



Form 990: Governance, Management and Disclosure

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A LITTLE HISTORY!

- Form 990 was last redesigned in 1979!
- Since then - Sarbanes-Oxley
- Growing media attention as to how organizations spend contributions



CPA'S DUTIES

“We are expected to use our professional judgment and due diligence to seek answers to the questions asked of the governing body”

- We can take our client representations that their answers are complete and accurate and answered to the best of their abilities



WHY THE FORM 990 CHANGED

- Enhanced Transparency
- Encourage Compliance
- Minimize the Filing Burden



WHY THE FORM 990 CHANGED

- Aside from the reasons listed earlier, a big benefit is to give donors the ability to “check out” an organization and gain public trust
- Growing attention to the role the board assumes
- Ask questions specific to the governing body



IMPORTANCE OF REPORTING!

- Existence of an Independent Governing Body!
- Can the IRS ask these questions?
 - YES, though not legally required, failure to answer will result in an incomplete return.
- Consequences for not answering!
- Some resistance, but likely nothing further to come



WHO HAS TO REPORT!

- Many more tax-exempt organizations are now required to file the long Form 990 for tax years beginning in 2010, filed in 2011:
 - The form 990-EZ may only be filed if your organization's gross receipts are **less than** \$200,000 **AND** total assets are **less than** \$500,000.



WHO HAS TO REPORT!

- The long Form 990 consists of a Core Form
 - 12 pages
 - Applies to all organizations filing the form
- 16 Schedules
 - A through O and R
 - Only filed if the organization meets certain criteria



WHO HAS TO REPORT!

- The IRS is using the information obtained to assess noncompliance and the risk of noncompliance with federal tax law
- Organizations should use the information to take a harder look at their organization, how it is run and how it is viewed in the public eyes



TENNESSEE FILINGS

- If an organization solicits charitable contributions in Tennessee they may be subject to the Charitable Solicitations Act
- The Charitable Solicitations act requires those who solicit to register with them unless they are exempt



TENNESSEE FILINGS

- Tennessee exempt organizations include, but not limited to:
 - Religious organizations
 - Volunteer fire departments
 - Educational institutions
 - Rescue squads
 - Civil defense organizations
 - Political parties
 - Hospitals and nursing homes



TENNESSEE FILINGS

- Organizations that do not intend to solicit and receive **AND** do not actually raise **OR** receive gross contributions from the public >\$30,000 are exempt from filing for registration with the state, but still **MUST** file for an EXEMPTION REQUEST – TN Form SS-6042



TENNESSEE FILINGS

- Remember: if an organization is not exempt from TN filings and their revenues, excluding grants received from government agencies and 501(c)(3) private foundations, exceeds **\$500,000**, then audited financial statements are required to be filed with Tennessee



TENNESSEE UPDATE

- On May 20th, 2011, new law Public Chapter 232 was signed.
- Increases financial reporting requirements for organizations which solicit contributions for disaster relief
- greater transparency about how money is spent and deterring charities from misusing donations.
- If the organization raises \$25,000 or more annually for disaster relief, quarterly reports required



FORM 990-N – E-POSTCARD

- All tax-exempt organizations generally must file either Forms 990, 990-EZ or 990-N (depending on gross receipts)
- The Form 990-N is for most small tax-exempt organizations whose gross receipts are **normally** \$50,000 or less
- For tax years beginning before 2010 the gross receipts threshold was \$25,000 or less



FORM 990-N – E-POSTCARD

- Normally \$50,000 or less really means:
 - Based on a 3 year average (for organizations in existence for more than 3+ years, special rules apply for organizations in existence less than 3 years)

- **Example 1:**

2010 gross receipts	= \$ 60,000
2009 gross receipts	= \$ 40,000
<u>2008 gross receipts</u>	= <u>\$ 45,000</u>
Total gross receipts	= \$145,000
Average gross receipts	= \$ 48,333

Organization eligible to file Form 990-N for 2010



FORM 990-N – E-POSTCARD

- **Example 2:** 2010 gross receipts = \$ 30,000
2009 gross receipts = \$ 75,000
2008 gross receipts = \$ 75,000
Total gross receipts = \$180,000
Average gross receipts = \$ 60,000

