

What you Need to Know About: New IRS Guidelines for Equivalency Determination

Host: Ted Hart

Guest: Beth Kingsley – Harmon, Curran, Spielberg, and Eisenberg

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Now, welcome the host of the *CAF America Radio Network*, Ted Hart.

Ted Hart: Welcome here to the latest edition of the *CAF America Radio Network*. Today we have a very important topic due to the IRS' release of revenue procedure 2017-53 on the foreign public charity equivalency determinations. My guest here today on the *CAF America Radio Network* is Beth Kingsley, attorney at the firm of Harmon, Curran, Spielberg, and Eisenberg. Welcome, here to the *CAF America Radio Network*, Beth Kingsley.

Beth Kingsley: Thank you, Ted. Glad to be with you.

Ted: Beth, it's great to have you here. I'll just let our listeners know that I'm also live casting on Facebook right now at [Facebook.com/tedhart](https://www.facebook.com/tedhart), so they can watch as well as listen. If you would like to ask a question of our guest today, you can also call in as the announcer mentioned at 914-338-0855. Now, Beth, our topic today, as I mentioned, are these new IRS guidelines for equivalency determination. I'm going to start off by saying, the IRS doesn't do this very often. They issued new regulations in 2015, this is lightning speed.

Beth: It really is. Those of us who advise charities are accustomed to waiting what seems like a very long time for the IRS to be able to mobilize and provide guidance. It's just a challenge. In this case, it's been less than two years. When they issued those regulations, they promised they would be updating related revenue procedure, and here it is.

Ted: Here it is, right here. Now, these guidelines are extremely important. We've got only a short period of time so I want to really get into the details. As an overall, as I read through these new guidelines, it seems to be that the IRS is very concerned about having equivalency determination, or ED certificates, downright. They are determined to give tools to help make

that happen.

Beth: I think that's right. The prior guidance didn't walk us through exactly what you needed to do in one of these opinions. Even the regulations just stated that an opinion has to be based on sufficient facts that the IRS could read it and come to a conclusion that the organization isn't a foreign charity equivalent. This really provides a roadmap for how to create a solid opinion that is reasonably reliable.

Ted: Reliable is, of course, an important aspect. So let's get right into this. Section three number four of these new guidelines specifically speaks to the issue of reasonable reliance and good faith equivalency determinations. It seems to me that the IRS specifically is concerned about those who might be doing what we might consider to be ED light or not paying close attention to the regulations. And so, they're determined to make sure that those who wish to grant internationally an ED or Equivalency Determination is the right procedure that it's based on good facts.

So, what do you think about the IRS' position as they stated in section three number four of these new guidelines?

Beth: I think they make it really clear. They provide a roadmap for a practitioner like me who's writing an opinion, but they also make it really clear that just having a piece of paper with a lawyer signature, and actually it's not just a lawyer, any qualified tax practitioner, but just having that piece of paper signed by someone who claims they know what they're doing is not sufficient. You still have to be reasonable in your reliance on it.

That's not reasonable if, for instance, you provided the information to the person who gives the opinion and you withheld certain facts, or if you know or should know that there is something fishy about it. That there's something insufficient about it. So, you need to pay some attention and keep your eyes open in looking at that.

Ted: Also, Beth, turning to someone who just happens to be a CPA or just happens to be an attorney but doesn't have expertise in putting this together is maybe not relying on reasonable good faith. It could be, but it may not.

Beth: Yes. It's hard for me to imagine that you could do a reasonable opinion if you don't have some background in charitable organizations, and maybe not in foreign grant making, but some familiarity with the sector and with the rules that are in place to qualify as a 501(c)(3) under US law.

Ted: The IRS goes on in section three number five of these new guidelines and specifically is talking about this checklist that needs to be thoughtfully reviewed by someone who really knows what they're doing, because there are pitfalls to not having good faith or not even having a knowledge of where the ED certificate is coming from.

Beth: That's right. I don't want to be too alarmist because I think there's a lot of ways you can lose the protections, the sort of safe harbor protections that are available, if you're relying on a qualified opinion under this revenue procedure. That doesn't automatically mean that you're going to be subject to excise taxes, but it removes that layer of protection. The whole purpose of going through equivalency determination is to give you that protection against these excise taxes.

Ted: Give you that protection, exactly. I think what the IRS is saying here is maybe just have enough doubt in your mind to ask the right questions and to, in fact, be able to rely on the information in good faith. Let's move on to section 4.03. I thought this was extremely important and I'd like you to sort of walk us through here seemingly sort of benign, but the affidavit must be signed by an officer or a trustee. Why is that significant?

