

Office of Chief Counsel
Internal Revenue Service
memorandum

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to: Brittany L. Lippold, Group Manager
BSA Examination West

from: Charles A. Hall, Special Counsel
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subject: BSA Legalized Substance Industry - Frequently Asked Questions

This Chief Counsel Advice responds to your request for assistance. This advice may not be used or cited as precedent.

You have asked a series of question related to the filing of Form 8300 that have arisen in examinations of trades or businesses involved in the legalized substance industry. The memorandum provides guidance on many of these issues in a question-and-answer format. We are working on additional guidance on questions related to cash couriers/armored cars who transport cash between growers/manufacturers and dispensaries/sellers.

Question 1: On Part 3, Line Item #33 which type of transaction should a legalized substance business be selecting?

Answer 1: Ideally, the business should be selecting Box J “Other” for Line Item #33 and then providing a specific description in Line Item #34 like “marijuana flower invoice #XYZ” or “marijuana edibles invoice XYZ”. However, due to the 5th Amendment these businesses cannot be forced to specifically state “marijuana” on Line 34. If the business does not want to mention “marijuana” then suggest that they go with NAICS code 11- “Agriculture, Forestry, Fishing and Hunting” or they could use a subcategory code that might be more fitting, such as 424590 – “Other Farm Product Raw Material Merchant Wholesalers.”

Businesses have been checking Box G for exchange of cash and some check other boxes, which is incorrect. Line Items #33 & #34 are considered critical fields and require

mandatory penalty assertion for incorrect filing. Examiners must educate the business on the appropriate selection for future filings.

Question 2: What is reasonable cause and what would allow it?

Answer 2: Under section 6724(a), no penalty for a failure under sections 6721 and 6722 shall be imposed “if it is shown that such failure is due to reasonable cause and not willful neglect.” It is the taxpayer’s burden to establish reasonable cause. As many of these businesses are represented by a Power of Attorney (POA), the majority will ask if they qualify for reasonable cause waiver. Determining reasonable cause starts with the initial interview, where the examiner should complete a detailed interview to gain a full understanding of the facts and circumstances for each case, including knowledge and intent. Starting the reasonable cause determination at the end of an exam is not recommended. There is an excellent discussion of reasonable cause for the information return penalties in IRM 20.1.7.12.1 (12-16-2022). The discussion below borrows liberally from the IRM.

- Reasonable cause for the information return penalties generally exists when:
 - The filer acted in a responsible manner, both before and after the failure occurred, **and**
 - (i) There are significant mitigating factors, or (ii) The failure was the result of circumstances beyond the filer’s control.
- Acting in a Responsible Manner (26 CFR 301.6724-1(d)) generally includes exercising the same degree of care that a reasonably prudent person (or organization) would use in the course of its business in determining filing obligations and in handling account information such as account numbers and balances. The filer must act in a responsible manner both before and after the failure occurs. Acting in a responsible manner also includes taking steps to avoid the failure, for example:
 - Requesting appropriate extensions of time to file when practical to avoid the failure,
 - Attempting to prevent a failure if it was foreseeable,
 - Acting to remove an impediment or the cause of the failure, and
 - Correcting the failure as promptly as possible, generally within 30 days.
- Sometimes the reasonable cause question is framed as “Can we get out of these penalties because we didn’t know about the requirements”? A waiver should not be automatically granted where the filer claims ignorance of the filing requirements. However, ignorance of the law may be considered as one factor which may indicate that the filer acted in a responsible manner if all the other facts support this contention.
- Significant mitigating factors - For the filer to establish reasonable cause under this category, the filer must show that they acted in a responsible manner as well as the

existence of a significant mitigating factor. Events generally considered to be significant mitigating factors include, but are not limited to:

- First time filer - prior to the failure, the filer had not previously been required to file this particular form or statement.
 - The filer has a history of complying with the information return reporting requirements. The filer's history of compliance should be considered whether or not the filer specifically requests abatement on this basis.
 - Significant consideration is given to if the filer was previously penalized under section 6721, section 6722, or section 6723.
- Events beyond the filer's control - For the filer to establish reasonable cause under this category, the filer must show that it acted in a responsible manner, as well as the event was beyond the filer's control. Events generally considered beyond the control of the filer include (but are not limited to): Actions by the IRS, Actions of an agent, Actions by the payee or any other person, and Unavailability of business records. See IRM 20.1.7.12.1 for further discussion of the events that might qualify for reasonable cause.
- Where a penalty is imposed for missing or incorrect TINs, a filer must comply with special rules for acting in a responsible manner. In general, a filer will have acted in a responsible manner if the filer:
- Exercised reasonable care to determine his/her filing obligations and handle the account numbers and balances,
 - Took significant steps to avoid a failure, such as requesting an extension of time to file, attempting to prevent a foreseeable failure, and acting to remove the cause of a failure once it had occurred, and
 - Corrected the failure promptly once the cause of the failure had been removed.
- Correction of a failure is ordinarily considered prompt if made:
- Within 30 days after the cause of the failure is removed,
 - Within 30 days after the failure is discovered, or
 - By the earliest date after the cause of the failure is removed or the failure is discovered on which a regular submission for corrections is made (a submission is considered "regular" only if made at intervals of 30 days or less).

