REFORM PENALTY AND INTEREST PROVISIONS

Legislative Recommendation #28

Convert the Estimated Tax Penalty Into an Interest Provision to Properly Reflect Its Substance

SUMMARY

- *Problem:* If a self-employed individual or business fails to pay sufficient estimated tax during the year, the IRS will impose an addition to tax that is computed as an interest charge but classified as a penalty. The term "penalty" implies that the individual or business has engaged in improper conduct, yet small businesses often experience significant fluctuations in their incomes and expenses from year to year that make it difficult for them to accurately estimate their tax liabilities.
- *Solution:* Reclassify the addition to tax for underpaying estimated tax as an interest charge (rather than a penalty).

PRESENT LAW

Through the combination of wage withholding and estimated tax payments, the IRC aims to ensure that federal income and payroll taxes are paid ratably throughout the year. IRC § 3402 generally requires employers to withhold tax on wages paid to employees. For many employees, wage withholding covers their tax liabilities in full. But taxpayers who are self-employed and taxpayers who have investment income typically are not subject to withholding on this "non-wage" income and instead must make estimated tax payments.

IRC § 6654 generally requires individual taxpayers to pay at least the lesser of (i) 90 percent of the tax shown on a tax return for the current tax year or (ii) 100 percent of the tax shown on a tax return for the preceding tax year (reduced by the amount of wage withholding) in four installment payments due on April 15, June 15, September 15, and January 15 of the following tax year.[1] IRC § 6655 generally requires corporate taxpayers to pay at least 100 percent of the tax shown on a tax return for the current tax year or, in some cases, 100 percent of the tax shown on a tax return for the preceding tax year in four installment payments due on April 15, June 15, September 15, and December 15.

IRC §§ 6654(a) and 6655(a) provide that a taxpayer who fails to pay sufficient estimated tax will be liable for a penalty that is computed by applying (i) the underpayment rate established under IRC § 6621(ii) to the amount of the underpayment (iii) for the period of the underpayment. IRC § 6621 is an interest provision. Therefore, the additional amount a taxpayer owes for failing to pay sufficient estimated tax is computed as an interest charge, even though it is denominated as a "penalty."

---

1 If the adjusted gross income of a taxpayer for the preceding tax year exceeds $150,000, "110 percent" is substituted for "100 percent" in applying clause (ii). IRC § 6654(d)(1)(C).

REASONS FOR CHANGE

For a variety of reasons, taxpayers often have difficulty predicting how much tax they will owe. Self-employed taxpayers or taxpayers who own small businesses may experience significant fluctuations in their income and expenses from year to year. Taxpayers with sizable investment incomes may experience significant fluctuations. Substantial changes in tax laws, such as those that took effect in 2018, may affect tax liabilities in ways that taxpayers do not fully anticipate. As a result, millions of taxpayers do not satisfy the requirements of IRC § 6654 and are liable for penalties each year, even though many have attempted to comply. Corporate taxpayers face similar challenges.

The term "penalty" carries negative connotations, and the National Taxpayer Advocate believes it should be reserved for circumstances in which a taxpayer has failed to make reasonable efforts to comply with the law. Thus, she agrees with the assessment of the House Committee on Ways and Means when it wrote during a previous Congress: "Because the penalties for failure to pay estimated tax are calculated as interest charges, the Committee believes that conforming their title to the substance of the provision will improve taxpayers' perceptions of the fairness of the estimated tax payment system."[2]

The Office of the Taxpayer Advocate has conducted research studies that have found "tax morale" has an impact on tax compliance.[3]

When the IRS imposes a "penalty" on a taxpayer, there is a strong implication that the taxpayer has engaged in improper conduct. For that reason, penalties generally should be subject to waiver for reasonable cause. Under current law, the estimated tax penalty cannot be waived. Thus, an individual who experiences a fire, flood, medical emergency, or other exigent circumstance that precludes payment by the estimated tax deadline will still be "penalized." This characterization is not good for "tax morale." If the addition to tax is recharacterized as an interest charge designed solely to compensate the government for the time value of money, it would be easier to justify imposing it without waiver.

RECOMMENDATIONS

- Recharacterize the penalty for failure to pay sufficient estimated tax as an interest charge – which is the basis for the calculation of the addition to tax. Toward that end, relocate IRC §§ 6654 and 6655 from part I of subchapter A of chapter 68 to the end of subchapter C of chapter 67 and make conforming modifications to the headings and text.[4]
- If a failure to pay sufficient estimated tax continues to be treated as a penalty, enact a reasonable cause exception so that the penalty will not apply when a payment is late due to circumstances beyond the taxpayer's control, such as a fire, flood, or medical condition that makes compliance impractical.[5]

---

2 H.R. Rep. No. 108-61, at 23-24 (2003).

3 *See* National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, at 1 (Research Study: *Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2013-ARC_VOL-2-1.pdf.

4 For legislative language generally consistent with this recommendation, see Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003).

5 For more detail on our recommendation to enact a reasonable cause exception if the additional charge for failure to pay estimated tax remains a penalty, see National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, at 34 (Research Study: *A Framework for Reforming the Penalty Regime*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/08_tas_arc_vol2.pdf.

Legislative Recommendation #29

Apply One Interest Rate Per Estimated Tax Underpayment Period

SUMMARY

- *Problem:* The due dates for estimated tax payments and the dates on which the interest rate for estimated tax underpayments are adjusted do not align. As a result, more than one interest rate may apply for a single estimated tax underpayment period, causing unnecessary complexity and burden for taxpayers.
- *Solution:* Apply the interest rate established on the first day of a calendar quarter to any underpayment that begins during that calendar quarter.

PRESENT LAW

IRC § 6654(c) provides that taxpayers who make estimated tax payments must submit those payments on or before April 15, June 15, September 15, and January 15 of the following tax year. Similarly, IRC § 6655(c) provides that corporations required to make installment payments must submit those payments on or before April 15, June 15, September 15, and December 15.[1] Failure to make required estimated tax payments results in a penalty that is determined by the underpayment rate, the amount of the underpayment, and the period of the underpayment.

Under IRC § 6621(a)(2), the underpayment rate is equal to the federal short-term interest rate, plus three percentage points. Under IRC § 6621(b)(1), the federal short-term interest rate is determined quarterly by the Secretary of the Treasury. If the Secretary determines a change in the federal short-term interest rate, the change is effective on January 1, April 1, July 1, and October 1.

REASONS FOR CHANGE

Under current law, more than one interest rate may apply for a single estimated tax underpayment period. Calculations are typically required to cover 15-day periods. For example, if a taxpayer fails to make an estimated tax payment due June 15 and the Secretary determines a change in the federal short-term interest rate effective July 1, one interest rate would apply for the period from June 16 through June 30, and the rate would be subject to adjustment on July 1. A change in interest rate just 15 days after the estimated tax underpayment period begins causes unnecessary complexity and burden for taxpayers. This complexity and burden would be reduced if a single interest rate were applied for each period.

RECOMMENDATION

- Amend IRC §§ 6654 and 6655 to provide that the underpayment rate for any day during an estimated tax underpayment period shall be the underpayment rate established by IRC § 6621 for the first day of the calendar quarter in which the underpayment period begins.[2]

---

1 To make compliance easier, the National Taxpayer Advocate has recommended that Congress set the estimated tax payment deadlines 15 days after the end of each calendar quarter (April 15, July 15, October 15, and January 15). *See* National Taxpayer Advocate 2023 Purple Book 11, *Adjust Individual Estimated Tax Payment Deadlines to Occur Quarterly*, https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2023/01/ARC22_PurpleBook_02_ImproveFiling_5.pdf.

