable decision. One objected that denial of Appeals consideration in Exception 18 strips taxpayers of a statutory right to Appeals. The other objected that Exception 18 improperly restricts access to Appeals and forces taxpayers to sacrifice legal arguments.

The Treasury Department and the IRS do not adopt these two comments; Exception 18 is consistent with the TFA. As discussed previously, the TFA does not provide an absolute statutory right to an administrative appeal. Rather, the Treasury Department and the IRS have the statutory authority to provide exceptions to Appeals consideration. Exception 18 is one such exception, and it is narrowly tailored and supported with reasonable rationales. As proposed, Exception 18 does not exclude the constitutionality issue from Appeals consideration totally but merely provides that Appeals will not be the first forum to hear such a challenge because it is not the appropriate forum without a final decision from a Federal court. The Treasury Department and the IRS still agree with the rationales in section I.C.18. of the proposed regulations' *Explanation of Provisions,* namely that questions within the IRS regarding the constitutionality of a statute, and positions taken by the IRS in light of such questions, are determinations of general applicability resolved at the highest levels of the Treasury Department and the IRS, in consultation with the Office of Legal Counsel of the Justice Department, and subject to the ultimate resolution by a court of relevant jurisdiction. Moreover, a constitutional determination should be communicated and applied consistently to all taxpayers. It would be inappropriate for Appeals to consider the constitutionality of a statute for a particular taxpayer in the absence of an unreviewable court decision, which is accessible to all taxpayers and the IRS.

A comment asserted Appeals has historically analyzed legal arguments concerning tax statutes, regulations, and IRS procedures and so Appeals is capable of considering these arguments. This comment insinuated that Exception 18, Exception 19, and Exception 20 are premised on Appeals' training, skills, or competency to review legal arguments related to statutes, regulations, or IRS procedures. The rationales for Exception 18, Exception 19, and Exception 20 provided in sections I.C.18., 19., and 20. of the proposed regulations' *Explanation of Provisions* do not relate to Appeals' training, skills, or competency. Appeals will continue to review taxpayer arguments about whether the relevant statutes, regulations, or IRS procedures apply to the taxpayer's factual circumstances just as Appeals has historically done.

A comment construed the definition of an *unreviewable decision* to mean an unreviewable decision only from a Federal court within the circuit in which the taxpayer resides. Neither the proposed regulations, nor these final regulations, require the unreviewable decision to be in the taxpayer's own circuit. Another comment recommended eliminating Exception 19 and Exception 20 but, in the alternative, it recommended clarifying the phrase *unreviewable decision.* The comment interpreted the phrase as the proposed regulations intended, that is, as an unreviewable decision of any Federal court, regardless of where the taxpayer resides, but stated it was unclear and should be clarified. In response to these comments, the language in the proposed regulations, ''a decision of a Federal court,'' is clarified in the final regulations to ''a decision of any Federal court regardless of where the taxpayer resides.'' *See* § 301.7803–2(c)(18).

A comment recommended the final regulations modify the definition of *unreviewable decision* to provide the decision must be one that would govern the taxpayer's case. In other words, the final regulations should ensure, according to the comment, that Appeals access is available only if there is a

relevant decision that would bind the taxpayer and the Government if the dispute proceeded to litigation. The Treasury Department and the IRS do not adopt this comment because it is too limiting. If the only unreviewable decision that Appeals should consider is one that is binding on the IRS and the taxpayer, then it would not be a matter of Appeals weighing the hazards of litigation because that decision would be controlling on the taxpayer. Also, such a rule would prevent Appeals from weighing the hazards of litigation by evaluating how a court in another circuit ruled on the issue. Like the proposed regulations would have done, the final regulations allow Appeals to consider that final decision in considering the hazards of litigation.

A comment stated that the Treasury Department and the IRS have no basis to hold Appeals to a different, and higher standard than that of the Justice Department or the Solicitor General. The comment's reference to the Justice Department and Solicitor General appeared to be a reference to those offices resolving cases in a manner that Appeals could not under Exception 19 and Exception 20. The comment appeared to suggest that Appeals should be able to do the same in fulfilling its function of considering hazards of litigation.

The Treasury Department and the IRS do not adopt this comment because the authority of employees of the Justice Department and the Solicitor General to take certain actions in fulfilling their distinct functions and roles does not mean employees of Appeals, like Appeals Officers (AO), can take the same actions. As explained in section I.D.12. of this *Summary of Comments and Explanation of Revisions,* questions regarding the validity of a regulation, or the procedural validity of a notice or revenue procedure, involve determinations of general applicability resolved at the highest levels of the Treasury Department and the IRS and must be followed by all IRS employees, including AOs. Such validity decisions should be communicated and applied consistently to all taxpayers. It would be inappropriate for Appeals to act in contravention with those decisions in a specific case involving one taxpayer and consider validity issues in the absence of an unreviewable court decision.

Three comments recommended Appeals be allowed to consider the hazards of litigation on a validity issue for a notice or regulation based on a similar or analogous court decision on a different notice or regulation. The comments mentioned *Green Valley Investors* v. *Commissioner,* 159 T.C. 5 (2022) (Tax Court setting aside Notice 2017–10, 2017–4 IRB 544 for failure to comply with the Administrative Procedure Act's (APA's) notice and comment requirements) as an example and suggested that if a court decision invalidated a notice for the same APA reason that a taxpayer is raising to challenge the validity of other guidance, Appeals should consider the hazards of litigation in the taxpayer's analogous case.

The Treasury Department and the IRS do not adopt these comments because it would defeat the purposes of Exception 18, Exception 19, and Exception 20. Appeals consideration is limited to unreviewable decisions involving the validity of the particular regulation, notice, or revenue procedure being challenged. As described previously, in this *Summary of Comments and Explanation of Revisions* and sections I.C.18., 19., and 20. of the proposed regulations' *Explanation of Provisions,* the promulgation of a regulation, notice, or revenue procedure consists of multiple levels of review at the highest levels within the Treasury Department and the IRS, and taxpayers are not well-served by confidential decisions by Appeals on a validity matter that is applicable to only a single taxpayer. Appeals does not have the authority to unilaterally contradict the decisions made through the regulatory or subregulatory process. In addition, there may be other defenses to APA challenges that the IRS might assert, and therefore the Tax Court having ruled on an unrelated notice or regulation is not a reason to provide the carve-out suggested here.

A comment recommended eliminating the unreviewable decision requirement and allowing Appeals to consider a judicial decision in weighing the hazards of a case. Similarly, another comment recommended allowing Appeals to consider hazards pending the appeal of a decision. The Treasury Department and the IRS do not adopt these recommendations because they would defeat the purpose of the unreviewable decision rule in Exception 18, Exception 19, and Exception 20. Until the pending decision becomes unreviewable by a Federal court, as described in proposed § 301.7803–2(c)(18), it would not be sufficiently final. The finality of the judicial decision is important because the judicial branch is charged with independently interpreting Federal statutes and a Federal court's decision on the merits may reject the determinations made by the Treasury Department or the IRS. There must be a final decision, however, before Appeals can weigh the hazards of litigation with respect to these specific challenges because a lower court decision that is not final might be overturned on appeal and the challenges under Exception 18, Exception 19, and Exception 20 relate to determinations of general applicability resolved at the highest levels of the Treasury Department and the IRS. Until a judicial decision is unreviewable and final, Appeals must respect the decision of the Secretary and the Commissioner of Internal Revenue (Commissioner). In that regard, the final regulations clarify that the definition of unreviewable decision includes decision of any Federal court regardless of where the taxpayer resides.

12. Challenges Alleging That a Treasury Regulation Is Invalid and Challenges Alleging That a Notice or Revenue Procedure Is Invalid: Exception 19 and Exception 20

Exception 19 provides that Appeals consideration is not available for any issue based on a taxpayer's argument that a Treasury regulation is invalid unless there is an unreviewable decision from a Federal court invalidating the regulation as a whole or the provision in the regulation that the taxpayer is challenging. Exception 20 provides that Appeals consideration is not available for any issue based on a taxpayer's argument that a notice or revenue procedure published in the Internal Revenue Bulletin is procedurally invalid unless there is an unreviewable decision from a Federal court holding it to be invalid. As proposed, Exception 19 and Exception 20 do not preclude Appeals from considering a Federal tax controversy based on arguments other than the validity of a regulation, or procedural validity of a notice or revenue procedure, such as whether the regulation, notice, or revenue procedure applies to the taxpayer's facts and circumstances.

The Treasury Department and the IRS received several comments on Exception 19 and Exception 20. In response to these comments, the Treasury Department and the IRS have modified the language in proposed § 301.7803–2(c)(19) and (20), as explained below.

A comment agreed with the rationales described in the proposed regulations for Exception 19 and Exception 20 that Appeals should not consider these types of challenges. Another comment made the same objection it made to Exception 18 that denial of Appeals consideration in Exception 19 and Exception 20 strips taxpayers of a statutory right to Appeals. Another comment made the same objection it made to Exception 18 that

Exception 19 and Exception 20 improperly restrict access to Appeals and forces taxpayers to sacrifice legal arguments.

Like Exception 18, Exception 19 and Exception 20 are consistent with the TFA, which does not provide an absolute statutory right to an administrative appeal, and permits the Treasury Department and the IRS to provide exceptions. The rationales for Exception 19 and Exception 20 are similar to the rationales for Exception 18, as discussed previously. *See* sections I.C.18., 19., and 20. of the proposed regulations' *Explanation of Provisions.* Questions regarding the validity of a regulation, or the procedural validity of a notice or revenue procedure, involve determinations of general applicability resolved at the highest levels of the Treasury Department and the IRS and must be followed by IRS employees, including AOs. Such validity decisions also should be communicated and applied consistently to all taxpayers. It therefore would be inappropriate for Appeals to act in contravention with those institutional decisions in a specific case involving one taxpayer and consider the validity issues in the absence of an unreviewable court decision.

