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The Duty to Make Annual Information Returns Available and the New Treasury Regulations

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Introduction.

On June 8, 1999, new Treasury Regulations regarding the obligation of charitable organizations that are tax-exempt under Section 501(c)(3) of the Internal Revenue Code of 1986 ("exempt organization(s)" or "organization"), to publicly disclose their annual information return, IRS Form 990 ("annual return," "return" or "Form 990") will take effect.¹

The new Treasury Regulations help clarify how, when and where an exempt organization is required to provide copies of its annual return to individuals requesting it ("requestor(s)"). The Regulations also help clarify how an exempt organization can limit its obligation to provide copies by posting its annual return on the Internet. Finally, the new Regulations provide a procedure for dealing with requests for copies of the annual return that are part of a campaign of harassment.

Substantial penalties may be imposed by the Internal Revenue Service for failure to meet public disclosure obligations.² Moreover, in a 1998 case, a plaintiff denied access to annual returns sued an exempt organization for \$55,000.00 in compensatory and \$500,000.00 in punitive

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¹ The new Regulations apply to organizations described in 26. U.S.C. §501(c) and (d) of the IRC of 1986, *as amended*, but not to private foundations.

² See 26 U.S.C. §6652(c)(1)(C) and §6684.

damages.³ Although the case was ultimately dismissed, the fact that the suit was brought, illustrates the importance of complying with the Regulations.

What is an annual information return, IRS Form 990?

IRS Form 990 is an informational return. It is filed annually with the IRS by exempt organizations. The information provided on the return is used by the IRS to police the exempt status of charitable organizations.

A completed Form 990, unlike other more familiar tax forms, contains not only numerical descriptors, but substantial narrative prose describing the exempt organization's mission, programs and accomplishments. Other sensitive information on the form includes a donor list, salaries of key employees and legal expenses. For federal tax law purposes, a reference to Form 990 should be deemed to include Forms 990-EZ, 990-BL, and Form 1065, as well as all required schedules and attachments, unless specifically excluded.⁴

Some members of the public (potential donors for example) utilize an exempt organization's annual return as a primary source of information about the organization. How they perceive the organization may hinge on how the information contained in the return is presented. With the increase in public access to the annual return occasioned by the new Regulations, the accuracy, substance and style of the completed return will take on increased importance. It may also portend a greater need for legal review.

Historical Filing and Disclosure Requirements.

In 1913, the first federal income tax was passed.⁵ That law imposed a tax on corporate earnings but exempted charitable organizations using language much the same as the language now contained in Section 501(c)(3) of the Internal Revenue Code.⁶ The law also contained a

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³ Schuloff v. Queens College Foundation, Inc.; Schuloff v. Brooklyn College Foundation, Inc., 994 F.Supp. 425 (E.D.N.Y. 1998).

⁴ For example, trade secret information and the donor list need not be publicly disclosed, *See, inter alia*, 26 C.F.R. §301.3104(d)-3(b)(4).

⁵ Omitting the Civil War tax acts and the income tax of 1894, which was later found to be unconstitutional. Act of October 3, 1931, An Act to Reduce Tariff Duties and Provide Revenue For the Government and Other Purposes.

⁶ *Id.* at Section II(G)(a)(pertaining both to business corporations to charitable organizations); Internal Revenue Code of 1986, *as amended*.

provision making returns filed with the Treasury Department public documents subject to disclosure.⁷

However, the law only required organizations to file a return if they were subject to the provisions of the law that imposed the tax.⁸ Since the law exempted charities from the provisions imposing the tax, they were not required to file a return.⁹

In 1944, the law was amended to impose an obligation upon exempt organizations, including charities but excepting churches, to file an annual return.¹⁰ Once filed, these returns became subject to the same public disclosure provisions included in the 1913 income tax law. Every subsequent amendment to the federal tax law has included these three basic elements: (1) an exemption for charities; (2) a requirement that charities file an informational return; and (3) public disclosure provisions covering the informational return. Although a later amendment allowed the IRS to withhold the names and addresses of contributors to tax-exempt charitable organizations, the law remained largely unchanged until 1987.¹¹

Before 1987, the *only* administrative procedure available for inspecting an annual return was to file a written request, usually on IRS Form 4506-A *Request for Public Inspection or Copy of Exempt Organization IRS Form*, pursuant to Treas. Reg. §§ 301.6104(a)-6 and 301.6104(b)-1. Once the request was processed, the IRS would make the return available at the IRS National Office in Washington, D.C. for inspection and copying. Although these inspection provisions are still available today, later amendments shifted much of the burden of disclosing annual return information to the exempt organization that filed the return.

