



COUNCIL *on* FOUNDATIONS

**Deloitte.**

# Form 990 Guide for Community Foundations



## ACKNOWLEDGEMENT

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## SUMMARY OF 2010 UPDATES

This guidebook, originally drafted in 2009 to summarize the redesigned Form 990 filing requirements applicable to community foundations, incorporates IRS updates for the 2010 Form 990. The FAOG Accounting Practices Committee of the Council on Foundations has again worked with Deloitte Tax to incorporate the IRS changes to the 2010 Form 990 and Deloitte Tax LLP (the Guide's original author).

Changes and clarifications for 2010 that you should note include:

- The instructions clarify the requirement to describe on Schedule O the average hours per week that officers, directors, key employees, etc. worked for related organizations (e.g. supporting organizations). This information flows from *Part VII, Compensation of Officers, Directors, Trustees, Key Employees, Highest Compensated Employees, and Independent Contractors*.
- The *Reconciliation of Net Assets* is back and has been added as Part XI.
- The gross receipts and total assets thresholds for Form 990 filers have been lowered (pg. 2)
- Schedule O is now used *only* to supplement responses to questions on the Core Form 990, no schedules (pg. 9) as there is now a narrative section part for each schedule
- The IRS has clarified that your board must adopt policies by the *end of the tax year* in order to answer “yes” to a question as to whether or not your organization has a policy in place – e.g. conflict of interest (pg. 23)
- The IRS has clarified that if you redact/remove any information (e.g. names or addresses on Schedule B) from the board review copy of the Form 990, you must answer “No” to the question of whether or not you provided a copy of the Form 990 to your board prior to filing (pg. 23). Note that this instruction does not change the rules related to public disclosure copies of your organization's Form 990.

These updates as well as footnote references and other date-specific changes have been included in the Guidebook. We hope that you find this tool useful, and please pass it along to anyone that you feel would benefit from it.

Our hearty thanks to Deloitte Tax LLP for all their pro bono work on the initial Guidebook and for continued charitable support on this valuable project for the community foundation field.

Accounting Practices Committee, FAOG

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# Introduction

The IRS completely redesigned Form 990 beginning with the 2008 tax year. According to the IRS, the redesigned form was designed with three guiding principles in mind:

- enhanced transparency
- better compliance
- ease the filing burden on the taxpayer (while still accomplishing goals 1 and 2)

From the perspective of a charitable organization completing the form, these guiding principles mean more disclosures which inherently require more time from the organization and/or its tax advisors.

Due to the monumental changes to the form, the Council on Foundations believed that community foundations might find a guide on the redesigned form helpful in complying with the areas of disclosure and methods for providing information. This Form 990 guide was written specifically to assist community foundations located in the United States and is current through the 2010 form instructions.

The guide begins with a summary of basic concepts in the redesigned form. The remaining chapters provide greater detail about, and insight into, certain parts of Form 990 and required schedules that are particularly relevant to community foundations.

Wherever possible, the author has tried to provide relevant information as well as references to resources available to you on the IRS Web site, the Council on Foundations Web site and others. We also followed the IRS's lead and have attempted to put in **bold font** all words or phrases that are defined in the glossary to the IRS Form 990 Instructions.

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# Chapter 1: Summary of Form 990

## A. The Basics

Form 990<sup>1</sup>, *Return of Organization Exempt from Income Tax*, must be filed on an annual basis by most community foundations in the **United States** that meet one of the following criteria for the 2010 **tax year**:<sup>2</sup>

- have **gross receipts** greater than or equal to \$200,000
- have **total assets** greater than or equal to \$500,000
- sponsor one or more **donor advised funds**<sup>3</sup>
- are a controlling entity within the meaning of Internal Revenue Code (IRC) § 512(b)(13)<sup>4</sup> if there was any transfer of funds between the controlling and controlled entity(ies)

Form 990 is 12 pages long and includes 12 parts. All organizations that complete Form 990 are required to complete Schedule O and may also be required to complete one or more of the 15 other supplemental schedules. Schedule O should be used only to supplement responses to questions on the core Form 990. We anticipate that many community foundations will also be required to complete several supplemental schedules (excepting only those schedules that may never apply to a community foundation, such as Schedule E for **schools** or Schedule H for **hospitals**).

The actual filing requirements are fact specific and each organization must make an independent determination of which schedules it is required to file. The following is a list of the various Form 990 Schedules that may be required:

- Schedule A — **Public Charity** Status and Public Support
- Schedule B — Schedule of Contributors
- Schedule C — Political Campaign and **Lobbying** Activities
- Schedule D — Supplemental **Financial Statements**
- Schedule E — **Schools**
- Schedule F — Statement of Activities Outside the U.S.
- Schedule G — Supplemental Information regarding **Fundraising** or **Gaming** Activities
- Schedule H — **Hospitals**

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<sup>1</sup> The actual tax form an exempt organization is required to file is, in part, dependent on the organization's normal gross receipts and end of year assets. If an organization does not meet the minimum receipts or assets thresholds described above for filing Form 990, then it may be eligible to file the simpler Form 990-EZ, or the even simpler Form 990-N. This guide assumes that the reader will file Form 990.

<sup>2</sup> As listed in the 2010 Form 990 Instructions. Form 990 Instructions should be reviewed each year to determine if the criteria have changed.

<sup>3</sup> In addition to the Form 990 glossary definition of donor advised fund, readers may find helpful the Council on Foundations' document "Flowchart: Is the Fund a Donor Advised Fund," available on the Council's Web site at [www.cof.org](http://www.cof.org).

<sup>4</sup> Unless otherwise noted, all references are to the Internal Revenue Code of 1986, as amended.

- Schedule I — **Grants and other Assistance** to Organizations, Governments and Individuals in the **United States**
- Schedule J — **Compensation** Information
- Schedule K — Supplemental Information on **Tax-exempt Bonds**
- Schedule L — Transactions with Interested Persons
- Schedule M — **Noncash Contributions**
- Schedule N — Liquidation, Termination, Dissolution, or Significant Disposition of Assets
- Schedule O — Supplemental Information to Form 990 (required schedule, to be used only to supplement responses to questions on the core Form 990)
- Schedule R — **Related Organizations** and Unrelated Partnerships

The Form 990 Instructions provide a sequencing list suggesting how the form and related schedules should be completed.<sup>5</sup> Similarly, a review of Form 990 Part IV, *Checklist of Required Schedules*, along with the related instructions, should be helpful in determining which schedules your organization may be required to complete. The instructions often clarify the questions in a way that may have been unanticipated by a simple reading of the questions on the face of the form.

## B. Program Service Accomplishments

There are several opportunities within the Form 990 for self-proclaiming the good deeds of the organization. One of the more prominent opportunities is in the description of the community foundation's three largest areas of program service accomplishments, also called the exempt purpose achievements. The instructions do not provide guidance on how broadly or narrowly the organization should define its programs; thus, organizations have some degree of latitude. However, the instructions indicate that the organization should report its three largest areas of program services based on expenses associated with the activity. Special care should be given as to how these statements are drafted as the Form 990 reader should understand from these statements why the organization is exempt from federal income tax.

The instructions provide examples of activities that might be reported as program service accomplishments for various entities (e.g. hospital providing charity care, university providing education).<sup>6</sup> The instructions also indicate that fundraising activities should not be considered program service accomplishments unless they are substantially related to the organization's exempt purpose.<sup>7</sup> For a community foundation, raising funds and making appeals to the community for support may be deemed activities that are substantially related to the organization's exempt purpose, as evidenced by the regulations regarding determination of public support.<sup>8</sup>

## C. Impact of IRS Designation as a “Community Trust”

Community foundations were historically recognized as public charities pursuant to the special “community trust” rules of IRC § 170(b)(1)(A)(vi) and the regulations issued thereunder. These rules provided special treatment for the community foundation and its component parts to be treated as a

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<sup>5</sup> See 2010 Form 990 Instructions, at p. 7.

<sup>6</sup> See 2010 Form 990 Instructions, at p. 12.

<sup>7</sup> *Id.*

<sup>8</sup> See Treas. Reg. § 1.170A-9(f)(3) and discussion of the facts and circumstances public support as it applies to community foundations at Chapter 6.

“single entity” and file one Form 990. Over time, community foundations have evolved and many are legally organized as something other than a trust.<sup>9</sup> Strictly from a Form 990 viewpoint, designation as a “community trust” is unlikely to impact the completion of Form 990 as the organization is still required to complete the public support section of Section A for organizations described generally in IRC § 170(b)(1)(A)(vi). Refer to Chapter 6 of this guide for a discussion on how community foundations should generally complete the public support test.

#### D. Key Definitions

The Form 990 instructions include a glossary of commonly used terms which are in bold font throughout the Form 990 instructions and this guide. Certain definitions (or elements of definitions) are also summarized below for your reference:

- **Related organization** is an organization that meets one of several definitions of **control** (either directly or indirectly through ownership or governance) or is a supporting/**supported organization** under IRC § 509(a)(3) but may not necessarily be the same as a **controlled entity** for return purposes.
- **Endowment** is defined by reference to term **endowment**, **permanent endowment** and **quasi endowment**, each with its own unique definition.
- **Joint venture** is a partnership, limited liability company, or other entity treated as a partnership for federal tax purposes, as described in Regulations §§301.7701-1 through 301.7701-3.

#### E. Compliance Items That Didn't Change But Are Still Worth Noting

- **Due date.** Form 990 continues to be due on the 15th day of the fifth month following the close of the organization's **tax year**.<sup>10</sup> This is May 15 for calendar year end organizations.
- **Extensions and failure to file.** An organization may request an automatic three-month extension of time to file Form 990 if it files a Form 8868 on or before the original due date of the Form 990. If additional time is needed to file the Form 990 prior to the expiration of the initial extension, an additional three month extension must be obtained by signing and filing page 2 of the Form 8868 and providing a basis for requesting an additional extension. Note that the first extension request is automatic but the second extension request requires IRS approval. A late-filed return is subject to the failure to file penalties under IRC § 6652.<sup>11</sup>
- **Requirement that the return be “properly” completed.** The IRS has historically indicated through instructions for Form 990 that failure to provide information requested on a Form 990 may result in the filing of an incomplete return that may subject the organization to the failure to file penalties discussed above. This generally requires that the organization complete all lines, provide all required narratives and report proper amounts.

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<sup>9</sup> See Christopher R. Hoyt, “Legal Compendium for Community Foundations,” Council on Foundations (1996) (For further information on the history of community foundations and specifically how they have been recognized as public charities by the Internal Revenue Service); *see, also*, George Johnson & David Jones, “K. Community Foundations,” (Exempt Organization CPE Text 1994), *available at*, [www.irs.gov/pub/irs-tege/eotopicp94.pdf](http://www.irs.gov/pub/irs-tege/eotopicp94.pdf).

<sup>10</sup> Organizations required to file Schedule H, however, cannot file the 2010 Form 990 with a completed Schedule H prior to July 1, 2011. As such, these organizations were granted an automatic extension of time to file the 2010 form until July 1, 2011.

<sup>11</sup> See 2010 Form 990 Instructions, at p.9. (The failure to file penalties are currently \$20/day [not to exceed the lesser of \$10,000 or 5 percent of gross receipts] for organizations with gross receipts of \$1 million or less; and \$100/day [not to exceed \$50,000] for organizations with more than \$1 million in gross receipts).

- **E-filing.** An exempt organization that files more than 250 federal returns of any type during the calendar year and has assets of at least \$10 million is required to electronically file its Form 990. For purposes of the return test, returns include information returns (e.g. Forms 990, W-2, 1099), income tax returns (e.g. Form 990-T), employment tax returns (e.g. Forms 940 and 941), and excise tax returns. If an organization is required to e-file its Form 990 but instead files a paper copy of its return, the organization may be subject to the failure to file penalties discussed above. Responses to Part V, Lines 1 and 2 will provide the IRS with the number of Forms W-2 and Forms 1099 filed by the organization allowing the IRS to determine if the return was properly filed (either electronically or by paper).

# Chapter 2: Compensation

Transparency was one of the guiding principles in the IRS redesign of Form 990. Transparency means more disclosure – especially in regard to **compensation** matters. For example, individual **compensation** is potentially disclosed twice on the same year's Form 990 – in Part VII of Form 990 and on Schedule J. **Deferred compensation** may require disclosure in multiple years – in the year earned and the year paid. In addition to providing expanded **compensation** detail, Schedule J asks a number of questions about the structure of executive compensation packages including benefit offerings, bonus and incentive plans, and **compensation** governance practices. Form 990 filers also are required to report **compensation** paid to listed persons by **related organizations**, and, in some circumstances, from **unrelated organizations**. In addition to the compensation reporting, Form 990 filers must also disclose the number of hours (on average) worked by each person reported at Part VII as well as the number of hours worked for a related organization at Schedule O.

Note: In reading this chapter, it will be most helpful to have a copy of Form 990 Part VII and Schedule J available to reference.

## A. Determining Compensation Amounts to Report

In Form 990, Part VII, the organization must disclose the following amounts for each listed person<sup>12</sup>:

- **reportable compensation** paid by the filing organization
- **reportable compensation** paid by an **unrelated organization** for services provided to the filing organization<sup>13</sup>
- **reportable compensation** provided by any **related organizations**
- other **compensation** provided by the filing organization and/or any **related organizations**

### 1. Reportable Compensation

Form 990, Part VII **reportable compensation** is the amount reported in Box 5 of Form W-2 or Box 7 of Form 1099-MISC as the case may be. If payments are made to an **institutional trustee** (such as a bank) for which the organization is not required to issue a Form 1099 MISC, **reportable compensation** is the amount that would have been reported in Box 7 if a Form 1099-MISC had been required.

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<sup>12</sup> Listed persons for purposes of the Form 990, Part VII are defined later in this chapter at subheading “B. Identifying Who is Disclosed in Part VII.”

<sup>13</sup> If a current or former officer, director, trustee, key employee, or highest compensated employee received or accrued compensation or payments from an unrelated organization (other than from certain management companies or leasing companies) in exchange for services provided to the filing organization in that person's capacity as an officer, director, trustee or key employee, then the filing organization must report (subject to certain exceptions) such amounts as compensation from the filing organization if it has knowledge of the arrangement and regardless of how the unrelated organization classifies the payment. The exception to this rule is where an officer, director, trustee, or key employee receives compensation from an unrelated taxable organization for services provided to the filing organization and the unrelated taxable organization does not report a charitable contribution deduction for the payment.

