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August 14, 2017

CC:PA:LPD:PR (REG-136118-15), room 5207
Internal Revenue Service
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044

Re: Request for Comments Regarding Proposed Regulations (REG 136118-15) Regarding the Partnership Audit Regime Enacted by the Bipartisan Budget Act of 2015

Dear Ms. Black,

American Fuel & Petrochemical Manufacturers ("AFPM") is a national trade association representing high-tech American manufacturers of nearly the entire U.S. supply of gasoline, diesel, jet fuel, other fuels and home heating oil, as well as the petrochemicals used as building blocks for thousands of products vital to everyday life. AFPM members make modern life possible and keep America moving and growing as they meet the needs of our nation and local communities, strengthen economic and national security, and support at least 3.1 million American jobs.

In response to the Internal Revenue Service's (the "IRS") and the Department of the Treasury's ("Treasury") request for comments regarding the partnership audit rules enacted in the Bipartisan Budget Act of 2015 (the "BBA") and subsequently amended (the BBA, with such amendments, is referred to herein as the "Audit Rules"), AFPM submitted two letters to the IRS, one on April 15, 2016 and the other on September 26, 2016, providing specific comments regarding the implementation of section 1101 of the BBA. AFPM also submitted a list to the House Ways and Means, Senate Finance and Joint Tax committees, and to Treasury, on November 2, 2016, identifying several specific issues to be considered as technical corrections or legislative revisions to section 1101 of the BBA.

On June 14, 2017, the IRS published proposed regulations (the "Proposed Regulations")[1] regarding the centralized partnership audit regime enacted by the BBA. 82 Fed. Reg. 27334. The IRS has expressly requested comments on many of the provisions of the Proposed Regulations. As discussed in our previous correspondence, AFPM members employ a wide array of partnership structures in connection with their financing and operations. This diversity of experience, coupled with deep understanding and appreciation for the tax compliance requirements of partnerships, informs our concerns about the administrability of certain aspects of the BBA. We would like to affirm each of our previous comments and provide

[1] Proposed regulations were originally issued on January 19, 2017, but were withdrawn prior to being published in the Federal Register.

additional analysis and suggestions with respect to the Proposed Regulations, with the hope that they would be taken into consideration in any temporary or final version of the regulations.

The stated intent of the BBA was to alleviate the administrative burden on the IRS under the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") rules and to enhance compliance, not to collect more tax than is actually due if the tax were collected at the partner level. Addressing taxpayer concerns in a way that is administrable, fair, and efficient for taxpayers and the IRS alike would help advance the policy goals of the BBA by streamlining the assessment and collection of the appropriate amount of tax attributable to the income of partnerships and partners. AFPM appreciates the opportunity to offer our perspectives on this complex statute that will have a significant impact on our members. In particular, we hope that our members' insight into the practical implications to partnerships of implementing and administering the new rules is helpful to the IRS and Treasury in developing further regulations and guidance. Further, AFPM offers itself as a resource to the IRS and Treasury as you work to finalize the regulations.

I. The Proposed Regulations

In previous correspondence, AFPM identified several specific issues to be considered in any regulations issued pursuant to the Audit Rules or as technical corrections of the Audit Rules. AFPM appreciates and is grateful that the Proposed Regulations account for many of AFPM's suggested clarifications and requests for practical regulations to implement the Audit Rules. However, AFPM urges Treasury to consider further the remaining concerns discussed below, which affect AFPM's members as well as many other American businesses.

a. Election Out of New Audit Rules (Code Section 6221(b))[2]

i. Availability of Election - Multi-Tiered Partnerships

Issue: The Proposed Regulations clarify that a partnership will not be permitted to elect out of the new audit rules if it has a partner that is itself a partnership, trust, foreign entity (other than a foreign entity that would be treated as a corporation), disregarded entity, nominee, otherwise an agent of another person, or an estate other than the estate of a deceased partner. Proposed Regulation Section 301.6221(b)-1(b)(3)(ii). The IRS has indicated that it is opposed to permitting an election out of the centralized audit regime by a partnership one or more partners of which is a partnership, disregarded entity, trust, or partner that uses a nominee generally on grounds of administrability. 82 Fed. Reg. 27343. However, the IRS has not specifically identified why an election out by a partnership with such types of partners would be unduly burdensome on the IRS.

Comment: Code section 6221(b) does not proscribe a partnership any of the partners of which are partnerships from electing out of the centralized partnership audit regime. Code section 6221(b)(1)(C) states that "This subchapter shall not apply with respect to any partnership for any taxable year if… each of the partners of such partnership is an individual, a C corporation, any foreign entity that would be treated as a C corporation were it domestic, an S corporation, or an estate of a deceased partner." Code section 6221(b)(2)(A) provides for a

[2] Except as otherwise indicated herein, all references to the "Code" herein are to the Internal Revenue Code of 1986, as amended.

"look-through" rule that applies to S corporation partners such that an S corporation is deemed to be a qualified partner of a partnership only if it provides certain information about its shareholders and the Forms K-1 issued by the S corporation will be deemed Forms K-1 issued by the partnership in order to comply with Code section 6221(b)(1)(B). Importantly, Code section 6221(b)(2)(C) authorizes the Secretary to "prescribe rules similar to the rules of subparagraph (A) with respect to any partners not described in such subparagraph or paragraph (1)(C)," which could include a partnership any of the partners of which are partnerships.

