

THE RESPONSIBLE PARTY – CHANGES EFFECTIVE MAY 2019

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Tags

E.I.N.
Foreign Person
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Responsible Party

The Federal Taxpayer Identification Number (“T.I.N.”) used by entities is the Employer Identification Number (“E.I.N.”). The E.I.N. application (both online and using Form SS-4) requires that a responsible party be identified. On March 27, 2019, the I.R.S. announced that starting May 13, 2019, only individuals with T.I.N.’s will be allowed to request an E.I.N. as the responsible party on the application.

WHO IS A RESPONSIBLE PARTY?

The responsible party is the person who ultimately owns or controls the entity or who exercises ultimate effective control over the entity. In other words, the responsible party is the person who controls, manages, or directs the entity and the disposition of its funds and assets. Generally, the responsible party is the principal officer of a corporation, the general partner of a partnership, the grantor or trustee of a trust, or the owner of an entity.

Entitlement to the property of the entity alone, without any corresponding authority to control, manage, or direct the entity does not cause the individual to be a responsible party. Likewise, a “nominee” may not be designated as the responsible party to obtain an E.I.N. because a nominee is given limited authority to act on behalf of an entity, usually for a limited period of time, and is not “the true responsible party” who has authority over an entity’s assets as per the above definition. The I.R.S. indicates that the use of nominees in this process prevents the I.R.S. from gathering appropriate information on entity ownership and has been found to facilitate tax non-compliance by entities and their owners.

The instructions for the current revision of the E.I.N. application provide that unless the applicant is a government entity, the responsible party must be an individual (*i.e.*, a natural person) and not an entity. Further, the instructions provide that the general requirement that the responsible party be an individual applies to entities with shares or interests traded on a public exchange or which are registered with the S.E.C. This represents a change from the instructions to the 2016 revision of the E.I.N. application, which allowed an entity to serve as the responsible party of a publicly traded entity.

One must be careful in designating the responsible party on the relevant entity’s E.I.N. application and carefully review the instructions to the most current revision of the application, which specifically and directly limits the use of entities as the responsible party only to governmental entities. Merely reviewing the I.R.S. webpage on an issue may result in an incorrect application, which may be rejected by the I.R.S. The I.R.S. webpage on responsible parties could result in such a mistake. While the webpage provides that it was last reviewed or updated on February 28, 2019, the page seemingly allows an entity to be a responsible party – at least when it comes to a publicly traded entity. But this, as mentioned above, is no longer correct.

WHAT IS THE EFFECT? ARE FOREIGN RESPONSIBLE PARTIES IMPACTED?

The I.R.S. announcement provides that this change (*i.e.*, that only individuals with T.I.N.'s will be allowed to request an E.I.N. as the responsible party) will prohibit entities from using their own E.I.N. to obtain additional E.I.N.'s. In fact, this requirement was actually present prior to this announcement, and notwithstanding this, many entities previously obtained an E.I.N. using another entity as their responsible parties. The I.R.S. seems to acknowledge that the requirement has not been well observed, but it is anticipated that it will be, come May 2019.

However, the general announcement may be read broadly, requiring every individual to have a social security number ("S.S.N.") or an individual taxpayer identification number ("I.T.I.N.") in order to apply for an E.I.N. Thus, a question arises as to foreign individuals. There are many instances where a foreign entity must obtain an E.I.N. (*e.g.*, in order to apply for a withholding certificate to reduce or eliminate the F.I.R.P.T.A. withholding on distributions from a U.S. real property holding company ("U.S.R.P.H.C.") or upon a disposition of an interest in U.S. real property). Currently, if the responsible party has not obtained an S.S.N. or I.T.I.N. for a different purpose, the entity leaves the space for a T.I.N. blank.

Concerns have been raised whether the I.R.S. announcement would require such individuals to first obtain an I.T.I.N. and whether this will impose an impediment on certain transactions. The current instructions to the application provide that a responsible party that does not have and is ineligible to obtain an S.S.N. or I.T.I.N. should leave the line blank. An individual is eligible to apply for an I.T.I.N. only under certain circumstances, such as when there is a requirement to file a tax return or when an individual is the recipient of a dividend from a U.S.R.P.H.C. and wishes to apply for a withholding certificate. But when the only reason for requesting an I.T.I.N. is to apply for an E.I.N., an individual is currently not treated as eligible. It is not clear whether the I.R.S. intends to revise the eligibility requirements for an I.T.I.N. to permit the issuance of an I.T.I.N. for this purpose or whether it will continue its current practice.

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