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New Online Form 1023-EZ
Makes Applying for Recognition of 501(c)(3) Tax-Exempt Status Easier

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On July 1, 2014, the Internal Revenue Service introduced the Form 1023-EZ, a short and online version of the Form 1023, *Application for Recognition of Exemption, (see* Rev. Proc. 2014-11, 2014-3 IRB 411). The new form is 3 pages long, as compared with the regular 26-page version, and the Service estimates it will take 14 hours to complete, as compared with the estimated 101 hours required for the regular Form 1023.

The Service estimates that approximately 70% of all applicants will be eligible to complete the short form, thereby reducing the backlog of applications (currently 60,000, representing a current average review period of 9 months), and speeding up application processing. It also anticipates that the reduced application burden on the Service will free it up to devote more time to reviewing compliance by organizations in the performance of their exempt activities.

Who can Use the Form 1023-EZ?

There is a 22-question worksheet for organizations to use to determine if they meet the eligibility requirements for the Form 1023-EZ. Generally, a domestic nonprofit corporation that anticipates $50,000 or less in annual gross receipts for its first three years or in any of the past three years, and having total assets equal to or less than $250,000, may use the short form. To use the short form, organizations must qualify as a non-operating private foundation or a Section 509(a)(1) or (2) public charity. Among a few other types of entities, the following are not entitled to use the short form: LLCs, churches, schools, hospitals, foreign organizations, donor-advised funds, credit-counseling organizations, and supporting organizations.

Part V of the new form also may be used for reinstating organizations whose exempt status was automatically revoked for failure to file required annual returns or notices for three consecutive years , if they are requesting reinstatement under sections 4 or 7 of Rev. Proc. 2014-11, 2014-3 IRB 411.

There is a user fee of $400 to process the Form 1023-EZ, which must be paid by direct deposit or by credit/debit card at the time of the application submission. Only an officer, director, or trustee listed in the form who is authorized to sign for the organization may electronically file the Form 1023-EZ.

What is included in the simplified form?

The three-page application form limits questions to those identifying the organization (including the names and addresses of officers, directors and trustees), defining the organization's structure and specific activities, and determining whether the organization is a public charity or a private foundation.

The short form does not request information about the applicant's budget, grant-making and scholarships plans, and general policies.

This is great! Right??

Although small organizations likely will appreciate the increased efficiencies of the Form 1023-EZ, it is precisely the small organizations that often fail to really think through the business aspects of operating a nonprofit, something that the longer form assisted applicants in doing. I question whether this abbreviated process will simply increase the already large number of exempt entities that quickly fail once they start operations, or which fail to consider the adoption of policies that help to ensure legal compliance.

Tips for Nonprofit Subsidiary LLCs

William S. Manne and Dustin R. Klinger, Miller Nash LLP

Nonprofit charities regularly own or receive donations of real estate. In the real estate world, holding title to property in an isolated limited liability company is so common that many lenders' and brokers' template forms refer to "______ LLC," with the blank for the buyer's name. Some real estate lenders require loan collateral to be owned by a separate and newly formed limited liability company, to reduce possible claims of past creditors. Until recently, charitable nonprofits faced uncertainty when using the single-member limited liability company ("SMLLC") structure so common in the forprofit world, because only the parent is granted IRS charitable (tax-exempt) status and Oregon law required the corporate form of ownership to be eligible for property tax exemption. This created concern over whether gifts transferred directly to the SMLLC would be eligible for tax-deductible donations and in many cases resulted in denial of Oregon property tax exemption, based solely on ownership.

For federal income tax and Oregon real property taxes, we now have clear recognition that a SMLLC owned by a 501(c)(3)-recognized nonprofit corporation is covered by the parent's charitable status. Issues surrounding nonprofit charities forming subsidiary organizations are complicated and differ by state. Nonprofit subsidiary organizations can be created for real estate holding or other purposes (for example, a corporation, a jointventure partnership, or a multimember limited liability company with another charity), depending on the specific circumstances and objectives. Not all subsidiaries, however, are (like the SMLLC) recognized under the parent's charitable status. The primary goal of an SMLLC subsidiary is to protect the parent organization from contractual and other types of liability by shielding the nonprofit parent organization's assets from operations at the subsidiary level. A subsidiary properly formed and maintained, with clear separate accounts and capital, but taxreported as part of the parent's return, can protect the parent organization from potential liability arising from the subsidiary's activity. Sometimes intentionally taxable subsidiaries are formed to avoid jeopardizing tax-exempt status when an activity or business does not clearly further the nonprofit organization's charitable purpose, but that is another topic.

While limiting liability is one goal, the tax results must also be acceptable. ORS 307.022 expressly provides, for purposes of the property tax laws of Oregon, that a limited liability company wholly owned by one or more nonprofit corporations is an entity qualifying for an exemption or special assessment if and to the extent that all the nonprofit corporation owners of the limited liability company qualify for the exemption or special assessment. Oregon will also exempt an SMLLC from tax on gain of the sale of the real property when the single member is an exempt charity and federal law exempts the sale. A variety of states have by statute or administrative guidance treated SMLLCs owned by charitable nonprofits as charitable nonprofits, but many others, such as our neighbors in Washington, have not.

At the federal level, after more than a decade of uncertainty, the IRS recognized charitable donations made to the wholly owned and controlled domestic SMLLC of a qualified U.S. charity in 2012. The IRS expressly provided that such an SMLLC qualifies under IRC Section 170 for the charitable income tax deduction. (IRS Notice 2012-52.) Previously, the IRS had cast doubt on that issue by publicly stating that it was not certain that this was the case.

