INFORMATION REPORTING PROGRAM ADVISORY COMMITTEE (IRPAC)

1111 Constitution Avenue, NW, Room 7563, Washington, D.C. 20224

March 28, 2011

Honorable Douglas Shulman
Commissioner of Internal Revenue
Internal Revenue Service
Attn: Yvette Lawrence
Room 6129
1111 Constitution Avenue, N.W
Washington, DC 20224

RE: Comments on Merchant Card, Third-Party Payments Form 1099-K

Dear Commissioner Shulman:

The Information Reporting Program Advisory Committee (IRPAC)[1] is pleased to submit the following comments regarding Form 1099-K reporting for Merchant Card and Third-Party Payments, which implements the rules set forth in section 6050W of the Internal Revenue Code of 1986, as amended, (IRC),[2] and Treasury Decision ("T.D.") 9496.[3] Although this correspondence is submitted in response to the IRS's Notice and Request for Comments Regarding Form 1099-K (Feb. 11, 2011), the significant effect of the payment card rules prompted IRPAC to provide additional comments on substantive issues that have been raised in the taxpayer and reporting communities following the issuance of the final section 6050W regulations.

As more fully described below, based upon the sweeping effect of the final section 6050W regulations, open questions and uncertainty related to the scope of these rules, the substantial compliance burden on those required to comply, and lack of clear guidance that raises significant noncompliance concerns, IRPAC strongly urges Treasury and the IRS to:

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[1] IRPAC was established in 1991 as a result of an administrative recommendation contained in the final conference report for the Omnibus Budget Reconciliation Act of 1989. The recommendation suggested that the Internal Revenue Service ("IRS") consider "the creation of an advisory group of representatives from the payer community and practitioners interested in the Information Reporting Program (IRP) to discuss improvements to the system."

[2] Hereafter, all section references are to the Internal Revenue Code.

[3] The Treasury Regulations promulgated or revised under T.D. 9496 include the following: Treas. Reg. §§ 1.6041-1, 1.6041A-1, 1.6050W-1, 1.6050W-2, 31.3406(b)(3)-5, 31.3406(g)-1, 31.3406(a)-2, 31.3406(b)(3)-5, 31.3406(d)-1, 31.6045-4, 301.6721-1, and 301.6722-1.

1. Postpone the current effective dates for both reporting and backup withholding by at least one additional year, or otherwise make the reporting optional for 2011, at least for third party networks that have been historically reported on Form 1099-MISC, and provide ample relief during the transition period.[4]

2. Issue guidance in whatever form necessary -- revised regulations, notices, FAQs, form instructions, etc. -- to limit, where necessary, the application of these rules and to provide much needed guidance. This guidance should:

    a. Limit the scope of the term "third party payment network," and define the key terms referenced therein: (i) substantial number of providers of goods or services, (ii) guarantee, and (iii) central organization.

    b. Provide a broad exclusion for healthcare payments (regardless of the funding arrangement), which have historically been reported on Form 1099-MISC.

    c. Provide a broad exclusion for all accounts payable processing arrangements (regardless whether the processing is performed by the purchaser of the goods or services, an affiliate or other related party, or a third party), which have historically reported reportable payments on Form 1099-MISC.

    d. Apply the non-U.S. payor documentation requirement for foreign payees to all payors.

I. SECTION 6050W REGULATIONS GENERALLY

The regulations issued under T.D. 9496 have a dramatic effect on the information reporting and backup withholding landscape and on compliance responsibilities for payors in general. In the case of payment cards, the new Form 1099-K and final section 6050W regulations reduce the compliance burden on payment card users by shifting the reporting burden to merchant acquiring entities. In the case of third party networks, however, organizations that did not foresee that the potential scope of the section 6050W rules could impact their reporting obligations have discovered that their organizations are either required to report under section 6050W or are possibly required to report under section 6050W. Further, the rules require reporting of the gross amount of reportable payment transactions on a monthly basis on new Form 1099-K. This new approach to reporting and the very short time horizon between the promulgation of the final regulations on August 16, 2010, the effective date for

[4] This would mean that the reporting on Form 1099-K would be required for payments made on or after January 1, 2012, and the backup withholding requirements would be required for payments made on or after January 1, 2013.

reporting of transactions (and the need to track such transactions) occurring on or after January 1, 2011, and the issuance of the new Form 1099-K on January 18, 2011, allows insufficient time for many reporting organizations to determine whether they, in fact, must report and, if so, whether they can establish the necessary procedures and systems to reasonably comply with the rules. The fact is that many reporting organizations simply cannot timely comply with these rules. Accordingly, the IRS should issue supplementary guidance to clarify the effect of the final section 6050W regulations and Form 1099-K instructions and extend by at least one year both the reporting and backup withholding requirements currently in place. In addition, the IRS should liberally grant penalty relief for those reporting organizations that attempt to comply but encounter difficulty doing so.

