Rules and Regulations

Federal Register
Vol. 52, No. 225
Monday, November 23, 1987

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 154, 375, and 382

[Docket Nos. RM87-3-019, and RM87-3-020]

Annual Charges Under the Omnibus Budget Reconciliation Act of 1986

Issued November 16, 1987.

AGENCY: Federal Energy Regulatory Commission, DOE.

ACTION: Final rules; order granting rehearing solely for the purpose of further consideration.

SUMMARY: On September 16, 1987, the Federal Energy Regulatory Commission (Commission) issued an order on rehearing, amending its regulations concerning annual charges established pursuant to section 3401 of the Omnibus Budget Reconciliation Act of 1986. Several entities have filed petitions for rehearing of that order on rehearing. In this order, the Commission grants rehearing of its September 16 decision solely for the purpose of giving further consideration to the petitions for rehearing.

EFFECTIVE DATE: November 16, 1987.

FOR FURTHER INFORMATION CONTACT: Roland M. Frye, Jr., Office of the General Counsel, Producer Regulation Division, Federal Energy Regulatory Commission, 825 North Capitol Street NE., Washington, DC 20426, (202) 357-8308.

SUPPLEMENTARY INFORMATION:

Order Granting Rehearing Solely for the Purpose of Further Consideration

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C.M. Naeve.

On October 16, 1987, ANR Pipeline Company and Colorado Interstate Gas Company sought rehearing or clarification of the Commission's September 16, 1987, rehearing order in Docket Nos. RM87-3-002 through 018. On the same date, Central Illinois Public Service Company sought clarification of the same order. In order to afford additional time for consideration of the issues raised in these petitions, the Commission grants rehearing of the September 16, 1987, order for the purpose of further consideration. This order is effective on the date of issuance. This action does not constitute a grant or denial of a petition on its merits, either in whole or part. As provided in § 385.713 of the Commission's Rules of Practice, 18 CFR 385.713, no answers to this petition will be entertained by the Commission because this order does not grant rehearing on any substantive issue.

By the Commission.

Lois D. Cashell,
Acting Secretary.

[FR Doc. 87-26933 Filed 11-20-87; 8:45 am]

BILLING CODE 6717-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 442

[Docket No. 87N-0313]

Antibiotic Drugs; Ceftriaxone Sodium Injection

AGENCY: Food and Drug Administration.

ACTION: Final rule.

SUMMARY: The Food and Drug Administration (FDA) is amending the antibiotic drug regulations to provide for the inclusion of accepted standards for a new dosage form of ceftriaxone sodium, ceftriaxone sodium injection. The manufacturer has supplied sufficient data and information to establish its safety and efficacy.

DATES: Effective November 23, 1987; comments, notice of participation, and request for hearing by December 23, 1987; data, information, and analyses to justify a hearing by January 22, 1988.

ADDRESS: Written comments to the Dockets Management Branch (HFA-305), Food and Drug Administration, Rm. 4-62, 5600 Fishers Lane, Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Peter A. Dionne, Center for Drug Evaluation and Research (HFN-815), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-443-4290.

SUPPLEMENTARY INFORMATION: FDA has evaluated data submitted in accordance with regulations promulgated under section 507 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 357), as amended, with respect to a request for approval of a new dosage form of ceftriaxone sodium, ceftriaxone sodium injection. The agency has concluded that the data supplied by the manufacturer concerning this antibiotic drug and adequate to establish its safety and efficacy when used as directed in the labeling and that the regulations should be amended in 21 CFR Part 442 by adding new § 442.55, by redesignating § 442.255 as § 442.255a, and by adding new §§ 442.255 and 442.255b to provide for the inclusion of accepted standards for the product.

Enviromental Impact

The agency has determined under 21 CFR 25.24(c)(6) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

Submitting Comments and Filing Objections

This final rule announces standards that FDA has accepted in a request for approval of an antibiotic drug. Because this final rule is not controversial and because when effective it provides notice of accepted standards, notice and comment procedure and delayed effective date are found to be unnecessary and not in the public interest. This final rule, therefore, is effective November 23, 1987. However, interested persons may, on or before December 23, 1987, submit written comments to the Dockets Management Branch (address above). Two copies of any comments are to be submitted, except that individuals may submit one copy. Comments are to be identified with the docket number found in brackets in the heading of this document. Received comments may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

Any person who will be adversely affected by this final rule may file objections to it and request a hearing. Reasonable grounds for the hearing must be shown. Any person who decides to seek a hearing must file (1) on or before December 23, 1987, a written notice of participation and request for hearing, and (2) on or before January 22, 1988, the data, information, and analyses on which the person relies to justify a hearing, as specified in 21 CFR 314.300. A request for a hearing may not rest upon mere allegations or denials, but must set forth specific facts showing that there is a genuine and substantial issue of fact that requires a hearing. If it conclusively appears from the face of the data, information, and factual analyses in the request for hearing that no genuine and substantial issue of fact precludes this action taken by this order, or if a request for hearing is not made in the required format or with the required analyses, the Commissioner of Food and Drugs will enter summary judgment against the person(s) who request(s) the hearing, making findings and conclusions and denying a hearing. All submissions must be filed in three copies, identified with the docket number appearing in the heading of this order and filed with the Dockets Management Branch.

The procedures and requirements governing this order, a notice of participation and request for hearing, a submission of data, information, and analyses to justify a hearing, other comments, and grants or denial of a hearing are contained in 21 CFR 314.300.

All submissions under this order, except for data and information prohibited from public disclosure under 21 U.S.C. 331(j) or 18 U.S.C. 1905, may be seen in the Dockets Management Branch (address above) between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 442

Antibiotics.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, Part 442 is amended as follows:

PART 442—CEPHA ANTIBIOTIC DRUGS

1. The authority citation for 21 CFR Part 442 continues to read as follows:

Authority: Sec. 507, 59 Stat. 463 as amended (21 U.S.C. 357); 21 CFR 5.10.

2. Part 442 is amended by adding new § 442.55, by redesignating § 442.255 as § 442.255a, and by adding new §§ 442.255 and 442.255b, to read as follows:

§ 442.55 Ceftriaxone sodium.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Ceftriaxone sodium is the 5-thia-1-azabicyclo[4.2.0]oct-2-ene-2-carboxylic acid, 7-[[(2-amino-4-thiazolyl) (methoxyimino)acetyl]amino]-8-oxo-3-[[(1,2,5,6-tetrahydro-2-methyl-5,6-dioxo-1,2,4-triazin-3-yl)thio]methyl]-,disodium salt, [6*R*-[6*alpha*, 7*beta*(*Z*)]]-. It is so purified and dried that:

(i) Its ceftriaxone potency is not less than 795 micrograms of ceftriaxone per milligram on an anhydrous free acid basis.

(ii) Its moisture content is not less than 8 percent and not more than 11 percent.

(iii) The pH of an aqueous solution containing the equivalent of 100.0 milligrams per milliliter is not less than 6.0 and not more than 8.0.

(iv) It is crystalline.

(v) It gives a positive identity test for ceftriaxone.

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on the batch for ceftriaxone potency, moisture, pH, crystallinity, and identity.

(ii) Samples, if required by the Director, Center for Drugs and Biologics: 10 packages, each containing approximately 500 milligrams.

(b) *Tests and methods of assay*—(1) *Ceftriaxone potency.* Proceed as directed in § 442.55a(b)(1) of this chapter, except prepare the sample solution and calculate the micrograms of ceftriaxone free acid per milligram as follows:

(i) *Preparation of sample solution.* Dissolve an accurately weighed portion of the sample with sufficient water to obtain a concentration of 180 micrograms of ceftriaxone activity per milliliter. Prepare the sample solution just prior to its introduction into the chromatograph.

(ii) *Calculation.* Calculate the micrograms of ceftriaxone anhydrous free acid per milligram as follows:

$$\text{Micrograms of ceftriaxone anhydrous free acid per milligram} = \frac{A_u \times P_s}{A_s \times C_u}$$

Where:

A_u = Area of the ceftriaxone peak in the chromatogam of the sample (at a retention time equal to that observed for the standard);

A_s = Area of the ceftriaxone peak in the chromatogram of the ceftriaxone working standard;

P_s = Ceftriaxone activity in the ceftriaxone working standard solution in micrograms of anhydrous free acid per milliliter; and

C_u = Milligrams of sample per milliliter of sample solution.

(2) *Moisture.* Proceed as directed in § 436.201 of this chapter.

(3) *pH.* Proceed as directed in § 436.202 of this chapter, using an aqueous solution containing 100 milligrams per milliliter.

(4) *Crystallinity.* Proceed as directed in § 436.203(a) of this chapter.

(5) *Identity.* Proceed as directed in § 436.211 of this chapter, using a potassium bromide disc containing 1.3 milligrams of ceftriaxone sodium in 300 milligrams of potassium bromide, prepared as described in paragraph (b)(1) of that section.

§ 442.255 Ceftriaxone injectable dosage forms.

§ 442.255a [Redesignated from § 442.255]

§ 442.255b Ceftriaxone sodium injection.

(a) *Requirements for certification*—(1) *Standards of identity, strength, quality, and purity.* Ceftriaxone sodium injection is a frozen aqueous iso-osmotic solution of ceftriaxone sodium which may contain one or more suitable and harmless buffer substances. Each milliliter contains ceftriaxone sodium equivalent to 10, 20, or 40 milligrams of ceftriaxone per milliliter. Its ceftriaxone content is satisfactory if it is not less than 90 percent and not more than 115 percent of the number of milligrams of ceftriaxone that it is represented to contain. It is sterile. It is nonpyrogenic. Its pH is not less than 6.0 and not more than 8.0. It passes the identity test. The ceftriaxone sodium used conforms to the standards prescribed by § 442.55(a)(1).

(2) *Labeling.* It shall be labeled in accordance with the requirements of § 432.5 of this chapter.

(3) *Requests for certification; samples.* In addition to complying with the requirements of § 431.1 of this chapter, each such request shall contain:

(i) Results of tests and assays on:

(A) The ceftriaxone sodium used in making the batch for potency, moisture, pH, crystallinity, and identity.

(B) The batch for content, sterility, pyrogens, pH, and identity.

(ii) Samples, if required by the Director, Center for Drugs and Biologics:

(A) The ceftriaxone sodium used in making the batch: 10 packages, each containing 500 milligrams.

(B) The batch:

(*1*) For all tests except sterility: A minimum of 10 immediate containers.

(*2*) For sterility testing: 20 immediate containers, collected at regular intervals throughout each filling operation.

(b) *Tests and methods of assay.* Thaw the sample as directed in the labeling. The sample solution used for testing must be at room temperature.

(1) *Ceftriaxone content.* Proceed as directed in § 442.55a(b)(1) of this chapter, except prepare the sample solution and calculate the ceftriaxone content as follows:

(i) *Preparation of sample solution.* Using a suitable hypodermic needle and syringe, remove an accurately measured representative portion from each container immediately after thawing and reaching room temperature and dilute with mobile phase to obtain a solution containing 180 micrograms of ceftriaxone per milliliter (estimated). Prepare the sample solution just prior to its introduction into the chromatograph.

(ii) *Calculation.* Calculate the milligrams of ceftriaxone anhydrous free acid per milliliter of sample as follows:

$$\text{Milligrams of ceftriaxone anhydrous free acid per milliliter} = \frac{A_u \times P_s \times d}{A_s \times 1{,}000}$$

where:

A_u=Area of the ceftriaxone peak in the chromatogram of the sample (at a retention time equal to that observed for the standard);

A_s=Area of the ceftriaxone peak in the chromatogram of the ceftriaxone working standard;

P_s=Ceftriaxone activity in the ceftriaxone working standard solution in micrograms of anhydrous free acid per milliliter; and

d=Dilution factor of the sample.

(2) *Sterility.* Proceed as directed in § 436.20 of this chapter, using the method described in paragraph (e)(1) of that section.

(3) *Pyrogens.* Proceed as directed in § 436.32(a) of this chapter, except inject a sufficient volume of the undiluted solution to deliver 40 milligrams of ceftriaxone per kilogram.

(4) *pH.* Proceed as directed in § 436.202 of this chapter, using the undiluted solution.

(5) *Identify.* The high-performance liquid chromatogram of the sample determined as directed in paragraph (b)(1) of this section compares qualitatively to that of the ceftriaxone working standard.

Dated: November 10, 1987.

Daniel L. Michels,

Director, Office of Compliance, Center for Drug Evaluation and Research.

[FR Doc. 87-26924 Filed 11-20-87; 8:45 am]

BILLING CODE 4160-01-M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 203, 221, 234, 251, and 575

[Docket No. N-87-1756]

Refinancing of FHA Insured Single Family Mortgages, Multifamily Leasehold Projects, and Emergency Shelter Grants Program; Announcement of Effective Dates

AGENCY: Office of the Assistant Secretary for Housing—Federal Housing Commissioner and Office of the Assistant Secretary for Community Planning and Development.

ACTION: Notice of announcement of effective dates for certain recent final rules.

SUMMARY: Section 7(o)(3) of the Department of Housing and Urban Development Act (42 U.S.C. 3535(o)(3)), requires HUD to wait until the first period of 30 calendar days of continuous session of Congress occurring after the rules' publication. This notice announces the effective date for certain recently published final rules. Accordingly, HUD stated that it would publish a notice of the effective date of the final rules following expiration of the 30-session-day waiting period. HUD also stated that whether or not the statutory waiting period had expired, the rules would not become effective until a separate notice was published in the **Federal Register** announcing the effective date. For an explanation of subject matter on the rules, see "SUPPLEMENTARY INFORMATION".

EFFECTIVE DATES: For effective dates see "SUPPLEMENTARY INFORMATION".

FOR FURTHER INFORMATION CONTACT: Grady J. Norris, Assistant General Counsel for Regulations, Department of Housing and Urban Development, Room 10276, 451 7th Street SW., Washington, DC 20410, telephone no. (202) 755-7055. (This is not a toll-free number.)

SUPPLEMENTARY INFORMATION: The effective date provision of the published rules stated that the rules would become effective following expiration of the first period of the 30-session-day waiting period. Thirty calendar days of continuous session of Congress have or will have expired on the respective dates listed below.

Accordingly, the purpose of this notice is to announce the effective dates for the rules listed below:

24 CFR Parts 203 and 234: Refinancing of FHA Insured Single Family Mortgages, Final Rule published October 6, 1987 (52 FR 37286); Docket No. R-87-1296; FR-2197. Effective Date: November 6, 1987.

24 CFR Parts 221, 234 and 251: Multifamily Leasehold Projects; Minimum Lease Term Eligibility, Final Rule published October 6, 1987 (52 FR 37288); Docket No. R-87-1339; FR-2222. Effective Date: November 6, 1987.

24 CFR Part 575: Emergency Shelter Grants Program, Final Rule published October 19, 1987 (52 FR 38864): Docket No. R-87-1316; FR-2298. Effective Date: December 2, 1987.

Authority: Section 7(d), Department of Housing and Urban Development Act (42 U.S.C. 3535(d)).

Dated: November 18, 1987.

Donald A. Franck,

Acting, Assistant General Counsel for Regulations.

[FR Doc. 87-26944 Filed 11-20-87; 8:45 am]

BILLING CODE 4210-27-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 35a

[T.D. 8163]

Imposition of Backup Withholding Due to Notification of an Incorrect Taxpayer Identification Number and the Due Diligence Exception to the Imposition of a Penalty for a Missing or an Incorrect Taxpayer Identification Number

AGENCY: Internal Revenue Service, Treasury.

ACTION: Temporary regulations.

SUMMARY: This document provides temporary regulations that relate to backup withholding on any reportable payment when the Internal Revenue Service notifies the payor or broker to backup withhold due to an incorrect taxpayer identification number. Changes to the applicable tax law were made by the Interest and Dividend Tax Compliance Act of 1983 and the Tax Reform Act of 1986. These regulations affect payors, brokers, and payees of certain reportable payments and provide them with the guidance necessary to comply with the law. These regulations explain when a payor of

such reportable payments must backup withhold due to notification of an incorrect taxpayer identification number, provide a definition of an incorrect taxpayer identification number, and explain how a payee may correct his taxpayer identification number to avoid the imposition of backup withholding due to an incorrect taxpayer identification number.

This document also provides additional guidance to payors of reportable interest or dividend payments with respect to the due diligence exception to the imposition of a penalty for failing to furnish a taxpayer identification number or for furnishing an incorrect taxpayer identification number on an information return filed with the Internal Revenue Service.

DATES: The regulations apply generally to reportable payments made after December 31, 1983, and information returns filed after December 31, 1984. However, the requirements of § 35a.3406–1 as added by these regulations are not effective until January 1, 1988. Thus, a payor is only required to notify payees and backup withhold on payee accounts as required by these regulations if the payor receives a notice of an incorrect taxpayer identification number from the Internal Revenue Service on or after January 1, 1988.

