

# New York State Bar Association

One Elk Street, Albany, New York 12207 • 518/463-3200



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Mary Kate Wold

February 9, 1998

Honorable Donald C. Lubick  
Acting Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Room 3120  
Washington, D.C. 20220

Honorable Charles O. Rossotti  
Commissioner of Internal Revenue  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224

Dear Secretary Lubick and Commissioner Rossotti:

I am pleased to enclose a report prepared by Committee on Tax Exempt Entities of the Tax Section of the New York State Bar Association. The report comments on regulations proposed under section 6104(e) of the Internal Revenue Code with respect to disclosure of exempt organizations' applications for recognition of tax-exemption and their most recent annual information returns. The regulations provide guidance on how organizations should make their exemption applications and information returns available for public inspection, how they should comply with requests for copies of these documents and how they can qualify for exemptions from the public inspection and copying requirements.

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The report commends the Internal Revenue Service on both its procedure for developing these regulations and the clear, practical and flexible rules it has drafted. The committee welcomes the effort to employ new communications technology to make the required disclosures more easily and broadly available and hopes that the use of appropriate technology will expand. The committee's comments generally deal with technical issues and offer a number of clarifications. In addition, the report provides certain recommendations that might be appropriately considered in the context of future administrative simplifications.

Please let me know if we can be of further assistance in finalizing the Regulations.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard O. Loengard, Jr.", written in black ink.

Richard O. Loengard, Jr.  
Chair

(Enclosure)

ccs: Jonathan Talisman, Esq.  
Deputy Assistant Secretary (Tax Policy)  
Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Room 3064  
Washington, D.C. 20220

Clarissa Potter  
Acting Deputy Tax Legislative Counsel  
Department of the Treasury  
1500 Pennsylvania Avenue, N.W.  
Washington, D.C. 20220

Stuart L. Brown  
Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue  
Room 3026  
Washington, D.C. 20224

Michael B. Blumenfeld, Esq.  
Office of the Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Room 5229  
Washington, D.C. 20224

Michael Slaughter  
Paralegal Specialist  
Office of the Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Room 5226  
Washington, D.C. 20224

**Committee on Tax-Exempt Entities  
New York State Bar Association Tax Section**

**REPORT ON PROPOSED REGULATIONS  
REGARDING PUBLIC DISCLOSURE OF MATERIAL  
RELATING TO TAX-EXEMPT ORGANIZATIONS<sup>1</sup>**

This report comments on proposed regulations<sup>2</sup> promulgated pursuant to Internal Revenue Code provisions originally enacted as part of the Omnibus Budget Reconciliation Act of 1987 (OBRA '87)<sup>3</sup> and expanded by amendments in The Taxpayer Bill of Rights 2 (TBOR2) enacted on July 30, 1996.<sup>4</sup> These regulations relate to the obligations imposed by those two laws under Code section 6104(e) which requires tax-exempt organizations to provide greater public disclosure of their applications for recognition of tax-exemption and of their most recent annual information returns. The regulations provide guidance on how affected organizations should make their exemption applications and information returns available for public inspection, how they should comply with requests for copies of these documents and how they can qualify for exemptions from the public inspection and copying requirements.

The Committee commends the Internal Revenue Service on both its procedure for developing these regulations and its effort to draft clear, practical and flexible rules consistent with their statutory source. In particular, we note the Service's solicitation of suggestions<sup>5</sup> prior to promulgating the regulations and the attention it paid to commentators' suggestions. We support the general approach of the proposed regulations, and we believe that organizations subject to the disclosure requirements<sup>6</sup> as well as individuals seeking information from these organizations will welcome the issuance of these regulations in final form. Accordingly, the comments, below, generally deal with technical issues. We also provide some suggestions that we recognize might more

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<sup>1</sup> This report was prepared by the Committee on Tax-Exempt Entities. The principal draftsman was Michelle P. Scott. Helpful comments were received from Kimberly S. Blanchard, Dennis J. Dempsey, Peter L. Faber, Richard O. Loengard and Stuart L. Rosow.

