IRS FOCUS ON TRANSPARENCY:

THE NEW FORM 990

For the first time in 25 years, the IRS has issued a re-designed annual information return with numerous "new" questions that must be answered by hospitals and other tax-exempt organizations. Form 990 now consists of an 11-page "core form" and 16 related schedules, including Schedule H designed solely for tax-exempt hospitals. The new Form 990 must be completed for the 2008 tax year, although most of the hospital schedule is not required until the 2009 tax year. On April 7, the IRS released draft instructions to accompany the Form and schedules.

In plain language, here are some key questions that trustees will want to know about:

1. **IS YOUR BOARD SUFFICIENTLY INDEPENDENT?** The new Form 990 requires disclosure of the number of voting members on an organization's Board and the number of those members that are considered "independent." In general, Boards should consist of members who can exercise independent judgment so that objective decisions are based solely on the best interests of the organization and not any possible financial interests of a Board member. A Board member is considered independent when the following circumstances are satisfied: (1) the member is not compensated by the organization as an officer or employee of the organization or of a related organization, (2) the member did not receive more than $10,000 for the year as an independent contractor of the organization or a related organization, (2) the member did not otherwise receive a material financial benefit from the organization or related organization and (4) the member did not have a family member that received compensation or other material financial benefits from the organization or a related organization. Transactions over $50,000 are per se material financial benefits. Hospitals must disclose and explain any family or business relationships between Board members, officers and key employees. Additionally, the new Form 990 asks whether Board members, officers, and key employees are required to annually disclose possible interests that could give rise to conflicts. An organization is also required to report whether and how it regularly and consistently monitors and enforces compliance with its conflict of interest policy.

2. **WHO IS REVIEWING THE 990?** The new Form 990 asks whether the Board was provided the Form 990 before it was filed, and directs organizations to describe the process, if any, as to who is provided the form, when it is provided, and the level of review that is undertaken. Boards should oversee a review of existing policies or otherwise adopt policies that address the distribution and review of the Form 990 so as to ensure that each Board member is provided a copy and at least a designated committee of Board members or top management officials undertakes a review of the Form 990 before it is filed.

3. **WHAT "BEST PRACTICES" POLICIES ARE IN PLACE?**

    - WRITTEN WHISTLEBLOWER POLICY: The new Form 990 asks whether an organization has a written whistleblower policy. Boards should oversee a review of existing policies or otherwise adopt such a policy that addresses procedures for receiving, investigating, and taking appropriate action regarding fraud and non-compliance with the law or the organization's policies and that also provides protection to whistleblowers against retaliation.

- **WRITTEN DOCUMENT RETENTION AND DESTRUCTION POLICY:** The new Form 990 asks whether an organization has a written document retention and destruction policy. To the extent not already in place, such a policy should identify the record retention responsibilities of staff, volunteers, board members, and outsiders for maintaining and documenting the storage and destruction of the organization's documents and records.

4. WHAT DOES THE FORM ASK ABOUT WHO GETS PAID WHAT AND WHY?

- **COMPENSATION PRACTICES FOR TOP MANAGEMENT, OFFICERS, AND KEY EMPLOYEES:** The new Form 990 asks whether an organization's process for determining the compensation of top management officials, officers, and key employees includes: (1) a review and approval by independent persons; (2) compensation comparability data; and (3) written records of the deliberation and decision of compensation decisions. Whether or not such items are part of the compensation process, an organization is required to describe its compensation process and report the procedures used to establish the compensation of the CEO.

- **COMPENSATION OF KEY EMPLOYEES:** In addition to compensation reporting for Board members, officers, and the five highest compensated employees, the new Form 990 requires the reporting of information on "key employees." A "key employee" is an employee of the organization who (1) has responsibilities, powers, or influence over the organization as a whole that is similar to those of officers, directors, or trustees; (2) manages a discrete segment or activity of the organization that represents 5% or more of the activities, assets, income, or expenses of the organization; or (3) has or shares authority to control or determine 5% or more the organization's capital expenditures, operating budget, or compensation of employees. Persons whose compensation does not exceed $150,000 are not key employees. The Form also requires reporting of compensation to former officers, key employees ,and trustees whose compensation meets certain thresholds.

- **REPORTABLE COMPENSATION:** The new Form 990 requires the reporting of compensation from the organization and related organizations and compensation from any unrelated entity if it provided services to the reporting organization.

5. **IS CURRENT DISCLOSURE SUFFICIENT?** In addition to an organization's tax-exempt application and Forms 990, which are required to be made available for public inspection, now an organization must describe whether it makes its governing documents, conflict of interest policy and financial statements available to the public. To the extent not already in place, Boards should oversee the adoption of policies for making such information publicly available.

6. **WHICH PERKS MUST BE DISCLOSED?** Schedule J requires an organization to report (and describe) whether it provided any of the following with respect to certain persons: first-class or charter travel; travel for companions; housing allowance or residence for personal use; payments

for business use of personal residence; tax indemnification and gross-up payments; health or social club dues or initiation fees; discretionary spending accounts; the provision of personal services (e.g., maid chauffeur, chef); severance or change in control payments; payments (or participation in) supplemental nonqualified retirement plans and equity-based compensation arrangements; and compensation contingent on revenues, net earnings, or other non-fixed payments of the organization or any related organization. Board members should be aware of any consequences of the disclosure of such payments or arrangements.

7. **HOW IS YOUR HOSPITAL ASSESSING AND RESPONDING TO COMMUNITY NEEDS?** Schedule H requires a hospital to demonstrate -- through a variety of questions -- how it is serving the needs of the community. Boards will want to oversee the review of existing charity care policies, including methods of informing and educating the public about such policies, the review or adoption of policies for preparing community benefit reports that are made publicly available; and the organization's assessment of community health care needs in connection with other activities that further its exempt purpose.

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