

## HOW TO COMPLY WITH THE PRIVATE FOUNDATION DISCLOSURE REQUIREMENTS

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The Treasury Department recently published final regulations which require broader public disclosure by a private foundation similar to the rules that currently apply to a public charity or other tax-exempt organization.<sup>1</sup> Specifically, a private foundation will now be required to make available for inspection, and provide a copy upon request of, its application for exemption (IRS Form 1023) and its annual information returns (IRS Forms 990-PF and 4720).<sup>2</sup> In addition, the final regulations describe how a private foundation can satisfy the disclosure requirements by using an agent or by making its documents "widely available" on the Internet. Finally, the final regulations describe appropriate procedures for obtaining relief when a private foundation is the subject of a harassment campaign. This memorandum explains how a private foundation can comply with these disclosure requirements. These provisions are also summarized in a chart attached to this memorandum.

The effective date of the final regulations is March 13, 2000. Therefore, these final rules apply to any private foundation annual return that is due to be filed after March 13, 2000 (after giving effect to extensions).

The final regulations governing disclosure by a private foundation differ from those governing disclosure by a public charity or other tax-exempt organization in several respects. First, the final regulations for a private foundation do not become effective until March 13, 2000, while those for a public charity or other tax-exempt organization became effective June 8, 1999. Second, the rules applicable to a private foundation will apply only to the private foundation's annual information returns due to be filed (after giving effect to extensions) after March 13, 2000. The rules applicable to a public charity or a tax-exempt organization apply to all annual information returns which have been filed as of June 8, 1999 (i.e., the charity's or organization's three most recent annual information returns as of June 8, 1999). Finally, a private foundation must disclose the parts of its annual information return that identify the names and addresses of

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1. The final regulations implement changes made by the Tax and Trade Relief Extension Act of 1998, which extended to private foundations the same rules regarding public disclosure of annual information returns that apply to charities and other tax-exempt organizations.
  2. A private foundation does not need to disclose its Form 990-T (Exempt Organization Business Income Tax Return), which is used to report unrelated business taxable income, if any.

contributors to the foundation, whereas a public charity or other tax-exempt organization is not required to do so.

#### **DISCLOSURE REQUIREMENTS IN GENERAL**

After March 13, 2000, a private foundation will be required to provide for inspection, and to produce copies upon request of, its application for exemption on Form 1023 and its three most annual information returns (IRS Forms 990-PF and 4720) during regular business hours at any office which employs three or more paid employees on a full-time basis.

##### ***Application for Exemption (IRS Form 1023)***

The final regulations require disclosure of the application for exemption form itself and any documents submitted to support it.<sup>3</sup> Supporting documents include correspondence between a private foundation and the Internal Revenue Service (including responses to questions) and any legal opinions furnished in connection with the application. A private foundation is not required to disclose its application for tax exemption while the application is pending or if the Internal Revenue Service has issued an adverse determination letter to the foundation.

##### ***Annual Information Returns (IRS Forms 990-PF and 4720)***

In addition, a private foundation will ultimately be required to make available, or produce copies upon request of, its three most recent annual information returns, along with all schedules, attachments and supporting documents. As mentioned above, this requirement is only effective for any annual information return required to be filed after March 13, 2000 (giving effect to any extensions). However, this requirement will be implemented on a going-forward basis so that a private foundation will eventually need to make available or produce copies of its three most recent annual information returns.

If a private foundation's annual information return is due after March 13, 2000, then the foundation must provide for inspection, and produce a copy upon request of, only that annual return (not any prior returns which have been filed by the foundation). If a private foundation's annual information return is due prior to March 13, 2000, the foundation will have no new disclosure obligation until the due date for its next annual information return. However, until that time, the foundation must still comply with the publication of notice requirements under current law.<sup>4</sup> Otherwise, the foundation need no longer publish an annual notice.

