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DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1, 31, and 301

[TD 9496]

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Information Reporting for Payments Made in Settlement of Payment Card and Third Party Network Transactions

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to information reporting requirements, information reporting penalties, and backup withholding requirements for payment card and third party network transactions. The final regulations implement section 6050W and related statutory changes enacted by the Housing Assistance Tax Act of 2008 that require payment settlement organizations to report payments in settlement of payment card and third party network transactions for each calendar year. The final regulations in this document will affect persons that make payment in settlement of payment card and third party network transactions and the payees of these transactions. The final regulations provide guidance to assist persons required to report payment card and third party network transactions and to the payees of those transactions.

DATES: Effective Date: These regulations are effective on August 16, 2010.

Applicability Date: For dates of applicability, see §§1.6041-1(j), 1.6041A-1(d)(4)(iii), 1.6050W-1(j), 1.6050W-2(b), 31.3406-(b)(3)-5(e).

FOR FURTHER INFORMATION CONTACT: Concerning these final regulations, Barbara Pettoni, (202) 622-4910 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

This document contains final regulations implementing amendments to the Income Tax Regulations (26 CFR part 1) relating to information reporting under sections 6041, 6041A, 6050W, and 6051 of the Internal Revenue Code (Code). This document also contains final regulations implementing amendments to the Regulations on Employment Tax and Collection of Income Tax at the Source (26 CFR part 31) relating to backup withholding under section 3406, and to the Regulations on Procedure and Administration (26 CFR part 301) relating to information reporting penalties under sections 6721 and 6722. These sections were amended or added by section 3091(a) of the Housing Assistance Tax Act of 2008 (Div. C of the Housing and Economic Recovery Act of 2008), Public Law No. 110-289, 122 Stat. 2654 (the Act) enacted on July 30, 2008. These regulations are issued under the authority contained in sections 6041, 6041A, 6050W, 6051, 3406, 6721, 6722 and 7805.

On February 6, 2009, the IRS announced that persons who will be required to report under section 6050W may match Taxpayer Identification Numbers (TINs) under the procedures established by Rev. Proc. 2003-9. See Announcement 2009-6, "Taxpayer Identification Number ("TIN") Matching Program is Available to Persons

Required to Make Returns Under New Section 6050W of the Internal Revenue Code” (Announcement 2009-6, 2009-9 IRB 643 (March 2, 2009)). See §601.601(d)(2)(ii)(b).

Notice 2009-19 invited public comments regarding guidance under section 6050W. See Notice 2009-19, "Information Reporting of Payments Made in Settlement of Payment Card and Third Party Network Transactions" (Notice 2009-19, 2009-10 IRB 660 (March 9, 2009)).

On November 24, 2009, the Treasury Department and the IRS published in the **Federal Register** (74 FR 61294) proposed regulations (REG-139255-08) reflecting the new requirements of the Act. The comments received in response to Notice 2009-19 were taken into account in developing the proposed regulations. Written comments were also received in response to the proposed regulations, and a public hearing was held on March 15, 2010.

Summary of Comments and Explanation of Revisions

Many written comments were received and are available for public inspection upon request. The comments are summarized in this preamble. After considering the public comments, the Treasury Department and the IRS are adopting the proposed regulations as revised by this Treasury decision.

These final regulations provide guidance to implement section 6050W, which requires information reporting for payments made in settlement of payment card and third party network transactions. These final regulations also amend the existing regulations under sections 6041 and 6041A to provide relief from duplicate reporting for certain transactions. In addition, these final regulations amend existing regulations under sections 6721 and 6722 to expand the penalty provisions of these sections to

apply to failures to file correct information returns required by section 6050W and to furnish correct payee statements required by section 6050W. These final regulations also amend existing regulations under section 3406 to provide that amounts reportable under section 6050W are subject to backup withholding.

Payment Settlement Entity

Section 6050W(b)(1) provides that the term payment settlement entity means, in the case of a payment card transaction, a merchant acquiring entity; and, in the case of a third party network transaction, a third party settlement organization. Section 6050W(b)(2) defines merchant acquiring entity as the bank or other organization with the contractual obligation to make payment to participating payees in settlement of payment card transactions. Section 6050W(b)(3) defines third party settlement organization as the central organization that has the contractual obligation to make payment to participating payees of third party network transactions. The proposed regulations incorporated these statutory definitions, which are retained in the final regulations.

Commenters asked how the reporting obligation applies when two or more persons qualify as payment settlement entities for a reportable payment transaction. Commenters stated that, under certain business models, multiple banks or other organizations have the contractual obligation to make payment to participating payees to settle payment card transactions. The final regulations provide that, if two or more persons qualify as payment settlement entities for a reportable payment transaction, then only the payment settlement entity that in fact makes payment in settlement of the reportable payment transaction is obligated to report the payment. The final regulations

clarify that the entity that makes a payment in settlement of a reportable payment transaction is the entity that actually submits the instruction to transfer funds to the account of the participating payee to settle the reportable payment transaction. See also the discussion under “Electronic Payment Facilitator” later in this preamble.

A commenter requested that, when multiple parties qualify as payment settlement entities, the parties be permitted to designate a reporting party. Under the final regulations, only the payment settlement entity that in fact makes payment is obligated to report the payment. Thus, no multiple party reporting obligations should arise. Nonetheless, the final regulations permit the party with the obligation to report to designate a different person to satisfy the reporting obligation under section 6050W. If, however, the designated person fails to satisfy the reporting obligation, then the party with the obligation to report is liable for any applicable penalties under sections 6721 and 6722.

Gross Amount

Section 6050W(a) provides that each payment settlement entity must report the gross amount of reportable payment transactions for each participating payee. The proposed regulations defined 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, refunded amounts, or any other amounts.

Several commenters suggested defining “gross amount” as net sales, taking into account credit transactions, chargebacks and other adjustments, on the ground that gross amount is not a true indicator of revenue. Commenters also suggested defining

“gross amount” as the amount actually paid to a merchant. Other commenters favored the rule in the proposed regulations that would require reporting the gross amount of transactions without reductions. The final regulations retain the proposed rule. The plain language of the statute requires reporting the gross amount of transactions rather than the net amount of transactions or payments. The information reported on the return required under these regulations is not intended to be an exact match of the net, taxable, or even the gross income of a payee.

Commenters asked whether the dollar amount of each transaction is determined on the date of the transaction, the settlement date, the date that payment is made, the posting date or some other date. Because the statute requires reporting of the gross amount of reportable payment “transactions,” the final regulations provide that the dollar amount of each reportable payment transaction is determined on the date of the transaction.

Several commenters expressed concern that defining “gross amount” as a number that reflects all positive sales transactions without adjustment for any items may raise issues related to backup withholding. These comments are discussed in detail later in this preamble.

Payment Card Transactions

Section 6050W(c)(2) defines a payment card transaction as any transaction in which a payment card is accepted as payment. Section 6050W(d)(2) defines a payment card as a card issued pursuant to an agreement or arrangement that provides for: (1) one or more issuers of such cards; (2) a network of persons unrelated to each other, and to the issuer, who agree to accept the cards as payment; and (3) standards

and mechanisms for settling the transactions between the merchant acquiring entities and the persons who agree to accept the cards as payment. Section 6050W(d)(2) further provides that the acceptance as payment of any account number or other indicia associated with a payment card is treated as the acceptance of the payment card. The proposed regulations incorporated these statutory rules. The proposed regulations further provided that a payment card includes, but is not limited to, all credit cards, debit cards, and stored-value cards (including gift cards). All of these provisions are retained in the final regulations.

Several commenters requested an exemption for all private label cards and quasi-private label cards. According to one commenter, a private label card is a card issued by a retailer or financial institution that can only be used at one retailer, and a quasi-private label card is a card issued by a financial institution that can be used within a limited network of merchants or service providers that are unrelated but operate within a particular industry or share other similar characteristics. Another commenter requested that the regulations clarify whether a card that is accepted as payment by a group of merchants operating within a shopping mall (a “mall card”) is a payment card.

The final regulations do not provide an exemption for private label cards, quasi-private label cards and mall cards. Private label cards that can only be used at one merchant or within a group of related merchants do not meet the statutory definition of payment card because they are not accepted as payment by a network of unrelated persons. Quasi-private label cards that are accepted as payment by a network of unrelated merchants or service providers are payment cards if the other requirements of the statutory definition are met. Similarly, a mall card is a payment card if it is accepted

as payment by a network of unrelated merchants and the other requirements of the statutory definition are met. However, if any of the merchants in the network are related to the issuer, as might be the case in certain campus card or mall card transactions, the final regulations clarify that no reporting is required for any transaction in which the card is accepted as payment by the related merchant or other payee. The final regulations provide additional examples to illustrate the treatment of private label, quasi-private label and mall cards.

One commenter requested that the regulations clarify whether electronic benefit transactions are reportable transactions under the regulations. According to the commenter, electronic benefit transactions are transactions made on cards or other media issued by a governmental unit for benefit payments, such as food stamps, welfare or unemployment. A card issued by a governmental unit for benefits is a payment card if, pursuant to an agreement, it is accepted as payment by a network of unrelated merchants and the other requirements of the statutory definition are met. Electronic benefit transactions for the purchase of goods or services, made on a card that meets the statutory definition of "payment card," are reportable under section 6050W. In contrast, the use of a benefits card to obtain cash would not be a reportable transaction, as discussed in the next paragraph.

Commenters asked whether the use of a payment card solely to obtain a loan or cash advance by the cardholder is reportable under the regulations. The final regulations provide an example to clarify that the use of a payment card to obtain a loan or cash advance does not fall within the statutory definition of "payment card transaction" because the card is not being accepted by a merchant as payment.

Rather, the cardholder is merely using the payment card to obtain a loan from the issuer. Similarly, the withdrawal of cash from an automated teller machine is not a payment card transaction because the card is not being accepted by a merchant as payment. Rather, the card is merely being used to obtain funds from the cardholder's own account.

Commenters also asked whether the use of a paper check associated with a payment card account (a "convenience check") is reportable under the regulations. Section 6050W(d)(2) provides that the acceptance as payment of any account number or other indicia associated with a payment card is treated as the acceptance of the payment card. Convenience checks are processed through the banking system in the same manner as a traditional check and then processed against a cardholder's account as a cash advance. Because convenience checks are accepted and processed as checks, not as payment cards, the final regulations provide an example to clarify that the use of a convenience check is not a "payment card transaction."

