

## IRS Releases Final Foreign Grantmaking Regulations

September 29, 2015

The Department of the Treasury and the IRS have published [final regulations](#) for private foundations that participate in foreign grantmaking. These regulations modify and finalize regulations concerning equivalency determinations proposed in September, 2012 (please see our previous alert "[IRS Issues New Regulations for Foreign Grantmaking by Private Foundations](#)"). While the final regulations continue to permit a private foundation to make a good faith determination that a prospective foreign grantee is the equivalent of a qualifying charitable organization, they redefine the IRS-favored approach to making such a determination. Good faith determinations, also known as "equivalency determinations," allow a grant to a foreign organization to be a qualifying distribution under section 4942 of the Internal Revenue Code and relieve a private foundation from the obligation to conduct expenditure responsibility over the grant as required under section 4945.

*The most significant change under the final regulations is that a determination based solely on a grantee affidavit is no longer ordinarily considered a good faith determination. In addition, accompanying comments provide that donor advised fund (DAF) sponsors may use these regulations to make equivalency determinations.*

### I. No More Reliance on Affidavits

To facilitate foreign charitable grantmaking, the 2012 proposed regulations introduced opinions of qualified tax practitioners as an additional option for private foundations seeking to make good faith determinations. Previously, private foundations had been permitted to rely only on grantee affidavits or on opinions of counsel, including grantee's foreign counsel.

Now, under the final regulations, a determination ordinarily will be considered a good faith determination only if it is based on an opinion from a qualified tax practitioner. Qualified tax practitioners include attorneys, certified public accountants, and enrolled agents, who are subject to the requirements of Circular 230. The government's goal in limiting reliance only to opinions of qualified tax practitioners is to ensure that equivalency determinations will be based on opinions of persons likely to have a sufficient understanding of the U.S. tax law on charities. Accordingly, a foundation can no longer rely on a grantee's affidavit or on an opinion of counsel unless that counsel also happens to be a qualified tax practitioner. Grantee affidavits and opinions from foreign counsel, however, can be used as a resource in gathering information to be used in making a good faith determination.

### II. Opinion of a Qualified Tax Practitioner

The opinion of a qualified tax practitioner must be in the form of written advice that is "current," which means that, as of the date of the grant payment, the relevant law upon which the advice is based has not changed and the factual information on which the advice is based is from the grantee's current or prior year. Written advice that a grantee meets the public support test for purposes of section 170(b)(1)(A)(vi) will be treated as current for

the two years following the end of the five-year test period. In addition, a private foundation may only rely on advice received directly from a qualified tax practitioner, and not from another foundation, so that it can appropriately evaluate the reliability of the opinion. Finally, a private foundation may not rely on the opinion of a qualified tax professional, if such reliance is not reasonable or in good faith.

### III. Donor Advised Funds

In response to comments on the proposed regulations, the Treasury Department and the IRS stated that sponsoring organizations of DAFs may use these regulations to make equivalency determinations for purposes of distributions from DAFs to foreign organizations, until further guidance is issued.

### IV. Effective Date and Transition Relief

The final regulations are effective September 25, 2015, although foundations are permitted to make grants through December 24, 2015, based on determinations made under the 2012 proposed regulations. In addition, foundations may continue to rely on determinations made under the 2012 proposed regulations for grants paid pursuant to a written commitment that was made on or before September 25, 2015. Such committed amounts must be paid out by September 25, 2020, to fall under this transition rule.

For more information about foreign grantmaking or the equivalency determination requirements, please contact a member of [Caplin & Drysdale's Exempt Organizations](#) practice group:

[Douglas N. Varley](#)  
[dvarley@capdale.com](mailto:dvarley@capdale.com)  
202.862.7818

[Brendan M. Wilson](#)  
[bwilson@capdale.com](mailto:bwilson@capdale.com)  
202.862.7813

[Sharon P. Want](#)  
[swant@capdale.com](mailto:swant@capdale.com)  
202.862.7849



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**Washington, DC Office:**  
One Thomas Circle, NW  
Suite 1100  
Washington, DC 20005  
202.862.5000

**New York, NY Office:**  
600 Lexington Avenue  
21st Floor  
New York, NY 10022  
212.379.6000

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