

## ***Form 990 Policy Series***

The attached Memorandum is a part of the *Form 990 Policy Series*, developed by a group of lawyers, all members of the California bar and practicing nonprofit law (the “Form 990 Policy Series Group”). The *Form 990 Policy Series* includes Memoranda containing rationales and procedures for legal counsel to use in advising their clients on drafting and adopting appropriate policies responding to the new Form 990 as well as form policies and/or questionnaires.

The members of the Form 990 Policy Series Group with respect to the attached Memorandum (posted July, 2011) were as follows: Joel S. Corwin, Co-Chair; Barbara Rosen, Co-Chair; Elizabeth Bluestein; Lani Meanley Collins; the late Gerald A. Laster; Henry Lesser; Nancy McGlamery; Louis Michelson; Joy P. Paeske; Alicia Plerhoples; Lisa A. Runquist; Robert Siemer; Myron Steeves; Patrick Sternal; and Martin J. Trupiano. The views expressed in the Memoranda do not necessarily reflect the views of the law firms or employers at which these lawyers practice or any individual member of the Group.

The date at the top of the attached Memorandum is the date that the Memorandum was finalized, and the Memorandum may not reflect changes in law or practice since that date.

**FORM 990 POLICY SERIES  
MEMORANDUM**

**Re: Form 990 Distribution and Review Policy -- Form 990, Part VI, Section B,  
Lines 11, 11A (Form 990 Policy Series Memo #5)**

**Date: February 16, 2010**

---

**NOTE ON THE SCOPE OF THIS MATERIAL**

This material is designed to provide general guidance about an aspect of nonprofit corporate governance in the specific and limited context of the governance questions contained in the new IRS Form 990 (published by the IRS in 2008 and applicable to 990 filers based on a 2009-2011 filing year phase-in period depending on the size of the nonprofit). It is intended to provide some general guidance on the establishment of processes and/or policies to address a specific governance question in the Form. The subject matter of that question implicates a broad array of legal and practical issues ranging far beyond the immediate subject matter of the question itself. This material may address some of those issues but does NOT attempt to review them comprehensively and is NOT intended to be relied on for guidance on how they should be addressed in any specific situation.

Whether or not a nonprofit organization adopts a specific governance process or policy (or modifies an existing one), either in response to the disclosure requirements of the new IRS Form 990 or to change its governance practices for other reasons is a matter to be carefully considered by that organization, with input from its board and advisors and evaluation of its specific circumstances. The IRS has explicitly stated that adoption of the policies and practices about which the new Form 990 asks is not mandatory, although the IRS has also indicated that it attaches significance to the manner in which all tax-exempt nonprofit organizations govern themselves. The inclusion of a sample policy in this material is not intended to suggest that the policy is appropriate for every nonprofit organization nor that, if a policy on that topic is determined to be appropriate, the formulation in the sample necessarily fits the needs of an individual nonprofit organization. A customized approach, with outside professional advice, is recommended. Accordingly, this material is intended as general information for legal practitioners advising nonprofit organizations as to their governance and does not constitute legal advice for any particular nonprofit organization.

Although the subject matter of this material may have relevance to nonprofit organizations that are not required to file informational tax returns with the IRS or are permitted to file on an IRS form other than Form 990, the focus of this material is 990 filers. While this material is meant to apply to Form 990 filers who are exempt under Section 501(c) of the Internal Revenue Code, certain portions of this material may be applicable only to Section 501(c)(3) organizations. In addition, although this material may be of assistance with respect to nonprofit organizations that are not subject to oversight under California law, there may be portions of this material that are relevant only to nonprofits organized under, or (by reason of their California-related activities) otherwise subject to, California law and, except as specifically discussed in this material, the laws of other States are not addressed.

---

**1. Summary**

The new Form 990, at Part VI, Section B, Line 11, states:

Has the organization provided a copy of this Form 990 to all members of its governing body before filing the form?

Also, Part VI, Section B, Line 11A states that each filer must:

Describe in Schedule O the process, if any, used by the organization to review this Form 990.

Federal tax law does not require any specific process for the review of the Form 990. However, a written policy may assist an organization in responding to the Form 990 by providing a clear process that can be described on Schedule O. This Memorandum is intended to provide general guidance for an organization considering the development and implementation of such a policy.

