American Bankers Association
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Keith Brau
Office of Associate Chief Counsel (Procedure & Administration)
Internal Revenue Service
CC:PA:LPD:PR (Notice 2010-51)
Room 5203
P.O. Box 7604
Ben Franklin Station, NW
Washington, DC 20044

RE: *IRS Notice 2010-51: Information Reporting Under the Amendments to Section 6041 for Payments to Corporations and Payments of Gross Proceeds and With Respect to Property*

Dear Mr. Brau:

The American Bankers Association (ABA) is pleased to submit comments on Notice 2010-51 (Information Reporting Under the Amendments to Section 6041 for Payments to Corporations and Payments of Gross Proceeds and With Respect to Property) (the "Notice") issued by the Internal Revenue Service (the "Service") on July 1, 2010. *The ABA represents banks of all sizes and charters and is the voice for the nation's $13 trillion banking industry and its two million employees.*

The Health Care Act (the "Act") enacted in March 2010 included a provision amending section 6041 of the Internal Revenue Code (the "Code") to expand existing information reporting requirements, to apply to payments made to corporations, and to include certain payments of gross proceeds and payments made with respect to property. The new reporting requirements apply to payments made after December 31, 2011. While we support and applaud the government's efforts to close the tax gap, we do not believe that this new reporting provision of the Act will contribute to this effort. In fact, we believe that the provision will have a significant adverse effect on businesses and the IRS. The ABA strongly supports the position that has been advanced by numerous individuals, businesses and groups, that this provision should be repealed mainly because we believe that reporting to corporations provides little or no benefit to the government.

The new provision imposes two new requirements on businesses which, we believe, will result in significant new burdens, including increased reporting and record keeping at a cost that far exceeds any perceived benefit of reporting to the government. The first new requirement repeals the current law exemption for corporations as recipients of IRS Form 1099-MISC. While reporting payments made to corporations for services might be perceived as a way to enable the Service match aggregate Form 1099 income reported against the recipient's taxable income and thereby identify underreported income and enhance tax revenue, the fact that calendar year Form 1099 reporting might not coincide with a corporation's fiscal year tax return filing will in many cases prevent the government from achieving the goal attached to this new reporting requirement. As a general matter, 1099-MISC reporting is done on a calendar year basis (i.e., payments made January 1 – December 31 are reported year end December 31), and many corporations file tax returns on a fiscal year-end basis (e.g., October 1 - September 30, and thus would only report payments received between Oct 1 – Sept 30). Thus, there would be a lack of symmetry in the information reported by the payor and the information provided by the

payee on its tax return. In essence, the payments reported on the Form 1099 will never match the income stated on the recipient's tax return, and efforts to reconcile the differences will be extraordinarily burdensome, if not impossible, for both the recipient corporation and the IRS. The situation would be even more complicated for taxpayers operating on a 52-53 week year. Attempts at reconciliation would be time-consuming and unduly costly for the recipient and the IRS and thus, might generate a significant amount of noncompliance. The fact that information reporting penalties (which themselves are scheduled to be increased under the Small Business Jobs Act) might be imposed on payors for noncompliance, in situations where compliance produces information that is not useful because it does not reflect the reality of the transactions that occurred, is very troubling.

Furthermore, 1099-MISC reporting is on a cash basis (i.e., when payments are actually made), whereas many corporations report income for tax purposes on an accrual basis (so that income may be reported before or after the actual cash payment). Again, the result is that the information provided by the payor on the 1099-MISC might not match the information in the payee's tax return. It is more than likely that many corporations will not rely on the information in the 1099 when preparing their tax returns (because it will not, in many cases, accurately reflect reality), and instead, will continue to rely on their own accounting records. Thus, payors would be in put in the situation where they incur significant administrative (and other) costs to implement an information reporting provision that achieves no useful result for the Service or the payees.

Finally, the possibility of significant payee Taxpayer Identification Number (TIN) and name/address mismatches exists for many corporations, especially those that operate through subsidiaries or under a "doing business as" (DBA) name. This will result in the issuance of a significant amount of IRS penalty notices to payors and payees. Payors and payees will have to spend a significant amount of time and money to deal with these penalty notices and correct any mismatches or provide missing information in order to avoid additional penalties, including backup withholding.

