INTERNAL REVENUE
BULLETIN

IRS

HIGHLIGHTS OF THIS ISSUE

Bulletin No. 2017–51
December 18, 2017

These synopses are intended only as aids to the reader in identifying the subject matter covered. They may not be relied upon as authoritative interpretations.

INCOME TAX

Notice 2017–71, page 561.

This notice provides that any act performed for the 2016 taxable year of a partnership, REMIC, or certain other entities will be treated as timely for all purposes under the Code, except with respect to interest, if the act would have been timely if the Surface Transportation Act had not changed the due date for partnership returns.

Notice 2017–74, page 566.

This notice provides guidance on computing the affordability exemption under § 5000A(e)(1) of the Internal Revenue Code and § 1.5000A–3(e) of the Income Tax Regulations for taxpayers with a family member who (i) is not eligible for coverage under an eligible employer-sponsored plan, and (ii) resides in an area in which the Health Insurance Marketplace serving the area does not offer a bronze-level qualified health plan.

ADMINISTRATIVE

Notice 2017–71, page 561.

This notice provides that any act performed for the 2016 taxable year of a partnership, REMIC, or certain other entities will be treated as timely for all purposes under the Code, except with respect to interest, if the act would have been timely if the Surface Transportation Act had not changed the due date for partnership returns.

REG–119337–17, page 568.

Proposed regulations addressing how certain international rules would operate in the context of the centralized partnership audit regime, including rules relating to the withholding of tax on foreign persons, withholding of tax to enforce reporting on certain foreign accounts, and the treatment of creditable foreign tax expenditures of a partnership.

Announcement 2017–16, page 583.

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, and appraisers. These individuals are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Part 10, and which are published in pamphlet form as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations.

EXCISE TAX

Notice 2017–73, page 562.

This notice describes approaches that the Department of the Treasury and the Internal Revenue Service are considering to address certain issues regarding donor advised funds of sponsoring organizations and requests comments on those approaches.

EXEMPT ORGANIZATIONS

Notice 2017–73, page 562.

This notice describes approaches that the Department of the Treasury and the Internal Revenue Service are considering to address certain issues regarding donor advised funds of sponsoring organizations and requests comments on those approaches.

Announcement 2017–19, page 585.

Serves notice to potential donors of a stipulated decision by the United States Tax Court in declaratory judgment proceedings under Section 7428.

Finding Lists begin on page ii.

Announcement 2017–20, page 585.
Serves notice to potential donors of a stipulated decision by the United States Tax Court in declaratory judgment proceedings under Section 7428.

Announcement 2017–21, page 585.
Serves notice to potential donors of a stipulated decision by the United States Tax Court in declaratory judgment proceedings under Section 7428.

The IRS Mission

Provide America's taxpayers top-quality service by helping them understand and meet their tax responsibilities and enforce the law with integrity and fairness to all.

Introduction

The Internal Revenue Bulletin is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest. It is published weekly.

It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws, including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.

Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.

Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

The Bulletin is divided into four parts as follows:

Part I.—1986 Code.
This part includes rulings and decisions based on provisions of the Internal Revenue Code of 1986.

Part II.—Treaties and Tax Legislation.
This part is divided into two subparts as follows: Subpart A, Tax Conventions and Other Related Items, and Subpart B, Legislation and Related Committee Reports.

Part III.—Administrative, Procedural, and Miscellaneous.
To the extent practicable, pertinent cross references to these subjects are contained in the other Parts and Subparts. Also included in this part are Bank Secrecy Act Administrative Rulings. Bank Secrecy Act Administrative Rulings are issued by the Department of the Treasury's Office of the Assistant Secretary (Enforcement).

Part IV.—Items of General Interest.
This part includes notices of proposed rulemakings, disbarment and suspension lists, and announcements.

The last Bulletin for each month includes a cumulative index for the matters published during the preceding months. These monthly indexes are cumulated on a semiannual basis, and are published in the last Bulletin of each semiannual period.

Part III. Administrative, Procedural, and Miscellaneous

Relief for Partnerships, REMICs, and Certain Other Entities Performing Any Acts by the Due Date in Effect Before the Enactment of the Surface Transportation Act

Notice 2017–71

PURPOSE

This notice provides that any act performed for the 2016 taxable year of a partnership, real estate mortgage investment conduit (REMIC), or certain other entities will be treated as timely for all purposes under the Internal Revenue Code (the Code), except with respect to interest under section 6601 of the Code, if the act would have been timely if the Surface Transportation and Veterans Health Care Choice Improvement Act of 2015 (the Surface Transportation Act), Public Law 114–41, 129 Stat. 443 (2015), had not changed the due date for partnership returns.

Notice 2017–47, 2017–38 I.R.B. 232, is amplified, clarified, and superseded.

BACKGROUND

Section 2006 of the Surface Transportation Act amended section 6072 of the Code and changed the date by which a partnership must file its annual return with the Internal Revenue Service (IRS). The due date for filing the annual return of a partnership changed from the fifteenth day of the fourth month following the close of the taxable year (April 15 for calendar-year taxpayers) to the fifteenth day of the third month following the close of the taxable year (March 15 for calendar-year taxpayers). The new due date applies to the returns of a partnership for taxable years beginning after December 31, 2015.

A REMIC is not a partnership, but under section 860F(e) it is generally treated as a partnership for purposes of subtitle F, "Procedure and Administration," of the Code. For example, under § 1.860F–4(b)(1) of the Income Tax Regulations, the due date and availability of any extension of time for filing a REMIC's annual return are determined as if the REMIC were a partnership. As a result, the new due date also applies to the returns of a REMIC for taxable years beginning after December 31, 2015.

The due date for the return of a bank with respect to a common trust fund, commonly filed on Form 1065, "U.S. Return of Partnership Income," is administratively tied to the due date of the return of a partnership under § 1.6032–1T of the Income Tax Regulations. Similarly, the annual return filed by a religious or apostolic association or corporation on Form 1065 is to be filed on the due date of a partnership return under § 1.6033–2T(e) of the Income Tax Regulations.

Partnerships filing Form 1065 and Form 1065–B, "U.S. Return of Income for Electing Large Partnerships," are affected by the Surface Transportation Act amendment. These partnerships may also file Form 8804, "Annual Return for Partnership Withholding Tax (Section 1446)," and Form 8805, "Foreign Partner's Information Statement of Section 1446 Withholding Tax," which are generally due to the IRS on the same date as the partnership's Form 1065 or 1065–B. Filers of Form 1065 must furnish their partners with Schedules K–1, "Partner's Share of Income, Deductions, Credits, etc.," by the due date of the Form 1065, and filers of Form 1065–B must furnish their partners with Schedules K–1 by the first March 15 following the close of the partnership's taxable year. Filers of Form 8804 that are required to file Forms 8805 must also furnish their partners with their respective copies of Forms 8805 by the due date of the Form 8804. Some partnerships must also file additional returns, such as Form 5471, "Information Return of U.S. Persons With Respect to Certain Foreign Corporations," by the due date of the Form 1065 or 1065–B. A REMIC must file Form 1066, "U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return," by March 15.

A partnership can obtain a six-month extension of time to file Form 1065, 1065–B, or 8804, and a REMIC can obtain a six-month extension of time to file Form 1066, by filing Form 7004, "Application for Automatic Extension of Time to File Certain Business Income Tax, Information, and Other Returns," by the statutory due date of those returns. A partnership that receives an extension of time to file Form 1065 receives a concurrent extension of time to furnish its partners with Schedules K–1. Also, a partnership that receives an extension of time to file Form 8804 receives a concurrent extension of time to file Forms 8805 and to furnish respective copies of the Forms 8805 to its partners. The six-month extension may apply to additional returns that a partnership may be required to file by the due date of its Form 1065 or 1065–B, but it does not affect the due date for a partnership filing Form 1065–B to furnish its partners with Schedules K–1.

An entity that fails to timely meet its obligations to file and furnish returns is subject to penalties. An entity that fails to file Form 1065, 1065–B, 1066, or 8804 by the due date (with regard to extensions) is subject to penalty under section 6698 or 6651 of the Code. A partnership that fails to file Forms 8805 by the due date (with regard to extensions) is subject to penalty under section 6721. A partnership that fails to furnish Schedules K–1 or the partner copies of Forms 8805 by the due date is subject to penalty under section 6722. A partnership that fails to file Form 5471 by the due date is subject to penalty under section 6038 or 6679. An entity that fails to file additional documents that it is required to file by the due date of its Form 1065, 1065–B, or 1066 may also be subject to other penalties.

In addition to the obligation to file returns with the IRS and furnish copies to recipients, an entity may be required to take various other actions, such as making elections, contributing to an employee pension plan, or paying tax, by the due date of its return, either with or without regard to any extension of time to file, depending upon the particular action. A nonexclusive list of examples of these actions is below:

- Section 860D(b)(1) provides that an entity that meets the requirements for a REMIC classification under section 860D(a) may elect to be treated as a

REMIC for its first taxable year and that the election must be made on the entity's income tax return for its first taxable year. Section 1.860D–1(d)(1) of the Income Tax Regulations identifies that return as a timely Form 1066.

- Section 475(e) of the Code allows a dealer in commodities to elect mark-to-market accounting for commodities. Section 475(f) allows a similar election for traders in securities or commodities. To make an election under either section 475(e) or (f), Rev. Proc. 99–17, 1999–1 C.B. 503, provides that a taxpayer must file an election statement not later than the due date (without regard to extensions) of its income tax return for the taxable year immediately preceding the election year. The election statement must be attached to either the taxpayer's original income tax return or, if applicable, to a request for an extension of time to file that return.
- Section 1.1092(b)–4T(f)(1) of the Income Tax Regulations generally provides that the election to establish one or more mixed straddle accounts (a mixed straddle election) for a taxable year must be made by the due date (without regard to extensions) of the taxpayer's income tax return for the immediately preceding taxable year. In order to make the mixed straddle election, a taxpayer must attach Form 6781, "Gains and Losses from Section 1256 Contracts and Straddles," to the taxpayer's income tax return (or request for an automatic extension) for the immediately preceding taxable year.
- Section 1295(b) of the Code permits a U.S. person who owns stock in a passive foreign investment company (PFIC) to elect to treat the PFIC as a qualified electing fund (QEF) by making the election on Form 8621, "Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund," filed with its income tax return on or before the due date (with regard to extensions) of its income tax return.
- Section 1.1296–1(h) of the Income Tax Regulations permits a U.S. person who owns marketable stock in a PFIC to elect to recognize gain or loss on the sale of the PFIC shares at the end of the year by making the election on Form 8621 and filing it with an original or superseding income tax return on or before the due date (with regard to extensions) of the income tax return for that year.
- Section 4980D of the Code and §§ 54.6011–2 and 54.6071–1(b)(1) of the Pension Excise Taxes Regulations require an employer who fails to meet certain group health plan requirements under chapter 100 of the Code to file Form 8928, "Return of Certain Excise Taxes Under Chapter 43 of the Internal Revenue Code," and pay an excise tax on or before the due date of its income tax return (without regard to extensions).
- Section 404(a)(6) of the Code provides that an employer's contribution payment to an employee's benefit plan shall be deemed made on the last day of the preceding taxable year if the payment is on account of that taxable year and is made not later than the due date of the employer's income tax return for that taxable year (with regard to extensions).

Many entities took the acts for the first taxable year beginning after December 31, 2015, by the date previously required by section 6072. If not for the Surface Transportation Act, these acts would have been timely.

DISCUSSION

The IRS will treat acts of any (a) partnership, (b) REMIC, or (c) entity that may properly file a Form 1065—such as a bank (with respect to the return of a common trust fund), or a religious or apostolic association or corporation—and in fact filed a Form 1065, as timely for the first taxable year that began after December 31, 2015, and before January 1, 2017, if the entity took the act by the date that would have been timely under section 6072 before amendment by the Surface Transportation Act (April 18, 2017, for calendar-year taxpayers, because April 15 was a Saturday and April 17 was a legal holiday in the District of Columbia). However, the entity will be liable for any interest due under section 6601 from the date prescribed for payment until the date the payment was actually made.

An entity that has already been assessed a penalty for failure to timely file a return that is deemed timely filed under this notice can expect to receive a letter within the next several months notifying it that the penalty has been abated. For other acts deemed timely under this notice, such as elections, an entity should file its returns consistent with the treatment of the acts as being performed timely as provided by this notice, and need not take further action to obtain relief unless contacted by the IRS. For reconsideration of a penalty covered by this notice that has not been abated by February 28, 2018, contact the number listed in the letter that notified you of the penalty or call (800) 829-0115 and state that you are entitled to relief under Notice 2017–71. Taxpayers who qualify for relief under this notice will not be treated as having received a first-time abatement under the IRS's administrative penalty waiver program.

EFFECT ON OTHER DOCUMENTS

This notice amplifies, clarifies, and supersedes Notice 2017–47, 2017–38 I.R.B. 232.

DRAFTING INFORMATION

The principal author of this notice is Jonathan R. Black of the Office of the Associate Chief Counsel (Procedure and Administration). For further information regarding this notice contact Jonathan R. Black at (202) 317-6845 (not a toll-free number).

Request for Comments on Application of Excise Taxes With Respect to Donor Advised Funds in Certain Situations

Notice 2017–73

SECTION 1. PURPOSE

This notice describes approaches that the Department of the Treasury (Treasury Department) and the Internal Revenue Service (IRS) are considering to address certain issues regarding donor advised funds (DAFs) of sponsoring organizations and requests comments on those approaches. Specifically, the Treasury Department and the IRS are considering developing proposed regulations under § 4967 of the Internal Revenue Code (Code) that would, if finalized, provide that: (1) certain distributions from a DAF that pay for the purchase of tickets that enable a donor, donor advisor, or related person under § 4958(f)(7), to attend or participate in a charity-sponsored event result in a more than incidental benefit to such person under § 4967; and (2) certain distributions from a DAF that the distributee charity treats as fulfilling a pledge made by a donor, donor advisor, or related person, do not result in a more than incidental benefit under § 4967 if certain requirements are met. In addition, the Treasury Department and the IRS are considering developing proposed regulations that would change the public support computation for organizations described in §§ 170(b)(1)(A)(vi) and 509(a)(1) and in § 509(a)(2) to prevent the use of DAFs to circumvent the excise tax rules applicable to private foundations under Chapter 42 of the Code. This notice requests comments regarding the issues addressed in the notice as well as certain other issues.

SECTION 2. BACKGROUND

Section 4966(d)(2) defines a DAF as a fund or account owned and controlled by a sponsoring organization, which is separately identified by reference to contributions of a donor or donors, and with respect to which the donor, or any person appointed or designated by such donor (donor advisor), has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of the funds. Section 4966(d)(2)(B) excepts from the definition of DAF any fund or account which makes distributions only to a single identified organization or governmental entity, or certain committee-advised funds that make grants to individuals for travel, study, or other similar purposes.

Section 4966(d)(1) defines a sponsoring organization as an organization that: (1) is described in § 170(c) (other than a governmental unit described in § 170(c)(1), and without regard to the requirement under § 170(c)(2)(A) that the organization be organized in the United States); (2) is not a private foundation (as defined in § 509(a)); and (3) maintains one or more DAFs.

Under § 170(f)(18), a deduction otherwise allowable under § 170(a) for a contribution to a DAF is allowed only if:

(A) the sponsoring organization is described in § 170(c)(2) and is not a "type III supporting organization," as defined in § 4943(f)(5)(A) (other than a functionally integrated type III supporting organization as defined in § 4943(f)(5)(B)); and

(B) the taxpayer obtains a contemporaneous written acknowledgment from the sponsoring organization of the DAF that the sponsoring organization has exclusive legal control over the assets contributed.

Section 4966 imposes an excise tax on each taxable distribution from a DAF. This excise tax is paid by the sponsoring organization. A separate excise tax, paid by fund managers, is imposed on the agreement of any fund manager to the making of a distribution, knowing that it is a taxable distribution. In general, under § 4966(c), a taxable distribution is any distribution from a DAF to any natural person, or to any other person if (i) the distribution is for any purpose not specified in § 170(c)(2)(B), or (ii) the sponsoring organization does not exercise expenditure responsibility with respect to such distribution in accordance with § 4945(h).

Under § 4966(c)(2), a taxable distribution does not include a distribution from a DAF to: (1) any organization described in § 170(b)(1)(A) (other than a disqualified supporting organization as defined in § 4966(d)(4)); (2) the sponsoring organization of such DAF; or (3) any other DAF.

Section 4967 imposes an excise tax on the advice that a person described in § 4967(d) provides regarding a distribution from a DAF that results in such person or any other person described in § 4967(d) receiving, directly or indirectly, a more than incidental benefit. Section 4967(d) refers to § 4958(f)(7), which describes a donor, donor advisor, a family member of a donor or donor advisor, or a 35-percent controlled entity of such persons as defined in § 4958(f)(3) (with the modifications described in § 4958(f)(7)(C)). This excise tax is paid by any person who advises the sponsoring organization as to the distribution or who receives the prohibited benefit. A separate excise tax, paid by fund managers, is imposed on the agreement of any fund manager of the sponsoring organization to the making of the distribution, knowing that it would confer a prohibited benefit. Section 4967(b) provides that, with respect to any distribution, no tax shall be imposed under § 4967 if a tax has been imposed under § 4958.

