

Part III - Administrative, Procedural, and Miscellaneous

De Minimis Error Safe Harbor to the I.R.C. §§ 6721 and 6722 Penalties

Notice [XXXX-XX]

SECTION 1. PURPOSE

This notice provides guidance to implement changes made by the Protecting Americans from Tax Hikes Act of 2015 (P.L. 114-113) (PATH Act) 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. These provisions are effective for information returns required to be filed and payee statements required to be furnished after December 31, 2016. The notice also announces that the Treasury Department and IRS intend to issue regulations under sections 6721 and 6722 with respect to the de minimis error safe harbor and the payee election that the safe harbor not apply. To the extent the regulations incorporate the rules contained in this notice, the regulations will be effective for returns required to be filed, and payee statements required to be furnished, after December 31, 2016.

SECTION 2. BACKGROUND

Section 202 of the 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 that the safe harbor not apply at such time and in such manner as the Secretary may prescribe. 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). Accordingly, if an election is in effect, a payor may be subject to penalties for an incorrect dollar amount appearing on an information return or payee statement even if the incorrect amount is a de minimis error.

Sections 6721(c)(3)(C) and 6722(c)(3)(C) provide that the Secretary may issue regulations to prevent the abuse of the safe harbor, including regulations providing that the safe harbor shall not apply to the extent necessary to prevent such abuse.

The amendments by Section 202 of the PATH Act to sections 6721 and 6722 are effective for returns required to be filed, and payee statements required to be furnished, after December 31, 2016. Section 6724(d) of the Code lists the information returns and payee statements subject to section 6721 and 6722 penalties.

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) and Forms W-2c (Corrected Wage and Tax Statement). This notice clarifies that the de minimis error safe harbor does not apply in the case of an intentional error or if a payor fails to file an information return or furnish a payee statement. In addition, this notice requires payors to retain certain records.

SECTION 3. ELECTION TO HAVE ERRORS CORRECTED

.01 In general. Pursuant to sections 6721(c)(3)(B) and 6722(c)(3)(B), a payee may make an election to have penalties apply to a payor who fails to correct an error on an information return or payee statement, even if the error is de minimis under sections 6721(c)(3)(A) and 6722(c)(3)(A). If a payee has made the election under section 6722(c)(3)(B), and the payor both furnishes a corrected payee statement to the payee and files a corrected information return with the IRS within 30 days of the date of the

election, the error will be treated as due to reasonable cause and not willful neglect, and the section 6721 and 6722 penalties will not apply to the error.

A payor may prescribe any reasonable manner for making the election, including in writing, on-line (electronic), or by telephone, provided that the payor furnishes the payee written notification of the reasonable manner before the date the payee makes the election. If the payor provides an on-line (electronic) option to make the election, this must not be the exclusive means to make the election. If a payor has prescribed a reasonable manner for making the election, the payee must adhere to that prescribed manner to make a valid election. If the payor has not prescribed a means to make the election, a payee may make the election under section 6722(c)(3)(B) in writing to the payor's address appearing on a payee statement furnished by the payor to the payee or as directed by the payor after making an appropriate inquiry.

The payor may not impose any prerequisite, condition, or time limitation on the payee's ability to request a corrected payee statement, other than prescribing a reasonable manner for making the election as described above.

This notice does not prohibit a payor from filing corrected information returns and furnishing corrected payee statements if the payee does not make an election.

.02 Time for making the election and duration. A payee may make an election with respect to information returns required to be filed and payee statements required to be furnished in the calendar year in which the payee makes the election (for example, a payee making an election on June 15, 2017, may make an election with respect to

information returns required to be filed and payee statements required to be furnished in calendar year 2017), or, alternatively, with respect to information returns required to be filed and payee statements required to be furnished in the calendar year of the election and succeeding calendar years. Nothing in this notice prevents a payee from requesting that the payor file a corrected information return or furnish a corrected payee statement required to be filed or furnished in a calendar year preceding the calendar year in which the payee makes the election. A payee may revoke an election at any time subsequent to making the election by providing the payor with written notice of revocation. Such revocation applies to all information returns of the type set forth in the revocation required to be filed and payee statements required to be furnished on or after the date the payor receives the revocation until the payee makes a new election.

.03 Information included in the election. When making the election, the payee must: (1) clearly state that the payee is making the election; (2) provide the payee's name, address, and taxpayer identification number (TIN) (as defined in section 7701(a)(41)) to the payor; (3) identify the type of payee statement(s) to which the election applies (e.g., Form 1099-DIV (Dividends and Distributions)) if the payee wants the election to apply only to specific statements; (4) if the payee wants the election to apply only to the year for which the payee makes the election, state that the election applies only to payee statements required to be furnished in that calendar year; and (5) provide the account number(s), if applicable, to which any payee statements relate. If the payee does not identify the type of payee statement or the calendar year to which the election relates,

the payor must treat the election as applying to all types of payee statements the payor is required to furnish to the payee and as applying to payee statements required to be furnished in the calendar year in which the payee makes the election and in any succeeding calendar years.

