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**Third Annual Nonprofit  
Executive Summit:  
Bringing Nonprofit  
Leaders Together to  
Discuss Legal, Finance,  
Tax, and Operational  
Issues Impacting  
the Sector**

Thursday, November 12, 2015



# Agenda

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**Third Annual Nonprofit Executive Summit**  
*Bringing Nonprofit Leaders Together to Discuss Legal, Finance,  
Tax, and Operational Issues Impacting the Sector*

**November 12, 2015**  
**Venable LLP**  
**Washington, DC**

**Networking Breakfast**

**8:00 AM - 8:45 AM**

**Welcome Remarks**

**8:45 AM - 9:00 AM**

John P. Langan, CPA  
Chief Industry Officer , Public Sector Group, CliftonLarsonAllen LLP

Jeffrey S. Tenenbaum, Esq.  
Partner and Chair of the Nonprofit Organization Practice, Venable LLP

**Session 1**

**9:00 AM - 10:15 AM**

*Nonprofit Privacy and Cybersecurity Risks: Not Just for Home Depot Anymore*

**Speakers**

Bobby N. Turnage, Esq.  
Partner, Venable LLP

Jim Kreiser, CISA, CRMA, CFSA  
Principal, CliftonLarsonAllen LLP

**Networking/Cell Phone Break**

**10:15 AM - 10:30 AM**

**Session 2**

**10:30 AM - 11:45 AM**

*Leadership Succession: Is Your Nonprofit Prepared?*

**Speakers**

Lisa M. Hix, Esq.  
Partner, Venable LLP

Ben Aase, MBA  
Principal, CliftonLarsonAllen LLP

**Break/Lunch**

**11:45 AM - 12:20 PM**

**Keynote Introduction****12:20 PM - 12:30 PM**

Brian Schwalb  
Vice Chairman, Venable LLP

**Keynote Presentation****12:30 PM - 1:00 PM**

*Beyond the IRS Form 990: How New Data Sources Are Reshaping the Nonprofit Sector*

**Keynote Speaker**

Jacob Harold  
President and Chief Executive Officer, GuideStar

**Session 3****1:00 PM - 2:15 PM**

*Nonprofit Chapters and Affiliates: Best Practices, Common Pitfalls, and Successful Approaches to Change*

**Speakers**

George E. Constantine, Esq.  
Partner, Venable LLP

Jacqueline Eckman, CPA  
Principal, CliftonLarsonAllen LLP

**Networking/Cell Phone Break****2:15 PM - 2:30 PM****Session 4****2:30 PM - 3:45 PM**

*IRS Exempt Organization Audits: Lessons Learned for All Nonprofits*

**Speakers**

Matthew T. Journy, Esq.  
Counsel, Venable LLP

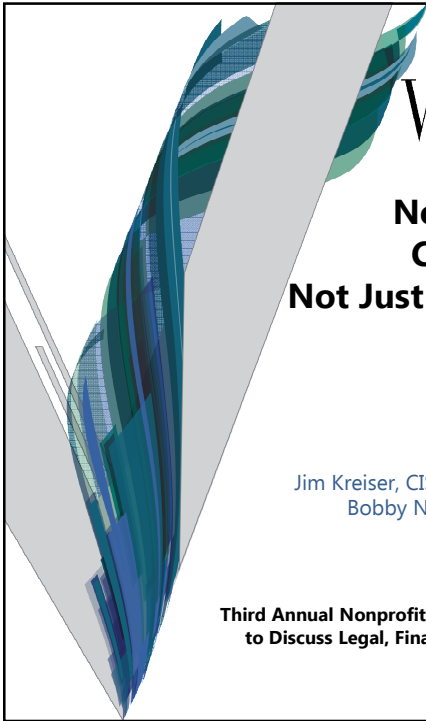
David Trimner, CPA  
Principal, CliftonLarsonAllen LLP


**Closing Remarks****3:45 PM - 4:00 PM****Reception****4:00 PM - 5:00 PM**



# Presentation #1

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**Nonprofit Privacy and  
Cybersecurity Risks:  
Not Just for Home Depot Anymore**

Thursday, November 12, 2015  
9:00 – 10:15 am ET

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Bobby N. Turnage, Jr., Esq., Partner, Venable LLP


**Third Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together  
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**Getting on the Same Page**

- What do the bad guys want?
- Who are the bad guys?
- How do they do it?
- Potential harms

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## What Do the Bad Guys Want?

- Customer or Client Data
- Trade Secrets/IP/Confidential Information
  - Includes third-party information
  - Public company information
  - New products/designs
- Employee Data
- Financial Assets
  - Payment cards; banking information
- Disruption/Destruction
  - Extortion, revenge or just for kicks



## Who Are the Bad Guys?

- Nation-state sponsored (APT)
  - Intelligence gathering or disruption
  - Political, economic or military
- Organized crime – financially motivated
- “Hacktivists” – focused on notoriety or a cause
- Disgruntled employees and customers
  - Former and *current*



## How Do They Do It?

- Vulnerabilities in system
  - Very patient and probing
  - Will move laterally through system
- Third-party vendors
- Rogue employees with inside access
- Well-meaning employees – inadvertently:
  - Social engineering
  - Phishing
  - Malware in email
- DDOS attacks



## What Are Some Potential Harms?

- Loss of IP
- Loss of financial assets
- Loss of customer data
- Loss of trade secrets/confidential information
- Loss of reputation
- Loss of business (due to interruption)
- Costs of forensic investigation
- Costs of legal counsel





## Potential Harms

- Costs of third-party claims and damages
  - Customers and shareholders
- Costs of contractual liability claims/damages
- Costs of regulator investigations and penalties
- Costs of notification/credit monitoring
- Costs of customer call center
- Costs of crisis management/PR firm
- Costs of remediation



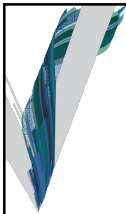
## A Deeper Dive

- Who is at risk?
- Specifics on attack methods



## All Organizations Are at Risk

- Every organization has information or access that can be useful to hackers
- Applies to for-profit *and* nonprofit
- Retailers
- Universities
- State and federal agencies
- Hospitals
- Insurance companies
- Associations



## A Hacker Profile

“So it is said that if you know your enemies and know yourself, you can win a hundred battles without a single loss.” –*The Art of War*

## A Threat Framework Nonprofits

- In some cases, hackers may *target* a specific organization because of the confidential information it maintains or to embarrass them
  - Organizations are targeted because their systems hold personal, medical, and credit information which can be sold
  - Also targeted to send political messages
- More frequently, hackers use *broad* attacks against numerous networks and sort out the information they are able to collect afterward
  - The goal of these attacks is simply to try and exploit any vulnerabilities that exist and figure out how to use them later

## Ransomware

- Malware encrypts everything it can interact with
  - i.e., anything the infected user has access to
- CryptoLocker
- Kovter
  - Also displays and adds child pornography images

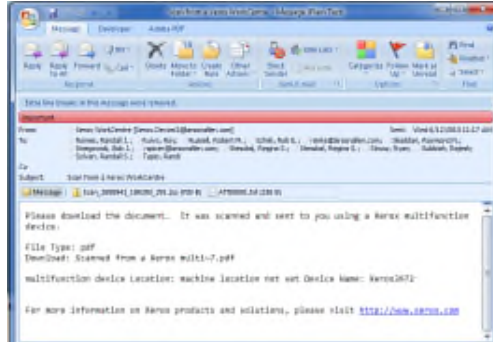


## Ransomware

- Microsoft reports over 500,000 PCs infected in first half of 2015

<http://www.microsoft.com/security/portal/mmpc/shared/ransomware.aspx>

- Zip file is preferred delivery method
  - Helps evade virus protection
- Working (tested) backups are key



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## Rise of the Bots (Broad)

- Bots & Botnets Defined:
  - Bots — Malicious software programs installed on a PC that allow hackers to use that PC to distribute spam, phishing scams, spyware, and malware
  - Botnets — Thousands of computers linked together create a botnet; can be used to disseminate millions of pieces of spam a day
- A case study:
  - In 2014, Proofpoint identified a wide-scale botnet attack using regular home appliances
  - 100,000 appliances used included home routers, TVs, and even a refrigerator (anything with an IP address)
  - Those appliances were used to distribute about 180,000 spam phishing emails across the world
- The increasing ability to use everyday devices to conduct cyber attacks is often referred to as the “Internet of Things”
  - 200 billion gadgets connected to the Internet by 2020, according to research group IDC Insight
  - Includes a wide range of devices across numerous fields (e.g., home thermostats, medical equipment, etc.)
  - Many of these devices are unprotected by AV and are not actively monitored

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# Types of Fraud

## Protecting Your Online Environment

### Hacked Email Account

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    graph LR
      HackedEmail((Hacked Email)) --- Privacy
      HackedEmail --- RetailResale[Retail Resale]
      HackedEmail --- Financial
      HackedEmail --- Spam
      HackedEmail --- Harvesting
      HackedEmail --- Employment
      Privacy --- P1[Your messages, calendar]
      Privacy --- P2[Your Google/Skype Chats]
      Privacy --- P3[Your photos]
      Privacy --- P4[Call records (+mobile acct)]
      Privacy --- P5[Your Location (+mobile/itunes)]
      RetailResale --- RR1[Facebook, Twitter, Tumblr]
      RetailResale --- RR2[Macys, Amazon, Walmart]
      RetailResale --- RR3[ITunes, Skype, Bestbuy]
      RetailResale --- RR4[Spotify, Hulu+, Netflix]
      RetailResale --- RR5[Origin, Steam, Crossfire]
      Financial --- F1[Bank accounts]
      Financial --- F2[Email Acct. Ransom]
      Financial --- F3[Change of Billing]
      Financial --- F4[Cyberheist Lure]
      Spam --- S1[Commercial Email]
      Spam --- S2[Phishing, Malware]
      Spam --- S3[Stranded Abroad Scam]
      Spam --- S4[Facebook, Twitter Spam]
      Spam --- S5[Email Signature Spam]
      Harvesting --- H1[Email, Chat contacts]
      Harvesting --- H2[File hosting accounts]
      Harvesting --- H3[Google Docs, MS Drive]
      Harvesting --- H4[Dropbox, Box.com]
      Harvesting --- H5[Software License Keys]
      Employment --- E1[Forwarded Works Docs]
      Employment --- E2[Forwarded Work Email]
      Employment --- E3[Fedex, UPS, Pitney Bowes Acct]
      Employment --- E4[Salesforce, ADP Accounts]
  
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# Types of Fraud

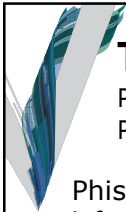
## Protecting Your Online Environment

### Social Engineering

Social engineering, in the context of information security, refers to psychological manipulation of people into performing actions or divulging confidential information. Phishing is a type of social engineering.

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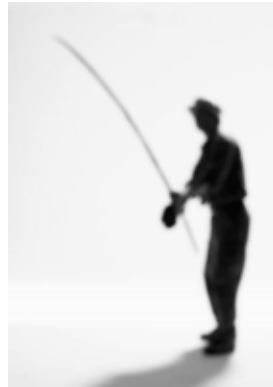
## Types of Fraud

### Protecting Your Online Environment Phishing

Phishing relates to acquiring confidential information by masquerading as a trustworthy entity in an electronic communication.

What to watch for:

- Links to email
- Spelling and grammar
- Popular company
- Urgency



\*Handout - Phishing for Red Flags



## Types of Fraud

### Protecting Your Online Environment Spoofing

Spoofing is when a spammer sends out emails using your email address in the From: field. The idea is to make it seem like the message is from you.

#### What to watch for:

You see mailer daemon error messages (returned emails) in your inbox that do not match any messages you sent. You get messages from people who received email from you that you did not send.

\*Handout - Phishing for Red Flags



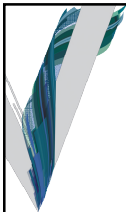


## Consequences...

*Organizations often think they are being attacked by this...*



...but increasingly are likely to be attacked by this.

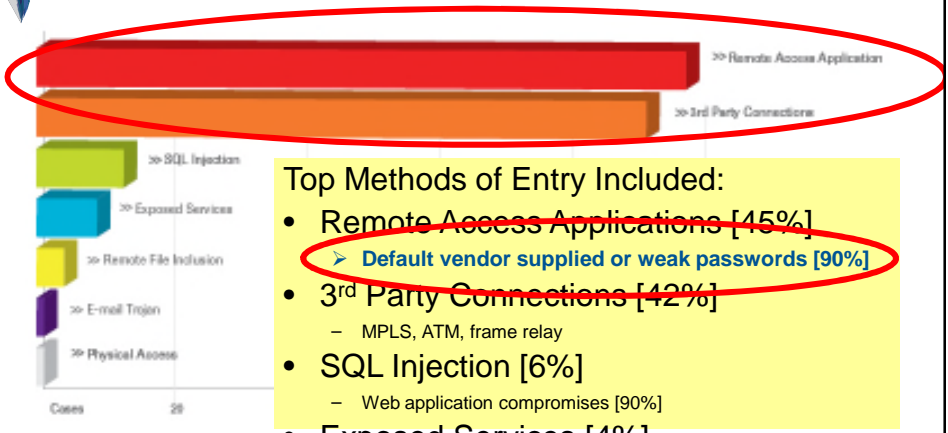


## Statistics & Trends

*Awareness, Sources, and Mitigation  
(but not easy)*

# TrustWave – Intrusion Analysis Report

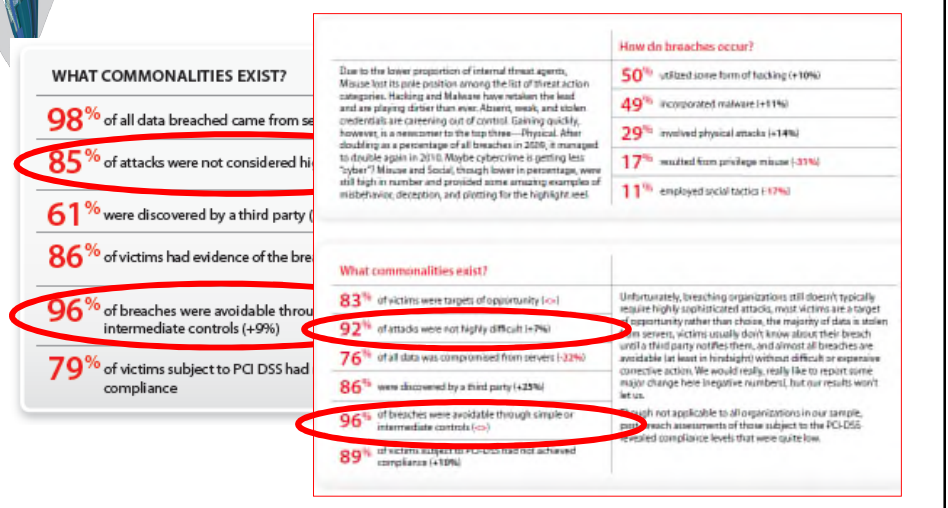
## Top Methods of Entry Included:



### Top Methods of Entry Included:

- Remote Access Applications [45%]
  - Default vendor supplied or weak passwords [90%]
- 3rd Party Connections [42%]
  - MPLS, ATM, frame relay
- SQL Injection [6%]
  - Web application compromises [90%]
- Exposed Services [4%]

# Verizon Data Breach Analysis





## Network Security – Trends & Implications

### Statistics on Data Breaches:

**73%** resulted from external sources

**18%** were caused by insiders

- - - -

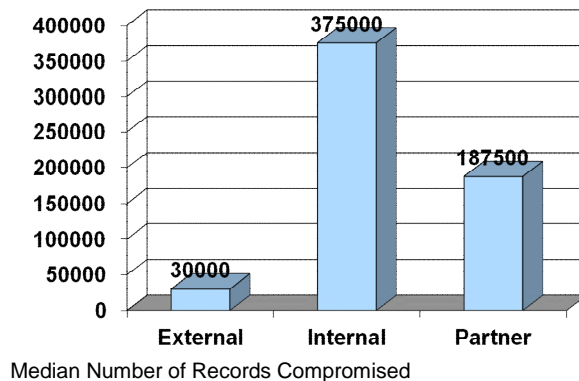
**39%** implicated business partners

**30%** involved multiple parties

- Data Breach Investigations Report conducted by Verizon

## Insider Threats and Risks

While “attacks” and breach attempts as a percentage of attempts are trending toward external factors, the depth of attacks from insiders are generally of greater impact:



-Verizon

## 10 Key Defensive Measures

Training Your Employees/Customers  
Is Critical  
*(but not easy)*

## Ten Keys to Mitigate Risk

### 1. Strong Policies —

- Email use
- Website links
- Removable media
- Business operations
- **Insurance**





## Ten Keys to Mitigate Risk

### 2. Defined user access roles and permissions

- Principle of minimum access and least privilege
- **Users should NOT have system administrator rights**
  - “Local Admin” in Windows should be removed (if practical)
- **NO email or internet browsing with Admin credentials**



## Ten Keys to Mitigate Risk

### 3. Hardened internal systems (end points)

- Hardening checklists
- Turn off unneeded services
- **Change default password**
- **Use strong passwords**

### 4. Encryption strategy – data centered

- Email
- Laptops and desktops
- Thumb drives
- **Email-enabled cell phones**
- Mobile media



## Ten Keys to Mitigate Risk

### 5. Vulnerability management process

- Operating system patches
- **Application patches**
- Testing to validate effectiveness
  - “belt and suspenders”



## Ten Keys to Mitigate Risk

### 6. Well-defined perimeter security layers:

- **Network segments**
  - Email gateway/filter
  - Firewall – “Proxy” integration for traffic in AND out
  - Intrusion detection/prevention for network traffic, Internet-facing hosts, AND workstations (end points)
- ### 7. Centralized audit logging, analysis, and automated alerting capabilities
- Routing infrastructure
  - Network authentication
  - Servers
  - Applications



## Ten Keys to Mitigate Risk

### 8. Defined incident response plan and procedures

- **Be prepared**
- Including data leakage prevention and monitoring
- Forensic preparedness



## Ten Keys to Mitigate Risk

### 9. Know/Use Online Banking Tools

- Multi-factor authentication
- Dual control/verification
- Out-of-band verification/callback thresholds
- ACH positive pay
- ACH blocks and filters
- Review contracts relative to all these
- Monitor account activity **daily**
- **Isolate the PC used for wires/ACH**

## Ten Keys to Mitigate Risk

### 10. Test, Test, Test

- “Belt and suspenders” approach
- Penetration testing
  - Internal and external
- Social engineering testing
  - Simulate spear phishing
- Application testing
  - Test the tools with your bank
  - Test internal processes



## Legal: Prevention/Mitigation – In Advance

- Review current systems, physical facilities, and processes for vulnerabilities
  - Consider security consultant (and remember attorney-client privilege)
- Contractual requirements with vendors
  - Require security commitments, reps, & warranties
    - Helps flush out important issues
    - Caution: “I’ll sign your paper today”
- Perform due diligence around vendor systems and facilities




## Legal: Prevention/Mitigation – In Advance

- Perform due diligence of *acquisition target* systems
- Train employees
- Maintain security policy
- Maintain top-down emphasis on security
- Review compliance with legal and contractual data security requirements




## Legal: Prevention/Mitigation – In Advance

- Maintain appropriate cyber insurance coverage
- Prepare incident response plan – The Game Plan
- Review privacy promises to ensure consistency with actual practices
- Risk shifting in vendor and customer contracts
- Confirm insurance requirements of vendors
- Consider public company disclosure obligations



## Legal: Mitigation – Actual Incident


- Isolate compromised systems
- Preserve relevant logs and other IT data
- Activate incident response plan & notify POCs
- Establish command center (legal department) for coordination of all activities
- Retain cybersecurity law firm to:
  - Advise on notification and messaging
  - Retain forensic firm (for privilege)
  - Help avoid missteps that will be second-guessed later



## Legal: Mitigation – Actual Incident

- Consider public company disclosure obligations
- Notify insurance carrier
  - Coordinate with carrier throughout
    - Experience to share
    - Reduce chances of misunderstanding
- Retain forensic firm (if applicable)
  - Have law firm retain (for privilege/work product)
- Consider adding members to response team
- Exercise caution with written communications





## Legal: Mitigation – Actual Incident

- Refer all press inquiries to PR department or designated individual
- Review contracts for notification obligations
- Notify third parties (law enforcement, regulators, individuals, and third-party businesses) where required



## Questions?





## “Three” Security Reports

- Trends: Sans Top Cyber Security Threats
  - <http://www.sans.org/top-cyber-security-risks/>
- Intrusion Analysis: TrustWave (Annual)
  - <https://www.trustwave.com/whitePapers.php>
- Intrusion Analysis: Verizon Business Services (Annual)
  - <http://www.verizonenterprise.com/DBIR/>



## Resources – Hardening Checklists

Hardening checklists from vendors

- CIS offers vendor-neutral hardening resources
  - <http://www.cisecurity.org/>
- Microsoft Security Checklists
  - <http://www.microsoft.com/technet/archive/security/chklist/default.aspx?mfr=true>
  - <http://technet.microsoft.com/en-us/library/dd366061.aspx>


Most of these will be from the “BIG” software and hardware providers



# Presentation #2

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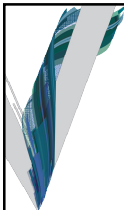
# Leadership Succession: Is Your Nonprofit Prepared?

Thursday, November 12, 2015  
10:30 am – 11:45 am ET

**Speakers**  
Lisa M. Hix, Esq., Partner, Venable LLP  
Ben Aase, MBA, Principal, CliftonLarsonAllen LLP

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# Part 1

## Is Your Bull Pen Full?

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## Why This Matters

- It is both inevitable and healthy
- It is expensive, whether done well or not
- The data suggests we should



## Three Kinds of Leadership Succession

1. Emergency
2. Departure-Defined
3. Strategic Leadership Development




## Leadership Succession Roles

- Board Members
- Executive
- Key Staff




## Readiness Assessment


1. Can you implement?
2. Have you identified candidates?
3. Sensitivity of key revenue relationships?
4. Level of outside faith in your bench strength?
5. Do you have the board talent?
6. Security of institutional knowledge and relationships?
7. Have you reality-checked the job?
8. Flight risk of others?



## Elements of a Succession Plan


- Purpose and Rationale: Planned *and* unplanned
- Plan Implementation: The triggers and first steps
- Priority Functions: With corresponding interim staffing strategy
- Differentiation: Absence vs. permanent departure
- Approvals: Maintenance of record

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## Absence vs. Permanent Departure

Short- or Long-Term Absence	Planned or Unplanned Departure
Definitions	Update job description
Staffing strategy	Succession planning/transition committee
Appointments (board-appointed vs. standing)	Interim leadership
Cross-training plans	Board oversight and support
Authority and restrictions	Situational assessment
Compensation	Search and hire
Board oversight and support	Post-hire
Communications plan	Communications plan

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## A Note About Founder Succession

- Strong board of directors
- Sense of partnership (shared ownership) within staff and board
- (If desired) a newly defined role at the organization based on the founder's best strengths and desired legacy

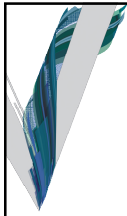


## People Are Complicated Assets

Watch out for...

- Lack of time and attention
- Lack of board understanding and buy-in
- Resistant executives
- Keeping the peace but avoiding the issue
- Culture void of personal and professional growth
- Short-term needs perpetually trump long-term impact
- Succession plan that isn't culturally legitimate
- Irrational rigidity and adherence to "the plan"
- If everyone's accountable, no one's accountable





**“The old adage ‘People are your most important asset’ is wrong.  
People are not your most important asset.  
The right people are.  
Good to great depends on having the right people on the right bus at the right time.”  
— Jim Collins, *Good to Great***



## **Development as Succession**

- Where do you spend your time?
  - Focusing on talent—make it everyone’s job
  - Planning for succession/change
  - Stewarding the culture



## Have a Talent Plan

- You are going to have to develop internal people and acquire external people to be successful
- It feels better to have a plan
- Try to eliminate single points of failure
- Don't overthink it: 70-20-10



## Be Intentional

- Identify promising employee(s) and intentionally develop them as leaders
- Articulate what it means to be a leader *within* your organization and *on behalf of* your organization
- Work with the promising employee to identify what he/she needs to be a successful leader for your organization:
  - Skills
  - Context and information
  - Feedback
  - Practical assistance
  - Stretch opportunities



## Match Your Culture and Capacity

- Create a leadership development approach that is a good fit with your organization's culture and capacity
- Examples of different approaches:
  - Mentorship, modeling, shadowing
  - Content and business leadership of a unit
  - Formal leadership development program with specific training, organized activities, etc.



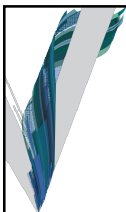
## Timing Is Everything

- Communicate an appropriate time frame
- Time new opportunities to provide the best chance for employees to fulfill their potential
- Recognize when it's time to let the new leader lead



## Final Observation

For nonprofit organizations,  
leadership succession  
and leadership development  
are dependent on both  
board and staff development.



## Part 2

### Successful Transitions



## Common Elements of Successful Transitions

- Built to Effectuate the Strategic Plan
- Ideally, 1.5 Years Before Transition
- Elements:
  - Strategic Plan
  - Succession Plan
  - Executive Search Process
  - Begin Priming Leadership



## Questions to Ask

- What are our strategic goals?
- What are the roles and responsibilities of our current staff?
- What are their strengths and development opportunities?
- How are they aligned to help us achieve our goals?



## Questions to Ask

- What are the expectations for this position?
- What are the roles and responsibilities? How will this role fit within the existing team structure?
- What is the general compensation range for this position in the marketplace and for the level of the position in our organization?
- What other compensation components (e.g., health/dental/vision, vacation, retirement program, etc.) are we able to offer?



## Overview of Steps

- Pre-Planning:
  - Strategic Plan
  - Succession Plan
  - Executive Search Plan
- Establish Decision-Making Structure
  - Search Committee
  - Chair
  - Staffing and Support
- Building Buy-in
- The Interview Process
- Negotiating the Deal
- Easing the Transition



## Forming the Search Committee

- What Will It Do?
  - Constituency Building
  - Communications
  - Manage Interview Process
  - Present Recommendation to Executive Committee



## Committee Support and Staffing

- Minimize/Eliminate Involvement of Current ED/President
- Mid-Level Staff Support
  - Agenda
  - Setting Meetings
  - Effectuating Communications Strategy
  - Ensuring Compliance with Policy



## Search Committee Chair

- Typically Designated by Chair
- Significant Time Commitment
  - Guided by Search Committee Process
  - Supported by Staff
- Consensus Builder
  - Staff
  - Member
  - Regions
  - Other Interests



## Initial Decisions

- Specialty Focus Areas
  - Communications
  - Staff Buy-in
  - Constituency Representation
  - Strategic Planning Sessions
    - Contacts – Networking
    - Advertising Network
    - Potential Candidates
- Search Firm
  - Communications Structure and Accountability





## Importance of Scoping

- Staff Input
- Based on Strategic Goals
- Defines Scope of Position
- Reflects Consensus on Future Course



## Job Description

- Overview of Organization
- Position's Reporting Relationships and Key Responsibilities
- Establish 5-6 "Must Have" Criteria
- Establish Additional "Nice to Have" Criteria
- Establish Salary and Benefits Range
- Job Title



## Advancement Criteria

- Adopt Uniform Set of Criteria
  - Ensure Legal Basis for Review
    - Marital Status
    - Residence
    - Pregnancy
    - Physical Health
    - Age
    - Citizenship
    - Religion
  - Conflicts of Interest



## Interview Questions & Initial Screening

- Develop List in Advance
- Ensure Common Set of Questions
- Identify Resume Concerns in Advance



## The Interview Process

- 3 Rounds
  1. Telephone Interviews
  2. Search Committee Interview
  3. Executive Committee Interview
    - Can Include Staff Briefing/Question Session
    - Basic Term Sheet
- Ratification by Board
  - Make Sure the Board Understands Its Role
    - Frequent Communications to Chair and Board



## Negotiating the Deal

- Chair and Chair of Search Committee
- Salary, Benefits, Term, Holidays, and the Probation Period



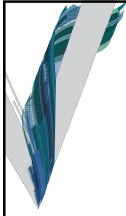
## Selling the Pick

- Internal Communications
  - Introduction Meetings
    - Staff
    - Chapters
    - Members
- External Communications
  - Congress
  - External Stakeholders



## Assisting the Transition

- Contacts to Interview During Transition Period
- Establish a Reasonable Number of Short-Term Goals
- Establish Initial Review Period
- Establish Long-Term Goals for Annual Performance Appraisal

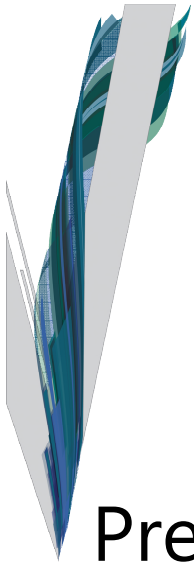


# Questions?



# Keynote Speaker

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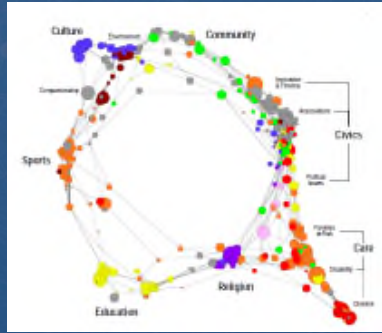


## **KEYNOTE SPEAKER**

Jacob Harold

President and Chief Executive Officer,  
GuideStar

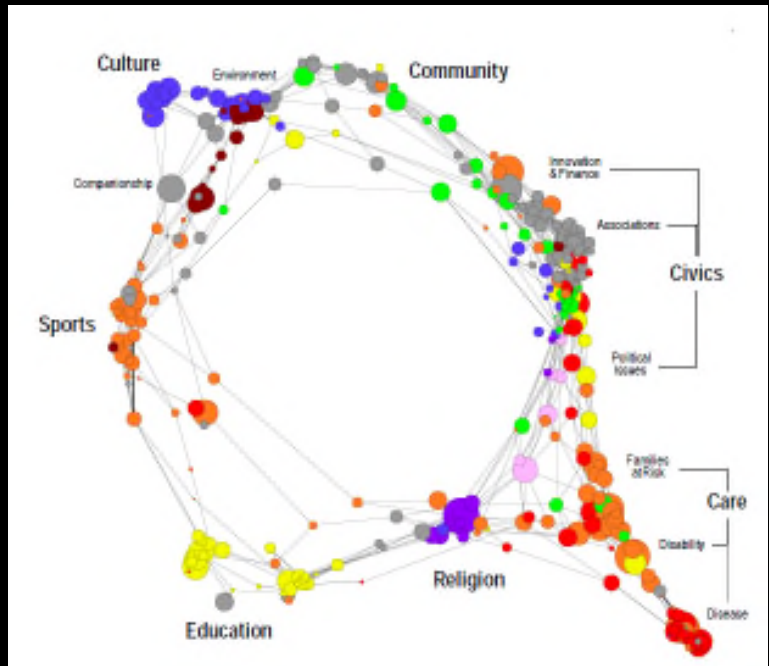
Beyond the IRS Form 990:  
How New Data Sources Are  
Reshaping the Nonprofit Sector



# Beyond the IRS Form 990: How New Data Sources Are Reshaping the Nonprofit Sector



Nonprofit Executive Summit  
12 November 2015







volatile  
uncertain



complex  
ambiguous



vision  
understanding



clarity  
agility

Social change is hard.  
Really hard.



the **two elephants**  
in the philanthropic  
room...