2 For legislative language generally consistent with this recommendation, see Taxpayer Bill of Rights Enhancement Act of 2017, S. 793, 115th Cong. § 305 (2017). If this proposal is adopted, repeal of IRC § 6621(b)(2)(B) may be required. *See also* H.R. Rep. No. 108-61, at 25 (2003); Taxpayer Protection and IRS Accountability Act, H.R. 1528, 108th Cong. § 101 (2003).

Legislative Recommendation #30

Pay Interest to Taxpayers on Excess Payments of Estimated Tax to the Same Extent Taxpayers Must Pay a Penalty on Underpayments of Estimated Tax

SUMMARY

- *Problem:* The government charges taxpayers interest for underpayments of estimated tax, but it does not pay taxpayers interest for overpayments of estimated tax. In both perception and reality, this incongruity is one-sided and unfair.
- *Solution:* Require the government pay interest on overpayments of estimated tax to the same extent as it charges taxpayers interest for underpayments of estimated tax.

PRESENT LAW

Through wage withholding and estimated tax payments, Congress aims to ensure that taxes are prepaid ratably throughout the year. IRC § 3402 generally requires employers to withhold tax on wages paid to employees. IRC § 6654(g) provides that income taxes withheld from wages are deemed paid in equal amounts on the estimated tax installment due dates throughout the year unless the taxpayer establishes the dates on which the amounts were withheld.

IRC §§ 6654 and 6655 generally require individual and corporate taxpayers, respectively, to prepay their tax in four installment payments. A taxpayer who fails to pay enough estimated tax will be liable for a "penalty" determined at a rate that is roughly equal to the interest rate on an underpayment under IRC § 6621 beginning on the date the estimated tax payment was due. However, the government does not pay interest on excess estimated tax payments made by taxpayers.

IRC § 6621(a) provides that the overpayment and underpayment rates are generally the federal short-term rate, plus three percentage points (or two percentage points for overpayments by corporations).[1]
IRC § 6611(b)(2) provides that the government is, in practice, generally entitled to a grace period of up to 30 days before it is required to pay interest. IRC § 6611(b)(3) provides that if a return is late, the government does not pay interest for any day before it is filed.

REASONS FOR CHANGE

There are at least three good reasons for the government to pay interest on excess estimated tax payments. First, it would be reciprocal and fair. The government effectively charges interest on estimated tax underpayments.[2] It seems one-sided that it does not pay interest on estimated tax overpayments.

---

1 The overpayment rate for corporations is further reduced to the extent their overpayments exceed $10,000, and corporations are charged a higher underpayment rate to the extent their underpayments exceed $100,000. IRC § 6621(a)(1)(B), (c)(1). To the extent that interest is payable on equivalent underpayments and overpayments made by the same taxpayer, the net rate of interest is zero. IRC § 6621(d).

2 Technically, amounts the government charges for tax underpayments are denominated as penalties pursuant to IRC §§ 6654(a) (individuals) and 6655 (corporations), but the amounts are computed by reference to IRC § 6621, which is an interest provision. For a recommendation to convert the estimated tax penalty into an interest provision, see *Convert the Estimated Tax Penalty into an Interest Provision to Properly Reflect Its Substance*, *supra*.

Second, paying interest could improve voluntary tax compliance. Tax professionals routinely advise taxpayers that it is foolish to make excess tax payments because they are, in effect, giving the government an interest-free loan.[3] But it is often difficult for taxpayers to estimate exactly how much they should pay.[4]

Notably, taxpayers who owe a balance upon filing are more likely than others to understate their tax liabilities.[5] In tax year 2021, moreover, nearly 33 percent of such taxpayers with a balance due failed to pay it in full.[6] Thus, if encouraging excess estimated tax payments reduces underpayments, it should improve both reporting and payment compliance.

Third, paying interest would provide an additional incentive for taxpayers to file timely to avoid forfeiting the interest on a late-filed return pursuant to IRC § 6611(b)(3). Therefore, it might also serve to improve filing compliance.

RECOMMENDATION

- Amend IRC § 6621 to pay interest on excess estimated tax payments at the applicable overpayment rate beginning on the due date of the payments. If Congress wishes to minimize the budget impact of this recommendation, it could cap the excess estimated tax payment amount that will bear interest for each taxpayer on an annual basis.

3 *See*, *e.g.*, Aimee Picchi, *The Great Tax Refund Debate: Is It Financially Wiser to Get a Big Refund — or Nothing?*, CBS News MoneyWatch, Mar. 21, 2023, https://www.cbsnews.com/news/tax-refund-debate-big-refund-zero-refund-cbs-news-explains.

4 *See*, *e.g.*, Wage and Investment Division (W&I), Research Group 5, Project No. 5-03-06-2-028N, Experimental Tests of Remedial Actions to Reduce Insufficient Prepayments: Effectiveness of 2002 Letters 7 (Jan. 16, 2004), *citing* W&I Customer Research Group 5, Causes and Potential Treatments for Underwithholding and Insufficient Estimated Payments (2000) (reporting a survey found approximately two-thirds of individual taxpayers with balances due did not plan to owe a balance upon filing); Caroline Bruckner, *Shortchanged: The Tax Compliance Challenges of Small Business Operators Driving the On-Demand Platform Economy* 12 (May 2016), https://ssrn.com/abstract=2784243 or http://dx.doi.org/10.2139/ssrn.2784243 (reporting on a survey that found 43 percent of gig workers had not set aside money to pay their taxes and did not know how much they owed).

5 Charles Christian, Phoenix District Office of Research and Analysis, *The Association Between Underwithholding and Noncompliance* 1-2 (July 14, 1995) (finding that "[o]n average, understated tax on balance due returns is ten times as large as understated tax on other returns").

6 IRS, Compliance Data Warehouse, Individual Returns Transaction File and Individual Master File Status History tables (July 27, 2022).

Legislative Recommendation #31

Extend the Reasonable Cause Defense for the Failure-to-File Penalty to Taxpayers Who Rely on Return Preparers to E-File Their Returns

SUMMARY

- *Problem:* A taxpayer who fails to file a tax return by the deadline is subject to a late-filing penalty unless the taxpayer can demonstrate "reasonable cause" for the failure. In 1985, the Supreme Court held that reliance on a tax return preparer to file a return did not alone constitute "reasonable cause" for a late-filing penalty because the taxpayer had a responsibility to ensure the deadline was met. While that conclusion may be appropriate in the context of paper-filed returns, where a taxpayer can mail the return himself, it is not appropriate in the context of e-filed returns, where the preparer typically submits the return and the taxpayer cannot easily verify whether a return has been filed and accepted.
- *Solution:* Allow taxpayers who rely on tax return preparers to e-file their returns to receive "reasonable cause" relief from the failure-to-file penalty.

PRESENT LAW

IRC § 6651 imposes an addition to tax when a taxpayer fails to file a return by the due date, unless the taxpayer can show the failure was due to reasonable cause and not due to willful neglect (the "failure-to-file penalty").[1] Reasonable cause exists when a taxpayer has exercised ordinary business care and prudence but was unable to file the return within the prescribed time.[2]

In *United States v. Boyle*, the Supreme Court held that a taxpayer's reliance on an agent to file a return did not constitute "reasonable cause" for late filing.[3] In *Boyle*, the tax return at issue was filed on paper. In 2023, the U.S. Court of Appeals for the Eleventh Circuit ruled that the *Boyle* holding applies in the context of e-filed returns.[4] This was the first time a federal appeals court had decided the issue. Several U.S. district courts have similarly held that *Boyle* applies to e-filing.[5]

In the IRS Restructuring and Reform Act of 1998, Congress adopted a policy that "paperless filing should be the preferred method and most convenient means of filing Federal tax and information returns" and gave the Secretary broad authority to incentivize taxpayers to file returns electronically.[6] IRC § 6011(e)(3) authorizes the Secretary to require tax return preparers to file returns electronically unless they reasonably expect to file ten or fewer individual income tax returns during a calendar year. Treas. Reg. § 301.6011-7 implements this requirement.

