

September 25, 2015

FINAL REGULATIONS:
***Reliance Standards for Making Good Faith
Determinations of Equivalency Determinations***

Available in the Federal Register at: <http://federalregister.gov/a/2015-24346>

Background

In 2012, the Department of Treasury and the IRS issued proposed regulations applicable to private foundations seeking to make grants to foreign organizations using equivalency determinations. Treasury published a final version of these rules **effective on September 25, 2015**. The regulations apply to distributions made after this date, with a few exceptions.

When the proposed rules were issued in 2012, the Council and TechSoup Global launched the first equivalency determination repository, NGOsource, upon interpreting the proposed regulations as paving the way for these repositories. These final regulations will further strengthen grantmakers' confident reliance on equivalency determinations through repositories. They also clarify many of the issues surrounding equivalency determinations that the Council has asked Treasury to address for years in an effort to reduce barriers to global grantmaking for foundations.

Final Regulations

As in the proposed regulations, the final version broadens the range of professionals on whose written advice a private foundation may rely for equivalency determinations for grants overseas. The rules also clarify that sponsoring organizations of donor-advised funds may rely on the rules for international distributions from DAFs, and narrow the circumstances in which a grantor can make use of a grantee affidavit to make a good faith determination of equivalency. Below is a summary of each of the primary elements of the final regulations.

Written Advice of a Qualified Tax Practitioner

A "qualified tax practitioner" under the regulations is an attorney, certified public accountant, or an enrolled agent. [Treasury Department Circular 230](#) continues to govern the professional standards of these practitioners, and governs the opinions they issue related to tax positions. Their written advice must contain **enough facts** to demonstrate to the IRS that the grantee organization would be likely to qualify as a public charity at the time the advice is written.

Significantly, the regulations allow a private foundation to rely on written advice of a qualified tax practitioner **without establishing an attorney-client relationship** between that tax practitioner and the grantmaker or the grantee. This confirms that grantmakers may rely on equivalency determinations obtained through a repository so long as that reliance is reasonable and in good faith. However, a foundation must receive the written advice from the qualified tax practitioner (i.e., the attorney or a repository, for instance) rather than directly from another foundation.

The final regulations specify that **a foundation cannot rely on an opinion from foreign counsel** to make a good faith determination of equivalency, unless the foreign counsel meets the definition of a qualified tax practitioner subject to Circular 230. On this point, language in the final regulations states:

The Treasury Department and the IRS are concerned that, standing alone, an opinion of foreign counsel, who may or may not have expertise in U.S. tax law, may not ordinarily be a sufficient basis for a determination of a foreign organization's status.

The written advice of a qualified tax practitioner must also be **“current”** in order for it to serve as the basis for a good faith determination under the regulations. Advice is “current” if the law that underlies the advice has not changed, and if the facts from the grantee organization remain the same. For advice on whether an organization meets the public support test, consistent with rules for determinations of public support over a five-year test period for U.S. public charities, written advice that an organization satisfied the public support requirements based on support over a test period of five years will be treated as current for two years following the end of the five-year period.

Reliance on Grantee Affidavits

The proposed regulations questioned whether a foundation’s ability to base a good faith determination on an affidavit should be removed, and if not, whether the use of affidavits should be restricted. Under the final regulations, the presence of **a grantee affidavit alone is NOT an adequate basis for a good faith determination of equivalency**. However, the regulations do allow grantmakers to use a grantee affidavit as one source of information in making a good faith determination, particularly in the case of foundations with internal knowledge of the relevant tax law.

The regulations offer an example of how a grantee affidavit could help a foundation manager form a good faith determination:

[G]rantee affidavits remain a cost-effective way of obtaining information relevant to making good faith determinations and foundations may continue to rely on them when making determinations to the extent reliance is reasonable and appropriate under the facts and circumstances... For example, a foundation manager with understanding of U.S. charity tax law may under the general rule make a good faith determination that a foreign grantee is a qualifying public charity based on the information in an affidavit supplied by the grantee. Furthermore, foundation managers or their in-house counsel may themselves be qualified tax practitioners, whose written advice may be reasonably relied upon for determinations to come within the special rule.

Treasury allows **a 90-day transition period** to allow foundations to comply with this change from the proposed regulations, which they have been relying on for the past few years. For this 90-day period (ending in December) foundations may rely on the former regulations regarding the use of grantee affidavits. In addition, under the final regulations, if a grant is distributed pursuant to a written commitment made prior to the applicability date of the final regulations and the grantor made a determination in good faith based on the prior regulations, the distribution is treated as compliant as long as the grant is paid out to the grantee within five years.

Donor-Advised Funds

Under the final regulations, these standards for good faith determinations of equivalency **can be used by sponsoring organizations of donor-advised funds** (DAFs), such as community foundations, for distributions from DAFs to organizations overseas, “until further guidance is issued” by Treasury.

Public Charities

While the regulations explicitly address the international activities of private foundations, the Council has long advised public charities such as community foundations to follow the private foundation regulations in this area. The regulations indicate that this may be explicitly addressed in future guidance.

Supporting Organizations

Like the proposed regulations, the final regulations clarify that equivalency determinations cannot be used for grants to either: 1) Type III non-functionally integrated supporting organizations, or 2) any type of supporting organization if one or more disqualified persons of the grantor foundation directly or indirectly controls either the supporting or supported organization. Foundations making overseas grants to these types of supporting organizations are **required to exercise expenditure responsibility**. This is consistent with the rules for grants to these types of supporting organizations enacted as part of the Pension Protection Act of 2006.

Update to Rev. Proc. 92-94

The final regulations also indicate that a **revision of Revenue Procedure 92-94 is under consideration**. Revenue Procedure 92-94 is still the primary authority on the substance of the equivalency determination process, but is over 20 years old. In our [2015-2016 Priority Guidance Plan submission](#), the Council urged Treasury to consider revising the decades-old guidance to resolve potential controversy over its application given intervening changes in the law, and to resolve various longstanding questions about the application of U.S. rules to foreign organizations.