II. SIGNIFICANT ISSUES RELATED TO THIRD PARTY NETWORKS

One of the greatest areas of confusion regarding Form 1099-K and section 6050W compliance relates to the meaning of "third party payment network." Treas. Reg. § 1.6050W-1(c)(3) provides that the term "third party payment network" means:

> [a]ny agreement or arrangement that --
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> (A) Involves the establishment of accounts with a central organization by a substantial number of providers of goods or services who are unrelated to the organization and who have agreed to settle transactions for the provision of the goods or services to purchasers according to the terms of the agreement or arrangement;
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> (B) Provides standards and mechanisms for settling the transactions; and
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> (C) Guarantees payment to the persons providing goods or services in settlement of transactions with purchasers pursuant to the agreement or arrangement.

The above definition of "third party payment network" in the final regulations is very similar to the statutory definition set forth in section 6050W(d)(3).[5] Congress defined "third party payment network" broadly to capture specific arrangements that had previously eluded the information reporting provisions of the tax law (*i.e.*, PayPal and

[5] The breadth of the definition of third party payment network potentially implicates arrangements not intended to be covered by section 6050W. For example, IRPAC members have observed that an expansive reading of the third party network provisions in the final section 6050W regulations could potentially implicate common commercial arrangements involving the transfer of accounts receivable. IRPAC does not believe that Congress intended such arrangements to be subject to reporting as third party payment networks nor does IRPAC believe that the IRS contemplated such arrangements when it developed the section 6050W regulations.

similar arrangements) and subject them to information reporting.[6] Congress did not intend to "reinvent the wheel," however, by complicating, substituting, or duplicating information reporting standards for arrangements and transactions that had been previously subject to reporting under section 6041.[7] To prevent duplication and tension between sections 6041 and 6050W, Congress granted Treasury authority under section 6050W(g) to promulgate regulations or other necessary guidance.

The final section 6050W regulations addressing third party network transactions urgently require additional development to address the meaning of key terminology, to more carefully harmonize the reporting under sections 6041 and 6050W, and to clearly identify those arrangements subject to reporting under section 6050W. IRPAC is very concerned that without such further development the transition to reporting under section 6050W will be exceptionally difficult for both the IRS and those required to report on Form 1099-K.

A. Definitions Needed for Key Terms

The third party network regulations use terms that must be clearly defined in order to properly understand the scope of reporting and properly apply the regulations. These terms include, "substantial number of providers of goods or services," "guarantee," and "central organization."

1. Substantial Number of Providers of Goods or Services

Under the final section 6050W regulations, in order for an agreement or arrangement to constitute a third party payment network, it must, among other things, involve the establishment of accounts with a central organization by a *substantial number* of providers of goods or services who are unrelated to the organization and who have agreed to settle transactions for the provision of goods or services to purchasers according to the terms of the agreement or arrangement. Treas. Reg. § 1.6050W-1(c)(3)(A). (Emphasis added). The correlative language in section 6050W(d)(3)(A) refers to a substantial number of persons rather than to a substantial number of providers of goods or services. Moreover, neither section 6050W nor the final section 6050W regulations touch upon the meaning of the term "substantial number" for purposes of these provisions.

In the context of a third party payment network, the only guidance regarding the term "substantial number" is provided in the Technical Explanation of Division C of H.R.

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[6] The House Ways and Means Report on the Alternative Minimum Tax Relief Act of 2008, includes the Committee's report on section 6050W and a section entitled "reasons for change." Following a general statement regarding information reporting of credit card and other electronic payment transactions, the report states "[g]enerally, business receipts that are subject to information reporting are less likely to be underreported by taxpayers." This infers that the legislative intent of section 6050W was to subject transactions to reporting -- generally credit card and electronic payment transactions -- that were not previously subject to reporting in order to improve compliance with the tax law. H.R. Rep. No. 110-728, at 35 (2008).

[7] *Id.*

3221, the "Housing Assistance Tax Act of 2008" prepared by the Staff of the Joint Committee on Taxation [JCX-63-08, 7/23/2008] (the "JCT Report"). There, the term "third party payment network" is defined (in part) as any agreement or arrangement which involves the establishment of accounts with a central organization by a substantial number of persons *(e.g., more than 50)* who are unrelated to such organization, provide goods or services, and have agreed to settle transactions for the provision of such goods or services pursuant to such agreement or arrangement. (Italics provided).

Thus, for purposes of determining whether the substantial number requirement for establishing a third party payment network is satisfied, existing guidance offers as an example of the requisite number, persons who number more than 50. This guidance is insufficient to enable a third party organization to determine its status as a third party settlement organization. If a putative third party settlement organization takes the position that an agreement or arrangement lacks a substantial number of providers of goods or services to establish the existence of a third party payment network and the IRS disagrees on audit, the third party organization may potentially be subject to penalties and backup withholding. Accordingly, additional guidance is necessary regarding this issue. For example:

- It is not clear whether the reference to "e.g., more than 50" in the JCT Report is intended to provides a safe harbor or a bright line rule. Under what circumstances is the third party organization able to rely on treating an arrangement with 50 or fewer providers as not involving a substantial number and, therefore, as not a third party payment network? Under what circumstances should the third party organization be able to demonstrate that merely having an arrangement with more than 50 providers at a particular point in time does not necessarily constitute a substantial number for purposes of the third party network rules?

