



MillerMusmar CPAs Nonprofit Standard

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Nonprofit Standard

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Get Ready to Open a Window - IRS Finalizes New 990

The Internal Revenue Service has released the final 2008 Form 990 and instructions for the 2009 tax season. This revision is the result of a huge undertaking by the IRS to update the form to reflect the complexity of the current tax exempt community and provide government and the public with more clear information about how these organizations are run. Major developments and growth in the sector over the past 30 years have changed the character of nonprofits and require a more complex reporting vehicle. Through hard work at the Service, with cooperation and input from the nonprofit community, IRS has accomplished a redesign that creates a new form that is better organized and, although easier to prepare for many, more complicated for organizations with complex compensation arrangements, related entity structures, and activities in troublesome compliance areas. The IRS' guiding principles for the redesign were established early: *to enhance transparency* by showing a more realistic picture of an organization's activities and presenting this information in a manner allowing a basis for comparison between organizations; *to improve compliance* by adequately reflecting the operations and use of assets to enable the IRS to assess compliance risk; and *to minimize burden* on exempt organizations by making the gathering of information for 990 preparation easier.

Exempt organizations are valuable to the public and government, and viewed positively as long as there is confidence in them. IRS, through the new form, intends to gather better information to maintain this trust. IRS has always looked to the public to help police the sector and it should be noted that IRS is not just updating the 990, but adding new requirements and establishing new law. Some have questioned IRS' authority to request governance

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and other revealing information about an organization's operations, but IRS has made it clear that they are entitled to this information and any return that is not answered entirely will be considered incomplete. Many new questions are asked in a yes/no format to encourage organizations to adopt certain practices or explain themselves. Ensuring you can answer these questions completely and accurately and not be embarrassed by your answers is of key concern.

The main part of the 990 filing, the "core" form, has been expanded to 11 pages with the first page being a summary page that captures key comparative information. In addition to summarizing financial data, the remaining parts of the core form ask important questions about the organization's activities and operations as well as other filings and tax compliance. IRS has also expanded the number and type of questions within the return to require a great deal of narrative information. IRS has even added a new schedule, Schedule O, specifically to capture some of this new detail.

In addition to the core form growth, the 990 Schedules have been expanded from two to a possible 16. These schedules are contingent on an organization's activities so the core form includes a section of questions just to identify these additional filings. The 16 schedules result primarily from a conversion of unstructured information on the old form into specific formatted questions to make reporting more complete and accurate; a break apart of the 501(c)(3) special reporting formerly included

on the old Schedule A; and, the addition of new supplemental reporting on areas of compliance concern.

One of the more complex areas of reporting is compensation. Compensation information is now reported both in the core form and Schedule J. Important to note is that this compensation is reported on the calendar year basis for all organizations beginning with the amounts reported on Forms W-2 and 1099. This is a significant change for fiscal year filers and may result in some confusion since the

compensation information will not be in line with the financial information reported within the core form. Additionally, certain information about the structuring and approval of compensation arrangements and the content and amount of other nontaxable benefits is required to be reported. Also, for the first time non-501(c)(3) organizations will be required to report compensation on non-officer/director employees and contractors.

Throughout the core form and schedules IRS has made modifications to increase and decrease the

A key new definition in the compensation area is that of a "key employee." For purposes of Form 990 reporting, a current key employee is an employee of the organization (other than an officer, director or trustee) who meets all three of the following tests:

- 1) **\$150,000 Test:** Receives reportable compensation from the organization and all related organizations in excess of \$150,000 for the calendar year ending with or within the organization's tax year.
- 2) **Responsibility Test:**
 - (a) has responsibilities, powers or influence over the organization as a whole that is similar to those of officers, directors or trustees;
 - (b) manages a discrete segment or activity of the organization that represents 10 percent or more of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole; or
 - (c) has or shares authority to control or determine 10 percent or more of the organization's capital expenditures, operating budget or compensation for employees.
- 3) **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 calendar year ending with or within the organization's tax year. (If the organization has more than 20 individuals who meet the Responsibility Test and \$150,000 Test, they report as key employees only the 20 individuals that have the highest reportable compensation. This complicates matters since those other than the top 20 get included in the non-officer/director compensation pool.)

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amount of detail required in the financial information. Decreases are to improve the ease of record-keeping. Increases in detail highlight areas of IRS interest and concern and to make data more comparable. Many organizations will be happy to see that dollar thresholds have been added for certain areas: grants are only listed if more than \$5,000 and compensation thresholds have been increased.