A comment stated Exception 19 and Exception 20 are not narrowly tailored because they encompass any challenge to almost any level of published guidance. The Treasury Department and the IRS do not adopt this comment. Exception 19 and Exception 20 are narrowly tailored and expressly allow Appeals to consider arguments other than the validity of a regulation, or procedural validity of a notice or revenue procedure, such as whether the regulation, notice, or revenue procedure applies to the taxpayer's facts and circumstances. They do not exclude the validity challenges from Appeals consideration totally but merely provide Appeals will not be the first forum to hear these challenges because it is not the appropriate forum for such challenges without an unreviewable decision of a court. Further, Exception 20 is even narrower in scope, applying only to a taxpayer's argument that a notice or revenue procedure published in the Internal Revenue Bulletin is procedurally invalid.

A comment asserted that Exception 19 and Exception 20 did not exist prior to the TFA and taxpayers historically could at least raise validity challenges to published IRS guidance and have those challenges be considered by Appeals; therefore Exception 19 and Exception 20 appear contrary to the TFA's intent to expand taxpayer access to Appeals. As explained previously, Exception 19 and Exception 20 are consistent with the intent of the TFA to grant the Treasury Department and the IRS the authority to make exceptions, which includes the authority to provide new exceptions that did not exist before the enactment of the TFA.

A comment asserted that Exception 19 and Exception 20 are contrary to Appeals' mission or function because they will force the parties into litigation instead of providing an opportunity for Appeals to resolve the case. Another comment similarly stated that Exception 20 tries to cast the validity determination as a high-level policy decision, while Appeals' function is to hear and settle cases and in doing so it is not making policy.

The Treasury Department and the IRS do not adopt these comments. Unlike most Appeals analyses that weigh litigation hazards in applying the law to specific facts, Appeals' potential consideration of the validity of a regulation or the procedural validity of a notice or revenue procedure does not necessarily involve taxpayer-specific facts. As explained in section I.C.20. of the proposed regulations' *Explanation of Provisions,* the issue of whether an IRS notice or revenue procedure is procedurally valid involves a determination regarding whether specific IRS subregulatory guidance complied with administrative law requirements, such as notice and comment under 5 U.S.C. 553. Whether a notice or revenue procedure was properly issued involves facts solely related to the Treasury Department and the IRS and is unlike the application of the tax law to a taxpayer's specific facts. Furthermore, the procedurally validity of a notice or revenue procedure is a determination of general applicability resolved at the highest levels of the Treasury Department and the IRS and such a determination would not be appropriate for Appeals to consider in a specific case involving one taxpayer.

The latter comment regarding Exception 20 did not address the other rationale in support of Exception 20, namely, that the issue of whether a notice or revenue procedure failed to comply with administrative law requirements should be communicated and applied consistently. As explained in the proposed regulations, an unreviewable decision of a Federal court is the appropriate means of accomplishing this objective because a settlement before Appeals is specific to a taxpayer and cannot be made available to other taxpayers. An unreviewable decision makes information accessible to all taxpayers and the IRS regarding whether a notice or revenue procedure was prescribed in accordance with applicable Federal law. A determination by the judicial branch on the merits of the validity challenge may reject the determinations made by the Treasury Department or the IRS with regard to the validity of a regulation or the procedural validity of a notice or revenue procedure, thereby providing a basis for Appeals to consider those issues. If no unreviewable decision has been issued on the validity challenge, Appeals would not be weighing hazards with respect to that particular guidance of general applicability because it has not been successfully challenged in court yet. Instead, absent an unreviewable decision, Appeals would be contravening the decision made at the highest levels of the Treasury Department and the IRS.

Four comments related to Appeals' competency to consider validity challenges to a regulation, notice, or revenue procedure. A comment alleged Appeals has historically analyzed legal arguments concerning statutes, tax regulations, and IRS procedures. A similar comment asserted that under Exception 19 and Exception 20 Appeals is unable to assess the hazards of litigation in a way that a Chief Counsel trial attorney is not restricted and that specialists within Appeals are competent to consider these arguments when evaluating other hazards of litigation in the case. A comment stated that AOs have the training and qualifications to consider all hazards of litigation, including challenges to the validity of regulations, notices, or revenue procedures, or if they lack such training and qualifications, the IRS should provide them instead of preventing Appeals from considering these issues. Another comment asserted Appeals is familiar with considering all arguments made by a taxpayer regarding the applicability of regulations, notices, and revenue procedures, and it should be able to consider in docketed cases credible arguments about hazards involving validity challenges to a regulation, notice, or revenue procedure because the APA and ordinary judicial methods for review of legislative rules apply to tax cases.

The Treasury Department and the IRS do not adopt these comments. None of these exceptions relate to Appeals' training, skills, or competency. Appeals' competency does not pertain to the rationales of Exception 19 and Exception 20 to prevent a decision for one taxpayer regarding guidance of general applicability, which has been approved at the highest levels within

the Treasury Department and the IRS. Also, like Appeals employees, Chief Counsel attorneys handling docketed cases in Tax Court must follow regulations, notices, and revenue procedures. *See* Chief Counsel Directives Manual (CCDM) or IRM 32.1.1.2.5(1) (08–02–2018) (relating to Treasury decisions); CCDM/IRM 32.2.2.10 (08–11–2004) (relating to force and effect of specified publications). Further, Appeals applying the APA and ordinary judicial methods to invalidate guidance would lack consistency because Appeals' action, unlike an unreviewable decision, is not public and is applicable to only that taxpayer challenging the guidance. A final court decision is applicable to, and accessible by, all taxpayers and the IRS, which promotes consistency. Furthermore, a final, unreviewable court decision ensures that Appeals does not act in contravention of a decision made at the highest levels of the Treasury Department and the IRS. In the absence of an unreviewable decision, Appeals would not have a court decision with respect to a particular document to weigh or evaluate any hazards.

Two comments recommended that if the Justice Department has conceded that an unrelated notice was invalid on the same basis as in the holding by the United States Court of Appeals for the Sixth Circuit (Sixth Circuit) in *Mann Construction Inc.* v. *United States,* 27 F.4th 1138 (6th Cir. 2022) (holding a different notice invalid because it was required to follow APA notice and comment procedures and failed to do so), Appeals should consider the hazards of litigation on a notice validity issue in a taxpayer's case involving a different notice. Similarly, another comment recommended allowing Appeals to consider the hazards of litigation on a regulation validity issue in a taxpayer's case if the Justice Department has settled or conceded that an unrelated regulation was invalid.

The Treasury Department and the IRS do not adopt these comments for the same reasons they disagree with the similar comments regarding analogous court decisions. *See* section I.D.11.a. of this *Summary of Comments and Explanation of Revisions.* If adopted, these recommendations would defeat the purposes of Exception 19 and Exception 20. Moreover, there are numerous factors that go into determining whether a case should be settled, and a recommendation for a settlement in one case may not dictate the same result in another case. There may be other defenses to APA challenges that the IRS might assert and therefore the Justice Department having settled an issue based on hazards of litigation involving an unrelated notice or regulation is not a reason to provide the suggested carve-out. Regarding the transaction in the case cited by the comment, for cases within the Sixth Circuit, the Treasury Department and the IRS have represented in court that APA matters conceded by the Government in the *Mann* case would not be subject to examination by the IRS in other listed transaction cases and therefore such cases would not come up for Appeals review.

A comment agreed with the policy expressed in Exception 19, but with a caveat that ''invalidity'' should be further defined. Specifically, the comment asked whether a change in the law would make regulations invalid or would fit within the provision in proposed § 301.7803–2(c)(19) that states Exception 19 would not prevent a taxpayer from arguing that a regulation does not apply to their position. Generally, a regulation would still be valid for prior tax years before any repeal of or amendment to the statute upon which the regulation is based, and a change in the statute would have precedent over the regulation for tax years after the change. These regulations do not prohibit a taxpayer from arguing whether the statute applies to the taxpayer's own facts and circumstances. In that case, Appeals is considering the applicability of the statute to the taxpayer for the relevant period. In response to this comment, the Treasury Department and the IRS have revised the language in Exception 19 and Exception 20 by adding a reference to the statute to clarify that Appeals may consider arguments based on whether a statute applies to the taxpayer's facts and circumstances. *See* § 301.7803–2(c)(19) and (20). Also, for the sake of clarity, Exception 19 is revised to define the term *invalid. See* § 301.7803–2(c)(19).

The same comment asked that if regulations overlap in a factual situation whether reconciliation of such a situation would involve a determination that a regulation is invalid. As proposed, Exception 19 would still allow Appeals to consider whether the regulations apply to a taxpayer's facts and circumstances, but to the extent the taxpayer argues that the regulations are invalid, Exception 19 would preclude Appeals from considering that validity issue in the absence of an unreviewable decision. The concern raised in this comment appeared to relate to ensuring consistency. Appeals is not the only administrative function within the IRS; there are other offices and other ways within the IRS to ensure such consistency short of consideration by Appeals or litigating the issue.

