

Title 26: Internal Revenue

PART 301—PROCEDURE AND ADMINISTRATION

Additions to the Tax, Additional Amounts, and Assessable Penalties

§301.6708-1 Failure to maintain lists of advisees with respect to reportable transactions.

(a) *In general.* Any person who is required to maintain a list under section 6112 who, upon written request for the list, fails to make the list available to the Secretary within 20 business days after the date of the request shall be subject to a penalty in the amount of \$10,000 for each subsequent calendar day on which the person fails to furnish a list containing the information and in the form required by section 6112 and its corresponding regulations. The penalty will not be imposed on any particular day or days for which the person establishes that the failure to comply on that day is due to reasonable cause.

(b) *Calculation of the 20-business-day period.* The 20-business-day period shall begin on the first business day after the earliest of the date that the IRS—

(1) Mails a request for the list required to be maintained under section 6112(a) by certified or registered mail to the person required to maintain the list;

(2) Hand delivers the written request to the person required to maintain the list; or

(3) Leaves the written request with an individual 18 years old or older at the usual place of business of the person required to maintain the list.

(c) *Making a list available.* (1) A person who is required to maintain a list required by section 6112 may make the list available by mailing or delivering it to the IRS within 20 business days after the date of the list request. Section 7502 and the regulations thereunder shall apply to this section.

(2) A person who is required to maintain a list required by section 6112 may also make the list available to the IRS by making it available for inspection and copying during normal business hours, as provided by section 6112, or by another agreed-upon method, on an agreed-upon date that falls within the 20-business-day period following the list request.

(3) *Extension*—(i) *In general.* Upon a showing of good cause by the person prior to the expiration of the 20-business-day period following a list request, the IRS may, in its discretion, agree to extend the period within which to make all or part of the list available. For purposes of this paragraph, “good cause” is shown if the person establishes that the 20-business-day deadline cannot reasonably be met despite diligent efforts by the person to maintain the materials constituting a list and to make that list available to the IRS in the time and manner required by the Secretary under section 6112.

(ii) *Requesting an extension.* Any request for an extension of the 20-business-day period must be made in writing to the person at the IRS who requested the list. The person requesting an extension must briefly describe the information and documents that comprise the list as required by section 6112; explain the circumstances that would warrant additional time; propose a schedule to complete the production of the list; state that to the best of the person's knowledge, as of the date of the list request, all information and records relating to the list under the person's possession, custody, or control had been maintained in accordance with procedures and policies that are consistent with sections 6001 and 6112 of the Internal Revenue Code; and state that the extension request is not being made to avoid the person's list maintenance obligations imposed by section 6112 and its corresponding regulations. The IRS may, in its discretion, grant the person's extension request in full or in part. The IRS will consider whether granting an extension may impair its ability to make a timely assessment against any of the participants in the transaction associated with the requested list. The IRS will not grant an extension if it determines that a significant reason for the extension request is to delay producing the list. A pending extension request by itself does not constitute reasonable cause for purposes of section 6708.

(4) *Examples.* The following examples illustrate paragraph (c)(3)(i) and (ii) of this section. These examples are intended to illustrate how the facts and circumstances in paragraph (c)(3)(i) and (ii) of this section may apply; in any given case, however, all of the facts and circumstances must be analyzed.

Example 1. (i) Firm A is a large law firm that is a material advisor. Firm A conducts annual sessions to educate its professionals about reportable transactions and the firm's obligations related to those reportable transactions. Firm A instructs its professionals to provide information on tax engagements that involve reportable transactions and to provide the documents required to be maintained under sections 6001 and 6112 to Firm A's compliance officer for list maintenance purposes. Firm A's policy provides that, for each engagement involving a reportable transaction, one firm professional will send an email to the firm's compliance officer about the engagement and then direct a subordinate to send the documents required to be maintained to the firm's compliance officer. Firm A has policies and procedures in place to monitor compliance with these rules and to address non-compliance.