.04 The de minimis safe harbor does not apply to Form W-2 and Form W-2c. Incorrect amounts reported with respect to employees on Form W-2 and Form W-2c, even if de minimis, frustrate an employee's and the Social Security Administration's efforts to secure and maintain accurate information governing Social Security benefits and result in excessive or insufficient benefit payments to employees. As a result, in contrast to other information reporting provisions which generally do not require payors to correct information returns and payee statements, the regulations under section 6051 have long required employers and insurers to file corrected wage statements if amounts reported are incorrect. See §31.6051-1(c). Permitting the de minimis error safe harbor in the case of Form W-2 and Form W-2c conflicts with this long-standing and generally-accepted principle and would therefore constitute an abusive use of the safe harbor. Accordingly, the de minimis error safe harbor does not apply to Forms W-2 or Forms W-2c.

.05 Safe harbor only applies to inadvertent errors and not to failure to file or furnish.

The de minimis error safe harbor applies only to inadvertent errors on a filed information return or furnished payee statement. A payor that intentionally misreports a dollar amount on an information return or payee statement, whether or not the amount

otherwise qualifies as de minimis, falls under the intentional disregard provisions of sections 6721(e) and 6722(e), and, therefore, the de minimis error safe harbor does not apply. A pattern of non-compliance may indicate intentional disregard for purposes of the penalty.

Also, the de minimis error safe harbor does not apply to a failure to file or furnish an information return or payee statement, even if the payee statement or information return would report dollar amounts of \$100 or less (or \$25 or less with respect to any amount of tax withheld). Section 6721(c)(3) applies only to information returns that have been filed and section 6722(c)(3) applies only to payee statements that have been furnished.

.06 Recordkeeping. Payors must retain records of any election, or revocation of an election, for as long as that information may be relevant to the administration of any internal revenue law.

SECTION 4. REGULATIONS TO IMPLEMENT THE DE MINIMIS ERROR SAFE HARBOR

The Treasury Department and the IRS intend to issue regulations to implement the de minimis error safe harbor and the payee election to have the safe harbor not apply. These regulations are expected to incorporate the rules contained in this notice. To the extent the regulations incorporate the rules contained in this notice, the regulations will be effective for information returns required to be filed, and payee statements required to be furnished, after December 31, 2016. The regulations will also

include a requirement for payors to notify payees regarding the de minimis error safe harbor and the election for the safe harbor not to apply. The regulations may also provide that the de minimis error safe harbor does not apply to information returns and payee statements in addition to those identified in section 3.04 of this notice.

SECTION 5. EFFECTIVE DATE

This notice applies with respect to information returns required to be filed, and payee statements required to be furnished, after December 31, 2016.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this notice will be submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act (44 U.S.C. 3507(c)).

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.

The collection of information in this notice is in section 3. This information is required to facilitate the making of elections by payees under section 6722(c)(3)(B), to allow payees to retract the elections, and to provide records to facilitate proof of compliance with information reporting requirements. This information will be used by payors to determine whether they are required to furnish corrected payee statements to payees and file corrected information returns with the IRS. This information will also be used by the IRS to determine whether payors are subject to penalties under sections

6721 and 6722. The collection of information is both voluntary to obtain a benefit and mandatory. The likely respondents are individuals, state or local governments, farms, business or other for-profit institutions, nonprofit institutions, and small businesses or organizations.

The estimated total annual reporting burden is 760,569 hours.

The estimated annual burden per respondent is approximately 0.09 hours. The estimated number of respondents is 8,307,625.

The estimated annual frequency of responses is 8,984,600.

Books or records relating to a collection of information must be retained as long as their contents may become relevant to the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. § 6103.

SECTION 7. REQUEST FOR COMMENTS

Comments are requested regarding the rules contained in this notice. Any person or persons wishing to submit comments in response to this notice should submit such comments by [date that is 90 days from date of publication]. Comments should be submitted to: Internal Revenue Service, CC:PA:LPD:PR (Notice 2016-XX), Room 5205, P.O. Box 7604, Ben Franklin Station, Washington, DC 20224. Alternatively, comments may be hand-delivered Monday through Friday between the hours of 8:00 a.m. to 4:00 p.m. to: CC:PA:LPD:PR (Notice 2016-XX), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, DC. Comments may also be submitted

electronically via the following e-mail address: Notice.Comments@irsounsel.treas.gov.

Please include Notice 2016-XX in the subject line of any electronic submissions.

Comments will be available for public inspection and copying.

SECTION 8. DRAFTING INFORMATION

The principal author of this notice is Mark A. Bond of the Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding this notice contact Mr. Bond on (202) 317-6844 (not a toll-free call).