Beth: Well, and it's interesting because it is just sort of an aside as they're talking about it, but they really want a senior person who is responsible for the organization. So, not just someone who is responsible for a program or for fund raising, but someone who speaks on behalf of the entire organization attesting to the fact in any affidavit that you want to rely on in doing an equivalency determination.

Ted: Beth, just for our listeners, let's back up just a little bit. Why would an affidavit be requested of a foreign charity as part of any of this process?

Beth: Sure. Until the regs were issued about two years ago, there used to be this procedure where you could absolutely just rely on an affidavit from a foreign charity that basically said it was an equivalent. The IRS realized that that was just too-- there was expecting foreign organizations to know far too much about US law. So, they changed that rule and you can't just rely on those representations, but you can rely on the grantee telling you about their organization, providing you their governing documents, telling you what their purposes are, telling you what their activities are, giving you their financial statements, and attesting to the fact that those are the documents and that is a reasonable description of the activities. So that you might an affidavit, then affidavit is required, but it seems like it's a good practice to ask them to really stand behind their representation of the description of the fact.

Ted: But the IRS is saying here, "No, hold on, this can't just be some staff person pushing paper here." It seems to me that they're saying, and as you said, it almost seems a sort of an aside, but it's really, really important, that that needs to be signed by an officer or a trustee. It seems that the IRS is saying, "There needs to be leadership involved in attesting to the facts."

Beth: Yes, that I absolutely agree with. It needs to be someone who speaks on behalf of the whole organization, basically. It's really parallel to what they require when a new US organization submits an application for recognition of exemption. That also has to be signed by an officer, right? So, they're emphasizing the parallel there.

Ted: That's right. Let me just ask you overall, because you're working in vetting a charity in

another country with a different culture, perhaps with a different legal system, what sort of translation of documents are permitted or required to be used? Because you may be actually vetting a charity that the country that they exist in have a different language? So, where are the requirements for certified copies of documents, and when can other sorts of translation be used?

Beth: Well, in a couple of different places. The IRS makes it clear that both with respect to foreign law and with respect to various documents such as bylaws, or articles of incorporation, or whatever documents you're reviewing, if you have a certified copy that meets the requirements of revenue procedure 2017-1, that is clearly sufficient. It doesn't require that you have that level of certification. So, I think it's a decision.

Ted: I guess for the higher level of protection for what you're looking at if it's been certified but that's not required.

Beth: That's right. I think in different contexts, it might be appropriate to rely on different levels or different kinds of translations you need to look at all the relevant tracts to make that call.

Ted: This comes back to the professionalism, the background, and the experience of the person who is putting together the equivalency determination. In the first place is their level of expertise, and being able to look at various types of translations to understand if it's reasonable that sort of an underlying fact to whether or not you can reasonably rely on good faith and the certificate itself.

Beth: Yes, I think that's right. There are a number of places where judgments are involved. If you're relying on someone else doing the work of an equivalency determination, then you want to be confident they are exercising their judgment with reasonable amount of discretion.

There's no guarantee that the answer is going to be the same that the IRS would arrive at, and no one is held to that standard. It's not that you can never have a conclusion that they disagree with, it's you got there in a responsible way. That's what's really key to having to protect-- yes.

Ted: Would certainly take some experience. Moving right along, section 5.06, really, really important here. What's new about lobbying? Which of course is a big issue in equivalency determinations to begin with, but now we've got some new guidance from the IRS in terms of, how should that be evaluated? So, lobbying being done by that foreign charity with the section 5.06 now say?

Beth: Well, right. What 5.06 now says is that you need to confirm that the grantee does not do a substantial amount of lobbying and does not intervene political campaigns. Also, that the governing instruments of the organization don't expressly permit substantial lobbying or political activity. Under the revenue procedure that this supersedes, there was a requirement that the grantee attest to the fact that the law and customs applicable to the organization actually prohibit substantial lobbying and political campaign intervention.

That required digging into foreign law in a way that could be really challenging, as a US attorney without necessarily the language or the access to materials.

Ted: Exactly. As a standard that, quite honestly, could be seen as sort of unfair to that foreign charity because they may restrict themselves, but requiring to attest to the laws and customs is something that may be beyond their capacity. Therefore, what are they attesting to? I think that's an important. So, everyone flag section 5.06, but let's move right on. I have to say when CAF America read these new guidelines, so much of what we consider to be best practices and we have had in place for many years are now part of the guidelines.

Section 5.09 certainly fits in that category. We're so pleased to see. This is essentially about what you tell the details, but from our perspective, regarding terrorist organizations, this is a best practice now codified.