(ii) Firm A receives a request from the IRS for a section 6112 list. In compiling its list to turn over to the IRS during the 20-business-day period following the list request, Firm A discovers that, with respect to one reportable transaction, a subordinate did not provide the documentation required by Firm A's policy. In addition, Firm A experiences difficulty locating the required documents as both the professional and the subordinate who worked on the matter are no longer employed by Firm A, requiring the firm to undertake an extensive search for the information responsive to the list request. Firm A also seeks the information from the firm's clients. Despite these efforts, Firm A reasonably determined that it will not be able to respond timely to the request. Within the 20-business-day period, Firm A notifies the IRS, in writing, of the difficulties it is experiencing and requests an additional 10 business days to locate and produce the information for this one transaction. Within the 20-business-day period, Firm A makes all other required list information

available to the IRS, together with a description of the information that is being searched for, all statements required by these regulations, and a proposed schedule to produce the missing information.

(iii) Under these circumstances, Firm A demonstrated that it could not reasonably make the portion of the list relating to the one transaction available within the 20-business-day period and thus qualified for an extension. Firm A had established policies and procedures reasonably designed and implemented to ensure and monitor compliance with the requirements of section 6112 and address non-compliance. Because the facts and circumstances indicate that Firm A made diligent efforts to maintain the materials constituting the list in a readily accessible form and as otherwise required under section 6112, the requested 10-business-day extension with respect to the portion of the list relating to the one transaction where records were not maintained in accordance with the firm's policies and procedures should be granted.

Example 2. (i) Assume the same facts set forth in example one, except that, in the process of compiling the list to comply with the list maintenance request, Firm A first becomes aware that a firm professional did not send an email to the firm's compliance officer about a transaction subject to the list maintenance request and did not direct a subordinate to send to the firm's compliance officer the information required to be maintained with respect to the transaction. Assume further that Firm A had a robust section 6112 compliance monitoring program in place and despite this, the firm did not know that the professional did not follow firm policies and procedures with respect to this transaction. The professional who worked on the matter is no longer employed by Firm A, causing Firm A difficulty in locating the required information and in ascertaining whether the professional in question failed to comply with Firm A's list maintenance policies with respect to any other reportable transactions. Firm A is searching its records to locate information responsive to the list request and to ensure that no other reportable transactions were omitted from the list. Firm A estimates that it will take an additional 20 business days after the 20th business day to retrieve the missing information and provide IRS with the additional information responsive to the list request. Within the 20-business-day period, Firm A notifies the IRS, in writing, of the difficulties it is experiencing and requests an additional 20 business days to locate and produce the information for this one transaction and for any other reportable transactions omitted from the list as a result of the inaction by the professional in question. Within the 20-business-day period, Firm A makes all other required list information available to the IRS, together with a description of the information that is being searched for, all statements required by these regulations, and a proposed schedule to produce the missing documents.

(ii) Under these facts and circumstances, Firm A demonstrated that it could not reasonably, within the 20-business-day period, make available the portion of the list relating to one or possibly more transactions omitted from the list because of the inaction of the professional in question. Firm A therefore qualifies for an extension. Firm A had established policies and procedures reasonably designed and implemented to ensure and monitor compliance with the requirements of section 6112 and address non-compliance. Because the facts and circumstances indicate that Firm A made diligent efforts to maintain the materials constituting the list in a readily accessible form and as otherwise required under section 6112, the requested 20-business-day extension with respect to the portion of the list relating to the one known omitted transaction and to any other omitted reportable transactions resulting from the inaction of the professional in question should be granted.

(d) *Failure to make list available.* A failure to make the list available includes any failure to furnish the requested list to the IRS in a timely manner and in the form required under section 6112 and its corresponding regulations. Examples of failures to make a list available include instances in which a person fails to furnish any list; furnishes an incomplete list; or furnishes a list, whether or not complete, after the time required by this section.

(e) *Computation of penalty—(1) In general.* The penalty imposed by section 6708 accrues daily, beginning on the first calendar day after the expiration of the 20-business-day period following a written list request, and continues for each calendar day thereafter until the person's failure to furnish a list in the form required by section 6112 and its corresponding regulations ends. If the list is delivered or mailed to the IRS outside of the 20-business-day period, the penalty shall not apply on the day the list is delivered to the IRS or, if the list is mailed, the day the list is received by the IRS.

