



Public Disclosure Takes on New Dimensions

New rules require nonprofits to disclose more information than ever before. Here are the details.

BY SARAH J. SCHMIDT

Recent tax-law changes require nonprofits to provide the public greater access to information. If your organization is exempt from taxation under IRS Section 501(c) or 501(d),¹ these regulations apply to you. Here are the changes you'll need to make to comply with these new rules.

What Are the New Requirements?

Effective June 8, 1999, you must, on request, provide copies of your application for exempt status (IRS Form 1023 or 1024) and your three most recent annual information tax returns (IRS Forms 990, 990-EZ, 990-BL, or 1065). You must also provide copies of any documents, attachments, and statements that accompanied your application or forms, such as:

- articles of incorporation, by-laws, code of regulations, or other similar instrument(s) that explain the powers of your organization and its leaders
- financial statements, complete with listings of assets, liabilities, income sources, receipts, and disbursements where applicable
- statements about your organization's mission and purpose, its general organizational character, and its charitable activities

- legal memos your organization (or its attorney) submitted to support your application
- responses your organization provided to IRS questions
- correspondence made in connection with your application or annual return, such as an IRS final determination letter.

You *are not required* to disclose material (such as Schedule K of Form 1065) that identifies names or addresses of your organization's donors. Nor are you required to disclose Form 990-T.

Which Nonprofits Are Excused from the Requirements?

Organizations that have applied for exempt status but haven't received a letter of determination from the IRS *are not required* to disclose their applications or any supporting materials unless and until the IRS determination letter is issued. If the IRS eventually denies an organization's application for exemption, that organization is not required to disclose any of its application materials.

Also excluded from the disclosure requirements are churches and small nonprofits (with annual budgets of less than \$25,000) because they're not required to file Form 990 in the first place. However, many churches

and smaller nonprofits elect to file a Form 990 for a variety of reasons. In those cases, the disclosure rules *do apply*. This means their decision to file now takes on a whole new dimension—one that should be thoughtfully considered before following the routine of previous years' filings.

What Place & Time Restrictions Apply to You?

You must make your documents available for public inspection and provide copies upon request at both your principal office and at any regional or district office² your organization operates. The only exception is for sites that "do not serve as offices of management staff," such as day care centers, health care facilities, or scientific or medical research labs.³ You may apply normal security measures to people who request inspection or copies, as long as you apply the same measures to the general public under the same circumstances. You may also have an employee in the room during an inspection as long as the person conducting the inspection has total access to the applicable documents and is allowed to take notes freely.

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How Must You Fulfill Written Requests for Information?

When someone requests copies in writing, you must send the copies within 30 days of receiving the request. If you usually charge copying and postage fees in advance and such fees aren't received with the request, you may provide the copies within 30 days of the date you receive *payment*, rather than the date of the initial request. But you must request payment within seven days from the date you receive the initial request. After notifying the requester that payment is due, you may disregard the request if you don't receive payment within 30 days or if the payment check doesn't clear upon deposit.

How Must You Fulfill In-Person Requests?

When someone requests copies in person, you must provide the copies *on the same day* the request is made. In "unusual circumstances," the rules give you till the next business day after the unusual circumstances have ended (or not longer than five business days). "Unusual circumstances" are times when your staff is completely unable to fulfill the requests, such as when the entire staff is away at an off-site meeting or handling special administrative tasks such as student registration. It may also include times when the number of requests exceeds your organization's daily capacity to make copies, or when requests are received shortly before the end of a regular business day and the time required to complete the copies would be extensive.

Subordinate or Local Organizations Exempt from the Rules?

Local or subordinate organizations of a parent group aren't exempt from the disclosure rules. If you're a local United Way office, for example, you must comply with a request for inspection or copies in essentially the

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same way as the headquarters office. However, the rules give you more time for compliance: You must provide copies in response to an in-person request "within a reasonable amount of time" (normally not more than two weeks) rather than on the same day. If you don't file your own Form 990 or are covered by your parent organization's tax-exempt application, you may omit the parts of those documents that don't pertain specifically to you.

Can You Charge Copying & Postage Fees?

The law allows you to charge "reasonable" copying and postage fees. It defines "reasonable" copying fees as the same amount the IRS charges (currently \$1 for the first page and 15 cents for each additional page). It limits postage fees to the actual cost of the postage. If costs exceed \$20, you must inform the requester and receive consent to proceed. You may charge fees in advance or may bill the fees when the request is fulfilled. Or you may provide copies exclusively by electronic mail if the individual who made the request approves.

To minimize the burden of copying costs, people may request partial copies of certain documents. But the request must specifically identify the part of the document or schedule in order for you to provide the partial copies.

You may retain a local agent to process copying requests made in person. This agent must be located within reasonable proximity of your

office, and must comply with the same rules that apply to your organization. For example, if you receive the request and forward it to the agent, the time limits that apply to your organization also apply to the agent. You are liable for any failure of the agent to comply with the disclosure rules.

Can You Post Your Documents on the Internet?

