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June 12, 2017

By Electronic Mail (Notice.Comments@irscounsel.treas.gov)

Internal Revenue Service
CC:PA:LPD:PR (Notice 2017-09)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

Re: Notice 2017-09 – De Minimis Error Safe Harbor to the I.R.C. §§ 6721 and 6722 Penalties

To Whom It May Concern:

The Securities Industry and Financial Markets Association ("SIFMA")[1], whose members manage nearly 80 percent of all U.S. broker-dealer client assets and more than 50 percent of investment advisor assets under management, appreciates the opportunity to comment on the Internal Revenue Service's ("IRS") Notice 2017-09 (the "Notice"). The advance Notice provides guidance to implement changes made by the Protecting Americans from Tax Hikes Act of 2015 (the "Path Act")[2] on the de minimis error safe harbor from information reporting penalties under Internal Revenue Code (the "Code") sections 6721 and 6722 and the payee election to have the safe harbor not apply.[3] It also announces that the U.S. Department of the Treasury ("Treasury") and the IRS intend to issue regulations under sections 6721 and 6722, and to the extent that the regulations incorporate the rules contained in the Notice, the regulations will be effective for returns required to be filed, and payee statements required to be furnished, after December 31, 2016.

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[1] SIFMA is the voice of the U.S. securities industry. We represent the broker-dealers, banks and asset managers whose nearly 1 million employees provide access to the capital markets, raising over $2.5 trillion for businesses and municipalities in the U.S., serving clients with over $18.5 trillion in assets and managing more than $67 trillion in assets for individual and institutional clients including mutual funds and retirement plans. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). For more information, visit http://www.sifma.org.

[2] Protecting Americans from Tax Hikes Act of 2015, Pub. L. No. 114-113, div. Q (Dec. 18, 2015), 129 Stat. 3040 (codified in scattered sections of 26 U.S.C.).

[3] I.R.S. Notice 2017-09, IRB 2017-4 (Jan. 23, 2017); *see also* 82 Fed. Reg. 17522 (Apr. 11, 2017) (for extension of comment period to June 12, 2017).

We believe that in crafting the final regulations, the Treasury and the IRS should be guided by the President's two Executive Orders[4] on reducing regulations as well as the core principles for regulating the U.S. financial system. Both require that federal agencies, in reviewing enacted and proposed regulations, ensure that costs and other burdens "…associated with the governmental imposition of private expenditures required to comply with Federal regulations" are prudently managed to comply with the policies of the executive branch.[5] Further, in the spirit of the President's Executive Orders, rules implementing enacted regulations should not negate the benefits of such regulations.

The comments below point out problems with certain aspects of the proposed rules that, if implemented, would not only contradict the spirit of the President's Executive Orders, but also Congressional intent behind the Path Act's safe harbor of reducing the burdens on taxpayers, information filers, and the IRS about de minimis error corrections.[6] The system framework needed to support all the data for the elections made pursuant to the proposed regulations would be an intensive undertaking for the industry, and would require more resources than maintaining the current state of issuing de minimis error corrections. We offer suggestions to prevent this from occurring. We also request guidance on elections for joint accounts.

1. A Deadline for Payees to Make a One-time Election Would Preserve the Benefits of the Safe Harbor and Prevent Abuse

First, we suggest adjustments to the manner and form in which elections are made – specifically, that the final regulations include a deadline for payees to make an election, and the election – to be made one-time – should apply prospectively. Currently, nothing in the proposed rules prevents a payee from requesting that the payor file a corrected information return or furnish a payee statement from years preceding the election. This is problematic from an implementation and compliance standpoint for our members, negates the benefits of the safe harbor, and has the potential for abuse by payees.

Currently, many of our members have numerous and disparate lines of business, each of which are required to file large volumes of information returns and payee statements. They do not have the systems capability to analyze and compare past information returns, payee

[4] Exec. Order No. 13771, 82 Fed. Reg. 9339 (Feb. 3, 2017); Exec. Order No. 13772, 82 Fed. Reg. 9965 (Feb. 8, 2017).

[5] Exec. Order No. 13771, 82 Fed. Reg. 9339.