(2) *Computation of penalty after grant of extension.* If the IRS grants an extension of the 20-business-day period pursuant to paragraph (c)(3) of this section, the penalty imposed by section 6708 accrues daily, beginning on the first calendar day after the extension period expires, and continues for each calendar day thereafter until the person's failure to furnish a list in the form required by section 6112 and its corresponding regulations ends. If the list is delivered or mailed to the IRS outside of the period of extension, the penalty shall not apply on the day the list is delivered to the IRS or, if the list is mailed, the day the list is received by the IRS.

(3) *Designation agreements and concurrent application of penalty.* If material advisors with respect to the same reportable transaction enter into a designation agreement pursuant to section 6112(b)(2) and §301.6112-1(f), separate penalties will be imposed on designated material advisors and nondesignated material advisors who are parties to the designation agreement for their respective periods of failure or noncompliance with a list request. A penalty will continue to accrue against a material advisor who is a party to a designation agreement until such time when a list complying with the requirements of section 6112 and its corresponding regulations is furnished by that material advisor or any other material advisor who is a party to the designation agreement.

(4) *Example.* The following example illustrates paragraph (e) of this section.

Example. The IRS hand delivers a written request for the list required to be maintained under section 6112 to Firm B, a material advisor, on Friday, March 10, 2017. Firm B must make the list available to the IRS on or before Friday, April 7, 2017, the 20th business day after the request was hand delivered. If Firm B fails to make the list available to the IRS by that day, absent reasonable cause or the IRS's grant of an extension of the response time, the \$10,000-per-day penalty begins on Saturday, April 8, 2017. The \$10,000 per day penalty will continue for each subsequent calendar day until Firm B makes the complete list available, except for those days for which Firm B demonstrates reasonable cause. If Firm B hand delivers a complete copy of the requested list to the IRS on the morning of Tuesday, April 11, 2017, absent reasonable cause or the IRS's prior grant of an extension for the response time, a penalty of \$30,000 will be imposed upon Firm B (for April 8, 9, and 10). See paragraphs (g) and (h) of this section for an explanation of reasonable cause.

(f) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Material advisor* means a person described in section 6111 and §301.6111-3(b).

(2) *Business day* means every calendar day other than a Saturday, Sunday, or legal holiday within the meaning of section 7503.

(3) *Reportable transaction* means a transaction described in section 6707A(c)(1) and section 1.6011-4(b)(1).

(4) *Listed transaction* means a transaction described in section 6707A(c)(2) and §1.6011-4(b)(2) of this chapter.

(g) *Reasonable cause—general applicability—(1) Overview.* The section 6708 penalty will not be imposed for any day or days for which the person shows that the failure to make a complete list available to the IRS was due to reasonable cause. The determination of whether a person had reasonable cause is made on a case-by-case and day-by-day basis, taking into account all the relevant facts and circumstances. Facts and circumstances relevant to a material advisor's reasonable cause for failing to make available the list on a specific day include facts and circumstances arising after the request for the list. The person's showing of reasonable cause should relate to each specific day or days for which the person failed to make available the requested list. Factors establishing reasonable cause include, but are not limited to, factors identified in paragraphs (g) and (h) of this section.

(2) *Good-faith factors.* The most important factors to establish reasonable cause are those that reflect the extent of the person's good-faith efforts to comply with section 6112. The following factors, which are not exclusive, will be considered in determining whether a person has made a good-faith effort to comply with the section 6112 requirements:

(i) The person's efforts to determine or assess its status as a material advisor as defined by section 6111;

(ii) The person's efforts to determine the information and documentation required to be maintained under section 6112;

(iii) The person's efforts to meet its obligations to maintain a readily producible list as required by section 6112;

(iv) The person's efforts, upon receiving the list request, to make the list available to the IRS within the 20-business-day period (or extended period) under paragraphs (a), (b), and (c)(3) of this section; and

(v) The person's efforts to ensure that the list furnished to the IRS is accurate and complete.