A comment on Exception 20 expressed some confusion as to the meaning of the term *procedurally invalid* and stated the comment had little concern regarding Exception 20 if its intent is only that Appeals would not be allowed to consider whether a notice or revenue procedure was properly adopted or promulgated. As explained in section I.C.20. of the proposed regulations' *Explanation of Provisions,* the term *procedurally invalid* in proposed § 301.7803–2(c)(20) was intended to mean challenges to procedural determinations regarding notices and revenue procedures, including determinations regarding compliance with administrative law requirements. This comment recommended defining the term *procedurally invalid* for the sake of clarity. The Treasury Department and the IRS adopt this recommendation and have defined the term to mean ''any determination regarding whether a notice or revenue procedure failed to comply with administrative law requirements, such as notice and comment under 5 U.S.C. 553.'' *See* § 301.7803–2(c)(20).

The same comment noted that the rationale behind Exception 19 is generally sound but opined that that rationale does not support Exception 20 because a notice or revenue procedure does not undergo the public notice and comment process under the APA, lacks the same approval process, and does not carry the same weight or level of authority of a regulation. The Treasury Department and the IRS do not adopt this comment. The same rationale for Exception 19 applies to Exception 20 because whether a notice or revenue procedure is procedurally valid is a determination of general applicability resolved at the highest levels of the Treasury Department and the IRS. As discussed previously, such a determination would not be appropriate for Appeals to consider in a specific case involving one taxpayer.

A comment asserted that Appeals has historically heard arguments about the application of Treasury regulations and that the meaning of a regulation, notice, or revenue procedure is not exclusively determined by senior officials at the Treasury Department and the IRS. This comment appears to misperceive the scope of Exception 19 and Exception 20. These exceptions do not preclude Appeals from considering a Federal tax controversy based on arguments other than the validity of a Treasury regulation or procedural validity of a notice or revenue procedure. As stated

in the text of Exception 19 and Exception 20, such arguments include whether the Treasury regulation, notice, or revenue procedure applies to the taxpayer's facts and circumstances. Appeals may resolve the Federal tax controversy by weighing the likelihood a court would agree with the position of the taxpayer or the Government. As for the comment's suggestion that guidance is not exclusively determined by senior officials at the Treasury Department and the IRS, the final regulations do not adopt this comment. While employees of all levels of the Treasury Department and the IRS have a role in promulgating a regulation, notice, or revenue procedure, such guidance is reviewed and approved by senior officials in the Treasury Department and the IRS, including the Assistant Secretary of the Treasury (Tax Policy) and the Deputy Commissioner of the IRS as appropriate. *See* generally IRM 32.1.1 (November 13, 2019).

Two comments related to consistency by Appeals. A comment alleged the proposed regulations did not explain why consistency cannot be accomplished if Appeals reviews the validity issues. The same comment argued Exception 19 and Exception 20 will result in bad policy because they will make the Appeals process more inconsistent, random, and less responsive to legal developments, causing additional costs and delay for taxpayers who otherwise could access Appeals while invalidity arguments work through the court system. Another comment stated that Appeals can reach a coordinated position on validity challenges and forcing taxpayers to litigate will decrease uniformity of tax administration because the IRS can settle or concede issues to avoid adverse opinions and because years may pass before there is an unreviewable judicial decision deciding the validity challenge.

Sections I.C.18., 19., and 20. of the proposed regulations' *Explanation of Provisions,* provides the Treasury Department and the IRS' position on consistency. Any determinations with respect to constitutional challenges to a statute, the validity of a regulation, or procedural validity of a revenue procedure or notice should be communicated and applied consistently to all taxpayers. An unreviewable decision of a Federal court is the appropriate means of making information accessible to taxpayers, and the Treasury Department and the IRS do not agree that Exception 19 and Exception 20 will result in bad policy. A court's unreviewable decision on the validity of a regulation, or procedural validity of a revenue procedure or notice ensures the judicial branch decides questions of law. The Treasury Department and the IRS recognize the deliberateness of the judicial process, but absent that process, Appeals lacks the authority to take actions contrary to the reasoned decisions of the Secretary and the Commissioner. An unreviewable decision is publicly available, and generally applicable, to all taxpayers and the IRS, which promotes consistency and uniformity. Having Appeals weigh hazards of litigation based on an unreviewable decision that is publicly available and generally applicable to all taxpayers is sounder policy than a confidential decision by Appeals on a matter that is applicable to only a single taxpayer. The question of whether Appeals can reach a coordinated position on validity challenges is irrelevant because under these exceptions the issues would not be considered by Appeals in the first place in the absence of an unreviewable decision.

A comment opined that Appeals should have the right to determine all hazards of litigation, including challenges to all levels of IRS published guidance on an unlimited basis and including rationale from all court opinions because this approach is consistent with the Treasury Department's 2019 Policy Statement on the Tax Regulatory Process (Policy Statement). Policy Statement on the Tax Regulatory Process (March 5, 2019), *https://home.treasury.gov/policy-issues/tax-policy/tax-regulatory-process.* The Treasury Department and the IRS do not adopt this comment. An unreviewable decision is necessary because it is publicly available to the IRS and taxpayers and generally applicable, which promotes consistency and uniformity. The Policy Statement is unrelated to Exception 19 and Exception 20 because it concerns the tax regulatory process and does not address Appeals or its function. The Policy Statement also explicitly states it does not create any right or benefit, either substantive or procedural.

A comment alleged that Exception 19 and Exception 20 undercut the key focus area for Appeals in fiscal year 2023 to improve taxpayer experience. To the contrary, Exception 19 and Exception 20 are consistent with the TFA as it relates to taxpayer experience. Section 1101 of the TFA requires the IRS to develop a comprehensive strategy for customer service and submit the plan to Congress. The strategy will include best practices of customer service provided in the private sector, including, online services, telephone call back, and training of employees, and the strategy must incorporate best practices of businesses to meet reasonable customer expectations. The strategic plan, updated guidance, and training materials must also be available to the public. The taxpayer experience requirement does not address whether a taxpayer can have the taxpayer's case or issue considered by Appeals. The strategic plan addresses topics like communications with the IRS and taxpayer information services, such as expanded digital services, guides to taxpayer resources and IRS communication channels, and outreach and education. *See* Publication 5426, *Taxpayer First Act Report to Congress* (January 2021).

A comment alleged that Appeals' consideration of all of a taxpayer's arguments, including validity challenges, does not harm the Government but instead provides the taxpayer and the Government the opportunity to resolve the issue without litigation. Appeals' consideration of validity challenges would harm the Government because in the absence of an unreviewable decision, such consideration would undermine the decisions based on the regulatory and subregulatory guidance process as described in sections I.C.19. and I.C.20. of the proposed regulations' *Explanation of Provisions,* and result in a decision by Appeals for one taxpayer on an issue that is not related to the taxpayer's specific facts and that would not be publicly available to other taxpayers and the IRS.

Another comment recommended that Appeals should consider APA challenges as part of its weighing of hazards of litigation. The comment argued that Treasury regulations are not necessarily in compliance with the APA because they go through an extensive review process involving numerous offices within the Treasury Department and the IRS. The comment alleged that challenges to a regulation's validity is taxpayer specific because any controversy before Appeals will involve the IRS enforcing an agency rule against a taxpayer based on that taxpayer's facts. Finally, the comment also suggested that the exceptions would prove unworkable because final, unreviewable decisions may be limited to one district court or circuit.

The Treasury Department and the IRS do not adopt this comment. As explained previously in this section and section I.D.12. of this *Summary of Comments and Explanation of Revisions,* the promulgation of a regulation, or publication of a notice or revenue procedure goes through multiple levels of review within the

Treasury Department and the IRS. An individual AO does not have the authority to unilaterally contradict the decisions made through the regulatory or subregulatory process. Furthermore, as explained above and in section I.C.20. of the proposed regulations' *Explanation of Provisions,* the validity of a regulation or the procedural validity of a notice of revenue procedure does not involve taxpayer-specific facts. The validity of a regulation or the procedurally validity of a notice or revenue procedure is a determination of general applicability and does not involve the application of tax law to a specific set of facts and circumstances. Lastly, as explained in section I.D.11. of this *Summary of Comments and Explanation of Revisions,* the Treasury Department and the IRS have clarified the final regulations to specify that an unreviewable decision means ''a decision of any Federal court regardless of where the taxpayer resides.'' *See* § 301.7803–2(c)(18).

13. Cases or Issues Designated for Litigation or Withheld From Appeals: Exception 21

Four comments were received on Exception 21, which provides that Appeals consideration is not available for any case or issue designated for litigation, or withheld from Appeals consideration in a Tax Court case, in accordance with guidance regarding designating or withholding a case or issue. As proposed, designation for litigation means that the Federal tax controversy, comprising an issue or issues in a case, will not be resolved without a full concession by the taxpayer or by decision of the court.

A comment proposed that Chief Counsel attorneys should have the flexibility to refer all docketed cases to Appeals for resolution. This comment is not adopted. To the extent this comment invites a Chief Counsel attorney to disregard the Office of Chief Counsel's decision to designate or withhold a case, trial attorneys do not operate independently of managerial direction. In addition, such flexibility would defeat the exception's purpose. As explained in section I.C.21. of the proposed regulations' *Explanation of Provisions,* cases are designated for litigation or withheld in the interest of sound tax administration to establish judicial precedent, promote consistency, conserve resources, or reduce litigation costs for the taxpayers and the IRS. Moreover, section 3.01 of Rev. Proc. 2016–22 provides that docketed cases are not referred to Appeals if Appeals issued the notice of deficiency or made the determination that is the basis of the Tax Court's jurisdiction. This exclusion also is set forth in Exception 22, *see* § 301.7803–2(c)(22), and prevents duplicative review by Appeals.

