

# NONPROFIT STANDARD



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## MOVING TOWARDS CLARITY - IRS RELEASES 2009 FORM 990 CHANGES

**W**ith the first year of filing the new Form 990 well on its way, the Internal Revenue Service (IRS) has released the revised 2009 forms for calendar year 2009 and fiscal year 2010 returns. In addition to improving the wording of the trigger questions, revising definitions, and clarifying many instructions, IRS has attempted to guide organizations in preparing a more complete return. Among the top errors reported on 2008 forms was the omission of Schedule O which requires certain disclosures from all organizations. IRS has added instructions to elicit a more complete filing and ensure all necessary disclosures are made.

### EXISTING ITEMS EFFECTIVE 2009

**990-EZ:** The thresholds for organizations allowed to file the short form 990 are reduced in 2009 requiring more organizations to complete the full revised form. Most organizations with annual gross receipts for tax year 2009 less than \$500,000, and total assets at the end of year less than \$1,250,000 can file Form 990-EZ. (2008 amounts were \$1,000,000 and \$2,500,000, respectively.)

**FIN 48:** With the end to the deferral period for FIN 48, Accounting for

Material discussed is meant to provide general information and should not be acted upon without first obtaining professional advice appropriately tailored to your individual circumstances.

To ensure compliance with Treasury Department regulations, we wish to inform you that any tax advice that may be contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding tax-related penalties under the Internal Revenue Code or applicable state or local tax or (ii) promoting, marketing or recommending to another party any tax-related penalties under the Internal Revenue Code or applicable state or local tax law provisions or (ii) promoting, marketing or recommending to another party any tax-related matters addressed herein.

Uncertainty of Tax Positions (now called Accounting Standards Codification (ASC) 740-10), most organizations will now be required to include the text of the footnote disclosure in the 990 as part of Schedule D. IRS clarified that any portion of the FIN 48 footnote that addresses only the filing organization's liability must be provided verbatim, however the organization can summarize the filing organization's share of liability when it's part of a consolidated footnote.

## Expanded Reporting

As previously announced, organizations filing Schedules H and K must complete all parts of these schedules for the 2009 tax year.

**Schedule H** – Beginning this year, IRS requires an organization to report information about whether the hospital is providing sufficient care to needy individuals and/or other community benefits to justify its tax-exempt status; and to provide information about management companies and joint ventures in which the organization is a participant. For this schedule, a hospital is a facility that is required to be licensed, registered, or similarly recognized by a state as a hospital. The schedule is required even when a hospital is operated through a disregarded entity or a joint venture treated as a partnership for tax purposes. If an organization operates multiple hospitals, or files a group return for a group that operates one or more hospitals, only one Schedule H should be completed by aggregating the information from all the hospitals. Medical facilities operated as a joint venture or partnership should be reported in Part IV.

Schedule H is not filed for a hospital located outside the U.S., nor by hospitals that are operated by a separate tax-exempt entity or an organization taxable as a corporation for federal tax purposes (unless included in a group exemption).

**Schedule K** – This schedule is required to report each outstanding tax-exempt liability that had an outstanding principal amount in excess of \$100,000 as of the last day of the tax year, and was issued after December 31, 2002. Bonds issued



after December 31, 2002, to refund bonds issued before January 1, 2003 have special reporting rules. These refunding bonds are subject to the reporting requirements of Parts I, II, and IV; however, Part III does not need to be completed.

The Schedule K is used to provide certain information on outstanding liabilities associated with tax-exempt bond issues. Generally, the IRS wants to confirm that organizations issuing tax-exempt bonds are maintaining the proper records and are not circumventing arbitrage requirements with their investment of the proceeds. The IRS is also concerned that arrangements with respect to bond-financed property may result in private business use.

The filing organization may complete Schedule K using the same period as the Form 990, or it may use any other 12-month period or periods selected by the organization and used consistently for an obligation for purposes of Schedule K and computations in accordance with the requirements under IRC Sections 141-150. For 2009 only, the filer should include on Part II, line 5 the cumulative amount of bond proceeds used to pay fees for credit enhancement that are taken into account in determining the yield on the issue for

purposes of Code section 148(h).