(3) *Ordinary business care.* The exercise of ordinary business care may constitute reasonable cause. To show ordinary business care, the person may, for example, show that the person established, and adhered to, procedures reasonably designed and implemented to ensure compliance with the section 6112 requirements. In all instances when ordinary business care is claimed as constituting reasonable cause, a person must show that the person took immediate steps, upon discovering any failure relating to the list, to correct the failure. A person's failure to take immediate steps to correct a failure related to the list upon discovering the failure is a factor weighing against a conclusion that the person exercised ordinary business care. Notwithstanding the occurrence of an isolated and inadvertent failure, a person still may be able to demonstrate that the person exercised ordinary business care, considering all the relevant facts and circumstances, but only if the person had established and adhered to procedures reasonably designed and implemented to ensure compliance with the section 6112 requirements.

(4) *Supervening events.* A person may establish reasonable cause for one or more days for which, considering all the relevant facts and circumstances, the failure to timely furnish the list required by section 6112 was due solely to a supervening event beyond the person's control. Events beyond a person's control may include fire, flood, storm, or other casualty; illness; theft; or other similarly unexpected event that damages or impairs the person's relevant business records or system for processing and providing these records, or that affects the person's ability to maintain the section 6112 list or make it available to the IRS. Reasonable cause may be established only for the period that a person who exercised ordinary business care would need to provide the list from alternative records in existence, or make the list available, under the specific facts and circumstances.

(5) *Reliance on opinion or advice—(i) In general.* A person may rely on an independent tax professional's advice to establish reasonable cause. The reliance, however, must be reasonable and in good faith, in light of all the other facts and circumstances. For a person to be considered to have relied on the advice, the advice must have been received by the person before the date the list is required to be made available to the IRS. If the person received advice from an independent tax professional, the person's reliance on that advice will be considered reasonable only if the independent tax professional reasonably believed that it is more likely than not that the person does not have an obligation imposed by section 6112. For example, this advice may conclude that the person is not a material advisor; that the transaction upon which the person provided material aid, assistance, or advice is not a reportable transaction for which a list was required to be maintained as of the date of the advice; that the information and documents to be produced constitute the required list; or that the information or documents withheld by the person are not required to be produced. The advice must also take into account and consider all relevant facts and circumstances, not rely on unreasonable legal or factual assumptions, not rely on or take into account the possibility that a list request may not be made, and not rely on unreasonable representations or statements of the person seeking the advice. Advice from a tax professional who is not independent may be considered in determining reasonable cause if, in light of and in relation to all the other facts and circumstances, taking into account such advice is reasonable. However, by itself, advice from a tax professional who is not independent is not sufficient to establish reasonable cause. Independent tax professional advice is not required to establish reasonable cause and the failure to obtain advice from an independent tax professional does not preclude a finding of reasonable cause if, based on the totality of all of the relevant facts and circumstances, reasonable cause has been established.

(ii) *Independent tax professional.* For purposes of this section, an independent tax professional is a person who is knowledgeable in the relevant aspects of Federal tax law and who is not a material advisor with respect to the specific transaction that is the subject of the list request. For advice related to a listed transaction, a person who is a material advisor with respect to any transaction that is the same as or substantially similar to the type of transaction that is the subject of the list request will not be considered an independent tax professional.

(6) *Examples.* The following examples illustrate this paragraph (g). These examples are intended to illustrate how the facts and circumstances in paragraphs (g)(2) through (g)(5) of this section may apply; in any given case, however, all of the facts and circumstances must be analyzed.

Example 1. On August 11, 2017, the IRS sends a list request via certified mail to Firm C, a material advisor. Firm C consists of a sole practitioner, X, who is away from the office on vacation on this date. X has arranged for a colleague, Y, to review Firm C's mail, email, and telephone messages daily during his absence. X returns to the office the day after his vacation ends, on September 5, 2017, and immediately contacts the IRS to notify it of his absence. Firm C makes a complete list available to the IRS on September 19, 2017, 10 business days after he has returned from vacation. Firm C establishes that X was on vacation at the time the list request was sent to Firm C, and Firm C promptly furnished the requested list in a manner and time period reflecting ordinary business care and prudence upon X's return to the office. Under these circumstances, Firm C is considered to have made a good-faith effort to comply with the section 6112 requirements. Firm C has established reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date the list was made available to the IRS. See paragraphs (g)(2) and (3) of this section.

