Venable Model Nonprofit Governance Policies

Fall 2008 – Updated to Reflect the New Form 990

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

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

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

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

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

Finally, we hope that these documents lay the groundwork for year-round practices that strengthen and protect your organization well beyond the scope of annual reporting requirements. Simply adopting these policies as you find them may satisfy the narrow goal of being able to check the "yes" box on the IRS Form 990, but that alone affords little security in the long run. In fact, failure to enforce a written policy may cause your organization to be worse off than had it never adopted the policy at all. Use this period of adjustment to the new Form 990 to your advantage. Implement new policies to encourage candor and transparency, and revisit old policies that may prevent your organization from putting its best face forward. Good governance need not be overly burdensome or complicated, but it does take some thought.

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

* * *

Conflict of Interest Policy

Conflicts of interest are a central focus of Part VI of the new Form 990. Line 1b of Part VI asks for the number of "independent voting members" of an organization's governing board, and requires that an organization make a "reasonable" effort to determine any financial material benefit that might flow to board members and their families. Line 2 requires disclosure of any business or family relationships between officers, directors, trustees, or key employees. Line 12a asks whether or not an organization has formally adopted a conflict of interest policy. Line 12b asks whether or not an organization requires its leaders to make annual disclosure of potential conflicts. Line 12c asks whether or not an organization "regularly and consistently" monitors and enforces its conflict of interest policy.

Note that simply answering "yes" or "no" to these questions often will not suffice. Your organization is encouraged—and, in some cases, required—to further explain its particular procedure for handling conflicts of interest on Schedule O, *Supplemental Information*. Further, there are additional, more detailed inquiries about transactions with, for example, organization directors, in other sections of the Form 990. The IRS has indicated as part of its Form 990 redesign process that having a robust conflict of interest disclosure and enforcement process is encouraged, as doing so helps to protect against abuse of a tax-exempt organization by directors, officers, or other private interests. An effective conflicts policy allows an organization to collect the necessary information to identify related-party issues before an organization's board of directors takes a particular action.

Moreover, a well-drafted conflict of interest policy is likely broader in scope than the fiscal focus of the Form 990 instructions would suggest. Instructions to Line 12 state that a conflict of interest arises "when a person in a position of authority over an organization … may benefit financially from a decision he or she could make in such capacity," but not in other circumstances "involving a person's competing or respective duties to the organization 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." Your organization ought to think beyond the specific needs of Part VI and develop a policy that provides protection from all potential conflicts, not simply those that involve potential material gain.

There are many different ways to address conflicts of interest. Some policies are sparse, deferring in large part to the judgment of the board of directors; others spell out detailed procedures. Some organizations adopt separate policies for directors and employees; others implement one overarching policy for the entire organization and its affiliates. To satisfy the Form 990, however, your conflict of interest policy must have a few core elements. As such, each of three model documents that follow define the term "conflict of interest," identify the individuals who must adhere to the policy, require an annual disclosure of potential conflicts, and describe a means to resolve such conflicts as they occur.

Note that while conflict of interest policies and disclosure forms traditionally have applied only to organization directors and members of organization committees, the Form 990 asks specifically whether an organization's officers, directors or trustees, and key employees are required to disclose annually interests that could give rise to conflicts. As such, the sample policies and disclosure forms are designed to apply not only to directors, but also to committee and task force volunteers, officers and key employees. Many organizations may take issue with this sort of approach, and in particular may prefer to keep the requirements for disclosure of potential conflicts of interest for employees separate from disclosure for directors. For instance, many organizations may already require employees to disclose annually potential conflicts of interest as part of their employee handbooks. For the purpose of being able to check "yes" on line 12b of the Form 990, having separate conflict disclosure regimes for volunteer leaders and employees will not present a problem.

* * *

Sample A

ABC NONPROFIT
Conflict of Interest Policy

Members of the Board of Directors of the ABC Nonprofit ("ABC"), officers, volunteers, and key employees must act at all times in the best interests of ABC. Members of the Board, officers, volunteers, and key employees shall disclose all potential and actual conflicts of interest to the Board of Directors and, as required, remove themselves from all discussion and voting on any related matter. Specifically, members of the Board, officers, volunteers, and key employees shall:

