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Via Email: lbi.lcc.program@irs.gov

RE: Proposed Elimination of Revenue Procedure 94-69

Dear Sir or Madam:

The Internal Revenue Service (the Service or IRS) announced on August 19, 2020,[1] it is considering obsoleting Revenue Procedure 94-69 (at times, the Procedure).[2] This news was surprising and quite disappointing, as the Service's largest and most complex business taxpayers have relied on the simplifying administrative procedure embodied in the Procedure for over thirty-five years.[3] The Procedure allows qualifying taxpayers to voluntarily disclose errors and other changes to items reported in tax returns under audit by the Service's Large Business & International Division (LB&I). It also provides an incentive — in the form of penalty relief — for taxpayers to self-correct erroneous return positions and transparently and expediently bring them to the Service within fifteen days of the Service's first written request for information or document.

Use of Revenue Procedure 94-69 is widespread among qualifying taxpayers for good reason. It simplifies examinations, promotes transparency and collaboration between taxpayers and LB&I examination teams, and results in the resolution of issues at the lowest possible level in the examination function—all praiseworthy objectives of sound tax administration.

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1 *See* IRS Statements and Announcements, IRS Seeks Comments on Revenue Procedure 94-69 (Aug. 19, 2020), *at* *https://www.irs.gov/newsroom/irs-seeks-comments-on-revenue-procedure-94-69* (last accessed Oct. 16, 2020) [the Announcement].

2 1994-2 C.B. 804 (Oct. 13, 1994).

3 *See* Rev. Proc. 85-26, 1985-1 CB 580 (providing the predecessor to Rev. Proc. 94-69 applicable to returns due after Dec. 31, 1982).

The Service outlined various reasons for the proposed departure from over thirty-five years of IRS large case audit procedure, including:

- Revenue Procedure 94-69 creates a disparity among the LB&I filing population;
- taxpayers in the Large Coordinated Case (LCC) Program may use existing methods for making adequate disclosures under section 6662 (including various disclosures available when filing returns);[4]
- LCC taxpayers may file qualified amended returns (QARs) at any time before they are first contacted for audit;
- the Procedure does not support the broader tax administration goal to improve the accuracy and reliability of returns at the time of filing; and
- the LCC Program is not a continuous examination program.[5]

Summary of TEI's Comments

The members of Tax Executives Institute, Inc. (TEI) view Revenue Procedure 94-69 as a critical simplifying procedure that promotes effective examinations of the most complex and significant tax returns filed with the Service. The current system created around the Procedure encourages voluntary disclosures through an efficient process that also results in a single round of amended state and local returns at the completion of an examination. The Procedure simplifies audits, promotes transparency and collaboration between taxpayers and Exam teams, and provides a mechanism for resolving issues at the lowest possible level in examinations. The reasons offered for questioning the continuing merits of Revenue Procedure 94-69 reflect an overly simplistic view of the Procedure and the tax compliance burdens and other pressures unique to LCC taxpayers. TEI's membership strongly believes the benefits of Revenue Procedure 94-69 far exceed any equity that may be achieved through its elimination. Accordingly, TEI encourages the Service to retain the Procedure and extend it to all LCC taxpayers regardless of when they became subject to the LCC Program.

TEI Background

TEI was founded in 1944 to serve the needs of business tax professionals. Today, the organization has fifty-seven chapters in North and South America, Europe and Asia.[6] As the preeminent association of in-house tax professionals worldwide, TEI has a significant interest in promoting sound tax policy, as well as the fair and efficient administration of the tax laws, at all levels of government. Our nearly 7,000 individual members represent over 2,800 of the leading companies in the world. We believe the diversity and professional experience of our members – who work across all industries – enables TEI to bring a

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4 Unless otherwise noted, all section references are to the U.S. Internal Revenue Code of 1986, as amended (the Code).

5 *See* Announcement, *supra* note 1.

6 TEI is a corporation organized under the Not-For-Profit Corporation Law of the State of New York. TEI is exempt from U.S. federal income taxation under section 501(c)(6).

balanced and practical perspective to the current debate surrounding the retention of Revenue Procedure 94-69.

Our members' perspectives on this issue are derived from actual experiences in tax matters spanning the lifecycle of a tax return, from interpretating and implementing new guidance (particularly in the wake of the 2017 Tax Cuts and Jobs Act (TCJA),[7] implementing extensive and detailed reporting and compliance obligations, through resolving disputes with Exam and at Appeals, working with IRS Service Centers to finalize computations, and finally, closing examination cases. TEI's membership also encompasses most taxpayers presently participating in the LCC Program, with many having participated in predecessor programs, such as the Coordinated Industry Case (CIC) Program, and even its predecessor, the Coordinated Examination Program (CEP). These TEI members have extensive experience using Revenue Procedure 94-69 to improve the efficiency and transparency of audits, and we would appreciate the opportunity to discuss these comments with LB&I in real time before formal action on obsoleting or sunsetting the Procedure is taken.

