

December 3, 2010

Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station, NW
Washington, DC 20044

RE: *IRS Draft Form W-9 Request for Taxpayer Identification Number and Certification*

Dear Sir/Ma'am:

The American Bankers Association (ABA) is pleased to submit comments on the Draft Form W-9 *Request for Taxpayer Identification Number and Certification* (the "Draft") issued by the Internal Revenue Service (the "Service" or IRS) on November 4, 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.*

Several years ago, the industry requested that the Service redesign and issue a new Form W-9. The goal is to restructure the form to make it easier to use (for payers and payees) and also request all the necessary information about a customer for purposes of the Service's information and tax reporting program. The ABA commends the Service's efforts so far in trying to reach that goal. This letter addresses some of our concerns with the Draft (and provides some suggestions/recommendations) and also addresses other issues that we hope that the Service will take into serious consideration as it attempts to finalize the Draft.

Implementation Issues:

While we appreciate the fact the Service issued the revised form as a draft, it is unclear whether the Service intends to mandate the use of the revised form earlier than one year from the date it was issued. Financial institutions will need sufficient time to implement the finalized Form W-9. System enhancements will be necessary at the front end (for account opening) as well as the back end (for coding accounts as subject to or exempt from backup withholding and information reporting, based on the customer's W-9). Typically, any system enhancements must be scheduled months in advance, and then take months of additional time to build and test. We strongly recommend that the Service **not** require mandatory and exclusive use of the new Form W-9 until after the calendar year in which it is finalized, plus at least one full additional calendar year.

Hence, mandatory use of the revised Form W-9 should be prospective only. Further, non-exempt payees that provided a certified TIN on the December 2000 or any later version of Form W-9 (or acceptable substitute) should be grandfathered, and not have to recertify their TINs on the revised Form W-9, unless they change their name, TIN or entity type, or their accounts appear on a B-Notice or Civil Penalty Notice (similar to the IRS Reg. 31.3406(d)-1(b)(1) rules for pre-1984 accounts).

If banks will be required to perform mass-mailed solicitations using the December 2010 version of Form W-9 to determine which corporate clients are C Corporations and which are S Corporations, rather than require backup withholding on such clients that fail to send back a valid response, clients that already have a TIN on file should be treated as if they were U.S. non-exempt payees (similar to the IRS Reg. 31.3406(d)-1(b)(1) rules for pre-1984 accounts).

For purposes of 1099 information returns and Cost Basis Transfer Statement reporting that will apply to S Corporations but not C Corporations, any corporations that have not certified their status on the December 2010 version of Form W-9 should be presumed to be S Corporations until they recertify on the new form.

Entity Classification Issues:

The Service should **not** require that the “entity classification” box be checked in order to validate a payee’s Form W-9 for TIN certification purposes. Under current rules, the Service permits a payor to rely on a payee’s Form W-9 (or acceptable substitute) certification as long as it contains the payee’s name and TIN, and is signed and dated by the payee. [IRS Reg. 31.3406(h)-3(e)(2)]. We suggest that the Service clarify in the instructions that indicating the entity type should only be required if the payee claims to be exempt. Thus, a payee that provides a W-9 that contains name/TIN/signature/date, but does not indicate entity type, should be treated as a non-exempt payee for purposes of 1099 reporting and backup withholding - unless the payor elects to treat it as exempt to the extent permitted by Reg. 1.6049-4(c)(1)(ii) or any other “eyeball test” that applies to the type of income paid.

Some banks currently face systemic challenges when trying to both capture the name/TIN of a Disregarded Entity’s owner for information reporting purposes and reflect the Disregarded Entity’s own name in the account title for legal account-ownership purposes. A 1099 return that is generated systemically with a Disregarded Entity’s name and the owner’s TIN will result in a B-Notice because the IRS does not recognize such a name/TIN combination as valid. Absent a manual work-around to produce a 1099 that does not show the Disregarded Entity’s name on Name Line 1 of the 1099, erroneous backup withholding could result. Until the IRS enhances its TIN Matching system to recognize the combination of a Disregarded Entity’s name and its owner’s TIN, any 1099 information returns with that combination that are listed on a B-Notice or Civil Penalty Notice should be treated the same a fiduciary account under IRS Reg. 31.3406(d)-5(b)(4)(i)(A).

On a Form W-9 submitted by an owner on behalf of an LLC that is a Disregarded Entity, in addition to checking “LLC” as the entity type and entering “D” as the tax classification, the owner should also be permitted to check the entity type corresponding to its own tax classification, as well as the “exempt” checkbox if applicable (e.g., if the owner is a C Corporation). In effect, a Disregarded Entity’s single owner that is a C Corporation would be permitted to check the “C Corporation” entity type and the “Exempt” checkbox, as well as checking “LLC” and entering “D” as the Disregarded Entity’s tax classification. A Form W-9 completed in this manner would enable the payor to suppress backup withholding and 1099 reporting on accounts titled in the Disregarded Entity’s name, because the same Form W-9 would be valid to certify the owner’s name/EIN combination and exempt status.

B-Notice & Civil Penalty Notice Issues:

Since all corporate accounts were previously exempt from reporting and withholding, there was no incentive for payers to “clean-up” name/TIN combinations for corporations where changes had occurred over the years due to mergers, acquisitions, and other events. New information reporting requirements will lead to numerous “B-Notices” and trigger backup withholding when corporations’ names and TINs don’t match the IRS’s data base. The IRS recently lowered its dollar threshold for generating B-Notices when there is a mismatch of the payee’s name and TIN. This has resulted in a substantial rise in the number of accounts receiving B-Notices, which gave payers an opportunity to identify errors and clean up non-exempt accounts.

