Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies

November 14, 2013

Venable LLP

Washington, DC

Moderator:

Jeffrey S. Tenenbaum, Esq., Venable LLP

Panelists:

Robert L. Waldman, Esq., Venable LLP

Richard F. Larkin, CPA, BDO USA, LLP

Yosef Ziffer, Esq., Venable LLP

Presentation

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Thursday, November 14, 2013, 12:30 p.m. – 2:00 p.m. ET

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Upcoming Venable Nonprofit Legal Events

December 5, 2013 – Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws

January 15, 2014 – Protecting Your Nonprofit from Fraud and Embezzlement: Best Practices, Common Pitfalls, and Practical Tips and Strategies

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Agenda

- Complying With (or Deviating From) Donor Intent: Recent Developments for Nonprofits
- Donor Restrictions on Contributions
- Factors to be Considered in Deciding Whether a Gift or Pledge Subject to Donor Stipulations is Conditional or Restricted
- Gift Acceptance Policies
  - Gift Acceptance Policies
  - Internal Governance Issues
  - Specific Types of Gifted Property

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Complying With (or Deviating From) Donor Intent: Recent Developments for Nonprofits

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Common Gift Restrictions

- Restricted purpose of gift
- Investment restrictions
- Holding period: Ability to sell or transfer gift
- Endowment : Invasion of principal
- Naming

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Some Basic Concerns

- Availability of charitable deduction if restrictions are too severe
- Accounting issues
- Impact of restriction on tax-exempt status
- Getting "sideways" with the donor
- Potential embarrassment associated with restriction

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Recent Donor Intent Cases

- Princeton sued for misusing gift to prepare graduate students for careers in foreign service
- JHU dispute over development of farm property
- Ipswitch public schools: Sale of property in deviation from terms of a 350 year-old charitable trust that provided “for euer . . . sayd land not to bee sould nor wasted.”
- New Jersey animal shelter case: Deviating from the stated purpose of a gift

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Uniform Prudent Management of Institutional Funds Act (UPMIFA)

- UPMIFA permits deviation (in management, investment or purpose)
  – With Donor consent
  – With court and Attorney General approval
  – UPMIFA permits prudent “appropriation” of an Endowment Fund

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Lessons Learned

- Gift agreements should be clear and specific
- Leave room for flexibility
- Consider the possibility for changed circumstances

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Donor Restrictions on Contributions

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Donor Restrictions on Contributions

The existence of donor restrictions on contributions is one of the main reasons why accounting for contributions received (as originally set forth in FASB Statement 116, now codified in Accounting Standards Codification Topic 958-605, and further discussed in Chapter 5 of the AICPA audit guide for nonprofits) is one of the most complex areas in all of accounting - not just 'nonprofit' accounting, but all accounting. Distinguishing between donor restrictions and donor conditions is especially challenging.

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General Rules

Applicable to All Types of Contributions

- Timing of revenue recognition
  - Unconditional gift or pledge – when made (communicated to donee)
  - Conditional gift or pledge – when condition is substantially met
- Valuation – Fair value at date of gift (can be challenging for some non-cash gifts)
- Contribution is never recorded as deferred income, except:
  - Conditional gift already paid (refundable advance)
  - Pooled income fund (a type of split interest)

General Rules (cont'd.)

Applicable to All Types of Contributions

- Reported in class according to any donor restrictions:
  - Unrestricted; temporarily restricted; permanently restricted *[Note - FASB is currently considering revisions to this class structure. They have tentatively decided to collapse the two restricted classes into one for reporting purposes.]*
  - If temporarily restrictions are met in same period as received, may report as unrestricted
    - If this is done, must be consistent for all such contributions and investment income
  - Note that these rules apply only to revenue with restrictions imposed by the donor of a gift, not to legal restrictions imposed by contract or by law.
  - Generally, restrictions apply only to net assets. Sometimes a donor will restrict specific assets.

Judgments Often Encountered with Contributions

- Is it a contribution or an exchange?
- Is it to or for the benefit of this organization?
- Is it a promise or just an intention?
- Is it conditional or unconditional?
  - Is there an *uncertain future event* which must occur before gift becomes final?
  - How uncertain does it have to be? Judgment

Judgments Often Encountered with Contributions (cont'd.)

- Is it restricted or unrestricted?
  - Only the *donor of a gift* can place a legally binding restriction
  - Board designated amounts are <u>not</u> restricted
    - Because board can undesignate as it wishes
- When has the restriction been met?
- Does the volunteer work require specialized skills?
- Would the recipient otherwise have to purchase the volunteers' services?

Judgments Often Encountered with Contributions (cont'd.)

Note that 'judgments' as used here (qualitative) differ from 'estimates' (quantitative).

For some of these, the accountant needs to try to get inside the donor's head and understand his/her real intentions. Donor communications can be maddeningly vague. When in doubt, ask the donor if possible, or consult an attorney - this is basically a legal determination.

There are special rules regarding 'pass-through' gifts (from A to B for the benefit of C), donated services of volunteers, split-interests (gift annuities, remainder trusts, etc.), and gifts of museum collection items.

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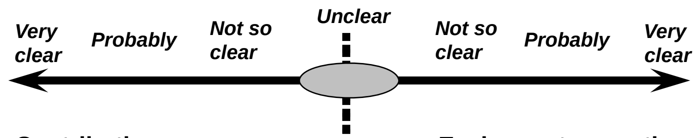
THE ACCOUNTING CONTINUUM



Contribution	vs.	Exchange transaction
Unrestricted	vs.	Restricted (by donor)
Intention to give (or less)	vs.	Promise to give
Conditional	vs.	Unconditional
To this organization	vs.	To another organization
Not a specialized skill	vs.	Specialized skill
Would not have to purchase	vs.	Would have to purchase

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Factors to be Considered in Deciding Whether a Gift or Pledge Subject to Donor Stipulations is Conditional or Restricted

(as discussed in SFAS #116/ASC 958-605)

Donor Stipulations

- Donors place many different kinds of stipulations on pledges and other gifts. Some stipulations create legal <u>restrictions</u> which limit the way in which the donee may use the gift. Other stipulations create <u>conditions</u> which must be fulfilled before a donee is entitled to receive (or keep) a gift.

Donor Stipulations (cont'd.)

In SFAS 116, FASB defines a condition as an uncertain future event which must occur before a promise based on that event becomes binding on the promisor. In some cases, it is not immediately clear whether a particular stipulation creates a condition or a restriction. (Some gifts are both conditional and restricted.) Since accounting for the two forms of gift is quite different, it is important that the nature of a stipulation be properly identified so that the gift is properly reported as to time and class of net assets.

Factors for Consideration

- Following is a list of factors to be considered by:
  - Recipients (and donors) of gifts, in deciding whether a pledge or other gift which includes donor stipulations is conditional or restricted; and
  - Auditors, in assessing the appropriateness of the client's decision.
- In many cases, no one of these factors will be determinative by itself; all applicable factors should be considered together.

Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional	Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted
Factors related to the terms of the gift/pledge:	
1. The document uses words such as: If; * Subject to; * When; Revocable. (D)	The document uses words such as: Must; For; Purpose; Irrevocable.
2. Neither the ultimate amount nor the timing of payment of the gift are clearly determinable in advance of payment.	At least one of the amount and/or timing are clearly specified.
3. The pledge is stated to extend for a very long period of time (over, say, 10 years) or is open-ended. (Often found with pledges to support a needy child overseas, or a missionary in the field)	The time is short and/or specific as to its end.

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Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be <u>conditional</u>	Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be <u>restricted</u>
Factors related to the terms of the gift/pledge:	
4. The donor stipulations in the document refer to <u>outcomes</u> expected as a result of the activity (with the implication that if the outcomes are not achieved, the donor will expect the gift to be refunded, or will cancel future installments of a multi-period pledge.[1a]) * (Such gifts are likely also restricted.)	The donor stipulations focus on the <u>activities</u> to be conducted. Although hoped-for outcomes may be implicit or explicit, there is not an implication that achievement of particular outcomes is a requirement.[1b] *
5. There is an explicit requirement that amounts not expended by a specified date must be returned to the donor.	There is no such refund provision, or any refund is required only if money is left after completion of the specified activities.

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Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be <u>conditional</u>	Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be <u>restricted</u>
Factors related to the terms of the gift/pledge:	
6. The gift is in the form of a pledge.	The gift is a transfer of cash or other non-cash assets.
7. Payment of amounts pledged will be made only on a cost-reimbursement basis. (D)	Payment of the gift will be made up front, or according to a payment schedule, without the necessity for the donee to have yet incurred specific expenses.
8. The gift has an explicit matching requirement (D), or additional funding beyond that already available will be required to complete the activity.	Factor not present.

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Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional	Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted
Factors relating to the circumstances surrounding the gift:	
9. The action or event described in the donor's stipulations is largely outside the control of the management or governing board of the donee. [2a] *	The action or event is largely within the donee's control. [2b] *
10. The activity contemplated by the gift is one which the donee has not yet decided to do; it is not certain whether the activity will actually be conducted. *	The donee is already conducting the activity, or it is fairly certain that the activity will be conducted. *
11. There is a lower probability that the donor stipulations will eventually be met.	There is a higher probability.

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Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be conditional	Factors whose presence in the grant documents, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be restricted
Factors relating to the circumstances surrounding the gift:	
12. The activities to be conducted with the gift money are similar to activities normally conducted on a for-profit basis by the donee or by other organizations.	The activities are not similar.
13. As to any tangible or intangible outcomes which are to be produced as a result of the activities, these products will be under the control of the donor. (In such cases, the payment may not be a gift at all; rather it may be a payment for goods or services.)	Any outcomes will be under the control of the donee, or will be in the public domain.

Notes:
D - Presence of this factor would normally be considered determinative. Absence of the factor is not necessarily determinative.
* - Factors which would generally be considered more important.

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Notes

1a. Examples of outcomes contemplated by this factor include: • Successful creation of a new vaccine; • Production of a new television program; • Commissioning a new musical composition; • Establishing a named professorship; • Reduction in the teenage pregnancy rate in a community; • Construction of a new building; • Mounting a new museum exhibit.	1b. Examples of activities contemplated by this factor include (but see Factor 10**): • Conduct of scientific or medical research; • Broadcasting a specified television program; • Performing a particular piece of music; • Paying the salary of a named professor; • Counseling teenagers judged at risk of becoming pregnant; • Operating a certain facility; • Providing disaster relief.
2a. Examples of events contemplated by this factor include: • Actions of uncontrolled third parties, e.g.: - other donors making contributions to enable the donee to meet a matching requirement of this gift; - a government granting approval to conduct an activity (e.g., awarding a building or land use permit, or a permit to operate a medical facility); - an owner of other property required for the activity making the property available to the organization (by sale or lease); • Natural and manmade disasters; • Future action of this donor (such as agreeing to renew a multi-period pledge in subsequent periods); • The future willingness and ability of a donor of personal services to continue to provide those services (see SFAS 116, par. 70, third sentence).	2b. Examples of events contemplated by this factor include (but see Factor 10 **): • Eventual use of the gift for the specified purpose (e.g. those listed in Note 1b above), or retention of the gift as restricted endowment; • Naming a building for a specified person; • Filing with the donor routine financial or operating performance reports on the activities being conducted. ** - There is a presumption here that the right column of Factor 10 applies.

Events outside of the donee's control, but which are virtually assured of happening anyway at a known time and place (e.g., astronomical or normal meteorological events), and the mere passage of time, are not conditions.

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Gift Acceptance Policies

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Topics for Discussion

- Gift acceptance policies
- Internal governance issues
- Specific types of gifted property

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Gift Acceptance Policies

- Establish prospectively to guide the organization in soliciting, procuring, and “closing” gifts
- Policy should govern both acceptance and disposition of gifted property
  – In many instances, the true “value” of a gift is in the proceeds that arise upon disposition

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General Comments

- No specific rules or laws directly on point
- Gift policies are not required. Rather, part of "best practices."
- Policy should "fit" the organization and reflect a workable and helpful process

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Sample Structure of Gift Policy

- Statement of mission, values, guiding principles, and organizational priorities
- Overview of different types of gifts and criteria for acceptance and disposition
- Procedural and administrative matters

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Internal Governance

- Gift Acceptance Committee
  - Composition: Just directors, or other professionals and volunteers too?
  - Authority: Able to take action on behalf of the organization, or in an advisory capacity to the Board?
  - Ensure consistency with organization's bylaws
  - Signature authority?

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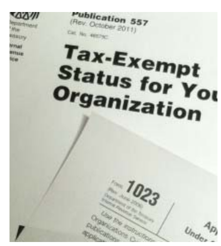
Internal Governance (cont'd.)

- Tax considerations:
  - Any effect on Section 501(c)(3) status?
  - Private foundations: Ensure compliance with Chapter 42 rules
  - Unrelated business income tax (UBIT) implications?
    - Acceptance of interests in LLCs or other pass-through entities
    - S corporation stock



Specific Types of Gifted Property

- Cash
- Securities – marketable versus non-marketable
  - UBIT
  - Limitations on disposition
- Real estate
  - Due diligence: Phase I environmental survey; appraisal
  - Consider use of single-member LLC to accept donation
- Tangible personal property
  - Expected use
  - Anticipated costs

Specific Types of Gifted Property (cont'd.)

- Intellectual property
- Conservation easements and façade easements
- Gifts of property with expected disposition within three years

Questions?

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Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies

Presentation by Richard Larkin, CPA - BDO USA LLP, Institute for Nonprofit Excellence

* * * * *

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- General rules - applicable to all types of contributions:
  - Timing of revenue recognition:
    - Unconditional gift or pledge – when made (communicated to donee)
    - Conditional gift or pledge – when condition is substantially met
  - Valuation – Fair value at date of gift (can be challenging for some non-cash gifts)
  - Contribution is never recorded as deferred income, except:
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    - Pooled income fund (a type of split interest)
  - Reported in class according to any donor restrictions:
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      - If this is done, must be consistent for all such contributions and investment income
    - Note that these rules apply only to revenue with restrictions imposed by the donor of a gift, not to legal restrictions imposed by contract or by law.
    - Generally, restrictions apply only to net assets. Sometimes a donor will restrict specific assets.

