



December 16, 2016

The Honorable William J. Wilkins  
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Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Ms. Sunita Lough  
Commissioner (TE/GE)  
Internal Revenue Service  
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Ms. Margaret Von Lienen  
Acting Director  
Exempt Organizations  
Internal Revenue Service  
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Ms. Vicki Judson  
Associate Chief Counsel (TE/GE)  
Office of Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

RE: Request to Permit Qualified Tax Practitioners to Perform Foreign Equivalency Determinations in Relation to Treas. Reg. § 1.1441-9

Dear Mr. Wilkins and Mmes. Lough, Von Lienen and Judson:

The American Institute of CPAs (AICPA) respectfully requests that the Internal Revenue Service (IRS) permit qualified tax practitioners to perform foreign equivalency determinations for the purpose of Internal Revenue Code (IRC or “Code”) section 1441<sup>1</sup> as is currently permitted for the purpose of section 4945.

### **Present Law and Procedures**

Treasury Reg. § 1.1441-9 provides that withholding is not required under section 1441 with respect to amounts paid to a foreign organization described in section 501(c), to the extent the amounts are not unrelated business taxable income (UBTI). A foreign organization is considered a section 501(c) organization if it has a favorable determination letter issued by the IRS or an opinion from a United States (U.S.) counsel (or any other person as the IRS may prescribe in published guidance). The favorable determination letter or opinion must conclude that the foreign organization is described in section 501(c).

Treasury Reg. § 53.4945-5(a)(5) provides that in relation to the determination of whether a private foundation has made a taxable expenditure when making a grant to a foreign organization which does not have an IRS determination letter, the foundation may rely on

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<sup>1</sup> All references herein to “section” or “§” are to the Internal Revenue Code of 1986, as amended, or the Treasury regulations promulgated thereunder.

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written advice from a qualified tax practitioner. The written advice must state that the grantee is an organization described in sections 509(a)(1), (a)(2), or (a)(3) (other than an organization described in sections 4942(g)(4)(A)(i) or 4942(g)(4)(A)(ii) or 4940(d)(2)). The term “qualified tax practitioner” is defined as an attorney, a certified public accountant, or an enrolled agent, within the meaning of 31 Code of Federal Regulations (CFR) 10.2 and 10.3, who is subject to the requirements in 31 CFR Part 10.

### **AICPA Proposal**

The AICPA requests that the IRS provide guidance indicating that taxpayers may, for the purpose of determining a foreign organization’s equivalency under section 1441 as an organization described in section 501(c), rely upon a written opinion provided by a qualified tax practitioner (using the same definition provided in the regulations for section 4945 purposes).

### **Analysis**

The preamble to the final regulations under section 4945 states that the IRS and the Department of the Treasury (“Treasury”) believe that expanding the class of practitioners on whose written advice a foundation may rely for the purposes of making a good faith determination, will decrease the cost of seeking professional advice.<sup>2</sup> In addition, it will encourage more foundations to obtain written tax advice, thereby promoting the quality of the equivalency determinations being made. We believe that the same argument applies with respect to equivalency determinations made for the purpose of section 1441.

Many tax practitioners believe that the final regulations under section 4945 may facilitate the establishment of organizations that will serve as repositories for equivalency determinations by allowing reliance on opinions prepared by qualified tax practitioners who are employed by the repositories. Such establishments will serve to potentially ease the compliance burden on private foundations or donor advised funds that wish to engage in foreign grant making. Unless the class of practitioners is similarly expanded for the purpose of section 1441, an equivalency determination made for the purpose of section 4945 is not acceptable for the purpose of section 1441 because it was provided by a certified public accountant rather than counsel. Obtaining an additional opinion to comply with section 1441 would result in duplicative efforts by a taxpayer.

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<sup>2</sup> [TD 9740](#).

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## **Conclusion**

The AICPA suggests that the IRS issue guidance which clarifies that a foreign organization may rely upon a written opinion provided by a qualified tax practitioner (using the definition provided for section 4945 purposes) for the purpose of determining the foreign organization's equivalency under section 1441, as an organization described in section 501(c). We believe this type of guidance is consistent with existing regulations and in the best interest of both the IRS and taxpayers.

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The comments and recommendations included in this letter were developed by the AICPA Exempt Organizations Taxation Technical Resource Panel and approved by the AICPA Tax Executive Committee.

The AICPA is the world's largest member association representing the accounting profession with more than 418,000 members in 143 countries and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of our recommendation and welcome the opportunity to discuss this issue further. If you have any questions, please feel free to contact me at (408) 924-3508, or [annette.nellen@sjsu.edu](mailto:annette.nellen@sjsu.edu); Elizabeth E. Krisher, Chair, AICPA Exempt Organizations Taxation Technical Resource Panel, at (412) 535 5503, or [bkrisher@md-cpas.com](mailto:bkrisher@md-cpas.com); or Ogochukwu Eke-Okoro, Lead Technical Manager – AICPA Tax Policy & Advocacy, at (202) 434-9231, or [oanokwute@aicpa.org](mailto: oanokwute@aicpa.org).

Sincerely,



Annette Nellen, CPA, CGMA, Esq.  
Chair, AICPA Tax Executive Committee

cc: Ms. Elinor Ramey, Attorney Adviser, Office of Tax Policy, Department of the Treasury