In order to provide additional time to clean up and identify corporate accounts with incorrect name/TIN combinations, particularly for corporations that were never subject to 1099 reporting before, the IRS should provide relief from B-Notice backup withholding and related Civil Penalties, for payments made to corporations, for at least a two-year transitional period after corporate reporting is first required for a particular type of income. Imposing B-Notice backup withholding on corporations that had changed their name since their accounts were opened, or that use their DBA names for banking purposes will have an adverse customer service impact on corporate clients. For small corporations that depend on cash flow, backup withholding - even if such withholding is only for a short time - will result in severe hardship if such corporations do not have the name or other specific contact information for a corporate officer authorized to sign the client's Form W-9.

The timing of the B-Notice process will be especially challenging for corporate accounts that are subjected to backup withholding in December following the "first-pass" B-Notice, because under IRS Reg. 31.6413(a)-3, payers' ability to refund backup withholding tax to payees is limited during the calendar year, and completely unavailable after year-end. The IRS's TIN Matching program will help payers identify and reduce some of the corporate name/TIN errors that currently exist in advance of receipt of B-Notices, but many corporate accounts will take several years to clean-up incorrect names and TINs.

Civil Penalty relief for tax year 2012 should be provided for corporate reporting related to the new regulations under section 6041 in order to give payers time to transition through the new reporting requirements. There will be tremendous pressure on payers to solicit certified EINs from corporations that never had to provide them in the past. In general, there is very limited communication between payers and corporate payees because payments to payees typically go from the banks to a lockbox area, rather than to a named individual. Thus, it will be extremely difficult for payers to communicate with many corporate payees or collect the required information in order to comply with the reporting requirements under the new regulations.

Signature and Date Issues:

Payers should be permitted to date-stamp or otherwise enter the "date received" directly on the W-9 form, or alternatively, make a systemic record of the "date received" (e.g., by systemically recording the date that a paper certification is scanned into an electronic recordkeeping system), for any otherwise-valid and signed Form W-9 that was not dated by the payee, and thus consider the payee to be validly certified. This procedure is currently permitted for withholding agents that receive otherwise-valid and signed but undated W-8 forms. In the alternative, the IRS should allow payers to enter the "date received" on any otherwise-valid signed but undated Form W-9 that is received as long as the payee's name/TIN information on the undated Form W-9 is identical to the payee's previously certified name/TIN already on file (e.g., if the undated Form W-9 is received in response to a "First B-Notice" solicitation).

In addition, payers should be permitted to systemically pre-populate the date on any official or substitute Form W-9 that is prepared or generated by the payer for the payee's signature, e.g., as part of the payee's account-opening documentation or subsequent account maintenance. Thus, if substitute W-9 certification language is included on a signature card for a new account, or on a signature card used to add a new joint owner to an existing account, the date systemically pre-printed on the signature card should be presumed to be the date it was signed by the taxpayer.

W-9 Instructions:

As stated above, several years ago the industry requested that the Service issue a redesigned Form W-9 and W-9 Instructions in draft form and make them available for public comment for a specific period of time in order to receive public input. The Service has granted the request in part by issuing the Draft and making it available for a 30-day comment period, but has not issued any draft instructions. It is important that draft instructions be issued as quickly as possible because the instructions that explain the contents of the Draft are just as important as the contents of the Draft and would need to be viewed in conjunction with the Draft for a better understanding and interpretation of its contents. Without the draft instructions, many of the provisions of the Draft raise all sorts of questions. Some of the answers may be included in the instructions and others may not. If the draft instructions are issued now, it might eliminate the need for some of the comments or suggestions that the Service might receive regarding the Draft and help taxpayers focus on the issues that really need to be addressed before the issuance of the final form and instructions. We recommend that the instructions clarify that:

- a foreign citizen who is a resident alien, either through meeting the “substantial presence” test (as described in IRS Pub. 519) or by obtaining a “green card,” is a U.S. person for tax purposes and therefore must complete Form W-9 rather than Form W-8BEN;
- payees who check the “Individual / Sole Proprietor” entity type box may not also check the “Exempt Payee” checkbox;
- payees with an SSN or ITIN may not check the “Exempt Payee” checkbox;
- payees may date the form in any legible manner, i.e., by typing, stamping or hand-writing the date, or by completing an on-line Form W-9 certification on which the date is automatically entered.
- payees check box and TIN can be pre-populated based on the information gathered during the account opening process of the bank.
- for a Disregarded Entity the instructions should:
 - clarify that the TIN entered on the form must be that of its single owner, even if the Disregarded Entity has its own EIN for payroll taxes or other purposes;
 - clarify that to be recognized as exempt, the Disregarded Entity’s single owner would have to enter an EIN, not an SSN or ITIN;
 - provide a default if no checkbox is selected as the taxpayer’s entity type. In that case, the W-9 certification would still be valid as long as it contained a name, TIN, signature and date, but the taxpayer would be treated as a U.S. non-exempt recipient for all types of income, and it would not be exempt from backup withholding or 1099 reporting;
 - provide a default if the LLC checkbox is selected as the recipient’s entity type, but no legible “D, C, S or P” letter entry is made for its tax classification. In that case, the W-9 certification would

still be valid as long as it contained a name, TIN, signature and date, but the LLC would be treated as a U.S. non-exempt recipient for all types of income, and it would not be exempt from backup withholding or 1099 reporting.

Furthermore, the instructions should update the list of entity types that are “exempt payees” with respect to each type of payment. This is important because some entities are exempt for certain payments and others are not. The list should also describe which entities are exempt from Form 1099-B Transfer Statement reporting under the new Cost Basis rules.

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 "Francisca N. Mordi". The signature is written in a cursive, flowing style.

Francisca N. Mordi