



MANUAL TRANSMITTAL

Department of the Treasury
Internal Revenue Service

4.24.9

AUGUST 24, 2016

EFFECTIVE DATE

(08-24-2016)

PURPOSE

- (1) This transmits a revision to IRM 4.24.9, *Excise Tax Penalties and Excise Return Preparer Penalties Guidance*.

MATERIAL CHANGES

- (1) This revision to IRM 4.24.9 incorporates interim guidance and updates the IRM for editorial changes such as website addresses, legal references, and IRM references.
- (2) The table below identifies the significant changes in content since the October 26, 2012, revision of this IRM:

IRM Section	Description of Change
4.24.9.1.1, Common Penalty Features	Removed note addressing penalty waivers for consistency with content from interim guidance memorandums SBSE-04-0616-0028, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , and SBSE-04-0615-0046, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , which removed materials that related to penalties that duplicated information addressed in 20.1, <i>Penalty Handbook</i> . User directed to 20.1 for more information.
4.24.9.1.1.1, First Time Abate (FTA) and Reasonable Cause Relief	Removed subsection. Content from interim guidance memorandums SBSE-04-0616-0028, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , and SBSE-04-0615-0046, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , removed materials, which related to penalties that duplicated information addressed in 20.1, <i>Penalty Handbook</i> . User directed to 20.1 for more information.

IRM Section	Description of Change
4.24.9.1.2, Who Asserts/Assesses Penalties	Retitled Appeal Procedures Applicable. Content updated and moved from 4.24.9.1.4. Prior content from interim guidance memorandums SBSE-04-0616-0028, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , and SBSE-04-0615-0046, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , removed materials, which related to penalties that duplicated information addressed in 20.1, <i>Penalty Handbook</i> . User directed to 20.1 for more information.
4.24.9.1.3, Penalty Reference Number (PRN)	Removed subsection. Content from interim guidance memorandums SBSE-04-0616-0028, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , and SBSE-04-0615-0046, <i>Interim Guidance on First Time Abate Administrative Waiver</i> , removed materials, which related to penalties that duplicated information addressed in 20.1, <i>Penalty Handbook</i> . User directed to 20.1 for more information.
4.24.9.1.4, Appeal Procedures Applicable	Removed subsection. Content updated and moved to 4.24.9.1.2.
4.24.9.5, IRC 6672 Trust Fund Recovery Penalty	Updated procedural guidance addressing when the collecting agent fails to collect tax from its customers.
4.24.9.7.3, Return Preparer Coordinator Responsibilities	Updated procedural guidance to reflect work now being performed in a different IRS organizational unit due to changes caused by SB/SE National Realignment.
4.24.9.7.5.3, Statute of Limitation Periods for Return Preparer Penalty Cases	Updated the time span required on Form 895 and Form 872-B necessary to forward a case to Appeals.
4.24.9.7.7.6, Protest to the Return Preparer Penalty	Updated the time span required on an unagreed Return Preparer Penalty case necessary to forward that case to Appeals.

IRM Section	Description of Change
4.24.9.7.11, Program Action Case (PAC) Procedures for Excise Tax	Updated procedural guidance to reflect work now being performed in a different IRS organizational unit due to changes caused by SB/SE National Realignment.
4.24.9.8.4.1, IRC 6719 Failure to Register Penalty	Added a note regarding entities that must be registered.

EFFECT ON OTHER DOCUMENTS

This material supersedes IRM 4.24.9 dated October 26, 2012, and incorporates interim guidance memorandum SB/SE-04-0616-0028, *Interim Guidance on First Time Abate Administrative Waiver*, dated June 9, 2016, and SB/SE-04-0615-0046, *Interim Guidance on First Time Abate Administrative Waiver*, dated June 12, 2015.

AUDIENCE

SB/SE Excise Managers, Excise Employees, and Excise Tax Specialists.

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Small Business/Self Employed

4.24.9

Excise Tax Penalties and Excise Return Preparer Penalties Guidance

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4.24.9.1 (08-24-2016) **Overview of Excise Penalty Provisions**

- (1) This section contains a brief overview of and procedural guidance for the majority of excise tax related penalties. Refer to IRM 20.1, *Penalty Handbook*, and IRM 20.1.11, *Excise Tax and Estate and Gift Tax Penalties*, for penalty policy.
- (2) Specific guidance on fraud indicators and the development of fraud may be found in IRM 25.1, *Fraud Handbook*.
- (3) For detailed information regarding development of fuel compliance penalties (IRC 6715, IRC 6715A, and IRC 6720A) see IRM 4.24.16, *Excise Fuel Compliance Report Writing, Case Processing, and Appeals Procedures*.
- (4) The mission of the Office of Servicewide Penalties (OSP) is to promote fair, consistent, and effective administration of the applicable IRC Title 26 civil penalties across the IRS. Servicewide Penalties supports the mission by working with all IRS Business Operating Divisions. The OSP landing page may be found at <http://sbseservicewide.web.irs.gov/penalty/default.aspx>.
- (5) For additional information see the Examining Excise Taxes, Issues and Procedures, Penalties web page at <http://mysbse.web.irs.gov/examination/specialty/excise/issues/pen/default.aspx>.

4.24.9.1.1 (08-24-2016) **Common Penalty Features**

- (1) In general, each penalty is unique and will stand alone unless otherwise indicated. Exceptions and additional information are noted in the discussions of the specific penalties. However, some general procedures listed below will apply.
- (2) Statute of Limitations - In general, the additions to tax, additional amounts, and assessable penalties in IRC 6651 - IRC 6657 and IRC 6671 - IRC 6725 are assessed, collected, and paid in the same manner as taxes. To the extent a penalty or addition to tax pertains to a tax return, the assessment is generally subject to the period of limitation in IRC 6501 and shall be assessed within 3 years after the return was filed (whether or not the return was filed on or after the date prescribed).
- (3) Reasonable Cause Relief - a determination as to whether or not reasonable cause exists must be based on a careful consideration of the facts and circumstances of each case prior to the assertion of a penalty. Excise employees should consider any reason a taxpayer provides in conjunction with the guidelines, principles and evaluating factors. See IRM 20.1.1.3.2, *Introduction and Penalty Relief, Reasonable Cause*, as well as the applicable IRC Section and Treasury Regulations relating to the specific penalty. Excise employees may use the reasonable cause relief lead sheet found at <http://sbseservicewide.web.irs.gov/penalty/about/default.aspx>.
- (4) Abatements - Information on penalty abatements are discussed in IRM 20.1.1.3, *Criteria for Relief from Penalties*.
- (5) Documentation and Managerial Involvement - Excise employees must use Administrative Lead Sheet E500, Penalty Check Sheet, located in the Forms Library of the Notebook, to document the assertion or non-assertion of penalties. Group manager involvement is not required on automatic penalties such as Failure to File Penalty and Failure to Pay Penalty. Managerial review

and approval is required on assertion of all other penalties and the non-assertion of IRC 6719 and/or IRC 6725 penalties.

4.24.9.1.2
(08-24-2016)
**Appeals Procedures
Applicable**

- (1) Appeals procedures with respect to excise taxes are applicable to penalties proposed by an excise employee, whether such penalties are in connection with unagreed tax adjustments or such penalties are the only items at issue.
- (2) Refer to IRM 4.24.10, *Appeals Referral Procedures*, for more information.

4.24.9.2
(08-24-2016)
**Overview of Excise
Examination Related
Penalties**

- (1) The majority of penalties the excise employee will encounter are listed in the table below.

IRC	Type of Penalty	IRM Reference
4103	Willful Failure to Pay Fuel Tax/ Additional Persons Liable	20.1.11.10
6651(a)(1)	Failure to File	20.1.2.2.7
6651(a)(2)	Failure to Pay	20.1.2.2.8
6651(f)	Fraudulent Failure To File, Civil	20.1.2.2.7.5
6656	Failure to Deposit	20.1.4
6662(c)(1)	Accuracy Related Penalty- Negligence	20.1.5.7
6663	Civil Fraud	20.1.5.14
6672	Trust Fund Recovery	20.1.11.3
6675	Excessive Fuel Claims	20.1.11.4
6694	Return Preparer Penalty- Understatement	20.1.6.4
6695	Return Preparer Penalty-Other	20.1.6.5
6715	Dyed Fuel Sold for Use, or Used in Taxable Use	20.1.11.5
6715A	Tampering With or Failing to Maintain Security Requirements for Mechanical Dye Injection Systems	20.1.11.6
6717	Refusal of Entry	20.1.11.7.2
6718	Failure to Display Tax Registra- tion on Vessels	20.1.11.7.4
6719	Failure to Register or Reregister Under Section 4101	20.1.11.7.5

IRC	Type of Penalty	IRM Reference
6720A	Certain Adulterated Fuels	20.1.11.7.6
6725	Failure to File Information Return Under Section 4101 and any failure to include all of the information required to be shown on such return or the inclusion of incorrect information	20.1.11.7.7
7270	Failure to Comply with the Requirements of IRC 4374, Liability for Tax	20.1.11.8
7272	Failure to Register or Reregister under Section 4101	20.1.11.7.3
7275	Offenses Relating to Certain Airline Tickets and Advertising	20.1.11.16
7342	Refusal to Permit Entry or Examination	20.1.11.7.1, 20.1.11.9

4.24.9.3
(08-24-2016)
IRC 4103 Willful Failure to Pay Fuel Taxes Penalty

- (1) IRC 4103 creates personal liability for certain people who are under a duty to assure payments of fuel taxes under IRC 4041(a)(1) or IRC 4081 and applies to each person:
 - a. Who is an officer, employee, or agent of the taxpayer who is under a duty to assure the payment of such tax and who willfully fails to perform such duty, or
 - b. Who willfully causes the taxpayer to fail to pay such tax.

