

MINIMIZING RISK AND MAXIMIZING BENEFITS UNDER THE FINAL DISCLOSURE REGS. FOR EXEMPT ORGANIZATIONS

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Now that the Service has implemented the Code provisions calling for most types of tax-exempt organizations to make certain information available to the public, the organizations face compliance burdens and the risk that penalties may be imposed on responsible persons if they fail to comply. The rules are by and large reasonable and workable, however, and give such organizations an unprecedented opportunity to present themselves in a favorable light.

On 4/9/99, the IRS issued final Regulations (TD 8818) requiring tax-exempt organizations (TEOs) to provide copies of their annual information returns and exemption applications to members of the public on request. Affected organizations include not only Section 501(c)(3) public charities but all TEOs described in Section 501(c) or Section 501(d), including labor unions, trade associations, chambers of commerce, social clubs, credit unions, and veterans' posts.¹ A failure to satisfy these new requirements can result in substantial penalties being imposed on the individuals responsible for the failure. The final Regulations went into effect 60 days after issuance—on 6/8/99.²

The Regulations and the underlying statute—Section 6104(d)—represent an unprecedented expansion of the availability of basic financial and programmatic information about TEOs. TEOs with annual gross receipts of \$25,000 or more are generally required to file an annual information return with the IRS detailing the organization's financial status (including assets, liabilities, revenues and expenses), programmatic activities, and other information, including the compensation paid to directors and officers.³ With the issuance of these final Regulations, any person can now obtain the most recent returns filed by the organization simply by requesting a copy either in person or in writing. The Regulations therefore provide

both a risk and an opportunity for TEOs: a risk to organizations that fail to comply with the new rules or provide incomplete, inaccurate, or confusing information; an opportunity for organizations that comply with the Regulations and ensure that requesters receive complete and accurate information that presents the organization in the best possible light.

GENESIS OF THE RULES

Before 1987, annual information returns and exemption applications of TEOs other than private foundations were available to the public only from the IRS.⁴ Frustration with delays experienced by individuals and organizations seeking to review these documents led Congress to enact Section 6104(e), giving the public the right to inspect these documents at any principal, regional, or district office of a TEO.⁵ In order to take advantage of this right, however, an individual needed to appear in person at one of these offices. In addition, if a copy of any of the information on the return was desired, the individual had to either provide the copying equipment or manually copy the information onto a blank return form.

Recognizing the limitations of the public inspection requirement, Congress in 1996 amended Section 6104(e) to grant the public the right to receive copies of these documents from TEOs on request.

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Congress exempted private foundations from this requirement with respect to annual information returns (for which special disclosure requirements already existed under Section 6104(d)) but not with respect to exemption applications. Congress also provided that this amendment would not become effective until 60 days after final Regulations implementing it were issued.

Any person can now obtain a TEO's most recent returns simply by asking for a copy, unless the information is available on the Internet.

In 1998, Congress expanded the disclosure requirements in amended Section 6104(e) to include private foundations with respect to both annual information returns and exemption applications, and redesignated the amended statute as Section 6104(d). As with the amended Section 6104(e), Congress provided that this expansion

would not become effective until 60 days after final Regulations implementing it were issued. Those Regulations have not been proposed, let alone finalized, although Treasury and the Service have stated their intent to issue a notice of proposed rulemaking shortly. The new disclosure requirements in TD 8818, therefore, do not yet apply to the annual information returns (Form 990-PF) of private foundations.

The visibility of annual information returns filed by Section 501(c)(3) organizations other than private foundations is also increasing for reasons other than the new Regulations. The IRS has announced that it is in the process of putting all Forms 990 for Section 501(c)(3) organizations on CD-ROMs that will be made available to the public. At least one organization already has expressed an interest in obtaining the CD-ROMs, both for research purposes and for posting the Forms 990 on the Internet.⁶ The first set of CD-ROMs are expected from the Service this summer, and should include most Section 501(c)(3) organization Forms 990 for fiscal year 1997 plus any Section 501(c)(3) organiza-

tion Forms 990 for earlier years received after August 1998.

THE FINAL REGULATIONS

Section 6104(d) requires TEOs to provide, on request, copies of their annual information returns (usually Form 990 or Form 990-EZ) and their applications for recognition of exemption (usually Form 1023 or Form 1024). Requests may be made in person or in writing. Only reasonable copying fees, defined by the Regulations as no greater than the current IRS copying charge, and actual postage costs may be charged to the requester. Organizations are relieved of these requirements only if they make their returns "widely available" through the Internet or if the requests they receive are part of a campaign of harassment designed to disrupt the organization's operations. In addition, the public inspection requirements continue to apply and are not subject to either of these exceptions.