Organization **NOT** eligible to file Form 990-N for 2010



FORM 990-N – E-POSTCARD

- Filed by 15th day of the 5th month after the organizations year-end
- Filed electronically via www.IRS.gov
- Only 8 items required to file the 990-N
 1. EIN
 2. Tax year
 3. Legal name and assumed names
 4. Address
 5. Name and address of principal officer
 6. Website, if any
 7. Confirmation of gross receipt limit
 8. Statement of termination, if applicable



RECENT NEWS

- 4,500 Not-For-Profit organizations lose tax exempt status across TN
- Visit IRS website for Revocation List
- IRS will accept the fact that small organizations never required to file before, as reasonable cause
- Must apply for reinstatement no later than 12/31/12
- Eligible for a reduced application fee



GOVERNANCE

- Good governance practices improve an organizations ability to:
 - Comply with the tax laws
 - Safeguard assets
 - Accomplish their mission
 - Instill trust with the Donating Public



GOVERNANCE

- Perhaps the biggest change that happened to the Form 990 is the IRS's specific interest in Corporate Governance.
- Corporate governance is the system by which organizations are controlled.
- Part of how organizations can manage resources for the betterment of the organization.



THE GOVERNING BODY

- Their Responsibilities and Duties:
 - Setting and keeping the policies of the organization
 - Monitoring the organizations operations
 - Serving as public figures
 - Reasonable care and loyalty
 - Review of Form 990 before filing



THE GOVERNING BODY

- Need to show the number of independent voting members
- They are considered independent only if all 4 apply at all times during the year:
 1. No wage type compensation
 2. < \$10,000 in independent contract compensation
 3. No other reportable financial transactions directly to the organization (this includes family members), items reported on Sch. L



THE GOVERNING BODY

- They are considered independent only if all 4 apply at all times during the year:
 4. No other reportable financial transactions directly to a related organization (this includes family members), items reported on Sch. L

Objective:

- Board members who think independently
- NOTE – NFP's are required to use the above circumstances and may not create their own definition



THE GOVERNING BODY

Members are not considered to lack independence because:

- They donate to the organization
- Receive benefits from the organization related to the NFP's exempt purpose***
- Are a member of a board for another NFP that receives funding from the reporting organization



THE GOVERNING BODY

- Family and Business Relationships:
 - Identify relationships between the board, officers, key employees and other members of the organization if they play a significant role.
 - Business relationships:
 - Mutual employment
 - Business transactions (other than in the ordinary course of business)
 - >\$10,000 in transactions with the organization
 - > 10% mutual ownership in outside business ventures



PRIVATE INUREMENT

- A transaction or exchange, with an insider, whereby an individual, with a personal interest in the organization, acquires economic gain through use of the organizations funds
- Most common: Excessive Compensation
- Consequences:
 - Loss of exempt status
 - Severe excise taxes
 - Intermediate sanctions



EXCESS BENEFIT TRANSACTIONS

“A transaction where an excess benefit is provided by the organization, directly or indirectly, or for the use of, any disqualified person.”

- Generally it is the excess of a benefit received from the organization over the consideration given.



EXCESS BENEFIT TRANSACTIONS

- Disqualified Person:
 - Position to ***exercise substantial influence*** over affairs of the organization during the prior 5 years beginning on the date of the transaction
 - Family members
 - Persons who hold certain power, responsibilities or interests
 - Voting member of governing body, presidents, CFO's, COO's and certain members of their family
 - Entities in which the above people have a 35% or more interest in
 - Facts and circumstances



EXCESS BENEFIT TRANSACTIONS

- Most common type is unreported compensation
 - The CEO receives car allowance each month, and at the end of the year this was not included on his W-2
 - This is an excess benefit transaction
- Generally must be corrected in the tax period it occurs to avoid the 200% tax
- The tax period begins on the date of occurrence and ends earlier of the notice of deficiency or when taxes are assessed



EXCESS BENEFIT TRANSACTIONS

- Organization have lost tax-exempt status for:
 - Unreasonable compensation and fringe benefits
 - Improper use of company assets
 - Forgiveness of indebtedness
 - Personal expenses paid by entity
 - Low-interest or unsecured loans to insiders
 - Other than arm's length transactions



EXCESS BENEFIT TRANSACTIONS

- Remember that non-profit organizations **can give** benefits to employees, consultants, and board members (in the form of a dinner, for instance, not pay)... they just can't be excessive benefits.



