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Penalties

Reconsidering the Reasonable Cause Defense to Late-Filing Penalties and the Impact of the Service's Clarification of the DIIRSP

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During the 2019 fiscal year, the Internal Revenue Service ("Service" or "IRS") assessed more than 4.7 million late-filing penalties that cost taxpayers nearly $9.9 billion.[1] These late-filing penalties account for an incredible 24% of the total $40.5 billion of penalties the Service assessed during the same year.[2] The Service abated a mere 818,000 late-filing penalties, "saving" taxpayers around $3 billion.[3] Stated differently, the Service removed only around 17% of the total 4.7 million or so late-filing penalties it originally assessed. Taxpayers who pursued abatements of late-filing penalties in litigation have fared even worse. During the five-year period between June 1, 2014, and May 31, 2019, taxpayers prevailed in less than 14% of the cases where the failure-to-file penalty was at issue.[4]

Armed with more than 150 statutory provisions authorizing the Service to impose penalties for various misdeeds, and overwhelming success in having courts sustain the penalties imposed, the Service has become more aggressive in asserting penalties in cases where penalties historically would not have been asserted. For example, on November 5, 2020, the Service clarified the procedures that apply to the imposition of penalties for late-filed international information returns submitted under the Delinquent International Information Return Submission Procedures ("DIIRSP").[5] Under the DIIRSP, taxpayers are encouraged to attach a reasonable cause statement, sworn under penalties of perjury, to each delinquent information return for which reasonable cause allegedly excused the late-filing. Prior to the enactment of the DIIRSP in 2014, the Service's stated procedure was to consider any statement of reasonable cause before assessing a late-filing penalty.[6] However, as the Service recently explained, penalties may be automatically assessed at the processing stage, notwithstanding and without review of any submitted statement of reasonable cause, due to the Service's inability to review each statement prior to processing the late-filed returns. The Service is advising taxpayers that, if penalties are assessed at processing, it is more likely than not that their reasonable cause statement was not reviewed and they should follow the appeal procedures set forth in the notice received.

The Service's practice of imposing penalties with increased frequency is not likely to change anytime soon. In mid-2019, the Treasury Inspector General for

Tax Administration ("TIGTA") issued a report finding that the Service is imposing accuracy-related penalties, but not necessarily late-filing penalties, on businesses with assets of more than $10 million (*i.e.*, businesses covered by the Service's Large Business and International Division) less often than it does on businesses with assets of $10 million or less (*i.e.*, businesses examined by the Small Business/Self-Employed Division).[7] In response to TIGTA's report, the Service's Director of Audit Coordination stated that the Service should adopt "a single approach to penalty issuance and that large corporations should be subject to the accuracy-related penalty to the same small extent as businesses."[8] Thus, large business and international taxpayers should expect the Service to look to assert (and potentially to assert) penalties in cases where penalties historically would not have been imposed.

Against this background, it is time to reconsider the strategies currently being used to secure abatements of late-filing penalties. Part I of this article examines the types of penalties that can be imposed for late-filing a return or other document with the Service and the availability of the reasonable cause defense with respect to each type of penalty. Part I also compares the often-misunderstood standards of "reasonable cause and not due to willful neglect," which applies to late-filing penalties, and "reasonable cause and good faith," which applies to certain accuracy-related penalties. Finally, Part I explains additional administrative requirements that the Service imposes before it will grant an abatement on the ground of reasonable cause. Part II of this article discusses recent clarifications by the Service with respect to the DIIRSP. Part II also explains the effect of those clarifications on voluntary disclosure submissions generally and the approach to be taken with respect to penalty abatement requests.

I. Late-Filing Penalties and the Reasonable Cause Defense Generally

The Code imposes various penalties for late-filing substantive returns, information returns, and other documents required to be filed with the Service. The most common failure-to-file penalties, and the availability of reasonable cause with respect to each, are given below (*see* Table 1).

Various defenses may be advanced to avoid a late-filing penalty. One of the most frequently cited, but most misunderstood, defenses is that the late-filing is excused on the ground of reasonable cause.[9] The misunderstanding surrounding the reasonable cause exception to a failure-to-file penalty, and the related difficulties taxpayers face in having late-filing penalties abated, is attributable to three reasons.

As to the first reason, the phrases "reasonable cause" and "not due to willful neglect" are technical legal terms that must be proven by the taxpayer in light of well-settled principles set forth in Treasury Regulations and related caselaw. Second, the reasonable cause exception to late-filing penalties is distinct from the reasonable cause exception to certain accuracy-related penalties, and certain principles, like the ability to rely on a professional, are transferable to late-filing penalties in only very limited circumstances. And third, in addition to establishing reasonable cause, taxpayers must satisfy various other conditions before a late-filing penalty will be abated. Each of these reasons is discussed in turn.

A. Misunderstanding #1: "Reasonable Cause" is a Technical Legal Term and the Legal Nuances Should Be Addressed

1. Reasonable Cause Generally

Taxpayers tend to overlook that the phrase "reasonable cause" is a legal concept that is specifically and technically defined in Treasury Regulations and an extensive body of caselaw. Treasury Regulations provide that a late filing is due to reasonable cause if the taxpayer exercised ordinary business care and prudence but was still unable to file the required return by its due date.[10] This is an objective standard under which all of the facts and circumstances of a late filing must be examined to determine whether a reasonably prudent person would have been unable to timely file the required return under the same set of facts and circumstances as the taxpayer.[11]

Reasonable cause is an amorphous concept that is highly dependent upon the facts and circumstances of a particular late-filing. Various reasons can constitute a reasonable cause for late-filing a return. Courts and the Service have recognized the following reasons as sufficient to excuse a late filing:

- The death, serious physical injury or mental illness, incapacitation, or unavoidable absence of the taxpayer or a member of the taxpayer's immediate family, provided that the condition affected the taxpayer to such a degree that he or she could not timely file the required return;[12]
- Destruction by fire, casualty, natural disaster, or other disturbance of the taxpayer's records or place of business, provided that the condition affected the taxpayer so greatly that the taxpayer could not timely file the required return;[13]

TABLE 1.

