



Form 990 Update; Lessons Learned (so far)

National Health Council and National Human Services Assembly CFO Affinity Group

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My General Observations

- Form 990 is the document of choice to enforce the tax-exempt provisions of the Internal Revenue Code.
 - Increased transparency and disclosure will make it easier to follow the money (e.g., Part IV).
 - Compliance will improve because pointed questions will create more awareness of the many tax laws that apply to tax-exempt organizations (e.g., Part V).
 - The focus on governance highlights the policies the IRS believes responsible persons should have in place to exercise their fiduciary duty (e.g., Part VI).
 - Many answers need to be explained and certain practices need to be described; accordingly, much more disclosure than before (e.g., Part VI).
 - Internal consistency will drive the filing of a complete and accurate return (necessary to avoid penalties under Section 6652).
 - Consider external consistency (e.g., website lobbying reports etc.).
- Organizations are going to have to focus on Form 990 as never before.

Everyone is still learning

- The principles of compliance and transparency continue to meet the very complex and diverse reality that exists in the tax-exempt sector
 - Continuing process of discovery
 - Reporting real-life information is proving to be difficult in some cases.
 - Deciphering the intent and application of the instructions to specific reporting situations
 - In some cases nontax laws prohibit the disclosure of certain information asked for in the Form 990
 - Complex interplay between many different (but related) areas of the return.

IRS Statements and Observations so far ...

- Non-filers of Form 990-N will likely receive revocation notices (third consecutive year)
 - Small calendar year organizations must file by May 15, 2010.
 - Be mindful of local chapters included in a group exemption.
 - A reasonable cause exception exists, but you will need a very good case.
- Expenses allocated to UBI result in continual losses
- There will be 500 payroll tax examinations annually in the EO area
- Revised Form 990 for 2008
 - Many more extensions for the 2008 return this year; no surprise
 - Not as much use of 990-EZ as anticipated
 - Schedule O is required for all Form 990 returns
 - 25% to 30% error rate on paper returns
 - 3% error rate on e-filed returns.

Seemingly Straightforward Questions – Part I

- Must complete Box F (with the name and address of the principal officer)
 - Name entered must be the current “principal officer” whether or not listed in Part VII (not a director)
 - Consider certain management company situations where officer duties are delegated.
- State of legal domicile (Item M)
 - What state laws apply to your organization, which Attorney General is the lead enforcer?
 - Not necessarily where your main (or only) office is located
 - Must look at your Articles of Incorporation to see the “State of incorporation”
 - If you are incorporated in one state but doing business in others, you may need a certificate of authority as a foreign corporation (check with legal counsel)
- Remember to count board members and advisory board members as volunteers if they are not compensated

Seemingly Straightforward Questions – Part III

- Difference between the mission and achievements
 - The mission is the organization’s overarching reason for being (e.g., charitable, to educate students, promote health, social advocacy, business advocacy, etc.).
 - Consider using the same language that is shown on your website
 - Programs, achievements, and activities are the methods the organization has chosen to accomplish its mission.
 - Describe the three largest programs ranked by expenses.
 - Consider indicating how these programs are accomplishing tax-exempt purposes.
- Section 501(c)(3) and Section 501(c)(4) organizations must also report all of the following:
 - The total amount of expenditures incurred (including grants)
 - The total of grants and allocations paid to others
 - The gross revenue generated by conducting each activity (e.g., fees, registrations).

Seemingly Straightforward Questions – Part IV

- Did the “organization” receive an audited financial statement prepared in accordance with GAAP? (Q12)
 - Must answer “No” in the 2008 Form 990 unless the filing organization received a stand-alone audited financial statement
 - New question 12A was added to the 2009 Form 990:
 - Was the organization included in a consolidated financial statement that was audited?

Seemingly Straightforward Questions – Part IV (continued)

- Foreign activities
 - What constitutes maintaining an office outside of the United States? Q#14a (leads to Schedule F Part 1, Question 3, Column b)
 - owner or lessee of office space outside the United States; not in situations where the foreign employee only maintains an office in his/her home unless the employee is reimbursed by the employer for maintaining the office.
 - Does an organization report expenses on Schedule F if it sends board members to board meetings or to attend and speak at seminars and conferences outside the United States? Yes.
 - Consider foreign individuals who receive scholarship grants from you to attend school in the U.S.
 - When do they cease to be living or residing outside the U.S.?
 - Does it matter where they are when they receive the grant?
 - Are these grants reportable on Schedule F or Schedule I?

FAQ directed to Q#14b

- A Form 990 filer must complete:
 - Schedule F, Part I if it had aggregate revenues or expenses of more than \$10,000 during the tax year from grant-making, fundraising, business **(including investments)**, and program service activities outside the United States; therefore, Q#14b:
 - Appears to include initial investments in foreign investment corporations and partnerships
 - Includes dividends and other distributions from foreign corporations that are received in cash
 - Includes the pass-through revenue and expense attributable to the filing organization in pass-through entity situations (e.g., foreign partnerships) whether or not the amounts are received in cash
 - See Schedule F, FAQ#8 and Form 990 instructions for Part IV, line 14b.

The IRS is very focused on transfers to foreign entities.