TEI Comments

Revenue Procedure 94-69 has a critical role in simplifying audits of large corporate taxpayers, incentivizing taxpayers to voluntarily comply with the tax laws through self-audit and self-correction ***and*** reducing the administrative burden on LB&I's examination teams. Obsoleting the Procedure and instead requiring taxpayers in the LCC Program to file QARs would create a roadblock to compliance for the largest and most complex taxpayers under LB&I's jurisdiction and eliminate important tax policy objectives the Procedure accomplishes in spades. In today's complex environment, LCC taxpayers and LB&I find it increasingly difficult to effectively and efficiently accomplish their unified mandates of complying, and ensuring compliance, with the nation's ever-evolving business tax laws. Both parties face budget and resource challenges, particularly in the wake of COVID-19 having dramatically altered how taxpayers and the Service interact, disclose, and exchange information and otherwise collaborate in audits. Despite these challenges, both parties give their very best effort day in and day out to succeed. Revenue Procedure 94-69 is a success story with a 35-year history of making extraordinarily complex large business examinations more efficient and effective. Much like the Compliance Assurance Process (CAP) and other LB&I programs that bring taxpayers and Exam teams together to openly discuss and resolve issues in real time, rather than engage in prolonged controversy, the Procedure is a win-win for all parties involved.

This comment letter first discusses practical aspects of the Procedure and why it is vitally important to LCC taxpayers and the Exam teams that spend countless hours and resources examining their returns. It then shifts to addressing the considerations the Announcement uses to evaluate the continuing merits of Revenue Procedure 94-69, which we believe reflect an overly simplistic view of the Procedure and the tax compliance burdens and other pressures unique to LCC taxpayers. Finally, the

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[7] Pub. L. 115-97.

letter reviews the negative consequences that would accompany elimination of the Procedure and provides transition rule suggestions if the Service selects such an unfortunate course.

TEI's membership strongly believes the merits of Revenue Procedure 94-69 far exceed any horizontal equity that may be achieved through its elimination. We sincerely hope LB&I chooses the efficient and effective course of continued collaboration with LCC taxpayers through the Procedure, rather than erecting an unnecessary barrier to compliance that will have far-reaching negative impacts on the resolution of these exceptionally large and important cases.

1. Practical Aspects of Revenue Procedure 94-69

a. Policy Underlying the Procedure

The Procedure has been, and continues to be, a valued dispute resolution tool. The preambles to Revenue Procedure 94-69 and its predecessor, Revenue Procedure 85-26, do not provide fulsome discussions of their underlying purposes. These important purposes, however, play out in LB&I's most complex and costly cases each day. The Procedure recognizes LCC taxpayers, more so than any other group of taxpayers within LB&I's jurisdiction, have complex structures and engage in complex transactions around the globe. It also recognizes tax laws are complex, and interpretations of the tax law shift over time as cases are decided, audits are finalized, and the Service promulgates guidance. And the Procedure recognizes that the tax returns filed by LCC taxpayers are the largest, most complicated returns the Service receives and have the most dollars at stake.

LCC taxpayers make enormous efforts to reflect hundreds of Code sections, thousands of pieces of formal and informal IRS guidance, millions of transactions and entries to the tune of multi-billions of dollars, on their annual tax returns and other filings with the Service. Many calendar-year LCC taxpayers have just completed the 2019 U.S. Federal compliance cycle (notwithstanding the foreign, state, and local tax returns and reporting flowing therefrom). The investment and effort LCC taxpayers face in preparing and signing, under the penalties of perjury, any Federal tax return in any given year or period that is, "to the best of [their] knowledge and belief, is true, correct, and complete"[8] has not only increased in the years since the advent of Revenue Procedure 94-69, but has exploded.

The knowledge and belief underlying LCC taxpayer returns is gained through thorough investigation, analysis, and documentation, and usually also involves audits by external third parties, such as financial statement auditors. Filing a return that is to the taxpayer's best knowledge and belief true, correct, and complete is the best an LCC taxpayer can do. Regrettably, a taxpayer's understanding of the operative facts underlying a tax position and the governing legal rules often change between the time a return is filed and its examination. For example, a taxpayer may discover computational errors,

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[8] *See, e.g.*, U.S. Internal Revenue Service, Form 1120 U.S. Corporation Tax Return for 2019, at 1 (signature block) (emphasis added); *see also* section 7206 (making of a false return, statement or other document, verified by a written declaration that is made under the penalties of perjury, for which the signer does not believe to be true or correct as to every material matter, is a felony, a conviction for which carries with it a fine of up to $500,000 (corporation) or imprisonment for up to three years, as well as prosecution costs).

despite many layers and levels of review and quality control. Audits may be resolved with adjustments flowing to open taxable years. Return positions may change as tax departments start, grow, evolve, and turnover, as do the critical eyes and judgments brought to bear on tax planning, tax reporting, tax compliance and risk of controversy. The IRS and U.S. Department of the Treasury (Treasury) may issue new or revised guidance, as seen in the wake of the TCJA in particular, providing more certainty as to how statutes and regulations operate alone or together, months or years after a Code or regulatory change. Courts may decide tax matters that impact return positions taken in past years. Each of these examples frequently occurs between the time an LCC taxpayer files its return and LB&I initiates an examination of the return. The Procedure was adopted thirty-five years ago to provide an efficient mechanism for incorporating these adjustments into the examination of the large case tax return requiring adjustment.