Code Sec.	Type of Failure-to-File Penalty	Reasonable Cause Defense Available?
6038(b)	Failure to Provide Information with Respect to Certain Foreign Corporations, Foreign Disregarded Entities, and Foreign Partnerships	Yes
6038A(d)	Failure to Provide Information with Respect to Certain Foreign-Owned Corporations	Yes
6038B(c)	Failure to Report Certain Transfers to a Foreign Corporation	Yes
6038D	Failure to Report Certain Specified Foreign Financial Assets	Yes
6039E	Failure to Provide Information Concerning Resident Status	Yes
6039F(c)	Failure to Report Gifts and Bequests from Foreign Individuals or Foreign Estates	Yes
6651(a)(1)	Failure to File Tax Return	Yes
6651(f)	Fraudulent Failure to File	No
6652(a)(1)	Failure to File Certain Information Returns	Yes
6652(c)(1)	Failure to File Annual Return by Exempt Organization	Yes
6652(c)(2)	Failure to File Returns Under Code Sec. 6034 or 6043(b))	Yes
6652(d)(2)	Notification of Change in Status of a Plan	Yes
6652(e)	Information Required in Connection with Certain Deferred Compensation Plans (Form 5500, *Annual Return/Report of Employee Benefit Plan*)	Yes
6652(h)	Failure to Give Notice to Recipients of Certain Pension, Etc., Distributions	Yes
6652(i)	Failure to Give Written Explanation to Recipients of Certain Qualifying Rollover Distributions	Yes
6652(j)	Failure to File Certification with Respect to Certain Residential Rental Projects	Yes
6677(b)	Failure to Provide Information with Respect to a Foreign Trust with a U.S. Owner	Yes
6692	Failure to File Actuarial Report	Yes
6698	Failure to File Partnership Return	Yes
6699	Failure to File S Corporation Return	Yes, under Code Sec. 6724
6721	Failure to File Correct Information Reporting Returns	Yes, under Code Sec. 6724
6722	Failure to Furnish Correct Payee Statements	Yes, under Code Sec. 6724
6723	Failure to Comply With other Information Reporting Requirements	Yes, under Code Sec. 6724

- An inability to obtain records, provided that the taxpayer exercised ordinary business care and prudence in requesting or attempting to obtain the necessary records and the inability to receive the records was due to circumstances beyond the taxpayer's control;[14]
- Unavoidable postal delays; and
- The taxpayer's timely filing of a return with the wrong Service office.[15]

Reasonable cause may also be found for any other reason which establishes that the taxpayer exercised ordinary business care and prudence, but was nevertheless able to file on time. It is the Service's policy that "[a]ny sound reason advanced by a taxpayer as the case for delay in filing a return … will be carefully analyzed to determine whether the applicable penalty should be asserted."[16] Thus, taxpayers have advanced various other reasons, including: reliance on the advice of a professional, such as a lawyer, accountant, or enrolled agent as to the filing requirement (discussed in Section I.B., below); reliance on a third-party, such as a paid return preparer or another agent or fiduciary, to file a required return; reliance on the written or oral advice of a Service employee; mistake of fact; mistake of law; ignorance of the law; and forgetfulness.

2. Possible Reasonable Cause Modifiers – "Not Due to Willful Neglect"

The wording used to describe reasonable cause in the context of a failure to file penalty can vary. Some Code sections, like Code Sec. 6698 (relating to partnership returns), require the taxpayer to show only that the failure to file on time was "due to reasonable cause." Other Code sections, like Code Sec. 6651(a)(1) (relating to tax returns), require the taxpayer to show that the failure to timely file was "due to reasonable cause and not due to willful neglect" (or other similar language).[17]

For purposes of any late-filing penalty, the term "reasonable cause" should be uniformly defined in accordance with the principles discussed throughout this article. For purposes of the Code, the term "willful neglect" has been defined by courts to mean "a conscious, intentional failure or reckless indifference."[18] Thus, where a Code section requires a taxpayer to show that a failure to file was also not due to willful neglect, the taxpayer must show that the failure to file a return timely was the result "neither of carelessness, reckless indifference, nor intentional failure."[19]

B. Misunderstanding #2: Reasonable Cause for Purposes of the Late-Filing and Accuracy-Related Penalties Is Different and the Principles Are Not Always Transferable

Taxpayers often confuse the legal standards of "reasonable cause" or "reasonable cause and not due to willful neglect," which apply to late-filing penalties, and "reasonable cause and good faith," which apply to certain accuracy-related penalties. To be sure, reasonable cause is a defense to penalties for late-filing a required return and to certain accuracy-related penalties for failing to do what the internal revenue laws required.[20] But, Treasury Regulations adopt a subtly different standard for determining whether a taxpayer should be held harmless for late-filing a return as compared to failing to do what the internal revenue laws required. This distinction is important because certain principles that are routinely cited to avoid accuracy-related penalties, like reliance on a tax professional, are transferable to late-filing penalties in only very limited circumstances.

Under either standard, all of the relevant facts and circumstances are taken into account to determine the existence of reasonable cause.[21] As noted, reasonable cause in the context of a failure-to-file penalty requires the taxpayer to prove that he or she exercised ordinary business care and prudence but was still unable to file the required return by its due date.[22] By contrast, reasonable cause in the context of an accuracy-related penalty is determined on a case-by-case basis, with the most important factor being "the extent of the taxpayer's effort to assess the taxpayer's proper tax liability."[23] A key difference between the tests is that reasonable cause for purposes of avoiding a late-filing penalty adopts an objective standard ("ordinary business care and prudence") but reasonable cause for purposes of avoiding certain accuracy-related penalties adopts a subjective standard ("the extent of the taxpayer's efforts").

1. Reliance on a Tax Professional with Respect to the Obligation to File a Return or the Due Date of a Return

Reliance on the advice of a tax professional typically relates to the reasonable cause exception to certain accuracy-related penalties as set forth in Code Sec. 6664(c). This result makes sense because a taxpayer's subjective belief (*e.g.*, the reasonableness of the reporting position) may be impacted by the advice of a professional. In *R.W. Boyle*, the leading case on whether reliance on an agent constitutes reasonable cause, the Supreme Court held that reasonable cause for a late filing may exist when a taxpayer relies on the erroneous advice of counsel concerning a question of law.[24] This result also makes sense because the advice of a professional may impact the actions of the reasonably prudent taxpayer (*i.e.*, the hypothetical person against whom all taxpayers' actions are judged). Against this background, it is relatively uncontroversial that reliance on the advice of a tax advisor may provide relief from late-filing penalties when the advice relates to a substantive tax issue.

Despite the holdings in *Boyle* and its progeny, the extent to which a taxpayer's reliance on the advice of a tax professional with respect to the obligation to file a return (or the date by which that return must be filed) satisfies the reasonable cause exception is not as clear as one might expect. The Service's position is: "[p]enalty relief based on reliance on the advice of a tax advisor is limited to issues generally considered technical or complicated. *The taxpayer's responsibility to file, pay, or deposit taxes generally cannot be excused by reliance on the advice of a tax advisor.*"[25] The Service routinely denies administrative penalty abatement requests on the ground that a taxpayer may not rely on a third-party to any extent to discharge that taxpayer's filing obligation. This position leads to unnecessary administrative appeals and related litigation.