Two comments stated that Exception 21 provides too much deference to Chief Counsel and recommended that the exception delete the reference to withheld cases. The Treasury Department and the IRS do not adopt these comments. The withholding of cases or issues from Appeals has been, and will continue to be, limited and rare.[1] The determination to withhold a case or issue from Appeals requires a high-level review, with the decision ultimately resting with the Division Counsel or a higher-level Chief Counsel official. *See* section 3.03 of Rev. Proc. 2016–22. When Congress enacted the TFA, it was aware of the historic exceptions to Appeals consideration, including Chief Counsel's authority to designate a case for litigation or withhold a case from Appeals consideration on the basis of a referral not being in the interest of sound tax administration under Rev. Proc. 2016–22. Congress recognized that the Treasury Department and the IRS retain their historical discretion to determine whether the resolution of particular types of disputes is appropriate for Appeals, and the discretion of the IRS to determine whether a particular Federal tax controversy is appropriate for the Appeals resolution process. As proposed, Exception 21 is narrowly tailored, and it does not encroach on Appeals' independence for the reasons discussed previously in section I.A. of this *Summary of Comments and Explanation of Revisions.*

Two comments that objected to Exception 19 and Exception 20, in the alternative, recommended the regulations provide notice and protest rules for any taxpayer with a case or issue withheld or designated for litigation. One of the comments recommended at least requiring meetings with Chief Counsel executives to explain the decision. Similarly, another comment recommended that low-income taxpayers should receive a written explanation and given an opportunity to object.

The Treasury Department and the IRS do not adopt these comments. If Chief Counsel determines that a docketed case or issue will be withheld from Appeals, Chief Counsel will notify the taxpayer that the case will not be referred to Appeals. *See* section 3.03 of Rev. Proc. 2016–22. Taxpayer cases that are withheld from Appeals consideration under Exception 21 and meet the requirements of proposed § 301.7803–3 already would receive a written notice detailing the facts of the case, the reason for the denial, and the opportunity to protest the denial pursuant to section 7803(e)(5). As discussed in section 2 of this *Summary of Comments and Explanation of Revisions,* section 7803(e)(5) only requires notice and denial protest rights be given to a taxpayer in receipt of a notice of deficiency. Consistent with the statute, these final regulations do not extend notice and denial protest rights to taxpayers who did not receive a notice of deficiency. With respect to situations involving low-income taxpayers, as described by the comment, such taxpayers would similarly receive an explanation and opportunity to protest under proposed § 301.7803–3 after they receive a notice of deficiency.

Another comment alleged that the designation of cases or issues for litigation is not rare and prevents sound tax administration in thousands of cases because Appeals could arrive at the correct amount of tax or a deduction and the IRS's approach of settling a designated case only if taxpayers concede all issues, including all penalties, has created a backlog in the IRS and the court. The comment is factually incorrect because designation of a case or issue is rare. The IRS has designated fewer than 10 cases since 2013.

A comment recommended the IRS make public a list of all designated cases docketed in Tax Court and all designated issues and publish the total number of taxpayers affected by cases or issues being designated for litigation. The Treasury Department and the IRS do not adopt this comment. The comment raises potential disclosure concerns under section 6103 of the Code relating to the prohibition of the disclosure of return information. Even if such disclosure was not prohibited by law, it is beyond the scope of these regulations.

[1] Since the TFA was enacted on July 1, 2019, the IRS has denied three requests for referral to Appeals, as described in section 7803(e)(5)(A), on the basis of sound tax administration. Because section 7803(e)(5)(A) is limited to denials of a request for referral to Appeals by those taxpayers in receipt of a notice of deficiency authorized under section 6212, fewer than 130 cases not subject to section 7803(e)(5)(A) were otherwise withheld from Appeals review during that period by Division Counsel under section 3.03 of Rev. Proc. 2016–22. For example, these cases include cases involving partnerships in which a final partnership administrative adjustment was issued instead of a notice of deficiency.

14. Appeals Consideration Is a Prerequisite to Jurisdiction of the Tax Court: Exception 23

One comment was received on Exception 23. Exception 23 provides that Appeals consideration is not available for a case in which timely consideration by Appeals must be requested before a petition is filed in the Tax Court because exhaustion of administrative review, including Appeals consideration, is a prerequisite for the Tax Court's jurisdiction, and the taxpayer failed to timely request Appeals consideration.

The comment opined the heading for this exception in the proposed regulations' preamble (that is, *Appeals Consideration is a Prerequisite to the Jurisdiction of Tax Court*) did not mention whether there could be exceptions to the requirement to exhaust administrative remedies. The comment recommended adding language to the regulation's text to explicitly indicate that Exception 23 does not apply when there is an exception to the requirement to exhaust administrative remedies as provided in a statute or other guidance. The Treasury Department and the IRS do not adopt this recommendation. The text of the regulation adequately covers the comment's point, as the text makes clear that this exception applies only when timely Appeals consideration itself is a prerequisite to the Tax Court's jurisdiction.

E. Procedural and Timing Requirements Are Followed: Proposed § 301.7803–2(e)

One comment was received on proposed § 301.7803–2(e), which provides the procedural and timing requirements that a taxpayer must meet before Appeals may consider the taxpayer's Federal tax controversy. Specifically, proposed § 301.7803–2(e) provides that a request for Appeals consideration must be submitted in the time and manner prescribed in applicable forms, instructions, or other administrative guidance and that all procedural requirements must be complied with for Appeals to consider a Federal tax controversy.

The comment recommended that the final regulations explicitly direct the IRS to list specific requirements that the IRS must meet for accessibility, to explain the processes in a way that is easy to understand for the unrepresented taxpayer and feasible for all taxpayers, including low-income taxpayers who may face financial and other barriers to following traditional mailing processes. The comment suggested including notices with appeal rights delivered by mail and to a taxpayer's online IRS account if they have one; deadlines to file an appeal should be clearly and accurately stated in plain language on the first page of a notice that has an appeal right; the IRS should have an easy-to-understand fill-in form that contains all required elements to request an appeal, and the form should be available for every level of appeal; each notice from the IRS that carries an appeal right should enclose a copy of the simple form along with an envelope and instructions for certified mailing to prove the mailing date; and each notice from the IRS that carries an appeal right should also include both a simple URL link and QR code link to the online simplified form, the form should be easily fillable on a computer or a smartphone and be available in multiple languages, and the taxpayer should be able to submit this form online to meet the deadline for the Appeals request.

The Treasury Department and the IRS do not adopt this comment's recommendations because they are outside the scope of these final regulations. The comment is better suited to be addressed in the specific correspondence sent from the IRS to taxpayers. Promoting taxpayer communication, understanding, and efficiency, including in accessing Appeals, are important topics that the IRS will continue to look at as it improves and develops its systems and procedures. In that regard, the IRS will carefully consider the suggestions in this comment as part of that process.

F. One Opportunity for Consideration by Appeals: Proposed § 301.7803–2(f)

One comment was received with a suggestion relating to the general rule of one opportunity for Appeals consideration in proposed § 301.7803–2(f)(1). Another comment was received on the exceptions to that general rule. Those comments are addressed in this section I.F. of the *Summary of Comments and Explanation of Revisions.*

1. In General. Proposed § 301.7803–2(f)(1)

Proposed § 301.7803–2(f)(1) provides that if a Federal tax controversy is eligible for consideration by Appeals and the procedural and timing requirements are followed, a taxpayer generally has one opportunity for Appeals to consider such matter or issue in the same case for the same period or in any type of future case for the same period. The comment on proposed § 301.7803–2(f)(1) recommended that the final regulations should explicitly include the situation in which the taxpayer and the Government have run out of time for Appeals consideration prior to the expiration of the statute of limitations and a notice of deficiency being issued, thereby confirming that a taxpayer's case can be heard by Appeals either before or after a case is docketed (although not both).

The Treasury Department and the IRS agree that if there is insufficient time remaining on the limitations period for Appeals consideration, a taxpayer in receipt of a notice of deficiency would have the opportunity to have Appeals consider the taxpayer's case after the taxpayer has filed a petition with the Tax Court and the case is docketed, assuming the issue being considered by Appeals is not subject to an exception described in the final regulations. An example has been added to § 301.7803–2(e) to illustrate this point, which is a more appropriate place in the regulations for this addition.

2. Exceptions. Proposed § 301.7803–2(f)(1) and (2)

There are several exceptions to the general rule in proposed § 301.7803–2(f)(1). Proposed § 301.7803–2(f)(1) provides an exception to the proposed general rule in a case in which the Tax Court remands a collection due process (CDP) case for reconsideration. Proposed § 301.7803–2(f)(2) provides an exception for a taxpayer that participated in an Appeals early consideration program but did not reach an agreement with Appeals. Proposed § 301.7803–2(f)(2) also provides an exception to the general rule in proposed § 301.7803–2(f)(1) for taxpayers who provide new information to the IRS and who meet the conditions and requirements for audit reconsideration or for reconsideration of liability issues previously considered by Appeals. Appeals may consider the new information.

A comment recommended clarifying in proposed § 301.7803–2(f)(2) that a new development in the law is ''new information'' that would allow Appeals reconsideration of the same matter. The Treasury Department and the IRS recognize that the original phrasing in the paragraph was unclear. For purposes of these final regulations, new information is intended to mean additional facts that the taxpayer did not provide during the original examination. It is not intended to mean a new development in the law. Additional language has been added to § 301.7803–2(f)(2) in the final regulations to clarify the intended meaning.

