

FORUM

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REDESIGNED IRS FORM 990 REQUIRES REPORTING ON CORPORATE POLICIES

By: Douglas C. Yohe, Esq. and Erin R. Bosley

Tax-exempt organizations will notice that IRS Form 990 looks different than forms filed in years past. The Form includes a new section, Part VI, entitled "Governance, Management and Disclosure," reflecting the IRS' focus on the corporate governance of tax-exempt organizations. Part VI, Section B, requires disclosures on corporate policies, including disclosures about an organization's conflict of interest policy, whistleblower and document retention policy, process for determining compensation, and involvement in joint ventures. While these policies are not required by federal law, the IRS considers such policies to improve tax compliance.

Section B presents a series of questions with respect to whether an organization has a written conflict of interest policy. A "conflict of interest" exists when a person in a position of authority over an organization, such as an officer, director, or manager, may benefit financially from a decision he or she could make in such capacity, including indirect benefits such as to family members or businesses with which the person is closely associated. A "conflict of interest policy" defines the conflicts of interest, identifies the classes of individuals within the organization covered by the policy, facilitates disclosure of information that may help identify conflicts of interest, and specifies procedures to be followed in managing conflicts of interest.

If the organization does have a written conflict of interest policy, it must indicate whether officers, directors or trustees, and key employees are required to disclose annually interests that could give rise to conflicts, such as a list of family members and substantial business affiliations or investment holdings. If the organization regularly and consistently monitors and enforces compliance with the policy, the organization must describe its practices for monitoring proposed or ongoing transactions for conflicts of interest and dealing with potential or actual conflicts. The description should include an explanation of which persons are covered under the policy, the level at which the determinations of whether a conflict exists are made, the level at which actual conflicts are reviewed, and any restrictions imposed on persons with a conflict.

An organization seeking to enact or update its conflict of interest policy should ensure that its conflict of interest policy is written, defines what a conflict of interest is, identifies who may have a conflict, requires disclosure of potential and actual conflicts, and prohibits conflicted individuals from making final decisions on matters.

Section B also requires an organization to state whether it has a written whistleblower policy. A whistleblower policy should encourage staff and volunteers to come forward with credible information on illegal practices or violations of adopted policies of the organization, specify that the organization will protect the individual from retaliation, and identify those staff or board members or outside parties to whom such information can be reported and the procedures that the organization will take in response to such allegations.

(See *IRS Form 990*, page 2)

BECOMING RAC READY

By: Steven M. Montresor, Esq.

The Recovery Audit Contractor ("RAC") program is live in Pennsylvania. Diversified Collection Services, Inc. ("DCS"), the RAC contractor for Pennsylvania, is authorized to commence reviewing providers' Medicare claims as early as August 1, 2009. Providers should be taking steps now to prepare for RAC audits.

The RAC program's mission is to reduce Medicare improper payments through the detection and collection of overpayments, the identification of underpayments, and the implementation of actions that will prevent future improper payments. Originally mandated as a three-year demonstration project in a limited amount of states, Congress ultimately mandated a nationwide expansion of the RAC program.

RACs will utilize a post-payment targeted review process using proprietary software to identify claims most likely to contain errors. Review will be either "automated" or "complex." Automated review will occur when a determination of error can be made without reviewing the medical record. Examples would include billing for more units than allowed in a day, clinically unbelievable issues, certain coding issues, duplicate claims and pricing mistakes. Complex review occurs when RAC personnel make a determination by reviewing the medical record. In complex review cases, the RAC will submit a record request to the provider which must be responded to within 45 days from receipt of the request.

Providers must be prepared to deal with the logistical challenges imposed by a RAC audit. Providers would be well-advised to designate a central point of contact for communicating with the RAC and develop a system to track all record requests and documentation forwarded in response to a request for records.

If the RAC determines that there has been an overpayment, it will ultimately issue a demand letter. Once the RAC issues a demand letter, a provider will have to determine whether to file an appeal. Generally, the appeals process tracks the Medicare appeals process. Providers may also elect to participate in a "discussion period," an informal resolution process initiated by sending a rebuttal letter to the RAC.

During the three-year demonstration project, most audit issues focused on medical necessity or coding determinations. Providers should continue to monitor DCS's website (www.dcsrac.com/issues.html) to determine which issues have been identified for potential audit. Providers should also prepare to identify high-risk and high-volume services likely to be targets of a RAC audit. Finally, providers may find it advisable to perform self-audits to identify any patterns of errors.

If you have any questions regarding RAC audits and appeal rights, Kimber L. Latsha and Steven M. Montresor are available to speak with you. ■

(IRS Form 990, continued from page 1)

Next, an organization must disclose whether it has a written document retention and destruction policy. Such a policy identifies the record retention responsibilities of staff, volunteers, board members, and outsiders for maintaining and documenting the storage and destruction of the organization's documents and records.