## CHANGES AND CLARIFICATIONS TO FORM

During the 2008 filing season IRS released a series of Frequently Asked Questions (FAQ) to provide clarification of the instructions on areas including compensation, foreign activities, transactions with interested persons, and related entities. These FAQs have been incorporated into the new form and schedules.

Codes for Part III, Statement of Program Services Accomplishments, are still not developed and remain deferred; however, the business activity codes for Part VIII, Statement of Revenue, can now be completed based on NAICS codes so they can more closely match the revenue types.

IRS clarifies that changes in organization activities and organizational documents should be described on the 990, rather than provided in a letter to EO Determinations section.



We are working closely with our clients and friends to share our knowledge and to help organizations understand the issues underlying their annual exempt organization return. Please feel free to contact us if you have any questions.

For a more detailed list of IRS changes see the IRS summary at:

<http://www.irs.gov/charities/article/0,,id=218938,00.html>. ■

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Many organizations were disconcerted that a consolidated audit prevented them from describing themselves as audited for 990 purposes. A question has been added for organizations to indicate they are included in a consolidated financial statement audit.

Part V of the 990 covering IRS filings and compliance now includes better information regarding how to answer the questions in this section and on handling compensation through related organizations and reporting agents.

Part VI on governance issues is reorganized somewhat and instructions clarify how to appropriately respond and disclose necessary information.

**Penalties:** IRS requires full compliance and, for years beginning after 2006 new law allows IRS to revoke tax-exemption for an organization that is required to file a 990 form and fails to do so for three consecutive years. Most organizations must at least file a 990-N, or risk loss of exemption. Also, IRS clarifies that an organization that files an incomplete return by failing to complete a required line or omitting a required disclosure or schedule can be subject to penalties. Penalties also apply if information is incorrect, and can be imposed on both the responsible person and tax preparer.

## IMPACT OF NEW FORM

The government, press and others are looking closely at the new Form 990. Although no section of the form is expected to trigger an IRS audit, IRS is using information from the new form to focus attention on key compliance and exemption areas. Current activities by IRS regarding compensation, overseas operations, revenue streams, UBIT, and lobbying and political activity are ongoing. The new form's format is also guiding organizations to readdress their status for public support purposes, and some organizations are now finding they have or may become a private foundation.

The new form will continue to challenge organizations and their preparers, but as implications of the disclosures become clearer and more returns become public, a better understanding of required disclosures and best practices will be established. IRS continues to focus on education and guidance and has a variety of materials available online.

MillerMusmar CPAs has many resources available to assist you with preparing the new IRS Form 990.

# FOREIGN ACCOUNT REPORTING - MORE IRS GUIDANCE IS HERE!

**A**s we have reported previously, Treasury and the IRS have greatly stepped up enforcement of the filing requirements for Form TD F 90-22.1, Report of Foreign Bank and Financial Accounts ("FBAR"). Penalties for non-compliance are steep: \$10,000 per occurrence. There is generally a filing requirement for both organizations with such accounts and individuals with signature authority (but no financial interest in) a foreign financial account. The FBAR report is filed on a calendar year basis and is due annually on June 30.

There has been confusion as to exactly what constitutes a foreign account and often a lack of compliance especially on the part of those with signature authority. The rules are the same for both for-profit entities and nonprofit organizations. In August 2009, the IRS issued Notice 2009-62 which extended until June 30, 2010 the filing due date for individuals with signature authority (but not a financial interest) in a foreign financial account or with signature authority or a financial interest in a foreign commingled fund. Many comments were received after this notice was issued, and the IRS has released additional guidance at the end of February 2010 in Notice 2010-23.

**Notice 2010-23 provides** relief in several key areas: First, it extends the filing date for persons with signature authority over (but not a financial interest in) a foreign financial account until June 30, 2011. This applies to calendar year 2010 and all prior years. Thus, individuals who may not have been aware of an individual FBAR filing requirement, have an opportunity to catch up without penalty.

