Mergers, Alliances, Affiliations and Acquisitions for Nonprofit Organizations: Financial and Legal Issues

December 6th, 2010
12:30 – 2:30 p.m.

Venable LLP
575 7th Street, N.W.
Washington, DC 20004

Moderator:
Fred Leamnson

Panelists:
Jeffrey S. Tenenbaum
Lisa Hix
David Warner
Lee Klumpp

Presentations

VENABLE® LLP

Mergers, Alliances, Affiliations and Acquisitions for Nonprofit Organizations: Legal and Financial Issues

December 6, 2010

Presented by:

Jeffrey S. Tenenbaum
Lisa Hix
David Warner

VENABLE® LLP

Why Start Down This Road?

- Vision: Enlightened organization /board has visionary goals, & sees limitations of current model and/or situation
- Membership/Funders/Services: Competition for a limited market of members/funders/attendees/consumers
- Sustainability: If an organization in financial trouble seeks a partner to assure continuance of its programs early enough, this situation may be worthwhile for a potential partner. If situation deteriorates far enough, it may be difficult or impossible to find a partner

Typical "Life Cycle" of a Deal
Setting the Stage

- Catalytic Event – Sense of Urgency
- Interest and Intent – Select Partner
- Develop Shared Vision – What Will We Do & Be?
- Visualizing the Deal – Merger, Affiliation, etc.

Merger

Overview

- One entity legally becomes part of the surviving entity and effectively dissolves.
- The surviving corporation takes title to all of the assets, and assumes all of the liabilities, of the non-surviving entity.

Benefits/Considerations

- Efficient Transaction
- Most Assets and Liabilities Transfer by "Operation of Law"
- Due Diligence Is Especially Critical
- Approval of Both Organizations Can Be Logistically Difficult

Merger

Mechanics

- The board of directors of *each* precursor organization must develop and approve a plan of merger consistent with relevant state law
- The plan of merger also must be submitted to the voting members, if any, of *each* organization for their approval
- While the conditions for member approval vary from state to state, statutes generally require a vote of *two-thirds* to effectuate the plan merger – a number that can be difficult to reach for practical and political reasons

Acquisition of a Dissolving Corporation's Assets

Overview

- One entity dissolves and transfers *select* assets to acquiring corporation
- The acquiring corporation takes title to *select* of assets, and assumes *select* liabilities, of the dissolving entity.

Benefits/Considerations

- May be strategically preferable
- Potentially less efficient transaction
- No transfer by "operation of law"
- Ability to shield from future liability - BUT depends on structure of deal and set asides

Acquisition of a Dissolving Corporation's Assets

Mechanics

- The board of directors of *dissolving* organization must approve.
- Voting members, of *dissolving* organization, if any, must approve
- Because the *successor* entity is merely absorbing the assets of another organization, a vote of the membership and accompanying state filings are *typically not required* for that corporation

Consolidation

Overview

- Creation of new entity (new incorporation, Tax-Exempt Status Application)
- Both predecessor entities dissolve and transfer assets *or* both entities merge into "new" entity

Benefits/Considerations

- May be strategically preferable
- However, also more complex

Mechanics

- Follow process for merger/asset transfer for all entities

Other Forms of Combinations and Alliances

- Overlapping Boards or Shared Members
- Program Acquisition
- Joint Venture/Program Collaboration
  - Examples:
    - Joint Trade Show
    - Joint Publications
- Shared Space and Resources
  - Co-location
  - Shared Staffing

Protection of Tax-Exempt Status

- Unrelated Business Income Tax
- Control
- Private Inurement (for 501(c)(6) Organizations)
- Private Benefit (for 501(c)(3) Organizations)

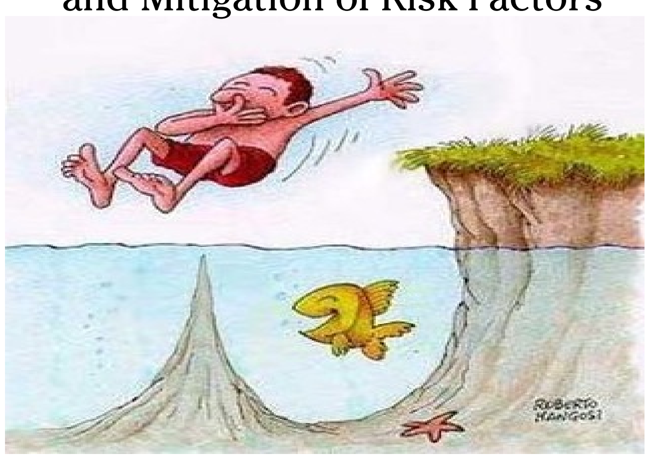
VENABLE LLP

Typical "Life Cycle" of a Deal
Getting it Done

- Due Diligence/Feasibility Assessment – Programmatic, Organization, Legal and Financial
- Address Third-Party Consideration and Support (Deals Often Evolve)
- Finalize – Obtain Votes, Sign Agreements
- Systems Integration – The "Morning After"

VENABLE LLP

Due Diligence and the Identification and Mitigation of Risk Factors



Due Diligence and the Identification and Mitigation of Risk Factors

Key "hot spots" for legal risk

- Contractual commitments
- Untended employee relations issues
- Pending claims
- FLSA and wage/hour compliance
  - Misclassified workers
  - Employee/independent contractor problems

Due Diligence and the Identification and Mitigation of Risk Factors

- "Audit" is not a dirty word
- Documents and data for review and analysis
  - Employee handbook and policies
  - Employment contracts
  - Position descriptions
  - Time-keeping records
  - Payroll

Due Diligence and the Identification and Mitigation of Risk Factors

- Documents and data for review and analysis – *cont'd*
  - Personnel files
  - Employee discipline records
  - Employee transaction data
  - Benefit plans and contracts

Shared-Staffing and Shared Risk

- Pre-existing risk of liability for conduct of third-parties
  - Vendors
  - Members
  - Directors
- Unique issues in shared staffing arrangements
  - The "integrated employer" doctrine
  - "Joint" employment

Shared-Staffing and Shared Risk

- Integrated employers
  - Common management
  - Interrelation between operations
  - Centralized control of labor functions
  - Degree of common ownership/financial control

Shared-Staffing and Shared Risk

- Joint employment
  - Employers need not be "integrated"
  - Determination is "employee-specific"
  - Applies when entities "handle certain aspects of employer-employee relationship jointly"
  - Common law element of "control" is principal guidepost
    - Compensation
    - Hiring/firing
    - Supervision

Shared-Staffing and Shared Risk

- Hidden issues under integrated employer and joint employment doctrines
  - Unanticipated liability of “unknown” violations
  - Number of employees might trigger additional legal rights
    - 15 employees – Title VII, ADAA
    - 20 employees – ADEA, COBRA, DC FMLA
    - 25 employees – increased leave entitlement under DC Accrued Sick and Safe Leave Act
    - 50 employees – FMLA, EO 11246

Strategies For Addressing Identified Risk Factors

- “Whistle past the graveyard”
- Remediate
- Apportion risk and duty to defend through contract

VENABLE LLP

Strategies For Addressing Identified Risk Factors

- "Don't just do something, stand there!"
  - Avoids current expenditure of resources
  - Avoids potentially delicate negotiations between entities or entities and individual employees
- BUT:
  - Issues swept under the rug create pool of potentially expanding liability for several years
  - Intentional (or unreasonable) ignorance is not a defense
  - Not consistent with duties as officers or directors

VENABLE LLP

Strategies For Addressing Identified Risk Factors

- Remediation
  - Provides for "correction" or mitigation of identified risks
  - May require difficult decisions and delicate negotiation
  - Could potentially scuttled desired corporate transaction
  - Actions should be confirmed as part of reps and warrants within deal documents

Strategies For Addressing Identified Risk Factors

- Apportioning risk via contract
- Indemnification agreements
  - Does not require specific identification of all issues
  - Does not require remediation of issues
  - Down-side risk of "kicking the can"
- Practical/structural problems with indemnification agreements
  - Post-hoc
  - Expensive
  - Capable of varying interpretation and enforceability

Strategies For Addressing Identified Risk Factors

- Alternatives to indemnification
  - Acceptance of specific potential liabilities
  - Incorporation of "duty to defend"
  - Still not a panacea:
    - Who picks/controls counsel?
    - Who has settlement authority?
    - Who pays?