Third Party Network Transactions

Section 6050W(b)(1)(B) provides that, in the case of a third party network transaction, the payment settlement entity is the third party settlement organization. Section 6050W(b)(3) defines third party settlement organization as the central organization that has the contractual obligation to make payment to participating payees of third party network transactions. Section 6050W(c)(3) defines third party network transaction as any transaction that is settled through a third party payment network. Section 6050W(d)(3) defines third party payment network as any agreement or arrangement that: (A) involves the establishment of accounts with a central

organization by a substantial number of persons who (i) are unrelated to such organization, (ii) provide goods or services, and (iii) have agreed to settle transactions for the provision of such goods or services pursuant to such agreement or arrangement; (B) provides for standards and mechanisms for settling such transactions; and (C) guarantees persons providing goods or services pursuant to an agreement or arrangement that those persons will be paid for providing those goods or services.

The proposed regulations incorporated these statutory definitions. The proposed regulations also provided that, consistent with the Joint Committee on Taxation (JCT) technical explanation, a central organization is a third party settlement organization that is required to report to the extent it provides a third party payment network that enables purchasers to transfer funds to providers of goods and services. These provisions are retained in the final regulations.

One commenter suggested that the regulations also incorporate the rule in section 6050W(d)(3) that a third party payment network does not include any agreement or arrangement that provides for the issuance of payment cards. The final regulations adopt this suggestion.

Healthcare Networks and Self-Insurance Arrangements

The proposed regulations included an example to demonstrate that health insurance networks are outside the scope of section 6050W because a healthcare network does not enable the transfer of funds from buyers to sellers. Instead, health carriers collect premiums from covered persons pursuant to a plan agreement between the health carrier and the covered person for the cost of participation in the healthcare network. Separately, health carriers pay healthcare providers to compensate providers

for services rendered to covered persons pursuant to provider agreements. This example is retained in the final regulations.

A commenter requested that the final regulations clarify that a self-insurance arrangement is also outside the scope of section 6050W. According to the commenter, a typical self-insurance arrangement involves a health insurance entity, healthcare providers, and the company that is self-insuring. The company submits bills for services rendered by a healthcare provider to the health insurance entity. The health insurance entity pays the healthcare provider the contracted rate and then debits the self-insuring company's bank account for the payments made to the healthcare providers.

This suggestion was not adopted because this arrangement could create a third party payment network of which the health insurance entity is the third party settlement organization to the extent that the health insurance entity effectively enables buyers (the self-insuring companies) to transfer funds to sellers of healthcare goods or services. If so, payments under a self-insurance arrangement are reportable provided the arrangement meets both the statutory definition of a third party payment network and the de minimis threshold (that is, for a given payee, the aggregate payments for the year exceed \$20,000 and the aggregate number of transactions exceeds 200).

Electronic Checks, Bill Paying Services and Other Electronic Payment Acceptance Products

Several commenters requested that the final regulations exclude electronic checks, bill paying services, and other electronic payment acceptance products from the scope of section 6050W. Financial institutions offer a wide array of services to allow individual and business customers to make and receive payments. Whether

arrangements involving electronic checks, bill paying services or other electronic payment acceptance products fall within the statutory definition of “third party payment network” depends on the facts and circumstances. For example, a customer initiated bill payment by means of an electronic check from the customer’s bank account to the merchant is merely an electronic transfer of funds from the buyer to the seller that would generally not meet the definition of a third party payment network.

In contrast, in certain arrangements, a third party entity may facilitate bill payment and presentment. According to one commenter, many financial institutions offer products and services that allow a commercial customer who provides goods or services to (1) send a purchase invoice electronically to customers; and (2) accept payment from these customers by automated clearinghouse (ACH) transfer. In these arrangements, the financial institution typically enters into an agreement with the merchant customer to settle payment transactions to an account the merchant has established at the financial institution. The individual or business that has purchased goods or services from the merchant is not required to establish an account with the financial institution. For payments that are made by ACH transfer, the financial institution will initiate payment through the ACH network. Commenters contend that these arrangements should not qualify as third party payment networks because the arrangements require merchants to establish accounts with a financial institution to accept electronic payment services but do not also require purchasers to establish accounts with the same financial institution. The commenters requested modifying the definition of a third party payment network to require purchasers to establish accounts

with the same central organization as the merchant providers in order to participate in the arrangement.

This suggestion was not adopted. The portion of the statutory definition of “third party payment network” relating to accounts requires only that the agreement or arrangement involve the establishment of accounts with a central organization by a substantial number of unrelated persons who provide goods or services and have agreed to settle transactions for the provision of goods or services pursuant to the agreement or arrangement. Nothing in this definition requires purchasers also to have established accounts with the same central organization. Therefore, a financial institution that enters into an agreement or arrangement with its merchant customers to settle payment transactions to an account the merchant customer has established at the financial institution may be operating a “third party payment network” if the agreement or arrangement with these merchants involves the establishment of accounts with a central organization by a substantial number of unrelated persons who provide goods or services and have agreed to settle transactions for the provision of goods or services pursuant to the agreement or arrangement, and the central organization guarantees payment to those persons for the goods or services.

Automated Clearing House (ACH) Networks

The proposed regulations provided that an ACH network is not a third party payment network. As explained in the preamble to the proposed regulations, an ACH merely processes electronic payments between payors and payees, and does not itself have contractual agreements with payees to use the ACH network. Thus, the ACH does not meet the statutory definition of a “third party settlement organization.”

A commenter asked that the regulations provide that an ACH processor is not a third party settlement organization of a third party payment network. According to the commenter, an ACH processor provides a variety of ACH payment processing services to a large number of merchants, such as converting checks received in payment of bills into ACH transactions. The ACH processor groups payment transactions into an ACH file and transmits the ACH file into the ACH network on behalf of merchants in order to initiate payment to merchants through the ACH network. The ACH processor will make the payment to the merchant after the ACH network verifies that the customers' accounts have sufficient funds.

This request was not adopted. An ACH processor's agreement or arrangement with merchants could potentially create an independent third party payment network separate from the ACH network of which the ACH processor is the third party settlement organization. Because the ACH itself is not a third party settlement organization, a party that makes payment on behalf of an ACH cannot be an electronic payment facilitator because it is not acting on behalf of a payment settlement entity. Nonetheless, an entity that initiates ACH entries into an ACH network on behalf of merchants may itself be operating a network that falls within the statutory definition of "third party payment network" if the entity has a separate agreement or arrangement with these merchants that: (A) involves the establishment of accounts with the entity by a substantial number of merchants or other persons who (i) are unrelated to the entity, (ii) provide goods or services, and (iii) have agreed to settle transactions for the provision of such goods or services pursuant to such agreement or arrangement; (B) provides for standards and mechanisms for settling such transactions; and (C) guarantees persons

providing goods or services pursuant to such agreement or arrangement that those persons will be paid for providing such goods or services. Whether an entity that initiates ACH entries into an ACH network has such a separate agreement or arrangement with merchants depends on the facts and circumstances. As stated earlier, the statutory definition of “third party payment network” does not require that this entity also have an agreement or arrangement with purchasers.

Electronic Payment Facilitators

Section 6050W(b)(4)(B) requires that, if an electronic payment facilitator or other third party “makes payments in settlement of reportable payment transactions on behalf of the payment settlement entity,” the electronic payment facilitator must report in lieu of the payment settlement entity. The proposed regulations incorporated this statutory requirement, which is retained in the final regulations.

Commenters requested that the final regulations clarify what it means to “make payments in settlement of reportable payment transactions on behalf of the payment settlement entity.” According to one commenter, when a merchant acquiring bank employs the services of a third party processor, the settlement obligation remains with the merchant acquiring bank. Another commenter stated that certain payment settlement entities, such as independent sales organizations (ISOs), use a “sponsoring bank” or other third party to do their payment processing. According to the commenter, it is not clear whether this third party processor is an electronic payment facilitator because the processor does not have a contract with the participating payee. Additionally, this processor generally would only know the net amount of the payment and would not have the information necessary to report the gross amount of the

reportable payment transaction. Another commenter suggested defining “electronic payment facilitator” as the party who contracts with a payment settlement entity to “facilitate the settlement (directly or indirectly)” of reportable payment transactions on behalf of the payment settlement entity.

In response to these comments, the final regulations provide that a payment settlement entity (or an electronic payment facilitator acting on behalf of a payment settlement entity) makes a payment in settlement of a reportable payment transaction if the payment settlement entity (or its facilitator) submits the instruction to transfer funds to the account of the participating payee to settle the reportable payment transaction. In cases involving a processor, the processor need not have any agreement or arrangement with the payee to qualify as an electronic payment facilitator. The statute requires only that the facilitator act on behalf of the payment settlement entity. Also, the payment need not come from the processor’s account. The processor need only submit the instruction to transfer funds from the payment settlement entity’s account. If a processor merely prepares payment instructions for the payment settlement entity, which in turn submits these instructions to initiate the transfer of funds, then the processor is not an electronic payment facilitator, and the payment settlement entity retains the reporting obligation. Electronic payment facilitators that do not know the gross amount of each reportable payment transaction are expected to obtain this information from the payment settlement entity. The final regulations include additional examples applying the electronic payment facilitator rule.

A commenter also expressed concern that merchants might only be aware of the merchant acquiring bank or other payment settlement entity and might, therefore, be

confused when receiving statements from the electronic payment facilitator. To address this concern, Form 1099-K, “Merchant Card and Third Party Payments,” will include the identifying information of both the payment settlement entity and the electronic payment facilitator. In addition, the payee’s copy of Form 1099-K will describe the entities that are shown on the form.

Participating Payee--Foreign Address Exclusion

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 “address rule”). The proposed regulations did not exclude persons with foreign addresses from the term participating payee, although the proposed regulations did provide that in many cases a payment settlement entity may rely on a foreign address to avoid reporting. Specifically, the proposed regulations provided that a payment settlement entity that is not a United States (U.S.) payor or U.S. middleman may rely on a foreign address for a participating payee to avoid reporting as long as the payor neither knows nor has reason to know that the payee is a U. S. person. The proposed regulations also provided that a payment settlement entity that is a person described as a U.S. payor or U.S. middleman in §1.6049-5(c)(5) 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).

Commenters expressed concern that the proposed regulations treat U.S. and non-U.S. payors inconsistently and may impose overly burdensome documentation

requirements on U.S. payors, and requested that the address rule apply to U.S. and non-U.S. payors alike. Alternatively, commenters requested that documentation and records maintained consistent with section 326 of the USA PATRIOT Act (“Patriot Act”), 31 U.S.C. 5318(l), should satisfy the documentation requirements for U.S. payors under these regulations.

The final regulations do not adopt these recommendations. The final regulations do not adopt the suggestion that the documentation standards be made consistent with the Patriot Act because the customer identification requirements under the Patriot Act are not intended to identify U.S. taxpayers and do not adequately address the tax administration concerns of section 6050W.