Affected Organizations

What organizations are required to disclose these documents? As noted, the final Regulations apply to all TEOs described in either Section 501(c) or Section 501(d).⁷ This includes:

- Public charities (Section 501(c)(3)).
- Social welfare organizations (Section 501(c)(4)).
- Labor unions (Section 501(c)(5)).
- Trade associations, chambers of commerce, and professional organizations (including bar associations) (Section 501(c)(6)).
- Social clubs (Section 501(c)(7)).
- Fraternal organizations (Section 501(c)(10)).
- Cemetery companies (Section 501(c)(13)).
- Credit unions (Section 501(c)(14)).
- Veterans' posts (Section 501(c)(19)).

While most retirement and other qualified benefit plans are described in Section 401(a) and therefore are not covered by the new rules, the Regulations do apply to certain types of benefit plans, notably Section 501(c)(9)

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¹ The only exception is that the final Regulations do not apply to the annual information returns (Form 990-PF) filed by "private foundations" (as defined in Section 509(a)), although the IRS and Treasury stated in the Preamble to TD 8818 that they intend to issue shortly a notice of proposed rulemaking extending the application of the Regulations to such returns. Until the IRS issues final Regulations to this effect, private foundations are subject to the disclosure requirements for their annual information returns imposed by the pre-1998 Section 6104(d) (requiring private foundations to allow public inspection of their annual returns and publication of a notice to this effect in a local newspaper).

² Regs. 301.6104(d)-3(h), -4(e), and -5(g); Ann. 99-62, 1999-25 IRB 13.

³ The only TEOs exempt from this filing requirement are churches, certain organizations affiliated with churches or religious orders, an exclusively religious activity of a religious order, state institutions exempt from tax under Section 115, Section 501(c)(1) organizations (corporations organized under an Act of Congress as instrumentalities of the U.S. exempt from federal income taxes), foreign organizations that normally receive annual gross receipts from sources within the U.S. of \$25,000 or less and have no significant activity (other than investment activity) in the U.S., governmental units, and affiliates of government units.

Rev. Proc. 83-23, 1983-1 CB 687, as supplemented by Rev. Proc. 94-17, 1994-1 CB 579, Rev. Proc. 95-48, 1995-2 CB 418, and Rev. Proc. 96-10, 1996-1 CB 577.

The \$25,000 threshold is calculated based on an average of the three preceding years (including the year for which the return would be filed), with special rules for organizations that have been in existence less than three years. Rev. Proc. 83-23, section 5. Section 501(c)(3) private foundations and Section 501(d) apostolic organizations are required to file annual information returns (Form 990-PF and Form 1065, respectively) regardless of the amount of gross receipts received annually. Reg. 1.6033-2(g)(1)(iii); 1998 Instructions for Form 990-PF, General Instruction A; 1998 Instructions for Form 1065, page 2.

⁴ See Sections 6104(a) and (b). For private foundations, Congress also had previously enacted Section 6104(d), effective 1/1/70, requiring private foundations to allow public inspection of their annual returns at their principal offices for 180 days after publishing a notice of the availability of the returns in a local newspaper.

⁵ These requirements were further described by the IRS in Notice 88-120, 1988-2 CB 454.

⁶ The organization is Philanthropic Research, Inc./GuideStar, whose Web site can be found at www.guidestar.org.

⁷ See Reg. 301.6104(d)-3(b)(1).

voluntary employees' beneficiary associations (VEBAs), Section 501(c)(17) supplemental unemployment benefits trusts (SUBs), and Section 501(c)(21) black lung benefits trusts.

As briefly noted above, the final Regulations do not yet apply to private foundations, although the Service and Treasury have stated that they intend to extend the new rules to private foundations. They also do not apply to TEOs described in other Code sections, such as political organizations described in Section 527, Section 521 farmers' cooperatives, Section 528 homeowners' associations, and Section 529 qualified state tuition programs. The Regulations likewise do not apply to entities exempt from federal income tax for intergovernmental or sovereign immunity reasons, such as states, their political subdivisions and instrumentalities, and Indian tribes.

The new disclosure requirements do not yet apply to the annual information returns (Form 990-PF) of private foundations.