Secondly, this notice modifies the guidance from Notice 2009-62 for persons (including organizations) with either a financial interest or signature authority over a foreign co-mingled fund that is a mutual fund. The date for filing these FBAR returns is June 30, 2010 for 2009 and prior years. However, the IRS made it clear in the new guidance that it will not require other types of commingled funds including foreign hedge funds or private equity funds

to file the FBAR. This clears up a significant area of uncertainty that caused many organizations to protectively file FBAR's for hedge funds and private equity funds in the prior year. Thus, there is a penalty-free catch up period for filing FBARs for foreign mutual funds for both organizations and those with signature authority, and clear guidance that other types of funds do not require filing. However, this notice does not address whether passive foreign investment companies (PFICs) are covered by the FBAR rules.

Lastly, Notice 2010-23 says that organizations or individuals who qualify for relief under this notice may answer "no" to the question on their tax return (990 for nonprofits or 1040 for individuals) about existence of foreign interests or signature authority if their only interests are accounts that have been granted relief. This is important as it tells the IRS not to be looking for an FBAR in these situations.

**Announcement 2010-16** extends an earlier Announcement (2009-51), which provided that only "United States persons" as defined in the FBAR instructions are required to file FBAR. The FBAR instructions state that US persons are (1) citizens or residents of the US, (2) domestic partnerships, (3) domestic corporations, or (4) domestic estates or trusts.

**Proposed Regulations** for FBAR reporting rules were issued by the Treasury Department on February 25, 2010. Although the IRS administers the FBAR rules, the rules actually come under Title 31 of the US Code as part of federal banking law. The proposed regulations (1) clarify who is a required filer (defining who is a US person) and which types of accounts are reportable, (2) exempt certain taxpayers with only signature authority from filing, and (3) provide rules intended to prevent US persons from avoiding the filing requirements. It is important to note that these are only proposed regulations at this time and do not carry the authority of law.

On March 18th, President Obama signed the HIRE Act into law.

Among its many provisions is a general requirement for heightened reporting and disclosure by foreign financial institutions with US account holders. Foreign institutions that do not comply with the heightened reporting are required to withhold 30% from payments to US account holders. Fortunately, the Act specifically excludes exempt organizations from these additional requirements. Thus, the foreign reporting provisions of the HIRE Act are not applicable to nonprofits (although the FBAR reporting is still very much in effect!).

**Conclusion:** While the new guidance does not totally resolve all the issues with FBAR reporting, it does go a long way towards clarification in some important areas, most significantly with regards to foreign hedge and private equity funds, which are clearly now excluded from the FBAR reporting requirements. Organizations should take a fresh look, with assistance from their financial advisors, at all foreign holdings to determine which will require reporting either by the organization itself or by organization managers with signature authority. It is extremely important for any individual in an organization with signature authority over a foreign account to be aware of the rules and to take care of their individual filing requirements by the extended "grace periods" allowed by the IRS. For these individuals, this is an opportunity to voluntarily comply for prior years without penalty.

There clearly will be further developments in this area, so organizations are urged to stay tuned on this topic. ■

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# SFAS 157 FAIR VALUE MEASUREMENTS - ADDITIONAL NOT-FOR-PROFIT PERSPECTIVES



Nonprofits are especially likely to need to apply this statement in connection with:

- Non-cash contributions received and made, (includes both items which will be capitalized on the balance sheet, and donated services and use of property which flow through the income statement), per SFAS 116 (ASC 958-605)
- Non-marketable (so-called 'alternative') investments, per Chapter 8 of the audit guide (ASC 958-325)
- Acquisition accounting under SFAS 164 (ASC 958-805) for a combination, and
- Any asset or liability for which the fair value option is elected under SFAS 159 (ASC 825).

**NOW THAT SFAS 157 HAS BEEN IN EFFECT FOR A WHILE, IT IS WORTHWHILE TO DISCUSS A FEW PRACTICAL ISSUES THAT OFTEN ARISE DURING ITS IMPLEMENTATION.**

## First a Few Reminders

**Nonprofit organizations use fair value accounting when they are:**

(1) required by certain accounting standards to use fair value for certain transactions and balances, and

(2) permitted by certain other accounting standards to use fair value for certain other transactions and balances,

Determination of fair value is governed by Statement of Financial Accounting Standards (SFAS) No. 157, *Fair Value Measurements*, (now codified in Topic 820 of the FASB Accounting Standards Codification (ASC)) and its several related FASB

staff positions. It is important to remember that SFAS 157 does not itself ever mandate the use of fair value accounting.

