

**THE SEPTEMBER 11TH DISASTER
QUESTIONS AND ANSWERS FOR NONPROFIT ORGANIZATIONS**

February 5, 2002

In the wake of the September 11, 2001 terrorist attacks, many not-for-profit organizations have questions that are particular to not-for-profit organizations and charitable giving. In some instances these questions are from those affected by the disaster, and in others these questions are from those who are participating in disaster relief efforts. The following questions and answers have been prepared by **Lawyers Alliance for New York** to provide general guidance to not-for-profit organizations and pro bono attorneys who are assisting them. They are being distributed for informational purposes only and are not meant to be nor should be considered a substitute for qualified legal counsel.

This document is divided into two sections: the first contains topics of interest to organizations whose operations have suffered as a result of the attacks; the second section addresses some of the legal issues that may confront organizations as they assist victims of the terrorist attacks. The subheadings are as follows:

Organizations Impacted by Disaster

1. Loans and grants available to nonprofits
2. Additional technical assistance available
3. Government regulations and filings
4. Employment and personnel
5. Commercial lease issues
6. Insurance coverage

Organizations Providing Disaster Relief Services

7. Establishing or operating a disaster relief program
8. Distributing cash assistance
9. Charitable contributions
10. The September 11th Victim Compensation Fund

1. LOANS AND GRANTS TO NONPROFITS

Question: How can nonprofit organizations obtain information about financial assistance, insurance and other related issues?

Answer: Empire State Development Corporation ("ESDC"), New York State's economic development agency, as well as the New York City Economic Development Corporation ("NYCEDC"), have established hotlines and walk-in business resources centers to assist organizations (including nonprofits) affected by the attack. The details as of March 2002 are as follows:

The State Business Assistance telephone hotline (800-456-8369) is available Monday-Friday from 9:00 a.m. until 5:00 p.m. The ESDC maintains two WTC Business Recovery Centers at 2 Rector Street (between Greenwich and Trinity Place) and 140 William Street (at Fulton Street). Hours are Monday, Tuesday, Thursday and Friday, 9 a.m. to 5 p.m., and Wednesday 9 a.m. to 8 p.m. Loan and grant applications can also be downloaded directly from www.newyorklovesmallbiz.com or www.empire.state.ny.us.

The NYCEDC telephone hotline (866-227-0458) is available from 9:00 a.m. to 5:00 p.m. Monday-Friday. The NYCEDC (as well as the Small Business Administration) shares the State business resource center space at the Fulton Street address noted above (hours are the same). A listing of resources for nonprofits is available at NYEDC's website, www.newyorkbiz.com.

Representatives staffing the hotline and the resource centers can provide information on a variety of subjects, including obtaining alternate office space, labor issues, city services, banking concerns, insurance issues, public utilities, tax issues and counseling services. In addition, information is available regarding financial assistance that may be available from federal, state and local agencies.

Question: Are nonprofit organizations eligible for loans from the U.S. Small Business Administration?

Answer: Yes. The U.S. Small Business Administration ("SBA") is working in partnership with the Federal Emergency Management Agency ("FEMA") and other federal, state and local agencies to assist affected businesses. The first step in the recovery process is to call FEMA's toll-free number 1-800-462-9029 or 800-462-7585 to register.

The SBA makes loans available to businesses of all sizes, including nonprofits. These loans include loans for businesses to repair or replace property damaged because of the disaster. For events related to the World Trade Center disaster of September 11, 2001, the filing deadline for applications for physical damage to homes, personal property, and businesses was November 10, 2001. For applications for economic injury the filing deadline is June 11, 2002. All businesses, including nonprofit organization, are eligible for this form of assistance.

The SBA also provides loans for working capital to small businesses and nonprofits to assist them through the disaster recovery period under its "expanded economic injury loan program."

This is a change from early fall 2002 when such working capital loans were available to small for-profit businesses, but not to nonprofit organizations. Nonprofits that applied in 2001 for working capital loans due to economic injury from September 11 and were turned down may reapply to the SBA and should note their prior file number on their application.

The SBA can be reached directly at 800-659-2955. Applications for assistance can be submitted at business resource centers located at 633 Third Avenue (between 41st and 42nd Street), 141 Worth Street, 80 Pine Street and 62 Mott Street. The address for the SBA's District Area 1 office, which serves New York and neighboring states, is: 350 Rainbow Blvd. South, Niagara, Falls, NY 14303. More information about SBA's programs can be found on the Internet at www.sba.gov.

Question: What are other sources of low-interest loans or grants to nonprofits affected by the attacks?

Answer: In the aftermath of the attacks, several loan programs have emerged. For example, Seedco (Structured Employment Economic Development Corporation) is prepared to offer zero interest loans of up to \$500,000 to organizations that qualify for tax exemption under Section 501 of the Internal Revenue Code and have been displaced or otherwise directly affected by the World Trade Center disaster. Additional eligibility criteria for borrowers include location within the five boroughs of New York and other affected communities and a demonstration of losses from the disruption of operations due to the disaster. Examples of losses include: (1) the destruction or inability to access physical assets or software necessary to conduct operations; (2) delayed receipt of funds from government or other contracts for the delivery of services that result in the inability to meet payroll or other current expenses; (3) the inability to conduct fund-generating activities (such as artistic performances) that are central to the borrower's mission; and (4) delays in scheduled fund development activities that enable the organization to finance ordinary course operations. For more information, please call Catherine Gill at (212) 473-0255, ext. 301 or Peter Oliver at (212) 473-0255, ext. 345, or visit www.seedco.org.