---

1 IRC § 6651(a)(1). The penalty amount is five percent of the tax due for each month or partial month the return is late, up to a maximum of 25 percent. The penalty increases to 15 percent per month up to a maximum of 75 percent if the failure to file is fraudulent. IRC § 6651(f).

2 Treas. Reg. § 301.6651-1(c)(1). *See also* Internal Revenue Manual (IRM) 20.1.1.3.2, Reasonable Cause (Nov. 21, 2017), https://www.irs.gov/irm/part20/irm_20-001-001r.

3 *Boyle*, 469 U.S. 241 (1985).

4 *Lee v. United States*, No. 22-10793, 2023 WL 6979257 (11th Cir. Oct. 24, 2023).

5 *See, e.g.*, *Haynes v. United States*, 119 A.F.T.R.2d (RIA) 2202 (W.D. Tex. 2017), *vacated and remanded*, 760 F. App'x 324 (5th Cir. 2019); *Intress v. United States*, 404 F. Supp. 3d 1174 (M.D. Tenn. 2019); *Oosterwijk v. United States*, No. CCB-21-1151, 2022 WL 255348 (D. Md. Jan. 27, 2022).

6 Pub. L. No. 105-206, § 2001, 112 Stat. 685, 723 (1998); IRC § 6011(f).

REASONS FOR CHANGE

At the time *Boyle* was decided, all tax returns were filed on paper. Taxpayers generally could fulfill the basic responsibility of mailing returns to the IRS themselves, even when they engaged tax professionals to prepare them. In ruling that the taxpayer in *Boyle* was not entitled to "reasonable cause" abatement as a matter of law, the Supreme Court stated that "[i]t requires no special training or effort to ascertain a deadline and make sure that it is met."[7]

In effect, the *Boyle* decision concluded that the duty to file a return is non-delegable. While that rule might make sense in a paper-filing context, it is not reasonable to apply it in the e-filing context. Today, most taxpayers effectively delegate the electronic filing of their returns to preparers or use software providers. Particularly when a taxpayer uses a preparer, the taxpayer is generally several steps removed from the filing process. When a preparer e-files a tax return, he or she must transmit it through an electronic return originator (typically, a software company) to the IRS. Thus, there are four parties sequentially involved in this chain: (i) the taxpayer; (ii) the preparer; (iii) the software company; and (iv) the IRS. If the IRS rejects an e-filed tax return, it generally sends a notification back through the software company to the preparer, but it will not notify the taxpayer directly.[8] In these circumstances, a taxpayer cannot easily ensure his or her return has been properly submitted by the preparer and accepted by the IRS. In addition, the IRS rejects e-filed returns before processing for a wide variety of reasons, and unlike with paper filing, a return that is e-filed with the IRS but rejected before processing is not treated as timely filed.

While Treasury regulations generally require tax return preparers to e-file client returns, the regulations exempt preparers from the e-filing requirement if a taxpayer provides the preparer with "a hand-signed and dated statement" that says the taxpayer chooses to file a paper return.[9] This "opt-out" may reduce a taxpayer's risk of incurring a failure-to-file penalty. In light of the congressional directive to incentivize e-filing, it makes little sense for the government, in effect, to tell taxpayers they can reduce their risk of incurring a failure-to-file penalty by filing their returns on paper.[10]

The Eleventh Circuit's decision, *Lee v. United States*, highlights the unfairness of applying the *Boyle* rule in the context of e-filing. In many ways, the taxpayer in *Lee* was a model taxpayer. A surgeon with significant earnings, he hired a certified public accountant (CPA) to prepare and file his complicated returns for 2014-2016. During each of those years, he ensured the returns were timely prepared and verified, and he sent a signed Form 8879, *IRS e-file Signature Authorization*, to the CPA before the filing deadline. Additionally, he made significant overpayments of tax each year to avoid an underpayment penalty, choosing to apply the overpayments to the following year's liability. However, his CPA never filed the returns, apparently because they were too complex for the filing software, and he did not tell the taxpayer. The CPA also did not provide the IRS with the taxpayer's correct mailing address, so the taxpayer did not receive any notices. The taxpayer was completely unaware that his returns had not been filed until the IRS visited his office in 2018. Because the CPA had not filed the returns, the IRS did not apply the 2014 overpayment to subsequent years, leaving the taxpayer with tax liabilities for 2015 and 2016 and approximately $70,000 in penalties.[11]

---

7 *Boyle*, 469 U.S. at 252.

8 IRM 3.42.5.7.2(1), Form 1040 Online Filing (Oct. 10, 2018), https://www.irs.gov/irm/part3/irm_03-042-005r.

9 Treas. Reg. § 301.6011-7(a)(4)(ii).

10 For context, over half of all individual income tax returns filed during 2023 were prepared by professionals and e-filed (more than 84 million returns). *See* IRS, 2023 Filing Season Statistics (week ending Oct. 20, 2023), https://www.irs.gov/newsroom/filing-season-statistics-for-week-ending-oct-20-2023.

11 The penalties were for failure to file a return under IRC § 6651(a)(1) and failure to pay tax under IRC § 6651(a)(2). The Eleventh Circuit noted that it and other courts have held that *Boyle* also applies to the failure-to-pay penalty. *Lee v. United States*, No. 22-10793, 2023 WL 6979257, at *3 (11th Cir. Oct. 24, 2023).

After filing a refund claim with the IRS, which was denied, the taxpayer brought suit in U.S. district court, arguing there was reasonable cause for the failure to file due to his reliance on the CPA. The district court held that the *Boyle* rule applied to e-filed returns,[12] and the Eleventh Circuit agreed. The taxpayer made several arguments as to why the penalties should be abated, including that once he had sent the Form 8879 to the CPA, the burden was on the CPA to file the returns and the failure to do so was beyond the taxpayer's control. However, the Eleventh Circuit rejected the taxpayer's arguments, concluding there was no basis to treat e-filed returns differently from paper-filed returns under the Supreme Court's *Boyle* decision. One judge wrote a concurring opinion "to highlight the risks facing taxpayers" due to *Boyle*'s application in the e-filing context, noting the fact that the taxpayer owed taxes and penalties to the IRS despite his otherwise prudent actions "is reflective of the current e-filing system and the precarious situation in which it places taxpayers who rely on" preparers.[13]

Prior to the Eleventh Circuit's decision in *Lee*, several U.S. district courts had similarly held that *Boyle* applied in the e-filing context.[14] As in *Lee*, the facts of these cases illustrate the unfairness of *Boyle*'s application. In *Haynes v. United States*, a married couple employed a CPA to prepare and file their joint tax return.[15] The preparer timely e-filed the return, but the IRS did not accept it for processing because a taxpayer identification number was listed on the wrong line. The preparer did not receive a rejection notice from the IRS. The preparer notified the taxpayers that their return had been timely filed. Ten months later, the IRS notified the taxpayers that their return had not been received and asserted the failure-to-file penalty. The taxpayers requested penalty abatement for reasonable cause, asserting they had sought to file their return timely, their preparer had transmitted the return timely, and both the preparer and the taxpayers believed the return had been received. The taxpayers filed suit in district court, arguing that *Boyle* should not apply in the context of electronic filing because the complexities of e-filing vastly exceed the comparatively simple and verifiable task of mailing a return. The district court concluded that the holding in *Boyle* applies to e-filed returns to the same extent as paper-filed returns and ruled in the government's favor as a matter of law.[16]

The issue in these cases is not whether the failure-to-file penalty is applicable in the first instance. Based on the wording of the statute, there is no doubt the penalty is applicable if the return is filed late. Rather, the issue is whether taxpayers are entitled to request abatement of the penalty on "reasonable cause" grounds. Because the *Boyle* decision used relatively sweeping language, lower courts have seemingly felt bound to apply its holding in the context of e-filed returns, notwithstanding the significant differences between paper filing and electronic filing.