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⁷ Id. at Section II(G)(d)(pertaining to public documents).

⁸ Id. at Section II(G)(a).

⁹ Id.

¹⁰ Act of February 24, 1944, Ch. 63, Title II, §117(a), 58 Stat. 36; now found at 26 U.S.C. §6033, IRC of 1986, *as amended*.

¹¹ Pub. L. No. 91-172, §§ 101(e)(1) and (j)(36).

The 1987 amendments.

In 1987, the Internal Revenue Code was amended to require the exempt organization to allow public inspection of its annual returns.¹² The applicable section of the amendment provides:¹³

A copy of the annual return filed under section 6033 (relating to returns by exempt organizations) by any organization to which this paragraph applies shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and, if such organization regularly maintains one or more regional or district offices having three or more employees, at each such regional or district office, . . .

26 U.S.C. 6104(d)(1)(A)(i), as amended by the Tax and Trade Relief Extension Act of 1998 (Division J of H.R. 4328, the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; Public Law 105-277, 112 Stat. 2681).

The 1987 amendment imposed three obligations upon the exempt organization. First, for a period of three years, beginning on the filing date, including any extensions, an exempt organization must make available for public inspection, a copy of its annual return. The ordinary effect of the three-year disclosure period will be to cause exempt organizations to make available their three most recent returns.

For example, suppose that Green Acre, a hypothetical exempt organization, *always* files its Form 990 on January 1 of each year. On December 31, 1999, Green Acre must have three annual returns available for public inspection, e.g., January 1, 1998, January 1, 1997 and January 1, 1996.

However, On January 1, 2000 (the next day), Green Acre will no longer be required to make available the January 1, 1996 return because that return will be more than three years old. Concomitantly, Green Acre will be obligated to make available its January 1, 2000 return, which it filed that day. An exempt organization is, therefore, ordinarily required to maintain its three most recent annual returns for public inspection.¹⁴

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¹² Act of December 22, 1987, Omnibus Budget Reconciliation Act of 1987 (OBRA 87), Pub. L. No. 100-203, Title X, 1072(a).

¹³ OBRA 87 amended 26 U.S.C. §6104 to add subsection(e) entitled: *Public inspection of certain annual returns and applications for exemption.*

¹⁴ 26 U.S.C. §6104(d)(1)(A)(i), as amended and redesignated by the Tax and Trade Relief Act of 1998. Note however, that if a return is filed, pursuant to an extension, on a date *subsequent* to the date when the next annual return is due, the organization would be required to have available for public disclosure four returns.

The second requirement imposed by the 1987 amendment was that the exempt organization must make these returns available for public inspection at the exempt organization's principal office and at each "regional or district" office that maintains three or more employees.¹⁵ The third requirement was that the exempt organization must maintain the annual returns for inspection during regular business hours.¹⁶ The most prominent feature of the 1987 amendment was that, for the first time, the duty to make the annual return available for *inspection* was placed on the exempt organization. As we shall see, later amendments would broaden this requirement to include the duty to *provide copies* to anyone who requested them.

The 1996 Amendments.

In 1996, the Internal Revenue Code was again amended to add another layer of disclosure requirements.¹⁷ The 1996 amendments imposed upon exempt organizations an obligation to provide a copy of the annual return upon request.¹⁸ The 1987 public inspection requirements still remained in effect, but in addition to allowing inspection, the exempt organization was required to provide copies of the annual return. The applicable section of the amendment provides:

Upon request of any individual made at such principal office or such a regional or district office, a copy of such annual return [Form 990] shall be provided to such individual without charge or other than a reasonable fee for any reproduction and mailing costs. The request described in [this paragraph] must be made in person or in writing. If the request [in this paragraph] is made in person, such copy shall be provided immediately and, if made in writing, shall be provided within 30 days.

