

Transitional Guidance Under §§ 162(f) and 6050X with Respect to Certain Fines, Penalties, and Other Amounts

Notice 2018–23

SECTION 1. PURPOSE

Section 13306 of “An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018,” Pub. L. 115-97 (the “Act”), which was signed into law on December 22, 2017, amended § 162(f) of the Internal Revenue Code (“Code”) and added new § 6050X to the Code. The Department of the Treasury (“Treasury Department”) and the Internal Revenue Service (“IRS”) intend to publish proposed regulations under §§ 162(f) and 6050X. This notice provides transitional guidance under §§ 162(f) and 6050X. Specifically, as provided in section 3.01 of this notice, to ensure efficient administration of this new provision, reporting will not be required under § 6050X until the date specified in the proposed regulations. The specified date will not be earlier than January 1, 2019, and will not be earlier than the date of publication of the proposed regulations. Reporting will not be required with respect to amounts required to be paid or incurred under a binding court order or agreement entered into before the specified date. Further, section 3.02 of this notice provides transitional guidance for purposes of satisfying the identification requirement in

§ 162(f)(2)(A)(ii). Finally, section 4 of this notice requests comments regarding issues to be addressed in the proposed regulations.

SECTION 2. LAW

Section 162(f)(1), as amended by the Act, disallows a deduction for amounts paid or incurred (whether by suit, agreement, or otherwise) to, or at the direction of, a government or governmental entity in relation to the violation of any law or the investigation or inquiry by such government or entity into the potential violation of any law. Section 162(f)(2) provides an exception to the general rule under § 162(f)(1). Under the exception, an amount described in § 162(f)(1) that is otherwise deductible under the Code is not disallowed if the taxpayer satisfies all of the requirements in § 162(f)(2)(A)(i), (ii), and (iii).

Section 162(f)(2)(A)(i) requires that the taxpayer establish that the amount paid or incurred (1) constitutes restitution (including remediation of property) for damage or harm that was or may be caused by violation of any law or the potential violation of any law, or (2) is paid to come into compliance with any law that was violated or otherwise involved in the investigation or inquiry into the potential violation of any law (the “establishment requirement”). Section 162(f)(2)(A)(ii) further requires that the amount paid or incurred be identified as restitution or as an amount paid to come into compliance with such law in the court order or settlement agreement (the “identification requirement”). Finally, § 162(f)(2)(A)(iii) provides that in the case of any amount of restitution for failure to pay any tax imposed under the Code, the amount is treated as if such amount were such tax if it would have been allowed as a deduction had it been timely paid. Section 162(f)(2)(A) further provides that meeting the identification

requirement alone is not sufficient to meet the establishment requirement under § 162(f)(2)(A)(i).

Section 6050X(a)(1) requires the appropriate official of any government or nongovernmental entity described in § 162(f)(5) that is involved in suits or agreements described in § 6050X(a)(2) to make a return in such form as determined by the Secretary setting forth (1) the amount required to be paid as a result of the suit or agreement to which § 162(f)(1) applies; (2) any amount required to be paid as a result of the suit or agreement that constitutes restitution or remediation of property; and (3) any amount required to be paid as a result of the suit or agreement for the purpose of coming into compliance with any law that was violated or involved in the investigation or inquiry.

Under § 6050X(a)(2), amounts required to be paid as a result of a suit or agreement are required to be reported under § 6050X(a)(1) if the suit or agreement is a type described in § 6050X(a)(2)(A)(i) and the dollar threshold in § 6050X(a)(2)(A)(ii) is met. A suit or agreement is described in § 6050X(a)(2)(A)(i) if it is (1) a suit with respect to a violation of any law over which the government or entity has authority and with respect to which there has been a court order, or (2) an agreement that is entered into with respect to a violation of any law over which the government or entity has authority or with respect to an investigation or inquiry by the government or entity into the potential violation of any law over which the government or entity has authority.

Under § 6050X(a)(2)(A)(ii), the dollar threshold for reporting is met if the aggregate amount involved in all court orders and agreements with respect to the violation, investigation, or inquiry is \$600 or more. However, § 6050X(a)(2)(B) requires

the Secretary to adjust the \$600 amount as necessary to ensure the efficient administration of the internal revenue laws.

Section 6050X(a)(3) requires the return to be filed at the time the agreement is entered into, as determined by the Secretary.

Section 6050X(b) requires every person required to make a return under § 6050X(a) to furnish to each person who is a party to the suit or agreement a written statement showing (1) the name of the government or entity, and (2) the information supplied to the Secretary under § 6050X(a)(1). This information must be furnished at the same time it is provided to the Secretary.

