



Venable's Presentation and Additional Materials on
Lessons Learned to Avoid Investing in the Next
Ponzi Scheme & Adaptive Risk Management to
Proactively Reduce the Impact of Extreme Events

Thursday, November 12, 2009

Bernstein's Washington, D.C. Office

800 Connecticut Avenue, N.W.

Washington, D.C. 20006

Lunch and Networking: 12:00pm - 12:30pm

Program: 12:30pm - 2:00pm

Presentation

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Lessons Learned to Avoid the Next Ponzi Scheme and Adaptive Risk
Management to Proactively Reduce the Impact of Extreme Events

Venable LLP and Bernstein Global Wealth Management

“Due Diligence Considerations for Nonprofit Investment Fiduciaries”

Rory Cohen, Partner, Venable LLP

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November 12, 2009



Statutory Guidance

- Uniform Prudent Management of Institutional Funds Act
 - applies to charities organized as charitable trusts and nonprofit institutions
 - modernized UMIFA (see below)
 - rules governing expenditures
 - management of investment management function
 - incorporates many standards set forth in Uniform Prudent Investor Act (adopted in 1994)
 - applies to trustees of trusts, including charitable trusts
 - harmonizes standards for managing and investing institutional funds
 - added “prudent” to emphasize the prudence in management
- Uniform Management of Institutions Fund Act (UMIFA)
 - drafted in 1972; adopted by 47 states



Prudent Management and Investment

- Give primary consideration to donor's intent
- Duty of loyalty – different standards for NFP corporations and charitable trusts
 - NFP directors – “best interests”
 - Trustees – “sole interests”
- Duty of care
 - Prudent investor / you are not a guarantor
 - reasonable care, skill and caution; portfolio approach
 - good faith and with care an ordinarily prudent person in a like position would exercise under similar circumstances
 - prudence under the facts and circumstances prevailing at the time of the action of decision
 - Consider the organization's risk/return objective
 - high standard for directors selected who have particular expertise or experience in investment management
 - Duty to minimize costs: reasonable costs to invest and manage, considering:
 - size of assets
 - purposes of the institution
 - skills/sophistication of investment committee
 - third party adviser costs should be reasonable



Prudent Decision Making

- In managing and investing an institutional fund, consider: (Section 3 of UPMIFA; substantially mirrors UPIA § 2(c))
 - general economic conditions
 - the possible effects of inflation and deflation
 - the expected tax consequences, if any, of investment decisions of strategies
 - the role that each investment or course of action plays within the overall investment portfolio of the fund
 - the expected total return from income and the appreciation of investments
 - other resources of the institution
 - the needs of the institution and the fund to make distributions and to preserve capital
 - an asset's special relationship or special value, if any, to the charitable purposes of the institution



Fiduciary Responsibilities

- Duty to investigate: reasonable efforts to verify facts pertaining to investment management
 - How are the assets going to be managed?
 - By board or subcommittee
 - Delegation to another officer (e.g., CIO)
 - Delegation to third parties (e.g., RIAs, BDs, banks)
- Modern Portfolio Theory: decisions about each asset in the context of the portfolio
 - e.g., consider risk and return objectives of entire fund
 - hedge funds, private equity, real estate funds
- Diversify unless due to special circumstances
- Dispose of unsuitable assets
- Develop investment strategy appropriate for the fund and charity



It's All About Process

- Educate yourself
- Develop Asset Allocation Strategy
- Prepare and Maintain Investment Policy Statement
- Implement Investment Strategy
- Monitor and Supervise Implementation of Investment Strategy
- Procedures for Controlling and Accounting for Expenses
- Process is key:
 - Evidence competence: be able to illustrate awareness of fiduciary responsibilities
 - Substantiation:
 - document analysis
 - timing of reviews/analysis
 - details of reviews and analysis (e.g., issues reviewed, persons involved, supporting calculations; background research and analysis)
 - Have a process to review your process



Due Diligence In A Nutshell



Firm/Firm History

- Ownership structure
- Investment team
 - backgrounds; lives outside the office;
 - education; prior employment history; experience of key personnel;
 - personal investments in the fund; amount of net worth/liquid net worth invested in the fund;
 - compensation/motivation/retention incentives;
 - office environment; turnover and terminations;
 - length the team has been together and individual investment experiences of key team members;
 - background checks of principals/investment decision makers;
 - litigation
- Relative composition of onshore vs. offshore in the strategy and master (if applicable)
- AUM and AUM growth over time (and separately with respect to onshore and offshore funds)
- Capacity of strategy
- Investor composition (concentration; quality (high net worth vs. institutional; fund of funds and other platforms)
- Maximum/sizeable drawdowns
- Any predecessor firms liquidated or closed



Investment Strategy, Objectives and Process

- **Overview of strategy and portfolio construction process (top down/bottom up)**
 - sector and geographic exposures;
 - leverage: net and gross exposures (how these are determined);
 - average position size (for both long and short positions);
 - hedging techniques;
 - how positions are built;
 - fixed income portfolio characteristics (duration/yield/credit quality).
- **Investment process and idea generation**
 - how do you articulate your process?
 - do you clearly articulate your process?
 - case studies: is security selection/asset allocation consistent with your articulation of process?
 - quantitative and qualitative factors used to construct portfolios and in security selection.
- **Portfolio constraints**
 - sector/market/position/leverage limits;
 - liquidity (e.g., days to liquidate/types of holdings).
- **Value proposition/what's your edge? use of sub-advisors consistent application of strategy?**
- **Research capabilities/investment team specialization; securities expertise;**
- **Targeted returns; best/worst environment for strategy; strengths/weakness of strategy.**

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Review of Performance

- **Review of composite and monthly track record since inception; is it sensible given strategy?**
- **Anything that might indicate strategy shifts? Any indication of smoothing?**
 - among strategies used;
 - instruments used;
 - sector or geographic exposure;
 - degree of leverage used.
- **Performance attribution (by sector/holdings/new issues); does it foot to client letters?**
- **Impact of leverage on returns;**
- **Relative performance versus peers; explanations of exceptionally strong and poor returns (relative and absolute); validity of explanations;**
- **Correlation of portfolio versus peers; comparison to indices.**

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Operational Due Diligence and Risk Management Controls

- Valuation process/controls (mark-to-market; fair valuation; any third party review, approval or triangulation); how often is the portfolio priced? have there been any NAV restatements?
- Review of service providers: review of audited financial statements since inception – review qualifications and unusual footnotes; evaluate quality/reputation of auditor; brokerage allocation; prime broker (evaluate quality/reputation of prime broker); any changes to service providers?
 - do you self-administer? who delivers NAV statements to clients?
 - verification that assets exist
- Cash movement and controls (evaluate organizational structure/evaluate org chart/legal oversight/CCO);
 - separation of responsibilities; independent checks;
 - how strong is the CCO? Is the compliance function robust; independent; adequacy of resources dedicated to compliance
- Trade processing and reconciliation (administrator strength/reputation); review of policies and procedures; CCO meeting;
- Registered/unregistered investment adviser (if not, why?);
- Third party marketing arrangements;
- Risk controls and analysis:
 - how do you assess and manage risks (e.g., market risk, liquidity risk; counterparty risk, operational risks);
 - stress testing and scenario analysis (best and worst case environment);
 - volatility and value at risk;
 - portfolio liquidity vs. investor liquidity – any matching issues;
 - who are the fund's material counterparties?
- How frequently does the manager test and verify the effectiveness of controls? What are the manager's reporting and communication procedures? How quickly do issues get resolved?
- Review of portfolio management systems; consider robustness/location of redundancy systems, data storage, firewalls, trading systems, disaster recovery.



Conflicts of Interest Considerations

- Who serves as the chief compliance officer; Is the compliance function robust and independent? Does the CCO have sufficient authority?
- Is there a culture of fair dealing? What and to what extent are costs allocated to investors?
- Any related party transactions or use of affiliated broker or other service provider?
- How are prime brokers and other service providers selected? Does the manager utilize capital introduction services of prime brokers? How is best execution achieved/reviewed?
- Are there any side letters? How does the manager disclose the existence of side letters and types of terms that may vary?
- How transparent is the manager? Does the manager provide different levels of access (i.e., portfolio level positions, aggregated data)?
- Personal trading policies and procedures; error correction procedures; side-by-side trading/allocation procedures.
- Does the manager have information barriers? What are its policies to prevent insider trading?
- Will the manager permit access to its code of ethics, annual compliance review and/or regulatory audit letters?



Underlying Document and Structured Features

- Investor eligibility and offering restrictions;
- Key terms:
 - fee structure (management and incentive) and other expenses;
 - frequency incentive allocation earned;
 - liquidity (frequency, notice period, key man provisions);
 - lock-ups; gates; suspension rights;
 - non-standard terms.
- Review of offering documents, subscriptions agreements and organization documents;
- Scope and depth of risk and conflict of interest disclosures;
- Review of pitchbooks and other marketing documents;
- Form ADV (Parts 1 and 2) if applicable; section 13D, 13G and 13F filings, if applicable; review for bad boy disclosures;
- SEC and other regulatory audits/disclosures (Form U4 and U5, if affiliated with a broker-dealer).
- Review of changes to fund documentation;
- Level of transparency/frequency of reporting; investor letters; side letters/preferential terms.

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PRACTICE FOCUS

Rory Cohen focuses his practice on advising private investment funds, funds of funds and investment managers on structuring and formation as well as operational, distribution, regulatory and compliance issues. Mr. Cohen assists financial institutions in the structuring and implementation of separate account wrap fee programs, unified managed accounts, variable life insurance products, private fund distribution and regulatory examinations. Mr. Cohen has extensive experience negotiating and structuring seed capital arrangements, private fund access platforms and advising on investment manager and private investment fund due diligence. His counsel relates principally to the Investment Company Act of 1940, Investment Advisers Act of 1940, the Securities Exchange Act of 1934 and FINRA and state blue sky laws and regulations.

SIGNIFICANT MATTERS

As a Managing Director at Bear Stearns, Mr. Cohen counseled several of the organization's entities on asset management activities, including Bear Stearns Securities Corp., Bear Stearns Asset Management Inc. and Bear Stearns & Co. Inc. During his tenure, among other things, Mr. Cohen supervised the development, implementation and distribution of separate account, mutual fund/ETF and hedge fund platforms. Mr. Cohen also played a key role during the spin-out of an \$8 billion asset manager by Bear Stearns Asset Management Inc. in mid-2007. As Associate General Counsel at Prudential Securities Inc., Mr. Cohen advised on development and implementation of investment advisory and wrap fee programs as well as day-to-day compliance and disclosure issues.

Mr. Cohen is a member of the Association of the Bar of the City of New York.