**SFAS 157 mentions three valuation techniques:**

- market for identical or comparable items
- future income (discounted)
- replacement cost.

and three levels of a hierarchy of inputs:

- Level 1 (para. 24-27) – quoted prices in active markets for identical items
- Level 2 (para. 28-29) – observable inputs other than quoted market prices
- Level 3 (para. 30) – unobservable inputs.

Balance sheet items for which SFAS 159 is most likely to be elected, and which are likely to require additional effort to determine their fair value, are pledges and loans receivable and payable. For long-term receivables and payables discounted to present value under APB 21 (ASC 835), the effect of using fair value is to unfreeze the interest rate used to compute the discount. Under APB 21 the interest rate is set at the inception of the agreement and is not changed over the life of the agreement; under SFAS 157 the interest rate is adjusted each period to a current rate.

Non-cash contributions are required to be valued at fair value by SFAS 116, and, even if alternative investments are not reported at fair value in the balance sheet, SFAS 107 (ASC 825) may require disclosure of their fair value in a footnote.

FASB is also considering further changes in measurement principles for financial instruments generally. At a meeting in July, 2009, the Board agreed to propose a model

**The Board reached the following decision:**

... to propose that all financial instruments will be presented on the balance sheet at fair value with changes in value recognized in net income or other comprehensive income with an optional exception for [its] own debt in certain circumstances, which will be measured at amortized cost.....

The main effect of this proposal will be to change SFAS 115 applicable to for-profit organizations. However it would also presumably remove the options for reporting non-SFAS 124 investments (see ASC 958- 325) that nonprofits now have, under the AICPA audit guide for not-for-profits, to use either fair value or another method (the other method - either cost or the lower of cost or fair value - varies depending on what type of organization is involved).

**AICPA Issues Paper** - In January 2010, the AICPA issued a draft of an issues paper designed to provide practical guidance in implementation of the fair value standards in SFAS 157 (ASC 820-10-35) as they apply to three areas peculiar to nonprofits:

- Pledges (promises to give)
- Beneficial interests in perpetual third-party trusts
- Split-interest agreements such as lead trusts, remainder trusts, and charitable gift annuities

**Parts of this paper are fairly straightforward; parts of it are very theoretical. Briefly, with respect to:**

I. - Pledges, it observes that two of the three methods of measuring fair value (cost and market) are not going to be useful or practical to use for pledges. By elimination, the present value of future cash flows approach is the one that is normally going to be used, which is consistent with existing practice. The paper discusses the determination of an appropriate discount rate and its relation to the assessed risk of collectibility of the pledge.

II. - Perpetual trusts, it refers to the guidance in Chapter 6 of the AICPA audit guide for not-for-profits, which indicates that the fair value of the beneficial interest is normally best measured by the fair value of the assets in the trust, absent indications to the contrary.

III. - Split-interests, it includes a lengthy theoretical discussion of the various aspects of measuring these agreements. The subject is complicated by the great variety of types of agreements, the variety of payment schemes contained in such agreements, the need to value both the assets and the liability under the agreements, and the number of variables affecting the value such as: life expectancy, discount rate, estimates of future return on the trust assets, type and potential variability of payments to the life tenant, valuation of the assets underlying the agreement, form of trust management (i.e., sometimes the charitable beneficiary is also the trustee; sometimes not), etc.

Comments on the draft were due in March. ■

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# EFFECTIVE BUILDING POLICIES - BUILDING THE FOUNDATION OF YOUR ORGANIZATION



**P**olicies are guidelines that regulate organizational action and control the conduct of individuals within an organization and ensure that an organization has the foundation to accomplish its mission. Procedures on the other hand describe the normal operating method and provide the protocol for implementation of the policies or the “how to.” Both policies and procedures are required by all organizations in order to operate efficiently, avoid confusion among employees, and ensure that an organization is in compliance with its legal and regulatory requirements. In this article we will explore the best practices for developing sound and effective policies for an organization.

