Oregon State Bar

NOLS Newsletter

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CONTENTS

Letter from the Chair

Welcome to our first edition of the NOLS newsletter!

Nancy Murray, NOLS 2014 Chair

The Nonprofit Organizations Law Section ("NOLS") was formed in 2012 in recognition of the significant impact of nonprofits in our economy and communities and the on-going need for competent nonprofit legal assistance. The nonprofits our members support range from small volunteer-run organizations to large, multi-million-dollar professional organizations with sophisticated tax and governance needs. Perhaps more than any other area of law, many Oregon lawyers are called upon in the course of their careers to provide pro bono services to nonprofits and the legal issues may fall outside their main area of expertise and thus present risks and pitfalls. We hope NOLS will help reduce and temper such risks, and advocate for nonprofit law improvement, through semi-annual CLEs, brown bag lunches, our legislative work and this newsletter.

We invite your submissions to this newsletter to help make it a success. How about converting the research you've done for a nonprofit – or other business with common concerns - into an article for this newsletter? If you needed to research an issue, chances are another practitioner will face a similar question in the future. By sharing information we can extend our services and effectiveness to our clients and the nonprofit community. We would be thrilled to get your feedback, suggestions, and submissions. You can contact the Publications Chair at susan.a.bower@state.or.us.

If you would like more information about NOLS or become involved in some way, feel free to contact me or any other Executive Committee member. (Here is a listing of NOLS Executive Committee members.) We enthusiastically welcome your participation!

Center for Public Service/Institute for Nonprofit Management

Linda Golaszewski, Program Manager

Nonprofit organizations have always been managed by dedicated, hardworking leaders. But not that many years ago, the management and leadership of nonprofits was either ignored or lumped uncomfortably with managing businesses or governmental agencies. Management of a charity or nonprofit organization was viewed as a stepchild to real management. Students, scholars, and researchers didn't spend much time examining the nuances of the mission-driven, volunteer-directed nonprofit organization.

The Institute for Nonprofit Management (INPM) was one of the earliest programs to examine the nonprofit sector and teach about it as a separate arena for thought and study. INPM has its roots in two programs, beginning with the Center for Management of Nonprofit Organizations (at Concordia College) established in 1988, providing hands-on learning by seasoned professionals, which grew into the Institute for Nonprofit Management (at Lewis and Clark College), offering a nonprofit concentration in the Master of Public Administration program (MPA) along with the non-credit certificate program. The Institute moved to Portland State University (PSU) in 1996.

In 2010, the Institute then joined forces with the Executive Leadership Institute to form the Center for Public Service (CPS). In 2012, under the auspices of CPS, INPM launched the Graduate Certificate in Nonprofit and Public Management.

INPM has provided a strong academic framework through the non-credit certificate in Nonprofit Management and historical support to the nonprofit specialization in the MPA, training and educating over 3,000 nonprofit leaders through the nonprofit-related coursework alone, not to mention the impact made through INPM's other endeavors. In addition, INPM established the highly regarded Leadership Fellows Program providing leadership training to 160 promising leaders from communities of color.

Besides having established a strong curriculum in nonprofit education, INPM has done much more in the past ten years as evidenced by its partnership with the Nonprofit Association of Oregon (NAO) to produce the *Oregon Nonprofit Sector Report*. Work by INPM faculty through the Nonprofit Summit in 2003 laid important groundwork for the NAO. INPM's history of strong collaboration with community groups is evidenced by partnerships with Idealist in its career and graduate school fairs, with Hands-On Greater Portland to develop board diversity education, with the Center for Nonprofit Stewardship in supporting their statewide nonprofit training, and with World Affairs Council in welcoming NGO (nonprofit, voluntary non-governmental organization) leaders from around the world.

Currently, INPM's education for nonprofit leaders and future nonprofit management employees takes place through the Public Administration Division of PSU. Students can earn an MPA with a specialization in nonprofit management or a Graduate Certificate in Nonprofit and Public Management. Both these programs provide a solid foundation to individuals seeking careers in public service. Additionally, courses are open to anyone with an interest in nonprofit management (or public administration for that matter!). Courses can be audited or taken for credit by students not enrolled in INPM programs, which makes them accessible to the nonprofit volunteers or staff members who want to expand their skills. This includes a complete online set of courses in volunteer management.