Joint Defense – We All Hang Together or We Hang Separately

- Advantages
  - United front
  - Pooling of discovery, work product and resources
  - Reduced costs
- On-going past practice of cooperation is insufficient for "common interest" to arise

Wrap-up

- No "one size fits all" form for teaming and other combinations of resources
- Look before your leap
- Understand what liabilities you are retaining, avoiding or accepting
- Document that understanding in clear terms
- If things do go wrong, "hang together" if you can

VENABLE® LLP

Questions and Discussion

VENABLE® LLP

Venable Team

Jeffrey S. Tenenbaum, Partner
jstenenbaum@Venable.com
t 202.344.8138

Lisa Hix, Associate
lmhix@Venable.com
t 202.344.4793

David Warner, Partner
drwarner@Venable.com
t 703.760.1652

To view Venable's index of articles and PowerPoint presentations on association and nonprofit legal topics, see www.venable.com/associations/publications.

Mergers and Acquisitions for Nonprofits

Presented by:
Lee Klumpp, CPA
BDO USA, LLP
National Nonprofit Group Audit and Accounting Technical Leader

BDO

Accounting For a Merger versus and Acquisition

BDO

Not-for-Profit Entities: Mergers and Acquisitions

- How it compares to Statement of Financial Accounting Standards No. 141(R), (ASC 805), *Business Combinations* (SFAS141 (R)):
  - Similarities (The Acquisition Method)
  - Differences (Recognition of Goodwill)

- Two types of not-for-profit entities
  - Those that are solely or predominately supported by contributions and returns on investments
  - Those the receive support from fees for services (more “businesslike”)

Accounting for combinations of not-for-profit organizations:

- Statement of Financial Accounting Standard (SFAS) No. 164 (ASC 958-805)(SFAS No. 164), *Not-for-Profit Entities: Mergers and Acquisitions* distinguishes the difference between a merger or an acquisition.

- Key Concepts:
  - Mergers are accounted for on ‘carryover basis’ - similar to pooling accounting under Accounting Principles Board (APB) Opinion 16 *Business Combinations*, (ASC 958-805) (APB 16).
  - Acquisitions accounted for on ‘acquisition basis’ - similar to SFAS 141(R).
  - Determining factor of a merger: ceding of control by the governing bodies of two (or more) organizations to a new organization; the governing board of the new entity must be newly formed, but establishing a new legal entity is not a requirement.
  - Other factors such as relative size, relative dominance of the process and of the combined entity, and relative financial health, can be considered in judging whether control has been ceded, but are not themselves determinants of a merger vs. an acquisition .
  - All other combinations are acquisitions.

Accounting for a merger

- For mergers we now use the carryover basis of accounting, which adds together the historical financial data of the merging entities as of the merger date (not, as under APB 16, as of the beginning of the fiscal year in which the merger occurs).
- Financial statements of the period of the merger include data only since the date of the merger (except that for a public company (FASB Staff Position (FSP) No. 126-1, (ASC 825), *Applicability of Certain Disclosure and Interim Reporting Requirements for Obligors for Conduit Debt Securities)*, pro forma disclosure is required as if the merger had occurred at the beginning of the fiscal year).
- Conform accounting policies, except, because this is not a 'fresh-start', a merger is not an event that permits the election of accounting options that are restricted to the entity's initial acquisition or recognition of an item (or the reversal of a previous election). Thus, for example, one merging entity's election of the fair value option (Statement of Financial Accounting Standards No. 159, (ASC 825) *The Fair Value Option for Financial Assets and Financial Liabilities—Including an amendment of FASB Statement No. 115*), for a particular financial asset or liability permits neither the new entity's election of the fair value option for *other* financial assets or liabilities nor reversal of a previous election of this option.

BDO

Accounting for a merger (Cont'd)

- Eliminate effects of any intra-entity transactions.
- All reclassifications, adjustments, and other changes needed to effect a merger are rolled into opening balances.
- Since the successor organization after a merger is a new entity, there is no prior period statement of activity or cash flows (an 'opening' balance sheet may be presented if desired).

BDO

Accounting for an acquisition

- Identifiable assets and liabilities (and any noncontrolling interest) of the acquired entity are brought in at their fair values at date of acquisition.
  - Exceptions specific to nonprofits: Collections are accounted for in accordance with the policy of the acquirer; conditional pledges are not recorded; no value is attributed to donor relationships.
  - Exception for leases: Leases are classified (operating vs. capital) according to their terms at lease inception, unless they have been modified.
- If the value of the acquired assets exceeds the sum of the acquired liabilities plus any consideration, the difference is recorded as an inherent contribution and reported as a separate credit in the statement of activities
- If the sum of the liabilities plus consideration exceeds the assets, the difference is recorded as goodwill, except:
- if the entity is predominantly supported by contributions and/or investment return, the goodwill is written off immediately as a separate charge in the statement of activities ('predominantly supported by' means that contributions and investment return are expected to be significantly more than the total of all other revenues)
- Any noncontrolling interests are accounted for in accordance with Statement of Financial Accounting Standards No. 160, *Noncontrolling Interest in Consolidated Financial Statements,* (ASC 810), (SFAS 160).

Accounting for an acquisition (Cont'd)

- Acquisition-related costs are period expenses, except for debt issuance costs.

- Statement of Financial Accounting Standards No. 142, *Goodwill and Other Intangible Assets* (ASC 350) (SFAS 142) is made fully effective for not-for-profit entities (goodwill is no longer amortized, rather it is tested for impairment).

  Exception: SFAS 142 does not apply to:

  a. The formation of a joint venture

  b. The acquisition of assets that do not constitute either a business or a nonprofit activity\

  c. A combination between entities under common control

  d. An event in which a not-for-profit entity obtains control of another entity but does not consolidate that entity, as permitted or required by AICPA SOP No. 94-3.

- Various descriptive, quantitative, and qualitative (why the merger/acquisition occurred) disclosures are required.

Effective date:

- Combinations occurring in reporting periods beginning on or after 15 December 2009;
- Early adoption prohibited

- Statement 164 includes many more details than summarized above. The statement should be consulted for guidance.

Fair Value Accounting Issues

Fair Value Usage

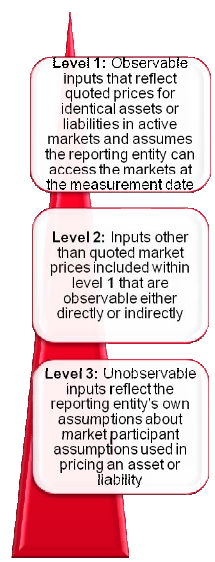
The consideration transferred in an acquisition by a not-for-profit entity shall be measured at fair value, which shall be calculated as the sum of the acquisition-date fair values of the assets transferred by the acquirer and the liabilities incurred by the acquirer.

The acquirer shall measure the identifiable assets acquired, the liabilities assumed, and any noncontrolling interest in the acquiree at their acquisition-date fair values.

Fair Value is the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date (paragraph 5 of FASB Statement No. 157 (ASC 820), *Fair Value Measurements).*

Market participants are buyers and sellers in the principal (or most advantageous) market for the asset or liability that are:

a. Independent of the reporting entity; that is, they are not related parties.
b. Knowledgeable, having a reasonable understanding about the asset or liability and the transaction based on all available information, including information that might be obtained through due diligence efforts that are usual and customary.
c. Able to transact for the asset or liability.
d. Willing to transact for the asset or liability; that is, they are motivated but not forced or otherwise compelled to do so.



