



NATHAN WECHSLER & COMPANY  
PROFESSIONAL ASSOCIATION

Orr&Reno

# “What you Need to Know about the New 990”

~ June 29, 2009 ~

Presenters:

Kelli Boyle, CPA [kboyle@nathanwechsler.com](mailto:kboyle@nathanwechsler.com)

Connie Boyles Lane, Esq. [clane@orr-reno.com](mailto:clane@orr-reno.com)

Jack M. Zaremba, Esq. [jzaremba@orr-reno.com](mailto:jzaremba@orr-reno.com)

# Form 990: Timeline

- Released December 20, 2007
- Effective for 2008 returns
- Increased threshold for 990-EZ – *IRS anticipates 200k more organizations will be eligible*

## May file 990-EZ for:

2008 tax year (filed in 2009)

2009 tax year (filed in 2010)

2010 and later tax years

## If gross receipts are:

>\$25,000 and < \$1 m

>\$25,000 and < \$500k

>\$50,000 and < \$200k

## If assets are:

< \$2.5 million

< \$1.25 million

< \$500,000

- E-postcard requirements
  - Currently for organizations with gross receipts under \$25,000
  - Increase limit to \$50,000 of gross receipts beginning with 2010 tax year



# Form 990: Reasons for Change

- The first redesign since 1979
- Enhance Transparency
  - comparison to other similar organizations
  - discuss experiences – handout 990 example
- Promote tax compliance
- Minimize burden on filing organizations
  - Asking questions in a clear, easy manner



# Why is redesign so important?

- Donors are becoming more sophisticated
- Completing the new form will require feedback from all areas of the organization
  - Finance
  - Activities/programs
  - Mission/marketing
  - Governance

# Form 990: The New Look

- 11 page core form
- 16 schedules
- Glossary of key terms
- Mission and Programs – right at the top of page 1

(insert bragging here)



# TIP #1: Enhance Your Mission

*(Part I: Summary, Line 1)*



***Think about who may be looking at your 990 on your website and/or on Guidestar! Tell your story!***

More to follow after the break on this topic . . .  
But here is food for thought until then . . .



## TIP #1 (part 2): Enhance Your Mission in Part 1 of the Form 990

### ■ Items to include:

- Why the organization exists
- What it hopes to accomplish
- Who it intends to serve
- What activities it will undertake and where



## MAJOR CHANGE:

### Governance Items on Form 990

The Form 990 requires information on practices or policies not required by federal tax law, such as:

- Information regarding the composition of the board or governing body
- Governance policies and practices
- Means by which you are held accountable to the public by making governance and financial information publicly available



## Why a section on governance?

- The word “governance” is not mentioned in the IRC
- Potential conflict with state attorney generals’ offices jurisdiction?
- IRS knows little about how nonprofits function or their management



Per IRS, 3 main reasons they focus on governance:

Reason #1:

- Good governance and accountability practices provide safeguards to ensure that the organization's assets will be used consistently with its exempt purposes.



## Reason # 2

- This is a critical tax compliance consideration, especially for organizations that are subject to private benefit, excess benefit, and private inurement prohibitions.



## Reason # 3

- Well-governed and well-managed organizations are more likely to be transparent with regard to their operations, finances, fundraising practices, and use of assets for exempt and unrelated purposes.



# GENERAL GOVERNANCE

- Independent Directors
- Delegation of Management
- Significant Changes to Organizational Documents
- Minutes
- Contact information for officers, directors, key employees
- Local Chapters



# FIDUCIARY DUTIES

**Require that board members act unselfishly and give to the organization their highest level of care**

- Duty of Care
- Duty of Loyalty
- Duty of Obedience



# DUTY OF CARE

- Must exercise due care in the management of the nonprofit's affairs
- Obtain sufficient information to make a decision
- Critically examine the information that is available
- Make informed, good faith decisions
- Identify risk and adopt policies and procedures to address it
- Appropriate selection and handling of investments



