

[4830-01-u]

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 301 and 602

[TD 8861]

RIN 1545-AW96

Private Foundation Disclosure Rules

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations that amend the regulations relating to the public disclosure requirements described in section 6104(d) of the Internal Revenue Code. These 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 other tax-exempt organizations. These final regulations provide guidance for private foundations required to make copies of applications for recognition of exemption and annual information returns available for public inspection and to comply with requests for copies of those documents.

DATES: Effective Date: These regulations are effective March 13, 2000.

Applicability date. Except as provided below, these regulations are applicable to private foundations on or after March 13, 2000. These regulations are not applicable to any private foundation annual information return the due date for which (determined with regard to any extension of time for filing) is before March 13, 2000.

FOR FURTHER INFORMATION CONTACT: Michael B. Blumenfeld, (202) 622-6070
(not a toll-free number).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507) under control number 1545-1655. Responses to these collections of information are mandatory.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number assigned by the **Office of Management and Budget**.

The estimated average annual burden per respondent/recordkeeper is 30 minutes.

Comments on the accuracy of this burden estimate and suggestions for reducing the burden should be sent to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer, OP:FS:FP, Washington, DC 20224, and to the **Office of Management and Budget**, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Background

This document amends §§301.6104(d)-1 through 301.6104(d)-5 of the Procedure and Administration Regulations (26 CFR Part 301) relating to the section 6104(d) public disclosure rules applicable to tax-exempt organizations (organizations described in section 501(c) or (d) and exempt from taxation under section 501(a)) and certain nonexempt charitable trusts and nonexempt private foundations referenced in section 6033(d). The amendments remove existing §301.6104(d)-1 (relating to public inspection of private foundation annual information returns). The amendments also revise §§301.6104(d)-2 through 301.6104(d)-5 to apply the provisions to all tax-exempt organizations, nonexempt charitable trusts described in section 4947(a)(1) and nonexempt private foundations. In addition, the amendments redesignate existing §§301.6104(d)-2 through 301.6104(d)-5 as §§301.6104(d)-0 through 301.6104(d)-3, respectively.

Description of Current Law Disclosure Requirements Applicable to Private Foundations

Section 6104(d), as in effect prior to the effective date of the Tax and Trade Relief Extension Act of 1998 (Division J of H.R. 4328, the Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999)(Public Law 105-277, 112 Stat 2681) (with respect to private foundations), requires a private foundation to make its annual information returns available for public inspection at its principal office during regular business hours for a period of 180 days after the foundation publishes notice of the availability of its return. A private foundation must publish the notice not later than the due date of the return (determined with regard to any extension of time for filing) in

a newspaper having general circulation in the county in which the principal office of the foundation is located. Section 6104(e), as in effect prior to the effective date of the Tax and Trade Relief Extension Act of 1998 (with respect to private foundations), requires a private foundation to allow public inspection of the foundation's application for recognition of exemption at the foundation's principal office (and certain regional or district offices). Section 6104(e) also requires a private foundation to provide copies of its exemption application upon request. The requirement to provide copies of an exemption application upon request becomes effective, however, only after the Secretary of the Treasury issues final regulations applicable to private foundations that describe how the requirement is inapplicable if the private foundation makes its exemption application widely available or obtains an IRS determination that a particular request is part of a harassment campaign.

Amendments Made by the Tax and Trade Relief Extension Act of 1998

The Tax and Trade Relief Extension Act of 1998 was enacted on October 21, 1998. Among its provisions, it amended section 6104(e) of the Code to apply to private foundations the same rules regarding public disclosure of annual information returns that apply to other tax-exempt organizations. In addition, the Tax and Trade Relief Extension Act of 1998 repealed existing section 6104(d), and redesignated section 6104(e), as amended, as new section 6104(d). Section 6104(d), as amended by the Tax and Trade Relief Extension Act of 1998, requires each tax-exempt organization, including one that is a private foundation, to allow public inspection at its principal office (and at certain regional or district offices) and to comply with requests, made

either in person or in writing, for copies of the organization's application for recognition of exemption and the organization's three most recent annual information returns. Congress also intended that nonexempt charitable trusts described in section 4947(a)(1) and nonexempt private foundations comply with the expanded public disclosure requirements, just as the information reporting requirements of section 6033, pursuant to section 6033(d), apply to these entities. See Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in 1998 (JCS-6-98), November 24, 1998, at 242, fn. 102.

