



July 9, 2020

Internal Revenue Service
CC:PA:LPD:PR (REG-104591-18)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Dear Regina Johnson:

On behalf of the National Association of State Auditors, Comptrollers and Treasurers we appreciate the opportunity to provide comments on the proposed regulations providing guidance on Section 162(f) and new Section 6050X of the Internal Revenue Code. While we appreciate the clarifications and definitions provided, the terms and rules regarding the information reporting requirements under Section 6050X would presumably be more efficient and less of an administrative burden if the basis and components for information reporting was based on what will actually be collected by the governments and not on the basis of the agreements or orders.

The COVID-19 pandemic has imposed severe budgetary limitations on state governments. We believe that implementing a new reporting requirement during this time will place additional strain on already limited resources by imposing additional administrative and financial burden during this challenging time. We strongly recommend that the Internal Revenue Service (IRS) seek a repeal of the new reporting requirement and utilize the existing IRS audit process to ensure compliance with the new requirements under the Tax Cuts and Job Act Section 162(f). If this is not feasible, then further delaying implementation until January 1, 2023 would be extremely beneficial.

Generally, the IRS is requesting comment regarding the practical utility of the information, the accuracy of the estimated burden and how collection efforts could be enhanced. We would recommend eliminating the case number and description of agreements to the current proposed Form 1098-F to eliminate the need to file multiple information returns for an individual taxpayer, which would promote administration efficiencies; and, suggest that the estimated burden calculations are low, and that the risk for incomplete or inaccurate reporting is high.

If the reporting requirements under Section 6050(x) cannot be repealed, we are providing the following comments in regard to the regulation. We have put our comments into two broad sections; one noting the overwhelming reporting burden on state governments and the other, providing areas of the proposed regulation that need further clarification.

Administrative Burden

The administrative burden required by the reporting requirement is substantial. The burden would include:

- Initial development, testing and implementation of reporting changes to financial systems.



- The ability to report on amounts that are received and the ability to distinguish what must be reported on and what should not.
- Instituting new forms and documents in the system to record non-financial transactions related to payments not directly made to governments that result from a settlement that a government is involved in.
- An increased amount of non-financial reporting components on Form 1098-F that would need to be defined and pulled from the system. For example, “5-Jurisdiction,” “6-Case Number,” “7-Name or description of matter/suit/agreement” and “8-Code.”
- The ability to separate out the portions of the settlement for Boxes 1, 2 and 3 for non-deductible and deductible amounts.
- Maintaining two separate systems for testing to ensure current tax reporting requirements are tested on the current version of the system while a separate version of the system includes changes related to 1098-F reporting. Maintaining these two systems will result in an increase in cost for governments related to additional system maintenance and space to maintain and test.
- Training current and new hire employees on how to record reportable settlements in the system to ensure thorough reporting on Form 1098-F.
 - These individuals will not be tax experts and therefore the understanding of how to appropriately document this information will be a steeper learning curve.
 - This will result in increased employee costs to process and record both financial (receipt of money) and non-financial (payer directed to make changes that cost them money but payment is not in direction of government) as this information was not required previously.
 - Tracking information to determine how to provide information in Box 8 will be challenging. Assessment and payment will happen at different times. Data entry will most likely occur when the settlement agreement is entered. That being said, payment date may be unknown. The requirement will require additional work to track the information after initial entry to determine how to fill out Box 8 based on number of payers, whether it was or was not paid, etc. This results in increased cost and employee hours.
- Annual testing of software updates
 - All software updates must be thoroughly tested to ensure that there are no adverse effects on the financial system or the reporting software. Testing will result in increased costs to Governments related to additional need of time and resources.
 - Testing often results in identification of defects and issues (which will be even more prevalent in the early years of this reporting). This will result in increased costs to governments related to additional time and resources.
- Annual reporting to payer’s and IRS
 - Review of data to ensure 1098-F is reporting correctly, including control total reconciliation and detailed sampling. This will result in increased costs to governments related to additional need for time and resources.
 - Working with agencies to correct data for accurate reporting. This will result in increased costs to governments related to additional need for time and resources.



- Generating and printing 1098-F forms. This will result in increased costs to governments.
- Providing staff available to answer recipient questions and correct forms. This will result in increased costs to governments related to additional need for time and resources.
- Timing of Reporting
 - The proposed regulations set a January 31st reporting deadline. This date adds another layer of regulatory burden to governments during an incredibly challenging time of the year. January 31st is the same deadline for Form W-2s, Form 1099-NECs, and Form 1095-Cs (amongst others). As these forms should only be required to be issued to those involved in a trade or a business who have a civil penalty or a fine, we would appreciate relief by extending the deadline to March 31st. Acceleration of this deadline to January 31st frustrates an already compacted reporting period.

Clarifications

We suggest that the following clarifications are necessary in order to lessen achieve accurate reporting. We would recommend that the threshold for reporting be set at \$1,000,000 to substantially reduce the burden for governments while still capturing the most material cases.

