

## ASSOCIATION OF CORPORATE COUNSEL

**TITLE:** The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?

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**PRESENTED BY:** ACC Nonprofit Organizations Committee

**SPONSORED BY:** Venable, LLP

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**Operator:** Just as a reminder, today's conference is being recorded. Welcome, to this ACC webcast. Steve, please go ahead.

**Steve Garrett:** Thank you, Sandy. Welcome to the Association of Corporate Counsel Nonprofit Organizations Committee Webcast entitled, "The New IRS Form 990: What Does It Mean For Your Nonprofit Organization?"

My name is Steve Garrett, and I will be the moderator for today's presentation. I am the Associate Vice President and General Counsel for the Texas A&M Research Foundation. I also serve as the Chair of the webcast subcommittee of the non-profit organization's committee of ACC.

Our first presenter today is Jeffrey S. Tennenbaum, a partner and head of the non-profit organization's practice at the law firm of Venable, LLP. The firm is the 2008 sponsor of the ACC Nonprofit Organization's Committee. Mr. Tennenbaum is located in the firm's Washington, D.C. office, where he counsels his clients on the wide range of legal matters affecting non-profit organizations.

He is one of the nation's leading non-profit attorneys. He is an accomplished and respected author, lecturer and commentator on non-profit legal issues. In 2006, he was presented with the ABA Outstanding Non-Profit Lawyer of the Year Award, and in 2004, he was an inaugural recipient of the Washington Business Journal's Top Washington Lawyers Award.

He is the author of the book, "Association Tax Compliance Guide" published by ASAE & The Center for Association Leadership and has authored numerous articles, book chapters and other publications on non-profit legal topics. This webcast is being presented through ACC's updated webcast page. Attendees may post questions to Mr. Tennenbaum and the other panelists by using the chat function on your screen. At any time, you may type in your questions and then press "send."

Your question will not appear on the other attendees' screens but will be visible to the panelists and myself. If your question does not get answered during the presentation, your answers will be posted by ACC at a later date on the Web site. If a question occurs to you after the close of this presentation, you can send it to Mr. Tennenbaum at [jstennenbaum@venable.com](mailto:jstennenbaum@venable.com), and that e-mail address is available on his materials on the Web site.

This webcast is being recorded. The audio file for this webcast will be available for re-play on the ACC Web site about three hours after the end of the presentation. It will be archived on the ACC Web site for about a year. During the course of the webcast, you will see a webcast evaluation on your screen in the links box. I think it's going to be item number eight. Please take a moment or two to respond to this evaluation. It is a very useful tool for ACC to organize and present webcasts that are interesting and informative to ACC members.

And now, let me turn the presentation over to Mr. Tennenbaum who will introduce the other three panelists for today's presentation.

**Jeffrey Tennenbaum:** Thank you, Steve. And good afternoon, everyone. Good morning to those of you on the West coast. We have a jam packed hour and 15-minute program for you today, and I apologize in advance for the speed with which we're going to have to move through this material.

But there is a lot of material to cover. We want to make sure we impart all of the relevant details to you, and we also want to make sure we have time for some questions at the end. Today, I'm frankly serving no more than a glorified moderator – co-moderator with Steve. The real panelists today are my colleagues Thora Johnson, Serena Simons, and George Constantine.

Serena, Thora, and George along with myself and others work in our non-profit organizations and employee benefits practice and spend our time counseling non-profit organizations like those that you are with on how to comply with various legal and tax matters including implementation of the new Form 990, which is the subject of our program today.

The Form 990 went through its first major redesign in over 30 years. And it is a massive overhaul of the form. I'm sure that all of you have heard about it. I'm sure that many of you have read about it. Today's program is designed to get you up to speed on what is new and different in the new form and to help you be able to help your own organizations implement the form for your own tax-exempt entity.

The 990 as you all know, is a primary tax compliance tool for tax-exempt organizations. Sorry, let me advance the slides here. It's a primary compliance tool for tax-exempt organizations. It's used by the IRS to gather information about tax-exempt organizations and is very much used by many if not most state tax enforcement agencies for tax enforcement purposes as well.

In addition, because it is very much a public document subject to public disclosure, it's an important source of information for the public, media, researchers and policymakers about the tax exempt sector generally and individual organizations specifically.

And when the IRS went through this process to redesign the new Form 990, according to the IRS's published materials on the subject, it was guided by three quote, "guiding principles: transparency, promoting compliance, and minimizing burdens."

The first guiding principle is to enhance transparency to provide the IRS and the public with a realistic picture of the organization along with a basis of comparison with other organizations. Second, to promote compliance by accurately reflecting the organizations operations so that the IRS can efficiently assess the risk of non-compliance, and three, minimizing the burden on filing organizations.

And while the IRS certainly did do its best in responding to comments from the tax exempt community to try to minimize the burdens on the filing community from the draft Form 990 that was released to the final form, there's no question that because this form is so much vaster and more complex and asks for so much more information than prior versions of the form, that there's no doubt it's going to impose a vastly increased burden on the tax exempt community.

Just to give you a sense of the timing how all this has played out, the final version of the Form 990 was issued on December 20, 2007. Draft instructions to the form, which as you're going to see with some references throughout today's webcast, are very important to understanding the form and how to fill out the form.

Draft instructions and a glossary were issued on April 7th of this year with a comment period that lasted until June 1st. The final instructions were released on August 19th, and the form now is being implemented for the 2008 tax year. So what that means is that if you were say a calendar year-fiscal year organization, then you will be filing your return, your Form 990 return for the 2008 year, next year.

If you do it on time, it'll be due by May 15th of 2009, and this is the form that you will use. So everything that's happening now in your organizations today will be reflected on the form that's going to be filed either next May or, if you get an extension, next August or next November. There are phased in schedules of implementation for Schedule H, which relates to hospitals, and Schedule K, which relates to tax exempt bonds.

Just to give you a brief overview of how the new form is laid out, unlike prior versions of the form, which really did not consist of too many schedules, here what the IRS has done has reduced the core form to what they call a core form, which also has a summary page, and that is a form that's filled out by all tax exempt organizations.