When the Procedure was adopted, the Service determined the benefits of actively collaborating with large case taxpayers outweighed the parity concerns associated with creating a procedure available to a limited stakeholder group. The Service recognized that it would be poor tax policy, and even counterproductive, to penalize large case taxpayers whose returns require correction due to faultless error. The Service created and adopted a procedure that encourages large case taxpayers to voluntarily disclose erroneous return positions with an efficient means of correcting such mistakes. Absent the Procedure, a large case taxpayer discovering an error would have little incentive to correct or even disclose it, unless the taxpayer were willing to accept the extreme burden of preparing a formal QAR and the attendant amended state and local returns.[9] Removing Revenue Procedure 94-69 from LB&I's case resolution toolkit would be an extreme pivot away from the Service's continued goals for transparency and efficiency in audits. Moreover, it runs the risk of defeating LB&I's recent efforts to facilitate collaborative audit resolution in favor of the less efficient processes and procedures for discovering adjustments through information document requests (IDRs).

b. Taxpayer Use of the Procedure

The longstanding policy rationale discussed above is demonstrated by LCC taxpayers' use of the Procedure in practice. For example, an LCC taxpayer recently submitted three different types of adjustments in its Revenue Procedure 94-69 disclosure covering multiple taxable years:

1. an appeals adjustment resolved with finality in a Section 906 Closing Agreement that impacted the next audit cycle;
2. a more controversial adjustment settled at appeals without a Section 906 Closing Agreement that impacted the next audit cycle; and
3. international effected errors.

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[9] Treasury regulations provide that taxpayers "should" correct errors on previously filed returns by filing amended returns (*see* Treas. Reg. §§1.451-1(a), 1.461-1(a)(3)), but a taxpayer has no obligation to do so. *See, e.g., Koch v. Alexander*, 561 F.2d 1115 (4th Cir. 1977).

The three voluntarily disclosed adjustments were examined by the Exam team; the Exam team proposed several examination adjustments to the voluntarily disclosed adjustments arising from items 2 and 3; and all of the resulting adjustments were agreed by the taxpayer and incorporated into the other examination adjustments determined from the audit. The process was collaborative, efficient, and effective. The taxpayer filed a single round of state amended returns after the federal case was closed.

Absent Revenue Procedure 94-69, the taxpayer would have to file a QAR for each taxable year impacted by items 1, 2, and 3. Only Item 1 would have a certain outcome because of the closing agreement. Each QAR would be initially processed by an IRS Service Center and transferred to the Exam team assigned to the taxpayer's case. The Exam team would have to examine each of the QARs, each containing thousands of pages of disclosures and computations. The Exam team would have to issue IDRs to understand the changes reported in the QARs. The Exam team would have to determine how the changes reported in the QAR related to the current year audit of the taxpayer. The taxpayer's tax department would be under extreme time pressure because filing the QARs would create an obligation to file hundreds of state and local tax returns. This distraction may cause delays in responding to the Exam team's IDRs, which would have negative spill-over effects on the taxpayer's relationship with the Exam team. Given the time and resources devoted to filing QARs and resultant state and local amended returns, the taxpayer may not agree to the changes the Exam team proposed to adjustments involving the controversial Appeals settlement (i.e., item 2 above). The issue would be transferred to Appeals again, and Appeals would likely decide in the taxpayer's favor again. The complicated nature of the examination involving the original return and the QAR would require significant IRS Service Center and Exam team time. When the case was finally resolved, the taxpayer would have to file a second round of state and local amended returns, which would require staff who would have otherwise been working on the U.S. tax return for the next filing cycle.[10]

As demonstrated above, the Procedure simplifies audits, promotes transparency and collaboration between taxpayers and Exam teams, and provides a mechanism for resolving issues at the lowest possible level in examinations. Each of these points reflects sound tax policy, and all are important facets of LB&I's ongoing efforts to achieve its mission.[11] The Announcement does not address these considerations, but rather focuses on penalty protection. Granting penalty protection to taxpayers that voluntarily disclose errors and other changes to previously filed returns is sound tax policy and is not unique to the LCC Program.[12] It is not, however, the primary reason LCC taxpayers rely on the Procedure.

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[10] This example reflects a simple case where items arising after a return had been filed required adjustment to the originally filed return. There are a variety of other items that routinely arise in LCC returns. These recurring items are addressed further below in part 2.c, pages 10-11, of this comment letter.

[11] *See* IRS Publication 5125 (providing the goals and objectives of LB&I's Examination Process).

[12] *See, e.g.*, the IRS's massively successful Offshore Voluntary Disclosure Program (providing certain procedural benefits (including avoiding criminal prosecution and certain penalties) to a targeted group of taxpayers that voluntarily disclose return errors).

