Disclosure requirements for tax-exempt organizations

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The following question and answer analysis sets forth the important disclosure requirements that apply to tax-exempt organizations as they relate to (1) applications for recognition of tax-exempt status and (2) annual information returns. It is important that all management team members and board members understand the disclosure rules as they apply to their organization. As can be seen in the following analysis, failure to adhere to the disclosure rules can result in substantial penalties against the organization and also against those in the organization that disregard these rules.

General rules

Tax-exempt organizations must make available for public inspection a copy of their exemption applications and annual returns for the preceding three years as provided for in section 6104(d)(1).

Q1) Who must an exempt organization make its application and annual return available to?

A1) An organization generally must furnish a copy of the application and annual returns to anyone who requests them in person or in writing.

Q2) Can persons go directly to the IRS to get a copy of the organization’s application, Form 1023, Application for Recognition of Exemption Under Section 501(c)(3) of the Internal Revenue Code?

A2) The IRS must maintain a copy of the application, open for public inspection, in its national office and at the appropriate IRS field office. Form 4506-A, Request for Public Inspection or Copy of Exempt or Political Organization IRS Form, is filed with the IRS as a request to inspect or obtain a copy of a
return, report, notice or an exemption application from the IRS. Instructions for the Form 4506–A indicate where to file the form based on what is requested. The IRS can provide copies of exempt organization returns on a DVD.

Q3) How does an organization make the public aware that it complies with the return public inspection requirements?

A3) An organization indicates on its annual return Form 990, Return of Organization Exempt From Income Tax, whether it has complied with the public inspection requirements (see Part VI, line 18).

**Application for exemption Form 1023**

The disclosure requirement applies to:

1. The application itself (Form 1023, 1023–EZ or 1024)
2. Any supporting documents (such as a legal brief or a response to questions from the IRS during the application process)
3. Any letter or other document issued by the IRS with respect to the application (such as a favorable determination letter or a list of questions from the IRS about the application)
4. The notice, including related documents, filed by an organization to advise the IRS that it is a political organization as described in section 527
5. All letters and documents pertaining to an application for a group exemption letter
6. All letters and documents relating to an organization’s status as a supporting organization, a private operating foundation or a private nonoperating foundation
7. Unfavorable rulings or determination letters in response to an application for exemption
8. Rulings or determination letters revoking or modifying a prior favorable determination letter

Once the application has been filed and the IRS has made its determination of exempt status, the public inspection requirement applies, regardless of whether a negative determination is issued. An exemption application submitted to the IRS before July 15, 1987, must be made available only if the organization had a copy of the application on July 15, 1987. The supporting documents that must be made available are only those submitted by the organization in support of its application. Submissions by anyone other than the entity seeking exempt status need not be disclosed.

Q4) Is there any information related to the Form 1023 that may be withheld from the public inspection rules?

A4) Yes, but the only information on an exemption application that may be withheld from public inspection is that which relates to a trade secret, patent, process, style of work or apparatus of the organization or any information that would adversely affect national defense. If any such information is contained in the application or supporting documents when filed, the information should be marked “NOT SUBJECT TO PUBLIC INSPECTION,” and the return should include a statement listing the information not to be disclosed and explaining why it should not be disclosed.

**Annual returns Form 990 and Form 990–EZ**

Q5) How long must a Form 990 series return be subject to public disclosure?

A5) An annual return must be available for the three–year period beginning with the due date (including extensions) or the date filed, whichever is later.

EXAMPLE: Exempt organization has a calendar year–end of Dec. 31, 2015. Its return is due May 15, 2016. The return is filed on May 15, 2016. The return as filed is subject to the public disclosure rules until May 15, 2019.

EXAMPLE: Exempt organization has a calendar year–end of Dec. 31, 2015. Its return is due May 15, 2016, but it files an extension to file on Nov. 15, 2016. The return is filed on Aug. 1, 2016. The return as filed is subject to the public disclosure rules until Nov. 15, 2019.

Q6) Do the annual return disclosure rules apply to amended returns?

A6) Yes, an amended return must be made available for a period of three years beginning on the date the amended return was filed with the IRS.

EXAMPLE: Exempt organization files an amended return on July 2, 2016. The amended return is subject to public disclosure until July 2, 2019.

Q7) What part of the Form 990 is required to be disclosed to the general public?

A7) The returns made available for inspection or the copy provided generally must be an exact copy of the return filed with the IRS, including all attachments and supporting documents. For example, salary information furnished in the return cannot be deleted.

