

Part III - Administrative, Procedural, and Miscellaneous

Documentation Requirements under Section 6050W

Notice 2012-2

PURPOSE

This notice provides interim guidance to payment settlement entities (as defined in §1.6050W-1(a)(4)(i)) (PSEs) that are United States payors or United States middlemen (each as defined in §1.6049-5(c)(5)) (U.S. payors) regarding the circumstances under which the return of information required under §1.6050W-1(a)(1) is required with respect to a payment to an account maintained outside the United States. This notice supplements, but does not modify or supersede, the guidance provided in Notice 2011-71, 2011-2 C.B. 233. The Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) intend to amend the regulations under section 6050W to reflect the guidance provided in this notice and Notice 2011-71. PSEs may rely on the interim guidance in this notice until the regulations are amended.

BACKGROUND

Section 6050W of the Internal Revenue Code was added by section 3091 of the Housing Assistance Tax Act of 2008, Div. C of Pub. L. No. 110-289, 122 Stat. 2653 (the Act), and requires information returns to be made by certain payors with respect to payments made to a participating payee (generally meaning a merchant that accepts a payment card or payment from a third party settlement organization) in settlement of payment card transactions and third party payment network transactions. Section

6050W(d)(1)(B) provides that, except as provided by the Secretary in regulations or other guidance, the term participating payee does not include any person with a foreign address. The final regulations prescribe the circumstances in which a PSE is required to report payments made to a participating payee that has a foreign address. Specifically, the final regulations provide that a PSE that is not a U.S. payor is not required to report payments made to a participating payee that does not have a U.S. address as long as the PSE neither knows nor has reason to know that the payee is a United States person (U.S. person). If the participating payee has any U.S. address, a PSE may treat the participating payee as a foreign person only if the PSE has in its files documentation upon which the PSE may rely to treat the payment as made to a foreign person in accordance with §1.1441-1(e)(1)(ii).

The final regulations also provide that a PSE that is a U.S. payor is not required to report payments to payees with a foreign address as long as, prior to payment, the payee has provided the payor with documentation upon which the payor may rely to treat the payment as made to a foreign person in accordance with §1.1441-1(e)(1)(ii). In addition, the final regulations provide a presumption under which a PSE that is a U.S. payor making a payment outside the United States (within the meaning of §1.6049-5(e)) to an offshore account (as defined in §1.6049-5(c)(1)) need not report payments to a participating payee with only a foreign address if the name of the participating payee indicates that it is a foreign per se corporation listed in §301.7701-2(b)(8)(i) and the PSE neither knows nor has reason to know that the participating payee is a U.S. person. The final regulations also provide a grace period after account opening to collect

documentation by applying the grace period rules of §1.6049-5(d)(2)(ii) if the participating payee has only a foreign address.

The final regulations apply to returns for calendar years beginning after December 31, 2010. The final regulations also provide a transition rule, which provides that, for payments made pursuant to contractual obligations entered into before January 1, 2011, a PSE that is a U.S. payor is not required to report payments made to a participating payee with a foreign address as long as the U.S. payor neither knows nor has reason to know that the payee is a U.S. person. For this purpose, a renewal of such a contractual obligation will not result in a new contractual obligation unless there is a material modification of the contractual obligation.

Notice 2011-71 states that the Treasury Department and the IRS intend to amend the regulations under section 6050W to provide that a PSE that is a U.S. payor will only be required to make the return of information required under §1.6050W-1(a)(1) with respect to a payment made outside the United States to an offshore account if any of the following applies: (i) there is a U.S. address associated with the participating payee (whether a residence address or correspondence address); (ii) the PSE has standing instructions to direct the payment to a bank account maintained in the United States; (iii) the participating payee submits for payment in U.S. dollars; or (iv) the PSE knows or has reason to know that the participating payee is a U.S. person.

DISCUSSION

The Treasury Department and the IRS have received a comment expressing uncertainty about the circumstances under which a payment is considered made

outside the United States to an offshore account for purposes of section 6050W. In response, the Treasury Department and the IRS intend to amend the regulations under section 6050W to provide an alternative method for a PSE to determine whether it must make the return of information required under §1.6050W-1(a)(1). The alternative method will apply only to a PSE that: (i) is a U.S. payor; (ii) makes a payment to an account maintained outside the United States by the PSE or, if the PSE does not maintain an account of the participating payee, makes a payment to an account maintained outside the United States by another financial institution (in either case without regard to whether the payment is made outside the United States); and (iii) has reasonably determined, based on all the information obtained or reviewed in connection with the establishment or maintenance of the contractual relationship with the participating payee (including information required to be obtained or reviewed under procedures required to be established under and compliant with 31 CFR § 103.121(b)), that the participating payee is doing business outside the United States. In such case, the PSE will only be required to make the return of information required under §1.6050W-1(a)(1) if any of the following applies: (i) there is a U.S. address associated with the participating payee (whether a residence address or correspondence address); (ii) the PSE has standing instructions to direct the payment to a bank account maintained in the United States; (iii) the participating payee submits for payment in U.S. dollars; or (iv) the PSE knows or has reason to know that the participating payee is a U.S. person. Notwithstanding the preceding sentence, a PSE will not be required to make the return of information required under §1.6050W-1(a)(1) if the PSE obtains from the participating payee a valid Form W-8 or documentary evidence establishing the

payee's non-U.S. status and the PSE does not know that the payee is a U.S. person. For purposes of section 6050W, an account is maintained outside the United States if it is maintained at an office or branch of a financial institution at any location outside the United States and outside the territories of the United States.

DRAFTING INFORMATION

The principal author of this notice is Danielle Nishida of the Office of Associate Chief Counsel (International). For further information regarding this notice, please contact Ms. Nishida at (202) 622-5399 (not a toll-free call).