The New York City Economic Development Corporation's Business Retention Grant Program was expanded on December 10, 2001 to include nonprofit organizations located south of Houston Street. Nonprofit organizations are eligible to receive a grant of up to \$10,000 if they have applied for an SBA loan or other qualifying loan. More information is available on NYCEDC's website at <http://www.newyorkbiz.com>.

In addition, the Fund for the City of New York operates a Cash Flow Loan Program. Go to their website at <http://www.fcny.org> and click on "Organizational Assistance." There is additional funding available for organizations that need cash flow loans because of situations related to the September 11 events. The application process is explained on the website.

The Nonprofit Finance Fund (NFF), <http://www.nonprofitfinancefund.org>, has developed the Nonprofit Recovery Fund to provide loans and grants to nonprofits affected by the events of September 11. Nonprofit groups that have experienced damage to facilities, equipment or operations in the wake of the disaster should review information provided on NFF's website and may contact Ann McKinnon at 212-868-6710 or ann.mckinnon@nffusa.org for information and assistance.

The New York Women's Foundation (NYWF) has established a Disaster Relief Fund. The Fund will grant up to \$15,000 to nonprofit community-based organizations delivering services to low-income women and girls affected by the September 11th tragedy. NYWF is particularly interested in organizations that are working (1) with families of displaced or deceased low-wage workers, (2) with victims of bias incidents/attacks, or (3) to address the environmental consequences of the attacks in poor neighborhoods. The filing date for applications is September 11, 2002. For information contact Rini Banerjee at 212-226-2220, ext. 12 or Sophia Silao at 212-226-2220, ext. 14 or visit www.nywf.org.

The Mellon Foundation is providing grants of \$250,000 to \$2 million to New York City's cultural and performing arts organizations directly affected by the events of September 11. Candidates will need to submit a proposal that documents the direct financial and related consequences they have experienced as a result of 9/11. Organizations can be located anywhere in the city. Groups may contact T. Dennis Sullivan, Financial Vice President at (212) 838-8400 or tds@mellon.org for further information.

2. ADDITIONAL TECHNICAL ASSISTANCE

Question: What other technical assistance services are available to nonprofits?

Answer: A number of other organizations are offering services to nonprofits:

Lawyers Alliance for New York's staff and pro bono attorneys are prepared to meet the business and transactional legal needs of nonprofit groups that are affected by and/or responding to the attack on the World Trade Center. Organizations that are collecting funds for disaster relief, providing adult or youth grief counseling and education programs, offering job placement activities for workers formerly employed at affected sites, or otherwise affected by or responding to the tragedy may contact: Lawyers Alliance for New York, 330 Seventh Avenue, 19th Floor, New York, N.Y. 10001, (212) 219-1800; email: info@lawyersalliance.org.

The Nonprofit Coordinating Committee (NPCC) has set up a special page on its website, <http://www.npceny.org/disaster.htm>, listing organizations that have offered to donate their resources (space, technology or advice) or assistance to nonprofit organizations affected by the events of September 11th.

NPower NY is offering a variety of technology assistance services to nonprofits in lower Manhattan whose technology was impacted by the disaster, as well as to those providing services to individuals affected by the disaster or assisting with disaster recovery efforts. Interested organizations should contact NPower NY at (212) 677-9622 (phone), (212) 677-9248 (fax) or email: september11@npowerny.org. Additional information can be found on its website at www.npowerny.org.

The Fund for the City of New York, a foundation dedicated to advancing the work of government and not-for-profit organizations in New York City, has been making consulting services available free of charge to nonprofit organizations in need of disaster-related technology assistance. This can include the development of emergency websites, relocation assistance or any technology needs. To request this assistance, please contact either Alicia Altmueller at

(212) 925-6705, email: aaltrueller@fcny.org or Joshua Peskay at (917) 747-1154, email: jpeskay@fcny.org.

The New York Regional Association of Grantmakers is acting as a clearinghouse for philanthropies, listing information on its website at www.nyrag.org on the kind of aid foundations are offering and, in some cases, where foundations displaced by the disaster have temporarily relocated.

ReSTART Central, an organization created by the New York City Economic Development Corporation, the Empire State Development Corporation and the New York City Partnership, provides donated goods and services to small and medium sized businesses and nonprofit organizations that suffered damage from the September 11 attacks. Donated goods include computers, office furniture and supplies, and donated services include technical, architectural, engineering, marketing and consulting services. In addition, ReSTART Central has negotiated special discount programs with major computer and telecom hardware manufacturers. More information is available on ReSTART Central's website at <http://www.restartcentral.org> or by calling 866-227-0458 or sending an email to assistance@restartcentral.org.

3. GOVERNMENT REGULATION AND FILINGS

Question: The filing deadline for our most recent Federal Form 990 occurred immediately after September 11. What extensions or other relief is available for organizations affected by the World Trade Center disaster?

Answer: The U.S. Treasury Department and the Internal Revenue Service ("IRS") extended certain tax filing and payment deadlines for taxpayers affected by the September 11th attacks. The IRS has issued Notice 2001-61 setting forth the relief provisions, several of which are discussed below. The full text of that Notice is available at www.irs.gov/pub/irs-drop/n-01-61.pdf.

This relief applies to annual returns filed by tax-exempt organizations, i.e. Forms 990 and Forms 990-PF. It also includes partnership returns, corporate income tax returns, estate and trust income tax returns, estate tax returns and certain excise tax returns and employment tax returns. Deadlines for employment and excise tax deposits generally are not extended.