The final regulations also do not extend the address rule to payment settlement entities that are U.S. payors. The Treasury Department and the IRS understand from meeting with affected parties that payment settlement entities do not currently rely solely on an address to identify a participating payee because payment settlement entities have a business interest in verifying the identity of the participating payee due to the credit and reputational risks inherent in payment card transactions. The Treasury Department and the IRS have a similar compliance interest in ensuring that the participating payee’s identity is verified, and applying the address rule generally to payment settlement entities that are U.S. payors does not adequately address those concerns. For example, where a participating payee receives payment from a U.S. person inside the United States or to a U.S. account, the Treasury Department and the IRS believe it is appropriate to require the participating payee to complete a Form W-8BEN (or other appropriate certification) thereby certifying its foreign status and whether

the payment constitutes income that is effectively connected with the conduct of a trade or business in the United States, as required under the proposed and final regulations.

To address the concerns of certain commenters regarding the burden that would be involved in re-documenting existing participating payees, however, the final regulations provide a transition rule. For payments made pursuant to contractual obligations entered into before January 1, 2011, a payment settlement entity that is a U.S. payor or middleman may rely on a foreign address as long as the U.S. payor or middleman neither knows nor has reason to know that the payee is a U.S. person. For this limited 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.

In addition, the final regulations provide a presumption under which a payment settlement entity that is a U.S. payor or middleman making a payment outside the United States 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 payment settlement entity 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.

Payment settlement entities that are not U.S. payors or middlemen are not required to make a return of information if the participating payee does not have a U.S. address as long as the payment settlement entity does not know or have reason to

know that the payee is a U.S. person. Commenters requested additional guidance for situations in which a participating payee has both a foreign address and a U.S. address. Under the final regulations, if the participating payee has any U.S. address, the non-U.S. payment settlement entity may treat the participating payee as a foreign person only if the non-U.S. payment settlement entity has in its files documentation upon which the payment settlement entity may rely to treat the payment as made to a foreign person in accordance with §1.1441-1(e)(1)(ii).

Payments Made in Currencies Other Than the United States Dollar

Several commenters requested that the final regulations provide a rule for the conversion into U.S. dollars of amounts paid in foreign currency. This suggestion was adopted. The final regulations provide that when a payment is made or received in a foreign currency, the U.S. dollar amount is determined by converting such foreign currency into U.S. dollars on the date of the transaction at the spot rate (as defined in §1.988-1(d)(1)) or pursuant to a reasonable spot rate convention, such as a month-end spot rate or a monthly average spot rate.

Duplicate Reporting of the Same Transaction

Section 6050W(g) provides that the Secretary may prescribe regulations or other guidance as necessary or appropriate to carry out section 6050W, including rules to prevent the reporting of the same transaction more than once. The proposed regulations provided that any payment card transaction that otherwise would be reportable under both sections 6041 and 6050W must be reported under section 6050W and not section 6041. Relief from reporting under section 6041 was not provided in the proposed regulations, however, for third party network transactions because these

transactions are not subject to reporting under section 6050W unless the de minimis threshold (more than 200 transactions aggregating more than \$20,000 per calendar year for a given payee) is met. Nor was relief provided from reporting under section 6050W and other Code sections, including section 3402(t) (relating to withholding on certain payments made by government entities). The proposed regulations requested additional comments regarding the application of a rule to prevent the reporting of the same transaction more than once.

Numerous commenters requested that relief from duplicate reporting under both sections 6050W and 6041 be extended to include third party network transactions. This suggestion was adopted. Accordingly, the final regulations provide that payment card and third party network transactions that otherwise would be reportable under both sections 6041 and 6050W must be reported under section 6050W and not section 6041. The final regulations also provide that, solely for purposes of determining whether a payor is eligible for relief from reporting under section 6041, the de minimis threshold for third party network transactions in §1.6050W-1(c)(4) is disregarded because the section 6041 payor will be unable to determine whether the de minimis threshold applies.

Commenters also requested relief from duplicate reporting under both sections 6050W and 3402(t). However, commenters have indicated that merchant acquiring banks and other payment settlement entities would have administrative difficulty in determining whether payment card and third party network transactions will be subject to withholding and reporting under section 3402(t). Therefore, the final regulations do not provide relief for transactions that would otherwise be reported under both sections

6050W and 3402(t). However, the Treasury Department and the IRS are continuing to consider whether relief could be provided under section 3402(t) or section 6050W.

Several commenters requested relief from duplicate reporting of the same transaction under both sections 6050W and 6041A (relating to returns regarding payments of remuneration for services and direct sales). This suggestion was adopted for payment card transactions and third party network transactions subject to section 6041A(a). The final regulations provide that any transaction that would otherwise be reported under both sections 6050W and 6041A(a) must be reported under section 6050W and not section 6041A(a).

Similar relief from duplicate reporting of the same transaction under both sections 6050W and 6041A(b) is not warranted, however, because sections 6050W and 6041A(b) report different types of information and serve different purposes. Section 6041A(b) provides that if any person engaged in a trade or business, in the course of the trade or business during any calendar year, sells \$5,000 or more of consumer goods to any buyer on a buy-sell basis, a deposit-commission basis, or any similar basis, for resale in the home or other than in a permanent retail establishment, that person must file a return reporting the amount of the sales to the buyer during the calendar year. Thus, unlike section 6050W, which requires payors to report information about payments to sellers, section 6041A(b) requires sellers of certain consumer products to report information about payments from buyers. Therefore, the final regulations do not provide relief for transactions that are reportable under both sections 6050W and 6041A(b).

Electronic Consent Procedures

Section 6050W(f) provides that payee statements may be furnished electronically. Prior to the proposed regulations, commenters requested that the existing procedures for payee statements be modified to eliminate the requirement for an affirmative consent to receive the payee statement under section 6050W electronically. This request was not adopted in the proposed regulations. Instead, additional comments were requested on electronic consent procedures.

Many commenters suggested eliminating the requirement for an affirmative consent to receive the payee statement electronically. Commenters requested that merchants already receiving business communications electronically be deemed to have consented to receive electronic payee statements under section 6050W. Commenters also suggested eliminating the requirement to notify payees about electronic payee statements in a separate communication. Commenters suggested permitting merchants receiving paper communications to consent to electronic payee statements by logging onto a website to indicate their consent, with no further written consent required.

In response to these comments, the final regulations simplify existing electronic consent procedures. Section 1.6050W-2 provides that a recipient consents to receive the statement required under section 6050W in an electronic format either by making an affirmative consent or, in the alternative, by previously having consented to receive from the furnisher other federal tax statements in an electronic format. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed

electronically. Section 1.6050W-2 sets forth the procedures for meeting the consent requirements.

Time, Form and Manner for Reporting

Section 6050W(a) provides that the return required under this section shall be made at the time and in the form and manner as required by regulations. The proposed regulations provided that the return required by section 6050W must be made according to the forms and instructions published by the IRS. Form 1099-K, "Merchant card and third-party payments," requires annual reporting, with respect to each participating payee, of the gross amount of the aggregate reportable payment transactions for the calendar year and the gross amount of the aggregate reportable transactions for each month of the calendar year.

A commenter expressed concern that the requirement for monthly amounts to be reported on Form 1099-K would be burdensome for small businesses and sole proprietors. The final rules retain the proposed rule because the inclusion of monthly amounts on the return filed with the IRS and furnished to the payee will aid in reconciling payment card and third party network transactions for fiscal year payees.

Backup Withholding

The Act amended section 3406(b)(3) to provide that amounts reportable under section 6050W are subject to backup withholding requirements, effective for amounts paid after December 31, 2011. The proposed regulations proposed to amend existing regulations under section 3406 to provide that persons making information returns with respect to any reportable payment under section 6050W made after December 31, 2011, are included in the definition of "payors" obligated to backup withhold.

Section 6050W(d)(1)(C) provides that, for purposes of section 6050W, the definition of participating payee includes any governmental unit. The proposed regulations incorporated this statutory provision. One commenter asked whether reportable payments made to governmental units are subject to backup withholding under section 3406(a). The Act amended section 3406(b) to provide that reportable payments subject to information reporting under section 6050W are subject to backup withholding if a condition for backup withholding, as set forth in section 3406(a)(1), exists. The Act, however, did not eliminate any of the existing statutory exceptions to backup withholding. For example, section 3406(g) provides that backup withholding under section 3406(a) shall not apply to any payment made to any organization or governmental unit described in subparagraph (B), (C), (D), (E), or (F) of section 6049(b)(4). The final regulations make no changes to the existing statutory exceptions to backup withholding.

As discussed earlier in this preamble, several commenters stated that defining “gross amount” as a number that reflects all positive sales transactions on the date of the transaction, without adjustment for any items, may complicate backup withholding, which is generally imposed on the amount of the payment at the time of payment rather than on the amount of the transaction at the time of the transaction. The amount reportable under section 6050W is the gross amount of the transaction on the date of the transaction, which may differ from the amount and date of the payment (potentially a net amount paid on a later date). In response to these comments, the final regulations clarify that the obligation to withhold arises on the date of the transaction. A payor is not required, however, to satisfy its withholding liability until the time that payment is made.

The amount withheld is based on the total reportable amount, that is, the gross amount of the transaction.

A commenter stated that on the date of payment, the payee's account may have insufficient funds available for backup withholding. For example, if sales returns exceed positive sales transactions for the transaction period, a merchant's account balance could be less than the required amount of backup withholding or even zero. In response to this concern, the final regulations allow backup withholding from an alternate source maintained by the payor for the payee if the payee's account has insufficient funds. The final regulations further provide that if the payor cannot locate an alternative source of cash from which to backup withhold, the payor may defer its obligation to backup withhold until the earlier of the date on which the payee's account has sufficient funds or the close of the fourth calendar year after the obligation arose. At the close of the fourth calendar year after the backup withholding obligation arose, if the payor has not located an alternate source from which to backup withhold, and the account has insufficient funds, then the backup withholding obligation will cease to exist.

Finally, the final regulations clarify how to apply the backup withholding rules to third party network transactions, which are subject to a de minimis rule. In general, the amount that is subject to withholding under section 3406 is the amount subject to reporting under section 6050W. Section 3406(b)(4) provides that the determination of whether a payment is a reportable payment for purposes of backup withholding is made without regard to any minimum amount that must be paid before a return is required. Accordingly, the final regulations provide that, in the case of payments made in settlement of third party network transactions, the amount subject to withholding under

section 3406 is determined without regard to the exception for de minimis payments by third party settlement organizations in section 6050W(e) and the final regulations in this document.

