

## Reform Penalty and Interest Provisions

### #31 CONVERT THE ESTIMATED TAX PENALTY INTO AN INTEREST PROVISION FOR INDIVIDUALS, TRUSTS, AND ESTATES

#### Present Law

Through the combination of wage withholding and the requirement that taxpayers make 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. IRC § 6654 generally requires that taxpayers 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 that are due on April 15, June 15, September 15, and January 15 of the following tax year.<sup>114</sup>

IRC § 6654(a) provides 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 denominated as a “penalty,” but the computation is strictly an interest charge.

#### 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 experience significant fluctuations in their incomes and expenses from year to year. Taxpayers with significant investment income also may experience significant fluctuations. In addition, significant changes in tax laws, such as those taking effect in 2018, affect tax liabilities in ways that taxpayers may not fully anticipate. As a result, millions of taxpayers do not satisfy the requirements of IRC § 6654 and are liable for penalties, even though many have attempted to comply.

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 Ways and Means Committee 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.”<sup>115</sup> Along those lines, the Office of the Taxpayer Advocate has conducted research studies that have found “tax morale” has an impact on tax compliance.<sup>116</sup> For that reason, the failure to pay sufficient estimated tax is better characterized as an interest charge than a penalty for deficient taxpayer behavior.

114 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).

115 H.R. REP. NO. 108-61, at 23-24 (2003).

116 See National Taxpayer Advocate 2013 Annual Report to Congress vol. 2, 1-13 (Research Study: *Do Accuracy-Related Penalties Improve Future Reporting Compliance by Schedule C Filers?*).

**Recommendation**

Convert the penalty for failure to pay sufficient estimated tax to an interest charge. Toward that end, relocate IRC § 6654 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.<sup>117</sup>

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<sup>117</sup> For language that is generally consistent with this recommendation, see H.R. 1528, 108th Cong. § 101 (2003). If the additional charge for failure to pay estimated tax remains a penalty, then the National Taxpayer Advocate reiterates her prior recommendation that Congress enact a reasonable cause exception. See National Taxpayer Advocate 2008 Annual Report to Congress vol. 2, 34-36 (Study: *A Framework for Reforming the Penalty Regime*).

## #32 APPLY ONE INTEREST RATE PER ESTIMATED TAX UNDERPAYMENT PERIOD FOR INDIVIDUALS, ESTATES, AND TRUSTS

### Present Law

Under IRC § 6654, taxpayers who make estimated tax payments must submit those payments on April 15, June 15, September 15, and January 15 of the following tax year. Failure to do so results in a penalty that is determined by the underpayment rate, the amount of the underpayment, and the period of the underpayment. The underpayment rate is established by IRC § 6621(a)(2) to be 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 January 1, April 1, July 1, and October 1.

### Reasons for Change

Under existing law, more than one interest rate may apply for a single estimated tax underpayment period. 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, while another interest rate would apply for any continued delinquency from July 1 through September 15. The application of more than one interest rate for a single underpayment period causes unnecessary complexity and burden for taxpayers and the IRS alike. This complexity and burden would be reduced if a single interest rate was applied for each period.

### Recommendation

Amend IRC § 6654 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.<sup>118</sup>

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<sup>118</sup> H.R. 1528, 108th Cong. § 101 (2003), passed in the House, and § 201 of the Senate amendment, and S. 1793, 115th Cong. § 305 (2017), contain language that is consistent with this recommendation. See also H.R. REP. NO. 108-61, at 25 (2003).

### #33 REDUCE THE FEDERAL TAX DEPOSIT PENALTY IMPOSED ON CERTAIN TAXPAYERS WHO MAKE TIMELY TAX DEPOSITS

#### Present Law

IRC § 6656(a) imposes a penalty, as a percentage of the underpayment, for the failure to deposit (FTD) taxes in a manner prescribed by regulation, unless such failure is due to reasonable cause and not due to willful neglect. Treasury Regulation § 31.6302-1(h) requires federal tax deposits to be made electronically via electronic funds transfer. Most taxpayers use the Electronic Federal Tax Payment System (EFTPS), a free service offered by the Department of Treasury. The penalty rate for FTD varies, depending on the length of the taxpayer's delay in making the deposit. IRC § 6656(b)(1) provides that the penalty is two percent for a FTD of not more than five days, five percent for a FTD of more than five days but not more than 15 days, and ten percent for a FTD of more than 15 days. Thus, taxpayers must make deposits on time, in full, and in the correct manner to avoid a penalty for FTD.<sup>119</sup>