In addition, Section B asks whether the process for determining compensation of the organization's CEO, Executive Director, or top management official, as well as other officers and key employees, satisfies the "Rebuttable Presumption of Reasonableness"—that is, whether it includes a review and approval by independent persons, comparability data, and contemporaneous substantiation of the deliberation and decision. The process for determining compensation should include: (1) review and approval by a governing body or compensation committee, provided

that persons with a conflict regarding the compensation arrangement at issue were not involved; (2) use of data as to comparable compensation for similarly qualified persons in functionally comparable positions at similarly situated organizations; and (3) contemporaneous documentation and recordkeeping with respect to deliberations and decisions regarding the compensation arrangement. If the organization does use such a process, it must describe the process on Schedule O, identify the offices or positions for which the process was used to establish compensation of the persons who served in those offices or positions, and state the year in which this process was last undertaken for each such person.

Finally, an organization is asked whether it has invested in, contributed assets to, or participated in a joint venture or similar arrangement with a taxable entity. A joint venture means any joint ownership or contractual arrangement through which there



PROPOSAL TO RESCIND THE “NO-MATCH” RULE

By: ANGELA L. THOMAS, ESQ. AND DANIEL R. JAMESON

Under the Immigration and Nationality Act, it is unlawful for an employer, after hiring an alien for employment, to continue to employ the alien in the United States *knowing* the alien is (or has become) an unauthorized alien with respect to his or her employment. Effective September 14, 2007, the U.S. Immigration and Customs Enforcement, a division of the Department of Homeland Security (“DHS”), amended the regulations relating to the unlawful hiring or continued employment of unauthorized aliens. This amended regulation became known as the “no-match” rule.

Under the no-match rule, an employer could be deemed to have constructive knowledge of employing an unauthorized alien if the employer receives a written notice from the Social Security Administration (“SSA”) (commonly known as a “no-match” letter) that the combination of the name and the Social Security number submitted to the SSA for an employee does not match agency records. If the employer then fails to take reasonable steps to address the situation, and if the employee is in fact not authorized to work in the United States, the employer may be deemed to have known these facts.

This rule has drawn much debate and discussion. The rule was challenged in federal court before its effective date and the federal court granted the plaintiffs’ motion for a preliminary injunction on October 10, 2007. All proceedings have been stayed in the federal court case until February 2010 to allow for rulemaking proceedings.

The new administration has now reviewed the matter and it looks like the no-match rule may become permanently moot. On August 19, 2009, the Obama administration officially proposed rescinding the no-match rule, stating that the administration does not want to use the DHS’ limited resources to enforce it. Instead, it wants to focus on improving the U.S. Citizenship and Immigration Services’ electronic employment verification system (“E-Verify”) and encourage employers to participate in E-Verify.

With debate over the no-match rule forthcoming, it leaves employers wondering what to do. It is probably a best practice for employers not to ignore no-match letters, even though it appears the rule will not be enforced. In light of prohibitions against discrimination based on citizenship, employers should not be too quick to terminate employment when they receive no-match letters. However, employers would be well-advised to properly investigate and attempt to resolve the reasons for receiving no-match letters. If after investigation an employer cannot determine what action is appropriate, they may want to seek advice of counsel before making a decision.

If you have any questions on the no-match rule, the proposed rescission, or any other employment law matter, please contact Angela L. Thomas or Glenn R. Davis. ■—

is an agreement to jointly undertake a specific business enterprise, investment, or exempt-purpose activity without regard to (1) whether the organization controls the venture or arrangement, (2) the legal structure of the venture or arrangement, or (3) whether the venture or arrangement is treated as a partnership for federal income tax purposes, or as an association, or corporation for federal income tax purposes.

If the organization has invested in such a joint venture, it must state whether it has adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements under applicable federal tax law, and taken steps to safeguard the organization’s exempt status with respect to such arrangements. An organization has adopted such a policy or procedure if it has both: (1) adopted a written policy or procedure that requires the organization to negotiate, in its transac-

tions and arrangements with other members of the venture or arrangement, such terms and safeguards as are adequate to ensure that the organization’s exempt status is protected; and (2) taken steps to safeguard the organization’s exempt status with respect to the venture or arrangement.

Organizations that file Form 990 should review their corporate compliance plans, as some of these policies may already be a part of such plans. Whether a particular policy should be adopted will depend on many factors specific to each organization, but the ultimate goal of any policy should be to ensure sound operations and compliance with the tax law. ■—



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SEMINARS

PACAH Fall Conference	October 13, 2009	"Effectively Managing the Unionized Workplace"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.
55th Annual Education Law Association Conference	October 22, 2009	"Fourth Amendment Update"	Kevin M. McKenna, Esq.
Friends Services for the Aging	November 4, 2009	"Interviewing"	Angela L. Thomas, Esq.
AAHSA Annual Meeting	November 9, 2009	"Legal Update/Culture Change"	Kimber L. Latsha, Esq.
AAHSA Annual Meeting	November 9, 2009	"FMLA, ADA and Workers' Compensation: Today's Legal Challenge"	Glenn R. Davis, Esq. & Angela L. Thomas, Esq.

INSIDE THE FIRM

ERIN R. BOSLEY joined Latsha Davis Yohe & McKenna, P.C. in August 2009. She graduated from the Widener University School of Law, where she earned her Juris Doctorate. Ms. Bosley concentrates her practice in the areas of healthcare and transactional law.

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