

INFORMATION REPORTING PROGRAM ADVISORY COMMITTEE

GENERAL REPORT

MICHAEL W. GANGWER, CHAIR

KEITH A. KING, VICE-CHAIR

ROBERT J. BIRCH

FREDERIC M. BOUSQUET

LAURA LYNN BURKE

BEATRIZ CASTANEDA

ERNESTO S. CASTRO

ROSEANN M. CUTRONE

CAROLYN W. DIEHL

TERRY W. EDWARDS

ALAN M. ELLENBY

DANA FLYNN

DARRELL D. GRANAHAN

JOEL LEVENSON

ROBERT C. LIMERICK

MARCIA L. MILLER

EMILY Z. ROOK

KEVIN V. SULLIVAN

NINA TROSS

KELLI WOOTEN

IRPAC General Report

A. 972CG Proposed Penalty Assessments

Recommendation

IRPAC recommends that the IRS take suitable action to rectify the systemic issues in the existing IRS penalty abatement process that prevent 972CG penalty abatement requests from being judged properly and addressed timely. In addition, until such action can be implemented, IRPAC recommends that the IRS temporarily suspend the assessment of further 972CG proposed penalties for information returns showing mismatched name and TINs and for which pre-submission TIN/name matching ("TIN Matching") is not permitted.

Discussion

Systemic issues with the penalty abatement process

It is widely recognized by payors and information return preparers that obtaining a 972CG proposed penalty abatement is an extraordinarily long and frustrating affair, during which they have come to expect denials and appeals. This is particularly true for penalties issued with respect to TIN/name mismatches, which typically are beyond the control of the payor as they result from payees and employees providing incorrect information. Compounding the problem, information reporters do not have the ability to use the TIN Matching system in advance of submitting information returns that are not subject to backup withholding. In order to get the penalty abated, payors and information return preparers must spend an extraordinary amount of time and effort working within the abatement administrative process to achieve that result. IRPAC believes that this is not an efficient use of time for neither the IRS nor payors.

Payors indicate that the IRS response to penalty abatement letters takes too long, sometimes up to nine months. Adding to the frustration, initial penalty abatement requests are frequently denied, meaning that payors must enter the appeal process in order to receive an abatement. In contrast, payors have just 45 days to review a 972CG notice, investigate potentially thousands of impacted customer accounts, and respond to the proposed penalty letter or the penalty is deemed to be assessed. Collection notices are sent out before any response to the penalty abatement request is received. The IRS contact information on the collection notices does not reach a team that has access to the civil penalty information. Unabated penalties are applied to other information return liabilities like Form 945 and 1042. Denial letters often arrive just prior to the next tax year's 972CG proposed penalty notices being released, meaning payors must often manage multiple 972CG penalty abatements and appeals simultaneously. It is common for these firms to manage multiple legal entities, further complicating the process.

Another item of concern for IRPAC is that when denial letters are received, payors have noted that the reasons cited by the IRS for the denial of the abatement request are not consistent with the reasonable cause arguments made by the payor.

IRPAC General Report

Based on the experiences of IRPAC members and others we've spoken to across a variety of industries, IRPAC is concerned that IRS personnel tasked with reviewing 972CG penalty abatement requests may not be adequately equipped to address the highly technical issues discussed in the penalty abatement letters submitted by payors. IRPAC requested IRS Office of Servicewide Penalties to provide more detailed insight into current IRS practices and procedures for reviewing and granting/denying penalty abatement requests, however made little progress in our 2016 working sessions.

It is IRPAC's belief that the current process for obtaining a reasonable cause waiver to abate these penalties is unreasonable and unsustainable. IRPAC, therefore, recommends that the IRS take suitable action to address these issues with the abatement process. Until such action can be implemented, IRPAC further recommends that the IRS temporarily suspend the assessment of further 972CG proposed penalties for information returns showing mismatched name and TINs. Moreover, because the impact of these problems with the abatement process goes beyond information returns filed with name and TIN mismatches (and in fact extends to all information reporting errors included on the 972CG proposed penalty), IRPAC further recommends that the IRS take the steps needed to address the issue as it relates to all abatement requests based on a reasonable cause defense.

Information Returns for the ACA

With increased per form penalty amounts and caps now in place and with the addition of many millions of ACA related information returns, the penalty abatement process problems will expand exponentially. Millions of new information returns will enter into the 972CG penalty process for the first time in 2016. Given the already burdened and in the eyes of IRPAC, flawed penalty review process, IRPAC does not believe that the current process is ready to handle this increased volume. IRPAC believes that a large number of the new 972CG proposed penalty notices from ACA reporting will be generated as a result of name and TIN mismatches on Forms 1095. The TIN matching service is only available to information reporters who report income that is subject to backup withholding and is not available to employers and insurance companies who must file Forms 1095. Thus, employers and insurance companies will not be able to address and correct any mismatches discovered until after their information returns have been submitted to the IRS electronically. In the end, employers and insurance companies will be left to sort out these errors – which typically covered by reasonable cause, through the already overburdened and inefficient 972CG penalty process. In sum, IRPAC recommends that the IRS temporarily suspend the assessment of further 972CG proposed penalties for ACA related information returns.

B. Form W-9, Request for Taxpayer Identification Number and Certification, Revision.

Two IRPAC recommendations made in the 2014 Burden Reduction subcommittee (Item C. 8 a. and 13) were not implemented into the Form W-9 (Rev.

