

SUPPORTING STATEMENT

De Minimis Error Safe Harbor to the I.R.C. §§ 6721 and 6722 Penalties
OMB # 1545-XXXX

1. CIRCUMSTANCES NECESSITATING COLLECTION OF INFORMATION

Section 202 of the Protecting Americans from Tax Hikes Act of 2015 (P.L. 114-113) (PATH Act) amended sections 6721 and 6722 of the Internal Revenue Code (Code) to establish a safe harbor from penalties for failure to file correct information returns and failure to furnish correct payee statements for certain de minimis errors. The penalties apply when a person is required to file an information return, or furnish a payee statement, but the person fails to do so on or before the prescribed date, fails to include all of the information required to be shown, or includes incorrect information. Under the safe harbor, an error on an information return or payee statement is not required to be corrected, and no penalty is imposed, if the error relates to an incorrect dollar amount and the error differs from the correct amount by no more than \$100 (\$25 in the case of an error with respect to an amount of tax withheld).

Section 6722(c)(3)(B) provides that the safe harbor does not apply to any payee statement if the payee makes an election at such time and in such manner as the Secretary may prescribe that the safe harbor not apply. Section 6721(c)(3)(B) provides that the safe harbor does not apply with respect to any incorrect dollar amount to the extent that such an error on an information return relates to an amount with respect to which an election is made under Section 6722(c)(3)(B).

This notice provides requirements for the election under section 6722(c)(3)(B), including the time and manner for making the election. This notice also provides that the de minimis error safe harbor does not apply with respect to Forms W-2, (Wage and Tax Statement), Form W-2c, (Corrected Wage and Tax Statement), and Form 1095-C, (Employer-Provided Health Coverage).

2. USE OF DATA

The voluntary third party disclosure requirements, in the notice, provide the means for a payee to make the election provided for by section 6722(c)(3)(B) or to retract that election. The mandatory record keeping requirement is necessary to facilitate compliance (i.e., enforcement by the IRS) with information reporting requirements.

3. USE OF IMPROVED INFORMATION TECHNOLOGY TO REDUCE BURDEN

The notice allows payees significant flexibility in making the election under section 6722(c)(3)(B), including the use of electronic media where the payor is in agreement, leading to reduced burden.

4. EFFORTS TO IDENTIFY DUPLICATION

We have attempted to eliminate duplication within the agency wherever possible.

5. **METHODS TO MINIMIZE BURDEN ON SMALL BUSINESSES OR OTHER SMALL ENTITIES**

There are no small entities affected by this collection.

6. **CONSEQUENCES OF LESS FREQUENT COLLECTION ON FEDERAL PROGRAMS OR POLICY ACTIVITIES**

The consequences are that taxpayers will be restricted from providing the means for a payee to make the election provided for by section 6722(c)(3)(B) or to retract that election. The mandatory record keeping requirement is necessary to facilitate compliance (i.e., enforcement by the IRS) with information reporting requirements.

7. **SPECIAL CIRCUMSTANCES REQUIRING DATA COLLECTION TO BE INCONSISTENT WITH GUIDELINES IN 5 CFR 1320.5(d)(2)**

There are no special circumstances requiring data collection to be inconsistent with Guidelines in 5 CFR 1320.5(d)(2).

8. **CONSULTATION WITH INDIVIDUALS OUTSIDE OF THE AGENCY ON AVAILABILITY OF DATA, FREQUENCY OF COLLECTION, CLARITY OF INSTRUCTIONS AND FORMS, AND DATA ELEMENTS**

IRS will publish a notice in the Internal Revenue Bulletin in the near future to solicit public comments. This notice will provide guidance to payors and payees regarding the de minimis error safe harbor from information reporting penalties under sections 6721 and 6722 and the payee election to have the safe harbor not apply. The notice will also announce that the Treasury Department and IRS intend to issue regulations under sections 6721 and 6722.

9. **EXPLANATION OF DECISION TO PROVIDE ANY PAYMENT OR GIFT TO RESPONDENTS**

No payment or gift will be provided to any respondents.

10. **ASSURANCE OF CONFIDENTIALITY OF RESPONSES**

Generally, tax returns and return information are confidential as required by 26 USC 6103.

11. **JUSTIFICATION OF SENSITIVE QUESTIONS**

No personally identifiable information (PII) is collected.

12. ESTIMATED BURDEN OF INFORMATION COLLECTION

The annual number of respondents is estimated to be 8,307,625. This volume is a result of the applicability of the notice to penalties applicable to a wide array of information reporting returns and payee statement, billions of which are filed and/or furnished annually. See Pub. 6961 (e.g. Form 1099-B, of which 1,434,809,803 were filed for TY 2015). The total responses are estimated to be 8,984,600. This number includes responses for each type of response included within the collection of information: elections made by payees, retractions made by payees, records of elections retained by payors, records of retractions retained by payors. The annual hour burden is estimated to be 760,569 hours. This burden was estimated by taking the data regarding the number of information returns projected to be filed for TY 2016 from Pub. 6961 (most recent data) and the number of unique filers of information returns for TY2014 (most recent data) and estimating from that data the number of elections and retractions that payees would make on an annual basis. Considerations of business practice, in light of the flexibility allowed in the notice for making the election, are the basis for the burden estimates for each response. The burden estimate is 6 minutes/response for the election, 2 minutes/response for the retraction, and 1 minute/response for the record retention, with the average being 5 minutes. This average estimate is dependent on the response type (elections made by payees, retractions made by payees, records of elections retained by payors, records of retractions retained by payors).

