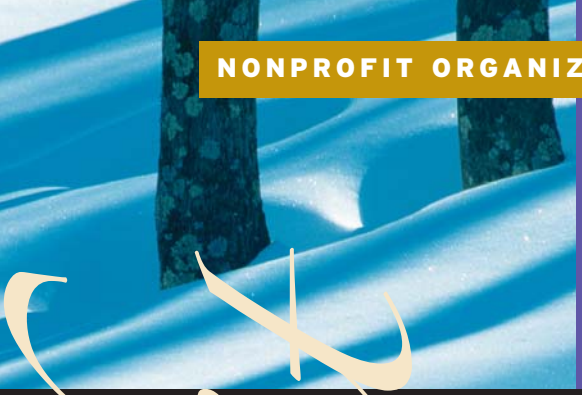

NONPROFIT ORGANIZATIONS

Update

WINTER 2009

Do You Have Time For Twice As Much Work?

For 30 years, organizations exempt from income tax have routinely filed the IRS Form 990 without tremendous effort. These organizations now face a newly revised and redesigned Form 990 that is twice as long and will require at least twice the time and twice the personnel resources.

It appears that this newly revised form will be costly in more ways than one. The old form consisted of 11 core parts and two schedules, while the revised form consists of 11 core parts and as many as 16 schedules depending on the type of organization. Right away, the IRS has acknowledged the additional time this new form will take in record keeping and preparation for filing. The IRS estimated approximately 230 hours for completing the old Form 990, while the new Form 990 could take more than 445 hours, not including the hours involved with learning about the law or the form itself. While the IRS has posted information regarding the changes on its website, including a PowerPoint introductory presentation, organizations that wait until the last minute will have a major problem when it comes time to file for 2009. This brings us to the next hurdle: small and mid-sized organizations may not receive word of this new form or its potential impact and will not understand the gravity of the revisions until it comes time to file the return itself.

Notwithstanding the burdens associated with the more-than-doubled amount of time it will take to prepare for and complete the new form, many organizations will face other obstacles as well. Prior to completion, the form may have to be reviewed by the organization's accountant, attorney, staff, board members, and possibly others. In addition, in order to properly complete the form and actually be in a position to gather the additional information and data required by these comprehensive changes, new positions may have to be created and outside assistance may be sought. The IRS was correct about one aspect: this will definitely have to be a "team effort." The cost alone of putting an organization in a position to comply with the new form may be enough to threaten the existence of small and mid-sized organizations whose focus has been on the organization's community service objectives and not on lengthy form filing efforts.

This is a big change for smaller organizations that lack the time, money, and personnel resources to accommodate the high demands of the new form. While there is a phase-in

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WTP WhitefordTaylorPreston LLP

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If you have any suggestions about topics you'd like to see addressed in future issues, please contact Editor Mary Claire Chesshire at mchesshire@wtplaw.com. We look forward to hearing from you.

for filing the revised form, this will not decrease the amount of time and money involved, only spread it out over a period of three years.

In addition, operational changes may be necessary, such as the revision of accounting practices and systems to allow for the collection of appropriate information, the development and adoption of new governance policies and procedures, and the incorporation of appropriate programs to collect this newly reportable data. Then the issue of what to do with all of this information arises. All activities of the board and committees will have to be well documented in order to be able to complete the form. Furthermore, a simple "yes" or "no" answer may require further explanation, and a lack of an appropriate explanation may lead to public scrutiny inasmuch as this form will be open to public inspection by members, donors, ratings agencies, and local tax and nonprofit governance regulators, not to mention the possibility of further review or audits by the IRS. In addition, questions are asked about certain policies, such as conflicts of interest, which are not actually required by law, and the "wrong" answer may lead an organization down a path of scrutiny without having done anything off track.

Along the same lines, the new governance section, containing 28 questions, may require some organizations to review and possibly revise their bylaws, and there will follow a need for a description of significant changes in an organization's organizational documents. The time it would take to consider whether a change to bylaws is "significant" enough to include on the form may discourage bylaw amendments, which could then lead to unreported changes and amendments.

Form 990 also inquires as to whether each member of the board has reviewed the final draft before it was filed and requests a description of the review process. A new policy for reviewing the form and providing feedback may be necessary. This, in turn, may mean a change to the bylaws which will also have to be reported, and cause for concern regarding individual liability.

Emily K. Lashley

Schaefer, Benson and Schaefer Join WTP

Our Nonprofits Organizations Group is delighted to announce the hiring of three attorneys from O'Brien, Butler, McConihe & Schaefer, PLLC – Jerome C. Schaefer, Steven P. Benson, and Stephen M. Schaefer.