Beth: Yes, that's right. There is a provision that says an organization that's on any of the terrorist watch lists, and there would-- a specific code section cited, cannot qualify as taxexempt.

The revenue procedure tells us we need to look up the organization to make sure they are not on a covered watch list or sanctions list, but it also makes the point that it's not necessarily a requirement for the ED opinion, but the grantor really needs to check out not only the entity itself, but its officers, directors, trustees, make sure they are not on any of the watch lists.

There are good reasons for that, it's not just tax law compliance. There's obviously a lot of different legal concerns when we're talking about terrorist financing or anti-terrorist financing measures.

Ted: There's so much that goes into that for those of us who sort of live and breathe this stuff. Knowing whether or not there are politically exposed persons serving on that board, whether or not there are people serving on that board or in a leadership position that have been convicted of money laundering, those who are associated, as you said, on a watch list for terrorist financing. Those become very, very important parts of the professional oversight that then gives you, the person who is making the grant, reasonable reliance on good faith work being done here.

Beth: Right. Well, in some of those laws, I mean, this revenue procedure is about an area where you get protection lee. If you reasonably rely on opinion of counsel, you're protected even if the IRS disagrees with that opinion in the long run. In some of these areas, you're not protected. The fact that you behaved reasonably. You've got to be really sure. You're responsible for making sure your money is not going to terrorist organizations.

Ted: Exactly. That's why for years, an ED certificate standing by itself is not necessarily a license to give. There's a lot of other aspects of moving money internationally, both out of the US and

into another country, that have to be satisfied and taken into consideration. Now, Beth, we're going to just have a very quick mid-show reminder here, and then we're going to come back. When we come back, we do have a caller. Caller will be with you in just one second.

Ted: We're live here with Beth Kingsley, Attorney at Harmon, Curran, Spielberg, and Eisenberg. Beth, we have a caller. Caller, I believe it's Robin from Buffalo, do you have a question for our expert today?

Robin: Yes, I do. Hi, Ted and Beth. Thank you for taking my call. I was wondering, well, hospitals outside the United States have to be in compliance with the Affordable Care Act to be able to qualify for an ED Certificate. I ask primarily because of 501(c)(3) Hospital in the US would have to comply with four specific requirements of the ACA. I wanted to get your thoughts.

Ted: Okay, good question.

Beth: Right. That is actually explicitly-- Yes, it's a great question. It's one of the things that I think is really beneficial about this ruling, is that it's very clear that a foreign hospital is not required to comply with those requirements, unless it's also licensed in the United States. We're not going to take US specific requirements and export them to foreign context.

Ted: That's right. That's sort of a potential stumbling block in an ED certificate averted, right? Because that's an inadvertent set of rules that do affect 501(c)(3). Of course, that's the underlying premise of equivalency determination, is that we're finding that charity to be equivalent, and so the ACA itself could trip up a hospital, which is probably not the intention of the ACA in the first place.

Beth: I think that's right. It was not passed with an eye toward changing how we look at foreign hospitals. It was passed with an eye toward changing how we regulate healthcare in this country. This just makes it clear that we don't have to address that in the foreign equivalency context.

Ted: Exactly. Now, another very important area within these new IRS guidelines is Section 5.11. This seems this is specifically related to schools, Beth. I draw your attention because from my perspective, this seems to recognize different cultures and legal structures, but gives very good guidance as to how a school could be found equivalent. Can you walk us through the details of Section 5.11?

Beth: Sure. In the United States, to a school since the 70s, the IRS has required that to qualify as a 501(c)(3) organization, a school may not discriminate on the basis of race. Given the history of race in this country and of foot-dragging and extended segregation in schooling, the IRS created this fairly burdensome set of procedures that a school has to go through. It can't just say, "We don't discriminate." It has to publicize that. It has to keep records to document nondiscriminatory policies.

Some of the specifics of those rules can be very difficult to translate, again, to a foreign context. The ruling here says a foreign school, it does have to have a racially nondiscriminatory policy, and it has to somehow demonstrate that it complies with that policy, but we're not going to require you to go through the exact same procedures as a US school. You can look at the appropriate context of the country, the laws that apply to it, and come up with whatever evidence you think is appropriate evidence of racial nondiscrimination.

Ted: While we're there on the issue of schools and discrimination, what about religious based schools who only admit students from a particular religion? Could they qualify under ED for funding? Is that possible using any of these guidelines?

Beth: There's nothing that says that you-- I mean, it is permissible to discriminate on the basis of religion, to have a religiously oriented school that is only open to students who are members of that religion, provided that that is not a cover for racial discrimination.