Section 4958 imposes an excise tax on any "excess benefit transaction." Section 4958(c)(1) defines an excess benefit transaction generally as any transaction in which an economic benefit is provided by an applicable tax-exempt organization (including a § 501(c)(3) sponsoring organization of a DAF) directly or indirectly to or for the use of a disqualified person (including in the case of any transaction that involves a DAF a donor, donor advisor, or a person related to a donor or donor advisor, as described in § 4958(f)(7)), if the value of the economic benefit provided exceeds the value of the consideration received. In general, the term "excess benefit" refers to the amount by which the value of the economic benefit provided exceeds the value of the consideration received. Section 4958(c)(2) provides that, in the case of any DAF, an excess benefit transaction also includes any grant, loan, compensation, or other similar payment from the DAF to a donor, donor advisor, or related person. For purposes of this special rule for DAFs, the excess benefit includes the full amount of the grant, loan, compensation, or other similar payment. This excise tax under § 4958 is paid by the disqualified person with respect to the transaction. A separate excise tax, paid by organization managers, is imposed on the participation of any organization manager in the transaction, knowing that it is an excess benefit transaction, unless such participation is not willful and is due to reasonable cause.

Notice 2006–109, 2006–2 C.B. 1121, provided interim guidance on several DAF issues, including criteria for determining whether a supporting organization is a disqualified supporting organization, exclusion of certain employer-sponsored disaster relief funds from the definition of DAF, and transitional rules for educational grants. The notice also requested comments regarding suggestions for future guidance on DAFs.

Notice 2007–21, 2007–1 C.B. 611, requested comments in connection with a study conducted by the Treasury Department and the IRS on the organization and operation of DAFs and supporting organizations, as required by § 1226 of the Pension Protection Act of 2006, Pub. L. No. 109–280, 120 Stat. 780 (2006).

In response to these notices, the Treasury Department and the IRS received a number of comments requesting guidance on various DAF issues. Several commenters indicated that guidance would be particularly helpful regarding whether § 4967 prohibits a donor, donor advisor, or person related to a donor or donor advisor of a DAF from advising a DAF distribution to pay the cost of any such person's attendance or participation in a charity-sponsored event or to fulfill the person's charitable pledge. The commenters noted that some DAF sponsoring organizations prohibit such DAF distributions, but others do not. One commenter expressed concern about improper use of DAFs by persons seeking to avoid application of the private foundation rules under Chapter 42 of the Code.

While the Treasury Department and the IRS continue to develop proposed regulations that would, if finalized, comprehensively address donor advised funds, this notice is intended to provide interim guidance on these specific issues and to solicit additional comments in anticipation of the issuance of further guidance.

SECTION 3. CERTAIN DISTRIBUTIONS FROM A DAF PROVIDING A MORE THAN INCIDENTAL BENEFIT TO A DONOR, DONOR ADVISOR, OR RELATED PERSON

Several commenters requested guidance on whether a distribution from a DAF to an organization described in § 501(c)(3) (a "charity") that enables a donor, donor advisor, or related person under § 4958(f)(7) (collectively referred to in this notice as a "Donor/Advisor") to attend or participate in an event results in the Donor/Advisor receiving a more than incidental benefit under § 4967.

Several commenters suggested that a distribution from a DAF should not be considered as conferring a more than incidental benefit as long as the amount of the distribution from the DAF does not exceed the portion of the ticket cost that would be deductible under § 170 if paid by the Donor/Advisor directly and the Donor/Advisor separately pays for the nondeductible portion. For example, if a charity sells tickets to a charity-sponsored event for $1,000 per ticket and notifies purchasers that the fair market value of each ticket is $100, then (assuming that the requirements of § 170 are satisfied), a person who purchases a ticket for $1,000 may deduct up to $900 of the payment as a charitable contribution. These commenters suggested that a Donor/Advisor with respect to a DAF does not receive a more than incidental benefit if the Donor/Advisor pays the $100 ticket value and the sponsoring organization, on the advice of a Donor/Advisor, distributes $900 from the DAF to the charity to pay the rest of the cost of the ticket, because the Donor/Advisor's position is the same as if the Donor/Advisor had paid the full cost of the ticket ($1,000) and claimed a $900 charitable contribution deduction.

One commenter offered the contrary view that an arrangement under which a Donor/Advisor pays only the nondeductible portion of the cost of a ticket to a charity event and advises a DAF distribution to pay the deductible portion of the cost results in a more than incidental benefit, because but for the DAF distribution the Donor/Advisor would not have received the benefits that the ticket provides. Under this view, the $900 distribution from the DAF in the example relieves the Donor/Advisor from a financial obligation that the Donor/Advisor would otherwise incur in order to receive the same benefits.

The Treasury Department and the IRS currently agree that the relief of the Donor/Advisor's obligation to pay the full price of a ticket to a charity-sponsored event can be considered a direct benefit to the Donor/Advisor that is more than incidental. Therefore, proposed regulations under § 4967 would, if finalized, provide that a distribution from a DAF pursuant to the advice of a Donor/Advisor that subsidizes the Donor/Advisor's attendance or participation in a charity-sponsored event confers on the Donor/Advisor a more than incidental benefit under § 4967. The Treasury Department and the IRS do not currently agree that, for purposes of § 4967, a distribution made by a sponsoring organization from a DAF to a charity upon advice of a Donor/Advisor should be analyzed the same as a hypothetical, direct contribution by the Donor/Advisor to the charity. A Donor/Advisor who wishes to receive goods or services (such as tickets to an event) offered by a charity in exchange for a contribution of a specified amount can make the contribution directly, without the involvement of a DAF.

The Treasury Department and the IRS recognize that a similar issue arises if a sponsoring organization makes a distribution from a DAF to a charity to pay, on behalf of a Donor/Advisor, the deductible portion of a membership fee charged by the charity, and the Donor/Advisor separately pays the nondeductible portion of the membership fee. Therefore, the Treasury Department and the IRS anticipate that the same analysis would apply to a case where the Donor/Advisor receives these types of membership benefits, so that the sponsoring organization cannot pay the deductible portion of the membership fee without conferring more than an incidental benefit on the Donor/Advisor.

The Treasury Department and the IRS recognize that a distribution that results in a more than incidental benefit under § 4967 may also result in an excess benefit under § 4958. The Treasury Department and the IRS anticipate that any proposed regulations would address the application of excise taxes in the case of a distribution that is potentially subject to tax under both §§ 4958 and 4967. *See* § 4967(b).

SECTION 4. CERTAIN DISTRIBUTIONS FROM A DAF PERMITTED WITHOUT REGARD TO A CHARITABLE PLEDGE MADE BY A DONOR, DONOR ADVISOR, OR RELATED PERSON

Commenters have expressed uncertainty about whether a Donor/Advisor may advise a distribution from a DAF to satisfy a Donor/Advisor's pledge to make a contribution to a charity. Commenters noted that under § 4941, a private foundation's grant or other payment in fulfillment of the legal obligation of a disqualified person ordinarily constitutes a prohibited act of self-dealing. *See* § 53.4941(d)–2(f)(1) of the Excise Tax Regulations.

Most commenters favored allowing distributions from DAFs to fulfill a Donor/Advisor's charitable pledge. A few commenters expressed concern that requiring a sponsoring organization to determine, before making a DAF distribution, whether a Donor/Advisor made a legally binding pledge may unduly complicate charitable giving. In particular, these commenters noted the difficulty inherent in determining whether a commitment identified as a "pledge" is legally enforceable under state law or merely an indication of charitable intent. One commenter stated that whether a given pledge is legally enforceable under state law often turns on factual details that can be difficult for the sponsoring organization to ascertain. A few commenters noted that determining whether a pledge is legally enforceable is impractical and also places an undue administrative burden on the IRS. These commenters also suggested that distributions from DAFs to charitable organizations should be encouraged and that allowing satisfaction of Donor/Advisors' charitable pledges facilitates the giving process.

The Treasury Department and the IRS currently agree with those commenters who suggested that it is difficult for sponsoring organizations to differentiate between a legally enforceable pledge by an individual to a third-party charity and a mere expression of charitable intent. The Treasury Department and the IRS are of the view that, in the context of DAFs, the determination of whether an individual's charitable pledge is legally binding is best left to the distributee charity, which has knowledge of the facts surrounding the pledge. Accordingly, to facilitate distributions from DAFs to charities, the Treasury Department and the IRS are considering proposed regulations under § 4967 that would, if finalized, provide that distributions from a DAF to a charity will not be considered to result in a more than incidental benefit to a Donor/Advisor under § 4967 merely because the Donor/Advisor has made a charitable pledge to the same charity (regardless of whether the charity treats the distribution as satisfying the pledge), provided that the sponsoring organization makes no reference to the existence of any individual's pledge when making the DAF distribution. Specifically, it is anticipated that under this approach a distribution from a DAF to a charity to which a Donor/Advisor has made a charitable pledge (whether or not enforceable under local law) will not be considered to result in a more than incidental benefit to the Donor/Advisor if the following requirements are satisfied:

(1) the sponsoring organization makes no reference to the existence of a charitable pledge when making the DAF distribution;
(2) no Donor/Advisor receives, directly or indirectly, any other benefit that is more than incidental (as discussed in this notice and as further defined in future proposed regulations) on account of the DAF distribution; and
(3) a Donor/Advisor does not attempt to claim a charitable contribution deduction under § 170(a) with respect to the DAF distribution, even if the distributee charity erroneously sends the Donor/Advisor a written acknowledgment in accordance with § 170(f)(8) with respect to the DAF distribution.

Because the relationship between a private foundation and its disqualified persons typically is much closer than the relationship between a DAF sponsoring organization and its Donor/Advisors, this special rule regarding certain charitable pledges would apply for purposes of § 4967 only. The principles discussed in this section 4 would not be intended to affect the tax treatment of any item under any provision of the Code other than § 4967.[1]

For example, assume that charity Z, an organization described in §§ 501(c)(3) and 170(b)(1)(A)(vi), holds an annual fundraising drive, and in response to the annual fundraising solicitation, individual B promises to contribute $1,000x to Z. B has advisory privileges with respect to a DAF and advises that the sponsoring organization distribute $1,000x from the DAF to Z. The sponsoring organization makes the advised distribution. Assume further that in its transmittal letter to Z, the sponsoring organization identifies B as the individual who advised the distribution, but makes no reference to a charitable pledge by B or any other person. Z chooses to treat the sponsoring organization's distribution as satisfying B's pledge. Z also publicly recognizes B for B's role in facilitating the distribution from the sponsoring organization, but Z provides no other benefit to B. B does not attempt to claim a § 170 deduction with respect to the distribution. Under these facts, the Treasury Department and the IRS are currently of the view that the DAF distribution does not result in a more than incidental benefit to B under § 4967 merely because Z treats the distribution as satisfying B's pledge.

SECTION 5. PREVENTING ATTEMPTS TO USE A DAF TO AVOID "PUBLIC SUPPORT" LIMITATIONS

Publicly supported organizations under § 170(b)(1)(A)(vi) normally receive a substantial part of their support from governmental units and from direct or indirect contributions from the public. In determining whether an organization qualifies as "publicly supported" during any period, the organization generally may treat contributions (including grants) from a person as support from the general public (public support) only to the extent that such person's total contributions to the organization during the period do not exceed 2 percent of the organization's total support during the period (the 2-percent public support limitation). For this purpose, all contributions made by an individual, trust, or corporation and by any person or persons standing in a relationship to the individual, trust, or corporation that is described in § 4946(a)(1)(C) through (G) and the related regulations are treated as made by one person. *See* § 1.170A–9(f)(6)(i) of the Income Tax Regulations. The 2-percent public support limitation does not apply to contributions received by a donee organization from a § 170(b)(1)(A)(vi) organization, except to the extent that the contributions represent amounts earmarked by a donor to the § 170(b)(1)(A)(vi) organization as being

[1] *See*, *e.g.*, Revenue Ruling 81–110, 1981–1 C.B. 479 (January 1, 1981) (a payment by a third party to a charitable organization that explicitly is made to pay the legally enforceable pledge of a donor is treated as a gift from the third party to the donor and then a charitable contribution from the donor to the organization); Treas. Reg. § 53.4941(d)–2(f)(1).

for, or for the benefit of, the donee organization. *See* § 1.170A–9(f)(6)(v).

Similarly, publicly supported organizations under § 509(a)(2) cannot treat contributions from a substantial contributor as public support, but contributions from an organization described in § 170(b)(1)(A) (other than clauses (vii) and (viii)) count as public support except to the extent that the contributions received by a donee organization represent amounts earmarked by a donor to the § 170(b)(1)(A) organization as being for, or for the benefit of, a particular recipient. *See* § 1.509(a)–3(j).

Because of the contributions they receive from the general public, DAF sponsoring organizations typically qualify as § 170(b)(1)(A)(vi) organizations whose distributions from DAFs would ordinarily be counted as public support without limitation to the distributee charity. The Treasury Department and the IRS are aware that some donors and distributee charities seek to use DAF sponsoring organizations as intermediaries. Rather than making contributions, which would be subject to the 2-percent public support limitation, directly to charities, these donors make contributions to DAFs maintained by sponsoring organizations and then advise the sponsoring organizations to make distributions from the DAFs to the distributee charities. In light of the potential for abuse, the Treasury Department and the IRS are considering treating, solely for purposes of determining whether the distributee charity qualifies as publicly supported, a distribution from a DAF as an indirect contribution from the donor (or donors) that funded the DAF rather than as a contribution from the sponsoring organization. Such treatment would better reflect the degree to which the distributee charity receives broad support from a representative number of persons.

Public support is defined in the regulations under §§ 1.170A–9(f) and 1.509(a)–3. The Treasury Department and the IRS are considering proposing changes to these regulations to prevent the use of DAFs to circumvent the private foundation rules and excise taxes imposed by the Code by advising distributions from a DAF to a charity. It is currently anticipated that any proposed changes to these regulations would provide that a donee organization, for purposes of determining its amount of public support, must treat:

(1) a sponsoring organization's distribution from a DAF as coming from the donor (or donors) that funded the DAF rather than from the sponsoring organization;
(2) all anonymous contributions received (including a DAF distribution for which the sponsoring organization fails to identify the donor that funded the DAF) as being made by one person; and
(3) distributions from a sponsoring organization as public support without limitation only if the sponsoring organization specifies that the distribution is not from a DAF or states that no donor or donor advisor advised the distribution.

The Treasury Department and the IRS recognize that a donee organization may need to obtain additional information from the sponsoring organization in order to determine its amount of public support. However, the Treasury Department and the IRS note that this additional information would only be needed if the donee organization intends to treat a distribution from a sponsoring organization as public support.

SECTION 6. REQUEST FOR PUBLIC COMMENTS

The Treasury Department and the IRS request comments regarding the issues addressed in this notice and suggestions for future guidance with respect to DAFs. In addition, the Treasury Department and the IRS request comments with respect to the following:

(1) How private foundations use DAFs in support of their purposes.
(2) Whether, consistent with § 4942 and its purposes, a transfer of funds by a private foundation to a DAF should be treated as a "qualifying distribution" only if the DAF sponsoring organization agrees to distribute the funds for § 170(c)(2)(B) purposes (or to transfer the funds to its general fund) within a certain timeframe.
(3) Any additional considerations relating to DAFs with multiple unrelated donors under the proposed changes described in section 5 of this notice.
(4) Methods to streamline any required recordkeeping under the proposed changes described in section 5 of this notice.

Written comments may be submitted by March 5, 2018 to Internal Revenue Service, CC:PA:LPD:PR (Notice 2017–73), Room 5203, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044, or electronically to Notice.Comments@irscounsel.treas.gov (please include "Notice 2017–73" in the subject line). Alternatively, comments may be hand delivered between the hours of 8:00 a.m. and 4:00 p.m. Monday to Friday to CC:PA:LPD:PR (Notice 2017–73), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue NW, Washington, D.C.. Comments will be available for public inspection and copying.

SECTION 7. RELIANCE ON NOTICE

Taxpayers may rely on the rules described in section 4 until additional guidance is issued.

SECTION 8. DRAFTING INFORMATION

The principal authors of this notice are Amber L. MacKenzie and Ward L. Thomas of the Office of Associate Chief Counsel (TEGE). For further information regarding this notice, contact Ms. MacKenzie at (202) 317-5800 or Mr. Thomas at (202) 317-6173 (not toll-free numbers).

Section 5000A Guidance for Individuals with No Available Marketplace Bronze-Level Plan

Notice 2017–74

PURPOSE

This notice provides guidance on computing the affordability exemption under § 5000A(e)(1) of the Internal Revenue Code (Code) and § 1.5000A–3(e) of the Income Tax Regulations (Regulations) for taxpayers with a family member who (i) is not eligible for coverage under an eligible employer-sponsored plan, and (ii) resides in an area in which the Health Insurance Marketplace (Marketplace) serving the area does not offer a bronze-level qualified health plan.