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3. The final regulations provide that any application for exemption filed before July 15, 1987, need not be made available unless the organization had a copy of the application on July 15, 1987 (which is the date upon which that disclosure rule became effective).
  4. Under current law, a private foundation must publish a notice, in a newspaper having general circulation in the county in which the private foundation's principal office is located, of the

The final regulations clarify that the term “annual information return” includes any return that is required to be filed under section 6033.<sup>5</sup> For a private foundation these returns include Form 990-PF and Form 4720 (which reports any excise taxes imposed on the private foundation, its managers, and self-dealers). Unlike a public charity or other tax-exempt organization, a private foundation must disclose the parts of its return that identify names and addresses of contributors to the foundation.

## HOW TO RESPOND TO REQUESTS

The final regulations tell a private foundation how to make applications and returns available for inspection, and the conditions that may be placed on requests for copies of these documents, including the amount, form and time of payment of any fees a private foundation may charge for copies.

### *Time and Place Documents Must Be Available For Public Inspection*

The new rules require a private foundation to make available for public inspection its application for exemption and annual information returns at its principal, regional and district offices during regular business hours. A regional or district office is defined as any office, other than a principal office, which employs people for at least 120 paid hours a week in the aggregate, whether those employees are part-time or full-time. An office is not considered a regional or district office if the only services provided further the exempt purposes of a private foundation (e.g., day care, health care or scientific or medical research) and if the office does not serve as an office for management staff.

If a private foundation does not maintain a permanent office, the foundation must comply with the final regulations by making its application for exemption and its annual information returns available for inspection at a reasonable location of its choice. Such a foundation must permit public inspection within a reasonable amount of time after receiving a request for inspection (normally not more than 2 weeks) and at a reasonable time of day. At the foundation’s option, it may mail, within 2 weeks of receiving the request, a copy of its application for exemption and annual information returns to the requester in lieu of allowing an inspection. The foundation may charge the requester for copying and actual postage costs as described below only if the person making the request consents to the charge.

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availability of its annual information return (i.e., Forms 990-PF and 4720), no later than the due date of that return. The foundation then must make its annual information return available for public inspection at its principal office during regular business hours for the 180-day period after the notice is published.

5. All section references are to the Internal Revenue Code of 1986, as amended (the “Code”).

### *Providing Copies*

The final rules require that a private foundation provide copies of its annual returns and application for exemption on the same day as an in-person request is made. Under unusual circumstances (e.g., when all of the organization's managerial staff is at an off-site conference), a request for copies may be complied with on the business day following the day the unusual circumstances cease to exist, but in no event no longer than five business days after the request has been made.

In response to a written request for disclosure, a private foundation must mail a copy of the documents sought within thirty days of receiving the request or, if it has a prepayment policy, within thirty days of receipt of payment. Material is deemed provided by a private foundation on the date of the postmark or private delivery mark. Written requests may also be made by electronic mail or facsimile and will be deemed received on the day the request is transmitted successfully. If the person requesting disclosure consents, the foundation may provide the material via electronic mail. In this case, the material is deemed provided on the date the foundation successfully transmits the electronic mail. If a private foundation requiring payment in advance receives a written request without payment or with insufficient payment, the foundation must, within seven days from the date it receives the request, notify the requester of its prepayment policy and the amount due.

A private foundation must fulfill a request for a copy of less than its entire application for tax exemption or its entire annual information return so long as the request specifically identifies the requested part or schedule.

### *Agents for Providing Copies*

A private foundation may designate a local agent to fulfill requests for copies of its documents. In the case of a request for copies made in person, the agent must be located in reasonable proximity to the office where the request is made and the foundation must provide requesters immediately with the name, address and telephone number of the agent.<sup>6</sup> A local agent must comply with all guidelines provided in the final regulations regarding timing of disclosure and notification of costs and payment policies. The deadline for producing the documents begins running from the time the request is made to the private foundation.

### *Costs of Providing Copies*

A private foundation may charge a reasonable fee for the cost of reproducing and mailing requested documents. This fee may not exceed the amount charged for duplicates by the Internal Revenue Service (currently \$1 for the first page and \$.15 for each additional page)

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6. The penalty provisions summarized below will apply to an exempt organization if its agent fails to provide documents as required.

plus any actual mailing costs. A private foundation may demand prepayment before furnishing requested documents by notifying the requester of its prepayment policy and the amount due. If a private foundation has informed an individual requesting documents of its prepayment policy and the individual does not pay the fee within thirty days, or if the individual pays the fee by check and the check does not clear upon deposit, the foundation may disregard the request. If a private foundation does not have a prepayment policy, it must obtain the prior consent of the requester before providing copies if the fee for copying and mailing the documents will exceed \$20.