Recall that the most important factor in determining whether a taxpayer had reasonable cause for late-filing a tax return or late-paying a tax is whether "the taxpayer exercised ordinary business care and prudence and was nevertheless unable to file the return within the prescribed time."[26] In *Boyle*, the executor of an estate relied upon an attorney to prepare and file the estate tax return. However, due to a clerical oversight, the attorney filed the estate tax return three months late.[27] The executor argued that his reliance on the attorney to file the estate tax return constituted reasonable cause for failure to file on time.[28] The Supreme Court held that reliance on an agent to actually file a return, no matter how reasonable, will not, as a matter of law, constitute reasonable cause for a late filing.[29]

However, the Supreme Court was careful to note that reliance on a tax advisor with respect to a question of substantive law may constitute reasonable cause when such advice turns out to be mistaken. The Supreme Court reasoned:

> Congress has placed the burden of prompt filing on the [taxpayer], not on some agent or employee of the [taxpayer]. The duty is fixed and clear; Congress intended to place upon the taxpayer an obligation to ascertain the statutory deadline and then to meet that deadline, except in a very narrow range of circumstances …. That the attorney, as the [taxpayer's] agent, was expected to attend to the matter does not relieve the principal of his duty to comply with the statute ….
>
> This case is not one in which a taxpayer has relied on the erroneous advice of counsel concerning a question of law. Courts have frequently held that "reasonable cause" is established when a taxpayer shows that he reasonably relied on the advice of an accountant or attorney that it was unnecessary to file a return, even when such advice turned out to have been mistaken. This Court also has implied that, in such a situation, reliance on the opinion of a tax adviser may constitute reasonable cause for failure to file a return.
>
> When an accountant or attorney *advises* a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney. To require the taxpayer to challenge the attorney, to seek a "second opinion," or to try to monitor counsel on the provisions of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place. "Ordinary business care and prudence" do not demand such actions.[30]

In many penalty abatement denial letters in which the taxpayer asserts reliance on a tax professional as ground for reasonable cause, the Service cites the general rule in *Boyle* that a taxpayer cannot rely on a third-party to discharge the taxpayer's duty to file a tax return. However, the Service often does not address the holding in *Boyle* that a taxpayer may rely on the advice of an advisor with respect to the substantive legal issue of whether or when a tax return is due or a tax is required to be paid. Nor does the Service address other cases, decided post-*Boyle*, holding that reliance on the advice of a professional as to a filing requirement can evidence ordinary business care and prudence sufficient to avoid the late-filing penalty.

The Service's reading of *Boyle* has met some resistance in the courts.[31] For example, when a taxpayer shows that she reasonably relied on the advice of a professional, even when such advice turned out to be mistaken, the United States Tax Court ("Tax Court") has held that such reliance constitutes "reasonable cause."[32] Such rulings are consistent with the "ordinary business care and prudence" standard required by Treasury Regulations. The U.S. district courts and appellate courts similarly agree that reliance on a professional can establish reasonable cause for failing to timely file a return or pay a tax.[33] This view even finds support in the Service's own instructions to its employees.[34]

In *James*,[35] the taxpayer was a doctor who set up an offshore trust to protect his assets against possible malpractice claims. He transferred more than $1.5 million to the trust over a three-year period, but did not file Form 3520, *Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts*, or cause the trust to file Form 3520-A, *Annual Information Return of Foreign Trust With a U.S. Owner*. The Service assessed late-filing penalties. The taxpayer, after he paid the penalties and sued for a refund, argued that he had reasonable cause because he relied on the advice of his accountant. He provided the accountant with all appropriate documents and information, and the accountant in-effect advised him that he did not need to file Form 3520 by not including it in the returns prepared. The Service argued that the taxpayer did not have reasonable cause because he had been put on notice of the requirement to file Form 3520 and his reliance on the accountant could not constitute reasonable cause. The court ruled that if the taxpayer could show that his accountant had advised him that he did not need to file Form 3520 and that he reasonably relied on that advice, he would have reasonable cause. In effect, the court held that a taxpayer can rely exclusively on his tax advisor concerning whether to file Form 3520, so long as the taxpayer provided all necessary information and the reliance was reasonable.

Similarly, in *Nance*,[36] the taxpayer formed offshore companies and set up an offshore trust under advice from a tax lawyer (Bly). The taxpayer received a letter from the Service that he was under examination and offered him the opportunity to participate in a voluntary compliance initiative. Having retained a new tax lawyer (Carney), the taxpayer entered the initiative, part of which was a requirement that he file delinquent international information returns for which no penalty would be imposed. Carney and the revenue agent reviewing the taxpayer's returns discussed which returns should be filed, and the revenue

agent asked for all international information returns through 2004, including Form 3520-A. The taxpayer submitted all the international information returns and signed a closing agreement for the 1999 through 2002 tax years, which required substantial penalties for civil fraud and failure to file foreign bank account reports, but no separate international information return penalties.

After the taxpayer signed the closing agreement and paid the penalties, the Service imposed a relatively large additional penalty for late-filing Form 3520-A for 2003, reasoning that the closing agreement covered only the years 1999 through 2002. The taxpayer paid the penalty and sued for a refund. Citing *Boyle*, the court stated that reasonable cause requires a taxpayer to demonstrate that he exercised ordinary business care and prudence but nevertheless was unable to file within the prescribed time. The court then explained the reasons the taxpayer could have reasonable cause, including that he first relied on Bly's advice that no returns need be filed, then relied on Carney's further erroneous advice that he did not need to file Form 3520-A. In other words, despite the taxpayer's involvement in a scheme that used offshore trusts and companies with the specific purpose of reducing his taxes, he could reasonably rely on the advice of others to show reasonable cause.

Applying the foregoing principles, the subtle differences between applying the reasonable cause defense to late-filing and accuracy-related penalties become apparent. Where a taxpayer relies on an agent to fulfill a known filing requirement, that reliance generally does not relieve the taxpayer's responsibility to ensure timely filing. However, *James*, *Nance*, and the other cases cited illustrate that a taxpayer can claim complete reliance on a professional's advice as to the existence or timing of a filing requirement to establish reasonable cause. In order for reliance on a tax advisor to rise to the level of ordinary business care and prudence, and therefore avoid a late-filing penalty, the taxpayer must prove that the tax advisor was competent, that the taxpayer provided the advisor with all necessary information, and that the taxpayer reasonably expected the advisor to prepare proper tax returns.