The day-to-day operations of an organization are managed by every member of the organization’s leadership team (management team) except for the board of directors. The management team members are the ones that are responsible for an organization’s operations and the boards of directors’ are responsible for providing the monitoring and oversight process in order to carry out their fiduciary duty related to the organization. It is important that this concept of division of

responsibilities be understood by all parties. If a board of directors is not involved in the organization (therefore hands off or providing the rubber stamp) that is almost as bad as a board of directors that micro manages an organization. In either of these cases the individual board members are opening themselves up to substantial risk and exposure as well as putting the organization at risk.

The management team is responsible for developing the organization’s policies and ensuring that they are developed, designed, implemented, and carried out in the day-today operations of an organization.

The board of director’s key responsibilities, besides those described above, is to provide vision, strategic thinking, and planning for the organization. Management has a wide variety of responsibilities as discussed above, which includes not only the operation of the organization and development of programmatic policies in order to accomplish the mission but also to develop policies related to fiscal controls, physical security, behavioral policies (code of conduct, conflict of interest and ethics),

human resources, administrative, and information technology, including social media. When developing policies in these areas it is important to be concise without strangling innovation. Many staff complain that their organization’s policies are too burdensome, confusing or too time consuming to work through. This can cause a culture in which policies are ignored completely by individuals within the organization and therefore the organization develops a vast difference between the written policies and the actual policies within which the organization operates. In most of these cases, the policies were not developed correctly in the first place with little effort put on the effectiveness and efficiency of the policies when they were written. There is no one correct set of rules or methodology for developing policies for an organization. An organization’s policies should be developed specifically for that organization taking into consideration its size, number of employees, segregation of duties, employees’ workloads, consideration of fraud and abuse, and compliance with laws and regulations.

A key element to remember about policies is that employees and other stake holders look to senior management and even the board of directors to be a model of behavior (tone from the top). If the leaders do not follow the prescribed policies then others will believe they do not have to follow the policies either. A perfect example is that of an Executive Director who wears jeans to the office against the organization’s prescribed policy. Within several months very few people will be following the prescribed dress code. The unofficial dress code being set by the Executive Director will prevail. Individuals in the work force will follow the leader and ignore the official policies. If the policy is worth having then it is worth having everyone follow it from the top of the organization down to every single employee. Once you start to deviate from a prescribed policy it is very hard to get back on the right course.

**Some of the key considerations in developing strong and effective organizational policies are:**

- Involve the people affected by the policies

in the development phase to the maximum extent possible.

- Document all policies and make them available to all employees. With today's technology this is very easy to accomplish through the use of an intranet site and web portals. Using technology to disseminate the organization's policies allows individuals at different sites easy access to the most current version of the organization's policies. Additionally, having the organization's policies in a manual that is computerized and maintained centrally makes updating the organization's policies relatively easy.
- Obtain an employee's written acknowledgment affirming that they have read the policies and understand them and accept the responsibility to adhere to them as a condition of employment.
- Make sure that you use one consistent format in documenting the organization's policies.
- Assign effective dates to all newly issued policies and affix the date to the document in order to be able to track when the policies became effective. This can be very important for documentation purposes and discussions with employees that are not following a prescribed policy.
- Write all policies clearly and concisely. The key is to avoid language that uses vague terms or language that is confusing. If you need to use terms that are specific to the organization or that are based on a specific discipline (i.e. accounting or finance) provide definitions for those terms.
- Provide training sessions for all employees in order to ensure that they are aware of the policies. Additionally, keep in mind that these training sessions need to occur on a regular basis as your staff expands or turns over and when there are significant changes to an organization's policies.
- The management team should consider the risk of fraud that the organization might be vulnerable to as policies are developed. The key thought process here is "what could go wrong" in the transaction streams and processes. Questions like this will go a long way in the development of sound and effective policies to prevent fraud and other abuse.
- Everyone needs to go the doctor from time to time for a check-up and an organization's policies are no different. An organization's policies need to be reviewed on a regular basis to ensure that the policies have stayed current with

the needs of the organization and the current environment.

### Some potential sources of feedback on the effectiveness of your policies are:

- External auditors;
- Internal audit procedures;
- Audits by funding sources;
- Feedback from contributors and grantors;
- Supervisors or employees bringing weaknesses to the attention of management;
- New Board Members' or managers' input; and
- Known reported instances of fraud and/or abuse.

When the various types of feedback are received the management team must take them seriously. Consideration should be given to the feedback received from these sources and any necessary updates to policies should be made.

