NonProfit Governance & The Revised IRS Form 990

Managing Conflicts of Interest

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Purpose of New IRS Form 990

Enhance Transparency and Promote Tax Compliance. IRS says:

The Internal Revenue Service believes that a well-governed charity is more likely to obey the tax laws, safeguard charitable assets, and serve charitable interests than one with poor or lax governance. A charity that has clearly articulated purposes that describe its mission, a knowledgeable and committed governing body and management team, and sound management practices is more likely to operate effectively and consistent with tax law requirements. And while the tax law generally does not mandate particular management structures, operational policies, or administrative practices, it is important that each charity be thoughtful about the governance practices that are most appropriate for that charity in assuring sound operations and compliance with the tax law. As a measure of our interest in this area, we ask about an organization’s governance, both when it applies for tax-exempt status and then annually as part of the information return that many charities are required to file with the Internal Revenue Service.
New IRS Form 990
Answering the Questions

- There is not necessarily a “right” or “wrong” answer to a question, although certain answers may lead to further inquiry.
- Answer questions thoughtfully.
- Use Schedule O.
New IRS Form 990
Focus on Conflicts of Interest

- Private Benefit.
  - Joint Ventures.
  - Contracts.
- Private Inurement.
  - Executive Compensation and Benefits.
  - Executive Loans.
  - Self-Dealing Transactions and Conflicts of Interest.
  - Excess Benefit Transactions.
New IRS Form 990
Focus on Conflicts of Interest

- Monitor Corporate Governance.
- Appropriate Board Composition and Committees.
- Policies.
  - Conflict of Interest.
  - Compensation.
  - Whistleblower.
  - Document Retention.
New Form 990
Focus on Conflicts of Interest

- Part IV
  - Question 26: Loans.
  - Question 27: Grants.
  - Question 28 and Schedule L: Transactions with “insiders.”
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Focus on Conflicts of Interest

- Part VI – Governance, Management and Disclosure.
  - Section A – Governing Body and Management.
  - Section B – Policies.
  - Section C – Disclosure.

- Part VII and Schedule J.
  - Compensation and benefits for officers, directors and “key employees.”
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Focus on Conflicts of Interest

Disqualified Person.

- Any person who was in a position to exercise substantial influence over the affairs of the organization at any time during the 5 year period ending on the date of the transaction.

- Includes the disqualified person’s family members, 35% controlled entity, donor or donor advisor to donor advised fund, and investment advisor of a sponsoring organization.
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Focus on Conflicts of Interest

- The term "key employee" means an employee who is not an officer, director or trustee, and who meets all 3 of the following tests:
  - $150,000 Test: The employee has reportable compensation from the organization and all related organizations in excess of $150,000.
  - Responsibility Test: The employee has responsibilities, powers or influence over the organization similar to that of an officer, director or trustee; OR manages a discrete segment of the organization that represents 10% or more of the organization's activities, assets, income or expenses; OR has or shares authority over 10% or more of the organization's capital expenditures, operating budget or compensation for employees.
  - Top 20 Test: The employee was within the 20 highest paid employees of the organization and related organizations for the year.

- The term "family member" includes an individual's spouse, ancestors, siblings (whether of the whole or half blood), children (natural or adopted), grandchildren, great grandchildren, and spouses of siblings, children, grandchildren and great grandchildren.

- The term "officer" means a "person elected or appointed to manage the organization's daily operations, such as a president, vice-president, secretary or treasurer. The organization’s bylaws and state law are determinative; the organization's "top management official" and "top financial official" are to be treated as officers.
New IRS Form 990
Focus on Conflicts of Interest

Definition of “Interested Person.” Relevant for Schedule L, and varies for each part of Schedule L. May include (depending on which part of Schedule L is relevant):

- any current officer, director, trustee, key employee or 5 highest paid <$100,000.
- any former officer or key employee who received more than $100,000 of reportable compensation from the organization and any related organizations.
- any former director or trustee who received, as a director or trustee, more than $10,000 of reportable compensation from the organization and any related organizations.
- a substantial contributor (<$5,000).
- any “family member” of some of the above.
- an entity more than 35% owned, directly or indirectly, by persons above, whether individually or collectively.
- an entity (other than a Section 501(c) organization) for which a person described above was serving at the time of a transaction as an officer, a director or trustee; a key employee; a partner or member with an ownership interest in excess of 5% if the entity is treated as a partnership; or a shareholder with any ownership interest in excess of 5% if the entity is a professional corporation.
- any management company of which a former officer, director, trustee or key employee or the organization within the past five years is an officer, director, trustee, key employee or direct or indirect 35% owner.
New IRS Form 990
IRS Filing Tips: Schedule L

- Do all Form 990 and Form 990-EZ filers need to file Schedule L?
- What types of transactions are reportable on Schedule L?
- Why are there different definitions of “interested persons” in the different parts of Schedule L?
- Does the definition of “business relationship” in the Form 990 Glossary and in the instructions to Part VI, line 2 (which include an “ordinary course of business” exception) apply for purposes of Part IV, line 28 and Schedule L, Part IV (business transactions involving interested persons)?
- Should our board member’s purchase of tax-exempt bonds that we issued on the open market be reported as a loan in Schedule L, Part II?
- One of our governing board members is the president of a bank in which our organization has an account. We earn interest on the deposits, and there are fees we pay to the bank throughout the year. Should this transaction be reported in Part II and/or Part IV of Schedule L?
- Must our organization, a primary school, report in Schedule L, Part III the name of one of our officer’s family members to whom we granted a scholarship?
- We compensate our chief financial officer $110,000 and the CFO’s spouse (an employee) $20,000. Must we report one or both of these transactions in Schedule L, Part IV?
- We don’t have enough room on Schedule L to include all of the information requested, such as a description of business transactions (Part IV) or the purpose of a loan (Part II). Must we limit our response to the space provided on Schedule L?
- How hard do we need to look for the information requested in Parts III and IV of Schedule L regarding assistance to interested persons and business transactions with interested persons? What if we are unable to obtain and report all of that information?
When Does the New IRS Form 990 Apply?

- For calendar or fiscal years beginning in 2008, most organizations with gross receipts of less than $1,000,000 and total assets less than $2,500,000 may choose to file either the new Form 990 or the Form 990-EZ.

- For calendar or fiscal years beginning in 2009, most organizations with gross receipts of less than $500,000 and total assets less than $1,250,000 may choose to file either the new Form 990 or the Form 990-EZ.

- For calendar or fiscal years beginning in 2010, most organizations with gross receipts of less than $200,000 and total assets less than $500,000 may choose to file either the new Form 990 or the Form 990-EZ.
IRS Published Guidance.

- New IRS Form 990 along with background information and instructions can be found at: www.irs.gov/charities/index.html.

- IRS Filing Tips for Schedule A and Schedule L can be found at: http://www.irs.gov/charities/article/0,,id=208553,00.html

- IRS Guidance on Corporate Governance can be found at: http://www.irs.gov/charities/article/0,,id=208454,00.html