

Section of Taxation

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November 4, 2005

Hon. Mark W. Everson
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments on Proposed Regulations on the Obligation of Partnerships
to Withhold Tax Under Section 1446 on Effectively Connected
Taxable Income Allocable to Foreign Partners

Dear Commissioner Everson:

Enclosed are comments on proposed regulations under Internal Revenue Code Section 1446. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,



Dennis B. Drapkin
Chair, Section of Taxation

Enclosure

cc: Donald L. Korb, Chief Counsel, IRS
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**COMMENTS CONCERNING PROPOSED REGULATIONS RELATING TO THE
OBLIGATION OF A PARTNERSHIP TO WITHHOLD TAX UNDER SECTION 1446
ON EFFECTIVELY CONNECTED TAXABLE INCOME ALLOCABLE TO FOREIGN
PARTNERS**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Alan I. Appel and Michael J. Karlin of the Committee on U.S. Activities of Foreigners and Tax Treaties (the “Committee”). Substantive contributions were made by Kimberly S. Blanchard. The Comments were reviewed by Stanley C. Ruchelman, Chair of the Committee; Michael Hirschfeld of the Section’s Committee on Government Submissions and N. Susan Stone, Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the federal tax principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: November 4, 2005

These Comments respond to the Department of Treasury's request for comments on proposed and temporary regulations published in the Federal Register on May 18, 2005,¹ published in conjunction with final regulations under Section 1446 of the Internal Revenue Code of 1986, as amended (the "Code") (all references herein to Sections shall mean Sections of the Code unless otherwise indicated). Regulations were originally proposed under Section 1446 on September 3, 2003.²

To avoid confusion, these Comments refer to the September 3, 2003 proposed regulations as "the Proposed Regulations", the May 18, 2005 final regulations as the "Final Regulations," and the proposed regulations at Prop. Reg. § 1.1446-6 and the May 18, 2005 temporary regulations at Temp. Reg. § 1.1446-6T collectively as the "Temporary Regulations."

The Final Regulations provide rules for the implementation of the requirement of Section 1446 that a partnership pay to the Internal Revenue Service (the "Service") taxes on behalf of a foreign partner with respect to the foreign partner's applicable percentage of the partnership's effectively connected taxable income ("ECTI"). The Temporary Regulations set forth rules to reduce or eliminate a partnership's Section 1446 withholding tax obligation with respect to a foreign partner in certain circumstances. Specifically, the Temporary Regulations address when a partnership is permitted to consider partner-level deductions and losses when computing its 1446 tax (or any installment of such tax) with respect to a foreign partner's allocable share of partnership ECTI. (The Final Regulations and Temporary Regulations use the expression "1446 tax" to refer to the Section 1446 withholding tax and we have followed this usage in these Comments.)

I. EXECUTIVE SUMMARY

The recommendations in these Comments include the following:

1. The Service should consider revising the Temporary Regulations to permit a partnership to take into account partner-level deductions attributable to partnership items. These items should include (i) previously suspended partner losses that are released because of an increase in basis resulting from the allocation of ECTI to the partner, (ii) partner-level Section 199 deductions, (iii) deductions for state income taxes on ECTI paid by the partnership on the foreign partner's behalf, and (iv) partner-level credits derived from the partnership.

2. The Service should reconsider the treatment of the overlap between Sections 1445(e)(1) and 1446. Section 1445(e)(1) deals with a specific situation – the sale by a domestic partnership

¹ Department of the Treasury Internal Revenue Service, TD 9200, 70 Fed. Reg. 28,702 (May 18, 2005) (to be codified at 26 C.F.R. pts 1,301 and 602).

² Department of the Treasury Internal Revenue Service, 68 Fed. Reg. 52,466 (September 3, 2003).

of a U.S. real property interest – that should prevail over the more general withholding requirement of Section 1446. There is no evidence that Congress intended to repeal or substantially limit Section 1445(e)(1).

3. The Service should reconsider the treatment of cashless cancellation of indebtedness (“COD”) income and gain from foreclosures and deeds in lieu of foreclosure. The remedy proposed in the Temporary Regulations is insufficient, especially because any exclusion of COD income will occur during the same year as the COD income and cannot therefore be certified to the partnership under the Temporary Regulations in their current form. The result is a significant and unfair burden on withholding agents, as explained in greater detail below. The Final and Temporary Regulations balance the interests of taxpayers and the government without apparent consideration of the interests of withholding agents. There is no indication that Congress intended withholding agents to pay the foreign partners’ tax from their own resources, especially in situations where the tax is refunded to the foreign partners and may never be returned to the withholding agents.

