Insured's separate disclosure obligation under § 1.6011–4 with respect to the transaction and the Insured discloses the transaction in a timely manner. The acknowledgment can be a copy of the Form 8886, *Reportable Transaction Disclosure Statement* (or successor form), filed (or to be filed) by the Insured and must be received by the Owner prior to the time set forth in § 1.6011–4(e) in which the Owner would otherwise be required to provide disclosure.

(f) *Disclosure requirements.* Participants must provide the information required under § 1.6011–4(d) and the Instructions to Form 8886 (or successor form). For all participants, describing the transaction in sufficient detail includes, but is not limited to, describing on Form 8886 (or successor form) when, how, and from whom the participant became aware of the transaction, and how the participant participated in the transaction (for example, as an Insured, a Captive, or other participant). A Captive and an Insured must also provide the information required in § 1.6011–10(f)(2) and (3), respectively.

(g) *Applicability date*—(1) *In general.* This section identifies transactions that are the same as, or substantially similar to, the transaction described in paragraph (a) of this section as transactions of interest for purposes of § 1.6011–4(b)(6) effective the date the regulations are published as final regulations in the **Federal Register**.

(2) *Obligations of participants with respect to prior periods.* Pursuant to § 1.6011–4(d) and (e), taxpayers who have filed a tax return (including an amended return) reflecting their participation in transactions described in paragraph (a) of this section prior to the date the regulations are published as final regulations in the **Federal Register**, who have not otherwise finalized a settlement agreement with the Internal Revenue Service with respect to the transaction, must disclose the transactions as required by § 1.6011–4(d) and (e) provided that the period of limitations for assessment of tax (as determined under section 6501, including section 6501(c)) for any taxable year in which the taxpayer participated has not ended on or before the date the regulations are published as final regulations in the **Federal Register**. However, taxpayers who have filed a disclosure statement regarding their participation in the transaction with the Office of Tax Shelter Analysis pursuant to Notice 2016–66, 2016–47 I.R.B. 745, will be treated as having made the disclosure pursuant to the final regulations for the taxable years for which the taxpayer filed returns before the final regulations are published in the **Federal Register**. If a taxpayer described in the preceding sentence participates in the Micro-captive Transaction of Interest in a taxable year for which the taxpayer files a return on or after the date the final regulations are published in the **Federal Register**, the taxpayer must file a disclosure statement with the Office of Tax Shelter Analysis at the same time the taxpayer files their return for the first such taxable year.

(3) *Obligations of material advisors with respect to prior periods.* Material advisors defined in § 301.6111–3(b) of this chapter who have previously made a tax statement with respect to a transaction described in paragraph (a) of this section have disclosure and list maintenance obligations as described in §§ 301.6111–3 and 301.6112–1 of this chapter, respectively. Notwithstanding § 301.6111–3(b)(4)(i) and (iii) of this chapter, material advisors are required to disclose only if they have made a tax statement on or after the date six years before the date the regulations are published as final regulations in the **Federal Register**. Material advisors that are uncertain whether the transaction they are required to disclose should be reported under this section or § 1.6011–10 should disclose under § 1.6011–10, and will not be required to disclose a second time if it is later determined that the transaction should have been disclosed under this section.

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–07315 Filed 4–10–23; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 301

[REG–121709–19]

RIN 1545–BP63

Rules for Supervisory Approval of Penalties

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations regarding supervisory approval of certain penalties assessed by the IRS. The proposed regulations are necessary to address uncertainty regarding various aspects of supervisory approval of penalties that have arisen due to recent judicial decisions. The proposed regulations affect the IRS and persons assessed certain penalties by the IRS.

DATES: Electronic or written comments and requests for a public hearing must be received by July 10, 2023. Requests for a public hearing must be submitted as prescribed in the "Comments and Requests for a Public Hearing" section.

ADDRESSES: Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal eRulemaking Portal at *www.regulations.gov* (indicate IRS and REG–121709–19) by following the online instructions for submitting comments. Once submitted to the Federal eRulemaking Portal, comments cannot be edited or withdrawn. The Department of the Treasury (Treasury Department) and the IRS will publish any comments submitted electronically and comments submitted on paper, to the public docket. Send paper submissions to: CC:PA:LPD:PR (REG–121709–19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations, David Bergman, (202) 317–6845; concerning submissions of comments and requests for a public hearing, Vivian Hayes (202) 317–5306 (not toll-free numbers) or by email at *publichearings@irs.gov* (preferred).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to the Regulations on Procedure and Administration (26 CFR part 301) under section 6751(b) of the Internal Revenue Code (Code). No regulations have previously been issued under section 6751.

1. Legislative Overview

Section 6751 was added to the Code by section 3306 of the Internal Revenue Service Restructuring and Reform Act of 1998 (1998 Act), Public Law 105–206, 112 Stat. 685, 744 (1998). Section 6751(a) sets forth the content of penalty notices. Section 6751(b) provides procedural requirements for the Secretary of the Treasury or her delegate (Secretary) to assess certain penalties, including additions to tax or additional amounts under the Code. *See* section 6751(c).

Section 6751(b)(1), as added by the 1998 Act, provides that "[n]o penalty under this title shall be assessed unless the initial determination of such

assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher level official as the Secretary may designate.'' As an exception to this rule, section 6751(b)(2), as added by the 1998 Act, provides that section 6751(b)(1) ''shall not apply to—(A) any addition to tax under section 6651, 6654, or 6655 [of the Code]; or (B) any other penalty automatically calculated through electronic means.''

The report of the United States Senate Committee on Finance regarding the 1998 Act (1998 Senate Finance Committee Report) provides that Congress enacted section 6751(b)(1) because of its concern that, ''[i]n some cases, penalties may be imposed without supervisory approval.'' S. Rep. No. 105–174, at 65 (1998), 1998–3 C.B. 537, 601. The report further states that ''[t]he Committee believes that penalties should only be imposed where appropriate and not as a bargaining chip.'' *Id.* The report provides that, to achieve this goal, section 6751(b)(1) ''requires the specific approval of IRS management to assess all non-computer generated penalties unless excepted.''