- Is each *person* (the term used in the Code and the JCT Report) to be treated as a separate *provider of goods and services* (the term used in the final section 6050W regulations) and is each provider of goods to be construed as satisfying the definition of "person" under section 7701(a)(1)? Thus, if the provider is a partnership with 20 partners, how is this arrangement counted for purposes of the substantial number requirement? Similarly, how does a taxpayer determine the number of providers of goods or services when a bill for services is submitted and payment is received by a single payee that covers services provided by persons who are owners, independent contractors or employees of that payee?

IRPAC believes that rules must be provided to determine whether an arrangement "involves a substantial number of providers of goods or services." Further, these rules must be set forth in a manner that allows ready and consistent application by both third party settlement organizations and the IRS, and that are consistent with the spirit of the

JCT Report language and the section 6050W reporting requirements. IRPAC submits that a bright line test is necessary for application of this rule.

IRPAC recommends that such a rule should provide that the arrangement does not involve a substantial number of providers in a calendar year if, for any day in the calendar year, the number of providers that accept payments from the taxpayer in settlement of accounts does not exceed 50. This provision is consistent with the JCT Report language, is easily administered, and provides a reasonable rule for seasonal businesses and for taxpayers who are starting up or winding down a business. The rule should also specifically provide that a provider that receives payment on behalf of others under the aggregated payees rule or otherwise should be counted as one provider for purposes of the substantial number of providers requirement. Otherwise, third party settlement organizations would have the difficult, if not impossible, task of determining the various kinds of sub-arrangements that may underlie the arrangement between the third party settlement organization and the providers receiving payments.

2. Guarantee

Section 6050W(d)(3)(C) and Treas. Reg. § 1.6050W-1(c)(3)(C) require that in order for an agreement or arrangement to constitute a third party payment network, it must, among other things, guarantee payment to persons providing goods or services in settlement of the transactions subject to the agreement or arrangement. Neither the statute nor the final regulations set forth the meaning of "guarantee" for this purpose or the factors that establish the existence of a guarantee.[8] IRPAC believes that the term "guarantee" is a term of art and can be ambiguous,[9] and, therefore, the IRS should issue guidance to define the meaning of "guarantee" for purposes of Form 1099-K and the section 6050W regulations so those third party settlement organizations potentially subject to reporting can properly understand and apply the standard.[10]

The term "guarantee" has been defined as "[a]n agreement by which one person assumes the responsibility of assuring payment or fulfillment of another's debts or obligations."[11] Black's law dictionary defines "guarantee" as [t]he assurance that a contract or legal act will be duly carried out."[12] In most U.S. jurisdictions under the statute of frauds, a guarantee (a/k/a a surety) -- an arrangement by which one party, the guarantor, assumes responsibility for the debt obligation of another -- must be in writing to be enforceable against the guarantor. In cases in which the guarantor acts

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[8] The term is sometimes spelled "guaranty" in legal writing. *See* Black's Law Dictionary 772 (9th ed. 2009).

[9] For example, the language in UCC § 3-419(d) seems to imply that there is a distinction between a guarantee of payment and a guarantee of collection.

[10] In a number of situations, the Internal Revenue Code and the Treasury Regulations address situations involving guarantees. For example, Treas. Reg. §§ 1.166-8 and 166-9 address circumstances involving the deductibility of bad debts when the debts are subject to guarantees, and under the "at-risk" rules set forth in Prop. Treas. Reg. § 1.465-6(d) when a guarantor's amount at risk is increased on account of a repayment guarantee.

[11] *See* The American Heritage College Dictionary 603 (3rd ed. 2000).

[12] *See* Black's Law Dictionary 772 (9th ed. 2009).

for its own benefit, however, a written agreement may not be required in certain jurisdictions.[13] Thus, the term "guarantee" is subject to interpretation based upon various meanings and requirements under state and commercial law. Accordingly, it is necessary to provide guidance regarding the meaning of "guarantee" for those potentially subject to third party network reporting requirements.

For this purpose, IRPAC believes that a guarantee should mean an enforceable legal obligation on the part of the third party settlement organization to make payment to the provider of goods or services and that such obligation must be set forth clearly and unambiguously in a written agreement under which both the third party settlement organization and the provider of goods or services are parties. Reporting under section 6050W should not be a nuanced determination where taxpayers are left guessing as to the applicability of the requirement. Further, where a putative third party settlement organization that makes payments to providers of goods or services promises to, and ordinarily does, make prompt payments from its own funds or from the funds of the recipient of goods or services, but is not legally required to provide payment if, for example, the purchaser of the goods or services can no longer fund its obligations, the agreement or arrangement should not constitute a qualifying arrangement because the putative third party settlement organization does not provide a payment guarantee for purposes of the third party network rules.