26 U.S.C. 6104(d)(1)(A)(ii), as amended by the Tax and Trade Relief Extension Act of 1998 (Division J of H.R. 4328, the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; Public Law 105-277, 112 Stat. 2681).

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¹⁵ Id. The "regional or district office" requirement turned out to be difficult to apply because so many exempt organizations had satellite offices that arguably met the requirement, but where there were no management personnel to handle inspection requests. The new Regulations soften this requirement as discussed below.

¹⁶ Id.

¹⁷ Act of July 30, 1996, Taxpayer Bill of Rights 2. (TBOR2), Pub. L. No. 104-68, 110 Stat. 1452.

¹⁸ 26 U.S.C. §6104(d)(1)(A)(ii), as amended and redesignated by the Tax and Trade Relief Act of 1998.

This portion of the 1996 amendment imposed four duties upon exempt organizations with respect to providing copies of its three most recent annual returns:

1. Provide a copy without charge except for reasonable copy costs;
2. Provide it immediately if the request is made in person;
3. Provide it within 30 days if the request is made in writing;
4. Provide copies at its main office and certain other offices.

A significant burden *not* imposed by the 1996 amendment is the burden to provide copies when requested by telephone or other means not meeting the "in person" or "in writing" requirements of the 1996 amendment.

The 1996 amendment also added two new and important limitations on the public disclosure requirements of tax-exempt charitable organizations as follows:

Paragraph (1)(A)(ii) [which refers to the obligation to supply copies upon request]. . . shall not apply to any request if, in accordance with the regulations promulgated by the Secretary, the organization has made the requested documents widely available, or, the Secretary determines, upon application by an organization, that such request is part of a harassment campaign and that compliance with such request is not in the public interest.

26 U.S.C. 6104(d)(3), as amended by the Tax and Trade Relief Extension Act of 1998 (Division J of H.R. 4328, the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999; Public Law 105-277, 112 Stat. 2681).

This paragraph contains a lot of information. First, note that the limitations set forth in this paragraph only apply to the obligations set forth in Section 6104(d)(1)(A)(ii) which are the obligations to provide copies imposed by the 1996 amendments. Therefore, these limitations are inapplicable to the public inspection obligation imposed by Section 6104(d)(1)(A)(i), which were imposed by the 1987 amendments.

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Second, the limitations set forth in this paragraph will not be available to exempt organizations until June 8, 1999, which is the effective date that the regulations promulgated by the Secretary become effective.¹⁹

The paragraph contains two important limitations. The exempt organization need not comply with a copy request if it has made its annual return widely available, or if the Secretary has determined *both* that request is part of a harassment campaign *and* that compliance with the request is not in the public interest. The Regulations provide guidance on both of these limitations as well as guidance on particulars of the obligation to provide copies.

The New Treasury Regulations.

On June 8, 1999, new Treasury Regulations on this subject become effective. The Regulations clarify how, when and where a tax-exempt charitable organization is required to provide copies of its completed annual return, Form 990. The Regulations also implement the limitations of Section 6104(d)(A)(3), e.g., making the return "widely available" and providing a framework for harassment determinations.²⁰

§301.6104(d)-3 Public inspection and distribution.

1. General requirements.

The Regulations begin by imposing the same general requirements as the 1987 and 1996 amendments described above:

[A] tax exempt organization . . . shall make its annual information returns . . . available for public inspection without charge in [its principal, regional and district] offices during regular business hours. Each annual information return shall be made available for a period of three years beginning on the date the return is required to be filed (determined with regard to any extension of time for filing) or is actually filed, whichever is later.

In addition, . . . an organization shall provide a copy without charge, other than a reasonable fee for reproduction and actual postage costs, of all or any part of any . . . return required to be

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¹⁹ 64 F.R. 17279, Vol. 64 No. 68.

²⁰ The final Regulations are found at 26 C.F.R. §301.6104(d)-3 (relating to public inspection and distribution), §301.6104(d)-4 (relating to making a form "widely available") and §301.6104(d)-5 (relating to harassment).

made available for public inspection under this paragraph to any individual who makes a request for such copy in person or in writing.