Across town, across campus, and around the globe, the Institute for Nonprofit Management helps keep nonprofits contributing to our broader social good.

"Responsible Person" Liability for "Trust Fund" Employment Taxes for Nonprofit Board Members

by Richard Baroway, Tomasi Salyer Baroway PC[1]

Introduction

As many of us have seen, the IRS is zealous in its collection efforts when a taxpayer has not paid to the IRS certain employee withholding taxes, i.e., "trust fund" taxes. These funds are typically accumulated by the taxpayer and paid over to the government on a quarterly basis.

A nonprofit with cash flow problems may be tempted to pay "net wages" to its employees without reserving and paying over the trust fund portion of those wages to the IRS. They are a "tempting source of ready cash." *Slodov v. United States*, 436 U.S. 238, 243 (1978). The accumulated trust funds may also be ripe for embezzlement.

Individuals serving as directors of nonprofits, or considering such volunteer service, may inquire about the potential for personal liability that may arise in these circumstances. The cases reviewed would indicate the parameters for imposing responsible person liability are broad, but not boundless.

Discussion

The Internal Revenue Code ("Code") requires employers to withhold federal income and social security taxes, Federal Insurance Contribution Act ("FICA") taxes, and Medicare taxes from employees' wages. *Verret v. United States*, 542 F. Supp. 2d 526, 533 (E.D. Tex. 2008) (*citing, in part,* 26 U.S.C. §§ 3102(a), 3402(a)). "These sums are commonly referred to as 'trust funds' because the Code provides that the monies are deemed to be 'a special fund [held] in trust for the United States.'" *Id*. These trust funds are remitted to the government on a quarterly basis. *Id*. "When net wages are paid to the employee, the taxes that were, or should have been, withheld are credited in full to the employee even if they are never remitted to the government." *Id*. Therefore, unless the government can collect these taxes from the employer, the revenues are lost forever to the government. *Id*.

Code Section 6672 provides the government with a mechanism by which it may collect the taxes withheld and protect itself against such losses. *Id*. That section imposes a penalty on "<u>[a]ny person required to collect, truthfully account for, and pay over any tax" withheld</u> who <u>willfully</u> fails to do so. *Id*., 26 U.S.C. § 6672(a) (emphasis added). The penalty is equal to the total amount of the tax not paid over to the government, i.e., 100%. *Id*. The term "person" in the statute includes any officer or employee of a corporation who is under a duty to collect, account for, or pay over the withheld tax. *Id*., 26 U.S.C. § 6671(b). This is known as the "responsible person." *Id*. In determining responsible person liability, the law disregards mechanical titles and functions of corporate officers and instead focuses on individuals who actually could have ensured the satisfaction of tax obligations. *Id*. at 534 (*citing Commonwealth Nat'l Bank of Dallas v. United States*, 665 F.2d 743, 752 (5th Cir. 1982)).

[1] With substantial assistance from Trish Walsh, Farleigh Wada Witt, Attorneys at Law

The Code expressly allows an exception to responsible person liability under Section 6672 for voluntary board members of tax-exempt organizations. 26 U.S.C. § 6672(e). Specifically, no penalty may be imposed "on any unpaid, volunteer member of any board of trustees or directors of an organization exempt from tax . . . if such member—(1) is solely serving in an honorary capacity, (2) does not participate in the day-to-day or financial operations of the organization, and (3) does not have actual knowledge of the failure on which such penalty is imposed." No interpretation to the phrase "solely serving in an honorary capacity" has been found. However, a plain-language interpretation would suggest the exception to liability would not apply to voting members of a voluntary board of directors. *Id*. Further, even to this exception there is a huge carve-out: The exception does not apply if it results in no person being liable for the penalty imposed by Section 6672(a).