Fair Value of Consideration

- Acquisition date is the date effective control is achieved
- If the initial accounting for an acquisition is incomplete by the end of the reporting period, the acquire reports provisional amounts. The acquirer will retrospectively adjust amounts until the acquirer receives information it was seeking about facts and circumstances that existed as of the acquisition date or learns the information is unobtainable, but in no cases shall this exceed one year. This is the measurement period.
- Contingent consideration is recognized at fair value as part of acquisition consideration
- Acquisition related costs are expensed
- Preexisting Relationship between the Acquirer and the Acquiree that effectively settled, it is measured at:
  a. For a preexisting noncontractual relationship (such as a lawsuit), fair value
  b. For a preexisting contractual relationship, the lesser of:
     1) The amount by which the contract is favorable or unfavorable from the perspective of the acquirer when compared with pricing for current market transactions for the same or similar items. (An *unfavorable contract is a contract that is unfavorable in terms of current market terms.* It is not necessarily a loss contract in which the unavoidable costs of meeting the obligations under the contract exceed the economic benefits expected to be received under it.)
     2) (2) The amount of any stated settlement provisions in the contract available to the counterparty to whom the contract is unfavorable.

     If (2) is less than (1), the difference is included as part of the acquisition accounting.

BDO

What is Goodwill?

An asset representing the future economic benefits arising from other assets acquired in a business combination or an acquisition by a not-for-profit entity that are not individually identified and separately recognized [Paragraph 3(j) of Statement 141(R)].

BDO

Identifying Intangible Assets and Goodwill

- The acquirer shall recognize separately from goodwill the identifiable intangible assets acquired. The asset is identifiable if:
  - Is separable, that is, capable of being separated or divided from the entity and sold, transferred, licensed, rented, or exchanged, either individually or together with a related contract, identifiable asset, or liability, regardless of whether the entity intends to do so; or
  - Arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations (paragraph 3(k) of SFAS 141(R)).

- Exceptions:
  - Donor Relationships
  - Collections
  - Conditional promises to give
  - Assembled and trained workforce

- Goodwill is measured as the excess of (a) over (b) below:
  a. The aggregate of:
     - The consideration transferred measured at its acquisition-date fair value
     - The fair value of any noncontrolling interest in the acquiree
     - In an acquisition achieved in stages, the acquisition-date fair value of the acquirer's previously held equity interest in the acquiree.

  b. The net of the acquisition-date amounts of the identifiable assets acquired and the liabilities assumed measured in accordance with this Statement.

BDO

Identifiable Intangible Assets

- Marketing Related:
  - Trademarks, trade names, service marks, collective marks, certification marks
  - Trade dress (unique color, shape, package design)
  - Newspaper mastheads
  - Internet domain names
  - Noncompetition agreements

- Artistic Related
  - Plays, operas, ballets
  - Books, magazines, newspapers, other literary works
  - Musical works such as compositions, song lyrics, advertising jingles
  - Pictures, photographs
  - Video and audiovisual material, including motion pictures or films, music videos, television programs.

- Customer and Donor Related
  - Donor lists
  - Order or Production Backlog
  - Customer contract and related customer relationships
  - Non-contractual customer relationships
- Contract-Based
  - Licensing, royalty, standstill agreements
  - Advertising, construction, management, service or supply contracts
  - Lease agreements (whether the acquiree is the lessee or the lessor)
  - Construction permits
  - Franchise agreements
  - Operating and broadcast rights
  - Employment contracts
  - Use rights such as drilling, water, air, timber cutting, and route authorities.
- Technology Based
  - Patented technology
  - Computer software and mask works
  - Unpatented technology
  - Databases, including title plants
  - Trade secrets, such as secret formulas, processes, recipes.

BDO

Items to Support in Fair Value Determination

- Controls over the process used to determine fair value measurements, including, for example, controls over data and the segregation of duties between those committing the entity to the underlying transactions and those responsible for undertaking the valuations.
- The expertise and experience of those persons determining the fair value measurements.
- The role that information technology has in the process.
- The types of accounts or transactions requiring fair value measurements or disclosures (for example, whether the accounts arise from the recording of routine and recurring transactions or whether they arise from nonroutine or unusual transactions).
- The extent to which the entity's process relies on a service organization to provide fair value measurements or the data that supports the measurement. When an entity uses a service organization, the auditor considers the requirements of SAS No. 70, *Service Organizations (AICPA, Professional Standards, vol. 1, AU sec. 324), as amended.*
- The extent to which the entity engages or employs specialists in determining fair value measurements and disclosures.
- The significant management assumptions used in determining fair value.
- The documentation supporting management's assumptions.
- The process used to develop and apply management assumptions, including whether management used available market information to develop the assumptions.
- The process used to monitor changes in management's assumptions.
- The integrity of change controls and security procedures for valuation models and relevant information systems, including approval processes.
- The controls over the consistency, timeliness, and reliability of the data used in valuation models.

BDO

Valuation Process

Due Diligence
- Gather Relevant Company Data
- Interview Key Management
- Research Industry and Economic Factors
- Search Databases for Market Data

Analysis
- Analyze Financial Performance and Forecasts
- Determine Appropriate Valuation Method(s)
- Prepare Models and Supporting Schedules

Prepare Report
- Summarize Facts
- Describe Assumptions and Analysis
- Outline Methodology Selection and Application
- Describe Conclusion

BDO

Goodwill Acquired

- Recognized as goodwill as of the acquisition date if the combined entity is supported by resources other than contributions and returns on investments.
- Measured as the excess of (a) over (b):
  - (a) the aggregate of:
    - (1) the consideration transferred measured at its acquisition-date fair value;
    - (2) the fair value of any non-controlling interest in the acquiree; and
    - (3) in an acquisition achieved in stages, the acquisition-date fair value of the acquirer's previously held equity interest in the acquiree.
  - (b) The net of the acquisition-date amounts of the identifiable assets acquired and the liabilities assumed.
- However, if the combined entity is predominately supported by contributions and return on investments, the excess of (a) over (b) is recognized as a separate charge in the statement of activities as of the acquisition date rather than as goodwill.

BDO

Goodwill Acquired (cont'd)

- Consider all relevant qualitative and quantitative factors in determining the expected nature of the predominant source of support.
- If no consideration is transferred, the goodwill or the separate charge would be the excess of liabilities assumed over assets acquired.

BDO

Transition for Previously Recognized Goodwill

- For combined entities predominately supported by contributions and returns on investments, write off previously recognized goodwill by a separate charge in the statement of activities at the acquisition date.

- For combined entities not predominately supported by contributions and returns on investments: 1) establish the reporting units [Paragraph 54 of Statement 142] and 2) perform a transitional goodwill impairment evaluation [Paragraphs 55-58 of Statement 142].

Goodwill and Other Intangible Assets

SFAS No.142 has been amended to apply to not-for-profit entities for goodwill and other intangible assets acquired in an acquisition by a not-for-profit entity.

What is meant by “Predominately Supported”?

SFAS 164 defines “predominately supported” to mean that contributions and returns on investments are expected to be significantly more than the total of all other sources of revenue.

What is a Contribution?

Statement of Financial Accounting Standards No. 116, (ASC 605) (SFAS 116) *Accounting for Contributions Received and Contributions Made* defines a contribution as an unconditional transfer of cash or other assets to an entity or a settlement or cancellation of its liabilities in a voluntary nonreciprocal transfer by another entity acting other than as an owner.

An inherent contribution is made if an entity voluntarily transfers assets (or net assets) or performs services for another entity in exchange either for no assets or for assets of substantially lower value and unstated rights or privileges of a commensurate value are not involved.

Contribution Received

- Recognize as a separate credit in the statement of activities as of the acquisition date.
- Measured as the excess of (b) over (a):
  - (a) the aggregate of:
    - (1) the consideration transferred measured at its acquisition-date fair value;
    - (2) the fair value of any non-controlling interest in the acquiree; and
    - (3) in an acquisition achieved in stages, the acquisition-date fair value of the acquirer's previously held equity interest in the acquiree.
  - (b) The net of the acquisition-date amounts of the identifiable assets acquired and the liabilities assumed.
- If no consideration is transferred, the excess amount would be the excess of assets acquired over liabilities assumed.

