

**CHALLENGES OF THE NEW FORM 990 FOR NONPROFITS**

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## **I. INTRODUCTION.**

### **A. Background.**

1. On December 20, 2007, the IRS released a redesigned draft Form 990 followed by draft instructions for the redesigned Form 990 on April 8, 2008.
2. On December 23, 2008, the IRS finalized the Form 990 and instructions for filing for 2009 tax years.
3. In early 2010, the IRS released the Form 990 for the 2009 tax year noting certain additional changes to the form for the 2009 filing year. See the attachment for the IRS summary of the significant changes on the 2009 Form 990 and schedules.
4. On January 21, 2010, the IRS issued News Release 2010-10 reminding tax-exempt organizations to file their annual information returns timely noting that in 2010 the tax-exempt status of any nonprofit organization that has failed to file its exemption application during the last three years will be revoked under new laws enacted as part of the Pension Protection Act of 2006. A list of organizations whose exemption is so revoked will be made available to the public as well as state charity and tax officials.

### **B. Reasons for Redesign.**

1. First redesign of the Form 990 since 1979.
2. Form 990 had not kept pace with changes in the exempt organizations sector and the law applicable to exempt organizations.
3. Piecemeal revisions of the Form 990 had rendered the Form 990 less helpful to the exempt organization sector and the public.

### **C. Goals for the Redesign of the Form 990.**

1. Reflect manner in which the exempt organization sector operates in the 21<sup>st</sup> century.
2. Emphasize the increasing size, diversity, and complexity of the exempt organization sector.
3. Enhance transparency and accountability.
4. Promote compliance.

5. Minimize filing burden on filing.

**D. Guiding Principles for Redesign.** The redesign of the Form 990 was based on three guiding principles.

1. Enhancing transparency by providing the IRS and the public with a realistic picture of the organization and its operations along with the basis for comparing the organization to similar organizations.
2. Promoting compliance by insuring that the Form 990 accurately reflects the organization's operations and use of assets, enabling the IRS to efficiently assess the risk of noncompliance.
3. Minimizing the burden on filing organizations by asking questions in a manner that makes it relatively easy to fill out the form and that do not impose unwarranted additional recordkeeping or information gathering burdens to obtain and substantiate the reported information.

**E. Overview of Revised Form 990.**

1. The revised Form 990 consists of a 12 page core form and a series of 16 schedules.
2. The structure of the redesigned Form 990 provides a method for organizations to share publicly how their operations and finances are consistent with their missions.
3. The redesigned Form 990 provides insights into the issues of concern to the IRS and Congress.
4. The redesigned Form 990 provides a great deal of information to the IRS that may be used in enforcement actions against organizations.

**F. Filing Requirements.**

1. Private foundations must file Form 990-PF.
2. Supporting organizations must file either Form 990 or Form 990-EZ.
3. Organizations (other than private foundations and supporting organizations) whose gross receipts are normally below \$25,000 do not need to file Form 990 or 990-EZ, but instead are required to make an electronic notice filing on Form 990-N.
4. Organizations (other than private foundations and supporting organizations) must file either Form 990 or Form 990-EZ.

5. Who must file the new Form 990?
  - a. For the 2008 tax year, organizations with over \$1 million in gross receipts or total assets over \$2.5 million were required to use the new Form 990.
  - b. For the 2009 tax year, organization with over \$500,000 in gross receipts or total assets over \$1.25 million must use the new Form 990.
  - c. For the 2010 tax year, organizations with over \$200,000 in gross receipts or total assets over \$500,000 must use the new Form 990.
6. Organizations (other than private foundations) that are not required to file the new Form 990 must file either Form 990-EZ or, in the case of organizations other than supporting organizations, the Form 990-N.
7. Failure to file a Form 990, Form 990-EZ, Form 990-PF, or Form 990-N for three consecutive years (beginning in 2007) will result in automatic loss of exempt status.