**E1: Some nonprofits are better than others**

(they create more social or environmental impact per dollar)

**E2: Some donors are better than others**

(their donations create more social or environmental impact per dollar)

## Information about...

### ISSUES

(e.g., 50% of children from at-risk backgrounds are below the basic level for reading and math skills)

### INTERVENTIONS

(e.g., regular nurse visitation for new mothers their babies leads to a .2 point increase in math & reading GPA in grades 1-6)



### RESOURCES

(e.g., The Robert Wood Johnson Foundation made a 5-year, \$10 million grant to Nurse-Family Partnership in 2007)

### ORGANIZATIONS

(e.g., Nurse-Family Partnership is currently serving 22,795 babies and their mothers in 40 states across the U.S.)

ORIGINAL  
 12/31/2003  
 Original EIN 13-356641  
 TO IRS  
 OGDEN UT 84  
 OGDEN No. 1989-0007  
**990** Return of Organization Exempt From Income Tax  
 Under section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except those filing Form 990-E)

Department of the Treasury Internal Revenue Service  
 The organization may have to file a copy of this return to satisfy state reporting requirements.

**2003** Open to Public Inspection

**A** For the 2<sup>nd</sup> calendar year, or tax year beginning: 1-1-2003 and ending 12-31-2003

**B** Check if applicable:  
 Initial return  
 Final return  
 Amended return  
 Multiple periods

**C** Name of the organization: **HANDICAP INTERESTS INTL (WORLD)**  
**D** Employer identification number: **13-356641**  
**E** Telephone number: **(518) 891-5466**  
**F** Mailing address: **PO Box 1173, SARANAC LAKE, NEW YORK 12983**  
 Don  Rec'd  Other (specify)

**G** Section 501(c)(3) organizations and 4947(a)(1) nonexempt charities must file a completed Schedule A (Form 990 or 990-E).  
**H** and I (if not applicable to section 527 organizations):  
 Yes  No  
 Yes  No  
 Yes  No  
 Yes  No

**J** Enter the date: **03-23-04**

**K** Check here if:  If the organization is a 501(c)(3) and generally not more than \$25,000. The filer must file a return with the IRS, but if the organization received a Form 990 Package in the mail, it may file a return without filing this. Some states require a separate return.  
 If the organization is a 501(c)(3) and generally not more than \$25,000. The filer must file a return with the IRS, but if the organization received a Form 990 Package in the mail, it may file a return without filing this. Some states require a separate return.

**L** Check if:  The organization is not required to attach Part 15 (Form 990, 990-E, or 990-B).

**Part 1** Revenue, Expenses, and Changes in Net Assets or Fund Balances (See Specific Instructions on page 15)

1	Contributions, gifts, grants, and similar amounts received:		
a	Direct public support	to \$ 2,000,000.00	
b	Indirect public support	to 200,000.00	
c	Government contributions (grants)	to 47,000.00	
d	Total (add lines 1a through 1c) (cash \$, non-cash \$) (Form 990, line 9)	to 2,697,000.00	to \$ 8,080,500.00
2	Program service revenue including government fees and contracts (from Part 15, line 93)	to 240,000.00	
3	Membership dues and assessments	to 13,500.00	
4	Interest on savings and temporary cash investments		
5	Dividends and interest from securities		to \$ 5,000.00

APR 27 08  
 3/24/04  
 NY 00301  
 Rev. Kenneth  
 2004

2003

H.I.I. World Religion Group 2003 EIK 13-3566610

Page 2

Form 990 (2003)

**Part II Statement of Functional Expenses** (All organizations must complete columns (A) through (D), and (E) are required for section 501(c)(29) and (4) organizations and section 4947(a)(1) religious charitable trusts but optional for others. (See Specific Instructions on page 21.)

Do not include amounts reported on line 6b, 6c, 6d, 10a, or 16 of Part I.

	(A) Total	(B) Program services	(C) Management and general	(D) Fundraising
22 Grants and allocations (attach schedule)				
(a) Total \$				
23 Specific assistance to individuals (attach schedule)				
24 Benefits paid to or for members (attach schedule)				
25 Compensation of officers, directors, etc.				
26 Other salaries and wages			70	
27 Pension plan contributions	2,000,000.00		1,000,000.00	1,000,000.00
28 Other employee benefits				
29 Payroll taxes				
30 Professional fundraising fees	3,000,000.00		2,000,000.00	1,000,000.00
31 Accounting fees				
32 Legal fees				
33 Supplies	492,000.00	492,000.00		
34 Telephone				
35 Postage and shipping				
36 Occupancy				
37 Equipment rental and maintenance				
38 Printing and publications				
39 Travel				
40 Conferences, conventions, and meetings	270,000.00	270,000.00		
41 Interest				
42 Depreciation, depletion, etc. (attach schedule)				
43 Other expenses not covered above (describe):				
b. <i>Misc expenses included</i>				
c. <i>above</i>				
d. <i>above</i>				
e. <i>above</i>				
44 Total functional expenses (Part II) (Total of lines 22 through 43e)	3,652,000.00	3,092,000.00	4,000,000.00	2,000,000.00

*Identified as Religious/Charitable/White W-3's*

*included in item 40*

*270,000.00*

*270,000.00*

b. *Misc expenses included* 43b

c. *above* 43c

d. *above* 43d

e. *above* 43e

44 Total functional expenses (Part II) (Total of lines 22 through 43e) 44 3,652,000.00 3,092,000.00 4,000,000.00 2,000,000.00

**Part III Statement of Program Service Accomplishments** (See Specific Instructions on page 24.)

What is the organization's primary exempt purpose? *Helped Social, Religious, and Reform with changing society values. Do not expect.*

All organizations must describe their most purpose achievements in a clear and concise manner. State the number of clients served, publications issued, etc. Discuss achievements that are not measurable. (Section 501(c)(29) and (4) organizations and 4947(a)(1) nonexempt charitable trusts must also enter the amount of grants and allocations to others.)

① *Helped Social, Religious, and Reform with changing society values. Do not expect.*

② *Construction of prayer centers and administrative work of different religious groups.*

③ *in unite worldwide (prayer offerings) defining, manifestation of God's and Religion of World. many benefited.*

④ *Religious marriage and Talaq (separation) void marriage Muslim style. many benefited.*

⑤ *handling interests, Reformation.*

⑥ Other program services (attach schedule) (Grants and allocations \$)

f. Total of Program Service Expenses (Total of equal line 44, column (B), Program services)

*Rw Sr*

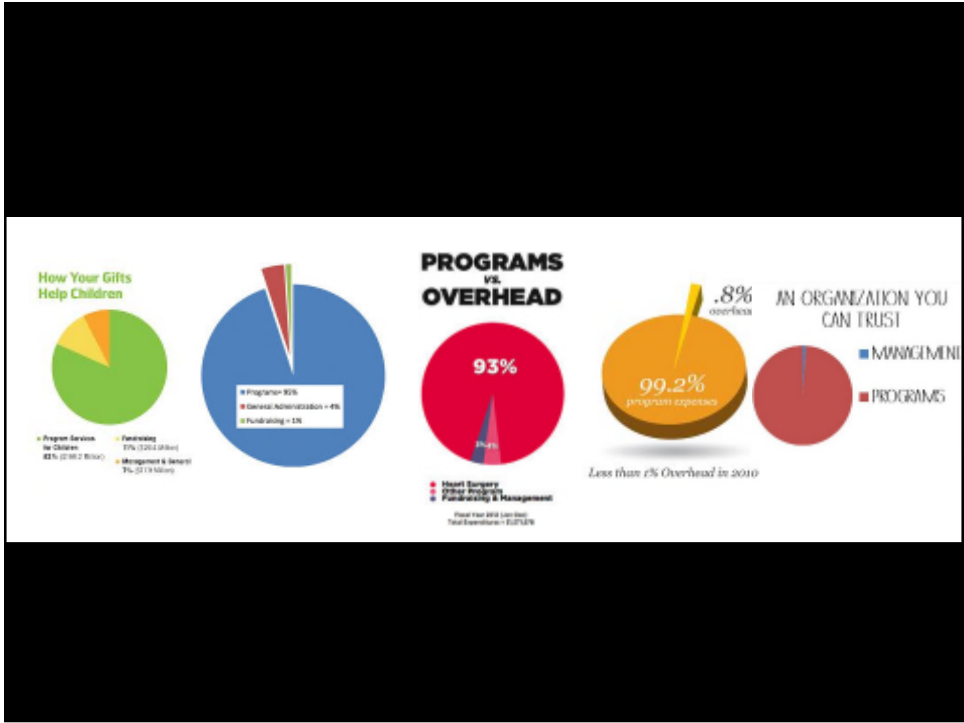
*Ken*

*3/31/2004*

*3/31/04*

*3/31/04*

Form 990 (2003)



**THE OVERHEAD MYTH**

**Research shows that the overhead ratio is negative and increasing:**

- 37% of charities report negative overhead ratios in 2010 (down from 20% in 2009)
- 13% report negative overhead ratios in 2010 (down from 10% in 2009)
- 75-85% of charities report negative overhead ratios in 2010 (down from 60% in 2009)

**62%** of charities report negative overhead ratios in 2010 (down from 40% in 2009)

**The "Overhead Myth" creates a false narrative that nonprofits in overhead battles better overall performance**

**2,000** charities report negative overhead ratios in 2010 (down from 1,000 in 2009)

**11.5%** vs **10.8%**

**Underfunding in overhead creates a range of negative outcomes which undermine quality and sustainability.**

Description of Underfunding	Consequences
• Underfunding of administrative costs	• Limited ability to experiment & manage creative financial management, etc.
• Limited investment in fundraising and development	• Limited ability to continue to improve and expand
• Underfunding of program costs	• Limited ability to improve quality of program
• Limited investment in marketing and public relations	• Limited ability to attract and retain donors
• Limited investment in technology	• Limited ability to improve efficiency and productivity
• Limited investment in human resources	• Limited ability to attract and retain top talent
• Limited investment in infrastructure	• Limited ability to improve safety and security
• Limited investment in legal and compliance	• Limited ability to avoid legal and compliance issues
• Limited investment in risk management	• Limited ability to avoid and mitigate risk
• Limited investment in disaster preparedness	• Limited ability to respond to and recover from disasters
• Limited investment in environmental sustainability	• Limited ability to improve environmental performance
• Limited investment in social responsibility	• Limited ability to improve social performance
• Limited investment in corporate citizenship	• Limited ability to improve corporate citizenship
• Limited investment in community development	• Limited ability to improve community development
• Limited investment in economic development	• Limited ability to improve economic development
• Limited investment in international development	• Limited ability to improve international development
• Limited investment in global development	• Limited ability to improve global development
• Limited investment in human rights	• Limited ability to improve human rights
• Limited investment in labor rights	• Limited ability to improve labor rights
• Limited investment in environmental justice	• Limited ability to improve environmental justice
• Limited investment in racial justice	• Limited ability to improve racial justice
• Limited investment in gender justice	• Limited ability to improve gender justice
• Limited investment in LGBTQ+ justice	• Limited ability to improve LGBTQ+ justice
• Limited investment in disability justice	• Limited ability to improve disability justice
• Limited investment in indigenous justice	• Limited ability to improve indigenous justice
• Limited investment in peace and justice	• Limited ability to improve peace and justice
• Limited investment in human health	• Limited ability to improve human health
• Limited investment in mental health	• Limited ability to improve mental health
• Limited investment in physical health	• Limited ability to improve physical health
• Limited investment in reproductive health	• Limited ability to improve reproductive health
• Limited investment in substance use	• Limited ability to improve substance use
• Limited investment in aging	• Limited ability to improve aging
• Limited investment in children	• Limited ability to improve children
• Limited investment in youth	• Limited ability to improve youth
• Limited investment in families	• Limited ability to improve families
• Limited investment in communities	• Limited ability to improve communities
• Limited investment in neighborhoods	• Limited ability to improve neighborhoods
• Limited investment in cities	• Limited ability to improve cities
• Limited investment in states	• Limited ability to improve states
• Limited investment in the nation	• Limited ability to improve the nation
• Limited investment in the world	• Limited ability to improve the world

**Thank you.**

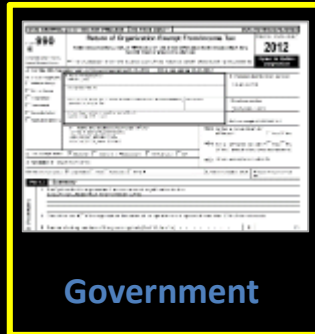
Art Dinkel, President & CEO, IIRB Non-Profit Alliance

Jack Harrell, President & CEO, Galileo

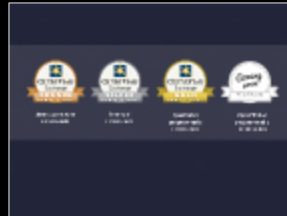
Bob Berger, President & CEO, Charity Navigator

© 2010 IIRB

# Sources of information about nonprofits in the United States



Government



Self-reported



Stakeholders



### Strengths of Form 990 data:

- It is relatively **comprehensive** (most nonprofits have to fill it out)
- It is in a **standardized** format (nonprofits have to answer the same questions)
- It has great **baseline information** on mission, staff, board, and finances



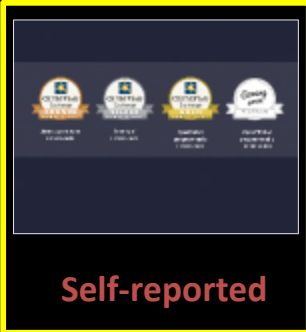
### Weaknesses of Form 990 data:

- It does not have much data on nonprofit **programs** or impact
- The data tends to be at least a year and a half **old**
- It **not specific** to particular types of nonprofits (for the most part)

# Sources of information about nonprofits



Government



Self-reported



Stakeholders



Basic operational information



Financial information



Qualitative programmatic information



Quantitative programmatic information

GUIDESTAR GuideStar Basic Search Advanced Search Update Nonprofit Profile Products Blog Jacob Harold

Summary Update Your Profile Confirm and Submit Benefits & Rewards View Public Profile

Track your progress: 100% BRONZE 100% SILVER 100% GOLD PLATINUM

Basic information  
 AmazonSmile  
 Bronze  
 Silver  
 Gold  
 Platinum  
 Board Leadership Practices  
 Social & Media Outreach  
 Demographics  
 Additional Docs

**STEP 1: REVIEW METRICS**  
**What metrics does your organization use to track your impact?**

We consulted with teams of subject-area experts to develop a library of standardized metrics. See what metrics make sense with your organization's service, mission, and reach.

Want to **view a PDF** so you can scan the whole list and brainstorm with your team? [Download PDF](#)

Or, jump forward to Step 2 to review (and select) metrics in our **searchable interface**. [Review and select metrics](#)

[Back](#) [Save](#) [Go to Step 2](#)

GUIDESTAR GuideStar Basic Search Advanced Search Update Nonprofit Profile Products Blog Jacob Harold

Summary Update Your Profile Confirm and Submit Benefits & Rewards View Public Profile

Track your progress: 100% BRONZE 100% SILVER 100% GOLD PLATINUM

**STEP 2: REPORTING RESULTS**  
**Report your results**

**1. Amount of gallons of purchased water consumed**

	Total	Do you want to add note to explain the context for this metric?	Options	Edit
2015	40,000		Yes, display this metric	<a href="#">✎</a>
2014	42,000	Between 2013 and 2014, we implemented water efficiency measures.	Yes, display this metric	<a href="#">✎</a>
2013	48,000		Yes, display this metric	<a href="#">✎</a>
<a href="#">+ Add a year</a>				

**2. Number or percent of children in foster care who reside in a family like setting**

	Total	Do you want to add note to explain the context for this metric?	Options	Edit
2015	204		Yes, display this metric	<a href="#">✎</a>
2014	267		Yes, display this metric	<a href="#">✎</a>
2013	201		Yes, display this metric	<a href="#">✎</a>
<a href="#">+ Add a year</a>				





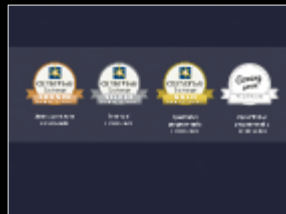
1. What is your organization **aiming to accomplish**?
2. What are your **strategies** for making this happen?
3. What are your organization's **capabilities** for doing this?
4. How will your organization **know if you are making progress**?
5. What have and haven't so far?



## Sources of information about nonprofits



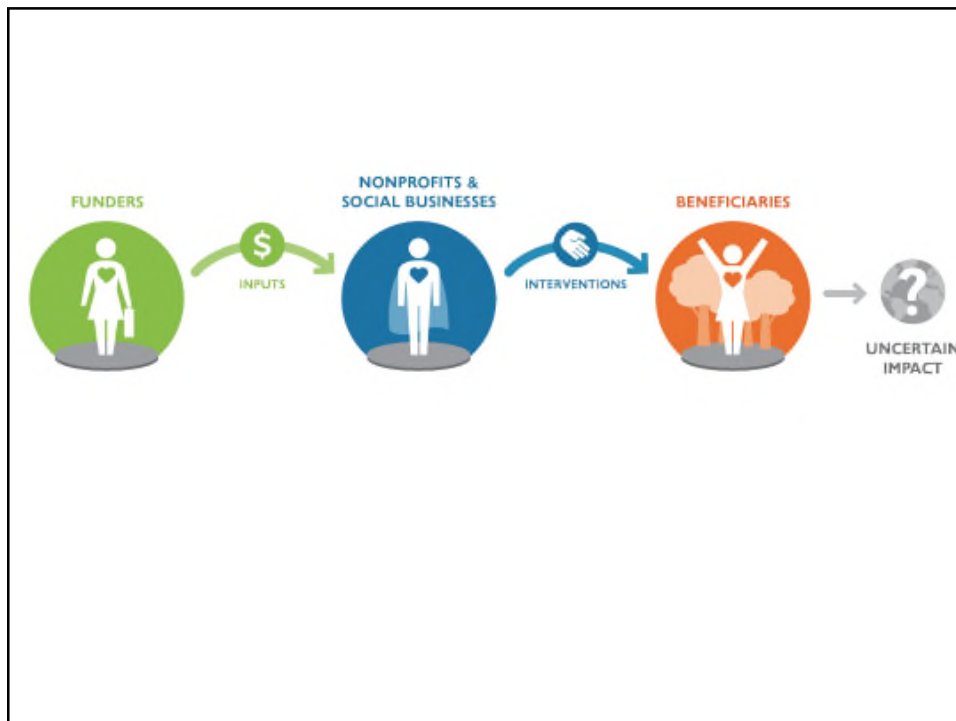
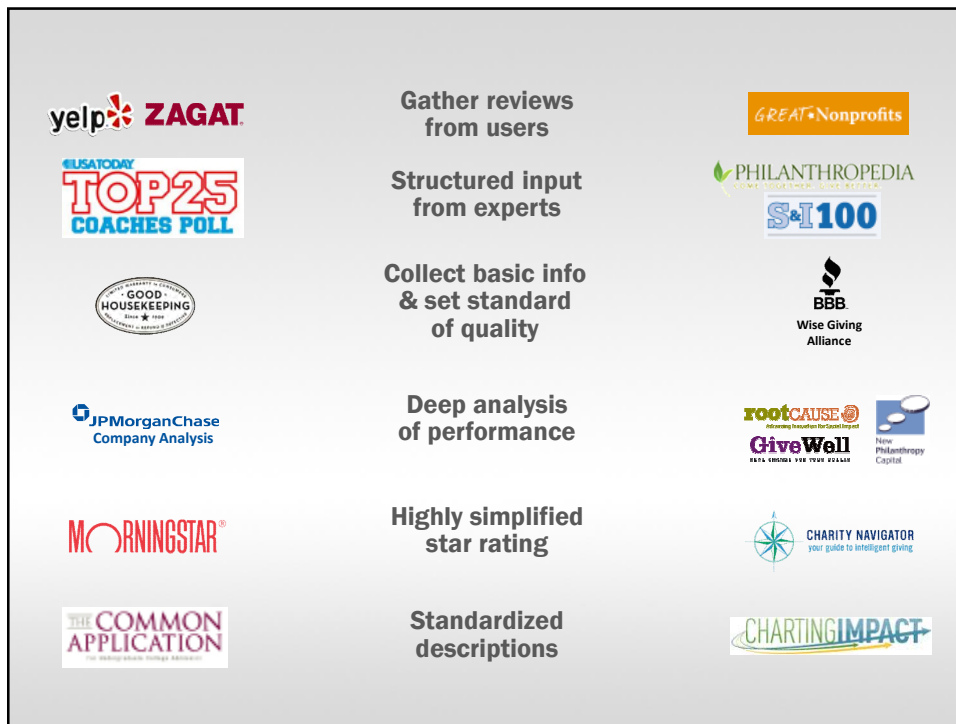
Government

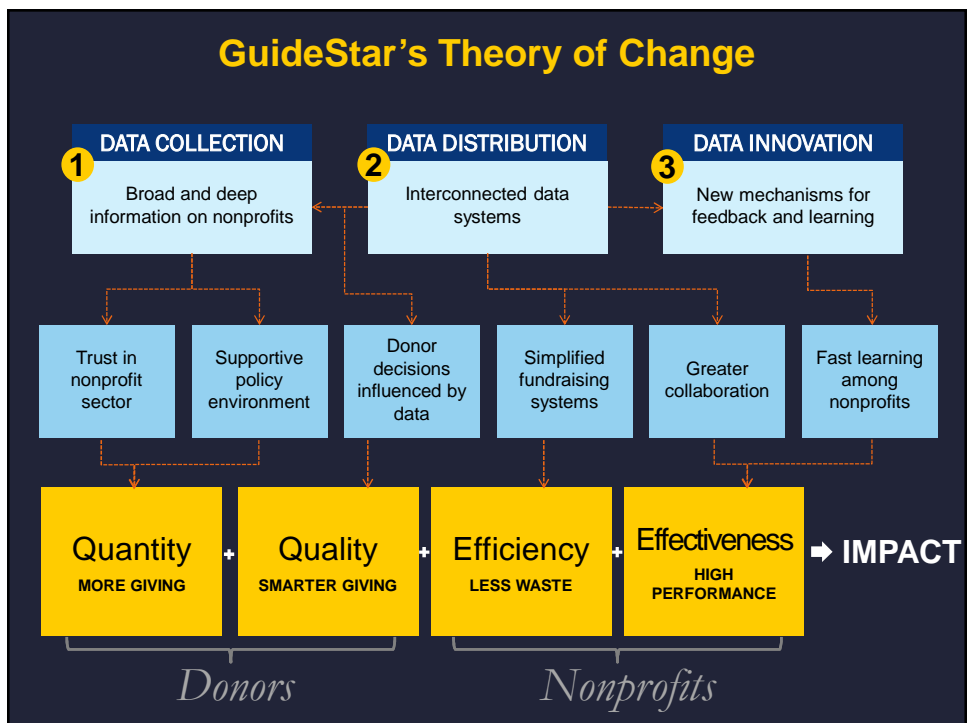
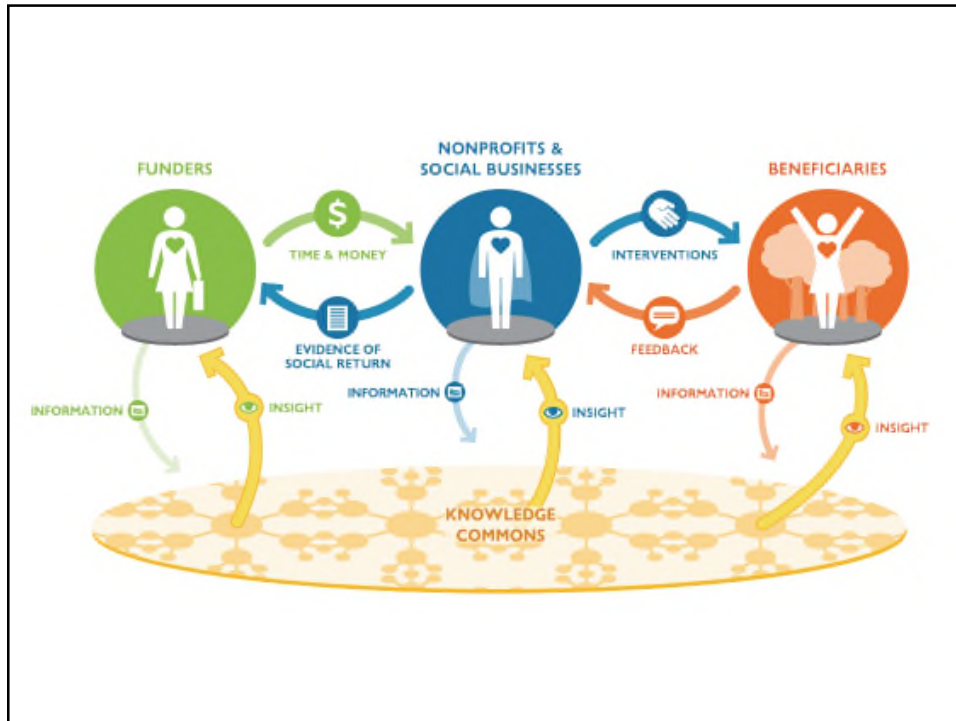


Self-reported



Stakeholders





1

# Data Collection

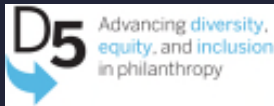
BROAD AND DEEP INFORMATION ON NONPROFITS

The bronze level focuses on basic qualitative information about your organization.

The silver level asks about quantitative information, such as financial data.

The gold level is all about impact, asking for qualitative information about your organization.

How do you measure your impact? The platinum level will ask you to provide quantitative program results.



#GSImpactCall

2

# Data Distribution

INTERCONNECTED DATA SYSTEMS

Trusted nonprofit information. Confident decisions.

Find up-to-date information on thousands of nonprofits including:

- FINANCIAL DATA
- OPERATIONAL DATA
- IMPACT DATA

Get the most complete, up-to-date nonprofit data available.