While the bright-line rule embodied in *Boyle* is convenient for the IRS to administer, the nearly automatic assessment of the failure-to-file penalty for e-filed returns deemed late (often where the return was submitted timely by the taxpayer or preparer but rejected by the IRS before processing) is grossly unfair and undermines

---

12 *Lee v. United States*, No. 8:21-cv-1579-TPB-AAS, 2022 WL 376066 (M.D. Fla. Feb. 8, 2022).

13 *Lee v. United States*, No. 22-10793, 2023 WL 6979257, at *8 (11th Cir. Oct. 24, 2023) (Lagoa, J., concurring). The judge also noted that under *Boyle*'s bright line rule, it was not clear whether the taxpayer would have avoided penalties even if the CPA had affirmatively misrepresented that the returns were timely e-filed. *See id*. at *9.

14 *See*, *e.g.*, *Haynes v. United States*, 119 A.F.T.R.2d (RIA) 2202 (W.D. Tex. 2017), *vacated and remanded*, 760 F. App'x 324 (5th Cir. 2019); *Intress v. United States*, 404 F. Supp. 3d 1174 (M.D. Tenn. 2019); *Oosterwijk v. United States*, No. CCB-21-1151, 2022 WL 255348 (D. Md. Jan. 27, 2022).

15 119 A.F.T.R.2d (RIA) 2202 (W.D. Tex. 2017).

16 On appeal, the U.S. Court of Appeals for the Fifth Circuit vacated and remanded the district court's decision on different grounds and did not take a position on the *Boyle* issue. *Haynes v. United States*, 760 F. App'x 324 (5th Cir. 2019). *See also* Keith Fogg, *Reliance on Preparer Does Not Excuse Late E-Filing of Return*, Procedurally Taxing Blog, Tax Notes Fed. (Sept. 4, 2019), https://www.taxnotes.com/procedurally-taxing/reliance-preparer-does-not-excuse-late-e-filing-return/2019/09/04/7h5vr.

the congressional policy that e-filing be encouraged. The American College of Tax Counsel shares this view and submitted a compelling *amicus curiae* brief in the appeal of the *Haynes* decision.[17]

RECOMMENDATION

- Amend IRC § 6651 to specify that reasonable cause relief may be available to taxpayers that use return preparers to submit their returns electronically and direct the Secretary to issue regulations specifying what constitutes ordinary business care and prudence for e-filed returns.

17 *See* Brief of American College of Tax Counsel (Nov. 27, 2017), https://www.actconline.org/wp-content/uploads/2018/02/ACTC_Amicus_Brief_Haynes.pdf.

Legislative Recommendation #32

Authorize a Penalty for Tax Return Preparers Who Engage in Fraud or Misconduct by Altering a Taxpayer's Tax Return

SUMMARY

- *Problem:* When a corrupt tax return preparer steals from a client or from the public fisc, the government's enforcement options are limited. The Department of Justice (DOJ) may bring criminal charges, but it lacks the resources to do so except in cases of widespread, high-dollar schemes. The alternative is civil penalties, but the law currently does not authorize meaningful amounts.
- *Solution:* Authorize the IRS to impose larger civil penalties in a wider range of cases.

PRESENT LAW

IRC § 6694(b) authorizes the IRS to impose a penalty when a tax return preparer has understated a tax liability on a "return or claim for refund" and the understatement is due to willful or reckless conduct.[1] IRC § 6695(f) imposes a $500 penalty (adjusted for inflation) on a preparer who negotiates a taxpayer's refund check.[2]

REASONS FOR CHANGE

TAS has handled hundreds of cases involving return preparer fraud or misconduct. In the most common scenario, a taxpayer visits a preparer to get his tax return prepared, the preparer completes the return while the taxpayer is present, and the preparer alters the return after the taxpayer leaves before submitting it to the IRS. In some cases, the items of income, deduction, and credit are accurate, but the preparer alters the direct deposit routing information so that the entire refund is directed to the preparer's account instead of the taxpayer's account. In other cases, the preparer increases the refund amount and elects a "split refund,"[3] so the taxpayer receives the refund amount he expects, and the additional amount goes to the preparer.

The DOJ may bring criminal charges against preparers who alter tax returns, but resource constraints generally preclude criminal charges except in cases of widespread schemes. In addition, the dollar amount of a refund obtained by a preparer in these cases often will determine whether DOJ pursues an erroneous refund suit under IRC § 7405, also due to resource constraints.[4] It is therefore important that the IRS has the authority to impose sizeable civil penalties against preparers who alter tax returns without the knowledge or consent of taxpayers.

---

1 The amount of the penalty is per return or claim for refund and is equal to the greater of $5,000 or 75 percent of the income derived (or to be derived) by the tax return preparer with respect to the return or claim.

2 Similarly, Section 10.31 of Circular 230 (31 C.F.R. Part 10) prohibits a tax practitioner who prepares tax returns from endorsing or negotiating a client's federal tax refund check. The penalty is adjusted annually for inflation, as provided by IRC § 6695(h).

3 Taxpayers can split their refunds among up to three accounts at a bank or other financial institution. *See* Form 8888, Allocation of Refund (Including Savings Bond Purchases) (2022). The instructions to Form 8888 specifically advise taxpayers not to deposit their refunds into their tax return preparer's account.

4 *See* Internal Revenue Manual (IRM) 21.4.5.15(6), Collection Methods for Category D Erroneous Refunds (Oct. 1, 2007), https://www.irs.gov/irm/part21/irm_21-004-005r ("The erroneous refund suit is limited to amounts that exceed the litigating threshold established by the Department of Justice.").

Under current law, the IRS has very limited authority to impose civil penalties in instances of preparer fraud or misconduct. The IRC § 6694 penalty generally will not apply to either of the scenarios described above for the following reasons:

- When a preparer has altered items of income, deduction, or credit in an attempt to increase a taxpayer's refund after the taxpayer has reviewed and approved the return for filing, the IRS Office of Chief Counsel has concluded that the resulting document is not a valid "return."[5] As a consequence, the IRC § 6694 penalty does not apply.
- When a preparer has altered only the direct deposit information on the return and has not changed the tax liability, there is no understatement of tax.

In addition, it is unclear whether the IRC § 6695(f) penalty applies. Treasury regulations have interpreted the IRC § 6695(f) penalty as applicable to a preparer who negotiates "a check (including an electronic version of a check)."[6] Although the IRS's internal procedures currently treat direct deposits as subject to the IRC § 6695(f) penalty, the tax code and regulations do not make clear whether a "direct deposit" is legally identical to an "electronic version of a check."[7] Moreover, even if the penalty is applicable, the penalty amount for 2023 of $600[8] is typically small in relation to the size of refunds that some preparers have misappropriated and does not serve as a deterrent.

The National Taxpayer Advocate recommends the IRS be given the authority to impose civil penalties on tax return preparers who engage in fraud or misconduct by altering the return of a taxpayer for personal financial gain.