## II. THE CORE FORM

- A. **Overview.** The core form must be completed by all filing organizations. Major changes include:
  1. A front page summary with key financial and operating information.
  2. A new section on governance matters and policies.
  3. Revised compensation reporting.
  4. Revised reporting on related organizations.
- B. **Part I – Summary.** The focus of Part I is to help the public gain more and better knowledge of the organization.
  1. **Before the Summary.**
    - a. The top of page 1, Questions A-M provide space for a variety of introductory information, much of which is new to the Form 990.
    - b. There is space for an assumed name, a box to check if the organization's name has changed, a box for the type of entity, the year of formation, and the state of legal domicile.

2. **The Summary.** The Summary is designed to enhance transparency by providing key information on the first page for the benefit of the public.
  - a. The Summary summarizes information found elsewhere on the Form 990. It is a snapshot of the key financial, governance, and operational information regarding the organization.
  - b. The Summary includes information regarding:
    - (1) The organization's mission.
    - (2) Unrelated business income revenue and professional fundraising expenses.
    - (3) Number of directors or trustees and number of independent directors or trustees.
- C. **Part II – Signature Block.** The signature block has been moved from the end of the Form 990 to the beginning of the Form 990.
- D. **Part III – Statement of Program Service Accomplishments.** Part III allows the organization to describe briefly its mission (again), new activities undertaken during the year, any activities ceased during the year, and three largest (by expense) program services.
  1. The mission set forth in this Part should be consistent with the mission as set forth in Part I.
  2. New activities, activities no longer engaged in, and program services other than the three largest should be described on Schedule O.
  3. This section offers a great opportunity for the organization to promote its accomplishments to the public.
- E. **Part IV – Checklist of Required Schedules.** This checklist is designed to assist the organization in determining which of the 16 schedules to the Form 990 it is required to file. By completing the checklist, the organization will know exactly what schedules to complete and file as the list is comprehensive.
  1. The goal of this Part of the core form is to ease the filing burden by listing all of the trigger questions for schedules in one place to assist organizations in determining which schedules they are required to complete.

2. The trigger questions are sequenced in a logical way, going through each schedule alphabetically and each part of each schedule.
  3. Several changes for the 2009 form include:
    - a. Identifying whether the organization was included in separate or consolidated independent audited financial statements for the tax year.
    - b. Requiring organizations that operate a hospital to complete all of Schedule H, and organizations that have tax exempt bonds of more than \$100,000 to complete all of Schedule K.
    - c. Noting that all organizations are required to file Schedule O with explanations for Part VI, lines 11 and 19.
- F. Part V – Statements Reporting Other IRS Filings and Tax Compliance.** Part V addresses various IRS filings and tax compliance matters that apply to exempt organizations. It is designed to alert the organization to potential federal tax compliance matters and filing obligations and collect important federal tax information in a single place.
1. This Part requests information that should alert organizations to compliance issues regarding employment taxes, unrelated business taxable income, foreign bank account reporting requirements, solicitation disclosures, donor advised funds, and supporting organizations.
  2. This Part will also alert the IRS to compliance issues and potentially trigger investigations.
- G. Part VI – Governance, Management, and Disclosure.** This is one of the more controversial provisions of the new Form 990. It incorporates the idea that good governance and accountability practices provide safeguards to ensure that organizations will use their assets in a manner consistent with their exempt purposes. In addition to seeking significant amounts of information regarding the governing body of the organization, it also asks whether the organization has a number of policies, including a conflict of interest and a whistleblower policy. Many of these questions do not pertain to requirements for tax exemption under federal law, but the IRS believes it has the authority to ask these questions and that good governance practices promote compliance with the tax laws. The IRS has indicated that organizations that do not have these policies may run a greater risk of audit depending upon other responses on the Form 990.
1. The first Section of the new governance part of the Form 990 requests answers to a number of very specific questions about the

governing body and management of the organizations. These questions include:

- a.** The number of voting members of the Board.
  - b.** The number of voting directors or trustees who are independent.
  - c.** Whether any officer, director, trustee, or key employee has a family or business relationship with any other officer, director, trustee, or key employee.
  - d.** Whether the organization delegates control over management duties customarily performed by or under the direct supervision of officers, directors, trustees, or key employees to a management company or other person.
  - e.** Whether the organization made any significant changes to its Articles of Incorporation or Bylaws since the filing of its last Form 990.
  - f.** Whether the organization became aware of any material diversion of its assets during the year.
  - g.** Whether the organization has any members or stockholders and, if so, whether they elect the directors or trustees or have any approval rights over actions by the governing board.
  - h.** Whether the organization contemporaneously documents the meetings of the governing board and any of its committees during the year.
  - i.** Whether there is any director, trustee, or officer who cannot be reached at the organization's mailing address.
- 2.** The second Section of the new governance part of the Form 990 requests answers to a number of very specific questions about certain policies. These questions include:
  - a.** Whether the organization has local chapters or affiliates and, if so, whether the organization has written policies and procedures governing their activities to ensure that their operations are consistent with those of the organization.
  - b.** Whether a copy of the Form 990 was provided to the governing board before it was filed (with a description of the process to be included on supplemental Schedule O).

- c.** Whether the organization has a written conflict of interest policy and, if so, whether the policy requires directors, trustees, officers, and key employees to disclose annually any interests they may have that could give rise to a conflict.
  - d.** If the organization has a written conflict of interest policy, a description of the manner in which the organization regularly and consistently monitors and enforces compliance with the policy.
  - e.** Whether the organization has a written whistleblower policy.
  - f.** Whether the process for determining the compensation of the persons described below included a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision (to be accompanied on supplemental Schedule O by a description of this process).

    - (1) The organization's President.
    - (2) Other officers and key employees of the organization.
  - g.** Whether the organization invested in or contributed assets to, or participated in, a joint venture or similar arrangement and, if so, whether the organization has adopted a written policy or procedure requiring it to evaluate its participating in such arrangements under applicable federal tax law and has taken steps to safeguard the organization's exempt status with respect to such arrangements.
- 3.** The final section on the new governance part of the Form 990 combines questions from the old Form 990 about the public disclosure of the Form 990 and the Form 990-T (used to report unrelated business income and now required to be made publicly available) and any state filings of the Form 990. The Form 990 also asks for information to be set forth on supplemental Schedule O describing whether and how, if appropriate, the organization makes the following documents available to the public: Articles of Incorporation, Bylaws, conflict of interest policy, and financial statements. Significantly, there is no federal law requiring that these documents be made available to the public.
- 4.** This Part encourages information to be reported on Schedule O regarding whether and how the organization will make changes to

its governing documents, conflict of interest policy, and financial statements publicly available.

**H. Part VII – Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors.**

1. The new Form 990 expands the number of persons whose compensation must be reported by the organization and provides for further specifics on the compensation of certain individuals. Certain basic compensation information must be reported by the organization. The core Form 990 (i.e., the part of the Form that must be completed by all filing organizations) requires disclosure about compensation to certain person as reported on a Form W-2 or Form 1099. The list of persons whose compensation must be disclosed is expanded on the new Form 990 and includes:
  - a. Current officers, directors, and trustees.
  - b. Up to 20 key employees (who are not officers, directors, or trustees) who are defined as persons with certain responsibilities who have reportable compensation greater than \$150,000 from the organization and related entities.
  - c. The five highest paid current employees whose reportable compensation exceeds \$100,000.
  - d. Former directors or trustees whose reportable compensation exceeds \$10,000.
2. With respect to each of these persons, the organization must disclose on the Form 990 the name and title of the person, average weekly hours, reportable compensation from the organization, reportable compensation from related organization(s), and the estimated amount of other compensation from the organization and related organization(s), such as housing, education assistance, or insurance. In addition, the organization must identify the total number of individuals being paid more than \$100,000 regardless of whether specifically reported on the Form 990.
3. The organization is also required to identify any independent contractors, such as law firms, accounting firms, investment managers, and other consultants, who receive more than \$100,000 from the organization and must also identify the services provided and the amount of compensation paid.
4. This Part also contains a series of trigger questions to determine whether the organization must also file Schedule J.

- I. **Part VIII – Statement of Revenue.**
  - 1. This Part requires a detailed breakdown of the various general types of revenues, including contributions and gifts and grants, program service revenue, and other types of revenue.
  - 2. This Part also asks organizations to report codes from Appendix J, which are derived from the North American Industry Classification System (NAICS).
  
