TABLE OF CONTENTS

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 23-30062

R S B C O,

Plaintiff—Appellee,

versus

United States of America,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:21-CV-1192

Before Smith, Graves, and Wilson, *Circuit Judges.*

Cory T. Wilson, *Circuit Judge:*

A jury awarded RSBCO a refund of its payment of an IRS-imposed penalty for failure to file timely information returns. The district court then awarded

RSBCO attorney fees and costs. The Government appeals, asserting that the jury instructions were erroneous, and that the district court abused its discretion in awarding attorney fees and costs. Because the jury instructions were irredeemably flawed, we vacate the verdict and remand for a new trial. And because RSBCO is no longer the prevailing party, we also vacate the attorney fees and costs awarded to RSBCO.

I.

RSBCO is a limited-partnership subsidiary of Argent Financial Group, a wealth management firm. For the 2012 tax year, RSBCO was required to file with the IRS more than 21,000 annual information returns. Gregory Smith, Argent's operations manager, was responsible for electronically filing RSBCO's returns through the IRS's Filing Information Returns Electronically (FIRE) system by March 31, 2013. Treas. Reg. § 1.6045-1(p).

Smith attempted to file RSBCO's returns the day they were due. Days later, however, the FIRE system sent Smith an automated message that certain of the files containing the returns had errors that prevented them from being processed and that RSBCO was required to send replacement files. The FIRE system thereafter sent two additional reminder emails to Smith. On July 16 and 17, 2013, Smith filed corrected returns that were accepted and processed.

Over a year after Smith filed the corrected returns, the IRS sent RSBCO a notice of proposed penalties for the delay in filing processable 2012

returns. The notice made clear that RSBCO was entitled to dispute the penalty if it believed its failure was due to reasonable cause. RSBCO did not respond to the notice. Instead, RSBCO asserts it was unaware of the notice until it was discovered in Smith's desk after Smith was terminated in November 2014. In October 2015, almost a year after RSBCO discovered the notice of proposed penalties in Smith's desk, the IRS actually assessed penalties against RSBCO for $510,700 ($500,000 for the late filing of 20,328 returns, and $10,700 for filing 107 returns with incorrect information).

When the IRS sent RSBCO a notice of intent to levy in January 2018, RSBCO requested a hearing and asserted a reasonable cause defense. After the telephonic hearing, the IRS offered to concede 25% of the penalty amount, but RSBCO instead paid the penalties and accrued interest in full and filed an administrative refund claim for $579,198.37, grounded on the same reasonable cause defense. The IRS failed to act on the claim within six months, so RSBCO filed a complaint for a refund in federal district court, again asserting reasonable cause for its untimely filings. That suit was voluntarily dismissed, and RSBCO filed a second administrative refund claim. When the IRS again failed to act timely, RSBCO filed this action in district court, in May 2021. After extensive motions practice, including denied cross-motions for summary judgment, the question of whether RSBCO had reasonable cause for its filing delay, as defined in Treas. Reg. § 301.6724-1, was tried before a jury.

RSBCO's primary trial contention was that its failure to file was caused by Smith's clinical depression—an event beyond RSBCO's control. Smith testified that he suffered from clinically diagnosed depression in 2013, and as a result, he had been suicidal and struggled to focus and complete tasks at work. Specifically, Smith's depression inhibited him from properly filing RSBCO's 2012 information returns.

The jury returned a verdict for RSBCO, finding that RSBCO established that it had acted in a responsible manner and that there were either significant mitigating factors or events beyond RSBCO's control that contributed to its failure to file timely returns. The Government orally moved for judgment as a matter of law at trial's end. The Government additionally filed a renewed motion seeking either judgment as a matter of law or a new trial. The district court denied the Government's motions.

The district court then granted RSBCO's post-trial motion for attorney fees. The court determined that the Government could "not overcome the presumption that it was not substantially justified" in denying RSBCO's refund claim "because [the IRS] did not follow its applicable published guidance[.]" The district court awarded fees at a rate exceeding the statutory rate provided in I.R.C. § 7430(c)(1)(B)(iii), finding that "special factors" were present.

The Government appeals, challenging both the jury verdict as based on faulty instructions, and the award of attorney fees and costs.

II.

We review challenges to jury instructions for abuse of discretion and afford the trial court great latitude in framing those instructions. *In re 3 Star Props., L.L.C.,* 6 F.4th 595, 609 (5th Cir. 2021) (citation omitted). A party challenging jury instructions "must demonstrate that the charge as a whole creates substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Johnson v. Sawyer*, 120 F.3d 1307, 1315 (5th Cir. 1997) (citation and internal quotation marks omitted). However, "even if the jury instructions were erroneous, we will not reverse if we determine, based upon the entire record, that the challenged instruction could not have affected the outcome of the case." *Id.* (citation omitted).

"This court reviews a district court's attorneys' fee awards for abuse of discretion." *In re High Sulfur Content Gasoline Prods. Liab. Litig.,* 517 F.3d 220, 227 (5th Cir. 2008) (citation omitted).

III.

The Government raises two issues: (A) whether the district court's jury instructions on "reasonable cause" were erroneous;[1] and (B) whether the district

[1] RSBCO argues that because the IRS "did not even object to the final jury instructions at trial on the record[,]" it has waived any objection to the final instructions on appeal. RSBCO is incorrect. Filing written objections suffices to preserve for appellate review objections to jury instructions, even when a party "d[oes] not

court abused its discretion in awarding attorney fees and costs to RSBCO. We resolve each issue in the Government's favor.

A.

We begin with the regulatory background governing RSBCO's obligation to file third-party information returns. *See* I.R.C. § 6045. In 2013, filers like RSBCO that were required to file more than 250 information returns had to do so electronically using the IRS's FIRE System by March 31 for the 2012 tax year. Treas. Reg. § 301.6011-2(b)–(c); § 1.6045-1(p). Penalties were (and still are) assessed for "any failure to file an information return . . . on or before the required filing date." I.R.C. § 6721(a)(2). Failure to file a processable return within 30 days after the due date resulted in a penalty of $60 per return. Id. § 6721(b)(2)(A) (as amended in 2010). The maximum amount imposed on a delinquent 2012 filer was

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lodge oral on-the record objections . . . when invited to do so by the trial court." *Bender v. Brumley,* 1 F.3d 271, 277 (5th Cir. 1993); *see also Lang v. Tex. Pac. Ry. Co.,* 624 F.2d 1275, 1279 (5th Cir. 1980) ("[T]he failure to object may be disregarded if the party's position has previously been made clear to the court and it is plain that a further objection would have been unavailing.") (citation omitted). The record is clear that the Government lodged strenuous objections to the instructions at issue. The parties and the district court also discussed the court's rulings on the jury instructions on the record, and in an off-the-record conference in chambers. Thus, as in Bender, the "lack of another in-court objection . . . d[oes] not defeat [the Government's] ability to challenge the instructions on appeal. 1 F.3d at 277.

capped at $500,000. *Id.* § 6721(b)(2)(B) (as amended in 2010).

A filer is not liable for penalties if it can show that its failure to file timely was "due to reasonable cause and not willful neglect." *Id.* § 6724(a)(1). Reasonable cause exists if the filer establishes either that "there are significant mitigating factors with respect to the failure . . . or the failure arose from events beyond the filer's control ([an] impediment)."

Treas. Reg. § 301.6724-1(a)(2)(i)–(ii).[2]

The law does not define "mitigators." However, the relevant rule provides at least some context:

> [M]itigating factors include, but are not limited to—
>
> (1) The fact that prior to the failure the filer was never required to file the particular type of return or furnish the particular type of statement with respect to which the failure occurred, or
>
> (2) The fact that the filer has an established history of complying with the information reporting requirement with respect to which the failure occurred. In determining whether

[2] The filer must establish that it "acted in a responsible manner . . . both before and after the failure occurred." Id. § 301.6724-1(a)(2)(iii). The jury found that RSBCO had acted responsibly, and the Government does not challenge that finding on appeal.

> the filer has such established history, significant consideration is given to—
>
> (i) Whether the filer had incurred any penalty under [the I.R.C.] in prior years for the failure . . . and
>
> (ii) if the filer has incurred any such penalty in prior years, the extent of the filer's success in lessening its error rate from year to year.

Treas. Reg. § 301.6724-1(b).

Treasury Regulation § 301.6724-1(c)(1) also delineates certain "events beyond the filer's control," i.e., impediments, that may excuse untimely filing:

> Events which are generally considered beyond the filer's control include but are not limited to—
>
> (i) The unavailability of the relevant business records (as described in paragraph (c)(2) of this section),
>
> (ii) An undue economic hardship relating to filing on magnetic media . . .
>
> (iii) Certain actions of the [IRS] . . .
>
> (iv) Certain actions of an agent (as described in paragraph (c)(5) of this section), and
>
> (v) Certain actions of the payee or any other person providing necessary information with respect to the return or payee statement . . . .

Section 301.6724-1(c)(5), in turn, cabins which "actions of an agent" qualify as impediments to proper filing:

> Actions of agent—imputed reasonable cause. In order to establish reasonable cause under paragraph (c)(1) of this section due to actions of an agent, the filer must show the following:
>
> (i) The filer exercised reasonable business judgment in contracting with the agent . . . ; and
>
> (ii) The agent satisfied the reasonable cause criteria set forth in paragraph (b) [i.e., "mitigating factors"] or one of the reasonable cause criteria set forth in paragraph (c)(2) through (6) of this section.