BACKGROUND

For each month beginning after December 31, 2013, § 5000A of the Code requires individuals to do one of the following: (i) maintain minimum essential coverage for themselves and any family members who are not exempt under § 5000A and § 1.5000A–3 of the Regulations, (ii) qualify for a coverage exemption, or (iii) include an individual shared responsibility payment with their Federal income tax return for the taxable year.

Section 5000A(e)(1) of the Code provides that an individual qualifies for an exemption for a month for which the individual lacks access to affordable minimum essential coverage. An individual lacks access to affordable coverage if the individual's required contribution (determined on an annual basis) for minimum essential coverage exceeds a percentage (8.16 percent for 2017) of the individual's household income for the taxable year.

For individuals who are ineligible to purchase coverage under an eligible employer-sponsored plan, the required contribution is the annual premium for the applicable plan, reduced by the maximum amount of any credit allowable under § 36B of the Code for the taxable year, determined as if the individual were covered for the entire taxable year by a qualified health plan offered through the Marketplace serving the rating area where the individual resides. In general, an applicable plan means the lowest cost bronze plan available through the Marketplace serving the rating area in which the individual resides that would cover all nonexempt members of the individual's family on one policy. However, if the Marketplace serving the rating area where the individual resides does not offer a single bronze plan covering all nonexempt members of the individual's family, the premium for the applicable plan is the sum of the premiums for the lowest cost bronze plans that are offered through the Marketplaces serving the rating areas where one or more of the family members reside that would cover, in the aggregate, all the nonexempt members of the family. A nonexempt family member is an individual in the family who is not otherwise exempt under § 1.5000A–3 of the Regulations and is ineligible for coverage under an eligible employer-sponsored plan under § 1.5000A–3(e)(3)(i).

GUIDANCE

Market instability has resulted in limited offerings of plans on the Marketplaces in some regions, and, as a result, there are some individuals who live in rating areas where no bronze plan was offered for 2017. Thus, affected taxpayers would not be able to make a determination as to whether an individual not eligible for employer-sponsored coverage who lives in a rating area without a bronze plan is eligible for the affordability exemption.

Individuals who are not eligible for coverage under an eligible employer-sponsored plan and who lack access to affordable coverage should not be denied the use of the affordability exemption under § 5000A(e)(1) of the Code and § 1.5000A–3(e) of the Regulations merely because they reside in an area served by a Marketplace that does not offer a bronze-level plan. Consequently, for purposes of the affordability exemption under § 5000A(e)(1) and § 1.5000A–3(e), if an individual resides in a rating area served by a Marketplace that does not offer a bronze plan, the individual generally should use as his or her applicable plan the lowest cost metal-level plan available in the Marketplace serving the rating area in which the individual resides that would cover all nonexempt members of the individual's family. However, if the Marketplace serving the rating area where an affected taxpayer resides does not offer a single bronze plan (or, if no bronze plan is available through the Marketplace, any lowest cost metal-level plan) that would cover all nonexempt members of the affected taxpayer's family, the affected taxpayer should determine the applicable plan by adding the premiums for the lowest cost bronze plans, or the lowest cost metal-level plans if a bronze plan is not offered, that would cover in the aggregate all of the nonexempt members of the affected taxpayer's family.

Example 1. Individual *K* resides in an area served by a Marketplace that does not offer a bronze plan but does offer several silver plans. *K* is not eligible for employer-sponsored coverage. To determine if he qualifies for the affordability exemption under § 5000A(e)(1) of the Code and § 1.5000A–3(e) of the Regulations, *K* should use as his applicable plan the lowest cost silver plan available in the Marketplace that would cover *K*.

Example 2. Individual *J* has three dependents, *A*, *B*, and *C*. None of the four family members is eligible for employer-sponsored coverage. *A* and *B* reside with *J* in an area served by a Marketplace that offers bronze plans. *C* resides with *J*'s former spouse in an area served by a Marketplace that does not offer a bronze plan but does offer a silver plan. The Marketplace serving the area where *J* resides offers bronze plans that cover *J* and her three dependents. Thus, *J* uses the lowest cost bronze plan offered by the Marketplace serving the area where *J* resides as her applicable plan to determine if *J* qualifies for the affordability exemption under § 5000A(e)(1) of the Code and § 1.5000A–3(e) of the Regulations.

Example 3. Same facts as *Example 2* except, although the Marketplace where *J* resides offers bronze plans covering *J*, *A*, and *B* under one policy, none of these plans also cover *C*. Because no bronze plan in the Marketplace serving the area where *J* resides covers all nonexempt members of *J*'s family, *J* must aggregate the cost of more than one plan to determine the premium for *J*'s applicable plan. *J* adds the cost of the lowest cost bronze plan covering *J*, *A*, and *B* and, because the Marketplace where *C* resides offers no bronze plans, the cost of the lowest cost silver plan offered by the Marketplace serving the area where *C* resides, to determine if *J* qualifies for the affordability exemption under § 5000A(e)(1) of the Code and § 1.5000A–3(e) of the Regulations.

EFFECTIVE DATE

This notice applies for taxable years ending after December 31, 2016.

CONTACT INFORMATION

The further information regarding this notice, contact Steve Toomey at (202) 317-4718 or Shareen Pflanz at (202) 317-7006 (not a toll-free call).

Part IV. Items of General Interest

26 CFR 1,754–1: Time and manner of making election to adjust basis of partnership property

Centralized Partnership Audit Regime: International Tax Rules

REG–119337–17

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations implementing section 1101 of the Bipartisan Budget Act of 2015 (BBA), which was enacted into law on November 2, 2015. Section 1101 of the BBA repeals the current rules governing partnership audits and replaces them with a new centralized partnership audit regime that, in general, assesses and collects tax at the partnership level. These proposed regulations provide rules addressing how certain international rules operate in the context of the centralized partnership audit regime, including rules relating to the withholding of tax on foreign persons, withholding of tax to enforce reporting on certain foreign accounts, and the treatment of creditable foreign tax expenditures of a partnership.

DATES: Written or electronic comments and requests for a public hearing must be received by January 29, 2018.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG–119337–17), room 5207, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8:00 a.m. and 4:00 p.m. to CC:PA:LPD:PR (REG–119337–17), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC 20224, or sent electronically via the Federal eRulemaking Portal at *www.regulations.gov* (IRS REG–119337–17).

FOR FURTHER INFORMATION CONTACT: Concerning the proposed regulations relating to creditable foreign tax expenditures, Larry R. Pounders, Jr., of the Office of Associate Chief Counsel (International), (202) 317-5465; concerning the proposed regulations relating to chapters 3 and 4 of subtitle A of the Internal Revenue Code (other than section 1446), Subin Seth of the Office of Associate Chief Counsel (International), (202) 317-5003; concerning the proposed regulations relating to section 1446, Ronald M. Gootzeit of the Office of Associate Chief Counsel (International), (202) 317-4953; concerning the submission of comments or a request for a public hearing, Regina Johnson, (202) 317-6901 (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

This document contains proposed amendments to 26 CFR part 301. These proposed regulations supplement the regulations proposed in the notice of proposed rulemaking (REG–136118–15) published in the **Federal Register** on June 14, 2017 (82 FR 27334) (the "June 14 NPRM") and amend the Procedure and Administration Regulations (26 CFR Part 301) under Subpart – Tax Treatment of Partnership Items to implement the centralized partnership audit regime.

1. *The New Centralized Partnership Audit Regime*

For information relating to (1) the new centralized partnership audit regime enacted by the BBA, Pub. L. 114–74 (129 Stat. 58 (2015)) (as amended by the Protecting Americans from Tax Hikes Act of 2015, Pub. L. 114–113 (129 Stat. 2242 (2015))); (2) Notice 2016–23 (2016–13 I.R.B. 490 (March 28, 2016)), which requested comments on the new partnership audit regime enacted by the BBA; and (3) the temporary regulations (TD 9780, 81 FR 51795) and a notice of proposed rulemaking (REG–105005–16, 81 FR 51835), which provided the time, form, and manner for a partnership to make an election into the centralized partnership audit regime for a partnership taxable year beginning before the general effective date of the regime, see the Background section of the June 14 NPRM.

2. *Proposed Regulations Implementing the Centralized Partnership Audit Regime*

The June 14 NPRM addresses various issues concerning the scope and process of the new centralized partnership audit regime. Unless otherwise noted, all references to proposed regulations in this Background refer to regulations proposed by the June 14 NPRM.

With respect to the scope of the centralized partnership audit regime, proposed § 301.6221(a)–1(a) provides that any adjustment to items of income, gain, loss, deduction, or credit of a partnership and any partner's distributive share is determined at the partnership level. Proposed § 301.6221(a)–1(b)(1) broadly defines the phrase "items of income, gain, loss, deduction, or credit" to include all items and information required to be shown, or reflected, on a partnership return or maintained in the partnership's books and records. For example, proposed § 301.6221(a)–1(b)(1)(i)(A) provides that the character, timing, source, and amount of the partnership's income, gain, loss, deductions, and credits, including whether an item is deductible, tax-exempt, or a tax-preference item, must be determined under the centralized partnership audit regime. Similarly, proposed § 301.6221(a)–1(b)(1)(i)(F) provides that an adjustment to the separate category, timing, and amount of the partnership's creditable foreign tax expenditures described in § 1.704–1(b)(4)(viii)(*b*), is included within the centralized partnership audit regime. Finally, proposed § 301.6221(a)–1(d) provides that the IRS is not precluded from making an adjustment to an item that must be determined under the centralized partnership audit regime for purposes of determining taxes imposed by provisions of the Internal Revenue Code (the Code) outside of chapter 1 of subtitle A (chapter 1).

Proposed § 301.6222–1 generally requires a partner to treat items consistently with the partnership's return; however, a partner may take an inconsistent position on an original income tax return if the partner provides notice of the inconsistent position in accordance with proposed § 301.6222–1(c). If a partner treats an item inconsistently with the partnership return position without providing notice, the item may be adjusted to conform to the partnership return, and any underpayment resulting from that adjustment may be assessed and collected as if it were on account of a mathematical or clerical error appearing on the partner's return.

Proposed § 301.6223–1 provides rules relating to the designation of the partnership representative. Proposed § 301.6223–2 provides rules relating to the authority of the partnership representative and the effect of actions taken by the partnership through the partnership representative. Partners are bound by the actions of the partnership representative and may not take a position that is inconsistent with the actions of the partnership (except with notice on the partner's return, as provided under section 6222 and proposed § 301.6222–1).

Proposed §§ 301.6225–1, 301.6225–2, and 301.6225–3 provide rules relating to partnership adjustments, including the computation of the imputed underpayment, modification of the imputed underpayment, and the treatment of adjustments that do not result in an imputed underpayment. Under proposed § 301.6225–1(d), adjustments are separated into four groupings: the reallocation grouping, the credit grouping, the creditable expenditure grouping, and the residual grouping. The June 14 NPRM reserved § 301.6225–1(d)(2)(iv) for rules addressing the treatment of items in the creditable expenditure grouping. Each grouping is further divided into subgroupings of adjustments to account for preferences, restrictions, limitations, and conventions. For example, an adjustment in the residual grouping could be further divided into subgroupings by character, source, category, and other restrictions under the Code.

Under proposed § 301.6225–1, the net positive adjustments in all subgroupings of the residual and reallocation groupings are summed. The sum is the total netted partnership adjustment, which is multiplied by the highest applicable tax rate in effect for the reviewed year (as defined in proposed § 301.6241–1(a)(8)). The resulting figure is then increased, or decreased, by the net adjustments in the credit grouping to produce the imputed underpayment amount. A net non-positive adjustment in the reallocation grouping or the residual grouping (or any subgrouping thereof) is treated as an adjustment that does not result in an imputed underpayment and is taken into account in the adjustment year (as defined under proposed § 301.6241–1(a)(1)) under proposed § 301.6225–3.

The partnership may request a modification, under proposed § 301.6225–2, to adjust the imputed underpayment calculated under proposed § 301.6225–1. The modification rules set out in proposed § 301.6225–2 generally allow: (1) modifications that result in the exclusion of certain adjustments, or portions thereof, from the calculation of the imputed underpayment (such as a modification under proposed § 301.6225–2(d)(2) (amended returns by partners), (d)(3) (tax-exempt partners), (d)(5) (certain passive losses of publicly traded partnerships), (d)(7) (partnerships with partners that are qualified investment entities described in section 860), (d)(8) (partner closing agreements), and, if applicable, (d)(9) (other modifications)); (2) rate modifications, which affect only the taxable rate applied to the total netted partnership adjustment (described in proposed § 301.6225–2(d)(4)); and (3) modifications to the number and composition of imputed underpayments (described in proposed § 301.6225–2(d)(6)).

Proposed § 301.6225–3 sets forth rules for the treatment of adjustments that do not result in an imputed underpayment. In general, pursuant to proposed § 301.6225–3(b)(1) the partnership takes the adjustment into account in the adjustment year as a reduction in non-separately stated income or as an increase in non-separately stated loss depending on whether the adjustment is to an item of income or loss. Proposed § 301.6225–3(b)(2) provides that if an adjustment is to an item that is required to be separately stated under section 702, the adjustment shall be taken into account by the partnership on its adjustment year return as an adjustment to such separately stated item. Proposed § 301.6225–3(b)(3) provides that an adjustment to a credit is taken into account as a separately stated item.

Proposed §§ 301.6226–1, 301.6226–2, and 301.6226–3 provide rules relating to the election under section 6226 by a partnership to have its partners take into account the partnership adjustments in lieu of paying the imputed underpayment determined under section 6225, the statements the partnership must send to its partners (including the computation of the partners' safe harbor amounts), and the computation and payment of the partners' liability. If a partnership makes the election under section 6226 to "push out" adjustments to its reviewed year partners, the partnership is not liable for the imputed underpayment. Instead, under proposed § 301.6226–3, reviewed year partners must either pay any additional chapter 1 tax that results from taking the adjustments reflected on the statements into account in the reviewed year and from changes to the tax attributes in the intervening years, or pay a safe harbor amount, which is calculated based on rules similar to those used to calculate the imputed underpayment. In addition to being liable for the additional tax or safe harbor amount, the partner must also pay its allocable share of any penalties, additions to tax, or additional amounts reflected on the statement from the partnership, and any interest determined in accordance with proposed § 301.6226–3(d).

Proposed § 301.6227–1 provides rules for a partnership to file an administrative adjustment request (AAR). A partnership subject to the centralized partnership audit regime may file a request for an administrative adjustment to one or more items of income, gain, loss, deduction, or credit of the partnership for any partnership taxable year. Filing an AAR is the only mechanism provided by the centralized partnership audit regime to request a change to an item reported on a partnership return that has already been filed with the IRS. Proposed § 301.6227–1(a) provides that only a partnership representative acting on behalf of the partnership may file an AAR; a partner may not make a request for an item to be adjusted administratively, such as by filing an amended return to take a position that is inconsistent with the partnership return. However, this rule does not preclude a partner from taking an inconsistent position on an original income tax return if the partner provides notice of the inconsistent position in accordance with proposed § 301.6222–1(c).

Proposed §§ 301.6227–2 and 301.6227–3 provide rules for how the partnership accounts for adjustments in an AAR and for how partners must account for adjustments in an AAR, respectively. Subject to certain special rules, adjustments in an AAR are generally taken into account in a manner similar to IRS-initiated adjustments. For example, an adjustment requested in an AAR may result in an imputed underpayment calculated in a manner similar to the computation of the imputed underpayment under section 6225, although modification is more restricted in the context of an AAR (see proposed § 301.6227–2(a)(2)). The partnership must pay the imputed underpayment or elect to have it and its partners take the adjustments into account under rules similar to those under section 6226. One significant difference between an IRS-initiated adjustment and an adjustment requested in an AAR is that requested adjustments that do not result in an imputed underpayment are accounted for under rules similar to those under section 6226.

Finally, proposed § 301.6241–1 provides definitions for purposes of the centralized partnership audit regime.

Explanation of Provisions

1. *In General*

These proposed regulations provide guidance on certain international issues related to the centralized partnership audit regime. This Explanation of Provisions proceeds as follows: Part 2 discusses provisions related to chapters 3 and 4 of subtitle A of the Code. Part 3 discusses provisions related to creditable foreign tax expenditures and foreign tax credits. Part 4 discusses issues related to treaties and reductions to the rate of tax on foreign persons under the Code. Part 5 discusses issues related to certain foreign corporations.

Unless otherwise stated, all references to proposed regulations in this Explanation of Provisions are to the new proposed regulations in this Notice of Proposed Rulemaking. Because these regulations are supplementing the regulations published in the June 14 NPRM, the numbering and ordering of some of the provisions do not follow typical conventions. The Department of the Treasury (Treasury Department) and the IRS intend to appropriately integrate these provisions when both these regulations and the proposed regulations in the June 14 NPRM are finalized.