26 C.F.R. §301.6104(d)-3, *Inspection and copying*.

The Regulations do not add much to the public inspection requirement except to provide that an employee of the exempt organization may be present in the room while the annual return is being inspected.

2. Definitions.

Many important definitions are included in the Regulations. The Regulations define "annual information return" to include all variations of the Form 990 except the 990-T and to include all attachments and schedules except the list of the names and addresses of contributors. The term includes amended return if the amended return is less than three years old.

The Regulations clear up some of the confusion surrounding the definition of "regional or district office" for the purpose of imposing the duty to provide copies at those offices. The definitions exclude from the definition of "regional or district office" sites where the *only* services provided there further the exempt purpose and the site does *not* serve as an office for any management staff.

Therefore, the effect of the 1987 amendment requiring any regional or district office with three or more employees to maintain and provide copies of the Form 990 has been ameliorated to some extent.

The Regulations define a reasonable fee for copying as a fee, not to exceed the fees currently charged by the IRS for copies, i.e., \$1.00 for the first page and \$.15 for each additional page. A reasonable postage fee is the cost of mailing.

3. Copy requirements.

The Regulations provide that an exempt organization may now utilize a local agent to process document requests on its behalf. Organizations utilizing this service need only respond to requests for copies of the annual return by giving the contact information for the agent.

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Note however, in the event of the agent's failure to provide copies in accordance with the Regulations, the exempt organization will be liable for any penalties. Note also that an exempt organization may *not* retain a local agent to satisfy the public inspection requirement. The exempt organization must continue to have copies of its three most recent annual returns available for inspection whether or not it engages an agent to provide copies.²¹

4. In-person requests.

The Regulations provide that when the request for a copy of the Form 990 is made in person, a copy must be provided on the same day that the request is made except for "unusual circumstances." The term "unusual circumstances" is defined as a time period when fulfilling the request on the same day would cause an "unreasonable burden." For example, if the management staff of the exempt organization is at an offsite conference or meeting, that satisfies the unusual circumstances requirement.²² In that case, the request should be fulfilled no later than the next business day after the unusual circumstances abate, but in no event later than five business days later.

5. Written requests.

The Regulations define a written request as including one transmitted by facsimile or e-mail and provide that such requests must be fulfilled within 30 days. A request may be fulfilled by e-mail if the requestor consents.

Regarding the 30 day response requirement, requests delivered by U.S. Mail will generally be deemed received by the exempt organization within 7 days of the postmark on the request. The annual return will be deemed provided to the requestor on the date post-marked.

If the request fails to include the necessary funds to pay for reasonable duplication and mailing charges, the tax-exempt charitable organization must notify the sender within 7 days. The organization must also respond to telephone inquiries for applicable costs. If the requestor does *not* pay the fee, the organization can disregard the request.

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²¹ 64 F.R. 17281, Vol. 64 No. 68.

²² 64 F.R. 17282, Vol. 64 No. 68.

However, if the tax-exempt organization does not require pre-payment and the total charges will exceed \$20.00, it must obtain the consent of the requestor before providing the copies and billing for the costs. Also, requests may be made for only part of a document and in that case, the exempt organization must cull out the unwanted material.

6. Subordinate organizations.

Subordinate organizations must make available annual return information submitted by the parent organization. A subordinate organization may respond to a request to inspect an annual return by mailing a copy to the requestor within two weeks.²³

Making annual reports widely available, 26 C.F.R. §301.6104(d)-4.

Exempt organizations are not required to provide copies if the requested document has been made "widely available." However, it must still make the annual reports available for inspection.

The term "widely available" is defined as Internet posting, either on the tax-exempt organization's own web site or on a web site that provides a library or database of such documents or information. The return must be posted so as to allow any individual with access to the Internet to access, download, view and print the return without payment of any fees and without special equipment other than document viewing software readily available to the public at no charge.

