

Tax Alert

Reporting Deadlines – and Penalties – Under the ACA are Approaching Quickly

October 28, 2015

The Affordable Care Act (ACA) requires insurers and certain large employers to file new information returns in connection with employer-provided healthcare coverage.¹ A failure to comply may result in substantial penalties. The new information returns require a significant amount of monthly data on each employee (and the employee's dependents), including employment data, whether the employee received an offer of coverage, and whether the employee and the employee's dependents are enrolled in coverage.

Many employers, insurers, and vendors (and even the IRS) are experiencing difficulties in collecting this information and preparing the systems and procedures necessary to report it. With the filing deadline fast approaching, some companies now face significant obstacles to filing complete and accurate information returns. The IRS has announced that it will waive penalties for 2015 for reporting entities that make a "good faith effort" to comply, but this raises important questions. What level of compliance constitutes a "good faith effort" to file the new information returns? Can an incomplete or inaccurate form still result in a good faith effort? And what if the good faith effort standard is not satisfied?

The ACA requires health insurance issuers and employers with over 50 full-time employees to provide the new information returns both to the IRS and to each employee.² Reporting is mandatory starting with the 2015 calendar year. Information returns must be provided to employees by February 1, 2016, and must be filed with the IRS by February 29, 2016 (hard copy filers) or March 31, 2016 (electronic filers). The new forms applicable to employers are Forms 1094-C (Transmittal Form) and 1095-C (Employer-Provided Health Insurance Offer and Coverage Form). The new forms applicable to health insurance issuers (and smaller employers with self-insured plans) are Forms 1094-B (Transmittal Form) and 1095-B (Health Coverage).

The Internal Revenue Code (Code) imposes a penalty under section 6721 for the failure to file correct information returns, such as Forms 1095-B and 1095-C and their Transmittal Forms, and for the failure to provide correct payee statements under section 6722. These penalties are substantial and apply separately to the Forms filed with the IRS and furnished to employees. The penalties for the Forms filed in 2016 for the 2015 plan year are \$500 per return (i.e., \$250 for the form filed with the IRS, and \$250 for the form provided to the employee), with an annual maximum penalty of \$6 million (\$3 million for information returns and \$3 million for employee statements). These penalty amounts may be reduced if the filer files a delinquent form or corrects errors within 30 days or before August 1 of the reporting year, but an intentional disregard of filing requirements increases the potential per-return penalty and eliminates the annual cap.

¹ For additional details regarding reporting requirements and forms see "[Penalties Double for Failure to File New IRS Information Returns Under the ACA](#)," posted August 26, 2015.

² The IRS has granted transitional relief and some exceptions under the ACA for 2015, including relief from the Employer Shared Responsibility Penalty for employers with more than 50 but fewer than 100 full-time equivalent employees; a rule that permits larger employers to comply by making a qualifying offer of coverage to 70% of its full-time employees, rather than 95%, and a rule for 2015 regarding the allocation of the Shared Employer Responsibility Penalty for aggregated ALEs. For additional details, see Internal Revenue Service, [Transition Relief](#) (Feb. 11, 2015),

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The penalties are summarized in the chart below:

	Failure to File Correct Information Returns (Code § 6721)	Failure to Furnish Correct Payee Statements (Code § 6722)	Maximum Penalty Per Return	Maximum Annual Penalty (separately under § 6721 or § 6722)
General Failure	\$250/return	\$250/return	\$500	\$3,000,000
Corrected within 30 Days of Filing	\$50/return	\$50/return	\$100	\$500,000
Corrected in the year due before August 1 st	\$100/return	\$100/return	\$200	\$1,500,000
De Minimis Errors	\$0 if corrected by 8/1, and number of returns is less than the greater of 10 or .5% of returns required to be filed	\$0 if corrected by 8/1, and number of returns is less than the greater of 10 or .5% of returns required to be filed	\$0	\$0
Limitations if Gross Receipts are Under \$5,000,000	No change from per return penalties (above)	No change from per return penalties (above)	No change from per return penalties (above)	\$1,000,000 (general failure) \$175,000 (30 days) \$500,000 (August 1 st)
Intentional Disregard	Greater of \$500 or 10% of aggregate amount of items to be reported	Greater of \$500 or 10% of aggregate amount of items to be reported	\$1,000	No maximum

The good news is that limited relief may be available to reporting entities who fail to comply with the new IRS reporting requirements. The IRS has granted some specific relief relating to the ACA's new reporting requirements. In addition, the Code contains long-standing rules providing relief from the penalties summarized above in connection with other information return reporting failures applicable, for example, to Forms W-2 and 1099. The IRS has also created some "safe harbor" compliance rules for the new ACA information returns that require less specific information than the general rules. This Alert discusses these forms of relief below.