The form then is accompanied by 16 different schedules, but don't worry, not all of those schedules are applicable to all organizations. It depends on what your activities are, what kinds of affiliates you have, whether you engage in lobbying and political activities, whether you have overseas activities, whether you're a hospital – a whole host of different schedules relating to different aspects of your operations. And George is going to get into those later today. But you will have to complete one or more of those schedules depending on the nature of your organization.

And finally, if you want to get a complete set of the Form 990 and the final instructions, on the slide here is a link to the particular section of the IRS Web site where you can find it even easier if you just go to [www.irs.gov](http://www.irs.gov), click on the charities and non-profits link. You'll easily be able to be directed to the section that has all of the IRS material about the new Form 990 and all of the background information as well.

In addition, in the handout materials that were provided to you today, you should have copies of our PowerPoint presentation along with a Form 990 itself, the various schedules, the instructions, and a pretty comprehensive article of ours that goes into all this in a fair amount of detail.

With that, I'm going to turn it over to my colleague Thora Johnson who's going to discuss the core Form 990 itself. Thora?

**Thora Johnson:** Thank you, Jeff. The core form is the heart of this revised Form 990 and must be completed by all filers. It's now 11 pages rather than the nine pages it used to be, and with the additional two pages comes a core form with both previously required items reformatted and many new required disclosures.

The Form 990's referred to in the tax code as an information return, and the redesigned Form 990 certainly lives up to this name. It's much more than a financial return. It is truly an information return, as you'll see.

The structure of the core form looks fairly familiar, although the very first page is now a summary of the information contained in the rest of the Form 990 and its schedules, and the signature block has been moved up front. It's followed by a statement of program services, a checklist of required schedules to be attached to the core form, then a checklist of other required IRS filings and tax compliance questions, followed by a new governance management and disclosure section, followed by compensation reporting and then financial reporting.

As I just mentioned, there's a new summary. It doesn't appear in the current 990. And what it boils down to is the very first page the organization's most significant activities, key financial, compensation, governance, and operational information.

Among other things, the summary requires your organization to provide revenue and expense information for both the current year and prior year, thereby allowing the reader to spot changes and trends. And rather correctly or incorrectly draw some conclusions on the health of your organization.

It also moves the signature block up front. It used to be buried in the core form, and the IRS has said that this is particularly important so that the reader of the 990 can see easily who has signed the return under penalties of perjury and has said that they have reviewed it and believe it to be true, correct and complete.

The next section is a statement of your organization's program. This part requires your organization to describe its mission, program services, and accomplishments and any changes in program services in a narrative format, and then to provide certain revenue and expense information regarding its largest program services. Most of this information is required on the current Form 990 but has certainly been reformatted.

And, in fact, the IRS has given you plenty of space here to describe your organizations programs and encourages you to fill out any additional information you would like on the new Schedule O, which basically looks like a blank page in a notebook. So you're not constrained by this section of the core form. You have extra space to continue your story.

And it's in response to comments that this is so early in the core form now – it used to be later on the core form, and people reviewing the draft 990 said they wanted the chance to tell their organization's story up front and before the details of its operation and financials were described.

And as I mentioned, in this section, you need to describe your three largest programs measured by expense, and in that, include the amount of grants and allocations to others, the total expenses and revenue of each of these programs.

The next section is a checklist of the required schedules. The answers to these questions trigger when you need to file a schedule, and it also gives the IRS a kind of quick snapshot of your organization. As Jeff mentioned, there are 16 schedules, but you don't need to complete each and every one.

They are targeted to specific types of tax-exempt organizations and to specific topics. And we need to be careful when you go through these schedules because not only are they triggered by the type of tax exempt you are and your activities, there may be reporting thresholds. For example, Schedule M is on non-cash contributions, and it's only triggered if your organization has received more than 25,000 in non-cash contributions.

The next section alerts organizations and the IRS to other potential federal tax filing obligations beyond the 990. For example, if you have unrelated business income and you need to file 990-T, this section of the form will highlight that. Also, if you need to report on, for example, foreign bank and financial accounts, this section of the form will highlight that need.

It also collects important federal tax compliance information in one place such as whether your charity has complied with the applicable substantiation disclosure rules applicable to contributions. These questions are applicable to all – the questions that are applicable to all filers are listed first, thereby making this section a little bit more user friendly than it is in the current Form 990.

The next section in the core form is on governance, management and disclosure. The reasoning behind this new section is the IRS believes that the existence of an independent governing body and well-defined governance and management policies increases the likelihood that an organization is operating in compliance with federal tax law safeguarding assets and serving exempt purposes.

In addition, the premise behind these questions is also that there should be a higher level of self-regulation and internal control to relieve at least to a small degree the oversight obligations of the IRS and state attorneys general who are charged with safeguarding charitable assets.

And you'll see in this section, many of the 33 principles for good governance and ethical practice that the panel on the non-profit sector recommends each charity to consider. And for those of you who are not familiar with the panel, it was formed by the independent sector, which is a national forum for charities in the given community at the encouragement of the U.S. Senate Finance Committee in October of 2004. In this section, you can also feel the influence of Sarbanes-Oxley Act and various new state laws governing non-profits.

Many of the non-profit sector's 33 principles go to and stress the importance of a charity maintaining an independent board. To this end, the core form asks questions regarding how the organization is governed and by whom. Specifically, it asks the number of voting members on your board, the number of those voting members who are independent, and whether there are any relationships between your officer, director or key employees and any other officers, directors and key employees, and whether they're family or business connections between them.

And for this purpose, the definition of independent means that at all times during the tax year, the board member is not compensated as an officer or other employee of the organization or a related organization. And a related organization for this purpose means a parent, a sub or a brother/sister corp or a supporting or supported organization if you're in a supporting/supported organization structure.

So to be independent you cannot have received compensation as an officer or other employee of the organization or a related organization; you have not received compensation exceeding \$10,000 for the year from the organization or a related organization as an independent contractor other than as a compensation or reimbursement for serving as a director; and you are not and your family members are not involved in a transaction that's reportable on the new Schedule L, which is transactions with interested persons, which George will talk about at the end.