FAQ; Schedule F, #9

- **How should foreign investments be reported in Part I?**
 - For 2008 and 2009 tax years, the following rules apply.
 - Investments should be reported on a region-by-region basis on Line 3, separately from other activities in the region.
 - All investments in a particular region may be aggregated for this purpose. For example, all investments in South America may be reported together in one line.
 - The organization may use the term "investments" to describe the foreign activity in column (d).
 - In reporting investments in a region, only columns (a) and (d) must be completed; columns (b), (c), (e), or (f) need not be completed with respect to investments for these tax years.

Part IV; Q#14b

- Organization has a six-person department in the United States that supports its overseas programs
 - How to respond to Q#14b, (i.e., would you report the expenditure of the U.S.-based support department to the overseas program?)
 - It depends (see FAQ Schedule F #4):
 - Situation 1: Organization separately tracks and allocates the department's expenses in its financial statements by region; YES, and report expenditures in Schedule F
 - Situation 2: Organization does not separately track or allocate the department's expenses in its financial statements; NO
- Another observation; consider questions 1 and line 2 in Schedule F Part 1:
 - Does the organization maintain records re: foreign grants?
 - Describe the procedures for monitoring the use of grant funds
- You may want to start tracking these expenses in the future to support your answer and attendant description (such tracking may be required for the 2010 Form 990)

Seemingly Straightforward Questions – Part IV (continued)

- Was a loan to, or by, a current or former O, D, T, KE, HCE or DP, outstanding at the end of the organization’s tax year? (Q26). What about:
 - Tax-exempt bonds held by board members
 - No, a governing board member’s purchase of tax-exempt bonds from the filing organization does not need to be reported on Schedule L, Part II, so long as the board member purchases the bonds on the same terms as are offered to the general public.
 - Deposits in a financial institution when a board member is an officer of the institution
 - While the bank would be an interested person for which Schedule L, Part IV may apply, Schedule L Part II reporting is required only if the bank is a “disqualified person,” as described in Code Section 4958(f)(1).
 - The IRS is considering whether placing funds on deposit with a bank constitutes a “loan” for purposes of Part II, and welcomes any comments you may have on this matter. In the meantime, this transaction need not be reported as a loan on Part II for tax years 2008 and 2009.

Seemingly Straightforward Questions – Part IV, Q#27

- Did the organization provide a grant or other assistance to an O, D, T, KE, or substantial contributor or to person related to such an individual? (Q27)
 - Report such grants or assistance on Schedule L Part III unless your organization is a school (see Schedule L FAQ #7).
- However, if your organization is a school, are you still required to disclose the name of O,D, T, KE or substantial contributor if family members were granted a scholarship?
 - No. Grants or assistance provided to an interested person as a member of the class that the organization intends to benefit in furtherance of its exempt purposes generally do not need to be reported in Part III, Schedule L, if such grants or assistance are provided on similar terms as are provided to other members of the class. However, grants for travel, study, or other similar purposes to interested persons do need to be reported in Part III.
 - Recognizing privacy issues, the type of reporting required in Part III, for colleges, universities, and primary and secondary schools is limited. Instead, these organizations must, in part III, group each type of financial assistance (e.g., need-based scholarships, merit scholarships, discounted tuition) provided to interested persons in separate lines.

Seemingly Straightforward Questions – Part IV, Q#28

- Organizations must also use Schedule L to report whether the organization was a party to a business transaction with any of the following parties:
 - a current or former O,D,T, or KE (including their family members)
 - an entity of which a current or former O,D,T, or KE (including their family members)
 - owns more than a 35% ownership interest in a business directly or indirectly (individually or collectively) with certain others
 - serves as an officer, director, trustee, or key employee (but does not include entities that are tax-exempt under Section 501(c), governmental units, and instrumentalities of governmental units)
 - was a partner or member with at least a 5% ownership interest in an entity taxed as a partnership (or shareholder of a professional corporation)
 - for example, attorneys, consultants, money managers, brokers, insurance providers, fundraising counsel, lessors, etc.
- Examples of business transactions are contracts of sale, lease, performance of services and participation in joint ventures if the interest of organization and the interested person each exceeds 10%

Part IV; Question 28 a, b, c, and Schedule L

- You don't have to provide certain information if you are unable to obtain the information after making a **reasonable effort** to gather the information necessary to report:
 - Transactions between the organization and current and former O, D, T, and KE
 - Family and business relationships among O,D,T, and KE
 - Obtaining such information can be difficult and confusing for all concerned
- What is a “Reasonable Effort”?
 - An example is provided in the FAQ for Schedule L [and Part IV Q# 27 and 28]
 - An officer eligible to sign Form 990 distributes a questionnaire annually to each of its current or former O, D, T, and KEs and each of the grant selection committee members asking for the information that needs to be reported in parts III and IV. The Questionnaire should include the name, title, date, and signature of the person reporting information.

