

# Morgan Lewis

**Kenneth S. Kail**

Partner  
+1.212.309.6950  
ken.kail@morganlewis.com

May 14, 2018

Roberto Mora-Figueroa  
Internal Revenue Service  
Room 6129  
1111 Constitutional Avenue N.W.,  
Washington DC 20224

Email: RJoseph.Durbala@irs.gov

Re: Department of the Treasury notice and request for comments on Forms SS-4 and SS-4-PR.

Dear Mr. Mora-Figueroa:

The following comments are submitted in response to Department of the Treasury notice and request for comments on Forms SS-4 and SS-4-PR, concerning employer identification number ("**EIN**") applications, OMB Number 1545-003, published in the Federal Register on March 23, 2018.

We urge the Service to consider: (1) permitting non-government entities to be named as the responsible party in order to accurately identify the true general partner or managing member of a limited partnership ("LP") or limited liability company ("LLC"); (2) expanding the definition of responsible party to permit entities to appoint an officer as a responsible party who is best suited to respond to enquiries from the Internal Revenue Service; (3) removing the restriction on one EIN issued per responsible party per day; and (4) with regard to international applicants, either permitting online applications or, at a minimum, permitting the material to be electronically transmitted to the Internal Revenue Service agent as part of the phone call.

**A. Permit an entity that is the managing partner of an LP or the managing member of an LLC to be the responsible party.**

EIN applications require naming a "responsible party," defined as "the person who ultimately owns or controls the entity or who exercises ultimate effective control over the entity". Examples in the instructions include the principal officer of a publicly traded corporation, the general partner of a publicly traded partnership, or a person who, as a practical matter, manages the applicant. The December 2017 Instructions to Form SS-4 added a new requirement that the responsible party must be an individual (*i.e.*, a natural person who exercises effective control over the applicant), unless the applicant is a government entity.

This new requirement does not provide sufficient flexibility to accurately identify the true responsible party in cases involving LPs and LLCs that are managed by an entity member or entity partner, or in the case of a publicly traded partnership where the instructions specify that the

**Morgan, Lewis & Bockius LLP**

101 Park Avenue  
New York, NY 10178-0060  
United States

☎ +1.212.309.6000  
📠 +1.212.309.6001

responsible party is the general partner, in that it inaccurately equates the natural person with the responsible party.

This problem is further exacerbated by the language contained on the EIN confirmation letter generated by the Internal Revenue Service, and the information that automatically populates on the EIN online data summary, which is the final screen appearing prior to pressing "Submit". We have found that in each instance, the individual identified as the responsible party has "GEN PTR" after his or her name if the entity is an LP, and "MBR" if an LLC. The problem is that the individual identified as the responsible party is not the general partner or a member. Under the laws of most states, holding oneself out as a general partner of an LP or member of an LLC could result in that person having the same liability as if they were in fact a general partner or member. We have advised our clients that upon receiving the EIN confirmation letter with the erroneous designation, to send a letter to the Internal Revenue Service identifying the true general partner or member, as applicable.

We have also seen individuals who refused to be responsible parties for purposes of Form SS-4 because they do not want there to be a risk of their social security number being compromised. Particularly in private equity and mergers and acquisition transactions, the Form SS-4 ends up in an electronic data room, and is seen by a large number of people, which could lead to it getting into the wrong hands. We would note that tax returns themselves don't require the social security numbers of the signor to be provided.

We can only surmise the reason for the shift to requiring that individuals be listed as responsible parties for purposes of Form SS-4 and Form 8822-B (Change of Address or Responsible Party – Business, which instructions incorporate those from the instructions for Form SS-4 regarding responsible parties). One explanation would be to avoid nominees or fraud, and a second would be so that any Internal Revenue Service correspondence goes to a person who knows how to handle said correspondence. We do not think that the risk of fraud or lost mail is lessened by the shift to a natural person.