The instructions clarify that an organization need not engage in more than reasonable efforts to glean this information on independents and can rely on information provided by board members. So the instructions suggest sending out a questionnaire to the members of your board each year to get this information so you can report accurately on the core form.

And again, these questions are going to highlight the importance of the independent board on the basis that charities are supposed to enjoy a broad base of public support and participation, and their board should reflect this fact.

The core form continues to ask whether your organization delegates control to a management company. Again, the IRS is signaling the importance of having an engaged board managing your organization and not ceding control, perhaps, to an outside company. It also asks whether there's been any material diversion of your organization's assets.

Proper use of assets is important, and this question is allowing the IRS to collect information from organizations that become aware that there's been a material diversion, and allows the organization to explain the circumstances and the corrective actions taken to address it. For these purposes, a material diversion must exceed the lesser of 250,000 or five percent of the organization's gross receipts for its tax year or total assets as of the year-end.

And this is really – it's a signal for the organization to think about whether there's been any prohibited enurement of net earnings for any taxable excess benefit transaction. The core form then continues to ask in this section, does your board and committee – board committees take appropriate minutes of their meetings. Again, the core form is stressing the importance of transparency and open operation of the board and its committees.

The form then goes on and asks whether your board has approved the 990 – or actually, has been provided – not even approved, but just provided the Form 990 before it was filed. And I'm sure there are many boards where they don't even know an organization completes a 990. So this may be a big takeaway point from our talk today – the importance of sharing a copy of the 990 before it's actually filed with the IRS.

And not only do you have to answer that question, you have to describe in narrative format any review process that's been used for your 990 on this new Schedule O, which is that notebook page. And, in fact, the instructions give you an example of an organization that e-mails out to each board member the 990 before it's filed; however, no board member undertakes any review before or after the 990 is filed.

So that organization would say, yes, board's received it before it was filed with the IRS but then go on and state, but no review was or will be conducted. And I don't think you want to be in that situation. So the big takeaway is to look at your 990-review process in light of these new disclosure questions.

And the IRS isn't looking for one particular review process. It's just highlighting that there has to be high accountability – a high level of accountability for the 990. Then there are questions about conflict of interest policy. All directors owe the organization a duty of loyalty, and the IRS is now asking, do you have a written conflict of interest policy? If yes, do your officers, directors and key employees disclose annually interest that could give rise to a conflict? And how does your organization monitor and enforce compliance?

Again, the IRS views the conflict of interest policy as a demonstration of the organization's commitment to carrying out its responsibilities ethically and effectively. The next part of the disclosure is on your written whistleblower policy. Do you have one and do you have a written document retention and destruction policy? Here you can clearly feel the effects of Sarbanes-Oxley, which generally doesn't apply to non-profits except for two provisions.

Sarbanes-Oxley requires non-profits to protect whistleblowers and imposes a criminal penalty for actions taken in retaliation against those who report suspected illegal activities in your non-profit. And it also makes it a crime to destroy documents to prevent their use in a federal investigation. But the inference between these – behind these two questions on the core form is that you now should have them in writing. It's not enough just to have them, they need to be reduced to writing, and the IRS encourages with regard to the whistleblower policy that it be quite broad – that you have a policy for handling employee complaints and that they're able to report in confidence any suspected financial impropriety or misuse of assets.

And with the document retention and destruction program, the IRS is encouraging you to have a written program for protecting your documents that show the time period for which they must be retained and when they can be destroyed and how they can be destroyed, and it should address both paper and electronic documentation.

This section continues with questions about how you set compensation. Do you follow, for example, the IRS safe harbor, known as the rebuttable presumption, and I'll let Serena talk about that in a little bit more detail next.

Then it asks, do you invest with a joint venture – are you in a joint venture with a taxable entity, and if yes, do you have a written policy to make sure that the joint venture furthers charitable purposes and you give priority to those charitable purposes.

Questions go on to ask, do you make your 1023, your application for tax exempt status, available? And if so, how? Further it asks, do you make your governing documents, your charter and bylaws, your conflict of interest policy, and your financial statements available to the public?

Those aren't required other than the application to be made available to the public, but by putting this question on the 990, the IRS is really signaling that they think that these other documents that typically haven't been made public should be made public, and you need to now state whether or not you make them public in the IRS' attempt to encourage transparency and accountability and self regulation.

There's a lot of concern about this new section on governance. Again, many of these questions – these policies are not legally required, but the presumption here is that the IRS is looking for them because the IRS says it will improve general tax compliance if you have these policies. And the IRS is not planning to back away from these disclosure requirements.

In fact, Steven Miller, the head of the Tax-Exempt and Government Entities Division, has said that he sees this 990, the core form, as the crown jewel of the IRS work on governance, and that the IRS always has a place at the table whenever governance is discussed.

Then the last portions of the core form deal with revenue – deal with compensation, which Serena will talk about, then a statement of revenue and expenses and the balance sheet, which are largely unchanged. But there is a new section on financial statement and reporting asking you whether you have your financials audited. Federal tax law might not require it, but your state law might. And then it's asking you if you do have it audited, how do you oversee your independent accountant? Do you have an audit committee, again, with an emphasis on self-regulation and having strong financial oversight.

And with that, I'm going to pass over to Serena who will discuss compensation reporting. Serena?

**Serena Simons:** Thank you, Thora, and good afternoon, everyone. Now that Thora has walked you through the core form, I'm going to drill down a bit on the subject of executive compensation reporting.

I'll go back over the core form sections that deal with executive compensation and also give you the highlights of Schedule J. The new Form 990 requires expanded reporting on just about everything and executive compensation is no exception. I think you'll find that as you work through these portions of the form, not only will many of you be reporting on more people, but for each person, you will have to provide more information and more specific information than you have in the past.

In addition, on some items, you'll be asked to provide additional kinds of information that you've never had to provide before. And, finally, I'll point out that the definitions are very specific in this section of the Form 990. They're specific everywhere, but here I think you'll find that they go into really remarkable detail, and it will take some time to read through and get familiar with what you're going to be asked to put down. And so it's certainly not too early to start looking over what's going to be required for reporting purposes.