Penalties

The Act amended section 6724(d) by adding returns required by section 6050W to the definition of information return for purposes of penalties for failure to comply with certain reporting requirements. The proposed regulations proposed to amend the regulations to add reportable payments under section 6050W to the list of information returns subject to the penalties under section 6721 (failure to file correct information returns) and section 6722 (failure to furnish correct payee statements). The final regulations adopt these amendments.

Commenters requested that the final regulations specifically waive penalties for persons who have made a reasonable and good faith effort to implement section 6050W reporting and related backup withholding but who fail to comply. This suggestion was not adopted because the existing regulations under section 6724 provide extensive guidance for waiver of penalties due to reasonable cause for failure to file correct information returns and failure to furnish correct payee statements. The IRS will continue to work closely with stakeholders to ensure the smooth implementation of the provisions in these regulations, including, in general, the mitigation of penalties in the early stages of implementation, except for particularly egregious cases.

Effective/Applicability Dates:

The regulations under sections 6041, 6041A, 6050W, 6051, 6721 and 6722 apply to returns for calendar years beginning after December 31, 2010. The regulations

under section 3406 apply to amounts paid after December 31, 2011.

Special Analyses

It has been determined that this final rule is not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It also has been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations. Pursuant to the Regulatory Flexibility Act (5.U.S.C. chapter 6), it is hereby certified that the regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the persons required to report under section 6050W, payment settlement entities, will generally not be small businesses. Merchant acquiring entities, the payment settlement entities required to report payment card transactions, will primarily be banks with over \$175 million in assets. Third party settlement organizations, the payment settlement entities required to report third party network transactions, will generally not be small entities by virtue of the definition of a third party payment network, which requires the establishment of accounts with a central organization (the third party settlement organization) by a substantial number of persons. Further, section 6050W(e) provides a de minimis exception that exempts third party settlement organizations from reporting transactions with respect to a payee if the aggregate amount of such transactions does not exceed \$20,000 or the aggregate number of such transactions does not exceed 200. The Treasury Department and the IRS certify that the regulations in this document will not have a significant economic impact on a substantial number of small entities. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to

the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these proposed regulations is Barbara Pettoni, Office of Associate Chief Counsel (Procedure and Administration).

List of Subjects

26 CFR Part 1

Income taxes, Reporting and recordkeeping requirements.

26 CFR Part 31

Employment taxes, Fishing Vessels, Gambling, Income taxes, Penalties, Pensions, Railroad retirement, Reporting and recordkeeping requirements, Social security, Unemployment compensation.

26 CFR Part 301

Administrative practice and procedure, Alimony, Bankruptcy, Child support, Continental shelf, Courts, Crime, Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Investigations, Law enforcement, Oil pollution, Penalties, Pensions, Reporting and recordkeeping requirements, Seals and insignia, Statistics and Taxes.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1, 31 and 301 are amended as follows:

PART 1--INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.6041-1 is amended by adding a sentence at the end of paragraph (a)(1)(ii), revising paragraph (j) and adding paragraphs (a)(1)(iv) and (a)(1)(v) to read as follows:

§1.6041-1 Return of information as to payments of \$600 or more.

(a) * * *(1) * * *(i) * * *

(ii) * * * For payment card transactions (as described in §1.6050W-1(b)) and third party network transactions (as defined in §1.6050W-1(c)) required to be reported on information returns required under section 6050W (relating to payment card and third party network transactions), see special rules in §1.6041-1(a)(1)(iv).

* * * * *

(iv) Information returns required under section 6050W for calendar years beginning after December 31, 2010. For payments made by payment card (as defined in §1.6050W-1(b)(3)) or through a third party payment network (as defined in §1.6050W-1(c)(3)) after December 31, 2010, that are required to be reported on an information return under section 6050W (relating to payment card and third party network transactions), the following rule applies. Transactions that are described in paragraph (a)(1)(ii) of this section that otherwise would be subject to reporting under both sections 6041 and 6050W are reported under section 6050W and not section 6041. For provisions relating to information reporting for payment card and third party network transactions, see §1.6050W-1. Solely for purposes of this paragraph, the de minimis threshold for third party network transactions in §1.6050W-1(c)(4) is disregarded in determining whether the transaction is subject to reporting under section 6050W.

(v) Examples. The provisions of paragraph (a)(1)(iv) of this section are illustrated by the following examples:

Example 1. Restaurant owner A, in the course of business, pays \$600 of fixed or determinable income to B, a repairman, by credit card. B is one of a network of unrelated persons that has agreed to accept A's credit card as payment under an agreement that provides standards and mechanisms for settling the transactions between a merchant acquiring bank and the persons who accept the cards. Merchant acquiring bank Y is responsible for making the payment to B. Under paragraph (a)(1)(iv) of this section, A, as payor, is not required to file an information return under section 6041 with respect to the transaction because Y, as the payment settlement entity for the payment card transaction, is required to file an information return under section 6050W.

Example 2. Restaurant owner A, in the course of business, pays \$600 of fixed or determinable income to B, a repairman, through a third party payment network. B is one of a substantial number of persons who have established accounts with Y, a third party settlement organization that provides standards and mechanisms for settling the transactions and guarantees payments to those persons for goods or services purchased through the network. Y is responsible for making the payment to B. Under paragraph (a)(1)(iv) of this section, A, as payor, is not required to file an information return under section 6041 with respect to the transaction because the transaction is a third party network transaction that is subject to reporting under section 6050W. Solely for purposes of determining whether A is eligible for relief from reporting under section 6041, the de minimis threshold for third party network transactions in §1.6050W-1(c)(4) is disregarded.

* * * * *

(j) Effective/applicability date. The provisions of paragraphs (b),(c),(e), and (f) apply to payments made after December 31, 2002. The provisions of paragraphs (a)(1)(iv) and (a)(1)(v) apply to payments made after December 31, 2010.

Par. 3. Section 1.6041A-1 is amended by adding paragraph (d)(4) to read as follows:

§1.6041A-1 Returns regarding payments of remuneration for services and certain direct sales.

* * * * *

(d) * * *

(4) Information returns required under section 6050W for calendar years beginning after December 31, 2010. (i) For payments made by payment card (as defined in §1.6050W-1(b)(3)) or through a third party payment network (as defined in §1.6050W-1(c)(3)) after December 31, 2010, that are required to be reported on an information return under section 6050W (relating to payment card and third party network transactions), the following rule applies. Transactions that otherwise would be reportable under both sections 6041A(a) and 6050W are reported under section 6050W and not section 6041A(a). For provisions relating to information reporting for payment card transactions and third party network transactions, see §1.6050W-1. Solely for purposes of this paragraph, the de minimis threshold for third party network transactions in §1.6050W-1(c)(4) is disregarded in determining whether the transaction is subject to reporting under section 6050W.

(ii) Examples. The provisions of paragraph (d)(4) of this section are illustrated by the following examples:

Example 1. Service-recipient A, in the course of its business, pays remuneration of \$600 to service provider B by credit card for services performed by B. B is one of a network of unrelated persons that has agreed to accept A's credit card as payment under an agreement that provides standards and mechanisms for settling the transactions between a merchant acquiring bank and the persons who accept the cards. Merchant acquiring bank Y is responsible for making the payment to B. Under paragraph (d)(4)(i) of this section, A is not required to file an information return under section 6041A(a) with respect to the transaction because Y, as the payment settlement entity for the payment card transaction, is required to file an information return under section 6050W.

Example 2. Service-recipient A, in the course of business, pays \$600 of fixed or determinable income to B, a repairman, through a third party payment network. B is one of a substantial number of persons who have established accounts with Y, a third party settlement organization that provides standards and mechanisms for settling the transactions and guarantees payments to those persons for goods or services purchased through the network. Y is responsible for making the payment to B. Under paragraph (d)(4)(i) of this section, A is not required to file an information return under

section 6041A(a) with respect to the transaction because the transaction is a third party network transaction that is subject to reporting under section 6050W. Solely for purposes of determining whether the transaction is subject to reporting under section 6050W, the de minimis threshold for third party network transactions in §1.6050W-1(c)(4) is disregarded.

(iii) Effective/applicability date. Paragraph (d)(4) of this section applies to payments made by payment card or through a third party payment network after December 31, 2010.

* * * * *

Par. 4. Section 1.6050W-1 is added to read as follows:

§1.6050W-1 Information reporting for payments made in settlement of payment card and third party network transactions.

(a) In general--(1) General rule. Every payment settlement entity, as defined in paragraph (a)(4) of this section, must file an information return for each calendar year with respect to payments made in settlement of reportable payment transactions, as defined in paragraph (a)(3) of this section, setting forth the following information:

(i) The name, address, and taxpayer identification number (TIN) of each participating payee, as defined in paragraph (a)(5) of this section, to whom one or more payments in settlement of reportable payment transactions are made.

(ii) With respect to each participating payee, the gross amount, as defined in paragraph (a)(6) of this section, of--

(A) The aggregate reportable payment transactions for the calendar year; and

(B) The aggregate reportable payment transactions for each month of the calendar year.

(iii) Any other information required by the form, instructions or current revenue procedures.

(2) Payments in settlement of reportable payment transactions. A payment settlement entity, as defined in paragraph (a)(4) of this section (or an electronic payment facilitator, as defined in paragraph (d)(2) of this section), makes a payment in settlement of a reportable payment transaction if the payment settlement entity (or electronic payment facilitator) submits the instruction to transfer funds to the account of the participating payee for purposes of settling the reportable payment transaction.

(3) Reportable payment transaction. The term reportable payment transaction means any payment card transaction (as defined in paragraph (b)(1) of this section) and any third party network transaction (as defined in paragraph (c)(1) of this section).

(4) Payment settlement entity--(i) Definition. The term payment settlement entity means a domestic or foreign entity that is--

(A) In the case of a payment card transaction, a merchant acquiring entity (as defined in paragraph (b)(2) of this section); and

(B) In the case of a third party network transaction, a third party settlement organization (as defined in paragraph (c)(2) of this section).

(ii) Multiple payment settlement entities. If two or more persons qualify as payment settlement entities (as defined in paragraph (a)(4)(i) of this section) with respect to a reportable payment transaction, then only the payment settlement entity that in fact makes payment in settlement of the reportable payment transaction must file the information return required by paragraph (a)(1) of this section.

(5) Participating payee--(i) Definition. In general, the term participating payee means any person, including any governmental unit (and any agency or instrumentality thereof), who:

(A) In the case of a payment card transaction, accepts a payment card (as defined in paragraph (b)(3) of this section) as payment; and

(B) In the case of a third party network transaction, accepts payment from a third party settlement organization (as defined in paragraph (c)(2) of this section) in settlement of such transaction.

