



Nonprofit Transparency – What Your Organization Must Do to Satisfy the IRS

The Internal Revenue Code provides that a tax-exempt nonprofit organization must make available certain information about the organization to the general public. In addition, the IRS Form 990 - the annual information return nonprofit organizations must file with the IRS – requires the nonprofit to disclose whether it is complying with these requirements.

Specifically, on the Form 990, Section C of Part VI asks the nonprofit to indicate in what manner it makes its documents available for public inspection, and whether it makes public other documents relating to the organization.

This alert will discuss what the Internal Revenue Code requires your organization to do to satisfy the public disclosure requirements. In addition, it will discuss alternative ways that your organization may meet these requirements.¹

A. Which Documents Need to be Disclosed

Under the Internal Revenue Code, a nonprofit organization must provide for public inspection:

- a. a copy of its annual Form 990, 990-EZ or 990-PF, whichever is applicable,² and
- b. the original application for exemption it submitted to the IRS on Form 1023 or Form 1024, whichever is applicable.

Each Form 990 must be made available for public inspection for at least a three year period, beginning with the due date for the annual return (including filing extensions) and ending with the third anniversary of the due date. The Form 1023/1024 must be made available for public inspection permanently.

If a nonprofit cannot find a copy of its Form 990 or exemption application, it can request a copy from the IRS. The organization should file a Form 4506-A

¹ This alert does not discuss the various state charitable solicitation laws, and what disclosure, if any, your organization must make if it is actively raising funds in a particular state.

² A 501(c)(3) organization must also make available for public inspection any Form 990-T, *Exempt Organization Business Income Tax Return*, filed after August 17, 2006.

with the IRS, specifying the form it is requesting.³

B. What Disclosure is Required

In order to meet the public disclosure requirements, a nonprofit organization is required to maintain copies of its Form 990s and Form 1023/1024 at its principal office and any other office where it employs full-time or part-time employees whose aggregate work hours add up to at least 120 hours per week.

An individual may request to inspect the forms in person or receive copies of the forms by mail. The nonprofit does not have to allow in-person inspections at any office that only provides program services, such as a health care clinic or day care center, and does not house managerial or administrative employees.

1. In-Person Visits.

A person may visit the nonprofit's offices to review the Form 990s or Form 1023/1024 during normal business hours. If someone comes to the office and asks to see the forms, the nonprofit has to make them available for inspection. The organization may have someone from its staff in the room during the in-person visit. It must allow the individual to take notes freely.

While at the nonprofit's office, the individual may ask for copies of the forms and, absent unusual circumstances, the nonprofit should satisfy the request the same day.

³ If a nonprofit organization filed its application for tax exempt status before July 15, 1987, and on July 15, 1987 it no longer had a copy of its application, it is relieved from the requirement to have the application available for inspection.

2. Requests by Mail.

An individual is also free to write to the organization, and request a copy of any of these forms. The individual can send the request by mail, fax, email or overnight courier. The nonprofit usually has 30 days to respond.

3. Charging for Copies.

Whether the person requests copies in person or by mail, the nonprofit may charge reasonable copying costs (currently, \$.20 per page) and the actual cost of postage before providing the copies.⁴

The nonprofit must notify the individual making the request of the approximate cost for the copies and in what form payment may be made. The nonprofit must provide this cost information within seven days of receiving the individual's request for copies. The nonprofit must accept payment for the copies in the form of cash or money order, in the case of an in-person request, and by certified check, money order and either personal check or credit card, in the case of a written request.

4. No Permanent Office or Very Limited Office Hours.

If a nonprofit has no permanent offices, the organization must make the exemption application and annual returns available for inspection at a

⁴ The nonprofit cannot charge an individual making an in-person visit for copies if the individual has provided his or her own means of making copies at the place of inspection.

reasonable time and location within a reasonable period of time (normally two weeks). Alternatively, the nonprofit can mail a copy of the requested materials to the individual within the two week period, but, in such case, it cannot charge the individual for copies unless the individual consents.

If a nonprofit has no or very limited office hours at any time during the year, during that time period it must comply with the same requirements that apply to an organization with no permanent offices.

C. Alternative Methods of Nonprofit Compliance

Many nonprofits wish to avoid the burden of meeting these requirements. In order to provide relief from these rules, the IRS permits alternative ways for a nonprofit to meet the public disclosure requirements.

A nonprofit organization does not have to comply with individual requests for copies if it makes the documents widely available. This can be done by posting the documents on the nonprofit's website.

To comply with this alternative, however, the documents must be posted in a format that exactly reproduces the image of the original document and allows the individual to download, view and print the document without the payment of a fee. One format that currently meets the criteria is Portable Document Format (pdf).

The nonprofit does not have to post the documents on its website. It can post the documents on another website that contains a database of exempt

organization documents. To date, the IRS has not stated whether posting the information on well known sites such as www.guidestar.org meets these requirements.

If the nonprofit makes the information widely available through the Internet, it must inform any individual requesting a copy of the IRS forms where on the Internet the documents are available. If someone makes the request in person, the Internet address must be provided immediately. If someone makes the request in writing, the information must be provided within seven days.

Nonprofits should note, however, that making documents widely available only satisfies the requirement to provide copies of the documents. The nonprofit must still make the documents available to any person requesting to inspect the documents in person.

D. Information Exempt From Disclosure

Even though a nonprofit is required to make copies of its IRS Form 990 available for public inspection, it is not required to disclose all of the information contained in the Form 990.