- Avoid placing self-interest or the interests of a third party above the interests of ABC, and avoid the appearance of placing self-interest or the interests of a third party above the interests of ABC;
- Refrain from using ABC's staff, services, equipment, materials, resources, or property for personal or third-party gain, and from representing to third parties that authority as a Board member extends any further than that which it actually extends;
- Not engage in any outside business, professional conduct, or other activities that may be directly or indirectly adverse to the interests of ABC;
- Not solicit or accept gifts, gratuities, free travel, or any other item of value from any person or entity as a direct or indirect inducement to provide special treatment with respect to matters pertaining to ABC without fully disclosing such an exchange to the Board of Directors;
- Provide goods or services to ABC as a paid vendor to ABC only after full disclosure to, and advance approval by, the Board of Directors, and pursuant to any related procedures adopted by the Board;
- Not persuade any employee of ABC to leave the employ of ABC or to become employed by any person or entity other than ABC; and
- Not persuade or attempt to persuade any member, exhibitor, advertiser, sponsor, subscriber, supplier, contractor, or any other person or entity with an actual or potential relationship with ABC to terminate, curtail, or not enter into its relationship with ABC, or to reduce any benefit that may be provided to ABC with respect to such relationship.

This policy shall apply to the members of the ABC Board of Directors, but also shall apply to all members of ABC committees, task forces, and others in the ABC governance structure, as well as to ABC's key employees. On an annual basis, all individuals to whom this policy shall apply shall be provided with a copy of this policy and required to complete and sign an acknowledgement and disclosure form prepared by the Board of Directors.

*   *   *

Acknowledgement and Disclosure Form

I have read the ABC Nonprofit ("ABC") Conflict of Interest Policy set forth above and agree to comply fully with its terms and conditions at all times during my service as a member of the ABC Board of Directors, an officer, volunteer, or a key employee of ABC. If I become aware of any actual or potential conflicts of interest at any time following the submission of this form, or if the information provided below becomes inaccurate or incomplete, I will promptly notify the ABC Board of Directors or the Chief Executive Officer of ABC in writing.

Disclosure of actual or potential conflicts of interest:

____
____
____
____

Do you receive compensation as an Officer, Director, committee member, task force member, or key employee of ABC? ❑ Yes ❑ No

Other than reimbursement of reasonable expenses, have you received or do you expect to receive more than $10,000 per year from ABC for services provided as an independent contractor? ❑ Yes ❑ No

Have you received or do you expect to receive any material financial benefit from ABC in addition or apart from the benefits described in the above inquiries? ❑ Yes ❑ No

Does any family member receive compensation or material financial benefit from ABC? ❑ Yes ❑ No

Do you have a family relationship or business relationship with any current or former Officer, Director, or key employee of ABC?[1] ❑ Yes ❑ No

If you answered "Yes" to any of the above, please explain in a separate statement.

________________________ ________________________
Board Member Signature **Board Member Printed Name**

________________________ ________________________
Date **Title**

[1] This question does not apply to attorney-client or doctor-patient relationships, nor does it apply to relationships with clergy members.

Sample B

ABC NONPROFIT
Conflict of Interest Policy and Disclosure Form

Members of the Board of Directors of the ABC Nonprofit ("ABC"), officers, and key employees each have an affirmative obligation to act at all times in the best interests of ABC. This policy serves to define the term "conflict of interest," to assist members of the Board, officers, and key employees in identifying and disclosing such conflicts, and to minimize the impact of such conflicts on the actions of ABC whenever possible. (Collectively, this policy will refer to directors, officers, and key employees as "Covered Officials.")

Fiduciary duty. Each Covered Official has a fiduciary duty to conduct himself or herself without conflict to the interests of ABC. When acting within his or her capacity as a Covered Official, he or she must subordinate personal, business, third-party, and other interests to the welfare and best interests of ABC.

Conflict of interest defined. A "conflict of interest" is any transaction or relationship which presents, or may present, a conflict between a Covered Official's obligations to ABC and his or her personal, business, or other interests.

Disclosure. The Board of Directors recognizes that conflicts of interest are not uncommon, and that not all conflicts of interest are necessarily harmful to ABC. However, the Board requires full disclosure of all actual and potential conflicts of interest. Each Covered official shall disclose any and all facts that may be construed as a conflict of interest, both through an annual disclosure process and whenever such actual or potential conflict occurs.

Process and remedy. The Board of Directors will determine whether or not a conflict of interest exists, and whether or not such conflict materially and adversely affects the interests of ABC. A Covered Official whose potential conflict is under review may not debate, vote, or otherwise participate in such determination. If the Board of Directors determines that an actual or potential conflict of interest does exist, the Board shall also determine an appropriate remedy. Such remedy may include, for example, the recusal of the conflicted Covered Official from participating in certain matters pending before the Board or other ABC body.