The "reasonable cause" exception under section 6664 provides penalty protection to LCC taxpayers, regardless of Revenue Procedure 94-69 disclosures, because of the tremendous amount of documentation and effort underlying the preparation of their returns. Financial accounting standards and Schedule UTP require timely and full disclosure of known uncertain positions whether the specter of penalties exists or not.[13] Penalties are simply not a significant motivator of accurate return preparation for the larger and more sophisticated business taxpayers under LB&I's jurisdiction. As discussed above, LCC taxpayers sign their returns under penalties of perjury – this is not taken lightly by any corporate officer whose name is signed in the signature block. The business, financial statement, legal, and publicity risks for LCC taxpayers in signing inaccurate returns are at the forefront and loom large when ensuring that such returns are made completely and accurately to the best of the taxpayer's information and belief. This is especially true for publicly-traded corporations and other business entities under some level of independent financial statement audit. Penalty protection under Revenue Procedure 94-69 matters, but not when the return is filed. At all times, LCC taxpayers strive to prepare complete and accurate returns. Based on our members' extensive experience, it would be implausible for an LCC taxpayer to accept known errors or incorrect filing positions in a return on the basis of being able to "clean them up with Revenue Procedure 94-69 if audited." Such indifference would be a significant breach of fiduciary duty and public trust and would create material reputational risk for the taxpayer. It simply does not happen that way.

Revenue Procedure 94-69 provides a significant incentive for taxpayers to transparently disclose later-discovered errors and other return changes to the Service because it provides a straightforward framework for correcting previously filed returns without filing thousands of pages of amended returns along with hundreds of state and local income tax returns each time errors are discovered. The burden imposed by requiring LCC taxpayers to file QARs and the attendant perverse incentives created by such a requirement cannot be overstated.

c. *Value of the Procedure to LB&I and Its Exam Teams*

Exam teams not only embrace the benefits of Revenue Procedure 94-69, but also rely upon it to make their examinations more efficient. Exam teams do not have to resort to the IDR process to discover the adjustments. They do not have to expend revenue agent time and specialist resources to fully comprehend the complex business transactions or changing legal interpretations underlying the adjustments. They do not have to formally develop facts and law in a Notice of Proposed Adjustment and Revenue Agent Report for the adjustments. And, they do not have to defend the proposed adjustments if a case is transferred to Appeals. Rather, Revenue Procedure 94-69 adjustments are voluntarily and transparently handed to Exam in an organized and efficient manner.

Exam teams appreciate taxpayers' disclosures under the Procedure because they provide a useful tool to get organized at the beginning of an examination. The disclosures set a collaborative tone with the Exam team and provide an immediate indication of the taxpayer's level of cooperation. Recently,

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[13] For the remainder of this letter we will refer to the financial accounting standards requiring the disclosure of uncertain tax positions as "FIN 48" (as codified in ASC 740-10).

Exam teams benefited significantly from taxpayers' disclosures of items related to the TCJA. Exam teams have intimated they learned about the TCJA in real time through their examinations and collaborating with taxpayers on their TCJA-related disclosures greatly aided the Exam team's understanding of the new tax laws. All these benefits would be lost with the sunsetting of the Procedure.

The Procedure also provides a simplifying mechanism for closing cases. It allows for the netting of all negative adjustments against positive adjustments determined during the course of the examination. Absent comprehensive netting, more case closings would require Joint Committee review and the accompanying disruptions that process entails.[14] In addition, we are aware of no legitimate rationale for LB&I taking an action that would result in the nation's largest, most complex taxpayers filing more QARs. Eliminating the Procedure would disrupt the existing streamlined and efficient process in favor of an inefficient process requiring LCC taxpayers and the government to unnecessarily expend more resources. We do not believe it is in the Service's best interests to consume already scarce government resources and interrupt efficient case closings in this manner.

2. Stated Considerations for Evaluating the Continuing Merits of Revenue Procedure 94-69

The Announcement advances the following considerations for evaluating the continuing merits of Revenue Procedure 94-69:

a. the LCC Program is not a continuous examination program;
b. the Procedure creates a disparity among the larger LB&I and IRS filing populations who must use the QAR process;
c. the Procedure does not support the broader tax administration effort to improve the accuracy and reliability of returns at the time of filing;
d. all taxpayers may submit informal claims for refunds to the exam team within 30 calendar days of the opening conference.

None of these considerations, taken independently or together as a whole, outweigh the important policy justifications of retaining Revenue Procedure 94-69. Some of the considerations in fact reinforce the critical role the Procedure serves in LCC examinations and support its retention, not elimination. We address each consideration in turn below.

a. The Nature of the LCC Program Supports Retaining Revenue Procedure 94-69.

The Announcement asserts the new LCC Program is different from its predecessor programs and Revenue Procedure 94-69 does not serve the same purposes it once did. The Announcement states:

> LCC is not a continuous examination program. Like other taxpayers, large corporate taxpayers are selected annually for examination based on their risk profile. While a small number of taxpayers may be examined in multiple

[14] *See* section 6405 (requiring Joint Committee review of any case in which the government will pay a refund of more than $2 million ($5 million for C corporations)).

> consecutive years due to consecutive selection, unlike the prior CIC program, the LCC program is not premised on the assumption of a continuous examination.

TEI members appreciate the significant time and effort LB&I leadership has dedicated to increasing the efficiency and effectiveness of the examination process for its largest and most complex taxpayers. We do not, however, share the views expressed in the Announcement.