Each year, a nonprofit is required to file Schedule B along with the nonprofit Form 990 or 990-EZ. This schedule contains the names of the nonprofit's largest donors.

However, the nonprofit does not have to make the complete schedule available for public inspection. The regulations specifically exclude the name and address of any contributor to the organization from the definition of

documents required to be disclosed.⁵ In fact, out of respect for the donors' privacy, the nonprofit should take steps to ensure that donor information is **not included** with the documents it makes available to the general public.⁶

Please note, however, that because Forms 990 and 990-EZ must be made publicly available, the nonprofit should not include on the form any personal identifying information about officers, directors, employees and others that is not required by the IRS, such as the individual's social security number.

E. Penalties for Failure to Comply

If a nonprofit fails to meet the disclosure requirements, then the responsible persons of the organization (such as an officer or director) may be subject to a penalty of \$20 per day for as long as the failure continues. There is a maximum penalty of \$10,000 for each failure to provide the Form 990. There is no maximum penalty for the failure to provide a copy of a Form 1023/1024, Application for Exemption.

⁵If the nonprofit included the names and addresses of contributors in its Form 1023/1024, Application for Exemption, those names and addresses are subject to disclosure.

⁶ The general exclusion of donor information does not apply to private foundations or to political organizations described in Section 527 of the Internal Revenue Code. These political organizations are required to report the name, address and occupation (and employer if an individual), of any person that contributes in the aggregate \$200 or more in a calendar year on the Schedule A of Form 8872. Political organizations are required to make Form 990, along with Schedule B, available to the public, including the contributor information.

If someone wants to make a complaint about the failure of a nonprofit to provide this information, the person can file a complaint with the IRS at the following address:

IRS EO Classification
Mail Code 4910
1100 Commerce Street
Dallas, TX 75242

F. Optional Disclosure

Although the nonprofit is required to disclose the Form 990 and Form 1023/1024, it may elect to make other information about its organization available to the public. In Question 19 of Part VI of the IRS Form 990, the IRS asks:

Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy, and financial statements available to the public.

As the instructions to Form 990 make clear, the nonprofit is not required to make these documents available to the general public, unless they are included as an attachment to another form, such as the Form 1023, Application for Exemption.

However, it is now common practice for publicly traded, for-profit companies, such as Microsoft and General Electric, to put these documents on its website. Your nonprofit may want to consider whether to make these documents available in order to create an impression among your donors, volunteers and staff that you are an open organization, with nothing to hide.

H. Harassment Campaigns

Some nonprofits engage in controversial activities. As a result, people who oppose the organization's mission may try to use the public disclosure requirements as a way to harass the nonprofit, and use up its resources on fulfilling their requests for information instead of serving the nonprofit's mission.

In order to deal with this problem, the IRS has set up procedures by which a nonprofit that feels it is subject to a harassment campaign can request an exemption from the requirement to provide copies of its IRS forms.

Under the IRS rules, a group of requests for an organization's Form 990 or 1023/1024 is indicative of a harassment campaign if "the requests are part of a single coordinated effort to disrupt the operations of a tax-exempt organization rather than to collect information about the organization."

An organization that feels that it is the subject of a harassment campaign must apply for such a determination to the director of the IRS. It may also suspend complying with requests that it believes are part of such a campaign, provided it files its request with the IRS within 10 business days from the date the organization suspends complying with the requests. The organization may also suspend compliance with requests after it files an application and until a final determination is made by the IRS.

In determining whether harassment is occurring, the IRS will review the facts and circumstances. Factors that indicate

the nonprofit is subject to a harassment campaign include:

- a sudden increase in the number of requests;
- a number of requests are made through form letters or similarly worded correspondence;
- requests containing language hostile to the organization;
- direct evidence of bad faith by organizers of the alleged harassment campaign;
- evidence that the organization has already provided the requested documents to the group; and
- evidence that the organization routinely provides copies of its documents upon request.

As a general rule, requests for copies from the news media will not be considered harassment. Also, if the nonprofit receives an increased number of requests for information following a news story about the nonprofit, the increase will not be considered harassment, even if the individuals requesting the copies are hostile to the nonprofit. The organization must demonstrate evidence of a coordinated, intentional effort on the part of the persons requesting the information.

If the IRS denies the organization's application, the organization will not be penalized for failing to comply with the request for documents, provided it provides the copies within 30 days of the date it is notified by the IRS that its application has been denied and provided further, that the IRS determines that the nonprofit had a good faith basis for making its application.

July 2009

Even without any evidence of harassment, if a nonprofit receives multiple requests for information from one individual or from the same address, it is allowed to ignore the multiple requests. An organization may disregard requests from the same individual or address for the same document beyond the first two within any 30-day period or the first four within any one-year period.

Additional Resources

If you have further questions about the public disclosure requirements, you may find the following resources to be helpful:

Life Cycle of an Exempt Organization

<http://www.irs.gov/charities/article/0,,id=169727,00.html>

IRS Publication 557

<http://www.irs.gov/pub/irs-pdf/p557.pdf>

This communication is provided by the D.C. Bar Pro Bono Program, as a public service solely for informational purposes, without any representation that it is accurate or complete. It does not constitute legal advice and should not be construed as such. It does not create an attorney-client relationship between the recipient and any other person, or an offer to create such a relationship. This communication contains information that is based, in whole or in part, on the laws of the District of Columbia and is current as of the date it is written. However laws vary from state to state and may change from time to time. As a result, the information may not be appropriate for anyone operating outside the District of Columbia and may no longer be timely. Consult an attorney if you have questions regarding the contents of this communication.