To remedy this problem, the Internal Revenue Service should rollback the "natural person" requirement to allow for entities to be listed as the "responsible party" on EIN applications and Form 8822-B, at least where the applicant is an LP or LLC, because this comports with the reality that many general partners and managing members are entities. If this relief is not granted, the Internal Revenue Service should at least update its computer systems to allow for a clarification on the status of individuals that have been listed as the "responsible party" as an officer of the responsible party. Another possibility for relief would be to provide that if the third party designee on a Form SS-4 has a PTIN, that the PTIN of the third party designee could be to be used in lieu of the responsible party's social security number.

**B. The definition of responsible party should be expanded to permit entities to appoint an officer who is best suited to respond to enquiries from the Internal Revenue Service as a responsible party.**

The definition of who qualifies as the responsible party for purposes of the EIN application is narrow, with the result that it can be impractical and cause delays in communications with the Internal Revenue Service. Form SS-4, by its description of the responsible party as "the person who ultimately owns or controls the entity or who exercises ultimate effective control over the entity", seems to be referencing the chief executive officer or president ("**CEO**") or equivalent title, although the language that follows ("*[t]he person . . . should have a level of control over, or entitlement to, the funds or assets in the entity that, as a practical matter, enables the person, directly or indirectly,*

*to control, manage, or direct the entity and the disposition of its funds and assets*") suggests a broader class of officers. With regard to publicly traded corporations the instructions specify that the person should be the "principal officer" (which also seems to be the CEO) and for publicly traded partnerships it is the general partner.

The requirement that the CEO be the responsible party for publicly traded corporations and possibly for other entities, is in stark contrast to the person who is permitted to sign the tax return. For a partnership, the instructions to Form 1065 provide that, "[b]eginning in 2017, any partner of a partnership or any member of a limited liability company may sign the return." For a corporation, the instructions to Form 1120 provide that the form must be signed by the "president, vice president, treasurer, assistant treasurer, chief accounting officer; or [a]ny other corporate officer (such as a tax officer) authorized to sign." Similarly, instructions to Form SS-4 permit signatories to be "other principal officer[s]" for corporations, an "officer having knowledge of its affairs" for partnerships, and other unincorporated organizations, and "division managers" in the case of foreign EIN applicants.

The function the responsible party performs can be equally, and in some instances more effectively, served by appointing someone who can specifically act as a point of contact with the Internal Revenue Service to facilitate productive interactions, and who has adequate federal income tax expertise to ensure entity tax compliance. We therefore urge the Internal Revenue Service to allow more flexibility in who can be named as the responsible party on EIN applications.

We would suggest that with respect to LPs and LLCs (including publicly traded partnerships) which have officers, and with respect to corporations, that the definition of responsible party for purposes of Form SS-4 and Form 8822-B be clarified so as to include "president, vice president, treasurer, assistant treasurer, chief accounting officer; or [a]ny other officer (such as a tax officer) authorized to sign." In short, we think that the taxpayer is best suited to decide who should receive correspondence from the Internal Revenue Service.

We also note that the terms, "responsible party" and "responsible person", appear in the Internal Revenue Code, the Treasury Regulations and in other internal revenue procedures, and that no consistent definition for these terms is apparent. The Internal Revenue Service has, however, taken a more expansive and practical approach as urged above. For example, the use of the term, responsible party, in the Federal Excise Tax Exemption Program permits the responsible party to be "individuals who are employees, officers or directors of the applicant with whom the IRS can resolve FET matters that arise under the closing agreement and have the authority to sign on the taxpayer's behalf."<sup>1</sup> Thus, the Internal Revenue Service has precedent for taking a more expansive, pragmatic approach.

**C. The restriction of one EIN issued per responsible party per day is commercially challenging.**

The EIN is an important identifier that businesses need to obtain to comply with various tax and non-tax obligations. For example, prior to opening a corporate bank account, banks require an entity's EIN as part of their customer identification program.<sup>2</sup> For business transactions that require

---

<sup>1</sup> See <https://www.irs.gov/individuals/international-taxpayers/federal-excise-tax-exemption-program> (last visited 4.23.2018)

<sup>2</sup> See 31 C.F.R. §§ 103.131(a)(6), (a)(4)(i), 68 F.R. 25109 (anti-money laundering requirements imposed on banks' customer intake processes); see e.g., Bank of America's published

bank accounts to be set up for multiple entities within a short period of time—which is not uncommon in large business transactions where multiple new holding companies are being formed—limiting EIN applications to one per responsible party per day delays the bank account opening process. Moreover, for private equity clients, the same individual may be a responsible party for multiple acquisitions, making the one-per-day limitation particularly problematic. Similarly, the EIN is also used for employment and sales tax purposes. Thus, the limitation can have the effect of creating transactional bottlenecks and delaying the timing of large business transactions, therefore compromising commercial efficacy. Clients have raised concerns that this limitation is commercially impractical.