The Tax and Trade Relief Extension Act of 1998 amendments apply to requests made after the later of December 31, 1998, or the 60th day after the Secretary of the Treasury issues final regulations referred to in section 6104(d)(4) (relating to when documents are made widely available and when a particular request is considered part of a harassment campaign). On April 9, 1999, the IRS published in the **Federal Register** (64 FR 17279) final regulations under section 6104(d) applicable to tax-exempt organizations other than private foundations. Accordingly, section 6104(d), as amended by the Tax and Trade Relief Extension Act of 1998, became effective with respect to tax-exempt organizations other than private foundations on June 8, 1999.

On August 10, 1999, the IRS published a notice of proposed rulemaking under section 6104(d) in the **Federal Register** (64 FR 43324) that extends the recently-published final regulations under section 6104(d) to apply to private foundations and modifies those final regulations in several respects. The IRS received a few comments on the proposed regulations. No public hearing on the regulations was requested or

held. After consideration of all the comments, the proposed regulations are adopted with minor clarifying modifications by this Treasury Decision. The provisions and significant comments are discussed below.

Explanation of the Provisions

These final regulations amend the final regulations under section 6104(d) that were published in the **Federal Register** (64 FR 17279) on April 9, 1999 (the April 9, 1999 final regulations). The amendments clarify that the term annual information return includes any return that is required to be filed under section 6033. For a private foundation, these returns include Form 990-PF and Form 4720. The amendments clarify that, unlike other tax-exempt organizations, a private foundation must disclose to the general public the names and addresses of its contributors, consistent with section 6104(d)(3). The amendments also clarify that, for purposes of section 6104(d), the terms tax-exempt organization and private foundation include nonexempt private foundations and nonexempt charitable trusts described in section 4947(a)(1) that are subject to the information reporting requirements of section 6033. Finally, the amendments remove existing §301.6104(d)-1 and redesignate existing §§301.6104-2 through 301.6104(d)-5, as §§301.6104(d)-0 through 301.6104(d)-3, respectively.

Until March 13, 2000, private foundations remain subject to section 6104(d) and section 6104(e), as in effect prior to the Tax and Trade Relief Extension Act of 1998, and existing §301.6104(d)-1. Thereafter, private foundations are subject to the public inspection requirements of section 6104(d), as in effect prior to the Tax and Trade Relief Extension Act of 1998, and existing §301.6104(d)-1 with respect to any annual

information return the due date (determined with regard to any extension of time for filing) for which is prior to March 13, 2000.

Summary of Comments

One commenter suggested another method to satisfy the widely available exception to the requirement that a private foundation provide a copy of its applicable documents upon request. The commenter would permit a private foundation to satisfy the widely available exception by (1) filing copies of its documents with a state agency that, in turn, makes the documents available for public inspection, and (2) publishing a notice in a newspaper of general circulation stating where the documents are available. The Tax and Trade Relief Extension Act of 1998 repealed the requirement (in former section 6104(d)) that private foundations publish notice of the availability of their annual information returns with respect to annual information returns due after the effective date of these final regulations. The Act extended the same public disclosure requirements that apply to all other tax-exempt organizations to private foundations, including the widely available exception. The proposed regulations specify that a private foundation satisfies the widely available exception by posting its documents on the World Wide Web as described in the April 9, 1999 final regulations. After carefully considering this comment, the IRS and the Treasury Department have concluded that providing copies of the applicable documents to a state agency and publishing notice would not make those documents widely available. We reached our conclusion because the method suggested by the commenter could impose a substantial inconvenience to members of the public. Therefore, the IRS and the Treasury

Department did not adopt this suggestion.