And § 301.6724-1(c)(2), addressing "unavailability of the relevant business records," pinpoints our focus in this case because it is the only other subsection of § 301.6724-1(c) implicated by the facts here. It provides:

> In order to establish reasonable cause . . . due to the unavailability of the relevant business records, the filer's business records must have been unavailable under such conditions, in such manner, and for such period as to prevent timely compliance (ordinarily at least a 2–week period prior to the due date . . . of the required return . . .), and the unavailability must have been caused by a supervening event. A "supervening event" includes, but is not limited to—

. . .

> (iii) The unavoidable absence (e.g., due to death or serious illness) of the person with the sole responsibility for filing a return or furnishing a payee statement.

Id. § 301.6724-1(c)(2).

With this background in mind, we must examine the jury instructions on mitigators and impediments given by the district court, with a view toward answering the following questions: First, were the jury instructions legally erroneous? If so, could the error have affected the case's outcome? To reverse, we must answer both questions in the affirmative. *See Johnson*, 120 F.3d at 1315.

1.

As for the first prong of the "reasonable cause" analysis—whether there were "significant mitigating factors with respect to" RSBCO's failure to file timely—the district court gave the following instruction:

> RSBCO must have undertaken significant steps to avoid or mitigate failing to file the information returns on time. Those steps might include attempting to prevent an impediment or failure, if it was foreseeable; acting to remove the impediment or the cause of the failure; or fixing the failure as quickly as possible once the impediment was removed or the failure was discovered.

> The law does not define Mitigators. However, a mitigator is generally defined as "something that lessens the gravity of an offense or mistake."

The Government contends that the court's "mitigators" instruction gave the jury too much latitude to determine that RSBCO established reasonable cause because "none of the mitigators asserted by RSBCO concerned its filing history[.]" More specifically, the Government maintains that (1) it was error to include any instruction on mitigators, as no evidence was introduced regarding RSBCO's filing history; and (2) regardless, applying the *ejusdem generis* canon,[3] the instruction should have "limited mitigators to factors related to the filer's filing history[.]" In contrast, by allowing the jury "to consider 'anything that lessen[ed] the gravity of [RSBCO's] offense,' the court allowed the jury to consider factors well outside the limited scope of the regulation." The Government reasons that, because the relevant Treasury Regulation only provides examples of mitigators related to a filer's history, that regulation cabins the universe of "mitigators" to similar factors.

The Government's reasoning rests on a faulty premise. To be sure, mitigators "include" a filer's filing history. *See* Treas. Reg. § 301.6724-1(b)(1)–(2). But "the word 'includes' is usually a term of enlargement, and not of limitation." *DIRECTV, Inc. v. Budden,* 420 F.3d 521, 527 (5th Cir. 2005) (internal

[3] "*Ejusdem generis*" literally means "of the same kind or class." Black's Law Dictionary, *ejusdem generis* (11th ed. 2019).

brackets and citation omitted). It thus runs contrary to the regulation's text to suggest that its prefatory phrase "includ[ing], but not limited to" only limits mitigating factors to those like the enumerated examples that follow it.

The Government's reliance on the *ejusdem generis* canon does not salvage its argument. Courts employ this canon "[w]hen confronted with a list of specific terms that ends with a catchall phrase" to "limit the catchall phrase to 'things of the same general kind or class specifically mentioned.'" *United States v. Clark, 990* F.3d 404, 408 (5th Cir. 2021) (quoting ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012)); *see also Huntington Ingalls, Inc. v. Dir., Off. of Workers' Compen. Programs, U.S. Dept. of Lab.*, 70 F.4th 245, 254 (5th Cir. 2023) (same). But here, the regulation on mitigators does not list "specific terms followed by general terms" in enumerating examples of "mitigating factors." To the contrary, the regulation employs the phrase "including, but not limited to" *before* listing examples of mitigators. That structure suggests that the examples provided are only a subset of mitigators encompassed by the rule, and "mitigating factors" are therefore not limited only to those related to filing history.

A jury instruction on mitigators was therefore well-taken, even without evidence of RSBCO's filing history. On substance, the district court generally defined "mitigator" as "something that lessens the gravity of an offense or mistake." Nothing in that definition is inconsistent with § 301.6724-1(b)(1)–(2).

The district court's "mitigators" instruction, in isolation, thus does not create "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Johnson*, 120 F.3d at 1315 (citation omitted). But there is a fly in the ointment, in this instruction's interplay with the court's instruction on "impediments," as measured against the framework of Treasury Regulation § 301.6724-1(c). We turn there next.

2.

Reasonable cause for untimely filing can also be established if there were "events beyond the filer's control," i.e., impediments to filing. The district court provided the following instruction on impediments:

> The law does not define Impediments. However, an impediment is generally defined as "a hindrance or obstruction in doing something." And the IRS provides examples of Impediments potentially warranting a Reasonable Cause refund or waiver including but not limited to:
>
> (i) Actions of the filer's agent. ("Events which are generally considered beyond the filer's control include but are not limited to: (iv) Certain actions of an agent . . .").
>
> (ii) The death, serious illness, or unavoidable absence of the filer. ("Death, Serious Illness or Unavoidable Absence— Death, serious illness, or unavoidable absence of the taxpayer, or a death or serious illness in the taxpayer's

> immediate family, may establish reasonable cause for filing.")

The Government argues that this instruction was erroneous in two respects: It incorrectly states the law regarding the allowable actions of an agent; and it likewise misstates the law regarding "unavoidable absence" "due to death or serious illness of the person with the sole responsibility for filing a return[.]" RSBCO disagrees, contending that the district court appropriately defined "impediments" based on its "plain and ordinary meaning," and that Smith's depression substantially impeded RSBCO. The Government's challenge is well-taken because, overlaid against the framework of Treasury Regulation § 301.6724-1(c), the court's impediments instruction is both overbroad and oversimplified.

The instruction is overbroad because, after "generally defin[ing]" "impediment" as "a hindrance or obstruction in doing something," it states without qualification that "examples of Impediments potentially warranting a Reasonable Cause refund or waiver includ[e] but [are] not limited to . . . [a]ctions of the filer's agent." The instruction recites part of § 301.6724-1(c)(1)(iv) ("Certain actions of an agent . . ."), but the district court nowhere else explained to the jury which "certain actions" could constitute impediments consonant with the regulation's fairly intricate parameters. Yet plainly not every action of a filer's agent excuses improper filing; § 301.6724-1(c)(5)(ii) makes clear that only those that fall within

§ 301.6724-1(b) or § 301.6724-1(c)(2)–(6) qualify.[4] By giving such an open ended instruction, stripped of any of this nuance, the court freed the jury to find that any of Smith's actions that constituted "a hindrance or obstruction" to RSBCO's timely filing "warrant[ed] a Reasonable Cause refund" as an impediment under the regulation. This was error.

It was also error for the instruction to state that the "death, serious illness, or unavoidable absence of the filer" constituted an "example[] of [an] Impediment[] potentially warranting a Reasonable Cause refund" under the regulation. Again, comparing the instruction's language with the text of § 301.6724-1(c) brings into clear view the instruction's oversimplifying conflation of what is required for an agent's actions to comprise an allowable impediment.

First, "death, serious illness, or unavoidable absence of the filer" is not included as an "example" of a cognizable impediment in § 301.6724-1(c)(2)–(6). Instead, "death, serious illness, or unavoidable absence of the filer" is enumerated only as a "supervening event" justifying the "unavailability of the relevant business records," as articulated in § 301.6724-1(c)(2):

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[4] There is no evidence in the record that Smith took any "mitigating" actions, i.e., that "lessen[ed] the gravity of an offense or mistake," as the court's instruction put it, that would fall within § 301.6724-1(b); indeed, it is factually inconsistent that Smith's incapacity could be both a "mitigating factor" and an "impediment" to excuse RSBCO's late filing. So we focus on Smith's actions that could fit within § 301.6724-1(c)(2)–(6).

> In order to establish reasonable cause . . . due to the unavailability of the relevant business records, the filer's business records must have been unavailable under such conditions, in such manner, and for such period as to prevent timely compliance . . . , and the unavailability must have been caused by a supervening event. A "supervening event" includes, but is not limited to—
>
> . . .
>
> (iii) The unavoidable absence (e.g., due to death or serious illness) of the person with the sole responsibility for filing a return or furnishing a payee statement.

In other words, Smith's incapacity, alone, was not a sufficient basis to excuse RSBCO's late filing, contrary to what the district court's impediments instruction suggests. To the extent the jury was allowed to find otherwise, the instruction was flawed.

Beyond that, the instruction omitted any mention of the other considerations discussed in § 301.6724-1(c)(2). This compounded its oversimplification. As just discussed, the instruction did not correctly identify an "example" of an impediment that was both at issue in the case and articulated in the regulation. Assuming that Smith's incapacity caused the "unavailability of the relevant business records" so as to frustrate RSBCO's timely filing, the instruction omitted any mention that those records "must have been unavailable under such conditions, in such manner, and for such period as to

prevent timely compliance (ordinarily at least a 2-week period prior to the due date . . .)," and that "the unavailability must have been caused by" Smith's incapacity, as "a supervening event." Treas. Reg. § 301.6724-1(c)(2). Again, the instruction, by erroneously conflating the regulation's requirements, allowed the jury to find that Smith's serious depression, standing alone, established reasonable cause.

Instead of substantiating that Smith's illness caused the unavailability of its business records as contemplated by § 301.6724-1(c)(2),[5] RSBCO counters that the Treasury Regulation's enumerated list of impediments is not exhaustive, much like its list of mitigating factors. *See id.* § 301.6724-1(b), (c)(2)–(6). RSBCO reasons that the Government "ignore[s] the 'includ[ing] but not limited to' modif[ier]" to restrict allowable "impediments" in derogation of traditional rules of statutory construction. Properly considered, Smith's illness may thus qualify as an impediment standing alone. The district court agreed with RSBCO.