2. Reliance on a Tax Professional to File a Return (Electronically or Otherwise)

A related issue is the extent to which a taxpayer may rely upon a tax professional to electronically file a tax return. In *Boyle*,[37] the Supreme Court held that the requirement to file a tax return is a personal, nondelegable duty. This foundational principle has been construed to mean that reliance on a tax advisor to file a tax return cannot in and of itself constitute reasonable cause to avoid a late-filing penalty. Over the past few years, taxpayers and practitioners have started to challenge *Boyle* in the e-filing context. The basic question is whether courts should reconsider the bright-line rule in *Boyle* when a taxpayer provides her tax information to her preparer and the preparer purports to e-file the return, but for some reason, the Service rejects the return and the taxpayer arguably has little reason to suspect that the return was not actually filed. For example, the preparer may fail to receive a rejection notice from the Service or the preparer may fail to tell the taxpayer of the rejection. In *Haynes*,[38] the Fifth Circuit has been asked to decide whether the bright-line rule in *Boyle* should be revisited in the e-filing context. The *Haynes* decision may have far-reaching implications for taxpayers citing reliance on a tax advisor as a ground for reasonable cause to avoid a late-filing penalty.

C. Misunderstanding #3: Additional Conditions Must Be Met and an Affirmative Showing of Reasonable Cause in a Sworn Statement Is Required to Establish Reasonable Cause

In addition to establishing reasonable cause under the appropriate legal standard, taxpayers must address other factors before the Service will grant a request to abate a late-filing penalty, including the taxpayer's compliance history and the length of time it took the taxpayer to comply. Additionally, Treasury Regulations generally require a taxpayer to memorialize a penalty abatement request in writing, even though the I.R.M. relaxes that rule for certain penalty abatement requests. It is generally advisable for the taxpayer to defer requesting an abatement of a late-filing penalty until all conditions are satisfied and the facts and circumstances constituting reasonable cause are alleged in a sworn statement.

a. Compliance History and Proof of Current Compliance

In determining whether a taxpayer exercised ordinary business care and prudence, the Service employee should consider any reason advanced by the taxpayer and other factors not relied upon by the taxpayer.[39] Specifically, a Service employee should check at least the preceding three tax years to examine the taxpayer's compliance history.[40] The same penalty, previously assessed or abated, tends to support that the taxpayer did not exercise ordinary business care for the later tax period at issue. And, even if the penalty in question is the taxpayer's first incident of noncompliant behavior, reasonable cause should not be assumed to exist because a first-time failure to comply

does not by itself establish reasonable cause.[41] Rather, the taxpayer's unblemished filing history is but one factor to be considered among all of the other factors that may be relevant to whether reasonable cause exists.

Additionally, at the time penalty abatement request is submitted (and, at a minimum, throughout the time the penalty abatement request is being considered), the taxpayer should be current with all tax filing and estimated tax payment obligations. To the extent the taxpayer has a liability due and owing for any period, a collection alternative, like an installment agreement, should be requested before a penalty abatement request is pursued.

b. Length of Time to Comply

The Service employee should also consider the length of time between the event cited as a reason for the noncompliance and the remedial action.[42] The Service takes the position that reasonable cause does not exist if, after the facts and circumstances that explain the taxpayer's noncompliant behavior cease to exist, the taxpayer fails to comply with the tax obligation within a reasonable period of time.[43] Thus, as explained more fully below, taxpayers should explain in a written statement the facts and circumstances surrounding the late-filing and the corrective steps taken to remedy the noncompliance. In addressing the corrective action, the taxpayer should also explain the reasonableness of the period between the existence of the condition that caused the late-filing and the ultimate filing. For example, a taxpayer might explain the lingering effects of a serious physical injury or mental illness, the additional time needed to engage a competent professional, related complexities associated with the filing of the required return, and the need to liquidate assets to remit payment.

c. Set Forth All Facts and Circumstances in Support of Reasonable Cause in a Written Statement Signed Under Penalties of Perjury

In order to avoid the late-filing penalty on the ground of reasonable cause, a taxpayer generally must make an affirmative showing of all facts alleged as reasonable cause for late-filing the return in a written statement signed under penalties of perjury.[44] The reasonable cause statement should be detailed and answer the questions the examiner will ask or want to know. At a minimum, the reasonable cause statement should answer the following questions:

- What facts and circumstances caused the taxpayer to be unable to timely file the required return;
- The dates of and duration that those facts and circumstances existed;
- How the facts and circumstances affected the taxpayer's ability to (1) timely file the required return, *and* (2) perform other day-to-day responsibilities (business and personal);
- Once the facts and circumstances no longer impeded the ability to timely file the required return, what actions did the taxpayer take to file the required return (*i.e.*, were tax duties attended to promptly, or within a reasonable period of time, after the condition passed); and
- In the case of an entity, like a corporation, partnership, estate, or trust, did the affected person have the sole authority to execute the return?[45]

The facts and circumstances to be emphasized will vary depending upon the reason cited as reasonable cause. Below are various questions to address in a reasonable cause statement, depending upon the reason cited as reasonable cause (*see* Table 2).

Additionally, it is typically advisable to include supporting documentation with the reasonable cause statement. For example, a taxpayer who contends that a serious physical injury or mental illness caused the late-filing should attach to the reasonable cause statement hospital records and/or a letter from a physician, psychiatrist, or psychologist. Similarly, a taxpayer who claims that an incapacitation caused the late-filing should attach any available court records to the reasonable cause statement. Finally, a taxpayer who contends that a casualty or natural disaster caused the late-filing should attach documentation as to the natural disaster or other events that prevented compliance. Such documentation could include copies of police or fire reports, media coverage, insurance claims (and responses), photos of damages, estimates for work to be performed, and/or receipts for rehabilitative work performed (or supplies purchased).

D. Summary

In order to establish that a late filing was attributable to reasonable cause and not due to willful neglect, and have a late-filing penalty abated, the abatement request should be in writing, recite the correct legal standard, and apply the law to the facts of a particular case.

II. Recent Clarifications to the DIIRSP and Related Responses for Penalty Abatement Requests on the Basis of Reasonable Cause

Recent clarifications to the DIIRSP remind taxpayers and their advisors of the need to understand the standards, case

TABLE 2.