Vague or ambiguous arrangements whereby a putative third party settlement organization is not under a clear legal duty to make such payments should not be subject to the requirements of section 6050W. IRPAC believes that qualifying guarantee agreements or arrangements could be two party or multiple party agreements or arrangements. That is, the agreements or arrangements may involve only the third party settlement organization and the providers of the goods or services, or alternatively such agreements or arrangements could involve multiple parties, including the third party settlement organization, the providers of the goods or services, and the purchasers of the goods or services. In either case however, the existence of a guarantee under the terms of the agreement or arrangement must be clear and legally binding.

3. Central Organization

Lastly, the relationship between a putative third party settlement organization and the provider of goods or services is critical in determining the existence of a third party payment network under Treas. Reg. § 1.6050W-1(c)(3). In particular, a third party payment network does not exist when the payor is related to the provider of goods or services. Treas. Reg. §§ 1.6050W-1(c)(3)(i)(A) and 1.6050W-1(d)(5). It is unclear under the final section 6050W regulations, however, whether a third party payment network can exist when a putative third party settlement organization is related to the purchaser of the goods or services. Such a determination is critical when evaluating any potential third party network transaction.

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[13] This exception is referred to as the "main purpose rule."

An example of an arrangement in which the relationship between the putative third party settlement organization and the purchaser of goods or services is critical is a "shared services" arrangement. Example 18 in the final section 6050W regulations addresses a scenario involving the processing of accounts payable by a shared-service organization that is unrelated to both the purchasers of goods or services and to the providers of goods or services.[14] The example concludes that the shared-service organization is a third party settlement organization under Treas. Reg. § 1.6050W-1(c)(2) and that the arrangement constitutes a third party payment network under Treas. Reg. § 1.6050W-1(c)(3). It is unclear in the example, however, whether this conclusion changes in a true "shared-service" arrangement in which an entity purchasing the goods or services is related to the entity performing the shared-service function. Based upon the flush language of the final regulations, it is unclear whether such an arrangement constitutes a third party payment network. Nevertheless, IRPAC does not believe that either Congress or the IRS intended for arrangements between purchasers of goods or services and related settlement organizations to constitute third party payment networks.

To resolve this issue, IRPAC strongly urges the IRS to issue guidance defining the term "central organization" as an organization that is unrelated, within the meaning of Treas. Reg. § 1.6050W-1(d)(5), to the purchaser of the goods or services.

B. Harmonization of Sections 6041 and 6050W

Congress enacted section 6050W with a focus on a transaction-based reporting model generally used by financial institutions (*e.g.*, banks, credit card companies, etc.). This approach is fundamentally different from the payment-based reporting model ordinarily used by non-financial businesses (*e.g.*, reporting on Forms 1099-MISC in connection with the processing of accounts payable) in which payments are made following the receipt of an invoice, and reporting on Forms 1099-MISC is based upon actual gross payments made during the calendar year. Applying the reporting requirements of section 6050W to traditional, non-financial businesses previously subject to reporting under section 6041 is a sea change for such organizations and the implementation burden -- both administrative and economic -- is substantial. For these reasons, the harmonization of sections 6041 and 6050W is exceptionally important, and the careful exercise of the power granted to Treasury and the IRS under section 6050W(g) is necessary to ensure a realistic and efficient transition to Form 1099-K reporting.

Congress granted Treasury the authority under section 6050W(g) to prevent section 6050W from displacing functional, well established, and effective information reporting mechanisms already in place under section 6041. The final section 6050W regulations issued in August of 2010, amended the regulations under section 6041 to provide that transactions otherwise "subject to reporting under both sections 6041 and

[14] The use of the term "shared service" in example 18 is a misnomer. Typically, shared service arrangements only exist in the context of related parties. The term "total outsourcing" is generally used to describe arrangements involving the performance of such services by third parties.

6050W are reported under section 6050W and not section 6041." Treas. Reg. § 1.6041-1(a)(1)(iv). In other words, the final section 6050W regulations adopt a standard whereby section 6050W *always* trumps section 6041 when a transaction is potentially subject to reporting under both sections.

IRPAC does not believe that this universal approach to harmonize sections 6041 and 6050W is the best or most effective approach in the case of third party network transactions.[15] IRPAC believes that those third party arrangements that were previously subject to reporting under section 6041, a reporting process that worked very well for many years, should remain under section 6041 and not shift to section 6050W. The economic and administrative burden created by shifting reporting for such arrangements to section 6050W reporting appears to outweigh the benefits likely to be realized from this significant change.[16] Moreover as pointed out previously in this correspondence, the universal harmonization approach used in the final section 6050W regulations seems inconsistent with Congressional intent to the extent that it displaces efficient and functional information reporting practices.

Two examples of situations in which Treasury and the IRS should allow the information reporting requirements under section 6041 to remain in effect are the reporting of medical and healthcare payments and third party accounts payable processing arrangements (addressed separately in parts III and IV, respectively). Accordingly, IRPAC urges Treasury and the IRS to issue guidance and modify the language of Treas. Reg. § 1.6041-1(a)(1)(iv), as necessary, to allow long-standing section 6041 reporting to remain in effect for functional and well-established reporting situations.

