WHY YOUR PARTNERSHIP AND LLC OPERATING AGREEMENTS NEED A TUNE-UP IN 2018: THE NEW PARTNERSHIP RULES

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PART I

OVERVIEW
SUMMARY OPERATING RULES

- New Partnership Audit Rules Effective Tax Years Beginning after December 31, 2017

- Default Rule: Partnership Level Audit and Payment of Tax Deficiency (the “Imputed Underpayment”)

- Imputed Underpayment Modification

- Election-Out and Push-Out Election

- Partnership Representative has Sole Control of Audit, Audit Elections, Audit Settlement and Tax Litigation

- Administrative Adjustment Requests Replace Amended Returns
PARTNERSHIP LEVEL DETERMINATION
REVIEWED YEAR/ADJUSTMENT YEAR

Reviewed Year

• 2018 Audit Commenced in 2020.
• Sally Partnership Representative for 2018 and Tim for 2020.

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Adjustment Year

• $1 mm Imputed Underpayment for 2018 Agreed and Paid in 2022.
• Sara Partnership Representative for 2022, Tim for 2020 and Sally for 2018.

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SUMMARY AMENDMENTS NEEDED

➢ Provisions Governing Selection, Resignation, Removal, Responsibilities, Authority, Indemnification, Standard of Care, Liability, etc. of Partnership Representative


➢ Provisions Governing Imputed Underpayment Modifications

➢ Provisions Addressing Economic Distortions Including Responsibility for Imputed Underpayment, Basis and Capital Account

➢ Provisions Governing Duties of Partners to Partnership Representative and to the Partnership
POST-2017 AUDIT PROCEDURES

- Commencement of Audit
- Notice of Proposed Partnership Adjustments or “NOPPA” (Examination Report)
- Modifications to Imputed Underpayment
- Notice of Final Partnership Adjustment or “FPA” (Deficiency Notice)
  - Partnership Pays Imputed Underpayment
  - Partnership Contests Imputed Underpayment in Court
  - Push-Out Election Results in Partners Paying Deficiency
PART II

OPERATING RULES
ELECTION-OUT

- Separate Election for Each Year on Tax Return
- Partner Level Determination and Partner Payments
- Not More Than 100 Partners All of Whom are Eligible Partners
- Eligible Partners: Individuals, Corporations, Certain Foreign Entities, S Corporations (Shareholders Counted Separately for 100 Partners), Estate of Deceased Taxpayers
- Ineligible Partners: Partnerships, Trusts, Disregarded Entity, Other Types of Estates
- Partnership Representative Still Required
ELECTION OUT NO PARTNERSHIP LEVEL DETERMINATION

**Reviewed Year**
- Election Out
- Partner Level Audit and Tax Payments.
- Sally Partnership Representative for 2018

![](chart)

**Adjustment Year**
- No Partnership Level Audit or Tax Payments

![](chart)

A: 50%  B: 50%  C: 20%  D: 40%
PARTNERSHIP REPRESENTATIVE

Tax Audits

Partnership Representative
Separate Designation for Each Year

Tax Audit Notices/Communications

Tax Audit Elections

Tax Litigation and Settlements
PARTNERSHIP REPRESENTATIVE

- New Designation Required for Each Partnership Tax Year
- Designation is Made on Timely Filed Tax Return
- Designation Continues for Tax Year Until Revocation, Resignation, Death or Incapacity
- Partnership Representative for Reviewed Year and for Adjustment Year Could be Different
PARTNERSHIP REPRESENTATIVE

- Can Be Individual or Entity
- No Requirement to be Partner
- If Entity a Natural Person Must be Appointed to Act for the Entity
- Substantial Presence in U.S., Address, Phone Number, TIN and Available to Meet IRS
- Capacity to Act
PARTNERSHIP REPRESENTATIVE

