IN THIS ISSUE

Form 990 Disclosure Requirements Challenge Hospitals, Provide Opportunities 1

The ABA Health Law Section
The Health Lawyer

Volume 21, Number 3
February 2009

FORM 990 DISCLOSURE REQUIREMENTS CHALLENGE HOSPITALS, PROVIDE OPPORTUNITIES

James R. King, Esq.
Travis F. Jackson, Esq.
Jones Day
Columbus, OH

Gerald M. Griffith, Esq.
Daniel J. Bacastow, Esq.
Jones Day
Chicago, IL

For over twenty-five years, the Internal Revenue Service ("IRS") Form 990 has been primarily a numbers document, with various narrative disclosures tacked on over the years as gap fillers. Now, with a running time start to finish that nearly matched the 2008 Presidential campaign, the IRS largely succeeded in developing a comprehensive new Form 990 that includes a dizzying array of change to put disclosure first for exempt organizations. Although the Form 990 still includes its fair share of pure financial data, it is more of a deliberate, substantive disclosure document arguably similar in level of detail to a bond prospectus, as is to be expected for a significant sector of the economy with a significant tax subsidy. The Government Accountability Office recently estimated that, as a whole, tax-exempt hospitals save $12.6 billion in federal, state and local taxes. [1]

Many general counsel, executives and board members at tax-exempt hospitals also may think that the IRS should include a warning label on the redesigned Form 990 (which weighed in at nearly 400 pages in the final draft form and instructions). After all, considering the breadth of its enhanced disclosure requirements, completing the new Form 990 will create at least a few headaches, regardless of the hospital's size.

The Form 990 is the primary tool that the IRS uses to oversee the activities of tax-exempt organizations and to enforce federal tax laws governing tax-exempt status. The redesigned Form 990 now more effectively targets real (or perceived) abusive transactions among officers, key employees, board members and hospitals. It also places a greater burden on hospitals to justify the favorable tax treatment that they receive. As a publicly available document, the Form 990 makes any missteps by a hospital readily available to other federal regulatory agencies, state attorneys general, media and others, who may not have the hospital's best interests at heart.

Instead of reaching for a bottle of aspirin, general counsel, executives and board members should consider the new Form 990 as an opportunity for developing highly focused, effective corporate

continued on page 3

"This information or any portion thereof may not be copied or disseminated in any form or by any means or downloaded or stored in an electronic database or retrieval system without the express written consent of the American Bar Association."

Chair's Corner

2009 promises to be an exciting time to be a health lawyer. Like many things in life, law is cyclical. Except for occasional statutory and regulatory changes, the area of health law has been fairly static in the last few years. However, it appears that 2009 is the time that health law issues may again be in the forefront, and many of us in the industry are expecting substantial statutory changes, including efforts once again at major healthcare reform. These promise to be tumultuous but exciting times for the industry. Change brings opportunity. I see lots of opportunity for lawyers in the area of health law.

I was recently interviewed for an ABA publication exploring "hot" areas of the law. This particular publication was geared towards law students. The interview caused me to focus on health law and to predict the opportunity for law students in this niche area of the law. It was this process which made me try to articulate how areas of the law are cyclical in nature and why I thought health law was once again going to become a very "hot" area of the law.

The bleak economic outlook has caused Americans to worry even more about securing and keeping appropriate healthcare insurance and accessing healthcare services. Congress and the Obama administration are assuring the American public that it is listening and will address their concerns by passing comprehensive healthcare reform measures. All of this — the debates on the issues and the Congressional responses — will bring changes and opportunity for healthcare lawyers.

One of the things I relish most about practicing in this niche area is that a health lawyer's practice usually encompasses more than implementing certain statutes and regulations. The area of health law also includes understanding a complex industry, grappling with and determining appropriate health policy, and formulating government strategy.

Updates on the upcoming debates and any legislative changes, along with other emerging issues in the health law area, will certainly be an integral part of the upcoming ABA Health Law Section Emerging Issues Conference ("EMI") to be held on February 18 – 20, 2009 at the lovely Disney Yacht Club Resort in Orlando, Florida. It is hard to believe that this will be the 10th anniversary of EMI.

continued on page 41

THE HEALTH LAWYER

THE ABA HEALTH LAW SECTION

The Health Lawyer (ISSN: 0736-3443) is published by the American Bar Association Health Law Section, 321 N. Clark Street, Chicago, IL 60654-7598. Address corrections should be sent to the American Bar Association, c/o Member Records.

Manuscripts should be double-spaced on letter sized paper and submitted in a Word document to the editor. Requests for permission to reproduce any material from **The Health Lawyer** should be addressed in writing to the editor.

The opinions expressed are those of the authors and shall not be construed to represent the policies or positions of the American Bar Association and the ABA Health Law Section.

Copyright © 2009 American Bar Association.

2008-2009 Officers and Council of the ABA Health Law Section are as follows:

Chair
Vickie Yates Brown
Frost Brown Todd LLC
Louisville, KY
502/779-8189
vybrown@fbtlaw.com

Secretary
David H. Johnson
Bannerman & Williams PA
Albuquerque, NM
505/837-1900
dhj@nmcounsel.com

Chair-Elect
David W. Hilgers
Brown McCarroll, LLP
Austin, TX
512/476-4716
dhilgers@mailbmc.com

Finance Officer
David L. Douglass
Shook Hardy & Bacon
Washington, DC
202/662-4861
ddouglass@shb.com

Vice Chair
Linda A. Baumann
Arent Fox, LLC
Washington, DC
202/857-6239
baumann.linda@arentfox.com

Immediate Past Chair
Andrew J. Demetriou
Fulbright & Jaworski, LLP
Los Angeles, CA
213/892-9338
ademetriou@fulbright.com

Section Delegates to the House of Delegates

Gregory L. Pemberton
Ice Miller
Indianapolis, IN
317/236-2313
gregory.pemberton@icemiller.com

J. A. (Tony) Patterson, Jr.
Fulbright & Jaworski, LLP
Houston, TX
214/855-8036
japatterson@fulbright.com

Council

Michael E. Clark
Hamel Bowers & Clark, LLP
Houston, TX
713/869-0557
mclark@hbctrial.com
clark@hal-pc.org

Shelley K. Hubner
Sedgwick, Detert, Moran & Arnold LLP
San Francisco, CA
T: 415/627-1428
shelley.hubner@sdma.com

Robert R. Nelson
Avera Health
Sioux Falls, SD
605/322-4607
robert.nelson@avera.org

Daniel A. Cody
Reed Smith LLP
San Francisco, CA
415/659-5909
dcody@reedsmith.com

Alexandra Hien McCombs
Pinnacle Partners in Medicine
Dallas, TX
972/663-8552
amccombs@pinnaclepartnersmed.com

Kathleen Scully-Hayes
Social Security Administration
Baltimore, MD
kathleen.scully-hayes@ssa.gov

Young Lawyer Division
Christi Braun
Ober Kaler Grimes & Shriver
Washington, DC
202/326-5046
cjbraun@ober.com

Publication Chair
Lisa L. Dahm
South Texas College of Law
Houston, TX
713/646-1873
ldahm@stcl.edu

Board of Governors Liaison
E. Paul Herrington III
Humana Inc.
Louisville, KY
502/580-3716
pherrington@humana.com

***The Health Lawyer* Editor**
Marla Durben Hirsch
Potomac, Maryland
301/299-6155
mdhirsch@comcast.net

Section Director
Jill C. Peña
American Bar Association
321 N. Clark Street
Chicago, IL 60654-7598
T: 312/988-5548 F: 312/988-9764
jillpena@staff.abanet.org

continued from page 1

governance and articulating more clearly the valuable benefits that their hospital provides in exchange for tax-exempt status. Doing so will not only simplify the hospital's compliance with the new Form 990, but it will also assist the hospital in protecting the financial benefits derived from exempt status.

