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Internal Revenue Service
CC:PA:LPD:PR (REG– 139255-08)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

RE: *REG- 139255-08 (Information Reporting of Payments Made in Settlement of Payment Card and Third Party Network Transactions)*

The American Bankers Association (ABA)[1] is pleased to submit comments on REG-139255-08 (Information Reporting of Payments Made in Settlement of Payment Card and Third Party Network Transactions) (the "Proposed Regulations") issued by the Treasury Department and Internal Revenue Service (collectively, the "Service") on November 24, 2009. ABA commends the Service on its efforts to provide much needed guidance and clarifications with respect to the new section 6050W reporting provisions. In particular, the ABA commends the Service for adhering to our requests that (1) the Service eliminate the duplicative reporting that would have resulted from the application of both sections 6041 and 6050W reporting rules; and (2) define the "gross amount" to be reported as the total dollar amount of aggregate reportable payment transactions without regard to any adjustments for credits, cash equivalents, discount amounts, fees, refunds or any other amounts. The industry supports the provisions in the Proposed Regulations that repeal section 6041 reporting for payment card transactions, to the extent that such reporting would result in duplicate reporting; and the Proposed Regulations' definition of "gross amount."

The ABA is pleased that the Service has provided detailed guidance and examples intended to assist the industry as it attempts to develop systems to implement the provisions of 6050W. In addition, the Service has requested comments on some specific issues that the Service feels should be addressed in the final regulations. This letter provides some comments in response to the Service's specific request and requests for further clarification on some of the issues addressed in the Proposed Regulations.

[1] ABA brings together banks of all sizes and charters into one association. ABA works to enhance the competitiveness of the nation's banking industry and strengthen America's economy and communities. Its members – the majority of which are banks with less than $125 million in assets – represent over 95 percent of the industry's $13.6 trillion in assets and employ over 2 million men and women.

The Service has requested additional comments on the following:

1. **Whether the Existing Consent Procedures for Electronic Reporting to Payees should Be Modified**

Section 6050W provides that payee statements may be furnished electronically. In our previous comment letter to the Service, we had suggested that the procedures for electronic reporting to payees under this reporting regime conform to existing procedures for electronic reporting to payees, but modified to create an "opt out" process. Under this process, the need for an affirmative consent to receive the payee statement electronically would be eliminated for merchants that are already receiving business communications electronically. Such a merchant would be deemed to have consented to receiving the payee statement under section 6050W electronically without further requirements, unless the merchant asserts his right to request a paper statement. The Service did not adopt our suggestion, but has requested comments on whether existing procedures should be modified.

The ABA believes that the existing consent procedures should be modified to adopt this "opt out" process for merchants already receiving business communications electronically. Thus, a merchant that has previously consented to receive other business communications (including other Form 1099 statements) electronically should not be subject to any new consent procedures with respect to the 1099-K. Indeed, we believe that merchants that are already receiving business communications electronically would be more inclined to disregard paper mailings as advertising because they expect that any communication from a payor would be transmitted electronically. For merchants not currently receiving any business communications electronically, a special mailing could be required to inform them of their option to receive payee statements electronically; however the affirmative consent to electronic mailing should be done electronically and not through another paper mailing, which, would be more efficient for both the reporting entity and the merchant.

2. **De Minimis Exception**

The Service requested further comments on the application of a de minimis reporting rule exception. We recommend that the Service set a nominal $600 annual reporting threshold for all payment card transactions. Taking into consideration the value of the information being provided as well as any costs incurred, we believe that reporting for such nominal amounts would provide very little, if any, value to the Service, while imposing substantial administrative costs on PSEs. Furthermore, any perceived benefit to the Service in reporting such nominal amounts will be far outweighed by the considerable processing costs that will be incurred by the Service in administering this reporting provision.

The ABA requests further clarification on the following:

1. **The Foreign Address Exclusion**

ABA believes that the tax documentation requirements described in the Proposed Regulations, particularly those applicable to U.S. payors, are inconsistent with Congressional intent, are unduly disruptive and burdensome, and would result in a

substantial competitive disadvantage for U.S. payors. For these reasons, among others, we respectfully suggest that the regulations be modified as more fully explained below.

- Inconsistent Treatment of U.S. and Non-U.S. Payors

The Proposed Regulations provide that a PSE that is not a U.S. payor or U.S. middleman (as defined in Treasury's Regulations) is not required to report payments to participating payees who have a foreign address as long as the PSE neither knows nor has reason to know that the payee is a U.S. person. The Service has requested comments on the treatment of non-U.S. PSEs.

