October 7, 2024

Via Electronic Filing

CC:PA:01:PR (REG–105128–23)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Rules Regarding Dual Consolidated Losses and the Treatment of Certain Disregarded Payments [REG-105128-23]; RIN 1545-BQ72

We, the undersigned trade associations, appreciate the opportunity to provide comments to the Department of the Treasury ("**Treasury**") and the Internal Revenue Service ("**IRS**") in response to the proposed regulations requiring an inclusion in income in respect of certain "disregarded payment losses" (the "**Proposed Regulations**").[1] As currently drafted, the Proposed Regulations would significantly increase the tax compliance costs for owners of minority interests in partnerships, while creating a heavy administrative burden for both taxpayers and the IRS in a manner that does not seem necessary to achieve the regulations' stated policy goals. Accordingly, we recommend that the Treasury and the IRS reconsider certain aspects of the Proposed Regulations.

While the Proposed Regulations address various issues with respect to the dual consolidated loss rules (the "**DCL Rules**"), we limit our comments to the regime pertaining to "disregarded payment losses" (the "**Proposed DPL Rules**"). We have serious concerns with respect to the Proposed DPL Rules, especially as applied to owners of minority interests in partnerships.

I. Executive Summary

As set forth in more detail below, we make the following two recommendations:

1. The Proposed DPL Rules should be withdrawn and re-proposed as a standalone notice of proposed rulemaking, with a new notice-and-comment period.
2. The partial ownership interest rule in Proposed Regulations Section 1.1503(d)-1(d)(7)(ii) should not apply unless the specified domestic owner is "related" to the disregarded payment entity within the meaning of section 954(d)(3).

[1] 89 Fed. Reg. 64750.

II. Discussion

1. The Proposed DPL Rules should be withdrawn and re-proposed as a standalone notice of proposed rulemaking, with a new notice-and-comment period.

Although the Proposed DPL Rules were issued together with proposed DCL Rules, the Proposed DPL Rules operate as a standalone regime. We recommend that the Proposed DPL Rules be withdrawn and reissued as a standalone notice of proposed rulemaking. This approach would be more consistent with the nature of the Proposed DPL Rules as a standalone set of rules. It would also afford taxpayers a more adequate notice-and-comment period, by more clearly signaling to affected taxpayers that these rules operate independently from the DCL Rules. In withdrawing and reissuing the Proposed DPL Rules, Treasury and the IRS could consider ways to refine the Proposed DPL Rules to resolve ambiguities in their application and minimize unintended effects.[2] As part of this process, Treasury and the IRS could also consider further whether there is statutory authority for promulgating such regulations.

2. The partial ownership interest rule in Proposed Regulations Section 1.1503(d)-1(d)(7)(ii) should not apply unless the specified domestic owner is "related" to the disregarded payment entity within the meaning of section 954(d)(3).

We have serious concerns with the Proposed DPL Rules and their impact on owners of minority interests in partnerships. If finalized in their current form, the rules would dramatically increase tax compliance costs for investment funds and their investors and create a heavy administrative burden for both taxpayers and the IRS.

In the past year, our members and their clients received hundreds of thousands of Schedules K-1 from different partnerships, most of which include domestic corporations as indirect partners. The Proposed DPL Rules would require these corporate partners to identify and track disregarded payment losses from these partnerships. However, the owner of a minority interest in a partnership would generally have limited ability to comply with the Proposed DPL Rules' certification requirements and, upon the inevitable failure to comply, would be required to include non-economic amounts in income.[3] For those that

[2] By way of example, there is a possible reading of the Proposed DPL Rules that would require a specified domestic owner to include the same amount in income in successive years in respect of multiple failures to certify with respect to the same disregarded payment loss, or in respect of a failure to certify with respect to a disregarded payment loss followed by a foreign use of such disregarded payment loss—a result which we do not believe was intended by Treasury and the IRS. We do not believe that this is the correct reading of the Proposed DPL Rules, as we believe that the first inclusion in income with respect to such a disregarded payment loss should cause such amount to no longer satisfy the condition of Prop. Treas. Reg. § 1.1503(d)-1(d)(6)(ii)(C)(2) that such payment be disregarded for U.S. tax purposes. However, the Proposed DPL Rules are ambiguous in this respect.

