

Failure to Furnish Correct Payee Statements.

IRC Sec. 6722 authorizes a civil penalty for failing to provide payees with correct copies of statements furnished to the IRS. (A separate penalty applies to the failure to furnish the statement to the IRS-see Key Issue 31B.) Unless due to reasonable cause and not willful neglect, and unless the exception for inconsequential errors or omissions described later in this key issue applies, the following will result in a penalty:

1. Any failure to furnish a payee statement to the person who is required to receive it on or before the prescribed due date (which for a calendar year generally is the following January 31)-referred to as a failure to timely furnish.
2. Any failure to include all information required to be shown on the payee statement, or the inclusion of incorrect information-referred to as a failure to include correct information.

Note: Final regulations allow the use of truncated taxpayer identification numbers (TTINs) on payee statements and certain other documents when not otherwise prohibited (Reg. 301.6109-4). When allowed by regulations, the use of a TTIN does not result in the application of a Section 6722 penalty [Reg. 301.6109-4(b)(1)]. A number is truncated by replacing the first five digits of the number with either asterisks or Xs (e.g., ***-**-6789 or XXX-XX-6789).

A failure to timely furnish includes a failure to furnish a statement on a form acceptable to the IRS. Furthermore, the failure to include correct information can encompass a failure to include the information required by the Code, as well as information required by relevant regulations, revenue rulings, revenue procedures, or IRS forms and instructions [Reg. 301.6722-1(a)(2)].

A payee statement generally means a copy of an information return that has been furnished to the IRS regarding an amount (e.g., taxable income) paid to the payee during the calendar year. The payee statement usually is provided to enable the payee to correctly prepare a current year or future year return. Payee statements include Form W-2 (Wage and Tax Statement) as well as the forms in the 1099 series, including Form 1099-MISC (Miscellaneous Income).

Note: IRC Secs. 6721 and 6722 are not mutually exclusive. If an employer fails to file a Form W-2 for an employee with the SSA (an information return), the employer will also probably fail to supply the employee with a copy of the form (a payee statement). The employer in this case will be subject to both penalties.

Observation: While the three-year statute of limitation on assessment applies to the penalty for failing to file correct information returns under IRC Sec. 6721, the IRS is unsure if the three-year period would apply to the penalty for failure to provide payee statements under IRC Sec. 6722, although the IRS believes it would seem logical. The uncertainty stems from the fact that the penalty under IRC Sec. 6722 is based on the issuance of payee statements, not a return filed with the IRS ([PMTA 2013-004](#)).

Amount of Penalty

Except in cases of intentional disregard (discussed later), filers who fail to timely furnish or include correct information on a payee statement are subject to a penalty that is based on when the filer furnishes the correct payee statement. If the filer satisfies a *gross receipts test* for the calendar year, the maximum annual penalty that may be imposed is reduced [IRC Sec. 6722(d)(1)]. This test is satisfied if the filer's average annual gross receipts for the three most recent tax years ending before the calendar year do not exceed \$5 million [IRC Sec. 6722(d)(2)]. In determining whether this test is satisfied, the rules of paragraphs (2) and (3) of IRC Sec. 448(c) (regarding certain taxpayers exempt from the ban against using the cash method of accounting) apply. For returns required to be filed in a calendar year beginning after 2014, the penalty amounts for failure to furnish correct payee statements are adjusted for inflation annually [IRC Sec. 6722(f)(1)]. However, the \$5 million gross receipts test is not adjusted for inflation.

Law Change Alert: The Trade Preference Extension Act of 2015 (TPE Act) increases the Section 6722 penalties for payee statements required to be furnished after December 31, 2015. The base penalty is increased from \$100 to \$250; if corrected within 30 days, the penalty amount is increased from \$30 to \$50; the penalty amount for corrections made by August 1 is increased from \$60 to \$100; and the penalty amount for intentional disregard is increased from \$250 to \$500 (IRC Sec. 6722, as amended by the TPE Act). The maximum amounts that may be imposed on a taxpayer for all such failures have also increased. The penalties and the maximum amounts are adjusted annually for inflation.

