

B. PUBLICITY AND DISCLOSURE OF FORM 990

by

John Roman Faron and David Flavin

1. Introduction - Who Must File

With some exceptions, exempt organizations, private foundations, and IRC 4947 trusts must file annual returns. IRC 6033(a) provides that, in general,

...every organization exempt from taxation under section 501(a) shall file an annual return, stating specifically the items of gross income, receipts, and disbursements, and such other information for the purpose of carrying out the internal revenue laws as the Secretary may by forms or regulations prescribe....

Generally, for years beginning after December 31, 1969, organizations exempt from tax under IRC 501(a) (other than organizations described in IRC 401(a) or 501(d)), that are not specifically excepted from filing are required by Regs. 1.6033-2 (a)(2) to file an annual return on Form 990, Return of Organization Exempt From Income Tax. Any non-exempt charitable trust described in IRC 4947(a)(1) which is not treated as a private foundation and meets the gross receipts threshold is also required to file Form 990.

For years beginning after December 31, 1972, organizations that have private foundation status under IRC 509(a) are required by Regs. 1.6033-2(a)(2) to file an annual return on Form 990-PF, Return of Private Foundation (for prior years, such organizations filed Form 990). Nonexempt charitable trusts described in IRC 4947(a)(1) that are treated as private foundations must also file Form 990-PF. IRC 6033(d)(2) requires an annual return on Form 990-PF by private foundations that are not exempt from tax under IRC 501(a).

IRC 6033(a)(2)(B) provides for discretionary exceptions from filing information returns where the Secretary "determines such filing is not necessary to the efficient administration of the internal revenue laws." Regs. 1.6033-2(g)(6) of the Income Tax Regulations delegates authority to the Commissioner to excuse organizations from the filing requirement. Regs. 1.6033-2(g)(1) provides a list of organizations that are not required to file annual returns either because they are excepted by statute or because the Commissioner has exercised the authority delegated by the regulations.

Rev. Proc. 83-23, 1983-1 C.B. 687, also contains a list of those organizations exempt under IRC 501(a) that are not required to file an annual information return. Rev. Proc. 83-23 has been supplemented by Rev. Proc. 86-23, 1986-1 C.B. 564, which establishes an additional class of organizations, affiliated with a church or convention of churches and exempt under IRC 501(c)(3), which are not required to file an annual return, Rev. Proc. 94-17, 1994-1 C.B. 457, which relieves certain foreign organizations (other than private foundations) from the requirement to file an annual return and Rev. Proc. 95-48, 1995-47 I.R.B. 13, which specifies two additional classes of organizations, governmental units and affiliates of governmental units, that are not required to file annual information returns on Form 990.

2. IRC 6103 - Confidentiality and Disclosure of Returns and Return Information

IRC 6103 provides that returns and return information are confidential information and, unless otherwise specifically authorized by the Code, may not be disclosed. IRC 6103(b)(1) defines the term "return" to mean "any tax or information return...filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or part of, the return so filed."

IRC 6103(b)(2) defines the term "return information" to include

...a taxpayer's identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax with-held, deficiencies, overassessments, or tax payments, whether the taxpayer's return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or the offense....

The annual returns required to be filed by exempt organizations clearly fit within the definition of a "return" under IRC 6103(b)(1) and the information required to be provided on those annual returns constitutes "return information" as defined in IRC 6103(b)(2).

As a result, in the absence of disclosure authorization under a specific section of the Code, tax returns and tax return information of organizations exempt from tax under IRC 501 are confidential. The specific exception to the non-disclosure rule of IRC 6103 for returns required to be filed and return information required to be furnished by organizations exempt from tax under IRC 501(a) is provided by IRC 6104.

3. IRC 6104 - Publicity of Information Required From Certain Exempt Organizations and Certain Trusts

IRC 6104 authorizes the public disclosure of information furnished on annual returns filed under IRC 6033. Public disclosure is required to be made by the Internal Revenue Service, under IRC 6104(b), by private foundations, under IRC 6104(d), and, under 6104(e), by organizations described in subsections (c) or (d) of IRC 501, that are not private foundations.

The intent of Congress in allowing for the public inspection of exempt organization information was to enable the public to scrutinize the activities of these organizations and trusts. Congress intended that these organizations and trusts be subject to a certain degree of public accountability in view of their privileged tax status and because the public has a right to know for what purposes their contributions are being or will be used.