True enough, § 301.6724-1(c)(1), like § 301.6724-1(b), contains a prefatory clause that the "[e]vents which are generally considered beyond the filer's control include but are not limited to" the enumerated list that follows (emphasis added), and

[5] To be clear, RSBCO argues that "Smith . . . concealed . . . the IRS penalty notices." But these purportedly hidden penalty notices merely evidence the penalties stemming from RSBCO's failure to file timely, processable returns; they are not RSBCO's "business records" of the sort necessary to effectuate filing in the first instance.

the Government concedes that § 301.6724-1(c)(2)–(6)'s list of impediments is not exclusive. Even so, the

Government maintains that because the given instruction's two examples of impediments "were derived (imperfectly) from provisions in the regulations" and dovetailed with RSBCO's theory that its failure to file timely returns was caused by its agent Smith's depression, RSBCO was required to satisfy the regulation's enumerated requirements. We agree.

Bloate v. United States, 559 U.S. 196 (2010), is instructive. In *Bloate*, the Court considered the effect of the phrase "including but not limited to" that preceded a list of eight categories of delays contained in the Speedy Trial Act, 18 U.S.C. § 3161. 559 U.S. at 208–09. The Court determined that the list was "illustrative rather than exhaustive[,]" in view of the prefatory qualifier. *Id.* at 208. But that deduction "in no way undermine[d]" the conclusion that a "delay that falls within the category of delay addressed by [the subparagraph at issue] is governed by the limits in that subparagraph." *Id.* (emphasis in original).

Granting that § 301.6724-1(c)(2)–(6)'s list of events "beyond a filer's control" is illustrative rather than exhaustive, RSBCO's proffered interpretation of the regulation, to allow Smith's illness to qualify as an unenumerated impediment, nonetheless collapses of its own weight. The reason is that "death, serious illness, or unavoidable absence of the filer" is expressly included in the regulation not as an "impediment," but as a "supervening event" justifying one—the "unavailability of the relevant business

records." *See* § 301.6724-1(c)(2)(iii). That suggests that the regulation excludes a filer's "unavoidable absence" as a stand-alone impediment in its own right. To read the text otherwise, as RSBCO urges, would render certain of the regulation's provisions contradictory, or surplusage. *See* § 301.6724-1(c)(5) (stating that for a filer "to establish reasonable cause . . . due to actions of an agent, the filer must show" that the agent met one of the criteria set forth in either § 301.6724-1(b) or (c)(2)–(6) (emphasis added)); *In re Crocker,* 941 F.3d 206, 220 (5th Cir. 2019) (noting that "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme") (quoting *Marx v. Rev. Gen. Corp.,* 568 U.S. 371, 386 (2013)).

Regardless, the jury instruction at issue, which tracks RSBCO's theory of the case that Smith's incapacity caused RSBCO's filing delay, also falls directly within § 301.6724-1(c)(2)'s ambit. It follows that the instruction should have fully delineated what RSBCO was required to prove for "actions of an agent," or the "unavoidable absence (e.g., due to . . . serious illness)" of the filer, to have impeded RSBCO from timely filing processable returns. See *Bloate*, 559 U.S. at 208. By contrast, the instruction as given glosses over the regulation's granularity, creating "substantial and ineradicable doubt whether the jury has been properly guided in its deliberations." *Johnson*, 120 F.3d at 1315 (citation omitted).

3.

To recap, the district court did not reversibly err in instructing the jury as to "mitigators." But it did by incompletely and incorrectly delineating allowable "impediments." Still, this court will not disturb a verdict based on erroneous instructions unless the "challenged instruction could [] have affected the outcome of the case." *Id.* (citation omitted). To answer that question, we must examine the interrogatory verdict form the jury completed in reaching its verdict for RSBCO. Doing so, this court "must reconcile answers on a verdict form when there is a basis to do so," but that reconciliation must be "logical and probable[.]" *Team Contractors, L.L.C. v. Waypoint Nola, L.L.C.,* 976 F.3d 509, 513 (5th Cir. 2020). When we "cannot discover the exact basis" of the jury's verdict because "the verdict is capable of comprehending any one of a number of theories of liability," we must "remand for a new trial[.]" *Jamison Co., Inc. v. Westvaco Corp.,* 530 F.2d 34, 37 (5th Cir. 1976); *cf. United States v. Hankton,* 51 F.4th 578, 591–92 (5th Cir. 2022) (vacating conviction and remanding for further proceedings when "[t]he verdict form did not require the jury to specify which predicate offense or offenses it relied upon" to convict defendants of 18 U.S.C. § 924 offenses).

Eschewing the parties' proposed verdict forms,[6] the district court instead presented the jury with this two-question verdict form:

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[6] RSBCO offered a two-question general verdict form. The Government objected to RSBCO's proposed verdict form and

> Do you the jury find that RSBCO has established:
>
> 1. That it acted in a responsible manner before and after the subject incident?
>
> . . .
>
> 2. That there were either significant mitigating factors offsetting any wrongdoing by RSBCO (Mitigators), and/or that there were events beyond RSBCO's control that contributed to the subject incident (Impediments)?

The jury checked "Yes" in response to both questions.

And therein lies the problem. The jury's response to the second question in the completed jury verdict form does not allow us to decipher whether the jury found that there were "significant mitigating factors" to excuse RSBCO's failure to file timely—based on the sound jury instruction on mitigators—or that "there were events beyond RSBCO's control" that impeded timely filing—based on the unsound one on impediments—or, that there were both. If the first or third possibility, we could affirm, based on the adequacy of the "mitigators" instruction. But the second possibility is fatally flawed, as discussed *supra*. Given the form's single yes-or-no question as to mitigators "and/or" impediments, there is no way logically to reconcile the verdict form to contain the

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proposed a three-question special verdict form pursuant to Federal Rule of Civil Procedure 49(a). That form posed individual questions on mitigators, whether RSBCO acted responsibly, and impediments.

improper instruction. Thus, the "challenged instruction could [well] have affected the outcome of the case," *Johnson*, 120 F.3d at 1315 (citation omitted), so we must vacate the verdict and remand for a new trial.

B.

Because the verdict must be set aside, it follows that the district court's award of $235,762.50 to RSBCO for its attorney fees and costs must likewise be vacated. Internal Revenue Code § 7430(a)(1)–(2) allows the "prevailing party" to recover "reasonable administrative costs" and "reasonable litigation costs incurred in connection" with a proceeding "brought . . . against the United States . . . [for a] refund of any tax, interest, or penalty" under the Internal Revenue Code. Should RSBCO again prevail, the district court is of course free to reconsider whether to award its attorney fees and costs. We forecast no result on either eventuality.[7]

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[7] We note that the substantially prevailing party in tax litigation is entitled to an award of costs and attorney fees unless the Government can establish that its litigation position was "substantially justified." I.R.C. § 7430(c)(4)(B)(i); *see Heasley v. C.I.R.,* 967 F.2d 116, 120 (5th Cir. 1992) (quoting *Pierce v. Underwood,* 487 U.S. 552, 565 (1988)). The Government's position is *rebuttably* presumed unjustified "if the [IRS] did not follow its applicable published guidance . . . ." I.R.C. § 7430(c)(4)(B)(ii). In awarding fees and costs here, the district court concluded that the IRS did not follow the Taxpayer Bill of Rights and the Internal Revenue Manual. But prior to the district court's decision, no court appears to have viewed the Taxpayer Bill of Rights as "applicable published guidance," and this court has foreclosed the notion that the Internal Revenue

IV.

The district court's jury instruction as to "impediments" that would excuse RSBCO's untimely filing of its 2012 information returns is fatally inconsistent with the governing Treasury Regulation. Because the resulting jury verdict may have been grounded on that improper instruction, we must vacate the verdict and remand for further proceedings. Necessarily, we also must vacate the district court's award of attorney fees and costs.

VACATED AND REMANDED.

Manual is "legally binding[,]" as it "do[es] not create rights in the taxpayer." *Est. of Duncan v. C.I.R.,* 890 F.3d 192, 200 (5th Cir. 2018) (citations omitted).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

RSBCO	**CASE NO. 3:21-CV-01192**
VERSUS	**JUDGE TERRY A. DOUGHTY**
USA	**MAG. JUDGE KAYLA D. MCCLUSKY**

MEMORANDUM ORDER

Before the Court is a Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial [Doc. No. 124] ("JMOL") filed by the Government[1]. An Opposition [Doc. No. 126] was filed by RSBCO[2] on November 9, 2022. No Reply was filed.

For the reasons set forth herein, the Government's Motion for Judgment is **DENIED**.

I. BACKGROUND

RSBCO filed suit against the Government seeking a refund with respect to $579,198.37 RSBCO paid in federal tax penalties to the Internal Revenue Service ("IRS") as a result of the filing of erroneous Information Returns. The Information Returns were corrected and submitted to the IRS on July 18, 2013. However, the Information Returns were not corrected

[1] Defendant
[2] Plaintiff

until forty-two days after the deadline, which resulted in the IRS system assessing penalties totaling $510,700.00. Of this amount, $10,700.00 was for missing or incorrect tax ID numbers, and the sum of $60.00 per return was assessed for late re-filing of the corrected informational returns. There were over 21,000 informational returns that were subject to the penalty, so a statutory cap limitation of $500,000.00 was assessed.

On or about April 1, 2013, RSBCO employee Gregory Smith ("Smith") filed informational returns with the IRS using the IRS's "FIRE" system. The FIRE system is an electronic portal that taxpayers use to transmit required informational returns.