Schedule A, which was used to capture all the supplemental reporting by 501(c)(3) organizations in prior years, has been remodeled and now only includes the reason for non-private foundation status and public support calculations. These support tests will need to be refigured for many organizations since they are now prepared on the organization's accounting method, rather than cash basis, and include five years instead of four. Although those with difficulty passing the support tests will have less time to respond to a failure since the calculation includes the current year, organizations may have an option to use a method that doesn't agree to their exemption ruling without IRS approval. New questions guide an organization when public support falls below the 33.33 percent test to help determine if you have become a private foundation. The Advanced Ruling for new organizations has been eliminated since support is now established for a new organization by reporting in the annual 990 filing.

Some of the other new schedules are: Schedule C to capture political and lobbying activities for various types of organizations. Schedule G to report fundraising and gaming.

Schedule M to report practices and details of non-cash contributions; and Schedule R for disclosures regarding related organizations and unrelated partnerships. Schedules F and I separate the reporting of grants between foreign and United States, and Schedule F includes additional details about foreign activities by region. Schedule H includes key information regarding hospitals. Schedule K addresses tax

exempt bond financing. Schedule H and K allow only certain information to be reported on the 2008 form as additional time was deemed necessary for organizations with these items to comply.

Timing of the new form preparation is important as IRS has suggested an organization's Board receive the 990 before filing, and asks about the details of the 990 review

Because many parts of the 990 form and schedules depend upon certain definitions and relationships established in other areas of the return it is important to prepare the return in a proper sequence. Some suggestions for the order are as follows:

1. See the instructions for Schedule R, Related Organizations and Unrelated Partnerships, and determine the organization's related organizations required to be listed in Schedule R.
2. Determine the organization's officers, directors, trustees, key employees (ODTKE), and five highest compensated employees required to be listed on Form 990, Part VII, Section A, Compensation of Officers, Directors, Trustees, Key Employees.
3. Complete the financial information in Parts VIII (Revenue), IX (Functional Expenses), and X (Balance Sheet) of Form 990.
4. Complete Parts III (Program Service Accomplishments), V (Other Filings and Tax Compliance), VII (Compensation of Highest Compensated Employees, and Independent Contractors), and XI (Financial Statements and Reporting) of Form 990.
5. See the instructions for Schedule L, Transactions with Interested Persons, and complete Schedule L, if required.
6. Complete Part VI (Governance, Management, and Disclosure) of Form 990. Transactions reported on Schedule L are relevant to determining independence of members of the governing body under Form 990, Part VI, line 1b.
7. Complete Part I (Summary) of Form 990 based on information derived from other parts of the form.
8. Complete Part IV (Checklist of Required Schedules) of Form 990 to determine which schedules must be completed by the organization.
9. Complete applicable schedules (for "Yes" boxes that were checked in Part IV). Use Schedule O, Supplemental Information, to provide required supplemental information and other narrative explanations.

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process. Many will need to time the financial audit and tax preparation around executive and board meeting schedules and make time to have some additional people involved in compiling and reviewing the new 990 information. The new governance and other policy disclosures should be reviewed now, and since W-2s and 1099s should be complete for 2008, many organizations can tackle the new calendar year compensation reporting. Take care as the people reported will be dependent on their roles during the organization's *fiscal* year.

Organizations with group exemptions or that have joint ventures or disregarded entities should be sure to check out the IRS Appendices E and F for special rules for preparing the new form and schedules. These guidelines can affect both the affiliate and main organization's filings.

Smaller organizations can utilize the phase-in period that permits them to use the simpler Form 990-EZ, but should consider whether completing the regular 990 is more appropriate for submission to states and funding resources. Most organizations can use the 990-EZ for 2008 returns when gross receipts are more than \$25,000, but less than \$1 million and total assets are less than \$2.5 million. However, even the simpler 990-EZ requires preparation of certain of the new schedules. Most organizations below the 990 and 990-EZ filing threshold are required to file the 990-N e-Postcard as of the 2008 tax season. The Pension Protection Act of 2006 added this filing requirement to ensure that the IRS

and potential donors have current information about organizations. This is important because any organization not filing 990, 990-EZ or 990-N, as required, will lose its exemption after three years.

The changes to the Form 990 are comprehensive so organizations should prepare now to ensure they can gather the new information. Many will want to consult with their accountants and lawyers as well as involve other organization personnel since the new form goes beyond financial information and discloses the intricacies of the organization and its operations. Also remember that the 990 is a window into the organization. You will want to ensure it paints the best picture of your organization and its accomplishments.

