




How to Resolve Your Cases at IRS Appeals Including Cases Docketed Before the Tax Court



UCLA's 38th Annual Tax Controversy Institute

11:15AM - 12:15PM

Moderator - Frank Agostino

Frank Agostino is the president of Agostino & Associates, P.C., a law firm in Hackensack, New Jersey concentrating in civil and criminal tax controversies.

Prior to entering private practice, Mr. Agostino was an attorney with the Internal Revenue Service's District Counsel in Springfield, Illinois and Newark, New Jersey. He also served as a Special Assistant United States Attorney, where he prosecuted primarily criminal tax cases.

Mr. Agostino has taught tax controversy at the Stillman School of Business at Seton Hall and served as the co-director of the Rutgers Federal Tax Law Clinic.

Mr. Agostino is a frequent speaker and author on tax controversy and litigation matters. He serves on the Advisory Board of the Journal of Tax Practice and Procedure. Mr. Agostino is actively involved with the American Bar Association and the New York County Lawyers' Association.

Mr. Agostino is also the President of the Taxpayers Assistance Corp., which provides tax and legal advice to low-income taxpayers in the NY/NJ area.

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Panelist - Cassidy Collins, Senior Counsel, SBSE LA

Cassidy Collins serves as Senior Counsel for the Office of Chief Counsel in Los Angeles, where she has worked for over twelve years. She received a Bachelor of Accountancy, a J.D., and an LL.M. from the University of San Diego, graduating with honors in all of her degrees. Prior to law school, Cassidy began her career as a CPA at PricewaterhouseCoopers.

Cassidy has led trial teams, tried numerous cases, and received litigation and fraud recognition awards. Her trial experience includes many cases decided with favorable outcomes for the IRS. Cassidy also has extensive experience in working with the IRS Independent Office of Appeals. Cassidy advises the IRS in several capacities, which include: Counsel Fraud Specialist for Los Angeles, member of the Offshore Counsel Cadre; member of the Virtual Currency Counsel Cadre; FBAR Coordinator; and attorney advisor for the IRS's Special Enforcement Program (SEP) and the LB&I International Individual Compliance group.

Panelist - Darren Lee

Darren Lee is the current Team Manager of the Appeals Team Case Leader managing large and complex cases on appeal to resolve complex issues including R&D credits, section 199 and transfer pricing issues.

Darren Lee was the Team Manager of the Appeals TEFRA/BBA Team of Technical Guidance which provides consultative services to Appeals employees working on TEFRA and BBA cases while managing case inventory nationwide. Darren was the lead TEFRA and BBA subject matter expert implementing the emerging BBA 2015 centralized partnership audit procedures in Appeals.

Prior to this position, Darren was the LB&I Team Manager managing large case examination in Southern California. He successfully led a large team of specialists, including international examiners, economists, computer audit specialists, engineers and local counsel through the Early Referral to Appeals process to resolve R&D and cost sharing issues as well as Fast Track Settlement to resolve penalty issue.

Prior to LB&I, Darren spent 20 years in private practice including 2 of the Big Four accounting firms. Darren is experienced in construction, hospitality, health care, high tech start-up, retailing, real estate, closely held companies, airlines, utilities, and tax-exempt organizations. Darren also specialized in employee benefits and worked extensively with employee benefits plans tax compliance and consulting.

Darren earned his Bachelor Business Administration degree in Accounting and Master in Accounting with emphasis in Taxation from University of Hawaii. He is a licensed CPA with active status in California.

Publication – Darren was the lead architect and author in preparing the Appeals Interim Guidance and training course for the BBA 2015 centralized partnership audit procedures for Appeals technical employees.



Panelist - Daniel N. Price

Dan's legal practice focuses on federal tax and Title 31 matters including civil and criminal defense of IRS audits and investigations. Dan also assists taxpayers in navigating the process of coming into compliance, especially international taxpayers who have for one reason or another failed to comply fully with U.S. tax and Title 31 laws. Dan's deep expertise concerning the IRS' voluntary disclosure practice, the Streamlined Filing Compliance Procedures, and international penalty regimes allows him craft strategies to mitigate civil penalties and criminal exposure.