RSBCO explained that it timely filed the subject Information Returns for the 2012 tax year on April 1, 2013, in six separate batches. However, in contrast to prior years, the FIRE System had returned 94.22% of the filings as "BAD." File number 0003 (contained 18,890 payees), 0005 (contained 360 payees) and 0006 (contained 1078 payees), that showed "error codes" when filed. Due to the error codes, the informational returns were deemed "unprocessable" by the FIRE system. RSBCO surmised that the batches likely contained systemic errors in information or were corrupted. RSBCO stated that it relied on Smith to help file the Information Returns via the FIRE System. After two subsequent reminder emails sent from the FIRE System, Smith eventually corrected the files and uploaded them to the FIRE System on or about July 17-18, 2013. After the files were corrected and filed on July 18, 2013, the FIRE System sent an email on

August 4, 2013, with a Form 972 CG Notice which indicated that unless RSBCO responded within forty-five days to dispute the penalty, the FIRE System will systematically assess the penalty. There was no response by RSBCO and on October 12, 2014, the FIRE System automatically assessed the penalties at issue.

Unfortunately for RSBCO, all of the FIRE System emails were sent only to Smith. Smith did not correct the unprocessed returns until July 18, 2013. After the penalty was assessed, Smith never responded to the August 4, 2013, Form 972CG notice. RSBCO alleges that it was completely unaware there was a problem with the FIRE System, or that any penalties had been assessed, until the notices were found in Smith's desk shortly after Smith was terminated (for unrelated reasons) on November 12, 2014.

RSBCO maintains that during the time Smith filed the informational returns and/or received the IRS notices, Smith was grappling with depression, mental troubles, marital troubles, and taking medication which affected Smith's ability to satisfy his job duties.

Smith was familiar with the FIRE System and properly filed informational returns which were due in March 2012, after Smith was hired by RSBCO as operations manager. Smith stated he did not recall ever seeing the emails from the IRS indicating the original filings were deficient, or that RSBCO was being assessed penalties. Smith stated that problems developed that kept him from carrying out his duties

at RSBCO. Smith testified he began feeling overwhelmed and was taking anti-depressants. Smith testified he did not communicate the problems he was having to RSBCO.

After RSBCO became aware of the IRS penalties, RSBCO filed a Form 843 Claim for Refund and Request for Abatement. According to RSBCO, the IRS did not make a decision on this claim. After the first suit was filed, RSBCO agreed to dismiss the first suit, without prejudice, in order to allow the IRS to review RSBCO's revised administrative complaint. However, the IRS never acted on RSBCO's revised administrative complaint, which resulted in RSBCO filing the present lawsuit.

This matter was tried before a jury on September 6-7, 2022. The jury found in favor of RSBCO, specifically finding that RSBCO acted in a responsible manner before and after the incident, and that there were either significant mitigating factors offsetting any wrongdoing by RSBCO, and/or that there were events beyond RSBCO's control that contributed to the subject incident.[3]

Thereafter, Judgment[4] was rendered awarding RSBCO $510,700.00, interest of $68,498.37, and prejudgment interest (through September 22, 2022) of $100,174.19 for a total of $679,372.56.

The pending Motion for JMOL was filed on October 19, 2022.

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[3] [Doc. No. 104]
[4] [Doc. No. 112]

II. APPLICABLE LAW

A. Renewed Motion for Judgment as a Matter of Law

Federal Rule of Civil Procedure 50(b) governs a renewed motion for judgment as a matter of law. This Court deferred ruling on the Government's Rule 50(a) motion and submitted the case to the jury. The jury rendered a verdict against the Government.

Federal Rule of Civil Procedure 50(b) allows a party to submit a motion for judgment as a matter of law no later than twenty-eight (28) days after entry of the judgment. A motion for judgment as a matter of law should be granted if, viewing the evidence as a whole and drawing all inferences in favor of the non-moving party, no reasonable juror could reach a contrary verdict. *Boeing Co. v. Shipman,* 411 F.2d 375 (5th Cir. 1969). All evidence is considered, drawing all reasonable inferences, and resolving all credibility determinations in the light most favorable to the non-moving party. The standard of review is especially deferential with respect to a jury verdict. *Flowers v. Southern Regional Physician Services, Inc.,* 247 F.3d 229, 235 (5th Cir. 2001).

B. Motion for New Trial

Federal Rule of Civil Procedure 59(a) provides that a court may grant a new trial on some or all of the issues, after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court. A new trial is the appropriate remedy for prejudicial errors in jury instructions. To

render an error harmless, it must be made to appear clearly that the party complaining of it was not prejudiced. *Aero International Inc. v. United States Fire Ins. Co.,* 713 F.2d 1106, 1113 (5th Cir. 1983).

A district court's denial of a motion for new trial is reviewed for abuse of discretion. Deference is the hallmark of the abuse of discretion review applicable to such decisions. A reviewing court must not substitute its judgment for that of the district court. An appellate court must defer to the lower court's sound judgment so long as its decision falls within its wide discretion and is not manifestly erroneous. *Hanan v. Crete Carrier Corporation,* 2022 WL 2188527 at 2 (5th Cir. 2022).

III. ANALYSIS

A. Motion for Judgment as a Matter of Law

The Government maintains it is entitled to judgment as a matter of law because RSBCO did not meet the legal standards set out in 26 U.S.C. § 6724(a) and in 26 C.F.R. § 301.6724-1. These statutes set forth that in order for a penalty to be refunded for "reasonable cause," the plaintiff must establish (i) the plaintiff/filer acted in a responsible manner before and after the failure occurred; or (ii) the failure arose from or was caused by either one of the following: (a) significant mitigating factors or (b) events beyond the filer's control.

1. Responsible Manner

A filer acts in a "responsible manner" if he exercises reasonable care, which is the standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations.[5] Viewing the evidence as a whole and drawing all inferences in favor of RSBCO, RSBCO easily meets this standard.

Smith received a bachelor's degree from Howard Payne University in 1998 and a master's degree in Finance from West Texas A&M in 2006. He then worked for American Express Financial Advisors, Amarillo National Bank, and T Bank before being hired by Argent Trust Company ("Argent") in May 2011.[6] Smith testified he knew how to operate and had successfully operated the IRS FIRE system previously.[7] Smith was the sole person responsible for tax reporting obligations with Sherri Colvin as backup. He was provided with handbooks and manuals, including the trust system user's manual. Smith also attended the TrustRite user conference at Cannon Financial Institute to be able to operate RSBCO's TrustRite accounts software.[8] Smith testified he was clearly trained by RSBCO to operate the IRS FIRE system.[9]

Prior to his employment with RSBCO/Argent, he had completed thirteen (13) years in the banking

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[5] [Doc. No. 113, p.6]
[6] [Doc. No. 115, pp. 196-197]
[7] [Id., p. 199]
[8] [Id., p. 204]
[9] [Id., p. 206]

industry with no reprimands, disciplines, suspensions, demotions, or terminations of any kind.[10] Smith was stated to have an impressive performance during his extensive pre-hire interview process.[11] Smith also had a clean background check.[12] After Smith was hired, he was given essential resources[13] needed to fill his written job description and was trained within industry standards.[14]

Smith was sent by RSBCO for training sessions in Las Vegas and Chicago,[15] and Smith obtained secondary certifications, scoring over 90% on the Cannon Operations exam.[16] Smith had successfully filed tens of thousands of informational returns on the IRS FIRE system the year before[17] and the year after[18] the subject incident. Smith had direct supervision in his office by Lucious McGehee.[19]

RSBCO terminated Smith for unrelated performance issues[20] prior to discovering the FIRE system notice and penalties when cleaning out Smith's desk.[21] Additionally, no witness or expert

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[10] [Id., pp. 196-97]
[11] [Id., p. 112-14, 115]
[12] [Id., p. 114]
[13] [Id., pp. 111-12, 115, 119, 198-204]
[14] [Id., pp. 198-201]
[15] [Id. pp. 115, 117, & 199]
[16] [Id., p. 199]
[17] [Id., pp. 124-27, 137, 202]
[18] [Id., pp. 124-25; 130-31; 206, 232]
[19] [Id., pp. 122; 201-202]
[20] [Id., pp. 121-22; 207]
[21] [Id., p. 232]

witness was called by the Government that testified the actions of RSBCO were not responsible.

Therefore, the record has sufficient evidence for which the jury could have found RSBCO acted in a responsible manner both before and after the incident.

2. Events Beyond RSBCO's Control

(i) Impediments

The jury also specifically found that there were either significant mitigating factors offsetting any wrongdoing by RSBCO and/or that there were events beyond RSBCO's control that contributed to the subject incident. Viewing the evidence as a whole and drawing all inferences in favor of RSBCO, there is evidence to support this finding. "Impediments" were described to the jury as, "[t]he law does not define Impediments. However, an impediment is generally defined 'as a hindrance or obstruction in doing something'".[22]

Smith testified live before the jury. The jury found him credible. Smith testified that he was sufficiently qualified, trained, and supervised to make proper and timely filings via the FIRE system.[23] Smith testified he suffered from depression and had symptoms between April 1, 2013, and July 18, 2013.[24] Smith obtained a diagnosis of depression from a licensed physician at the Green Clinic and was

[22] [Doc. 113, p. 7]
[23] [Doc. No. 115, pp. 201-02, 211]
[24] [Id., p. 207]

prescribed and routinely took medication.[25] Smith further testified that because of his depression, he felt overwhelmed, and it was hard for him to concentrate. He would shut down and not be able to do things. He also had suicidal tendencies.[26]

Smith testified his depression inhibited his ability to do his job, including filing the informational tax returns at issue in 2014.[27] Further, Smith testified that during the time from April 1, 2013, through July 18, 2013, he did not tell anyone at RSBCO about his depression.[28]

(ii) Mitigators

"Mitigators" were described to the jury as, "[t]he law does not define Mitigators. However, a mitigator is generally defined as something that lessens the gravity of an offense or a mistake.[29]

RSBCO maintains that their actions did not harm the Government nor any third-party; that they did not derive any undue benefits; they made no material misrepresentation; they committed no fraud; and that their actions were not intentional. Those, RSBCO argues, are all separate mitigators under a fair reading of 28 U.S.C. § 6724. RSBCO further argues that the errors were insignificant in nature and amount because the "error" was Smith placing twenty-six dash marks in a file that contained 21,574

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[25] [Doc. No. 115, pp. 208-210; 231-32]
[26] [Id., p. 209-210]
[27] [Id., p. 223]
[28] [Doc. No. 113, pp. 209-11]
[29] [Id., p. 7]

returns. Smith further corrected and re-filed all returns without any errors on July 16, 2013.