AFPM believes the plain language of Code section 6221 indicates that Congress contemplated that partnerships with indirect beneficial owners--including through upper-tier partnerships--may be permitted to elect out of the centralized partnership audit regime, demonstrated by the delegation of authority to the Secretary to apply rules similar to Code section 6221(b)(2)(A) to partnerships, among other types of entities. Moreover, AFPM notes that the specific approach taken in the Proposed Regulations in regard to disregarded entities is inconsistent with generally applicable U.S. federal income tax law. Specifically, Proposed Treasury Regulations Section 301.6221(b)-1(b)(3)(ii) states that "a disregarded entity described in §301.7701-2(c)(2)(i)" is not an eligible partner." However, Treasury Regulations Section 301.7701-2(c)(i) states "a business entity that has a single owner and is not a corporation under" Treasury Regulations Section 301.7701-2(b) is disregarded such that for income tax matters--which are the only matters subject to the centralized partnership audit regime--only the owner of the entity is regarded as a taxpayer before the IRS. Further, it does not increase the Internal Revenue Service's administrative burden to permit a partnership with one or more disregarded entity partners because the disregarded entity must disclose its beneficial owner on any Form W-9 or series W-8 that is provided to the partnership. Thus, there is nothing to be gained from the exclusion of partnerships one or more partners of which is a disregarded entity that is wholly-owned by a person described in Code section 6221(b)(1)(C).

AFPM believes that extending the look-through treatment set forth in Code section 6221(b)(2)(A) to partnerships and disregarded entities is consistent with the Congress's goals and should be authorized in regulations, particularly when there are a limited number of partners and indirect beneficial owners. Absent such a rule, the election out would be foreclosed for groups of entities that do not present the logistical concerns which led to the enactment of the centralized partnership audit rules. Without understanding the IRS' specific concerns as to why an election out in a multi-tier partnership is unduly burdensome, we are unable to provide substantive suggestions with respect to the appropriate process or how the burden on the IRS may pragmatically be eased. Accordingly, AFPM requests Treasury provide an administrable election out for multi-tiered partnerships or clearly identify the basis of its opposition if final regulations do not provide for such election.

b. Partnership Representative (Code Section 6223)

Issue: The Proposed Regulations do not provide for the revocation of an appointment of a designated individual without also terminating the appointment of a partnership representative.

Comment: The Proposed Regulations provide clear and fulsome guidelines for eligibility and designation. Importantly, the Proposed Regulations also provide clear and fulsome guidelines for the resignation, and revocation of a partnership representative. Proposed Regulations sections 301.6223-1(e)(5), (f)(2), (f)(4). Guidance regarding revocation is particularly important to members of the business community, including AFPM's members, because it ensures that partners have an ability to prevent a third party, which may or may not be a partner of an audited partnership, from abusing the trust of the partners.

The Proposed Regulations also provide that when an entity is designated as partnership representative, an individual must be designated to act on behalf of such entity (a "designated individual"). Proposed Regulations sections 301.6223-1(b)(1), (3), 301.6223-2(c)(2)(ii). While the Proposed Regulations provide for the resignation of a designated individual, an IRS finding that a designated individual does not have the capacity to act, and termination of a designation in case of a termination of a designation of the partnership representative, they do not provide for a partnership's ability to revoke the appointment of the *designated individual*. Proposed Regulations section 301.6223-1(d)(3).

The simple fact is that employees come and go. A disgruntled former employee of a partnership representative who was appointed to act as a designated individual could do great damage to a partnership and its partners because that individual would still have authority to act on behalf of the partnership vis-à-vis the IRS in case of audit or related proceedings. Therefore, it is essential that the final regulations include a clear method for an entity partnership representative or the partnership itself to revoke an appointment of a designated individual without revoking a partnership representative designation also. This method could mirror the method for revoking the designation of a partnership representative or, assuming specific forms are issued to notify the IRS of the appointment, resignation, or revocation of a partnership representative, be a selection on that form.

c. Imputed Underpayments (Code Section 6225)

i. Netting Procedures

Issue: The netting procedures are broad, vague, and generally err on the side of maximizing tax revenue resulting from an audit without regard to generally applicable provisions of the Code.

Comment: Page 13 of the Preamble and the Joint Committee Report for the BBA[3] indicates that the IRS and Congress do not intend that an imputed underpayment result in more tax than the partnership would have paid if an item was correctly taken into account in a reviewed year. However, the complex web of "netting" rules are expressly inconsistent with generally applicable U.S. federal income tax law and, as demonstrated in Example 3 of Proposed Regulation section 301.6225-1(f), will frequently result in double taxation of the same income items due to the requirement that only net positive adjustments be taken into account.

The netting rules create a very difficult environment for strategic and operational planning and decision-making. Businesses require predictability in order to thrive, but the netting rules would render businesses unable to effectively evaluate the risk of audit adjustments and thereby impair the ability of partners and partnerships to make crucial business or investment decisions. Moreover, since the netting rule has great capacity to expose income items to double taxation, it effectively constitutes a penalty provision masquerading as a procedural rule.

The Preamble notes that the modification provisions are intended to be used at the request of a partnership to appropriately reduce an imputed underpayment. However, the modification provisions do not expressly permit a modification to reflect how the partners actually took an item into account, to account for reductions that would be permitted to offset an increase under generally applicable law, or to otherwise expressly challenge the IRS' method of

[3] General Explanation of Tax Legislation Enacted in 2015, Staff of the Joint Committee on Taxation, p. 68.

calculating a proposed adjustment amount. In addition, without clear published guidance regarding exactly how the IRS must allocate items to various subgroupings and net within those groupings, these rules will be inadministrable by taxpayers *and* IRS personnel.

At minimum, AFPM urges Treasury to provide more specific and detailed guidance regarding the netting process, including many more examples. Final regulations should also include a clear statement that the netting process will be applied in accordance with generally applicable tax law and, as discussed below, provide for a modification procedure that would permit a partnership to demonstrate how an adjustment would impact its partners and reduce an imputed underpayment accordingly without a need for the partners to file an amended return.

