
Internal Revenue Service Revised Form 990 (2008): Sample Governance Policies

by Jerald A. Jacobs

The Internal Revenue Service has issued a new Form 990 annual tax return/report that must be submitted by most federal income tax exempt organizations, including trade associations, professional societies, cause/social welfare groups, and charitable/scientific/educational organizations. Instructions for the form have also been issued. This Client Alert provides sample governance policies responsive to the new Form 990 and those Instructions.

The new Form 990 is to be used beginning with the filing for 2008, the one a calendar-year organization will file by May 15, 2009. (For non-calendar-year organizations, the new form is to be first used for the tax year that began in 2008.)

To a significant extent, the revised Form 990 is IRS's reaction to concerns expressed by key committees in Congress for greater disclosure and improved governance in nonprofit tax exempt organizations. IRS also asserts its view that appropriate governance enhances compliance with federal income tax exemption requirements.

Among other new features, the form asks in Part VI if the filing organization has adopted a series of five governance policies; the organization must answer "yes" or "no" for each. While a "no" answer does not indicate any violation of law or inconsistency with federal income tax exemption requirements, it could trigger scrutiny by the IRS. To minimize that risk, many organizations using the new form will want to be able to answer "yes" to all five of these governance policy questions.

Each governance policy must be adopted by the end of the year for which the form is being submitted if the organization is to answer "yes" on the Form 990. While not specified by the IRS, it would be typical for such policies to be adopted by the organization's principal governing body such as its board of directors.

Presented here are sample governance policies for nonprofit tax-exempt organizations in basic versions that reflect the narrowly defined IRS definitions/instructions for Part VI of the new Form 990. Each would likely be sufficient to permit the organization to respond "yes" to the Form 990 question about that policy.

Many organizations may prefer expanded or enhanced versions of the policies; if the essential elements are maintained, those should still suffice for Form 990 purposes.

Conflict of Interest Policy

This **Conflict of Interest Policy** of (insert the name of the “Organization”): (1) defines conflicts of interest; (2) identifies classes of individuals within the Organization covered by this policy; (3) facilitates disclosure of information that may help identify conflicts of interest; and (4) specifies procedures to be followed in managing conflicts of interest.

- 1. Definition of conflicts of interest.** A conflict of interest arises when a person in a position of authority over the Organization may benefit financially from a decision he or she could make in that capacity, including indirect benefits such as to family members or businesses with which the person is closely associated. This policy is focused upon material financial interest of, or benefit to, such persons.
- 2. Individuals covered.** Persons covered by this policy are the Organization’s officers, directors, chief employed executive and chief employed finance executive.
- 3. Facilitation of disclosure.** Persons covered by this policy will annually disclose or update to the Chairman of the Board of Directors on a form provided by the Organization their interests that could give rise to conflicts of interest, such as a list of family members, substantial business or investment holdings, and other transactions or affiliations with businesses and other organizations or those of family members.
- 4. Procedures to manage conflicts.** For each interest disclosed to the Chairman of the Board of Directors, the Chairman will determine whether to: (a) take no action; (b) assure full disclosure to the Board of Directors and other individuals covered by this policy; (c) ask the person to recuse from participation in related discussions or decisions within the Organization; or (d) ask the person to resign from his or her position in the Organization or, if the person refuses to resign, become subject to possible removal in accordance with the Organization’s removal procedures. The Organization’s chief employed executive and chief employed finance executive will monitor proposed or ongoing transactions for conflicts of interest and disclose them to the Chairman of the Board of Directors in order to deal with potential or actual conflicts, whether discovered before or after the transaction has occurred.

Whistleblower Policy

This **Whistleblower Policy** of (insert the name of the “Organization”): (1) encourages staff and volunteers to come forward with credible information on illegal practices or serious violations of adopted policies of the Organization; (2) specifies that the Organization will protect the person from retaliation; and (3) identifies where such information can be reported.

