The Honorable Lily Batchelder
Assistant Secretary of Tax Policy
U.S. Department of Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

April 25, 2022

The Honorable William M. Paul
Chief Counsel (Acting)
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Electronically submitted at www.regulations.gov
CC:PA:LPD:PR (REG – 118250-20)

RE: Guidance on Passive Foreign Investment Companies and Controlled Foreign Corporations Held by Domestic Partnerships and S Corporations and Related Person Insurance Income (REG-118250-20)

Dear Assistant Secretary Batchelder and Chief Counsel Paul,

The undersigned organizations appreciate the opportunity to provide comments to the Treasury Department and the Internal Revenue Service on aspects of the proposed regulations (the "Proposed Regulations") published on January 25, 2022, that address the treatment of foreign corporations owned by partnerships and S corporations.

Investment managers typically form partnerships as commingled investment vehicles to facilitate investment by limited partners. Investments are made globally through such partnerships and the U.S. partners in such partnerships have an increasing exposure to foreign corporations that are "passive foreign investment companies" ("PFICs") with respect to them.

The ability of a partnership to perform PFIC reporting for U.S. partners, with the ability to make associated PFIC elections, is a valuable, efficiency-creating tool that places compliance at the level of ownership that has (1) greater access to information about the non-U.S. entities and (2) the resources and expertise to collate the data, understand and apply the relevant tax rules, and carry out compliance reporting accurately.

The Proposed Regulations introduce a substantial compliance burden on taxpayers and partnerships that invest in foreign corporations, without any notable benefit to tax compliance, administration and enforcement. Specifically, the Proposed Regulations would increase the information reporting and collection burdens between domestic partnerships and partners with

respect to foreign corporations that are PFICs with respect to the partners.[1] Furthermore, because the Proposed Regulations would require each U.S. taxpayer that is a partner in a partnership to file its own PFIC election in respect of each PFIC owned directly or indirectly by the partnership, the number of separate PFIC filings will grow exponentially, thereby significantly increasing the administrative burden and aggregate cost of compliance, as well as the number of inadvertent failures to file elections (since small individual investors and their tax return preparers (if any) are generally less well-versed in these rules than the investment partnerships and their advisers).

The preamble to the Proposed Regulations (the "Preamble") indicates that the policy rationale for the Proposed Regulations, in general, is to treat a partnership under the PFIC regime as an "aggregate" of its partners, consistent with the regimes for global intangible low-taxed income and Subpart F. In addition, the Treasury and Service suggest that (1) the aggregate approach aligns elections with the treatment of partnerships under the PFIC regime and for the purposes of section 1297(d) (the "CFC overlap" rule); (2) the aggregate approach provides partners with the ability to decide to make the "qualified electing fund" ("QEF") or "mark-to-market" ("MTM") elections; and (3) the reporting on Schedules K-2 and K-3 of Form 1065 provides the partner the information necessary to make these elections.

The Preamble to the Proposed Regulations requests comments on the partner-level QEF and MTM elections, and whether the final regulations should permit domestic partnership QEF and MTM elections in conjunction with the general rule requiring the partner to make the election. Specifically, the Preamble requests that comments address:

(i) The legal mechanism by which the domestic partnership would be delegated the ability to make a QEF or MTM election on behalf of its partners;
(ii) the standard of delegation that should be required, including whether delegation should be based on the partnership agreement, or some other instrument, and, if so, whether delegation should be explicit or implicit within the instrument;
(iii) whether the domestic partnership's election should be binding on all partners, or only on certain partners;
(iv) if binding on all partners, whether certain partners should be allowed to opt out and whether an opt-out is consistent with the current rules; and
(v) the timing, filing, and notification requirements that should apply to a domestic partnership-level QEF and MTM elections, taking into account the possibility of nonconforming taxable years among the partners and partnership and the QEF.

We believe it is essential for the final regulations to continue to permit partnership-level QEF and MTM elections to be made, in a manner consistent with the aggregate principle of the Proposed Regulations, in order to reduce compliance burdens, costs and lapses.

