August 31, 2011

Hon. Douglas Shulman
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments on Notice 2011-62 Ex Parte Communications Between Appeals and Other Internal Revenue Service Employees

Dear Commissioner Shulman:

Enclosed are comments on Notice 2011-62 ex parte communications between Appeals and other Internal Revenue Service employees. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

William M. Paul
Chair, Section of Taxation

Enclosure

cc: Emily McMahon, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
William Wilkins, Chief Counsel, Internal Revenue Service
Deborah Butler, Associate Chief Counsel, Internal Revenue Service
Henry S. Schneiderman, Special Counsel to Associate Chief Counsel (Procedure & Administration), Internal Revenue Service
ABAJ SECTION OF TAXATION
COMMENTS ON NOTICE 2011-62
EX PARTE COMMUNICATIONS BETWEEN APPEALS AND OTHER INTERNAL REVENUE SERVICE EMPLOYEES

The following comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Julian Y. Kim of the Committee on Administrative Practice of the Section of Taxation. Substantive contributions were made by the following members of the Committee on Administrative Practice and the Low Income Taxpayers Committee: Michael J. Desmond, T. Keith Fogg, James R. Gadwood, George A. Hani, Deborah S. Kearns, Carol M. Luttati, David B. Robison, Diane Ryan and George Willis. The Comments were reviewed by Sheri A. Dillon, Committee Chair for the Committee on Administrative Practice and T. Keith Fogg, Committee Chair for the Low Income Taxpayers Committee. The Comments were further reviewed by Elizabeth J. Atkinson and Ronald L. Buch Jr. of the Section’s Committee on Government Submissions and by Alice G. Abreu, Council Director for the Low Income Taxpayers Committee, and Scott D. Michel, Council Director for the Committee on Administrative Practice.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the legal issues addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise influence the development or outcome of, the specific subject matter of these Comments.

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Date: August 31, 2011
EXECUTIVE SUMMARY

On July 19, 2011, the Internal Revenue Service (the “Service”) issued Notice 2011-62, which proposes revisions to the Office of Appeals (“Appeals”) ex parte guidelines contained in Rev. Proc. 2000-43. Rev. Proc. 2000-43 was issued following the enactment of the Internal Revenue Service Restructuring and Reform Act of 1998 (the “RRA of 1998”), which prohibited ex parte communications between Appeals officers and other Service employees “to the extent that such communications appear to compromise the independence of the appeals officers.” The proposed revisions are in the form of a draft revenue procedure (the “Draft Rev. Proc.”) that reformats and expands the existing ex parte guidelines and addresses some of the concerns that have been expressed regarding the Service’s administration of the ex parte rule and the independence of Appeals. These Comments set out recommendations regarding the application of the ex parte rule to communications between Appeals and Counsel, the provisions of the ex parte guidelines with respect to Collection Due Process (“CDP”) cases, and the monitoring of and strengthening of compliance with the ex parte rule.

DISCUSSION

I. INTRODUCTION

These Comments respond to the request in Notice 2011-62 for comments regarding the Draft Rev. Proc. that revises the guidelines for the Appeals ex parte rule currently set forth in Rev. Proc. 2000-43. That revenue procedure implements the directive in the RRA of 1998 that the Commissioner develop and implement a restructuring plan that, among other things, “ensure[s] an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.”

We commend the Service for revisiting these guidelines. Appeals plays an essential role in resolving the vast majority of disputes between taxpayers and the Service that remain unresolved after an examination. We believe Appeals has been able to perform that function effectively because taxpayers and their representatives understand that Appeals will provide a fair and independent assessment of the issues in dispute. The

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3 Pub. L. No. 105-206, § 1001(a)(4), 112 Stat. 685, 689. This prohibition is referred to here as the “ex parte rule.”
ex parte rule is perceived – and must function – as one of the foundations of Appeals’ independence.

These Comments are based on our belief that the function of the ex parte rule is not only to prohibit communications that compromise the independence of Appeals in fact, but also to prohibit communications that appear to compromise the independence of Appeals. The importance that Congress placed on the independence of Appeals is demonstrated by the plain words of the statute as well as its legislative history. As the Service observed in Rev. Proc. 2000-43, Congress considered enacting an ex parte rule that would have been considerably more stringent than the directive that ultimately was included in the RRA of 1998 and also considered restructuring Appeals to remove it from the oversight of the Commissioner. Although those far-reaching proposals were not adopted, they emphasize the importance of Appeals’ independence, and any ex parte guidelines must be evaluated in the context of the statute’s history. Beyond Congressional intent in enacting the ex parte rule is the practical importance the rule has served over the past 13 years in assuring taxpayers that they will receive a fair and impartial audience in Appeals. That assurance is critical to ensuring that Appeals continues to be a meaningful opportunity for resolving tax disputes.

II. BACKGROUND

On June 25, 1997, the National Commission on Restructuring the Internal Revenue Service issued a report recommending a number of changes to the structure and operation of the Service. In response to those recommendations, the House of Representatives passed the Internal Revenue Service Restructuring and Reform Act of 1997 (the “RRA of 1997”) and referred the legislation to the Senate. The House-passed version of the RRA of 1997 was silent as to ex parte communications between Appeals officers and other Service employees.