III. ALL MEDICAL PAYMENTS MADE BY HEALTHCARE NETWORKS SHOULD BE TREATED CONSISTENTLY AND EXEMPTED FROM THE REPORTING REQUIREMENTS OF SECTION 6050W.

In addition to the traditional accounts payable functions that have always been covered under section 6041, IRPAC strongly urges the IRS to exempt both fully-insured and self-insured healthcare arrangements from reporting medical and healthcare payments on Form 1099-K,[17] as well as those payments otherwise exempted from reporting since

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[15] IRPAC was concerned that a broad, overreaching approach regarding third party networks would be disruptive to businesses, and it cautioned the IRS on this issue in correspondence submitted on January 20, 2010. At that time, IRPAC recommended that existing reporting under section 6041 should remain in place rather than replace such reporting with new rules under section 6050W.

[16] As of the date of this letter, Congress appears poised to repeal the expanded Form 1099 reporting passed under the Patient Protection and Affordable Care Act of 2010, so the notion that the reporting of property purchases and payments to corporate payees is critical in the context of all third party network arrangements that are already compliant with the requirements of section 6041 should not a factor.

[17] Before the issuance of the final section 6050W regulations, medical and health care payments under both fully-insured and self-insured healthcare arrangements were reportable in box 6 of Form 1099-MISC. Those healthcare arrangements not implicated by the final section 6050W regulations continue to be required to report medical and health care payments in box 6 of Form 1099-MISC. Special exceptions preclude reporting of payments made under employee flexible spending arrangements

such amounts have also always fallen under sections 6041 and 6041A.[18] The preamble to the final section 6050W regulations contemplates that certain self-insured arrangements could constitute third party payment networks, and that reportable payments made under such arrangements would be reported on Form 1099-K. Because such payments are already subject to reporting on Form 1099-MISC for both fully-insured and self-insured healthcare arrangements, IRPAC believes that reporting under section 6050W for payments made by a subset of self-insured healthcare arrangements that happen to satisfy the broad definition of third party payment network under section 6050W(d)(3) and Treas. Reg. § 1.6050W-1(c)(3) frustrates rather than enhances Federal information reporting for healthcare payments.

IRPAC also believes that requiring separate reporting on Form 1099-K for effected healthcare arrangements will be administratively burdensome and economically costly for payors, confusing for payees and of little enforcement value for the IRS. Health insurers have informed IRPAC members that the aggregate estimated compliance costs to implement the information reporting requirements of section 6050W for payments to healthcare providers will exceed $50 million industry wide in the first year, and prospective costs to comply with the duplicative, split reporting for payments to the same providers on Forms 1099-MISC and Forms 1099-K (*e.g.*, duplicative software, IT, printing, postage, etc.) based upon the type of plan triggering the payment (fully insured or self-funded) will be significant. Importantly, the payments at issue are already subject to reporting on Forms 1099-MISC.

As noted above, section 6050W(g) grants Treasury the authority to issue regulations or other guidance to prevent duplicative reporting, and IRPAC believes that a comprehensive exemption from section 6050W reporting for healthcare networks is warranted. IRPAC recognizes that a broad definition of "third party payment network" was necessary under the statute and regulations to facilitate reporting under section 6050W, but in this particular case, an exemption is necessary to retain the long-standing reporting of healthcare payments and to prevent needless confusion, encourage administrative efficiency for payors, contain costs in an industry where cost containment is paramount, and foster effective tax reporting of healthcare payments.

("FSA") under section 106(c)(2) or health reimbursement arrangements ("HRA") treated as employer-provided coverage under an accident or health plan under section 106. When payments are made from FSAs and HRAs, they are exempt from Form 1099 reporting even if made to a medical provider under section 6041(f). It is not clear whether the exemption applies to payments for medical services through health savings accounts ("HSA"). Section 6041(f) predates the creation of HSAs and does not address them, but the vehicles are similar and many practitioners believe that the exemption should extend to cover HSAs.

[18] Treas. Reg. § 1.6041-3(p)(1) exempts payments to (a) a hospital or extended care facility which qualifies as a tax exempt charitable organization; or (b) a hospital or extended care facility owned and operated by the U.S., a state, the District of Columbia, or a U.S. possession (or a political subdivision or an agency or instrumentality of any of the foregoing). In addition, payments to pharmacies are also not subject to reporting. *See* Situation 4 in Rev. Rul. 70-608, 1970-2 C.B. 268.