Responsible person status depends on the unique facts and circumstances of each individual case; however, common factors include: identification of the person as an officer, director, or principal shareholder of the corporation; duties of the officer as set forth in the bylaws; authority to sign checks; ability to control the financial affairs of the business; authority to determine which creditors would be paid and exercise of that authority; control of payroll disbursements; control of the voting stock of the corporation; authority to sign employment tax returns; and authority to hire and fire employees. *See Verret*, 542 F. Supp. 2d at 534; *Cook v. United States*, 52 Fed. Cl. 62 (Fed. Cl. 2002). The court will consider the substantive acts performed—merely signing checks and preparing tax returns is not dispositive of liability under Section 6672. *Dougherty v. United States*, 18 Cl. Ct. 335, 340 (1989). Further, the court must determine the person or persons actually responsible for the employer's failure to withhold and pay over the tax. *Id*. In the Ninth Circuit, "responsible persons" are "those who 'had the final word as to what bills should or should not be paid, and when.'" *Purcell v. United States*, 1 F.3d 932, 936 (9th Cir. 1993). In other words, the responsible person "ha[s] the authority required to exercise significant control over the corporation's financial affairs, regardless of whether he exercised such control in fact. The authority that permits control carries with it a nondelegable duty to ensure that withholding taxes are duly collected and paid over to the government." *Id*. at 937.

The Seventh Circuit held that the volunteer board president of a day care center was a responsible person under section 6672(a) who willfully failed to pay the center's taxes where he had authority to direct and authorize payment of the center's bills, to authorize payment of federal tax deposits, to determine its financial policy, to obtain loans for the center, and to sign checks on the center's behalf. *Jefferson v. United States*, 546 F.3d 477, 479 (7th Cir. 2008). The court explained that even though the person was not involved in the day-to-day operations, he had significant involvement in the financial affairs of the day care center sufficient to make him a responsible person. *Id*. at 481.

By contrast, a volunteer, unpaid president of a nonprofit social club for seniors who became president while the club was in a state of financial chaos in its waning days was found not to have had responsible person liability because he had only nominal financial authority in the club and was only marginally involved in day-to-day financial operations. *Lartz v. IRS (In re Lartz)*, Case No. 1-00-01864, 2003 Bankr. LEXIS 246, at *7 (Bankr. M.D. Penn. Mar. 10, 2003). The court explained that "[w]hile 'on paper' Debtor may have been a responsible person, in the totality of the actual circumstances, his degree of 'responsibility' over payment of bills and taxes was very limited." *Id*.

Further, "[t]o be considered a responsible person for purposes of the trust fund recovery penalty for any quarter, one need only be a responsible person at the beginning of the quarter." Fed. Tax Coordinator 2d ¶ V-1705 (RIA 2012). "A responsible person's liability arises at the time of the withholding, even if he is no longer a responsible person when the taxes are required to be paid." *Id*. Thus, in some circumstances, even a board member's resignation from the position of a board officer, for example, may not relieve him or her of responsibility for taxes that should have been withheld before the resignation. *See, e.g.*, *Long v. Bacon*, 239 F. Supp. 911, 912 (S.D. Iowa 1965) (holding that the liability for payment of taxes arises upon the collection of those taxes and not at the date when the statute requires that they be paid over to the government). Note that each responsible person can be held jointly and severally liable for the debt under Section 6672(d).

Responsible person liability also depends upon a finding of willfulness. 26 U.S.C. § 6672(a). "Willful," in this context, means "voluntary, conscious and intentional—as opposed to accidental—decisions not to remit funds properly withheld to the Government" or "recklessly disregard[ing] a known risk that the taxes were not being paid over." *Jefferson*, 546 F.3d at 481; *Cook*, 52 Fed. Cl. at 69 (explaining that "mere negligence" is insufficient to constitute willfulness under Section 6672). "Reckless disregard" includes failure to investigate or correct mismanagement after being notified that withholding taxes have not been paid. *Greenberg v. United States*, 46 F.3d 239, 244 (3d Cir. 1994). But note that a bad purpose or motive is not required. *See Domanus v. United States*, 961 F.2d 1323, 1326 (7th Cir. 1992).