AREAS OF PRACTICE

Business Transactions

INDUSTRIES

Green Businesses

BAR ADMISSIONS

New York

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New Jersey

EDUCATION

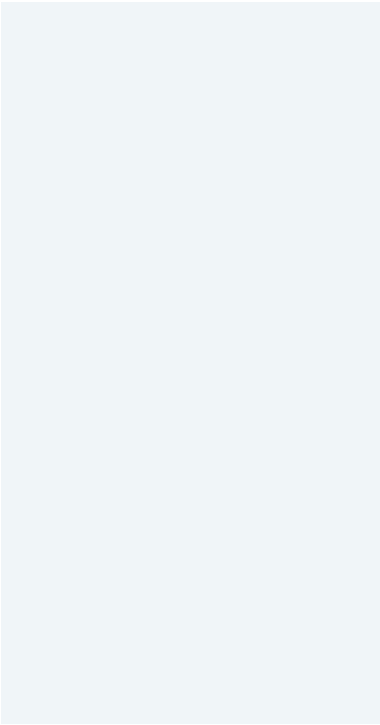
J.D., Boston University School of Law, 1994

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B.B.A., University of Michigan, 1991

SPEAKING ENGAGEMENTS

Mr. Cohen is a frequent speaker on topics dealing with regulation of hedge funds and investment advisers. His recent speaking engagements include:

- "Alternative Emerging Managers: Finding Success in Today's Marketplace" at the Third Party Marketers Association and Critical Value Advisors Webcast on September 22, 2009.
- "Investment and Operation Due Diligence Considerations," 2nd Annual Hedge Fund Tax, Accounting, and Administration Master Class, New York, NY, May 19, 2009.
- "2009 Investment Pulse," Hedge Fund Seeder and Emerging Manager Forum, New York, NY, May 18, 2009.
- "Due Diligence Considerations for Nonprofit Investment Fiduciaries," Venable LLP, Merrill Lynch, and Tate & Tryon Panel, May 7, 2009.
- "Legal Quick Hit: Practical Due Diligence Considerations for Nonprofit Investment Fiduciaries," Association of Corporate Counsel's Nonprofit Organizations Committee, March 10, 2009.
- "Regulatory Guidelines for Providing Timely and Informative Reports," Financial Research Associates' Marketing and Client Services for Hedge Funds Conference, New York, NY, February 25, 2009.
- "Investor Due Diligence In A Nutshell," Financial Research Associates' Hedge Funds A - Z Conference, New York, NY, January 22, 2009.
- "The Characteristics and Structure of Funds of Funds", Financial Research Associates' Hedge Funds A - Z Conference, New York, NY, January 22, 2009.
- "Exploring the Current and Future Regulatory Environment," Opal Financial Group's 11th Annual Alternative Investing Summit, Laguna Niguel, CA, December 9, 2008.
- "Seed Fund Investments: Legal, Regulatory and Compliance Issues," Financial Research Associates' 5th Annual Hedge Fund Incubation and Seeding Conference, New York, NY, July 29, 2008.
- "Discovering and Disclosing Conflicts of Interest: Obligatory Guide for the CCO," Hedge Fund Taxation & Compliance Forum Conference Sponsored by the Institute for International Research, New York, NY, June 19, 2008.
- "Hedge Fund Performance Presentation and Disclosure," Hedge Fund Taxation & Compliance Forum Conference Sponsored by the Institute for International Research, New York, NY, June 19, 2008.

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- "Surviving an SEC Examination in Response to the New Inspection Letter," Half-Day Workshop at the Institutional Investor Chief Compliance Officer Forum, New York, NY, March 12, 2008.
 - "Legal Issues Relating to Seeding Private Investment Funds," Faculty Presenter at Stroock & Stroock & Lavan LLP CLE Course, New York, NY, January 10, 2008.
 - "Ensuring You Receive Optimal Fees and Terms for Your Investment," GAIM Hedge Fund Operational Due Diligence Conference, Grand Cayman, Cayman Islands, May 14, 2007.
 - "Custody, Proxy Voting, Suitability and Investment Restrictions," The ABCs of Investment Adviser Regulation Sponsored by the Practising Law Institute, New York, NY, May 9, 2008, May 11, 2007 and November 17, 2006.
 - "Wrap Fee Programs - New Challenges in a Familiar Framework," ALI-ABA Course of Study – Investment Adviser Regulation, Washington, D.C., January 27, 2007.



Jeffrey S. Tenenbaum

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Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group, as well as its Credit Counseling and Debt Settlement Industry Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished and respected author, lecturer and commentator on nonprofit legal matters. Based in the firm's Washington, D.C. office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting trade and professional associations, charities, foundations, 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 arbitration.

Mr. Tenenbaum devotes his full time and attention to the legal issues facing trade and professional associations and other nonprofit organizations, as well as credit counseling agencies and debt settlement companies. His exclusive concentration and his broad-based experience in this unique legal discipline enable Mr. Tenenbaum to provide his clients with pragmatic solutions to their legal challenges on a responsive and cost-efficient basis.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, the inaugural (2004) recipient of the Washington Business Journal's Top Washington Lawyers Award, 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. He also was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by Martindale-Hubbell.

AREAS OF PRACTICE

- Tax and Wealth Planning
- Antitrust
- Political Law
- Business Transactions Tax
- Tax Controversies
- Tax Policy
- Tax-Exempt Organizations
- Wealth Planning

INDUSTRIES

- Nonprofit Organizations and Associations
- Credit Counseling and Debt Settlement

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

HONORS

- 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

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

- 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
- Legislative Assistant, U.S. House of Representatives, 1990-93
- 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 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*, published by the American Society of Association Executives, and is a contributor to numerous ASAE & The Center for Association Leadership 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. He also is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. In addition, he is a frequent author for ASAE & The Center and many of the major nonprofit industry organizations and publications, having written more than 250 articles on nonprofit legal topics. For a listing of and links to Mr. Tenenbaum's published articles, please visit www.Venable.com/nonprofits/publications.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer for ASAE & The Center for Association Leadership and many of the major nonprofit industry organizations, conducting over 30 speaking presentations each year, including many with top Internal Revenue Service, Federal Trade Commission, U.S. Department of Justice, Federal Communications Commission, and other governmental officials. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *The New York Times*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, and other periodicals. For a listing of to Mr. Tenenbaum's

past and upcoming speaking engagements, please visit www.Venable.com/nonprofits/events.

REPRESENTATIVE CLIENTS

American Academy of Physician Assistants
American Association of Homes and Services for the Aging
American Association of Museums
American College of Radiology
Air Conditioning Contractors of America
American Society for Training and Development
American Society of Association Executives
American Society of Civil Engineers
American Society of Clinical Oncology
American Staffing Association
Association for Healthcare Philanthropy
The College Board
Homeownership Preservation Foundation
Independent Insurance Agents and Brokers of America
Money Management International
National Association of Chain Drug Stores
National Coalition for Cancer Survivorship
National Defense Industrial Association
National Fallen Firefighters Foundation
National Hot Rod Association
National Propane Gas Association
National Retail Federation
National Telecommunications Cooperative Association
The Nature Conservancy
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Romance Writers of America
Texas Association of School Boards
Trust for Architectural Easements



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our experience



VENABLE SNAPSHOT

Nearly 600 Nearly 600 lawyers
nationally

Top 100 nationally
American Lawyer 2008

Top 10 in Washington, D.C.
Washington Business Journal, 2008

Counsel to 40 of the Fortune 100

CLIENT FOCUS

Hedge funds

Investment advisers

Mutual funds and exchange-traded
funds

Private equity funds

Private investment funds

REITs and real estate funds

PRACTICE FOCUS

Private investment funds

Fund structuring and formation

Portfolio management

Service provider agreements

Marketing and distribution

Corporate governance issues

Transaction documents for
private investments

Compliance policies and
procedures

Litigation

Investment Management

a broad and integrated array of services for the investment
management industry

The world of investment management is complex, constantly changing and affected by a vast assortment of business and legal issues. Venable's investment management team has a strong track record of helping investment advisers and financial products sponsors navigate through this diverse legal and regulatory landscape.

Our experience extends across a range of financial products, including: private investment funds; REITs and real estate funds; wrap fee programs and other investment advisory platforms; and mutual funds and exchange-traded funds.

We bring an experienced team of attorneys from a variety of disciplines, including tax, ERISA, securities regulation and enforcement, anti-money laundering and labor and employment. Clients also benefit from our highly regarded corporate and transactional capabilities.

WHAT WE DO

Investment fund formation and management

We assist our clients with the formation and structuring of a broad array of private investment funds, ranging from domestic and offshore hedge funds, to private equity and real estate funds.

Our work in this area is broad, and can include the drafting of service provider agreements, advising on the marketing and distribution of the fund, drafting and negotiating transactional documents, drafting policies and procedures and, if necessary, litigation support.

We have particular experience representing clients who are forming or investing in a real estate fund or real estate investment trust (REIT). We help these clients acquire and sell interests in real property and counsel them on all issues related to financing, asset securitization and lending. Should a loan go into default or require a workout, we're able to help with that as well. When litigation is required, our team stands ready to assist using our vast experience in litigating private securities matters.

Members of our team also have significant experience counseling program sponsors and investment managers on the structuring, marketing and distribution of wrap fee programs and other investment advisory platforms. Because our team includes attorneys who have practiced in-house at several large financial institutions, we have a unique perspective on the roles and responsibilities of sponsors and managers, as well as the operational and technological issues faced by broker-dealer sponsors.

Counsel to registered investment advisers across the country

Investment advisers frequently seek our counsel on issues related to registration, regulation and compliance, management, and other issues that help them operate successfully. We have experience assisting advisers in all aspects of their operations, from forming the investment entity to the key issues faced by a growing organization.

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REITs and real estate funds

- Formation of REITs
- Acquisition and sale of real estate interests
- Asset securitization
- Collateralized lending
- Loan defaults and workouts
- Joint ventures and other co-investment arrangements
- Real estate finance
- Real estate litigation

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Registered investment advisers

- Registration
- Investment advisory and service provider agreements
- Disclosure documents and reporting requirements
- Adviser advertising review
- Compliance policies and procedures
- “Best practices” advice
- Self-audits, regulatory examinations, and enforcement investigations and proceedings
- Acquisitions and divestitures of investment management entities
- Lift-outs of portfolio management teams
- Compliance with applicable rules, regulations and state law

Regulatory compliance, securities litigation and enforcement

We advise our clients on a broad range of issues related to federal and state securities laws. Many of our clients consult us for counsel on front-end compliance issues in order to mitigate risk.