Section 212 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020, which was enacted as Division EE of the Consolidated Appropriations Act, 2021, Public Law 116–260, 134 Stat. 1182, 3067 (2020), expanded the list of penalties in section 6751(b)(2)(A) excepted from the supervisory approval requirement of section 6751(b)(1) by revising the end of section 6751(b)(2)(A) to read ''6654, 6655, or 6662 (but only with respect to an addition to tax by reason of subsection (b)(9) thereof);'' (relating to the addition to tax under section 6662(b)(9) of the Code with regard to the special charitable contribution deduction under section 170(p) of the Code for taxable years of individuals beginning in 2021). Section 605 of Division T of the Consolidated Appropriations Act, 2023, Public Law 117–328, 136 Stat. 4459, 5395 (2022), further amended section 6751(b)(2)(A) by striking ''subsection (b)(9)'' and inserting ''paragraph (9) or (10) of subsection (b).'' Section 6662(b)(10) imposes an accuracy-related penalty on underpayments attributable to any disallowance of a deduction by reason of section 170(h)(7).

2. Judicial Treatment

In 2016, a United States Tax Court (Tax Court) majority read section 6751(b)(1)'s silence about when supervisory approval is required to mean that no specific timing requirement exists and, thus, the approval need only be obtained at some time, but no particular time, prior to assessment. *Graev* v. *Commissioner,* 147 T.C. 460, 477–81 (2016), *superseded by* 149 T.C. 485 (2017).

The United States Court of Appeals for the Second Circuit (Second Circuit) rejected the *Graev* court's interpretation of section 6751(b)(1), finding ambiguity in the statute's phrase ''initial determination of such assessment.'' *Chai* v. *Commissioner,* 851 F.3d 190, 218–19 (2d Cir. 2017). The Second Circuit held that, with respect to penalties subject to deficiency procedures, section 6751(b)(1) requires written approval of the initial penalty determination no later than the date the IRS issues the notice of deficiency (or files an answer or amended answer asserting such penalty). *Id.* at 221. The Second Circuit reasoned that for supervisory approval to be given force, it must be obtained when the supervisor has the discretion to give or withhold it, and, for penalties determined in a notice of deficiency, this discretion no longer exists upon the issuance of the notice. *Id.* at 220. In *Graev III,* 149 T.C. 485 (2017), the Tax Court reversed its earlier interpretation of section 6751(b) and followed *Chai.* Since then, the Tax Court has imposed increasingly earlier deadlines by which supervisory approval of the initial penalty determination must be obtained to be considered timely under the statute, formulating tests that are difficult for IRS employees to apply.

In *Clay* v. *Commissioner,* 152 T.C. 223, 249–50 (2019), the Tax Court held that supervisory approval of penalties was too late where it was obtained before the IRS issued a notice of deficiency but after the revenue agent sent the petitioner a ''30-day letter'' proposing penalties and giving the petitioner an opportunity to request an administrative appeal. In *Belair Woods, LLC* v. *Commissioner,* 154 T.C. 1, 13 (2020), the Tax Court held that supervisory approval must be obtained before the IRS sends a notice that ''formally communicates to the taxpayer, the [IRS] Examination Division's unequivocal decision to assert a penalty.'' In subsequent cases, the Tax Court has held that supervisory approval must be obtained before the first communication to the taxpayer that demonstrates that an initial determination has been made. *See, e.g., Beland* v. *Commissioner,* 156 T.C. 80 (2021); *Kroner* v. *Commissioner,* T.C. Memo. 2020–73, *rev'd* 48 F. 4th 1272 (11th Cir. 2022); *Carter* v. *Commissioner,* T.C. Memo. 2020–21, *rev'd* 2022 WL 4232170 (11th Cir. Sept. 14, 2022). The Tax Court has applied this timing rule to penalties subject to pre-assessment review in the Tax Court, as well as to assessable penalties.

Recently the United States Court of Appeals for the Ninth Circuit (Ninth Circuit), the United States Court of Appeals for the Tenth Circuit (Tenth Circuit), and the United States Court of Appeals for the Eleventh Circuit (Eleventh Circuit) reversed the Tax Court's ''formal communication'' timing rule, noting that it has no basis in the text of the statute. *Laidlaw's Harley Davidson Sales, Inc.* v. *Commissioner,* 29 F.4th 1066 (9th Cir. 2022), *reh'g en banc denied,* No. 20–73420 (9th Cir. July 14, 2022); *Minemyer* v. *Commissioner,* Nos. 21–9006 & 21–9007, 2023 WL 314832 (10th Cir. Jan. 19, 2023); *Kroner* v. *Commissioner,* 48 F. 4th 1272 (11th Cir. 2022). In *Laidlaw's,* the Ninth Circuit held that the statute requires approval before the assessment of a penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment, and noted that ''[t]he statute does not make any reference to the communication of a proposed penalty to the taxpayer, much less a 'formal' communication.'' *Laidlaw's,* 29 F. 4th at 1072. In *Minemyer,* the Tenth Circuit, in an unpublished opinion, held that the statute requires approval before the IRS issues a notice of deficiency asserting a penalty. *Minemyer,* 2023 WL 314832 at *4–5. In *Kroner,* the Eleventh Circuit held that the statute only requires approval before assessment, finding that a deadline of assessment is ''consistent with the meaning of the phrase 'initial determination of such assessment,' . . . . reflects the absence of any express timing requirement in the statute . . . [and] is a workable reading in light of the statute's purpose.'' *Kroner,* 48 F.4th at 1276. The Tax Court has continued to use its ''formal communication'' timing rule subsequent to *Laidlaw's* and *Kroner. See, e.g., Simpson* v. *Commissioner,* T.C. Memo 2023–4; *Castro* v. *Commissioner,* T.C. Memo. 2022–120.

Recent cases have also addressed other issues under section 6751(b)(1), including (but not limited to) clarification as to who is an immediate supervisor, *see, e.g., Sand Investment Co.* v. *Commissioner,* 157 T.C. 136 (2021); what constitutes personal, written approval, *see, e.g., PBBM-Rose Hill, Ltd.* v. *Commissioner,* 900 F.3d 193 (5th Cir. 2018); whether particular Code sections impose a ''penalty'' subject to section 6751(b)(1), *see, e.g., Grajales* v. *Commissioner,* 156 T.C. 55 (2021), *aff'd* 2022 WL 3640274 (2d Cir. 2022); and what constitutes a penalty ''automatically calculated through

electronic means.'' *See, e.g., Walquist* v. *Commissioner,* 152 T.C. 61 (2019).