AFPM appreciates the daunting complexity of auditing and collecting underpayments from a flow-through vehicle. Thus, another alternative that Treasury should consider is to expressly treat an audited partnership as an "entity" rather than an "aggregate" solely for purposes of calculating an imputed underpayment. Under this alternative, the imputed underpayment would be calculated using generally applicable provisions of the Code. Referring again to Example 3 of Proposed Regulation section 301.6225-1(f), the recharacterization of $125 of income as ordinary when it was originally reported as long-term capital gain would result in a reduction of long-term capital gain and an increase in ordinary income, in each case in the reviewed year.

There are various ways that the applicable tax provisions (i.e., those portions of the Code that apply to C corporations or individuals) could be determined if this alternative were implemented. AFPM suggests that this determination be based on majority ownership (measured by the partners' interest in profits, which is already available on Forms K-1). Specifically, if more than 50% of the interest in a partnership's profit is held by one or more individuals, S corporations, or closely-held corporations, those provisions of the Code that apply to individuals should apply for purposes of determining the amount of any imputed underpayment. In that case, the adjustment above would result in an underpayment due to the rate difference between ordinary income and long-term capital gain that is applicable to U.S. individuals. If, on the other hand, more than 50% of the profit interest in a partnership is held by one or more non-closely held corporations, then those provisions that apply to C corporations should apply to the partnership for purposes of determining the amount of any imputed underpayment.

For the purpose of determining the ownership of an audited partnership under this alternative, a partnership or trust that is a partner in the audited partnership should be treated as an individual unless it provides information about its beneficial ownership to the IRS audit agent. If such information is provided, then the classification of the upper-tier partnership or trust for this purpose should be determined as for the audited partnership. That is, an upper-tier partnership or trust would be treated as an individual if more than 50% of the interest in such upper-tier partnership's profits (or upper-tier trust's beneficial interests, based on income) is held by one or more individuals, S corporations, closely-held corporations (or partnerships and trusts, the classification of which is determined using the same system) or as a corporation if more than 50% of the profit interest of the upper-tier partnership (or upper-tier trust's beneficial interests, based on income) is held by C corporations. Moreover, consistent with generally applicable U.S. federal income tax law, for purposes of determining the ownership of an audited partnership, disregarded entities should be disregarded at all levels and, instead, only the regarded owner should be evaluated for this purpose. We note that a disregarded entity must disclose its beneficial owner on any Form W-8 or W-9 provided to the partnership (or an upper-tier partnership or trust), so recordkeeping in this instance should not be unduly complicated.

Using this alternative, modifications to account for certain characteristics of partners, e.g., tax-exempt organizations, and those partners that choose to file amended returns, would be permitted, as currently contemplated in Code section 6225, in order to further refine the imputed underpayment calculation when warranted. Double taxation due to a failure to account for net non-positive adjustments that would under generally applicable law decrease another category of taxable income or increase losses would be eliminated.

Another alternative is to revise Code section 6225 as contemplated in the Tax Technical Corrections Act of 2016 introduced to Congress on December 6, 2016 (the "Technical Corrections Act"), to take into account current year partner attributes modifying any imputed underpayment. The Technical Corrections Act would revise Code section 6225(a) such that if any adjustments (presumably taken into account after netting to the extent permitted under other provisions of Code section 6225) "do not result in an imputed underpayment, such adjustments shall be taken into account by the partnership in the adjustment year" and, according to the Technical Explanation concerning the Technical Corrections Act, "passed through to the adjustment year partners." However, the Technical Corrections Act would not otherwise permit current year tax attributes to reduce an imputed underpayment under Code section 6225.

ii. **Alternative Modification Provisions**

Issue: The Proposed Regulations should use the statutory authority in Code section 6225 to refine the proposed modification methods and provide additional practical procedures for partnerships to address the potential for double taxation in the netting rule.

Comment

- As stated in Proposed Regulations sections 301.6225-2(d)(2)(iii)-(v), a modification by reason of filing an amended return will be permitted only to the extent: (i) the partner files an amended return in respect of the first affected year (the partner's tax year that includes the reviewed year) and each year in which a tax attribute is affected by an adjustment in the first affected year; (ii) the statute of limitations is open in respect of the relevant partner and tax year for which an amended return must be filed; and (iii) the partnership representative provides to the IRS the filing partner's affidavit (signed under penalties of perjury) that each required amended return has been filed. This modification is available to pass-through partners, including partnership partners, in tiered structures. Specifically, the Proposed Regulations provide that a pass-through partner may, solely for modification purposes, take into account its allocable share of the adjustments. Proposed Regulations section 301.6225-2(d)(2)(vii)(A). If, however, modification is approved with respect to a pass-through partner that takes it share of the partnership adjustments into account and pays the amount due, the partnership is not permitted to request modification based on amended returns of direct and indirect partners of the pass-through partner. This would provide a result that is inconsistent with a multi-tier push out election under Code section 6226 and is inconsistent with the law that is generally applicable to partnerships, e.g., under Code sections 701 and 702. Accordingly, if the regulations to be issued under Code section 6226 permit a multi-tier push-out, this modification procedure should at least permit a modification of a pass-through partner's imputed adjustment based on amended returns filed by its upper-tier owners.

- Modifications will be permitted to account for "specified passive activity loss" allocable to a "specified partner" of a publicly-traded partnership (as defined in Code section 469(k)(2)). Proposed Regulations section 301.6225-2(d)(5). This modification is available in respect of publicly-traded partnerships that are audited or that are direct or indirect partners in an audited partnership. However, a "specified partner" includes only an individual, estate, trust, closely held C corporation, or personal service corporation. Partnerships should be included in this list in order to accommodate persons that hold an indirect interest in the audited partnership through one or more upper-tier partnerships.