A few commenters asked that these final regulations not require private foundations to disclose to the general public the identities of their contributors. Section 6104(d) requires public disclosure of all the information contained on an exemption application and an annual information return filed with the IRS, unless the information is specifically excepted from disclosure. Section 6104(d)(3) specifically excepts from disclosure the names and addresses of any contributor to an organization which is not a private foundation. By its terms, this exception does not apply to private foundations. The IRS and the Treasury Department believe the rule of the proposed regulation is consistent with the statute and Congressional intent and, therefore, did not change this provision.

One commenter asked that these final regulations clarify how the disclosure requirements apply to a supporting organization described in section 509(a)(3). Section 509(a) provides that an organization described in section 501(c)(3) is a private foundation if it does not meet the requirements of section 509(a)(1), (2), (3), or (4). Therefore, an organization that is described in section 501(c)(3) and classified as a supporting organization under section 509(a)(3) is not a private foundation. The disclosure requirements under section 6104(d) apply to supporting organizations described in section 509(a)(3) in the same manner as they apply to all other tax-exempt organizations that are not private foundations. The proposed regulations define the terms tax-exempt organization and private foundation consistent with the applicable statutory provisions, and the IRS and the Treasury Department have determined that

further regulatory clarification is not necessary in this regard.

Another commenter expressed concern that some private foundations may not have copies of their exemption applications. This commenter suggested that these final regulations only require private foundations formed after 1990 to disclose their exemption applications. Since July 15, 1987, a tax-exempt organization, including one that is a private foundation, has been required under section 6104 to make its exemption application available for public inspection. See section 10702(b) of the Omnibus Budget Reconciliation Act of 1987 (Public Law 100-203) and Notice 88-120 (1988-2 C.B. 454). Under the proposed regulations, a private foundation that filed its exemption application before July 15, 1987 is required to make available for public inspection a copy of its application only if it had a copy of its application on July 15, 1987. Thus, these final regulations do not change this provision of the proposed regulations.

One commenter stated that the applicable date in the proposed regulations, which would eliminate the requirement that private foundations publish notice of the availability of their annual information returns, is inconsistent with the effective date specified in the House Committee Report to the Tax and Trade Relief Extension Act of 1998 (H.R. Rep. No. 105-817). This commenter requested that the final regulations add a rule that prevents the IRS from asserting a late filing penalty against a private foundation whose return is rejected by the IRS because the foundation filed the return on or after June 8, 1999 (the effective date of the April 9, 1999 final regulations) without proof that it satisfied the publication of notice requirement. Section 6104(d), as in

effect prior to the effective date of the Tax and Trade Relief Extension Act of 1998, provides that a private foundation must publish a notice of the availability of its return not later than the due date of the return (determined with regard to any extension of time for filing). Section 1.6033-3(b) of the regulations requires a private foundation to attach a copy of the notice to its return.

The Tax and Trade Relief Extension Act of 1998 repealed the publication of notice requirement of section 6104(d) effective for private foundation annual information returns due after the later of December 31, 1998 or 60 days after the Treasury Department issues final regulations that explain how requested documents may be made widely available or when requests for documents are part of a harassment campaign. The April 9, 1999 final regulations do not apply to private foundations and, therefore, the issuance of those regulations did not trigger the repeal of the publication of notice requirement. Indeed, the April 9, 1999 final regulations stated explicitly that, until the IRS issues final regulations under section 6104(d) applicable to private foundations, private foundations continue to be governed by the existing § 301.6104(d)-1 requirements relating to public disclosure of private foundation annual information returns

The IRS and the Treasury Department believe the effective date of the repeal of the publication of notice requirement stated in the proposed regulations is consistent with both the statute and the legislative history. Further, the IRS and the Treasury Department believe it is important to retain one public disclosure standard for private foundations until another is finally adopted. Accordingly, the IRS and the Treasury

Department did not modify these final regulations as suggested.