- Resigning/Revoked Partnership Representative Can Designate a Successor

- Partnership Designates Successor if No Valid Designation

- IRS Designates a Successor if No Valid Designation

- No Valid Resignation/Revocation Prior to Commencement of Audit or Filing AAR

- No filing AAR Solely to Resign/Revoke
IMPUTED UNDERPAYMENT

- Partnership Level Determination of Tax Deficiency from Audit Adjustments for Reviewed Year

- Total Net Audit Adjustments Multiplied by Highest §1 or §11 Rate for Reviewed Year

- Imputed Underpayment is Payable in the Adjustment Year
PARTNERSHIP LEVEL DETERMINATION
REVIEWED YEAR/ADJUSTMENT YEAR

### Reviewed Year

- 2018 Audit commenced 2020
- Sally Partnership Representative for 2018

### Adjustment Year

- $1 mm Imputed Underpayment for 2018 Agreed and Paid in 2022
- Sara Partnership Representative for 2022 but not for 2018

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MODIFICATIONS OF IMPUTED UNDERPAYMENT

- Partnership Representative Requests Modifications from IRS after NOPPA and Provides Substantiation
- Amended Return Modification
- Tax-Exempt Partner Modification
- Tax Rate Modification
PUSH-OUT ELECTION

- Push-Out Election Filed Within 45 Days of FPA

- Push-Out Election Statements sent to IRS and Partners within 60 Days after later of (1) Expiration of Time to File for Court Review; or (2) Court Decision is Final

- Push-Out Election Requires Reviewed Year Partners to Report Adjustments and Pay Tax for the Reporting Year Tax Return (Calendar Year in which Push-Out Election Statement is Sent)

- Reviewed Year Partners Pay Additional Reporting Year(s) amount

- Interest on Tax from Push-Out Election is 2 Percentage Points Higher than Underpayment Rate
PUSH-OUT ELECTION

**Reviewed Year**

2018 Audit commenced 2020
Sally Partnership Representative for 2018

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**Adjustment Year**

Push-Out Reviewed Year Election in 2022
Partners Pay Tax Based on 2018
Adjustments on 2022 Returns
Sally Partnership Representative for 2018 and Sara for 2022

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ADMINISTRATIVE ADJUSTMENT REQUESTS ("AARs")

- AAR Used to Report Corrections to Partnership Return
- AAR Used to Request Refunds
- AAR Resulting in Imputed Underpayments Must be Paid by Partnership or If Election Similar to Push-Out Election Payments Made Be Reviewed Year Partners
- Refund Adjustments Reported by Reviewed Year Partners
PARTNERSHIP CEASES TO EXIST

- Reviewed Year Adjustments Reported by Former Partners for What Would be Adjustment Year

- IRS Can Determine Partnership Ceases to Exists if Ceases to Carry on Business (§708(b)(1)(A)) or No Ability to Pay Tax
PART III

DRAFTING CONSIDERATIONS
ELECTION-OUT

- Should the election out be mandatory, discretionary or the default rule unless a majority (or supermajority) vote not be make such election on that year’s returns?

- Partnership Representative should have the responsibility to determine if the partnership is eligible for the election out?

- Should the partnership agreement contain restrictions on transfers to ineligible partners?

- Should penalties apply for transfer to ineligible partners?

- Should ineligible partners be required to transfer the partnership interest to an eligible partner to permit the partnership to make an election out?
DESIGNATION, QUALIFICATION AND ACCEPTANCE

- The partnership representative (or designated individual or an entity) can be a general partner, a manager or a member manager, or any other individual such as the partnership’s CPA or attorney.

- The method and criteria for annually selecting the partnership representative should be set forth in the partnership/operating agreement.

- The partnership representative could be identified in the partnership/operating agreement or in a separate service agreement.
DESIGNATION, QUALIFICATION AND ACCEPTANCE- Continued

- The agreement should contain a representation by or require a separate certificate from the partnership representative to that effect he/she/it meets the US presence requirements.

- The partnership representative should accept the position in writing.

- The partnership representative should agree to be bound by the terms of the partnership/operating agreement and/or the service agreement.

