RETAIL INDUSTRY LEADERS ASSOCIATION
Educate.Innovate.Advocate.

1700 NORTH MOORE STREET
SUITE 2250
ARLINGTON, VA 22209
T (703) 841-2300 F (703) 841-1184
WWW.RILA.ORG

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BY ELECTRONIC SUBMISSION

Internal Revenue Service
CC:PA:LPD:PR (Notice 2010-51)
1111 Constitution Avenue, N.W.
Washington, DC 20224

RE: Comments on Notice 2010-51

On behalf of the Retail Industry Leaders Association (RILA), I write pursuant to Notice 2010-51 (the Notice) and the request for comments on amendments made to Section 6041 of the Internal Revenue Code of 1986 (the Code)[1] by Section 9006 of the Patient Protection and Affordability Care Act of 2010 (PPACA).[2] Specifically, this letter offers RILA's views on the expanded information reporting requirements and recommendations for minimizing burden and avoiding duplicative reporting.

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA appreciates the Treasury Department's and the Internal Revenue Service's (the Service) consideration of the detailed comments provided below. Section I of this letter explains RILA's general policy concerns with the amendments under PPACA Section 9006, Section II outlines recommendations with respect to the specific questions posed in the Notice as well as related issues under the expanded reporting requirements, and Section III pertains to the effective date for the new rules.

I. BACKGROUND

The amendments made by the PPACA address two aspects of § 6041. First, the legislation eliminates the long-standing regulatory exemption for payments to corporations,[3] thereby expanding current reporting requirements with respect to payments for services to include those rendered by incorporated service providers.[4] Second, the PPACA amendments dramatically expand the list of reportable payments to include "gross proceeds" and "amounts in

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[1] Unless otherwise specified, all "§" references are to the Code and all "Treas. Reg. §" references are to the Treasury Regulations promulgated there under, both as amended through the date of this letter.
[2] Pub. L. No. 111-148 (Mar. 23, 2010).
[3] Treas. Reg. § 1.6041-3(p).
[4] PPACA § 9006(a), adding new § 6041(h).

consideration for property."[5] For both, the legislation grants the Treasury Department and the Service authority to promulgate regulatory guidance as may be necessary and appropriate to carry out the purposes of § 6041.

While the addition of § 6041(h) will substantially increase the current reporting burden of business taxpayers, this change is at least familiar since businesses have long been required to report payments for services to non-incorporated providers. On the other hand, the modifications to § 6041(a) represent a seismic change in the current information reporting regime and will require businesses to implement new tracking systems for all purchases of goods and property – from inventory for resale to pens and paper used in the course of daily operations. Separately tracking purchases from each vendor to determine when they aggregate $600 or more in a given tax year will be a monumental undertaking for large established retailers and raises serious questions about the ability of smaller businesses to comply in an economically viable manner.

In assessing the impact of these changes to § 6041 and developing guidance to implement them, it is important to recognize that each business will be affected from two perspectives: First, as the issuer of additional Form 1099-MISCs for the expanded range of reportable transactions, and second, as the recipient of an enormous increase in such forms with respects to the business' sales of goods and services. The issues raised in the Notice, and discussed below, pertain to a number of the concerns from the issuer's perspective.

However, taxpayers will also need guidance for the recipient issues raised by the expanded reporting requirements, namely what to do with the influx of Form 1099-MISCs. For example, how are recipients to reconcile differences in the amounts reported from that reflected in their tax books (e.g., inclusion of sales tax paid as part of "gross proceeds," returns of merchandise that cross reporting periods)? Similarly, how are differences in taxable years of the issuer and the recipient (calendar versus fiscal year) to be reconciled? For the expanded information reporting to be of any use to the recipients, these and other issues will need to be addressed by the Treasury Department and the Service in future guidance.

Lastly, the new and expanded reporting requirements raise significant questions about the Service's ability to receive, process, and utilize the exponential increase in Form 1099-MISCs. While we understand the Administration's and Congress' goal of improving tax compliance through additional information disclosure, we question the prudence of imposing such significant costs and burdens on business taxpayers if these new requirements do not improve tax administration by at least an equal measure.