Publicity of exempt organization information is discussed in several parts of the Internal Revenue Manual. IRM 1272, Disclosure of Official Information Handbook, discusses the provisions of law governing disclosure of tax information. IRM 1272-900, Exempt Organization Information, provides rules and procedures for disclosing material under IRC 6104, as does Chapter 49(00) of IRM 7751, Exempt Organizations Handbook. IRM 7(16)00, Publicity and Limitations of EP/EO Material, provides specific procedures for disclosing Exempt Organization information. IRM 7(10)90 discusses penalty procedures with regard to filing and publicity of exempt organization returns.

A. Public Disclosure Under IRC 6104(b) - Inspection of Annual Information Returns

For returns filed after December 31, 1969, IRC 6104(b) provides, in part, that "...[t]he information required to be furnished by sections 6033, 6034 and 6058, together with the names and addresses of such organizations and trusts, shall be made available to the public at such times and in such places as the Secretary may prescribe." Prior to January 1, 1970, only information furnished on Part II of Forms 990-A, filed pursuant to IRC 6033(b) by certain exempt organizations, and on Forms 1041-A, filed pursuant to IRC 6034 by trusts

claiming charitable, etc., deductions under IRC 642(c), was required to be made available for public inspection. This information is still available upon request to the extent that it has not been destroyed in accordance with the Service's records retention schedule.

IRM 1272-900 lists the following documents which are to be made available for public inspection in accordance with IRC 6104(b):

- (1) Form 990, Return of Organization Exempt from Income Tax, Form 990-EZ, Short Form Return of Organization Exempt From Income Tax, and attachments which are required to be filed with the Service, except for the names and addresses of contributors. The amounts of contributions and bequests are also disclosed unless such amounts could reasonably be expected to identify any contributor.
- (2) Form 990-PF, Return of Private Foundation (under Section 501(c)(3)), or Section 4947(a)(1) Trust Treated as a Private Foundation and attachments required to be filed.
- (3) Form 1041-A, U.S. Information Return -- Trust Accumulation of Charitable Amounts.
- (4) Form 4720, Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code, filed by foundations. (Note: Forms 4720 filed by individuals are not subject to the disclosure provisions of IRC 6104.)
- (5) Form 5578, Annual Certification of Racial Nondiscrimination for a Private School Exempt from Federal Income Tax.
- (6) Form 5768, Election/Revocation of Election by an Eligible Section 501(c)(3) Organization to Make Expenditures to Influence Legislation.

IRM 1272-900 lists the following documents which are not to be disclosed except as provided by IRC 6103:

- (1) Form 4720, Return of Certain Excise Taxes on Charities and Other Persons Under Chapters 41 and 42 of the Internal Revenue Code, filed after 12-31-76, by individuals. (Note: Forms 4720 filed by foundations are subject to disclosure under IRC 6104.)
- (2) Form 990-C, Farmer's Cooperative Association Income Tax Return.
- (3) Form 990-T, Exempt Organization Business Income Tax Return.

(4) Form 5227, Split-Interest Trust Information Return.

Under Regs. 1.6033-2(a)(2)(ii) the information generally required to be furnished by an exempt organization and, therefore, the information which is subject to public inspection is:

- (1) Gross income for the year (other than contributions, gifts, grants, and similar amounts received);
- (2) Dues and assessments from members and affiliates for the year;
- (3) Expenses incurred within the year;
- (4) Disbursements made within the year for the purposes for which it is exempt;
- (5) A balance sheet showing its assets, liabilities, and net worth as of the beginning and end of such year.
- (6) The total of the contributions, gifts, grants and similar amounts received by it during the taxable year, and the names and addresses of all persons who contributed, bequeathed, or devised \$5,000 or more (in money or other property) during the taxable year. In the case of a private foundation, the names and addresses of all persons who became substantial contributors (as defined in IRC 507(d)(2)) during the taxable year shall be furnished. In addition, for its first taxable year beginning after December 31, 1969, each private foundation was required to furnish the names and addresses of all persons who became substantial contributors before such taxable year.
- (7) The names and addresses of all officers, directors, or trustees (or any person having responsibilities or powers similar to those of officers, directors, or trustees) of the organization, and, in the case of a private foundation, all persons who are foundation managers, within the meaning of IRC 4946(b)(1). Organizations described in IRC 501(c)(3) must also attach a schedule showing the names and addresses of the five employees (if any) who received the greatest amount of annual compensation in excess of \$30,000; the total number of other employees who received annual compensation in excess of \$30,000; the names and addresses of the five independent contractors (if any) who performed personal services of a professional nature for the organization (such as attorneys, accountants, and doctors, whether such services are performed by such persons in their individual capacity or as employees of a professional service corporation) and who received the greatest amount of compensation in excess of \$30,000 from the organization for the year for the performance of such services; and the total number of other such independent contractors who received in excess of \$30,000 for the year for the performance of such services.