GuideStar APIs  
(Application Programming Interfaces)



3

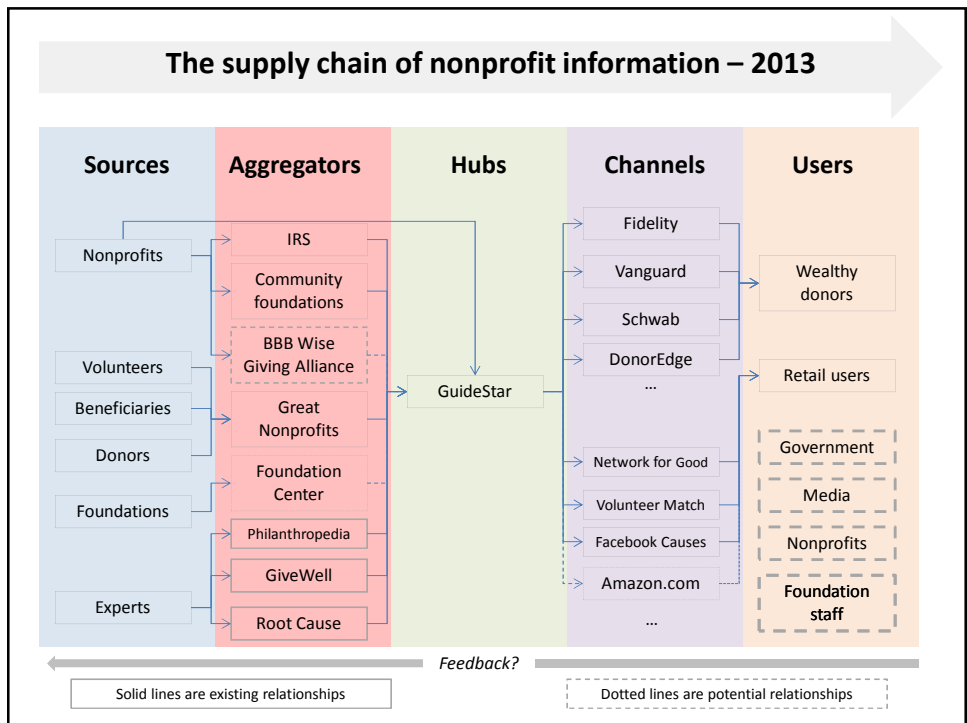
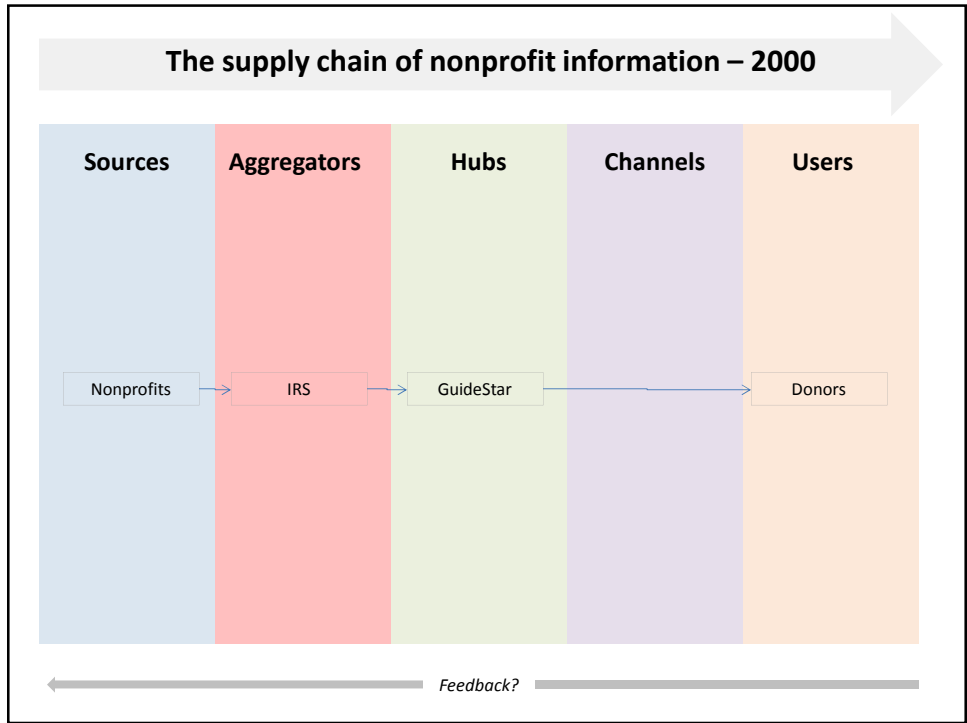
## Data Innovation

NEW MECHANISMS FOR FEEDBACK AND LEARNING



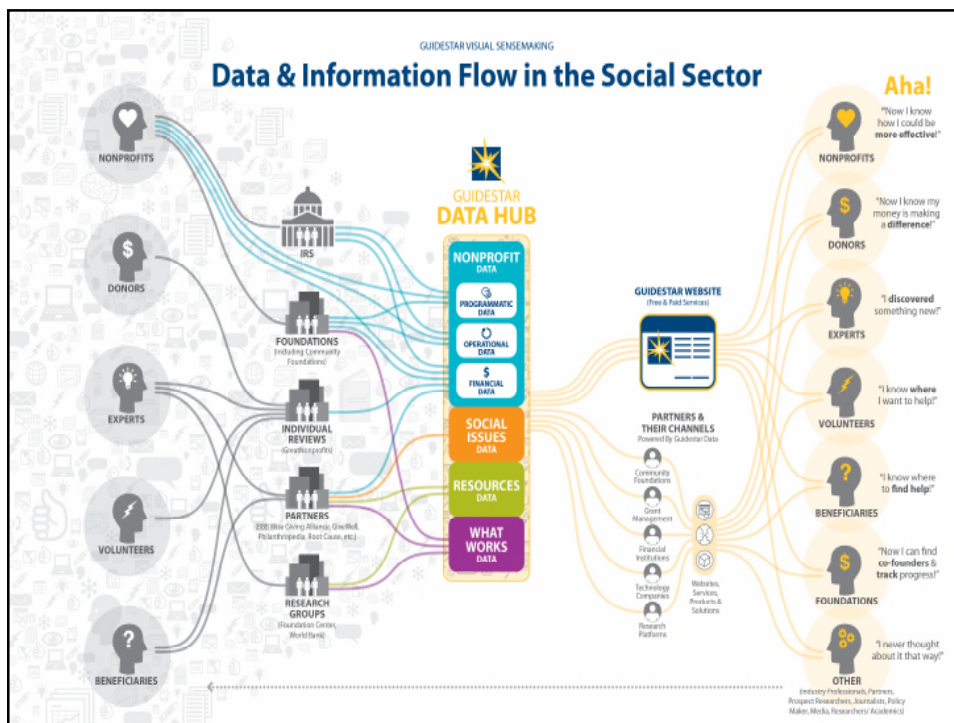
1 Standardized profile

2 Distribution system



## The basics of “medium data” for the nonprofit sector:

- A nonprofit **common profile**
- ...that is **multidimensional**,
- ...placed in **context**,
- ...linked to the key tech **platforms** of our time,
- ...and enhanced by constant cycles of **innovation & learning...**
- ...at **scale**
- (without being a **jerk**)

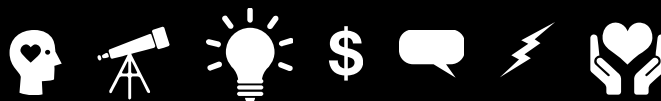


Not chaos-like together crushed  
and bruised;  
But, as the world, harmoniously  
confused:

**Where order in variety we see;  
And where, though all things  
differ, all agree.**

*Alexander Pope, 1713*

## Questions?



[jharold@guidestar.org](mailto:jharold@guidestar.org)

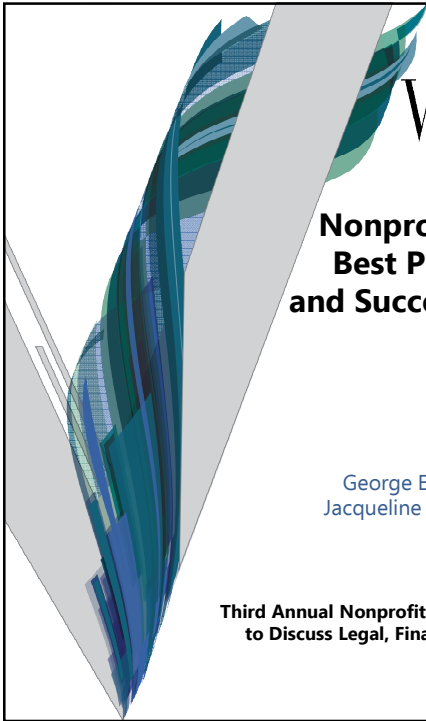
@jacobcharold






# Presentation #3

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**VENABLE**<sup>®</sup><sub>LLP</sub>  CliftonLarsonAllen


**Nonprofit Chapters and Affiliates:  
Best Practices, Common Pitfalls,  
and Successful Approaches to Change**

Thursday, November 12, 2015  
1:00 – 2:15 pm ET

**Speakers**  
George E. Constantine, Esp., Partner, Venable LLP  
Jacqueline Eckman, CPA, Principal, CliftonLarsonAllen


**Third Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together  
to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector**

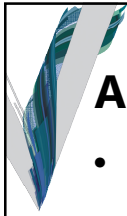
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**Agenda**

- Introductions
- Setting the Stage
- The Good, the Bad, and the Ugly
- Legal Considerations
- Tax Considerations
- Conclusion

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## About Us

- George E. Constantine, III, Esq., Partner, Venable LLP
- Jacqueline Eckman, CPA, Principal, CliftonLarsonAllen




## Setting the Stage


- Very common for nonprofit organizations to have chapters and affiliates
- Why?
  - Geography
  - Grassroots support
  - Need for separate entities for tax or legal reasons
- Often tension between “too much control” and “not enough support”
- Structures, staffing, lines of reporting all can contribute to success or failure



# **The Good, the Bad, and the Ugly**

Identifying Models That Work or Don't Work


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# **The Good, the Bad, and the Ugly**

We want to hear from you—what are some of the key characteristics you've observed of:

- A good chapter/affiliate relationship?
- A bad chapter/affiliate relationship?

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## The Good

- Dedicated chapter/affiliate support team
- System-wide policies and procedures
- Standard reporting
- Internal audit
- Regular national board interaction at chapter/affiliate level
- Fair revenue share that recognizes and rewards chapter performance
- Processes in place to support affiliates that are in need



## The Good (continued)

- Chapter leader input on policies and procedures
- Accurate accounting for time spent and billed to chapter/affiliate programs
- Regular training for leaders on legal compliance
- Insurance coverage
- Open communications



## The Bad

- Limited oversight from national/parent
- Inconsistent reporting
- Lack of awareness of potential for joint legal liability
- Lack of firm policies and procedures at national/parent level or, worse, lack of fair and uniform application of policies
- “Us vs. them” sorts of communications
- Board of national/parent making decisions on policy matters without obtaining input



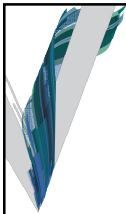
## The Bad (continued)

- Lack of understanding at chapter/affiliate leader level of where they fit
- Governance best practices ignored—such as proper board representation at chapter level, sufficient turnover
- Lack of or insufficient charter/affiliation agreement



## The Ugly

- Girl Scouts of Manitou Council, Inc.—chapter restructuring overturned by 7<sup>th</sup> Circuit
- Instances of embezzlement, trademark infringement, revocations



## Legal Structure

Best Practices and Options to Consider



## Common Affiliation Structures

### Risk Profile

- **Fully Integrated**
  - Activities conducted by and in name of parent
  - Parent 100% liable
- **Parent/Subsidiary**
  - Activities of subsidiary conducted by and in name of subsidiary
  - Parent not liable unless separate entity status disregarded (“piercing the corporate veil”)
- **Contractual Affiliation**
  - Activities of affiliate usually carried out by and in name of the affiliate
  - Parent potentially liable if affiliates not separately incorporated



## Common Affiliation Structures

### Other Characteristics

- **Fully Integrated**
  - Common for entities with affiliates dedicated to specific subject-matter interests; also sometimes used by entities with geographically based affiliates
  - Full integration minimizes administrative burden of maintaining separate legal entities
- **Parent/Subsidiary**
  - Common for association-related foundation relationships or other closely affiliated relationships
  - Maximizes control while minimizing liabilities
- **Contractual Affiliation**
  - Common for “federation” model of related national, regional, state, or local associations
  - Degree of integration or autonomy varies to suit organizations’ needs and preferences
  - But beware unincorporated affiliates and/or absence of affiliation agreement





## Key Legal Pitfalls

- Failure to observe corporate formalities (when using a separate entity structure), unincorporated affiliates, substantial control by parent all can bring liability to the parent
- Fiduciary duty compliance can be compromised when substantial overlap
- Membership needs to be addressed clearly in bylaws
- Support payment allocation needs to be addressed clearly in affiliation agreement



## Key Legal Pitfalls (continued)

- Must address threshold for becoming an affiliate, inactive/probation status, disaffiliation
- Use of names, logos, copyrighted materials should be addressed in affiliation agreement as well



## Tax Structure

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## Group Exemptions

- IRS recognizes a group of entities as tax-exempt if they are affiliated with a central organization
- Single IRS application for the entire group
- Subordinates must be affiliated with the central organization; subject to the central organization's general supervision or control; and exempt under the same paragraph of IRC 501(c), though not necessarily the paragraph under which the central organization is exempt

IRS Publication 4573

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## Group Exemptions

- Filing requirements do not change
- Central organization must file its own return
- A group return may be filed on behalf of some\* or all of the subordinates

\* If only some subordinates are included, a list of the included subordinates must be included with the return.



## Operating Structure



## Chapter/Affiliate Support

- Possible types of support:
  - Human Resources
  - Information Technology
  - Financial Reporting
  - Legal
  - Advertising/Public Relations
  - Fundraising
  - Program Delivery
  - Training

*Which do you feel are the most important?*



## Operating Efficiencies

- Centralizing administrative functions
- Purchasing power
- Investment pooling



## Fees to National

- Fees needed to pay for chapter support
- Structure varies
  - Be clear on what is/is not included in “share” calculation
  - Keep the calculation simple
- Communication is key to keeping chapters engaged

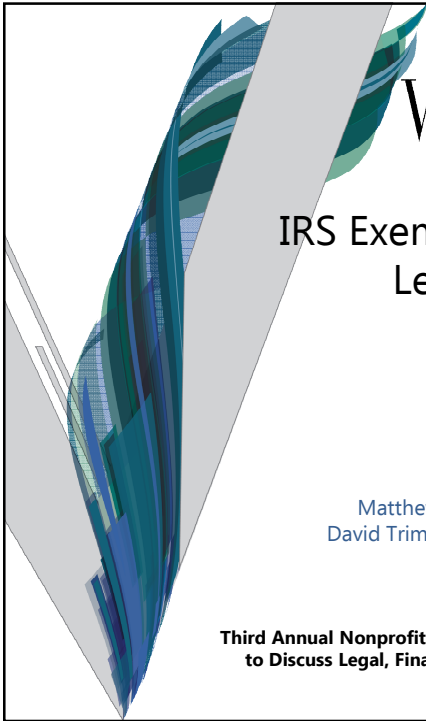



## Questions/Conclusion



# Presentation #4

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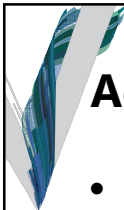
## IRS Exempt Organization Audits: Lessons Learned for All Nonprofits

Thursday, November 12, 2015  
2:30 – 3:45 pm ET

**Speakers**  
Matthew T. Journy, Esq., Counsel, Venable LLP  
David Trimmer, CPA, Principal, CliftonLarsonAllen LLP


**Third Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together  
to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector**

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## Agenda

- The Enforcement Pendulum
- Current IRS Enforcement
- Future IRS Enforcement
- Factors Influencing IRS Enforcement Issues
- Specific Focus of IRS Enforcement

 **VENABLE** 2



## Enforcement Pendulum

- The IRS is reactionary
- How IRS enforcement initiatives begin
  - Media focus on potential abuses
  - Congress questions effectiveness of IRS enforcement
- Example: healthcare industry
- Example: credit counseling industry



## Current IRS Enforcement

- IRS is asleep at the wheel
- Examinations – very little IRS enforcement, expedience is more important than thoroughness
- Initial determinations – Expedience is more important than thoroughness
- FYE 2014 statistics for review of Form 1023:
  - IRS approved approximately 94,300 applications for exempt status





## Current IRS Enforcement

- FYE 2014 statistics for review of Form 1023:
  - Factors that should influence statistics:
    - Lower budget
    - Fewer Reviewers
  - IRS reviewed 100,032 applications for exempt status (approximately 150% increase from historic rate)
  - IRS closed approximately 94,300 cases
  - IRS cut average wait for determination from 110 days to 16 days
  - IRS denied exemption for 67 applications, approximately 0.067% of closed cases



## Future IRS Enforcement

- Too many charities are being recognized with too little review
- Lack of current IRS enforcement will result in the recognition of “sham” charities
- Tampa Tribune publishes annual list of “America’s Worst Charities”
- Tipping point
  - When
  - Tax years subject to examinations



## Factors Influencing IRS Enforcement

- Congressional and Media Focus
- Recent compliance initiatives
  - College and University Compliance Project
  - Credit Counseling Compliance Project
  - Healthcare Compliance Program
  - Group Exemption Compliance Project
  - Focus on related entities
  - Political activities



## Specific Focus of IRS Enforcement

- Compensation – Excess benefit transactions
- Private inurement – transactions with insiders
- Private benefit – transactions with independent contractors
- Employment Taxes
- Unrelated business income
- Related entities/supporting organizations



## IRS Focus: Compensation

- Recent statements by IRS officials
- Recent efforts to litigate issues
- Substantial focus of healthcare, credit counseling, and college and university compliance programs
- Penalties:
  - Revocation
  - Intermediate sanctions
- Protections – rebuttable presumption of reasonableness



## Compensation/Bonuses

### What to Look For:

- Compensation seems significantly larger than comparable organizations
- Compensation is not set by independent, disinterested persons
- Individual's hours do not justify the compensation
- Executives holding positions for which they are not qualified
- Accomplishments and results do not justify the compensation/bonus

### Why it Matters:

Intermediate sanctions exist to curb inurement to disqualified persons who have substantial influence over the organization. In extreme cases, tax-exempt status can be revoked.

An excess benefit transaction occurs when the economic benefit provided by the organization exceeds the value of the consideration received.



## Compensation/Bonuses

### What to Look For:

- Compensation for officers and key employees is NOT determined by independent members of the governing body or compensation committee
- Compensation levels are being set without regarding to comparability data for similar positions at similar organizations
- Organization is not documenting the decision-making process

### Why it Matters:

If these procedures are followed, the compensation will be presumed to be reasonable under the excess benefit rules. Excise taxes can then be imposed only if the IRS develops sufficient contrary evidence to rebut the organization's evidence (the burden of proof shifts to the IRS to prove that the compensation is unreasonable).



## IRS Focus: Inurement

- Credit counseling compliance project
- Will be substantial issue for "sham" charities
- Transactions with entities controlled by insiders
- Inurement = Revocation
- Protections – good governance (rebuttable presumption of reasonableness)



## **IRS Focus: Private Benefit**

- Credit counseling and related entity compliance project
- IRS has frequently overreached in the application of private benefit
- Transactions with independent contractors



## **IRS Focus: Employment Taxes**

- Employment tax compliance program
- Employee v. Independent Contractor



## Independent Contractors

### What to Look For:

Workers classified as independent contractors who: appear to have set working hours, receive significant training, follow specific instructions, are paid based on time instead of by the job, aren't working for any other employer, and who can be fired even if the job specifications are met.

### Why it Matters:

To determine whether an employment relationship exists between the individual and the organization for federal employment tax purposes. When the organization has the right to control and direct not only what is done but how it is done, the relationship may be that of employer and employee. Penalties for worker misclassification are severe. An organization that fails to file a required 1099 is subject to 28% backup withholding.



## IRS Focus: UBI

- College and University Compliance project
- Issues:
  - NOLs
  - Royalty income
  - Convention/trade show income
  - Advertising/sponsorship income
  - Contractual obligations



## Use of NOL Carryovers

- College and University Compliance Project
- Only income producing activities may result in NOL carryovers
- Potential issue affecting multiple tax years



## Mailing List Rental

### What to Look For:

- Sale or rental of mailing lists to nonprofit or commercial organizations
- Any services provided along with the mailing list

### Why it Matters:

- The rental or exchange of mailing lists between exempt organizations is not taxable. However, if the Organization provides any additional services, the payment may be treated as an unrelated trade or business.



## Conventions/Trade Shows

### What to Look For:

- The organization conducts a trade show where vendors exhibit their products and services and promote public interest in the industry.

### Why it Matters:

Income from such activity is excluded from UBI only when the activity is carried on by a qualifying organization in conjunction with a qualified convention or trade show. The purpose of the activity should be educating members, promoting products and services of the industry, or educating persons attending the show concerning new developments or products and services related to the exempt activities.



## Conventions/Trade Shows



*The Bottled Water Association (BWA)* is a 501(c)(6) trade association. It's mission includes supporting and enhancing activities within the industry, acting as a spokesperson for the industry, providing members with current information on technical developments, training methods, and economic issues, encouraging and fostering higher safety and technical standards, promoting technological advancements and improvements, and gathering and disseminating information about markets and products.





## Conventions/Trade Shows



BWA conducts semi-annual trade shows to promote and stimulate demand for bottled water products. BWA plans and directs the show, secures the facility, charges admission, charges for rental of exhibitor space, and sells refreshments. There are educational seminars, and members and suppliers display products and services. Sales are permitted. Members, nonmembers, and potential customers attend the shows. Revenues from the shows are used to defray the shows' operating costs, and any net income is used in furtherance of BWA's exempt purposes.



## Conventions/Trade Shows



BWA has an Internet website available to the general public 24 hours a day, 7 days a week for two weeks, after which the website is removed. It does not overlap or coincide with any convention, annual meeting, or show conducted by BWA. The website permits members and the public to access information and visual displays, such as product directories and specific product listings, and contains links to the websites of BWA's members and suppliers. The website contains order forms, and allows on-line purchases from members and suppliers appearing. BWA charges a fee to those who wish to have information listed on the website.



## Advertising/Sponsorships

### What to Look For:

- Corporate donations that oblige the nonprofit to provide anything in return, including acknowledgement of the gift.

### Why it Matters:

While return benefits, most frequently advertising, may be taxable, a qualified sponsorship payment is not. To qualify as a sponsorship, there must be no arrangement or expectation of a substantial return benefit to the donor. Mere acknowledgement is not a return benefit.



## Advertising/Sponsorships

### Advertising

- Any message or material which promotes or markets any trade, business, service, facility or product:
  - Qualitative or comparative language
  - Price information or other indications of savings or value
  - Endorsements
  - Inducement to purchase, sell, or use any company, service, facility or product
- A single message that contains both advertising and an acknowledgment is advertising

## Advertising/Sponsorships

### Sponsorship Acknowledgement

- Exclusive Sponsor arrangement
- Name, Address, Phone number, website, logo
- General description of the product line (“retailer of fine bathroom fixtures”)
- Visual depictions of the products and services
- Taglines (“The Ultimate Driving Machine”)
- Display or distribution of products

## Advertising/Sponsorships

RECEIVE A \$3,000 CREDIT  
ON A 2013 BMW 6 SERIES.\*

[LEARN MORE](#)

**BMW EfficientDynamics**  
Less essential. More driving pleasure.

\*Applied to leases issued or financed through BMW Financial Services NA, LLC. Offer does not include BMW i8, Coupe or Convertible.

## Advertising/Sponsorships



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## Advertising/Sponsorships



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americanexpress.com/advisoryservices



CliftonLarsonAllen VENABLE 28

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Sponsorships**



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DELTA.COM

## Advertising/ Sponsorships



## Contractual Obligations

### What to Look For:

- Contracts or other agreements that obligate the nonprofit to perform certain acts or services in exchange for payment. For example, in exchange for a large donation, the nonprofit agrees to encourage its members to use the donor's goods and services, send out letters or emails to its members, monitor and report on results, etc.

### Why it Matters:

Services provided by an exempt organization to a donor can result in a substantial return benefit to the donor without advancing the mission. The organization should make a good-faith estimate of the fair market value of the services it is providing, and consider whether that portion of the payment is exempt-function income or UBI.

## Contractual Obligations

The Bottled Water Association conducts a conference with exhibitors.



Exhibitors pay \$5,000 for a booth, and attendees pay \$1,000/person.

The Platinum Sponsor pays \$50,000 and receives:

- Link from website
- Logo on tote bag
- Free booth at the trade show
- 6 admission tickets
- Right to introduce the keynote speaker
- 2 full page ads in the monthly magazine (FMV of \$4,000/each)

How should the payment be shown on Form 990?

## Contractual Obligations

The Kids Hockey Foundation has a mission of mentoring troubled youths and giving them the opportunity to learn challenging skills through a structured athletic program.

The Foundation holds a celebrity golf event and reception dinner.

Platinum Sponsorship Package –\$25,000:

- Sponsorship recognition
- 4 rounds of golf with a pro hockey player
- Brunch, dinner with all attendees
- Swag



## Contractual Obligations

Thank you for your Platinum Sponsorship of our Celebrity Golf Event. We received your contribution for \$25,000, and we are most grateful for your support! A large portion of your sponsorship is tax deductible. As part of your sponsorship, you received goods/services associated with the event with an estimated fair market value of \$144; therefore, the deductible portion is \$24,856.

Your generous support of the Kids Hockey Foundation will help us continue to advance our mission to improve the lives of disadvantaged children in the region.

On behalf of the Foundation's Board of Directors,  
thanks again for your generous support.



## Contractual Obligations

- \$184 Green fees per golfer
- \$146 Brunch, cocktails, dinner
- \$16 Photo plaque
- \$59 Golf Trophy
- \$85 Autographed hockey jersey
- \$50 Polo shirt and hat
- \$15 Golf balls
- \$50 Gift certificate to golf pro shop
- \$300 Gift certificate for team fan gear
- \$905 Total



## Contractual Obligations

Thank you for your \$25,000 payment for the Platinum Sponsorship of our Celebrity Golf Event. You received goods/services associated with the event with an estimated fair market value of \$3,620.

Your generous support of the Kids Hockey Foundation will help us continue to advance our mission to improve the lives of disadvantaged children in the region.

On behalf of the Foundation's Board of Directors, thanks again for your generous support.

## Contractual Obligations

*Ted,*

*The notion that anyone received goods and services worth 900.00 dollars per golfer is ridiculous.*

*Your accountant's position is nonsense. The entire cost of the outing should not be shifted to the sponsors as goods and services.*

*You continue to try and punish those that are trying to help you.*

*I suggest you revisit this position.*

*By the way, no one else does this.*

*Sincerely,*

*Dan*



## Analyzing Contracts

\$100,000 License Agreement

Trial Balance/Audited Financial Statements

- Contribution?
- Sponsorship?
- Royalty?



## Analyzing Contracts



The Save the Whales Foundation signs an agreement with Flyover Country Airlines.

The Foundation will:

- Grant a license to use its trademarks
- Provide a quarterly membership list, including physical and email addresses
- Send an email to its members, promoting the affinity agreement with Flyover
- Insert Flyover's promotional material in its membership renewal notices
- Put Flyover's logo on its homepage, with a hyperlink
- Identify Flyover as the "preferred" airline of the Save the Whales Foundation
- Provide educational content to be featured on Flyover's website



## Analyzing Contracts

The Save the Whales Foundation signs an agreement with Flyover Country Airlines.



The Airline will:

- Obtain written approval of all promotional material using the trademarks
- Paint the Foundation's logo and a depiction of a humpback whale on the body of 10 planes
- Pay a sponsorship of \$100,000
- Pay the Foundation 1% of all tickets purchased by individuals following the hyperlink from the Foundation's website
- Pay the Foundation 1% of all tickets purchased by members responding to a solicitation from Flyover



## IRS Focus: Related Entities/Supporting Organizations

- Compensation – Excess benefit transactions
- Private inurement
- Private benefit – transactions with related entities
- Unrelated business income
- Advertising



## Supporting Organizations

### What to Look For:

- A 501(c)(3) public charity classified as a supporting organization under 509(a)(3) that supports a 501(c)(4), (5), or (6) organization.

### Why it Matters:

The supporting organization must confirm that the supported organization satisfies the public support test described in 509(a)(2).



## Questions?



# Speaker Biographies

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## Jeffrey S. Tenenbaum

Partner

Washington, DC Office

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### AREAS OF PRACTICE

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

### INDUSTRIES

Nonprofit Organizations and Associations  
 Financial Services

### GOVERNMENT EXPERIENCE

Legislative Aide, United States House of Representatives

### BAR ADMISSIONS

District of Columbia

### EDUCATION

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

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

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was one of only seven "Leading Lawyers" in the Not-for-Profit category in the prestigious 2012 *Legal 500* rankings, one of only eight in the 2013 rankings, one of only nine in the 2014 rankings, and also one of only 10 in the 2015 rankings. Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member 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. Mr. Tenenbaum was listed in the 2012-16 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014 and 2015 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

### REPRESENTATIVE CLIENTS

AARP  
 Air Conditioning Contractors of America  
 Airlines for America  
 American Academy of Physician Assistants  
 American Alliance of Museums  
 American Association for the Advancement of Science  
 American Bar Association  
 American Bureau of Shipping  
 American Cancer Society  
 American College of Cardiology

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

## MEMBERSHIPS

American Society of Association Executives

New York Society of Association Executives

American College of Radiology  
American Council of Education  
American Friends of Yahad in Unum  
American Institute of Architects  
American Institute of Certified Public Accountants  
American Red Cross  
American Society for Microbiology  
American Society of Anesthesiologists  
American Society of Association Executives  
America's Health Insurance Plans  
Association for Healthcare Philanthropy  
Association for Talent Development  
Association of Clinical Research Professionals  
Association of Corporate Counsel  
Association of Fundraising Professionals  
Association of Global Automakers  
Association of Private Sector Colleges and Universities  
Auto Care Association  
Biotechnology Industry Organization  
Brookings Institution  
Carbon War Room  
CFA Institute  
The College Board  
CompTIA  
Council on Foundations  
CropLife America  
Cruise Lines International Association  
Design-Build Institute of America  
Endocrine Society  
Erin Brockovich Foundation  
Ethics Resource Center  
Foundation for the Malcolm Baldrige National Quality Award  
Gerontological Society of America  
Global Impact  
Goodwill Industries International  
Graduate Management Admission Council  
Habitat for Humanity International  
Homeownership Preservation Foundation  
Human Rights Campaign  
Independent Insurance Agents and Brokers of America  
Institute of International Education  
International Association of Fire Chiefs  
International Sleep Products Association  
Jazz at Lincoln Center  
LeadingAge  
The Leukemia & Lymphoma Society  
Lincoln Center for the Performing Arts  
Lions Club International  
March of Dimes  
ment'or BKB Foundation  
Money Management International  
National Association for the Education of Young Children  
National Association of Chain Drug Stores  
National Association of College and University Attorneys  
National Association of County and City Health Officials  
National Association of Manufacturers  
National Association of Music Merchants  
National Athletic Trainers' Association  
National Board of Medical Examiners  
National Coalition for Cancer Survivorship  
National Coffee Association  
National Council of Architectural Registration Boards  
National Council of La Raza  
National Defense Industrial Association  
National Fallen Firefighters Foundation

National Fish and Wildlife Foundation  
National Propane Gas Association  
National Quality Forum  
National Retail Federation  
National Student Clearinghouse  
The Nature Conservancy  
NeighborWorks America  
New Venture Fund  
NTCA - The Rural Broadband Association  
Nuclear Energy Institute  
Peterson Institute for International Economics  
Professional Liability Underwriting Society  
Project Management Institute  
Public Health Accreditation Board  
Public Relations Society of America  
Recording Industry Association of America  
Romance Writers of America  
Telecommunications Industry Association  
Trust for Architectural Easements  
The Tyra Banks TZONE Foundation  
U.S. Chamber of Commerce  
United Nations High Commissioner for Refugees  
United States Tennis Association  
University of California  
Volunteers of America  
Water Environment Federation  
Water For People

## HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-15

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-16

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-15

Served as member of the selection panel for the inaugural *CEO Update* Association Leadership Awards, 2014

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

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

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

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

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

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

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

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

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

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

## ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Advisory Board of the American Society of Association



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

## PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 700 articles.

## SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 700 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times* and other periodicals. He also has been interviewed on nonprofit legal topics on Fox 5 television's (Washington, DC) morning news program, Voice of America Business Radio, Nonprofit Spark Radio, and The Inner Loop Radio.