Under the broad definition of "mitigators," any of these actions could reasonably be found by the jury to be mitigators. The examples of mitigators in 26 U.S.C. § 6724 are illustrative, not exhaustive. Because there is only a broad definition of mitigators, the jury could have found for RSBCO using any of the mitigators suggested by RSBCO. It should also be noted that the broad definition for mitigator was suggested by the Government in their proposed jury instructions.[30]

Therefore, the record has sufficient evidence for which the jury could have found that there were either significant mitigating factors offsetting any wrongdoing and/or that there were events beyond RSBCO's control that contributed to the subject incident.

B. Motion for New Trial

In its Motion for New Trial, the Government maintains the previously discussed jury instructions describing an "impediment" were incorrect in that they were too lenient. The Government requests the Court use the various illustrations in 26 U.S.C. § 301.6724 as exhaustive, rather than illustrative. However, "events beyond the filer's control" in 26 U.S.C. § 301.6724(c) clearly states the list of items generally considered to be beyond the filer's control

[30] [Doc. No. 96, pp. 13-14 (D9)].

"include but are not limited to" the list.[31] The definition is broad. The Government's attempt to limit the definition is in contradiction to the statute, and the jury instructions are correct.

Therefore, the Government's Motion for New Trial is **DENIED**.

IV. CONCLUSION

For the reasons set forth herein,

IT IS ORDERED that the Government's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, a New Trial [Doc. No. 124] is **DENIED**.

IT IS FURTHER ORDERED that the Government's Oral Motion for Judgment as a Matter of Law [Doc. No. 100] is **DENIED**.

MONROE, LOUISIANA, this 28th day of November 2022.

/s/ Terry A. Doughty
TERRY A. DOUGHTY
UNITED STATES DISTRICT JUDGE

[31] 26 C.F.R. § 6724-1(c)

APPENDIX C

U.S. DISTRICT COURT * WESTERN DISTRICT OF LOUISIANA * MONROE DIV.

RSBCO	**CIVIL ACTION NO. 3:21-CV-01192**
versus	**JUDGE TERRY A. DOUGHTY**
USA	**MAGISTRATE JUDGE KAYLA D.L MCCLUSKY**

JUDGMENT

This action was tried before a jury on September 6th & 7th, 2022, resulting in a unanimous jury verdict in favor of RSBCO and against USA, whereby the jury's unanimous verdict was that RSBCO had established "reasonable cause" warranting a refund of the $579,198.37 penalty by showing both: (1) RSBCO behaved "responsibly" before and after the subject incident; and (2) RSBCO experienced "mitigators" and/or "impediments" related to the subject incident.

Now, pursuant to this verdict, IT IS ORDERED, ADJUDGED, and DECREED:

1. Principal. The USA is liable unto RSBCO for the full amount of the penalty ($510,700) and interest thereon ($68,498.37) for a total overpayment principal amount of $579,198.37.

2. Interest. The USA is liable unto RSBCO for statutory pre-judgment overpayment interest on the amount stated above pursuant to §6611 and §6621

from November 19th, 2018 through September 22nd, 2022 in the amount of $100,174.19, continuing to accrue until paid as provided by law.

3. Fees & Costs. Pursuant to prior oral order, the Court will retain jurisdiction to hear RSBCO's claim for attorney fees and costs at a later date.

Done, rendered, and signed on September 21st, 2022, in Monroe, Louisiana.

/s/ Terry A. Doughty
Honorable Judge Terry A. Doughty
Western District of Louisiana–Monroe Division

Approved as to form by counsel for the parties on September 21st, 2022:

/s/ Russell A. Woodard, Jr.	*/s/ Aaron Brownell*
Russell A. Woodard, Jr.	Aaron Brownell
Counsel for RSBCO	*Counsel for USA*

APPENDIX D

United States Court of Appeals for the Fifth Circuit

No. 23-30062

R S B C O,

Plaintiff—Appellee,

versus

United States of America,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Louisiana
USDC No. 3:21-CV-1192

ON PETITION FOR REHEARING

Before Smith, Graves, and Wilson, *Circuit Judges.*

Per Curiam:

IT IS ORDERED that the petition for rehearing is DENIED.

APPENDIX E

Federal Rules of Civil Procedure Rule 51. Instructions to the Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) *Before or at the Close of the Evidence.* At the close of the evidence or at any earlier reasonable time that the court orders, a party may file and furnish to every other party written requests for the jury instructions it wants the court to give.

(2) *After the Close of the Evidence.* After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated by an earlier time that the court set for requests; and

(B) with the court's permission, file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing before the instructions and arguments are delivered; and

(3) may instruct the jury at any time before the jury is discharged.

(c) Objections.

(1) *How to Make.* A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds for the objection.

(2) *When to Make.* An objection is timely if:

(A) a party objects at the opportunity provided under Rule 51(b)(2); or

(B) a party was not informed of an instruction or action on a request before that opportunity to object, and the party objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) *Assigning Error.* A party may assign as error:

(A) an error in an instruction actually given, if that party properly objected; or

(B) a failure to give an instruction, if that party properly requested it and—unless the court rejected the request in a definitive ruling on the record—also properly objected.

(2) *Plain Error.* A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.

Internal Revenue Code, 26 U.S.C. § 6724. Waiver; definitions and special rules.

(a) Reasonable cause waiver. No penalty shall be imposed under this part [26 USCS §§ 6721 et seq.] with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect.

(b) Payment of penalty. Any penalty imposed by this part [26 USCS §§ 6721 et seq.] shall be paid on notice and demand by the Secretary and in the same manner as tax.

Internal Revenue Service, 26 C.F.R. § 301.6724-1 Reasonable Cause.

(a) Waiver of the penalty —

(1) General rule. The penalty for a failure relating to an information reporting requirement as defined in paragraph (j) of this section is waived if the failure is due to reasonable cause and is not due to willful neglect.

(2) Reasonable cause defined. The penalty is waived for reasonable cause only if the filer establishes that either —

(i) There are significant mitigating factors with respect to the failure, as described in paragraph (b) of this section; or

(ii) The failure arose from events beyond the filer's control (impediment), as described in paragraph (c) of this section.

(iii) Moreover, the filer must establish that the filer acted in a responsible manner, as described in paragraph (d) of this section, both before and after the failure occurred. Thus, if the filer establishes that there are significant mitigating factors for a failure but is unable to establish that the filer acted in a responsible manner, the mitigating factors will not be sufficient to obtain a waiver of the penalty. Similarly, if the filer establishes that a failure arose from an impediment but is unable to establish that the filer acted in a responsible manner, the impediment will not be sufficient to obtain a waiver of the penalty. See paragraph (g) of this section for the reasonable cause safe harbor for persons who exercise due diligence. See paragraph (h) of this section for

the reasonable cause safe harbor after an election under section 6722(c)(3)(B) and § 301.6722-1(d)(3).

(b) Significant mitigating factors. In order to establish reasonable cause under this paragraph (b), the filer must satisfy paragraph (d) of this section and must show that there are significant mitigating factors for the failure. See paragraph (c)(5) of this section for the application of this paragraph (b) to failures attributable to the actions of a filer's agent. The applicable mitigating factors include, but are not limited to—

(1) The fact that prior to the failure the filer was never required to file the particular type of return or furnish the particular type of statement with respect to which the failure occurred, or

(2) The fact that the filer has an established history of complying with the information reporting requirement with respect to which the failure occurred. In determining whether the filer has such an established history, significant consideration is given to —

(i) Whether the filer has incurred any penalty under § 301.6721-1, § 301.6722-1, or § 301.6723-1 in prior years for the failure; and

(ii) If the filer has incurred any such penalty in prior years, the extent of the filer's success in lessening its error rate from year to year.

(3) A filer may treat as a penalty not incurred any penalty under sections 6721 through 6723 [26 USCS §§ 6721 — 6723] that was self-assessed under section 6724(c)(3) [26 USCS § 6724(c)(3)] and any penalty under section 6676(b) [26 USCS § 6676(b)] that was self-assessed under section

6676(d) [26 USCS § 6676(d)], prior to amendment or repeal by the Omnibus Budget Reconciliation Act of 1989. See paragraph (c)(5) of this section for the application of this paragraph (b) to failures attributable to the actions of a filer's agent.

(c) Events beyond the filer's control —

(1) In general. In order to establish reasonable cause under this paragraph (c)(1), the filer must satisfy paragraph (d) of this section and must show that the failure was due to events beyond the filer's control. Events which are generally considered beyond the filer's control include but are not limited to —

(i) The unavailability of the relevant business records (as described in paragraph (c)(2) of this section),

(ii) An undue economic hardship relating to filing on magnetic media (as described in paragraph (c)(3) of this section),

(iii) Certain actions of the Internal Revenue Service (IRS) (as described in paragraph (c)(4) of this section),

(iv) Certain actions of an agent (as described in paragraph (c)(5) of this section), and

(v) Certain actions of the payee or any other person providing necessary information with respect to the return or payee statement (as described in paragraph (c)(6) of this section).

