

# Retirement **Spotlight**

Illuminating current industry news and events

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## IRS Releases Final Guidance on Penalty Exceptions for Failure to File Correct Information Returns or Furnish Payee Statements

The Internal Revenue Service (IRS) has released [final regulations](#) that provide de minimis error safe harbor exceptions to penalties for failure to file correct information returns or furnish correct payee statements. The final regulations update penalty amounts relating to information returns and payee statements that are not currently accounted for in the existing regulations, establish a maximum number of returns to which the de minimis exception can apply for a calendar year, and define when and how a payee may elect not to have the statutory safe harbor rules apply. The final regulations also provide rules for brokers regarding the reporting of basis of securities as this reporting relates to the de minimis error safe harbor rules.

### Background

The Protecting Americans from Tax Hikes (PATH) Act of 2015, part of the Consolidated Appropriations Act of 2016, created a safe harbor for de minimis errors to certain information returns or payee statements filed with the IRS. The safe harbor provided in most cases, that a distribution amount error of \$100 or less may not need to be corrected by issuing a revised information return (e.g., [Form 1099-R](#), *Distributions from Pensions, Annuities, Retirement or Profit Sharing Plans, IRAs, Insurance Contracts, etc.*). Likewise, payee statements that have a withholding amount error of \$25 or less may not need to be corrected by issuing a revised payee statement (e.g., [Form 1042-S](#), *Annual Withholding Tax Return for U.S. Source Income of Foreign Persons*). The IRS later released [Notice 2017-09](#) that provided guidance on this topic prior to releasing [proposed regulations](#) in 2018. The recently released final regulations state that information returns and payee statements reported with incorrect dollar amounts that are considered de minimis are determined to be correct information returns or payee statements for certain penalty purposes.

### Updates to Penalties for Failure to File Information Returns or Furnish Payee Statements

Generally, a filer may incur a penalty of \$250 for each information return or payee statement with respect to which a failure occurs. No more than one penalty will be assessed to a single information return or payee statement even though there may be more than one failure identified on the respective return or statement. However, the \$250 penalty will apply 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 an employer or financial organization to reflect several types of payments made to the same payee. The

penalty amount for all failures during any calendar year will not exceed \$3 million with respect to information returns or a separate \$3 million for failures to furnish payee statements.

- **Information Returns.** These penalties may be reduced for information returns (not payee statements) if the correction meets certain deadlines.
  - **Correction within 30 days.** The penalty imposed for a failure to file timely or for a failure to include correct information will be reduced to \$50 if the failure is corrected within 30 days. The total amount imposed on a person for all failures during any calendar year that are corrected within 30 days will not exceed \$500,000.
  - **Correction after 30 days but on or before August 1.** The penalty imposed for a failure to file timely or for a failure to include correct information will be reduced to \$100 if the failure is corrected after 30 days, but on or before August 1 of the year in which the required filing date occurs. The total amount imposed for all failures during any calendar year corrected after 30 days but on or before August 1 will not exceed \$1.5 million.

For returns that are *not* due on January 31, February 28, or March 15, the penalty decreases to \$50 if the failure is corrected within 30 days. But if the failure is corrected after 30 days, the penalty remains \$250.

- **Inconsequential Error.** An inconsequential error or omission is not considered a failure to include correct information. The term inconsequential error or omission means any failure that does not prevent or hinder the IRS from processing the return, from correlating the information required to be shown on the return with the information shown on the payee's tax return, or from otherwise putting the return to its intended use.
- **Intentional Disregard.** The penalty will increase and may not be limited to \$3 million if a failure is due to intentional disregard of the requirement to file timely or to include correct information on a return or statement.

## De Minimis Error Safe Harbor Maximum Penalty

Penalties will not be imposed for a *de minimis number* of failures to include correct information if the filer corrects such failures on or before August 1 of the year in which the required filing date occurs. An error when reporting a dollar amount is considered *de minimis* if the difference between any single amount in error and the correct amount is not more than \$100; and if the difference is not more than \$25 with respect to an amount of tax withheld.

- **Calculation of the De Minimis Exception.** The number of returns to which the *de minimis* exception applies for any calendar year will not exceed the greater of 10 or one-half of one percent of the total number of all information returns the filer is required to file during the year. If the number of returns on which the filer fails to include correct information exceeds the number of returns to which the *de minimis* exception applies, the *de minimis* exception applies to those returns that will afford the filer the greatest reduction in penalty.

For required information returns, a *de minimis* exception applies to failures to include correct information that exists after the application of the safe harbor exception for certain *de minimis* errors provided by [IRC Sec. 6721\(c\)\(3\)](#) and after the application of the waiver for reasonable cause under [IRC Sec. 6724\(a\)](#) and [Treasury Regulation 301.6724-1](#). For payee statements, a *de minimis* exception applies to failures to include correct information that exist after the application of the safe harbor exception for certain *de minimis* errors provided by [6722\(c\)\(3\)](#).

## Election to Override the De Minimis Error Safe Harbor

The *de minimis* error safe harbor exception does not apply to any failure to file a correct information return or furnish a payee statement if the individual receiving the statement affirmatively elects to not apply the safe harbor standard with respect to the statement. An account holder must affirmatively elect no later than 30 days after the date on which their information return or payee statement is required to be furnished or October 15 of the calendar year in which they are to receive the information return or payee statement. The election date is defined as the date the affirmative election is received by the filer and remains in effect for all subsequent years unless revoked.

- **Written Election.** The written election must clearly state that the filer or payee is making the election and identify the payee's name, address, and taxpayer identification number. An election applies to all types of information returns or payee statements the filer or payee is required to furnish, unless the filer or payee specifies otherwise on the election. The filer or payee may deliver a hard copy of the election in person, by mail, or by a designated delivery service. If the filer or payee wants the election to apply only to specific types of statements, he needs to identify the applicable information return(s) or payee statement(s) and account

number(s) the election applies (for example, [Form 1099-DIV](#), *Dividends and Distributions*); and provide any other information required.

- **Alternative Election Method.** The filer of the information returns or payee statements may offer individuals an alternative method to make an election to disregard the de minimis safe harbor. Filers must notify individuals of the ability to make the election method using a reasonable alternative manner (e.g., electronically). The notification of the reasonable alternative manner of election may require all, or only some, of the information required to make such an election. The notification may also inform filers and payees of the procedures to revoke an election for the purpose of disregarding the de minimis error safe harbor.
- **Records Retention.** Filers must retain records of any election or revocation by the payee, and any notification for as long as the contents of the election, revocation, or notification may be material in the administration of any law under the Internal Revenue Code.

## Rules for Securities Brokers

In the past, it was possible for a payee to elect to override the safe harbor exception with respect to one information return, such as Form 1099-DIV, *Dividends and Distributions*, but not elect to override the safe harbor exception with respect to a corresponding Form [1099-B](#), *Proceeds From Broker and Barter Exchange Transactions*. This type of situation could result in inconsistent reporting of the cost, or basis, of a security. The final regulations address this issue by requiring the corresponding forms to reflect whether a payee elects to override the de minimis error safe harbor. For example, if a Form 1099-DIV is corrected because a payee elects to override the de minimis error safe harbor exceptions as applied to the Form 1099-DIV, then the adjusted basis reported on the corresponding Form 1099-B must be based on and consistent with the corresponding corrected dollar amount shown on the corrected Form 1099-DIV.

## Effective Dates

These regulations apply with respect to information returns and payee statements required to be filed or furnished on or after January 1, 2024. Visit [ascensus.com](https://ascensus.com) for the latest developments.