## **2. Rationale for Adoption of a Form 990 Distribution and Review Policy**

Federal tax law does not require nonprofit organizations to distribute Form 990 to board members or have board members review Form 990. However, with Lines 11 and 11A, the IRS is signaling that distribution in advance of filing and a process for review are encouraged. By asking these questions, the IRS is also making it easy for donors, members, sponsors and others who read the Form 990 to determine whether an organization conducts such a review. In its background paper describing the changes to the new Form 990, the IRS indicated that this question about Form 990 review is part of a group of questions designed to show “how the organization is governed, and by whom,” including questions about the governing body and “any delegation of significant governance or management duties to others.”<sup>1</sup>

Because the new Form 990 contains questions about governance that may indicate whether the governing body is performing its oversight duties, it is important for an organization’s governing body to have a chance to review what is disclosed and to ensure that the disclosure is accurate. In addition, the new Form 990 contains more opportunities for the organization to provide narrative descriptions of its mission and activities. As a part of the annual review of Form 990, the board (or an appropriate committee) should review these descriptions to be sure that they are consistent with the organization’s mission and fundraising objectives, and that they present a positive message to the organization’s donors, members, sponsors and others. Review of the Form 990 provides an additional opportunity for the governing body (or an appropriate committee) to review the organization’s financial situation and tax compliance. The description on Schedule O of this review process enables the organization to tell the public that the governing body is conducting such a review. A less than robust description, on the other hand, may trigger questions for readers of the Form 990.

The Form 990 does not require a *written policy* relating to the distribution and review of the Form 990. Nevertheless, an organization may find it helpful to have a written policy that requires such distribution and a review procedure. It reminds management and directors to distribute the Form 990. It also formalizes a review process, and provides approved language for the description of that process on Form 990,

---

<sup>1</sup> See IRS Publication “Background Paper Forms 990, Moving From the Old to the New” (August 19, 2008) at [http://www.irs.gov/pub/irs-tege/moving\\_from\\_old\\_to\\_new.pdf](http://www.irs.gov/pub/irs-tege/moving_from_old_to_new.pdf).

Schedule O. This Memorandum describes a procedure that will enable the organization to answer “yes” to Part VI, Section B, Line 11 and provides a framework for a description of the review process on Schedule O as required by Line 11A. It also suggests considerations for an organization drafting its Form 990 review procedures that will enable the organization to conduct a meaningful board-level review of the Form 990 based on the size and nature of the organization.

This Memorandum also provides sample policy language for use if an organization decides to adopt a formal written policy relating to Form 990 review. The sample policies include alternatives that will allow the drafter to make choices. The organization may choose to adopt a policy that mandates that the organization follow a distribution process that will permit it to answer “yes” to the question in Part VI, Section B, Line 11 each year. In the alternative, the organization may avoid putting such a mandatory distribution requirement into its corporate policies, and adopt a more flexible policy that will enable it to determine each year whether it can respond “yes” or “no” to that question. An organization’s board may decide that it is fulfilling its fiduciary responsibilities by adopting a mandatory distribution requirement to the board of directors or to a committee of top management officials *following* the filing of the Form 990 even if it answers “no” to the question in Part VI, Section B, Line 11 each year.

### **3. Background of Requirements/Sources for the Policy**

#### **A. Form 990 and Instructions**

As noted above, Part VI, Section B, Line 11 of the new IRS Form 990 asks:

Has the organization provided a copy of this Form 990 to all members of its governing body before filing the form?

The instructions to the Form 990 relating to Line 11 state:

Answer “Yes” only if a copy of the organization’s final Form 990 (including required schedules), as ultimately filed with the IRS, was provided to each **voting member of the organization’s governing body**, whether in paper or electronic form, prior to its filing with the IRS. The organization can answer “Yes” if it emails all of its governing body members a link to a password-protected web site on which the entire Form 990 can be viewed, and notes in the email that the Form 990 is available for review on that site.

Part VI, Section B, Line 11A of the new Form 990 requires filers to:

Describe in Schedule O the process, if any, used by the organization to review this Form 990.

The instructions relating to Line 11A state:

Describe on Schedule O (Form 990) the process, if any, by which any of the organization's **officers, directors, trustees**, board committee members, or management reviewed the prepared Form 990, whether before or after it was filed with the IRS, including specifics regarding who conducted the review, when they conducted it, and the extent of any such review. If no review was or will be conducted, state "No review was or will be conducted."

As a result, an organization cannot remain silent on the question of whether any officers or directors conducted a review of the Form 990, but must affirmatively state that there was no review by any officer or director, if such was the case.

The instructions include the following example, which makes clear there is no requirement that the board take any action prior to filing (including no requirement that any members of the board actually review the document) in order to answer "Yes" to the question on Line 11, which concerns only whether the document was "provided" to the governing body.

