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Basics of the new 990

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Form 990 Series - Filing Phase-In

The new Form 990 series returns are effective for 2008 tax years (returns filed beginning in 2009). To allow organizations time to adjust to the new forms, the IRS is phasing in the new returns during a three-year transition period. During the transition, an organization's annual filing requirement depends on its financial activity. The charts below indicate the general exempt organization filing requirements during the transition period.

2007 Tax Year (Filed in 2008 or 2009)	***Form to File***
Gross receipts normally < $25,000	990-N
Gross receipts > $25,000 and < $100,000, and Total assets < $250,000	990-EZ or 990
Gross receipts > $100,000, or Total assets > $250,000	990

2008 Tax Year (Filed in 2009 or 2010)	***Form to File***
Gross receipts normally < $25,000	990-N
Gross receipts > $25,000 and < $ 1 million, and Total assets < $2.5 million	990-EZ or 990
Gross receipts > $1 million, or Total assets > $2.5 million	990

2009 Tax Year (Filed in 2010 or 2011)	***Form to File***
Gross receipts normally < $25,000	990-N
Gross receipts > $25,000 and < $500,000, and Total assets < $1.25 million	990-EZ or 990
Gross receipts > $500,000, or Total assets > $1.25 million	990

2010 Tax Year and later (Filed in 2011 and later)	***Form to File***
Gross receipts normally < $50,000	990-N
Gross receipts > $50,000 and < $200,000, and Total assets < $500,000	990-EZ or 990
Gross receipts > $200,000, or Total assets > $500,000	990

Sample Letter

Re: IRS Instructions for Redesigned 2008 Forms 990

Dear Client:

The IRS has issued instructions for completing and filing the revised Form 990, Return of Organization Exempt from Income Tax. As an exempt organization, the revised Form 990 may affect you.

The IRS released the redesigned form in December 2007, for use in reporting for tax year 2008 information filed in 2009. The Redesigned form consists of a core form to be completed by all tax-exempt organizations required to file Form 990 and 16 schedules to be completed depending on the organization's type of activities. Transition rules are in place to permit small organizations time to adjust to the new form.

For the 2008 tax year we will prepare for organizations with gross receipts less than $1.0 million and total assets less than $2.5 million Form 990-EZ, Short Form Return of Organization Exempt from Income Tax (not redesigned for 2008). For 2009 tax year we will prepare Form 990-EZ for entities with gross receipts that are less than $500,000 and total assets less than $1.25 million. The filing thresholds for the 990 EZ will be set permanently at $200,000 gross receipts and $500,000 total assets beginning with the 2010 tax year.

The IRS is expected to issue a revised Form 990-EZ. We anticipate that the 990-EZ revised will be similar to the new requirements of the 990 so we suggest that you prepare to comply with the new requirements within the next fiscal year. We have included a questionnaire that entails what those requirements will be and we suggest that your organization implements procedures to comply with the new requirements.

The revised Form 990 requires substantial additional detail compared to previous reporting requirements. Some major changes in reporting requirements from the 2007 Form 990 include a new governance section and substantial revisions to the reporting of the organization's compensation of officers, directors, trustees, key employees, and highest compensated employees. The requirements to provide so much additional detail may prove burdensome and complex. This is why we suggest following the 990-EZ for organizations below the thresholds to keep the organizations tax preparations costs reasonable.

In addition to the changes in the format of the 990 there is a new requirement for organizations that normally have gross receipts of less then $25,000. Those organizations must now file Form 990-N, Electronic Notice (e-postcard) for Tax-Exempt

Organizations not Required to File Form 990 or 990-EZ (with exceptions for certain §509(a)(3) supporting organizations and for certain religious organizations, governmental organizations, and political organizations). The minimum requirements for the 990-N is expected to increase in the year 2010 so that it can be filed by organizations having gross receipts of less than $50,000.

In addition to the attached questionnaire, enclosed are pages 5 and 6 of the new 990 to review for your non-profit requirements. We have also enclosed a sample of a Whistleblower Policy. We are providing this information purely as a courtesy with intent on aiding you, our client in preparing yourselves for the new requirements. It is management's responsibility to adhere to the guidelines and ensure that they are met. We are only providing this documentation to aid in this endeavor and encourage you to consult legal counsel to properly abide by the Governing Body and Management section of the new 990.

We respectfully request that you do not call our office with questions regarding any of the accounting issues involved with these new requirements until after our grueling April 15th, 2009 tax deadline.

For your benefit we are attaching an excellent FAQ from The Charities Review Council, in addition there is great information from the Internal Revenue Service on www.irs.gov and you can certainly Google "new 990" to obtain even more resources on the new 990 requirements.