- The final regulations should include a modification procedure whereby an imputed underpayment is reduced when *the partnership* provides sufficient evidence that the adjustments underlying the imputed underpayment would have resulted in a smaller imputed underpayment if they had been taken into account according to how the partners and the partnership actually treated the partnership item (and, unless otherwise accounted for in audit guidance, under generally applicable tax law). This places the burden of proof on the partnership, rather than the IRS, which is consistent with Congress' intent to increase the audit rate of partnerships and facilitate IRS administration and enforcement. It is also similar to the "pull-in" procedure included in the Technical Corrections Act and would be consistent with statements made by Treasury and Congress that the audit rules are not intended to produce a net increase in tax paid in respect of partnerships.

iii. **Multi-year Audits**

Issue: Adjustments that are not attributable to an imputed underpayment will, subject to limited exceptions, be allocated according to the partnership agreement; allocations in respect of a person that is no longer a partner will be made to their successor in the adjustment year. Proposed Regulations section 301.6225-3(b)(4); Preamble, pages 92-93. Accordingly, past-year partners will bear the burden of any overpayment.

Comment: Neither the Code nor the Proposed Regulations clearly address how multi-year audits should be handled. For example, if an audit of 2018 results in an imputed underpayment in 2018 and an overpayment in 2019 in regard to adjustment items, the Proposed Regulations would not permit those amounts to be netted. If a modification is not available to take the 2019 overpayment into account, it isn't clear whether the benefit of the overpayment in 2019 may be claimed by the partnership filing an administrative adjustment request (an "AAR") for 2019 or otherwise. Clear guidance permitting a partnership to claim the benefit of a net non-positive adjustment should be issued in order to reduce the likelihood of double taxation as a consequence of an audit adjustment.

iv. **Allocations Among the Partners of Adjustments Attributable to Imputed Underpayments**.

Issue: The IRS has indicated it plans to release additional regulations to address inside and outside basis and capital account adjustments attributable to an imputed underpayment and has requested comments regarding how such adjustments should be allocated among the partners. Preamble, page 94; Proposed Regulations section 301.6226-4. The Proposed Regulations indicate that the IRS believes that the adjustments are properly made in respect of the <u>adjustment</u> year partners. Under this approach, adjustments will not always match the economic arrangement of the partnership.

Comment: Consistency of economic and tax treatment is a fundamental goal of Code section 704 and, generally, Subchapter K of the Code. Accordingly, AFPM suggests that Treasury consider the following suggestions when drafting regulations to address inside and outside basis and capital account adjustments in case of payment of an imputed underpayment.

<u>Adjustments to items of income, gain, loss, deduction or credit that gave rise to the imputed underpayment</u>

˜ If a partnership pays an imputed underpayment:

- Those adjustments to items of income, gain, loss, deduction or credit that gave rise to the imputed underpayment should be accounted for in the adjustment year and be allocated to the adjustment year partners according to the generally applicable provisions of the partnership agreement and of applicable law, in each case as they apply in the adjustment year.

- To the extent any adjustment would increase or reduce depreciation or amortization deductions in respect of an asset, the relevant adjustment should be made to such asset's inside basis (and the partners' corresponding outside basis, accounting for any variation resulting from a Code section 754 election according to applicable law in the adjustment year) in the adjustment year. In any case in which the asset has been disposed of or the depreciation or amortization period has ended, the relevant adjustment should be accounted for as income (e.g., in case too much depreciation was taken) or loss (e.g., in case additional depreciation was available and was not claimed) in the adjustment year.

˜ If, instead, a partnership makes a push-out election or the imputed underpayment is otherwise paid by the reviewed year partners by reason of applicable law (as opposed to a contribution or indemnification agreement under a relevant partnership agreement):

- Any imputed underpayments attributable to an adjustment should be allocated among the reviewed year partners according to the generally applicable provisions of the partnership agreement and of applicable law, in each case as they applied in the reviewed year.

- To the extent any adjustment would increase or reduce depreciation or amortization deductions in respect of an asset, the relevant adjustment should be made to such asset's inside basis (and the partners' corresponding outside basis, accounting for any variation resulting from a Code section 754 election according to applicable law in the reviewed year) in the reviewed year and any such adjustment should be accounted for in any relevant subsequent taxable year according to generally applicable tax law as applicable in each such taxable year.

The allocations above should have a predictable effect on each partner's capital accounts and outside basis and the partnership's inside basis, in each case based on the applicable provisions of the audited partnership's partnership agreement.

<u>Adjustments attributable to the payment of an imputed underpayment</u>

Proposed Regulation section 301.6241-4 treats an imputed underpayment paid by the partnership as a nondeductible expense under Code section 705(a)(2)(B). Accordingly, Treasury Regulation section 1.704-1(b)(2)(iv)(*b*) indicates that any such payment would decrease the partners' capital accounts. Treasury Regulation Section 1.704-(1)(b)(2)(iv)(*i*)(*1*) states that any allocation of such a reduction must be have substantial economic effect and, if it does not, shall be allocated according to the partners' interest in the partnership. Accordingly:

˜ When a partnership pays an imputed underpayment, the adjustment to capital account required by Treasury Regulation section 1.704-1(b)(2)(iv)(*b*) should be made to the adjustment year partners' capital accounts.

˜ When a partnership makes a push-out election or the imputed underpayment is otherwise paid by the reviewed year partners by law, the adjustment to capital account required by Treasury Regulation section 1.704-1(b)(2)(iv)(*b*) should be made to the reviewed year partners' capital accounts. When the reviewed year partners are no longer partners in the partnership, the reduction should have no effect.

Nonetheless, Temporary Treasury Regulations section 1.163-9T(b)(2) indicates that a corporation may deduct a payment of interest to the IRS in respect of an underpayment of tax. Thus, the Proposed Regulations should state that a corporate partner may deduct that portion of any imputed underpayment attributable to interest to the extent that the corporate partner contributes cash to the partnership to pay such interest, provided that a special allocation of such corporate partner has substantial economic effect. In that case, the corporate partner's capital account should be increased to account for the relevant capital contribution and decreased to account for the specially allocated interest expense.