Should an investigation be initiated, we defend organizations before securities agencies including the Securities and Exchange Commission (SEC), the Financial Industry Regulatory Authority (FINRA), the U.S. Department of Justice (DOJ), the Commodity Futures Trading Commission (CFTC) and others.

Our team is at the forefront of defending against regulatory and investigative initiatives, and we handle all manner of civil and criminal investigations. When faced with litigation, we assess all options, including negotiating favorable settlements for our clients.

For clients seeking to have their voices heard on Capitol Hill, we leverage the experience of our legislative advisers and attorneys to influence securities law policy and regulation.

Mezzanine Finance

We represent lenders, investors and issuers in structuring and closing debt and equity transactions. An essential part of our work is negotiating subordination and intercreditor agreements with senior lenders and advising lenders on post-investment issues. We collaborate with Venable’s Bankruptcy and Creditors’ Rights attorneys to provide advice on restructuring, when appropriate.

We work with major banks and funds on a national scale, on loans of tens of millions of dollars, as well as with regional funds that serve the more modest needs of smaller businesses.

Private Equity and Hedge Fund Transactions

Private equity and venture capital firms rely on our attorneys to structure a wide variety of transactions, ranging from mergers and joint ventures to restructurings and exit planning.

We draw upon the broad experience of our Business Transactions attorneys to advise on acquisition finance matters and all aspects of corporate planning, including capital raising, debt and equity financing, capital planning (including recapitalizations), compensation arrangements, technology, outsourcing, strategic alliances and distributor relationships.

Our attorneys are well-versed in cross-border transactions and emerging company formation and finance, with a particular focus on growth-oriented industries. When necessary, we leverage the capabilities of our nationally recognized litigation team to assist debtors and creditors with complex restructurings and bankruptcies.

Project Finance

We help companies secure the financing they require for large-scale projects while mitigating the risks involved. Our knowledge and experience in this area extends across the country and across borders, spanning a multitude of jurisdictions and industries. In the evolving and challenging world of limited recourse financing, clients appreciate our sensitivity to the importance of credit enhancement, as well as our sophisticated political risk mitigation techniques.

We regularly represent and work with all project participants, ranging from developers, to financiers, insurers, contractors, government agencies and others.

We have developed particular experience in the fast-growing realm of Public Private Partnerships, with a specific focus on transportation and related industries. In this area, our attorneys have played leading roles in multi-billion dollar projects across the country.

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Wrap fee programs and other advisory platforms

Counsel for program sponsors and investment managers

Traditional separate account, separate account and mutual fund/exchange traded fund wrap fee programs

Unified managed account programs

Hedge fund consulting

Hedge fund and private equity fund access platforms

Operational and technological issues

Drafting and negotiating applicable agreements and disclosures

Investment adviser and mutual fund advertising

Counsel regarding supervisory controls and infrastructure

Tax Issues

Venable's nationally recognized tax team provides creative and innovative advice to a broad spectrum of clients including publicly traded corporations, consolidated groups, REITs, LLCs, partnerships and small business organizations.

Clients seek out our advice on tax matters ranging from local issues to complex international matters.

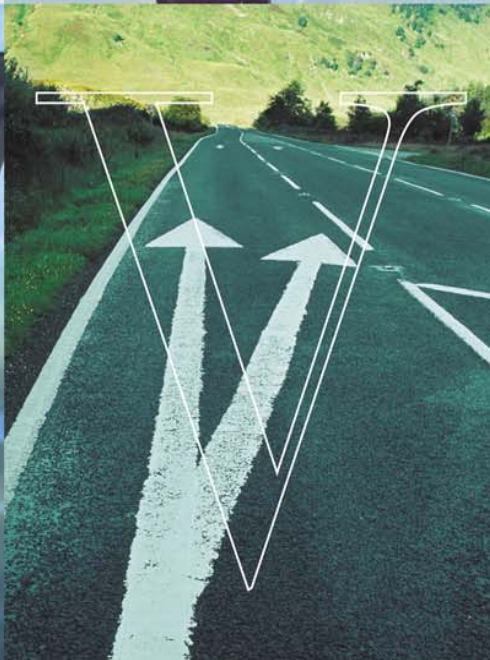
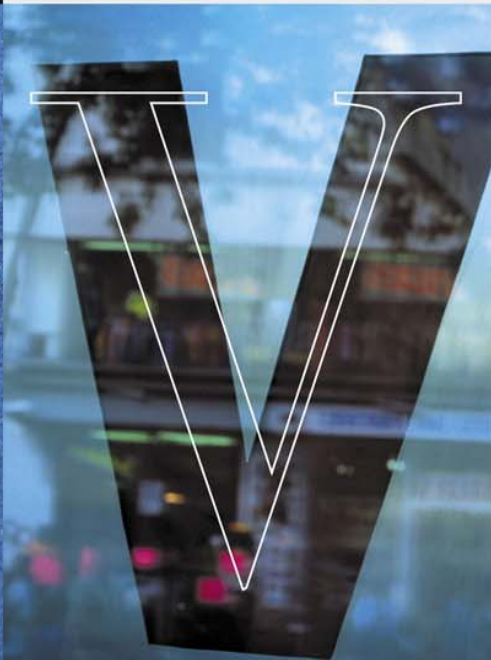
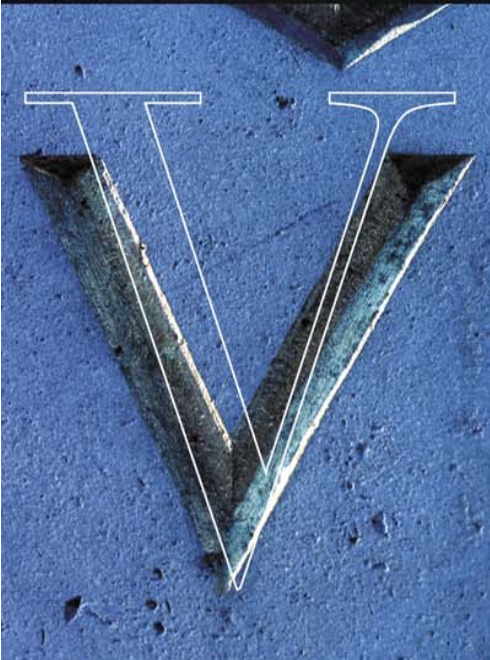
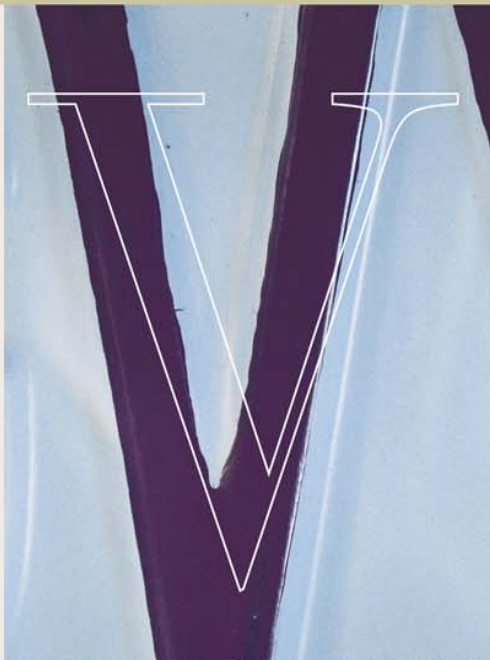
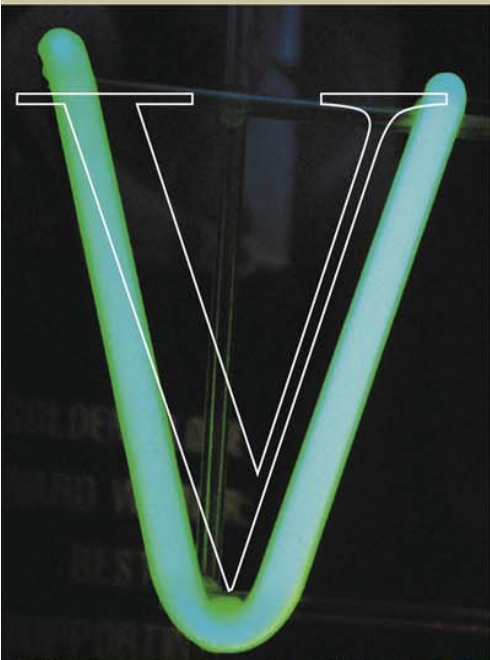
We provide counsel on a diverse array of issues including requests for private letter rulings, technical advice memoranda, comments on current or proposed legislation, and controversies with the Internal Revenue Service (IRS).

Our investment management team has a strong and proven track record of assisting clients across the country with the structuring and formation of investment funds, as well as compliance and regulatory matters, project finance structuring, business transactions, tax issues and others. Clients benefit from a team that is comprised of experienced and nationally recognized attorneys from a diverse spectrum of practices.

How can we help you? To find out, please contact us at 1.888.VENABLE or www.Venable.com.

VENABLE[®]LLP

nonprofit
organizations and
associations





VENABLE SNAPSHOT

- Nearly 600 lawyers nationally
- Top 100 nationally
American Lawyer 2008
- Top 10 in Washington, DC
Washington Business Journal 2008
- Counsel to 40 of the Fortune 100

NONPROFIT QUICK FACTS

More than 40 attorneys focused on nonprofit issues, including

former government counsel with the

- IRS Chief Counsel's Office
- Joint Committee on Taxation
- Senate Finance Committee
- U.S. Department of Justice, Tax Division

The American Bar Association's *Outstanding Nonprofit Lawyer of the Year*

Author of the *Association Tax Compliance Guide*, published by the American Society of Association Executives

Former legal counsel at the American Society of Association Executives

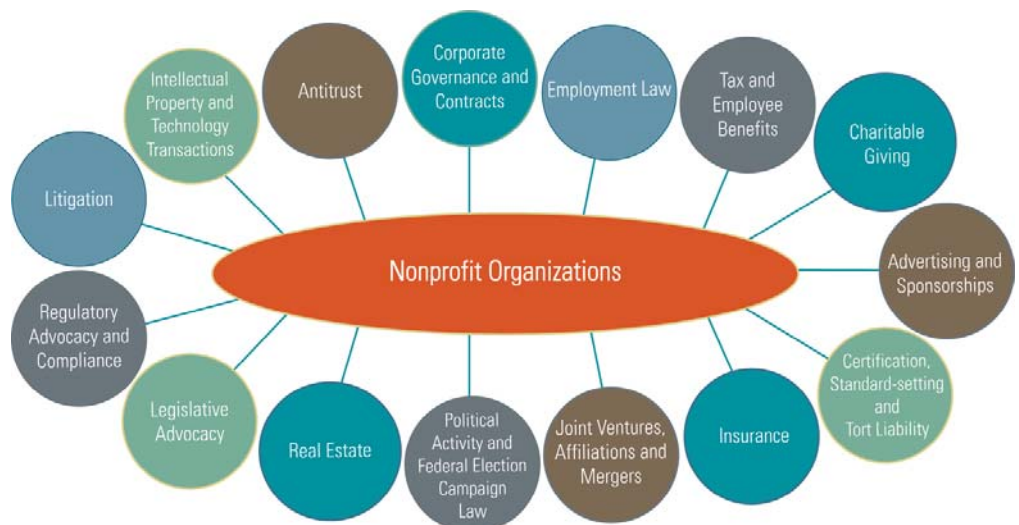
Attorneys recognized by *The Best Lawyers in America* for nonprofits/charities law

NONPROFIT ORGANIZATIONS AND ASSOCIATIONS attorneys who are part of your world

With more than 600 nonprofit clients nationwide, Venable has the largest concentration of attorneys in the country providing counseling and advocacy for charities, hospitals, schools, foundations, trade associations, professional societies, advocacy groups and other nonprofit organizations.

