



**TAX SECTION**

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# To 1099 or Not to 1099: That is the Question (For Insurance Companies)

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For most businesses, the question of whether to issue a Form 1099 to a given payee is an easy enough inquiry. Is the payee a contractor? File the Form. Is the payee a law firm? File the form. Is the payee a corporation? *Don't* file the form. (And so on...)

For insurance companies, the question can get more complicated due to the sheer volume of checks that are written to various payees in various circumstances. Additional complications arise when an insurance company is issuing a check to multiple payees, including attorneys for the insured. This article is an overview of how an insurance company can address its information return filing obligations under the Internal Revenue Code and Treasury Regulations.

## A. Payments Made to an Insured's Attorney

Payments made to an insured's attorney must be reported to the IRS. This is true whether the payment is made on a joint check listing the attorney and other payees, or through a separate check to the attorney.

IRC 6045(f) requires "[a]ny person engaged in a trade or business and making a payment . . . to an attorney in connection with legal services" to file an information return. IRC § 6045(f)(1)-(2)(A). This return must be filed whether or not the legal services were performed for the payor. IRC § 6045(f)(2)(A). The return must report the full amount paid to the attorney, even if the attorney may not retain the entire payment as compensation for legal services rendered. Treas. Reg. § 1.6045-5(a)(1)(i).

If the payment is made to an attorney through a check made out jointly to the attorney and the insured or other additional payees, the entire amount is reportable as to the attorney. This is true regardless of whether separate reporting obligations exist as to the other payees, such as a public adjuster or a vendor. *See* Treas. Reg. § 1.6045-5(f), Ex. 1 (payment via joint check to attorney and claimant; full amount of the check is reportable as to the attorney via IRC 6045; reporting obligations as to the claimant is governed by other rules).

If the payment is made to an attorney through a check made out solely to the attorney, while other checks are made out to other payees, then only the amount paid to the attorney is reportable under IRC 6045. Treas. Reg. § 1.6045-5(f), Ex. 3. Reporting obligations as to the other payees will be governed by the rules applicable to them.

Therefore, payments made by an insurance company to an attorney for the insured must be reported to the IRS on Form 1099-MISC. *See* Instructions for Form 1099-MISC (2020), p. 2, *Payments to Attorneys*. The full amount paid to the attorney must be reported.

## B. Payments Made to a Public Adjuster

Public adjusters sometimes help insureds to navigate the claims process. For their services, a public adjuster may be named as a joint payee on a check or may receive a separate payment from an insurance company for the work performed for an insured.

The insurance company must report payments to a public adjuster if: (1) the public adjuster is not a corporation; and (2) the insurance company can ascertain the specific amount that the public adjuster will receive from a given payment.

The insurance company has no reporting obligation if the public adjuster is operating as a corporation, or if the insurance company cannot ascertain the specific amount that the public adjuster will receive.

### 1. Is the Public Adjuster a Corporation?

If the public adjuster is an entity operating as a "corporation" under the Internal Revenue Code, then the insurance company has no obligation to report the amount paid to the public adjuster. Treas. Reg. § 1.6041-3(p)(1) (no information return is necessary for payments made to a corporation).

Section 1.6041-3(p)(1) defines "corporations" that are exempt from the payment reporting requirement as those "described in § 1.6049-4(c)(1)(ii)(A)." *Id.* Section 1.6049-4(c)(1)(ii)(A) provides that, in the absence of actual knowledge of the corporate status of a payee, a payor "may treat a payee as a corporation (and, therefore, as an exempt recipient)" if: (1) "[t]he name of the payee contains an unambiguous expression of corporate status;" (2) "[t]he payor has on file a corporate resolution or similar document clearly indicating the corporate status [of the payee]"; (3) the payor receives a Form W-9 from the payee that includes an EIN and a statement from the payee that it is a domestic corporation; or (4) the payor receives a withholding certificate certifying that the person named on the certificate is a foreign corporation.

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Treas. Reg. § 1.6049-4(c)(1)(ii)(A)1.-4.