Affected taxpayers include, among others, business entities and not-for-profit organizations whose principal place of business or necessary records are in a covered disaster area. The covered disaster areas are the five New York counties -- Bronx, Kings (Brooklyn), New York, Queens and Richmond (Staten Island) -- and Arlington County, Virginia.

Nonprofits (which fall within the category of affected taxpayers other than individuals), with original filing deadlines between September 11, 2001 and November 30, 2001, have an automatic extension that amounts to six months plus 120 days to file certain tax returns and make tax payments.

Those currently on six-month extensions that expired between September 11, 2001 and November 30, 2001 had an additional 120 days to file such returns. Although a similar

postponement to pay the tax generally is not permitted (because the tax was due on the due date of the 2000 return), a period of 120 days from September 11, 2001 until January 9, 2002 will be disregarded in the calculation of any failure-to-pay penalty.

Affected corporations and other entities that were scheduled to make estimated tax payments between September 11, 2001 and January 14, 2002 could postpone those payments until January 15, 2002.

Organizations that believe they are entitled to relief under Notice 2001-61 should mark "September 11, 2001 Terrorist Attack" in red ink on the top of their return and other documents submitted to the IRS.

Question: Is our organization eligible for tax filing and payment extensions at the state level?

Answer: The New York State's Department of Taxation and Finance has issued Notice N-01-14, "Announcement Regarding the Terrorist Attacks on September 11, 2001", which grants certain extensions for state taxpayers. The Notice is available at www.tax.state.ny.us/pdf/Notices/N01_14.pdf. It applies to taxpayers both within and outside New York State who were affected by the terrorist acts of September 11th. The Department extended deadlines until December 10, 2001 for certain acts that otherwise fell within September 11, 2001 through December 10, 2001.

Question: Where can we find out about extensions of City tax deadlines?

Answer: The New York City Department of Finance has issued a Finance Memorandum titled: "Emergency Extensions of Filing and Payment Due Dates Relating to the World Trade Center Disaster." The full text of the Memorandum is available at www.nyc.gov/html/dof/html/fm_wtc.html.

Question: I understand that organizations soliciting in New York for charitable purposes generally must register with the Charities Bureau before soliciting. What are my organization's registration obligations, and how has the Charities Bureau been handling new charities registrations during the period following the September 11 attacks?

Answer: Pursuant to Article 7-A of the New York Executive Law, organizations that intend to solicit or actually solicit over \$25,000 annually in New York State are required to register with the Charities Bureau prior to soliciting, unless they fall within a statutory exemption. Registration involves the submission of a Charities Registration Statement (CHAR 410) and certain organizational and financial documents. In addition, registrants are required to submit annual financial statements (CHAR 497 and IRS tax returns) to the Charities Bureau within 4 1/2 months of the end of the registrant's fiscal year.

Additional information on registration is available on the Attorney General's website at www.oag.state.ny.us/charities/charities.html. Soliciting organizations that have not yet registered should seek to comply as promptly as possible with the registration requirements. No enforcement action will be taken against organizations that, in good faith, attempted to register prior to the solicitation of funds, but were unable to do so due to the temporary closing of the Charities Bureau's offices.

Question: We already are registered with Charities Bureau of the New York State Attorney General's Office. What is the status of the offices of the Charities Bureau in lower Manhattan? Are any extensions being granted for the filing of annual financial reports with the Charities Bureau in light of the September 11 attacks?

Answer: The Attorney General's Office at 120 Broadway, New York, NY 10271, 212-416-8000 resumed operations as of September 24, 2001. Charities Bureau representatives have indicated that the Attorney General's Office is accepting the federal extension for the filing of annual financial reports.

Question: How does our organization obtain the approval of the Attorney General's Office for time sensitive matters, such as amending a certificate of incorporation to change our organization's purposes or powers, or effecting a merger or sale of all or substantially all our assets?

Answer: The usual procedures still apply for giving the Attorney General notice under the New York Not-for-Profit Corporation Law for amendments, mergers, asset transfers and dissolutions. While in most cases an organization will be able to have matters reviewed by the Attorney General's staff in the ordinary course of business, there may be situations where the Attorney General's review is more urgent. In the case of time sensitive matters, organizations may send an email to karin.goldman@oag.state.ny.us or barbara.zuckerman@oag.state.ny.us and indicate that they will be submitting papers for a matter that needs immediate attention.

4. EMPLOYMENT

Question: May an employer require its employees to use their accrued vacation or sick leave to cover their absences from work due to the World Trade Center disaster?

Answer: Yes, provided that such use of accrued leave time is consistent with the employer's leave policies and provided that the employee's absence from work does not qualify as leave pursuant to the Family and Medical Leave Act (FMLA).

Question: Does an employer have to provide an employee with either paid or unpaid leave if the employee is unable to work as a result of an injury suffered in the World Trade Center?

Answer: Possibly, if the employee is suffering from a serious health condition or if the employee is disabled. An employer may be required to provide an employee with unpaid leave under (1) the FMLA if (a) the FMLA applies to the employer (those employers that employ 50 or more employees for each working day in each of 20 or more calendar workweeks in the current or preceding calendar year) and (b) the employee or member of the employee's family is suffering from a serious health condition as defined under the FMLA or (2) under the Americans with Disabilities Act (ADA) and the New York Executive Law if the employee is disabled within the meaning of those statutes and if the granting of leave would serve as a reasonable accommodation to the employee. An employee also may be able to recover under New York state disability benefits for injuries that are not work-related. Employers can obtain further information about their obligations under the FMLA and ADA from the following website:

www.dol.gov/dol/esa/fmla.htm. Information on the New York Executive Law can be obtained from www.labor.state.ny.us.

