April 15, 2016

Internal Revenue Service
CC:PA:LPD:PR (Notice 2016-23)
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Notice 2016-23—Comments on the Implementation of the New Partnership Audit Regime Enacted as Part of the Bipartisan Budget Act of 2015

Dear Sir or Madam:

In response to Notice 2016-23 (the "Notice"), the Master Limited Partnership Association ("MLPA") is pleased to submit comments on the implementation of section 1101 of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74 (the "BBA Partnership Audit and Adjustment Provisions").

The BBA Partnership Audit and Adjustment Provisions were enacted on November 2, 2015. Unfortunately, the affected taxpayers and their advisors were not given an opportunity to adequately review or comment on the legislation prior to enactment. The statutory language effectively was made public for the first time when the bill (H.R. 1314) was sent to the House Rules Committee on October 28, 2015. The bill was passed by the House on the same day and considered (and passed) by the Senate over the course of the following two days. Neither the House Committee on Ways and Means, nor the Senate Finance Committee held a public hearing or a mark-up for the BBA

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Partnership Audit and Adjustment Provisions prior to passage. In short, the legislative process was unusually brief and opaque for legislation that makes fundamental changes to the manner in which partnerships are audited and taxed. After passage, the Chairman of the Senate Finance Committee addressed "those who might be concerned about the process" and highlighted the two-year delay before the effective date of the BBA Partnership Audit and Adjustment Provisions; he stated that the "Finance Committee will treat the TEFRA partnership reforms as a work in process."[1]

In light of this history, the complexity and importance of the BBA Partnership Audit and Adjustment Provisions, and the possibility of further legislative action, we respectfully request that taxpayers and practitioners be given more time to review and comment on the multitude of issues raised by the Notice. Making the BBA Partnership Audit and Adjustment Provisions function efficiently for the IRS, partnerships, and taxpayers without disrupting long standing partnership tax principles and master limited partnership ("MLP") investor expectations will require open dialogue and cooperation between the government, tax practitioners, and taxpayers.[2] We are committed to doing our part to help facilitate this important process.

I. Summary and Recommendations

1. For purposes of section 6225,[3] regulations should provide that: (a) MLPs will be permitted to substantiate the allowable amount of partners' "specified passive

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[1] 161 Cong. Rec. S7637 (daily ed. Oct. 29, 2015) (statement of Sen. Hatch).

[2] As used herein, the term "MLP" refers to a publicly traded partnership as defined under section 7704.

[3] Unless otherwise indicated, all "section", or "subchapter" references are to the Internal Revenue Code of 1986, as amended (the "Code"). All references to the "IRS" are to the Internal Revenue Service and references to "Treasury" are to the U.S. Department of the Treasury.

activity losses"; and, (b) Summary schedules provided by an MLP showing Schedule K-1 data for the specified partners along with a determination of such partners' allowable specified passive activity losses satisfy the MLP's requirements under section 6225(c)(5)(A)(i). Regulations should not require MLP investors to provide their tax returns in order to substantiate the amount of their specified passive activity losses, nor should they require the MLP or its investors to provide paper copies of the Schedules K-1.

2. If an MLP makes the election under section 6226 to push out an adjustment to its partners, regulations should permit the MLP to provide the required information to those partners whose tax liability will not be impacted by the election (because it is fully offset by passive losses of the partner subject to section 469(k)) on the partner's current-year Schedule K-1 in lieu of providing a separate section 6226 statement.

3. Regulations should: (a) Treat items reported on a statement described in section 6226 received by an upper-tier partnership in the same manner as items shown on an adjusted Schedule K-1 received by the upper-tier partnership for the reviewed year; and, (b) Require an upper-tier partnership that receives a statement described in section 6226 to pass through the items reported on the statement in a manner similar to that prescribed in section 6226(b) as the statute provides no basis for requiring an upper-tier partnership to determine and pay tax absent the upper tier filing a request under section 6227.