Part VI Governance, Management, and Disclosure *(Sections A, B, and C request information about policies not required by the Internal Revenue Code.)*

Section A. Governing Body and Management

			Yes	No
	For each "Yes" response to lines 2–7b below, and for a "No" response to lines 8 or 9b below, describe the circumstances, processes, or changes in Schedule O. See instructions.			
1a	Enter the number of voting members of the governing body 1a			
b	Enter the number of voting members that are independent 1b			
2	Did any officer, director, trustee, or key employee have a family relationship or a business relationship with any other officer, director, trustee, or key employee?	2		
3	Did the organization delegate control over management duties customarily performed by or under the direct supervision of officers, directors or trustees, or key employees to a management company or other person?	3		
4	Did the organization make any significant changes to its organizational documents since the prior Form 990 was filed?	4		
5	Did the organization become aware during the year of a material diversion of the organization's assets?	5		
6	Does the organization have members or stockholders?	6		
7a	Does the organization have members, stockholders, or other persons who may elect one or more members of the governing body?	7a		
b	Are any decisions of the governing body subject to approval by members, stockholders, or other persons?	7b		
8	Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the following:			
a	The governing body?	8a		
b	Each committee with authority to act on behalf of the governing body?	8b		
9a	Does the organization have local chapters, branches, or affiliates?	9a		
b	If "Yes," does the organization have written policies and procedures governing the activities of such chapters, affiliates, and branches to ensure their operations are consistent with those of the organization?	9b		
10	Was a copy of the Form 990 provided to the organization's governing body before it was filed? All organizations must describe in Schedule O the process, if any, the organization uses to review the Form 990	10		
11	Is there any officer, director or trustee, or key employee listed in Part VII, Section A, who cannot be reached at the organization's mailing address? *If "Yes," provide the names and addresses in Schedule O*	11		

Section B. Policies

			Yes	No
12a	Does the organization have a written conflict of interest policy? *If "No," go to line 13*	12a		
b	Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts?	12b		
c	Does the organization regularly and consistently monitor and enforce compliance with the policy? *If "Yes," describe in Schedule O how this is done*	12c		
13	Does the organization have a written whistleblower policy?	13		
14	Does the organization have a written document retention and destruction policy?	14		
15	Did the process for determining compensation of the following persons include a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision:			
a	The organization's CEO, Executive Director, or top management official?	15a		
b	Other officers or key employees of the organization?	15b		
	Describe the process in Schedule O. (see instructions)			
16a	Did the organization invest in, contribute assets to, or participate in a joint venture or similar arrangement with a taxable entity during the year?	16a		
b	If "Yes," has the organization adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and taken steps to safeguard the organization's exempt status with respect to such arrangements?	16b		

Section C. Disclosure

17 List the states with which a copy of this Form 990 is required to be filed ▶

18 Section 6104 requires an organization to make its Forms 1023 (or 1024 if applicable), 990, and 990-T (501(c)(3)s only) available for public inspection. Indicate how you make these available. Check all that apply.

☐ Own website ☐ Another's website ☐ Upon request

19 Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy, and financial statements available to the public.

20 State the name, physical address, and telephone number of the person who possesses the books and records of the organization: ▶

A checklist for the new 990 requirements:

1.) a mission statement or a description of the organizations most significant activities:
____
____
____
____
____

2.) the number of voting members in the organization's governing body _____________
3.) the number of independent voting members in the governing body (not compensated) _______________
4.) the number of employees (not new)______________
5.) the number of volunteers (may be estimated) ______________________
6.) the total of the unrelated business income, if any $______________
7.) Did the organization undertake any significant program services during the year which were not listed on the prior Form 990 or 990-EZ?__________ If Yes, describe (the description of program services should describe program service accomplishments through specific measurements such as clients served, days of care provided, number of sessions or events held, or publications issued-think of these descriptions as an advertisement).
____
____
____
____
____
8.) Did the organization cease conducting or make significant changes in how it conducts any program services? __________ If Yes, explain
____
____
____
____
____
9.) Only three of the largest program services are required to be listed with their expenses, grants and revenue separately stated with each of the programs having a description of the exempt purpose achievements. All the others are combined into one line and described in a separate schedule. Please attach list of three largest program services with their descriptions on a separate paper and a separate list of all others that you would like bulked into the other program service line with their descriptions that would be described separately in another schedule.

10.) The following is a Checklist to determine the Required Schedules to be completed by the organization:

1.) Not new – Is the organization a 501©3 or 4947(a)(1) other than a private foundation?_____ If yes – schedule A must be prepared.

2.) Not new - Is the 50l© 3 organization that met the 331/3% support test of the regulations under §§509(a)(1)/170(b)(1)(A)(vi) (usually follows a yes to question above) and received more than $5,000 from any one contributor or an amount that exceeds two percent of the total income received from campaigns, membership dues, excess fundraising events, related organizations, government grants and other cash and non cash contributions?_____ These organizations require schedule B which requires name, addresses and amounts of those contributions from the contributors over $5,000 or 2% of total income from the above cited sources.