Q8) Is there any part of Form 990 that is not subject to public inspection?

A8) Yes, Schedule B (Schedule of Contributors) is open to public inspection if attached to Form 990 or 990–EZ. However, the names and addresses of the contributors, along with information that identifies contributors, from Schedule B filed with Forms 990 and 990–EZ does not have to be publicly disclosed. To be identifying, information must be something that publicly identifies the contributor. It cannot be information that might identify the contributor. It is important to note that all other information on a Schedule B, including the amounts of contributions, descriptions of noncash contributions and any other information provided, is open to public inspection unless it clearly identifies the contributor. (Important note: For Form 990–PF, Return of Private Foundation, all Schedule B information is subject to public disclosure, including donor
names and addresses; therefore, Form 990-PF, Schedule B, is subject in its entirety to public disclosure, with no allowed redactions of donor information).

Q8a) What if someone requests a “part” of Form 990 in his or her request for a copy?

A8a) If someone requests a “part” of Form 990, that request must be specific. For example, “I request all compensation information from the exempt organization’s Form 990” is not an adequate request. However, if the request is “I request a copy of Part VII, Form 990, and all parts of Schedule J, Form 990,” this is an adequate request and copies of those parts of the return become subject to the disclosure rules.

Unrelated business income tax returns

Q9) Do we have to make our Form 990-T, Exempt Organizations Business Income Tax Return, available for public inspection?

A9) Form 990-T, including schedules and some attachments, must be available for public inspection if filed by a section 501(c)(3) organization. However, certain forms and other attachments are not required to be made available for public inspection even if filed with Form 990-T.

A Form 990-T filed by a section 501(c)(3) organization, including the required schedules and attachments (statements), generally must be made available for public inspection for the three-year period beginning with the due date of the return (including extensions). This includes a Form 990-T filed by a charitable organization, such as a church, that is not otherwise subject to any disclosure rules. If the organization files an amended return, the amended return must be the one made available for public inspection.

The following forms, when attached to a section 501(c)(3) organization’s Form 990-T, are not required to be made available for public inspection:

- Form 926, Return by a U.S. Transferor of Property to a Foreign Corporation
- Form 5471, Information Return of U.S. Persons With Respect to Certain Foreign Corporations
- Form 8271, Investor Reporting of Tax Shelter Registration Number
- Form 8594, Asset Acquisition Statement Under Section 1060
- Form 8621, Information Return by a Shareholder of a Passive Foreign Investment Company or Qualified Electing Fund
- Form 8832, Entity Classification Election
- Form 8858, Information Return of U.S. Persons With Respect to Foreign Disregarded Entities
- Form 8865, Return of U.S. Person With Respect to Certain Foreign Partnerships
- Form 8886, Reportable Transaction Disclosure Statement
- Form 8913, Credit for Federal Telephone Excise Tax Paid
- Form 8925, Report of Employer-Owned Life Insurance Contracts
- Form 8941, Credit for Small Employer Health Insurance Premiums

A copy of an organization’s Form 990-T can be requested from the IRS by submitting a completed Form 4506-A.

Note: Certain Form 990-T information may be withheld from public disclosure and inspection if public availability would adversely affect the organization, similar to the information that may be withheld regarding applications for exemption and Form 990. In addition, schedules, attachments and supporting documents that do not relate to the unrelated business income tax calculation need not be made available for inspection or copying.

Locations for allowing public inspection or providing copies

Q10) When do the application and returns have to be made available for public inspection?

A10) The documents must be made available during regular business hours at the organization’s principal office and at each of its regional or district offices that has the equivalent of at least three paid full-time employees. A regional or district office is subject to the disclosure requirement only if it has paid employees, whether part or full time, who normally work a combined total of at least 120 hours each week. However, a site is not a regional or district office if the only services provided further the organization’s exempt purposes and the site does not serve as an office for management staff other than managers who are involved solely in managing exempt function activities at the site. An exempt organization that does not maintain a permanent office (or one that has an office but no regular office hours or only limited office hours during certain times of the year) can make its application for tax exemption available at a reasonable location of its choice. The organization must permit public inspection within a reasonable period of time after receiving a request (normally not more than two weeks) or, at its option, mail a copy of the appropriate documents within two weeks after receiving a request.

Q11) If someone requests a copy of the application or returns, within what time frame must the organization comply with the request?