Delegation. The Board of Directors may delegate its authority to review and remedy potential conflicts of interest to the ABC Executive Committee. Only disinterested members of the Executive Committee may participate in any such review. The Executive Committee shall inform the Board of its determination and recommended action. The Board shall retain the right to modify or reverse such determination and action, and shall retain the ultimate enforcement authority with respect to the interpretation and application of this policy.

Annual disclosure process. On an annual basis, each member of the Board of Directors shall be provided with a copy of this policy, and shall complete and sign the acknowledgement and disclosure form below.

ABC BOARD OF DIRECTORS
Annual Statement of Disclosure

I, ______________________________ (name printed), have read the Conflict of Interest Policy of ABC.

To the best of my knowledge and belief, neither I nor any person or organization with whom I have a personal or business relationship is engaged in any transaction or activity that may represent a conflict with my obligations to ABC.

To the best of my knowledge and belief, neither I nor any person or organization with whom I have a personal or business relationship intends to engage in any transaction, to acquire any interest in any organization or entity, or to receive any substantial gift or favor that may represent a conflict with my obligations to ABC.

To the best of my knowledge and belief, I do not expect to receive compensation from ABC, or to receive in excess of $10,000 annually from ABC for services I provide to ABC as an independent contractor, other than reimbursement of reasonable expenses.

To the best of my knowledge and belief, no member of my family expects to receive any compensation or material financial benefit from ABC.

To the best of my knowledge and belief, I have no family relationship or business relationship with any current member of the Board of Directors, any officer, or any key employee of ABC.

Any exception to the statements made herein are disclosed in full below.

Without Exception ____ (initial)

With Exception as Described Below ____ (initial)

Signature ___________________________ Date _______________

Sample C

ABC NONPROFIT & ABC FOUNDATION
Conflict of Interest Policy

In their capacity as directors, officers, and key employees, the individual leaders of the ABC Nonprofit ("ABC") and the ABC Foundation ("Foundation") must act at all times in the best interests of the organizations they represent.

1. What Is a Conflict of Interest?

A conflict of interest may arise in any circumstance that may compromise the ability of a director, officer, or key employee to make unbiased and impartial decisions on behalf of ABC or the Foundation. Such circumstances may involve family relationships, business transactions, professional activities, or personal affiliations.

The Board of Directors of ABC the Board of Directors of the Foundation require all directors, officers, and key employees to complete and submit an annual Statement of Disclosure detailing any facts or circumstances that might constitute a conflict of interest. The Board of Directors further requires directors, officers, and key employees to submit an amended Statement of Disclosure to reflect any material changes or additions to the submitted information that may arise during the course of the year. Officers, directors, and key employees are encouraged to err on the side of disclosure and to report any set of circumstances that may appear to pose a conflict of interest, even if there is uncertainty as to whether such circumstances should be disclosed.

2. How Are Conflicts of Interest Identified?

Each Audit Committee of ABC and the Foundation ("Audit Committee") will review each Statement of Disclosure for any set of facts or circumstances that may reflect an actual, potential, or apparent conflict of interest. The applicable Audit Committee may request the assistance of legal counsel to identify potential conflicts. When evaluating a particular set of facts or circumstances, the Audit Committee shall consider the following non-exhaustive list of factors that may indicate a conflict of interest:

- Solicitation or acceptance of gifts or other items of value that may create an appearance or expectation of special treatment in ABC or Foundation matters;
- Any incident of abuse or misuse of a leadership position for personal or third-party gain or benefit;
- Situations in which a director, officer, or key employee may be divided between personal interests or the interests of another organization and the best interests of ABC or the Foundation;
- Business, professional, or other activities that would materially and adversely affect ABC or the Foundation, either directly or indirectly; and,
- Any arrangement in which a director, officer, or key employee provides goods or services to ABC or the Foundation as a paid vendor.

The Audit Committee may request additional information from any director, officer, or key employee at any time; however, no individual whose relationships or activities are under review may participate in deliberations, debate, or any vote of the Audit Committee while such review is pending.

3. How Are Conflicts of Interest Resolved?

If the applicable Audit Committee, the Board of Directors of ABC, or the Board of Directors of the Foundation identifies an actual, potential, or apparent conflict of interest, it may take one of the following actions to resolve such conflict:

- ***Waive*** the conflict of interest as unlikely to affect the director's, officer's, or key employee's ability to act in the best interests of the organization;
- Determine that the individual director or officer should be ***recused*** from all deliberation and decision-making related to the particular transaction or relationship that gives rise to the conflict of interest. This course of action should apply particularly when the transaction or relationship is one which presents a conflict only with respect to one or two discrete programs or activities; or
- Determine that the individual director or officer must ***resign*** from his or her service to ABC or the Foundation. This course of action should apply when the conflict of interest is so pervasive that the director or officer would likely seldom, if ever, be able to act solely in the best interests of the organization.