Question: Is an employee entitled to either paid or unpaid leave if the employee claims to be too afraid or emotionally traumatized to work?

Answer: If the employee is suffering from posttraumatic stress disorder, depression, or some other mental condition, the employer may be required to provide the employee with unpaid leave under the FMLA or unpaid leave as an accommodation under the ADA or the New York Executive Law. However, the employee will have to meet the applicable requirements of the FMLA, ADA, and Executive Law as set forth in the question above. An employer could allow an employee to use paid leave time such as vacation or sick leave for stress-related absences as well.

Question: Is an employer required to reinstate an employee who has been absent from work due to voluntary or involuntary duty in the Armed Services or National Guard?

Answer: Generally, yes. With few exceptions an employee will generally be entitled to reemployment after his or her military service if (1) the employee provides advanced written or oral notice of the service; (2) the employee's cumulative period of absence for military service does not exceed five years; and (3) the employee makes timely application for reemployment.

Question: What are a retirement plan sponsor's options and/or obligations in the event that plan participants or beneficiaries make requests for plan distributions in light of unexpected needs that have arisen as a result of the disaster?

Answer: A plan sponsor has the obligation to honor the participant's request if permitted under the terms of the plan. This event probably will not qualify as a hardship under the terms of the plan which are generally limited to the need for funds to pay medical care expenses, purchase a home, prevent eviction or pay dependents' education expenses. The plan participant would be eligible to take a loan from the plan, if such loans are offered under the plan terms. A plan sponsor should inform the participant or beneficiary of the consequences of non-hardship early withdrawal distributions from the plan. Any distributions prior to the attainment of age 59 ½ will be subject to an additional 10% early withdrawal tax penalty.

Question: What can employers do to help their employees recover psychologically from the trauma of September 11th?

Answer: Employers can provide information regarding health insurance coverage for mental health problems and counseling. Employers should be cautious of "advising" employees regarding the content of insurance policies. Employers should provide employees with copies of applicable policies and suggest that employees contact the insurance carrier for more specific information.

5. COMMERCIAL LEASE ISSUES

The answers to each of the following questions are based on the Standard Form of Office Lease (the "Lease Form") promulgated by the Real Estate Board of New York, Inc., which is often used for smaller office leases in New York City. Each landlord and tenant, however, must consult their actual leases, as the standard form is usually supplemented with Riders that amend the provisions of the Lease Form. Moreover, in the wake of September 11, some landlords have been willing to negotiate lease modifications for tenants who plan to return to the premises.

Question: Our organization holds leased property in the "frozen zone" that was damaged and untenable due to the dust and debris from the World Trade Center disaster. Was the lease automatically terminated as a result of the accidental destruction?

Answer: No, the lease continues in full force and effect.

Question: Can the tenant terminate its lease on the basis that the September 11 attacks are a casualty?

Answer: In the provision of the Lease Form that governs casualty, the tenant expressly waives rights it may have been entitled to under Section 227 of the Real Property Law; therefore, the lease is not terminable by the tenant in the event of a casualty.

Question: Who is responsible for the property located in the demised premises that was damaged or stolen as a result of the events on September 11, 2001?

Answer: The landlord is only responsible for damage to tenant's property or the theft of tenant's property when such damage or theft is caused by the landlord's negligence. In all other instances, including damage caused by other persons or by construction operations, the tenant is responsible for the tenant's property that was damaged or stolen. In the casualty provision of the Lease Form, the tenant expressly acknowledges that the landlord will not carry insurance on the tenant's furniture and/or furnishings or on any fixtures or equipment, improvements or appurtenances removable by the tenant and the tenant agrees that the landlord is not obligated to repair any damage to the same.

Question: Who bears the obligation to repair damage to the demised premises as a result of the events on September 11, 2001? Are tenants eligible for a rent abatement during the time the tenant's access to the demised premises was limited or restricted due to the casualty?

Answer: When fire or other casualty damages the demised premises, the tenant is to notify the landlord of such; however, the lease continues in full force and effect, except if the landlord elects to terminate the lease as noted below. In the event the demised premises were partially damaged or rendered partially unusable, the damages to the demised premises shall be repaired by and at the expense of the landlord. In addition, the rent (including any additional rent) shall be apportioned according to the part of the demised premises that are unusable from the day following the casualty until the repair is substantially completed.

If the demised premises were totally damaged or wholly unusable, the tenant is still obligated to pay rent up to the time that the casualty occurred; the tenant's obligation to pay rent (including

any additional rent) ceases from the time of the casualty until the date the demised premises are repaired or restored by the landlord; and the tenant's obligation to pay rent resumes five days after the landlord notifies the tenant in writing that the demised premises are substantially ready for the tenant's occupancy. In cases where the demised premises were rendered wholly unusable, but the tenant subsequently reoccupies a part of the demised premises prior to the complete repair or restoration by the landlord, then the tenant is obligated to pay rent apportioned according to the part of the demised premises that are unusable until the repair is substantially completed. However, where the demised premises were rendered wholly unusable, the landlord has the option to terminate the lease by written notice to the tenant in accordance with the terms of the lease, if the landlord decides to demolish or rebuild the building, regardless of the extent of the damage.

The landlord is obligated to make such repairs with reasonable expedition, subject to delays due to insurance claim adjustments, labor expedition, or causes beyond the landlord's control. After a casualty, the tenant is obligated to cooperate with the landlord by removing all of tenant's salvageable inventory and equipment as promptly as reasonably possible.