(2) Unavailability of the relevant business records. In order to establish reasonable cause under paragraph (c)(1) of this section due to the unavailability of the relevant business records, the filer's business records must have been unavailable under such conditions, in such manner, and for

such period as to prevent timely compliance (ordinarily at least a 2-week period prior to the due date (with regard to extensions) of the required return or the required date (with regard to extensions) for furnishing the payee statement), and the unavailability must have been caused by a supervening event. A "supervening event" includes, but is not limited to —

(i) A fire or other casualty that damages or impairs the filer's relevant business records or the filer's system for processing and filing such records;

(ii) A statutory or regulatory change that has a direct impact upon data processing and that is made so close to the time that the return or payee statement is required that, for all practical purposes, the change cannot be complied with; or

(iii) The unavoidable absence (e.g., due to death or serious illness) of the person with the sole responsibility for filing a return or furnishing a payee statement.

(3) Undue economic hardship relating to filing on magnetic media. In order to establish reasonable cause under paragraph (c)(1) of this section due to an undue economic hardship for filing on magnetic media, the filer must show that it failed to file on magnetic media because the filer lacked the necessary hardware. For purposes of this paragraph (c)(3), the filer will not be considered to have acted in a responsible manner under paragraph (d) of this section unless —

(i) The filer attempted on a timely basis to contract out the magnetic media filing;

(ii) The cost of filing on magnetic media or in electronic form was prohibitive as determined at least 45 days before the due date of the returns (without regard to extensions);

(iii) The cost was supported by a minimum of two cost estimates from unrelated parties; and

(iv) The filer filed the returns on paper. Reasonable cause will not ordinarily be established under this paragraph (c)(3) if a filer received a reasonable cause waiver in any prior year under paragraph (c)(1) of this section due to an undue economic hardship relating to filing on magnetic media.

(4) Actions of the IRS. In order to establish reasonable cause under paragraph (c)(1) of this section due to certain actions of the IRS, a filer must show that the failure was due to the filer's reasonable reliance on erroneous written information from the IRS. Reasonable reliance means that the filer relied in good faith on the information. The filer shall not be considered to have relied in good faith if the IRS was not aware of all the facts when it provided the information to the filer. In order to substantiate reasonable cause under this paragraph (c)(4), the filer must provide a copy of the written information provided by the IRS and, if applicable, the filer's written request for the information.

(5) Actions of agent — imputed reasonable cause. In order to establish reasonable cause under paragraph (c)(1) of this section due to actions of an agent, the filer must show the following:

(i) The filer exercised reasonable business judgment in contracting with the agent to file

timely correct returns or furnish timely correct payee statements with respect to which the failure occurred. This includes contracting with the agent and providing the proper information sufficiently in advance of the due date of the return or statement to permit timely filing of correct returns or timely furnishing of correct payee statements; and

(ii) The agent satisfied the reasonable cause criteria set forth in paragraph (b) or one of the reasonable cause criteria set forth in paragraph (c) (2) through (6) of this section.

(6) Actions of the payee or any other person. In order to establish reasonable cause under paragraph (c)(1) of this section due to the actions of the payee or any other person, such as a broker as defined in section 6045(c) [26 USCS § 6045(c)] providing information with respect to the return or payee statement, the filer must show either —

(i) That the failure resulted from the failure of the payee, or any other person required to provide information necessary for the filer to comply with the information reporting requirements ("any other person"), to provide information to the filer, or

(ii) That the failure resulted from incorrect information provided by the payee (or any other person) upon which information the filer relied in good faith. To substantiate reasonable cause under this paragraph (c)(6), the filer must provide documentary evidence upon request of the IRS showing that the failure was attributable to the payee (or any other person). See paragraph (d)(2) of this section for special

rules relating to the availability of a waiver where the filer's failure relates to a taxpayer identification number (TIN), and the failure is attributable to actions of the payee described in paragraph (c)(6) (i) or (ii) of this section.

(d) Responsible manner —

(1) In general. Acting in a responsible manner means —

(i) That the filer exercised reasonable care, which is that standard of care that a reasonably prudent person would use under the circumstances in the course of its business in determining its filing obligations and in handling account information such as account numbers and balances, and

(ii) That the filer undertook significant steps to avoid or mitigate the failure, including, where applicable —

(A) Requesting appropriate extensions of time to file, when practicable, in order to avoid the failure,

(B) Attempting to prevent an impediment or a failure, if it was foreseeable,

(C) Acting to remove an impediment or the cause of a failure, once it occurred, and

(D) Rectifying the failure as promptly as possible once the impediment was removed or the failure was discovered. Ordinarily, a rectification is considered prompt if it is made within 30 days after the date the impediment is removed or the failure is discovered or on the earliest date thereafter on which a regular submission of corrections is made. Submissions will be

considered regular only if made at intervals of 30 days or less. A failure may be rectified by filing or correcting the information return, furnishing or correcting the payee statement, or by providing or correcting the information to satisfy the specified information reporting requirement with respect to which the failure occurs. Paragraph (d)(ii)(D) of this section does not apply with respect to information the filer is prohibited from altering under specific information reporting rules. See § 1.6045-4(i)(5) of this chapter.

(2) Special rule for filers seeking a waiver pursuant to paragraph (c)(6) of this section. A filer seeking a waiver for reasonable cause pursuant to paragraph (c)(6) of this section with respect to a failure resulting from a missing or an incorrect TIN will be deemed to have acted in a responsible manner in compliance with this paragraph (d) only if the filer satisfies the requirements of paragraph (e) of this section (relating to missing TINs) or paragraph (f) of this section (relating to incorrect TINs), whichever is applicable.

(e) Acting in a responsible manner — special rules for missing TINs —

(1) In general. A filer that is seeking a waiver for reasonable cause under paragraph (c)(6) of this section will satisfy paragraph (d)(2) of this section with respect to establishing that a failure to include a TIN on an information return resulted from the failure of the payee to provide information to the filer (that is, a missing TIN) only if the filer makes the initial and, if required, the annual solicitations

described in this paragraph (e) (required solicitations). For purposes of this section, a number is treated as a missing TIN if the number does not contain nine digits or includes one or more alpha characters (a character or symbol other than an Arabic numeral) as one of the nine digits. A solicitation means a request by the filer for the payee to furnish a correct TIN. See paragraph (f) of this section for the rules that a filer must follow to establish that the filer acted in a responsible manner with respect to providing incorrect TINs on information returns. See paragraph (e)(1)(vi)(A) of this section for alternative solicitation requirements. See paragraph (g) of this section for the safe harbor due diligence rules.

(i) Initial solicitation. An initial solicitation for a payee's correct TIN must be made at the time an account is opened. The term account includes accounts, relationships, and other transactions. However, a filer is not required to make an initial solicitation under this paragraph (e)(1)(i) with respect to a new account if the filer has the payee's TIN and uses that TIN for all accounts of the payee. For example, see § 31.3406(h)-3(a) of this chapter. If the account is opened in person, the initial solicitation may be made by oral or written request, such as on an account creation document. If the account is opened by mail, telephone, or other electronic means, the TIN may be requested through such communications. If the account is opened by the payee's completing and mailing an application furnished by the filer that requests

the payee's TIN, the initial solicitation requirement is considered met. If a TIN is not received as a result of an initial solicitation, the filer may be required to make additional solicitations (annual solicitations).

(ii) First annual solicitation. Except as provided in paragraph (e)(1)(vi) of this section, a filer must undertake an annual solicitation if a TIN is not received as a result of an initial solicitation (or if the filer was not required to make an initial solicitation under paragraph (e)(1)(i) of this section and the filer has not received a payee's TIN). The first annual solicitation must be made on or before December 31 of the year in which the account is opened (for accounts opened before December) or January 31 of the following year (for accounts opened in the preceding December) ("annual solicitation period").

(iii) Second annual solicitation. If the TIN is not received as a result of the first annual solicitation, the filer must undertake a second annual solicitation. The second annual solicitation must be made after the expiration of the annual solicitation period and on or before December 31 of the year immediately succeeding the calendar year in which the account is opened.

(iv) Additional requirements. After receiving a TIN, a filer must include that TIN on any information returns the original due date of which (with regard to extensions) is after the date that the filer receives the TIN.

(v) Failures to which a solicitation relates. The initial and first annual solicitations relate to failures on returns filed for the year in which an account is opened. The second annual solicitation relates to failures on returns filed for the year immediately following the year in which an account is opened and for succeeding calendar years.

(vi) Exceptions and limitations.

(A) The solicitation requirements under this paragraph (e) do not apply to the extent an information reporting provision under which a return, as defined in paragraph (h) of § 301.6721-1, is filed provides specific requirements relating to the manner or the time period in which a TIN must be solicited. In that event, the requirements of this paragraph (e) will be satisfied only if the filer complies with the manner and time period requirements of the specific information reporting provision and the provisions of this paragraph (e) to the extent applicable. Also, see section 3406(e) [26 USCS § 3406(e)] which provides rules on the manner and time period in which a TIN must be provided for certain accounts with respect to interest, dividends, patronage dividends, and amounts subject to broker reporting.

(B) An annual solicitation is not required to be made for a year under this paragraph (e) with respect to an account if no payments are made to the account for such

year or if no return as defined in paragraph (g) of § 301.6721-1 is required to be filed for the account for the year.