#### Reasons for Change

The IRS has taken the position that the maximum ten percent penalty rate automatically applies if a deposit is not made in the manner prescribed by the regulation.<sup>120</sup> As a result, taxpayers who timely remit full payment to the IRS but who do not do so in the manner prescribed are subject to a higher penalty rate than taxpayers who do not make a timely payment at all. The National Taxpayer Advocate believes it is inappropriate to penalize taxpayers who make timely payments more harshly than taxpayers who do not, and the Ways and Means Committee has observed that this approach “does not reflect the intent of the Congress.”<sup>121</sup>

#### Recommendation

Amend IRC § 6656 to establish a penalty rate of two percent for FTD in the manner prescribed by the Secretary of Treasury.<sup>122</sup>

119 See *F.E. Schumacher Co. v. U.S.*, 308 F. Supp.2d 819, 830 (N.D. Ohio 2004) (“penalties assessed pursuant to Section 6656 are appropriate even where taxes are timely paid, albeit by means other than [Electronic Funds Transfer]”).

120 Rev. Rul. 95-68, 1995-2 C.B. 272; IRM 20.1.4.2, *Authorized Deposit Methods* (Jan. 6, 2012).

121 H.R. REP. NO. 108-61, at 36 (2003).

122 H.R. 1528, 108th Cong. § 108 (2003), passed in the House, contains language that is consistent with this recommendation. S. 1793, 115th Cong. § 309 (2017) also contains language that is substantially similar to this recommendation.

## #34 AUTHORIZE A PENALTY FOR TAX RETURN PREPARERS WHO ENGAGE IN FRAUD OR MISCONDUCT BY ALTERING A TAXPAYER'S TAX RETURN

### Present Law

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 then 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 the entire refund is directed to his account instead of the taxpayer's account. In other cases, the preparer increases the refund amount and elects a "split refund,"<sup>123</sup> so the taxpayer receives the refund amount he expects and the additional amount goes to the preparer.

IRC § 6694 authorizes the IRS to impose a penalty where a preparer has understated a tax liability on a "return or claim for refund" when the understatement is due to willful or reckless conduct.<sup>124</sup> However, 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 or claim for refund."<sup>125</sup> As a consequence, the section 6694 penalty does not apply.

By contrast, when the preparer has altered only the direct deposit information on the return, the resulting document is treated as a valid "return or claim for refund." However, the penalty still does not apply because there is no understatement, as the return is otherwise accurate.

IRC § 6695(f) imposes a \$500 penalty on a preparer who negotiates a taxpayer's refund check.<sup>126</sup> The IRS and Treasury have interpreted this penalty to apply to a preparer who negotiates "a check (including an electronic version of a check)."<sup>127</sup> It is unclear, however, whether an "electronic version of a check" is legally identical to a direct deposit. Thus, when a preparer diverts a taxpayer's refund via direct deposit but the return is otherwise accurate, it is not clear whether the preparer's misconduct is subject to the section 6695(f) penalty. Moreover, even if the penalty is applicable, the penalty amount is typically small in relation to the size of refunds that some preparers have misappropriated.

### Reasons for Change

While the Department of Justice (DOJ) may bring criminal charges against preparers who alter tax returns, resource constraints generally preclude criminal charges except in the case of widespread schemes. In addition, the dollar amount of a refund obtained by a preparer in these cases often will determine whether the DOJ pursues an erroneous refund suit under IRC § 7405, as resources again constrain the number of suits

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

124 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.

125 PMTA 2011-20, *Tax Return Preparer's Alteration of a Return* (June 27, 2011); PMTA 2011-13, *Horse's Tax Service* (May 12, 2003).

126 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.

127 Treas. Reg. § 1.6695-1(f)(1).

that can be brought each year. It is therefore important that the IRS have the authority to impose sizeable civil tax penalties against preparers who alter tax returns without the knowledge or consent of taxpayers.