For over 19 years Dan served as an attorney for the Office of Chief Counsel of the Internal Revenue Service. Dan's prior government service included extensive work in the arena of international enforcement and included assisting the IRS in completely revising the Voluntary Disclosure Practice. Dan also worked with the various Offshore Voluntary Disclosure Programs, the Streamlined Filing Compliance Procedures, foreign bank account reporting, Bank Secrecy Act investigations, various LB&I compliance campaigns, expatriation issues, international collection of taxes, and much more.

Dan received his J.D., with honors, from the University of Texas School of Law. While attending law school, he passed the Uniform CPA exam (not licensed as a CPA) and was a staff member on two law journals.



Panelist - Todd Welty

Todd has extensive experience in resolving civil tax matters at all stages of a tax dispute, including Internal Revenue Service (IRS) examinations, fast-track appeals, administrative appeals, post-appeals mediation and, if necessary, litigation in the U.S. Tax Court, the U.S. Court of Federal Claims, U.S. district courts, and U.S. Courts of Appeal.

The vast majority of Todd's cases are resolved administratively and without becoming public. Nonetheless, litigation is sometimes necessary. A seasoned trial lawyer, Todd has a track record of winning difficult cases. *Chambers* describes Todd as an "excellent trial lawyer" who is "very effective" at handling tax disputes, and as a "go-to attorney for bet-the-company matters involving the IRS."



Agenda

- Proposed Regulations
 - Fast Track Settlement
 - Appeals, Backlogs, Resources, Staffing, and Strategies
 - Appeals Conferences
 - Appeals' Settlement Options on Penalties
 - IRC § 6751 Issues
 - Second Bite at Appeal and Appeals' Issued Notices of Deficiency
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Proposed Regulations



Proposed Regulations

The Taxpayer First Act of 2019 (TFA) added section 7803(e) to the code and formally established the IRS Independent Office of Appeals.

The September 13, 2022, proposed regulations build on that codification.

- Proposed § 301.7803-2 implements section 7803(e)(3) and (4) regarding the resolution of Federal tax controversies by Appeals.
 - Proposed § 301.7803-3 implements the special notice procedures of section 7803(e)(5) to be followed by the IRS upon denying taxpayer requests to have Federal tax controversies referred to Appeals for those taxpayers in receipt of a notice of deficiency.
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Proposed Regulations

Proposed § 301.7803–2(c) sets forth the exceptions to consideration of a Federal tax controversy by Appeals

1. Frivolous Positions
2. Penalties Related to Frivolous Positions and False Information
3. Whistleblower Awards
4. Administrative Determinations Made by Other Agencies
5. Taxpayer Assistance Order
6. Material To Be Deleted From a Written Determination
7. Denials of Access Under the Privacy Act
8. Issues Settled by a Closing Agreement
9. The IRS Erroneously Returns or Rejects an OIC
10. Criminal Prosecution Is Pending Against Taxpayer
11. Branded Prescription Drug Fee and Health Insurance Providers Fee
12. IRS's Automated Process of Certifying a Seriously Delinquent Tax Debt
13. Issues Barred From Consideration in CDP Cases
14. Authority Over the Matter Rests With Another Office
15. Certain Technical Advice Memoranda
16. Technical Advice From an Associate Office in a Docketed Case
17. Letter Rulings Issued by an Associate Office
18. Challenges Alleging That a Statute Is Unconstitutional
19. Challenges Alleging That a Treasury Regulation Is Invalid
20. Challenges Alleging That a Notice or Revenue Procedure Is Invalid
21. Case or Issue Designated for Litigation or Withheld From Appeals
22. Appeals Issued the Determination That Is the Basis of the Tax Court's Jurisdiction
23. Appeals Consideration Is a Prerequisite to the Jurisdiction of Tax Court
24. An Administrative Determination To Deny or Revoke a CPEO Certification

Proposed Regulations

Also...