RECOMMENDATIONS

- Amend IRC § 6694(b) so the penalty the IRS may assess against a tax return preparer for understating a taxpayer's liability is broadened beyond tax returns and claims for refund by adding the words "and other submissions purporting to be returns."
- Amend IRC § 6695 to (i) explicitly cover a preparer who misappropriates a taxpayer's refund by changing the direct deposit information and (ii) increase the dollar amount of the penalty to deter preparers from engaging in this type of fraud or misconduct. To make the public fisc whole, the penalty should be equal to 100 percent of the amount a preparer has improperly converted to his own use by altering a taxpayer's tax return.

---

5 IRS, Program Manager Technical Advice (PMTA) 2011-20, Tax Return Preparer's Alteration of a Return (June 27, 2011); PMTA 2011-13, Horse's Tax Service (May 12, 2003).

6 Treas. Reg. § 1.6695-1(f)(1).

7 *See* IRM 20.1.6.5.6, Negotiation of Check – IRC 6695(f) (Oct. 13, 2021), https://www.irs.gov/irm/part20/irm_20-001-006.

8 Rev. Proc. 2022-38, 2022-45 I.R.B. 454.

Legislative Recommendation #33

Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties

SUMMARY

- *Problem:* By law, some penalties require supervisory approval. However, the law leaves the timing of this approval unclear. This ambiguity has generated conflicting decisions among the courts, which leaves taxpayers lacking certainty about how they should be treated by the IRS.
- *Solution:* Clarify that supervisory approval is required before a proposed penalty is communicated in written form to a taxpayer.

PRESENT LAW

IRC § 6751(b)(1) provides: "No 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."

IRC § 6751(b)(2) carves out two categories of exceptions from this supervisory approval requirement: (i) the additions to tax for failure to file a tax return or pay the tax due (IRC § 6651) and the additions to tax for failure to pay sufficient estimated tax (IRC §§ 6654 and 6655) and (ii) any other penalty that is "automatically calculated through electronic means."

REASONS FOR CHANGE

IRC § 6751(b) protects taxpayers' *right to a fair and just tax system*[1] by ensuring that penalties are only imposed in appropriate circumstances and are not used as a bargaining chip to encourage settlement.[2] However, the phrase "initial determination of [an] assessment" is unclear. A "determination" is made based on the IRS's investigation of the taxpayer's liability and an application of the penalty statutes. An "assessment" is merely the entry of a decision on IRS records. Therefore, while a penalty can be determined and a penalty can be assessed, "one cannot 'determine' an 'assessment.'"[3] Due to this apparent drafting error and consequent ambiguity in the statute, an increasing number of courts have had to grapple with the question of when written supervisory approval must be provided.[4] In recent years, courts have come to various conclusions about when the supervisory approval must occur:

- In 2016, the Tax Court held in *Graev v. Commissioner* (which was later vacated) that supervisory approval for penalties subject to deficiency procedures could take place at any point before the assessment was made.[5]

1 *See* IRS, Pub. 5169, Taxpayer Bill of Rights (July 2014), https://www.irs.gov/pub/irs-pdf/p5169.pdf.
2 *See* S. Rep. No. 105-174, at 65 (1998).
3 *Chai v. Comm'r*, 851 F.3d 190, 218-19 (2d Cir. 2017) (quoting *Graev v. Comm'r*, 147 T.C. 460 (2016) (Gustafson, J., dissenting)).
4 *See* National Taxpayer Advocate 2019 Annual Report to Congress 149 (Most Litigated Issue: *Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/ARC19_Volume1_MLI_03_Accuracy.pdf; National Taxpayer Advocate 2018 Annual Report to Congress 447 (Most Litigated Issue: *Accuracy-Related Penalty Under IRC § 6662(b)(1) and (2)*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/07/ARC18_Volume1_MLI_01_AccuracyRelatedPenalty.pdf.
5 147 T.C. at 460, *superseded by*, *in part*, *modified by*, *in part*, 149 T.C. 485 (2017).

- In 2017, the U.S. Court of Appeals for the Second Circuit held in *Chai v. Commissioner* that supervisory approval was required for penalties subject to deficiency procedures no later than the date on which the IRS issued the notice of deficiency or, if the penalty was asserted through an answer or amended answer, the time of that filing.[6]
- In 2019, the Tax Court held in *Clay v. Commissioner* that supervisory approval for penalties subject to deficiency procedures was required prior to sending the taxpayer a formal communication that included the right to go to the IRS Independent Office of Appeals.[7]
- In 2020, the Tax Court followed *Clay* and held in *Laidlaw's Harley Davidson Sales, Inc. v. Commissioner* that the same timing rule applied to assessable penalties. That decision was overruled by the U.S. Court of Appeals for the Ninth Circuit in 2022.[8] There, the Ninth Circuit held that approval must be obtained before assessment of the penalty or, if earlier, before the relevant supervisor loses discretion to approve the penalty assessment.

In *Belair Woods, LLC v. Commissioner,* the Tax Court found the IRS did not have to obtain supervisory approval before sending the taxpayer a Letter 1807, TEFRA Partnership Cover Letter for Summary Report, which invited the taxpayer to a closing conference to discuss proposed adjustments.[9] Instead, the court found that Letter 1807 only advised the taxpayer of the possibility that penalties could be proposed, and the pivotal moment requiring supervisory approval was when the IRS sent the 60-day letter formally communicating its definite decision to assert the penalties.

In September 2020, the IRS issued interim guidance that instructs employees to obtain written supervisory approval before sending a written communication that offers the taxpayer an opportunity to sign an agreement or consent to assessment or proposal of a penalty.[10] The interim guidance specifies that prior to obtaining written supervisory approval, employees can share written communications with the taxpayer that reflect proposed adjustments as long as they do not offer the opportunity to sign an agreement or consent to assessment or proposal of the penalty.

In 2023, the Treasury Department issued proposed regulations under IRC § 6751.[11] For pre-assessment penalties subject to Tax Court review, the proposed regulations would allow supervisory approval to be obtained any time before issuance of the statutory notice of deficiency. Penalties not subject to pre-assessment Tax Court review could be approved up until the time of the assessment itself. Also in 2023, the Treasury Department asked Congress to amend IRC § 6751 to achieve the same result.[12] Thus, the proposed regulations and legislation would establish the broadest possible window and allow the requisite supervisory approval to occur at the latest possible moment. In this way, the proposed regulations and legislative proposal would bring relative certainty to this area, but they would do so by seriously eroding

---

6 851 F.3d 190 (2d Cir. 2017).

7 152 T.C. 223 (2019).

8 *Laidlaw's Harley Davidson, Inc. v. Comm'r*, 29 F.4th 1066 (9th Cir. 2022), *rev'g* 154 T.C. 68 (2020). *See also Kroner v. Comm'r*, 48 F.4th 1272 (11th Cir. 2022), *rev'g* T.C. Memo. 2020-73, in which the Eleventh Circuit agreed with the Ninth Circuit's *Laidlaw's* decision. In *Carter v. Comm'r*, No. 20-12200 (11th Cir. Sept. 14, 2022), *rev'g* T.C. Memo. 2020-21, the Eleventh Circuit followed its decision in *Kroner*.

9 154 T.C. 1 (2020).

10 Interim Guidance Memorandum (IGM) SBSE-04-0920-0054, Timing of Supervisory Approval of Penalties Subject to IRC 6751(b) (Sept. 24, 2020), *reissued by* IGM SBSE-04-0922-0075, Reissue Interim Guidance (IG) for Timing of Supervisory Approval of Penalties Subject to IRC 6751(b) (Sept. 28, 2022), https://www.irs.gov/pub/foia/ig/sbse/sbse-04-0922-0075.pdf.