30-day Extension of IRS Filing Deadline

Employers and other reporting entities may obtain an "automatic" 30-day extension of time to file Forms 1095-B and -C with the IRS by completing IRS Form 8809 (Application for Extension of Time to File Information Returns). No signature or explanation is required for the extension. Form 8809 must be filed by the due date of the returns. The IRS may grant another an additional 30-day extension under certain

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hardship conditions. Generally, requests for additional time are granted only where extenuating circumstances prevented filing by the date granted by the first request.

The automatic 30-day extension applies only with respect to filing a return with the IRS. It does not apply to the return required to be provided to covered individuals. Employers and other reporting entities may request an extension of time to furnish statements to covered individuals. However, the reporting entity must provide a reason for the delay and the IRS must approve the extension. If the IRS grants the extension, which it typically does in only unusual circumstances, it will generally grant a maximum of 30 additional days. Because the IRS expects a significant number of these requests for the Form 1095-B and –C payee statements, IRS officials have indicated that they may provide guidance to ease this potential increase.³

Short-Term Relief for Good Faith Compliance Efforts in 2015

The IRS has stated that it will not impose penalties for 2015 if a reporting entity demonstrates a good faith effort to comply with the law. Specifically, the IRS will not penalize reporting entities that file reports or statements for 2015, even if the form contains incomplete or incorrect information regarding social security numbers,⁴ taxpayer identification numbers (TINs),⁵ and dates of birth.⁶ The IRS has further indicated, however, that relief under the “good faith effort” standard will not be available for employers and other reporting entities that fail to timely file a return.

The IRS has indicated that short-term relief in 2015 is available for making a reasonable effort to obtain the employer identification number (EIN) of the employer sponsoring the coverage but entering an incorrect EIN or failing to enter the EIN under section 6055 reporting requirements for health insurance issuers.⁷ There is little guidance as to what else constitutes a good faith effort. The IRS has granted this relief in other information reporting return contexts—particularly in the first year of reporting, but has not provided any minimum standards. In the context of information reporting by payment settlement entities to participating merchants, the IRS has excused missing or “obviously incorrect” TINs (such as TINs with more or less than nine digits or TINs with alpha characters) or incorrect name and TIN combinations.⁸

Section 6724 Statutory Relief for “Reasonable Cause”

It is important to note that the short-term relief for good faith compliance efforts for 2015 is in addition to the general statutory relief from penalties under sections 6721 (failure to file correct information returns)

³ *IRS Considering Revamping 30-Day Extension for ACA Info Forms*, 98 Highlights & Doc. 8179 (Oct. 20, 2015)

⁴ *Information Reporting by Applicable Large Employers on Health Insurance Coverage Offered Under Employer-Sponsored Plans*, 79 Fed. Reg. 13,231-01, 13,246 (Mar. 10, 2014) (codified at 26 C.F.R. Parts 301 and 602) (Preamble to Final Regulations)

⁵ *Information Reporting of Minimum Essential Coverage*, 79 Fed. Reg. 13,220-01, 13,226 (Mar. 10, 2014) (codified at 26 C.F.R. Parts 1, 301, and 602) (Preamble to Final Regulations)

⁶ *Id.*

⁷ Internal Revenue Service, Question 3, Questions and Answers on Information Reporting by Health Coverage Providers (Section 6055), (Aug. 25, 2015), <http://www.irs.gov/Affordable-Care-Act/Questions-and-Answers-on-Information-Reporting-by-Health-Coverage-Providers-Section-6055>

⁸ See Notice 2013-56 (Transitional Penalty Relief for Information Returns Relating to Payment Card and Third Party Network Transactions) (Sept. 23, 2013)

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and 6722 (failure to furnish correct payee statements) of the Code. Code section 6724 provides relief for non-compliance with these information return filing rules, provided that the failure was due to reasonable cause and not to willful neglect.