[1] References to partnerships and their partners throughout this letter generally should apply equally to an S corporation or its shareholder(s). In addition, references to partnerships are intended to refer to entities that are partnerships for tax purposes; limited liability companies and their members, to the extent treated as partnerships and partners, respectively, should be subject to the same regime.

Suggested modifications: The final regulations should permit all partnerships (domestic and foreign) to make QEF and MTM elections pursuant to the authorizations by, and on behalf of, their direct and indirect partners, in conjunction with the adoption of the general rule that partners may make QEF and MTM elections. The partnership that directly owns the PFIC would file a QEF or MTM election (as applicable) on behalf of all partners, including indirect partners who own through an upper-tier partnership, provided it is authorized to do so.

For a delegation model to operate effectively, we believe it is essential that the delegation model be available to all partners, including pass-through partners. Tiered partnerships are very common in the investment world, and include for example fund-of-funds, which raise money from investors and generally invest in a number of partnerships managed by other fund managers. The ultimate U.S. taxable investors in these funds – and the fund-of-funds themselves – generally prefer to rely on the underlying funds to manage all PFIC-related elections and compliance. It is the underlying funds that have the familiarity with the investment structures, and the relevant resources, necessary to make PFIC-related elections in a timely and efficient manner. This approach also has the benefit of centralizing all PFIC-related compliance in a single partnership. Accordingly, we believe that a delegation model that is available to all partners (including pass-through partners) would be the most administrable and, if designed properly, would be best positioned to facilitate broad exercise of QEF and MTM elections.

We recommend that the partnership that directly owns a PFIC be permitted to file a QEF or MTM election on behalf of all partners, including indirect partners who own through an upper-tier partnership. To be consistent with the delegation model, there should be an unbroken chain of authorizations between the indirect U.S. taxable investors and the electing partnership.[2] With that said, we believe it is critical to the effectiveness of the delegation model that the underlying partnership be able to presumptively rely on each pass-through partner's ability to bind its own partners or shareholders. This presumption could be supported by a representation made by the pass-through partner in the subscription document of the underlying fund, which could attest to the requisite delegation of authority.

We believe this delegation model should apply equally to both domestic and foreign partnerships. An approach that encompasses all partnerships would be consistent with the aggregate approach underlying the proposed regulations and would help further the policy goal of facilitating timely QEF and MTM elections for all U.S. taxable investors.

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[2] Thus, the ultimate U.S. taxpayers would authorize the partnership in which they are direct partners to make an election on their behalf and each upper-tier partnership would similarly authorize the partnership in which it is a direct partner to make (or to authorize) an election on behalf of its direct and indirect authorizing partners. In the event a partnership in a chain of ownership lacks the requisite authorization, the Treasury and the Service could consider allowing its partners (either ultimate U.S. taxpayers or other pass-through entities) to directly contract with the lower-tier partnership (and bypass the partnership lacking the requisite authorization) and provide the lower-tier partnership with the relevant authorization to make the election on behalf of that delinquent partnership's partners.

To the extent a foreign partnership makes a QEF or MTM election on behalf of its partners, the foreign partnership should be required to file a U.S. federal income tax return (a Form 1065), even if the partnership does not receive any items of U.S. source income or is otherwise required to file. Foreign partnerships already have to file returns in other contexts to make U.S. tax elections. For example, a foreign partnership similarly may file a U.S. federal income tax return to make valid elections under sections 754 or 163(j)(7)(B).

In our view, the purposes underlying the aggregate approach with respect to the QEF and MTM elections are not prejudiced by this proposal. While the flexibility afforded by the Proposed Regulations to partners to make individualized PFIC election decisions may be relevant in some cases, in practice those situations are highly unusual. Nearly all well-advised owners of PFICs prefer to make a timely QEF election or, in the case of publicly-traded PFICs, an MTM election, and the choice between those alternatives is usually clear and consistent for all partners.