4. The Service should consider reducing the period for a foreign partner to become eligible to provide a certificate to the partnership from four to two years. Foreign estates and trusts should be permitted to provide certifications to partnerships, and foreign estates should be permitted to take into account the decedent’s compliance record.

5. The Service should consider clarifying the 90% limitation on the use of net operating loss carryovers in foreign partner certificates.

6. The Service should consider a simplified procedure for updating certificates and should ease the rules relating to the time when foreign partner certificates must be provided if they are to be relied on by partnerships.

II. BACKGROUND

A. Overview of Section 1446

Section 1446(a) provides that, if a partnership has ECTI for any taxable year, and any portion of such income is allocable under Section 704 to a foreign partner, the partnership “shall pay a withholding tax under this Section at such time and in such manner as the Secretary shall by regulations prescribe.” For this purpose, Section 1446(c) defines ECTI as the taxable income of the partnership that is effectively connected (or treated as effectively connected) with the conduct of a trade or business in the United States, subject to certain adjustments. Generally, in determining the taxable income of a partnership, certain items listed in Section 702(a) are excluded because they are separately stated.³ In calculating ECTI, however, those amounts are included because Section 1446(c) provides that Section 703(a)(1) does not apply.

³ Section 703(a)(1).

Because the withholding tax imposed on partnerships pursuant to Section 1446 is based upon ECTI, it is imposed regardless of when or whether the partnership makes distributions to its foreign partners.

Section 1446(f) authorizes the issuance of “such regulations as may be necessary to carry out the purposes of this section.”

B. Prior Guidance and Comments

Section 1446 in its current form was enacted by the Technical and Miscellaneous Revenue Act of 1988.⁴ Not long after enactment, the Service issued Rev. Proc. 89-31⁵ to provide guidance under Section 1446. Rev. Proc. 89-31 generally followed the regime set forth in Section 6655 for estimated tax payments by corporations and required a partnership to annualize its ECTI and pay over the withholding tax to the Service in quarterly installments and make a final payment with the annual tax return. Rev. Proc. 89-31 also provided special rules for publicly-traded partnerships and tiered partnerships.

On September 3, 2003, the Service issued Proposed Regulations that were generally consistent with Rev. Proc. 89-31. Individual members of the Section provided comments to the Service on those regulations on January 27, 2004 (the “Earlier Comments”).

On May 18, 2005, the Service issued the Final Regulations (§§1.1446-1 through 5) and the Temporary Regulations (§1.1446-6T), the latter also being issued as proposed regulations.

III. COMMENTS

A. The Unsolved Problem of Overwithholding

Section 1446 has the potential to require tax to be withheld in excess of the amount of the foreign partner’s actual tax, because Section 1446 does not take into account a partner’s losses from outside the partnership during the taxable year or a partner’s loss carryovers.⁶ The problem is exacerbated if the partnership is further not allowed to take into account partner-level losses, exemptions and credits derived from partnership items. These Comments refer to this potential

⁴ P.L. 100-647, 102 Stat. 3342, 3526(1988) (the “1988 Act”). Rev. Proc. 88-21, 1988-1 C.B. 777, which provided guidance prior to the 1988 Act, was thereby rendered obsolete.

⁵ 1989-1 C.B. 895.

⁶ The preamble to the Final Regulations also referred to the fact that Section 1446 requires withholding at the maximum statutory rates generally applicable to a foreign partner with effectively connected income. We note and welcome the Service’s decision to interpret the highest rate of tax to refer to the preferential rates of tax applicable to individuals on long-term capital gains, depreciation recapture and collectibles gain. See Reg. § 1.1446-3(a)(2)(ii).

for excess withholding as “overwithholding” and, in this portion of the Comments, we request the Service to mitigate the overwithholding problem by expanding the scope of the Temporary Regulations.

Although this submission is made in response to the Treasury Department’s request for comments concerning the Temporary Regulations, the Final and Temporary Regulations should be viewed as an integrated whole. The Section 1446 regulations have not followed a traditional track. Although the Service had received several public comments about overwithholding during the years since enactment, the Service chose not to address those comments in the Proposed Regulations. Instead, the Preamble to the Proposed Regulations invited further public comment:

Comments are requested with respect to approaches that would permit an adjustment to the amount of 1446 tax obligation that are consistent with the statute and legislative history and administrable by partnerships, partners and the IRS. In particular, comments are requested on whether the rules coordinating sections 1445 and 1446 should be modified to address these concerns.