The insurance company can confirm the corporate status of a payee by requiring a Form W-9 to be on file for the payee that meets the requirements of section 1.6049-4(c)(1)(ii)(A)3. This would allow the insurance company to place the burden of determining the reportable status of a payee on the payee itself rather than requiring the insurance company to investigate the status of each one. If the public adjuster is a corporation under the rules, then the insurance company has no obligation to report amounts paid to the public adjuster.

**2. Can the Specific Payment Amount be Ascertained?**

IRC 6041 only requires information returns to be filed when a payor (like an insurance company) makes a payment in the course of its trade or business that constitutes a “fixed or determinable” gain or income to the payee. IRC § 6041(a); Treas. Reg. § 1.6041-1(a)(1)(i).

A payment constitutes fixed and determinable income “whenever there is a basis of calculation by which the amount to be paid may be ascertained.” Treas. Reg. § 1.6041-1(c).

If there is no basis to make this calculation, then the payor has no obligation to report the payment. *See* Rev. Rul. 80-22, 1980-1 C.B. 286 (where the payor of crop insurance proceeds has no way to know how much of a payment will be income to the payee, the payor is not required to report the payment); Rev. Rul. 82-93, 1982-1 C.B. 196 (same).<sup>1</sup>

If the insurance company has a basis to know how much of a payment to a public adjuster is “fixed or determinable” income to the public adjuster, then the insurance company will have an obligation to report the payment amount to the IRS. The insurance company would always have a duty to report a payment to a public adjuster that is not a corporation if the insurance company issues a check solely to the public adjuster.

However, if the insurance company has no basis to know how much of a payment to a public adjuster is fixed or determinable income to the public adjuster, then the insurance company will not have an obligation to report the payment. This may occur when the insurance company issues a joint check to the insured and the public adjuster and has no way to know how much of the payment is attributable to the public adjuster’s fee.

**C. Payments Made to a Vendor**

An insurance company will sometimes make pay-

ments to a vendor performing services for an insured through an assignment of benefits. The vendor may be named as a joint payee on a check or may receive a separate payment from the insurance company for the work performed for an insured.

As explained above, the insurance company has no reporting obligation if the payment is made to a vendor that is operating as a “corporation.” However, the insurance company will have a reporting obligation if the insurance company has a basis to calculate the amount of the payment that constitutes fixed or determinable income to a vendor when the vendor is not a corporation.

If the vendor is paid on a joint check made out to the vendor and the insured, and the check is for the amount due to the vendor for its services, then the insurance company would have a reporting obligation as to the vendor. *See* Treas. Reg. § 1.6041-1(c) (“A payment made jointly to two or more payees may be fixed and determinable income to one payee even though the payment is not fixed and determinable income to another payee. For example, property insurance proceeds paid jointly to the owner of damaged property and to a contractor that repairs the property may be fixed and determinable income to the contractor but not fixed and determinable income to the owner, and should be reported to the contractor.”).

The specific circumstances of a payment to a vendor will determine whether an insurance company has the ability to calculate the amount of the payment that is “fixed and determinable” as to the vendor. If this calculation can be made, then the insurance company will have a reporting obligation unless the vendor is operating as a corporation.

**D. Can Form W-9 Be Required?**

Because the question of information reporting revolves so closely around whether the payee is a corporation or not, the question arises of whether the insurance company can require payees to submit Form W-9 in order to have the payees attest to whether or not they were operating as corporations under the Internal Revenue Code. A related question is whether a payee that failed to submit a Form W-9 would be subject to backup withholding.

The brief answer to this question is that an insurance company has the authority to require a payee to submit a Form W-9. If a payee does not submit a Form W-9 in response to the insurance company’s request, the insurance company may apply backup withholding to payments made to the payee. An analysis of these issues follows below.

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**TO 1099 OR NOT TO 1099. . .***from previous page***1. Payees Must Supply TINs to Payors**

When an insurance company pays an attorney for an insured, the attorney is required to supply the insurance company with its Tax Identification Number (“TIN”). Treas. Reg. § 1.6045-5(e). Other payees that receive reportable payments must also furnish their TINs to the insurance company. IRC § 6109(a)(2).