Example 2. On March 3, 2017, the IRS hand delivers to Firm D, a material advisor, a list request related to a transaction believed by the IRS to have been implemented in November 2008 by a group of Firm D's clients (the advisees). Firm D's involvement in the transaction included implementing the transaction on behalf of some but not all of the advisees. Firm D timely makes the requested list available to the IRS. Upon review, the IRS determines that the information furnished by Firm D appears to be accurate, but the IRS believes that some of the information is incomplete because it does not contain information about certain individuals who were identified through other investigative means as Firm D's clients who may have engaged in the transaction. In response to a follow-up inquiry by the IRS, Firm D establishes, however, that it is not a material advisor with respect to these taxpayers. Under these circumstances, Firm D has furnished the list as required by section 6112. Because the list was complete when furnished, Firm D need not make a showing of reasonable cause. See paragraph (g)(1) of this section.

Example 3. The IRS sends a list request by certified mail to Firm E, a material advisor. Firm E maintains the materials responsive to the list request on a portable data storage device. Under Firm E's established procedures for maintaining section 6112 lists, once the transaction is completed, paper documents are scanned and saved electronically according to Firm E's records management procedures. Under Firm E's records management procedures, after the scanning process is completed, Firm E sends the paper documents to an off-site storage facility. Three days before the 20th business day following the date of the written request, the electronic data is permanently destroyed. Firm E contacts the IRS representative listed as a contact person on the section 6112 list request to advise him that the relevant data was permanently destroyed. Firm E establishes that it exercised ordinary business care but that the data was nevertheless destroyed due to circumstances outside of its control. Under these circumstances, Firm E has reasonable cause for the period of time that Firm E cannot respond to the list request due to circumstances out of Firm E's control. The reasonable cause exception, however, will only be available to Firm E for the period of time that a person who exercises ordinary business care would need to obtain the materials that are part of the list, including in this case paper documents from the off-site storage facility, and furnish the list to the IRS. See paragraphs (g)(3) and (4) of section.

Example 4. On February 2, 2017, the IRS hand delivers a list request to Firm F, a material advisor. Firm F filed with the IRS the disclosure statement required by section 6111 for the reportable transaction that is the subject of the list request but did not maintain the section 6112 list documentation in a readily accessible format after filing the section 6111 statement. On March 3, 2017, the 20th business day (due to the Presidents' Day holiday) after the list request is delivered to Firm F, Firm F contacts the IRS to ask for additional time to comply with the list request, stating that it could not gather the list information together in 20 business days. Because Firm F is not able to show that it made diligent efforts to maintain the materials constituting the list in a readily accessible form, the IRS should not grant Firm F an extension of time. See paragraph (c)(3) of this section. Further, Firm F does not have reasonable cause because it has failed to demonstrate a good-faith effort to comply with the section 6112 requirements and ordinary business care. See paragraphs (g)(2) and (3) of this section.

Example 5. On August 11, 2017, the IRS sends a list request, via certified mail, to Firm G, a material advisor. Firm G consists of a sole practitioner, P. Firm G maintains the materials responsive to the list request electronically. Generally, under Firm G's records management procedures, once a transaction is completed, the documents related to that transaction are scanned and then saved electronically consistent with IRS guidance on maintaining books and records in electronic form. P is aware of the list request but ignores it. On September 24, 2017, the 13th calendar day after the 20-business-day period following the list request (due to the Labor Day holiday), P suffers a temporary but debilitating illness that lasts 22 days. Following the illness, P immediately returns to work. After returning to work, P continues to ignore the list request. In this situation, the facts and circumstances indicate that Firm G does not have reasonable cause for any day in which there was a failure to make the list available to the IRS, including the 22 days due to the intervening event, because the failure was not due solely to the supervening event occurring on September 24, 2017. Firm G did not make a good-faith effort to make the list available to the IRS before or after the supervening event occurred. Firm G is liable for the \$10,000 per day penalty from the first day following the expiration of the 20-business-day period until but not including the day that Firm G furnishes the list to the IRS. See paragraphs (g)(2) and (4) of this section.