Question: Does the lease terminate or is rent abated if the demised premises have not been damaged, but damage to the nearby buildings has limited our organization's access to the space?

Answer: The casualty provision in the standard form does not address the case where the premises have been rendered partially or totally inaccessible (as opposed to partially or totally damaged, as described above). The general rule, however, is that the tenant is not entitled to a rent abatement unless the lease specifically provides for one. Moreover, under the Lease Form, a landlord's inability to perform under the lease does not affect or excuse the tenant's rent or other obligations where the landlord is not the cause of the inability. Thus, if the tenant's access was limited because the premises were in or near a "frozen zone," a landlord may argue that there should be no abatement for rent because the circumstances preventing or limiting access were beyond the landlord's control. If you are obligated to pay rent in this circumstance, you should consult with your insurance carrier to determine if you are eligible to make a claim for business interruption to cover rent payments made or owed for the period when you were displaced from, or had limited access to, the demised premises.

6. INSURANCE

Question: How can my organization determine if its insurance policies will pay for the damages sustained as a result of the disaster?

Answer: The organization should first gather complete copies of all insurance policies and receipts that document expenditures and out-of-pocket losses due to the disaster. If the organization cannot locate complete copies, call the insurance broker/agent or insurer. Gathering all of the required documentation will facilitate not only the filing of an insurance claim, but also provide a complete file for review by counsel, should legal advice be necessary.

In reviewing the insurance policies, check the Declarations page to confirm the policy number, the name of the insured, the policy period (to ensure that the policy was in effect on September

11, 2001), any limitations on liability for each type of coverage under the policy, the endorsements that are applicable to the policy and whether the property in question is in fact insured under the policies.

Your insurance policy may not only cover property damage, but also provide for some form of business interruption coverage in connection with the property damage. Business interruption insurance typically provides for reimbursement for loss of net revenues while an organization's operations are closed due to property damage, plus continuing operating expenses, including payroll, rent, and any additional expenses incurred (e.g., additional expenses for transportation, communications and reconstructing lost documents). Some policies may provide for extended business interruption coverage for loss of net revenues and additional expenses incurred after the organization has resumed operations but prior to the time that it is operating at the level that would have existed had no property damage occurred. Some policies may also include coverage for loss of net revenues and additional expenses incurred due to denial of access to the organization's facilities by a civil authority. This type of coverage applies even if the organization has not experienced any property damage, but is usually limited to a period of two to three weeks.

Importantly, the organization should contact its insurance agent/broker by phone as soon as possible and notify them *in writing* about their losses. The Notice Provisions generally state that the insurer must be notified as soon as practicable of any facts and circumstances that gave rise to the claim, including how, when and where the "occurrence" took place, the names and addresses of any injured persons, and the nature and location of any injury or damage arising out of the "occurrence."

Question: Where can my organization get additional information about insurance issues?

Answer: For more information or to make a complaint, please consult the New York Insurance Department's website at www.ins.state.ny.us.

The Insurance Coverage Litigation Committee of the Section of Litigation of the American Bar Association has created a Task Force on Insurance and Terrorism Claims to address insurance issues arising out of the September 11 attacks. The Task Force has made available on its website sample property insurance and business interruption insurance checklists, as well as a sample spreadsheet calculation for a business interruption claim. The Task Force's website address is <http://www.abanet.org/litigation/committee/insurance/taskforce.html>.

7. ESTABLISHING OR OPERATING A DISASTER RELIEF PROGRAM

Question: Does our organization, an existing charitable organization, need to take any special legal steps to establish a disaster relief program or engage in disaster relief activity?

Answer: The Board of Directors or Executive Director should check the organization's certificate of incorporation to ensure that the planned activities fall within the organization's current corporate purposes. If not, the organization may need to amend its certificate, which requires Board action and court approval upon notice to the state Attorney General, in order to change or add to the purposes.

The Board may also seek to establish resolutions authorizing disaster-related activity. If the organization plans to distribute funds for disaster relief, the Board should adopt resolutions establishing such a disaster relief program, an appropriate mission statement and guidelines for distributing funds.

Question: How can I form a new charitable organization to provide relief to victims of the terrorist attacks and apply for federal tax exemption?

Answer: First, at the state level, the organization must be created in the form of a nonprofit corporation, trust or unincorporated association. It may need to obtain state licenses to perform certain services, such as health care. In New York, as in thirty-nine states, the charitable organization generally must register with the state's charities bureau (in the Attorney General's office) before soliciting funds. The organization also must qualify to do business in any state in which it intends to do business.

At the federal level, the entity must submit an application to the IRS for recognition of its tax-exempt status on Form 1023, and it must seek classification as a public charity or private foundation.

To qualify as exempt under Section 501(c)(3) of the IRC, the organization, among other things, must be organized and operated for charitable purposes and serve public, rather than private, interests. Generally, disaster relief programs are exempt on the ground that they are formed for the relief of the distressed, but an organization also may seek to establish that is charitable on other grounds. Disaster relief organizations also must have in place a set of objective criteria to make distributions. In addition, the organization must serve a large or indefinite group rather than particular, pre-selected individuals.

Generally, Section 501(c)(3) organizations that provide cash assistance to disaster victims must make a specific determination of need prior to distributing funds to individual victims. Recent federal legislation, discussed in Section 8 below, relaxes this requirement for distributions to September 11 and anthrax victims, but not for distributions to victims of other disasters.

Question: Has the Internal Revenue Service issued any special guidance relating to the provision of disaster relief in light of the World Trade Center attack?