You can avoid the copying regulations altogether if you post your Form 990 and application for exempt status on the Internet, or otherwise make the documents "widely available."⁴ To meet the "widely available" standard, the rules specify that any documents posted on the Internet must be in a format that the IRS uses to post forms and publications. You may post your documents on your organization's Web site or on another site as part of a database of similar materials.⁵ Then when people request copies, all you need to do is provide the Web address or other location where they can access the documents.

For several years, the IRS has been working to develop its own database of Form 990s that would be current, free of charge, and widely accessible to the public via the Internet. Completion of this project is still several years away, according to most expert projections, but the possibility exists that nonprofit organizations could someday be relieved of their copying responsibilities simply by filing tax information with the IRS. The IRS would then post the documents on a government Web site, which would satisfy the "widely available" criterion mandated by the disclosure rules. If that indeed happens, the advancement could eventually make these disclosure rules obsolete. Until the technology is in place to provide that service, however, nonprofits must be diligent in their own efforts to comply with the disclosure rules.



What Issues Should You Consider before Disclosure?

Because exempt organizations started filing the Form 990 way back in 1969, many organizations don't think twice about filing. But thanks to the potential for much wider distribution under the disclosure rules, you should more carefully consider what your Form 990 communicates.

The form itself has been called the "most universal tool available to provide information on the finances and activities of nonprofit organizations,"⁶ but the Form 990 isn't necessarily designed to highlight your organization's good works. It provides a wealth of detail about your organization's financial health, but it allows little space to describe charitable programs or other services. With your organization's reputation and public image now riding so prominently on the Form 990, you should make sure your Form 990 puts the best foot forward for your organization by doing the following:

- Use attachments to the Form 990 that more fully describe your organization's charitable activities.
- Proof read the Form 990. Proof read it again, then proof it again. A sloppy Form 990 not only portrays the wrong image for your organization, it's also more likely to be misinterpreted.
- Seek accounting and legal guidance to help complete or review the Form 990. Nonprofits lacking staff to do the job or start-up nonprofits lacking experience could especially benefit from professional guidance.
- Brief your board about the wider scope of public disclosure obligations. Consider appointing a special board committee to review the

Form 990 every year before it's filed, since the board is ultimately responsible for its contents.

Are You Protected from Harassment Campaigns?

The IRS realizes that someone could harass a nonprofit organization by deluging it with requests for copies. To prevent this mischief, the rules explain how you can seek protection if you are threatened by harassment stemming from the disclosure rules.

What Are the Penalties for Non-Compliance?

Failure to allow public inspection or provide copies can result in a penalty of \$20 for each day of non-compliance, with a maximum of \$10,000. For failure to file a Form 990 or to include all required information, the penalty is \$20 for each day the non-compliance continues, up to a maximum penalty of \$10,000 or 5% of the organization's gross receipts, whichever is less. Organizations with annual gross receipts of \$1 million or more are subject to a \$100 per day penalty, with a maximum of \$50,000.⁷ Your only defense is to show that the failure was due to reasonable cause.

What Impact Can You Expect from the New Rules?

Despite the compliance burden of these disclosure rules, many commentators suggest that the new rules will ultimately benefit the nonprofit community by providing insight into the IRS's thought processes and regulatory oversight.⁸ Some suggest the rules will "change the very nature of enforcement from an IRS-centered universe to one of public monitor-

Penalties for non-compliance can run to \$100 a day and reach \$50,000.

ing."⁹ The long-term impact remains to be seen, but what is clear from the outset is this: Nonprofits must be prepared to offer greater access to—and more information about—their internal workings than has ever before been required under law. ■

Footnotes

¹The IRS has yet to develop regulatory guidelines to implement these rules for private foundations. Thus, private foundations remain subject to the public disclosure requirements under §6104(d) & (e) of the tax code, and this article pertains solely to tax-exempt organizations *other than* private foundations.

²A "regional or district office" is one that has employees, whether part-time or full-time, whose aggregate number of paid hours a week are normally at least 120 hours.

³IRS Notice 88-120.

⁴The public inspection requirement would, nevertheless, still apply even if the documents were widely available.

⁵Several services now offer such databases, including the GuideStar Web site, operated by the nonprofit Philanthropic Research, Inc., at <http://www.guidestar.org>. For more information, contact GuideStar at 1126 Professional Drive, Williamsburg, Virginia 23185. Also see "No More Escape from Disclosure Law" in *Nonprofit World*, Vol. 17, No. 4.

⁶"Governance and Accountability," *Board Member*, Vol. 8, No. 3.

⁷IRS Code §6652 and §6685.

⁸"Disclosure Regs for Exempts Finalized," *EOTR Weekly*, Vol. 14, No. 3.

⁹Gene Steuerle, "The Coming Revolution in the Nonprofit Sector," *The Exempt Organization Tax Review*, Sept. 1998.

Sarah J. Schmidt, Esq., is the editor of the Nonprofit Alert®, published monthly by the law firm of Gammon & Grange, P.C. For a complimentary copy of the newsletter, contact Gammon & Grange at 703-761-5000. This article is excerpted from Nonprofit Alert® Memo NP9904-1, "Nonprofit Disclosure Requirements," available for \$20 per copy from Gammon & Grange, P.C., 8280 Greensboro Drive, 7th Floor, McLean, Virginia 22102.

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