Reason Cited as a Reasonable Cause	Points to Address in the Reasonable Cause Statement
Death, serious physical injury or mental illness, incapacitation, or unavoidable absence	(1) The relationship of the taxpayer to the other parties involved; (2) The date of death, the dates, duration and severity of the illness, or the dates and reasons for the absence; (3) How the event prevented compliance; (4) Whether other business obligations were impaired, and if so, how; and (5) Whether tax obligations were attended to promptly when the illness passed, or within a reasonable period of time after a death or return from an unavoidable absence.[i]
Fire, casualty, natural disaster, or other disturbance	(1) The timing of the fire, casualty, natural disaster, or other disturbance; (2) The effect on the taxpayer and the taxpayer's business or financial affairs; (3) The steps taken to attempt to comply with the filing obligation; and (4) Whether tax obligations were attended to promptly, or within a reasonable period of time, after the condition passed.[ii]
Inability to obtain records	(1) Why the records were needed to comply; (2) Why the records were unavailable and what steps were taken to secure the records; (3) When and how the taxpayer became aware that he or she did not have the necessary records; (4) If other means were explored to secure needed information; (5) Why the taxpayer did not estimate the information (and file a "best efforts return"); (6) Whether the taxpayer contacted the Service for instructions on what to do about missing information; and (7) Whether the taxpayer promptly complied once the missing information was received.[iii]

[i] *Accord* IRM, pt. 20.1.1.3.2.2.1 (Nov. 25, 2011).
[ii] *Accord* IRM, pt. 20.1.1.3.2.2.2 (Oct. 19, 2020).
[iii] *Accord* IRM, pt. 20.1.1.3.2.2.3 (Dec. 11, 2009).

law, and administrative guidance that apply to requests to have late-filing penalties abated on the ground of reasonable cause.

In June 2014, the Service established the DIIRSP for entities or individuals seeking to late-file delinquent international information returns and to avoid civil penalties based on reasonable cause. Prior to the Service's clarification on November 5, 2020, for taxpayers using the DIIRSP, the Service's website instructed that taxpayers "should file the delinquent information returns with a statement of all facts establishing reasonable cause for the failure to file."[46] Per the same webpage, where a reasonable cause statement was not attached to the delinquent information return, the IRS reserved the right to assess (and typically did assess) late-filing penalties.[47] The Service's frequently asked question and answer concerning the DIIRSP ("FAQ") explained how the Service would approach penalties where a reasonable cause statement was attached to the delinquent return. The FAQ provided:

> … penalties may be imposed under the [DIIRSP] *if the Service does not accept the explanation of reasonable cause*. The longstanding authorities regarding what constitutes reasonable cause continue to apply, and existing procedures concerning establishing reasonable cause, including requirements to provide a statement of facts made under the penalties of perjury, continue to apply.[48]

Many practitioners interpreted the italicized language in the FAQ to mean that the Service would review the reasonable cause statement and make a substantive determination concerning the existence of reasonable cause before assessing a late-filing penalty. These practitioners expected that, in order to accept or reject the explanation of reasonable cause (as the FAQ intimated the Service would do), the reasonable cause statement would be reviewed.

The DIIRSP, when available, was a more attractive option than the Offshore Voluntary Disclosure Program (until that program ended on September 28, 2018), the traditional voluntary disclosure practice, or the Streamlined Filing Compliance Procedures ("SFCP") because the DIIRSP allowed taxpayers to resolve historical noncompliance with respect to the reporting of foreign income and assets without penalties if reasonable cause existed. Of course, reasonable cause has been a defense to international tax penalties since the enactment of the applicable penalty provisions, but the establishment of the DIIRSP was perceived by taxpayers and their advisors, and touted by the Service, as an established compliance path under which the Service would review statements of reasonable cause in advance of assessing any penalties.

The DIIRSP was a popular path for bringing noncompliant taxpayers into compliance. Taxpayers worked with their advisors to prepare reasonable cause statements and file delinquent international information returns in accordance with the established procedures. Unfortunately, despite these efforts, the Service frequently processed the returns and promptly assessed civil penalties, advising taxpayers of appeal rights *if reasonable cause existed.* It was clear from these notices that the Service was not reading the detailed submissions and penalties were being assessed automatically at the time the returns were processed. Of course, this led to confusion, frustration, and substantial time, effort, and costs incurred as the taxpayers and practitioners navigated through the appeals process, which has been portrayed by some as akin to a winding, complex, and sometimes confusing city subway system.[49] In response, practitioners raised the issue with the Service, with the National Taxpayer Advocate, and with national, state, and local professional associations.[50]

On November 5, 2020, in response to the hue and cry, the Service clarified the language of the DIIRSP on its website. The current guidance provides:

> Taxpayers who have identified the need to file delinquent international information returns who are not under a civil examination or a criminal investigation by the IRS and have not already been contacted by the IRS about the delinquent information returns should file the delinquent information returns through normal filing procedures.
>
> Penalties may be assessed in accordance with existing procedures.
>
> … Taxpayers may attach a reasonable cause statement to each delinquent information return filed for which reasonable cause is being asserted. During processing of the delinquent information return, penalties may be assessed without considering the attached reasonable cause statement. It may be necessary for taxpayers to respond to specific correspondence and submit or resubmit reasonable cause information.[51]

In other words, taxpayers are still advised to attach a reasonable cause statement to each late-filed delinquent information return for which reasonable cause is alleged to exist. However, even if a reasonable cause statement is attached to a late-filed return, taxpayers and their advisors are warned that a Service employee may assess penalties without considering the attached reasonable cause statement. Moreover, the Service clarified that taxpayers may need to respond to specific correspondence and submit or resubmit reasonable cause information.

A. What to Expect Under the DIIRSP?

A taxpayer who proceeds under the DIIRSP should expect that delinquent information return penalties will be asserted soon after filing, irrespective of the strength of the taxpayer's reasonable cause defense. In response to the initial assessments of the penalty, the Service will typically afford the taxpayer an opportunity for an administrative appeal with the IRS Independent Office of Appeals. The taxpayer should exercise these administrative appeal rights. As explained in the following paragraph, the opportunity for an administrative appeal affects a taxpayer's ability to challenge the penalty without first prepaying it, filing an administrative claim for refund with respect to the penalty, and suing for a refund in the United States Court of Claims ("Court of Claims") or the appropriate U.S. district court.