Answer: Yes, shortly after September 11 the IRS released the Advanced Text of a Special IRS Publication on how the public can use charitable organizations to help victims of disasters. The text, entitled "Disaster Relief: Providing Assistance Through Charitable Organizations" (IRS Advanced Text), is available at <http://www.irs.gov/pub/irs-utl/aid-charity-pub.pdf>. It explains how to use existing organizations to make donations, as well as how new charitable organizations can apply for and receive recognition of tax-exempt status.

Question: How can our organization receive expedited review of its Form 1023 application for recognition of tax-exempt status?

Answer: It typically takes the IRS approximately four months to review an application. However, the IRS has a special expedited review and approval process for new organizations seeking tax-exempt status to provide disaster and hardship relief to victims of the September

11th attacks. The organization should submit a cover letter requesting expeditious treatment of its 1023 application and should explain the circumstances justifying the request. It also should write at the top of the Form 1023 "Disaster Relief, Sept. 11, 2001".

Question: Where can I get more background information about forming a disaster relief organization?

Answer: Check the IRS website at <http://www.irs.gov> for updates.

The Exempt Organizations group at the law firm of Simpson Thacher & Bartlett has created some helpful documents pertaining to establishing a disaster relief organization. On its website, www.simpsonthacher.com, under "Publications," you can find a Memorandum entitled "[Contributing to Disaster-Relief Efforts: Frequently Asked Questions](#);" a Memorandum entitled "[Establishing a Disaster-Relief Program: Frequently Asked Questions](#);" "[Sample Resolutions to Establish a Disaster-Relief Fund at an Existing Public Charity](#);" a "[Sample Mission Statement for a Disaster-Relief Fund](#);" "[Sample Guidelines for Distribution Committee of a Disaster-Relief Fund](#);" and a "[Sample Request Form for Assistance From a Disaster-Relief Fund](#)."

8. DISTRIBUTING CASH ASSISTANCE

Question: Has the IRS issued any specific announcements regarding distributions of cash or other assistance by charities to victims of the September 11 attacks?

Answer: Yes. In IRS Notice 2001-78; 2001-50 IRB (16 November 2001) the IRS modified the legal standards for charities regarding payments by reason of the death, injury or wounding of an individual incurred as a result of the September 11, 2001 terrorist attacks. The Notice stated that "the Service will treat such payments by a charity to individuals and their families as related to the charity's exempt purpose provided that the payments are made in good faith using objective standards." The Notice applies to payments made before the earlier Congressional legislation or December 31, 2002. This Notice has since been superseded by the federal tax legislation discussed in the next question.

Question: I understand that there is new federal tax legislation that addresses when payments by a charitable organization to disaster victims may be treated as within the organization's tax-exempt purposes?

Answer: Yes, Congress has recently enacted the Victims of Terrorism Tax Relief Act of 2001, P.L. 107-134 (the "Tax Relief Act"), which was signed on January 23, 2002. It relaxes the requirement that Section 501(c)(3) organizations make a specific determination of need prior to distributing cash assistance to victims of the September 11 disasters. Section 104 of the Tax Relief specifically provides:

Payments made by an organization described in section 501(c)(3) . . . by reason of the death, injury, wounding, or illness of an individual incurred as the result of the terrorist attacks against the United States on September 11, 2001, or an attack involving anthrax occurring on or after September 11, 2001, and before January 1, 2002 shall be treated as related to the purpose or function constituting the basis for such organization's exemption

under section 501 of such Code if such payments are made in good faith using a reasonable and objective formula which is consistently applied. . . .

This provision applies to payments made on or after September 11, 2001. This legislation, like the IRS Notice, is intended to reduce delays in the distribution of relief to victims.

The legislative history makes clear that this provision is intended to give charities the option of paying over relatively large sums to victims and families of victims without requiring them to go through the often time-consuming fact-finding process of determining the needs of the particular recipient. However, the legislative history also makes clear that, if the charity chooses to rely on this new statute, the payments must be made pursuant to a reasonable and objective formula that is consistently applied; they must serve a public not a private purpose; and the recipients must be members of a charitable class.

There are some open issues regarding the scope of the Tax Relief Act, such as, how closely must the link be between the terrorist attacks and "death, injury, wounding, or illness," how expansive is the term victims for purposes of this statute, and what formulas will be considered reasonable and objective. The legislative history suggests that the Section 104 language is general because, given the devastating impact of September 11, there may be situations that meet the requirements of Section 104 that Congress could not anticipate when enacting the statute.

Question: Will a disaster-assistance fund established by an employer to help employees and their families qualify as "charitable"?

Answer: It depends on the nature of the program. Employer-related assistance programs will qualify as charitable and not result in taxable compensation to employees if they meet certain criteria. The IRS Advanced Text on Disaster Relief discusses the IRS's present thinking on this issue. The legislative history accompanying the Tax Relief Act discusses the current law applicable to employer-controlled foundations making grants to employees of the employer, indicates that such foundations are permissible, and directs the IRS to issue prompt guidance that further clarifies the IRS's position on this subject.

Question: Our agency is providing direct cash assistance to 9-11 victims. Do we have to issue a 1099 to evidence those payments?

Answer: No, assuming the person to whom the cash assistance is being given is a member of a charitable class entitled to assistance, a 1099 does not have to be issued. That is because the payments are not being made in exchange for *services* in the course of the agencies' business.