BDO

Consideration Transferred

- In acquisitions by not-for-profit entities
  - Measured at the acquisition-date fair value.
  - The sum of the assets transferred and the liabilities incurred.

- Forms:
  - Cash.
  - Other assets.
  - A business or a nonprofit activity of the acquirer.
  - Contingent consideration.

BDO

Accounting Guidance

Relevant Guidance

- **SFAS 164 (ASC 958-805):** Statement of Financial Accounting Standards No. 164, *Not-for-Profit Entities: Mergers and Acquisitions.*
- **FASB Staff Position (FSP) No. SFAS 126-1 (ASC 825):** *Applicability of Certain Disclosure and Interim Reporting Requirements for Obligors for Conduit Debt Securities*
- **SFAS 141(R) (ASC 805):** Statement of Financial Accounting Standards No. 141(R), *Business Combinations.*
- **SFAS 142 (ASC 350):** Statement of Financial Accounting Standards No. 142, *Goodwill and Other Intangible Assets.*
- **SFAS 116 (ASC 958-605):** Statement of Financial Accounting Standards No. 116, *Accounting for Contributions Received and Contributions Made.*
- **SFAS 160 (ASC 810):** Statement of Financial Accounting Standards No. 160, *Noncontrolling Interest in Consolidated Financial Statements.*
- **SOP 94-3 (ASC 958-810):** AICPA Statement of Position 94-3, *Reporting of Related Entities by Not-for-Profit Organizations.*
- **APB Opinion 16 (ASC 958-805):** Accounting Principles Board Opinion No. 16, *Business Combinations.*

Questions ???

Speaker Biographies

Fred Leamnson, CFP®
First Vice President
Consulting Group
RBC Wealth Management

We work to help investment fiduciaries and other disciplined investors manage a prudent investment process. One of the main obstacles to consistent investment performance and proper risk management is the lack of a disciplined approach consistently applied and followed. To that end, we're dedicated to helping clients spend the time needed to develop and define their goals, and implement and monitor the investment process needed to achieve them. We will help you apply this process to take the emotion out of your investing and improve your ability to achieve the types of returns you deserve.

Fred has been in the financial services industry for 22 years and has guided clients through numerous economic and market cycles. None was more difficult than the one just past. This experience has taught us the value of staying focused on clients' investment objectives and not getting caught up in the news of the day.

Fred has several professional designations and certifications including the CERTIFIED FINANCIAL PLANNER™ certification and the Accredited Investment Fiduciary®.

Memberships and Affiliations:

American Society of Association Executives (ASAE)
Fred recently spoke at ASAE's Finance and Business Operations Symposium on *"How to Protect your Portfolio from the Next Crisis"*, a topic within Investment Management. He was also a sponsor at last year's event. Over the past two years, he has hosted several webcasts on investment and fiduciary topics for association and nonprofit executives. Fred serves as a volunteer for the ASAE's Dollars and Sense Newsletter, an online publication of ASAE published on a bimonthly basis. Last fall, he wrote an article on UPMIFA and its impact on the nonprofit community. He is also preparing an article for an upcoming issue of Dollars and Sense on Governance Issues and the Investment Decision Making Process.

Greater Washington Society of CPA's (GWSCPA)
Fred sits on the Nonprofit Symposium planning committee. The Nonprofit Symposium is an annual event for CPAs who serve in both the public accounting fields and the nonprofit executive ranks. Last year's event hosted over 450 professionals at the Mayflower Hotel in Washington, DC. The planning committee formulates the agenda for the conference, including workshop topics, speakers, and sponsors. Fred will be moderating a session at the December, 2010 Symposium on *"The Top Five Legal Risk Management Issues Facing Nonprofits: What You Can Do to Mitigate Your Exposure"* with some of the top legal experts in the nonprofit community.

Investment Management Consultants Association
Center for Fiduciary Studies (FI360)
Certified Financial Planner Board of Standards

VENABLE® LLP

our people

Jeffrey S. Tenenbaum

Partner

Washington, DC Office

T 202.344.8138 F 202.344.8300

jstenenbaum@Venable.com

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group, as well as its Credit Counseling and Debt Services Industry Practice Group. He is one of the nation's leading nonprofit attorneys, and also is an accomplished author, lecturer and commentator on nonprofit legal matters. Based in the firm's Washington, 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 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*. He started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill.

AREAS OF PRACTICE

Tax and Wealth Planning

Antitrust

Political Law

Business Transactions Tax

Tax Controversies

Tax Policy

Tax-Exempt Organizations

Wealth Planning

Regulatory

INDUSTRIES

Nonprofit Organizations and Associations

Credit Counseling and Debt Services

Financial Services

Consumer Financial Protection Bureau Task Force

GOVERNMENT EXPERIENCE

Legislative Assistant, United States House of Representatives

BAR ADMISSIONS

District of Columbia

REPRESENTATIVE CLIENTS

American Academy of Physician Assistants
American Association of Homes and Services for the Aging
American Association of Museums
American College of Radiology
American Forests
American Institute of Architects
Air Conditioning Contractors of America
American Society for Microbiology
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
Association of Corporate Counsel
Association of Private Sector Colleges and Universities
The College Board
Council on Foundations
Foundation for the Malcolm Baldrige National Quality Award
Homeownership Preservation Foundation
The Humane Society of the United States

EDUCATION

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

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

MEMBERSHIPS

American Society of Association Executives

California Society of Association Executives

New York Society of Association Executives

Independent Insurance Agents and Brokers of America
Money Management International
National Association of Chain Drug Stores
National Athletic Trainers' Association
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 Student Clearinghouse
National Telecommunications Cooperative Association
The Nature Conservancy
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Recording Industry Association of America
Romance Writers of America
Texas Association of School Boards
Trust for Architectural Easements

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

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

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

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

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

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

ACTIVITIES

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

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, published by the American Society of Association Executives, and is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. 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 and many of the other principal nonprofit industry organizations and publications, having written more than 250 articles on nonprofit legal topics.

SPEAKING ENGAGEMENTS

Tenenbaum is a frequent lecturer for ASAE 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. He also has been interviewed on nonprofit legal issues on Voice of America Business radio.

VENABLE® LLP

our people

Lisa M. Hix

Associate

Washington, DC Office

T 202.344.4793 F 202.344.8300

lmhix@Venable.com

Ms. Hix concentrates her practice on counseling charities, trade and professional associations, and other nonprofits on a wide range of legal topics, including tax exemption, intellectual property, corporate governance, and antitrust, among others.

Ms. Hix has broad experience in the nonprofit sector, having served in various capacities at nonprofit organizations, including as the Founding Executive Director of the Memorial Institute for the Prevention of Terrorism (MIPT) and Development Director of East Harlem Block Schools. This experience has included representation before Members of Congress and federal agencies. She also worked in the nonprofit practice of a large national law firm for four years before joining Venable.