The Board of Directors of ABC reserves final authority over the resolution of all conflicts of interest involving a director or officer of ABC. Likewise, the Board of Directors of the Foundation reserves final authority over the resolution of all conflicts of interest involving a director or officer of the Foundation. The appropriate Board of Directors may overrule any decision of the Audit Committee with regards to any actual, potential, or apparent conflict of interest, and the Audit Committee may refer any such matter to the Board of Directors at any time.

4. May Directors and Officers Do Business with ABC?

A conflict of interest exists any time a director, officer, or key employee seeks to enter into a business relationship with ABC or the Foundation. Similar conflicts may arise through family members or through organizations in which directors, officers, or key employees serve in a leadership, employment, or ownership capacity.

Such conflicts do not, however, necessarily preclude business relationships with ABC and the Foundation. The following procedure is designed to resolve conflicts of interest whenever a director, officer, key employee, or a related party, seeks to provide goods or services to ABC or the Foundation as a paid vendor, or applies to receive a significant grant or contract from either organization:

- The director, officer, or key employee must promptly disclose the intent to enter into a business relationship with ABC or the Foundation, either to the appropriate Audit Committee, the appropriate Board of Directors, or both.
- The director, officer, or key employee must recuse himself or herself from all deliberation, debate, and voting related to the contemplated business relationship.
- If the value of the transaction exceeds $5,000, ABC or the Foundation must solicit proposals or applications from a broad range of other qualified candidates for the agreement, contract, or grant under consideration.
- The appropriate Board of Directors must determine, without the presence or participation of the director, officer, or key employee under review, that the transaction is fair and in the best interest of ABC or the Foundation.
- If the appropriate Board of Directors approves the business relationship under consideration, the director, officer, or key employee may not participate in any process by which his or her performance as a vendor, grantee, or recipient is evaluated, or in any such evaluation of a related party.

*   *   *

The attached Statement of Disclosure shall be completed, signed and submitted annual basis.

*   *   *

ABC NONPROFIT & ABC FOUNDATION
Statement of Disclosure

As a director, officer, or key employee of ABC or the Foundation, I understand that I am obligated to disclose the existence of any facts or circumstances that may constitute a conflict of interest, as the term is defined in the Conflict of Interest Policy above.

- I have the following interests in third parties providing goods and services to ABC or the Foundation:

- I serve in a leadership capacity, have a significant investment, or own at least a one percent interest in the following entities or organizations that may have conflicting interests with those of ABC or the Foundation, or take public positions contrary to those of ABC or the Foundation:

- I expect to receive compensation from ABC or the Foundation in the following amount, not including reimbursement of reasonable expenses:

- The following members of my family expect to receive some form of compensation or material financial benefit from either ABC or the Foundation:

- Outside of my capacity as a director, officer, or key employee of ABC or the Foundation, I have a family relationship or business relationship with the following directors, officers, or key employees of either organization:

- I wish to disclose the following additional facts or circumstances:

I have read the ABC Conflict of Interest Policy in full, and understand that I am required to notify the appropriate Audit Committee, the Board of Directors of ABC, or the Board of Directors of the Foundation in the event of any material change to the answers I have provided in this statement.

Date: ____________________ Signed: _________________________

Whistleblower Policy

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

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

* * *

Sample A

ABC NONPROFIT
Whistleblower Policy

ABC Nonprofit, Inc. (“ABC”) is committed to high standards of ethical, moral, and legal business conduct. ABC is further dedicated to acting in good faith with those employees who raise concerns regarding incorrect financial reporting, unlawful activity, or otherwise improper conduct.

This Whistleblower Policy aims to provide employees with an avenue for raising such concerns, and to reassure such employees that they will be protected from reprisal or victimization as a consequence of reporting the alleged wrongdoing of any officer, director, employee, or agent of ABC.

Statement of Policy

No officer, director, employee, or agent of ABC shall take any harmful action with the intent to retaliate against any person, including interference with employment or livelihood, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any offense. Nor will any officer, director, employee, or agent of ABC take any harmful action with intent to retaliate against any person for reporting to an appropriate senior management or elected official of ABC the suspected misuse, misallocation, or theft of any Organization resources.

Safeguards

Harassment or Victimization – ABC will not tolerate the harassment or victimization of any employee who raises concerns under this policy.