FAQ Directed at Q#28a and b

- We compensate our Chief Financial Officer (CFO) \$110,000 and the CFO's spouse (an employee) \$20,000. Must we report one or both of these transactions in Schedule L, Part IV?
 - The compensation to the CFO's spouse must be reported in Schedule L, Part IV, assuming that it is not reported in Form 990, Part VII or Schedule L, Part I, because
 - (1) The spouse is a family member of an officer, and therefore an "interested person" for purposes of Part IV
 - (2) The compensation to the spouse exceeds \$10,000.
 - The organization does not need to report its compensation to the CFO in Schedule L, Part IV, though it does need to report that compensation in Part VII of the core Form 990.
- Also, don't forget about reporting the spouse's compensation in Part IX, Line 6

FAQ Directed at Q#28c – Accounts and Transactions

- One of our governing board members is the president of a bank in which our organization has **an account**. We *earn* interest on the deposits, and there are fees we *pay* to the bank throughout the year. Should **this “transaction”** be reported in ... Part IV of Schedule L?
 - The bank is an interested person for purposes of Part IV, because of the board member’s status as an officer of the bank. Accordingly, the organization would need to report on Part IV any payments of fees and interest **between** the filing organization and the bank during the tax year if the total of all such fees and interest **paid to and from the bank** during the tax year exceeded \$100,000, **or** if any one transaction between the organization and the bank (not including deposits into and withdrawals from the bank) exceeded the greater of \$10,000 or 1% of the organization’s total revenue for its tax year. (This language is not exactly as shown in the FAQ).
 - The IRS is considering whether deposits into and withdrawals from a bank account constitute “payments” or “business transactions” for purposes of Part IV, and welcomes any comments you may have on this matter. **In the meantime, deposits and withdrawals need not be counted as payments or reported as business transactions on Part IV for tax years 2008 and 2009.**

Seemingly Straightforward Questions – Part V

- Q#4a: Did the organization have an interest in...a “financial account” in a foreign country for FBAR purposes?
 - Big question: Are offshore investments (e.g., hedge funds, private equity funds etc.) included and should they be reported in the FBAR?
 - Answer: See Notice 2010-23 issued February 26, 2010 and note that “mutual fund or similar pooled fund” – is generally defined as a fund that (1) issues shares to the general public, (2) has a regular net asset value determination, and (3) has regular redemptions – concept of liquidity.
 - What is (or will be) the relationship between this question and reporting investments in Schedule F?
 - In 2008, the instructions connected this question to Schedule F reporting. (i.e., if an organization reported such investments on the FBAR, it would not have to list them in Schedule F.
 - However, in 2009, the instructions provide that organizations will be required to list passive foreign investments in Schedule F, regardless of whether these investments are reported on the FBAR Form.

The IRS is Interested in Your Governance, Part VI

- The IRS is focused on governance because as the Service administers the tax laws, it sees a strong link between tax compliance and governance.
- Therefore, the IRS will emphasize governance in its:
 - Education and outreach programs
 - Rulings and agreements activities
 - Examination and enforcement efforts
- See the IRS Web site for its governance training materials for Revenue Agents (2009 CPE Training)

Governance and tax issues intersect

- Stated reasons for the IRS' intense interest in governance was provided in the 2009 CPE training materials provided to IRS Revenue Agents:
 - Did organization managers participate in decisions that resulted in excess benefits or other noncompliance?
 - Did the organization take steps to assure the fairness of the arrangements to the exempt organization (e.g., reasonableness of compensation)?

Seemingly Straightforward Questions – Part VI, Q#1a

- Number of “voting” members of the governing body?
 - Only individuals with the power to vote on all matters that come before the governing body may be counted as voting members.
 - Not the same as a “director” for other Form 990 purposes where a director is defined as someone with any voting rights during any part of the year.
 - Consider situations where the CEO’s compensation is reviewed and approved by only a subset of the board.
 - The number of voting members is not necessarily reduced if such power is delegated to a subset of the board by the whole board.
 - However, if such power is reserved to a subset of the board by the governing documents outside the control of the rest of the board, the number of voting members may be reduced to those with such voting authority.

Seemingly Straightforward Questions – Part VI, Q#1b

- Number of “independent” voting members of the governing body?
 - This is relevant to the issue of whether board members serve public interests or private interests.
- For purposes of Form 990 reporting, an independent board member is one who:
 1. Was not compensated as an officer or other employee of the organization or a related organization
 2. Did not receive total compensation or other payments exceeding \$10k during the organization’s tax year from the organization or from a related organization as an independent contractor (other than reimbursements under an accountable plan or compensation for services as a board member)
 3. Was not involved (nor was a family member involved) in a transaction with the organization (or in a transaction with a related organization) that is (or would be) required to be reported on Schedule L (even if a Form 990 is not filed)

Seemingly Straightforward Questions – Part VI, Q#3

- Did the organization delegate control over management duties customarily performed by or under the direct supervision of O, D, T, or KE individuals to a management company or other person?
 - What are “management” duties?
 - What other potential reporting requirements may be triggered by a “Yes” answer?
- Consider the obvious issues created if you only list members of the board in Part VII and:
 - Who is responsible for the day-to-day administrative and financial management?
 - Who will sign Form 990 as an authorized officer of the organization?
 - Who will you list on Page 1, Box F?

Part VI Management Companies

- Delegation of management duties:
 - Hiring, firing, and supervising personnel
 - Planning or executing budgets or financial operations
 - Supervising exempt operations or unrelated trades or businesses for the organization
- Delegation of such duties to individuals at management companies may result in them being deemed the “top administrative” and/or “top financial” officials of an organization; therefore,
 - Depending on the facts, such individuals may need to be listed on Part VII.
 - The management company may need to be reported on Schedule L as an interested person.

