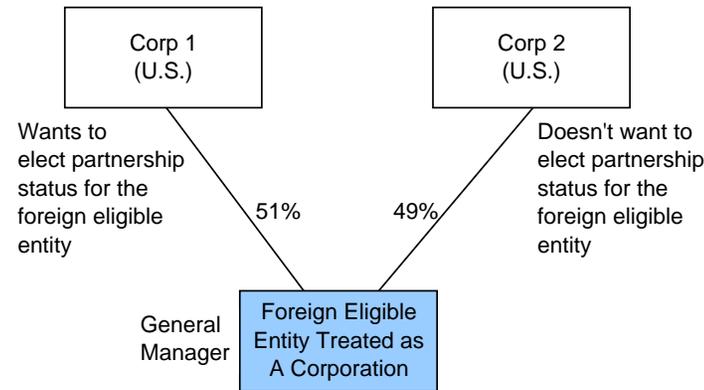


Signature Authority Regarding Check-the-Box Elections



Corp 1, a U.S. corporation, owns 51% of the stock of Foreign Eligible Entity. The remaining 49% of Foreign Eligible Entity is owned by Corp 2, also a U.S. corporation. Foreign Eligible Entity has been treated as a corporation by default since its formation. Corp 1 wants to change the entity classification of Foreign Eligible Entity to be treated as a partnership, but Corp 2 wants to keep the corporate entity classification. Reg. 301.7701-3(c)(2) provides that a check-the-box election:

must be signed by (A) Each member of the electing entity who is an owner at the time the election is filed; or (B) Any officer, manager, or member of the electing entity who is authorized (under local law or the entity's organizational documents) to make the election and who represents to having such authorization under penalties of perjury.

Assume the following: 1) Corp 1 has the voting power necessary to appoint a general manager (or officer) of Foreign Eligible Entity, 2) The organizational documents of Foreign Eligible Entity make no reference to authority to make U.S. tax elections, 3) The general manager has the authority to legally bind Foreign Eligible Entity in the normal course of business, 4) Corp 1 presents Form 8832 to the general manager and requests that he sign, and he does sign, a check-the-box election to treat Foreign Eligible Entity as a partnership. Has a valid election been made?

Clearly, the election was not signed by all of the members of the entity. Thus, a valid election will be made only if the general manager is authorized "under local law or the entity's organizational documents" to make the election. The organizational documents made no reference to U.S. tax elections. Therefore, presumably the general manager was not authorized to make the election under the organizational documents. The general manager has the authority to legally bind the Foreign Eligible Entity under local law. Again, presumably local law in the foreign country makes no reference to authority to sign U.S. tax entity classification elections. One might question, however, whether local law of any state of the United States (or of any foreign country) makes reference to authority to make U.S. federal entity classification elections. If no state or foreign laws make reference to authority to make such elections, then one might argue that the intent of the rule is to allow a person that has general authority to legally bind the entity to be authorized to make such an election.

On the other hand, one might argue that restrictions on signature authority are to protect the minority owners from the potentially significant tax ramifications from changes in entity classification. This policy would be consistent with requiring all of the owners to sign the election and would also be consistent with preventing the majority shareholder from making such an election unless the shareholder has sufficient voting power to alter the entity's organizational documents. It is unclear which argument prevails.