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# ***WNTS Insight***

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## IRS revises limitations on communications between Appeals, other IRS staff

Rev. Proc. 2012-18 updates the guidelines concerning permissible and impermissible ex parte communications between IRS Appeals staff and other IRS personnel with the goal of maintaining the independence of Appeals. (The term "ex parte" refers to the fact that neither the taxpayer nor its representative participates in the communication.) Rev. Proc. 2012-18 applies to communications that occur after May 15, 2012, and supersedes Rev. Proc. 2000-43 as of that date. While Rev. Proc. 2012-18 does not make major changes to its predecessor, it provides important clarifications and updates.

### *Background*

Section 1001(a) of the Internal Revenue Service Restructuring and Reform Act of 1998 (RRA) established a statutory basis for an independent Appeals function. To maintain its independence, the Appeals function prohibits communications between Appeals personnel and other IRS employees to the extent that such communications appear to compromise the independence of Appeals. Rev. Proc. 2000-43 was issued to provide guidance to all IRS personnel.

Since issuance of Rev. Proc. 2000-43, work practices within the IRS have changed. New practices have been implemented and old ones modified. Rev. Proc. 2012-18 was issued to incorporate these changes and to clarify and modify the rules as a result of experience under the prior guidance.

In addition, the IRS plans to revise the Internal Revenue Manual (IRM) to provide additional guidance regarding ex parte communication rules and to provide training to all affected functions. Appeals will consider implementing a mechanism to track breaches of the rules.



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## Revenue Procedure 2012-18

### Issue management teams

While keeping in place many provisions of Rev. Proc. 2000-43, the new guidance addresses some significant changes to IRS business practices. Specifically, the new rules prohibit Appeals personnel from participating in issue management teams and clarify the role of Appeals in multifunctional meetings. At the same time, Appeals may participate in generic meetings with IRS personnel from compliance functions as long as specific taxpayer cases are not discussed.

### Administrative files

Rev. Proc. 2012-18 includes guidance relating to the contents of administrative files transmitted from the originating functions. The rules state that the administrative file or documents used to transmit a file should not contain statements intended to influence Appeals' decision-making process, such as gratuitous comments and recommendations concerning what Appeals should consider and how Appeals should resolve the case.

### Legal advice

Under the ex parte communication rules, Appeals employees may obtain legal advice from attorneys in the IRS Office of Chief Counsel (Counsel), although generally they are not bound by such advice with respect to their cases. The legal advice simply is to be one factor for Appeals to take into account in its consideration of a case. Appeals employees ultimately remain responsible for independently evaluating the strengths and weaknesses of the issues and forming independent judgments.

**Observation:** Inclusion of this provision in the new revenue procedure is a positive development. It always has been Appeals policy that Appeals was not bound by Counsel advice, but Appeals officers generally have tended to defer to that advice. Note that communications between Appeals and Counsel on cases docketed in the U.S. Tax Court are not subject to ex parte rules.

### Counsel field attorneys

The ex parte communication rules prohibit an Appeals employee from communicating with a Counsel field attorney if the field attorney either personally provided legal advice regarding the same issue in the same case to the originating function or served as an advocate for the originating function regarding the same issue in the case. This restriction applies only while Appeals is evaluating the strengths and weaknesses of the specific issues. If Appeals is preparing a statutory notice of deficiency, this restriction does not apply.

**Observation:** This standard is subject to varying interpretations and appears to be a loosening of the more stringent standard in Rev. Proc. 2000-43.

### Breach of ex parte communication rules

Appeals is to share any written communication received ex parte in violation of the rules and provide a response period to the taxpayer as a cure for the breach. Appeals will request input from the taxpayer or its representative regarding an appropriate remedy. The specific administrative remedy is in the sole discretion of Appeals. The deciding official will be a second-level manager; generally, this would be the Appeals Area Director.

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**Observation:** This is a positive development. It demonstrates that Appeals views violations as a breach of trust with the taxpayer.

### **Rebuttal to protest**

If a rebuttal to the taxpayer's protest regarding the audit of the taxpayer is prepared by the originating function, it must be shared with the taxpayer/representative by the originating function at the time that it is sent to Appeals.

### **Guiding principles**

The guiding principles provided in Rev. Proc. 2012-18 to aid IRS employees in applying the ex parte communication rules include:

- The role of Appeals in alternative dispute resolution programs;
- The remedies available to taxpayers in the event of ex parte violations; and
- The application of ex parte communication rules to collection due process (CDP) cases.

**Note:** Not all ex parte communications with the originating function violate the rules. For example, the following are permissible:

- database inquiries by Appeals employees;
- ministerial, administrative, or procedural matters communications;
- mathematical tax calculations; and
- post-settlement conferences.

Communications with other IRS functions, such as Competent Authority, the Taxpayer Advocate Service, the Criminal Investigation Division, and the Commissioner's office are not subject to the ex parte rules.

## *Observations*

While Rev. Proc. 2012-18 updates and better defines the rules on permissible and impermissible communications between Appeals and other IRS functions, there are no sweeping changes from its predecessor, Rev. Proc. 2000-43.

One noted change -- that Appeals may not participate on issue management teams -- was implemented and publicized in early 2011. Other areas of explanation include information found in the IRM. More noteworthy is inclusion in the new revenue procedure of the requirement that Appeals share with the taxpayer written communications received ex parte and provide a response period to the taxpayer as a cure for the breach.

Importantly, some concerns were not addressed in Rev. Proc. 2012-18 and should be monitored closely. For example, pockets of geographical-based practices may still exist. Taxpayers with multiple years ongoing in both Appeals and Compliance functions may remain especially vulnerable to potential ex parte breaches. Taxpayers with issues supported by Counsel may be subject to unintended exposure.

The IRS continues to hold out updates to the IRM and additional training as the primary remedies for ex parte problems. Appeals will consider the added remedy of creating a tracking mechanism.

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