So onto the Form 990. Basically, the executive compensation section of the core form can be summed up as the IRS asking who gets how much and who decides? The "who decides" question appears first in the governance section as Thora referred to. That's part six, section (B), question 15. Who gets how much follows in part seven of the core form with more detailed information to be provided for certain benefits and certain individuals on Schedule J.

But let's talk about who decides first. As Thora mentioned, this question asks whether your organization has a process in place used for determining compensation with respect to its officers and its key employees, and whether this process includes the following features: first, that the compensation was reviewed by an independent body that was knowledgeable in compensation matters and had no conflict of interest; second, that the independent body considered comparability data; and third, that the independent body simultaneously substantiated its deliberations and decisions.

No doubt you'll recognize this – many of you – as the compensation setting procedure provided as a safe harbor in the intermediate sanction regulations. If an organization follows these procedures, the organization gets the benefit of the rebuttable presumption that the compensation so set is reasonable. As Thora mentioned again, this is one of those questions that asks about procedures that are not legally required but are clearly being encouraged by the IRS.

And if you use this particular process, not only are you in the safe harbor, you are spared from having to report certain types of compensation on Schedule J because of the presumption of reasonableness.

Finally, although this procedure does not have to be in writing to allow you to make a yes answer on the form, it will still have to be described in writing on Schedule O. So one way or another, you're going to have to write it down, and you – and you might want to begin that process if it's not already in writing.

Let's move on to compensation reporting. Basically, compensation is reported on the core form with more detail on Schedule J. This form uses the same approach as the old 990, a core form with schedules, and you'll recognize many of the defined terms and some of the individuals that you have to report on. But basically the similarity stops there.

There are lots of differences in the details of what is reported and for whom. Some of these details will lighten your load and make it easier to fill out the form but most will not. In any event, I don't want you to be lulled into thinking that because you take a quick look at the form and you recognize the terminology and it all sort of looks familiar that it's going to be pretty much the same process you've done before.

That will likely not be the case. You're going to have to report on a lot more and a lot more detail. So it's very important that you read the instructions sooner rather than later so you know what you're looking at ahead and getting into. With that being said, let's talk about who you have to report for for compensation purposes.

On the new core form in part seven, section (A), you have to report on all current officers, directors and trustees without regard to their compensation amount. You have to report on all current key employees, and I'll say more about who these people are and how you identify them

on the next slide, and you have to report on the five highest paid, non-key current employees with compensation of over \$100,000.

With regard to former employees, you have to report on former officers, key employees and the five highest paid with compensation of more than \$100,000. You also have to report on former directors and trustees with compensation of over \$10,000, and you have to report on former highest – five highest paid employees who meet a new test. This is a new test that came out in the final instructions that were published in August.

To be reported on, a former five highest paid employee has to have compensation of more than \$100,000, the individual has to have not been an employee of the organization at any time during the year, and the amount of compensation that the employee received has to have made the employee one of the five current highest paid employees – non-key employees if the employee were still employed. So it is a new test, and it's a little more work, but it does perhaps help to cut down on the number of former five highest paid employees that you have to report on.

I said there was a new test also for reporting on key employees. This new definition – new test was sort of pre-announced after the draft instructions and before the final instructions, but it stayed the same. And it – and it was meant to again help people identify who their key employees were and make it a little clearer who was and who wasn't.

Under this new definition of key employee, it's a three-part test. The first is \$150,000 of reportable compensation – more than \$150,000 of reportable compensation. The second part of the test is called the responsibility test. Under that test, an employee has to have had or shared organization-wide control or influence similar to an officer, director or trustee, or alternatively, the employee has to have managed or had authority or control over at least 10 percent of the organizations activity.

Finally, there's a third test, and that's the top 20 test. Under this test, if the employee is in the group of employees who meets the first two parts of the test – \$150,000 and the responsibility test, the employee also has to be one of the highest 20 paid in that group. So hopefully, in these large organizations, this top 20 test will help to pare down the number of employees, key employees, that you have to report on.

A final note about who you have to report on, some good news also with respect to the former status, is limited to a five-year look back so that if an individual has not been reported on a 990 as a current employee, director, trustee, key employee anything like that for the last five years, reporting doesn't apply regardless of their compensation level. So it's a five-year look back, and that cuts off your former employee reporting in a way that should be helpful.

Now that you know who you have to report on, let's talk a little bit about what you have to report. On slide 32, we see the definitions of the different kinds of compensation that have to be reported on. The first, the main definition, is reportable compensation, and that's from the organization that's filing the form.

Then there is reportable compensation from any related organization to the filing organization, and finally, the third category is other compensation. And other compensation is an aggregated compensation from both the organization and related organizations. So this is just a hint of how much attention you have to pay to the precise definition of the type of compensation or amount that you're being asked to report on.

What is reportable compensation? Reportable compensation for an employee is W2 compensation and for a non-employee is 1099, miscellaneous compensation. This is one of the biggest changes on the new Form 990 in that the IRS is requiring a specific definition of compensation to be used for 990 reporting.

It's also requiring a specific period for which that compensation has to be reported. Compensation has to be reported for the calendar year. For organizations using a fiscal year, you must use the calendar year ending in the fiscal year. Fiscal year reporting of compensation is no longer allowed.

There is one exception to this rule that fiscal year reporting is no longer allowed, and that is you can continue to use fiscal year reporting for the amount of compensation reported in part nine of the core form, the statement of expenses.

What is other compensation? Now we're on slide 34. Other compensation for part seven of the core form is compensation other than what's on the W2, no surprise. That can include non-taxable deferred compensation, whether in a qualified plan like a 401k or a 403b or even an old fashioned defined benefit plan, and also it doesn't matter whether that compensation is vested or not vested.

It also includes most non-taxable benefits. There is an exclusion for some benefits valued at \$10,000 or less, but the exclusion does not cover retirement benefits or health benefits. This is another area where the rules are quite detailed and complicated. So it's important to go over, again – let me continue to say it – the form and the instructions closely to make sure you're reporting exactly what's being asked for.