Finally, one commenter expressed concern that disclosure in some instances could adversely affect the charitable operations of some small operating private foundations that advance unpopular causes or desire to maintain a low profile. This commenter suggested that the final regulations should authorize the Secretary to grant a waiver from some or all of the disclosure requirements if a small operating foundation establishes that, without the waiver, its charitable operations could be adversely affected and it provides alternative methods of disclosure that enhance oversight and public accountability. Section 6104(d), however, does not authorize the Secretary to grant waivers except in the case of a harassment campaign determination. Moreover, all tax-exempt organizations have the option under the regulations of avoiding having to comply with requests for copies of documents by making such documents widely available on the Internet. Therefore, the IRS and the Treasury Department did not adopt this suggestion.

Effective Date

These final regulations are applicable to private foundations on March 13, 2000.

Special Analyses

It is hereby certified that the collections of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based on the fact that the average time required to maintain and disclose the information required under these regulations is estimated to be 30 minutes for each private foundation. This estimate is based on the assumption that, on average, a

private foundation will receive one request per year to inspect or provide copies of its application for tax exemption and its annual information returns. Approximately 0.1 percent of the private foundations affected by these regulations will be subject to the reporting requirements contained in the regulations. It is estimated that annually, approximately 65 private foundations will make their documents widely available by posting them on the Internet. In addition, it is estimated that annually, approximately 3 private foundations will file an application for a determination that they are the subject of a harassment campaign such that a waiver of the obligation to provide copies of their applications for tax exemption and their annual information returns is in the public interest. The average time required to complete, assemble and file an application describing a harassment campaign is expected to be 5 hours. Because applications for a harassment campaign determination will be filed so infrequently, they will have no effect on the average time needed to comply with the requirements in these regulations. In addition, a private foundation is allowed in these regulations to charge a reasonable fee for providing copies to requesters. Therefore, it is estimated that it will cost a private foundation less than \$10 per year to comply with these regulations, which is not a significant economic impact. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small business.

Drafting Information

The principal author of these regulations is Michael B. Blumenfeld, Office of Associate Chief Counsel (Employee Benefits and Exempt Organizations), IRS. Other personnel from the IRS and Treasury Department also participated in their development.

List of Subjects

26 CFR Part 301

Employment taxes, Estate taxes, Excise taxes, Gift taxes, Income taxes, Penalties, Reporting and recordkeeping requirements.

26 CFR Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 301 and 602 are amended as follows:

PART 301—PROCEDURE AND ADMINISTRATION

Paragraph 1. The authority citation for part 301 is amended by adding entries in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805 * * *

Section 301.6104(d)-2 also issued under 26 U.S.C. 6104(d)(3);

Section 301.6104(d)-3 also issued under 26 U.S.C. 6104(d)(3); * * *

§301.6104(d)-1 [Removed]

Par. 2. Section 301.6104(d)-1 is removed.

§301.6104(d)-2 [Redesignated as §301.6104(d)-0]

Par. 3. Section 301.6104(d)-2 is redesignated as §301.6104(d)-0.

Par. 4. Newly designated §301.6104(d)-0 is revised to read as follows:

§301.6104(d)-0 Table of contents.

This section lists the major captions contained in §§301.6104(d)-1 through 301.6104(d)-3 as follows:

§301.6104(d)-1 Public inspection and distribution of applications for tax exemption and annual information returns of tax-exempt organizations.