Nevertheless, while efforts to repeal this new reporting provision continue, we are providing the following comments, which we hope will be given serious consideration by the Service.

1. *The appropriate scope of the terms "gross proceeds" and "amounts in consideration for property" in section 6041(a), as amended, and how to interpret these terms in a manner that minimizes the reporting burden and avoids duplicative reporting*.

The definition of "gross proceeds" for purposes of the new law should be different from the definitions of "gross proceeds" under section 6045 and "gross amount" under the recently-enacted section 6050W because the intent under the new law is for the government to obtain information only on amounts paid in exchange for personal property. Hence, the definition should reflect such intent and be narrowly defined as "the amounts paid for merchandise or property" – it should exclude amounts received from the types of transactions covered by other reporting sections (even if payments are exempted from reporting under those sections). For instance, a payment described in section 6049 (reporting on interest payments) or section 6045 (payments of gross proceeds by brokers) should be excluded from the definition of "gross proceeds" for purposes of the new reporting rules.

The new reporting requirement would generally apply to "any corporation that is not an exempt recipient". An entity that is a corporation could also be a RIC, charity, government agency, or other typically exempt recipient. Guidance should clarify that any exemption that exists under current law will continue to do so for an entity that is an exempt recipient because of its other status (i.e., status other than as a corporation). Moreover, all of the statutory exclusions and carve-outs should lead to a conclusion that the "amounts in consideration for property" and "gross proceeds" reportable to corporations are unrelated to investment transactions (transactions in securities, securities loans and derivatives), and that corporations continue as exempt recipients for transactions in investments otherwise reportable on IRS Forms 1099-B, DIV, INT, OID and similar forms.

Further, the Service should clarify that (i) the new law does not require the reporting of exempt payment types (e.g., cash on delivery transactions, foreign currency) and (2) a payor is not required to report monthly payment totals for gross proceeds or property payments to corporations. The current accounting process used by payors does not aggregate payment totals by monthly transactions. Thus, a requirement to report monthly payment totals would be very burdensome for payors, because they would have to build new systems or significantly modify existing systems to capture and report monthly payment totals to corporate recipients.

2. *Whether or how the expanded reporting requirements should apply to payments between affiliated corporations, such as payments related to intercompany transactions within the same consolidated group*.

Guidance should clarify that the expanded reporting does not apply to intercompany payments. Intercompany payment reporting would force affiliates that file consolidated returns to also file meaningless Forms 1099 for payments back and forth between the affiliates, which would also be shown on the consolidated return. Furthermore, in many cases, intercompany liabilities between affiliated corporations tend to result in "net payments" – the affiliates simply "net" the liabilities on their books, which creates a net payable or receivable without an actual payment ever being made. If reporting is required in such a case, where only a net payment amount is made by one company, the payor would have to be able to capture and report all of the "gross payments" that were not actually made. This would require the development of new systems, because current systems are not able to report payments that lack a cash movement. Affiliate reporting would not produce any useful information to the Service, and would require a significant amount of costly changes and other administrative burdens for filers because of the huge number of gross proceeds and property payments that typically occur between affiliated companies.

A similar issue involved here would be the reporting of payments made to publicly traded corporations and their subsidiaries. We recommend that such payments be exempt from the new reporting rules. In general, audited financial statements of publicly traded corporations that must be filed annually are open to the public. These statements are prepared in a manner that ensures that all important and "disclosable" information about the company (and their subsidiaries) are included in the statements. Hence, a requirement that payments to such corporations be reported separately is unnecessary as that would not provide any information that would not have been obtained from the company's tax returns. Therefore, we suggest that the Service consider reducing incidents of multiple reporting, which would help reduce some of the significant burdens that would result from these new reporting requirements.