**Example.** The return preparer emails a copy of the final version of Form 990 to each Board member before it was filed. However, no board member undertakes any review of the form either before [or] after filing. Because such a copy of the final version of the form was provided to each voting member of the organization's governing body before it was filed, the organization can answer "Yes" even though no review took place. The organization must describe its Form 990 review process (or lack thereof) on Schedule O (Form 990).

## **B. California Nonprofit Corporation Law**

California law requires that members of the boards of directors of California nonprofit corporations exercise their duties as directors in good faith, in a manner that the directors believe to be "in the best interests of the corporation and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." See Cal. Corp. Code §§ 5231(a), 7231(a) and 9241(a) with respect to Public Benefit Corporations, Mutual Benefit Corporations, and Religious Corporations, respectively.

In performing the duties of a director, California law provides that directors are entitled to rely on information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by (1) officers or employees of the corporation whom the director believes to be reliable and competent in the matters presented; (2) counsel, independent accountants or other persons as to matters which the director believes to be within that person's professional or expert competence; or (3) a committee upon which the director does not serve that is composed exclusively of any or any combination of directors, persons described in paragraph (1), or persons described in

paragraph (2), as to matters within the committee's designated authority, which committee the director believes to merit confidence. In any such case of reliance, the director must act in good faith, after reasonable inquiry when the need for inquiry is indicated by the circumstances, and without knowledge that would cause that reliance to be unwarranted. See Cal. Corp. Code §§ 5231(b), 7231(b) and 9241(b) with respect to Public Benefit Corporations, Mutual Benefit Corporations, and Religious Corporations, respectively.

Review of the Form 990, whether by the full board of directors, or by a committee of the board consisting of persons having the appropriate expertise to do so, assists a corporation's directors in complying with this duty of exercising due care in the oversight of the corporation's activities.

### **C. Sarbanes-Oxley and its Effect on Corporate Best Practices**

The American Competitiveness and Corporate Accountability Act of 2002 (commonly referred to as Sarbanes-Oxley or "SOX") was adopted as an attempt to legislate accurate and truthful reporting by public companies to their shareholders. Although most provisions of SOX do not by their terms apply to nonprofits, many are increasingly viewed as "best practices" for all entities, including nonprofits.

One of the provisions of SOX requires the CEO and CFO to certify an issuer's financial reports. The certifications include that they have reviewed the reports, that they have no knowledge of material misstatements or omissions in the reports, and that to the best of their knowledge the reports fairly present the financial condition and operations of the issuer.

Some commentators view the requirements of SOX, including the requirement for review of important financial statements as a "best practice" for all corporations, including nonprofits. For example, The Independent Sector and BoardSource, in their joint publication "*The Sarbanes-Oxley Act and Implications for Nonprofit Organizations*,"<sup>2</sup> recommended in 2003 that nonprofits voluntarily incorporate certain provisions of SOX, including the financial statement review. This publication, updated in 2006, states:

CEOs or CFOs, while they need not certify the financial statements..., do need to fully understand such reports and make sure they are accurate and complete....

The CEO and CFO should review the Form 990 ... before it is submitted to ensure that it is accurate, complete, and filed on time.

Regardless of whether the CEO and CFO certify the financial report, the board has the ultimate fiduciary responsibility for approving financial

---

<sup>2</sup> BoardSource and Independent Sector (revised January 2006).  
<http://www.independentsector.org/PDFs/sarbanesoxley.pdf>.

reports. Just as the financial and audit reports are reviewed and approved by the audit committee and the board, the Form 990 ... should also be reviewed and approved. At a time when the Form 990 and 990-PF are published on the Internet by third parties, it is more important than ever that directors be familiar with the contents of the organization's 990 each year.

The IRS has indicated that it concurs with this recommendation. The IRS publication entitled "Governance and Related Topics – 501(c)(3) Organizations," released on February 4, 2008,<sup>3</sup> states that the IRS:

encourages the board, either directly or indirectly through a board-authorized committee, to ensure that financial resources are used to further charitable purposes and that the organization's funds are appropriately accounted for by regularly receiving and reviewing up-to-date financial statements and any auditor's letters or finance and audit committee reports.

The IRS acknowledged in this publication that with respect to reviews of Form 990, organizations may conduct their review in different ways, stating that:

Practices differ widely as to who sees the form, when they see it, and the extent of their input, review or approval. Some, especially smaller organizations, may provide a copy of the Form 990 to the full board for review or approval before it is filed. Others provide a copy of the form to a portion of the governing body, or to a committee or top management officials. Still others provide a copy to the board, a committee or top management officials, but not until after it is filed.