“Other **compensation**” includes any amounts not included in **reportable compensation**, including nontaxable benefits. Other **compensation** specifically includes:

- the value of employer-provided health insurance benefits that are not included in **reportable compensation**
- *employer* contributions to tax-deferred retirement savings plans (such as 401(k), 403(b), or 457 plans)
- increase in actuarial value of defined benefit pension plans (whether qualified or non-qualified, vested or non-vested)
- tax-deferred contributions to **nonqualified deferred compensation** arrangements (whether vested or non-vested)

On Schedule J, Part II the **compensation** detail required is generally a more detailed breakdown of what is disclosed in Form 990, Part VII. On Schedule J, the organization must disclose the following five categories of **compensation** for each listed person required to be shown:

- **base compensation** (such as base salary or directors fees)
- **bonus compensation** (such as payments made for satisfaction of performance targets and signing bonuses)
- **other taxable compensation** (amounts included in **reportable compensation** such as taxable fringe benefits)
- **retirement and other deferred compensation**
- **nontaxable benefits**

In addition to the above, an organization is required to disclose the amount of **compensation** reported on the **current year's** Form 990 that was previously reported on another year's Form 990 as part of the individual **compensation** disclosure (as opposed to the aggregate **compensation** reported in the statement of functional expenses).

The first three items should agree, in the aggregate, to the individuals Form W-2, Form 1099-MISC or Form 1042-S, as appropriate. Thus, as also noted below, it is important to understand the elements of an individual's Form W-2 and Form 1099-MISC in order to properly reflect the **compensation** on Schedule J.

## 2. Period for Determining Compensation

**Compensation** amounts, as reported on Form 990, Part VII and Schedule J, are determined on a calendar year basis. For **fiscal year** filers, amounts for these purposes are determined on the basis of the calendar year ending within the organization's **tax year**. For example, assume an organization has a June 30, 2011 **fiscal year** end. **Compensation** amounts reported in Part VII of the 2010 Form 990 and Schedule J will be based on **compensation** paid during the calendar year ending Dec. 31, 2010. The **compensation** expense reported in Part IX of the 2010 Form 990 would still be determined based on the organization's June 30, 2011 **fiscal year**.

## 3. Deferred Compensation and Nontaxable Benefits

**Deferred compensation** includes current employer contributions to any retirement or **deferred compensation** plans. **Deferred compensation** also includes the increase in actuarial value of the benefits provided under a defined benefit plan. It is irrelevant whether the plan is qualified and whether or not the benefits are vested. For Form 990 purposes, **deferred compensation** is **compensation** that is earned or accrued in, or is attributable to, one year and deferred to a future year for any reason, whether funded, vested, or subject to a substantial risk of forfeiture. Whether **deferred compensation**

exists will depend on the arrangement and the impact of the **deferred compensation** rules in the IRC, such as IRC §§ 83, 409A, 457(f) and 3121(v).<sup>14</sup>

Certain nontaxable benefits, even if excluded from gross income, are nonetheless disclosed on Schedule J. For example, the following is a list of some of the benefits that must specifically be included in nontaxable benefits (unless the value was previously reported as an element of **reportable compensation**):

- employer provided housing
- educational assistance
- health insurance
- life insurance
- disability benefits
- long-term care insurance
- dependent care assistance
- adoption assistance

However, disregarded benefits defined in IRC § 132 are not required to be disclosed in Schedule J. Disregarded benefits include:

- no-additional cost service
- qualified **Employee** Discount
- de minimis fringe
- reimbursements made pursuant to an **accountable plan** (discussed in greater detail in the next paragraph)
- working condition fringe
- qualified transportation fringe
- qualified retirement planning services
- qualified military base realignment and closure fringe

An **accountable plan** is a method for reimbursing or otherwise paying for **employee** expenses where:

- the covered expenses are reasonable **employee** expenses (as further defined in IRC §162);
- the **employee** must adequately “account” to the employer for the expenses (i.e. provide a receipt) within a reasonable period of time; and
- the **employee** must return any excess allowance or reimbursement within a reasonable period of time.

#### 4. Retirement, Health, and Other Reporting

**Employee** contributions to 401(k), 403(b) and 457(b) plans should be included in base compensation reported in Form 990, Schedule J, Part II, Column B(i).

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<sup>14</sup> 2010 Schedule J Instructions at p. 4.

Amounts paid from qualified retirement plan trusts or other qualified retirement accounts (such as qualified defined benefit, defined contribution, 401(k) and 403(b)) plans are not considered **compensation** paid by the organization. However, non-qualified retirement plan payments (such as from Supplemental Executive Retirement Plans) are reportable as **compensation** and, as such, could cause an individual receiving such amounts to report these amounts on the Form 990 for as many as five years after they leave the organization.

Health plan contributions, however, are handled differently because these amounts are generally not included in **reportable compensation**.

The Form 990 instructions include a table that lists the most common types of **compensation** and where to report the **compensation** elements – as reportable **compensation**, other **compensation**, nontaxable benefits, etc. Although the table is helpful, organizations should exercise care in using the chart as the organization's internal tax treatment of certain items can determine whether an item is included in **reportable compensation**.

In many cases, the organization will need to make a reasonable estimate of the value of the **compensation**-related benefit provided. Examples include:

- defined benefit plan accruals. The organization must include a reasonable estimate of the increase in actuarial value of pension benefits (whether the defined benefit plan is qualified or not).
- defined contribution plan deferrals are reported whether vested or not. An increase in earnings in a nonqualified defined contribution plan, however, is only reported on Part VII and Schedule J if the employee is substantially vested in the benefit plan.
- health benefits provided by the employer that are not included in reportable (taxable) **compensation**. The amounts estimated and disclosed are based on the cost of coverage provided, not the amount of claims paid.

Other nuances of note include:

- Employer contributions, such as matching amounts to 401(k), 403(b) and other plans, are generally included in **deferred compensation** on Schedule J and “other compensation” on Part VII of Form 990. As noted above, **employee** contributions are generally included in reportable compensation (since 401(k) and 403(b) **employee** deferrals, for example, are included in Medicare wages).
- Benefits paid from a qualified plan (such as a qualified pension plan, a 401(k) plan or a 403(b) plan) – These amounts, which are typically reported to the recipient on a Form 1099-R issued by the retirement plan, are not reportable on Form 990.
- Contributions to nonqualified plans are reportable on Form 990 and Schedule J. This would include amounts contributed to supplemental **employee** retirement plans (“SERPs”) and 457(f) plans. Contributions are reported when they are earned. Depending on whether the amounts are vested, they are included in either **reportable compensation** (if vested) or deferred compensation (if unvested). **Nonqualified deferred compensation** amounts are generally reported in two different years – as deferred compensation when the benefits are earned (but not vested or paid) and as reportable compensation when the amounts are taxable (when no longer a substantial risk of forfeiture or paid). Part II of Schedule J includes a column for “**compensation** reported on prior Form(s) 990,” which allows the organization to identify amounts that would otherwise appear to be “double counted.”

## B. Identifying Who is Disclosed in Part VII

The first step in completing the **compensation** sections of the form is to identify the persons required to be disclosed in Part VII of Form 990. These persons must be identified in the following order:

- current individual trustees and directors

- current **institutional trustees**
- current officers
- current key employees
- other five **highest compensated employees**
- persons formerly holding positions described in 1-5 above during the previous five years

*Current officers, directors, trustees* – All current **officers, directors, and trustees** are disclosed, regardless of whether any **compensation** was paid to these persons. **Officers** are those persons holding positions listed as such in the organizing documents, or by resolution of the governing body or as otherwise required by state law. For purposes of Form 990 reporting purposes, the organization's **top management official** and **top financial official** (the person who has ultimate responsibility for managing the organization's finances) are considered officers. A director or trustee is a **member of the governing body** and has voting rights. An **institutional trustee** (which is an organization and not an individual or other natural person) would also be disclosed.

A person who was an **officer, director, or trustee** at any time during the organization's **tax year** is considered "current."

*Current key employees* – An **employee** must meet all of the following three tests to be considered a **key employee**:



Note that individuals with responsibilities, power or influence over the organization similar to that of an **officer** or **trustee** are considered to meet the responsibility test. Otherwise, the responsibility test is based on a 10 percent standard – individuals managing more than 10 percent of the organization's activities, assets, income, or expenses, or has or shares **control** over 10 percent or more of the organization's operating budget, **compensation** for **employees**, or capital expenditures are considered to meet the responsibility test.

The top 20 test for **key employees** is determined after reporting all **officers, directors, or trustees** which are separately required to be disclosed. In other words, up to 20 **key employees** may be reported in addition to the **officers, directors, and trustees**.

**Five highest compensated employees** – After the **officers, directors, trustees, and key employees** have been identified, the organization must list the next five **highest compensated employees**. However, only **employees** receiving more than \$100,000 of **reportable compensation** need to be disclosed on Part VII. In determining whether this **compensation** threshold is met, **compensation** paid by the reporting organization and **related organizations** must be taken into account.

*Former officers, directors and trustees, key employees and highest paid employees* – The organization must disclose certain individuals who were required to be reported on the organization's Form 990 in any of the previous five years:

- former officer or key employee if total **reportable compensation** for the year<sup>15</sup> was more than \$100,000
- former five **highest compensated employees** if total reportable **compensation** for the year<sup>16</sup> was more than \$100,000, the individual was not an employee at any time during the year and the individual's **compensation** for the year would place him or her in the organization's current five **highest compensated employees**
- former director or trustee if total **reportable compensation** for the year<sup>17</sup> was more than \$10,000 but only if the **compensation** was in their capacity as a former officer or trustee

Once the listed persons are identified, the **reportable compensation** and other **compensation** paid to each listed person are disclosed on Part VII. Depending on the **compensation** levels of these individuals, they may also require disclosure on Schedule J where additional detail is provided. If the organization has more individuals to list than there is space on Part VII, the 2010 form has been modified to allow for additional pages of Part VII to continue reporting individuals required to be listed here and the Schedule J-2 was deleted from the 2010 form.

From a practical perspective, a spreadsheet to track persons who are reported as **officers, directors, trustees, key employees** and **highest compensated employees** for each of the last five years is helpful in identifying individuals for which the organization will need to obtain **compensation** information in order to ascertain whether there is any **compensation** reporting required in the **current year** for any of these persons. Although the Form 990 definitions of these terms may have differed over the past five years, organizations are to include in this analysis only those persons that would have been required to have been reported as an officer, director, trustee, key employee or **highest compensated employees** based on the Form 990 instructions in effect in each such year.

All organizations filing Form 990 must complete Form 990, Part VII. Even if there are no **compensation** amounts to report, the directors and trustees must still be listed.

### C. The \$10,000 Exceptions

The Form 990 instructions provide a "\$10,000-per-item" exception for reporting "other compensation" on Form 990, Part VII, Column F and a "\$10,000-per-related organization" exception for disclosing reportable compensation from a related organization on Form 990, Part VII, Column E. These exceptions, however, do not apply to disclosing reportable and other compensation on Schedule J. In order to avoid inconsistencies between Part VII and Schedule J, some organizations may choose to

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<sup>15</sup> Certain individuals who received reportable compensation in the calendar year ending with or within the organizations current tax year. See 2010 Form 990 Instructions, at p. 24-26.

<sup>16</sup> Certain individuals who received reportable compensation in the calendar year ending with or within the organizations current tax year. See 2010 Form 990 Instructions, at p. 24-26.

<sup>17</sup> *Id.*

voluntarily report the amounts that are otherwise permitted to be excluded from Part VII provided that doing so does not create a Schedule J filing requirement.

The instruction provide an example of how these rules work for purposes of reporting compensation in Form 990,Part VII and Schedule J, Part II:

Exempt organization pays an officer of the organization as follows:<sup>18</sup>

\$110,000	Reportable compensation (including \$5,000 of pre-tax employee contribution to qualified defined contribution retirement plan)
\$5,000	Tax-deferred matching employer contribution to qualified defined contribution retirement plan
\$5,000	Nontaxable employer contribution to health benefit plan
\$4,000	Nontaxable dependent care assistance
\$500	Nontaxable group life insurance premium
\$8,000	Moving expense (nontaxable as qualified under IRC § 132)

In addition to the compensation received from the exempt organization, the officer receives the following compensation from a related organization:

\$21,000	Reportable compensation (including \$1,000 of pre-tax employee contribution to qualified defined contribution retirement plan)
\$1,000	Tax-deferred matching employer contribution to qualified defined contribution retirement plan
\$5,000	Nontaxable tuition assistance

The officer in this example receives no compensation in the capacity as a former director or trustee of the organization and no compensation from an unrelated organization for services provided to the exempt organization. In determining total reportable compensation and other compensation for purposes of meeting the Schedule J threshold, the following compensation amounts from the example can be disregarded: \$4,500 dependent care and group life insurance payments (under the \$10,000 per item exception); \$8,000 moving expenses (excluded under IRC § 132); \$5,000 tuition assistance from the related organization (under the \$10,000 per item exception).<sup>19</sup>

Therefore, the officer's reportable compensation is \$131,000 (reportable compensation from the filing organization and the related organization) and other compensation is \$11,000 (tax deferred employer contributions made by the filing organization and the related organization as well as the nontaxable health benefits). Under these circumstances, the officer's dependent care, group life, moving

<sup>18</sup> See 2010 Form 990 Instructions, at p. 29.

<sup>19</sup> *Id.*

expenses, and tuition assistance items need not be reported as other compensation on Form 990, Part VII, Schedule A, Column F, and the officer's total reportable and other compensation is not reportable on Schedule J (because it fails to meet the threshold for Schedule J reporting). If, however, the reportable compensation from the related organization was \$30,000 instead of \$21,000, then the officer's total reportable and other compensation would be reportable on Schedule J, including the dependent care, group life, and tuition assistance items, even though these items would not have been reported as other compensation on Form 990, Part VII.<sup>20</sup>

An organization may take advantage of these exceptions for Part VII reporting *unless* the item is: (1) \$10,000 or more for the calendar year ending with or within the organization's **tax year**; or (2) the item of **compensation** is one of the following:

- tax-deferred contributions by the employer to a defined contribution retirement plan
- the annual increase in actuarial value of a qualified defined benefit plan, whether or not the benefit is funded or vested
- the value of health benefits provided by the organization that is not included in reportable **compensation**. This is based on the value of the coverage, not the benefits paid. This amount does not include disability or long-term care insurance premiums or benefits for this purpose
- tax-deferred contributions (by the employer and **employee**) to a nonqualified defined contribution plan
- the annual increase in actuarial value of a nonqualified defined benefit plan

For purposes of the last two items above, it is irrelevant whether the plan is funded, vested, or subject to a substantial risk of forfeiture.

#### D. Identifying Who is Disclosed on Schedule J

Additional detail is required in Schedule J for certain persons listed in Part VII. Schedule J detail is required for persons depending on the amount of total **compensation** received, the person's status as a person who formerly served in a certain capacity, or the source of the payment.

Schedule J is a subset of persons listed on Part VII of the Form 990. The following chart is included in the Form 990 Instructions for Part VII and might assist readers in determining which persons reported on Form 990, Part VII should also be reported on Schedule J.<sup>21</sup> The chart does not, however, capture all persons who may be *excluded* from reporting, such as certain former highest paid employees.

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<sup>20</sup> See 2010 Form 990 Instructions, at p. 29.