Explanation of Provisions

The Treasury Department and the IRS have concluded that it is in the interest of sound tax administration to have clear and uniform regulatory standards regarding the penalty approval requirements under section 6751(b). In the absence of such regulatory standards, caselaw has developed rules for the application of section 6751(b). Such judicial holdings are subject to unanticipated but frequent change, making it difficult for IRS employees to apply them in a consistent manner. The difficulty in applying or anticipating how courts will construe these rules has resulted in otherwise appropriate penalties on taxpayers not being sustained and has undermined the efficacy of these penalties as a tool to enhance voluntary compliance by taxpayers. In addition, the evolving standards regarding interpretations of section 6751(b) have served to increase litigation, which consumes significant government resources. The recent Ninth Circuit and Eleventh Circuit rulings also create a different test to satisfy the requirements of section 6751(b) in cases appealable to those circuits as opposed to other cases that come before the Tax Court. *See Laidlaw's Harley Davidson Sales,* 29 F.4th at 1066; *Kroner* v. *Commissioner,* 48 F. 4th at 1276. The proposed regulations are intended to clarify the application of section 6751(b) in a manner that is consistent with the statute and its legislative history, has nationwide uniformity, is administrable for the IRS, and is easily understood by taxpayers.

1. Timing Issues

The proposed regulations would adopt three rules regarding the timing of supervisory approval of penalties under section 6751(b) that are based on objective and clear standards. One rule addresses penalties that are included in a pre-assessment notice that is subject to the Tax Court's review, such as a statutory notice of deficiency. One rule is for penalties that the IRS raises in an answer, amended answer, or amendment to the answer to a Tax Court petition. And one rule is for penalties assessed without prior opportunity for review by the Tax Court.

A. Penalties Subject to Pre-Assessment Review in the Tax Court

Proposed § 301.6751(b)–1(c) provides that, for penalties that are included in a pre-assessment notice issued to a taxpayer that provides the basis for jurisdiction in the Tax Court upon timely petition, supervisory approval may be obtained at any time before the notice is issued by the IRS. Section 6751(b) clearly provides that there be supervisory approval before the assessment of a penalty and contains no express requirement that the ''written approval be obtained at any particular time prior to assessment.'' *Chai,* 851 F.3d at 218. Courts have noted that there is ambiguity in the statutory phrase ''initial determination of such assessment [of the penalty]'' that a supervisor must approve. *See, e.g., Chai,* 851 F.3d at 218–19 (noting that since an ''assessment'' is the formal recording of a taxpayer's tax liability, one can determine a deficiency and whether to make an assessment, but one cannot ''determine'' an assessment); *Roth* v. *Commissioner,* 922 F.3d 1126, 1132 (10th Cir. 2019) (''[W]e agree with the Second Circuit that the plain language of § 6751(b) is ambiguous. . . .''). But courts have not agreed that an ambiguity about what constitutes an initial determination provides an opportunity to craft a deadline for approval of an initial determination from the statute's legislative history. *Compare Chai,* 851 F.3d at 219 with *Laidlaw's Harley Davidson Sales,* 29 F.4th at 1072. Instead, courts have agreed that a supervisor can approve a penalty only at a time that the supervisor has discretion to give or withhold approval. *See, e.g., Chai,* 851 F.3d at 220; *Laidlaw's Harley Davidson Sales,* 29 F.4th at 1074; *Cf., Kroner,* 48 F. 4th at 1276, n.1 (holding that approval is required before assessment but declining to address whether the supervisor must have discretion at the time of approval because it was undisputed in that case that the supervisor did).

Prior to the Second Circuit's ruling in *Chai,* the Tax Court interpreted section 6751(b) merely to require supervisory approval prior to assessment, which is the only definitive deadline provided in the statute and which, for penalties determined in a notice of deficiency, occurs after the opportunity for Tax Court review of a penalty. *See Graev* v. *Commissioner,* 147 T.C. 460 (2016), *superseded by* 149 T.C. 485 (2017). The Treasury Department and the IRS acknowledge that approval of a penalty after the IRS issues a notice subject to Tax Court review is counter to the statutory scheme for Tax Court review. Once a taxpayer petitions to the Tax Court a notice that includes a penalty, section 6215(a) of the Code directs that the Tax Court decides whether the penalty will be assessed. In that case, a supervisor no longer has discretion that will control. Further, as a practical matter, the IRS has no general process for supervisory approval of a penalty after issuing a pre-assessment notice to a taxpayer subject to review by the Tax Court that includes the penalty, such as a notice of deficiency. If a taxpayer does not timely petition the Tax Court, the IRS will simply assess any penalty determined in the notice. Therefore, the Treasury Department and the IRS conclude that a penalty appearing in a pre-assessment notice issued to a taxpayer subject to Tax Court review should be subject to supervisory approval before the notice is issued. This interpretation is consistent with the Second Circuit's holding in *Chai* and provides for penalty review while the IRS still has discretion regarding penalties. *See also Laidlaw's Harley Davidson Sales,* 29 F.4th at 1074 (''Accordingly, we hold that § 6751(b)(1) requires written supervisory approval before the assessment of the penalty or, if earlier, before the relevant supervisor loses discretion whether to approve the penalty assessment.'').

The proposed regulations do not require written approval of an initial determination of a penalty that is subsequently included in a pre-assessment notice subject to review by the Tax Court by any deadline earlier than the issuance of the notice to the taxpayer. As already mentioned, no language in the statute imposes any such earlier deadline, and the statutory scheme for assessing such penalties does not deprive a supervisor of discretion to approve an initial determination before the issuance of a pre-assessment notice subject to review by the Tax Court.

The Treasury Department and the IRS have concluded that an earlier deadline for approval of an initial determination of a penalty would not best serve the legislative purpose of section 6751(b). The lack of any deadline in the statute other than the deadline that approval must come before assessment indicates that Congress did not intend an earlier deadline. No earlier deadline is mentioned in the legislative history. To create earlier deadlines, the caselaw relies on a single statement in the limited legislative history that ''[t]he Committee believes that penalties should only be imposed where appropriate and not as a bargaining chip.'' *See Belair Woods,* 154 T.C. at 7 (citing S. Rep. No. 105–174, at 65 (1998)). But the earlier deadlines created by the Tax Court do not ensure that penalties are only imposed where appropriate.