3. *The appropriate time and manner of reporting to the Service, and what, if any, changes to existing practices for Form 1099 information reporting to the Service are needed to minimize burden in compliance with the new reporting requirements.*

In the past, reporting on Forms 1099-MISC was required only for income amounts. The new requirement of reporting payments made for property, including gross proceeds from sales, will result in a huge increase in the reporting burden for filers – with the majority of the reporting being for payment amounts representing little or no actual income to the payee, and in some cases an actual loss. Thus, reporting in many cases will not provide any useful information to the Service. The Service should consider providing a very narrow definition of "gross proceeds" and "amounts in consideration of property" and thus, provide very broad exclusion for reporting of such payments, especially where the income actually involved is minimal or where a loss is recorded. This would help to minimize the burden in compliance for many taxpayers.

We suggest that the service consider the reporting of any type of section 6041 payments to corporations in one specified box on the 1099-MISC or similar form. Alternatively, boxes 6, 7 and 14 of the 1099-MISC could be consolidated, to allow for the reporting of "services" in one box, and for combined reporting of the new "amounts in consideration for property" and "gross proceeds" in another box. A third option would be to continue to allow the reporting of "services" in box 7, and allow reporting for all "gross proceeds" and "amounts in consideration for property" in box 14.

A positive presumption should exist that a card payment is exempt from reporting under section 6041 if it is subject to reporting under 6050W. It should be made clear that in this situation there is no payor obligation to validate that reporting under 6050W will occur in order for the payment to be exempt from section 6041 reporting.

4. *What, if any, changes to Form W-9, Request for Taxpayer Identification Number and Certification, and the existing rules for soliciting taxpayer identification numbers (TINs) are needed to minimize the burden for payors to obtain TINs from payees, what are the privacy concerns with respect to TINs, and what are other concerns regarding identifying payees?*

The Service should issue a revised Form W-9. The revised W-9 (including payee instructions or W-9 requester instructions) should be issued initially in draft form in order to accommodate public comments prior to publication of a final version. In addition, mandatory use of any revised Form W-9 should be prospective only, with at least one full year after publication to phase it in. In connection with this request, we suggest that the Service allow a grandfathering for corporations that provide a certified TIN on the older version of Form W-9 or acceptable substitute (prior to the issuance of the revised version). Such corporations should not have to recertify their TINs on the revised Form W-9, unless there are some important changes that affect the earlier certification such as name/TIN/entity type change or their accounts appear on a B-Notice or Civil Penalty Notice. The amended Form W-9 should clearly identify entities that continue to be exempt under the reporting rules, such as Section 501(a) Tax Exempt Organizations.

The revised Form W-9 payee instructions should (1) clarify that payees that check the "Individual / Sole Proprietor" entity type box may not also check the "Exempt Payee" checkbox and (2) clarify that only payees

with an EIN (and not those with an SSN or ITIN) are permitted to check the "Exempt Payee" checkbox. Furthermore, the revised form and its instructions should be structured to better accommodate payees that are "Disregarded Entities". The current form creates some systems challenges for payors that want to capture the name/TIN of a Disregarded Entity's owner for information reporting purposes and also reflect the Disregarded Entity's own name in the account title for legal account-ownership purposes. Unless payors go in manually to capture and reflect the information, B Notices and backup withholding generally occurs. The form should be structured in a manner that allows the owner of a Disregarded Entity that is a corporation to certify its exempt status on the same Form W-9 that it uses to certify its own name/TIN combination while providing the Disregarded Entity's name on the "Business Name" line. This can be accomplished by allowing the owner to check the "Exempt Payee" entity type box, in addition to checking the "Limited Liability Company" entity type box and entering the letter "D" with respect to the Disregarded Entity. To be recognized as exempt, the Disregarded Entity's owner would have to enter an EIN (not an SSN or ITIN). If a Disregarded Entity's account is listed on a B-Notice or Civil Penalty Notice because of a name/TIN mismatch, TIN solicitation should be required, but no backup withholding should be imposed (similar to the current rule for fiduciary accounts in IRS Reg. 31.3406(d)-5(b)(4)(A)). The IRS should expand its TIN Matching system to include Disregarded Entities, so that payers can verify the combination of a Disregarded Entity's name and its owner's TIN.

