

**MEMO# 30503**

January 5, 2017

# IRS Guidance on De Minimis Error Safe Harbor from Information Reporting Penalties

[30503] January 5, 2017 TO: Tax Committee

Transfer Agent Advisory Committee RE: IRS Guidance on De Minimis Error Safe Harbor from Information Reporting Penalties

The Internal Revenue Service (“IRS”) recently issued [Notice 2017-09](#) regarding the *de minimis* error safe harbor from information reporting penalties under sections 6721 and 6722. The Notice provides guidance on how a payee may elect out of the safe harbor, when the safe harbor does not apply, and payors’ recordkeeping obligations.

## Background

The Protecting Americans from Tax Hikes Act of 2015 (P.L. 114-113) (the “Path Act”) amended sections 6721 and 6722 to provide a safe harbor from penalties for failure to file correct information returns and failure to furnish correct payee statements, respectively, for certain *de minimis* errors.[\[1\]](#) Under the safe harbor, an error 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).

The safe harbor does not apply to any payee statement if the payee elects not to have the safe harbor apply.[\[2\]](#) It also 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 such an election is made.[\[3\]](#) If the payee makes such an election, 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.

The IRS and the Treasury Department have authority under the amendments to sections 6721 and 6722 to determine how and when the payee election is made. The IRS also may issue regulations to prevent the abuse of the safe harbor.

The Path Act amendments are effective for returns required to be filed and payee statements required to be furnished after December 31, 2016.

## Notice 2017-09

Election to Have the Safe Harbor not Apply

Under the Path Act amendments, a payee may elect to have the *de minimis* safe harbor not

apply. The Notice provides that a payor may prescribe any reasonable manner for making the election, including in writing, electronic, or by telephone, provided that the payor provides the payee written notification of the manner in which to make the election before the date the payee makes the election. Note, however, that a payor that permits electronic elections must make a non-electronic election available as well. Payees must adhere to the payor's manner for making the election, so long as it is reasonable. The payor may not otherwise impose any prerequisite, condition, or time limitation on the payee's ability to request a corrected payee statement. If the payor has not prescribed a manner to make the election, a payee may make the election in writing.

A payee may make an election with respect to payee statements required to be furnished in the calendar year in which the payee makes the election. The election also may apply to any subsequent calendar years, if the payee so chooses. A payee may revoke an election at any time subsequent to making the election by providing the payor with written notice of revocation.

The Notice provides specific information that must be included when a payee makes an election.

The *de minimis* safe harbor applies only to inadvertent errors on information returns or payee statements actually filed or furnished; it does not apply to failures to file or furnish an information return or payee statement, even if the dollar amounts fall within the *de minimis* safe harbor. Further, the Notice states that a pattern of non-compliance may indicate intentional disregard for purposes of penalties.

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.

#### Regulations to Implement the *De Minimis* Safe Harbor

The Treasury Department and the IRS intend to issue regulations to implement the *de minimis* safe harbor. The regulations are expected to incorporate the rules contained in the Notice. To that extent, the regulations will be effective for information returns required to be filed and payee statements required to be furnished after December 31, 2016. The government also expects to include in the regulations a requirement for payors to notify payees regarding the *de minimis* safe harbor and the election to have it not apply.

#### Effective Date

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

### Comments Requested

The IRS and Treasury Department have requested comments on the rules contained in the Notice, as well as potential abuses of the *de minimis* safe harbor and any information returns or payee statements that should be excepted from these provisions. Comments must be submitted to the government by April 24, 2017. Therefore, please provide any comments on the Notice and the *de minimis* safe harbor to me ([kgibian@ici.org](mailto:kgibian@ici.org) or 202/371-5432) no later than **Monday, March 20, 2017**.

Karen Lau Gibian

**endnotes**

[1] See Institute Memorandum No. 29576, dated December 18, 2015, available at: [https://www.ici.org/my\\_ici/memorandum/memo29576](https://www.ici.org/my_ici/memorandum/memo29576).

[2] Section 6722(c)(3)(B).

[3] Section 6721(c)(3)(B).

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