PUBLICATIONS

- November 10, 2010, Legal Issues in Publishing – Copyright and Reprint Requests
- November 3, 2010, Cyberspace Risk: What You Don't Know Could Hurt You
- September-October 2010, The Ins and Outs of Alliances and Affiliations, *Associations Now*
- September 24, 2010, Doing Business in a Changing Economy: Contracts, Liability, and Understanding Risk
- September 21, 2010, Legal Aspects of Social Networking and Online Media Platforms
- September 20, 2010, Best Practices for Negotiating Meeting Contracts in the Current Economy
- August 24, 2010, Association Alliances, Partnerships and Mergers
- May 7, 2010, Combinations and Alliances Among Nonprofit Associations
- January 26, 2010, The Building Blocks for a Successful Nonprofit Merger
- December 15, 2009, Best Practices for Negotiating Hotel Contracts in the Current Economy
- December 15, 2009, Hotel Contract Clauses That Work: Understanding the Fine Print
- April 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- March 12, 2009, IM N, R U? Managing the Nonprofit Legalities of Social Networking and Online Media Platforms
- November 18, 2008, The Ten Most Common Online Legal Pitfalls for Nonprofits...and How to Avoid Them
- September 16, 2008, Obtaining and Maintaining Tax-Exemption for Your Affiliates: The Mechanics, Pros and Cons of Group Exemption

AREAS OF PRACTICE

Tax-Exempt Organizations

Tax and Wealth Planning

Regulatory

INDUSTRIES

Nonprofit Organizations and Associations

BAR ADMISSIONS

District of Columbia

EDUCATION

J.D., Duke University School of Law, 2004

Duke Journal of Comparative and International Law

B.A., Political Science, Smith College, 1996

MEMBERSHIPS

Chair, ASAE Legal Symposium Planning Committee

ASAE Legal Section Council

ASAE Association Law "Tool Kit" Task Force

ASAE Technology Resources Committee

SPEAKING ENGAGEMENTS

- December 6, 2010, Mergers, Alliances, Affiliations and Acquisitions for Nonprofit Organizations: Financial and Legal Issues
- November 10, 2010, "Copyright and Reprint Requests" to the Coalition of Education Association Publications
- November 3, 2010, "Cyberspace Risk: What You Don't Know Could Hurt You," Nonprofit Risk Management Center
- September 24, 2010, "Doing Business in a Changing Economy: Contracts, Liability, and Understanding Risk," at the 2010 Annual Association Law Symposium in Washington, DC
- September 21, 2010, "Legal Aspects/Issues of Social Networking and Media Platforms" at the Texas Society of Association Executives Annual Conference
- September 20, 2010, "Best Practices for Negotiating Meeting Contracts in the Current Economy" at the Texas Society of Association Executives Annual Conference
- August 24, 2010, "Association Alliances, Partnerships and Mergers" at the 2010 Annual Meeting & Expo of the American Society of Association Executives (ASAE)
- August 14, 2010, "Overview of Association Law" at the National Institute of Governmental Purchasers Annual Conference
- August 4, 2010, "Avoiding Legal Pitfalls When Using On-Line Social Media" for the Indiana Grantmakers Alliance, in collaboration with various State Grantmakers Alliances
- April 13, 2010, Legal Quick Hit: “Best Practices for Negotiating Hotel Contracts in the Current Economy” for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 10, 2009, Two presentations on hotel contracts at PMPI’s 4th Annual Mid-Atlantic Conference and Expo (MACE)
- September 25, 2009, American Society of Association Executives (ASAE) Annual Association Law Symposium
- June 22, 2009, Building Member and Supporter Buy-In Through Improved Governance Practices
- June 9, 2009, Legal Quick Hit: Copyright Law Basics and Pitfalls for Nonprofits
- April 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- November 18, 2008, Association of Corporate Counsel Webcast: The Ten Most Common Online Legal Pitfalls for Nonprofits ... and How to Avoid Them
- 2008, "Developing Security Policies and Procedures to Protect Member Data" at the 2008 ASAE Association Technology Conference & Expo, Washington, DC
- 2007, "Board of Directors' Responsibilities" at the 2007 Society for Women's Health Research Board Orientation, Washington, DC
- 2007, "Legal Considerations in Nonprofit Mergers" at the Association of Corporate Counsel "Legal Quick Hit"
- 2007, "Overtime for Employees on Travel" at the Association of Corporate Counsel "Legal Quick Hit"
- 2007, "Intellectual Property Challenges in the Life of an Association" at the 2007 ASAE Annual Association Law Symposium, Washington, DC
- 2007, "Update on Hotel Contracts: Attrition and Other Key Issues" at the Association of Corporate Counsel "Legal Quick Hit"
- 2007, "Understanding and Managing Fiduciary Responsibility" at the 2007 Finance and Administration Roundtable, Washington, DC
- 2006, "Legal Issues for Nonprofit Organizations" at the American College of Cardiology, 2006 General Scientific Session, Atlanta, Georgia
- 2006, "Contracts Insurance & Liability: What Every Meeting Professional Should Know" at the 2006 ASAE Meetings Management Institute Issues in Hotel Meeting

Contracts, ASAE Hotel Operations Program, Washington, DC

- 2006, "Opening General Session Panel: The Year in Review - Legal Style" at the 2006 ASAE Finance & Business Operations Symposium, Baltimore, MD

VENABLE LLP

our people

AREAS OF PRACTICE

Labor and Employment

Financial Services Wage Compliance

Investment Management

Regulatory

INDUSTRIES

Government Contractors

Nonprofit Organizations and Associations

BAR ADMISSIONS

Virginia

District of Columbia

Maryland

COURT ADMISSIONS

U.S. District Court for the District of Maryland

U.S. District Court for the District of Columbia

U.S. Court of Appeals for the Fourth Circuit

U.S. District Court for the Northern District of Florida

David R. Warner

Partner

Tysons Corner, VA Office

T 703.760.1652 F 703.821.8949

drwarner@Venable.com

David Warner concentrates his practice in the areas of labor and employment law, representing and counseling private and public sector clients with particular emphasis on employment discrimination, enforcing management rights in regard to restrictive covenants, trade secrets and business conspiracy laws and government contractor compliance. Mr. Warner's litigation experience includes complex, class action litigation, brought by both private claimants and government agencies, involving extensive electronic discovery and statistical analyses. In addition to regularly advising clients regarding specific employment decisions, Mr. Warner's counseling practice focuses on strategies for employer compliance with EEO laws and government contracting regulations and for the avoidance and minimization of litigation. This includes diagnostic reviews of corporate policies and practices and the development and implementation of recruitment, selection, performance management and compensation systems.

SIGNIFICANT MATTERS

Mr. Warner currently is lead defense counsel for three employment discrimination class actions pending before the Equal Employment Opportunity Commission (EEOC). Mr. Warner is also representing one of the fifty largest employers in North America in an ongoing class action matter adverse to the Office of Federal Contract Compliance Programs (OFCCP). He has assisted in the successful defense of class action litigation brought against a major financial institution by the OFCCP and in the successful resolution of multiple OFCCP "glass ceiling" audits. Mr. Warner has successfully defended multiple age, race, gender and disability-related cases in state and federal courts and administrative charges before the EEOC and local agencies. He was also a member of the defense trial team for what would have been the largest employment discrimination class action ever tried to a jury had the matter not resolved – following a significant defense victory on motions *in limine* – on the eve of trial.

PUBLICATIONS

- June 2010, Turns Out, There's No Such Thing As "Free Labor" Either: Why Most Employers Should be Paying Interns or Modifying/Abandoning Their Unpaid Internship Programs, Labor & Employment News E-lert
- May 12, 2010, Nonprofit Labor and Employment: Challenges, Solutions and Legal Pitfalls
- May 6, 2010, Proactive Strategies for Minimizing HR and Other Legal Risks in Mergers and Joint Ventures (handouts)
- May 6, 2010, Proactive Strategies for Minimizing HR and Other Legal Risks in Mergers and Joint Ventures (PowerPoint presentation)

EDUCATION

J.D., *cum laude*, Georgetown University Law Center, 1996

Editor, Articles and Notes, *American Criminal Law Review*

B.A., *cum laude*, Georgetown University, 1993

MEMBERSHIPS

American Bar Association

Maryland Bar Association

Virginia Bar Association

District of Columbia Bar Association

Maryland Defense Counsel, Inc.