And let me also mention that in the instructions to the form, there is really quite an extensive and quite helpful chart just listing many different kinds of compensation and telling you under the chart in what line or what part of both the core form and Schedule J this kind of compensation should be reported. Of course it can't cover everything, but it does cover a lot, so you should find that quite helpful in figuring out what goes where on these new forms.

Well, that's it for the core form. Moving now to the Schedule J, let me start out by saying that Schedule J has three sections but really only two parts. The first part is a list of questions about specific types of fringe benefits and specific kinds of payments made to certain individuals. If your organization provides any of these types of benefits or payments to anyone listed in part seven, section (A), question one of the core form, those details about those payments have to be provided in the third part of Schedule J.

And just to help sort of clarify who you have to report on, the people who are reported in part seven, section (A), question one are everyone we've been talking about but the independent contractors that have to be reported on under the core form. Those do not have to show up in this part of the form Schedule J.

There are also several questions – four, at the very end – for 501(c)(3) organizations only. These request compensation based on – or ask about compensation based on revenues or net earnings, non-fixed payments and payments under the initial contract exception. This is just the IRS asking for more detailed information about matters in which it's particularly interested with respect to 501(c)(3) organizations.

Now on to the chart. Who has to be listed on this chart, and why do we care? Well, a lot of people might have to be listed on the chart. Going over it not quite in the same order it's on the slide, all former employees, directors and trustees – that's all of them – that are listed in part seven of the core form are also listed on Schedule J. It turns out that the compensation thresholds for Schedule J reporting and core form reporting are the same. So if they're on part seven of core form, they're on Schedule J.

Current officers, directors and trustees are on Schedule J if their total compensation is over \$150,000. Total compensation is – you'll recall – reportable compensation plus other compensation. Current key employees and current high five employees are also on Schedule J if

their total compensation is over \$150,000, and this will mean that all key employees will be listed because they're over that threshold to begin with.

And finally, anyone listed in part seven of the core form who received compensation from an unrelated entity for services this person is performing for the filing organization, that person has to be reported on Schedule J. This is an anti-abuse provision. The IRS says that it's needed because some organizations have tried to get around the reporting requirements by having compensation provided by an organization that does not meet the test for being a related organization. Because the good news here is that you're only required to report on this compensation from an unrelated organization if you have knowledge that it's happening.

My last slide goes to the breakout of compensation that's required on the Schedule J for the people who are listed on it. And that breakout really does just what it says – it asks for a breakout of the different components of compensation of the individual. The first three items are the components of reportable compensation, and the other items are non-qualified deferred comp and non-taxable benefits.

Some of you may be aware of the fact that there has been concern about a double reporting problem all along with non-qualified deferred compensation, and that it can get reported twice – first when it's earned and then also when it's paid, and that can make compensation look higher than it is. On the chart for the Schedule J, the IRS has actually tried to improve this situation a bit in that it's added a column to Schedule J for listing deferred compensation that's being reported for this year that was also previously reported on a Form 990 for a prior year.

It's a subtle thing and it may take some educating for the public at large to understand what it means, but at least it is an attempt to help deal with that double reporting issue. And with that, I'm going to turn it back over to – or turn it over to George to talk about the schedules.

**George Constantine:** Great. Thanks a lot, Serena. We're rounding third here, headed for home. I will talk about the 16 schedules that are part of the Form 990. Obviously, with the time we have and the fact that these schedules are all over the place in terms of the issues and types of entities that are being focused on with each of them, I won't give a significant amount of attention to any one particular schedule, but certainly, we do plan to leave some time for questions. So should there be some issues that will you know arise on any of the specifics that I haven't given enough time to, please do so – please do raise your question, and we will – we can get to them at the end.

I'm just going to march through each of these you know (A) through (R), and hit it you know in alphabetical order, and hit the high points of each. As I noted, there are 16 separate schedules. It kind of reflects the approach that the IRS has with this new Form 990 to separate out specific issues and types of entities. I think this is at least a nod towards to the IRS' attempt to streamline Form 990 filing by trying to separate out from the core form those areas that are specific to unique types of organizations and not forcing disparate organizations to go through the same questions that may or may not be relevant to them.

In addition, as Thora noted in her presentation, there's a checklist of required schedules at the front of the – at the core form in part four of the Form 990, and that checklist is invaluable to telling you what you need to file and what you don't need to file. I can't imagine that any organization would be – would be able to – would be required to file all 16. In fact, I know it would be almost impossible. So going through that checklist gives you a good idea as to what needs to be filed and what doesn't.

As I said, these are the 16 schedules on this slide. I'll walk through and start with Schedule A. This is very similar to or at least somewhat similar to the current Schedule A of Form 990 in that it asks for numerous responses regarding public charity status and public support. There are no other questions though. If you'll recall, the current Form 990 Schedule A has a lot of different questions about you know if you're a school what are your non-discrimination policies; if you're a

510(c)(3) what type of lobbying do you do; do you have any related party transactions; what's your compensation of non-key employees and independent contractors – all those questions have been removed to other schedules or the core form.

Also another unique aspect or different aspect of the Schedule A is the public support testing period is now moved from four to five years, and it's going to include the current tax year. And as you may have heard, the IRS is doing away with the advance ruling process now so that they will – the IRS will gather the information about public support through the Form 990 once an organization – when an organization is founded and gets through its first five years. So there isn't a need for filing that separate form – I believe it was 8734 – going forward.

Schedule A also allows for accrual accounting organizations to use the accrual method while they calculate the public support test. In the past, they had to use the cash method. There are also a number of questions involving supporting organizations – this is part of the kind of higher level of scrutiny being paid to supporting organizations generally. The IRS and the now revised Internal Revenue Code after the Pension Protection Act requires you know better kind of more formal categorization between type one, type two, and type three, for instance.

Other changes in Schedule A, 990-EZ filers will be required to complete Schedule A. Space has been added to make the case under the 10 percent facts and circumstances test – this is for organizations that instead of meeting the one-third public support test under 509(a)(1), only managed to get between 10 percent and 33-and-a-third percent in their public support.