Theoretically speaking, LCC taxpayers may not undergo comprehensive examinations of each taxable year. It is disingenuous to suggest, however, that the returns filed by these taxpayers are not under continuous scrutiny—a level of scrutiny not comparable to other taxpayers within or outside LB&I's jurisdiction. LB&I's memorandum dated May 21, 2019, explaining implementation of the LCC Program (the May 2019 Memorandum), briefly summarizes the layers of scrutiny returns filed by LCC taxpayers undergo.[15] ***All returns*** are initially analyzed. Returns are included in an LCC audit selection process if they meet unspecified LCC criteria. Returns are further analyzed using automated pointing criteria and classified into categories of risk based on unspecified data analytics. LB&I personnel then determine compliance treatment streams to be applied to LCC returns based upon the return's overall category of risk and available resources. While this process may not meet the technical definition of an "examination," it is undeniable that all LCC Program returns are under continuous review and scrutiny. That said, many TEI members representing LCC taxpayers see the practical reality that they remain and expect to remain under actual, continuous audit for each open taxable year.

It is also incorrect to suggest that taxpayers in CEP and CIC were subjected to comprehensive examinations for each taxable year. In those programs, it was not uncommon for examination cycles to skip one or more taxable years. The important point is that under CEP and CIC, just like under LCC, the largest and most complex business tax returns were, and continue to be, subject to continuous scrutiny and analysis, a level of scrutiny and analysis much higher and different than taxpayers outside the large taxpayer compliance programs. The experience of TEI members bears this out. Our members continue to see what are, in effect, continuous audit cycles and expect if the businesses for which they work are not audited every year, they will certainly be audited most years.

In the context of determining whether Revenue Procedure 94-69 should or should not be retained, no meaningful difference between the LCC and its predecessor programs exists. Returns filed by the largest and most complex taxpayers are and will continue to be under extreme administrative scrutiny. Further, there is no justification for restricting application of the Procedure to only a subset of LCC taxpayers as suggested in the Announcement. By its terms, the Procedure applies to all taxpayers "subject to the Coordinated Examination Program" regardless of whether the taxpayer became subject to CEP before or after issuance of the Procedure.[16] When LB&I transitioned from CEP to the CIC program, it continued to apply the Procedure to all taxpayers subject to the CIC program, again regardless of when they became subject to the program. Despite this established administrative practice, LB&I asserts in the Announcement that "Revenue Procedure 94-69 does not apply to LCC taxpayers that

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15 Large Business & International Division Memorandum, LB&I-04-0419-004 (May 21, 2019).

16 Rev. Proc. 94-69 at 1.

were not previously CIC taxpayers, or to any CIC taxpayers that did not have an open CIC examination as of May 2019."[17] The Announcement does not provide any rationale for treating LCC taxpayers differently depending upon whether they had an open CIC examination as of May 2019. Making such a distinction without a difference violates established legal precedents,[18] is contrary to the Service's established administrative practice of applying the Procedure to all taxpayers subject to LB&I's reincarnated large case examination programs, and is remarkably incompatible with the disparity concerns LB&I raises elsewhere in the Announcement. Accordingly, LB&I should formally extend the Procedure to all LCC taxpayers, notwithstanding the timing of their LCC status, unless LB&I is able to enunciate a rational basis for treating LCC taxpayers differently based solely on the point in time they became subject to the LCC program. We do not believe a rational reason exists given the similarities among the CEP, CIC, and LCC programs and the nature of taxpayers subject thereto.[19]

b. The Procedure Does Not Create Meaningful Disparity between LCC and Non-LCC Taxpayers; Its Elimination Would.

The Announcement cites the inability of all taxpayers to use Revenue Procedure 94-69 as a reason for eliminating it and requiring LCC taxpayers to instead file QARs. TEI agrees equity requires similarly situated taxpayers to be treated similarly, but LCC taxpayers and the smaller, less complex taxpayers under LB&I's jurisdiction are *not* similarly situated. Significant disparities exist in how LB&I treats LCC and non-LCC taxpayers, as well as in the complexities these groups face in preparing returns. Eliminating the Procedure and requiring LCC taxpayers to instead file QARs would, in practice, increase these existing disparities.

As discussed above, LB&I subjects LCC taxpayers to continuous scrutiny and comprehensive examinations as a matter of course, not as a matter of exception. The fact that LB&I has established specialty programs for large, complex business taxpayers itself illustrates they are treated differently (i.e., examined more vigorously and consistently) than the other segments of LB&I's jurisdiction. It is therefore inherently equitable to provide different disclosure and settlement procedures for these distinct categories of taxpayers. The Procedure lessens the administrative burden inflicted upon LCC taxpayers,

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17 Announcement at 1. When the CIC program became the LCC program, LB&I stated that the Procedure would continue to apply to "any taxpayer currently in the CIC and the new LCC program." May 2019 Memorandum at 2. LB&I did not specifically address the applicability of the Procedure to taxpayers that were not classified as CIC as of the date of the program change, but later grew to the size and complexity warranting LCC classification.

18 *See, e.g., Computer Sciences Corp. v. United States*, 50 Fed. Cl. 388 (2001) (holding that the IRS cannot discriminate between similarly situated taxpayers absent a rational basis for the discrimination); *Oshkosh Truck Corp. v. United States*, 123 F.3d 1477 (Fed. Cir. 1997) (same); *International Business Machines Corp. v. United States*, 343 F.2d 914 (1965) (same).

19 We understand Exam teams have extended Revenue Procedure 94-69 to LCC taxpayers that did not have open CIC examinations as of May 2019. Applying the Procedure uniformly to all LCC taxpayers would avoid future instances of the Procedure being applied differently across Exam teams.

leveling the playing field somewhat as compared to non-LCC taxpayers whose audits are less invasive and less frequent.