FOR FURTHER INFORMATION CONTACT: Renay France of the Legislation and Regulations Division, Office of the Chief Counsel, Internal Revenue Service, 1111 Constitution Avenue, N.W., Washington, D.C. 20224 (Attention: CC:LR:T) (202–566–3829, not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains temporary regulations relating to the requirement that a payor or broker backup withhold 20 percent from any reportable payment under section 3406(a)(1)(B) of the Internal Revenue Code of 1986. This provision was added to the Code by section 104 of the Interest and Dividend Tax Compliance Act of 1983 (Pub. L. 98–67, 97 Stat. 369, 371). This document also contains temporary regulations relating to due diligence requirements under section 6676 (b) of the Code as amended by section 105 of the Act (Pub. L. 98–67, 97 Stat. 369, 380).

On October 4, 1983, the **Federal Register** published Temporary Employment Tax Regulations under the Interest and Dividend Tax Compliance Act of 1983 (26 CFR Part 35a) under sections 3406 and 6676 (b) of the Internal Revenue Code of 1954 (26 CFR Part 35a.9999–1; T.D. 7916, 48 FR 45362, as amended on November 25, 1983, by T.D. 7922, 48 FR 53111). Additional temporary regulations were published in the **Federal Register** on November 25, 1983 (26 CFR Part 35a.9999–2; T.D. 7922, 48 FR 53106, as amended on December 20, 1983, by T.D. 7929, 48 FR 56342, and on March 13, 1984, by T.D. 7922, 49 FR 9417), on December 20, 1983 (26 CFR Part 35a.9999–3; T.D. 7929, 48 FR 56330, as amended on January 3, 1984, by T.D. 7933, 49 FR 63, and on August 22, 1984, by T.D. 7966, 49 FR 33236), on February 28, 1984 (26 CFR Part 35a.9999–3A; T.D. 7946, 49 FR 7227), on August 22, 1984 (26 CFR Part 35a.9999–4T, T.D. 7966, 49 FR 33237, as amended on August 29, 1984, by T.D. 7972, 49 FR 34340; and 26 CFR Part 35a.9999–5; T.D. 7967, 49 FR 33240, as amended on September 19, 1984, by T.D. 7973, 49 FR 36645, on August 20, 1985, by T.D. 8046, 50 FR 33526, on April 3, 1986, by T.D. 8046, 51 FR 11447, on December 19, 1986, by T.D. 8110, 51 FR 45453), and on April 23, 1987 (26 CFR Part 35a.3406–2; T.D. 8137, 51 FR 13430). Those regulations were published primarily to provide guidance under the Interest and Dividend Tax Compliance Act of 1983.

Under this document § 35a.3406–1 is no longer reserved and is added to 26 CFR Part 35a, Temporary Employment Tax Regulations under the Interest and Dividend Tax Compliance Act of 1983. Section 35a.3406–1 will contain the temporary regulations in this document, issued under section 3406 (a)(1)(B), and will remain in effect until superseded by final regulations on this subject.

This document also adds additional questions and answers to § 35a.9999–1 and § 35a.9999–3 concerning the due diligence requirements under section 6676(b) which were published in the **Federal Register** on October 4, 1983 (26 CFR Part 35a.9999–1; T.D. 7916, 48 FR 45362) and on December 20, 1983 (26 CFR Part 35a.9999–3; T.D. 7929, 48 FR 56330). These questions and answers also will remain in effect until superseded by final regulations on this subject.

These temporary regulations are necessary to provide immediate guidance to payors, brokers, and payees when there is notification of an incorrect taxpayer identification number. The Internal Revenue Service intends to publish a notice of proposed rulemaking in the **Federal Register** in the near future that will provide comprehensive rules regarding backup withholding. Generally, the pertinent provisions of all the temporary regulations with respect to backup withholding will be incorporated in the notice of proposed rulemaking. The notice of proposed rulemaking will provided the public an opportunity to comment on the regulations.

Explanation of Provisions

The temporary regulations provide guidance concerning the backup withholding process when the payee furnishes a taxpayer idenfification number (hereafter, "TIN") to the payor, and the payor is subsequently notified by the Internal Revenue Service or by a broker that the number is incorrect. In general, payments subject to backup withholding due to an incorrect TIN are payments required to be shown on information returns under section 6049(a) (relating to returns regarding payments of interest), 6042(a) (relating to returns regarding payments of interest), 6042(a) (relating to returns regarding payments of dividends and corporate earnings and profits), 6041 (relating to information at source), section 6041A(a) (relating to returns regarding payments of remuneration for services and direct sales), section 6044 (relating to returns regarding payments of patronage dividends), section 6045 (relating to returns of brokers), section 6050A (relating to reporting requirements of certain fishing boat operators), and 6050N (relating to returns regarding payments of royalties), hereinafter "reportable payments." Some reportable payments described in the preceding sentence are not subject to backup withholding under section 3406(a)(1)(B) under certain circumtances are described in the regulations in this document.

Definition of an Incorrect TIN

A payee will be subject to backup withholding under section 3406(a)(1)(B) if the Service or a broker notifies a payor that the TIN furnished by the payee is incorrect. The Service will determine that a payee provided an incorrect TIN if either the name or number provided on an information return filed with respect to the payee does not match the name and associated number on the records of the Social Security Administration or the Service at the time the Internal Revenue Service determines if the number is correct.

Notice to Payors and Brokers Regarding Backup Withholding

The Service will notify payors and brokers that the payee is subject to backup withholding due to an incorrect taxpayer identification number. The form of the notice that the Service will send to a payor or broker is set forth in the Appendix to these temporary regulations. If a payor receives notification from the Service or a broker that a payee provided an incorrect TIN and if at the time of such notice that incorrect TIN is reflected on a payee's account with the payor or will be used by the payor on information returns filed with the Service with respect to the payee, the payor must send a copy of the notice or a substitute notice to the payee within 5 business days after the date the payor receives the notice from the Service or a broker. The notice generally will inform the payee that the payor has been notified that the TIN furnished by the payee is incorrect and will advise the payee that backup withholding may apply to reportable payments made to him unless he provides his current surname and TIN under penalties of injury to the payor within 30 business days.

The payor must also include with this notice a reply envelope (self-addressed) which may, but is not required to, be postage prepaid, and a Form W-9 or acceptable substitute form on which the payee may certify, under penalties of perjury, that he is furnishing his correct TIN to the payor.

A broker who receives notice from the Service that a payee is subject to backup withholding under section 3406(a)(1)(B) and through whom the payee subsequently acquires a readily tradable instrument as defined in section 3406(h)(6) with respect to which the broker is not the payor is required to notify the payor of that instrument that the payee is subject to backup withholding under section 3406(a)(1)(B). The broker is required to give this information to the payor in connection with the transfer instructions for the acquisition. See A-41 of § 35a.9999-1 for the time and manner in which the broker is required to provide this information to the payor. Upon receiving the notice from a broker, a payor is required to notify the payee and to begin backup withholding under the same rules that apply to payors who receive a notice from the Service to begin backup withholding under section 3406(a)(1)(B).

If the payee timely provides a certified Form W-9 pursuant to the notice of the incorrect TIN, backup withholding will not commence on the account or will cease if the payor has already imposed backup withholding on the account under 3406(e)(5)(A). The payor must use the name and certified TIN provided by the payee on the Form W-9 on subsequent information returns required to be made with respect to the payee.

If the payee does not furnish another Form W-9 to the payor within the prescribed period, the payor must begin withholding on (1) any reportable payment made after the close of the 30th business day after the day the payor received notification from the Service or a broker that the payee provided an incorrect TIN and (2) any withdrawal that occurs after the close of the 7th business day after the day the payor received notification that the payee provided an incorrect TIN to the extent of reportable payments made to the payee after the date the payor received such notification and before the earlier of (1) the close of the 30th business day after the day the payor received notification of an incorrect TIN, (2) the date the payor receives a new certified TIN from the payee, or (3) the date of the withdrawal. For purposes of the preceding sentence all cash withdrawals in an amount up to the amount of reportable payments made during such period are treated as reportable payments.

After receiving notification of the incorrect TIN, the payor may elect, however, to begin backup withholding on reportable payments made at any time during the 30-business-day period unless backup withholding is required on a withdrawal as described in the preceding paragraph. Backup withholding applies to all existing accounts or instruments making reportable payments that a payor can locate using reportable payments that a payor can locate using reasonable care if the incorrect TIN is used on such accounts or instruments.

Backup withholding will continue until the payor receives a Form W-9 from the payee. The payor must stop backup withholding under section 3406(a)(1)(B) within 30 calendar days of receiving a Form W-9 from the payee. The payor, however, may elect to treat the TIN as having been received at any time within the 30-calendar-day period. The payee still may be subject to backup withholding if other provisions of section 3406(a)(1) require backup withholding.

The procedures and the backup withholding requirements described in the above paragraphs are effective only with respect to a notice of an incorrect TIN issued by the Service on or after January 1, 1988.

Two Notices of an Incorrect TIN Within 3 Calendar Years

If a payor receives two notifications of an incorrect TIN with respect to a payee, and if the payor is still using that second incorrect TIN with respect to reportable payments made to the payee, the payor must send a notice to the payee informing him that the payor must impose backup withholding on all reportable payments made on accounts or instruments for which that incorrect TIN is being used and must ignore any further TINs received from the payee for all existing accounts of the payee until the payor is notified by the Service that the payee has provided a correct TIN. Payors are responsible for determining whether they have received two notices within 3 calendar years. A notice of an incorrect TIN issued by the Service prior to January 1, 1988, shall not be considered in determining whether a payor has received two notices of an incorrect TIN with respect to a payee within 3 calendar years. Further, only those notices issued by the Service on or after January 1, 1990, shall be counted as the second of two notices of an incorrect TIN with respect to a payee within 3 calendar years. Thus, a notice issued by the Service in 1988 or 1989 will be counted as the first notice even though a payor may have received a notice in both years with respect to the same payee. Additionally, even though a payor receives two or more notices in the same calendar year with respect to a payee, those notices will be treated as one notice for that calendar year.

Miscellaneous

Payors are required to remit to the Service amounts withheld under section 3406(a)(1)(B) in the same manner as other backup withholding under section 3406(a)(1). See A-47 of § 35a.9999-1 for requirements relating to remitting to the Service amounts withheld under section 3406.

These regulations also explain how backup withholding applies, describe the manner in which the payee must furnish a TIN, and provide guidance on other procedural and miscellaneous issues.

Due Diligence

These regulations provide guidance concerning the rules under which a payor will be considered to have exercised due diligence in attempting to comply with his obligation to obtain and provide correct TINs to the Service.

Due Diligence Before Notification of an Incorrect TIN

(1) Due Diligence Requirements for Pre-1984 Accounts or Instruments

A payor will be treated as having exercised due diligence for his pre-1984 accounts or instruments (as defined in A-34 of § 35a.9999-1) if at least annually the payor solicits a TIN from the payee for whom the payor does not have a TIN provided under penalties of perjury. Generally, these mailings must meet the requirements of A-5 and A-6 and the related questions and answers on due diligence under § 35a.9999-1.

Some payors have questioned whether a return envelope is required in the nonseparate annual mailing which must be made for years after 1983 for pre-1984 accounts and instruments with respect to those payees who have not provided a certified TIN. These regulations clarify that a reply envelope (self-addressed) is required to be included in the annual mailing, but no penalties will be assessed against payors for failure to provide an reply envelope in nonseparate annual mailings made before January 1, 1988. Further, the failure to include the envelope in the mailing shall not be taken into account in determining whether a payor has exercised due diligence on the particular account in a subsequent calendar year.

Questions also have arisen concerning a TIN that is determined to be incorrect as a result of a human, clerical, or processing error (collectively defined as a "processing error"). Specifically, the question is whether a processing error is a defense to the penalty under section 6676(b). The regulations make clear that a penalty will be imposed for a processing error unless the payor has satisfied all the due diligence criteria set forth in § 35a.9999–1. The due diligence criteria require, in part, that the payor must use the same care in processing TINs that a reasonably prudent payor would use in the course of his business in handling account information, such as account numbers and account balances. Correlatively, a payor who otherwise satisfies the due diligence criteria but does not exercise care in processing TINs will be liable for the $50 penalty for each information return filed with an incorrect TIN as a result of the processing error. Of course, payors who did not undertake due diligence are liable for the penalty whether or not the TIN is incorrect due to a processing error.

Many payors of pre-1984 accounts or instruments have inquired how they can exercise due diligence with respect to those accounts or instruments for which they do not have a certified TIN if they missed one or more of the prescribed mailings or failed to follow properly the mailing procedures under A-5 and A-6 and under the related questions and answers on due diligence under § 35a.9999–1. These temporary regulations reiterate the rule provided in the earlier temporary regulations that a $50 penalty will be imposed on payors for each information return filed with an incorrect TIN or a missing TIN for which there is not a valid awaiting-TIN certification unless the payor (1) satisfied the cumulative due diligence requirements set forth in A-5 and A-6 of § 35a.9999–1 (and the related questions and answers on due diligence) for the account or instrument with respect to which an information return was filed with an incorrect or an missing TIN or (2) received a certified TIN from the payee and used it on information returns filed with respect to that payee for the calendar year subject to the penalty. (See the next topical heading which describes the requirement for obtaining prospective relief from the penalty for those payors who did not comply with the requirements set forth in A-5 and A-6 and in the related questions and answers under § 35a.9999–1 and who have not obtained a certified TIN with respect to such pre-1984 accounts or instruments.)

Thus, for example, if a payor receives notice from the Service in 1988 that an information return was filed in 1986 with an incorrect TIN, the payor is liable for the penalty for all information returns previously filed with that incorrect TIN unless the payor had a certified TIN from the payee at the time the information return was filed and used that number on the information return or made the mailings in the time and manner required by A–5 and A–6 and by the related questions and answers on due diligence under § 35a.9999–1. Except as provided below, payors who were required but failed to properly make the mailings with respect to accounts or instruments for which the payor does not have a certified taxpayer identification number are subject to penalties for any year with respect to which they file an information return with an incorrect or missing taxpayer identification number whether or not the payor made the mailings at a later date or imposed backup withholding on the payee.

(2) Prospective Relief Administrative Discretion

Even though a payor may have failed to undertake the mailings as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1, in its administrative discretion the Service will not enforce the penalty with respect to information returns filed for the 1988 or subsequent calendar years with a missing or an incorrect TIN under the following circumstances: First, the payor must have sent a separate mailing by June 30, 1988, to *all* payees of pre-1984 accounts and instruments who have not provided a certified taxpayer identification number to the payor. Second, the payor must have sent nonseparate mailings requesting the certified taxpayer identification number by December 31 of each year subsequent to the year of the separate mailing to payees who have not by that time provided their certified taxpayer identification numbers. Third, if the payee has provided no taxpayer identification number or one which is obviously incorrect (*e.g.*, contains an incorrect number of digits), the payor must have commenced backup withholding on payments made after December 31, 1983. Fourth, the payor must use the same care in processing taxpayer identification numbers provided by payees that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

In addition, in order to receive administrative relief, each year a payor must make an affirmative showing to the satisfaction of the district director or director of the Internal Revenue Service Center that the person otherwise liable for such penalty fulfilled the above requirements or the mailings in § 35a.3406–1 (c) or (f)(2) of these regulations if applicable, with respect to the calendar year in question. A description of the rules for obtaining this relief is set forth in Q/A–56 of § 35a.9999–1.

(3) Due Diligence Requirements for Post-1983 Accounts

In general, a payor of an account or instrument that is a post-1983 account (as described in A–34 and A–41 of § 35a.9999–1) must obtain a certified TIN from the payee at the time the account is opened in order to satisfy due diligence. The Service believes that a certified TIN can be obtained most easily and efficiently at the time the account is opened. Thus, if a payor permits a payee to open an account or acquire an instrument without obtaining a certified TIN from the payee and an information return is filed by the payor with a missing or incorrect TIN, the payor will be liable for a penalty whether or not the payor backup withheld on the account.

These regulations also amplify the few limited circumstances in which due diligence may be shown by the payor in the absence of obtaining a certified TIN from the payee at the time the account is opened. These include cases where the payor used a TIN provided by a broker, cases in which a payor records on its books a transfer to which the payor was not a party, cases in which the payee provides the payor with an awaiting-TIN certification as discussed below, and cases in which the payor could have exercised due diligence only by incurring undue hardship. Generally, undue hardship is an extraordinary cost or unexpected event such as the destruction of records or place of business by fire or other casualty. Thus, the Service anticipates that only in exceptional circumstances will there be an undue hardship preventing a payor from obtaining or reporting a certified TIN on an information return.