2. *Provisions Related to Chapters 3 and 4 of Subtitle A of the Code*

A. *Background*

Chapter 3 (Withholding of Tax on Nonresident Aliens and Foreign Corporations) of subtitle A of the Code imposes withholding requirements on payments or allocations of income to foreign persons (under sections 1441 through 1446) and provides rules regarding the application of those withholding provisions (under sections 1461 through 1464). Sections 1441 and 1442 require all persons having the control, receipt, custody, disposal, or payment of certain specified items of income of any nonresident alien, foreign partnership, or foreign corporation to withhold tax at a 30-percent rate from such items unless a reduced rate of withholding applies. Amounts subject to withholding under sections 1441 and 1442 include amounts from sources within the United States that constitute fixed or determinable annual or periodical income, which in turn is defined under § 1.1441–2(b)(1)(i) to include all income included in gross income under section 61, subject to certain exceptions. In addition to being required to withhold on a payment made to a foreign person, a domestic (U.S.) partnership is required to withhold under sections 1441 and 1442 on an amount subject to withholding that is includible in the gross income of a partner that is a foreign person. See § 1.1441–5(b)(2)(i). A foreign partnership may also be required to withhold with respect to its foreign partners under sections 1441 and 1442 if it is either a foreign withholding partnership as described in § 1.1441–5(c)(2), or fails to meet the requirements described in § 1.1441–5(c)(3)(v). A partnership satisfies its withholding requirements with respect to its foreign partners by withholding on distributions made to the partner that include amounts subject to withholding, or, to the extent the partnership's withholding liability is not satisfied by withholding on distributions, by withholding on the partner's distributive share. See § 1.1441–5(b)(2)(i).

Section 1446 requires a partnership to pay withholding tax to the extent that the partnership has effectively connected taxable income (ECTI) that is allocable to a foreign partner, at the highest rate applicable to that partner. See § 1.1446–3(a)(2). ECTI generally refers to the partnership's taxable income as computed under section 703, with adjustments as provided in section 1446(c) and § 1.1446–2, and computed with consideration of only those partnership items that are effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States. See § 1.1446–2.

Section 1443 imposes withholding requirements on certain payments or allocations of income made to foreign tax-exempt organizations, including income includible under section 512 for computing unrelated business taxable income (subject to section 1443(a)) and income subject to tax under section 4948 (subject to section 1443(b)). Because the tax under section 4948 is not a chapter 1 tax, and therefore is not implicated by the centralized partnership audit regime, references to chapter 3 in this preamble and these proposed regulations refer to the provisions in chapter 3 of subtitle A of the Code, excluding section 1443(b). See proposed § 301.6225–1(a)(4).

Section 1445 imposes withholding requirements upon the disposition of a U.S. real property interest (as defined in section 897(c)) by a foreign person and certain related distributions. To the extent that a partnership's income from the disposition of a U.S. real property interest is allocable to a foreign partner, the partnership is subject to the requirements under section 1446. See §§ 1.1446–2; 1.1446–3(c)(2).

Chapter 4 (Taxes to Enforce Reporting on Certain Foreign Accounts) of subtitle A of the Code (chapter 4) requires a withholding agent (as defined in § 1.1473–1(d)) to withhold tax at a 30-percent rate on a withholdable payment (as defined in § 1.1473–1(a)) made to a foreign financial institution (FFI) unless the FFI has entered into an agreement described in section 1471(b) to obtain status as a participating FFI, or the FFI is deemed to have satisfied the requirements of section 1471(b). A participating FFI is required to withhold tax with respect to payments made to recalcitrant account holders (as defined in § 1.1471–5(g)(2)) and nonparticipating FFIs (as defined in § 1.1471–1(b)(82)) to the extent required under § 1.1471–4(b). Chapter 4 also generally requires a withholding agent to withhold tax at a 30-percent rate on a withholdable payment made to a nonfinancial foreign entity (NFFE) unless the NFFE has provided information to the withholding agent with respect to the NFFE's substantial U.S. owners or has certified that it has no such owners. See section 1472.

Under sections 1461 and 1474, any person required to withhold tax under chapters 3 and 4 is made liable for such tax, and may also be liable for any penalties, additions to tax, additional amounts, and interest that may apply for failure to timely pay the tax required to be withheld. To the extent that the tax required to be withheld is paid by the beneficial owner of the income (as defined in §§ 1.1441–1(c)(6) and 1.1471–1(b)(8)) or by the withholding agent (as defined in §§ 1.1441–7(a)(1) and 1.1473–1(d)), the tax will not be collected a second time from the other; however, the person that did not pay the tax is not relieved from liability for any penalties, additions to tax, or interest that may apply. See §§ 1.1446–3(e); 1.1463–1; 1.1474–4.

Under §§ 1.1462–1 and 1.1474–3, a beneficial owner is required to include in gross income the entire amount of income from which tax is required to be withheld, but the amount of any tax actually withheld (including any amount withheld on a partner's distributive share) is allowed as a credit under section 33 against the beneficial owner's income tax liability. Similarly, under § 1.1446–3(d)(2)(i), the amount of section 1446 tax paid by the partnership that is allocable to a foreign partner is allowed as a credit under section 33 against the partner's income tax liability. In general, because the beneficial owner will have gross income during the taxable year when the withholding occurs, the beneficial owner will be required to file a U.S. income tax return for that year. See section 6012. However, a beneficial owner's requirement to file a return is waived when it is not engaged in a U.S. trade or business and its tax liability has been fully satisfied through withholding at source. See §§ 1.6012–1(b)(2)(i); 1.6012–2(g)(2)(i).

B. *Coordination of the Centralized Partnership Audit Regime with Chapters 3 and 4*

Proposed § 301.6221(a)–1(a) (June 14 NPRM) provides that all adjustments to items of income, gain, loss, deduction, or credit of a partnership, and any partner's distributive share of those adjusted items are determined, and any tax attributable thereto is assessed and collected, at the partnership level under the centralized partnership audit regime. Proposed § 301.6221(a)–1(b)(1)(i) (June 14 NPRM) broadly defines the phrase "items of income, gain, loss, deduction, or credit" to include all items and information required to be shown, or reflected, on a partnership return or maintained in the partnership's books and records. Proposed § 301.6221(a)–1(b)(3) (June 14 NPRM) defines tax for purposes of the centralized partnership audit regime to be the tax imposed by chapter 1. Proposed § 301.6221(a)–1(d) (June 14 NPRM), however, provides that nothing in subchapter C of chapter 63 and the regulations thereunder (the centralized partnership audit regime) precludes the IRS from making any adjustment to any of these items for purposes of determining taxes imposed by other chapters of the Code. The preamble to the June 14 NPRM explains that those taxes that are not covered by the centralized partnership audit regime include taxes imposed by chapters 3 and 4. Accordingly, the IRS will continue to examine a partnership's compliance with its obligations under chapters 3 and 4 in a proceeding outside of the centralized partnership audit regime.

As discussed in Part 2.A of this Explanation of Provisions, a partnership that receives a payment or has income allocable to a partner that is a foreign person, an FFI, or an NFFE may have withholding requirements under chapters 3 and 4. These requirements are imposed on the partnership to ensure that any chapter 1 tax owed by its partners with respect to the item of income is collected, or in the case of chapter 4, to ensure compliance with certain information reporting obligations regarding U.S. persons that hold foreign financial accounts or interests in passive foreign entities. The provisions of chapters 3 and 4, therefore, create a collection mechanism for tax that would otherwise be due from the beneficial owner of the income under chapter 1. This could potentially result in taxes being collected twice and, for this reason, and as discussed in Part 2.A of this Explanation of Provisions, chapters 3 and 4 provide that the tax is collected only once—either from the withholding agent or from the beneficial owner of the income. Similarly, because an imputed underpayment may now be assessed and collected at the partnership level under the centralized partnership audit regime, and is designed to closely reflect the chapter 1 tax that the partners would have reported and paid had the partnership and partners reported correctly, coordination rules are necessary to clarify how the centralized partnership audit regime interacts with a partnership's obligations under chapters 3 and 4, and to ensure that tax is collected only once with respect to the same item of income.

To demonstrate the rules regarding the scope of the centralized partnership audit regime and the examination of the partnership's obligations under chapters 3 and 4 outside of the centralized partnership audit regime, these proposed regulations provide examples that illustrate what occurs when (1) a partnership fails to withhold at the correct rate on an item of income allocable to a foreign partner, and (2) a partnership fails to report an item of income and, therefore, also fails to withhold on the additional income allocable to a foreign partner. Example 1 under proposed § 301.6221(a)–1(f) clarifies that a partnership's withholding tax liability for failure to withhold at the correct rate on an item of income that the partnership received and properly reported on its partnership return may be adjusted by the IRS under the procedures applicable to an examination under chapter 3 or chapter 4, and that the procedures under the centralized partnership audit regime do not apply to the adjustment. The same result would occur on a partnership's failure to withhold at the correct rate under section 1441 on a payment made to an unrelated foreign person, or upon a partnership's failure to withhold as a transferee of a U.S. real property interest at the correct rate under section 1445. Example 2 under proposed § 301.6221(a)–1(f) presents a case in which the partnership has failed to report on its partnership return an item of income that it received for which it would have had a withholding obligation under chapters 3 and 4, and the failure to report the item is discovered in an examination of the partnership's compliance with its obligations under chapters 3 and 4. Because an adjustment to increase the partnership's income would be an adjustment to an item of income of the partnership, it would be subject to the centralized partnership audit regime. See proposed § 301.6221(a)–1(a) (June 14 NPRM). However, under proposed § 301.6221(a)–1(d) (June 14 NPRM), the IRS is not precluded from determining an adjustment to the same item under chapters 3 and 4 outside of the centralized partnership audit regime.

To address situations in which an item subject to the centralized partnership audit regime is also subject to the rules under chapters 3 and 4, these proposed regulations provide rules that coordinate the interaction between the separate regimes, and ensure that tax is collected only once with respect to the same adjustment. When an examination of the partnership's obligations under chapters 3 and 4 is conducted before the initiation of an administrative proceeding under the centralized partnership audit regime, proposed § 301.6225–1(c)(5) provides that to the extent that the IRS has collected tax under chapter 3 or chapter 4 attributable to an adjustment to an amount subject to withholding (as defined in § 301.6226–2(h)(3)(i)), that adjustment (or portion thereof) will be disregarded for purposes of calculating the total netted partnership adjustment (upon which the imputed underpayment amount is determined) under the centralized partnership audit regime. When the IRS has not collected tax under chapter 3 or chapter 4 on an amount subject to withholding, and the partnership is subject to examination under the centralized audit partnership regime, proposed § 301.6225–1(a)(4) provides that if the partnership pays the imputed underpayment pursuant to section 6225, and the total netted partnership adjustment (upon which the imputed underpayment amount is determined) includes an adjustment to an amount subject to withholding under chapter 3 or chapter 4, the partnership is treated as having paid the amount required to be withheld with respect to that adjustment under chapter 3 or chapter 4 for purposes of applying § 1.1463–1 or § 1.1474–4. Therefore, the partnership is considered to have satisfied its withholding tax liability associated with the adjustment. The partnership, however, is not relieved from any interest, penalties, or additions to tax that may otherwise apply under current rules for failure to withhold under chapters 3 and 4. See §§ 1.1461–1(a)(2); 1.1461–3; 1.1474–1(h). Under proposed § 301.6227–2(b)(3), this same rule applies when the partnership pays the imputed underpayment in an AAR pursuant to section 6227.

C. *Requirement to Withhold and Report under Chapters 3 and 4 upon a Section 6226 Election*

Under section 6226, a partnership may elect to "push out" adjustments to its reviewed year partners rather than paying an imputed underpayment determined under section 6225. If a partnership makes a valid election under section 6226 (a section 6226 election), proposed § 301.6226–2 (June 14 NPRM) requires it to furnish a statement to each reviewed year partner that includes information regarding the partner's allocable share of partnership adjustments with respect to the imputed underpayment for which the election is made and the partner's share of any penalties, additions to tax, or additional amounts (a section 6226 statement). The partnership must also calculate and include on each section 6226 statement a safe harbor amount and, for each reviewed year partner that is an individual, an interest safe harbor amount. Under proposed § 301.6226–3 (June 14 NPRM), each reviewed year partner must increase its tax imposed under chapter 1 by its additional reporting year tax for the taxable year that includes the date on which the section 6226 statement is furnished (the reporting year). The additional reporting year tax is either the aggregate of the adjustment amounts (as computed under proposed § 301.6226–3(b) (June 14 NPRM)) or the safe harbor amount. In addition, each reviewed year partner must also pay its share of any penalties, additions to tax, additional amounts, and interest (either as computed at the partner level under proposed § 301.6226–3(d)(1) (June 14 NPRM) or, if applicable, the interest safe harbor amount).

As discussed in the preamble to the June 14 NPRM, it is the view of the Treasury Department and the IRS that, consistent with the purposes of chapters 3 and 4, if adjustments reflected on a section 6226 statement represent additional income allocable to a foreign or domestic partner that was not properly accounted for in the reviewed year, and the partnership makes a section 6226 election to have the partners take the adjustments into account, these allocations of income should be subject to the rules in chapters 3 and 4 to the same extent that these amounts would have been if they had been properly accounted for by the partnership in the reviewed year. Accordingly, these proposed regulations provide rules that apply withholding and reporting requirements under chapters 3 and 4 to a partnership that makes a section 6226 election with respect to a reviewed year partner that would have been subject to withholding in the reviewed year, and rules that apply to the reviewed year partner when taking these adjustments into account. Under proposed § 301.6227–2(b)(4), these same rules apply when a partnership elects to have its reviewed year partners take into account adjustments requested in an AAR.

Proposed § 301.6226–2(h)(3)(i) requires a partnership that makes a section 6226 election to pay the amount of tax required to be withheld under chapters 3 and 4 on any adjustment allocable to a reviewed year partner that would have been subject to withholding in the reviewed year. The partnership must pay the withholding tax (in the manner prescribed by the IRS in forms, instructions, and other guidance) on or before the due date for furnishing the section 6226 statement that reports the adjusted item. Proposed § 301.6226–2(h)(3)(iii) clarifies the reporting requirements of chapters 3 and 4, including a requirement to file an applicable return (Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, or Form 8804, Annual Return for Partnership Withholding Tax (Section 1446)) and any associated information returns (Forms 1042–S, Foreign Person's U.S. Source Income Subject to Withholding, or Forms 8805, Foreign Partner's Information Statement of Section 1446 Withholding Tax). The partnership must file the return and issue information returns for the partnership's taxable year (for withholding reported on Forms 8804 and 8805) or the calendar year (for withholding reported on Forms 1042 and 1042–S) that includes the date on which the partnership furnishes the section 6226 statement.

Proposed § 301.6226–2(h)(3)(ii) allows a partnership that is required to pay withholding tax under proposed § 301.6226–2(h)(3)(i) to reduce the amount of that tax to the extent that the reviewed year partner provides valid documentation to establish that it is entitled to a reduced rate of tax under chapters 3 and 4. For this purpose, these proposed regulations allow the partnership to rely on documentation that the partnership possesses that is valid with respect to the reviewed year (determined without regard to the expiration after the reviewed year of any validity period prescribed in chapters 3 and 4), or new documentation that the partnership obtains from the reviewed year partner if the partner includes a signed affidavit stating that the associated information and representations are accurate with respect to the reviewed year. However, proposed § 301.6226–2(h)(3)(ii) does not allow the partnership to reduce the amount of withholding tax due based on partner-level items as provided in § 1.1446–6. Consideration of these partner-level items raises administrability issues given the partner's activities in the intervening taxable years between the reviewed year and the reporting year. For example, partner-level deductions and losses certified to the partnership for the reviewed year may have been used in a subsequent year to offset the partner's allocable share of partnership ECTI or income effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States from other sources. Accordingly, reductions to the amount of withholding tax a partnership is required to pay under proposed § 301.6226–2(h)(3)(i) are limited to those based on a reduced rate of tax. The procedures under proposed § 301.6226–2(h)(3)(ii) do not constitute a modification as described in section 6225.

Proposed § 301.6226–3(f) requires a reviewed year partner that is subject to withholding under proposed § 301.6226–2(h)(3)(i) to file a return for the reporting year to report its additional reporting year tax and its share of penalties, additions to tax, additional amounts, and interest, notwithstanding any filing exception in § 1.6012–1(b)(2)(i) or § 1.6012–2(g)(2)(i). Therefore, a reviewed year partner whose allocable share of adjustments is subject to withholding under chapters 3 and 4 must file a federal income tax return for the reporting year and pay its allocable share of penalties, additions to tax, additional amounts, and interest, even if the partner's additional reporting year tax has been satisfied by the partnership through withholding at source and the partner would not otherwise be required to file a federal income tax return under an exception in the section 6012 regulations.