In February 1998, while the Senate Committee on Finance was holding a series of hearings on the RRA of 1997, Senators Bond, Cochran, Snowe and Shelby introduced the Putting the Taxpayer First Act of 1998 (the “PTFA”), which sought to prohibit “any communications” between Appeals officers and the originating function unless the taxpayer, or the taxpayer’s representative, was given an opportunity to be present. The proposed legislation also sought to (1) preclude Appeals officers from addressing issues and arguments not raised by the originating function; and (2) establish an independent Office of Appeals under the supervision of an officer who reported to a Service-wide oversight board. Neither the House of Representatives nor the Senate passed the PTFA.

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9 See Nat’l Commission on Restructuring the Internal Revenue Service, A Vision for a New IRS (June 25, 1997).
10 H.R. 2676, 105th Cong. (as passed by House, Nov. 5, 1997).
13 Id.
In April 1998, the Senate Committee on Finance reported an amended version of the RRA of 1997, which had been renamed the RRA of 1998. Section 1001(a)(4) of the amended bill directed the Commissioner to develop and implement a restructuring plan that, among other things, “ensure[s] an independent appeals function within the Internal Revenue Service, including the prohibition in the plan of ex parte communications between appeals officers and other Internal Revenue Service employees to the extent that such communications appear to compromise the independence of the appeals officers.” After a Conference Report, which left section 1001(a)(4) unchanged, the RRA of 1998 was signed into law on July 22, 1998.

In response to the RRA of 1998, the Service issued Notice 99-50 which proposed a revenue procedure containing guidance (in the form of a series of questions and answers) regarding ex parte communications between Appeals officers and the originating function. After considering public comments and making revisions to the proposed revenue procedure in response to those comments, the Service published a final version of the guidance in Rev. Proc. 2000-43.

In October 2010, the Service announced that it was working to revise the ex parte guidance contained in Rev. Proc. 2000-43. Later that year, the National Taxpayer Advocate’s 2010 Annual Report to Congress requested an opportunity for notice and comment before the Service released revised guidance. On July 19, 2011, the Service issued Notice 2011-62 which proposed the Draft Rev. Proc. to revise and replace the ex parte guidelines set out in Rev. Proc. 2000-43. As was the case with Notice 99-50, the Service has again invited public comment.

III. IMPLEMENTATION AND ADMINISTRATION OF THE EX PARTE RULE

The implementation and administration of the ex parte rule must be monitored carefully, and we commend the Service for its commitment to revising the ex parte guidelines and its efforts to address concerns that have been raised with respect to the ex parte rule and Appeals’ independence more broadly. The additional guidance and clarification regarding the administrative file in section 2.03(4) of the Draft Rev. Proc., for example, addresses a continuing concern among taxpayers, particularly with respect to transmittal memoranda (or T-Letters). Moreover, the revised format of the Draft Rev. Proc., the inclusion of guiding principles and the expansion of the guidance to cover additional areas such as alternative dispute resolution proceedings are all welcome changes and will increase awareness and understanding of the ex parte rule among taxpayers, practitioners, and Service personnel. We are pleased that the Draft Rev. Proc.

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continues to reinforce the fundamental principle that Appeals is charged with the task of independently evaluating the strengths and weaknesses of the issues presented and of ultimately deciding those issues based on the hazards of litigation. In that regard, the clear emphasis in section 2.06(1) of the Draft Rev. Proc. that Appeals employees generally are not bound by legal advice that they receive from Counsel and instead must independently evaluate the strengths and weaknesses of the competing positions in a case bears special mention.

The Service’s recognition in both Rev. Proc. 2000-43 and the Draft Rev. Proc. of the importance of training Service personnel on the ex parte rule is critical to the long-term success of the ex parte rule. We strongly support efforts to reach out to all affected Service employees. As the Service’s ongoing training plan is refined and implemented, we would look forward to any opportunity to provide our services and views as either an advisor to the training team or as part of a panel of external stakeholders for the actual instruction. Our members have a high degree of familiarity with the provisions of Rev. Proc. 2000-43, both in practice and as a result of experience inside various functions of the Service, and strongly support strengthening the overall understanding of the ex parte rule within the Service.

IV. SUMMARY OF RECOMMENDATIONS

Our Comments reflect an appreciation of the fact that guidance for the ex parte rule must balance Appeals’ position as a component of the Service with Congress’s directive in the RRA of 1998 that Appeals be independent. The Service’s overall mission is to “[p]rovide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.” Although designed to be independent, Appeals shares in this overall mission and can best help carry it out by remaining independent both in fact and in appearance. Set forth below are our recommendations for improving the ex parte rule guidance while preserving the role of Appeals within the Service’s overall tax administration mission.

Communication Between Appeals and Counsel

1. We recommend retaining the existing rule that Counsel attorneys who previously provided advice to the Service employees who made the determination Appeals is reviewing may not communicate ex parte with Appeals on that same issue.

2. We recommend retaining those provisions in the existing ex parte guidelines emphasizing the independence of Appeals and providing taxpayers the opportunity to participate in communications that would otherwise violate the ex parte rule.

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22 See also I.R.M. 8626.4(2); I.R.M. 8641.
24 I.R.M. 2111.1(1).
3. We recommend clarifying that the *ex parte* rule cannot be avoided by having a Counsel attorney communicate with Appeals through another Counsel attorney.

4. We recommend that consideration be given to holding multifunctional meetings in a manner that is more open to the public.

**Ex parte Guidelines, CDP Cases, and Perceptions Regarding the Independence of Appeals**

5. We recommend that a request by Appeals for support from Counsel in a remanded CDP case not be handled by the same Counsel attorney handling the case before the Tax Court.