- (a) In general.
- (b) Definitions.
 - (1) Tax-exempt organization.
 - (2) Private foundation.
 - (3) Application for tax exemption.
 - (i) In general.
 - (ii) No prescribed application form.
 - (iii) Exceptions.
 - (iv) Local or subordinate organizations.
 - (4) Annual information return.
 - (i) In general.
 - (ii) Exceptions.
 - (iii) Returns more than 3 years old.
 - (iv) Local or subordinate organizations.
 - (5) Regional or district offices.
 - (i) In general.
 - (ii) Site not considered a regional or district office.
- (c) Special rules relating to public inspection.
 - (1) Permissible conditions on public inspection.
 - (2) Organizations that do not maintain permanent offices.
- (d) Special rules relating to copies.
 - (1) Time and place for providing copies in response to requests made in person.
 - (i) In general.
 - (ii) Unusual circumstances.
 - (iii) Agents for providing copies.
 - (2) Request for copies in writing.
 - (i) In general.
 - (ii) Time and manner of fulfilling written requests.
 - (A) In general.
 - (B) Request for a copy of parts of document.
 - (C) Agents for providing copies.
 - (3) Fees for copies.
 - (i) In general.

- (ii) Form of payment.
 - (A) Request made in person.
 - (B) Request made in writing.
- (iii) Avoidance of unexpected fees.
- (iv) Responding to inquiries of fees charged.
- (e) Documents to be provided by regional and district offices.
- (f) Documents to be provided by local and subordinate organizations.
 - (1) Applications for tax exemption.
 - (2) Annual information returns.
 - (3) Failure to comply.
- (g) Failure to comply with public inspection or copying requirements.
- (h) Effective date.
 - (1) In general.
 - (2) Private foundation annual information returns.

§301.6104(d)-2 Making applications and returns widely available.

- (a) In general.
- (b) Widely available.
 - (1) In general.
 - (2) Internet posting.
- (i) In general.
- (ii) Transition rule.
- (iii) Reliability and accuracy.
- (c) Discretion to prescribe other methods for making documents widely available.
- (d) Notice requirement.
- (e) Effective date.

§301.6104(d)-3 Tax-exempt organization subject to harassment campaign.

- (a) In general.
- (b) Harassment.
- (c) Special rule for multiple requests from a single individual or address.
- (d) Harassment determination procedure.
- (e) Effect of a harassment determination.
- (f) Examples.
- (g) Effective date.

§301.6104(d)-3 [Redesignated as §301.6104(d)-1]

Par. 5. Section 301.6104(d)-3 is redesignated as §301.6104(d)-1.

Par. 6. Newly designated §301.6104(d)-1 is amended as follows:

1. Revise the section heading.
 - 1a. Paragraph (a) is amended as follows:
 - a. Remove the language “, other than a private foundation (as defined in paragraph (b)(2) of this section),” from the first sentence.
 - b. Remove the language “, other than a private foundation,” from the second sentence.
 - c. Remove the language “§§301.6104(d)-4 and 301.6104(d)-5” from the fourth sentence and add “§§301.6104(d)-2 and 301.6104(d)-3” in its place.
 2. In paragraph (b) introductory text, remove the language “§§301.6104(d)-4 and 301.6104(d)-5” and add “§§301.6104(d)-2 and 301.6104(d)-3” in its place.
 3. In paragraph (b)(1), add a sentence at the end of the paragraph.
 4. In paragraph (b)(2), add the language “or a nonexempt charitable trust described in section 4947(a)(1) or a nonexempt private foundation subject to the information reporting requirements of section 6033 pursuant to section 6033(d)” at the end of the sentence.
 5. In paragraph (b)(3)(iii)(B), remove the word “or” at the end of the paragraph.
 6. Redesignate paragraph (b)(3)(iii)(C) as paragraph (b)(3)(iii)(D) and add a new paragraph (b)(3)(iii)(C).
 7. In paragraph (b)(4)(i), remove the last two sentences and add three sentences in their place.
 8. Paragraph (b)(4)(ii) is amended as follows:
 - a. Remove the language “, and the return of a private foundation” from the first

sentence.

b. Revise the last sentence.

9. Revise paragraph (h).

The revisions and additions read as follows:

§301.6104(d)-1 Public inspection and distribution of applications for tax exemption and annual information returns of tax-exempt organizations.