Government-related organizations that are tax-exempt under Section 115, such as state universities and hospitals, are also generally exempt from these Regulations. Some of these organizations, however, have chosen to apply for recognition as Section 501(c)(3) organizations. By virtue of having so applied, it appears that such organizations are subject to the disclosure rules. Therefore, these organizations will want to consider whether they can successfully apply for exemption from having to file Form 990 as an affiliate of a government unit under Rev. Proc. 95-48, 1995-2 CB 418. Absent such an exemption, these organizations will be subject to the disclosure requirements not only with respect to their exemption applications but also with respect to their Forms 990.

Affected Documents

Two types of documents must be disclosed:

- Annual information returns.
- Applications for tax exemption.
- *Annual information returns* include Form 990, Form 990-EZ, Form 990-BL (filed by Section 501(c)(21) black lung benefits trusts), and Form 1065 (filed by Section 501(d) apostolic organizations).⁸ Exact copies of the returns as filed with the IRS for the past three years—measured from the date on which the return was due or was actually filed, whichever is later—must be disclosed.⁹ Annual information returns do not include Form 990-T (relating to unrelated business income), Schedule A to Form 990-BL, Schedule K-1 to Form 1065, or Form 1120-POL.¹⁰

All schedules, attachments, and supporting documents for annual information returns that were filed with the Service also must be disclosed in their entirety. This includes the information that must be reported on in Part V of Form 990 (Part IV of Form 990-EZ): the names, addresses,¹¹ and compensation of officers, directors, trustees, and key employees.¹² The only exception in Reg. 301.6104(d)-3(b)(4)(i) is that names and addresses of any contributors that are required to be provided as part of the annual information return filed with the IRS do not need to be disclosed to the public.

Applications for tax exemption, such as Form 1023 and Form 1024, also must be disclosed, along with all supporting documents and statements filed with the Service in connection with the application and all correspondence from the IRS relating to the application.¹³ If there is no prescribed

application form, Reg. 301.6104(d)-3(b)(3)(ii) provides that the application is considered to include the following:

- The application letter.
- The organization's governing documents (articles, bylaws, etc.).
- Its latest financial statements.
- Statements regarding the organization's character, purposes, activities, and sources of income.
- Any other statements or documents submitted in support of the application.

Certain information does not have to be disclosed, including any unfavorable exemption ruling by the IRS and any trade secrets, patents, or similar business secrets for which the organization requested protection and the Service agreed could be withheld from disclosure when the organization filed the application.¹⁴

Applications for tax exemption do not include applications that have yet to be granted by the IRS.¹⁵ In addition, Reg. 301.6104(d)-3(b)(3)(iii)(B) provides limited exception for organizations that filed their applications before 7/15/87 (the effective date of the original public inspection requirements): "applications for tax exemption" do not include these applications unless the organization had a copy of the application on that date. What this means is that if an organization filed its application before 7/15/87 and lost all of its copies of that application before that date, it does not need to disclose the application. If, however, a TEO either filed its application after that date or had its application as of

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⁸ Reg. 301.6104(d)-3(b)(4)(i).

⁹ Reg. 301.6104(d)-3(b)(4)(iii). For amended returns, the three-year period begins when the amended return is filed. *Id.*

¹⁰ Reg. 301.6104(d)-3(b)(4)(ii).

¹¹ The instructions to Form 990 and Form 990-EZ state that the address provided should be the preferred address at which these individuals want the IRS to contact them, if the IRS chooses to initiate such a contact. Therefore, these individuals have some flexibility regarding what address (for example, home or business) they ask the organization to provide.

¹² Section 501(c)(3) organizations are also required to file Schedule A to Form 990 and Form 990-EZ, which requires them to report, among other information, the names,

addresses, and compensation of the five highest-paid employees (other than officers, directors, and trustees) and the five highest-paid independent contractors for professional services if those employees or independent contractors are paid more than \$50,000 annually.

¹³ Reg. 301.6104(d)-3(b)(3)(i).

¹⁴ Reg. 301.6104(d)-3(b)(3)(iii)(C). Since the Regulations only apply to TEOs, any unfavorable exemption ruling received by an organization subject to the Regulations must have been subsequently reversed. This situation could occur, for example, if the IRS initially issued an adverse ruling to an organization but the organization successfully challenged the ruling in court.

¹⁵ Reg. 301.6104(d)-3(b)(3)(iii)(A).

that date, it must provide a copy of that application.