The document must be posted in a format that *exactly* reproduces the document. The exact reproduction requirement means, for example, that while a PDF format will be acceptable, HTML will not be acceptable because HTML cannot *exactly* reproduce a heavily formatted document.²⁴

The Regulations provide a transition rule under which exempt organizations with annual returns posted on the Internet on or before April 9, 1999, in a manner that will allow the public to access, view and download the document without paying a fee will be deemed in compliance with this Regulation until June 8, 2000, even though the format may not *exactly* reproduce the form or otherwise fails to meet some of the technical requirements in the Regulations. The Regulations also impose security requirements upon the tax-exempt charitable organization to prevent the alteration, destruction or loss of on-line documents.

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²³ 64 F.R. 17283, Vol. 64 No. 68.

²⁴ 64 F.R. 17283, Vol. 64 No. 68.

Note that the IRS will continue to consider additional methods by which exempt organizations may make documents widely available. The Commissioner of the IRS may prescribe other methods for making documents widely available in future revenue procedures.

Harassment, 26 C.F.R. §301.6104(d)-5.

If the Commissioner of the IRS or his/her designee determines that the tax-exempt organization is subject to a campaign of harassment and that fulfilling a document request would not be in the public interest, he/she may suspend an exempt organization's compliance with this section of the Regulations.

A group of requests for annual returns is indicative of a harassment campaign if the requests are part of a single coordinated effort to disrupt the operations of the organization. A sudden increase in the number of requests, an extraordinary number of requests made through form letters or similarly worded correspondence, wording that suggests an attempt to disrupt the organization, hostile language and direct evidence of the bad faith of the campaign organizers all indicate that a set of requests are part of a harassment campaign.

In making a determination, the IRS will also take into consideration whether the organization can demonstrate that it has routinely provided copies of its documents in the past. In other words, the organization's compliance history.

The Regulation contains a safe-harbor provision by which an exempt organization may disregard *any* request for information beyond the first two requests from the same address in a 30-day period or beyond the first four in a one-year period from the same address.

In addition to exercising its discretion under the safe-harbor provision, an exempt organization may suspend compliance with a request or set of requests if it reasonably believes that the requests are part of a harassment campaign. However, within 10 days of suspending compliance, it must file an "Application for Determination" with the district director for the key district where the organization's principal office is located.

The organization may then continue to suspend compliance until its application is acted upon. Note however, in the event that the district director determines that the organization did *not* have a reasonable basis for concluding that it was subject to a harassment campaign, penalties may be imposed.

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The Regulation offers a number of examples which illustrate the following compliance principals:

1. Whether the number of requests lodged in a given period of time is considered "large" is determined with reference to the average number of requests that the organization usually receives in that same period of time;
2. A large number of requests, without more, is not a campaign of harassment;
3. A number of hostile requests that are not integrated into an organized campaign, do not constitute harassment;
4. Hostile Internet postings urging the public to make requests will probably suffice to establish bad-faith; and
5. Requests received from hostile news media are not harassment.

The Regulations provide that individuals denied a copy of, or an opportunity to inspect an annual return, may file a statement with the district director for the key district in which the principal office of the exempt organization is located. The statement must describe the request and the reason why the individual believes that the exempt organization's denial of the request is a violation of the applicable legal requirements.

The IRS will publish a revenue procedure describing harassment campaign determinations and the imposition or mitigation of penalties for failure to comply. Other procedures may be developed to deal with the issue of appeal rights and whether harassment determinations themselves will be publicly available.

Penalties under IRC §6652(c)(1)(C) and §6685.

A penalty of \$20.00 per day up to a maximum of \$10,000.00 may be imposed upon a tax-exempt charitable organization for failure to allow public inspection or failure to provide copies of annual information returns. An additional penalty of \$5,000.00 may be imposed for willful failure to allow public inspection or provide copies.

Conclusion.

The imposition of a new regulatory requirement sometimes offers opportunities that do not become apparent until long afterwards. For this reason, it is always a good practice to document the cost of

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compliance as well as the fact of compliance. This can sometimes make it possible to take advantage of opportunities that may arise later in reimbursement and compliance disputes. If nothing else, such documentation can support a request for a harassment campaign determination by establishing a pattern and practice of compliance. Finally, don't overlook the opportunity to rethink how your Form 990s are put together. Consider using the services of a technical writing consultant who can effectively communicate your organization's mission and accomplishments. If the annual return is going to be available on the Internet, why not turn it into a marketing opportunity?

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