Our clients—ranging from some of the nation's largest philanthropic charities to a "who's who" of trade and professional associations—call on us for assistance in matters of general nonprofit law and in matters unique to their industries, professions, causes or issues.

WE UNDERSTAND WHAT MAKES NONPROFITS DIFFERENT



The Venable advantage: deep experience with nonprofit legal issues.

As a result of our extensive experience in representing nonprofit organizations, virtually no legal issue or problem is new to us.

Experience with the most common and the most unusual issues enables us to provide precise answers and workable solutions with a legal style marked by ingenuity and pragmatic judgment.

Legal experience, reinforced by personal experience.

Our understanding of the nature and business of nonprofits—derived not only from our legal practice but from our deeply rooted participation in the nonprofit community—enables us to offer broader and more useful counseling that recognizes the practical management, political

PRACTICE FOCUS

Advertising and sponsorships
Corporate governance and contracts
Tax and employee benefits
Charitable giving
Employment law
Joint ventures, affiliations and mergers
Antitrust
Certification and standard-setting
Tort liability
Intellectual property and technology transactions
Political activity and federal election campaign law
Legislative advocacy
Regulatory advocacy and compliance
Litigation
Insurance
Real estate
Advertising and sponsorships

CLIENT FOCUS

Charities and foundations
Trade associations
Professional societies
Advocacy groups
Hospitals
Schools, colleges and universities

and business considerations involved in the issues faced by nonprofits.

Our attorneys contribute to the nonprofit community in many ways, including giving speeches, writing articles, serving on boards and committees and offering their time and resources to numerous nonprofit events and initiatives. For example, we give dozens of presentations a year to nonprofit executives and regularly publish articles on nonprofit legal issues (see www.Venable.com/Nonprofits/Publications and www.Venable.com/Nonprofits/Events).

You won't hear "no" for an answer.

Instead of simply saying, "No, you can't do that," we pride ourselves on our ability to find innovative solutions to the seemingly most intractable problems and challenges facing our clients.

Seasoned attorneys who have walked in your shoes.

Venable maintains a core team of more than 20 attorneys who concentrate exclusively on the legal needs of nonprofit organizations. This team works day-in and day-out addressing the legal issues of nonprofit clients. They are leaders at what they do, with comprehensive resumes of credentials and achievements in their respective areas of concentration.

The team has several attorneys who previously worked in-house at nonprofits. This wide-ranging in-house experience has proven invaluable in understanding and relating to the unique needs of our clients. As individuals and as a team, we provide the responsive, efficient service needed by the nonprofit community.

Additionally, Venable operates the Venable Foundation, its own charitable vehicle to promote the health and well-being of the communities where Venable's clients and attorneys work and live. As such, we are more than just attorneys—we are partners with our clients in bettering our cities and communities.

Integrated legal services that bring a deep bench and a one-stop-shop to the full range of nonprofit legal challenges.

While members of our nonprofit team spend all of their time addressing the legal issues affecting nonprofit clients, our practice is much broader than that. We are fully integrated with the rest of our firm and frequently draw on the knowledge and experience of hundreds of Venable attorneys in every office of the firm. This network of attorneys not only brings an unmatched wealth of experience in areas such as those listed below (and many others), but it also brings an understanding of how these other areas of law apply to the unique characteristics of nonprofits, due to the frequency with which these attorneys work with our clients.

Our clients frequently remark about how much they appreciate Venable's ability to serve as a "one-stop-shop" for all of their legal needs. Our deep "bench" in virtually every legal area and issue affecting nonprofits enables us to tap into the experience required to deal with the most complex and nuanced legal challenges. Venable's various attorneys throughout the firm—coupled with our core nonprofit practitioners—form a powerful team that works seamlessly to provide our nonprofit clients with everything they could need or want from a law firm, in a manner that is both cost-efficient and effective.



our experience

OUR CLIENTS

Abidi Foundation
Abilities Network
ACA International
Academic Health Centers' Clinical Research Forum
Academy of Managed Care Pharmacy
Academy of Radiology Research
Adhesives and Sealants Council
Advertising Mail Marketing Association
Advertising Specialty Institute
AGA Foundation for Digestive Health and Nutrition
Agricultural Retailers Association
Air Conditioning Contractors of America
Air Transport Association of America
Aircraft Owners & Pilots Association
Alaska Federation of Natives
Alcoholic Beverage Medical Research Foundation
Alexander Graham Bell Association for the Deaf and Hard of Hearing
All Hazards Consortium
Alliance of Automobile Manufacturers
America's Health Insurance Plans
American Academy of Actuaries
American Academy of Optometry
American Academy of Physician Assistants
American Animal Hospital Association
American Association for Homecare
American Association for Medical Transcription
American Association of Attorney-Certified Public Accountants
American Association of Colleges for Teachers of Education
American Association of Credit Union Leagues
American Association of Health Plans
American Association of Homes and Services for the Aging
American Association of Museums
American Association of Retired Persons
American Bankers Association
American Benefits Council
American Chamber of Commerce Executives
American Chemistry Council
American Coalition for Clean Coal Electricity
American College for Advancement in Medicine
American College of Emergency Physicians
American College of Health Care Administrators
American College of Radiology
American Conference for the Treatment of HIV
American Council of Life Insurers
American Dental Association
American Dental Education Association
American Federation of Television and Radio Artists
American Floral Endowment
American Forest and Paper Association
American Friends of Bucerius Law School
American Health Care Association

INTEGRATED LEGAL SERVICES

Below are highlights of some of the key areas and issues on which our nonprofit practice places its focus:

Corporate governance.

We advise nonprofit clients on a full range of governance-related matters, including:

- articles of incorporation and bylaws;
- policies and procedures;
- conflicts of interest and fiduciary duties;
- codes of ethics and enforcement procedures;
- private inurement and private benefit;
- parliamentary procedure;
- membership standards;
- record-retention policies and practices;
- structural and legal relationships among foundations, taxable subsidiaries, chapters, affiliated federations and other industry organizations; and
- leadership, management and oversight structures.

For example, we helped the National Retail Federation develop a new conflicts of interest policy and disclosure process for its board of directors, and we assisted the United Way of the National Capital Area, the International Municipal Signal Association and the Building Industry Association of Southern California in overhauling and instituting new governance structures and procedures.

We also regularly attend our clients' board, executive committee, membership and other meetings as needed.

Contract services.

Contracts are a core aspect of any nonprofit counseling practice. That's why it's not surprising that there is rarely a type of contract for which we do not have a model form and dozens of samples to draw upon, or that we have not previously drafted, negotiated, revised and, if necessary, litigated or arbitrated. In fact, because we have previously negotiated contracts with most of the leading vendors and facilities that provide products and services to nonprofits, we are able to bring a wealth of inside experience to each transaction in a way that few, if any, law firms can. This has proven to be of enormous value to our nonprofit clients.

We also know how to resolve disputes about contracts. From our extensive work with meeting, trade show and hotel and convention center contracts, to chapter affiliation agreements, to endorsement and sponsorship agreements, to software licensing and Web-hosting contracts, to much else, we bring a very experienced perspective to the resolution of contractual issues. Our attorneys are seasoned contract negotiators who are deeply valued by, and deliver consistent results for, our clients.

American Health Information Community Successor
 American Herbal Products Association
 American Hospital Association
 American Hotel and Lodging Association
 American Immigration Lawyers Association
 American Institute of Architects
 American Institutes of Research
 American Insurance Association
 American Iron and Steel Institute
 American Logistics Association
 American Lumber Standards Committee
 American Management Association
 American Management Association International
 American Mensa
 American Moving and Storage Association
 American Occupational Therapy Association
 American Orthotic and Prosthetic Association
 American Psychiatric Nurses Association
 American Public Gas Association
 American Red Cross
 American Resort Development Association
 American Society for Colposcopy and Cervical Pathology
 American Society for Quality
 American Society for Parenteral and Enteral Nutrition
 American Society for Training and Development
 American Society of Botanical Artists
 American Society of Breast Surgeons
 American Society of Civil Engineers
 American Society of Clinical Oncology
 American Society of Electroneurodiagnostic Technologists
 American Sportfishing Association
 American Staffing Association
 American String Teachers Association
 American Subcontractors Association
 American Traffic Safety Services Association
 American Trucking Associations
 American Urogynecologic Society
 Americans for Balanced Energy Choices
 Anna Emory Warfield Foundation
 Anne Arundel Medical Center
 The Annie E. Casey Foundation
 Anteon Foundation
 Aplastic Anemia Foundation of America
 Arbutus Volunteer Fire Company
 Archer Stables Equestrian Club
 Architectural Woodwork Institute
 Armed Forces Marketing Council
 ASAE & The Center for Association Leadership
 Asian Relief
 Associated Black Charities
 Associated Builders & Contractors, Inc.
 Association for Community Affiliated Health Plans
 Association for Education and Rehabilitation of the Blind and Visually Impaired
 Association for Educational Publishers
 Association for Healthcare Documentation Integrity
 Association for Healthcare Philanthropy
 Association for International Practical Training
 Association for Management and Operations of Transportation Infrastructure Assets
 Association for Postal Commerce
 Association for Supervision and Curriculum Development
 Association for the Advancement of Medical Instrumentation
 Association for Women in Science
 Association of Baltimore Area Grantmakers
 Association of Certified Anti-Money Laundering Specialists
 Association of Corporate Counsel
 Association of Food Industries
 Association of Osteopathic State Executive

Tax exemption and benefits.