- 9100 Relief- existing exception. IRM 8.6.3.11(4).
- Changes of Accounting Method - existing exception. IRM 8.6.3.10(3).

Effects?

- Independent Office of Appeals
 - The “Hazards of Litigation”- review not applicable to regulations or revenue procedures validity.
 - Exception - unreviewable decision from a federal court.
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Fast Track Settlement



Fast Track Settlement

Fast Track is a voluntary mediation program that may help you resolve your tax dispute more quickly than a traditional appeal. You can request Fast Track for most examination disputes, Offer in Compromise cases and Trust Fund Recovery Penalty cases once the examiner or collection officer (the IRS) has completed their work and there are issues that remain unresolved.

Fast Track Settlement

How Fast Track Works

With Fast Track, an independent Appeals mediator will try to help you and the IRS reach an agreement on the disputed issue(s). The Appeals mediator will facilitate settlement discussions and may offer settlement proposals.

Because Fast Track is voluntary, the Appeals mediator can't force you or the IRS to participate or to accept a proposed agreement. You retain control over decisions you make about your case. If you are unable to resolve your dispute through Fast Track, you will still have the right to request a traditional appeal or a conference with an IRS manager.

Fast Track Settlement

- The Benefits of Fast Track
 - Choosing Fast Track may result in:
 - Speedier case resolution
 - Lower costs
 - More flexibility
 - When considering Fast Track, consider what might happen if your case isn't settled:
 - Be prepared for the possibility of a lengthy appeal
 - Assess the risk and consequences if your litigation is unsuccessful
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Fast Track Settlement

Small Business, Self-Employed

Fast Track Settlement offers small businesses, the self-employed and individual taxpayers a way to resolve tax disputes during the examination process.

The goal is to resolve these cases within 60 days from the date the Fast Track application is accepted.

Fast Track Settlement

Large Business and International

- Limited to 120 days.
 - Uses mediation techniques.
 - A joint LB&I/Appeals program.
 - All three parties (taxpayer, LB&I and Appeals) participate in the process.
 - Utilizes Appeals settlement authority.
 - Cases stay in LB&I jurisdiction.
 - No need for a formal protest nor protest response.
 - No problem with *ex parte* Communication.
 - TEFRA and BBA cases eligible.
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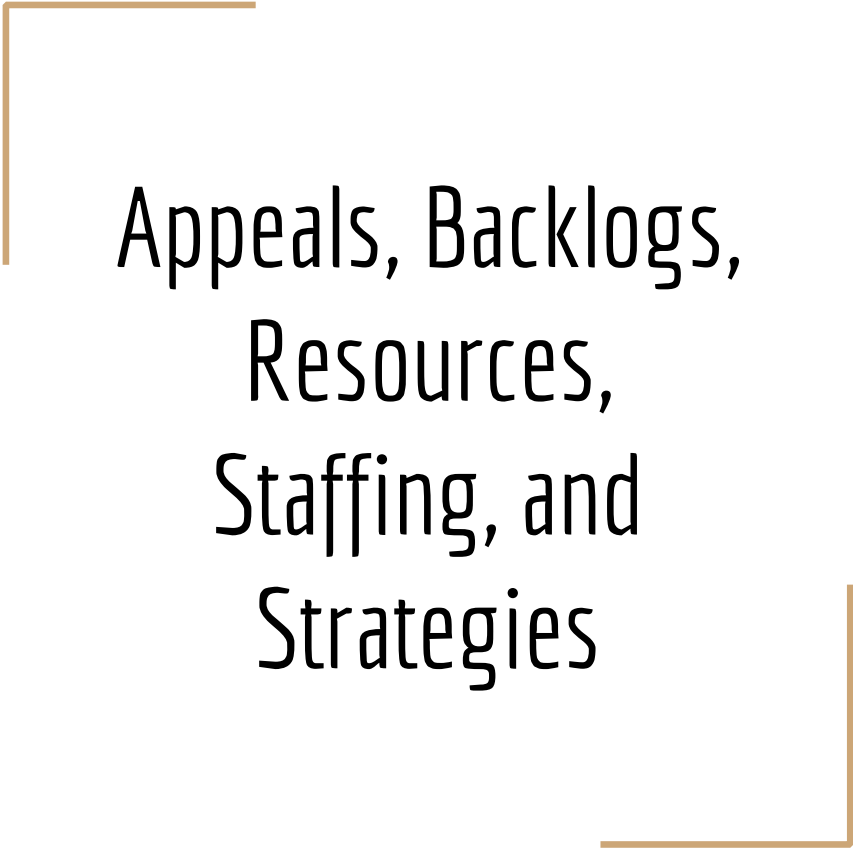
Fast Track Settlement