In sum, directors of nonprofits must actively inquire into a nonprofit's policies and procedures for payment of employee withholding obligations and must exercise oversight of the process. Some payroll services will not issue payroll checks without a deposit of trust fund taxes, and this may serve as a backstop—though not a failsafe—for payment of the tax obligations.

Recent Developments in Federal Tax Law

Justine C Thede, Thede, Culpepper, Moore, Munro & Silliman, LLP

Rev. Proc. 2014-11, 2014-3 IRB

The IRS issued new guidance for organizations that have lost their tax exempt status for failing to file required annual tax returns or notices for three consecutive years under IRC Section 6033(J)(1). Rev. Proc. 2014-11, issued on January 2, 2014, provides procedures for retroactively reinstated tax-exempt status. Organizations that are eligible to file a short form (Form 990-EZ) or postcard return (Form 990-N) may use a "Streamlined Retroactive Reinstatement Process" if a new application for exemption is submitted within 15 months after revocation of exempt status. Other organizations must follow a more involved procedure, including demonstrating reasonable cause for failure to file annual tax returns. However, organizations that file a new application within 15 months of revocation need only show reasonable cause for one of the three consecutive years in which the organization failed to file.

NPRM REG-154890-03 / February 3, 2014

The IRS issued proposed regulations that would provide a special rule for determining basis in certain charitable remainder trust ("CRT") term interests when the entire interest in the CRT is transferred. Under the regulations, the basis for a term interest of a taxable beneficiary would be the portion of the adjusted uniform basis assignable to that interest, reduced by the amount of undistributed net ordinary income that, if distributed, would be included in the taxable beneficiary's gross income, and the amount of undistributed net capital gain that, if distributed, would be included in the taxable beneficiary's capital gain. The regulations are intended to prohibit manipulation of existing rules in such a way as to effectively allow the seller to step up its basis in the CRT interest and avoid recognizing gain attributable to the CRT's appreciated property.

PLR 201416010 / January 22, 2014

An organization established to provide fundraising education to churches and charity employees did not qualify for exemption under 501(c)(3). In exchange for a membership fee, the organization offered instructional materials regarding fundraising practices. The IRS concluded that the organization was not described in section 501(c)(3) because it was operated in a commercial manner and not for a 501(c)(3) exempt purpose. Two officers of the organization were previously officers at a for-profit company that offers charitable financial products and administrative services, and manages donor-advised funds. The education materials promoted products provided by the for-profit company, and some of the materials were written by another former officer of the for-profit company. Furthermore, the IRS determined that the membership fees collected by the organization were not priced to provide assistance substantially below cost and that the organization operated in furtherance of a private, rather than public, interest.

PLR 201417022 / January 20, 2014

Matching gifts made by a private foundation do not constitute self-dealing within the meaning of Section 4941. The organization's sole contributor is a for-profit company that established a matching gifts program under which it matched employees' contributions to public charities. Shortly after establishing the program, the private foundation assumed the role of payor in the company's matching program. The foundation matching program included numerous restrictions, including limiting the recipients eligible for matching gifts to public charities classified as exempt under Section 509(a)(1) or (2).

The IRS concluded that: (1) the matching gifts do not constitute self-dealing within the meaning of Section 4941, (2) the matching gifts will be "qualifying distributions" within the meaning of Section 4942(g), and (3) the matching gifts will not be "taxable expenditures" within the meaning of Section 4945(d).

PLR 201418060 / February 5, 2014

The IRS determined that the proposed transfer of a charitable trust's assets to an exempt nonprofit corporation would constitute a transfer of assets by a private foundation to another private foundation described in Section 507(b)(2). The transfer of assets would not result in termination of the trust's treatment as a private foundation and would not subject it to tax imposed by Section 507(c). As with many section 507 rulings, a key element in the ruling is that the transferee foundation assumed the Chapter 42 excise tax obligations of the transferor foundation.