At the policy level, RILA has and will continue to advocate for the repeal of this onerous and ill-advised reporting requirement. Notwithstanding that objective, as the Treasury Department and the Service undertakes their responsibilities of implementing this provision, we offer our views and recommendations on behalf of the retail industry to make the required rules as minimally burdensome, costly and duplicative as possible.

[5] PPACA § 9006(b), amending § 6041(a).

II. SCOPE AND IMPLEMENTATION ISSUES

RILA offers the following views and recommendations on various issues regarding the scope of the expanded reporting requirements and recommendations on certain implementation issues. We note, however, reports that the Service does not intend to match dollar for dollar the amount of payments reported on Form 1099-MISCs to the amounts reported on tax returns, but will use the information reported analytically to assess whether a taxpayer is compliant in reporting its income and/or expenses. The following views and recommendations are submitted with that approach in mind.

A. Reporting of Payments to Corporations for Services

While the Notice focuses primarily on the changes to § 6041(a), we also offer some initial views on guidance needed to implement new § 6041(h). In particular, RILA urges the Treasury Department and the Service to retain and update the exemption under Treas. Reg. § 1.6041-3(c) with respect to reporting of payments for regularly occurring services.[6] We believe there will be little improvement in tax compliance if business taxpayers have to begin issuing Form 1099-MISCs for payments relating to utilities (e.g., electric, gas, water, sewer, waste disposal), communication services (e.g., telephone, cable, Internet services), financial institutions (e.g., interchange fees, letters of credit, bank loans), payment-settlement entities,[7] transportation (e.g., airlines, freight, shipping services), state or local governmental entities, and similar services simply because they are received from an incorporated provider.

Updating the current reporting exemption for the kinds of regularly occurring businesses services provided in the 21st Century will go a long way to mitigating the burdens of reporting payments for services in light of new § 6041(h). In addition, we believe it would be reasonable and appropriate to do so since these types of services have long been exempt from reporting with respect to payments to non-incorporated providers.

B. Specific Issues Raised in the Notice

1. *The appropriate scope of the terms "gross proceeds" and "amounts in consideration for property" in section 6041(a), as amended, and how to interpret these terms in a manner that minimizes the reporting burden and avoids duplicative reporting.*

As noted above, the addition of "gross proceeds" and "amounts in consideration for property" will monumentally expand current reporting requirements. In generally, the purchase of goods, such as inventory, includes not only the initial payment for the goods (and possibly state and local sales taxes), but also subsequent credits for returns, allowances, damaged goods, timely pay discounts, and rebates. As a result, the payor either reduces the amount of its payment taking into account the credit (as in the case of timely pay discounts) or the vendor issues a credit memo

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[6] Treas. Reg. § 1.6041-3(c) current exempts "Payments of bills for merchandise, telegrams, telephone, freight, storage, and similar charges."
[7] Defined in Treas. Reg. § 6050W-1(a)(4).

to the payor, which reduces the amount owed on a subsequent invoice. The accounts-payable systems of many companies track the amount of cash paid, which is usually net of credit memos and other payment reductions. To identify gross payment amounts, however, would typically require substantial modification to accounting systems. Therefore, for ease in administering the changes to § 6041 and to prevent costly systems modifications, we recommend that Treas. Reg. § 1.6041-1(f) should be amended to permit payors to report proceeds on the Form 1099-MISC either before or after such allowances, credits, rebates, and taxes. In addition, Form 1099-MISC should be modified to include a box allowing the issuer to indicate whether the amount reported is gross or net.

More broadly and in keeping with our recommendation in Section II.A, above, we urge the Treasury Department and the Service to harmonize the current exemption for regularly occurring payments under Treas. Reg. § 1.6041-3(c) with the addition of reporting for payments of gross proceeds and with respect to property. Currently, Treas. Reg. § 1.6041-3(c) exempts payments for "merchandise," which we strongly support retaining, especially as a significant portion of payments made by retailers relate to purchases of merchandise for resale in the ordinary course of business. Since purchases of merchandise tend to be in large, on-going quantities, we do not believe these are the types of transactions that generally contribute to non-compliance and that are the target of increase information reporting. Inventory expenses are regularly audited, especially in the retail industry, and manufacturers and wholesalers are similarly scrutinized with respect to their sales revenues.