The time and complexities involved in preparing an LCC taxpayer's original return and QAR are far greater and simply not comparable to returns filed by non-LCC taxpayers. The Code and regulations provide complex reporting regimes that only apply to large business taxpayers. For example, the enormous tracking burdens of Section 59A (i.e., the Base Erosion Anti-Abuse Tax or BEAT) apply only to corporations with average annual gross receipts of over $500 million. Similarly, the annual country-by-country reporting requirement of Treas. Reg. §1.6038-4 only applies to multinational groups with annual revenues exceeding $850 million. Smaller taxpayers within LB&I's jurisdiction do not face these and other complexities created by the tax law, which significantly add to the filing burdens of LCC taxpayers. Due to their size, complexity, and expansive international operations, LCC taxpayers are also much more likely to have changes in facts (particularly as foreign statutory accounting is completed sometimes long after the due dates of U.S. federal income tax returns), prior period flow-through audit settlements, adjustments attributable to finalizing Advance Pricing Agreements, or simply to be subject to changes in law or regulations that necessitate adjustment to a previously filed return. It does not serve taxpayer parity or fairness to provide non-LCC taxpayers penalty protection with relatively easily filed QARs and yet effectively bar LCC taxpayers from the same opportunity for penalty protection through an administrative process that appropriately accounts for their complex operations. This is why the Procedure was adopted thirty-five years ago and its use has continued uninterrupted since. It provides a streamlined administrative process for the much more complex business operations and much more complex returns filed by LCC taxpayers, in fact leveling the playing field for LCC taxpayers as compared to their smaller counterparts.

c. *The Procedure Has No Impact Whatsoever on the Accuracy and Reliability of LCC Returns at the Time of Filing*.

A core premise underpinning the proposed elimination of Revenue Procedure 94-69 appears to be that the Procedure encourages taxpayers to be less thorough in preparing original returns. This premise is patently false and disregards the legal obligation to file as accurate a return as possible under penalties of perjury,[20] the desire of corporations to avoid additional work by having to amend returns, and, most importantly, the financial statement implications attendant to tax reporting. The vast majority of LCC taxpayers are publicly traded. The U.S. federal income tax filing positions of these taxpayers undergo exhaustive audits by Big Four accounting firms, and the taxpayers have a responsibility under FIN 48 to disclose all "uncertain tax positions" on Schedule UTP. For these taxpayers, putting more effort into getting a return "right the first time" is simply not possible. Further, the compliance burden created by a requirement to file QARs (as described in part 2.d below), including massive numbers of duplicative amended state returns, would significantly diminish taxpayer resources available to accurately file current year returns.

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20 *See supra* discussion in part 1.a. at page 4 and part 1.b. at page 6.

The unavoidable collision of complex, international operating structures and shifting legal rules and precedents frequently and routinely results in changes in facts or governing law underlying items reported in originally filed returns. Some common situations were addressed above in the discussion of the policy underlying the Procedure.[21] Other routine examples include items impacted by audit resolutions of pass-through entity returns that occur long after an LCC taxpayer files its original return. The Procedure provides an efficient method to disclose these adjustments without re-filing an entire amended U.S. federal income tax return and hundreds of amended state and local income tax returns. LCC taxpayers have spent enormous time and resources since 2017 implementing information technology (IT) systems updates so they can track tax attributes that must be reported for the new international regimes, such as the BEAT. These new IT systems often uncovered previously unknown or untrackable data attributes that required corrections to prior year returns. The new global intangible low-taxed income (GILTI) regime now requires tax calculations, including taxes paid, as a current tax item when filing IRS Form 1120, yet many jurisdictions do not complete their statutory reporting until after the extended deadline for LCC taxpayers to file their U.S. return. Revenue Procedure 94-69 provides an efficient and effective means for disclosing differences between foreign tax estimates used for return filing and foreign data finalized after the return due date. The same timing issue commonly occurs for tax information arising from minority investments held in entities that are deemed controlled-foreign-corporations (CFCs). As the IRS and Treasury are well aware, the repeal of section 958(b)(4) has resulted in a number of non-controlled foreign investments becoming CFCs. The reporting timelines for these foreign entities and determination of corrections resulting therefrom may occur long after the U.S. tax return filing deadlines for GILTI reporting have come and gone.

Mergers and acquisitions offer another category of adjustments frequently appearing on Revenue Procedure 94-69 disclosures. The accounting and tax departments of LCC taxpayers expend significant time and effort reviewing complex transaction allocations included in purchase and sale agreements, and it is not uncommon for purchase price allocations to require adjustment post-tax return filing for transactions that close within days of a year-end. Adjustments related to systems and data record availability from a newly acquired company are likewise common. Such disclosures made under the Procedure provide an initial opportunity for LCC taxpayers and their Exam teams to engage in open and collaborative discussions concerning the taxpayer's merger and acquisition activity. These discussions are instrumental in setting the stage for a successful LCC examination and would not happen if the Service were to eliminate the Procedure.