First, the supervisory approval deadlines the Tax Court has created are unclear in application. One formulation

sets the deadline for approval to occur before the IRS ''formally communicates to the taxpayer, the Examination Division's unequivocal decision to assert a penalty.'' *Belair Woods,* 154 T.C. at 13. Prior to assessment, it is unclear what constitutes this unequivocal decision other than a notice that gives the taxpayer the right to petition the Tax Court. For any notice before the right to petition the Tax Court, the taxpayer is free to present more evidence or arguments to the Examination Division as to why a penalty should not apply, which could lead the IRS supervisor charged with approving an initial determination to conclude that a penalty should not be asserted.

Second, if the ''Examination Division's unequivocal decision to assert a penalty,'' *id.,* means that the Examination Division was finished with its work and could or would not change its mind upon receiving further information, there is no harm in delaying approval in writing until sometime after that moment. There would be no possibility of a change to the penalty during the period after the Examination Division has completed its work. The Tax Court's imposition of an approval deadline immediately after the Examination Division has completed its work rather than sometime later would do nothing to prevent an attempt to bargain because the Examination Division could not consider a bargain if it has already completed its work

Third, none of the deadlines the Tax Court has imposed actually ensure that penalties could never be used as a bargaining chip because each formulation of what constitutes an ''initial determination'' has been tied to a written communication. Although it would violate longstanding IRS Policy Statements and would contradict the Internal Revenue Manual's (IRM) instructions, in theory a penalty could be used as a bargaining chip if conveyed orally, and the deadlines the Tax Court has created do not come into play without written communication. As a result, the Tax Court opinions imposing deadlines are not effective to prevent bargaining.

Fourth, the courts' struggles to determine a consistent deadline has undermined the legislative purpose that penalties be imposed ''where appropriate.'' S. Rep. No. 105–714 at 65. The Tax Court has found no evidence that an IRS employee actually attempted to use a penalty as a bargaining chip in any of the cases in which it invalidated a penalty for section 6751(b) noncompliance. Instead, the Tax Court has consistently removed penalties when IRS employees simply obtained written supervisory approval after deadlines the Tax Court created and applied retroactively without any indication that the penalty was improper. *See, e.g., Kroner,* T.C. Memo. 2020–73, *rev'd* 48 F. 4th 1272 (11th Cir. 2022); *Carter,* T.C. Memo. 2020–21, *rev'd* 2022 WL 4232170 (11th Cir. Sept. 14, 2022). In one case, the Tax Court explicitly noted that imposition of the penalty would be proper but for the IRS's failure to obtain written supervisory approval by the deadline created by the Tax Court. *See Becker* v. *Commissioner,* T.C. Memo. 2018–69 (stating that ''Mr. Becker's fraud is evident'' and that, but for section 6751(b) compliance, the court's analysis ''would normally lead to a holding that sustains the Commissioner's civil fraud penalty determinations . . .'').

In contrast, by allowing a supervisor to approve the initial determination of a penalty up until the time the IRS issues a pre-assessment notice subject to review by the Tax Court, the proposed rule ensures that penalties are ''only [ ] imposed where appropriate.'' S. Rep. No. 105–714 at 65. With this deadline, the supervisor has the opportunity to consider a taxpayer's defense against a penalty, if applicable, and decide whether to approve the penalty. If the facts of the case suggest that a penalty should have been considered but none is imposed, the supervisor's later review would allow the supervisor to question why none was recommended. Furthermore, this bright-line rule relieves supervisors from having to predict whether approval at a certain point will be too early or too late, thereby risking that an otherwise appropriate penalty may not be upheld by a court. Pre-assessment notices that provide a basis for Tax Court jurisdiction are well known to supervisors, and the proposed rule will be clear in application to both IRS employees and taxpayers.

Finally, the rule in proposed § 301.6751(b)–1(c) is consistent with longstanding IRS Policy Statements. Penalty Policy Statement 20–1 has, since 2004, included the following direction to IRS employees:

''The [IRS] will demonstrate the fairness of the tax system to all taxpayers by:

a. Providing every taxpayer against whom the [IRS] proposes to assess penalties with a reasonable opportunity to provide evidence that the penalty should not apply;

b. Giving full and fair consideration to evidence in favor of not imposing the penalty, even after the [IRS]'s initial consideration supports imposition of a penalty; and

c. Determining penalties when a full and fair consideration of the facts and the law support doing so.

Note: This means that penalties are not a ''bargaining point'' in resolving the taxpayer's other tax adjustments. Rather, the imposition of penalties in appropriate cases serves as an incentive for taxpayers to avoid careless or overly aggressive tax reporting positions.''

IRM 1.2.1.12.1 (9). As reflected in this Policy Statement and the language of section 6751(b) itself, it may not be until the IRS has had the opportunity to develop the facts in support of or against the penalty that a supervisor is in the best position to approve an initial determination to assert a penalty as appropriate. Therefore, the Treasury Department and the IRS have concluded that the deadline for providing approval for penalties appearing in a pre-assessment notice that entitles a taxpayer to petition the Tax Court should be no earlier than issuance of such notice.

B. Penalties Raised in the Tax Court After a Petition

Proposed § 301.6751(b)–1(d) provides that, for penalties raised in the Tax Court after a petition, supervisory approval may be obtained at any time prior to the Commissioner requesting that the court determine the penalty. The proposed rule gives full effect to the language in both sections 6214 and 6751(b)(1) because once a penalty is raised, the Tax Court decision will control whether it is assessed. Section 6214(a) permits the Commissioner to raise penalties in an answer or amended answer that were not included in a notice that provides the basis for Tax Court jurisdiction upon timely petition. The proposed rule allows the exercise of this statutory grant of independent judgment by the IRS Office of Chief Counsel (Counsel) attorney, while maintaining the intent of Congress that penalties be imposed only where appropriate, and with meaningful supervisory review. Any concern about a Counsel attorney using penalties raised in an answer or amended answer as a bargaining chip is mitigated by the requirement in proposed § 301.6751(b)–1(d) for supervisory approval within Counsel before the answer or amended answer is filed. Moreover, by raising a penalty on answer, amended answer, or amendment to the answer to, the Commissioner will likely bear the burden of proof at trial regarding the application of the penalty, thus reducing further the possibility that Counsel will attempt to use a penalty as

a bargaining chip in a docketed case. *See* Tax Court Rule 142. Furthermore, Tax Court Rule 33(b) provides that signature of counsel on a pleading constitutes a certificate by the signer that the pleading is not interposed for any improper purpose, thus diminishing the potential for abuse. No case has found that a penalty raised on answer, amended answer, or amendment to the answer was untimely under section 6751(b).

