

New Exempt Organization Disclosure Requirements

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Practice Area: Nonprofit and Tax Exemption

For over 10 years, exempt organizations have been required to allow public inspection of their annual Form 990 and exemption application. On April 8, 1999, the IRS issued final regulations that modify the disclosure requirements. Beginning on June 8, 1999, exempt organizations must provide photocopies of their Form 990 and exemption application within 30 days of receiving a written request. The new regulations provide for only two exceptions. First, disclosure is not required if the request is part of a harassment campaign. Second, copies do not need to be provided if the organization has made the documents "widely available" (posted on the Internet). The specifics of these new rules are described below.

The new regulations send two strong messages. First, public scrutiny of exempt organization activities (including compensation information) is a fact of life and part of doing business as an exempt organization. Second, the IRS wants organizations to use the Internet for disclosure. Exempt organizations can respond to the first by using the Form 990 as a public relations tool to communicate the value of their activities to the community. In deciding whether to use the Internet, organizations need to balance the convenience of avoiding photocopy requirements against its impact on accessibility and ability to track who obtains the information.

Public disclosure of the Form 990 and exemption application is not a new requirement. They have always been available by written request from the IRS. In 1987, recognizing that this was more theoretical than practical, Congress required that tax-exempt organizations make their exemption application and three most recent Form 990s available for public inspection at their business locations. A tax-exempt organization was not required to provide copies. However, the requesting person could bring his or her own copying equipment. Beginning June 8, 1999, with limited exceptions, photocopies must be provided. The who, when, what, where, how, and why of these requirements are explained below.

WHO: Any organization described in § 501(c) or § 501(d) and exempt from taxation under § 501(a) must comply with the new disclosure requirements to the extent it has been required to file a Form 990 or exemption application. Private foundations, as defined in § 509(a), are not covered by the new regulations. The IRS intends to issue separate rules relating to the public disclosure requirements applicable to private foundations.

WHAT: Consistent with existing law, the new regulations require that tax-exempt organizations keep copies of their last three Form 990s and exemption application available for on-site public inspection during normal business hours. However, unlike previous law, organizations must now provide copies of their Form 990 and their exemption application.

A tax-exempt organization must fulfill a request for a copy of the organization's entire application for tax exemption or Form 990 return or any specific part or schedule of its application or return. However, an organization is not required to disclose parts of the return that identify names and addresses of contributors to the organization. The disclosure requirement does not apply to Form 990-T (unrelated business income tax returns), payroll returns, or any state returns.

WHERE: The Form 990 and exemption application must be made available at the organization's principal, regional, and district offices. An office will be considered to be a regional or district office only if it has paid employees (whether part-time or fulltime) whose aggregate number of paid hours per week is normally at least 120. A site will not be considered a regional or district office if the services provided at the site directly further exempt purposes (such as day care, health care, scientific or medical research) and the site is not an office for management staff, other than managers who are involved solely in managing the exempt function activities at the site.

If an organization does not have a permanent office, it may make the required documents available for public inspection at a reasonable location of its choice, within a reasonable amount of time after receiving a request (normally not more than two weeks) and at a reasonable time of day. At the organization's option, it may mail, within two weeks of receiving the request, a copy of its Form 990 and exemption application to the requester in lieu of allowing an inspection. However, the organization may not charge the requester for copying and postage costs unless the requester consents. If the organization has a permanent office but has limited or no office hours, it must make the required documents available during the periods when the office hours are limited or not available, as if it were an organization without a permanent office.

HOW & WHEN: If a request for copies is made in person, the copies must generally be provided that day unless unusual circumstances exist. The regulations specify that unusual circumstances may include, but are not limited to: the request for copies exceeding the organization's daily capacity for copies, the request being made shortly before the end of the business day, or the organization's managerial staff conducting special duties. If such an unusual circumstance is present, the copies may be provided no later than the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the date of the request, whichever comes first.

Copies may also be requested in writing: by facsimile, electronic mail, etc. The organization must generally provide the copies within 30 days of receiving the written request. A request for a copy of less than the entire application or less than the entire return must specifically identify the requested part or schedule.

The regulations allow organizations to charge a reasonable fee for copies and actual postage costs. The copy fee may be no more than the fees charged by the IRS for copies of exempt organizations' information returns and related documents: currently \$1.00 for the first page and \$.15 for each subsequent page.