Time is growing short for hospitals to prepare, given that the new Form 990 is effective for tax years that began in 2008. To assist in that process, this article focuses on: key disclosures for corporate governance and insider financial relationships (including how some of those disclosures might be affected by changes in the governance structure); the heightened transparency surrounding charity care and billing and collection practices under Schedule H; continued scrutiny of tax-exempt bond arrangements in Schedule K; and the increasingly challenging enforcement climate for tax law violations, as aided by recent enhancements to the tax law whistleblower rules.

Background Information

The IRS overhauled the Form 990 because it was outdated and ineffective. The last comprehensive revision of the Form 990 took place in 1979. Since that time, hospitals outpaced the disclosure requirements of the Form 990 by developing increasingly complex compensation arrangements for executives, implementing intricate corporate structures and employing aggressive strategies for remaining financially viable.

The Form 990's failure to portray the activities of hospitals accurately, fueled by newspaper articles focusing on excessive executive compensation, minimal charity care and draconian collection efforts, convinced many (including key U.S. Senators) that hospital boards had neglected their oversight responsibilities and that many hospitals no longer deserved tax-exempt status.[2]

The IRS released a discussion draft of a revised Form 990 on June 24, 2007.[3] In doing so, Kevin Brown, then Acting Commissioner of the IRS, acknowledged the failure of the Form 990 to reflect the activities and operations of tax-exempt organizations in the 21st century. Mr. Brown also recognized the need for greater transparency among these organizations by stating, "The new 990 aims to give both the IRS and the public an improved window into the way tax-exempt organizations go about their vital mission."[4]

General counsel, executives and board members of tax-exempt hospitals should be concerned about what the IRS and others will see when they look through the "improved window" that the Form 990 creates. Hospitals that have not adequately controlled the growth or composition of their boards of directors, failed to adopt and operate in accordance with best practices for corporate governance, or pursued business strategies without adequate thought of charity care and other community benefits will find that the redesigned Form 990 and its final instructions ("Instructions") flag these failures for further inquiry by the IRS. Even the many hospitals that have monitored governance closely and articulated their charitable mission carefully should use the new Form 990 to evaluate whether further changes to governance structures or community benefit programs are desirable.

Focus on Corporate Governance Generally

The Form 990 and its Instructions emphasize the importance of effective governance and ask questions reminiscent of the IRS's draft *Good Governance Practices for 501(c)(3) Organizations*, which called on charities voluntarily to implement "best practices" for corporate governance.[5] The "good governance practices" that the IRS enumerated included focusing on the organization's board size and composition, ensuring obedience by the organization's directors and officers to its charitable mission, developing effective whistleblower policies, facilitating a "culture of compliance" through a code of ethics, and promoting transparency by making significant financial and other information readily available to the public. These "good governance practices" did not impose mandatory standards, but they reflected the practices that would make the IRS comfortable when it examines an organization's financial arrangements with insiders for potential private inurement, private benefit and excess benefit.

The IRS credited its "good governance practices," in part, with facilitating "continued discussions within the sector regarding the respective roles of the IRS, the states and the sector regarding nonprofit governance."[6] After it released the new Form 990, the IRS issued a notice stating, "we have removed the previously posted preliminary staff discussion draft entitled *Good Governance Practices for 501(c)(3) Organizations* from our web site. Current IRS positions on nonprofit governance are best reflected in the reporting required by the revised Form 990 . . ."[7] In its place, the IRS added a revised version of the governance document consistent with the new disclosure requirements in Form 990.[8]

How a hospital responds to Part VI – the governance section of the Form 990 – will likely indicate to the IRS and others whether the organization is managed appropriately. For example, Part VI of the redesigned Form 990 seeks information about, among other things, the following policies and practices:

- Whether the directors reviewed the Form 990 before it was filed;
- Whether the organization has adopted a written conflicts of interest policy;
- Requirements under the conflicts of interest policy for officers, directors and key employees to disclose annually potential conflicts of interests;

continued on page 4

continued from page 3

- How the organization monitors and enforces its conflicts of interest policy;
- Whether the organization has a written whistleblower policy and a written document retention policy;
- The policies and procedures that the organization employs in establishing compensation for officers and key employees;
- The manner in which the organization makes its Form 990 publicly available; and
- The way, if at all, that the organization makes its governing documents, conflict of interest policy and financial statements available to the public.

The Form 990 itself recognizes that many of its questions concerning corporate governance and management are "not required by the Internal Revenue Code."[9] This acknowledgment is not an invitation for organizations to skirt the questions asked in Part VI. Steve Miller, the IRS Commissioner for Tax-Exempt and Government Entities, has made it clear that the IRS deems these questions to be relevant in that poorly managed organizations pose a greater risk of violating federal tax laws. In fact, Mr. Miller said earlier this year, "We have been saying that good governance is a leading indicator of good tax compliance. In reply, some say: 'Prove it.' We are going to try."[10] General counsel, executives and directors of hospitals should read this statement as a call to action for examining their governance structures and the policies and procedures that they have adopted to prevent, detect and correct any abusive transactions. The governance questions provide a useful checklist for measuring current practices of an organization against what the IRS likely considers to be industry "best practices."

Reconsidering and restructuring the size and composition of a governing board may be one way in which hospitals can enhance corporate governance while streamlining compliance with the Form 990's disclosure requirements. Board size and composition for hospitals is particularly important because of the highly technical and specialized nature of the healthcare industry. A board's failure to perform its responsibilities efficiently (either because of size or disinterest) may be measured not only in terms of reduced revenues, declining profit margins and weak oversight at the hospital, but also in poorer service quality for the hospital's community.

The IRS has expressed concerns regarding board size for hospitals and other tax-exempt organizations. The IRS studied board size as part of its May 2006 Hospital Compliance Project.[11] In releasing its preliminary findings, the IRS noted that the average hospital board had 17 members.[12] However, nearly a quarter of the hospitals that the IRS surveyed had at least 20 members on its governing board. The IRS noted, "Hospital board size tended to increase with hospital revenues ...."[13] In fact, 49 percent of hospitals with over $250 million in total annual revenue had boards comprised of 20 or more members.