<sup>2</sup> REG-246250-96, 62 F.R. 50533-50541, Prop. Reg. Secs. 301.6104(e)-0, 301.6104(e)-1, 301.6104(e)-2 and 301.6104(e)-3, issued September 26, 1997.

<sup>3</sup> Pub. L. No. 100-203. The IRS provided guidance to tax-exempt organizations on complying with the 1987 public inspection requirements in Notice 88-120, 1988-2 C.B. 454.

<sup>4</sup> Pub. L. No. 104-168.

<sup>5</sup> Notice 96-48, 1996-39 I.R.B. 8.

<sup>6</sup> Under section 6104(e), the public inspection and copying requirements relating to applications for exemption apply to organizations described in section 501(c) and (d), and exempt from tax under section 501(a), including private foundations. In addition, the public inspection and copying requirements relating to annual information returns apply to organizations described in section 501(c) and (d), excluding private foundations. Section 6104(d) and present Treas. Reg. Sec. 301.6104(d)-1 require a private foundation to make its annual return available for inspection at its principal office and to publicize the return's availability.

appropriately be considered in the context of future administrative simplifications and that might require legislative action with respect to both the IRS' authority and budget.

## I. Principal Comments

### 1. "Widely Available" Internet Exception to Copying Obligation

#### a. Exception

An exempt organization will not be required to provide a copy of its exemption application and/or annual return if it makes the documents "widely available" within the meaning of the regulations. The organization nevertheless must still meet the public inspection requirements.<sup>7</sup> By allowing Internet posting that meets specified requirements<sup>8</sup> to pass the "widely available" test, the proposed regulations enable organizations to fulfill their obligations in an efficient, economical and effective manner.

#### b. Requirements

The proposed regulations treat information as "widely available" if (1) the exempt organization posts it on a World Wide Web page that the organization establishes and maintains, or (2) the organization posts it, as part of a database of similar documents, on a World Wide Web page established and maintained by another entity. In the latter case, the posting entity must have procedures for ensuring the reliability and accuracy of the documents it posts and must take reasonable precautions to prevent alteration, destruction or accidental loss of the documents posted on its page. In addition, the regulations impose certain standards of conformity to the format the IRS uses in posting documents to its Web page. Instructions must be provided for accessing and downloading, for<sup>1</sup> which no fee can be charged by the organization maintaining the page. Downloaded prints must be in substantially the same form, and contain the same information<sup>9</sup>, as the original documents.

#### c. Comments: Certifications and Clearinghouse

It would be helpful to add one or more examples of procedures that would be adequate for ensuring reliability and accuracy. An initial step could be to require an officer of the organization to certify to the accuracy of the information provided. While the IRS may not currently be authorized or funded to provide a "confirmation" of documents' accuracy, it would serve organizations and the Service alike if the Service played a role in developing a clearinghouse. The creation of a central database or clearinghouse would greatly aid both exempt organizations and persons seeking information about them. The

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<sup>7</sup> Prop. Reg. Sec. 301.6104(e)-2(a).

<sup>8</sup> Prop. Reg. Sec. 301-6104(e)-2(b)(2).

<sup>9</sup> Information that otherwise may be withheld from public disclosure, e.g., names and addresses of contributors or trade secrets, also can be excluded from the Internet posting and downloaded material. Prop. Reg. Sec. 301.6104(e)-2(b)(2)(iii).

IRS itself might establish a public database on the Web to provide the information from applications and returns for which public disclosure is required. Or, at the request of an exempt organization, the IRS might provide the information to create and maintain an accessible data base to an independent, private entity. As the Service pursues its plans to improve technologically, to simplify procedures and to improve its relationship with its clients, we urge it to consider how it might provide or assist with the establishment of a database.

## 2. Harassment Exception

### a. Exception

A second exception to the requirement that an organization supply copies of its application and returns upon request applies when the requests constitute harassment of the organization. An organization that receives a group of requests for documents that appear to be part of a coordinated effort, or that receives multiple requests from a single individual or address, can be relieved of the duty to provide the documents. Generally, an organization must obtain a determination from the district director that the organization is subject to an harassment campaign. An organization is allowed "automatic relief" from the copying obligation for requests for copies 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 address without obtaining a determination.<sup>10</sup>

An organization reasonably believing that a request is part of a campaign of harassment can suspend compliance with the copying rule if it files an application with the district director explaining why the facts and circumstances giving rise to this belief within five days of its suspension of compliance with the rule. Such a suspension can continue until the district director responds to the application for a determination. Penalties may be imposed if an application is determined to have been unreasonable. A district director has significant discretion to impose conditions upon an organization seeking relief from responding to requests determined to constitute harassment.