These persons shall be jointly and severally liable with the taxpayer for the tax to which such failure relates.
- (2) IRC 4103 is not an actual penalty or a tax, but a tool used to collect unpaid excise fuel taxes. This provision imposes joint and several liability with the taxpayer on each taxpayer's officer, employee, or agent who willfully fails to meet his or her duty to assure the payment of the tax or who willfully causes the taxpayer to fail to pay the tax.
- (3) For additional guidance about IRC 4103, refer to IRM 5.19.7.3.10.4, *Collecting Process, Liability Collection, Campus Collections Programs, Personal Liability Excise Tax (PLET)*.
- (4) For additional guidance about excise tax fraud, see IRM 25.1.2, *Special Topics, Recognizing and Developing Fraud*.
- (5) When IRC 4103 is applicable, the excise employee should review Form 4180, *Report of Interview with Individual Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Tax*, which is used when conducting an interview with potentially responsible parties to determine if they should be held responsible for the Trust Fund Recovery penalty or the excise tax personal liability.

See IRM 11.3.40.5.2.2, *Communications and Liaison, Disclosure of Official Information, Disclosure Involving Trust Fund Recovery Penalty Assessments, Form 4180, Report of Interview with Relative to Trust Fund Recovery Penalty or Personal Liability for Excise Taxes*, for disclosure guidance involving Trust Fund Recovery Penalty assessments.

- (6) Excise employees will include appropriate remarks in their work papers and include a copy of the completed referral memorandum in the case file. See IRM 4.24.9.3.1 below for referral procedures.
- (7) For those cases where the excise employee determines that IRC 4103 does not apply, a comment shall be made in the work papers that a referral was considered but not made and include the reasons for not making a referral to the Collection function.
- (8) The assessment statute for IRC 4103 is identical to the limitations period for the IRC 4041(a)(1) or IRC 4081 taxpayer. For example, three years from the actual Form 720, *Quarterly Federal Excise Tax Return*, filing date (not the presumptive date). If no return was filed or if a fraudulent return with intent to evade the tax was filed, there is no assessment statute.

4.24.9.3.1
(10-26-2012)

**Referring Potential IRC
Section 4103 Cases to
Collection Function**

- (1) Excise employees will use the following procedures for referring potential IRC 4103 cases to the Collection function:
- (2) The duty to ensure tax is paid and the willful failure to perform such duty on the part of an officer, employee, or agent of the taxpayer, or willfulness and the causation of the taxpayer's failure to pay tax on the part of a person involved will be determined by the excise employee prior to referring the case to the Collection function.
- (3) The excise employee will prepare a memorandum to the Advisory Function in Collection. The subject line will state "Referral of Potential IRC 4103 Case."
- (4) The memorandum will be forwarded to Advisory through the territory manager and will contain the following information:
 - a. Excise employee's name and telephone number.
 - b. Taxpayer's name, taxpayer's identification number (TIN) and current address.
 - c. Tax period(s), statute date(s), abstract number(s) and deficiencies involved.
 - d. Names, titles, TIN's and current addresses of all persons who appear responsible for ensuring payment of the tax.
 - e. The excise employee's best estimate of the projected disposition of the case.
 - f. An explanation of the proposed adjustments and the facts supporting the excise employee's determination.
- (5) When Advisory receives a referral from Excise or any other Compliance examination function, the Collection function will make the final determination in assessing the personal liability for excise tax.

4.24.9.4

(08-24-2016)

IRC 6651 Failure to File Tax Return or Pay Tax Penalty

- (1) This section provides guidance with respect to delinquent returns secured by the excise employee as well as substitute for returns.
- (2) The excise employee will, after considering the statement of the taxpayer, recommend assertion or non-assertion of the delinquency penalty in the examination report. Any appropriate comments regarding a penalty recommendation will be incorporated into the report.
- (3) Reasonable cause exemptions can be found under IRM 20.1.1.3.2, *Reasonable Cause*.
- (4) See to determine whether reasonable cause relief can be granted for the penalty being considered.

4.24.9.4.1

(10-26-2012)

Nontaxable Delinquent Returns

- (1) A nontaxable delinquent excise tax return has \$0 liability. It is filed administratively by IRS for a specific taxpayer to establish the tax period in order to make an assessment.
- (2) Nontaxable delinquent excise tax returns may be filed for which there is additional tax developed as the result of an examination. Since the returns as filed are nontaxable, they are processed without considering the delinquency features or without securing from the taxpayer any statement of reasonable cause for delay in filing.
- (3) In such cases the excise employee will, after considering the statement of the taxpayer, recommend assertion or non-assertion of the delinquency penalty in the examination report. Any appropriate comments regarding a penalty recommendation will be incorporated into the report.
- (4) Reasonable cause criteria can be found under IRM 20.1.1.3.2.
- (5) To determine whether reasonable cause relief can be considered for the penalty being considered, excise employees should see Exhibit 20.1.1-1 at <http://irm.web.irs.gov/Part20/Chapter1/Section1/IRM20.1.1.asp>.

4.24.9.4.2

(10-26-2012)

Penalties Applicable to Delinquent Returns Secured by Excise Employee

- (1) The excise employee's recommendation for assertion or non-assertion of the failure to file or pay penalty will accompany each delinquent return.
 - a. Reasonable cause criteria can be found under IRM 20.1.1.3.2.
 - b. To determine whether reasonable cause relief can be considered for the penalty being considered, excise employees should see Exhibit 20.1.1-1 at <http://irm.web.irs.gov/Part20/Chapter1/Section1/IRM20.1.1.asp>.
- (2) These requirements preclude affording appeal rights prior to assessment of the penalties. In these cases, the taxpayer should be advised that an appeal may be initiated by filing Form 843, *Claim for Refund and Request for Abatement*, for the amount of penalties upon payment of the penalties.
- (3) An excise employee securing a delinquent return may examine the return to determine whether the tax reported is correct. Such examination should be made as soon as possible after the return is received, and to the extent deemed necessary.
- (4) A "No-Change" report will be issued if the excise employee determines that the tax is correctly reported. See IRM 4.4.9.5.14.1, *Examining Process, AIMS Pro-*

cedures and Processing Instructions, Delinquent and Substitute for Return Processing, No Change to Original Return, for more information regarding no-change case processing.

- (5) If the excise employee finds that the tax is incorrect, an examination report will be prepared covering proposed changes to the tax reported on the return, and to the delinquency penalty, if applicable.
- (6) If the additional tax is unagreed, normal appeal procedures apply.
- (7) See IRM 4.4.9 for more information.
- (8) For guidance on processing delinquent returns and substitutes for returns (SFRs) see the electronic link under "My SB/SE Web Page - Delinquent Returns and SFR Procedures" at <http://mysbse.web.irs.gov/examination/specialty/excise/initiating/establish/del/default.aspx>.

4.24.9.4.3
(10-26-2012)

**Penalties Applicable to
Substitute For Return**

- (1) The excise employee will recommend assertion or non-assertion of penalties.
- (2) The excise employee will also explain the basis for the recommendation and comment on the taxpayer's statement in the case file.
 - a. Reasonable cause criteria can be found under IRM 20.1.1.3.2.
 - b. To determine whether reasonable cause relief can be considered for the penalty being considered, excise employees should see IRM 20.1.1-1 at <http://irm.web.irs.gov/Part20/Chapter1/Section1/IRM20.1.1.asp>.
- (3) The excise employee will compute any penalty recommended on the total tax due for the period involved.
- (4) Appeals procedures apply.