- April 2010, "What Are You, People? On [State-Licensed Medical Marijuana]?"– The Hazy Intersection of State Medical Marijuana Laws, Federal Authorities and Employer Drug Free Workplace and Testing Policies, Labor & Employment News E-lert
- April 19, 2010, Comments to EEOC Notice of Public Rulemaking Regarding "Reasonable Factor Other Than Age" Under the Federal Age Discrimination in Employment Act
- Summer 2009, "Spiraling Costs and Crashing Markets – Who Will Be Left Holding the (Empty) Bag for Depleted Pensions and Unfunded Health Care Liabilities?" in *Law Journal of the Energy and Mineral Law Institute*, 30th volume
- January 4, 2010, December "Payroll Surprise" Waiting for Some Employers in 2010, Labor & Employment News E-lert
- May 21, 2009, Nonprofits in Lean Times: Employment and Labor Challenges for Nonprofits in the Economic Downturn
- February 2, 2009, President Obama Issues Three Labor-Friendly Executive Orders, Labor & Employment News E-lert
- February 2008, IP News & Comment - February 2008, IP News & Comment
- August 2005, Legal Trends: E-Mail and Electronic Discovery – Ignore Now, Pay Later, *HR Magazine*
- April 1, 1999, Avoiding Liability in Discipline and Termination Decisions - A Reverse Engineering Analysis

SPEAKING ENGAGEMENTS

Mr. Warner is a frequent lecturer on topics including compliance with the McNamara-O'Hara Service Contract Act, the Davis-Bacon Act, the Family and Medical Leave Act, the Fair Labor Standards Act, reasonable accommodation under the Americans with Disabilities Act, OFCCP compliance, hiring, firing, discipline and other aspects of the employer/employee relationship touched upon by state and federal law.

- December 6, 2010, Mergers, Alliances, Affiliations and Acquisitions for Nonprofit Organizations: Financial and Legal Issues
- September 14, 2010, Legal Quick Hit: "Employee Privacy and Employer Liability in the Age of Texting, 'Sexting,' Facebook, and Other Social Media Phenomena" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 13, 2010, "Nonprofit Labor and Employment: Challenges, Solutions and Legal Pitfalls" audioconference presented by *Association TRENDS*
- May 11, 2010, Legal Quick Hit: "What the Developing Federal Legislative and Regulatory Agenda Means to Your Nonprofit as an Employer," for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 6, 2010, "Proactive Strategies for Minimizing HR and Other Legal Risks in Mergers, Outsourcing and Shared-Staffing" at the 2010 Finance and Business Operations Symposium, sponsored by the American Society of Association Executives
- July 21, 2009, "Labor and Employment: Challenges, Solutions and Legal Pitfalls" at an audioconference held by AssociationExecs.com
- May 21, 2009, Nonprofits in Lean Times: Employment and Labor Challenges for Nonprofits in the Economic Downturn
- January 13, 2009, Legal Quick Hit: Reductions in Force - Planning, Implementation and Communication
- December 18, 2008, RAFFA's "Managing the Economic Downturn"

Areas of Experience:

Not-for-profits

Higher Education

HealthCare

State and Local Government

Employee Benefit Plans

BDO

BDO Seidman, LLP
Accountants and Consultants

Greater Washington, DC

Lee Klumpp, CPA

National Nonprofit Industry Group's Accounting and Auditing Technical Leader

Experience

Lee is a Director with BDO Seidman and has been with the firm for over five years and prior to joining BDO; Lee worked in the audit practices of Ernst and Young, LLP and KPMG. His representative clients have included the State of Maryland, University of Maryland System, Howard University, Education Finance Council, the District of Columbia, INOVA Healthcare System, Children's National Medical Center, American College of Cardiology, World Wildlife Fund and United Way Worldwide.

Lee spends an extensive amount of time:

Researching, writing and disseminating information related to recent accounting and auditing pronouncements promulgated by the Financial Accounting Standards Board, the Government Accounting Standards Board, the Office of Management and Budget (OMB), the Government Accountability Office, the Auditing Standards Board and others that provide guidance for the nonprofit industry.

Providing consultation to BDO engagement teams and our alliance firms around the country on various financial, accounting, auditing and reporting issues related to the nonprofit organizations. Additionally, Lee provides assistance to our international offices on OMB A-133 topics and issues for their clients that are foreign sub-recipients of funds from United States Federal Agencies.

Preparing and presenting speeches, seminars and webinars on various accounting, auditing, internal control, governance, financial reporting and Single Audit Issues (OMB Circulars A-133, A-122, A-87 and A-21) topics related to nonprofit organizations around the country.

Listed below are a few of the organizations that Lee has spoken for:

American Institute of Certified Public Accountants
American Society of Association Executives
The Environmental CFO Roundtable
The Nonprofit CFO Roundtable
The Knowledge Congress
and over forty state societies.

Lee's work experience includes:

Working with organizations in the governmental and not-for-profit community with multiple divisions, reporting units and nonprofit and for-profit entities

Significant expertise in compliance auditing of organizations receiving federal financial funding in accordance with OMB A-133

Preparing, reviewing and auditing indirect cost rates proposals

Presenting audit reports and management letters to Boards of Directors and Audit Committees.

Professional Affiliations

Member of the American Institute of Certified Public Accountants and serves as National Instructor for various Nonprofit and Governmental accounting and auditing topics and is a member the Ethics Committee's Technical Standards Subcommittee

Member of the Financial Accounting Standards Board's Nonprofit Resource Group

Member of the Greater Washington Society of CPAs and serves as the Chairman of the Not-for-Profit Committee

Member of the Maryland Association of Certified Public Accountants

Member of the Greater Washington Society of CPAs and serves as the Chairman of the Not-for-Profit Committee

Lee also serves on the Board of Directors and is the Vice-President of Budget and Finance of the Bethesda Chevy Chase Chamber of Commerce, Board of Directors of the Congressional Awards Foundation and is the President of the Board of Directors of Montgomery Community Television.

Education

B.S., Accounting, University of Maryland

BDO Seidman, LLP
Accountants and Consultants

Additional Information

VENABLE® LLP

Articles

January 26, 2010

The Building Blocks for a Successful Nonprofit Merger

AUTHORS

Brock R. Landry

Lisa M. Hix

RELATED INDUSTRIES

Nonprofit Organizations and Associations

ARCHIVES

2010 2006 2002

2009 2005 2001

2008 2004 2000

2007 2003

Related Topic Area(s): Corporate Governance, Miscellaneous

Financial imperatives, contractions in membership bases, and consolidation in industries have led to an unprecedented period of growth in interest in nonprofit mergers. As a result, many nonprofits are eyeing current competitors as potential partners. However, mergers can easily fail when organizations mistake a central fact: mergers occur between people, not organizations. Mergers can fall apart for a variety of reasons: unexpected discoveries in the due diligence process, intractable issues that have been ignored, and differences in organizational cultures, among others. The following is a list of "lessons learned" from two association attorneys who have handled a broad range of association mergers.

Establish a Core Group of Merger Stewards. Establishing a group of volunteer and staff leaders to act as stewards of the merger is critical to success. The merger stewards will have two roles: 1) to come to an understanding of the merger plan, and to communicate this plan to the association's stakeholders, including the boards, staff and membership; and 2) to work through the inevitable issues that will arise in the due diligence process and/or as the groups integrate.

Ask the Hard Question Early: Which Organization Survives? Strength of negotiation posture can be measured by financial assets, membership base, industry contacts, and depth of operational expertise. Deciding how, and whether, to acknowledge this power disparity can be key to success in the long run. Early on, the organizations should agree on whether one organization should be viewed as the "surviving" entity, or whether both organizations will combine as equals. Although most mergers are described as the marriage of equals, rarely is this, in fact, the case.

Ask the Harder Question: What Are the Roles of the Respective Staff and Officers? A clear understanding of future roles and authority is central to a successful integration.

Jointly Develop a Merger Plan. The merger stewards from each organization should jointly develop a merger plan. This plan should include an outline of the combined governance structure, mission, core activities, membership categories and dues, and a broad staffing plan. A critical component of this plan is identifying board appointment procedures and the key leaders of the combined organization. The merger plan should include sufficient detail on the hard issues, but should be broad enough to allow for revision and elaboration based on stakeholder input.