6. We recommend eliminating Counsel remand memoranda in CDP cases.

7. We recommend eliminating Counsel review of draft supplemental determinations following remand of a CDP case.

8. We recommend clarifications of what constitutes a ministerial, administrative, or procedural matter with respect to a CDP case.

**Monitoring and Strengthening Compliance with the *Ex Parte* Rule**

9. We recommend the creation of a dedicated *ex parte* rule compliance function within Appeals.

10. We recommend requiring prompt taxpayer notification of any *ex parte* rule violations.

11. We recommend supplemental training following an *ex parte* rule violation.

**V. RECOMMENDATIONS REGARDING COMMUNICATIONS BETWEEN APPEALS AND COUNSEL**

The existing *ex parte* guidelines under Rev. Proc. 2000-43 provide clear direction when Appeals seeks legal advice from Counsel. Rev. Proc. 2000-43 states that “Appeals employees should not communicate ex parte regarding an issue in a case pending before them with Counsel field attorneys who have previously provided advice on that issue in the case to the [Service] employees who made the determination Appeals is reviewing.”

Any exception to that bright-line rule requires that taxpayers have an opportunity to participate in the communications. This guidance recognizes that the overarching purpose of the *ex parte* rule is to secure Appeals’ independence in both fact and appearance.

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The Draft Rev. Proc. threatens to erode this protection by abandoning the bright-line rule in favor of a subjective standard that is susceptible to a range of interpretations. In particular, section 2.06(1) of the Draft Rev. Proc provides the following:

Appeals employees should not communicate *ex parte* regarding an issue in a case pending before them with a field attorney if the field attorney personally provided legal advice regarding the same issue in the same case to the originating function or personally served as an advocate for the originating function regarding the same issue in the same case. For purposes of this section, in determining whether a field attorney is considered to have personally provided legal advice to the originating function or personally served as an advocate for the originating function, regarding the same issue in the same case, the extent and nature of the field attorney’s involvement in the case relating to the issue with respect to which Appeals is seeking legal advice is determinative.\(^{26}\)

The Draft Rev. Proc. does not explain who is supposed to make the determination of whether a communication with Counsel violates the *ex parte* rule under the proposed “extent and nature” standard. Nor does the Draft Rev. Proc. explain how these determinations will be documented and reviewed, if for no other reason than to ensure the consistent application of the standard. In addition, there is no indication of whether the taxpayer will be given any notice of, or information about, the determination.

A. Recommendation: Retain the Existing Bright-Line Rule

We recommend retaining the existing rule that Counsel attorneys who previously provided advice to the Service employees who made the determination Appeals is reviewing may not communicate *ex parte* with Appeals on that same issue.\(^{27}\) Any situation where Appeals is securing advice from the same Counsel attorney who advised with respect to the Service’s initial position in the taxpayer’s case weakens the appearance of Appeals’ independence. Although we recognize the need to balance the resource demands on Counsel with the protection of Appeals’ independence, we believe that the existing rule in Rev. Proc. 2000-43 should not be changed absent an explanation of the basis for the change, including whether and, if so, how the existing rule unduly burdens Counsel or Appeals. Separately, we recommend that, for purposes of the Draft Rev. Proc., the reference to “field attorney” be clarified to include any attorney within the Office of Chief Counsel who advised the originating Service function. We see no reason to limit the potential application of the *ex parte* rule only to communications between Appeals and certain Counsel attorneys based on position or title, when other Counsel attorneys may have provided otherwise identical support to the originating Service function.

\(^{26}\) Notice 2011-62, 2011-32 I.R.B. 126, § 2.06(1). Notwithstanding our comments regarding communications between Appeals and Counsel, we commend the Service for continuing to treat Counsel attorneys as subject to the *ex parte* rule. We believe this is consistent with Congressional intent and necessary to give substance to the *ex parte* rule. Although interactions between Appeals and Department of Justice attorneys should be relatively infrequent (although they may occur, for example, in the bankruptcy context), we recommend that the Service work with the Department of Justice to ensure that the purpose of the *ex parte* rule is not frustrated by such communications.

We are particularly concerned that the proposed “extent and nature” standard for determining whether an *ex parte* communication between Appeals and a Counsel attorney is prohibited would significantly complicate administration, monitoring, and enforcement of the *ex parte* rule. Varying interpretations of “extent and nature” will both diminish transparency and provide ample fodder for linguistic debate. The guidance provided by Rev. Proc. 2000-43 with respect to communications with Counsel attorneys not only strengthens the perception of Appeals’ independence but also is clear and, we believe, more easily administered. It should be retained, and we therefore recommend deleting the last sentence of section 2.06(1) of the Draft Rev. Proc. which contains the “extent and nature” standard.

Correlatively, we recommend that the existing provisions of Rev. Proc. 2000-43 that reinforce the bright-line rule be added to the Draft Rev. Proc. Specifically, we recommend that the following language from Rev. Proc. 2000-43 be incorporated into the final revenue procedure as either a guiding principle or in the section discussing communications with Counsel:

> Appeals will continue to be able to obtain legal advice from the Office of Chief Counsel, subject to limitations designed to ensure that the advice to Appeals is not provided by the same field attorneys who previously gave advice on the same issue to the [Service] officials who made the determination Appeals is reviewing.28

In addition, the emphasis in the existing guidelines that taxpayers have the opportunity to participate in communications that would otherwise violate the *ex parte* rule should be retained.