3.) Did the organization engage in direct or indirect political campaign activities?______ If yes, Schedule C needs to be completed and requires considerable more information regarding this activity.

4.) Did the organization engage in lobbying activities? _____ If yes, Schedule C needs to be completed and additional information may be required.

5.) Is the organization is a 50l© (4), 501© (5), 501©(6) and subject to the sections 6033(e) notice and reporting requirement and proxy tax? _____ If yes, Schedule C needs to be completed and additional information may be required.

6.) Did the organization maintain any donor advised funds or any accounts where donors have the right to provide advice on the distribution of investment of amounts in such funds or accounts?______ If yes, Schedule D Part 1 needs to be prepared and the following questions need to be address:

a.) Did the organization inform all donors and donor advisors in writing that the assets held in donor advised funds are the organizations property subject to the organization's exclusive legal control?___________ (should be yes)

b.) Did the organization inform all grantees, donors and donor advisors in writing that grant funds may be used only for charitable purposes and not for the benefit of the donor advisor or other impermissible private benefit?___________(should be yes)

7.) Did the organization receive or hold a conservation easement?______ If yes Schedule D Part II needs to be prepared and additional requirements will be discussed.

8.) Did the organization maintain collections of works of art, historical treasures or other similar assets? ______ If yes Schedule D Part III needs to be prepared and additional requirements will be discussed.

9.) Did the organization include in its balance sheet an escrow account liability, serve as a custodian for accounts, or provide credit counseling, debt management, credit repair, or debt negotiation services?______ If yes Schedule D Part IV needs to be prepared and additional requirements will be discussed.

10.) Did the organization hold assets in term, permanent, or quasi-endowments? _____ If yes, Schedule D Part V needs to be prepared and additional requirements will be discussed.

11.) Does the organization include land, buildings or equipments, investments or other liabilities on their balance? ________ If yes, additional requirements will be discussed, if required.

12.) Did the organization receive audited financial statement for the year for which it is completing this return that was prepared in accordance with GAAP?______ If yes, Schedule D part XII and XIII are required – information will be taken from audit.

13.) Is the organization operating a school as described in section 170(b)(1)(A)(11)? _______ If yes, additional requirements will be discussed.

14.) a.) Did the organization maintain an office, employees, or agents outside of the U.S.?_______ If yes, Schedule F will be required and additional information may be requested.

b.) Did the organization have aggregate revenues or expenses of more than $10,000 from grantmaking, fundraising, business, and program service activated outside the U.S.? ______ If yes, Schedule F will be required and additional information may be requested.

15.) Did the organization receive more than $5,000 in the form of grants or assistance to any organization or entity located outside the United States?______ If yes, Schedule F will required and additional information may be requested.

16.) Did the organization pay more than $5,000 of aggregate grants or assistance to individuals located outside of the United States? _____ If yes, Schedule Schedule F will be required and additional information my be requested

17.) Did the organization pay more than $15,000 to professional fundraising services? _____ If yes, Schedule G will be required and additional information may be requested

18.) Did the organization receive more than $15,000 gross from fundraising events? _____ If yes, Schedule G will be required and additional information may be requested.

19.) Did the organization receive more than $15,000 gross income from gaming events? ______ If yes, Schedule G will be required and additional information may be requested.

20.) Did the organization operate one or more hospitals? _____ If yes, Schedule H will be required and additional information may be requested.

21.) Did the organization pay more than $5,000 of grants and other assistance to governments and organization in the U.S.?_______ If yes, Schedule I will be required and additional information may be requested

22.) Did the organization pay more than $5,000 of grants and other assistance to individuals in the U.S.? _______ If yes, Schedule I will be required and additional information may be requested.

23 a.) Did the organization list any former officer director or trustee, key employee or highest compensated employee?______ If yes, Schedule J will be required and additional information may be requested.

b.) For any officer, director, trustee, key employee or highest compensated employee did the sum paid exceed $150,000? _____ If yes, Schedule J will be required and additional information may be requested.

c.) Did any officer, director, trustee, key employee or highest compensated employee receive or accrue compensation from any unrelated organization for services rendered to the organization?_______ If yes, Schedule J will be required and additional information may be requested.

24 a.) Did the organization have a tax-exempt bond issue with an outstanding principal amount of more than $100,000 as of the last day of the year, that was issued after December 31, 2002?______ If yes, additional questions will be required to complete Schedule K If No, go to question 25

b.) Did the organization invest any proceeds of tax-exempt bonds beyond a temporary period exception? ______

c.) Did the organization maintain an escrow account other than a refunding escrow at any time during the year to decease any tax-exempt bonds? _____

d.) Did the organization act as an "on behalf of" issuer for bonds outstanding at any time during the year? _____

25 a.) For 501©(3) and 501©(4) organizations: Did the organization engage in an excess benefit transaction with a disqualified person from a prior year? _____ If yes, Schedule L will be required and may require additional information.

b.) Did the organization become aware that it had engaged in an excess benefit transaction with a disqualified person from a prior year? _______ If yes, Schedule L will be required and may require additional information.