Exempting inventory purchases would also eliminate some of the issues inherent in such transactions described above. For example, depending on the vendor's tax year relative to that of the purchaser, the amount reflected on the Form 1099-MISC may not reflect the ultimate purchase price (after adjustments for returns and allowances) of the merchandise to the retailer. Thus, without an exemption, the Service would have to expend additional examination resources to reconcile the differences in the reported amount relative to either the seller's or buyer's books and records, thereby undercutting the value of the 1099-MISC as a tool for identifying unreported income or overstated expenses.

RILA also urges the Treasury Department and the Service to consider an exemption for other regularly occurring purchases of products for use in the ordinary course of the taxpayer's trade or business similar to that for services under Treas. Reg. § 1.6041-3(c) described above. Items like office supplies, light bulbs, cleaning supplies, paper products and various fixtures, which business typically purchase from large wholesale venders, again, do not seem like the types of transactions that would benefit from increased information reporting and improve overall compliance with the tax laws. Moreover, any marginal valued added by the issuance of Form 1099-MISCs for such regular business purchases would be vastly outweighed by the additional costs and burdens imposed on the issuer as well as the recipients in terms of reconciling likely differences.

To the extent that purchases of these types of products are not exempted, RILA strongly urges the Treasury Department and the Service to issue guidance that clearly defines the contours of "gross proceeds" and "amounts in consideration for property." Without clear answers to the myriad issues created by the expansion of § 6041, taxpayers will have little hope of accurate compliance, which undermines any value of the new reporting requirements for the Service.

2. ***Whether or how the expanded reporting requirements should apply to payments between affiliated corporations, such as payments related to intercompany transactions within the same consolidated group.***

RILA recommends exempting all payments for goods or services between or among members of an affiliated group. For many transactions between affiliated companies, there is no actual transfer of cash; the payment is simply reflected as a journal entry on the books of each corporation. Without a transfer of cash, the payment would never show up in the accounts-payable system, and without significant programming changes, it would be extremely difficult to capture these payments for reporting purposes.

Likewise, if there is a transfer of cash between or among affiliated companies, it may be done as a lump-sum payment at the end of each accounting period. The amount transferred could relate to payment for intercompany goods and services as well as for the payment of intercompany loans and other payables, which may not be reportable. Thus, for accurate compliance, it would be necessary to bifurcate such lump-sum payments into reportable and non-reportable amounts, which would again require significant systems modifications to implement.

Finally, to the extent that these intercompany payments are payments between companies that file a consolidated income tax return, it is unlikely that gross proceeds arising from intercompany sales and services are underreported. Thus, the expanded reporting requirement serves no apparent compliance benefit for the taxpayer or the Service in the context of a consolidated return, and an exemption would be an additional means of reducing the costs and burdens of new § 6041(h) and the expansion of § 6041(a), as well as avoid duplicative reporting.

3. ***The appropriate time and manner of reporting to the Service, and what, if any, changes to existing practices for Form 1099 information reporting to the Service are needed to minimize burden in compliance with the new reporting requirements.***

Currently, Form 1099-MISC requires payors to report separately payments of rents, royalties, other income, and non-employee compensation. Typically, payments to sole proprietors and partnerships fall into one such category of payments. Payments to corporations, however, are more likely to involve more than one category. For example, installation costs or consulting services may be rendered in connection with the purchase of property. In this case, the payee would generally issue one invoice for the property and services, and the total amount would be reflected as a single payment in the payor's accounts-payable system.

In light of current business practices and the enormous amount of time currently spent by businesses coding payments for reporting purposes, we recommend against requiring payors to track the nature of each payment for separate reporting on Form 1099-MISC. In fact, the Service should consider combining box 1, 2, 3, and 7 into one box and allowing the payee to determine the most accurate reporting of such income on its tax return.

With respect to the timing for issuing and filing Form 1099-MISC under the expanded provisions of § 6041, we are concerned that the substantial increase in volume of such forms will make it even more challenging for companies to meet the January 31st deadline for providing a copy of the form to each payee. We encourage the Service to consider extending that deadline.