If the penalty amount is equal to the amount by which a preparer has benefited (*i.e.*, a 100 percent penalty), the public fisc would be made whole.

### **Recommendations**

Amend IRC § 6694 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 "and other submissions."

Amend IRC § 6695 to explicitly cover a preparer who misappropriates a taxpayer's refund by changing the direct deposit information and 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 improperly converted to his own use through fraud or misconduct by altering a taxpayer's tax return.

## #35 REQUIRE WRITTEN MANAGERIAL APPROVAL BEFORE ASSESSING THE ACCURACY-RELATED PENALTY FOR “NEGLIGENCE”

### Present Law

A taxpayer who submits a return that is not accurate (*i.e.*, reflects an “underpayment”) may be subject to an accuracy-related penalty under IRC § 6662. In particular, a penalty for “negligence or disregard of rules or regulations” may be imposed under IRC § 6662(b)(1). IRC § 6662(c) defines “negligence” as “any failure to make a reasonable attempt to comply with the provisions of this title” and defines “disregard” to include “any careless, reckless, or intentional disregard.”

As a taxpayer protection, IRC § 6751(b)(1) requires that the immediate supervisor of an employee making the initial determination of a penalty assessment must personally approve the determination, in writing.<sup>128</sup> However, penalties “automatically calculated through electronic means” are not required to receive managerial approval.<sup>129</sup>

### Reasons for Change

The purpose of penalties is to encourage voluntary compliance and deter noncompliance. Unlike penalties that can be assessed by answering a simple yes/no question (for example, the penalty for failing to file a return under IRC § 6651), the determination to assess a negligence penalty requires knowledge of what actions the taxpayer took to comply with the tax laws, as well as his or her motivations for taking those actions. Negligence cannot reasonably be determined by a computer, because a computer cannot assess whether a taxpayer made a “reasonable attempt” to comply with the law.

Nevertheless, the IRS has programmed its computers to apply negligence penalties automatically as part of its Automated Underreporter (AUR) program. AUR is an automated program that identifies discrepancies between the amounts that taxpayers report on their returns and what payors report via Forms W-2, Forms 1099, and other information returns. In general, penalties assessed under the AUR program are automatically computed pursuant to a computer program when a discrepancy is detected in the document matching program. If the negligence penalty is assessed through the AUR program, without an employee independently determining its appropriateness, there is no requirement for managerial approval.

An IRS employee will review a penalty assessment to make a determination of “negligence” only if a taxpayer responds to initial notices issued by AUR. There are many reasons why a taxpayer may not respond to a notice. The taxpayer may not receive it if he or she has moved. The taxpayer may put it aside and not get back to it. Or a taxpayer may accept the proposed adjustment but not realize he or she must respond to avoid the penalty assessment. In these and other circumstances, taxpayers may be assessed a penalty for negligence

128 This area of law has been the focus of recent litigation. In 2016, a majority of the U.S. Tax Court ruled that the written approval for an accuracy-related penalty could be given at any time prior to assessment, including while a case was in litigation before the Tax Court. As a result, the Tax Court held it was premature for it to consider an argument under IRC § 6751(b). *Graev v. Comm’r*, 147 T.C. No. 16 (2016), *vacated*, No. 30638-08 (T.C. Mar. 30, 2017). However, the decision in *Graev v. Comm’r* has since been vacated, because shortly after the decision was issued, the U.S. Court of Appeals for the Second Circuit (to which *Graev* would have been appealed) came to a different conclusion. In *Chai v. Commissioner*, the Second Circuit ruled that managerial approval for penalty assessments must be obtained before the IRS issues a notice of deficiency. *Chai v. Comm’r*, 851 F.3d 190 (2d Cir. 2017). These two rulings initially suggested a split between the majority of the Tax Court and the Second Circuit. Following the ruling in *Chai*, however, the Tax Court reversed course in a subsequent ruling in *Graev*. Taking *Chai* into account, the Tax Court ruled that it is not premature to consider an argument under IRC § 6751(b) in a deficiency proceeding, and the IRS bears the burden of production under IRC § 7491(c) to show the penalty received managerial approval. *Graev v. Comm’r*, 149 T.C. No. 23 (2017).

129 IRC § 6751(b)(2)(B).

without any analysis into their reasonable attempts to comply with tax laws (or lack thereof). This result runs contrary to the protections afforded in IRC § 6751(b).