## John P. Langan

**CPA, Chief Industry Officer, Public Sector, CliftonLarsonAllen**

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John Langan is the Chief Industry Officer at CliftonLarsonAllen LLP (CLA) a top 10 national accounting and consulting firm. Before joining CLA and its predecessor LarsonAllen, Mr. Langan was the founder and managing partner of Langan Associates, an exclusive DC-area provider of nonprofit accounting, tax, and consulting services. The Public Sector Group at CLA is the firm's largest industry group with over \$100M in annual billings and serving over 8,000 nonprofits, state and local governments, and institutions of higher education.

Mr. Langan has nearly 30 years' experience serving nonprofit organizations and has a national reputation as an expert, author, and presenter on financial, tax, and technology topics facing nonprofits. He has served major nonprofit organizations including the American Public Transportation Association, the Biotechnology Industry Organization, the National Telecommunications Cooperative Association, Cotton Council International, and United Way Worldwide.

# KEYNOTE SPEAKER



## Jacob Harold

### President and Chief Executive Officer

Jacob Harold is a social change strategist, grantmaker, and author. Jacob came to GuideStar from the Hewlett Foundation, where he led grantmaking for the Philanthropy Program. Between 2006 and 2012, he oversaw \$30 million in grants that, together, aimed to build a 21st-century infrastructure for smart giving.

At the beginning of his career, Jacob worked as a climate change campaigner for Rainforest Action Network and Greenpeace USA and as organizing director at Citizen Works. He also worked as a consultant to nonprofits and foundations at the Bridgespan Group and as a climate change strategist for the David and Lucile Packard Foundation based at The Energy and Resources Institute in New Delhi, India.

Jacob was recently named to the *NonProfit Times* (NPT) 2014 Power and Influence Top 50 list, and currently serves as a term member for the Council on Foreign Relations. He has written extensively on climate change and philanthropic strategy. His essays have been used as course materials at Stanford, Duke, Wharton, Harvard, and Oxford. He earned an AB *summa cum laude* from Duke University and an MBA from the Stanford Graduate School of Business with a certificate in public management. Harold has further training from Green Corps in grassroots organizing, Bain in business strategy, the Chinese Academy of Sciences in complex systems science, and the School for International Training in Tibetan studies. Harold was born and raised in Winston-Salem, North Carolina, where his parents ran small community-based nonprofit organizations.



## Bobby N. Turnage, Jr.

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### AREAS OF PRACTICE

Corporate  
Privacy and Data Security  
Advertising and Marketing  
Intellectual Property  
Technology Transactions and Outsourcing  
Domain Names and Cyber Protection  
Franchise and Distribution  
Insurance  
Mergers and Acquisitions

### INDUSTRIES

Cybersecurity  
New Media, Media and Entertainment  
Government Contractors  
Consumer Products and Services  
Emerging Companies: Venable Venture Services  
Life Sciences  
Nonprofit Organizations and Associations

### BAR ADMISSIONS

District of Columbia  
Virginia

Bobby Turnage is a partner with Venable's Corporate Practice Group, and has a background in the Internet and high-tech industries. He primarily represents and advises clients concerning:

- Technology and IP transactions;
- Licensing, distribution and outsourcing contracts;
- Strategic partnering and co-branding contracts;
- Data security and privacy matters; and
- General legal counseling.

Mr. Turnage has an in-depth understanding of the inner workings of successful business operations, and is experienced in working collaboratively with client executive teams to accomplish stated objectives in a manner that works best for the client.

Prior to joining Venable, Mr. Turnage served as Senior Vice President, General Counsel and Secretary for Network Solutions, LLC, a leading Web-presence services company. Having worked as both an executive and a lawyer embedded in a business, Mr. Turnage brings valuable experience that enables him to provide practical, business-focused legal advice on matters faced by businesses in their daily operations.

Mr. Turnage's prior legal experience includes work as a litigation associate in private practice, as well as serving as Associate General Counsel for VeriSign, Inc. (a high-tech Internet services company), and serving as a defense attorney and prosecutor in the U.S. Army Reserve JAG Corps.

### HONORS

Recognized in the 2013 edition of *Legal 500* in categories of M&A: Middle-Market (sub-\$500m) and Technology: Data Protection and Privacy

### ACTIVITIES

During his time in the military, Mr. Turnage received several awards, including the Meritorious Service Medal; Army Commendation Medal (1OLC); Army Achievement Medal (1OLC); Leatherneck Dress Blues Award (USMC); and Navy League Outstanding Marine Corps Recruit Award (USMC).

## EDUCATION

J.D., University of Mississippi  
School of Law, 1992

Editorial Board, *Mississippi Law Journal*

Moot Court Board

Who's Who Among Students in  
American Universities and  
Colleges

B.S., Business, Virginia  
Commonwealth University, 1989

Omicron Delta Kappa National  
Leadership Honor Society

## MEMBERSHIPS

Past Chair, General Counsel  
Committee of the Northern  
Virginia Technology Council

Past Member, Association of  
Corporate Counsel

Past Board Member, Home Care  
Delivered, Inc.

## PUBLICATIONS

- March 17, 2014, Cybersecurity Assessments – Using the Tool Well, Cybersecurity Alert

## SPEAKING ENGAGEMENTS

- December 10, 2015, A Breach Can Happen to You (or Already Has, and You Just Don't Know It Yet): How Nonprofits Can Best Manage Cybersecurity Risk
- April 22, 2015, "Cyber Security - Know the Risks and Protect Your Company" at the AHT Cyber Security Summit
- February 27, 2015, "Cybersecurity: Safely Doing Business in the Digital World" at the Wharton Executive MBA Entrepreneurial Gala at the University of Pennsylvania Wharton School
- October 30, 2014, "Valuing, Mitigating & Insuring Your Cybersecurity Risk" at CyberMaryland 2014
- September 22, 2014, "Big Data & Analytics: Opportunities and Challenges" at LEAD Virginia's Conversations with Leaders Conference
- September 24, 2013, "Emerging Cyber Threats and Breach Response from the Boardroom to the Data Room" for ACG National Capital
- April 17, 2013, Government Contracts Symposium
- March 21, 2013, "Managing Cybersecurity Risks for Financial Institutions" for ALI CLE
- November 15, 2012, "Managing and Responding to Data Security Breaches: Minimizing Reputational, Business and Legal Costs" at ACI's 2nd National Summit on Industrial & National Security Compliance
- November 5, 2012, "Fundamentals of Intellectual Property" for the USDA Commercialization Assistance Training Program (CATP)
- October 18, 2012, "Getting the Most Value from Legal Counsel," Larta Institute
- October 11, 2012 - October 12, 2012, NetDiligence Cyber Risk & Privacy Liability Forum
- September 30, 2012 - October 3, 2012, Association of Corporate Counsel (ACC) 2012 Annual Meeting
- July 12, 2012, "Expanding Privacy Rights" for the Life Sciences IT Coalition
- June 20, 2012, Getting Deals Done in a Challenging Environment
- June 19, 2012, "ACC June Webcast: Understanding Cyber-Insurance and Managing Your Risk," hosted by the Association of Corporate Counsel
- June 18, 2012, Getting Deals Done in a Challenging Environment, Venable Business Division Presentation from Tysons Corner, VA
- March 29, 2012, "The True Costs of Cyber Security: Getting Past the Myths and Misconceptions" at the Center Club
- October 5, 2011, "Building Your Brand Through Social Media" at PLI Corporate Counsel Institute 2011
- April 1, 2011, "In-House Counsel in the Cross-Hairs – How to Avoid Pitfalls Presented by New and Changing Federal Laws and Regulations," NVTC General Counsel Committee



## James Kreiser

**CISA, CRMA, CFSA, Principal, CliftonLarsonAllen**

[James.Kreiser@claconnect.com](mailto:James.Kreiser@claconnect.com)

Jim has almost 20 years experience in the areas of risk advisory services, information technology audit, risk management, business process and controls, third party reporting, and internal audit. He is a Principal at CliftonLarsonAllen, and currently serves as a national leader for the Business Risk Services group. His primary focus is state and local governments, non-profits, and financial institutions – in the areas of third-party reporting, IT advisory, and ERM. He has been a speaker and presented on a variety of topics for NASACT, GFOA, AICPA, PICPA, AGA, MACPA, IIA, Bankers Association, and many others.



## Lisa M. Hix

Partner

Washington, DC Office

T 202.344.4793 F 202.344.8300

lmhix@Venable.com

### 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

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. Ms. Hix is the former Chair of the American Society of Association Executives (ASAE) Washington, DC Legal Symposium, a former member of the ASAE Legal Section Council, and current member of the ASAE Finance and Business Operations Committee.

### HONORS

Recognized in *Legal 500*, Not-For-Profit, 2013 - 2015

Selected for inclusion in Washington, DC "Rising Stars" edition of *Super Lawyers*, 2013

### PUBLICATIONS

- December 19, 2013, New York Nonprofit Revitalization Act Signed into Law
- October 31, 2013, The New Nonprofit Revitalization Act
- October 16, 2013, New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon
- October 15, 2013, Combinations and Alliances among Nonprofit Organizations
- July 30, 2013, New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon
- June 25, 2013, Employee Leaves of Absence and Other Accommodations under the Law: What Every Nonprofit Needs to Know
- June 26, 2012, Agreeing to Convene: Spotting and Solving the Most Common Event Contract Pitfalls
- March 20, 2012, All About UBIT: What Nonprofit Leaders Need to Know
- November 18, 2011, The New DC Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply

- October 24, 2011, Unrelated Business Income Tax for Nonprofits: The Basics
- October 13, 2011, Traps on the Web: Legal Essentials on Social Media, Protecting Data, HR Policies, and More
- October 6, 2011, Nonprofit Strategic Partnerships: Building Successful Ones and Avoiding the Legal Traps
- September 20, 2011, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- September 16, 2011, Playing by the Rules: A Fresh Look at Corporate Sponsorship & Affinity Program Income
- August 8, 2011, Cyberspace Risk: The Top Legal Traps for Associations
- June 16, 2011, Sponsorships, Advertising, Endorsements and Cause Marketing: Understanding Critical UBIT Issues for Nonprofits
- May 13, 2011, Online Social Media and Nonprofits: Navigating the Legal Pitfalls
- April 28, 2011, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- April 20, 2011, Navigating Nonprofit Partnerships, Joint Ventures and Commercial Co-Ventures: How Arts Organizations Can Avoid the Legal Pitfalls
- March 29, 2011, Dangers and Opportunities: Navigating Nonprofit Partnerships, Collaborations, Joint Ventures and More
- March 8, 2011, Sponsorships, Advertising, Endorsements, and Cause Marketing - Understanding Critical UBIT Issues for Nonprofits
- February 3, 2011, Top Ten Legal Issues for Associations: Common Mistakes, and How to Avoid Them
- December 16, 2010, So You Want To Be On The Internet<sup>®</sup>
- December 6, 2010, Mergers, Alliances, Affiliations and Acquisitions for Nonprofit Organizations: Financial and Legal Issues
- 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



## SPEAKING ENGAGEMENTS

- October 19, 2015, "Advising and Serving on Nonprofit Boards" at the 2015 Association of Corporate Counsel Annual Meeting
- August 11, 2015, "An Insider's Guide to Grant Success" at the 2015 American Society of Association Executives Annual Meeting & Exposition
- August 6, 2015, Top Ten "Must Have" Provisions for Nonprofit Meeting Contracts
- October 31, 2013, What New York Nonprofits Need to Know about the New Nonprofit Revitalization Act
- October 16, 2013, "New York Legislature Passes Nonprofit Revitalization Act: Comprehensive, Significant Changes to New York Nonprofit Corporation Law on Horizon" for the New York Society of Association Executives
- June 25, 2013, Employee Leaves of Absence and Other Accommodations under the Law: What Every Nonprofit Needs to Know
- June 20, 2013, "Preparing an Online Social Media Policy: The Top Ten Legal Considerations for Your Nonprofit" at CAPLAW's 2013 National Training Conference
- June 27, 2012, WMACCA Non-Profits & Associations Forum: "Agreeing to Convene – Spotting and Solving the Most Common Event Contract Pitfalls"
- March 20, 2012, "All About UBIT: What Nonprofit Leaders Need to Know" for the Better Business Bureau of New York
- October 13, 2011, "Traps on the Web: Legal Essentials on Social Media, Protecting Data, HR Policies & More" for the Better Business Bureau of New York
- October 6, 2011, Nonprofit Strategic Partnerships: Building Successful Ones and Avoiding the Legal Traps
- September 20, 2011, "Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts" at Meeting Quest Charlotte
- September 16, 2011, "Playing by the Rules: A Fresh Look at Corporate Sponsorship & Affinity Program Income" at ASAE's Annual Association Law Symposium
- August 8, 2011, "Cyberspace Risk: The Top Legal Traps for Associations," 2011 ASAE Annual Meeting
- June 16, 2011, Sponsorships, Advertising, Endorsements and Cause Marketing: Understanding Critical UBIT Issues for Nonprofits
- May 18, 2011, "Mastering Tradeshow Contracts" at the 2011 Annual Association Law Symposium in Chicago
- May 17, 2011, "Legal Aspects/Issues of Social Media Platforms" for the Kansas Society of Association Executives
- May 13, 2011, "Cyberspace Risk: The Top Legal Traps for Associations," ASAE Finance, HR & Business Operations Conference
- April 29, 2011 - May 3, 2011, "Trends in Law, Practice and Management of Copyright and Licensing of Content" for the Council of Science Editors
- April 28, 2011, "Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts" at ASAE's 2011 Springtime Expo
- March 29, 2011, "Dangers and Opportunities: Navigating Nonprofit Partnerships, Collaborations, Joint Ventures and More" for Better Business Bureau New York
- March 8, 2011, Legal Quick Hit: "Sponsorships, Advertising, Endorsements, and Cause Marketing - Understanding Critical UBIT Issues for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- February 7, 2011, "Legal Update: What Every Tax-Exempt Association Should Know" for the Commercial Real Estate Development Association
- February 3, 2011, "Top Legal Issues for Tax-Exempt Associations" for the Mid-Atlantic Society of Association Executives
- 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, "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, "Board of Directors' Responsibilities" at the 2007 Society for Women's Health Research Board Orientation, Washington, DC
- 2007, "Update on Hotel Contracts: Attrition and Other Key Issues" 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, "Understanding and Managing Fiduciary Responsibility" at the 2007 Finance and Administration Roundtable, Washington, DC
- 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
- 2006, "Legal Issues for Nonprofit Organizations" at the American College of Cardiology, 2006 General Scientific Session, Atlanta, Georgia



## Ben Aase

**MBA, Principal, CliftonLarsonAllen**

Minneapolis, MN

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[ben.aase@CLAconnect.com](mailto:ben.aase@CLAconnect.com)

Ben has been with CliftonLarsonAllen for over 10 years, and provides national leadership to our Public Sector Group's consulting and advisory services. Ben personally leads projects for a range of K—12, foundation, nonprofit, and quasi-governmental clients nationwide to drive both organizational and field-wide change and results at the intersection of strategy, finance, and operations.



## Brian L. Schwalb

Vice Chairman

Washington, DC Office

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### AREAS OF PRACTICE

Litigation  
 Commercial Litigation  
 Tax Controversies and Litigation  
 Real Estate  
 Healthcare - Labor and  
 Employment Law

### INDUSTRIES

Cybersecurity  
 Hospitality and Lodging

### GOVERNMENT EXPERIENCE

Trial Attorney, United States  
 Department of Justice, Tax  
 Division

### BAR ADMISSIONS

District of Columbia  
 Maryland  
 Virginia

### COURT ADMISSIONS

U.S. Supreme Court  
 U.S. District Court for the District  
 of Columbia  
 U.S. District Court for the District

Brian Schwalb, Venable's Vice Chairman, is a trial lawyer and civil litigator who helps clients address a broad range of challenging issues that confront businesses, organizations and their stakeholders.

Mr. Schwalb represents clients across a broad spectrum of issues, ranging from real estate, commercial and contract litigation, to corporate and partnership ownership, governance and management disputes, business tort cases, partnership and limited liability company disputes, employment and compensation disputes, estate and trust contests, and tax controversies.

Mr. Schwalb's trial work and advocacy skills have been recognized by prestigious organizations and publications. He is a Fellow of the American College of Trial Lawyers, whose membership is limited to the top one percent of trial lawyers in each U.S. jurisdiction. Since 2010, Mr. Schwalb has been listed in *Best Lawyers* in Washington, DC for Commercial Litigation and Bet The Company Litigation, and he was also selected to appear in *District of Columbia Super Lawyers*. Mr. Schwalb has received Martindale Hubbell's AV Preeminent rating.

While he has been recognized as one of the nation's top trial lawyers, Mr. Schwalb's practice extends far beyond the courtroom, with a focus on providing advice that allows his clients to avoid, respond to and/or resolve issues sensibly and efficiently. In all cases, he applies sound business judgment and a collaborative approach to develop practical and cost-effective solutions to his clients' most difficult challenges.

After a two-year judicial clerkship with the late Hon. John R. Hargrove, Sr. in the U.S. District Court for the District of Maryland, Mr. Schwalb served as a trial attorney for the U.S. Department of Justice, Tax Division, prosecuting and defending civil tax matters on behalf of the United States in courts throughout the Southeast.

### REPRESENTATIVE CLIENTS

Mr. Schwalb's clients include businesses (corporations, partnerships, limited liability companies) and individual entrepreneurs in many commercial areas including real estate, energy, importing, wholesaling and retailing, as well as nonprofits and institutions of higher and graduate learning.

### SIGNIFICANT MATTERS

Mr. Schwalb has successfully tried cases (both jury and bench trials) and has been involved in complex litigation matters in state and federal trial and appellate courts, as well as in arbitration and mediation, throughout the country, with extensive experience in the state and federal courts of the District of Columbia, Maryland and Virginia.

of Maryland

U.S. Court of Appeals for the D.C. Circuit

U.S. District Court for the Eastern District of Virginia

U.S. Court of Appeals for the Fourth Circuit

## EDUCATION

J.D., *cum laude*, Harvard Law School, 1992

A.B., *magna cum laude*, Duke University, 1989

*Phi Beta Kappa*

## JUDICIAL CLERKSHIPS

Honorable John R. Hargrove, Sr., U.S. District Court for the District of Maryland, 1992 - 1994

Mr. Schwalb's recent trials include:

### Real Estate Litigation

- Successful representation of real estate owner and developer in dispute over ownership and development rights for a valuable parcel of real estate located in down town Bethesda, Maryland. Two investors brought an action against developer alleging breach of fiduciary duty and contract, seeking to dissolve the LLC, seeking several million dollars in damages, and seeking to deprive developer of its right of first refusal. After a five day arbitration trial, an Arbitral Award was entered in favor of owner/developer on all claims, including upholding developer's exercise of its right of first refusal and acquisition of the Bethesda property despite the Claimants' contentions that developer had purchased the property for \$3 million less than fair market value.
- Successful representation of a real estate development company in the Circuit Court for Montgomery County, Maryland in a case involving breaches of ground leases entitling developer to build, lease and sell luxury apartment buildings in Bethesda, Maryland, resulting in a \$36.4 million jury verdict in favor of developer (reported to be the largest single verdict in the State of Maryland in 2010), as well as court orders requiring defendants to pay Mr. Schwalb's client's legal fees, in excess of \$5.4 million, as prevailing party.
- Successful representation of general partners in the Circuit Court for Montgomery County, Maryland in a case involving limited partner's claims of breach of fiduciary duty and improper squeeze-out, resulting in jury verdict rejecting limited partner's claim to damages and attempt to dissolve limited partnership, and a jury verdict finding that limited partner had breached its agreement and was liable to general partners for more than \$3.1 million in legal fees and costs.

### Tax Controversy Litigation

- Successful representation in U.S. Tax Court of taxpayer accused by IRS of having entered into an "excess benefit" transaction with non-profit tax exempt organization. After developing a thorough factual record and expert testimony demonstrating that the transaction between the taxpayer and the tax exempt organization provided a substantial benefit to the non-profit entity and thus, did not constitute an "excess benefit" transaction, the IRS conceded the case, acknowledging that taxpayer owed no additional tax.

### Trust and Estate Litigation

- Successful representation in the Circuit Court for Dade County, Florida of Personal Representative of an estate valued in excess of \$35 million against alleged beneficiary's attempt to set aside the decedent's testamentary documents on grounds of undue influence and lack of testamentary capacity.

### General Litigation

- Successful representation in the Circuit Court for Fairfax County, Virginia of homeowner in a nuisance and negligence suit brought by adjacent neighbor suing for more than \$20 million in actual and punitive damages for alleged property damage caused by flooding, resulting in jury verdict for defendant landowner and rejection of all adjacent neighbor's claims.
- Successful representation in the U.S. District Court for the District of Columbia of a local university and its law school against sexual harassment, Title VII retaliation and breach of contract claims filed by a former visiting professor, resulting in jury verdict for defendant university on all claims.
- Successful representation in the Superior Court for the District of Columbia of a local university and its medical school against claims of national origin discrimination, Title VII retaliation and breach of contract filed by medical resident dismissed from residency program, resulting in jury verdict for defendant university on all claims.

## HONORS

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

U.S. Department of Justice, Tax Division (Honors Program) (1994-1998), Recipient of Tax Division Outstanding Attorney Award, 1997

Fellow, American College of Trial Lawyers

Listed in *The Best Lawyers in America*, Commercial Litigation, Litigation - Real Estate, Litigation - Trust and Estates and Litigation and Controversy - Tax (Woodward/White, Inc.), 2010 to present

Recognized in *Super Lawyers Business Edition*, Business Litigation, Washington, DC, 2013

Selected for inclusion in *Washington DC Super Lawyers*, 2010 - 2015

Washington, DC Legal Elite, 2006, *SmartCEO Magazine*

## ACTIVITIES

Mr. Schwalb is active in the District of Columbia Bar Association, having served on the Litigation Section's and Courts, Lawyers and Administration of Justice Section's Steering Committees. He is a member of the American Bar Association and its Litigation Section. Mr. Schwalb is on the Board of Directors for the Council for Court Excellence, and a member of the Lawyer's Club of Washington. He is a member of the Board of Directors and serves on the Executive Committee of Adas Israel Congregation in Washington, DC. Mr. Schwalb also is an instructor and Program Director for the National Institute for Trial Advocacy, an instructor in the ABA's Litigation Institute for Trial Training and the Maryland Judicial Institute. Mr. Schwalb was born and raised in the Washington, DC area. He, his wife and three daughters live in DC.



## George E. Constantine

Partner

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### AREAS OF PRACTICE

Political Law  
 Tax-Exempt Organizations  
 Tax Controversies and Litigation  
 Tax and Wealth Planning  
 Regulatory  
 Antitrust

### INDUSTRIES

Nonprofit Organizations and Associations  
 Credit Counseling and Debt Services

### BAR ADMISSIONS

Maryland  
 District of Columbia

### EDUCATION

J.D., University of Maryland School of Law, 1998

Recipient, Order of the Coif law school honors society

Recipient, Judge R. Dorsey Watkins Award for excellence in torts

B.A., Loyola College In Maryland, 1989

George Constantine concentrates his practice exclusively on providing legal counseling to and advocacy for nonprofit organizations, including trade associations, professional societies, advocacy groups, charities, and other entities. He has extensive experience with many of the major legal issues affecting nonprofit organizations, including contracts, tax, antitrust, governance, and political activity matters.

Mr. Constantine has represented Internal Revenue Code § 501(c)(3), 501(c)(4) and 501(c)(6) clients on a number of critical tax-exemption matters, including representing clients that are undergoing Internal Revenue Service examinations challenging their exempt status; he has assisted associations and other nonprofit organizations going through mergers, consolidations, joint ventures, and dissolutions; and he has provided ongoing counseling on numerous transactional and governance matters that are unique to nonprofit organizations.

Mr. Constantine serves on the Legal Section Council of the American Society of Association Executives. In addition, Mr. Constantine is the former Staff Counsel of the American Society of Association Executives (ASAE), the 25,000-member national society for trade and professional association executives. As ASAE's sole staff attorney, he gained in-depth experience with the many legal issues facing associations. He also represented ASAE's interests before Congress and federal agencies. Mr. Constantine co-chairs Venable's Regulatory Practice Group.

### HONORS

Recognized in *Legal 500*, Not-For-Profit, 2012 - 2015

### PUBLICATIONS

Mr. Constantine is the author of numerous articles regarding legal issues affecting associations and other nonprofit organizations published by ASAE, the Greater Washington Society of Association Executives, the American Chamber of Commerce Executives, the New York Society of Association Executives, and the Texas Society of Association Executives.

- June 2, 2015, Association Codes of Ethics and Conduct: Minimizing the Liability Risks
- May 6, 2015, Federal Appeals Court Affirms Mandatory Filing of Unredacted Donor List by Charities Registered for Solicitations in California
- April 2, 2015, Boycotts and Association Meetings: Managing Your Organization's Risk
- March 2015, Association TRENDS 2015 Legal Review

- January 27, 2015, IRS Publishes New Revenue Procedures Addressing Applications for Tax-Exempt Status
- November 19, 2014, Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices
- October 2, 2014, Best Practices for Enhancing the Nonprofit Governance Model
- June 24, 2014, Multi-Entity Organizations
- March 27, 2014, Top Five Nonprofit Legal Issues of the Past Year
- February 28, 2014, Key House Committee Chairman Releases Long-Awaited Tax Reform Overhaul: Major Changes Proposed for Nonprofits
- February 2014, Informing Regulators When You Alter Your Mission
- January 2014, Is Your Nonprofit Selling Goods Online? U.S. Supreme Court Provides Reminder of Potential Sales Tax Liability
- September 27, 2013, New Developments on Federal Tax Matters Impacting Associations
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- July 9, 2013, A Look at the IRS Final Report on the Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations (presentation)
- May 14, 2013, Revisiting "Force Majeure" for Nonprofit Meetings and Events
- May 2013, IRS Releases Final Report on Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations (article – short version)
- March 25, 2013, Revisiting 'Force Majeure' for Association Meetings and Events
- March 12, 2013, Protecting Your Nonprofit Housing Counseling Agency's 501(c)(3) Status
- March 2013, IRS Denials of Tax-Exempt Status to Mortgage Foreclosure Assistance Providers Offer Lessons for Housing Counseling Agencies
- March 1, 2013, Safe Passage: Managing Legal Risks when Your Association Meets Abroad
- February 5, 2013, IRS Releases Exempt Organizations 2012 Annual Report and 2013 Workplan
- February 4, 2013, IRS Examinations of Nonprofit Housing Counseling Agencies
- October 2012, IRS Releases Group Exemption Questionnaire as Part of Compliance Check Initiative, *Nonprofit Alert*
- July 12, 2012, Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies
- June 12, 2012, Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips and Common Pitfalls
- May 2012, FCC Orders TV Stations to Post Their Political Files Online
- May 2012, Groups Sponsoring Electioneering Communications Must Disclose All Donors Pending Appeal of District Court Order
- May 17, 2012, Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls
- May 2012, Representing Foreign Entities
- May 2012, Tax-Exempt Organizations the Focus of Upcoming Congressional Hearings
- April 26, 2012, Changes in Store for Group Tax Exemptions?
- March 2012, Association TRENDS 2012 Legal Review
- January 10, 2012, Top Ten Things Every New Nonprofit General Counsel Should Know
- December 19, 2011, The New DC Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply



- November 18, 2011, The New DC Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- November 4, 2011, Top Ten Things a New Nonprofit General Counsel Should Investigate
- September 27, 2011, Protecting and Licensing Nonprofit Trademarks: Key Trademark and Tax Law Issues
- August 3, 2011, Could Your Nonprofit's Chapters Be Considered "Franchises" under State Law?
- Summer 2011, Grassroots Lobbying: A Legal Primer
- July 20, 2011, Related Foundations of Associations: Top Five Legal and Tax Pitfalls to Avoid
- February 2011, Recent IRS Determination Highlights Importance of Separation Among Affiliates
- December 16, 2010, So You Want To Be On The Internet ®
- November 3, 2010, Cyberspace Risk: What You Don't Know Could Hurt You
- July 22, 2010, Lobbying for Your Agency: Avoiding the Tax and Legal Pitfalls
- May-June 2010, The IRS Tax-Exempt Examination Process
- April 27, 2010, IRS Provides Guidance to Nonprofits Assisting Homeowners
- April 9, 2010, Legal Traps of Internet Activities for Nonprofits
- March 30, 2010, DC Circuit Paves Way for Unlimited Contributions for Independent Expenditures
- March 2010, DC Circuit Paves Way for Unlimited Contributions for Independent Expenditures, Political Law Alert
- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- January 2010, Supreme Court Strikes Down Laws Banning Corporate Expenditures, Political Law Alert
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Organization?
- May 19, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- March 4, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- February 15, 2008, Political Activity, Lobbying Law and Gift Rules Guide
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- November 2006, Pension Protection Act of 2006: Provisions of Interest to Exempt Organizations
- October 1, 2006, New Tax Law Establishes Additional Standards and Requirements for Credit Counseling Agencies
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- January 2005, IRS Issues 'Virtual' Trade Show Guidance
- January 4, 2005, Characteristics of a Tax-Exempt Credit Counseling Agency
- October 27, 2004, New IRS Ruling Could Have Taxing Impact on 501(c)(3) Associations with Certification Programs
- August 10, 2004, Association Codes of Ethics: Identifying Legal Issues and Minimizing Risk

- April 16, 2004, Antitrust Concerns with Association Information Exchanges
- March 25, 2004, Untangling the Web - Internet Legal Issues for Associations
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- May 6, 2003, Summary of Provisions in S. 476 — The Charity Aid, Recovery, and Empowerment Act of 2003
- December 16, 2002, Good Governance — Ensuring That Your Association's Governing Documents Pass Legal Muster
- September 1, 2002, Association Activities Targeted in Recent Antitrust Enforcement Actions
- May 1, 2002, Corporate Sponsorship: The Final Regulations
- April 1, 2002, Associations and Campaign Finance Reform
- January 1, 2002, Recent Antitrust Decision on Salary Surveys Highlights Risks to Associations
- November 1, 2001, Legal and Tax Considerations for Capital Campaigns
- January - February 2001, New Campaign Finance Disclosure Law Hits the Wrong Target, *Journal of Taxation of Exempt Organizations*

## SPEAKING ENGAGEMENTS

Mr. Constantine is a frequent lecturer on association and tax-exemption organization legal topics, including corporate and tax issues.