4.24.9.4.4
(10-26-2012)

**IRC Section 6020(b),
Certification Procedures
for Non-Filed Excise
Returns**

- (1) IRC 6020(b) certification procedures are required to impose the IRC 6651(a)(2), *Failure to Pay Tax Penalty*, when a taxpayer fails to file an excise tax return.
- (2) For information about situations where a taxpayer fails to file an excise tax return and the application of the IRC 6651(a)(2) is warranted, refer to IRM 20.1.2.2.10.2, *Failure to File/Failure to Pay, Processing When Deficiency Procedures Do Not Apply*.
- (3) IRC 6651(g)(2) provides that for purposes of IRC 6651(a)(2) a return prepared by the excise employee under IRC 6020(b) is treated as a return filed by the taxpayer. IRC 6020(b) return requirements are met in a case where the excise employee has processed as a return, documents that:
 - Identify the taxpayer.
 - Provide a basis for the taxpayer's tax computation.
 - Are signed by the excise employee who has been delegated the authority to sign IRC 6020(b) returns.
- (4) Instructions for applications of IRC 6020(b) are listed below and also found in IRM 20.1.2.2.10.2 (1)(b):
 - Complete and attach Form 13496, IRC Section 6020(b), *Certification*, to the source document for assessment of tax under IRC 6020(b).

- Attach the report summarizing excise examination changes or equivalent report of adjustments.
- Attach Form 886-A, *Explanation of Items*, appropriate issue lead sheet, or similar form.

4.24.9.5
(08-24-2016)
IRC 6672 Trust Fund Recovery Penalty

- (1) IRC 6672 provides for a penalty for the willful failure to collect, truthfully account for, and pay over tax when required. This penalty is used solely as a collection device against collecting agents and their responsible officers.
- (2) For excise tax purposes, the IRC 6672 penalty applies to:
 - The communications tax imposed by IRC 4251.
 - The air transportation taxes imposed by IRC 4261 and IRC 4271.
 - The indoor tanning service tax imposed by IRC 5000B.
- (3) The penalty is equal to the amount of tax evaded, or not collected, or not accounted for and paid over.
- (4) Responsibility is a matter of status, duty and authority. A determination of responsibility is dependent upon the facts and circumstances of each case. A responsible person has the duty to perform and the power to direct the act of collecting trust funds, and accountability and authority to pay trust funds.
- (5) A responsible person includes an officer or employee of a corporation, or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.
- (6) Willful means intentional, voluntary, reckless or knowing as opposed to accidental. No evil intent or bad motive is required. Willfulness will be determined for each issue raised in the examination.

Example: Willfulness exists where a responsible person makes a deliberate choice to use trust fund taxes to pay other creditors instead of the United States.

- (7) See IRM 5.7.3, *Collecting Process, Trust Fund Compliance, Establishing Responsibility and Willfulness for the Trust Fund Recovery Penalty (TFRP)*, for more information.
- (8) The IRC 6672 penalty case developed by the excise employee is referred to the area office Collection function for final determinations to be made and the penalty collected.
- (9) A consent extending the period of limitation for assessment under IRC 4251, IRC 4261, or IRC 4271 does not extend the period for making a separate assessment against the collector or responsible person under IRC 7501 or IRC 6672. See IRM 25.6.22.6.10.3, *Statute of Limitations Extension of Assessment Statute of Limitations by Consent, Employment Tax*.
- (10) For additional guidance and information about extending the period of limitations to assess air transportation taxes, refer to IRM 4.24.6, *Technical Guidance and Procedures for Excise Issues*.

- a. Consents under IRC 4251, IRC 4261, or IRC 4271 are secured from the actual taxpayer. Form 872-B, *Consent to Extend the Time to Assess Miscellaneous Excise Taxes*, is used.
- b. Consents under IRC 7501 are secured from the collector.
- c. For assessments under IRC 6672, Form 2750, *Waiver Extending Statutory Period for Assessment Trust Fund Recovery Penalty*, is used and secured from the person potentially liable for the trust fund penalty.

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- (11) If a collecting agent has collected tax from its customers, but failed to pay the tax to the Government, the following procedures will apply:

- a. The tax should be assessed against the collecting agent under IRC 7501(a) with any applicable delinquency penalties and interest. The IRC 6672 penalty should not be assessed against the collecting agent, even if the collecting agent willfully failed to pay the tax, since the penalty is used solely as a collection device.
- b. If the collecting agent is unable to pay the tax, the excise employee should determine if there was a willful failure to pay on the part of any of the responsible officers. If so, the penalty should be assessed against the responsible persons.
- c. If a collecting agent has failed to collect tax from its customers, the tax, by law, cannot be assessed against the collecting agent except in IRC 4261 cases after October 1, 1997 where IRC 4263(c) applies. However, if there was willful failure on the part of collecting agent or its employees to collect the tax, the IRC 6672 penalty is applicable and should be assessed.

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- (12) When the collecting agent fails to collect the tax from its customers, the following procedures will apply:

- a) The tax cannot be assessed against the collecting agent except in IRC 4261 cases after October 1, 1997. IRC 4263(c) applies. (This procedure is only applicable to taxes imposed under IRC 4261 and may not be imposed for IRC 4271 taxes where an air carrier failed to collect
- b) If there was willful failure on the part of the collecting agent or its employees to collect the tax, the IRC 6672 penalty is applicable and should be assessed.

- (13) However, the full unpaid trust fund amount will be collected only once in each case, whether it is collected from the collecting agent, from one or more of its responsible person or a combination of the collecting agent and one or more of the responsible persons. Where more than one penalty has been assessed with respect to the same tax, any outstanding assessments will be adjusted accordingly once the tax has been paid.

4.24.9.6

(08-24-2016)

IRC 6675 Excessive Claims with Respect to the Use of Fuels Penalty

- (1) IRC 6675 provides an assessable penalty against a person making an excessive claim with respect to:
 - a. IRC 6416(a)(4), registered ultimate vendors or credit card issuers to administer credits and refunds of gasoline tax.
 - b. IRC 6420, gasoline used on farms.
 - c. IRC 6421, gasoline used for certain non-highway purposes, used by local transit systems, or sold for certain exempt purposes.
 - d. IRC 6427, fuels not used for taxable purposes.
- (2) See IRM 20.1.11.4, *IRC Section 6675 Excessive Claims with Respect to the Use of Certain Fuels*, for more information.
- (3) The excise employee who finds that a claim of this type is excessive should recommend assertion of the penalty provided by IRC 6675, unless the claimant can show that the claim for the excessive amount was due to a reasonable cause.
- (4) The determination as to whether the penalty provided by IRC 6675 should be imposed will be made by the excise employee in the same manner as on other issues and normal appeals procedures apply.

4.24.9.7

(08-24-2016)

Introduction to Excise Return Preparer Penalties

- (1) Prior to May 25, 2007, preparer penalties under IRC 6694 and IRC 6695 were not applicable to excise tax returns. The Small Business and Work Opportunity Tax Act (SBWOTA) of 2007 amended IRC 6694 and IRC 6695 to include any tax return preparer. Preparer penalties became applicable to excise tax returns prepared after May 25, 2007.
- (2) It is the responsibility of the excise employee to identify and consider whether the conduct provisions of the Code are followed as part of any examination of an excise return prepared by a tax return preparer. If the conduct provisions were not followed, it is the excise employee's responsibility to assert the penalties.
- (3) IRM 20.1.6, *Preparer/Promoter/Material Advisor Penalties*, contains guidance pertaining to return preparer penalties.
- (4) Excise employees are required to utilize a management specified report generating software system, appropriate lead sheets and templates for all excise tax return preparer cases. The current application used by the excise employee is the Issue Management System (IMS). See IRM 4.24.6.2, *Excise Issue Management System (IMS)*, for further information regarding utilizing IMS.
- (5) Specific lead sheets have been developed for each preparer penalty. These lead sheets must be utilized in developing each penalty and are located in the Activity Code Section of the Forms Library of the Notebook.
- (6) The excise employee will determine, based on oral testimony and/or written evidence obtained during the excise examination, if a return preparer penalty case should be recommended to the manager for approval to initiate.
- (7) The excise employee must document their consideration for preparer penalties on the Administrative Lead Sheet E500 Penalty Check Sheet. This will be part of the taxpayer (client) case file.

- (8) The excise employee must document their consideration for preparer penalties on the Administrative Lead Sheet E500 Penalty Check Sheet. This will be part of the taxpayer (client) case file.
- (9) For additional information on return preparer penalties see the Examining Excise Taxes, Issues and Procedures, Penalties, Return Preparer Penalties web page at <http://mysbse.web.irs.gov/examination/specialty/excise/issues/pen/preppen/default.aspx>.