26.) Was a loan to or by a current or former officer, director, trustee, key employee, highly compensated employee, or disqualified person outstanding as of the end of the organization's tax year? _____ If yes, Schedule L will be required and may require additional information.

27.) Did the organization provide a grant or other assistance to an officer, director, trustee, key employee, or substantial contributor, or to a person related to such an individual?_______ If yes, Schedule L will be required and may require additional information.

28.) During the tax year, did any person who is a current or former officer, director, trustee, or key employee:

a.) Have a direct business relationship with the organization (other than as an officer, director, trustee, or employee), or an indirect business relationship through ownership of more than 35% in another entity? _____ If yes Schedule L will need to be prepared.

b.) Have a family member who had a direct or indirect business relationship with the organization? _______If yes Schedule L will need to be prepared.

c.) Serve as an officer, director, trustee, key employee, partner or member of an entity doing business with the organization? ______ If yes, Schedule L will need to be prepared.

29.) Did the organization receive more than $25,000 in non-cash contributions?_____ If yes, Schedule M will need to be prepared.

30.) Did the organization receive contributions of art, historical treasure, or other similar assets, or qualified conservation contributions? ______If yes, Schedule M will need to be prepared

31.) Did the organization liquidate, terminate or dissolve and cease operations? ______ If yes, Schedule N will need to be prepared.

32.) Did the organization sell, exchange, dispose of or transfer more than 25% of its net assets? ______If yes, Schedule N will need to be prepared.

33.) Did the organization own 100% of an entity disregarded as separate from the organization under Regulations section 301.7701-2 and 301.7701-3? _____ If yes, Schedule R will need to be prepared.

34.) Was the organization related to any tax-exempt or taxable entity? ______ If yes, Schedule R will need to be prepared.

35.) Is any related organization a controlled entity within the meaning of section 512(b)(13)? ______ If yes, Schedule R will need to be prepared.

36.) Did the 501©(3) organization make any transfers to an exempt non-charitable related organization? ______ If yes, Schedule R will need to be prepared.

37.) Did the organization conduct more than 5% of its exempt or unrelated activities through an entity that is not a related organization and that is treated as a partnership for federal income tax purposes? If yes, Schedule R will need to be prepared.

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New Form 990 Disclosure Requirements

By John Crigler and Benjamin J. Lambiotte*

Beginning with returns for tax year 2008, federal tax-exempt entities that file Form 990 will be required to state whether the organization has adopted certain internal governance policies, including document retention policies, whistleblower protection policies, and policies related to conflicts of interest. The Form 990 is due May 15, 2009 for organizations with calendar year accounting periods.

Background

Although the Sarbanes Oxley Act applies primarily to publicly-traded corporations, two of its provisions apply to all companies, including exempt organizations. One provision pertains to protection for individuals who report suspected violations of federal law, and prohibits retaliation against such "whistleblowers." The other provision creates criminal penalties for intentional destruction, concealment, falsification or alteration of certain documents. This provision implements Congressional concern about the need for greater transparency and good governance practices in tax-exempt organizations.

New Disclosure Requirements Regarding Internal Governance

To advance these concerns, the IRS has revised Form 990 and filing instructions. The changes include a new section (Part VI, Section B), which requires an exempt organization to disclose its governance and management structure, and to answer "yes" or "no" to questions about whether it has adopted internal policies regarding five key areas: (a) conflict of interests; (b) whistleblower protection; (c) document retention and destruction; (d) determination of compensation of key personnel; and (e) investment and joint venture activity. The exempt organization must declare whether its governing documents, policies and financial statements are made available to the public. While the IRS has said that adoption of these policies is not *required*, it has also made clear that failure to adopt such policies may lead to greater IRS scrutiny and to enforcement action where suspected violations are detected.

For these reasons, it is highly desirable that organizations required to file Form 990 for 2008 and succeeding tax years adopt appropriate policies for the five areas noted above. Reliance on "boilerplate" language is risky. IRS expects governance policies to be tailored to the nature of each organization.

Some requirements are general, however. For example, the Form 990 instructions recommend a "whistleblower policy [that] encourages staff and volunteers to come forward with information on illegal activities and violations of adopted policies of the organization, specifies that the organization will protect the individual against retaliation, and identifies those staff or board members or outside parties to whom such information can be reported."

The instructions also recommend a document retention and destruction policy that "identifies the record retention and destruction responsibilities of staff, volunteers, board members, and outsiders, for maintaining and documenting the storage and destruction of the organization's documents and records." The IRS expects the policy to establish specific standards for document integrity, retention and destruction, and to provide guidelines for handling electronic records, including backup procedures, archiving of documents, and regular checkups of the reliability of the system. A good document retention policy includes procedures for preventing destruction in the event of an investigation or litigation and specifies the duration for retaining different categories of documents. Here are some basic categories of documents you should consider retaining:

<u>Documents</u>

Governance documents (Articles of Incorporation, Bylaws, Minutes)

Tax reports and related documents

Intellectual property records (copyright and trademark registrations.)