Generally, non-employee compensation is reported on a Form 1099. This type of compensation includes interest, dividends, rents, royalties, commissions, non-employee compensation and certain other payments. The General Instructions for Forms 1099 indicate that "payments for services performed for a trade or business by people not treated as its employees" are reported on a Form 1099-MISC. See, The General Instructions for Forms 1099, 1098, 5498 and W-2G, page Gen-13. The 2002 Instructions for Form 1099-MISC state that non-employee compensation must be reported when "(1) you made the payment to someone who is not your employee; (2) you made the payment for services in the course of your trade or business (including government agencies and nonprofit organizations); (3) you made the payment to an individual, partnership,

estate, or, in some cases a corporation; and (4) you made the payments to the payee of at least \$600 during the year." The 2002 Instructions for Form 1099-MISC page Misc—4. Therefore, because the payments are not being made in exchange for services, the agency does not have to issue a 1099.

Question: Will recipients of our cash assistance grants have to pay federal income tax on the funds they receive from us?

Answer: Probably not. The Internal Revenue Code excludes gifts from income. The IRS has recognized that need-based payments by charities are excludible from income as gifts. Further, the new Tax Relief Act sets forth the exclusion for disaster relief payments.

Specifically, the Tax Relief Act enacts a new IRC § 139, which excludes "qualified disaster relief payments" from income. Such payments include amounts paid to an individual to reimburse or pay reasonable living expenses for housing, food, clothing, transportation, medical care and funeral expenses. Payments must be made on account of a Presidentially declared disaster, one triggered by terrorism or military action, or one declared under state or local law. There is no dollar limit on the amount that can be excluded under this provision, nor a restriction on who may be the payor.

Question: According to The New York Times (September 27, 2001), the New York State Attorney General has proposed creating a formal list of every person who gets help and how much money each receives. However, another article (October 2, 2001) reported that Mayor Giuliani has indicated that New York City intends to perform that coordination role. What is the status of regulatory agencies' proposals to coordinate charitable efforts, and what are our organization's obligations?

Answer: New York State Attorney General Eliot L. Spitzer proposed the creation of a central roster of aid recipients at a September 26, 2001 meeting of nonprofit groups. In a press release, the Attorney General commented on the need to coordinate charitable efforts and proposed the development of a database that would assist charities in making decisions on how to allocate disaster relief funds, with a goal of avoiding duplication in the disbursement of funds. A full copy of the press release is available at www.oag.state.ny.us/press/2001/sep/sep26a_01.html.

Since that announcement, numerous charities involved in the distribution of relief to individual victims have been cooperating in the assembly of a disaster relief database that will enable relief organizations to determine when victims have previously received assistance, and the nature and extent of that relief. The development of that database has been undertaken by a new organization, September 11th United Services, and charities involved in disaster relief efforts desiring more information may contact Robert J. Hurst at (212) 902-5262. Charities may choose whether to participate in the database. Individual victims and families and families seeking disaster assistance may obtain information about disaster relief activities at www.wtcrelief.info/Charities/Information/pages/Home.jsp.

9. CHARITABLE CONTRIBUTIONS

Question: When is a contribution to help in disaster relief efforts tax-deductible?

Answer: An individual or corporation will be eligible to claim a federal income tax deduction only if the contributions are made to an organization deemed "charitable" within the meaning of Section 170(c)(2) of the Internal Revenue Code ("IRC"). This includes some, but not all, organizations that are exempt from federal taxes.

It includes organizations exempt under IRC section 501(c)(3) (charitable organizations), 501(e) (cooperative hospital service organizations), 501(f) (cooperative service organizations of certain educational organizations), and 501(k) (nonprofit childcare organizations). It does not include, for example, organizations exempt under IRC section 501(c)(4) (advocacy, lobbying, and political organizations) or 501(c)(5) (labor unions and agricultural associations).

Organizations claiming exemption under section 501(c)(3) must seek recognition of their exemption by filing Form 1023 and will receive a "determination letter" confirming exempt status. Churches, temples, synagogues, mosques and certain other religious organizations are not required to seek recognition of exempt status from the IRS to qualify to receive deductible contributions. A donor will also be eligible to claim a tax deduction for charitable contributions made to a state or local government.

However, a donor will not be able to claim a tax deduction for a gift made directly to the family of a victim of the September 11th attack, or a fund established to benefit a specified individual or family, because a gift to a specified individual or family is not "charitable" within the meaning of the federal tax law.

Exempt organizations should maintain their determination letters on file for inspection by donors, especially those who will need confirmation of that exempt status for their records (e.g., private foundation grantors). The IRS website contains a cumulative list of the 501(c)(3) exempt organizations that have been formed during the past five months to help victims of the September 11 attacks. IRS Publication 78 contains a cumulative list of all 501(c)(3) exempt organizations, including those established prior to September 11. You can call the IRS at 800-829-1040 to inquire whether an organization is qualified.

Question: What are a not-for-profit organization's obligations regarding documentation of charitable contributions?

Answer: Taxpayers may not deduct individual contributions of \$250 or more unless they have received a contemporaneous written acknowledgment from the exempt organization that received the donation (IRC §170(f)(8)). The obligation is imposed only upon the donor, not the exempt organization, to request and obtain the acknowledgement for charitable contributions over \$250. However, charities are often compelled to initiate documentation in the interest of good donor relations.

For *quid pro quo* contributions (that is, contributions in exchange for which the donor receives some benefit), the charitable organization must give the donor a written statement if the payment is over \$75 and is partly a contribution and partly in exchange for goods or services.