Confidentiality – ABC will make every effort to treat a complainant’s identity with an appropriate regard for confidentiality, with the understanding that the details of complaints may need to be shared with others in order to investigate such complaints properly.

Anonymous Allegations – Because a thorough investigation often depends on an ability to gather additional information, ABC encourages complainants to put their names to allegations of wrongdoing. ABC will explore anonymous allegations to the extent possible, but will weigh the prudence of continuing such investigations against the likelihood of confirming the alleged facts or circumstances from attributable sources.

Bad Faith Allegations – Allegations made in bad faith may result in disciplinary action.

Procedure

Process for Raising a Concern:

Reporting – ABC intends this policy to be used for serious and sensitive issues. Such concerns, including those relating to financial reporting or unethical or illegal conduct, may be reported directly to: _______________, Executive Director. In the event that an individual's concern rises to the level that he/she reasonably believes that notice to the Executive Director will be disregarded or otherwise not fairly considered, the individual may then report violations or suspected violations either to the Chairman of the Board. Employment-related concerns should continue to be reported through supervisors and the Human Resources department.

Timing – The earlier a concern is expressed, the easier it is to take action.

Evidence – Although a complainant is not expected to prove the truth of an allegation, he or she should be able to demonstrate that he or she has made a report in good faith.

How the Report of Concern Will Be Handled:

Initial Inquiries – The Executive Director will make initial inquiries in consultation with legal counsel, if necessary, to determine whether or not further investigation is necessary or appropriate.

Further Information – The Executive Director may seek further information from any officer, director, employee, or agent of ABC, and shall take all reasonable precautions to protect the identity of the complainant to the extent possible while doing so.

Reporting – The Board of Directors and the Audit and Finance Committee shall receive information on each complaint. In consultation with the Executive Director and, if necessary, legal counsel, the Board of Directors will determine an appropriate response to a report of concern. Officers, directors, employees, and agents of ABC who may be implicated in such reports shall not participate in any deliberation of the Board of Directors related to the complaint, except to present information directly to the Board on his or her own behalf.

* * *

For additional information, please contact ______________, Executive Director.
ABC reserves the right to modify or amend this policy at any time.

Sample B

ABC NONPROFIT
Whistleblower Policy

Purpose This Whistleblower Policy is designed to provide a mechanism for employees and other organization leaders to raise good faith concerns regarding suspected violations of law or ABC policy; to facilitate cooperation in any inquiry or investigation by any court, agency, law enforcement, or other governmental body; and to protect individuals who take such action from retaliation or any threat of retaliation by any other employee or agent of ABC.

Scope This Policy applies to all ABC employees, including part-time, temporary, and contract employees, as well as directors, officers, and other organization volunteers.

Policy ABC is committed to maintaining a workplace where employees are free to raise good faith concerns regarding ABC's business practices. Employees should be encouraged to report suspected violations of the law on the part of ABC; to identify potential violations of ABC policy, including those contained the ABC Policies and Procedures Manual; and to provide truthful information in connection with any official inquiry or investigation.

ABC expressly prohibits any form of retaliation, including harassment, intimidation, adverse employment actions, or any other form of retaliation, against employees who raise suspected violations of law, cooperate in inquiries or investigations, or identify potential violations of ABC policies. Any employee who engages in retaliation will be subject to discipline, up to and including termination.

Procedure Reports of suspected violations of law or policy and reports of retaliation will be investigated promptly and in a manner intended to protect confidentiality. The Chief Ethics and Compliance Officer will manage such investigation, and may request the assistance of counsel or other outside parties as he or she deems necessary. The Chief Ethics and Compliance Officer will prepare a report of the findings of the investigation, and submit such report to the Board of Directors.

In the event that a report concerns the Chief Ethics and Compliance Officer, he or she shall recuse himself or herself from the proceedings, and the Board of Directors shall select an appropriate officer of ABC to continue the investigation.

Any employee who believes that he or she has been subjected to any form of retaliation as a result of reporting a suspected violation of law or policy should immediately report such incident to his or her supervisor, the Chief Ethics and Compliance Officer, or the Director of Human Resources. Supervisors, managers, and Human Resources staff who receive complaints of retaliation must immediately inform the Chief Ethics and Compliance Officer.