The regulations under section 6724 (Existing Regulations), which date back to 1991 (well before the creation of Form 1095-C), have applied for years to failures to file other types of information returns, such as Form W-2 and Form 1099.⁹

Under the Existing Regulations, “reasonable cause” to abate penalties may exist if the reporting entity demonstrates two requirements: 1) there are significant mitigating factors or the failure was due to certain events outside the filer’s control; and 2) the filer acted in a “responsible manner” both before and after the failure occurred to obtain relief.¹⁰ If the IRS determines there is a mitigating factor or an event beyond the control of the filer, the IRS will then evaluate whether the employer behaved in a responsible manner. If it determines that the filer satisfies both criteria, the IRS may waive the reporting penalties.

It is important to keep in mind that the Existing Regulations are over two decades old, and do not necessarily contemplate the scale or complexities of modern information technology systems, especially under the ACA reporting requirements where information must be drawn or reformatted from different information systems. Additionally, the mitigating factors and events beyond the filer’s control detailed below are not exclusive. As such, if an employer or other reporting entity is unable to qualify for the short-term relief, it may still be possible to construct an argument for a waiver of penalties, depending on the facts and circumstances surrounding the failure.

a. Mitigating Factors & Events Beyond the Filer’s Control

The existence of a mitigating factor or an event beyond the filer’s control is a factual determination. The Existing Regulations set forth some examples, but these examples merely indicate that a met the first prong of the reasonable cause test. The filer must also show that it acted in a responsible manner both before and after the failure occurred. Significant mitigating factors may include, but are not limited to, the following circumstances:

- The filer was not previously required to file the particular type of return or report
- The filer has an established history of complying with the reporting requirements for that particular return, with significant consideration given to whether or not the filer has incurred penalties in prior years

Events beyond the control of the filer that will constitute reasonable cause include, but are not limited to:

- The unavailability of business records under certain circumstances
- An undue economic hardship relating to filing on magnetic media
- Certain actions of the IRS resulting in reliance

⁹ See Treas. Reg. § 301.6724–1 (Existing Regulations)

¹⁰ See Treas. Reg. § 301.6724-1(a)(2)

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- Certain actions of an agent causing the late or erroneous filing
- Certain actions of the payee or other person failing to provide necessary information

These factors are discussed in the context of the ACA information reporting below:

First Year of Filing and Established History of Filing. While failing to file or filing incorrect information in the first year of mandatory reporting is an established mitigating factor indicating reasonable cause, it may be difficult for a non-compliant filer to rely on this circumstance alone for 2015, as it is the first year for every filer, particularly in light of the one-year filing extension for 2014. Additionally, relief from penalties still requires that the filer have acted in a responsible manner, despite being unfamiliar with the particulars of new filing requirements.

These mitigating factors are likely to be of greater use in avoiding penalties in the future, as reporting entities get past the first year of filing and establish a history of compliance.

Unavailability of Business Records. The unavailability of business records must be due to a “supervening event” such as a fire or other casualty, a statutory or regulatory change that has a direct impact on data processing, or the unavoidable absence (i.e., death or serious illness) of the person with sole responsibility for filing. Additionally, the unavailability of the records must be under the conditions and for a period that prevents timely compliance, usually a one-to-two week period before the filing deadline. It is unlikely that the ACA itself will be considered a “supervening event” as it was passed in 2010, well before filing deadlines.

Magnetic Media. This reason for a failure to file only applies to certain types of information returns that can be reported using magnetic media with the permission of the IRS. This criterion will not be effective for Forms 1095-B or 1095-C, as magnetic filing is not available for filing these Forms.

Actions of the IRS. Under the Existing Regulations, in order to establish reasonable cause based on the actions of the IRS, the filer must demonstrate that the failure to file was based on the reasonable reliance on erroneous written information from the IRS to the taxpayer. The reporting entity must have relied on the information in good faith, but there is no good faith reliance if IRS was unaware of all relevant facts when it provided information to the filer. This criterion suggests that the written information must be taxpayer-specific for this to apply. Additionally, the reporting entity must provide a copy of the written information before a penalty will be abated. The IRS has been issuing regulations and other general guidance on reporting requirements under the ACA since 2010, and believes that filers have had sufficient guidance to comply with the new law. In future years, this exception may apply to situations where the IRS has provided individualized information to a filer.