IRPAC understands that health insurers participating in Administrative Services Contracts ("ASC") or Administrative Services Only ("ASO") arrangements[19] and independent third party administrators ("TPAs") -- those healthcare organizations potentially implicated as third party settlement organizations in the preamble to the final section 6050W regulations -- universally concluded following the issuance of the proposed regulations that healthcare networks were fully exempt from reporting under section 6050W.[20] This belief was reasonable in light of the discussion of the issue set forth in the preamble to the proposed section 6050W regulations. Specifically, the preamble to the proposed regulations included two paragraphs that discussed healthcare networks. The first paragraph discussed healthcare networks broadly, and makes reference to both fully-insured and ASC (self-insured) arrangements. Without adequately distinguishing fully-insured healthcare arrangements from self-insured arrangements, the second paragraph states that "health carriers operating healthcare network are outside the scope of section 6050W" and concludes that "because the purpose of a healthcare network is not to enable buyers to transfer funds to sellers, a healthcare network is not a 'third party payment network' within the meaning of the proposed regulations."[21] IRPAC believes that the IRS would have been inundated with comments from the healthcare industry had the proposed regulations clearly explained that self-insured arrangements could be subject to reporting under section 6050W.

IRPAC submits that those payors (insurers) under ASC and ASO arrangements and TPAs potentially subject to reporting under section 6050W for payments to healthcare providers were caught completely unaware and by surprise by the discussion of self-insured arrangements in the preamble to the final section 6050W regulations and will have significant difficulty complying with these rules for 2011. In addition, insurers that administer both fully-insured and self-insured healthcare arrangements have universally expressed concern to IRPAC members that distinguishing between payments to healthcare providers in order to report correctly on Forms 1099-MISC and Forms 1099-K will be exceptionally difficult and costly because payments are often made to healthcare providers that satisfy charges for both fully-insured and self-insured participants.

IV. ALL ACCOUNTS PAYABLE PROCESSING ARRANGEMENTS SHOULD BE TREATED CONSISTENTLY AND EXEMPTED FROM THE REPORTING REQUIREMENTS OF SECTION 6050W.

IRPAC strongly urges the IRS to exempt all accounts payable processing arrangements from reporting transactions with providers of goods or services on Form 1099-K,

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[19] ASC and ASO arrangements are arrangements under which an employer hires a third party to administer employee benefit services to the employer. Such services typically include health claims processing, including adjudication of claims, and billing.

[20] After the proposed section 6050W regulations, the IRS received no comments from health insurers regarding ASC/ASO arrangements or TPAs regarding self-funded health plans. The IRS received a single comment regarding self-funded insurance arrangements (Document: IRS-2009-0032-0005) on December 30, 2009, from Roger O. Longenbach of Triple S Petroleum.

[21] Preamble to Proposed Regulations under Section 6050W, 74 Fed. Reg. 61294, 61297 (Nov. 24, 2009).

including third party accounts payable arrangements. Payments to providers under accounts payable processing arrangements have historically been subject to the provisions of section 6041 and reportable payments are reported on Forms 1099-MISC. For the reasons discussed herein, this well-established and effective practice should be allowed to continue.

There are three fundamental approaches to accounts payable ("AP") processing: an in-house AP department, a shared-service AP arrangement, and a total outsourcing (*i.e.*, third party) AP arrangement. An in-house AP department is an accounting function of the purchaser of goods and services by which the purchaser makes payments directly to sellers on the purchaser's own behalf. As stated in the preamble to the proposed regulations, such a department is not a "third party" and, therefore, is not a third party settlement organization of a third party network.

A shared-service AP arrangement typically provides for a single entity (which may be domestic or foreign) within an affiliated group to process the AP for all or a subset of the members of the group. This arrangement does not differ materially from the in-house model, discussed above, except that in the shared-services arrangement, the AP function is housed in a separate related entity rather than in a separate department or division of the purchaser. The legal formality of a separate but related entity should not result in treating a shared-services AP arrangement differently from an in-house arrangement for purposes of section 6050W. Moreover, as discussed above under "Central Organization" (in part II.A.3) IRPAC believes that in a shared-services AP arrangement, the related AP entity does not constitute a central organization, and therefore, is not a third party settlement organization of a third party payment network.

Under a total outsourcing AP arrangement, the AP function of a purchaser of goods or services is conducted by an entity that is unrelated to that purchaser (*i.e.*, a true third party). The AP processing activities performed under a shared-service AP arrangement and the AP processing activities performed under a total outsourcing arrangement are identical and reportable payments made under both arrangements are subject to reporting under section 6041.

IRPAC believes that all AP processing arrangements (in house, shared-service, and total outsourcing) should remain subject to the information reporting rules under section 6041 and not subject to reporting under section 6050W because the only distinction between such arrangements is that the AP processor in total outsourcing arrangements is a third party. No other substantive differences exist that should necessitate a different reporting regime, including the fact that all three types of AP processing arrangements are subject to section 6041 reporting and have been for years. Accordingly, IRPAC believes that the introduction of Form 1099-K reporting to total outsourcing AP arrangements is inconsistent with Congressional intent, inconsistent with other AP processing arrangements, and administratively and economically inefficient for third party AP processors and the IRS.

V. ONEROUS AND DISPARATE TREATMENT OF U.S. PAYORS UNDER TREAS. REG. § 1.6050W-1(a)(5)(ii) CREATES SUBSTANTIAL COMPETITIVE DISADVANTAGES FOR U.S. PAYORS IN FOREIGN MARKETS AND SHOULD BE IMMEDIATELY REMEDIED.