Section 6050X(c) defines “appropriate official” as the officer or employee having control of the suit, investigation, or inquiry or the person appropriately designated for purposes of § 6050X.

Under § 13306(a)(2) and (b)(3) of the Act, § 162(f) as amended and new § 6050X generally apply to amounts paid or incurred on or after December 22, 2017, except that they do not apply to amounts paid or incurred under any binding order or agreement entered into before that date. If the order or agreement required court approval and the approval was not obtained before that date, § 162(f) as amended and new § 6050X will apply.

SECTION 3. TRANSITIONAL GUIDANCE

Section 162(f) as amended and new § 6050X were effective on December 22, 2017, the date of the enactment of the Act. Parties to suits and agreements covered by these sections have an immediate need for guidance and have contacted the Treasury Department and the IRS with questions regarding the reporting requirement of § 6050X

and the identification requirement of § 162(f)(2)(A)(ii). This section provides transitional guidance regarding those requirements.

.01 SECTION 6050X REPORTING

Following the enactment of the Act, officials of a number of governments and governmental entities contacted the Treasury Department and the IRS requesting additional time to make the necessary changes to their systems to comply with their new reporting responsibilities under § 6050X. In addition, the IRS needs additional time to make necessary programming and form changes to implement § 6050X.

Accordingly, the Treasury Department and the IRS are providing transitional guidance with respect to reporting obligations under § 6050X. Under this transitional guidance, to ensure efficient administration of this new provision, reporting will not be required under § 6050X until the date specified in the proposed regulations. The specified date will not be earlier than January 1, 2019, and will not be earlier than the date of publication of the proposed regulations. Reporting will not be required with respect to any amounts required to be paid or incurred under a binding court order or settlement agreement entered into before the specified date. For purposes of this notice, an agreement that requires court approval is binding when court approval is obtained. This transitional guidance will provide additional time for dialogue with stakeholders in an effort to clarify the reporting requirements consistent with effective implementation of the law.

Transitional guidance will also provide governmental and nongovernmental regulatory entities additional time to develop their systems for collecting and reporting the required information.

.02 SECTION 162(f)(2)(A)(ii) IDENTIFICATION

The transitional guidance provided in section 3.01 of this notice does not affect or delay the applicability of § 162(f). Accordingly, the identification requirement in § 162(f)(2)(A)(ii) applies to amounts paid or incurred on or after December 22, 2017, unless the amounts were paid or incurred under any binding order or agreement entered into before that date. Taxpayers and officials of governments and governmental entities have asked for immediate guidance regarding the identification requirement.

Until proposed regulations under § 162(f) are issued, the identification requirement in § 162(f)(2)(A)(ii) is treated as satisfied for an amount if the settlement agreement or court order specifically states on its face that the amount is restitution, remediation, or for coming into compliance with the law. Even if the identification requirement under this section 3.02 is treated as satisfied, taxpayers must also meet the establishment requirement in order to qualify for the § 162(f)(2) exception.

SECTION 4. COMMENTS

The Treasury Department and the IRS intend to issue proposed regulations amending and adding sections to the Income Tax Regulations with respect to §§ 162(f) and 6050X. To assist in the development of the proposed regulations, this notice requests comments from the public and affected governments and nongovernmental entities, on any and all issues related to the application and implementation of §§ 162(f) and 6050X that the proposed regulations should address. In particular, the Treasury Department and the IRS request comments on:

1. The timing of the reporting required under § 6050X;

2. The threshold amount for reporting under § 6050X(a)(2);
3. Any anticipated administrative difficulties in securing information needed to report under § 6050X, including situations involving multiple payors or payees;
4. How to define key terms in § 162(f); and
5. What entities are nongovernmental entities under § 162(f)(5).

WHERE TO SEND COMMENTS

Comments may be submitted by May 18, 2018, using one of the following methods:

- By Mail:

Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2018-23)
Room 5203
P.O. Box 7602
Ben Franklin Station
Washington, D.C. 20444

- By Hand or Courier Delivery: Submissions may be hand-delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to:

Courier's Desk
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2018-23)
1111 Constitution Avenue, N.W.
Washington, D.C. 20224

- Electronic: Alternatively, persons may submit comments electronically to Notice.Comments@irs.counsel.treas.gov. Please include "Notice 2018-23" in the subject line of any electronic communications. All submissions will be available for public inspection and copying in room 1621, 1111 Constitution Avenue, N.W., Washington, D.C., from 9 a.m. to 4 p.m.

SECTION 5. CONTACT INFORMATION

The principal author of this notice is Christopher Wrobel of the Office of the Associate Chief Counsel (Income Tax and Accounting). For further information regarding this notice, contact Mr. Wrobel at (202) 317-7011 (not a toll-free number).