



SOUTHERN FEDERAL
TAX INSTITUTE

**RESOLVING TAX CONTROVERSIES WITH THE
IRS INDEPENDENT OFFICE OF APPEALS:
WHAT'S NEW AND WHAT'S NEXT**

By

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I. Introduction

A. The Independent Office of Appeals: Mission and Function

The Independent Office of Appeals (“Appeals”) is a separate and independent function of the Internal Revenue Service (“IRS” or “Service”), operating as the Service’s dispute resolution forum.¹ Appeals provides a forum for taxpayers and the government to settle disputes without the need for litigation. As described in more detail below, Appeals is “generally available to all taxpayers.”²

The statutory mission of Appeals is 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.³ To preserve the impartiality of Appeals, *ex parte* communications between Appeals and other Service employees are generally prohibited.⁴

Using a “quasi-judicial” approach and acting as an independent, impartial arbiter, Appeals relies on facts developed at the Examination level to evaluate taxpayers’ and the government’s positions on issues. Appeals attempts to settle cases by considering the hazards of litigation to each party.

Appeals executes its mission by considering taxpayers’ protests of cases, holding conferences (in-person, telephonic, correspondence, or virtual), and negotiating settlements.⁵ It is a goal of Appeals “to effect settlement of contested cases on a basis fair to both the Government and the taxpayer to the maximum extent possible by resolving non-docketed cases in non-docketed status and resolving docketed cases without trial.”⁶ Appeals is organized into four functions: Examination Appeals, Collection Appeals, Specialized Examination Programs & Referrals, and Case & Operations Support.⁷

¹ Internal Revenue Manual (“IRM”) 8.1.1.3(1) (Jan. 9, 2024).

² I.R.C. § 7803(e)(4); Treas. Reg. § 301.7803-2(b). I.R.C. § 7803(e)(5) provides procedures the IRS must follow if a taxpayer receives a notice of deficiency and its referral to Appeals is denied. *See also* Treas. Reg. § 301.7803-3.

³ I.R.C. § 7803(e)(3); Treas. Reg. § 301.7803-2(a).

⁴ *See* Rev. Proc. 2012-18, 2012-10 I.R.B. 455.

⁵ IRM 8.1.1.2(2) (Jan. 9, 2024).

⁶ IRM 8.1.1.2(2)(d) (Jan. 9, 2024).

⁷ IRM 1.4.28.1.3 (Dec. 12, 2024).

B. Limitations on Taxpayers' Right of Appeal

I.R.C. § 7803(e)(4) states that the Appeals resolution process “shall be generally available to all taxpayers.” Thus, as stated in the statute, Congress did not provide taxpayers with an absolute right to Appeals consideration for all issues. The legislative history of the Taxpayer First Act,⁸ which added § 7803(e) to the Code, reflects Congress’s intent for Treasury and the Service to provide “reasonable exceptions” to the scope of what Appeals can consider.⁹

In September 2022, Treasury and the Service issued Proposed Regulations that proposed an exclusive list of 24 exceptions to Appeals consideration.¹⁰ In January 2025, Treasury and the Service issued final regulations that maintained the 24 exceptions with minor, non-substantive revisions.¹¹ The final regulations apply to all requests for Appeals consideration on or after February 14, 2025. A full analysis of all 24 exceptions is beyond the scope of this analysis; however, taxpayers and practitioners should pay particular attention to the exception in Treas. Reg. § 301.7803-2(c)(19), which prevents Appeals from considering any issue based on a taxpayer’s argument that a Treasury Regulation is invalid.

In *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), the Supreme Court expressly overruled *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As a result, courts addressing challenges to agency interpretations must now “exercise their independent judgment in deciding whether an agency has acted within its statutory authority” and “may not defer” to the agency’s interpretation, regardless of any ambiguities in the statutory provision being interpreted.¹² In the wake of *Loper Bright*, taxpayers should evaluate whether one or more issues raised during an examination are ripe for a regulation validity challenge. Unfortunately, Treas. Reg. § 301.7803-2(c)(19) expressly preempts Appeals consideration of such challenges and forces taxpayers to take all regulation validity challenges to Federal court, at least and until there is an “unreviewable” federal court decision invalidating the relevant regulation. Treasury and IRS justify this result on the policy grounds that questions regarding the validity of regulations “involve determinations of general applicability resolved at the highest levels of the Treasury Department and the IRS . . . 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.”¹³ Furthermore, in the Government’s view, a final decision from a Federal court is publicly available, is applied consistently to all taxpayers, and promotes efficiency at Appeals.

