

IRS Announces Penalty Relief for 2019, 2020 Tax Years

Taxpayers must act quickly to determine if further action is necessary to obtain relief. Delinquent returns must be filed on or before September 30, 2022.

Key Points:

- For tax years 2019 and 2020, IRS Notice 2022-36 provides automatic relief to corporations, partnerships, trusts, tax-exempt organizations, and individuals from certain failure-to-file penalties and international information return (IIR) penalties.
- Penalty relief under the Notice is automatic — meaning, generally, penalties covered by the Notice will be abated, refunded, or credited (as appropriate) if a taxpayer has filed certain delinquent 2019 and/or 2020 returns on or before September 30, 2022.
- The Notice separately provides automatic penalty relief for taxpayers who filed certain 2019 and 2020 information returns by August 1, 2020, and August 1, 2021, respectively.
- Notably, the Notice does *not* provide relief from penalties associated with taxpayers' failure to file FinCEN Form 114, a Report of Foreign Bank and Financial Accounts (FBAR), or IRS Form 8938, Statement of Specified Foreign Financial Assets.

On August 24, 2022, the IRS released [Notice 2022-36](#) (the Notice). The penalty relief provided in the Notice follows a series of notices and other guidance designed to provide relief to taxpayers adversely affected by the COVID-19 pandemic (e.g., IRS Notices 2020-17, 2020-18, and 2021-21).¹ This initiative not only provides a safe harbor from certain penalties associated with coming into compliance with filing requirements, but will also allow the IRS to better focus available resources on processing backlogged tax returns and taxpayer correspondence.

According to the IRS, nearly 1.6 million taxpayers will automatically receive more than \$1.2 billion in refunds or credits, and most eligible taxpayers will receive their refunds by the end of September 2022.²

Penalty Relief Under the Notice

Given the burdens on taxpayers to meet their filing obligations during the pandemic and the significant backlog of IRS returns still to be processed, the IRS issued Notice 2022-36 to focus IRS resources more efficiently and provide additional relief to taxpayers.³ As summarized in the table in this Alert, the Notice grants relief from certain failure-to-file penalties and certain IIR penalties with respect to returns for tax years 2019 and 2020.

Penalty relief under the Notice is automatic — meaning, generally, penalties covered by the Notice will be abated, refunded, or credited (as appropriate) if a taxpayer has filed certain delinquent 2019 and/or 2020 returns on or before September 30, 2022. A taxpayer is not required to provide any additional submissions or requests in order to receive the relief described in the Notice.⁴

If the IRS already assessed the penalty, it will be automatically abated. If the penalty was already paid, the taxpayer will receive a credit or refund. Over the coming weeks and months, the IRS will mail standard notices to taxpayers informing them that amounts were abated, refunded, or credited (as appropriate). According to the IRS, these notices will not specifically reference the Notice.

Penalty Relief for Information Reporting Penalties

The IRS will not impose penalties under Section 6721(a)(2)(A) for the failure to timely file an information return (e.g., W-2s, Form 1099, Forms 1094/1095-C, etc.) depending upon when the information return was due and when it was actually filed:

- 2019 Information Returns: To receive penalty relief, the information return must have been filed on or before August 1, 2020, with an original due date of January 31, 2020; February 28, 2020 (if filed on paper) or March 31, 2020 (if filed electronically); or March 15, 2020.
- 2020 Information Returns: To receive penalty relief, the information return must have been filed on or before August 1, 2021, with an original due date of January 31, 2021; February 28, 2021 (if filed on paper) or March 31, 2021 (if filed electronically); or March 15, 2021.

If a taxpayer has not yet filed these information returns, or filed them after the dates noted above, filing them by September 30, 2022 will not qualify for relief under the Notice.