11 Prop. Treas. Reg. § 301.6751-1, 88 Fed. Reg. 21,564 (Apr. 11, 2023).

12 Department of the Treasury, *General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals* 161-162 (Mar. 2023), https://home.treasury.gov/policy-issues/tax-policy/revenue-proposals. Like the proposed regulations, this legislative proposal would also expand the definition of supervisors permitted to provide the required approval. We note it is extremely unusual for the Treasury Department to simultaneously propose legislation and regulations that are substantially identical. Presumably, the General Counsel's office is uncertain whether it has the legal authority to impose a timing rule by regulation, so it is asking for a legislative change in case the courts invalidate the regulation.

the taxpayer protections provided by IRC § 6751 and in opposition to the views expressed by a range of stakeholders and commentators, including the National Taxpayer Advocate.[13]

Both *Belair Woods* and the Treasury Department's position leave open the possibility that IRS employees could use penalties as a bargaining chip – precisely what Congress sought to prevent by enacting IRC § 6751(b). Under *Belair Woods*, IRS employees can propose penalties to induce a resolution without first obtaining written supervisory approval, so long as the communication is deemed a proposal and not a definite decision. This approach undermines the statutory intent because, as explained in the dissent in *Belair Woods*, "[e]very communication from the Commissioner proposing a deficiency and a related penalty – whether it is a preliminary report, a 30- or 60-day letter, or a notice of deficiency – sets forth proposed adjustments, which do not become final until a decision is entered, or an assessment is properly recorded."[14]

The IRS's interim guidance, the proposed regulations, and the Treasury Department's legislative proposal seek to resolve the question of what is merely a proposal as opposed to a definite decision by drawing the line at written communications that offer a chance to agree to assessment or consent to proposal of a penalty. However, employees could still use penalties as a bargaining chip because some taxpayers may feel pressured to resolve their cases when penalties are first put on the table as proposed adjustments.

In addition to the timing issue, the statutory language of IRC § 6751(b)(1) is also problematic because of its focus on "assessment(s)." In *Wells Fargo & Company v. Commissioner*, the U.S. Court of Appeals for the Eighth Circuit found that supervisory approval under IRC § 6751(b) was not required because there was no assessment.[15] There, the IRS asserted the accuracy-related penalty in a refund suit to offset any refund granted to the taxpayer. Because the penalty, if upheld by the court, would only lead to a reduced refund and not a balance to be assessed, the court found there would be no assessment and thus no requirement for supervisory approval.

In practice, the overwhelming majority of penalties imposed by the IRS are excluded from the supervisory approval requirement through one of the exceptions in IRC § 6751(b)(1).[16] But where written supervisory approval is required, the National Taxpayer Advocate believes it should be required early enough in the process to ensure it is meaningful and is not merely an after-the-fact rubber stamp applied in the cases in which a taxpayer challenges a proposed penalty.

RECOMMENDATION

- Amend IRC § 6751(b)(1) to clarify that no penalty under Title 26 shall be assessed or entered in a final judicial decision unless the penalty 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 *prior to the first time the IRS sends a written communication to the taxpayer proposing the penalty as an adjustment*.

---

13 For a more detailed discussion of the problems arising under the IRS's interpretation of IRC § 6751, see Erin M. Collins, *Reconsidering the IRS's Approach to Supervisory Review*, National Taxpayer Advocate Blog (Aug. 29, 2023), https://www.taxpayeradvocate.irs.gov/news/nta-blog-reconsidering-the-irs-approach-to-supervisory-review/. Stakeholder comments regarding the proposed regulations can be viewed at https://www.regulations.gov/document/IRS-2023-0016-0010/comment.

14 *Belair Woods, LLC v. Comm'r*, 154 T.C. 1, 11 (Jan. 6, 2020) (Marvel, J., dissenting).

15 957 F.3d 840 (8th Cir. 2020), *aff'g* 260 F. Supp. 3d 1140 (D. Minn. 2017).

16 In fiscal year 2022, the IRS imposed 33.5 million penalties on individuals, estates, and trusts in connection with income tax liabilities. The following penalties, generally imposed by electronic means, accounted for nearly 98 percent of the total: failure to pay (16.2 million), failure to pay estimated tax (12.2 million), failure to file (3.4 million) and bad checks (1.1 million). IRS, 2022 Data Book, Table 26, Civil Penalties Assessed and Abated, by Type of Tax and Type of Penalty, Fiscal Year 2022, at 60 (2023), https://www.irs.gov/pub/irs-pdf/p55b.pdf.

Legislative Recommendation #34

Require an Employee to Determine and a Supervisor to Approve All Negligence Penalties Under IRC § 6662(b)(1)

SUMMARY

- *Problem:* The tax law generally requires supervisory approval before the IRS may assess a penalty, but it provides exceptions for certain penalties that may be automatically calculated and do not require employee judgment. The IRS currently takes the position that the negligence penalty can sometimes be automatically calculated and applied, but whether a taxpayer acted negligently requires an assessment of the taxpayer's conduct and state of mind, which a computer cannot make. As a result, the IRS is imposing the negligence penalty in some cases where the taxpayer was not negligent.
- *Solution:* Do not allow the IRS to impose the negligence penalty by automation, without employee review and supervisory approval.

PRESENT LAW

IRC § 6662(b)(1) imposes a penalty equal to 20 percent of any underpayment of tax required to be shown on a tax return that is attributable to negligence or disregard of rules or regulations. IRC § 6662(c) defines "negligence" to include "any failure to make a reasonable attempt to comply with the provisions of this title" and "disregard" to include "any careless, reckless, or intentional disregard."

IRC § 6751(b)(1) provides: "No 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."[1] IRC § 6751(b)(2) carves out two categories of exception from this supervisory approval requirement: (i) the penalties for failure to file a tax return (IRC § 6651(a)(1)), failure to pay the tax due (IRC § 6651(a)(2)), failure to pay sufficient estimated tax (IRC §§ 6654 and 6655), and understatements described in IRC § 6662(b)(9), and (ii) any other penalty that is "automatically calculated through electronic means."

REASONS FOR CHANGE

IRC § 6751 states that the initial determination of penalties must be personally approved (in writing) by the immediate supervisor of the individual making the initial determination, subject to the exceptions described above. In the significant majority of cases, the IRS imposes penalties by electronic means because it is easier and cheaper to do so.[2] Where the imposition of a penalty is mechanical, such as the penalties for failure to file, failure to pay, or failure to pay estimated tax, that approach is justifiable.

However, imposition of a penalty for "negligence or disregard of rules or regulations" is different. To determine whether a taxpayer made a "reasonable attempt to comply" with the law, an employee must analyze the taxpayer's state of mind, the actions the taxpayer took to comply, and the taxpayer's motivations for taking those actions. A computer cannot perform this analysis.

1 The meaning of "initial determination of such assessment" and the timing required for approval have been the subject of litigation. *See, e.g.*, *Belair Woods v. Comm'r*, 154 T.C. 1 (2020). For a recommendation to clarify the timing, see *Clarify That Supervisory Approval Is Required Under IRC § 6751(b) Before Proposing Penalties*, *supra*.