We provide support and legal guidance with respect to every major tax and benefit issue affecting nonprofits, including, among others:

- recognition of tax-exempt status;
- defense of IRS and state tax audits (we have recently handled more than 65 IRS audits of tax-exempt organizations);
- Form 990 reporting and disclosure;
- establishing and managing relationships with subsidiaries and affiliates;
- unrelated business income tax planning and restructuring;
- employee benefits;
- retirement and deferred compensation plans;
- executive compensation planning;
- private inurement and private benefit issues;
- charitable solicitation, substantiation and registration requirements;
- public disclosure requirements;
- tax-exempt bond financing;
- charitable planned giving and bequests;
- lobbying limitations, tracking and reporting;
- sales and use taxation and exemptions; and
- special tax rules applying to private foundations.

Tax controversies and policy.

In the areas of tax controversy and tax policy, Venable is ripe with seasoned practitioners—attorneys formerly with the IRS Office of Chief Counsel and the Joint Committee on Taxation, as well as a former tax counsel for the Senate Finance Committee and legislation counsel for the Joint Committee on Taxation, a former tax counsel for the Senate Finance Committee and a former trial attorney for the U.S. Department of Justice, Tax Division.

Employment law.

Venable's labor and employment attorneys provide counsel in every aspect of employment law as it applies to nonprofit organizations, including:

- employment policies and agreements;
- employee benefits;
- litigation in federal and state EEO agencies and in court;
- mediation, arbitration and other forms of alternative dispute resolution;
- age, race, sex, disability and other discrimination claims;
- sexual harassment allegations and investigations;
- affirmative action planning;
- employment class actions;
- hiring, firing and promotion concerns;
- overtime rules;
- executive contracts and compensation;
- privacy concerns;
- defamation claims;
- disputes with unions; and
- occupational health and safety matters.

Directors

Association of Real Estate License Law Officials
Association of Small Business Development Centers
Association of State and Provincial Psychology Boards
Association of State and Territorial Health Officials
Association of University Research Park
Association of Vascular and Interventional Radiographers
Atlantic & Pacific Exchange
Auditory-Verbal International
Authors Coalition of America
Automation Forum
Automotive Warranty and Service Contract Association
Baltimore Community Foundation
Baltimore County Volunteer Fire Departments
Baltimore Ravens Foundation for Families
Baltimore Reads
Baltimore Rh Typing Lab
Baltimore School for the Arts
Bank of America Charitable Foundation
Bearman Foundation
Ben-Dov Foundation
Besche Foundation
Bicycle Council
Bicycle Products Suppliers Association
Biotechnology Industry Association
Bladensburg Volunteer Fire Department
Boat Owners Association of the United States
Boring Volunteer Fire Company
Bowling Proprietors Association of America
Brazelton Foundation
The Brookings Institution
Bryn Mawr School
Building Industry Association of Southern California
California Hospital Association
Campbell Foundation
Cancer Research Foundation of America
Cardiology Advocacy Alliance
Casey Trees Endowment Fund
Cellular Telecommunications and Internet Association
Center for American Nurses
Center for Aquatic Life & Conservation
Center for Clean Air Policy
Center for Public Integrity
Charitable Gaming Association
Charitable Marine Society of Baltimore
Chesapeake Health Plan Foundation
Chestnut Ridge Volunteer Fire Company
Chicago Area Bicycle Dealers Association
Child Welfare League of America
Children's Guild
Chiropractic Education Organization
Citizens Against Open Bay Dumping
Citizens Care & Rehabilitation Center
Citizens Climate Lobby
City of Rockville
Classroom Publications Association
Coalition for Employment Through Exports
Coalition for Imaging and Bioengineering Research
The College Board
College of Healthcare Information Management Executives
Combined Health Agencies of Maryland
Commission on Accreditation of Healthcare Management
Community Health Charities of America
Competitive Telecommunications Association
Composite Lumber Manufacturers Association
Composite Panel Association
Conference of State Banking Supervisors
Congressional Country Club

Joint ventures, affiliations and mergers.

We have guided and negotiated dozens of complex, high-profile nonprofit mergers, consolidations, asset transfers and dissolutions and strategic alliances. For instance, we played key roles in the mergers of the American Society of Association Executives and the Greater Washington Society of Association Executives & the Center for Association Leadership; the American Bankers Association and America's Community Bankers; and the American Electronics Association and the Information Technology Association of America.

From the acquisition of assets, to the restructuring of organizations, to the formation of partnerships, joint ventures and limited liability corporations (LLCs), we have deep experience in every legal and tax aspect of nonprofit and for-profit corporate transactions. For instance, we have provided extensive counsel to the American Association of Homes and Services for the Aging, the American Society for Training and Development, the Council for Biotechnology Information and the American College of Radiology in this area.

In nonprofit mergers and consolidations, Venable's experience runs the gamut from strategic advice and planning to due diligence to complex regulatory approval.

In connection with nonprofit joint ventures with for-profit companies, we have a nuanced understanding of the complex tax-exemption rules and risks.

We also frequently assist clients with the establishment and management of both nonprofit and for-profit subsidiaries. For instance, we have worked for years with the National Association of Chain Drug Stores on the creation and maintenance of numerous subsidiaries and affiliates.

We advise clients on the intellectual property, tax, liability allocation and other aspects of partnerships, joint ventures, affinity relationships, endorsements and sponsorships with both nonprofit and for-profit entities. We have worked with groups ranging from The Nature Conservancy to American Mensa to the American College of Health Care Administrators in this regard.

Antitrust.

Given the interaction of competitors at association meetings and the vigilance of antitrust authorities regarding potential abuses of association programs and activities, antitrust is an essential element of our work for trade associations.

Venable attorneys have counseled hundreds of trade associations on antitrust compliance and helped defend them from antitrust investigations and claims. For example, we have:

- drafted antitrust compliance manuals for organizations such as the U.S. Telecom Association and the National Telecommunications Cooperative Association;
- counseled the Entertainment Software Association, the Automotive Warranty and Service Contract Association and the Independent Insurance Agents and Brokers of America on the antitrust risks posed by new ventures and activities;
- advised hundreds of clients on the lawful structuring of salary surveys, the collection of price and cost data and other information exchanges, group purchasing programs, joint marketing, advertising and public relations campaigns, membership restrictions, trade show and advertising restrictions, certification and accreditation programs, standard-setting and numerous other association programs and activities that pose anti-competitive risk; and
- long been involved with the American National Standards Institute process.

We also regularly handle large-scale civil and criminal antitrust investigations and litigation for clients nationwide.

With a wealth of antitrust experience—from former federal antitrust enforcement officials to seasoned antitrust litigators—Venable has one of the largest association antitrust practices in the nation.

Certification and standard-setting.

Venable has extensive experience in standard-setting, certification and accreditation matters. Examples of our work include:

- serving as ethics counsel for the member ethics enforcement program of the Project Management Institute;

Congressional Fire Services Institute
 Construction Financial Management Association
 Consultative Group on International Agricultural Research
 Consumer Data Trade Association
 Cool Roof Rating Council
 Coppin University Foundation
 Corporate Crisis Response Officers Association
 Council for Biotechnology Information
 Council of State Community Development Agencies
 Council on Social Work Education
 Cranial Academy
 Creative Coalition
 CropLife America
 Cruise Industry Charitable Foundation
 Custom Builders of Northern Virginia
 Design-Build Institute of America
 DC Automotive Careers Foundation
 Diocese of Brooklyn
 Direct Marketing Association
 Distributed Power Coalition of America
 Doctor's Hospital
 Eastern Equipment Dealers Association
 Edison Electric Institute
 Education Research Foundation
 Effie Worldwide
 Eierman Foundation
 Electrical Safety Foundation International
 Electronic Retailing Association
 Employees Council on Flexible Compensation
 Energy Institute
 Engineering and Construction Risk Institute
 Engineering Society of Baltimore
 Enterprise Foundation
 Entertainment Software Association
 Episcopal Diocese
 EPS Molders Association
 Estuarine Research Federation
 Executive Leadership Council
 Federal Demonstration Partnership
 Federation of Employers and Workers of America
 Fight for Children
 Financial Executives International
 Financial Services Institute
 Financial Services Roundtable
 The Flavor and Extract Manufacturers Association of the United States
 Florida Association of Homes and Services for the Aging
 Foam Sheathing Coalition
 Foundation for Advanced Cancer Studies
 Foundation for Environmental Security & Sustainability
 Francis Scott Key Medical Center
 Frederick Memorial Hospital
 Frost & Sullivan Institute
 Fuel Cell Seminar
 GAMA Foundation for Education and Research
 Garrett Community College
 Gay Su Pinnell Foundation
 Geisinger Health System
 George Mason University Foundation
 George W. Yu Foundation
 Gilman School
 Global Works Foundation
 Glyndon Volunteer Fire Company
 Golf Range Association of America
 Goodwill Industries of the Chesapeake
 Grameen America Association
 Greater Baltimore Medical Center
 Greater Las Vegas Chamber of Commerce
 Hackerman Foundation
 Hardwood Plywood and Veneer Association
 Healthy Neighborhoods, Inc.
 Hearth Patio and Barbeque Association
 Helene Christine Johnson Foundation

- overturning a promulgated standard on American National Standards Institute (ANSI) procedural grounds for a consortium of associations led by the Roof Coatings Manufacturers Association;
- advising the Association of Clinical Research Professionals on the overhaul of its membership code of ethics;
- developing a professional certification program for the Construction Financial Management Association, now operated by an affiliated entity we created;
- advising the Composite Panel Association on voluntary ANSI standards involving formaldehyde emissions and the America Lumber Standard Committee in its oversight of lumber grading in the United States and Canada;
- assisting the American Society for Training and Development with the creation of a program to certify e-learning software, followed by the creation of a professional certification program;
- advising the American Society of Civil Engineers on its member ethics program;
- preparing enforcement procedures for the new mandatory safety and environmental standards promulgated by the International Council of Cruise Lines;
- counseling the Information Technology Industry Council on all aspects of its consensus standards-making process; and
- advising the Tire Industry Association, the Air Conditioning Contractors of America, the Recreational Vehicle Dealers Association and the National Propane Gas Association on technician-certification programs.

Tort liability counsel.

Our counsel on certification programs and standard-setting extends beyond the realm of antitrust into tort liability, defamation, due process, Americans with Disabilities Act compliance and the taxation of certification program income. Our attorneys have handled numerous cases involving conspiracy allegations against trade associations regarding product liability claims against industry products.

In addition, the risk of tort liability plays a particularly significant role in the advice we give to clients in areas ranging from online job banks and referral programs to endorsements, technical manuals, training programs and consulting services. Venable attorneys have been innovative and successful in helping trade associations minimize the tort and antitrust liability risks of their membership, certification, standard-setting and related programs.