Taxpayers seeking Appeals jurisdiction and review should carefully study Treas. Reg. § 301.7803-2 to understand which issues may be excluded from Appeals jurisdiction. Taxpayers currently under examination should also plan their defenses if any of the regulatory exceptions may apply in their case. Finally, taxpayers should keep an eye on cases pending at the Tax Court and in the appellate

⁸ Pub. L. No. 116-25, 133 Stat. 981, § 1001 (July 1, 2019).

⁹ See H.R. Rep. No. 39, Part 1, 116th Cong., 1st Session, 30-31 (2019) (“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.”).

¹⁰ REG-125693-19, 87 Fed. Reg. 55934 (Sept. 13, 2022).

¹¹ See Treas. Reg. § 301.7803-2(c)(1)-(24).

¹² 603 U.S. at 412-413.

¹³ See T.D. 10030, 90 Fed. Reg. 3645 (Jan. 15, 2025).

courts involving regulation validity challenges, including: *Schwarz v. Commissioner*, Docket No. 12347-20 (Tax Ct.); *Tribune Media Co. v. Commissioner*, No. 23-1135 (7th Cir.); *3M Co. v. Commissioner*, No. 23-3772 (8th Cir.).

C. Alternative Dispute Resolution

The IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685 (1998) (the “RRA”), codified I.R.C. § 7123, which requires the IRS to prescribe Appeals dispute resolution procedures. Since the enactment of I.R.C. § 7123, various Alternative Dispute Resolution (“ADR”) programs have been established per this mandate.

ADR programs provide a separate avenue to the traditional Appeals process. A primary objective of the IRS, inclusive of the Appeals function, is to resolve tax controversies at the lowest level without sacrificing the quality and integrity of those determinations; ADR programs were developed to achieve this objective.¹⁴ ADR programs can be potentially beneficial to all taxpayers and the IRS alike, as ADR participation can offer flexibility, lower costs, and quicker resolution. Taxpayer interest to participate in an ADR program could also be driven by the desire for issue certainty with respect to financial statement reporting, state, local, or foreign tax returns, and non-tax matters.

Even if an ADR program does not result in a settlement between the taxpayer and the IRS, participation in the program could clarify the facts, clarify the legal positions, and allow each side to reflect on their respective likelihood of success if the dispute continues. Application and participation in ADR programs is voluntary to the taxpayer; however, the programs do generally require the Examination function’s (“Exam”) agreement to participate.

As described in more detail below, ADR programs have been criticized by the Government Accountability Office, the Taxpayer Advocate Service, and practitioners alike. In response to that input and the overall decline in ADR program use, in April 2024, the Service announced the formation of a new Alternative Dispute Resolution Program Management Office (“PMO”).¹⁵ The purpose of the PMO is to revitalize the existing ADR programs by making them more attractive and accessible to taxpayers and to pilot new initiatives. The preliminary results of the renewed focus on ADR programs appear positive, with significant increases in ADR program participation in 2024.¹⁶

In January 2025, the Service announced three pilot programs testing changes to the Fast Track Settlement (“FTS”) and Post Appeals Mediation (“PAM”) Procedures, and the introduction of a “Last Chance FTS” program for certain taxpayers within the jurisdiction of the Small Business/Self-Employed (“SB/SE”) division.¹⁷ The following changes to FTS and PAM are being piloted during a two-year test period:

¹⁴ IRM 8.26.4.2(1) (Mar. 13, 2025).

¹⁵ See IR-2024-119.

¹⁶ See Nat’l Taxpayer Advocate Blog, *Appeals Improves Alternative Dispute Resolution Programs, But Barriers Remain* (May 22, 2025), available at <https://www.taxpayeradvocate.irs.gov/news/nta-blog/appeals-improves-adr-programs-but-barriers-remain/2025/05/#:~:text=ADR%20is%20an%20informal%2C%20confidential,IRS's%20current%20ADR%20programs%20include>.

¹⁷ See Ann. 2025-6, 2025-5 I.R.B. 526.

- FTS can be applied to one or more issues in a case. Under the existing FTS procedures, if a taxpayer's case included an issue that was not eligible for FTS, the entire case was not eligible.
- Participation in FTS will not disqualify a taxpayer from participating in PAM.
- Taxpayers' requests to participate in FTS and PAM will not be denied without the approval of a first-line IRS executive. When the Service denies a request, taxpayers will now receive an explanation for the denial.
- Elimination of the requirement for a pre-FTS managerial conference for taxpayers within the jurisdiction of the SB/SE and Tax-Exempt & Government Entities ("TE/GE") divisions.