Financial records (audited financial statements)

Employment and employee benefit records

Agreements with independent contractors

Other business records (correspondence files, budgets, bank statements, personnel manuals)

Should you have any questions about the new Form 990's requirements, or need assistance or guidance in preparing and implementing governance policies, please contact John Crigler (jcrigler@gsblaw.com) or Ben Lambiotte (blambiotte@gsblaw.com).

Prepared March 30, 2009

NONPROFIT RISK MANAGEMENT CENTER

www.nonprofitrisk.org

SAMPLE

Employee Protection (Whistleblower) Policy

If any employee reasonably believes that some policy, practice, or activity of [Name of Nonprofit] is in violation of law, a written complaint must be filed by that employee with the Executive Director or the Board President.

It is the intent of [Name of Nonprofit] to adhere to all laws and regulations that apply to the organization and the underlying purpose of this policy is to support the organization's goal of legal compliance. The support of all employees is necessary to achieving compliance with various laws and regulations. An employee is protected from retaliation only if the employee brings the alleged unlawful activity, policy, or practice to the attention of [Name of Nonprofit] and provides the [Name of Nonprofit] with a reasonable opportunity to investigate and correct the alleged unlawful activity. The protection described below is only available to employees that comply with this requirement.

[Name of Nonprofit] will not retaliate against an employee who in good faith, has made a protest or raised a complaint against some practice of [Name of Nonprofit], or of another individual or entity with whom [Name of Nonprofit] has a business relationship, on the basis of a reasonable belief that the practice is in violation of law, or a clear mandate of public policy.

[Name of Nonprofit] will not retaliate against employees who disclose or threaten to disclose to a supervisor or a public body, any activity, policy, or practice of [Name of Nonprofit] that the employee reasonably believes is in violation of a law, or a rule, or regulation mandated pursuant to law or is in violation of a clear mandate or public policy concerning the health, safety, welfare, or protection of the environment.

My signature below indicates my receipt and understanding of this policy. I also verify that I have been provided with an opportunity to ask questions about the policy.

____   _____________

Employee Signature   Date

For more information or assistance on any risk management topic, visit **www.nonprofitrisk.org** or call (202) 785-3891.

MASSACHUSETTS NONPROFIT NETWORK, INC.

CONFLICT OF INTEREST POLICY

ARTICLE I

Purpose

The Board of Directors of Massachusetts Nonprofit Network, Inc. ("MNN"), a corporation formed under Chapter 180 of the Massachusetts General Laws, wishes to avoid any actual or potential conflict of interest in MNN's operations and to follow best practices recommended by the Internal Revenue Service with respect to any transactions involving director or officer compensation or other potential conflicts.

This policy applies whenever any transaction or decision of MNN might benefit the private interest of an officer or director of MNN or might result in possible self-dealing or an excess benefit transaction. This policy is intended to supplement but not replace any applicable state and federal laws governing conflict of interest applicable to nonprofit and charitable organizations.

Article II
Definitions

1. **Interested Person**
Any director, principal officer, employee, or member of a committee with governing board delegated powers, who has a direct or indirect financial interest, as defined below, is an interested person.

2. **Financial Interest**
A person has a financial interest if the person has, directly or indirectly, through business, investment, or family:

a. an ownership or investment interest in any entity with which MNN has a transaction or arrangement,

b. a compensation arrangement with MNN or with any entity or individual with which MNN has a transaction or arrangement, or

c. a potential ownership or investment interest in, or compensation arrangement with, any entity or individual with which MNN is negotiating a transaction or arrangement.

Compensation includes direct and indirect remuneration as well as gifts or favors that are not insubstantial.

A financial interest is not necessarily a conflict of interest. Under Article III, Section 2 of this policy, a person who has a financial interest may have a conflict of interest only if the appropriate governing board or committee decides that a conflict of interest exists.

Article III
Procedures

1. **Duty to Disclose**
In connection with any actual or possible conflict of interest, an interested person must disclose the existence of the financial interest and be given the opportunity to disclose all material facts to the directors and members of committees with governing board delegated powers considering the proposed transaction or arrangement.

2. **Determining Whether a Conflict of Interest Exists**
After disclosure of the financial interest and all material facts, and after any discussion with the interested person, he/she shall leave the governing board or committee meeting while the determination of a conflict of interest is discussed and voted upon. The remaining board or committee members shall decide if a conflict of interest exists.