When that happens, rather than automatically being re-characterized as a private foundation, those organizations have the ability to demonstrate to the IRS in sort of a subjective way that they are engaged in activities that are designed to solicit public support, they just haven't been very successful at it. In the past, that sort of explanation would have to come in the form of an attachment.

Also, a membership dues section has been included in the support schedules. And, importantly and I think a lot of folks who have filed the 990 regularly are happy to hear that it separates out the 509(a)(1) and 509(a)(2) support tests, which is a helpful change.

Trying to move on to Schedule B, here. There we go. There are no changes to Schedule B. It's the same. Schedule B is the listing of contributors that organizations currently are required to file, and it's listing them out if they gave more than – 5,000 or more for the year. It should be noted that there's a new schedule, Schedule M, which also requires information regarding contributors. This having to do with non-cash contributions.

Also remember the Schedule B still does not have to be disclosed publicly, while the rest of the Form 990 generally does. For the most part, the Schedule B does not need to be disclosed publicly or at least the information identifying the donors. Recently encountered a technical explanation that the IRS would actually require you to disclose the Schedule B without the names of the donors listed somehow blacked or something like that, and that would be the technical compliance, with the exception to the public disclosure rule.

Moving on to Schedule C. As I said about Schedule A, they used to ask questions about lobbying activities in Schedule A for 501(c)(3) organizations. Now there's a new schedule for that, and that's Schedule C, and it's not only for 501(c)(3) organizations. It's a specific form that asks questions for organizations about their lobbying and their political activities.

And the organization of the form and the instructions themselves makes me a little concerned that 501(c)(3) organizations, particularly those smaller ones that aren't – don't have much professional help for the filing of these types of forms might invert political with lobbying. And as we know, political activity is out and out prohibited for 501(c)(3) organizations, whereas lobbying activity is acceptable as long as it's not a substantial amount.

There are also new disclosure requirements that are different from what used to be collected on Schedule A. There's a description of direct and indirect political campaign activities that you're required to provide and an estimate of volunteer hours spent on political activities which would be very difficult in practice to calculate, similar to the volunteer hour requirement for page one of the core Form 990 as well.

Schedule D is for supplemental financial statements and requires some disclosures regarding specific types of activities that are clearly high on the list of transactions that might be red flags in the eyes of the IRS – donor advised funds, conservation easement donations, art collections and other investments, et cetera.

Also, it should be noted that there's a question regarding what's called FIN 48. That's a disclosure that's made by accounting and legal professionals about uncertain tax positions that an organization may have. In short, FIN 48 requires a tax-exempt organization to record a liability for income tax when there are uncertainties as to whether its income is exempt from income tax.

So for a tax-exempt organization, 501(c)(3) status itself is a tax position as well as whether or not a certain activity generates unrelated business income tax. So if there are any red flags in your organization's financial statements, they will have to be revealed on the Form 990 to the IRS and to the general public.

Schedule E is the schedule that is only to be completed by schools. It is the exact same information that had been collected under the current or soon to be obsolete Form 990 Schedule A. Nothing's changed there.

Moving on to the next slide. Schedule F has a number of questions regarding activities outside the United States for tax-exempt organizations. Again, this schedule reflects, I think, an enforcement focus area for the internal revenue service in that there are significant amounts of inquiries and focus that the IRS puts on organizations that engages in grants and other sorts of activities that are outside the United States. It's not limited to 501(c)(3) organizations.

Some of the disclosures being requested on this new Schedule F are specific descriptions of activities where there are aggregate revenue or expenses that exceed \$10,000. The requirement is to disclose a region in which the activities are being undertaken. The offices there – number of offices, the number of employees, description of the activities, and a listing of the expenditures.

It also requires a disclosure of the procedures that the organization uses to monitor the use of their grant funds. Again, this keys off of IRS enforcement focus on making sure that money that has been particularly received by and expended to a 501(c)(3) organization is not used for purposes other than 501(c)(3) purposes, which are very limited.

I think in extreme situations, we've seen examples of the IRS and, actually, criminal enforcement agencies taking charities and churches to task for having their revenue or having their expenditures go to the benefit of terrorist-linked organizations. Well, this may not be the sole focus of this form, I think that's part of what's going on here. The specific disclosures that need to be made are the name of the recipient organization, the taxpayer id number if they have one, the region in which the organization operates, the purpose of the grant, the amount of the grant, manner of disbursement, the amount and description of non-cash assistance and the method of valuation.

Moving right along. Schedule G is specifically focused on fundraising or gaming activities. Just a few things to point out here: There are new disclosures that are required particularly on the fundraising end that seem to me to be almost a checklist for state charity enforcement officials to look to, to see if you are checking these boxes such as mail solicitations, e-mail, phone, in

person, solicitation of non-government grants, solicitation of government grants, and special fundraising events.

These activities are – many of them are also regulated at the state level, and should these activities take place, the organization likely should be registered in reporting their charitable solicitation activities in those particular jurisdictions. In addition, there's specific disclosure requirements for individuals who are professional or paid fundraisers seeking more information on that as well. This is based on what the IRS reports to be a continuing non-compliance in these areas.

Relationships with fundraisers also have to be disclosed. There's, unfortunately, the not very unusual occurrence where charities have relationships with fundraising – you know for-profit fundraising companies that have some sort of close relationship with the organization, and this is certainly part of the IRS' focus and part of their intent on this schedule, I believe. Also a list of states in which the organization is registered to solicit listing the actual fundraising and gaming events.

Schedule H is a very controversial schedule, and not one I'm going to spend a lot of time with here, because those of you who do work for hospitals have certainly been able to avail yourselves, I'm certain, of almost full-day seminars on what's being asked about in Schedule H. And suffice to say that it's been probably the most talked about aspect of the Form 990, at least in terms of what industry or profession is talking about it the most.

Primarily the concern is that there's significant inquiry – new questions and questions about things that normally don't get asked on the old Form 990, and hospitals are kind of scurrying to see how they can comply. Just a few things that I'll point out, the term "hospital" as defined in the Form 990 is essentially as hospital is defined by the appropriate state's licensure rules.