The "Last Chance FTS" program is a limited scope pilot for select SB/SE cases, in which Appeals will act as a neutral point-of-contact and will reach out to the taxpayer after it submits a protest at the conclusion of an examination to inform the taxpayer of the FTS option.

To support broader FTS use, on July 23, 2025, the Service issued an Interim Guidance Memorandum ("IGM") to all Large Business and International ("LB&I") employees, requiring additional internal reviews and approvals before denying a taxpayer's FTS request.¹⁸ Per the IGM, effective from August 1, 2025 through August 1, 2027, before the Service denies a taxpayer's FTS request, the applicable senior directors must notify the LB&I deputy commissioner of the proposed FTS denial. The IGM explains that the decision to accept or deny a taxpayer's FTS request is "a business decision, not a legal decision."

D. Overview of Traditional Appeals Procedures and Alternative Dispute Resolution Options

Below is a table reflecting the turn of events when a taxpayer and Exam fail to resolve a disputed issue.¹⁹ Included in the table are specific ADR programs in which Appeals either administers or has a primary role within the particular program. Further details of each referenced ADR program are provided in Section II.

¹⁸ See LB&I-04-0725-0008 (Jul. 23, 2025), available at <https://www.irs.gov/pub/foia/ig/spder/lbi-04-0725-0008%20public.pdf>. The IGM replaces and supersedes LB&I-04-0225-0002 (Feb. 20, 2025).

¹⁹ Appeals will consider certain taxpayer disputes with the Service's Collection function; however, the focus of this outline is on the appeal of non-collection disputes.

Event	Description
Exam issues Form 5701, Notice of Proposed Adjustment	<p>Once Exam has completed its review of an issue, or completed the examination, Exam will compose its version of the facts and law with respect to each issue to support Exam’s position. This written report is provided on a Form 5701, <i>Notice of Proposed Adjustment</i> (“NOPA”), and is generally accompanied by Form 886-A, <i>Explanation of Items</i>, in Large Business & International cases, or a lead sheet in Small Business/Self Employed cases. Taxpayers are often given the opportunity to review a draft NOPA before Exam issues the final NOPA.</p> <p><i>ADR Option: Early Referral to Appeals</i></p> <p><i>A taxpayer and Exam may initiate an Early Referral of an issue to Appeals. The request may be made after an issue has been fully developed, but not after issuance of the 30-day letter (see Section II for additional information).</i></p> <p><i>ADR Option: Fast Track Settlement</i></p> <p><i>Generally, a taxpayer may request Fast Track Settlement after a final NOPA is issued to the taxpayer, and the taxpayer has provided a written response to the NOPA. Fast Track Settlement is not available after the issuance of the 30-day letter (see Section II for additional information).</i></p>
Exam issues 30-day letter	<p>The 30-day letter is the formal letter that sets forth the proposed Examination adjustments. The 30-day letter begins a 30-day period during which the taxpayer can appeal an unagreed issue to Appeals.</p>
Taxpayer submits a protest in response to 30-day letter	<p>The taxpayer must specifically request, generally in a written protest, that an unagreed issue be considered by Appeals. This written submission is due to Exam within 30 days from the receipt of the 30-day letter (discretionary extensions may be requested).</p>
Exam prepares a rebuttal to Taxpayer’s protest and submits to Appeals	<p>Exam responds to the taxpayer’s written protest with a written rebuttal. Exam will send the taxpayer’s protest and its rebuttal to Appeals for case assignment in Appeals. There is no deadline for Exam to prepare its rebuttal, which may cause significant delays in resolving protested issues with Appeals.</p>
Case assigned to Appeals	<p>Approximately six months after Exam’s submission, Appeals will assign the case to an Appeals officer, and the designated officer will receive and review the pertinent materials. The Appeals Officer will send a letter to the taxpayer alerting the taxpayer that the case is assigned and asking the taxpayer to contact the Appeals Officer for scheduling an Appeals conference.</p>

