



Flashpoint: Boy, Are You In Trouble Now!... Uh, Maybe Not!

Periodically, the Internal Revenue Service (IRS) or the Department of Labor, both of whom have authority over Forms 5500, scan their records electronically to determine if everyone has filed their Forms 5500 for the year. While this seems reasonable, it has often been our experience that the scan occurs prior to the time that the government has fully registered its receipt of the Forms. The result is that many people who receive late notices for their form filings actually filed on time. (For example, this happened in 2020, and the IRS ultimately printed a retraction of the late notices.)

Several practitioners from around the country tell us that their clients are receiving late notices in relation to the Form 5558 extension requests filed for their 2020 Forms 5500. Form 5558 is used to extend the deadline for submitting Form 5500 for an additional 2½ months and must be sent to the IRS by the normal Form 5500 due date (July 31, 2021, for 2020 calendar year plans).

The IRS's notice (Notice # CP216H) says: "We have denied your request for an extension of time to file your return. . . We received your Form 5558 . . . We can't approve your request because you didn't file your request on or before the due date of your return." The notice then directs that you should immediately file your Form 5500, along with a statement providing reasonable cause for your late filing. It does not threaten penalties, but this is clearly the first step down that path.

What Should You Do?

Confirm whether the late notice is erroneous.

If you are a plan sponsor who relies on a service provider (such as a third-party administrator or TPA) to send in your Form 5500 to the government, do not assume that your TPA made an error. Contact the TPA and ask that it provide proof that it sent in the Form 5558 or Form 5500 before the due date. If you filed on your own behalf, check your records for proof.

You or your TPA can then respond to the IRS with a letter, attaching the Form 5500 and the Form 5558, as well as the proof of timely filing, explaining that the IRS's premise is incorrect. If the Form 5558 was, in fact, filed late, you should prepare and attach the statement of reasonable cause to your response letter.

Don't ignore the notice, even if the IRS is wrong.

We do **not** recommend that you do nothing, safe in the knowledge that the IRS is wrong about the late filing. If you do not respond, the next step is likely to be a letter from the IRS, threatening to assess its penalty of \$250 per day late up to \$250,000 for the form, with the due date for the form going back to July 31, 2021, the unextended filing deadline. While there is still time at that point to convince the IRS of the error if its ways, the row is harder to hoe, because the IRS would believe that you have been unresponsive to the first inquiry. No good comes of that.

What should TPAs do?


If you are a TPA or other service provider, you may want to send a note to your clients, warning them that the IRS is sending out letters that are, in many cases, erroneous. Ask your clients to advise you if they receive such a communication. Again, encouraging quick response to the IRS is likely to be the least disruptive way to handle this issue.

What a Pain!

We empathize with both Plan Sponsors and their service providers about how frustrating and annoying this process is, especially at year end when we are dealing with both business pressures and the holidays. But, when all is said and done, responding directly and quickly to the IRS is the best route to avoiding further disruption.

If You Have Questions or Problems ... We're Here to Help!

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