3. **Procedures for Addressing the Conflict of Interest**

a. An interested person may make a presentation at the governing board or committee meeting, but after the presentation, he/she shall leave the meeting during the discussion of, and the vote on, the transaction or arrangement involving the possible conflict of interest.

b. The chairperson of the governing board or committee shall, if appropriate, appoint a special committee to investigate alternatives to the proposed transaction or arrangement. The special committee shall be composed entirely of nonmembers of the governing board or committee.

c. After exercising due diligence, the special committee shall determine whether MNN can obtain with reasonable efforts a more advantageous transaction or arrangement from a person or entity that would not give rise to a conflict of interest.

d. If a more advantageous transaction or arrangement is not reasonably possible under circumstances not producing a conflict of interest, the special committee shall determine whether the transaction or arrangement is in MNN's best interest, for its own benefit, and whether it is fair and reasonable. In conformity with the above determination it shall make its decision as to whether to enter into the transaction or arrangement.

4. **Violations of the Conflicts of Interest Policy**

a. If the governing board or committee has reasonable cause to believe a member has failed to disclose actual or possible conflicts of interest, it shall inform the member of the basis for such belief and afford the member an opportunity to explain the alleged failure to disclose.

b. If, after hearing the member's response and after making further investigation as warranted by the circumstances, the governing board or committee determines the member has failed to disclose an actual or possible conflict of interest, it shall take appropriate disciplinary and corrective action.

Article IV
Records of Proceeding

The minutes of the governing board and all committees with board delegated powers shall contain:

a. The names of the persons who disclosed or otherwise were found to have a financial interest in connection with an actual or possible conflict of interest, the nature of the financial interest, any action taken to determine whether a conflict of interest was present, and the governing board's or committee's decision as to whether a conflict of interest in fact existed.

b. The names of the persons who were present for discussions and votes relating to the transaction or arrangement, the content of the discussion, including any alternatives to the proposed transaction or arrangement, and a record of any votes taken in connection with the proceedings.

Article V
Compensation

a. A voting member of the governing board who receives compensation, directly or indirectly, from MNN for services is precluded from voting on matters pertaining to that member's compensation.

b. A voting member of any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from MNN for services is precluded from voting on matters pertaining to that member's compensation.

c. No voting member of the governing board or any committee whose jurisdiction includes compensation matters and who receives compensation, directly or indirectly, from MNN, either individually or collectively, is prohibited from providing information to any committee regarding compensation.

Article VI
Annual Statements

Each director, principal officer and member of a committee with governing board delegated powers shall annually sign a statement which affirms such person:

a. has received a copy of the conflicts of interest policy,

b. has read and understands the policy,

c. has agreed to comply with the policy, and

d. understands MNN is charitable and in order to maintain its federal tax exemption it must engage primarily in activities which accomplish one or more of its tax-exempt purposes.

Article VII
Periodic Reviews

To ensure MNN operates in a manner consistent with charitable purposes and does not engage in activities that could jeopardize its tax-exempt status, periodic reviews shall be conducted. The periodic reviews shall, at a minimum, include the following subjects:

a. Whether compensation arrangements and benefits are reasonable, based on competent survey information, and the result of arm's length bargaining.

b. Whether partnerships, joint ventures, and arrangements with management organizations conform to MNN's written policies, are properly recorded, reflect reasonable investment or payments for goods and services, further charitable purposes and do not result in inurement, impermissible private benefit or in an excess benefit transaction.

Article VII
Use of Outside Experts

When conducting the periodic reviews as provided for in Article VII, MNN may, but need not, use outside advisors. MNN shall consider, in determining whether to use outside advisors, the extent and quality of the survey information available; the ability of MNN to relate the survey information to the transactions under consideration; and the cost of outside advisors. If outside experts are used, their use shall not relieve the governing board of its responsibility for ensuring periodic reviews are conducted.

Record Retention and Document Destruction Policy for Nonprofit Organizations

Eileen Morgan Johnson and Dorothy Deng
Whiteford Taylor & Preston, LLP
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I. Introduction to the Sarbanes-Oxley Act and how it affects nonprofit organizations

The Sarbanes-Oxley Act is a federal law enacted in 2002 in response to the corporate and accounting scandals of Enron, Tyco, and others. Under the Act, it is a federal crime to alter, cover up, falsify, or destroy any document to prevent its use in an official proceeding.

While nearly all of the provisions of the Act apply only to publicly traded corporations, two provisions of the Sarbanes-Oxley Act apply to all entities, including nonprofit organizations. These provisions are:

A. Whistleblower Protection—the Act provides protections for whistleblowers and imposes criminal penalties for actions taken in retaliation against those who report suspected illegal activities in the organization.

B. Document Destruction—all entities are subject to criminal penalties for intentionally destroying, concealing, falsifying or altering documents related to a federal investigation.

The focus of this presentation is to introduce why and how every nonprofit organization should have a record retention and destruction policy.

II. Record Retention and Destruction Policy

Every nonprofit organization should have a written record retention and destruction policy to ensure that documents are managed properly. Moreover, a record retention and destruction policy helps limit accidental or innocent document destruction, and it also sets the procedure if a federal investigation ever takes place.