In certain circumstances, the reviewed year partner is allowed a credit under section 33 for tax paid by the partnership under proposed § 301.6226–2(h)(3)(i) that the partner may apply against its income tax liability for its reporting year. For purposes of sections 1441 through 1443 and 1471 through 1474, a reviewed year partner is allowed a credit for the amount of tax actually withheld from that partner (including any amounts withheld on the partner's distributive share). To the extent the tax is not withheld, but is instead paid by the partnership (because, for example, the reviewed year partner is no longer a partner in the partnership), the partnership (rather than the partner) is allowed a credit against its withholding tax liability for the amount of tax paid. In that case, the tax will not be collected a second time from the partner, but the partner would remain liable for any applicable penalties, additions to tax, or interest. See §§ 1.1463–1; 1.1464–1; 1.1474–4. For purposes of section 1446, a reviewed year partner is allowed a credit for the tax paid by the partnership with respect to ECTI allocable to the partner. See § 1.1446–3(d)(2). A partner claiming a credit under section 33 must properly report the additional reporting year tax on its return and substantiate the credit with the appropriate information return (Form 1042–S or Form 8805), as well as any other requirements prescribed by the IRS in forms, instructions, and other guidance.

Because § 301.6226–1(c)(1) (June 14 NPRM) requires a partnership to satisfy the provisions of proposed §§ 301.6226–1 and 301.6226–2 (June 14 NPRM) to make a valid section 6226 election, a partnership must pay the tax due under proposed § 301.6226–2(h)(3)(i) and meet the reporting obligations under proposed § 301.6226–2(h)(3)(iii) to satisfy this requirement. However, a partnership that anticipates making a section 6226 election may instead request during the modification process that the IRS determine a specific imputed underpayment (as defined in § 301.6225–1(e)(2)(iii) (June 14 NPRM)) with respect to adjustments allocated to reviewed year partners that would have been subject to withholding in the reviewed year, and a general imputed underpayment (as defined in § 301.6225–1(e)(2)(ii) (June 14 NPRM)) with respect to all other adjustments. If the IRS agrees with the modification request, upon receipt of the notice of final partnership adjustment the partnership could then (1) pay under section 6225 the specific imputed underpayment that includes adjustments subject to withholding, and (2) make a timely section 6226 election with respect to the adjustments that result in the general imputed underpayment. A partnership might make such a request so that its partners subject to withholding under chapters 3 and 4 would not need to file a return as they would under proposed § 301.6226–3(f) when the partnership makes a section 6226 election with respect to those adjustments.

The Treasury Department and the IRS are considering additional ways to alleviate the filing obligation in proposed § 301.6226–3(f) for foreign persons when a partnership pushes out its adjustments and does not make a specific imputed underpayment for adjustments subject to withholding. Specifically, the Treasury Department and the IRS are considering whether to allow a partnership that pays the withholding tax required under proposed § 301.6226–2(h)(3)(i) to elect to pay the share of penalties, additions to tax, additional amounts, and interest attributable to a partner that would have been subject to withholding in the reviewed year. Under this approach, if the partner's additional reporting year tax and the partner's share of penalties, additions to tax, additional amounts, and interest have been satisfied by the partnership, the partner's tax liability would be treated as having been fully satisfied through withholding at source with respect to the adjustments on its section 6226 statement. In that case, the partner may be relieved of any filing obligation that would otherwise arise upon receiving a section 6226 statement if the foreign partner otherwise qualifies for a filing exception under § 1.6012–1(b)(2)(i) or § 1.6012–2(g)(2)(i). Comments are requested regarding this approach and how it should operate.

In the June 14 NPRM, the Treasury Department and the IRS requested comments on how the rules under chapters 3 and 4 should apply when a section 6226 statement includes income allocable to a foreign partner that is an intermediary or flow through entity. The Treasury Department and the IRS continue to study this issue in conjunction with the broader issue of how to treat pass-through partners generally under the section 6226 regime. Specifically, comments are still requested regarding the application of chapters 3 and 4 to section 6226 in the case of partners that are foreign flow through entities, including partners that assume primary withholding responsibility as withholding foreign partnerships or withholding foreign trusts.

3. *Provisions Related to U.S. Foreign Tax Credits*

A. *Background*

Subject to limitations, a taxpayer may elect to claim a credit under section 901 for income, war profits, and excess profits taxes paid or accrued during the taxable year to any foreign country or possession of the United States. This credit is generally referred to as the foreign tax credit (FTC). Under section 902, certain corporations are deemed, for FTC purposes, to have paid the foreign taxes that are paid or accrued by foreign subsidiaries from which they receive a dividend. Under section 960, inclusions under subpart F of part III of subchapter N of chapter 1 of the Code (subpart F) are treated as dividends for purposes of computing the foreign taxes deemed paid under section 902.

A partnership is not eligible to claim an FTC under section 901 (or a deduction for foreign taxes under section 164). See section 703(b)(3). Instead, under sections 702(a)(6), 706(a), and 901(b)(5) each partner takes into account its distributive share of the creditable foreign taxes paid or accrued by the partnership in the partner's tax year with or within which the partnership's tax year ends. See § 1.702–1(a)(6). Under section 702(a)(6), this amount, known as a creditable foreign tax expenditure (CFTE), is accounted for as a separately stated item. Similarly, under section 902(c)(7), a partner is treated as owning a proportional share of stock owned by or for the partnership for purposes of computing a deemed paid credit under section 902. Therefore, while a partnership is not deemed to pay foreign taxes paid by a foreign corporation in which it holds stock, each of its domestic corporate partners, if eligible, independently calculates foreign taxes deemed paid with respect to dividends or subpart F inclusions relating to stock owned by or for the partnership.

The amount of FTC allowed against a taxpayer's U.S. tax in a given year is limited to the amount of pre-credit U.S. tax on the taxpayer's foreign source income. See section 904. This FTC limitation is applied separately to foreign source income in each of the separate categories described in section 904(d)(1) (i.e., the passive category and general category) and additional separate categories described in § 1.904–4(m). The components of the FTC limitation computation are maintained and adjusted at the partner level; several of these attributes must be tracked from year to year and can affect the computation of the partner's FTC and FTC limitation (e.g., FTC carrybacks or carryovers under section 904(c) and overall foreign loss accounts or overall domestic loss accounts under section 904(f) and (g)). Other specific rules may further limit a taxpayer's utilization of FTCs (e.g., sections 901, 907, 908, and 909). If a taxpayer pays or accrues creditable foreign tax in excess of the limitation, the taxpayer may not use the excess credits in that year. However, section 904(c) provides that excess FTCs are first carried back one year and then forward for up to 10 years and are utilized in the first year in which the taxpayer has sufficient excess limitation to use the FTCs.

Given the nature and purpose of the FTC to mitigate the effects of double taxation and the importance of preventing the inappropriate use of the credit, special procedural rules often apply. For example, because the amount of foreign tax may change as the result of a foreign audit, refund claim, or other dispute resolution process involving a foreign tax authority, taxpayers are required to notify the IRS if a foreign tax for which credit is claimed is refunded (in whole or in part), if an accrued tax remains unpaid after two years, or if the amount of taxes paid differs from the amount accrued. See section 905(c). Any underpayment resulting from a change to the amount of creditable foreign tax paid or accrued is collectable upon notice and demand, without regard to the generally applicable statute of limitations. See section 6501(c)(5). Moreover, taxpayers have a special ten-year period of limitations under section 6511(d)(3) for claiming refunds of overpayments attributable to the application of an FTC. The IRS also permits a taxpayer to accrue a contested foreign tax if the amount of the tax has actually been paid to the foreign tax authority. Rev. Rul. 70–290 (1970–1 C.B. 160). These special rules allow increased flexibility with regard to the timing of adjustments in order to better match foreign income and the foreign tax on that income and thereby mitigate double taxation of income.

Neither the statutory text of the centralized partnership audit regime nor the explanation of that text prepared by the staff of the Joint Committee on Taxation explicitly addresses coordination with the FTC rules. Joint Comm. on Taxation, JCS–1–16, *General Explanations of Tax Legislation Enacted in 2015*, 57 (2016) (JCS–1–16). Nothing in the BBA indicates that the new procedures should increase the incidence of double taxation or alter the pre-existing restrictions, limitations, or obligations affecting a taxpayer's right to claim (or retain) an FTC. It is also unlikely that the enactment of the new centralized partnership audit regime was meant to change significant and well-established FTC rules without any explicit reference to those rules in the statutory text.

The view of the Treasury Department and the IRS is that, to the maximum extent possible, the long-standing FTC rules should be preserved while implementing the broader purpose of the centralized partnership audit regime. In order to coordinate these provisions in a manner that is administrable and fair, rules should be promulgated to clarify the appropriate interaction of these two regimes. Some of these issues are discussed in this preamble and addressed in the regulations proposed herein, such as the treatment of CFTEs under the imputed underpayment provisions of the centralized partnership audit regime. Additionally, this preamble discusses the application of the FTC limitation of partners in a partnership subject to the centralized partnership audit regime, certain special procedural FTC rules (including those under sections 905(c) and 6511(d)(3)), and the treatment of credits under sections 902 and 960 (which are not themselves items of the partnership, but the calculation of which turns on certain items of the partnership, such as the amount and separate category of dividend or subpart F inclusion). The Treasury Department and the IRS request comments both with respect to the items specifically identified and also with respect to any additional issues regarding the coordination of the FTC regime and the new centralized partnership audit regime that warrant clarification or additional guidance.

B. *Adjustments Affecting the Category or Amount of CFTEs of a BBA Partnership*

A partnership reports CFTEs to its partners as separately stated items, allowing each partner to elect either a credit under section 901 or a deduction under section 164(a)(3). See Sections 702(a)(6) and 901(b)(5). Under current rules, the partnership is not required to maintain records or report to the IRS whether its partners claimed credits or deductions with respect to their CFTEs or the extent to which any such credits are subject to a partner's FTC limitation. Accordingly, the tax effects of an adjustment to the CFTEs reported by a partnership cannot be determined solely by examining the return and other records of the partnership. Similarly, the partnership lacks the necessary information to determine those tax effects in connection with an AAR.

Proposed § 301.6225–1(a)(2) (June 14 NPRM) provides that for purposes of determining the imputed underpayment, all applicable preferences, restrictions, limitations, and conventions will be taken into account to disallow netting of adjustments as if the adjusted item was originally taken into account in the manner most beneficial to the partners. Similarly, proposed § 301.6225–1(d)(1) (June 14 NPRM) provides that items within each grouping are divided into subgroups, for netting purposes, based on preferences, limitations, restrictions, and conventions, such as source, character, holding period, or restrictions under the Code applicable to such items.

Consistent with this general approach, proposed rules are added in the paragraph reserved in the June 14 NPRM for the creditable expenditure grouping, proposed § 301.6225–1(d)(2)(iv)(A), relating to the treatment of adjustments to CFTEs made in an administrative proceeding under the centralized partnership audit regime. Proposed § 301.6225–1(d)(2)(iv)(A)(*1*) provides that the creditable expenditure grouping includes all adjustments to CFTEs, as defined in § 1.704–1(b)(4)(viii)(*b*). Proposed § 301.6225–1(d)(2)(iv)(A)(*2*) further provides that adjustments to CFTEs are included in subgroupings based on the category of income to which the CFTEs relate in accordance with section 904(d) and the regulations thereunder and in order to account for different allocations of CFTEs between partners. Proposed § 301.6225–1(d)(2)(iv)(A)(*3*) provides rules used in computing the imputed underpayment when there are one or more adjustments to CFTEs. Specifically, proposed § 301.6225–1(d)(2)(iv)(A)(*3*) provides that a net reduction to CFTEs in any subgrouping is treated as a decrease to credits in the credits grouping and therefore increases the imputed underpayment (and safe harbor amount) on a dollar-for-dollar basis. A net increase to CFTEs in any subgrouping is an adjustment that does not result in an imputed underpayment and is therefore taken into account in the adjustment year in accordance with proposed § 301.6225–3 (June 14 NPRM). Examples 6, 7, 8, and 9 are added to proposed § 301.6225–1(f) to illustrate the application of the rules in proposed § 301.6225–1(d)(2)(iv).

These CFTE subgrouping rules serve several goals. First, subgrouping prevents netting of CFTEs between partners, or between separate categories with respect to the same partner, a restriction which is necessary to preserve the application of the category-by-category limitation required under section 904 and the regulations thereunder. Second, by subgrouping based on the sharing ratio of the partners in the reviewed year, adjustments that would be allocable to one partner cannot be netted against adjustments to CFTEs that would be allocable to another partner. This is intended to provide greater consistency with the requirement that CFTEs be allocated in accordance with the partners' interests in the partnership under section 704 and the regulations thereunder. Subgrouping based on the category and allocation of the adjustment between the partners is necessary to avoid a net reduction in the U.S. tax collected as the result of adjustments to CFTEs for which no credit would have been allowed to the partner if the CFTEs had been correctly reported in the reviewed year.

One comment received in response to Notice 2016–23 addressed the treatment of adjustments to CFTEs in calculating the imputed underpayment. Specifically, the comment noted the complex FTC limitation computation which must be made at the partner level, based on components maintained and adjusted each year by the partner. After discussing several possible approaches, the comment recommended that CFTEs be treated as a credit for purposes of computing the imputed underpayment, increasing the imputed underpayment to account for any decrease to CFTEs, but suggested that the regulations disallow any reduction to the imputed underpayment based on an increase to CFTEs, since they may be subject to limitation at the partner level. The comment explained that while this treatment may cause the imputed underpayment to overstate the correct tax amount, this overstatement can be remedied if the partnership provides additional information through the modification process.

Proposed § 301.6225–1(d)(2)(iv) generally adopts the recommended approach. If the amount of CFTEs is decreased on audit, the proposed regulations treat the item as if the partners had reduced their U.S. tax by that amount and, therefore, increase the imputed underpayment by the amount of the CFTE reduction. Conversely, if the amount of CFTEs is increased on audit, the proposed regulations treat the item as if the FTC limitation would prevent use of the increased credit and, therefore, do not reduce the imputed underpayment.

The Treasury Department and the IRS recognize that the rules proposed in § 301.6225–1(d)(2)(iv) may cause the amount of the imputed underpayment to exceed the amount of tax that would have been due if the partnership had accurately reported in the reviewed year, either because CFTEs reported in the reviewed year were not claimed by all partners as FTCs or because any additional CFTEs agreed to on audit could be claimed as FTCs. However, because the partners' FTC posture is neither reflected on the partnership returns nor required to be maintained in the partnership's books and records, the only practical way to maintain the efficacy of the FTC rules is to assume both that the partners claimed FTCs for all CFTEs originally reported and that the FTC limitation would prevent any additional CFTEs from being claimed as credits. This approach preserves the long-standing principles underlying the FTC regime, especially the FTC limitation rules in section 904 and the regulations thereunder, and is consistent with the general rule in § 301.6225–1(a)(2) (June 14 NPRM) which explicitly provides that the adjusted items are treated as if they were originally taken into account by the partnership or the partners, as applicable, in the manner most beneficial to the partnership and the partners. The modification process under section 6225 (including modification resulting from a partner filing an amended return or entering into a closing agreement) will generally provide an opportunity for the partnership to take the partners' particular facts and circumstances into account when determining the imputed underpayment, while at the same time adhering to those long-standing principles.

In addition to the amended return modification or section 6226 election available under the current rules, additional types of modification may be appropriate with respect to some CFTEs under section 6225(c)(6) and proposed § 301.6225–2(d)(9) (June 14 NPRM). For example, not all partners are eligible to look through the partnership for purposes of determining the separate category of their CFTEs. See § 1.904–5(h). Such partners have only passive category CFTEs, regardless of the category of those items at the partnership level. Under these circumstances, a partnership may request modification under section 6225(c)(6) by providing sufficient evidence that a particular portion of CFTEs would be allocable to a partner or group of partners who cannot look through the partnership to characterize such CFTEs, so that all adjustments to CFTEs allocable to that partner or group of partners may be netted without regard to separate category. Similarly, if different sharing ratios apply to the allocation of adjusted CFTEs, some portion of the adjustments subject to different sharing ratios may still ultimately be allocable to the same partner or group of partners. Under these circumstances, the partnership may request modification by providing sufficient evidence of the portion of each adjustment that is allocable to the same partner or group of partners in order to allow netting of those CFTEs by modification, where appropriate.

The Treasury Department and the IRS request comments on the application of the netting rules to CFTEs and the related computation of the imputed underpayment, including any special modification rules that may be appropriate with respect to CFTEs. The Treasury Department and the IRS also request comments regarding circumstances in which the grouping and subgrouping of CFTE adjustments could be improved while preserving the FTC limitation rules.

These proposed regulations continue to reserve the rules on creditable expenditures other than CFTEs. The Treasury Department and the IRS request comments as to whether special rules are needed to address any other creditable expenditures and if so, whether those rules should follow or differ from the grouping and netting rules for CFTEs set forth in these proposed regulations.

C. *Preserving FTC Limitation Rules under Section 904*

Under the principles of proposed section 301.6225–1 (June NPRM), an adjustment decreasing the amount of foreign source income would not offset an adjustment increasing the amount of U.S. source income under the netting process described in proposed § 301.6225–1(c) (June 14 NPRM). Instead, these items, the foreign source income adjustment (which is negative) and the U.S. source income adjustment (which is positive), would be in separate subgroups. Assuming no other adjustments, the decrease in foreign source income would be treated as an adjustment which does not result in an imputed underpayment, and the increase in U.S. source income would be a net positive adjustment included in computing the imputed underpayment. This is an appropriate result.