Seemingly Straightforward Questions – Part VI, Q#5

- Did the organization become aware during the year of a material diversion of the organizations assets? (if “Yes”)
 - Explain the nature of the diversion
 - The amounts or property involved
 - Corrective actions taken to address the matter
 - Pertinent circumstances on Schedule O
 - You do not have to include the name of the person(s) involved
- However, if the persons involved were disqualified persons, you will also need to complete Schedule L, Part I
- Note the change to the definition of “material diversion” for 2009
 - **If all diversions in the aggregate** meet any of the following thresholds (i.e., 5% of assets or revenue or \$250,000), this question must be marked “Yes”

Seemingly Straightforward Questions – Part VI, Q#8

- Did the organization contemporaneously document the meetings held or written actions undertaken during the year by the governing body and each committee with authority to act on behalf of the governing body?
 - The importance of this question cannot be overemphasized because of the link to tax compliance issues
 - Goes to whether the governing body is engaged and who is (or was) responsible
- This can lead to penalty exposure for certain persons in their individual capacity (e.g., Section 4958)

Seemingly Straightforward Questions – Part VI, Q#10

- What does it mean to provide a copy of Form 990 to the organization's governing body before Form 990 is filed?
 - Must be provided to all “voting” members of the governing body
 - Distribution of a copy as a PDF document via e-mail is OK
 - The 2009 Form 990 instructions now provide notification by e-mail that the return can be viewed on the director's Web site may also ok if:
 - an organization emails all of its Board members a link to a password-protected website on which the entire 990 may be viewed, and notes in the email that the Form 990 is available for review on that site.

Board Awareness of Form 990 Information

- The questions about the board's involvement in the Form 990 review process are asked to determine:
 - Whether the members of the governing body are aware of the information contained in Form 990
 - The organization's practice, if any, for reviewing the annual Form 990
- All organizations must describe their process for reviewing Form 990 on Schedule O.

Seemingly Straightforward Questions – Part VI, Q#12a, b, and c

- Does the organization have a Conflict of Interest policy (COI)?
 - Are O, D, T, and KE (and family members) required to disclose or update annually (or more frequently) interests that could give rise to conflicts?
 - Does the organization regularly and consistently monitor and enforce compliance with the COI policy?
 - Describe how the organization regularly and consistently monitors and enforces compliance with its Conflict of Interest Policy. (Part VI, Question 12c)

Seemingly Straightforward Questions – Part VI, Q#15a and 15b

- Did the process for determining compensation of the following persons include a review and approval by independent persons, ... of the CEO and other officers and key employees of the organization?
 - What does it take for a “Yes” answer to this question?

Focusing on Q#15

- The following three elements must be present in an organization's process before answering this question "Yes," and then each element must be described.
- The elements are:
 1. Review and approval by the governing body or compensation committee composed of independent persons
 2. Use of comparable data
 3. Contemporaneous documentation and recordkeeping with respect to the deliberations and decisions about compensation

Seemingly Straightforward Questions – Part VI, Q#16b

- Did the organization take steps to safeguard the organization's exempt status with respect to joint venture arrangements?
 - What is a joint venture or similar arrangement?
- While there are exceptions, an agreement to jointly undertake a specific business enterprise, investment, or exempt-purpose activity regardless of:
 - Whether the organization controls the venture
 - What the legal structure is for the venture
 - Whether the venture is treated as a partnership for federal income tax purposes
- Watch agreements to conduct activities and share profits or expenses
- Safeguards include all of the following:
 - Effective control over the venture
 - Exempt purposes have priority over maximizing profits
 - Prohibition of political or substantial lobbying activities
 - Arm's length (or more favorable) terms to the organization

Part VII; Compensation – Who?

- Who must be reported in Part VII?
 - A “director” or “trustee” means an individual with any voting power at any time during the year whether compensated or not.
 - An “officer” includes (but is not limited to) the chief financial and management officer, or other top administrative and financial official, regardless of their title.
 - Five highest paid employees regardless of their title or duties for those with W-2 compensation over \$100,000.
 - Former O or KE in the prior five years if they receive current Form W-2 compensation of more than \$100,000 or a former D or T if they receive more than \$10,000 in that capacity.
 - Former HCE if current Form W-2 compensation exceeds \$100,000 and such compensation places him or her among the five highest paid employees in the current year. (This is a new requirement for non-charitable organizations; therefore, no former HCE needs to be reported prior to the 2008 return year).
 - Determining who are “key employees” may require some extensive effort (the definition casts a wide net). There is a three prong test:

Definition of a “Key” Employee

1. Compensation Test (i.e., receives reportable compensation from the organization and all related organizations in excess of \$150,000)
2. Responsibility Test
 - (a) Has responsibilities, powers, or influence over the organization as a whole that is similar to those of officers, directors, or trustee
 - (b) Manages a discrete segment or activity of the organization that represents 10% or more of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole
 - (c) Has or shares authority to control or determine 10% or more of the organization’s capital expenditures, operating budget, or compensation for employees
3. Top 20 Test
 - Only report those top 20 employees that satisfy the \$150,000 Test and Responsibility Test

Part VII; Compensation – What?