Rules for Multiple Payers

A Form 1098-F is required for each payer if the total of the settlement is over the threshold of \$50,000 but the amount each payer owes is under \$50,000. This requirement will be challenging to implement without a systematic way to link each receipt from each payer to one settlement and then determining if that settlement is over \$50,000. This will also be challenging for the non-financial component where payment is not required in the direction of the government, but the government is involved. We suggest that instead each payer only report if the financial impact is over the threshold (as now defined – \$50,000), and reporting be limited to the entity making the payment if the threshold is exceeded.

Payment Amount Not Identified

A Form 1098-F is required for settlements that the government is involved in where there is financial impact on an entity due to the settlement; however, no money is paid in the direction of the government. This will prove challenging for governments to accurately report and estimate potential costs resulting from the settlement and then have to report a threshold amount if the estimates are not feasible but are expected to exceed the threshold. This situation can be even more complex for reporting when the settlement requires both payment in the direction of the government but also has costs resulting from the settlement but that are not in the direction of the government. Representatives in these settlements are normally not financial employees in nature and therefore will be focused on the legal aspects of the settlement and not the unidentified costs. It will also be challenging to obtain estimates or actual costs from a payer who has a settlement decided against them. We suggest that **governments are only required to report on amounts to be paid directly to the governments.**



Collection of Information – Form 1098-F

“Whether the proposed collection of information is necessary for the proper performance of duties of the IRS, including whether the information will have practical utility” is made. Reading through the document there appears to be no expansion on this statement. We believe there is no incentive to provide payer TIN numbers to the Government to populate for 1098-F (like there is for Form 1099 due to backup withholding). Therefore, there is a high potential that many forms will either have no payer’s TIN or the wrong payer’s TIN. Without a TIN or an accurate TIN, this form may prove to not provide the intended benefit to the IRS as it cannot be matched to a Federal tax return. The regulations must require taxpayers to provide governments a Form W-9 and allow governments the ability to TIN Match to facilitate 6050x reporting.

Section 1.162-21(c)(2) notes *“However, if penalties are imposed with respect to these taxes, paragraph (a) of this section applies to disallow a deduction for any interest payments related to the penalties imposed.”* Clarification is requested on the expectations of audits that result in a taxpayer owing the government money where the entity agrees to make a payment as a result of the audit (this would be outside of a legal proceeding). This statement is an example of a situation where it is unclear whether the penalties and interest from a tax audit (for example) should be included on Form 1098-F if they exceed the threshold. Additional clarification of what constitutes a settlement agreement or suit that is required to be reported as agreement can have a vast definition if not clarified. To avoid legal proceedings/litigations or payment requirements through legal proceeding/litigation (suit), we would suggest that reporting only include agreements that are constituted as settlements. The reporting should exclude any fines, penalties and amounts determined to be owed through audits, inspections, citations or reviews.

We also request clarification on what truly constitutes a settlement under 6050(x). Does it include, for example:

- Amounts due from inspection
- Amounts due from an audit
- Fines related to tickets (example: Environmental tickets for destructions of wetlands written by a conservation officer requiring the land to be returned to original)
- Amounts due from sale, use and withholding tax audits (penalties, interest on penalties, interest on taxes due, taxes due – which are still potentially deductible)
- Subsequent fines identified in a settlement agreement or court order based upon the occurrence of some future event

Timing of Reporting

We have several questions related to the timing of reporting. Specifically, when are these amounts determined to be reportable?

- We request more clarification on instances when a payment plan is agreed to across multiple calendar years – what amount should be reported and when?



- What happens if the fined/penalized entity appeals the penalties/fines and it crosses calendar years – when is the government entity required to report? For example: Per state and federal law, the Occupational Safety and Health (OSH) Division issues penalties to employers that are not adhering to minimum state and federal occupational safety and health laws. After citation/penalty issuance an employer can do either of the following:
 - i. Do nothing at all – penalties and citations automatically become a final order. Employer is responsible for full payment of penalties.
 - ii. Request an informal conference within the specified time frame to discuss the inspection, citations and/or penalties. After an informal conference is held, the outcome would be one of the following:
 - 1. no changes are made to citations/penalties and if employer takes no further action in a specified time frame all citations/penalties become a final order and full payment is due
 - 2. the employer and OSH enter into a legally binding informal settlement agreement that is considered a final order that would indicate specific terms associated with all citation items and associated penalties (a settlement agreement could include stipulations that the employer must pay the full amount of penalties, partial amount of penalties or it could delete all penalties).
 - a. the employer could contest cited items and/or associated penalties

NOTE: If a contestment is filed, a date for a formal hearing would be set by the non DOL based Review Commission and assigned a hearing examiner. The employer could enter into a formal settlement agreement with OSH prior to a hearing. If so, the formal settlement agreement would be a legally binding final order that would indicate specific terms associated with all citation items and associated fines (a formal settlement agreement could include stipulations the employer must pay the full amount of penalties, partial amount of penalties or it could delete all penalties). If a settlement is not reached, the outcome of a formal hearing would be the issuance of a final order that would be one of the following: (1) all citations and all penalties could be deleted; (2) some citations and some penalties could be deleted; or (3) all citations and all penalties are upheld and employer must pay. An OSH case could be resolved via an informal settlement agreement, following an informal conference.