#### **4. Considerations for Implementation of a Form 990 Distribution and Review Policy**

**A. Whether to Adopt a Formal Written Policy.** As an initial matter, it should be determined whether a formal written policy will be adopted requiring the review and distribution of the Form 990, or whether the organization will adopt a less formal set of procedures that are expected to be followed in the current year. In making this determination, the organization should consider whether adoption of a formal policy will make it more likely that the organization's management and board of directors will remember to conduct a review each year (such as in the case of a small organization with frequent management and board turnover). On the other hand, the organization should consider whether it is likely that the policy as adopted will be feasible to implement and follow each year. It cannot be stressed enough that the organization should only adopt policies which it is confident it can follow.

---

<sup>3</sup> Published at [http://www.irs.gov/pub/irs-tege/governance\\_practices.pdf](http://www.irs.gov/pub/irs-tege/governance_practices.pdf)

The samples provided in Section 5 of this memorandum are drafted in the form of formal organizational policies that could be adopted by the Board or a relevant committee of the Board. In the event the organization determines not to adopt a formal policy, the organization could still follow the procedures described in these policies and answer “Yes” to Part VI, Section B, Line 11 of the Form 990 if the procedures followed comply with that question.

**B. Where to Place the Policy.** Prior to adoption of a formal policy, the organization should determine where the policy should be placed in the organization’s documentation. Alternatives may include, for example, in the bylaws, in a board policies and procedures manual, or as a stand-alone item.

**C. Need to Review Prior Policies.** It is very important that any Form 990 review policy adopted by the organization be consistent with, or expressly supersede, any policies that already exist within the organization, such any board committee charter that already provides for review of the Form 990 or other financial disclosures. A practitioner advising an organization on the adoption of a Form 990 review policy should carefully check the client’s existing policies to avoid inconsistencies.

**D. Level of Detail in Policies; Samples.** The client should be cautioned that in creating a formal Form 990 review policy, it is very important to institute procedures that the corporation is likely to be able to comply with consistently in the long term. A policy that contains too much detail in the procedures outlined for review of the Form 990 may lead to inadvertent violations of the policy. Failure to follow an adopted policy may give rise to an inference that members of the organization’s governing body are not complying with their duty of care, even if the governing body conducts a different review that in the absence of the policy would seem reasonable and prudent.

Sample A provided below may be used if after such consideration the client wishes to mandate that the organization annually follow a procedure that will enable it to answer “Yes” to the question in Part VI, Section B, Line 11. Sample B may be used if the client wishes to adopt a formal policy but not to mandate distribution of the Form 990 to all board members before filing. If the organization adopts a policy along the lines of Sample B, that organization may determine each year whether it is feasible to distribute the Form before filing and if so it may answer “Yes” that year. If it is not feasible or consistent with an organization’s practice to distribute the final version of the Form 990 to every voting member of the governing body before the Form is filed with the IRS, the proper response is “No”. Nonetheless, the organization should still consider providing a copy of the form to a portion of the governing body, or to a committee or top management officials after it is filed. Even if the question is answered “No,” the organization must still provide a description of the review procedure on Schedule O.

**E. Responsibility for 990 Review.** In drafting the policy, care should be taken in determining who will be responsible for the detailed review of the Form 990. The draft policy set forth in this memorandum provides alternatives for detailed review by a committee of the board, by a committee as well as certain officers, or by the full

board. In the case of a smaller organization that does not have separate board committees, it may be appropriate to have the full board review the Form 990 (after initial review by management), or to designate a subcommittee consisting of board members who have appropriate expertise or understanding of financial statements and tax forms. In a larger organization that has an Audit Committee, the Audit Committee is likely to be the appropriate committee to undertake a detailed review of the Form 990.

**F. Reporting to Board.** If the detailed review will be conducted by a committee or smaller group of individuals other than the full board, the organization should consider whether it is feasible to require a report or recommendation to the full board before filing the Form 990. Before including any such requirement the organization should consider that, as a practical matter, often the timing between the completion of the Form 990 and the filing deadline will be short. It may not be possible to obtain a vote of the full board before the filing deadline. If the organization has an executive committee that regularly acts on behalf of the full board between board meetings, the organization may consider requiring approval by the executive committee following review by any other committee or group of officers/directors.