- November 19, 2014, Enhancing the Nonprofit Governance Model: Legal Pitfalls and Best Practices
- October 2, 2014, Second Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- August 11, 2014, "Association Law Review for Aspiring CAEs" at the 2014 ASAE Annual Meeting & Exposition
- August 10, 2014, "Comparing Compensation: Effective Approaches to Benchmarking Pay and Perks" at the 2014 ASAE Annual Meeting & Exposition
- June 24, 2014, "Multi-Entity Organizations" for the Greater Washington Society of CPAs (GWSCPA)
- June 3, 2014, "The Impossible NO (A Panel on Getting Funders to YES)" at the 2014 Nonprofit Empowerment Summit hosted by Raffa, PC
- April 25, 2014, "Trade Association Update" for Georgetown Law's Representing and Managing Tax-Exempt Organizations CLE
- April 15, 2014, "Certified Association Executive (CAE) Prep Course Webinar," American Society of Association Executives
- September 27, 2013, "New Developments on Federal Tax Matters Impacting Associations" at ASAE's Annual Association Law Symposium
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- September 10, 2013, "Certification Review Course" for American Society of Association Executives
- August 5, 2013, "Association Codes of Ethics" at ASAE's Annual Meeting
- July 9, 2013, Legal Quick Hit: "A Look at the IRS Final Report on the Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 14, 2013, Legal Quick Hit: "Revisiting 'Force Majeure' for Nonprofit Meetings and Events" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- March 12, 2013, Protecting Your Nonprofit Housing Counseling Agency's 501(c)(3) Status

- September 6, 2012, "Association Legal Review" for American Society of Association Executives
- July 12, 2012, Nonprofit Chapters and Affiliates: Key Legal Issues, Pitfalls and Successful Strategies
- June 13, 2012, "Starting and Sustaining a Nonprofit Organization" for the Washington, DC Economic Partnership
- June 12, 2012, Legal Quick Hit: "Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 17, 2012, Nonprofit Contracts: Best Practices, Negotiation Strategies, Practical Tips, and Common Pitfalls
- May 2, 2012, "Risk and Reward – Keeping Your Tax-Exempt Status" for the Nonprofit Risk Management Center
- January 18, 2012, "Generating New Revenue Streams—Legal and Tax Issues for Nonprofit Organizations" at NYSAE Finance & Management Institute Luncheon
- January 10, 2012, Legal Quick Hit: "Top Ten Things Every New Nonprofit General Counsel Should Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- December 19, 2011, The New D.C. Nonprofit Corporation Act Takes Effect on Jan. 1, 2012: Everything You Need to Know to Comply
- October 21, 2011, "IRS Group Exemption Procedures" for ABA
- September 27, 2011, Association of Corporate Counsel Webcast: "Protecting and Licensing Nonprofit Trademarks: Key Trademark and Tax Law Issues"
- July 20, 2011, "Related Foundations of Associations: The Top Five Legal and Tax Pitfalls to Avoid" for the Association Foundation Group
- June 22, 2011, "Play on Natural Turf: Authentic and Transparent Grassroots Lobbying" for the American Society of Association Executives
- May 12, 2011, "Starting and Sustaining the Growth of a Nonprofit Organization" for the Washington, DC Economic Partnership Program
- November 12, 2010, Protecting Your Association from Cyber Attacks and Financial Fraud
- November 3, 2010, "Cyberspace Risk: What You Don't Know Could Hurt You," Nonprofit Risk Management Center
- September 13, 2010, "Board Leadership: Legal Issues" at Greater DC Cares Nonprofit Board Leadership Program
- July 22, 2010, "Lobbying for Your Agency: Avoiding the Tax and Legal Pitfalls" at the Association of Independent Consumer Credit Counseling Agencies Summer 2010 Conference
- June 8, 2010, Legal Quick Hit: "Lessons in Tax Compliance: The Broad Impact of the IRS' Interim Report on the Colleges and Universities Compliance Project" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 9, 2010, "Legal Traps of Internet Activities for Nonprofits" a Lorman Teleconference
- March 16, 2010, The Form 990: Dealing with the Fall Out (Audioconference)
- February 18, 2010, *Citizens United*: How the Supreme Court's Decision Will Impact Associations and Their Members
- February 18, 2010, "Legal Issues 2010: Keeping Your Association Out of Trouble" for the American Association of Medical Society Executives
- October 13, 2009, "Risk Management for Events and Meetings" course at the George Washington University's School of Business
- October 13, 2009, Presentation on meeting contracts to George Washington University students
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center, and Meeting Contracts

- July 16, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts: A Roadmap for Nonprofits
- March 3, 2009, Steering Clear of the Most Common Legal Hazards in Hotel, Convention Center and Meeting Contracts
- February 24, 2009, Legal Issues for Nonprofit Associations
- October 1, 2008, The New IRS Form 990: What Does it Mean for Your Organization?
- September 22, 2008, The New IRS Form 990: What Does It Mean for Your Nonprofit Organization?
- May 19, 2008, New IRS Form 990 Audio conference
- January 10, 2008, The Honest Leadership and Open Lobbying Act: New Lobbying and Ethics Rules
- November 5, 2007, American Public Health Association Annual Meeting
- September 28, 2007, Annual Association Law Symposium
- June 13, 2007, Contracts - 10 Steps to a Better Contract
- September 7, 2006, Legal and Tax Issues for Nonprofit Associations
- February 10, 2004, American Society of Association Executives Winter Conference
- November 4, 2003, Avoiding Association Tax Pitfalls in Cyberspace
- October 3, 2003, American Society of Association Executives 2003 DC Legal Symposium
- August 25, 2003, American Society of Association Executives' Annual Meeting
- April 17, 2003, Board Fiduciary Duties
- March 13, 2003, Protecting Your Chamber's Intellectual Property
- March 7, 2003, The Ins and Outs of Nonprofit Liability
- February 7, 2003, Legal and Tax Aspects of Raising Non-Dues Revenue
- December 10, 2002, ASAE 2002 Winter Conference



## Jacqueline Eckman

**CISA, CRMA, CFSA, Principal, CliftonLarsonAllen**

[Jackie.Eckman@claconnect.com](mailto:Jackie.Eckman@claconnect.com)

As a Principal at CliftonLarsonAllen, Jackie Eckman focuses her time serving nonprofit clients. Jackie's primary background is in audit and accounting, but she also spends time consulting on issues affecting nonprofits. Jackie has served clients of all sizes, from large, complex national organizations to local membership-based organizations. In addition, Jackie serves as an audit and accounting instructor internally for CliftonLarsonAllen, training staff on accounting and auditing changes and other topics affecting nonprofits. Jackie also serves as a member of CliftonLarsonAllen's internal quality review team.



## Matthew T. Journy

Counsel

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### AREAS OF PRACTICE

Tax-Exempt Organizations  
Tax and Wealth Planning  
Political Law  
Regulatory  
Tax Controversies and Litigation

### INDUSTRIES

Nonprofit Organizations and Associations  
Credit Counseling and Debt Services

### GOVERNMENT EXPERIENCE

Attorney, Internal Revenue Service

### BAR ADMISSIONS

Massachusetts  
District of Columbia

### EDUCATION

LL.M., Georgetown University Law Center, 2006  
J.D., Northeastern University School of Law, 2003  
B.A., Marquette University, 1999

Matt Journy is counsel in Venable's Washington, DC office, where he practices in the Nonprofit Organizations and Associations Practice Group. In his practice, Mr. Journy counsels trade and professional associations, public charities, private foundations, and other nonprofits on a variety of tax, governance, and general corporate matters, including tax exemption applications, audits, tax planning, joint ventures, unrelated business income tax issues, lobbying, and charitable solicitation, among other issues.

Mr. Journy also represents nonprofit clients in tax disputes with the IRS. Mr. Journy has represented clients before the IRS during each stage of the IRS examination process, including: the examination stage and administrative appeals process. If the tax controversy is not resolved administratively, Mr. Journy represents the client in court litigation, typically in U.S. Tax Court.

### SIGNIFICANT TAX CONTROVERSY LITIGATION MATTERS

- Successful representation in U.S. Tax Court of taxpayer accused by IRS of having entered into an "excess benefit" transaction under IRC § 4958. After developing a thorough factual record and expert testimony demonstrating that the transaction between the taxpayer and the tax-exempt organization provided a substantial benefit to the nonprofit entity and thus, did not constitute an "excess benefit" transaction, the IRS conceded the case, acknowledging that taxpayer owed no additional tax.
- Litigated multiple Declaratory Judgment matters contesting the authority of the IRS to issue a final adverse determination letter to organizations recognized as exempt under IRC § 501(c)(3). Settling each case by entering into a closing agreement under which the IRS continued to recognize the organization's tax-exempt status.
- Litigated and negotiated favorable settlement of deficiency cases resulting from the revocation of a nonprofit organization's tax-exempt status.

Mr. Journy has appeared frequently before the IRS National Office, representing clients in requests for private letter rulings or technical advice memoranda.

Having worked both as a regulator and tax consultant in the nonprofit community, Mr. Journy draws upon his prior experience to provide clients with reliable and thorough advice on the wide array of legal issues faced by nonprofits. Before joining Venable, Mr. Journy worked at Ernst & Young, LLP in the National Tax Practice, where he provided nonprofit clients with tax advice relating to corporate reorganizations, expenditure responsibility for international grants, fundraising activities, commercial co-ventures, unrelated business income, and post-issuance compliance for private activity bonds. In addition to providing tax advice, Mr. Journy provided tax compliance services, including the technical review of various federal and state tax and information returns. Prior to joining Ernst & Young, Mr. Journy worked in the Tax-Exempt/Government Entities Division of the IRS Office of Chief Counsel, where he prepared legal and technical advice for field agents and composed legal memoranda on a variety of issues affecting tax-exempt organizations.

## HONORS

Named American Bar Association "Outstanding Nonprofit Lawyer of the Year Award," Young Attorney category, 2014

Recognized in *Legal 500*, Not-For-Profit, 2013 and 2014

## PUBLICATIONS

- June 4, 2015, Top Trends and Traps in Nonprofit Executive Compensation
- March/April, 2015, Enjoining the IRS-Using Litigation to Stop a Revocation
- January 30, 2015, Federal Court Orders IRS to Release Digitally Readable Forms 990
- January 27, 2015, IRS Publishes New Revenue Procedures Addressing Applications for Tax-Exempt Status
- November/December 2014, Groundbreaking (or Not) Ruling Holds Form 1023 Not Required upon Incorporation
- October 2, 2014, Nonprofit Tax Issues: Where the IRS Is Today, and Where Congress Is Headed
- May/June 2014, Mitigating the Income Tax Expense of a Retroactive Revocation for EOs
- November/December 2013, Tools for Bypassing IRS Delays in EO Applications
- October 25, 2013, The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations (NGO General Counsel Forum Fall Meeting)
- October 24, 2013, The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- July 2013, Lessons from the IRS Nonprofit College and University Compliance Project: Final Report Offers a Wealth of Information for All Tax-Exempt Organizations (article – long version)
- July 9, 2013, A Look at the IRS Final Report on the Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations (presentation)
- May 2013, IRS Releases Final Report on Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations (article – short version)
- April 18, 2013, An Unfair Fight: IRS Enforcement of Intermediate Sanctions and the Lessons Learned from Recent Tax Controversies
- March 12, 2013, Protecting Your Nonprofit Housing Counseling Agency's 501(c)(3) Status
- March 2013, IRS Denials of Tax-Exempt Status to Mortgage Foreclosure Assistance Providers Offer Lessons for Housing Counseling Agencies
- March/April 2013, Using Section 7428 to Resolve Exempt Status Controversies, *Taxation of Exempts*, Volume 24, Number 5
- February 5, 2013, IRS Releases Exempt Organizations 2012 Annual Report and 2013 Workplan
- February 4, 2013, IRS Examinations of Nonprofit Housing Counseling Agencies
- January 28, 2013, Protecting Tax-Exempt Status: The Importance of Intangible Asset Valuation
- October 11, 2012, Nonprofit Executive Compensation and Incentive Compensation: Keys to Protecting Your Organization and Its Leaders from IRS Sanctions
- September 28, 2012, Paying for the Best: Executive Compensation for Section 501(c)(3) Public Charities (White Paper)

- July 10, 2012, The Next Generation of Nonprofit Executive Compensation: The Keys to Withstanding IRS Scrutiny
- June 19, 2012, The Next Generation of Nonprofit Executive Compensation: The Keys to Withstanding IRS Scrutiny
- May 15, 2012, IRS to Focus on Housing Counseling Agencies
- March 20, 2012, All About UBIT: What Nonprofit Leaders Need to Know
- January 26, 2012, The Next Generation of Nonprofit Executive Compensation: Providing a Competitive Advantage for Your Organization
- October 24, 2011, Unrelated Business Income Tax for Nonprofits: The Basics
- August 23, 2011, Nonprofit Executive Compensation: Avoiding the Treacherous Tax and Governance Pitfalls
- June 29, 2011, Nonprofit Salary Trends and Executive Compensation Issues
- June 16, 2011, Sponsorships, Advertising, Endorsements and Cause Marketing: Understanding Critical UBIT Issues for Nonprofits
- June 13, 2011, IRS Nonprofit College & University Compliance Project: Findings, Examinations and Mock Audits
- May 13, 2011, IRS Denies 501(c)(3) Status to Bankruptcy Counseling Agency
- April 12, 2011, Internal Revenue Code Section 501(q) and Its Critical Implications for the Nonprofit Housing Counseling Industry in Light of Recent IRS Guidance
- March 8, 2011, Sponsorships, Advertising, Endorsements, and Cause Marketing - Understanding Critical UBIT Issues for Nonprofits
- December 16, 2010, So You Want To Be On The Internet ®
- October 18, 2010, Avoiding UBIT Pitfalls
- June 3, 2010, A Lesson in Compliance: IRS Releases Interim Report on Nonprofit Colleges and Universities Compliance Project (Short Version)
- June 3, 2010, A Lesson in Compliance: IRS Releases Interim Report on Nonprofit Colleges and Universities Compliance Project (Long Version)
- May-June 2010, The IRS Tax-Exempt Examination Process
- April 27, 2010, IRS Provides Guidance to Nonprofits Assisting Homeowners
- April 9, 2010, Legal Traps of Internet Activities for Nonprofits
- March 9, 2010, Intermediate Sanctions: Why You Should Be Concerned about Excess Benefit Transactions and How You Can Avoid Them
- January 12, 2010, FIN 48: What Every Nonprofit Needs to Know
- December 10, 2009, Avoiding IRS Audit Risks: Protecting Your Club's Tax Exemption
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- June 2008, Requirements for Tax-Exempt Status under IRC § 501(c)(7): A Primer for Social Clubs
- June 2008, Advertising Considerations for Tax-Exempt Social Clubs

## SPEAKING ENGAGEMENTS

- November 13, 2014, "Tax Litigation" for ALI's Advanced Course on EOs
- October 2, 2014, Second Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- March 21, 2014, "How to Handle Tax Controversies and State AG Investigations" at the 2014 Washington Nonprofit Legal & Tax Conference
- December 4, 2013, "How to Protect Your Tax-Exempt Status – Beyond the Basics" at the NYSSCPA and FAE Exempt Organizations Conference
- October 25, 2013, "The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations" at the NGO General Counsel Forum Fall Meeting



- October 24, 2013, The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations
- September 26, 2013, Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- July 25, 2013, "The IRS College and University Compliance Project Final Report: UBIT & Executive Compensation Lessons for All Tax-Exempt Organizations" for Non-Profit Cooperation Circle
- July 9, 2013, Legal Quick Hit: "A Look at the IRS Final Report on the Nonprofit Colleges and Universities Compliance Project: UBIT and Executive Compensation Lessons for All Tax-Exempt Organizations" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 18, 2013, "An Unfair Fight: IRS Enforcement of Intermediate Sanctions and the Lessons Learned from Recent Tax Controversies" at the 1st Annual Institute on Not-for-Profit Law
- March 12, 2013, Protecting Your Nonprofit Housing Counseling Agency's 501(c)(3) Status
- January 28, 2013, "Protecting Tax-Exempt Status: The Importance of Intangible Asset Valuation," for the New York State Society of CPAs
- December 12, 2012, Association of Corporate Counsel Webcast: "Nonprofit Executive Compensation and Incentive Compensation: Keys to Protecting Your Organization and Its Leaders from IRS Sanctions"
- October 11, 2012, "Nonprofit Executive Compensation and Incentive Compensation: Keys to Protecting Your Organization and Its Leaders from IRS Sanctions" for Guidestar
- July 10, 2012, Legal Quick Hit: "The Next Generation of Nonprofit Executive Compensation: The Keys to Withstanding IRS Scrutiny" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- June 19, 2012, "The Next Generation of Nonprofit Executive Compensation: The Keys to Withstanding IRS Scrutiny" for GuideStar
- March 20, 2012, "All About UBIT: What Nonprofit Leaders Need to Know" for the Better Business Bureau of New York
- January 26, 2012, The Next Generation of Nonprofit Executive Compensation: Providing a Competitive Advantage for Your Organization
- November 3, 2011, National Business Officers Association / National Association of College and University Business Officers Tax Forum on School, College and University Nonprofit Tax Challenges
- August 23, 2011, Nonprofit Executive Compensation: Avoiding the Treacherous Tax and Governance Pitfalls
- June 29, 2011, "Nonprofit Executive Compensation" for Association TRENDS
- June 16, 2011, Sponsorships, Advertising, Endorsements and Cause Marketing: Understanding Critical UBIT Issues for Nonprofits
- June 13, 2011, "Internal Revenue Service (IRS) Compliance Project: Findings and Examinations; 990 Discussions," 9th Annual Higher Education Compliance Conference
- April 12, 2011, Internal Revenue Code Section 501(q) and Its Critical Implications for the Nonprofit Housing Counseling Industry in Light of Recent IRS Guidance
- April 10, 2011, "Top Tax Issues Relating to Income Generated by State and Municipal Organizations Exempt under Sections 115, 501(c)(3) and 501(c)(4)" at the 2011 IMLA Mid-Year Seminar
- March 8, 2011, Legal Quick Hit: "Sponsorships, Advertising, Endorsements, and Cause Marketing - Understanding Critical UBIT Issues for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- October 18, 2010, "Confusing Stuff You Need to Know to Keep You and Your Chamber Out of Trouble" for the Western Association of Chamber Executives (WACE)

- June 8, 2010, Legal Quick Hit: "Lessons in Tax Compliance: The Broad Impact of the IRS' Interim Report on the Colleges and Universities Compliance Project" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- April 9, 2010, "Legal Traps of Internet Activities for Nonprofits" a Lorman Teleconference
- March 16, 2010, The Form 990: Dealing with the Fall Out (Audioconference)
- March 9, 2010, Legal Quick Hit: "Intermediate Sanctions: Why You Should Be Concerned about Excess Benefit Transactions and How You Can Avoid Them" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- February 12, 2010, "Avoiding IRS Audit Risks: Protecting Your Club's Tax Exemption Status from IRS Scrutiny" at the Club Managers Association of America (CMAA) World Conference on Club Management
- January 12, 2010, Legal Quick Hit: "FIN 48: What Every Nonprofit Needs to Know" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- October 6, 2009, Legal Traps of Internet Activities for Nonprofits
- September 16, 2009, "The Impact of the New IRS Form 990 on Healthcare Philanthropy: The Changes That You Need to Know About" to the Association for Healthcare Philanthropy



## David Trimner

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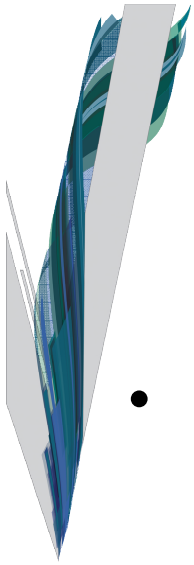
[david.trimner@CLAconnect.com](mailto:david.trimner@CLAconnect.com)

David has provided specialized tax consulting and compliance services to several hundred tax-exempt clients over his career. He provides Federal and state tax services, focused primarily on public charities, private foundations, trade associations, healthcare organizations and higher education institutions. David devotes himself to thorough comprehension of the rules and regulations critical to charitable and tax-exempt entities as well as assisting in the preparation of tax filings designed to enhance an organization's image with contributors, the media and the general public. David also assists clients on a variety of other issues including unrelated business income, intermediate sanctions, obtaining and maintaining exempt status, IRS examinations, executive compensation and benefits disclosures, and state solicitation requirements.



# Additional Information

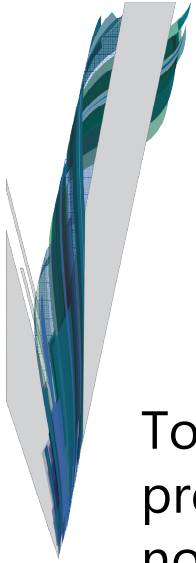
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## Upcoming Venable Nonprofit Events

Register Now

- **November 17, 2015** – [Proposed Changes to the FLSA's White-Collar Exemption Criteria: What Nonprofits Need to Know about the Current Rules, Where Things Are Heading, and How to Avoid Employee Classification Traps and Pitfalls](#)
- **December 10, 2015** – [A Breach Can Happen to You \(or Already Has, and You Just Don't Know It Yet\): How Nonprofits Can Best Manage Cybersecurity Risk](#)
- **January 14, 2016** – [Impact Investing and Nonprofits: Opportunities, Innovative Structures, and Creative New Ways to Raise Funds and Further Your Mission](#)



# Venable Nonprofit Resources

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see [www.Venable.com/nonprofits/publications](http://www.Venable.com/nonprofits/publications) or [www.Venable.com/nonprofits/events](http://www.Venable.com/nonprofits/events).

To view recordings of Venable's nonprofit programs on our YouTube channel, see [www.youtube.com/user/VenableNonprofits](http://www.youtube.com/user/VenableNonprofits) or [www.Venable.com/nonprofits/recordings](http://www.Venable.com/nonprofits/recordings).

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# 2015 LEGAL REVIEW

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## ASSOCIATION LEGAL ISSUES FROM THE PAST YEAR



By George E. Constantine and  
Jeffrey S. Tenenbaum

FROM THE INTERNAL REVENUE SERVICE TO THE Federal Trade Commission to state and federal labor agencies, federal and state regulators are taking a close look at association activities in 2015. In light of changes to the law and enhanced enforcement efforts, association executives should take a close look at existing policies, procedures and practices regarding employment, member discipline, and tax compliance to minimize their associations' legal and tax risks in these areas.

Below are five key legal developments over the past year for association executives to keep in mind when evaluating legal and tax compliance efforts in the months ahead:

### I. Association membership restrictions and antitrust

The FTC has been looking closely at association rules governing member activities, particularly those that regulate conduct related to members' competition with one another. Most recently, the agency announced consent orders on Dec. 23, 2014, requiring the Professional Lighting and Sign Management Companies of America and the Professional Skaters Association to eliminate their bylaws provisions that limited competition among each association's members. These orders, along with two similar actions earlier in 2014 involving the California Association of Legal Support Professionals and the Music Teachers National Association, are important reminders that trade and professional association codes of ethics and membership restrictions can present significant antitrust risk if not structured properly.

PLASMA, an association representing about 25 member firms that specialize in commercial lighting, and electrical sign installation and maintenance, had bylaws provisions that, according to the FTC:

- Prohibited members from providing services in the designated territory of another member, unless the other member first declines to perform the work;
- Included a price schedule for any work performed in the designated territory of another member; and
- Barred any member, for one year following termination of membership, from soliciting or competing for the customers (or prospective customers) of another member.

Although the FTC challenged the first provision, the proposed consent order does not prohibit PLASMA from requesting that its members identify any geographic region(s) within which the members can quickly respond for service, so long as there are no restrictions on the number of members that may identify a particular geographic region as a "quick response" region.

In the PSA matter, the FTC raised similar concerns regarding a "no-solicitation" provision prohibiting member coaches from soliciting business from skaters who are signed onto other coaches.

The FTC's actions regarding these associations show a strong focus on activities that may restrict competition and, thus, in the eyes of the FTC, have an effect of causing prices to be artificially high. Associations should pay close attention to existing bylaws, codes of ethics, and other membership restrictions that seek to address competitive conduct such as advertising.

*See ISSUES, next page*

## Associations: Break some trademark rules!

By Andrew D. Price and Justin E. Pierce

UNDER THE TRADITIONAL RULES OF PROPER trademark use, brands must be used as adjectives and in a consistent manner. While this standard works for many brands, it is too restrictive when it comes to strong brands. Nonprofits with strong brands, especially famous ones, may break these rules when their culture, tradition and policy allow.

Recent trends suggest there are ways strong brands can use their marks as a noun or verb without substantial risk of genericide (i.e., when use of the term becomes so prevalent it is no longer uniquely tied to the brand-owning organization). A number of organizations have used their key trademarks as verbs in advertising campaigns without genericide. In recent months, for example, Google launched its advertising campaign "Play your heart out" to entice consumers to visit its PLAY store online.

To mitigate risk of genericide, we suggest that nonprofits take a few precautionary steps, such as:

- **Make clear to consumers** that the action suggested by the verbed-up brand use cannot be accomplished without using the branded product or service – the verbed-up brand can be built into taglines, slogans, and/or logos that reinforce this point;
- **Register the verbed-up brand** or the tagline, slogan, or logo containing the verbed-up brand; and
- **Monitor the public's use** and view of the verbed-up brand – ultimately, it is the consuming public that determines, through its use, whether a verbed-up brand has lost distinctiveness through genericide.

Next, traditional thinking says that a mark should be represented in a consistent manner. Brand owners fear the loss of rights that can occur when they cannot "tack" rights from an updated version of a mark onto rights from the original mark. Google did something disruptive when it started to morph its Google logo on a regular basis into so-called Doodles. The Doodles have enhanced goodwill in the Google brand by making it come to life in the eyes of consumers, and Google has conditioned consumers to believe that strong brands can change.

To mitigate risk, we suggest that nonprofits take a few precautionary steps, such as:

- **Make sure the subject design** or stylization has substantial goodwill;
- **Gauge how much to play** with the design

*See TRADEMARK, next page*

**ISSUES,** *from previous page*

ing, solicitations, bids, market allocation, and, of course, pricing. Such restrictions very well may give rise to significant antitrust risk.

**2. New state employment laws**

In recent months, states have been quite active in enacting statutes that affect all employers in their jurisdictions, including associations, and may require changes to existing policies. For instance, the District of Columbia recently became the 14th jurisdiction to enact a law that prohibits employers from asking applicants if they have ever been arrested. This “ban the box” law would permit an employer only to seek information about prior criminal convictions (not merely arrests) after it makes a conditional offer of employment to the individual. If an employer discovers a criminal conviction after the conditional offer is made, that conditional offer may only be revoked in narrow situations having to do with, for example, the nature of the conviction and its relation to the applicable position.

Also in the nation’s capital, the D.C. Wage Theft Protection Act was passed recently to require numerous notices to employees, increase penalties for employers who retaliate against employees who report labor violations, and revise record-keeping procedures. The new law has been the source of much confusion among D.C. employees and, in fact, has twice been modified by emergency amendments. It is expected to become effective after a mandatory congressional review period concludes; as of the time of this writing, that effective date was expected to be Feb. 26, 2015.

Finally, in California, employers are now required to guarantee employees at least three paid sick days per year. The law includes requirements for notice to employees about their sick leave accrual and right to use sick leave. No accrual or carry-over is required if an employer provides the full amount of sick leave at the beginning of each year, allowing the employee to take sick leave before he or she would have otherwise accrued it.

**3. Obamacare employer mandate begins**

The employer mandate provisions of the Affordable Care Act began to take effect on Jan. 1, 2015. This imposes a mandate on large employers to offer minimum essential coverage to full-time employees and their dependent children (up to age 26) or pay a penalty tax. Further, if that minimum essential coverage is not affordable or does not provide minimum value, the employer also will be subject to a penalty tax. The mandate in 2015 applies to employers that have employed an average of at least 100 full-time employees (including full-time equivalent employees) on business days during the preceding calendar year. In future years, the definition of an applicable large employer will be 50 full-time employees.

Associations in the 100-plus employee range certainly should already have been reviewing their healthcare offerings in light of this new requirement; those with 50 or more employees should prepare for next year if they have not already done so.

# Nonprofits with federal awards face new Super Circular compliance

By Dismas Locaria and Melanie Jones Totman

**N**OW, A YEAR AFTER ITS RELEASE, NONPROFITS that receive federal awards (including federal grants and cooperative agreements) must begin implementing the new requirements of the U.S. Office of Management Budget’s Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Super Circular). Through the Super Circular, an effort more than two years in the making, OMB sought to streamline eight federal regulations applicable to nonprofits and others into a single, comprehensive policy guide. Despite OMB’s intent, the Super Circular notably imposes a set of regulations on the federal award community that is more akin to the heavily regulated federal procurement/contracting arena, a stark departure from the previous regime. In particular, the Super Circular materially changes how federal awards are administered, how such organizations may subaward or subcontract with federal funds, and how those awards/contracts should be monitored. A number of provisions were added to prevent and eliminate waste, fraud and abuse, including mandatory disclosure requirements and a prohibition of organizational conflicts of interest. Accordingly, the implementation of the Super Circular will have important implications for all nonprofit recipients of, and applicants for, federal awards.

**4. New developments from the IRS**

With the scandals from the IRS Exempt Organizations Division slowly fading into history, the division’s new leaders have begun to implement changes to how associations and other tax-exempt organizations interact with the agency. Of note for 2015: the IRS has implemented significant cost increases for organizations seeking private letter rulings and has realigned its operations so that such letter rulings and technical advice memoranda are issued by a different office than had previously issued such documents. As a practical matter, this means that associations seeking a ruling from the IRS (for example, if the association is undertaking a new activity and wishes to know if the IRS will treat the revenue from that activity as taxable) will need to go to the Chief Counsel, an IRS office that does not work exclusively on tax-exempt matters. Notably, those associations will need to pay a \$28,300 fee to the IRS to obtain such a ruling.

