

# LEGAL ALERT

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## IS YOUR TAX-EXEMPT ORGANIZATION PREPARED TO FILE THE NEW IRS FORM 990?

*The form that most nonprofits are required to file annually with the IRS has undergone substantial changes that place significant new burdens on nonprofits.*

**By: Scott D. Harvey, Attorney**

In the likely event that your organization has been so focused on simply running your day-to-day operations in these challenging times, this Legal Alert is intended to provide you with a reminder that the IRS Form 990 has been substantially revised for the 2008 tax year. Time still exists to implement the necessary changes in 2008 in order to completely, accurately, and confidently complete the new form that is due to be filed in early 2009.

This is the first time in almost 30 years that the IRS has revised its Form 990. The new form, which most tax-exempt organizations are required to file with the IRS annually, contains significant structural changes. The form now consists of an eleven-part core form that all organizations must complete as well as 16 separate schedules that will need to be completed as necessary. These new schedules reflect changes in the size and in the complexity of the tax-exempt sector, including matters related to compensation, transactions with interested parties, foreign activities, non-cash contributions, hospitals, and organizations that are financed with tax-exempt bonds. Most organizations will need to complete between one and five schedules.

### **Governance**

A key component of the new Form 990 deals with the governance of the organization, as the IRS has taken an increased interest in the governance of tax-exempt organizations. While it is not necessarily required by federal law, the IRS believes governance should be considered by tax-exempt organizations because it generally improves compliance with policies and

procedures. The IRS perceives that the enhanced transparency and public disclosure required by the new 990 form will support both meaningful governance and accountability. Accordingly, organizations must consider appropriate policies and procedures based on their size, type, and culture.

Part VI of the 990 form is the section dealing with the organization's governance. It is divided into three main components:

- Section A: Governing Body & Management;
- Section B: Policies; and
- Section C: Disclosure.

Specific governance topics addressed include board size and structure, conflict of interest, management, director independence, intra-board relationships, audit committee practice, written governance policies, and the role of governance in the preparation and review of the 990 form. Significant highlights of the governance section include conflicts of interest and independence, particularly as they relate to voting members of the governing board, and the business and family relationships among officers, directors and key employees of the organization.

Furthermore, a series of important corporate governance issues are addressed in the final version of the 990 instructions that were released earlier this year. These instructions combine and significantly enhance the form's impact on the boards of tax-exempt organizations. To that end, the governance section

requires information about the governing body, governing policies, and disclosure practices. Also, it includes questions about the number of independent voting members of the governing body, whether the organization has a conflict of interest policy, and whether the organization contemporaneously documents governing body meetings.

The new form also suggests that the board should be involved in its review of the form. It asks whether the organization's final Form 990 and required schedules were provided to each voting member of the organization's board prior to filing with the IRS. Schedule O asks the extent to which, if at all, any of the organization's officers, directors, trustees, board committee managers, or management reviewed the prepared Form 990.

### Compensation

Another significant section of the new form deals with compensation. Schedule J of the revised form requires detailed reporting of compensation related information for certain individuals including officers, directors, and key employees of the organization, as well as those who receive or accrue compensation in excess of \$150,000, and individuals who receive or accrue in excess of \$250,000 of reportable and other compensation (e.g., deferred compensation, performance bonuses, non-taxable fringe benefits, expense reimbursements for the year). The information required to be reported for each such individual includes base compensation, bonus or other incentive-based compensation, severance pay, non-qualified deferred compensation, non-reportable benefits, and non-reportable expense reimbursements.

### Revamped Schedule H

Finally, nonprofit hospitals, which have been undergoing increased scrutiny by the IRS in recent years, clearly are major targets of the new form. Included with the compensation disclosures required by Schedule J – which will affect all nonprofit hospitals – is a revamped Schedule H that specifically targets nonprofit hospitals. Schedule H now has five major

components and requests a significant amount of information on the hospital's practices, including information to demonstrate the community benefits of the hospital, the hospital's billing and collections practices, information on any management companies or joint ventures that the hospital owns an interest in, as well as information on the hospital's facilities and other general information. Taken together, this represents a significant burden on nonprofit hospitals and provides an impetus to hospitals to ensure that they conduct business the "right" way, with emphasis on the areas of corporate governance and compensation practices.

### Conclusion

In sum, the new Form 990 significantly increases the amount of information required to be disclosed by all tax-exempt organizations with regard to governance, accountability, compensation and other organizational matters. It is imperative that your organization's operations and governance be in order so that your organization can accurately complete the new Form 990.

In order to ensure that this is the case, your organization should review and revise as necessary all of its governance documents, policies, and procedures. Moreover, all tax-exempt organizations should ensure that their accounting systems permit the timely collection of appropriate information, and that staff and board members are

educated about the new Form 990, specifically with respect to the IRS' increased focus on corporate governance.

If you are interested in attending an in-service on the new Form 990, have any questions in regard to the new Form 990, or would like for an attorney to assist you in implementing operational or governance changes, please contact a member of Smith Haughey's Tax-exempt or Health Law Practice Groups.

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