2 In fiscal year 2022, the IRS imposed 33.5 million penalties on individuals, estates, and trusts in connection with income tax liabilities. The following penalties, generally imposed by electronic means, accounted for approximately 98 percent of the total: failure to pay (16.2 million), failure to pay estimated tax (12.2 million), failure to file (3.4 million), and bad checks (1.1 million). IRS, 2022 Data Book, Table 26, Civil Penalties Assessed and Abated, by Type of Tax and Type of Penalty, Fiscal Year 2022, at 60 (2023), https://www.irs.gov/pub/irs-pdf/p55b.pdf.

Nevertheless, Treas. Reg. § 1.6662-3(b)(1)(i) states that negligence is strongly indicated when a taxpayer omits income from an information return on his or her income tax return. In reliance on this regulation, the IRS has programmed its computers to calculate certain negligence penalties automatically as part of its Automated Underreporter (AUR) program. For example, the AUR system proposes the negligence penalty where IRS data suggests the taxpayer failed to report income reflected on a third-party information return for a second tax year in a row.[3]

Legal advice from the Office of Chief Counsel goes further, concluding that "in the absence of any other evidence suggesting the failure was not negligent, it is appropriate to propose and subsequently assess an accuracy-related penalty for negligence when a taxpayer does not include on an income tax return an amount of income shown on an information return."[4]

However, the AUR system in this scenario solely checks for the presence of information returns and unreported income. It cannot determine there is no other evidence that would rebut the negligence finding, such as whether the information return was mailed to a different address than the one used by the taxpayer when filing the return or whether the information return contained an error. Before the IRS can reasonably conclude that a taxpayer acted negligently, an employee must review the case to consider facts and circumstances that may suggest the taxpayer did not act negligently.

Although the AUR program and the applicable proposed regulations do require supervisory approval for the negligence penalty if the taxpayer submits a response,[5] there are many reasons a taxpayer may not respond. A taxpayer may have moved and not received the notice. A taxpayer may have put the notice aside and not replied before the response deadline. Or a taxpayer may have accepted the proposed tax adjustment without realizing that he or she must respond to avoid the penalty assessment.

In these and other circumstances, taxpayers may face a penalty for negligence without any analysis into their reasonable attempts to comply with tax laws. Allowing a computer to determine negligence without employee involvement harms taxpayers and undermines the protections afforded by IRC § 6751(b). The Treasury Department has also made a legislative proposal that would perpetuate this harm by definitively removing all IRC § 6662 penalties, including negligence penalties, from the supervisory review requirement.[6]

RECOMMENDATION

- Amend IRC § 6751(b)(2)(B) to clarify that the exception for "other penalties automatically calculated through electronic means" does not apply to the penalty for "negligence or disregard of rules or regulations" under IRC § 6662(b)(1).

3 Internal Revenue Manual (IRM) 4.19.3.22.1.4, Accuracy-Related Penalties (Sept. 21, 2020), https://www.irs.gov/irm/part4/irm_04-019-003r.

4 IRS, Program Manager Technical Advice 2008-01249, Accuracy Related Penalties and Automated Underreporter Program (Oct. 22, 2007).

5 Proposed Treas. Reg. § 301.6751(b)-1(a)(3)(v); IRM 4.19.3.22.1.4, Accuracy-Related Penalties (Sept. 21, 2020), https://www.irs.gov/irm/part4/irm_04-019-003r.

6 U.S. Dep't of the Treasury, *General Explanations of the Administration's Fiscal Year 2024 Revenue Proposals* 161-162 (2023), https://home.treasury.gov/policy-issues/tax-policy/revenue-proposals.

Legislative Recommendation #35

Modify the Definition of "Willful" for Purposes of Determining Report of Foreign Bank and Financial Accounts Violations and Reduce the Maximum Penalty Amounts

SUMMARY

- *Problem:* Penalties for failure to file international information returns or to disclose foreign assets are steep and grow even steeper when the IRS determines a taxpayer's failure was "willful." The IRS has become increasingly aggressive in asserting that taxpayers' failures to file are willful, which can lead to draconian penalties for good-faith errors.
- *Solution:* Increase the burden of proof on the IRS for declaring a failure "willful" and reduce the maximum penalty for willful violations.

PRESENT LAW

U.S. citizens, residents, or entities (collectively, U.S. taxpayers) with specified interests in foreign accounts exceeding $10,000 in total during the year generally are required by 31 U.S.C. § 5314 and 31 C.F.R. § 1010.350 to report the accounts to the Financial Criminal Enforcement Network (FinCEN) in the Treasury Department. They must do so on FinCEN Form 114, Report of Foreign Bank and Financial Accounts (FBAR). 31 U.S.C. § 5321(a)(5) imposes civil penalties for failing to report accounts.

The amount of the civil penalty depends on whether the failure was "willful" or "non-willful." The maximum penalty for a non-willful violation is $10,000 (adjusted for inflation).[1] Under 31 U.S.C. § 5321(a)(5)(C)(i)(I) and (II), the maximum civil penalty for a willful violation is the greater of $100,000 (adjusted for inflation) or 50 percent of "the balance in the account at the time of the violation."[2] As currently interpreted by the IRS in non-binding policy guidance, 31 U.S.C. § 5321(a)(5)(B)(ii) will not allow for a penalty to be imposed for a non-willful violation if the account holder filed accurate or amended FBAR(s) rectifying prior violations and had reasonable cause for failing to file the FBAR(s).[3]

The IRS has created procedures that allow some account holders to correct non-willful noncompliance if they learn about the problem early. Under its Delinquent FBAR Submission Procedures and Streamlined Filing Compliance Procedures, the IRS will not impose a penalty (or will impose a penalty of five percent) for non-willful violations if an account holder reports his or her accounts on an FBAR and reports and pays tax on the income from the foreign financial accounts before being contacted by the IRS about an examination or FBAR violation.[4] Account holders who first learn of their FBAR violations when the IRS initiates an exam or contacts them about a violation are ineligible for these procedures.

---

1 31 U.S.C. § 5321(a)(5)(B)(i); 31 C.F.R. § 1010.821.

2 "The time of the violation" is the FBAR due date. Internal Revenue Manual (IRM) 4.26.16.5.2(2), FBAR Penalty Structure (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016; IRM 4.26.16.5.5(3) Penalty for Willful FBAR Violations (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016. *See also United States v. Schwarzbaum*, 24 F.4th 1355, 1365 (11th Cir. 2022).

3 The IRM provides that a penalty should not be imposed for a nonwillful violation if (1) the violation was due to reasonable cause; and (2) "[a]ccurate delinquent or amended FBAR(s) are filed, rectifying prior violation(s)." IRM 4.26.16.5.4(3), Penalty for Non-willful FBAR Violations (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016.

4 Specifically, the Streamlined Filing Compliance Procedures require a combination of income tax, FBAR, and potentially international information return delinquent submissions in addition to a Title 26 miscellaneous offshore penalty. Delinquent FBAR Submission Procedures solely concern instances where a taxpayer/account holder did report income from their foreign accounts on their income tax returns but did not file FBARs for those accounts. *See* IRS, Delinquent FBAR Submission Procedures, https://www.irs.gov/individuals/international-taxpayers/delinquent-fbar-submission-procedures (last visited Sept. 27, 2023) (no penalty if no underreporting and fixed before contact). *See also* IRS, Streamlined Filing Compliance Procedures, https://www.irs.gov/individuals/international-taxpayers/streamlined-filing-compliance-procedures (last visited Sept. 27, 2023).

REASONS FOR CHANGE

The maximum FBAR penalty is among the harshest civil penalties the government may impose. For example, if an account holder maintains a balance of $25,000 in a foreign account that he willfully fails to report, the IRS may impose a penalty of over $100,000 per year and may go back six years, producing an aggregate statutory maximum penalty of over $600,000.[5] Some commentators have suggested the penalty is so severe that it may violate the U.S. Constitution's prohibition against excessive fines.[6] Individuals who have lived in foreign countries or have immigrated to the United States often maintain foreign bank accounts and may overlook this requirement for benign reasons.