### b. Procedures and Participants

Third-Party Role. The proposed regulations outline rules for responding to requests for documents, suspending responses when an organization believes itself the subject of a campaign of harassment and applying for determinations by the key district director on the existence of a campaign of harassment. They prescribe the effects of the director's determination. The regulations provide little detail about the content of an application for a determination or the procedures to be followed by the director in making the determination. They do not indicate whether the individuals requesting documents are given any right to information, to participate in the process, or procedural protection that corresponds to the disclosure and copying duties imposed on the exempt organizations. In view of the limitations imposed on third-parties attempting to assert rights in the federal

<sup>10</sup> Prop. Reg. Sec. 301-6104(e)-3(c).

tax arena, particularly the role of the standing requirement, it would be worthwhile to have these procedural questions addressed by the IRS and the IRS analysis and conclusions reported.

Recommendation. We believe that the IRS should not extend a right to participate in the district director's determination process to persons who are denied copies of documents because the organization believes that their requests constitute harassment under the regulations. We believe their participation is not required by law, nor is it necessary for the district director to make a determination. A statutory duty imposed on one person in the public interest of providing easier access to information does not automatically create a right in another person to demand performance of the statutory duty. Allowing the participation of third-parties in a district director's determination process would risk creating an undue administrative burden on the Service and could in itself constitute further harassment of the complaining exempt organization. The refusal to recognize the right of a third party to participate in such a process, however, should not prevent the district director from deciding in his/her discretion to seek information from that person.

The harassment exception applies only with respect to the copying obligations imposed on exempt organizations. It does not apply to the public disclosure requirements. The denial of requests for copies of documents and a determination of the existence of a campaign of harassment do not prevent individuals from obtaining the information in the documents. The exempt organization still is required to maintain copies of the documents in its principal, regional and district offices for public examination under the public disclosure rules. Accordingly, there are alternative and adequate ways for the individuals requesting the copies to obtain the same information.

### c. Other Recommendations

Automatic Relief. The regulatory provision for automatic relief from the copying obligation if multiple requests are received within specified time frames from the same source states that the organization can disregard further requests "regardless of whether the key district director has determined" that the requests constitute harassment.<sup>11</sup> In such circumstances, the organization should not be required to apply for a determination. We recommend that the regulations expressly state that no application is required in such circumstances.

Application Deadline. Requiring organizations to apply for harassment determinations within a short time of suspending its response to inquiries is highly desirable. Requiring a prompt filing and providing a quick response balances the organization's right to resist harassment and the public's right to learn about the organization. Imposing a five-day limit, however, seems too stringent. Organizations will have to locate and inform directors and officers to determine a course of action. Preparing and vetting the necessary paperwork also entails time. Too short a time limit may motivate

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<sup>11</sup> Prop. Reg. Sec. 301.6104(e)-3(c).

organizations to file applications that upon more thorough reflection and consultation they might have foregone. A longer period, say 10 to 15 days, is recommended. It is also urged that the "days" counted for the time limit be business days. Saturdays, Sundays and holidays should be disregarded.

Default Determination. The proposed regulations prescribe no deadline for action by the key district director on an application for a harassment determination. An organization reasonably believing that it is the subject of a harassment campaign is entitled to suspend compliance with the request for documents that is part of the alleged campaign until the director responds to its application for a determination. We believe that applications for determinations should receive responses within a reasonable period, especially in the case of applications that should be denied. Therefore, we recommend that the proposed regulations be amended to provide that, if the key district director does not act on a request for a determination within 90 days, the request is deemed granted.