These regulations clarify the rules regarding how a payor may satisfy due diligence when the payee provides an awaiting-TIN certification but fails to provide a certified TIN within 60 days. If a payor obtains an awaiting-TIN certification in 1984, 1985, 1986, or 1987, in the manner provided in A-18 of § 35a.9999-2, the payor will be considered to have exercised due diligence by backup withholding on reportable payments made to the payee after the 60-day period if the payee fails to provide a certified TIN by that time. These regulations also provide that an awaiting-TIN certification received in 1984, 1985, 1986, or 1987 (hereinafter a "pre-1988 awaiting-TIN certification") shall become null and void on the later of 60 days after the day the awaiting-TIN certification is received or January 1, 1988, unless the payor (1) continues to backup withhold on reportable payments made to the account and (2) sends an annual mailing to the payee similar to the mailing described in A-5 and A-6 in the related questions and answers on due diligence under § 35a.9999-1 by December 31, of each calendar year until a certified TIN is received from the payee or the account is closed.

Different rules apply for awaiting-TIN certifications that are not pre-1988 awaiting-TIN certifications. A payor who receives an awaiting-TIN certification from a payee in 1988 or a subsequent calendar year must obtain a certified TIN from the payee within the 60-day period to show due diligence. In addition, to exercise due diligence the payor must backup withhold on any withdrawal during the 60-day period that occurs after the close of the 7th calendar day after the day the payor receives the certification to the extent of reportable payments made after the day the certification is received and before the earlier of (1) the date a certified TIN is received, (2) the end of the 60-day period, or (3) the date of withdrawal. For purposes of the preceding sentence all cash withdrawals in an amount up to the amount of reportable payments made during such period are treated as reportable payments.

In no certified TIN is provided by the payee within the 60-day period described above and the payor thereafter files an information return with respect to the payee, the payor will be liable for the penalty regardless of whether the payor imposed backup withholding on the payee after the 60-day period. The payor may close the account at the end of the 60-day period in order to avoid the penalty. A payor who closes an account because a payee fails to provide a certified TIN will not be in violation of the Internal Revenue Code. See Q-A-48 of § 35a.9999-1.

Due Diligence Following Notification of the First Incorrect TIN

If, on or after January 1, 1988, a payor is notified that he filed an information return with an incorrect TIN (for either pre-1984 or post-1983 accounts or instruments) and the payor continues to use that same incorrect number on the account, the payor must satisfy additional requirements in order to demonstrate due diligence for years beginning in the year he was notified. First, the payor must be exercising due diligence (or complying with the requirements for administrative relief under A-56 of § 35a.9999-1) at the time the payor receives notification of an incorrect TIN as decribed above. Second, the payor must send the notice prescribed in § 35a.3406-1(b)(1) or an acceptable substitute notice to the payee within 5 business days after the date the payor receives the notice of the incorrect TIN. Third, the payor must continue to send this notice (and not the notice described in A-5 and A-6 (or A-56) of § 35a.9999-1 by December 31 of each year to a payee who has not by that time responded to the notice by returning a certified From W-9 to the payor. Fourth, in the case of a payee who responds to the notice by providing a certified Form W-9, within 30 calendar days after receiving the certified Form W-9 from the payee the payor must use the name and TIN provided by the payee on a new Form W-9 on all subsequent information returns relating to that payee filed with the Service.

Due Diligence Following Notification of the Second Incorrect TIN

If, on or after January 1, 1988, a payor receives two notifications of an incorrect TIN within 3 calendar years (for either pre-1984 or post-1983 accounts) with respect to a payee and the payor continues to use that same incorrect number on the account of a payee, the payor must satisfy additional requirements to exercise due diligence for years beginning in the year he is notified. First, the payor must be exercising due diligence at the time the payor receives notification of an incorrect TIN. Second, the payor must send the notice prescribed in § 35a.3406-1(f) to the payee and code any information return that is filed with that incorrect TIN with the words "2nd notice." With respect to information returns so coded, the Service will not continue to notify payors that the payee provided an incorrect TIN. See the heading, "Two Notices of an Incorrect TIN within 3 calendar years", in this preamble for the circumstances under which a notice will be counted as the second of two notices within 3 calendar years.

Non-Applicability of Executive Order 12291

The Commissioner has determined that these temporary regulations are not a major rule subject to review under Executive Order 12291 and that a regulatory impact analysis, therefore, is not required.

Regulatory Flexibility Analysis

A general notice of proposed rulemaking is not required by 5 U.S.C. 553 for temporary regulations. Accordingly, the temporary regulations do not constitute regualtions subject to the Regulatory Flexibility Act (5 U.S.C. chapter 6).

Paperwork Reduction Act

The collection-of-information requirements contained in these regulations have been submitted to the Office of Management and Budget in accordance with the requirements of the Paperwork Reduction Act of 1980. These requirements have been approved by OMB under control number 1545-0969.

Drafting Information

The principal author of these regulations is Renay France of the Legislation and Regulations Division of the Office of Chief Counsel, Internal Revenue Service. Personnel from other offices of the Internal Revenue Service and Treasury Department participated, however, in developing the regulations, on matters of both substance and style.

List of Subjects in 26 CFR Part 35a

Employment taxes, Income taxes, Backup withholding, Interest and Dividend Tax Compliance Act of 1983.

Accordingly, 26 CFR Part 35a is amended as follows:

PART 35a—TEMPORARY EMPLOYMENT TAX REGULATIONS UNDER THE INTEREST AND DIVIDEND TAX COMPLIANCE ACT OF 1983

Paragraph 1. The authority for Part 35a continues to read in part:

Authority: 26 U.S.C. 7805. * * * Section 35a.3406–1 also issued under 26 U.S.C. 3406 (a), (b), (e), (g), (h), and (i); 26 U.S.C. 6109; and 26 U.S.C. 6676.

Par. 2. The heading for § 35a.3406–1 is revised and text is added thereto to read as follows:

§ 35a.3406–1 Imposition of backup withholding due to notification of an incorrect taxpayer identification number.

(a) *Requirement that a payor backup withhold due to notification of an incorrect taxpayer identification number*—(1) *In general.* Except as otherwise provided in paragraph (a)(3) of this section, backup withholding under section 3406(a)(1)(B) applies to any reportable payment (as defined in section 3406(b) and paragraph (a)(2) of this section) made to an account (as defined in paragraph (a)(7) of this section) of a payee if, after December 31, 1987, the Internal Revenue Service or a broker (as defined in section 3406(h)(5) and pursuant to section 3406(d)(2)(B)(ii)(II)) notifies a payor (as defined in section 3406(h)(4)) that the payee's taxpayer identification number is incorrect (as defined in paragraph (a)(6) of this section) and such incorrect taxpayer identification number is used with respect to such account of the payee. The payor is required under section 3406(h)(8) and paragraph (c) of this section to send a copy of the notice received by the payor (from the Internal Revenue Service or a broker) to inform the payee that he has furnished an incorrect taxpayer identification number and that, as a result, he may be subject to backup withholding under section 3406(a)(1)(B). The requirements for the notice that a payor must send to a payee are set forth in paragraph (c)(3) of this section. An example of the notice required by paragraph (c)(3) is set forth in the Appendix to this section. The period for which backup withholding applies due to notification of an incorrect taxpayer identification number is described in paragraph (d) of this section. See paragraph (e) of this section for the rules regarding how a payee may prevent backup withholding from starting or to stop it once it has begun. See paragraph (f) of this section for the applicable rules when the Internal Revenue Service or a broker notifies a payor twice within 3 calendar years that a payee has furnished an incorrect taxpayer identification number. See section 6676 for the penalty that may be imposed on a payor for providing an incorrect or a missing taxpayer identification number on an information return filed with the Internal Revenue Service unless, in the case of reportable interest and dividend payments as defined in section 3406(b)(2), the payor has exercised due diligence (or complied with the rules under A–56 of § 35a.9999–1 to obtain administrative relief from the penalty or comes within a due diligence exception) or, in the case of other reportable payments as defined in section 3406(b)(3) the payor has exercised reasonable care. See the questions and answers in § 35a.9999–3 for the actions that a payor must take to exercise due diligence after being notified of an incorrect taxpayer identification number.

(2) *Definition of reportable payment*—(i) *In general.* See section 3406(b), and the questions and answers under §§ 35a.9999–1, 35a.9999–2, 35a.9999–3A, and 35a.9999–5 for the definition of a reportable payment.

(ii) *Exceptions.* The following payments are not "reportable payments" for purposes of section 3406(a)(1)(B):

(A) *Section 6041(a) or section 6041A(a) payments.* Payments described in sections 6041(a) and 6041A(a) are not treated as reportable payments for purposes of backup withholding under section 3406(a)(1)(B) if reportable payments to the payee—

(*1*) Are less than $600 in the aggregate during the calendar year;

(*2*) The payor was not required to file an information return under section 6041(a) or 6041A(a) with respect to that payee for the preceding calendar year; and

(*3*) The payor was not required to impose backup withholding on payments made to the payee as described in section 6041(a) or 6041A(a) during the preceding calendar year.

See Code section 3406(b)(6), A–11 of § 35a.9999–2, and A–13, A–14, A–15, A–16, A–17, A–18, and A–19 of § 35a.9999–3 for more information on amounts subject to information reporting under sections 6041(a) and 6041A(a).

(B) *Patronage Dividends.* Payments of patronage dividends as described in section 3406(b)(2)(A)(iii) are not treated as reportable interest or dividend payments for purposes of backup withholding under section 3406(a)(1)(B) unless the payment is in money.

(C) *Section 6050A payments.* Payments under section 6050A are treated as reportable payments for purposes of backup withholding under section 3406(a)(1)(B) only to the extent such payments are in money and represent a share of the proceeds of the catch.

(D) *Window payments.* Window payments as defined in A–42 of § 35a.9999–1 and A–9 of § 35a.9999–2 are not treated as reportable payments for purposes of backup withholding under section 3406(a)(1)(B).

(3) *Reportable payments excluded from backup withholding.* The following reportable payments are not subject to backup withholding under section 3406(a)(1)(B):

(i) *Certain dividends.* Certain reportable dividend payments as defined in A–9 of § 35a.9999–3.

(ii) *Certain section 6041(a) and 6041A(a) payments.* Certain section 6041(a) and 6041A(a) payments as described in A–13 and A–14 of § 35a.9999–3.

(iii) *Exempt recipients.* Certain reportable payments made to exempt recipients as described in A–21 of § 35a.9999–2 and A–13 of § 35a.9999–3.

(iv) *Minimal payments.* Minimal payments of reportable interest and dividends and section 6045 payments (as described in A–19 of § 35a.9999–2), if the payor elects not to impose backup withholding on such amounts.

(v) *Net commissions.* Net commissions as described in A–17 of § 35a.9999–3 unless there is a payment in cash.

(vi) *Original issue discount.* Original issue discount as defined in section 1273, unless there is a payment in cash. See A–15 of § 35a.9999–2.

(vii) *Security sales through margin account.* Certain gross proceeds from a security sale through a margin account as described in A–24 of § 35a.9999–3.

(viii) *Security short sales.* Certain gross proceeds with respect to a short sale of securities, at the option of the broker, as described in A–25 of § 35a.9999–3.

(ix) *Payments subject to other withholding.* Payments already subject to withholding under section 3406 or another provision of the Internal Revenue Code, *e.g.*, as described in A–19 of § 35a.9999–3.

(4) *Definition of payor.* See section 3406(h)(4) for the definition of a payor.

(5) *Definition of broker.* See section 3406(h)(5) for the definition of broker.

(6) *Definition of incorrect taxpayer identification number.* An incorrect taxpayer identification number is any number that, at the time the Internal Revenue Service makes a determination that the taxpayer identification number is incorrect—

(i) Is not assigned under section 6109 to any surname of the payee, or

(ii) Is not assigned by the Internal Revenue Service to the name of a nonindividual such as a corporation, estate, partnership, or trust,

and that was provided on an information return filed with respect to a payee.

(7) *Definition of account.* The term "account" means any account, instrument, or other relationship with a payor.

(b) *Notice regarding an incorrect taxpayer identification number*—(1) Notice from the Internal Revenue Service to payors and brokers. The Internal Revenue Service will notify—

(i) Payors that a payee's taxpayer identification number is incorrect and that the payor must commence backup withholding as required under section 3406(a)(1)(B) and paragraphs (d) and (f) of this section on reportable payments made to accounts of the payee as defined in paragraph (a)(7) of this section that contain such incorrect taxpayer identification number, and

(ii) Brokers that a payee's taxpayer identification number is incorrect and that the broker must notify a payor that the payee is subject to backup withholding under section 3406(a)(1)(B) on accounts of the payee as defined in paragraph (a)(7) of this section that contain that incorrect taxpayer idenfification number.

The Internal Revenue Service will furnish the payor or broker with a copy of the notice and the payor shall furnish such copy, or an acceptable substitute copy, to the payee as described in paragraph (c) of this section.

(2) *Notice from a broker to a payor.* A broker who receives a notice from the Internal Revenue Service pursuant to paragraph (b)(1)(ii) of this section that a payee has furnished an incorrect taxpayer identification number and through whom the payee subsequently acquires a readily tradable instrument (as defined in section 3406(h)(6)) with respect to which the broker is not the payor as defined in section 3406(h)(4) must notify the payor of that instrument of the following information:

(i) The fact that the broker was notified by the Internal Revenue Service that the payee furnished an incorrect taxpayer identification number and the date set forth on such notice from the Internal Revenue Service,

(ii) The name and taxpayer identification number of the payee with respect to whom the broker was notified, and

(iii) The fact that the named payee is subject to backup withholding under 3406(a)(1)(B).

The broker is required to provide this information to the payor of the instrument in the time and manner provided in A-41 of § 35a.9999-1. A broker is required to exercise reasonable care as prescribed in paragraph (b)(5)(ii) of this section in locating all accounts of the payee with respect to which the broker is required to notify a payor under this paragraph (b)(2).

(3) *Accounts subject to backup withholding.* After receiving notice from the Internal Revenue Service or from a broker, as provided in paragraph (b) (1) and (2) of this section, the payor is required to notify the payee in accordance with paragraph (c) of this section and to institute backup withholding as prescribed in paragraph (d) of this section on all reportable payments subject to backup withholding that are made to any account of the payee that contains the incorrect taxpayer identification number. See paragraph (f) of this section for the rules that apply when a payor has received two notifications of an incorrect taxpayer identification number with respect to a payee from the Internal Revenue Service or a broker within 3 calendar years. See paragraph (b)(5) of this section for an exception to the rule that a payor backup withholds on all accounts of a payee paying reportable payments subject to backup withholding.

(4) *Joint accounts*—(i) *In general.* Generally, payors are required to backup withhold on reportable payments made to the account of joint payees if the payee subject to backup withholding under section 3406(a)(1)(B) is the first person listed on the account at the time the payor receives the notice under paragraph (b) (1) or (2) of this section.

(ii) *Exception.* In the case where the first person listed on the account is an exempt foreign person for information reporting purposes under the applicable information reporting provisions and the account contains the names of persons who are not foreign persons, the payor is required to backup withhold on the account if the incorrect taxpayer identification number matches the name and number combination of the person on the account used for information reporting.

(iii) *Change in order of names.* If the account of a payee may be subject to backup withholding as described in paragraph (b)(4) of this section, backup withholding shall apply, if required, even though the order of the names on the account is subsequently changed, provided that the incorrect taxpayer identification number giving rise to backup withholding remains on the account.

(5) *Reasonable care exception*—(i) *Payors.* Payors are not required to withhold on reportable payments made to an account of a payee that could not be located with reasonable care. A payor will be considered to have exercised reasonable care if the payor uses the name, taxpayer identification number, and any account numbers provided on the notice from the Internal Revenue Service or from a broker as described in paragraph (b) (1) and (2) of this section is locating all accounts of a payee.

(ii) *Brokers.* Brokers are not required to notify payors of the accounts of payees that could not be located with reasonable care as described in paragraph (b)(5)(i) of this section. Thus, brokers are required to use the information and follow the procedures described in paragraph (b)(5)(i) to locate accounts of the payee with respect to which a broker is required to notify a payor pursuant to paragraph (b)(2) of this section.

(c) *Notice from payors of backup withholding due to an incorrect taxpayer identification number*—(1) *In general.* If the name and taxpayer identification number listed on the notice from the Internal Revenue Service or a broker as described in paragraph (b) (1) or (2) of this section matches the name and taxpayer identification number used on the payee's account at the time the payor receives the notification of an incorrect taxpayer identification number—

(i) The payor who receives a notice from the Internal Revenue Service is required under section 3406(h)(8) to send a copy of the notice required by paragraph (b)(1) of this section or a substitute notice as described in paragraph (c)(3) of this section to the payee of the account in accordance with paragraph (c)(2) of this section (an example of the notice from the Internal Revenue Service required by section 3406(h)(8) and paragraph (b)(1) of this section is set forth in the Appendix to these temporary regulations), and

(ii) The payor who receives notification of an incorrect TIN from a broker as described in paragraph (b)(2) of this section must send a substitute notice as described in paragraph (c)(3) of this section to the payee in accordance with paragraph (c)(2) of this section.