4. Regulations should apply the administrative adjustment mechanism of section 6227 to allow any upper-tier partnership that receives a statement described in

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section 6226 from a lower-tier partnership to determine and pay the tax due under rules similar to section 6225.

5. Regulations should confirm that a partnership that makes the election under section 6226 to push out an adjustment and properly provides the required statements to its partners is no longer liable for any tax with respect to the adjustment. In the event a partner does not pay tax as required, normal procedures for collecting the tax from the partner should apply. The BBA Partnership Audit and Adjustment Provisions provide no authority to collect from a partnership any tax with respect to items reported to partners under section 6226.

6. Regulations should provide that a partnership making the election under section 6226 should be permitted to send the statements described in section 6226 at any time prior to the due date (without extension) of the partnership's federal return for the partnership year during which the adjustments become final. Regulations also should provide that a partnership making the election under section 6226 may report the required information to its partners on a form substantially similar to Schedule K-1.

7. Regulations should clarify that the obligation of a partnership making the section 6226 election to furnish statements to each partner of the partnership for the reviewed year will be deemed satisfied if the partnership in good faith sends a statement to each partner to which it was required to send a Schedule K-1 for the reviewed year.

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8. Regulations should provide that a partnership making the election under section 6226 that challenges the notice of final partnership adjustment in court will not be required to furnish the statements described in section 6226 before the date that is 90 days after the case is litigated to final judgment or is otherwise settled pursuant to a closing agreement, as defined in section 7121.

9. Regulations should provide that a taxpayer challenging a final partnership adjustment in court may, on or before the date that is 45 days after the case is litigated to final judgment or is otherwise settled pursuant to a closing agreement, as defined in section 7121, revoke the election under section 6226 and pay the tax as determined under section 6225.

II. Overview of Key BBA Partnership Audit and Adjustment Provisions

In general, the BBA Partnership Audit and Adjustment Provisions repeal the unified partnership audit and adjustment rules established by the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA"), and the rules for electing large partnerships enacted as part of the Taxpayer Relief Act of 1997, for returns filed for partnership taxable years beginning after December 31, 2017.[4] The BBA Partnership Audit and Adjustment Provisions replace them with new audit and adjustment procedures that apply by default to all partnerships. Under the BBA Partnership Audit and Adjustment Provisions, adjustments to partnership items are determined at the partnership level, and any additions to tax—plus penalties and interest—are assessed and collected at the

[4] Taxpayers may elect to apply the BBA Partnership Audit and Adjustment Provisions to partnership returns for taxable years beginning after November 2, 2015. This letter does not address issues relating to early application of the BBA Partnership Audit and Adjustment Provisions.

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partnership level unless the partnership elects to pass the adjustment through to its partners or the partners file amended tax returns.

A. Default Rule: Imputed Underpayment Paid by the Partnership

Under the default rule, new section 6225, all adjustments to partnership income, gain, loss, and deduction for a year under examination (the "reviewed year") that are adjusted as the result of an examination (not including reallocations of such items among the partners) are netted, and any resulting increase in the partnership's income for the reviewed year is multiplied by the highest rate of tax under section 1 or 11 to arrive at the "imputed underpayment" amount. Unless the partnership makes an election under section 6226 (the "push-out election" described below) or the partners file amended tax returns, the partnership is required to pay the imputed underpayment.

Section 6225(c) contains provisions that permit the Secretary to establish procedures under which the imputed underpayment amount may be reduced to reflect any payments made by a partner on an amended return that properly reflects the adjusted items for the reviewed year (and any intervening taxable year with respect to which any tax attribute was affected by the reviewed-year adjustments). In addition, the imputed underpayment amount may be reduced to the extent it is attributable to items allocable to a partner that would not owe tax by reason of its status as a tax-exempt entity or to a partner of an MLP with passive activity losses related to such MLP.

Finally, section 6225 allows the tax rate applied to the partnership's imputed underpayment amount to be modified to the extent the imputed underpayment is allocable to a corporation or is long-term capital gain or qualified dividend income allocable to an individual.