Event	Description
	<p><i>ADR Option: Rapid Appeals Process</i></p> <p><i>In certain cases, after assignment of a case in Appeals, the parties may agree to the Rapid Appeals Process. The taxpayer, the Exam team, and the Appeals Officer conduct a Rapid Appeals Process session in lieu of a formal Appeals conference (see Section II for additional information).</i></p>
<p>Appeals conference held</p>	<p>The taxpayer, the Exam team, and Appeals Officer (including any Appeals technical specialists, if necessary) will hold a conference to discuss the protested issue(s).</p> <p>The Appeals Officer has settlement authority during the Appeals conference, and the objective of this meeting is to settle the issues based on litigation hazards.</p>
<p>If settled at Appeals, settlement agreement signed and tax year(s) at issue closed</p>	<p>Once settled, the Appeals Officer will send the settled case back to the Exam team to close out the examination.</p>
<p>If not settled at Appeals, Exam will issue a Statutory Notice of Deficiency</p>	<p>If an issue remains unagreed after the Appeals conference, Exam will send the taxpayer a Statutory Notice of Deficiency.</p> <p><i>ADR Option: Post Appeals Mediation</i></p> <p><i>If a settlement cannot be reached through the traditional Appeals procedures, the taxpayer may request Post Appeals Mediation, extending the Appeals process prior to the issuance of a Statutory Notice of Deficiency (see Section II for additional information).</i></p>
<p>If a Statutory Notice of Deficiency is issued, the taxpayer may (1) file a petition with Tax Court, or (2) pay the tax assessed and file suit for a refund in a federal district court or Court of Federal Claims</p>	<p>A Statutory Notice of Deficiency triggers the 90-day statutory period of time during which a taxpayer may file a petition (thus initiating a lawsuit against the IRS) with the Tax Court. Filing a petition with the Tax Court is the way to challenge an IRS determination in a federal court without having to prepay the tax associated with the determination.</p> <p>To initiate suit for a refund in a federal district court or the Court of Federal Claims, generally, full payment of the tax assessed is required.</p>

II. ADR Programs

A. ADR Program Goal

The goal of the ADR programs is to use dispute resolution techniques to encourage the IRS and the taxpayer to resolve issues at earlier stages and decrease the overall time from return filing to ultimate issue resolution. As discussed in Section I, this is an important goal, as ADR programs can help taxpayers understand the strengths (or weaknesses) of their positions, save significant public and private resources (time and money) by truncating the full Appeals process that can easily last well over a year, and potentially eliminate the need for litigation.

The IRS ADR programs include (1) FTS; (2) Fast Track Mediation; (3) Early Referral; (4) PAM; and (5) Rapid Appeals Process (“RAP”). Certain ADR programs and procedures are specifically geared towards collection cases; however, the focus of this analysis is on the non-collection ADR programs.²⁰

B. Fast Track Settlement

FTS is optional and permits Exam and the taxpayer to mediate their disputes with the FTS Appeals Official serving as a neutral party. Exam retains jurisdiction of the issue during the FTS process. FTS is available to taxpayers under the jurisdiction of the following IRS divisions: LB&I,²¹ SB/SE,²² and TE/GE.²³ For purposes of simplicity, this discussion aggregates the general procedures for FTS cases.

1. Eligibility

FTS is generally available for all cases within LB&I, SB/SE, and TE/GE jurisdiction once the issue is fully developed, i.e., after Exam issues the Form 5701, *Notice of Proposed Adjustment*, and the taxpayer provides a written response. With the exception of the “Last Chance FTS” pilot program for select SB/SE cases, FTS is generally not available after the issuance of the 30-day letter.²⁴ Additionally, prior to the pilot program described in Section I, if there were multiple issues arising in the taxpayer’s case and one of them was not eligible for FTS, all issues in the taxpayer’s case were not eligible.

²⁰ For additional information on collection case ADR programs see IRM 8.26.3 (Fast Track Mediation for Collection Cases) (Sept. 27, 2017), and IRM 8.26.9 (Post-Appeals Mediation Procedures for Collection Cases) (Sept. 23, 2020). *See also* Rev. Proc. 2016-57, 2016-49 I.R.B. 786, and IRS Pub. 3605 (rev. Mar. 2022) for information on SB/SE Fast Track Mediation (Collection).

²¹ *See* Rev. Proc. 2003-40, 2003-1 C.B. 1044; IRS Pub. 4539 (rev. May 2012); IRM 8.26.1 (Mar. 13, 2025).

²² *See* Rev. Proc. 2017-25, 2017-14 I.R.B. 1039; IRS Pub. 5022 (rev. Sept. 2021); IRM 8.26.2 (June 23, 2017).

²³ *See* IRS Ann. 2012-34, 2012-36 I.R.B. 334 (Sept. 4, 2012); IRS Pub. 5092 (rev. Sept. 2017).

²⁴ *See* Ann. 2025-6 (Last Chance FTS Pilot Program).