Ted: All right. So, it's the professional aspect of being able to divine the difference between that. Really suggest that you've done this before, and that you have seen the evidence and you're able to, again, in putting together the certificate, working with an organization like CAF America and our advisors who have the expertise in this area. The underlying premise here is that in making an international grant using equivalency determination, there is a good faith reason for you to have reasonable reliance on that opinion.

Moving along and watching our time here, I want to draw our audience's attention and yours back to Section 6.03. This is so important, because many organizations are new. They don't have five years experience. It looks to me, again, like this is codifying best practice in an area that many of us have already had to maneuver, but there were not specific guidelines in the past.

Beth: Yes, that's right. It is coming to the legal conclusion that I think we had all-- or many of us had arrived at by reasoning from the nature of 501(c)(3), and how new US organizations are treated. This ruling makes it really clear that a new organization in existence for less than five years can qualify for equivalency. In fact, there's an example at the end that talks about an organization that's really brand new, and there's no concern about it getting an equivalency ruling in the same month that it's created, so long as you have all the information that's needed to reach that conclusion.

Ted: That's right. That really is very, very important, because as you said, those of us who are professionals in this area and do this for a living, on behalf of those who really just want to be charitable, they want to be philanthropic in their support, but they also want to make sure that they're guaranteed of regulatory compliance. This has been an area that has been a concern in terms of potentially going too far out on the limb, even though as you said, many of us have sort of come to a comfort place with divining from current regulation and practice.

This really is giving comfort to those best practices within these new guidelines, and potentially

opens up opportunities for those that are new or less than five years and wouldn't normally have as clearer path to qualifying under equivalency determination.

Beth: Yes, that's right. It no longer is a matter of reasoning. It's a matter of, it says it right here. We can totally rely on that.

Ted: Talk about saying it right here. I mean, you read through this entire document which, again, we started off our chat here today saying how odd and nice for us that are in the business, how quickly this was established and sent out by the IRS. This actually came into effect, these new guidelines, on September 14th of this year 2017. So, it has come very, very quickly, but it also came with some really good examples as you just mentioned. One example that's related to section 6.03, but section seven itself, talk to me a little bit more about this guidance.

It seems that the IRS, again, and we started off with this premise, is saying they really want this done right, and they're giving us much example and checklist in this new guidance to make sure that there's less doubt about what a good ED looks like.

Beth: Yes, that's right. What a good ED looks like, and how long you can rely on it for. Because there are these intersecting periods of when is an opinion currently qualified, and when does the public support test run? Because you do this five-year average and then it covers subsequent years, but then with a new organization, you can get a rule and you're likely to be publicly supported for five. So, how does the twos and the five line up?

They really walk it through instead of making you parse sort of the language of regulations talking about number of years. They give us a number of examples that really, I think, clarify it and make it a lot easier to know exactly when an opinion is good for.

Ted: That's right. I just want to wind up here. Beth, believe it or not, we only have about few minutes left on such an important topic. The IRS has released new revenue procedure 2017, we can say, 2017-53. This is specifically on foreign public charity equivalency determinations. Our guest today is Beth Kingsley. Beth, can you just summarize? We've covered so much today, section three, section four, section five, section six, section seven, and specific things that are new, guidance that's important. Summarize all of this. What has the IRS done in issuing this new guidance?

Beth: I think the IRS has given a road map for exactly how to do a good equivalency opinion. It's also made clear what doesn't qualify. So, things that don't really get into the substance, that's laid out here. It's really made it possible to be really comfortable that an opinion meets the necessary standard, because it just spells out all the different requirements, and it's addressed some substantive legal concerns that made it harder to do these opinions.

Ted: That's right. Beth, why do you think the IRS has done this so quickly after the 2015 regulations?

Beth: I think it was a priority on their list. Having done the regs, this was the clear next step. I also think there was some concern on their part about what people are considering qualified advice of counsel, and wanting to make it clear that it has to really have some content to it and that your reliance has to be reasonable. They came up with this, and I think they did a really good job.

Ted: They did a great job from CAF America's perspective. This checklist is fantastic as I said before. It's codified some of the best practices that we've been using for many years. I think it's fair to say that there may have been some concern on the part of the IRS of some out there who may be issuing ED certificates that could some people might see as questionable, or ED light.

I think this really solidifies what is a really good ED, what can a grant maker rely on in good faith, and now we've got these new guidelines. Beth Kingsley, thank you so much for your expert advice, and thank you for being our guest today here on the CAF America Radio Network.

Beth: Thank you. Great to talk to you.

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