Code section 6050W provides an exclusion from the definition of "participating payee" for "any person with a foreign address." We believe this "foreign address" exclusion reflects Congress' intent to eliminate foreign merchants from this new reporting regime and also to provide PSEs with an efficient, workable process (using foreign address as a basis) to reliably determine a merchant's foreign status without requiring the PSE to obtain documentation from the payee (e.g., Forms W-8 or documentary evidence).

The ABA believes that the Proposed Regulations fail to correctly interpret Congress' intent with respect to the foreign address exclusion by requiring that U.S. payors,[2] but not non-U.S. payors, engage in the unduly disruptive and burdensome procedure of obtaining documentation from foreign merchants in order to ascertain their foreign status. This requirement would impose very costly and significant administrative burdens on U.S. merchant acquirers, especially those that are primarily in the business of foreign merchant acquisition, by requiring that they obtain, retain and renew valid Forms W-8 from thousands of foreign merchants for whom there is no indication whatsoever of U.S. status. Congress' intent is that these foreign merchants, who have been so designated because of their foreign addresses, be excluded from this reporting regime and not be subject to information reporting or backup withholding.

Furthermore, the fact that a U.S.-owned foreign payor is treated as a U.S. payor under the definition of the term places an additionally enormous burden on such an entity, which will be required under the language of the Proposed Regulations to spend time and money attempting to collect information that is of no value. It is highly unlikely that foreign merchants will provide timely and properly completed W-8 forms despite best efforts of PSEs to obtain them, with the result that backup withholding will be imposed on an extremely large percentage of the foreign merchant population. This will create an unnecessary interruption and disruption in the business relationships between PSEs and foreign merchants to whom the backup withholding provisions should not have applied in the first place.

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[2] The meaning of "U.S. payor" under Treas. Reg. § 1.6049-5(c)(5) is exceptionally broad. It includes not only payors who are U.S. persons (e.g., U.S. citizens, partnerships, and corporations) but also controlled foreign corporations within the meaning of Section 957 ("CFCs"), such as a US-owned merchant acquirer located in a foreign jurisdiction that is in the business of foreign merchant acquisition. Because these U.S. acquirers deal primarily with foreign merchants, the requirement that they obtain documentation from these merchants establishing their foreign status in order to avoid backup withholding would likely result in a costly administrative exercise that achieves little or no meaningful result.

Moreover, the fact that a U.S.-affiliated merchant acquirer located in a foreign jurisdiction is treated as a U.S. payor under the Proposed Regulations and is, therefore, required to obtain Forms W-8 to exempt foreign participating payees from the reporting requirements places such an entity at a competitive disadvantage when compared to a foreign-affiliated merchant acquiring entity located in the same jurisdiction.

Our previous comment letter suggested that the Proposed Regulations treat all PSE/EPFs in the same manner (i.e., that the same tax documentation requirements apply to foreign and U.S. payors). ABA continues to believe that there should be symmetry between the treatment of U.S. and non-U.S. payors. Under such an approach, neither U.S. nor non-U.S. payors would be required to make an information return for payments to a participating payee with a foreign address as long as the payor had no actual knowledge or reason to know that the payee was a U.S. person. There should be no need for the payor (U.S. or non-U.S.) to obtain tax documentation substantiating the payee's foreign status unless a foreign payee also provides a U.S. address. Only in such cases should the payee be required to furnish Form W-8 or other tax-related documentation sufficient to establish its foreign status.

- Suggested Rule

The ABA suggests that the final regulations adopt a rule similar to the current presumption rules contained in Treas. Reg. § 1.1441-1(b)(3)(iii)(A), which rely on "indicia of foreign status" (including, for example, the existence of a foreign address) for purposes of establishing the foreign status for both corporate and individual payees. Thus, under the final regulations, any payee would qualify for the "foreign address" exclusion if communications with such payee are mailed to an address outside the U.S. or payment to such payee is made outside the U.S.

In situations where there is ambiguity – for instance, when a payee has both a foreign and a U.S. address on file – a PSE should then be able to request and rely on a Form W-8 or other additional documentary evidence obtained from the payee, such as an organizational document, to establish foreign status and not be required to report under Section 6050W or impose backup withholding.

This result is most desirable and will allow PSEs to achieve efficiency and compliance in this area by avoiding the enormous difficulties associated with obtaining timely and valid Form W-8 documentation from foreign payees.