<sup>21</sup> See 2010 Form 990 Instructions, at p. 33.

Position	Current or former	Enter on Form 990, Part VII, Section A	Enter on Schedule J (Form 990), Part II
Directors and trustees	Current	All	If reportable and other <b>compensation</b> is > \$150,000 in aggregate from organization and <b>related organizations</b>
	Former	If <b>reportable compensation</b> in capacity as former director or trustee > \$10,000 in the aggregate from organization and <b>related organizations</b>	If listed on Form 990, Part VII, Section A
Officers	Current	All	If reportable and other <b>compensation</b> is > \$150,000 in aggregate from organization and <b>related organizations</b>
	Former	If reportable compensation > \$100,000 in the aggregate from organization and <b>related organizations</b>	If listed on Form 990, Part VII, Section A
Key employees	Current	All	All
	Former	If <b>reportable compensation</b> > \$100,000 in the aggregate from organization and <b>related organizations</b>	If listed on Form 990, Part VII, Section A
Other five highest compensated employees	Current	If <b>reportable compensation</b> > \$100,000 in the aggregate from organization and <b>related organizations</b>	If reportable and other <b>compensation</b> > \$150,000 in the aggregate from organization and <b>related organizations</b>
	Former	If <b>reportable compensation</b> > \$100,000 in the aggregate from organization and <b>related organizations</b>	If listed on Form 990, Part VII, Section A

Note that the Schedule J Part I questions (discussed later in this chapter) must be answered for all persons listed in Part VII regardless of whether the person's **compensation** is subject to disclosure on Schedule J Part II. On the other hand, if no person meets the requirements for reporting on Schedule J, then the schedule, including Part I, is not required.

### E. Beyond the Numbers: Schedule J Compensation Questions

Schedule J, Part I asks a number of questions about benefit offerings and **compensation** practices. Schedule J, Part 1, Question 1 asks whether or not certain specified benefits are provided to any of the persons listed in Form 990, Part VII (not just the persons disclosed on Schedule J – but recall that Schedule J is not required, including Part I, if none of the persons listed on Part VII meet the **compensation** thresholds for completing Schedule J – see chart above). The benefits offered must be disclosed, regardless of whether a fringe benefit is treated as taxable **compensation** to the recipient. The benefits addressed (“Specified Benefits”) are:

- first class and charter travel. Such travel, however, need not be disclosed if the employee obtains an upgrade using frequent travel benefits or a similar arrangement which is at no additional cost to the organization. Flying in business class on a three-class aircraft is not considered “first class” travel. However, reimbursements for upgrade certificates must be disclosed. Charter travel includes travel on any plane or boat that is owned or leased by the organization.
- companion travel. This includes travel for a listed person's guest if the guest is not traveling for bona fide business purposes of the organization. It also includes any travel provided to a family member of the listed person regardless of whether the benefit is reported as **compensation** on the respective Form W-2 or Form 1099.
- tax indemnifications and gross-up payments. This includes any payment of reimbursement for a listed person's tax obligations. This encompasses any tax obligation, not merely federal income tax.
- discretionary spending account. This refers to an account or sum of money with respect to which the listed person is not accountable to the organization. The actual use of the funds is not relevant. Note that an executive who is provided an expense advance or a corporate charge card and who is required to account for and substantiate under the “**accountable plan**” rules would not be considered to have a discretionary spending account.
- personal housing allowance or residence.
- payments for business use of personal residence. For example, this would include payment of rent to a listed person to use the listed person's home to host a **fundraising** or other event for the organization (vs. reimbursement of direct expenses associated with the event).
- health or social club dues. This includes payment of dues for membership in a health, recreational, social or fitness club. Whether the club itself is exempt from tax is irrelevant. However, this type of benefit is not required to be disclosed if it's provided to all employees.
- personal services. These are services for the personal benefit of a listed person or his/her family or friends. The instructions list 21 examples of personal services, which include, but are not limited to: concierge, cleaning services, legal services, tax preparation, or financial planning. Thus, in responding to the question related to “personal services” on Schedule J, the corresponding instructions should be reviewed.

For each benefit provided, Schedule J Part III must be completed to disclose “relevant information” for each benefit which may include: the type of benefit provided, the listed person(s) receiving the benefit, and whether the benefit was treated as taxable **compensation**. In addition to any disclosure related to the type of benefit provided, *if* the community foundation does *not* follow a *written* policy for the payment or provision of the benefit, then a disclosure should be provided in Part III describing the decision-making process to determine that such benefit(s) would be provided. The community foundation also must indicate whether it requires the expenses for the “listed benefits” to be substantiated under the **accountable plan** rules.

Schedule J also includes a number of questions about incentive **compensation** programs and executive **compensation** governance practices. The community foundation must indicate which of the following methods (if any) were used to determine the **compensation** of the organization’s **top management official**:

- **compensation** committee
- independent consultant
- **compensation** data reported on Forms 990, 990-EZ, or 990-PF for similar organizations
- written employment contracts – this includes, for example, an offer letter from a potential competing employer
- **compensation** survey or study
- approval by **compensation** committee or board of directors

The responses regarding the methods for determining **compensation** should be consistent with the responses to the questions in Form 990, Part VI, Section B, Line 15.

Question 4 of Schedule J requires identifying, by name, in Part III the listed persons, describing the terms and conditions, and reporting applicable amounts during the year paid or contributed under any of the following arrangements:

- severance or change-of-control payments. The organization may need to consult with legal counsel to determine whether disclosing severance pay could violate confidentiality terms included in the applicable severance agreement.
- **nonqualified deferred compensation**. The community foundation must indicate whether any listed persons participated in or received payments from a **nonqualified deferred compensation** plan. Schedule J uses the term “supplemental **nonqualified deferred compensation**.” However, whether a **deferred compensation** plan is specifically designed as a “retirement supplement” is irrelevant.<sup>22</sup> 457(b) plans can be disregarded for purposes of this question.
- equity-based **compensation**. Payments from the community foundation of any equity-based pay must be disclosed. This includes items such as stock options, phantom stock arrangements, and stock appreciation rights. Foundations typically cannot issue equity and, as a result, **compensation** arrangements based on equity of the Form 990 filing organization are rare. However, an arrangement tied to the equity of a **related organization** must also be disclosed. This would include, for example, a plan awarding a listed person options to acquire equity in a subsidiary or affiliate of the community foundation as well as arrangements providing a listed person options to acquire equity in an unrelated entity (such as a mutual fund).

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<sup>22</sup> See 2010 Schedule J Instructions, at p. 2 describing such plans as generally not available to all employees but rather only available to certain class or classes of officers or highly compensated employees.

Finally, Schedule J asks several questions regarding the determination of variable pay such as bonuses. The organization must describe arrangements providing for any of the following:

- **compensation** determined based on the organization’s revenues, or the revenues of one or more of the organization’s activities
- **compensation** determined based on the organization’s net earnings, or the net earnings of one or more of the organization’s activities
- other “non-fixed payments” (such as bonuses) that are not determined on the basis of revenues or net earnings

If any of these payments are made, the organization must explain who is eligible under the program and the performance criteria that must be met to earn an award.

The Schedule J reporting rules for these types of arrangements are a bit confusing. **Compensation** is considered to be determined based on revenues or net earnings only when the **compensation** is a percentage of the revenues or expenses of the organization or of a particular activity or department. For example, a bonus equal to 5 percent of the community foundation’s net earnings for a specified period of time would be considered a payment contingent on the net earnings of the community foundation and subject to disclosure under Question 6 of Schedule J regardless of whether the bonus is also contingent on the community foundation meeting a net earnings target.<sup>23</sup> On the other hand, if the bonus to be paid is a fixed amount payable if the community foundation meets its net earnings target, this bonus will not be considered a payment contingent on the net earnings of the organization for purposes of Question 6. Please note that, for exemption purposes, 501(c)(3) organizations are prohibited from sharing their net earnings with private individuals.<sup>24</sup>

Although Schedule J asks about “non-fixed” payments, the community foundation may want to consider whether it has made “discretionary” payments. The critical question to address in identifying a non-fixed payment is whether any discretion is exercised in determining the amount of a payment or whether to make the payment in the first place. Suppose, for example, that a community foundation has a bonus plan for senior management. Under the plan, the bonus payable is a formula that takes into account future specified events, such as the attainment of one or more performance goals. Although the payment amount is variable, the bonus is a *fixed payment* if the organization merely applies the formula to determine the bonus.<sup>25</sup>

On Schedule J, the community foundation must describe the process used to determine **CEO compensation**. This is an opportunity for the community foundation to provide insight as to its overall **compensation** philosophy as well as the organization’s process for ensuring that overall **compensation** is reasonable.

Concluding thoughts: The revised Form 990 requires more **compensation** disclosure than ever before. Such information can be useful to the board and other committees as they review **compensation** (and performance) for the reported individuals.

The usefulness of the information, however, may depend on the whether the board understands the reporting requirements and appreciates the public nature of Form 990. As such, a community foundation might consider offering board education on the Form 990 disclosure areas and

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<sup>23</sup> See 2010 Schedule J Instructions, at p. 3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

**compensation** disclosures in particular. Since this is an area of keen interest to outside parties, such as potential donors, employees, competitors, and perhaps the press, careful review of the **compensation** disclosures from both a technical accuracy as well as a public perception point of view may be prudent. If the organization chooses to include additional explanation of any item related to Part VII or Schedule J, it might consider providing that explanation both at Schedule O, in relation to information reported at Part VII, and Schedule J Part III, in relation to information reported at the detailed schedule.

# Chapter 3: Governance and Interested Persons

Over the past few years, different groups, including the IRS, have focused on governance and tax-exempt organizations.<sup>26</sup> In considering governance and Form 990, it's important to note that governance is not addressed within the Internal Revenue Code or Regulations. That being said, based on the Form 990 questions, the government is clearly interested in a tax-exempt organization's governance practices.

Generally, the IRS assumes that good governance practices result in a greater compliance with exempt organization tax rules.<sup>27</sup> While good governance is not required under the tax law, it may nevertheless provide evidence of the organization's knowledge and commitment to sound governance practices.<sup>28</sup>

The IRS has encouraged organizations to consider having certain policies and practices in place to demonstrate good governance.<sup>29</sup> The IRS has stressed that an organization should have organizational documents (such as articles of incorporation, bylaws, or operating agreements) that provide a framework for governance and management practices.<sup>30</sup> In order to report having policies in place, a community foundation's board must adopt those policies prior the tax year-end and cannot indicate that the organization has adopted policies adopted by a group other than the board, such as a committee delegated to adopt such policies. The IRS stated it "will use the information reported in Part VI [governance], along with other information reported on the form, to assess noncompliance and the risk of noncompliance with federal tax law for individual organizations and access the broader exempt sector."<sup>31</sup>

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<sup>26</sup> See, e.g., Panel on the Nonprofit Sector, "Principles for Good Governance and Ethical Practice, A Guide for Charities and Foundations" (October 2007); Steven T. Miller, Former Commissioner, Tax Exempt and Government Entities, Internal Revenue Service, has drawn the line between good governance and good compliance in numerous speeches; see, e.g., Steven T. Miller, remarks on Nonprofit Governance, Western Conference on Tax Exempt Organizations, Los Angeles (Nov. 20, 2008).

<sup>27</sup> The IRS has provided a discussion of the best practices for governance in certain training materials released on the IRS's Web site, see Governance and Related Topics – 501(c)(3) Organizations, *available at*, [www.irs.gov/pub/irs-tege/governance\\_practices.pdf](http://www.irs.gov/pub/irs-tege/governance_practices.pdf).

<sup>28</sup> This statement is supported by the fact that the IRS now requires all agents performing **audits** of nonprofits to complete a governance checksheet as part of the exam, *available at*, [www.irs.gov/pub/irs-tege/governance\\_check\\_sheet.pdf](http://www.irs.gov/pub/irs-tege/governance_check_sheet.pdf), and [www.irs.gov/charities/article/0,,id=216068,00.html](http://www.irs.gov/charities/article/0,,id=216068,00.html).

<sup>29</sup> See Governance and Related Topics – 501(c)(3) Organizations, *available at*, [www.irs.gov/pub/irs-tege/governance\\_practices.pdf](http://www.irs.gov/pub/irs-tege/governance_practices.pdf).

<sup>30</sup> Note that significant changes to governing documents are required to be reported on Form 990, Part VI, Section A, Line 4.

<sup>31</sup> FAQ #2 "Form 990, Part VI – Governance, Management, and Disclosure Frequently Asked Questions and Tips" (May 2009) *available at*, [www.irs.gov/pub/irs-tege/partvi\\_faqs\\_tips\\_05\\_2009.pdf](http://www.irs.gov/pub/irs-tege/partvi_faqs_tips_05_2009.pdf).

## A. Governing Body

The IRS has emphasized the importance of an organization having an active and engaged **governing body** or board of directors. In general, organizations should pay particular attention to the size and composition of the board, and whether the board is primarily made up of **independent** members. However, the appropriate size of the board depends on the type and needs of the organization.

Regardless of the size of the **governing body**, the IRS has suggested that the governing body should not be dominated by individuals who are not independent.<sup>32</sup> On Form 990, Part VI, Section A, Line 1, the organization is required to report the number of voting **members of the governing body** and the number of voting members that are **independent**.

The IRS has provided a very clear definition of independence in the Form 990 instructions.<sup>33</sup> In order for a **voting member of the governing body** to be considered **independent**, three requirements must be met. First, the voting member must not have received **compensation** as an **officer** or other **employee** from the organization or a **related organization**. Second, the voting member must not have received total **compensation** or other payments greater than \$10,000 from the organization or a **related organization**<sup>34</sup> as an **independent contractor** during the **tax year**. The reimbursement of expenses under an **accountable plan** or **reasonable compensation** for the voting member's services provided in the capacity as a **member of the governing body** will not cause the voting member to lack independence. Third, the voting member, or any **family member**, must not have been involved in a transaction with the organization, directly or indirectly, that is reportable on Form 990, Schedule L. A **family member** includes any spouse, ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren, and spouses of brothers,

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<sup>32</sup> See "Governance and Related Topics – 501(c)(3) Organizations," *supra*, note 6.

<sup>33</sup> Note that other definitions of "independent" may be relevant to a community foundation, such as the definition of an "independent" compensation committee for purposes of excess benefit transactions defined at IRC § 4958 or the definition of "independence" adopted by respective state regulators.

<sup>34</sup> A separate 501(c)(3) entity is a related organization if the community foundation controls the separate 501(c)(3). For purposes of this determination, a community foundation controls a separate 501(c)(3) if the foundation's governing body collectively represent more than 50% of the governing body of the separate 501(c)(3) entity, even if such overlap in board representation is coincidental. Similarly, a community foundation will be deemed to control a separate 501(c)(3) if its governing body has the power to appoint or replace the governing body of the separate entity.

sisters, children, grandchildren, and great-grandchildren.

