



TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

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MEMORANDUM FOR ALL EMPLOYEES, FEDERAL, STATE AND LOCAL
GOVERNMENTS DIVISION

FROM: Paul Marmolejo, Director /s/ *Paul A. Marmolejo*
Federal, State and Local Governments Division

SUBJECT: Information Returns Procedures in FSLG

Purpose:

The purpose of this memorandum is to clarify and amend the procedures for securing and processing delinquent information returns and proposing information return penalties during an FSLG examination. These changes will be incorporated into the next revisions of IRM 4.90.12, Case Closing and Special Handling Procedures, as well as 4.90.4, Penalties.

Procedural clarification and changes regarding securing delinquent information returns during an examination:

During employment tax examinations, FSLG Specialists frequently identify information returns that were not furnished and/or filed. Updated procedures are provided in this memo, and IRM 4.90.12.11.3 will be revised to address Delinquent Information Return Procedures in all situations. There are 3 sections of this memo:

1. [Delinquent Information Return Procedures](#)

- [Delinquent Forms 1099 Identified in examinations](#)
- [Delinquent Forms W-2/W-2c Secured by Specialist during an examination](#)
- [Delinquent Forms W-2/W-2c Not secured by Specialist](#)
- [Delinquent Forms W-2/W-2c Secured by Specialist after an examination is concluded](#)
- [Special Procedures For Failure to File Form W-2 — Unagreed Case](#)

2. [Procedural clarification and changes for regarding proposing information return penalties during an examination \(Specialists\)](#)
3. [Procedural clarification and changes for proposing information return penalties after an examination has closed \(CPM and tax examiners\)](#)

Delinquent Information Return Procedures

Delinquent Forms 1099 identified in examinations

- (1) When conducting an examination, if the Specialist determines that the taxpayer failed to file required Forms 1099, the Specialist should secure the delinquent Forms 1099. The Specialist should require the payer to furnish the delinquent returns to payees and file them with the Specialist, or submit substantiation that the returns have been filed electronically through the IRS Filing Information Returns Electronically (FIRE) system. If a payer refuses to file the delinquent returns then information return penalties should be considered using the rates for intentional disregard.
- (2) The payer should be given a reasonable time, i.e., 30 days, to prepare the delinquent information returns, furnish them to the payees, and file the information returns with the Specialist or through the FIRE system.
- (3) Specialists securing delinquent paper Forms 1099 should refer to IRM 4.23.8.10.4 for detailed processing instructions. The delinquent Forms 1099 should be sent to the address identified in IRM 20.1.7 6 (7-15-2011) for "BMF" (other than Large Business and International/LB&I):

Internal Revenue Service - Stop 31
201 W. Rivercenter Blvd.
Covington, KY. 41011
- (4) If the taxpayer files the delinquent returns electronically through the IRS FIRE system then the Specialist should secure substantiation of the transmission to include in the workpapers. The FIRE system sends an e-mail to the filer that contains the FILE STATUS and "Count of Payees" included in the file. A FILE STATUS of either "Good, Not Released" or "Good, Released" indicates that the file is or will be, released for mainline processing. Files uploaded to FIRE are held for 10 days to afford the taxpayer the opportunity to correct them, if necessary. A copy of this e-mail verification may serve as sufficient substantiation and should be included in the work papers.
- (5) Specialists should attach copies of delinquent paper returns secured during an examination to the workpapers. Scanned or electronic copies should be named

“34.1005.1096&1099.DELINQ.YYYY” (where “YYYY” represents the year of the returns submitted). The naming convention appearing in Exhibit 4.90.12-6 will be amended to include this change.

- (6) Specialists should prepare Forms 5666 for recipients of delinquent Forms 1099 that have high tax potential for possible income tax underreporting for investigation by SB/SE.

Delinquent Forms W-2/W-2c Secured by Specialist during an examination

- (1) Specialists securing delinquent paper Forms W-2/W-3 (and Forms W-2c/W-3c) should refer to IRM 4.23.8.10 and 4.23.10.14 for detailed processing instructions.
- (2) If the taxpayer files the delinquent Forms W-2/W-3 (and Forms W-2c/W-3c) electronically through the Social Security Administration Electronic Wage Reporting (EWR) system, then the Specialist should secure documentation from the taxpayer verifying the transmission. After submitting the file containing the Forms W-2/W-3 (and Forms W-2c/W-3c), the taxpayer can print the “Confirmation Receipt – Your File was Received” page and submit this to the specialist as documentation of the transmission. The confirmation receipt includes the Wage File Identifier (WFID) and should be included in the work papers as sufficient substantiation of the filing.
- (3) Specialists should prepare Forms 5666 for recipients of delinquent Forms W-2 that have high tax potential for possible income tax underreporting for investigation by SB/SE.