Finally, if the Service decides to adopt a subjective standard, we recommend that the *ex parte* guidelines clearly set forth the governing criteria and describe the circumstances under which a Counsel attorney will be deemed to have personally provided legal advice to, or personally served as an advocate for, the originating function. In the alternative, we recommend the Service adopt an existing standard for determining when a Counsel attorney has provided advice to the originating function, such as the “personally and substantially participated” standard in section 10.25(b)(2) of Circular 23029 or the “participated personally and substantially” standard in section 207(a)(1)(B) of Title 18 of the United States Code.30

B. Recommendation: Clarify that Indirect Communications Can Constitute Prohibited *Ex Parte* Communications

Neither Rev. Proc. 2000-43 nor the Draft Rev. Proc. specifically address the extent to which the *ex parte* guidelines prohibit a Counsel attorney, who would otherwise be prohibited by the *ex parte* rule from communicating directly with Appeals, from

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otherwise participating in the matter. The existence of indirect communications with Appeals, through providing advice and opinions to a Counsel attorney who is not subject to an \textit{ex parte} prohibition and who has ongoing communication with Appeals, threatens both the actual and perceived independence of Appeals. The use of the term “personally” in section 2.06(1) of the Draft Rev. Proc. could be read to limit the \textit{ex parte} rule’s inquiry solely to the past involvement of the Counsel attorney directly advising Appeals. Where legal support is requested by Appeals and the assigned Counsel attorney, who did not assist with the original examination, communicates with or obtains advice from the Counsel attorney who assisted with the original exam position, the protection that the \textit{ex parte} rule is intended to provide has been lost, either in effect or in appearance. We therefore recommend that the final revenue procedure prohibit the original Counsel attorney from communicating with any subsequently assigned Counsel attorney regarding the matter. This approach is similar to that used in other areas where there are restrictions on subsequent involvement in matters. \textit{See, e.g.}, 18 U.S.C. § 207(a)(1) (prohibiting making any communication with an intent to influence). Absent such exclusion, the final revenue procedure should, at a minimum, address the issue and reinforce the responsibility of the Appeals employee to conduct his or her own analysis of the issue.\textsuperscript{31}

C. Recommendation: Consider Opening Multifunctional Meetings Involving Appeals to the Public

Section 2.04(1) of the Draft Rev. Proc. retains the general rule of Rev. Proc. 2000-43 that communications to Appeals during multifunctional meetings (\textit{i.e.}, meetings involving various Service components) are not covered by the \textit{ex parte} rule provided the discussions are not taxpayer specific.\textsuperscript{32} One type of multifunctional meeting specifically identified in section 2.04(1) of the Draft Rev. Proc. is a meeting of the members of an Issue Management Team (“IMT”). However, Commissioner Shulman recently announced that Appeals personnel would be excluded from IMTs precisely to avoid the ongoing appearance of influence over Appeals by other Service functions.\textsuperscript{33} We recommend that commissioner Shulman’s approach be formalized by incorporating it in the \textit{ex parte} rules.

\textsuperscript{31} We similarly recommend that the Service consider situations where the facts and circumstance of particular communications between or among Appeals employees may justify treating those communications as subject to the \textit{ex parte} rule. \textit{See Notice} 2011-62, 2011-32 I.R.B. 126, § 2.01(1)(a)(ii). For example, an Appeals Technical Guidance Coordinator (“ATGC”) may be involved in reviewing a case that Exam is attempting to settle under an Appeals Settlement Guideline (“ASG”). \textit{See Notice} 2011-62, 2011-32 I.R.B. 126, § 2.03(12)(a). If the case ultimately cannot be resolved under the ASG (\textit{e.g.}, the ATGC determines that the case is not within the scope of the ASG) but the ATGC was involved in discussing the merits of the case with Exam, then we believe that the ATGC should not be permitted to have an \textit{ex parte} communication with the Appeals officer who is ultimately assigned that case once it reaches Appeals.


\textsuperscript{33} \textit{See Prepared Remarks of IRS Commissioner Doug Shulman before the Tax Executive Institute Mid-Year Meeting, Washington, D.C. (April 4, 2011)} (“I have concluded that the benefits of having Appeals personnel on issue management teams to help gain expertise are outweighed by the perception that having them on those teams compromises their independence.”).
Briefings by IMTs present *ex parte* issues that are not addressed by the Draft Rev. Proc. or by Commissioner Shulman’s announcement. Although Appeals can be briefed by IMTs – something that is consistent with the Draft Rev. Proc. – it would significantly strengthen the perception of Appeals’ independence if the briefings were open forums similar to the Coalition Meetings that Appeals conducts for coordinated or high-profile issues (*e.g.*, cost sharing, hybrid debt, etc.). This added transparency would assure taxpayers that there is balanced information sharing. Currently, the Appeals Technical Guidance Coordinators (“ATGCs”) are the Appeals representatives for IMTs and their authority for approving all settlements of Compliance Coordinated Issues and Appeals Coordinated Issues makes their independence pivotal to the credibility of Appeals in such cases. The Commissioner has expressed his sensitivity to the issue, and we therefore recommend that consideration be given to making multifunctional meetings open to the public to the extent possible. We nevertheless recognize that making such meetings open implicates a number of tax administration considerations and would look forward to working with the Service on this issue.