Did the member receive reportable or other compensation as an officer or other employee of the organization or of a related organization?



Did the member receive total compensation or other payments exceeding \$10,000 from the organization (or from related organizations) as an independent contractor, other than reimbursement of expenses under an accountable plan and other than reasonable compensation for services provided in the capacity as a member of the governing body?



Was the member, or any family member of the member, involved in a transaction with the community foundation required to be disclosed on Schedule L or in a transaction with a related organization of a type and amount that would be reported on Schedule L if the related organization were required to complete that schedule?



**Member is independent**

If the answer to any of the above is “yes,” the member is not “counted” as independent for purposes of the disclosure in Form 990, Part VI (which is also reported as part of the summary information on Form 990, Part I).

## B. Family or Business Relationships

On Form 990, Part VI, Section A, Line 2, organizations must report whether any officer, director or trustee, or key employee has a **family or business relationship** with any other officer, director or trustee, or key employee. **Business relationships** include the following:

- One person is employed by the other in a sole proprietorship or by an organization with which the other is associated as a trustee, director, officer, key employee, or greater-than-35 percent owner;
- One person is transacting business (direct or indirect) with the other and the transaction is in excess of \$10,000 in the aggregate during the **tax year**;
- Two persons are each a director, trustee, officer or greater-than-10 percent owner (vote or value) in the same business or investment entity.

Note that “**business relationship**” for purposes of this disclosure does not include serving on the board of the same tax-exempt organization.<sup>35</sup>

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<sup>35</sup> See 2010 Form 990 Instructions, at p.20.

Business transactions that occur within the ordinary course of business or on the same terms that are generally offered to the public, however, are not required to be reported on Form 990, Part VI, Section A, Line 2. For example, if an officer at a community foundation purchases a vehicle from a dealership owned by a director on the community foundation's board, that transaction is not disclosed provided that the terms of the purchase are the same as those generally offered to the public.<sup>36</sup> Again, this is a departure from the Schedule L disclosure requirements (discussed later in this chapter) that do not provide a similar exception for ordinary course of business transactions. Additionally, a privileged relationship such as an attorney and client, a medical professional and patient, or a priest/clergy and penitent/communicant is not required to be reported.

Examples of family or **business relationships** that must be reported include the following:

- Person 1 is an officer of the organization and Person 2 is a member of the organization's governing body. Person 1 is Person 2's sister. The organization must report that Person 1 and Person 2 have a family relationship.
- Persons 3 and 4 are members of the organization's governing body. Persons 3 and 4 are also officers of publicly traded corporations and serve on each other's boards. The organization must report that Persons 3 and 4 have a **business relationship** because each person is a director or officer in the same business entity.

Organizations are required to use **reasonable effort** to gather the information necessary to determine whether any family or **business relationships** exist. One way that organizations may gather information is by distributing a questionnaire annually to each officer, director, trustee, and key employee. The Fiscal and Administrative Officers Group for Community Foundations (FAOG) has developed an example Annual Form 990 Questionnaire for use by community foundations in obtaining the data necessary to determine the number of independent board members and whether there are any reportable family or **business relationships**. Organizations may wish to refer to the questionnaire made available by FAOG specifically for community foundations (available to Council on Foundations' members only) and consider whether any of the questions should be updated specifically for that organization's needs.

### C. Members

On Form 990, Part VI, Section A, Lines 6 and 7, organizations are required to disclose:

- whether the organization has members or stockholders
- whether the members or stockholders are able to elect members of the governing body
- whether decisions of the governing body are subject to approval by members or stockholders

(The definition of member for purposes of these disclosures, however, should not be confused with a person who is a voting member of the reporting organization's governing body.) For purposes of this question, the IRS has defined a "member" as a person who, pursuant to a provision of the organization's governing documents or applicable state law, has the right to participate in the organization's governance or to receive distributions of income or assets from the organization.

The instructions provide the following examples of "members" for purposes of the disclosures at Form 990, Part VI, Section A, Lines 6 and 7 as follows:

- The members elect the members of the **governing body** (but not if the persons on the governing body are the organization's only members) or their delegates.
- The members approve significant decisions of the governing body.

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<sup>36</sup> Id.

- The members can receive a share of the organization's profits or excess dues or a share of the organization's net assets upon dissolution.<sup>37</sup>

Therefore, a community foundation might consider reviewing its articles and bylaws for purposes of determining if it has any members or stockholders. Similarly, a review of the community foundation's relevant state statutes may provide guidance as to whether a nonprofit organization in that state would be required to have (or perhaps be prohibited from having) a member or stockholder. It is common for non-profit organizations to be structured as "membership" organizations with another non-profit named as the sole corporate member.

Organizations should consider the specific structure of their entity and refer to the governing documents when determining the response to these questions. If the organization determines that it does have members, the organization should include a description of the class of persons considered to be members and their rights on Form 990, Schedule O. If decisions of the governing body are subject to member approval, a description of the decisions that require approval should be included on Schedule O as well.

#### D. Policies

In addition to providing information on governance practices, organizations must also disclose on Form 990, Part VI whether certain specified policies and procedures are in place to safeguard assets and promote sound management practices.<sup>38</sup>

The organization should consider whether it currently has formal, written policies in place related to determining executive **compensation**, monitoring conflicts of interest, documenting decisions of the governing body, performing appropriate record retention and destruction, and examining whistleblower claims. While organizations are not required by the IRC to have such policies in place, the IRS has stated that it believes these are a key step in promoting good governance.<sup>39</sup> Each governing body should consider which policies and practices are most appropriate for the organization based on the size and extent of its operations.<sup>40</sup> Some organizations may find that they operate as if they had such policies, but that formal written policies have never actually been adopted. Organizations may want to consider formally adopting these types of written policies in order to answer "yes" to these questions. These policies must be *adopted* by the **governing board** by the end of the **tax year** in order to report having such policy in place for that **tax year**.

On Form 990, Part VI, Section A, Line 11, the organization must report whether a copy of Form 990 was provided to the voting members of the organization's governing body before it was filed. If the organization decides to provide a copy of the final Form 990 to the governing body before filing with the IRS, a process should be determined for distributing the final Form 990 to the members. Form 990 may be distributed in either paper or electronic form. Regardless of how Line 11 is answered, Line 11A states that the organization must describe in Schedule O the process that the organization uses to review the Form 990 prior to filing. Although there is no distinct level of review required, the organization should consider whether certain aspects of the Form 990 should be reviewed by either the full governing body or an appropriate committee of the governing body. Officers and other management level employees may also request the opportunity to review the Form 990 before filing. Particular aspects of the Form 990 that may require a prudent review will depend on the facts of each

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<sup>37</sup> See 2010 Form 990 Instructions, at p.21.

<sup>38</sup> Sample policies are available at National Standards for Community Foundations, at [www.cfstandards.org](http://www.cfstandards.org) see Tabs 14 to 20.

<sup>39</sup> See "Governance and Related Topics – 501(c)(3) Organizations," *supra*, note 26.

<sup>40</sup> An article discussing record retention policies can be found on the Council on Foundations' Web site at [www.cof.org](http://www.cof.org). (Note that there is no penalty if a question is checked no and indicates that the organization does not have such a policy. However, an organization that answers yes but in fact has no such policy could be assessed a penalty for filing an incomplete return.)

reporting organization. Organizations should devise a process to identify which aspects of the Form 990 will be reviewed by the governing body or a committee and the timing and procedure for the review. If an organization redacts or removes any information (e.g., names and address of contributors listed on Schedule B) from the copy of its final Form 990 that it provides to its governing body members before filing the form, the IRS instructs that Line 11 should be answered “No.”

On Form 990, Part VI, Section B, Line 12, the organization must disclose whether it has a written **conflict of interest policy**; whether **officers, directors or trustees**, or **key employees** are required to annually disclose interests that could give rise to conflicts; and whether the organization regularly and consistently monitors and enforces compliance with the policy. In addition, the organization must describe on Schedule O its practices for monitoring proposed or ongoing transactions for conflicts of interest and dealing with potential or actual conflicts, whether discovered before or after the transaction has occurred. The organization must also explain which persons are covered under the policy, the level at which potential conflicts are reviewed, and any restriction imposed on persons with a conflict. Possible restrictions may include prohibiting persons with conflicts of interest from participating in the governing body’s decision-making process with regard to the specific transaction from which the conflict arose.<sup>41</sup> This is just one example of a possible restriction and each organization should determine what restrictions are in place for that particular reporting organization.

A **conflict of interest policy** is used to monitor situations that arise when a person in a position of authority over an organization, such as an officer, director, or manager, may benefit financially from a decision that the person could make in such capacity, including indirect benefits such as to family members or businesses with which the person is closely associated.<sup>42</sup>

However, a conflict of interest does not include a person’s competing or respective duties to the organization and to another organization, such as by serving on the boards of both organizations, that do not involve a material financial interest of, or benefit to, such person. For example, assume that a person is a board member of a community foundation and another charity, both of which are public charities with different charitable purposes. Assume that the other charity has already taken a public stand in opposition to a specific legislative proposal, and at an upcoming board meeting, the community foundation will consider whether to publicly endorse the same legislative proposal. The IRS concluded in this example that while the person may have a conflict of interest in this decision, the conflict does not involve a material financial interest of the board member merely as a result of the community foundation’s position on the **legislation**.

On Form 990, Part VI, Section B, Line 15, the organization must disclose whether the process used for determining the **compensation** for the organization’s **CEO, executive director, or top management official** and other officers or key employees included a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision. Generally, if the organization has included these three steps in the process for determining **compensation**, then the rebuttable presumption standard under IRC § 4958 for **reasonable compensation** has been met.<sup>43</sup> Although organizations are not required to meet this test, compensation is presumed to be reasonable if

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<sup>41</sup> See Council on Foundations, “Conflicts of Interest: Protecting your Foundation,” available at [www.cof.org](http://www.cof.org).

<sup>42</sup> For a guide to drafting a conflict of interest policy, see Council on Foundation available at [www.cof.org](http://www.cof.org). Further, the IRS has included a sample conflict of interest policy in the instructions to IRS Form 1023, Application for Recognition of Exemption, available at [www.irs.gov/pub/irs-pdf/i1023.pdf](http://www.irs.gov/pub/irs-pdf/i1023.pdf).

<sup>43</sup> For additional information on meeting the rebuttable presumption of reasonableness and other compensation-related information, see Council on Foundation “Recommended Best Practices in Determining Reasonable Executive Compensation, A Guidance Memorandum from the Board of Directors of the Council on Foundations,” (Dec. 6, 2002), available at [www.cof.org](http://www.cof.org).

this test is met, thereby putting the burden of proof on the IRS to demonstrate that the compensation is unreasonable. Therefore, organizations are encouraged to meet the rebuttable presumption test.

### E. Transactions with Interested Persons

Form 990, Schedule L requires organizations to provide detailed information on certain financial transactions or arrangements that may have occurred between the organization and **disqualified persons** under IRC § 4958, or other **interested persons**.

The definition of an interested person varies depending on the type of transaction being disclosed and if the transaction is classified as a grant, loan or business transaction. Generally, interested persons include any officer, director, or key employee, and each of their family members (primarily siblings, ancestors and lineal descendants, and each of their spouses). For certain purposes, interested persons may include substantial contributors, **highest compensated employees** (top five), and organizations of which any such individuals are also either officers or directors or substantial owners. Transactions, direct or indirect, may also be reportable for persons who were a former officer, director, trustee or key employee of the organization in the previous five years.

The chart below summarizes who may be an interested person for purposes of Schedule L and the narratives that follow the chart provide more in-depth analysis of the definitions and highlight some of the potential impacts on reporting. Note that, in many instances, the persons listed in the chart will be considered an interested person for purposes of Schedule L if they served in the capacity listed during the tax year or in any of the five previous years.

Interested person	Schedule L			
	Part I	Part II	Part III	Part IV
Substantial contributor	X	X	X	
• Family member of substantial contributor	X	X	X	
• 35% <b>controlled entity</b> of substantial contributor	X	X	X	
• Employee of substantial contributor or a 35% <b>controlled entity</b> of substantial contributor			X	
Donor or advisor to a <b>donor advised fund</b>	X	X		
Officer	X	X	X	X
Director	X	X	X	X
Trustee	X	X	X	X
• Family member of officer, director or trustee	X	X	X	X
• 35% <b>controlled entity</b> of officer, director or trustee	X	X	X	X
Key employee		X	X	X
• Family member of key employee			X	X
• 35% <b>controlled entity</b> of key employee			X	X
Entity of which officer, director, trustee, or key employee serves as an officer, director, trustee, key employee, partner or shareholder				X
<b>Five highest compensated employees</b>		X		
Member of the organization's grant selection committee(s)			X	
• Family member of grant selection committee member			X	
• 35% <b>controlled entity</b> of grant selection committee member			X	

Organizations should develop a process to gather the appropriate information to determine if any such transactions with **interested persons** have occurred. One way that organizations may gather this information is by distributing a questionnaire annually to each current or former **officer, director, trustee, and key employee**. The questionnaire process may parallel the existing conflict of interest process; however the questionnaire must be for the same period as the organization's tax reporting year. The questionnaire should include questions to determine if any of the following reportable transactions have occurred: (1) **excess benefit transactions** for **disqualified persons**; (2) loans to and from interested persons; (3) grants or assistance benefiting interested persons; or (4) business transactions involving interested persons. Each reportable transaction is only required to be disclosed once on Form 990, Schedule L.

The IRS has stated that it expects organizations to perform a **reasonable effort** to gather information on transactions involving both grants and assistance and business transactions. For the first time, the IRS has provided a formal definition of **reasonable effort** in the instructions to the Form 990. The IRS considers that a **reasonable effort** refers to a reasonable amount of effort in information gathering that the organization is expected to undertake in order to gather sufficient information to disclose any reportable transactions. The description of **reasonable effort** contained in the various sections of the return that allow the **reasonable efforts** standard generally presume that the organization will obtain a

written, signed disclosure from the individual that contains pertinent instructions and definitions for the individual to properly understand the disclosure being requested. The **reasonable effort** standard serves as a voluntary safe harbor rather than a requirement.

If a **reasonable effort** standard is adopted by an organization, the organization should convey to an interested person the pertinent instructions and definitions for Schedule L as part of its information gathering. Because the definitions of interested person for Schedule L are technical in nature, organizations may inquire if their board members would benefit from education on these disclosures. Additionally, the information gathering process may be time intensive, so organizations should have a timeline in place to ensure that all information can be gathered before the Form 990 must be filed. Again, we would point Council on Foundations community foundation members to the interested person questionnaire that has been made available to you through the Fiscal and Administrative Officers Group on Community Foundations (and available on the Council on Foundations' Web site).