See IRM 20.1.7.12.2; IRM 4.26.10.10.3.1 (07-13-2012); and IRM 4.26.11.9.11 (08-04-2021).

- IRM 20.1.7.12.1 lays out the process in detail on how to navigate reasonable cause with the business, what they need to do to prepare a reasonable cause justification, and how the IRS will process it. The Group Manager needs to be involved and ideally the Exam team should make sure the business understands they do not qualify for reasonable cause just because they didn't know the rules. Let them know

that penalties will be assessed and then they can follow the procedures provided in the letters L4595 or L4596 if they disagree.

Question 3: Is it reasonable for a legalized substance business to check the suspicious activity box simply because of the type of product they deal with?

Answer 3: No. When marking the suspicious activity box is purely done defensively, much like a Money Service Business filing defensive Significant Activity Reports, this is an abuse of the use of that box. If they are solely marking the box because of the industry and for no other reason, this is not an appropriate use of the box. If a business is checking the box in these circumstances, the agent should inform them that continuing to check the box could result in penalties for inaccurate forms. Of course, this depends on the facts and circumstances in each case.

Question 4: What is the impact on notification statements when the suspicious activity box is checked?

Answer 4: Under section 6050I(e), a trade or business required to file a return under section 6050I “shall furnish to each person whose name is required to be set forth in such return a written statement.” Regardless of whether the suspicious box is checked, the business is not relieved of the requirement to provide a notification statement (neither the statute nor the regulations allow for not providing a notification statement just because the box is marked).

- However, notification statements should not disclose to the payer of the cash that the form was marked suspicious. If the payer only has one reportable transaction and the business normally provides a copy of the filed form to meet the notification requirement, then the business will need to provide the statement by sending a letter with the required information instead of providing a copy of the actual form that was filed.
- If the payer had multiple reportable transactions, then providing a copy of the filed form itself does not meet the requirement for notification as the statement must be a single document.
- If the business genuinely fears for their safety if they were to send a notification statement, they need to prepare a written statement as to why the notification wasn't provided and keep it with their records. Even if this is done, the examiner must still consider the facts and circumstances as to whether there is a real fear, and whether to assert a penalty for failure to provide the notification statement if the examiner determines the fear was not real.

Question 5: Does prior correspondence from the BSA Support team (CTR Ops) regarding violations in earlier periods establish the business' knowledge and therefore, give BSA Exam the ability to assert intentional disregard? Also, if a business continues to do business with a customer who refused to provide EIN/TIN, is this considered intentional disregard of Form 8300 filing procedures?

Answer 5: Under sections 6721(e) and 6722(e), higher penalties may be imposed if the failure under those sections was due to intentional disregard of the filing and furnishing requirements. In both situations in the question the Exam team needs discuss with the business and educate them on the filing requirements and inform them that continued failure to obtain required information, especially after being informed that the information must be included, can result in being assessed intentional disregard penalties. For the first part of the question, it is important to determine what actions the business took after receiving the correspondence from CTR Ops. Sometimes businesses just ignore the correspondence and do not take any corrective action, which can support a determination of intentional disregard in a subsequent period. The important piece here is for the Exam team to work with the business and inform them as to what the law requires and inform them of the potential of intentional disregard/willful penalties. If the business chooses to ignore the guidance provided by the Exam team and continues to operate in the same manner, then it falls on them and they will be faced with the consequences of ignoring the law. **Make sure to request a follow-up exam for next scope year.**

Suggested work around for business so they don't have to cease business altogether: The business may come back and say that the customer refuses to provide their EIN/TIN information. The Exam team can suggest that the business inform their customer that the law requires the EIN/TIN information when transacting in cash and if the customer doesn't want to provide the EIN/TIN information that the customer can still conduct the transaction by paying in another form rather than using cash. If the customer insists that they will use cash and not provide the information, then the business must decide whether to continue to do business with that customer. Going forward, since the Exam team formally informed the business of the requirements and risks, if the business continued to do business in the same manner, then the Exam team could assert intentional disregard penalties.

