



The Compliant, Unaccountable Nonprofit Or, How to Not Be Accountable, While Remaining Compliant with IRS Disclosure Rules

BY ELLIOTT ALVARADO

The purpose of the disclosure rules, recently passed by the IRS, is to make sure nonprofits are accountable to the public. Yet it's possible to comply with the rules while not being fully accountable.

Are we suggesting that's what you should do? No, just the opposite. We're pinpointing ways you could avert the spirit of the law precisely so that you can be careful not to do so.

It behooves us to understand how tax-exempts can stall access to information under the new regulations. We can then use that understanding to help structure better legal, financial, and ethical accounting systems to make nonprofits more responsive to the communities they serve.

Let's Look at the Law

The IRS disclosure rules (Section 6104 of the Internal Revenue Code) require tax-exempt organizations to provide copies of their annual information returns (Form 990s) and exemption application (Form 1023 or 1024) to whomever requests it—at a cost not to exceed the amount normally charged by the IRS for the same service. The regulations increase the accountability of tax-exempt organizations to the American public by ensuring access to the organization's informational returns.

Most nonprofits have strongly supported the intent of the regulations. But not all tax-exempts see greater accountability as a positive move (for example, the Trustees of the Bishop Estate in Hawaii actively lobbied against it).

How Can Nonprofits Thwart the Law?

While the IRS expects all tax-exempt organizations to obey the new law, the regulations allow nonprofits some latitude in their compliance. It is possible to diminish (or even defeat) the intent of the disclosure regulations by complying with the letter, but not the spirit, of the law.

How? Here are some examples:

Delay Access to Information.

The regulations encourage (but don't require) nonprofits to make their information returns (Form 990s) "widely available" by posting them on the Internet. Without Internet distribution, nonprofits could delay access by limiting distribution to paper-based modes of dissemination.

Though not clear in the regulations, nonprofits responding to a paper-based request and collecting an advance fee for copying the return appear to have the privilege of not fulfilling the request until a personal check clears the bank. Again, this

causes a delay while not denying access.

Tax-exempts that routinely file extensions for their returns can delay the filing time for each return by several months. The law requires access only to the three most recently filed returns. As a result, nonprofits that routinely file extensions could provide the three returns that span four or five financial years. While this would be compliant with the regulations, it would also be misleading because the information would be older and ill-suited for comparisons with similar organizations with more timely returns. In addition, routine filing extensions would delay the inspection of current financial data. Keep in mind that the regulations don't require the release of any financial information that is not part of the Form 990 (such as an audited financial report).

A nonprofit could also delay access to information by doing the following:

- Require exact pre-payment. (The regulations allow nonprofits to disregard requests that under-pay the copy charges but are silent about over-payment.)



- Require all requests to go through a single staff person (such as the executive director). Regulations allow up to five days for staff to respond if away at conferences or the like, so such a requirement would often delay an organization's response.

Withhold Information.

In addition, a nonprofit wishing to thwart the spirit of the law could:

- Respond only to specific requests for information. (For instance, a request for "all financial information" that didn't specify the 990 wouldn't include it.)
- Not explain that pre-payment is required until after the request has been made. The rules allow a nonprofit to mail a notice of pre-payment up to seven days after they receive the initial request.)

Provide Misleading Data.

Incorrect or misleading data hampers the informational value of the Form 990 to promote accountability. For example:

- A nonprofit could lease management staff through an outside personnel company. It might thus avoid listing their salaries in the return.
- Using the organization's business address as the mailing address of all board members would thwart efforts to prove prohibited "insider" relationships.

Misuse Harassment Rules.

The law provides special rules to keep nonprofits from being harassed by enemies seeking to deluge them with informational requests. To establish a case for harassment, the nonprofit must take certain steps to substantiate its claim. For example, the organization may implement the following policies, which may also have a "chilling" effect on other requestors:

- Record the name, address, and date of every requester (to make sure that no one requests more than two copies in a 30-day period or four within a year, as per regulations).
- Keep written requests on file and compare them against one other (looking for similarities apparent in form letters and the use of hostile language).
- Record the number and frequency of requests (to document any sudden increase in requests or any extraordinary requests).
- Keep an up-to-date "enemies list" to compare against requestors (allowing the organization to tie unsympathetic individuals to a campaign of structured harassment).
- Apply for a waiver from the IRS after denying a request because it is "reasonably" believed to be part of a harassment campaign. The IRS then gets to review the application. If the IRS denies the waiver, the nonprofit still has 30 days after that decision to comply with the initial request.

Embrace the Spirit of the Law

Ideally, nonprofits should *not* adopt any of the practices mentioned in this article. These practices hinder accountability and the image of the entire sector.

While a strictly literal implementation of the disclosure rules could be legally compliant, it could also prove to be ethically unsound. Tax-exempt organizations that consider themselves fully responsive to the public should inventory their current practices and eliminate those mentioned in this article to avoid any appearance of unaccountability. It is ultimately in the best interests of all tax-exempt organizations to be accountable to the American public by disclosing their informational returns as swiftly and accurately as possible. ■

Disclaimer: The author is not a lawyer. This article does not provide legal advice. If you have questions regarding the application of the disclosure rules to your organization, consult your attorney.

Selected References

Muehrcke, Jill, ed., *Law and Taxation, Leadership Series*.

Schmidt, Sarah, "Public Disclosure Takes on New Dimensions," *Nonprofit World*, September-October 1999.

These publications are available through the Society for Nonprofit Organizations' Resource Center, 608-274-9777.

Elliott Alvarado (3371 Glenrose Point, Atlanta, Georgia 30341-5788, 770-493-4469, eia1957@aol.com) has held management, program, and fundraising positions in five nonprofits over the past 15 years and now volunteers with several organizations in the Atlanta area.