



November 10, 2021

The Honorable Ron Wyden
Chairman
U.S. Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Mike Crapo
Ranking Member
U.S. Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard Neal
Chairman
U.S. House Committee on Ways and Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Kevin Brady
Ranking Member
U.S. House Committee on Ways and Means
1139 Longworth House Office Building
Washington, DC 20515

Re: Tax Provisions in House Manager's Amendment to Rules Committee Reconciliation Legislation or Being Considered

Dear Chairmen Wyden and Neal, and Ranking Members Crapo and Brady:

The American Institute of CPAs (AICPA) provides comments on various tax issues important to the accounting profession that are in the [House Manager's Amendment to Rules Committee reconciliation legislation](#), or that might be considered as legislation is further considered. These comments are in addition to our prior letter submitted to Congress on October 1, 2021 regarding various provisions important to the profession and tax policy that were in the House Ways and Means Committee passed version of the reconciliation legislation.¹

The AICPA is a long-time advocate for a tax system based on principles of good tax policy.² We look forward to working with Congress as the reconciliation package moves forward to ensure that the proposed changes are administrable, equitable, and meet the needs of both taxpayers and tax practitioners. In this regard, we highlight some of the key issues we have identified for your consideration. We note that the items listed are not in any priority order, and we likely will have additional comments and insights as we further analyze the reconciliation legislation. In addition, as Congress moves forward with reconciliation legislation, it is important that special care is given to transition rules and to provide sufficient time and flexibility to implement the transition rules and offer penalty relief as needed.

¹ See AICPA letter, "[Tax Provisions in House Reconciliation Legislation or Being Considered](#)" (October 1, 2021).

² See [AICPA Principles of Good Tax Policy](#) (12 principles providing objective framework to evaluate policy proposals).

Specifically, the AICPA provides comments on the following tax issues:

- I. AICPA Concerns with Certain Tax Provisions in the House Manager's Amendment to Rules Committee Reconciliation Legislation
 1. Corporate Alternative Minimum Tax
 2. Funding of the Internal Revenue Service
 3. Modification of Procedural Requirements Relating to Assessment of Penalties
 4. Modifications to Treatment of Certain Losses
 5. Limitations on Excess Business Losses of Noncorporate Taxpayers

- II. Additional Comments
 1. Structural Changes to Subchapter K (Partnership Taxation)

The AICPA is the world's largest member association representing the accounting profession, with more than 428,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state, and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We welcome the opportunity to discuss these comments on the reconciliation legislation or to answer any questions that you may have. If you have any questions, please contact; Edward Karl, AICPA VP Taxation, at (202) 355-4892, or edward.karl@aicpa-cima.com; Lauren Pfingstag, Director – AICPA Congressional or Political Affairs, at (407) 257-0607, or lauren.pfingstag@aicpa-cima.com; or me at (601) 326-7119 or JanLewis@HaddoxReid.com.

Sincerely,



Jan Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: Members of the Senate Committee on Finance
Members of the House Committee on Ways and Means
Mr. Thomas Barthold, Chief of Staff, Joint Committee on Taxation
The Honorable Janet Yellen, Secretary of the Treasury
The Honorable Lily Batchelder, Assistant Secretary for Tax Policy, Department of the Treasury
Mr. Mark Mazur, Deputy Assistant Secretary for Tax Policy, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
The Honorable William M. Paul, Chief Counsel, Internal Revenue Service

AMERICAN INSTITUTE OF CPAs

Tax Provisions in House Manager's Amendment to Rules Committee Reconciliation Legislation or Being Considered

November 10, 2021

I. AICPA CONCERNS WITH CERTAIN TAX PROVISIONS IN THE HOUSE MANAGER'S AMENEDMENT TO RULES COMMITTEE RECONCILIATION LEGISLATION

The AICPA has concerns with the following provisions in the [House manager's amendment to the Rules Committee reconciliation legislation](#).

1. Corporate Alternative Minimum Tax

The AICPA has concerns with the *Corporate Alternative Minimum Tax* proposal, Section 138101.³ In particular, we think the minimum tax violates numerous elements of good tax policy and that there may be unintended consequences that should be carefully considered. For example, imposing tax according to financial statement income takes the definition of taxable income out of Congress's hands and puts it into the hands of industry regulators and others.⁴ There are many key conceptual differences between financial income and taxable income, including the concept of materiality. Public policy taxation goals should not have a role in influencing accounting standards or the resulting financial reporting. Independence and objectivity of accounting standards are the backbone of our capital markets system.

There are other considerations as well.⁵ For example, section⁶ 56A(c) introduces "General Adjustments" to "applicable financial statements" that adds a level of complexity and requires clarification. In addition, the proposed *Corporate Alternative Minimum Tax* appears to fundamentally alter the foreign tax credit system that has been in place since 1962.