C. Penalties Not Subject to Pre-Assessment Review in the Tax Court

Proposed § 301.6751(b)–1(b) provides that supervisory approval for penalties that are not subject to pre-assessment review in the Tax Court may be obtained at any time prior to assessment. This includes penalties that could have been included in a pre-assessment notice that provides the basis for Tax Court jurisdiction upon timely petition, but which were not included in such a notice because the taxpayer agreed to their immediate assessment.

Unlike penalties subject to deficiency procedures before assessment, there is no Tax Court or potential Tax Court decision that would make approval of an immediately assessable penalty by an IRS supervisor meaningless. Instead, consistent with the language of section 6751(b), supervisory approval can be made at any time before assessment without causing any tension in the statutory scheme for assessing penalties.

The proposed rule is also consistent with congressional intent that penalties not be used as a bargaining chip. Most penalties not subject to pre-assessment review in the Tax Court cannot be used as a bargaining chip because they are not in addition to a tax liability. Rather, the penalty is the sole liability at issue.

2. Exceptions to the Rule Requiring Supervisory Approval of Penalties

Proposed § 301.6751(b)–1(a)(2) provides a list of penalties excepted from the requirements of section 6751(b). Proposed § 301.6751(b)–1(a)(2) excepts those penalties listed in section 6751(b)(2)(A), along with penalties imposed under section 6673 of the Code. Penalties under section 6673 are imposed at the discretion of the court and are designed to deter bad behavior in litigation and conserve judicial resources. Section 6673 penalties are not determined by the Commissioner, and the applicable Federal court may impose them regardless of whether the Commissioner moves for their imposition. The proposed rule excepts penalties under section 6673 from the requirements of section 6751(b)(1) because section 6751(b)(1) was not intended as a mechanism to restrain Federal courts. This rule is consistent with the Tax Court's holding in *Williams* v. *Commissioner,* 151 T.C. 1 (2018).

3. Definitions

A. Immediate Supervisor and Designated Higher Level Officials

Section 6751(b)(1) requires approval by ''the immediate supervisor'' of the individual who makes the initial penalty determination, or such higher level official as the Secretary may designate. The statute does not define the term immediate supervisor. The 1998 Senate Finance Committee Report only provides that section 6751(b) requires the approval of ''IRS management.'' In *Sand Investment,* the Tax Court held that for purposes of section 6751(b) the ''immediate supervisor'' is the individual who directly supervises the examining agent's work in an examination. In the Tax Court's view, the legislative history of section 6751(b) supports the conclusion that the person with the greatest familiarity with the facts and legal issues presented by the case is the immediate supervisor. 157 T.C. at 142.

Proposed § 301.6751(b)–1(a)(3)(iii) defines the term ''immediate supervisor'' as any individual with responsibility to approve another individual's proposal of penalties without the proposal being subject to an intermediary's approval. The proposed rule does not limit the term immediate supervisor to a single individual. To limit the term to a single individual within the IRS would restrict section 6751(b)(1) in a way that does not reflect how the IRS operates and would invite unwarranted disputes about which specific individual was most appropriate in situations where multiple individuals could fairly be considered an ''immediate supervisor.'' Instead, the term is better understood to refer to any person who, as part of their job, directly approves a penalty proposed by another. This includes acting supervisors operating under a proper delegation of authority. This approach is consistent with the intent of Congress to prevent IRS examining agents from operating alone. The proposed rule further ensures that the person giving the approval has appropriate supervisory responsibility with respect to the penalty.

Proposed § 301.6751(b)–1(a)(4) designates as a higher level official authorized to approve an initial penalty determination for purposes of section 6751(b)(1) any person who has been directed via the IRM or other assigned job duties to approve another individual's proposal of penalties before they are included in a notice prerequisite to Tax Court jurisdiction, an answer to a Tax Court petition, or are assessed without need for such inclusion. Proposed § 301.6751(b)–1(a)(3)(iv) defines a higher level official as any person designated as such under proposed § 301.6751(b)–1(a)(4).

With respect to ''higher level officials'' who may provide penalty approval in lieu of the immediate supervisor, the statute does not specify whether the official needs to be at a ''higher level'' than the individual making the initial penalty determination, or at a higher level than that individual's supervisor. Read in light of the statute's legislative purpose and the structure and operations of the IRS, it is appropriate to understand that term as referring to an official at a higher level than the individual making the initial penalty determination. To do otherwise would be to exclude a large group of individuals the IRS has assigned to review proposed penalties. This approach is consistent with the legislative history and allows IRS employees to operate within the scope of their assigned duties.

To be able to identify which supervisor should approve an initial penalty determination, it must be clear which individual made the ''initial determination of [a penalty] assessment.'' Proposed § 301.6751(b)–1(a)(3)(ii) provides that the individual who first proposes a penalty is the individual who section 6751(b)(1) references as the individual making the initial determination of a penalty assessment. Proposed § 301.6751(b)–1(a)(3)(ii) also provides that a proposal includes those made either to a taxpayer or to the individual's supervisor or a designated higher level official. This approach will allow for easy identification of the appropriate supervisor or higher level official. Proposed § 301.6751(b)–1(a)(3)(ii) also makes clear that the assessment of a penalty must be attributable to an individual's proposal for that individual to be considered as the individual who made the ''initial determination of such assessment.'' If a proposal of a penalty is not tied to an ultimate assessment, then it should not be treated as the ''initial determination of such assessment.'' This approach allows the IRS the flexibility to pursue penalties when new information is received that alters earlier thinking on whether a penalty is appropriate. It also allows for more than one set of an individual employee and supervisor to exercise

independent judgment about whether a penalty should be assessed. This situation is illustrated by an example in proposed § 301.6751(b)–1(e)(4).