## 1. Excess Benefit Transactions

Organizations must disclose in Schedule L, Part I any **excess benefit transactions** with **disqualified persons** under IRC § 4958. Generally excess benefit situations can occur when a person receives more value from the organization than the value given by the person. (Note: Organizations that sponsor **donor advised funds** should also be aware that an **excess benefit transaction** could include a grant, loan, **compensation** or similar payment from the fund to a donor or advisor, or their family member or their 35 percent **controlled entity**. Similarly, certain transactions involving a **supported organization** and a **supporting organization** may also be considered to result in an excess benefit.<sup>44</sup>)

## 2. Loans

Organizations must disclose in Schedule L, Part II any loans to and from **interested persons** that are outstanding as of the end of the organization's **tax year**. Loans may include salary and other advances and receivables. For purposes of Part II, an interested person includes current and former **officers, directors, trustees, key employees** and five **highest compensated employees; disqualified persons** under IRC § 4958(f)(1); and for **supporting organizations, disqualified persons** under IRC § 4958(c)(3)(B). The IRS did not provide a **reasonable efforts** exception in the instructions for reporting loans, so organizations are responsible for determining a process for assuring that all loan transactions have been identified. However, inclusion of loans in the annual conflicts of interest disclosure may be a helpful cross check to the organization's own records.

## 3. Grants

In Schedule L, Part III, organizations must disclose any **grants or other assistance** benefiting **interested persons**. Grants may include scholarships, fellowships, internships, prizes and awards. For purposes of Part III, an interested person includes current and former **officers, directors, trustees, key employees**; substantial contributors; or a related person. The terms "substantial contributor" and "related person" are defined below.

For Schedule L, Part III, a "substantial contributor" is a person who has contributed at least \$5,000 during the year to the organization, and is required to be reported by name on Schedule B. Thus, if the organization is not required to file Schedule B then it is not required to complete Schedule L, Part III. The definition of substantial contributor has been slightly simplified compared to the general definition of substantial contributor which is typically defined as someone who has contributed more

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<sup>44</sup> See Council on Foundations, "Changes in Intermediate Sanctions for Donor-Advised Funds and Supporting Organizations," available at [www.cof.org](http://www.cof.org). (For more information on how the Pension Protection Act of 2006 changed the excess benefit rules for both donor advised funds and supporting organizations)

than \$5,000 and more than 2 percent of the total contributions that the organization has received cumulatively to date.<sup>45</sup>

A “related person” includes a member of the organization’s grant selection committee; a **family member** of any interested person; a 35 percent **controlled entity** of any **officer, director, trustee or key employee**; or an employee (or child of an employee) of a substantial contributor or of a 35 percent **controlled entity** of a substantial contributor. Therefore, the **reasonable efforts** safe harbor that otherwise applies to gathering data for potential Schedule L disclosures also applies to persons serving on the grantmaking committee for purposes of the disclosure requirement for grants to interested persons.

#### 4. Business Transactions

On Schedule L, Part IV, organizations must disclose any business transactions involving **interested persons**. Business transactions that must be reported include, but are not limited to, sales, leases, licenses, and payments for the performance of services. Business transactions also include **joint ventures** if the reporting organization and the interested person each have a capital or profits interests in the venture exceeding 10 percent. Indirect business transactions that must be disclosed include transactions with any **management company** of which a former **officer, director, trustee or key employee** of the organization (within the last five **tax years**, whether or not listed in Form 990 Part VII Section A) is a direct or indirect 35 percent owner, or an **officer, director, trustee, or key employee**.

For any of the above business transactions, the transaction must be reported if: (1) all payments during the year between the organization and the interested person exceeded \$100,000; (2) all payments during the year from a single transaction between such parties exceeded the greater of \$10,000 or 1 percent of the filing organization’s total revenues; (3) **compensation** payments by the organization paid to a family member of certain persons exceeded \$10,000; or (4) in the case of a joint venture with an interested person, the organization has invested at least \$10,000 in the joint venture (whether or not during the current tax year). Note that the requirement to disclose and the disclosure itself are based on transfers recorded during the current **tax year** regardless of when the original arrangement was entered into.

For purposes of Schedule L, Part IV, an interested person includes current and former **officers, directors, trustees, or key employees**; a **family member** of a current or former **officer, director, trustee or key employee**; an entity more than 35 percent owned, directly or indirectly, by one or more of these individuals or their family members whether individually or collectively; or an entity (other than an entity with 501(c)(3) status or the same status as the organization), of which a listed current or former **officer, director, trustee or key employee** was serving at the time of the transaction as an **officer, director, trustee, key employee**, partner or member with an ownership interest in excess of 5 percent if the entity is treated as a partnership, or a shareholder with an ownership interest in excess of 5 percent if the entity is a professional corporation.

Organizations should keep in mind that any **member of the governing body** who is involved in a transaction required to be disclosed on Schedule L will not be considered **independent** for purposes of determining the number of independent voting members on Form 990, Part VI, Section A, Line 1.

Concluding thoughts: Although there are no current Internal Revenue Code requirements regarding governance of tax-exempt organizations, the government’s attention to this area, and particularly in data that will be made available to the general public in the Form 990, might prove a sufficient reason for a community foundation to take the time to consider its governance policies and procedures, and

<sup>45</sup> Compare the 2010 Schedule L Instructions definition of “substantial contributor” to the definition of this term at IRC § 507(d)(2)(A).

how they work to promote or support the community foundation's exempt purposes. Additionally, a community foundation might consider if it wants to formalize in writing any "practices in place", such as a written whistleblower policy. Finally, a community foundation might consider whether the state in which it is organized has governance-related requirements applicable to nonprofit organizations in that state that bear mention in Form 990.

Determining whether a board member is independent, particularly in light of the narrow definition contained in the Form 990 instructions, is a complex task. Accordingly, a community foundation may wish to be thoughtful in how it gathers such information, educates its board, and considers the composition and size of its board.

# Chapter 4: Financial Data — Income Statement

Revenue and expense as recorded during the **tax year** are reported on Form 990, Parts VIII and IX. As with other parts of the Form 990, various schedules may be required based on information provided in these sections of the return. Additionally, questions in Form 990, Part IV will be answered based on information provided in these sections of the return.

## A. Contributions

**Contributions**, gifts and other similar amounts received by the filing organization are reported on Part VIII, Lines 1a through 1h. Both **cash** and **noncash contributions** (see Chapter 6 for a discussion of noncash contributions) and gifts received are to be captured on these lines and should be reported regardless of whether the contributor is entitled to a charitable contribution deduction. Amounts that are not considered **contributions** include: payments for services, donations of services or materials (even if reported on the organization's **financial statements**), and unreimbursed expenses incurred by **officers, employees or volunteers**. Note that the value of **noncash contributions** is separately stated on Line 1g, but this amount should also be included on the appropriate portion of Lines 1a through 1f. **Contributions** are discussed in much greater detail in Chapter 6.

Community foundations may conduct special events as part of their **fundraising** efforts. Money raised at these events will be reported on either Line 1c, **contributions from fundraising events**, or on Line 8a, gross income from **fundraising events**. **Fundraising events** include activities undertaken to raise funds for the organization, such as:

- holding auctions
- publicizing and conducting **fundraising** campaigns
- maintaining donor mailing lists
- hosting events such as galas or sports outings

**Fundraising** gross income reported on Line 8 should be reported net of (i.e. reduced by) the contribution income from the event reported on Line 1c.<sup>46</sup> **Fundraising events** do not include **gaming** activities that are reportable on Line 9. **Gaming**, per the Form 990 instructions includes activities such as poker tournaments, raffles and casino nights.

Expenses incurred in **fundraising** continue to be separately stated in Part IX as a delineated category of the reporting organization's functional expenses. In addition to **fundraising** expense allocations in Part IX, column (D), there is now a discrete disclosure on Line 11e of Part IX to disclose fees paid for **professional fundraising services**.<sup>47</sup>

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<sup>46</sup> See 2010 Form 990 Instructions, at p.35.

<sup>47</sup> See 2010 Form 990 Instructions, at Parts IV, V and IX.

## B. Investment Income

Most sources of passive investment income are reported in the aggregate on Form 990, Part VIII, Line 3 and include: interest, dividends, capital gain dividends,<sup>48</sup> and capital gain distributions from trusts. If, however, the organization earns interest from notes and loans receivable that are considered **program-related investments**<sup>49</sup> for balance sheet reporting purposes, this interest should be separately stated at Part VIII, Line 2.<sup>50</sup>

Gains or losses from the sale of securities and other assets are reported at Part VIII, Line 7. Although no longer required to provide a detailed list of all investment assets that were sold during the year, organizations should maintain books and records to substantiate information regarding any securities or other assets sold, including market quotations or other documentation if the quotes were not published or are not otherwise readily available.

If the community foundation has **tax-exempt bonds**, it must separately state any investment income related to the bond **proceeds** at Part VIII, Line 4. If the community foundation receives royalty income, this must also be separately stated at Part VIII, Line 5.

## C. Other Revenue

Generally, items of revenue reported for **financial statement** purposes will appear on Form 990, Part VIII. If the community foundation is active in conducting charitable programs, it would have program service revenue to report on Line 2. Note that program service and miscellaneous revenue items require a business code to describe the activity that generated the revenue. Business codes are located at Appendix J of the 2010 Form 990 Instructions.<sup>51</sup>

## D. Functional Expenses

Functional expenses reported in Part IX, Column A by a community foundation must be further categorized as one of the following: program service expense (Column B), management and general expense (Column C), or **fundraising** expense (Column D). This information may be of particular interest to the state agency to which the community foundation reports, if any. A community foundation's expenses, and specifically how the community foundation chooses to spend its money between program services, management and general, and **fundraising**, may also be of interest to a potential donor.

**Compensation** reported on Lines 5 through 7 of Form 990, Part IX, Column A should be reported based on the organization's **fiscal year-end**. Therefore, if the reporting organization has a year-end other than December 31, **compensation** reported on Form 990, Part IX Lines 5 and 6 will not agree to **compensation** reported on Form 990, Part VII. Further, the level of detail required for Parts VII and IX

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<sup>48</sup> See 2010 Form 990 Instructions, Appendix F, Joint Ventures Treated as Partnership for federal income tax purposes," at p.73.

<sup>49</sup> See Discussion Chapter 5 Financial Data – Balance Sheet, *infra*, for further discussions regarding program-related investments.

<sup>50</sup> Investment activities may also result in unrelated business income (UBI). Certain income from investment activities is specifically excluded from UBI under IRC § 512(b), including: dividends, interest, income from securities lending, annuities, royalties, certain rents, gains from sales of assets other than inventory. Excluded investment income may nonetheless be subject to tax if the underlying income-producing property is debt-financed. A complete discussion of UBI and the debt-financed property rules is beyond the scope of this guide.

<sup>51</sup> See 2010 Form 990 Instructions, at p. 81.

purposes essentially requires a **fiscal year** organization to calculate **compensation** for affected persons twice – once on a calendar year basis and once on a **fiscal year** basis. The **fiscal year** calculation, however, is calculated using the accounting method used for financial reporting purposes, including pension plan contributions and other employee benefits, rather than using the **compensation** definitions used for Part IX purposes.

Program service expenses (Column B) are generally those expenses incurred in the conduct of a direct charitable activity. **Lobbying** expenses that are directly related to the community foundation's exempt purpose(s) are reported in this column.

Management and general expenses reported in Column C include expenses incurred for the community foundation's overall operations. Such expenses generally include the salaries paid to the community foundation's chief executive officer as well as the **CEO's** staff if those persons are not directly involved in **fundraising** or program service activities. Similarly, the following expenses should be reported in Column C:

- expenses incurred to hold board, committee or staff meetings
- general legal
- accounting
- office management and any centralized services (such as human resources)
- expenses incurred in producing, publishing and distributing the community foundation's annual report
- investment expenses<sup>52</sup>

**Lobbying** expenses not directly in furtherance of the community foundation's exempt purpose(s) must be reported in Column C.

Finally, Column D is used to report expenses related to **fundraising** including direct and allocated overhead costs. A fee paid to professional fundraisers would also be reported in Column D and will be separately stated on Line 11e. If the amount on Line 11e, Column A (**fundraising** expense per books before allocation to Columns B, C and D) is more than \$15,000, Schedule G, Part I must be completed to disclose the services provided by the professional fundraiser.

If a community foundation is actively soliciting **contributions**, it should consider whether it may be required to register with the state(s) in which it solicits such **contributions**.<sup>53</sup>

## E. Grants

Form 990 has several reporting and tracking obligations for grantmaking organizations. An organization should report **grants** on Form 990, Part IX, Lines 1 through 3. Grant amounts reported on these lines should generally agree to the amounts recorded per the books and records of the community foundation. However, if the community foundation has adopted FASB ASC 958-605-05 (previously **SFAS No. 116**) for purposes of reporting grants on its books and records, the organization may opt to report grants in the year paid rather than as reported under FASB ASC 958-605-05 for Form 990

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<sup>52</sup> However, if the investment expense is related to a program-related investment, then it might be properly reported in Column B; see Discussion Chapter 5 Financial Data – Balance Sheet, *infra*, for further discussion of program-related investment.

<sup>53</sup> For more information on state registration requirements for charitable solicitations, see The Unified Registration Statement, The Multi-State Filer Project, available at, [www.multistatefiling.org/](http://www.multistatefiling.org/).

purposes.<sup>54</sup> FASB ASC 958-605-05 effectively reports a multi-year grant at its present value in the year of commitment and then, in each subsequent year, will recognize the present value increments to the unpaid grant. The method of accounting used for Part IX purposes will impact the individual contribution reporting on Schedule B.

**Grants** include awards, prizes, cash allocations, scholarships, stipends, fellowships, research grants, and other similar payments made by the organization during the **tax year**. Expenses for grantmaking, however, should not be included on Lines 1 through 3. Instead, expenses such as mailing costs incurred as part of a mass solicitation, fees paid to a professional fundraiser, etc., should be reported on Lines 5 through 24 of Part IX. Similarly, voluntary payments to organizations or governments in the **United States** are considered a grant. However, taxes paid to governmental entities are not considered **grants** for reporting purposes.

For purposes of reporting **grants** on the schedules of Form 990, organizations should group **grants** into two separate categories: domestic and foreign. Domestic and foreign grants should then be split again into two separate subcategories: grants to organizations and grants to individuals. Note that grantmaking expenses would be otherwise reported, as appropriate, on lines other than 1 through 3 of Form 990, Part IX.

### 1. Domestic Grants to Individuals or Organizations

Schedule I requires an organization to provide information on **grants** or assistance made by the filing organization to organizations, governments, and individuals in the **United States**. Schedule I is required if the grantmaking organization reports more than \$5,000 in **grants** to organizations on Form 990, Part IX, Line 1 or more than \$5,000 in grants to individuals on Form 990, Part IX, Line 2.

**Grants** made to affiliates that are not separately organized from the filing organization or **grants** to branch offices, or employees of the filing organization within the **United States** are not considered **grants** for Schedule I reporting purposes. However, **grants** made to **related organizations** that are separately organized must be disclosed. Other grants that require disclosure include grants made by a **disregarded entity** under the reporting organization as well as grants made by a partnership in which the reporting organization is a partner.

