



January 25, 2010

Internal Revenue Service
CC:PA:LPD:PR (Notice 2009-106: REG-139255-08)
Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

**RE: Notice 2009-106: Comments to Proposed Regulations (REG-139255-08)
Information Reporting Requirement for Payments Made in Settlement of
Payment Card and Third-Party Network Transactions**

The Electronic Transactions Association (ETA) submits the following comments on REG-139255-08 (“Proposed Regulations”) issued by the U.S. Department of Treasury and Internal Revenue Service (collectively, the “Service”) on November 23, 2009.

The ETA is an international trade association representing companies who offer electronic transaction processing products and services. ETA’s membership spans the breadth of the payments industry, from financial institutions to transaction processors to independent sales organizations (ISOs) to equipment suppliers. ETA’s member companies, over 500 worldwide, desire to be in compliance by the effective date of the new information reporting required under the Internal Revenue Code of 1986, as amended (the “Code”) and the Treasury Regulations.

The ETA is grateful that the Service has provided detailed guidance and examples in the Proposed Regulations intended to assist the industry as it develops processes to comply with this new reporting regime. This letter provides comments in response to certain issues raised in the Proposed Regulations and also requests clarification on other issues in, and related to, the Proposed Regulations.

The ETA and its members will be available to answer questions or provide information to the Service as needed. Please contact Mary Bennett at 202.828.2635 x203 or mary.bennett@electran.org if you have questions or would like to set up a meeting to discuss our comments.

The Service has requested additional comments on the following:

- 1. Treatment of Payment Settlement Entities (PSE) that are not U.S. payors or U.S. middlemen.**

The Proposed Regulations provide that a PSE that is not a U.S. payor or U.S. middleman is not required to report payments to participating payees that do not have a United States address as long as the PSE neither knows nor has reason to know that the participating payee is a United States person. Therefore, under the Proposed Regulations, only U.S. owned PSEs will be subject to the administrative burden of collecting documentation on a huge number of merchants for whom it already has foreign addresses on file in order to establish foreign status (*i.e.*, Form W-8, foreign articles of incorporation), whereas, non-U.S. owned or foreign PSEs will not be subject to this burdensome and costly exercise.

The difficulty in obtaining timely and valid Form W-8 documentation from foreign payees, who have no US presence and lack a US TIN, will result in backup withholding on payments to foreign merchants. Backup withholding and 1099 reporting must be in U.S. dollars. However, the Proposed Regulations provide no guidance on converting the amounts for withholding and reporting purposes from the functional currency used exclusively by many foreign merchants to U.S. dollars for backup withholding and reporting purposes.

► In light of the disparate treatment provided for in the Proposed Regulations, we request that the Service provide that the same presumption rule (that relies on the existence of a foreign address) applies for all PSEs regardless of whether a foreign PSE or U.S PSE. In other words, if a PSE – whether a U.S. owned or foreign – has a non-U.S address on file for a merchant, then the PSE – U.S. or foreign – can presume that the merchant is foreign without the need to obtain additional documentation substantiating foreign status. Any other rule would create an unintended loophole in the law with the strong likelihood that US merchants will flee US acquirers for foreign ones in order to avoid this new burdensome reporting and backup withholding regime.

2. Whether the existing consent procedures for electronic reporting to payees should be modified.

Section 6050W(f) provides that payee statements may be furnished electronically. The Proposed Regulations rejected several suggestions relating to easing the confusion and administrative burden for merchants who want to receive only electronic communications, but the Service has asked whether existing consent procedures should be further reviewed and modified.

► We request that the Service modify the existing consent procedures to reflect how business communications and technology actually work by adopting the following (i) an “opt out” process for merchants who have already consented to receiving information electronically (in other words, a merchant that has previously consented to receive merchants statements electronically should not be subject to an additional consent requirement to receive the 1099K electronically); (ii) stating that merchants not currently receiving any business communications electronically should not be required to receive a unique communication to inform them of their option to receive payee statements electronically; but rather, such notice should be includible with another business mailing; and (iii) merchants receiving paper communications desiring an electronic payee statement, should be able to log onto the PSE/EPF website and consent to electronic communications; no other written consent should be required.