B. The Push-Out Election

New Section 6226 allows a partnership to elect, not later than 45 days after the date of the notice of final partnership adjustment, to push out the adjusted items to the partners for the reviewed year (such election referred to herein as the “push-out election”). If a partnership makes the push-out election, the electing partnership is required to provide a statement to each person that was a partner in the reviewed year, showing that person’s share of the adjustment to the partnership’s income, gain, loss, deduction, or credit.

Each person receiving such a statement must increase its tax for the year in which the statement is furnished by the additional tax that would have been due in the reviewed year and any intervening years as if the adjustment had been taken into account by the partner on its return for the reviewed year and all subsequent tax returns up to and including the year for which the statement was furnished. The tax attributes that are affected by the adjustments are changed accordingly. Penalties are determined at the partnership level and passed through to the partners in a manner similar to income adjustments; interest is determined at the partner level at a rate that is two percent higher than the normal underpayment rate prescribed by section 6621(a)(2).

C. Administrative Adjustment Request by Partnership

Section 6227 provides that a partnership may file a request for an administrative adjustment in the amount of one or more items of income, gain, loss, deduction or credit of the partnership for any partnership taxable year. Any such adjustment is taken into account by the partnership under rules “similar to” the rules of section 6225 (not including modifications in section 6225(c) related to amended returns of partners for the reviewed year) or section 6226. A partnership may not request an administrative adjustment more than three years after the later of (1) the date on which the partnership return for the year for which the adjustment is requested is filed, or (2) the last day for filing the partnership return for such year. In addition, a partnership may in no event request an administrative adjustment after a notice of administrative proceeding at the partnership level (described in new section 6231) is mailed to the partnership.

III. Comments

A. Section 6225

1. Concerns with Entity-Level Tax on Partnerships

Section 701, the first and most fundamental rule of subchapter K, has just two sentences: "A partnership as such shall not be subject to the income tax imposed by this chapter. Persons carrying on business as partners shall be liable for income tax only in their separate or individual capacities." Because partnerships are not subject to tax and partners are taxable only in their separate or individual capacities, an investor in a partnership has very different expectations regarding federal income taxation than an investor in a corporation.

In the corporate context, shareholders generally understand that they will bear a pro-rata share of the economic burden of the corporation's federal income taxes regardless of whether they would themselves—in their separate or individual capacities—be taxable on the corporation's income or whether those taxes relate to periods before the shareholder acquired its shares (periods for which the shareholder simply could not be liable for tax in its separate or individual capacity).

In the partnership context, expectations are very different. A partner expects to pay tax only with respect to the items for which he is entitled to receive an economic benefit and only to the extent he would be taxable on such items in his separate or individual capacity. Imposing an entity-level tax on a partnership under the default rule of section 6225 is a fundamental change to the federal tax law that, in the absence of the push-out election, could severely impact the ability of businesses to raise capital through the use of partnership structures. For example, tax-exempt investors almost certainly would not continue to invest in partnerships if the partnership were required to pay the tax on any adjustment that, if allocated to the tax-exempt partner, would not be taxed.

We believe Congress recognized this problem and partially addressed it in section 6225 by providing rules to alter the imputed underpayment in certain circumstances. Section 6225(c) permits modifications to the amount of an imputed underpayment that allow it to be more closely aligned with the amount of tax that would be due if the partners were taxed on the adjustments in their separate or individual capacities. But section 6225(c) is an imperfect mechanism that cannot account for all partner-level facts, circumstances, or attributes that determine whether or to what extent a partner would be liable for tax in its separate or individual capacity. As a result, in many cases, section 6225 will not provide sufficient remedies to ensure fairness.