(C) If a filer fails to make one (or more) of the required solicitations under paragraphs (e)(1) (i), (ii), and (iii) of this section, the filer may satisfy the requirements of this section by —

(1) Making two consecutive annual solicitations in subsequent years ("make-up solicitations"), and

(2) Satisfying paragraph (e)(1)(iv) of this section.

For example, a filer who has made none of the required solicitations may satisfy the requirements of this section by making two consecutive solicitations. In determining whether a filer has made two consecutive solicitations, years to which paragraph (e)(1)(vi)(B) of this section applies shall be disregarded. If a filer fails to make the initial solicitation under paragraph (e)(1)(i) of this section, the make-up solicitations described in this paragraph (e)(1)(vi)(C) may be made in the years in which the first and second annual solicitations are required to be made; however, the penalty will apply with respect to the year in which the filer failed to make the initial solicitation. The penalty will apply to failures with respect to years for which a required solicitation is not made and to failures with respect to all

subsequent years until the filer conducts its make-up solicitations. The penalty will not apply with respect to the year in which the first make-up solicitation is made (unless it is also the year in which the filer fails to make its initial solicitation) if the second make-up solicitation is made in the following year.

(D) A financial institution is not required to make an annual solicitation by mail on accounts with "stop-mail" or "hold-mail" instructions, provided the filer furnishes the solicitation material to the payee in the same manner as it furnishes other mail.

(E) A filer is not required to make annual solicitations by mail on accounts with respect to which the filer has an undeliverable address, that is, where other mailings to that address have been returned to the filer because the address was incorrect and no new address has been provided to the filer.

(F) Except as provided in paragraphs (e)(1)(vi)(A) and (C) of this section, no more than two annual solicitations are required under this paragraph (e) in order for a filer to establish reasonable cause.

(2) Manner of making annual solicitations — by mail or telephone —

(i) By mail. A mail solicitation must include —

(A) A letter informing the payee that he or she must provide his or her TIN and that he or she is subject to a $ 50 penalty imposed

by the IRS under section 6723 [26 USCS § 6723] if he or she fails to furnish his or her TIN,

(B) A Form W-9 or an acceptable substitute form, as defined in § 31.3406 (h)-3 (a), (b), or (c) of this chapter, on which the payee may provide the TIN, and

(C) A return envelope for the payee to provide the TIN which may be, but is not required to be, postage prepaid.

(ii) By telephone. An annual solicitation may be made by telephone if the solicitation procedure is reasonably designed and carried out in a manner that is conducive to obtaining the TIN. An annual solicitation is made pursuant to this paragraph (e)(2)(ii) for a failure if the filer —

(A) Completes a call to each person with a missing TIN and speaks to an adult member of the household, or to an officer of the business or the organization,

(B) Requests the TIN of the payee,

(C) Informs the payee that he or she is subject to a $ 50 penalty imposed by the IRS under section 6723 [26 USCS § 6723] if he or she fails to furnish his or her TIN,

(D) Maintains contemporaneous records showing that the solicitation was properly made, and

(E) Provides such contemporaneous records to the IRS upon request.

(f) Acting in a responsible manner — special rules for incorrect TINS —

(1) In general. A filer that is seeking a waiver for reasonable cause under paragraph (c)(6) of this section will satisfy paragraph (d)(2) of this section with respect to establishing that a failure resulted from incorrect information provided by the payee or any other person (that is, inclusion of an incorrect TIN) on an information return only if the filer makes the initial and annual solicitations described in this paragraph (f). See paragraph (e)(1) of this section for the definition of the term solicitation. See paragraph (f)(5)(i) of this section for alternative solicitation requirements. See paragraph (g) of this section for the safe harbor due diligence rules.

(i) Initial solicitation. An initial solicitation for a payee's correct TIN must be made at the time the account is opened. The term account includes accounts, relationships, and other transactions. However, a filer is not required to make an initial solicitation under this paragraph (f)(1)(i) with respect to a new account if the filer has the payee's TIN and uses that TIN for all accounts of the payee. For example, see § 31.3406(h)-3(a) of this chapter. No additional solicitation is required after the filer receives the TIN unless the IRS or, in some cases, a broker notifies the filer that the TIN is incorrect. Following such notification the filer may be required to make an annual solicitation to obtain the correct TIN as provided in paragraphs (f)(1)(ii) and (iii) of this section.

(ii) First annual solicitation. Except as provided in paragraph (f)(5) of this section, a filer must undertake an annual solicitation

only if the payor has been notified of an incorrect TIN and such account contains the incorrect TIN at the time of the notification. The first annual solicitation must be made as required by paragraph (f) (2) or (3) of this section, whichever applies. An account contains an incorrect TIN at the time of notification if the name and number combination on the account matches the name and number combination set forth on the notice from the IRS or a broker. A filer may be notified of an incorrect TIN by the IRS or by a broker pursuant to section 3406(a)(1)(B) [26 USCS § 3406(a)(1)(B)] or by a penalty notice issued by the IRS pursuant to section 6721 [26 USCS § 6721]. Except as otherwise provided in this section, the annual solicitation required by this paragraph (f) must be made on or before December 31 of the year in which the filer is notified of the incorrect TIN or by January 31 of the following year if the filer is notified of an incorrect TIN in the preceding December.

(iii) Second annual solicitation. A filer must undertake a second annual solicitation as required by paragraph (f) (2) or (3) of this section, whichever applies, if the filer is notified in any year following the year of the notification described in paragraph (f)(1)(ii) of this section that the account of a payee contains an incorrect TIN, as described in paragraph (f)(1)(ii) of this section.

(iv) Additional requirements. Upon receipt of a TIN, a filer must include that TIN on any information returns the original due date of

which (with regard to extensions) is after the date that the filer receives the TIN.

(2) Manner of making annual solicitation if notified pursuant to section 6721 [26 USCS § 6721]. A filer that has been notified of an incorrect TIN by a penalty notice or other notification pursuant to section 6721 [26 USCS § 6721] may satisfy the solicitation requirement of this paragraph (f) either by mail, in the manner set forth in paragraph (e)(2)(i) of this section; by telephone, in the manner set forth in paragraph (e)(2)(ii) of this section; or by requesting the TIN in person.

(3) Coordination with solicitations under section 3406(a)(1)(b) [26 USCS § 3406(a)(1)(b)]

(i) A filer that has been notified of an incorrect TIN pursuant to section 3406(a)(1)(B) [26 USCS § 3406(a)(1)(B)] (except filers to which § 31.3406(d)-5(b)(4)(i)(A) of this chapter applies) will satisfy the solicitation requirement of this paragraph (f) only if it makes a solicitation in the manner and within the time period required under § 31.3406(d)-5(d)(2)(i) or (g)(1)(ii) of this chapter, whichever applies.

(ii) A filer that has been notified of an incorrect TIN by a notice pursuant to section 6721 [26 USCS § 6721] (except filers to which § 31.3406(d)-5(b)(4)(i)(A) of this chapter applies) is not required to make the annual solicitation of this paragraph (f) if —

(A) The filer has received an effective notice pursuant to section 3406(a)(1)(B) [26 USCS § 3406(a)(1)(B)] with respect to the same payee, either during the same

calendar year or for information returns filed for the same year; and

(B) The filer makes a solicitation in the manner and within the time period required under § 31.3406(d)-5(d)(2)(i) or (g)(1)(ii) of this chapter, whichever applies, before the filer is required to make the annual solicitation of this paragraph (f).

(iii) A filer that has been notified of an incorrect TIN by a notice pursuant to section 6721 [26 USCS § 6721] with respect to a fiduciary or nominee account to which § 31.3406(d)-5(b)(4)(i)(A) of this chapter applies is required to make the annual solicitation of this paragraph (f).

(4) Failures to which a solicitation relates. The initial solicitation relates to failures on returns filed for the year an account is opened and for any succeeding year that precedes the year in which the filer receives a notification of an incorrect TIN. The first and second annual solicitations relate to failures on returns filed for the year in which a notification of an incorrect TIN is received. The second solicitation also relates to failures on returns filed for succeeding calendar years.

(5) Exceptions and limitations. —

(i) The solicitation requirements under this paragraph (f) do not apply to the extent that an information reporting provision under which a return, as defined in § 301.6721-1(h), is filed provides specific requirements relating to the manner or the time period in which a TIN must be solicited. In that event, the requirements of this paragraph (f) will be satisfied only if the

filer complies with the manner and time period requirement under the specific information reporting provisions and this paragraph (f), to the extent applicable.

(ii) An annual solicitation is not required to be made for a year under this paragraph (f) with respect to an account if no payments are made to the account for such year or if no return as defined in § 301.6721-1(h) is required to be filed for the account for such year.

(iii) If a filer fails to make one (or more) of the required solicitations under paragraph (f)(1)(i), (ii), and (iii) of this section, the filer may satisfy the requirements of this section by:

(A) Making two consecutive annual solicitations in subsequent years ("make-up solicitations"), and

(B) Satisfying paragraph (f)(1)(iv) of this section.

For example, a filer who has made none of the required solicitations may satisfy the requirements of this section by making two consecutive solicitations. In determining whether a filer has made two consecutive solicitations, years to which paragraph (f)(5)(ii) of this section applies are disregarded. If a filer fails to make the initial solicitation under paragraph (f)(1)(i) of this section, the make-up solicitations described in this paragraph (f)(5)(iii) may be made in the years in which the first and second annual solicitations are required to be made; however, the penalty will apply with respect to the year in which the filer

failed to make the initial solicitation. The penalty will apply to failures in years in which a required solicitation is not made and to failures with respect to all subsequent years until the filer conducts its make-up solicitations. The penalty will not apply with respect to the year in which the first make-up solicitation is made (unless it is also the year in which the filer fails to make the initial solicitation) if the second make-up solicitation is made in the following year.