- Although reportable wages are reported on a calendar year basis per Form W-2, what about “other compensation”?
 - Annual increase in the actuarial value for the current year [probably on the calendar year]
 - May need to include amounts in a 457(f) plan even if no payment was made to the employee
 - Unanswered questions:
 - Are other benefits reported on a calendar year, and on the cash basis?
 - How should we report compensation by exempt organizations where one organization pays employees on behalf of a related organization, outside of common paymasters and formal designation of a payroll processing agent ?
 - Situation: the organization filing the W-2 is reimbursed by the other organization (i.e., paid on behalf)
 - Possible mismatch of compensation expenses between organizations

Part VII; Employees Paid on Behalf of Another Organization – Common Scenario

- Organization A issues payroll checks to its employees and Organization B's employees. Organization A's CFO spends an average of 30 hours per week working for Organization A and 10 hours per week functioning as the CFO of Organization B (in total, the CFO works an average of 40 hours a week). Organization B reimburses Organization A for 25% of the CFO's compensation and benefits. Therefore, Organization A's books and records reflect 75% of the officer's salary and benefits as expenses, and Organization B's books and records reflect 25% of the officer's salary and benefits as expenses.
- There may (or may not) be a written agreement between the organizations, the arrangement for some employees may not qualify under the common paymaster rules for certain employees, the organizations are related, and there is no formal designation that Organization A is functioning as a payroll processing agent.
- Some view the 2008 instructions to mean that you should follow the Form W-2 reporting, but this could be misleading.

Part VII; Employees Paid on Behalf of Related Organization – Possible Clarification Coming in 2010

- **Part VII, Column (D), (E), and Column (F):**
- Organization A would report as follows:
 - 75% of the officer's reportable compensation in Column D
 - 25% of the officer's reportable compensation in Column E
 - 100% of the officer's other compensation in Column F
- Organization B would report as follows:
 - 25% of the officer's reportable compensation in Column D
 - 75% of the officer's reportable compensation in Column E
 - 100% of the officer's other compensation in Column F
- You can always explain the situation in Schedule O

Part VII; Section B

- Independent Contractors must be listed
 - New requirement for non-charitable organizations
 - You cannot rely solely on your Form 1099 vendor list
 - The top five of those to whom you paid more than \$100,000 for professional or nonprofessional services
 - Apparently as of the end of the calendar year that ends within your fiscal year and on a cash basis
 - Those that are individuals (who are not employees), partnerships, or corporations
 - Be mindful of misclassification of employees and the attendant tax exposure
 - Professional independent contractors generally include attorneys, accountants, auditors, health care professionals, investment advisers, and professional fundraisers and the like.
 - Other independent contractor services include cleaning, maintenance, catering, storage services, hardware troubleshooting, installer, computer networking services, repair services, convention services, fulfillment, and mailing services and the like.

Part IX; Statement of Functional Expenses

- Part IX, Lines 5 and 6
 - Line 5: Include salary and other benefits provided to current O,D,T, and KE; not formers or top 5 HCE.
 - Line 6: Include compensation and other distributions provided to “other disqualified persons”
 - Consider the compensation of former O, D, T, KE, HCE for possible line 6 reporting
 - Remember the potential tie to Schedule L, Part IV for certain people
- 11e – Be mindful that expenses for professional fundraising services (e.g., exercise of professional judgment in providing advice or consulting concerning planning, management, and preparation of materials) must be reported on this line.
 - If you can’t distinguish between fees and charges for printing paper mailing list rentals, then all such fees and amounts must be included on Line 11e
- Part IX, Line 24f (other expenses)
 - Limited to only 5 custom lines and 1 for “all other expenses;” therefore, you must group your expenses in the expense categories shown in Part IX for the most part
 - Grouping expenses may be challenging and you will probably want to be consistent from year-to-year
 - Expenses grouped together on Lines 24a to 24e and labeled “other” or “miscellaneous” etc. cannot exceed 5% of organization’s total functional expenses (i.e., Line 25)

Part X; Balance Sheet

- Line 12: Investments – other securities includes:
 - Generally list “Alternative Investments” on this line.
 - Investments in partnerships and funds that are not publicly traded
 - Investments in corporate securities that are not publicly traded
 - Include the investment in your taxable subsidiary corporation(s)
 - Also include publicly traded securities if you own 5% or more of the outstanding shares of the same class

Schedule A

- Support Calculation 509(a)(1) and 501(a)(2)
 - If you are a “Public Charity” under Section 170(b)(1)(A)(vi) or 509(a)(2), you must complete the support schedule on an “ACCRUAL BASIS” (assuming that is your accounting method).
 - You must go back and restate the four prior years on the same basis.
 - You must include the current year support amounts (new this year).
 - You must also go back and redetermine your excess contributors on an accrual basis.
- What happens if an organization now fails the test?
 - Maybe the one year grace period is not long enough to avoid becoming a private foundation
- What happens if a contributor does not come through on a pledge?
 - Do you somehow net the “deduction” against current year contribution amounts, is it a management and general expense, a fundraising expense, or a prior year adjustment?
 - Is there any affect on the public support percentages reported in prior years?