Document Retention and Destruction Policy

Although adapting to the Form 990 is the right occasion to formalize or revisit your document retention and destruction policy, it is likely that your organization is already taking steps to protect itself on this front. Most state nonprofit corporation statutes require a nonprofit entity to maintain its books and records and to make such documents available to its members. The Internal Revenue Code mandates that a tax-exempt entity retain certain information related to its tax exemption and its filings with the IRS. In one of the rare instances that it directly regulates the nonprofit sector, the Sarbanes-Oxley Act imposes criminal liability on any entity (including a tax-exempt organization) that destroys documents with the intent to obstruct a federal investigation.

Line 14 of Part VI asks whether or not your organization has a written document retention and destruction policy. The instructions require that such a policy outline the "responsibilities of staff, volunteers, board members, and outsiders for maintaining and documenting the storage and destruction of the organization's documents and records."

As noted in our introduction, Venable is not able to provide a "one-size-fits-all" detailed document retention and destruction policy and schedule. Effective document retention and destruction policies are tailored an organization's unique issues and activities. If you do not have a detailed document retention and destruction policy, we urge you to seek legal counsel's assistance in crafting a policy that suits your organization's particular needs.

In the meantime, for purposes of being able to respond "yes" to the IRS Form 990, we have provided a very brief statement that meets the technical requirements of the instructions accompanying Line 14. This brief policy statement should not be considered satisfactory to meet an organization's long-term document retention and destruction needs. To that end, we have provided a sample table of contents and a sample statement of policy from a comprehensive record retention policy that should provide an indication of the necessary scope of an effective policy and schedule. For more information on an effective policy and documents schedule, please see the frequently asked questions document available on Venable's website (www.venable.com/recordsfaq).

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ABC NONPROFIT
Record Retention Policy

1. General

It is the ABC Nonprofit's ("ABC") policy to maintain complete, accurate and high quality records. Records are to be retained for the period of their immediate use, unless longer retention is required for historical reference, contractual, legal or regulatory requirements or for other purposes as may be set forth herein. Records that are no longer required, or have satisfied their required periods of retention, shall be destroyed.

No officer, director, employee, volunteer, or agent of ABC shall knowingly destroy a document with the intent to obstruct or influence the investigation or proper administration of any matter within the jurisdiction of any government department or agency or in relation to or contemplation of any such matter or case. This policy covers all records and documents of ABC. ABC reserves the right to amend, alter and terminate this policy at any time and for any reason.

2. Responsibility for Administration

The President/CEO of ABC (or his/her staff designee) shall be responsible for administering this policy. As part of this role, the President/CEO of ABC (or his/her staff designee), in consultation with legal counsel, shall ensure that ABC documents and records retained by officers, directors, employees, volunteers, or agents are stored or destroyed in a manner consistent with this policy.

ABC NONPROFIT
Record Retention Policy

<u>Sample Table of Contents</u>

ABC NONPROFIT
Record Retention Policy

Sample Introductory Provisions of Records and Information Management Policy

1. Introduction

1.1 General

The Organization has adopted this Records and Information Management Policy (the "Policy") regarding the management, retention, and destruction of records in an effort to ensure the presence of adequate space for the storage of current records and to account for appropriate operational and legal considerations. Failure to comply with this Policy can cause negative consequences, including excess storage costs and inability to locate records that are needed. In addition, adherence to this Policy will assist the Organization in complying with legal requirements and in responding to subpoenas and document production requests.

1.2 Records Covered

This Policy covers Organization records and documents as defined below in Section 3. Guidelines for management and treatment of general categories of records are set out in Section 5. Appendix A to this Policy lists the retention period applicable to each specific type of record.

1.3 Reservation of Rights

The Organization reserves the right to amend, alter and terminate this Policy at any time and for any reason.

2. Statement of Policy

It is the Organization's policy to maintain complete, accurate and high quality records. Records are to be retained for the period of their immediate use, unless longer retention is required for historical reference, contractual, legal, or regulatory requirements or for other purposes as set forth herein. Records that are no longer required, or have satisfied their required periods of retention, shall be destroyed as described in this Policy.

Compensation Policy

The new Form 990 subjects the compensation of officers and key employees to considerable scrutiny. For the first time, all tax-exempt entities—not simply 501(c)(3) organizations—are required to publicly disclose the salaries of their five highest paid employees. Organizations must also account for a more complete picture of executive compensation, describing any retirement plan contributions, deferred compensation, or health and welfare benefits that may complement reportable wages.

Line 15a of Part VI requires your organization to detail the process by which it approves compensation for your Chief Executive Officer, Executive Director, and top management officials. Line 15b asks you describe the process used to approve compensation for any other officers or key employees.