B. Personally Approved (in Writing)

Section 6751(b)(1) requires that the immediate supervisor ''personally approve (in writing)'' the initial determination to assert a penalty. Proposed § 301.6751(b)–1(a)(3)(v) provides that ''personally approved (in writing)'' means any writing, including in electronic form, that is made by the writer to signify the writer's assent and that reflects that it was intended as approval. The proposed rule reflects a straightforward, plain language interpretation of the term, and is consistent with the legislative history's requirement that ''specific approval'' be given. The plain language of the statute requires only personal approval in writing, not any particular form of signature or even any signature at all. The plain language of the statute also contains no requirement that the writing contain the supervisor's substantive analysis, nor does the statute require the supervisor to follow any specific procedure in determining whether to approve the penalty. Thus, for example, a supervisor's signature on a cover memorandum or a letter transmitting a report containing penalties is sufficient approval of the penalties contained in the report. The proposed rule is consistent with existing caselaw on this issue. *See PBBM-Rose Hill,* 900 F.3d at 213; *Deyo* v. *Commissioner,* 296 Fed. Appx. 157 (2d Cir. 2008); *Thompson* v. *Commissioner,* T.C. Memo. 2022–80; *Raifman* v. *Commissioner,* T.C. Memo. 2018–101.

C. Automatically Calculated Through Electronic Means

Section 6751(b)(2) exempts from the penalty approval requirements penalties under sections 6651, 6654, 6655, 6662(b)(9), and 6662(b)(10) and ''any other penalty automatically calculated through electronic means.'' The term is not defined in the statute and the legislative history only provides that approval is required of ''all non-computer generated penalties.''

Proposed § 301.6751(b)–1(a)(3)(vi) provides that a penalty is ''automatically calculated through electronic means'' if it is proposed by an IRS computer program without human involvement. Proposed § 301.6751(b)–1(a)(3)(vi) provides that a penalty is no longer considered ''automatically calculated through electronic means'' if a taxpayer responds to a computer-generated notice proposing a penalty and challenges the penalty or the amount of tax to which the penalty is attributable, and an IRS employee works the case.

Current IRS computer software, including but not limited to the Automated Correspondence Exam (ACE) program using Report Generation Software (RGS) and the Automated Underreporter (AUR) program, is capable of automatically proposing certain penalties to taxpayers without the involvement of an IRS examiner. Penalties that can be proposed in this way are then assessed without review by an IRS examiner. Requiring supervisory approval for these penalties would disrupt the automated process of determining a penalty and would not square with the statutory text requiring approval by the immediate supervisor of the ''individual'' making an initial penalty determination.

When an IRS computer program sends a taxpayer a notice proposing a penalty and the taxpayer responds to that notice, an IRS examiner often considers the taxpayer's response. If the taxpayer's response questions the validity of the penalty or the adjustments to which the penalty relates, and an examiner considers the response, any subsequent assessment of the penalty would not be based solely on the automatic calculation of the penalty by the computer program. Instead, it would be at least partially based on a choice made by an IRS employee as to whether the penalty is appropriate. Therefore, the exception for penalties automatically calculated through electronic means does not apply, and supervisory approval is required in that situation. This rule is consistent with the Tax Court's holding in *Walquist,* 152 T.C. at 73.

Proposed Applicability Dates

The proposed rules are proposed to apply to penalties assessed on or after the date of publication of the Treasury decision adopting the proposed rules as final regulations in the **Federal Register**.

Special Analyses

I. Regulatory Planning and Review

It has been determined that this notice of proposed rulemaking is not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

II. Regulatory Flexibility Act

Pursuant to the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this regulation will not have a significant economic impact on a substantial number of small entities. This certification is based on this regulation imposing no obligations on small entities and the effectiveness of the regulation in having supervisors ensure that penalties for violations of other provisions of tax law are appropriate and not used as a bargaining chip. Because only appropriate penalties will apply with the proper application of this regulation, the proposed regulations do not impose a significant economic impact on a substantial number of small entities.

Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for the Office of Advocacy of the Small Business Administration for comment on its impact on small business.

III. Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a State, local, or Tribal government, in the aggregate, or by the private sector, of $100 million in 1995 dollars, updated annually for inflation. This rule does not include any Federal mandate that may result in expenditures by State, local, or Tribal governments, or by the private sector in excess of that threshold.

IV. Executive Order 13132: Federalism

Executive Order 13132 (Federalism) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on State and local governments, and is not required by statute, or preempts State law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. These proposed regulations do not have federalism implications and do not impose substantial direct compliance costs on state and local governments or preempt State law within the meaning of the Executive order.

Comments and Requests for a Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the **ADDRESSES** heading. The Treasury Department and the IRS

request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing also are encouraged to be made electronically. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020–4, 2020–17 I.R.B 1, provides that, until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

Drafting Information

The principal author of these regulations is David Bergman of the Office of the Associate Chief Counsel (Procedure and Administration). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendment to the Regulations

Accordingly, the Treasury Department and the IRS propose to amend 26 CFR part 301 as follows:

PART 301—PROCEDURE AND ADMINISTRATION

■ **Paragraph 1.** The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805.

■ **Par. 2.** Section 301.6751(b)–1 is added to read as follows:

§ 301.6751(b)–1 Supervisory and higher level official approval for penalties.

(a) *Approval requirement*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, section 6751(b) of the Internal Revenue Code (Code) generally bars the assessment of a penalty unless the initial determination of the assessment of the penalty is personally approved (in writing) by the immediate supervisor of the individual making the initial determination or such higher level official as the Secretary of the Treasury or her delegate (Secretary) may designate. Paragraph (a)(2) of this section lists penalties not subject to section 6751(b)(1) and this paragraph (a)(1). Paragraph (a)(3) of this section provides definitions of terms used in section 6751(b) and this section. Paragraph (a)(4) of this section designates the higher level officials described in this paragraph (a)(1). Paragraphs (b), (c), and (d) of this section apply section 6751(b)(1) and this paragraph (a)(1) to penalties not subject to pre-assessment review in the Tax Court, penalties that are subject to pre-assessment review in the Tax Court, and penalties raised in the Tax Court after a petition, respectively. Paragraph (e) of this section provides examples illustrating the application of section 6751(b) and this section. Paragraph (f) of this section provides dates of applicability of this section.

(2) *Exceptions.* Under section 6751(b)(2), section 6751(b)(1) and this section do not apply to:

(i) Any penalty under section 6651, 6654, 6655, 6673, 6662(b)(9), or 6662(b)(10) of the Code; or

(ii) Any other penalty automatically calculated through electronic means.

(3) *Definitions.* For purposes of section 6751(b) and this section, the following definitions apply—

(i) *Penalty.* The term *penalty* means any penalty, addition to tax, or additional amount under the Code.