- The partnership and the partnership representative should negotiate provisions addressing indemnification, authority exculpation, standard of care, waiver of claims and potential conflicts.
For example, suppose Ann, the partnership representative, is a partner and the adjustment results from the reallocation of income from Clara to Ann. If Ann and Clara both file amended returns reporting the adjustments or there is a push-out election, Ann will pay additional tax and Clara will receive a refund. Otherwise, the partnership will pay the imputed underpayment and Clara will not receive any refund for the excess tax paid.
TERM OF APPOINTMENT; RESIGNATION AND REVOCATION

- The agreement should address the length of the designation. Should it continue until death, incapacity, resignation or revocation. **Note:** a separate designation must be made annually on the partnership return for each partnership tax return for that year.

- A revocation or resignation for a tax year cannot be made prior to the commencement of an audit for that year or the filing of an AAR (AAR cannot be filed solely to effect a resignation or revocation).

- The agreement should address the anomaly of a resignation or revocation that is not effective for the partnership audit rules, but is effective under the terms of the partnership agreement or state law.
TERM OF APPOINTMENT; RESIGNATION AND REVOCATION Continued

- The agreement should contain provisions requiring a resigning or revoked partnership representative to designate the successor chosen by the partnership.

- The agreement should require the resigning or revoked partnership representative to file all necessary forms, agreements and take all actions as directed by the partnership or the success partnership representative prior to the date the resignation or revocation is effective for purposes of the new audit rules.
PARTNERSHIP REPRESENTATIVE AUTHORITY

- The new audit rules give the partnership representative for the Reviewed Year the sole and exclusive authority vis a vis the IRS (including Chief Counsel) and Justice Department to represent and to bind the partnership and the partners with respect to all matters, decisions and elections related to a federal income tax audit of the Reviewed Year.

- The agreement can provide the partnership representative with a general statement of authority and responsibility that might reference the new audit rules or the agreement could list specific duties, responsibilities and authority.

- The agreement should specify whether the partnership representative’s exercise of authority is mandatory, discretionary and/or conditioned on the consent of someone else (such as the general partner, manager, partners or members).
The proposed regulations state that the partnership representative’s authority is absolute notwithstanding any provision of the agreement or state law to the contrary. As a matter of contract between the partnership representative and the partnership, the partnership agreement can impose restrictions on the partnership representative’s actions that could give rise to a cause of action against the partnership representative.

The agreement should acknowledge and affirm the partnership representative’s authority to bind the partnership and the partners in connection with the audit.
PARTNERSHIP ELECTIONS

- Should all elections authorized by the new audit rules be mandatory or discretionary? These elections include: (1) the election out of the new audit rules; and (2) the push out election.

- Should the partnership representative be required to obtain the consent of someone else (general partner, manager, partners or members) before making these elections?

- The agreement should specify what information and notices about the audit are required to be provided to the partners.
PARTNERSHIP ELECTIONS
Continued

- The partnership representative should have the authority to require partners to provide all necessary information and individual tax information in connection with the audit.

- The partnership representative should have the authority to impose penalties or specific performance to obtain the information.

- The partnership representative should have the authority to require the partners to file amended returns without filing a push-out election in order to qualify for amended return modifications.
DUTY TO INFORM PARTNERS

- The agreement should specify the content and the frequency of the audit information provided by the partnership representative to the partnership, the general partner, the manager and/or to the partners/members.

- Should the partnership representative be required to provide copies of all notices and information received regarding the audit and resulting litigation or should periodic summaries be sufficient?

- The partnership representative should be required to provide copies of all elections and statements required by new audit rules to the partnership and the partners, including election out and push out elections.

- The partnership representative should be required to provide timely information regarding AARs to the partners/members.
ECONOMIC DISTORTIONS

- Should the partnership representative have the authority to correct economic distortions by making corrective allocations and distributions and/or requiring capital calls?

- Should this authority be mandatory or discretionary?