- (8) A schedule showing the compensation and other payments made during the organization's annual accounting period (or during the calendar year ending within such period) that are includible in the gross income of each individual whose name is required to be listed.
- (9) In the case of a private foundation liable for tax imposed under Chapter 42, such information as is required by Form 4720.
- (10) Its lobbying expenditures, grass roots expenditures, exempt purpose expenditures, lobbying nontaxable amount, and grass roots nontaxable amount for the taxable year and for prior taxable years that are base years (within the meaning of Regs. 1.501(h)-3(c)(7)).

Under IRC 6033(e)(1)(A)(i) and Rev. Proc. 95-35, 1995-32 I.R.B. 51, social welfare organizations described in IRC 501(c)(4) (other than veterans organizations), agricultural and horticultural organizations described in IRC 501(c)(5), and organizations described in IRC 501(c)(6) are required to include on their annual returns information setting forth the total expenditures of the organization to which IRC 162(e)(1) applies and the total amount of the dues or similar amounts paid to the organization to which such expenditures are allocable. IRC 162(e)(1) applies to amounts paid or incurred in connection with (1) influencing legislation, (2) participating in, or intervention in, any political campaign on behalf of (or in opposition to) any candidate for public office, (3) any attempt to influence the general public with respect to elections, legislative matters, or referendum, or (4) any direct communication with a covered executive branch official in an attempt to influence the official actions or positions of such official. Since this information is part of the organization's return it would be subject to public inspection under IRC 6104(b). Under IRC 6033(e)(1)(A)(ii), the above organizations are required to provide notice to their dues paying members which contains a reasonable estimate of the portion of the member's dues to which the organization's lobbying and political expenditures are allocable. Since the notice required to be provided under IRC 6033(e)(1)(A)(ii) is not required to be filed as part of the return, that information would not be subject to public inspection.

Certain information normally contained on Form 990, or on attachments thereto, is, by statute or regulation, not disclosable under IRC 6104. IRC 6104(b) exempts the names and addresses of contributors to an organization other than a private foundation from public inspection. Regs. 301.6104(b)-1(b)(3) also mandates that the names, addresses, and amounts of contributions or bequests to a foreign organization described in IRC 4948(b) by persons who are not citizens of the United States are not to be made available for public inspection under section 6104(b).

Under Regs. 301.6104(b)-1(b)(2) the amounts of contributions and bequests to an organization are to be made available for public inspection unless the disclosure of such information can reasonably be expected to identify any contributor. However, the amounts of contributions and bequests to a private foundation, as well as the identities of the contributors and bequeathers, are always to be made available for public inspection. The exemption from public inspection provided by Regs. 301.6104(a)-5 for trade secrets, patents, processes, styles of work, or apparatuses appearing on an application for tax exemption, has no counterpart in Regs. 301.6104(b), and such information, to the extent it appears on an annual return, is available for public inspection.

Under Regs. 301.6104(b)-1(c) information furnished on an exempt organization's annual return is to be made available for public inspection at the IRS National Office and at the office of any district director. Requests for information must be in writing. Oral requests will not be honored. Form 4506-A can be used to request a copy or to inspect an exempt organization return. The request should be sent to the District Director (Attention: Disclosure Office) of the district in which the person making the request wishes to inspect the return. If the person making the request wants to inspect the return at the National Office, the request should be sent to the Commissioner of Internal Revenue, Attention: Freedom of Information Reading Room, 1111 Constitution Avenue, NW, Washington, D.C. 20224.

The written request must include the following information:

- (1) The name and address of the organization (city and state);
- (2) The type of return;
- (3) The year(s) involved.