(iv) A financial institution is not required to make an annual solicitation by mail on accounts with "stop-mail" or "hold-mail" instructions, provided the filer furnishes the solicitation material to the payee in the same manner as it furnishes other mail.

(v) A filer is not required to make annual solicitations by mail on accounts with respect to which the filer has an undeliverable address, i.e., where other mailings to that address have been returned to the filer because the address was incorrect and no new address has been provided to the filer.

(vi) In general, except as provided in paragraph (f)(5) (i) and (iii) of this section, no more than two annual solicitations are required under this paragraph (f) in order for a filer to establish reasonable cause. However, a filer who complies with this paragraph (f) during a calendar year after receiving a notice under section 6721 [26 USCS § 6721] and who later during the same calendar year receives a

notice pursuant to section 3406 [26 USCS § 3406] may be required to undertake additional annual mailings in such calendar year pursuant to section 3406(a)(1)(B) [26 USCS § 3406(a)(1)(B)] in order to satisfy the annual solicitation requirement in paragraph (f)(3) of this section.

(g) Due diligence safe harbor —

(1) In general. A filer may establish reasonable cause with respect to a failure relating to an information reporting requirement as described in paragraph (j) of this section if the filer exercises due diligence with respect to failures described in sections 6721 through 6723. Paragraphs (g)(2) through (7) of this section provide special rules on the exercise of due diligence with respect to TINs for an exception to a penalty under sections 6721 through 6723 for—

(i) A failure to provide a correct TIN on any—

(A) Information return as defined in § 301.6721-1(h);

(B) Payee statement as defined in § 301.6722-1(e)(2) and (3); or

(C) Document as described in § 301.6723-1(a)(4); or

(ii) The failure merely to provide a TIN as described in § 301.6723-1(a)(4)(ii).

(2) General rule. A filer is not subject to a penalty for failure to provide the payee's correct TIN on an information return, if the payee has certified, under penalties of perjury, that the TIN provided to the filer was the payee's correct TIN, and the filer included such TIN on the information return before

being notified by the IRS (or a broker) that such TIN is incorrect.

(3) Due diligence defined for accounts opened and instruments acquired after December 31, 1983 —

(i) In general. For a filer of a reportable interest or dividend payment (other than in a window transaction) to be considered to have exercised due diligence in furnishing the correct TIN of a payee with respect to an account opened or an instrument acquired after December 31, 1983 (that is, an account or instrument that is not a pre-1984 account nor a window transaction), the filer must use a TIN provided by the payee under penalties of perjury on information returns filed with the IRS. Therefore, if a filer permits a payee to open an account without obtaining the payee's TIN under penalties of perjury and files an information return with the IRS with a missing or an incorrect TIN, the filer will be liable for the $250 penalty for the year with respect to which such information return is filed. However, in its administrative discretion, the IRS will not enforce the penalty with respect to a calendar year if the certified TIN is obtained after the account is opened and before December 31 of such year, provided that the filer exercises due diligence in processing such number, that is, the filer uses the same care in processing the TIN provided by the payee that a reasonably prudent filer would use in the course of the filer's business in handling account information such as account numbers and balances.

(ii) Notification of incorrect TIN. Once notified by the IRS (or a broker) that a number is incorrect, a filer is liable for the penalty for all prior years in which an information return was filed with that particular incorrect number if the filer has not exercised due diligence with respect to such years. A pre-existing certified TIN does not constitute an exercise of due diligence after the IRS or a broker notifies the filer that the number is incorrect unless the filer undertakes the actions described in § 31.3406(d)-5(d)(2)(i) of this chapter with respect to accounts receiving reportable payments described in section 3406(b)(1) and reported on information returns described in sections 6724(d)(1)(A)(i) through (iv).

(iii) Inadvertent processing. A filer described in this paragraph (g)(3) is liable for the penalty if the filer obtained a certified TIN for a payee but inadvertently processed the TIN or name incorrectly on the information return unless the filer exercised that degree of care in processing the TIN and name and in furnishing it on the information return that a reasonably prudent filer would use in the course of the filer's business in handling account information, such as account numbers and account balances.

(4) Instruments not transferred with assistance of broker —

(i) In general. If a filer files an information return with a missing or an incorrect TIN with respect to an instrument transferred without the assistance of a broker, the filer will be

considered to have exercised due diligence with respect to a readily tradable instrument that is not part of a pre-1984 account with the filer if the filer records on its books a transfer in which the filer was not a party. This paragraph (g)(4)(i) applies until the calendar year in which the filer receives a certified TIN from the payee.

(ii) Solicitation of TIN not required. A filer described in paragraph (g)(4)(i) of this section is not required to solicit the TIN of a payee of an account with a missing TIN in order to be considered as having exercised due diligence in a subsequent calendar year under the rule set forth in paragraph (g)(4)(i) of this section.

(iii) Payee provides incorrect TIN. If a payee provides a TIN (whether or not certified) to a filer described in paragraph (g)(4)(i) of this section who records on its books a transfer in which it was not a party, the filer is considered to have exercised due diligence under the rule set forth in paragraph (g)(4)(i) of this section if the transfer is accompanied with a TIN provided that the filer uses the same care in processing the TIN provided by a payee that a reasonably prudent filer would use in the course of the filer's business in handling account information, such as account numbers and account balances. Thus, a filer will not be liable for the penalty if the filer uses the TIN provided by the payee on information returns that it files, even if the TIN provided by the payee is later determined to be incorrect. However, a filer will not be considered as

having exercised due diligence under paragraph (g)(4)(i) of this section after the IRS or a broker notifies the filer that the number is incorrect unless the filer undertakes the required additional actions described in paragraph (g)(2) of this section.

(5) Filer incurred an undue hardship —

(i) In general. A filer of a post-1983 account or instrument is not liable for a penalty under section 6721(a) for filing an information return with a missing or an incorrect TIN if the IRS determines that the filer could have satisfied the due diligence requirements but for the fact that the filer incurred an undue hardship. An undue hardship is an extraordinary or unexpected event such as the destruction of records or place of business of the filer by fire or other casualty (or the place of business of the filer's agent who under a pre-existing written contract had agreed to fulfill the filer's due diligence obligations with respect to the account subject to the penalty and there was no means for the obligations to be performed by another agent or the filer). Undue hardship will also be found to exist if the filer could have met the due diligence requirements only by incurring an extraordinary cost.

(ii) Only IRS makes undue hardship determinations. A filer must obtain a determination from the IRS to establish that the filer satisfies the undue hardship exception to the penalty under section 6721(a) for the failure to include the correct TIN on an information return for the year with respect to

which the filer is subject to the penalty. A determination of undue hardship may be established only by submitting a written statement to the IRS signed under penalties of perjury that sets forth all the facts and circumstances that make an affirmative showing that the filer could have satisfied the due diligence requirements but for the occurrence of an undue hardship. Thus, the statement must describe the undue hardship and make an affirmative showing that the filer either was in the process of exercising or stood ready to exercise due diligence when the undue hardship occurred. A filer may request an undue hardship determination by submitting a written statement to the address provided with the notice proposing penalty assessment (for example, Notice 972CG) or the notice of penalty assessment (for example, CP15 or CP215), or as otherwise directed by the IRS in forms, instructions, or publications.

(6) Acquisitions of pre-1984 accounts or instruments —

(i) In general. A pre-1984 account or instrument of a filer that is exchanged for an account or instrument of another filer pursuant to a statutory merger of the other filer or the acquisition of the accounts or instruments of such filer is not transformed into a post-1983 account or instrument if the merger or acquisition occurs after December 31, 1983, because the exchange occurs without the participation of the payee.

(ii) Establishing due diligence was exercised for accounts or instruments. The acquiring taxpayer described in this paragraph (g)(6) may rely upon the business records and past procedures of the merged filer or the filer whose accounts or instruments were acquired in order to establish that due diligence has been exercised on the acquired pre-1984 and post-1983 accounts or instruments to avoid the penalty under section 6721(a) with respect to information returns that have been or will be filed.

(7) Limited reliance on certain pre-2001 rules. A filer may rely on the due diligence rules set forth in 26 CFR 35a.9999-1, 35a.9999-2, and 35a.9999-3 in effect prior to January 1, 2001 (see 26 CFR 35a.9999-1, 35a.9999-2, and 35a.9999-3, revised April 1, 1999), solely for the definitions of terms or phrases used in this paragraph (g).

(h) Reasonable cause safe harbor after election under section 6722(c)(3)(B). A filer may establish reasonable cause with respect to a failure relating to an information reporting requirement as described in paragraph (j) of this section under this paragraph (h) if the failure is a result of an election under § 301.6722-1(d)(3)(i) and the presence of a de minimis error or errors as described in sections 6721(c)(3) and 6722(c)(3) and §§ 301.6721-1(e) and 301.6722-1(d) on a filed information return or furnished payee statement. This paragraph (h) applies only if the safe harbor exceptions provided for by § 301.6721-1(e)(1) or § 301.6722-1(d)(1) would have applied, but for an election under § 301.6722-1(d)(3)(i). To establish reasonable cause and not willful neglect under this

paragraph (h), the filer must file a corrected information return or furnish a corrected payee statement, or both, as applicable, within 30 days of the date of the election under § 301.6722-1(d)(3)(i). Where specific rules provide for additional time in which to furnish a corrected payee statement and file a corrected information return, the 30-day rule does not apply and the specific rules will apply. See for example §§ 31.6051-1(c) through (d) and 31.6051-2(b). If the filer rectifies the failure outside of this 30-day period, the determination of reasonable cause will be on a case-by-case basis.