4. ***What, if any, changes to Form W-9, Request for Taxpayer Identification Number and Certification, and the existing rules for soliciting taxpayer identification numbers (TINs) are needed to minimize the burden for payors to obtain TINs from payees, what are the privacy concerns with respect to TINs, and what are other concerns regarding identifying payees.***

In general, RILA members are concerned about the viability of obtaining the federal identification number of every business payee with which they do business, many of which have been excluded from information returns previously. Unless exemptions for regularly occurring products and services are adopted as recommended above, the sheer volume of this customer-information collection will be daunting. Moreover, the collection of detailed data from each payee, especially a non-incorporated vendor whose TIN may be a Social Security number, will create significant privacy concerns and impose additional costs and burdens with respect to data security to protect against the potential for identity theft.

Additionally, even if a separate Form W-9 is obtained from each payee, instances of mismatched name/TIN combinations will assuredly increase. In the experience of RILA members, the typical reason for the report of such a mismatch on a B-Notice is that many payees provide their trade name instead of the legal entity name that is on file with the Service. While the Service currently offers its "TIN match" program, given the dramatic expansion in reportable payees under § 6041, the use of "TIN match" may not be feasible for many payors. One option to address this problem would be for the Service, prior to the January 1, 2012, to issue each business taxpayer a notice similar to Letter 147c, which the payee could provide to a payor in lieu of a Form W-9. Such a notice would ensure that payors have the payee information that matches the Service's records and reduce the potential for B-Notice mismatches.

In addition to the foregoing issues concern the collection of payee identification information, we are also concerned about providing such information in all of the expanded situations required under the new reporting requirements. For example, a retailer will have to be prepared for checkout personnel to provide the retailer's federal identification number at the request of any customer professing to be making a business purchase. Similarly, for online purchases, the retailer's identification information will have to be posted on its website and available to all potential business purchasers.[8]

[8] We also note that the exemption of payment-card transactions will not obviate the need for broad public access to retailers' identification information as payors will still be required to track all purchases from a particular vendor to determine if/when the aggregate of non-payment-card purchases equals or exceeds $600.

The potential misuse of this information could be damaging to the payee and lead to additional, costly efforts with credit bureaus, government agencies and potentially the Service to resolve them. RILA members report instances in which individuals have fraudulently completed a Form 1099-MISC indicating that the retailer has withheld tax on one or more payments. These individuals then file income tax returns claiming refunds of the allegedly withheld tax. Currently, the primary means that the Service has for identifying these Forms 1099-MISC as fraudulent is that the perpetrators do not have the retailer's federal tax identification number to put on the form. If tax identification information is required to be broadly available to the public, it will make it more difficult for the Service to identify fraudulent refund claims and force taxpayers into the impossible position of proving the negative – that they did not withhold nor file the alleged Form 1099-MISC.

For the foregoing reasons, we urge the Treasury Department and the Service to consider options for limiting the public disclosure of payee's federal identification information under the expanded § 6041 requirements.

5. *How should the backup withholding requirements for missing TINs under the expanded new reporting requirements be administered in order to minimize burden on payors.*

Currently, regulations require backup withholding on the first payment if a TIN has not been received. With the vast expansion of payees under the new § 6041 requirements, compliance with the current requirement could lead to a substantial number of cases where backup withholding is triggered, especially during the initial implementation period. Significant backup withholding risks disruption to business relationships, especially since the withheld funds cannot be refunded by the payor, and it creates enormous challenges for businesses with payments subject to withholding as these taxpayers will have to track individual amounts withheld to ensure they are appropriately claimed on their annual tax return.

In light of these potential outcomes, RILA recommends that the Treasury Department and the Service consider amending the regulations so that a payor may elect to delay the start of backup withholding for up to 90 days after the first payment. This period would allow the payor sufficient time to correct any deficiencies before being liable for backup withholding and avoid business disruptions with vendors. Such an election would not preclude immediate backup withholding by payors that currently have systems in place to do so beginning with the first payment.

