

Department  
of the  
Treasury

Internal  
Revenue  
Service

Office of  
Chief Counsel

# Notice

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May 05, 2006

**Subject:** Case Specific Legal Advice **Cancel Date:** Upon incorporation into CCDM

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## Purpose

This notice advises of recommendations made by the Case Specific Advice Task Force to improve the manner in which attorneys in the Office of Chief Counsel provide legal advice to Internal Revenue Service personnel. This notice also advises of steps the Office of Chief Counsel is taking to implement these recommendations.

## Background

Our primary function as attorneys in the Office of Chief Counsel is to serve as the legal advisor to the Commissioner of Internal Revenue on all matters pertaining to the interpretation, administration, and enforcement of the internal revenue laws. In August 2005, the Chief Counsel Don Korb, and the Deputy Chief Counsel (Operations) Don Rocen, convened a task force to consider whether improvements could be made to the process by which field and national office counsel work together to provide timely and accurate legal advice that meets the needs of the Service. The "Case Specific Advice" task force interviewed a cross-section of managers from the Service and the Office of Chief Counsel who are involved in the case specific advice process and reviewed procedures for providing this advice as set forth in the IRM, CCDM and revenue procedures. In April 2006, the task force submitted its report to the Chief Counsel and Deputy Chief Counsel (Operations). The report (copy attached to this notice) sets forth the approach of the task force, analyzes the problems with the current case specific advice process and makes suggestions for improvement.

## Implementation

The Chief Counsel and Deputy Chief Counsel (Operations) have for the most part adopted the recommendations of the task force, and the Office of Chief Counsel is taking the following steps to improve the timeliness and quality of formal and informal advice provided to the Service.

(1) Legal advice procedures, as set forth in the CCDM, will be revised to ensure that the procedures provide clear direction for obtaining legal advice that will assist Service personnel in administering their examination programs by providing authoritative legal opinions on certain matters, such as industry-wide issues.

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## **Report of the Case Specific Advice Task Force**

### **I. Background**

A primary function of the Office of Chief Counsel is to serve as the legal advisor to the Commissioner of Internal Revenue on all matters pertaining to the interpretation, administration, and enforcement of the internal revenue laws. The Office of Chief Counsel spends approximately one-third of its direct time providing post-filing legal advice to IRS personnel. This advice is rendered in a variety of contexts, such as (1) telephone and email advice by national office counsel to IRS personnel or to field counsel, (2) written legal memoranda by national office counsel to IRS personnel or to field counsel, (3) in-person advice provided by field counsel to IRS personnel during case development, including participation in meetings between IRS personnel and the taxpayer, (4) written legal memoranda by field counsel to IRS personnel (some are issued directly by field counsel; others are reviewed by national office counsel before issuance), and (5) telephone and email advice by field counsel to IRS personnel.

Traditionally, field counsel has rendered advice directly to IRS organizations without consultation with national office counsel when the advice addresses issues that can be resolved with a high degree of certainty by the application of settled principles of law. When the law or the IRS's position is unclear, however, field counsel has coordinated with national office counsel before rendering the requested legal advice. Established procedures provide that any doubts about whether an issue should be coordinated should be resolved in favor of coordination. See CCDM section 33.1.1.2(3). As a result, much of the advice that Counsel provides to the IRS is a joint product of field counsel and national office counsel.

In August 2005, the Chief Counsel, Don Korb, and the Deputy Chief Counsel (Operations), Don Rocen, assembled a "Case Specific Advice Task Force" to consider whether improvements could be made to the process by which field counsel and national office counsel work together to provide timely and accurate legal advice that meets the needs of the IRS. The names and titles of the task force members appear at the bottom of this document. The task force interviewed a cross-section of IRS and Counsel managers involved in the case specific advice process. In April 2006, the task force submitted this report to the Chief Counsel and Deputy Chief Counsel (Operations). The report, as set forth below, analyzes the problems with the current case specific advice process and sets forth ideas for improvement.

### **II. Analysis of the Problems and Recommended Solutions**

#### **A. Formal Written Advice from National Office Counsel**

##### **1. The Problem:**

The issues that come to national office counsel for resolution through the Technical Advice process are not matters of well settled law. Rather, they involve gray areas of the law for which there may be no published guidance on point. A Technical Advice Memorandum (TAM) is a legal determination that is binding on the IRS with respect to one particular taxpayer. Section 6110(k)(3) provides that it may not be used or cited as precedent. Thus, the TAM process is intended to resolve a difficult question of law in a particular taxpayer's factual situation; TAMs are not and never were intended as a means of providing industry-wide guidance.