The IRS did not offer any specific guidance on board size as part of its preliminary report, but its "good governance practices" expressed concern that "[s]mall boards generally do not represent a public interest and large boards may be less attentive to oversight duties."[14] Similarly, the IRS has stated that hospitals should be cognizant of the talents that their board members make available to the organization. The IRS has suggested that "[s]uccessful governing boards include individuals who not only are knowledgeable and engaged, but selected with the organization's needs in mind (e.g. accounting, finance, compensation, and ethics)."[15]

The administrative burden that would flow from the expanded Form 990 disclosure requirements for current board members also suggest that large boards may not be the most desirable for a hospital, either in terms of effective governance or Form 990 disclosure compliance. The first chart below identifies those Lines on the revised Form 990 that solicit information relating in whole or in part to a hospital's governing body. In reviewing it, imagine the recordkeeping process that a hospital with a large board would need to develop and implement in order to track the information that the Form 990 requests.

Financial Arrangements with Insiders

Whether it intended to do so or not, the IRS has imposed a significant burden on those organizations having governing boards with more than 20 members. The amount of due diligence to identify, track and provide complete responses to these disclosure requirements is staggering. For example, hospitals that have begun to address the changes wrought by the disclosure-first approach of the new Form 990 have found that the length, if not the complexity, of their annual board conflict questionnaires will need to double to gather the necessary information. The Instructions for Form 990 include virtual safe harbors for many of these questions that protect the organization if it makes a "reasonable effort" to obtain the information from board members and others through an annual questionnaire that explains the information sought and the relevant definitions (e.g., family, business relationships, interested persons).[16] Many of those definitions, in turn, are expansive, vary based on the question being asked, or have a variety of exceptions that may apply. At the same time, IRS officials have commented informally that with the implementation of the new Form 990, it may be time to revisit and increase the penalties for filing an incomplete or inaccurate return.[17]

There have also been recent criminal prosecutions for failing to disclose insider transactions on the old Form 990.[18]

Rather than attempting this process, hospitals and hospital affiliates (e.g., foundations and auxiliaries) with large boards may want to consider whether now is the time to reduce board membership to those directors who are "knowledgeable and engaged, but selected with the organization's needs in mind (e.g. accounting, finance, compensation, and ethics)."[19] Hospitals could transition the remaining directors into an advisory capacity, potentially directly related to the individual's area of expertise. After all, for purposes of the Form 990, "A member of an advisory board that does not exercise any governance authority over the organization is not considered a director or trustee."[20] Alternatively, advisory committees could be established so that hospitals can train potential board members and gauge their effectiveness.

The benefits that a hospital would receive from a more centralized, focused board of directors carry over into Form 990 compliance. As noted in the chart below, the Form 990 disclosure requirements generally would not apply to a director transitioned into an advisory capacity. This is not to say that, by transitioning to a smaller board, a hospital will avoid all reporting requirements.

Form 990 Section	Form 990 Disclosure Requirement	Effect of Disclosure Requirement on Board Members Transitioned to "Advisory Status"
Core Form, Part I, Line 3	Number of voting members of the governing body.	**No disclosure required.** The disclosure requirement seeks information about the voting members of the governing body as of the year end. If a director or trustee does not have voting rights as of the year end, the organization does not need to identify the individual in response to the disclosure requirement.
Core Form, Part I, Line 4	Number of independent voting members of the governing body.	**No disclosure required.** The disclosure requirement seeks information about the independent voting members of the governing body as of the year end. If a director or trustee does not have voting rights as of the year end, the organization does not need to identify the individual in response to the disclosure requirement.
Core Form, Part IV, Line 25a	Did the organization engage in an excess benefit transaction with a disqualified person during the year? If "yes," complete Schedule L, Part I.	**Potential disclosure required.** Disqualified persons include an individual who is, or during the previous five years was, in a position to exercise substantial influence over the affairs of the organization, including a voting trustee or director as well as his or her family members and 35 percent controlled entities of the individual or his or her family members.
Core Form, Part IV, Line 25b	Did the organization become aware that it had engaged in an excess benefit transaction with a disqualified person from a prior year? If "yes," complete Schedule L, Part I.	**Potential disclosure required.** As noted above, disqualified persons would include former directors and trustees during a five-year "lookback" period. However, the disclosure requirement does not necessarily limit itself to the "lookback" period. Instead, it seeks information regarding excess benefit transactions identified by the organization from a "prior year."
Core Form, Part IV, Line 26	Was a loan to or by a current or former officer, director, trustee, key employee, highly compensated employee or disqualified person outstanding as of the end of the organization's tax year? If "yes," complete Schedule L, Part II.	**Potential disclosure required.** As noted above, this disclosure requirement is not triggered unless the loan involves a disqualified person (which would include an individual's family members as well as 35 percent controlled entities of the individual or his or her family members).

continued on page 6

continued from page 5

Form 990 Section	Form 990 Disclosure Requirement	Effect of Disclosure Requirement on Board Members Transitioned to "Advisory Status"
Core Form, Part IV, Line 27	Did the organization provide a grant or other financial assistance to an officer, director, key employee or substantial contributor, or to a person related to such an individual? If "yes," complete Schedule L, Part III.	**Potential disclosure required.** The Instructions state that prior directors or trustees (as well as their family members and 35 percent controlled entities) may fall within the scope of individuals encompassed by this disclosure requirement. The Instructions to Schedule L, however, generally require a prior trustee to be reported in Part VII, Section A before a disclosure requirement exists.
Core Form, Part IV, Lines 28a to 28c	During the tax year, did any person who is a current or former officer, director, trustee or key employee: • have a direct business relationship with the organization (other than as an officer, director, trustee or employee) or an indirect business relationship through ownership of more than 35 percent in another entity (individually or collectively with other person(s) listed in Part VII, Section A)? • have a family member who had a direct or indirect business relationship with the organization? • serve as an officer, director, trustee, key employee, partner or member of an entity (or shareholder of a professional corporation) doing business with the organization? If "yes," complete Schedule L, Part IV.	**Potential disclosure required.** The Instructions to Schedule L again clarify that not all prior officers, directors, trustees or key employees are considered former officers, directors, trustees or key employees for purposes of the disclosure requirement. First, the officer, director, or key employee must be reported in Part VII, Schedule A. If the individual is identified in Part VII, Schedule A, the disclosure requirement will extend to such individual as well as his or her family members and any 35percent controlled entity of such individual or his or her family members. Second, the disclosure requirement also applies to entities (other than a tax-exempt organization) of which an individual listed in Form 990, Part VII, Section A was serving at the time of the transaction as (1) an officer, (2) a director, (3) a trustee, (4) a key employee, (5) a partner or member with an ownership interest in excess of 5 percent if the entity is treated as a partnership, or (6) a shareholder with an ownership interest in excess of 5 percent if the entity is a professional corporation. Third, the disclosure requirement applies specifically to management organizations in which a former officer, director or key employee is a direct or indirect 35 percent owner, or an officer, director, trustee or key employee.
Core Form, Part VI, Section A, Line 1a	Enter the number of voting members of the governing body.	**No disclosure required.** The disclosure requirement seeks information about the voting members of the governing body as of the year end. If a director or trustee does not have voting rights as of the year end, the organization does not need to identify the individual in response to the disclosure requirement.