Finally, Forms W-8 and W-9 should be amended to include a box to be checked by a corporation that is publicly traded (or a subsidiary of a publicly traded corporation) for purposes of the exemption discussed in (2) above. A corporation that has checked such a box will be exempt from the reporting and withholding requirements of the new law.

5. *How should the backup withholding requirements for missing TINs under the expanded new reporting requirements be administered in order to minimize burden on payors*?

Due to the fact that corporate payees were previously exempt from reporting and withholding, there has been no reason for payors to "clean-up" name/TIN combinations for corporations over the years where changes may have occurred because of mergers, acquisitions, and other events. This new reporting requirement will lead to numerous "B-Notices" that will trigger backup withholding when corporations' names and TINs do not match the IRS's data base. The IRS recently lowered its dollar threshold for generating B-Notices substantially when there is a mismatch of the payee's name and TIN, resulting in a substantial rise in the number of accounts receiving B-Notices. In order to provide additional time to clean up and identify corporate payees with incorrect names and TINs, the IRS should provide an exemption from backup withholding due to B-Notices for payments made to corporations, for a transitional period (e.g., 2 years after corporate reporting is first required). Imposing backup withholding due to a B-Notice on a corporation that has changed its name or has provided a DBA name that does not match IRS records will result in severe hardship to many small corporations that depend upon cash flow and would be substantially hurt by backup withholding. Procedures for sending B-Notices to corporations and collecting W-9s or other required responses from their authorized representatives in a timely manner will be difficult to implement, and thus, will result in substantial backup withholding. The timing of the B-Notice process will be especially challenging for accounts that are identified for backup withholding in December following the "first-pass" B-Notice, because the ability to refund withholding to a corporate payee is limited during the year and completely unavailable after year-end under existing regulations.

While the Service's current TIN Matching program will help identify and reduce some of the corporate name/TIN errors that currently exist in advance of receipt of B-Notices, it will take several years to clean up incorrect name/TIN for many corporate payees.

The Service should consider providing penalty relief for tax year 2012 reporting under the new law. Given the compliance challenges described above, payors will be under tremendous pressure to solicit EINs from corporations that never had to provide their EIN in the past. In fact, many corporations will be extremely difficult to communicate with, since their payments go to a lockbox area. A one year penalty relief period for a payor that is able to demonstrate that it made reasonable efforts to comply with the new reporting requirements would make for a smoother transition and increased compliance effort.

Conclusion

The new regulations will put a significant burden and cost on payer institutions and their clients. Payers will be required to develop, test and implement system enhancements, conduct new training, draft new policies and procedures, and perform client TIN solicitations, at the same time many of them are gearing up for section 6050W and FATCA compliance. Clients will be burdened with solicitations and backup withholding. Because a large number of corporate client payments generally go to lockbox areas, rather than to the client's physical location, communicating with the corporation in order to obtain the required information to ensure compliance would be extremely difficult. Implementing the backup withholding effective date of 1/1/2012 will be problematic for both payors and payees. Thus, we continue to stress that payments made in 2012 should not be subject to backup withholding as long as the payor demonstrated that good faith efforts have been made to obtain the payee's correct name and TIN.

In any event, it is almost certain that backup withholding will occur in relation to numerous payments to corporations. Thus, the Service will need to revise Form 1120 (U.S. Corporation Income Tax Return) in a way that would make provisions for corporations to claim credits for backup withholding amounts reported on Forms 1099-MISC. The current Form 1120 does not contain any procedure for claiming such a credit. In relation to this point, the Form 1120 instructions should be updated to inform filers of the new line on the form for claiming the credit and how to claim the credit. A bold statement should be included on the instructions informing filers that payors will not be able to refund backup withholding unless an error occurred and even then a refund cannot be made after year end.

We appreciate your efforts in getting out guidance quickly and ensuring a smooth implementation. We hope you will seriously consider our suggestions and recommendations as you move forward with the guidance project. Please feel free to contact me at 202.663.5317 or fmordi@aba.com if you would like to discuss these comments further or if we can answer any questions you may have.

Sincerely,

Francisca N. Mordi