



CHIEF FINANCIAL OFFICER
JIMMY PATRONIS
STATE OF FLORIDA

October 29, 2018

Laurie Brimmer
Internal Revenue Service
Room 6129
111 Constitution Avenue NW
Washington, DC 20221

**Re: Proposed Extension of Information Collection Request Submitted for Public
Comment; Transitional Guidance Under Sections 162(f) and 6050X With Respect to
Certain Fines, Penalties, and Other Amounts**

Dear Ms. Brimmer:

The Florida Department of Financial Services (the "Department") submits these comments in response to the Proposed Extension of Information Collection Request Submitted for Public Comment; Transitional Guidance Under Sections 162(f) and 6050X With Respect to Certain Fines, Penalties, and Other Amounts ("Notice and Request for Comments"), as published in the Federal Register on September 4, 2018.¹ The Notice and Request for Comments concerns transitional guidance under Internal Revenue Code (IRC or "Code") sections 162(f)² and the new reporting requirements in section 6050X as enacted under Public Law No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA).

The Department overseen by Florida Chief Financial Officer Jimmy Patronis, is made up of 13 divisions and several specialized offices. The Department is responsible for the review, approval, payment, and reporting for every expenditure the State of Florida makes. Additionally, the Department has regulatory and enforcement responsibilities that result in the issuance of court orders, administrative orders, and settlement agreements. These comments have been developed considering the Department's current reporting responsibilities, and in consideration of reporting responsibilities pursuant to section 6050X that are likely to fall on the various other state and local governmental entities entering into settlement agreements with taxpayers.

I. OVERVIEW

The TCJA significantly modified section 162(f) and added a new reporting requirement for fines and penalties in section 6050X. Section 162(f)(1), as amended by the TCJA, disallows a deduction for amounts paid or incurred (whether by suit, agreement, or otherwise) to, or at the direction of, a government or governmental entity in relation to the violation of any law or the investigation or inquiry

¹ Proposed Extension of Information Collection Request Submitted for Public Comment; Transitional Guidance Under Sections 162(f) and 6050X With Respect to Certain Fines, Penalties, and Other Amounts, 83 Fed. Reg. 45015 (September 4, 2018) [hereinafter referred to as the "Notice"] <https://www.federalregister.gov/d/2018-19172>.

² All references herein to "section" or "§" are to the Internal Revenue Code of 1986, as amended, or the Treasury Regulations promulgated thereunder.

by such government entity into the potential violation of any law. Section 162(f)(2) provides an exception to the general rule for restitution or for amounts paid to come into compliance with the law.

To meet the exception, section 162(f)(2)(A)(i) requires that the taxpayer establish that the amount paid or incurred (1) constitutes restitution (including remediation of property) for damage or harm that was or may be caused by violation of any law or the potential violation of any law, or (2) is paid to come into compliance with any law that was violated or otherwise involved in the investigation or inquiry into the potential violation of any law (the “establishment requirement”). Further, the amount paid or incurred must be identified in the settlement agreement or court order as restitution or as an amount paid to come into compliance with such law (the “identification requirement”).³ Meeting the identification requirement alone, however, is not sufficient to meet the establishment requirement.⁴

Section 6050X(a)(1) requires the appropriate official of any government or applicable nongovernmental entity which is involved in a suit or agreement described in section 6050X(a)(2) to make a return in such form as determined by the Secretary of the Treasury setting forth:

- 1) the amount required to be paid as a result of the suit or agreement to which paragraph (1) section 162(f) applies;
- 2) any amount required to be paid as a result of the suit or agreement to which constitutes restitution or remediation of property; and
- 3) any amount required to be paid as a result of the suit or agreement for the purpose of coming into compliance with any law which was violated or involved in the investigation or inquiry.

The reporting requirement applies to:

- 1) a suit with respect to a violation of any law over which the government or entity has authority and with respect to which there has been a court order; or
- 2) an agreement which is entered into with respect to a violation of any law over which the government or entity has authority, or with respect to an investigation or inquiry by the government or entity into the potential violation of any law over which such government or entity has authority; and
- 3) the aggregate amount involved in all court orders and agreements with respect to the violation, investigation, or inquiry is \$600 or more.⁵

The appropriate official must file the required return with the Internal Revenue Service (IRS) at the time the agreement is entered into.⁶ The person required to file the return with the IRS must also furnish each person who is a party to the suit or agreement a written statement showing (1) the name of the government or entity, and (2) the information provided to the IRS.⁷ The written statement must be furnished to the person at the same time the return is filed.⁸

Section 6050X(c) defines the appropriate official required to file the return with the IRS as the officer or employee having control of the suit, investigation, or inquiry or the person appropriately designated for purposes of the section.