G. Special Rules. Proposed § 301.7803–2(g)

A comment suggested that Chief Counsel delaying Appeals review of a case was tantamount to a denial of Appeals review. The Treasury Department and the IRS disagree. As explained in section I.H.2. of the proposed regulations' *Explanation of Provisions* regarding the special rule in proposed § 301.7803–2(g), Chief Counsel may delay forwarding a docketed case to Appeals when Chief Counsel anticipates filing a dispositive motion such as a motion for summary or partial summary judgment, or a motion to dismiss for lack of jurisdiction, in which case Chief Counsel will retain jurisdiction over the case until the Tax Court rules on the motion. This flexibility to respond to the needs of specific Federal tax controversies promotes the efficient disposition of a taxpayer's case, including developing or narrowing the issues in dispute. The taxpayer will continue to be eligible for consideration by Appeals if the litigation continues and all other requirements in § 301.7803–2 are met. Accordingly, these final regulations do not adopt this comment.

H. Section 9100 Relief and Change of Accounting Method

The list of exclusions in proposed § 301.7803–2(c) does not include certain exclusions from Appeals consideration currently provided in the IRM relating to requests for 9100 relief and CAMs. In the proposed regulations, the Treasury Department and the IRS requested comments on whether these items should be included in the list of exclusions. Specifically, comments were requested on whether the binary nature of decisions by an Associate Office regarding 9100 relief or CAM requests makes these decisions unsuitable for Appeals review; whether a different review standard should apply if Appeals considers the decisions; and what impact would Appeals review of the decisions have on later years that are not before Appeals.

In response, the Treasury Department and the IRS received four comments. One comment in support of adopting an Appeals exception recommended that Exception 17 relating to letter rulings issued by an Associate Office be finalized as proposed so that the regulations ensure, consistent with the historical IRS position, that Appeals not be permitted to consider an Associate Office decision concerning whether to issue 9100 relief or CAM letter rulings. *See* section I.D.10. of this *Summary of Comments and Explanation of Revisions* regarding Exception 17. According to this comment, letter ruling decisions regarding 9100 relief and CAMs should not be considered by Appeals for the reasons described in the proposed regulations that apply to other types of letter rulings. In particular, a letter ruling interprets internal revenue laws and applies them to the taxpayer's specific set of facts. A voluntary request for a letter ruling is not an administrative determination that is a part of the IRS's compliance function. A taxpayer receiving a letter ruling is not obligated to file a return consistent with that letter ruling. Generally, the program is designed instead to provide taxpayers with information regarding whether the IRS will accept a position to be taken on the taxpayer's return. For letter rulings responding to a taxpayer's request for a CAM, the letter ruling grants or denies consent under section 446(e) of the Code. The Treasury Department and the IRS adopt this recommendation for those reasons and added language to clarify this point that Exception 17 includes Associate Office decisions on 9100 relief requests and CAM requests. *See* § 301.7803–2(c)(17). While Appeals cannot consider an Associate Office's decision on whether to issue a letter ruling or the content of a letter ruling, Exception 17 recognizes that Appeals may consider the subject of the letter ruling if all other requirements in § 301.7803–2 are met. For example, if an Associate Office issues an adverse letter ruling to a taxpayer, the taxpayer cannot immediately appeal the issuance of the adverse letter ruling. If the taxpayer later files a return taking a position that is contrary to the letter ruling and that position is examined by the IRS, Appeals can consider that Federal tax controversy if all other requirements in § 301.7803–2 are met.

The comment also recommended a separate exclusion for Appeals consideration of decisions by an Associate Office regarding 9100 relief or CAM requests. The Treasury Department and the IRS do not adopt this recommendation. As previously described, if a taxpayer files a tax return contrary to the Associate Office's decision and a Federal tax controversy arises that involves the subject of the adverse decision, Appeals could consider the subject of that Associate Office's decision in the dispute if all other requirements in § 301.7803–2 are met.

Another comment suggested the final regulations should empower Appeals to consider an Associate Office's decisions regarding 9100 relief or CAM requests because Appeals consideration would protect taxpayer rights. Two comments suggested the final regulations should allow Appeals to consider such cases because judicial review is costly and time consuming and Appeals consideration would reduce litigation. The Treasury Department and the IRS agree Appeals review as described in the preceding paragraph is consistent with the function of Appeals to resolve Federal tax controversies without litigation and is consistent with the provision that such resolution be generally available to all taxpayers. A comment suggested the final regulations should empower Appeals to consider such cases because Appeals consideration would promote impartial resolution. The Treasury Department and the IRS disagree with this reasoning because, as explained previously in this *Summary of Comments and Explanation of Revisions,* impartiality presupposes that the matter is being considered by Appeals in the first place. Once a Federal tax controversy is referred to Appeals, Appeals will consider the hazards of litigation while impartially considering the positions of the taxpayer and of the IRS.

A comment asserted accounting method issues do not have to be viewed as binary and noted Appeals already reviews adjustments initiated by the IRS through an examination. According to this comment, Appeals should review accounting method issues consistently regardless of whether the originating function was through an IRS examination or an Associate Office. Similarly, another comment asserted that Appeals consideration of a CAM letter ruling denial that was issued on the basis that the requested change would not clearly reflect income or would otherwise not be in the interest of sound tax administration would allow Appeals review of the substantive positions in these cases, similar to Appeals review of the substantive issue in cases arising in examination or a docketed case, and that foreclosing Appeals consideration would create inconsistencies and be counterproductive to tax administration. The Treasury Department and the IRS agree that Appeals should have the ability to review accounting method issues arising in an examination, even when the accounting method issue relates to an Associate Office's denial of a CAM letter ruling request.

Another comment suggested Appeals consideration of an Associate Office's decisions regarding 9100 relief or CAM requests would promote consistent application of laws and public confidence in the IRS. Appeals consideration of an Associate Office's

decisions regarding 9100 relief or CAM requests would promote public confidence in the IRS and is consistent with the purpose of the TFA.

A comment asserted the ultimate decision may be binary, in that an Associate Office either does or does not permit 9100 relief or a CAM. According to this comment, the binary nature of decisions on these matters should not automatically exclude them from Appeals review. To the extent an Associate Office's decision regarding a 9100 relief or CAM request is viewed as a binary decision, the Treasury Department and the IRS agree with the comment's general premise that the binary nature of such decisions would not automatically exclude them from Appeals review. If a taxpayer files a tax return contrary to the Associate Office's decision and a Federal tax controversy arises that involves the subject of the adverse decision, Appeals may consider the subject of that Associate Office's decision in the dispute if all other requirements in § 301.7803–2 are met.

The IRM currently provides that Appeals will not partially or fully concede an issue in a case in which an Associate Office's decision would be reviewed by a court using an abuse of discretion standard. One comment urged that if Appeals is permitted to consider a decision by an Associate Office that denied a 9100 relief or a CAM request, then the final regulations should apply a different standard of review than the abuse of discretion standard used for other administrative determinations. The comment recommended that Appeals should only be permitted to make concessions if it determines there is a significant risk that, if litigated, a court would find that the IRS abused its discretion in issuing an adverse letter ruling. Another comment observed that a CAM request may be denied by an Associate Office for many different reasons, including, for example, on the basis of substantive issues or due to procedural issues when the Associate Office determines that the taxpayer has not complied with all the procedural terms and conditions, such as filing requirements and deadlines. The comment urged the Treasury Department and the IRS to look through the superficial similarities of these denials to the underlying legal issues when determining whether Appeals review is warranted. The Treasury Department and the IRS agree that an Associate Office may issue a denial letter on a 9100 relief request or CAM request for a variety of different reasons, which are generally expressed in the applicable statute, regulations, or other guidance published in the Internal Revenue Bulletin. A decision to deny such a request, whether on a procedural or a substantive basis, is based on all the facts and circumstances. The final regulations do not provide a standard of review because it is outside the scope of these regulations, and the Treasury Department and the IRS expect the existing review standard would be used by Appeals for such cases.

A comment stated Appeals may need to enter into closing agreements with taxpayers to ensure that future taxable years are consistent with the request that was denied by the Associate Office, but that closing agreements would be more difficult for the taxpayer and the Government to reverse in future years compared to a letter ruling issued by an Associate Office. These regulations do not alter the authority delegated to the Associate Offices over 9100 relief or CAM requests or to restrict Appeals' ability to use its existing settlement authority to review or settle such cases. *See, e.g.,* Rev. Proc. 2002–18, 2002–1 C.B. 678 (regarding procedures relating to the settling of method change issues). Likewise, these regulations do not alter the IRS's authority to review these issues during an examination of a taxpayer's Federal income tax return.

I. Miscellaneous Recommendations Regarding Proposed § 301.7803–2

A comment expressed concern that the proposed regulations could make the Appeals review process more confusing and stressful for taxpayers, including low-income taxpayers, but did not specify how or why this could happen. The Treasury Department and the IRS disagree with this comment. The procedural requirements, timing requirements, and almost all of the exceptions to consideration by Appeals already exist in previously established guidance regarding Appeals. As in the past, the proposed exceptions are limited in number and the vast majority of taxpayers, including low-income taxpayers, would have the opportunity to have Appeals consider their Federal tax controversies.

The same comment suggested considering the impact of the regulations on closed cases in Appeals. To the extent this comment is suggesting these regulations should cover procedures for reopening a closed case, that topic is beyond the scope of these regulations. Procedures for reopening closed Appeals cases already exist in other guidance. *See* IRM 8.6.1.7 (09–25–2019).

A comment suggested that the proposed regulations overlap with § 601.106. To the extent that the Treasury Department and the IRS are not repealing or revising § 601.106, the comment recommended Treasury explicitly harmonize areas of overlap and consolidate all Appeals regulations into adjacent sections of the regulations to prevent ambiguity and controversy. In the alternative, even if no actual or perceived conflict exists, the comment recommended adding cross-references in § 301.7803–2 to avoid creating a trap for the unwary.