If a payor sends a substitute notice, such notice must include all the information set forth in paragraph (c)(3) of this section. In addition to the copy of the notice required by paragraph (b)(1) of this section or the substitute notice described in paragraph (c)(3) of this section, the payor must include a Form W-9 or an acceptable substitute form (as described in A-36 or § 35a.9999-1) with the notice for the payee to use to provide his name and taxpayer identification number and to certify that the taxpayer identification number is correct, or to provide his name and the taxpayer identification number that was originally furnished and to certify that such taxpayer identification number is correct. The payor is required to include a reply envelope (self-addressed) with the notice to the payee which may, but is not required to, be postage prepaid. The envelope containing the notice and Form W-9 or acceptable substitute form must state on the outside in a bold and conspicuous manner: "Important Tax Document Enclosed". The mailing may not include any material other than the notice, the Form W-9 or acceptable substitute form, and the reply envelope to the payee. The notice required by paragraph (c) of this section, and not the notice required by A-39 of § 35a.9999-1 and in the Appendix to § 35a.9999-2, shall apply to those payors notified by a broker that a payee is subject to backup withholding under section 3406(a)(1)(B). For purposes of this section, the date set forth on the notice from the Internal Revenue Service (or a broker) shall be considered the date of receipt by and of notification to the payor.

(2) *Procedure*. The payor must send the notice described in paragraph (c) of this section to the payee within 5 business days after the date that the Internal Revenue Service or a broker notifies the payor pursuant to paragraph (b) (1) or (2) of this section. The payor must mail the notice to the payee's last known address by first-class mail. If it is the customary practice of the payor not to mail and correspondence to a payee, the payor may furnish the notice by personal delivery, by intra-office mail, or by any other means reasonably expected to furnish the notice to the payee promptly. A payor is not required to send the notice to the payee if there is currently a "do not mail" or a "stop mail hold" instruction with respect to the payee's account subject to backup withholding under section 3406(a)(1)(B). However, the payor must handle the notice in the same manner that the payor handles other correspondence of the payee.

(3) *Requirements of substitute notice to the payee*. If the payor does not send a copy of the notice received from the Internal Revenue Service pursuant to paragraph (b) or if the payor is notified by a broker as described in paragraph (b)(2) of this section that the payee provided an incorrect taxpayer identification number, the payor may send a substitute notice as provided for in this paragraph (c)(3). The notice to the payee will satisfy the requirement of section 3406(h)(8) and paragraph (c)(1) of this section if the notice—

(i) Informs the payee that the payor has been notified that the taxpayer identification number furnished by the payee is an incorrect number (as defined in paragraph (a)(6) of this section);

(ii) Advises the payee of the name and taxpayer identification number combination that the Internal Revenue Service has determined to be incorrect;

(iii) Informs the payee that the payee must either—

(A) Correct the surname (or business name) or taxpayer identification number (or both) and certify, under penalties of perjury, that the newly provided taxpayer identification number is correct, or

(B) State—

(*1*) Under penalties of perjury that the taxpayer identification number originally furnished to the payor is correct and provide that number and the corresponding listed surname (or business name),

(*2*) That the Social Security Administration (or the local office of the Internal Revenue Service in the case of an incorrect employer identification number) has been contacted by the payee to resolve the problem giving rise to the notification of an incorrect taxpayer identification number, or

(C) In the case of a notification of an incorrect taxpayer identification number of an individual payee due to a name change by the payee when the payee has not communicated the change of name to the Social Security Administration—

(*1*) Contact the Social Security Administration and reassign the taxpayer identification number to the surname that is used on the account with the payor, certify under penalties of perjury that the existing taxpayer identification number shown on the account is correct (and provide the corresponding surname used with that number), and provide a statement that the Social Security Administration has been contacted to reassign the taxpayer identification number to the surname shown on the account, or

(*2*) Use both surnames on the account with the payor (the surname currently shown on the account and the surname shown on the payee's Social Security Administration card if the payee is unable to contact the Social Security Administration at this time) provide the surnames and certify, under penalties of perjury, that the furnished taxpayer identification number is correct, and

(*3*) Follow either paragraph (c)(3)(iii)(C) (*1*) or (*2*) of this section consistently with respect to all accounts with the payor;

(iv) Advises the payee how to provide the new information to the payor;

(v) Advises the payee to contact the Social Security Administration to obtain a social security card if the payee was never assigned an SSN or to obtain a replacement social security card if the payee lost his card and does not remember his SSN;

(vi) Advises the payee that as a result of providing an incorrect taxpayer identification number, the payor is required under section 3406(a)(1)(B) of the Internal Revenue Code to begin backup withholding 20 percent of—

(A) Reportable payments made to the payee no later than after the close of the day 30 business days after the date that the payor is notified of the incorrect taxpayer identification number if the payee has not provided the payor with the required certification, i.e., the Form W-9, and

(B) Any withdrawals of reportable payments by the payee (or a joint payee in the case of a joint account) that occur after the close of 7 business days after the date that the payor received notice of the incorrect taxpayer identification number and before the day that is 31 business days after the day that the payor received notice of the incorrect taxpayer identification number, if the payee has not provided the payor with the required certified Form W-9 prior to any such withdrawals;

(vii) Gives the payee the date that the payor received the notice that the payee provided an incorrect taxpayer identification number; and

(viii) States that the payee must complete and return the enclosed Form W-9 and if necessary, the statement that the payee contacted the Social Security Administration (or the Internal Revenue Service) before the time described in paragraph (c)(3)(vi) of this section in order to prevent backup withholding under section 3406(a)(1)(B) from starting, or after the time described in paragraph (c)(3)(vi) of this section to stop backup withholding once it has begun and to avoid the imposition of other penalties for failure to provide a correct taxpayer identification number.

(4) *Payor must use new certified number*. If the payor receives a certified Form W-9 or acceptable substitute form from the payee in the manner required in paragraph (e) of this section before the end of a calendar year, the payor shall use the name and certified taxpayer identification number on the Form W-9 or acceptable substitute form on information returns that the payor is required to file for reportable payments made with respect to the payee for that year and subsequent calendar years. A

payor who uses the name and certified taxpayer identification number on an information return as described in this paragraph will satisfy the requirement to provide this information to the Internal Revenue Service as prescribed in section 3406(h)(9).

(d) *Period during which backup withholding is required due to notification of an incorrect taxpayer identification number*—(1) *In general.* Except as provided in paragraph (d)(2) of this section, upon receiving a notice described in paragraph (b) (1) or (2) of this section, the payor must impose backup withholding on all reportable payments made to the payee that are subject to backup withholding during the following periods:

(i) After the close of the 30th business day after the date the payor receives the notice described in paragraph (b) (1) or (2) of this section and on or before the close of the 30th calendar day after the day the payor receives from the payee the certification described in paragraph (e) of this section, and

(ii) At the time of any withdrawal by the payee (or a joint payee in the case of a joint account) that occurs after the close of 7 business days after the date the payor receives the notice described in paragraph (b) (1) or (2) of this section to the extent of reportable payments made after receiving the notice described in paragraph (b) (1) or (2) of this section and before the earlier of—

(A) The date the payor imposes backup withholding under paragraph (d)(1)(i) of this section,

(B) The date the payor receives the certification described in paragraph (e) of this section, or

(C) The date of the withdrawal.

For purposes of paragraph (d)(1)(ii), all cash withdrawals in an amount up to the amount of reportable payments made during the period beginning after the day that the payor receives the notice described in paragraph (b) (1) or (2) of this section to the end of the period described in paragraph (d)(1)(ii) (A), (B), or (C) of this section are treated as reportable payments. The payor is required to backup withhold 20 percent of all reportable payments subject to backup withholding under section 3406(a)(1)(B) that are made with respect to any account of the payee where that incorrect taxpayer identification number is used (or will be used) by a payor on an information return. However, the payor is not required to backup withhold on any account that could not be located using reasonable care. See paragraph (b)(5) of this section for the definition of reasonable care.

(2) *Grace periods*—(i) *Starting backup withholding.* Pursuant to section 3406(e)(5)(A), the payor may elect, on a payee-by-payee basis or in general, to begin backup withholding at any time during the 30-business-day period described in paragraph (d)(1)(i) of this section. However, a payor must impose backup withholding if there is a withdrawal from the account of the payee as described in paragraph (d)(1)(ii) of this section.

(ii) *Stopping backup withholding.* Pursuant to section 3406(e)(5)(B), the payor may elect, on a payee-by-payee basis or in general, to treat the certified Form W-9 or acceptable substitute form described in paragraph (e) of this section as having been received at any time within 30 calendar days after such certification is provided by the payee and to stop backup withholding at any time within such 30-day period. See section 3406(e)(5)(B) and A-31 of § 35a.9999-1 for the application of the rules contained in this paragraph (d)(2).

(e) *Manner required for payee to furnish certified taxpayer identification number.* A payee with respect to whom the payor has been notified (as described in paragraph (b) of this section) that the payee's taxpayer identification number is incorrect is required to provide his name and taxpayer identification number and to certify, under penalties of perjury, that the taxpayer identification number being provided to the payor on a Form W-9 or acceptable substitute form is correct in order to prevent backup withholding from starting or to stop it once it has begun. Additionally, the payee may be required to state on the notice provided to the payor, as described in paragraph (c)(3)(iii)(C)(*1*) of this section, the the Social Security Administration (or the Internal Revenue Service) was contacted by the payee within 30 calendar days from the date of the notice from the payor. In general, the payee is required to provide the information described in this paragraph for each account, including any pre-1984 account or instrument (as defined in A-34 of § 35a.9999-1 and A-20 of § 35a.9999-3) that contains the incorrect taxpayer identification number identified by the Internal Revenue Service pursuant to paragraph (b) (1) or (2) of this section. See A-9, A-10, and A-49 of § 35a.9999-1 which respectively provide that the Form W-9 is the prescribed form for the payee to make the certification, permit the use of substitute forms, and explain who may sign the form. See paragraph (f)(1) of this section for the rules on obtaining a certified taxpayer identification number after a payor is notified twice within 3 calendar years that a payee's taxpayer identification number is incorrect.

(f) *Notification of two incorrect taxpayer identification numbers within a 3-year period*—(1) *In general.* If, with respect to a payee, a payor receives a notification as described in paragraph (b) (1) or (2) of this section twice within 3 calendar years, and if an existing account of the payee reflects the incorrect taxpayer identification number when the payor receives the second notice described in paragraph (b) (1) or (2) of this section, then the payor shall—

(i) Disregard any future certifications (described in paragraph (e) of this section) furnished by the payee with respect to existing accounts with the payor.

(ii) Send the notice described in paragraph (f)(2) of this section to the payee (and not the notice required under paragraph (c) of this section) within 5 business days after the date that the payor receives the notice described in this paragraph (f), and

(iii) Impose backup withholding on any account containing the incorrect taxpayer identification number for the period described in paragraph (f)(3) of this section.

For purposes of this paragraph (f), a payor shall not count any notice received from the Internal Revenue Service or a broker prior to January 1, 1990, as the second of two notices. Additionally, a payor shall treat the receipt of two or more notices in a calendar year as described in paragraph (b) (1) or (2) of this section with respect to the same payee as the receipt of one notice for purposes of this paragraph. The preceding sentence applies only with respect to a payor who received such two or more notices under the same Employer Identification Number. The payor shall maintain sufficient records to determine whether the payor has received notices described in this paragraph and paragraph (b) (1) or (2) of this section twice within 3 calendar years with respect to a payee as described in this paragraph (f). The envelope containing the notice must state on the outside in a bold conspicuous manner: "Important Tax Document Enclosed". The payor is not required to include a Form W-9, nor is the payor required to include a reply envelope in the mailing of the notice to the payee. The payor may not include any material in the mailing of the notice described in this paragraph (f). The notice requirements provided in this paragraph (f), and not the notice requirements provided in A-39 of § 35a.9999-1 and in the Appendix to § 35a.9999-2, shall apply to a payor notified by a broker that a payee is subject to backup withholding under section 3406(a)(1)(B). The mailing procedure described in paragraph (c)(2) of this section shall apply to the mailing of the notice described in paragraph (f) of this section.

(2) *Notice to payee who has provided two incorrect taxpayer identification numbers within 3 years.* The notice to the payee required by paragraph (f)(1) of this section must list, in a bold and conspicuous manner, the payor's access key number, the relevant sequence number, the date the payor was notified of the second incorrect taxpayer identification number, the payee's name, address (including street, city, state, (or country) and zip or mailing code), and such other information that may be required by revenue procedures and revenue rulings. In addition the notice must state that—

(i) The payor has been notified that the taxpayer identification number furnished by the payee is incorrect, setting forth the name and taxpayer identification number that the Internal Revenue Service has determined to be incorrect and the specific account number that contains the incorrect taxpayer identification number;

(ii) The payor has been notified twice within 3 calendar years that the payee has furnished an incorrect taxpayer identification number on an account with the payor;

(iii) The payor is required to disregard any future taxpayer identification numbers, whether or not certified under penalties of perjury, received from the payee with respect to existing accounts with the payor;

(iv) As a result of providing an incorrect taxpayer identification number, the payor is required under section 3406(a)(1)(B) with respect to any account of the payee that contains that incorrect taxpayer identification number when the payor is notified that the number is incorrect as described in paragraph (f) of this section, to begin backup withholding 20 percent of—

(A) Reportable payments made to the payee no later than after the close of the day 30 business days after the date that the payor is notified of the incorrect taxpayer identification number, and

(B) Any withdrawals of reportable payments by the payee (or a joint payee in the case of a joint account) that occur after the close of 7 business days after the date that the payor received the second notice of an incorrect taxpayer identification number and before the day that is 31 business days after the date that the payor received such notice if the Internal Revenue Service has not notified the payor that the payee provided a correct taxpayer identification number to the Internal Revenue Service; and

(v) The payee must contact the Internal Revenue Service Center where the payee is required to file his income tax return in order to prevent backup withholding under section 3406(a)(1)(B) from starting or to stop it once it has begun.

(3) *Period during which backup withholding is required due to a second notification of an incorrect number within 3 years.* Upon receiving the second notice of an incorrect taxpayer identification number from the Internal Revenue Service or a broker as described in paragraph (f)(1) of this section, the payor must backup withhold on all reportable payments subject to backup withholding (as described in this paragraph) made to the payee—

(i) After the close of the 30th business day after the day on which the payor receives a notice described in paragraph (b) (1) or (2) of this section and ending as of the close of the 30th calendar day after the payor receives the notification from the Internal Revenue Service as described in paragraph (h) of this section, or

(ii) At the time of any withdrawal by the payee (or a joint payee in the case of a joint account) that occurs after the close of 7 business days after the date the payor receives the notice described in paragraph (b) (1) or (2) of this section and before the earlier of—

(A) The date payor imposes backup withholding as described in paragraph (f)(3)(i) of this section,

(B) The date the payor receives notification from the Internal Revenue Service as described in paragraph (h) of this section, or

(C) The date of withdrawal.

For purposes of paragraph (f)(3)(ii) of this section, all cash withdrawals in an amount up to the amount of the reportable payments made during the period beginning from the day after the day that the payor received the notice described in paragraph (b) (1) or (2) of this section to the end of the period described in paragraph (f)(3)(ii) (A), (B), or (C) are treated as reportable payments. The payor is required to withhold 20 percent of all reportable payments that are made with respect to accounts that the payee maintains with the payor at the time the payor received the second notice of an incorrrect taxpayer identification number if that incorrect taxpayer identification number is used by the payor on the account. However, the payor is not required to backup withhold on any account that could not be located using reasonable care. See paragraph (b)(5) of this section for the definition of reasonable care. The payor may not stop backup withholding under paragraph (f)(3) of this section even if the payee provides the certification described in paragraph (e) of this section.

(4) *Grace periods*—(i) *Starting backup withholding.* Pursuant to section 3406(e)(5)(A), the payor may elect, on a payee-by-payee or in general, to begin backup withholding at any time during the 20-business-day period described in paragraph (f)(3)(i) of this section. However, a payor must impose withholding as described in paragraph (f)(3)(ii) of this section if there is a withdrawal from the account of the payee.

(ii) *Stopping backup withholding.* Pursuant to section 3406(e)(5)(B), the payor may elect, on a payee-by-payee basis or in general, to treat the notification from the Internal Revenue Service as described in paragraph (h) of this section as having been received at any time within 30 calendar days after such notification is provided by the Internal Revenue Service and to stop backup withholding at any time within 30 calendar days of receiving such notice. See A–31 of § 35a.9999–1 for the application of the rule contained in this paragraph (f)(4)(ii).

(g) *Procedure for furnishing a correct taxpayer identification number to the Internal Revenue Service.* The procedure that a payee must follow after the Internal Revenue Service or a broker has notified a payor twice within 3 calendar years that the payee provided an incorrect taxpayer identification number as described in paragraph (f)(1) of this section will be provided in a revenue procedure published by the Internal Revenue Service.