### **Recommendation**

Amend IRC § 6751(b)(2)(B) to require written managerial approval prior to assessment of the accuracy-related penalty imposed on the portion of an underpayment attributable to negligence or disregard of rules or regulations under IRC § 6662(b)(1) and specify which penalties and facts or circumstances result in penalties “automatically calculated through electronic means.”



## #36 COMPENSATE TAXPAYERS FOR “NO CHANGE” NATIONAL RESEARCH PROGRAM (NRP) AUDITS AND WAIVE ASSESSMENT OF TAX, INTEREST, AND PENALTIES RESULTING FROM NRP AUDITS

### Present Law

There is no provision under Present Law that allows compensation of taxpayers who are audited under the IRS’s National Research Program (NRP) or provides relief from the assessment of tax, interest, and penalties that may result from an NRP audit.

### Reasons for Change

Through the NRP, the IRS conducts audits of randomly selected taxpayers. The NRP benefits tax administration by gathering strategic information about taxpayer compliance behavior, assisting the IRS in developing and updating its workload selection formulas, collecting data about the causes of reporting errors, and providing estimates of the tax gap, which measures the magnitude of taxpayer noncompliance with the tax laws. In addition, NRP studies benefit Congress by providing taxpayer compliance information that is useful in formulating tax policy, and they help the IRS focus its audits on returns with a relatively high likelihood of errors, thereby building trust in the fairness of the tax system.

For the tens of thousands of individual taxpayers (or businesses) that are subject to NRP audits, however, they impose significant burden. In essence, these taxpayers, even if fully compliant, serve as “guinea pigs” to help the IRS improve the way it does its job. They must contend with random and intensive audits that consume their time, drain resources (including representation costs), and may impose an emotional and reputational toll.

In 1995, the House of Representatives Committee on Ways and Means, Subcommittee on Oversight, held a hearing on the NRP’s predecessor, the Taxpayer Compliance Measurement Program (TCMP).<sup>130</sup> Testimony provided during the hearing and subsequent witness responses to questions-for-the-record highlighted the burden TCMP audits imposed on taxpayers, as well as a strong sentiment that audited taxpayers were bearing the burden of a research project intended to benefit the tax system as a whole. Proposals raised at the hearing included compensating taxpayers selected for TCMP audits as well as possibly waiving tax, interest, and penalties assessed during the audits.

Subsequent to the hearing, the House Budget Committee included a proposal in its 1995 budget reconciliation bill to compensate individual taxpayers by providing a tax credit of up to \$3,000 for TCMP-related expenses.<sup>131</sup> Ultimately, this proposal was not adopted, as the IRS was pressured to stop conducting TCMP audits. The inability to perform regular TCMP audits was bad for tax administration because it prevented the IRS from updating its audit formulas. It was also bad for compliant taxpayers, because when the IRS is not able to accurately identify returns with a high likelihood of noncompliance, taxpayers who filed compliant returns are more likely to face audits.

For the same reasons that led to the taxpayer-compensation proposal for TCMP audits, the National Taxpayer Advocate believes it is appropriate to recognize that taxpayers audited under the NRP are bearing a heavy burden to help the IRS improve the effectiveness of its compliance activities. A tax credit or authorized payment would alleviate the monetary component of the burden. Further relief could be provided by waiving

<sup>130</sup> *Taxpayer Compliance Measurement Program: Hearing Before the H. Subcomm. on Oversight of the H. Comm. on Ways and Means, 104th Cong. (1995).*

<sup>131</sup> See H.R. REP. NO. 104-280, VOL. 2, AT 28 (1995).

any assessment of tax, interest, and penalties resulting from an NRP audit. Such a waiver might also improve the accuracy of the NRP audits, since taxpayers would be more likely to be forthcoming with an auditor if they were assured they would not face additional assessments. However, this waiver should not apply where tax fraud or an intent to evade is uncovered in an NRP audit.

### **Recommendation**

Amend the IRC to compensate taxpayers for “no change” NRP audits through a tax credit or other means (such as IRS user fees), and waive assessment of tax, interest, and penalties resulting from an NRP audit absent fraud or an intent to evade federal taxes.