Notwithstanding several comments (including the Section’s Earlier Comments), addressing the issues, the Regulations nevertheless fail to provide any relief (other than the limited relief set forth in the Temporary Regulations).⁷ Thus, the Final Regulations represent the first time that the Service has taken the formal position that no relief should be given. We respectfully submit that a further period of comment, not limited to issues addressed in the Temporary Regulations, would have been helpful for the Service and taxpayers.

Instead, the Final Regulations and Temporary Regulations, taken together, represent the public’s first opportunity to review and comment on the Service’s overall approach to overwithholding. Having now reviewed the Final Regulations and Temporary Regulations as a whole, the Section believes that these regulations do not sufficiently address all facets of the problem. Further, we request that the limited remedy proposed in the Temporary Regulations be expanded in the manner described in these Comments.

In addition, we urge the Service to consider, or reconsider, the burden placed by Section 1446 on withholding agents. As the Comments observe in more detail below, the Final Regulations and Temporary Regulations balance the interests of the government and taxpayers without taking into account the interests of withholding agents.

⁷ See, for example, comments submitted by the Florida Bar Tax Section dated April 1, 2004, reproduced at 2004 TNT 77-45 (April 21, 2004); comments submitted by Richard Winston of Steel, Hector & Davis LLP dated March 12, 2004, reproduced at 2004 TNT 57-33 (March 24, 2004).

1. Allowance of Current Year Deductions and Credits

a. Partner-Level Deductions of Partnership Items

The Temporary Regulations do not permit the partnership to take into account current year partner-level items. We believe that this rule is a significant cause of overwithholding and we respectfully request that the Service reconsider its approach, especially if the foreign partner is a “good driver” eligible under the certification procedures of Temp. Reg. 1446-6T.⁸

Specifically, the regulations should allow the partnership to take into account partner-level items derived from the partnership itself. Consideration should also be given to extending this principle to partner-level deductions from any other partnership with overlapping general partners or managers. We believe that the Service should have a higher level of confidence in the partnership’s knowledge of deductions for items incurred by the partnership (and partnerships with overlapping general partners and managers) than for deductions and losses incurred during the current year in other activities.

Relief should also be given for losses that were suspended at the partnership level and that are currently released at the partner level by reason of increases in the partner’s basis in the partnership. For example, Section 470 may have operated to cause a partnership level suspension of losses that would be available to offset later income in that partnership; we do not see any compelling reason why offset should not be allowed there. Once again, the partnership should have the data needed to determine the availability of the suspended losses.

We understand that the Final and Temporary Regulations were largely complete before the enactment of Section 199. Section 199 provides for a rate reduction in the form of a deduction. The benefit of that rate reduction should be applied to the foreign partner’s share of 1446 tax on ECTI that is attributable to domestic manufacturing. The partnership will have all the information it needs about the amount of the deduction. Moreover, there would be no risk to the government if the partner’s overall section 199 deduction from both partnership and non-partnership activities were less than the amount allocated to the partner by the partnership. The only way this might occur would be if the foreign partner had losses from other activities that reduced the total amount of its income from domestic production activities. But those losses would also, presumably, reduce the amount of tax due by the foreign partner on income from the partnership.

Example: Partnership PRS allocates \$20,000 in ECTI to foreign partner FP, of which \$10,000 is attributable to domestic production activities and is entitled to a \$900 Section 199 deduction. Assume FP is also engaged in a separate business that generates a loss of \$5,000, all of it attributable to domestic production activities. Such loss may not be taken into account by PRS in computing the 1446 tax. As a result of the loss, FP’s

⁸ See Preamble to the Final and Temporary Regulations, “Explanation of Provisions”, para. G.1.

Section 199 deduction for the year will be reduced to \$450. Nevertheless, the government's interest has not been harmed if PRS pays 1446 tax on \$19,100 because FP's taxable income from all sources will be \$14,550 (\$20,000 ECTI from PRS minus \$5,000 loss minus \$450 deduction for domestic production activities). FP will still have been subject to withholding on an amount substantially in excess of its taxable income.