Before your organization may answer "yes" with respect to setting compensation for any of these "Covered Individuals," you must implement a compensation policy that includes three basic elements:

- The organization's board of directors, or a committee tasked with setting compensation, must approve the compensation arrangement;
- The board of directors or its committee must have obtained and relied upon appropriate comparability or benchmarking data—such as industry surveys or compensation studies—prior to making its decision; and
- The board of directors or its committee must adequately document the basis for its decision at the time it is made.

A compensation policy that meets these requirements will satisfy the Form 990. In addition, a nonprofit organization that chooses to adhere to a policy with these three elements creates additional grounds to defend itself from any allegation of excessive compensation.

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ABC NONPROFIT
Compensation Policy

In compliance with Internal Revenue Service guidelines for approval of senior management compensation, the Board of Directors of ABC Organization ("ABC") will follow the following review and approval guidelines.

<u>Individuals Subject to this Policy</u> (defined as "Covered Individuals"):

- Chief Employed Executives: The individual or individuals who have the ultimate responsibility for implementing the decisions of ABC's governing body or for supervising the management, administration, or operations of ABC, including ABC's top management official and top financial official. If this ultimate responsibility resides with two or more individuals who may exercise such responsibility in concert or individually, then each individual should be included.

- Officers: A person elected or appointed to manage ABC's daily operations, such as a president, vice-present, secretary, or treasurer. The officers of an organization are determined by reference to its organizing document, bylaws, and include, at a minimum, those officers required by applicable state law.

- Key Employees: Individuals who are not a Chief Employed Executive or an officer of ABC, but who meet all of the following criteria:

    1. *$150,000 Threshold*. The individual receives reportable compensation[1] from ABC and all related organizations[2] in excess of $150,000 for the calendar year ending with or within ABC's tax year;

    2. *Responsibility Criteria*. The individual:

        a) has responsibilities, power or influence over ABC as a whole that is similar to those of officers, directors, or trustees;
        b) manages a discrete segment or activity of ABC that represents 10% or more of the activities, assets, income, or expenses of the organization, as compared to the organization as a whole; or
        c) has or shares authority to control or determine 10% or more of ABC's capital expenditures, operating budget, or compensation for employees.

    3. *Top 20 Limitation*. In addition to meeting the $150,000 threshold and the Responsibility Criteria, the individual is one of the top 20 most highly compensated employees (including all income from ABC and related organizations) for the calendar year ending with or within ABC's calendar year.

Procedure for Approving Compensation

In reviewing and approving the compensation of any Covered Individuals, the ABC Organization Board of Directors, or a delegated committee of the Board (referred to as the "Approval Body" below), will utilize the following process:

1. Impartial Decision Makers. The compensation arrangement must be approved in advance (before any payment is made) by the Approval Body of ABC composed entirely of individuals who do not have a conflict of interest with respect to the compensation arrangement (example: neither the executive whose compensation is being determined nor any of his/her family members may be present during the discussion/debate or participate in the vote).

2. Comparability Data. When the Approval Body is considering compensation to Covered Individuals, it must rely on comparability data that demonstrate the fair market value of the compensation in question. For example, when crafting compensation packages, the Approval Body must secure data

[1] Compensation that is reported on Form W-2, Box 5, or in Box 1 if the employee's compensation is not reported in Box 5, or Form 1099-MISC, Box 7, filed for the calendar year ending with or within the organization's tax year
[2] An organization that stands in one or more of the following relationships to the filing organization: (1) Parent – an organization that controls the filing organization; (2) Subsidiary – an organization controlled by the filing organization; (3) Supporting/Supported – an organization that is (or claims to be) at any time during the organization's tax year (i) a supporting organization of the filing organization within the meaning of Section 509(a)(3), if the filing organization is a supported organization within the meaning of Section 509(f)(3), or (ii) a supported organization, if the filing organization is a supporting organization.

that documents compensation levels for similarly qualified individuals in like positions at like organizations. This data may include the following:

a) expert compensation studies by independent firms;
b) written job offers for positions at similar organizations;
c) documented telephone calls about similar positions at both nonprofit and for-profit organizations; and
d) information obtained from the IRS Form 990 filings of similar organizations.

3. Concurrent Documentation. The Approval Body must document how it reached its decisions, including the data on which it relied. To qualify as concurrent documentation, written or electronic records of the Approval Body (such as meeting minutes) must note:

a) the terms of the compensation and the date it was approved;
b) the members of the Approval Body who were present during the debate on the compensation that was approved and those who voted on it;
c) the comparability data obtained and relied upon and how the data were obtained; and
d) any actions taken with respect to consideration of the compensation by anyone who is otherwise a member of the Approval Body but who had a conflict of interest with respect to the decision on the compensation.