## DUTY OF LOYALTY

- Act in the interest of the organization, not in your own interest or in the interest of another
- Conflicts of Interest – statutory provisions
  - Religious organizations, hospitals and others exempt from statute, but prudent to observe it as if applicable
  - Disclosure by board member critical
  - Documentation in minutes imperative
  - Policy required
- Corporate Opportunity Doctrine



# How to implement governance requirements?

- Outline importance of transparency and good governance generally – at a board orientation session or as an agenda item at a regular meeting
- Review Form 990 requirements generally at Board meeting
- Discuss how best to implement; develop timeframe and designate responsibilities/committees




## Implementation of governance requirements

- Draft and circulate policies
- Discuss with individual board members, if necessary
- Review at one meeting/vote at next meeting if revisions needed or many members absent
- Consensus is critical



## Implementation of governance requirements

- Minutes should reflect adoption of policies
- Policies should be dated and kept with the corporate governance documents maintained by secretary/clerk
- Each Board member should retain a copy
- Review annually



## Form 990: Executive Compensation (Part VI, Section B, Line 15)

Must do the following three things for top management officials, officers and key employees:

- Review and approval by the governing body or compensation committee
- Review of “comparable compensation” data
- Contemporaneous documentation and recordkeeping with respect to the deliberations and decisions regarding the compensation arrangement.

# Form 990: Executive Compensation

- ✓ Step one – review and approval by board
- ✓ Step two – comparable data
  - Guidestar [www.guidestar.org](http://www.guidestar.org)
  - NH Center for Nonprofits: *Wage and Benefit report*  
[www.nhnonprofits.org](http://www.nhnonprofits.org)
  - Charity Navigator: *2008 CEO Compensation Study*  
[www.charitynavigator.org](http://www.charitynavigator.org)
- ✓ Step three – documentation? What does the new form look like?????



# Form 990: Executive Compensation

- Schedule O

---

---

---

---

---

---

Identify offices or positions for which this process was used to determine compensation and the year in which the process was last done.

# Tip #2: Document Procedures in Board Minutes



## ■ Schedule O

“The organization determines compensation for its executive director and director of finance annually. The compensation committee evaluates the performance of these individuals based on goals set in the prior year. Salary ranges for the positions were determined utilizing information published on [www.guidestar.org](http://www.guidestar.org) and in the NH Center for Nonprofits Wage and Benefit guide. There was additional discussion regarding goal setting and performance and the impact of comparable salary data. A formal recommendation was provided to the board of trustees for approval. This procedure was last conducted in December of 2008 and compensation was approved by the board of trustees on January 18, 2009.”



## Major change

### Form 990: Compensation (*definitions*)

- **Current Director or Trustee** = a member of the organization's governing body (with voting rights) and served at any time during the tax year
  
- **Officer** = person elected or appointed to manage the daily operations (president, VP, secretary, treasurer) and served at any time during the tax year. Would typically include the following regardless of their titles:
  - **Top management official** = The person who has ultimate responsibility for implementing the decisions of the governing body or for supervising the mgmt, admin or operation of the organization (CEO, Executive Director)
  
  - **Top financial official** = The person who has ultimate responsibility for managing the organization's finances



# Form 990: Compensation (*definitions*)

- **Key employee** = other than an officer, director or trustee  
(*Must meet all three tests*)
  1. \$150k Reportable Compensation Test (*W-2 wages for calendar year ending on or within the tax year*) – *related entities?*
  2. Responsibility Test
    - Responsibility, power or influence similar to officers, directors & trustees
    - Manages a segment or activity = 10%+ of revenues, assets, activities or expenses
    - Has or shares authority to control or determine 10%+ of capital expenditures, operating budget or employee comp
  3. Top 20 Test





## Form 990: Compensation (*definitions*)

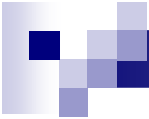
- Certain **former** officers, directors, trustees, key employees & highest compensated employees = anyone who should have been reported in any of the last 5 forms 990 in these categories
- **Reportable compensation** = generally refers to compensation reported on Form W-2, box 5 and Form 1099-MISC, box 7. Also includes compensation from related organizations (parent co's, subsidiaries, brother/sister organizations, supporting and supported organizations)



# Form 990; Part VII; Section A: Compensation Reporting (Core form)

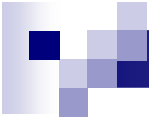
## Who is included on Core Form?

