

**HOW TO COMPLY WITH THE FINAL REGULATIONS
GOVERNING DISCLOSURE REQUIREMENTS
FOR EXEMPT ORGANIZATIONS
OTHER THAN PRIVATE FOUNDATIONS**

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On April 8, 1999, the Treasury Department issued final regulations containing guidelines for compliance with the disclosure requirements of section 6104(d) of the Internal Revenue Code of 1986, as amended.¹ The final rules provide guidance to charities and other tax-exempt organizations, other than private foundations, regarding the public inspection and distribution of applications for tax exemption and annual information returns. Under current law, a tax-exempt organization must make available for public inspection its application for exemption and annual information returns; however, under the new regulations, a tax-exempt organization must provide copies of these materials as well.

Like the proposed regulations, the final regulations describe how a tax-exempt organization can satisfy the disclosure requirements through the use of an agent or by making such documents "widely available" on the Internet. In response to comments, the final regulations do not require that the documents be posted on the Internet in a particular format but instead set forth certain criteria that must be met. Finally, the final regulations set forth the standards that apply in determining whether a tax-exempt organization is the subject of a harassment campaign and describe the appropriate procedures for obtaining relief from a harassment campaign.

The new provisions described in this memorandum will go into effect on June 8, 1999. However, although Congress passed legislation in October 1998 which made private foundations subject to the same disclosure obligations as public charities, these provisions do not apply to applications for exemption and annual information returns filed by private foundations. Therefore, until sixty (60) days after the publication of final regulations specifically applicable to private foundations, existing law disclosure rules continue in effect for private foundations, including publication of a newspaper notice announcing the availability of private foundation returns for inspection.

¹ All section references are to the Internal Revenue Code of 1986, as amended (the "Code").

**DISCLOSURE REQUIREMENTS OF
SECTION 6104(D)²**

Once the final regulations take effect, a tax-exempt organization will be required both to provide for inspection, and to produce a copy upon request, of its application for exemption on Form 1023 or 1024 (if any is required).³ Section 6104(d) and the final regulations require disclosure of the application form itself and any documents submitted to support it. These include correspondence between a tax-exempt organization and the Internal Revenue Service (including responses to questions) and any legal opinions furnished in connection with the application. A tax-exempt organization is not required to disclose its application for tax exemption while the application is pending or where the Internal Revenue Service has issued an adverse determination. In addition, a tax-exempt organization must also make available, or produce a copy upon request, its three most recent annual information returns (usually Form 990 or 990-EZ but not 990-T or 1120-POL), along with all schedules (including Schedule A, which lists compensation), attachments and supporting documents. A tax-exempt organization is not required, however, to disclose the parts of its return that identify names and addresses of contributors to the organization nor is it required to disclose certain other information that is not available for public inspection under Section 6104. These records (minus the contributor list) must be available to the public, or copies thereof must be produced upon request, during regular business hours, at all of a tax-exempt organization's offices that employ three or more paid employees on a full-time basis.

RESPONDING TO REQUESTS

The final regulations provide details regarding the time and place for making applications and returns available for inspection, and the conditions that may be placed on requests for copies of these documents, including the amount, form and time of payment of any fees a tax-exempt organization may charge for copies.

TIME AND PLACE DOCUMENTS MUST BE AVAILABLE FOR PUBLIC INSPECTION

The new rules require a tax-exempt organization to make available for public inspection its application for exemption and annual information returns (minus the contributor list) at its

² The Tax and Trade Relief Extension Act of 1998 repealed existing section 6104(d), and redesignated section 6104(e), amended, as new section 6104(d).

³ Not all organizations that qualify for tax-exempt status are required to file an application for recognition of exemption. For example, a church is not required by law to apply for recognition of exemption. The final regulations also provide that any application for exemption filed before July 15, 1987, need not be made available unless the organization had a copy of the application on July 15, 1987.

principal, regional and district offices during regular business hours.⁴ A regional or district office is defined as any office, other than a principal office, which employs people for at least 120 paid hours a week in the aggregate, whether those employees are part-time or full-time. An office is not considered a regional or district office if the only services provided further the exempt purposes of the tax-exempt organization (e.g., day care, health care or scientific or medical research) and if the office does not serve as an office for management staff. The final regulations also set forth special rules for disclosure by a tax-exempt organization that does not maintain a permanent office.