A similar but more complicated ruling can be found in PLR 201417021.

Kaufman v. Commissioner / T.C. Memo 2014-52, No. 15997-09

On remand, the Tax Court sustained the IRS's disallowance of a charitable contribution deduction for the donation of a façade easement on the donor's home, concluding that the fair market value of the easement was zero. The court concluded that the typical buyer would not find the restrictions of the easement more burdensome than applicable local zoning restrictions, and thus the value of the property was unchanged after the taxpayers granted the easement.

New State Charity Laws

Susan A. Bower, Oregon Department of Justice

The Oregon Legislature recently enacted two pieces of legislation targeted at bolstering charitable oversight and accountability. In the 2013 session, the legislature passed HB 2060, which allows the Attorney General to disqualify charitable organizations from receiving tax deductible donations for Oregon income tax purposes if the charitable organization fails to spend at least 30 percent of its total annual expenses on program services based on a three-year average. The legislation is limited to organizations required to file an IRS Form 990, i.e., those with annual revenue exceeding $200,000, and the 30 percent calculation is based on figures disclosed on the organization's Form 990. The legislation includes notice provisions to the disqualified organizations and donors and a safe harbor for unwitting donors.

In the 2014 session, the legislature passed HB 4081, which goes into effect on January 1, 2015. HB 4081 addresses compliance issues under the Charitable Trust and Corporation Act, ORS 128.610 *et seq*. The legislation more clearly specifies that the failure to file annual reports, the filing of false annual reports, the failure to pay the fee includable with any annual report, and the failure to provide information requested by the Attorney General authorized or required by the statute constitute violations of the Act and can be the basis for the imposition of civil penalties and other remedies. The maximum civil penalty that can be imposed under the statute increases from $1,000 to $2,000, and those liable for such penalties is expanded to include the responsible individuals in addition to the charitable organization.

The bills are described in more detail below along with links to the full texts of the bills.

HB 2060 - Targeting Sham Charities by Denying State Income Tax Deductions

By all measures, Americans are remarkably generous in their charitable giving. In 2012, individuals donated $223 billion to charitable organizations.[1] Indiana University Lilly Family School of Philanthropy, *Giving USA 2013 Highlights: The Annual Report on Philanthropy in America*. Unfortunately, many donations go to unscrupulous organizations that primarily exist for the financial benefit of professional fund raisers and the charity executives that retain them. In a year-long investigative project, the *Tampa Bay Times*, in

[1] Additionally, foundations gave $47.44 billion, and corporations gave $18.97 billion in 2012.

collaboration with CNN and the Center for Investigative Reporting, determined that 50 of the nation's worst charities spent $1 billion of the $1.3 billion donated to them to pay professional fund raisers. Kris Hundley and Kendall Taggart, *America's Worst Charities: You've given them more than $1 billion. They've given almost nothing to the needy*, Tampa Bay Times, June 6, 2013. The worst charity identified by *Tampa Bay Times* spent less than three cents of every dollar collected on its program services. *Id.* Moreover, many times the organizations used names similar to well-known charities in an effort to confuse donors and capitalize on the reputations of good charities.

Such reports frequently generate outrage and disbelief that there are no laws to guard against such abuses. In fact, Oregon and other states once had laws that prohibited charities from soliciting if their fundraising and administrative costs were grossly disproportionate to the funds expended on charitable programs. However, these laws, including Oregon's, were repealed after the United States Supreme Court's decision in *Schaumburg v. Citizens for a Better Environment*, 444 US 620 (1980), in which the Court ruled that the government could not restrict a charity's ability to solicit based on its administrative expense ratio because such laws infringed upon the organization's First Amendment rights. Since then, charities that are closely linked to for-profit fundraisers have proliferated, and abuses like those reported in the *Tampa Bay Times* article have increased.