Jerome "Jerry" C. Schaefer
(jschaefer@wtplaw.com, 202.689.3150) joins the firm as a partner; he was the managing partner of O'Brien, Butler, McConihe & Schaefer (formerly Hanson, O'Brien, Birney and Butler; and O'Brien, Birney and Butler). Jerry acts as outside general counsel to a wide variety of nonprofit, trade/professional, and scientific organizations headquartered throughout the country. He has been the President and a member of the Board of Directors for the Mutual Insurance Company, Ltd., since October 2002, and has served as their U.S. General Counsel since 1997. He is a current member of the Inquiry Committee for the Board of Professional Responsibility of the District of Columbia Bar, and a former member of the Inquiry Committee for Montgomery County Bar and the Attorney Grievance Commission of the Maryland Bar. Additionally, Jerry is a former member of the Clients' Security Fund of the District of Columbia Bar. From 1975 to 1978, he was a partner in Smith & Schaefer in Rockville where he practiced general litigation. Jerry began his legal career as an Assistant State's Attorney for Montgomery County. He earned his J.D. in 1972 from Catholic University of America's Columbus School of Law and his B.A. in 1969 from the John Carroll University. He is admitted to practice in the District of Columbia and Maryland.

Steven "Steve" P. Benson
(sbenson@wtplaw.com, 202.659.6811) also joins as a partner. With over 22 years of experience representing nonprofit, trade/professional, and scientific organizations, he serves as outside general counsel for many organizations and provides governance, tax and other legal advice. Steve began his career in the Judge Advocate General's Corps of the U.S. Navy, achieving the rank of Lieutenant, where he handled extensive appellate criminal litigation matters before the Supreme Court, the Court of Military Appeals, and the Navy-Marine Corps Court of Military Review. He serves on the Board of Directors of the Northern Virginia Christian Academy, the National Maritime Heritage Foundation, the Everymay Society, and the Potomac Heritage Partnership. Steve earned his J.D. in 1981 from George Washington University's National Law Center and his B.A. in Political Science in 1978 from the University of Massachusetts. He is admitted to practice law in the District of Columbia and Massachusetts.

Stephen M. Schaefer
(sschaefer@wtplaw.com, 202.659.6765) joins the firm as counsel with over nine years of experience represent-

Which Form 990 Should My Organization File?

As the previous article noted, the new Form 990 filing requirements will impact virtually all exempt organizations. At issue is what version of the Form 990 needs to be filed in the upcoming phase-in period of the new filing regime. The version of the Form 990 that needs to be filed depends on the organization's assets and gross receipts for the reporting period.

Form 990-N is the electronic postcard filing containing the basic identifying information of the organization, such as name, employer identification number, tax year, mailing address, name and address of a principal officer, and confirmation that the organization's gross receipts are normally $25,000 or less. Filing may be accomplished through links on the IRS's website.

Form 990-EZ is a four-page version of the Form 990. Required information includes the identifying information for the organization, revenue and expense statement, a short form of balance sheet, statement of program accomplishments and expenses, and information regarding key employees, officers and directors, including their compensation and contributions to employee benefit programs.

As noted in the previous article, the full Form 990 contains 11 core parts and as many as 16 schedules, depending on the type of organization reporting and the activities of the organization.

Phased-in schedule for the required filings >

2008 Tax Year – Filed in 2009 or 2010	Form to File
Gross Receipts normally less than or equal to $25,000	990-N
Gross Receipts greater than $25,000 and less than $1 Million, and Total Assets less than $2.5 Million	990-EZ or 990
Gross Receipts greater than or equal to $1 Million, or Total Assets of at least $2.5 million	990
2009 Tax Year – Filed in 2010 or 2011	**Form to File**
Gross Receipts normally less than or equal to $25,000	990-N
Gross Receipts greater than $25,000 and less than $500,000, and Total Assets less than $1.25 Million	990-EZ or 990
Gross Receipts greater than or equal to $500,000, or Total Assets of at least $1.25 Million	990
2010 Tax Year – Filed in 2011 or 2012	**Form to File**
Gross Receipts normally less than or equal to $50,000	990-N
Gross Receipts greater than $50,000 and less than $200,000, and Total Assets less than $500,000	990-EZ or 990
Gross Receipts greater than or equal to $200,000, or Total Assets of at least $500,000	990

Forms 990 are due to be filed by the 15th day of the fifth month following the close of the organization's fiscal year (May 15th for organizations with tax years ending December 31). The parties responsible for oversight of the Form 990 preparation are cautioned to begin planning early for the preparation of the correct Form 990, including engaging an outside preparer for assistance.

