February 27, 2012

BY E-MAIL: notice.comments@irscounsel.treas.gov

Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Room 5203

RE: CC:PA:LDP:PR (REG-109369-10)

Dear Sir or Madam:

I am pleased to submit and attach The Florida Bar Tax Section's comments with respect to the Internal Revenue Service's proposed, modified treasury regulations concerning the definition of "an interest in a limited partnership as a limited partner" as reflected and articulated in the Federal Register (i.e., beginning at 76 F.R. 72875) (the "Proposed Rule").

Principal responsibility for these comments was exercised by Nicholas S. Risi. The comments have been reviewed by Guy E. Whitesman. Although the members of The Florida Bar Tax Section (the "Tax Section") who participated in preparing these comments may have clients who would be affected by the Proposed Rule, no such member has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

These materials were prepared by the Comment Projects Subcommittee of the Tax Section.

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The Tax Section is comprised of approximately 2,000 members of The Florida Bar. The membership of the Tax Section engages in a broad spectrum of the practice of tax law, including (but not necessarily limited to) federal, individual, corporate and partnership income tax; federal estate and gift tax, international tax, state and local tax, as well as employee benefits law.

As always, we will be pleased to provide additional commentary as requested. If the Internal Revenue Service has any questions regarding our comments, please do not hesitate to contact us.

Sincerely,

Domenick R. Lioce, Chair

Attachment as stated.

cc: Guy E. Whitesman, Esq.
Nicholas S. Risi, Esq.

COMMENTS OF THE FLORIDA BAR TAX SECTION ON DEFINITION OF LIMITED PARTNERSHIP INTEREST UNDER PROPOSED REGULATION

We appreciate the opportunity to provide written comments on the Internal Revenue Service's proposed regulation modifying the definition of "an interest in a limited partnership as a limited partner" for the purpose of determining whether a taxpayer materially participates in an activity under section 469 of the Internal Revenue Code of 1986, as amended.

The Internal Revenue Service ("IRS") has requested comments regarding the proposed treasury regulations concerning the definition of an "interest in a limited partnership as a limited partner" for purposes of determining whether a taxpayer materially participates in an activity under section 469 of the Internal Revenue Code of 1986, as amended (the "Code").

The proposed treasury regulations provide that an interest in an entity will be treated as an interest in a limited partnership under section 469(h)(2) of the Code if (A) the entity in which such interest is held is classified as a partnership for Federal income tax purposes under §301.7701-3; and (B) the holder of such interest does not have rights to manage the entity at all times during the entity's taxable year under the law of the jurisdiction in which the entity was organized and under the governing agreement.

The proposed treasury regulations do not specify what it means to "have rights to manage the entity at all times during the entity's taxable year" for purposes of determining whether a taxpayer holds an interest in a limited partnership as a limited partner for purposes of section 469(h)(2) of the Code. The explanation of the proposed regulation as set forth in the Federal Register, however, provides that "rights to manage include the power to bind the entity". The word "include" here indicates that rights other than the right to bind the entity may constitute "management rights" for the purpose of determining whether an interest is a limited partnership interest under the section 469 passive activity loss rules. Given that the crux of the regulation revolves around the "management rights" held by the interest holder, we believe that the IRS, in adopting the final regulations, should provide more specific guidance as to the types of rights and powers which would constitute "rights to manage the entity" for purposes of this regulation. Specifically, we urge the IRS to adopt a clear cut rule providing that a taxpayer has "rights to manage the entity" only if he has the "power to bind the entity". For this purpose, the "power to bind the entity" should mean the power to contractually obligate the entity to third parties, with the taxpayer's "power to bind" being vested in him by either under the statutory law of the state under which the entity was organized, or under the entity's governing documents consistent with the law of the applicable state.

Furthermore, in defining the standard for determining whether an interest holder has rights which would qualify as "rights to manage the entity" under the regulation, we believe that the regulation should provide that a taxpayer has rights to manage the entity and therefore should not be treated as holding an interest in a limited partnership (thereby allowing the taxpayer to use

the generally applicable seven part material participation test in Treas. Reg. 1.469-5T(a) to the extent that the taxpayer is vested with the power to bind the entity, regardless whether that power stems from the taxpayer's ownership interest in the entity. We have set forth several examples below to illustrate this rule, and we urge the IRS to incorporate these examples into the final regulation.