(ii) Foreign payees--(A) In general. For payments pursuant to contractual obligations entered into after December 31, 2010, a payment settlement entity that is a person described as a U.S. payor or U.S. middleman in §1.6049-5(c)(5) is not required to make a return of information for payments to a participating payee with a foreign address as long as, prior to payment, the payment settlement entity has in its files documentation upon which the payment settlement entity may rely to treat the payment as made to a foreign person in accordance with §1.1441-1(e)(1)(ii). For purposes of this paragraph (a)(5)(ii), the provisions of §1.1441-1 shall apply by substituting the term payor for the term withholding agent and without regard to the limitation to amounts subject to withholding under chapter 3 of the Internal Revenue Code and the regulations under that chapter. Such a payment settlement entity need not make a return of information for payments made outside the United States (within the meaning of §1.6049-5(e)) to an offshore account (as defined in §1.6049-5(c)(1)) to a participating payee with only a foreign address if the name of the participating payee indicates that it is an entity listed as a per se corporation under §301.7701-2(b)(8)(i) and the payment

settlement entity does not know or have reason to know that the participating payee is a United States person. A payment settlement entity may apply the grace period rules of §1.6049-5(d)(2)(ii) of the regulations for payments to a participating payee with only a foreign address, without regard to whether the amounts paid are described in §1.1441-6(c)(2) or are reportable under section 6042, 6045, 6049, or 6050N. For payments pursuant to contractual obligations entered into before January 1, 2011, a payment settlement entity that is a person described as a U.S. payor or U.S. middleman in §1.6049-5(c)(5) is not required to make a return of information for payments to a participating payee with a foreign address as long as the payment settlement entity neither knows nor has reason to know that the participating payee is a United States 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 to the contractual obligation.

(B) Non-U.S. payor or middleman. A payment settlement entity that is not a person described as a U.S. payor or U.S. middleman in §1.6049-5(c)(5) is not required to make a return of information for a payment to a participating payee that does not have a United States address as long as the payment settlement entity neither knows nor has reason to know that the participating payee is a United States person. If the participating payee has any United States address, the payment settlement entity may treat the participating payee as a foreign person only if the payment settlement entity has in its files documentation upon which the payment settlement entity may rely to treat the payment as made to a foreign person in accordance with §1.1441-1(e)(1)(ii).

(C) Foreign address; United States address. For purposes of this section, foreign address means any address that is not within the United States, as defined in section 7701(a)(9) of the Internal Revenue Code (the States and the District of Columbia). United States address means any address that is within the United States.

(6) Gross amount. For purposes of this section, gross amount means 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, refunded amounts or any other amounts. The dollar amount of each transaction is determined on the date of the transaction.

(b) Payment card transactions--(1) Definition. The term payment card transaction means any transaction in which a payment card, or any account number or other indicia associated with a payment card, is accepted as payment.

(2) Merchant acquiring entity. The term merchant acquiring entity means the bank or other organization that has the contractual obligation to make payment to participating payees (as defined in paragraph (a)(5)(i)(A) of this section) in settlement of payment card transactions.

(3) Payment card--(i) The term payment card means any card, including any stored-value card as defined in paragraph (b)(4) of this section, issued pursuant to an agreement or arrangement that provides for--

(A) One or more issuers of such cards;

(B) A network of persons unrelated to each other, and to the issuer, who agree to accept such cards as payment; and

(C) Standards and mechanisms for settling the transactions between the merchant acquiring entities and the persons who agree to accept the cards as payment.

(ii) Persons who agree to accept such cards as payment as described in this paragraph (b)(3) are participating payees within the meaning of paragraph (a)(5)(i)(A) of this section.

(4) Stored-value cards. The term stored-value card means any card with a prepaid value, including any gift card.

(5) Transactions for which no return of information is required under section 6050W--(i) Withdrawals and cash advances. The use of a “payment card” as defined in paragraph (b)(3) of this section by a cardholder to withdraw funds at an automated teller machine, or to obtain a cash advance or loan against the cardholder’s account, is not a payment card transaction under paragraph (b)(1) of this section because the card is not being accepted as payment by a merchant or other payee.

(ii) Convenience checks. The acceptance of a check issued in connection with a payment card account by a merchant or other payee is not a payment card transaction under paragraph (b)(1) of this section because the check is accepted and processed through the banking system in the same manner as a traditional check, not as a payment card.

(iii) Payee related to issuer. No return of information is required under this section for any transaction in which a payment card within the meaning of paragraph (b)(3) is accepted as payment by a merchant or other payee who is related to the issuer of the payment card.

(c) Third party network transactions--(1) Definition. The term third party network transaction means any transaction that is settled through a third party payment network.

(2) Third party settlement organization. The term third party settlement organization means the central organization that has the contractual obligation to make payments to participating payees (as defined in paragraph (a)(5)(i)(B) of this section) of third party network transactions. A central organization is a third party settlement organization if it provides a third party payment network (as defined in paragraph (c)(3)(i) of this section) that enables purchasers to transfer funds to providers of goods and services.

(3) Third party payment network. (i) The term third party payment network means any agreement or arrangement that--

(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;

(B) Provides standards and mechanisms for settling the transactions; and

(C) Guarantees payment to the persons providing goods or services in settlement of transactions with purchasers pursuant to the agreement or arrangement.

(ii) A third party payment network does not include any agreement or arrangement that provides for the issuance of payment cards.

(iii) Persons who are providers of goods and services as described in this paragraph (c)(3) are participating payees within the meaning of paragraph (a)(5)(i)(B) of this section.

(4) Exception for de minimis payments. A third party settlement organization is required to report any information under paragraph (a)(1) of this section with respect to third party network transactions of any participating payee only if--

(i) The amount that would otherwise be reported under paragraph (a)(1)(ii) of this section with respect to such transactions exceeds \$20,000; and

(ii) The aggregate number of such transactions exceeds 200.

(d) Special rules--(1) Aggregated payees. If a person receives payments from a payment settlement entity (as defined in paragraph (a)(4) of this section) on behalf of one or more participating payees and distributes such payments to one or more participating payees (as defined in paragraph (a)(5) of this section), the person is treated as:

(i) The participating payee with respect to the payment settlement entity; and

(ii) The payment settlement entity with respect to the participating payees to whom the person distributes payments.

(2) Electronic payment facilitator. If a payment settlement entity (as defined in paragraph (a)(4) of this section) contracts with an electronic payment facilitator or other third party to make payments in settlement of reportable payment transactions on behalf of the payment settlement entity, the facilitator must file the annual information return under this section in lieu of the payment settlement entity. The facilitator need not have any agreement or arrangement with the participating payee. Also, the payment need not come from the facilitator's account. The facilitator need only submit instructions to transfer funds to the account of the participating payee in settlement of the reportable

payment transaction. The facilitator is liable for any applicable penalties for failure to comply with the information reporting requirements of section 6050W.

(3) Designations. The party with the obligation to file the annual information return under this section may designate by written agreement any other person to satisfy the requirements of this section. Thus, notwithstanding the rule in paragraph (d)(2) of this section imposing the obligation to file the annual information return on the electronic payment facilitator in lieu of the payment settlement entity, the payment settlement entity may file the information return by designation if the parties agree in writing. However, a designation does not relieve the party with the reporting obligation from liability for any reporting failures. The party with the obligation to file the annual information return under this section remains liable for any applicable penalties under sections 6721 and 6722 if the requirements of this section are not satisfied.

(4) Conversion into United States dollars of amounts paid in foreign currency. When a payment is made or received in a foreign currency, the U.S. dollar amount shall be determined by converting such foreign currency into U.S. dollars on the date of the transaction at the spot rate (as defined in §1.988-1(d)(1)) or pursuant to a reasonable spot rate convention. For example, a payor may use a month-end spot rate or a monthly average spot rate. A spot rate convention must be used consistently with respect to all non-dollar amounts reported and from year to year. Such convention cannot be changed without the consent of the Commissioner or his or her delegate.

(5) Unrelated persons. For purposes of this section, unrelated means any person who is not related to another person within the meaning of section 267(b) (providing a list of relationships), including the application of section 267(c) and (e)(3)

(providing rules relating to constructive ownership), and section 707(b)(1) (relationships with partnerships).

(e) Examples. The following examples illustrate the provisions of this section:

Example 1. Merchant acquiring entity. Customer A purchases goods from merchant B using a credit card issued by Bank X. B is one of a network of unrelated persons that has agreed to accept credit cards issued by X as payment under an agreement that provides standards and mechanisms for settling the transaction between a merchant acquiring bank and the persons who accept the cards. Bank Z is the merchant acquiring bank with the contractual obligation to make payment to B for goods provided to A in this transaction. As defined in paragraph (b)(2) of this section, Z is the merchant acquiring entity that must file the annual information return required under paragraph (a)(1) of this section to report the payment made to settle the transaction for the sale of goods from B to A.

Example 2. Third party settlement organization. (i) Merchant B is one of a substantial number of persons selling goods or services over the Internet that have an account with X, an Internet payment service provider. None of these persons, including B, are related to X, and all have agreed to settle transactions for the sale of goods or services to customers according to the terms of their contracts with X. X has guaranteed payment to all of these persons, including B, for the sale of goods or services to customers. Customer A purchases goods from B. A pays X for the goods purchased from B. X, in turn, makes payment to B in settlement of the transaction for the sale of goods from B to A.

(ii) X's arrangement constitutes a third party payment network as defined in paragraph (c)(3) of this section because a substantial number of persons that are unrelated to X, including B, have established accounts with X, and X is contractually obligated to settle transactions for the provision of goods or services by these persons to purchasers. Thus, under paragraph (c)(2) of this section, X is a third party settlement organization and the transaction discussed in this Example is a third party network transaction under paragraph (c)(1) of this section. Therefore, X must file the annual information return required under paragraph (a)(1) of this section to report the payment made to B in settlement of the transaction with A provided that X's aggregate payments to B from third party network transactions exceed \$20,000 and the aggregate number of X's transactions with B exceeds 200 (as provided in paragraph (c)(4) of this section).

Example 3. Automated clearinghouse network. A operates an automated clearinghouse ("ACH") network that merely processes electronic payments (such as wire transfers, electronic checks, and direct deposit payments) between buyers and sellers. There are no contractual agreements between A and the sellers for the purpose of permitting the sellers to use the ACH network. Thus, A is not a third party settlement organization under paragraph (c)(2) of this section, the ACH network is not a third party payment network under paragraph (c)(3) of this section, and the electronic payment

transactions are not third party network transactions under paragraph (c)(1) of this section. A is not required to file the annual information return required under paragraph (a)(1) of this section.