- The judgments often encountered with contributions: (see the 'accounting continuum' following)
  - Is it a contribution or an exchange?
  - Is it to or for the benefit of this organization?
  - Is it a promise or just an intention?
  - Is it conditional or unconditional?
    - Is there an *uncertain future event* which must occur before gift becomes final?
    - How uncertain does it have to be? Judgment
  - Is it restricted or unrestricted?
    - Only the *donor of a gift* can place a legally binding restriction
    - Board designated amounts are not restricted
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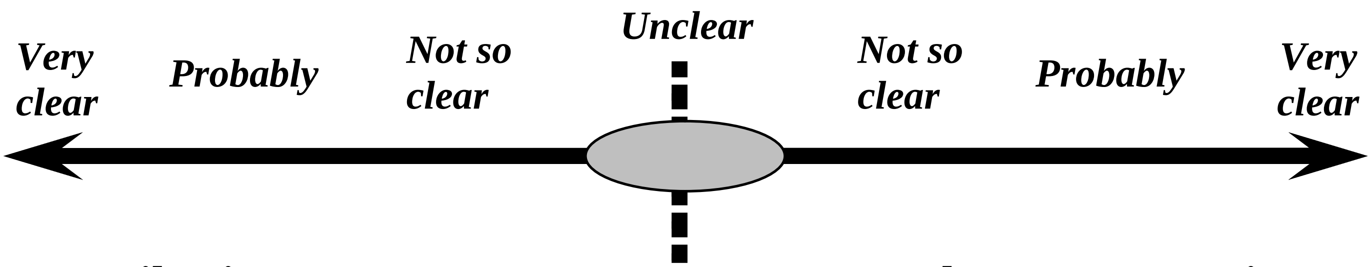

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Intention to give (or less)	vs.	**Promise to give**
Conditional	vs.	**Unconditional**
To <u>this</u> organization	vs.	**To another organization**
Not a specialized skill	vs.	**Specialized skill**
Would not have to purchase	vs.	**Would have to purchase**

* * * * * * *

FACTORS TO BE CONSIDERED IN DECIDING WHETHER A GIFT OR PLEDGE SUBJECT TO DONOR STIPULATIONS IS CONDITIONAL OR RESTRICTED
(as discussed in SFAS #116 / ASC 958-605)

- Donors place many different kinds of stipulations on pledges and other gifts. Some stipulations create legal <u>restrictions</u> which limit the way in which the donee may use the gift. Other stipulations create <u>conditions</u> which must be fulfilled before a donee is entitled to receive (or keep) a gift.

  In SFAS 116, FASB defines a condition as an uncertain future event which must occur before a promise based on that event becomes binding on the promisor. In some cases, it is not immediately clear whether a particular stipulation creates a condition or a restriction. (Some gifts are both conditional and restricted.) Since accounting for the two forms of gift is quite different, it is important that the nature of a stipulation be properly identified so that the gift is properly reported as to time and class of net assets.

- Following is a list of factors to be considered by:
  - recipients (and donors) of gifts, in deciding whether a pledge or other gift which includes donor stipulations is conditional or restricted;
  - auditors, in assessing the appropriateness of the client's decision.

- In many cases, no one of these factors will be determinative by itself; all applicable factors should be considered together.

Factors whose presence in the communication from the donor or in a donee-prepared pledge card would indicate the gift may be <u>conditional</u>	**Factors whose presence in the grant document, donor's transmittal letter, or other gift instrument, or in the appeal by the recipient would indicate the gift may be <u>restricted</u>**
<u>Factors related to the terms of the gift/pledge:</u>	
1. The document uses words such as: If; * Subject to; * When; Revocable. (D)	The document uses words such as: Must; For; Purpose; Irrevocable.
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3. The pledge is stated to extend for a very long period of time (over, say, 10 years) or is open-ended. (Often found with pledges to support a needy child overseas, or a missionary in the field)	The time is short and/or specific as to its end.
4. The donor stipulations in the document refer to <u>outcomes</u> expected as a result of the activity (with the implication that if the outcomes are not achieved, the donor will expect the gift to be refunded, or will cancel future installments of a multi-period pledge.[1a]) * (Such gifts are likely also restricted.)	The donor stipulations focus on the <u>activities</u> to be conducted. Although hoped-for outcomes may be implicit or explicit, there is not an implication that achievement of particular outcomes is a requirement.[1b] *
5. There is an explicit requirement that amounts not expended by a specified date must be returned to the donor.	There is no such refund provision, or any refund is required only if money is left after completion of the specified activities.
6. The gift is in the form of a pledge.	The gift is a transfer of cash or other non-cash assets.
7. Payment of amounts pledged will be made only on a cost-reimbursement basis. (D)	Payment of the gift will be made up front, or according to a payment schedule, without the necessity for the donee to have yet incurred specific expenses.
8. The gift has an explicit matching requirement (D), or additional funding beyond that already available will be required to complete the activity.	Factor not present.
<u>Factors relating to the circumstances surrounding the gift:</u>	
9. The action or event described in the donor's stipulations is largely outside the control of the management or governing board of the donee. [2a] *	The action or event is largely within the donee's control. [2b] *

10. The activity contemplated by the gift is one which the donee has not yet decided to do; it is not certain whether the activity will actually be conducted. *	The donee is already conducting the activity, or it is fairly certain that the activity will be conducted. *
11. There is a lower probability that the donor stipulations will eventually be met.	There is a higher probability.
12. The activities to be conducted with the gift money are similar to activities normally conducted on a for-profit basis by the donee or by other organizations.	The activities are not similar.
13. As to any tangible or intangible outcomes which are to be produced as a result of the activities, these products will be under the control of the donor. (In such cases, the payment may not be a gift at all; rather it may be a payment for goods or services.)	Any outcomes will be under the control of the donee, or will be in the public domain.

Notes: D - Presence of this factor would normally be considered determinative. Absence of the factor is not necessarily determinative.

* - Factors which would generally be considered more important.

1a. Examples of outcomes contemplated by this factor include:

- Successful creation of a new vaccine;
- Production of a new television program;
- Commissioning a new musical composition;
- Establishing a named professorship;
- Reduction in the teenage pregnancy rate in a community;
- Construction of a new building;
- Mounting a new museum exhibit.

1b. Examples of activities contemplated by this factor include (but see Factor 10**):

- Conduct of scientific or medical research;
- Broadcasting a specified television program;
- Performing a particular piece of music;
- Paying the salary of a named professor;
- Counseling teenagers judged at risk of becoming pregnant;
- Operating a certain facility;
- Providing disaster relief.

2a. Examples of events contemplated by this factor include:

- Actions of uncontrolled third parties, e.g.:
  - other donors making contributions to enable the donee to meet a matching requirement of this gift;
  - a government granting approval to conduct an activity (e.g., awarding a building or land use permit, or a permit to operate a medical facility);
  - an owner of other property required for the activity making the property available to the organization (by sale or lease);
- Natural and manmade disasters;
- Future action of this donor (such as agreeing to renew a multi-period pledge in subsequent periods);
- The future willingness and ability of a donor of personal services to continue to provide those services (see SFAS 116, par. 70, third sentence).

2b. Examples of events contemplated by this factor include (but see Factor 10 **):

- Eventual use of the gift for the specified purpose (e.g. those listed in Note 1b above), or retention of the gift as restricted endowment;
- Naming a building for a specified person;
- Filing with the donor routine financial or operating performance reports on the activities being conducted.

** - There is a presumption here that the right column of Factor 10 applies.

Events outside of the donee's control, but which are virtually assured of happening anyway at a known time and place (e.g., astronomical or normal meteorological events), and the mere passage of time, are not conditions.

Speaker Biographies

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our people

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal*'s Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, and one of only eight in the 2013 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-14 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was named as one of Washington, DC's "Legal Elite" in 2011 by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

REPRESENTATIVE CLIENTS

AARP
Air Conditioning Contractors of America
American Academy of Physician Assistants
American Alliance of Museums
American Association for the Advancement of Science
American Bar Association
American Bureau of Shipping
American Cancer Society
American College of Radiology
American Institute of Architects
American Society for Microbiology
American Society for Training and Development
American Society of Anesthesiologists
American Society of Association Executives

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Antitrust

Political Law

Business Transactions Tax

Tax Controversies and Litigation

Tax Policy

Tax-Exempt Organizations

Wealth Planning

Regulatory

INDUSTRIES

Nonprofit Organizations and Associations

Credit Counseling and Debt Services

Financial Services

Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Association for Healthcare Philanthropy
Association of Corporate Counsel
Association of Private Sector Colleges and Universities
Automotive Aftermarket Industry Association
Biotechnology Industry Organization
Brookings Institution
Carbon War Room
The College Board
Council on CyberSecurity
Council on Foundations
CropLife America
Cruise Lines International Association
Design-Build Institute of America
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Goodwill Industries International
Graduate Management Admission Council
Homeownership Preservation Foundation
Human Rights Campaign
The Humane Society of the United States
Independent Insurance Agents and Brokers of America
Institute of International Education
International Association of Fire Chiefs
Jazz at Lincoln Center
LeadingAge
Lincoln Center for the Performing Arts
Lions Club International
Money Management International
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Defense Industrial Association
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Hot Rod Association
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Trust for Architectural Easements
The Tyra Banks TZONE Foundation
United Nations High Commissioner for Refugees
Volunteers of America

HONORS

Recognized as "Leading Lawyer" in the 2012 and 2013 editions of *Legal 500*, Not-For-Profit

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law, Washington, DC (Woodward/White, Inc.), 2012-14

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association Executives' *Association Law & Policy* legal journal, the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and the ASAE Public Policy Committee. He previously served as Chairman of the *AL&P* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 500 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 500 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine, The Chronicle of Philanthropy, The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.

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Bob Waldman, Venable's Co-Managing Partner, also leads the firm's national representation of tax-exempt organizations. Mr. Waldman's practice includes general representation of numerous foundations, hospitals, educational institutions, trade associations and other charitable entities. Mr. Waldman also practices extensively in the areas of philanthropic and estate planning, employee benefits and taxation. Mr. Waldman is included in *The Best Lawyers in America* in the fields of Employee Benefits Law, Non-Profit/Charities Law and Tax Law.

The Daily Record, the newspaper serving Baltimore's business and legal communities, honored Mr. Waldman with its "Leadership in Law" award. The award recognizes those individuals whose leadership, both in the legal profession and in the community, has made a positive impact on Maryland, and who have demonstrated outstanding achievement in the practice of law; involvement in the profession, and support of the community. Mr. Waldman was also recognized in the 2012 edition of *Legal 500* and was selected for inclusion in *Maryland Super Lawyers*, 2010 - 2013 editions. Mr. Waldman is an Elected Fellow of the Baltimore City Bar Foundation.

AREAS OF PRACTICE

Tax and Wealth Planning

Tax-Exempt Organizations

Healthcare

Business Transactions Tax

Tax Controversies and Litigation

Tax Policy

INDUSTRIES

Nonprofit Organizations and Associations

Education

BAR ADMISSIONS

Maryland

Pennsylvania

EDUCATION

J.D., Stanford Law School, 1981

B.A., Haverford College, 1978

MEMBERSHIPS

American Bar Association

Maryland State Bar Association

HONORS

Named "Lawyer of the Year" for Baltimore Non-Profit/Charities Law in *The Best Lawyers in America*, 2014

Listed in *The Best Lawyers in America* for Employee Benefits Law, Non-Profit/Charities Law, and Tax Law (Woodward/White, Inc.)

Recognized in the 2012 and 2013 editions of *Legal 500*, Not-For-Profit

Selected for inclusion in *Maryland Super Lawyers,* 2010 - 2013

AV® Peer-Review Rated by *Martindale-Hubbell*, selected as a 2013 Top Rated Lawyer in Healthcare

Recipient, Spirit of Partnership Award, Sodexo Foundation

The Daily Record, the newspaper serving Baltimore's business and legal communities, honored Mr. Waldman with its "Leadership in Law" award. The award recognizes those individuals whose leadership, both in the legal profession and in the community, has made a positive impact on Maryland, and who have demonstrated outstanding achievement in the practice of law; involvement in the profession, and support of the community.

Elected Fellow of the Baltimore City Bar Foundation

ACTIVITIES

Mr. Waldman is a member of the Board of the Association of Baltimore Area Grantmakers (past Chairman) and serves on the Boards of the Enoch Pratt Free Library and the Downtown Partnership of Baltimore. He has also served on the Board of the Maryland Association of Nonprofit Organizations and is a member of the Best Lawyers Advisory Board.

Mr. Waldman is a member of the American Bar Association Committee on Tax-Exempt Organizations and former chair of the Employee Benefits Subcommittee of the Maryland State Bar Association.

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Yosef Ziffer is an associate in Venable's Tax and Wealth Planning Group. He focuses his practice on the full array of tax, corporate, and strategic needs of tax-exempt organizations, including public charities, private foundations, hospitals, private schools, and trade associations. Additionally, Mr. Ziffer works with individuals and business entities on various tax planning matters, including transfers of business interests, estate planning, and tax audits.

As part of his work with tax-exempt organizations, Mr. Ziffer often helps clients adapt to recent changes in the law. By way of example, Mr. Ziffer has counseled clients on compliance with new rules regarding donor advised funds and supporting organizations under the Pension Protection Act of 2006; the application of new standards for the management of endowments under the Uniform Prudent Management of Institutional Funds Act (UPMIFA); and the impact and effect of new Treasury Regulations regarding measures of public support for charities.

SIGNIFICANT MATTERS

Some of Mr. Ziffer's significant recent client-matters include the following:

Tax-Exempt Organizations

- Preparation of an Internal Revenue Service private letter ruling request for a prominent charity undertaking a major reorganization.
- Formation of a medical research organization affiliated with a major local hospital.
- Consolidation of two related foundations into a single, integrated public charity.
- Formation of a new "Friends Of" organization to support an overseas charitable institution.
- Negotiation of a gift agreement pertaining to a substantial gift of stock.
- Procurement of tax-exempt status for numerous newly-formed public charities and private foundations.

General Tax-Planning

- Organization of comprehensive estate-freeze plans for local entrepreneurs and high-net-worth individuals.

Tax Audits

- Defending against various IRS audits pertaining to charitable donations, conservation easements, capital gains issues, and executive compensation matters.

ACTIVITIES

Mr. Ziffer is a member of the American Bar Association and the Maryland State Bar Association. He is also a participant in the Young Leadership Council of THE ASSOCIATED: Jewish Community Federation of Baltimore, Inc.

AREAS OF PRACTICE

Tax and Wealth Planning

Business Transactions Tax

Tax Controversies and Litigation

Tax Policy

Tax-Exempt Organizations

Wealth Planning

INDUSTRIES

Nonprofit Organizations and Associations

BAR ADMISSIONS

Maryland

EDUCATION

J.D., *cum laude*, New York University School of Law, 2005

B.A., *summa cum laude*, Yeshiva University, 1998

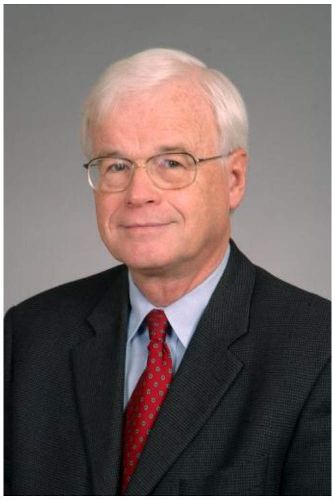
MEMBERSHIPS

American Bar Association

Maryland State Bar Association

LANGUAGES

Hebrew



Richard F. Larkin *CPA; MBA, Harvard Business School*

Mr. Larkin is Technical Director for Not-for-Profit accounting and auditing for the Institute for Nonprofit Excellence in the Washington, D.C. area office of BDO USA, LLP. Previously he was Technical Director in the Not-for-Profit Industry Services Group in the national office of PricewaterhouseCoopers LLP, with responsibility for assisting firm partners and staff worldwide with accounting and auditing issues involving not-for-profit organizations. He is a certified public accountant with over forty years of experience serving a wide variety of not-for-profit organizations as independent accountant, board member, treasurer, and consultant. He teaches, speaks and writes extensively on not-for-profit industry matters and is active in many professional and industry organizations. Professional memberships have included the Financial Accounting Standards Board Not-for-Profit Advisory Task Force, the AICPA Not-for-Profit Organizations Committee (three terms), the Evangelical Joint Accounting Committee, and the AICPA Not-for-Profit Audit Guide Task Force (chair). He has been a member of the governing boards of several not-for-profit organizations, including Children's Hospice International, the Grass Foundation, and the Washington Cathedral Choral Society (also a singing member of the chorus). He is a co-author of the fourth, fifth, and sixth editions of *Financial and Accounting Guide for Not-for-Profit Organizations*, author of the first edition of *Financial Statement Presentation and Disclosure Practices for Not-for-Profit Organizations* (published by the AICPA), the 1998 - 2011 editions of *Not-for-Profit GAAP*, as well as numerous articles. He has received Lifetime Achievement Awards from the AICPA and the Greater Washington Society of CPAs. He is an adjunct professor of not-for-profit management at Georgetown University, and as a member of the Peace Corps taught business administration at Haile Sellassie I University in Addis Ababa, Ethiopia.