The limitation could also hinder prompt tax compliance. For example, where a responsible party is seeking to register multiple newly-established entities for payroll taxes prior to a tax filing deadline, or where a group of foreign entities are seeking to make an entity classification election through the filing of Form 8832. While there are instances where the taxpayer may be allowed to provide a tentative EIN response,<sup>3</sup> the reality remains that the limitation on EIN applications can impact a taxpayer's ability to promptly remedy any compliance issues.

The instructions to Form SS-4 indicate that "[t]o ensure fair and equitable treatment for all taxpayers, EIN issuances are limited to one per responsible party, per day. . . . This limitation is applicable to all requests for EINs whether online, telephone, fax or mail."

With regard to online applications, the Internal Revenue Service computer system seems to process requests nearly instantaneously, so permitting multiple applications by the same responsible party should not impede others making online applications at the same time. Similarly, we would expect mailed or faxed applications to be processed largely electronically, so increasing the limit shouldn't impede other mailed or faxed applications, not to mention the issue of what the Internal Service should do if it receives two mailed requests from the same responsible party on the same day, even if mailed on different days. We agree that phone requests demand more time from the Internal Revenue Service, but believe, as discussed in the next section, that streamlining the process and permitting online applications for foreign entities would free-up more time for phone applications.

**D. With regard to international applicants, either permit online applications or, at a minimum, permit the application to be electronically transmitted to the Internal Revenue Service agent as part of the phone call.**

With regard to international applications, the process is quite slow and cumbersome in that it requires a telephone call, and then there is a wait of 30 minutes to an hour, and then, if a third party designee (such as a law firm or an accounting firm) is making the application, a walk to the fax machine by the third party designee, followed by a walk to the fax machine by the Internal Revenue Service agent. Usually, after about 15 minutes of "did you receive it" and "ok, I will resend it", until the third party designee or Internal Revenue Service Form 2848 is received and can be

---

documentation requirements for the opening of corporate bank accounts:  
<https://www.bankofamerica.com/deposits/required-documents-corporation.go>.

<sup>3</sup> E.g., a taxpayer can indicate "EIN applied for" if it does not have an EIN by the return filing due date—see Instructions for Form SS-4 (Rev. December 2017), but tracking of the election would be much easier if the EIN was provided on the form.

Roberto Mora-Figueroa  
May 14, 2018  
Page 5

processed. The time spent waiting, as well as the going to a fax machine and waiting for the fax to be received, is a frustrating and time consuming process.

It is rare that a law firm or accounting firm sends a fax anymore, and, as a result, there are fewer and fewer fax machines. Any document that is sent via email is first scanned into PDF format, is subsequently received by a computer, and then emailed to the ultimate recipient. If the Internal Revenue Service permitted applications to be emailed or otherwise electronically transmitted to the agent while on the phone, it would halve the processing time, perhaps allotting time to process a second application from the same responsible party. Alternatively, if there are concerns about inadequate encryption or security, there might be a way for law and accounting firms, and other frequent requesters, to upload pdf documents to an IRS server, receive a tracking number, and then provide that tracking number to the agent.

In addition, we are uncertain why international applicants are not permitted to apply on-line. It would certainly expedite the process and free-up time for Internal Revenue Service personnel. If security is an issue, where a third part designee is involved, a PTIN could be used to establish identity.

\* \* \* \* \*

Morgan Lewis thanks the U.S. Department of Treasury and the Internal Revenue Service for their willingness to consider our comments to the EIN application process. If you have any questions, please do not hesitate to contact us.

Sincerely,



Kenneth S. Kail