Certain issues are specifically excluded from FTS. For example, the following issues are not eligible for taxpayers under the jurisdiction of LB&I:²⁵

- issues designated for or under consideration for designation for litigation;
- issues for which the taxpayer submitted a request for competent authority assistance;
- issues for which the taxpayer requested the simultaneous Appeals/Competent Authority procedure;
- issues outside LB&I's jurisdiction;
- whipsaw issues;
- issues inconsistent with sound tax administration; and
- issues identified in an IRS Chief Counsel Notice or other publication as excluded from FTS.

2. Application Process

FTS may be initiated by the taxpayer or Exam before Exam's issuance of the 30-day letter, but both parties must agree. If the issue is appropriate for FTS, the parties complete an application form, which is subject to review and will not be denied without the approval of a first-line IRS executive.²⁶

3. Settlement Process

Prior to holding the FTS session, the FTS Official will prepare a FTS Session Report and Agenda to plan the mediation session. The parties are encouraged to include fact witnesses and other experts at the FTS session to assist during the settlement process. The FTS Official has authority to propose a settlement. If the taxpayer agrees to a proposed settlement and the Exam Team Manager rejects it, the Territory Manager must review and concur with the rejection in writing. If that occurs, the FTS issue will be closed out as unagreed. In such a case, the taxpayer will retain all traditional rights to request Appeals consideration of the unagreed issue. If resolution is not reached, Exam can use information provided during FTS in preparation of the 30-day letter.

If a settlement is reached, the parties sign the FTS Session Report acknowledging acceptance of the terms. An FTS settlement will not bind the parties for tax years not included in the FTS Session Report. A Form 870-AD or closing agreement will be prepared after the FTS session. The taxpayer, Exam, or FTS Appeals Official can withdraw from the FTS process at any time. The prohibition against *ex parte* communications is waived during the FTS process.

²⁵ See Rev. Proc. 2017-25, at Sec. 4, and IRS Ann. 2012-34, for issues specifically excluded for cases under SB/SE and TE/GE jurisdiction, respectively.

²⁶ See Ann. 2025-6; LB&I-04-0725-0008.

4. Timing

FTS is structured to resolve disputes within 120 days (LB&I) and 60 days (SB/SE and TE/GE) of acceptance in the program.

C. Early Referral

Early Referral permits the parties to transfer a fully developed, unagreed issue to Appeals while other issues in a case are still pending with Exam. The RRA codified I.R.C. § 7123(a), which provides a statutory mandate for the Secretary to provide procedures through which a taxpayer can request early referral of one or more issues to Appeals. The IRS issued those procedures in Rev. Proc. 99-28, 1999-2 C.B. 109.

1. Eligibility

Early Referral is available for a range of issues including IRS-initiated accounting changes, employment tax/worker classification issues, collection, and employee plans/exempt organizations. Appropriate issues are limited, however, to those that:

- if resolved, can reasonably be expected to result in a quicker resolution of the entire case;
- Exam and the taxpayer agree that the issue should be referred to Appeals;
- are fully developed; and
- are part of a case where the remaining issues are not expected to be completed before Appeals could resolve the early referral issue.

Early Referral is not appropriate for an issue:

- for which a 30-day letter has been issued;
- that is designated for litigation;
- for which the taxpayer has or intends to seek Competent Authority assistance;
- that is part of a whipsaw transaction.

2. Application Process

A taxpayer submits a request in writing to the Exam Group Manager. The request must include the taxpayer's name, tax period(s) at issue, identification of the issue, and a description of the facts and law applying to the issue. Unlike with FTS, only the taxpayer may initiate the Early Referral process, and Exam must approve the request.

The Group Manager should respond within 14 days of receiving the request. There is no formal appeal of a denial, but the taxpayer can request a meeting with the person denying the request. If the request is approved, within 30 days, (1) Exam will submit a Form 5701 or equivalent form to the

taxpayer, and (2) the taxpayer must respond in writing within 30 days of receipt, which serves as the taxpayer's protest.

3. Settlement Process

Established Appeals procedures, including those controlling submissions and taxpayer conferences, apply. If agreement is reached, a closing agreement is prepared. If agreement is not reached, the taxpayer may request mediation or any subsequent procedure. If mediation is not requested, Appeals closes the issue and returns jurisdiction of the issue to Exam.

Appeals will not reconsider an unagreed early referral issue if there are other issues protested to Appeals, unless there has been a substantial change in the circumstances with respect to the early referral issue. The prohibition against *ex parte* communications **is not** waived during the Early Referral process because jurisdiction has shifted to Appeals.²⁷

A. Post-Appeals Mediation

PAM is available for cases where a limited number of issues remain unresolved following settlement discussions with Appeals. Like the Early Referral process, PAM was codified by the RRA in I.R.C. § 7123(b)(1). The applicable procedures are included in Rev. Proc. 2014-63, 2014-53 I.R.B 1014, and IRM 8.26.5 (Mar. 14, 2025). PAM is a non-binding process, and the mediator does not have settlement authority and cannot render a decision regarding any issue in dispute.