If a request for documents is made in person, a private foundation must accept payment by cash and money order, and may accept other forms of payment, such as credit cards or personal checks. If a request for documents is made in writing, a private foundation must accept payment by certified check, money order and either personal check or credit card and may accept other forms of payment.

#### **MAKING REQUIRED DOCUMENTS "WIDELY AVAILABLE"**

The final regulations provide that a private foundation is not required to comply with a request for copies of its application for exemption or annual information returns if the foundation has made the requested documents "widely available" to the public. A private foundation can make required documents "widely available" by posting the documents on the Internet, either on the foundation's own World Wide Web page, or on another organization's World Wide Web page designed to contain such information for several organizations.

These documents do not need to be posted on the Internet in a particular format. The final regulations, however, state that a document will be considered "widely available" only if the following three conditions are met.<sup>7</sup> First, the applicable World Wide Web page must clearly inform readers that a document is available and provide instructions for downloading the document. Second, a document must be posted in a format that, when accessed, downloaded, viewed and printed in hard copy, exactly reproduces the image of the document as filed with the Internal Revenue Service (except for Form 990-T which need not be disclosed). Third, a document must be posted in a format that may be accessed, downloaded, viewed and printed by any individual with access to the Internet without special computer hardware or software and without payment of a fee to the private foundation or to another entity maintaining the World Wide Web page. In addition, the entity maintaining the World Wide Web page must have procedures for ensuring the reliability and accuracy of any posted

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7. The final regulations provide a short transition rule for a private foundation that posted its documents on the Internet on or before April 9, 1999, in a manner consistent with the proposed regulations. Until June 8, 2000, such a foundation will be treated as having made its documents "widely available" for purposes of the final regulations even if the format used does not currently satisfy all of the criteria set forth in the final regulations.

document and must take reasonable precautions to prevent alteration, destruction or accidental loss of any posted document.

Once a private foundation has posted its required documents on a World Wide Web page, the foundation must provide any individual requesting a copy of documents with the location where the documents are available, such as the web site address. These instructions must be provided immediately to an in-person requester and within seven days in response to a request by mail. However, even if a private foundation makes its application or returns “widely available” on a web site or otherwise, the foundation must still make those documents available for inspection in person at its offices during business hours, as described above.

#### **PENALTIES FOR NONCOMPLIANCE**

Failure to comply with the final regulations regarding disclosure of applications for tax exemption and annual information returns upon request will result in penalties.<sup>8</sup> Specifically, a private foundation will be fined \$20 for each day that it fails to meet the requirements regarding the disclosure of annual returns, not to exceed a maximum penalty of \$10,000 for any one return. A penalty of \$20 per day will be due for the foundation’s failure to allow inspection of or provide a copy of its application for exemption, with no stated maximum penalty provided.

If the foundation’s failure to comply with a request is deemed to be willful, section 6685 imposes an additional penalty of \$5,000 on the foundation with respect to each application or return in question.

#### **HOW TO RESPOND TO A PERCEIVED HARASSMENT CAMPAIGN**

The final regulations define a procedure to be followed by a private foundation that is the subject of a harassment campaign.

##### ***What Constitutes a Harassment Campaign***

The final regulations state that a group of requests for a private foundation’s annual return or exemption application will indicate a harassment campaign if the requests are part of a single coordinated effort to disrupt the operations of a private foundation, rather than to collect information about the organization. Factors that might indicate that a campaign is underway include hostile wording, voluminous requests, sudden increases in the number of requests received, and multiple requests made on a form letter or with similar wording. In addition, the regulations provide examples indicating situations which rise to the level of a harassment campaign.

The final rules provide for limited self-help remedies. A private foundation need only respond to two requests in the same month or four in the same year that are made by the same

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8. These penalties are set out at sections 6652(c)(1)(C), 6652(c)(1)(D), and 6685.

person or received from the same address. However, further relief is available only after an organization has received a determination from the Internal Revenue Service that it is subject to a harassment campaign.