IRPAC recognizes the pressure on Treasury and the IRS to stem the tide of U.S. tax evasion and to narrow the Federal tax gap. IRPAC also recognizes that this requires action, including the need for rulemaking and increased enforcement. Nevertheless, IRPAC believes that the creation of rules that unquestionably and dramatically skew the competitive playing field against U.S. payors attempting to compete in foreign markets directly or through foreign affiliates is ill advised, especially when the U.S. fisc is unlikely to recognize any appreciable economic benefit.

The establishment of a rule that requires U.S. payors to obtain tax documentation from foreign payees while largely exempting non-U.S. payors from the same requirement, not only prejudices U.S. payors in foreign markets but seems inconsistent with Congressional intent.[22] The creation of rules that dramatically disadvantage the competitiveness of U.S. businesses in foreign markets should only occur for substantial and compelling reasons because such rules threaten the existence and profitability of businesses that the Federal government seeks to tax. The rule set forth in both the proposed and final section 6050W regulations does not seem to be supported by economic benefits to the U.S. fisc sufficiently compelling to justify the economic harm likely to be sustained by U.S. payors competing abroad. Accordingly, IRPAC believes that a single standard under Treas. Reg. § 1.6050W-1(a)(5)(ii) for both U.S. payors and non-U.S. payors must be applied. IRPAC believes that given the nature of the significant tax and economic policy concerns with respect to this specific issue, the establishment of such a disparate standard between U.S. and non-U.S. payors should be reserved for Congress.

Specifically, Treas. Reg. § 1.6050W-1(a)(5)(ii) requires U.S. payors to obtain tax documentation from foreign payees -- generally foreign merchants for payment cards and both foreign merchants and non-merchants for third party payment networks -- that satisfies the requirements found in Treas. Reg. § 1.1441-1(e)(1)(ii).[23] Such documentation may be a completed Form W-8BEN, a U.S. taxpayer identification number ("TIN"), or other official documentation that establishes the foreign payee is a foreign person. Without this documentation in hand, U.S. payors must impose backup withholding (currently 28%) under section 3406 for payments made on or after January 1, 2012. Conversely, unless non-U.S. payors have reason to believe that a foreign

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[22] IRPAC made this point previously in comments submitted to the IRS on January 20, 2010. Section 6050W(d)(1)(B) provides that the term "participating payee" does "not include any person with a foreign address."

[23] The final section 6050W regulations use a very broad definition of "U.S. payor or middleman" that includes not only U.S. payment settlement entities, but also foreign branches and controlled foreign corporations ("CFCs") of a U.S. payment settlement entity. *See* Treas. Reg. § 1.6049-5(c)(5). The effect of this standard means that the subsidiaries of U.S.-based multinationals that act as payment settlement entities are generally subject to these rules and are similarly disadvantaged compared to non-U.S. payors.

payee is a U.S. person, non-U.S. payors are not required to obtain any such documentation from foreign payees and may rely on the fact that the foreign payee has a foreign address. This documentation requirement foisted on the foreign accounts of U.S. payors may seem innocuous to seasoned U.S. tax practitioners, but to wholly foreign merchants with no U.S. connection whatsoever, applying to the U.S. taxing authorities for a TIN or completing a Form W-8BEN is disconcerting.[24] This reality coupled with the fact that a similar requirement is not imposed on non-U.S. payors that compete side by side with U.S. payors for the same accounts has an obvious and profound effect on the foreign business of U.S. payors. That is, foreign merchants faced with a burdensome requirement for doing business with U.S. payors will likely just decline to do their payment card and third party payment business with U.S. payors and opt to do business with non-U.S. payors not subject to these rules.[25]

IRPAC does not believe that either Treasury or the IRS intended to dramatically impede the competitiveness of U.S. payors in foreign markets, but IRPAC believes that this is the practical effect of the foreign payee standard imposed on U.S. payors under the final section 6050W regulations. In testimony at the Public Hearing on Proposed Regulations under Section 6050W on March 15, 2010, (the "Hearing"), representatives of companies adversely affected by the foreign payee rules testified on how their businesses would suffer under those rules. Some excerpts from that testimony are set forth below.

> American Express signs millions of foreign merchants to accept the American Express card. Approximately 98 percent of merchants in a typical region are small retail merchants that usually do not speak English. Legal agreements and all account communications are in local language . . . When American Express recently surveyed its merchant account information data, less than 1 percent of active foreign merchants have a U.S. address on record.[26]

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[24] The proposed and final section 6050W regulations imposed this standard on U.S. payors when the regulations under section 1441, which were harmonized with the reporting rules under section 6041 et seq. and backup withholding under section 3406, include presumption rules under Treas. Reg. § 1.1441-(b)(3)(iii) to determine U.S. or foreign status in the absence of documentation. It is puzzling why the proposed and final section 6050W regulations impose such a burdensome standard when the same standard is not used in this other context.