It should be noted that for 2008 only, part five, the facility information will be required, but 2009 the entire schedule will be required. One of the areas that this schedule is really hitting hard on is inquiries regarding whether charity care is being provided and whether community benefit is being provided by the hospital. As you know – many of you know at least – 501(c)(3) hospitals have really been in the spotlight from Congress, particularly the Senate Finance Committee with hearings and questions about whether they truly are operating in a manner that's truly beneficial to the public. And these questions about charity care have a lot to do with that.

And in the interest of leaving time for questions, I'm going to skip over to Schedule I, here. Very similar to the questions that are being asked on Schedule F about foreign activities of tax exempt organizations, Schedule I has a number of questions about domestic activities on the grants front by tax exempt organizations. And it's asking for many of the same kind of detailed information about the types of grants made and the recipients.

There's a \$5,000 per grant threshold for that disclosure. If you do not meet or exceed that threshold then you don't have to complete the detailed portion of the schedule. Schedule J, Serena just handled, and we'll just move right along then to Schedule K.

Again, if I characterize Schedule H as the most controversial schedule of the whole form, perhaps Schedule K is close behind it. It has to do with information regarding tax-exempt bonds. A lot of new information is being requested. The IRS in describing why it is asking these questions in one of its publications earlier on in the Form 990 process, indicated that it was aware of significant non-compliance with record keeping and retention requirements for tax-exempt bonds.

Similar to Schedule H, only one part of it is required – one part of Schedule K is required to be filed for 2008 – parts two, three, four are required for 2009. And just disregard that last bullet point. We're a very green law firm. We believe in recycling, and I actually recycled this slide from a prior presentation. So, Davis Sherman will not be discussing this in the next section.

Schedule L. There is a significant amount of inquiries about transactions with interested persons. It's a one-page document, but it has been an area of concern for a lot of tax-exempt practitioners not certain how to characterize certain transactions and how to even find out about them. But as Thora talked about earlier in her discussion of the core Form 990, the IRS has come up with a – what's called a reasonable efforts provision in the instructions that allows an organization to at least do its best to find out from its board members what kind of transactions they are engaged in with the organization itself, which I would think the organization should have some way of tracking that on its own, but also among other interested persons.

So, for instance, a board member having a contract or business relationship with another board member is the type of activity that's asked about here on Schedule L. And what the new reasonable efforts exception or safe harbor essentially provides in the instructions is that if you kind of seek information on an annual basis in writing from your board members and other key insiders, then you will have satisfied the IRS that you've tried your hardest, and there will not be any other kind of risk to the organization if it turns out that the Form 990 response turns out to be incorrect because the organization didn't have information about such transactions.

Should be noted there's also questions about excess benefit transactions and this involves 501(c)(3) and (c)(4) organizations. This is section 4958-type question. And that type of inquiry was also made in – excuse me, that type of inquiry was also made in the old Form 990, just check a yes or no were you engaged in any excess benefit transactions, which on the face of it, one would think you would always just answer no.

But it's interesting by doing that, you may be extending the statute of limitations for 4958 by three years. Not something I want to go into in depth here, but that's one of the reasons why it actually might be a consideration from time-to-time.

Schedule M, another area of focus that the IRS has. This is in regards to donations of non-cash contributions and there's a long list if you have the schedule in front of you, you'll see it. Of all sorts of art, books, et cetera, et cetera, types of non-cash contributions an organization may receive, the IRS has focused pretty closely on organizations that have received or received a significant amount of these sorts of non-cash contributions in the past.

And you've seen evidence of that enforcement. A lot of it has to do with you know valuation issues, for instance, and how the contributions themselves are solicited and whether there may be significant or inappropriate promises of deductibility to the donors. Note that there's a \$25,000 threshold on Schedule M. There's also a question regarding whether the organization has a gift acceptance policy, yet another in the long litany of policies that are inquired about in the Form 990. And a question regarding whether third parties are used to solicit.

Moving quickly through – Schedule N has to do with organization that is essentially dissolved or otherwise liquidated or terminated its operations. The primary inquiry going on here is whether there might have been some sort of private enurement, some sort of transfer of the net assets after dissolution that may have gone to an insider rather than gone to perhaps another 501(c)(3) organization or other type of organization. Note that this doesn't apply to just (c)(3)'s, it's for other tax exempts as well.

Schedule O is that supplemental form that we talked about earlier – or Thora talked about, which is essentially a blank piece of paper, which you can use to fill out you know additional narrative responses to any area of the Form 990.

Finally, our last one here is Schedule R. This has to do with reporting of related organizations and unrelated partnerships. There are a number of new questions for tax-exempt organizations that have related entities. Disregarded entities, for instance, need to be disclosed in more

information than has been required in the past. Also related tax exempts – related organizations taxable as partnerships, and related organizations taxable as corporations or trusts.

Obviously, one of the areas of focus that the IRS has here is to gauge the transactions that the tax exempt organization may have with these related organizations and certainly, there may be questions of whether they're at fair market value and whether there's inappropriate benefit being provided say from a 501(c)(3), for example, to a non-(c)(3) or a taxable corporation.

One thing that's notable here is there's a significant amount of information that's being requested about transactions that are often very common among related entities. I'm thinking of the shared services contract, for instance, or perhaps a sublease of space. There's no suggestion that by having these transactions you're inherently suspect, but it's interesting that the IRS is requiring a lot of information about those.

OK, I'm going to turn this over now to Jeff. I went a little longer than I wanted to, and I definitely want to make sure we've got plenty of time for questions, here. So, Jeff?

**Jeffrey Tennenbaum:** Thank you, George. Just a few other quick points before we open it up for questions. It's been suggested by many and done by more than a few that it makes sense for your organization to right now kind of do a dry run of the Form 990, either using last year's financial data and other information or using an annualized version of this year's data if you're a calendar year organization, you already have close to nine months under your belt, you should be able to annualize that information.

And basically fill out the Form 990 with your attorney – with any outside consultants that you work with – your CPAs, if you have outside counsel, and yourself being in-house lawyers – prepare the Form 990, see how things look, see how the data looks, see how your answers to the questions look. It'll give you an opportunity to change or fix or modify things now before it's time to actually complete the form and before it's too late. If you need to adopt certain policies or procedures, you want to have those in place before the end of the year so that you don't have to check no to questions that you might otherwise be able to check yes to.