Question 6: Can a revenue agent put a marijuana business on an "inadequate records" notice because of a Form 8300 examination? See IRM 4.10.8.16

Answer 6: Currently, inadequate records notices do not apply to Form 8300 Exams. However, it is something that is being explored. If there is a particularly egregious scenario, then the examiner should speak with his or her manager, and they should coordinate with BSA Policy and/or Counsel and an inadequate records notice could potentially be used. But for now, it is not a normal tool in the examiner's toolbox.

Question 7: When cash payments are made between related entities in the marijuana industry is there a Form 8300 filing requirement?

Answer 7: While entities can be related by being in the same ownership group, or one entity being a subsidiary of the other (parent), the controlling factor as to whether a Form 8300 must be filed is whether the entities have different and separate Employer Identification Numbers (EINs). If a grower/manufacturer receives over \$10,000 in cash

from a related dispensary/seller in the course of doing business, the determining factor as to whether it is a reportable transaction for which a Form 8300 is required is whether the two businesses have different EINs. For example, if one entity owns both businesses and both businesses use the same EIN, the transaction would not require a Form 8300 filing as the transaction would just be considered a transfer of funds between the different locations of the same entity. If instead, each business has a separate EIN then there would be a Form 8300 filing requirement because having a separate EIN is sufficient for there to be separate legal entities for purposes of the Form 8300. This is true even if both businesses are located in the same building and work together. In this situation the Form 8300 filing requirement can be satisfied by the grower filing the Form 8300, or the common parent/headquarters filing the Form 8300.

Sample Scenarios Related to Above Question:

Scenario 1: Company A is marijuana manufacturer. Company A established a subsidiary, company B, as a distributor in charge of cannabis sales. Company A and company B are separate legal entities (different EINs). Company B gives cash to company A for the purchase of products to sell. Is a Form 8300 required?

Scenario 1 Answer: As the cash was received in the course of business and the entities are separate legal entities (have different EINs) then a Form 8300 is required to be filed by company A for the receipt of the cash from company B when it's over \$10,000.

Scenario 2: Company A is a marijuana manufacturer. Company A established a subsidiary, company B, as a distributor in charge of the cannabis sales. Company A and company B are separate legal entities (different EINs). Company B collected cash over \$10,000 from sales and put it in a safe that company A shares as they're both located in the same building. A transfer of cash over \$10,000 was made on the books from company B to company A and company A used the cash to pay vendors. There was never a physical transfer of cash between the two since they share the safe. Is a Form 8300 required?

Scenario 2 Answer: Yes. Company A received cash over \$10,000 from company B, even though it was in the same safe, the legal ownership of the cash changed and that's what triggers the reporting obligation.

Scenario 3: Holding Company A establishes two different subsidiaries, Company B, a grower and Company C, a seller. Both Company B and Company C have different EINs. Company B receives cash in excess of \$10,000 from Company C. Company B does not file a Form 8300 but Holding Company A as parent to Company B files the Form 8300 for this transaction. Is there a violation that would give rise to penalty for failure to file a correct information return?

Scenario 3 Answer: No, there not a violation. In this situation either Company B or Holding Company A could discharge the duty to file a Form 8300 for this cash transaction.

Question 8: If cash over \$10,000 is given for a pre-paid deposit, is the recipient of the cash required to file Form 8300?

Answer 8: Yes. The 15-day time frame in which the Form 8300 must be filed starts *the day the cash is received*, regardless of when the invoice is prepared, or the product is given to the customer. Cash that is transferred before the rest of the transaction is essentially considered a deposit for a sale as the parties know or have reason to know that a transaction will occur because of the receipt of this cash. If the recipient of the cash must return some of the cash to the customer because the customer didn't use all of it, that doesn't change that business still had the obligation to file the Form 8300 when it received the cash.

Example: Dispensary A gives Grower X \$100,000 in cash on 9/1 to use as credit for future purchases – no invoices or receipts are prepared or presented. The cash is placed into Grower X's safe and logged in Grower X's system as a deposit. Dispensary A purchases \$30,000 in product on 10/15 and Grower X prepares the sales invoice and transfers the funds from the safe to their bank. Grower X is required to file a Form 8300 on or before 9/16 for \$100,000 as the cash was received on 9/1. If \$70,000 in cash is returned to Dispensary A, then it is possible that Dispensary A has a filing requirement for this transaction. This type of situation could result in TWO filing requirements.

Question 9: As part of completing the Form 8300, must the filer always include the TIN of anyone involved with the movement of the cash including 3rd parties, employees, cash courier services, including the drivers working for the cash courier service?