Delinquent Forms W-2/W-2c Not Secured by Specialist

- (1) When the Forms W-2/W-2c (and Forms W-2c/W-3c) are not obtained from the employer, the Specialist will notify the employer that the returns must be filed with the GE Closing Unit at the address on the Form 4668 by the due date prescribed or a civil penalty may apply. The Specialist should also notify the employer that if they choose to file the delinquent Forms W-2/W-2c (and Forms W-2c/W-3c) electronically through the SSA EWR system, then they should send a copy of the Confirmation receipt to the GE Closing Unit at the address on the Form 4668 to avoid any possible information return penalty.
- (2) If the Failure to File Penalty and the Failure to Furnish Penalty have already been considered and determined to be applicable, and the taxpayer still refuses to file the delinquent forms, the Willful Failure to File Penalty under IRC 7203 should be considered. The taxpayer’s appeal rights are post-assessment and the taxpayer will not be able to appeal the penalties until the Forms W-2/W-2c (and Forms W-2c/W-3c) have been filed.

- (3) The Specialist should attach a list of employees who should receive Forms W-2/W-2c to the Form 4668. The list should provide: the worker's name, SSN, amount of adjustment to total compensation, social security and Medicare wages, as well as related employment tax adjustments. If the case is 100% electronic the file should be named 31.F4668.EE LIST, so that it is readily identified by CPM Review and the GE Closing Unit.
- (4) The GE Closing Unit will create a tickler file containing a copy of Form 4668 for each year examined, **the list of employees who did not receive Forms W-2/W-2c (and Forms W-2c/W-3c)**, and the F3198-A from the exam case file. If an employer fails to file the required Forms W-2/W-2c (and Forms W-2c/W-3c) with the GE Closing Unit by the due date required, the GE Closing Unit will return the tickler file flagged as a "Penalty Case Referral" to CPM Austin.
- (5) CPM Austin will be responsible for creating the Civil Penalty case files associated with delinquent Forms W-2/W-2c (and Forms W-2c/W-3c) identified in FSLG examinations. See below for more information on this.

Delinquent Forms W-2/W-2c Secured by Specialist after an examination is concluded

- (1) If Delinquent Forms W-2/W-2c (and Forms W-2c/W-3c) identified on the Form 4668 of the report are provided to the Specialist after the case is closed to CPM, whether the returns are in paper format or electronic it is the responsibility of the Specialist to forward copies of these to prevent information return penalties from being processed the year following the calendar year during which the exam concludes.
- (2) Paper copies should be mailed directly to the GE Closing Unit:

INTERNAL REVENUE SERVICE
300 East 8th Street
MS 4097 AUS
Austin, Texas 78701

- (3) Electronic files or validation of e-filing through the Social Security Administration Electronic Wage Reporting (EWR) system should be e-mailed to the Closing Unit manager charles.w.rogers@irs.gov.

Special Procedures for Failure to File Form W-2 — Unagreed Case

- (1) When the Specialist recommends assessment of penalties for failure to file and failure to furnish Form W-2 on an employment tax case involving reclassification of workers to employee status and the case is unagreed, the appropriate Information Return Penalty Package will be prepared. When neither Form 1099 nor Form W-2 was filed, follow the special procedures found in IRM 4.23.8.10.3.

Procedural clarification and changes for regarding proposing information return penalties during an examination (Specialists)

Information return penalty case files may be submitted 100% electronically to CPM. The GE Closing Unit prints out the files listed below and compiles these information return penalty case files for FSLG. These case files are identified in RCCMS by using "CIVPEN" at the beginning of all related filenames. Required forms include:

- CIVPEN.1.F3198-A
- CIVPEN.31.F3645
- CIVPEN.31.F8278
- CIVPEN.33.100.F4318A

The Small Business Jobs Act of 2010, section 2102, increased the amounts of information return penalties per document for returns due after 1/1/2011 as well as the calendar year maximums under each. IRM 4.90.4 will be revised to include the changes below.