PROVIDING COPIES

The final rules require that a tax-exempt organization respond to an in-person request for copies of its documents on the same day the request is made. Under unusual circumstances (e.g., when all of the organization's managerial staff is at an off-site conference), a request for copies may be complied with on the business day following the day the unusual circumstances cease to exist, but in no event no longer than five (5) business days after the request has been made.

In response to a written request for disclosure, a tax-exempt organization must mail a copy of the documents sought (minus the contributor list) within thirty (30) days of receiving the request or, if it has a prepayment policy, within thirty (30) days of receipt of payment. Material is deemed provided by a tax-exempt organization on the date of the postmark or private delivery mark. Requests may be made by electronic mail or facsimile and will be deemed received on the day the request is transmitted successfully. If the person requesting disclosure consents, the organization may provide the material via electronic mail. In this case, the material is deemed provided on the date the organization successfully transmits the electronic mail. If a tax-exempt organization requiring payment in advance receives a written request without payment or with insufficient payment, the organization must, within seven (7) days from the date it receives the request, notify the requester of its prepayment policy and the amount due.

⁴ A tax-exempt organization that did not file its own application for tax exemption and does not file its own annual information return because it is a local or subordinate organization covered by a group exemption letter and a group return must, upon request, make available for public inspection, or provide copies of, the application and supporting documents submitted by its central or parent organization to obtain the group exemption letter and the group returns filed by its central or parent organization. The local or subordinate organization shall permit public inspection, or comply with a request for copies made in-person, within a reasonable amount of time, i.e., normally not more than two weeks. The local or subordinate organization must comply with a written request for copies in the same manner as any other tax-exempt organization.

A tax-exempt organization must fulfill a request for a copy of less than its entire application for tax exemption or its entire annual information return so long as the request specifically identifies the requested part or schedule.

AGENTS FOR PROVIDING COPIES

The proposed regulations authorize a tax-exempt organization to designate a local agent to fulfill requests for copies of its documents. In the case of a request for copies made in person, the agent must be located in reasonable proximity to the office where a request is made and the organization must provide requesters immediately with the name, address and telephone number of the agent.⁵ A local agent must comply with all guidelines provided in the final regulations regarding timing of disclosure and notification of costs and payment policies. The deadline for producing the documents begins running from the time the request is made to a tax-exempt organization.

COSTS OF PROVIDING COPIES

The final rules allow a tax-exempt organization to charge a reasonable fee for the cost of reproducing and mailing requested documents. This fee is not to exceed the amount charged for duplicates by the Internal Revenue Service (currently \$1 for the first page and \$.15 for each additional page) plus any actual mailing costs. A tax-exempt organization may demand prepayment before furnishing requested documents. If a tax-exempt organization has informed an individual requesting documents of its prepayment policy and the individual does not pay the fee within thirty (30) days, or if the individual pays the fee by check and the check does not clear upon deposit, the organization may disregard the request. If a tax-exempt organization does not have a prepayment policy, it must obtain the prior consent of the requester before providing copies if the fee for copying and mailing the documents will exceed \$20.

If a request for documents is made in person, a tax-exempt organization must accept payment by cash and money order, and may accept other forms of payment, such as credit cards or personal checks. If a request for documents is made in writing, a tax-exempt organization must accept payment by certified check, money order and either personal check or credit card and may accept other forms of payment.

MAKING REQUIRED DOCUMENTS "WIDELY AVAILABLE"

The final regulations provide that a tax-exempt organization is not required to comply with request for copies of documents if the organization has made the requested documents

⁵ The penalty provisions summarized below will apply to an exempt organization if its agent fails to provide documents as required under section 6104(d).

“widely available” to the public. The final regulations specify that a tax-exempt organization can make required documents “widely available” by posting the documents on the Internet, either on the organization’s own World Wide Web page, or on another organization’s World Wide Web page designed to contain such information for several organizations.