Other recent developments include the new availability of an IRS Form 1023-EZ application for small organizations that wish to obtain 501(c)(3) tax-exempt status recognition. This new application, introduced in July, is far less burdensome than the full form. Filers must complete an eligibility worksheet certifying, among other things, that the organization’s total assets are less than \$250,000 and that actual gross receipts were less than \$50,000 for the past three years and are projected to remain the same or decrease over the next three years. The activities in the applications are described with codes, and no corporate documents are submitted.

In other IRS news, a federal judge on Jan. 30, 2015, handed the IRS a significant defeat in its fight against releasing IRS Form 990 information returns in a digitally readable format. The ruling will have a significant impact on the IRS as well as all tax-exempt organizations required to file the annual Form 990. Assuming this ruling is upheld or not challenged by the IRS, organizations that e-file their annual Form 990 will likely be the first

to feel the effects of this ruling. With members of the public having searchable versions of the forms, it will be easier for the media and others to search the documents for red flags and other areas of concern.

**5. Payroll taxes and nonprofit compliance**

The Treasury Inspector General for Tax Administration published the results of a study last year highlighting rampant noncompliance among tax-exempt organizations in the area of payroll tax withholding and payment. The study found that more than 64,000 nonprofits have not paid taxes owed since 2012; of those, about 1,200 owed more than \$100,000 in unpaid taxes.

Studies like this often serve as a launching point for IRS enforcement efforts. Payroll tax noncompliance may not present risk to an organization’s tax-exempt status, but it can expose individual directors to penalties. Further, noncompliance in this area is viewed by the IRS as a potential indicator of noncompliance in other nonprofit activities; as such, an IRS audit of an organization suspected of not meeting its payroll tax obligations will almost certainly involve a broader review of other compliance areas. Association executives should take this time to review their compliance with withholding and related payroll matters and, in particular, should review whether they are properly treating individuals as independent contractors (versus as employees).

**TRADEMARK,** *from previous page*

or stylization based on the strength of the mark (e.g., famous marks can be changed the most);

- **Change only the design or stylization,** not the corresponding word mark; and
- **Continue regular use and registration** of the original design or stylization.

Nonprofits should not be afraid to break the old rules of proper trademark use when it comes to strong brands, especially famous ones, when their culture, tradition, and policy allow.



## Cybersecurity and antitrust: Guidance for assn-sponsored information exchanges

By Andrew E. Bigart and Jeffrey S. Tenenbaum

ON OCT. 2 THE U.S. DEPARTMENT OF JUSTICE issued a business review letter advising CyberPoint International LLC that its True Security Through Anonymous Reporting cyberintelligence data-sharing program does not raise antitrust concerns. Although focused on the company's cybersecurity service, the DOJ letter provides a helpful reminder to trade and professional associations of the need to be cognizant of and review any proposed information exchange or benchmarking program for potential antitrust risk.

Although such programs offer numerous benefits for participating industry members and the public, any association-sponsored exchange of competitively sensitive information will draw heightened antitrust scrutiny because of the risk that the sharing of information can lead to anticompetitive agreements. Below is a brief summary of the DOJ letter and recommended best practices for any trade or professional association interested in managing a similar program.

### DOJ's business review letter

Under the federal Sherman Act and the Federal Trade Commission Act, information exchanges are analyzed under the rule of reason, which balances the procompetitive benefits of the conduct against the potential anticompetitive harm to determine the likely overall effect on competition. The main competitive concern with information exchanges is the potential for participating industry members to use the information exchanged to further a price-fixing or other anticompetitive conspiracy.

In reviewing CyberPoint's TruStar program, the DOJ applied the standard "rule of reason" analysis by reviewing (1) the business purpose and nature of the program, (2) the type of information shared, and (3) the safeguards implemented to minimize the risk that participants (members) will exchange competitively sensitive information. With respect to the first two points, the DOJ found that the focus of the program was procompetitive – it allows members to share accurate and timely intelligence on potential cyber threats, best

practices, and remediation solutions. In addition, the TruStar program offers members a "community forum" that allows them to discuss cyber threats and collaborate on best practices. In this regard, the DOJ noted that CyberPoint had implemented procedures to obtain commitments from members that they would not share competitively sensitive information.

Thus, for all three factors, the DOJ found that the TruStar program was procompetitive and unlikely to raise antitrust concerns.

### Recommended best practices for information exchanges

The DOJ business review letter, along with a prior joint DOJ/FTC statement on a similar cybersecurity proposal, reinforces that properly structured information exchanges and benchmarking programs can provide significant procompetitive benefits. To minimize potential risk, any trade or professional association seeking to develop such a program should keep the following safeguards in mind:

- **The proposed exchange should be reviewed** by antitrust counsel in advance.
- **Clearly articulate the purpose and procompetitive benefits** of the information exchange, and keep it closely focused on those criteria.
- **Participation should be voluntary**, and the program should include instructions cautioning participants on potential antitrust risk and prohibiting discussions of competitively sensitive information with other participants.
- **Participants should not be involved** in the collection or compilation of data for programs that involve the exchange of data. In addition:
  - **Any data provided by participants should be at least three months old** (no current or future information). Data should be provided by a minimum of five participants, with no individual participant's data representing more than 25% on a weighted basis.
  - The trade or professional association or third party managing the program should **treat specific data provided by participating members as confidential** and not disclose it in its raw form to any other participant or third party.
  - **The program should not identify the individual members** who participated in the survey/exchange.
  - **Any data published should be in aggregate form only.**
  - **Joint discussion and analysis of the data should be avoided.** Each participant should separately analyze the data and make independent business decisions based on the data.

## Investigating nonprofit fraud, embezzlement and charitable diversions

By Edward Loya, Stephanie Montano, Doreen Martin and Jeffrey S. Tenenbaum

ON OCT. 26, 2013, THE WASHINGTON POST reported that from 2008 through 2012, more than 1,000 nonprofit organizations disclosed hundreds of millions of dollars in losses attributed to theft, fraud, embezzlement, and other unauthorized uses of organizational funds and assets. According to a study cited by the Post, nonprofits and religious organizations suffer one-sixth of all major embezzlements – second only to the financial services industry.

While the numbers are shocking, the underlying reasons for nonprofit susceptibility to fraud and embezzlement are easy to understand. Many nonprofits begin as underresourced organizations with a focus on mission rather than strong administrative practices. As organizations established for public benefit, nonprofits assume the people who work for them, especially senior management, are trustworthy. Often these factors result in less stringent financial controls than implemented by their for-profit counterparts.

Of course, nonprofit employees are not immune to the vulnerabilities of economic distress, including financial difficulties, overspending and even gambling. Further, high-level employees and their close associates have significant access to organizational funds and financial records, causing them to believe they can successfully commit the fraud and embezzlement, and conceal their conduct from outside scrutiny. Employees may rationalize their unlawful conduct as just compensation for lower salaries or unfair treatment, or as legitimate financial arrangements whereby the employee is simply "borrowing" money from the organization.

In light of the disturbing numbers reported by the Washington Post, Congress and numerous state attorneys general have pledged to launch

investigations, and reportedly, some have. This will likely lead to even greater scrutiny by government regulators. External audits are necessary to ensure that effective financial controls and fraud prevention measures are being followed, but a standard audit is not the method by which nonprofit organizations should expect to detect fraud. The Association of Certified Fraud Examiners reports that less than 4 percent of frauds are discovered through an audit of external financial statements by an independent accounting firm.

Nonprofits may no longer elect to handle instances of fraud or embezzlement quietly to avoid unwanted attention and embarrassment. As of 2008, a larger nonprofit must publicly disclose any embezzlement or theft exceeding \$250,000, 5 percent of the organization's gross receipts, or 5 percent of its total assets. A tax-exempt organization whose gross receipts are greater than or equal to \$200,000 – or whose assets are greater than or equal to \$500,000 – is subject to additional public disclosure requirements on its IRS Form 990 concerning the embezzlement or theft.

Nonprofit boards of directors should facilitate establishment and supervision of strong policies that support the best practices explained above. Nonprofit organizations should put policies and procedures in writing to clearly communicate the organization's stance. While the board should not micromanage the day-to-day operations of an organization with paid staff, neither should it be complacent about its fiduciary obligation to "act with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances." Periodic review of financial reports and the IRS Form 990 return, appointment of an audit committee, and hiring a strong chief staff executive who is in sync with all of these risk management measures are all actions a board can take to fulfill its duty of care and protect the charitable funds and other assets entrusted to it.

# Enforceability of online terms of use

## Guidance for nonprofits from a federal appeals court

By A.J. Zottola and Robert Parr

IN A RECENT DOJ BUSINESS REVIEW LETTER to STARS Alliance LLC, the U.S. Department of Justice reviewed a joint purchasing arrangement proposed by an association of several nuclear utility operators. As a starting point, the DOJ noted that the proposal likely qualified for the safety zone for collaborations that account for less than 20 percent of the relevant market. Nevertheless, the DOJ went on to conduct a rule of reason analysis to determine whether the anticompetitive effects outweighed the procompetitive benefits.

Starting with potential anticompetitive effects, the DOJ found that it was unlikely the arrangement would “restrict competition in either the upstream markets for goods and services or the downstream markets for electricity” because the STARS members were generally located in different geographic areas and did not compete against each other. At the same time, DOJ found that the arrangement had the potential for procompetitive benefits through increased efficiencies and lower costs.

Further, DOJ noted that STARS had implemented numerous safeguards to limit the potential for anticompetitive coordination among its members, including that the joint purchasing activities would be voluntary for members, that members would not discuss prices for procuring goods and services, and that STARS would require antitrust compliance training for its members.

This ruling confirms the general rule that, absent extraordinary circumstances, the enforcement agencies are unlikely to challenge an association joint purchasing program where members are not required to purchase a particular product or service, each member makes its own independent decision to participate, and there is significant competition in the relevant market.

Associations looking to implement a joint purchasing program should implement safeguards, as appropriate, to prevent members from sharing competitively sensitive information, such as downstream sale prices, the timing of price increases or purchase orders, and margins. Suggested precautionary measures include:

- **Check your association’s governing documents** and evaluate its tax-exempt status to confirm that a joint purchasing program is a permissible association activity.
- **Consult with antitrust counsel** before establishing a joint purchasing program and periodically throughout the process to ensure compliance with antitrust laws.
- **Monitor the buying group’s market share** in the input and output markets to stay within the safeguards set forth in the enforcement agencies’ Antitrust Guidelines for Collaborations Among Competitors (e.g., 35 percent share for total purchases in the relevant input market and 20 percent share in the relevant output market).
- **The association or an independent agent should handle joint buying activity** and negotiate with suppliers on behalf of the purchasing group, or require each member to contract individually with the supplier offering a group discount.
- **The program should not impose minimum** purchasing requirements on members.
- **Participation in the joint purchasing arrangement should be available to all association members** and should not be limited by the size, type or location of a member.
- **Joint purchasing should not be used** to raise, lower or stabilize prices, or to boycott suppliers.
- **Members should not share competitively sensitive information** or enter into any agreement or understanding on prices or other competitive conduct in the downstream output market.
- **Any meetings of a joint purchasing group should have an agenda** and minutes. All discussions should be limited to the purposes of the joint purchasing group.
- **Antitrust counsel should be present at all meetings** where competitively sensitive information is discussed.

# VENABLE LLP

## Nonprofit Organizations Practice

With more than 600 nonprofit clients nationwide, Venable has the largest concentration of attorneys in the country providing counseling and advocacy for trade and professional associations, charities, foundations and other types of nonprofit organizations. Our clients call on us for assistance with matters of general nonprofit law and matters unique to their industries, professions, causes and issues.

As a result of our extensive experience representing nonprofit organizations, virtually no legal issue or problem is new to us. Experience with the most common and the most unusual nonprofit issues enables us to provide precise answers and workable solutions with a legal style marked by ingenuity and pragmatic judgment. Our understanding of the nature and business of nonprofits – derived not only from our legal practice, but also from our deeply rooted participation in the nonprofit community – enables us to offer broader and more useful counseling that recognizes practical management, political and business considerations. Our clients frequently remark 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 sophisticated legal challenges.

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. Here is a partial listing of Venable’s nonprofit team:



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## CYBERSECURITY ALERT

March 17, 2014

### CYBERSECURITY ASSESSMENTS – USING THE TOOL WELL

*This alert was also published by Inside Cybersecurity on March 21, 2014.*

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Are you considering a cybersecurity assessment? If you heard Venable's presentation, "**New Cybersecurity Framework Released: What You Need to Know**," you might be.

The Framework places increased emphasis on organizational cybersecurity risk management. NIST states in the Framework that "organizations responsible for Critical Infrastructure need to have a consistent and iterative approach to identifying, assessing, and managing cybersecurity risk." Sectors not considered to be Critical Infrastructure are likely subject to similar expectations. For instance, the SEC has indicated that "risk oversight is a core competence" of the boards of publicly held companies, and there can be little question today that cyber risk is an elemental component of many businesses' risk portfolios.

As a result, your organization should consider whether to perform reviews and assessments of your cybersecurity programs in the context of NIST's recommended risk management methodology. You may also want to determine your readiness to "adopt" the Framework or, because of current events and a growing awareness of increasingly sophisticated and widespread cybersecurity threats, perform vulnerability assessments or other penetration tests.

#### Why Consider an Assessment?

These assessments not only identify areas of improvement in any given cybersecurity program, but also confirm that other program components are successfully functioning as intended. These assessments can be extremely valuable in terms of risk management and could be used in litigation or enforcement actions to show that the cybersecurity program in question was "commercially reasonable" and managed in a reasonable manner. Additionally, corporate boards, as a matter of good corporate governance practice and fulfillment of their fiduciary duties, should consider obtaining periodic updates and assessments of their data security profile in light of the potential risks of IP loss, business interruption, harm to business reputation, and other adverse consequences arising from a data breach.

#### What Does My Organization Need to Know?

Evaluating your security program can help you identify areas where you can better protect your organization as well as your clients and customers, and there are some important considerations to keep in mind prior to embarking on such an endeavor.

- **First, consider engaging a third-party security consultant that specializes in cyber security.**  
The typical in-house IT department has many responsibilities related to the day-to-day operations of the business, whereas a third-party specialist makes it their business to know the latest and greatest threats as well as the most effective tools for defending against those threats. Bringing in a third-party specialist will both allow your IT department to continue focusing on the important work of keeping your business running and better ensure an objective analysis of organizational cyber risk.
- **Second, we urge you to consider having outside counsel retain your selected consultant, with draft reports being provided directly to the law firm.**  
This provides your lawyers with the ability to review draft findings and conclusions. Your organization likely will not know in advance what these third-party assessments will reveal, and having that information protected by attorney-client privilege could become very important, depending upon what is discovered in the assessment. Additionally, allowing your outside counsel the opportunity to provide input on the findings and conclusions in such a report while it is still in draft form enables them to ensure that a report does not contain speculative or inflammatory statements or conclusions

that are not necessary but that could be harmful if ever disclosed.

Venable's **Cybersecurity Team** has considerable experience with these types of assessments and has partnered with numerous IT consultant firms to provide both targeted and full-service cybersecurity reviews. Please feel free to contact us with any questions about protecting your organization while ensuring that its cyber risk is effectively and reasonably managed in light of the NIST Cybersecurity Framework.

## ARTICLES

June 18, 2015

### WHAT TO DO WHEN APPLICANTS ARE UNTRUTHFUL DURING THE HIRING PROCESS: LESSONS FOR NONPROFITS FROM THE SPOKANE NAACP CASE

Nonprofit employers are entitled to hire and employ individuals based on information that is both accurate and truthful. Such information permits the organization to safeguard its interests by hiring individuals who are capable of performing the jobs for which they are hired, thereby advancing the interests and mission of the nonprofit. Indeed, hiring individuals based on inaccurate information may expose a nonprofit to negligent hiring claims and even damage a nonprofit's reputation—as we saw in the recent controversy surrounding the now-resigned (volunteer, elected) president of the Spokane, Washington branch of the NAACP. Of course, the president was not an employee of the nonprofit, but the case is a good reminder of these risks in the employment setting. Even in the case of a nonprofit volunteer leader, similar cautions apply, albeit with far less legal risk.

Nonprofits should take steps to protect themselves from potential harm resulting from employee applicant-provided false or misleading information. In addition, when faced with an applicant or an employee who has provided inaccurate information during the hiring process, a nonprofit should carefully assess the significant potential legal risk associated with possible responses before taking action.

A nonprofit can protect itself from the liability risks stemming from inaccurate applicant-supplied data by including on its employment application—and any other document on which the applicant is responsible for listing information—an acknowledgment signed by the applicant that the information provided is accurate and that any falsification, misleading information, or omission can result in disqualification from further consideration for hire or immediate termination of employment. This signed acknowledgment not only puts applicants and employees on notice that there are consequences of providing inaccurate information, but it also sets forth the nonprofit's policy regarding the provision of false or misleading information or omissions. Such a written policy can be useful in defending against potential unlawful disqualification or termination claims. In addition, nonprofits may consider performing background checks to verify applicant data, but because of the implications and requirements of numerous state and federal laws, it is advisable to seek the advice of legal counsel first.

If a nonprofit discovers that an applicant or an employee provided false information or omitted information during the hiring process, disqualification or termination most likely will be the organization's desired response. Before taking any action, however, the employer should balance the potential damage resulting from the falsification/omission with its ability to successfully defend against a potential unlawful disqualification or termination claim. Specifically, the organization should assess the nature of the falsification/omission and its potential impact on the individual's ability to perform his or her duties and/or on the nonprofit as a whole—the greater the negative impact, the more likely it is that a disqualification or termination is warranted.

For example, if an applicant falsely represents that s/he received a college degree in a field related to the position for which s/he applied, it is highly possible that the applicant would perform the job duties unsatisfactorily, resulting in potential damage to the nonprofit's reputation and interests. The high likelihood of the applicant's inability to adequately perform his or her job duties provides the nonprofit with a legitimate, nondiscriminatory business reason for the disqualification, which is necessary to defend against an unlawful disqualification claim. In such a case, because the potential harm to the nonprofit outweighs the risk of the applicant bringing a successful claim, a disqualification likely would be appropriate.

In sum, to avoid potential damage to their reputation and interests, nonprofit employers should take steps to ensure that applicant-provided information is accurate. If, however, the organization discovers that an applicant or employee provided false or misleading information during the hiring process, it should weigh the risks associated with potential responses before it takes action.

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## ARTICLES

March/April 2015

### ENJOINING THE IRS-USING LITIGATION TO STOP A REVOCATION

*This article appeared in the March/April 2015 edition Taxation of Exempts.*

For many tax-exempt organizations and the practitioners who represent them, the prospect of litigating a tax issue against the IRS is possibly the scariest thing in the world. Tax litigation is therefore often viewed as a tactic to be used only when all hope is lost. Basically, most organizations and many tax advisors will not seriously consider the prospect of engaging in litigation over an organization's tax-exempt status until the IRS has already revoked the organization's exempt status and dissolution has become inevitable. This is the worst time to engage in tax litigation.

#### Background

To avoid litigation, most organizations facing the prospect of having their tax-exempt status revoked will have spent several years, possibly more than a decade, and expended a substantial portion of the organization's resources attempting to resolve their case administratively in a non-adverse manner. By the time that the IRS issues a final adverse determination letter revoking an organization's tax-exempt status, the organization will have incurred expenses related to an IRS examination; filing a protest to a proposed revocation; responding to the IRS rebuttal to the protest; at least one and possibly several meetings with an IRS appeals officer; requesting technical advice from the IRS National Office regarding issues about which the law is unclear, including whether the proposed revocation should be applied retroactively; seeking assistance from members of Congress (which rarely has any tangible benefit); and participating in meetings with various officers in the Exempt Organizations Division.

In addition to exhausting all avenues for a resolution within the IRS, many organizations will spend substantial time attempting to obtain a favorable resolution by seeking support from media sources and politicians, in the often misguided belief that this will compel the Service to reconsider its proposed revocation. All told, organizations will spend many thousands of dollars, or more, and countless hours floundering in the Service's administrative review process, and this does not even take into account the immeasurable costs of the institutional pressures of working under the prospect of a proposed revocation, which may include the loss of grant funding, questions from the media and others within the exempt community, and problems recruiting and retaining talented leadership—people who may well be concerned about the long-term viability of an organization that has already received a proposed revocation letter.

Often, by the time the IRS has revoked an organization's tax-exempt status and litigation has become the only remaining option, an organization will have exhausted its assets, ceased a substantial portion of its operations, significantly reduced its work force, and no longer have the ability to generate additional revenue. Basically, by the time that most organizations decide to litigate, all that remains of a once viable charity is an empty shell that lacks the assets to mount a sufficient legal defense. More significantly, many organizations will not consider engaging in litigation until circumstances are so dire that dissolution has become inevitable, irrespective of the outcome of the litigation. The worst time to attempt to litigate an organization's tax exemption is when the outcome of the litigation is no longer relevant to the organization's continued existence and the organization lacks the resources to challenge the Service's position in a meaningful way.

A review of prior case law provides multiple examples of organizations that filed a Tax Court petition but lacked sufficient funds to participate in any aspect of the case after the initial filing, and organizations that filed a petition after having dissolved—unsurprisingly, none of the organizations in these cases were ultimately successful in their litigation.<sup>[1]</sup> However, it is only at this point that many organizations decide to enter into litigation against the IRS.

The time to challenge a proposed revocation letter in litigation is not after the IRS has revoked the

organization's tax-exempt status and the ultimate fate of the organization has already been decided. Instead, an organization should litigate its exempt status before it is revoked, when it still has the ability to accept charitable contributions and can engage in operational activities that require it to be recognized as exempt under Section 501(c)(3). It is then that a favorable ruling by the court will actually benefit the organization, ensuring its continued existence. Litigating an exemption issue prior to the issuance of a final revocation letter provides several additional benefits. Among them:

- By litigating a case as a charitable entity, the organization preserves its ability to receive deductible contributions and avoid paying tax on these contributions throughout the litigation.<sup>[2]</sup>
- As a charitable entity, the organization will be allowed to continue to engage in its operational activities that require, or are substantially benefited by, recognition as a Section 501(c)(3) entity.
- More funds will be available to present the case in court, both because fewer resources will have been wasted on the administrative process and because the continuation of existing revenue streams will prevent the organization from simply depleting its funds.
- The burden of proof will be on the IRS, not the organization.
- Restrictions on the admissibility of evidence in U.S. Tax Court will be reduced.
- The organization will be able to take greater control over its tax-exempt status by obtaining an injunction prohibiting the IRS from revoking that status until the court rules on whether the organization should be recognized as exempt.

Regardless of the outcome, litigation will be a drain on an organization's resources. However, organizations that seek a judicial review of their tax-exempt status will be better able both to withstand the financial burdens of the litigation—which, based on the author's experience, are unlikely to significantly exceed the expense associated with the IRS administrative process—and, if a favorable ruling is obtained, emerge from litigation in a better position to continue their operations as seamlessly as possible.

There are two hurdles to implementing the strategy of litigating a case as early as possible to obtain the benefits discussed above. First, this strategy requires an organization to challenge the Service's final adverse determination before the Service issues it. Second, many of the benefits described above will benefit the organization only until the IRS actually revokes its tax-exempt status, and so depend on the organization's ability to enjoin the IRS from issuing the final adverse determination letter during the pendency of the litigation.

### **Obtaining a declaratory judgment before a revocation**

Pursuant to Section 7428, the U.S. Tax Court, the U.S. district court for the District of Columbia, and the U.S. Court of Federal Claims have concurrent jurisdiction to issue a declaratory judgment in the case of an actual controversy with respect to a determination, or the Service's failure to make a determination, regarding the continued qualification of an organization described in Section 501(c)(3). To meet the jurisdictional requirements necessary to obtain a declaratory judgment, Section 7428(a) "requires (1) an actual controversy (2) involving a determination or a failure to make a determination by the Secretary (3) with respect to an organization's initial or continuing qualification or classification as an exempt organization..."<sup>[3]</sup>

Courts have generally interpreted the "actual controversy" requirement to mean that "the power to issue declaratory judgments does not extend to advisory opinions on abstract or hypothetical facts, which do not involve any case or controversy."<sup>[4]</sup> As such, courts have determined that they lack jurisdiction over cases in which the Service has "not spoken finally with regard to [the] petitioner's status."<sup>[5]</sup> Therefore, when the Service recognizes an organization as exempt, as a general rule, "there is no actual controversy which gives rise to judicial review unless the IRS directly determines that the organization is no longer exempt."<sup>[6]</sup>

While a final adverse determination is generally required for an actual controversy to exist, courts have noted that an "exception to this requirement that the organization actually obtain an adverse final ruling exists when jurisdiction is invoked under Code § 7428(a)(2) on the ground that respondent has failed to make a determination as to initial or continuing qualification."<sup>[7]</sup> Further, in *Gladstone*,<sup>[8]</sup> the Tax Court specifically found that the Section 7428(a)(2) exception applied both to organizations seeking a determination regarding initial qualification for exempt status and to those seeking a determination regarding continued qualification of exempt status. "Congress clearly intended that declaratory judgment actions as to tax-exempt status ... be available remedies for revocation cases where final determinations were made and where there has been a failure to make a determination."<sup>[9]</sup>

In *Anclote Psychiatric Center*,<sup>[10]</sup> the Tax Court determined that when the organization received notice that the Service's National Office had reviewed and approved the Service's proposed adverse

determination through the issuance of a technical advice memorandum, the final revocation was inevitable. Once the issuance of the final adverse determination became inevitable, the court said that "[t]here can be no other conclusion but that an actual controversy existed."<sup>[11]</sup>

The author's experience has been consistent with the rulings in *Gladstone* and *Anclote*. In the past four years, the author's firm has filed four Tax Court petitions and one district court complaint seeking a declaratory judgment pursuant to Section 501(c)(3) prior to the issuance of a final adverse determination. Although the parties settled each of these cases on the Service's withdrawal of the revocation before the courts ruled on their jurisdiction over any of these cases, it is telling that the Service did not challenge the courts' jurisdictional authority to issue a declaratory judgment in any of the cases. Thus, it seems fairly settled that courts have jurisdiction over declaratory judgment cases that petitioners file prior to the issuance of a final adverse determination letter.<sup>[12]</sup>

### **Jurisdiction to enjoin the IRS in Section 7428 cases**

The question of whether a court that has jurisdiction to enjoin the IRS from issuing a final adverse determination letter while an organization is seeking a declaratory judgment is less clear, but no less important. The most significant reason why an injunction is so important is that it appears to be the Service's usual practice in these situations to issue a final adverse determination letter to an organization shortly after the organization files a suit for declaratory judgment, even when it has not completed the administrative process.<sup>[13]</sup> If the Service is able to revoke an organization's tax-exempt status while litigation is pending, it will effectively be able to eliminate several of the benefits that make the pre-revocation filing attractive—i.e., the ability to (1) receive charitable contributions throughout the litigation, (2) continue to engage in all activities requiring recognition as a Section 501(c)(3) organization, and (3) delay the adverse effect of a revocation for the duration of the litigation.

Another significant problem resulting from the issuance of a revocation letter during litigation was that it complicated the litigation by requiring the organization to file a second, "protective" petition to challenge the revocation letter. While, in the author's experience, the protective petition has never advanced beyond the initial pleadings, it is an additional obstacle and expense, both for the parties and the courts, which would be unnecessary if the courts have authority to enjoin the IRS from revoking an organization's tax-exempt status during litigation.

**Hurdles to obtaining an injunction.** As discussed above, Section 7428 expressly permits a tax-exempt organization to seek a declaratory judgment concerning its tax-exempt status. Therefore, by filing a suit seeking a declaratory judgment, a taxpayer will have properly invoked its statutory right under Section 7428 to have a court—not the Service—decide its tax-exempt status. In these circumstances, if the Service issues a final adverse determination letter before the court hears and adjudicates the taxpayer's claims, potentially making the financial burdens of litigating the case too large for the organization to fully litigate its claim, the Service will have effectively stripped the taxpayer of its statutory right to be heard by the court. Thus, it is reasonable to believe that a court of competent jurisdiction over a declaratory judgment case would also have the authority to protect its jurisdiction by issuing a narrow order restraining the Service from issuing a final adverse determination letter while the suit for a declaratory judgment is pending. This may be a reasonable assumption but, as with many things in tax law, the interpretation necessary to accomplish that apparently simple result is long and complex.

There are several obstacles to obtaining the seemingly reasonable injunction, the first and most significant of which is the limitation on a court's authority to restrain the assessment or collection of any tax through the issuance of an injunction or declaratory judgment by the Anti-Injunction Act (AIA),<sup>[14]</sup> and the federal tax exception to the Declaratory Judgment Act (DJA).<sup>[15]</sup> The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax was assessed."<sup>[16]</sup> In addition to and consistent with the AIA, suits to restrain tax assessment or collection are prohibited by the exception to the DJA, which permits individuals to obtain declaratory relief in cases of actual controversy "except with respect to Federal taxes."<sup>[17]</sup> If the AIA and the DJA are applicable in cases filed under Section 7428, absent a statutory exception from the DJA and the AIA specifically authorizing the court to grant the requested relief, the court will lack the jurisdictional authority to grant either the injunctive or declaratory relief requested in the taxpayer's filing.

The limitations that the federal tax exception to the DJA imposes are significant. They are, however, largely irrelevant to a taxpayer's timely request for declaratory judgment pursuant to Section 7428 because Section 7428 is expressly excluded from this limitation. Thus, if a court has the authority to grant declaratory relief under Section 7428, such relief will not be prohibited by the DJA.