FAQ; Schedule F, #7

- Should grants reported in Parts II and III of Schedule F be reported on the cash method of accounting?
 - The organization should use the same accounting method it uses in reporting expenses throughout the Form 990 (i.e., the method checked in Part XI, Line 1), whether cash or accrual. If the organization is reporting an accrued but unpaid expense in Parts II or III of Schedule F, it should report the anticipated manner of cash disbursement in Part II, column (f) and/or Part III, column (e).
 - In some cases reporting on the accrual method may actually be more difficult for organizations because their detailed accounting records are more geared to tracking cash payments.
- It appears the same general rules apply to Schedule I.

Clarifications in the 2009 Form 990 Schedule F

- Schedule F, Part I, Line 3, column F “Total expenditures in regions” has been changed to “Total expenditures for region,” clarifying that expenditures for foreign activities should be reported even if those expenditures are made in the United States or from a U.S. bank account.
- The 2009 Schedule F, Part III instructions were revised to clarify that Schedule F filers should report not only grants to foreign individuals—that is, individuals living or residing outside the United States at the time the grant is distributed to the individual—but also grants to U.S. individuals for foreign activity, such as scholarships or assistance for study or research abroad.
- Schedule F instructions now clarify that types of foreign activities to be reported in Schedule F, Part I, include conducting board meetings abroad and sending agents of the organization to attend and speak at seminars and conferences. Similarly, the instructions clarify that organizations should report travel expenses to, from, and within foreign regions.
- The 2009 Schedule F instructions also clarify that expenditures should be reported on Schedule F based on the method used to account for them in the organization's financial statements, and that allocations of indirect expenditures to foreign activities are not necessary if the organization does not separately track them.

Schedule G, Q#3 in Part 1

- List all states in which the organization is registered or licensed to solicit funds or has been notified it is exempt from registration or licensing. (Begs the question: “Where should you be registered”?)
- The instructions provide as follows:
 - If the organization is registered or licensed, or has been notified that it is exempt from registration or licensing in all states requiring registration or licensing for solicitation it may answer “All states” in 2008. However, the states must be listed in the 2009 return.
- We only get to Schedule G, Part 1 if we have incurred more than \$15,000 of “professional fundraising expenses” which are defined as:
 - Services performed that require the exercise of professional judgment or discretion (e.g., planning, management, preparation of materials, providing advice, and consulting) not purely ministerial tasks e.g., printing, mailing services, receiving and depositing contributions, etc.

Schedule H

- Consider recent legislation in Congress and its potential affect on Schedule H in the future.
- Proposed Section 501(r), provides additional requirements for hospitals that are tax-exempt under Section 501(c)(3). Under the proposed new provision, a hospital organization shall not be treated as tax-exempt under Section 501(c)(3) unless the organization meets the:
 - (A) Community health needs assessment requirements
 - (B) Financial assistance policy requirements
 - (C) Requirements on charges
 - (D) Billing and collection requirement.
- See Section 6007 of the America's Healthy Future Act

Potential Collateral Impact of 501(r)

- Remember the discussions some time back to require organizations to reapply for tax-exempt status every five years?
- Consider how provisions similar to proposed section 501(r) may be imposed in the future on:
 - Other Section 501(c)(3) organizations
 - All other Section 501(c) organizations

Schedule I, Grants and other assistance

- Part IV, Questions 21 and 22 – What is meant by “grants and other assistance” for purposes of Schedule I?
 - Old Form 990, Line 22 required organizations to report only “scholarships, fellowships, and research grants.”
- Much expanded definition in the new Form 990
 - New Form 990 instructions indicate that “Grants and other assistance” include awards, prizes, cash allocations, stipends, scholarships, fellowships, research grants, and payments and distributions similar to the forgoing.

Schedule I, Grants and other assistance (continued)

- Examples of items to consider include:
 - Event/meeting sponsorship payments to other organizations that constitute contributions under Section 513(i)
 - FILER's donations (whether restricted or not) to the FILER's Foundation
 - Contributions or donations by FILER to the fundraisers and events of other tax-exempt organizations
 - Nonresearch specific contributions by FILER to charitable and educational organizations described in Section 501(c)(3) of the Internal Revenue Code
 - Financial assistance provided by FILER to organizations in the form of contributions and donations to support the donee's public policy advocacy
- The above payments do not appear to be any type of quid-pro-quo payment; therefore, these payments seem to be reportable on Lines 1, 2, or 3 of Form 990, Part IX.
 - Also report on Schedule F (for foreign entities) and Schedule I (for domestic entities) if required under the instructions to those supplemental schedules.

Schedule J, Severance vs. Settlement Payments

- What if the organization has signed a confidentiality agreement in connection with a “severance” payment reportable on Form W-2?
 - If the requested information is disclosed, the organization may be violating the confidentiality agreement.
 - Does the organization have to list the severance amount in Column (iii) of Schedule J, Part II (also potentially violating the confidentiality agreement)?
 - Plan to avoid the problem in the first place.
- You do not have to disclose “settlement” payments reportable in Form 1099, Box 3. A settlement payment is the portion of the payment that was made
 - In response to an underlying legal claim at the time of the payment
 - For a claim that encompassed personal injuries, and
 - For a payment to settle such claim

Schedule J, 457(f) and Contingent Compensation

- Q. 4b: A supplemental nonqualified retirement plan does not include your organization's 457(b) plan (only 457(f) type plans).
- Q. 5 and 6: What is meant by "compensation contingent on revenues or net earnings"?
 - Example: if an officer receives a bonus payment of a specific dollar amount to be paid only if a gross revenue or net revenue target of the department is achieved, the payment is **NOT** a contingent payment for purposes of these questions.
 - Probably designed to identify situations where compensation is based on a percentage of revenues or net earnings.