2. Treatment of Participating Payees With More Than One Address

For PSEs that are considered to be U.S. payors, the Proposed Regulations provide that payees with a foreign address will not be subject to reporting if the PSE obtains '*...documentation upon which the payment settlement entity may rely to treat the payment as made to a foreign person...*'. In other words, if the payor has a reliable form W-8BEN on file for a payee, such payee should be excluded from this reporting. The Service does not address the potential situation when a PSE has in its records both a U.S. and foreign address for a merchant. For instance, a Puerto Rico resident travel company that has multiple offices, one of which is located in Miami, accepts customer credit

cards at all of its offices. The PSE maintains separate processing accounts for each of the merchant locations, which includes the location's address. Thus, the PSE has both foreign and U.S. addresses for the merchant). Is the PSE allowed to exclude this merchant from this reporting provision?

Our previous comment letter suggested that if a payee has both U.S. and foreign addresses, the PSE/EPF should have the option of relying on other evidence, including the payee's organizational document, in order to determine whether such payee is a "foreign person" and, therefore, excluded from this reporting requirement. In addition, the Service could implement rules similar to the presumption rules of Treas. Regs. 1.1441-1(b)(3)(iii)(A), under which certain entities may be presumed foreign if communications with the payee are mailed to an address in a foreign country.

The ABA suggests that the Service clarify this issue by adopting our suggestion above. Thus, the PSE may exclude a foreign merchant from reporting to the extent that the merchant provides additional documentary evidence to support its claim of foreign status when the PSE's records contain both U.S. and foreign addresses.

3. Definition of "Payment Card"

The Proposed Regulations define the term "payment card" and provide examples to illustrate the types of payment cards that are covered under this new reporting provision. The examples illustrate the application of the rules with respect to campus cards, prepaid telephone cards, transit cards and gift cards. There is no example to illustrate the application (or non thereof) to private label cards. Thus, the Service needs to clarify that this reporting provision does not apply to: (1) private label cards that are issued by a retailer and can only be used at that retailer; (2) private label cards that are issued by a bank and can only be used at one retailer; and (3) the processing of echecks (for instance, when a customer makes an online purchase of goods and uses a check for payment and such payment transaction is not converted into a debit card transaction. This would be a straight check payment transaction).

4. Reporting Date

The Proposed Regulations broadly define the "gross amount" to be reported as the total dollar amount of aggregate reportable payment transactions without regard to any adjustments for credits, cash equivalents, discount amounts, fees, refunds or any other amounts. Furthermore, the Proposed Regulations require reporting on an annual (year-end) and monthly (month-end) basis. This creates some confusion as to whether the reporting date would be the authorization date, the transaction date, the clearing date, the settlement date, or some other date. This clarification is important because the reporting date controls the transactions that would be captured for any particular month. Thus, we request that the final regulations clarify that the reporting date should be a date that the transactions have been reviewed and approved for payment, which would be the "settlement" or "submission" date (i.e., the date the charge is submitted by the participating payee for payment.

5. Treatment of Aggregated Payments

The ABA had requested clarification with regard to payments made to a merchant that has one name and has multiple locations. A PSE/EPF should have the option of either aggregating payments made to merchants that have the same name but multiple locations or reporting the payments individually. In some cases, merchants with the same name and multiple locations are set up separately in the PSE/EPF's merchant systems. In such cases, the PSE/EPF should have the option of either reporting aggregate payments to the merchants or reporting each individual payment. This flexibility in reporting procedure is important because of the different systems frameworks currently used by PSE/EPFs.

The Proposed Regulations did not address this issue. Therefore, the ABA requests that the Service include this clarification in the final regulations.

6. Waiver of Penalties

The ABA suggests that the Service provide some latitude for PSE/EPFs under this regime through an initial period of waiver of penalties for failure to comply under certain circumstances. In addition to the fact that final regulations will not be issued at least one year before the effective date of this provision, we anticipate that there will be some difficult issues to deal with as systems are put in place and implementation gets underway, thus, making it unrealistic for the industry to be ready to comply by 1/1/2011. We suggest that the Service issue guidance providing for waiver of penalties where a PSE/EFP is able to show that it has made all reasonable efforts to comply by the effective date, but is not ably to comply because of circumstances beyond its control.

We would welcome an opportunity to further discuss any of our comments with you in person or on the phone. Please contact me at 202.663.5317 or fmordi@aba.com if you have any questions or would like to meet to discuss our comments.

Sincerely,

Francisca N. Mordi