While the limitations imposed by the DJA are easily avoided by the very provision of the Code permitting organizations to obtain a declaratory judgment, the AIA's limitations should be of particular concern to tax-exempt organizations seeking to enjoin the IRS from issuing a final adverse determination letter. In *Bob Jones University v. Simon*,<sup>[18]</sup> the Supreme Court ruled that a court order preventing the Service from issuing a final adverse determination revoking its recognition of an organization's Section 501(c)(3) status "falls squarely within the literal scope of the [AIA]."<sup>[19]</sup> Thus, any attempt to enjoin the Service from issuing a final adverse determination letter will necessarily be a motion to restrain the assessment or collection of any tax, and an organization seeking to enjoin the IRS from issuing a final adverse determination will need to demonstrate that the requested relief is excluded from the limitations that the AIA imposes.

Finally, to obtain the requested injunction, a taxpayer demonstrating that its motion for injunctive relief is not prohibited by either AIA or DJA will need to prove that it satisfies the common law requirements for obtaining an injunction in its circuit. These requirements generally include showing that (1) the action to be enjoined will cause the taxpayer an irreparable injury; (2) the taxpayer lacks any adequate remedy at law; (3) the balance of the equities is in favor of granting the injunction; and (4) the taxpayer is likely to succeed on the merits of the underlying case.<sup>[20]</sup>

**Federal tax exceptions to AIA and DJA.** The AIA provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax was assessed." Enacted in 1867, there is very little legislative history to the AIA to guide its interpretation. However, the Supreme Court discussed the purpose of the AIA in *Enochs v. Williams Packing & Navigation Co.*<sup>[21]</sup> The Court said that the "manifest purpose of Section 7421(a) is to permit the United States to assess and collect taxes alleged to be due without judicial intervention, and to require the legal right to the disputed sums be determined in a suit for refund."<sup>[22]</sup> Thus, it is clear that the AIA's language and intent prohibit any suit to restrain the assessment or collection of taxes unless it falls within a statutory exception to the AIA.<sup>[23]</sup>

In addition to and consistent with the AIA, suits to restrain the assessment or collection of any tax are prohibited by the tax exception to the DJA, which permits individuals to obtain declaratory relief in cases of actual controversy "except with respect to Federal taxes." The language of the DJA has been interpreted at times as broader than that of the AIA and in other instances has been deemed coterminous and coextensive with that of the AIA. "There is no dispute, however, that the federal tax exception to the Declaratory Judgment Act is at least as broad as the Anti-Injunction Act."<sup>[24]</sup> Courts considering the issue, therefore, historically held that the DJA is coextensive and coterminous with the AIA, so that an action allowed under one statute will not be barred by the other statute.<sup>[25]</sup>

Thus, an injunction may be available to a taxpayer that brings a suit seeking a declaratory judgment pursuant to Section 7428. Section 7428 is an express exception to the federal exception to the DJA and provides a court with the jurisdictional authority to grant the requested declaratory relief. As courts have ruled that the federal tax exception to the DJA is at least as broad as the AIA, a grant of jurisdictional authority to issue declaratory relief is necessarily a grant of authority to issue injunctive relief. Therefore, pursuant to the authorities cited herein, a court may grant preliminary injunctive relief notwithstanding the AIA's general prohibition on injunctions in tax cases.

**DJA legislative history and precedential authority.** Unlike that of the AIA, the legislative history of the federal tax exception to the DJA is very informative. The DJA was initially enacted in 1934 without the federal tax exception. Thus, taxpayers used the DJA to obtain declaratory judgments that effectively subverted the AIA by restraining the government's ability to collect and assess taxes. Congress responded in 1935 by amending the DJA to include the federal tax exception.

In discussing the purpose of the amendment, the Senate Finance Committee said that "application of the Declaratory Judgments Act to taxes would constitute a radical departure from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes."<sup>[26]</sup> Thus, Congress's purpose in adding the federal tax exception to the DJA was to ensure that the DJA was applied consistently with the AIA; i.e., that the AIA's prohibitions on restraining the government's ability to assess and collect taxes could not be avoided by a suit for a declaratory judgment.

When applying the federal tax exception to the DJA, courts have looked to both the language of the DJA and its legislative history, noting that the federal tax exception to the DJA was added for the "explicit purpose of limiting the jurisdiction of the courts to issue declaratory judgments in the same fashion as their general jurisdiction was limited by the Tax Injunction Act."<sup>[27]</sup> Thus, on examining the DJA's legislative history, several courts have concluded "that the Declaratory Judgment Act and the Anti-

Injunction Act were intended to be coterminous."<sup>[28]</sup> Under the coterminous interpretation of the AIA and the DJA, when granting injunctive relief or declaratory relief, courts have deemed an express exception to either the AIA or the DJA, not both, to be "determinative of jurisdiction."<sup>[29]</sup>

Applying the judicial interpretations of the federal tax exception of the DJA and the AIA, it is clear that the Section 7428 declaratory judgment exclusion from the federal tax exception to the DJA is also a statutory exception from the AIA. To hold otherwise would effectively eliminate the effect that Congress intended Section 7428 to have.

As stated above, the legislative history makes it clear that the purpose of adding the federal tax exception to the DJA was to ensure that the DJA was applied consistently with the AIA and did not provide a mechanism for circumventing the AIA prohibition on maintaining suits for the purpose of restraining the assessment or collection of any tax. Thus, if the declaratory judgment provision of Section 7428 is not also interpreted as an exception to the limitations of the AIA, courts—including the Court of Claims and the D.C. district court—would be precluded from issuing or enforcing the declaratory judgments that Congress has expressly delegated to them. As the court said in *Cohen*, "Congress did not intend to provide declaratory relief for litigants when the AIA barred injunctive relief. Holding to the contrary, as the IRS urges, would vitiate the structural design of the DJA."<sup>[30]</sup> In other words, if the court lacks the authority to grant injunctive relief, it will necessarily lack the authority to issue enforceable declaratory judgments. Further, if the court lacks the power to enforce its declarations made pursuant to Section 7428, it would find itself in the paradoxical situation of having the statutory authority to declare the rights of the parties but lacking the jurisdictional authority necessary to enforce those rights, thereby undermining the authority that Congress expressly granted.

In that situation, after obtaining a declaratory judgment by a court under Section 7428, taxpayers would either be forced to file a separate action for injunctive relief in another court that has the authority to grant such relief, or run the risk that the Service will disregard the court's unenforceable declaration and re-revoke the taxpayer's tax-exempt status. This could potentially result in a perpetual cycle through which the Service revokes a taxpayer's exempt status, then a court issues an unenforceable declaration under Section 7428 that the taxpayer is exempt, after which the Service re-revokes the taxpayer's tax-exempt status, restarting the cycle. The Seventh Circuit identified the reverse of this paradox in *Tomlinson v. Smith*. "It is unreasonable to think that a court with authority to issue a restraining order is without power to declare the rights of the parties in connection therewith. In other words, it is our view that the language which excepts federal taxes from the Declaratory Judgment Act is co-extensive with that which precludes the maintenance of a suit for the purpose of restraining assessment or collection of a tax."<sup>[31]</sup>

The unreasonable result of a non-coterminous interpretation of the federal tax exception to the DJA and the AIA is particularly problematic because, as the court in *Cohen* noted, "an injunction of a tax and a judicial declaration that a tax is illegal have the same prohibitory effect on the federal government's ability to assess and collect taxes."<sup>[32]</sup> Thus, when a party seeks an injunction and declaratory relief, the relief sought is "singular, as equitable relief, and not separate, as an injunction and declaratory judgment." "A non-coterminous reading of the two statutes thus poses an insurmountable obstacle. The court would not have jurisdiction to provide declaratory relief but could effectively do so anyway."<sup>[33]</sup>

*Cohen* and *Tomlinson* are not alone in their interpretation that the federal tax exception of the DJA is coterminous and coextensive with the AIA. These decisions are consistent with the rule in the majority of the circuits that have examined the scope of the AIA and the DJA.<sup>[34]</sup> Moreover, following the Supreme Court's rulings in *Bob Jones University* and *Americans United*, the circuits that have not deemed the AIA and the federal tax exception to the DJA to be coterminous have each determined that the federal tax exception to the DJA is "at least as broad as" the AIA.<sup>[35]</sup> As the AIA is no broader than the DJA, there can be no circumstance in which the DJA permits declaratory relief but the AIA prohibits injunctive relief. Therefore, a statutory exception to DJA, such as Section 7428, must also be interpreted as a statutory exception to the AIA.

**Standard statutory interpretation.** While it is clear that the DJA is at least as broad as the AIA, meaning that a statutory exception to the DJA must also be an exception to the AIA, such an interpretation is also consistent with standard rules of statutory interpretation. As the Supreme Court has stated in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), when interpreting a statutory provision "it is always appropriate to assume that our elected representatives, like other citizens, know the law."<sup>[36]</sup> Thus, when interpreting the breadth of the statutes, even in districts in which the courts have not interpreted the AIA and DJA to be coterminous, it is appropriate to assume that Congress was familiar with the precedents of the federal courts and that it "expected its enactment to be interpreted in

conformity with them."<sup>[37]</sup>

Because the case law interpreting the federal tax exception to the DJA as being coterminous with the AIA stretches back to *Tomlinson* in 1942, it is reasonable to assume that, when drafting Section 7428 in 1976, Congress was aware that numerous courts had adopted the coterminous interpretation of those statutes. Moreover, because the legislative history extensively quoted the Supreme Court's decisions in *Bob Jones University* and *Americans United*, it is a near certainty that Congress was aware that the Supreme Court had determined that the federal tax exception to the DJA was "at least as broad as" the AIA. Thus, Section 7428 should be interpreted in light of the Supreme Court's explanation that the federal tax exception to the DJA is at least as broad as the AIA.<sup>[38]</sup> The exemption from the federal tax exception of the DJA that confers on a court the authority to grant declaratory relief must also be interpreted as an exception to the general prohibition on a court's ability to issue injunctions pursuant to the AIA.

**Section 7428 is an exception to the DJA and the AIA.** The mere fact that the relief that a taxpayer seeks is an injunction does not foreclose the possibility that the court has the authority to grant that relief. Rather, it means that, to obtain the relief, the taxpayer must make its request pursuant to statutory authority granting the court jurisdiction to provide the relief. When an organization seeks a declaratory judgment under Section 7428, such statutory authority can be found in Section 7428, which confers on a court the statutory authority to grant declaratory relief that, as discussed above, has the same prohibitory effect as an injunction. Thus, consistent with the legislative history, precedential authority, and tenets of statutory interpretation, the Section 7428 statutory grant of authority to issue a declaratory judgment must also be interpreted as the statutory conferring of jurisdictional authority to issue the injunctive relief.

**Venue considerations.** An analysis of the law demonstrates that a court with the appropriate jurisdiction to issue a declaratory judgment also has authority to enjoin the Service from issuing a final adverse determination letter during the pendency of litigation filed under Section 7428. To obtain such relief, however, the court must believe that it has the jurisdiction to grant the relief. As Section 7428 grants the authority to issue a declaratory judgment to both the D.C. district court and the Tax Court, a decision about the best venue to seek injunctive relief requires an analysis of the general scope of each court's jurisdictional authority.<sup>[39]</sup>

**Tax Court considerations.** The author's firm has filed three motions for preliminary injunction in declaratory judgment cases in the Tax Court. The court ruled on two of the three motions, denying them for a lack of jurisdiction to grant the requested equitable relief without reaching a decision on the merits of the taxpayer's argument in either case. In denying the petitioners' requests for injunctive relief, the Tax Court said that injunctive relief is an exercise of a court's equitable authority and that, as the court lacked general equitable powers, its authority to grant equitable relief is constrained by specifically detailed statutory language. As the language of Section 7428 expressly permits courts only to grant declaratory relief, the court determined that it lacked the authority to grant injunctive relief under Section 7428.

The author disagrees with the Tax Court's ruling on these motions. First, in ruling that the authority to issue a declaratory judgment does not also carry the authority to enjoin parties from violating such declaration, the Tax Court's orders effectively hold that the court lacks the authority to enforce its own declaratory rulings issued pursuant to Section 7428. Also, the court's interpretation of the scope of Section 7428 failed to properly apply the *Golsen* rule, which caused the court to misinterpret the scope of its authority.<sup>[40]</sup> Had the court properly applied the *Golsen* rule, under which the AIA and the DJA were deemed to be coterminous in the circuits subject to the court's orders, it would have interpreted Section 7428 to be an exception to the AIA as well as the DJA. This would have given the court the authority to issue the injunctive relief requested by the taxpayers.

Although the author disagrees with the Tax Court's interpretation of the scope of its own authority to grant injunctive relief, that disagreement should be of little comfort to a taxpayer seeking to enjoin the Service from issuing a final adverse determination letter in Tax Court—the court's position on the matter is clear. The Tax Court believes that it lacks the statutory authority necessary to enjoin the IRS from issuing a final adverse determination while a petition for declaratory judgment is pending before the court. Therefore, it is extremely unlikely that the Tax Court will grant injunctive relief under such circumstances anytime in the near future. This should be considered as an important factor when selecting a venue for taxpayers who would like to enjoin the IRS from issuing a final adverse determination during the pendency of the litigation.

**D.C. district court.** The author's firm has filed only one motion for preliminary injunction in the D.C.

district court using theory discussed above and, unfortunately for this analysis, the court did not rule on that motion because the government conceded the revocation issue before the court had the opportunity to do so. The D.C. district court therefore has never ruled on the specific question of whether it has the authority to enjoin the Service from issuing a final adverse determination while a declaratory judgment case is pending. However, the D.C. circuit has a substantial number of precedential cases holding that the AIA and the DJA are coterminous.

Precedent in the D.C. circuit provides that, although the AIA and the DJA use different language, "well-documented history behind the tax exception to the DJA and its relationship to the AIA has led numerous courts, including the D.C. circuit, to conclude that the scope of the DJA's tax exception is 'coterminous' or 'coextensive' with the AIA's prohibition."<sup>[41]</sup> Therefore, when choosing a venue for filing a suit for declaratory judgment, practitioners should consider that in the D.C. circuit, "precedent interprets the DJA and AIA as coterminous" such that relief available under one statute will not bar relief available under the other.<sup>[42]</sup>

In addition to the favorable precedent in the D.C. circuit, and unlike the Tax Court, the D.C. district court has general federal question jurisdiction under 28 U.S.C. section 1331. Thus, the Tax Court's narrow interpretation of its authority to grant equitable relief will not be an obstacle in the D.C. district court and, if obtaining an injunction is a significant motivation for the timing of a suit for declaratory judgment, the D.C. district court may be a better venue for the organization's suit.

### Conclusion

Currently, no court has expressly ruled that an organization seeking a declaratory judgment under Section 7428 can enjoin the Service from issuing a final adverse determination letter during the pendency of litigation. However, under a coterminous interpretation of the AIA and the DJA, it is clear that the Section 7428 exception to the DJA must also be considered an exception to the limitations imposed by the AIA. Thus, organizations that are located in circuits, such as the D.C. circuit, where precedent holds that AIA and the DJA are coterminous, and that properly seek a declaratory judgment under Section 7428 prior to receiving a final adverse determination letter, should be able to enjoin the IRS from issuing a final adverse determination during pendency of the litigation.

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<sup>[1]</sup> See *Solutions Plus, Inc.*, TCM 2008-21 ("Petitioner's only involvement in this case has been to file the petition and a designation of place of submission"); *National Republican Foundation*, TCM 1988-336; *Abraham Lincoln Opportunity Foundation*, TCM 2000-261.

<sup>[2]</sup> Note that Section 7428(c)(1) allows organizations to receive tax-deductible charitable contributions during the pendency of a case seeking a declaratory judgment under Section 7428. However, pursuant to Section 7428(c)(2), the total amount of such contributions is limited to \$1,000 per individual for the duration of the litigation.

<sup>[3]</sup> *Gladstone Foundation*, 77 TC 221, 226 (1981).

<sup>[4]</sup> *AHW Corp.*, 79 TC 390, 397 (1982).

<sup>[5]</sup> *Id.* See also *High Adventure Ministries*, 80 TC 292 (1983) (mere threat of notice of proposed revocation does not give rise to actual controversy); *Founding Church of Scientology of Washington, D.C.*, 69 AFTR2d 92-1385 (Cl. Ct., 1992) (no actual controversy when organization sought declaratory judgment after IRS issued "no change" letter on completion of its examination).

<sup>[6]</sup> *Urantia Foundation*, 77 TC 507, 513 (1981).

<sup>[7]</sup> *AHW Corp.*, 79 TC 390, 397 (1982). See also *Founding Church of Scientology*, supra note 5 ("An actual controversy may exist when the IRS fails to make a determination, see I.R.C. Section 7428(a)(2), so long as the petitioner/plaintiff waits 270 days after the date on which the request for such determination was made.").

<sup>[8]</sup> Note 3, supra at 229, citing Staff of the Joint Committee on Taxation, *General Explanation of the Tax Reform Act of 1976* (Blue Book), page 403.

<sup>[9]</sup> *Id.*

<sup>[10]</sup> 98 TC 374 (1992).

[11] *Id.* at 378.

[12] For a more substantial analysis of judicial authority to issue declaratory judgment prior to the Service's issuance of a final adverse determination letter, see Journy, "Using Section 7428 to Resolve Exempt Status Controversies," 24 Exempts 5 (March/April 2013), page 8.

[13] In four of the five cases that the author's firm filed under this theory, the Service issued a final adverse determination letter that was eventually withdrawn in each case, shortly after the petition was filed.

[14] Section 7421(a).

[15] 28 U.S.C. section 2201.

[16] Section 7421(a).

[17] 28 U.S.C. section 2201 (a).

[18] 416 U.S. 725, 33 AFTR2d 74-1279 (1974).

[19] *Id.* at 416 U.S. 732.

[20] This article analyzes whether a court of competent jurisdiction to issue a declaratory judgment under Section 7428 has the authority to enjoin the IRS from issuing a final adverse determination during the pendency of litigation. It does not analyze the particular common law requirements for obtaining such injunctive relief in each circuit. However, a taxpayer intending to seek the injunctive relief discussed in this article should consider, before deciding where to file a suit for declaratory judgment, the relevant case law in the taxpayer's circuit as well as in the D.C. circuit to determine the most favorable venue for obtaining injunctive relief.

[21] 370 U.S. 1, 9 AFTR2d 1594 (1962).

[22] *Id.* at 370 U.S. 7.

[23] In addition to the statutory exceptions to the AIA, there is a narrow equitable exception that allows courts to grant an injunction when the taxpayer demonstrates both that (1) because of the assessment or collection of a tax, "the taxpayer would suffer irreparable injury" and (2) "that under no circumstances could the Government ultimately prevail." *Enochs v. Williams Packing & Navigation Co*, *supra*, note 21.

[24] *Bob Jones University*, *supra* note 18 at fn. 7.

[25] See, e.g., *Cohen*, 650 F.3d 717, 108 AFTR2d 2011-5046 (CA-D.C., 2011) (*en banc*).

[26] S. Rep't No. 1240, 74th Cong., 1st Sess. 11 (1935). Note that "Rev. Stat. 3224 is the lineal ancestor of the present 26 U.S.C. Section 7421(a)." *McGlotten v. Connally*, 338 F. Supp. 448, 29 AFTR2d 72-378 fn. 22 (DC-D.C. 1972).

[27] *McGlotten v. Connally*, 338 F. Supp. 448, 453, 29 AFTR2d 72-378 (DC-D.C. 1972).

[28] *Eastern Kentucky Welfare Rights Organization v. Simon*, 506 F.2d 1278, 34 AFTR2d 74-5985 (CA-D.C., 1974), *vacated on other grounds*, 426 U.S. 26 (1976).

[29] "*Americans United, Inc. v. Walters*, 477 F.2d 1169, 31 AFTR2d 73-582 (CA-D.C., 1973), *rev'd on other grounds sub nom. Alexander v. "Americans United" Inc.*, 416 U.S. 752, 33 AFTR 2d 74-1289 (1974) ("The breadth of the tax exception of [the DJA] is co-extensive with the effect of [the AIA], and so the applicability of the latter to our situation is determinative of jurisdiction.").

[30] *Cohen*, *supra* note 25 at 650 F.3d 729.

[31] 128 F.2d 808, 811, 29 AFTR 720 (CA-7, 1942).

[32] *Cohen*, *supra* note 25 at 650 F.3d 729.

[33] *Id.*

[34] *In re Leckie Smokeless Coal Co.*, 99 F.3d 573 (CA-4, 1996) ("Though the [AIA] concerns federal courts' subject matter jurisdiction and the tax-exclusion of the [DJA] concerns the issuance of a particular remedy, the two statutory texts are, in underlying intent and practical effect, coextensive"); *Perlowin v. Sassi*, 711 F.2d 910, 52 AFTR2d 83-5654 (CA-9, 1983) ("The [DJA] is coextensive with the [AIA]"); *Wyo. Trucking Ass'n v. Bentsen*, 82 F.3d 930, 77 AFTR2d 96-2098 (CA-10, 1996) (reach of the DJA and the AIA "is coextensive").

[35] *Bob Jones University*, *supra* note 18 at fn. 8 (no dispute "that the federal tax exception to the [DJA]

is at least as broad as the [AIA]"); *Alexander v. "Americans United," Inc.*, *supra* note 29 at fn. 10 (while the court did not take a position on whether the DJA and the AIA are coterminous, "it is in any event clear that the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]"); *McCarthy v. Marshall*, 723 F.2d 1034 (CA-1, 1983) (citing *Bob Jones University* in determining that "there is no dispute that 'the federal tax exception to the [DJA] is at least as broad as the [AIA]'"); *McCabe v. Alexander*, 526 F.2d 963, 965, 37 AFTR2d 76-750 (CA-5, 1976) (where the AIA applies, declaratory relief is necessarily unavailable because "the federal tax exception to the [DJA] is at least as broad as the [AIA]"); *Ecclesiastical Order of the ISM of AM, Inc.*, 725 F.2d 398, 53 AFTR2d 84-654 (CA-6, 1984) (citing *Bob Jones University* in determining that "the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]"); *Mobile Republican Assembly*, 353 F.3d 1357, fn. 6, 93 AFTR 2d 2004-335 (CA-11, 2003) ("the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]"); *Bufkin*, 111 AFTR2d 2013-2349, 2013-2350 (CA-11, 2013) (Eleventh Circuit has "noted that 'the federal tax exception to the [DJA] is at least as broad as the prohibition of the [AIA]'").

[36] *Cannon v. University of Chicago*, 441 U.S. 677, 696 (1979).

[37] *Id.* at 699.

[38] See Blue Book, *supra* note 9, page 402.

[39] Pursuant to Section 7428(a), the Court of Federal Claims also has jurisdiction to issue a declaratory judgment under Section 7428. However, the author's firm has not sought injunctive relief from the Court of Federal Claims and is unaware of any cases in which such relief has been requested. Thus, this article will not discuss that court's interpretation of its authority to grant such relief.

[40] Pursuant to the *Golsen* rule, for purposes of "efficient and harmonious judicial administration," the Tax Court is constrained by the precedent in the Court of Appeals that is responsible for reviewing the court's opinion. *Golsen*, 54 TC 742 (1970).

[41] *Z Street Inc. v. Koskinen*, 113 AFTR2d 2014-2217, 2014-2221 (DC D.C., 2014); see also *The Church of Scientology of Celebrity Centre, L.A. v. Egger*, 539 F. Supp. 491, 50 AFTR2d 82-5072 (DC, D.C., 1982) ("Although the two acts are not similarly worded, in this Circuit the two acts are interpreted conterminously.").

[42] *Cohen*, *supra* note 25 at 650 F.3d 727; see also *"Americans United," Inc. v. Walters*, *supra* note 29 at 477 F.2d 1176 ("The breadth of the tax exception of [the DJA] is co-extensive with the effect of [the AIA]"); *Eastern Kentucky Welfare Rights Organization*, *supra* note 28 at 506 F.2d 1284 ("A reexamination of the legislative history of the tax exemption provision leads this court to conclude, as it did in *Americans United*, that the [DJA] and the [AIA] were intended to be coterminous.").



## 10 Nonprofit Tax Issues to Address Before an IRS Audit

Knowing what examiners look for can help your organization prepare.

While the [percentage of nonprofit tax returns examined by the IRS](#) has slipped back to pre-2010 levels, it remains higher than the rates for small corporations and individuals. The frequency is still high enough that it strikes fear into the hearts of many who are responsible for annual tax filings.

The good news is that IRS examination patterns can serve as a guide for tax-exempt organizations wishing to avoid the excise taxes, penalties, and other consequences of noncompliance. Preparation is the best answer to an audit notice.

Following are 10 areas of concern that often come up in IRS examinations of nonprofits.

### 1) Executive officer compensation

The IRS may determine that your organization's executive compensation is an "excess benefit transaction." In essence, the IRS is claiming that an individual's total compensation package, including all benefits, is greater than the value of the work the person performs. Unless the claim is proven wrong, the individual is subject to a 25 percent excise tax, and the managers who approved the compensation are subject to a 10 percent excise tax up to \$20,000.

The burden of proof is generally on the organization, which must prove that the compensation is not excessive. However, if you follow three steps called the "rebuttable presumption of reasonableness," the burden of proof shifts to the IRS.

*Surprise and panic are your worst enemies when an IRS audit notice arrives. Preparation can be your best friend, but you have to know what to expect.*

1. Review and approval by an independent governing body or compensation committee
2. Use of comparable compensation data for similarly qualified persons in equivalent positions at similar organizations
3. Documentation and recordkeeping of the deliberations and decisions

If the IRS attempts to develop sufficient contrary evidence to rebut the presumption of reasonableness, it usually attacks the comparability data or the documentation.

### **Use competitor tax returns to support your compensation decisions**

The instructions to [Form 990 Schedule J](#) state that organizations may use the tax returns of similar organizations to determine comparable compensation. IRS guidance also suggests that small organizations (those averaging less than \$1 million in gross revenue) may rely on as few as three comparable organizations for such data. This implies, of course, that larger organizations should have a more rigorous method than simply downloading [Form 990](#) from three similar nonprofit organizations.

When considering whether to penalize for excessive compensation, the IRS looks at the following factors:

- Is the comparability data for a similar function at a similar organization (taxable or tax-exempt)?
- Are similar services available in the local geographic area?
- Did the organization obtain a compensation survey from a reputable professional firm with industry knowledge and expertise?
- Does the individual have written employment offers from similar organizations?

Organizations under these circumstances should engage an outside, independent professional to perform an annual compensation survey. Nonprofit compensation data may also be obtained from the [Council on Foundations](#) and the [Guidestar Nonprofit Compensation Report](#).

## **2) Form 1099 for independent contractors**

Every vendor you pay can be scrutinized for classification and reporting compliance. The IRS will go through your general ledger and ask for copies of contracts, receipts, invoices, and Forms 1099. If the IRS determines that your organization should have sent a 1099 to a vendor but failed to do so, it can impose a \$100 “failure to file” penalty and an additional \$100 “failure to furnish” penalty for each occurrence. Those amounts are set to increase for information returns filed after December 31, 2015.

The IRS can also require you to submit evidence for specified vendors for subsequent years without opening those years up to a full examination. For example, if the IRS is examining the 2012 tax return and determines that the 1099 reporting

requirements were not met in 2012, it does not have to formally open an examination of subsequent year tax returns in order to demand evidence that the organization met its 1099 reporting requirements in those years.

If your organization fails to issue a required 1099, the IRS will allow you to contact the vendor for confirmation that the vendor did, in fact, report the payment on its own tax return. If you don’t receive confirmation, you could be subject to a 28 percent backup withholding tax. For example, if you fail to issue a required 1099 to a vendor that was paid \$20,000, you may be liable for \$5,600 in backup withholding tax, plus penalties and interest.

### **Make it a habit: Obtain a W-9 from all vendors**

Obtain a [Form W-9, Request for Taxpayer Identification Number and Certification](#), from every vendor you do business with for every single year there is a transaction. If the IRS determines that the organization failed to file a required Form 1099 but did obtain a contemporaneous W-9, the IRS will impose the failure to file/furnish penalties, but it cannot impose the 28 percent backup withholding tax.

You should also have a robust system for issuing Form 1099. It is easy to overlook certain vendors, to mistakenly assume that a vendor is a corporation, or to rely on conclusions reached in prior years. At the end of every year, do a thorough and critical analysis of all vendors who received at least \$600 during the year. If in doubt, it is usually better to issue a 1099 that wasn’t necessary than to overlook one that was required.

## **3) Value of gifts to employees**

Your organization gave Henry a \$500 gift for his 25th anniversary and didn’t include the amount on his W-2. You also gave your employees a \$50 gift card for dinner and a movie, but didn’t report it as taxable compensation. You are liable for both the employer and the employee portion of payroll taxes, as well as 25 percent federal income tax.

### **Include the value of gifts in employee compensation**

Cash and gift certificates must always be included in taxable income. Other gifts must also generally be included unless they are “de minimis,” meaning that they are so small that accounting for them is impractical or unreasonable. Examples of de minimis benefits that do not need to be treated as taxable income include:

- Occasional use of the office copier and other supplies
- Snacks, coffee, doughnuts
- Occasional tickets to entertainment
- Flowers or fruit baskets for special circumstances
- Personal use of cell phone or laptop provided primarily for business

Business expenses that are reimbursed under an accountable plan are not taxable compensation.



When in doubt, it is better to include the amount in taxable compensation. You may choose to “gross-up” the payment to achieve the desired after-tax consequences. For example, if you really want Henry to get \$500, pay him \$650.

#### 4) Advertising and sponsorships

Your organization has “sponsors” who receive acknowledgement, either on your website, as part of a conference or trade show, or as part of contractual fee-for-services arrangement. While the entire payment may be classified as “sponsorship income” on your financial statements, the IRS will attempt to break these payments down into their constituent parts. Some parts of the payment may be excludible as a contribution, as exempt function income, or as a royalty. The examiner will attempt to determine if any portion of the acknowledgement is taxable as advertising.

##### Know the difference between advertising and sponsorships and treat the income differently

To start, you must understand the distinction between acknowledging a sponsor (nontaxable) and advertising (taxable). Advertising is a payment from an outsider in which the outsider receives something of benefit in return.