In an effort to combat such abuses, regulators and watchdogs have employed education and awareness campaigns. Organizations such as the Better Business Bureau and Charity Navigator factor charities' expense to program service ratios in their evaluation and ratings of charitable organizations. And though it can be difficult to define what the appropriate expense ratio should be for charities given the tremendous variety of organizations and types of services provided within the charitable sector, most agree there is some minimum that organizations should strive to meet. The Better Business Bureau's position is that charitable organizations should dedicate at least 65 percent of their funds to program services, with no more than 35 percent toward administrative and fundraising costs. Charity Navigator issues a 0-star rating to organizations for their financial health if they spend less than one-third of their budget on program services, asserting such organizations are "simply not living up to their missions."

Financial Ratings Tables, Charity Navigator, (2013) *available at* http://www.charitynavigator.org/index.cfm?bay=content.view&cpid=48#.U4PW8PldVzE.

Similarly, the Oregon Attorney General has compiled and published a list of the worst charities registered to conduct activities in Oregon for the past several years. The lists are compiled based on organizations' annual IRS Form 990 that charities are required to file with the Oregon Department of Justice. The forms reveal the amount and source of an organization's income, expenses (including fundraising costs and salaries), and amount spent on program services. Based on a three-year average of actual expenditures as reported by the organizations, the Attorney General compiles and publishes a list of the charities registered in Oregon that allocate the lowest percentage of funds for program services[2]. On the 2013 worst charities list, the lowest percentage spent on program services was 3.1 percent.

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[2] See the Oregon Department of Justice website for the 2013 Worst Charities list: http://www.doj.state.or.us/charigroup/pdf/attorney_generals_20_worst_charities_2013.pdf

In an effort to have a greater impact on such organizations, the Attorney General proposed and the legislature passed HB 2060, which limits Oregon's tax subsidy for such charities because restricting a charity's ability to obtain subsidies through tax deductions does not implicate its First Amendment rights. *See Regan v. Taxation with Representation of Wash*., 461 US 540 (1983). HB 2060 adds new provisions to the Charitable Trust and Corporation Act, ORS 128.610 to 128.750, that enable the Attorney General to disqualify charitable organizations from eligibility for tax deductible donations for Oregon income tax purposes if the organizations fail to expend a minimum of 30 percent on charitable programs, averaged over a three-year period; this 30 percent minimum is calculated based on organizations' Form 990, Part IX Statement of Functional Expenses. (The full text of HB 2060 can be viewed here.)

The corresponding Oregon tax code provisions were also amended. Previously, the Oregon tax code provided that if a charity has IRS 501(c)(3) tax-deductible status, donations can be deducted on state income tax returns to the same extent as on the taxpayers' federal returns. HB 2060 changes this.

Additional provisions of HB 2060 are as follows:

- The law requires that disqualified organizations be given advance notice of the disqualification determination and an opportunity to challenge the determination under the Oregon Administrative Procedures Act.
- Organizations that are disqualified under this law are required to notify Oregon donors of their disqualification for Oregon income tax charitable deduction before the donor makes a decision to donate. The Oregon Department of Justice will publish a list of disqualified organizations on its website and provide the list to the Oregon Department of Revenue.
- Donations made to disqualified organizations will not be tax deductible for Oregon income tax purposes, but will remain tax deductible for federal income tax purposes.
- The legislation provides a safe harbor for donors who were misled by the disqualified charity about the deductibility of donations and enables the Department to take legal action for unlawful trade practices against organizations that fail to make the appropriate disclosures.
- The legislation is limited to organizations that are required to file an IRS Form 990, i.e., those with revenue exceeding $200,000. Small organizations that file 990N or 990EZ returns are not encompassed by the legislation.
- The legislation does not impact private foundations, organizations that receive most of their income as fees for services, or organizations that are already ineligible to receive deductible donations.

The Charitable Activities Section of the Oregon Department of Justice is developing administrative rules for the implementation of the legislation. Although the law is already in effect, because of the time required to implement the legislation, it will not impact donations made in the 2013 calendar year.

HB 4081 – Addressing Noncompliance with the Charitable Trust and Corporation Act

The Charitable Trust and Corporation Act, ORS 128.610 *et seq*., requires charitable organizations doing business in the state to register and file annual financial reports with the Oregon Department of Justice.