The Treasury Department and the IRS do not agree with this comment and do not adopt these recommendations. The Statement of Procedural Rules, 26 CFR part 601, are procedural rules governing internal IRS affairs. Those rules do not concern the substantive resolution of Federal tax controversies by Appeals.

Two comments recommended additional funding, including funding for Appeals in order to more effectively and fairly serve taxpayers, and limit the need for the exceptions in these regulations. The recommendation addresses operational matters of Appeals and is beyond the scope of these regulations because it does not address the proposed regulations or recommend any changes.

One comment addressed the Interim Guidance (IG) Memorandum (Control Number AP–08–0922–0011) that Appeals issued on September 14, 2022, relating to validity challenges to regulations and relating to procedural validity challenges to notices or revenue procedures. This comment alleged that the IRS has already begun to make the substance of Exception 19 and Exception 20 effective even though, as proposed in the proposed regulations, they would not take effect until 30 days after the publication of a final regulation. The comment recommended that Appeals pause using these exceptions before the regulations are finalized.

The Treasury Department and the IRS decline to adopt the comment's recommendation because it is outside the scope of these regulations. The IG Memorandum provides interim guidance by Appeals to AOs and does not have bearing on these final regulations.

II. Notice and Protest of Denial Procedures Following Issuance of a Notice of Deficiency: Proposed § 301.7803–3

Two comments were received on proposed § 301.7803–3, which implements the notice and protest procedures of section 7803(e)(5). As proposed, these procedures apply if any taxpayer requests Appeals consideration of a matter or issue, the request is denied, and the taxpayer meets the

requirements of proposed § 301.7803–3(a)(1) through (5). Proposed § 301.7803–3(a)(1) adopts the statutory language in section 7803(e)(5)(A), which refers to any taxpayer in receipt of a notice of deficiency authorized under section 6212 (relating to notice of deficiency).

The comments recommended that the notice and protest procedures should not be limited to taxpayers in receipt of a notice of deficiency. The Treasury Department and the IRS do not adopt this recommendation because it is contrary to the TFA. Section 7803(e)(5) does not grant the right to notice and protest a denial to all taxpayers. That statute requires the provision of such rights when the taxpayer is in receipt of a notice of deficiency, the taxpayer requests referral to Appeals, and that request is denied. Thus, a taxpayer would not be entitled to notice and protest procedures under section 7803(e)(5) and proposed § 301.7803–3 in the absence of a notice of deficiency.

A comment described the notice and protest procedures in proposed § 301.7803–3 as not applying when a taxpayer is ineligible for Appeals consideration because one of the exceptions listed in proposed § 301.7803–2(c) applies to the taxpayer. This description is incorrect. As written and intended, proposed § 301.7803–3 does not except such cases or issues from the notice and protest procedures. Thus, that one of the exceptions listed in proposed § 301.7803–2(c) applies to a taxpayer does not prevent these procedures from applying if the taxpayer otherwise meets the requirements of proposed § 301.7803–3(a)(1) through (5), although it may be a reason why the request for referral to Appeals was denied. In response to the comments, the final regulations make clarifying edits to the text of § 301.7803–3(a).

III. Comments on Topics That Are Outside the Scope of These Regulations

Although the *Explanation of Provisions* of the proposed regulations discussed other new sections of the TFA, such as section 7803(e)(6) relating to Appeals' authority to obtain legal assistance and advice from Chief Counsel attorneys with regard to cases pending at Appeals, the proposed regulations stated that sections 7803(e)(4) and 7803(e)(5) were the primary focus of the guidance provided in the proposed regulations. Some comments received in response to the proposed regulations concerned topics and issues that are outside the scope of these final regulations.

One such comment recommended that these final regulations include the assurances currently provided in subregulatory guidance regarding the *ex parte* rules; limitations on the IRS examination function or Appeals raising new issues; conference rights; or the longstanding policies regarding the reopening of mutual concession cases. A comment was offered on access to administrative files under new section 7803(e)(7). Another comment recommended that the Treasury Department should adopt the National Taxpayer Advocate's proposal that a taxpayer has the right to a conference with Appeals that does not include personnel from Chief Counsel or the IRS examination function unless the taxpayer specifically consents to the participation of those parties in the conference, and another comment recommended that neither Appeals nor any IRS personnel involved in the Appeals conference should offer ''nuisance'' settlement offers of zero or small numbers.

The Treasury Department and the IRS do not adopt these comments because their topics are outside the scope of sections 7803(e)(4) and 7803(e)(5), which were the primary focus of the proposed regulations. Section 7803(e)(4) provides for the general availability of Appeals consideration for taxpayers and section 7803(e)(5) provides for the limitation on designation of cases as not eligible for referral to Appeals. These comments do not address those areas and are already contained in other existing guidance. The IRS will consider and evaluate the comments for inclusion in the IRM or other guidance, as appropriate.

Special Analyses

I. Regulatory Planning and Review

Pursuant to the Memorandum of Agreement, Review of Treasury Regulations under Executive Order 12866 (June 9, 2023), tax regulatory actions issued by the IRS are not subject to the requirements of section 6 of Executive Order 12866, as amended. Therefore, a regulatory impact assessment is not required.

II. Regulatory Flexibility Act

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) it is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities.

These regulations affect any person who would like to have a Federal tax controversy considered by Appeals, including any small entity. Because any small entity could potentially request consideration by Appeals, these regulations are expected to affect a substantial number of small entities. However, the IRS has determined that the economic impact on small entities affected by these regulations would not be significant.

The regulations provide procedural and timing requirements for consideration by Appeals. The regulations also establish the general availability of consideration by Appeals and exceptions to that consideration. The procedural requirements, timing requirements, and the vast majority of the exceptions to eligibility for consideration by Appeals already exist in previously established guidance regarding Appeals. The regulations also provide rules regarding certain circumstances in which a written explanation will be provided regarding why Appeals consideration was not provided. None of the regulations affect entities' substantive tax liability nor do they affect the process that Appeals follows when it considers an eligible Federal tax controversy. Any significant economic impact on small entities will result from the application of the substantive tax provisions and will not be a result of these final regulations. Accordingly, the Secretary hereby certifies that these regulations will not have a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking was submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business, and no comments were received.

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Indian tribal government, in the aggregate, or by the private sector, of $100 million (updated annually for inflation). These final regulations do not include any Federal mandate that may result in expenditures by State, local, or Indian tribal governments, or by the private sector in excess of that threshold.

IV. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and

local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These final regulations do not have federalism implications and do not impose substantial direct compliance costs on State and local governments or preempt State law within the meaning of the Executive order.

V. Congressional Review Act

Pursuant to the Congressional Review Act (5 U.S.C. 801 *et seq.*), the Office of Information and Regulatory Affairs designated this rule as not a major rule as defined by 5 U.S.C. 804(2).

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings notices, and other guidance cited in this document are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at *https://www.irs.gov.*

Drafting Information

The principal author of these regulations is Joshua Hershman of the Office of the Associate Chief Counsel (Procedure and Administration). Other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, the Treasury Department and the IRS amend 26 CFR part 301 as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 is amended by adding entries in numerical order for §§ 301.7803–2 and 301.7803–3 to read, in part, as follows:

Authority: 26 U.S.C. 7805.

* * * * *

Section 301.7803–2 is also issued under 26 U.S.C. 7803(e).

Section 301.7803–3 is also issued under 26 U.S.C. 7803(e).

* * * * *

■ **Par. 2.** Sections 301.7803–2 and 301.7803–3 are added to read as follows:

§ 301.7803–2 Internal Revenue Service Independent Office of Appeals resolution of Federal tax controversies without litigation.

(a) *Function of the Internal Revenue Service Independent Office of Appeals.* The Internal Revenue Service Independent Office of Appeals (Appeals) resolves Federal tax controversies without litigation on a basis that is fair and impartial to both the Government and the taxpayer, promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and enhances public confidence in the integrity and efficiency of the Internal Revenue Service (IRS).

(b) *Consideration of a Federal tax controversy by Appeals*—(1) *In general.* The Appeals resolution process is generally available to all taxpayers to resolve Federal tax controversies.

(2) *Definition of Federal tax controversy.* For purposes of this section, a *Federal tax controversy* is defined as a dispute over an administrative determination with respect to a particular taxpayer made by the IRS in administering or enforcing the internal revenue laws, related Federal tax statutes, and tax conventions to which the United States is a party (collectively referred to as internal revenue laws) that arises out of the examination, collection, or execution of other activities concerning the amount or legality of the taxpayer's income, employment, excise, or estate and gift tax liability; a penalty; or an addition to tax under the internal revenue laws. For purposes of this section, a Federal tax controversy includes, for example, a dispute over an administrative determination made by the IRS concerning a taxpayer's proposed deficiency, a taxpayer's claim for credit or refund, the tax-exempt nature of a particular organization, private foundation, or qualified employee plan under the internal revenue laws, or the status of a tax-exempt or other tax-advantaged bond.

(3) *Other administrative determinations treated as Federal tax controversies.* Notwithstanding the definition of a Federal tax controversy in paragraph (b)(2) of this section, disputes over administrative determinations made by the IRS with respect to a particular person regarding the following topics are treated as Federal tax controversies for purposes of this section:

(i) Liabilities and penalties administered by the IRS that are outside the Internal Revenue Code (Code), such as a liability or penalty pursuant to 31 U.S.C. 5321 (relating to Report of Foreign Bank and Financial Accounts or Bank Secrecy Act civil penalties);

(ii) A request under the Freedom of Information Act (5 U.S.C. 552);

(iii) Application to become, or the sanction of, an Electronic Return Originator or Authorized IRS e-file Provider;

(iv) An IRS-proposed determination to a bond issuer that denies a claim for recovery of an asserted overpayment of arbitrage rebate, yield reduction payment, or penalty in lieu of rebate under section 148 of the Code (relating to arbitrage) with respect to tax-exempt bonds or under section 148 as modified by relevant provisions of the Code with respect to other tax-advantaged bonds;

(v) Administrative costs under section 7430 of the Code (relating to awarding of costs and certain fees); or

(vi) Any other topic that the IRS has determined may be considered by Appeals.