[6] To get a sense of the importance of the benefits of the safe harbor provision, SIFMA surveyed its members and found that, for example, one of our members files nearly 6 million forms per year, and a significant number of those result in corrections.

statements and other forms, in addition to keeping track of payee elections. They would have to design and build these systems at tremendous cost, and often at the expense of other competing business requirements. In many cases, building these systems would be costlier and more burdensome than simply issuing de minimus error corrections, thus defeating the intended purpose of the safe harbor. The compliance burdens on taxpayers, information return filers, and the IRS would essentially remain in place. In addition, allowing payees to request corrections from preceding years creates the potential for abuse. Payees could abuse the election process by selectively requesting, or "cherry picking," only those corrections that benefited them the most. At first glance, the impact may seem small, but could be significant for payees with multiple accounts at a firm or at many firms.

We therefore propose that the final regulations specifically include a deadline for an one-time election of either December 31st, or at the very latest, January 15th, with respect to payee statements required to be filed in the calendar year of the election and succeeding calendar years. This would effectively eliminate many of our concerns. And there is precedent for doing so.

2. Streamlining the Information Payees Are Required to Supply Would Make It Easier for Them to Make an Election

Second, we also suggest that the final regulations make it easier for payees to make an election. Section 3.03 of the Notice specifies detailed information, some of which may not be readily available or cumbersome to obtain for certain clients. From a customer service perspective, and the desire by our members to provide the highest possible level of client satisfaction, we suggest that the proposed information be streamlined by allowing payees to simply provide account numbers for those accounts eligible for the election. This would relieve the some of the burdens on the payee and the payor alike.

3. Flexibility is Necessary to Address Conflict with the Path Act

Third, we suggest the flexibility to issue corrections despite taking advantage of the safe harbor, if a correction prevents a firm from making cost basis adjustments. Section 202(c)(iii) of the Path Act amends the Code to treat uncorrected de minimis errors as the correct amount for cost-basis reporting.[7] By implication, if a firm does not issue a correction, it may not make costs basis adjustments. This is a significant implementation concern for our members.

To illustrate: Most firms have separate systems for reporting dividends and similar

[7] Protecting Americans from Tax Hikes Act of 2015 § 202(c)(iii), 26 U.S.C. 6045 (2015).

payments on Forms 1099-DIV, and for maintaining cost basis information. If a firm were to receive a payment representing a return of capital during the day, it would adjust the tax dividend system and it would adjust the cost basis of the corresponding security that evening, in batch. The firm would generally not know until after it runs its correction process whether any one box would hit the $100 threshold for issuing a correction. If it does not issue the corrected Form 1099-DIV, it would require the firm at some point to reverse the return of capital payment adjustment in the cost basis system and then be prepared to reprocess it if the $100 de minimis threshold was met sometime down the road. This is not practical and would also mean that the firm's client would have a moving target for cost basis on shares the client still holds.

To solve this problem, we propose a provision in the final regulation that allows a payor the flexibility to issue corrections and make cost basis adjustments for return of capital, even if the safe harbor is in place. This flexibility would reduce the implementation burdens on firms.

4. Open-ended Recordkeeping Requirements are Unnecessary and Burdensome

Fourth, we suggest that the proposed recordkeeping requirements outlined in Section 3.05 of the Notice be curtailed from "…as long as that information may be relevant to the administration of any internal revenue law"[8] to a minimum of three years (the statute of limitations for amended returns), and maximum of seven years, which is necessary to comply with various SEC and FINRA recordkeeping requirements and members' internal retention schedules.[9] Given these recordkeeping requirements, an open-ended retention period is unnecessary and burdensome on firms.

5. Request for Guidance Regarding Joint Accounts and Elections

Finally, we respectfully request guidance from the IRS on payee elections for joint accounts, which the Notice does not address and can be problematic. For example, guidance would be helpful in situations where joint account payees attempt to submit contrary elections, or where some submit elections, while others do not. These issues could be resolved with guidance from the IRS.

SIFMA appreciates your consideration of our suggestions for the final regulations to be implemented by Treasury and the IRS. Please do not hesitate to contact me at

[8] I.R.S. Notice 2017-19, *supra* note 3, at p. 7.

[9] *See, e.g.*, 15 U.S.C. § 78q(a)(1), 17 C.F.R. 240.17a-3, 17 C.F.R. 240.17a-4, and FINRA Rule 4511.

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Sincerely,

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