(h) *Notice from the Internal Revenue Service to stop backup withholding.* A payor who received a notice pursuant to paragraph (f) of this section will be notified by the Internal Revenue Service to stop backup withholding after the Internal Revenue Service receive a correct taxpayer identification number from the payee. A broker who received a notice pursuant to paragraph (b) of this section will be notified by the Internal Revenue Service that the payee is no longer subject to backup withholding under section 3406(a)(1)(B) and that the broker is no longer required to provide notices to payors under paragraph (b)(2) of this section. A broker who receives a notice under this paragraph (h) from the Internal Revenue Service is not required to provide the notice to any payor to which the broker has previously provided the notice required under paragraph (b)(2) of this section.

(i) [Reserved].

(j) *Examples.* The application of the provisions of this section may be illustrated by the following examples:

Example (1). D opened an account with Bank O prior to 1984 and furnished a taxpayer identification number to O at the time he opened the account. O is open for business Monday through Friday. O pays interest on the account at the end of each calendar quarter, and the account is a pre-1984 account as described in A-34 of § 35a.9999-1 and A-20 of § 35a.9999-3. On July 1, 1988, the Internal Revenue Service notifies Bank O that the taxpayer identification number provided by D is incorrect. O timely sends the notice information to D as required in paragraph (c)(1) of this section. O does not receive a certification from D as described in paragraph (e) of this section. O is required to backup withhold 20 percent of (i) all reportable payments made after August 15, 1988 (which is 30 business days after the date the Internal Revenue Service notified O), and (ii) any withdrawal made after July 13, 1988 (which is 7 business days after the day that O was notified by the Internal Revenue Service) and on or before August 15, 1988, to the extent of the reportable payments made between July 2, 1988, and the date of withdrawal if earlier than August 16, 1988, or the date O receives the certification as described in paragraph (e) of this section from D. Therefore, O is required to backup withhold on the reportable payment made on September 30, 1988. O is required to continue to backup withhold under section 3406(a)(1)(B) until O receives the certification described in paragraph (e) of this section from D.

Example (2). Assume the same facts as in *Example (1)* except that D furnishes a new taxpayer identification number to O on August 7, 1988, but does not certify, under penalties of perjury, that it is his correct taxpayer identification number as required in paragraph (e) of this section. Even though the account is a pre-1984 account, O is required to withhold 20 percent of (i) all reportable payments made after August 15, 1988 (which is 30 business days after the date the Internal Revenue Service notified O), and (ii) any withdrawal made by O after July 13, 1988 (which is 7 business days after the day that O was notified by the Internal Revenue Service) and on or before August 15, 1988, to the extent of the reportable payments made between July 2, 1988, and the date of withdrawal if earlier than August 16, 1988, or the date O receives the certified taxpayer identification number as described in paragraph (e) of this section from D.

Example (3). Assume the same facts as in *Example (2)* except that D provides O with the certification described in paragraph (e) of this section on August 31, 1988. D elects pursuant to paragraph (d)(2) of this section to treat the certification as received on August 31, 1988. Even though D did not provide the certification to O within 30 business days after the Internal Revenue Service notified O that D provided an incorrect taxpayer identification number, O is not required to backup withhold under section 3406(a)(1)(B) because D did not make any withdrawal and O did not make any reportable payment to D after notification of an incorrect taxpayer identification number and before O received D's certification in the manner required in paragraph (e) of this section. Pursuant to section 3406(e)(5)(B), O may elect to treat the certification as having been received at any time within 30 calendar days after it is provided by D.

Example (4). Individual E has an account with Credit Union P that will pay interest on the first day of each month. Credit Union P is open for business Monday through Friday. The account is a pre-1984 account. E has furnished his taxpayer identification number to P. On June 1, 1988, the Internal Revenue Service notifies P that E's taxpayer identification number is incorrect as defined in paragraph (a)(6) of this section. P sends a copy of the notice information described in paragraph (b)(1) of this section to E, and P receives the certification described in paragraph (e) of this section from E on August 16, 1988. P is not required to backup withhold on the reportable payment made on July 1 because backup withholding under section 3406(a)(1)(B) may not apply until after the close of the 30th business day after the date that the Internal Revenue Service notifies P of the incorrect taxpayer identification number unless E withdraws funds before that date. P is required to withhold 20 percent of the reportable payment made on August 1, however, because that is a reportable payment made more than 30 business days after the date the Internal Revenue Service notifies P and before P receives the certification described in paragraph (e) of this section from E. P is required to backup withhold on September 1 unless P elects pursuant to paragraph (d)(2) of this section to treat E's certification as having been received by that date. P is required to stop backup withholding by September 15, 1988.

Example (5). Assume the same facts as *Example (4)* except that E makes a withdrawal on July 1, 1988. P is required to withhold 20 percent of the withdrawal, to the extent of reportable payments made to the account from June 2, 1988, to July 1, 1988, because the withdrawal occurred after the close of 7 business days after the date P was notified by the Internal Revenue Service of the incorrect taxpayer identification number and on or before 30 business days after the date the Internal Revenue Service notified P of the incorrect taxpayer identification number.

Example (6). Assume the same facts as in *Example (4)* except that the Internal Revenue Service notifies P again on November 9, 1990, that E's taxpayer identification number is incorrect. P is required to maintain its business records in a manner that P can determine that the Internal Revenue Service has notified P twice within a 3-year period that E's taxpayer identification number is incorrect. P is required to send the notice described in paragraph (f)(2) of this section to E. E does not make any withdrawal from the account after November 9, 1990. Under paragraph (f) of this section, P is required to begin backup withholding on reportable payments made after December 24, 1990 (after the close of the 30th business day after the day Internal Revenue Service notifies P), and P is required to continue backup withholding until the Internal Revenue Service notifies P to stop backup withholding because E has furnished a correct taxpayer identification number to the Internal Revenue Service. Because P has been notified twice in a 3-year period that E's taxpayer identification number is incorrect, P may not stop withholding under section 3406(a)(1)(B) even if E furnishes another certification described in paragraph (e) of this section to P.

Example (7). Individual F has three post-1983 accounts with Bank R that pay reportable interest: a checking account, a savings account, and a money market account. The checking and money market account were opened in 1986 and the saving account was opened in October of 1988. R treats each of these accounts as a separate account with the Bank. F provided R with the certifications as described under A-32 of § 35a.9999-1 at the time each account was opened. On June 1, 1988, the Internal Revenue Service notified R pursuant to paragraph (b)(1) of this section that F furnished an incorrect taxpayer identification number. From its business records, R determined that only the money market account contains the incorrect taxpayer identification number. R timely sends F the notice required under paragraph (b)(1) of this section and receives the certification required under paragraph (e) of this section from F on June 30, 1988. On November 15, 1990, the Internal Revenue Service notifies R that F furnished an incorrect taxpayer identification number. R determines from its business records that two notifications of an incorrect taxpayer identification number have been received with respect to F within 3 calendar years. R checks all accounts of F and determines that only the savings account contains the incorrect taxpayer identification number. R must send F the notice required under paragraph (f)(2) of this section and must commence backup withholding on reportable interest paid on the savings account pursuant to paragraph (f)(2) of this section after December 31, 1990. R must continue to backup withhold on the savings account until the Internal Revenue Service notifies R pursuant to paragraph (h) of this section that F has furnished a correct taxpayer identification number.

Appendix to § 35a.3406-1

A notice required by paragraph (c) (3) of this section shall be substantially similar in content to the following.

Date ______________________

Important Tax Information—Please Read Carefully

Notice of Backup Withholding

We received a notice from the Internal Revenue Service (IRS) stating that the taxpayer identification number (TIN) on your account with us is incorrect. A TIN is incorrect if either the name or number shown on an account does not match a name and number combination shown or he records of the Social Security Administration (SSA) or IRS. You must act to correct this problem within 30 calendar days from the date shown above. Otherwise, we may be required to withhold 20% of the interest, dividends, and certain other payments that we make to your account.

Section 3406 of the Internal Revenue Code requires that we withhold 20% in tax, called backup withholding, when you do not give us your correct TIN. Further, you may be subject to a $50 penalty by the IRS under section 6676 of the Internal Revenue Code for failing to provide us with your correct TIN. This notice provides you with instructions to correct your account record in order to avoid backup withholding and the possible imposition of the penalty.

Instructions For Individuals

For individuals, the TIN is the social security number (SSN). Very often a TIN is incorrect because of a name change due to marriage, divorce, adoption or some other reason that has not been communicated to the Social Security Administration (SSA) and recorded on its records. Alternatively, the account may not contain the correct SSN of the actual owner. For example, an account in a child's name may contain a parent's SSN. An account should be titled in the name of the actual owner of the account with that person's SSN.

What to Do

To determine what actions you should take to correct your TIN, compare the name and SSN on your account with us (listed on page 3) with the name and SSN shown on your social security card and then follow the chart below to determine what action you should take. (If you have never been assigned a SSN by SSA or if you lost your card and do not know your SSN, contact your local SSA office to apply for an original or a replacement SSN card, whichever is required. Also, *read* the enclosed Form W-9, write the words "applied for" on the form according to its instructions, and return the form to us. You do not need to follow the chart below. You must send us your name and SSN, as shown on the SSN card that you get from SSA, on a Form W-9 within 60 days.)

If—	Then—
1. The last name and SSN on your account agree with the last name and SSN on your social security card ________.	1. Contact your local SSA office to ascertain why the information on SSA's records is different from that on your social security card and to resolve that problem. Also, put your name and SSN on the enclosed Form W-9 according to its instructions. Sign the Form W-9 and the statement below that you contacted SSA. Send both forms to us.
2. The SSN on your account is different from the SSN on your social security card, but the last name is the same ________.	2. Put your name and SSN, shown on your social security card, on the enclosed Form W-9 according to its instructions, sign it and send it to us. No contact with SSA is necessary.
3. The last name on your account is different from the last name on your social security card, but the SSN is the same on both ________.	3. Take one of the following steps (but not all): If the last name on your account is correct, (a) Contact SSA to correct the name on your social security card. Put your SSN and name shown on your account on the enclosed Form W-9 according to its instruction, sign it and the statement that you contacted SSA. Send both forms to us. (b) If you are not able to contact SSA at this time, you can provide us with both last names. Put your SSN and the name shown on your social security card plus the last name shown on your account (in that order) on the enclosed Form W-9 according to its instructions, sign it, and return it to us. For example, if your social security card lists your maiden name, you can provide us with your SSN and your name in the following order: First/maiden/married name. Please note, however, that you should contact SSA as soon as possible. If the last name on your social security card is correct, (c) Put that name and your SSN on the enclosed Form W-9 according to its instructions, sign it, and return it to us. No contact with SSA is necessary.
4. Both the last name and SSN on your account are different from the last name and SSN on your social security card ________.	4. (a) If the last name and SSN on your social security card are correct, put that name and SSN on the enclosed Form W-9 according to its instructions, sign it, and send it to us. No contact with SSA is necessary. (b) If the last name on your account and the SSN on your social security card are correct, follow the procedures in section 3(a) or (b) above. Be sure to put the name shown on your account and the SSN shown on your social security card on the Form W-9.

You must be consistent with the name and number (SSN) that you furnish (1) to us for all of your accounts and (2) to your other payors in order to avoid a problem in the future. If you must visit SSA, take this notice, your social security card, and other relevant documents with you. You should call SSA first so they can explain to you what other documents you need to bring to the SSA office.

Instructions for Nonindividuals

For most nonindividuals (such as trusts, estates, partnerships, and similar entities), the taxpayer identification number is the employer identification number (EIN). The EIN on your account may be incorrect because it does not contain the number of the actual owner of the account. For example, an account of an investment club or bowling league should reflect the organization's own EIN and name, rather than the SSN of a member. (The account of a sole proprietor who may have both an EIN and a SSN should reflect the individual name of the sole proprietor and his or her SSN.) Please put the name and EIN on the enclosed Form W-9, sign it, and send it to us.

Remember

YOU MUST SEND US A SIGNED FORM W-9 WITHIN 30 CALENDAR DAYS FROM THE DATE SHOWN AT THE TOP OF PAGE 1 even if the name and number (SSN or EIN) on your account with us match the name and number (SSN or EIN) on your social security card or the document issuing you an EIN. If we do not receive your Form W-9 and, if necessary, the statement that you contacted SSA or IRS within the 30-day period, we may be required to withhold 20% from any reportable payment that we pay to your account until we receive the necessary documents. Also, if you make a withdrawal from your account before the end of a 30-business-day period beginning from the date after the date of this notice and before we receive the necessary documents, we may be required to withhold 20% of reportable payments made to your account during such period.

Please complete the form below if you are required to contact SSA or the IRS.

Detach and Return to Us

Statement of SSA or IRS Contact

I hereby state that I have contacted the Social Security Administration concerning my social security number (SSN) or the

Internal Revenue Service concerning my employer identification number (EIN) to resolve the problem with my name or number which resulted in my being notified of an incorrect taxpayer identification number.

(Print name)

(Signature)

By

(For Nonindividuals and Agents Only)

Date

Account Number

Current TIN on Account

Current Name on Account

Par. 3. Section 34a.9999-1 is amended by adding a new sentence at the end of A-4, by adding two new sentences at the end of A-5, by adding a new heading and new Q/A-7A and Q/A-7B immediately after A-7, by adding a new sentence at the end of A-37, by revising the heading immediately before Q-42, by adding new Q/A-42A, a new heading and new Q/A-42B immediately after Q/A-42A, by adding a new sentence at the end of A-48, and by adding a new heading and a new Q/A-56 immediately after A-55 to read as follows:

§ 35a.9999-1 Questions and answers concerning the due diligence requirement and the certification requirements in connection with backup withholding and other related issues.

* * * * *

A-4. * * * See A-51 of § 35a.9999-3 for the general rule for the actions that a payor of an account or instrument that is not a pre-1984 account (as defined in A-34 of § 35a.9999-1 and A-20 of § 35a.9999-3) must take to exercise due diligence under section 6676(b).

* * * * *

A-5. * * * See A-7A of this section for the rule for nonseparate annual mailings. See A-56 of this section for the actions that payors who failed to exercise due diligence as described in A-5 and A-6 and the related questions and answers on due diligence under this section on all or part of their pre-1984 accounts or instruments may take to be relieved of the penalty otherwise due under section 6676(b).

* * * * *

Subsequent Year's Mailing

Q-7A. In order for a payor of reportable interest or dividend payments to be considered to have exercised due diligence in soliciting a taxpayer identification number of a payee with respect to a pre-1984 account or instrument, what information is the payor required to include in the subsequent year's mailing (nonseparate annual mailings) described in the fourth paragraph of A-5 of § 35a.9999-1 to a payee who has not provided the payor with a certification, under penalties of perjury, that his taxpayer identification number is correct?

A-7A. The payor is required to include (1) an appropriately modified copy of the notice described in A-7 of § 35a.9999-1, (2) a Form W-9 or acceptable substitute form for the payee to provide a correct taxpayer identification number, and (3) a reply envelope (self-addressed) for the payee to return the Form W-9 or acceptable substitute form. However, for those subsequent mailings described in A-5 or A-6 made before the 1988 calendar year, the mailings should, but are not required to, contain the reply envelope.

Q-7B. In order to be considered to have exercised due diligence in soliciting the payee's certified taxpayer identification number, by what date must the payor of reportable interest or dividends mail the subsequent year's mailing described in the fourth paragraph of A-5 and in A-7A of this section to a payee of a pre-1984 account who has not certified, under penalties of perjury, that his taxpayer identification number is correct?

A-7B. The payor may send the mailing at any time during each year that a nonseparate annual mailing is required, but in no event later than December 31 of such year. Section 7503 shall apply in determining the time for sending the subsequent year's mailing if December 31 falls on a Saturday, Sunday, or a legal holiday.

* * * * *

A-37. * * * See A-4 of § 35a.9999-1 and the answers under § 35a.9999-3 beginning with A-51 for the actions that a payor of an account or instrument that is not a pre-1984 account must take to exercise due diligence and thereby avoid a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number.

* * * * *

Window Transactions Pre-1984 Instruments

* * * * *

Q-42A. Is a payor on a pre-1984 instrument in a window transaction subject to a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number with respect to that transaction?

A-42A. No. However, see A-42 in this section which provides, in part, that a payor is required to backup withhold if a payee fails to provide a taxpayer identification number (*i.e.*, there is a missing taxpayer identification number). See A-66 of § 35a.9999-3 for the actions that payors of post-1983 window transactions, as defined in A-42B, must take to avoid a penalty under section 6676(b).

Post-1983 Instruments

Q-42B. Is a payor required to treat an instrument that is negotiated in a window transaction (as defined in A-42 of § 35a.9999-1 and A-9 of § 35a.9999-2) after December 23, 1987, as an instrument acquired after December 31, 1983?

A-42B. Yes. A window transaction occurring on or after December 23, 1987, will be considered made with respect to an instrument acquired after December 31, 1983, regardless of when the instrument was issued by the payor or acquired by the payee. See A-66 of § 35a.9999-3 for the actions that payors must take to avoid a penalty under section 6676(b) with respect to a post-1983 window transaction.