Without a subgrouping requirement, the netting of U.S. and foreign source items would circumvent FTC limitation calculations under section 904 by effectively ignoring the potential impact of changes to foreign source income on FTCs. Specifically, netting U.S. and foreign source items at the partnership level would, in many cases, understate the true underpayment of tax caused by the partnership treating these items incorrectly in the reviewed year and, in other cases, would cause a permanent reduction in the partners' FTC limitation over time. Similarly, in the case of adjustments to items allocable to foreign partners, because foreign partners typically owe tax only with respect to U.S. source income, netting adjustments to U.S. source items against adjustments to foreign source items may understate the tax owed. Grouping adjustments by source may also facilitate modification requests with respect to amounts allocable to foreign partners.

One obstacle to subgrouping foreign source and U.S. source items is that the source (or allocation and apportionment) of certain partnership items is determinable only by the partners. In this regard, section 861 and the regulations thereunder provide that deductible expenses, including interest expense and research and experimentation (R&E) expense, are allocated and apportioned between foreign source gross income and other income on the basis of partner-level attributes. For example, § 1.861–9(e) provides that, subject to certain exceptions, a partner's distributive share of the interest expense of a partnership is considered to be related to all income-producing activities and assets of the partner and is apportioned between a partner's U.S. and foreign source income based on the relative values of the partner's assets. See also, for example, § 1.871–17 (providing rules for the allocation and apportionment of R&E expense).

Therefore, these expense items, when allocated and apportioned, affect the partners' net foreign and U.S. source income (and therefore the partner's FTC limitation), in amounts that cannot be determined at the partnership level. Similarly, items of gain or loss attributable to sales of non-inventory property are sourced at the partner level. See section 865(i)(5). Because the source of certain items cannot be accurately established at the partnership level (and because certain expenses must be allocated and apportioned at the partner level), those items cannot definitively be included in either foreign or U.S. source income subgroupings for purposes of computing the imputed underpayment. Moreover, if an adjustment to items sourced (or allocated and apportioned) at the partner level can offset other adjustments not sourced (or allocated and apportioned) in that manner, the purposes of the FTC limitation rules could effectively be circumvented.

Under the proposed regulations in the June 14 NPRM, adjustments to items that may be sourced (or allocated and apportioned) at the partner level will generally be divided into subgroups in accordance with the specific method applicable for the sourcing (or allocation and apportionment) of those items in order to avoid netting that would undermine the application of the FTC limitation under section 904 unless the IRS determines otherwise. See proposed § 301.6225–1(a)(2) (June 14 NPRM). This would prevent, for example, an increase to interest expense from being netted against an increase to U.S. source income. However, netting of an increase to interest expense from one activity against a decrease to interest expense from another activity would generally be permissible because netting these adjustments would not typically affect the partners' section 904 limitation.

The Treasury Department and the IRS recognize that subgrouping significant items of expense, such as R&E or interest, may cause imputed underpayments to exceed the tax that would have been owed had all items been treated correctly in the reviewed year. While the partnership can attempt to reduce this distortion during the modification process or by making a section 6226 election, the Treasury Department and the IRS request comments regarding whether such distortions can be reduced when computing the imputed underpayment before the modification process, while remaining consistent with the purpose of the source and allocation and apportionment rules under sections 861 and 865, as well as the application of the FTC limitation under section 904.

The Treasury Department and the IRS request comments with respect to the grouping and subgrouping of items of income, gain, loss, or deduction based on source and separate category. Specifically, the Treasury Department and the IRS request comments on any rule or modification method that would allow the calculation of the imputed underpayment to more accurately reflect the amount of tax that would have been due if the partnership had reported correctly in the reviewed year. The Treasury Department and the IRS also specifically request comments relating to any rules that would preserve the potential effects of adjustments to partnership items that are sourced (or allocated and apportioned) at the partner level in determining the imputed underpayment without requiring that all of these items be assigned to separate subgroupings.

D. *Application of Section 905(c) to Creditable Foreign Tax Expenditures*

Section 905(c) generally requires a taxpayer to notify the IRS in the event of certain changes to creditable foreign taxes. A taxpayer must notify the IRS if any foreign tax claimed as a credit is refunded in whole or in part. Similarly, a taxpayer must notify the IRS if an accrued foreign tax claimed as a credit remains unpaid after two years or if the amount when paid differs from the amount accrued. The notice requirement under section 905(c) is generally satisfied by the taxpayer filing an amended return for the year or years to which the foreign tax relates and paying any underpayment that results from the adjustment to the amount of creditable foreign tax. If such an adjustment results in an overpayment of tax, a taxpayer may generally claim a refund or credit within the 10-year period described in section 6511(d)(3). See section 905(c)(3). In the context of a partnership, the partner who claimed the FTC has historically borne the primary obligation to notify the IRS if there was a change in the foreign tax liability described in section 905(c) (and to pay any underpayment, upon notice and demand, or timely file a claim for refund of any overpayment). However, several aspects of the centralized partnership audit regime make it difficult to determine the most appropriate application of section 905(c) with respect to CFTEs reported by a partnership subject to the centralized partnership audit regime.

Neither the statutory text of the centralized partnership audit regime, nor the explanation of that text prepared by the staff of the Joint Committee on Taxation, explicitly addresses section 905(c). See JCS–1–16. There is no indication that the new procedures were intended to restrict either the taxpayer's or the government's right to recoup any overpayment or underpayment of U.S. tax resulting from a redetermination required under section 905(c). It is also unlikely that Congress would effectuate a change to long-standing principles through generic procedural provisions without any specific discussion of section 905(c) in the statutory text.

Generally, if a partnership reports CFTEs and has an adjustment described in section 905(c), there are two ways of viewing the adjustment required under section 905(c): it is either an adjustment at the partnership level, which is subject to the centralized partnership audit regime, or it is an adjustment at the partner level, which is subject to the historic application of this provision in the partnership context. Either of these two approaches presents administrative challenges. Therefore, the Treasury Department and the IRS request comments addressing coordination and administration of section 905(c) and the centralized partnership audit regime. Specifically, the Treasury Department and the IRS request comments on using the AAR process for purposes of satisfying the requirements of section 905(c) with respect to changes to the foreign tax liability reported by a partnership as a CFTE.

E. *Foreign Taxes Deemed Paid Under Sections 902 and 960*

Under sections 902 and 960, certain domestic corporations are permitted to claim credits for foreign taxes "deemed paid" corresponding to foreign taxes paid by a foreign subsidiary from which the domestic corporation receives a dividend or with respect to which the domestic corporation has a subpart F inclusion. As discussed in Part 3.A. of this Explanation of Provisions, section 902(c)(7) provides that stock of a foreign corporation held by or on behalf of a partnership will be treated as if it was actually owned (proportionally) by the partners for purposes of computing the foreign taxes deemed paid under sections 902 and 960. Thus, qualifying partners are generally entitled to claim FTCs for deemed paid taxes attributable to their allocable share of partnership dividend income and subpart F inclusions.

Section 6221(a) provides that any adjustment to an item of income, gain, loss, deduction, or credit of a partnership for a partnership taxable year must be determined, and any tax attributable thereto must be assessed and collected, at the partnership level pursuant to the centralized partnership audit regime. Further, proposed § 301.6221(a)–1 (June 14 NPRM) provides that all items required to be shown or reflected on the partnership's return and information in the partnership's books and records related to a determination of these items, as well as factors that affect the determination of items of income, gain, loss, deduction, or credit, are subject to determination and adjustment at the partnership level under the centralized partnership audit regime.

Under existing filing requirements, a partnership reports dividends from its subsidiaries, foreign and domestic, and domestic (U.S.) partnerships also report subpart F inclusions, but neither foreign nor domestic partnerships are required to report the amount of foreign taxes deemed paid by a partner with respect to stock held by or for the partnership. Further, a partnership is generally not required to maintain or report all information upon which the computations of those amounts are based (for example, the foreign subsidiary's pools of post-1986 undistributed earnings and post-1986 foreign income taxes). Accordingly, the amount of any deemed paid foreign tax computed with respect to stock owned by or for a partnership cannot be determined based on existing partnership reporting requirements.

The centralized partnership audit regime did not explicitly address the treatment of FTCs allowed with respect to deemed paid foreign taxes under the centralized partnership audit regime. However, the dividends and subpart F inclusions that trigger the availability of the deemed paid FTC are subject to that regime. Therefore, in order to preserve the IRS's ability to audit FTCs for deemed paid taxes claimed with respect to stock owned through partnerships subject to the centralized partnership audit regime, coordinating rules are necessary. These rules should ensure that all restrictions and limitations on the FTC allowed under sections 902 and 960 are given effect with respect to both the items giving rise to FTCs and the FTCs themselves.

The broad scope of the centralized partnership audit regime contemplates that all tax effects, including FTCs for deemed paid taxes, are considered during a centralized partnership audit. However, in the case of sections 902 and 960, the current rules require the partners, and not the partnership, to maintain and report the relevant information. Therefore, the Treasury Department and the IRS request comments on whether it would be appropriate to require a partnership, as opposed to the individual partners, to maintain and report the information necessary to compute deemed paid foreign taxes with respect to foreign corporations in which the partnership owns shares, so that the IRS can audit foreign tax credits under section 902 and 960 entirely at the partnership level. The Treasury Department and IRS request comments on how this information-reporting requirement could be crafted to minimize compliance costs and burdens, especially for partnerships whose partners are not eligible to compute deemed paid taxes. Alternatively, the Treasury Department and the IRS request comments on any approach, consistent with the statutory principles of the centralized partnership audit regime and the FTC regime, whereby the IRS could effectively adjust credits for deemed paid foreign taxes at either the partnership level or at the partner level, without creating unreasonable distortions or undue burdens on taxpayers or tax administration.

4. *Modification of an Imputed Underpayment Based on the Status of a Foreign Partner and Other Treaty Issues.*

Proposed § 301.6225–2(d)(2) through (8) (June 14 NPRM) provides seven enumerated types of modifications the IRS will consider if requested by the partnership. The preamble to the June 14 NPRM requested comments on modifications that could be considered appropriate where a partner is a foreign person and thus may be subject to gross basis taxation under section 871(a) or 881(a), or where a partnership, partner, or indirect partner is entitled to a reduced rate of tax under the Code or as a resident of a country that has in effect an income tax treaty with the United States.

Under U.S. tax treaties, a foreign partner or partnership may be entitled to benefits with respect to an item of income, profit, or gain paid to an entity that is fiscally transparent under the laws of the United States to the extent it is treated as an item of income, profit, or gain of a resident of the applicable treaty jurisdiction. See also section 894. Thus, for example, the Treasury Department and the IRS are considering providing a modification in proposed § 301.6225–2(d) (June 14 NPRM) that would apply as illustrated in the following example: The IRS initiates an administrative proceeding with respect to a domestic partnership, and determines a single partnership adjustment increasing the U.S. source dividend income received by the partnership. The partnership had two equal partners during the reviewed year: A, a U.S. citizen, and B, a nonresident alien individual resident in Country X. The United States has in effect an income tax treaty with Country X, and Country X treats the partnership as fiscally transparent. Assuming that the other requirements set forth in the regulations for modifications are satisfied, if the partnership provides documentation demonstrating to the IRS's satisfaction the amount of the adjustment that is allocable to B under the partnership agreement and B's entitlement to a reduced rate of tax on dividends in the reviewed year pursuant to the income tax treaty between Country X and the United States, the IRS could agree to a modification to the imputed underpayment with respect to the amount of the adjustment allocable to B that is subject to a reduced rate of tax under the income tax treaty. Additionally, other methods for modifications could be provided in future guidance with respect to other Code-based exemptions from tax applicable to foreign persons, including sections 871(h) and 881(c), which provide an exemption from tax for foreign persons with respect to interest on certain portfolio debt investments. See also sections 871(a)(2) and 881(a) (limiting taxation of foreign persons on U.S. source capital gains).

The Treasury Department and the IRS are still considering additional modifications to address circumstances where a partnership, partner, or indirect partner is a foreign person, and which potential modifications, such as modifications for portfolio interest and U.S. source capital gains, may already be addressed by one of the seven types of modifications included in the June 14 NPRM. See proposed § 301.6225–2(d)(3) (June 14 NPRM) (providing rules for modifications for tax-exempt partners which, as defined, includes certain foreign persons or entities). Accordingly, the Treasury Department and the IRS continue to request comments on what specific types of modifications available to partners or partnerships that are foreign persons (including partners that are foreign persons described under section 501(c)) should be included in proposed § 301.6225–2(d) (June 14 NPRM).

The June 14 NPRM also requested comments on the coordination of the proposed rules with the mutual agreement procedures (MAP) available under income tax treaties that a partnership, partner, or indirect partner may invoke in order to determine eligibility for treaty benefits that may affect the calculation of the imputed underpayment. Pursuant to income tax treaties in effect between the United States and other jurisdictions, the Treasury Department and the IRS intend to allow access to MAP, when and where appropriate, for a partnership, partner, or indirect partner that is subject to the centralized partnership audit regime. However, the Treasury Department and the IRS are continuing to study this issue and request comments on how to coordinate MAP with the centralized partnership audit regime.

5. *Foreign Corporations*

The preamble to the June 14 NPRM stated that the Treasury Department and the IRS intend to issue regulations to address situations where a partnership pushes out an adjustment under section 6226 to a direct partner in the partnership that is a foreign entity, such as a trust or corporation, that may not be liable for U.S. federal income tax with respect to one or more adjustments, but an owner of the direct partner is or could be liable for tax with respect to that amount. For example, if a direct partner in the audited partnership is a controlled foreign corporation, the foreign corporation as a direct partner may not have a U.S. tax liability with respect to a given adjustment; however, the adjustment may impact the tax liability of its U.S. shareholder(s) by increasing the subpart F income of the CFC that is included in the income of the U.S. shareholder(s) under section 951(a). The Treasury Department and the IRS continue to study this issue and continue to request comments both on how the reporting obligations concerning foreign entities should be modified to ensure that statements issued under section 6226 are reflected on the returns of the U.S. owners of these entities, and more generally, on how to incorporate rules governing foreign corporations into the centralized partnership audit regime.

Special Analyses

Certain IRS regulations, including these, are exempt from the requirements of Executive Order 12866, as supplemented and reaffirmed by Executive Order 13563. Therefore, a regulatory impact assessment is not required. Because the regulations would not impose a collection of information on small entities, the Regulatory Flexibility Act (5 U.S.C. chapter 6) does not apply.

Pursuant to section 7805(f) of the Code, these regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Statement of Availability of IRS Documents

IRS Revenue Procedures, Revenue Rulings, Notices and other guidance cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS website at www.irs.gov.

Comments and Requests for Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any electronic and written comments that are submitted timely to the IRS as prescribed in this preamble under the ADDRESSES heading. The Treasury Department and the IRS request comments on all aspects of the proposed rules. All comments will be available at *www.regulations.gov* or upon request. A public hearing will be scheduled if requested in writing by any person that timely submits written comments. If a public hearing is scheduled, then notice of the date, time, and place for the public hearing will be published in the **Federal Register.**

Drafting Information

The principal authors of these proposed regulations are Larry R. Pounders, Jr., Ronald M. Gootzeit, and Subin Seth of the Office of the Associate Chief Counsel (International). However, other personnel from the Treasury Department and the IRS participated in their development.

List of Subjects in 26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

Proposed Amendments to the Regulations

Accordingly, 26 CFR part 301, as proposed to be amended June 14, 2017 (82

FR 27334), is proposed to be further amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 continues to read in part as follows:

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

Par. 2. Section 301.6221(a)–1 is amended by adding paragraph (f) to read as follows:

§ 301.6221(a)–1 Scope of the partnership procedures under subchapter C of chapter 63 of the Internal Revenue Code.

* * * * *

(f) *Examples*. The following examples illustrate the rules of paragraphs (a) and (d) of this section as applied to cases in which a partnership has a withholding obligation under chapter 3 or chapter 4 of subtitle A of the Internal Revenue Code (Code) with respect to income that the partnership earns. For purposes of these examples, each partnership is subject to the provisions of subchapter C of chapter 63 of the Code, and the partnership and its partners are calendar year taxpayers.

Example 1. Partnership, a partnership created or organized in the United States, has two equal partners, A and B. A is a nonresident alien who is a resident of Country A, and B is a U.S. citizen. In 2018, Partnership earned $200 of U.S. source royalty income. Partnership was required to withhold 30 percent of the gross amount of the royalty income allocable to A unless Partnership had documentation that it could rely on to establish that A was entitled to a reduced rate of withholding. See §§ 1.1441–1(b)(1) and 1.1441–5(b)(2)(i)(A) of this chapter. Partnership withheld $15 from the $100 of royalty income allocable to A based on its incorrect belief that A is entitled to a reduced rate of withholding under the U.S.-Country A Income Tax Treaty. In 2020, the IRS determines in an examination of Partnership's Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, that Partnership should have withheld $30 instead of $15 on the $100 of royalty income allocable to A because Partnership failed to obtain documentation from A establishing a valid treaty claim for a reduced rate of withholding. The rate of withholding on the income allocable to A is not an item of income, gain, loss, deduction, or credit under paragraph (b)(1) of this section. Therefore, in accordance with paragraph (a) of this section, the adjustment to increase Partnership's withholding tax liability by $15 is not determined under subchapter C of chapter 63, and instead must be determined as part of the Form 1042 examination.