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VENABLE LLP

nonprofit alert

August 2013

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New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon

The Nonprofit Revitalization Act, NY A8072 (the "Act"), a bill that makes comprehensive updates to the New York Not-for-Profit Corporation Law, as well as several other statutes related to nonprofits, recently passed both houses of New York's legislature unanimously. The Act is awaiting delivery to the Governor's office, at which time the Governor would have 10 days to take action or the bill would automatically become law, provided it is delivered before the end of the legislative session on December 31, 2013. The Act would be the first major revision to New York's nonprofit laws in over 40 years. Its provisions apply to nonprofits that are incorporated in New York, but one significant section – related to financial audits and financial reporting to the state – applies to all nonprofits that are registered in New York for charitable solicitation purposes.

If signed into law, most provisions of the new Act would be effective on July 1, 2014 (a couple of the provisions noted below would take effect in 2015, 2017, and 2021). The Act modernizes aspects of the current laws, including the incorporation of new technology options for holding meetings and taking action. The law also imposes standards for enhanced governance processes such as mandating that nonprofits of a certain size adopt conflict of interest and whistleblower policies, and it contains a new definition and approval process for related-party transactions. In addition, the law imposes new limitations and prohibitions on certain governance structures and practices, which may create significant challenges for particular organizations. Many nonprofits will find that they need to amend their governance documents, policies, and procedures – and, in some cases, significantly overhaul their governance structure – to comply with some of the detailed requirements of the Act.

The Act is based on recommendations from the Nonprofit Revitalization Group, convened by New York Attorney General Schneiderman, which recommended changes to cut red tape and eliminate outdated procedures to make it easier and more efficient for nonprofits incorporated in New York to operate. Some heralded these changes as welcome updates to create greater transparency in response to growing public mistrust of nonprofit governance. However, some of these changes may create practical challenges for many nonprofits that must now significantly revise their governance and oversight procedures in response.

Applicability

Generally, the Act only applies to nonprofits incorporated in New York. One section of the Act, however – relating to audit committees, related governance procedures, and financial reporting to the Attorney General – also applies to nonprofits which must register to conduct charitable solicitations in New York, regardless of where they are incorporated.

The major provisions of the Act are summarized below.

Elimination of Letter Types

One of the most substantial changes in the Act is the elimination of classification as Type A, Type B, Type C, and Type D. Nonprofits will instead now be classified as either "charitable" or "non-charitable." Existing organizations do not have to amend their governing documents to clarify whether the organization is "charitable" or "non-charitable." The Act provides that Type B and C entities, as well as Type D entities formed for a charitable purpose, will be deemed to be "charitable." Type A and all other Type D entities will be regarded as non-charitable.

Modernization and Streamlining of Nonprofit Governance Actions and Communication

Electronic Mail for Meeting Notice / Waiver of Notice / Unanimous Consent

The Act makes changes to reflect use of modern technology in governance. Prior to the Act, nonprofits were required to provide notice of member and director meetings by mail or in person. The Act now provides that notice, or waiver of notice, can be given by electronic communication such as e-mail. The Act also provides that electronic communication can be used by members to designate a proxy, and by directors and members to give unanimous written consent in lieu of an in-person meeting.

Video Conferencing for Board Meetings

Unless restricted by the corporation's certificate of incorporation or bylaws, the Act also allows members of the board to participate in a meeting of the board or any committee thereof through electronic video screen communication such as Skype, so long as all board members can hear each other at the same time and each director can participate in all matters before the board.

Enhanced Governance Procedures, Policies, and Prohibitions

Limitation on Employee Serving as Chair

In an effort to preserve the balance between the board and the executive staff of nonprofits, the Act contains an express prohibition on an employee serving as chair of the board or in an officer position with similar responsibilities. However, it should be noted that this prohibition would not extend to bona fide independent contractors. The Act provides that the board may appoint among its officers a chair or a president, or both. The prohibition on an employee serving as chair would presumably not apply to the president in an organization in which different individuals serve as chair and president.

The provision prohibiting employees serving as a chair has an effective date of January 1, 2015, one year later than the other provisions of the Act.

Compensation Approval

The Act provides that no person who may benefit from a compensation decision may be present at or otherwise participate in any board or committee deliberation or vote concerning that person's compensation, except that the board or committee may request that the person present information as background or answer questions at a board or committee meeting prior to the commencement of deliberations or voting thereon.

New Definition of "Independent Director"

The Act defines an "independent director" as an individual who meets all of the following criteria:

(1) has not been an employee of, or does not have a relative that was a key employee of, the corporation or an affiliate of the corporation in past three years;

(2) has not received, or does not have a relative that has received, $10,000 or more in direct compensation from the corporation or an affiliate in the last three years (other than expense reimbursement or reasonable compensation as a director);

(3) is not a current employee of or does not have substantial financial interest in an entity that made or received payments from the corporation or an affiliate of more than $25,000 or 2% of the corporation's gross revenue for property or services (whichever is less) in the last three years; and

(4) does not have a relative who is a current officer of or has a substantial interest in an entity making or receiving payments of a similar amount to the organization in the past three years.

The Act exempts payments of charitable contributions from the definition of payments, but does not contain an exemption for membership dues, which could trigger the "$25,000 or 2%" definition of independence and should be noted by an organization whose board consists of employees of member entities (which is common in trade associations as well as in other types of nonprofits).

This definition of independence particularly impacts audit oversight and administration of the organization's whistleblower and conflict of interest policies, as discussed below.

Mandatory Conflict of Interest Policy

The Act requires all nonprofits to adopt a conflict of interest policy covering directors, officers, and key employees. Some nonprofits may need to adopt a new conflict of interest policy, or update their current policy, to meet the new requirements. At a minimum, this policy must include (1) a definition of circumstances that constitute a conflict of interest, (2) procedures for disclosing a conflict to the audit committee or the board, (3) a requirement that the person with a conflict of interest not be present at or participate in board or committee deliberations or voting on the matter giving rise to such conflict, (4) a prohibition on any attempt by a conflicted person to influence board deliberations, (5) documentation procedures for detailing the existence and resolution of the conflict, and (6) procedures for disclosing and addressing related-party transactions. The Act provides that, prior to the initial election of any director, and annually thereafter, directors must complete, sign, and submit a written statement identifying any potential conflict, as defined in the Act. The board or designated audit committee of the board must oversee the adoption, implementation of, and compliance with any conflict of interest policy if this function is not otherwise performed by another committee of the board consisting solely of independent directors.

Related-Party Transaction Approval Process

In conjunction with the new conflict of interest policy requirement, the Act updates the definition of what constitutes a "related party," defined as (1) any director, officer, or key employee of the corporation or any affiliate of the corporation; (2) any relative of any director, officer, or key employee of the corporation or any affiliate of the corporation; or (3) any entity in which any individual described in (1) or (2) has a 35 percent or greater ownership or beneficial interest or, in the case of a partnership or professional corporation, a direct or indirect ownership interest in excess of five percent. A "related-party transaction" is defined as any transaction, agreement, or other arrangement in which a related party has a financial interest and in which the corporation or any affiliate of the corporation is a participant.

The Act prohibits all corporations from entering into any related-party transaction unless the transaction is fair, reasonable, and in the corporation's best interests. The Act contains additional requirements for charitable organizations (as opposed to non-charitable organizations, as defined by the Act) considering such transactions, including a requirement that the board consider alternative transactions to the extent available and approve the transaction by not less than a majority vote of the directors or committee members present at the meeting.

With regard to enforcement, the Act adds a provision allowing the New York Attorney General to bring an action to enjoin, void, or rescind any related-party transaction that is not reasonable and in the best interests of the corporation at the time such transaction was approved.

Mandatory Whistleblower Protection Policy

The Act also mandates that nonprofits with 20 or more employees and annual revenue in the prior fiscal year in excess of $1,000,000 institute a whistleblower protection policy. The whistleblower policy must protect from retaliation any director, officer, employee, or volunteer who in good faith reports an action or suspected action that is potentially illegal, fraudulent, or in violation of any adopted policy of the corporation. The policy must include procedures for reporting violations; a designated employee, officer, or director tasked with administering the policy and reporting to the audit committee or other committee of independent directors or, if there are no such committees, to the board; and a requirement that the policy is distributed to all directors, officers, employees, and volunteers.

Required Audit Procedures and Financial Reporting

Audit Committee and New Audit Procedures

One of the more significant changes in the Act relates to financial audits, including audit committees, governance procedures, and financial reporting to the Attorney General. The audit provisions apply not just to nonprofits incorporated in New York, but also to nonprofit organizations incorporated anywhere that are required to register under New York Executive Law Section 172 – the charitable solicitation registration statute – due to their charitable solicitation activities in New York.

The Act requires all organizations subject to registration for charitable solicitation in New York that are required to file an independent auditor's report with the Attorney General, pursuant to Section 172-b of the New York Executive Law (triggered by receipt of gross revenues above $500,000 in 2014; $750,000 in 2017; and $1,000,000 in 2021, as further explained below), to have a designated audit committee of the board comprised of independent directors responsible for retaining an independent auditor and reviewing the results of the audit. Alternatively, the delineated tasks must be performed by the independent directors on the board.

The audit committee of an organization with annual revenues (presumably meaning gross revenues) in excess of $1,000,000 that is required to file an independent certified public accountant's audit report with the Attorney General, pursuant to Section 172-b of the New York Executive Law, is subject to more extensive duties relating to the audit, including reviewing the scope and planning of the audit with the auditor prior to commencement of the audit, discussing any significant disagreements between the auditor and management after the audit, and annually considering the performance and independence of the independent auditor.

The audit committee also is charged with overseeing adoption, implementation, and compliance with the mandatory conflict of interest and whistleblower policies.

Raised Thresholds for Financial Reports

The Act raises the thresholds of revenues for which organizations conducting charitable solicitations in New York are required to file certain financial reports with the Attorney General. These threshold levels will become progressively higher on July 1, 2014; July 1, 2017; and July 1, 2021, respectively. Starting on July 1, 2014, organizations with gross revenues under $250,000 (previously $100,000) may file unaudited financial statements signed by the chief financial officer and president, or other authorized officer, under penalties of perjury. Organizations with gross revenues greater than $250,000 (previously $100,000) but less than $500,000 (previously $250,000) must file annual financial reports accompanied by an independent certified accountant's review report in accordance with "statements on standards for accounting and review services" issued by the American Institute of Certified Public Accountants. Organizations with gross revenues greater than $500,000 (previously $250,000) must file annual financial statements accompanied by an independent certified public accountant's audit report with an opinion that the financial statement and balance sheet fairly present the financial operations and position of the organization.

In 2017, these threshold levels are raised so that organizations with gross revenues under $250,000 will still file unaudited financial statements, but organizations with gross revenues between $250,000 and $750,000 must file annual financial statements with a CPA's review report, and organizations with gross revenues over $750,000 must filed annual financial statements with certified audit reports. In 2021, the threshold is increased to allow organizations with gross revenues between $250,000 and $1,000,000 to file annual financial statements with review reports and organizations with gross revenues over $1,000,000 to file annual financial statements with certified audit reports.

Interestingly, if the Attorney General is unsatisfied with the statements that are filed with a review report, the Attorney General can require an organization to have its financial statements audited; even if the organization's gross revenue is below the threshold limit. This could be an expensive endeavor for smaller organizations.

The requirement to file different types of financial reports is not new, and the three-step increase in revenue thresholds should relieve the burdens of filing audited financial statements or financial statements with review reports for some smaller nonprofits. However, the mandatory audit procedures and designated audit committee functions go well beyond what was previously required under New York law and are detailed in a nature that goes well beyond that of other states' requirements in the charitable solicitation area.

Simplification of Approval Process for Certain Transactions

Ability to Seek Consent of Attorney General as Opposed to New York Supreme Court for Certain Corporate Transactions

The Not-for-Profit Corporation Law previously required Type B, C, and D organizations to engage in a two-step process of 1) seeking approval of the New York Supreme Court, and 2) providing notice to the New York Attorney General, prior to engaging in certain fundamental transactions. The Act now provides a simplified process for "charitable" entities, whereby the organization can seek the approval of the Attorney General instead of initiating a court proceeding for transactions such as dissolution (sale, lease, exchange, or other disposition of substantially all assets); merger or consolidation; and change of purposes. The Attorney General has discretion whether to grant such action or to require the action to be submitted for the approval of the New York Supreme Court, and the nonprofit can appeal a denial by the Attorney General to the New York Supreme Court. The process for approval of non-charitable entities remains the same as under current law.

Notification Instead of Consent to New York Commissioner of Education

The Act also modifies a prior requirement for certain organizations with an educational purpose as defined by the New York Education Law (i.e., "colleges, universities, or other entities providing post-secondary education; nursery, elementary, secondary or charter schools; libraries, archives, or museums or historical societies with collections; and public television and radio shows") to seek the approval of the New York Commissioner of Education prior to incorporation. Under the new Act, out of the types of entities listed above, those that do not have as one of their purposes the operation of a "school, university, library, museum, or historical society" no longer have to receive prior approval.

Lowered Approval Requirements for Real Property Transactions

Previously, the New York Not-for-Profit Corporation Law required that two-thirds of the entire board approve any purchase of real property, for organizations with fewer than 21 directors. The Act lowers this threshold by requiring that only a simple majority of the board needs to authorize the purchase, sale, lease, exchange, or other disposition of real property, provided that the property to be acquired or disposed of does not constitute all, or substantially all, of the assets of the corporation. If the property does constitute all, or substantially all, of the corporation's assets, the approval of two-thirds of the entire board will continue to be required (unless there are 21 or more board members, in which case simple majority approval is sufficient). The Act also allows for the final determination as to the purchase, sale, lease, exchange, or other disposition of real property to be delegated to a committee authorized by the board, provided that the committee report any actions taken to the board by the next regularly scheduled board meeting.

Other

New Definition of "Entire Board"

The Act includes a new definition for the term "entire board" that clears up an ambiguity in the previous definition regarding the number of directors that must be counted for purposes of a quorum and board action when board size is provided as a range in the bylaws. Under the Act's new definition, if the board size is provided as a range between a minimum and maximum number, any reference to the "entire board" shall refer to the number of directors elected as of the most recent election. Meeting the "entire board" voting thresholds could be difficult for a board with vacant seats if there is a set number of directors provided for in the bylaws.

Removal of Requirement to Provide Residential Addresses of Board Members

The Act eliminates a provision in the section on membership access to records that required the corporation to provide the residential address of board members and officers to members upon request. Under the Act, a corporation may lawfully comply with a member request by providing a list of board members and officers without addresses.