Private Foundations and Deferred Tax Assets

Given recent major declines in the securities markets, it is likely that many private foundations will be in an 'under water' investment position as of balance sheet dates after about August 2008, and for the foreseeable future. That is, the current fair value of their portfolio will be less than their tax basis¹ in those investments. Most investments are reported in their financial statements at fair value under SFAS 124.

Deferred tax assets

Private foundations are subject to an excise tax² of 2% (in some cases it may be 1%) on their net investment income, including net realized (but not unrealized) capital gains. When the book basis of a private foundation's portfolio is above its tax basis, they record a deferred tax liability equal to the tax they will pay when they sell their appreciated securities at a gain in a future period.³

When a foundation sells securities at a loss, they may offset that realized loss against any realized capital gains (but not against investment income or unrelated business income) in the same period (there is no carryforward or carry-back provision) for purposes of calculating the excise tax. However for securities owned at year end whose fair value is below their tax basis, no tax loss can be claimed until such securities are sold in the future. Accordingly, a private foundation in an under water position must record a deferred tax asset (DTA) equal to the tax saving they would realize if the securities were to be sold at a loss in the future.³

Realizability of a deferred tax asset

Will these foundations then have to reserve the DTA? In an operating

business, realization of a DTA is dependent on the ability of the business to generate future taxable income against which the current loss can be carried forward. This ability is something that management can plan for and auditors can assess the likelihood of. However in a private foundation, realization of a DTA is almost wholly dependent on a factor over which the foundation has no control - i.e., future performance of the securities markets.

There are two ways for a private foundation to realize a DTA:

1. It can sell the depreciated securities in a future period at a loss and claim the capital loss for tax purposes. However that will only result in a tax benefit if the foundation is also able to sell other securities at a capital gain in the same period⁴. The capital loss will offset the capital gain and a tax saving will result.
2. It can hold the securities and wait until the value of the depreciated securities returns in a future period to an amount at least equal to the tax basis. It will then record a book unrealized capital gain in that period but will owe no tax on that gain because there will be no taxable realized gain.

In both cases the ability to realize a tax benefit from the DTA depends on the securities markets recovering enough to either generate taxable gains in other securities (Case 1), or restore the value of the depreciated securities back to or above their basis (Case 2).

Regarding Case 1: Although a foundation can control the timing of a tax loss by selling depreciated securities⁵, most foundations have little incentive to do so, and in fact have an incentive not to sell (to avoid locking in unrealized losses), i.e., their incentive is to hold securities indefinitely in the hope that the markets will recover. Most foundations also have the ability to hold securities indefinitely since their payout usually comes mostly from current income.

Recovery of the securities markets Case 2: This is, for all practical purposes, impossible to predict. Everyone would like to, but few are able with any reliability. Accordingly, for purposes of consideration of realizability of a DTA, accountants will (after appropriate consideration and documentation as required by SFAS 109) in most cases likely conclude that such realizability is uncertain, and hence the DTA would have to be fully reserved in accordance with Paragraphs 17e and 20-25 of SFAS 109.

For more information, please contact MillerMusmar at 703.437.8877.

¹ Tax basis is generally cost, or, in some cases for donated securities, the basis in the hands of the donor of the securities.

² Although this is called an excise tax, it is covered by SFAS 109 because it is calculated based on a type of income.

³ Since it is impossible to know the future selling price, the tax is calculated assuming that the securities will be sold at their market price on the balance sheet date.

⁴ This is the scenario contemplated in Para. 24b of SFAS 109.

⁵ This would be considered a tax planning strategy as contemplated in Para. 21d of SFAS 109.

Harsh New Rules for Thrift Stores

Passed in August 2008, the Consumer Protection Safety Information Act (CPSIA) was Congress's attempt to protect consumers from purchasing dangerous children's products being sold in the United States. Toys and clothing imported from other countries were found to contain high levels of lead as well as phthalates, chemicals that are used to soften plastics, resulting in large recalls.

Under the original CPSIA regulations, manufacturers, retailers and resellers (thrift stores, charities holding used clothing sales to raise funds, etc.) of any children's products for ages 12 and under are required to verify that the products being sold have not been recalled as well as meet the new lead and phthalates standards as set forth in CPSIA. If an organization is found in violation of the new regulations, it can be fined up to \$100,000 per violation. The regulations are effective beginning February 10, 2009.

Many charities and thrift stores had expressed great concern to the Consumer Product Safety Commission (CPSC) regarding the new verification requirements of products under CPSIA. These organizations receive large numbers of used children's products daily. Many stated that they do not have the capability or resources to verify donated children's products meet the new standards under CPSIA. In fact, many items received are one-of-a-kind and would be destroyed or otherwise damaged during verification testing. As a result, some thrift stores were considering not selling

used children's products, a significant portion of their revenue base, due to legal concerns.