Intellectual property.

We represent clients in all aspects of intellectual property law, including patents, technology licensing and transactions, trademark, copyrights, trade secrets and antitrust and unfair competition.

More than 60 Venable attorneys advise nonprofit clients on intellectual property law and address the unique issues that nonprofits face, such as:

- the role directors, committee members and volunteer authors and speakers play in the creation of copyrightable works;
- descriptiveness of nonprofit trademarks;
- use of association logos by members;
- peculiarities of certification and collective marks; and
- Internet and e-commerce issues.

We prepare trademark, copyright and patent registration applications (both in the United States and in dozens of foreign countries); offer opinions regarding trademark, copyright and patent clearances, infringement, validity and enforceability; and prosecute and defend intellectual property claims in court and other forums.

For instance, we manage the worldwide trademark portfolio of the Project Management Institute; conducted an intellectual property audit for the Refrigeration Service Engineers Society; provided staff training to the American Orthotic and Prosthetic Association on copyright and trademark practices and compliance; and regularly assist the Romance Writers of America and The Authors Coalition on copyright protection and enforcement.

We also negotiate and draft domestic and international intellectual property and technology

Hemming Family Foundation
 Home Builders Association of Connecticut
 Homeownership Preservation Foundation
 Howard Community College Foundation
 Howard County Hospital
 Howard Hughes Medical Institute
 Howard Theatre Restoration
 Independent Cosmetic Manufacturers and Distributors
 Independent Insurance Agents and Brokers of America
 Independent Telephone and Telecommunications Alliance
 Industrial Minerals Association of North America
 Information Technology Industry Council
 Institute for Functional Genomics
 The Institute for Genomic Research
 Institute for International Economics
 Institute for the Advancement of Community Pharmacy
 Institute of Management Accountants
 Institute of Navigation
 Institute of Scrap Recycling Industries
 Instructional Systems Association
 Insulation Contractors Association of America
 Insurance Marketplace Standards Association
 Interchurch Medical Assistance
 Interlibrary Users Associates
 International Association for Continuing Education and Training
 International Association of Privacy Professionals
 International Association of Refrigerated Warehouses
 International Bicycle Association
 International Bone and Mineral Society
 International Cast Polymer Association
 International Certification and Reciprocity Consortium
 International Forum
 International Intellectual Property Association
 International Laser Display Association
 International Mass Retail Association
 International Municipal Signal Association
 International Peace Operations Association
 International Sleep Products Association
 International Society for the Study of Xenobiotics
 International Society of Restaurant Association Executives
 International Social Services
 J. Craig Venter Institute
 Jewish Foundation for Group Homes
 Johns Hopkins Medical Institutions
 Josie King Foundation
 Keswick Multi-Care Center
 Kitchen Cabinet Manufacturers Association
 Ladies Auxiliary of the Pikesville Volunteer Fire Company
 Laureate-Sylvan Learning Foundation
 Lessard Charitable Foundation
 Life Insurance Settlement Association
 Lighthouse for the Blind
 Lillie Carroll Jackson Museum
 Link TV
 Locke Family Foundation
 Louisiana Finance Association
 Lutheran Center Corporation
 Lutheran Immigration & Refugee Service
 Lutheran World Relief
 M.A.D.E. in Maryland
 Mailing Industry CEO Council
 Managed Fund Association
 Manufacturers Association of Florida
 Maret School
 Marine Corps Association
 Marine Corps Reserve Association Foundation

licenses, technology-transfer contracts, joint venture agreements and research contracts. Our experience with every aspect of complex technology-related contracts is deep and extensive.

We are fluent in all aspects of domain name protection and enforcement, and regularly arbitrate and litigate claims in this area.

Email, fax and telephone marketing counsel.

Our attorneys are well versed on federal and state laws and regulations governing electronic mail (such as the CAN-SPAM Act), faxes and telemarketing (such as the Telephone Consumer Protection Act), and their unique applicability to nonprofit organizations. For instance, we work with both the Direct Marketing Association and the American Association of Retired Persons in these areas.

Two Venable attorneys are authoring a new book, *CAN-SPAM Compliance Guide for Associations*, to be published by the American Society of Association Executives and The Center for Association Leadership.

We also have extensive experience with privacy issues and have one of the foremost practices in the country in this area.

Political activity and federal election campaign law.

Venable attorneys are extremely well versed in the federal and state laws and regulations governing political activity, including both election and tax laws.

We help our clients interpret and comply with the complex, ever-changing web of federal and state requirements in this area, and also provide training to their staff and others. For instance, we work with both The College Board, the Entertainment Software Association, the Recording Industry Association of America and the Independent Insurance Agents and Brokers of America in this regard. We are also frequent lecturers, authors and commentators on these issues.

We regularly counsel nonprofit clients regarding:

- the establishment and operation of federal and state PACs;
- federal and state laws governing political communications, contributions and other political activity;
- federal and state lobbying registration and reporting requirements;
- the federal lobbying tax law affecting association membership dues deductibility;
- federal tax limitations on lobbying by 501(c)(3) organizations; and
- federal and state ethics and gift rules.

Legislative advocacy.

Venable has a nationally recognized legislative practice - the Capitol Hill newspaper *Roll Call* referred to Venable as a "powerful lobbying firm." We help nonprofit clients negotiate the legislative and regulatory environment of our nation's capital.

We have more than 20 attorneys and legislative advisors in our legislative practice, including:

- a former Attorney General of the United States;
- former U.S. Senator who served for 18 years;
- former U.S. Secretary of Transportation;
- two attorneys named as "Washington's Lobbying Leaders" by *Influence* magazine;
- one of the most well-connected veteran lobbyists in Washington, consistently included in rankings of DC's top lobbyists;
- a former policy director and counsel in the Senate Republican Whip's office;
- two former tax counsels for the Senate Finance Committee and the Joint Committee on Taxation;
- a former counsel and policy coordinator for the House of Representatives' Energy and Commerce Subcommittee on Telecommunications and the Internet;
- a chief counsel for the Senate Permanent Subcommittee on Investigations;

Marriott - D.C. Childcare Corporation
 Maryland Association of Nonprofit Organizations
 Maryland Businesses for Responsive Government
 Maryland Credit Union Foundation
 Maryland Executive Council for Educational Opportunities
 Maryland Foundation for Kiplin Hall
 Maryland Historical Society
 Maryland Psychiatric Society
 Maryland Retailers Association
 Maryland State Fair
 The Masonic and Eastern Star Home of the District of Columbia Charities
 Masonry Veneer Manufacturers Association
 Mathematical Association of America
 Medical Device Manufacturers Association
 Meritas Foundation
 Metal Building Manufacturers Association
 Michigan Municipal League
 Mid-Atlantic Cardiovascular Foundation
 Montgomery County Public Schools
 Mpala Wildlife Foundation, Inc.
 The Myelin Project
 National Alliance of Forest Owners
 National Aquarium of Baltimore
 National Aquarium Society
 National Architectural Trust
 National Art Education Association
 National Association for Debt Education and Assistance
 National Association for Gifted Children
 National Association for State Community Services Programs
 National Association of Architectural Metal Manufacturers
 National Association of Area Agencies on Aging
 National Association of Catering Executives
 National Association of Chain Drug Stores
 National Association of Child Care Resource and Referral Agencies
 National Association of Development Organizations
 National Association of Drug Court Professionals
 National Association of Enrolled Agents
 National Association of Federal Credit Unions
 National Association of Home Builders
 National Association of Manufacturers
 National Association of Medical Staff Services
 National Association of Professional Employer Organizations
 National Association of Secondary School Principals
 National Association of Security Companies
 National Association of Small Business Accountants
 National Association of State Energy Officials
 National Association of State Investment Trusts
 National Association of Ticket Brokers
 National Auto Auction Association
 National Automotive Finance Association
 National Bicycle Dealers Association
 National Burglar and Fire Alarm Association
 National Business Aviation Association
 National Business Officers Association
 National Cancer Research Foundation
 National Child Support Enforcement Association
 National Coalition for Cancer Survivorship
 National Collegiate Athletic Association
 National Communication Association
 National Council of Agricultural Employers
 National Council of Juvenile and Family Court Judges
 National Council of University Research Administrators
 National Criminal Justice Association
 National Defense Industrial Association

- an in-house general counsel for the National Association of Federal Credit Unions;
- former staff to Vice President Biden; and
- former appropriations staff member.

Our legislative attorneys work closely with our core team of nonprofit attorneys, as well as with commercial, appellate and regulatory litigators, as part of an orchestrated, multifaceted approach to problem-solving that delivers effective and efficient results. We assist clients in developing, drafting and guiding legislation; drafting committee report language; preparing witnesses for congressional hearings; and testifying before Congressional committees on behalf of clients. They also help to coordinate legislative and public relations strategy for our clients.

Clients for whom we have recently provided legislative advocacy include the National Collegiate Athletic Association, the Women’s National Basketball Association, the Air Transport Association, the National Multiple Sclerosis Society, the National eHealth Collaborative, Money Management International, the Financial Counseling Research Roundtable and many others.

Regulatory advocacy and compliance.

From the Federal Trade Commission to the Food and Drug Administration, from the Federal Election Commission to the Federal Communications Commission, and from the U.S. Department of Justice to the Environmental Protection Agency to the U.S. Department of Defense, we represent clients in opposition to, or in support of, key regulatory initiatives—advocating for or against policies, regulations and legislation in the interests of nonprofit clients and the public. We understand well the regulatory and policy components of federal agencies, as well as the relationship between the agencies and Congress.

Our approach includes counseling on regulatory compliance, petitioning and negotiating with agency officials, preparing formal comments, pursuing legislative remedies and, where necessary, litigating aggressively both in support of and in opposition to policies, regulations and legislation pursued by regulatory agencies. In this regard, our victories in the federal and state regulatory arenas are both numerous and impressive.

We have provided regulatory advocacy to organizations ranging from the Direct Marketing Association to The Sugar Association to the Outdoor Advertising Association of America.

Our regulatory practice comprises veterans from the upper ranks of federal agencies, including:

- a former undersecretary of Homeland Security and former Drug Enforcement Agency administrator;
- a former Securities and Exchange Commission assistant director for enforcement;
- former Federal Trade Commission officials;
- a former Food and Drug Administration official;
- a former Office of Management and Budget counsel;
- officials with several financial regulators including the Federal Deposit Insurance Corporation (FDIC), the Office of the Comptroller of the Currency and the Federal Reserve;
- U.S. Department of Justice veterans in the antitrust, environmental crimes and natural resources divisions, and in the Office of Justice Programs and Office of Civil Rights; and
- numerous U.S. Department of Defense government contract attorneys.