Form 990 Section	Form 990 Disclosure Requirement	Effect of Disclosure Requirement on Board Members Transitioned to "Advisory Status"
Core Form, Part VI, Section A, Line 1b	Enter the number of voting members that are independent.	**No disclosure required.** The disclosure requirement seeks information about the voting members of the governing body as of the year end. If a director or trustee does not have voting rights as of the year end, the organization does not need to identify the individual in response to the disclosure requirement.
Core Form, Part VI, Section A, Line 2	Did any officer, director, trustee or key employee have a family relationship or a business relationship with any other officer, director, trustee or key employee?	**Potential disclosure required.** The Instructions state that an organization must disclose information regarding family relationships or business relationships among officers, directors, trustees or key employees. This disclosure obligation extends to any former directors or trustees reported in response to Core Form, Part VII, Section A.
Core Form, Part VI, Section A, Line 4	Did the organization make any significant changes to the organizational documents since the prior Form 990 was filed?	**Disclosure required.** The organization must report any changes to the organization's governing documents, including any changes to the composition and structure of its governing body.
Core Form, Part VI, Line 12a to 12c	Does the organization have a written conflicts of interest policy? *If "Yes":* Are officers, directors or trustees, and key employees required to disclose annually interests that could give rise to conflicts? Does the organization regularly and consistently monitor and enforce compliance with the policy? If "Yes," describe in Schedule O how this is done.	**No disclosure required.** The Instructions do not expressly require an organization to solicit conflicts of interest statements from former directors or trustees. However, an organization may be well advised to have members of advisory committees disclose conflicts of interest, particularly those that may be affected by their advisory capacity (to protect against arguments that the advisory group had de facto authority and should have made disclosures).
Core Form, Part VII	Compensation of officers, directors, trustees, key employees, top five highest compensated employees and highest paid (top five for professional and top five for other services) independent contractors.	**Potential disclosure required.** As noted below, an organization must report information about current officers, directors, trustees or key employees; former directors or trustees; and former officers or key employees.
Core Form, Part VII, Section A, Line 1a	List all of the organization's former directors or trustees that received, in the capacity as a former director or trustee of the organization, more than $10,000 of reportable compensation from the organization and any related organization.	**Potential disclosure required.** The organization must report information about **former** directors or trustees. As noted above, however, this obligation does not extend to all prior directors or trustees. Instead, an organization must disclose information in response to this requirement if (and only if) the organization reported (or should have reported) the individual as a director or trustee on a Form 990 for one of the five prior years and paid the individual reportable compensation in excess of $10,000 during the calendar year ending with or within the organization's tax year for his or her service as a former director or trustee.

continued on page 8

Form 990 Disclosure Requirements Challenge Hospitals, Provide Opportunities

continued from page 7

Form 990 Section	Form 990 Disclosure Requirement	Effect of Disclosure Requirement on Board Members Transitioned to "Advisory Status"
Core Form, Part VII, Section A, Line 1a	List all of the organization's former officers, key employees and highest compensated employees who received more than $100,000 of reportable compensation from the organization and any related organization.	**Potential disclosure required.** The organization must report information about former officers, key employees and highest compensated employees. This obligation does not extend to all prior officers and key employees. Instead, an organization must disclose information on Part VII, Section A if (and only if) the organization reported (or should have reported) the individual as an officer or key employee on a Form 990 for one of the five prior years and paid the individual reportable compensation in excess of $10,000 during the calendar year ending with or within the organization's tax year.
Core Form, Part VII, Section A, Line 3	Did the organization list any former officer, director or trustee, key employee or highest compensated employee on line 1a? If "yes," complete Schedule J for such individual.	**Potential disclosure required.** If an organization reports a former officer, director or trustee, key employee or highest compensated employee in Part VII, Section A, it must complete a Schedule J for such individual.
Core Form, Part VII, Section A, Line 5	Did any person listed on line 1a receive or accrue compensation from any unrelated organization for services rendered to the organization? If "yes," complete Schedule J for such person.	**Potential disclosure required.** The Instructions state – without distinguishing between current and former directors, trustees, officers or key employees – that an organization must complete Schedule J if the person receives or accrues compensation from an unrelated organization for services rendered to the filing organization in the person's capacity as an officer, director, trustee, or employee of the filing organization.
Schedule H, Part IV	Management companies and joint ventures with combined officer, director, trustee, key employee and staff or employed physician ownership of more than 10 percent of the equity interest in the joint venture.	**Potential disclosure required.** Schedule H, Part IV (which is optional for 2008) requires each hospital to list those management companies and joint ventures in which any officer, director or key employee own in the aggregate 10 percent of the entity's interests and provide management services, medical care, equipment and other tangible or intangible personal property to the hospital. The Instructions state that this disclosure requirement extends to anyone who served as a director during the tax year in question. The Instructions suggest that, other than the year in which the director transitioned off the board, the organization would have no reporting obligation. However, other sections of Form 990, particularly Schedule L, Part IV, may apply.

Form 990 Section	Form 990 Disclosure Requirement	Effect of Disclosure Requirement on Board Members Transitioned to "Advisory Status"
Schedule H, Part VI, Line 6	Provide any other information important to describing how the organization's hospitals or other healthcare facilities further its exempt purpose by promoting the health of the community (e.g., open medical staff, community board, use of surplus funds, etc.).	**Potential disclosure required.** This disclosure requirement pertains to mission effectiveness. An advisory board may be relevant in communicating how the organization receives input on and adapts to changing community needs to fulfill its mission (i.e., one form of community outreach).
Schedule J	Provide any other information important to describing how the organization's hospitals or other healthcare facilities further its exempt purpose by promoting the health of the community (e.g., open medical staff, community board, use of surplus funds, etc.).	**Potential disclosure required.** If an organization reports a former officer, director or trustee, key employee or highest compensated employee in Part VII, Section A, it must complete Schedule J for such individual.
Schedule J, Part I, Lines 1a & 1b	Requires disclosure of certain benefits that an individual receives (such as first class travel accommodations); health club dues or fees; and spending accounts as well as information regarding the organization's policies and procedures with respect to such benefits.	**Potential disclosure required.** This disclosure requirement tracks the Core Form, Part VII, Section A, Line 1a. Accordingly, former directors moved to an advisory role would need to be included in this disclosure for five years if they received more than $10,000 in reportable compensation from the organization and any related organization.
Schedule J, Part I, Line 3	Requires a "check the box" disclosure of the process used by the board or committee to establish CEO compensation.	**Potential disclosure required.** The organization must describe the processes that it undertakes to establish CEO compensation.
Schedule J, Part I, Lines 5-8	Requires disclosure of whether any of the interested persons whose compensation is reported in Form 990, Part VII, Section A, Line 1a receives or is entitled to compensation contingent upon the revenues or net earnings of the organization or any related organization, or any non-fixed (e.g., discretionary) payments, and whether they can rely on the initial contract exception to avoid excess benefit.[21]	**Potential disclosure required.** An organization that bases compensation on revenues or net earnings or other factors would need to describe the compensation formula.