Requests for Copies

Requests for copies may be made in person or in writing. Reg. 301.6104(d)-3(d)(2) requires a TEO to honor any written request, whether made by fax, e-mail, regular mail, or delivery service, as long as the request provides the address to which a copy of the requested documents should be sent. Telephone requests are not either in-person or written requests, and therefore the Regulations do not require an organization to respond to them.

Names and addresses of any contributors that are provided as part of the annual return filed with the IRS do not need to be disclosed to the public.

A request for copies may cover part or all of a document. If the request is for part of document, it must specifically identify the requested part or schedule (for example, "Part V of Form 990" or "Schedule A to Form 990").¹⁶

In-person requests must be made during regular business hours. The requested documents must be provided on the day the request is made unless "unusual circumstances" exist. For example, the Regulations provide that unusual circumstances include, but are not limited to, a volume of requests that exceeds the organization's copying capacity, receipt of a request shortly before the close of business that requires extensive copying, and receipt of a request on a day when an organization's managerial staff is engaged in special duties (such as student regis-

tration or attending an off-site meeting or convention). If such circumstances exist, the organization must provide the copies by no later than the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the day of the request, whichever occurs first.¹⁷

Timing of written requests. If a request is made in writing, the requested documents must be mailed (that is, postmarked or marked for private delivery) within 30 days from the receipt of the request. If the organization requires payment in advance, the 30 days starts when payment (as opposed to the request) is received. If payment in advance is required and a written request is received without payment or with an insufficient payment, the organization must notify the requester within seven days of receiving the request. Requests and payments sent by mail are deemed, absent evidence to the contrary, to have been received by the organization seven days after the date of the postmark. Requests sent by e-mail or fax are deemed to have been received on the day the request is transmitted successfully. If and only if the individual making the request consents, the organization may provide a copy of the requested document exclusively by electronic mail.¹⁸

Location for requests. Requests may be made at or addressed to the TEO's principal office or any of its "regional or district offices."¹⁹ According to comments in the Preamble to TD 8818, individuals making in-person requests can be required to comply with the same security procedures that are applied to all members of the public visiting an organization's offices.

A regional or district office is any office that has paid employees, whether

part-time or full-time, whose aggregate number of paid hours per week are normally at least 120.²⁰ Nevertheless, regional and district offices do not include offices where the only services provided are those that further the organization's exempt purposes, and the only management staff is involved solely in managing the exempt function activities in that office.²¹ For example, a research laboratory with nine researchers and a research director whose sole management function is to manage the laboratory itself is not a regional or district office. With respect to annual information returns, regional or district officers are required to have the return available 30 days after the return was due (including all extensions) or was filed, whichever is later.²²

The Regulations are silent regarding whether coordination activities, such as participation in a regional advisory committee for the organization, would constitute "off-site management." A traditional interpretation of "management," however, would encompass only such functions as personnel and budgetary decisions within the meaning of that term, leading to the conclusion that nonbinding coordination or advisory activities should not constitute off-site management.

Fees. An organization may charge a "reasonable fee" for providing copies. The Regulations define a reasonable fee as no more than the amount charged to the public by the IRS for making copies, currently set at \$1 for the first page and \$0.15 for each additional page, plus actual postage costs.²³ TEOs are required to respond to any questions, whether in writing or not, about fees, including questions about the exact amount of fees charged for each relevant document with and without attachments.²⁴

For in-person requests, a TEO must accept payment by cash or money order, and may accept other forms of payment, such as personal checks or credit cards.²⁵ For written requests, an organization must accept payment by certified check, money order, and either personal check or credit card, and may accept other forms of payment.²⁶ If the fee is not paid within 30 days of a

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¹⁶ Reg. 301.6104(d)-3(d)(2)(iii)(B).

¹⁷ Reg. 301.6104(d)-3(d)(1)(ii).

¹⁸ Reg. 301.6104(d)-3(d)(2)(iii)(A).

¹⁹ Reg. 301.6104(d)-3(a).

²⁰ Reg. 301.6104(d)-3(b)(5)(i). Section 6104(d)(1)(A) actually provides that a regional or district office is one with three or more employees. Therefore, such an office presumably must have at least three employees as well as

having total paid hours per week of normally at least 120.

²¹ Reg. 301.6104(d)-3(b)(5)(ii).

²² Reg. 301.6104(d)-3(e).

²³ Regs. 301.6104(d)-3(d)(3)(i) and 601.702(f)(5)(iv)(B).