And while high-profile regulatory advocacy may garner the headlines, counseling clients on nut-and-bolts regulatory compliance issues—such as postal regulations and the rules governing raffles and lotteries—is a staple of our nonprofit practice.

Litigation.

Venable has a formidable team of aggressive, accomplished trial attorneys on both coasts—more than 175 litigators in Washington, DC, Baltimore, New York City and Los Angeles.

We have litigated in many federal trial and appellate courts throughout the nation, including four successful cases in the past five years before the U.S. Supreme Court.

We have argued cases before the National Labor Relations Board and filed *amicus curiae* briefs on behalf of organizations such as the U.S. Chamber of Commerce, the National Association of Manufacturers, Associated Builders and Contractors and the American College of Radiology.

We are currently defending multiple nationwide class actions, many as lead counsel.

We frequently bring our litigation capabilities to bear in defense of nonprofit clients. For example, we are representing, or have recently represented, nonprofits in actions such as:

National eHealth Collaborative
 National Electrical Contractors Association
 National Electrical Manufacturers Association
 National Electrical Safety Foundation
 National Fallen Firefighters Foundation
 National Federation of the Blind
 National Fisheries Institute
 National Foundation for Credit Counseling
 National Hot Rod Association
 National Human Services Assembly
 National Independent Automobile Dealers Association
 National Institute of Standards and Technology
 National Investor Relations Institute
 National Law Enforcement Officers Memorial Fund
 National Legal Center for the Public Interest
 National Marine Manufacturers Association
 National Mentoring Partnership
 National Mitigation Banking Association
 National Motor Freight Traffic Association
 National MultiCultural Institute
 National Multiple Sclerosis Society
 National Organization of Italian American Women
 National PACE Association
 National Parks and Conservation Association
 National Patient Safety Foundation
 National Propane Gas Association
 National Retail Federation
 National Rural Utilities
 National Salvage Vehicle Reporting Program
 National Society for Experimental Education
 National Telecommunications Cooperative Association
 National Volunteer Fire Council
 National Wildlife Federation
 National Youth Leadership Forum
 The Nature Conservancy
 New York American Marketing Association
 New York Roentgen Society
 New Jersey School Boards Association
 North American Spine Society
 North American Steel Framing Alliance
 North American Veterinary Conference
 North Carolina Home Builders Association
 Northeast Cast Polymer Association
 Northern Virginia Association of Realtors
 Northwestern - Annenberg University
 Oak Crest Village
 Online Lenders Alliance
 Open Compliance and Ethics Group
 Open Door of Baltimore
 ORC Industries
 Organic Trade Association
 Owings Mills Corporate Roundtable
 Oxygenated Fuels Association
 Parents Choice Foundation
 Penn-Mar Organization
 Performance Marketing Association
 Pickersgill
 Pikesville Volunteer Fire Company
 Planned Parenthood of Maryland
 Point-of-Purchase Advertising International
 Postcom
 Preservation Maryland
 Prettyboy Watershed Alliance
 Prince George's Temple
 Printing Industries of Southern California
 Procter and Gamble Cosmetic and Fragrance Foundation
 Professional Golfers Association of America
 Project Management Institute
 Pro Musica Hebraica
 Public Education Network
 Public Health Accreditation Board
 Public Relations Society of America

- class-action lawsuits and lawsuits brought by federal and state government agencies;
- cases alleging conspiracy related to products liability issues arising from industry products; and
- lawsuits filed by the Federal Trade Commission, state attorneys general and other federal and state agencies.

We also regularly represent our nonprofit clients—especially trade and professional associations—in connection with the defense of third-party subpoenas seeking information and documentation in the organization's possession.

On behalf of the U.S. Chamber of Commerce, we led a team pursuing damages litigation in the U.S. District Court for the Eastern District of Virginia and a parallel arbitration before the American Arbitration Association regarding a failed software development and outsourcing project.

On behalf of the United Way of America, we helped terminate a software vendor for cause and then successfully pursued mediation in advance of litigation.

On behalf of the American Society of Association Executives, we prosecuted an arbitration against one of its largest endorsed vendors and successfully negotiated a favorable settlement for ASAE.

In addition, we represent nonprofits in a broad array of other business litigation, arbitration and mediation.

Insurance counsel.

Venable attorneys successfully counsel clients in a range of insurance matters:

- We regularly advise nonprofit clients on insurance coverage and claim procedures, both on property and casualty and health and benefit matters.
- We are very familiar with the major nonprofit carriers of directors and officers liability policies, and frequently advocate with them on our clients' behalf. We do the same in connection with other types of insurance policies as well. We have an excellent, successful track record in this regard.
- We help nonprofits turn insurance into a lucrative non-dues revenue source. We have structured numerous group insurance programs for membership associations, their chapters and their subsidiaries through a variety of mechanisms.
- We have counseled several nonprofit clients in the establishment and operation of captive insurance companies.

Real estate transactions.

Venable's highly respected real estate practice assists nonprofits with complex commercial real estate transactions, including, among other aspects:

- negotiation of sale, purchase and lease transactions;
- preparing financial documentation; and
- obtaining land use approvals.

For instance, we represented the Special Libraries Association in the sale of its historic Washington, DC headquarters building and the purchase of its Alexandria, Virginia headquarters, and did the same for the Air Conditioning Contractors of America.

Real estate tax implications.

We advise nonprofits on the tax implications of real estate transactions, including, for instance, The American Institute of Architects.

We are currently representing Howard Theatre Restoration in a series of complex, sophisticated real estate and tax transactions involving both historic and new markets tax credits.

Venable has particular experience representing title-holding subsidiaries of tax-exempt organizations, including 501(c)(2) and 501(c)(25) entities, as well as single-member limited liability corporations. We are very familiar with the unrelated business income tax issues that surround the use of these entities, as well as the limitations on their activities.

Advertising, Sponsorships and Partnerships for Nonprofits

RAISE
 Real Estate Settlement Services Providers Council
 Recording Industry Association of America
 Recreation Vehicle Dealers Association
 Reese Volunteer Fire Company
 Reginald Lewis Foundation
 Regulatory Affairs Professionals Society
 Republican Party of Florida
 Reverse Mortgage Counseling Association
 Road Runners Club of America
 Rocknet
 Roland Park Country School
 Roland Park Place
 Romance Writers of America
 Roof Coating Manufacturers Association
 Save the Children
 Scientific Apparatus Makers Association
 SnowSports Industries America
 Social Enterprise Alliance
 Society for American Archaeology
 Society for Marketing Professional Services
 Society for Pediatric Radiology
 Society for the Preservation of H. L. Mencken
 Society of Breast Imaging
 Society of Business Appraisers
 Society of Cardiovascular Computed Tomography
 Society of Computed Body Tomography and Magnetic Resonance
 Society of Financial Service Professionals
 Society of NeuroInterventional Surgery
 Society of Radiologists in Ultrasound
 Society of Research Administrators International
 Society of Women Engineers
 Sodexo Foundation
 Software Publishers Association
 Solar Energy Industries Association
 South Atlantic Association of Obstetricians and Gynecologists
 Southern California Honda Dealers' Association
 Spark-Partnership for Service
 Special Libraries Association
 Sportfishing & Boating Foundation
 Sports Lawyers Association
 St. Joseph Medical Center
 St. Paul's School
 St. Timothy School
 Steel Framing Alliance
 Steel Shipping Container Institute
 Stoner Foundation
 Straus Foundation
 Suburban Hospital Foundation
 Suburban Newspapers of America
 The Sugar Association
 Sullivan Family Foundation
 Sunrise Assisted Living
 Tech America
 Terasem Foundation
 Texas Association of School Boards
 Transcen
 Tressler Lutheran Services
 Truck Renting and Leasing Association
 Toy Industry Association
 U.S. Chamber of Commerce
 U.S. Export Council for Renewable Energy
 U.S. Psychiatric Rehabilitation Association
 U.S. Soccer Foundation
 U.S. Telecom Association
 U.S. Tuna Foundation
 Union Hospital of Cecil County
 United Way of America
 United Way of the National Capital Area
 Upper Chesapeake Health System
 Valley Brook Community Church
 Venable Foundation
 Virginia Independent Power Producers

Nonprofit organizations can benefit greatly from the market awareness generated from targeted sponsorships, partnerships and co-ventures. Whether it consists of a partnership with an entertainer or athlete who supports their cause, or a unique branding campaign with a national advertiser, such initiatives can help drive fundraising and articulate the organization's mission to a broader audience than might otherwise be available.

Venable operates at this intersection of nonprofits, advertisers and the entertainment industry by facilitating key introductions between nonprofits and athletes, celebrities and local and national brands, and by providing the comprehensive legal and tax counsel needed to get the deal done.

Our attorneys provide advice to nonprofits across a wide range of matters in this area, including:

- branding relationships and opportunities;
- sponsorships and placements;
- co-ventures/productions;
- alternative marketing and distribution strategies for entertainment properties; and
- creative solutions for public policy issues.

* * * * *

Highly regarded by its nonprofit clients, Venable is steeped in the nuances, challenges and opportunities of nonprofit law—as well as the distinct culture, governance and politics of nonprofit organizations.

We have the experience and ingenuity to help our nonprofit clients meet the needs and demands of their members, constituencies and industries.

Our nonprofit practice provides its clients with pragmatic, creative solutions to their legal challenges on a responsive, cost-efficient basis.

Our capabilities and experience in nonprofit law are strong nationwide, making Venable remarkably well prepared to meet each and every legal need of our clients across the country.

We take great pride in our leadership role in the nonprofit bar and will continue to be an active participant in the nonprofit community we represent.

* * * * *

Please visit www.Venable.com/Nonprofits/Overview to obtain a copy of this Nonprofit Organizations and Associations brochure.

Volunteers of America
Washington Suburban Sanitary Commission
Water Environment Federation
Westreich Foundation
Wilderness Society
Wood Products Indoor Air Consortium
Woodbourn Center
Yale University
YWCA of Greater Baltimore
Zero to Three

Corporate Governance

February 24, 2009

Practical Due Diligence Considerations for Nonprofit and Other Investment Fiduciaries

Related Topic Area(s): Corporate Governance

Published in the June 2009 issue of *Association Law & Policy*, the March 13, 2009 issue of *Association Trends* and the March-April 2009 issue of *FARSight: The F&A Roundtable Report*.