[3] It is not even clear whether, under the rules as proposed, these investors would be able to compute their income inclusions.

do attempt to comply, the IRS would face the overwhelming challenge of having to reconcile complex chains of minority ownership across potentially thousands of entities to verify certifications. This process seems like a gratuitous waste of resources, without any apparent benefit in terms of furthering the stated policy objectives (as discussed below).

The disregarded payment entity combination rule in the Proposed DPL Rules would exacerbate these issues.[4] Under that rule, all disregarded payment entities for which the relevant foreign tax law is the same (such as entities that are tax residents of the same foreign country) would be treated as a single disregarded payment entity. The application of this rule would require that even the most insignificant indirect ownership interest be combined with all other relevant disregarded payment entities that may be owned, directly or indirectly, by the same specified domestic owner. As a result, the owner of a minority interest in a partnership could cause a triggering event with respect to its *entire* disregarded payment loss in a foreign country solely by reason of its ownership of such minority interest.

For example, consider a domestic corporation that owns a disregarded payment entity subject to the tax laws of Country X with a $100 disregarded payment loss that will *not* be available for foreign use. In addition, the corporation is an indirect owner of a 10% interest in a disregarded payment entity through a series of interests in partnerships, and its share of a disregarded payment loss through such 10% interest is $1.[5] But for the 10% interest, the corporation could satisfy the certification requirements of Proposed Regulations Section 1.1503(d)-1(d)(4) with respect to the $100 disregarded payment loss. However, because of its minority interest in a separate partnership, the corporation may be unable to comply with any of its Country X certification obligations under the disregarded payment entity combination rule and, thus, may be required to include $101 in income even though no foreign use has occurred.

In addition to being administratively unfeasible and unfairly punitive, situations involving indirect minority interests in disregarded payment entities do not present the same related-party tax structuring concerns the Proposed DPL Rules purportedly target. The preamble to the Proposed Regulations explains that the Proposed DPL Rules include fewer "triggering events" than the DCL Rules because "D/NI outcomes from disregarded payment losses involve only related parties and typically are highly-structured."[6] The preamble similarly explains that a foreign use is only deemed to occur upon use by a person related to the specified domestic owner because foreign use by a person that is not related is

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[4] Proposed Regulations Section 1.1503(d)-1(d)(7)(i).

[5] One illustrative example is an investment in a fund-of-funds which may receive over five hundred Schedules K-1 in a given year corresponding to over one thousand (or more) portfolio companies. A minority investor in a fund-of-funds could not possibly be expected to satisfy the certification requirements with respect to its potential indirect ownership of disregarded payment entities owned (directly or indirectly) by the portfolio companies.

[6] 89 Fed. Reg. 64763.

generally not tax-motivated.[7] By definition, a specified domestic owner is not related to an indirect *minority* interest in a disregarded payment entity, and accordingly, disregarded payment losses are generally not driven by the specified domestic owner's tax planning.

Moreover, the statutory authority to apply the Proposed DPL Rules to owners of minority interests in partnerships is tenuous at best because such authority appears to rely on the deemed consent by specified domestic owners of disregarded payment entities to be subject to the Proposed DPL Rules.[8] An indirect owner of a minority interest in a disregarded payment entity cannot reasonably be considered to have consented to the application of the Proposed DPL Rules by reason of such minority ownership, and therefore, such ownership should not be viewed as a proper basis for statutory authority for application of such rules.

Accordingly, we recommend that the Proposed DPL Rules be revised to provide that the partial ownership interest rule does not apply unless the specified domestic owner is related to the disregarded payment entity within the meaning of section 954(d)(3), with the result that a specified domestic owner will not be related to a disregarded payment entity unless the specified domestic owner owns more than 50% (by value) of the beneficial ownership interests in such disregarded payment entity.[9]

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We appreciate the opportunity to provide our comments to Treasury and the IRS on the Proposed DPL Rules, and we would be pleased to meet with Treasury and the IRS to discuss our comments. If Treasury and the IRS have questions or comments, please do not hesitate to Joseph Schwartz, Vice President and Senior Counsel, Regulatory Affairs, MFA, or P.J. Austin, Vice President, Tax, SIFMA.

Respectfully submitted,

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[7] *Id.*

[8] Proposed Regulations Section 301.7701-3(c)(4)(iii).

[9] Attempts to circumvent the Proposed DPL Rules would be subject to the general anti-avoidance rule under the Proposed Regulations. *Id.* at 64757 ("This anti-avoidance rule also applies with respect to transactions that attempt to avoid the purposes of the disregarded payment loss rules.").