

Partnership Representatives: IRS Regulations Under Section 6223 and Challenges for Pass-Through Entities

THURSDAY, FEBRUARY 13, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Guinevere M. Moore, Partner, **Johnson Moore**, Chicago
Rachel L. Partain, Member, **Caplin & Drysdale**, New York

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1.**

NOTE: If you are seeking CPE credit, you must listen via your computer – phone listening is no longer permitted.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please send us a chat or e-mail sound@straffordpub.com immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

NOTE: If you are seeking CPE credit, you must listen via your computer – phone listening is no longer permitted.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

For CPE credits, attendees must participate until the end of the Q&A session and respond to five prompts during the program plus a single verification code. In addition, you must confirm your participation by completing and submitting an Attendance Affirmation/Evaluation after the webinar.

For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.

Partnership Representatives: New IRS Final Regulations Under Section 6223 and Challenges for Pass-Through Entities



Strafford Webinar

Rachel L. Partain
Caplin & Drysdale
rpartain@capdale.com

Guinevere M. Moore
Johnson Moore
guinevere.moore@jmtaxlitigation.com

Overview of the Partnership Audit Regime



- On November 2, 2015, Congress enacted the Bipartisan Budget Act of 2015 (“BBA”).
- The BBA repealed the partnership examination procedures under the Tax Equity and Fiscal Responsibility Act of 1982 (“TEFRA”) and created a new partnership audit regime.
- Under the new partnership audit regime, examination and collection occur at the partnership level.
- The BBA applies to tax years beginning on or after January 1, 2018 unless the partnership is eligible to opt out.

Overview of the Partnership Audit Regime, Cont.



- The IRS published Internal Guidance Memorandum LB&I-04-1019-010 on October 24, 2019, updating Internal Revenue Manual 4.31.9 regarding the field examination procedures for use by Large Business and International (LB&I) and Small Business / Self Employed (SB/SE) employees when auditing returns under the new centralized partnership audit regime.
- The United States Tax Court also adopted amendments to Tax Court Rules 255.1 through 255.7 on July 15, 2019.

Partnership Representatives



- One of the biggest changes was the introduction of the “Partnership Representative” as a replacement for the “Tax Matters Partner” previously used under TEFRA.
- The Partnership Representative has far more power to act on behalf of the partnership than the Tax Matters Partner (TMP) and has no duties to the partnership under the Code (unlike the TMP).

Partnership Representatives



- On June 14, 2017, the Treasury Department published proposed regulations (REG-136118-15) regarding partnership representatives.
- On August 9, 2018, the Treasury Department promulgated final regulations (TD-9839) which clarified the Partnership Representative's qualifications and responsibilities.
- On December 21, 2018, the Treasury Department promulgated final regulations (TD-9844) which clarified various aspects of how an administrative proceeding regarding partnership examinations will be conducted but did not impact the role of Partnership Representative as it was defined in the August 9 regulations.

Differences between the Tax Matters Partner and the Partnership Representative

- Selection of the representative:
 - Tax Matters Partner (TMP) – had to be a partner/member of the entity.
 - Partnership Representative – can be any person defined in section 7701(a)(1), including entities and an outside representative.
- Qualifications of the representative:
 - TMP – certain events could render TMP ineligible, such as a personal bankruptcy.
 - Partnership Representative – must be present in the United States. IRS has removed all other requirements regarding eligibility, including personal bankruptcy.

Differences between the Tax Matters Partner and the Partnership Representative



- Power to bind the partners:
 - TMP – could settle partnership-level items with the IRS, although there were exceptions where some partners could not be bound.
 - Partnership Representative – binds the partnership and all partners to any settlement with the IRS.
- Notification and participation rights of other partners:
 - TMP – other partners had notification and participation rights in proceedings with the IRS.
 - Partnership Representative – only the partnership and Partnership Representative are notified of an examination or administrative proceeding. Only the Partnership Representative has participation rights. Partnership Representative has obligations to IRS ONLY, no statutory obligations to partners.
- Removal:
 - TMP – could be modified, changed, or removed at any time.
 - Partnership Representative – generally cannot be changed until IRS notifies partnership of selection for examination.

Selection of the Partnership Representative



- The Partnership Representative for each tax year will be designated on the partnership's annual tax return.
- The final regulations expanded the eligibility of who can serve as a partnership's Partnership Representative:
 - Any person (as defined under IRC §7701(a)(1)) may serve as the Partnership Representative.
 - This includes entities, and even the partnership itself.
 - If an entity is selected as the Partnership Representative, the partnership must appoint a “Designated Individual” of the entity to act on behalf of the partnership.

Selection of the Partnership Representative



- The Partnership Representative and the Designated Individual must have “Substantial Presence” in the U.S.
- A Partnership Representative and Designated Individual meet the substantial presence requirement if they have:
 - A U.S. taxpayer identification number;
 - A U.S. address;
 - A U.S. telephone number; and
 - Make themselves reasonably available to the IRS.
- This is **not** the same substantial presence test to determine whether a non-U.S. citizen is required to pay taxes in the United States.

Considerations for Partnership Representative



- May be the partnership itself if substantial presence test is met, but still required to designate an individual who also meets the substantial presence test.
- May be a partner or a non-partner.
- Benefits of choosing a partner:
 - Potential lower cost to partnership, partner should have historical knowledge and easy access to documents, as well as be motivated to respond to IRS inquiries.
- Benefits of choosing a non-partner:
 - Ability to avoid Partnership Representative who is a partner negotiating a settlement with the IRS to his / her benefit but to the detriment of other partners, can choose a professional who is qualified to deal with IRS.