continued on page 10

Form 990 Disclosure Requirements Challenge Hospitals, Provide Opportunities

continued from page 9

Form 990 Section	Form 990 Disclosure Requirement	Effect of Disclosure Requirement on Board Members Transitioned to "Advisory Status"
Schedule L, Part I	Requires disclosure of certain benefits that an individual receives (such as first class travel accommodations); health club dues or fees; and spending accounts as well as information regarding the organization's policies and procedures with respect to such benefits.	**Potential disclosure required.** Disqualified persons include an individual who is, or during the previous five years was, in a position to exercise substantial influence over the affairs of the organization, including a voting trustee or director.
Schedule L, Part II	Requires disclosure of whether any of the interested persons whose compensation is reported in Form 990, Part VII, Section A, Line 1a receives or is entitled to compensation contingent upon the revenues or net earnings of the organization or any related organization, or any non-fixed (e.g., discretionary) payments, and whether they can rely on the initial contract exception to avoid excess benefit.[22]	**Potential disclosure required.** To the extent that an organization has participated in a loan with a disqualified person, such as a prior director or trustee, the organization must complete Schedule L, Part II, if the loan remains outstanding as of the end of the organization's tax year. The Instructions state that a "loan" for Schedule L purposes includes debt originally made by or to a third party that is transferred to the organization or disqualified person.
Schedule L, Part III	Requires the organization to: • Identify the disqualified person(s) that received an excess benefit in the transaction; • Identify the organization manager(s), if any, that participated in the transaction, knowing that it was an excess benefit transaction; • Describe the transaction; and State whether the transaction has been corrected (which typically would require repayment or return of property plus interest).[23]	**Potential disclosure required.** Schedule L, Part III requires organizations to disclose information regarding, among others, former directors or trustees, their family members, and 35 percent controlled entities.

Form 990 Section	Form 990 Disclosure Requirement	Effect of Disclosure Requirement on Board Members Transitioned to "Advisory Status"
Schedule L, Part IV	Requires the organization to disclose information on loans, including salary advances and other advances and receivables, that remain outstanding as of the end of the organization's tax year.	**Potential disclosure required.** The Instructions to Schedule L again clarify that not all prior officers, directors, trustees or key employees are considered former officers, directors, trustees or key employees for purposes of the disclosure requirement. Significantly, however, a further exception exists to the reporting requirement. An organization is not required to report transactions with an individual or organization for a dollar amount that did not exceed the greater of $10,000 or 1 percent of the organization's total revenue for the organization's tax year. This exception is not available if total payments for all transactions between the parties exceed $100,000 for the tax year or the transaction was compensation to a family member of a current officer, director or key employee of the organization in excess of $10,000.

Hospitals who implement more effective governance through a reduction of "excess" board members should be cognizant of potential state law fiduciary obligations that may be imposed on advisory bodies. For example, many states, including Ohio, define a "fiduciary" broadly in such a manner as to impose obligations on such persons when acting in the capacity as an advisor.[24] Hospitals would be well advised to consider their respective state laws and director and officer insurance policies to determine whether the advisory board would be subject to similar fiduciary duties prior to restructuring their governing boards.

Community Benefit Highlighted

Much of the criticism that members of Congress, state attorneys general and others have directed toward charitable hospitals involves why these organizations deserve tax-exempt status. The IRS developed the "community benefit standard" in 1969 to distinguish between for-profit and tax-exempt hospitals. While the Form 990 itself does not change this standard for exemption, the following chart, drawn from Schedule H to the Form 990, indicates what factors the IRS will consider in determining whether a hospital continues to qualify for exemption under the community benefit standard. In other words, the Form 990 does not make new law or add regulations, but it does reflect the indicia of community benefit that the IRS is likely to look for under the existing exemption standards.[25] An increasing number of states, such as California and Illinois, will require separate community benefit reports that do not necessarily follow the format or scope of the new Schedule H.[26]

Form 990 Section	Community Benefit Element	Impact on Hospital Operations
Schedule H, Part I, Lines 1a and 1b (Optional for 2008)	Does the organization have a charity care policy? If "yes," is it a written policy?	Nothing in the community benefit standard requires an organization to have a charity care policy. This fact is not lost on Senator Grassley and others critical of the community benefit standard. For example, Senator Grassley has noted, "Non-profit doesn't necessarily mean pro-poor patient."[27]

continued on page 12

Form 990 Disclosure Requirements Challenge Hospitals, Provide Opportunities

continued from page 11

Form 990 Section	Community Benefit Element	Impact on Hospital Operations
Schedule H, Part I, Lines 6a and 6b (Optional for 2008)	Does the organization prepare an annual community benefit report? If "yes," does the organization make it available to the public?	The federal community benefit standard also does not require an organization to publish a community benefit report.
Schedule H, Part II (Optional for 2008)	Community Building Activities	The IRS recognizes that the scope of community benefit exceeds charity care alone. Part of the scope, at least according to Schedule H, includes physical improvements and housing; economic development; community support; environmental improvements; leadership development and training for community members; coalition building; community health improvement advocacy; workforce development; and similar activities.
Schedule H, Part III, Sections A, B and C (Optional for 2008)	Requires hospitals to provide specific information on bad debt expense, Medicare receipts and collection practices.	The primary burden of Schedule H, Part III will fall on the hospital's finance staff. However, the focus on collection practices is likely to draw greater attention by states attorneys general, media and others in light of recent efforts to closely regulate hospital billing practices.[28]
Schedule H, Part IV (Optional for 2008)	Requires hospitals to provide information regarding joint ventures and management organizations in which officers, directors and/or key employees participate.	The Instructions provide examples of the types of joint ventures that a hospital would need to report. These include "joint ventures formed by the organization and its officers or physicians to conduct an exempt or unrelated business activity, a company owned by the organization's officers or physicians that owns and leases to the organization a hospital or other medical care facility, and a company that owns and leases to entities other than the organization diagnostic equipment or intellectual property used to provide medical care."[29]

Schedule H, Part I, requires each hospital to report whether it has adopted a charity care policy, prepares annual reports regarding the community benefits that it provides and makes such reports available to the public. Nothing in the community benefit standard requires an organization to have a charity care policy or to produce an annual community benefit report. However, Schedule H leads off with this series of questions, from which it is fairly obvious that the IRS considers charity care policies and community benefit reports as a significant, if not vital, condition of a hospital's tax-exempt status. Part I also asks the organization to identify by cost the amount that it spends in pursuit of charity care and other community benefits, such as research, education of healthcare professionals and delivery of subsidized healthcare services.

Schedule H, Part II provides an opportunity for organizations to demonstrate the "community building activities" that their hospitals conduct. The final Instructions explain that these activities include those that protect or improve the community's health or safety and are not reported elsewhere on Schedule H.[30] Specific examples of community building activities listed in Schedule H, Part II include physical improvements and housing; economic development; community support; environmental improvements; leadership development and training for community members; coalition building; community health improvement advocacy; and workforce development.

Schedule H, Part III focuses on how a hospital reports "bad debt" expense; how it accounts for Medicare costs and reimbursements; and what billing and collection practices it has adopted. For directors and hospital executives not assigned to the CFO's office, this last item is likely to be the most important. Hospital billing and collection practices have an unwritten, emotional component that goes well beyond a patient's financial information. Real (or even perceived) abuses in billing and collection activities by hospitals create dramatic newspaper headlines that can have devastating consequences for an organization's reputation and its finances. For example, in April, *The Wall Street Journal* ran a front-page story entitled "Cash Before Chemo" that focused on efforts by M.D. Anderson Cancer Center to collect a $105,000 fee before it would provide treatment to an underinsured patient.[31] The story not only exposed M.D. Anderson and its management to widespread criticism regarding this alleged practice, but it also drew the attention of Senator Grassley.

