

## Planning For Partnership Representatives In The New Year

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The past several months were an active time in the implementation of the new partnership audit regime, created under the Bipartisan Budget Act of 2015.[1] 2018 is the first tax year to which the new audit regime applies and the U.S. Department of the Treasury and the Internal Revenue Service issued a number of proposed and final regulations, along with draft forms and instructions, during the past year to assist taxpayers in preparing for and navigating the audit process. Final regulations governing the selection, designation and power of partnership representatives were issued on Aug. 6, 2018. On Dec. 21, 2018, the Treasury and the IRS issued final regulations addressing other aspects of the partnership audit regime.[2]

Partnerships and limited liability companies that have not yet reviewed their agreements, should take steps now to comply with the new rules and regulations, or risk compliance issues should they be selected for audit. Furthermore, partnerships and limited liability companies should take steps now to identify a partnership representative as one must be designated on their next filed partnership tax return, Form 1065.

Here are some helpful reminders for companies on the status of the new partnership audit rules and regulations, now that 2018 has come to a close.

### Partnership Representative Regulations

One of the biggest changes to the partnership audit process was the creation of the partnership representative as the replacement for the tax matters partner, or TMP, who acted on behalf of the partnership under the Tax Equity and Fiscal Responsibility Act of 1982, or TEFRA, in the audit process.[3] The new partnership representative has far more authority to act on behalf of the partnership, including the power to bind the partnership and all partners to any audit determinations.[4] This authority exists as a matter of federal statutory law, regardless of the terms of the partnership agreement. With the substantial increase in authority, a partnership must be careful deciding who, or what, should serve as its partnership representative.

The IRS previously issued proposed regulations on the selection and powers of the partnership



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representative.[5] After notice and comment on the proposed regulations, the IRS published final regulations in August 2018.[6] The final regulations provide a great deal of flexibility as to who may be selected as a partnership's partnership representative.[7]

Unlike under TEFRA, which required a partner — or member in the limited liability company structure — to serve as the TMP,[8] any individual or entity may be selected as the partnership representative.[9] The individual or entity can come from outside of the partnership.[10] A partnership can even select itself as its own partnership representative.[11] If an entity is chosen as the partnership representative, a “designated individual” must be selected from within the entity to work with the IRS in the event of a partnership audit.[12]

The main requirement to be a partnership representative — and designated individual — is that the representative must have substantial presence in the United States.[13] Substantial presence requires the partnership representative to have a U.S. taxpayer identification number, telephone number and postal address.[14] Further, to satisfy the substantial presence requirement, partnership representatives must make themselves reasonably available to meet and communicate with the IRS.[15] Should a partnership fail to designate a qualified partnership representative, the IRS has the ability to select a partnership representative on the partnership's behalf.[16]

Generally, once a partnership representative is chosen for a particular tax year, the designation cannot be changed until the partnership receives notice of its selection for audit.[17] The only way to change the designation prior to selection for audit is to file an administrative adjustment request, or AAR. However, the filing of an AAR must be accompanied by some form of substantive change to the partnership's tax return.[18] The AAR cannot be filed solely to change the partnership representative.[19] Should a partnership not have a need to file an AAR, it must wait until selection for audit to change its partnership representative. While this may seem like an unreasonable burden on partnerships, this is not likely to cause a problem. A partnership representative's powers and responsibilities generally only go into effect once the partnership is selected for audit.

In the event a partnership does not feel comfortable with its previously selected partnership representative — i.e., a falling out with the partnership representative, or even the death of the partnership representative — the partnership will immediately be able to revoke the partnership representative's authority after receipt of the notice of selection of exam by filing a Form 8979, Partnership Representative Revocation, Designation and Resignation Form.

