

**DON'T MISS THE IRS OCTOBER 15, 2010 DEADLINE THAT MIGHT APPLY TO YOUR VOLUNTEER FIRE RELIEF ASSOCIATION (VFRA).**

**PLEASE IMMEDIATELY CONSULT WITH YOUR VFRA'S CPA AND/OR ATTORNEY.**

**CONFLICTING OPINIONS REGARDING VFRA 990 FILINGS**

As you may or may not know, legal and accounting professionals throughout Minnesota have conflicting opinions concerning the filing by tax-exempt VFRAs of "annual returns" (Form 990-series filings) with the IRS and the possibility, if such filings are required but not made, of VFRAs becoming subject to "automatic revocation" of their exempt status.

On September 27, 2010, IRS National Office Exempt Organizations' Division Senior Tax Specialist and Form 990 Project Manager Stephen Clarke met via conference call with a group of exempt organizations/nonprofit CPAs and leading nonprofit attorney, Eve Borenstein, at the request of Minnesota Firefighter Pension Consultants (MNFPC), to clarify the 990-series filing requirements for Minnesota VFRAs (i.e. to confirm the IRS National Office Exempt Organizations' Division's interpretation of Revenue Procedure 95-48 and consequences stemming from the upcoming October 15, 2010, deadline for groups who have not filed Forms 990, 990-EZ, or 990-N on one or more of the prior three tax years pursuant to Pension Protection Act of 2006).

**CONCLUSION AND VARIOUS VFRA ACTIONS REQUIRED**

Based on Mr. Clarke's comments, VFRAs must act according to their specific exemption history, which includes whether or not they have:

- Filed any Form 990-series
- An IRS letter of determination saying they are an "affiliate" of a governmental unit
- Average annual gross receipts above \$25,000
- Corresponded with the IRS to assert their tax exempt qualification as a 501(c)(3) or 501(c)(4) tax-exempt entity
- Been listed on the IRS Exempt Organizations' Business Master File

**See immediate actions for Minnesota VFRAs in paragraphs A through E below.**

Citations

1. Exempt Organization's Business Master File citations: <http://www.irs.gov/charities/article/0,,id=169840,00.html>
2. The Instruction Booklet: Record Layout, Descriptions, and All Codes for the Exempt Organization Master Listing in MicroSoft® Word (<http://www.irs.gov/pub/irs-soi/eobk10.doc>). June 2010. The Instruction Booklet: Record Layout, Descriptions, and All Codes for the Exempt Organization Master Listing in Plain ASCII Text. (<http://www.irs.gov/pub/irs-soi/eobk10.txt>) June 2010.
3. Minnesota files to download (these were pulling June 2010 info as of today), you pull them as either ASCII Text File ([http://www.irs.gov/pub/irs-soi/eo\\_mn.txt](http://www.irs.gov/pub/irs-soi/eo_mn.txt)).OR as Excel Files A-M ([http://www.irs.gov/pub/irs-soi/eo\\_mnam.xls](http://www.irs.gov/pub/irs-soi/eo_mnam.xls)), N-Z ([http://www.irs.gov/pub/irs-soi/eo\\_mnnz.xls](http://www.irs.gov/pub/irs-soi/eo_mnnz.xls))

**A) For VFRA's who have NOT filed a Form 990-EZ (or Form 990) on any one of the three years started in 2007, 2008, and 2009 AND do NOT have a determination letter saying they are an "affiliate" of a governmental unit: if total dollars received each year (averaged with the prior two years) are above \$25,000 (total dollars includes state aid, all investment income, gross dollars from all fundraisers and social activities [gross means PRE-expenses], all sales of raffle tickets or other entries for games of chance, etc.)**

IMMEDIATELY PREPARE all three years' returns since your most recent tax year closed December 31, 2009. For organizations eligible to file Forms 990-EZ on all three years (meaning that they met the income/assets thresholds that filing has in place for each of those years), there is a one-time opportunity to file under a Voluntary Compliance Program that the IRS announced this past July, but the program has a October 15, 2010 deadline. This program requires complete returns be packaged together and mailed to a specific address along with a checklist agreeing to the late-filer terms, and a modest user fee (same is in lieu of penalties). Access the checklist, the sending address, and user fees via the IRS' website at: <http://www.irs.gov/charities/article/0,,id=225704,00.html> IF YOU DO NOT FILE UNDER THE VOLUNTARY COMPLIANCE PROGRAM on or before October 15, 2010, the law sets out that you automatically lose tax-exemption back to May 15, 2010 and at that point are subject to corporate income tax (also, the IRS could still audit the organization and assert failure to file penalties on the 2007-2009 tax years). The only way to regain exemption is to make (and pay the filing fee associated with) a future application for exemption.

