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Occupy Groups Would Face Burdens, Get Benefits From Tax Exempt Status, Practitioners Say

by **David van den Berg**

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Through large protests and public encampments, the Occupy groups have attempted to raise awareness about what they consider corporate greed and income inequality. So far, some Occupy organizations, including those in Portland, Ore., and Atlanta, have registered as nonprofits with their appropriate state agencies. On its website, the Occupy organization in Wilmington, N.C., said it has "voted to file" for section 501(c)(3) status.

The main advantage of tax exemption for the Occupy groups would be the ability to directly receive tax-deductible contributions, said Lloyd Mayer, a professor at the University of Notre Dame. But he isn't sure that matters to the Occupy groups.

"Given the grass-roots nature of the movement, I am not sure how much their supporters need that incentive in order to be enticed into giving," Mayer said. "It appears inconsistent with the general character of these groups for them to seek such status and the organizational and operational restrictions that come with it."

All About the Money?

Gregory L. Colvin, a partner with Adler & Colvin, said the key factor in determining whether the Occupy groups should pursue exemption is money.

"If the group doesn't handle any money, it doesn't need tax-exemption -- it can just be a collection of like-minded people, each bearing their own expenses with no common expenses," Colvin said. "But if money is raised, accumulated, and spent collectively, an entity that has some form of existence under our tax system has been created."

A woman who asked not to be identified but said she's involved with Occupy Wall Street and has work experience with nonprofits advised Occupy groups to question the motivations behind adopting tax-exempt status, especially if exemption lays the groundwork "for becoming another social justice organization mired in the nonprofit industrial complex -- an organization that becomes dependent on foundation and state funding to realize its goals." She said that for people giving small amounts of money, \$100 or less, making the donations tax-deductible would have a negligible effect on their taxes.

Grass-roots fundraising, in some ways, is a more sustainable model than trying to coordinate projects and goals to what's being funded in a particular grant cycle or what is popular at the moment, she said.

"We can stay more true to the movement's ideals, I think, that way," she said.

To the Dogs

While protesting economic injustice, the Occupy groups have generally tried to avoid appointing formal leadership. The Occupy Denver group, according to its website, voted to select a dog named Shelby as its leader. In a press release posted on its website, the group said it elected the dog in response to the insistence of Denver Mayor Michael Hancock that the group choose leaders to deal with city and state officials.

Ofer Lion, of Mitchell Silberberg & Knupp LLP, said it makes sense for the groups to form as 501(c)(3) organizations, and that the Occupy groups could be "good" 501(c)(3)s engaged in issue advocacy. But a reluctance to appoint leaders may be one reason why more Occupy groups haven't sought exempt status, he said.

"Assuming that Occupy Denver or any of the other Occupy movements forms and is housed in a corporate nonprofit. Then there are often requirements as to how many directors there are, what officers are required, and I'm pretty sure that the president or CEO cannot be a dog," Lion said. "It may be that the corporate form -- that is the traditional method for nonprofits -- is not really in line with their structure, and so the two don't mesh."

But even if the Occupy groups don't have specific people in specific leadership positions, Colvin said they may have a series of committees to deal with administrative issues like money.

"Occupiers tend to write a lot of things down, at least electronically," Colvin said. "And I wouldn't be surprised if the result, legally, were to place certain assets 'in trust' for the group's common purposes, with certain human individuals undertaking the role of 'trustees.'"

Are Protests a Problem?

Elizabeth J. Kingsley, a partner at Harmon, Curran, Spielberg & Eisenberg, Washington, said the activities of the Occupy groups are the key factor in determining their qualification for exempt status.

If promotion of illegal activities (including nonviolent civil disobedience) is a substantial part of an Occupy group's activities, that disqualifies it from tax-exempt status, Mayer said. Civil disobedience can include refusing to leave property when told to do so, which has led to police forcibly removing protesters from encampments in multiple cities nationwide, causing financial burdens on governments. The mere fact that their activities may be costly to the government is not enough, however, to disqualify them, Mayer said.

Civil disobedience is a tricky issue, Colvin said.

"To qualify as tax-exempt under Section 501(c)(3) or (c)(4), IRS rulings from the antiwar protests of the 1960s make clear that the organization must refrain from inducing or encouraging violations of law or public policy," he said. "So, any civil disobedience that occurs would need to be an individual choice, not sponsored or facilitated by the tax-exempt entity."

Which Type of Exemption Best Fits?

Section 501(c)(3) status brings constraints with it, and Occupy groups must decide whether they're comfortable working within those constraints, Kingsley said.

At some point, the groups might want to do more lobbying and advocate for specific legislation, she said. Then they can form section 501(c)(4) social welfare organizations to do that, she pointed out.

"They may well, if this really does turn into a movement with staying power, find that being (c)(3)s, and just being (c)(3)s, is not what they need," Kingsley said. "They may need more flexibility to do political and legislative advocacy, and we may see them creating the more complicated structures we're used to in the advocacy world."

While (c)(4) status does offer greater flexibility for political activity, organizations are generally inclined to seek exempt status under section 501(c)(3), Kingsley said. Beyond the obvious advantage of tax-deductible contributions that status offers, Kingsley said it also can lead to less obvious benefits, mentioning that tax exempt status under state law often hinges on federal exemption under section 501(c)(3).

"They certainly would have fewer legal constraints as (c)(4)s than as (c)(3)s, but if you can qualify as a (c)(3), why wouldn't you take advantage of that status?" she asked.

Colvin, in a recent blog post, said section 501(c)(3) status is "the most beneficial." However, he told Tax Analysts that section 501(c)(4) status could be a better fit for the Occupy groups.

"Section 501(c)(4) social welfare status may be the most appropriate, to allow for a mix of educational, lobbying, and even political activity," he said.

In the blog post, Colvin said that it can take three to six months or more for an organization to apply to the IRS and receive approval of its exemption application.

Kingsley said Occupy groups shouldn't count on a speedy review process.

"I would not be at all surprised if they put them all together and consolidated that and sat on them for years," Kingsley said. "If you're applying for (c)(3) status and the IRS isn't dealing with it -- it's not that they're asking you for more information to process, they're just sitting on it -- there is a point at which you can go to court and get a declaratory judgment, so there's a benefit to that."

Occupy Wall Street Forgoes Tax Exemption

Occupy Wall Street, the most well-known of the Occupy movements, is taking a different approach. The Alliance for Global Justice, a 501(c)(3) organization based in Washington, is serving as the fiscal sponsor for Occupy Wall Street.

According to the Alliance's website, its duty as sponsor is to collect and process all of Occupy Wall Street's donations and pass on the money to Occupy Wall Street. The Alliance must include Occupy Wall Street's financial reporting with its own when filing a Form 990, "Return of Organization Exempt from Income Tax," and the Alliance is accountable legally and financially to prove all of Occupy Wall Street's financial expenditures are in accordance with IRS rules for exempt organizations, according to a statement on the Alliance's website.

"They understand the role of the fiscal sponsor," Kingsley said. "There's an inclination to want to treat these like passthrough grants -- the sponsor just takes the money and forwards it and doesn't worry about it any further. And that's not appropriate and these folks obviously get that."

This model is a good one for Occupy Wall Street, Lion said. In many cases, there's no need for a nonprofit to form as its own corporation and file an exemption application. What it really needs to do is get its program going and succeed at it, he said. "Then, to the extent they want to go out on their own and leave the umbrella of their fiscal sponsor, that makes a lot more sense than wasting a lot of time and resources on formation when they're not really ready for it."

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