



[\(Click here for updated information on the elimination of the tax matters partner role and how to prepare for new partnership audit rules.\)](#)

The Bipartisan Budget Act of 2015 (the “BBA”), which became law in November, includes significant changes in the way IRS partnership audits will be handled (all references herein to “partnerships” and “Partners” apply to LLCs and their members). One of the major changes the BBA makes is replacing the concept of a Tax Matters Partner (“TMP”) with a “Partnership Representative.” Because the authority of a Partnership Representative goes far beyond that of a TMP, partnerships and LLCs need to think about how this change in law should be reflected in the partnership agreement or operating agreement.

The authority of the TMP is limited under current law. First, the TMP is only relevant in TEFRA unified audit proceedings, which do not apply to many smaller partnerships. Also, individual partners generally have the right to participate in these proceedings. Under the new audit rules, Code Section 6223 provides that the role of the TMP is replaced by a “partnership representative” who has almost complete authority to act on behalf of the partnership (and therefore effectively the partners) when dealing with the IRS. This authority includes the ability to bind the partnership and the partners in audits and other proceedings, including settlement authority and decisions on procedural issues such as whether to proceed to litigation. Unlike a TMP, the partnership representative does not need to be a partner of the partnership. If a partnership does not designate a partnership representative the IRS may select any person as the partnership representative.

Because of the significant authority granted to the partnership representative, a partnership agreement or operating agreement should address the partnership representative’s status, authority and the limitations imposed on the exercise of this authority. Provisions similar to those limiting the authority of a manager, for instance, will in most cases be appropriate with respect to the partnership representative. Provisions could require that some percentage of the partners must agree to certain actions to be taken by the partnership representative. Provisions should also be included for how a partnership representative is elected and removed, and how a replacement partnership representative is chosen. Since it is possible that a partnership representative would have a conflict of interest in acting on behalf of the partnership, consideration should also be given to imposing some level of duty on the partnership representative to make an unbiased decision, or at least provide for the possible replacement of the partnership representative if it appears that there is a conflict of interest.

START PLANNING NOW

Although these new rules are not effective until 2018, it is not too early to start thinking about how to incorporate these changes into partnership agreements and LLC operating agreements. Our recent alert “New audit rules require careful review of partnership and operating agreements” provides detailed information on the new audit rules to help you prepare. I will also be discussing the new audit rules from 1:30-2:45 p.m. on April 28 at the Sharonville Convention Center in Cincinnati, OH. You can register for the event – “Understanding the New Partnership (and LLC) IRS Audit Rules” – by clicking here.