*Application for Determination of a Harassment Campaign*

If a private foundation receives a group of requests for information that seems to indicate a coordinated effort to disrupt its operations, it may apply to the district director for the Internal Revenue Service key district where the foundation's principal office is located for a determination that it is the subject of a harassment campaign. This application must consist of a written statement giving the organization's name, address, employer identification number and the name, address and telephone number of the person to contact regarding the application. The application must also describe in detail the facts and circumstances suggesting that such a campaign is in progress. Pending a final determination on the application, a private foundation may refuse to fulfill any request for a copy of its documents if it reasonably believes the request is part of the alleged campaign, provided that its application for a determination was filed within ten days of the day that the foundation first suspended compliance due to the alleged harassment campaign.

If the key district director determines that a harassment campaign is in progress, a private foundation need not respond to any requests that it reasonably believes to be part of the campaign. However, it should be noted that, ordinarily, the Internal Revenue Service will not consider it reasonable for an organization to deny requests for information that it receives from members of the news media.

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The foregoing is intended only as a summary and the final regulations are necessarily more complex in their entirety. If you have any questions about the final regulations, or would like more information regarding specific provisions, please do not hesitate to call Victoria B. Bjorklund (212-455-2875), Jennifer L. Franklin (212-455-3597), or Nancy Mehlman (212-455-2328) or any other member of our Exempt Organizations group.

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**SUMMARY OF THE PRIVATE FOUNDATION DISCLOSURE REQUIREMENTS**

	Description
<p><b>Disclosure of Application for Exemption (Form 1023)</b></p>	<ul style="list-style-type: none"> <li>• Form 1023 and all supporting documentation must be made available for public inspection during regular business hours at any principal, regional or district office, if the foundation had the form on July 15, 1987.</li> <li>• Copies of all or part of Form 1023 and supporting documentation must be provided on the same day for in-person requests (increased to 5 business days upon “unusual circumstances”) and within 30 days for requests by mail (or 30 days within receipt of payment, if a prepayment policy is in effect). Any prepayment policy must be provided to a person making an in-person request within 7 days.</li> <li>• Material may be provided by electronic mail if consent is obtained.</li> <li>• A reasonable fee may be charged for the cost of reproducing and mailing requested documents (currently not to exceed \$1 for the first page and \$.15 for each additional page). If a request is made in-person, payment by cash and money order must be accepted, and payment by credit card or personal check may be accepted. If a request is made in writing, payment by money order, certified check and either personal check or credit card must be accepted.</li> </ul>
<p><b>Disclosure of Annual Information Returns (Forms 990-PF and 4720)</b></p>	<ul style="list-style-type: none"> <li>• If due to be filed after March 13, 2000 (taking into account any extensions), Forms 990-PF and 4720 must be made available for public inspection during regular business hours at any principal, regional or district office.</li> <li>• If due to be filed after March 13, 2000 (taking into account any extensions), copies of all or part of Forms 990-PF and 4720 must be provided on the same day for in-person requests (increased to 5 business days upon “unusual circumstances”) and within 30 days for requests by mail (or 30 days within receipt of payment, if a prepayment policy is in effect). Any prepayment policy must be provided to a person making an in-person request within 7 days.</li> <li>• Material may be provided by electronic mail if consent is obtained.</li> <li>• A reasonable fee may be charged for the cost of reproducing and mailing requested documents (currently not to exceed \$1 for the first page and \$.15 for each additional page). If a request is made in person, payment by cash and money order must be accepted, and payment by credit card or personal check may be accepted. If a request is made in writing, payment by money order, certified check and either personal check or credit card must be accepted.</li> </ul>
<p><b>Penalties</b></p>	<ul style="list-style-type: none"> <li>• Violations regarding disclosure of application for exemption: \$20/day, with no maximum specified.</li> <li>• Violations regarding disclosure of annual information returns: \$20/day, up to a maximum of \$10,000 per return.</li> <li>• Willful violations: additional penalty of \$5,000 per application or return.</li> </ul>