

PUBLICATION

Spotlight on Exempt Organizations: Revisiting the IRS Form 990 and Tax Exempt Entity Governance

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Tax exempt organizations of almost every type must consider whether they are required to annually file with the Internal Revenue Service a Form 990, Return of Organization Exempt From Income Tax. That filing decision, together with various other tax exempt organization issues that frequently arise, can be quite daunting. The purpose of this Alert is to provide an overview of certain basic as well as key points pertaining to the current Form 990, as well as to briefly address certain organizational governance best practices for tax exempt organizations.

Form 990 and Basic Filing Requirements

Form 990 was revised by the IRS for tax reporting years 2008 forward. The redesigned form provides the contributing public substantially more insight into the inner workings of charitable organizations. In addition, a new Form 990-EZ and Form 990-N were added. Prior to such revision, Form 990 was essentially a collection of financial information about the organization.

Organizations having gross receipts of \$25,000 or less may file Form 990-N, which is not actually a Form but an e-Postcard accessible through the IRS web site. The filing thresholds for the Form 990-EZ are as follows, depending on assets and receipts:

May file 990-EZ for If Gross Receipts are: And if Assets Are:

2008 (filed in 2009)	<\$1,000,000	<\$2,500,000
2009 (filed in 2010)	<\$ 500,000	<\$1,250,000
2010 and later	<\$ 200,000	<\$ 500,000

An exempt organization that does not fit within these asset and receipts limitations must file the full Form 990. All private foundations, as defined in Internal Revenue Code (Code) Section 509, regardless of size, are required to file Form 990-PF.

All Forms 990 can be filed on either the cash or the accrual method. (A few states may require that the Form 990 or its state equivalent be filed only on the accrual method.) Failure to file a Form 990 (even if a Form 990-N is permitted) for three consecutive years results in the loss of exempt status under Section 501(c)(3).

Forms 990 are due by the fifteenth day of the fifth month after the end of the fiscal year, unless an extension is approved by the IRS.

Key Disclosures Required by Revised Form 990

The redesigned and revised Form 990 contains a number of disclosure requirements in addition to the applicable financial information. A few key disclosures which an organization must make in the Schedules that are attached to and become a part of the core Form 990 are as follows:

1. Business Relationships. Part IV within the core Form 990 requires the organization to disclose certain "business relationships" between its directors, officers, trustees, key employees and "interested persons." A "yes" answer directs the organization to complete Schedule L, Transactions with Interested Persons. Such relationship disclosure requirements are similar to the corporate governance transparency expectations applicable to publicly held for profit businesses which have developed in recent years.
2. Governance and Written Policies. Part VI of the core Form 990 asks a series of questions regarding the organization's governing body and management. For example, the Form 990 inquires as to whether the entity has a written policy regarding various management and governance topics, such as whether written policies exist on conflicts of interest, whistleblower treatment, document retention and destruction and joint venture participation. Since promulgation of the revised Form 990, all exempt organizations would be well advised to consider adopting written policies concerning these issues.
3. Internal Review. The organization must describe in Schedule O of the core Form 990 the process, if any, the organization uses to review the Form 990 before it is filed. A prudent practice is for an exempt organization to circulate a draft of the Form 990 to the entire board of directors for review in advance of filing.
4. Compensation. The core Form 990 also requires the organization to describe in Schedule O its process for determining compensation of the chief executive officer, executive director, top management, officers and employees. Exempt organizations which pay substantial compensation to management should consider relying on an outside consultant's review and survey data to identify and document the reasonableness of such compensation.
5. Documents Available to the Public. Schedule O further requires an exempt organization to describe whether and how it makes its governing documents, conflict of interest policy and financial statements available to the public.
6. Public Charity Status. Organizations with an advance ruling from the IRS that expires on or after June 9, 2008, no longer need to file Form 8734 as Schedule A to the Form 990 takes its place.
7. Schedule of Contributors. Schedule B to the Form 990 requires most organizations to report information about contributions of \$5,000 or more. An exempt organization may find some donors reticent about such requirement because the Form 990 is open to public inspection; however, an organization may redact identities and create separate publicly-available versions of the Form 990 to accommodate this privacy concern.
8. Political Campaign and Lobbying Activities. Schedule C to the Form 990 requires reporting of political activities for exempt organizations. While the Code permits lobbying activities by certain types of exempt organizations, other exempt organization types are penalized significantly if the lobbying prohibitions are violated. We intend to address lobbying activities by exempt organizations in a subsequent Tax Alert.
9. Independence of Directors. Director independence minimizes the risk of private inurement. The core Form 990 therefore requires the disclosure of the number of independent voting members of the board of directors. The IRS defines a director as "independent" if (1) he or she is not compensated by the organization or a related organization; (2) he or she did not receive more than \$10,000 from the organization or related organization as an independent contractor; and (3) neither the director nor any member of the director's family has been involved in a transaction with the organization or related organization.

Summary

The increased visibility imposed by the IRS on exempt organizations filing the revised Form 990, together with the many other significant tax compliance issues facing such organizations, clearly place significant burdens on exempt organizations and their staff, directors, volunteers and donors. Despite the many good faith criticisms which have been directed toward these new disclosure requirements and other burdens, there does not appear to be any ground-swell movement within Congress to override the Service on these issues. As a result, exempt organizations must be well educated so as to address these issues and annually comply with the filing requirements.

Further, and despite many of the criticisms focused on the revised Form 990, the disclosures required under that Form provide the exempt organization with a basic due diligence checklist for upgrading their management and governance credentials.

Should you have any questions regarding the revised Form 990 or these selected governance issues, or if you wish to discuss any other issues pertaining to tax exempt organizations, please do not hesitate to contact any attorney within the Firm's Tax Department.