<u>Partner contributions to fund a partnership's payment of an imputed underpayment</u>

The Proposed Regulations should clearly state that the capital account of a partner that contributes any cash or property to the partnership to fund the partnership's payment of any imputed underpayment will be increased to account for such capital contribution.

d. Push-out Election (Code Section 6226)

i. **Application of Push-Out Election to Tiered Structures**

Issue: The push-out election should be available in multi-tier partnerships. There is ample statutory authority and legislative history for this approach.

Comment: The alternative payment method under Code section 6226(a) permits "the partnership" to elect to push out adjustments to income, gain, loss, deduction, or credit to each partner of the partnership. The statute is clear that this authority allows the partnership under audit (the "<u>Audit Partnership</u>") to push out the adjustments to a first-tier partnership partner. Since there is no statement in the statute that indicates that generally applicable provisions of the Code, e.g., Code sections 701 and 702, do not apply to any such upper-tier partnership, those generally applicable provisions should apply such that an upper-tier partnership may push out an adjustment to its own partners just as it would "push out" any other tax item. In addition, the Technical Corrections Act expressly included a multi-tier push election under Code section 6226. By including this provision in the Technical Corrections Act, Congress clearly indicated that it intended that the existing version of Code section 6226 be available to push out an audit adjustment through multiple tiers of partnerships following an audit of a lower-tier partnership.

The Preamble of the Proposed Regulations indicates that the IRS is considering an approach for pushing out audit adjustments in a multi-tier structure and intends to issue additional proposed regulations concerning this method. When drafting these regulations, care should be taken to clearly state that a multi-tier push out is consistent with existing, generally applicable law and to avoid any suggestion that the Audit Rules amend provisions of the Code other than as plainly stated in the relevant statutes.

ii. **Mechanics of the Push-Out Election**

Issue: In the Preamble of the Proposed Regulations, Treasury requested comments regarding methods for implementing a multi-tier push out method and emphasized that any multi-tier push out method should consider Treasury's goal of "reducing noncompliance and collection risk in tiered structures, while at the same time limiting the administrative costs of the IRS." 82 Fed. Reg. at 27365.

Comment: The IRS and Treasury should rely on existing tax compliance and information reporting methods to implement multi-tier adjustments under Code section 6226.[4] Given the January 1, 2018 effective date of the centralized partnership audit regime, procedures must be designed so that partnerships are able to obtain any information needed as of January 1, 2018. If partnerships--particularly partnerships with high turnover of partners such as master limited partnerships--delay in acquiring the data, they run the risk of not being able to obtain the necessary information about their partners in case of a desired push-out election. Accordingly, to the extent practicable, in order to minimize burden, confusion and cost to both partnerships and the IRS, and to enhance administrability and compliance, existing IRS forms and reporting mechanisms should be utilized or enhanced.

First, to provide sufficient information to the IRS in the context of an audit to support a multi-tier push out, the IRS should adapt the existing Form W-8IMY reporting process. To provide sufficient information to the partners of an audited partnership, the IRS should adapt the existing Form K-1 process. To facilitate this method, AFPM proposes that Treasury consider the following general guidelines:

- When an Audit Partnership wishes to make a push out election under Code section 6226, the Audit Partnership should be required to provide withholding certificates to the audit agent and a comprehensive withholding chart disclosing relative allocation percentages of relevant items of income.
  - Method (please see the attached slides for a visual representation)
    - Non-U.S. partners would provide the series W-8 forms and related documentation that are currently required by U.S. withholding agents. Especially pertinent to this discussion is the requirement that a non-U.S. entity treated as a partnership for U.S. federal tax purposes must provide to a withholding agent (i) a Form W-8IMY for itself, (ii) Forms W-8IMY for any non-U.S. partnerships that hold a direct or, in some cases, indirect equity interest in the reporting non-U.S. partnership, (iii) withholding certificates (relevant Series W-8 or a Form W-9) for all of the reporting non-U.S. partnership's beneficial owners, including those that indirectly hold an equity interest in the reporting non-U.S. partnership through one or more other non-U.S. partnerships, and (iv) a withholding chart disclosing relative allocation percentages of relevant items of income.
    - U.S. partners that are corporations or individuals would continue to provide Forms W-9 to the Audit Partnership.

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[4] This method should apply to both active and terminated partnerships. The single-tier "push-out" guidance in the Proposed Regulations issued under Code section 6241 provides partial relief for partners of terminated partnerships, but if one of those partners is itself a partnership, that partner should not have a worse result than if the Audit Partnership were still active.

  - U.S. partners that are partnerships for U.S. federal tax purposes would provide a Form "W-9IMY" that would be broadly similar to the Form W-8IMY (though with appropriate substitution of information categories, e.g., in regard to the Foreign Account Tax Compliance Act) and a withholding chart disclosing relative allocation percentages of relevant items of income.

  - Importantly, if an upper-tier partnership fails to provide a Form W-8IMY or "W-9IMY" or provides only a Form W-8IMY or "W-9IMY" without the additional information required above, the upper-tier partnership would not be permitted to push out the adjustment further.

  - An electronic system for collecting the certificates and withholding charts described above would ease the process for taxpayers and the IRS alike. In addition, if partners are permitted to directly upload documentation to the electronic system and only the IRS may retrieve information from it, concerns about keeping sensitive taxpayer information confidential may be reduced.

- Consequence

  - The partnership would be responsible for providing the information required to facilitate the IRS' tracking of adjustments *only* at the time the information is needed, thus reducing the burden of a multi-tier push out on the IRS and reducing the burden on the partnership or the partnership representative in regard to legal obligations to protect sensitive taxpayer information.

  - The relative burden on the taxpayer of this process will generally mean that partnerships will not elect to push out unless a material adjustment is at stake and material savings are available. Thus, a minimum adjustment amount would not be needed in order for a multi-tier push out election to be available.