Recent guidance issued for resellers, thrift and consignment stores from CPSC

Due to the overwhelming number of comments received from thrift stores and charities as well as other resellers of used children's products, the CPSC issued guidance for these organizations on January 8th. Under this guidance, CPSC states, "Sellers of used children's products, such as thrift stores and consignment stores, are not required to certify that those products meet the new lead limits, phthalates standard or new toy standard."

Although resellers such as thrift stores will not be required to test the children's products for new lead limitations, they cannot sell products that exceed the lead limitation requirements. If an organization is caught violating the standards, it can still be subject to the \$100,000 fine per violation.

What can thrift stores do?

If the resellers do not have the ability to test the children's products, CPSC is recommending that resellers avoid selling certain troublesome items such as:

- Recalled children's products such as play yards and cribs
- Products possibly containing lead such as metal toys, painted toys, children's jewelry
- Toys that can break into small parts
- Toys with no age warnings on them
- Stuffed toys with small parts (eyes, noses, etc.) that could be easily pulled off and become a choking hazard

Resellers can also check to see what products have been recalled on CPSC's website (www.cpsc.gov).

IRS Issues Exempt Organizations Annual Report and FY 2009 Workplan

The IRS Exempt Organizations (EO) unit has just published its first Annual Report. The Report contains the accomplishments of FY 2008, statistics and information about how the unit operates, and its FY 2009 Workplan. The Annual Report also lists several pages of accomplishments of EO from FY 99 to the present.

How EO Operates

EO has three divisions with a total of 838 employees. The three divisions are: Examinations; Rulings and Agreements; and Customer Education and Outreach.

The Examination Division is responsible for IRS audits, compliance checks and follow-up reviews of operations. IRS touts that it is doing a better job of targeting noncompliant organizations for audit. Better targeting is demonstrated in the Report with statistics that show in 2004, 63% of the IRS EO audits resulted in changes to the organizations' tax positions whereas in 2008, 80% of the examinations resulted in changes that were favorable to the government.

The Rulings and Agreements division reviews applications for exemption, issues private letter rulings, provides technical advice and assists with providing formal guidance such as regulations. Rulings and Agreements also produces technical guidesheets to provide guidance and consistency in the application of the tax laws.

IRS had received many complaints about the long delays in processing applications for exemption. The Report indicates that in 2008 the IRS introduced some strategies to speed up the handling of applications for exemption and also to communicate better with applicants. The new IRS program divides cases into three groups: those applications that can be processed without any additional information; those that require minimal additional information; and those applications that require full development. With the new procedures, IRS was able to close 59% of the cases in 2008 without full development compared to only 34% of the cases in 2004.

The third division, Customer Education and Outreach, is responsible for tax publications, the IRS website and helping to educate exempt organizations about their responsibilities. This division is responsible for publishing the *EO Update*, a free online subscription newsletter. This group has done an outstanding job as can be seen at the IRS website, www.irs.gov. Simply click on the "Charities & Non-Profits" link at top of the homepage for a wealth of information.

2008 Accomplishments and 2009 Plans

Form 990 Revision

The Form 990 had not had a major overhaul in almost 30 years. The new form will require information that has never before been required. The major EO accomplishment of FY 2008 was the revision of the Form 990 and its instructions. The revision to Form 990 began in June 2007 when a draft form was released to the public for comment. Various other drafts followed, including drafts of instructions, culminating in the finally released-form and instructions in December 2008. IRS will be anxiously awaiting the first returns to arrive this May. In 2009 the Service will help with the transition by providing speakers, workshops, tax forums, online mini-courses and webinars.

Form 990-N (e-Postcard)

In 2008 IRS instituted the new electronic filing system for small organizations that did not previously have a filing requirement because they had less than \$25,000 of gross receipts. Congress had legislated in the Pension Protection Act of 2006 (PPA) that these organizations would now have to provide certain information in order to not automatically have exemption revoked after three consecutive years of non-filing. In 2009, IRS will continue to reach out to small tax-exempt organizations with this new

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mandatory filing requirement. Organizations with small affiliates should make sure that those organizations are in compliance.

Federal and State Project

PPA also gave IRS the authority to share information with state agencies in order to provide more effective enforcement for both the federal and state governments. The law tightened security and safeguard requirements in order to allow a state to participate in the sharing of information. In 2008, IRS made 196 disclosures to state agencies, such as which organizations had tax exemptions revoked and organizations where tax exemption had been denied. In FY 2008, the states referred 83 cases to IRS on issues such as private benefit and inurement, political activities and employment taxes.