- How To Apply for Fast Track Settlement
 - For information about eligibility and the Fast Track application process, see [Publication 5022, Fast Track Settlement: A Process for Prompt Resolution of Small Business and Self Employed Tax Issues](#) or [Publication 4539, LB&I *Fast Track Settlement* brochure](#)
 - To get started, complete [Form 14017, Application for Fast Track Settlement](#).
 - Fast Track Settlement Resources
 - [SB/SE Fast Track Settlement Process \(video\)](#)
 - [Revenue Procedure 2017-25 \(SBSE\)](#)
 - [Revenue Procedure 2003-40 \(LB&I\)](#)
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Fast Track Settlement

Fast Track Mediation (Small Business & Self-Employed)

- Gives IRS and Small Business/Self-employed (SB/SE) opportunity to mediate
 - An IRS Appeal Officer, specially trained in mediation, serves as neutral mediator
 - Most disputes resolved within 40 days
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Appeals, Backlogs,
Resources,
Staffing, and
Strategies

Appeals, Backlogs, Resources, Staffing, and Strategies

STAFFING

Appeals hired about 300 people during FY 2022.

Appeals intends to continue hiring efforts in 2023.

Appeals is interested to candidates with outside professional firm experiences and industry experiences.

	FY 2018	FY 2019	FY 2020	FY 2021
Total Staffing*	1,207	1,230	1,286	1,404
Total Receipts	92,430	85,286	57,573	72,216

Appeals, Backlogs, Resources, Staffing, and Strategies

BACKLOGS

1. To try to move cases along faster, Appeals began to do phone outreach to taxpayers who have smaller docketed cases (generally correspondence exam and AUR SNDs with fairly straightforward issues, regardless of dollar amount) starting April of this year, and we expect this to continue.

PRACTICE TIPS

1. How can you know if a call is really from IRS Independent Office of Appeals?
- 2. SIGN UP FOR TDC! (TAXPAYER DIGITAL COMMUNICATIONS)**

<https://www.irs.gov/about-irs/accelerating-digital-communications-to-solve-pandemic-challenges-and-improve-the-taxpayer-experience>



Appeals Conferences



Appeals Conferences

CONFERENCE TECHNIQUES INCLUDE:

- Telephone
- In person
- Video (Teams or Zoom)
- Correspondence

IN-PERSON CONFERENCES

- Resumed June 2022

Taxpayer may obtain an in-person conference; Appeals will use its best efforts to schedule the in-person conference on a date and in a location that is reasonably convenient for taxpayer and Appeals, subject to workload, availability of subject matter experts.

Appeals Conferences

COMPLIANCE ATTENDANCE

- Most Appeals conferences are conducted without Compliance or Counsel
 - Appeals Officers have the discretion to invite Counsel or Compliance
 - If invited, Compliance attends only the non-settlement discussion portion of conferences (unless both the taxpayer and Compliance agree to mediation)
 - Appeals completed a multi-year pilot to test the utility of inviting LB&I and Counsel to engage with taxpayers during conferences for certain large cases. A summary of Appeals findings is posted on irs.gov at https://www.irs.gov/pub/irs-utl/atcl_update.pdf
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Penalty Resolutions in Appeals

Appeals - settlement possibilities for penalties

- Reasonable Cause
- 6751(b)(1) Supervisory Approval
- Hazards of Litigation
- Penalty Mitigation