Conclusion

The New York Nonprofit Revitalization Act will modernize the laws applicable to nonprofits incorporated in New York and enhance nonprofit governance and oversight. It also will establish new restrictions and requirements in the governance area that will require certain nonprofits to make significant – and, in some cases, challenging – changes to their governance structure. Notably, the financial audit provisions apply to all nonprofits required to register to solicit New York residents for charitable contributions, regardless of their state of incorporation. Presuming the Act is signed into law – which most expect it will be – many New York nonprofit corporations will need to adopt additional policies and procedures, and should carefully review their governance documents for compliance with the new law.

- The New York Nonprofit Revitalization Act, as passed by the New York legislature, is available at: http://assembly.state.ny.us/leg/?default_fld=&bn=A08072&term=&Summary=Y&Actions=Y&Text=Y.
- The New York Nonprofit Revitalization Group Report, on which much of the new law is based, is available at: http://www.ag.ny.gov/sites/default/files/press-releases/2012/NP%20Leadership%20Committee%20Report%20(2-16-12).pdf.

* * * * * *

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VENABLE® LLP

Articles

November 18, 2011

The New DC Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply

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The coming New Year will soon usher in a new legal landscape for District of Columbia nonprofit corporations. On January 1, 2012, the new District of Columbia Nonprofit Corporation Act of 2010 goes into effect. To ensure that your organization is ready to comply, now is the time to review your organization's articles of incorporation, bylaws, and governance policies and practices for any necessary changes.

As a general rule, the 2010 Act provides D.C. nonprofit corporations with considerable flexibility to structure their corporate governance, and for the most part will not require changes to day-to-day operations. However, numerous default rules have changed under the 2010 Act and new, more detailed provisions governing matters like director standards of conduct and liability, indemnification, member voting rights and ballot voting procedures, and numerous other topics require D.C. nonprofit corporations to familiarize themselves with the new law, and determine whether changes to their governing documents or practices will be necessary to comply. The following highlights many of the significant changes that are in store.

GENERAL PROVISIONS AND APPLICABILITY

Location of General Provisions (D.C. Code, Title 29, Chapters 1 and 4)

- The new Business Organizations Code—Title 29 of the D.C. Code—is a hub-and-spoke structure. Chapter 1 of the Code contains one set of general provisions and definitions that govern all business organizations in the District on matters such as filing of corporate reports and requirements for registered agents. Separate chapters then govern matters unique to each type of business entity. Nonprofit corporations must look to Chapter 1 of Title 29 for important general provisions and definitions and to Chapter 4 for the rules specifically applicable to nonprofit corporations.

Biennial Reports Filing Deadline (D.C. Code § 29-102.11)

- Biennial reports will now be due every two years on or before April 1 instead of January 15. According to unofficial agency guidance, organizations should continue to follow their existing two-year cycle for filing the biennial report, and should simply begin using the new April 1 filing deadline in the year their report is due (i.e., organizations that last filed in January 2010 have until April 1, 2012 to file their next-due biennial report).

Corporate Records (D.C. Code §§ 29-413.01 to .05)

- The new law specifies expanded record-keeping requirements for D.C. nonprofit corporations and permits such records to be kept in digital form. Minutes of all meetings of and records of all actions taken by the board, members, and any designated body must be maintained permanently. Appropriate accounting records and membership lists must be maintained. Additionally, numerous records must be maintained at the corporation's principal office, including the articles, bylaws, minute books for the most recent three years, all formal notices or other communications to members for the most recent three years, a current list of the names and business addresses of the corporation's directors and officers, and a copy of the corporation's most recent biennial report.

"Old Act" Corporations (D.C. Code §§ 29-107.01(b); 414.01)

- The new law appears to be intended to phase out so-called old act corporations—those incorporated in the District prior to the 1962 enactment of the District of Columbia Nonprofit Corporation Act. See D.C. Council Committee on Public Services and Consumer Affairs, Committee Report on Bill 18-500, at 18 (explaining that § 29-107.01 "includes a provision designed to phase out 'old-Code' corporations"). Technically, old act corporations have two years from the new law's applicability date in which to file a notice with the District that includes the corporation's articles of incorporation or other public organic record and the names and street addresses of its current directors and officers. Any old act corporation that fails to provide the required notice within the required time period shall be thereafter barred from asserting that it is not subject to the requirements of the new law. However, despite this provision, any old act corporation that desires to do business in the District must file articles of incorporation and comply with the provisions of the new law.

BOARD AND OFFICER PROVISIONS

Board Quorum (D.C. Code § 29-406.24)

- Default quorum is now a majority of directors in office before a meeting begins. A different quorum may be established by the articles or bylaws, provided it is not lower than the minimum quorum requirement.
- Minimum quorum is now 1/3 of the directors in office or two directors, whichever is greater.
- *Previous default quorum was a majority of the number of directors fixed in the articles or bylaws. Previous minimum quorum was 1/3 of the number of directors fixed in the articles or bylaws.*

Board Committees (D.C. Code § 29-406.25)

- A board committee may now consist of one or more directors (previously at least two directors were required).

Minimum Officers (D.C. Code § 29-406.40)

- Two separate officers are required at minimum—one officer responsible for management (e.g., a "president"), and one officer for finances (e.g., a "treasurer"). The president and treasurer positions cannot be held by the same individual. One of the officers must be assigned the duties of a secretary.
- *Previously a president, secretary, and treasurer were required, and the president and secretary positions could not be held by the same person*.

Standards of Conduct (D.C. Code §§ 29-406.30, 406.32, 406.42, 406.70, 406.80)

- The new law codifies traditional common law concepts of director and officer fiduciary duties (e.g., the duties of care and loyalty). An individual director or officer must discharge his or her duties in good faith, in a manner that he or she reasonably believes is in the best interests of the corporation, and with either the care that a person in a like position would reasonably believe appropriate under similar circumstances (directors) or with the care an ordinarily prudent person in a like position would exercise under similar circumstances (officers).
- The new law provides procedures by which potential conflict of interest transactions can be processed.
    - *Conflicted Interest Transactions*. Transactions between the corporation and any director, officer, or member having an interest in the transaction shall not be void or voidable solely for that reason, provided the transaction is fair to the corporation at the time it is authorized or provided the material facts as to the relationship or interest are disclosed and the transaction is then approved in good faith by vote of the disinterested directors or the members.
    - *Business Opportunities*. A director may avoid liability for taking for himself, directly or indirectly, a business opportunity in which the nonprofit corporation may be interested, provided the director first brings the opportunity to the corporation's attention and the corporation disclaims its interest in the opportunity pursuant to the procedures for a conflicted interest transaction (i.e., the material facts as to the relationship or interest are disclosed and the opportunity is disclaimed in good faith by vote of the disinterested directors or the members).
- Loans to directors and officers continue to be prohibited; however, the new law carves out exceptions for particular permissible advances (e.g., for reimbursable expenses or pursuant to employee benefit plans) and loans (e.g., those secured by the principal residence of an officer or to pay relocation expenses of an officer).

Liability (D.C. Code §§ 29-402.02(c), 406.31, 406.90 to .91)

- The new law codifies specific standards for director liability to the corporation or its members.
    - *General Standard*. As a general rule, a director will not be liable to the corporation or its members unless the party asserting liability establishes that the director failed to meet the required standards of conduct for directors (i.e., the prescribed standards of good faith, loyalty, and care) in discharging his or her duties.
    - *Limited Liability for Money Damages*. The new law automatically limits the liability of a director of a charitable corporation for money damages in connection with certain actions or inactions of the director. Directors of non-charitable corporations may only qualify for similar limited liability protections if the limitation is specified in the corporation's articles. For purposes of the new law, a charitable corporation is one that is eligible for exempt status under Section 501(c)(3) of the Internal Revenue Code. A trade association or other non-501(c)(3) corporation should consider

amending its articles if providing these protections to the corporation's directors is desired.

- The new law retains provisions of existing law that provide volunteers of nonprofit corporations (e.g., directors, officers, and others who perform services for the corporation without compensation) with limited immunity from civil liability to third-parties in connection with their volunteer service, provided that the corporation maintains a minimum level of liability insurance (i.e., not less than $200,000 per individual claim and $500,000 per total claims arising from the same occurrence). The exception from the minimum insurance requirement is retained for 501(c)(3)s having annual total functional expenses, exclusive of grants and allocations, of less than $100,000.

Indemnification (D.C. Code §§ 29-406.50 to .58)

- The new law includes detailed provisions governing when a corporation must, may, and may not indemnify a director or officer. Specific procedures are now required to be followed before indemnification may be made under non-mandatory circumstances. Under the new law, a corporation may not indemnify a director or officer unless indemnification is authorized for a specific proceeding after a determination is made by the disinterested members of the board, by the members, or by special legal counsel that indemnification is permissible because the director or officer has met the applicable standard of conduct. The corporation may authorize permissible indemnification in advance through an obligatory provision of the articles or bylaws or by resolution of the board. However, the determination of permissibility must be made in each specific instance. Similarly, detailed procedures are required before a corporation may advance expenses to a director or officer in connection with a proceeding. Finally, the corporation may provide for broader indemnification under a provision of its articles (within specific limits), or may limit any indemnification rights provided by statute under a provision of its articles or bylaws.

MEMBERSHIP PROVISIONS

"Member" Definition (D.C. Code § 29-401.02)

- A member is any person that has the right to select or vote for the election of directors or delegates, or to vote on any type of fundamental transaction. Other persons may be referred to by the corporation as "members" but those who do not have voting rights are not members for purposes of the statute.

Membership Meetings (D.C. Code §§ 29-405.01 to .09)

- If authorized by the articles or bylaws, meetings of members may now be held by means of the Internet or other electronic communications technology that permits members to read or hear the proceedings substantially concurrently with their occurrence, to vote on matters submitted, to pose questions, and to make comments.
- Special meetings may be called by at least 10 percent of the voting members or such other amount up to 25 percent as the articles or bylaws may specify.
- *Previously, special meetings could be called by at least five percent of the voting members, unless otherwise provided in the articles or bylaws, with no cap on the minimum percentage required to call the meeting.*

Notice (D.C. Code §§ 29-101.02(39); 401.03; 405.05)

- Notice may be communicated in person or by delivery, including by electronic transmission, no fewer than 10 nor more than 60 days before each meeting of the members, unless otherwise provided in the articles or bylaws.
- *Previously, the default notice period was no fewer than 10 nor more than 50 days before each meeting and no particular provision was made for oral or electronic notice*.

Action by Ballot (D.C. Code § 29-405.09)

- A new provision governing ballot voting permits members to act without a meeting provided the corporation follows specific procedures pertaining to ballots. The corporation must deliver a ballot to every member entitled to vote on the matter; the ballot must be in the form of a record (which could include an electronic ballot or email), set forth each proposed action, provide an opportunity to vote for or withhold a vote for each candidate in the case of a director election, and provide an opportunity to vote for or against each other proposed action. All solicitations for votes by ballots must indicate the number of responses needed to meet the quorum, state the percentage of approvals necessary to approve each matter other than the election of directors, and specify the time by which a ballot must be received by the corporation to be counted. Approval by ballot shall be valid only when the number of votes cast equals or exceeds the quorum required to be present at a meeting authorizing the action, and the number of approvals equals or exceeds the number of votes that would be required to approve the matter at a meeting at which the total number of votes cast was the same as the number of votes cast by ballot.

Voting Entitlement (D.C. Code § 29-405.21)

- Each member is entitled to one vote on each matter voted on by the members, except as otherwise provided in the articles or bylaws.
- *Previously, members were not entitled to vote except as the right to vote was granted in the articles. The new default is the opposite—members are entitled to vote unless otherwise limited by the articles or bylaws*.

Member Quorum (D.C. Code § 29-405.24)

- Default quorum is now a majority of votes entitled to be cast on a matter. A different quorum (greater or lesser) may be established by the articles or bylaws.
- *Previous default quorum was 1/10 of the votes entitled to be cast on a matter*.

Voting for Directors (D.C. Code §§ 29-405.27; 414.03)

- Directors shall be elected by a plurality of the votes cast by the members entitled to vote in the election at a meeting at which a quorum is present, unless otherwise provided in the articles or bylaws.
- Members shall not have the right to cumulate their votes, unless permitted by the articles or bylaws. However, members that were entitled to cumulate their votes for election of directors prior to the effective date of the 2010 Act may continue to do so until otherwise provided in the organization's articles or bylaws.
- *Previously, by default, directors were elected by majority vote and members were entitled to cumulate votes in director elections*.

Delegates; Designated Body (D.C. Code §§ 29-404.30; 406.12)

- Under the new law, a nonprofit membership corporation may provide in its articles or bylaws for delegates, which may exercise some or all of the rights of members in governing the corporation. Additionally, a group of delegates may be a "designated body" authorized to exercise some, but less than all, powers of the board, to the extent provided in the articles or bylaws.

Amendments to Articles and Bylaws (D.C. Code §§ 29-408.01 to .09)

- Amendments to the articles proposed by the board must be approved by the board and submitted for approval to any members entitled to vote on the amendments. The board need not obtain approval of the members, however, to adopt certain administrative amendments or to restate the articles without revision. Members entitled to vote on amendments to the articles may also propose and adopt amendments without approval of the board—such amendments may be proposed by 10 percent or more of the members entitled to vote on articles amendments, or by such greater or lesser number as specified in the articles.
- Members may amend or repeal the corporation's bylaws, except as otherwise provided in the articles or bylaws. The board of directors may also amend or repeal the corporation's bylaws, unless the articles or bylaws reserve that power exclusively to the members or a designated body, in whole or in part. However, unless otherwise provided by the articles or bylaws, certain amendments affecting the rights of members may only be adopted by the members (e.g. members' respective rights and obligations with respect to voting; levying dues, assessments or fees on some or all members; requiring cause to remove a director). Only the members may amend the articles or bylaws to alter the members' exclusive statutory right to adopt such amendments.
- *Previously, the members did not have an independent right to amend the articles without approval of the board, and the power to amend the bylaws was vested solely in the board, unless otherwise provided in the articles or bylaws. Also, the new law permits a nonprofit corporation to restate its articles, which was not previously an option*.

Inspection of Membership List (D.C. Code § 29-405.20)

- The corporation must prepare a list of members entitled to notice of a particular meeting of members, showing the address of each member and the number of votes that each member is entitled to cast at the meeting. The list must be made available to members for inspection beginning two business days after notice of the meeting is given and continuing through the meeting. Upon written demand and a showing of proper and relevant purpose, the member must also be allowed to copy the list. Instead of making the list available for inspection, the corporation may state in the meeting notice that the corporation has elected to proceed under D.C. Code § 29-405.20(f), which requires a member's demand for inspection to state a proper purpose for inspection, and which permits the corporation to offer, within 10 business days of receiving the demand, a reasonable alternative method for achieving the purpose. Refusal or failure to prepare or make the list available shall not affect the validity of action taken at the meeting; however, a member is entitled to seek enforcement of his or her right to inspect or copy the list by court order.

Inspection of Records; Financial Statements (D.C. Code §§ 29-413.02; 413.20)

- Members are granted the right to inspect and copy any of the corporate records required to be maintained by the corporation under the new law upon written demand, and in some circumstances, upon a showing of proper and relevant purpose. Members may not use the member list, however, for any commercial purpose, or to solicit money or property (unless the money or property will be used to solicit votes of the members in connection with an election to be held by the nonprofit corporation). The new law currently states that the members' right to inspect corporate records may be abolished or limited in the articles or bylaws. However, indications have been made that this was a drafting error which may soon be corrected in a package of technical amendments to the new law.
- Separately, the corporation's latest annual financial statements, which shall include a balance sheet and a statement of operations for the most recent fiscal year, must be furnished to members upon written request.