1. Eligibility

PAM is available for:

- Legal and factual issues;
- Coordinated Issues;
- Unagreed Early Referral issues;
- Issues for which competent authority assistance has not been filed;
- Unsuccessful attempts to enter into a closing agreement; and
- Certain collection issues.

PAM is not available for:

- issues outside Appeals' authority;
- issues designated for litigation;
- issues docketed in court;
- certain collection issues;

²⁷ See Rev. Proc. 2012-18, 2012-10 I.R.B. 455, at Sec. 2.05(1).

- issues inconsistent with sound tax administration;
- frivolous issues;
- whipsaw issues;
- cases where the taxpayer did not act in good faith during settlement negotiations; and
- issues the IRS has identified as excluded from mediation.

2. Application Process

The taxpayer and Appeals must agree to participate in the process. To initiate the process, a taxpayer submits a written request to the Appeals Team Manager. The Appeals Team Manager will generally respond to the request within two weeks. If approved, the taxpayer will be informed, and a meeting will be scheduled to discuss the mediation process. If denied, as explained in Section I, the taxpayer will receive an explanation for the denial. The denial is not subject to judicial review.

3. Mediation Process

The parties to the mediation process are the taxpayer and Appeals. The taxpayer and Appeals enter into a written agreement to mediate, and mediation will generally begin within 60 days after signing the agreement.

(a) Selection of the Mediator

The taxpayer and Appeals Team Manager can select the Appeals mediator from a list of trained employees. Alternatively, at the taxpayer's own expense, the taxpayer may elect to use a co-mediator who is not employed by the IRS. The taxpayer and the Appeals Team Manager will select the non-IRS co-mediator from any local or national organization that provides a roster of neutral parties.

(b) Mediation Session

Each party prepares a summary of the issues no later than two weeks before the mediation session. Each party must have a person with settlement authority attending the session. *Ex parte* contacts with the mediator outside the mediation session are prohibited unless the mediator initiates contact.

(c) Post-Mediation

At the conclusion of the process, the mediator prepares and disseminates a written report. If the parties reach an agreement, Appeals will prepare a closing agreement. If the parties cannot reach an agreement, a statutory notice of deficiency will be issued.

B. Rapid Appeals Process

RAP is a mediation tool used to improve the efficiency and timeliness of Appeals resolutions.²⁸

1. Eligibility

RAP is available in LB&I cases (except International Individual Compliance cases), and SB/SE estate and gift cases. RAP is unavailable for the following:

- constitutional issues;
- issues designated for litigation or docketed in any court;
- issues under consideration for designation for litigation;
- issues for which a taxpayer requests the simultaneous Appeals/Competent Authority procedure;
- International Individual Compliance cases;
- issues that are part of a whipsaw transaction;
- issues identified in an IRS Chief Counsel Notice, or Advice, as excluded from the RAP process; and
- issues for which mediation is not consistent with sound tax administration.²⁹

1. Application Process

RAP is elective. Both the taxpayer and Exam must agree to participate in the process, and either party can withdraw from the process at any time. Unlike the FTS process, where the case is in Exam's jurisdiction, RAP takes place while the case is in Appeals' jurisdiction.

2. Mediation Process

If all parties agree, the appeals pre-conference becomes a working conference where Appeals utilizes mediation techniques to resolve unagreed issues. *Ex parte* communications between Appeals and Exam are permitted if the taxpayer signs a waiver for the term of the session to allow for the communications.

If the parties reach agreement, traditional closing procedures apply. If the process is unsuccessful, the traditional Appeals process continues. RAP does not replace traditional Appeals procedures or prevent the taxpayer from using other ADR programs.

²⁸ See IRM 8.26.11 (June 23, 2017).

²⁹ IRM 8.26.11.6 (Jul. 1, 2017).

III. ADR Program “Issues”

A. Government Accountability Office Report on ADR Programs

As a result of the National Taxpayer Advocate reporting the decline in use of ADR programs, the Government Accountability Office conducted a study of the IRS ADR programs and prepared a report titled “IRS Could Better Manage Alternative Dispute Resolution Programs to Maximize Benefits” (the “GAO Report”).³⁰

The GAO Report highlights deficiencies in the IRS’s management and use of ADR programs, and the National Taxpayer Advocate agreed with the GAO Report’s findings in her Annual Report to Congress.³¹ From fiscal years 2013 to 2022, the IRS only used ADR programs in less than half of one percent of all cases Appeals reviewed. During that same period, use of ADR fell by 65 percent. Interestingly, the IRS has stated that it does not know definitively why ADR usage has declined but has also stated that taxpayers do not perceive the benefits of using ADR programs.