In the case of an average MLP, for example, approximately 15-20 percent of the publicly traded units are sold or exchanged each year. Payment of tax on a prior-year adjustment at the partnership would result in the new public unit purchasers bearing the burden of taxes associated with income realized in years prior to the time they owned an interest in the MLP.[5] Given that the average MLP has approximately 40,000

[5] It also likely would result in the government collecting tax on the adjustment twice, because the persons who were unit holders in the reviewed year but sold prior to the adjustment year effectively overstated their gain on sale. If the adjustment had been included in income by the selling unitholders, increasing their bases in their units prior to sale, then their gain on sale of their partnership units would have been reduced in an amount equal to the adjustment. Regardless, the MLP would be required to pay the tax

unitholders, this could affect 6,000 to 8,000 new unitholders per MLP each year. None of the enumerated exceptions in section 6225(c) fix this transfer of the tax obligation to the new partner. From an investor standpoint, the potential for any material amount of federal income tax at the partnership level is likely to have a negative impact on the value and liquidity of MLP units, as it could significantly alter the risks associated with ownership of such units.[6]

The Joint Committee on Taxation's discussion of the BBA Partnership Audit and Adjustment Provisions, published on March 14, 2016, in its General Explanation of Tax Legislation Enacted in 2015 (the "Bluebook"), highlights that some partnerships subject to the BBA Partnership Audit and Adjustment Provisions might be able to revise their partnership agreements to include provisions requiring partners to indemnify the partnership for certain partnership-level taxes, require the filing of amended reviewed year returns, or require partners to fund additional capital contributions to pay tax in order to ensure proper distribution of the tax burden. However, for many partnerships, including MLPs, this is just not practical from a commercial standpoint.

For example, requiring investors in MLPs to make capital contributions to the partnership or indemnify other partners in the event of material adjustments to prior-year items is impractical given the sheer number of partners and level of unitholder sales. Doing so would have a negative impact on the value and liquidity of MLP units, as this requirement would alter significantly the risks associated with ownership of such

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again, as it would be difficult, expensive, and otherwise impractical for it to force a former partner to amend his tax return and provide such return to the partnership to substantiate for the Secretary that tax was paid on the adjustment allocable to such partner.

[6] In the case of private sales of partnership interests, parties contracting directly with each other might be able to address the potential shifting of tax liability with indemnification provisions. But in the case of publicly traded partnership interests, the only avenue for addressing this issue is price.

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units. The types of approaches suggested by the Bluebook to make section 6225 more workable from a business standpoint generally are only practicable for partnerships with 100 or fewer partners (which, in many cases, may be able to elect out of the BBA Partnership Audit and Adjustment Provisions altogether). We believe that a key reason why Congress enacted section 6226 was to provide a way for partnerships to address these issues.

Nevertheless, in the case of adjustments to the income of an MLP that are relatively minor on a per-unit basis (including after the reduction to the imputed underpayment for partners with passive losses),[7] it will benefit the IRS, the MLP, and its unitholders to have the tax paid by the MLP. We are committed to helping to develop rules that allow for a reasonable determination of tax liability at the MLP level under section 6225 in order to minimize those situations in which an MLP will feel obligated from an investor fairness perspective to make a push-out election under section 6226.

2. Imputed Underpayment Calculation

The provisions addressing passive losses in section 6225(c) are designed to determine more appropriately the amount of imputed tax an MLP owes to the extent it can be shown that partners should not have an increased tax liability from the MLP level adjustment. Section 6225(c)(5) provides publicly traded partnerships the ability to reduce an imputed underpayment by the portion of such underpayment that the partnership can demonstrate is attributable to a partner that has specified passive activity losses (i.e., losses described in section 469(k)) to offset its share of the imputed

[7] Even a seemingly significant adjustment may be small on a per unit basis. For example, a $10 million adjustment to basis of an asset amortizable on a 15-year straight-line basis in an MLP with 100,000 units would result in an annual adjustment to income of only $6.67 per unit.

underpayment. Section 469(k) prevents passive losses of an MLP from offsetting passive income from any other source (other than the MLP that generated the loss). This special limitation on the utilization of passive losses puts each MLP in a unique position to determine the partner-level tax impact of any adjustment to its income.