Understand Approval Requirements and Dynamics. Once the core elements of the merger plan are in place, each organization should undertake a careful analysis of its respective board and member approval requirements. These requirements will be outlined in the state corporate code provisions of the organization's state of incorporation, as well as each organization's governing documents, such as bylaws. Where high approval requirements exist, early and active communication to the board and members is essential, as is a thorough understanding of permissible voting mechanisms.

Coordinate Internal and External Communication. In organizations with overlapping membership, having a coordinated "sell" document for the staff, board and members of each organization is critical. Release of information should be carefully coordinated between the organizations and each party should agree to give the other notice before making any announcements to the public. Nothing kills a merger faster than being blindsided by an unauthorized communication.

Agree on Coordinated Due Diligence. Merger timelines must allow for thorough due diligence. Associations considering mergers face a multitude of legal, governance, financial, and administrative issues that must be carefully explored and coordinated. To facilitate this process, the parties should agree upon a scope of due diligence and a diligence timeframe.

Culture Matters. Finally, while it may make good business sense to merge, key stakeholders –

including members, staff, and volunteer leaders – will not shift allegiances if the combined organization fails to bridge the cultures of both entities. Mergers work only when associations take the necessary steps to build teamwork and a shared vision of the future.

* * * * * *

*Brock Landry and Lisa Hix have handled a variety of mergers, including the American Bankers Association/America's Community Bankers merger and the American Electronics Association/Information Technology Association of America merger. For more information, please contact or Mr. Landry at **brlandry@Venable.com** or Ms. Hix at **lmhix@Venable.com**.*

VENABLE® LLP

Articles

September-October 2010

The Ins and Outs of Alliances and Affiliations

Associations Now

Related Topic Area(s): Meeting, Vendor and Government Contracts, Miscellaneous, Tax and Employee Benefits

Q: We are considering an affiliation, combination, or possible merger, with another organization. What options do we have?

A: There is a wide array of ways in which nonprofit associations can combine, affiliate or otherwise come together. Some involve a complete integration of programs, activities, membership, leadership, and staff, while some provide for maintaining varying degrees of separateness and autonomy. A summary of several options is below.

Merger. Nonprofit corporations can fully and completely integrate their programs, functions, and membership by merging. When two nonprofit entities merge, one entity legally becomes part of the surviving entity and effectively dissolves. The surviving corporation takes title to all of the assets, and assumes all of the liabilities, of the non-surviving entity.

Benefits. By merging, associations may combine their assets, reduce costs by eliminating redundant administrative processes, and provide broader services and resources to their members. Furthermore, members who paid dues and fees to participate in the formerly separate associations are often able to reduce their membership dues and the costs and time demands of association participation by joining a single, combined organization. Finally, merger may allow associations participating within the same field or industry to offer a wider array of educational programming, publications, advocacy and other services to a larger constituency in the public arena.

Mechanics. To merge with another organization, each organization must follow the procedures mandated under the nonprofit corporation law of its state of incorporation, as well as any specific procedures in its governing documents. While nonprofit corporation statutes differ by state, the laws governing merger typically set forth certain core procedures. The board of directors of each precursor organization must develop and approve a plan of merger according to the requirements set forth in the nonprofit corporation statute of the state, or states, where the organizations are incorporated. The plan of merger also must be submitted to the voting members, if any, of each organization for their approval. While the conditions for member approval vary from state to state, statutes generally require a vote of two-thirds to effectuate the plan merger – a number that can be difficult to reach for practical and political reasons.

Acquisition of a Dissolving Corporation's Assets. Another legal mechanism is the dissolution and distribution of assets of a target association. While the dissolving entity must adhere to specific statutory procedures, a dissolution is much less onerous on the entity that acquires the dissolving entity's assets (the "successor" entity) than a merger. Because the successor entity is merely absorbing the assets of another organization, a vote of the membership and accompanying state filings are typically not required for that corporation.

Benefits. An asset transfer may be strategically preferable for combining organizations when one organization is of a much smaller size than the other, or the "successor" entity is only acquiring discrete programs or assets of the dissolving entity. Another benefit is that the successor organization is typically shielded from its predecessor's debts and liabilities, though an asset transfer always poses some risk of successor liability, particularly if adequate provision has not been made for pre-existing liabilities.

Mechanics. Like a merger, an asset transfer must follow the applicable state nonprofit corporation laws and each entity's governing documents. The procedure for dissolution and asset distribution is fairly

AUTHORS

Lisa M. Hix

RELATED INDUSTRIES

Nonprofit Organizations and Associations

ARCHIVES

2010	2006	2002
2009	2005	2001
2008	2004	2000
2007	2003	

simple for the successor entity. Member approval for such a transaction is typically unnecessary unless the organization's bylaws require otherwise. The process is more complicated, however, for the dissolving entity. In most instances, the nonprofit corporation statute of the dissolving entity's state of incorporation requires approval by both the board and any members having voting rights:

Other Types of Strategic Alliances. Mergers and asset acquisitions involve a substantial level of commitment, but associations need not go so far in order to engage in alliances with one another. Nonprofit corporations may enter into other strategic alliances that are temporary or permanent, and allow both entities to "test the waters" before binding themselves to a more involved or permanent arrangement.

Joint Venture. For example, in a joint venture, two or more associations lend their efforts, assets, and expertise in order to carry out a common purpose. The associations involved may develop a new entity (such as a limited liability company or a partnership) to carry out the endeavor. One example is joint trade shows.

A well-structured joint venture is codified in a written agreement that details the precise obligations and allocation of risk between the associations involved. Joint ventures can be permanent, set to expire on a given date or after the accomplishment of a certain goal, or structured with an increasingly overlapping set of commitments and an eye towards an eventual merger. Although the bylaws of an organization might specify otherwise, joint ventures do not usually require the approval of the general membership.

In the event that a contemplated joint venture would involve a taxable entity or an organization that is exempt under a different section of the tax code, there are additional precautions that may need to be taken in order to protect your organization from incurring taxable income or jeopardizing its exempt status.

Joint Membership Programs. Joint membership programs typically allow individuals to join two associations for a reduced fee. These initiatives allow the members of one organization to become more familiar with another, and are usually conducted in the context of other jointly run programs and activities. Programs in this vein are designed to bring associations closer together, often as a precursor to a more formal alliance, but allow the entities to modify the arrangement or disengage altogether if circumstances or expectations change.

Conclusion. There is an array of possible mechanisms for combinations and alliances that available to associations. The selection of an appropriate structure is heavily dependent on fully identifying the goals of the transaction and the potential ramifications for both groups.

Lisa M. Hix *is an attorney with Venable LLP and a member of ASAE & The Center's Washington, D.C. Legal Symposium Planning Committee. Email:* ***lmhix@venable.com***.

This article was originally published in the September-October 2010 edition of ASAE & The Center's Associations Now Magazine.

Governance and the Investment Process

(Published in ASAE Dollars and Cents Newsletter, November, 2010)

In the aftershocks of the crisis that rocked the financial markets in late 2008 and early 2009, many organizations have taken steps to review and analyze best practices in the areas of cost control, risk management and operational efficiency. Some have made incremental changes in these areas while others have been more dramatic. Some involved programs; others personnel. Organizations have examined whether to own or lease space. Many have taken a closer look at their reserve funds and found themselves asking some tough questions: Are we taking too much risk in our investments? Do we have adequate safeguards in place to protect our assets? Is our decision making process too cumbersome and bureaucratic to respond properly in the next crisis? The purpose of this article is to discuss some ways to make your decision making process more efficient in the area that is often overlooked: investment management.

If we've learned anything in the last couple of years, it's that change happens rapidly, especially in the investment world. Let me illustrate. It is widely accepted that a bull market is a rise in stock prices of 20% and a bear market a fall of 20%. By these time honored benchmarks, we had two complete bull and bear markets from September 15, 2008 to March 26, 2009. Panic was everywhere. Investor pessimism reached an all time high. The point of desperation may have been reached right about the time that Warren Buffet invested $5 billion into Goldman Sachs preferred stock. Mr. Buffet had the courage to execute his convictions at a time when most everyone else was panicked. Though this isn't rocket science (buy low/sell high), not many of us had the courage to do this during the peak of the crisis.