Today, most issues identified by examiners, particularly issues within the jurisdiction of LMSB, affect more than one taxpayer. Especially for LMSB, which has been organized by industry since the restructuring of the IRS in 2000, issues that are identified during an audit of one taxpayer are oftentimes raised in audits of others in that same industry.

Consequently, in recent years, IRS personnel have used TAMs as more than merely a vehicle for resolving issues in specific cases. Based on interviews of IRS and Counsel managers involved in the case specific advice process, it appears that TAMs are now being used regularly as a means of obtaining advice that can be applied across an industry. That is, IRS personnel request a TAM for one case with the intention that they will use its analysis of the issues to resolve other cases. For example, Technical Advisors in LMSB often post TAMs on their websites to alert revenue agents to industry-wide issues and advise them of arguments that may be made on those issues. Taxpayers likewise cite TAMs issued in other situations to advance positions in their own cases. Because TAMs are so used by both examiners and taxpayers, the process of issuing a TAM has become cumbersome and time consuming. For example, attorneys in the national office are often reluctant to issue a TAM without briefing the issue to the Associate Chief Counsel level. Likewise, the Associate Chief Counsel may feel the need to brief a TAM to the Deputy Chief Counsel or even the Chief Counsel. In addition, examination teams often appeal to higher management if they anticipate that national office counsel will not agree with their views on the issue.

Not only do examination teams use taxpayer-specific TAMs on an industry-wide basis, they occasionally use them to obtain generic legal advice or strategic advice during the development of a case. The TAM process is not appropriate in these types of situations. First, the TAM process is a determination and should be used for specific issues that are ripe for a determination. Second, the TAM process contemplates participation by the taxpayer. Finally, the TAM process is inappropriate as a means of obtaining case development advice since at this stage of an examination there are no issues with respect to which a substantive determination is needed.

It is important to note that a process exists currently for obtaining strategic or general legal advice outside of the TAM process. According to Part 33.1.2.2.3.1 of the CCDM, the national office provides non-TAM legal advice in the form of a memorandum tailored to the needs of the recipient. This non-TAM legal advice may be sought at different stages of case development and may be issued to help decide what lines of factual development may be worth pursuing. The interviews indicated that this process is underutilized for several reasons. First, non-TAM legal advice is not viewed as a priority by national office because it does not have strict time deadlines for completion. Second, the CCDM indicates that the Office of Chief Counsel prefers TAMs to non-TAM advice. Third, some examination teams and field counsel mistakenly believe that there is no mechanism for obtaining advice on case development from the national office because there is no longer any specific reference to advice as "Field Service Advice." Fourth, because non-TAM legal advice may not be given the degree of review afforded a TAM, examination teams and field counsel believe that non-TAM legal advice is somewhat more likely to be reversed at a later date.

## 2. The Recommendation:

There is no single change to the current process that will resolve the difficulties currently experienced with the formal advice process. Instead, a multi-faceted approach to the problem is needed that will (a) provide a vehicle for resolving audit issues that affect multiple taxpayers in

an industry, (b) give IRS personnel an alternative to the TAM as a vehicle for obtaining timely advice to aid them in case development, and (c) streamline existing procedures to encourage the more timely issuance of TAMs with taxpayer involvement.

The first recommendation is to enable the various Associate Chief Counsel to provide generic advice on issues under their jurisdiction. Consequently, the task force proposes the creation of a Generic Legal Advice memorandum that would, except in limited circumstances, be issued and signed by the Associate, Deputy Associate, or Assistant Chief Counsel. This memorandum could originate from a request by an Industry Director or national program manager or it could originate unilaterally from an Associate or Assistant Chief Counsel. It would assist IRS personnel in administering their examination program by providing them with an authoritative opinion on industry-wide issues.

This memorandum will have two primary benefits. First, it will give the Associate or Assistant Chief Counsel a means of providing advice on issues pending in audits of multiple taxpayers within a particular industry. Second, it will reduce the need for an Associate or Assistant Chief Counsel to delay the issuance of a TAM in order to explore how the issue might be decided on factual patterns that differ from that presented in the TAM. The pending TAM could be issued, and if so inclined, the Associate or Assistant Chief Counsel could use a Generic Legal Advice memorandum to clarify how the issue might be decided or developed in other factual situations.