  - U.S. and non-U.S. partners would be held to more similar information standards. However, a U.S. partnership may choose to not disclose its beneficial ownership if privacy is more important to its partners than reducing the impact of an imputed underpayment.

  - Most of the required forms are already available and the remaining form may be easily adapted from an existing form.

  - Many multi-tier structures include non-U.S. investors. Accordingly, many withholding agents are already familiar with the Form W-8IMY information collection process. The incremental additional burden on businesses should not be overly cumbersome.

˜ For a push out election to be effective, the Audit Partnership must issue Forms K-1 to all of the direct and indirect partners that provided withholding certificates as described above.

- Method (please see the attached slides for a visual representation)

  - Either: (i) the Form K-1 annually issued to partners may be revised to include audit adjustments as well as other tax items or (ii) a second Form K-1 may be provided solely to reflect audit adjustments. In either case, the form should include a field used to indicate that the form includes audit adjustments related to a specific year. It should be noted that the approach in (ii), above, is similar to the Form W-2c, which is used to correct a previously issued Form W-2, but includes substantially the same information fields as well as a comparison of the previously reported and corrected information.

  - The pertinent information should be reported to partners at the time that the Audit Partnership would be required to issue a Form K-1 to its partners under generally applicable law.

  - The Form K-1 used to report audit adjustments would be attached to the Audit Partnership's tax return for the adjustment year.

  - To simplify tracking the returns that direct and indirect partners would be required to file, the IRS should consider a software upgrade that would permit the relevant EINs and SSNs to be cross-referenced in respect of the relevant tax year.

  - The IRS may also consider a reasonable limit on the number of partners in a multi-tier structure for purposes of determining if a multi-tier push out is available. If this approach is taken, consideration should be given to upper-tier partnerships that are master limited partnerships ("MLPs"). In that case, unitholders in the adjustment year would not have recourse to or indemnity protection from unitholders in the audited year because MLPs are publicly traded. Thus, enforcement of indemnification obligations between partners would be extremely difficult, perhaps impossible. (This should be compared with non-publicly traded partnership where partners frequently have enforceable indemnification rights vis-à-vis prior year partners.) On the other hand, because ownership records are generally maintained, it should be possible to push out an adjustment and inform the IRS of the persons to which an adjustment is allocated using typical reporting mechanisms. AFPM suggests that the Code section 6226 push out therefore always be available to MLPs that are upper-tier partners of an Audit Partnership.

- Consequence

    - The Form K-1 process is a tried and true reporting mechanism that has worked well over the years. Partnerships are familiar with the form, the process and the timing of the Form K-1 process, and IRS systems are designed and programmed to capture and utilize the data reported on K-1s. To maximize compliance and minimize burden for both the IRS and partnerships, AFPM strongly believes the existing K-1 regime should be utilized to accomplish the reporting and transparency objectives in the new partnership audit rules.

e. Administrative Adjustment Requests (Code Section 6227)

Issue: The Proposed Regulations do not provide guidance regarding how an audit adjustment works for partnerships that have other partnerships as partners.

Comment: The Proposed Regulations provide for a partnership election to cause reviewed year partners to take into account any imputed underpayment resulting from an AAR. Proposed Regulations section 301.6227-2(c). In that case, the partnership will not be responsible for paying the imputed underpayment and the reviewed year partners will be required to take into account in the reporting year (that is, the year in which a payment would be made in respect of a push-out election) their share of adjustments in an AAR, including those adjustments that do not result in an imputed underpayment. Proposed Regulations section 301.6227-3(a). Proposed Regulations section 301.6227-3(c), however, is currently reserved for forthcoming guidance regarding the application of this election to partners of an audited partnership that are pass-throughs, including partnership-partners. Additional proposed regulations should provide for an "AAR push out" method similar to that included in the proposed regulations for the Code section 6226 push out that Treasury has indicated are forthcoming. As discussed above, that method would facilitate the IRS' ability to track any push out of an adjustment and is similar to existing mechanisms with which many taxpayers are already familiar.

f. Non-U.S. Partners and Partnership Activities

Issue: The Proposed Regulations generally do not provide dispositive guidance regarding the treatment of non-U.S. partners and the treatment of foreign income items and taxes of the partnership. In particular, the IRS has requested comments about and indicated that it will address in future regulations the following considerations: withholding (including the application of FATCA) in respect of allocations of adjustment items to non-U.S. partners, creditable foreign tax expenditures and other matters pertinent to the foreign tax credit, and treatment of non-U.S. partners that are not directly liable for U.S. income tax (e.g., controlled foreign corporations), including for purposes of modifications pursuant to Code Section 6225(c).

Comment: Absent clear guidance, partnerships are not prepared to account for adjustments relating to foreign tax credits, foreign income items, and withholding. It is clear that the outcome of the application of existing rules should vary depending on whether a partnership pays any imputed underpayment or whether such imputed underpayment is "pushed out" or otherwise paid by the reviewed year partners by operation of law. In any event, as in regard to the regulations that will be issued in regard to adjustments to inside and outside basis and capital accounts, AFPM urges Treasury to adopt regulations in regard to non-U.S. partners and foreign income items that conform to the general principle of Subchapter K, that is, that tax consequences closely track economic consequences. In addition, AFPM urges Treasury to release such proposed Treasury Regulations regarding this matter as quickly as possible. As noted above in regard to the push-out election, partnerships must be able to gather all necessary information from partners as of January 1, 2018. Therefore, it is of the utmost importance that the forms and guidance that detail the information that will be required to comply with the law in regard to non-U.S. partners and foreign income items are released as soon as possible.

II. Impact of the Tax Technical Corrections Act of 2016

a. Modification of Imputed Underpayments (Code Section 6225(c))

Issue: The Technical Corrections Act clarifies that the IRS, rather than the audited partnership, is responsible for accounting for the amended returns filed by partners for purposes of modifying the imputed underpayment that the audited partnership must pay.