The assessment of the penalty, which is the recording of the penalty as a liability on the Service's books and records, is significant because the Service takes the position that it may collect an assessed tax liability (including a delinquent information return penalty) by filing a Notice of Federal Tax Lien and/or proposing to levy the taxpayer's property or rights to property. Normally, a taxpayer would be allowed to challenge an international information return penalty in an administrative collection due process proceeding before the Service or, if the administrative hearing is not successful, in a collection review proceeding before the Tax Court. However, the Tax Court and the United States Courts of Appeals for the Fourth, Seventh, and Tenth Circuits have all held that the right to challenge the *existence* or *amount* of a tax liability (including a delinquent information return penalty), as opposed to the method by which the Service seeks to collect the liability, in court is not available if a taxpayer had a prior administrative opportunity to challenge that liability.[52] Under this precedent, the opportunity afforded to a taxpayer to administratively appeal the initial penalty assessment constitutes a prior administrative opportunity that forecloses a later challenge on the merits in a collection due process or collection review proceeding.

As noted, even if a taxpayer may not challenge a delinquent information return penalty in a collection review proceeding, the taxpayer may still pay the penalty, file an administrative claim for refund, and, if the Service denies that administrative claim for refund, file a lawsuit in the Court of Claims or the appropriate U.S. district court to recover the amount paid. Moreover, it is not free from

doubt that the Service may summarily assess a delinquent information return penalty and use traditional collection devices, such as a Notice of Federal Tax Lien or a levy, to collect the penalty. Instead, a delinquent information return penalty may arguably be collected only by the United States Department of Justice's Tax Division ("Tax Division") in an affirmative collection suit or after the taxpayer is issued a notice of deficiency (and afforded an opportunity to file a petition for a redetermination of the liability in the Tax Court.[53]

B. How Should Taxpayers with Delinquent Information Returns Come into Compliance?

A taxpayer with unfiled delinquent international information returns should file all required returns, but with the advice of counsel familiar with the various paths to compliance, grounds for defending against proposed civil penalties, and the taxpayer's potential exposure to criminal investigation and prosecution.[54] For a taxpayer who has reasonable cause for late-filing the information return, the DIIRSP is one option for correcting the historical noncompliance. But any taxpayer who opts to use the DIIRSP must understand that it is possible (indeed, likely) that (1) the Service will assess delinquent international information return penalties, and (2) the taxpayer may not be able to challenge the imposition of that penalty in a judicial forum without first prepaying the liability and filing a lawsuit to recover the amount paid.

The recent clarifications to the DIIRSP suggest that taxpayers and tax advisors should revisit the standards, case law, and administrative guidance that apply to requests to have late-filing penalties abated on the ground of reasonable cause.

A second option is for an eligible taxpayer to forego the DIIRSP and instead avail herself of the SFCP. The SFCP is available to a taxpayer who certifies that her failure to report foreign financial assets and pay all tax due in respect of those assets did not result from willful conduct on her part. In general, the SFCP requires a taxpayer to file an amended tax return and all required international information forms for the most recent three years, pay tax and interest due for those three years, and pay a miscellaneous offshore penalty equal to 5% of the highest aggregate balance or value of the taxpayer's foreign financial assets that are subject to the penalty. The taxpayer may avoid this penalty if she meets the definition of a nonresident. The availability of the SFCP is limited to individuals and estates, so entities seeking to address noncompliance with international information returns are not eligible under the SFCP.

For those taxpayers who engaged in willful noncompliance, and are therefore ineligible for the DIIRSP, the Service offers the voluntary disclosure practice, which is designed for those taxpayers who have true exposure to a criminal investigation and prosecution. The Service has made it clear that its voluntary disclosure practice is not intended to be a solution for those who acted with reasonable cause.[55]

Finally, taxpayers may always simply file delinquent or amended returns, frequently referred to as a "quiet disclosure," to come into compliance. The Service has a well-established, general policy set forth in the I.R.M. advising taxpayers to utilize a six-year look-back period.[56] While this policy does not offer finality for years prior to the look-back period, and does not start the statute of limitations on assessment for unfiled returns,[57] the approach remains a viable method of addressing a taxpayer's noncompliance.

C. The Reasonable Cause Statement and Responding to Requests for Information

The reasonable cause statement takes renewed significance under the DIIRSP. By attaching the reasonable cause statement to the delinquent information return, it remains possible that the Service will not assess a late-filing penalty at all. In fact, as the Service recruits and hires additional personnel, it may be in a position in the not-too-distant future to review reasonable cause statements attached to returns prior to assessing any civil penalties. Moreover, drafting the reasonable cause statement with the principles discussed in part I of this article in mind enables a taxpayer to anticipate any questions the Service may have, and in answering those questions prospectively, the strength (or weakness) of the taxpayer's reasonable cause position should become apparent. Another benefit of this early effort is the ability to point to the statement if and when the taxpayer pursues an administrative appeal.

Of course, not all taxpayers have fully embraced the need to come into compliance. In fact, some taxpayers will have taken questionable (or fraudulent) positions in a reasonable cause statement. These same taxpayers, if questioned by the Service under the DIIRSP, might reaffirm the prior false statement or seek to clarify or correct the statement in an attempt to undo the original fraud. Making a false statement in the reasonable cause statement, or providing an explanation that is inconsistent with the reasonable cause statement, can have important civil and criminal tax penalty implications.

The reasonable cause statement, and any response to a Service inquiry with respect to a previously filed DIIRSP, are material submissions to the Service. From a civil perspective, an inconsistency between the reasonable cause statement and the response to an inquiry from the Service may lead the Service employee to conclude that reasonable cause does not exist and a civil penalty should apply. And, an inconsistency can result in a referral by the examining agent to the Service's Criminal Investigation Division to investigate the allegedly false statement and determine whether the taxpayer should be referred to the Tax Division for further investigation or prosecution.

The Tax Division, for its part, previously prosecuted Brian Nelson Booker for making a submission under the SFCP that falsely certified that his failure to report all income, pay all tax, and submit all required information returns was due to non-willful conduct.[58] The *Booker* indictment should serve as warning that the Tax Division will prosecute a false or fraudulent reasonable cause statement submitted in connection with the DIIRSP. To be sure, extending the logic in *Booker* to the DIIRSP, a materially false reasonable cause statement can easily lead to a felony prosecution under section 7206(1) for making a false document. Additionally, a materially false reasonable cause statement can lead to a felony prosecution under section 7201 for tax evasion. Finally, if a taxpayer falsely responds to an inquiry from the Service with respect to a submission under the DIIRSP, that affirmative act can lead to a felony prosecution under section 7212(a) for tax obstruction.

III. Conclusion

The Service has been asserting late-filing penalties with increased frequency and with great success in court. There are numerous defenses to these late-filing penalties, but the defenses available for more complex returns are limited. The recent clarifications to the DIIRSP suggest that taxpayers and tax advisors should revisit the standards, case law, and administrative guidance that apply to requests to have late-filing penalties abated on the ground of reasonable cause. Any penalty abatement request on the ground of reasonable cause should be supported with a reasonable cause statement, recite the correct legal standard, and persuasively apply the law to the facts of a particular case.