Schedule I, Part 1 requests information about domestic **grants** made during the taxable year, as well as a description of the organization's procedures for monitoring the use of grant funds in the **United States**. Such a description may include the grant making organization's pre-grant inquiries and procedures that are conducted to minimize the risk of a diversion of charitable assets for non-charitable or personal purposes. The narrative also may include a description of the organization's post-grant monitoring process, such as grant recipient reporting.

In the event there is a material diversion of assets,<sup>55</sup> then the filing organization may be required to report such diversion on Form 990, Part VI in response to Question 5, and include an explanation of the nature of the diversion, amounts or property involved, corrective actions taken to address the matter, and pertinent circumstances on Schedule O. Community foundations may wish to have a formal policy in place to outline the internal reporting levels, responsibilities and action steps to take in the event of a diversion.

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<sup>54</sup> Statement of Financial Accounting Standards FASB ASC 958-605-05 (previously SFAS No. 116), Accounting for Contributions Received and Contributions Made.

<sup>55</sup> See 2010 Form 990 Instructions, at pg. 21. A material diversion of assets is defined as an unauthorized use or conversion of the organization's assets in an amount that exceeds the lesser of 5 percent of the organization's gross receipts for the year, 5 percent of the organization's total assets as of the end of the tax year, or \$250,000.

A diversion of assets, regardless of amount, could have other reporting ramifications depending on the person(s) involved and a complete discussion of these is beyond the scope of this guide.<sup>56</sup>

## 2. Foreign Grants

Besides grants, other types of foreign activities are required to be included in determining whether Schedule F is required. If the aggregate revenues or expenses attributable to foreign activities are \$10,000 or more from grantmaking, **fundraising**, business and program services outside the **United States**, then Schedule F is required.<sup>57</sup> Country-by-country reporting has been replaced with regional reporting to help protect the safety of overseas employees.<sup>58</sup> This chapter focuses solely on the grant reporting and not on the other types of activities that may also require reporting. This chapter does not cover other issues that may be considered when making foreign grants that are outside the scope of Form 990 and Schedule F reporting requirements.<sup>59</sup>

A careful reading of the instructions and Frequently Asked Questions<sup>60</sup> issued for Schedule F may be required to correctly determine whether a grant is reportable on Schedule F. For example, any payment to an organization that is not organized under the laws of the **United States**, including related **foreign organizations**, would be considered a foreign grant. This could occur if the organization made a grant to a branch of a **foreign organization** or to a **foreign government** or agency even if that branch or agency is located in the **United States**, including related foreign corporations. For example, a grant to a foreign embassy located in Washington, D.C. would be reported on Schedule F as a grant to a **foreign government**.

Similarly, payments to U.S. citizens living or residing abroad are also considered foreign grants. Grants to organizations organized under the laws of Puerto Rico, the Commonwealth of the Northern Mariana Islands, Guam, American Samoa, and the U.S. Virgin Islands, are all considered domestic grants. Further, a **grant** to any U.S. government agency is reported as a grant to a U.S. organization on Part IX, Line 1 (and Schedule I if other thresholds are met – see discussion above) regardless of where the agency is located or operated. A **grant** to a **foreign individual** who is a resident of the **United States** and living in the **United States** is reported as a domestic grant.

Schedule F, **Grants to Foreign Individuals**, Part I is required to be completed by any organization that makes **grants** to a **foreign organization** or to an individual living or residing generally outside of the **United States** (but see above). Part II is required to be completed if the organization reports more than \$5,000 in aggregate **grants** to any particular **foreign organization** on Form 990, Part IX, Line 3. If no single recipient receives more than \$5,000 then the organization does not need to complete this section. It may simply check the relevant box at the top of the section. Part III is required to be completed if the organization granted more than \$5,000 to any foreign person.

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<sup>56</sup> See e.g. 2010 Form 990 Instructions, Appendix G, *Excess Benefit Transactions*, at p.74. Note this is just a single example and consideration should be given to other potential ramifications, including those that might exist outside of federal tax matters.

<sup>57</sup> For more information on foreign activity reporting, see Form 990 Filing Tips: Reporting Foreign Activities (Schedule F), available at [www.irs.gov/charities/article/0,,id=211325,00.html](http://www.irs.gov/charities/article/0,,id=211325,00.html).

<sup>58</sup> The 2010 Form 990 Instructions to Schedule F, at pg. 1-2 (listing the nine regions).

<sup>59</sup> For further information on international grant making, refer to “Principals of International Charity,” developed by the Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors (2005) available at the Council on Foundations’ Web site at [www.cof.org](http://www.cof.org).

<sup>60</sup> The IRS has published tips for filing Form 990 and several schedules. They are available at [www.irs.gov/charities/article/0,,id=206699,00.html](http://www.irs.gov/charities/article/0,,id=206699,00.html).

Part I is used to report direct foreign activities including direct operations and grantmaking to **foreign organizations** and/or individuals. If the filing organization has more than \$10,000 of revenues or expenses from foreign activities, then it must also report information from all off-shore investments, even if those investments are passive. Offshore investments are disclosed by region as a separate activity on Part I, Line 3.<sup>61</sup>

Part I requires disclosure of the total expenditures in foreign countries broken down by region.<sup>62</sup> Note that the expenses to be reported here should be limited to those actually expended in the foreign country, and not expenditures in the **United States** that support foreign activities.

Part II is used to report **grants and other assistance** to any particular **foreign organization** or entity (including a **foreign government**) that received more than \$5,000 in grants or assistance for the **tax year**.

Part III is used to report **grants** or other assistance made to **foreign individuals**, or directly to **foreign organizations** for the benefit of specified **foreign individuals**, of more than \$5,000 for the **tax year**.

An organization making **grants** outside of the **United States** should determine its level of foreign activity, including revenue received, and amount of **grants** or assistance outside the **United States**. Also, the organization might consider conducting additional due diligence for purposes of evaluating and monitoring use of foreign **grants**. For example, a grantmaking organization might consider adopting procedures similar to those outlined in the U.S. Department of Treasury's updated anti-terrorist financing guidelines.<sup>63</sup>

Concluding thoughts: Much of the information reported on Parts VIII and IX will be reported directly from a community foundation's financial statements. However, the community foundation will be well-served to spend some time considering how it will categorize revenue and expenses to illustrate its program services and other activities. Grantmaking activities require much more detailed reporting than in the past, and perhaps in unnatural groupings. Consideration should be given as to how to most efficiently capture the necessary Form 990 grant reporting information.

## F. Other Tax Reporting

### 1. Reporting on Transfers to Foreign Organizations

An organization may be required to report to the IRS separately any transfer of \$100,000 (in cash or other property) to a **foreign organization** during any 12 month period. The form used for disclosure purposes depends on the recipient's tax status for US income tax purposes as follows:

- foreign entity treated as corporation: Form 926
- foreign entity treated as partnership: Form 8865 (only certain parts)

Whether a disclosure is required is determined by looking at all transfers to the foreign entity in aggregate; a community foundation will be treated as making its allocable share of transfers to **foreign organizations** made by an investment partnership in which the community foundation is an investor. In general, information related to potential foreign disclosures is included in the footnotes attached to a Schedule K-1 issued by a partnership. If the community foundation is making direct transfers to

<sup>61</sup> See 2010 Schedule F Instructions, at p. 2.

<sup>62</sup> See 2010 Schedule F Instructions, at p. 2.

<sup>63</sup> "Voluntary Best Practices for U.S.-Based Charities," *available at*, [http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines\\_charities.pdf](http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/guidelines_charities.pdf).

**foreign organizations**, it will need to separately track this information for potential IRS reporting purposes.

Therefore, care should be given to tracking all transfers, both direct and indirect, to ensure that proper disclosures are filed.

In addition to filing disclosures for certain transfers to foreign entities, a community foundation may be required to file a disclosure if it owns an interest in a **foreign organization**, as follows:

- ownership of more than 10 percent of the total vote or value of a foreign entity treated as a corporation: Form 5471<sup>64</sup>
- change in ownership of 10 percent or more in a foreign entity treated as a corporation: Form 5471
- ownership of more than 10 percent of the interests in a foreign entity treated as partnership: Form 8865 (only certain parts)<sup>65</sup>
- change in direct ownership of 10 percent or more in a foreign entity treated as partnership: Form 8865 (only certain parts)
- ownership (directly, indirectly or constructively) of a foreign entity treated as **disregarded entity**: Form 8858

## 2. Foreign Bank Account Reporting (“FBAR”)

In addition to disclosures for certain transfers to and ownership in foreign entities, reporting is required on Form TD F 90-22.1 (Report of Foreign Bank Account and Financial Accounts (“FBAR”)) where a US person (including exempt entities organized in the US) has foreign financial accounts with an aggregate value of more than \$10,000 (USD). A foreign financial account includes a bank account, foreign securities account and other foreign financial account. For purposes of determining what constitutes an “other” foreign financial account, regulations were issued in 2011 that define this to include foreign commingled funds, including foreign mutual and pooled investment funds, but only if the fund meets two tests: first, the fund must issue shares that are available to the general public (a condition not generally met by hedge and similar funds); second, the fund must have regular net asset value determinations and regular redemptions.

In addition to the entity that owns the foreign financial account, individuals with signature authority over foreign financial accounts must separately file their own FBAR even if they do not have a personal financial interest in the account. An individual has signatory authority only if that person is authorized to move funds into or out of the foreign financial account by his/her signature on a document. If two or more signatures are required, both persons have signatory authority.

The FBAR filing is due on June 30 of each year for the preceding calendar year and account information is reported on a calendar year basis, even if the filing entity has a fiscal year end. The form must be received by June 30 in order to be deemed timely filed.<sup>66</sup>

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<sup>64</sup> The threshold for reporting based on ownership is met at 10 percent but expanded disclosures may be required if the U.S. investor owns 50 percent or more of the value or controls more than 50 percent of the vote of the foreign entity treated as a corporation for U.S. income tax purposes. A Form 926 may also be required depending on how the exempt organization obtained its interest in the offshore corporation.

<sup>65</sup> The threshold for reporting based on ownership is met at 10 percent but expanded disclosures may be required if the U.S. investor owns 50 percent or more of the interests in the foreign entity treated as a partnership for U.S. income tax purposes.

Rules related to FBAR reporting are published by The Treasury Department's Financial Crimes Enforcement Network (a/k/a FinCEN). Consider reviewing FinCen final rules for questions, including those related to foreign accounts established by some custodian banks to settle transactions involving the purchase and sale of foreign securities.

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<sup>66</sup> This differs from the timely filing rule for income tax returns which simply requires evidence of mailing by the due date.

# Chapter 5: Financial Data — Balance Sheet

Balance sheet information is now primarily in two locations: Form 990, Part X (summary balance sheet) and Schedule D (detailed support of certain items reported on Part X).

The revised balance sheet has three notable changes from the pre-2008 reporting requirements including: (1) elimination of the schedules for Other Notes, Loans Receivable, Other Mortgages, and Notes Payable; (2) addition of Schedule L for reporting loans and receivables between the organization and selected individuals; and (3) addition of Schedule D to consolidate schedules previously requested for other line items.

Schedule D requires additional supplemental financial reporting regarding year-end balances of certain types of assets and liabilities reported on Form 990, Part X, including **escrow and custodial accounts**. Schedule D also requires supplemental information for items not separately stated on Part X, including: **donor advised funds, endowment funds, and conservation easements**, as well as reconciliation to the organization's **audited financial statements**. Some of the information requested requires an understanding of financial reporting at the community foundation and may require obtaining information from other parties.

## A. Donor Advised Funds and Other Similar Funds/Accounts

Reporting the activities of **donor advised funds**, as well as other funds/accounts (separately shown) is now required in the aggregate on Schedule D, Part I. **Donor advised funds** are defined in the instructions as funds that meet all of the following:

- are separately identified by reference to **contributions** of the donor(s)
- are owned or controlled by a sponsoring organization (i.e., a community foundation)
- are funds for which the donor (or **donor advisor**) has or reasonably expects to have advisory privileges in the distribution or investment of amounts held in the fund or account because of the donor's status as a donor<sup>67</sup>

The instructions note that a **donor advised fund** does not include a fund that can only make distributions to a single, named organization or a fund where the donor serves in a limited capacity on the grantmaking committee.

Organizations must provide the aggregate number of accounts, **contributions** received during the year, grants made from the funds, and value of the funds at the end of the year.

## B. Escrow or Custodial Accounts

Any organization that has **escrow or custodial accounts** (regardless of whether the accounts are reported as both an asset and a liability on their **financial statements**) is required to complete Part IV of Schedule D. However, Schedule D, Part IV, Line 1 financial data disclosures are only applicable if

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<sup>67</sup> See Council on Foundations, "Is the Fund a Donor Advised Fund?" available at [www.cof.org](http://www.cof.org).

the reporting organization acts as an agent, trustee, custodian, or other intermediary for funds payable to other organizations or individuals and has not reported those amounts on its balance sheet. For all **escrow or custodial accounts** where the community foundation serves as an agent, trustee, custodian, or other intermediary or where the community foundation reports a balance on Part X, Line 21 (escrow account liability), an explanation of the arrangement is required on Schedule D, Part XIV.

A community foundation that maintains agency endowment funds may be required to report these funds as escrow or custodial accounts on Schedule D, Part IV to the extent the community foundation is serving as agent over the fund.

### C. Endowment Funds

Schedule D, Part V requires a reconciliation of the organization's endowment funds from beginning of year to end of year, including: contributions; investment earnings or losses; and grants, scholarships, or other expenditures. Eventually five years of reconciliation data will be required; however, no reconciliation of such data is required for years prior to 2008. Organizations must follow the FASB ASC 958-205-05 (previously **SFAS 117**) definition of endowment fund to determine which endowment funds are to be reported and how they should be characterized.<sup>68</sup> As to the amounts that must be reported, if an organization is subject to either FSP FAS 117-1<sup>69</sup> or, for state tax purposes, to the Uniform Prudent Management of Institutional Funds Act, then such guidance is used to determine the amounts, if any, the organization must report as endowment funds.<sup>70</sup>

Many community foundations have organizational endowment funds, also known as agency funds. Agency Funds are created by not-for-profit organizations when the organization is also named the designated grantee of the fund.<sup>71</sup>

Reporting is required for **endowments** held by the organization as well as **endowment** funds not in the possession of the organization but held for the filing organization's benefit, such as those that might be held by a **related organization** discussed in Schedule R. Such funds should be compared to agency endowment funds that may be reported at Schedule D, Part IV and might include charitable remainder trust assets where the community foundation is the named beneficiary.