Organizations are also cautioned to be cognizant of the requirement to file a Form 990-T (Exempt Organization Business Income Tax Return) if it has $1,000 or more of gross income through an unrelated business. The Form 990-T filing requirement applies regardless of the level of gross receipts or total assets.

Mary Claire Chesshire

Schaefer, Benson and Schaefer Join WTP, continued

ing and serving as outside general counsel to nonprofit, trade/professional, and scientific organizations. He has eight years of experience as claims counsel to the Mutual Insurance Company, Ltd. Stephen earned his J.D. from Villanova University School of Law in 1999, and his B.A. from Villanova University in 1996. He is admitted to practice in the District of Columbia and Maryland.

Think Before You Type

Courts and parties involved in litigation are placing an increased emphasis on e-mails and other electronically stored information in the wake of amendments to the Federal Rules of Civil Procedure regarding the discovery of electronically stored information and similar rules adopted (or being considered for adoption) by several states.

What does this mean for employers?

E-mail is quickly becoming the preferred means of communication. When litigation arises, parties often recognize that the informal nature of e-mail makes it a goldmine for potentially damaging communications. You should expect that e-mails will be the subject of discovery requests in litigation or a regulatory investigation. Not only will the contents of some e-mails be featured when brought to light during discovery or at trial, but failure to preserve the e-mail and other electronically stored information can result in the imposition of sanctions, including monetary penalties, instructions to the jury that they should assume the missing document was unfavorable to the party, and dismissal of a claim. There are various ways to minimize the risks associated with discovery of e-mails

What steps can you take to minimize risks before a document is created?

Advising employees not to use e-mail is impractical. E-mail is commonplace in most companies, but there are a number of steps that can be taken to lessen the possibility of damaging communications at the outset:

Consider alternative means for communication. Your organization can avoid the risks associated with a damaging e-mail coming to light by not sending an e-mail under certain circumstances. For example, if an issue is sensitive, consider picking up the phone or having a face-to-face meeting. It will prevent a damaging record from being created in the first place.

Take time to cool off. If the message pertains to a particularly "heated" topic, consider imposing a "cooling-off" period before responding to an e-mail. Take time to think about what you want to say and how to respond in a manner that will not be damaging if the e-mail becomes a poster-size exhibit in a courtroom.

Consider the content. Because a party will almost inevitably have access to your organization's (or your personal) e-mails through discovery, it is important to consider what you type. Rephrase e-mails when possible. Have someone who is objective review an e-mail, if necessary.

What can you do to manage the records once created?

Because the use of e-mails does not appear to be ending any time soon, your organization should consider what can be done to manage the records:

Implement a records management policy. Consider implementing a policy to govern the retention and destruction of e-mails and other types of documents. This policy should be sent to each employee.

Apply the policy consistently. Every records management policy should include a retention schedule with a list of the categories of documents generated and how long the records will be retained. Retention schedules must be followed consistently because having selectively enforced a policy is worse than having no policy at all.

Include a "legal-hold" provision. Develop a policy that includes a process for implementation of a "legal hold" to preserve documents if litigation, a regulatory investigation, or any other situation triggering a preservation obligation is reasonably anticipated. Once someone becomes aware of or reasonably anticipates litigation or some event requiring preservation of records, there is a duty to preserve documents regardless of format. This is important because many e-mail systems include a feature that systematically deletes information after the lapse of a specific amount of time. These types of systems must be suspended when a "legal hold" is implemented, or your organization faces the risk of sanctions.

Conclusion

E-mails are increasingly becoming the subject of requests in connection with litigation and regulatory investigations. Although there are several risks associated with e-mails coming to light, the risks can be minimized by taking a few simple steps to prevent damaging e-mails from being created. The risk of damaging e-mails coming to light can also be reduced by implementing a records management policy that governs the company's e-mails and other records. And, don't forget: think before you type!

For more information, contact Dennis Robinson at drobinson@wtplaw.com or 410.347.8797

Dennis M. Robinson, Jr.

Is a Merger a Good Idea for Our Association?

This article will appear in the March issue of *Associations Now* magazine.

Question: *Our association has been around for decades and everything is slowing down – membership recruitment and retention, convention attendance, revenues, and the size of our programs. We have tried reorganizations, new board leadership, new staff and new programs but it seems like nothing is working to truly energize our association and turn things around. Meanwhile, other associations in our industry sector appear to be doing well. Is it time for us to consider a merger?*

Answer: While mergers are sometimes considered to be limited to for-profit corporations, it is not unheard of for two associations to merge. Sometimes an association has outlived its usefulness in terms of changes in society or in its industry sector. Several niche associations may have sprung up over the years to meet demand for programs or benefits that the association did not offer. An association might have spun off some related entities over the years and a consolidation might be in order. In the current economic climate, association boards should consider all of the tools available to them, including merging or working with other associations.