A. A record retention and destruction policy usually contains certain provisions:
   1. A statement as to the purpose of the policy;
   2. Whether the policy will be for the entire organization or a certain department;
   3. An exclusion from the policy for litigation or audit purposes;
   4. Employees and/or departments responsible for overseeing the policy;
   5. Employees and/or departments responsible for destruction pursuant to the policy;

6. A description of the type of records along with the retention schedule;
7. Procedures to implement the policy; and
8. Procedures to amend the policy.

B. The policy should cover the following records:
   1. Employee records;
   2. Membership records (if applicable);
   3. Accounting and tax records (bank statement, audits, IRS forms);
   4. Legal documents (articles of incorporation, tax-exempt application, determination letter, contracts, intellectual property documents, real estate records);
   5. Board-related records (minutes, policies, resolutions); and
   6. Emails and voicemails.

C. The policy should not only comply with the legal requirements but also meet specific organizational and industry needs.

D. The policy should cover back-up procedures, archiving of documents, and regular check-ups of the reliability of the system.

E. When under federal investigation or where litigation is either ongoing or imminent, state clearly that all document destruction must stop and documents must be preserved.

III. The era of electronic documents

Documents include paper and electronic documents. Electronic documents are easier and cheaper to copy, distribute, and store than paper documents. Recent surveys show that more than 90 percent of all documents produced in litigations since 1999 are in electronic format.

The amendments[1] to the Federal Rules of Civil Procedure concerning the discovery of "electronically stored information" went into effect on December 1, 2006. **The amended rule FRCP 26 (a)(1) provides that all corporate records, including those at a board member's place of business or residence or on the director's personal computer, cell phone or PDA are subject to a document discovery request in the event of litigation.**

A. Sources of electronic information:
   1. Emails;

[1] The amendments include the following: (1) definition of discoverable material; (2) early attention to issues relating to electronic discovery, including the format of production; (3) discovery of electronically stored information from sources that are not reasonably accessible; (4) the procedure for asserting claim of privilege or work product protection after production; and (5) a "safe harbor" limit on sanctions under Rule 37 for the loss of electronically stored information as a result of the routine operation of computer systems.

2. Internet browser information (cookies, download records);
3. Instant messaging/chat records;
4. Efaxes;
5. Electronic calendars;
6. Voicemail;
7. Text messages;
8. Blogs; and
9. Chat-room/bulletin board postings.

B. Deleted electronic documents are NOT destroyed

Electronic documents can be spread around the world in seconds, and there is no way to retrieve and destroy all the copies. Most importantly, a deleted file is never actually destroyed because a deleted file can be recovered. Therefore, it is virtually impossible to completely destroy an electronic document.

C. Incorporating electronic records into the policy:
   1. Meet with the information technology department to learn where and how electronic information is created, stored, archived, and destroyed. Note that different departments may be subject to different regulations.
   2. Locate the information and types of electronic records.
   3. Draft a policy that will directly address the information that is being created.
   4. Review with your legal department or outside counsel what information should be maintained and for how long, and what information can be destroyed

IV. Records retention policy requirements check list

The policy should:

A. Address which records are kept or destroyed (originals, photocopies, duplicates with changes noted, drafts, handwritten notes);
B. Establish a retention period for each type of record;
C. Assign responsibility for the enforcement of the policy within the organization;
D. Cover electronic as well as paper records;
E. Provide procedures to implement and amend the policy; and
F. Provide backup procedures.

V. IRS Public Disclosure Requirements

In general, exempt organizations must make available for public inspection certain annual returns and applications for exemption, and must provide copies of such returns and applications to individuals who request them. Copies usually must be provided immediately in the case of in-person requests, and within 30 days in the case of written requests. The tax-exempt organization may charge a reasonable copying fee plus actual postage, if any.

Documents that must be made available for public inspection:

A. Application for exemption (Form 1023 or 1024), all attachments and all correspondence with the IRS about the organization's tax exempt status;
B. Last three year's Form 990; and
C. Any Form 990-T filed after August 17, 2006 (applies to 501(c)(3) organizations only).

Attributions and Additional Resources

The Sarbanes-Oxley Act and Implications for Nonprofit Organizations, BoardSource and Independent Sector, revised in January 2006.
http://www.boardsource.org/clientfiles/sarbanes-oxley.pdf

Designing a Compliant Electronic Record-Retention Policy for Your Association, Jenna F. Leavitt, Association Law & Policy, July 2007.
http://www.asaecenter.org/PublicationsResources/EnewsletterArticleDetail.cfm?ItemNumber=27512

E-Discovery Amendments to the Federal Rules of Civil Procedure Goes Into Effect Today, Posted on December 1, 2006 by K&L Gates.
http://www.ediscoverylaw.com/2006/12/articles/news-updates/ediscovery-amendments-to-the-federal-rules-of-civil-procedure-go-into-effect-today/

Summary of the Sarbanes-Oxley Act.
http://thecaq.aicpa.org/Resources/Sarbanes+Oxley/

Good Governance Practices for 501(c)(3) Organizations, Internal Revenue Service, http://www.irs.gov/pub/irs-tege/good_governance_practices.pdf.