In light of this fact, and recognizing that it would be impractical to require investors to provide their tax returns to an MLP to substantiate the amount of their passive losses, the special rule in section 6225(c) anticipates that the MLP will provide information to the IRS to substantiate the partners' allowable passive activity losses for purposes of reducing an imputed underpayment.

To substantiate a partner's passive losses associated with an MLP, an MLP can provide summary schedules reflecting the specific allocations to each specified partner of the partnership from the year such partner purchased units through the year the partnership receives the notice of final partnership adjustment (i.e., a summary schedule of each prior year's Schedule K-1 allocations). These summary schedules will quantify each specified partner's allowable, cumulative net losses subject to section 469(k) from the reviewed year through the adjustment year.

For purposes of section 6225(c)(5), regulations should provide that: (a) MLPs will be permitted to substantiate the allowable amount of partners' "specified passive activity losses" without requiring tax returns from its unitholders; and, (b) Summary schedules provided by an MLP showing Schedule K-1 data for the specified partners, along with a determination of each specified partner's allowable specified passive activity losses, satisfy the MLP's requirement under section 6225(c)(5)(A)(i). Neither an MLP, nor its investors should be required to provide paper copies of the Schedules K-1 pursuant to this provision.

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As drafted, the special rule for specified passive activity losses is available only under section 6225. We believe, however, that it would be advantageous to both the IRS and taxpayers if regulations permitted an MLP that makes a push-out election under section 6226 to provide the required information to those partners whose tax liability will not be impacted (due to passive losses) on the adjustment year Schedule K-1 at any time prior to the due date (without extension) of the partnership's federal return for the year the adjustments are finalized in lieu of providing a separate section 6226 statement. Permitting such an approach would yield three significant benefits: (i) It would simplify and likely enhance compliance by the large numbers of retail investors in MLPs who otherwise would have to perform the complex calculations to prior-year returns that will not result in any change to their tax liability; (ii) It would limit the statements provided to the Secretary to those for which there possibly is a change in the recipient's tax liability; and, (iii) It would provide the information needed to adjust passive-loss carryforwards to those investors whose liability is not affected by the adjustment.

B. Section 6226

In recognition of the significant impact that an entity-level tax could have on partnerships, including the ability of partnerships to raise and deploy capital, Congress included a statutory remedy that enables a partnership to elect to "push-out" any adjustment to the partners in lieu of the partnership paying any imputed underpayment. Specifically, section 6226 provides a partnership that is willing to accept the administrative burden of sending the section 6226 statements to its partners the ability to pass through the adjustment to the appropriate partners (i.e., those persons who were partners in the partnership for the reviewed year, who, under longstanding partnership principles, should be responsible for any additional reviewed year tax). The remainder of our comments are focused on the operation of the section 6226 election.

1. Tiered Partnerships

It is common for an MLP to be organized in a tiered partnership structure. Often, the operating assets of the MLP are held by one or more operating partnerships the interests in which are owned by both the MLP and its sponsor. Many MLPs also own interests in joint ventures with other third parties. Also, one MLP may own interests in another MLP, and MLP public units are often owned by unrelated partnerships.

The BBA Partnership Audit and Adjustment Provisions are silent with regard to the effect of the push-out election in a tiered partnership structure. Given the way in which the statute is constructed, however, there is no section 6225 liability for an upper-tier partnership if a lower-tier partnership makes a section 6226 election. If the lower-tier partnership makes the push-out election, section 6225 (which contains the rules for determining an "imputed underpayment") is turned off. The flush language of section 6226(a) provides that, if the partnership makes the push-out election, "section 6225 shall not apply with respect to such underpayment and each partner shall take such adjustment into account as provided in subsection (b)." Under section 6226(b), each partner's tax imposed under chapter 1 of the Code for the taxable year in which a section 6226 statement is furnished shall be increased by the adjustment amounts further determined under section 6226(b). Importantly, an upper-tier partnership by definition does not owe tax under chapter 1 of the Code; rather such tax would be owed by the partners of the upper-tier partnership.

