

IRS

Looming IRS change could impact doing business in U.S.

By **Veronika Chang**

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(April 24, 2019, 9:46 AM EDT) -- On March 27, the Internal Revenue Service announced that only individuals with tax identification numbers may request an Employer Identification Number (EIN) as the "responsible party" on the application. This begins May 13. Until now, there has been no such requirement. The IRS says this change is part of its ongoing security review.

There was little response from the tax community in the U.S. as it will likely not affect those in the country. However, this change does warrant a closer look for those based outside the U.S. and who do business there.

An EIN is a nine-digit, federal tax identification number that identifies a business entity and other entities (i.e., a partnership, estates, trusts and retirement plans for tax purposes). One can apply for an EIN online (only for applicants in U.S.) or by filing a Form SS-4, *Application for Employer Identification Number*.

The application is simple, consisting of basic information about the entity. It must also list the name of the responsible party and, starting May 13, the responsible party's social security number (SSN) or IRS individual taxpayer identification number (ITIN). An ITIN is another nine-digit number issued by the IRS to those not eligible to get a SSN. A responsible party is defined as the person who ultimately owns or controls the entity and must be an individual (unless the applicant is a government entity).

How does this affect Canadians?

Canadian businesses with some footprint in the U.S. would need to apply for an EIN, whether it's a Canadian corporation doing business in the U.S. or a Canadian (corporation or individual) doing business there through a U.S. entity.

Consider James and Kate, both Canadian residents with successful businesses. James owns a Canadian corporation and plans to expand his business to the U.S. by forming a Delaware corporation as a subsidiary of his Canadian corporation. Kate also plans to dip into the U.S. market, but unlike James, she wants to deal with her U.S. customers through her Canadian corporation. Both need to obtain an EIN for their businesses.

James must apply for an EIN for the Delaware corporation, and Kate for an EIN for her Canadian corporation doing business in the U.S. This is so they can file taxes and meet with other reporting requirements south of the border. If they were to apply for an EIN for their respective corporations prior to May 13, no problem. However, if they apply for an EIN after May 13, the application gets complicated.

James and Kate, being the sole owners of their corporations, are considered the only responsible party for their respective corporations. Both are Canadian citizens and residents, and it's unlikely either has a SSN or ITIN. Unless they hold some type of U.S. visa (green card, work permit), they aren't eligible to receive a SSN. So they must apply for an ITIN, which is no straightforward matter.

To apply for an ITIN, you must file a Form W-7, *Application for IRS Individual Taxpayer Identification*

Number. And only the following individuals are eligible:

- an individual claiming a tax treaty benefit;
- an individual who needs to file a U.S. tax return;
- a dependent or spouse of someone who has a SSN (U.S. citizen, resident, or holds a U.S. visa);
- another person who meets certain listed exceptions.

These exceptions are:

- a person who receives passive income from the U.S., subject to a third party who withholds, or is eligible for, tax treaty benefits;
- a person with a home mortgage loan on real property in the U.S., subject to third-party reporting on mortgage interest, and those who sell U.S. real property);
- a representative of a foreign corporation for the purpose of meeting their e-filing requirements.

Bottom Line? Neither James nor Kate meets any of these criteria to be eligible for an ITIN. What can they do?

One solution is to have them file a U.S. tax return for the sole purpose of obtaining an ITIN. But why file a tax return in the U.S. when you don't have to and expose yourself to the IRS? Also note that an ITIN is not permanent; it expires. So, if James and Kate need to apply for another EIN for another entity, they need to go through the same process again.

It's possible the IRS will revise the eligibility requirement to apply for an ITIN to include non-resident individuals for the purpose of applying for an EIN as a responsible party. But there are no talks about that yet. And until it happens, James and Kate might just have to file a U.S. tax return (or make someone with a SSN or an ITIN a responsible party for their corporations).

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