1. GAO Recommendations

The GAO Report provided the following eight recommendations for executive action:

- The Commissioner of Internal Revenue (the “Commissioner”) “should collect consistent, reliable data on what happens to taxpayer requests to use ADR as well as the results of each ADR program, such as resolutions achieved for the time and costs invested.” (Recommendation 1).
- The Commissioner “should establish objectives for ADR programs in clear, measurable terms.” (Recommendation 2).
- The Commissioner “should link the ADR program objectives to the IRS strategic goals and objectives that the programs support.” (Recommendation 3).
- The Commissioner “should regularly analyze data on the use and results of ADR to make real-time decisions to improve performance, as appropriate.” (Recommendation 4).
- The Commissioner “should regularly monitor ADR program operations with a focus on soliciting and using taxpayer feedback on the quality of their experiences with ADR.” (Recommendation 5).
- The Commissioner “should establish a neutral IRS resource to communicate with taxpayers to answer questions about IRS’s Fast Track programs.” (Recommendation 6).

³⁰ U.S. Gov’t Accountability Office, GAO-23-105552, *IRS Could Better Manage Alternative Dispute Resolution Programs to Maximize Benefits* (rev. June 7, 2023), available at <https://www.gao.gov/products/gao-23-105552>.

³¹ Nat’l Taxpayer Advocate, Annual Report to Congress, “Most Serious Problems Encountered by Taxpayers: Appeals” at 139-41 (Dec. 31, 2023), available at <https://www.taxpayeradvocate.irs.gov/reports/2023-annual-report-to-congress/full-report/>.

- The Commissioner “should conduct periodic evaluations of the ADR programs to identify actions needed to improve their performance in achieving objectives.” (Recommendation 7).
- The Commissioner “should establish clear responsibility and related tasks for managing ADR programs, including the practices in the above recommendations, to help ensure that the programs maximize the benefits of using ADR.” (Recommendation 8).

2. IRS Response

The IRS agreed to take action on the GAO Report’s eight recommendations. Specifically, the IRS agreed with Recommendations 5, 7, and 8, and tied agreement with Recommendations 1, 3, and 4 to certain contingencies, including implementing the Strategic Operating Plan for the Inflation Reduction Act of 2022.³² The IRS also agreed to consider the necessary changes in Recommendations 2 and 6.

As described in Section I, in April 2024, the Service created the Alternative Dispute Resolution Program Management Office Appeals to implement new ADR pilot projects and to collaborate with stakeholders (internal and external) to increase awareness of these important programs.

IV. Considerations to Participation in ADR Programs and Potential Barriers

A. Considerations to Participation

As described in Sections I and II above, ADR programs can be beneficial to both the IRS and taxpayers because, like traditional Appeals, they are a tool for resolving disputes without litigation. If the ADR programs are properly functioning, they may, as compared to traditional Appeals, lower costs, offer flexibility, minimize burdens, provide quicker issue resolution and issue certainty (with respect to financial statement reporting; state, local, or foreign tax returns; and non-tax matters), and protect taxpayer rights.

An eligible taxpayer’s decision to use an ADR program will largely depend on the particular facts and issues involved, as well as the taxpayer’s perception of the likelihood of “success.” A taxpayer (and Exam) must be open and flexible to resolution to find success in an ADR program. If a taxpayer is certain of their legal position and not inclined to move on that position, ADR might not be appropriate. The same can be said if Exam appears to be wedded to its issue position. If a taxpayer does not think that Exam will be open to a compromised agreement, then ADR may not be worth the taxpayer’s time and resources. However, while being “too far apart” may be viewed as a disincentive to pursue ADR, taxpayers and Exam may benefit from mediation in those instances.

- With respect to Early Referral, Taxpayers should ensure they are well-prepared to argue an issue, because if an issue is not resolved and remains unagreed, traditional Appeals will generally not reconsider the unagreed early referral issue if there are other issues later protested to Appeals.
- With respect to FTS, additional time could be added to an already lengthy examination timeline if the taxpayer does not believe Exam will move on its position.

³² See IRS Pub. 3744 (rev. Apr. 2023).