A11) A copy generally must be furnished on the same day when the request is made in person, or within 30 days of receiving a written request. Sometimes an in-person request may place an unreasonable burden on the organization in fulfilling the request on the same business day because of unusual circumstances. When this occurs, the organization has until the earlier of the next business day following the day that the unusual circumstances cease to exist or the fifth business day after the date of the request to comply. However, if the exempt organization requires payment for copies in advance, it is only required to provide such copies within 30 days of receiving the payment.
Charges for copies

Although a reasonable fee can be charged for copies, the instructions to Form 990 do not define reasonable. According to the instructions to Form 990-T, a fee is reasonable only if it is no more than the per-page copying fee charged by the IRS plus no more than the actual postage costs incurred to provide the copies.

The current fee schedule set forth on Form 4506–A reflects a $0.20 per page charge for a commercial user, and for all other requesters, the fee is $0.20 per page only after the first 100 pages, which are free.

An exempt organization can charge the applicable IRS per-page copying fee for any number of pages, without regard to the fee exclusion applicable to the first 100 pages. The organization must provide timely notice of the approximate cost and acceptable form of payment within seven days of the request. Acceptable forms of payment include cash and money orders for in-person requests and certified checks, money orders, personal checks, or credit card payments for written requests. In addition, an organization may charge for actual postal costs incurred to mail the copies. However, when prepayment is not required, no more than $20 can be charged for copying and postage without the requester’s consent.

Disclosure exemption for widely available documents

Q12) How can an exempt organization avoid having to manually copy applications and returns if a copy is requested?

A12) An exempt organization can avoid providing copies by posting all the documents on its website or at another organization’s site as part of a database of similar materials. The organization then only has to inform persons requesting copies how and where to obtain them (immediately for requests made in person and within seven days for written requests). For this exception to apply, the website must provide instructions for downloading the documents. In addition, the documents must be posted in a format that, when accessed, downloaded, viewed and printed, exactly reproduces the image of the document as it was filed with the IRS (except for donor information permitted to be withheld by public charities). The documents must be accessible to anyone with internet access without requiring any special computer hardware or software (other than free software that is readily available) and without payment of a fee to the exempt organization or the entity maintaining the website.

Q13) We know the IRS uploads our filed returns to the GuideStar central computer server for anyone to view on the internet. Can you use this to meet the exception for providing a public disclosure copy and making it widely available?

A13) Generally, you cannot use the returns from the IRS posted on the GuideStar website (www.guidestar.org) as your widely available copy because the entire Schedule B, in most instances, is not included with the copy posted on that website. The disclosure rules require that Schedule B be attached in its entirety, except that donor information may be redacted (remove name and address of donor). However, two exceptions apply (see Q14).

Q14) Under what limited circumstances can the GuideStar website be used to meet the exception for providing a public disclosure copy and making it widely available?

A14) There are two situations where an exempt organization can state its return is made widely available on the GuideStar website. One, if the return does not have a Schedule B filing requirement, such return posted on the GuideStar website would be a full public disclosure copy. Two, if the exempt organization contacts GuideStar and uploads its own full copy of the public disclosure return to the GuideStar website, under the heading Returns Provided by the Organization, the requirement will be met.

Harassment campaign

Q15) Are there circumstances where an exempt organization need not comply with the public disclosure requirements?

A15) An organization need not comply with a request for a copy of its exemption application or an annual return if the request is part of a harassment campaign. Generally, a harassment campaign exists if it is obvious that the intent of the requests is to disrupt the organization’s operations rather than obtain information. Evidence of a harassment campaign includes a sudden increase in the number of requests or an extraordinary number of requests with form letters or similarly worded correspondence.

Q16) Is there a procedure that must be followed in order to inform the IRS that an exempt organization considers itself the target of a harassment campaign?

A16) A tax–exempt organization may apply for a determination that it is the subject of a harassment campaign and that compliance with requests that are part of the campaign would not be in the public interest by submitting a signed application to the IRS district director for the district where the organization’s principal office is located (or such other person as the IRS commissioner may designate).

The application consists of a written statement giving the organization’s name, address and employer identification number and the name, address and telephone number of the person to contact regarding the application. The application must describe in detail the facts and circumstances that the organization believes support a determination that the organization is subject to a harassment campaign. The organization may suspend compliance with respect to any request for a copy of its documents based on its reasonable belief that such request is part of a harassment campaign, provided that the organization files an application for a determination within 10 business days from the day the organization first suspends compliance with respect to a request that is part of the alleged campaign. In addition, the organization may suspend compliance with any request it reasonably believes to be part of the harassment campaign.
until it receives a response to its application for a harassment campaign determination.