Actions of an Agent: Imputed Reasonable Cause. The IRS believes that the mere act of hiring an agent should not insulate a filer from penalties.¹¹ The filer must show that it used reasonable business judgment in contracting with the agent for the returns, including providing the agent with the information necessary to prepare and file the returns. The filer

¹¹ *Imposition of Penalty for Failure to Comply with Information Reporting Requirements*, 56 Fed. Reg. 67,178-01, 67,181 (Dec. 30, 1991) (codified at 26 C.F.R. Part 301) (Preamble to Final Regulations)

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must also show that the agent had reasonable cause (as defined by the Existing Regulations) for the failure before the agent's reasonable cause will be imputed to the filer. This rule may provide some protection to filers whose vendors are unable to comply with reporting requirements. If the filer exercised reasonable business judgment in the selection of a vendor and provided the required information in a timely manner, the filer may be eligible for relief provided the vendor experienced a mitigating factor or event beyond the vendor's control that resulted in the failure.

Actions of the Payee/Other Responsible Party. To establish reasonable cause based on the actions of the payee or other person required to provide information, the filer must show that its failure (usually to report the correct information) resulted from the failure of the other person to provide information to the filer or to provide correct information to the filer. This means, for example, that if a filer makes reasonable efforts to obtain the necessary information from its employees, it will not be penalized for the employee's failure to respond or if the employee provides incorrect information. The IRS has issued interim guidance specifically on the filer's duties in obtaining and reporting TINs for ACA reporting purposes.¹²

Other Electronic Media Events Beyond the Filer's Control. Although not discussed in the Existing Regulations, the IRS's manual on information reporting penalties suggests that certain events related to filing using electronic media may be outside the filer's control.¹³ For example, if the filer relied on an internal computer system that encountered major hardware and/or software problems, this may constitute reasonable cause. However, the IRS's manual notes that documentation to verify the failure is required before penalties will be waived. The IRS has noted two other situations in which events were determined to be beyond the filer's control, including a situation in which a filer contacted two or more service providers to arrange information reporting but was refused by each provider unless the filer also contracted for a range of other services; and a situation in which a filer located in a remote geographic area found it impossible to arrange for electronic media processing services.

Reliance on Advice of a Tax Advisor. Filers may have reasonable cause for a failure to file the returns based on the advice of a tax advisor. If the filer contacted a competent advisor knowledgeable about the specific tax matter, furnished necessary and relevant information, but was nonetheless incorrectly advised that the filing of a return was not required, reasonable cause may apply if the filer exercised normal business care and prudence based on its information and knowledge in determining whether to secure further advice.

b. Acting in a Responsible Manner

In addition to establishing the first prong of the reasonable cause test explained above (i.e., mitigating factor or an event beyond the filer's control), the filer must also demonstrate that it acted in a "responsible manner" both before and after the failure in order to receive relief. Acting in a responsible manner means the filer exercised the standard of care that a reasonably prudent person would use in the course of its business to determine his or her filing obligations. The filer must also take significant steps to avoid or mitigate the failure, including requesting appropriate extensions, attempting to prevent a foreseeable failure,

¹² Notice 2013-68 (Information Reporting on Minimum Essential Coverage) (Oct. 13, 2015)

¹³ Internal Revenue Manual § 20.1.7.8.1(25) (July 15, 2011)

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acting to remove the cause of the failure once it occurred, and rectifying the failure as promptly as possible.

Reporting “Safe Harbors”

The IRS has provided some very limited alternatives to the general reporting requirements on Forms 1094-C and 1095-C, which may allow employers to avoid providing the more complete data required in a general Form 1095-C filing and thus avoid penalties for failing to provide that data. These alternatives may allow employers to simplify the reporting requirements with respect to some, but not necessarily all, of their employees by requiring less detailed information than under the general reporting requirements.

There are two alternative reporting methods: 1) the Qualifying Offer Method; and 2) the 98% Offer Method. Both of these methods also have special transition-year rules applicable for the 2015 calendar year. Employers with 50 or more full-time equivalents who wish to use the simplified reporting methods must certify that they satisfy one of these four methods by checking the appropriate box on Form 1094-C.

a. Qualifying Offer Method

For purposes of both of the simplified reporting rules, an offer of coverage to an employee is a “Qualifying Offer” if:

- The offer consists of “minimum essential coverage” that provides “minimum value”
- The employee cost for employee-only coverage for each month does not exceed 9.5 percent of the single federal poverty line, divided by 12 (\$93.18 in 2015)¹⁴
- The offer of minimum essential coverage is also made to the employee’s spouse and dependents (if any)

With respect to employees who receive a Qualifying Offer in all 12 months of a year, an employer certifying to the Qualifying Offer Method need report only the names, addresses, and TINs of those employees and the fact that they received a Qualifying Offer for all 12 months. The Qualifying Offer Method applies with respect to an offer of insured coverage (and an offer of self-insured coverage, but only with regard to an employee who does not elect self-insured coverage). In addition, rather than providing such employees with a copy of Form 1095-C, the employer may instead provide employees with a standard statement indicating that the employee received a full-year Qualifying Offer (using text to be supplied by the IRS).