4.24.9.7.1
(10-26-2012)
**IRC 6694, 6695, and
6713 Return Preparer
Penalties**

- (1) IRC 6694 provides, in part, for penalties against tax return preparers due to an understatement of a taxpayer's liability by a tax return preparer. IRC 6694(a) applies to an understatement due to unreasonable positions. If a tax return preparer prepares an excise return or claim for refund with respect to which any part of an understatement of liability is due to an unreasonable position, and knew (or reasonably should have known) of the position, the tax return preparer can be subject to a penalty with respect to each return.
- (2) IRC 6694(b) provides for increased penalties where the understatement was due to willful or reckless conduct by the tax return preparer.
- (3) Under IRC 6695, *Other Assessable Penalties with respect to the Preparation of Tax Returns for Other Persons*, there are various penalties in regard to the preparation of tax returns for other persons. They include:
 - IRC 6695(a), *Failure to Furnish Copy to Taxpayer*
 - IRC 6695(b), *Failure to Sign Return*
 - IRC 6695(c), *Failure to Furnish Identifying Number*
 - IRC 6695(d), *Failure to Retain Copy or List*
 - IRC 6695(e), *Failure to File Correct Information Returns*
 - IRC 6695(f), *Negotiation of Check*
- (4) IRC 6713, *Penalty for Unauthorized Preparer Disclosure or Use*, imposes a penalty for each unauthorized disclosure or use of information connected with a tax return or the preparation of a tax return. The penalty may be asserted against a preparer or any person providing services in connection with the preparation of a tax return.
- (5) Under IRC 7407 the Service has the power to seek an injunction prohibiting a tax return preparer from engaging in certain practices. Any employee conducting an investigation under IRC 6694, IRC 6695, IRC 6700, IRC 6701, IRC 6707, or IRC 6708, will consider whether an injunction should be sought under IRC 7407 or IRC 7408. Injunctions based on IRC 6700 or IRC 6701 can be initiated only after the Lead Development Center (LDC) authorizes an investigation. Submit a lead to the LDC using Form 14242, *Reporting Abusive Tax Promotions and/or Promoters*.
- (6) The excise employee should review IRM 20.1.6.22, *Third Party Contacts* - IRC 7602(c), and IRM 4.11.57, *Examining Officer's Guide (EOG), Third Party Contacts*, for additional information regarding the application of these laws.

4.24.9.7.2
(10-26-2012)
**Return Preparer Penalty
Disclosure Issues**

- (1) A return preparer penalty determination action is an individual (separate) Federal tax matter of the preparer. The excise employee may disclose Federal tax information only to that individual, in accordance with IRC 6103(e)(1)(A)(i), or to the preparer's attorney in fact, or duly authorized power of attorney, as permitted by IRC 6103(e)(6).

- (2) Return preparer penalty files may include:
 - Copies of tax returns or portions of tax returns prepared by the preparer.
 - Other information taken from examination administrative files.
 - Work papers and transcripts of taxpayers' accounts.
 - Information received directly from the preparer.
- (3) Return preparer penalty case information, obtained from underlying case(s) that are the basis for the penalty exam, may only be disclosed to the preparer or authorized power of attorney during the course of the penalty determination or subsequent tax administration activity, if the information relates to the resolution of the penalty issue per IRC 6103(h)(4).
- (4) Other information in the penalty file that does not relate to the penalty determination, such as the taxpayer's current address or current employer, may not be disclosed to the preparer or the preparer's authorized power of attorney. The excise employee must avoid placing any information in the file which does not pertain directly to, or support, a penalty determination.
- (5) If the return preparer penalty file includes information that would seriously impair Federal tax administration if disclosed, that information must be withheld by the excise employee's manager based on IRC 6103(e)(7) and Delegation Order 11-2, *Authority to Permit Disclosure of Tax Information and to Permit Testimony or the Production of Documents*.

4.24.9.7.3 (08-24-2016) **Return Preparer Coordinator Responsibilities**

- (1) The Return Preparer Coordinator (RPC), based in Workload Selection and Delivery (WSD) group within Excise Case Selection (ECS), is responsible for coordinating excise tax return preparer penalty cases.
- (2) The RPC:
 - Supports and offers guidance to excise employees.
 - Provides assistance to the manager and excise employee at the start of the investigation regarding audit techniques, questions, and general direction.
 - Assists the excise employee in identifying, working, and closing client and preparer penalty cases.
 - Advises the excise employee if the Return Preparer is being investigated by Criminal Investigation Division (CI), the Lead Development Center, or one of the Income Tax Examination Areas.
 - Provides coordination if more than one investigation is ongoing or contemplated.
- (3) The territory manager and group manager are still primarily responsible for the overall quality development and management of the return preparer and client examinations.

4.24.9.7.4 (10-26-2012) **When to Propose a Return Preparer Penalty**

- (1) Generally, no return preparer penalty will be proposed until the conclusion of the excise tax examination (referred to as the client's return) at the group level. If the excise tax case is unagreed, the excise employee may pursue the preparer penalty after the unagreed excise tax case is closed out to Appeals.

Note: Determining whether or not to proceed with a preparer penalty investigation is documented on the penalty leadsheet of the examination return preparer's client case file.

Refer to IRM 20.1.6, for more information about preparer penalties.

- (2) The determination and settlement of the excise tax examination will at all times proceed without regard to the return preparer penalty issue.

4.24.9.7.5
(10-26-2012)
**Return Preparer Penalty
Case Development**

- (1) A preparer penalty case is separate and distinct from the excise tax examination of the preparer's client. A preparer penalty case can be started based on the examination of one client or the result of a preparer project.
- (2) Refer to the disclosure rules found in IRM 4.24.9.7.2 and third party contact requirements found in IRM 20.1.6.22 to ensure the proper handling of return preparer penalty cases.

4.24.9.7.5.1
(10-26-2012)
**Establishing the Need
for a Return Preparer
Penalty Case**

- (1) The excise employee will evaluate the facts and circumstances of the excise return preparation and address the following questions:
 - a. Was the return prepared by a return preparer?
 - b. Was the return prepared for a fee?
 - c. Did the taxpayer receive a copy of the return?
 - d. Did the preparer comply with the provisions of IRC 6695?
 - e. Did the examination result in an understatement?
 - f. Do the facts, based on what observations, statements made, records reviewed, indicate preparer negligence for any part of the deficiency?
 - g. Do any of the facts suggest the preparer willfully attempted to understate the tax liability? How and in what fashion?
- (2) Basic information regarding the preparation of the return (items a, b, and c above) will be documented in the taxpayer (client) work papers. Any information pertaining to the other questions above will be separately documented outside the taxpayer (client) case file.
- (3) If the answer is yes to either items d, e, f, or g above, the excise employee will discuss the potential for a preparer penalty with the Return Preparer Coordinator (RPC). The excise employee along with Group Manager should be involved in the decision to pursue preparer penalties.
- (4) Group manager approval is required on the Administrative Lead Sheet E500 Penalty Check Sheet. When a decision is made that preparer penalties will not be pursued, the RPC will retain this information to be held for a period of not less than one year.

4.24.9.7.5.2
(10-26-2012)
**Overview Return
Preparer Penalty Case
Control Procedures**

- (1) If the excise group manager approves the potential of a preparer penalty, the excise employee will establish a separate return preparer case file. All time devoted to working the applicable preparer penalty will be charged to this case file.
- (2) The manager will contact the RPC prior to going forward with any penalty investigation to ensure there is not already an open Program Action Case (PAC), Compliance Initiative Project (CIP), or criminal investigation on the preparer.

- (3) Return preparer cases are not controlled on Audit Information Management System (AIMS). The excise employee will establish the return preparer case on the Examination Returns Control System (ERCS) using Form 5809, *Preparer Penalty Case Control Card*, as the ERCS Input Document. ERCS controls will permit the excise employee to apply time to the case and is a means of keeping a manual record of penalty action on the preparer.

Note: Form 5345-D, *Examination Request Master File*, is not used to establish a preparer penalty on ERCS.

- (4) The excise employee will record on Form 5809 the relevant information from the client's tax return. Form 5809 becomes part of the case file work papers.
- (5) The excise employee will forward, via secure e-mail, a copy of Form 5809 Copy B to the RPC at the start of any penalty investigation.
- (6) The excise employee needs to complete a separate Form 5809 for each penalty category.

4.24.9.7.5.2.1 (10-26-2012) Instructions for Completion of Form 5809

- (1) There are two different ways of preparing Form 5809 for input on ERCS:
 - Method 1: Return Preparer's TIN and Name - This is advantageous when only one excise employee will be conducting a Return Preparer Penalty investigation and there could be a number of penalties that may ultimately be asserted. All of the penalty examinations can be condensed into one, and the sum total of hours applied and penalty amounts for each year and penalty type can be input without creating a separate Form 5809 and ERCS record for each client penalty investigation.
 - Method 2: Client's TIN and Name of Return Preparer Subject of the Penalty Investigation - For this method a separate Form 5809 and an ERCS record will need to be created for each return preparer penalty investigation. This method is preferred when multiple excise employees will each be conducting a separate return preparer penalty investigation on a specific preparer for a particular year. Each excise employee charges their time and any penalties assessed are input to the particular client affiliated record created. The disadvantage to creating separate cards arises when there is one excise employee conducting the preparer penalty investigation. A separate Form 5809 must be prepared for each penalty and the examination time must be separately input for each period on ERCS.
- (2) For Method 2 controls, the excise employee will establish a separate ERCS record for each client year proposed penalty combination using the following guidelines:
 - a. TIN field- record the SSN or EIN of the preparer or client.
 - b. Name field-record the preparer's name.
 - c. Tax Period field- record the tax period of the client's return
 - d. Statute field-record the statute of the client's return.
 - e. Activity Code field- record one of the following codes listed below:

Activity Code	IRC	MFT
501	6694(a)	P - 1

Activity Code	IRC	MFT
502	6694(b)	P - 2
503	6695(f)	P - 3
504	6695 (a), (b), c), (d), or (e)	P - 4
504	6713	P - 4
505	7407 injunction	Not a Civil Penalty
553	6695(g)	PC
828	Indirect Exam Time	Used for closing the investigation file when the only time charged was for attempting, unsuccessfully, to locate the preparer.