When a payee is the recipient of a reportable payment, such as a payment to an attorney under IRC 6045 or nonemployee compensation under IRC 6041, the payee must furnish its TIN to the payor to avoid being subject to backup withholding. IRC § 3406(a)(1)(A), (b)(1)(B), (b)(3)(A)-(C) (payee that receives “any reportable payment” must supply TIN to avoid backup withholding; “any reportable payment” includes any “other reportable payment”; “other reportable payment” includes payments reportable under IRC 6045 or 6041). The backup withholding rate is 24 percent. IRS Publication 1281, p. 3 (Rev. 8-2018).

**2. The Payor Can Require TIN Submissions on Form W-9**

The payee must supply its TIN “in the manner required.” IRC § 3406(a)(1)(A). The “manner required” to supply the TIN for payments reportable under IRC 6045 or 6041 is “either orally or in writing.” Treas. Reg. § 31.3406(d)-1(d).

The payor can require the payee to use Form W-9 both to submit the TIN and to certify that the payee is exempt from backup withholding. The Form W-9 submission requirement also allows the payor to determine whether the payee is a corporation.

To this end, the Treasury Regulations state that “[a] payor, even if permitted to treat a person as exempt [from backup withholding] without requiring a [penalty of perjury] certificate under the provisions of section 6049, may require a payee, otherwise not required to file a certificate regarding its exempt status, to file a [Form W-9] certificate and may treat a payee who fails to file the certificate as a person who is not an exempt recipient.” Treas. Reg. § 31.3406(g)-1(b) (emphasis added).<sup>2</sup>

For example, a payee that is a not-for-profit corporation qualified for tax-exempt treatment under IRC 501(a) is specifically exempt from backup withholding pursuant to Treasury Regulation 31.3406(g)-1(a)(1)(i). However, a payor can still require this type of payee to submit a Form W-9 to attest to its exemption. Treas. Reg. § 31.3406(g)-1(b).

Therefore, the Treasury Regulations permit payors

like an insurance company to require a payee to submit Form W-9 even if the payee is not otherwise required to submit the form to certify that the payee is exempt from backup withholding. *Id.*

**3. Backup Withholding When Payee Does Not Submit Form W-9**

If the payee does not submit a Form W-9 at the insurance company’s request, the insurance company may treat the payee as if the payee is subject to backup withholding. Treas. Reg. § 31.3406(g)-1(b). The insurance company is required to file an information return as to such payments. Treas. Reg. § 1.6049-4(c) (“if the payor backup withholds under section 3406 on [a] payment (because, for example, the payee has failed to furnish a Form W-9 on request), then the payor is required to make [an information] return under this section, unless the payor refunds the amount withheld in accordance with [Treas. Reg.] § 31.6413(a)-3 [Repayment by payor of tax erroneously collected from payee].” (emphasis added)).

**4. Reasonable Reliance on Form W-9 and Avoidance of Liability**

As explained above, Treasury Regulation 31.3406(g)-1(b) provides that a payor may require a payee to submit a Form W-9 to claim an exemption from backup withholding. The regulation refers to Treasury Regulation 31.3406(h)-3 as the section governing the use of Form W-9. *Id.*

Treasury Regulation 31.3406(h)-3(e)(1) provides that “[a] payor is not liable for the tax imposed under section 3406 if the payor’s failure to deduct and withhold the tax is due to reasonable reliance, as defined in paragraph (e)(2) of this section, on a Form W-9 . . . required by this section.” *Id.* (emphasis added).<sup>3</sup>

Under subsection (e)(2) of the regulation, a payor can “reasonably rely” on a Form W-9 to determine a payee’s backup withholding status unless one of the following circumstances exists:

- (i) The form does not contain the name and taxpayer identification number of the payee (or does not state, in lieu of a taxpayer identification number, that the payee is awaiting receipt of a taxpayer identification number (i.e., an awaiting-TIN certificate));
- (ii) The form is not signed and dated by the payee;
- (iii) The form does not contain the statement, when required, that the payee is not subject to withholding due to notified payee underreporting;
- (iv) The payee has deleted the jurat or other similar provisions by which the payee certifies or affirms the correctness of the statements contained on the form; or

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(v) For purposes of section 3406(a)(1)(C), the payor is required to subject the account to which the form relates to withholding under section 3406(a)(1)(C) under the circumstances described in § 31.3406(c)-1(c)(3)(iii).<sup>4</sup>

Treas. Reg. § 31.3406(h)-3(e)(2).

