

February 11, 2013

Internal Revenue Service
CC:PA:LPD:PR (Notice 2012-65)
Room 5203
P.O. Box 7604
Ben Franklin Station, NW
Washington, DC 20044RE: *Notice 2012-65 - IRS Form 1099-C – Information Reporting For Discharge of Indebtedness*

Dear Sir/Ma'am:

The American Bankers Association (ABA) is pleased to submit comments on Notice 2012-65 (the "Notice") published by the Internal Revenue Service (IRS) in the Internal Revenue Bulletin - December 27, 2012. *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 IRS is requesting comments on whether the eighth identifiable event that triggers an obligation to report discharge of indebtedness under IRC Section 6050P and Treas. Reg. section 1.6050P-1 should be eliminated.

Under the statute and regulations, an applicable entity¹ that discharges indebtedness of \$600 or more in a calendar year is required to file IRS Form 1099-C reporting such discharge to the IRS (and provide a copy to the debtor/customer). The regulations provide a list of eight identifiable events² that could occur to trigger reporting - whether or not an actual discharge has occurred. The first seven of the eight identifiable events are specific acts that result from an actual cancellation of indebtedness, such as discharge in bankruptcy, discharge based on an agreement between the lender and the borrower to cancel the debt, or discharge due to the lender's decision or defined policy to discontinue collection activity. However, the eighth identifiable event - expiration of a non-payment testing period - does not necessarily result from an actual cancellation of indebtedness. This event is triggered if, during a 36-month period, the lender does not receive any payment on the indebtedness. After the 36-month period within which there has been no payment on the debt, a rebuttable presumption that an identifiable event has occurred arises, and the lender is required to issue a Form 1099-C. The lender can rebut this presumption either (i) by showing that it (or any third party on its behalf) has engaged in significant collection activities at any time during the 12-month period ending at the close of the calendar year; or (ii) by proving through facts and circumstances existing as of January 31 of the calendar year following the expiration of the non-payment testing period that the indebtedness had not been discharged.

Prior to adding the 36-month non-payment testing period event to the final regulations, the proposed rules contained a facts and circumstances test for determining whether a discharge had occurred. This raised concerns that the rule did not sufficiently clarify the effect of continuing collection activity on

¹ The term applicable entity includes governmental entities and financial entities including "any organization a significant trade or business of which is the lending of money." I.R.C. § 6050P(c)(2)(D). Treasury Regulation § 1.6050P-2 sets forth the test for whether the lending of money is a significant trade or business and contains safe harbors and examples.

² Treasury Regulation § 1.6050P-1(b)(2)

issuance of Form 1099-C. The 36-month testing period was added to the final rules in 1996 for the purpose of clarifying that a debt would be presumed to be discharged, and therefore, subject to 1099-C reporting, if during a fixed time period of nonpayment the creditor had not engaged in any significant collection efforts.

The presumption is rebuttable. Hence, the issuance of a Form 1099-C upon expiration of a 36-month non-payment testing period is not necessarily a conclusion that a debt has actually been cancelled. For purposes of determining when taxable income is incurred, the actual cancellation of the debt may be prior to or after the identifiable event. Moreover, in some cases, the debt may never be cancelled. In effect, a taxpayer may receive a Form 1099-C that was issued because of the expiration of the 36-month testing period and yet, the debt has not been (or may never be) cancelled. Because of the confusion this causes for taxpayers, especially as it relates to whether and when to include cancelled debt in income, the IRS is considering clarifying, revising or eliminating the non-payment testing period as an identifiable event for reporting cancellation of debt.

We support the complete removal of this non-payment testing period event as one of the listed identifiable events for reporting discharge of indebtedness. We agree that the issuance of Form 1099-C due to the expiration of the non-payment testing period followed by collection activities by a creditor could be a source of confusion for taxpayers. In fact, this event does not add any sort of value to the rules for creditors, and unlike the first seven events that are accompanied by factual tests, it does not have a factual test, which makes it difficult to relate it to actual forgiveness by the creditor. This event does not provide any usefulness to the rules and its removal would not have a negative impact on creditors.

If the 36-month non-payment testing period is not removed as we recommend, we believe the following changes to the existing rule are necessary:

- Reporting on Form 1099-C should not be required if any level of collection activity occurs during the final 12 months of the 36-month non-payment testing period. Banks that continue collection efforts, regardless of the method, should not be deemed to have discharged debt. Banks should not be required to incur undue expense to achieve some level of “significant” collection efforts regarding debt for which there has been no recent payment in order to avoid Form 1099-C reporting. Banks should not be deemed to have discharged debt if they are continuing some level of recent collection activity and intend to maintain their legal rights for future collection.
- The “Instructions for Debtor” for the new Form 1099-C, Box 6, “Identifiable event code”, Code “H – Expiration of nonpayment testing period” should include notification to the debtor that a legal discharge of debt has not occurred and reporting is required solely for regulatory purposes as a result of a deemed discharge due to the expiration of the 36-month non-payment testing period. The additional instruction to the debtor would alleviate confusion by the taxpayer and clarify that a legal discharge of debt has not occurred.

Please feel free to contact me at any time at fmordi@aba.com or 202.663.5317 to discuss these comments further or answer any questions you may have.

Sincerely,

A handwritten signature in black ink that reads "Fran Mordi". The signature is written in a cursive, slightly slanted style.

Francisca N. Mordi