Public Charity Status

In 2008 the IRS eliminated the “advance ruling period” for organizations and granted an initial five-year period as a public charity. During the five-year period support is reported on the Form 990 and upon the fifth year and thereafter an organization has to prove that it has enough public support to keep its public charity status. In 2009, the IRS will develop procedures to monitor the public charity status of organizations.

Compliance Initiatives

Exempt Organizations Voluntary Compliance Program

In 2009, IRS EO will work with Treasury to issue new guidance in various areas including an Exempt

Organizations Voluntary Compliance Program (EOVCP). Since the PPA law provides for automatic revocation of exempt status if an organization does not file for three years in a row, IRS will develop a program whereby non-filers can come into compliance before the automatic revocation process begins, and potentially permit a reduction of late filing penalties to encourage compliance.

Governance

IRS believes that a well-governed organization is more likely to be tax compliant and this is the basis for the management and governance questions that are now on the Form 990. IRS would like to follow-up on its hypothesis and; therefore, EO will develop a checklist to be used after an examination to determine if governance practices impacted the compliance issues identified in the examination. The checklist will also be used to educate organizations. Furthermore, IRS plans to develop a training program to educate its employees about governance issues in the determination and ruling processes. Finally, IRS will identify whether governance questions could be used in compliance initiatives such as for executive compensation, transactions with interested persons, solicitation of noncash contributions or diversion or misuse of organization assets.

On-Going Compliance Initiatives

Colleges and Universities

IRS developed a compliance check questionnaire that was sent out to 400 colleges and universities in

October 2008. The focus of the questionnaire is on unrelated activities and expenses, endowments, and executive compensation practices. The completed questionnaires will be returned to IRS in February. IRS will then analyze the information and publish the results in a report. IRS will also conduct examinations on a sample of the organizations questioned.

Political Activities Compliance Initiative (PACI)

In 2009 IRS will publish a report that summarizes the allegations of political intervention during the 2008 election, reports on the ongoing efforts of IRS and makes recommendations for the future.

Hospitals

IRS had a compliance check questionnaire for the hospital industry focusing on community benefit and executive compensation and released an interim report in 2007 with the results of that study. The report recommended further research regarding differences in community benefit expenditure amounts and types taking into account varying demographics such as urban versus rural. The results of that research are expected to be released in the first quarter of 2009.

Community Foundations

IRS is studying this sector of the exempt organization community, with a particular focus on grant-making and donor advised funds. IRS sent questionnaires to over 3,000 organizations to learn about their operations and found that many may not actually be community foundations. In 2009, IRS will design a project to properly classify

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these organizations and also will be examining organizations identified through the compliance checks.

Non-Filer Initiatives— Ongoing

In this program, EO will target three areas:

Gaming

IRS will review whether organizations with gaming activities are filing returns, failing to report activity, withholding income taxes, paying employment taxes and reporting unrelated business income.

Employment Taxes and Combined Annual Wage Reporting

This program compares Form W-2 data reported to the Social Security Administration to that reported to IRS. Through this matching program IRS seeks to obtain delinquent employment tax returns and rectify inconsistencies.

Form 990-Non-Filers

This program reviews intermittently filed returns with high dollar amounts; Forms 990-T filed without corresponding Forms 990; and large contributions claimed with Forms 1098-C (Contributions of Motor Vehicles, Boats and Airplanes) and no Form 990 filed by the donee organization.

New Compliance Projects

In 2009 the IRS EO unit will initiate new compliance projects including the following:

Charitable Spending Initiative

IRS will study the sources and uses of funds raised and initially focus on organizations that have unusual fundraising levels and unrelated trade or business activity and relatively low levels of program service expenditures.

Gifts In-Kind

IRS will study valuation issues surrounding non-cash gifts that are given to organizations that give the items to other charities.

Mutual Organizations

IRS will study these organizations that include benevolent life insurances associations, ditch or irrigation companies, telephone and electric coops. All are exempt under IRC 501(c)(12) and have specific member income tests.

Student Loan Organizations

In light of growth of funding needs in the current economic times, IRS will review student loan organizations, especially those with related for-profit subsidiaries. Executive compensation will also be studied.

Summary

IRS EO has undertaken many projects to improve its oversight of the exempt organization community. These projects provide IRS with extensive information that can sometimes result in changes to tax laws. Organizations should be aware of how information is used and should attempt to be in compliance with the law.