Under Regs. 301.6104(b)-1(d)(2) a person making a proper request for information will be notified by the Service when the material will be available for inspection. Information will be made available for inspection at reasonable and proper times, and under conditions that will not interfere with its use by the Service and will not exclude other persons from inspecting it. In addition, the Commissioner, Director of the Service Center, or District Director may limit the number of returns to be made available to any person for inspection on a given date. Inspection will be allowed only in the presence of an Internal Revenue officer or employee and only during the regular hours of business of the Internal Revenue Service office.

The Assistant Commissioner (Examination) (CP:EX), has overall responsibility for disclosure of tax information through the Office of Disclosure. That office would normally handle most disclosures of exempt organization tax information under IRC 6103 and 6104. Chapter 700, Reading Room Operations, of IRM 1272 outlines the procedures for disclosing IRC 6104 information. It also discusses the responsibilities different offices - Taxpayer Service, Employee Plans and Exempt Organizations, Public Affairs - have with respect to IRC 6104 disclosure. Because the Office of Disclosure has primary responsibility for disclosing tax information, any IRC 6104 disclosure problem not clearly covered under IRC 6104, the regulations, or IRM 1272 should be referred to that office.

B. Public Disclosure Under IRC 6104(d) - Private Foundations

IRC 6104(d) requires that Form 990-PF be made available by foundation managers for inspection at the principal office of the foundation during regular business hours by any citizen on request made within 180 days after the date of publication of its availability. A "notice of availability" of the annual return must be published not later than the date required for filing the annual return, in a newspaper having general circulation in the county in which the principal office of the foundation is located. The term "newspaper having general circulation" in section 6104(d) includes any newspaper or journal which is permitted to publish statements in satisfaction of State statutory requirements relating to transfers of title to real estate or other similar legal notices. The notice must state that the annual return is available at the principal office of the foundation for inspection during regular business hours by any citizen who requests it within 180 days after the date of such publication. It must also show the address of the foundation's principal office, the name of its principal manager, and, since January 1, 1985, the telephone number of the foundation's principal office.

IRC 6033(c)(2) provides that a copy of the notice required by IRC 6104(d), together with proof of publication, be filed by the foundation with the annual Form 990-PF. A copy of the notice as published, and a statement signed by a foundation manager stating that the notice was published, setting forth the date of publication and the publication in which it appeared, is sufficient proof.

In addition to making the returns publicly available, under Regs. 1.6033-3(c)(1) the foundation manager must furnish a copy of the annual return and Form 4720, if any, to the Attorney General of (a) each state which the foundation is required to list on its return pursuant to Regs. 1.6033-2(a)(2)(iv), (b) the state in which the principal office of the foundation is located, and (c) the state in which the foundation was incorporated or created. Additionally, the foundation manager must also furnish copies to the Attorney General or appropriate state

officer (within the meaning of IRC 6104(c)(2)) of any state who requests them. Copies to the state officials must be mailed at the same time the returns are sent to the Service.

For tax years beginning after December 31, 1980, IRC 4947(a)(1) trusts treated as private foundations are also subject to the public inspection and notice provisions of IRC 6104(d).

C. Public Disclosure Under IRC 6104(e) - Organizations Exempt Under IRC 501 (c) and (d) Other Than Private Foundations

Section 10702 of the Omnibus Budget Reconciliation Act of 1987, P.L. 100-203, 12/22/87, added IRC 6104(e), which requires all exempt organizations except for private foundations, which are covered by IRC 6104(d), to make a copy of their annual Form 990 available for public inspection. The organization must make its return available during the three year period beginning on the filing date of the return. The filing date for this purpose is the last day prescribed for filing the return including any extension of time granted.

The requirements for the content of the required disclosure and the method of inspection are set forth in Notice 88-120, 1988-2 C.B. 454. The organization must make available an exact copy of the original Form 990 and all schedules and attachments filed with the Internal Revenue Service, except for the names and addresses of contributors to the organization. The required disclosure includes, for example, Schedule A of Form 990, containing supplementary information on section 501(c)(3) organizations, the compensation of specific individuals required in Part VI of Form 990 and Parts I and II of Schedule A, and any attachments and amendments. The required disclosure does not include Form 990-T, Exempt Organization Business Income Tax Return, relating to unrelated business income tax, or Form 1120-POL, U.S. Income Tax Return for Certain Political Organizations, relating to taxes on political organizations.

