





Grantee Affidavits Cannot Be Basis for Good-Faith Determinations

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Affidavits from foreign grantees can be used by private foundations as information sources when making a good-faith determination that a foreign organization is a public charity but cannot be relied on as the basis for the determination, according to final regulations released September 23.

The final regs (T.D. 9740 ) address the standards for making good-faith determinations so that foundation grants to foreign entities will be qualifying distributions, not taxable expenditures. The regs follow generally supportive comments on the proposed regs (REG-134974-12 ), which came out in 2012. (Prior coverage , )

For purposes of the "special rule" -- a foundation ordinarily will have made a good-faith determination that a grantee would likely qualify as a public charity or operating foundation if the determination is based on a grantee affidavit or an opinion of counsel of the grantor or grantee -- the final regs remove reliance on grantee affidavits as a basis for making a good-faith determination, explaining in the preamble that Treasury and the IRS "do not think it is appropriate to ordinarily consider a good faith determination to have been made solely because it is based on a grantee affidavit." However, grantee affidavits can still be used as sources of information in making good-faith determinations, the preamble says, adding that elimination of the affidavit for purposes of the special rule does not mean the foundation must obtain written advice from a qualified tax practitioner to make a good-faith determination.

The final regs provide a 90-day transition period during which foundations may distribute grants in accordance with the former regs regarding the use of grantee affidavits and opinions of counsel of the grantor or grantee, the preamble says.

The final regulations also modify the special rule to expand the class of eligible advisers to include qualified tax practitioners, such as a foundation's inside or outside counsel. Also, a foundation may reasonably rely on written advice from a qualified tax practitioner that in turn reasonably relies on advice or assistance from a foreign counsel regarding questions of foreign law or other issues the foreign counsel is well-versed in, according to the final regs.

Although the final regs do not prohibit a foundation from making a good-faith determination with written advice obtained from another foundation, the written advice it relies on must be received from its qualified tax practitioner.

The IRS said in the final regulations that it plans to publish an update to Rev. Proc. 92-94, 1992-2 C.B. 507, to reflect changes implemented in the final regulations and changes to the public support tests listed in final regulations (T.D. 9549) released in 2011 that implement the redesigned Form 990, "Return of Organization Exempt From Income Tax."

The new final regulations also say written advice that an organization satisfied requirements for public support based on support over a five-year test period will be considered current for two years immediately following the test period's conclusion.

Practitioners Highlight Grantee Affidavit Issue

The ability to rely on a broader set of advisers when making good-faith equivalency determinations shows the intent of IRS and Treasury to facilitate more cost-effective grant-making to foreign organizations, David A. Shevlin of Simpson Thacher & Bartlett LLP told Tax Analysts. The two-year window for relying on public support data provides needed certainty too, he said. And the provision dealing with grantee affidavits is significant, he said.

"It is very important for grantors to focus on IRS and Treasury's decision to disallow reliance on a grantee affidavit as the sole basis for satisfying the 'special rule' as to when a grantor will ordinarily be considered to have made a good faith determination," Shevlin told Tax Analysts. The door has been kept open, at least theoretically, for grantee affidavits to be a source of information for otherwise making a good-faith determination, he said.

Foundations were united in their opposition to eliminating the rule allowing for sole reliance on grantee affidavits, Alexander L. Reid of Morgan, Lewis & Bockius LLP told Tax Analysts. He called the final regs "an interesting object lesson in being careful what you wish for."

"We asked for a repository, and we got one," he said. "But in return, we lost the ability to rely on grantee affidavits for purposes of making a good faith determination. Why? Because the repository is intended to lower the cost of obtaining an equivalency determination, which had the unintended consequence of undermining the rationale that foundations should be allowed to rely on grantee affidavits in order to save on legal costs," he said.

The two-year period, removing the need for annual determinations, should help reduce costs, Reid said. He also noted the plan to update Rev. Proc 92-94. "Those of us writing opinions under the Revenue Procedure 92-94 standards probably should be sure to hurry up and finish!" he said.

Reid said while there may be "painful transitions," the sector is optimistic the final regulations will prove effective.

Jane Searing, a CPA with Clark Nuber PS, told Tax Analysts she welcomed the issuance of the final regs. She praised the move in the final regs to limit the set of practitioners on which foundations can rely to those subject to Circular 230 standards.

"Limiting the reliance to this circle of professionals provides that these professionals are held to the standard of not practicing in areas for which they are not qualified to practice," Searing said. She said it also solves the issue of advisers having to rely directly on foreign counsel. "If they are licensed to practice before the IRS, they are a qualified tax practitioner."