(ii) *Individual who first proposed the penalty.* Except as otherwise provided in this paragraph (a)(3)(ii), the *individual who first proposed the penalty* is the individual who section 6751(b)(1) and paragraph (a)(1) of this section reference as the individual making the initial determination of a penalty assessment. A proposal of a penalty can be made to either a taxpayer (or the taxpayer's representative) or to the individual's supervisor or designated higher level official. A proposal of a penalty, as defined in paragraph (a)(3)(i) of this section, to a taxpayer does not include mere requests for information relating to a possible penalty or inquiries of whether a taxpayer wants to participate in a general settlement initiative for which the taxpayer may be eligible, but does include offering the taxpayer an opportunity to agree to a particular penalty in a particular amount other than a penalty under a settlement initiative offered to a class of taxpayers. An individual who first proposed the penalty is not the individual whom section 6751(b)(1) and paragraph (a)(1) of this section reference as the individual making the initial determination of a penalty assessment if the assessment of the penalty is attributable to an independent proposal made by a different individual.

(iii) *Immediate supervisor.* The term *immediate supervisor* means any individual with responsibility to approve another individual's proposal of penalties, as defined in paragraph (a)(3)(i) of this section, without the proposal being subject to an intermediary's approval.

(iv) *Higher level official.* The term *higher level official* means any person designated under paragraph (a)(4) of this section as a higher level official authorized to approve a penalty for purposes of section 6751(b)(1).

(v) *Personally approved (in writing).* The term *personally approved (in writing)* means any writing, including in electronic form, made by the writer to signify the writer's assent. No signature or particular words are required so long as the circumstances of the writing reflect that it was intended as approval.

(vi) *Automatically calculated through electronic means.* A penalty, as defined in paragraph (a)(3)(i) of this section, is *automatically calculated through electronic means* if an IRS computer program automatically generates a notice to the taxpayer that proposes the penalty. If a taxpayer responds in writing or otherwise to the automatically-generated notice and challenges the proposed penalty, or the amount of tax to which the proposed penalty is attributable, and an IRS employee considers the response prior to assessment (or the issuance of a notice of deficiency that includes the penalty), then the penalty is no longer considered ''automatically calculated through electronic means.''

(4) *Higher level official.* Any person who has been directed by the Internal Revenue Manual or other assigned job duties to approve another individual's proposal of penalties before they are included in a pre-assessment notice prerequisite to United States Tax Court (Tax Court) jurisdiction, an answer, amended answer, or amendment to the answer to a Tax Court petition, or are assessed without need for such inclusion, is designated as a higher level official authorized to approve the penalty for purposes of section 6751(b)(1).

(b) *Penalties not subject to pre-assessment review in the Tax Court.* The requirements of section 6751(b)(1) and paragraph (a)(1) of this section are satisfied for a penalty that is not subject to pre-assessment review in the Tax Court if the immediate supervisor of the individual who first proposed the penalty personally approves the penalty in writing before the penalty is assessed. Alternatively, a person designated as a higher level official as described in paragraph (a)(4) of this section may

provide the approval otherwise required by the immediate supervisor.

(c) *Penalties subject to pre-assessment review in the Tax Court.* The requirements of section 6751(b)(1) and paragraph (a)(1) of this section are satisfied for a penalty that is included in a pre-assessment notice that provides a basis for Tax Court jurisdiction upon timely petition if the immediate supervisor of the individual who first proposed the penalty personally approves the penalty in writing on or before the date the notice is mailed. Alternatively, a person designated as a higher level official as described in paragraph (a)(4) of this section may provide the approval otherwise required by the immediate supervisor. Examples of a pre-assessment notice described in this paragraph (c) include a statutory notice of deficiency under section 6212 of the Code, a notice of final partnership administrative adjustment under former section 6223 of the Code, and a notice of final partnership adjustment under section 6231 of the Code.

(d) *Penalties raised in the Tax Court after a petition.* The requirements of section 6751(b)(1) and paragraph (a)(1) of this section are satisfied for a penalty that the Commissioner raises in the Tax Court after a petition (*see* section 6214(a) of the Code) if the immediate supervisor of the individual who first proposed the penalty personally approves the penalty in writing no later than the date on which the Commissioner requests that the court determine the penalty. Alternatively, a person designated as a higher level official as described in paragraph (a)(4) of this section may provide the approval otherwise required by the immediate supervisor.

(e) *Examples.* The following examples illustrate the rules of this section.

(1) *Example 1.* In the course of an audit regarding a penalty not subject to pre-assessment review in the Tax Court, Revenue Agent A concludes that Taxpayer T should be subject to the penalty under section 6707A of the Code for failure to disclose a reportable transaction. A sends T a letter giving T the options to agree to the penalty; submit additional information to A about why the penalty should not apply; or request within 30 days that the matter be sent to the Independent Office of Appeals (Appeals) for consideration. After T requests that Appeals consider the case, A prepares the file for transmission, and B (who is A's immediate supervisor, as defined in paragraph (a)(3)(iii) of this section) signs a cover memorandum informing Appeals of the Office of Examination's proposed penalty and asking Appeals to consider it. The Appeals Officer upholds the penalty, and it is assessed. The requirements of section 6751(b)(1) are satisfied because B's signature on the cover memorandum is B's personal written assent to the penalty proposed by A and was given before the penalty was assessed.

(2) *Example 2.* In the course of an audit, Revenue Agent A concludes that Taxpayer T should be subject to an accuracy-related penalty for substantial understatement of income tax under section 6662(b)(2). A sends T a Letter 915, Examination Report Transmittal, along with an examination report that includes the penalty. The Letter 915 gives T the options to agree to the examination report; provide additional information to be considered; discuss the report with A or B (who is A's immediate supervisor, as defined in paragraph (a)(3)(iii) of this section); or request a conference with an Appeals Officer. T agrees to assessment of the penalty and signs the examination report to consent to the immediate assessment and collection of the amounts shown on the report. B provides written supervisory approval of the penalty after T signs the examination report, but before the penalty is assessed. Paragraph (b) of this section applies because T's agreement to assessment of the penalty excepts it from pre-assessment review in the Tax Court. Because B provided written supervisory approval before assessment of the penalty, the requirements of section 6751(b) are satisfied.