²⁴ Reg. 301.6104(d)-3(d)(3)(iv).

²⁵ Reg. 301.6104(d)-3(d)(3)(iii)(A).

²⁶ Reg. 301.6104(d)-3(d)(3)(iii)(B).

request for payment of the fee, or if the requester pays the fee by check and the check does not clear when deposited, the organization may disregard the request.²⁷ If the organization does not require prepayment and the requester does not provide prepayment, the organization may not charge a requester more than \$20 for copying and postage without the requester's consent in advance.²⁸

Agents. A TEO may retain an agent to process requests for copies. For in-person requests, each principal, regional, or district office may choose to retain a local agent in reasonable proximity to that office to process such requests. If such an agent is retained, an in-person requester who comes to the organization's office must be immediately provided with the name, address, and telephone number of the local agent.²⁹ For written requests, a single agent may presumably be retained for all offices of the organization, with those offices forwarding written requests to that agent.³⁰

An agent is subject to the same obligations as the organization, including with respect to the time for responding to requests and the fees that may be charged. For written requests, the 30-day response time begins to run when the organization receives the request and not when the request is forwarded to the agent. The failure of an agent to meet any of the organization's obligations will subject the responsible individual at the TEO to the applicable penalties.³¹

Group returns and applications. Special rules in Reg. 301.6104(d)-3(f) apply for TEOs that do not file their own returns or their own applications for tax exemption but instead are covered by a group return or group application filed by a central or parent organization. These "local or subordinate organizations," as they are referred to in the Regulations, must provide copies only of certain portions of the applicable group returns and group applications. For group returns, such organizations may omit any schedules that relate only to other organizations included in the group return. For group applications, if the central or parent organiza-

tion submitted with the application a list or directory of local or subordinate organizations covered by the group exemption letter, a local or subordinate organization is required to provide only the application for the ruling and the pages of the list or directory that specifically refer to it.

The Regulations recognize that many local or subordinate organizations will not have copies of their group returns or applications on hand. Accordingly, for in-person requests such organizations will have a "reasonable amount of time," defined as "normally not more than two weeks," to provide the requested copies. For written requests, the normal 30-day period for responding applies.

Individuals making in-person requests can be required to comply with the same security procedures applied to all public visitors to the TEO.

The central or parent organization must provide copies of the entire group return on request. For the group application, if the organization submitted a list or directory of local or subordinate organizations covered by the group exemption letter, the organization need only provide copies of those pages of the list or directory that refer to the particular local or subordinate organizations specified by the requester. The same time periods for responding to requests that apply to other TEOs also apply to central or parent organizations.

Public Inspection

Most requests for annual information returns and applications for tax exemption undoubtedly will be for copies of these documents. Nevertheless, TEOs also are still required to make these documents available for public inspection.

A TEO must allow individuals to inspect these documents at its principal, regional, or district offices during regular business hours.³² An employee of the organization may be present

during the inspection, but the TEO must allow the individual conducting the inspection to take notes freely and to copy the document (if the individual has brought his or her own photocopying equipment to the inspection site).³³

Some organizations do not have a permanent office or have only a permanent office with either no regular or only very limited office hours. For these organizations, the public inspection obligation may be met by providing the documents for inspection at (1) a reasonable location of the TEO's choice, (2) at a reasonable time of day, and (3) within a reasonable time (normally not more than two weeks) after receiving a request for inspection. In lieu of allowing a public inspection, the organization may instead choose to mail a copy of the requested documents within two weeks, but in this event the organization may charge the requester for copying and postage costs only if the requester consents to such charges.³⁴

In contrast to requests for copies, no fees may be charged for allowing a public inspection.³⁵ In addition, a TEO may not hire an agent to process requests for public inspection.³⁶ Finally, the same rules that apply to in-person requests for copies made to local or subordinate organizations also apply to requests for public inspection, except that such organizations may choose to mail a copy of the applicable documents to the re-

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²⁷ Reg. 301.6104(d)-3(d)(3)(i).

²⁸ Reg. 301.6104(d)-3(d)(3)(iii).

²⁹ Reg. 301.6104(d)-3(d)(1)(iii).

³⁰ See Reg. 301.6104(d)-3(d)(2)(ii)(C).

³¹ Regs. 301.6104(d)-3(d)(1)(iii) and -3(d)(2)(ii)(C). The Regulations are unnecessarily unclear on the application of the penalties in this context because they state that the penalties will apply "to the tax-exempt organization" if the agent fails to meet the copying requirements in a timely fashion, but the penalty provisions cited actually are imposed on the responsible individuals at the organization and not on the TEO itself.