If the appropriate district director (or such other person as the commissioner may designate) determines that a tax-exempt organization is the subject of a harassment campaign and it is not in the public interest to comply with requests that are part of the campaign, such an organization is not required to comply with any request for copies that it reasonably believes is part of the campaign. This determination may be subject to other terms and conditions set forth by the district director (or such other person as the commissioner may designate). A person (as defined in section 6652(c)(4)(C)) shall not be liable for any penalty under section 6652(c)(1)(C), 6652(c)(1)(D) or 6685 for failing to timely provide a copy of documents in response to a request covered in a request for a harassment determination if the organization fulfills the request within 30 days of receiving a determination from the district director (or such other person as the commissioner may designate) that the organization is not subject to a harassment campaign.

Penalties for failure to disclose required information

A person responsible for a failure to comply with any of the disclosure requirements is personally liable for a penalty of $20 per day. If the failure is caused by a wilful act, an additional penalty of $5,000 can apply.

For a failure related to disclosing an annual return, the $20 per day penalty is limited to $10,000 per return, regardless of the number of persons involved. However, a failure to disclose the organization's exemption application upon request draws a $20 per day penalty that applies for as long as the failure continues.

The term person, for these disclosure penalties, includes all management personnel responsible for filing an organization's Form 990 annually and also includes members of the organization whose duty it is to provide the disclosure copies to requesters of such information.

The $20 per day disclosure penalty will not be assessed if reasonable cause can be shown for the failure. However, the $5,000 willful failure penalty does not contain a reasonable cause exception.

Miscellaneous rules

Q17) If a person comes to the organization to look over the return, can the exempt organization have a representative in the room as this person looks over the return?

A17) Yes, the exempt organization can have a person in the room as the person looks over the return provided and must be allowed to freely take notes as well.

Q18) If a person comes to the exempt organization's offices, requests to look over a copy of a return, and brings his or her own copy machine, can this person freely make copies of the return to take with them out of the premises?

A18) Yes, a person who brings his or her own copy machine must be allowed to freely take copies of the return at no charge to this person.

Q19) Can an exempt organization retain the services of an agent to provide copies of its returns to requesters of such information?

A19) Yes, a principal, regional or district office of a tax-exempt organization subject to the disclosure requirements may retain a local agent to process requests made in person for copies of its documents. A local agent must be located within reasonable proximity of the applicable office. A local agent that receives a request made in person for copies must provide the copies within the time limits and under the conditions that apply to the organization itself. For example, a local agent generally must provide a copy to a requester on the day the agent receives the request. When a principal, regional or district office of a tax-exempt organization using a local agent receives a request made in person for a copy, it must immediately provide the name, address and telephone number of the local agent to the requester.

A tax-exempt organization subject to the disclosure rules may also retain an agent to process written requests for copies of its documents. The agent must provide the copies within the time limits and under the conditions that apply to the organization itself. For example, if the organization received the request first (e.g., before the agent), the deadline for providing a copy in response to a request is be determined by reference to when the organization received the request, not when the agent received the request. An organization that transfers a request for a copy to such an agent is not required to respond further to the request.

Q20) What forms of payment must the exempt organization accept as payment for copies of returns requested?

A20) If a tax-exempt organization charges a fee for copying, it must accept payment by cash and money order for requests made in person. The organization may accept other forms of payment, such as credit cards and personal checks. If a tax-exempt organization charges a fee for copying and postage, it must accept payment by certified check, money order, and either personal check or credit card for requests made in writing. The organization may accept other forms of payment.

Q21) Does an exempt organization have to respond to queries related to charges for copying of its application for exemption and annual information returns?

A21) Yes, in order to facilitate a requester’s ability to receive copies promptly, a tax-exempt organization must respond to any questions from potential requesters concerning its fees for copying and postage. For example, the organization must inform the requester of its charge for copying and mailing its application for exemption and each annual information return, with and without attachments, so that a requester may include payment with the request for copies.
Q22) What if the exempt organization notices multiple requests from the same individual or address?

A22) Under a special rule, a tax-exempt organization may disregard any request for copies of all or part of any document beyond the first two received within any 30-day period or the first four received within any one-year period from the same individual or the same address, regardless of whether the IRS district director for the applicable district (or such other person as the IRS commissioner may designate) has determined that the organization is subject to a harassment campaign.

Conclusion

There are many important disclosure rules of which a tax-exempt organization’s management and board of directors need to be aware. If you have any questions related to the information contained in this white paper, contact your tax advisor.