More than 18,000 charitable organizations are currently registered with the Oregon Department of Justice. The number of registered charities has doubled since 1996, and new registrations are processed almost daily. As the number of charities has grown, compliance problems have increased.

Although the existing statute imposes registration and reporting obligations, it does not clearly specify the possible consequences for noncompliance or describe the specific actions that constitute violations of the Act. HB 4081 seeks to clarify those matters and is largely viewed by the Oregon Department of Justice as making minor technical corrections or improvements to the Act.

HB 4081 specifies that failing to register, failing to file an annual financial report, failing to pay a fee required by the statute, willfully making false or misleading statements in any registration material or annual financial report, and willfully failing to provide documents or other information requested by the Attorney General under the statute constitute violations of the Act. (The full text of HB 4081 can be viewed here.) The legislation further specifies that the enforcement remedies available to the Attorney General for such violations include: denying, revoking or suspending the registration of a charitable organization; imposing a civil penalty of not more than $2,000 on the organization or responsible fiduciary; ordering the charitable organization to cease soliciting or accepting donations until it comes into compliance; and ordering the charity or responsible fiduciary to submit additional information or documentation. The procedures for such enforcement measures are governed by the Oregon's Administrative Procedures Act. The legislation further specifies that under ORS 128.710, the Court has the ability to issue a temporary, preliminary or permanent injunction and can require a charity or responsible fiduciary to provide an accounting.

Though the Oregon Department of Justice's position is that these remedies were already available to it under the Act, common law, and other statutes, the legislation makes the potential consequences of noncompliance explicit. It is hoped that adding specificity to the statute will improve compliance and enable the Department of Justice to more effectively address compliance issues.

Effective Oversight

The Attorney General's role of protecting charitable assets and monitoring charitable fiduciaries is vital to safeguarding the integrity of the charitable sector. It is hoped that these new laws will strengthen the Attorney General's ability to perform these duties for the public's benefit.

Practice Tip:
Liability Insurance for Users of Property Owned by a Nonprofit

Nancy Murray, Law Office of Nancy B. Murray, murraylaw@comcast.net

A common issue in the nonprofit arena is determining the liability insurance a nonprofit should require of users of the nonprofit's building or unimproved real estate. What's reasonable and practical to require?

When the user is a for-profit business, requiring the user to provide proof of commercial general liability insurance in specific amounts (often $1,000,000 single occurrence/$3,000,000 in the aggregate) and requiring that the nonprofit be named as an additional insured on the liability policy is commonly requested and relatively easy to obtain at a reasonable cost ($50) and with minimal delay. But when the user is a small nonprofit or an individual engaged in a community or charitable activity, both the nonprofit and the user often resist and struggle with providing the liability insurance we lawyers often draft into our user agreements.

Consider the specifics.

When a nonprofit is asked to allow any third party to use the nonprofit's premises, the nonprofit should consider the specific risks presented by the proposed use. Is the proposed use a church study group, or is it a wedding and reception at which alcohol will be served? Will children be present? Is the building in good condition, or do its steps or handrails fail to meet today's building codes or are in less than optimal condition? How much liability insurance does the nonprofit itself carry?

Is accepting a homeowner's policy a good idea?

In limited, low-risk circumstances, a homeowner's policy may provide acceptable risk mitigation for the nonprofit. A homeowner's policy, such as the ISO HO 00 03 04 91, typically provides some liability coverage of the homeowner for claims arising on someone else's premises and as to which the homeowner is legally liable. If the homeowner requests, the homeowner's insurer may provide an additional insured endorsement for the benefit of the nonprofit at a cost of approximately $30-50, depending on the amount of liability coverage required and the risks involved.

Such insurance coverage is better for the nonprofit than having no insurance protection from the user, but note that, even with an additional insured endorsement, the typical homeowner's policy will not provide coverage if:

- The user agreement is not in the homeowner's name.
- The use constitutes a business (for-profit as opposed to nonprofit) activity.
- The use is regularly carried on as opposed to occasional.
- The users themselves are not otherwise liable within the terms of their homeowner's policies.