POLICIES & PROCEDURES

- Does the organization have written policies or procedures covering the following:
 - Conflicts of Interest
 - Whistleblowers
 - Document retention and destruction
 - Compensation
 - Investments in joint ventures



KEEP IN MIND...

- Information provided by these questions will be used by the IRS to assess the risk of noncompliance with federal tax law.
- A governance check sheet (GCS) released in December 2009 by the IRS will be used by EO revenue agents in obtaining additional information on governance during an examination of the organization.
- Number of EO returns examined
 - Around 7,200 in 2004
 - Almost 17,000 in 2009



CONFLICT OF INTEREST POLICY

- Purpose of policy is to protect the organization from a possible transaction that might benefit the private interest of an officer or director (or might result in a possible excess benefit transaction).
- Define “conflict of interest”
- Identify who is covered
- Detail procedures for managing conflict
 - Who determines if there is a conflict?
 - Once a conflict is identified, what happens next?



CONFLICT OF INTEREST POLICY

- Describe the process of resolving the conflict
 - Who supervises the resolution?
 - Are any restrictions placed on the involved individual?
- Are officers, directors, and key employees required to annually disclose interests that could raise a conflict?
- Is the policy regularly monitored and enforced?
- Best to have policy in place before a conflict arises.
 - Form 1023 asks if organization has conflict of interest policy. (And there is a sample policy Appendix A of instructions.) <http://www.irs.gov/pub/irs-pdf/i1023.pdf>



WHISTLEBLOWER POLICY

- Sarbanes-Oxley Act (criminal liability applies to nonprofits as well) states that alleged whistleblowers may not have any retaliation taken against them in any manner.



WHISTLEBLOWER POLICY

- Key points to include in this policy:
 - No type of retaliation will be taken against whistleblower
 - Retaliation includes firing, demotion, harassment or other types of unfair treatment
 - The reporting is to remain confidential



DOCUMENT RETENTION

- How long should records be kept?
 - Keep for as long as support is needed to show compliance
 - The statute of limitations runs for three years after the date the return is due or filed (whichever is later)
 - States might have different statute of limitations
 - Some records should be kept permanently
 - Application
 - Determination Letter
 - Organizing Documents
 - Minutes



DOCUMENT DESTRUCTION

- Sarbanes-Oxley Act strikes again!
- Destruction of any document during the process of litigation (or the threat) is illegal
- The procedure should be detailed in a written policy.
 - Don't forget about electronic correspondence.



COMPENSATION POLICY

- Safe harbor clauses
 - Did organization have independent individuals review and approve the compensation for:
 - CEO, Executive Director
 - Officers
 - Key Employees
 - Did organization gather comparable data?
 - Did organization keep contemporaneous records of the deliberation and the determination of the compensation?



Speaking of Compensation...

- Part VII, Section A (page 7 of Form 990)
 - CURRENT Officer, Director, Trustee
 - CURRENT Key Employee
 - CURRENT Top 5 Highest Compensated Employees over \$100,000 (other than O,D,T or KE)
 - FORMER Officer, Key Employee and Highest Compensated Employees who received more than \$100,000
 - FORMER Director or Trustee that received more than \$10,000 (in the capacity of that role)



REPORTABLE COMPENSATION

- Thresholds
 - Officers, Directors and Trustees – none
 - Key Employees – over \$150,000
 - Highly Compensated Employees – over \$100,000
 - Former Director or Trustee – over \$10,000
 - Former Officer, Key Employee or Highly Compensated – over \$100,000



REPORTABLE COMPENSATION

- What do we add up?
 - Form W-2
 - Form 1099
 - Form 1042-S (foreign employee)
 - Other compensation
- What gets included?
 - Disregarded Entities
 - Related Entities
 - Unrelated Entities
 - Management Companies