See generally IRM 8.11.1 “Return Related Penalties in Appeals”

Policy Statement 8-47 at IRM 1.2.1.9.6

“Appeals will ordinarily give serious consideration to an offer to settle a tax controversy on a basis which fairly reflects the relative merits of the opposing views in the light of the hazards which would exist if the case were litigated. However, **no settlement will be made based upon nuisance value of the case to either party.** If the **taxpayer makes an unacceptable proposal** of settlement under circumstances indicating a good-faith attempt to reach an agreed disposition of the case on a basis fair both to the Government and the taxpayer, the Appeals official generally should give an **evaluation of the case in such a manner as to enable the taxpayer to ascertain the kind of settlement that would be recommended for acceptance. ...**”

Reasonable Cause

- Generally all or nothing resolution
 - Appeals often considers
 - Taxpayer compliance history
 - Length of time to come into compliance
 - Appeals has favorite cases to cite and consider in nearly all reasonable cause disputes
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Reasonable Cause (cont'd)

- United States v. Boyle, 469 U.S. 241 (1985)
 - The timely filing of a tax return is not excused by the taxpayer's reliance on an agent
 - Neonatology Assocs., P.A. v. Commissioner, 115 T.C. 43, 98-99 (2000), aff'd, 299 F.3d 221 (3d Cir. 2002)
 1. the advisor is competent
 2. the taxpayer provided necessary and accurate information to the advisor
 3. the taxpayer relied in good faith on the advisor
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IRC 6751(b)(1) supervisory approval

- Generally all or nothing resolution
 - Appeals Officers should verify timing of penalty approval by locating source document in administrative file
 - Not explicit but implicit at IRM 8.11.1.2.1
 - For international information return penalties, locating source document may be difficult for Appeals
 - Practitioner best practice- explicitly raise supervisory approval in protest
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FOIA to Optimize Presentation to Appeals

- As soon as you anticipate a penalty dispute, send the IRS a FOIA for § 6751(b)(1) documents to support written supervisory approval
 - In context of IIRs that are campus assessed, highly likely that IRS will not produce actual record satisfying § 6751(b)(1)
 - Appeal the FOIA production
 - Appeals rubber stamps FOIA decisions without making independent analysis and without consulting representatives
 - In the Appeals protest on the penalties, provide Appeals the records obtained in FOIA to make the Appeals Officer's job easier
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Hazards of Litigation

- IRM 8.11.1.2.7.5 states:
 - (4) The hazards of litigation are the uncertainties of the outcome of the court's decision in the event of a trial.
 - (5) Litigating hazards generally fall into three categories: factual, legal and evidentiary.

Note: Lack of case law should not be considered a hazard of litigation.
 - Factual hazards- salient facts are unclear as to whether the taxpayer meets reasonable cause. Examples:
 - Taxpayer claims he was ill at the time a return was due but the facts are inconclusive
 - Taxpayer filed a return 10 days late and the facts are inconclusive regarding whether he timely postmarked his filing.
 - Legal hazards- status of case law, law of circuit, etc.
 - Evidentiary hazards- (admissibility, willingness/availability of witnesses)
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Penalty Mitigation – The Mystery in Appeals

- Formally adopted in FBAR context by Exam –IRM Exhibit 4.26.16-2
 - Minimal or no hazards
 - Extenuating circumstances exist
 - According to Appeals penalty training material: “Mitigation is available but should be used sparingly.”
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Foundation for Mitigation

- Application of macro-level penalty policy to reduce the severity of the penalty
- IRM 20.1.1.2.1 “Encouraging Voluntary Compliance”

IRM 20.1.1.2.1 (8) The IRS has the obligation to advance the fairness and effectiveness of the tax system. Penalties should do the following:

- Be severe enough to deter noncompliance,
 - Encourage noncompliant taxpayers to comply,
 - Be objectively proportioned to the offense, and
 - Be used as an opportunity to educate taxpayers and encourage their future compliance.
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Foundation for Mitigation (cont'd)