So when – in the slide here when we reference perform the gap analysis, there are a number of policies that, while not mandated by the Form 990, are certainly suggested to be good practices, and if you have to check no to those questions on the 990, it's certainly not going to look favorable for your organization.

Establish a compensation approval procedures for your senior executives. Determine if any new bookkeeping is required, and a lot of organizations seems to be a good idea kind of select a team within your organization made up, of course, of yourselves but also people – folks from your finance department, from your executive management team. The Form 990 has become and with this new form now certainly has become far more than simply a form with financial data.

It has reaches that go far beyond the finance department of your organization, and as such, if you want to have a team working on Form 990 compliance and what you want to do to prepare for the new form, it makes sense to have a team that reaches far beyond the actual finance department.

With that, we're going to turn it open for a few minutes of questions. We have some questions that have already come in through the Web site, and we have some other questions as well that were previously posed. With that, let me take one of the first questions here from the Web site:

“What is the definition of interested parties for Schedule L?” And, George, if you don't have the precise answer available, if you could at least direct the questioner to where to look.

**George Constantine:** Sure. I believe that is actually covered in the glossary, although I'm looking at the glossary, and I'm not seeing it here.

**Thora Johnson:** And, George? This is Thora just stepping in for a second. It's your current or former officers, directors and key employees and five highest compensated employees that you will have already identified on the core form in part seven, section (A). And then if you are a (c)(3) or a (c)(4), it's whoever would qualify as a disqualified person for intermediate sanctions. So that's a thumbnail sketch of who those interested persons are.

**George Constantine:** Right. OK. Thank you, Thora.

**Jeffrey Tennenbaum:** And that's actually in the instructions on Schedule L, pages two and three.

**George Constantine:** I see it now.

**Jeffrey Tennenbaum:** OK. Here's another question that was previously posed. And, Steve, feel free to jump in with other questions that you've been presented with as well.

"What do you think the IRS will do if it sees an organization responding no to questions about conflict of interest policies or other policies?"

Thora or George, you want to take a stab at that?

**George Constantine:** It's hard to say. I mean we get a lot of these questions, particularly from smaller organizations that may have chapters, for instance, or smaller affiliates where you know some of these policies are very much advisable to have. But some organizations for better or worse may not have them and what's the result? You know I think at some point, we are going through the electronic filing era here, and you know the IRS is able to kind of hit on these no answers rather quickly as opposed to going through them manually.

So you know I think perhaps that mixed with some other red flags sort of responses, might increase, somewhat, an organizations risk of enforcement, that being an audit, then it would without it. But it's very hard to say without seeing it in practice yet.

**Jeffrey Tennenbaum:** OK. Here's another question: "Should a very small non-profit organization, say a small chapter of a national organization undergo a full blown financial audit every year?"

Again, either George or Thora?

**Thora Johnson:** It's certainly not required under the federal tax code, and that being said, it can only be a good thing, but I think you need to look at your resources and decide if that's really the best allocation in the bigger scheme of things.

**George Constantine:** That's a good situation where you know say you answer no there, or the response is we don't have an annual financial audit. You know that might be an opportunity to you know take advantage of Schedule O and explain, for instance, if you do something short of that, say every other year with a compilation of review in the off years. I mean there are going to be small organizations for which that cost of a full audit is pretty prohibitive.

Jeff, I noticed a couple of questions here on the chat area. One of them was: "is the updated 990 required for upcoming filing when fiscal year ends prior to August 2008?"

The updated 990, the 2008 Form 990, does not need to be filed for any fiscal year, does need to be filed for any fiscal year that started in 2008. So the first round of 990s that's going to be required to be filed will be those for calendar year end December 31, 2008. So if you have a fiscal year that started sometime after January 1, then you're not going to be required to file it until you know your fiscal year's up in 2009.

**Jeffrey Tennenbaum:** Yes. There's a question here: "Are the – in a compensation area regarding the procedures that are asked about, are these applicable for tax exempt organizations other than 501(c)(3) organizations?"

**Serena Simons:** This is Serena, and the answer is yes. I mean the question applies to all tax-exempt organizations. They just use the model from the (c)(3) organizations.

**Jeffrey Tennenbaum:** OK. We actually have two kinds of related questions. One here says, "Can you please clarify your discussion of board members being engaged in business with each other?" And then there was a separate question submitted, "Regarding the interested transactions issues, what if one of the members of the board of directors is a lawyer or a doctor who has a client or patient relationship with another board member?"

**George Constantine:** On the interested-persons question, that's specifically addressed in the Form 990 instructions that that's one sort of transaction that doesn't have to be disclosed. I think the third – it was attorney-client, doctor-patient, and I think priest and follower, I'm not sure what the proper word is there, but you know those kind of confidential relationships don't have to be disclosed.

**Steve Garrett:** Jeff, this is Steve. I think we're going to have to close our shop up here. And I'd like to take the opportunity to tell anybody that's got any more questions, you can pose them and the panelists can answer, and ACC should post them on the Web site.

Any wrap up, real quick as we sign off?

**Jeffrey Tennenbaum:** No, I'll let you wrap it up, Steve.

**Steve Garrett:** All right. Well that concludes today's webcast, and I would like to thank our panelists for their time and excellent presentation. Also I want to thank the Venable law firm for sponsoring our webcast.

And once again, let me remind our audience that the audio file for the webcast will be available on the ACC Web site about three hours from now and will be archived there for about a year. I also wanted to thank our audience for attending our webcast. Remember if you have any questions relating to today's topic, send an e-mail to Mr. Tennenbaum at [jstennenbaum@venable.com](mailto:jstennenbaum@venable.com), and please don't forget to complete the evaluation in the links box.

Let me also take a moment to remind you of ACC's annual meeting taking place in Seattle, Washington beginning October the 19th through the 22nd of this year and encourage you to register and attend. The annual meeting is two-and-a-half days packed with immediately useful information and qualifies for continuing legal education credit in most states.

Please check the ACC Web site for further details. And once again, thank you for joining us today, and you may now log off.

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