Nothing prohibits IRS personnel from requesting both a TAM and a Generic Legal Advice memorandum on an issue. As indicated above, it is likely that an Associate/Assistant Chief Counsel would be comfortable issuing a timely TAM at the branch level (regardless of the holding in that TAM) where an alternative vehicle exists for addressing the issue on an industry-wide basis.

When an Industry Director or other executive requests Generic Legal Advice, the Associate or Assistant Chief Counsel and the requestor should agree to a mutually acceptable time frame for completion of the advice. This approach encourages good communication between national office counsel and the requesting office. Some Generic Legal Advice memoranda may be completed in less than 30 days. Most will take more time, but relatively few should require more than 180 days. Facts and circumstances will determine the appropriate time frame for any given request. To the extent some general benchmark may be appropriate, a 180-day period is recommended. Of course, if the priorities of the requestor necessitate a more rapid response, and the Associate or Assistant Chief Counsel is able to accommodate a shorter time frame, the parties should agree to a time frame shorter than 180 days. Similarly, if the issue is so complex or requires so much coordination with other offices that a longer time period is warranted, then the parties should agree to a time frame longer than 180 days. Under all circumstances, however, it is imperative that the parties discuss and agree on an appropriate date in good faith and confirm their agreement in a written memorandum or an e-mail message. This documentation would identify the issue(s) to be addressed, the expected date for completion, the projected dates for sharing preliminary drafts for review, and the turnaround time by which reviewers will submit comments. Any Generic Legal Advice memorandum pending for more than 180 days will be briefed to the Deputy Chief Counsel (Operations) by the Associate or Assistant Chief Counsel and by the field counsel who are assisting the requesting office.

The second recommendation is to provide IRS personnel with a vehicle for obtaining timely advice from national office counsel or from field counsel concerning case development.

IRS personnel already receive this type of advice from field counsel on a regular basis. However, there is a prevailing view that the TAM process is the means for obtaining similar advice from national office counsel. Consequently, the task force proposes to develop a Case-Specific Legal Advice memorandum that would be issued either by field counsel or national office counsel to provide advice on case development. When issued by national office counsel, this Case-Specific Legal Advice memorandum would be a vehicle through which field counsel could obtain strategic, tactical, or other legal advice from national office counsel. In general, responses by national office counsel would be issued within 90 days. A stated time frame of 90 days enables national office counsel to appropriately prioritize this type of advice.

Existing CCDM provisions relating to non-TAM legal advice will be modified to provide for Case-Specific Legal Advice. Appropriate caveats should be developed for the Case-Specific Legal Advice memoranda to advise readers that the advice is not a TAM, that it is based on facts provided solely by IRS personnel, and that the legal conclusion might differ if the facts are not as presented. The CCDM, together with appropriate training, should also provide that time is of the essence when providing case-specific legal advice and that national office counsel and field counsel should focus on answering the question presented in a concise manner, without setting forth an unnecessary history of the law or a detailed recitation of the facts. This Case-Specific Legal Advice memorandum is somewhat similar in purpose to the Field Service Advice memorandum used in prior years.

The third recommendation is to streamline the existing TAM procedures. TAMs serve an important role in the resolution of disputes between taxpayers and IRS personnel. However, the current process has built-in impediments to timeliness. For example, it is common for taxpayers to decide not to participate in the field's TAM request at the outset, only to request a conference later in the process to present information that was never presented to the examination team. This requires national office counsel to reconsider its entire analysis, and negatively impacts the Service's efforts to reduce cycle time and improve currency in the examination process. Accordingly, the task force proposes to make the following changes to the TAM procedures:

1. Eliminate the mandatory conference of right in cases where the taxpayer has not participated in the TAM from the outset. Instead, the national office would have discretion to grant a conference in these cases.
2. Provide that, whenever there is a dispute between the taxpayer and the examination team about the facts, national office counsel will issue the TAM based on the examination team's version of the facts. An important purpose of the TAM process is to advise IRS personnel. For this reason, the national office should use the version of the facts developed by the examination team when advising it, and stop the time-consuming practice of issuing two TAMs – one based on the examination team's facts and one based on the taxpayer's facts. However, field counsel should be encouraged to assist the examination team in determining the facts. The interviews showed that many disputes over facts are really disagreements about which facts are relevant, rather than which facts actually occurred, or about ultimate findings of fact. For these disputes, the examination team should submit all facts relevant to either position.
3. Shorten the periods of time during which taxpayers may provide additional information and appear at conferences. The goal here is to encourage taxpayers to gather and submit all relevant information at the time the TAM is requested. A maximum of 10 calendar days is proposed for additional submissions of information, with extensions available in appropriate cases. In addition, any written brief by the taxpayer after a

conference should be submitted in appropriate cases at the discretion of the national office and not submitted as a matter of right by the taxpayer. Similarly, the deadline for submitting them should be set at the discretion of the national office.

4. Eliminate the prohibition on requesting a TAM when the issue is pending in Appeals. Settlement of an issue by Appeals in an earlier audit cycle should not necessarily prevent an examination team from seeking a TAM for a later cycle.
5. Establish a 120-day time frame for the issuance of a TAM. Currently, there is both a 120-day and 180-day time frame for TAMs.
6. Eliminate the TEAM process. Since it was first established, this process has rarely been used. In light of the other suggested changes to the formal advice process, continuing the TEAM process is unnecessary.

#### B. Informal Advice from National Office Counsel

##### 1. The Problem:

Although there were relatively few complaints voiced during the interviews about the process for obtaining informal advice, there is room for improvement. There was overall satisfaction with the technical acumen of the subject matter experts in the National Office. The most significant problem is identifying the appropriate subject matter expert and, in some cases, the timeliness of a response from that expert.

Field counsel and national office counsel have different perceptions of the role and priority of informal advice. Field counsel is increasing its reliance on informal advice from the national office, while national office counsel tends to assign informal advice a lower priority than formal advice and published guidance. The elimination of the Field Service Division may account for the perception that national office counsel does not place as high a priority on informal advice as it does on formal advice. Because the primary objective of the Field Service Division was to assist field counsel, attorneys in the Field Service Division were keenly aware of the time pressures in the field and had established relationships with field counsel. Since the elimination of the Field Service Division, field counsel does not feel the same level of rapport with national office counsel.

##### 2. The Recommendation:

There is no single recommendation to ensure that field counsel is able to reach the appropriate subject matter expert and obtain a timely response to informal advice requests. Differences in the structures of the Associate Chief Counsel offices make it unlikely that a solution in one particular office will be effective for another office. For example, an Associate office whose branches have concurrent jurisdiction over its subject matters may implement a system for responding to informal advice that would not work for an office whose branches do not have concurrent jurisdiction. Each Associate Chief Counsel office should be required to designate specific procedures for improving communications. The following are examples of procedures that could be implemented to improve informal communications with the field.

1. Designate a Field Service Branch within the Associate Chief Counsel office that would provide all informal and formal advice under that office's jurisdiction. Because the branch would have as its primary goal the provision of timely advice to field counsel, it

would not be assigned published guidance projects. Alternatively, each branch could designate certain employees whose primary responsibility would be to provide assistance to the field.

2. Designate within the front office of the Associate Chief Counsel one or more "Special Counsel (Field Service)." These individuals would be responsible for developing and maintaining relationships with field counsel, serving as the primary contact for field counsel on requests for informal and formal advice, and coordinating responses with appropriate subject matter experts. This person would maintain regular contact with field counsel about the status of pending requests for formal advice and coordinate with other Associate Chief Counsel offices on matters that affect more than one office.
3. Create a telephone "hotline," under which all telephone calls would be routed to the Associate Chief Counsel's front office and then assigned to a branch responsible on that particular day or week for responding to informal requests from the field. The front office would ensure that the attorney to whom the call is directed is available that day and would give the caller the name and telephone number of that attorney. Responding to field inquiries would be a high priority. A similar system could be established for communications by email by creating an email "hotbox" for each Associate Chief Counsel office. Informal requests for advice would be directed and distributed from this hotbox to the appropriate national office attorney.