In July 2008, Senator Grassley submitted over 40 information requests to M.D. Anderson on various matters ranging from its charity care policy to its corporate governance policies.[32] Upon receiving M.D. Anderson's responses, Grassley raised the possibility of further federal regulation of governmental hospitals. He said, "I hope the hospital's response will provide useful information to help guide Congress on the decision of whether government hospitals should be subject to the same standards as charitable hospitals, since they receive the same federal tax benefits."[33] Grassley went on to reiterate his disdain for the community benefit standard applicable to tax-exempt, non-governmental hospitals. "Because it's a government entity, M.D. Anderson doesn't have to satisfy the *weak* community-benefit standard that applies to private charitable hospitals," he said.[34]

Schedule H, Parts IV and V request detailed information regarding the participation of the organization in joint ventures with directors, key employees and physicians and the activities that occur at each facility the organization operates. This information will not only be of interest to the IRS in assessing compliance with federal tax laws, but will also be of interest to federal agencies charged with administering the myriad of laws and regulations that govern financial relationships between hospitals and physicians.

Tax-Exempt Bonds

The new reporting requirements of Form 990 and Schedule K provide an easy-to-follow path for the IRS to challenge the tax-exempt status of the interest on a particular bond issue and impose significant reporting and information gathering burdens that did not previously exist in prior iterations of Form 990. These burdens will now include annual expenditures of time, organizational resources and funds that previously only had to be expended at the time the bonds were first issued. Some of these burdens are centered in areas that the IRS has identified as being target enforcement areas in its Tax Exempt Bond Division's annual work plans. Complying with these new annual disclosure requirements in some cases will require, as described below, the equivalent of an internal or external audit of the use of tax-exempt bond proceeds.

Any organization that reported an outstanding tax-exempt bond issue which had both an outstanding principal amount in excess of $100,000 as of the last day of the tax year and was issued after December 31, 2002 must answer "Yes" to question 24a of Form 990, Part IV, and complete Schedule K. While Schedule K is effective for tax years that begin in 2008, only Part I is required to be completed for the 2008 tax year. Parts II, III and IV are optional for 2008, but fully effective for 2009. No reporting is required under the final Form 990 and instructions for Schedule K for bonds issued before 2003, except that Bonds issued after December 31, 2002, to refund bonds issued before January 1, 2003 have special reporting requirements in Schedule K.

continued on page 14

Form 990 Disclosure Requirements Challenge Hospitals, Provide Opportunities

continued from page 13

Form 990 Section	Form 990 Disclosure Requirement	Impact on Operations
Schedule K, Part I	Disclose the following information regarding each bond issuance: • Issuer Name; • Issuer EIN; • CUSIP#;[35] • Date Issued; • Issue Price; • Description of Purpose; • Defeased? (yes or no); and • On Behalf of Issuer? (yes or no).	Only Part I is required for 2008. Organizations should complete multiple Schedule K's if necessary to account for all bond issues. The IRS requires reporting on "outstanding" bond issues on Schedule K, even if previously defeased, if such bonds were issued after December 31, 2002. This is likely to create a greater reporting burden over time as bonds issued after 2002 are refunded. If any of the bond proceeds were used to refund a prior issue, the date of issue for each of the refunded issues must be reported. If an issue had multiple purposes, all purposes must be reported. The Instructions for Part I note that the information required to be reported in Part I, including issuer name, EIN, CUSIP#, issue date, issue price and purpose should be "consistent" with the information included on Form 8038 filed by the Issuer in connection with the bond issue.[36] It can be expected that if the review of Part K reveals that a Form 8038 was not filed as required, or if Part I is inconsistent with the information reported on Form 8038, an IRS examination may be triggered. It is likely that most organizations will not have bonds which were issued by the organization "on behalf of a state or local governmental unit" (i.e., tax-exempt bonds issued under Revenue Ruling 63-20). Conduit bond issues that are issued directly by a state or local governmental unit are not issued under Revenue Ruling 63-20, and almost all healthcare organizations will check "no" for this item regarding "On Behalf of Issuer" for each bond issue.[37]

Form 990 Section	Form 990 Disclosure Requirement	Impact on Operations
Schedule K, Part II (Optional for 2008)	Seeks information regarding use of the bond proceeds, such as: • Gross proceeds in reserve funds; • Issuance costs; • Working capital expenditures; • Capital expenditures; and • Information regarding whether the organization maintains adequate books and records to support the final allocation of bond proceeds.	After 2008, Part II will need to be completed for each bond issue listed in Part I of Schedule K. Form 8038 is a useful guideline for reporting certain information in Part II, including gross proceeds in reserve funds, issuance costs, working capital expenditures and capital expenditures, if Form 8038 was properly completed at the time of bond issuance. Line 8 requires the organization to provide the year in which construction, acquisition or rehabilitation of the financed project was substantially completed. For multiple projects, the organization should provide the latest year in which construction, acquisition or rehabilitation of each of the financed projects was substantially completed. For example, if a bond issue financed the construction of three projects which were substantially completed in 2003, 2004, and 2005, the latest year, 2005, would be entered in response to this item for that bond issue. Line 11 requires the organization to indicate whether a final allocation of bond proceeds has been made. This item should be answered for most project issues only after consultation with bond counsel, as the rules regarding "final allocation" and when it occurs are complicated and present potential pitfalls. An organization must maintain adequate records regarding the expenditure and allocation of bond proceeds sufficient to survive an examination by the IRS, which generally requires a detailed description of expenditures made from bond proceeds, including specific projects and lists of equipment acquired and their completion dates as well as reasonably expected economic lives.

continued on page 16

continued from page 15

Form 990 Section	Form 990 Disclosure Requirement	Impact on Operations
Schedule K, Part III (Optional for 2008)	Seeks information regarding private business use, such as: • Was the organization a partner in a partnership, or a member of an LLC, which owned property financed by tax-exempt bonds? • Are there any management or service contracts with respect to the financed property which may result in private business use? • Does the organization routinely engage bond counsel or other outside counsel to review any management or service contracts or research agreements relating to the financed property? • Amounts of private business use arising from non-governmental organizations that are not tax-exempt and from unrelated business income activities.	Optional for 2008, but a preview to what will be required in future tax years and the work that would be required now to survive an IRS examination of the use of tax-exempt bond proceeds. This is a road map for the IRS of potential examination/audit issues, and must be carefully and thoroughly analyzed and completed by the organization. Answering the questions in Part III regarding management and service contracts and research contracts that may result in private use is complicated by the fact that the instructions require that the organization answer "Yes" even if the organization has determined that the management, service or research contracts meet the safe harbors available under the applicable IRS Revenue Procedures governing such contracts. The IRS asks in Line 3c of this Part whether the organization routinely engages bond or other outside counsel to review management, service and research contracts – a strong hint as to the level of review the IRS expects to ensure compliance with private use rules. Answering item 5 requires an organization to compute the average percentage of bond financed property for each bond issue used in an unrelated trade or business during the relevant tax year, to the nearest tenth of a percent. For this purpose, management, service or research contracts which meet the safe harbors need not be reported in the percentage of "private use." Answering this question will likely require an internal or external private use audit of all reported bond issues, and that process is best initiated before Part III becomes effective in order to create a template for developing the private use computation. If the answer to question 7 (whether the organization has adopted management practices and procedures to ensure post issuance compliance for its bonds) is "No," the organization can expect its bond issues to be examined by the IRS.

