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New Form 990 Disclosure Requirements

By John Crigler and Benjamin J. Lambiotte*

Beginning with returns for tax year 2008, federal tax-exempt entities that file Form 990 will be required to state whether the organization has adopted certain internal governance policies, including document retention policies, whistleblower protection policies, and policies related to conflicts of interest. The Form 990 is due May 15, 2009 for organizations with calendar year accounting periods.

Background

Although the Sarbanes Oxley Act applies primarily to publicly-traded corporations, two of its provisions apply to all companies, including exempt organizations. One provision pertains to protection for individuals who report suspected violations of federal law, and prohibits retaliation against such “whistleblowers.” The other provision creates criminal penalties for intentional destruction, concealment, falsification or alteration of certain documents. This provision implements Congressional concern about the need for greater transparency and good governance practices in tax-exempt organizations.

New Disclosure Requirements Regarding Internal Governance

To advance these concerns, the IRS has revised Form 990 and filing instructions. The changes include a new section (Part VI, Section B), which requires an exempt organization to disclose its governance and management structure, and to answer “yes” or “no” to questions about whether it has adopted internal policies regarding five key areas: (a) conflict of interests; (b) whistleblower protection; (c) document retention and destruction; (d) determination of compensation of key personnel; and (e) investment and joint venture activity. The exempt organization must declare whether its governing documents, policies and financial statements are made available to the public. While the IRS has said that adoption of these policies is not *required*, it has also made clear that failure to adopt such policies may lead to greater IRS scrutiny and to enforcement action where suspected violations are detected.

For these reasons, it is highly desirable that organizations required to file Form 990 for 2008 and succeeding tax years adopt appropriate policies for the five areas noted above. Reliance on “boilerplate” language is risky. IRS expects governance policies to be tailored to the nature of each organization.



Some requirements are general, however. For example, the Form 990 instructions recommend a “whistleblower policy [that] encourages staff and volunteers to come forward with information on illegal activities and violations of adopted policies of the organization, specifies that the organization will protect the individual against retaliation, and identifies those staff or board members or outside parties to whom such information can be reported.”

The instructions also recommend a document retention and destruction policy that “identifies the record retention and destruction responsibilities of staff, volunteers, board members, and outsiders, for maintaining and documenting the storage and destruction of the organization’s documents and records.” The IRS expects the policy to establish specific standards for document integrity, retention and destruction, and to provide guidelines for handling electronic records, including backup procedures, archiving of documents, and regular checkups of the reliability of the system. A good document retention policy includes procedures for preventing destruction in the event of an investigation or litigation and specifies the duration for retaining different categories of documents. Here are some basic categories of documents you should consider retaining:

Documents

Governance documents (Articles of Incorporation, Bylaws, Minutes)

Tax reports and related documents

Intellectual property records (copyright and trademark registrations.)

Financial records (audited financial statements)

Employment and employee benefit records

Agreements with independent contractors

Other business records (correspondence files, budgets, bank statements, personnel manuals)

Should you have any questions about the new Form 990’s requirements, or need assistance or guidance in preparing and implementing governance policies, please contact John Crigler (jcrigler@gsblaw.com) or Ben Lambiotte (blambiotte@gsblaw.com).

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