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Automatic Revocation of Tax-Exempt Status for Failure to File IRS Form 990

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The Pension Protection Act of 2006 requires the Internal Revenue Service ("IRS") to revoke the tax-exempt status of organizations that fail for three consecutive years to file required Forms 990. These revocations will occur automatically by operation of law beginning as early as May 15, 2010.

This memorandum provides background on the Form 990 filing requirements and due dates, penalties for failure to timely file, and strategies for non-filing organizations to protect their tax-exempt status. Should you have questions or require our assistance, please do not hesitate to contact Dianne Bailey at (704) 377-8323.

Which Form 990 is my Organization Required to File?

For tax year 2009, a tax-exempt organization must file (a) Form 990-N if its gross receipts normally are less than \$25,000, (b) Form 990-EZ or Form 990 if its gross receipts are more than \$25,000 and less than \$500,000 and if its total assets are less than \$1.25 million, and (c) Form 990 if its gross receipts are greater than \$500,000 or its total assets are more than \$1.25 million.

For tax year 2010 and later years, a tax-exempt organization will be required to file (a) Form 990-N if its gross receipts are normally less than \$50,000, (b) Form 990-EZ or Form 990 if its gross receipts are between \$50,000 and \$200,000 and if its total assets are less than \$500,000, and (c) Form 990 if its gross receipts are more than \$200,000 or if its total assets are more than \$500,000.

For the remainder of this memorandum, the Forms 990-N, 990-EZ and 990 will be referred to collectively as the "Form 990."

When is my Form 990 Due?

Forms 990 must be filed by the 15th day of the fifth month after the end of your organization's fiscal year. For example, if your organization's fiscal year ends on December 31, the Form 990 is due by May 15th of the following year. IRS Form 8868 may be used to request an automatic three-month extension of time to file and also to apply for an additional three-month extension if needed. The additional three-month extension, however, is not automatic. Note also that the filing deadline for the Form 990-N may not be extended.

What are the Penalties for Filing Forms 990 Late?

If an organization fails to file a required Form 990 by the due date (including any extensions), it must pay a penalty of \$20 per day for each day the return is late. The penalty generally may not exceed the lesser of \$10,000 or 5% of the organization's gross receipts. For an organization that has gross receipts of over \$1 million for the year, the penalty is \$100 per day up to a maximum of \$50,000. Organization managers who do not comply with a written demand that information be provided may also be subject to a penalty of \$10 per day, subject to a \$5,000 maximum.

Penalties for late filing may be abated if the organization establishes to the satisfaction of the IRS that such failure was due to reasonable cause. The request for abatement can be made as an attachment to the Form 990.

What Happens if my Organization Fails to File Forms 990 for Three Years?

If an organization required fails to file the required Form 990 for three consecutive years, the organization's tax-exempt status is revoked automatically by operation of law. The revocation is effective from the last day the organization could have timely filed the third required Form 990.

The three-year period for automatic revocations for failure to file Forms 990 began when the Pension Protection Act was adopted in 2006. Thus, an organization that does not file a required Form 990 for 2007, 2008 and 2009 will have its tax-exempt status revoked on the applicable filing deadline in 2010.

An organization whose tax-exempt status is revoked for failing to file Forms 990 may apply to obtain reinstatement of that status, by filing Form 1023 or 1024, as applicable, and paying the requisite user fee. If, upon application for reinstatement of tax-exempt status, an organization can show to the satisfaction of the IRS reasonable cause for the failure to file the Forms 990, the organization's tax-exempt status may, in the discretion of the IRS, be reinstated retroactively to the date of revocation.

How will this Impact Donors?

Contributors to Section 501(c)(3) organizations may rely on determination letters until the IRS publishes the list of revoked organizations on its website and in Publication 78. The IRS has stated informally that the initial list of revoked organizations will not be available until early 2011. As always, donors should check Publication 78 to confirm the exempt status before making gifts to tax-exempt organizations.

What are the Possible Next Steps?

Non-filing organizations should file a Form 990 for the 2009 fiscal year in a timely manner, requesting extension(s) if necessary, to prevent the revocation of the organization's exempt status. The organization should, of course, make all appropriate filings in future years.

Previously non-filing organizations should be aware that filing a Form 990 could cause the IRS to request tax returns for prior years. Filing such additional returns could be difficult if the organization does not have adequate records as to income and expenses for earlier years. The organization also could owe taxes, interest, and penalties. Furthermore, because the statute of limitations does not run when a taxpayer fails to file a return, returns could be due for many prior years.