- J. **Part IX – Statement of Functional Expenses.**
  - 1. This Part requires a detailed breakdown of various general types of expenses, with the total amounts broken down into program service expenses, management and general expenses, and fundraising expenses.
  - 2. This Part also includes a line for reporting various technology-related expenses.
  
- K. **Part X – Balance Sheets.** This Part provides a comparison of assets and liabilities at the beginning of the year and the end of the year.
  
- L. **Part XI – Financial Statements and Reporting.** This is a new Part on financial statements and reporting.
  - 1. This Part examines the oversight the organization engages in with respect to its revenues, expenses, and balance sheet, as set forth in Parts VIII, IX, and X.
  - 2. It seeks information regarding independent audits, audits required as a result of federal grants, the accounting method used to prepare the Form 990, and whether the financial statements were issued on a separate basis, consolidated basis, or both.

### III. SCHEDULES TO FORM 990.

#### A. Schedule A – Public Charity Status and Public Support.

1. This Schedule is filed by Section 501(c)(3) organizations.
2. Part I of this Schedule requires the organization to describe the basis for its status as a public charity. Notably, it requires more detailed information than previously required on the old Form 990, including additional information on supporting organizations.
3. Parts II and III of this Schedule requires financial information to show that the organization meets the public support tests.
  - a. There are separate support schedules for 509(a)(1) and 509(a)(2) organization.
  - b. The years of support required to be reported is increases from four to five years.
  - c. If the organization is relying on the facts and circumstances test for 509(a)(1) status because its public support is below one third, the organization must explain how it meets the facts and circumstances test.
  - d. If the organization fails to meet the tests and is a private foundation, it has to acknowledge this fact and the instructions require the organization to file a Form 990-PF.
4. Other information previously reported on Schedule A has been moved elsewhere.

**B. Schedule B – Schedule of Contributors.** This Schedule remains much the same as the former Schedule B, with the clarification that if an organization knows the identity of a donor, it should specifically identify the donor rather than reporting the donor as “anonymous.”

**C. Schedule C – Political Campaign and Lobbying Activities.** In general, much of this Schedule is similar to Schedule C on the old Form 990. There are, however, a few substantive changes.

1. **Part I-A.** The focus of these questions is to determine if the primary purpose of the organization is political activity, which will, in general, endanger the tax-exempt status. Note that the request for information regarding the number of volunteer hours may, according to the instructions, be an estimate.

2. **Part I-C.** Again, the focus of these questions is to determine if the primary purpose of the organization is political activity. However, because for these organizations some political activity is permissible, the questions elicit further information regarding the organization's political activity.
- D. Schedule D – Supplemental Financial Statements.** The focus of this Schedule is the finances of the organization.
1. This Schedule requests detailed information about donor-advised funds, conservation easements, art, historical treasures, trust, escrow, and custodial arrangements, endowments, and investments.
  2. It is designed to eliminate attachments, increase compliance, and standardize reporting.
  3. Asset by asset reporting of investments is eliminated and instead reporting by classes is permitted with certain exceptions.
  4. Part X specifically asks for the text of footnotes in financial statements reporting liability for uncertain positions under FIN 48. Essentially, the IRS is requesting that organizations disclose any tax positions that they are uncertain about – which allows the IRS to focus immediately on the most potentially damaging issues.
- E. Schedule E – Schools.** The information on this Schedule was previously included on Schedule A.
- F. Schedule F – Statement of Activities Outside the United States.**
1. Previously, the Form 990 had only a few questions about overseas activity and asked about the number of offices, bank accounts, and overseas grants.
  2. The new Form 990 requires disclosure of substantially more information. All foreign activities or organizations engaged in fundraising or grant-making outside the United States must also identify and describe the activity and foreign expenditures, including any grants to foreign individuals, organizations, or governments.
  3. The organization must also provide detail about its procedures for engaging in activities and making grants.