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- Practical Due Diligence Considerations for Nonprofit and Other Investment Fiduciaries

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The December 11, 2008 arrest of Bernard Madoff and his alleged \$50 billion Ponzi scheme and more recent arrests of several other investment managers alleged to have similarly defrauded investors have sent shock waves throughout the nonprofit and for-profit financial communities. As a result of these events, and the historic volatility and disruption in global financial markets, many trustees, board members and investment committee members ("Investment Fiduciaries") of foundations, charities, endowments, pension funds, family offices and high net worth investors have begun to more closely consider their investment policies (including the extent to which such policies include allocations to hedge funds and other alternative investments) and their due diligence processes for selecting third party investment managers. Many Investment Fiduciaries seek to use outside consultants and advisers to review, select and monitor investment managers, mutual funds, hedge funds and other pooled investment vehicles. Now is a good time to review their due diligence processes as well.

On January 15, 2009, the Investors' Committee to the President's Working Group on Financial Markets issued its final report entitled "Principles and Best Practices for Hedge Fund Investors" (the "Investors' Committee Report"). The Investors' Committee Report, delayed to permit the Investors' Committee an opportunity to refine its conclusions in light of recent financial market dislocations and the alleged Madoff fraud, sets forth a number of factors that should be considered by investment fiduciaries when evaluating the appropriateness of hedge fund investing. Though the Investors' Committee Report focuses on hedge fund investments, we believe many of the best practices identified can be equally effective with respect to both traditional long-only and hedge fund managers. The Investors' Committee notes that "one cannot eliminate investment risk, but one should be aware of the risks that are being undertaken when investing with individual managers and also in the portfolio as a whole." The Investors' Committee further emphasizes that "there can be no substitute for comprehensive and ongoing due diligence not only of hedge funds in the investment portfolio but indeed of the full portfolio."

Recognizing that due diligence will vary depending upon an organization's needs as well its financial resources, the best practices recommended by the Investors' Committee Report should be viewed as a guide for Investment Fiduciaries responsible for reviewing and implementing investment policies and analyzing the effectiveness of due diligence. Our discussion below touches on several best practices identified by the Investors' Committee and also reflects some of our own observations based upon our experiences advising Investment Fiduciaries.

Duty of Care of Investment Fiduciaries

Investment Fiduciaries are not guarantors of performance. They do, however, owe a "duty of care" with respect to the investment and management of investment funds. This "duty of care" is derived under state laws governing investments by nonprofit organizations. Most state laws incorporate principles derived from one of two uniform statutes approved by the National Conference of Commissioners on Uniform State Laws ("NCCUSL"): the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") and Uniform Management of Institutional Funds Act ("UMIFA"). UPMIFA was approved in 2006 with the intent of superseding UMIFA. [1] (These provisions are frequently incorporated into a state's nonprofit corporation statute).

Among other things, UPMIFA modernizes the standards for investing by nonprofits and, as discussed below, provides some protection for Investment Fiduciaries who properly delegate portions of the investment function. UPMIFA applies generally to charitable organizations organized as nonprofit corporations, unincorporated associations, governmental subdivisions or agencies, trusts (where the trustee itself is a charity) and other entities organized and operated exclusively for charitable purposes. Trusts managed by corporate or other fiduciaries that are not charities do not fall within the scope of UPMIFA but are subject to the "duty of care" set forth under the Uniform Prudent Investor Act as implemented and interpreted by the states.

UPMIFA sets forth a number of factors to be considered in managing and investing the assets of a nonprofit organization, including "the role that each investment or course of action plays within the context of the entire portfolio" and "the expected total return from income and appreciation of investments." UPMIFA also requires an Investment Fiduciary to reasonably seek to verify the accuracy of information used in making decisions and includes a general "duty to diversify" investments. In discharging these responsibilities, some degree of research, or due diligence, should be conducted.

So what does this mean? What can be done? Due diligence should be viewed as far more than a simple "check-the-box" exercise. It is not simply a matter of documenting the receipt and completion of questionnaires and filing them away. Investment Fiduciaries who are directly involved in due diligence and investment selection should be actively engaged. They should be sufficiently knowledgeable about financial markets and investment instruments and remain abreast of current events. If they engage investment managers, they should analyze information provided by such managers. They also should seek to obtain information from independent sources to help evaluate the accuracy and completeness of information provided by managers. In addition, Investment Fiduciaries should strive to ask thoughtful questions in an effort to understand the instruments or funds that they are investing in and to evaluate the relative risks and sources of investment returns.

Delegation of Investment Responsibilities

As contemplated by UPMIFA, Investment Fiduciaries are generally relieved from liability with respect to investment decisions made by third parties to whom investment discretion is delegated via written agreement, provided they exercise the appropriate degree of diligence, care and skill in selecting such third party advisers. For example, Investment Fiduciaries are not liable for decisions made by investment managers to purchase and sell individual securities or decisions by consultants or advisers to hire or fire portfolio managers, provided (a) discretion has been appropriately delegated; (b) they have exercised diligence, care and skill when engaging such parties; and (c) they periodically review the third party's actions to monitor such party's performance and compliance with the scope and terms of the delegation.

However, many relationships with outside consultants and advisers are non-discretionary, whereby the consultant or adviser is engaged solely to "assist" in defining investment policies and/or to "assist" in reviewing, selecting and monitoring investments and investment managers. Investment Fiduciaries should review their advisory agreements to determine whether discretion has been granted and to see if they contain any limitations of liability and/or disclaimers of reliance. In any event, whether or not discretion is granted to outside consultants or advisers, Investment Fiduciaries should carefully consider and periodically review such party's investment selection and due diligence processes. Such reviews should test the robustness and consistency of the underlying advisers' processes and seek to verify, among other things, that such third parties understand the investments they are looking at and risks and sources of returns.

Review Your Investment Process and Portfolio

Due diligence will not solve all problems, but a well-designed process, together with thoughtful analysis can help identify red flags that suggest further questioning or abandonment of an investment opportunity. We offer the following non-exhaustive list of considerations for reviewing investment managers and portfolio performance (and, when applicable, to assess whether outside consultants or advisers include similar considerations as part of their process):

- Review the extent to which due diligence focuses on a manager's investment strategy and objectives. Can the manager clearly articulate his/her investment thesis? How are investment ideas

generated? Is the investment manager willing to disclose portfolio positions and discuss specific investments --- both those that performed well *and* those that performed poorly? Are security selection and portfolio composition consistent with the articulated strategy and investment selection process?

- Is the investment manager registered with the Securities and Exchange Commission ("SEC")? If so, the Investment Advisers Act of 1940, as amended (the "Advisers Act"), requires the adviser to maintain written compliance policies and procedures, a Code of Ethics and policies and procedures to prevent insider trading, among other things. Registered investment advisers must also appoint a Chief Compliance Officer ("CCO") who should be sufficiently knowledgeable about Advisers Act requirements. The CCO should also be competent and "empowered", which, in the view of one prominent SEC Staffer, is one that has "...a position of sufficient seniority and authority within the organization to be able to compel others to adhere to the firm's compliance policies and procedures." [2] Query whether the CCO or person acting in a similar capacity actually has such independence and authority. Even in the absence of SEC-registration, does the investment manager conduct itself as if it was registered and maintain similar policies and procedures? Will the manager permit reviews of its compliance policies and procedures? Interview the CCO or person acting in a similar capacity to understand their strengths and weaknesses and to assess whether they have sufficient competence and independence within the organization.
- Review conflicts of interest. Evaluate how they are identified and how quickly they are resolved. Are they prevalent? Does the manager utilize affiliated broker-dealers, engage in principal trading or other related-party arrangements, permit personal trading or have side-by-side trading considerations that might impact allocations and other portfolio decisions? To what extent are conflicts disclosed in the manager's Form ADV (if registered with the SEC) and, if applicable, fund offering documents.
- Review the extent to which operational risk and risk controls are evaluated. Consider the effectiveness of such process. Some industry professionals distinguish between "risk management" and "risk measurement". Risk measurement is generally the ability to conduct scenario analysis to determine how securities and other portfolio positions may react based on historical reactions. Risk measurement is a quantitative measurement and hypothetical, based on historical behavior, but not a real-time reaction to actual events. Risk management is the ability to illustrate actual actions taken in response to live market events, based on, in large part, a manager's own expectations of future events.

When evaluating an organization's risk controls, it is helpful to understand a manager's forward-looking views on the economy and financial markets (what do they actually think?) and how they are positioning their portfolios in light of their own future expectations. It is helpful to understand (a) how the manager's systems identify risks, including excess concentration, excessive leverage, changes in correlation (among securities, sectors, countries, etc.) and counterparty risks with prime brokers and other financial institutions and (b) how quickly they can react and reposition the portfolio. Focus not only on portfolio liquidity, but on organizational constraints that might hinder the timely implementation of changes. In other words, who does the risk manager report to and does he or she have sufficient independence to unilaterally make changes to the portfolio? Review the manager's valuation process and cash movement controls. Review trade processing and reconciliation controls.

- Do you apply your due diligence process consistently? Are your due diligence efforts tailored to reflect unique issues posed by different investment strategies? In other words, by way of example, does your process differ for equity, fixed income, currency and real estate managers.
 - Review your documentation of due diligence to see if similar documents are collected from each investment manager and fund. Are you maintaining notes of your review and analysis and minutes of investment committee meetings and decisions?
 - Monitor and periodically review investment performance, portfolio concentration and the relative merits of continuing to maintain each investment within the portfolio. These types of reviews are helpful with respect to each investment and the entire portfolio and with respect to separate account managers and managers of pooled vehicles such as mutual funds, hedge funds, private equity funds, real estate funds and funds of hedge funds. [3] Continued underperformance and excessive concentration might suggest the need for further consideration internally among Investment Fiduciaries and perhaps externally with outside consultants and advisers, if used.
 - When investments perform poorly, re-evaluate your process to potentially identify factors that you may be able to change or emphasize in connection with future investments.
- If you have any questions about this alert, your investment or due diligence process or legal considerations that may arise in connection with investment products used by your organization,

please contact any member of Venable's Nonprofit Organization or Investment Management practice groups.

1 UPMIFA has been enacted in twenty-six states and UMIFA in forty-seven according to NCCUSL. State statutes should be separately evaluated in order to determine the extent to which its provisions mirror the relevant uniform model statute.

2 Speech by Gene Gohlke, Associate Director, Office of Compliance Inspection and Examinations, U.S. Securities and Exchange Commission at the Managed Funds Association Educational Seminar Series 2005: Practical Guidance for Hedge Fund CCOs Under the SEC's New Regulatory Framework; available at: <http://investor.gov/news/speech/spch050505gg.htm>.

3 Pooled investment vehicles are generally more difficult to evaluate and monitor due to certain inherent limitations, including limited transparency, limitations on withdrawal and the more frequent use of sophisticated investment strategies and instruments (that utilize various options and futures, commodities and currencies, etc.).