Form 990 Section	Form 990 Disclosure Requirement	Impact on Operations
Schedule K, Part IV (Optional for 2008)	Seeks information regarding arbitrage, such as the following: • Whether a Form 8038-T has been filed with respect to the issue; • Whether the bond is a variable rate issue; and • Whether any bonds were invested beyond an available temporary period.	Lines 3a, b and c relate to payments under qualified hedges/swaps; an area of focus for the IRS in its tax-exempt bond work plans and one where IRS officials have noted some significant issues.[38] Reporting of guaranteed investment contracts ("GICs"), another area of work plan focus of the IRS, is required here.[39] Each filing organization should confirm with its bond counsel when bidding GICs that all applicable requirements of the Code will be met, as compliance with those requirements must now be certified on line 4d. Item 5 requires reporting of unspent bond proceeds beyond any allowed "temporary period" during which bond proceeds can be invested without regard to yield. For example, a typical project fund may be invested for three years before yield restrictions apply (although arbitrage rebate may apply from day one). If an organization has project funds that were not spent within three years, it should consult with bond counsel on how to address unspent bond proceeds after the allowed temporary period, and be prepared to explain to the IRS why it did not meet the three year temporary period. The Tax Exempt Bonds Division of IRS views arbitrage profits on unspent project fund proceeds as a target area for its enforcement efforts, as disclosed in its recent work plans and as seen in recent examinations.

Whistleblower Statutes Highlight Need for Governance and Community Benefit Review

Traditionally, policing responsibilities of tax-exempt organizations fell to the IRS and state attorneys general. This enforcement environment is changing dramatically thanks to two factors – the significant disclosure requirements of the Form 990 and the newly created IRS Whistleblower Office. Congress amended the federal tax code in 2006 to increase the potential reward for informants who bring violations of tax laws to the attention of the IRS. These rewards may be 15 to 30 percent of the proceeds that the IRS collects (including penalties, interest, additions to tax, and additional amounts) as a result of an action based on information that the informant provided.[40] Presently, these enhanced whistleblower provisions apply only to disputes involving more than $2 million in tax, penalties, additions to tax and additional amounts. The IRS may pay reward up to a lower 10 percent maximum if the whistleblower's tip is based on public information (e.g., from Form 990 or other reports),[41] and in smaller cases (under $2 million) whistleblowers still can recover up to a 15 percent bounty.[42] Although tax law violations are prosecuted exclusively by the government, the IRS has discretion to enter into tax administration contracts with whistleblowers and their attorneys to share confidential return information (e.g., tax returns of subsidiaries, directors and officers and prior closing agreements) to allow the whistleblower to assist in the investigation.[43] These developments have established a cottage industry of attorneys and others ready to report tax-exempt organizations and their board members for violations of various federal tax laws.

IRS Enforcement Initiatives

Focused compliance initiatives are gaining in popularity, and the IRS has already reached hundreds of nonprofit hospitals with initiatives focused on executive compensation, insider loans, private use of bond financed facilities and community benefit activities. There are no signs of these focused reviews

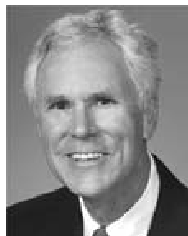
continued on page 18

continued from page 17

slowing down or stopping at a single contact per hospital. Rather, with the added details that will be reported on the Form 990, the IRS is likely to expand the range of issues that it reviews through these compliance checks and correspondence exams. In that regard, the most recent compliance initiative involves a compliance check of approximately 400 colleges and universities on a variety of issues, including unrelated business income.[44] Given historic IRS skepticism on the level of compliance in reporting and properly allocating revenues and expenses from unrelated trade or business activities,[45] it is reasonable to expect that the unrelated business income portion of this latest initiative will be carried over to the tax-exempt healthcare sector in the years to come.

Conclusion

General counsel, executives and their boards should view the Form 990 as an opportunity to enhance corporate governance, potentially through the reduction in size of an organization's board and the adoption of procedures for accurate Form 990 reporting. One helpful method to ensure that the transition to the revised Form 990 does not present board members with any surprises is to conduct a mock audit based on 2007 information. Doing so will identify potential disclosure issues and consequences when the new Form 990 takes effect for the 2008 tax year. This exercise can be especially beneficial for Schedule H, most of which is optional for 2008, and the various intertwined disclosures regarding corporate governance and executive compensation. Organizations also should consider whether to conduct this mock audit exercise under privilege to try to protect against discovery of the resultant work product by the IRS, state regulators, plaintiffs attorneys, unions or other interested adverse parties. In order to ease the compliance pains under the new Form 990, general counsel and governance specialists also should consider reviewing the organization's current governance policies and revamping board education programs. The updated board education may include a substantive review of the new reporting requirements in the Form 990, IRS views of governance best practices, the need for expanded annual questionnaires, and the importance of full disclosure to protect the organization and the board. By following these steps, hospitals will be better positioned to respond to these changes and to put disclosure first in the new Form 990.



James R. King, member of the healthcare and tax practices of Jones Day, is resident in the Columbus, Ohio office. He represents tax-exempt organizations regarding IRS disputes and other controversy matters and counsels tax-exempt organizations on corporate governance and other tax compliance and transactional matters. He may be reached at *jrking@jonesday.com*.

Travis F. Jackson, member of the healthcare and tax practices of Jones Day, is also resident in the Columbus, Ohio office. He represents healthcare organizations with respect to IRS audits and other compliance and transactional matters. He may be reached at *tfjackson@jonesday.com*.

Gerald M. Griffith, member of the healthcare and tax practices of Jones Day, is resident in the Chicago office. He represents healthcare organizations with respect to major IRS audits, unique IRS rulings and a variety of other compliance, governance and transactional matters. He may be reached at *ggriffith@jonesday.com*.

Daniel J. Bacastow, member of the healthcare and tax practices of Jones Day, is also resident in the Chicago office. He represents issuers, underwriters and hospitals in tax-exempt bond financings and related tax compliance matters. He may be reached at *djbacastow@jonesday.com*.

Endnotes

1 U.S. Government Accountability Office, Non-Profit Hospitals: Variation in Standards and Guidance Limits Comparison of How Hospitals Meet Community Benefit Requirements (September 2008), at p. 1.

2 See, e.g., Press Release from Sen. Grassley, "GAO Report on Non-profit Hospitals" (Oct. 14, 2008), available online at http://finance.senate.gov/press/Gpress/2008/prg101408.pdf; "Letters to Two Tax-exempt Hospitals" (Sept. 2, 2008), available online at http://finance.senate.gov/press/Gpress/2008/prg090208B.pdf; Remarks of Sen. Chuck Grassley at the Roundtable on Non-profit Hospitals, Tuesday, Oct. 30, 2007, available online at http://finance.senate.gov/press/Gpress/2007/prg103007.pdf.

