

EDITORIAL

IRS Form 990 and How NRECA's Sample Questionnaire May Help

This month's editorial was written by Jessica Healy, NRECA Assistant General Counsel.

In general, organizations that are exempt from federal income taxation must file an "annual return" stating gross income, receipts, disbursements, and any other information prescribed by the Internal Revenue Service (IRS) in the return's instructions.¹ For these organizations, including tax-exempt electric cooperatives, the annual return is filed on Form 990, "Return of Organization Exempt From Income Tax."²

Beyond an Organization's Finances

The Form 990 goes beyond a tax-exempt organization's finances. Among other non-financial topics, through the Form 990, the IRS enquires into an organization's governance structure, with questions addressing the governing body, governance decisions reserved for the organization's members, and changes to governing documents like articles of incorporation and bylaws, if any. The IRS also enquires into director independence and personal or family benefit to current or former directors, officers, and certain employees.

Following the IRS' major revision of the Form 990 in 2007 for the 2008 tax year, then-IRS Commissioner for the Tax Exempt and Government Entities Division Steven Miller noted that, "Indeed, the word 'governance' does not appear in [the Internal Revenue Code] at all." He continued, "the [IRS] is going to be involved with governance. [...] We care about governance because we believe, and I believe, that a

well-governed organization is more likely to be compliant with the tax law, while poor governance can easily lead to trouble."³

To collect additional information regarding governance and other non-financial topics, since the major revision, the Form 990 has asked specific questions and requested information regarding an organization's current and former officers, directors, trustees, key employees, and highest compensated employees.⁴ "Former" includes directors who served on the board of directors, and applicable individuals who were employed by the cooperative, within the last five tax years.

"Reasonable Effort" and Questionnaires

An organization is not required to provide certain information if it is unable to obtain the information after making a "reasonable effort." A "reasonable effort" includes annually distributing a questionnaire to each current and former officer, director, trustee, key employee, and highest compensated employee. The questionnaire must include the individual's name and title, blank lines for the individual's signature and signature date, and must contain the relevant Form 990 instructions and definitions.⁵

NRECA created a Sample Electric Cooperative IRS Form 990 Questionnaire (Sample Questionnaire) to assist its members in making a reasonable effort to obtain the information for which the Form 990 Instructions include a "reasonable effort"

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statement, and to assist with additional Form 990 questions.⁶ NRECA has revised the Sample Questionnaire based upon the Form 990, supporting schedules, relevant instructions, and definitions available as of January 1, 2018.⁷

The Sample Questionnaire is designed to be distributed to an electric cooperative's current and former officers, directors, trustees, key employees and highest compensated employees. Because certain information is unique to individual electric cooperatives, before distributing or using the Sample Questionnaire: (1) an electric cooperative's tax

adviser should review the Sample Questionnaire; (2) the cooperative should modify the Sample Questionnaire as necessary; and (3) the cooperative should supply the appropriate information requested in the Sample Questionnaire.

The Sample Questionnaire addresses Form 990 questions regarding: (1) grants or other assistance provided by the cooperative; (2) business relationships and doing business with the cooperative; (3) director independence; (4) relationships with other officers, directors, trustees, or key employees; (5) compensation from organizations related to the cooperative; and (6) hours devoted to the cooperative.

The Importance of Accuracy and Completeness

Answering the questions and completing the Form 990 thoroughly and accurately is critical from a legal perspective, as well as from a public and member-relations perspective. The Form 990 and its related schedules, attachments and supporting documents, will be received by the IRS and, with very limited exceptions, all of these documents could be reviewed by state and local officials, the media, watch-dog groups, electric cooperative member-owners, and the general public. Further, penalties may be imposed.

For example, where an organization is found to have failed to include any of the information required on the Form 990 or failed to show the correct information, the organization "shall" pay a penalty of \$100 for each day that the failure continues, with a maximum penalty of \$50,000 for organizations with gross receipts exceeding \$1,000,000 for any year.⁸ For other organizations, the penalty is \$20 for each day that the failure continues, with a maximum penalty equaling the lesser of \$10,000 or 5 percent of the organization's gross receipts for that year.⁹

If a person is found to have "willfully" delivered or disclosed a Form 990 "known" by the person to be "fraudulent" or "false" regarding any "material matter," the person "shall" be fined up to \$50,000 in the case of a corporation, or in the case of an individual, up to \$10,000 or imprisoned for up to one year, or both.¹⁰ If a person "willfully" signs a Form 990 that the person does not believe to be true and correct regarding every "material matter," or if a person "willfully aids or assists" in preparing or filing a Form 990 that is fraudulent or false regarding any "material matter," regardless of whether the person knew of or consented to the fraud or falsity, then the person "shall be guilty of a felony," and upon conviction, "shall be fined" up to \$500,000 in the case of a corporation, or in the case of an individual, up to \$100,000, or imprisoned up to three years, or both.¹¹ "Person" includes an officer or employee of the organization "under a duty" to perform these acts.¹²

Officers, directors, and many, if not all of the current key employees and highest compensated employees owe a fiduciary duty to the organization. The "duty of care" obligates a fiduciary to generally understand the laws and regulations that apply to the organization and oversee its compliance, including with the Form 990. In fact, the Form 990 asks whether the board of directors has received a "complete copy" of the organization's Form 990 before filing and the organization must describe its Form 990 review process.¹³

Public Inspection

Form 990s and all schedules, attachments, and supporting documents must be made available for public inspection and the IRS may impose a penalty on a "person" of \$20 per each day of failure to comply with these requirements, with a maximum penalty on all persons of \$10,000.¹⁴ Person