(1) IRC Section 6721 provides for a penalty when an information return or statement is not correctly filed by the due date of the return. Penalties assessed under this section for returns due PRIOR to January 1st, 2011 are based on a time-sensitive penalty rate, as follows:

- \$15 per failure, not to exceed an annual maximum of \$75,000 for returns filed correctly within 30 days of the due date
- \$30 per failure, not to exceed an annual maximum of \$150,000 for returns filed correctly after 30 days but on or before August 1
- \$50 per failure, not to exceed an annual maximum of \$250,000 for returns filed after August 1
- \$100 per failure when intentional disregard applies with no annual maximum
- The correction must be made in the year the information return was required to be filed.

(2) IRC section 6722 provides for a penalty when an information return or statement is not correctly furnished to the payee by the due date of the return. Penalties assessed under this section for returns due after 1989 are based on a time-sensitive penalty rate, of \$50 for each failure, not to exceed \$100,000, to timely and correctly furnish payee statements that were due prior to January 1st, 2011. If the failure is due to intentional disregard, the penalty may be increased to \$100 or greater for each failure.

(3) Penalties assessed under IRC 6721 & 6722 for returns due AFTER January 1st, 2011 are based on a time sensitive penalty rate, as well as gross receipts of the entity. Gross receipts for a private sector entity are comparable to total revenues for a

government entity. When gross receipts / total revenues are LESS than \$5 Million penalties are assessed at the following rates:

- \$30 per failure, not to exceed an annual maximum of \$75,000 for returns filed correctly within 30 days of the due date
- \$60 per failure, not to exceed an annual maximum of \$200,000 for returns filed correctly after 30 days but on or before August 1
- \$100 per failure, not to exceed an annual maximum of \$500,000 for returns filed after August 1
- \$250 per failure when intentional disregard applies with no annual maximum
- The correction must be made in the year the information return was required to be filed.

(4) Penalties assessed under IRC 6721 or 6722 for returns due AFTER January 1st, 2011 are based on a time-sensitive penalty rate, as well as gross receipts. Gross receipts for a private sector entity are comparable to total revenues for a government entity. When gross receipts are MORE than \$5 million, penalties are assessed at the following rates:

- \$30 per failure, not to exceed an annual maximum of \$250,000 for returns filed correctly within 30 days of the due date
- \$60 per failure, not to exceed an annual maximum of \$500,000 for returns filed correctly after 30 days but on or before August 1
- \$100 per failure, not to exceed an annual maximum of \$1,500,000 for returns filed after August 1
- \$250 per failure when intentional disregard applies with no annual maximum
- The correction must be made in the year the information return was required to be filed.

Procedural clarification and changes for proposing information return penalties after an examination has closed (CPM and tax examiners):

If an employer fails to file the required Forms W-2/W-2c (and Forms W-2c/W-3c) with the GE Closing Unit by the due date required, the "Penalty Case Referral" tickler files will be sent to CPM Austin and the following procedures will be followed. CPM will send correspondence to the entity under the attention of the contact listed on the F3198-A inquiring about the delinquent Forms W-2/W-2c (and Forms W-2c/W-3c). If no response is received within 30 days, then CPM will prepare the Forms 3645, 8278, and 3198-A for the information return penalty cases under IRC 6721 & 6722.

Information return cases will be established in RCCMS following established procedures in the RCCMS Case Closing Guide but using a November period instead of December (for example, 200911 instead of 200912). This way, the Forms W-2/W-2c (and Forms W-2c/W-3c) information return penalties will be easily identified in RCCMS, separate from any Form 1099 information return penalties.

Effect on Other Documents:

This guidance supersedes FSLG Interim Memo #48 (TE/GE 04-1112-07) and changes procedures contained in IRM 4.90.4, Penalties as well as 4.90.12, Case Closing and Special Handling Procedures.

Effective Date:

This memorandum is effective upon issuance.

This memorandum will be posted to the IRS Freedom of Information Act electronic reading room (e-FOIA) for public inspection.

Contact:

If you have any questions, please contact Phyllis Burnside, CPM Manager, at (401) 528-1852.