FUNDAMENTAL TRANSACTIONS

Domestication (D.C. Code § 29-407.01 to .06)

- The new law provides for a domestication process, which permits a nonprofit corporation to transfer its jurisdiction of incorporation without having to create or merge into a different legal entity, provided that domestication is authorized by the laws of both the new and old jurisdictions.

Notice of Charitable Dissolution (D.C. Code § 29-412.02)

- A charitable corporation must now provide notice to the Attorney General of the District of Columbia that it intends to dissolve prior to delivering articles of dissolution to the D.C. Department of Consumer and Regulatory Affairs. This notice requirement shall not, however, delay or otherwise affect the dissolution process.

VENABLE® LLP

Articles

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The Top Ten Things You Need to Know about the New District of Columbia Nonprofit Corporation Act

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On January 1, 2012, the District of Columbia Nonprofit Corporation Act of 2010 (the "New Act") went into effect. As a general rule, the New Act provides D.C. nonprofit corporations with considerable flexibility to structure their corporate governance, and for the most part will not require changes to day-to-day operations. However, numerous default rules have changed under the New Act and new, more detailed provisions governing matters like director standards of conduct and liability, indemnification, member voting rights and ballot voting procedures, and numerous other topics require D.C. nonprofit corporations to familiarize themselves with the new law, and determine whether changes to their governing documents or practices will be necessary to comply. The following highlights many of the significant changes that are in store. The District of Columbia Code can be found online, **here**.

(1) Applicability *(D.C. Code §§ 29-414.01, .02)* – The New Act is applicable to nonprofit corporations incorporated in the District of Columbia. Except for some limited provisions, such as the change of filing date for the Biennial Reports and an expansion of the registered agent provisions, the provisions in the New Act do not affect foreign corporations authorized to do business in the District of Columbia.

(2) Expanded Corporate Records *(D.C. Code §§ 29-413.01 to .05)* – The New Act specifies expanded recordkeeping requirements for D.C. nonprofit corporations, and also permits records to be kept in digital form. Additionally, numerous records must be maintained at the corporation's principal office, including the Articles of Incorporation, bylaws, minute books for the most recent three years, all formal notices to members for the most recent three years, a current list of names and business addresses of the corporation's officers and directors, and a copy of the corporation's most recent biennial report.

(3) Ability to Create Designated Body *(D.C. Code §§ 29-404.30, -406.12)* – The New Act allows an organization to create, through a provision in an organization's Articles of Incorporation, a new governing body, called a "Designated Body," that may exercise "some, but less than all" powers of the board of directors. This is helpful for committees which exercise the power of the board but include non-directors.

(4) Different Minimum Officers *(D.C. Code § 29-406.40)* – Previously, D.C. nonprofit corporations needed to have a President and a Secretary; now they need to have at least a President and Treasurer, with one officer having the responsibilities of a Secretary.

(5) Codified Standards of Conduct *(D.C. Code §§ 29-406.30, -406.32, -406.42, -406.70, -406.80)* – The New Act codifies traditional common law concepts of fiduciary duties for directors and officers, and provides procedures for approaching conflict of interest transactions.

(6) New Indemnification Provisions *(D.C. Code §§ 29-406.50 to .58)* – The New Act provides very detailed provisions governing when a corporation must, may, and may not indemnify a director or officer. Organizations should review their current indemnification provisions to ensure the provisions are compliant with these new standards.

(7) Limitation of Liability for Non-501(c)(3) Directors Must Be in Articles *(D.C. Code § 29-402.02 (c))* – Liability of directors of 501(c)(3) organizations is automatically limited under the New Act for certain actions or inactions. Directors of associations and other non-501(c)(3) corporations must rely on the inclusion of a specific provision in their organization's articles of incorporation to have the same limitation of liability.

(8) Reaffirmed Provisions for Board Committees *(D.C. Code § 29-406.25)* – Executive Committees and other committees exercising board authority must consist solely of members of the board of directors who are appointed to such committees by a majority of the directors in office.

(9) Switched Default and Higher Quorum for Member Voting *(D.C. Code §§ 29-405.21, -405.24)* –

The new default is that members are entitled to one vote on each matter submitted to members; the default quorum for member voting is now a majority of the votes entitled to be cast on a matter.

(10) Allows for Electronic Membership Meetings and Action by Ballot for Member Vote *(D.C. Code §§ 29-405.01(e), -405.09)* – If authorized by the Articles or Bylaws, the New Act allows for meetings of members to be held through electronic means; the New Act also authorizes ballot voting by members without a meeting if specific requirements are met.

For more information, please contact Janice Ryan at ***jmryan@Venable.com*** *or Kristalyn Loson at* ***kjloson@Venable.com****, or at 202-344-4000.*

The authors are attorneys in the law firm of Venable LLP. This article is not intended to provide legal advice or opinion and should not be relied on as such. Legal advice can only be provided in response to specific fact situations.

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THE NEWSLETTER OF THE BDO NONPROFIT & EDUCATION PRACTICE

NONPROFITSTANDARD

MY APPLICATION FOR TAX EXEMPTION WAS SUBMITTED TO THE IRS – WHY IS IT TAKING SO LONG?

By Paul E. Hammerschmidt, CPA, MS (Taxation)

Perhaps you submitted an application for recognition of tax exemption to the IRS months ago and wonder why it's taking so long for the agency to process and send a determination letter. Tax-exempt organizations are currently experiencing significant delays after submission of their applications to the IRS. This article explores the reasons for the delay and offers suggestions to those who have submitted, or plan to submit, an application for exemption.

Most charitable organizations are required to submit an application for exemption (Form 1023) to the IRS to be recognized as tax-exempt under Section 501(c)(3) of the Internal Revenue Code. Exceptions include religious organizations that are not required to submit an application of exemption to the IRS. Other organizations, such as social welfare organizations and trade associations, may file Form 1024 for a determination of exempt status. However, these organizations can operate as tax-exempt without filing an exemption application (Form 1024). These so-called "self-declared" Section 501(c)(4), (5) and (6) organizations have not filed an application for exemption but operate as not-for-profits and annually file Form 990. However, most trade associations and social welfare organizations do, in fact, file Form 1024 to receive positive assurance that they are tax-exempt.

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TAX EXEMPTION

Organizations applying for recognition of tax-exempt status under Section 501(c)(3) will typically face fundraising challenges without an IRS determination letter. Understandably, many donors are reluctant to make contributions (especially large contributions) to such organizations. Contributions from private foundations (PFs) and donor advised funds (DAFs) are subject to rules that prohibit taxable expenditures and grants to organizations that are not classified as public charities under 501(c)(3). Such grants count as taxable expenditures unless the grantor exercises expenditure responsibility over those grants. Typically, PFs and DAFs do not want this responsibility.

In addition to fundraising from the public, many states require charitable organizations to have a determination letter issued by the IRS prior to charitable solicitation or to obtain a sales tax exemption.

The recent and significant delays in processing exemption applications at the IRS are perhaps a *perfect storm* and can be attributed to the following factors:

▶DELAYS IN PROCESSING APPLICATIONS FOR TAX EXEMPTION ARE ATTRIBUTABLE TO:

- **Automatic Revocation of Exemption Under Pension Protection Act** – Beginning in 2011 the IRS automatically revoked approximately 275,000 exemptions under the provisions passed by Congress in the Pension Protection Act (PPA) of 2006 because they did not file legally required annual reports (i.e., Form 990, 990-EZ or 990-N, as applicable) for three consecutive years. Many of these organizations have submitted applications for reinstatement of exemption. GuideStar published, "What Automatic Revocation of Nonprofit Tax Exemptions Means for You" that provides guidance for nonprofits, grant makers and donors.

- **IRS Scrutiny of Self-Declared 501(c)(4), (5) and (6) Organizations** – In early 2013 the IRS sent nine-page questionnaires to more than 1,300 organizations that declared themselves tax-exempt without a determination letter. The IRS indicated that completing the questionnaire was optional, but encouraged. This recent IRS scrutiny likely caused a number of self-declarers to apply for tax exemption.

- **IRS Resignations, Dismissals and Staffing Shortages** – According to a report from the Treasury Inspector General for Tax Administration (TIGTA), the IRS used inappropriate criteria that identified for review Tea Party and other organizations applying for tax-exempt status based upon their names or policy positions instead of indications of potential political campaign intervention. As a result according to TIGTA, their applications were subjected to unnecessary scrutiny and inappropriate questions. After this report was released, the IRS Commissioner resigned and many senior leaders in the IRS EO Group have subsequently resigned or retired.

- **The IRS' self-certification process** – This new process is available to certain 501(c)(4)s (see below) and is likely to create delays in processing other applications as the IRS attempts to prioritize applications rather than process applications in the order received.

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INSTITUTE PROFESSIONAL PROFILE

PAUL HAMMERSCHMIDT

Paul is the director of the Exempt Organization Tax Practice in the BDO Greater New York Nonprofit industry group. He has more than 25 years of taxation experience with nonprofit organizations. Paul's knowledge covers all facets of nonprofit taxation and includes assisting nonprofit organizations commence their tax planning at the inception of the organization and assisting with the completion of applications for exemption to be filed with the IRS.

Paul is responsible for the Greater New York nonprofit taxation practice's overall service approach and directing its day-to-day work. He works closely with client management and those charged with governance to ensure that organizations have complied with all tax requirements to protect their tax-exempt status.

Paul's experience includes reviewing nonprofit operations to ensure compliance with tax regulations, assisting organizations in analyzing proposed transactions to identity any potential excess benefit transactions and ensuring compliance with intermediate sanctions. Paul also has experience in the evaluation of fundraising activities to determine compliance with IRS and state requirements.

Paul is currently an active member of the Exempt Organization Committee of the New York State Society of Certified Public Accountants (NYSSCPA) and is on the response team that provides technical guidance to NYSSCPA members on exempt organization tax matters. Paul has previously chaired the Exempt Organization Tax Committee of the NYSSCPA.

Paul is a graduate of Long Island University with a bachelor's in Accounting and an M.S. in Taxation from Pace University. He is a member of the American Institute of Certified Public Accountants and the NYSSCPA.

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TAX EXEMPTION

▶WHAT ORGANIZATIONS CAN DO TO EXPEDITE THE PROCESSING OF THEIR APPLICATION

Background

First, it would be helpful to understand a little about the IRS determination application process. Upon receipt of the application at the IRS, exemption applications accompanied by the required user fee are initially separated into four categories: (1) those that can be approved immediately based on the information submitted, (2) those that need minor additional information to be resolved, (3) those that are submitted on obsolete forms or do not include the items specified on the Form 1023 Checklist found at the end of IRS Form 1023 Instructions, and (4) those that require development.

It should be the goal of all applicants to be in the first category as their applications can be processed efficiently. The IRS currently indicates that applications that fall within one of the first three categories will receive either their determination letter or a request for additional information, via phone, fax or letter, within approximately 90 days of the date the application was submitted. Applicants will want to avoid the fourth category as "further development" can mean substantial additional time to process.

The IRS website provides the month from which it is currently assigning applications it received. "Where Is My Exemption Application"? For example, mid-September 2013 the IRS indicated it was currently assigning applications received in April 2012.

The Application

- Make sure the application is accurate, complete and includes all required schedules and copies of the organizing documents, bylaws and the correct user fee.

- Request IRS expedited processing if any of the following compelling reasons exist:
  - A pending grant, where failure to secure the grant will have an adverse impact on the organization's ability to continue operating
  - A newly created organization providing disaster relief to victims of emergencies
  - IRS errors have caused undue delays in issuing a determination letter

After Submission

- **501(c)(4), (5) and (6) organizations can self-declare** – If they filed an application for exemption but have experienced delays in processing, they may withdraw their application at the IRS and "self-declare" that they qualify for tax-exempt status.

- **Self-Certification process for certain 501(c)(4) organizations** – The IRS has recently offered a streamlined "hybrid" approach that combines the self-declaration with a formal recognition of tax-exempt status. This is available to organizations whose application had been pending for more than 120 days as of May 28, 2013, and the organization's activities involve possible political campaign intervention or issue advocacy. The applicant organization may "self-certify" and make the following representations under penalties of perjury:
  - The organization devotes 60 percent or more of both spending and time to activities that promote "social welfare" within the meaning of Section 501(c)(4).
  - The organization devotes less than 40 percent of both spending and time to political campaign intervention.
  - The organization ensures the above thresholds apply for past, current and future activities.

If the organization is able and willing to make these representations, it may return the appropriate Letter 5228 to the IRS. The IRS has indicated that it will issue a favorable determination letter within two weeks of receiving the signed representations. This expedited process is optional and organizations may choose to seek recognition of exemption under their previously submitted Form 1024.

- **501(c)(3) organizations can seek a declaratory judgment** – Charities that have applied for tax-exemption under Section 501(c)(3) have a right to bring suit if the IRS does not respond to the application within 270 days.[1] Organizations that are confident of their position and whose application for recognition of exempt status under 501(c)(3) has been denied, or not acted on within 270 days, may file an action in the U.S. Tax Court, the U.S. Court of Federal Claims or the U.S. District Court for the District of

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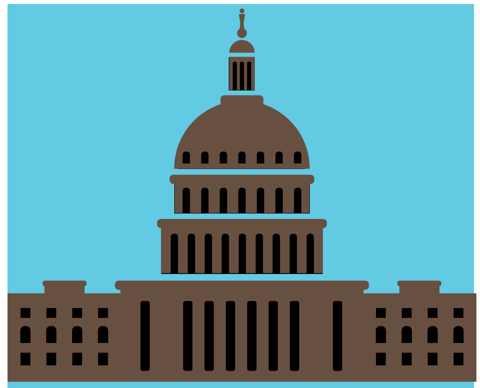

FEDERAL GOVERNMENT SHUTDOWN

The federal government, including the Internal Revenue Service, shut down Oct. 1 as Congress failed to pass a government funding bill. Approximately 800,000 federal workers, including more than 85,000 IRS employees, are now furloughed until spending is reauthorized. The IRS did issue a contingency plan on Sept. 27 noting that the following activities would cease during the shutdown: refunds, examinations, operation of taxpayer services and centers, operation of the Practitioner Priority Service and processing of paper returns that do not require remittance. Unfortunately, based on this information there will be no work on the backlog of the applications for exemption at this point.

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TAX EXEMPTION

Columbia for a declaratory judgment that it is entitled to recognition of exempt status.

A declaratory judgment can be issued only when the court determines that the organization has exhausted administrative remedies available to it within the IRS. In addition, the cost of litigation would generally preclude smaller organizations from seeking a declaratory judgment.

- **Provide a prompt and complete response to the IRS' request for additional information during its review of the application** – Organizations should be responsive to requests from the IRS in order to help it process the application.

Moving Forward

On May 15, 2013, President Obama appointed Daniel Werfel as acting IRS Commissioner. On May 24, 2013, IRS acting Commissioner Daniel Werfel announced two appointments. Michael Julianelle was appointed IRS Acting Commissioner of Tax Exempt and Government Entities (TE/GE) and Ken Corbin was appointed to be acting director of Exempt Organizations. Most recently, on June 10, Karen Schiller, a 25-year veteran with the IRS, became the Director of Exempt Organizations Rulings and Agreements.