Also note that no contractual liability coverage will be provided, which a commercial form is likely to provide for rental use, and the homeowner's policy will cover property damage in amounts much lower than the policy's liability limits (for example, 10% or $500-$1000).

Cost-effective event insurance.

As an alternative, cost-effective event insurance is available from other insurers, such as Gales Creek Insurance Services at eventinsurancenow.com. Liability insurance for many common events is available through this and other sources at reasonable cost.

Options.

The most conservative approach to risk mitigation is to require the user, no matter who or what it is, to provide a commercial general liability insurance policy in the required amount with a certificate naming the nonprofit as an additional insured. With a regular user, or with special events involving higher risk, this should always be required. Event insurance may be available and appropriate if the user doesn't carry commercial general liability insurance. The cost of either should be reasonable.

A less conservative, and at times more practical, approach is to allow the passive, occasional user to provide proof of homeowner's liability insurance and a certificate naming the nonprofit as an additional insured. The cost and delay involved in obtaining the certificate should be manageable.

Some nonprofits may seek the simpler approach of requiring the individual user to attest that he or she carries homeowner's insurance including liability insurance in an amount not to exceed, say, $300,000. While it's possible having such insurance in place could provide a source other than the nonprofit to make an injured party whole, this approach promises the nonprofit very little reliable benefit.

Of course, the nonprofit may choose, as a board policy matter, to rely on its own liability insurance policy for protection and to not expect the user to mitigate risks through the user's insurance. This may be appropriate if the user and prospective use meet certain policy criteria, such as if the user is a member of the nonprofit or specific community and the use involves only a small number of adults, is passive in nature and consistent with the mission of the nonprofit, and no alcohol will be served.

NOLS Brown Bag Lunch Discussions

The Nonprofit Organization Law Section is pleased to announce a brown bag lunch discussion series in an effort to provide section members an opportunity to connect with peers and discuss issues they are encountering in their practice in an informal, collegial setting.

The discussions will be held noon – 1:00 at the offices of Tonkon Torp, LLP, 888 SW 5th Ave Suite 1600, Portland , Oregon 97204, on the following dates:

Wednesday, August 13, 2014

Wednesday, November 12, 2014

Wednesday, February 11, 2014

Please note, this is not a lecture format. Attendees will be encouraged to engage in the discussion, share challenges they have encountered, as well as practices they have found to be effective.

So bring your lunch, questions, conundrums, and success stories to share with your fellow nonprofit practitioners. A conference call number will be provided for those cannot attend in person and would like to participate by phone.

Contact Shouka Rezvani with any questions at shouka.rezvani@tonkon.com.

ORS Chapter 65 Workgroup Project

The Nonprofit Organizations Law Section has formed a Legislative Committee to review Chapter 65 of the Oregon Revised Statutes to identify provisions that need clarification or improvement with the goal of developing a bill for the Oregon Legislature in the 2015 or 2017 session. The Committee is comprised of nonprofit practitioners, representatives of the Attorney General's office, academics, and a representative from the Nonprofit Association of Oregon (NAO).

The Committee has not started with any particular policy changes in mind. Rather, its goal is to look for places where the statutes need updating (e.g. electronic meeting rules) or where the statutes may be unclear. As a preliminary measure, the Committee solicited comments and suggestions from nonprofit practitioners. The project is likely to be a multi-year project and there is still time to share any suggestions or concerns with the Committee. The Committee seeks as much involvement from the nonprofit community as possible, including receiving input from nonprofit organizations themselves.

The Committee plans to circulate periodic reports of its work, including proposed amendments under consideration, through the NOLS Newsletter, NAO's eNews, and other publications and listservs. The Committee welcomes feedback and input throughout the process which it feels will greatly improve its ability to produce a good bill.

Suggestions or comments to improve ORS Chapter 65 can be sent to Susan Gary at sgary@uoregon.edu.

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NOLS Publications Committee:

Susan Bower, Chair
Anne O'Malley
Jane Hanawalt
Matthew Lowe

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