[25] The rules set forth in section 6050W(b)(4)(B) shift the documentation and reporting requirements to intermediaries that qualify as Electronic Payment Facilitators ("EPFs"). If an EPF is foreign, it may rely on the foreign address of foreign payees and need not obtain documentation from the payee. U.S. payors could separate themselves from payments to foreign payees by using a foreign EPF for foreign payees. Although this approach would allow a U.S payor to avoid the documentation requirements for foreign payees, the use of an EPF could be detrimental to business relationships and increase costs considerably. More importantly for Treasury and the IRS, however, this approach would remove U.S. payors from the payment chain and thwart efforts to identify U.S. tax evasion. Making documentation requirements reasonable for U.S. payors in a manner that encourages the monitoring of indicia of U.S. status for foreign payees would seem to be more advantageous for the U.S. fisc than encouraging an approach that bifurcates the documentation and payment processes simply to allow U.S. payors to sidestep an unreasonable documentation standard that ultimately allows reliance on the foreign address anyway.

[26] Testimony of Anne Pontrelli, Vice President and General Tax Counsel for American Express.

> [t]he average merchant will not easily understand or accept, notwithstanding our educational efforts, that the Form W-8BEN is not asking for any information that Elavon most likely has in its account information; that the form will not result in unanticipated and unwarranted tax consequences to the merchant; or that Elavon will not provide the form or its information to the IRS or any government body, foreign or domestic. The merchant will see that it's a United States tax form and . . . will be highly resistant to completing and providing the form to us.[27]

> First Data provides services to over two million merchants located outside the U.S. . . . This requirement would hurt our ability and the ability of other companies like us to compete in foreign markets. In essence, the proposed regulation as written will cripple U.S. payor's attempts to compete outside the U.S. in the merchant economy space.[28]

In addition to testimony given at the Hearing, Treasury and the IRS received significant feedback regarding the harm caused by this rule, including written comments from U.S. payors that would be directly and adversely affected.[29] IRPAC believes that the concern raised by these U.S. payors is accurate and justified. Although it is important to curtail U.S. tax evasion and narrow the tax gap, it is also critical to maintain competitive parity among market participants. It makes little sense to implement a standard that will doom the competitiveness of U.S. business in foreign markets. Accordingly, IRPAC strongly recommends that the rule set forth in Treas. Reg. § 1.6050W-1(a)(5) for U.S. payors be promptly revised in such a manner that U.S. payors and non-U.S. payors are afforded the same treatment in order to maintain competitive parity between U.S. payors and non-U.S. payors. Specifically, IRPAC recommends that the standard currently applied to non-U.S. payors under Treas. Reg. § 1.6050W-1(a)(5)(ii)(B) apply to both U.S. and non-U.S. payors so that both may rely on the foreign address of a foreign payee, absent any indication that the payee may be a U.S. person.

VI. COMPLIANCE BURDEN, PENALTY RELIEF, AND THE NEED TO EXTEND THE EFFECTIVE DATES FOR BOTH SECTION 6050W REPORTING AND BACKUP WITHHOLDING

IRPAC believes that the implementation of section 6050W reporting is so significant that it is unlikely that many of those subject to these rules, particularly in the context of third party network transactions, will be able to timely comply by the current effective dates. It is unlikely, if not impossible in many cases, for business software providers and the IT functions of reporting organizations to develop and test software that

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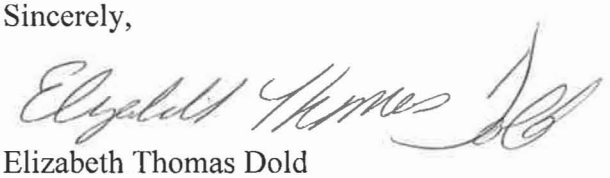
[27] Testimony of Stuart Harvey, Chief Executive Officer of Elavon.
[28] Testimony of Mark Waring, Vice President of Compliance for First Data.
[29] For example, the American Bankers Association submitted detailed comments on this issue on January 25, 2010.

conforms to the rules in sufficient time to allow for reasonable compliance with the section 6050W rules. Further, significant open questions exist under the final section 6050W regulations that require additional consideration and attention before these rules should be implemented.

For the reasons set forth herein, IRPAC believes that to persist with the current effective dates when so many reporting organizations cannot reasonably comply makes little sense and is unreasonable. Accordingly, IRPAC strongly urges the postponement of the current effective dates for both reporting and backup withholding by at least one additional year, or otherwise make the reporting optional for 2011 and 2012, at least with respect to third party payment networks that have historically reported payments on Form 1099-MISC. And even with such an extension of time, IRPAC urges the adoption of a much more lenient standard for penalty relief during the transition period to section 6050W reporting than the traditional reasonable cause standard.

IRPAC appreciates the opportunity to comment on the important issues addressed herein raised by the Form 1099-K and the promulgation of the final section 6050W regulations. Please do not hesitate to contact us if you have any questions or need additional information.

Sincerely,



Elizabeth Thomas Dold
IRPAC Chair