- 1. Encouragement of reporting.** The Organization encourages complaints, reports or inquiries about illegal practices or serious violations of the Organization’s policies, including illegal or improper conduct by the Organization itself, by its leadership, or by others on its behalf. Appropriate subjects to raise under this policy would include financial improprieties, accounting or audit matters, ethical violations, or other similar illegal or improper practices or policies. Other subjects on which the Organization has existing complaint mechanisms should be addressed under those mechanisms, such as raising matters of alleged discrimination or harassment via the Organization’s human resources

channels, unless those channels are themselves implicated in the wrongdoing. This policy is not intended to provide a means of appeal from outcomes in those other mechanisms.

2. **Protection from retaliation.** The Organization prohibits retaliation by or on behalf of the Organization against staff or volunteers for making good faith complaints, reports or inquiries under this policy or for participating in a review or investigation under this policy. This protection extends to those whose allegations are made in good faith but prove to be mistaken. The Organization reserves the right to discipline persons who make bad faith, knowingly false, or vexatious complaints, reports or inquiries or who otherwise abuse this policy.
3. **Where to report.** Complaints, reports or inquiries may be made under this policy on a confidential or anonymous basis. They should describe in detail the specific facts demonstrating the bases for the complaints, reports or inquiries. They should be directed to the Organization's chief employed executive or Chairman of the Board of Directors; if both of those persons are implicated in the complaint, report or inquiry, it should be directed to ___(SUPPLY TITLE)__. The Organization will conduct a prompt, discreet, and objective review or investigation. Staff or volunteers must recognize that the Organization may be unable to fully evaluate a vague or general complaint, report or inquiry that is made anonymously.

Document Retention and Destruction Policy

This **Document Retention and Destruction Policy** of (insert the name of the "Organization") identifies the record retention responsibilities of staff, volunteers, members of the Board of Directors, and outsiders for maintaining and documenting the storage and destruction of the Organization's documents and records.

1. **Rules.** The Organization's staff, volunteers, members of the Board of Directors and outsiders (i.e., independent contractors via agreements with them) are required to honor these rules: (a) paper or electronic documents indicated under the terms for retention below will be transferred and maintained by the Human Resources, Legal or Administrative staffs/departments or their equivalents; (b) all other paper documents will be destroyed after three years; (c) all other electronic documents will be deleted from all individual computers, databases, networks, and back-up storage after one year; and (d) **no paper or electronic documents will be destroyed or deleted if pertinent to any ongoing or anticipated government investigation or proceeding or private litigation.**

2. **Terms for retention.**

- a. Retain **permanently**:

Governance records—Charter and amendments, Bylaws, other organizational documents, governing board and board committee minutes.

Tax records—Filed state and federal tax returns/reports and supporting records, tax exemption determination letter and related correspondence, files related to tax audits.

Intellectual property records—Copyright and trademark registrations and samples of protected works.

Financial records—Audited financial statements, attorney contingent liability letters.

b. Retain for 10 years:

Pension and benefit records—Pension (ERISA) plan participant/beneficiary records, actuarial reports, related correspondence with government agencies, and supporting records.

Government relations records—State and federal lobbying and political contribution reports and supporting records.

c. Retain for three years:

Employee/employment records—Employee names, addresses, social security numbers, dates of birth, INS Form I-9, resume/application materials, job descriptions, dates of hire and termination/separation, evaluations, compensation information, promotions, transfers, disciplinary matters, time/payroll records, leave/comp time/FMLA, engagement and discharge correspondence, documentation of basis for independent contractor status (retain for all current employees and independent contractors and for three years after departure of each individual).

Lease, insurance, and contract/license records—Software license agreements, vendor, hotel, and service agreements, independent contractor agreements, employment agreements, consultant agreements, and all other agreements (retain during the term of the agreement and for three years after the termination, expiration, non-renewal of each agreement).

d. Retain for one year:

All other electronic records, documents and files—Correspondence files, past budgets, bank statements, publications, employee manuals/policies and procedures, survey information.

3. Exceptions. Exceptions to these rules and terms for retention may be granted only by the Organization's chief staff executive or Chairman of the Board.**Policy on the Process for Determining Compensation**

This Policy on the Process for Determining Compensation of (insert the name of the "Organization") applies to the compensation of the following persons employed by the Organization:

_____ The Organization's **chief employed executive**¹ (CHECK IF APPLICABLE)

_____ Other **Officers**² or **Key Employees**³ of the Organization by title: _____

¹ **Chief employed executive**—The CEO (i.e., Chief Executive Officer), executive director, or top management official (i.e., a person who has ultimate responsibility for implementing the decisions of the Organization's governing body or for supervising the management, administration, or operations of the Organization).