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includes any “officer, director, trustee, employee, or other individual” under a “duty” to make the organization’s Form 990 and other documents available for public inspection or to provide a requested copy.¹⁵ If the person’s failure to comply is “willful,” the penalty is \$5,000 for each applicable Form 990.¹⁶

An exact copy of the organization’s Form 990 and related schedules, as filed with the IRS, must be made available for public inspection in the organization’s principle office, and possibly additional offices, without charge during regular business hours for a period of three years beginning on the filing date.¹⁷ A copy of the Form 990 must be provided upon written request unless the organization makes it “widely available.”¹⁸ This includes posting the Form 990 on the organization’s own website or “on a database of exempt organization documents maintained by another organization,” provided the documents are “posted in a format that meets the criteria set forth in the regulations.”¹⁹

Many tax-exempt organizations’ Form 990s are available on Guidestar.org.²⁰ Form 990s are also available for inspection and copying, upon written request, at times and places prescribed by the IRS.²¹

There is an exception for providing a copy where the organization reasonably believes “a group of requests” for its Form 990 are part of a “harassment campaign.”²² The organization must file an application and a local IRS official will make a determination based on “relevant facts and circumstances.”²³

Questions on Policies and Processes

The Form 990 includes questions about, but does not require, certain policies and processes, including a written conflict of interest policy, an executive compensation process, and the public availability of certain governance documents such as the organization’s articles of

incorporation and bylaws. With regard to executive compensation, the Form 990 asks whether the organization’s process for determining CEO or other officers’ or key employees’ compensation includes “a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision.”²⁴ If yes, the process must be described in the applicable schedule. As a result of the IRS’ attention on these matters, some organizations have adopted or updated policies and procedures on these and other governance topics.²⁵

Conclusion

The Form 990, schedules, instructions, and related documents have gone largely unchanged since the 2007 revision and most likely, so has the IRS’ attention on governance. As then-IRS Tax Exempt and Government Entities Division Commissioner Miller noted in his speech nearly a decade ago, “the IRS has been and will remain active in [governance]. It is too important to ignore.”²⁶

NRECA encourages cooperatives to work closely with their attorney and a tax adviser when collecting information and completing the Form 990 and related documents, particularly due to the Form 990’s complexity, penalties, and the potential scrutiny the cooperative may receive.

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¹ 26 U.S.C. § 6033(a)(1).

² 26 C.F.R. § 1.6033-2(a)(2)(i).

³ Steven T. Miller, IRS Tax Exempt and Government Entities Division Comm’r, Remarks at the IRS Western Conference on Tax Exempt Organizations (Nov. 20, 2008), https://www.irs.gov/pub/irs-tege/stm_loyolagovernance_112008.pdf.

⁴ A “highest compensated employee” means, based upon reportable compensation for the calendar ending with or within the tax year, and other than officers, directors, trustees, or key employees, one of the five highest compensated employees of the organization, or an entity wholly owned by the organization that is not a separate entity for federal tax purposes, who received more than \$100,000 of reportable compensation from the organization and any related organizations during the tax year. See IRS, 2016 Instructions for Form 990 Return of Organization Exempt From Income Tax 62 (Dec. 9, 2016).

⁵ See *id.* at 19, 20, 30; IRS, 2017 Instructions for Schedule L (May 16, 2017).

⁶ The Sample Questionnaire is available for NRECA voting members at <https://tinyurl.com/SampleCooperativecom> and Electric Cooperative Bar Association members at <https://tinyurl.com/SampleECBAcoop>.

⁷ As of January 1, 2018, the Instructions for Form 990 Return of Organization Exempt From Income Tax had not been updated for the 2017 tax year. Once available, NRECA will review and revise the Sample Questionnaire as needed.

⁸ 26 U.S.C. § 6652(c)(1)(A).

⁹ *Id.*

¹⁰ 26 U.S.C. § 7207.

¹¹ 26 U.S.C. § 7206.

¹² 26 U.S.C. § 7343.

¹³ IRS, 2017 Form 990 Return of Organization Exempt from Income Tax, Part VI, Section B, lines 11 a and b.

¹⁴ 26 U.S.C. § 6652(c)(1)(C).

¹⁵ 26 U.S.C. § 6652(c)(5)(C); 26 C.F.R. § 301.6652-2(d)(1).

¹⁶ 26 U.S.C. § 6685.

¹⁷ See 26 C.F.R. § 301.6104(d)-1.

¹⁸ 26 U.S.C. § 6104(d).

¹⁹ *Public Disclosure and Availability of Exempt Organizations Returns and Applications: Exemption Where Organization Makes Documents “Widely Available,”* <https://www.irs.gov/charities-non-profits/public-disclosure-and-availability-of-exempt-organizations-returns-and-applications-exemption-where-organization-makes-documents-widely-available> (last updated Apr. 21, 2017).

²⁰ It is unclear whether an organization’s Form 990 on Guidestar.org is “widely available.” Further, there is often a delay in Form 990s being added to Guidestar.org.

²¹ 26 U.S.C. § 6104(b); 26 C.F.R. § 301.6104(b)-1(c), (d).

²² 26 U.S.C. § 6104(d)(4); 26 C.F.R. §§ 301.6104(d)-1(a), 301.6104(d)-3(a).

²³ 26 C.F.R. § 301.6104(d)-3(b).

²⁴ IRS, 2017 Form 990 Return of Organization Exempt from Income Tax, Part VI, Section B, line 15.

²⁵ American Bar Association, *Guidebook for Directors of Nonprofit Corporations* 40 (3rd ed. 2012).

²⁶ Miller, *supra* note 3.