The acknowledgment must be written and should include: the amount contributed if cash, or a description of the property if non-cash; the date; a statement as to whether the charity gave anything in exchange for the contribution; and a description and good faith estimate of the value of any goods or services provided by the charity in exchange for the contribution. Additional procedures apply for non-cash contributions with a fair market value greater than \$500. In addition, the written statement to donors making a *quid quo pro* payment over \$75 must include a statement that the donor can deduct only the amount by which the contribution exceeds the value of any goods or services received.

Question: Is there a gift tax if someone gives a gift directly to an individual or through a non-qualified organization?

Answer: Donors may choose to give gifts directly to individual victims or through non-qualified organizations, even though such assistance does not qualify as a tax-deductible contribution. According to the IRS Advanced Text, individual recipients of gifts are not subject to tax on the value of the gift, unless an employer provides the assistance for the benefit of an employee. Persons who provide gifts directly to individuals may be subject to gift tax if the value of the gift exceeds \$10,000 to a person in a particular year. The \$10,000 amount is periodically adjusted for inflation.

Question: Where can I find out more details about income-tax deductions for charitable contributions?

Answer: The IRS's Publication 526, entitled "Charitable Contributions," summarizes the rules relating to the federal income-tax deduction. IRS Publication 171, "Charitable Contributions (for exempt organizations)- Substantiation and Disclosure Requirements," contains detailed information about what a charity is required to include in the written acknowledgments. These documents can be downloaded from the IRS website, www.irs.gov, or ordered free through the IRS at (800) 829-3636.

10. SEPTEMBER 11TH VICTIM COMPENSATION FUND OF 2001

Question: What is the September 11th Victim Compensation Fund of 2001 (the "Fund")?

Answer: The Fund, created by an Act of Congress as Title IV of Public Law 107-42, offers federal compensation to an individual (or the personal representative of a deceased individual) who was physically injured or killed as a result of the terrorist-related aircraft crashes on September 11, 2001. The Fund is designed to provide a no-fault alternative to tort litigation. Claimants must elect to participate in the program. Claimants have the right to reject the program and instead go to the more traditional tort civil litigation system (i.e. sue the airline, sue the World Trade Center). The U.S. Attorney General appointed Kenneth Feinberg as the Special Master to administer the Fund.

Question: What losses are covered by the Fund?

Answer: The Fund provides compensation only for losses caused on account of personal physical injuries or death, even though others may have suffered emotional injury or other losses, such as employment or property loss. Under the Interim Final Rules, 28 CFR Part 104, claimant's awards are to be determined by the following formula: (i) the computation of economic loss (i.e. lost income looking forward, as a result of the death or serious injury); plus (ii) the computation of non-economic loss (i.e. pain and suffering, emotional distress, loss of consortium); minus (iii) collateral source compensation (i.e. life insurance, pension funds, death benefit programs, and payments by federal, state, or local governments related to September 11, 2001).

Question: Will donations by charities to the families of the victims of September 11, 2001 affect awards from the Fund?

Answer: Under the Interim Final Rules, charitable donations distributed to the beneficiaries of the decedent, to the injured claimant, or to the beneficiaries of the injured claimant by private charitable entities do *not* constitute collateral source compensation under the Fund. That means that Fund awards generally will not be reduced by cash assistance distributed by charities. Also, the value of services or in-kind charitable gifts such as provision of emergency housing, food or clothing does not constitute collateral source compensation. Notwithstanding the foregoing, the Fund's regulations state that the Special Master may determine that money provided to victims or their families through a private charitable entity constitute, in substance, a collateral source compensation that may be deducted from the amount of the award a claimant is eligible to receive under the Fund. It is not yet clear how the Special Master will exercise his discretion in this area.

Question: What is the application process?

Answer: Only one claim may be submitted by an individual or on behalf of an individual. Claimants will need to submit (i) an "Eligibility Form," and (ii) either a "Personal Injury Compensation Form," or a "Death Compensation Form." These forms shall require the claimant to provide certain information that the Special Master deems necessary to determine the amount of any award, including information concerning, income, collateral sources, benefits, and other financial information. The Special Master is to make a final determination on any claim within 120 days from when the claim was filed, and payments shall be authorized by the Special Master not later than 20 days after such final determination. Claimants may be eligible for an "Advance Benefit." Claimants have the option to request a hearing before the Special Master or his designee to argue about the amount of an individual's award. Determinations by the Special Master are final and are not reviewable by any court. No claims may be filed after December 22, 2003.

Question: How can I obtain more information or submit comments on the Fund?

Answer: The final regulations are available for review at the following website: <http://www.usdoj.gov/victimcompensation/victimcompfedreg.htm>. Comments in response to the notice on the interim rule were due by January 22, 2002; however, the Special Master verbally indicated that he would accept comments through mid-February. Comments should be submitted

by e-mail to: victimcomp.comments@usdoj.gov, or by fax (15 page limit) to 301-519-5956, or by mail to Kenneth L. Zwick, Director, Office of Management Programs, Civil Division, U.S. Department of Justice, Main Building, Room 3140, 950 Pennsylvania Avenue NW, Washington, DC 20530. Comments received are public record, should contain the name and address of the commenter, and will be available for review at www.usdoj.gov/victimcompensation.gov.

FURTHER INFORMATION

If you have questions about the foregoing or other legal issues affecting nonprofits, you may contact **Elizabeth M. Guggenheimer**, Legal Director, or **Eva DuBuisson**, Program Assistant, at **Lawyers Alliance for New York**, 330 Seventh Avenue, 19th Floor, New York New York 10001, 212-219-1800; website: www.lawyersalliance.org; email address: info@lawyersalliance.org.