Since backup withholding can also be triggered through repeated B-Notices, we also urge the Service to consider alternatives to help taxpayers resolve mismatched information, especially with the anticipated substantial increase in information reports filed. One option would be for the Service to make B-Notices available to taxpayers in an electronic format that would permit the data to be uploaded into a taxpayer's accounts-payable system without having to reenter manually all of the data from a paper notice (which risks further errors). Under this approach, B-Notices reflecting a small number of mismatches (e.g., 25 or less) could still be issued in paper format.

Lastly, with respect to refunds of backup withholding, there is no apparent, easy way for a payee to claim the amount that has been withheld as a credit on its annual income tax return. Since the Form 1099-MISC presumably has an incorrect or missing TIN, the Service has no way to credit the withholding to the payee's correct account. To address this issue, we recommend that the Service modify the portions of the various annual income tax forms (e.g., Forms 1040, 1065, 1120, 1120S) to include a line for reporting amounts withheld as a result of backup withholding. To substantiate such amounts, taxpayers could be required to attach the relevant Form 1099-MISC reflecting the amount withheld.

C. Exclusion of Publicly Traded Corporations

As an additional option for reducing the burdens of expanded § 6041, RILA urges the Service to consider exempting payments to corporations (and their subsidiaries) that are publically traded. Publically traded corporations are presently required to be audited by independent certified public accountants and file their audited financial statements with the Securities and Exchange Commission (SEC). These corporations are also required to reconcile income reported on the financial statements to net book income reported on Form 1120.[9] Thus, for these corporations, it is extremely unlikely that gross income would be underreported. To facilitate the administration of this exemption, Form W-9 could contain a box in which a qualifying corporation could enter its CUSIP number, which would indicate that payments to the corporation are exempt from reporting under § 6041.

D. Exclusion of Purchases Made with Payment Cards

RILA appreciates the Service's effort to reduce the burden of the new reporting requirements by exempting purchases made with payment cards. We are concerned, however, that without modification, this exemption could add to the complexity of implementing the new reporting requirements and, in the end, increase the compliance burdens.

As provided in current regulations, payments reportable under § 6050W are excluded from reporting under § 6041.[10] The payor, however, must still account for the amount paid with a payment card in order to compute the $600 threshold and determine whether other payments – those not made using a payment card –must be reported. Current accounting systems typically do not segregate purchases from a particular vendor according to payment type – payment card versus other means (e.g., cash, check, electronic funds transfer). Accounts-payable systems generally show a lump-sum payment to the payment settlement entity but do not track the individual vendors paid with the card. As a result, tracking payments made using payment cards for purposes of determining the $600 dollar threshold will be virtually impossible for many payors without substantial system changes. Thus, for the exclusion to be effective, RILA recommends that the regulations be clarified to exclude payments made using a payment card from the $600 threshold for purposes of the expanded § 6041 reporting requirements.

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[9] *See* Form 1120, Schedule M-3, Part I.
[10] Treas. Reg. § 1.6041-1(a)(iv).

III. EFFECTIVE DATE ISSUES

While we understand that the statute requires the expanded reporting requirements under § 6041 to be effective for payments made after December 31, 2011, we strongly urge the Treasury Department and the Service to consider options for phasing in such expansive changes to the current reporting regime.

At a minimum, we ask the Service to use its discretionary authority to waive penalties for reasonable failures to file Form 1099-MISCs while business taxpayers, especially smaller enterprises, implement the new systems and procedures for compliance. Additionally, we recommend penalty relief with respect to B-Notice mismatches for a reasonable period as businesses struggle to resolve these cases and prevent them thereafter.

Concluding Remarks

RILA appreciates the opportunity to comment on the expanded information reporting requirements imposed by PPACA Section 9006. We recognize the challenges that the Treasury Department and the Service face in implementing these new requirements. However, RILA urges the Treasury Department and the Service to consider the issues and recommendations outlined in this letter before proposing the new rules to ensure that they can be implemented effectively without creating undue compliance costs and burdens on retailers and other business taxpayers.

We would be pleased to discuss RILA's views and recommendations with you further at your convenience.

Respectfully submitted,

Mark E. Warren
Vice President, Tax & Finance