³ IRC § 162(f)(2)(A)(ii).

⁴ IRC § 162(f)(2)(A)(i).

⁵ IRC § 6050X(a)(2)(A).

⁶ IRC § 6050X(a)(3).

⁷ IRC § 6050X(a)(3)(b).

⁸ *Id.*

II. COMMENTS AND RECOMMENDATIONS

The reporting requirements pursuant to section 6050X are unduly burdensome on state and local governmental entities. If implemented as broadly as the statute may be interpreted, state and local governmental entities will be required to report thousands of fines and penalties that are not deductible to the taxpayer. Reporting non-deductible payments for fines and penalties related to court orders and settlements is unnecessary for the proper performance of the functions of the IRS, and providing such information will have little, if any, practical utility.

A. Reporting Requirements of 6050X are Unduly Burdensome on State and Local Governmental Entities

Section 6050X requires governmental entities to report to the IRS amounts of \$600 or more required to be paid because of a suit or agreement. Such reporting is also required for agreements with a government entity with respect to a violation of any law over which the government entity has authority. This reporting requirement is so broad that it potentially reaches all the state and local governmental entities that have the authority to impose fines and penalties on taxpayers or to require taxpayers to come into compliance with laws. For example, this Department alone has the authority to impose upon or seek orders and settlements for fines, penalties, and restitution from, *inter alia*, insurance agents, insurance companies, persons committing various types of fraud involving insurance claims or theft and misuse of public funds, persons violating state laws regarding fire prevention and control, etc.

Recommendation

The Department recommends that the IRS and Treasury issue guidance and regulations that curtail the reporting of fines, penalties, and restitution that are not deductible by the taxpayer pursuant to section 162. Specifically, a governmental entity may enter into a settlement agreement whereby a taxpayer agrees to comply with a law or regulation *and* pay an amount as a penalty for past violations. Pursuant to the requirements of section 6050X, the governmental entity would have to report the amount of penalties agreed to in the settlement even though those amounts are not deductible under section 162(f).

Further, the Department recommends that the IRS and Treasury issue guidance and regulations that shift the burden of reporting of compliance costs to the taxpayer. It is impossible for governmental entities to know what the taxpayer will ultimately spend to come into compliance. Accordingly, the taxpayer should be responsible for tracking and reporting to the IRS its ultimate compliance costs.

B. Reporting Threshold is Too Low

Section 6050X requires governmental entities to report to the IRS amounts of \$600 or more required to be paid because of a suit or agreement. This \$600 threshold is so low that it will require governmental entities to furnish thousands of reports to the IRS and taxpayers on a host of matters ranging from traffic offenses to minor and civil impositions. Such a low reporting threshold will be exceptionally burdensome and costly for state and local governmental entities.

Recommendation

The Department recommends that the IRS and Treasury significantly raise the \$600 reporting threshold. Raising the reporting threshold to \$1 million or more would drastically decrease the reporting burden on governmental entities.⁹

C. Reporting Requirement for Governmental Entities is Unclear

Section 6050X applies to court orders and agreements with respect to a violation of any law over which the government or entity has authority, or with respect to an investigation or inquiry by the government or entity into the potential violation of any law over which such government or entity has authority. The reporting requirement, however, does not expressly state that it applies to administrative orders.

In Florida, most state agencies and many governmental entities' law enforcement actions afford the alleged violator the opportunity to be heard in a quasi-judicial proceeding conducted by an executive agency pursuant to Florida's Administrative Procedure Act. The orders issued from these proceedings are not from a court, but rather from the agency tasked with enforcing its laws. The administrative orders may be appealed to a court and enforcement of the order may be obtained through a court proceeding. The Department is uncertain whether the reporting requirements of section 6050X apply to administrative orders.

Recommendation

The Department recommends that the IRS and Treasury issue guidance and regulations that specify whether the reporting requirements of section 6050X apply to administrative orders resulting from quasi-judicial proceedings.

We appreciate the opportunity to provide our comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact me at (850) 413-3098 or Mark.Merry@myfloridacfo.com

Sincerely,



Mark Merry
Assistant Director
Accounting & Auditing

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⁹ The U.S. Department of Justice, in its May 18, 2018, comments to the IRS recommended a threshold amount of \$10 million.