Moreover, allowing a partnership to make a tax election on behalf of its partners will not impact the partnership's tax accounting with respect to a foreign corporation that it owns. In addition, this proposal will likely lead to better compliance in respect of all investors in large partnerships, the managers of which generally have the necessary information, as well as the knowledge and skill, to properly account for income generated by a QEF or MTM election. Further, this would likely result in a broader exercise of QEF and MTM elections, providing more consistency in treatment with respect to partners in a partnership, thereby making tax administration and audits easier.

The legal mechanism: The best framework under which a partnership could make a QEF or MTM election on behalf of a partner is through a partner's grant of a power of attorney to the general partner of the partnership to file such election on the partner's behalf.[3] Each partner is ultimately responsible for making the QEF or MTM election; however, consistent with industry practice, a limited partner may delegate authority over various matters (including tax matters) to the general partner or other persons. In addition, the general partner is frequently in a position to make decisions that are in the best interest of the limited partners, and a determination of whether to make a QEF or MTM election, if applicable, with respect to the partners in the partnership would be no different.

We acknowledge that the general partner could only make such election to the extent it has knowledge that the partner in the partnership would not be a "United States shareholder" for the purposes of section 951(b) with respect to the foreign corporation that is a "controlled foreign corporation" for the purposes of section 957 (a "CFC"). However, we believe that the general partner is in the best position to use information available to it (and its affiliates) to make the

[3] In the case of limited liability companies or other hybrid entities, any legal mechanism that is binding between the parties under local law should be permitted. The legal mechanism should be flexible enough to accommodate differences in local law and legal entities.

determination, including through representations made in subscription documents to the partnership and periodic information requests.[4]

For example, if a single, large partnership wholly owns a foreign corporation and no partner owns more than a 10% interest in the partnership, the general partner should be able to reasonably determine that no partner in the partnership is a United States shareholder with respect to the foreign corporation. If there are minority shareholders (e.g., co-investors or management shareholders) of the foreign corporation, the general partner may still reasonably determine whether any such minority shareholders are also partners in the partnership depending on the general partner's knowledge of the co-investors and members of management.

If one or more of the partners in a partnership would be treated as United States shareholders (either because of the partners' ownership in the partnership or other direct/indirect ownership of the foreign corporation), but others would not be so treated, the partnership should be able to make a QEF or MTM election with respect to such other partners (and the election would only be valid with respect to such other partners).

The standard of delegation: An implicit delegation of authority to make QEF and MTM elections, where applicable, should be sufficient. General partners typically have broad authority in the partnership agreement to file tax returns, certificates, and other tax filings of the partnership. As this election would be made with the filing of the partnership's tax return, the delegation of authority should already be addressed.[5] Further, if explicit delegation is required, this would require general partners to seek such authority from partners in all existing partnerships, which would likely limit the broad, ameliorative impact sought by our suggested modifications to the Proposed Regulations.

To the extent the Treasury and Service require explicit delegation of such authority, we would expect many partnerships would need to request such authority from their partners. Such explicit delegation could be included in a partnership agreement, a side letter to the partnership agreement, or subscription agreement to the partnership, and should not require an amendment to the partnership agreement itself. We propose that the applicability of the final regulations with respect to the QEF and MTM elections be delayed an additional tax year following the effective date of the final regulations to permit partnerships time to obtain the necessary, explicit delegation of authority in that case. In addition, to the extent the partners grant the partnership such authority on or before the date the partnership returns are due (taking into account all

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[4] This is consistent with the determination a partnership must make when reporting on Schedules K-2 and K-3, Part VI, which does not need to be completed if "the partnership knows that it does not have a direct or indirect partner (through pass-through entities only) that is a U.S. shareholder of the CFC . . .". Partnership Inst. for Sch. K-2 and K-3 (Form 1065) (2021), page 17.

[5] It should be noted that these delegations are already prevalent in other contexts, as illustrated by Form 2848 (Power of Attorney and Declaration of Representative). Thus, the delegation of election authority to a partnership should not create additional audit burdens for the Service beyond what is encompassed in existing power of attorney delegations.

applicable extensions), but before the final regulations are applicable, we would propose permitting a partnership to make QEF and MTM elections in earlier tax years.