³² Reg. 301.6104(d)-3(a). The definition of "regional or district office" discussed in the text, above, also applies to requests for public inspection.

³³ Reg. 301.6104(d)-3(c)(1).

³⁴ Reg. 301.6104(d)-3(c)(2).

³⁵ Reg. 301.6104(d)-3(a).

³⁶ See Reg. 301.6104(d)-3(c).

quester in lieu of allowing an inspection (but no fee may be charged without the requester's consent).³⁷

'Widely Available' on the Web

A TEO is excused from providing copies with regard to any document that it makes "widely available." The organization still must have these documents available for public inspection at its principal, regional, and district offices, however, regardless of whether it has satisfied the widely available requirement.³⁸

The failure of an agent to meet the TEO's obligations will subject the responsible individual at the TEO to the applicable penalties.

Reg. 301.6104(d)-4(b) defines making a document widely available as posting the document on a World Wide Web page. The Web page may be established and maintained by the TEO or by another entity as part of a database of similar documents of other TEOs.³⁹ In addition, several other requirements must be met:

- The organization must give the address of the Web page to any individual requesting copies of the document. For in-person requests, this information must be provided immediately. For written requests, this information must be provided within seven days of receiving the request.⁴⁰
- The Web page must clearly inform readers that the document is avail-

able and must provide readers with instructions for downloading it.⁴¹

- The document must be posted in a format that, when downloaded, viewed, and printed, exactly reproduces the document (except for information the organization is not required to disclose).⁴²
- Any individual with access to the Internet can download, view, and print the document without special computer hardware or software required for that format (other than software that is readily available to the public without charge).⁴³
- The entity maintaining the Web page must have procedures in place for ensuring the reliability and accuracy of the document that it posts on the page, and it must take reasonable precautions to prevent alteration, destruction, or accidental loss of the posted document.⁴⁴
- No fee may be charged by the entity maintaining the Web page to access or download the document.⁴⁵

Organizations that already had posted their documents prior to 4/9/99, when the final Regulations were issued, in a manner that met the requirements of the Proposed Regulations (which allowed posting in any of the formats used by the IRS to post forms and publications on the IRS Web page), have until 6/8/00 to meet the third and fourth requirements listed above.⁴⁶

By not specifying any specific posting formats, the IRS has allowed organizations to use any format, including formats still to be developed, that meet these requirements. The Regulations also state that the Service has the discretion to prescribe other methods for

making documents widely available, although the IRS has not prescribed any other method at this time.⁴⁷

The fact that the IRS is releasing Section 501(c)(3) organization Forms 990 on CD-ROMs will not, by itself, be sufficient to satisfy the widely available requirement for these organizations. First, there will be a significant delay between when a Form 990 is filed and when it is available on CD-ROM from the IRS, while the disclosure requirements are effective as of the date the form is filed. Second, while some organizations have expressed an interest in posting these Forms 990 on the Internet, significant technological hurdles will have to be overcome and there is no guarantee that these postings will satisfy the Regulations' requirements as detailed above. Third, the Regulations make it clear that the TEO must arrange for the posting, and therefore the TEO must find a way to make the posting of its Form 990 by one of these other organizations constitute a posting arranged by the TEO.

Harassment

Under Reg. 301.6104(d)-5, a TEO also is excused from its copying obligations if the requests are part of a "harassment campaign." As with the widely available exception, this exception does not apply to requests for public inspection. To take advantage of this exception, the organization must submit a request for a determination that such a campaign exists to the key district director for the exempt organizations key district where the TEO's principal office is located.⁴⁸

Campaign. A harassment campaign is a single coordinated effort to disrupt the operations of a TEO rather than to collect information about the organization. Circumstances that indicate the existence of such a campaign include a sudden increase in the number of requests, an extraordinary number of requests made through form letters or similarly worded correspondence, requests that contain language hostile to the organization, and evidence that the organization has already provided the requested documents to a member of the purported harassing group.

The receipt of requests from indi-

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³⁷ *Id.*

³⁸ Reg. 301.6104(d)-4(a).

³⁹ At least one Web site has already appeared that offers to post a TEO's documents for a fee (www.990online.com). It is, of course, still the organization's responsibility to ensure that all the requirements for Internet posting contained in the final Regulations have been satisfied.