At the annual public meeting of the Advisory Committee on Tax Exempt and Government Entities (ACT) held Sept. 12, acting Commissioner Werfel indicated that the IRS made significant progress in addressing the problems in the 501(c)(4) application process identified in the TIGTA May 14 report.

The IRS has charted a path forward with intermediate actions which is available on its website. In addition an 83-page report from acting Commissioner Werfel dated June 24, 2013, is in response to the request by the Secretary of the Treasury for an update, addresses the findings of TIGTA and acknowledges both organizational and individual failures within the IRS.

On June 26, 2013, National Taxpayer Advocate Nina E. Olson released a statutorily mandated mid-year report to Congress that identifies the priority issues the Taxpayer Advocate Service (TAS) will address during the upcoming fiscal year. The report stated that there is a lack of guidance and transparency in connection with the legal standard "primarily" required for section 501(c)(4) organizations to qualify for tax-exempt status. Treasury regulations provide that an "organization is operated exclusively for the promotion of social welfare if it is *primarily* engaged in promoting in some way the common good and general welfare of the people of the community" (emphasis added).

It may be too early to tell if these IRS actions are substantive and whether they will substantially reduce the amount of time it takes them to review exemption applications.

Marcus Owens, former head of the IRS' Exempt Organizations division, didn't appear to be optimistic when he commented, "It's outrageous that the IRS is so dysfunctional in processing applications."[2] He attributed the delays to staffing shortages and no plan for resolving hard technical issues raised by the applications. Owens said that the process is slowing down even more now, due to management shake-ups over the scandal involving the handling of conservative groups, in which senior management of the exempt unit at the IRS was replaced with people who have no familiarity with the area.

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[1] IRC § 7428.

[2] Bloomberg BNA Daily Tax Report Article, August 21, 2013 and republished by Caplin & Drysdale in Client Alert

For more information, contact Paul E. Hammerschmidt, director, at phammerschmidt@bdo.com.

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IRS UPDATES

TAX-EXEMPT ORGANIZATIONS WITH POLITICAL ACTIVITY – EXAMINATIONS SUSPENDED:

In a Sept. 18 House Ways and Means Oversight Subcommittee hearing, the IRS Acting Commissioner Werfel announced the suspension of all examinations of tax-exempt organizations involving possible political campaign activity. New leadership of the Tax Exempt and Government Entities (TE/GE) has decided that a review of the examination processes and procedures is needed. They decided to suspend such examination activity until the review is completed.

TAX-EXEMPT ORGANIZATIONS – ONLINE EXEMPTION APPLICATION:

An online application process for new Section 501(c)(3) organizations is under development by the IRS. The intent is to guide preparers through the process to ensure a more complete and accurate application. The program is expected to be released later this year, but in the meantime, the IRS is inviting users to test and comment on the interactive version of the application on the IRS website at www.stayexempt.irs.gov. The test version is quite limited in function. It guides you through a process to identify the needed forms and steps. It does not facilitate the creation of the application except to provide fill-in versions of the forms. The forms are not interactive at this point.

USING OUTCOMES TO MEASURE NONPROFIT SUCCESS

By Richard Larkin, CPA

Those who donate to nonprofit organizations naturally want to feel their gifts will be used successfully in a way that will improve society or some part of it, like children, the sick, students, etc. But how can donors evaluate whether or not a charity will ultimately deliver on their promise or mission?

Success in the business world is generally measured by the amount of profit—the bottom line—that is reported in the business's financial statements. There are other aspects that can mark a successful business: Does it treat its workers fairly? Does it protect the environment? Is its advertising truthful, and are its products or services of good quality? But failure in these aspects eventually leads to diminished profits, as workers, customers and investors desert that business for more socially responsible companies whose products or services are of better quality.

In the nonprofit world, however, there is no common, easily understood measure of success. In fact, having a large positive bottom line may be an indicator that the organization is not doing as much as it could to fulfil its mission. The true measures of success for most nonprofits are statistics related to its programs, but such data are difficult even for management to obtain and understand, much less outsiders. For example, an obvious measure of success for an educational institution would be how much students learn from attending classes. But, much to the chagrin of educators and public policy makers, actually measuring this learning is very difficult for a variety of reasons. (Think about how a church might measure its own success. Souls saved per pew-hour preached? And where would *those* data points come from?)

▶THE SUCCESS METRIC CONUNDRUM

There are three types of data that might be used to measure a nonprofit's success, but only one of them is a true measure:

- Inputs describe how much in the way of resources (both financial and non-financial, such as volunteer time, materials, equipment, etc.) was used to conduct an activity.

- Outputs measure the activities conducted by the organization, such as the number of classes held, the number of students enrolled or graduated, the number of concerts performed and number of concertgoers attending, the number of members enrolled and the like. The problem with this type of data is that, while it shows the quantity of program services provided, it does not indicate whether any real benefits resulted. Did the students learn anything? What was the quality of the concerts? How well were the members served?

- Outcomes measure how much better off the organization's clients or society as a whole are as a result of the organization's activities. For example, by how much has the teenage pregnancy rate in a community been reduced through the efforts of a charity whose mission includes educating children about the undesirable results of getting pregnant so young?

Of these three types of data, only the first is traditionally found in financial statements, although some organizations present certain output data in footnotes, as supplementary schedules or in management reports. However, true success is measured only by outcomes, and these data are never found in financial statements, if they can be obtained at all.

▶EVALUATING NONPROFIT OVERHEAD

So, lacking access to most output data and almost all outcome data, donors are often left with input data as a surrogate for measuring success for nonprofits. But these data are very flawed when used for this purpose, as they do not necessarily have any direct relationship to true organizational success. For example, in a hospital, input data show how much money is spent treating patients, but not whether any patients are actually cured of the conditions that brought them to the hospital in the first place. Further, these data are necessarily past-oriented, and do not offer any assurance that the gift I make today will be used the same way in the future.

The particular input data that have been widely used to evaluate charities demonstrate how an organization spends its resources. Accounting standards require nonprofits to report their expenses in three categories: program, management and fundraising. The knee-jerk reaction by users of financial statements is to consider program expenses as good and management and fundraising expenses (so-called overhead) as bad. Usually data are expressed as ratios of each category of expenses to total expenses, totalling 100 percent.

Various attempts have been made over the years to define acceptable ratios, with desirable program expenses usually somewhere in the range of 60 to 80 percent, and/or acceptable fundraising ratios generally no more than 15 to 30 percent. Of course, some expenditure on overhead is necessary for any organization to operate, but too

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NONPROFIT SUCCESS

often more attention is paid to this than is warranted. Recently, a major Internet news site published a list of what it called "The 50 Worst Charities in America." Its sole criterion for being on the list was related to the overhead ratio. While expense ratios provide valuable information for nonprofit executives charged with making decisions about the organization's activities, these ratios don't serve any value as an indicator of organizational success. Although most people understand that it takes money to raise money, and money to manage an organization, sometimes one sees expressions in a fundraising appeal of an expectation that 100 percent of all contributions raised will go directly toward program expenses. That is clearly unreasonable and indicative of an attempt to mislead the public about how a charity uses contributions.

▶LOW OVERHEAD VS. HIGH PERFORMANCE

Some states—most recently, Oregon—have passed laws attempting to regulate how much charities that solicit contributions in that state are allowed to spend on overhead. The Internal Revenue Service (IRS) and federal law have no such requirements. The IRS, however, evaluates tax-exempt organizations on how well they appear to be fulfilling the mission for which they obtained exempt status. So an extremely low program-expense ratio would naturally raise a question as to whether that mission is likely being fulfilled. Definitions and penalties vary, but the logic behind such a law is clear: to protect innocent citizens of the state from being bilked by unscrupulous charities that try to give the impression that donating to them will result in wonderful benefits to society, when in fact most of the money raised will go for overhead. Unfortunately, there are some so-called charities out there that spend little, if anything, on programs while paying exorbitant amounts to professional fundraisers and to their own managers. The problem for donors and regulators is to distinguish the bad actors from the well-intentioned charities. There can be various legitimate reasons why a charity's overhead ratio may be on the high side. For example, the organization espouses a cause that is relatively unpopular with the public, so it naturally has to expend more effort to raise the money it needs; the organization's constituency is largely in an economically depressed area, so is less able to contribute or pay for services; the organization is new and still building its infrastructure; or the organization has experienced some problems recently, but is now getting back on its feet.

Several years ago, *The Wall Street Journal* published a single-panel cartoon showing a homeless individual with his hat held out. Around his neck was a sign saying, "No portion of your contribution will be used for administration." Would you contribute to this nonprofit "organization?" The sign is presumably telling the truth, and the "charity" likely would not end up on the 50-worst list, but what is the program here? What beneficial outcomes are to be expected? If the program is aimed at providing him with food, clothing, job training and a job, then maybe this is a cause worth donating to. But if the "program" consists of enjoying the offerings of the nearest tavern, donors would probably give this one a pass.

Earlier this year, the presidents of three well known nonprofit organizations—the BBB Wise Giving Alliance, GuideStar and Charity Navigator, whose missions include evaluating charities and making their evaluations available as guidance to donors—issued a joint letter titled, "The Overhead Myth." In this call to action, the three organizations urged donors and the public to place less reliance on expense ratios when making giving decisions. They correctly point out that *how* money is spent is often not a very reliable indicator of the outcomes achieved by the nonprofit. In fact, they suggest that many nonprofits should probably be spending *more* on overhead to improve the quality of management, strengthen internal control, gain operating efficiency, provide for long-term stability and the like.

The last sentence of that letter reads, "The people and communities served by charities don't need low overhead, they need high performance." This author could not agree more.

For more information, contact Dick Larkin, director, BDO Institute for Nonprofit Excellence℠, at dlarkin@bdo.com.

BDO PROFESSIONALS IN THE NEWS

BDO professionals are requested to speak on a regular basis at various conferences due to their recognized experience in the industry. The following is a list of some of the upcoming events where you can hear BDO professionals speak. .

OCTOBER

Jeffrey Schragg will be presenting a session entitled "State and Local Tax Obligations for Higher Education Institutions" at the National Association of College and University Business Officers Tax Forum on Oct. 22 in St. Louis, Mo.

Mike Sorrells will be will be presenting an all day course entitled "Form 990: A Comprehensive Approach" for the AICPA on Oct. 26 in Randolph, Mass.

NOVEMBER

Rebekuh Eley will be conducting a session entitled "The Life Cycle of an IRS Exam" at the AICPA Not-for-Profit Financial Executive Forum on Nov. 4 in San Francisco, Calif.

Lee Klumpp will be conducting a session entitled "Nonprofit Financial Statement Presentation – What is on the Horizon?" at the Virginia Society of CPAs 43rd Annual Virginia Accounting and Auditing Conference on Nov. 22 in Virginia Beach, Va.

DECEMBER

Dick Larkin will be presenting a session entitled "Accounting and Auditing Update for Nonprofits" at the Greater Washington Society of CPAs (GWSCPA) Nonprofit Symposium on Dec. 16 in Washington, D.C.

Klumpp will also be presenting a session entitled "FASB Update" at the GWSCPA Nonprofit Symposium on Dec 16.

Schragg is also presenting a session at the GWSCPA Nonprofit Symposium entitled "If I Had Only Known: The Good, The Bad and The Ugly of Alternative Investments" on Dec. 17.

Sorrells will also be presenting a course entitled "Tax Red Flags for Auditors and Financial Managers: Know When to Call in the Tax Pros" at the GWSCPA Nonprofit Symposium on Dec. 17.

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ISSUES WITH IMPLEMENTATION OF THE NEW GASB PENSION STANDARDS

By Patricia Duperron, CPA

The Government Accounting Standards Board (GASB) Statement No. 67, *Financial Reporting for Pension Plans*, revises current guidance for financial reporting of most governmental pension plans. GASB Statement No. 68, *Accounting and Financial Reporting for Pensions*, establishes new financial reporting requirements for most governments that provide their employees with pension benefits. GASB Statement No. 67 is effective for years ending June 30, 2014, and GASB Statement No. 68 is effective for years ending June 30, 2015. The following discusses some implementation issues with cost-sharing multiple employer pension plans as well as agent multiple employer plans.

Cost-sharing multiple employer pension plans allow participating employers to pool their assets and obligations. Assets can be used to pay benefits for any retiree of a participating employer. Currently, the plan assets and liabilities are not allocated to individual employers and the plan financial statements report only total assets and total liabilities of the plan as a whole. Under current standards, individual employers have limited footnote disclosure requirements and each employer only records a liability if they don't make their annual required contribution. The liability is based on the funding requirements of the plan. Once GASB Statement No. 68 is implemented, employers will have to record their proportionate share of the net pension liability, deferred outflows/inflows and pension expense. For the first time, these employers will be required to record pension expense as employees earn the benefits. The expense will no longer be based on the annual required contribution.

Cost-sharing plans are required to implement GASB Statement No. 67 a year earlier than employers have to implement GASB Statement No. 68. As mentioned above, cost-sharing plans currently do not allocate the assets, liabilities and deferred inflows/outflows to the individual employers. As a result of these new standards, the plans will need to determine an allocation method and allocate the pension amounts to individual employers going forward. Some plans have thousands of participating employers and it will be a significant amount of work to allocate all of the pension amounts to each employer.

The main issue employers will face when implementing GASB Statement No. 68 is how to obtain their share of the cost-sharing plan's pension amounts. Also, because these amounts will most likely be material for each employer, the allocation will need to be audited to avoid a modified opinion for the employer's financial statements. Currently audited financial statements of cost-sharing multiple employer plans do not provide this information, nor do they provide the amounts of deferred inflows/outflows. The employer will not have access to the census data held by the plan so they will need the plan to provide audited data. It's not feasible for each employer to try to calculate their own allocations as they won't have enough information. Also, if each employer estimated its share of the liability, it could result in different allocation bases and total more or less than the 100 percent allocated amount when you add up all the individual calculations.

The American Institute of Certified Public Accountants (AICPA) has suggested that plans include a schedule of employer allocations and a schedule of collective pension amounts and that both be audited by the plan's auditors.

Agent multiple employer plans pool assets of individual employers for investment purposes but maintain separate accounts for each individual employer. Like cost-sharing plans, employers currently recognize annual pension expense equal to the annual required contribution and liabilities to the extent the annual required contribution is not made. Once GASB Statement No. 68 is implemented, employers will be required to recognize a liability as employees earn their pension benefits. Like employers participating in cost-sharing plans, they will be required for the first time to recognize their specific pension amounts in their financial statements. GAAP-based financial statements of agent plans do not include the elements required to be reported by GASB Statement No. 68. Therefore, employers will have the same challenge as those participating in cost-sharing plans to obtain audited pension amounts from the plan to avoid a modified opinion.

Employers need to start working with their plan's administrators now to ensure these details are being addressed to avoid any implications to the opinion on the employer's financial statements upon adoption of GASB Statement No. 68.

For more information, contact Patricia Duperron, director, at pduperron@bdo.com.

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HIGHER EDUCATION FACTS

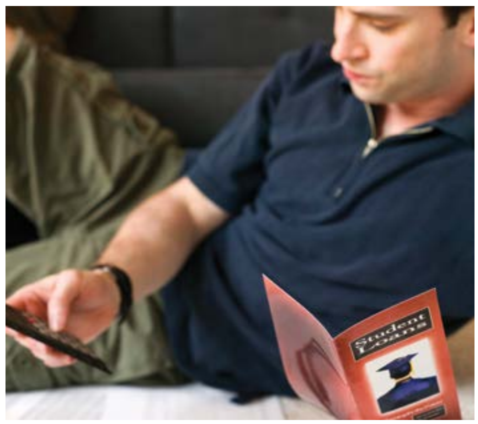
Did you know...