So how did your organization do? Did you have the courage of conviction? Did you sell into the panic? Did you put more cash into your long term reserves? Did you have an investment policy that was written to help during these times of desperation? If so, did you follow it? What, if any, changes have you made to your investment process as a result of the financial crisis?

The key to the decision making process, asset allocation strategies, risk management, manager changes, etc. all lie in the way the investment policy statement (IPS) is constructed and followed. The IPS is your business plan. It describes the roles and responsibilities of all of the parties to the agreement, including, but not limited to the Board, Investment/Finance Committees, staff, investment advisors/consultants, investment managers, and custodians. It is your governing document.

At the very least, the IPS should do four things:

1. *Define a purpose statement* – Why does the fund exist? What is the purpose of the organization? If it is the organization's reserves, how are the reserves to be used?
2. *Define the investment objectives* - What are the goals of the fund? Is it to maintain buying power (keep up with inflation), fund current operations/grants, or a combination of the two? What are your beliefs about investments? Do you want the investments to reflect the values of the organization? If so, what does that look like?
3. *Define investment guidelines* – What kind of return is needed to meet the goals of the fund? What is the maximum risk you will take to achieve this result? What due diligence standards will you set for manager selection? Will you utilize strategic allocation, core satellite, tactical or a combination? Who decides?

4. *Define the monitoring criteria* - What benchmarks will be used to measure performance? What are the criteria for replacing a manager? How often will we review the performance and managers? Who will be involved with that? How often will you review the IPS? Who is accountable for these criteria?

The organization should also clearly define who can make each of these decisions and the process that will be used. If there is a tactical element to the portfolio that requires approval, can the CFO/CEO make that decision with the advisor or does it need the approval of the investment committee? Who is involved in the quarterly meetings? What decisions can be made at that meeting vs. the annual review? If you utilize traditional strategic allocation with rebalancing, what are the rebalancing criteria defined in the IPS. Is the formula absolute? Is there flexibility? If flexible, what's the process for and who is involved in that decision? Having a clearly defined decision making process in your IPS will help your organization be more efficient. It puts in writing the roadmap to making potentially tough decision at a time when you may find yourselves in crisis.

Though it can't keep the markets from going down or the economy from slipping into recession, a properly crafted investment policy statement, if followed, can take the guesswork out of your investment decision making process. You will know who has the authority to make the tough decisions and what the process is to make them. It takes away the temptation to overreact in a crisis. It can keep you from making poor decisions in an emotional time. It can help prevent strong opinioned committee or board members from hijacking the process. It will also provide written documentation showing that your organization takes its fiduciary responsibility seriously. It gives all of the parties to the agreement written instructions as to their roles and responsibilities. It helps keep the investment managers and advisors from taking on more risk than they should to hit a specific return target.

Good governance is important to running your organization effectively and efficiently. At the very least most every organization operates with some kind of a policies and procedures manual. The investment policy statement is your policies and procedures manual that will help your organization run a more effective and efficient investment program. If your organization doesn't have one or if you haven't reviewed yours recently, there's no better time than the present to get that process started.

The opinions expressed in this article are those of the author and are not necessarily the same as those of RBC Wealth Management or its research department. RBC Wealth Management did not assist in the preparation of the material and makes no guarantee as to its accuracy or the reliability of the sources used for its preparation.

RBC Wealth Management does not provide tax or legal advice. All decisions regarding the tax or legal implications of your investments should be made in connection with your independent tax or legal advisor.

How UPMIFA Impacts Your Organization's Investment Decisions

(Published in ASAE Dollars and Cents Newsletter, September, 2009)

The Uniform Prudent Management of Institutional Funds Act (UPMIFA) (the Act) was adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in July, 2006. This Act replaces the Uniform Management of Institutional Funds Act (UMIFA) adopted by 47 states in 1972. The purpose of this article is to discuss a few of the key changes made and what impact they may have on your association's management of its Foundation and Endowment funds.

UPMIFA provides 501 (c) (3) organizations with a template for making investment and spending decisions. UPMIFA updates and clarifies standards in three major areas:

1. Investment conduct.
2. Delegation of management/investment decisions.
3. Expenditures.

In Section 6 of the1972 UMIFA, investment conduct is defined as a general obligation to invest prudently using the standard of ordinary business care. UPMIFA, 2006, goes into much greater detail in defining investment conduct. Section 3 (b) defines the obligation as a good faith effort to utilize the duty of care standard of a prudent person in a similar position. The commentary of the Act states that UPMIFA makes the duty of care, the duty to minimize costs, and the duty to investigate (due diligence) mandatory.

Section 3 (c) (3) has particular significance to organizations who want to pool long term reserve funds with foundation or endowment funds with the same investment objectives for investment management purposes. In addition to simplified investment management, this pooling may allow the organization to reduce the investment management fees and thus satisfy the obligation to do what is necessary to control investment costs (Section 3 (c) (1)).

Section 3 also includes the requirement to take a portfolio approach to managing investments, rather than making individual asset decisions in isolation and to *"…rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms, and distribution requirements of the institution..."* (Section 3 (e) (5))

Delegation of investment management was allowed in UMIFA without express standards. UPMIFA defines fairly specific criteria for delegating this authority.
Section 5 (a) of the Act uses the duty of care language and applies it in: *(1) selecting an agent, (2) establishing the scope and terms of the delegation..." and (3) periodically reviewing the agent's actions in order to monitor the agent's performance and compliance with the scope and terms of the delegation."*

Section 5 may also be useful in liability protection for the individuals involved in the decision making. Section 5 (c) states, *"An institution that complies with subsection (a) is not liable for the decisions or actions of an agent to which the function was delegated."* By following the steps of UPMIFA, organizations can do much to insulate themselves from potential liability coming from bad decisions made by a money manager, mutual fund or anyone to whom investment management has been delegated. UPMIFA tells us that performance is secondary to process. That is contrary to what many in the investment community have taught you.

The third aspect of change in UPMIFA is expenditures. The Act brings much more flexibility to the restrictive standards set forth in UMIFA. Historic value, the standard defined by UMIFA, meant the fair value in dollars of the original contributions to an endowment fund and any subsequent gifts to the fund. Expenditures from endowments were based on historic dollar value. Net appreciation over historic dollar value could be spent only if it was in line with the long and short term goals of the organization, and if the amounts spent did not allow the corpus to fall below its historic dollar value.

UPMIFA removed the historic dollar value restriction for endowment spending. In its place come seven standards by which to measure whether a spending amount is prudent as follows:

1. Fund duration
2. Fund/institution purpose
3. General economic conditions
4. Effects of inflation/deflation
5. Expected total return
6. Other resources
7. Institutional investment policy

The final provision, which is optional, as it relates to fund expenditures, is the presumption that amounts spent over 7% are considered imprudent. Though it doesn't say that expenditures above 7% can't be made, it does suggest that they should be well documented and at the very least meet the 7 standards listed above. Check with your state to see if they have adopted the 7% provision.

Whether talking about your association's 501 (c) (3) or long term reserves, adopting the Act as the standard in your investment policy statement and following the processes it defines can bring greater credibility and integrity to your investment management decision making. It provides for better expense control, more effective due diligence and monitoring procedures, and a sound documented process to help establish institutional memory when your boards change. In adopting UPMIFA, you will have taken a significant step to bring the highest standards of prudent care to your organization's investment portfolios.

For further information:
UPMIFA:
http://www.upmifa.org/DesktopDefault.aspx
FI 360 and the Foundation for Fiduciary Studies:
http://www.fi360.com/main/home.jsp
Prudent Investment Practices Handbook:
http://www.fiduciarystore.com/index.asp?PageAction=VIEWPROD&ProdID=28