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IRS Revises EIN Application Process, Increasing Burden on Non-U.S. Taxpayers

On March 27, the IRS announced that taxpayers can no longer request an employer identification number unless the "responsible party" named on the application has a Social Security number or Individual Taxpayer Identification Number. This change goes into effect on May 13.

An Employee Identification Number (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. Applicants can apply for an EIN by completing an online EIN application or by filing IRS Form SS-4. Under either method, the applicant must provide the name of a "responsible party," which the IRS defines as an individual (unless the applicant is a government entity) who ultimately owns or controls the entity, or who exercises ultimate effective control over the entity. Prior to this rule change and on a pre-2018 iteration of the Form SS-4, applicants were not required to provide a Social Security number (SSN) or Individual Taxpayer Identification Number (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 an SSN or ITIN, even if the applicant needs an EIN only to change the classification of a business entity.

The IRS explained that the rule change was a mechanism to provide greater security and improve transparency. This is consistent with other recent efforts by the Treasury Department to boost transparency and combat money laundering, such as the extension of Form 5472 reporting obligations to U.S. disregarded entities with foreign owners, the imposition of due diligence requirements on financial institutions opening accounts for closely held business entities, and the imposition of beneficial ownership reporting requirements on title insurers in connection with all-cash purchases of real estate in certain geographic markets.

This change should not have much of an impact on taxpayers who are already "in the system" – e.g., where the owner of the business entity is a U.S. person who already has an SSN (or a non-U.S. person with an ITIN). However, it can have a significant impact on many time-sensitive elections where there is no responsible party with an existing SSN or ITIN.

This issue has already manifested itself for many non-U.S. investors who own property through wholly owned U.S. LLCs, as many of them have had to scramble to apply for ITINs in order for the LLCs to obtain EINs to comply with Form 5472 filing requirements that went into effect last year. This rule change will now impact the timing of elections for many foreign entities.

For example, in the postmortem planning context where a closely held foreign corporation is changing hands from a non-U.S. owner to one or more U.S. owners, it is often necessary for the corporation to make a check-the-box election effective on or prior to the date of death (or effective a few days after death if the corporation holds U.S. situs assets). The election serves to step up the basis on the underlying assets and prevent application of foreign anti-deferral rules to the new U.S. owners. Although the election can be filed up to 75 days after the effective date, a timely election is critical to minimizing tax leakage and other adverse tax consequences for the new U.S. owners. Particularly in situations where the corporation is held in a foreign trust for U.S. beneficiaries and the foreign trustee's employees or affiliates are providing director services to the underlying company, there may not be a responsible party with an existing ITIN or SSN. In that case, a non-U.S. company director may have to apply for one. An ITIN can be obtained by filing an IRS Form W-7, but the process is cumbersome, often

requiring original copies of documents, such as passports, that the applicant may not want to part with. Further, the application process can take up to several months.

This issue also can arise with lifetime gifts and sales of interests in such corporations to U.S. persons and in other situations where a check-the-box election might be in order. Ultimately, non-U.S. taxpayers investing in U.S. situs assets through foreign "blocker" corporations or those planning gifts, sales or bequests of closely held foreign corporations to U.S. persons will want to plan ahead to ensure that critical elections are not held up by the lack of a responsible party ITIN or SSN. If a check-the-box election is on the horizon, now may be the time for some applicants to consider applying for an ITIN.

Day Pitney's tax and international estate planning groups will continue to stay abreast of any new rules and developments that may affect you or your business. Please contact a member of your Day Pitney advisory team if you are unsure whether this law change applies to you or if you have any questions.

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