

Overhaul of IRS Audit Rules for LLCs and Partnerships

The IRS has overhauled its rules for auditing entities taxed as partnerships, including most LLCs (collectively, “Partnerships”), effective for tax years beginning on or after January 1, 2018. The changes make it easier for the IRS to audit, assess and collect taxes from Partnerships and their members. We are concerned that these changes may result in more Partnership audits.

This Client Advisory provides a high level summary of this new audit regime. We urge our clients to contact us with any questions and to consider amending their partnership agreements and operating agreements before these new rules become effective.

Partnership May Have to Pay the Underpayment of Federal Tax

Under current rules, if an audit results in an underpayment of tax, the IRS has to obtain payment from the individual members, not from the Partnership. The new rules permit the IRS to assess and collect the underpayment, including interest and penalties, from the Partnership directly. By moving directly against the entity (the Partnership), the IRS has streamlined its ability to collect underpayments.

“Partnership Representative” Replaces the “Tax Matters Partners”

The new rules replace the “tax matters partner” with the “partnership representative.” While the tax matters partner’s authority was limited, the partnership representative has broad authority to act on behalf of the

Partnership before the IRS. The partnership representative may bind the Partnership and the members with respect to Partnership audits. The partnership representative has no legal obligation to notify members of the audit or to update members on its status. If a Partnership does not designate a partnership representative, the IRS may select any person (not necessarily a member) as the partnership representative.

Opt Out Election

Some Partnerships may elect annually to opt out of this new audit regime. This election is only available if the Partnership has 100 or fewer members and all of the members are individuals, C corporations, foreign entities characterized as C corporations for U.S. tax purposes, S corporations, or estates of deceased members. This opt out election though is unavailable if the partnership has another LLC or partnership as a member. This opt out election must be made annually on a timely filed return by the partnership representative.

Push-Out Election

If the Partnership does not opt out of the new regime or does not qualify for the opt out election, the Partnership may make a push out election. A push out election permits a Partnership to avoid paying the federal underpayment of tax by transferring this liability to its members. The partnership representative has the authority to make the push-out election on behalf of the Partnership.

Consider Amending Operating Agreement

Consider whether your partnership agreement or operating agreement should be amended to take these new rules into account. An amendment could include designating a partnership representative so the opt out and push out elections can be made. The Partnership may not be able to make these elections unless a partnership representative has been designated. An

This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the IRS audit rules, please contact Jeff Groshek or David Moran at (617) 350-6800 or email us at jeff.groshek@gesmer.com or david.moran@gesmer.com.



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amendment could also limit the substantial power and authority granted to a partnership representative under this new audit regime. For example, the amendment could require the partnership representative to give notice of an audit to the members of the Partnership and limit the partnership representative's discretion to settle an audit on behalf of the Partnership and the members.

Deadline for Designating Agent for Digital Millennium Copyright Act

Last November, we informed our clients that the United States Copyright Office had issued an important rule regarding registration of agents under the Digital Millennium Copyright Act (DMCA). The DMCA is the law that establishes the “notice and takedown” system, pursuant to which internet companies such as YouTube, Amazon and Tripadvisor enjoy liability protection when a user posts infringing material on their websites.

This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the Digital Millennium Copyright Act, please contact Lee Gesmer or Joe Laferrera at (617) 350-6800 or email us at lee.gesmer@gesmer.com or joe.laferrera@gesmer.com.

Registration of an agent is necessary to comply with the DMCA, and the deadline for doing so is coming up – December 31, 2017.

You can read about the DMCA requirements in more detail in our November 2016 Client Advisory on the subject. You can find that [here](#). Or, contact us directly, and we can help you work through the detailed requirements of this important law.



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