**G. Schedule G – Fundraising and Gaming.**

1. This Schedule solicits information about fundraising methods and gaming activities and the expenses associated with these activities.
2. Generally, the Schedule takes information from various places on the prior Form 990 and compiles it in one place.
3. Part I of this Schedule, however, is new and requires more detail on types of fundraising activities and information on the use of professional fundraisers.

**H. Schedule H – Hospitals.** The reporting requirements for nonprofit hospitals increases significantly on the new Form 990, although there is a phase-in of the reporting requirements.

1. Only Part V of Schedule H was required to be completed for the 2008 tax year. It requires a list of the name, address, and other information for each facility operated by the hospital.
2. Part I focuses on charity care and community benefit, which has become an increasingly important issue for the IRS and Congress over the last few years. The new Form 990 is one way in which the IRS is examining whether hospitals are “charitable” enough.
  - a. This Part requires reporting on charity care and community benefit, including the cost, revenue offset, and net cost of charity care, lack of reimbursement from Medicaid, community health improvement services, subsidized health services, research, and cash and in-kind donations.
  - b. Also, the organization must state whether it prepares an annual community benefit report and if it has a charity care policy (and, if so, how it communicates the policy to patients).
  - c. Other Parts of Schedule H require the reporting of community building activities, information about management companies and joint ventures, billings and collections information, existence of a written debt collection policy, a description of emergency room policies and procedures (including hours of operation), needs assessments, and a description of the community served.

**I. Schedule I – Grants and Other Assistance to Organizations, Governments, and Individuals in the U.S.** This Schedule generally compiles information previously captured in various places on the old Form 990 and compiles it

in one place. But, the information on grant selection and substantiation and monitoring of the use of grant funds is new.

**J. Schedule J – Compensation Information.**

1. If certain requirements are met, the organization must provide additional and more detailed compensation information on new Schedule J. Schedule J must be filed if (1) the organization is required to list any former officer, director, trustee, key employee, or five highest compensated employees in the core Form 990; (2) the sum of reportable compensation and other compensation paid to any individual listed in the core Form 990 exceeds \$150,000; or (3) the organization participated in an arrangement in which an unrelated organization paid compensation to at least one of its officers, directors, trustees, key employees, or five highest compensated employees for services performed for the organization.
2. For persons required to be reported on Schedule J, the organization must breakdown its reporting of executive compensation into components, including regular wages and salary, bonus and incentive compensation, other reportable compensation, deferred compensation, fringe or nontaxable benefits, including expense allowances and reimbursements.
3. Schedule J also requests information about the organization's general compensation practices.
  - a. For any persons whose compensation was reported in the core part of the Form 990, the organization is required to disclose whether any of the following were provided by the organization to the person:
    - (1) First-class or charter travel.
    - (2) Travel for companions.
    - (3) Tax indemnification and gross up payments.
    - (4) Discretionary spending account.
    - (5) Housing allowance or residence for personal use.
    - (6) Payments for business use of personal residence.
    - (7) Health or social club dues or initiation fees.
    - (8) Personal services (e.g., maid, chauffeur, chef)



provide further explanation (whether for the benefit of the public or the IRS) regarding a particular compensation package, practice, or arrangement.

**K. Schedule K – Supplemental Information on Tax-Exempt Bonds.**

1. Only Part I was required to be completed for the 2008 tax year. Organizations are now required to complete the entire Schedule.
2. The Schedule requires substantial detail on every bond including the purpose of the bond, amount outstanding, proceeds, and third-party use of the facility.

**L. Schedule L – Transactions with Interested Persons.**

1. In furtherance of the IRS's concerns about conflicts of interest (and the possibility of excess benefit transactions between the organization and persons in a position to substantially influence the organization), the new Form 990 contains a new Schedule L requesting information about transactions between the organization and certain interested persons.
2. This new Schedule L:
  - a. Requires reporting of:
    - (1) excess benefit transactions,
    - (2) outstanding loans to or from current or former directors or trustees, officers, key employees, highly compensated employees, or disqualified persons
    - (3) grants or assistance benefiting an officer, director, trustee, key employee, or substantial contributor, or persons related to them,
    - (4) direct and indirect business relationships with a current or former officer, director, trustee, or key employee or entities in which there is more than a 35% ownership interest by such persons,
    - (5) direct or indirect business relationships of family members of a current or former officer, director, trustee, or key employee, and
    - (6) service by a current or former officer, director, trustee, or key employee as an officer, director, trustee, key employee, partner or member of an

entity (or a shareholder in a professional corporation) in an entity doing business with the organization.