- Should the partnership representative have the authority to issue capital calls to pay the imputed underpayments?

- Should the partnership representative’s authority to correct economic distortion extend to reviewed year partners who are not adjustment year partners?
MODIFICATIONS

Should the partnership representative have the authority to require reviewed year partners to amend returns to establish an amended return modification? Should the partnership representative have authority to imposed penalties on partners who fail to comply?

Should the partnership representative have the authority to require a tax exempt partner to provide information and a certification of tax exempt status in order to establish a tax exempt partner modification? Should the partnership representative have authority to imposed penalties on partners who fail to comply?

Should the partnership representative have authority to require corporate and individual partners to provide information and certifications to establish a tax rate modification?
STANDARD OF CARE

- Should the partnership representative’s actions be judged based upon a fiduciary duty standard; a business judgement standard; a negligence, or gross negligence standard; a bad faith standard or some other standard of care?

- Will the partnership provide indemnification and costs of defense for claims made against the partnership representative by the partners, by the IRS or by third parties in connection with the performance of the required duties and if so under what circumstances?
STANDARD OF CARE
Continued

- The partnership representative should be authorized to engage and pay experts and professionals to assist with the audit; to cause the partnership to pay those costs and fees; and to rely on advice of professionals without liability for any resulting damages, costs or losses.

- Should the agreement require the partnership to purchase “D&O” insurance to protect the partnership representative?
DUTY OF CONFIDENTIALITY

- Should a duty of confidentiality be imposed on the partnership representative?

- What exceptions to the confidentiality obligation should be set forth in the agreement?
INDEMNIFICATION, EXPENSES, FEES AND COMPENSATION

- The partnership should be obligated to indemnify the partnership representative, except for certain specified actions, such as breach of fiduciary duty, negligence, gross negligence, bad faith or willful neglect.

- The partnership should be obligated to pay for all costs, expenses and fees related to the audit and advance defense fees, costs and expenses in the event the partnership representative is sued.

- The agreement should provide for compensation to the partnership representative.
PARTNERSHIP AND PARTNERS DUTY TO PROVIDE INFORMATION AND TO TAKE SPECIFIC ACTIONS

- The partnership and the partners could release and agree not to sue the partnership representative, its officers, directors or affiliates except for specified actions such as negligence, gross negligence, bad faith or willful neglect.

- The partners should be obligated to provide information requested by the partnership representative including individual tax returns and liabilities relevant to its duties.

- The partners could be required to timely file amended tax returns and to timely pay any tax due.
PARTNERSHIP AND PARTNERS DUTY TO PROVIDE INFORMATION AND TO TAKE SPECIFIC ACTIONS –

Continued

- The agreement could specify that the partners will not be released from any obligations except by the partnership representative in writing and that these obligations will continue after withdrawal or the disposition of their interests.

- The partners could be required to notify the partnership representative of any inconsistent reporting with the partnership return and of any IRS individual settlement of any partnership item.

- The agreement could require the partners to commit to satisfy their obligations under a push-out election including timely filing amended returns and paying any taxes due.
CAPITAL CALLS AND RESERVES

- Should the partners be subject to capital calls by the partnership representative to pay the imputed underpayment, correct economic distortions and pay costs, expenses and fees associated with the audit?

- What penalties should apply for failure to contribute?

- Should the partnership representative be permitted to establish reserves to pay the imputed underpayment, correct economic distortions and pay costs, expenses and fees associated with the audit?
MISCELLANEOUS MATTERS

Survival of Partner Duties.

- Should partner duties continue upon termination of the partnership?

- Should a partner’s duties continue upon withdrawal of the partner or transfer of the partnership interest?
MISCELLANEOUS MATTERS
Continued

Transfers or Sales of Partnership Interests.

- Should the transferor provide warranties and representations about prior tax years?

- Should the transferor be obligated to indemnify and hold transferee liable for imputed underpayments?