Example 4. ACH processor. B provides a variety of ACH payment processing services to a large number of merchants, such as converting checks received in payment of bills into ACH transactions. B groups payment transactions into an ACH file and transmits the ACH file into the ACH network on behalf of merchants in order to initiate payment to merchants through the ACH network. B makes payments to the merchants after the ACH network verifies that the customers' accounts have sufficient funds. Because the ACH network is not a third party payment network under paragraph (c)(3) of this section, B cannot be a third party settlement organization with respect to the ACH network. Similarly, because the ACH itself is not a third party settlement organization under paragraph (c)(2) of this section, B cannot be an electronic payment facilitator because B is not acting on behalf of a payment settlement entity. However, B may itself be operating third party payment network under paragraph (c)(3) of this section if B has a separate agreement or arrangement that: involves the establishment of accounts with B by a substantial number of unrelated merchants who provide goods or services and have agreed to settle transactions for the provision of the goods or services pursuant to the agreement or arrangement; provides for standards and mechanisms for settling the transactions; and guarantees persons providing goods or services pursuant to such agreement or arrangement that these persons will be paid for providing such goods or services.

Example 5. Gross amount. On Day 1, Customer A uses a payment card to purchase \$100 worth of goods from merchant B. Bank X, the merchant acquiring entity for B, is the party with the contractual obligation to make payment to B in settlement of the transaction. On Day 2, X, after deducting fees of \$2, makes payment of \$98 to settle the transaction for the sale of goods from B to A. Under paragraph (a)(6) of this section, X must report the amount of \$100, the amount of the transaction on Day 1, without any reduction for fees or any other amount, as the gross amount of this reportable payment transaction on the annual information return filed under paragraph (a)(1) of this section.

Example 6. Gift card. (i) Customer A purchases a gift card from Merchant X that may be used only at X and its related network of stores. A purchases the gift card using cash. A gives the gift card to B. B uses the gift card to purchase goods at one of X's stores. The purchase of the gift card by A using cash is not a payment card transaction described in paragraph (b)(1) of this section and, thus, is not required to be reported in a return of information required under paragraph (a)(1) of this section. Under paragraph (b)(3) of this section, the gift card is not a payment card because the gift card is only accepted as payment by persons who are related to the issuer of the gift card and to each other. Therefore, the use of the gift card by B is not required to be reported in a return of information required under paragraph (a)(1) of this section.

(ii) The facts are the same as in paragraph (i), except that B adds value to the gift card using a credit card. The use of the credit card to add value to the gift card is a reportable payment transaction (as defined in paragraph (a)(3) of this section) and must be reported in a return of information under this section by the bank or other organization that has the contractual obligation to make payment to X in settlement of the transaction.

Example 7. Private label card. Bank B issues a card imprinted with Retailer C's logo to cardholder A. The "C-card" is accepted as payment only at C or at stores related (within the meaning of section 267(b), (c) and (e)(3) and, section 707(b)(1)) to C. A uses the card at C to purchase electronics equipment. Under paragraph (b)(3) of this section, the C-card is not a payment card because the card is accepted as payment only within a network of persons who are related to each other. Therefore, the use of the card by A at C is not required to be reported in a return of information required under paragraph (a)(1) of this section.

Example 8. Quasi-private label card. Bank B issues a card to cardholder A. The card, known as an "E-card," is issued by B pursuant to an agreement that provides that the E-card is accepted as payment only within a limited network of merchants that carry electronics equipment. The agreement provides for standards and mechanisms for settling the transactions between the merchants and the merchant acquiring entities. The merchants accepting the E-card as payment are not related (within the meaning of section 267(b), (c) and (e)(3) and section 707(b)(1)) to each other or to B. A uses the card to purchase electronics equipment at F Store, one of the stores within the network of merchants accepting the E-card. Under paragraph (b)(3) of this section, the E-card is a payment card because the card is issued pursuant to an agreement that provides for a network of persons unrelated to each other, and to the issuer, who agree to accept the card as payment. Therefore, the use of the E-card by A to purchase electronics equipment at F Store must be reported in a return of information required under paragraph (a)(1) of this section.

Example 9. Campus card. (i) University Y issues Student A a card that may be used on campus at various university-owned merchants and at various local merchants unrelated to Y. A uses the card in the university-owned cafeteria to purchase lunch. Under paragraph (b)(5)(iii) of this section, no return of information is required because the card is being accepted as payment by a person who is related to the issuer of the card.

(ii) The facts are the same as in paragraph (i), except that A uses the campus card to purchase lunch at a local restaurant, unrelated to Y, that has agreed to accept the campus card as payment. Under paragraph (b)(3) of this section, the campus card is a payment card in this transaction because the card is accepted as payment by a person that is unrelated to this issuer of the card pursuant to an agreement. Therefore, the use of the card by A in the local restaurant for the purchase of lunch must be reported in a return of information required under paragraph (a)(1) of this section by the

bank or other organization that has the contractual obligation to make payment to the restaurant in settlement of the transaction.

Example 10. Mall card. Customer B purchases a card that is issued by shopping mall A. Pursuant to an agreement or arrangement, the card is accepted as payment by various merchants located within the mall, who are unrelated to the issuer of the card and to each other. B uses the card in the mall to purchase goods from merchant C. Under paragraph (b)(3) of this section, the mall card is a payment card because the card is accepted as payment by a network of persons who are unrelated to the issuer of the card and to the other merchants who have agreed to accept the card as payment. Therefore, the use of the mall card by B to purchase goods from merchant C is required to be reported in a return of information required under paragraph (a)(1) of this section.

Example 11. Electronic benefit transactions card. Government Agency A issues benefits electronically to recipients by loading these benefits onto a payment card. Pursuant to an agreement, a network of merchants unrelated to A, and to each other, has agreed to accept the benefits card as payment. A issues a card to B, who uses the card to purchase goods from Merchant C. The card issued by A is a payment card (as defined in paragraph (b)(3) of this section) because the card is accepted as payment by a network of persons that are unrelated to the issuer of the card, and to each other. The use of the card by B to purchase goods from C must be reported in a return of information required under paragraph (a)(1) of this section.

Example 12. Prepaid telephone card. A purchases a prepaid telephone card from Company X that may be used to make telephone calls using various long-distance providers unrelated to X that have agreed to accept the card as payment. A places a telephone call using the prepaid card as payment for the telephone call. Under paragraph (b)(3) of this section, the prepaid telephone card is a payment card because the card is accepted as payment by a person that is unrelated to the issuer of the card pursuant to an agreement. Therefore, the use of the prepaid card to make payment for the telephone call must be reported in a return of information required under paragraph (a)(1) of this section by the bank or other organization that has the contractual obligation to make payment to the long distance provider in settlement of the transaction.

Example 13. Transit card. City Z accepts a transit card as payment for use of its mass transit system. The transit card is issued by B, an organization unrelated to Z. A network of persons, including Z, who are unrelated to each other and to B, have agreed to accept the transit card issued by B as payment for transit and for other goods and services. Transit rider X purchases a transit card and uses the card to pay for travel on Z's mass transit system. Under paragraph (b)(3) of this section, the transit card is a payment card because the card is accepted as payment by a person who is one of a network of persons that are unrelated to the issuer of the card, and to each other, and that have agreed to accept the card as payment. Therefore, the use of the transit card by X to pay for transit on Z's mass transit system is a payment card transaction described in paragraph (b)(1) of this section that must be reported in a return of information required under paragraph (a)(1) of this section by the bank or other

organization that has the contractual obligation to make payment to Z. Z is the participating payee, described in paragraph (a)(5)(i)(A) of this section, of the payment card transaction.

Example 14. Cash advance. Bank A issues Cardholder B a credit card that is a payment card under paragraph (b)(3) of this section. B uses the card at a local bank to obtain a cash advance. Under paragraph (b)(5)(i) of this section, B's use of the payment card to obtain a cash advance is not a payment card transaction (as defined in paragraph (b)(1) of this section) because the card is not being accepted as payment by a merchant.

Example 15. Withdrawals from automated teller machines. Bank A issues Cardholder B a credit card that is a payment card under paragraph (b)(3) of this section. B uses the card at an automated teller machine to obtain cash. Under paragraph (b)(5)(i) of this section, B's use of the payment card to obtain cash is not a payment card transaction (as defined in paragraph (b)(1) of this section) because the card is not being accepted as payment by a merchant.

Example 16. Convenience checks. Bank A issues Cardholder B a credit card that is a payment card under paragraph (b)(3) of this section. A sends B paper checks imprinted with the account number associated with the credit card. B uses one of the checks to purchase goods from Merchant S. The check is accepted by S and processed through the bank system in the same manner as a traditional check. Under paragraph (b)(5)(ii) of this section, B's use of the convenience check to purchase goods is not a payment card transaction (as defined in paragraph (b)(1) of this section) because the check is accepted and processed as a traditional check, not as a payment card.

Example 17. Healthcare network. Health carrier A operates healthcare network Y. A collects premiums from covered persons pursuant to a plan agreement between A and the covered persons for the cost of membership in Y. Separately, A pays healthcare providers pursuant to provider agreements to compensate these providers for services rendered to covered persons who are members of Y. A is not a third party settlement organization under paragraph (c)(2) of this section because A does not operate a third party payment network that enables purchasers to transfer funds to providers of goods and services. Therefore, A is not required to file the annual information return required under paragraph (a)(1) of this section.

Example 18. Third party accounts payable. X is a "shared-service" organization that performs accounts payable services for numerous purchasers that are unrelated to X. A substantial number of providers of goods and services have established accounts with X and have agreed to accept payment from X in settlement of their transactions with purchasers. The provider agreement with X includes standards and mechanisms for settling the transactions and guarantees payment to the providers, and the arrangement enables purchasers to transfer funds to providers. Under paragraph (c)(3) of this section, X's accounts payable services constitute a third party payment network,

of which X is the third party settlement organization (as defined in paragraph (c)(2) of this section). For each payee, X must file the annual information return required under paragraph (a)(1) of this section to report payments made by X in settlement of accounts payable to that payee if X's aggregate payments to that payee exceed \$20,000 and the aggregate number of transactions with that payee exceeds 200 (as provided in paragraph (c)(4) of this section).

