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Insights

Is Your Organization in Compliance With IRS Rules on Employer Identification Numbers?

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On March 27, 2019 the IRS announced that taxpayers can no longer request an employer identification number ("EIN") unless the "responsible party" named on the application has a Social Security number ("SSN") or Individual Taxpayer Identification Number ("ITIN"). This change goes into effect on May 13, 2019. This new requirement follows a 2014 rule change requiring organizations to update the IRS of any change in the "responsible party" identified by the organization.

Ein - Background

An EIN is a nine-digit taxpayer identification number assigned to sole proprietors, corporations, partnerships, estates, trusts, employee retirement plans and other entities for tax filing and reporting purposes. It is obtained by filing Form SS-4, *Application for Employer Identification Number (EIN)*, either online, or by phone, fax or mail. Since 2010, the IRS has asked for the name and SSN (individual), ITIN (alien), or EIN (entity) of a "responsible party" ("RP") of the applicant submitting Form SS-4. The IRS amended the form to obtain the name of the RP to facilitate communication with employer representatives regarding tax reporting and compliance issues.

The Form SS-4 instructions provide a detailed explanation of who should be the RP for various types of entities. Generally, the RP is the person who ultimately owns or controls the entity or who exercises ultimate effective control over the entity. For example, in the case of a corporation, the RP may be a principal officer and, in the case of a partnership, the RP may be the general partner. For tax-exempt organizations, including tax-exempt healthcare organizations, the RP is generally the same as the "principal officer" as defined in the instructions to Form 990, *Return of Organization Exempt From Income Tax*. For trusts, the RP is a grantor, owner, or trustor.

2014 EIN Regulation Requires Reporting of Responsible Party to IRS

By 2013, the IRS had become increasingly frustrated by its inability to communicate with RPs identified in employers' SS-4 forms. Often the RP no longer served in that capacity for one reason or another. As a result, on November 18, 2013 in its *Employee Plans News* newsletter, the IRS announced a new requirement that an employer with an EIN must report changes in the identity of its RP to the IRS using Form 8822-B, *Change of Address or Responsible Party - Business.* The requirement, set forth in Treasury Regulations §301.6109-1, applied to all persons possessing an EIN on or after January 1, 2014, which means the rules applied retroactively and not only to persons that applied for or were issued EINs after the 2014 effective date. Existing EIN holders were given sixty (60) days to report their RP to the IRS (i.e., by March 1, 2014). Going forward, an organization has sixty (60) days from the date of a change in its RP to update the IRS with a Form 8822-B

filing.

As provided in the instructions for Form 8822-B, for an EIN holder with a RP change, the filing of Form 8822-B is mandatory. Currently, organizations will not be subject to penalties for failure to file Form 8822-B. However, the IRS cautions that you may not receive a notice of deficiency or notice of demand for tax if it does not have a current RP on file. Many organizations filed Form SS-4 many years ago (i.e., before the IRS began asking for a RP to be named). While the instructions for Form 8822-B do not address this common situation, it is generally a best practice that such an organization file the form in order identify the current RP for the IRS.

As of May 13, 2019, Responsible Party Must Be Individual with SSN or ITIN

On March 27, 2019, as an additional step in improving the accuracy and transparency of its EIN data, the IRS announced that, starting on May 13, 2019, it will only accept applications for EINs that list a RP who is an individual (*i.e.*, a natural person and not an entity) and who has either a SSN or an ITIN. The IRS explained that the rule change was meant to provide greater security and improve transparency. This announcement is consistent with the updated instructions to the Form SS-4 published in late 2017. The requirement will apply to both the paper Form SS-4 (filed by phone, fax or mail) and the IRS online EIN application. Only governmental entities (federal, state, local and tribal), along with the military, including state national guards, are exempt from the requirement. Tax professional can continue as third-party designees who can complete applications.

Impact on Check-The-Box Elections

Prior to this 2019 rule change, EIN applicants were not required to provide a SSN or ITIN if the sole purpose for obtaining an EIN for a business entity was to file IRS Form 8832, *Entity Classification Election* (*i.e.*, a "check-the-box" election) to change the entity's classification for federal tax purposes. However, in the most recent version of the Form SS-4, the IRS has eliminated this exception for check-the-box elections and now generally requires every responsible party to have either a SSN or ITIN, even if the applicant needs an EIN only to change the classification of a business entity.

The "check-the-box" regulations allowed for various tax avoidance and tax deferral strategies. Specifically, they provided more opportunity for strategies which take advantage of differences in the classification of an entity as a corporation or not in multiple jurisdictions, in order to engage in cross-border tax planning. This new requirement for PRs could have a significant impact on many time-sensitive elections where there is no responsible party with an existing SSN or ITIN due to processing delays.

An ITIN can be obtained by filing an IRS Form W-7, but the process can be burdensome, often requiring original copies of documents, such as passports, that the applicant may not want to part with. Further, the application process can take several weeks (sometimes months). As a practical matter, this requirement could create significant delays in obtaining EINs for international applicants, which in turn could create delays in setting up bank accounts, filing entity classification elections, etc. As a result, if a check-the-box election is anticipated, the requirement for a RP with a valid ITIN, and the potential processing delays related to obtaining one, should be considered.

Recommendations

As of May 13, 2019, the updated responsible party requirement will apply to all EIN applicants, including international applicants in instances where the applicant is applying for an EIN for the sole purpose of making an entity classification election on IRS Form 8832. Organizations should be prepared to identify an individual possessing a valid SSN or ITIN for this purpose as the use of an entity, even with a valid EIN, will no longer be permitted.

In addition, any changes to the responsible party in the future should be reported to the IRS, within 60 days of the change, by completing Form 8822-B. Organizations who did not update the IRS on the identify of their responsible party in 2014, when the related treasury regulations were released, should consider doing so at this point.

Special Note for Churches
Despite being exempt from an annual informational reporting obligation (i.e., Form 990), any church that has employees (and files employment tax returns) or has a bank or brokerage account must have an employer identification number (EIN). Accordingly, churches should be aware of both the new individual RP condition as well as the earlier RP update responsibility. Because church structures don't generally fit within the RP definitions, it may not be obvious who should be chosen to serve as an organization's RP. Most likely, a bishop, pastor, member of church board, or treasurer would be the best choice for such an organization. Whomever is identified, churches should be aware that their status as religious organizations does not exempt them from these EIN provisions.

Special Note for Employee Plans
Qualified retirement plan trusts often obtain an EIN separate from the plan sponsor's EIN, for use in opening plan accounts so that the income is reported to the EIN of the tax exempt trust, rather than the EIN of the plan sponsor. Therefore, such qualified plan trusts must name their RP when applying for an EIN and must update the IRS of changes in the RP using Form 8822-B.

If you have any questions regarding this alert, please contact Kendall A. Schnurpel, or your regular Krieg DeVault attorney.