Comment: The Technical Corrections Act would address AFPM's concern about the burden on partnerships of filing amended returns. Specifically, the Technical Corrections Act would revise Code section 6225(c) to permit a partner to provide a statement (and payment of tax attributable to such partner's allocable share of adjustments) in lieu of an amended return (referred to as the "pull-in procedure" in the Technical Explanation). This mechanism (though *not* the amended return mechanism in Code section 6225(c)(2)(A)) would be available to direct *and indirect* partners, including through upper-tier partnerships and S corporations.[5] The Technical Explanation expressly states that both the statement and a partner's payment of any amount due may be provided directly to the IRS or--apparently at the option of the partnership or partner--centrally collected by a partnership representative or a third party (e.g., an accounting or law firm) and then remitted to the IRS. The Technical Explanation notes that this procedure will be designed to both ease the use of the modification process under Code section 6225(c) and address privacy concerns.

Since the existing statute and the provisions in the Technical Corrections Act concerning the so-called "pull-in procedure" indicate that amended returns and statements required pursuant to the pull-in procedure will be provided to the IRS, it appears that the IRS would therefore be directly responsible for adjusting any imputed underpayment to reflect amended returns or pull-in procedure statements. Thus, these revisions would represent a realistic alternative to the push-out mechanism. This represents a significant simplification for many taxpayers, including many of AFPM's members. Accordingly, AFPM urges Treasury to seek a new technical corrections bill that provides a similar correction.

b. Administrative Adjustment Request by Partnership, Period of Limitations (Code Section 6227)

Issue: The Technical Corrections Act expressly declines to extend the statute of limitations for filing an AAR for purposes of taking into account adjustments of a lower-tier partnership. However, that the Technical Corrections Act would clarify that amended returns and pull-in procedure statements may be filed under Code section 6225(c) without regard to the statutes of limitations under Code sections 6501 and 6511. These extensions would apply only

[5] It should be noted that the pull-in statement would expressly *not* be an administrative adjustment request and would therefore presumably be required of each direct and indirect partner claiming the procedure.

to adjustments to partnership-related items for the reviewed year and the effect of such adjustments on any tax attributes. Thus, this extension of the statute would enable a partner to equitably take into account adjustments to partnership-related items (including those allocable to a lower-tier partnership) in the *reviewed* year without being exposed to a full audit of a reviewed year that is already closed under the applicable statute of limitations.

Comment: The Technical Corrections Act would address AFPM's concern that Code section 6225 be more equitable and less cumbersome by providing that modifications and amended returns may be filed without regard to the generally applicable statutes of limitation. However, extending a statute of limitation requires legislative action. Accordingly, AFPM urges Treasury to seek a new technical corrections bill that addresses this concern.

III. Delay of Implementation of the Statutes

The new partnership audit regime under the BBA is a significant departure from the existing scheme under TEFRA and the implementation of, and compliance with, the BBA will require substantial efforts by Treasury, the IRS and taxpayers. Many businesses will experience significant hardship due to the Proposed Regulations, particularly if there is further delay in the implementation of the regulations. At a minimum, partnerships will need to review their current organizational structures and choice of entities and revise existing operating agreements to reflect the new partnership audit rules.

Generally, comments are due no later than 90 days following the date on which proposed regulations are published in the Federal Register. Treasury and the IRS, however, reduced the comment period for the Proposed Regulations to 60 days. Notwithstanding the reduced comment period, an effective date of January 1, 2018 provides little time for Treasury and the IRS to finalize these and forthcoming Proposed Regulations or for taxpayers to adequately interpret and implement final regulations. Legislation which would delay the effective date by one year (to January 1, 2019) would significantly mitigate the administrative burdens on Treasury and the IRS and reduce the uncertainty among taxpayers about how to comply and how audits will affect their business interests going forward. Additionally, a delayed effective date would allow time for the Technical Corrections Act, which provides important clarifications to a number of provisions of the partnership audit rules, to be reintroduced and enacted. Recognizing the challenges of a legislative delay, including the repeal of TEFRA, other options might be (i) to allow taxpayers a grace period to make necessary legal, structural and administrative changes to comply with the new rules or (ii) to require various levels of compliance that increase each year (i.e., substantial compliance required in year 2019 and complete compliance required in year 2020).