Example 1. X is the President of Y, a manager-managed limited liability company which is taxed as a partnership for Federal income tax purposes, at all times during the taxable year. X is also a non-manager member of Y. Under Y's operating agreement, the President of the entity is vested with the power to contractually obligate the entity to third parties. Accordingly, in this instance, X should be considered to have "rights to manage the entity at all times during the entity's taxable year" and therefore X should not be considered to own an interest in Y as a limited partner for purposes of section 469 of the Code.

Example 2. X is the limited partner of Y, a limited partnership which is taxed as a partnership for Federal tax purposes. In X's capacity as a limited partner of Y, X does not have any rights to participate in the management of the entity. GP is a manager-managed limited liability company which is the general partner of Y. Under state law and under Y's governing documents, GP has the right to contractually obligate Y to third parties. X is the manager of GP. Accordingly, in this instance, X should be considered to "have rights to manage the entity at all times during the entity's taxable year" and therefore X should not be considered to own an interest in Y as a limited partner for purposes of section 469 of the Code.

Example 3. X is the member of Y, a manager-managed limited liability company which is taxed as a partnership for Federal tax purposes. M, a member-managed limited liability company, is the manager of Y. X is a member of M, and under the law of the state in which M is organized, X has the right to manage M and therefore has the power to bind Y at all times during Y's taxable year in accordance with Y's operating agreement. Accordingly, in this instance, X should be considered to have "rights to manage the entity at all times during the entity's taxable year" and therefore X should not be considered to own an interest in Y as a limited partner for purposes of section 469 of the Code.

Example 4. X is the limited partner of Y, a limited liability limited partnership which is taxed as a partnership for Federal tax purposes. Under Y's governing documents, X does not have the power to participate in the management of Y as a limited partner. G, a trust of which X is the trustee, is the general partner of Y. Under the law of the state in which Y is organized, X has the power to contractually obligate Y to third parties as the trustee of G. Accordingly, and in this instance, X should be considered to "have rights to manage the entity at all

times during the entity's taxable year" and therefore X should not be considered to own an interest in Y as a limited partner for purposes section 469 of the Code.

In the examples above, the taxpayer has the power to bind the entity (even though this power does not stem from the taxpayer's ownership interest in the entity) under state law or under the entity's governing documents. As stated in the Proposed Rule in the Federal Register, one of the primary reasons behind the IRS's proposed change in the definition of a limited partnership interest under section 469(h)(2) of the Code is that many states have adopted limited partnership statutes which allow limited partners to participate in the control of the partnership's business without losing limited liability protection. Limited liability companies, which have risen in prevalence over the last two decades, also allow a taxpayer to manage the business without losing limited liability. Accordingly, the IRS has determined that a taxpayer's "management rights" in an entity are a more appropriate measure for determining whether the taxpayer materially participates in the entity's business. In the examples above, the taxpayer holds rights to manage the entity, and therefore the presumption against material participation should not apply and the taxpayer should be able to utilize all seven tests of material participation under Treas. Reg. 1.469-5T(a).

The language of the Proposed Rule does not specifically mention whether, and to what extent, an interest in a limited liability company is covered by the Proposed Rule. We urge the IRS to incorporate language into the Proposed Rule specifically addressing its application to limited liability companies (given their current prevalence). The Proposed Rule also provides that Prop. Reg. §1.469-5T(e)(3) concerning an interest in a limited partnership is provided solely for the purposes of section 469 of the Code and no inference is intended that the proposed rules would apply for any other provisions of the Code requiring a distinction between a general partner and limited partner. This appears to mean that the proposed regulation will not apply in determining whether a taxpayer qualifies as a limited partner for employment tax purposes. The IRS has proposed regulations in 1997 concerning the definition of a limited partnership interest for employment tax purposes but has not finalized those regulations. Although not directly relevant to the regulations under Prop. Reg. §1.469-5T(e)(3), and in order to eliminate any confusion as to whether a taxpayer should look to the 1997 proposed regulations or to final regulations adopted under I.R.C. §469, we believe that the IRS should clarify this point in the Proposed Rule and should further promulgate final regulations which provide guidance as to the definition of a limited partnership interest for employment tax purposes.

We thank you again for the opportunity to comment on REG-109369-10 and look forward to the IRS taking into serious consideration all of the comments received from the various responders. We would be pleased to comment further upon request by the IRS.