* * * * *

A-48. * * * See A-4 of § 35a.9999-1 and the answers under § 35a.9999-3 beginning with A-51 for the actions that a payor of an account or instrument that is not a pre-1984 account or instrument must take to exercise due diligence and thereby avoid a penalty under section 6676(b) or filing an information return with a missing or an incorrect taxpayer identification number.

* * * * *

Nonassessment of the Penalty by Administrative Discretion

Q-56. Is a payor of a pre-1984 account or instument who did not undertake the mailings in accordance with A-5 and A-6 and the related questions and answers on due diligence under this section liable for the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number for all years in which the payor did not have a certified Form W-9 or acceptable substitute form from a payee?

A-56. Yes. The payor is liable for the penalty under section 6676(b) for each year the payor files an information return with a missing or an incorrect taxpayer identification number for a pre-1984 account or instrument if the payor has not exercised due diligence as described in A-5 and A-6 and in the related questions and answers on due diligence under this section or obtained a certified taxpayer identification number from the payee. However, in its administrative discretion the Internal Revenue Service will not impose the penalty on a payor for an information return filed for calendar years after 1987 if the payor makes or has made a separate mailing of the type described in A–5 and A–52 (as applicable under those Q and A's) on or before June 30, 1988, and makes or has made the nonseparate mailing described in A–5 and A–52 (as applicable under those Q and A's) in each year subsequent to the year of the separate mailing claimed as the basis for administrative relief. Such separate and nonseparate mailings must be made with respect to all pre-1984 accounts or instruments of payees who have not previously certified, under penalties of perjury, that the taxpayer identification number furnished to the payor is the payee's correct taxpayer identification number or established the payee's foreign status (under § 1.6049–5(b)(2)(iv) with respect to interest payments or under Q and A 36 of § 35a.9999–3 with respect to dividend payments). The rules described in A–5 and A–6 and the related questions and answers on due diligence under this section shall apply, as shall the rules described in A–8, A–9, A–10, A–11, A–12, A–14, A–15, and A–16. Further, the special rules in A–17, A–18, A–19, A–20, A–21, A–22, A–23, A–24, and A–25 also shall apply to the mailing described in A–56 of this section.

In order to receive administrative relief each year, a payor must make an affirmative showing to the satisfaction of the district director or the director of the Internal Revenue Service Center that the person otherwise liable for such penalty fulfilled the requirements of this paragraph. A payor will remain liable for any applicable penalties under section 6676(b) for years prior to 1988.

Par. 4. Section 35a.9999–2 is amended by adding a new sentence at the end of A–18 to read as follows:

§ 35a.9999–2 Questions and answers concerning due diligence and issues in connection with backup withholding.

* * * * *

A–18. * * * See A–56, A–57, A–58 and A–59 of § 35a.9999–3 for the actions that a payor must take to exercise due diligence after December 31, 1987, for an account with respect to which the payor received an awaiting–TIN certification to avoid a penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number. Payors will remain liable for any applicable penalties under section 6676 for years prior to 1988.

* * * * *

Par. 5. Section 35a.9999–3 is amended by adding a new heading before A–51, by revising Q/A–51, by renumbering Q/A–52 as Q/A–104, and by adding new Q/A–52 through Q/A–103 immediately after Q/A–51 to read as follows:

§ 35a.9999–3 Questions and answers concerning backup withholding.

* * * * *

Due Diligence Defined for Accounts Opened and Instruments Acquired After December 31, 1983

Before Notification of an Incorrect TIN

Q–51. In order for a payor 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 taxpayer identification number of a payee with respect to an account opened or an instrument acquired after December 31, 1983, what actions must the payor take?

A–51. In general, the payor of an account or instrument that is not a pre-1984 account (see A–34 of § 35a.9999–1 and A–20 of 35a.9999–3) nor a window transaction (as defined in A–42 of § 35a.9999–1 and A–9 of § 35a.9999–2) must use a taxpayer identification number provided by the payee under penalties of perjury on information returns filed with the Internal Revenue Service to satisfy the due diligence requirement. Therefore, if, after 1983, a payor permits a payee to open an acocunt without obtaining the payee's taxpayer identification number under penalties of perjury and files an information return with the Internal Revenue Service with a missing or an incorrect taxpayer identification number, the payor will be liable for the $50 penalty. Once notified by the Internal Revenue Service (or a broker) that a number is incorrect, a payor is liable for the penalty for all prior years in which an information return was filed with that particular incorrect number if the payor has not exercised due diligence with respect to such years. See A–56 through A–70 of this section for the exceptions to due diligence. A pre-existing certified taxpayer identification number does not constitute an exercise of due diligence after the Internal Revenue Service or a broker notifies the payor that the number is incorrect if the Internal Revenue Service or a broker notifies the payor on or after January 1, 1988, unless the payor undertakes the actions specified in A–88 of this section.

Q–52. Is a payor as described in A–51 liable for the penalty if the payor obtained a certified taxpayer identification number from a payee but inadvertently processed the name or number incorrectly on the information return?

A–52. Yes. The payor is liable for the penalty unless the payor exercised that degree of care in processing the taxpayer identification number and name and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Payors and Trustees of Certain Grantor Trusts

Q–53. Is a payor of reportable interest or dividend payments to a grantor trust that was established on or after January 1, 1984, and which has ten or fewer grantors, liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number if the trustee could not provide a certified taxpayer identification number to the payor at the time the account was opened because each grantor had not furnished the trustee with a certified taxpayer identification number under penalties of perjury as provided under A–20 of § 35a.9999–2?

A–53. A payor of a post-1983 grantor trust which has ten or fewer grantors is liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number unless the payor has exercised due diligence or comes within one of the exceptions to due diligence in this section. In general, a payor of a post-1983 grantor trust exercises due diligence by obtaining a certified taxpayer identification number from the payee (trust) as described in A–4 of § 35a.9999–1 and A–51 of this section.

Q–54. Under what circumstances is a grantor trust liable for a penalty under section 6676 (b) for filing an information return with a missing or an incorrect taxpayer identification number?

A–54. Only a grantor trust with 10 or more grantors is a payor and may be liable for a penalty under section 6676 (b) unless the trust has exercised due diligence as described in A–51 of this section or comes within an exception to the due diligence requirements.

Special Rules Under Q/A 28 of § 35a.9999–3

Q–55. Is a payor who obtains a taxpayer identification number pursuant to the special rule under A–28 of this section, relating to readily tradable instruments, liable for the penalty under section 6676 (b) for those years in which the payor filed an information return with an incorrect taxpayer identification number if the payor did not obtain a certified taxpayer identification number from the payee within the 30-day grace period provided in A–28 of this section?

A–55. Yes. A payor of a post–1983 account is liable for the penalty under section 6676 (b) for filing an information return with an incorrect taxpayer identification number unless the payor has exercised due diligence. In general, a payor of a post-1983 account exercises due diligence by obtaining a certified taxpayer identification number from the payee as described in A-4 of § 35a.9999-1 and A-51 of this section. Thus, the payor described in Q-55 will be liable for the penalty for filing an information return with an incorrect taxpayer identification number if the payee did not provide the required certification to the payor within the 30-day period whether or not the payor backup withholds on the account. The rule described in this answer is effective with respect to information returns filed for the 1988 and subsequent calendar years.

Exceptions to Due Diligence

(1) Awaiting-TIN Certification

Q-56. In general, what actions must a payor who receives an awaiting-TIN certification prior to January 1, 1988 (a "pre-1988 awaiting-TIN certification"), take to be considered to have exercised due diligence?

A-56. In general, a payor with respect to an account or instrument that is not a pre-1984 account, instrument or relationship nor a window transaction will be considered to have exercised due diligence if the payee has complied with the requirements of A-18 of § 35a.9999-2 (exception for a payee who is waiting for receipt of a taxpayer identification number) prior to January 1, 1988, provided that the payor imposes backup withholding if the payee fails to provide a taxpayer identification number in the manner and within the period required by A-18 of § 35a.9999-2. This provision applies only with respect to information returns filed for calendar years before 1988.

Q-57. Is a payor who receives an awaiting-TIN certification before January 1, 1988, liable for the penalty under section 6676 (b) for filing an information return with a missing taxpayer identification number for the 1988 or a later calendar year?

A-57. A payor who receives a pre-1988 awaiting-TIN certification for an account of a payee and files an information return with a missing taxpayer identification number for the 1988 or a later calendar year with respect to that account will be subject to the penalty under section 6676 (b) unless the payor continues to exercise due diligence by undertaking additional actions described in A-58 below to solicit the payee's taxpayer identification number.

Q-58. What actions must a payor with a pre-1988 awaiting-TIN certification take in order to exercise due diligence after December 31, 1987, so that the payor will not be subject to a $50 penalty for filing an information return with a missing taxpayer identification number for a calendar year after 1987?

A-58. A payor with a pre-1988 awaiting-TIN certification may exercise due diligence after December 31, 1987, by: (1) Continuing to backup withhold on the account, instrument, or relationship until a certified taxpayer identification number is received, (2) sending a mailing before December 31 of each year after 1987, requesting the certified taxpayer identification number from a payee who has not by that time provided a certified TIN, and (3) including a Form W-9 or acceptable substitute form in the mailing for the payee to provide his certified taxpayer identification number. The payor must include a reply envelope (self-addressed) in the mailing. The envelope sent to the payee must contain the following statement in a bold and conspicuous manner: "Important Tax Document Enclosed." The payor may include other information in the mailing. The payor must continue to backup withhold and send the mailing each year until the payor receives a certified taxpayer identification number from the payee or until the account is closed.

Q-59. What actions must a payor take in order to exercise due diligence on an account, instrument or relationship for which the payor receives an awaiting-TIN certification after December 31, 1987 (a "post-1987 awaiting-TIN certification")?

A-59. In order to exercise due diligence a payor who receives a post-1987 awaiting-TIN certification from a payee must: (1) Obtain a certified taxpayer identification number from the payee within 60 days after the date that the payor receives the awaiting-TIN certification, and (2) backup withhold on any withdrawals made after the close of 7 business days after the date the awaiting-TIN certification is received and before the earlier of (i) the date that the payor receives a certified taxpayer identification number from the payee, (ii) the date the account is closed, or (iii) the date backup withholding commences on all reportable payments made to the account, instrument, or relationship. For purposes of subsection (ii) in this A-59, a payor is also required to backup withhold on any reportable payment made at the time the account or relationship is closed. For purposes of subsection (2) in this A-59, all cash withdrawals in an amount up to the reportable payments made from the day after the date of receipt of the awaiting-TIN certification to the date of withdrawal are treated as reportable payments. Thus, a payor who receives a post-1987 awaiting-TIN certification from a payee who does not provide the payor with a certified taxpayer identification number within the 60 days described in A-18 of § 35a.9999-2 is liable for the penalty if reportable payments are paid to the account after the 60 days and the payor files an information return with respect to the account with a missing taxpayer identification number. The payor is liable for the penalty whether or not the payor backup withholds on the reportable payments made after the 60-day period.

(2) Instruments Acquired From a Broker

Q-60. Under what circumstances will a payor whose readily tradable instrument was acquired by a payee through a broker be considered to have exercised due diligence?

A-60. Generally, a payor will be considered to have exercised due diligence with respect to a readily tradable instrument that was acquired by the payee through a post-1983 brokerage account as described in A-41 of § 35a.9999-1 if the payor uses a taxpayer identification number furnished by a broker. In addition, to exercise due diligence a payor must use the same care in processing the taxpayer identification number and name provided by the broker that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. A taxpayer identification number acquired from a broker as described in this A-60 will not constitute an exercise of due diligence after the Internal Revenue Service or a broker notifies the payor that the number is incorrect unless the payor undertakes the actions specified in A-88 of this section.

Q-61. Is the payor in A-60 liable for the penalty if the payor obtained the taxpayer identification number and name from a broker but inadvertently processed the number or name incorrectly and thus put an incorrect number on the information return?

A-61. Yes. The payor is liable for the penalty unless the payor exercised that degree of care in processing the certified taxpayer identification number and name and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Q–62. What actions must a payor who was notified by a broker that a payee failed to certify or furnish a taxpayer identification number take to be considered to have exercised due diligence?

A–62. A payor who is notified by a broker that a payee failed to certify or furnish a taxpayer identification number to the broker will be considered to have exercised due diligence if the payor: (1) Imposes backup withholding if the payee did not certify his taxpayer identification number to the payor, (2) provides notice to the payee as provided in A–39 of § 35a.9999–1 and A–18 of § 35a.9999–2, and (3) encloses a postage-paid reply envelope (self-addressed) in the mailing of the notice. A payor described in this A–62 will be liable for the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1988 or subsequent calendar years unless the payor complies with the procedures described in this A–62 in each such calendar year until the payor receives a certified taxpayer identification number form the payee or until the account is closed. For years prior to 1988, no penalty will be imposed on a payor who has complied with the requirements in this A–62 in the year the payor was notified by a broker.

A payor as described in this A–62 who receives a noncertified taxpayer identification number from a broker may be liable for the penalty under section 6676(b) for the 1988 or subsequent calendar years with respect to which the number provided by a payor on an information return filed with the Internal Revenue Service is determined to be incorrect unless the payor complies with the procedures described in this A–62 in each such calendar year until the payor receives a certified taxpayer identification number from the payee, the account is closed, or the payor undertakes the actions described in A–88 of this section after being notified of the incorrect taxpayer identification number.

(3) Instruments Transferred Without the Assistance of a Broker

Q–63. With respect to an instrument transferred without the assistance of a broker, is a payor liable for the penalty under section 6676(b) if the payor records on its books a transfer of a readily tradable instrument in a transaction in which the payor was not a party?

A–63. Generally, a payor as described in Q–63 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 payor if the payor records on its books a transfer in which the payor was not a party. This exception applies until the calendar year in which the payor receives a certified taxpayer identification number from the payee.

Q–64. Is the payor described in A–63 required to solicit the taxpayer identification number 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?

A–64. There is no requirement on the payor to solicit the taxpayer identification number in order to be considered to have exercised due diligence in a subsequent calendar year under the rule set forth in A–63.

Q–65. Is a payor as described in Q–63 considered to have exercised due diligence if the payee provides a taxpayer identification number to the payor (whether or not certified), the payor uses that number on the information return filed for the payee, and the number is later detemined to be incorrect?

A–65. A payor as described in Q–63 who records on its books a transfer in which it was not a party is considered to have exercised due diligence under the rule set forth in A–63 where the transfer is accompanied with a taxpayer identification number provided that the payor uses the same care in processing the taxpayer identification number provided by a payee that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. Thus, a payor will not be liable for the penalty if the payor uses the taxpayer identification number provided by the payee on information returns that it files, even if the taxpayer identification number provided by the payee is later determined to be incorrect. However, a payor will not be considered as having exercised due diligence under A–63 after the Internal Revenue Service or a broker notifies the payor that the number is incorrect unless the payor undertakes the actions described in A–88 of this section.

(4) Window Transactions

Q–66. What action must a payor of a post-1983 window transaction (as defined in A–42 and A–42B of § 35a.9999–1 and A–9 of § 35a.9999–2) take to be considered as having exercised due diligence?

A–66. A payor of a post-1983 window transaction shall be considered to have exercised due diligence only if the payor uses the taxpayer identification number provided by the payee on information returns filed with the Internal Revenue Service. If no number is provided, the payor will not be considered to have exercised due diligence.

(5) Undue hardship

Q–67. Is a payor liable for a penalty under section 6676(b) with respect to a post-1983 account or instrument if the payor could have met the due diligence requirements but for the fact that the payor incurred an undue hardship?

A–67. A payor of a post-1983 account or instrument is not liable for a penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number if the Internal Revenue Service determines that the payor could have satisfied the due diligence requirements but for the fact that the payor 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 payor by fire or other casualty (or the place of business of the payor's agent who under a pre-existing written contract had agreed to fulfill the payor's due diligence obligations under section 6676(b) 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 payor). Undue hardship will also be found to exist if the payor could have met the due diligence requirements only by incurring an extraordinary cost.

Q–68. How does a payor obtain a determination from the Internal Revenue Service that the payor has met the undue hardship exception to the penalty under section 6676(b) for the year with respect to which the payor is subject to the penalty?

A–68. A determination of undue hardship may be established only by submitting a written statement to the Internal Revenue Service signed under penalties of perjury that sets forth all the facts and circumstances that make an affirmative showing that the payor could have satisfied the due diligence requirements but for the occurrnece of an undue hardship. Thus, the statement must describe the undue hardship and make an affirmative showing that the payor either was in the process of exercising or stood ready to exercise due diligence when the undue hardship occurred. A payor may request an undue hardship determination from the district director or the director of the Internal Revenue Service Center where the payor is required to remit the penalty under section 6676(b).