Considerations for Partnership Representative



The most important factor to consider in selecting a Partnership Representative is that the IRS rules generally prohibit partnerships from changing the Partnership Representative *for any reason* until after the IRS contacts the partnership regarding selection for examination.

The practical impact of this requirement is that even if a partner who was the Partnership Representative leaves the partnership, that partner remains the Partnership Representative until (1) the IRS contacts the partnership regarding selection for examination, and (2) the partnership files a valid request to change the Partnership Representative.

*** Choose Carefully and Wisely!! ***

Partnership Representatives *can* be changed if the partnership files an “amended return” in the form of a valid administrative adjustment request (AAR). However, a partnership may not file such a request solely for purposes of changing the Partnership Representative designation.

Designating the Partnership Representative



- The Partnership Representative must be reported to the IRS when the partnership files IRS Form 1065, U.S. Return of Partnership Income:
 - On page 3 of the 1065, the TMP signature block has been replaced with the designation of the Partnership Representative.
- If the partnership chooses an entity as the Partnership Representative, including a disregarded entity or the partnership itself, the partnership must also indicate who within the entity is the “designated individual.”
- The Form 1065 must be signed by a partner:
 - Practice Point: If the partnership chooses to designate a non-partner as a Partnership Representative, then the partnership must determine which partner will sign the tax return and take any other action under the partnership agreement to make this possible.

Duties and Responsibilities of the Partnership Representative



- The Partnership Representative must make themselves reasonably available to schedule telephone calls with the IRS, meet with the IRS at a mutually convenient time and place, and make the books and records of the partnership available to the IRS.
- The Partnership Representative has sole and complete authority to bind the partnership during audit proceedings with the IRS both in administrative disputes and in litigation.
- Any additional duties placed on the Partnership Representative would come from the partnership agreement or a contract between the Partnership Representative and the partnership:
 - While this would place contractual obligations on the Partnership Representative, it will not impact the relationship between Partnership Representative and the IRS.

Some Partnership Agreement Drafting Considerations



- Determine whether electing out of BBA is possible, and if so, whether the election is required.
- All references to TMP must be amended.
- Define Partnership Representative.
- Decide if Partnership Representative will be a partner or a non-partner.
- Create duties of Partnership Representative to partnership and to partners:
 - Notification requirements.
- Compensation for Partnership Representative?
- Indemnification for Partnership Representative?
- How to proceed in audits? Votes on contesting or conceding each issue? Give Partnership Representative unilateral control?
- Whether to require a capital call for partnership's payment of IRS's adjustments?
- How IRS adjustments are allocated to the partners?
- Create requirement for partners to cooperate with Partnership Representative and provide necessary documents to defend IRS examination or modify IRS's adjustments?
- How to decide whether to make push-out election for IRS adjustments? Votes after the audit is under way? Decide in advance?
- Create requirement for partners to agree to amend personal income tax returns in accordance with outcome of IRS examination?
- Contest adjustments in Tax Court or refund jurisdiction.

Changing a Partnership Representative



- As stated above, in general, the designation of a Partnership Representative can only be changed once the partnership is notified it has been selected for examination or receives a notice of administrative proceeding:
 - A partnership may change its selection prior to this by filing an administrative adjustment request, but only if the request is also used for a substantive change.
- To change a Partnership Representative, [IRS Form 8979](#), Partnership Representative Revocation, Designation, and Resignation Form must be filed with the IRS during the appropriate time period.

Partnership Representative Designated by the IRS



- Most important consideration when designating a Partnership Representative is the provision in Treas. Reg 301.6223-1(5) that provides for designation by the IRS:
 - If the partnership designated a Representative who does not meet the requirements, then the IRS may determine that the designation was not “in effect” and designate a Partnership Representative.
 - If the partnership or partners change the designated Representative too frequently, then there is no Representative designation “in effect.”
 - “The IRS is not obligated to search for or otherwise seek out information related to the circumstances in which the IRS may determine a Partnership Representative designation is not in effect.”

Partnership Representative Designated by the IRS



Examples provided in the Treasury Regulations:

Example 1. The IRS determines that partnership has designated a Partnership Representative that does not have substantial presence in the United States as defined in paragraph (b)(2) of this section. The IRS may, but is not required to, determine that the designation is not in effect and designate a new Partnership Representative after following the procedures in this paragraph (f).

Example 2. Partnership designates as its Partnership Representative a corporation but fails to appoint a designated individual to act on behalf of the corporation as required under paragraph (b)(3) of this section. The IRS may, but is not required to, determine that the Partnership Representative designation is not in effect and may designate a new Partnership Representative after following the procedures in this paragraph (f).

Example 3. The Partnership Representative resigns pursuant to paragraph (d) of this section. The IRS mails Partnership a notification informing Partnership that no designation is in effect and that the IRS plans to designate a new Partnership Representative. Partnership fails to respond within 30 days of the date the IRS mails the notification. The IRS must designate a Partnership Representative pursuant to this paragraph (f).

Partnership Representative Designated by the IRS



What are the takeaways?

- The Partnership Representative has **absolute authority** to bind the partnership and the partners in all IRS related matters.
- If the partnership does not follow the rules and make a valid designation and maintain that valid designation, the IRS may appoint a Partnership Representative of its own choosing.
- The partnership and the partners will have to live with the consequences of the IRS appointed Partnership Representative's actions, inaction, and decisions.

*** Choose Carefully and Wisely!! ***