- (3) In general, the excise employee working an actual penalty case(s), needs to use the appropriate codes listed in the above table and charge time accordingly throughout the examination(s).
- (4) When the excise employee reaches a point in their investigation that suggests that a IRC 7407 injunction should be sought (or is assigned one), then any time devoted to the development of the injunction would be charged to Activity Code 505. Specific procedures relating to injunctive actions are found in IRM 20.1.6.10, *Action to Enjoin Preparers - IRC 7407*, and IRM 4.32.2.9.1, *Abusive Transactions, The Abusive Transactions (AT) Process, Examiner Injunction Referrals*.

4.24.9.7.5.3
(08-24-2016)
**Statute of Limitation
Periods for Return
Preparer Penalty Cases**

- (1) Return preparer penalty cases have separate statutes of limitation periods that must be protected. The statute of limitations on assessment for IRC 6694(a) and IRC 6695 expires three years from the later of either:
 - The due date of the related (client) return.
 - The date the return was filed.
- (2) The statute of limitations on assessments for:
 - IRC 6694(b)
 - IRC 6700
 - IRC 6701 penalties
 expired three years from the date the return was filed.
- (3) Excise employees should always ensure that the statute of limitations period for IRC 6694(a) and IRC 6695 return preparer penalty case is protected from expiration by attempting to secure an extension of the regular statute.
- (4) When the preparer penalty statute of limitations is within 365 days of expiration, Form 895, *Notice of Statute Expiration*, will be issued to the excise employee.

- (5) Alpha code "XX" is used to designate that a return preparer penalty under IRC 6694(b) may be assessed at anytime. In IRC 6694(b) penalty cases (willful or reckless conduct), the manager must approve the Form 895 and update the ERCS record to the Alpha Code of "XX" *Return Preparer, Promoter, and Aiding/Abetting Penalties*.
- (6) Extending the statute of limitations period on a client's return with a Form 872, *Consent to Extend the Time to Assess Tax*, does not extend the statute for the return preparer penalty case. If the statute is less than 365 days and the preparer will agree, the statute on a return preparer penalty case under IRC 6694(a) or IRC 6695 can be extended using Form 872-D, *Consent to Extend the Time on Assessment of a Tax Return Preparer Penalty*. The form is sent to the return preparer via Letter 907 P, *Return Preparer Penalty Statute Extension Request*.

- (7) See Rev. Rul. 78-245 for additional information.

Note: IRC 6671(a) now equates penalties with taxes.

- (8) A transcript of the taxpayer's return (client case) on which the preparer penalty is based should be included in the preparer penalty case file for accurate monitoring of the statute of limitations period expiration date.
- (9) If the preparer does not agree to extend and the statute of limitations period is imminent, the excise employee will forward the case for prompt assessment. See IRM 4.24.9.7.9, *Quick and Prompt Assessment Procedures*, for guidance. For more information on prompt assessment procedures see IRM 4.23.17.5.6, *Employment Tax, Preparer Penalty Procedures for SB/SE Employment Tax, Prompt Assessment Procedures*.

4.24.9.7.6 (10-26-2012) **Contacting the Return Preparer and Conducting a Comprehensive Interview**

- (1) An excise tax examination is separate and distinct from the return preparer penalty case file. Excise employees will not propose or discuss preparer penalties in the presence of the taxpayer.
- (2) When initiating a preparer penalty case, the excise employee should mail Letter 4523, *Preparer Contact Letter*, to the preparer to notify the preparer.
- (3) A comprehensive interview of the preparer and/or the client is required to adequately develop facts and circumstances to determine if a return preparer penalty case is warranted. During the interview process, the excise employee should ask the taxpayer the following questions:
 - Did the taxpayer meet with the preparer?
 - Did the taxpayer complete a questionnaire and/or have a face-to-face meeting with the preparer?
 - What documentation was provided to the preparer?
 - Did the taxpayer receive a copy of the return?
 - Was the preparer compensated?
- (4) The excise employee needs to ask follow-up questions. While asking basic interview questions is required, critical information may be provided in responses to follow-up questions.

- (5) The questions asked of the preparer are important to determine if additional development regarding the return preparation is warranted. Further, it may establish that penalties are more applicable to the taxpayer's (client) return. If the preparer is the taxpayer's representative, the excise employee should ask the following questions:
- Was an interview held with the taxpayer?
 - What documentation was provided to prepare the return?
 - Was a copy of the return provided to the taxpayer?
 - Was the preparer aware of any errors, omissions, or mistakes on the return under examination?
 - Was the preparer compensated for the tax return preparation?
- (6) The excise employee should be aware that representatives will review the return and the taxpayer's records prior to the initial interview. If the representative does so and discovers an error has been made on the return, the representative is not required to disclose the error.
- (7) When interviewing the taxpayer or preparer, the excise employee should ask if other services are provided by the preparer's firm and how long the preparer has been preparing returns for the taxpayer. These questions will help to determine the extent of the preparer's knowledge regarding the taxpayer's financial situation/status. These questions will also alert the excise employee as to the potential applicability of penalties. A preparer who has been preparing a client's return for a number of years may be more knowledgeable than a preparer who is preparing a client's return for the first time.
- (8) The excise employee should contemporaneously document the preparer penalty case file following the conversation with the taxpayer and/or preparer. While each excise employee's interview style is different, the documentation of the facts should be consistent and recorded only as appropriate, considering disclosure issues, in each separate case file.
- (9) The excise employee must utilize the lead sheets for preparer penalty case files. These lead sheets may be found on the Office of Servicewide Penalties, News, Preparer Penalty Information, located at <http://sbseservicewide.web.irs.gov/penalty/news/188.aspx> and in the Activity Code section of the Forms Library of the Notebook.
- (10) Affidavits are not used routinely in return preparer cases. However, affidavits are recommended in all cases where the Service may ask the Justice Department to seek an injunction. See IRM 20.1.6.20, *Affidavits Overview*, for further information.

Note: The excise employee must carefully separate the answers to inquiries into the proper work papers. All information regarding the return preparer's activities and the applicability of any penalties relating to the return preparer should be separated from the taxpayer's case file. This information is then included in the return preparer penalty case file using a preparer penalty lead sheet.

4.24.9.7.7
(10-26-2012)

Return Preparer Report Writing and Case Processing

- (1) In situations involving multiple years or taxpayers (clients), it is important to handle each case file properly and in accordance with the facts/circumstances.
- (2) Unless otherwise stated in this IRM, excise case processing procedures found in IRM 4.24.20, *Excise Tax Report Writing Guide*, and IRM 4.24.21, *Case Closings*, will apply for return preparer penalty cases.
- (3) The excise employee needs to complete check the Preparer Penalty box in the Special Features section on Form 3198, *Special Handling Notice for Examination Case Processing*, indicating the case is a preparer penalty with the applicable code section; on the "Other" line of the Special Features section, the excise employee must note the nature of closing (i.e. agreed, no-change, etc.) and whether letters have been sent to the preparer.
- (4) Per IRM 20.2.5.3, *Penalty and Interest, Interest, Interest and Underpayments, Interest on Penalties and Additions to Tax*, interest on most penalties starts from the assessment date. The major exceptions are the failure to file, and the accuracy related penalties. Interest will not be charged, if the taxpayer full pays the return preparer penalty before it is assessed or:
 - a. Within the notice grace period of 21 days, if under \$100,000 or
 - b. Within 10 business days if over \$100,000

See also IRC 6601(e)(2)(A).

4.24.9.7.7.1
(10-26-2012)

No Change Return Preparer Penalty Case

- (1) The group manager will review the investigation file and document their concurrence. The excise employee will:
 - a. Prepare Letter 1120, *Preparer Penalty No-Change Case Letter*, mail the original to the preparer and include a copy in the case file.
 - b. Complete Form 5809, *Preparer Penalty Case Control Card*, and e-mail a copy to the RPC.
 - c. Complete Form 8278, *Computation and Assessment of Miscellaneous Penalties*.
 - d. In the Special Features Section of Form 3198, check the box for Preparer Penalty, enter the Penalty code section, then in the Other section of Special Features, indicate the case is a no change preparer penalty case and finally, on page 2 of Form 3198, Letter Instructions for CCP, check the box for "No letter required to be sent by CCP".
 - e. Forward the case file to the group manager for review. Once the manager has accepted the determination, the case will be updated to status 51 and closed immediately to Centralized Case Processing (CCP).
 - f. Notify the RPC of the case closing in order to review the information on IMS. If access to IMS is not possible, the group will e-mail appropriate work papers to the RPC for review. The RPC will extract pertinent information to be retained for not less than one year.