Binding application of elections: We believe the efficiency of the proposal would be undone if partners could "opt-out" of the QEF and MTM elections made by the partnership on the partners' behalf. We believe the proposal is consistent with the current proposed rules because, although the partnership makes the election on its return, the partnership is doing so on behalf of its partners. In addition, to the extent partners cannot override such elections, this would minimize the amount of information required to be shared by the partner to the partnership (for the partnership to separately track), which is a significant burden created by the Proposed Regulations. Moreover, because partners will rarely wish to opt out of the QEF or MTM election being made by the partnership on the partners' behalf, an opt-out would create significant administrative burdens without any real practical benefit.

There may be circumstances in which a partnership does not have information indicating that a partner is a United States shareholder, and the partnership's assumptions turn out to be incorrect. To address this possibility, the Treasury and Service might consider requiring that any QEF or MTM election made by a partnership contain a clear legend to the effect that the election is invalid with respect to any partner that is a United States shareholder with respect to a controlled foreign corporation to whom section 1297(d) would apply.[6] Furthermore, any such elections should not impact the partnership's duties to file information on Schedules K-2 and K-3 with respect to subpart F income or GILTI. If necessary, the partner would request such additional information from the partnership.

Timing and reporting: The QEF and MTM elections made by the partnership on behalf of its partners generally should be filed with the partnership's tax return. Information with respect to QEF and MTM inclusions for the applicable taxpayer should be included on Schedules K-1, K-2, and K-3.

There may, however, be circumstances in which a partnership's taxable year does not coincide with the taxable year of the foreign corporation with respect to which a QEF or MTM election is made, which could create reporting issues with respect to partners. For example, suppose that a partnership with a June 30 taxable year end owns all of the issued and outstanding shares of a PFIC with a December 31 taxable year end. If the partnership did not transmit information relating to a QEF election with respect to the PFIC until after June 30, then its partners with December 31 taxable year ends may already have filed returns that did not reflect the QEF election. In these circumstances, partnerships should be allowed (or required) to transmit an early QEF election to their partners based on the date on which the PFIC's taxable year ends.

We believe the form of the elections should be amended to permit the partner or partnership to file a consolidated Form 8621, which would include all of a partner's PFICs and relevant information on a supporting schedule attached to the Form 8621, provided that the PFICs have

[6] Although not necessary for purposes of our proposal, the government could consider issuing additional guidance to assist partnerships in determining whether a direct or indirect partner is a United States shareholder, as defined in section 951(b), that is consistent with the guidance issued in Rev. Proc. 2019-40, 2019-43 I.R.B. 982.

the same taxable year.[7] The partnerships described earlier commonly hold multiple PFIC investments, and, in such cases, a partner that is a U.S. taxpayer is required to file multiple Forms 8621 to report each underlying PFIC. A consolidated Form 8621 could alleviate the associated filing burden when making the election (whether it is the partner or partnership). In particular, if the final regulations permit partnerships to file QEF or MTM elections on behalf of partners, a single Form 8621 with respect to each partner's interest in each PFIC owned by the partnership could exponentially increase the number of forms filed by the partnership and reduce the number of partnerships participating in the proposed regime.

We appreciate your consideration of these comments and would welcome the opportunity to discuss them further with you. If you or your staff have questions regarding these comments, please reach out to Brad Bailey, Senior Vice President of Government Affairs, The American Investment Council, at bbailey@investmentcouncil.org; Ryan McCormick, Senior Vice President & Counsel, The Real Estate Roundtable, at rmccormick@rer.org; or Joseph Schwartz, Director & Counsel, Managed Funds Association, at jschwartz@managedfunds.org.