IRPAC General Report

December 2014). IRPAC renews its request to incorporate the feedback contained in the 2014 report and requests additional updates to the next Form W-9:

1. Page 29, 8 a. – add “The information must match your government-issued identification information.” Add “or IRS confirmation” to clarify the documentation associated with an EIN. This information would be helpful given that the name on the Social Security card or IRS confirmation is what is used to match against the TIN provided by the customer.
2. The IRS posted to its website the “Clarification for Form W-9, Request for Taxpayer Identification Number and Certification (Rev. December 2014) on 10-APR-2015. It contained additional information related to the instructions for Lines 3, 4 and 5. The document is not presented with the Form W-9 so it is difficult for a taxpayer to access or know it exists. The language recommendations should be incorporated into the next Form W-9.
3. It would be helpful if the team responsible for updates to the Form W-9 worked with IRPAC to make additional updates so the information is clear to the taxpayer completing the form. Specific language recommendations have been provided to the team responsible for updates to the Form W-9.

Form W-9: FATCA Jurat, Exempt Payee Code, and Exemption from FATCA Reporting Code

Two IRPAC recommendations in the 2014 International Reporting and Withholding subgroup report (Item O., 1 and 2) have not been implemented. IRPAC renews its request to incorporate the feedback contained in the 2014 report and summarized below.

IRPAC recommends the fourth certification of Form W-9, Part II (regarding the FATCA code) be removed. If this recommendation is not adopted, IRPAC recommends the IRS issue guidance specifying for accounts opened and maintained in the United States, the fourth certification may be omitted from a substitute W-9 incorporated into other business forms. In addition, IRPAC recommends the Instructions for the Requester of Form W-9 be modified to clarify that the exempt payee code and the exemption from FATCA reporting code are not required fields, and do not affect the validity of the form for purposes of withholding.

Recommendation

IRPAC recommends that the fourth certification of Form W-9, Part II (regarding the FATCA code) be removed. If this recommendation is not adopted, IRPAC recommends the IRS issue guidance specifying that, for accounts maintained in the United States, a substitute version of Form W-9 is not required to include the fourth certification. In addition, IRPAC recommends the Instructions for the Requester of Form W-9 be modified to clarify that the exempt payee code and the exemption from FATCA reporting code are not required fields, and do not affect the validity of the form for purposes of withholding.

IRPAC General Report

Discussion

The fourth certification of Part II of Form W-9 was added pursuant to FATCA. IRPAC recommends that this certification be eliminated, as we see neither regulatory authority for it (see Treas. Reg. §§31.3406(h)-3(a)(1)-(2) regarding the statements that must be made under penalties of perjury on Form W-9), nor a need for a penalties of perjury statement with respect to a field that, according to our understanding, merely affects information reporting. If the recommendation in the preceding sentence is not adopted, IRPAC recommends guidance be issued by the IRS that the fourth certification in Part II of Form W-9 need not be included on a substitute version of Form W-9 for accounts opened and maintained in the United States. The certification is a source of confusion to customers since it was added to the Form W-9 (Rev. Dec 2014).

IRPAC believes the exempt payee code and the exemption from FATCA reporting code solely affect whether a payee or account holder may be subject to information reporting. It does not impact any requirement to withhold. The absence of an exempt payee code is not a reason to invalidate the form for backup withholding purposes, as this code is not a requirement for a valid Form W-9 (see Treas. Reg. §31.3406(h)-3(a)(2)). Since our 2014 report recommendation, certain payors continue to reject Forms W-9 and backup withhold when an exempt payee code is not provided. The absence of an exempt payee code could require a payor to treat such a payee as a U.S. nonexempt recipient and issue information reporting. The exemption from FATCA reporting code, in some cases, leads to unnecessary rejections of Forms W-9 and FATCA withholding. Both codes are only relevant for information reporting. IRPAC recommends the Instructions for the Requester of Form W-9 be modified to clarify that the absence of these codes does not require backup or FATCA withholding.

C. Suggestions for Improvements to the IRS Use of FAQs

Recommendation

IRPAC recommends that the IRS implement a process to archive past FAQs so that payors who rely on an FAQ in filing information returns can later demonstrate the basis for the position taken. In addition, where practical, IRPAC recommends that the IRS enunciate the reasons supporting any changes to or deletions of prior FAQs to enhance transparency.

Discussion

In matters relating to information reporting, the IRS often posts on its website informal frequently asked questions with answers ("FAQs") to provide real time assistance for the information reporting community. FAQs are extremely helpful to the information reporting community as they typically answer procedural questions in the absence of formal guidance. In this regard, FAQs are akin to form instructions and publications, but can be issued more quickly so that the information reporting community can utilize the FAQs in preparing and filing timely information returns.

IRPAC General Report

Although IRPAC finds FAQs to be a very helpful tool for the information reporting community, there can be a problem with this tool when the IRS modifies or deletes FAQs from the website. Typically, these modifications/deletions are not highlighted in the newly posted FAQs (date stamped with a later date) nor is the rationale for these modifications/deletions provided. Unexplained FAQ modifications/deletions give rise to uncertainty in the information reporting community because even if the modifications/deletions are noticed, the community is often left without an understanding as to what, if any, action should be taken with respect to past reports issued following the recommendations provided by the prior FAQ.

IRPAC recommends that the IRS implement a process to archive (and preferably make searchable) past FAQs – or at a minimum save modified FAQs after replacing FAQ and deleted FAQs in one centralized location – so that payors who rely on an FAQ in filing information returns can later demonstrate the basis for the position taken. Currently many payors are forced to print hard copies of the website with date stamps to support any position taken in reliance on an FAQ should the content of the FAQ later change or be deleted. Where practical, the IRS should also enunciate the reasons supporting its changes/deletions made to prior FAQs to enhance transparency.

IRPAC General Report