- Potential problem arises for any type of transfers including gifts, bequests, redemptions and sales.
PART IV

SAMPLE PROVISIONS
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Partnership Representative [Generic Duties and Authority]

For tax years beginning after December 31, 2017, [TBD] is hereby designated as the partnership representative.

The partnership representative shall have all of the authority, duties and responsibilities as set forth in Code §§ 6221 – 6241 and the regulations thereunder (the “Partnership Audit Rules”).
Partnership Representative [Generic Duties and Authority]-Continued

The partnership representative must accept such appointment in writing and provide a written confirmation to the partnership that it satisfies the substantial presence requirement of Code § 6223(a) and the regulations thereunder.

A partnership representative shall serve until his, her, or its death, resignation, incapacity, bankruptcy, revocation/removal or a determination by the Internal Revenue Service that the designation is not effective.
Partnership Representative [Generic Duties and Authority]-Continued

The partnership representative shall [or may with the consent of [TBD]] [or may in her sole and absolute discretion] timely file such election forms, statements and other information required by the Partnership Audit Rule (a) to make the election out of the Partnership Audit Rules if the partnership is eligible for such election; and (b) to make the push-out election, for each [any] tax year of the partnership.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Partnership Representative [Specific Duties and Authority]

For tax years beginning after December 31, 2017, [TBD] is the partnership representative.

The partnership representative shall have all of the authority, duties and responsibilities as set forth in Code §§ 6221 – 6241 and the regulations thereunder (the “Partnership Audit Rules”) including but not limited to elections related to an audit; matters arising from the audit; the audit proceedings, including receiving notices of the commencement of an audit and requests for information; providing information to the IRS with regards to the audit; meeting with IRS personnel to discuss and settle the audit; extending the statute of limitations for the partners and the partnership; binding the partnership and the partners to a settlement with respect to the
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Partnership Representative [Specific Duties and Authority]-
Continued

audit matters; electing not to contest the notice of final partnership adjustments in
court or to contest all or any portion of the matter in court and to choose the court
forum; filing an election out; making decisions regarding the payment of the
imputed underpayment; making a push-out election; entering into a closing
agreement with the IRS; requesting multiple imputed underpayments; filing an
ARR; and deciding whether to settle with IRS appeals or to settle litigation and
whether to appeal an adverse court decision.

The partnership representative must accept such appointment in writing and
provide a written confirmation to the partnership that it satisfies the substantial
presence requirement of Code § 6223(a) and the regulations thereunder. A tax
matters partner/partnership representative shall serve until his, her, or its death,
resignation, incapacity, bankruptcy, revocation/removal or a determination by the
Internal Revenue Service that the designation is not effective.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Partnership Representative [Specific Duties and Authority]-Continued

The partnership representative shall [or may with the consent of [TBD: general partner, manager, management committee, partners or members, whichever is applicable] or may in her sole and absolute discretion] timely file such election forms, statements and other information required by the Partnership Audit Rule (a) to make the election out of the Partnership Audit Rules if the partnership is eligible for such election; and (b) to make the push-out election, for each [any] tax year of the partnership.
Resignation.

A partnership representative may resign at any time by giving written notice to [TBD: manager, general partner, management committee, partners, or members].

The resignation of the partnership representative shall take effect upon the appointment of a successor partnership representative or at such other time agreed upon by [TBD: manager, general partner, management committee, partners, or members, whichever is applicable].

The resigning partnership representative shall follow the directions of [TBD: manager, general partner, management committee, partners, or members, whichever is applicable] in connection with the appointment of a successor partnership representative and the filing of such statements, forms and other document with the IRS as required by the Partnership Audit Rules.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Resignation – continued.

Notwithstanding the foregoing, in the event such resignation is not effective for purposes of the Partnership Audit Rules, the resigning partnership representative shall take any and all actions and sign and deliver any and all documents, instruments, elections and agreement as directed by the [TBD: manager, general partner, management committee, partners, or members, whichever is applicable] until such resignation is effective for purposes of the Partnership Audit Rules.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Revocation of Designation.