Although, as a general rule, foreign and domestic partnerships should not be treated differently for purposes of Section 1446, the regulations could require that the tax matters partner, or at least one responsible person for a partnership, must be a U.S. person as a condition for allowing the partnership to take into account partner-level partnership items. There is precedent for this approach.⁹

b. Partner-Level Deductions of State Income Taxes

Temp. Reg. §1.1446-6T(c), as well as Reg. § 1.1446-2(b)(3), should permit state income taxes to be taken into account when paid by the partnership on the foreign partner's behalf with respect to the partner's share of the income. We recognize that if the state tax paid by the partnership resulted in a refund, the refund would be taxable directly to the partner and would not be subject to withholding under Section 1446 or any other provision of Chapter 3. The regulations could provide that only 90% of the deduction for taxes paid by the partnership would be allowable to provide an approximate offset for possible state income tax refunds to partners paid without withholding.

c. Partner-Level Credits.

Under the Final Regulations, 1446 tax is computed without regard to a partner's distributive share of the partnership's tax credits.¹⁰ Current year credits as well as credits carried over from prior years should be taken into account. While tax credits can sometimes be limited by reference to a foreign partner's specific circumstances, the risk to the Service does not appear great nor does the current disallowance of the partnership's tax credits appear to be compelled by the language of Section 1446.

2. Section 1445 and 1446 Overlap.

The Final Regulations provide that when Section 1445 withholding, which relates to FIRPTA gains, and Section 1446 both technically apply, a partnership is required to pay withholding tax

⁹ See the provisions of the Section 1441 regulations dealing with qualified intermediaries (Reg. § 1.1441-1(e)(5)) and withholding foreign partnerships (Reg. § 1.1441-5(c)(2)) and the provisions of Section 2056A relating to qualified domestic trusts, including, in particular, Section 2056A(a)(1). See also Treas. Reg. § 1.871-14, effectively requiring a pass-through trust to be a domestic trust in order for the portfolio interest exemption to apply.

¹⁰ Reg. § 1.1446-3(a)(1).

on behalf of its foreign partners in accordance with Section 1446. This rule, referred to as the “trumping rule,” primarily relates to a domestic partnership’s disposition of a United States real property interest, which is subject to withholding under Section 1445(e)(1). Even in the case where Section 1445 would grant an exclusion from withholding tax, presumably because no tax would be due, Section 1446 withholding continues to apply.

The Preamble to the Final Regulations explains the rationale for the Service’s position: “Treasury and the IRS do not believe Congress intended for section 1445 to apply to the exclusion of section 1446 where the sections overlap.” We are not aware, however, of any support for this statement, and Congress has never in fact expressed itself on the point. Sections 1446 and 1445 and the corresponding legislature history do not address this issue.

Although Section 1446 was enacted four years after Section 1445, Section 1445(e)(1) is a specific provision dealing with dispositions of United States real property interests by partnerships. There is no evidence that Congress intended to repeal Section 1445(e)(1) when it enacted Section 1446. If the Preamble to the Final Regulations were correct, Section 1445(e)(1) would have no residual effect. Congressional silence about Section 1445(e)(1) when Section 1446 was enacted suggests strongly that Congress did not intend for Section 1446 to disturb the existing regime for domestic partnership dispositions of real property interests.

We therefore recommend that Section 1445(e)(1) apply in priority to section 1446 and that the Section 1445 withholding certificate procedure should also apply to reduce withholding under section 1446. The Section 1445 withholding certificate procedure involves a Service determination of whether the seller of a United States real property interest has made a reasonable case for reducing the tax to be withheld, in accordance with procedures that have worked well for many years.

3. Cancellation of Debt and Foreclosure

The Preamble to the Proposed Regulations invites comments on the treatment of COD income and gain arising from foreclosure or a deed in lieu of foreclosure. The Earlier Comments, and as stated in the Preamble, other commentators, offered various suggestions. The Final Regulations did not adopt any of these suggestions. Instead, the Preamble to the Final Regulations refers to the certification procedure in the Temporary Regulations, stating that “Treasury and the IRS believe that this approach, which is consistent with the statute and legislative history, appropriately balances the interests of taxpayers and the government.”¹¹

The Preamble to the Final Regulations contains the first articulation of the Service’s position and the underlying rationale. The progression from invitation for comments directly to final regulations on this issue denied taxpayers an opportunity to provide focused comments on the Service’s proposal.

¹¹ See Preamble to the Final and Temporary Regulations, “Explanation of Provisions”, para. B.1.