(3) *Example 3.* In the course of an audit of Taxpayer T by a team of revenue agents, Revenue Agent A concludes that T should be subject to an accuracy-related penalty for negligence under sections 6662(b)(1) and 6662(c). Supervisor B is the issue manager and is assigned the duty to approve the Notice of Proposed Adjustment for any penalty A would propose. A reports to B, but B is not responsible for the overall management of the audit of T. C is the case manager of the team auditing T and is responsible for the overall management of the audit of T. C may assign tasks to A and other team members, and has responsibility for approving any examination report presented to T.

(i) Only B approves the penalty in writing before the mailing to T of a notice of deficiency that includes the penalty. Under paragraph (a)(3)(iii) of this section, B qualifies as the immediate supervisor of A with respect to A's penalty proposal, and the requirements of section 6751(b)(1) are met.

(ii) Only C approves the penalty in writing before the mailing to T of a notice of deficiency that includes the penalty. Because C has responsibility to approve A's proposal of the penalty as part of approving the examination report, C qualifies as a higher level official designated under paragraph (a)(4) of this section to approve the penalty proposed by A, and the requirements of section 6751(b)(1) are met.

(4) *Example 4.* In the course of an audit, Revenue Agent A concludes that Taxpayer T should be subject to a penalty for negligence under section 6662(c). A recommends the penalty to her immediate supervisor B, who thinks more factual development is needed to support the penalty but must close the audit immediately due to the limitations period on assessment expiring soon. The IRS issues a statutory notice of deficiency without the penalty and T petitions the Tax Court. In reviewing the case file and conducting discovery, IRS Chief Counsel Attorney C concludes that the facts support imposing a negligence penalty under section 6662(c). Attorney C proposes to her immediate supervisor, D, that the penalty should apply and should be raised in an Answer pursuant to section 6214(a). D agrees and signs the Answer that includes the penalty before it is filed. The section 6662(c) penalty at issue is subject to pre-assessment review in the Tax Court and was raised in the Tax Court after a petition under paragraph (d) of this section. Therefore, written supervisory approval under paragraph (d) of this section was required prior to filing the written pleading that includes the penalty. Attorney C is the individual who first proposed the penalty for purposes of section 6751(b)(1) and paragraphs (d) and (a)(3)(ii) of this section, and she secured timely written supervisory approval from D, the immediate supervisor, as defined in paragraph (a)(3)(iii) of this section, so the requirements of section 6751(b)(1) are met. Revenue Agent A did not make the initial determination of the penalty assessment because any assessment would not be attributable to A's proposal but would be based on the independent proposal of Attorney C raised pursuant to section 6214(a).

(5) *Example 5.* The IRS's Automated Underreporter (AUR) computer program detects a discrepancy between the information received from a third party and the information contained on Taxpayer T's return. AUR automatically generates a CP2000, Notice of Underreported Income, that includes an adjustment based on the unreported

income and a proposed penalty under section 6662(d) that is mailed to T. The CP2000 gives T 30 days to respond to contest the proposed adjustments and the penalty. T submits a response to the CP2000, asking only for more time to respond. More time is granted but no further response is received from T, and a statutory notice of deficiency that includes the adjustments and the penalty is automatically generated and issued to T. The section 6662(d) penalty at issue is automatically calculated through electronic means under paragraphs (a)(2)(ii) and (a)(3)(vi) of this section. The penalty was proposed by the AUR computer program, which generated a notice to T that proposed the penalty. Although T submitted a response to the CP2000, the response did not challenge the proposed penalty, or the amount of tax to which the proposed penalty is attributable. Therefore, the penalty was automatically calculated through electronic means and written supervisory approval was not required.

(f) *Applicability date.* The rules of this section apply to penalties assessed on or after [the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register**].

Douglas W. O'Donnell,

Deputy Commissioner for Services and Enforcement.

[FR Doc. 2023–07232 Filed 4–10–23; 8:45 am]

BILLING CODE 4830–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R09–OAR–2018–0160; FRL–10867–01–R9]

Air Plan Revisions; California; Yolo-Solano Air Quality Management District

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to partially approve and partially disapprove, under the Clean Air Act (CAA or ''Act''), a revision to the California state implementation plan (SIP). This revision addresses reasonably available control technology (RACT) requirements for the 2008 8-hour ozone national ambient air quality standards (NAAQS or ''standards'') in the portion of the Sacramento Metropolitan nonattainment area that is subject to the jurisdiction of the Yolo-Solano Air Quality Management District (YSAQMD). We are taking comments on this proposal and plan to follow with a final action.

DATES: Comments must be received on or before May 11, 2023.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R09–OAR–2018–0160 at *https://www.regulations.gov*. For comments submitted at *Regulations.gov,* follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from *Regulations.gov*. The EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. The EPA will generally not consider comments or comment contents located outside of the primary submission (*i.e.,* on the web, cloud, or other file sharing system). For additional submission methods, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section. For the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit *https://www.epa.gov/dockets/commenting-epa-dockets*. If you need assistance in a language other than English or if you are a person with a disability who needs a reasonable accommodation at no cost to you, please contact the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

FOR FURTHER INFORMATION CONTACT: Eugene Chen, EPA Region IX, 75 Hawthorne St., San Francisco, CA 94105. By phone: (415) 947–4304 or by email at *chen.eugene@epa.gov*.

SUPPLEMENTARY INFORMATION: Throughout this document, ''we,'' ''us,'' and ''our'' refer to the EPA.

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I. The State's Submittal

A. What document did the State submit?

Table 1 lists the document addressed by this proposal with the dates that it was adopted by the local air agency and submitted by the California Air Resources Board (CARB).

TABLE 1—SUBMITTED DOCUMENT

Local agency	Document	Adopted	Submitted
YSAQMD	Reasonably Available Control Technology (RACT) State Implementation Plan (SIP) Analysis for the 2008 Federal Ozone Standard (''2017 RACT SIP'').	09/13/2017	11/13/2017

The EPA determined that the negative declarations portion of the 2017 RACT SIP met the SIP submittal completeness criteria in 40 CFR part 51, Appendix V on April 11, 2018.[1] The EPA determined that the remaining elements of the 2017 RACT SIP met the completeness criteria on August 23, 2018.[2]

[1] Letter dated April 11, 2018, from Elizabeth J. Adams, Acting Director, Air Division, EPA Region IX, to Richard Corey, Executive Officer, CARB.

[2] Letter dated August 23, 2018, from Elizabeth J. Adams, Acting Director, Air Division, EPA Region IX, to Richard Corey, Executive Officer, CARB.