- IRM 20.1.1.1.4 - Every function in the IRS has a role in proper penalty administration. It is essential that each function conduct its operations with an emphasis on promoting voluntary compliance. Appropriate business reviews should be conducted to ensure consistency with the penalty policy statement and philosophy
 - Policy Statement P-1-18 to enhance voluntary compliance
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Mitigation Statement in Appeals' Training Material

“With respect to these automatic penalties [Form 5471 and Form 5472], there is no prior function that has exercised any independent judgment or assessment made with respect to the applied penalties (unlike field cases such as FBAR where the dollar amount of penalty is carefully considered and for which the IRM provides Exam only the function of mitigation). As a result, it is appropriate for Appeals to incorporate penalty policy in resolutions to ensure that the proposed penalty enhances voluntary compliance and is in accordance with the IRM.”

Mitigation Hypothetical


Alpha Corp is a small family owned company with some manufacturing operations in Mexico, Alpha Corp relied on a CPA tax preparer to file its tax return extension. Due to a software glitch and oversight of an employee of the CPA firm not noticing the glitch, the electronic extension form was not received by the IRS. The staff at Alpha Corp was not aware of this problem. In fact, they received correspondence from the CPA firm which assured them that the appropriate extension had been filed. Ultimately, Alpha Corp was assessed \$100,000 for 10 delinquent Forms 5471 relating to the operating CFCs in Mexico. Alpha Corp has never been delinquent in filing returns or extensions in the past. Further, the delinquent return was filed within the extension period. Alpha Corp contested the Form 5471 penalties, but the IRS Campus group that considered the abatement request did not grant first time abatement or reasonable cause.

Mitigation Applied to Hypo


- Appeals would likely mitigate the penalty to 25% to 30% of the assessed penalty, but is that the right answer under the IRS' penalty policy?
 - Appeals' Official Training - **"This is not a tool to give the house away!"**
 - Observed Appeals abatement ranging from 60-80%
 - Result: Offering taxpayers settlement requiring taxpayer to pay 20%-40% of penalty assessment
 - Use of mitigation theory sidesteps the issue of disfavored nuisance settlements
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A Better Approach to Late International Information Return (IIR) Penalties

- IRS should formalize penalty relief for all taxpayers who timely filed their income tax returns who submit delinquent IIRs.
 - So long as the taxpayers are not under civil examination or criminal investigation the IRS should allow penalty-free late IIR filings.
 - Implementing a policy analogous to qualified amended returns in the IIR realm will promote voluntary compliance in correcting past compliance issues relating to IIRs.
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I.R.C. § 6751
ISSUES




I.R.C. § 6751 Issues

8.11.1.2.1 (07-03-2019) Supervisory Approval Of Penalties Before Appeals' Consideration

The examiner's immediate supervisor (or designated higher level official) generally must approve, in writing, an examiner's initial penalty determination and references to IRM 20.1.5.2.3.



SECOND BITE AT
APPEAL AND
APPEALS' ISSUED
NOTICES OF
DEFICIENCY



Second Bite at Appeal and Appeals' Issued Notices of Deficiency

Counsel Referrals of Docketed Cases - IRC 7803(e)(5)

- Taxpayers in receipt of a notice of deficiency can “request referral” to Appeals
- If request is denied, written notice explaining reason and procedure to protest
- Denials submitted in annual report to Congress
- Not applicable to frivolous taxpayers

Procedures for Withholding Case

- CCDM 33.3.6 - Designated for litigation
- Rev Proc 2016-22 - Other limited circumstances if Division Counsel or a higher level Counsel official determines that referral is not in the interest of sound tax administration

Authority given to Commissioner per statute, delegated and redelegated Delegation Order 30-9.

- Authority to withhold & to deny taxpayer request for referral and explain in writing – delegated to Chief Counsel
 - Authority to hear appeal – delegated to Chief Counsel.
 - Coordination required with P&A and Special Counsel (litigation)
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QUESTIONS?