An advertisement:

- Promotes or encourages the use of the trade, business, service, facility, or product of the payor (“Visit today and check out our fine selection of tires”)
- Contains qualitative or comparative language (“Offering the finest selection of tires in town” or “The largest selection of tires in town”)
- Offers an endorsement (“Recommended for all your automotive needs”)
- Provides price information or indications of savings or value (“Home of the ‘Buy 3 Get 1 Free’ Special” or “Show your ticket stub for a 10% discount”)

In most cases, advertising revenue will be treated as unrelated business income (UBI) subject to taxation, unless the activity is not regularly carried on, or if it is directly related to the accomplishment of the exempt purpose of your organization (for example, a student newspaper, where selling ads is part of the training).

A sponsorship is a payment from an outsider where the payor receives nothing of value in return. The sponsorship acknowledgement may include:

- Recognition as a sponsor, including “exclusive” sponsorship
- Name, address, phone number
- Website
- Logo
- General description of product or services (“Retailer of bathroom fixtures”)

- Visual depictions of products or services
- Taglines (“The Ultimate Driving Machine”)
- Display or distribution of products

A sponsorship payment is usually treated as contribution revenue. You should provide a written acknowledgement to sponsors who give at least \$250. The acknowledgment should specify the value of any benefits that were provided to the donor in connection with the payment, including event tickets, goods, services, and advertising. Benefits other than advertising may be disregarded if the value is less than 2 percent of the sponsorship payment. In the case of qualified convention and trade show activities, benefits other than advertising will not be treated as UBI even if the activity would generate UBI if it were being conducted outside of a convention or trade show.

#### 5) Mailing lists

If you rent your mailing list to outside organizations, the payment is taxable if you provide services in connection with the rental. Some IRS agents take the position that only transactions between two charitable 501(c)(3) organizations can be excluded as royalties, while others have concluded that the activity can only be passive if it is conducted by a third-party list broker.

##### Use a list broker whenever possible if you rent your mailing list to outside organizations

If you prefer to handle the mailing list rental directly, the agreement should explicitly state that:

- Your organization is not obliged to perform any services (such as sending emails to your members or filtering the data in the list)
- The agreement is not a joint venture or a partnership
- Payment to your organization is for use of the list, and you will not share in the net profit or loss (this does not necessarily preclude the payment of a commission)
- Neither party is acting as an agent for the other
- If the contract contemplates more than just the rental of the mailing list, the portion of the payment that relates to the mailing list should be clearly stated.

#### 6) Lobbying and political activity

Nonprofit organizations have varying restrictions on the amount of lobbying and political activity they are allowed. Engaging in impermissible activities can result in excise taxes or revocation of your exempt status. Membership organizations must notify their donors of the nondeductible portion of dues that is attributable to lobbying, or they must pay a proxy tax.

##### Understand the difference between lobbying and political activity

You should begin with an understanding of what lobbying and political intervention mean for tax purposes:

- Lobbying is the attempt to influence the passage or defeat of a piece of legislation
  - Direct lobbying is contact with legislators
  - Grassroots lobbying is a call to action to motivate others to contact legislators
- Political intervention is an attempt to influence an election or defeat a candidate
- Lobbying and political intervention do not include:
  - Nonpartisan analysis, study, or research
  - Examination of broad social or economic problems
  - Providing technical advice in response to a written request by a legislative body
  - Communications designed to defend your existence or tax-exempt status

Next, determine the limits applicable to your organization:

- Private foundations may not do any lobbying or political intervention
- Public charities (501(c)(3) organizations) may do limited lobbying but no political intervention
- Non-charitable tax-exempt organizations may lobby and engage in political intervention as long as it is not the “primary purpose” of the organization

You must carefully track expenses related to your lobbying and political activities using one of the IRS’s approved methods of accounting:

- Gross-up method
- Ratio method

## 7) Reporting foreign investments

You may be generally familiar with the reporting requirements related to programs, activities, and grants awarded outside the United States. But it is often more difficult to identify foreign investments that require disclosure on Form 990 Schedule F and on other returns. There are significant penalties for failure to properly disclose foreign investments using the required form.

Your organization may have disclosure and additional filing requirements when:

- It owns an interest in, or transfers property to, a foreign corporation
- It has an interest in a foreign trust
- It owns an interest in a foreign partnership
- It is a direct or indirect shareholder in a passive foreign investment company (PFIC)
- It had operations in a boycotting country
- It has a financial interest or signature authority over a foreign financial account

### Track the location of all foreign investments

You can generally avoid problems with foreign investments by tracking the location of all of your organization’s

investments, including those disclosed in the footnotes in all Schedules K-1 showing pass-through income.

**Identify investments that meet the definition of a financial account** — A financial account includes, but is not limited to, a securities, brokerage, savings, demand, checking, deposit, time deposit, or other account maintained with a financial institution (or other person performing the services of a financial institution). A financial account also includes a commodity futures or options account, an insurance policy with a cash value (such as a whole life insurance policy), an annuity policy with a cash value, and shares in a mutual fund or similar pooled fund that is available to the general public with a regular net asset value determination and regular redemptions.

*You can generally avoid problems with foreign investments by tracking the location of all of your organization’s investments.*

Offshore hedge funds and private equity funds that are not offered to the public will not be considered financial accounts reportable as a financial interest in a foreign account. Owners of offshore private investment fund interest, and individuals with signature authority over these interests, are not required to report these interests unless the private investment fund itself owns financial accounts.

**Determine whether the investment in a financial account constitutes a financial interest** — A U.S. organization has a financial interest in a foreign financial account for which it is the direct owner of record or holder of legal title, or, among other things, it owns more than 50 percent of a financial account that is located outside the United States.

**Identify any foreign investments held indirectly through ownership of a pass-through interest in the United States** — Disclosure of such investments is not subject to reporting on [Schedule F Part I](#) or for FinCen (FBAR), but may trigger the filing of certain other returns.

**Identify foreign investments that are traded on a U.S. stock exchange** — These do not need to be reported.

## 8) Fundraising events

Special events are often unrelated to your exempt purpose. Absent a charitable element, they can be considered UBI, especially if they occur frequently. Nonprofits that conduct lavish events that result in little or no charitable revenue may open themselves to additional scrutiny by the IRS and criticism from the public.

“Donors” at these events must be given written acknowledgement, particularly when they receive something in return, such as an incentive gift. Non-charitable exempt

organizations should be very clear that no part of the donation is a charitable donation. Failure to provide the required documentation can cause the donor's charitable donation deduction to be denied, and can subject the nonprofit to penalties.

Accounting for a special event requires that you track the total gross receipts, the fair market value of anything the donor received in return, and the total expenses of the event. Organizations may be tempted to equate the expenses incurred in holding the event with the value received by the donors, but these are two independent calculations. Likewise, do not equate the *value* of any goods or services the donor received with your organization's *cost* of providing those goods and services.

Gaming activities, including lotteries, raffles, casino nights, and poker tournaments, are generally UBI. Most states have strict requirements for licensing and reporting.

#### **Determine a fair market value for the activity; any excess payment is a donation**

Careful planning well in advance of the event is essential. Identify the fair market value of the activity, such as attending a dinner or concert, or playing a round of golf. Only the portion of the payment in excess of that fair market value is a charitable donation. Keep careful records of the expenses directly connected to the event.

*Identify the fair market value of the activity, such as attending a dinner or playing a round of golf. Only the portion of the payment in excess of that fair market value is a charitable donation.*

For charitable contributions of \$250 or more that provide no benefits to the donor, you must provide a written acknowledgement that explicitly states that no goods and services were provided:

- "No goods or services were provided in return for the contribution."

For payments of \$75 or more that are partially a contribution and partially a payment for goods and services, you must provide a written acknowledgement that contains a description and good faith estimate of the value of goods and services provided.

- "Thank you for your payment of \$100. You received goods and services with a fair market value of \$60."

If your organization is exempt under 501(c)(3), you should also state that the deductible portion of the contribution is

limited to excess payment over the fair market value of the goods and services received.

With the exception of bingo and non-wagering sweepstakes, organizations should exercise extreme caution if conducting any gaming activity. Be sure to obtain the necessary licenses from local authorities, and comply with all reporting requirements, including [Form 990 Schedule G](#) and [Form 990-T](#).

## **9) Governance policies and fraud**

Form 990 Part VI contains numerous "trigger" questions regarding governance policies. With a few exceptions, it is unlikely that the answer to any single question will cause an IRS audit. However, the IRS has concluded that a pattern of weak oversight is an indication that an examination is warranted.

One question that has been known to trigger an IRS audit is regarding "a significant diversion of the organization's assets." An organization that discovers fraud may be tempted to minimize or obscure it for a variety of reasons, not the least of which is the increased chance of an IRS audit.

*The entire board should have the opportunity to review Form 990 before it is filed.*

### **Engage your board, educate your employees, and disclose instances of fraud**

Your board of directors should be actively engaged in fraud oversight. The board should adopt customized policies that meet your circumstances, including policies for conflict of interest, whistleblower protection, and document retention and destruction. The entire board should have the opportunity to review Form 990 before it is filed. Explanations in [Form 990 Schedule O](#) should be brief, concise, and accurate.

Even more important than having a fraud policy is educating managers and employees and monitoring compliance with the policies. Policies should be well publicized, and employees should provide an annual acknowledgement that they have read and understand them. Interested persons should complete an annual disclosure form to identify business and family relationships.

If you become aware of fraud, you must disclose the information on the return for the year of discovery, even if the fraud itself occurred in a prior year. The explanation must include a description of the fraud, the amount involved, and the corrective action taken. Do not provide information that could disclose the identity of the person or persons involved.

## 10) Respond to IRS compliance notices

Your organization may receive a notice from the IRS but not fully understand its implications, and either disregard it, or fail to bring it to the attention of qualified personnel. Failing to respond, or responding incompletely, can significantly increase the chance of an IRS audit.

### Formally designate someone to receive and respond to IRS notices

Form 990 Part VI allows you to provide contact information for “the person who possesses the books and records of the organization.” Do not simply fill in the name of your organization. When the IRS initiates contact, it usually does so by mail, not by phone, so it is important that you provide the name of a person who is authorized to respond to these communications. Do not allow notices to languish in the mail room or on the receptionist’s desk simply because there is uncertainty about who is responsible for replying.

Promptly notify your tax advisor, even if you intend to respond to the notice without assistance. Do not wait until the day the response is due, or until you receive a second (invariably more threatening) notice to ask for guidance. Engage a professional to prepare or review the response before it is submitted. Making a small investment to ensure a complete and accurate response can save an enormous amount of time and energy later.

### How we can help

If you understand what is required for IRS compliance and you act accordingly, there is no need to live in fear of an examination. Preparation begins, not when the examination notice arrives, but in the years prior to receiving it. Our nonprofit consultants can provide guidance, resources, and a tremendous amount of experience, so you can feel confident that your operational practices can stand up to IRS scrutiny.

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## Protecting Your Organization From Online Hackers

by Mark Eich

While high profile breaches at Target, Home Depot, and Sony dominate the headlines, breaches at small businesses fly under the radar. Yet these disruptions are often more devastating, even to the point of business failure.

Churches and other organizations that never considered themselves targets are becoming victims of credit card fraud, automatic clearing house (ACH) fraud, and wire fraud. These crimes are often perpetrated from outside the country by attacking the online cash management features that banks provide their customers.

You can take steps to protect your entity, but before taking action, you must first understand and acknowledge this growing threat. The attacks fall into three main categories:

- Theft of personal financial information
- Online banking malware (so-called corporate account take-over)
- Ransomware attacks (the most common being CryptoLocker)

### Theft of personal financial information

Organized crime groups (primarily in Russia, Eastern Europe, and China) have created a high demand for personal financial information, including name, address, social security number, driver's license number, bank account number, and credit card details. Hackers steal this information then sell it to criminals who use it to commit various forms of identity theft. The more complete and associated to an individual,

the more valuable the information is on a "wholesale" basis. Payroll databases, customer sales records, and supplier/accounts payable records are common targets for this type of attack.

This was the driving force behind the breaches at Target, Neiman Marcus, the University of Maryland, and many others. Indeed, as the price being paid to hackers escalates, smaller businesses are being targeted.

### Online banking malware

Zeus, Citadel, Spyeye, and Gozi are just a few examples of the new breed of sophisticated online banking malware. Once a network is infected with this type of malware the online banking credentials (user ID, password, challenge questions) are harvested by the attacker, who then logs into the online banking server and executes fraudulent wires or ACH transactions. More sophisticated malware can bypass multifactor authentication tokens. This type of attack is often called corporate account takeover.

Malware code is often delivered via email, either by a file attached directly to the message, or more commonly, by use of a link to a rogue web page. In the latter case, the malware returns with the web page and installs itself on the victim's computer. This type of attack has been dubbed "spear phishing" since often only one email is sent to the victim organization.

Spear phishing emails have improved significantly in their sophistication and effectiveness, and can be very difficult for users to identify as fraudulent. They often use carefully crafted scripts to entice the user to click the link. In some cases, the emails are even "spoofed," that

is, they are crafted to appear to come from someone inside the victim organization (e.g., the company president). In other cases, the emails are designed so they appear to come from a legitimate business or organization, such as UPS, American Express, PayPal, or the IRS. These spoofing tactics are designed to increase the likelihood that the recipient will act quickly, clicking on the link without much thought.

## Ransomware

Ransomware is a malware that encrypts virtually all data and files that it can find, both on the local machine and on every network device that it can connect to. This renders the data unusable by the victim organization. Typically the hacker requests payment (the ransom) in exchange for decrypting the affected data. This is how the hacker hopes to make his money.

Having working backups that are regularly tested allows victims to wipe the affected machines clean and reinstall both systems and data. However, for companies with high reliance on technology, even the downtime required to wipe and reinstall can result in costly losses and reputational damage.

CryptoLocker is by far the most common ransomware deployed. CryptoLocker attacks are increasing rapidly because they are easy and effective. Such attacks rose from 7,000 in April 2014, to more than 15,000 in May. Kovter is a ransomware variant with an especially malicious tactic. It dumps a payload of child pornography, in addition to the encryption, to put more pressure on the victim to comply with the ransom demand.

## Protecting your business

Preventing these attacks is no small task. It requires a multilayered approach. Organizations should consider each of these tactics.

### Properly defend

- Keep current on technical defensive measures such as firewalls, intrusion detection systems, and spam filters.
- Keep up-to-date on the anti-virus software on each device, and complete regular scans to keep them clean.
- Keep all network servers and PC workstations current with the latest security updates and patches.
- Limit the number of PCs used to conduct online cash management. If possible, isolate them from the rest of the company network.

- Encrypt sensitive data, such as intellectual property and personal financial information.
- Utilize bank security tools for online cash management, including:
  - Multifactor authentication
  - ACH blocks and filters
  - Daily and individual transaction limits
  - Wire call-back features
  - Positive pay systems to reduce check fraud
- Make regular backups of key data and systems and store them in a secure, off-site location.
- Monitor activity and balance online accounts daily.
- Perform periodic vulnerability or penetration assessments to validate that controls believed to be in place are functioning as intended.

## Relationships, communication, and training

- Educate users to spot fake emails and to be wary of website links and file attachments.
- Read and thoroughly understand your agreements with your bank related to online activity.
- Identify the primary contact at your bank who will be your first call for help in the event of a breach.
- Develop an incident response plan so users know who to contact immediately if they suspect malicious activity on their computer.
- Establish a relationship with local law enforcement agencies that are familiar with online crimes.

## How we can help

Reliance on technology is a reality for even the smallest organization. But you can conduct business securely in this threatening environment with the right strategy and implementation. View our webinar on payment fraud trends to help prepare your entity against online attacks.

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## **Attachment A**

### **Sample Leadership Development and Succession Plan**

#### **1. Rationale**

The executive director position in a nonprofit organization is a central element in the organization's success. Therefore, ensuring that the functions of the executive director are well-understood and even shared among senior staff and volunteer leaders is important for safe guarding the organization against unplanned and unexpected change. This kind of risk management is equally helpful in facilitating a smooth leadership transition when it is predictable and planned.

This document outlines a leadership development and succession plan for the NONPROFIT ORGANIZATION. The purpose of this plan is to ensure that the organization's leadership has adequate information and a strategy to effectively manage NONPROFIT ORGANIZATION in the event the executive director is unable to fulfill his/her duties.

#### **2. Plan Implementation**

The Board of Directors authorizes the Board Chair to implement the terms of this succession plan in the event of a planned or unplanned temporary or short-term executive director absence.

- It is the responsibility of the executive director to inform the Board President/Board of Directors of a planned temporary or short-term absence, and to plan accordingly.
- The Board President should immediately, or as soon as is feasible, advise the full Board of Directors of the planned temporary or short-term absence.
- As soon as feasible, following notification by the Executive Director of an unplanned temporary or short-term absence, the Board President advise the full Board of Directors and convene an Executive Committee meeting to affirm the procedures prescribed in this plan, or to modify them as needed.

#### **3. Priority Functions of the executive director at NONPROFIT ORGANIZATION**

The full executive director position description is attached to this plan.

Among the duties listed in the position description, the following are considered to be the key functions of the executive director and have a corresponding temporary staffing strategy (see Section #3 for further guidance about temporary staffing).

<b>Key Executive Director Functions</b>	<b>Temporary Staffing Strategy</b>
Leadership and Vision	Board Chair with [Staff member title]
Board Administration and Support	[Staff member title]
Program Management	[Staff member title]
Financial Management	Chief Financial Officer; Treasurer
Human Resource Management	Director, Human Resources
Funder Relations; Community and Public Relations	Marketing Manager; Board Chair
Spokesperson	Board Chair or his/her Designee

The positions assigned in the Temporary Staffing Strategy are based on NONPROFIT ORGANIZATION's organization structure as of [Date plan adopted]. In the event this plan is implemented and assigned positions are vacant or no longer available, the Board Chair shall select other senior staff to support each of the key Executive Director functions.

#### **4. Succession plan in the event of a temporary, planned or unplanned absence - Short-Term**

##### **a. Definitions**

- A temporary absence is one in which it is expected that the executive director will return once the events precipitating the absence are resolved.
- An unplanned absence is one that arises unexpectedly, in contrast to a planned leave such as vacation or a sabbatical.
- A temporary absence is 30 days or less.
- A temporary short-term absence is between 30 and 90 days.

##### **b. Temporary Staffing Strategy**

- For temporary planned or unplanned absences of 30 days or less, the Temporary Staffing Strategy described above may become effective.
- In the event of a temporary short-term planned or unplanned absence, the Executive Committee shall determine if the Temporary Staffing Strategy is sufficient for this period of time.

##### **c. Appointing an Acting Executive Director**

Based on the anticipated duration of the absence, the anticipated return date, and accessibility of the current executive director, the Executive Committee may appoint an acting executive director, as well as continue to implement the Temporary Staffing Strategy.



**d. Standing Appointees to the Position of Acting Executive Director**

- The first position in line to be acting executive director is [Position – Senior Staff Member, may also be Board Chair]. If the current Board Chair accepts the position he or she will take a temporary leave from the Board of Directors.
- The second position in line is [Position].
- The third position in line is [Position].
- In the event that no clear choice is available for an acting executive director, for example if the next most senior staff member is new to the position or fairly inexperienced with NONPROFIT ORGANIZATION, the Executive Committee may consider an external consultant to serve as an acting executive director.

**e. Cross-Training Plan**

- The executive director shall develop a training plan for each senior level position for each of the key functions of the executive director listed in Section 3.
- An up-to-date training plan shall be attached to this document.

**e. Authority and Restrictions of the Acting Executive Director**

- The acting executive director shall have full authority for day-to-day decision-making and independent action as the regular executive director.
- Decisions that shall be made in consultation with the Board Chair and/or Executive Committee include staff hiring and terminations, financial issues, taking on a new project, and taking public policy positions on behalf of the organization.
- For additional communication guidelines refer to the organization's operating policies on transitions.

**f. Compensation**

- Director level staff appointed as acting executive director may receive a salary increase for the time period he/she serves as acting director [or may receive a one-time bonus]. The amount shall be determined by the Executive Committee based on the duration of the assignment and available resources.
- A current or former board member appointed as acting executive director may enter into an independent contractor agreement, depending on the circumstances of their availability.

- The executive director on leave is eligible for disability insurance. NONPROFIT ORGANIZATION maintains a self-insured 30-day policy and a long-term disability policy that becomes effective at 90-days.

**g. Board Oversight and Support to the Acting Executive Director**

- The acting executive director reports to the Board as a whole.
- The Executive Committee shall be alert to the special support needs of the acting executive director in this temporary role. The Executive Committee shall convene monthly when an acting executive director is appointed.

**h. Communications Plan**

- Within 48-hours after an acting executive director is appointed, the Board Chair and the acting executive director shall meet to develop a communications plan including the kind of information that will be shared, when and with whom. The following chart identifies key supporters and a primary contact to facilitate communication.
- As soon as possible, the Board Chair and acting executive director shall implement the communications plan to announce the organization's temporary leadership structure to staff, the Board of Directors and key supporters.
- Updated contact information shall be maintained in the organization's database with the following designations:
  - Key Contact List
  - Extended Key Contact List
  - Past Board Officers/Members List
  - Foundation CEOs
  - Clients/Members/Individuals Served
  - Other Organization Contacts
- Within 5 business days, the Board of Directors shall distribute a press-release with general information appropriate to the situation.

<b>Key NONPROFIT ORGANIZATION Supporters</b>	<b>Communication Responsibility</b>
Governmental Agencies Elected Officials Other Stakeholders	[Staff member- title] with designated Board Members
Foundation Program Officers (holding Grants and Contracts with NONPROFIT ORGANIZATION)	[Staff member- title] with designated Board Members
Major Donors	Designated Board Members responsible for phone call to top 10 followed by a letter to all donors
Clients	[Staff member- title]
National Colleagues	[Staff member - title]
Personal Colleagues	Strategic Initiatives Director with designated Board Members
Operating Support (based on need)	Auditor Legal Counsel Insurance Agent

## **5. Succession plan in the event of a temporary, unplanned absence - Long-Term**

### **a. Definition**

- A long-term absence is 90 days or more.

### **b. Procedures**

- Procedures and conditions to be followed shall be the same as for a temporary short-term absence with the following addition: The Executive Committee shall give immediate consideration, in consultation with the acting executive director, to temporarily filling the management position left vacant by the acting executive director, or reassigning priority responsibilities where help is needed to other staff. This is in recognition that, for a term of 90 days or more, it may not be reasonable to expect the acting director to carry the duties of both positions.
- The Board Chair and Executive Committee are responsible for gathering input from staff and reviewing the performance of the acting executive director according to the organization's Performance Review Policy. A review shall be completed between 30 and 45 days.

## **6. Succession plan in the event of a permanent planned or unplanned departure of the executive director.**

Procedures and conditions to be followed shall be the same as for a temporary absence with the following additions:

### **a. Transition Committee**

- Within 15 business days from the announcement of a planned departure, the Board Chair shall appoint an Executive Transition Committee. This committee shall be comprised of at least one member of the Executive Committee, two other members of the Board of Directors and one Director level staff. Other community volunteers may be recruited at the discretion of the Board Chair. The size of the committee shall be the discretion of the Board Chair.
- At its first meeting the Transition Committee shall determine its role, including responsibilities related to conducting the search process. The Transition Committee may recommend that the Board of Directors appoint a separate Search Committee, while the Transition Committee manages the overall transition process for the organization. The Transition Committee shall also determine the need for consulting assistance (such as, transition management or executive search consultant) based on the circumstances, and establish a time frame and plan for the recruitment and selection process. [Note: Circumstances that would point to the need for outside assistance include: involuntary separation of the executive director, departure of a founder or long-time leader, if the agency is in a crisis, or if the agency is considering merger or other significant structural change.]

### **b. Interim Leadership**

- An interim executive director may be needed, even in the event of a planned departure of the executive director. The purpose of establishing an interim executive director is to provide neutral leadership to the organization while assessment and key decisions about the future are made by the Board of Directors.
- The Board of Directors shall consider the need to hire an interim executive director from outside the organization, instead of appointing an acting executive director. This decision shall be guided, in part, by internal candidates for the executive director position, the expected time frame for hiring a permanent executive, and the management needs of the organization at the time of the transition.

- If an interim executive director is hired, the Board Chair and Executive Committee shall negotiate an independent contractor agreement with a defined scope of work, with a work assignment of no more than 3 days per week.
- The scope of the agreement with an interim executive director shall be determined based on an assessment of the organization's needs at the time of the leadership transition.

### **Responsibilities of the Interim Executive Director**

- An interim executive director shall have full authority for day-to-day decision-making and independent action as the regular executive director.
- Decisions that shall be made in consultation with the Board Chair and/or Executive Committee include staff hiring and terminations, financial issues, taking on a new project, and taking policy positions on behalf of the organization.
- The interim executive director may be asked to conduct an organizational assessment.
- For additional communication guidelines refer to the organization's operating policies on transitions.

### **Board Oversight and Support to the Interim Executive Director**

- The interim executive director reports to the Board as a whole.
- The Executive Committee shall be alert to the special support needs of the interim executive director in this temporary role. The Executive Committee shall convene monthly when an interim executive director is hired.
- The Board Chair and Executive Committee are responsible for gathering input from staff and reviewing the performance of the interim executive director according to the organization's Performance Review Policy. An initial review shall be completed between 30 and 45 days and 90 days thereafter.

### **c. Organizational Assessment**

- The Board shall conduct an organizational assessment that includes a review of the mission, vision, and strategic direction of the organization.

- The Board shall determine the type of leadership the organization is seeking on a permanent basis. Other organizational options may be explored such as restructuring, strategic alliance, merger, or a management company.
- If the same organizational structure will be maintained, the Board (or Transition Committee) shall determine the knowledge, skills, and attributes needed in the new executive director and develop an appropriate position description and announcement.

**d. Search and Hire**

- The Board shall conduct a search for the executive director that is transparent and complies with all personnel policies and laws.
- The Board shall disclose all relevant information about the organization at the time of offer, including organizational mission, vision, strategy, financial position, audit outcomes, any pending legal issues, and any other information that will be relevant to their decision to accept the position.
- The Board shall disclose any “exit plan” of the departing executive.

**e. Post Hire**

- The Board shall provide written expectations of the new executive director to govern the first 6 months of the executive director’s tenure. The Board may ask the new executive director to provide a written entry plan.
- The Board shall provide the executive director with the evaluation process and instrument it will use after the first 12 months on the job.
- The Board shall have informal check-in meetings with the new executive director three months and six months after the start date to review the work plan, priorities and resolve any issues that have arisen.
- The Board shall provide a formal evaluation of the executive director after 12 months of service.

**7. Approvals and maintenance of record**

**a. Leadership Succession Plan Approval**

- This leadership succession plan shall be approved initially by the Board of Directors.

- Thereafter, annually, the Executive Committee shall review the plan and recommend amendments to the full Board as needed.

**b. Signatories**

- The Board Chair, the executive director and the appointees designated in the Leadership Succession Plan shall sign the plan.
- At all times the Board Chair and Treasurer and at least one director-level staff, in addition to the executive director, shall have signature authorization for checks and contracts for the organization.

**c. Maintenance or record**

- Copies of this plan shall be maintained by all members of the Board of Directors, director level staff, and the organization's auditor.

**d. Financial Considerations**

- It shall be the responsibility of the Board of Directors to review the organization's finances during an unplanned absence of the executive director, and make adjustments, as needed, to the agency's budget to ensure adequate resources for the transition.

Source: Maryland Nonprofits dba Standards for Excellence Institute

### **Attachment B**

## **Board Member and Leadership Succession Planning**

### **Is Your Bull Pen Full?**

It doesn't matter if you are a committee chair, project leader, four-term board president, or a board member who does his or her work behind the scenes without a title, you need to be thinking about your exit strategy.

Are you helping to recruit and groom your successor? The mark of an exceptional leader is that his/her organization is thriving and does not collapse in his/her absence.

Every organization and board is unique and no one system will work for everyone. Some boards have well-established leadership development with well-defined and documented processes for orderly transition. Some organizations just put a warm body with a pulse into a position and reinvent the wheel. No matter where your organization falls, here are some things to think about.

### **Strategies for Successful Succession Questions to Ask and Things to Do**

- **Do you have an accurate job description?** If not, draft one. After all, who is in a better position to say what the job is than the person doing it? Next go through the proper channels to get it approved and adopted.
- **Do you keep a “how I did it” journal?** Methods of doing things that you may think are intuitive, obvious, and common sense, can be things a successor coming with different experience could view as unique, insightful and innovative.
- **Do you take the time to let someone help you?** Yes, it is often much more efficient (in the short term) and less frustrating to just do it yourself. But if the position you are in is helpful to the organization and you are not planning to stay in your position forever, you'd better take the time to let others help and develop ownership in a



positive outcome. Don't underestimate how intimidating many positions and tasks can seem from the outside. Once you let others see how things work from the inside and how you manage the task or activity, you might be surprised when those people volunteer for positions instead of having to be drafted. Apprentices are not just for Donald Trump!

- **Does your organization already have an established system of leadership cultivation that can be replicated within your committee structure or for other key volunteer positions?** If you have a president-elect, there is really no reason you could not have a "marketing committee chair-elect." (Note: This type of "rigid" succession planning is best suited to professional associations or social organizations with large dedicated memberships that tend to remain involved over long periods of time.)
  
- **If you do not have a system of leadership development, could your board encourage its members to adopt a three-year exit strategy?**

**Year one is triggered by one of the following thoughts or realizations:** "I know I will be invited back for another term but I think I have made my mark and would like to move on." Or, "My term is over soon and due to term limits I will need to step down for a least one year."

To do-list:

- Make a list of what loose ends you would like to tie up.
  
- Work with or help the Board Development or Executive Committee to identify who will take over for you.
  
- Have him or her officially elected, appointed or recognized as the next X (X = president, treasurer, committee chair, event host, etc.).

### **Year Two**

To-do list:

- Actively engage the new person in all aspects of the position he/she will be assuming.
  
- Let everyone your position interacts with know that X will be in your position next year and you think he or she is great.
  
- Keep a journal to pass on to X.

### **Year three**

- Turn over your journal and “gavel.”
- Sit back and watch. Be supportive and defer to the new person.

This system can be abridged to fit your time frame but keep in mind you are much more likely to get someone to agree to take on a leadership position if they know a year in advance so they can pay attention to not just what is being done but how.