OPTIONS

There are several different ways that associations can work together:

Merger — in a merger, two associations combine all of their assets, members and programs. The result is either a new association that represents the best of each association or one of the associations emerges as the surviving entity. A merger often involves lengthy negotiations unless one entity is clearly in an inferior bargaining position due to debts or other issues necessitating quick action. The parties identify what programs and brand(s) will survive the merger and work out combining membership lists and benefits. While there are costs involved in a merger, cost savings can be found once the merger is complete.

Affiliation — an association might decide to affiliate with a larger association in the same industry or field. This can be an option for state or local associations that consider affiliation with a regional, national or international association. By affiliating with a larger association, the smaller association and its members receive benefits from the larger association and may be relieved of expenses that they could not otherwise afford.

Federation — in a federation, a number of associations band together for a common purpose. They might be united under a new umbrella "parent" association with a formal governance structure. In that case, each individual association maintains its own governance and participates in the governance of the umbrella association. Common purposes and goals are established and common expenses are shared.

Collaboration — two or more associations decide to work together to share common activities and related expenses through a formal collaboration. They might not come from the same industry group. A common purpose could hold them together for an indefinite period of time. Actions are approved by consensus and expenses are shared.

Alliance — two or more associations may agree to share backend infrastructure such as accounting, human resources, purchasing, membership invoicing, or information systems and support. Membership benefits and programs are not shared, and each association maintains its own identity. The associations may be co-located in the same building or could be geographically dispersed.

PROCESS

Whatever option is considered, the first step is for the leadership of the associations to meet to discuss each association's needs. They will often enter into a confidentiality and nondisclosure agreement (NDA) to protect the confidentiality of each association's financial information, business plans, membership lists, and other sensitive

information. Once the NDAs are signed, the parties will exchange information to assist each party in evaluating appropriate action. If the parties decide not to pursue any of the above options, they will destroy or return any information received from the other party at the end of the discussions.

The next step is often forming a working group made up of representatives of both associations to discuss their mutual needs and resources and identify what relationship options might be the most suitable. If some action is recommended, a timetable might be established to identify the steps in the process and any governance or other time constraints.

A formal merger could require the approval of the voting delegates of one or both of the associations. Depending on each association's articles of incorporation and bylaws and applicable state law, the board of directors might have the authority to approve a merger or it might need to be presented to the voting delegates. This can impose time constraints since most associations' voting delegates meet together only once a year and calling a special meeting could be cost prohibitive. The timing of the annual convention could cause the approval process to be rushed or delayed.

Options other than a merger that would allow the associations to work more closely together and share expenses might not require approval of the voting delegates. In those cases where only the board of directors of each association is required to approve the action, care should be taken to inform the membership of the action and the reasons behind it. Members will naturally be concerned about any action that might imply that their membership in the association is less valuable.

ANTITRUST

Whenever two or more trade or professional associations discuss working together for any reason, they must consider whether their actions (or proposed actions) would violate federal antitrust laws. Any action that can be seen as restricting trade should be avoided. Legal counsel should be consulted to ensure that no antitrust violation is likely to occur from the proposed actions.

CONCLUSION

Whether a merger, collaboration or other arrangement makes the most sense for your association will depend on the facts and circumstances at any given time. Contracts, intellectual property, corporate governance, and antitrust laws are just some of the legal issues involved before the discussions even begin. No matter what course of action is decided upon, legal counsel should be involved to assist in guiding your association leaders through the legal complexities that will be involved in any relationship with another association.

Eileen Morgan Johnson

Q&A

Q: I operate a nonprofit organization in the District of Columbia and heard about new licensing requirement. Am I exempt?

A: No. Nonprofit organizations will require one of two licenses even if the organizations do not pay taxes to the District of Columbia. The District of Columbia City Council passed the Business Licensing Processing Adjustment Act of 2008. According to materials published by the Department of Consumer and Regulatory Affairs, organizations that conduct fund-raising campaigns or seek grants or government funding will require a Charitable Solicitations License. However, organizations that solicit contributions only from their own members need only a General Business License. The only noted exceptions are for religious organizations, unless those organizations conduct activities that must be inspected, such as daycare centers or soup kitchens.

WTP Whiteford Taylor Preston LLP®

Understanding the business of nonprofits

Whiteford, Taylor & Preston LLP is a limited liability partnership. Our Delaware office is operated under a separate Delaware limited liability company, Whiteford Taylor & Preston LLC.

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