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First-time penalty abatement

Use this often-overlooked IRS waiver to help your clients.

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In 2011, the IRS assessed [38.6 million penalties](#) to taxpayers, totaling almost \$31 billion. According to the IRS, the purpose of penalties is to [deter noncompliance](#), not to raise revenues. Certain penalties can be waived or abated if the taxpayer has a past history of compliant behavior. In effect, the IRS rewards taxpayers with a history of compliant behavior with a one-time penalty amnesty. For individuals, this relief applies to two of the most common penalties: failure to file (delinquency) and failure to pay. For businesses, this relief also applies to the failure-to-deposit penalty for payroll taxes.

Types of penalty relief

Penalty relief is usually classified according to one of the following categories:

Reasonable cause. This is a facts-and-circumstances test in which the taxpayer demonstrates that he or she exercised ordinary business care and prudence in determining the tax obligation, but nevertheless failed to comply. Depending on the penalty, the taxpayer must also prove that he or she acted in good faith or that his or her failure to comply with the law was not due to willful neglect. The IRS determines reasonable cause abatement on a case-by-case basis, treating each tax form and year separately. The IRS often abates penalties based on reasonable cause because of circumstances beyond the taxpayer's control, such as illness, natural disasters, or destruction of taxpayer records.

Statutory exceptions. The IRS waives or abates penalties because of specific exceptions. For example, Sec. 6654 (e) provides exceptions to the estimated tax penalty when the tax is less than \$1,000, when there is no tax liability in the preceding year, or when the taxpayer is newly retired or disabled. Another example is Sec. 7508, which prohibits penalty assessments on taxpayers in combat zones.

Correction of an IRS error. The IRS waives penalties when it makes an error. For example, if the IRS incorrectly posted an extension to file, resulting in a failure-to-file penalty, the IRS would waive the penalty. This category can also include erroneous written or oral advice from the IRS that the taxpayer relied on using ordinary business care and prudence.

Appeals nonassertion or relief due to hazards of litigation. The IRS Office of Appeals can waive penalties to settle a case based on "hazards of litigation," which is the probability that the IRS determination will not be upheld in court. For example, an IRS Appeals officer may waive penalties in an appeals hearing to reach an agreement with the taxpayer. This is used primarily for accuracy-related penalties in Appeals proceedings involving audits.

Administrative waiver. The IRS may formally interpret or clarify a provision to provide administrative relief from a penalty it would otherwise assess. The IRS may address an administrative waiver in either a policy statement, news release, or other formal communication stating that the policy of the IRS is to provide relief from a penalty under specific conditions. For example, in 2012, the IRS provided relief for the failure-to-pay penalty for taxpayers with financial hardship (see [IR-2012-31](#)).

The most widely available administrative waiver is often overlooked and misunderstood: first-time penalty abatement (FTA) for taxpayers with a clean compliance history. This type of penalty relief allows abatement of certain penalties for a single tax period (one tax year for individual and business income taxes, and one quarter for payroll taxes).

FTA overlooked

The IRS instituted the first-time penalty abatement waiver in 2001 to bolster voluntary compliance and help fairly administer the application of penalties.

According to a [2012 Treasury Inspector General for Tax Administration report](#), in 2010 about 1.65 million individual taxpayers qualified for FTA. However, according to the same TIGTA report, only 8.8% of the taxpayers in the sample it tested actually received the abatement. The report indicates that the primary reason for this disparity is that most taxpayers and tax professionals do not know FTA exists. This is largely because the IRS does not indicate FTA as a relief option on its penalty-related notices. This is likely a strategic move. If the IRS publicized FTA, the IRS would be inundated with requests.

The TIGTA report also highlights that the IRS often incorrectly applies its rules in determining whether taxpayers qualify for FTA, due in part to the IRS's unreliable Reasonable Cause Assistant, an internal system tool used to make penalty abatement decisions. This inconsistency often necessitates that practitioners send a written request for abatement using one of the other four categories of penalty relief. With sufficient knowledge of the FTA process and a phone call to the IRS, tax professionals can often save their individual and business clients from penalty assessments.

Requesting FTA

The most complex part of requesting FTA is determining whether your client qualifies. FTA applies only to certain penalties and certain returns filed. Your client must also satisfy the [clean compliance criteria](#).

- For individuals, FTA applies to the failure-to-file and failure-to-pay penalties. Estate and gift tax returns do not qualify for FTA waivers.
- For businesses and payroll clients, FTA applies to the failure-to-file, failure-to-pay, and/or the failure-to-deposit penalties. S corporation and partnership late-filing penalties also qualify under FTA.

For individual and business clients, FTA does not apply to the estimated tax and accuracy-related penalties. The assertion of an accuracy-related penalty is based on the facts and circumstances of each taxpayer and each tax year.

To qualify for FTA, your client must meet the clean compliance criteria rules:

Clean three-year penalty history. Your client cannot have penalties of a “significant” amount assessed in the prior three years on the same type of tax return. IRS procedures do not publicly define significant amount, but in practice, the IRS has used any penalty amount as significant in its application of the FTA qualification. Practitioners should remind the IRS of the “significant amount” qualification if the IRS rejects the request because of a small penalty amount assessed in the past three years. The estimated tax penalty is an exception and would not disqualify your client from receiving FTA.

Required returns filed. Your client must have filed all tax returns for the past three years, as required.

Keep in mind that there is an [unpublished ceiling](#) on the penalty amount that the IRS will abate under FTA by phone. If your client's penalties are substantial, you can request FTA in writing. If you request abatement in writing, provide other relevant penalty relief arguments, including any reasonable cause arguments. This will increase your client's chances of penalty abatement.

FTA has been traditionally used by tax professionals who know internal IRS procedures. Now, you have all of the information necessary to request FTA for clients with a clean compliance history and save them from IRS penalties.

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