Time and again, LCC taxpayers encounter innocuous return adjustments arising from inherent limitations in applying extraordinarily complex and ever-changing tax laws to their complex international operations. No extra level of care or due diligence in return preparation will eliminate them. They are simply inherent in the U.S. tax system as applied to these exceptionally large and complex taxpayers. Requiring LCC taxpayers to file QARs and hundreds of amended state and local returns and

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[21] *See supra* discussion in part 1.a. at pages 3-4.

eliminating the collaborative benefits of the Procedure is an extremely inefficient solution to addressing LB&I's concerns.

d. *The Ability of LCC Taxpayers to Submit Informal Claims for Refund Does Not Support Elimination of the Procedure*.

The Announcement correctly states that all taxpayers may submit informal claims for refunds to an Exam team within thirty calendar days of the opening conference. That mechanism, however, does not extend to adjustments that increase tax, which are reported in the Revenue Procedure 94-69 disclosure. The only alternative to the Procedure is to file a QAR, which is not an adequate substitute.

First, filing a QAR imposes a substantial burden on LCC taxpayers because they must implement the effect of the adjustment through every schedule and calculation in an amended return, often consisting of tens of thousands of pages of disclosures and computations, and make a payment of additional taxes due, all before even knowing if the Service will agree with the adjustment. Second, the effort of filing a QAR detracts resources from filing a complete and accurate current year return. Like LB&I, tax departments of LCC taxpayers have limited resources. The added compliance burden of preparing and filing QARs would consume resources that would otherwise be dedicated to preparing the current return, detracting from, not advancing, LB&I's objective of promoting accurate return preparation. This point has recently been exacerbated by the TCJA and the related regulatory guidance, which has shifted over time.

The TCJA was the most significant reform of the Code since the Tax Reform Act of 1986. Its implementation, as with all significant tax bills, required a tremendous amount of regulatory guidance, as well as significant changes to existing forms and the creation of entirely new forms. The complexity of legal issues required extensive guidance packages, including proposed, temporary, final, re-proposed and re-finalized Treasury regulations. Despite herculean and much appreciated efforts by the Service and Treasury, the government did not issue all needed TCJA guidance prior to the due date of the first post-TCJA original returns. Further, much of the regulatory guidance applied retroactively. The combination of significant tax reform and retroactive regulatory guidance resulted in many LCC taxpayers filing returns based upon incomplete information and guidance and, in many cases, taking original return positions arguably contrary to subsequently issued and retroactive guidance. Absent Revenue Procedure 94-69, LB&I would have received an avalanche of QARs, substantially increasing its already burgeoning caseload.

Third, filing a QAR creates an obligation to amend state and local income tax returns. While the timing of these amended state returns varies by state, large corporations may file hundreds of state and local tax returns annually, and such filing burden can range from inefficient to outright cost prohibitive. Elimination of the Procedure would require LCC taxpayers to file, at a minimum, not one but two complete sets of amended state and local returns: the first tranche upon filing the QAR; and the second at the close of the examination upon receipt of the final Revenue Agent Report (RAR) or closing agreement. By submitting self-audit adjustments as part of Revenue Procedure 94-69, the adjustments become part of the RAR, thereby eliminating the prospect of having to file multiple tranches of state and

local amended returns. Thus, looking beyond U.S. federal income tax administration, eliminating the Procedure would have a cascading negative effect on already over-burdened state departments of revenue.

Finally, the QAR approach would impose a significant burden on the Service. Under the current system, an Exam team evaluates the taxpayer's Revenue Procedure 94-69 disclosures as part of the audit, and, at the end of the audit, a single statement of income tax examination changes captures all the adjustments. Without the Procedure, Service Centers would have to process a second massive return for each LCC taxpayer (i.e., the QAR), without even knowing which adjustments would be accepted, and then process examination adjustments again later. Further, the QARs would be transferred to the Exam team after processing, so the Exam team would now be burdened with reviewing those in addition to performing the examination. The additional Service resources such a system would consume is not insignificant.

3. Elimination of Revenue Procedure 94-69 Would Have Negative Consequences for both the Service and Taxpayers.

Throughout this letter, we have highlighted negative consequences that would naturally flow from elimination of the Procedure. In summary, they include:

- LCC taxpayers would have no incentive to voluntarily disclose known return errors to Exam teams. *See* discussion at pages 4-5.
- Lost opportunity to promote trust and collaboration between taxpayers and the Exam team. *See* discussion at pages 3-5, 7.
- Exam teams would have to rely on normal examination procedures to discover items that were previously handed to them in a simple, concise disclosure and document the resulting adjustments in NOPAs and RARs. *See* discussion at pages 5-7.
- The comprehensive computational netting that occurs in LCC cases would no longer be available, resulting in more case closings requiring Joint Committee review. *See* discussion at page 7.
- Disparities between LCC and non-LCC taxpayers would be intensified. *See* discussion at pages 8-10.
- Items that would otherwise be voluntarily disclosed and explained at the beginning of an examination may be buried in a QAR, foregoing the opportunity to resolve the issues at the lowest point in the administrative process. *See* discussion at pages 1, 7.
- Efficient process of voluntarily disclosing return errors that are processed at the conclusion of an examination together with other proposed adjustments replaced by the extraordinarily inefficient QAR process which would require:
    - Extraordinary taxpayer expense to prepare not only the QAR, but also two separate tranches of state and local amended returns;

- Additional IRS Service Center resources to process duplicative computations;
- Additional LB&I resources to process and examine the QARs (which is far more costly than examining written statements of items furnished under the Procedure).