Therefore, an insurance company can reasonably rely on the statements made in a Form W-9 submitted by a payee as long as the form does not contain any of the anomalies listed in Treasury Regulation 31.3406(h)-3(e)(2), above. Such reasonable reliance will insulate the insurance company from liability for incorrectly failing to apply backup withholding to payments where it should have been applied.<sup>5</sup>

### Conclusion

Insurance companies face complicated information return filing obligations due to the volume of checks that they write and the parties that they write them to. This article provides a roadmap for insurance companies to follow when deciding when an information return might be required.

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### (Endnotes)

1. See also IRS Chief Counsel Advisory 201533012 (May 4, 2015) (a payor is not required to file an information return “if the payor does not have a basis to determine the amount of a payment that is required to be included in the recipient’s gross income.”); IRS Non-Docketed Service Advice Review 4402F (Aug. 9, 2012) (where the payor settling claims does not know how much of a joint payment to an attorney and customer would constitute income to the claimant, the payment is not “fixed and determinable income” to the customer and the payor has no obligation to file a 1099 for the customer); IRS Priv. Ltr. Rul. 110076-06 (PLR 200704004) (Jan. 26, 2007) (“Because section 6041(a) is conditioned on a payor knowing that a payment to a payee is in the nature of income and the amount of income, if a payor cannot determine either that a payment is in the nature of income or in what amount, then the payor is not required to file an information return under the section.” (citing Rev. Rul. 80-22)); IRS Chief Counsel Advice 199919020 (Feb. 10, 1999) (where the payor of a grant cannot determine how much of the grant will constitute gross income to the recipient, the payment is not “fixed and determinable” under IRC 6041 and no reporting requirement exists (citing Rev. Rul. 80-22)).

2. The regulation refers to IRC 6049 because that section and the regulations issued thereunder are used to determine what types of payee entities are exempt from backup withholding. Treas. Reg. § 31.3406(g)-1(b).

3. The “liability” here is due to IRC 3403, which generally provides that the “employer” is liable for all taxes that should be withheld under IRC sections 3401 through 3406. Though IRC 3403 uses the term “employer” rather than a payor required to make an information return (as the insurance company is in this case), the Internal Revenue Manual, published by the IRS for its internal use, refers to the liability for backup withholding in terms of the “payor.” I.R.M. 4.23.8.13, § 5 (“Payors will be held liable for the payment of any backup withholding required to be deducted and withheld under IRC 3406 per IRC 3403.”).

4. Treasury Regulation 31.3406(h)-3(e)(2)(v) applies to payments of interest and dividends where the IRS has notified the payee of under-reported interest or dividends. Please advise if additional information on this issue is needed.

5. The insurance company will be required to retain the Forms W-9 submitted by payees for a period of three years. Treas. Reg. § 31.3406(h)-3(g)(1). However, the three-year retention rule is not a statute of limitations on potential liability. See IRS Chief Counsel Advisory 201037027 (May 20, 2010) (three-year retention rule does not impact the backup withholding obligation; if the Taxpayer has not retained Forms W-9 beyond the three-year window, the Taxpayer can only avoid backup withholding liability where it can show that Form W-9 “was in fact received.”). A better practice may be to retain the Forms W-9 received from payees until the applicable statute of limitations has expired.

## Submit an Article

The Tax Bulletin is published three times a year, Fall, Spring, and Summer. Each publication accepts up to six articles of approximately 500 to 1,000 words each. The Tax Section would like to thank Mitchell Goldberg of Berger Singerman (Fort Lauderdale) and Guy Whitesman of Henderson Franklin (Fort Myers) for serving as the Tax Bulletin’s Content Editors. Lisa Gallagher of Fergeson Skipper, P.A. (Sarasota) currently serves as the Publishing Editor.

If you have an article you would like to be considered for publication, or questions regarding deadlines, please reach out to Lisa via email: [LGallagher@FergesonSkipper.com](mailto:LGallagher@FergesonSkipper.com)

