

October 18, 2000

The Honorable George E. Pataki
Governor of the State of New York
Executive Chamber, State Capitol
Albany, New York 12224

Dear Governor Pataki:

I am writing on behalf of the New York State Bar Association Tax Section.¹

On August 16, 2000, New York State Bill S. 7256, which imposes a publication requirement on certain charitable organizations, became law. This law is unduly burdensome and expensive, and it is unnecessary because its purposes are already fully achieved by existing provisions of the Internal Revenue Code and Internal Revenue Service regulations.² We agree with the public disclosure goals of the new state law, but we believe they are already better served by these federal rules. Therefore, the Tax Section requests that you seek to have the new state law repealed.

The recent New York legislation requires every private foundation formed under New York law to publish annually a notice of the availability of its annual return for public inspection during regular business hours at the private foundation's principal office. The notice

¹ This letter was drafted by Michelle Scott and Dickson Brown, co-chairs of the Tax Section's Committee on Tax Exempt Entities. It is submitted on behalf of the Tax Section only, and it has not been considered by the New York State Bar Association's Executive Committee.

² I.R.C. § 6104; Treas. Reg. § 301.6104(d)-1 and -2.

must provide the address and telephone number of the foundation's principal office and the name of its principal manager. It must be published in a newspaper designated by the clerk of the county in which the principal office of the private foundation is located. The newspaper must be one of general circulation in the county.³ The notice must appear no later than the due date of the foundation's return and must state that the foundation's return is available for inspection upon request within 180 days after publication of the notice.

This publication requirement is closely modeled on former provisions of the Internal Revenue Code, which were amended by Congress in 1998 and replaced by more effective disclosure rules. The prior federal law required that a private foundation publish an annual notice of its annual return's availability. A copy of the notice also had to be filed with the foundation's annual return. These former requirements were burdensome and costly without being very effective disclosure procedures. In addition, the notice-filing rule was an unnecessary trap for unwary foundation managers. These rules were changed by Congress in 1998 to afford broader and easier disclosure. The new federal rules have been well publicized, and people who have an interest in inspecting the reports of a private foundation are aware of them.

Federal regulations implementing the new statutory rules became effective this year. They require a private foundation to make available during business hours at its principal office, and at regularly maintained regional or district offices, its annual returns for the last three years as well as its application for tax-exempt status and related materials. Private foundations without regular offices must make the disclosure material available at a reasonable location of their choice. In addition, upon request by any individual in person or in writing (including a request sent by electronic mail or facsimile), the federal rules require that a private foundation provide a copy of the annual returns, exempt status application and related materials to the individual at no charge, except for reasonable reproduction and mailing costs. Under the New York rule,

³ N.Y. Not-for-Profit Corp. Law § 406(b).

only on-site inspection must be allowed and only requests by citizens must be honored. Thus, the three-year federal requirement provides for longer and more comprehensive disclosure than the New York statute.

A private foundation does not have to comply with the federal copying requirement if it makes the information subject to disclosure widely available on the Internet.⁴ The foundation can post the information either on a web site that the foundation itself establishes and maintains, or on a web site established and maintained by another entity that provides a database of required documents of other tax-exempt organizations. To fulfill the requirement, the web site must be widely available to the public and the posted documents must be easy to download. Currently, the information required of more than 640,000 charitable organizations, including foundations, is available free to the public for viewing and downloading on the Guidestar web site (www.Guidestar.org).

The New York law provides less information to the public yet imposes a greater cost burden than do the federal requirements. The federal procedures, particularly the utilization of Internet posting, make information vastly more accessible than would ever be possible through one-time-only publication on a county-by-county basis. Imposing unnecessary expenses on private foundations conflicts with the basic purpose of such tax-exempt organizations, which is to use their resources for worthy purposes. Because private foundations' assets are primarily financial, most foundations could easily avoid burdensome New York regulations by incorporating under the laws of other states.

⁴ Treas. Reg. § 301.6104-2.

The Honorable George E. Pataki
October 18, 2000
Page 4

Because current federal law and Internal Revenue Service regulations already require greater disclosure at lower cost, we urge that you seek to eliminate inconsistent state requirements by repeal of S. 7256.

Sincerely,

Robert H. Scarborough

The Honorable Elliot Spitzer
Attorney General

The Honorable Sheldon Silver
Speaker
New York State Assembly

The Honorable Joseph Bruno
Majority Leader
New York State Senate