* * * * *

(b) * * *

(1) * * * The term tax-exempt organization also includes any nonexempt charitable trust described in section 4947(a)(1) or nonexempt private foundation that is subject to the reporting requirements of section 6033 pursuant to section 6033(d).

* * * * *

(3) * * *

(iii) * * *

(C) In the case of a tax-exempt organization other than a private foundation, the name and address of any contributor to the organization; or

* * * * *

(4) * * * (i) * * * Returns filed pursuant to section 6033 include Form 990, Return of Organization Exempt From Income Tax, Form 990-PF, Return of Private Foundation, or any other version of Form 990 (such as Forms 990-EZ or 990-BL, except Form 990-T) and Form 1065. Each copy of a return must include all information furnished to the Internal Revenue Service on the return, as well as all schedules, attachments and

supporting documents. For example, in the case of a Form 990, the copy must include Schedule A of Form 990 (containing supplementary information on section 501(c)(3) organizations), and those parts of the return that show compensation paid to specific persons (currently, Part V of Form 990 and Parts I and II of Schedule A of Form 990).

(ii) * * * In the case of a tax-exempt organization other than a private foundation, the term annual information return does not include the name and address of any contributor to the organization.

* * * * *

(h) Effective date—(1) In general. For a tax-exempt organization, other than a private foundation, this section is applicable June 8, 1999. For a private foundation, this section is applicable (except as provided in paragraph (h)(2) of this section) beginning March 13, 2000.

(2) Private foundation annual information returns. This section does not apply to any private foundation return the due date for which (determined with regard to any extension of time for filing) is before the applicable date for private foundations specified in paragraph (h)(1) of this section.

§301.6104(d)-4 [Redesignated as §301.6104(d)-2]

Par. 7. Section 301.6104(d)-4 is redesignated as §301.6104(d)-2.

Par. 8. Newly designated §301.6104(d)-2 is amended as follows:

1. In paragraph (a), remove the language “§301.6104(d)-3(a)” from each place it appears and add “§301.6104(d)-1(a)” in each place, respectively.

2. Revise paragraph (e).

The revision reads as follows:

§301.6104(d)-2 Making applications and returns widely available.

* * * * *

(e) Effective date. For a tax-exempt organization, other than a private foundation, this section is applicable June 8, 1999. For a private foundation, this section is applicable beginning March 13, 2000.

§301.6104(d)-5 [Redesignated as §301.6104(d)-3]

Par. 9. Section 301.6104(d)-5 is redesignated as §301.6104(d)-3.

Par. 10. Newly designated §301.6104(d)-3 is amended as follows:

1. In paragraph (a), remove the language “§301.6104(d)-3(a)” and add “§301.6104(d)-1(a)” in its place.
2. Revise paragraph (g).

The revision reads as follows:

§301.6104(d)-3 Tax-exempt organization subject to harassment campaign.

* * * * *

(g) Effective date. For a tax-exempt organization, other than a private foundation, this section is applicable June 8, 1999. For a private foundation, this section is applicable beginning March 13, 2000.

.PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 11. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 12. In §602.101, paragraph (b) is amended by removing the entries for 301.6104(d)-4 and 301.6104(d)-5, by revising the entries for 301.6104(d)-1 and 301.6104(d)-3, and adding a new entry for 301.6104(d)-2 in numerical order to the table to read as follows:

§602.101 OMB Control numbers.

* * * * *

(b) * * *

CFR part or section where identified and described	Current OMB control No.
* * * * *	
301.6104(d)-1.....	1545 -1655
301.6104(d)-2.....	1545 -1655
301.6104(d)-3.....	1545 -1655
* * * * *	

Robert E. Wenzel

Deputy Commissioner of Internal Revenue

Approved: 12-23-99

Jonathan Talisman
Acting Assistant Secretary of the Treasury
(Tax Policy)