For payee statements required to be furnished after 2015, if the failure is corrected on or before the 30th day after the date prescribed for furnishing the statement, the penalty per statement is \$50, adjusted annually for inflation (the amount for 2016 statements remains \$50). The maximum amount for all such failures during the calendar year is \$500,000, adjusted annually for inflation (the amount for 2016 statements is \$532,000) [IRC Sec. 6722(b)(1)]. However, if the filer satisfies the previously described \$5 million gross receipts for the calendar year, the maximum penalty for all such failures during the calendar year that are corrected within this period cannot exceed \$175,000, adjusted annually for inflation (the amount for 2016 statements is \$186,000) [IRC Sec. 6722(d)(1)(B)].

Note: For payee statements that were required to be furnished before 2016, the penalty was \$30 per statement, up to a maximum of \$250,000 if the failure was corrected within the 30-day period. The maximum amount was reduced to \$75,000 if the filer satisfied the \$5 million gross receipts test.

For payee statements required to be furnished after 2015, if the failure is corrected after the 30-day period, but on or before August 1 of the calendar year in which the date prescribed for furnishing the statement occurs, the penalty per statement is \$100, adjusted annually for inflation (the amount for 2016 statements remains \$100). The maximum amount for all such failures during the calendar year is \$1.5 million, adjusted annually for inflation (the amount for 2016 statements is \$1,596,500) [IRC Sec. 6722(b)(2)]. However, if the filer satisfies the previously discussed \$5 million gross receipts test for the calendar year, the maximum penalty for all such failures during the calendar year that are corrected within this period cannot exceed \$500,000, adjusted annually for inflation (the amount for 2016 statements is \$532,000) [IRC Sec. 6722(d)(1)(C)].

Note: For payee statements that were required to be furnished before 2016, the penalty was \$60 per statement, up to a maximum of \$500,000 if the failure was corrected after the 30-day period but on or before August 1. The maximum amount was reduced to \$200,000 if the filer satisfied the \$5 million gross receipts test.

For payee statements required to be furnished after 2015, if the failure is not corrected or is corrected after August 1 of the calendar year in which the date prescribed for furnishing the statement occurs, the base penalty per statement is \$250, adjusted annually for inflation (the amount for 2016 statements is \$260). The maximum amount for all such failures during the calendar year is \$3 million, adjusted annually for inflation

(the amount for 2016 statements is \$3,193,000) [IRC Sec. 6722(a)(1)]. However, if the filer satisfies the previously described \$5 million gross receipts test for the calendar year, the maximum penalty for all such failures during the calendar year cannot exceed \$1 million, adjusted annually for inflation (the amount for 2016 statements is \$1,064,000) [IRC Sec. 6722(d)(1)(A)].

Note: For payee statements that were required to be furnished before 2016, the penalty was \$100 per statement, up to a maximum of \$1.5 million if the failure was not corrected or is corrected after August 1 of the calendar year in which the date prescribed for furnishing the statement occurred. The maximum amount is reduced to \$200,000 if the filer satisfies the \$5 million gross receipts test.

No more than one penalty is imposed on each payee statement, even if there is more than one failure with respect to that statement [Reg. 301.6722-1(a)(1)]. However, the penalty applies to failures on composite substitute payee statements as though each type of payment and other required information were furnished on separate statements. A *composite substitute payee statement* is a single document created by a filer to reflect several types of payments made to the same payee [Reg. 301.6722-1(a)(1)].

Penalty for Intentional Disregard

When a filer fails to furnish a payee statement or include all information required on such a statement, or includes incorrect information on such a statement, because of an intentional disregard of the rules, the penalty amount for each such act increases. For payee statements required to be furnished after December 31, 2015, the penalty for intentional disregard is the greater of (1) \$500, adjusted annually for inflation (the amount for 2016 statements is \$530), or (2) for the employment tax forms previously listed, 10% of the aggregate dollar amount of the items required to be reported correctly [IRC Sec. 6722(e)(2)]. Determining whether a failure is due to intentional disregard is based on the surrounding facts and circumstances, including those considered in applying the intentional disregard rule discussed in Key Issue 31B [Reg. 301.6722-1(c)(1)].