Example 19. Toll collection network. State A charges a toll to vehicles that travel its state highways. The tolling agency for A contracted with organization X to perform its toll collection. X provides an electronic toll collection system that allows the toll facility to record the passage of a vehicle with a transponder affixed to the vehicle. The customer account associated with the transponder is automatically debited for the amount of the toll. The customer funds a balance in the account, which is then depleted as the toll transactions occur. X periodically bills the customer to replenish the account. X then makes payment to A to settle the toll transactions that are recorded by the transponder. X also contracts with a substantial number of other entities unrelated to X that have established accounts with X and have agreed to accept payment using the electronic toll collection system provided by X. X guarantees payment to the entities for all toll transactions that are recorded by the transponders, and the arrangement enables customers to transfer funds to State A and other entities that charge tolls. Under paragraph (c)(3) of this section, X's electronic toll collection system constitutes a third party payment network, of which X is the third party settlement organization (as defined in paragraph (c)(2) of this section). For each payee, including A, X must file the annual information return required under paragraph (a)(1) of this section to report payments made by X in settlement of toll transactions if X's aggregate payments to that payee exceed \$20,000 and the aggregate number of transactions with that payee exceeds 200 (as provided in paragraph (c)(4) of this section).

Example 20. Hotel kiosk. Under a "hotel kiosk" arrangement, Hotel B permits its customers to charge, to their room account, transactions for goods and services at a substantial number of sellers unrelated to B that operate on B's premises, or on the premises of hotels related to B, and that have established accounts in B's hotel kiosk system. Customers settle their room account with B when they check out, and B in turn settles the hotel kiosk transactions with the unrelated sellers. B guarantees payment to the sellers for these transactions and the arrangement enables customers to transfer funds to the sellers by means of one payment made to the hotel. Under paragraph (c)(3) of this section, B's hotel kiosk system constitutes a third party payment network, of which B is the third party settlement organization (as defined in paragraph (c)(2) of this section). For each payee, B must file the annual information return required under paragraph (a)(1) of this section to report payments made by B in settlement of the hotel kiosk transactions if B's aggregate payments to that payee exceed \$20,000 and the aggregate number of transactions with that payee exceeds 200 (as provided in paragraph (c)(4) of this section).

Example 21. Aggregated payee. Corporation A, acting on behalf of A's independently-owned franchise stores, receives payment from Bank X for credit card

sales effectuated at these franchise stores. X, the payment settlement entity (as defined in paragraph (a)(4)(i) of this section), is required under paragraph (d)(1)(i) of this section to report the gross amount of the reportable payment transactions distributed to A (notwithstanding the fact that A does not accept payment cards and would not otherwise be treated as a participating payee). In turn, under paragraph (d)(1)(ii) of this section, A is required to report the gross amount of the reportable payment transactions allocable to each franchise store. X has no reporting obligation under this section with respect to payments made by A to its franchise stores.

Example 22. Electronic payment facilitator. (i) Bank A is a merchant acquiring entity (as defined in paragraph (b)(2) of this section) with the contractual obligation to make payments to participating merchants to settle certain credit card transactions. A enters into a contract with Processor X. Pursuant to this contract, X prepares and submits instructions to move funds from A's account to the accounts of participating merchants to settle credit card transactions. X is making payment on A's behalf in settlement of payment card transactions pursuant to a contract between X and A. Therefore, under paragraph (d)(2) of this section, X is an electronic payment facilitator and must file the information return required under paragraph (a)(1) of this section with respect to credit card transactions settled by X. A has no reporting obligation with respect to payments made by X on A's behalf.

(ii) The facts are the same as in paragraph (i) except that A and X state in their contract that A will file the information return required under paragraph (a)(1) of this section. A may file the information return pursuant to this designation. However, X is liable for any applicable penalties under sections 6721 and 6722 if the reporting requirements of this section are not satisfied.

(iii) The facts are the same as in paragraph (i) except that X merely prepares the instructions to move the funds to the accounts of participating merchants, and the instructions are actually submitted by A. A, not X, is making payment in settlement of payment card transactions. Therefore, A retains the obligation to file the information return required under paragraph (a)(1) of this section with respect to credit card transactions settled by A.

(f) Prescribed form. The return required by paragraph (a)(1) of this section must be made according to the forms and instructions published by the Internal Revenue Service.

(g) Time and place for filing. Returns made under this section for any calendar year must be filed on or before February 28th (March 31st if filing electronically) of the

following year at the Internal Revenue Service Center location designated in the instructions to the relevant form.

(h) Time and place for furnishing statement--(1) In general. Every payment settlement entity required to file a return under this section must also furnish to each participating payee a written statement with the same information (as described in paragraph (h)(2) of this section). The statement must be furnished to the payee on or before January 31st of the year following the calendar year in which the reportable payment is made. If the return of information is not made on magnetic media, this requirement may be satisfied by furnishing to such person a copy of all Forms 1099-K, "Merchant card and third-party payments," or any successor form with respect to such person filed with the Internal Revenue Service Center. The statement will be considered furnished to the payee if it is mailed to the payee's last known address. The payment settlement entity may furnish the statement electronically in accordance with the rules provided in §1.6050W-2.

(2) Information to be shown on statement furnished to payee. Each written statement furnished under paragraph (h)(1) of this section must include the following information--

(i) The name, address, and phone number (or email address if the statement is furnished electronically) of the information contact of the payment settlement entity.

(ii) With respect to the participating payee, the gross amount of--

(A) The aggregate reportable payment transactions for the calendar year; and

(B) The aggregate reportable payment transactions for each month of the calendar year.

(iii) Any other information required by the form, instructions, or current revenue procedures.

(i) Cross-reference to penalties. For provisions relating to the penalty for failure to file timely a correct information return required under section 6050W, see section 6721 and the associated regulations. For provisions relating to the penalty for failure to furnish timely a correct payee statement required under section 6050W(f), see section 6722 and the associated regulations. See section 6724 and the associated regulations for the waiver of a penalty if failure is due to reasonable cause and is not due to willful neglect.

(j) Effective/applicability date. The rules in this section apply to returns for calendar years beginning after December 31, 2010.

Par. 5. Section 1.6050W-2 is added to read as follows:

§1.6050W-2 Electronic furnishing of information statements for payments made in settlement of payment card and third party network transactions.

(a) Electronic furnishing of statements--(1) In general. A person required by section 6050W to furnish a written statement (furnisher) regarding payments made in settlement of payment card and third party network transactions to the person to whom it is required to be furnished (recipient) may furnish the statement in an electronic format in lieu of a paper format. A furnisher who meets the requirements of paragraphs (a)(2) through (a)(5) of this section is treated as furnishing the required statement.

(2) Consent--(i) In general. The recipient must have affirmatively consented to receive the statement required under section 6050W in an electronic format or, in the alternative, have previously consented to receive other federal tax statements in an

electronic format from the furnisher. The consent may be made electronically in any manner that reasonably demonstrates that the recipient can access the statement in the electronic format in which it will be furnished to the recipient. Alternatively, the consent may be made in a paper document if it is confirmed electronically. Consents must be kept at all times available for inspection by the Internal Revenue Service. Recipients currently receiving electronic communications from the furnisher may elect to receive the statement required under section 6050W in a paper document in lieu of an electronic format. The election to receive a paper document may be made by notifying the furnisher electronically or in a paper document.

(ii) Withdrawal of consent. The consent requirement of paragraph (a)(2)(i) of this section is not satisfied if the recipient withdraws the consent to receive electronic statements and the withdrawal takes effect before the statement is furnished. The furnisher may provide that a withdrawal of consent takes effect either on the date it is received by the furnisher or on a subsequent date. The furnisher may also provide that a request for a paper statement will be treated as a withdrawal of consent.

(iii) Change in hardware or software requirements. If a change in the hardware or software required to access the statement creates a material risk that the recipient will not be able to access the statement, the furnisher must, prior to changing the hardware or software, provide notice to the recipient. The notice must describe the revised hardware and software required to access the statement and inform the recipient that a new consent to receive the statement in the revised electronic format must be provided to the furnisher. After implementing the revised hardware and software, the furnisher must obtain from the recipient, in the manner described in paragraph (a)(2)(i) of this

section, a new consent or confirmation of consent to receive the statement electronically.

(iv) Examples. The following examples illustrate the rules of this paragraph (a)(2):

Example 1. Recipient R has consented to receive the statements required under section 6041 in electronic format from Furnisher F. F has retained R's consent and keeps it available for inspection by the IRS. F may furnish to R the statement required under section 6050W in electronic format without securing an affirmative consent from R with respect to the statements required under section 6050W.

Example 2. Recipient R has not consented to receive any electronic federal income tax statements from Furnisher F. F may not furnish to R the statements required under section 6050W unless F first secures from R a consent to receive those statements in electronic format in accordance with the requirements of paragraphs (a)(2) through (a)(5) of this section.

Example 3. Furnisher F sends Recipient R a letter stating that R may consent to receive statements required by section 6050W(f) electronically on a website instead of in a paper format. The letter contains instructions explaining how to consent to receive the statements electronically by accessing the website, downloading the consent document, completing the consent document, and e-mailing the completed consent back to F. The consent document posted on the website uses the same electronic format that F uses to furnish statements electronically. R reads the instructions and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

Example 4. Furnisher F sends Recipient R an e-mail stating that R may consent to receive statements required by section 6050W(f) electronically instead of in a paper format. The e-mail contains an attachment instructing R how to consent to receive the statements electronically. The e-mail attachment uses the same electronic format that F uses to furnish statements electronically. R opens the attachment, reads the instructions, and submits the consent in the manner provided in the instructions. R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

Example 5. Furnisher F posts a notice on its website stating that Recipient R may receive statements required by section 6050W(f) electronically instead of in a paper format. The website contains instructions on how R may access a secure web page and consent to receive the statements electronically. By accessing the secure web page and giving consent, R has consented to receive the statements electronically in the manner described in paragraph (a)(2)(i) of this section.

(3) Required disclosures--(i) In general. Prior to, or at the time of, a recipient's consent, the furnisher must provide to the recipient a clear and conspicuous disclosure statement containing each of the disclosures described in paragraphs (a)(3)(ii) through (a)(3)(viii) of this section.

(ii) Paper statement. The recipient must be informed that the statement will be furnished on paper if the recipient does not consent to receive it electronically.

(iii) Scope and duration of consent. The recipient must be informed of the scope and duration of the consent. For example, the recipient must be informed whether the consent applies to statements furnished every year after the consent is given until it is withdrawn in the manner described in paragraph (a)(3)(v)(A) of this section or only to the statement required to be furnished on or before the January 31st immediately following the date on which the consent is given.

(iv) Post-consent request for a paper statement. The recipient must be informed of any procedure for obtaining a paper copy of the recipient's statement after giving the consent described in paragraph (a)(2)(i) of this section and whether a request for a paper statement will be treated as a withdrawal of consent.

(v) Withdrawal of consent. The recipient must be informed that--

(A) The recipient may withdraw a consent by writing (electronically or on paper) to the person or department whose name, mailing address, telephone number, and e-mail address is provided in the disclosure statement;

(B) The furnisher will confirm the withdrawal and the date on which it takes effect in writing (either electronically or on paper); and

(C) A withdrawal of consent does not apply to a statement that was furnished electronically in the manner described in this paragraph (a) before the date on which the withdrawal of consent takes effect.