Joint Venture Policy

Tax-exempt organizations and taxable entities frequently team up to take advantage of available business opportunities. These interactions are increasingly common, but joint ventures with taxable entities may raise some concerns. A tax-exempt organization that operates substantially outside its express tax-exempt purposes risks a revocation of its tax-exempt status. Even if unrelated activities are carefully limited, revenue generated from a joint venture may still constitute unrelated business income subject to federal income tax (this tax is often referred to as "UBIT").

Because 501(c)(3) organizations are subject to different and more restrictive standards than 501(c)(4) and 501(c)(6) organizations with regard to the types of activities such organizations may engage in, these concerns may also extend to a joint venture between a public charity and a different type of tax-exempt entity. Simply put, every joint venture should be governed by a written agreement, reviewed by counsel, and designed to protect your tax-exempt status.

The new Form 990 asks your organization to take an additional step in preparation for such joint ventures. Line 16a of Part VI asks whether or not your organization has invested in, contributed assets to, or otherwise participated in a joint venture or similar arrangement with one or more taxable entities within the past taxable year. A "yes" response prompts your organization to answer Line 16b: "has the organization adopted a written policy or procedure requiring the organization to evaluate its participation in joint venture arrangements . . . and taken steps to safeguard the organization's exempt status with respect to such arrangements?"

The instructions define a "joint venture or similar arrangement" as "any joint ownership or contractual arrangement through which there is an agreement to jointly undertake a specific business enterprise, investment, or exempt-purpose activity." In essence, Line 16 asks whether an organization has adopted a set of basic principles to follow in the negotiation of any joint venture with a taxable entity or entity with tax exempt status under a different section of the Internal Revenue Code. The model document that follows is a brief statement of such principles.

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ABC NONPROFIT
Joint Venture Policy

In compliance with Internal Revenue Service guidelines for approval and management of any joint venture entered into by ABC Nonprofit, Inc. ("ABC"), the Board of Directors adopts the following guidelines.

<u>Activities Subject to this Policy</u>

For the purposes of this policy, the term "Joint Venture" is defined as any arrangement, including contractual or more formal arrangements undertaken through a limited liability company, partnership, or other entity, though which ABC and another entity jointly undertake any activity or business venture, or otherwise agree to joint ownership of any asset. A Joint Venture may include both taxable and tax-exempt activities.

<u>Approval and Management of Joint Activities</u>

Before making any decision to participate in a Joint Venture, ABC will ensure that the Joint Venture furthers ABC's exempt purposes and will negotiate at arm's length contractual and other terms of participation that safeguard ABC's exemption from federal income tax. Such terms shall be in writing in the operating agreement of the Joint Venture and shall include the following minimum requirements:

- With respect to any whole joint venture (that is, a joint venture in which ABC contributes substantially *all* of its assets to the enterprise), ABC's control over the Joint Venture through fifty-one percent (51%) or more of the voting rights and/or veto power;
- With respect to any ancillary joint venture (that is, a joint venture to which a portion of ABC's resources are contributed), ABC would, at a minimum, maintain sole control over the tax-exempt aspects of the Joint Venture and would have voting and ownership interests in the Joint Venture that are consistent with ABC's capital contributions;
- A requirement that any subsequent contract with ABC's partner in the Joint Venture be negotiated at arm's length and for fair market value;
- A requirement that the Joint Venture give priority to ABC's tax-exempt purposes over maximization of profit for the participants of the Joint Venture; and
- A prohibition on activities that would jeopardize ABC's tax-exempt status.

Where there is any question as to whether a particular Joint Venture may pose a risk to ABC's tax-exempt status, a decision to enter into such Joint Venture will be made only in consultation with legal and/or tax counsel.

Approval of the Form 990

Part VI, Section A, line 10 of the new Form 990 asks: "Was a copy of the Form 990 provided to the organization's governing body before it was filed? All organizations must describe in Schedule O the process, if any, the organization uses to review the Form 990." The instructions suggest that, so long as the voting members of your board of directors receive a paper or electronic copy of the Form 990 prior to filing—even if they choose not to review the document—they may answer "yes" to the question on line 10.

Although this hurdle seems small and does not require you to adopt any specific policy, it does require a detailed description of the review process. For some organizations, providing an advance copy of the Form 990 for review and approval to the full board of directors will simply be an impossible task. However, such organizations may consider allowing a smaller subset of its board have the ability to review and approve the form, such as an executive committee or an audit committee.

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