When Penalty Relief Does Not Apply

Penalty relief under the Notice is explicitly not available for:

- any penalty not specifically identified in the Notice (e.g., penalties arising from the failure to file an FBAR);
- any return to which the penalty for fraudulent failure to file or fraud applies;⁵
- penalties in an accepted offer in compromise;⁶ and
- penalties settled in an IRS closing agreement or finally determined in a judicial proceeding.

Taxpayers Should Contact Legal and Tax Advisors Immediately

Penalty relief will be automatic for taxpayers who have already filed eligible delinquent returns. However, taxpayers who have not yet filed delinquent 2019 and/or 2020 returns should promptly contact tax counsel to discuss potential eligibility for relief under the Notice or a different IRS program. Given the complexity of tax and information reporting penalties and the numerous pathways to penalty relief, determining the best penalty relief strategy and preparing and filing returns can be a time and resource-intensive exercise — so time is of the essence.

Filings Eligible for Automatic Penalty Relief

The following table sets forth the types of filings eligible for automatic penalty relief that are filed by or with respect to corporations, partnerships, trusts and estates, individuals, and tax-exempt organizations:

IRS Form	Applicable Penalties Absent Relief
Corporations	
Form 1120 , <i>U.S. Corporation Income Tax Return</i> (including series C, F, FSC, H, L, PC, POL, REIT, RIC, ND, and SF)	Section 6651(a)(1) Penalty <ul style="list-style-type: none"> 5% net tax liability due for the year, increasing 5% for each additional month the failure to file continued (or fraction thereof), up to 25% of the outstanding net tax liability due.
Form 1066 , <i>U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return</i>	
Form 1120-S , <i>U.S. Income Tax Return for an S corporation</i>	Section 6699(a)(1), (2) Penalties <ul style="list-style-type: none"> \$205 or \$210 (depending upon the tax year) multiplied by the number of S corporation shareholders, per month, up to 12 months.
Form 5471 , <i>Information Return of U.S. Persons With Respect To Certain Foreign Corporations</i> (attached to a late filed Form 1120)	Section 6038 Penalty <ul style="list-style-type: none"> \$10,000 for each annual accounting period the failure occurred. This penalty begins to increase by an additional \$10,000 for each 30-day period (or fraction thereof) following 90 days after the mailing of an IRS notice concerning the failure. The maximum total penalty is \$60,000.
Form 5472 , <i>Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business</i> (attached to a late filed Form 1120)	Section 6038A(d) / 6038C(c) Penalties <ul style="list-style-type: none"> \$25,000 for each taxable year the failure occurs. This penalty begins to increase by an additional \$25,000 for each 30-day period (or fraction thereof) following 90 days after the mailing of an IRS notice concerning the failure.
Partnerships	
Form 1065 , <i>U.S. Return of Partnership Income</i>	Section 6698(a)(1), (a)(2) Penalties <ul style="list-style-type: none"> \$205 or \$210 (depending upon the tax year) multiplied by the number of partners, per month, up to 12 months.
Form 5471 , <i>Information Return of U.S. Persons With Respect To Certain Foreign Corporations</i> (attached to a late filed Form 1065)	Section 6038 Penalties <ul style="list-style-type: none"> \$10,000, per foreign corporation, for each annual accounting period the failure occurred. This penalty begins to increase by an additional \$10,000 for each 30-day period (or fraction thereof) following 90 days after the mailing of an IRS notice concerning the failure. The maximum total penalty is \$60,000 for each violation. 10% reduction of foreign taxes credits (FTC) under Sections 901 and 960. This FTC reduction penalty begins to increase by an additional 5% reduction is made for each 3-month period (or fraction thereof) following 90 days after the mailing of an IRS notice concerning the failure. This additional reduction shall not exceed the greater of \$10,000 or the annual income of the foreign business entity.⁷
Form 5472 , <i>Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business</i> (attached to a late filed Form 1065)	Section 6038A(d) / 6038C(c) Penalties <ul style="list-style-type: none"> \$25,000 for each taxable year the failure occurs. This penalty begins to increase by an additional \$25,000 for each 30-day period (or fraction thereof) following 90 days after the mailing of an IRS notice concerning the failure.