(c) *Exceptions to consideration by Appeals.* The following are Federal tax controversies that are excepted from consideration by Appeals or matters or issues that are otherwise ineligible for consideration by Appeals because they are neither a Federal tax controversy nor treated as a Federal tax controversy under paragraph (b)(3) of this section. If a matter or issue not eligible for consideration by Appeals is present in a case that otherwise is eligible for consideration by Appeals, the ineligible matter or issue will not be considered by Appeals during resolution of the case. The exceptions are:

(1) Any administrative determination made by the IRS rejecting a position of a taxpayer that the IRS has identified as frivolous for purposes of section 6702(c) of the Code (regarding listing of frivolous positions) and any case solely involving the taxpayer's failure or refusal to comply with the internal revenue laws because of frivolous moral, religious, political, constitutional, conscientious, or similar grounds.

(2) Penalties assessed by the IRS under section 6702 (relating to frivolous tax submissions) or section 6682 of the Code (relating to false information with respect to withholding) or any other penalty imposed for a frivolous position or false information. Appeals, however, may obtain verification that the assessment of the penalties complied with sections 6203 (relating to method of assessment) and 6751(b) (relating to supervisory approval of assessment) of the Code in a collection due process (CDP) hearing under sections 6320 (relating to a hearing upon filing of a notice of lien) and 6330 (relating to a hearing before levy) of the Code.

Appeals also may consider a non-frivolous substantive challenge to a section 6702 or section 6682 penalty in a CDP hearing.

(3) Any administrative determination made by the IRS under section 7623 of the Code (relating to awards to whistleblowers).

(4) Any administrative determination issued by an agency other than the IRS, such as a determination by the Alcohol and Tobacco Tax and Trade Bureau (TTB) concerning an excise tax administered by and within the jurisdiction of TTB.

(5) Any decision made by the IRS not to issue a Taxpayer Assistance Order (TAO) under section 7811 of the Code (relating to TAOs).

(6) Any decision made by the IRS concerning material to be deleted from the text of a written determination pursuant to section 6110 of the Code (relating to public inspection of written determinations) unless the written determination is otherwise being considered by Appeals.

(7) Any denial of access under the Privacy Act (5 U.S.C. 552a(d)(1)).

(8) Any issue resolved in an agreement described in section 7121 of the Code (regarding closing agreements) that the taxpayer entered into with the IRS, and any decision made by the IRS to enter into or not enter into such agreement. Appeals may consider the question of whether an item or items are covered, and how the item or items are covered, in a closing agreement.

(9) Any case in which the IRS erroneously returns or rejects an offer in compromise (OIC) submitted under section 7122 of the Code (relating to compromises) as nonprocessable or no longer processable and the taxpayer requests Appeals consideration to assert that the OIC should be deemed to be accepted under section 7122(f).

(10) Any case in which a criminal prosecution, or a recommendation for criminal prosecution, is pending against the taxpayer for a tax-related offense, except with the concurrence of the Office of Chief Counsel or the Department of Justice, as applicable.

(11) Any issues relating to allocation among different fee payers of the branded prescription drug and health insurance providers fees in section 9008 of the Patient Protection and Affordable Care Act (PPACA), Public Law 111–148 (124 Stat. 119 (2010)), as amended by section 1404 of the Health Care and Education Reconciliation Act of 2010 (HCERA), Public Law 111–152 (124 Stat. 1029 (2010)), and section 9010 of PPACA, as amended by section 10905 of PPACA, and as further amended by section 1406 of HCERA.

(12) Any certification or issuance of a notice of certification of a seriously delinquent Federal tax debt to the Department of State under section 7345 of the Code (relating to the revocation or denial of a passport in the case of serious tax delinquencies).

(13) Any issue barred from consideration under section 6320 or section 6330, §§ 301.6320–1 and 301.6330–1, or any other administrative guidance related to CDP hearings or equivalent hearings.

(14) Any case, determination, matter, decision, request, or issue that Appeals lacks the authority to settle. The following is a non-exclusive list of examples:

(i) Any case or issue in a case that has been referred to the Department of Justice.

(ii) Any competent authority case (including a competent authority resolution previously accepted by the taxpayer) under a United States tax treaty that is within the exclusive authority of the United States Competent Authority.

(iii) Any decision of the Commissioner of Internal Revenue or the Commissioner's delegate to not rescind a penalty under section 6707A of the Code for a non-listed reportable transaction.

(iv) Any request for relief under section 6015 of the Code (relating to relief from joint and several liability on a joint return) when the nonrequesting spouse is a party to a docketed case in the United States Tax Court (Tax Court) and does not agree to granting full or partial relief under section 6015 to the requesting spouse.

(v) Any criminal restitution-based assessment under section 6201(a)(4) of the Code (relating to certain orders of criminal restitution and restriction on challenge of assessment).

(15) Any adverse action related to the initial or continuing recognition of tax-exempt status, an entity's classification as a foundation, the initial or continuing determination of employee plan qualification, or a determination involving an obligation and the issuer of an obligation under section 103 of the Code. The exception in this paragraph (c)(15) applies only if the tax-exempt recognition, classification, determination of employee plan qualification, or determination involving an obligation and the issuer of an obligation under section 103 is based upon a technical advice memorandum issued by an Office of Associate Chief Counsel before an appeal is requested.

(16) Any case docketed in the Tax Court if the notice of deficiency, notice of liability, or final adverse determination letter is based upon a technical advice memorandum issued by an Office of Associate Chief Counsel in that case involving an adverse action described in paragraph (c)(15) of this section.

(17) Any decision by an Office of Associate Chief Counsel regarding whether to issue a letter ruling or the content of a letter ruling. This includes decisions regarding requests for relief under §§ 301.9100–1 through 301.9100–22 and requests for a change in method of accounting. The subject of the letter ruling may be considered by Appeals if all other requirements in this section are met. For example, if an Office of Associate Chief Counsel issues an adverse letter ruling to a taxpayer, the taxpayer cannot immediately appeal the issuance of the adverse letter ruling. If the taxpayer subsequently files a return taking a position that is contrary to the letter ruling and that position is audited by the IRS, Appeals may consider that Federal tax controversy if all other requirements in this section are met.

(18) Any issue based on a taxpayer's argument that a statute violates the United States Constitution unless there is an unreviewable decision from a Federal court holding that the cited statute is unconstitutional. For purposes of this paragraph (c)(18), an argument that a statute violates the United States Constitution includes any argument that a statute is unconstitutional on its face or as applied to a particular person. The exception in this paragraph (c)(18) does not preclude Appeals from considering a Federal tax controversy based on arguments other than the constitutionality of a statute, such as whether the statute applies to the taxpayer's facts and circumstances. For purposes of this section, the phrase *unreviewable decision* is a decision of any Federal court regardless of where the taxpayer resides that can no longer be appealed to any Federal court because all appeals in a case have been exhausted or the time to appeal has expired and no appeal was filed.

(19) Any issue based on a taxpayer's argument that a Treasury regulation is invalid unless there is an unreviewable decision from a Federal court invalidating the regulation as a whole or the provision in the regulation that the taxpayer is challenging. The exception in this paragraph (c)(19) does not preclude Appeals from considering a Federal tax controversy based on arguments other than the validity of a Treasury regulation, such as whether the Treasury regulation applies to the taxpayer's facts and circumstances. For purposes of this paragraph (c)(19), the term *invalid* means any challenge to

validity, whether substantively invalid or procedurally invalid in scope. *See* paragraph (c)(20) of this section for definition of the term *procedurally invalid.*

(20) Any issue based on a taxpayer's argument that a notice or revenue procedure published in the Internal Revenue Bulletin is procedurally invalid unless there is an unreviewable decision from a Federal court holding it to be invalid. This exception does not preclude Appeals from considering a Federal tax controversy based on arguments other than the procedural validity of a notice or revenue procedure, such as whether the notice or revenue procedure applies to the taxpayer's facts and circumstances. For purposes of this section, the term *procedurally invalid* is defined as any determination regarding whether a notice or revenue procedure failed to comply with administrative law requirements, such as notice and comment under 5 U.S.C. 553.

(21) Any case or issue designated for litigation, or withheld from Appeals consideration in a Tax Court case, in accordance with guidance regarding designating or withholding a case or issue. For purposes of this section, *designated for litigation* means that the Federal tax controversy, comprising an issue or issues in a case, will not be resolved without a full concession by the taxpayer or by decision of the court.

(22) Any case docketed in the Tax Court if the notice of deficiency, notice of liability, or other determination was issued by Appeals unless the exception in paragraph (f)(1) of this section (regarding when the Tax Court remands a CDP case for reconsideration) applies.

(23) Any case in which timely Appeals consideration must be requested before a petition is filed in the Tax Court because exhaustion of administrative review, including consideration by Appeals, is a prerequisite for the Tax Court to have jurisdiction, and the taxpayer failed to timely request Appeals consideration. For example, Appeals consideration must be requested before a petition is filed in the Tax Court regarding a declaratory judgment request under section 7428 (relating to declaratory judgment on the classification of specified organizations), section 7476 (relating to declaratory judgment on qualification of certain retirement plans), or section 7477 (relating to declaratory judgment on the value of certain gifts) of the Code.