Example 2. Partnership, a partnership created or organized in the United States, has two equal partners, A and B. A is a nonresident alien who is a resident of Country A, and B is a U.S. citizen. In 2018, Partnership earned $100 of U.S. source dividend income. Partnership was required to report the dividend income on its 2018 Form 1065, "U.S. Return of Partnership Income," and withhold 30 percent of the gross amount of the dividend income allocable to A unless Partnership had documentation that it could rely on to establish that A was entitled to a reduced rate of withholding. See §§ 1.1441–1(b)(1) and 1.1441–5(b)(2)(i)(A) of this chapter. In 2020, in an examination of Partnership's Form 1042, the IRS determines that Partnership earned but failed to report the $100 of U.S. source dividend income in 2018. The adjustment to increase Partnership's dividend income by $100 would be an adjustment to an item of income, gain, loss, deduction, or credit under paragraph (b)(1) of this section if made in an administrative proceeding under subchapter C of chapter 63. The tax imposed on Partnership for its failure to withhold on that income, however, is not a tax as defined in paragraph (b)(3) of this section because it is a tax imposed by chapter 3 of subtitle A of the Code (chapter 3 tax). Pursuant to paragraph (d) of this section, the IRS may determine, assess, and collect that chapter 3 tax without conducting a proceeding under subchapter C of chapter 63. Therefore, the IRS may determine the chapter 3 tax in the examination of Partnership's Form 1042 by adjusting Partnership's withholding tax liability by an additional $15 for failing to withhold on the $50 of dividend income allocable to A. If the IRS subsequently initiates an administrative proceeding under subchapter C of chapter 63 and makes an adjustment to the same item of income, the portion of the dividend income allocable to A will be disregarded in the calculation of the imputed underpayment to the extent that the chapter 3 tax has been collected with respect to such income. See § 301.6225–1(c)(5).

Par. 3. Section 301.6225–1 is amended by adding paragraphs (a)(4) and (c)(5), revising paragraph (d)(2)(iv), and adding *Examples 6* through *9* to paragraph (f) to read as follows:

§ 301.6225–1 Partnership Adjustment by the Internal Revenue Service.

* * * * *

(a) * * *

(4) *Coordination with chapters 3 and 4 when partnership pays an imputed underpayment*. If a partnership pays an imputed underpayment (as determined under paragraph (c) of this section) and the total netted partnership adjustment (as determined under paragraph (c)(3) of this section) includes a partnership adjustment to an amount subject to withholding (as defined in § 301.6226–2(h)(3)(i)), the partnership is treated as having paid (at the time that the imputed underpayment is paid) the amount required to be withheld with respect to that adjustment under chapter 3 or chapter 4 for purposes of applying §§ 1.1463–1 and 1.1474–4 of this chapter. For purposes of the regulations under subchapter C of chapter 63 of the Internal Revenue Code (Code), the term *chapter 3* means sections 1441 through 1464 of subtitle A of the Code, but does not include section 1443(b), and the term *chapter 4* means sections 1471 through 1474 of subtitle A of the Code. *See* paragraph (c)(5) of this section for the coordination rule that applies when an adjustment is made to an amount subject to withholding for which tax has been collected under chapter 3 or chapter 4.

* * * * *

(c) * * *

(5) *Adjustments to items for which tax has been collected under chapters 3 and 4*. To the extent that the IRS has collected tax under chapter 3 or chapter 4 (as defined in paragraph (a)(4) of this section) attributable to an adjustment to an amount subject to withholding (as defined in § 301.6226–2(h)(3)(i)), that adjustment (or portion thereof) will be disregarded for purposes of calculating the total netted partnership adjustment under paragraph (c)(3) of this section. See paragraph (a)(4) of this section for the coordination rule that applies when a partnership pays an imputed underpayment that includes an adjustment to an amount subject to withholding under chapter 3 or chapter 4.

(d) * * *

(2) * * *

(iv) *Creditable expenditure grouping*—(A) *Creditable foreign tax expenditures*—(*1*) *In general*. The creditable expenditure grouping includes all partnership adjustments (including reallocation adjustments as described in paragraph (d)(2)(ii) of this section) to creditable foreign tax expenditures (CFTEs) as defined in § 1.704–1(b)(4)(viii)(*b*) of this chapter.

(*2*) *Subgroupings*. Adjustments to CFTEs are grouped into subgroupings based on the separate category of income to which the CFTEs relate in accordance with section 904(d) and the regulations thereunder, and to account for different allocations of CFTEs between partners. Two or more adjustments are included within the same subgrouping only if each adjustment relates to CFTEs in the same separate category and each adjusted item would be allocated to the partners in the same ratio had those items been properly reflected on the partnership return for the reviewed year. An adjustment that changes the separate category of a CFTE for section 904 purposes or that reallocates the distributive share of a CFTE between partners is treated as two separate adjustments: an increase to the amount of CFTEs in one subgrouping and a decrease in another subgrouping.

(*3*) *Effect on Imputed Underpayment*. For purposes of computing the imputed underpayment in paragraph (c)(1) of this section, a net decrease to CFTEs in any CFTE subgrouping is treated as a decrease to credits in the credit grouping described in paragraph (d)(2)(iii) of this section. A net increase to CFTEs in any CFTE subgrouping is treated as a net non-positive adjustment, as defined in paragraph (d)(3)(ii)(C) of this section. See paragraphs (b) and (c)(2) of this section and § 301.6225–3 for the treatment of adjustments that do not result in an imputed underpayment.

(B) *Other creditable expenditures*. [Reserved]

* * * * *

(f) * * *

Example 6. Partnership reports on its 2019 partnership return $400 of CFTEs in the general category under section 904(d). The IRS initiates an administrative proceeding with respect to Partnership's 2019 taxable year and determines that the amount of CFTEs was $300 instead of $400 (<$100> adjustment to CFTEs). No other adjustments are made for the 2019 taxable year. The <$100> adjustment to CFTEs falls within the creditable expenditure grouping described in paragraph (d)(2)(iv) of this section and is within the general category subgrouping. Because there are no other adjustments for the 2019 taxable year in this subgrouping, the net adjustment in the subgrouping is <$100>. Pursuant to paragraph (d)(2)(iv)(A)(*3*) of this section, a net decrease to CFTEs in a subgrouping in the creditable expenditure grouping is treated as a decrease to credits under paragraph (d)(2)(iii) of this section. Because no other adjustments have been made, the <$100> adjustment to credits under paragraph (d)(2)(iii) of this section produces an imputed underpayment of $100 under paragraph (c)(1) of this section.

Example 7. Partnership reports on its 2019 partnership return $400 of CFTEs in the passive category under section 904(d). The IRS initiates an administrative proceeding with respect to Partnership's 2019 taxable year and determines that the CFTEs reported by Partnership were general category instead of passive category CFTEs. No other adjustments are made. Under the rules in paragraph (d)(2)(iv)(A)(*2*) of this section, an adjustment to the category of a CFTE is treated as two separate adjustments: an increase to general category CFTEs of $400 and a decrease to passive category CFTEs of $400. Both adjustments are included in the creditable expenditure grouping under paragraph (d)(2)(iv) of this section, but they are included in separate subgroupings. Therefore, the two amounts do not net. Instead, the $400 increase to CFTEs in the general category subgrouping is treated as a net non-positive adjustment within the meaning of paragraph (d)(3)(ii)(C) of this section and is an adjustment that does not result in an imputed underpayment within the meaning of paragraphs (b) and (c)(2) of this section. Therefore, the $400 increase to CFTEs in the general category subgrouping of the creditable expenditure grouping is taken into account in accordance with § 301.6225–3. The decrease to CFTEs in the passive category subgrouping of the creditable expenditure grouping results in a net decrease to CFTEs. Therefore, pursuant to paragraph (d)(2)(iv)(A)(*3*) of this section, it is treated as a decrease to credits under paragraph (d)(2)(iii) of this section, which results in an imputed underpayment of $400 under paragraph (c)(1) of this section.

Example 8. Partnership has two partners, A and B. Under the partnership agreement, $100 of the CFTE is specially allocated to A for the 2019 taxable year. The IRS initiates an administrative proceeding with respect to Partnership's 2019 taxable year and determines that $100 of CFTE should be reallocated from A to B. The partnership adjustment is a <$100> adjustment to general category CFTE allocable to A and an increase of $100 to general category CFTE allocable to B. Pursuant to paragraph (d)(2)(iv)(A)(*2*) of this section, the <$100> adjustment to general category CFTE and the increase of $100 to general category CFTE are included in separate subgroupings, and the increase is disregarded for purposes of computing the imputed underpayment under paragraph (c)(1) of this section. The increase and decrease of $100 of general category CFTE do not net. Instead, the net increase to CFTEs in the general-category, B-allocation subgrouping is treated as a net non-positive adjustment, which does not result in an imputed underpayment and is therefore taken into account by the partnership in the adjustment year in accordance with § 301.6225–3. The net decrease to CFTEs in the general-category, A-allocation subgrouping is treated as a decrease to credits in the credit grouping under paragraph (d)(2)(iii) of this section, resulting in an imputed underpayment of $100 under paragraph (c)(1) of this section.

Example 9. Partnership has two partners, A and B. Partnership owns two entities, DE1 and DE2, that are disregarded as separate from their owner within the meaning of § 301.7701–3 and are operating in and paying taxes to foreign jurisdictions. The partnership agreement provides that all items (income, gain, loss, deduction, credit, etc.) from DE1 and DE2 are allocable to A and B in the following manner. Items related to DE1: to A 75% and to B 25%. Items related to DE2: to A 25% and to B 75%. Partnership reports CFTEs in the general category of $300, $100 with respect to DE1 and $200 with respect to DE2. Partnership allocates the $300 of CFTEs $125 and $175 to A and B respectively. On examination, the IRS determines that Partnership understated the amount of creditable foreign tax paid by DE2 by $40 and overstated the amount of creditable foreign tax paid by DE1 by $80. No other adjustments are made. Because the two adjustments each relate to CFTEs that are subject to different allocations, the two adjustments are in different subgroupings under paragraph (d)(2)(iv)(A)(*2*) of this section. The adjustment reducing the CFTEs related to DE1 produces a net decrease to CFTEs within that subgrouping and is treated as a reduction to credits under paragraph (d)(2)(iii) of this section and results in an imputed underpayment of $80 under paragraph (c)(1) of this section. The increase of $40 of general category CFTE related to the DE2 subgrouping results in a net increase to CFTEs within that subgrouping and is treated as a net non-positive adjustment, which does not result in an imputed underpayment and is taken into account in the adjustment year in accordance with § 301.6225–3.

* * * * *

Par. 4. Section 301.6226–2 is amended by revising paragraph (h)(3) to read as follows:

§ 301.6226–2 Statements furnished to partners and filed with the IRS.

* * * * *

(h) * * *

(3) *Adjustments subject to chapters 3 and 4*—(i) *In general*. A partnership that makes an election under § 301.6226–1 with respect to an imputed underpayment must pay the amount of tax required to be withheld under chapter 3 or chapter 4 (as defined in § 301.6225–1(a)(4)) on the amount of any adjustment set forth in the statement described in paragraph (a) of this section to the extent that it is an adjustment to an amount subject to withholding and the IRS has not already collected tax attributable to the adjustment under chapter 3 or chapter 4. The partnership must pay the amount due under this paragraph (h)(3)(i) on or before the due date (as determined under paragraph (b) of this section) for furnishing the statement required under paragraph (a) of this section that reflects the adjustment, and must make the payment in the manner prescribed by the IRS in forms, instructions, and other guidance. For purposes of

the regulations under subchapter C of chapter 63 of the Internal Revenue Code, the term *amount subject to withholding* means an amount subject to withholding (as defined in § 1.1441–2(a) of this chapter), a withholdable payment (as defined in § 1.1473–1(a) of this chapter), or the allocable share of effectively connected taxable income (as computed under § 1.1446–2(b) of this chapter).

(ii) *Reduced rate of tax*. A partnership may reduce the amount of tax it is required to pay under paragraph (h)(3)(i) of this section to the extent that it can associate valid documentation from a reviewed year partner pursuant to the regulations under chapter 3 or chapter 4 (other than pursuant to § 1.1446–6 of this chapter) with the portion of the adjustment that would have been subject to a reduced rate of tax in the reviewed year. For this purpose, the partnership may rely on documentation that the partnership possesses that is valid with respect to the reviewed year (determined without regard to the expiration after the reviewed year of any validity period prescribed in § 1.1441–1(e)(4)(ii), § 1.1446–1(c)(2)(iv)(A), or § 1.1471–3(c)(6)(ii) of this chapter), or new documentation that the partnership obtains from the reviewed year partner that includes a signed affidavit stating that the information and representations associated with the documentation are accurate with respect to the reviewed year.

(iii) *Reporting requirements*. A partnership required to pay tax under paragraph (h)(3)(i) of this section must file the appropriate return and issue information returns as required by regulations under chapter 3 or chapter 4. For return and information return requirements, see § 1.1446–3(d)(1)(iii); § 1.1461–1(b), (c); § 1.1474–1(c), (d) of this chapter. The partnership must file the return and issue information returns for the year that includes the date on which the partnership furnishes the statement required under paragraph (a) of this section. The partnership must report the information on the return and information returns in the manner prescribed by the IRS in forms, instructions, and other guidance.

* * * * *

Par. 5. Section 301.6226–3 is amended by revising paragraph (f), and adding *Example 6* to paragraph (g) to read as follows:

§ 301.6226–3 Adjustments Taken Into Account by Partners.

* * * * *

(f) *Partners subject to withholding under chapters 3 and 4*. A reviewed year partner that is subject to withholding under § 301.6226–2(h)(3)(i) must file an income tax return for the reporting year to report its additional reporting year tax and its share of any penalties, additions to tax, additional amounts, and interest (notwithstanding any filing exception in § 1.6012–1(b)(2)(i) or § 1.6012–2(g)(2)(i) of this chapter). The amount of tax paid by a partnership under § 301.6226–2(h)(3)(i) is allowed as a credit under section 33 to the reviewed year partner to the extent that the tax is allocable to the reviewed year partner (within the meaning of § 1.1446–3(d)(2) of this chapter) or is actually withheld from the reviewed year partner (within the meaning of § 1.1464–1(a) or § 1.1474–3 of this chapter). The credit is allowed against the reviewed year partner's income tax liability for its reporting year. The reviewed year partner must substantiate the credit by attaching the applicable Form 1042–S, "Foreign Person's U.S. Source Income Subject to Withholding," or Form 8805, "Foreign Partner's Information Statement of Section 1446 Withholding Tax," to its income tax return for the reporting year, as well as meeting any other requirements prescribed by the IRS in forms and instructions.

(g) * * *

Example 6. On its partnership return for the 2020 tax year, Partnership, a domestic partnership, reported U.S. source dividend income of $2,000. On June 1, 2023, the IRS mails an FPA to Partnership for Partnership's 2020 year increasing the amount of U.S. source dividend income to $4,000 and asserting an imputed underpayment plus an accuracy-related penalty under section 6662(b). Partnership makes a timely election under section 6226 in accordance with § 301.6226–1 with respect to the imputed underpayment in the FPA for Partnership's 2020 year and does not file a petition for readjustment. The time to file a petition expires on August 30, 2023. Pursuant to § 301.6226–2(b), the partnership adjustments become finally determined on August 30, 2023. On September 30, 2023, Partnership files the statements described under § 301.6226–2 with the IRS and furnishes to partner A, a nonresident alien individual who was a partner in Partnership during 2020 (and remains a partner in Partnership in 2023), a statement described in § 301.6226–2. A had a 50 percent interest in Partnership during all of 2020 and was allocated 50 percent of all items from Partnership for that year. The statement shows A's share of U.S. source dividend income reported on Partnership's return for the reviewed year of $1,000 and an adjustment to U.S. source dividend income of $1,000. In addition, the statement reports A's share of the accuracy-related penalty related to the imputed underpayment, and A's safe harbor amount and interest safe harbor amount (as determined under § 301.6226–2(g)). Under § 301.6226–2(h)(3)(i), because the additional $1,000 in U.S. source dividend income allocated to A is an amount subject to withholding (as defined in § 301.6226–2(h)(3)(i)), Partnership must pay the amount of tax required to be withheld on the adjustment. See §§ 1.1441–1(b)(1) and 1.1441–5(b)(2)(i)(A) of this chapter. Under § 301.6226–2(h)(3)(ii), Partnership may reduce the amount of withholding tax it must pay because it has valid documentation from 2020 that establishes that A was entitled to a reduced rate of withholding in 2020 on U.S. source dividend income of 10 percent pursuant to a treaty. Partnership withholds $100 of tax from A's distributive share, remits the tax to the IRS, and files the necessary return and information returns required by § 1.1461–1 of this chapter. A does not elect to pay the safe harbor amount and therefore must pay the additional reporting year tax as determined in accordance with paragraph (b) of this section, in addition to A's share of the penalty and interest. On his 2023 return, A must report the additional reporting year tax determined in accordance with paragraph (b) of this section, plus A's share of the accuracy related penalty determined at the partnership level, and interest determined in accordance with paragraph (d) of this section. Under paragraph (f) of this section, A may claim the $100 withholding tax paid by Partnership pursuant to § 301.6226–2(h)(3)(i) as a credit under section 33 against A's income tax liability on his 2023 return.