**B) For VFRA's who have NOT filed a Form 990-EZ (or Form 990) on any one of the three years started in 2007, 2008, and 2009 but DO have a determination letter saying they are an "affiliate" of a governmental unit and on that basis believed they did not have to file such returns: if your Board of Directors has less than five Municipal Trustees which is required under Minnesota Statutes, Section 424A.04, you might have unintentionally misrepresented to the IRS that majority control of your Board was situated in officials of the township/city/municipality served when it was not, you cannot rely on that determination letter, and...**

YOU SHOULD FOLLOW THE INSTRUCTIONS IN A, ABOVE, assuming your total dollars received each year averaged above \$25,000. NOTE THAT IF YOU DO NOT MAKE A VOLUNTARY COMPLIANCE PROGRAM COMPLETE FILING on or before October 15, 2010 and the IRS discovers (upon audit or otherwise) that you should have been filing Forms 990-EZ or 990 In 2007-2009, you will lose the right to tax-exemption either on the years under audit or as of May 15, 2010, and be subject to corporate income tax. Exemption could be later regained, but only by making (and pay the filing fee associated with) a future application for exemption.

**C) For VFRA's whose total dollars received each year (averaged with the prior two years) were \$25,000 OR LESS (total dollars includes state aid, all investment income, gross dollars from all fundraisers and social activities [gross means PRE-expenses], all sales of raffle tickets or other entries for games of chance, etc.) and you have NOT filed a Form 990-N in 2007, 2008, or 2009:**

YOU NEED TO FILE a 2009 Form 990-N by October 15, 2010. This is an electronic filing (and it does not matter that you missed 2007 and/or 2008). What now NEEDS be filed by VFRA's who do not have an "affiliate" of a governmental unit determination AND LIKELY SHOULD be filed with those who DO have such a determination (since you may not be entitled to rely on it if your facts have changed or underlying representations were incorrect; See Background section below) is that most recent (i.e., 2009) 990-N. To make that filing, go to: <http://epostcard.form990.org/> and follow the directions there (you will need the organization's taxpayer identification number). IF YOU DO NOT FILE THE 2009 990-N on or before October 15, 2010, you will lose the right to be tax-exempt organization until such time as you make (and pay the filing fee associated with) a future application for exemption. NOTE: if you are not able to make that site work for you, it will be because your organization is NOT listed on the IRS' Exempt Organizations Business Master File and you will need to follow the procedure in D or E, following.

**D) Organizations who have NEVER corresponded with the IRS to assert their qualification as a 501(c)(3) or 501(c)(4) tax-exempt entity will NOT be on the IRS' Exempt Organizations Business Master File and will not be able to make a 2009 Form 990-N filing via the electronic submission discussed in C, above.**

TO MAKE THAT FILING, an officer of the organization needs to call the IRS' Customer Account Services toll-free number (877.829.5500) and explain to the IRS staff person that the VFRA is described in Code section 501(c)(4) *or that it has less than \$5,000 in gross receipts on average each year and is a self-described 501(c)(3)*. [Being a "self-described 501(c)(4)" does not forestall the organization from later determination that it is a 501(c)(3).] The point to make with the IRS' Customer Account Services representative is that the organization IS entitled to tax-exemption even though it has not ever made an application to be so recognized. Because the organization is ENTITLED to that tax-exemption, it must comply with the filing requirements, which now include the Form 990-N for organizations with receipts of \$25,000 or less (as described in C, preceding). IF YOU DO NOT FILE THE 2009 990-N (the agent on the phone will take all the information that Form requires and "file it for you") on or before October 15, 2010, you will lose the right to be tax-exempt until such time as you make (and pay the filing fee associated with) a future application for exemption.

**E) Some organizations who HAVE corresponded with the IRS with respect to their qualification as 501(c)(3) or 501(c)(4) tax-exempt entity will discover that they, through no fault of their own, are "missing" from the Exempt Organizations Business Master File (sometimes this is caused by the IRS inputting a typo in the organization's valid name). That defect will cause an organization to be stopped when it attempts to make a 2009 Form 990-N filing electronically as set out in C, above.**

TO MAKE THAT FILING, an officer of the organization needs to call the IRS' Customer Account Services toll-free number (877.829.5500) and explain to the IRS staff that an error exists. The IRS' Customer Accounts' representative should take all the information required by the 2009 Form 990-N and "file it for you". IF YOU DO NOT DO THIS on or before October 15, 2010, you will lose the right to be tax-exempt until such time as you make (and pay the filing fee associated with) a future application for exemption.