A copy of the annual information return must be made available for public inspection at the organization's principal office. If the organization regularly maintains one or more regional or district offices having three or more full time employees serving as management staff (or part-time employees whose total number of paid hours per week is at least 120), a copy of the return must also be made available at each regional or district office. If the organization does not maintain a permanent office and receives a request to inspect its annual returns, it must provide the person making the request an opportunity to inspect the material at a reasonable location of the organization's choice. At the organization's option, it may mail the information to the requester in lieu of an inspection.

Generally, the required information should be available during the normal business hours of the organization's office on the day of the request for inspection. In exceptional circumstances where an organization has no office, or where the office has limited hours during certain times of the year, the required information should be made available within a reasonable amount of time (normally not more than 2 weeks) and at a reasonable time of day.

An organization is not required to provide or distribute a photocopy of its annual returns, but must have on hand a copy available for inspection. The organization may have an employee present in the room during the inspection, but must allow the person making inspection to take notes freely during the inspection or, if the requester prefers, must allow the requester to photocopy the document on the requester's own photocopying equipment within reasonable constraints of time and place. If the organization does not object to making a photocopy, the organization may charge up to the per page copying charge stated in section 601.702(f)(5)(iv)(B) of the Internal Revenue Service's Statement of Procedural Rules, as well as postage if the copy is mailed.

Individuals who request inspection of an information return at the organization's office and are denied access to the return or any of the information required to be disclosed, should bring this to the attention of the appropriate key district director. The requester should provide, in writing, the name of the person who refused to provide the information and the date on which the refusal occurred. The key district office should attempt to get the organization to comply with the requirements of IRC 6104(e) before imposing the penalties for failure to comply.

4. Penalties for Failure to Make Returns Public

IRC 6652(c)(1)(C) provides that the person who fails to meet the requirements of IRC 6104(d) or (e)(1) relating to public inspection of Forms 990 and 990-PF, must pay a penalty of \$10 per day as long as the failure continues. The maximum penalty on all persons for failures with respect to any one return shall not exceed \$5,000. No penalty will be imposed if the failure is due to reasonable cause.

A willful failure to permit public inspection of annual returns will result in an additional penalty of \$1,000 per return under the provisions of IRC 6685. For taxable years beginning after December 31, 1986, IRC 6685 applies to the annual returns of all exempt organizations. For taxable years beginning before January 1, 1987, IRC 6685 applied only to annual returns of private foundations. If more than one person has a duty, all persons who fail to comply are jointly and severally liable for the penalties. More information on penalties can be found in IRM 7(10)92.2.

5. Current Developments

The Taxpayer Bill Of Rights 2, P.L. 104-168, 110 Stat. 1452, signed by the President on July 30, 1996, adds additional filing and public disclosure rules.

The Act extends the present-law IRC 501(c)(3) private inurement prohibition to nonprofit organizations described in IRC 501(c)(4) and provides for certain intermediate sanctions that could be imposed when nonprofit organizations described in IRC 501(c)(3) or 501(c)(4) engage in transactions, termed "excess benefit transactions", with certain insiders, called "disqualified persons", that result in private inurement. The Act amends IRC 6033 (b) to require tax exempt organizations described in IRC 501(c)(3) and 501(c)(4) to disclose on their Form 990 the amount of the taxes paid by the organization, or any disqualified person with respect to the organization, during the taxable year as a result of an "excess benefit transaction" and such additional information as the Secretary may prescribe regarding excess benefit transactions and regarding disqualified persons. In addition, exempt organizations described in IRC 501(c)(3) will be required to disclose on their Form 990 any other excise tax penalties paid during the year under present-law sections 4911 (excess lobbying expenditures), 4912 (disqualifying lobbying expenditures), or 4955 (political expenditures), including the amount of the excise tax penalties paid with respect to such transactions, the nature of the activity, and the parties involved.

The Act also provides that, unless relief is granted, a tax-exempt organization that is subject to the public inspection rules of present-law section 6104(e)(1) will be required to supply copies of their annual return without charge, other than a reasonable fee for reproduction and mailing costs, for any of the organization's three most recent taxable years. In addition, the penalty imposed under IRC 6685 on tax-exempt organizations that willfully fail to allow public inspection of their annual returns (or applications for exemption) is increased.