

Appointing Your Partnership Representative

A Financial Executives Alliance Webinar

Steven D. Bortnick
Partner - Tax

Bortnicks@pepperlaw.com

609.951.4117 Office
609.610.4171 Mobile

Julia D. Corelli
**Partner and Co-Head of
Fund Services**

Corellij@pepperlaw.com

215.981.4325 Office



Financial Executives Alliance
A First Republic Affinity Group

Pepper Hamilton LLP
Attorneys at Law

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Summary

- ▶ The Bipartisan Budget Act of 2015 eliminated the role of the tax matters partner, and requires that each partnership have a partnership representative.
- ▶ The rule applies for tax years beginning after 2017.
- ▶ The partnership representative for the 2018 year must be appointed on the partnerships' 2018 tax return (Form 1065) filed in 2019.
 - The IRS has not released any forms, instructions or notices providing for earlier appointment.
 - Final Regulation on partnership representatives have been issued.

Partnership Representative Generally

- ▶ Replaces Tax Matters Partner
- ▶ Requirements:
 - Need not be a partner
 - Any person including an entity
 - If entity, **partnership** must appoint single individual to act on behalf of the entity
 - Must have substantial presence in U.S.
 - Person makes self available to meet with IRS @ reasonable time/place
 - IRS agents select time
 - Endeavor to be reasonable under circumstances
 - US Taxpayer ID Number
 - US street address and phone number
 - Must actually be reachable
 - Individual designee of entity also must meet these requirements

Partnership Representative – Capacity?

- ▶ Removed the requirement
 - Partnership should determine
 - Best party to pick representative
 - Able to protect itself by removing representative
 - But the IRS still may determine that circumstances inconsistent with substantial presence requirement
 - *e.g.* Incarcerated

Partnership Representative

Designation

- ▶ Appointment made in accordance with forms and instructions provided to IRS.
 - Regulations indicate this is done on the partnership tax return (IRS Form 1065).
 - Currently, no forms, instructions or notices permitting early appointment.
- ▶ Appoint on tax return for tax year
 - Separate appointment for each tax year
 - No carryover one year to subsequent tax years
 - Applies to the tax year even if representative for another year is different
- ▶ Appointment valid until affirmative action to terminate
 - Representative resigns
 - Partnership revokes designation
 - IRS determines designation not in effect

Partnership Representative

Sole Appointee

- ▶ A partnership can have only one partnership representative and one designated individual for any single tax year.
- ▶ There is no right to include other individuals on calls or in meetings with the IRS.
 - Final regulations confirm that partnership may provide power of attorney to other individuals who may attend conferences with IRS.
- ▶ Relationship between partnership and partnership representative/partnership representative and designated individual:
 - Procedures before partnership representative/designated individual binds partnership.
 - How to deal with termination of employment (see limitations on resignation on next page).

Partnership Representative

Limitations on Change

- ▶ No resignation or revocation until IRS issues notice of administrative proceeding or partnership files administrative adjustment request
 - Added ability to revoke appointment when notified that return under audit
 - Partnership representative not notified – ensures NAP goes to proper partnership representative
 - Signed by *any partner* – What about hybrids?
 - No longer ability to resign in connection with filing of an AAR
 - Felt unfair to allow resigning party to suggest changes in partnership items
 - Same rule applies to the designated individual of partnership representative that is an entity
 - Cannot use administrative adjustment request solely to appoint new partnership representative

Partnership Representative

Designation Not In Effect

- ▶ If no appointment in effect or partnership representative does not have substantial US presence
- ▶ IRS notifies partnership and last representative
- ▶ Normally partnership has 30 days to appoint
- ▶ If IRS cannot determine who appointed or multiple revocations, IRS appoints without giving partnership opportunity
 - Partnership may revoke with IRS approval

Partnership Representative

Authority

- ▶ All partners are bound by actions (and final decision in action)
- ▶ Settlements
- ▶ Final partnership adjustment
- ▶ Election to have partners adjust returns rather than pay imputed underpayment
- ▶ Extending period for adjustment
- ▶ Sole authority to act on behalf of partnership
- ▶ No other partners may participate in or contest results of examination / proceeding without IRS permission

Impact of Agreement / State Law

- ▶ Cannot limit broad authority by state law or agreement
 - Actions binding
 - May be liable for damages

US Partnership Representative Does Not Increase Incidence of Taxation in US for Foreign Investors

- ▶ Funds generate capital gains, dividends, interest income, foreign currency exchange gains and similar investment income.
- ▶ Mere investment does not constitute a trade or business.
- ▶ Although trading in securities may constitute a trade or business, by statute, trading in stock or securities through partnerships does not constitute a trade or business in the US.
 - Accordingly, investment income of the investment partnerships cannot be effectively connected income.
 - US source income allocable to foreign investors subject to gross basis (not net basis) tax by way of withholding.
 - Investment activities likely do not rise to level of trading in any event.
- ▶ Partnership Representative would act as an independent agent, and, thus, would not constitute a “permanent establishment” for funds.
 - The existence of a permanent establishment would mean that foreign partners resident in treaty jurisdictions would be subject to tax in the US on effectively connected income.

Modification of LPAs to Appoint Partnership Representative and Handle Role

- ▶ Do LPAs for existing funds have to be amended to deal with the appointment of the partnership representative?
- ▶ Is LP approval required?
- ▶ Provide partnership representative broad authority to pay tax or push out tax.
- ▶ Require LPs to provide information necessary to reduce partnership tax liability.

Indemnification Under LPA

- ▶ Is partnership representative covered under general indemnification provisions?
- ▶ Provide explicit indemnification?
- ▶ If Partnership representative is not a member of the investment advisor's affiliated group, likely will have to include in appointment letter.

Insurance Issues

- ▶ Covered by D+O insurance?
- ▶ What if not a member of investment advisor affiliated group?
- ▶ Consider tail coverage (*i.e.*, coverage for events during employment that arise after termination of employment).