



EIN Kleine Komplikation: New IRS Policy on Employer Identification Numbers Could Seriously Delay Entity Formations

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The IRS' new policy regarding employer identification numbers (**EINs**) could significantly delay the formation of new entities, especially by non-U.S. persons, unless practitioners and their clients get very proactive. By way of background, any new entity must obtain an EIN so that it can open bank accounts and start payroll and other business operations. To get an EIN the entity must complete and sign a Form SS-4 (Application for Employer Identification Number) and follow the instructions. Those instructions require that the applicant designate a responsible party (e.g., owner, manager, officer, or trustee), and list that party's Social Security number (**SSN**) or individual taxpayer identification number (**ITIN**).

The IRS' long-standing policy behind the responsible party requirement is to prevent fraud and to cut down on zombie entities that have no live person whom the IRS can contact regarding the entity's status. To further this policy, the IRS requires an employer with an EIN to report responsible party changes within 60 days through Form 8822-B (Change of Address or Responsible Party – Business). Usually the IRS requirements have been non-issues because typically there is one individual with an SSN willing and able to sign as the responsible party. Even so, some thorny situations have arisen which practitioners have had to address – for example:

- If a non-U.S. resident (who, by definition, does not have an SSN) wanted to form a U.S. entity, there may not have been any U.S. person available to sign as a responsible party and provide her SSN. Before the new IRS policy, and instead of having a client get an ITIN, a practitioner could have the client sign the SS-4 as the responsible party and note that the responsible party was FOREIGN in the application. This has worked well in the past, although the practitioner could not apply for the EIN online (but rather had to speak with an IRS representative over the phone, fax the SS-4 to the IRS, and wait 4-6 weeks for the IRS letter confirming the EIN).

- If a non-U.S. resident formed a U.S. entity and wanted to file a Form 8832 (Entity Classification Election) (a/k/a check-the-box election) for that entity's particular tax treatment (e.g., an LLC wanting to be taxed as a corporation), then per the SS-4 instructions up to now the entity did not need to list an ITIN on its SS-4 application for the responsible party.
- Finally, even if a U.S. resident formed a U.S. entity, that resident might be wary of listing her SSN on the SS-4 application (because of privacy concerns, fear of data breaches, or otherwise). Until now, that U.S. resident could have another entity sign the SS-4 as the responsible party and submit its own EIN instead of the resident's SSN.

All of this changes under the new IRS policy which says that, starting May 13th, the responsible party signing the Form SS-4 *must have either an SSN or an ITIN*. Because legal entities can never have an SSN or ITIN, practitioners can no longer list entities as responsible parties; and because non-U.S. persons rarely have SSNs, they will now need to obtain ITINs. An ITIN is simply an IRS identifying number for a non-U.S. resident so that he or she can sign IRS forms like an SS-4 application. An ITIN is not the same as an SSN (*i.e.*, the client would not become part of the Social Security system) and it does not by itself subject the client to U.S. taxes or require him or her to file a U.S. tax return.

The non-U.S. resident would apply for an ITIN using Form W-7 (Application for IRS Individual Taxpayer Identification Number) and following the instructions (all 14 pages of them!). Unfortunately, this application is a laborious process which can take several weeks and will require the non-U.S. resident to gather and submit various items of identification (the W-7 instructions give a laundry list of what is acceptable). For example, the applicant can submit an original passport, or a copy certified as accurate by a U.S. consulate or embassy. Given the scope of the ITIN application process, the best time to apply for an ITIN is well before the formation of the U.S. entity (and not a few days before the entity needs to open a bank account). Some non-U.S. residents in countries that have a tax treaty with the U.S. may be under the impression that a foreign taxpayer identification number issued by their home country (**foreign TIN**) can function as an ITIN, but that's fake news: A foreign TIN enables such an individual to submit U.S. forms to claim reduced tax withholding or no withholding [*e.g.*, IRS Form W-8BEN — Certificate of Foreign Status of Beneficial Owner for United States Tax Withholding and Reporting (Individuals)], but it is not the same as the ITIN required to file the Form SS-4.

(By the way, with respect to those U.S. residents who do not want to furnish their SSNs in an SS-4 application out of privacy concerns, the IRS now has two words: Too bad.)

Some good news about this new IRS policy is that it is prospective only (*i.e.*, it does not apply to entities that submitted their SS-4s before May 13, 2019). Further, even though an attorney or paralegal cannot sign an SS-4 as the responsible party, that advisor could always complete and submit the signed SS-4 as a third-party designee on behalf of the client who so authorizes, and can continue doing so under the new IRS policy.

How Nossaman can help.

We are experienced in forming business entities for U.S. and non-U.S. clients; advising on check-the-box and other tax considerations; and completing and submitting SS-4 applications and similar tax forms. If you would like further information or assistance regarding formation matters or obtaining an ITIN, please contact us.