Example 6. On August 11, 2017, the IRS sends a list request, via certified mail, to Firm H, a material advisor. Firm H, consists of a sole practitioner, P. Firm H maintains the materials responsive to the list request electronically. Generally, under Firm H's records management procedures, once the transaction is completed, the documents are scanned and then saved electronically consistent with IRS guidance on maintaining books and records in electronic form. P is aware of the list request and begins compiling the documents to respond to the IRS within the 20-business-day period ending on September 11, 2017 (due to the Labor Day holiday). Before responding to the list request, P suffers a temporary but debilitating illness on September 3, 2017, that lasts through September 19, 2017. Upon returning to work on September 20, 2017, P contacts the IRS to explain that P experienced a temporary but debilitating illness from September 3, 2017, through September 19, 2017, and that P has returned to the office and intends to furnish the list to the IRS within a short period of time. Firm H furnishes the list to the IRS on September 22, 2017. In this situation, the facts and circumstances indicate that Firm H has reasonable cause for the period from September 12, 2017 until September 21, 2017, attributable to P's illness. The failure to furnish the list in a timely fashion was solely attributable to the supervening event occurring on September 3, 2017, and Firm H promptly furnished the requested list in a manner and time period reflecting ordinary business care upon P's return to the office. Firm H is considered to have made a good-faith effort to comply with the section 6112 requirements. Firm H has established reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date Firm H furnished the list to the IRS. See paragraphs (g)(2) and (4) of this section.

Example 7. Firm I receives a list request for transactions that are the same or substantially similar to the listed transaction described in Notice 2002-21, 2002-1 CB 730. Firm I will be considered a material advisor with respect to a particular transaction for which it provided advice if the transaction is the same as or substantially similar to the transaction described in Notice 2002-21. Firm I, however, is unsure whether the transaction is the same as or substantially similar to the transaction described in this Notice. Firm I obtains an opinion from Firm L, a law firm, on this issue. P, a partner in Firm L,

provided tax advice to clients who invested in other Notice 2002-21 transactions, including how to report the purported tax benefits from the transaction on their income tax returns, and Firm L is a material advisor with respect to those transactions. Because Firm L is a material advisor with respect to the type of transaction that is the same as or substantially similar to the transaction described in Notice 2002-21, Firm L is not considered an independent tax professional under paragraph (g)(5)(ii) of this section. Therefore, Firm I cannot rely on advice provided by Firm L to establish reasonable cause under this paragraph (g). The IRS may consider Firm L's advice in determining reasonable cause in light of other facts and circumstances, but Firm L's advice, without more, is not sufficient to establish reasonable cause because P is not an independent tax professional under paragraph (g)(5)(ii) of this section.

Example 8. Firm J, a law firm, provides advice to various clients of the firm regarding the potential tax benefits of a reportable transaction under §1.6011-4(b)(5) of this chapter (involving a section 165 loss) and is a material advisor with respect to that transaction. Firm J also provides advice to Firm M, an accounting firm, regarding the same transaction. Firm M then advises various Firm M clients regarding this same transaction, and is a material advisor. The transaction is not a listed transaction. Firm N, a law firm that is not associated with Firm J and has not provided advice with respect to the same transaction to Firm M, has provided advice to its own clients regarding other transactions subject to §1.6011-4(b)(5) of this chapter, but not the particular transaction that was the subject of Firm J's advice to Firm M. The IRS hand delivers a list request to Firm M, the subject of which is the transaction regarding which Firm J provided advice to Firm M. Before the expiration of the 20-business-day period, Firm M seeks advice from Firm J and Firm N about the propriety of withholding certain documents related to the transaction. Because Firm J provided advice with respect to the particular transaction that is the subject of the list request, Firm J is not an independent tax professional under paragraph (g)(5)(ii) of this section. Although Firm N has provided advice on a transaction that is considered a reportable transaction under §1.6011-4(b)(5) of this chapter, Firm N is considered to be an independent tax professional under paragraph (g)(5)(ii) of this section because Firm N did not provide material assistance with respect to the particular transaction that is the subject of the list request.

(h) *Reasonable cause—special considerations—(1) Material advisor no longer in existence.* If a material advisor has dissolved, been liquidated, or otherwise is no longer in existence, the person required by section 6112 to maintain the list (the “responsible person”) is subject to the penalty for failing to make the list available. In considering whether a responsible person or successor in interest has reasonable cause for any failure to timely make the list available to the IRS, the IRS will consider all of the facts and circumstances, including those facts and circumstances relating to the dissolution, liquidation, and winding up of the original material advisor's business and any efforts the original material advisor made to comply with the section 6112 requirements before the dissolution or liquidation. When appropriate or applicable, due diligence, if any, performed by a responsible person or successor in interest will be considered, and due consideration will be given for acts taken by that person to minimize the potential for violating the section 6112 requirements.