The proposed *Corporate Alternative Minimum Tax* will substantially increase the complexity of the Internal Revenue Code and presents a fundamental shift in taxation of U.S. entities and could result in uncertain results to taxpayers and a costly compliance requirement.

2. Enhancement of the Internal Revenue Service Resources

Section 138401 proposes providing the Internal Revenue Service (IRS) with the following funding through September 30, 2031:

³ AICPA letter, "[Corporate Profits Minimum Tax in Reconciliation Language being Considered](#)," October 28, 2021.

⁴ The *Corporate Alternative Minimum Tax* is a minimum tax based on 15% of adjusted financial statement (book) income rather than recognized income. The proposed corporate minimum tax would operate much like the corporate alternative minimum tax (AMT), requiring corporations to calculate taxes, first on taxable income and then again on book income based on adjusted financial statements that include current value of assets, and pay the higher of the two.

⁵ AICPA letter, "[Corporate Profits Minimum Tax in Reconciliation Language being Considered](#)," October 28, 2021.

⁶ All references to "section" (unless referencing the House reconciliation legislation) are to the Internal Revenue Code of 1986, as amended, unless otherwise specified.

- \$1,931,500,000 for taxpayer services,
- \$44,887,500,000 for enforcement,
- \$27,376,300,000 for operations support, and
- \$4,750,700,000 for business systems modernization.

We understand that enforcement is an important aspect of what the IRS does, however, enforcement actions need to be in balance with the services the IRS provides taxpayers. In order to meet the needs of taxpayers, we encourage the IRS to strive to be a [Modern-Functioning IRS for the 21st Century](#). Aspects of a Modern-Functioning IRS prioritizes customer satisfaction, including from enforcement actions, a modernized technological infrastructure, and provides IRS employees with the experience and training to understand and address taxpayer needs.

The legislative and executive branches should determine the appropriate level of service and compliance they want the IRS accountable to provide and then dedicate adequate resources for the agency to meet those goals. Given the historic low levels of IRS taxpayer services,⁷ we are concerned about a possible imbalance between the funding for taxpayer services and enforcement.

3. Modification of Procedural Requirements Relating to Assessment of Penalties

The AICPA opposes Section 138403 relating to the modification of procedural requirements for the assessment of penalties. The check and balance of current Internal Revenue Code (IRC) section 6751(b)⁸ is necessary to protect taxpayers and provide a fair and just tax system. IRC section 6751(b) also requires at least one level of review of the IRS’s most punitive tool. The procedural protection in the current law also ensures that penalties are never used as bargaining chips or to induce a taxpayer into settling a case. Section 138403 would repeal the requirement of prior supervisory approval of assertion of penalties, effective retroactively to 1998. IRS supervisors would, instead, only be required to certify on a quarterly basis that they are in compliance with the requirements of IRC section 6571(a) and related IRS policies.

Efforts should be focused not in reducing taxpayer protections when it comes to penalty assertion, but in preserving and expanding taxpayer protections. The IRS should focus efforts on ensuring consistency in determining whether the penalties should be imposed (abated) for similarly situated taxpayers. This consistency would mitigate, for example, perceived disparate treatment in the abatement consideration of international penalties, such as for Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, or Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*. Moreover, penalty abatement determinations will be more efficient if the IRS expands abatement authority to telephone customer service personnel, which would eliminate the need for many taxpayers to correspond with the IRS on a notice, thus bolstering taxpayer service and reducing the IRS paper workload.

⁷ Michelle Singletary, The Washington Post, [“The IRS is a hot mess: Millions of tax returns haven’t been processed, and calls are going unanswered, including mine,”](#) July 2, 2021.

⁸ Under IRC section 6751(b), “No penalty... shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher-level official as the Secretary may designate.” One exception includes penalties “automatically calculated through electronic means.” This provision requires, for example, first-level managerial approval before a revenue agent may determine or propose a penalty against a taxpayer during an exam.

4. Modifications to Treatment of Certain Losses

The AICPA notes that Section 138143 of the legislation proposes new section 267(h) that may be currently drafted more broadly than intended by Congress. The proposed provision would defer any loss until the property received by members of the controlled group in connection with a liquidation is transferred to unrelated persons. Thus, it appears the intent is to defer a loss when certain events cause stock or securities of a controlled group member to become worthless for tax purposes, but assets of the member remain within the member's controlled group, until the time such assets leave the group.

The current provision could be read to cover a much broader category of circumstances. The term "specified control group liquidation" is defined to include any transfer (or series of transfers) of property if stock or securities of a corporation become worthless in connection with a transfer, as well as any issuance of debt to related parties if any stock or security of such corporation becomes worthless in connection with such issuance. As currently drafted, this language could be read to capture a multitude of situations beyond the apparent intended scope described above.