Although the Internal Revenue Manual (IRM) limits the total amount of the penalties for non-willful violations to 50 percent of the highest aggregate balance (HAB) of all unreported foreign financial accounts for all years under examination, examiners are still free to propose a penalty of up to 100 percent of the HAB for willful violations if a manager approves.[7] Even half the HAB can be more than the current balance if the account value has declined. Account holders have reasonably argued in many cases that the harshness of the maximum penalty, particularly the "willful" penalty, is disproportionate to the reporting failure.

While the distinction between willful and non-willful violations makes sense in concept, its application can lead to unduly harsh results. If the IRS chooses to assert a violation was willful, it is very difficult for a taxpayer to prevail. Schedule B of Form 1040, U.S. Individual Income Tax Return, asks if the taxpayer has a foreign account and references the FBAR filing requirement. Taxpayers are presumed to know the contents of their return when they sign it under penalties of perjury; the jurat they must sign states: "Under penalties of perjury, I declare that I have examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct and complete."

It may be considered reckless or "willful blindness" for a taxpayer not to learn about the FBAR filing requirement after having been directed to the FBAR form by Schedule B and having signed the jurat.[8] For this reason, the government might reasonably argue (and a court might reasonably find) that *any* failure to file an FBAR form is willful where a taxpayer filed a federal tax return that included Schedule B.[9] Courts have arrived at different determinations when presented with this argument.[10] In practice, tax forms and

---

5 Under current guidance, the IRS should not impose such a severe penalty. *See* IRM 4.26.16.5.5, Penalty for Willful FBAR Violations (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016 (discussed in the text below). *See also* IRM 4.26.16.5.5.3(7), Penalty for Willful FBAR Violations – Calculation (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016 ("In no event will the total penalty amount (among all open years) exceed 100 percent of the highest aggregate balance of all foreign financial accounts to which the violations relate during the years under examination."). Note that the IRM is not binding on the IRS.

6 *See* Alison Bennett, *New FBAR Penalty Limits Seen Reflecting IRS Concern on Eighth Amendment Litigation*, BNA Tax Mgmt Weekly Rept (June 15, 2015), https://www.bloomberglaw.com/product/tax/document/X80RQG3C000000. However, courts have held either that the FBAR penalties were not excessive or that the Eighth Amendment does not apply to them. *See United States v. Toth*, 33 F.4th 1, 19 (1st Cir. 2022); *United States v. Bussell*, 699 F. App'x 695, 696 (9th Cir. 2017); *United States v. Kerr*, 2022 WL 912563, at *10 (D. Ariz. 2022); *United States v. Schwarzbaum*, 611 F. Supp. 3d 1356, 1374 (S.D. Fla. 2020), *vacated and remanded on other grounds*, 24 F.4th 1355 (11th Cir. 2022).

7 *See* IRM 4.26.16.5.4.1, Penalty for Non-willful Violations – Calculation (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016; IRM 4.26.16.5.5.3, Penalty for Willful FBAR Violations – Calculation (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016. The IRS also has "mitigation" guidelines that could result in lower penalties. *See* IRM Exhibit 4.26.16-2, FBAR Penalty Mitigation Guidelines for Violations Occurring After October 22, 2004 (June 24, 2021), https://www.irs.gov/irm/part4/irm_04-026-016. Commentators have suggested the IRS limited the maximum FBAR its examiners would propose to address concerns that the statutory maximums could violate the Excessive Fines clause of the Eighth Amendment to the Constitution. *See, e.g.*, Alison Bennett, *New FBAR Penalty Limits Seen Reflecting IRS Concern on Eighth Amendment Litigation*, BNA Tax Mgmt Weekly Rept (June 15, 2015), https://www.bloomberglaw.com/product/tax/document/X80RQG3C000000.

8 *See, e.g.*, *Norman v. United States*, 942 F.3d 1111, 1115 (Fed. Cir. 2019).

9 *See, e.g.*, *United States v. Bohanec*, 263 F. Supp. 3d 881, 890 (C.D. Cal. 2016) (finding willful blindness, in part, because "Schedule B of Defendants' 1998 tax return put them on notice that they needed to file an FBAR," even though it was checked "yes" to indicate foreign accounts).

10 Compare *United States v. Bohanec*, *id.*, with *United States v. Schwarzbaum*, 611 F. Supp. 3d (S.D. Fla. 2020) (finding that willfulness could not be shown under a theory of constructive knowledge based on the signing of tax returns that included Schedule B where reasonable reliance on a tax preparer was present), *vacated and remanded on other grounds*, 24 F.4th 1355 (11th Cir. 2022).

instructions contain a lot of verbiage, and few if any taxpayers have a complete understanding of all lines, questions, and instructions on a return.

Account holders who do not file required FBAR forms due to negligence, inadvertence, or similar causes may be subject to penalties for non-willful violations (which have a reasonable cause exception). But they should not face uncertainty regarding possible application of the harsh penalties for "willful" violations. The National Taxpayer Advocate recommends Congress clarify that the IRS must prove a violation was "willful" without relying on the instructions to Schedule B or the failure to check the box on Schedule B before imposing a willful FBAR penalty and must do so by clear and convincing evidence – the standard typically required in fraud cases.[11]

RECOMMENDATIONS

- Clarify that the government has the burden to establish willfulness by clear and convincing evidence before asserting a civil willful FBAR penalty and that the government cannot meet this burden by relying on the Schedule B attached to a return.
- Remove subsection (I) in 31 U.S.C. § 5321(a)(5)(C)(i), which would have the effect of narrowing the statutory maximum civil penalty for a willful FBAR violation to no greater than 50 percent of the balance in the account at the time of the violation so that a $100,000 penalty cannot be imposed with respect to low-balance accounts.[12]

11 In Tax Court, the IRS bears the burden of proving fraud by "clear and convincing" evidence. *See* Tax Ct. R. 142(b) ("In any case involving the issue of fraud with intent to evade tax, the burden of proof in respect of that issue is on the [IRS], and that burden of proof is to be carried by clear and convincing evidence."); IRM 25.1.6.2(3), Overview (June 10, 2021), https://www.irs.gov/irm/part25/irm_25-001-006 ("Civil fraud penalties will be asserted when there is clear and convincing evidence that some part of the understatement of tax was due to fraud" (underlining in original text)). However, U.S. district courts generally have not required the government to present "clear and convincing" evidence to prove willfulness in FBAR cases. *See, e.g.*, *United States v. Garrity*, 304 F. Supp. 3d 267 (D. Conn. 2018); *United States v. Bohanec*, 263 F. Supp. 3d 881 (C.D. Cal. 2016); *United States v. McBride*, 908 F. Supp. 2d 1186 (D. Utah 2012); *United States v. Williams*, 106 A.F.T.R.2d (RIA) 2010-6150 (E.D. Va. 2010), *rev'd on other grounds*, 489 Fed. Appx. 655 (4th Cir. 2012).

12 For more detail, *see* National Taxpayer Advocate 2014 Annual Report to Congress vol. 1, at 331 (Legislative Recommendation: *Foreign Account Reporting: Legislative Recommendations to Reduce the Burden of Filing a Report of Foreign Bank and Financial Accounts (FBAR) and Improve the Civil Penalty Structure*), https://www.taxpayeradvocate.irs.gov/wp-content/uploads/2020/08/2014-ARC_VOL-1_S2_LR-6-508.pdf.