(vi) Notice of termination. The recipient must be informed of the conditions under which a furnisher will cease furnishing statements electronically to the recipient.

(vii) Updating information. The recipient must be informed of the procedures for updating the information needed by the furnisher to contact the recipient. The furnisher must inform the recipient of any change in the furnisher's contact information.

(viii) Hardware and software requirements. The recipient must be provided with a description of the hardware and software required to access, print, and retain the statement, and the date when the statement will no longer be available on the website.

(4) Format. The electronic version of the statement must contain all required information and comply with applicable revenue procedures relating to substitute statements to recipients.

(5) Notice--(i) In general. If the statement is furnished on a website, the furnisher must notify the recipient that the statement is posted on a website. The notice may be delivered by mail, electronic mail, or in person. The notice must provide instructions on how to access and print the statement. The notice must include the following statement in capital letters, "IMPORTANT TAX RETURN DOCUMENT AVAILABLE." If the notice is provided by electronic mail, the foregoing statement must be on the subject line of the electronic mail.

(ii) Undeliverable electronic address. If an electronic notice described in paragraph (a)(5)(i) of this section is returned as undeliverable, and the correct electronic

address cannot be obtained from the furnisher's records or from the recipient, then the furnisher must furnish the notice by mail or in person within 30 days after the electronic notice is returned.

(b) Effective/applicability date. The rules in this section apply to returns for calendar years beginning after December 31, 2010.

PART 31--EMPLOYMENT TAXES AND COLLECTION OF INCOME TAX AT SOURCE

Par. 6. The authority citation for part 31 continues to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Par. 7. Section 31.3406-0 is amended as follows:

1. Entries for §31.3406(b)(3)-5(a), (b), (c), (d), and (e) are added.
2. Entry for §31.3406(g)-1 is amended by adding paragraphs (d), (e), and (f).

The additions read as follows:

§31.3406-0 Outline of the backup withholding regulations.

* * * * *

§31.3406(b)(3)-5 Reportable payments of payment card and third party network transactions.

- (a) Payment card and third party network transactions subject to backup withholding.
- (b) Amount subject to backup withholding.
- (c) Time when payments are considered to be subject to backup withholding.
- (d) Backup withholding from an alternate source.
- (e) Effective/applicability date.

* * * * *

§31.3406(g)-1 Exception for payments to certain payees and certain other payments.

* * * * *

- (d) Reportable payments made to Canadian nonresident alien individuals.
- (e) Certain reportable payments made outside the United States by foreign persons, foreign offices of United States banks and brokers, and others.
- (f) Special rule for certain payment card transactions.

* * * * *

Par. 8. Section 31.3406(a)-2 is amended by revising paragraph (a) to read as follows:

§31.3406(a)-2 Definition of payors obligated to backup withhold.

(a) In general. Payor means the person that is required to make an information return under section 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, 6050N, or 6050W with respect to any reportable payment (as described in section 3406(b)), or that is described in paragraph (b) of this section.

* * * * *

Par. 9. Section 31.3406(b)(3)-5 is added to read as follows:

§31.3406(b)(3)-5 Reportable payments of payment card and third party network transactions.

(a) Payment card and third party network transactions subject to backup withholding. The gross amount of a reportable transaction that is required to be reported under section 6050W (relating to information reporting for payment card and third party network transactions) is a reportable payment for purposes of section 3406. See §31.6051-4 for the requirement to furnish a statement to the payee if tax is withheld under section 3406.

(b) Amount subject to backup withholding. In general, the amount described in paragraph (a) of this section that is subject to withholding under section 3406 is the amount subject to reporting under section 6050W. In the case of payments made in settlement of third party network transactions, the amount subject to withholding under section 3406 is determined without regard to the exception for de minimis payments by third party settlement organizations in section 6050W(e) and the associated regulations.

(c) Time when payments are considered to be subject to backup withholding--(1)

In general. In the case of a payment card or third party network transaction reportable under section 6050W, the obligation to withhold arises on the date of the transaction. A payor is not required, however, to satisfy its withholding liability until the time that payment is made.

(2) Example. The provisions of paragraph (c)(1) are illustrated by the following example:

Example. On Day 1, Customer A uses a payment card to purchase \$100 worth of goods from Merchant B. Bank X, the merchant acquiring entity for B, is the party with the contractual obligation to make payment to B in settlement of the transaction. On Day 2, X, after deducting fees of \$2, makes payment of \$98 to settle the transaction for the sale of goods from B to A. Under paragraph (a)(6) of §1.6050W-1, X must report the amount of \$100, the amount of the transaction on Day 1, without any reduction for fees or any other amount, as the gross amount of this reportable payment transaction on the annual information return filed under paragraph (a)(1) of §1.6050W-1. Under paragraph (c)(1) of this section, X's obligation, if any, to backup withhold arises on Day 1, the backup withholding obligation must be satisfied on Day 2, and the amount subject to backup withholding is \$100 (the gross amount of the reportable payment transaction (as defined in paragraph (a)(6) of §1.6050W-1)).

(d) Backup withholding from an alternate source--(1) In general. A payor may not withhold under section 3406 from a source maintained by the payor other than the source with respect to which there exists a liability to withhold under section 3406 with respect to the payee. See section 3403 and §31.3403-1, which provide that the payor is liable for the amount required to be withheld regardless of whether the payor withholds.

(2) Exceptions for backup withholding when there are no funds available--(i)

Backup withholding from an alternative source. In the event there are no funds available in the source with respect to which there exists a liability to withhold under section 3406 with respect to the payee, the payor may withhold under section 3406 from another source maintained by the payee with the payor. The source from which the tax

is withheld under section 3406 must be payable to at least one of the persons listed on the account subject to withholding. If the account or source is not payable exclusively to the same person or persons listed on the account subject to withholding under section 3406, then the payor must obtain a written statement from all other persons to whom the account or source is payable authorizing the payor to withhold under section 3406 from the alternative account or source. A payor that elects to withhold under section 3406 from an alternative source may determine the account or source from which the tax is to be withheld, or may allow the payee to designate the alternative source.

(ii) Deferral of withholding. If the payor cannot locate, with reasonable care (following procedures substantially similar to those set forth in §31.3406(d)-5(c)(3)(ii)(A) and (B)), an alternative source of cash from which the payor may satisfy its withholding obligation pursuant to paragraph (d)(2)(i) of this section, the payor may defer its obligation to withhold under section 3406 until the earlier of--

(A) The date on which cash, in a sufficient amount to satisfy the obligation in full, is deposited in the account subject to withholding under section 3406; or

(B) The close of the fourth calendar year after the obligation arose.

(iii) Termination of obligation to backup withhold. If, at the close of the fourth calendar year after the backup withholding arose, the payor has not located an alternate source of cash from which the payor may satisfy its withholding obligation, and sufficient cash to satisfy the obligation in full has not been deposited in the account subject to withholding under section 3406, then the obligation to backup withhold terminates at the close of the fourth calendar year.

(e) Effective/applicability date. The provisions of this section apply to amounts

paid after December 31, 2011.

Par. 10. Section 31.3406(d)-1 is amended by revising paragraph (d) to read as follows:

§31.3406(d)-1 Manner required for furnishing a taxpayer identification number.

* * * * *

(d) Rents, commissions, nonemployee compensation, certain fishing boat operators, and payment card and third party network transactions, etc.--Manner required for furnishing a taxpayer identification number. For accounts, contracts, or relationships subject to information reporting under section 6041 (relating to information reporting at source on rents, royalties, salaries, etc.), section 6041A(a) (relating to information reporting of payments for nonemployee services), section 6050A (relating to information reporting by certain fishing boat operators), section 6050N (relating to information reporting of payments of royalties), or section 6050W (relating to information reporting for payment card and third party network transactions), the payee must furnish the payee's taxpayer identification number to the payor either orally or in writing. Except as provided in §31.3406(d)-5, the payee is not required to certify under penalties of perjury that the taxpayer identification number is correct regardless of when the account, contract, or relationship is established.

Par. 11. Section 31.6051-4 is amended by revising paragraph (c)(2) to read as follows:

§31.6051-4 Statement required in case of backup withholding.

* * * * *

(c) * * *

(2) The amount subject to reporting under section 6041, 6041A(a), 6042, 6044, 6045, 6049, 6050A, 6050N, or 6050W whether or not the amount of the reportable payment is less than the amount for which an information return is required. If tax is withheld under section 3406, the statement must show the amount of the payment withheld upon;

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PART 301--PROCEDURE AND ADMINISTRATION

Par. 12. The authority citation for part 301 continues to read in part as follows:

Authority: 26 U.S.C. 7805* * *

Par. 13. Section 301.6721-1(g) is amended by:

1. Removing the language “or” at the end of paragraph (g)(3)(xii).
2. Redesignating paragraphs (g)(3)(viii), (g)(3)(ix), (g)(3)(x), (g)(3)(xi), (g)(3)(xii) and (g)(3)(xiii) as (g)(3)(ix), (g)(3)(x), (g)(3)(xi), (g)(3)(xii), (g)(3)(xiii) and (g)(3)(xiv).
3. Adding the language “or” at the end of newly designated paragraph (g)(3)(xiii).
4. Adding new paragraph (g)(3)(viii).

The revisions and additions read as follows:

§301.6721-1 Failure to file correct information returns.

* * * * *

(g)* * * (3)* * *

(viii) Section 6050W (relating to information returns with respect to payments made in settlement of payment card and third party network transactions (effective for

information returns required to be filed for calendar years beginning after December 31, 2010)),

* * * * *

Par. 14. Section 301.6722-1 is amended by:

1. Removing the language “and” at the end of paragraph (d)(2)(xviii).
2. Redesignating paragraphs (d)(2)(xvi), (d)(2)(xvii), (d)(2)(xviii) and (d)(2)(xix) as (d)(2)(xvii), (d)(2)(xviii), (d)(2)(xix) and (d)(2)(xx).
3. Adding new paragraph (d)(2)(xvi).
4. Adding the language “and” at the end of the newly designated paragraph (d)(2)(xix).

The revisions and additions read as follows:

§301.6722-1 Failure to furnish correct payee statements.

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(d) * * * (2) * * *

(xvi) Section 6050W (relating to information returns with respect to payments made in settlement of payment card and third party network transactions (effective for information returns required to be filed for calendar years beginning after December 31, 2010) , generally the recipient copy),

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Steven T. Miller

Deputy Commissioner for Services and Enforcement.

Approved: August 3, 2010

Michael Mundaca

Assistant Secretary of the Treasury (Tax Policy).