See discussion at pages 12-14.

- The added QAR filing burden would consume limited taxpayer resources that would otherwise be available for original return preparation. *See* discussion at pages 12-14.
- State and local tax authorities would suffer from an onslaught of amended state and local returns filed for the same taxable year. *See* discussion at pages 13-14.

It is also conceivable, perhaps probable, that elimination of Revenue Procedure 94-69 would result in a surge of penalty assertions and that such penalties would be inconsistently applied across different Exam teams. Taxpayers would almost certainly contest these penalties at Appeals, further increasing the backlog of Appeals cases and delaying the final resolution and closing of LCC cases. Avoiding the problems posed by inconsistent and improper accuracy-related penalty assertions is perhaps reason enough to retain the Procedure.

4. Alternatives and Transition Rules if Revenue Procedure 94-69 Is Eliminated for Some or All Taxpayers

If LB&I chooses to disregard the continuing merits of the Procedure for all LCC taxpayers and the sound tax policy underlying it, we encourage the division to consider retaining the Procedure in cases where an LCC taxpayer has been under formal examination for at least three out of five taxable years prior to the taxable year in question, which equates to de facto continuous examination taking into account cycles skipped due to net operating loss or other conditions that temporarily reduce the taxpayer's risk profile. Taxpayers under continuous, formal examination have little to no opportunity to file a QAR between the filing of their original return and receipt of a notice of examination. This limited population of taxpayers is simply unable to reasonably utilize existing methods for making adequate disclosures under section 6662 to avoid the imposition of penalties, and Revenue Procedure 94-69 should remain available to them out of parity concerns.

If the Procedure is withdrawn, in whole or in part, we also request that LB&I clarify the specific timing within which an amended return must be filed to qualify as a QAR—i.e., state with specificity what constitutes being "first contacted" by the Service concerning an examination of the return as this phrase is used in Treas. Reg. §1.6664-2(c)(3). For LCC taxpayers under constant contact by LB&I examiners, it is often unclear when the examination of a new return cycle begins. To avoid misunderstandings and the inevitable disputes that follow, we recommend that the date of "first contact" be the date on which a taxpayer actually receives and acknowledges a written notification from the Exam team that the Service is commencing an examination of the tax return in question.

Finally, to the extent the benefits of the Procedure are withdrawn, we strongly encourage the division to adopt a thoughtful transition rule that treats all LCC taxpayers the same regardless of their

audit currency. For example, eliminating the procedure on a static date, say December 31, 2020, would give taxpayers whose audits have been completed through taxable year 2019 an unfair advantage over taxpayers whose examinations are not that current because the former taxpayers would receive the benefit of the Procedure for all taxable years up to and including 2019, while the latter taxpayers would not. Elimination of the Procedure should not create new disparities based on audit currency. To do this, we would recommend tying elimination of the Procedure to a specifically identified future taxable year, as opposed to a point in time. Thus, all LCC taxpayers and Exam teams would benefit from the Procedure for the same taxable years rather than creating new inequities based on currency. We also recommend delaying the elimination to taxable year 2022 at the earliest to avoid taxable years that include TCJA implementation issues and are impacted by disruptions arising from the COVID-19 pandemic.

5. Conclusion

TEI members' extensive experience working with LB&I Exam teams across the country indicates both Exam teams and LCC taxpayers overwhelmingly view Revenue Procedure 94-69 as a critical simplifying procedure that promotes efficient and effective examinations of the most complex and significant tax returns filed with the Service. Thus, as tax professionals with a passionate and vested interest in both accurate return preparation and efficient tax administration, we are disappointed that LB&I is considering eliminating the Procedure. This is especially true at this critical time when taxpayers and the Service are dedicating enormous resources with limited staffing to properly implement the TCJA and the nation is in the midst of a global pandemic.

The current system created around Revenue Procedure 94-69 encourages voluntary disclosures through an efficient process that also results in a single round of amended state and local returns at the completion of an examination. These aspects of the LCC Program are not broken; they are working quite well. We are aware of no instances in which Exam teams have questioned the value of the Procedure or otherwise suggested that taxpayers are taking unfair advantage of it. The Announcement raises concerns that may be attractive on the surface, but quickly recede into insignificance when the practical details of LCC tax administration and the consequences of eliminating the Procedure are revealed. TEI members understand the importance of filing accurate original returns, and the current system of checks and balances provides additional motivation to do so. Elimination of Revenue Procedure 94-69 would send the absolute wrong message to the critical LCC stakeholder group that currently values collaboration and cooperation in the examination process.

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TEI appreciates the opportunity to comment on the continuing merits of Revenue Procedure 94-69. As already stated, our members have extensive experience utilizing the Procedure to improve the efficiency and transparency of audits, and we would appreciate the opportunity to discuss these comments with LB&I prior to formal action being taken.

These comments were prepared by a cross-section of TEI members involved in and representing TEI's IRS Administrative Affairs Committee, Federal Tax Committee, and U.S. International Tax Committee. Please contact Patrick Evans, TEI Chief Tax Counsel, at 202.464.8351 or pevans@tei.org should you wish to discuss this letter.

Respectfully submitted,

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