

Whether and Where to Register Your Foundation

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In what states is a foundation required to register? As if foundation executives don't have enough to worry about, the current regulatory climate indicates that they should now consider this question. Registration is increasingly a hot topic with the states. Most states require that a foundation register if the foundation is active within the state. Enforcement levels vary, however. Some states' attorneys general are more aggressive than others in enforcing the registration requirements. For example, the Pennsylvania Attorney General's office is very aggressive in its enforcement actions.

The question of registration is also increasing in importance to the Internal Revenue Service ("IRS"). For instance, when our office files new Forms 1023, the IRS is consistently asking (i) how the applicant has determined whether or where state registrations are required and (ii) whether the applicant has registered with the applicable states. This increasing importance is also reflected in the new Form 990 which requires that the filing charity report in what states it is "required" to register, rather than in what states it does register. Finally, the IRS TE/GE Annual Report specifically notes that the IRS will engage in a robust information exchange with the states' attorneys general (Annual Report, p. 13 *Spotlight on the Federal and State Project*). It is clear that there will be increased cooperation among Federal and state officials regulating tax-exempt entities, including a focus on proper registration.

At the same time that registration compliance and enforcement initiatives are implemented, the question of *where* a charity *must* register is becoming more confusing. For instance, is maintenance of a website available in all 50 states sufficient activity to require a charity to register in all 50 states? Probably not. Is an e-mail solicitation sufficient to require a charity to register in a state? In most cases, yes. These questions and others must be analyzed, however, on an individual basis. There is no "one-size fits all" formula. What is certain, however, is that physical presence within a state and targeted fundraising activity are the touchstones for determining whether registration in a particular state is necessary.

When considering whether registration is necessary, confirm that the state under consideration requires registration. Several states, including Vermont, Indiana, Iowa, Nebraska, South Dakota, Texas, Wyoming, Montana, Idaho and Nevada do not require any registration at all. All other states require some level of registration.

If the state under consideration requires registration, then the foundation should analyze its fundraising and other activities in a state. Typically, regulatory authority over charities is based on (one or both) of two premises: (i) is the non-profit physically present in the state, e.g., has an office, owns real estate or conducts program activities in the state or (ii) does the non-profit solicit funds in the state. A "yes" to either question means registration is required in most states. Note that under prong (ii) above, a foundation may have no connection with a state, yet be required to register if the foundation sends a letter, makes a telephone call or otherwise contacts state residents soliciting funds.

The internet poses a unique problem in that a website encouraging donations may be a solicitation under prong (ii) above requiring registration. The National Association of State Charity Officials ("NASCO") has

promulgated advisory guidelines known as *The Charleston Principles: Guidelines on Charitable Solicitations Using the Internet*. (*The Charleston Principles* may be found at www.nasconet.org). These guidelines are helpful in determining whether web based activities are sufficient to require registration in one or several states. Highlights of this guidance are as follows:

1. An entity that has its principal place of business in a state and uses the internet to conduct charitable solicitation in that state must register in that state - so physical presence will require registration.
2. A non-resident charity maybe subject to registration requirements if:
 - a. Its non-internet activities alone would be sufficient to require registration; or
 - b. (1) the entity solicits contributions through interactive websites; and
(2) either the entity:
 - i. Specifically targets persons physically located in the state for solicitation; or
 - ii. receives contributions from the state on a *repeated and ongoing* basis or a *substantial* basis through its website; or
 - c. (1) the entity solicits contributions through a site that is not interactive but either specifically invites further offline activity to complete contribution, or establishes other contacts with the state, such as sending e-mail messages or communications that promote the website; and
(2) the entity satisfies Principle (b)(2) above.

The gist of all of this seems to be that a foundation should register if it (i) would be required to register under longstanding principles regardless of its internet usage, or (ii) a non-resident charity has repeated and ongoing contacts with a state, or receives substantial sums from a particular state. So, generally speaking, merely maintaining an interactive website that does not solicit contributions on a state-specific basis, provided no one state accounts for a substantial percentage of overall contributions, should not require registration.

A final consideration is the form of registration required. NASCO and the National Association of Attorneys General have promulgated a form known as the "Unified Registration Statement" ("URS"). This makes preparing the filing paperwork easier in some respects for foundations required to register in multiple states. All states except Colorado, Oklahoma and Florida accept the URS, meaning that most foundations should be able to use the URS, significantly simplifying the required paperwork.

Please contact John Christopher, Sean Callan or Jacklyn Olinger for your registration questions.

Loss of Exemption Under Group Ruling Requires Full Re-Application

If your organization has subordinates that are, or assume they are, reported as a part of your group Form 990, then you should be aware of recently issued IRS Technical Guidance. Under this Technical Guidance, if a subordinate is intentionally or inadvertently not listed on your group return for a period of three (3) years, the subordinate loses its exempt status and must file a new exemption application seeking tax-exempt status on its own. The de-listed subordinate cannot be reinstated simply by filing amended returns or by subsequent inclusion on the list of subordinates in the group. So, double-check that all subordinates are listed on group returns!