The designation of partnership representative may be revoked with or without cause by a written notice from the [TBD: manager, general partner, management committee, partners, or members, whichever is applicable].

The partnership representative whose designation has been revoked shall follow the directions of [TBD: manager, general partner, management committee, partners, or members, whichever is applicable] in connection with the appointment of a successor partnership representative and the filing of such statements, forms and other document with the IRS as required by the Partnership Audit Rules.
Revocation of Designation -continued.

Notwithstanding the foregoing, in the event such revocation is not effective for purposes of the Partnership Audit Rules and in any event prior to the effective appointment of a successor, the partnership representative whose designation has been revoked shall take any and all actions and sign and deliver any and all documents, instruments, elections and agreement as directed by the [TBD: manager, general partner, management committee, partners or members, whichever is applicable] until such revocation is effective for purposes of the Partnership Audit Rules.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Vacancies. If there is a vacancy in the position of partnership representative, a successor partnership representative shall be designated by [TBD: manager, general partner, management committee, partners, or members, whichever is applicable].

Compensation. The partnership representative may receive reasonable compensation for the services rendered [TBD].

Costs, Expenses and Professional Fees. The partnership shall reimburse the partnership representative for all costs and expenses reasonably incurred in connection with her actions under the Partnership Audit Rules.

The partnership representative is hereby authorized to engage professionals, experts and advisors in connection with its performance of its duties under the Partnership Audit Rules and incure costs, expenses, professional and other fee on behalf of the partnership.
Standard of Care; Liability for Certain Acts.

The partnership representative shall act in good faith and shall use commercially reasonable best efforts to carry out the duties, authority and responsibilities set forth in this Agreement and the Partnership Audit Rules.

Unless fraud, deceit, gross negligence, willful misconduct or a wrongful taking shall be proved by a non-appealable court order, judgment, decree or decision, the partnership representative shall not be liable or obligated to the partnership or to any of the partners for any breach of fiduciary duty, for any mistake of fact or judgment, or for the doing of any act, or the failure to do any act, which may cause or result in any loss or damage to the partnership or to its members.

The partnership representative does not, in any way, guarantee the results of any partnership audit.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Partnership Representative Has No Exclusive Duty to Company.

The partnership representative shall not be required to act in such capacity as her sole and exclusive function. The partnership representative shall devote such time to this position as is commercially reasonably to fulfill her obligations, responsibilities and duties.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Indemnification of the Partnership Representative.

The partnership representative shall be indemnified and held harmless by the partnership under the following circumstances and in the manner and to the extent indicated:

In any threatened, pending or completed action, suit or proceeding to which the partnership representative is or was a party or is threatened to be made a party by reason of the fact that she is a partnership representative involving an alleged cause of action for damages arising from the performance of her activities in such capacity;

The partnership shall indemnify and hold the partnership representative harmless against costs, liabilities, damages and expenses, including attorney’s fees, judgments and amounts paid in settlement, actually and reasonably incurred by her in connection with such action, suit, or proceeding if the
Indemnification of the Partnership Representative, continued.

partnership representative acted in good faith and in a manner she reasonably believed to be in, or not opposed to, the best interests of the partnership and the partners; and provided that her conduct has not been found by a non-appealable court judgment, order, decree, or decision to constitute gross negligence, fraud, willful or wanton misconduct.

The termination of any action, suit, or proceeding by judgment, order, or settlement shall not, of itself, create a presumption that the partnership representative did not act in good faith and in a manner which she reasonably believed to be in and not opposed to the best interests of the company.

To the extent the partnership representative has been successful on the merits or otherwise in defense of any action, suit, or proceeding, or in defense of any claim, issue, or matter therein, the company shall indemnify the partnership representative against the expenses, including attorney’s fees, actually and reasonably incurred by her in connection therewith.
Indemnification of the Partnership Representative, continued.

The company shall advance such expenses to the partnership representative in advance of the conclusion of such action, suit or proceeding.