(6) Error in Agency Records

Q–69. Is a payor liable for the penalty under section 6676(b) if the taxpayer identification numnber is incorrect as a result of an intrinsic error in the number records of the Social Security Administration or Internal Revenue Service?

A–69. Generally, a payor will not be liable for a penalty under section 6676(b) if a taxpayer identification number is determined to be incorrect as a result of an intrinsic error in the records of the Social Security Administration or the Internal Revenue Service (for instance, because the records of such agencies in the normal course of business should be, but are not, up-to-date at the time the Internal Revenue service makes a determination that a taxpayer identification number is incorrect). The records of the Social Security Administration or the Internal Revenue Service will not be treated as in error if the records contain the name and taxpayer identification number of a person (or business) who subsequently changes his or her name (or business name) and does not communicate the change of name to the Social Security Administration or the Internal Revenue Service before the Internal Revenue Service determines that the taxpayer identification number is incorrect. The burden of proof will be on the payor to substantiate that the records of the Social Security Administration or the Internal Revenue Service are in error. A photocopy of the payee's social security card or the document provided by the Internal Revenue Service issuing the payee's employer identification number (that contains identical information to that on the information return with respect to which the penalty may be imposed) will be sufficient proof to come within this exception.

(7) Exempt Recipients

Q–70. Is a payor liable for the penalty under section 6676(b) if the payor files an information return with a missing or an incorrect taxpayer identification number for an exempt recipient whom the payor determined was exempt at the time of the payment pursuant to the rules under A–29 of § 35a.9999–1?

A–70. A payor is not liable for the penalty under section 6676(b) for filing an information return with a missing or an incorrect taxpayer identification number if the payee is exempt from information reporting under the applicable information reporting provisions of the Internal Revenue Code.

Circumstances Where Due Diligence is Not Shown

Both Pre-1984 and Post-1983 Accounts and Instruments

Q–71. Is a payor liable for the penalty under section 6676(b) if, after the due date of an information return (including extensions of time for filing), the payor files a corrected information return that contains the correct taxpayer identification number?

A–71. Yes. The payor is still liable for the penalty under section 6676(b) for filing an information return with an incorrect or a missing taxpayer identification number. The payor is not liable for the penalty, however, if the payor files a corrected information return with the correct taxpayer identification number before the due date of the return with regard to extensions.

Q–72. Is a payor liable for the penalty under section 6676(b) if the payor has been assessed (or has self-assessed) a $5 penalty under section 6723(a) for the failure to put correct information (which may include an incorrect taxpayer identification number) on an information return?

A–72. Yes. The payor is liable for the penalty under section 6676(b) if the payor files an information return with a missing or an incorrect taxpayer identification number without exercising due diligence, coming within one of the exceptions to due diligence, or coming within the rule described in A–56 of this section, whether or not the payor is liable for or has been assessed the penalty under section 6723(a) with respect to the information return. To the extent that a penalty under sections 6723(a) and 6676(b) is assessed with respect to the same information return, the payor should file for a refund of the penalty under section 6723(a). Thus, with respect to the failure to include the correct taxpayer identification number (a missing or an incorrect taxpayer identification number) on an information return, the provisions under section 6676(b) shall apply and not the provisions under section 6723(a). If the penalty for the intentional failure to include the correct taxpayer identification number on an information return under section 6723(b) is assessed, no penalty shall be assessed under section 6676(b).

Q–73. Is a payor who is not exercising due diligence liable for the penalty under section 6676(b) if the taxpayer identification number is determined to be incorrect because the payor (or his agent) improperly prepared or formatted the information return?

A–73. Yes. A payor who is not satisfying all the due diligence requirements for the account in question is liable for a penalty under section 6676(b) if the taxpayer identification number is determined to be missing or incorrect due to a human, clerical, or processing error on the part of the payor (or the payor's agent) in preparing or formatting the information return. In general, a payor (or his agent) will not be considered to have erroneously prepared or formatted an information return if the payor (or his agent) has complied with all pertinent income tax regulations, revenue rulings, and procedures in effect with respect to information returns.

Revised Due Diligence Standards for Transactions With Foreign Persons

Q–74. What actions must a payor or broker of a pre-1984 account or instrument take to establish due diligence with respect to the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1984 and subsequent calendar years if payment on the account would not have been a reportable payment under section 6045 or 6049 but for the fact that the foreign person failed to provide the prescribed penalty of perjury statement under § 1.6045–1(g)(1) or under § 1.6049–5(b)(2) (iv) of the Income Tax Regulations?

A–74. The payor or broker will be considered to have exercised due diligence on the account, if—

(1) The payor or broker sent the separate and nonseparate annual mailings to the payee as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 and imposed backup withholding on the account beginning on January 1, 1984 (or, alternatively, imposed backup withholding under A–18 of § 35a.9999–2 on payments made on or after January 16, 1984), until the taxpayer identification number is received from the payee, or

(2) The payor or broker sent a separate mailing as described in A–52 or A–55 of § 35a.9999–1 to the payee requesting the required penalty of perjury statement (provided that the payor or broker has evidence in its records that the payee is a foreign person and provided that the payor or broker has no actual knowledge that such evidence is false), commenced backup withholding on payments made on or after July 1, 1984, and sends a nonseparate mailing by December 31 of the 1987 calendar year and each calendar year thereafter until the

required penalty of perjury statement is received from the payee, or

(3) The payor or broker sent a mailing as described in A–52 or A–55 of § 35a.9999–1 to the payee requesting the required penalty of perjury statement (provided that the payor or broker has evidence in its records that the payee is a foreign person and has no actual knowledge that such evidence is false), imposed backup withholding on payments made on or after January 1, 1985, and sent an additional mailing as described in A–3 of § 35a.9999–4 during the 1984 and 1987 calendar years and each calendar year thereafter, until the payor or broker receives the required penalty of perjury statement.

Q–75. What actions must a payor or broker of a post-1983 account or instrument take to establish due diligence with respect to the penalty under section 6676(b) for filing an information return with a missing taxpayer identification number for the 1984 and subsequent calendar years when payment on the account would not have been a reportable payment under Code section 6045 or 6049 but for the fact that the foreign person failed to provide any prescribed penalty of perjury statement under § 1.6045–1(g)(1) or under § 1.6049–5(b)(2)(iv) of the Income Tax Regulations?

A–75. Generally, payor or broker will be treated as having satisfied the due diligence requirements with respect to post-1983 account or instrument if at the time the account or instrument was opened or acquired the payor or broker obtained a certified taxpayer identification number from the payee and used that number on the information return that was filed for the particular calendar year that is subject to the penalty. See A–51 of this section for the due diligence requirements for payors of accounts or instruments that are not pre-1984 accounts or instruments.

Q–76. What actions must a payor or broker take to exercise due diligence with respect to an account for which a Form W–8 is no longer in effect so that the payor or broker is not liable for the penalty for filing an information return with a missing taxpayer identification number?

A–76. A payor or broker of a pre-1984 or a post-1983 account or instrument that becomes subject to information reporting because of Form W–8 is no longer in effect may exercise due diligence with respect to such account by (1) sending a separate mailing to the payee before January 1 of the first calendar year that a Form W–8 is no longer in effect (and during which a Form W–9 or its acceptable substitute has not been received) and before December 31 of each such calendar year thereafter requesting the required penalty of perjury statement (Form W–8), and (2) imposing backup withholding on reportable payments made on the account during a year that a Form W–8 is not in effect (and during which a Form W–9 or its acceptable substitute has not been received). (For Forms W–8 that expired in the 1986 calendar year, the payor may make one separate mailing that will satisfy the mailing requirement for both the 1986 and 1987 calendar years. This separate mailing must be made on or before June 30, 1988.) The mailing must be by first-class mail, or airmail if sent to a foreign address, and must contain the Form W–8 and a notice describing the Form W–8 and advising the payee that backup withholding may commence (or has commenced) because the form is not provided. The payor must also include a reply envelope (self-addressed) in the mailing. The rules of A–18 and A–19 shall apply to this rule provided in this A–76.

Clarification of the Due Diligence Standard Prior to Being Notified by the Internal Revenue Service That a Number is Incorrect

Pre-1984 Accounts and Instruments

Q–77. What action must a payor of reportable interest or dividends on a pre-1984 account or instrument take to exercise due diligence so that the payor is not liable for the penalty under section 6676(b) for filing an information return with an incorrect taxpayer identification number?

A–77. A payor of reportable interest or dividends on a pre-1984 account or instrument will be considered to have exercised due diligence in furnishing a taxpayer identification number with respect to a particular calendar year if in such year the payor (1) has made the prescribed yearly mailings as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 with respect to such account or instrument, or (2) obtained a certified taxpayer identification number from the payee. In addition, to be considered to have exercised due diligence the payor must have used the same care in processing the taxpayer identification number provided by the payee and in furnishing that taxpayer identification number on the information return that is filed for the year that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances. However, see A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through administrative discretion with respect to information returns filed for the 1988 or subsequent calendar years.

Q–78. Will a payor who filed an information return with an incorrect taxpayer identification number be considered to have exercised due diligence for a particular calendar year with respect to a pre-1984 account or instrument for which the payor did not have a certified taxpayer identification number if, in such calendar year, the payor undertook a mailing as described in A–5 and A–6 and in the related questions and answers on due diligence in § 35a.9999–1 but failed to undertake one or more of the mailings required under A–5 or A–6 of § 35a.9999–1 in an earlier year?

A–78. No. The annual solicitation of the correct taxpayer identification number for a pre-1984 account or instrument is a cumulative requirement. Thus, if the separate mailing or one of the nonseparate annual mailings described under A–5 or A–6 of § 35a.9999–1, respectively, is not undertaken or is undertaken improperly, the payor can never demonstrate due diligence for the particular account or instrument in question through solicitation of the taxpayer identification number. Therefore, the payee is liable for the penalty under section 6676(b) with respect to the year in which the payor failed to make a mailing or makes a mailing improperly and all subsequent years (regardless of whether a mailing is made in a subsequent year) in which a return is filed with an incorrect taxpayer identification number. See A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through the administrative discretion of the Internal Revenue Service with respect to information returns filed for the 1988 or subsequent calendar years.

Q–79. Can a payor of reportable interest or dividends ever establish due diligence for a pre-1984 account or instrument if the payor missed one of the prescribed annual mailings or if one of the mailings was not undertaken in accordance with A–5 and A–6 and in accordance with the related questions and answers on due diligence described in § 35a.9999–1?

A–79. The payor of a pre-1984 account or instrument who failed to undertake one or more of the annual mailings as described in A–5 and A–6 and in the related questions and answers on due diligence described in § 35a.9999–1 (or undertook those mailings improperly) can establish due diligence by obtaining a certified taxpayer identification from the payee and using that number on the information return. Due diligence will be considered as exercised beginning in the calendar year in which the certified number is received and used on the information return filed for that year. Also, see A–56 of § 35a.9999–1 for the circumstances under which the penalty will not be imposed through the administrative discretion of the Internal Revenue Service.

Q–80. Does a payor who subsequently obtains a certified taxpayer identification number or a Form W–8 on a pre-1984 account or instrument remain liable for the penalty for filing an information return with an incorrect or a missing taxpayer identification number in prior years if the payor did not exercise due diligence in such years by the prescribed mailings, by obtaining a certified taxpayer identification number, or by obtaining a Form W–8 signed under penalties of perjury?

A–80. Yes. Obtaining a certified taxpayer identification number on a pre-1984 account or instrument may be considered an exercise of due diligence only for the year in which the certified number is received and subsequent calendar years.

Q–81. Does the answer in A–80 change with respect to a calendar year if the payor subsequently obtains a certified number from a payee that matches the number used by the payor on a previous information return filed for such year?

A–81. No. The payor remains liable for the penalty for those calendar years with respect to which the payor filed an information return with an incorrect taxpayer identification number without exercising due diligence in such year. The question of whether a payor has exercised due diligence is a year-by-year determination. Due diligence must be exercised in the particular year for which the payor is subject to the penalty.

Q–82. Is a payor of a pre-1984 account or instrument who obtained a noncertified taxpayer identification number from a payee liable for the penalty if the payor undertook all the prescribed annual mailings but inadvertently processed the name or taxpayer identification number incorrectly on the information return?

A–82. Yes. The payor is liable for the penalty unless the payor can show that the payor exercised that degree of care in processing the name and taxpayer identification number and in furnishing it on the information return that a reasonably prudent payor would use in the course of the payor's business in handling account information, such as account numbers and account balances.

Q–83. Is a payor of a pre-1984 account or instrument who has a certified taxpayer identification number from a payee liable for the penalty if the payor inadvertently processed the name or taxpayer identification number incorrectly on the information return?

A–83. Yes. The payor is liable for the penalty unless the payor can show that the payor exercised that degree of care in processing the name and taxpayer identification number and in furnishing it on the information return that a reasonably prudent payor would use in handling account information, such as account numbers and balances.

Due Diligence Defined After Notification by the Internal Revenue Service That a Taxpayer Identification Number is Incorrect

In General

Q–84. Is a payor of a reportable interest or dividend payment liable for the penalty under section 6676(b) in 1989 and subsequent calendar years if the Internal Revenue Service or a broker notifies the payor on or after January 1, 1988, and before the original due date of an information return that a payee's taxpayer identification number is incorrect, and the payor later provides that number on an information return?

A–84. Yes. A payor will be liable for the penalty under section 6676(b) for providing an incorrect taxpayer identification number on an information return for the 1988 and subsequent calendar years if the payor is notified by the Internal Revenue Service on or after January 1, 1988, and before the original due date of an information return that such number is incorrect, unless the payor is exercising due diligence.

Pre-1984 Accounts and Instruments

Q–85. What actions must a payor of a pre-1984 account or instrument take to exercise due diligence to avoid the penalty under section 6676(b) for filing an information return with an incorrect taxpayer indetification number for the 1988 and subsequent calendar years, if the Internal Revenue Service or a broker notifies the payor, on or after January 1, 1988, and before the original due date of such information return, that the payee's taxpayer identification number is incorrect?

A–85. A payor of a pre-1984 account or instrument will not be liable for the penalty if (1) at the time that the payor receives the first notice of an incorrect taxpayer identification number on or after January 1, 1988, the payor is considered to be exercising due diligence as described in A–5 and A–6 and the related questions and answers on due diligence under § 35a.9999–1 or is complying or with the rule described in A–56 and the related questions and answers on due diligence under § 35a.9999–1, (2) the payor sent the notice to the payee in the manner prescribed in § 35a.3406–1(c), (3) if the payor received a Form W–9 or acceptable substitute Form W–9 (including a recertified taxpayer identification number) from the payee before the original due date of an information return (see A–31 under § 35a.9999–1 and § 35a.3406–1(d)(2) as to when a payor may treat a Form W–9 or substitute Form W–9 as being received), the payor used the new name and taxpayer number provided on the Form W–9 or acceptable substitute form on information returns filed after the calendar year in which the number is received, and (4) the payor sends the notice prescribed in § 35a.3406–1(c) in each year subsequent to the year in which the notice was first sent to the payee (who has not by the end of such year provided a certified Form W–9 or acceptable substitute form) until the Internal Revenue Service or a broker sends a second notice (of an incorrect taxpayer identification number for the payee) to the payor within 3 calendar years. If a second notice is sent, due diligence is met according to the rules set forth in A–89 of this section.

Q–86. Is a payor of a pre-1984 account or instrument who is considered to be exercising due diligence through the prescribed annual mailings in A–5 and A–6 (or who is undertaking the actions described in A–56 of § 35a.9999–1) and through the related questions and answers on due diligence under § 35a.999–1 in the year that the Internal Revenue Service notifies the payor of an incorrect taxpayer identification number required to undertake those mailings in addition to mailing the notice required in § 35a.3406–1(c) (or in § 35a.3406–1(f)(2) in the case of the notification of two incorrect taxpayer identification numbers in 3 calendar years)?

A–86. No. A payor of a pre-1984 account or instrument is not required to undertake the mailings prescribed in A–5 and A–6 of § 35a.9999–1 (or A–56 of § 35a.9999–1) in any year in which the payor is also required to send the notice prescribed in § 35a.3406–1(c) (or in § 35a.3406–1(f)(2)). Thus, for example, assume that Payor X pays reportable interest on a pre-1984 account and has undertaken all the prescribed mailings in A–5 and A–6 by December 31, 1988, for the account of Payee A. Also assume that payor X filed the calendar year 1984 return on February 28, 1985, with respect to Payee A with an incorrect taxpayer identification number and the 1985, 1986, and 1987 calendar year information returns on February 28, 1986, March 2, 1987, and February 29, 1988, respectively, with the same incorrect taxpayer identification number. Payor X has not filed a Form 8210 for any of these years to remit the penalty under section 6676(b). In November of 1988 the Internal Revenue Service notifies Payor X that the number set forth on the 1986 calendar year information return (*i.e.*, filed in 1987 with respect to Payee A) was filed with an incorrect taxpayer identification number. Under these facts, Payor X is not liable for the penalty for filing the 1986 information return with an incorrect taxpayer identification number because (1) Payor X filed the information return before being notified by the Internal Revenue Service of the incorrect taxpayer identification number, and (2) Payor X exercised due diligence in 1986 through the prescribed annual mailing (*i.e.*, Payor X made the separate mailing in 1983 and the nonseparate mailings in 1984, 1985, and 1986 with respect to Payee A).