IRS Publication 4221, *Compliance Guide for 501(c)(3) Tax-Exempt Organizations,* http://www.irs.gov/pub/irs-pdf/p4221.pdf.

Published on *Blue Avocado* (http://www.blueavocado.org)

Six Things Every Board Member Should Know About the NEW 990

By *Jeanne Bell*
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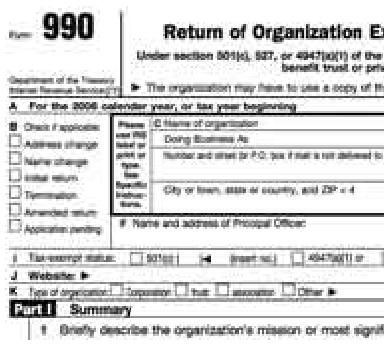

Just the thought *of an IRS form can bring out the clouds on a sunny day. But now that this annually required nonprofit form is on the web for everyone to see (at* GuideStar.org *[4]), it goes beyond compliance to being an important way to tell your organization's story.*

Federal Form 990 from the Internal Revenue Service (IRS) is like a tax return for nonprofits, but since we are tax-exempt, it's called an "information return."

You may have heard by now that the IRS Form 990 has been substantially revised for the fiscal years beginning in 2008 and in the future. The issues disclosed on the form that especially interest the media, potential donors, and the general public still include executive compensation and overhead costs, but with this revised form, the IRS has entered the territory of "good governance" as well.

In fact, in a speech this week [5], IRS Commissioner Steve T. Miller said, "We have pushed to require [new] reporting on how organizations are managed. The crown jewel of this effort is the governance section of the revised Form 990, effective for [tax years beginning in] 2008." This broader IRS scrutiny means that board members and executives of community nonprofits should feel even more urgency to review and understand what's being submitted each year.

Here, very briefly, are six things that you should know about the revised nonprofit tax return. You can find all the details about these and other changes -- and download forms -- at www.irs.gov/charities [6].

1. **Your organization's 990 is due** 4 and one-half months after the close of your fiscal year: if your fiscal year ends June 30 your 990 is due on November 15; if your fiscal year ends December 31 it s due May 15, and so on. It is very common to obtain an extension of time to file by submitting Form 8868, so that you can use your final audit numbers in completing the Form 990. Our recommendation: the Board Chair should review and sign the 990, and copies should be given to each board member. P.S. The penalties are substantial so be sure either to get it in on time or to request an extension by the filing date.

2. It used to be that most small tax-exempt organizations -- those with annual gross

receipts below $25,000 -- didn't have to file the 990 annually, but now every year they must file the **new Form 990-N**, "Electronic Notice (e-Postcard) for Tax-Exempt Organizations Not Required to File Form 990 or 990-EZ." [7] This "proof of life" form will allow for a much more accurate count of nonprofits and what we do.

3. Part III of the new 990 is an **expanded *Program Service Accomplishments*** section that requires you to describe your three largest programs, how much you spent on each of them in the prior year, and even whether you discontinued any core programs since your last filing. Our recommendation: don't just let your auditor or bookkeeper complete this section as a routine task. This is a key opportunity to tell the story of your organization's impact to the world: make full use of it.

4. A new section is Part VI of the **revised form *Governance, Management, and Disclosure*** that asks about the organization's board structure, policies, and practices. Examples: whether your organization has a conflict of interest policy, whether it posts its 990 on its website, and whether there was an annual compensation review for the executive director and other key employees that included a review by independent persons, the use of comparable salary data, other factors.

5. The expanded scrutiny of **employee, director, and contractor compensation** requires that full compensation be disclosed for all key employees and current board members. It also asks whether the organization paid a *former* board member or key employee more than $100,000 in the prior year. And, the organization must disclose its five highest paid employees and independent contractors making more than $100,000.

6. Part IX, the ***Statement of Functional Expenses**,* is still the place readers will find out how much of every dollar your organization spent last year on your non-program activities: fundraising and management. It is important not to overstate these overhead costs due to poor accounting allocation methods. We recommend: Board members should ensure that finance staff or contractors have appropriately classified both direct and shared costs across the core functions of the organization.

The IRS is allowing for a rolling adoption [8] of the new form depending on current organizational revenue and asset size. Again, be sure to check the directions and download blank forms at www.irs.gov/charities. [6]

See also: Is It Time to Get an Audit? [9]

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Editor's note: Starting in January 2009 we'll be having a series on board policy documents with model templates including conflict of interest policy, bylaws, whistleblower policy, document retention policy, ethics policy, and more. Stay tuned to your Inbox!

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