* * * * *

Par. 6. Section 301.6227–2 is amended by adding paragraphs (b)(3) and (4) to read as follows.

§ 301.6227–2 Determining and accounting for adjustments requested in an administrative adjustment request by the partnership.

* * * * *

(b) * * *

(3) *Coordination with chapters 3 and 4 when partnership pays an imputed underpayment*. If a partnership pays an imputed underpayment resulting from adjustments requested in an AAR under paragraph (b)(1) of this section, the rules in § 301.6225–1(a)(4) apply to treat the partnership as having paid the amount required to be withheld under chapter 3 or chapter 4 (as defined in § 301.6225–1(a)(4)).

(4) *Coordination with chapters 3 and 4 when partnership elects to have adjustments taken into account by reviewed year partners*. If a partnership elects under paragraph (c) of this section to have its

reviewed year partners take into account adjustments requested in an AAR, the rules in § 301.6226–2(h)(3) apply to the partnership, and the rules in § 301.6226–3(f) apply to the reviewed year partners that take into account the adjustments pursuant to § 301.6227–3.

* * * *

Kirsten Wielobob,
Deputy Commissioner for Services and Enforcement.

(Filed by the Office of the Federal Register on November 29, 2017, 8:45 a.m., and published in the issue of the Federal Register for November 30, 2017, 82 F.R. 56765)

Announcement of Disciplinary Sanctions From the Office of Professional Responsibility

Announcement 2017–16

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, appraisers, and unenrolled/unlicensed return preparers (individuals who are not enrolled to practice and are not licensed as attorneys or certified public accountants). Licensed or enrolled practitioners are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Subtitle A, Part 10, and which are released as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations. Unenrolled/unlicensed return preparers are subject to Revenue Procedure 81–38 and superseding guidance in Revenue Procedure 2014–42, which govern a preparer's eligibility to represent taxpayers before the IRS in examinations of tax returns the preparer both prepared for the taxpayer **and** signed as the preparer. Additionally, unenrolled/unlicensed return preparers who voluntarily participate in the Annual Filing Season Program under Revenue Procedure 2014–42 agree to be subject to the duties and restrictions in Circular 230, including the restrictions on incompetent or disreputable conduct.

The disciplinary sanctions to be imposed for violation of the applicable standards are:

Disbarred from practice before the IRS—An individual who is disbarred is not eligible to practice before the IRS as defined at 31 C.F.R. § 10.2(a)(4) for a minimum period of five (5) years.

Suspended from practice before the IRS—An individual who is suspended is not eligible to practice before the IRS as defined at 31 C.F.R. § 10.2(a)(4) during the term of the suspension.

Censured in practice before the IRS—Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual's eligibility to practice before the IRS, but OPR may subject the individual's future practice rights to conditions designed to promote high standards of conduct.

Monetary penalty—A monetary penalty may be imposed on an individual who engages in conduct subject to sanction, or on an employer, firm, or entity if the individual was acting on its behalf and it knew, or reasonably should have known, of the individual's conduct.

Disqualification of appraiser—An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

Ineligible for limited practice—An unenrolled/unlicensed return preparer who fails to comply with the requirements in Revenue Procedure 81–38 or to comply with Circular 230 as required by Revenue Procedure 2014–42 may be determined ineligible to engage in limited practice as a representative of any taxpayer. Under the regulations, individuals subject to Circular 230 may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (*i.e.*, representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

Disciplinary sanctions are described in these terms:

Disbarred by decision, Suspended by decision, Censured by decision, Monetary penalty imposed by decision, and Disqualified after hearing—An administrative law judge (ALJ) issued a decision imposing one of these sanctions after the ALJ either (1) granted the government's summary judgment motion or (2) conducted an evidentiary hearing upon OPR's complaint alleging violation of the regulations. After 30 days from the issuance of the decision, in the absence of an appeal, the ALJ's decision becomes the final agency decision.

Disbarred by default decision, Suspended by default decision, Censured by default decision, Monetary penalty imposed by default decision, and Disqualified by default decision—An ALJ, after finding that no answer to OPR's complaint was filed, granted OPR's motion for a default judgment and issued a decision imposing one of these sanctions.

Disbarment by decision on appeal, Suspended by decision on appeal, Censured by decision on appeal, Monetary penalty imposed by decision on appeal, and Disqualified by decision on appeal—The decision of the ALJ was appealed to the agency appeal authority, acting as the delegate of the Secretary of the Treasury, and the appeal authority issued a decision imposing one of these sanctions.

Disbarred by consent, Suspended by consent, Censured by consent, Monetary penalty imposed by consent, and Disqualified by consent—In lieu of a disciplinary proceeding being instituted or continued, an individual offered a consent to one of these sanctions and OPR accepted the offer. Typically, an offer of consent will provide for: suspension for an indefinite term; conditions that the individual must observe during the suspension; and the individual's opportunity, after a stated number of months, to file with OPR a petition for reinstatement affirming compliance with the terms of the consent and affirming current fitness and eligibility to practice (*i.e.*, an active professional license or active enrollment status, with no intervening violations of the regulations).

Suspended indefinitely by decision in expedited proceeding, Suspended indefinitely by default decision in expedited proceeding, Suspended by consent in expedited proceeding—OPR instituted an expedited proceeding for suspension (based on certain limited grounds, including loss of a professional license for cause, and criminal convictions).

Determined ineligible for limited practice—There has been a final determination that an unenrolled/unlicensed return preparer is not eligible for limited representation of any taxpayer because the preparer violated standards of conduct or failed to comply with any of the requirements to act as a representative.

A practitioner who has been disbarred or suspended under 31 C.F.R. § 10.60, or suspended under § 10.82, or a disqualified appraiser may petition for reinstatement before the IRS after the expiration of 5 years following such disbarment, suspension, or disqualification (or immediately following the expiration of the suspension or disqualification period if shorter than 5 years). Reinstatement will not be granted unless the IRS is satisfied that the petitioner is not likely to engage thereafter in conduct contrary to Circular 230, and that granting such reinstatement would not be contrary to the public interest.

Reinstatement decisions are published at the individual's request, and described in these terms:

Reinstated to practice before the IRS—The individual's petition for reinstatement has been granted. The individual is an attorney, certified public accountant, enrolled agent, enrolled actuary, or an enrolled retirement plan agent, and eligible to practice before the IRS, or in the case of an appraiser, the individual is no longer disqualified.

Reinstated to engage in limited practice before the IRS—The individual's petition for reinstatement has been granted. The individual is an unenrolled/unlicensed return preparer and eligible to engage in limited practice before the IRS.

OPR has authority to disclose the grounds for disciplinary sanctions in these situations: (1) an ALJ or the Secretary's delegate on appeal has issued a final decision; (2) the individual has settled a disciplinary case by signing OPR's "consent to sanction" agreement admitting to one or more violations of the regulations and consenting to the disclosure of the admitted violations (for example, failure to file Federal income tax returns, lack of due diligence, conflict of interest, etc.); (3) OPR has issued a decision in an expedited proceeding for indefinite suspension; or (4) OPR has made a final determination (including any decision on appeal) that an unenrolled/unlicensed return preparer is ineligible to represent any taxpayer before the IRS.

Announcements of disciplinary sanctions appear in the Internal Revenue Bulletin at the earliest practicable date. The sanctions announced below are alphabetized first by state and second by the last names of the sanctioned individuals.

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
California				
Rowland Heights	Zhong, John Z.	CPA, EA	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from January 10, 2017
San Jose	Boitano, Steven F.	CPA		Reinstated to practice before the IRS, effective October 5, 2017
Illinois				
South Barrington	Ahmed, Naveed	CPA		Reinstated to practice before the IRS, effective August 29, 2017
Indiana				
South Bend	Marshall, Sven E.	Attorney, CPA	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from August 30, 2017
Kentucky				
Louisville	Ford, David C.	Attorney	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from August 1, 2017
Massachusetts				
Chicopee	Lowe, James	CPA	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 19, 2017
Michigan				
Grand Blanc	Alexander, Jr., Royal	Enrolled Agent	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 6, 2017

City & State	Name	Professional Designation	Disciplinary Sanction	Effective Date(s)
New Jersey				
Union	Johnson, Courtney	CPA	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 19, 2017
New York				
Amsterdam	Witzke, Angela	CPA	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 19, 2017
Great Neck	McCoy, William L.	Enrolled Agent	Suspended by decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from September 7, 2017
Middletown	Guthrie, Sushana	Enrolled Agent	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from July 19, 2017
North Carolina				
Arden	Dearwester-Soboleski, Jane	Attorney	Suspended by default decision in expedited proceeding under 31 C.F.R. § 10.82(b)	Indefinite from August 1, 2017
	Ford, David C., see Kentucky			
Oklahoma				
Tulsa	Auer, David B	Attorney	Suspended by consent for admitted violation of 31 C.F.R. § 10.51(a)(10)	Indefinite from September 26, 2017
Pennsylvania				
	Johnson, Courtney, see New Jersey			
Texas				
Livingston	Knebel, Walter	CPA	Suspended by ALJ default decision	Suspended for a minimum of 48 months from June 8, 2017

Announcement 2017–19

Notice of Disposition of Declaratory Judgment Proceedings under Section 7428

This announcement serves notice to donors that on June 20, 2017, the United States Tax Court entered a decision that, effective May 1, 2008 the organization listed below is not qualified as an organization described in section 501(c)(3) and is not exempt from taxation under section 501(a).

American Friends of Yeshiva Shaare Chaim, Inc.

Cleveland Heights, Ohio

Announcement 2017–20

Notice of Disposition of Declaratory Judgment Proceedings under Section 7428

This announcement serves notice to donors that on September 13, 2017, the United States Tax Court entered stipulated decision that the organization listed below is qualified as an organization described in section 501(c)(3) and is exempt from taxation under section 501(a).

Columbians of Nampa, Inc.

Nampa, ID

Announcement 2017–21

Notice of Disposition of Declaratory Judgment Proceedings under Section 7428

This announcement serves notice to donors that on May 24, 2017, the United States Tax Court dismissed the section 7428 action of the organization listed below for lack of jurisdiction.

Faith's Hope Foundation

Fullerton, CA

Definition of Terms

Revenue rulings and revenue procedures (hereinafter referred to as "rulings") that have an effect on previous rulings use the following defined terms to describe the effect:

Amplified describes a situation where no change is being made in a prior published position, but the prior position is being extended to apply to a variation of the fact situation set forth therein. Thus, if an earlier ruling held that a principle applied to A, and the new ruling holds that the same principle also applies to B, the earlier ruling is amplified. (Compare with *modified*, below).

Clarified is used in those instances where the language in a prior ruling is being made clear because the language has caused, or may cause, some confusion. It is not used where a position in a prior ruling is being changed.

Distinguished describes a situation where a ruling mentions a previously published ruling and points out an essential difference between them.

Modified is used where the substance of a previously published position is being changed. Thus, if a prior ruling held that a principle applied to A but not to B, and the new ruling holds that it applies to both A and B, the prior ruling is modified because it corrects a published position. (Compare with *amplified* and *clarified*, above).

Obsoleted describes a previously published ruling that is not considered determinative with respect to future transactions. This term is most commonly used in a ruling that lists previously published rulings that are obsoleted because of changes in laws or regulations. A ruling may also be obsoleted because the substance has been included in regulations subsequently adopted.

Revoked describes situations where the position in the previously published ruling is not correct and the correct position is being stated in a new ruling.

Superseded describes a situation where the new ruling does nothing more than restate the substance and situation of a previously published ruling (or rulings). Thus, the term is used to republish under the 1986 Code and regulations the same position published under the 1939 Code and regulations. The term is also used when it is desired to republish in a single ruling a series of situations, names, etc., that were previously published over a period of time in separate rulings. If the new ruling does more than restate the substance of a prior ruling, a combination of terms is used. For example, *modified* and *superseded* describes a situation where the substance of a previously published ruling is being changed in part and is continued without change in part and it is desired to restate the valid portion of the previously published ruling in a new ruling that is self contained. In this case, the previously published ruling is first modified and then, as modified, is superseded.

Supplemented is used in situations in which a list, such as a list of the names of countries, is published in a ruling and that list is expanded by adding further names in subsequent rulings. After the original ruling has been supplemented several times, a new ruling may be published that includes the list in the original ruling and the additions, and supersedes all prior rulings in the series.

Suspended is used in rare situations to show that the previous published rulings will not be applied pending some future action such as the issuance of new or amended regulations, the outcome of cases in litigation, or the outcome of a Service study.

Abbreviations

The following abbreviations in current use and formerly used will appear in material published in the Bulletin.

A—Individual.
Acq.—Acquiescence.
B—Individual.
BE—Beneficiary.
BK—Bank.
B.T.A.—Board of Tax Appeals.
C—Individual.
C.B.—Cumulative Bulletin.
CFR—Code of Federal Regulations.
CI—City.
COOP—Cooperative.
Ct.D.—Court Decision.
CY—County.
D—Decedent.
DC—Dummy Corporation.
DE—Donee.
Del. Order—Delegation Order.
DISC—Domestic International Sales Corporation.
DR—Donor.
E—Estate.
EE—Employee.
E.O.—Executive Order.
ER—Employer.
ERISA—Employee Retirement Income Security Act.
EX—Executor.
F—Fiduciary.
FC—Foreign Country.
FICA—Federal Insurance Contributions Act.
FISC—Foreign International Sales Company.
FPH—Foreign Personal Holding Company.
F.R.—Federal Register.
FUTA—Federal Unemployment Tax Act.
FX—Foreign corporation.
G.C.M.—Chief Counsel's Memorandum.
GE—Grantee.
GP—General Partner.
GR—Grantor.
IC—Insurance Company.
I.R.B.—Internal Revenue Bulletin.
LE—Lessee.
LP—Limited Partner.
LR—Lessor.
M—Minor.
Nonacq.—Nonacquiescence.
O—Organization.
P—Parent Corporation.
PHC—Personal Holding Company.
PO—Possession of the U.S.
PR—Partner.
PRS—Partnership.
PTE—Prohibited Transaction Exemption.
Pub. L.—Public Law.
REIT—Real Estate Investment Trust.
Rev. Proc.—Revenue Procedure.
Rev. Rul.—Revenue Ruling.
S—Subsidiary.
S.P.R.—Statement of Procedural Rules.
Stat.—Statutes at Large.
T—Target Corporation.
T.C.—Tax Court.
T.D.—Treasury Decision.
TFE—Transferee.
TFR—Transferor.
T.I.R.—Technical Information Release.
TP—Taxpayer.
TR—Trust.
TT—Trustee.
U.S.C.—United States Code.
X—Corporation.
Y—Corporation.
Z—Corporation.

Numerical Finding List[1]

Bulletin 2017–27 through 2017–51

[1]A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2017–01 through 2017–26 is in Internal Revenue Bulletin 2017–26, dated June 27, 2017.

Finding List of Current Actions on Previously Published Items[1]

Bulletin 2017–27 through 2017–51

Notices:

2015-77
Amplified by
Notice 2017-40, 2017-32 I.R.B. *190*

2017-10
Modified by
Notice 2017-58, 2017-42 I.R.B. *326*

2017-29
Modified by
Notice 2017-58, 2017-42 I.R.B. *326*

Revenue Procedures:

2016-27
Modified by
Rev. Proc. 2017-43, 2017-31 I.R.B. *153*

2016-27
Superseded by
Rev. Proc. 2017-43, 2017-31 I.R.B. *153*

2016-48
Superseded by
Rev. Proc. 2017-48, 2017-36 I.R.B. *232*

[1]A cumulative list of all revenue rulings, revenue procedures, Treasury decisions, etc., published in Internal Revenue Bulletins 2017–01 through 2017–26 is in Internal Revenue Bulletin 2017–26, dated June 27, 2017.

Internal Revenue Service
Washington, DC 20224

Official Business
Penalty for Private Use, $300

INTERNAL REVENUE BULLETIN

The Introduction at the beginning of this issue describes the purpose and content of this publication. The weekly Internal Revenue Bulletins are available at *www.irs.gov/irb/*.

We Welcome Comments About the Internal Revenue Bulletin

If you have comments concerning the format or production of the Internal Revenue Bulletin or suggestions for improving it, we would be pleased to hear from you. You can email us your suggestions or comments through the IRS Internet Home Page (*www.irs.gov*) or write to the Internal Revenue Service, Publishing Division, IRB Publishing Program Desk, 1111 Constitution Ave. NW, IR-6230 Washington, DC 20224.