Schedule J, Compensation Components

- You must separate the components of reportable compensation among “base,” “bonus,” and “other” when Schedule J is applicable to an individual.
 - Careful analysis is required, and note the potential disconnect between the answer to Question 7 in Part 1 of Schedule J (i.e., nonfixed payments) and an entry (or no entry) in Column B(ii)
- Be mindful of use of reporting thresholds in Part VII
 - If you take advantage of the reporting thresholds in Part VII, you may be reporting different compensation amounts in Part VII and Schedule J (for those persons required to be listed in Schedule J)
 - May be confusing to those viewing your Form 990 (i.e., media, donors, etc.)

Schedule K

- Tax Exempt Bond Reporting: Part IV, Questions 24a–d and the completion of Schedule K.
 - Get ready to calculate the private business use percentages that you will need to report on the Form 990 for 2009 to the nearest tenth of a percentage point.
 - Percent of financed property used by non-Section 501(c)(3) organizations
 - Percent of financed property used in an UBI activity by you, another Section 501(c)(3) organization, or a state or local government
 - Consider leases, vendor contracts, and research agreements

Schedule R, Controlled and Related Entities

- Part IV: Questions 33, 34, and 35
 - How do we determine if we have a controlled not-for-profit entity within the meaning of Section 512(b)(13)?
 - Consider “voting” board members in determining status as a controlled related entity.
 - The old regulations under Section 512(b)(13) may be useful in this area.
 - Your sponsored PAC is a related entity (i.e., a Section 527 organization).

Schedule R, Disclosures by Controlling Organizations

- Why the IRS is seeking information about transactions with “controlled” entities
- See Section 6033(h); controlling organizations must disclose:
 - (i) interest, (ii) annuities, (iii) royalties, and (iv) rent from a controlled entity
 - Loans to or loan guarantees for each controlled entity
 - Any transfers of funds between the controlling entity and each controlled entity

Special Reporting Issues

- Group returns
 - Appendix E. Group Returns – Reporting Information on Behalf of the Group
- Disregarded entities
 - Appendix F. Disregarded Entities – Inclusion of Activities and Items
- Joint ventures
 - Appendix F. Joint Ventures – Inclusion of Activities and Items

Form 990 Group Returns

- See Form 990 instructions; Appendix E
 - For subordinates that choose to file a group Form 990, there are several kinds of information
 - Financial data (i.e., dollar amounts or numerical data)
 - Generally reported in the aggregate for all subordinates
 - Program information (i.e., Form 990, Part III; mission and activities)
 - Generally reported in the aggregate (in effect, treating all of the subordinates as one entity)
 - Questions that require a Yes/No answer
 - Generally answered the aggregate, but whether it is “Yes” or “No” depends on the particular question

Additional Special Instructions

- Compensation of officers
 - File a single consolidated Form 990, Part VII showing the O,D,T, and KEs of each subordinate included in the group return
 - Report the five highest compensated employees and independent contractors above \$100,000 for the whole group of subordinates (not for each subordinate)
 - If a reported person receives compensation from more than one organization included in the group return, report the aggregate in column (D).
 - Report compensation provided to O, D, T, and KE by other subordinates included in the group ruling but not included in the group Form 990 return as compensation from a related organization (even if that related organization is not required to be reported on Schedule R)

Default Answers to Yes/No Questions

- Certain questions default to a “Yes” answer
 - In general, if the answer is not the same for all subordinates to which the line applies, state “Yes.”
 - Explain the answer in the schedule’s supplemental information or Schedule O, as appropriate
 - Consider the potential impact of certain questions
 - Part IV questions requiring supplemental schedules for example:
 - Question 3 – political activity
 - Question 25 – excess benefit transactions
 - Questions 26 and 27 – loans and grants to insiders
 - Question 28a, b, and c – direct and indirect business relationships
 - Part V
 - Question 5 a and b – tax shelter participation

Default Answers to Yes/No Questions

- Certain other questions default to a “No” answer, for example:
 - Form 990, Part V
 - Line 1c (backup withholding)
 - Line 2b (federal employment tax returns)
 - Line 3b (Form 990-T)
 - Line 5c (Form 8886-T)
 - Line 7b (quid pro quo rules)
 - Part VI
 - Lines 8a and 8b (contemporaneous documentation of meetings)
 - Lines 12b and 12c (disclosure of conflicts monitoring and enforcement)
 - Schedule J Part 1
 - Line 1b (written reimbursement policy for certain items)
 - Line 2 (substantiation required prior to reimbursement for certain items)

Observations about Yes/No Default Answers

- Default answers were chosen carefully to find outliers
 - Designed to generate the maximum disclosure and transparency
 - For individual subordinates and the group as a whole
 - Depending on the question, the answers may create exposure or unwanted publicity with the IRS, Attorneys General, donors, the press, and the general public
 - For individual subordinates and the group as a whole
 - May call the parent's general control and supervision into question
 - Inclusion in a group Form 990 return may not be advisable in some situations.
 - Parent organizations may make inquiries of subordinates before allowing them to remain in the group or included in a group Form 990.
 - Subordinates should make inquiries about other subordinates before agreeing to being included in a group Form 990.