1. Massachusetts recently approved a $34 billion state budget that freezes tuition rates at state colleges.
2. More than 7 million Americans are expected to take out student loans during the fall of 2013.
3. While U.S. citizens have held total consumer debt to a respectable 9 percent increase since 2004, student debt has more than tripled to approximately $1 trillion during the same period.
4. Oregon has developed a college affordability program that would allow students to attend in-state public universities at no immediate cost in exchange for 3 percent of their annual earnings for 25 years after they graduate.
5. A new study by HSBC found that Australia is the most expensive country for overseas students to study in, with the USA and the UK coming in close behind at second and third.
6. The cost of higher education, as measured by private and public tuition, has risen at rates higher than inflation, roughly 4 percent per year for nonprofit private tuition.
7. In the Pennsylvania State System of Higher Education, despite a 3 percent tuition increase, eight of the universities have issued warnings that they may lay off faculty in order to stop their budgets from going into the red due to falling enrollment and lower state funding.
8. New research has found that 57 percent of students are now working part-time to pay for the record costs of higher education.
9. The U.S. federal government spends over $150 billion every year on student aid, mostly in the form of loans.
10. The MOOC industry is booming, and one company, Coursera, has already partnered with 83 higher education institutions worldwide.

OBAMA PROPOSES NEW COLLEGE RATING SYSTEM

By Tom Gorman, CPA

IN A SPEECH DELIVERED ON AUG. 22, 2013, PRESIDENT OBAMA OUTLINED A SET OF BROAD PROPOSALS AIMED AT CONTROLLING COLLEGE COSTS WITH A GOAL OF MAKING COLLEGE MORE AFFORDABLE.



Other elements of his plan will seek to promote innovations in the delivery of education and deal with the rising student debt burden.

COLLEGE RATING SYSTEM

The proposal calls for the U.S. Department of Education (ED) to develop a college rating system that would take into consideration factors such as:

- **Affordability** – including the average tuition charged, availability of scholarships, and level of loan debt
- **Access** – measure of how well the institution provides access to education to students from disadvantaged backgrounds
- **Outcomes** – includes graduation rates, graduate earning potential, and number of advanced degrees pursued by graduates

While these are laudable goals, there is some degree of skepticism about how effective ED can be in developing this rating system. Critics point to many of the shortcomings in the College Scorecard developed by ED in recent years. There is also a concern about the second aspect of the proposed college rating system – tying future student financial aid funding to a college's rating and performance. Students that attend higher performing colleges would be eligible for potentially larger financial aid awards. While these proposals are just that – proposals with implementation dates of 2015 for the development of the new rating system and 2018 for legislation to change how aid is awarded based on performance – they do signal continuing pressure on the industry to do a better job of controlling costs and reining in the rate of tuition increases.

INNOVATION AND COMPETITION

The president laid out his vision for promoting innovation in the delivery of education and measures to enhance competition among colleges and universities as they compete for a proposed $260 million innovation fund. This would be in addition to an additional $500 million the Department of Labor would make available to support accelerated degree programs and credentials for adult students.

In his speech, the president highlighted the steps some institutions have made to leverage massive open online courses (MOOCs) to deliver content, shorten the length of degree programs by granting credit for prior learning or using competency-based assessment models, and the use of technology to improve student retention. He also called on states and private donors to be partners in supporting these initiatives.

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COLLEGE RATING SYSTEM

While this sounds well and good, and many institutions are already engaged in many of these activities, significant regulatory barriers need to be removed to make these initiatives more widespread and readily accepted. It is yet to be seen how quickly ED will move to revise regulations that restrict the use of federal financial aid dollars to support these initiatives.

▶DEALING WITH STUDENT DEBT

The plan also includes proposals to help the 37 million student loan borrowers deal with what many are calling "a mountain of debt" that has the potential to restrict future economic growth.

The major component of the proposal is to expand the existing "pay as you earn" program. This program, only available to certain borrowers, caps federal student loan repayment at 10 percent of the borrower's income. The proposal calls for an expansion of the program to all student borrowers. This would be combined with a massive education campaign to make students aware of this option and promote the plan.

▶THE DEVIL IS IN THE DETAILS

As with so many proposals, the final product will likely look very different from the plan outlined by the president. However, as noted in my industry outlook in the Summer 2013 edition of the *Nonprofit Standard*, the higher education industry will continue to face increasing regulatory attention as the disconnect between cost and value remains firmly in place.

For more information, contact Tom Gorman, director, at tgorman@bdo.com.

INTERMEDIATE SANCTIONS AND THE RISKS OF NONPROFIT EXECUTIVE COMPENSATION: WHAT YOU NEED TO KNOW

By Laura Kalick, JD, LLM

IF YOU'RE A HIGHLY COMPENSATED EXECUTIVE AT A NONPROFIT AND IN A POSITION TO INFLUENCE HOW MUCH YOU EARN, YOU MAY BE AT RISK.

Nonprofit executives who are paid what might be considered excess benefits in their compensation packages could be subject to a substantial penalty tax. What could these penalty taxes mean for your organization and what do they mean for you? How can you avoid them?

The penalty taxes, called Intermediate Sanctions, were enacted into law in 1996 to address situations in which influential "insiders" were unjustly enriched from charities. Previously, the only action the IRS could take for this excessive compensation was to threaten revocation of exemption, which only hurt the organization and its community—not the wrongdoer. But now, Intermediate Sanctions provide the Internal Revenue Code (IRC) an additional, powerful tool to deal with this.

For so-called "excess benefit transactions," or compensation earned by key persons that is in excess of fair market value, the Internal Revenue Code imposes a 25 percent tax. If the arrangement is not corrected—which usually means paying back the excess with interest—a 200 percent tax can apply. But here's the kicker: the tax is levied on the *executive* who is considered able to substantially influence the organization—*not* on his/her organization. Additionally, board members who approve of such compensation while knowing that it is excessive can also be at risk for a penalty tax.

The taxes are imposed on a Disqualified Person (DP)—someone who can substantially influence an organization—when he/she enters into an excess benefit transaction with either a 501(c)(3), 501(c)(4) organization or an entity that the organization controls. By definition, officers and board members are DPs and, depending on the organization's leadership structure, other positions can also be categorized as such. Just because a person is highly compensated does not necessarily make the individual a DP, however. For instance, if the person does not participate in any management decisions affecting the organization as a whole, and if he/she does not control a discrete segment of the organization that represents a substantial portion of the activities, assets, income or expenses of the organization, the person may not qualify as a DP.

An excess benefit transaction could be unreasonable compensation or a transaction between a DP and an organization, such as a loan, lease or sale. And, if an executive receives an economic benefit that is not documented as compensation, then it could be classified as an automatic excess benefit. For example, if an executive takes her entire family of five on a 10-day trip to Hawaii so that she can attend a two-day educational conference and none of the personal expenses are reported as compensation, those expenses may constitute an automatic excess benefit, even though her overall compensation may be considered reasonable.

Given these substantial risks, what can nonprofits and their leaders do to guarantee that they are in compliance? When the IRS examines nonprofits, the organization under scrutiny has to prove that compensation is reasonable. The only exception is if the organization has previously established the "Rebuttable Presumption of Reasonableness,"

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INTERMEDIATE SANCTIONS

which shifts the burden to the IRS to prove that compensation is unreasonable. There are three simple steps to establish the Rebuttable Presumption: (1) have an authorized independent board or committee make compensation decisions; (2) have the authorized body use comparable data; and (3) have the decision and its process contemporaneously documented.

Actually establishing the Rebuttable Presumption can be tricky. In the recently released IRS College and University Compliance Project Report, the IRS indicated that approximately 20 percent of the institutions examined failed to establish it. Oftentimes, comparability data fell short because the surveyed schools were not similarly situated. For example, the report indicated that the institutions were not similar to the comparables on factors such as location, endowment size, revenues, total net assets or number of students. Also, compensation studies did not document the selection criteria for the schools compared, or they failed to specify whether the compensation amounts included benefits other than salaries, which must be taken into account for purposes of IRC 4958. The total compensation package must be compared and includes salary, deferred compensation, car and housing allowances, etc.

Moving forward, states such as New York appear to be adopting rules regarding how nonprofit organizations should set compensation levels for executives. (See the article on page 13 for more on this issue.) Hopefully, this will be an incentive for more organizations to use a process that will minimize their risk of sanctions.

Nonprofits can even use for-profit comparables as long as they can show how they are relevant. If the comparables include the Forms 990 of other organizations, make sure that the relevancy of the institution and the comparability of the executive's duties are being documented *and* that the Forms 990 are in the files. The IRS is looking for a process. What metrics does your organization use to establish compensation packages?

For more information, contact Laura Kalick, national director, Nonprofit Tax Consulting, at lkalick@bdo.com.

COMPENSATION CONSULTANT – DO WE NEED ONE?... REALLY?

By Michael Conover

IN THE WEEKS PRECEDING THIS ISSUE OF THE *NONPROFIT STANDARD*, I'VE BEEN WRACKING MY BRAIN FOR A TOPIC.

Previous articles have covered many aspects of executive compensation, but then it occurred to me that one aspect had not been covered: the role of the compensation consultant. I suspect that partly out of a lack of objectivity (more than 25 years as one of "them") and excessive familiarity (doesn't everyone know what we do?), I never thought about exploring this particular topic. However, I believe it is well worth examining the consultant's role in the overall governance and administration of executive compensation. And so, having revealed my total lack of objectivity, I hope that some of my observations may be helpful in better understanding the role of a compensation consultant.

At the start of my career, my mentor advised me never to waste my time telling people what I did. "They'll never understand it. Tell them you're a dentist. People always clam up about what you do then," he advised. My youngest daughter once told her friend, "My dad doesn't have a real job. He just flies in airplanes and tells people how much money they should make." Finally, on one of my earliest client interviews, a particularly caustic executive quipped, "You and people like you aren't consultants, you're 'insult-ants!' People that need outsiders to run their business shouldn't be in business!"

Thankfully, times have changed and I believe most people have a clearer idea of what compensation consultants do. The consultant's work of analyzing and interpreting competitive information, as well as providing advice and assistance with development of pay plans and processes, is pretty familiar to most businesspeople today. There are, however, some ongoing discussions about the role that consultants play in the executive compensation arena. Who should the consultant represent, the board or management? Are consultants to blame for the spiraling levels of executive pay?

Clarity around the consultant's role is essential for executive compensation to be properly governed and administered. I believe that sharing a few "anonymous" situations I've encountered over the years may help illustrate this.

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COMPENSATION CONSULTANT

- **Independence**

Just prior to a presentation to the board's Compensation Committee of the results of a consulting project for a nonprofit financial services organization, the CEO asked me to recommend that he receive a $100,000 bonus. He explained the organization had a "good year" and he'd located a boat he wanted to buy. It was soon apparent that he was not joking. I explained that neither the competitive data nor business results for his organization for the year in question could support that recommendation. When he pressed the point and made it clear I would not meet the board if I did not make the recommendation, I refused and was shown the door.

There have not been many instances as dramatic as this one over the years, but there certainly have been times when it has been necessary to remind executives and boards that the facts and recommendations presented are not intended to serve the interest of one party or group over another.

It is very important that all parties understand that the board and management have related, but distinctly different, roles to play with regard to executive compensation. Executives have a strong stake in the compensation program as a critical component of the organization's management systems. Board members provide oversight and necessary authority and/or approvals to ensure the propriety of the compensation program. The board and executives should find common ground in supporting findings and recommendations that are in the best interest of the organization and its mission. They are jointly accountable for the overall success of the organization's executive pay practices. The consultant is a resource and provides support to both parties in fulfilling their respective roles.

- **Advisor – Not a "Decider"**

On more than one occasion, perhaps a day crowded with busy board and committee meetings, I've found myself sitting with some board members obviously not interested in discussing the data provided to them in advance of the meeting, but eagerly pressing me to "just tell us what we should do." The decisions at hand have ranged from salary increases to bonus awards, even unusual perquisites. I suspect the individuals in question are either pressed for time, have not taken the time to understand the topic in question or might want to explain an unexpected or unwelcomed decision to an executive with "the consultant made us do it."

The consultant's advisor role, in my opinion, is to help the organization understand the compensation topic under review as well as any competitive information presented that is related to the topic, but not to make the decision. The objective is to prepare the board and executives to make an informed decision about what is best for their organization. Frequently, this is accomplished with a review of the pros and cons of several alternative courses of action and/or identification of other areas impacted by a decision on this topic. The result should be a decision in which the organization has full ownership.

- **Resource**

An organization seeking a compensation consultant for the first time once asked us to dispense with the typical "proposal," but instead prepare a sample report of what we could offer the board about competitive pay practices. After securing some basic background from the organization's human resources department, we prepared a competitive analysis of the top three or four executives. Board members were stunned when they saw the analysis and the significant gap between their pay and competitors.' They had never seen the total compensation for the executives, but had instead dealt with each pay program component separately. Salary, bonus, incentive and benefit matters were addressed on an "as-needed basis" and were never presented in the aggregate. Competitive information had similarly been distributed on a piecemeal basis. Many directors had no information about the criteria used to identify competitors or the organizations viewed as "peers."

The consultant's resource role is to know where to obtain, how to analyze and effectively present information or advice that is pertinent to the organization and issue at hand. In many instances, individuals associated with nonprofit organizations have very limited experience with compensation matters or the sources of data about it. For this reason, the resource offered by the consultant is both educational and informational, providing background and explanatory information to ensure the information is understood and useful. The IRS also stresses the role that access to reasonable and relevant information plays in good governance of executive pay. It is one of the factors outlined in the Intermediate Sanctions' presumption of reasonableness.

With another acknowledgement of my bias/lack of total objectivity on this topic, I'll conclude with my answer to the question posed in the title of this short article. Yes, many organizations do need a compensation consultant, particularly nonprofits. Board members and executives who are often those unfamiliar with the subject of compensation or are more in tune with the for-profit compensation realm often benefit from the involvement of a consultant who can fulfill the roles highlighted here. A consultant can help by explaining unfamiliar terms and regulations, dispelling mistaken assumptions and assisting with the formulation of policies and guiding principles that will guide the organization's pay practices in the future.

Ideally, an organization should cultivate a relationship with a trusted advisor that can get to know the organization and keep abreast of pertinent marketplace trends and regulatory developments. The need for the consultant's services might vary over time. It might range from a significant introductory engagement to periodic updates and/or in specific as-needed situations. It need not always be an extensive and expensive involvement. However, the role as an independent advisor and resource to the organization must always be maintained.

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UPDATE ON THE FASB NOT-FOR-PROFIT FINANCIAL REPORTING PROJECT

By Laurie Arena De Armond, CPA

As noted in the Winter 2011 issue of the *Nonprofit Standard*, the Financial Accounting Standards Board (FASB or the Board) added a standard-setting project to its agenda entitled "Not-for-Profit Financial Reporting: Financial Statements." This project is focused on examining the financial statements and related disclosures that are unique to nonprofit organizations. The main focus points of the project include the reexamination of the existing standards related to net asset classification and other topics such as how nonprofit organizations show their liquidity, financial performance and cash flows.