The instructions to Form 1094-C provide that an employer certifying compliance with Qualifying Offer Method on Form 1094-C may use Code 1A (minimum essential coverage providing minimum value offered to employee) or 1I (employer claimed “Qualifying Offer Transition Relief” for 2015), while leaving the employee share of lowest cost monthly premium (Line 15) blank. Further, the simplified general report to such an employee under the Qualifying Offer Method, in lieu of a copy of Form 1095-C, need include only:

¹⁴ The single federal poverty line for 2015 is \$11,770

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- Employer name, address, and EIN
- Contact name and telephone number at which the employee may receive information about the offer of coverage (if any) and the information on the Form 1095-C filed with the IRS for that employee
- A notification indicating that the employee (and his or her spouse and dependents, if any), are not eligible for a premium tax credit in 2015 if they received a Qualifying Offer
- Information directing the employee to see Publication 974 for more information on eligibility for the premium tax credits

b. Qualifying Offer Method Transition Relief

For 2015 only, an employer that makes a Qualifying Offer to 95% of its full-time employees in one or more months is permitted to provide an employee with the simplified general statement instead of a copy of Form 1095-C, even if such employee did not receive a Qualifying Offer for all 12 months and, even if the employee did not receive a Qualifying Offer in any month.

c. 98% Offer Method

Alternatively, or perhaps in addition to the Qualifying Offer Safe Harbors, an employer may avoid having to identify which employees are full-time in any given month provided that, for each month the employee was employed (excluding limited non-assessment periods) the employer makes an offer of affordable health coverage providing minimum value to at least 98% of the employees for whom it is required to file Form 1095-C and their dependents.¹⁵ Under this 98% Offer Method, the employer may leave blank the “Full-Time Employee Count” required by Part III(b) of Form 1094-C, and merely provide the “Total Employee Count.” The employer may certify its use of the 98% Offer Method by checking the appropriate box on Form 1094-C.

d. Section 4980H Transition Relief

Employers eligible for the 2015 transition relief from the Employer Shared Responsibility Penalty should so certify by checking Line 22(c) of Form 1094-C. In addition, the employer must indicate the basis for such section 4980H transition relief. For example, to indicate the basis of transition relief for employers with more than 50 but fewer than 100 full-time equivalents or for certain aggregated large employers with more than 100 full-time equivalents, the employer must respond to line 23, column(e) (Section 4980H Transition Relief Indicator) of Form 1094-C. To indicate transition relief offered on account of a non-calendar year plan or on account of a multiemployer plan, an employer should use alpha-numeric codes 2E (Multiemployer interim rule relief) or 2I (Non-calendar year transition relief, as applicable, on line 16 of Form 1095-C. While the IRS will be on notice that the employer is generally exempt from the Employer Shared Responsibility Penalty, the exemption does not provide relief from reporting the information required by line 14 (offer of coverage) and line 15 (employee’s share of the lowest cost monthly premium) on Form 1095-C.

¹⁵ For example, an employer with 1,000 employees is required to file Form 1095-C for 70% (or 700) of its employees in 2015. To use the 98% Offer Method, the employer must make a Qualifying Offer to at least 98% of the 700 employees, or 686 employees

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Although the simplified reporting measures are difficult to decipher and may be of limited utility whether used individually or in tandem, employers using the safe harbors may show a good faith effort by making a filing.

Conclusion

The ACA reporting requirements are cumbersome and complex and the penalties for failing to comply are significant. Reporting entities should act now to gather as much of the required information from their employees or insureds as possible. Additionally, reporting entities should file the appropriate forms with as much information they have. The IRS has indicated that it will not penalize reporting entities who make good faith efforts to report the required information, even if that information is incorrect or incomplete. The IRS will not offer the good faith efforts relief, however, for reporting entities who simply do not comply.

Employers and other reporting entities should take care to document the steps they are taking to comply with reporting requirements. The statutory relief for failures to file and report correct information is highly dependent on the particular facts and circumstances surrounding the failure. Information in the IRS's manual indicates that it may require extensive documentation to excuse a failure.