- Current officers, directors & trustees (no minimum compensation requirement)
- Current key employees (over \$150k of reportable compensation – including related organizations)
- Current 5 highest compensated employees other than those included above (over \$100k of reportable compensation – including related organizations)
- Former officers, key employees & highest compensated employees (over \$100k)
- Former directors and trustees (over \$10k)



## Form 990; Part VII; Section A: Compensation Reporting (Core form) – EXAMPLE #1

- Matt is an employee of ABC and is not an officer, director or trustee.
- Matt's reportable compensation for the calendar year exceeds \$150k and he meets the Responsibility Test.
- Matt would qualify as a key employee (KE) of ABC, except that 20 employees had higher compensation and qualified as KE; therefore those 20 are listed as ABC's KE.
- Matt has the highest reportable compensation from ABC other than the 20 KE; therefore Matt must be listed as one of the organization's five highest compensated employees.



## Form 990; Part VII; Section A: Compensation Reporting (Core form) – EXAMPLE #2

- Sue chairs a small academic dept in the College of Art.
- As dept chair she supervises faculty in the dept, approves course curriculum and oversees the operating budget for the dept
- The dept represents less than 10% of the college's activities, assets, income, expenses, capital expenditures, operating budget and employee compensation
- Sue does not meet the Responsibility Test and is not a key employee



# SCHEDULE J

## Detailed Compensation Information

What additional information is required on Schedule J?

- Deferred compensation
- Nontaxable benefits
- Prior year 990 compensation

**NOTE: There should be NO individuals listed on schedule J that have not been included on Part VII**



# SCHEDULE J

## Now have to report the existence of:

- first-class travel,
- travel for companions,
- tax indemnification or gross-up payments,
- a discretionary spending account that is not an accountable plan,
- housing allowance or residence for personal use,
- business use of personal residence,
- health or social club dues or initiation fees,
- personal services (maid, chauffeur, chef).



## SCHEDULE J

- Now have to report compensation from the organization filing the Form 990 and from related organizations
- Related organization – parent, sub, brother/sister, supported/supporting
- Based on control – power to appoint directors/trustees or overlapping boards



# Business and Family Relationships

*(Part VI, Section A, Line 2)*

- Did any officer, director, trustee or key employee have a family relationship or a business relationship with any other officer, director, trustee or key employee?
  - Reasonable effort requirement
  - Can rely on members of the governing body
  - One employed by the other
  - One person contracting business w/ the other (gen. transactions >\$10k)
  - Two persons are each a director, trustee, officer or greater than 10% owner in the same business or investment



# Business and Family Relationships

*(Part VI, Section A, Line 2)*

- Does *not* include: (1) attorney and client (2) medical profession and patient (3) priest/clergy and penitent/communicant



# Business and Family Relationships

*(Part VI, Section A, Line 2)*

- “Ask who is giving financial advice”
- “Pay close attention to who is on the [investment] committee, especially the chairman. Ask if the members are related to each other or anyone at the charity...”

Bernstein, Elizabeth. “After Madoff, Donors Grow Wary of Giving”, Wall St. Journal (December 23, 2008).



# Business and Family Relationships

- Example #1

B is an officer of the organization, and C is a member of the organization's governing body. B is C's brother-in-law. The organization must report that B and C have a family relationship.



# Business and Family Relationships

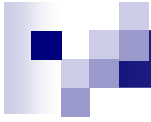
- Example #2

D and E are trustees of the organization. D is owner and CEO of an auto dealership. E purchased a \$45k car from the dealership on terms generally offered to the public. The relationship between D and E is not a reportable business relationship because the transaction was in the ordinary course of business on terms generally offered to the public.