⁴⁰ Reg. 301.6104(d)-4(d).

⁴¹ Reg. 301.6104(d)-4(b)(2)(i)(A).

⁴² Reg. 301.6104(d)-4(b)(2)(i)(B).

⁴³ Reg. 301.6104(d)-4(b)(2)(i)(C).

⁴⁴ Reg. 301.6104(d)-4(b)(2)(iii).

⁴⁵ Reg. 301.6104(d)-4(b)(2)(i)(C).

⁴⁶ Reg. 301.6104(d)-4(b)(2)(iii). In the Preamble to TD 8818, the IRS indicated that some of the formats it uses may require access to special hardware or software and so it was necessary to allow a transition period for organizations that had relied on the Proposed Regulations' standard.

⁴⁷ See Reg. 301.6104(d)-4(c).

⁴⁸ The relevant key district offices are currently in Dallas (Midstates Key District), Brooklyn (Northeast Key District), Baltimore (Southeast Key District), and Los Angeles (Western Key District). The key districts and their office locations may be changed, however, as part of the ongoing IRS restructuring process.

Practice Notes

There are two essential planning steps that any TEO subject to these Regulations should take:

1. The organization should ensure that it is prepared to meet the legal requirements imposed by these Regulations.
2. The organization should ensure that the information provided portrays the organization in the best light possible.

With respect to the first step, a TEO needs to make certain decisions, such as whether it will provide its documents on the World Wide Web, whether it will use an agent, whether it will charge fees for copies, and, if a fee is charged, whether prepayment will be required. The first and second choices may be dictated by the resources available to the organization. The third and fourth choices probably will be based on the trade-off between absorbing the cost of providing copies and the administrative tasks entailed in processing payments for copies. As a public relations matter, the organization also may choose to provide copies of the documents for free.

Once these choices are made, the TEO should identify a person in each of its principal, regional, and district offices, as defined in the Regulations, who will be responsible for responding to requests for inspection or copies (the latter not being relevant if the World Wide Web option has been chosen). Copies of the annual information returns and exemption applications subject to disclosure (with information not subject to disclosure, such as donor names, redacted) must be available at each of these offices, and not simply at a central location. A procedure also must exist to ensure that copies of future annual information returns also are made available. The person chosen at each such office should be provided with information about the legal requirements, especially the time periods for responding to requests, and with copies of the relevant documents. Any staff, such as a receptionist, who regularly deal with the public and so are likely to be the first to receive a request for the documents should know the identity of the persons with responsibility for responding to such requests. Finally, the TEO should maintain a log of requests received and documentation showing responses to those requests to provide a record that the TEO is meeting its legal obligations. This documentation is particularly important if the TEO believes it may deny some requests as repetitious or as part of a harassment campaign.

Once the basic system is in place for meeting the TEO's legal requirements, it should consider how it can respond to the requests for the documents in a manner that presents the organization in the best light. For example, Form 990 requires program descriptions. The TEO should consider providing complete descriptions, on a separate schedule if necessary, to highlight its positive activities. The TEO also should ensure that the relevant documents, particularly its annual information returns, are as accurate and clear as possible. For example, failing to complete the compensation information schedules and instead stating that the "information is available on request" not only may cause the Service to reject the return as incomplete—the instructions to Part V (List of Officers, Directors, Trustees, and Key Employees) of Form 990 explicitly provide that the use of such a phrase is not acceptable (and IRS officials have stated that as part of the centralization of the filing of annual information returns at the Ogden Service Center there will be increased scrutiny of TEOs' returns)—but may cause a member of the public or the media to become suspicious regarding what the organization may be hiding.

The organization also should consider whether other documentation should be provided with the required documents. Form 990 often is difficult for a lay reader to comprehend, especially given that certain accounting conventions are required for TEOs; the organization may go a long way to resolving any confusion by providing a requester with a copy of its latest annual report, explanations of the different categories of expenses, and/or informational brochures or other public relations materials. While such considerations may be most relevant to public charities, which are usually both dependent on public support and highly concerned about their public images, other TEOs also should consider similar steps. Many requesters may be potential critics, such as members of the media or watchdog organizations, and favorably impressing such requesters may help forestall or at least diminish any negative publicity.