Sincerely,

The Alternative Investment Management Association (AIMA)

The American Investment Council (AIC)

The Managed Funds Association (MFA)

The Real Estate Roundtable (RER)

The S Corporation Association (S-CORP)

cc:
Peter Blessing, Associate Chief Counsel (International), Internal Revenue Service
Jose Murillo, Deputy Assistant Secretary, International Tax Affairs, Department of the Treasury
Erika Nijenhuis, Senior Counsel, Office of Tax Policy, Department of the Treasury
Tom West, Deputy Assistant Secretary, Office of Tax Policy, Department of the Treasury

[7] In the case of tiered partnerships, the Form 8621 that is prepared by a partnership on behalf its direct and indirect partners would show only the name of the upper-tier partnership that is a direct partner of the partnership filing the Form 8621 and the income, gain, etc. allocable to that partner. This is necessary both to reduce compliance burdens and to preserve the confidentiality of investor information, since investment funds are reluctant to share their investor lists with the managers of the investment funds in which they invest. Each upper-tier partnership would, in turn, file a Form 8621 showing its direct partners and their respective shares of the income, gain, etc. of each PFIC in which it holds an indirect interest through the partnership.

Appendix: Description of the Associations

1. **The Alternative Investment Management Association** (AIMA) is the global representative of the alternative investment industry, with more than 2,100 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2.5 trillion in assets. AIMA draws upon the expertise and diversity of its membership to provide leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs and sound practice guides. AIMA works to raise media and public awareness of the value of the industry. AIMA set up the Alternative Credit Council (ACC) to help firms focused in the private credit and direct lending space. AIMA is committed to developing skills and education standards and is a co-founder of the Chartered Alternative Investment Analyst designation (CAIA) – the first and only specialized educational standard for alternative investment specialists. AIMA is governed by its Council (Board of Directors). For further information, please visit AIMA's website, www.aima.org.

2. **The American Investment Council** (AIC) is an advocacy, communications, and research organization established to advance access to capital, job creation, retirement security, innovation, and economic growth by promoting responsible long term investment. In this effort, the AIC develops, analyzes, and distributes information about the private equity and private credit industries and their contributions to the U.S. and global economy. Established in 2007, and formerly known as the Private Equity Growth Capital Council, the AIC is based in Washington, D.C. The AIC's members are the world's leading private equity and private credit firms, united by their commitment to growing and strengthening the businesses in which they invest. For further information about the AIC and its members, please visit our website at http://www.investmentcouncil.org.

3. **The Managed Funds Association** (MFA) represents the global alternative investment industry and its investors by advocating for regulatory, tax and other public policies that foster efficient, transparent, and fair capital markets. MFA's more than 150 members collectively manage nearly $1.6 trillion across a diverse group of investment strategies. Member firms help pension plans, university endowments, charitable foundations, and other institutional investors to diversify their investments, manage risk, and generate attractive returns over time. MFA has a global presence and is active in Washington, London, Brussels, and Asia.

4. **The Real Estate Roundtable** (RER) brings together leaders of the nation's top publicly-held and privately-owned real estate ownership, development, lending and management firms with the leaders of major national real estate trade associations to jointly address key national policy issues relating to real estate and the overall economy.

   By identifying, analyzing and coordinating policy positions, The Roundtable's business and trade association leaders seek to ensure a cohesive industry voice is heard by government officials and the public about real estate and its important role in the global economy.

The Roundtable's membership represents over 3 million people working in real estate; some 12 billion square feet of office, retail, and industrial space; over 2 million apartments; and more than 3 million hotel rooms. It also includes senior, student and manufactured housing as well as medical office, life science campuses, data centers, cell towers, and self-storage properties. The collective value of assets held by Roundtable members exceeds $3 trillion.

5. **The S Corporation Association** (S-CORP) is the only organization devoted exclusively to promoting and protecting the interests of America's 5 million S corporations. Since its inception in 1996, S-CORP has worked to improve and modernize the rules governing individually- and family-owned businesses, and to ensure their competitiveness in the modern era. S-CORP's membership is comprised of firms operating in virtually every industry and region across the country, and includes some of the most iconic and recognizable privately-held companies in America. For additional information, please visit www.s-corp.org.