

Exempt Exposure

TAX LAW: Recently finalized IRS regulations create a brave new world of public disclosure for charitable organizations. By Louis E. Michelson

What can make a bad day even worse for a busy lawyer is receiving a panicked call from a client, the director of a tax-exempt organization, wondering what he should do about the reporter who appeared in the lobby with demands to inspect a copy of the organization's most recent information return — and the cash to pay for it.

The receptionist had overheard the reporter calling his editor and explaining his planned exposé of the compensation being paid to the top executives of the charity. When the receptionist explained that the requested documents were unavailable and did not know whether or when this reporter's request would be met, the reporter walked off mumbling something about penalties and reporting the denial to the Internal Revenue Service.

The director wants to know whether there is anything to be concerned about. In particular, he wants to know what to say to the next reporter with a similar request.

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The IRS recently finalized regulations that provide guidelines for public disclosure of tax-exemption applications and annual information returns. Treasury Decision 8818 (April 9). Beginning June 8, the failure of tax-exempt organizations (other than private foundations) to allow inspection and provide copies of the requisite documents can subject the charity's officers, employees and directors, who are under a duty to comply with the new inspection and copying requirements, to a \$20-a-day penalty per return for each day the failure continues, not to exceed a maximum penalty of \$10,000. There is no maximum penalty for failure to allow inspection of the exemption application. Internal Revenue Code Sections 6652(c)(1)(C) and (D).

If more than one person has the duty to make the returns or exemption application available, they are jointly and severally liable for the penalties. If there is a willful failure to comply with the disclosure requirements, an additional penalty of \$5,000 for each return may be imposed. I.R.C. Sections 6652(c)(4)(B) and 6685.

Any person can alert the IRS to the "possible need for enforcement action" by providing a statement to the district director for the district where the tax-exempt organization's principal office is located. Treasury Regulations Section

301.6104(d)-3(g). However, an individual may not compel an exempt organization to allow inspection of tax returns. The obligations of Section 6104 may not be enforced through a private cause of action. *Schuloff v. Queens College Foundation Inc.*, 98-7465(L) and 98-7466 (2nd Cir. 1999).

The Tax and Trade Relief Extension Act of 1998 amended Section 6104 to subject private foundations to the same rules regarding furnishing copies of annual information returns that apply to other tax-exempt organizations. However, the new rules do not affect private foundations until the IRS issues final regulations that apply to them. Until then, the existing rules still apply.

The new public-disclosure regulations require tax-exempt organizations to comply with requests for copies of the following:

■ The organization's application for tax exemption and any supporting documents.

■ Any letter or document issued by the IRS in connection with the application.

■ Three most recent annual information returns. Generally, an annual information return includes Forms 990, 990-EZ, 990-BL and Form 1065 and all schedules, attachments and supporting documents. Sections 301.6104(d)-3(a) and (b).

If an individual requests a specific portion of the document, only that portion needs to be provided. However, the requester must specify exactly which portion is requested.

The compensation informa-

tion for officers and key employees must be made available. Section 301.6104(d)-3(d)(2)(ii)(B). An organization is not required to disclose the parts of the return that identify names and addresses of contributors to the organization or Form 990-T, the exempt organization business income tax return. Section 301.6104(d)-3(b)(4)(ii).

Tax-exempt organizations are permitted to charge a reasonable fee for the cost of copying and mailing documents in response to a request for copies (currently \$1 for the first page and 15 cents for each subsequent page, plus actual postage). They are required to accept payment made in cash or with a money order. If the request is made in writing, an exempt organization that accepts credit cards is not required to accept personal checks. Section 301.6104(d)-3(d)(3).

A tax-exempt organization is not required to comply with requests for copies if the organization has made the exemption application and its annual information returns "widely available" on the Internet. The documents must be posted in a format that, when accessed, viewed and printed, exactly reproduces the original document filed with the IRS.

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ne format that currently satisfies the regulations is "portable document format." PDF is designed to reproduce the

image of the original document exactly. Documents in the PDF format can be viewed, navigated and printed by anyone using freely available reader software. Individuals who request copies of documents must be furnished with the World Wide Web address where the documents are available to take advantage of this alternative. Section 301.6104(d)-4(b)(2).

Time and place restrictions exist for responding to document requests. How much time is afforded the tax-exempt organization depends on how the request is made. Requests made in person generally must be satisfied that day. If "unusual circumstances" arise, the request must be fulfilled the next business day after the unusual circumstance no longer exists (but no later than five business days after the initial request). An unusual request includes a request made at the end of the business day that require an extensive amount of copying. Section 301.6104(d)-3(d)(1).

For written requests, tax-exempt organization generally need to mail copies of their requested documents within 30 days of the date the request was received. If the tax-exempt organization requires advance payment of copying charges, it must notify the requester of the prepayment policy and the amount due within seven days of receiving the request. Section 301.6104(d)-3(d)(2).

The tax-exempt organization must make documents available and provide copies upon request during regular business hours at its principal office

and certain regional or district offices. Section 301.6104(d)-3(d).

The IRS has recognized that many tax-exempt organization maintain locations where their employees or volunteers solely perform exempt functions, but do not maintain administrative staff to respond to public-disclosure requests at such sites. Such offices are not considered to be regional or district offices subject to the disclosure requirements. Section 301.6104(d)-3(b)(5)(ii).

A tax-exempt organization need not comply with requests if it reasonably believes it is the subject of a harassment campaign. Generally, a harassment campaign exists when a group of requests and circumstances indicate that the purpose is to disrupt the operations of the organization rather than to obtain information. The Treasury regulations provide a procedure for requesting a determination from the IRS that an organization is subject to a harassment campaign. Section 301.6104(d)-5.

The executive directors of tax-exempt organizations (as well as others with a duty to respond to requests) need to be educated about how to comply with the new disclosure requirements. Increased disclosure may result in more scrutiny of annual information returns by officers, directors or trustees who wish to avoid surprises and inquiries that public disclosure might trigger. ■