**G. Distribution of *Final* Form 990.** Regardless of the procedure used for review of the Form 990, in order to respond “Yes” to the question on Part VI, Section B, Line 11, the organization must distribute the final version of the Form 990 “as ultimately filed with the IRS” to *every* voting member of the governing body *before* filing the Form 990 with the IRS. This means that the version that must be distributed to all members of the board includes any changes that have been made after any detailed review is completed.

**H. Considerations Relating to Distribution of Form 990.** Failure to require that the Form 990 be distributed to the board can facilitate embezzlement or waste of charitable assets by the staff members responsible for completing the Form 990. For this and other reasons relating to proper oversight, both sample policies A and B are drafted to require distribution of the final version of Form 990 to the board at some time, either before or after it is filed.

## **5. Sample Policies:**

### **A. *Prior* Distribution and Review Policy**

**I. Purpose of the Policy.** The purpose of this policy is to create a process for preparation and review of the Form 990 and its distribution to all board members of [Name of Organization] (the “Organization”) *prior* to filing with the Internal Revenue Service. This process will provide the board members the opportunity to review the Form 990 while also ensuring that annual filing deadlines may be met.

### **II. Procedure for Preparation and Review of Form 990.**

A. Preparation of Form 990. The Organization’s [insert title, e.g., Chief Financial Officer, or senior management] is responsible for the timely preparation of the Form 990. The Organization’s [title] may confer with accountants and legal counsel of the Organization with respect to drafts of the Form 990.

B. Review of Form 990 Before Filing. Copies of the completed draft Form 990 (including required schedules) will be distributed to [insert appropriate officer(s) or committee, e.g., the Audit Committee] in either electronic or paper form for review and approval. Any questions or concerns will be noted and addressed, and management staff will ensure that changes are incorporated into the Form 990 as appropriate.

[THE FOLLOWING SENTENCE WOULD BE ADDED ONLY IF FULL BOARD REVIEW AND APPROVAL WILL BE FEASIBLE BEFORE FILING DEADLINE]

Copies of the draft Form 990 will then be distributed to the Board of Directors in either electronic or paper form for review and approval. Any questions or concerns will be noted and addressed, and management staff will ensure that changes are incorporated into the Form 990 as appropriate.

**III. Distribution of Form 990 to All Members of Governing Body.** After all input has been appropriately addressed, the final version of the Form 990 (with required schedules) will be distributed to every voting member of the Organization’s board of directors prior to filing with the IRS. The final form may be distributed either in paper or electronic form in any manner deemed appropriate by the Organization’s [insert title, e.g., “Chief Financial Officer”, or “Chairperson”].

**IV. Filing of Form 990.** After the final version of the Form 990 has been distributed pursuant to paragraph III above, management staff will cause the final Form 990 to be filed as required.

**B. *Flexible Distribution and Review Policy***

**I. Purpose of the Policy.** The purpose of this policy is to create a process for preparation and review of the Form 990 and its distribution to all board members of [Name of Organization] (the “Organization”) whether before or after filing with the Internal Revenue Service. This process will provide the board members the opportunity to review the Form 990 while also ensuring that annual filing deadlines may be met.

**II. Procedure for Preparation and Review of Form 990.** The Organization’s [Insert title, e.g., Executive Director] is responsible for the timely preparation of the Form 990. The Organization’s [title] may confer with accountants and legal counsel of the Organization with respect to drafts of the Form 990.

[THE FOLLOWING SENTENCE WOULD BE ADDED ONLY IF ADDITIONAL REVIEW IS FEASIBLE BEFORE FILING DEADLINE]

Copies of the completed Form 990 (including required schedules) will also be reviewed by [insert appropriate officer(s) or committee, e.g., the Audit Committee or “Treasurer”].

Any questions or concerns will be noted and addressed, and the [title] shall ensure that any appropriate changes are incorporated into the Form 990, which then shall be signed by the Executive Director or other authorized officer of the Organization.

**III. Filing of Form 990 (with possible prior distribution to the governing body).**

The Form 990 shall then be filed with the IRS on a timely basis; provided, if management considers it feasible and appropriate under the circumstances, it may distribute the final version of the Form 990 (with required schedules) to every voting member of the organization’s Board of Directors prior to filing with the Internal Revenue Service. The final form may be distributed either in paper or electronic form in any manner deemed appropriate by the Organization’s [insert title, e.g., “Chief Financial Officer”, or “Chairperson”].

**IV. Distribution of Form 990 to All Members of Governing Body.** A copy of the filed Form 990, if the final version was not circulated prior to filing, shall be circulated to the Board of Directors as promptly as reasonably practical after the filing, and in no case later than its next regular meeting following such filing. For the manner of distribution, see III. above.