IRS Form	Applicable Penalties Absent Relief
Trusts & Estates	
Form 1041 , <i>U.S. Income Tax Return for Estates and Trusts</i> (including series N and QFT)	Section 6651(a)(1) Penalty <ul style="list-style-type: none"> 5% net tax liability due for the year, increasing 5% for each additional month the failure to file continued (or fraction thereof), up to 25% of the outstanding net tax liability due.
Form 3520 , <i>Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts</i> and Form 3520-A , <i>Annual Information Return of Foreign Trust With a U.S. Owner</i> (Under section 6048(b))	Section 6677 Penalty <ul style="list-style-type: none"> As applicable, the greater of \$10,000 or <ul style="list-style-type: none"> 35% of the gross value of any property transferred to a foreign trust for failure by a U.S. transferor to report the creation or transfer to a foreign trust; 35% of the gross value of the distributions received from a foreign trust for failure by a U.S. person to report receipt of such distributions. 5% of the gross reportable amount, whichever is greater for a U.S. owner where the foreign trust fails to timely file Form 3520-A, or does not furnish information required by Section 6048(b). This penalty begins to increase by an additional \$10,000 for each 30-day period (or fraction thereof) following 90 days after the mailing of an IRS notice concerning the failure. The maximum penalty for each failure per year is the gross reportable amount.
Individuals	
Form 1040 , <i>U.S. Individual Income Tax Return</i> (including series C, NR, NR-EZ, PR, SR, and SS)	Section 6651(a)(1) Penalty <ul style="list-style-type: none"> 5% net tax liability due for the year, increasing 5% for each additional month the failure to file continued (or fraction thereof), up to 25% of the outstanding net tax liability due.
Form 3520 , <i>Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts</i>	Section 6039F(c) Penalty <ul style="list-style-type: none"> 5% of the applicable gift amount, per month, not to exceed a total of 25% of the applicable gift amount.
Exempt Organizations	
Form 990-T , <i>Exempt Organization Business Income Tax Return (and Proxy Tax Under Section 6033(e))</i>	Section 6651(a)(1) Penalty <ul style="list-style-type: none"> 5% net tax liability due for the year, increasing 5% for each additional month the failure to file continued (or fraction thereof), up to 25% of the outstanding net tax liability due.
Form 990-PF , <i>Return of Private Foundation or Section 4947(a)(1) Trust Treated as Private Foundation</i>	

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Endnotes

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- ¹ IRS Notice 2020-17, 2020-15 I.R.B. 590, postponed the due date for certain Federal income tax payments from April 15, 2020, until July 15, 2020. IRS Notice 2020-18, 2020-15 I.R.B. 590, superseded Notice 2020-17 and provided expanded relief. IRS Notice 2021-21, 2021-15 I.R.B. 986, postponed the due date for filing Federal income tax returns in the Form 1040 series and making certain Federal income tax payments that were originally due on April 15, 2021, to May 17, 2021.
 - ² [IR-2022-155 \(Aug. 24, 2022\)](#).
 - ³ Id.
 - ⁴ Nothing in the Notice impacts Taxpayer's ability to argue that penalties should not apply because the failure to timely file a return or to furnish required information or to provide the required notice, as applicable, was due to "reasonable cause." See IRC §§ 6651(a)(1), 6038(c)(4)(B), 6038A(d)(3), 6038C(c), 6039F(c)(2), 6677(d), 6698(a) flush language, 6699(a) flush language, and 6724(a).
 - ⁵ IRC § 6651(f) (fraudulent failure to file); IRC § 6663 (fraud).
 - ⁶ Acceptance of an offer-in-compromise conclusively settles all liabilities in the offer. IRC § 7122; Treas. Reg. § 301.7122-1(e)(5).
 - ⁷ The Notice's scope is not entirely clear, including whether the reduction in foreign tax credits is covered.