The organization may require that the payment be made in advance. However, it must notify the requester of the prepayment policy within seven days of receiving the request. If the requester does not pay the fee within 30 days, the organization may disregard the request. For requests made in writing the organization must accept payment by any of the following means: certified check, money order, and either personal check or credit card. For requests made in person, the organization must accept payment by cash or money order.

Local agents may be hired to process requests for copies. The agent must be within a reasonable proximity of the applicable office and must follow the same guidelines as if the organization were providing the copies. The applicable deadlines for providing the copies are from the date of the request to the organization, not when the agent received the request. The use of an agent does not absolve the organization from any liability incurred under the regulations.

EXCEPTIONS: There are two exceptions to the copying requirements. First, organizations are not required to comply with requests for copies if they have made their requested documents “widely available.” The regulations provide that this exception can be met by posting the document on the organization’s World Wide Web page on the Internet or by having the document posted on another organization’s World Wide Web page as part of a database of similar materials.

The information will be considered widely available only if the entity maintaining the World Wide Web page has procedures for ensuring the reliability and accuracy of the application or return and takes reasonable precautions to prevent alteration, destruction or accidental loss of the documents. Additionally, the web page must clearly inform the reader that the document is available and provide instruction for downloading; it must be posted in a format that, when downloaded, viewed and printed, exactly reproduces the image of the exemption application or return as originally filed with the IRS; and an individual can access and download the document without special computer hardware or software and without any payment of fee to the organization maintaining the World Wide Web page. An organization that makes its documents widely available must inform individuals who request copies how and where to obtain the requested document. Although making the documents widely available exempts the organization from providing copies, the documents must still be made available for on-site public inspection.

An organization is also not required to comply with a request for copies if the key district director determines that the organization is the subject of a harassment campaign. The regulations indicate that a harassment campaign is a group of requests that are part of a singular coordinated effort to disrupt the operations of the organization rather than to obtain information. Whether a group request constitutes a harassment campaign depends on the relevant facts and circumstances. The regulations identify factors, such as an extraordinary number of requests made through form letters or similarly worded correspondence, that are indicative of a harassment campaign.

An organization need not comply with requests beyond the first two received within any 30-day period or beyond the first four received within any one-year period from the same individual or the same address. If a request does not fall into this category but the organization feels it is subject to a harassment campaign, it may apply for a determination by submitting a signed application to the district director for the key district where the organization's principal office is located. The organization may suspend compliance with any copy request if there is a reasonable belief that the request is part of a harassment campaign. However, the organization may only suspend compliance if it files an application for determination within ten business days from the day the organization first suspends compliance with respect to the request that is part of the alleged campaign. If the district director determines the organization is the subject of a harassment campaign, compliance with the copying request is not required. If the district director determines there is not a harassment campaign but the organization had a reasonable belief in delaying compliance, the organization must provide copies within 30 days of receiving the determination. If the district director determines the organization did not have a reasonable basis to suspend compliance, the organization remains liable for any penalties for not providing the copies in a timely fashion.

WHY: Penalty for failure to provide copies or allow public inspection of the Form 990 is a fine of \$20 per day, with a maximum penalty of \$10,000. Penalty for failure to provide copies or allow public inspection of the exemption application is \$20 per day, with no cap. Penalty for willful failure to provide copies or allow public inspection is \$5,000 per return or application.

CONCLUSION: Exempt organizations need to establish procedures or policies to educate personnel on these requirements and demonstrate corporate intent to comply. The policy should address whether the organization will: use the Internet, charge for photocopies, and require advance payment. It should also address where public inspection will be available and who will be responsible for monitoring and meeting time deadlines. Although using the Internet may be the easiest method for compliance, organizations should consider its impact on accessibility. The need to appear in person or submit a written request and pay for the copies may serve as a deterrent to the curious (including employees) who are merely seeking executive compensation information. It may also be more difficult to determine the source of the request when the information is obtained over the Internet.

The new disclosure requirements make the Form 990 and exemption application even more accessible than it has been. The good news is that Form 990 can serve as a public relations tool for communicating the organization's good works to the entire community. The annual Form 990 should be drafted with a wider audience in mind than the IRS. Although much of the Form 990 involves reporting strictly financial information, there are also general questions regarding the organization's exempt activities. As part of the Form 990, organizations must describe their exempt purpose achievements and the relationship of the organization's activities to the accomplishment of exempt purposes. Too often these questions are answered with broad, vague explanations. Answers should be as descriptive as possible to highlight exempt activities and the community benefit provided.

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