# Review of Form 990

- Was a copy of the Form 990 provided to the organization's governing body before it was filed? Describe the process if any on Schedule O.
  
- Why is this important?
  - Does the organization have appropriate financial oversight?
  - Financial oversight – crucial to have this representation on the board
  
- Documentation – what does the new form look like?



# Review of Form 990

- Schedule O

---

---

---

---

---

---

# Tip #3: Document Review in Board Minutes



## ■ Schedule O

“Form 990 was reviewed by the Finance/Audit Committee in detail prior to filing. Questions were addressed to the preparer and resolved timely. A final draft version of the return was provided to the full board prior to filing.”





# MATERIAL DIVERSIONS/FRAUD

- On Part VI, Section A, Line 5, the organization must report whether it became aware during the year of a material diversion of its assets.
- Key: when the organization became aware of the diversion, not when it occurred.
- Diversion: conversion or use of assets other than for authorized purpose.
  - Embezzlement or theft

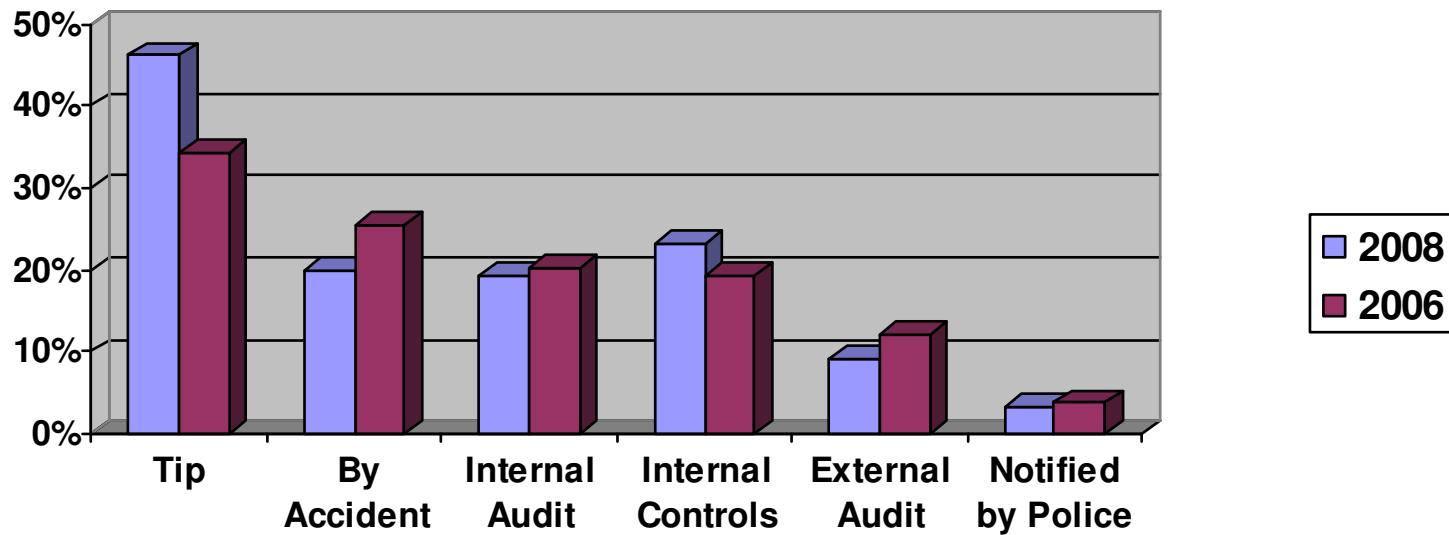


# MATERIAL DIVERSIONS/FRAUD

- By officers, directors, trustees, employees, volunteers, contractors, grantees (diverting grant funds) or any other person
- Material: gross amount of diversion exceeds lesser of \$250,000 or 5% of gross receipts or assets
  - Disregard insurance recovery, restitution, etc.
- If yes, report on Schedule O: nature of diversion, amount, corrective actions. Do not identify by name.