Answer 9: Yes. There is currently no exception to keep driver information from being reported. The driver is involved in the cash transaction and the Form 8300 requires the SSN of all persons involved. Using the EIN of cash courier service for the driver is not allowed.

Question 10: Does the filer of the Form 8300 need to notify all parties in Part 1 and Part 2 of the Form 8300 including a cash courier service and an employee/driver of the cash courier?

Answer 10: Yes. All persons and businesses reported in Part 1 and Part 2 must receive a notification statement, including if there are multiple Part 2s.

Question 11: Can an employee/driver of a cash courier service provide the recipient of the cash/filer an unexpired marijuana license or card issued by a

state government for the identification document (ID) and number required on line 14 of the Form 8300?

Answer 11: It depends. The filer must verify the name and address of every individual reported on the Form 8300. Verification must be made by examination of a document normally accepted as a means of identification when cashing checks (for example, a driver's license, passport, alien registration card, or other official document). A government issued marijuana license or card may be an acceptable form of ID for the Form 8300 if it has a photo, the employee's name, and an unexpired expiration date. However, some of these licenses or cards may not include an address. In that situation the filer must take additional steps to verify the individual's address. ***Please see question 12 below for a discussion about verified addresses.***

Question 12: What must a filer do to verify the information of persons or businesses reported in Parts 1 and 2 of the Form 8300?

Answer 12: The filer of the Form 8300 is required to verify the name and the address of every person reported in Parts 1 and 2 of the form. A driver's license is typically the best form of identification as that has a name, address, identification number, and an expiration date. Some other forms of identification may not have an address on them. In that situation, a filer could verify the address with another form of identification, or a utility or other type of bill or account statement, with the individual's name and address. Businesses should have procedures in place to verify names and addresses when an identification document does not have an address.

Question 13: Can an employee/driver of a cash courier service provide the filer of the Form 8300 with the cash courier service's business address as their address for purposes of the Form 8300 filing or must the employee's address reported on Form 8300 be a residential address?

Answer 13: There is nothing in the law that specifically requires a residential address be provided instead of a business address. However, as turnover of drivers might be high, there could be an issue with providing the notification statement to a driver if the driver uses the business' address and the driver ends employment with the cash courier service. Thus, a residential address is preferable.

Question 14: If there are multiple drivers for the same cash courier service over the course of the year how does the filer of the Form 8300 handle the notification statements?

Answer 14: The filer of the Form 8300 provides the cash courier service with one notification statement for the total of all Forms 8300 on which the cash courier service was listed throughout the entire year. The filer of the Form 8300 provides the individual drivers with one notification statement for the total of all Forms 8300 on which the individual driver was included throughout the entire year.

Question 15: A dispensary has three invoices from a grower for purchases of product. Invoice 1 is for \$15,000, invoice 2 is for \$9,000, and invoice 3 is for \$18,000. On 10/1/23 the dispensary provides cash of \$19,000 to the grower, broken down as follows: \$15,000 of it is to pay off invoice 1, \$3,000 is to pay towards invoice 2, and \$1,000 is to pay towards invoice 3. The dispensary provides the grower with a second payment of \$23,000 on 10/11/22. This pays off invoices 2 and 3. When does the grower have to file the Form 8300 and how much cash must be reported on it?

Answer 15: The grower must file the Form 8300 within 15 days of 10/1/22 and must report cash received in the amount of \$42,000. If the grower filed the Form 8300 prior to the cash payments made on 10/11/22, then the grower would need to file an amended Form 8300 to report the full amount of \$42,000 as these invoices are considered related transactions since multiple payments were made at the same time on each of them. The subsequent payment was made within 15 days of the first payment. If an Exam team discovers that this had occurred, it may want to suggest to the grower that if they allow partial payments and/or payments in terms that they do not file Form 8300s until the 15th day after a reportable payment if invoices involved still have remaining balances due. Electronic filing will help ensure a timely filing if the business is waiting the 15 days for additional payments.

Question 16: Same scenario as above however, the 2nd payment of \$23,000 is received on 10/17/22. This pays off invoices 2 and 3. When does the grower have to file Form 8300 and how much cash must be reported on it?

Answer 16: The grower must file the Form 8300 within 15 days of 10/1/22 and must report cash received in the amount of \$19,000. The grower would need to file a second Form 8300 within 15 days from 10/17/22, reporting cash received in the amount of \$23,000.

This writing may contain privileged information. Any unauthorized disclosure of this writing may undermine our ability to protect the privileged information. If disclosure is determined to be necessary, please contact this office for our views.

Please call (240) 613-6347 if you have any further questions.