In the absence of explicit statutory authority to require payment of the tax at the upper-tier partnership, it is questionable whether Treasury could, by regulation, impose on an upper-tier partnership the obligation to calculate and pay the additional tax on behalf of its partners. This obligation is not explicitly authorized by the statute. We believe that a legislative change would be required to impose this obligation on upper-tier partnerships if that were intended by Congress.

In contrast, the Bluebook contains a discussion of the application of the push-out election to tiered partnerships that strongly implies that if a lower-tier partnership makes the push-out election, an upper-tier partnership to which additional items are reported is required to pay tax on those items.[8] Under this interpretation of the statute, the upper-tier partnership would have no ability to pass through the adjustment to its partners. The Bluebook goes on to state that an upper-tier partnership that receives a section 6226 statement from a lower-tier partnership "pays the tax attributable to adjustments with respect to the reviewed year and the intervening years, calculated as if it were an individual (consistently with section 703), for the taxable year that includes the date of the statement."[9]

We do not believe this interpretation is accurate, but even if the Bluebook interpretation of the statute were correct, it is not clear how this tax would be calculated. There is no suggestion in the statute or the Bluebook that the rules in section 6225 are somehow applicable for upper-tier partnerships if the push-out election is made at a lower-tier partnership, which might enable an imputed underpayment to be calculated at the upper tier in a manner that takes the tax attributes of the upper-tier partnership's partners into account. Furthermore, there is no suggestion in the statute that any imputed tax liability imposed on the upper-tier partnership would be computed as if it

[8] *See* Bluebook at 70.

[9] *Id*.

were an individual. Unless the section 6225(c) modifications to the tax could be applied at the upper-tier partnership, it is likely that too much tax could be imposed.

For example, in the case of an upper-tier partnership all of whose partners are tax exempt in the reviewed year, under the construct postulated in the Bluebook, tax still would be due, because the exceptions provided in section 6225 do not appear to be available. In other words, under the BBA Partnership Audit and Adjustment Provisions as interpreted by the Bluebook, an entity-level tax could be imposed that bears no resemblance or connection to the tax that otherwise would be due from the partners. Moreover, the statement that the partnership pays tax calculated "as if it were an individual" is problematic. There is no statutory language supporting this statement, which could be read to suggest that the partnership has an entity-level tax liability computed in accordance with section 1 of the Code. At a minimum, the Bluebook statement requires significant further clarification to explain precisely how a liability would be determined.

Additionally, we note that the Bluebook reference to section 703 is a non sequitur; the regulations under section 703 provide rules for determining the "taxable income" of a partnership (in the same manner as the taxable income of an individual), but they do not provide rules for determining the payment of tax on such income. These rules are explicitly provided in section 702. Section 702 provides that each partner shall take into account separately his distributive share of the partnership's income. Thus, the reference to section 703 in the Bluebook to justify requiring the partnership to pay any tax is inaccurate.

We note that the Bluebook is not authoritative legislative history,[10] and, with respect to the proper application of the BBA Partnership Audit and Adjustment Provisions to tiered partnerships, the Bluebook discussion cited above does not provide a persuasive view of how the legislation was intended to function. For this reason, we believe the IRS should ignore the discussion of tiered partnerships on page 70 of the Bluebook. Instead, a section 6226 statement received by an upper-tier partnership should be treated in a manner consistent with the aggregate concept of the section 6226 "push-out election." This approach also would be consistent with other provisions of the Internal Revenue Code and the general principles of subchapter K, which taxes the partners on the income of the partnership only in their separate or individual capacities.