viduals hostile to a TEO does not, in itself, constitute a harassment campaign. Neither does a campaign that does not realistically threaten to disrupt an organization's operations. The Regulations provide the example of a TEO that normally receives ten requests per month for copies of its annual information returns. The example provides that the receipt of 15 requests for copies of the return in a single month, all from members of the board of directors of a hostile organization, would be insufficient by itself to demonstrate the existence of a harassment campaign that would disrupt the TEO's activities. If, on the other hand, the organization received those 15 requests plus 75 other form-letter requests containing hostile language, and the TEO learns that the hostile organization has urged its members to submit as many requests as possible, facts sufficient to show a harassment campaign would exist.⁴⁹

Determination process. If an exempt organization believes that a request is part of a harassment campaign, it may suspend compliance with that request pending a determination by the IRS that this is the case. Within ten business days of first suspending compliance, the organization must apply for a determination that it is the subject of a harassment campaign with the key district director for the exempt organizations key district in which its principal office is located. The application must include the organization's name, address, and employer identification number; a contact person's name, address, and telephone number; and a detailed description of the facts and

circumstances that the organization believes support a determination that it is the subject of a harassment campaign. While the application is pending, the organization may suspend compliance only with those requests it reasonably believes are part of the purported harassment campaign.

If the Service determines there is in fact a harassment campaign, the TEO is not required to comply with any requests it reasonably believes are part of that campaign, subject to whatever terms and conditions the IRS includes with its determination. If the IRS determines that there is not a harassment campaign, the organization has 30 days to comply with all suspended requests. If in the latter event the Service further determines that the TEO did not have a reasonable basis for requesting the harassment determination, the responsible individuals at the TEO remain liable for any penalties that apply for not complying with the requests within the required time periods. It is generally unreasonable for an organization to conclude that requests from the media are part of a harassment campaign, absent strong facts to the contrary.⁵⁰ The Preamble to TD 8818 states that IRS intends to publish a Revenue Procedure that will provide additional details regarding harassment campaign determinations and may prescribe rules concerning when penalties should be imposed and when they should be mitigated.

Multiple requests. Regardless of whether a TEO believes it is the target of a harassment campaign, the organization may disregard certain repeat requests for copies of all or part of any document from the same individual or address. Specifically, a TEO can ignore any such requests after (1) the first two received within any 30-day period or (2) the first four received within any one-year period.⁵¹

Reporting Noncompliance

If a TEO improperly denies an individual's request for inspection or a copy of an applicable document, that individual may inform the IRS of the denial by providing a statement to the district director for the key district in which the applicable TEO's principal office is located.⁵²

Penalties

The penalties for a failure to comply with these disclosure requirements fall not on the TEO itself but on its officers, directors, trustees, employees, or other individuals under a duty to satisfy the requirements.⁵³ While the penalty statutes and the Regulations do not elaborate on how these individuals should be identified, the IRS would probably consider individuals with sufficient managerial authority to authorize the public inspection or copying of the relevant documents to have this duty.

Most requests undoubtedly will be for copies, but TEOs still have to make their returns and applications available for a free public inspection.

Sections 6652(c)(1)(C) and (D) provide that the penalty for failing to allow public inspection or provide copies of the documents requested within the time periods specified in the Regulations is \$20 for each day during which the failure occurs, with a maximum of \$10,000 for any one annual return. No maximum applies for with respect to an application for tax exemption.⁵⁴ Section 6685 imposes an additional \$5,000 penalty per return if the failure was willful.⁵⁵

CONCLUSION

The new Regulations generally strike a good balance between allowing public access to information about TEOs and the need to avoid imposing undue administrative burdens on such organizations. But it must be recognized that the Regulations will lead to a new level of scrutiny of such organizations, and that TEOs must think carefully about how they can look their best while complying with the new requirements. It is only in this manner that organizations can turn the risk presented by these Regulations into an opportunity that is to their benefit. ■

NOTES

⁴⁹ Reg. 301.6104(d)-5(f), Examples 2 and 3.

⁵⁰ See Reg. 301.6104(d)-5(f), Example 4.

⁵¹ Reg. 301.6104(d)-5(c).

⁵² Reg. 301.6104(d)-3(g).

⁵³ See Sections 6652(c)(4)(C) and 6671(b); Reg. 301.6685-1(b).

⁵⁴ If more than one person is liable for the penalties, all such persons will be jointly and severally liable for the penalties. Reg. 301.6652-2(d)(2) (referring to this Code section by its pre-1986 designation of Sections 6652(d)(2) and (3)).

⁵⁵ Reg. 301.6685-1 is silent with regard to whether, if multiple persons are liable for the penalty, those persons will be jointly and severally liable.