The indemnification set forth in this paragraph shall in no event cause the members to incur any liability beyond their capital contributions, plus their share of any undistributed profits of the company, nor shall it result in any liability of the members to any third party.
**DRAFTING CONSIDERATIONS**

**SAMPLE PROVISIONS**

**Correction of Economic Distortions.**

The partners intend that the economic consequences of an imputed underpayment for any reviewed year shall be borne by the reviewed year partners in the same manner as if the adjustments had been correctly reported on the reviewed year partnership return.

Therefore, notwithstanding anything to the contrary herein, [TBD: general partner, manager or management committee whichever is applicable] shall make such offsetting special allocations of partnership income, gain, loss or deduction in whatever manner it determine appropriate so that, after such offsetting allocations are made, each partner’s capital account balance at the end of the adjustment year is to the extent possible, equal to the capital balance such partners would have had if all partnership items in the reviewed year had been allocated to the partners in accordance with the adjustments as determined by the notice of final partnership adjustments, any settlement with the IRS, the Justice Department or the final court
Correction of Economic Distortions - continued.

decision, whichever is applicable. In addition, the [TBD: general partner, manager or management committee whichever is applicable] shall have the authority to require reviewed year partners who have transferred their partnership interests to reimburse the partnership for the imputed underpayment.

In addition, the [TBD: general partner, manager or management committee whichever is applicable] shall have the authority to require reviewed year partners who have transferred their partnership interests to reimburse the partnership for the imputed underpayment.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Limitation on Authority of Partnership Representative.

Notwithstanding anything to the contrary herein, the partnership representative shall not make any election, settlement or take any actions to settle or to litigate any adjustments set forth in the notice of final partnership adjustment under the Partnership Audit Rules without the consent of [TBD: the general partner, the manager, a vote of the majority of the partners/members or the management committee, whichever is applicable].
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Duties Owed by the Partners to the Partnership Representative.

Each partner hereby covenants and agrees to promptly provide the partnership representative with all information regarding the partner’s tax returns and tax liabilities as requested from time to time, including but not limited to proof that the partner has filed an amended return and paid any resulting tax, the partner’s address, taxpayer identification number and current contact information, the partner’s status as a tax-exempt partner, the tax rate applicable to the partner and the partner’s status as an eligible partner.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Duties Owed by the Partners to the Partnership Representative – continued.

The partner’s obligations hereunder shall continue notwithstanding the partner ceasing to be a partner whether resulting from a transfer, sale, withdrawal or other disposition of her partnership interest.

Each partner shall notify the partnership representative of any inconsistent treatment of any partnership item on the partner’s return and of any settlement with the IRS regarding any partnership items.
DRAFTING CONSIDERATIONS
SAMPLE PROVISIONS

Reliance on Advice. The partnership representative may rely on the services and advice of attorneys, accountants and other professional advisors or experts. The partnership representative shall not be liable to the partnership or to any partner for damages, losses, or costs, any loss of value or any liability arising from such reliance.

Binding Effect of Actions by Partnership Representative. The partnership and the partners hereby agree and acknowledge that (a) the actions of the partnership representative in connection with the Partnership Audit Rules shall be binding on the partnership and the partners; and (b) neither the partnership nor the partners have any right to contact the IRS or participate in an audit or proceedings under the Partnership Audit Rules.
Communications to Partners. The partnership representative shall provide reports to the partners on a reasonable basis to keep them reasonably informed of the status, issues and resolution of any partnership income tax audit.

Ineligible Partners. The transfer of a partnership interest to an ineligible partner shall not be permitted except upon the written consent of [TBD: general partner, manager, management committee, partners or members whichever is applicable].

Any purported transfer shall be null and void [or trigger the buy-sell provisions in the partnership agreement].

If any partner is an ineligible partner on the date that is 90 days prior to the due date for filing the election out for any tax year, such partnership interest shall be transferred to an eligible partner prior to the due date for filing such election.