ENDNOTES

1 IRS, *Data Book*, 2019 (Pub. 55-B), 60 (June 2020). The Code often refers to late-filing penalties as "additions to tax." For simplicity, this article uses the terms "addition to tax" and "penalty" interchangeably.

2 *Id.*

3 *Id.*

4 *See* National Taxpayer Advocate, *2019 Annual Report to Congress*, 1, 179 (2019) (reporting that the Service prevailed in 30 out of 32 reviewed cases where the failure-to-file penalty was at issue); 1 National Taxpayer Advocate, *2018 Annual Report to Congress*, 1, 512 (2018) (reporting that the Service prevailed in 41 out of 46 reviewed cases where the failure-to-file penalty was at issue); National Taxpayer Advocate, *2017 Annual Report to Congress*, 1, 430-431 (2017) (reporting that the Service prevailed in 48 out of 60 reviewed cases where the failure-to-file penalty was at issue); 1 National Taxpayer Advocate, *2016 Annual Report to Congress*, 1, 484 (2016) (reporting that the Service prevailed in 40 out of 45 reviewed cases where the failure-to-file penalty was at issue); 1 National Taxpayer Advocate, *2015 Annual Report to Congress*, 1, 501 (2015) (reporting that the Service prevailed in 52 out of 63 reviewed cases where the failure-to-file penalty was at issue).

5 IRS, *Delinquent International Information Return Submission Procedures*, *www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures* (last updated Nov. 5, 2020).

6 IRM, pt. 20.1.1.3.5(2) (Oct. 19, 2020) (requiring employees to "carefully analyze the taxpayer's [statement of reasonable cause] to determine if penalty relief can be considered and is warranted.").

7 TIGTA, *Few Accuracy-Related Penalties Are Proposed in Large Business Examinations, and They Are Generally Not Sustained on Appeal (No. 2019-30-036)* (May 31, 2019).

8 *Id.* at 8.

9 Other available defenses include the administrative waiver commonly referred to as the "First Time Abate" and the statutory exception for erroneous written advice by the Service. Additionally, the IRS Independent Office of Appeals may consider "hazards of litigation." Under the First Time Abate administrative waiver procedures, the Service generally provides administrative relief from failure-to-file penalties under Code Secs. 6651(a)(1) (late-filed income tax returns), 6698(a)(1) (late-filed partnership returns), and 6699(a)(1) (late-filed S corporation returns). IRM, pt. 20.1.1.3.3.2.1(1) (Oct. 19, 2020). Under relevant provisions of the IRM, amended in October 2020, the First Time Abate waiver is available provided that the taxpayer:
- Has filed, or filed a valid extension for, all required returns currently due and
- Has paid, or arranged to pay, any tax currently due. *Id.*

Pursuant to Code Sec. 6404(f), the Service Is required to abate any penalty or addition to tax attributable to erroneous written advice furnished by a Service employee acting in his or her official capacity.

10 Reg. §301.6651-1(c)(1).

11 *Id.*

12 *See Boyle*, 469 US at 243 n.1; *see also* IRM, pt. 20.1.1.3.2.2.1 (Nov. 25, 2011).

[13] *See Boyle*, 469 US at 243 n.1; *see also* IRM, pt. 20.1.1.3.2.2.2 (Oct. 19, 2020).

[14] *See* IRM, pt. 20.1.1.3.2.2.3 (Dec. 11, 2009).

[15] *Boyle*, 469 U.S. at 243 n.1. Other less-frequently implicated reasons include: the taxpayer's reliance on the erroneous advice of an employee of the Service; the failure of the Service to furnish the taxpayer with the necessary forms in a timely fashion; and the inability of a Service employee to meet with the taxpayer when the taxpayer makes a timely visit to a Service office in an attempt to secure information or aid in the preparation of a return. *See id.*

[16] IRM, pt. 1.2.1.4.2(2) (Dec. 29, 1970) (Policy Statement 3-2) (formerly P-2-7).

[17] The Code sometimes omits the work "due." *See, e.g.*, Code Sec. 6038B (allowing a taxpayer to avoid a late-filing penalty for the failure to report certain transfers to certain foreign corporations if the failure was "due to reasonable cause and not to willful neglect").

[18] *R.W. Boyle*, SCt, 85-1 USTC ¶13,602, 469 US 241, 245, 105 SCt 687; *see also East Wind Indus., Inc.*, CA-3, 99-2 USTC ¶50,968, 196 F3d 499, 508–509 (3d Cir. 1999). The term "willful neglect" is a distinct legal standard from "willful" conduct, as would generally be required to support the maximum late-filing penalty for failure to report FinCEN Form 114, *Report of Foreign Bank and Financial Accounts* ("FBAR"). A discussion of the "willful" standard in the context of failing to file an FBAR is outside the scope of this article.

[19] *Boyle*, 469 US at 246 n.4.

[20] *See* Code Secs. 6651(a)(1) (late-filing addition to tax); 6664(c) (accuracy-related penalties). Reasonable cause is not a defense to certain accuracy-related penalties, such as the gross valuation misstatement penalty with respect to so-called "charitable deduction property" or the penalty for transactions lacking economic substance. *See* Code Sec. 6664(c)(2), (3).

[21] *See* Reg. §301.6651-1(c)(1) (late-filing addition to tax); Reg. §1.6664-4(b)(1) (accuracy-related penalties).

[22] Reg. §301.6651-1(c)(1).

[23] Reg. §1.6664-4(b)(1).

[24] *R.W. Boyle*, SCt, 85-1 USTC ¶13,602, 469 US 241, 250-251, 105 SCt 687.

[25] IRM, pt. 20.1.1.3.3.4.3(3) (Nov. 21, 2017) (emphasis in original).

[26] *See* Code Sec. 6651(c).

[27] *Boyle*, 469 US at 243.

[28] *Id.* at 244.

[29] *Id.* at 249-250.

[30] *Id.* (internal citations omitted and emphasis in original).

[31] Anecdotally, courts' reluctance to accept the Service's reading of *Boyle* is one reason taxpayers prevail in litigation, even if in only 14% of cases. Thus, where the advice of a professional caused a taxpayer to not timely file a required return, it is appropriate to closely consider the applicability of *Boyle*, notwithstanding the Service's determination that reasonable cause does not exist.