There are technical flaws in the method articulated in the Final Regulations. The certification procedure does not permit the use of current year items. By definition, the exclusion of COD income under section 108 arises only in the current year and so cannot be covered by a limited partner certificate under the Temporary Regulations. Moreover, the Preamble's statement that the regulations have appropriately balanced the interests of taxpayers and the government disregards the interests of withholding agents (the partnerships) and, derivatively, their U.S. partners as well as the responsible persons of partnerships such as general partners and managing members, a point that is made in the Preamble:

Treasury and the IRS believe that section 1446 requires a partnership to pay 1446 tax on COD income and gain recognized by reason of a foreclosure or deed in lieu of foreclosure on property when such income or gain is allocated to foreign partners. The purpose of the statute is to collect taxes that foreign persons may not otherwise pay, regardless of the liquidity or financial situation of the withholding agent.

Although Section 1446 is concerned with collecting tax on the income of foreign partners, it should not be implemented in a way that requires U.S. persons to pay and bear the tax when the foreign partner's share of partnership net assets is insufficient, or insufficiently liquid to fund the payment. Otherwise, the result is to make withholding agents pay tax out of their own resources rather than out of the money and property of the foreign taxpayer. The failure to provide adequate relief is a substantial and continuing problem and is magnified when the 1446 tax may substantially exceed the foreign partner's tax liability, with the overwithheld tax being refunded to the foreign partner and not the withholding agent. In these circumstances, the Final Regulations implement a system of transfer payments through the Treasury, taking cash from partnerships, their U.S. partners and responsible persons and turning it over to foreign partners. We believe that the statute in its current form did not intend such an unfair result.

The overwithholding problem is not the result of a situation where the partnership has voluntarily put itself in a position where it cannot fund the tax. In fact, the unexpected and accompanying financial distress of the partnership that led to the COD or foreclosure puts it in an adverse financial position to even be able to satisfy this withholding obligation. It could request further capital infusion from its US investors, but they may be loath to agree, especially since that will increase their likely loss from the investment. In many cases, it is a situation where no tax will ever be due. The Service recognized that this was the case when it promulgated the Section 1445 regulations and withholding certificate procedures under Section 1445. We believe it should do so in the case of Section 1446.

Equally troublesome is the fact that the partnership may be unable to compel the foreign partner to fund that portion of the 1446 tax that exceeds the foreign partner's share of partnership assets, even if the foreign partner is contractually bound to do so. For example, if a foreign partner is able to exclude COD income because it is bankrupt or insolvent, it may be unable to fund the tax; even more unjustly, any overwithheld tax may end up in the hands of the partner's bankruptcy trustee or estate for the benefit of foreign creditors. This seems to be an inappropriate result, yet is mandated under the Final Regulations, with no relief provided by the Temporary

Regulations. Because the method chosen in the Final Regulations was never proposed, the Service provided no opportunity for taxpayers to provide meaningful evaluation and comment.

Having now had the first opportunity to review the Service's proposal in this area, we urge the Service to reconsider its position in light of the effect it has on withholding agents, an effect that was not contemplated by Congress. We request that the Final Regulations be amended to provide that, so long as the partnership receives no cash or other property as part of a cancellation of a debt or the foreclosure of partnership property, income attributable to such amounts should be excluded from ECTI for withholding purposes. We refer to Treas. Reg. § 1.1445-2 for previous ameliorating applications of the principle. To the extent the partnership makes a distribution in the year of the realization of this income, the amount of the cancellation of indebtedness or foreclosure income would be included in ECTI.

B. Comments on the Temporary Regulations

The Section's specific technical comments on the Temporary Regulations are as follows.

1. Eligibility

We believe that the requirement in Temp. Reg. § 1.1446-6T(b) that a foreign partner have filed tax returns for at least four years is unduly restrictive. It is not atypical that unsophisticated foreign partners file late returns in the initial year of partnership operations. While delay is not excusable and can have other negative tax consequences, the system would operate more efficiently if the four-year period were reduced to the most recent two years.

2. Foreign Estates and Trusts

A partner that is a foreign estate is not permitted to provide a "good driver" certificate.¹² We respectfully disagree with this decision and think foreign estates should be eligible. In particular, the estate of a decedent who was eligible to provide a certificate should be permitted to do so after the decedent's death, and the tax compliance record of a decedent should count towards an estate's eligibility.