For example, if an insolvent member of a controlled group transferred all of its assets to creditors in satisfaction of debt, there is a literal transfer of assets and that transfer may be the identifiable event that establishes worthlessness of that corporation. Thereby, the transfer could be viewed as "in connection with" the corporation becoming worthless. Under such circumstance, new section 267(h) could be read to disallow a worthless stock loss to the shareholder of that corporation permanently, even though the statute seems to intend only a temporary deferral, because there will be no property received by members of the controlled group in connection with the liquidation that would ever be transferred to unrelated parties when the members of the controlled group never received property in the first place. It does not appear that Congress intends the rule to apply in this manner. Therefore, we suggest clarifying the statutory language to cover only the narrow circumstances apparently intended.

With respect to an issuance of debt, the scope of the rule is unclear, and it is likewise unclear what property would be viewed as having been received by members of the controlled group in connection with such "liquidation," which would have to be disposed of to trigger any loss. We therefore recommend clarification of this provision as well.

Additionally, the current proposed section 267(h) requires a transfer to unrelated parties of "all" (as opposed to "substantially all" from a prior draft) property received. We recommend replacing "all" with "substantially all." As currently drafted, the proposal would result in administrative complexity and may effectively disallow losses permanently, rather than just deferring losses. For example, the members of the controlled group may receive cash and other assets that are difficult to track subsequent to a controlled group liquidation. Furthermore, it may not be practical to transfer all of the property to unrelated parties, for example: (i) the controlled group may receive depreciable assets that waste and are discarded, rather than transferred; or (ii) there may be certain assets that an unrelated party does not want. Overall, there may be many circumstances in which the controlled group has in effect disposed of the business of the former member, but, has not literally transferred *all* assets to unrelated parties. As these situations occur in the regular course of business, are not abusive, and appear outside of the scope of the proposal, we recommend returning to the originally proposed "substantially all" language for this requirement.

5. Limitations on Excess Business Losses of Noncorporate Taxpayers

Section 138202 modifies IRC section 461(l) to provide that the excess business loss disallowed for a year carries over to the next taxable year as a business loss in determining the next taxable year's limitation. The AICPA supports the retention of current law, and we also recommend that section 461(l) not apply in the year of the taxpayer's death. Taxpayers' excess business losses are a result of economic losses. The deferred business loss should be allowed to offset any type of income in the year of death, similar to a net operating loss carryover to the year of death. Further, the statute should clarify that gains and losses from the sales of stock of S corporations and interests in partnerships are business gains and losses for purposes of section 461(l) to the extent attributable to business activities of the S corporation and partnership.

II. ADDITIONAL COMMENTS

The AICPA has concerns and suggestions regarding other provisions that were not included in the House reconciliation legislation.

1. Structural Changes to Subchapter-K (Partnership Taxation)

The AICPA encourages Congress to not include Subchapter K changes in the reconciliation legislation. We also recommend considering fundamental and structural changes to Subchapter K only after comprehensive study and sufficient input in order to address policy considerations and mitigate unforeseen consequences due to the intricacy of Subchapter K. Introducing significant changes would also require the Department of the Treasury to provide additional guidance, which could create uncertainty for the time prior to when (or if) regulations are issued or finalized.

The AICPA submitted detailed comments analyzing the [Pass-through Reform Discussion Draft](#)⁹ ("proposal").¹⁰ We have also raised¹¹ several practical concerns regarding the proposed reforms to Subchapter K. Passthrough entities, and specifically partnerships reporting under Subchapter K of the IRC, generate significant business income. Partnerships also serve as the structure for many small businesses and newly formed businesses. The partnership¹² is the ubiquitous business structure for private equity investment, personal service firms, and many start-up businesses (which naturally grow and employ more individuals as they mature). Good tax policy¹³ related to partnerships and effective administration of that system should provide fairness, simplicity, neutrality, and certainty.

⁹ Released by Senate Finance Committee Chairman Wyden on September 10, 2021.

¹⁰ AICPA letter, "[Tax Provisions in House Reconciliation Legislation or Being Considered](#)," October 1, 2021.

¹¹ AICPA letter, "[Additional Comments Analyzing Proposed Reform\(s\) to Subchapter K \(Partnership Taxation\)](#)," November 2, 2021.

¹² Limited liability companies (LLCs) formed between two or more members are taxed under Subchapter K by default under the check-the-box regulations. *See* Reg. § 301.7701-2 and Reg. § 301.7701-3.

¹³ *See* [AICPA Principles of Good Tax Policy](#) (12 principles providing objective framework to evaluate policy proposals).