As such, the Form 990 disclosure may not agree with the organization's balance sheet. Further, because the Form 990 requires information on **endowment** funds held on behalf of the filing organization, organizations should take steps to determine what other entities may hold **endowment** funds on their behalf and implement processes to gather requisite information. Consideration should also be given to policies regarding how **endowment** funds are used, and whether current use is limited to earnings. There is currently no requirement to distribute and reduce **endowment** funds. The organization is, however, required to explain how it intends to use its **endowment** funds in Part XIV of Schedule D.

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<sup>68</sup> Statement of Financial Accounting Standards FASB ASC 958-205-05 (previously SFAS No. 117) Financial Statements of Not-for-Profit Organizations.

<sup>69</sup> FASB Staff Position No. FAS 117-1, Endowments of Not-for-Profit Organizations: Net Asset Classification of Funds Subject to an Enacted Version of the Uniform Prudent Management of Institutional Funds Act, and Enhanced Disclosures for All Endowment Funds.

<sup>70</sup> A community foundation that is unsure about its specific reporting requirements should consult its external auditors or, at a minimum, review its audited financial statements.

<sup>71</sup> See Council on Foundations, Frequently Asked Legal Questions about Agency Endowment Funds, *available at*, [www.cof.org](http://www.cof.org).

## D. Balance Sheet Detail

Certain balance sheet items reported on Form 990 Part X require additional detail in Schedule D. Some of these disclosures are determined by the relative amount of the asset or liability as compared to all others. For example, if a community foundation reports at least 5 percent of **total assets** on the balance sheet as other securities on Form 990, Part X, Line 12, or as **program-related investments** on Form 990, Part X Line 13, then supplemental detail is also required on either Schedule D, Part VII or Part VIII, respectively. The primary purpose of **program-related investments** is the furtherance of the reporting organization's exempt purpose(s) and not the production of income. Examples of **program-related investments** include student loans and notes receivable from other organizations pursuing the exempt purpose(s) of the reporting organization.<sup>72</sup>

Similarly, a community foundation that reports land, buildings or equipment on Form 990, Part X, Line 10, or that reports other liabilities on Form 990, Part X, Line 25 is required to provide additional detail related to these balances on Schedule D, Part VI and X, respectively. Further, organizations that are required to disclose other liabilities on Schedule D, Part X, are also required to disclose, verbatim, the text of the footnote to the organization's **audited financial statements** that reports the organization's liability for uncertain tax positions under **FIN 48**.

Unlike for 2008 Form 990 reporting purposes, the question on Part XI, Line 2 allows the organization to indicate that the organization does have an **audit** and then whether it was a separate **audit** or within a consolidated **financial statement**. Reconciliation between Form 990 and the organization's **audited financial statements** is reported in Schedule D, Parts XI-XIII and is required for organizations that receive **audited financial statements** prepared in accordance with **GAAP** on a stand-alone basis. Organizations that are included in a consolidated **audited financial statement** are not required to complete these parts. Unlike for 2008 Form 990 reporting purposes, the question on Part XI, Line 2 allows the organization to indicate that the organization does have an **audit** and then whether it was a separate **audit** or within a consolidated **financial statement**.

Similarly, organizations that have received group status and file group returns are not required to complete these sections.

## E. Substantial Contraction

Any organization that undergoes a liquidation, termination, dissolution, cessation of operations, or reports a **significant disposition of net assets** (i.e. one or more sales, exchanges, dispositions of, or transfers of more than 25 percent of an organization's net assets, as measured by **fair market value** as of the beginning of the **tax year**), will be required to report the transaction(s) on Form 990, Schedule N, *Liquidation, Termination, Dissolution or Significant Disposition of Assets*, Part II. A **significant disposition of net assets**, for this purpose, does not include transfers for full and adequate consideration or distributions out of current income. Further, a **significant disposition of net assets** may result from a single transaction, or may include a series of transactions over multiple years if made under a plan to dispose of assets. However, a decrease in the value of net assets because of market fluctuation or similar changes in the makeup of an organization's portfolio is not considered a significant disposition of assets subject to disclosure.<sup>73</sup> Further, a distribution of assets to a **disregarded entity** of which the reporting organization is the sole member is not considered a **substantial disposition of net assets** that must be disclosed on Schedule N (however, please consider necessary Schedule R disclosures).

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<sup>72</sup> See 2010 Form 990 Instructions Glossary definition of program-related investment, at p. 59.

<sup>73</sup> See 2010 Schedule N Instructions, at p. 5.

Concluding thoughts: As with increased transparency in other parts of the Form 990, the balance sheet detail required in Schedule D provides more transparency around certain assets and liabilities. Of interest to persons reading a community foundation Form 990 may be the magnitude of the organization's endowment and **donor advised funds**, and the degree of activity within those funds.<sup>74</sup>

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<sup>74</sup> In Notice 2007-21, the IRS requested public comments on several topics impacting donor advised funds and supporting organizations, including whether these funds and/or organizations should be subject to an annual minimum payout requirement, similar to those already applicable to private foundations. The Notice was issued as part of a study of donor advised funds required by Congress under IRC § 1226 of the Pension Protection Act of 2006, see Pub. L. No. 109-280, 120 Stat. 780 (2006). Since issuing the Notice, the IRS has issued proposed regulations that would impose a payout requirement on certain supporting organizations. See 74 Fed. Reg. 48672 (Sept. 24, 2009). For example, Sen. Chuck Grassley(R-Iowa) has expressed an interest in understanding whether and how university and college endowment funds are used to support education and students. See, e.g., comments made by Grassley as reported in the *Wall Street Journal* article "College Endowments Plunge," Jan. 27, 2009, available at, <http://online.wsj.com/article/SB123302147236318209.html>.

# Chapter 6: Contributions and Public Support

Several sections of Form 990 and its supporting schedules involve reporting **contributions** to and **fundraising activities** of community foundations, along with the information and calculations pertaining to **public charity** status. The following will be addressed in this chapter:

- Core Form 990
- Schedule A, **Public Charity** Status and Public Support
- Schedule B, Schedule of Contributors
- Schedule G, Supplemental Information Regarding **Fundraising** or **Gaming** Activities
- Schedule M, **Noncash Contributions**

Reporting **contributions** on Part VIII and related **fundraising** expenses on Part IX have already been discussed at Chapter 4.<sup>75</sup> Questions applicable to organizations eligible to receive deductible charitable **contributions** are included at Form 990, Part V. Form 990, Part V, Line 7c inquires as to whether the filing organization sold, exchanged or otherwise disposed of tangible personal property during the filing year for which it was required to file Form 8282, *Donee Information Return*. A corresponding item on line 7d asks the filing organization to list the number of Forms 8282 filed. This form, and the related Form 8283, *Noncash Charitable Contributions*, are discussed later in this chapter in relation to Schedule M.

## A. Public Charity Status — In General

Organizations exempt from federal income tax under IRC § 501(c)(3) are classified as either **private foundations** or public charities. There are significant differences between the rules applicable to these two categories of charitable entities.<sup>76</sup>

Schedule A, **Public Charity** Status, serves to demonstrate the basis for an organization's **public charity** status, and to document the organization's sources of financial support. The first part of the schedule requires that the entity select one of 11 potential bases of support for **public charity** status. Those options fall under four general categories of **public charity** status:

1. organizations that are public charities by definition under IRC §§ 509(a)(1) and 170(b)(1)(A) (other than 170(b)(1)(A)(vii)-(viii)) (Schedule A, Part I, Lines 1-6, including **churches**, **schools**, **hospitals**, medical research organizations, organizations operated for the benefit of a state college or university, and federal, state and local government organizations)

<sup>75</sup> See 2010 Form 990, at Part I, Line 8, Contributions and Grants, which captures summary reporting of current year contributions and grants flowing from Part VIII, Line 1h, as well as prior year contributions and grants, within the snapshot on page 1 of the filing organization. Part IV, Checklist of Required Schedules, prompts the filing organization to complete certain supporting schedules as attachments to the Form 990 filing. Among those supporting schedules are Schedules A, B, G and M which require further disclosure regarding the type of contributions received and fundraising activities of the filing organization. Particular attention should be paid when responding to the Part IV checklist so that no required supporting schedule is overlooked.

<sup>76</sup> See, e.g., Council on Foundations, "Tax Treatment of Charities," (2001), available at [www.cof.org](http://www.cof.org).

- organizations that meet the 33 1/3 support test under IRC § 170(b)(1)(A)(vi) (Schedule A, Part I, Lines 7 – *including community trusts described in IRC § 170(b)(1)(A)(vi)*)
- organizations that meet the mechanical support tests of IRC § 509(a)(2)
- **supporting organizations** as described in IRC § 509(a)(3) (Schedule A, Part I, Line 10) public safety organizations as described in IRC § 509(a)(4) (Schedule A, Part I, Line 11)

If an organization checks the box on Schedule A, Part I, Line 10 indicating its **public charity** status as a **supporting organization**, it will also provide the following information in Part I:

- type of **supporting organization** (I, II, III – functionally integrated, or III – other)<sup>77</sup>
- certification that the **supporting organization** is not controlled by one or more **disqualified persons** other than publicly supported organizations defined in 509(a)(1) (generally including community foundations) or foundation managers<sup>78</sup>
- whether the **supporting organization** has received a written determination of type from the IRS
- whether the **supporting organization** has accepted any gift or contribution from certain persons or entities<sup>79</sup>
- the name of the **supported organization(s)**
- the **supported organization(s)** employer identification number(s)
- the **supported organization(s)** **public charity** status (by reference to the applicable line checked on that organization’s Schedule A)
- whether the **supported organization(s)** is listed in the reporting organization’s governing documents, was notified of the reporting organization’s support, and is organized in the **United States**<sup>80</sup>
- the amount of support provided by the **supporting organization** to each **supported organization**

In addition to the information reported in Part I, Line 10, a **supporting organization** may provide additional detail regarding the support it provides in Schedule A, Part III. Such additional detail might outline non-monetary types of support provided by the **supporting organization** or additional detail about the relationship(s) between the **supporting organization** and the **supported organization(s)**.

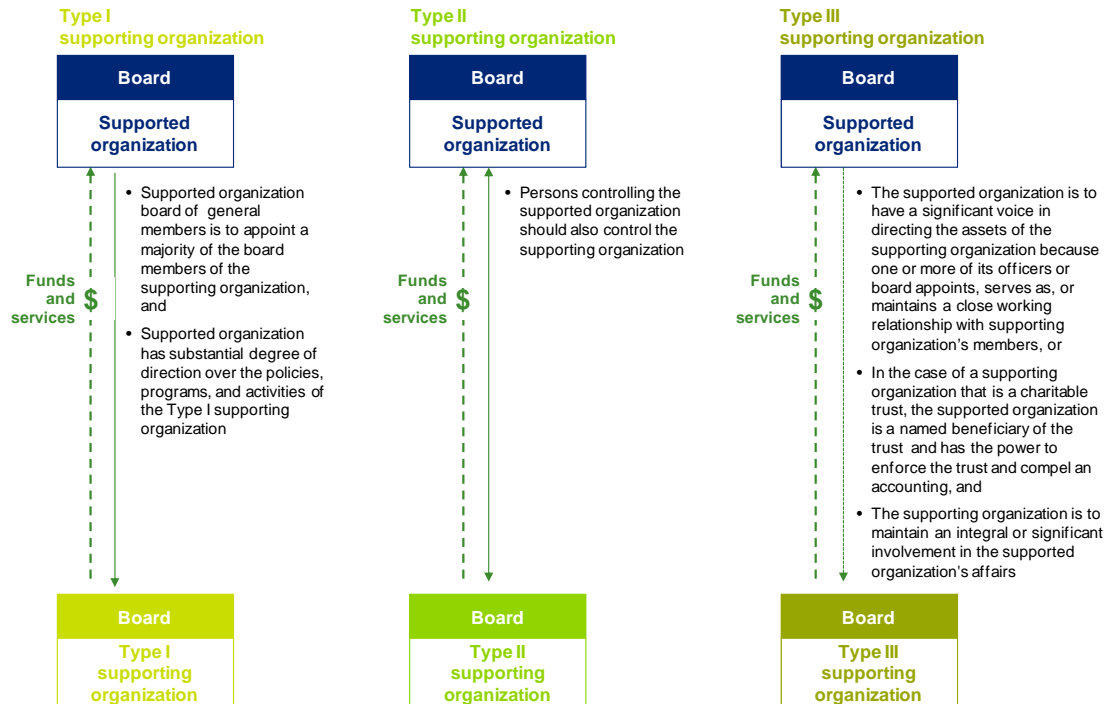
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<sup>77</sup> For more information on how to determine what type of supporting organization, see Council on Foundations, “Determination of Supporting Organization Status,” *available at*, [www.cof.org](http://www.cof.org) .

<sup>78</sup> For more information on the importance of these questions, see Council on Foundations “Pension Protection Act of 2006 (H.R. 4): Provisions Affecting Supporting Organizations,” *available at*, [www.cof.org](http://www.cof.org) .

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*



## B. Public Support

Since community foundations are instructed to check box 8 (community trust described in IRC § 170(b)(1)(A)(vi)) and complete Part II regardless of whether they are organized as a trust or corporation, the remainder of the Schedule A discussion will focus on Part II of this schedule.<sup>81</sup>

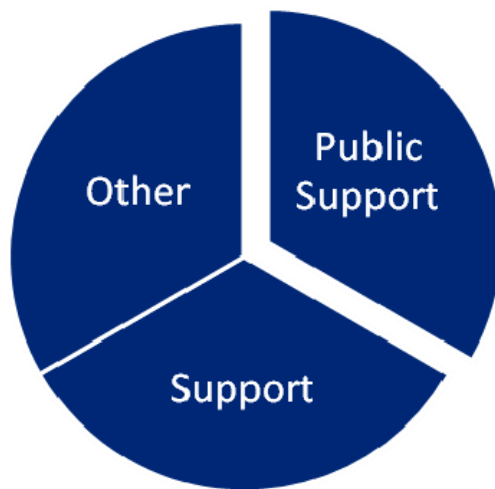
Part II applies to §§ 170(b)(1)(A)(iv) and 170(b)(1)(A)(vi) organizations. Information provided in Part II is to be completed based on the organization's accounting method. Prior to the redesign of the Form 990 for the 2008 **tax year**, public charities were required to report support using a cash method of accounting. After the redesign, an organization utilizing an accounting method other than cash was required to restate support for years prior 2008.

Both Parts II and III of Schedule A are computed based on the support the organization received during the current **tax year** and the four previous **tax years**. If the organization is a new entity, the financial support information need only be provided for the years in which the organization has been in existence. Organizations described in IRC § 170(b)(1)(A)(vi), are organizations that normally receive more than one-third of their support from the general public (direct or indirect) or from domestic governmental agencies.<sup>82</sup>

The mechanical test for community foundations requires evidencing that at least one-third of its total support is from the general public ("public support").