Note: For payee statements that were required to be furnished before 2016, the penalty for intentional disregard was the greater of \$250 or 10% of the aggregate dollar amount of the items required to be reported correctly.

In the case of an intentional disregard, the following do not apply: (1) the calendar year dollar limitation and the reduced percentages for errors fixed within 30 days or on or before August 1 previously described; (2) the reduced calendar year dollar limitation for filers meeting the gross receipts test, also previously described; and (3) the *de minimis* rules described later in this key issue [IRC Secs. 6722(e)(1) and (e)(3)]. Furthermore, the total intentional disregard penalty is ignored in computing these dollar limitations.

Inconsequential Errors or Omissions Exception

An inconsequential error or omission does not constitute a failure to include correct information. This includes any failure that cannot reasonably be expected to prevent or hinder the payee from timely receiving correct information and reporting the information on the proper return, or otherwise putting the information to its intended use [Reg. 301.6722-1(b)(1)]. However, errors and omissions relating to the following are never inconsequential: (1) a dollar amount; (2) significant items in the payee's address; (3) the appropriate form for the information provided; and (4) the manner in which the payee statement for dividends, interest, patronage dividends, and royalties is furnished to the payee [Reg. 301.6722-1(b)(2)].

By way of illustration, the regulations state that misspelling the word boulevard in the payee's address is inconsequential. Conversely, entering 8421 Grant Boulevard on the statement, when the payee's correct address is 4821 Grant Boulevard, is not inconsequential since such a mistake can be expected to prevent or hinder the payee from timely receiving the statement [Reg. 301.6722-1(b)(3)].

***De Minimis* Exception**

A *de minimis* number of payee statements that fail to include required information or include incorrect information will be treated as having been properly furnished if such failure(s) are corrected on or before August 1 of the calendar year in which the required filing date occurs [IRC Sec. 6722(c)(1)]. This exception allows businesses that file a minimal number of incorrect payee statements to avoid all penalties if they furnish the payee statements on time and correct any errors by August 1. The *de minimis* number is the greater of 10 or 0.5% of the total number of payee statements the taxpayer is required to file during the calendar year [IRC Sec. 6722(c)(2)]. This number is determined without considering payee statement failures due to reasonable cause and not willful neglect [IRC Sec. 6722(c)(1)(B)].

Reasonable Cause

Neither the Section 6721 penalty discussed in Key Issue 31B, nor the Section 6722 penalty discussed in this key issue, applies if the failure at issue is due to reasonable cause and not willful neglect [IRC Sec. 6724(a)]. Reasonable cause exists [Reg. 301.6724-1(a)(2)] if the filer establishes both of the following:

1. There are significant mitigating factors for the failure (e.g., never required to file before), or the failure arose from events beyond the filer's control (e.g., fire or death of the return preparer).
2. The filer acted in a responsible manner both before and after the failure occurred.

To obtain a penalty waiver based on reasonable cause, the filer must submit a written statement to the IRS Service Center where the return was filed (see IRS Notice 2010-53). The statement must be signed under penalties of perjury and must include (1) the specific regulation under which the waiver is being requested, and (2) all facts forming the basis for reasonable cause [Reg. 301.6724-1(m)].

Practice Tip: The IRS has a taxpayer identification number (TIN) matching program that allows payers to match payee TIN and name combinations with IRS records before submitting certain Forms 1099 to the IRS. The TIN matching program is intended to help payers avoid TIN errors and reduce the number of Section 6722 penalties. Participating payers may cite a name and TIN match as reasonable cause under IRC Sec. 6724(a), if the IRS asserts a Section 6722 penalty because of a TIN/name mismatch. The penalty will be waived if the participating payer presents documentation of the match in a manner set forth in IRS Pub. 2108-A (On-Line TIN Matching Program). See Key Issue 16G for additional information on the TIN matching program.

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