4.24.9.7.7.2
(10-26-2012)

Form 8278 Instruction Reminders

- (1) Item 9(c), Preparer/Promoter/Appraiser/Tax Shelters Penalties, should be blank for penalty No-Change and/or withdrawal cases.
- (2) Item 9(d), Amount Assessed, is 0.00 for each specific penalty code section in item 9 (a) and penalty reference number in item 9(b) for penalty No-Change cases.

- (3) Item 9(d) of 0.00 results in the Penalty Reference Number with an 0.00 amount posting to the MFT 55 (IMF) or MFT 13 (BMF) Civil Penalty Master File and the DLN of the administrative case file.

Note: Applies for cases that are not related to a PAC (Return Preparer Program Action Case). See IRM 4.1.10.3.11, *Planning and Special Programs, Return Preparer Program Coordinator, PAC Termination*.

- (4) If multiple penalties under different IRC sections are considered against the same preparer for the same period, a separate Form 8278 need to be prepared for each penalty. For example, if a preparer is subject to six penalties in one year and three are under IRC 6694(a) and three are under IRC 6694(b), then the excise employee will complete two separate Forms 8278 accordingly.
- (5) A copy of Form 8278 is maintained in the case file.

4.24.9.7.7.3
(10-26-2012)
**Return Preparer
Penalties Proposed**

- (1) The preparer should be afforded an opportunity to meet with the group manager to resolve the issues. The excise employee must document the actions taken on Form 4665, *Report Transmittal*, if the preparer does not agree.
- (2) If penalties are proposed in conference with the preparer, the excise employee should provide the preparer with:
- a. Form 5816, *Report of Tax Return Preparer Penalty*
 - b. Form 886-A, *Explanation of Items*
 - c. Pub 5, *Your Appeal Rights and How to Prepare a Protest if You Do Not Agree*
 - d. Pub 594, *What You Should Know About the IRS Collection Process*
- (3) When penalties are based on many different prepared returns, the excise employee will attach a list of client names, SSNs / EINs, and tax periods. Use a separate Form 5816 for each year / return combination.
- (4) If penalties are being proposed via mail, the excise employee should provide the preparer with:
- a. Letter 1125, *Preparer Penalty 30 - Day Letter*
 - b. Form 5816
 - c. Form 886-A
 - d. Pub 5
 - e. Pub 594

4.24.9.7.7.4
(10-26-2012)
**Agreed Return Preparer
Penalty Case Processing**

- (1) For agreed cases, the preparer signs Form 5816. The excise employee will solicit payment from preparer and if the preparer pays, will prepare Form 3244 -A, *Payment Posting Voucher - Examination*.
- (2) Complete Form 8278. A separate Form 8278 needs to be completed for each penalty when more than one penalty under different IRC sections will be assessed against the same preparer for the same period.
- (3) In completing Form 8278 carefully review the IMPORTANT REMINDERS and INSTRUCTIONS at the end of the document.
- (4) Prepare a separate Form 8278 for each penalty assessment. The exception is penalties assessed under:

- IRC 6695(a)
- IRC 6695(b)
- IRC 6695(c)
- IRC 6695(d)
- IRC 6695(e)

- (5) Attach Form 3198 to each penalty case file. Identify the case as a return preparer penalty case in the "Other Instructions" section and reference the applicable IRC section.
- (6) If the preparer filed a joint income tax return, annotate on Form 3198 with either "Assess on Primary SSN or Assess on Secondary SSN" in the "Other" section to identify the individual against whom the penalty is to be asserted.
- (7) Annotate the Form 3198, to indicate that the Letter 1195, *Acceptance Letter - Agreed Preparer Penalty Case Acceptance Letter - Agreed Preparer Penalty Case*, and addressed envelope are enclosed in the file. The completed Form 5809 will also be included as part of the work papers.
- (8) The return preparer case will be updated on ERCS to status 51 and forwarded to CCP for assessment and other necessary actions using Form 3210.
- (9) Notify the RPC of the case closing in order to review the information on IMS. If access to IMS is not possible, the group will e-mail appropriate work papers to the RPC for review. The RPC will extract pertinent information to be retained for not less than one year.

4.24.9.7.7.5 (10-26-2012)

Unagreed Return Preparer Penalty Case Processing Procedures

- (1) Managerial involvement is required in unagreed cases. Letter 1125 generally should not be issued to the preparer unless the manager has contacted the preparer and/or representative to attempt to resolve the tax controversies and reach an agreement. If the case is a no-response case, the manager will verify that an address confirmation was done. These efforts will be documented in the case file on Form 9984, *Examining Officer Activity Record*.
- (2) The excise employee should provide the preparer with:
 - Letter 1125
 - Form 5816 with the bottom part of the form removed
 - Form 886-A or equivalent
 - Pub 1, *Your Rights as a Taxpayer*
 - Pub 5
 - Pub 594
- (3) The case then goes into suspense for 30 days, during which time the preparer may agree or protest. If response is agreed or there is no response, follow the procedures above for agreed case.
- (4) If the client excise tax examination case was closed unagreed, the unagreed preparer penalty investigation file should not be closed to Appeals without coordination with the RPC. The RPC will assist in determining current status of the client case and directing the preparer penalty case file as warranted.

4.24.9.7.7.6
(08-24-2016)

**Protest to the Return
Preparer Penalty**

- (1) If the preparer submits a written pre-assessment protest within 30 days, the investigation file will be reviewed by the group manager and excise employee for:
 - Adequacy of the protest
 - Development of the issue(s)
 - Managerial involvement
- (2) The excise employee will complete Form 5809, *Preparer Penalty Case Control Card*, and include in case file for the RPC.

Note: Form 8278 will be prepared by Appeals.

- (3) The excise employee will update the case on ERCS to Status 41 and send to the manager for review. After review, the manager will update ERCS to Status 21 and forward the case to Technical Services to be sent to Appeals via Form 3210, *Document Transmittal*. Normal excise case routing procedures are to be followed. Refer to IRM 4.24.10 for additional guidance about case routing procedures for unagreed excise cases going to Appeals.
- (4) An unagreed Return Preparer Penalty Case file cannot be submitted to Appeals for pre-assessment consideration if there is less than 365 days remaining on the assessment statute of limitations. For more information and guidance on the statute of limitations on the assessment of penalties see IRM 8.2.1, *Appeals, Pre-90 Day and 90 Day Cases, Agreed Pre-90 Day Income Tax Cases*. The excise employee should consider a minimum of 30 days for processing in consideration of the statute requirements.

Note: Form 872-D is employed to extend the statute in a preparer penalty investigation. See IRM 20.1.6 for guidance relating to extending the statute of limitations on assessment for Return Preparer Penalty Cases.

- (5) Notify the RPC of the case closing in order to review the information on IMS. If access to IMS is not possible, the group will e-mail appropriate work papers to the RPC for review. The RPC will extract pertinent information to be retained for not less than one year.

4.24.9.7.8
(10-26-2012)

**Return Preparer Penalty
Appeals**

- (1) For Appeals Rights, Pre-Assessment Appeals, Post-Assessment Appeal Procedures, special claims and other matters see IRM 20.1.6.19, *Appeal Rights*, through IRM 20.1.6.19.5, *Appeals for Special Claims*, for further explanations.
- (2) IRC 6694 and IRC 6695 were designated an Appeals Coordinated Issue Category of Case (AClcc). An AClcc is a category of case with Servicewide impact or importance, requiring coordination to ensure uniformity and consistency nationwide.
- (3) Form 4665, *Report Transmittal*, and Form 3198 should include the following information when forwarding a case to Appeals:
 - Special action required for receiving Appeals Officer.
 - Instructions stating that provisions of IRM 1.4.28.9, *Organization, Finance, and Management, Resource Guide for Managers, Appeals Managers Procedures, Referrals to Domestic Operations, International, and TEGE*, and IRM 8.2.1.7(2), *Uniform Acknowledgement Letter Procedures - ATE*,

require the Appeals Officer to contact/make a referral to Appeals Technical Guidance utilizing Form 13381, *Appeals Technical Guidance Referral*.