3 Chronological History: Redesign of the 2008 Form 990 and Corresponding Instructions, available at http://www.irs.gov/charities/charitable/article/0,,id=185892,00.html.

4 IRS Releases Discussion Draft of Redesigned Form 990 for Tax-Exempt Organizations, I.R. 2007-117, available at http://www.irs.gov/newsroom/article/0,,id=171329,00.html.

5 See, e.g., Good Governance Practices for 501(c)(3) Organizations, *EO Tax Journal* (vol. 12, no. 1, January/February 2007).

6 Governance of Charitable Organizations and Related Topics, available at http://www.irs.gov/charities/article/0,,id=178221,00.html.

7 *Id.*

8 The revised governance guidelines document, Governance and Related Topics – 501(c)(3) Organizations (hereafter "Governance Practices"), is available at http://www.irs.gov/pub/irs-tege/governance_practices.pdf.

9 Background Paper – Changes to April Draft Instructions (Aug. 19, 2008), at p. 10, available at http://www.irs.gov/pub/irs-tege/changes_to_april_draft_instructions.pdf.

[10] Remarks of Steven T. Miller, Commissioner, TEGE, Before the Georgetown Law Center Seminar on Representing and Managing Tax-Exempt Organizations, at p. 4 (April 24, 2008), available at http://www.irs.gov/pub/irs-tege/represent_manage_speech_042408.pdf.

[11] The Hospital Compliance Project involved the distribution of a nine page compliance check questionnaire with eighty-one questions focused primarily on nonprofit hospital community benefit activities and executive compensation practices. Additional information on that project is available at http://www.irs.gov/charities/charitable/article/0,,id=172267,00.html.

[12] Hospital Compliance Project Interim Report (Summary of Reported Data), at p. 15, available at http://www.irs.gov/pub/irs-tege/eo_interim_hospital_report_072007.pdf

[13] *Id.*

[14] *Supra* n. 5.

[15] Governance Practices, *supra* n. 9.

[16] See Form 990 Instructions (2008), Part VI, Lines 1b & 2, Part VII, Section A, and Schedule L, Parts III & IV.

[17] See, D. Freda, "IRS Eyeing Revision of Penalty Regime Following Debut of Redesigned Form 990," Daily Tax Report (BNA), p. G-6 (Oct. 16, 2008).

[18] See, e.g., U.S. v. Madison, 99 AFTR 2d 2007-2252 (6th Cir. 2007); U.S. v. Fumo, 100 AFTR 2d 2007-6902 (E.D. Pa. 2007).

[19] See Governance Practices, *supra* n. 9, at p. 2.

[20] Form 990 (2008), Glossary, definition of "director or trustee".

[21] See 26 C.F.R. § 53.4958-4(a)(3).

[22] See 26 C.F.R. § 53.4958-4(a)(3).

[23] See 26 C.F.R. § 53.4958-7.

[24] See, e.g., Strock v. Pressnell, 38 Ohio St.3d 207, 216 527 N.E. 2d 1235, 1243 (1988).

[25] See, e.g., Rev. Rul. 69-545, 1969-2 C.B. 117.

[26] See California Health & Safety Code § 127350(d); 210 Ill. Comp. Stat. 76/20. The Illinois legislation was enacted in 2003 and arguably marked the beginning of increased state legislative interest in community benefit reporting. Currently at least twenty-three states have some specific community benefit reporting or standards in effect.

[27] Kathleen Day, "Hospital Charity Care Is Probed: Investigators Find Hospitals Overcharge or Deny Services," Washington Post (Sept. 13, 2006), at p. D02.

[28] See, e.g., Illinois Fair Patient Billing Act, Pub. Act No. 094-0885 (effective Jan. 1, 2007).

[29] Form 990 (2008), Instructions for Schedule H, Part IV.

[30] Id., Part II, Line 9.

[31] Barbara Martinez, "Cash Before Chemo: Hospitals Get Tough," *Wall St. Journal* (April 28, 2008).

[32] Todd Ackerman, M.D. Anderson Submits Its Records on Charity Care, Houston Chronicle (Oct. 9, 2008).

[33] Id.

[34] *Id.* (Emphasis added).

[35] CUSIP stands for Committee on Uniform Securities Identification Procedures. A CUSIP number is a unique identifying number for most issues of publicly traded securities in the United States, including tax-exempt municipal bonds. The CUSIP system—owned by the American Bankers Association and operated by Standard & Poor's—facilitates the clearing and settlement process of securities.

[36] Each tax-exempt bond issue benefiting a 501(c)(3) organization must be reported to the IRS on an Information Return for Tax-Exempt Private Activity Bond Issues, Department of Treasury Form 8038. The Form requires the reporting of information including the name of the municipal issuer, the corporation borrowing the bond proceeds, the use of the bond proceeds, details on any bonds refunded and information on the sale price and yield of the bonds issued.

[37] Rev. Rul. 63-20, 1963-1 C.B. 24.

[38] See T. Jaworski, "IRS Tracking of Private Use of Exempt Bond Financing at Colleges and Universities," Tax Notes Today, 2008 TNT 223-4 (Nov. 18, 2008).

[39] Guaranteed Investment Contracts or "GICs" are investment contracts that are similar to certificates of deposit that can be purchased at banks; however, they are typically sold by insurance companies. Ranging from typical terms of one to three years in most bond transactions, they provide an investment option for project and construction funds in which a fixed rate of return is paid on the investment under the contract. A maximum number of withdrawals per month is typically contained in the contract. Typically the investment return is priced from a draw down schedule that the borrower provides to the insurance company in connection with the bidding of the GIC. Despite the use of the term "guaranteed" in their name, investments in GICs are not guaranteed by the United States of America or its agencies, and the strength of the investment is determined by the credit quality of the insurance company providing the "guaranteed return." If the company providing the contract fails, the borrower may loose most if not all of its principal investment. Many GICs require collateralization upon a rating downgrade below certain levels, but the ability of an investment provider to provide collateral in a distress situation may be limited.

[40] 26 U.S.C. § 7623(b)(1).

[41] 26 U.S.C. § 7623(b)(2).

[42] 26 U.S.C. § 7623(a); 26 C.F.R. § 301.7623-1(c).

[43] 26 C.F.R. § 301.6103(n)-2T.

[44] The college and university questionnaire, related instructions and news release are available at http://www.irs.gov/charities/article/0,,id=186865,00.html. The IRS also has made it clear that compliance checks are now a key component of federal tax law enforcement and compliance initiatives. See EO Annual Report and FY 2009 Work Plan, p. 19, available at http://www.irs.gov/pub/irs-tege/finalannualrptworkplan11_25_08.pdf.

[45] See, e.g., Testimony of Steven T. Miller, Commissioner, TEGE, Before the Oversight Subcommittee – House Ways and Means Committee, On the Oversight of Tax-Exempt Organizations (July 24, 2007), p. 9, available at http://www.irs.gov/pub/irs-tege/miller_testimony_7_24_07.pdf.

REMINDER:

ABA Health Law Section members can access past issues of *The Health Lawyer* on the Section's website. To access back issues and *The Health Lawyer's* full index, go to www.abanet.org/health/03_publications/01_health_lawyer.html