(2) *Review by IRS.* Whether reasonable cause exists for a period of time will be determined based on all the relevant facts and circumstances, including facts and circumstances arising after the request for the list. If a material advisor establishes that, in its efforts to comply with the provisions of section 6112 and its corresponding regulations, it acted in good faith, as defined in paragraph (g)(2) of this section, the material advisor will be deemed to have reasonable cause for the periods of time the IRS takes to review a furnished list for compliance with the section 6112 requirements and to inform the material advisor of any identified failures in the list. If the material advisor does not establish that it acted in good faith the IRS will not consider the time it takes to review the list or inform the material advisor of identified failures as a factor in determining whether the material advisor has reasonable cause for that period.

(3) *Examples.* The following examples illustrate paragraph (h)(2) of this section.

Example 1. On February 2, 2017, the IRS hand delivers a list request to Firm O, a material advisor. On March 3, 2017, the 20th business day (due to the Presidents' Day holiday) after the list request is delivered to Firm O, Firm O sends a list to the IRS that was contemporaneously prepared after Firm O issued advice with respect to the reportable transaction and continuously maintained in accordance with the requirements of section 6112 and the related regulations. Before sending the list, a supervisor at Firm O carefully reviewed the list to verify that it was comprehensive and accurate. The IRS completes its review on March 23, 2017, and determines that the list is not complete because Firm O furnished a draft copy of the tax opinion, rather than the final document, which Firm O had mistakenly misfiled. After Firm O is notified of the missing information, Firm O immediately furnishes a complete copy of the final version of the tax opinion. Firm O made a good-faith effort to comply with the section 6112 requirements, including its efforts to ensure that the list that was furnished to the IRS was accurate and complete. Firm O has reasonable cause for the entire period between the expiration of the 20-business-day period following the list request and the date it furnished the complete list to the IRS.

Example 2. On February 2, 2017, the IRS hand delivers a list request to Firm P, a material advisor. Firm P's involvement in the reportable transaction included implementing the transaction on behalf of some but not all of Firm P's clients. On March 3, 2017, the 20th business day (due to the Presidents' Day holiday) after the list request is delivered to Firm P, Firm P sends the list to the IRS. The IRS completes its review on March 23, 2017. The IRS believes the client list is incomplete because it does not contain information about certain individuals who were identified through other investigative means as clients of Firm P who may have engaged in the transaction. On March 27, 2017, in response to a follow-up inquiry by the IRS, Firm P establishes that it is not a material advisor with respect to these taxpayers. Therefore, the March 3, 2017 list was complete and accurate when first furnished. Under these circumstances, Firm P has timely furnished the list as required by section 6112. Because Firm P complied with the requirements of section 6112 no penalty applies, and Firm P does not need to establish reasonable cause for the period from March 4, 2017, through March 27, 2017, when the IRS was reviewing the list.

Example 3. On February 2, 2017, the IRS hand delivers a list request to Firm Q, a material advisor. On March 3, 2017, the 20th business day (due to the Presidents' Day holiday) after the list request is delivered to Firm Q, Firm Q sends the list to the IRS. Firm Q had not maintained a list contemporaneously after issuing the advice with respect to the reportable transaction, and created the list during the 20 business days before providing the list to the IRS. To meet the 20-business-day deadline, a supervisor did not review the final list before sending it to the IRS. The IRS completes its review on March 23, 2017, and determines that the list is not complete because it does not include 15 persons for whom Firm Q acted as a material advisor with respect to the reportable transaction. Firm Q furnishes the additional information on March 27, 2017. Because Firm Q is not able to show that it made diligent efforts to maintain the materials constituting the list in a readily accessible form and that it made a reasonable effort to ensure that the list that was furnished to the IRS was accurate and complete, Firm Q cannot establish that it exhibited a good-faith effort to comply with the section 6112 requirements. Firm Q does not have reasonable cause for its failure to furnish the complete list from March 4, 2017, through March 26, 2017.

