



Proposed Regulations Relating to Equivalency Determinations by Private Foundations

September 26, 2012

On September 24, 2012, the Department of the Treasury (“Treasury”) issued proposed regulations that expand the class of tax practitioners upon whose written advice private foundations may rely when making a “good faith determination” that a foreign organization is the equivalent of a United States public charity (the “Proposed Regulations”). The notice accompanying the Proposed Regulations also requests comments responding to questions raised by Treasury.

Under current law, a private foundation may make a “good faith determination” based on an affidavit of a foreign organization or an opinion of counsel (of either the distributing private foundation or the foreign donee organization) that the foreign donee organization is an eligible public charity described in section 509(a)(1), (2) or (3) of the Internal Revenue Code of 1986, as amended (the “Code”).¹ The affidavit or opinion must set forth sufficient facts concerning the operations and support of the foreign organization for the Internal Revenue Service (the “IRS”) to determine that the organization would be likely to qualify as an organization described in Code section 509(a)(1), (2) or (3).

The Proposed Regulations revise Treasury Regulations sections 53.4942(a)-3(a)(6) and 53.4945-5(a)(5) to provide that a private foundation may make a “good faith determination” based on an affidavit of the foreign organization or written advice from a qualified tax practitioner² that the foreign organization is an organization described in Code section 509(a)(1), (2) or (3).³

The Proposed Regulations define “qualified tax practitioner” as an attorney, certified public accountant, or an enrolled agent, who is subject to Circular 230. Circular 230 governs the professional standards of these practitioners. The Proposed Regulations therefore permit a private foundation to rely on written advice from a broader class of tax practitioners than permitted under current law. However, because Circular 230 requires that the tax practitioner be licensed in a state, territory or possession of the United States (or, in the case of an enrolled agent, enrolled by the IRS), the Proposed Regulations are narrower in that they do not permit a private foundation to rely on an opinion of the foreign organization’s counsel, if that counsel is not admitted to practice in a state, territory or possession of the United States.

¹ A private foundation also may make a “good faith determination” in connection with grants to certain organizations that qualify as operating foundations.

² Emphasis added.

³ The Proposed Regulations also include conforming changes to exclude from eligibility certain supporting organizations described in Code section 4942(g)(4)(A)(i) and (g)(4)(A)(ii), consistent with statutory amendments previously made to Code sections 4942 and 4945.

If the determination is based on written advice, the Proposed Regulations provide that the determination will be considered as made in good faith only if the private foundation reasonably relied upon the written advice as permitted in Treasury Regulations section 1.6664-4(c)(1). This section provides that all pertinent facts and circumstances must be taken into account when determining whether a taxpayer has reasonably relied in good faith on written advice.

In the Explanation of Provisions accompanying the Proposed Regulations, Treasury and the IRS seek public comments on the following questions:

- Whether it is appropriate to limit the timeframe during which a private foundation will be permitted to rely upon a qualified tax practitioner's written advice for purposes of making "good faith determinations" (e.g., limiting the period of time during which a private foundation may make grants to the foreign organization to 12 months from the date of the written advice before it will need to obtain updated advice);
- Whether Revenue Procedure 92-94 ("Rev. Proc. 92-94"), which sets forth a procedure for making "good faith determinations" based on the affidavit of a foreign organization, should be revised to take into account changes to the public support test for public charity status; and
- Whether it is appropriate further to amend the current regulations to remove the ability of a private foundation to base a "good faith determination" on an affidavit of a foreign organization.

We believe that Rev. Proc. 92-94 merits updating, including, but going beyond, the public support test calculation. We believe that amending the current regulations to remove the ability of a private foundation to rely on the affidavit of a foreign organization would inhibit grants to foreign organizations and discourage foreign grantmaking by private foundations and by public charities, such as sponsoring organizations of donor-advised funds, that follow these rules. This is because obtaining written advice from a qualified tax practitioner often may not be cost-effective, particularly in connection with smaller grants.

We encourage grantmakers to share their views with Treasury. Comments regarding the Proposed Regulations must be received by December 24, 2012. The proposed regulations will apply to grants made after the date of publication of the Treasury decision adopting the Proposed Regulations as final regulations in the Federal Register. However, private foundations may rely on the Proposed Regulations for grants made on or after September 24, 2012.

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The Proposed Regulations can be found at <https://www.federalregister.gov/articles/2012/09/24/2012-23553/reliance-standards-for-making-good-faith-determinations>

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