Circumstances of Harassment. In Example 3,<sup>12</sup> an organization experiences multiple circumstances that, alone or together, seem strong evidence of harassment. The organization is determined to be the subject of a campaign of harassment. An organization should not have to demonstrate the multiple circumstances described in this example to demonstrate a reasonable belief of harassment and to obtain a determination. In this example, the receipt of 75 similarly-worded form letters should be enough to demonstrate that an harassment campaign exists even if the organization is unaware of any direct appeal by a hostile organization to its members to undertake the letter-writing effort. We recommend that the circumstances in this example be edited down to the receipt of the 75 similarly-worded form letters. Independent examples can be provided for other circumstances constituting reasonable grounds for believing and determining that a campaign of harassment exists.

News Media Requests. In Example 4,<sup>13</sup> an organization that has been determined to be the subject of a campaign of harassment because of a form letter barrage and other circumstances is required to respond to requests from five representatives of the news media who previously published articles criticizing the organization. It is not clear from the example if the requests from the media in the context presented are not considered to constitute a campaign of harassment, or if there is to be a general rule that the harassment exception is never to apply to requests from the news media. If a general rule is intended, it would be preferable to have it stated expressly in a separate example.

In either case, the reference to "news media" is problematic. We could support a blanket exception for publications of general circulation and the broadcast media of general interest. On the other hand, we would think that "news media" in this context would not include an organization's internal newsletter. However, even this exclusion might be too broad since such diverse publications as Consumer Reports or the Smithsonian Monthly might be considered membership publications. Since some

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<sup>12</sup> Prop. Reg. Sec. 301.6104(e)-3(f).

<sup>13</sup> Prop. Reg. Sec. 301.6104(e)-3(f).



clarification is desirable, we recommend adding the positive definition of news media as publications of general circulation and the general broadcast media and avoiding narrow, exclusionary categories.

## II. Other Comments

### 1. Individual Inspecting or Requesting Copies on Behalf of an Organization

The provisions on inspection and copying of exemption applications and annual information returns refer to the person conducting an inspection or requesting a copy as an "individual." The regulations should make it clear that such an individual can exercise these rights whether acting on his/her own behalf or on behalf of an organization. An addition to the definitions in section 301.6104(b) might provide that the term individual includes both individuals acting on their own behalf and individuals acting on behalf of other persons, including organizations.

### 2. Definition of Regional or District Offices.

The regulations define the "regional or district offices" where documents must be available for public inspection on the basis of the number of management employees at the site.<sup>14</sup> By requiring every office with three or more management employees to make provision for public inspection, the regulations impose on organizations with two or more offices in a city a burden that seems excessive compared to the benefit derived. We recommend that the regulations treat an organization with more than one office in a city as complying with the regulations if it meets the inspection requirements at one office in the city.

### 3. Organization with No Permanent Office<sup>15</sup>

Small tax-exempt organizations may not have a permanent office at which to make their applications for exemption and annual returns available for examination. To meet the public inspection requirement, the regulations permit an organization without an office to make its records available for inspection at any reasonable location of its choice.<sup>16</sup> The regulations should include as a permissible location the office of a lawyer or accountant who works with or represents the organization, the office of an officer of the organization, or the office of a member of its board of directors.

### 4. Public Inspection and Copying

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<sup>14</sup> Prop. Reg. Sec. 301.6104(e)-1(b)(5).

<sup>15</sup> Within the statutory constraints, the proposed regulations recognize the limitations of many small organizations lacking permanent offices and staff. It is hoped that in preparing final regulations and in addressing future legislation in this area, the IRS will continue to recognize the legitimate, practical concerns of such organizations.

<sup>16</sup> Prop. Reg. Sec. 301.6104(e)-1(c)(2).

The regulations provide “permissible conditions”<sup>17</sup> for public inspection of documents at organization offices. The regulations make it clear that the organization is not required to provide an individual inspecting documents with photocopying equipment but they are silent about any responsibility for providing writing materials to such an individual. In order to avoid a negative implication from this silence, the regulation should specifically state that the individual is responsible for providing any writing materials needed at the place of inspection.

The regulations also allow an organization to have an employee present in the room during an inspection.<sup>18</sup> The regulations also should provide that an organization may have present, in addition or in lieu thereof, an accountant or lawyer who works with or represents the organization, an officer of the organization, or a member of its board of directors.