3. De Minimis Exception for Backup Withholding

The Service requested further comments on the application of a de minimis reporting rule exception.

► We recommend that the IRS set a de minimis annual reporting threshold for all payment card transactions. We support a more meaningful annual threshold of \$20,000 for payment card transactions, which we think properly weighs the value of the information being provided as well as the costs incurred to obtain that information. Information reporting under this amount will provide little, if any, value to the IRS and would impose substantial administrative cost and burden on the PSEs and the Service in processing these reports. In the alternative, we believe, at a minimum, a nominal \$600 annual amount should be applied if the IRS is unwilling to establish a higher threshold.

Other ETA Matters of Concern:

1. Treatment of Aggregated Payments

We requested that the Service's guidance should state clearly that, for reporting purposes a PSE/EPF has the option of either aggregating payments made to merchants that have the same name and TIN but multiple locations, or reporting the payments individually. In some cases, merchants with the same name and TIN and multiple locations would be 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 types of system set ups currently used by PSE/EPFs.

► The Proposed Regulations did not address this issue. Accordingly, the ETA requests that the Service include this clarification in the final regulations.

2. Electronic Payment Facilitator

The Proposed Regulations provide for a special rule for electronic payment facilitators. "If a PSE contracts with an electronic payment facilitator or other third party to settle reportable payment transactions on behalf of the PSE, the Electronic Payment Facilitator or other third party must file the annual information return under this section in lieu of the PSE." Example 14 in the Proposed Regulations provides a scenario where an electronic payment facilitator contracting with a merchant acquiring entity would be obligated to file the annual information. This Example is ambiguous and does not cover the contact terms a number of our members operate within.

► We recommend that the Service clarify Example 14 and provide "real world" examples on who has the reporting obligation under different scenarios.

3. Timing of the Determination of the "Gross Amount"

The Proposed Regulations define “gross amount” as the total dollar amount of aggregate reportable payment transactions for each participating payee without regard to any adjustments for credits, cash equivalents, discount amounts, fees, refund amount or any other amounts. *See* Prop. Treas. Reg. § 1.6050W-1(a)(5).

► We agree with the approach taken by the Service with respect to the definition of “gross amount;” however, we believe the Proposed Regulations need to be clarified with respect to the timing of the determination of such “gross amount.” It is common in the industry to have a considerable time lag between when a purchase is made by the cardholder, when a charge is submitted by the participating payee, and when the charge is ultimately settled by the payment settlement entity. As such, it is unclear under the Proposed Regulations whether payment settlement entities would be required to report the gross amounts that were submitted for payment by participating payees during the calendar year or, alternatively, the gross amounts that were settled during the calendar year. To minimize the administrative and cost burden for payment settlement entities, we recommend that the final regulations clarify that payment settlement entities are required to report gross amounts that *were submitted for payment* by participating payees during the calendar year.

4. IRS TIN Matching System

We are confident that the Service will work to maintain and upgrade the existing IRS TIN matching system. Our members have expressed great frustration with the current system and its error rate (*i.e.*, name on file does not exactly match the name in the IRS system and in many cases the name is spelled wrong in the IRS system) and lack of real time matching for large batches of TINs.

► We suggest that the Service update the TIN matching interface in order to accommodate the size of the industry now subject to reporting. For example, it would be helpful if the IRS would allow and publish a way to get a real time return code from the TIN matching site via an interface or web service. That would allow TIN data to be verified immediately at the time merchant accounts are set up.

5. Penalty Relief

The Service recognized the need for a smooth implementation of the new information reporting regime, including the mitigation of penalties in the early stages.

► We appreciate this recognition by the Service and request that the Service provide some extra degree of latitude for PSE/EPFs under this new reporting regime though an initial waiver of penalties for a two-year period for failure to comply under reasonable circumstances.