In response to comments, the final regulations do not require that the documents be posted on the Internet in a particular format but instead set forth certain criteria that must be met.⁶ A document will be considered “widely available” only if the following three conditions are met. First, the applicable World Wide Web page must clearly inform readers that a document is available and provide instructions for downloading the document. Second, a document must be posted in a format that, when accessed, downloaded, viewed and printed in hard copy, exactly reproduces the image of the document as filed with the Internal Revenue Service (except for the contributor list, Form 990-T, and Form 1120-POL, which need not be disclosed). Third, a document must be posted in a format that may be accessed, downloaded, viewed and printed by any individual with access to the Internet without special computer hardware or software and without payment of a fee to the tax-exempt organization or to another entity maintaining the World Wide Web page. In addition, the entity maintaining the World Wide Web page must have procedures for ensuring the reliability and accuracy of any posted document and must take reasonable precautions to prevent alteration, destruction or accidental loss of any posted document.

Once the World Wide Web page is in place, a tax-exempt organization must provide any individual requesting a copy of documents with the location where the documents are available, including the web site address (if applicable). These instructions must be provided immediately to an in-person requester and within seven days in response to a request by mail. However, even if an organization makes its application or returns “widely available” on a web site or otherwise, it must still make those documents (minus the contributor list) available for inspection in person at its offices during business hours, as described above.

**PENALTIES FOR
NONCOMPLIANCE**

Failure to comply with the final regulations regarding disclosure of applications for tax exemption and annual information returns upon request will result in penalties outlined in sections 6652(c)(1)(C), 6652(c)(1)(D), and 6685. Specifically, a tax-exempt organization shall be fined \$20 for each day that it fails to meet the requirements regarding the disclosure of annual returns, not to exceed a maximum penalty of \$10,000 for any one return. A penalty of \$20 a day

⁶ The final regulations provide a one-year transition rule for a tax-exempt organization that posted its documents on the Internet on or before April 9, 1999 in a manner consistent with the proposed regulations. Until June 8, 2000, such an organization will be treated as having made its documents “widely available” for purposes of the final regulations even if the format used does not currently satisfy all of the criteria set forth in the final regulations.

is likewise due for failure to allow inspection of or provide a copy of an application for exemption, and no stated maximum penalty is provided.

If failure to comply with a request is deemed to be willful, section 6685 imposes an additional penalty of \$5,000 with respect to each application or return in question.

**GUIDELINES FOR RESPONDING
TO PERCEIVED HARASSMENT
CAMPAIGNS**

The final regulations define a procedure to be followed by a tax-exempt organization that is the subject of a harassment campaign.

WHAT CONSTITUTES A HARASSMENT CAMPAIGN

The final regulations state that a group of requests for an organization's return or exemption application is indicative of a harassment campaign if the requests are part of a single coordinated effort to disrupt the operations of a tax-exempt organization, rather than to collect information about the organization. Factors that might indicate that a campaign is underway include hostile wording, voluminous requests, sudden increases in the number of requests received, and multiple requests made on a form letter or with similar wording. In addition, the regulations provide examples indicating situations which rise to the level of a harassment campaign.

The final rules provide for limited self-help remedies. An organization need only respond to two requests in the same month or four in the same year that are made by the same person or received from the same address. However, further relief is available only after an organization has received a determination from the Internal Revenue Service that it is subject to a harassment campaign.

APPLICATION FOR DETERMINATION

If an organization receives a group of requests for information that seems to indicate a coordinated effort to disrupt its operations, it may apply to the district director for the Internal Revenue Service key district where the organization's principal office is located for a determination that it is the subject of a harassment campaign. The application must consist of a written statement giving the organization's name, address, employer identification number and the name, address and telephone number of the person to contact regarding the application. The application must also describe in detail the facts and circumstances suggesting that such a campaign is in progress. Pending a final determination on the application, a tax-exempt organization may refuse to fulfill any request for a copy of its documents if it reasonably believes the request is part of the alleged campaign, provided that its application for a

determination was filed within ten (10) days of the day that the organization first suspended compliance due to the alleged harassment campaign.

If the key district director determines that a harassment campaign is in progress, a tax-exempt organization need not respond to any requests that it reasonably believes to be part of the campaign. However, it should be noted that, ordinarily, the Internal Revenue Service will not consider it reasonable for an organization to deny requests for information that it receives from members of the news media.

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The foregoing is intended only as a summary and the final regulations are necessarily more complex in their entirety. If you have any questions about the final regulations, or would like more information regarding specific provisions, please do not hesitate to call Victoria B. Bjorklund (212-455-2875), Christina L. Nooney (212-455-2740), or Jennifer L. Franklin (212-455-3597) of our Exempt Organizations group.

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