Form 990 Policies – Is It Better to Check “Yes” or “No”?
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The questions regarding certain governance policies referenced by the revised Form 990 have caused quite a stir since the revised Form 990 was released. Scattered throughout the Form 990 (2011) are governance questions which may be influenced by the presence or lack of policies, such as:

- Conflict of Interest Policy (Part VI, Section B)
- Executive compensation approval process (Part VI, Section B)
- Document Retention and Destruction Policy (Part VI, Section B)
- Gift Acceptance Policy (Schedule M)
- Meeting minutes document practices (Part VI, Section A)
- Review process of Form 990 by the Board of Directors (Part VI, Section B)
- Whistleblower Policy (Part VI, Section B)
- Joint Venture Policy, if applicable (Part VI, Section B)
- Policies regarding chapters, affiliates, and branches, if applicable (Part VI, Section B)

An organization can only check yes to having a policy if its board of directors (or a committee of the governing body, if the governing body delegated authority to that committee to adopt the policy) has adopted the policy by the end of its tax year and the policy is applied to the organization as a whole. (2011 Form 990 Instructions). What does this mean for organizations if they didn’t have such policies (i.e., does it lead to penalties or increased scrutiny from the IRS)?

The answer is, not surprisingly, it depends. The IRS explains in the 2011 instructions to Form 990 that the policies and procedures requested in Part VI, Section B are generally not required under the Internal Revenue Code. However, the IRS goes on to state that “the IRS considers such policies and procedures to generally improve tax compliance. The absence of appropriate policies and procedures can lead to opportunities for excess benefit transactions, inurement, operations for non-exempt purposes, or other activities inconsistent with exempt status.” Therefore, it likely will be a “bad fact” for an organization facing an IRS audit to lack such policies (or efforts to adopt such policies) and might actually contribute to an IRS decision to examine or audit an organization in the first place (see, e.g., IRS Governance Checklist, Part 5 – Conflict of Interest and Part 7 – Document Retention). From a practical standpoint, regardless of potential penalties in the future, such policies are encouraged because they provide helpful and, in some cases, critical guidance for better management of an organization.

“Yes,” we have a policy!
Having a policy that has been adopted by the board can indicate good governance, assuming certain other conditions have also been met in implementing and enforcing this policy. The value of a policy in promoting good governance depends on more than simply having a document titled “____ Policy.” Policies, like an organization’s bylaws, are living documents that should be reviewed and revised throughout the organization’s life cycle. Questions to ask include:
• Where did the policy come from? Is this a wholesale adoption of another organization’s policy? Has it been vetted for legal compliance?
• When was the last time the policy was reviewed? Have the laws changed since then? Has the organization changed since then?
• Does the organization currently have the capacity – staff, financial resources, or otherwise – to adhere to the policy?
• Do the appropriate parties have and understand the policy (e.g., officers and directors understand and have signed a conflict of interest policy)?
• Is there anything we don’t understand about a certain policy? Should we seek assistance (e.g., counsel) for further clarification?
• In practice, are we actually turning to these policies for guidance (e.g., referring to a gift acceptance policy when accepting major gifts)?
• What past governance issues have occurred and did these policies actually help in these situations? Does the policy need to be further altered or fine-tuned to fit the organization’s needs?

(Note: Changes to policies are not required to be reported to the IRS unless such polices or procedures are contained within the organizing documents or bylaws and regarding certain subject matter such as conflicts of interest. See 2011 Form 990 Instructions.).

Bottom line: Read, understand, and follow your policy. Review, revise as necessary, and repeat.

“No,” we don’t.
Being able to report “yes” to having a policy probably feels better than having to mark “no,” but organizations without these encouraged policies should not rush to adopt a policy just to join the “yes” group. Some organizations may fear that marking “no” on the publicly available Form 990 annual return will reflect poorly on the organization. However, the benefit of appearing to have good governance is severely undercut when an organization is not exercising good governance in practice. Furthermore, if an organization says “yes” to having adopted a particular policy, the public and the authorities such as the IRS will understandably expect the organization to follow it.

This is not to say these policies should be put on the back burner indefinitely. This is only to emphasize developing such policies takes time. Given that the revised Form 990 first went into effect for the 2008 tax year, organizations should be taking steps to join the “yes” group even if they currently have to mark “no” to having such policies on this tax year’s Form 990. Thoughtful considerations about how to get to “yes” can include questions such as:

• Which policies have a higher priority based on the circumstances of the organization? For example, an organization that frequently accepts non-cash gifts may have a more pressing urgency to adopt a useful gift acceptance policy as opposed to an organization that hardly, if ever, accepts donations from the public.
• What are anticipated governance issues or past governance issues that these policies should address?
• What kind of capacity limitations – staff, financial resources, or otherwise – should we be mindful of in drafting and adopting a new policy?
• What is the projected timeline for drafting such policy and presenting it to the board?
• If anticipating a prolonged delay (due to resources, time, etc.) before formally adopting such policies, what problems might this cause and what can the organization do to help mitigate these risks?
• Is the organization prepared to explain to the IRS, its constituents, or others why it currently does not have a certain policy and articulate its action plan moving forward to adopt one?

Additionally, it is important to note an organization lacking the recommended policies is not without any recourse on the Form 990. For example, Schedule O (2011) allows for supplemental narratives to further explain the policies or processes used at the organization to address these governance concerns.
Bottom line: It is worse to adopt a policy that will not be followed or one that causes more problems than benefits than having to say “no” while in the process of developing a thoughtful governance policy.

Are we focusing on the bigger picture?
The question is really less about whether to check “yes” or “no” and more about what purposes these policies serve for the organization and whether steps are being taken to adopt these encouraged governance policies in an appropriate way for the organization. The Form 990 can be a marketing tool, but it's not just about being a good marketer. It's about being a good organization in practice as well.