On the other hand, recent statistics show that FTS can save significant time as compared to traditional Appeals with nearly 90 percent of FTS cases in LB&I and SB/SE reaching resolution within three to four months.³³

- With respect to PAM, if PAM is not successful, there is no next option to the taxpayer other than litigation. A taxpayer will want to consider whether to put its resources towards PAM if there is little to no expectation that Appeals will move on its position.

Whether Appeals may engage in *ex parte* communications with Exam should also be considered. Appeals is generally prohibited from discussing “strengths and weaknesses of the issues and positions in cases or with respect to matters other than ministerial, administrative, or procedural matters, without providing the taxpayer/representative an opportunity to participate.”³⁴ This prohibition is in place to prevent perceived or actual impairment of Appeals’ independence. While *ex parte* communications are prohibited in Early Referral, taxpayers should keep in mind that *ex parte* communications are expressly permitted in FTS. In RAP, taxpayers are encouraged to authorize *ex parte* communications during the course of the RAP session. Whereas, in PAM, the mediator can initiate contact, without taxpayer permission.

B. Potential Barriers

In addition to taxpayer specific ADR considerations, taxpayers should also consider certain potential system-based barriers to a successful ADR result.³⁵ A Service-side lack of understanding or appreciation for an ADR program, processes, and goals may cause Exam to not wholeheartedly, and earnestly, participate in the ADR process. Generally, Exam must agree with a taxpayer’s request to use an ADR program. If the Exam employee does not understand ADR procedures, or the benefits of ADR, that employee might be inclined to deny a taxpayer’s request to use ADR. Similarly, Appeals employees, even those trained in ADR methods, may not have a complete understanding of the ADR program purpose and process.

If an Examination case has been open for a long period of time, Exam might be facing pressure to close the case. Use of ADR could extend the age of the case and disincentivize Exam from agreeing to participate in an ADR program. Additionally, certain ADR settlements must be reached with the agreement of Service-side employees with decision-making authority. If that employee is not present during the ADR proceedings, it can be difficult to reach a successful settlement. Although other Examination employees might communicate with the Service’s “decisionmaker” to obtain a settlement agreement after the ADR proceeding, the Service’s decisionmaker may have a lack of understanding and appreciation for the parties’ positions (strengths and weaknesses). These barriers are not hypothetical.

³³ See Nat’l Taxpayer Advocate Blog, *Appeals Improves Alternative Dispute Resolution Programs, But Barriers Remain* (May 22, 2025), available at <https://www.taxpayeradvocate.irs.gov/news/nta-blog/appeals-improves-adr-programs-but-barriers-remain/2025/05/#:~:text=ADR%20is%20an%20informal%2C%20confidential,IRS's%20current%20ADR%20programs%20include>.

³⁴ Rev. Proc. 2012-18, at Sec. 2.02(6).

³⁵ There are also actual barriers to participation, e.g., taxpayers in a correspondence examination cannot participate in ADR programs.

There is apparent consensus among practitioners,³⁶ Appeals, the National Taxpayer Advocate, and the GAO that the available ADR programs are not functioning as well as they could or should be. As described in the GAO Report, participants in GAO focus groups stated they perceived that IRS employees did not always participate in ADR programs in good faith, the IRS employees did not have knowledge of the programs, and they could not provide information regarding the ADR process. All of these factors disincentivize taxpayers from participating in the available ADR programs, thereby protracting issues that could have been resolved at the lowest level.

Finally, PAM requires Appeals to “advocate” its position against the taxpayer to a mediator, which is seemingly inconsistent with Appeals’ role as a neutral third party. As explained above, Appeals’ mission is to take a fresh look at the facts and legal arguments of the parties, i.e., the taxpayer and the division within the Service making the adverse determination, and resolve cases in a manner that is fair and impartial to both the government and the taxpayer. With PAM, Appeals and taxpayers are placed in an adversarial posture, and this may serve as a potential barrier to successful resolution.

V. Conclusion

To make the most of their “one opportunity” for Appeals consideration,³⁷ taxpayers (and their advisors) should be aware of the I.R.C. § 7803 regulations and how they impact taxpayers’ rights at Appeals. Taxpayers should also consider whether an ADR program will help them resolve their tax controversy at the lowest level, lowest cost, and shortest amount of time.

³⁶ See Am. Bar Ass’n, Section of Taxation, *Comments on Ways to Improve Dispute Resolution Programs* (Sept. 15, 2023), available at <https://www.americanbar.org/content/dam/aba/administrative/taxation/policy/2023/091523comments.pdf>.

³⁷ See Treas. Reg. § 301.7803-2(f).