Similarly, Payor X is not liable for the penalty for the 1984, 1985, and 1987 calendar year information returns filed on February 28, 1985, February 28, 1986, and February 29, 1988, respectively.

Payor X will be liable for the penalty, however, for filing the 1988 calendar year information return with the same incorrect taxpayer identification number (*i.e.*, the number that the Internal Revenue Service notified was incorrect) unless Payor X (1) sends the notice information as described in § 35a.3406–1(c), and (2) uses the certified taxpayer identification number that is furnished by the payee, if one is received before the end of 1988, on the information return that is filed for the 1988 calendar year. If Payor X sends the notice described in § 35a.3406–1(c) in the 1988 calendar year, Payor X is not also required to send the mailing described in A–5 and A–6 (or A–56) of § 35a.9999–1 in 1988. If the payee does not provide a new taxpayer identification number to the payor, the payor must continue to use the existing taxpayer identification number on information returns filed for such payee.

Q–87. Is Payor X in the example in A–86 required to send the notice to Payee A described in § 35a.3406–1 (c) if, earlier in the year, Payor X sent the 1988 annual mailing to Payee A as described in A–5 and A–6 of (or A–56) § 35a.9999–1?

A–87. Yes. Once a payor is notified of an incorrect taxpayer identification number, the payor must send the mailing prescribed in § 35a.3406–1 (c) in or to continue exercising due diligence.

Post-1983 Accounts or Instruments

Q–88. What actions must a payor of a post-1983 account or instrument take to exercise due diligence so as to avoid the penalty for filing an information return with an incorrect taxpayer identification number after being notified by the Internal Revenue Service or a broker on or after January 1, 1988, and before the original due date of such return that the number is incorrect?

A–88. A payor as described in Q–88 of an account or instrument that is a post-1983 account or instrument will not be liable for the penalty for filing an information return with an incorrect taxpayer identification number after the Internal Revenue Service notifies the payor that the number is incorrect if (1) the payor is considered to be exercising due diligence at the time of the notice from the Internal Revenue Service because the payor has a certified taxpayer identification number from the payee or comes within one of the exceptions to due diligence, (2) the payor sent the notice in the manner prescribed in § 35a.3406–1(c), and (3) if the payor received a new certified Form W–9 or acceptable substitute form (which may contain a recertified taxpayer identification number) from the payee in a calendar year prior to the calendar year that is the original due date of an information return, the payor used the new name and taxpayer identification number provided on the Form W–9 or acceptable substitute form on information returns filed after the calendar year in which the taxpayer identification number is received. (See A–31 under § 35a.9999–1 and § 35a.3406–1(d)(2)(ii) as to when a payor may treat a taxpayer identification number as being received.)

In order to continue the exercise of due diligence, the payor must send the notice as described in § 35a.3406–1(c) in each calendar year until the payor obtains a certified taxpayer identification number from the payee or until the Internal Revenue Service sends a second notice (of an incorrect number for the payee) to the payor within 3 calendar years with respect to the account in question in which case due diligence is met according to the rules set forth in A–89 of this section.

Due Diligence Defined After Two Notifications of an Incorrect Taxpayer Identification Number Within 3 Calendar Years

Both Pre-1984 and Post-1983 Accounts and Instruments

Q–89. What actions must a payor take, if the payor is notified twice within 3 calendar years that a payee has provided an incorrect taxpayer identification number, to exercise due diligence so that the payor will not be subject to the penalty for the continued use of that incorrect taxpayer identification number?

A–89. The payor (1) must send the notice to the payee as prescribed in § 35a.3406–1(f)(2), (2) must code all subsequent information returns that are filed in the calendar year after the calendar year in which the second notice is received with the words "2ND NOTICE", and (3) must, if the payor receives a new name and taxpayer identification number with respect to the payee from the Internal Revenue Service as described in paragraph (g) of § 35a.3406–1, use that name and taxpayer identification number on the information returns that are filed after the calendar year in which the name and number are received. The manner in which the words "2ND NOTICE" should be set forth on the information return will be provided in a revenue procedure issued by the Internal Revenue Service. A payor shall not count any notice received from the Internal Revenue Service or a broker prior to January 1, 1990, as the second of two notices within 3 calendar years. Further, a payor shall treat two or more notices received in a calendar year with respect to the same payee as one notice received in that calendar year for that payee. The preceding sentence applies only with respect to a payor who receives such two or more notices under the same Employer Identification Number. See § 35a.3406–1(f).

Procedural Items

Q–90. In what year does the liability for the penalty under section 6676(b) arise?

A–90. The liability for the penalty arises on the day following the date that the payor files an information return with an incorrect (or a missing taxpayer identification number) with respect to a calendar year in which the payor failed to exercise due diligence.

Q–91. When must the payor remit the penalty to the Internal Revenue Service?

A–91. The penalty is due by April 1 of the year following the calendar year for which the information return is filed.

Q–92. Will interest accrue on the penalty if it is not timely paid?

A–92. Yes. The interest rate will be determined pursuant to section 6621 of the Internal Revenue Code. For example, assume Bank Y is notified by the Internal Revenue Service in November 1986 that Y filed 1500 information returns with respect to the 1984 calendar year with incorrect taxpayer identification numbers. Y exercised due diligence in 1984 on 1,000 of the accounts for which Y filed information returns with incorrect taxpayer identification numbers. As a result, Y is liable for a $25,000 penalty (500×$50) with respect to the information returns filed for the 1984 calendar year. Further, interest will be charged on the $25,000 beginning April 1, 1985. To the extent Y filed information returns for the calendar year 1985 (or a later calendar year) with those same incorrect taxpayer identification numbers, Y may also be liable for a penalty and interest beginning on April 1, 1986 (or April 1 of the year following such later calendar year), with respect to such information returns.

Q–93. In what manner should a payor remit the penalty to the Internal Revenue Service?

A–93. Generally, the payor shall remit the penalty with a properly executed Form 8210. However, effective for information returns filed for the 1984 and 1985 calendar years with missing or incorrect taxpayer identification numbers, the payor may remit the penalty only with the certification statement set forth in CP 2100 and letter 2137 provided by the Internal Revenue Service for notifying payors of missing or incorrect taxpayer identification numbers. The submission to the Internal Revenue Service of the signed certification statement shall constitute the filing of a return. With respect to information returns filed with missing or incorrect taxpayer identification numbers for the 1986 or a later calendar year, the payor must remit the penalty with the Form 8210.

Q–94. What method should the payor use to contest any part of the proposed penalty under section 6676(b)?

A–94. A payor may contest the penalty judicially and administratively. With respect to a judicial contest, each penalty with respect to a return or statement is separable; therefore, a payor may contest its liability for the penalty by paying one such penalty and suing for a refund in a case in which the same issue arises with respect to multiple failures. A payor may also request an administrative appeals conference with the Internal Revenue Service. A request for an appeals conference may be made and granted after the penalty has been imposed by the Internal Revenue Service. The manner for requesting an appeals conference is set forth in Publication 556.

Q–95. When does the period for the statute of limitations on assessment begin to run on the penalty under section 6676(b)?

A–95. The period for the statute of limitations on assessment begins to run on a penalty that is due under section 6676(b) on the date the payor files the respective Form 8210 or, with respect to the penalty due for the 1984 and 1985 calendar year information returns, the earlier of the date the payor files the Form 8210 or files the certification statement set forth in CP 2100 and Letter 2137. The period for the statute of limitations on assessment runs for a period of 3 years. See section 6501.

Q–96. May a payor surcharge or pass the penalty on to the account of the payee with respect to which the payor was liable for the penalty under section 6676(b)?

A–96. No. A payor shall not surcharge or otherwise pass the penalty on directly or indirectly to the account of a particular payee. Section 6676 provides for a separate $50 penalty for a payee who fails to provide a correct taxpayer identification number to a payor.

Miscellaneous Items

Q–97. Is a payor of a pre-1984 account or instrument who does not undertake the prescribed mailings in A–5 and A–6 of (or A–56) § 35a.9999–1 but obtained a certified taxpayer indentification number from a payee required to retain a copy of the document containing the certified number in its files?

A–97. Yes. A payor of a pre-1984 account or instrument who does not undertake the prescribed mailings under A–5 or A–6 (or A–56) of § 35a.9999–1 is required to maintain a copy of the document containing the certified number in its files in the same manner and for the same period of time that the payor retains other account-creation or instrument-purchase documents.

Q–98. If a payor is notified that a payee is subject to backup withholding under both section 3406(a)(1) (B) and (C), with which rules should the payor comply and subject the payee to backup withholding?

A–98. A payor should comply with both provisions. Certain reportable payments that are subject to backup withholding under section 3406 (a)(1)(B) are not subject to backup withholding under section 3406(a)(1)(C). In a case where a reportable payment, such as interest reportable under section 6049, is potentially subject to backup withholding under both provisions, the payor must comply with the notice requirements under both section 3406(A)(1) (B) and (C). The payor should stop backup withholding on the account only when all conditions subjecting the account to backup withholding have been satisfied by the payee. Backup withholding should be stopped according to the provision that applies last to the account in question.

Acquisitions and Mergers

Q–99. Under what circumstance is a taxpayer liable for the penalty under section 6676(b) with respect to another taxpayer?

A–99. A taxpayer will be liable for the penalty under section 6676(b) of another taxpayer if there is a validly enforceable agreement under State law by which the taxpayer agreed to pay the Federal tax liability of the other taxpayer or has guaranteed the payment of such taxpayer's tax liabilities. Alternatively, the penalty may be collectible from the taxpayer as a transferee of property of the other taxpayer pursuant to section 6901 if the liability arises on the liquidation of a partnership or corporation, or on a reorganization within the meaning of section 368(a). See section 6901 and the regulations thereunder. In the latter situation the taxpayer will be liable for any interest on the penalty if the value of the assets transferred exceeds the amount of such penalty, other taxes, related penalties, and interest as precribed under the Internal Revenue Code. However, if the value of such transferred assets is less than the penalty, interest will not be collected from the transferee taxpayer.

Q–100. Is a pre-1984 account or instrument of a payor that is exchanged for an account or instrument of another payor as a result of a merger of the other payor or acquisition of the acounts or instruments of such payor transformed into a post-1983 account or instrument if the merger or acquisition occurs after December 31, 1983?

A–100. No. A pre-1984 account or instrument that is exchanged for another account or instrument pursuant to a statutory merger or the acquisition of accounts or instruments is not transformed into a post-1983 account or instrument because the exchange occurs without the participation of the payee. See A–34 of § 35a.9999–1.

Q–101. May the acquiring taxpayer described in A–100 rely upon the business records and past procedures of the merged payor or the payor 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?

A–101. Yes. The acquiring payor may rely upon the business records and past procedures of the merged payor or of the payor whose accounts or instruments were acquired in order to establish due diligence to avoid the penalty under section 6676(b) with respect to information returns that have been or will be filed.

Q–102. If the business records of a merged payor or of a payor whose accounts or instruments were acquired do not disclose whether an account is a pre-1984 or post-1983 account or instrument, how should the payor classify such account or instrument?

A–102. The payor described in Q–102 may presume that such account or instrument is a pre-1984 account or instrument for purposes of backup withholding and due diligence. A payor who so treats such accounts and instruments may comply with the provisions of A–56 of § 35a.9999–1 in the calendar year of such merger or acquisition to obtain relief from the penalty under section 6676(b) with respect to information returns filed for the year following the year of the acquisition or merger and subsequent calendar years. With respect to the requirement to backup withhold on such accounts or instruments with respect to which there is a missing or an obviously incorrect taxpayer identification number, the payor may commence such backup withholding no later than sixty days following the date of the merger or acquisition of such accounts or instruments. A payor who withholds as described under the prior sentence will meet the backup withholding criterion under A–56 § 35a.9999–1. A payor as described in this answer is not required to obtain a determination from the Internal Revenue Service as described in A–56 of § 35a.9999–1.

Q–103. Is a payor required to retain the notice of an incorrect taxpayer identification number described in § 35a.3406–1(b) (1) or (2) that the Internal Revenue Service or a broker sends to the payor?

A–103. Yes. The payor is required to maintain the notices (whether or not such payor imposes backup withholding on the account to which the notice relates or incurs any liability for backup withholding) for a period of four years after the later of (1) the due date of such tax (backup withholding) for the return period to which the notice relates, (2) the date an information return is filed reflecting the final payments that are subject to backup withholding as a result of the notice described in § 35a.3406–1(b) (1) or (2), or (3) the date the tax is paid with respect to the notice. See section 6001 and the regulations issued thereunder for other rules on record retention.

* * * * *

There is a need for immediate guidance with respect to the provisions contained in this Treasury decision. For this reason, it is found impracticable to issue it with notice and public procedure under subsection (b) of section 553 of Title 5 of the United States Code or subject to the effective date limitation of subsection (d) of that section.

Lawrence B. Gibbs,

Commissioner of Internal Revenue.

Approved.

O. Donaldson Chapoton,

Acting Assistant Secretary of the Treasury.

October 2, 1987.

[FR Doc. 87–26773 Filed 11–17–87; 1:52 pm]

BILLING CODE 4830-01-M

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

29 CFR Part 2700

Amendment of Commission Procedural Rule

AGENCY: Federal Mine Safety and Health Review Commission.

ACTION: Final rule.

SUMMARY: The Federal Mine Safety and Health Review Commission, as a result of a decision in one of its recent adjudicative proceedings, is revising its procedural rule concerning the procedure by which a complainant may file a discrimination complaint with the Commission on his or her own behalf pursuant to the Federal Mine Safety and Health Act of 1977. This revision amends the Procedural rule to no longer permit a complainant to file a private discrimination complaint with the Commission prior to a final determination by the Secretary of Labor as to whether a violation has occurred. Because this change is procedural rather than substantive and is required by a Commission adjudicative decision, public comment has not been invited.

EFFECTIVE DATE: November 23, 1987.

FOR FURTHER INFORMATION CONTACT: L. Joseph Ferrara, General Counsel, Office of the General Counsel, Federal Mine Safety and Health Review Commission, 1730 K Street NW., 6th Floor, Washington, DC 20006, telephone: 202–653–5610 (202–566–2673 for TDD Relay). These are not toll-free numbers.

SUPPLEMENTARY INFORMATION: The Federal Mine Safety and Health Review Commission (Commission) is an independent adjudicatory agency providing trial and appellate review of cases arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 *et seq.* (1982) (Mine Act).

Section 105(c)(1) of the Mine Act, 30 U.S.C. 815(c)(1), prohibits discharge or discrimination against miners, representatives of miners, and applicants for employment, or interference with their protected statutory rights under the Mine Act. Section 105(c)(2), 30 U.S.C. 815(c)(2), provides that individuals protected by section 105(c) who believe that they have been discriminated against in violation of the Mine Act may file a complaint of discrimination with the Secretary of Labor (Secretary). Section 105(c)(2) further requires the Secretary to conduct an investigation of the complainant's complaint. If the Secretary determines that section 105(c)(1) has been violated, the Secretary is required to file a discrimination complaint with the Commission. 30 U.S.C. 815(c)(2). The complaint is heard before a Commission administrative law judge with discretionary appellate review before the Commission. Section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3), requires the Secretary, within 90 days of his receipt of the miner's complaint, to notify the miner of his determination as to whether a violation has occurred. That section also states that if the Secretary determines that no violation occurred, the complainant may file an action on his or her own behalf before the Commission within 30 days of notice of the Secretary's determination. The same opportunity for a hearing before an administrative law judge and discretionary review by the Commission exists when the complainant files such a private action.

Our previous Procedural Rule 40(b), 29 CFR 2700.40(b), permitted complainants to file private discrimination complaints with the Commission not only if the Secretary determined that no violation of section 105(c) of the Mine Act had occurred, but also if the Secretary failed to make a determination of violation within 90 days after the miner had complained to the Secretary. In *John A. Gilbert* v. *Sandy Fork Mining Co., etc.*, 9 FMSHRC 1327 (August 1987), *pet. for review filed*, No. 87–1499 (D.C. Cir. September 21, 1987), the Commission reexamined this procedural rule in light of a challenge to its validity raised by the Secretary in that proceeding.

The Commission determined that the rule was inconsistent with section 105(c) of the Mine Act. The Commission concluded that the plain language and structure of section 105(c)(3) of the Mine Act mandates that a complainant may file a private complaint with the Commission "*only* after the Secretary informs the complainant of his determination that a violation has not occurred * * *." *Gilbert, supra,* 9 FMSHRC at 1337 (emphasis in original). The Commission held that the statute is