(24) Any administrative determination made by the IRS to deny or revoke a Certified Professional Employer Organization certification.

(d) *Originating office has completed its review*—(1) *In general.* Appeals consideration of a matter or issue is appropriate only after the originating IRS office has completed its action on the Federal tax controversy and issued an administrative determination or a proposed administrative determination accompanied by an offer for consideration by Appeals. If the originating office has not completed its action regarding the Federal tax controversy, the request for Appeals consideration is premature. Appeals may consider the Federal tax controversy if the taxpayer requests consideration after the originating office's action is complete and if all requirements in this section are met.

(2) *Exception for early consideration programs.* If administrative guidance permits the originating office to engage Appeals prior to completing its action regarding the Federal tax controversy, Appeals may consider the Federal tax controversy under the terms of that administrative guidance, such as mediation under a fast track settlement program or early consideration of some issues under an early referral program.

(e) *Procedural and timing requirements are followed*—(1) *In general.* A request for Appeals consideration of a Federal tax controversy must be submitted in the time and manner prescribed in applicable forms, instructions, or other administrative guidance. All procedural requirements must be complied with before Appeals will consider a Federal tax controversy. In addition, there must be sufficient time remaining on the appropriate limitations period for Appeals to consider the Federal tax controversy, as provided in administrative guidance. In a case docketed in the Tax Court, if the Office of Chief Counsel has recalled the case from Appeals or, if not recalled, Appeals has returned the case to the Office of Chief Counsel so that it is received by the Office of Chief Counsel prior to the date of the calendar call for the trial session, further consideration by Appeals will not be available if there is insufficient time for such consideration.

(2) *Example.* The following example illustrates the application of the rule of insufficient time remaining on the limitations periods for Appeals consideration: The IRS examines Taxpayer X's Form 1040, *U.S. Individual Income Tax Return,* and determines a deficiency in income tax due to the IRS disallowing some of the deductions reported on the return. Because the expiration date of the assessment period of limitations with respect to the proposed deficiency is imminent, there is insufficient time for Appeals to receive the case and determine whether the case is susceptible to settlement. Consequently, the IRS issues a notice of deficiency under section 6212 of the Code to Taxpayer X. Under section 6213(a) of the Code, the issuance of this notice suspends the running of the assessment period while a taxpayer seeks judicial review of the notice. Taxpayer X timely files a petition with the Tax Court. After the case is docketed in the Tax Court, Taxpayer X generally would have the opportunity to have Appeals consider the case.

(f) *One opportunity for consideration by Appeals*—(1) *In general.* If a Federal tax controversy is eligible for consideration by Appeals and the procedural and timing requirements are followed, a taxpayer generally has one opportunity for Appeals to consider such matter or issue in the same case for the same period or in any type of future case for the same period, unless the Tax Court remands for reconsideration in a CDP case. Appeals has considered a Federal tax controversy if the Federal tax controversy was before Appeals for consideration and Appeals issued a determination or made a settlement offer, Appeals decided the Federal tax controversy was not susceptible to settlement, or the person who requested consideration was issued and failed to respond to Appeals' communications and as a result of that failure Appeals issued or made a determination. Appeals also has considered a Federal tax controversy if the taxpayer notified the Office of Chief Counsel or the IRS that the taxpayer wanted to discontinue settlement consideration by Appeals or requested to transfer from Appeals to the Office of Chief Counsel settlement consideration of a Federal tax controversy that is currently before the Tax Court.

(2) *Exceptions.* Notwithstanding paragraph (f)(1) of this section, taxpayers retain the opportunity for a traditional appeal after participating in an early consideration program as described in paragraph (d)(2) of this section if no agreement was reached between the taxpayer and the IRS originating office. Taxpayers may be able to request post-Appeals mediation under the terms of administrative guidance after a traditional appeal if no agreement was reached between the taxpayer and Appeals. Notwithstanding paragraph (f)(1), taxpayers who provide new factual information to the IRS and who meet the conditions and requirements for audit reconsideration or for reconsideration of issues

previously considered by Appeals may have an opportunity for Appeals consideration, as provided in administrative guidance.

(g) *Special rules.* The following special rules apply to this section:

(1) *Appeals reconsideration.* Notwithstanding the exception in paragraph (c)(22) of this section, if Appeals issued a notice of deficiency, notice of liability, or other determination without having fully considered one or more issues because of an impending expiration of the statute of limitations on assessment, Appeals may choose to have the Office of Chief Counsel return the case to Appeals for full consideration of the issue or issues once the case is docketed in the Tax Court.

(2) *Coordination between Office of Chief Counsel and Appeals.* Appeals and the Office of Chief Counsel may determine how settlement authority in a Federal tax controversy that is before the Tax Court is transferred between the two offices.

(h) *Applicability date.* This section is applicable to requests for consideration by Appeals made on or after February 14, 2025.

§ 301.7803–3 Requests for referral to the Internal Revenue Service Independent Office of Appeals following the issuance of a notice of deficiency.

(a) *Notice and protest.* If any taxpayer requests consideration by the Internal Revenue Service Independent Office of Appeals (Appeals) of any matter or issue under section 7803(e)(5) of the Internal Revenue Code (Code) (relating to limitation on designation of cases as not eligible for referral to Appeals) and the request is denied, the Commissioner of Internal Revenue (Commissioner) or the Commissioner's delegate must provide the taxpayer a written notice that provides a detailed description of the facts involved, the basis for the decision to deny the request, a detailed explanation of how the basis for the decision applies to such facts, and the procedures for protesting the decision to deny the request, but only if the requirements of paragraphs (a)(1) through (5) of this section are met:

(1) *Notice of deficiency.* The taxpayer received a notice of deficiency authorized under section 6212 of the Code (relating to notice of deficiency) before the taxpayer requested consideration by Appeals.

(2) *Frivolous positions.* The issue involved is not a frivolous position within the meaning of section 6702(c) of the Code (regarding listing of frivolous positions).

(3) *Multiple requests for referral to Appeals.* The taxpayer has not previously requested consideration by Appeals, pursuant to section 7803(e)(5), of the same matter or issue in a taxable year or period.

(4) *Previous Appeals consideration.* Appeals has not previously considered the matter or issue in a taxable year or period that is the subject of the request and determined that the matter or issue could not be settled or a settlement offer was rejected, except as provided in § 301.7803–2(f)(2) with respect to a taxpayer participating in an early consideration program.

(5) *Notice of deficiency with more than one matter or issue.* If the notice of deficiency for which the taxpayer requests Appeals consideration includes more than one matter or issue in a taxable year or period, the taxpayer must request referral for Appeals consideration and submit all such matters or issues at the same time.

(b) *Applicability date.* This section is applicable to relevant requests for consideration by Appeals made on or after February 14, 2025.

Douglas W. O'Donnell,

Deputy Commissioner.

Approved: January 3, 2025.

Aviva R. Aron-Dine,

Deputy Assistant Secretary of the Treasury (Tax Policy).

[FR Doc. 2025–00426 Filed 1–14–25; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. OSHA–2020–0004]

RIN 1218–AD36

Occupational Exposure to COVID–19 in Healthcare Settings

AGENCY: Occupational Safety and Health Administration (OSHA), Labor

ACTION: Final rule; termination of rulemaking

SUMMARY: OSHA is terminating its COVID–19 rulemaking.

DATES:

Effective dates: The termination of the rulemaking is effective January 15, 2025.

Compliance dates: There are no relevant compliance dates.

ADDRESSES: In accordance with 28 U.S.C. 2112(a), the Agency designates Edmund C. Baird, Associate Solicitor of Labor for Occupational Safety and Health, Office of the Solicitor, U.S. Department of Labor, to receive petitions for review of this final agency action. Service can be accomplished by email to *zzSOLCovid19ruleterm@dol.gov.*

Docket: To read or download comments or other material in the docket, go to Docket No. OSHA–2020–0004 at *www.regulations.gov* index; however, some information (*e.g.,* copyrighted material) is not publicly available to read or download through that website. All comments and submissions, including copyrighted material, are available for inspection through the OSHA Docket Office. Documents submitted to the docket by OSHA or stakeholders are assigned document identification numbers (Document ID) for easy identification and retrieval. The full Document ID is the docket number plus a unique four-digit code. For example, the Document ID number for OSHA's COVID–19 Healthcare ETS is OSHA–2020–0004–1033. Some Document ID numbers also include one or more attachments.

When citing exhibits in the docket, OSHA includes the term ''Document ID'' followed by the last four digits of the Document ID number. For example, document OSHA–2020–0004–1033 would appear as Document ID 1033. Citations also include the attachment number or other attachment identifier, if applicable, page numbers (designated ''p.'' or ''Tr.'' for pages from a hearing transcript), and in a limited number of cases a footnote number (designated ''Fn.''). In a citation that contains two or more Document ID numbers, the Document ID numbers are separated by semi-colons (*e.g.,* ''Document ID 1231, Attachment 1, p. 6; 1383, Attachment 1, p. 2'').

This information can be used to search for a supporting document in the docket at *www.regulations.gov.* Contact the OSHA Docket Office at (202) 693–2350 (TTY number: 877–889–5627) for assistance in locating docket submissions.

FOR FURTHER INFORMATION CONTACT:

For press inquiries: Contact Frank Meilinger, Director, Office of Communications, Occupational Safety and Health Administration, U.S. Department of Labor; telephone (202) 693–1999; email *oshacomms@dol.gov.*

For general information: Contact Andrew Levinson, Director, Directorate of Standards and Guidance, Occupational Safety and Health Administration, U.S. Department of Labor; telephone (202) 693–1950; email: *osha.dsg@dol.gov.*