If Treasury issues regulations on this point (notwithstanding the uncertain authority discussed above), such regulations should: (i) Treat items reported on a statement described in section 6226 received by an upper-tier partnership in the same manner as items shown on an adjusted Schedule K-1 received by the upper-tier partnership for the reviewed year; and, (ii) Require an upper-tier partnership that receives a statement described in section 6226 to pass through the items reported on the statement in a manner similar to that prescribed in section 6226(b). When the items are reported to taxpayers (i.e., persons subject to tax under chapter 1, including individuals and

[10] *See U.S. v. Woods*, 134 S.Ct. 557, 567 (2013) ("Blue Books are prepared by the staff of the Joint Committee on Taxation as commentaries on recently passed tax laws. They are "written after passage of the legislation and therefore d[o] not inform the decisions of the members of Congress who vot[e] in favor of the [law]." *Flood v. United States,* 33 F.3d 1174, 1178 (C.A.9 1994). We have held that such "[p]ost-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth LLC,* 562 U.S. ––––, ––––, 131 S.Ct. 1068, 1081, 179 L.Ed.2d 1 (2011); accord, *Federal Nat. Mortgage Assn. v. United States*, 379 F.3d 1303, 1309 (C.A.Fed.2004) (dismissing Blue Book as "a post-enactment explanation"). While we have relied on similar documents in the past, see *FPC v. Memphis Light, Gas & Water Div.*, 411 U.S. 458, 471–472, 93 S.Ct. 1723, 36 L.Ed.2d 426 (1973), our more recent precedents disapprove of that practice. Of course the Blue Book, like a law review article, may be relevant to the extent it is persuasive.")

corporations) by any top-tier partnership, then such persons would pay the tax as determined under section 6226(b).

In addition, any such regulations should apply the administrative adjustment mechanism of section 6227 to allow any upper-tier partnership that receives a statement described in section 6226 from a lower-tier partnership to determine and pay the tax due under rules similar to section 6225. While the Bluebook is not authoritative legislative history, we would point out that the discussion of administrative adjustment requests in the Bluebook arguably supports this application of section 6227.[11] Adopting this approach would ease the administrative burden for partnerships, taxpayers, and the IRS, particularly when an upper-tier partnership's adjustment amount is immaterial and the upper-tier partnership would prefer to determine and pay any tax due. Moreover, such an approach would allow an upper-tier partnership to determine its imputed underpayment, and the associated tax thereon, in a manner that is more consistent with the actual tax that would be due were the adjustments to flow through as otherwise required.

As discussed above, we believe that the default rule (to be applied in the absence of a request for an administrative adjustment by an upper-tier partnership) is that any items reported by a lower-tier partnership to an upper-tier partnership must be reported to the partners of the upper-tier partnership under traditional subchapter K principles, treating the statement provided by a lower-tier partnership to an upper-tier partnership in the same manner as an adjusted Schedule K-1 for the reviewed year. Regulations

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[11] Bluebook at 71 ("In the case of tiered partnerships, a partnership's partners that are themselves partnerships may choose to file an administrative adjustment request with respect to their distributive shares of an adjustment. The partners and indirect partners that are themselves partnerships may choose to coordinate the filing of administrative requests as a group to the extent permitted by the Secretary.")

should confirm that this rule applies in the absence of a request for administrative adjustment by an upper-tier partnership. An administrative adjustment request with respect to an item reported to an upper-tier partnership thus would function as an election to determine and pay tax under rules similar to section 6225.

2. Collection of Tax Underpayment from Partnership

The Notice requests comments on the "consequences that result when a partner fails to account for adjustments as required under section 6226(b), including how tax attributable to those adjustments is assessed and collected."

If a partnership makes the election under section 6226 to push out an adjustment to its partners, the statute provides that section 6225, by which an entity-level tax might be imposed, does not apply. Thus, the remedies available to the IRS in the case of non-payment of the tax related to the adjustment amount by the partners are exactly the same as they were under pre-BBA law.

