

Risk Alert – Should a CPA Agree to be a Partnership Representative?

The Bipartisan Budget Act of 2015 (BBA) resulted in dramatic changes to the partnership audit rules. The law created a new role, the “partnership representative”, to replace the tax matters partner (TMP). Partnership representatives may be considered fiduciaries and have the “sole authority to act on behalf of the partnership” in the event of an audit (Internal Revenue Code Section 6223), which includes many responsibilities beyond those of a TMP. These include, but are not limited to the authority to:

- Unilaterally bind partners in administrative or judicial proceedings,
- Waive the tax statute of limitations,
- Settle a tax deficiency with the Internal Revenue Services (IRS),
- Allocate tax due to individual partners or pay it at the partnership level, and
- Being the sole point of contact with the IRS.

Some partnership clients may ask their CPA to serve as the partnership representative. While this may appear to be a benign request, or even a service opportunity, acting as a partnership representative presents significant professional liability risk to the CPA.

CPAs should carefully evaluate requests to serve as partnership representative and move forward only after considering the following professional liability risks:

Professional liability insurance coverage considerations

Professional liability insurance policies typically limit or exclude coverage for services rendered when the policyholder also performs management duties or assumes management responsibilities on behalf of the client, regardless of whether a formal title is used to describe these duties or responsibilities. As the partnership representative responsibilities include the unilateral authority to bind the partners, it would be difficult for the CPA to serve in this role without making management decisions.

Firms should review the details of their professional liability insurance policy and confer with their insurance agent or broker regarding the application of insurance.

Conflicts of interest

Black’s Law Dictionary defines conflict of interest as “a real or seeming incompatibility between one’s private interests and one’s public or fiduciary duties.” According to the AICPA Code of Professional Conduct, a conflict of interest creates a threat to the CPA’s integrity and objectivity when the CPA provides services to clients whose interests are in conflict.

Consequently, serving as a partnership representative creates potential conflicts of interest as decisions made by the partnership representative may be beneficial for one partner but not for another. If the CPA agrees to serve as partnership representative, a conflict of interest waiver should be obtained from every partner, although the waiver of such a conflict may not be possible in the applicable jurisdiction. The waiver should be updated annually with the engagement letter and with every ownership change. The CPA should create a plan that addresses how to minimize risk or resign from the role of partnership representative if an actual conflict arises. While conflict waivers may help mitigate the risk of a professional liability claim, they may not be iron-clad. Guidance on identifying and managing conflicts of interest is provided in the AICPA Code of Professional Conduct; however, perception sometimes carries more weight than reality in the court of public opinion.

For more information on addressing conflicts of interest, read [Managing Conflicts of Interest](#) and [Considerations in Avoiding Becoming a Casualty in the Divorce Wars](#).

Right to withdraw

Partnerships should amend their partnership agreements for many BBA provisions, including the possible identification of the partnership representative. Most CPAs would only consider serving as a partnership representative for a current client. The partnership representative is identified on Form 1065 for the year to which the designation relates, but what happens if that client is subject to audit and the firm no longer provides professional services to the client? How should the CPA proceed if other circumstances arise necessitating the CPA’s withdrawal as partnership representative?

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The CPA, in conjunction with the CPA firm's attorney, should read the partnership agreement to ensure it includes the right of the CPA to withdraw as partnership representative. In addition, consider modifying the agreements to indemnify and hold the CPA harmless from any and all claims arising from or related to their services and, specifically, resignation.

Contractual considerations

As previously stated, partnership agreements should be modified for BBA provisions. These modifications may include limitations on the rights of the partnership representative. For instance, the partnership agreement may require the partnership representative to inform all partners in the event of an IRS audit or to only take positions approved by the partnership or a committee of it. Or if the role requires obtaining consent from all partners and the partnership representative is unable to, it may have difficulty performing its role in

accordance with the partnership agreement. The partnership representative may have to defend a breach of contract claim from individual partners.

CPAs should carefully review the role and responsibilities of the partnership representative as defined in each partnership agreement *before* agreeing to serve in this capacity. If an audit occurs for a year in which the CPA is designated as the partnership representative, they should carefully review the partnership agreement again to remind themselves of their duties so they can perform services accordingly.

Agreeing to serve as a partnership representative is easy; a CPA can just include their name on Form 1065 as they prepare it for filing. However, the risks are many. CPAs should carefully evaluate all of them and discuss the opportunity with the AICPA or their professional liability insurer before agreeing to serve.



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