

GUEST EDITORIAL

Co-ops, Cannabis, and Cash: High Time to Get Into Compliance with Often Overlooked IRS Reporting Requirements

This month's editorial was written by Brad Seltzer, Amish Shah, and Mary Kate Nicholson, Eversheds Sutherland (US) LLP.

Most utilities pride themselves on their compliance with statutory and regulatory rules, including tax information reporting requirements. One often-overlooked reporting obligation is that imposed under Section 6050I of the Internal Revenue Code (Code), which imposes reporting requirements on businesses that receive cash payments of more than \$10,000 in a single transaction or across a series of “related transactions” (Section 6050I). Under the Internal Revenue Service’s (IRS) view of “related transactions,” even small cash receipts over a series of months of amounts used to pay utility bills may give rise to IRS reporting requirements. Electric cooperatives should consider whether they have unknowingly failed to satisfy this requirement for prior periods, how failures can be remedied, and how they can comply going forward.

While most utility customers do not pay utility bills in cash, one industry frequently pays its expenses in cash—producers, distributors, and retail merchants of cannabis. Although an ever-increasing number of states have legalized cannabis for medical and/or recreational use, the federal treatment of cannabis as a Schedule 1 drug under the Controlled Substances Act generally precludes industry participants from maintaining federally insured bank

accounts, effectively requiring them to pay bills in cash. Additionally, cannabis producers use substantial amounts of energy in their growing operations. Therefore, when cannabis producers pay one or more utility bills that, in the aggregate, exceed \$10,000 during a 12-month period, Section 6050I’s reporting obligations often are triggered.

As the production of cannabis is legal in many states, with more states sure to follow, utilities are likely subject to cash payment reporting obligations. Failure to comply with such obligations may subject the utility to large civil monetary penalties, as well as potential criminal liability. We discuss in this editorial the relevant reporting rules, what is required to comply with those rules, the penalties for non-compliance, and how your electric cooperative can remediate any past instances of non-compliance and comply going forward.

Section 6050I Reporting Rules

Section 6050I requires persons who receive more than \$10,000 in cash in any one transaction, or in a series of “related transactions,” to file an information return with respect to such cash transactions. Cash includes U.S. and foreign currency, cashier’s checks, bank drafts, traveler’s checks, and money orders, but does not include personal checks.

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This rule applies not only to persons who receive a one-time cash payment exceeding \$10,000, but also to payments that constitute “related transactions” aggregating over \$10,000 within a rolling 12-month period. The information must be reported on the IRS Form 8300 (Form 8300) to the IRS within 15 days for both a single payment over \$10,000 or the “last” payment that causes the \$10,000 threshold

to be exceeded. In addition, by January 31 of each year, the recipient of the cash must provide written notice to individuals whose names were included on a Form 8300 that was filed during the preceding calendar year. These reporting requirements will be discussed further below.

How these requirements work in practice is best seen through a few examples. In each of the examples, we assume that Customer has not made any prior cash payments to Electric Co-op.

Example 1: On March 1, 2021, Electric Co-op receives a \$12,000 cash payment from Customer. Because the cash payment exceeds \$10,000, Electric Co-op is subject to information reporting under Section 6050I with respect to the \$12,000 cash payment.

Example 2: On March 1, 2021, Customer receives a bill for \$12,000. On March 15, 2021, Customer pays Electric Co-op \$9,000 in cash with respect to that bill. There is no reporting requirement associated with the March 15, 2021 payment because it does not reach the \$10,000 threshold. However, March 15, 2021 begins the 12-month rolling period for purposes of aggregating payments from “related transactions.” On April 15, 2021, Customer pays the \$3,000 remaining balance of the March 1 bill. As the March and April payments are made with respect to the same March bill, the transactions are clearly “related” and Section 6050I’s reporting requirement is triggered upon the payment of the second installment, which causes the aggregate amount of payments in the rolling 12-month period to reach the \$10,000 threshold. The trigger then resets, and the next cash payment received by Electric Co-op from Customer will start a new 12-month rolling period.

In Example 2, the key fact is that the March and April payments were related transactions, that is, separate installments of the same bill, which required Electric Co-op to aggregate such payments.

The IRS, however, has taken the position that all payments made by cannabis industry participants (and other customers) of their monthly utility bills for utility services are “related transactions.” For example, in Private Letter Ruling 201309005 (Ruling), the IRS concluded that: (i) the supply of energy to customers is a transaction within the scope of Section 6050I; (ii) the monthly bills that a utility company sends to customers are “related transactions;” and (iii) the utility must file an information return under Section 6050I if, in the course of its trade or business, the utility receives more than \$10,000 in cash in one transaction, or two or more related transactions.¹ More specifically, the IRS also stated that the billing cycle established by a utility, and applicable utility regulatory authorities, does not convert a single transaction into multiple transactions in order to avoid reporting.²

As applied to monthly utility bills for electric service, we believe the position of the IRS is illogical and unwarranted, and the related private letter rulings are conclusory and devoid of meaningful analysis, but it has yet to be formally challenged by any taxpayer. Nonetheless, unless and until there is a successful challenge of the IRS’ position, we believe that electric cooperatives should comply with those requirements (or shift the compliance burden to third parties) to avoid the potential penalties described later in this editorial.