The IRS published a draft of Form 8979 in August 2018,[20] along with a draft of the Instructions for Form 8979 in November 2018.[21] The partnership must provide the reason it is filing a Form 8979, as different sections of the form must be completed depending on whether the previously selected partnership representative resigned or had its designation revoked.[22] On that same form, the partnership is also able to designate a new entity or individual partnership representative.[23]

The draft form and instructions adhere closely to the final partnership regulations, with both the form and instructions reiterating the importance of proving that the partnership representative and designated individual have substantial presence in the U.S.[24] Form 8979 requires that the partnership representative or the designated individual list a U.S. address and telephone number.[25]

### **Regulations: the Centralized Audit Regime**

In August, the IRS issued new proposed regulations to address the other aspects of the BBA regime.[26]

The new proposed regulations update previously published proposed regulations, to bring them in line with amendments to the audit process found in the Tax Technical Corrections Act of 2018.[27] The proposed regulations mainly address updates to the meaning of partnership-related items and imputed underpayments and the administrative adjustment request process.[28] Hearings on the proposed regulations were held in October. On Dec. 21, 2018, finalized regulations were issued.[29] With the preamble, the final regulations are 419 pages long. Partnership representatives will need to familiarize themselves with the new regulations to effectively represent their partnerships before the IRS.

### **Opting Out of the BBA Regime**

Having previously published final regulations on elections out of the BBA partnership audit regime for eligible partnerships, the IRS published draft instructions to Form 1065, Schedule B-2 in September, addressing the process to opt out of the BBA regime.[30] There are strict eligibility requirements to opt out of the regime, focusing on the number and type of partners in the partnership. Each eligible partnership should carefully consider whether it wishes to be bound by the BBA partnership audit process or to opt out.

### **Important Reminders**

Partnerships should start thinking about logical choices for who, or what, to select as a partnership representative. The designation is required on all future Form 1065 filings. Should a partnership fail to select a partnership representative, the IRS does have the ability to select one on the partnership's behalf. Partnerships that still have not reviewed their partnership agreements in light of the new BBA regime should take proactive steps to ensure compliance with the new rules and regulations. Otherwise, they face substantial risk should they be selected for audit. For additional information, a resource page at [www.partnershiprepresentative.com](http://www.partnershiprepresentative.com) can be reviewed.

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[1] Pub. L. No. 114-74.

[2] T.D. 9844 (Dec. 21, 2018).

[3] See 26 U.S.C. § 6223(a).

[4] 26 U.S.C. § 6223(b).

[5] IRS, Centralized Partnership Audit Regime, 82 Fed. Reg. 27,334 (proposed June 14, 2017).

[6] IRS, Partnership Representative Under the Centralized Partnership Audit Regime and Election To Apply the Centralized Partnership Audit Regime, 83 FR 39331 (Aug. 9, 2018).

[7] See 26 CFR § 301.6223-1(b).

[8] 26 U.S.C. § 6231 (1998).

[9] 26 CFR § 301.6223-1(b).

[10] See id.

[11] Id.

[12] 26 CFR § 301.6223-1(b)(3)(ii).

[13] 26 CFR § 301.6223-1(b)(2).

[14] 26 CFR § 301.6223-1(b)(2)(ii).

[15] 26 CFR § 301.6223-1(b)(2)(i).

[16] 26 CFR § 301.6223-1(f).

[17] 26 CFR § 301.6223-1(d)(2).

[18] 26 CFR § 301.6223-1(e)(2)(ii).

[19] Id.

[20] IRS, Partnership Representative Revocation, Designation, and Resignation Form, Form 8979 (draft as of Aug. 14, 2018).

[21] IRS, Instructions for Form 8979 (draft as of Nov. 28, 2018).

[22] IRS, Partnership Representative Revocation, Designation, and Resignation Form, Form 8979 (draft as of Aug. 14, 2018).

[23] Id.

[24] See IRS, Partnership Representative Revocation, Designation, and Resignation Form, Form 8979 (draft as of Aug. 14, 2018); IRS, Instructions for Form 8979 (draft as of Nov. 28, 2018).

[25] IRS, Partnership Representative Revocation, Designation, and Resignation Form, Form 8979 (draft as of Aug. 14, 2018)

[26] IRS, Centralized Partnership Audit Regime, 83 Fed. Reg. 41,954 (proposed Aug. 17, 2018).

[27] See id.

[28] See id.

[29] T.D. 9844 (Dec. 21, 2018).

[30] IRS, Instructions for Schedule B-2, Form 1065 (draft as of Sept. 8, 2018).