### **BACKGROUND**

It has been a longstanding issue as to whether Minnesota's VFRA's that are tax-exempt under IRC 501(c)(3) or 501(c)(4) can properly fall into the "exception" from having to make annual 990-series filings due to being an "affiliate of a governmental unit". The controlling law on this point (Revenue Procedure 95-48) excepts entities from 990-series filings if they are either:

- (1) themselves a government unit and thus exempt under IRC 115 (or qualify for tax-deductible contributions under IRC 170(c)(1)), OR
- (2) an "affiliate of a governmental unit".

Eve Borenstein, principal with Borenstein and McVeigh Law Office LLC, in Minneapolis, is not familiar with any Minnesota VFRA itself (the entire association, not the stand-alone pension fund) who would have a ruling properly placing them into category (1) above. At issue, and thus the subject of the September 27, 2010 conference call, is that some VFRA's have told the IRS on their exemption applications that they fall into category (2) above and the IRS has accepted that representation (indeed, noting such non-filing status on those VFRA's' determination letters). Knowing that to be the case, other VFRA's have not sought such exception from the IRS, but have thought they could similarly position themselves and have as a result not made 990 series filings.

Borenstein's concern has been that all of these non-filers (both those with the determinations and those relying on others' receipt of them) do not qualify for Revenue Procedure 95-48 category (2) status because their Board structure (per Minnesota Statutes, Section 424A.04) does not agree with the IRS position in Revenue Procedure 95-48. The September 27, 2010 call confirmed that at present, the IRS only allows organizations to be "excepted" from the annual 990-series filing by holding status as an "affiliate" of a governmental unit when they are akin to a "subsidiary" of a "parent",

measured by having the VFRA's Board of Trustees comprised of a majority of individuals who are appointed or elected by the governmental unit served or who are officers/Board members of that governmental unit (other affiliation factors also need be in place, but those are easily reached).

Legal opinion and September 27, 2010 conference call summary provided by Eve Borenstein, principal with Borenstein and McVeigh Law Office LLC, in Minneapolis.

### **IRS CONFERENCE CALL ATTENDEES (September 27, 2010)**

#### **Borenstein and McVeigh Law Office LLC**

- Eve Borenstein, 612-822-2677 or [eve@bamlawoffice.com](mailto:eve@bamlawoffice.com)

#### **Abdo, Eick & Meyers LLP**

- Steve McDonald, CPA, Managing Partner, 952-835-9090 or [smcdonald@aemcpas.com](mailto:smcdonald@aemcpas.com)
- Tom Olinger, CPA, Governmental Services Partner, 507-625-2727 or [tolinger@aemcpas.com](mailto:tolinger@aemcpas.com)

#### **HLB Tautges Redpath, Ltd.**

- Deb Jezierski, CPA, Senior Auditor, 651-407-5892 or [dajeziarski@hlbtr.com](mailto:dajeziarski@hlbtr.com)
- Tom Hodnefield, CPA, Partner, 651-407-5820 or [thodnefield@hlbtr.com](mailto:thodnefield@hlbtr.com)
- Dianne Hickok, CPA, Tax Manager, 651-255-9318 or [dhickok@hlbtr.com](mailto:dhickok@hlbtr.com)

**LarsonAllen LLP**, Karen A. Gries, CPA, Principal, 612-376-4716 or [kgries@larsonallen.com](mailto:kgries@larsonallen.com)

**Le Sueur Firefighters Relief Association**, John King, Secretary, 612-756-4590 or [vetventures@mchsi.com](mailto:vetventures@mchsi.com)

**Minnesota Firefighter Pension Consultants (MNFPC)**, Colleen Hartmon Bollom, President, 651-332-5557 or [colleen@mnfpc.com](mailto:colleen@mnfpc.com)

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MNFPC model documents are drafted to conform to Minnesota state laws relating to relief association pension plans for volunteer firefighters. The model documents are not drafted to meet the requirements of tax-qualified retirement plans under the Internal Revenue Code, and it is doubtful that the model documents can meet those requirements. MNFPC makes no representation regarding the status of the plans under federal or state tax laws. MNFPC recommends that Relief Associations consult their own tax advisors regarding the treatment of the plan and distributions from the plan under state and federal tax laws.

MNFPC does not render investment, legal, accounting or tax advice. You should consult with an attorney, accountant or other independent qualified advisor regarding the legal or tax effect of the plan, distributions from the plan, and changes to organizational documents.