At what point is the contested penalties/fines reportable? How would reporting be impacted if the issuance of the fine and appeal process crosses calendar years?

Information Required to Complete Form 1098 F

We request additional guidance to understand what information is required to complete IRS 1098-F. Specifically, which fields are optional, and which are required?

Most government agencies are currently not collecting personally identifiable information (PII) data within their penalty/fines systems (particularly legacy systems) including Tax Identification Numbers (TINs).

How should the agency report the information on the 1098-F, if the payer has not and/or refuses to provide a TIN?



- Will there be a similar penalty to the CP2100 notices related to mismatches?
- In future years, should the TIN be collected on a W-9?
- What should the agency do if the citation is issued to an individual or entity that does not have a TIN (non-U.S. citizen)?
- Specifics to the form:
 - a. Box 1 – Total Amount required to be paid
 - i. Define what should be included in this amount?
 - b. Box 2 – Restitution/Remediation
 - i. What if this amount is not available?
 - c. Box 3 – Compliance Amount
 - i. What if this amount is not available?
 - d. Boxes 4 – 8 – are these optional or required information?
- What is the correction process if the fines are resolved or revised prior to payment?
- What is the penalty to the government agency for non-compliance?
(We are not suggesting non-compliance; these details assist in obtaining funds from various agencies if system upgrades are necessary).

Again, we strongly recommend 6050X reporting scope capture and be limited to the dollar amount collected by the government and not on the basis of agreements or orders. Specifically, reporting should be limited to the dollar amount of the civil penalty or fine instead of requiring the three current reporting categories. Each of the examples within proposed Regulation 1.162-21 seem to indicate that the civil penalties may not be deducted while the other amounts are allowable deductions by a taxpayer. The reporting of these three categories is not in the direction of the risk for the IRS (understatement of a civil penalty), and the clear benefit of the IRS receiving the currently required (3 categories) specific information is not evident based upon the examples provided. Additionally, the reporting of these three categories does not address IRS compliance concerns as taxpayers may still “bury” civil penalties or fines within other expenses (fraud). The data collection of the dollar amount of the civil penalty or fine would certainly be valuable to the IRS as these amounts are not deductible. The IRS could match these reported amounts from the Forms 1098-F to the taxpayer tax returns in the form of a book to tax reconciliation. The civil penalty or fine would be a reconciling item. We believe specific identification of the civil penalty or fine amount would reduce the exposure of the IRS to taxpayer fraud. Additionally, governments do not have the time or resources to be forced to be a party to an IRS characterization of an amount disputed with a taxpayer. This is a matter that should remain between the IRS and an impacted taxpayer. Governments must not be a party to these disputes.

Other

As Section 162 of the IRC only applies to those involved in a trade or business, the definition of a taxpayer should be in plain English (as it applies to 6050x) and explicitly limit reporting requirements to those taxpayers involved in a trade or business. Individuals must, in plain English, be specifically excluded from the 6050X reporting requirements.

The proposed regulations provide deductibility examples; however, these regulations do not provide completion of the 1098-F examples. Please include examples related to the reporting requirements of 6050X including examples for all of the Box 8 options (including multiple Box 8 selections) as follows:



matter to which a court order or an agreement relates.

Box 8. Shows one or more of the following codes.

- A— Multiple payments.
- B— Multiple payers/defendants.
- C— Multiple payees.
- D— Property or services required to be acquired, constructed, or transferred under a court order or an agreement.
- E— Payment amount not identified.
- F— Paid in full as of time of filing.
- G— No payment received as of time of filing.
- H— Deferred prosecution agreement.
- I— Payment to third party at the direction of a government or governmental entity.

Again, we specifically request Boxes 5-8 be eliminated from the Form 1098-F as any beneficial purpose to the IRS is not evident.

The proposal modifies the reporting requirement from the original draft allowing for separate divisions of the government to report. It does not appear that governments can centralize reporting, we would request flexibility in this regard.

Thank you for the opportunity to provide comment on the proposed regulations providing guidance on Section 162(f) and new Section 6050X of the Internal Revenue Code. While we understand that the IRS is responsible for implementing the statute, we recommend that the IRS consider seeking a repeal of the new reporting requirement and utilize the existing IRS audit process to ensure compliance with the new requirements under the Tax Cuts and Job Act Section 162(f). In the alternative, we are hopeful that the IRS can alleviate some of the administrative and financial burden through additional clarification. Should you have any questions or require additional information, please feel free to contact NASACT's representative in Washington, Cornelia Chebinou at cchebinou@nasact.org or (202) 624-5451.

Regards,

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