#### 5. Exemption Application and Sources of Organization Income

In defining the term “application for tax exemption,” the regulations expansively include all supporting documents and statements, including “[s]tatements showing the sources of the organization’s income and receipts and their disposition ...”<sup>19</sup> Although the statute explicitly exempts the names and addresses of contributors from disclosure in connection with the disclosure of annual returns,<sup>20</sup> it is silent with respect to disclosure of such information in connection with applications for exemption. Even though the statute is silent on this point, we urge that the regulations specify that, as with other public disclosures of filings, the “sources” of income and receipts refers to the type of contributor or activity, and does not contemplate the publication of the names and addresses of actual persons.

#### 6. Time and Place for Providing Copies

In the case of requests for copies of documents made in person at the location where documents are provided for public inspection, the proposed regulations generally require the exempt organization to provide the copies on the same day at the same place. In unusual circumstances that make same day performance impractical, the regulations permit the copies to be provided the next business day.

This provision assumes that organizations have copying equipment and staff available to perform copying. This assumption may be unfounded, particularly in the case of small organizations. Same-day, same-place copying service also may be impractical for an organization that has no principal office but makes its documents available at a “reasonable location” as permitted under the regulations. For organizations that find it difficult to provide copies on a same-day, same-place basis, it would be helpful to allow

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<sup>17</sup> Prop. Reg. Sec. 301.6104(e)-1(b)(5)(ii)(C)(1).

<sup>18</sup> Prop. Reg. Sec. 301.6104(e)-1(c)(1).

<sup>19</sup> Prop. Reg. Sec. 301.6104(e)-1(b)(3)(ii)(E).

<sup>20</sup> Sec. 6104(e)(1)(C).

copies to be mailed within a reasonable time, say one week, to meet the copying requirements. With respect to timing, it would be helpful to clarify that the next business day deadline occurs only after the unusual circumstances preventing same-day, same-place copying have ceased. It also would be helpful to have the regulations state that a national organization may mail copies of documents to persons who have requested them from a subordinate organization.

#### 7. Responsibilities of "Subordinate Organizations"

Subordinate organizations will depend on their central organizations to provide them with copies of the organizations' exemption applications and annual returns. The proposed regulation lets the IRS penalize the failure at the subordinate level, leaving the subordinate organization to recover its penalty cost from the central organization. Although the Committee is concerned that, under the regulations, subordinate organizations could be penalized for failures of their central organizations, the Committee believes on balance that the proposed rule is simpler for the IRS to administer because it does not require the IRS to determine who, the subordinate or central organization, is at fault.

As a policy matter we agree that a subordinate organization, although a separate legal entity, should be treated as a regional or district office for purposes of section 610(e). However, since a subordinate organization, unlike a branch, is a separate entity, further clarification of the obligations running between it and its central organization would be helpful. The regulations should be supplemented with a requirement that the central organization must provide copies of its annual information return to each of its subordinate organizations within 30 days of the date such return is filed. The regulations also should require the central organization to provide each subordinate organization with a copy of the central organization's exemption application, its group exemption request, and any additional documents submitted to the Internal Revenue Service in connection with the subordinate's inclusion under a group exemption letter.

#### 8. Identification of Persons Requesting Documents.

The regulations are silent about whether persons requesting access to or copies of documents must provide their names to the exempt organizations. We are in accord with this approach but also recognize that organizations may have legitimate reasons for seeking the identification of these persons. Requiring disclosure might discourage some individuals from making the requests. On the other hand, requiring such disclosure or even expressly allowing exempt organizations to inquire about identities might facilitate recognition of harassment campaigns. On balance, permitting organizations to ask for identification without compelling disclosure seems a balanced approach.

#### 9. Copies of Audited Reports as Substitute for Returns.

Many organizations customarily provide copies of their annual reports to persons seeking information about the organization. We suggest that regulations state that the

requirement of providing copies of an organization's annual information return be considered fulfilled if the organization makes available for distribution copies of an annual report that has been prepared by independent auditors and that contains substantially all the information available in the annual return.