At first glance this may look like a daunting endeavor; however, to avoid feeling overwhelmed, management teams are advised to look at the key processes at each level of their organization as a start. As you go through this process it may be important for the management team to look for insight and direction by reading articles and other literature on the topic, attending seminars, and seeking the help of professionals and consultants in this area. It is important that no matter how you gather the information and insight to develop your organization's policies, at the end of the day they are your organization's policies and the management team needs to take responsibility for them.

The needs, requirements, and circumstances for designing and developing an organization's policies vary from organization to organization, and even within an organization that may be complex. At the same time, addressing and applying the information discussed in this article is the first step in designing appropriate policies for an organization. The next step is the design and implementation of effective procedures to carry out the policies and provide the organization with strong internal controls. Stay tuned for a discussion of this process in the next edition of the Nonprofit Standard. ■

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## EMPLOYEE BENEFITS SECURITY ADMINISTRATION'S (EBSA) 2010 PRIORITIES

**R**ecently the Department of Labor's (DOL) EBSA revealed its priorities for 2010 and at the top of the list is enforcement relating to the timely remittance of employee deferral contributions to defined contribution plans.

The DOL requires that employee deferral contributions and loan repayments be remitted to retirement plans on the earliest date on which they can be reasonably segregated from the company's general assets. Failure to remit such employee contributions and loan repayments to the plan in a timely manner results in a breach of fiduciary duty and is considered to be a prohibited loan to the company. The transactions must be separately reported to the DOL and may result in the payment of lost earnings, excise taxes and penalties by the company, not the plan.

On January 14th, the EBSA issued final regulations setting forth a "safe harbor" for the remittance of employee deferral contributions and loan repayments by small plans (those with under 100 eligible participants). In order to comply with the safe harbor, these contributions and



repayments must be received by the plan "not later than the 7th business day following the day on which such amount is received by the employer (in the case of amounts that a participant or beneficiary pays to an employer), or the 7th business day following the day on which such amount would otherwise have been payable to the participant in cash."

Historically, the DOL has penalized plan sponsors for untimely remittance of employee contributions and loan repayments. However, in a speech on September 14, 2009, at the 2009 American Society of Pension Professionals and Actuaries/DOL Speaks conference in Washington, D.C., the new head of EBSA, Assistant Secretary of Labor Phyllis Borzi, emphasized the DOL's commitment to enforcement activities such as a "contributory plan criminal project" to prosecute violators who fail to forward employee contributions to employee benefit plans. **This program is designed "to target the most egregious and persistent violations and to protect the most vulnerable employee populations by pursuing criminal prosecution of individuals who commit crimes involving contributory health and retirement plans."**

Examples of violations that would fall under this enforcement project include embezzlement of plan funds, including those who withhold money from worker paychecks without depositing them into the plan, and knowingly filing false Form 5500s.

Among the other priorities in 2010, the EBSA also plans to address 401(k) fee disclosure, investment advice regulations and issues regarding target-date funds used as qualified default investments. ■

## FIN 48 Update for Nonprofit Organizations

Nonprofit organizations are now beginning the process of documenting tax positions. Material uncertain tax positions will have to be disclosed in a footnote to the financial statements and that footnote is now required to appear on Schedule D of Form 990. Most organizations were not required to implement FIN 48 (now called ASC 740-10) until years ending on December 31, 2009 or later. Thus, all nonprofits that have not previously implemented this provision will have to do so soon.

What does the organization have to document? Since tax exemption itself is a tax position, an organization must document the certainty of exemption. Since the IRS granted exempt status based on representations made in the application for exemption, a good place to start might be to look at the original Form 1023 or 1024 and document that the organization is doing what it said it was going to do. An inventory of revenue streams can be found on the Form 990 in the section that describes income producing activities. An organization should document that the characterization of those items is appropriate and that it would be more likely than not to be sustained if the organization was audited by taxing authorities. FIN 48 is applicable to tax positions at the federal, state and local and international levels. Alternative investments should be reviewed not only for federal unrelated business income tax issues but should also be reviewed for state tax issues. Finally, an organization should look closely at the expenses that have been used to offset unrelated trade or business income, especially when those expenses come from activities that consistently generate losses. ■

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