Example 3: Customer receives the bills and makes the cash payments to Electric Co-op as displayed in the

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footnoted chart.³ Under the IRS' view as provided in private letter rulings, each of the utility bills are "related payments." There is no reporting requirement associated with the payments prior to August 15, 2021, because they do not, in the aggregate, reach the \$10,000 threshold. However, under the IRS' view, when customer makes the cash payment on August 15, 2021, Section 6050I's reporting requirement is then triggered and Electric Co-op must report all of the payments made from April 15 through the date of such payment, regardless of the amount of any individual month's payment. The filing trigger resets, and the next cash payment received by Electric Co-op on September 15, 2021 will start a new 12-month rolling period.

Our view of the IRS' position reflects the critical difference between a bill for greater than \$10,000 which is paid in installments and the recipient is on notice the payments will collectively exceed \$10,000 and one where the customer may receive a series of bills that conceivably might exceed \$10,000 (or may not) but neither the utility nor the customer necessarily will be on notice that the customer will continue to be a customer or that the bills will aggregate to more than \$10,000 in a rolling 12-month period.

Section 6050I Reporting Requirements

The reporting obligations under Section 6050I are satisfied by filing Form 8300 within 15 days after receipt of the payment that causes the \$10,000 threshold to be reached.⁴ Form 8300 requires

the recipient of the cash to collect information from the payee at the time of cash payment. The form breaks down required information into four parts:

- Part I requires information regarding the identity of the individual(s) from whom cash was received, including such person's name, taxpayer identification number (TIN), address, date of birth, occupation, and information regarding the document used to verify the person's name and address (e.g., driver's license). The person's occupation should be provided with some specificity. For example, financial consultant, attorney, or automobile dealer are acceptable; consultant, businessman, and self-employed are not specific enough. Note that this information is for the person that makes the cash payment, regardless of the relationship of such person to the utility customer (e.g., the customer, an employee, or a courier).
- Part II requires information regarding the person(s) on behalf of whom the payment was made, including the person's name, TIN, address, and certain other information. If a TIN was requested but not obtained within 15 days of a transaction, the form provides space to explain why a TIN was not included.
- Part III requires a description of the transaction and method of payment, including the date(s) on which reportable cash was received, and a breakdown of the various forms of cash received and reported on the form. For example, the amount of U.S. currency and number of \$100 bills received is required information, as is the serial number of any cashier's check, money order, bank draft, or traveler's check.

- Part IV requires information regarding the entity that received the cash payment, including the name, TIN, address, nature of business, and a contact person's name and telephone number.

In short, Form 8300 requires an electric cooperative to obtain substantial information, much of which is personal information of individuals. It is readily apparent that when the utility has no way of knowing that cash payments with respect to utility bills might or might not exceed \$10,000 on a rolling 12-month basis, it is placed in a precarious position by the IRS interpretation of "related transactions." If the first bill the customer receives is for \$500 (as shown in Example 3), is it reasonable for the utility to collect all of the Form 8300 information from the person delivering cash payments and/or the customer because of the mere possibility that later bills and cash payments would trigger the 6050I reporting requirements? How willing is the person delivering the payment to provide personal information? And, how likely is the person delivering the payment to have the information required with respect to the person on whose behalf the payment is made, such as the TIN?

In addition to the filing of Form 8300, Section 6050I requires that a written or electronic statement be provided to each person named on a required Form 8300 on or before January 31 of the year following the calendar year in which the cash is received. The statement must show the name, telephone number, and address of the utility contact employee responsible for submitting the form, the aggregate amount of reportable cash received, and that the information was furnished to the IRS.

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Civil and Criminal Penalties for Non-Compliance

Failure to properly report cash payments to the IRS via Form 8300 and to notify individuals whose names appeared on such Form 8300s may subject cash recipients to civil penalties. The penalty is for any failure to file the information return, any failure to include all information required to be shown on the return, or the inclusion of incorrect information. Generally, for 2021 the penalty is \$280 per return, not to exceed \$3,392,000 per calendar year. If the IRS properly determines that the failure was due to “intentional disregard,” for 2021, the penalty increases to the greater of: (1) \$28,260 per return; or (2) the amount of cash received in the transaction, not to exceed \$113,000 (with no calendar year limitation applicable). The above penalty amounts are adjusted annually for inflation.

For 2021, the penalty for negligent failure to furnish a timely, complete, and correct notice to the person(s) required to be identified on the Form 8300 is \$280 per statement, not to exceed \$3,392,000 per calendar year, subject to certain limitations. Intentional disregard of the requirement to furnish timely, correct, and complete notices is \$560 per failure or, if greater, 10 percent of the aggregate amounts of the items required to be reported correctly (with no calendar year limitation applicable).

Additionally, the failure to file and notify may give rise to criminal penalties. Under the Code, any person required to file a Form 8300 who

willfully fails to file, fails to timely file or fails to include correct and complete information may be subject to criminal sanctions of up to \$100,000 for corporations and/or imprisonment. A good faith belief that the IRS interpretation of “related transactions” is erroneous may negate the “willful” intent necessary to sustain a criminal penalty.