VI. **Recommendations Regarding the Ex Parte Guidelines and CDP Cases**

Rev. Proc. 2000-43 provides that the prohibition on *ex parte* communications applies equally to Appeals’ consideration of cases that originate in the Collection function, such as CDP appeals, collection appeals program (“CAP”) cases, offers in compromise, and trust fund recovery penalty cases.\(^{34}\) This remains unchanged under the Draft Rev. Proc.\(^{35}\)

Rev. Proc. 2000-43 does not impose any limitations on communications between Appeals and Counsel in cases docketed in the Tax Court.\(^{36}\) The Draft Rev. Proc. retains this rule by providing that “[t]he *ex parte* communication rules do not apply to communications between Appeals and Counsel in connection with cases docketed in the United States Tax Court.”\(^{37}\) However, the Draft Rev. Proc. includes new provisions with respect to CDP cases that, *ab initio*, (1) delineate the remedies that are available to a taxpayer in the event of a breach of the *ex parte* rule in CDP cases while simultaneously declaring that no substantive taxpayer rights are created by the *ex parte* rule (or, at least, by the Draft Rev. Proc.),\(^{38}\) and (2) address the application of the *ex parte* rule to CDP cases remanded to Appeals by the Tax Court that remain under the Tax Court’s jurisdiction.\(^{39}\)

These new provisions in the Draft Rev. Proc. amplify and expand the underlying premise that “[a] request by Appeals for legal advice in connection with a remanded CDP case may be handled by the same Counsel attorney who is handling the Tax Court

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\(^{38}\) *See id.* at §§ 2.02(8), 2.10.

\(^{39}\) *See id.* at § 2.03(10)(c).
In the context of a CDP hearing, Appeals is making a determination on behalf of the Service regarding the propriety of an actual or proposed collection action. While we agree that Appeals is entitled to receive legal advice from Counsel, we are concerned that Appeals independence will be, or will be perceived to be, undermined if it receives such legal advice from Counsel who has or will represent the Service in the remanded CDP case. Similarly recognizing the importance of preserving independence both in fact and in appearance, the Draft Rev. Proc. provides:

Although remanded CDP cases remain under the Tax Court’s jurisdiction, the Appeals employee assigned to the remanded CDP case must be impartial in the review of the remanded case . . . requiring the application of similar considerations to those underlying the ex parte communication rules.  

We believe that in order to preserve both the reality and appearance of Appeals independence, it is paramount that any Appeals request for legal advice in connection with a remanded CDP case be handled by a Counsel attorney different from the one who is advocating the case in Tax Court, and we therefore recommend that this provision in the Draft Rev. Proc. be changed to preclude the same attorney from handling both. We view allowing the same Counsel to handle the Tax Court case and provide advice to Appeals regarding the remanded CDP case as inconsistent with the appearance of impartiality.

Our other concerns regarding the additional proposed guidelines for remanded CDP cases are set forth below, and similarly relate to preserving impartiality.

A. Recommendation: Eliminate Counsel Remand Memoranda in CDP Cases

With respect to CDP cases that are remanded to Appeals by the Tax Court, section 2.03(10)(c)(i)(A) of the Draft Rev. Proc. proposes to allow the Counsel attorney who handled the CDP case in the Tax Court to:

[Prepare a written memorandum to Appeals explaining the reasons why the court remanded the case to Appeals, any special requirements in the court’s Order (e.g., whether and to what extent a new conference should be held; whether the case must be reassigned to a different Appeals employee than the Appeals employee who handled the original CDP case; and what material Appeals is prohibited from reviewing, if any), and what issues the court has ordered Appeals to address on remand.]

However, this new guideline cautions that the memorandum (a “Remand Memorandum”) should not contain any legal analysis or advice or discuss the credibility of the taxpayer

40 Id. at § 2.03(10)(c)(ii).
41 Id. at § 2.03(10)(c).
or the accuracy of the facts presented by the taxpayer.\(^{43}\) The new guideline also requires that Counsel furnish a copy of the Remand Memorandum to the taxpayer.\(^{44}\)

Although we concur that a Remand Memorandum should be limited as provided in the Draft Rev. Proc. and that the taxpayer should receive a copy in order to have a meaningful opportunity to respond to the contents, we question the need for a Remand Memorandum in the first instance because it appears duplicative of matters that are typically addressed in the Tax Court’s remand order. Moreover, to the extent such matters are not contained in the Tax Court’s remand order, we believe it is preferable for the parties to seek clarification or additional guidance from the Tax Court rather than having the Counsel attorney “fill in the gaps.”

The parties should have a full and fair opportunity to present and articulate their respective positions to the Tax Court with respect to the issues that Appeals will address on remand, as well as any special requirements. Whether this is done through written submission or upon oral argument is within the Tax Court’s discretion. Upon due deliberation, the Tax Court can then set forth in its remand order the reason for the remand, the issues Appeals is to address and any special requirements. The role of the Tax Court in such matters should not be usurped by Counsel. Allowing the Tax Court to address these matters will guard against any communication by Counsel to Appeals that might give, or appear to give, the appearance of compromising the objectivity and independence of Appeals.\(^{45}\)

Similarly, section 2.03(10)(c)(iii) of the Draft Rev. Proc. proposes to allow the Counsel attorney handling the Tax Court case to “review the supplemental notice of determination before it is issued to the taxpayer . . . for the limited purpose of ensuring compliance with the Tax Court’s remand Order.”\(^{46}\) We believe that in light of the role Appeals serves in a CDP hearing, Counsel should not perform this function and, therefore, recommend that the final revenue procedure modify this provision to state that any review should be handled within Appeals by the group or team manager. The Appeals determination should be based on the order of the Tax Court and Appeals’ application of the relevant law. It should not be perceived to be based on Counsel’s view of what will withstand Tax Court review. At a minimum, if Appeals requests a review by Counsel of its proposed determination after remand, we recommend that any review be performed by a Counsel attorney not involved in the Tax Court case.