In the context of nongrantor foreign trusts and foreign estates, the 1446 tax is required to be apportioned between the estate or trust and its beneficiaries. Rules should be issued that address how that apportionment is implemented. For example, if the 1446 tax is to be apportioned to beneficiaries, consideration should be given to a look-through procedure similar to the rule for tiered partnerships,¹³ *i.e.*, a "good driver" certificate could be given by the beneficiaries. We request that the Service consider adopting a procedure that would explain how and when a beneficiary could provide a certificate, perhaps accompanied by an acknowledgement from the

¹² Temp. Reg. § 1.1446-6T(b).

¹³ Reg. § 1.1446-5.

trustee or the executor that it would not file a certificate with regard to that income. This procedure would be integrated with rules allowing the foreign trust or estate to provide its own Section 1446 “good driver” certificate for amounts not distributed to beneficiaries. In such latter case, the trust or estate would be required to represent that the income reflected in its certification will not be distributed or otherwise apportioned to the beneficiaries nor deducted by the trust.

3. 90% Limitation on Use of NOL Carryovers

Temp. Reg. § 1.1446-6T(c)(iii) provides that a partnership may not consider a partner’s net operating loss deduction in an amount greater than 90% of the partner’s allocable share of ECTI. This requirement may reflect a concern about the alternative minimum tax (“AMT”) limitation on net operating losses, although we note that if the AMT applies, the rate of tax is lower than the highest rate in sections 1 or 11.¹⁴ If that is in fact the reason, the regulations should be tied to the continuing applicability of the 90% AMT limitation on the use of NOL carryovers. Otherwise, the regulation will continue to apply even if, the AMT is repealed or curtailed.

If the 90% limitation is retained, or so long as it applies, the regulations should be clarified to explain that the limitation should be applied on a cumulative basis each time the partnership is required to pay 1446 tax. With this clarification, if the partnership’s annualized income changes during the year, the amount of losses that can be applied will be increased or reduced accordingly.

4. Updated Certificates Requirements

a. Simplified Update Procedure

Updated certificates are required in a variety of circumstances. For example, an updated certificate will be required whenever the foreign partner has not filed a tax return for the immediately preceding year, and the first certificate of the year therefore includes (as it is permitted to do) a representation that the return will be timely filed. The Temporary Regulations require that an updated certificate must meet all of the requirements of an original certificate and include a copy of the certificate that is being updated, which can be burdensome when the changes to the original certificate are minor. The updated certificate may do nothing more than confirm that the return has indeed been filed.

The approach of requiring a fully amended and restated certificate every time information changes is, we believe, unnecessary. The regulations should provide for a short-form certificate that identifies the superseded certificate and simply states what has changed, signed under penalty of perjury. We believe a short-form certificate would help avoid confusion caused by the

¹⁴ See Sections 56(a)(4) and (d).

need for the partnership to make a line-by-line comparison of the new and original certificates. One full certificate for a particular year should be sufficient.

b. Timing

The partnership may only rely on the initial certificate for the partnership taxable year if received at least 30 days before the partnership installment due date or the annual Form 8804 filing date (without regard to extensions) for the partnership taxable year for which the partner would like the certificate to be considered in computing the 1446 tax due.¹⁵ Updates may be considered only if received not less than ten days before the partnership installment due date or the Form 8804 filing date (without regard to extensions).¹⁶ The Temporary Regulations provide that a partnership is not permitted to rely on an updated certificate received within ten days of the due date, even where the partner has certified a reduced amount of loss in the update.¹⁷

The Temporary Regulations' Preamble provides no analysis regarding the need for these timing requirements. If the partnership is willing to rely on a certificate submitted at the last moment, we see no reason why the partnership should not be permitted to do so, so long as the installment is timely paid or the final return is timely filed

We therefore recommend that the rule be expressed as follows: A partnership may rely on any certificate received prior to the making of a payment of Section 1446 tax or the filing of a return with respect to that tax, but will not be penalized if it does not take account of a certificate received less than ten days before the due date for such payment or filing. The receipt of a certificate less than ten days before the due date for payment of the Section 1446 tax or the filing of a return shall not constitute reasonable cause for late payment or filing.

¹⁵ Temp. Reg. § 1.1446-6T(c)(2)(i)(A).

¹⁶ Temp. Reg. § 1.1446-6T(c)(2)(i)(B)(4).

¹⁷ Temp. Reg. § 1.1446-6T(e), Example 2(iii). This seems inconsistent with the rule that the partnership need not consider a certificate at all.