The IRS has stated that Form 8300 provides valuable information to the IRS and the Financial Crimes Enforcement Network (FinCEN) in their efforts to combat money laundering and that money is “laundered” to conceal illegal activity, including the crimes that generate money itself, such as drug trafficking, tax evasion, and terrorist financing. In addition, there have been various proposals circulating to provide funds for enhanced IRS enforcement of tax non-compliance. As such, the IRS takes very seriously the filing of Form 8300. Given restrictions on the disclosure of taxpayer information, however, the extent of the IRS’ enforcement activities for Section 6050I compliance for specific industries, including for electric cooperatives and other utilities, is not publicly available.

Coming into Compliance

Utilities that have received cash payments and who have historically failed to comply with Section 6050I likely do not have the necessary information available to complete a prior-year Form 8300. That may be the case particularly with respect to the information required for Part I of the form regarding the person who actually made the payment. If that information was not obtained at the time of the cash payment, an electric cooperative may not have any record of who even delivered the payment, much less all the detailed information about that

person required for Part I of the form. Accordingly, with respect to past periods, electric cooperatives cannot now timely file the Form 8300 and likely do not have the information needed to properly complete the form.

Electric cooperatives could consider whether to initiate voluntary disclosure discussions with the IRS to address those situations. In conjunction with those discussions, and to minimize the likelihood of costly penalties, electric cooperatives could gather any information that is available with respect to past periods and come into compliance with the Section 6050I requirements as soon as possible for future periods. It would also be helpful to review cash payments from prior years to establish how many forms should have been filed under the IRS’ interpretation of the reporting requirements.

With respect to future periods, there are several ways for electric cooperatives to become compliant with the Section 6050I reporting requirements.

First, cooperatives may choose to no longer accept cash payments, avoiding the Section 6050I reporting obligations altogether. However, this is likely not feasible as certain sectors, such as the cannabis industry, often rely on cash payments. Moreover, it is not clear that under state regulatory rules, cooperatives can decline to accept cash payments tendered in person or by mail.

Another option is to put into place an information collection mechanism, which would capture required information from customers and the tracking of each cash payment by cooperative customers. For example, a cooperative may choose to have customers fill out an additional form at the time of cash payment to obtain the information needed should the filing

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of a Form 8300 become necessary, and track payments on an internal system. It can be expected however, particularly where the payment is being made by someone other than the customer, such as a courier, that cooperatives may meet resistance in attempting to collect that information.

Another viable option is to outsource the collection of all cash payments away from cooperatives. Since Section 6050I's reporting obligation applies to the person in receipt of more than \$10,000 in cash, outsourcing shifts the reporting obligation to the third party collection agent, and is a good option if a cooperative does not have the resources to internally collect and track reporting information.

Finally, a cooperative could wait for the IRS to assert the penalties based on its interpretation of related transactions, and the cooperative could challenge that interpretation as arbitrary and capricious and an abuse of discretion. Given the cost of challenging the IRS position, as well as the cost and risk of the above-described penalties, however, that approach should be very carefully considered before being adopted.

Whatever the solution chosen, it is recommended to consult with a trusted tax advisor to establish appropriate procedures to comply with, or contest, the reporting requirements and to address past instances of non-compliance.

If you have any questions or comments, please contact Amish Shah at 202-383-0456 or amishshah@eversheds-sutherland.com.

1 See also I.R.S. Priv. Ltr. Rul. 201309006 (Mar. 1, 2013); I.R.S. Priv. Ltr. Rul. 201309007 (Mar. 1, 2013); I.R.S. Priv. Ltr. Rul. 201309008 (Mar. 1, 2013); I.R.S. Priv. Ltr. Rul. 201309009 (Mar. 1, 2013); I.R.S. Priv. Ltr. Rul. 201309010 (Mar. 1, 2013).

2 Treas. Reg. § 1.6050I-1(c)(7)(iii), Example (2).

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Bill Date	Bill Amount	Cash Payment Date	Cash Payment Amount	Aggregate Cash Payment
March 1, 2021	\$500	March 15, 2021	\$500	\$500
April 1, 2021	\$1,600	April 15, 2021	\$1,600	\$2,100
May 1, 2021	\$2,300	May 15, 2021	\$2,300	\$4,400
June 1, 2021	\$3,000	June 15, 2021	\$3,000	\$7,400
July 1, 2021	\$2,400	July 15, 2021	\$2,400	\$9,800
August 1, 2021	\$900	August 15, 2021	\$900	\$10,700
September 1, 2021	\$1,000	September 15, 2021	\$1,000	\$1,000
October 1, 2021	\$700	October 15, 2021	\$700	\$1,700
November 1, 2021	\$2,000	November 15, 2021	\$2,000	\$2,700
December 1, 2021	\$5,000	December 15, 2021	\$5,000	\$7,700

4 The filing of Form 8300 also should satisfy the reporting requirements of the U.S. Department of the Treasury Financial Crimes Enforcement Network (FinCEN) with respect to cash payments over \$10,000.

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