December 17, 2018

Internal Revenue Service
CC:PA:LPD:PR (REG-118826-16)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20224

Re: De Minimis Error Safe Harbor Exceptions to Penalties for Failure to File Correct Information Returns or Furnish Correct Payee Statements

To Whom it May Concern:

The Securities Industry and Financial Markets Association ("SIFMA")[1] appreciates the opportunity to comment on the proposed rulemaking to implement the Internal Revenue Service's ("IRS") *de minimis* error safe harbor from information return and payee statement penalties (the "proposed rule"). We value the previous opportunities for comment and appreciate many of the clarifications provided in the Preamble to the proposed rule, in particular the clarification that the safe harbor exception is calculated on an error-by-error basis rather than on the cumulative total of multiple errors, and we agreed with your conclusion that the payee election out of the safe harbor should not expire. These provisions provide necessary clarity and consistency for filers seeking to utilize the safe harbor.

There are two specific concerns addressed in the Preamble to the proposed rule that SIFMA wishes to revisit and request additional clarification:

[1] SIFMA is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of our industry's nearly 1 million employees, we advocate for legislation, regulation and business policy, affecting retail and institutional investors, equity and fixed income markets and related products and services. We serve as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. We also provide a forum for industry policy and professional development. 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.

First, the proposed rule did not adopt a prior comment suggesting the payee's ability to elect out of the *de minimis* safe harbor should apply on an account-by-account basis, and instead permits the payee to make the election with respect to each and every payee statement.[2]

The preamble provides a specific example where a payee makes an election with respect to their Form 1099-DIV but not with respect to their Form 1099-B. The proposed rule explains that Section 6722(c)(3(A) prescribes the *de minimis* safe harbor exception "with respect to any payee statement" and that following the account-level election would 'significantly limit payees' options for making elections."[3] We understand this position, but we do not believe Congress's reference to "any payee statement" reflects an intent to require taxpayers to decide on elections individually for each payee statement. The term "payee statement" is not synonymous with a form type, such as Form 1099-DIV or Form 1099-B. A payee statement may include certain transactions that are aggregated in reporting on the payee statement, such as dividends and distributions on a Form 1099-DIV, while other payee statements are reported on a transactional basis, such as sales proceeds. In fact, with the implementation of cost basis, a single sale transaction may result in more than one payee statement. Under the proposed rule, it would appear that a payee could make the election with respect to one Form 1099-B payee statement but not with respect to another, even if the payee statements relate to the same sale transaction (e.g., where the Forms 1099-B relate to discrete steps in an integrated taxable merger transaction). Furthermore, transactions corrected on one payee statement may impact the "correct amount" of adjusted basis that should be reported on another payee statement, or that should continue to be associated with shares remaining in the account, implementing the de minimis regime in a manner that increases the possibility of inconsistencies in basis reporting should be viewed as contrary to Congressional intent.

For example, assume a return of capital for less than $100 should have been reported in Box 3, *Nondividend distribution*, on Form 1099-DIV but instead was included in Box 1a, *Total ordinary dividends*: The return of capital should have resulted in a basis adjustment to both the shares sold during the year and those remaining unsold in the account. Where a payee elects to have the reporting corrected with respect to the Form 1099-DIV but not with respect to the Forms 1099-B generated by subsequent sales, the payee's dividend amount would be reduced without a

[2] Federal Register, Vol. 83, No. 201, Page 52729-30
[3] Federal Register, Vol. 83, No. 201, Page 52729

corresponding reduction in the basis of the shares sold and therefore should be viewed as inconsistent with Congressional intent for cost basis reporting.

In light of the foregoing and given the complexities of payee statements, Congress's expectation of cost consistency with a customer's adjusted basis on uncorrected returns[4], and the interrelationship between amounts reported on payee statements, we respectfully request the Treasury Department and the IRS to require taxpayers to elect out of the *de minimis* regime on an account-by-account basis.

Second, the proposed rule did not adopt a comment that requested the payee election be made only on a prospective basis.[5] SIFMA provided comments on this issue in our June 12, 2017 letter requesting a deadline for payees to make a one-time election, noting that such a deadline would preserve the benefits of the safe harbor.[6] In the preamble, the Treasury Department and the IRS reasoned that "potential administrative burden to filers . . . is but one factor that must be considered; flexibility for the payee in requesting corrected statements is another." One precursor for the *de minimis* legislation was the 2014 IRPAC Burden Reduction subgroup report, which called for a $50 *de minimis* threshold for corrections to original information returns and payee statements. Permitting a payee to make a retrospective election, even if limited to the current calendar year, would be a significant impediment to implementation and one that may introduce even greater burdens to taxpayers and the IRS than the *de minimis* corrections that the legislation was intended to relieve. We respectfully request that the Treasury Department and IRS should reconsider its position with respect to retroactive elections and instead only permit a payee to elect out of the safe harbor before the end of the calendar year immediately preceding the year in which the information return and payee statements are required to be provided.

Allowing a payee to make a retroactive election with respect to corrections will introduce greater recordkeeping burden, additional risk, and could have far-reaching implications beyond the payee statement being corrected. For example, borrowing from our prior return of capital scenario: if a payee elects to require a corrected 2018 Form 1099-DIV in October 2019, the broker, in order to retain the cost basis consistency discussed above, would have to retroactively adjust the basis for (1) all shares currently held "unsold" in the account, (2) shares sold during 2019, and (3) shares

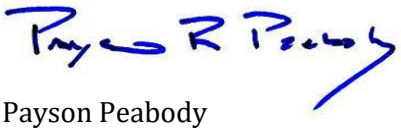
[4] 6045(g)(2)(B)(iii)
[5] Federal Register, Vol. 83, No. 201, Page 52731
[6] https://www.sifma.org/wp-content/uploads/2017/06/SIFMA-Submits-Comments-to-the-IRS-on-Notice-2017-09-De-Minimis-Error-Safe-Harbor-to-the-I.R.C..pdf

transferred to another broker during 2019. If the payee does not make the election with respect to the various payee statements for sales proceeds, a broker can, but is not required to, correct the basis of shares sold during 2018. The complexity of correcting the 2018 Form 1099-DIV and applying the corresponding basis adjustments to only certain cost basis lots makes the provision overly complex and potentially unworkable.

Finally, if a payee is permitted to elect out of the safe harbor as late as the October 15th tax filing deadline, the filer would have until November 14th to correct the payee's tax forms. If the payee elects to receive a corrected Form 1099-DIV, the payee may not know the correct amounts that the filer will include on the Form 1099-DIV that they will send the payee 30 days later. Since the filer can voluntarily correct the Form 1099-B, the payee will not know whether or not to adjust the basis reported on their income tax return until 30 days later, when they receive the corrected form(s) from the filer. Absent sufficient information regarding the corrected amounts, there is a far greater likelihood that the payee will have to amend their income tax return. Amending their income tax return will not only place a burden on the IRS to process the amendments, but will often will come at a monetary cost and burden to the payee. The additional cost and burden to the payee will create unnecessary conflict between the filer and the payee, especially where the filer voluntarily corrects a payee statement.

SIFMA greatly appreciates your consideration of the above comments. Please do not hesitate to contact me at (202) 962-7300 or ppeabody@sifma.org.

Sincerely,



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