



Venable Model Nonprofit Governance Policies

Fall 2008 – Updated to Reflect the New Form 990

After months of deliberation and public comment, guided by the principles of “transparency, compliance, and burden minimization,” the Internal Revenue Service (“IRS”) has released a dramatically redesigned Form 990. Although the 2008 Form 990 allows tax-exempt organizations to better describe their activities and contributions to the community, it also requires significantly more disclosure than it ever has before.

In many respects, the most far-reaching changes to the Form 990 appear in Part VI of the Core Form, *Governance, Management, and Disclosure*. Section A of Part VI requires an organization to describe aspects of its internal governance: the composition of its board, the delegation of certain management responsibilities, and the rights of its members. Section B of Part VI asks, in almost checklist fashion, whether or not an organization has certain written policies in place. Specifically, the IRS is inquiring whether a tax-exempt entity has a conflict of interest policy, a whistleblower protection policy, a document retention and destruction policy, a policy for setting the compensation of key employees, and a policy to govern joint ventures with taxable entities. Part VI also asks whether or not the board of directors has reviewed the Form 990 before it is filed.

It should be noted that, while applicable nonprofit corporation laws in various states are continually being revised, often with the imposition of new obligations and restrictions, we are not aware of any state or federal statute that broadly requires nonprofit corporations to implement all of the above policies or actions. Nonetheless, it has become increasingly clear that adopting and implementing these policies is an accepted “best practice” within the nonprofit community. As such, even without affirmative statutory requirements, having such policies in place may soon be part of the prevailing common law standard of care for nonprofit organization governance. Further, given the close attention paid to organizations’ Forms 990 by the IRS, watchdog groups, and others, an indication that such governance policies have not been implemented may increase the risk of public complaints and/or IRS examination.

We have drafted this set of model policies with a few basic objectives in mind. First and foremost, we want your organization to be prepared when it files its next Form 990. These forms are designed to help you gather the information you need to describe your organization with accuracy and confidence. By adopting the policies by the end of your taxable year—as early as December 31 for many organizations—you will be positioned to answer “yes” to several key questions in Part VI.

Second, we recognize that there is no one best approach to any of these policies. Rather than adopting these model documents word for word, treat them as blueprints and craft a set of policies that fits the size and scope of your particular organization. We often provide you with more than one version of the same policy to help you with this task. Note particularly that, given the vast differences among statutes and regulations in the states, it is impossible for us to provide an effective “model” document retention policy. As such, we provide only a very brief statement regarding records retention responsibilities that will suffice for an organization to check “yes” in response to the applicable Form 990 question. We do not provide a model schedule or detailed policy in this regard. Note also that some of the attached policies may refer to an executive committee or an audit committee. We recognize that many nonprofit organizations may not have such committees, and the policies provided would need to be revised accordingly in such situations.

Finally, we hope that these documents lay the groundwork for year-round practices that strengthen and protect your organization well beyond the scope of annual reporting requirements. Simply adopting these policies as you find them may satisfy the narrow goal of being able to check the “yes” box on the IRS Form 990, but that alone affords little security in the long run. In fact, failure to enforce a written policy may cause your organization to be worse off than had it never adopted the policy at all. Use this period of adjustment to the new Form 990 to your



advantage. Implement new policies to encourage candor and transparency, and revisit old policies that may prevent your organization from putting its best face forward. Good governance need not be overly burdensome or complicated, but it does take some thought.

As always, please let us at Venable know how we may be of assistance.

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Whistleblower Policy

The effort to overhaul the Form 990 was motivated, at least in part, by nearly a decade of sizeable corporate and accounting scandals—many of which have reached deeply into the nonprofit sector. Allegations of excessive compensation, self-dealing, and ineffective governance were often brought to light by “whistleblowers,” employees who may have come forward and provided information to the authorities and/or to organization leaders. In light of these developments, the federal Sarbanes-Oxley Act (P.L. 107-204) was enacted in 2002. The law includes a provision that makes it a federal crime for an entity to retaliate against whistleblowers who report suspected wrongdoing to federal law enforcement authorities. Although Sarbanes-Oxley does not apply to nonprofit organizations in most respects, its prohibition on retaliating against whistleblowers does apply to all types of entities.

The purpose of most whistleblower protection policies is to provide protection to individuals who in good faith seek to report improprieties or illegal actions. Line 13 of Part VI asks whether or not an organization has a whistleblower policy, and the Form 990 instructions states that such a policy should serve three purposes. First, it “encourages staff and volunteers to come forward with credible information on illegal practices or violations of adopted policies of the organization.” Second, it “specifies that the organization will protect the individual from retaliation.” Third, it “identifies those staff or board members or outside parties to whom such information can be reported.”

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ABC NONPROFIT Whistleblower Policy

- Purpose* This Whistleblower Policy is designed to provide a mechanism for employees and other organization leaders to raise good faith concerns regarding suspected violations of law or ABC policy; to facilitate cooperation in any inquiry or investigation by any court, agency, law enforcement, or other governmental body; and to protect individuals who take such action from retaliation or any threat of retaliation by any other employee or agent of ABC.
- Scope* This Policy applies to all ABC employees, including part-time, temporary, and contract employees, as well as directors, officers, and other organization volunteers.
- Policy* ABC is committed to maintaining a workplace where employees are free to raise good faith concerns regarding ABC's business practices. Employees should be encouraged to report suspected violations of the law on the part of ABC; to identify potential violations of ABC policy, including those contained the ABC Policies and Procedures Manual; and to provide truthful information in connection with any official inquiry or investigation.
- ABC expressly prohibits any form of retaliation, including harassment, intimidation, adverse employment actions, or any other form of retaliation, against employees who raise suspected violations of law, cooperate in inquiries or investigations, or identify potential violations of ABC policies. Any employee who engages in retaliation will be subject to discipline, up to and including termination.
- Procedure* Reports of suspected violations of law or policy and reports of retaliation will be investigated promptly and in a manner intended to protect confidentiality. The Chief Ethics and Compliance Officer will manage such investigation, and may request the assistance of counsel or other outside parties as he or she deems necessary. The Chief Ethics and Compliance Officer will prepare a report of the findings of the investigation, and submit such report to the Board of Directors.
- In the event that a report concerns the Chief Ethics and Compliance Officer, he or she shall recuse himself or herself from the proceedings, and the Board of Directors shall select an appropriate officer of ABC to continue the investigation.
- Any employee who believes that he or she has been subjected to any form of retaliation as a result of reporting a suspected violation of law or policy should immediately report such incident to his or her supervisor, the Chief Ethics and Compliance Officer, or the Director of Human Resources. Supervisors, managers, and Human Resources staff who receive complaints of retaliation must immediately inform the Chief Ethics and Compliance Officer.

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