# How is Fraud Detected?

*Source: 2008 Report to the Nation on Occupational Fraud and Abuse by the Association of Certified Fraud Examiners*



# Tip #4: Adopt a Whistleblower Protection Policy

*(Part VI, Section B, Line 13)*



- Does the organization have a written whistleblower policy?
- Is there an anonymous feature?
  - Fraud-hotline.com
  - Allegiance Silent Whistle
  - Ethicspoint.com
- See Sample policy ~ handout
  - Policy must be in place on the last day of the organization's tax year.



# Tip #5: Adopt a Written Document Retention and Destruction Policy

*(Part VI, Section B, Line 14)*



- Clarifies responsibilities of staff, volunteers, board members and outsiders
- See Sample policy ~ handouts
  - *Policy must be in place on the last day of the organizations tax year.*



# Form 990: Public Disclosure Requirements

*(Part VI, Section C, Lines 18 & 19)*

- Form 990 & 990-T – how are these made available?
  - Own website
  - Another's website
  - Upon request
  - Available for 3 years from filing date
  - Policy must be in place on the last day of the year



# Form 990: Public Disclosure Requirements *(Part VI, Section C, Lines 18 & 19)*

- “Look for transparency. Many experts say that a truly transparent charity will provide key financial data on its website, including its annual report, an audited financial statement and its Form 990....”

Bernstein, Elizabeth. “After Madoff, Donors Grow Wary of Giving”, Wall St. Journal (December 23, 2008).



# Form 990: Public Disclosure Requirements

*(Part VI, Section C, Lines 18 & 19)*

- Describe in Schedule O whether (and if so, how), the organization makes its governing documents, conflict of interest policy and financial statements available to the public.
  - *Note: Federal law does not require that such documents be made publicly available unless they were included in a form that is publicly available.*

# Tip #6: Address Public Disclosure Options Now



## ■ Schedule O

“The organization’s Form 990 is available on-line at [www.guidestar.org](http://www.guidestar.org). Governing documents and conflict of interest policies are available upon request. Financial statements are available for inspection at our primary business location.”



## SCHEDULE B: Schedule of Contributors

- Unchanged from prior Form 990
- Non-public unless private foundation or a 527 political organization
- Donors > \$5,000/year
- Public charity meeting the 33 1/3 % test – also have to be > 2% total contributions
- Non-cash donations
- Anonymous donors – must report



# OTHER IRS FILINGS

## Part V – Other IRS Filings and Tax Compliance

- Form 1096 – information returns (Forms 1099, 1098, W-2G, etc.)
- Form W-2G – Gambling winnings
- Form 990-T – unrelated business income tax; public document following PPA 2006



# OTHER IRS FILINGS

## Part V – Other IRS Filings and Tax Compliance

- Form 8282 – dispose of tangible personal property within 3 years of contribution
- Donor Advised Funds



# ADDITIONAL RESOURCES

- IRS website for Charities & Nonprofits:  
<http://www.irs.gov/charities/index.html>
- NH Center for Nonprofits:  
[www.nhnonprofits.org/index.cfm](http://www.nhnonprofits.org/index.cfm)
- NHCNP Resource Center for Governance:  
<http://www.nhnonprofits.org/knowledgecenter/govleadership/govdocuments.cfm>



# ADDITIONAL RESOURCES

- NH Department of Justice:  
<http://doj.nh.gov/charitable/>
- NH DOJ Handbook:  
[http://doj.nh.gov/publications/pdf/nhfc\\_guidebook.pdf](http://doj.nh.gov/publications/pdf/nhfc_guidebook.pdf)
- Panel on the Nonprofit Sector  
<http://www.nonprofitpanel.org/>

# QUESTIONS??



**NATHAN WECHSLER & COMPANY**  
PROFESSIONAL ASSOCIATION  
CERTIFIED PUBLIC ACCOUNTANTS & BUSINESS ADVISORS

**Orr&Reno**