We are mindful that the Counsel attorney handling the Tax Court case represents the Service and that any restrictions on communications between Appeals and that attorney must have a strong basis. We believe the emphasis that Congress placed on

\(^{43}\) See id.\(^{44}\) See id.\(^{45}\) See id. at § 2.02(2) (emphasizing that Appeals’ independence is a guiding principle and that Appeals must be “adequately insulated from influence (or the appearance of influence) by other IRS functions, thereby providing Appeals with an unencumbered working environment within which to objectively and independently evaluate the facts and law that are relevant to each case and quantify the hazards of litigation based on that evaluation.”).\(^{46}\) Id. at § 2.03(10)(c)(iii).
Appeals’ independence and the unique role that Appeals serves in the CDP area justifies limiting these communications in a remanded CDP case to situations where Appeals affirmatively requests assistance from Counsel and requiring that such assistance be provided by a Counsel attorney not involved in the Tax Court case.

B. Recommendation: Clarify What Constitutes a Ministerial, Administrative or Procedural Matter for Purposes of a CDP Case

The Draft Rev. Proc. sets out a more comprehensive list of examples of communications involving ministerial, administrative or procedural matters that do not constitute prohibited ex parte communications than had been provided in Rev. Proc. 2000-43.\(^47\) Section 2.03(2)(a)(xi) of the Draft Rev. Proc. includes the following in that expanded list:

Communications in connection with a CDP hearing to verify compliance with legal or administrative requirements; communications with respect to verification of assets/liabilities involving an offer in compromise submitted as an alternative payment option during a CDP hearing; or communications regarding deadlines relating to a remanded CDP case.\(^48\)

By contrast, under sections 2.03(10)(b) and 2.03(10)(c)(i)(B) of the Draft Rev. Proc., respectively, ministerial, administrative or procedural matters are confined simply to the Appeals officer obtaining “verification that the requirements of any applicable law or administrative procedure have been met”\(^49\) and to “[c]ommunications to Appeals from the Counsel attorney handling the Tax Court case regarding deadlines relating to the remanded CDP case….”\(^50\) There is no mention of communications with respect to verification of assets/liabilities involving an offer in compromise submitted as an alternative payment option during a CDP hearing. We therefore recommend that section 2.03(2)(a)(xi) of the Draft Rev. Proc. be conformed to sections 2.03(10)(b) and 2.03(10)(c)(i)(B) of the Draft Rev. Proc. by eliminating the reference to verification of assets/liabilities.

Indeed, pursuant to sections 6320 and 6330 of the Internal Revenue Code and the Treasury Regulations promulgated thereunder, Appeals is only required to verify “that the requirements of any applicable law or administrative procedure have been met”\(^51\) before rendering its Summary Notice of Determination or its Decision Letter.\(^52\)Deleting

\(^{47}\) See id. at § 2.03(2)(a).
\(^{48}\) Id. at § 2.03(2)(a)(xi).
\(^{49}\) Id. at § 2.03(10)(b).
\(^{50}\) Id. at § 2.03(10)(c)(i)(B).
\(^{51}\) Id. at § 2.03(10)(b).
\(^{52}\) See Reg. § 301.6320-1(e)(1) (“Appeals will determine the timeliness of any request for a CDP hearing that is made by a taxpayer. Appeals has the authority to determine the validity, sufficiency, and timeliness of any CDP Notice given by the IRS and of any request for a CDP hearing that is made by a taxpayer. Prior to issuance of a determination, Appeals is required to obtain verification from the IRS office collecting the tax that the requirements of any applicable law or administrative procedure with respect to the filing of the [Notice of Federal Tax Lien] have been met. . . . Taxpayers will be expected to provide all relevant information requested by Appeals, including financial statements, for its consideration of the facts
reference to communications with respect to verification of assets/liabilities would be consistent with these statutory and regulatory provisions and would be consistent with insulating Appeals from the originating function’s substantive assessment of the determination (which, under Rev. Proc. 2000-43, have always been considered prohibited communications).

We also recommend that the Draft Rev. Proc. be modified to clarify that “verify[ing] compliance with legal or administrative requirements” does not include, for purposes of determining whether a communication is outside of the ex parte rule, any discussion between the Appeals officer and the compliance official that involves an explanation of why a procedural step was or was not taken. Such discussions between Appeals and a Service compliance official involve questions of substantive compliance with procedural requirements and could prejudice the taxpayer that has requested the CDP hearing. The taxpayer in these cases should be afforded the opportunity to participate in those discussions.