* * *

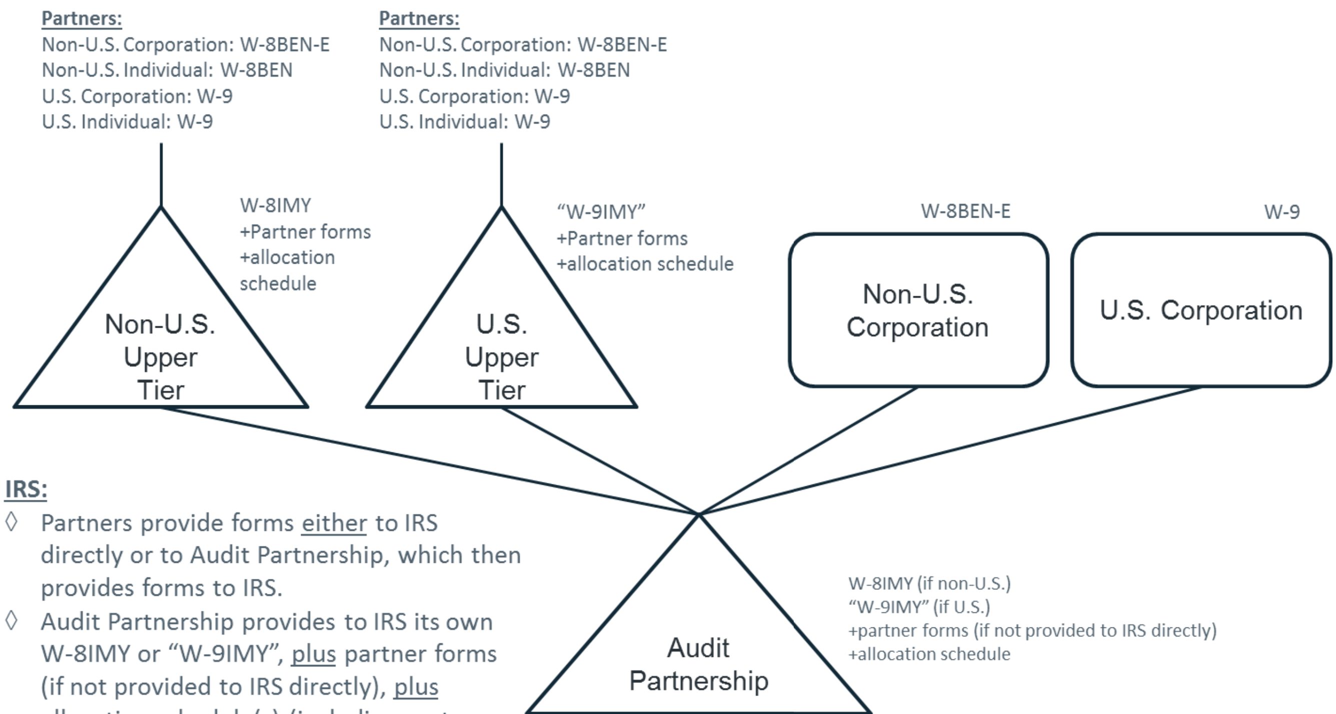
Thank you for the opportunity to provide these comments. We look forward to continuing to work with you to address and resolve them through the regulatory and guidance process. Please contact Geoff Moody at gmoody@afpm.org with any questions that you may have.

Sincerely,

Geoff Moody
Vice President
Government Relations

Enclosures: April 15, 2016 Comment Letter, September 26, 2016 Comment Letter, November 2, 2016 List

Section 6226 Push Out Election Documents Provided to IRS

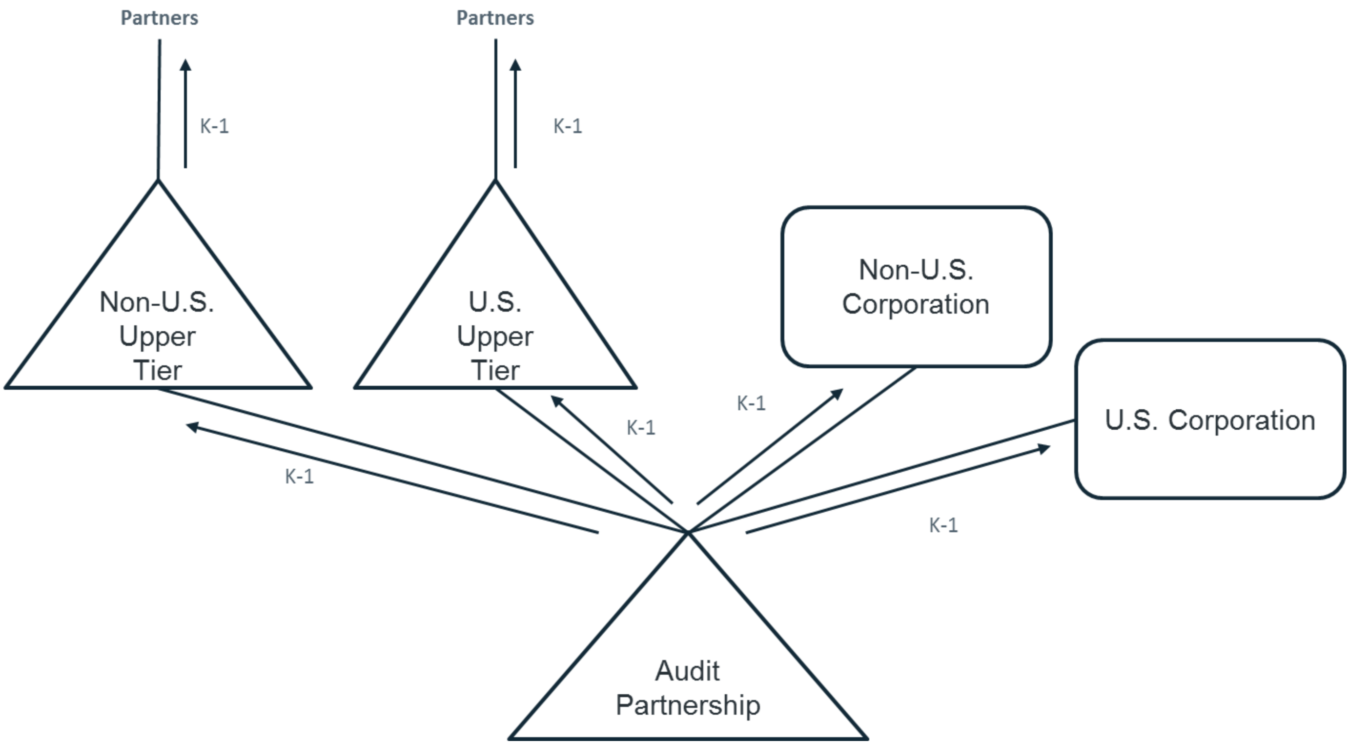


IRS:

◊ Partners provide forms either to IRS directly or to Audit Partnership, which then provides forms to IRS.

◊ Audit Partnership provides to IRS its own W-8IMY or "W-9IMY", plus partner forms (if not provided to IRS directly), plus allocation schedule(s) (including partner allocation schedules not provided to IRS directly)

Section 6226 Push Out Election
Documents Provided to IRS and Partners



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