4.24.9.7.9
(10-26-2012)
**Quick or Prompt
Assessment Procedures
for Return Preparer
Penalty Cases**

- (1) If the Statute of Limitations period has less than 365 days remaining and the preparer refuses to extend the statute of limitations period, the excise employee will forward the preparer penalty case for prompt assessment.
 - (2) The excise employee will:
 - a. Send the preparer Form 5816, with the bottom part of the report removed along with an explanation of the reason for the quick assessment and a discussion of the preparer's Appeals rights.
- Note:** Letter 1125 is not sent to the preparer.
- b. Forward to the RPC a copy of Form 5816, along with a completed Form 8278.
 - c. In the Other line in the Expedite Processing section on the Form 3198 include the word "Quick Assessment."
 - d. Forward the case file to the manager for review. The manager should immediately alert CCP, via e-mail, of the pending short statute and route the case to CCP for the prompt assessment.
 - (3) If the Statute Expiration Date is greater than 14 days and less than 60 days, overnight the case to CCP via UPS with tracking service. If the Statute Expiration Date is greater than 60 days, mail the case to CCP using regular mail procedures.
 - (4) If the Statute Expiration Date is within 14 days, notify Ida Grissom at 859-669-3323 or Connie Cummins at 859-669-7553 and FAX the following information to 859-669-2674:
 - a. Form 5816
 - b. Form 8278
 - c. Payment voucher if paid but not posted yet
 - d. Form 3198
 - (5) Quick assessments are complete when the presence of a history item or activity code MAAS date appears on TXMOD. Example: "MAAS 080712". Update the case to Status 51 on ERCS.
 - (6) It will take four to six weeks for a quick assessment to post on TXMOD, however the statute is protected once CCP gets a DLN from the Accounting Department. The assessment will not show pending on TXMOD. Accounting provides CCP the DLN after the assessment date. The DLN for a quick assessment has a Doc Code of 51. The excise employee can request that CCP Fax a copy of the quick assessment DLN to confirm that the short statute was completed.
 - (7) Form 2859, *Request for Quick or Prompt Assessment*, is completed by CCP when they receive the file. See Exhibit 4.24.9-2 for more information.
 - (8) Upon request, the preparer will be provided the same Appeals rights post-assessment as would have been provided if the request for Appeals consideration was received before the assessment.

4.24.9.7.10
(10-26-2012)
Referral to the Office of Professional Responsibility (OPR)

- (1) The OPR exercises jurisdiction over those who practice before the IRS. Excise employees should exercise discretion in making referrals of specific cases. See IRM 20.1.6.12, *Office of Professional Responsibility (OPR)*, for more information.
- (2) In matters involving non-willful conduct, a referral should only be made when it can be established that the preparer has a pattern of failing to meet the required standards of Circular 230, *Regulations Governing Practice before the Internal Revenue Service*. An isolated instance in which a penalty may apply should not, in and of itself, require a referral unless willful conduct is involved.
- (3) The imposition of penalties under IRC 6694(a) and IRC 6695(a) through IRC 6695(e) should not automatically generate a referral to the director of the OPR.
- (4) A referral to OPR is mandatory in the event that the preparer is determined to have violated IRC 6694(b). For a further discussion regarding referral criteria, see IRM 4.11.55.4.2.2, *Power of Attorney Rights and Responsibilities, When Should A Referral Be Made To OPR?*
- (5) When making a referral to OPR, excise employees will:
 - Prepare Form 8484, *Report of Suspected Practitioner Misconduct*, and obtain signature approval from their manager.
 - Send the completed Form 8484 to the RPC for routing to the Director, Office of Professional Responsibility.
- (6) Additional information regarding OPR may be found on the OPR web page at [https://www.irs.gov/Tax-Professionals/Enrolled-Agents/The-Office-of-Professional-Responsibility-\(OPR\)-At-a-Glance-1](https://www.irs.gov/Tax-Professionals/Enrolled-Agents/The-Office-of-Professional-Responsibility-(OPR)-At-a-Glance-1).

4.24.9.7.11
(08-24-2016)
Program Action Case (PAC) Procedures for Excise Tax

- (1) A Program Action Case (PAC) is an investigation where clients of questionable preparers are examined to determine whether preparer penalties and/or injunctive actions against the preparer(s) are warranted.
- (2) If, during the course of an excise tax audit, the excise employee believes a preparer's noncompliance is pervasive, consideration should be given to opening a PAC. With managerial approval, excise employees will forward the following information via secure e-mail to the RPC:
 - Name of preparer
 - Address of preparer
 - EIN, SSN, and/or PTIN of preparer
 - Detailed description of the suspected non-compliance
- (3) IRM 4.1.10.3, *Program Action Cases Overview*, contains general procedures for conducting a PAC. The following procedures are specific to excise employees for making a preparer referral to initiate a PAC:
 - a. The RPC will determine whether a PAC is warranted and whether there are any ongoing PACs or investigations currently open on the referred preparer. A separate PAC cannot be opened if there is already an open PAC or investigation. Excise employees and/or group managers are not to research preparers on their own; all referrals must be routed through the designated RPC.

- b. If there is another open PAC or investigation in another Business Operating Division, the RPC will provide the excise tax referral information to the responsible RPC.
 - c. The RPC will prepare an analysis of the preparer's clients' returns to determine if the issue identified by the employee is prevalent.
 - d. If the issue is not prevalent or insufficient information is available, the RPC will notify the group manager that a PAC is not warranted. The excise employee may submit additional information that will be considered by the RPC.
 - e. When appropriate, the RPC will submit a referral package with the necessary research to the Preparer Steering Committee (PSC) for consideration of a PAC. The RPC will notify the group manager that the referral has been forwarded to the PSC for consideration.
- (4) The PSC will meet periodically, as necessary, to consider and review the preparer research and select those referrals they determine warrant a PAC. The PSC is comprised of :
- Examination Case Selection (ECS) Program Manager
 - Workload Selection Delivery (WSD) Group Manager
 - Return Preparer Coordinator (RPC)
 - One excise territory manager on a 1 year rotating assignment
- (5) The PSC will prepare a PAC Request Memo and submit it to the ECS Program Manager for routing and approval by the Director, Examination - Specialty Tax, through the Chief, Excise Tax Program.
- (6) If the PAC is approved, the RPC will notify the group manager and coordinate with WSD to ensure that the necessary returns are selected for compliance action and assigned a unique tracking code.
- Note:** Under certain conditions it may be appropriate to request an excise Compliance Initiative Project (CIP) before considering a PAC. This alternative should be discussed with the RPC as soon as possible to determine if it is a viable option.
- (7) Source Code 49 is only to be used for the primary return year selected as part of the Program Action Case (PAC) client sample originating from WSD. In addition, Aging Reason Code 49 should be reflected on all return preparer program returns including the primary and multiple-year returns.

4.24.9.8
(08-24-2016)
**Overview of Fuel Tax
Enforcement Penalties**

- (1) To aid in the enforcement of the fuel tax laws, the Internal Revenue Code provides penalties for :
- Misuse of dyed fuel
 - Refusing to allow entry to premises
 - Failing to display a registration
 - Failing to register or reregister (e.g., by terminal operators and vessel operators)
 - Failing to timely report or correctly report information to the IRS

4.24.9.8.1
(10-26-2012)
IRC 6715 Misuse of Dyed Fuel

- (1) IRC 6715 and IRC 6715A, *Abuse of the Dyed Fuel Exemption*, impose an assessable penalty for the following types of misuse of dyed fuel:
 - Improper sale
 - Improper use
 - Willful alteration of dye concentration
 - Knowledge of alterations or attempted alterations
 - Tampering with or failing to maintain security requirements for mechanical dye injection systems .
- (2) See IRM 20.1.11.5, *IRC 6715 Dyed Fuel Sold for Use or Used in Taxable Use*, for more information regarding this penalty.
- (3) See the Fuel Compliance IRM 4.24.13, *Overview of Excise Fuel Compliance Program*, through IRM 4.24.16 for detailed guidance regarding how to assess IRC 6715 penalties.

4.24.9.8.2
(10-26-2012)
IRC 6717 Penalty for Refusal of Entry

- (1) IRC 6717 imposes an assessable penalty for refusing entry (or not permitting an action) authorized by IRC 4083(d)(1).
- (2) See IRM 20.1.11.7.2, *Excise Tax and Estate and Gift Tax Penalties, IRC Section 6717 Penalty for Refusal of Entry*, for more information.

4.24.9.8.3
(10-26-2012)
IRC 6718 Penalty for Failure to Display Tax Registration on Vessels

- (1) IRC 6718 imposes an assessable penalty for any operator of a vessel who is required to register under IRC 4101 and does not display proof of registration using an identification device as defined by the IRS on vessels transporting taxable fuel.
- (2) Notice 2005-4, 2005-2 IRB 289 provides at section 6 that no penalty will be imposed until after the IRS provides guidance on the identification device and the manner of its display.
- (3) See IRM 20.1.11.7.4, *Joint and Several Liability*, for more information.

Note: This penalty is not currently enforceable. The excise employee should check with Excise Fuel Policy Manager for latest updates on this penalty.