VII. RECOMMENDATIONS REGARDING MONITORING AND STRENGTHENING COMPLIANCE WITH THE EX PARTE RULE

The Draft Rev. Proc. acknowledges that independence “is one of Appeals’ most important core values,” and recognizes that the statutory prohibition on prohibited ex parte communications “is a significant component of Appeals’ independence.” Yet neither the Draft Rev. Proc. nor the existing ex parte guidelines in Rev. Proc. 2000-43, provides a meaningful remedy for violations of the ex parte rule regardless of how significant those violations might be. Although the Draft Rev. Proc. contains a new section captioned “Remedies Available to Taxpayers,” that section makes clear that the Draft Rev. Proc. does not “create substantive rights” for taxpayers and instead focuses on a permissive notice provision and CDP cases remanded to Appeals from the Tax Court (discussed above). For the reasons set forth below, we believe the remedies provision may be ineffective and could diminish the confidence that taxpayers have in the administration of the ex parte rule and Appeals’ independence.

Although we are concerned by the emphasis in the Draft Rev. Proc. that a violation of the ex parte guidelines creates no substantive taxpayer rights, we also recognize that remedies for violations of the ex parte rule may risk frustrating the mission of the Service by delaying resolution of cases in Appeals, distracting from Appeals’ focus on the merits of the case, and unduly interfering with the Service’s ability to manage its

and issues involved in the hearing.”); Reg. § 301.6330-1(e)(1) (to the same effect with respect to a proposed levy).

58 See id.
personnel. Such results ultimately could do more harm to tax administration than good, and we therefore recognize that any enforcement provision must be carefully calibrated to keep these competing considerations in mind.

We believe that a more robust and targeted remedy provision could better emphasize the importance the Service places on Appeals independence without unduly compromising the Service’s legitimate tax administration concerns. A meaningful remedy could be internal within the Service and need not even be labeled a remedy. For example, consistent with question and answer number 28 of Rev. Proc. 2000-43, section 2.10 of the Draft Rev. Proc. could be labeled “Ex Parte Prohibition Compliance” and still serve its purpose. As long as there is transparency with respect to the potential consequences of an ex parte rule violation, the provision can be effective and reinforce confidence in the independence of Appeals. Our recommendations are as follows.60

A. Recommendation: Create a Dedicated Ex Parte Rule Compliance Function

Under current practice, violations of the ex parte rule are handled on a case-by-case basis, with some centralized reporting and coordination within Appeals. There is no single person or function within Appeals (or elsewhere in the Service), whose job it is to monitor compliance with the ex parte prohibition in real time. We recommend the creation of a dedicated ex parte compliance function within the Service.

By way of example, assigning an experienced, dedicated Appeals officer the task of monitoring compliance and taking steps to remedy confirmed cases of prohibited ex parte communications would send a strong signal both internally in the Service and, more importantly, to taxpayers that the ex parte rule is taken seriously. Although a dedicated Appeals officer would require some commitment of resources, overall that person could save resources by reducing the significant amount of time currently spent by a dispersed group of personnel across the Service on issues relating to ex parte rule violations. Moreover, we are confident that the benefit in terms of increased confidence in the Appeals process, and in tax administration generally, although difficult to measure, would far outweigh the resources spent. Appearances in this context matter and a dedicated ex parte rule compliance function would not need to cover all issues or cases, but rather could leverage existing processes for addressing ex parte rule violations.

59 We are aware of the complications that can arise when a remedy relating to actions by Service personnel limits the Service’s ability to respond to those actions on a case-by-case basis. See, e.g., RRA of 1998, Pub. L. No. 105-206, § 1203, 112 Stat. 685, 720-21 (containing a list of ten infractions, commonly referred to as the “Ten Deadly Sins,” for which Service employees must be terminated).

60 Although we believe inclusion of these provisions in the final revenue procedure would appropriately reinforce the ex parte rule, an alternative approach could be to include these provisions in Part 8 of the Internal Revenue Manual, which governs the operation of Appeals. Indeed, there are already a number of provisions in Part 8 of the Internal Revenue Manual that speak to the ex parte rule. See, e.g., I.R.M. 8163; I.R.M. 8(22)22.3(2). This alternative would address any concern the Service might have that an enforcement section in the final revenue procedure, even if it was limited to Service administrative actions, could somehow be construed as creating affirmative taxpayer rights. Again, the important consideration is transparency with respect to the steps the Service will take in response to a demonstrated violation of the ex parte rule.
function alone would serve to increase the perception (and the reality) that ex parte rule violations are taken seriously.

Specific functions served by the dedicated ex parte compliance function could include the following:

1. Conducting sample reviews of Appeals case files to evaluate whether prohibited ex parte communications have occurred. We are aware that the Service, in conjunction with its broader quality review process, currently conducts an after-the-fact evaluation of ex parte contacts. However, this review does not provide taxpayers real-time assurance that someone is monitoring their case to ensure compliance with the ex parte rule.

2. Investigating reports (internal or external) of ex parte rule violations, conducting further inquiry with respect to those reports that are found to be credible and making recommendations for appropriate remedial action.

3. Serving as a resource for questions arising under the ex parte guidelines to ensure the guidance is being applied fairly and uniformly across all Service functions.

4. Serving as a conduit for taxpayer and practitioner concerns regarding compliance with the ex parte rule and guidelines in instances where there is a perception that other Service functions are not being responsive.

B. Recommendation: Require Mandatory Taxpayer Notification

It is widely understood and the Tax Court has explicitly recognized that violations of the ex parte rule are particularly problematic “because they are so hard to detect.” It is important that all reasonable efforts be made not only to identify violations of the rule, but also to alert taxpayers and their advisors, and we therefore recommend that the final revenue procedure require prompt taxpayer notification of ex parte rule violations. This change would promote transparency and allow the Service to have and take into consideration taxpayer input in fashioning a remedy for any violation of the ex parte rule. Taxpayers would view the process as more even-handed.