Disregarded Entities and Form 990 Reporting

- Generally, an entity formed under state law as a single member limited liability company
 - Disregarded (i.e., ignored) for federal income tax purposes
 - Regarded (i.e., not ignored) for employment tax purposes
- Treated as a branch or division of its member (or parent organization) for 990 reporting purposes
 - Financial and other information applicable to a disregarded entity must be reported as the parent organization's information.
 - Financial – revenue, expenses, assets, liabilities and net assets
 - Activities – e.g., volunteer lobbying effort and political intervention

Disregarded Entities; Special Instructions 1

- The number of information returns (e.g., W-2 and Form 1099) and compliance with the backup withholding rules includes a disregarded entity.
- Including the number of volunteers of a disregarded entity is optional.
- Consider activities and accomplishments of all disregarded entities when completing Form 990, Part III.
- Consider contributions to disregarded entities when answering the questions in Form 990, Part V (Question 7a–h).
- O, D, T, and KE of a disregarded entity will not be considered as such for the parent organization.
 - However, such persons may be included in the top 20 key employees or five highest compensated employees of the filing organization by virtue of their compensation
 - By virtue of their responsibilities and authority within the disregarded entity when compared to the filing organization as a whole

Disregarded Entities; Special Instructions 2

- Governance; Form 990 Part VI
 - Part VI, Section B, Lines 12-16 are to be answered based on the filing organization's policies.
 - However, for each "Yes" answer, report on Schedule O whether the policy applies to all of the organization's disregarded entities.
- Schedule L
 - Transactions between the organization as a whole (including a disregarded entity) and their own O, D, and T are generally not reportable in Schedule L, Part IV.
 - However, if such persons constitute key employees of the organization as a whole (i.e., those who meet the compensation test, responsibility test and in the top 20), then transactions are subject to Schedule L, Part IV reporting.

Disregarded Entities; Special Instructions 3

- Schedule R
- Reporting payments to and transfers from disregarded entities
 - Specified payments (virtually any transfer) to a disregarded entity by a controlled entity of the filing organization
 - Transfers from a disregarded entity to an exempt noncharitable entity are to be reported in Schedule R, Part V, Line 2

Participation in Joint Ventures

- The term “joint venture” includes any entity (or arrangement) that is treated as a partnership for federal income tax purposes (i.e., Subchapter K)
 - Joint ventures
 - General and limited partnerships
 - Limited liability companies that chose to be treated as partnerships
 - Certain other agreements to conduct activities and share expenses or net profit
- The key concept of Subchapter K is pass-through treatment for tax purposes.

Joint Ventures; Schedule L Considerations

- Business transactions (Schedule L, Part IV) include new or ongoing joint ventures with interested persons in which either the profits or capital interest of the organization and of the interested person each exceeds 10%
 - For example, ventures with physicians

Joint Ventures; Schedule R Considerations

- Two types of joint venture participation (i.e., related and not related)
 - Related (over 50% capital or profits interest)
 - Identify entity in Schedule R, Part III
 - Report transactions with entity in Schedule R, Part V

Joint Ventures; Schedule R Considerations (continued)

- Not related (i.e., 50% or less capital or profits interest) BUT over 5% of the filing organization's activities are conducted through the partnership – measured by either assets or gross revenue
 - The 5% asset or gross revenue tests are separate for each first tier partnership
 - $JV \text{ total assets} / (JV \text{ Assets} + \text{Filing organization assets}) > 5\%$
 - $JV \text{ gross revenue} / (JV \text{ gross revenue} + \text{Filing organization gross revenue}) > 5\%$
- If either test is met, identify the venture in Schedule R, Part VI
 - Answer specific questions relating to the venture
 - For example, non-501c(3) partners, disproportionate allocations, and UBI amount
 - However, there is an exception...

Joint Ventures; Schedule R Considerations (continued)

- Exception: disregard such “unrelated” partnerships that meet both of the following conditions:
 - 95% or more of the partnership’s gross revenue consists of interest, dividends, royalties, rents, and capital gains (including debt-financed income)
 - Primary purpose of the investment is the production of income or appreciation of property and not the conduct of a section 501(c)(3) activity

Impact on Form 990 (and Form 990-T) of Joint Ventures – examples

- Disposition of 25% of assets (Part 1 and Sch N)
- Pass-through of UBI (Part 1 and Form 990-T)
- Political campaign activity (Part IV and Sch C)
- Lobbying activity (Part IV and Sch C)
- Hospital facilities (Part IV and Sch H)
- Loans & grants (Part IV and Sch L)
- Business transactions (Part IV and Sch L)
- Related entities (Part IV and Sch R)
- Unrelated entities (Part IV and Sch R)
- Joint venture policies (Part VI)
- Joint venture ownership of property financed by tax-exempt bonds (Sch K, Part III)

Questions

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