4.24.9.8.4
(10-26-2012)
Overview of IRC 6719 Failure to Register or Reregister and IRC 6725 Failure to Report Information

- (1) Any person who is required to register or reregister under IRC 4101 with the IRS and fails to do so is subject to a penalty under IRC 6719. No penalty applies if the person required to register or reregister can establish reasonable cause for not doing so. See IRM 20.1.1.3.2 .
- (2) A fuel information reporting program, the Excise Summary Terminal Activity Reporting System (ExSTARS), requires terminal operators and bulk transport carriers to report monthly on the movement of any liquid product into or out of an approved terminal pursuant to IRC 4101(d). The following returns are jointly referred to as ExSTARS returns.
 - Terminal Operators (TO) file Form 720-TO, *Terminal Operator Report*, which shows the monthly receipts and disbursements of all liquid products to and from an approved terminal.
 - Bulk transport carriers, barges, vessels, and pipelines, that receive liquid product from an approved terminal or deliver liquid product to an approved terminal file Form 720-CS, *Carrier Summary Report*, which details such receipts and disbursements.

- (3) Refer to IRM 4.24.17, *Excise Summary Terminal Activity Reporting System (ExSTARS) Compliance Examination Procedures*, which contains procedural guidance for conducting ExSTARS compliance examinations and applicable penalty considerations.

4.24.9.8.4.1
(08-24-2016)
IRC 6719 Failure to Register Penalty

- (1) IRC 6719 imposes a penalty on every:
- Terminal Operator
 - Carrier
 - Credit card issuer that issues credit cards for sales of taxable fuel to a state or local government for its exclusive use or for sales of gasoline to a nonprofit educational organization for its exclusive use

who is required to register or reregister under IRC 4101 and fails to do so. The amount of the penalty is \$10,000 for each initial failure to register or reregister and \$1,000 for each day thereafter that the Terminal operator or Carrier fails to register or reregister. This penalty is in addition to any tax due.

Note: For a comprehensive list of entities that must be registered, refer to IRC 4101(a)(1) and IRC 4101(a)(2), as well as §48.4101(c)(1).

- (2) Penalties may be abated if the Terminal Operator or Carrier can show reasonable cause for the non-compliance.
- (3) See IRM 20.1.1.3.2 for a complete description of the circumstances and conditions which will support a request for abatement due to reasonable cause.

4.24.9.8.4.2
(10-26-2012)
IRC 6725 Failure to Report Information Penalty

- (1) IRC 6725 imposes a penalty of \$10,000 in the case of each failure to make a report under IRC 4101(d) on or before the date prescribed and any failure to include all of the information required to be shown on such report or the inclusion of incorrect information by any person with respect to a vessel or facility.
- (2) The requirement for information reporting comes from authority established by IRC 4101, which authorizes the IRS to require information reporting by:
- a. Any person registered under IRC 4101 rules with respect to fuel excise taxes, and
 - b. Any other persons that IRS deems necessary to administer the applicable fuel taxes.
- (3) IRC 4101 and corresponding regulations provide that each information report required must be:
- a. Made in the form required by IRS.
 - b. Made for a period of one calendar month.
 - c. Filed by the last day of the first month following the month for which the report is made.
- (4) For program administrative purposes, a return will be accepted as timely filed if it meets the guidelines specified in IRM 3.11.23.11, *Submission Processing, Returns and Document Analysis, Excise Tax Returns, Received Date Editing*.

- (5) The statutory language in IRC 6725(a) refers to “each failure” which can be read as every failure; the language “and” connecting IRC 6725(b)(1) and (2) can be read as “also” or “in addition to”. This supports the application of the two penalties to a report that is both late and incorrect or incomplete. Therefore, if an ExSTARS return is filed after the due date and the return does not include all the required information or includes incorrect information, the ExSTARS filer may be liable for both the penalty under IRC 6725(b)(1) and the penalty under IRC 6725(b)(2) in the absence of reasonable cause.
- (6) See IRM 20.1.1.3.2 for a complete description of the circumstances and conditions which will support a request for abatement due to reasonable cause

4.24.9.9
(08-24-2016)
**IRC Section 7272
Penalty for Failure to
Register**

- (1) IRC 7272 provides for a penalty for failing to register under IRC 4101.
- (2) See IRM 20.1.11.7.3, *IRC Section 7272 Penalty for Failure to Register*, for more information.

4.24.9.10
(08-24-2016)
**IRC Section 7275,
Penalty For Offenses
Relating To Certain
Airline Tickets And
Advertising**

- (1) Tickets for airline passenger transportation must show the total of the tax and the transportation charge. IRC 7275(d) provides that any person who violates the provisions of this section is guilty of a misdemeanor for each violation and upon conviction shall be fined not more than \$100.
- (2) See IRM 20.1.11.16, *IRC Section 7275 Penalty for Offenses Relating to Certain Airline Tickets and Advertising*, for more information.

4.24.9.11
(08-24-2016)
**IRC Section 7342,
Penalty for Refusal to
Permit Entry or
Examination**

- (1) IRC 7606(a) provides that the IRS may enter, in the daytime, any building or place where any articles subject to tax are made, produced, or kept so far as may be necessary for the purpose of examining the articles. IRC 7206(b) provides that when such premises are open at night, the IRS may enter them while they are open for the purpose of the performance of official duties.
- (2) IRC 7342 provides for a \$500 penalty against a person who refuses to admit any officer or employee of the Treasury Department, or refuses to permit the officer or employee to examine such article or articles. This penalty shall apply for every incident of such refusal. Refer to IRM 20.1.11.7.1, *IRC Section 7342 Penalty for Refusal to Permit Entry or Examination*, and IRM 20.1.11.7.1.1, *Computation for IRC 7342*, for more information.

Exhibit 4.24.9-1 (10-26-2012)**Instructions for Completion of Form 8278 Computation and Assessment of Miscellaneous Penalties, Non-Return Related Civil Penalties**

1. Form 8278 is the input sheet for penalties not subject to deficiency procedures and is the source document used by CCP to make penalty assessments. This form may also be used to abate previously assessed penalties.
 2. A separate Form 8278 is required for each tax period and penalty code section. One Form 8278 cannot be used to assess penalties under different code sections, even if all penalties are to be assessed against the same tax period.
 3. Multiple assessments of penalties with the same reference number for the same entity and period must be consolidated as a single assessment.
 4. The excise employee will complete the following:
 - a. Line 1 - Taxpayer's Name: Enter the name against whom the penalty is to be assessed. DO NOT ENTER JOINT NAMES for individuals even if a joint return is filed. For a sole proprietorship (Schedule C business) enter the name of the OWNER of the business as the business is not a separate legal entity and therefore, cannot be the responsible party.
 - b. Line 2 - Address: Self-explanatory.
 - c. Line 3 - MFT: Check the box that corresponds with the information on the Name/TIN line, individual (IMF) or business (BMF).
 - d. Line 4 - No Statute: Check only if no statute exists.
 - e. Line 5 - Year: MANDATORY COMPLETION. Use the period which the act or failure occurred. A separate Form 8278 is required for each period involved.
 - f. Line 6 - Statute Date: For late filed returns, calculate the 3 year period of limitations and insert here. Insure that the ERCS database is updated with the 3 year period of limitations date.
 - g. Line 7 - TIN: Enter the SSN of the individual or the EIN of the entity being assessed.
 - h. Line 8 - Function: Check the function responsible for recommending the assessment or abatement (SB/SE).
 - i. Line 9 - Penalty Description: Complete appropriate columns of section 9(H). For example, for those cases where penalties are proposed for late/non-filing of Form 720-TO, the excise employee would input the number of periods on the line containing "Failure to report vessel/facility". The number of periods would be multiplied by \$10,000 to come to the amount posted in column 9(d) amount assessed.
 - j. See IRM 4.24.9.7.7.2 for more information regarding instructions for line 9.
 - k. Lines 10-13: Self-explanatory.
- Note:** Line 10a and 10b must be signed by the appropriate official.

Exhibit 4.24.9-2 (10-26-2012)**Instructions for Request for Quick or Prompt Assessment**

1. A request for quick or prompt assessment for a penalty case file is sent to Centralized Case Processing. The excise employee will prepare Form 3198, *Special Handling Notice for Examination Case Processing*, with instructions in the "Special Features" section that a quick/manual assessment is required. If the statute expiration date is within 14 days, the excise employee will notify Centralized Case Processing Team Manager and then FAX the following:
 - RAR
 - Form 5344
 - Waiver - if agreed
 - Payment voucher if paid but not posted yet

Note: The Centralized Case Processing web page at <http://mysbse.web.irs.gov/examination/cp/control/default.aspx> contains the current contact listing and FAX numbers.

2. If the statute expiration date is less than 60 days mail case to CCP by UPS overnight mail with tracking service.
3. If the statute expiration date is greater than 60 days follow normal mailing procedures to send case to CCP.
4. A quick assessment has been completed when the MAAS date appears on TXMOD in history section. Example: "MAAS 061208".