Apart from these systemic changes, the adoption of several best practices might improve communication. For example:

1. Publish on the Chief Counsel intranet site, and publicize to field counsel, an up-to-date Code and Subject Matter directory that lists the name of the attorney who is the subject matter expert for the particular Code section. This directory, which would assist field counsel in contacting the appropriate attorney, should have easy search capabilities.
2. Emphasize that attorneys must acknowledge receipt of telephone calls and emails within one business day.
3. Remind attorneys to put clear messages on their answering machines about whether they are in or out of the office, when they will return, and who to contact in their absence. Also, remind attorneys to use their email "out of office" messages.
4. Emphasize at orientation sessions for new attorneys the importance of coordination and of the timeliness of informal advice.
5. Identify an attorney in each Division Counsel headquarters to serve as a contact for the Associate Chief Counsel offices. Often, examination teams or Division Commissioner headquarters personnel call the Associate Chief Counsel offices without involving field counsel. Although the Associate Chief Counsel offices should give the advice, they also should ensure that Division Counsel headquarters is advised when this occurs and puts the caller in contact with field counsel.
6. Consider using a survey to gather continuing feedback from field counsel and IRS personnel on their experiences obtaining informal advice from national office counsel.



## C. Connectivity and Client Management

### 1. The Problem:

Many attorneys in the national office and the field do not know each other. This makes it easier to criticize one another and more difficult to resolve disputes when the parties are at an impasse. The nationwide continuing education that in the past served to introduce field counsel to national office counsel and gave them the opportunity to learn about each other's organizations and priorities rarely occurs today. At the same time, managers and executives in Counsel need to develop a better awareness of the pressures, priorities, and goals faced by managers and executives in the Operating Divisions. While the recommended changes to the system for providing formal advice will help alleviate some of the difficulties encountered in the advice process, better management and stronger relationships are crucial to the ability to work together.

### 2. The Recommendation:

The Chief Counsel should consider emphasizing that legal advice is as much a priority as published guidance or litigation, and that the IRS's business priorities are Counsel's priorities as well. The various Operating Divisions are being asked to increase audit coverage and to quicken the pace of examinations. Increased audit coverage may require the use of more nontraditional examination initiatives, such as pre-filing agreements (PFA), limited issue focused exams (LIFE), and the compliance assurance process (CAP). It is important that the Chief Counsel emphasize that assisting in these initiatives is a high priority.

It also is important that the Operating Division executives and their Division Counsel executives have the opportunity to meet regularly with the Associate Chief Counsel, in person or by teleconference, to discuss the status of pending advice and priorities for the upcoming quarter or fiscal year. At present, there are no regularly scheduled meetings between the Associate Chief Counsel and the Operating Division executives.

### 3. Best Practices:

In 2005, a task force was formed to consider the use of the "80/20" concept throughout the Office of Chief Counsel. The 80/20 concept is a management tool that is based on the notion that 80 percent of what can be achieved on a project is generally produced from 20 percent of the time spent. While the Case Specific Advice Task Force did not specifically address how 80/20 principles apply to the issuance of legal advice, those principles should be applied to the Case Specific Advice Task Force's recommendations. For example, at the outset of an assignment, the manager should consider the time constraints of the requestor and the length of the document sufficient to answer the question. Legal advice should not be written as a treatise or law review article; and, at some point, we must recognize that continued research will have diminishing returns. In short, Counsel must recognize that an excellent product produced in a timely manner is far more useful than an untimely, perfect product.

Finally, managers and executives in Counsel should resolve difficulties with their peers through a cooperative, collaborative process. Discussion, negotiation, and if necessary, a joint elevation of disputes to higher levels of authority are recommended. See CCDM section 31.1.4.6.

/s/

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Lon Smith  
Associate Chief Counsel (Financial Institutions & Products)

/s/

\_\_\_\_\_  
William Alexander  
Associate Chief Counsel (Corporate)

/s/

\_\_\_\_\_  
Michael Corrado  
Deputy Area Counsel (Large & Mid-Sized Business)

/s/

\_\_\_\_\_  
Richard Fultz  
Special Counsel to the Associate Chief Counsel (International)

/s/

\_\_\_\_\_  
Andrew Keyso  
Special Counsel to the Chief Counsel

/s/

\_\_\_\_\_  
Lisa Mojiri-Azad  
Senior Technician Reviewer (Tax Exempt & Government Entities)

/s/

\_\_\_\_\_  
Nancy Romano  
Deputy Area Counsel (Small Business & Self-Employed)

/s/

\_\_\_\_\_  
Curt Wilson  
Assistant Chief Counsel (Administrative Provisions & Judicial Practice)

/s/

\_\_\_\_\_  
Donna Marie Young  
Special Counsel to the Associate Chief Counsel (Passthroughs & Special Industries)