Example 4. Within the 20-business-day period following a list request, Firm R sends four boxes of documents comprising the required list to the IRS using a commercial delivery service. The IRS receives only three of the boxes because box 4 was erroneously self-addressed using Firm R's office address. Box 4 arrives at Firm R's office on January 6, 2017, the 2nd calendar day after the 20th business day after the list request was made. Firm R immediately recognizes its clerical error, promptly contacts the IRS, and resends the original and unopened box 4, properly addressed, to the IRS together with documentation supporting the error. The IRS receives box 4 on January 9, 2017. Under these circumstances, Firm R has reasonable

cause for the late delivery of box 4 because it made a good-faith attempt to timely comply with the list request and immediately corrected an inadvertent error upon its discovery. As a result, no penalty will be imposed based on the delay in providing box 4. If, after inspection, the IRS determines that, even with the contents of box 4, the list is incomplete or defective, Firm R must establish reasonable cause for the incomplete nature of the list or the defect to avoid imposition of a penalty for the period beginning January 5, 2017, until but not including the day that Firm R furnishes the list to the IRS.

Example 5. (i) Firm S is a large law firm that is a material advisor. Firm S conducts annual sessions to educate its professionals about reportable transactions and the firm's obligations related to those reportable transactions. Firm S instructs its professionals to provide information on tax engagements that involve reportable transactions and to provide the documents required to be maintained under section 6112 to Firm S's compliance officer for list maintenance purposes. Firm S's policy provides that, for each engagement involving a reportable transaction, one firm professional will send an email to the firm's compliance officer about the engagement and then direct a subordinate to send to the firm's compliance officer the documents required to be maintained.

(ii) Firm S receives a request from the IRS for a section 6112 list. In compiling its list to turn over to the IRS during the 20-business-day period, Firm S asks all professionals to ensure that they have reported all engagements involving a reportable transaction to the firm's compliance officer. Before submission to the IRS, a Firm S supervisor reviews the list to ensure completeness. Firm S has no reason to know of any deficiencies, and in compiling its list, Firm S discovers no deficiencies.

(iii) Upon review of the list, the IRS determines that the information furnished by Firm S appears to be accurate, but the IRS believes that some of the information is incomplete because it does not contain information about an individual who may have engaged in the transaction and who was identified through other investigative means as Firm S's client. In response to a follow-up inquiry by the IRS, Firm S immediately reviews its files and discovers that a former Firm S professional, who is no longer employed by Firm S, provided material advice to the individual with respect to carrying out a reportable transaction, but did not send an email to the firm's compliance officer about the transaction or direct a subordinate to send the documents required to be maintained to the firm's compliance officer. Firm S immediately furnishes the missing information and documents related to the identified omission to the IRS.

(iv) Firm S establishes that the professional in question ordinarily complied with Firm S's list maintenance procedures and that Firm S had no reason to know of this one omission or to suspect that the professional had failed to report any reportable transactions to the firm's compliance officer in accordance with the firm's policies. Firm S also immediately undertakes a thorough search of its electronic and paper files to locate any additional reportable transactions relating to the professional in question that may have been omitted from the list. Under these circumstances, Firm S has demonstrated that it has acted in good faith in its efforts to comply with section 6112 and is deemed to have reasonable cause for the period of time the IRS took to review the furnished list and to inform the material advisor of the identified failure in the list. See paragraph (h)(2) of this section. The reasonable cause exception, however, will only be available to Firm S with respect to the omission identified by the IRS for the period of time that a person who exercises ordinary business care would need to obtain the information and documents related to the identified omission. See paragraph (g)(3) of this section. With respect to any other omissions related to the same professional and not identified by the IRS, the reasonable cause exception will only be available to Firm S for the period of time that a person who exercises ordinary business care would need to ascertain whether any other reportable transactions were omitted from the list and to obtain the information and documents related to any such omissions. See paragraph (g)(3) of this section.

(i) *Effective/applicability date.* This section applies to all requests for lists required to be maintained under section 6112, including lists that persons were required to maintain under section 6112(a) as in effect before October 22, 2004, made on or after April 28, 2016.

[T.D. 9764, 81 FR 25334, Apr. 28, 2016]