13. ESTIMATED TOTAL ANNUAL COST BURDEN TO RESPONDENTS

Estimates of the annual cost burdens are not available at this time.

14. ESTIMATED ANNUALIZED COSTS TO THE FEDERAL GOVERNMENT

There are no known annualized costs to the federal government.

15. REASONS FOR CHANGE IN BURDEN

This is a new notice. This notice provides the means for a payee to make the election provided for by section 6722(c)(3)(B) or to retract that election. The mandatory record keeping requirement is necessary to facilitate compliance (i.e., enforcement by the IRS) with information reporting requirements.

16. PLANS FOR TABULATION, STATISTICAL ANALYSIS AND PUBLICATION

There are no plans for tabulation, statistical analysis, and publication.

17. REASONS WHY DISPLAYING THE OMB EXPIRATION DATE IS INAPPROPRIATE

We believe that displaying the OMB expiration date is inappropriate because it could cause confusion by leading taxpayers to believe that the notice sunsets as of the expiration date. Taxpayers are not likely to be aware that the IRS intends to request renewal of the OMB approval and obtain a new expiration date before the old one expires.

18. EXCEPTIONS TO THE CERTIFICATION STATEMENT

There are no exceptions to the certification statement.

Note: The following applies to all of the collections of information in this submission:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 USC 6103.

Emergency Justification Statement

This emergency justification statement explains why emergency approval is needed for the information collection in NOT-133723-16, De Minimis Error Safe Harbor to the I.R.C. §§ 6721 and 6722 Penalties. New legislation under sections 6721(c)(3) and 6722(c)(3) provides that payors that otherwise timely and accurately file information returns and furnish payee statements do not need to correct information returns and payee statements containing “de minimis” errors in order to avoid application of the section 6721 and 6722 penalties. Under section 6722(c)(3)(B), however, payees can elect “at such time and in such manner as the Secretary may prescribe” that this safe harbor does not apply; if this election is in effect, payors would have to provide corrected information in order to avoid the penalties. The legislation is effective with respect to information returns required to be filed and payee statements required to be provided after December 31, 2016.

The information collection in the notice is the requirement in section 2 of the notice that for a payee to make an election under section 6722(c)(3)(B) the payee must make a disclosure to the payor of certain information to obtain the benefit of having the de minimis error safe harbor not apply. This is a voluntary disclosure requirement to another person. The notice also includes the option for payees to retract the election, so that the election is no longer in effect. This also is a voluntary disclosure requirement to another person. Finally, the collection of information includes the requirement that payors retain records of any election or retraction for as long as that information may be relevant to the administration of any internal revenue law. This is a mandatory specified record keeping requirement.

This information collection requirement is needed prior to the expiration of time periods established under normal processing times because, as noted above, the new legislation is effective with respect to information returns required to be filed and payee statements required to be provided after December 31, 2016. To publish guidance prior to that effective date, approval no later than December 15, 2016 is necessary.

The information collection requirement is essential to the mission of the Internal Revenue Service (IRS). The IRS mission is to “provide America’s taxpayers top quality service by helping them understand and meet their tax responsibilities and by applying the tax law with integrity and fairness to all.” As explained above, section 6722(c)(3)(B) provides that the election by payees, that the de minimis error safe harbor not apply, shall be made “at such time and in such manner as the Secretary may prescribe”. Guidance regarding the time and manner for the election, as well as any retraction of the election, is needed before the effective date of the legislation in order to further the IRS’s mission to serve America’s taxpayers. The rules regarding recordkeeping are necessary to facilitate compliance with information reporting requirements.

If normal clearance procedures are followed, notice will not be issued before the effective date of the new legislation. Taxpayer’s may be harmed because they will be left without clear and enforceable guidance regarding the time and manner for the election; therefore, they will be left without certain recourse to elect that the de minimis error safe harbor not apply. If that is the case, the new legislation under sections 6721(c)(3) and 6722(c)(3) will be in effect providing that payors do not have to correct de minimis errors on information returns and payee statements in order to avoid penalties, but payees won’t have guidance regarding how to elect, under new section 6722(c)(3)(B), that this safe harbor not apply. Payees will be in a significantly disadvantaged position in terms of obtaining accurate information for purposes of maintaining their records and filing their own income tax returns, because without the election that the safe harbor not apply, payors will likely have no incentive to correct de minimis errors. To give payees the ability to elect that the safe harbor not apply, so that they do not face this disadvantage and can accurately meet their own tax responsibilities, guidance is necessary before January 1, 2017.