<sup>81</sup> The National Standards for U.S. Community Foundations accreditation program, as administered by the Community Foundations National Standards Board, also require that a community foundation demonstrate it "meets the public support test set forth in Internal Revenue Code Section 170(b)(1)(A)(vi) as modified by Treasury Regulation Section 170A-9(e)(10)," available at [www.cfstandards.org/all\\_tabs/tabs6-13/Tab7.asp](http://www.cfstandards.org/all_tabs/tabs6-13/Tab7.asp) for more detail.

<sup>82</sup> See Treas. Reg. 1.170A-9T(f)(1)-(2).



Public support includes	Total support <sup>83</sup> includes
<ul style="list-style-type: none"> <li>• Gifts, grants, and <b>contributions</b> from domestic government, general public, or other public charities</li> <li>• Qualified sponsorship payments</li> <li>• Membership fees paid for the organization's general support</li> <li>• Tax revenues levied for the organization's benefit (or paid to or expended on behalf of the organization)</li> <li>• Value of services or facilities furnished by the government at no charge<sup>84</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Items reported as public support (defined at left and including amounts that are excluded from public support under the 2% limitation)</li> <li>• <b>Gross receipts</b> from non-UBI trade or business<sup>85</sup></li> <li>• Gross investment income</li> <li>• Net income from unrelated activities<sup>86</sup></li> <li>• Other income</li> </ul>

Total support does not include any gain or loss from the sale or other disposition of property which would be considered a capital asset (e.g. stocks, bonds, etc.). For purposes of reporting gifts, grants and **contributions** on Schedule A, Part II (required for 170(b)(1)(A)(vi) organizations), gifts, grants and **contributions** received from contributors that may otherwise be included in public support are limited to the lesser of the grants received from the substantial contributor or 2 percent of the total public support reported at Part II, Line 11, Column F. A "substantial contributor" does not include other publicly supported organizations or domestic **governmental units**. The contributor limitations that apply to the public support test can cause "tipping"<sup>87</sup> issues when grants from certain individuals "tip" an otherwise publicly supported organization out of the mechanical support test and into the facts and circumstances test or private foundation status. The tipping is caused by the gift being partially excluded from the

<sup>83</sup> IRC §509(d).

<sup>84</sup> Do not include the value of services or facilities generally provided to the general public without charge.

<sup>85</sup> This only applies to organizations described in IRC § 509(a)(2); many community foundations are described under the other mechanical test for publicly supported organizations in IRC § 170(b)(1)(A)(vi). Gross receipts from admissions, sales of merchandise, performance of services, or furnishing of facilities in any activity which is not an unrelated trade or business (within the meaning of IRC §513; see, also, IRC§ 509(d)(2).

<sup>86</sup> Consider whether this revenue should also be reported as unrelated business income for purposes of the Form 990-T and related disclosures on Form 990.

<sup>87</sup> "Tipping" is sometimes used to refer to an organization failing to meet the one-third public support test and "tipping" into private foundation status.

public support numerator due to the 2 percent limitation but remaining in the total support denominator of the fraction.

If an organization reports amounts on Schedule A that are not otherwise reported as revenue on Part VIII, Line 1 or as an asset on Part X, then it must disclose the basis for treating the contribution as an element of support on Schedule A in Part IV. For example, a community foundation that receives and holds a cash transfer for another tax-exempt organization and reports **contributions** of such property on Schedule A as public support would provide a narrative in Schedule A Part IV to explain the community foundation's basis for not characterizing the property as revenue or assets.

Public support does not include unusual grants – in either the numerator or the denominator of the public support test. This exclusion is generally intended to apply to substantial **contributions** or bequests from disinterested parties which are attracted by reason of the publicly supported nature of the organization; are unusual or unexpected with respect to the amount thereof, and would, by reason of their size, adversely affect the status of the organization as normally being publicly supported.<sup>88</sup> Therefore, if the organization meets its public support test without taking into account potential unusual grants, then, by definition, it has no unusual grants.<sup>89</sup> A list of unusual grants must be included on a list of all such grants maintained by the organization in its records. The list must show, for each year, the name of the contributor, the date of the contribution, the amount of the contribution, and a brief description of each grant. This list should not be attached to the organization's Form 990.<sup>90</sup> **Gross receipts** are not included in the numerator for the public support test for 170(b)(1)(A)(vi) organization but are included (subject to limitations) under an alternative public support test described in IRC §509(a)(2). An organization may meet either test for any given year.<sup>91</sup>

Alternatively, a publicly supported organization described in IRC § 170(b)(1)(A)(vi) may meet a 10 percent facts and circumstances test if it cannot otherwise meet the one-third public support test. This alternate test is somewhat modified by Treasury Regulation § 1.170A-9(f)(10) (applicable to community trusts), which states that a community trust will qualify as publicly supported if it is "organized and operated so as to attract new and additional public or governmental support on a continuous basis sufficient to meet the facts and circumstances test." Therefore, a community trust that falls into the facts and circumstances category for the current or previous reporting year, Schedule A, Part II, Line 17, should be careful to refer to this modified test in its explanation provided in Schedule A, Part IV as it applies solely to community foundations.

### C. Contributions

Schedule B, which remains virtually unchanged, should generally be completed by community foundations, whether filing Form 990 or Form 990-EZ, to the extent one of the following criteria are met:

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<sup>88</sup> Treas. Reg. §1.170A-9(f)(6)(ii).

<sup>89</sup> In determining whether a grant may be excluded as an unusual grant, all pertinent facts and circumstances will be taken into consideration. No single factor will necessarily be determinative. Treas. Reg. §1.170A-9T(f)(6)(ii).1.509(a)-(3)(T)(c)(3)-(4). See, also, Council on Foundations, "Unusual Grants: An Online Legal Guide for Public Charities," (September 2005), available at, [www.cof.org](http://www.cof.org).

<sup>90</sup> Because such detail is not requested as part of Form 990, an organization that voluntarily provides detail regarding its unusual grants should expect that this information will be available for public inspection. In general, contributor information as reported in Schedule B (discussed later in this chapter) is not included in the public inspection copy of an organization's Form 990.

<sup>91</sup> Treas. Reg. § 1.170A-9T(f)(7)(iii).

- The organization meets the 33 1/3 percent public support test and received from any one contributor either (aggregate **contributions** of \$5,000 or more, or **contributions** in an amount greater than 2 percent of total **contributions** received for the **tax year**)<sup>92</sup>
- The organization does not meet the 33 1/3 percent public support test, but received **contributions** from any one contributor of \$5,000 or more.<sup>93</sup>

As indicated in the above criteria, Schedule B discloses information for contributors to the organization that meet the \$5,000 or 2 percent of total **contributions** test. It is important to note when completing Schedule B that it is acceptable to prepare the schedule by reporting only those **cash** and **noncash contributions** in an amount greater than 2 percent of total **contributions** for the year (as reported on Part VIII, line 1h) whether or not the filing organization is otherwise described in IRC §170(b)(1)(A).<sup>94</sup>

Schedule B should be completed based on the organization's method of accounting, including accounting for pledges, discounts and bad debts. Contributor information is not open to public inspection but the amount of the contribution and descriptions of noncash amounts received is available to the public unless it identifies the contributor.<sup>95</sup> Schedule B is removed entirely from returns that are uploaded to Guidestar's Web site. Whether complete removal of Schedule B is allowed or whether an organization may only redact certain donor information is open to some debate. Therefore, a community foundation should take care in what it chooses to provide to the general public for inspection purposes, including what it provides to its representative state authority, if any.

#### D. Supplemental Information Regarding Fundraising or Gaming Activities

Schedule G is required to be completed by all organizations that have **fundraising events, gaming activities** or use professional fundraisers. The reporting thresholds are as follows:

- **fundraising events** — \$15,000 of gross income and **contributions**
- gaming activities — \$15,000 of gross income
- **professional fundraising services** - \$15,000 of expenses

#### E. NonCash Contributions

A community foundation which receives more than \$25,000 in **noncash contributions** should complete Schedule M, **Noncash Contributions**. Schedule M is used to report detail by type of **noncash contribution** received during the tax filing year, including the number of contributors of that type of property, and the related reported revenues by type of property.

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<sup>92</sup> Per IRC §§ 509(a)(1) and 170(b)(1)(A)(vi), a U.S. corporation organized and operated exclusively for charitable, religious, scientific or educational purposes which normally receives a substantial part of its support, outside of its exempt function income, from a governmental unit or from direct or indirect contributions from the general public, qualifies as a publicly supported organization. Treas. Reg. § 1.170A-9(f)(2) provides a 33 1/3 percent test such that if a community foundation normally receives more than 33 1/3 percent of total support from government funding or contributions, direct or indirect, from the general public, the community foundation will qualify as publicly supported. Further, Treas. Reg. § 1.170A-9(f)(3) provides criteria for a facts and circumstances test to the extent the 33 1/3 percent support test is not met. Those criteria include, among others, a 10 percent base threshold for receipt of contributions from government or the general public, and that the organization must have a regular program for solicitation of funds from the public as well as a governing body representing broad public interests.

<sup>93</sup> See 2010 Form 990 Instructions, at p.13.

<sup>94</sup> See 2010 Schedule B Instructions, at p. 9.

<sup>95</sup> Id.

A detailed listing of the types of property to be reported in Part I is beyond the scope of this publication. The IRS has given a high level description of each type of property and some specific examples in the instructions to Schedule M. An organization that reports non-cash contributions on Schedule M is also required to disclose in the narrative section whether the disclosure of the number of contributions in Part I is the number of items contributed or the number of contributions, or a combination of the two.

**Noncash contributions** are reported on Form 990, Part VIII, Lines 1a and 1g, are included in Schedule A, and appear on Schedule B (subject to the thresholds noted above).

## F. Other Donation Forms to Consider

In addition to the required contribution disclosures on the annual Form 990, there are several additional IRS forms that may be required to be completed or filed by a community foundation that is the recipient of certain types of charitable **contributions**.

### 1. Form 8283, Noncash Charitable Contributions

The recipient organization of the contribution at issue should expect to complete and sign Part IV of Form 8283 to acknowledge receipt of **contributions** reported in Section B, generally hard to value property, for which a deduction of more than \$5,000 was claimed. The statement must be signed by an authorized tax return signer of the recipient charity, or party separately designated to sign Forms 8283. The authorized signer, in addition to acknowledging receipt of the property, is affirming that a Form 8282 will be filed if the property is disposed of within three years of receipt.<sup>96</sup>

### 2. Form 8282, Donee Information Return

Form 8282 should be filed by a charity receiving a contribution of certain charitable deduction property, whether directly or indirectly from a predecessor charity, if, within three years of original receipt, the charity sells, consumes, exchanges or otherwise disposes of the contributed property or some portion thereof. Charitable deduction property is defined in the Form 8282 instructions as donated property, other than money and **publicly traded securities**, where the value claimed exceeds \$5,000 per item or group of similar items. Exceptions to filing include donated items valued at not more than \$500 and property consumed or distributed in furtherance of the charitable missions of the recipient charity.<sup>97</sup>

The completion of Form 8282 will vary depending on whether the reporting entity is the original or successor charity. The bulk of the information to be reported on Form 8282, Parts I and II, is merely identifying information of the recipient charities. On Part III, the filing organization reports a description of the disposed property, how it was used by the organization, whether that use was related to the organization's exempt purposes, and whether the disposal was of a partial or entire interest in the property as well as key data and value received upon disposition.<sup>98</sup>

Form 8282 must be filed within 125 days following the date of disposition and should be signed by an officer of the filing organization. In general, a penalty of \$50 per form applies for failure to file or failure to supply complete and accurate information.<sup>99</sup>

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<sup>96</sup> See Form 8283 Instructions.

<sup>97</sup> See Form 8282 Instructions

<sup>98</sup> Id.

<sup>99</sup> Id.

The number of Forms 8282 filed by the organization during the **tax year** are disclosed in Part V on Line 7d of the Form 990, while the number of Forms 8283 received by the organization for which the organization completed Part IV, Donee Acknowledgement, are reported on Schedule M.

### 3. Form 8899, Notification of Income from Donated Intellectual Property

Form 8899 is used to report to the original contributor and to the IRS information regarding net income from qualified intellectual property following contribution to the charity. Qualified intellectual property includes, but is not limited to, patents, copyrights, trademarks, trade secrets or other know-how.<sup>100</sup>

A Form 8899 should be filed for the first 10 years, beginning with the initial year of contribution, in which net income is received from the qualified intellectual property. The Form 8899 is due the last day of the first full month following the end of the recipient organization's **tax year**. Note that a contributor must notify the charity receiving the qualified intellectual property that the contributor intends to treat the contribution as qualified intellectual property when the contribution is made. The charity has no requirement to file a Form 8899 for any **tax year** in which the qualified intellectual property fails to produce income.<sup>101</sup>

### 4. Form 1098-C, Contributions of Motor Vehicles, Boats, and Airplanes

Form 1098-C must be filed by every community foundation receiving a qualified vehicle, including a motor vehicle primarily for use on public transportation routes (streets and highways) as well as a boat or airplane, for which the contributor has claimed more than \$500 in value. The timing for filing of Form 1098-C is consistent with the IRS deadlines for other Forms 1099 and 1098; on or before March 1 of the subsequent year if paper filing or on or before March 31 of the subsequent year if filing electronically.<sup>102</sup>

## G. Other Public Charity Matters

A new organization is classified as a **public charity** during its first five **tax years** if it can show on its exemption application, on the basis of revenue projections in the organization's exemption application, that it can reasonably be expected to satisfy a public support test during that five-year period.<sup>103</sup> For Schedule A purposes, therefore, the organization is required to complete a support analysis for **tax years** that it was in existence, but does not go so far as to calculate the actual amount of public support. By providing this interim information, however, the charity should project whether it will in fact meet the public support test upon the expiration of its first five years and, if its current trend is not to meet the public support test, to then develop and implement a plan to attract **contributions** sufficient to meet its public support test as soon as possible.

As indicated in Schedule A, Part II, Line 18, an organization that fails both the one-third support and facts and circumstances tests will default to **private foundation** status and is instructed to complete a Form 990-PF. The ramifications of conversion to **private foundation** status are beyond the scope of this chapter, and we would highly recommend that a community foundation seek the advice of a professional tax advisor if it believes it will be required to check the box on Line 18 of Schedule A, Part II which indicates that the organization is a **private foundation**.

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<sup>100</sup> See Form 8899 Instructions

<sup>101</sup> Id.

<sup>102</sup> See Form 1098-C Instructions

<sup>103</sup> Treas. Reg. § 1.509(a)-3T (d) (1).

Concluding thoughts: Evidencing **public charity** support status is arguably one of the more important purposes served by Form 990 and supporting schedules. From a donor perspective, this information is extremely relevant to the extent it impacts the allowable charitable contribution deduction that may be claimed on an individual income tax return since lower limits (as a percentage of adjusted gross income) apply for **contributions to private foundations**.

The additional detail required for certain types of **contributions** appears to reflect the IRS's perception that abuses might exist in donors claiming charitable contribution deductions for **noncash contributions**, gaming activities, and charitable events.