COMPENSATION – OFFICER

- Elected or appointed to manage daily affairs, president, VP, secretary or treasurer, including all state requirements
- Current officer serves any time during tax year
- Includes the organization's:
 - Top management official
 - Top financial official
 - These positions are regardless of “official” title
 - You can have shared responsibility
 - “Co-” positions



COMPENSATION – KEY EMPLOYEE

1. Income Test

- Any person whose reportable compensation exceeds \$150,000

2. Responsibility Test

- a) Any person who has responsibilities, powers or influence over the org as a whole that is similar to officer, director or trustee
- b) Manages a discrete segment or activity of the org that represents 10% or more of the activities, assets, income or expenses of the org
- c) Has or shares authority to control or determine 10% or more of the capital expenditures, operating budget, or compensation for employees

3. Top 20 Test

- One of top highest paid 20 employees



Example

- T is a large section 501(c)(3) university. Kelly is the dean of the law school of T, which generates more than 10% of the revenue of T, including contributions from alumni and foundations.
- Although Kelly doesn't have ultimate responsibility for managing the university as a whole, she meets the Responsibility Test and is reportable as a key employee of T.



Another example

- U is a large 501(c)(3) hospital. U employs Daniel as a radiologist. Daniel gives instructions to staff with respect to the radiology work that he conducts, but he does not supervise other U employees, manage the radiology department, or have or share authority to control or determine 10% or more of U's capital expenditures, operating budget or employee compensation.
- Under these facts, Daniel does not meet Responsibility Test and is not a key employee of U.



COMPENSATION - HCE

- Top 5 Current highest compensated employees
- Not an Officer, Director, Trustee or Key Employee
- Compensation is over \$100,000



Example - HCE

- T is a large section 501(c)(3) university. Kelly is the dean of the law school of T, which generates more than 10% of the revenue of T, including contributions from alumni and foundations.
- Although Kelly doesn't have ultimate responsibility for managing the university as a whole, she meets the Responsibility Test and is reportable as a key employee of T.
- If 20 other employees made more than Kelly, she would be listed as a HCE



JOINT VENTURE POLICY

- Must have in it requirement to negotiate, in its transactions and arrangements with other members of the venture or arrangement, such terms and safeguards adequate to ensure that the organization's exempt status is protected
- AND have steps been taken to safeguard the organization's exempt status?



JOINT VENTURE POLICY

- Safeguard examples:
 - Control over the venture sufficient to ensure that the exempt purpose of the EO is advanced through its participation
 - Requirements that the venture give priority to EO purposes (even over maximization of profit for other participants)
 - Venture activities will not jeopardize the exemption of the EO
 - Arm's length transactions
- Rev Ruling 98-15



REVIEW PROCEDURE

- Have all members of the governing body been provided a copy of the Form 990 before filing?
 - The Form 990 is one of the main ways the IRS and the public learn about the organization - its programs and activities, its revenue and expenses – where the money is going...
 - Ways to get the Form 990 to those required to review it
 - Email
 - Secure server
 - Board meeting



REVIEW PROCEDURE

- Describe the process of review
(A statement is required)
 - Who conducted the review?
 - When was review done (before or after filing)?
 - To what extent?
 - Or state “No review was or will be conducted”



FINANCIAL OVERSIGHT

- Were the financial statements compiled or reviewed by independent accountant?
- Were the financial statements audited by independent accountant?
 - TN requires audited financial statements if revenues (excluding grants from gov't agencies and PF's) exceed \$500,000
- If yes to either questions above, is there an audit committee in place?
 - Oversees compilation, review or audit
 - Selects the independent accountant



DISCLOSURE

- What is available to the public?
 - Required:
 - Form 1023 (or 1024 if applicable)
 - Form 990
 - Form 990-T (501(c)(3) only)
 - Governing documents
 - Conflict of interest policy
 - Financial statements
- How is this information made available?
 - Own website
 - Another entity's website
 - Upon request



CONCLUSION

- The IRS sees a direct correlation between the existence of policies and compliance.
- The IRS wants the board to be comprised of individuals who are informed and who will be active in overseeing the operations and finances.
- The IRS as well as potential donors will be using the 990 as a window into the organization and how the board conducts its responsibilities.



QUESTIONS?

A copy of today's presentation can be found on our website at the following location:

www.pughcompany.com

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