- b. Focuses on whether the transactions were arm's length and at fair market value for purposes of the excess benefit transactions rules; and
- c. Alerts the IRS to potential excess benefit transactions and the corresponding tax revenues in the form of excise taxes on excess benefits paid to "insiders."

**M. Schedule M – Non-Cash Contributions.** This Schedule collects aggregate annual information on various noncash contributions, as well as noncash fundraising policies, practices, and substantiation. In general, it mixes a requirement of transparency with a policy proposal to require certain governance procedures.

- 1. This Schedule applies to all tax-exempt organizations, not just section 501(c)(3) and applies only to contributions of goods not services.
- 2. The Schedule breaks out non-cash contributions across categories, such as works of art, art and historic treasures, books and publications, intellectual property, and taxidermy.
- 3. The Schedule requests information regarding gift acceptance policies, the number of Forms 8283 filed, and the use of third parties or related organizations to process noncash gifts.

**N. Schedule N – Liquidation, Termination, Dissolution, or Significant Disposition of Assets.**

- 1. **Part I – Liquidation, Termination, Dissolution.** This Part requests information regarding:
  - a. The fair market value of assets transferred and the method for determining the fair market value.
  - b. The role officers, directors, trustees, key employees, and independent contractors will play in the transferee organization.
  - c. Whether the distributions followed the requirements of the organization's governing documents.
  - d. Whether the organization adhered to state law in discharging or paying liabilities.

2. **Part II – Sale, Exchange, Disposition, or Other Transfer.** This Part expands the disclosure requirement to include all asset dispositions of more than 25 percent of the organization’s assets. It also requires information regarding:
  - a. The fair market value of all assets transferred and the method for determining the fair market value.
  - b. The role officers, directors, trustees, key employees, and independent contractors will play in the transferee organization.

**O. Schedule O – Supplemental Information.**

1. Schedule O to the Form 990 is a blank schedule, which allows organizations to supplement answers to questions on the Form 990 in a narrative form. It is a new addition to the revised Form 990 and was added (1) out of a concern that a simple yes or no response, in some cases, would not allow as complete a response as a narrative, and (2) to better enable electronic filing by requiring the same format for all filings by eliminating supplemental information on separate sheets.
2. Schedule O should not be used, however, to explain a late filing of Form 990.

**P. Schedule R – Related Organizations and Unrelated Partnerships.**

1. This Schedule was added to capture information about more complex organizational structures. The Schedule includes several examples of the means by which an organization can control or be controlled by another organization for purposes of determining related organizations.
2. It requires organizations to identify and provide information about:
  - a. “Disregarded” entities, such as single member limited liability companies (Part I).
  - b. “Related” tax-exempt organizations, including parent-subsidiary, brother-sister, and supporting organizations (Part II).
  - c. “Related” partnerships (Part III) and corporations/trusts (Part IV), even if not tax-exempt.
3. The Schedule requires information about transactions with all organizations listed in Parts I through IV, including any

governmental units and instrumentalities and foreign governments, which are treated as exempt organizations for the purposes of this Schedule.

#### **IV. CONCLUSION.**

##### **A. Preparing for the New Form 990.**

1. Determine whether any transition rules apply.
2. Read the instructions and glossary.
3. Identify a single person to oversee and coordinate completion of Form 990.
4. Review Form 990 and identify schedules that the organization will be required to complete and determine whether and what additional recordkeeping is required.
5. Review governance policies and procedures and develop, implement, and revise policies and practices if necessary.
6. Collect data on business and family relationships among officers, directors, trustees, and key employees and among the organization and current and former officers, directors, trustees, and key employees.
7. Develop and implement new internal tracking and reporting procedures to capture relevant information.

##### **B. Treat the Form 990 as an IRS Audit.**

##### **C. Use the Form 990 as a Marketing Tool.**