To date, the Board has deliberated on the net asset and intermediate operating measure project components and has made certain tentative decisions that are discussed below.

NET ASSETS

Currently, the Board has made the tentative decision to replace the current requirement to show three classes of net assets: unrestricted, temporarily restricted and permanently restricted and to replace this with two classes of net assets. The net asset classes would be presented as net assets with donor-imposed restrictions and without donor-imposed restrictions. The two classes of net assets would still be presented on the face of the statement of financial position in total and for changes in each of those classes on the face of a statement of activities and would be subject to similar requirements.

The current requirement to provide information about the nature and amounts of different types of donor-imposed restrictions would be maintained. However, the current distinction between temporarily and permanently restricted would be removed and the current focus would be on providing information regarding how and when net assets could be used. So, for example, in the footnote detailing the net assets, the components would potentially be described as (a) endowments, (b) purpose restricted and (c) time restricted.

The footnote disclosures would still need to provide information about the nature and amounts of net assets designated by the governing board.

OPERATING MEASURE

The Board tentatively decided to define an intermediate operating measure that is based on two dimensions. The first is a mission dimension and would be based on whether resources are from or directed at conducting the nonprofit's purpose for existence. The second is an availability dimension and would be based on whether resources are available for current period activities, and would reflect both external limitations and internal limitations set by the nonprofit's governing board.

The Board has directed staff to discuss whether the availability dimension should be limited to resources that are liquid.

The Board considered three options for the presentation of the intermediate measure in the statement of activities and tentatively decided to adopt the following option. All legally available mission-related revenues would be presented and, then, any reductions for amounts designated by the governing board for use in future periods would be shown as a transfer out of the intermediate operating measure. In this presentation, amounts that were previously designated by the governing board that became available in the current period would be shown as transfers into the intermediate operating measure.

The Board will address whether the intermediate operating measure will be required, permitted or encouraged at a future meeting.

On Sept. 9, 2013, the Board and FASB staff met with the FASB's Not-for-Profit Advisory Committee (NAC) to discuss the tentative decisions outlined above. The NAC was established in 2009 to serve as a standing resource for the Board in obtaining input from the nonprofit sector on existing guidance, current and proposed technical agenda projects and longer-term issues affecting nonprofits.

NAC members generally agreed with the Board's tentative decision to show two classes of net assets; however, some members raised questions about whether this would preclude entities from presenting additional information. The FASB staff clarified that the Board has not finalized the required disclosure related to this issue at this point but noted there is no intent to preclude organizations from disclosing more than the minimum information.

NAC members had mixed views on the tentative decision regarding the presentation of the operating measures specifically with regard to the analysis of liquidity versus availability included therein. NAC members felt there was confusion in the industry regarding these terms and that it would add additional difficulties and cost to the financial statement presentation process.

The feedback received from the NAC will be considered by the FASB as it continues to work through this project.

The staff expects to discuss the liquidity and statement of cash flows presentation aspects of this project with the Board in October.

These tentative decisions allow the project to continue to move forward. The Board projects that an exposure draft related to this project will be issued in the first quarter of 2014. We will continue to keep you apprised of the Board's tentative decisions and the overall project status.

For more information, contact Laurie Arena De Armond, partner, at ldearmond@bdo.com.

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NEW YORK LEGISLATURE PASSED THE NONPROFIT REVITALIZATION ACT PROVIDING COMPREHENSIVE AND SIGNIFICANT CHANGES TO NEW YORK NONPROFIT CORPORATION LAW

By Christina K. Patten

New York Attorney General Eric T. Schneiderman set out to make New York a model for nonprofit governance and oversight through the recently passed Nonprofit Revitalization Act (the Act). The Act involves updates to New York Nonprofit Corporation Law which aims to improve corporate governance and oversight while cutting red tape. The Act was passed unanimously in both the Senate and Assembly on June 21, 2013, and is currently awaiting delivery to Governor Cuomo's office, at which time Governor Cuomo would have 10 days to take action or the bill would automatically become law, provided it is delivered before the end of the legislative session on Dec. 31, 2013. This would be the first major revision to New York's nonprofit laws in over 40 years.

Most of the Act applies to nonprofits incorporated in New York but one significant provision, relating to financial audits and reporting to New York State (NYS), applies to ***all*** nonprofits which are registered with New York for charitable solicitation, regardless of state of incorporation. Some of these provisions will require many nonprofits to amend their governance documents, policies and procedures; and, in some cases, significantly rebuild their governance structure in order to comply with some of the detailed requirements of the Act. Most provisions summarized below would be effective July 1, 2014, with a few provisions taking effect in 2015, 2017 and 2021.

Elimination of Letter Types

The Act involves the elimination of classification as Type A, B, C and D and now classifying nonprofit corporations as either "charitable" or "non-charitable." There would be no need for existing nonprofits to amend their governing documents as the Act provides that Type B and C entities, as well as Type D entities formed for a charitable purpose, will be deemed "charitable." Type A and all other Type D entities will be regarded as "non-charitable."

Modernization and Streamlining of Nonprofit Governance Actions and Communication

The Act will allow new technology options for holding meetings and taking action. Notice or waiver of notice can be given via e-mail, where prior to the Act it was required to be given via mail or in person. Video conferencing, such as Skype, for board meetings will be allowed unless restricted by the organization's certificate of incorporation or by-laws.

Enhanced Governance Procedures, Policies and Prohibitions

Limitation on Employee Serving as Chair

Effective Jan. 1, 2015, the Act expressly prohibits an employee from serving as chair of the board or in an officer position with similar responsibilities. This prohibition would not extend to *bona fide* independent contractors. The prohibition on an employee serving as chair would presumably ***not*** apply to the president in a nonprofit in which different individuals serve as chair and president.

Compensation Approval

The Act provides that compensation paid to directors, officers and key employees be "fair, reasonable and commensurate" with the services provided to the organization. The respective person may not participate in his/her own compensation deliberations or vote on it.

The Act adds a provision allowing the New York Attorney General to bring an action to enjoin, void or rescind compensation of directors, officers and key employees that is not fair, reasonable and in the best interest of the organization.

New Definition of "Independent Director"

An "independent director" under the Act meets all of the following criteria:

1. Has not been an employee or does not have a relative who was a key employee of the organization or affiliate in the past three years
2. Has not received or does not have a relative who received $10,000 or more in direct compensation from the organization in the past three years (expense reimbursement not considered)
3. Not a current employee and does not have substantial influence in an entity that made or received payments from the organization or affiliate of more than $25,000 or 2 percent of the organization's gross revenue for property or services (whichever is less) in the last three years
4. Does not have a relative who is a current officer or with substantial interest in an entity making or receiving payments of a similar amount to the organization in the past three years

Mandatory Conflict of Interest Policy

Nonprofits are required to adopt a conflict of interest policy covering directors, officers and key employees. As a result some nonprofits may need to adopt a new conflict of interest policy, or update their current policy, to meet the new requirements.

The conflict of interest policy must include:

1. What constitutes a conflict of interest
2. Procedures for disclosing a conflict of interest to the audit committee or the board
3. Requirement that person(s) with a conflict of interest cannot be present or participate in board deliberations or voting on these matters
4. Requirement that person(s) with a conflict of interest be prohibited from influencing the board
5. Documentation procedures to detail existence and resolution of a conflict of interest
6. Procedures for disclosing and addressing related-party transactions

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NONPROFIT REVITALIZATION ACT

Additionally, a written statement identifying potential conflicts must be signed prior to initial election of any director and annually thereafter. The board or designated audit committee must oversee adoption, implementation and compliance of a conflict of interest policy if not performed by another committee of the board with solely independent directors.

Related-Party Transaction Approval Process

The Act redefines what constitutes a "related party" and requires that transactions with a nonprofit be fair, reasonable and in the best interest of the nonprofit. Additional requirements include that the board consider alternative transactions to the extent available and approve any related party transaction by not less than a majority vote.

The Act grants the New York Attorney General authority to bring action to enjoin, void or rescind any related-party transaction that violates any law or is otherwise not fair, reasonable and in the best interest of the nonprofit.

Mandatory Whistleblower Protection Policy

The Act mandates that nonprofits with 20 or more employees ***and*** annual revenue in the prior fiscal year in excess of $1 million institute a whistleblower protection policy. The policy must be distributed to all directors, officers, employees and volunteers and must protect from retaliation any one of them who, in good faith, reports an action or suspected action that is potentially illegal, fraudulent or in violation of any adopted policy of the nonprofit. Additionally, the policy must include procedures for reporting violations, identification of person responsible for administering the policy and reporting to the audit committee or other committee of independent directors.

Required Audit Procedures and Financial Reporting

This provision of the Act also applies to nonprofits registered in New York for charitable solicitation that are incorporated both inside and outside of New York.

Audit Committee and New Audit Procedures

A designated audit committee is required and must be comprised of "independent directors" responsible for retaining an independent auditor and reviewing the results of the audit.

Audit committees of nonprofits subject to NYS charitable solicitation with greater than $1 million gross revenues have additional duties relating to the audit including:

- Review the scope and planning of the audit with the auditor prior to commencement of the audit
- Discuss significant disagreements between auditor and management after audit
- Annually consider performance and independence of auditor

Raised Thresholds for Financial Reports

The Act provides that threshold levels increase on July 1, 2014:

Gross Revenues	Financial Statement (FS)
< $250,000 (previously $100,000)	Unaudited F/S signed by CFO and President
> $250,000; < $500,000 (previously $100,000; $250,000 respectively)	F/S with CPA's review report
> $500,000 (previously $250,000)	Audited F/S with CPA's audit report

The Act further increases the threshold for the audit requirement for all organizations subject to registration for charitable solicitation in New York to $750,000 in 2017 and $1 million in 2021. The threshold for a review report is scheduled to increase up to the audit requirement thresholds.

Streamlining Procedures for Nonprofit Mergers, Property Sales and Corporate Dissolutions

Ability to Seek Consent of Attorney General as Opposed to New York Supreme Court for Certain Corporate Transactions

The Act provides for a simplified process for "charitable" entities, in which the organization can seek the approval of the Attorney General instead of initiating a court proceeding for transactions such as dissolution (sale, lease, exchange or other disposition of substantially all assets); merger or consolidation; and change of purposes.

Notification Instead of Consent to New York Commissioner of Education

The Act eliminates the requirement to obtain consent of the New York Commissioner of Education (now notification) prior to incorporation for some nonprofits with an educational purpose.

Lowered Approval Requirements for Real Property Transactions

The Act lowers the approval requirements for real property transactions. It requires a simple majority of the board to authorize the purchase, sale, lease, exchange or disposal of real property to be acquired or disposed of unless it constitutes all or substantially all of the assets of the nonprofit. If property constitutes all or substantially all of the assets of the nonprofit, approval of two-thirds of the entire board is required (unless 21-plus board members, then a simple majority is required).

Other Provisions

- New definition for the term "entire board" that clears up an ambiguity in the previous definition
- Removal of requirement to provide residential address of board members

The Nonprofit Revitalization Act, assuming it will be signed into law, is set to go into effect on July 1, 2014. In short, nonprofit organizations will now be able to operate, dissolve and merge more easily; communicate and hold meetings using modern technology; and enter into certain transactions without having to go to court. At the same time, the Act includes critical oversight, and governance restructuring is aimed at preventing fraud and improving public trust.

For more information, contact Christina K. Patten, associate, at cpatten@bdo.com.

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OTHER ITEMS TO NOTE....

Data Collection Form Update

Currently the Federal Audit Clearinghouse (Clearinghouse) has not released the revised 2013 Data Collection Form. As a result, although a single audit for a fiscal period ending in 2013 may have been released by the auditors, the data collection form cannot be prepared at this point. Therefore, auditees will not be able to meet the 30-day deadline for submission of the data collection form as required by Office of Management and Budget (OMB) Circular A-133, section .320(a). To address this issue, OMB has granted an extension until Dec. 31, 2013, for reporting packages due to the Clearinghouse before that date. The extension is automatic and no approval is required. The extension applies only to single audits for the fiscal periods ending in 2013.

The Clearinghouse is also planning system changes that will include new log-in procedures, including requiring individual accounts and passwords. The Clearinghouse is also planning other updates to the submission requirements. The Clearinghouse plans to roll out the new system changes effective Oct. 7, 2013. In light of the government shutdown this launch will most likely be delayed. Currently, the FAC website is unavailable. One of the proposed updates to be effective in 2014 is that the reporting package uploads need to be unlocked and unencrypted to allow them to be searchable.

New Charity Navigator Ratings

Charity Navigator (CN), a charity-ratings group, is introducing a new approach in rating charities. The new approach, referred to as "CN 3.0," will focus on "results-oriented" and "evidence-based" information provided by charities. This new approach will focus on whether a charity's programs are successful and whether they are achieving programmatic results.

CN has said this new results-reporting evaluation method will not affect a charity's rating on the group's website until at least 2016, but they have started to perform reviews of charities using the new assessments and have begun to post the results of these assessments online. These initial evaluations do not tell donors whether a charity is effective, just whether the charity is trying to find out if they are. The initial evaluations consist of 14 questions. The charity is awarded a blue X for those questions that can be answered positively, and a red X for those that cannot. CN has noted that these initial evaluations have shown many red Xs.

Charities should consider these proposed changes and the effect this new evaluation methodology may have on their organization and what changes they may need to make internally to measure the success of their programs and the rating they may receive from CN in the future based on this new criteria.

FASB to Prioritize Disclosure Framework, Financial Instruments Aim for Simplification of Codification

The Financial Accounting Standards Advisory Council (FASAC), the main advisory group for the Financial Accounting Standards Board (FASB), recently released the results of a survey it performed to solicit views about FASB's future agenda. The purpose of the FASAC's role is to advise the FASB on future project priorities and other possible new agenda items.

The FASAC's annual survey of constituents' views helps the FASB develop its agenda of what its upcoming priorities for the next three to five years, and most urgent priorities for the next two years, should be. A high-level summary of the results of the survey revealed a strong desire by many constituents for the following to be addressed: financial disclosures, hedging and simplification of FASB's codification of U.S. GAAP.

The top projects survey participants thought the FASB's agenda should address were the disclosure framework, accounting for financial instruments - hedging, financial instruments with the characteristics of equity and pension accounting. With the completion of several major FASB projects on the current agenda expected in the next year or so, the survey was timely in providing the FASB's constituents an opportunity to share their views on projects and areas that they believe are the most important for FASB to address.

Other priorities mentioned in the survey included overhauling the conceptual framework that the FASB uses as a foundation for developing new standards, financial statement presentation, liquidity and interest rate disclosures, and accounting for intangible assets. While many of the constituents polled had similar priorities, some who answered the survey gave greater priority to accounting for intangible assets, such as intellectual property, than other groups.

While some of these projects, most notably disclosure framework, accounting for financial instruments and pension accounting, may affect nonprofit organizations, there are a few that might not. It is also key to note that the FASB's current agenda for this year will include the continuing contributions of the Private Company Council (PCC) (three projects that could affect nonprofits) and the Not-for-Profit Advisory Committee (NAC) (one standard-setting and two research projects). These groups are providing advice that could help simplify both private and public company and nonprofit accounting and financial reporting, which has already resulted from some PCC recommendations finding their way into proposed Accounting Standards Updates (ASU), which would apply to both public and private companies.

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