² **Officer**—A person elected or appointed to manage the Organization's daily operations, such as a president, vice-president, secretary or treasurer. The officers of the Organization are determined by reference to its organizing document, bylaws, or resolutions of its governing body, or as otherwise designated consistent with state law, but at a minimum include those officers required by applicable state law. Include as officers the Organization's top management official and top financial official (the person who has ultimate responsibility for managing the Organization's finances).

³ **Key Employee**—An employee of the Organization who meets all three of the following tests: (a) \$150,000 Test: receives reportable compensation from the Organization and all related organizations in excess of \$150,000 for the year; (b) Responsibility Test: the employee: (i) has responsibility, powers, or influence over the Organization as a whole that is similar to those of officers, directors, or trustees; (ii) manages a discrete segment or activity of the Organization that represents 10% or more

_____ (CHECK IF APPLICABLE; SUPPLY TITLES).

The process includes all of these elements: (1) review and approval by the board of directors or compensation committee of the Organization; (2) use of data as to comparable compensation; and (3) contemporaneous documentation and recordkeeping.

1. **Review and approval.** The compensation of the person is reviewed and approved by the board of directors or compensation committee of the Organization, provided that persons with conflicts of interest with respect to the compensation arrangement at issue are not involved in this review and approval.
2. **Use of data as to comparable compensation.** The compensation of the person is reviewed and approved using data as to comparable compensation for similarly qualified persons in functionally comparable positions at similarly situated organizations.
3. **Contemporaneous documentation and recordkeeping.** There is contemporaneous documentation and recordkeeping with respect to the deliberations and decisions regarding the compensation arrangement.

Joint Venture Policy

This Joint Venture Policy of (insert the name of the “Organization”) requires that the Organization evaluate its participation in joint venture arrangements under Federal tax law and take steps to safeguard the Organization’s exempt status with respect to such arrangements. It applies to any joint ownership or contractual arrangement through which there is an agreement to jointly undertake a specific business enterprise, investment, or exempt-purpose activity as further defined in this policy.

1. **Joint ventures or similar arrangements with taxable entities.** For purposes of this policy, a joint venture or similar arrangement (or a “venture or arrangement”) means any joint ownership or contractual arrangement through which there is an agreement to jointly undertake a specific business enterprise, investment, or exempt-purpose activity without regard to: (1) whether the Organization controls the venture or arrangement; (2) the legal structure of the venture or arrangement; or (3) whether the venture or arrangement is taxed as a partnership or as an association or corporation for federal income tax purposes. A venture or arrangement is disregarded if it meets both of the following conditions:
 - a. 95% or more of the venture’s or arrangement’s income for its tax year ending within the Organization’s tax year is excluded from unrelated business income taxation [including but not limited to: (i) dividends, interest, and annuities; (ii) royalties; (iii) rent from real property and incidental related personal property except to the extent of debt-financing; and (iv) gains or losses from the sale of property]; and
 - b. the primary purpose of the Organization’s contribution to, or investment or participation in, the venture or arrangement is the production of income or appreciation of property.

■ of the activities, assets, income, or expenses of the Organization, as compared to the Organization as a whole; or (iii) has or shares authority to control or determine 10% or more of the Organization’s capital expenditures, operating budget, or compensation for employees; and (c) Top 20 Test: is one of the 20 employees (that satisfy the \$150,000 Test and Responsibility Test) with the highest reportable compensation from the Organization and related organizations for the year.

- 2. Safeguards to ensure exempt status protection.** The Organization will: (a) 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 (b) take steps to safeguard the Organization's exempt status with respect to the venture or arrangement. Some examples of safeguards include:
- a. control over the venture or arrangement sufficient to ensure that it furthers the exempt purpose of the organization;
 - b. requirements that the venture or arrangement gives priority to exempt purposes over maximizing profits for the other participants;
 - c. that the venture or arrangement not engage in activities that would jeopardize the Organization's exemption; and
 - d. that all contracts entered into with the organization be on terms that are arm's length or more favorable to the Organization.

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