There is no indication in the statute that Congress intended the BBA Partnership Audit and Adjustment Provisions to alter fundamentally the self-assessment system or the basic logic of subchapter K by requiring a partnership to be liable for tax because a partner fails to fulfill his tax obligations. In fact, enactment of the BBA Partnership Audit and Adjustment Provisions, particularly section 6226, marked a clear departure from certain policies in the partnership audit and adjustment bill (H.R. 2821) that was considered and rejected by Congress earlier in 2015.[12] That bill would have permitted the IRS to assess and collect underpayments of tax at the partnership level with no

[12] H.R. 2821 (the Partnership Audit Simplification Act) was widely known to have been considered and rejected as a revenue offset to fund a shortfall in the Highway Trust Fund in the summer of 2015.

option for the partnership to make a push-out election and would have made the partners jointly and severally liable for such partnership-level taxes. Thus, any attempt to obligate a partnership to be secondarily liable for the tax of its partners is contrary to clear congressional intent as evidenced by the policy changes made to the legislative proposal prior to reconsideration and enactment.

Therefore we recommend that regulations confirm that a partnership that makes the election under section 6226 to push out an adjustment and properly provides the required statements to its partners is no longer liable for any tax with respect to the adjustment.

3. Timing of Push-Out Election Statements

Section 6226 provides a partnership 45 days from the date of the notice of final partnership adjustment to elect to make the push-out election but does not provide a due date for the statements described in section 6226. In our view, a partnership making the push-out election generally should be permitted to send the statements described in section 6226 at any time prior to the due date (without extension) of the partnership's federal return for the year the adjustments are finalized. This will enable most partners to receive such statements at the same time as they receive their normal tax information from a partnership and would obviate the need for and cost of multiple communications on tax matters with partners.

Statements described in section 6226 sent to partners separately from regular Schedules K-1 are unlikely to receive the same attention as those sent with the Schedules K-1. In the tiered partnership context, tiered partnerships can be expected to deal with any section 6226 statement timing issues in the same manner as they deal with timing issues inherent in the Schedule K-1 requirements. Therefore, we recommend Treasury consider permitting the statements under section 6226 to be provided any time prior to the due date (without extension) of the partnership's federal return for the year the adjustments are finalized.[13]

For similar reasons, regulations also should provide that a partnership making the election under section 6226 may report the required information to its partners on an amended Schedule K-1 or a form substantially similar to Schedule K-1, which may be delivered in the same manner that Schedule K-1 is otherwise delivered to partners. Further, the regulations should clarify that the obligation of a partnership making the push-out election to furnish statements to each partner of the partnership for the reviewed year will be deemed satisfied if the partnership in good faith sends a statement to each partner to which it was required to send a Schedule K-1 for the reviewed year.

In addition, in the case of an adjustment that a partnership challenges in court, the final amount of the adjustment will not be known until the case has been litigated to final non-appealable judgment or is otherwise settled in a binding manner (e.g. pursuant to a closing agreement, as defined in section 7121) (collectively, a "final determination"). Thus, in the event a partnership making the election under section 6226 challenges a final partnership adjustment in court, guidance should provide that the statements described in section 6226 would not be required before the date that is 90 days after a final determination. Similarly, we recommend that partnerships challenging an adjustment for which the push-out election has been made be permitted, on or before the date that is 45 days after a final determination, to revoke the election under section

[13] We recognize that this rule could defer the obligation of a partner to report and pay tax on the adjustment to the year the Schedule K-1 is received.

6226 and pay the tax as determined under section 6225. We believe such an approach is helpful to both taxpayers and the IRS.

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Making the BBA Partnership Audit and Adjustment Provisions efficient for the IRS, partnerships, and taxpayers without disrupting long standing partnership tax principles and investor expectations will require open dialogue and a willingness of all to cooperate. We look forward to working together to help create a set of rules that benefit all parties.

If you have any questions please do not hesitate to contact our external advisors on this letter Brian Meighan, Robert Baldwin, or Michael Hauswirth.

Sincerely,

Master Limited Partnership Association

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