[32] *See, e.g., L. Meres Est.*, 98 TC 294, 314-315, Dec. 48,085 (1992); *A. Zabolotny*, 97 TC 385, 400-401, *aff'd in part and rev'd in part*, CA-8, 93-2 USTC ¶50,567, 7 F3d 774 (8th Cir. 1993); *Paxton Est.*, 86 TC 785, 820, Dec. 43,021 (1986); *Aiken Indus., Inc.*, 56 TC 925, 935-936, *acq.*, 1972-2 C.B. 1; *Buring Est.*, 51 TCM 113, TC Memo 1985-610; *Bradley Est.*, TC Memo 1974-17, *aff'd*, 511 F2d 527 (6th Cir. 1975); *K. Lee Est.*, 97 TCM 1435, TC Memo 2009-84.

[33] *See, e.g., Am. Ass'n of Eng'rs Emp't, Inc.*, CA-7, 53-1 USTC ¶9383, 204 F2d 19, 21 (7th Cir. 1953); *Burton Swartz Land Corp.*, CA-5, 52-2 USTC ¶9410, 198 F2d 558, 560 (5th Cir. 1952); *Haywood Lumber & Min. Co.*, CA-2, 50-1 USTC ¶9131, 178 F2d 769, 771 (2d Cir. 1950); *Girard Inv. Co.*, CA-3, 41-2 USTC ¶9653, 122 F2d 843, 848 (3d Cir. 1941); *see also James*, 110 AFTR 2d 2012-5587 (M.D. Florida, 2013); *Nance*, 111 AFTR 2d 2013-1616 (W.D. Tenn. 2013).

[34] *See* IRM, pt. 20.1.1.3.3.4.3(2) (Nov. 21, 2017).

[35] 110 AFTR 2d 2012-5587 (M.D. Florida, 2013).

[36] 111 AFTR 2d 2013-1616 (W.D. Tenn. 2013).

[37] *R.W. Boyle*, SCt, 85-1 USTC ¶13,602, 469 US 241, 245.

[38] No. 16-cv-112, 2017 WL 2895438 (W.D. Tex. 2017), *vac'g and rem'g*, 760 Fed Appx. 324 (5th Cir. 2019), *cert. filed*.

[39] *See* IRM, pt. 20.1.1.3.2(3)(a) (Nov. 21, 2017) (providing that the Service will consider "any reason which establishes that the taxpayer exercised ordinary business care and prudence, but nevertheless was unable to comply with a prescribed duty within a prescribed time"); *see also* IRM, pt. 20.1.1.3.5(7) (Oct. 19, 2020) (directing Service employees to perform a compliance check in connection with evaluating whether the taxpayer exercised ordinary business care and prudence).

[40] IRM, pt. 20.1.1.3.2.2(2)(b) (Feb. 22, 2008).

[41] *Accord* IRM, pt. 20.1.1.3.5(7)(b) (Oct. 19, 2020).

[42] IRM, pt. 20.1.1.3.2.2(2)(c) (Feb. 22, 2008).

[43] *See* IRM, pt. 20.1.1.3.2(6) (Nov. 21, 2017).

[44] Reg. §301.6651-1(c)(1). The IRM. does permit oral requests for penalty relief in certain circumstances. *See generally* IRM, pt. 20.1.1.3.1 (Nov. 21, 2017). It is a best practice to adhere to the requirement imposed in Reg. §301.6651-1(c)(1) and attach a reasonable cause statement to the penalty abatement request.

[45] *Accord* IRM, pt. 20.1.1.3.2 (Nov. 21, 2017) (directing Service employees to ask similar questions when determining whether to abate a penalty on the basis of reasonable cause).

[46] IRS, *Delinquent International Information Return Submission Procedures*, *www.web.archive.org/web/20201028094724/https://www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures* (last updated Oct. 2, 2020).

[47] *Id.*

[48] IRS, *Delinquent International Information Return Submission Procedures Frequently Asked Questions and Answers*, Q&A-1, *www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures-frequently-asked-questions-and-answers* (last updated Apr. 17, 2020) (emphasis added).

[49] *See* IRS Taxpayer Advocate Service, *The Taxpayer Roadmap, An Illustration of the Modern United States Tax System* (Pub. 5341) (Dec. 2019); *see also* 1 National Taxpayer Advocate, *2018 Annual Report to Congress*, 1, 10–16.

[50] *See, e.g.*, Letter from Tom Callahan, Section of Taxation to the Hon. David Kautter, Assistant Secretary (Tax Policy), Department of the Treasury, the Hon. Charles P. Rettig, Commissioner of the IRS, and the Hon. Michael Desmond, Chief Counsel to the IRS, *Recommendations for 2020-2021 Priority Guidance Plan* (July 22, 2020), *available at www.americanbar.org/content/dam/aba/administrative/taxation/policy/2020/072220comments.pdf*.

[51] IRS, *Delinquent International Information Return Submission Procedures*, *www.irs.gov/individuals/international-taxpayers/delinquent-international-information-return-submission-procedures* (last updated Nov. 5, 2020).

[52] *See Our Country Home Enters.*, CA-7, 2017-1 USTC ¶50,215, 855 F3d 773, 791-793 (7th Cir. 2017); *Keller Tank Servs. II, Inc.*, 854 F3d 1178, 1199-1200 (10th Cir. 2017); *Iames*, 850 F3d 160, 164 (4th Cir. 2017).

[53] These procedural defenses are not discussed in this column, which is focused on the reasonable cause defense to late-filing penalties and related changes to the DIIRSP.

[54] Criminal exposure for noncompliance, or questionable determinations concerning reasonable cause, is a real risk. This column, which is focused on civil penalties and defenses, does not address this criminal exposure.

[55] *See, e.g.*, IRM, pt. 9.5.11.9(2) (Sept. 17, 2020) (providing that a taxpayer who committed a violation of the law that was not willful should consider other voluntary compliance options, such as by filing amended or past-due tax returns).

[56] *See* IRM, pt. 1.2.1.6.18 (Aug. 4, 2006) (Policy Statement 5-133) (providing the policy that enforcement beyond the six-year period will normally not be undertaken, and only will be undertaken with managerial approval).

[57] *See* Code Sec. 6501(c)(3); *see also* Code Sec. 6501(c)(8).

[58] *See* DOJ Tax, *Former CPA Indicted for Failing to Report Foreign Bank Accounts and Filing False Documents with the IRS*, *www.justice.gov/opa/pr/former-cpa-indicted-failing-report-foreign-bank-accounts-and-filing-false-documents-irs* (last updated Aug. 27, 2019).