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61 The Service uses a similar real-time sampling method to ensure compliance with the prohibition on disclosure of taxpayer return information under section 6103. IRS Pub. No. 1075, Tax Information Security Guidelines for Federal, State and Local Agencies (Rev. Aug. 2010).

62 See Nat’l Taxpayer Advoc., 2010 Annual Report to Congress, vol.1 at 121. Similarly the Treasury Inspector General for Tax Administration plays an important role in ensuring compliance with the ex parte rule and has issued reports with respect thereto. See, e.g., Treasury Inspector General for Tax Administration, Ref. No. 2005-10-141, The Overall Independence of the Office of Appeals Appears to Be Sufficient (Sept. 9, 2005). These reports serve an important function but, again, are limited in their ability to assure taxpayers in real time that application of the ex parte rule is being monitored in their case.

63 Indus. Investors v. Comm’r, 93 T.C.M. (CCH) 1128, 2007 T.C.M. (RIA) ¶ 2007-093 (“Ex parte contacts not only undermine the impartiality of the officer hearing the appeal, but are especially pernicious because they are so hard to detect.”).
As an initial matter, taxpayers do not have a practical way of identifying communications between Appeals and other Service personnel or Counsel attorneys that may violate the *ex parte* rule. We recognize that it would be impractical and an undue administrative burden for the Service to notify taxpayers of all of these communications, but this only highlights why it is important for the Service to have robust procedures for identifying potential *ex parte* rule violations and giving taxpayers prompt notification of identified violations. Without taxpayer notification and a meaningful opportunity to weigh in on an appropriate remedy, an *ex parte* rule violation is perceived to be like the archetypal tree falling in the woods with no one there to hear it.

The focus of the “remedies” section in the Draft Rev. Proc. (aside from CDP cases remanded from the Tax Court) is on permissive taxpayer notice only. More specifically, the Draft Rev. Proc. states that “[m]ost breaches of the *ex parte* communication rules may be cured by timely notifying the taxpayer/representative of the situation, sharing the communication or information in question and affording the taxpayer/representative an opportunity to respond.” The Draft Rev. Proc. goes on to state that “[t]he specific administrative remedy that may be made available in any particular case is within the sole discretion of Appeals.”

By not mandating prompt disclosure of an *ex parte* rule violation to the taxpayer, the issue may come to light (if at all) at a later point in time and create a more difficult situation for both the Service and the taxpayer if a court ultimately finds material irregularities in the Appeals process.

Finally, although we believe it appropriate for Appeals to have discretion to determine what administrative remedy should be made available in any particular case for a violation of the *ex parte* rule, we recommend that the final revenue procedure discuss the range of remedies that may be considered by Appeals. The facts and circumstances of a particular case may be such that a *post hoc* opportunity for the taxpayer to learn of and respond to the contents of the prohibited *ex parte* discussion may be insufficient to assure the taxpayer that it is receiving independent and impartial Appeals consideration. We believe, for example, that affording the taxpayer the opportunity to request a new Appeals officer may be appropriate in certain limited cases, and by acknowledging such a possibility in the Draft Rev. Proc., the Service would clearly signal to taxpayers the seriousness with which it takes the *ex parte* rule.

C. Recommendation: Provide Supplemental Training Following a Violation of the *Ex Parte* Rule

In Rev. Proc. 2000-43, the Service emphasized the importance of informing its employees of the prohibition on *ex parte* contact and the contents and requirements of the revenue procedure. Similarly, the Draft Rev. Proc. contains a detailed provision

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64 Notice 2011-62, 2011-32 I.R.B. 126, § 2.10(1) (emphasis added). This provision is consistent with the Service’s position in litigated cases where violations of the *ex parte* rule have been found. See, e.g., Moore v. Comm’r, 92 T.C.M. (CCH) 131, 2006 T.C.M. (RIA) ¶ 2006-171, action on decision 2007-02 (Feb. 27, 2007), nonacq. 2007-1 C.B. xvi.


66 See id.

explaining how the Service will monitor and ensure compliance with the *ex parte* rule, including through training.\textsuperscript{68} There is, however, a demonstrated perception that at least some Appeals personnel and other Service employees are generally unaware of the *ex parte* rule.\textsuperscript{69} Given the inherent difficulty in identifying violations of the *ex parte* rule and the lack of complete transparency in the Service’s efforts to respond to violations (even if the mandatory disclosure recommendation made above were adopted), it is difficult to know whether the lack of knowledge is a widespread problem.

We applaud the Service’s commitment to training and recommend that, in addition to regular periodic training on the *ex parte* rule,\textsuperscript{70} some form of supplemental training be mandated for all Service employees involved in an established violation of the *ex parte* rule. This would advance both the perception and the reality of a Service employee base that is well versed in the *ex parte* rule and associated guidelines. This supplemental training need not be extensive, but it would be far more efficient because it would come into play in the real-life context of the rule’s application, rather than in abstract training programs.


\textsuperscript{69} See ABA Tax Sec., *Survey Report on Independence of IRS Appeals* 16 (2007) (“When asked whether they believed that the Appeals Officer was aware of the rule against *ex parte* communications with other Service personnel, only slightly over half of the tax practitioners responding to this inquiry (51.4%) believed that the Appeals Officer was aware of this rule; 16.6% believed that the Appeals Officer was not aware of the rule; and 32.0% were unable to reach a conclusion in this regard.”).