Many charities had used wholly owned LLCs as part of their overall structure, but the 2012 clarification has increased the comfort and number of SMLLC subsidiaries, especially for directly receiving donations of real property to keep the parent entity out of the chain of title. Advisers frequently recommend forming wholly owned SMLLC entities for charities to hold donated real estate or other unknown or riskassociated assets. Real estate is a particularly attractive asset to hold in a separate LLC, because that structure can limit the reach of direct liabilities within the subsidiary, including environmental liabilities (think of anything near the Portland Harbor), from reaching other assets owned by the parent charity. With the Notice, this structure became easier to accomplish, because contributions of real property (or other assets) can be made directly to a charity-owned LLC without compromising the donor's charitable deduction.

The IRS's recognition of a charity SMLLC does not change other requirements for such contributions, including the need for donors to obtain a "qualified appraisal" (if applicable), the need for the charity to provide a contemporaneous written acknowledgment of the donation (which should include an express reference to the parent charity and an acknowledgment that the SMLLC is a wholly owned but disregarded entity). The donor must still meet all the other requirements of Section 170. Under the Notice, the parent charity will be considered the donee organization for purposes of the substantiation and disclosure requirements of IRC Sections 170(f) and 6115, and the limitations of IRC Section 170(b) will apply as though the gift were made to the U.S. charity.

Does the SMLLC need a separate EIN? This is the IRS guidance position: not unless the SMLLC will have its own employees or be involved in specific excise tax activities (oil, timber, etc.). So by IRS policy, the parent's own EIN is recognized as the SMLLC's EIN for reporting purposes. In practice, however, some financial institutions appear to have internal policies or practices to request a separate EIN for an SMLLC. We have most often been able to explain or show in the SMLLC's operating agreement the disregarded nature and IRS allowance for use of the parent's EIN to open subsidiary checking accounts. Sometimes, however, it may be more efficient to file a new IRS SS4 (application for an EIN), but everyone involved must keep track of this separate EIN, and remember, the SMLLC is *not* a separate taxpayer.

In closing, considering common industry practice and changes in federal and state laws, formation of wholly owned SMLLCs should be considered by tax-exempt nonprofits, particularly when receiving a real property gift or starting an activity with unusual risk.

Ethics Basics for Lawyers Serving on Boards

Calon Russell, Holland & Knight, LLP

Your friend has asked you to serve on the board of her small nonprofit, which has a stated mission of promoting artistic doughnut making. You agree to join the board because this mission interests you and because you know that it could present a good networking opportunity. Unbeknownst to you, your friend wants you on the board because you are a lawyer, and having you around will provide easy access to free legal advice.

This type of situation, which is not uncommon, presents ethical issues from the outset. The fact that you and your friend are not on the same page as to the reasons you are joining the board presents the foremost issue. Fortunately, the risks are quite manageable if dealt with early on, but they carry the potential of snowballing if they are ignored.

As implied by the above hypothetical, the first question you should ask yourself upon joining a board is whether you plan on acting as a lawyer for the company under any circumstances. If you *only* want to be a board member, managing risk will be relatively simple, but if you plan to take on a dual role as both lawyer and director, you will confront a broader array of issues.

Acting as a Board Member

For a lawyer who does not intend to act as a lawyer for the entity, much ethical risk can be managed by taking steps to avoid inadvertently entering into an attorney-client relationship.[1] As noted in *In re Spencer*, "[t]he modern trend in Oregon and elsewhere is to find the existence of an attorney-client relationship whenever the would-be client reasonably believes under the circumstances that the client is entitled to look to the lawyer for advice." 335 Or 71, 84, 58 P3d 228 (2002) (quoting *The Ethical Oregon Lawyer* § 6.3 (OSB CLE 1991)); *In re Weidner*, 310 Or 757, 770, 801 P2d 828 (1990) (accord).

Most lawyers are familiar with the practice of disclaiming attorney-client relationships with statements such as, "I am not your lawyer" or "this is not legal advice." Such disclaimers certainly help—especially if they are in writing—but in the context of the boardroom, issues constantly come up that involve legal considerations, and a lawyer can only disclaim so much. A lawyer voicing her opinion can easily veer into discussing legal issues. And the reality is that if the lawyer knows the answer to a legal question, and knows that the entity is not going to hire (or cannot afford) another lawyer, it will be very difficult for the lawyer to avoid offering the answer.

Of course, it is not the end of the world if the lawyer ends up offering legal advice. What is important is that the lawyer at least recognize when she may have crossed the line from acting as a director to acting as a lawyer. Once the lawyer takes on a dual role, the ethical considerations and risks become broader.

Dual Role (Director and Attorney)

Oregon State Bar Formal Opinion No. 2005-91 addresses whether a lawyer may serve as a board member of a company that is also a firm client.[2] The opinion notes that lawyers may do so, even when they personally provide legal representation to the company. Thus there is no question that lawyers may ethically take on the dual role of legal counsel and board member for a single entity. There are, however, important ethical considerations that arise in this scenario—especially with respect to conflicts of interest. This dual role can also have a substantial impact on the attorney-client privilege.

Before delving into the specific pitfalls of this dual role, it is important to recognize a key risk management measure that should be taken at the outset of the dual role. Namely, the lawyer should clearly explain how the dual role will function, with specific attention paid to when she will be wearing her lawyer hat and when she will be wearing her director hat.

This distinction is important because the rights and responsibilities of both the lawyer and the client could substantially differ depending on which capacity the lawyer is acting in. Many of the Oregon Rules of Professional Conduct ("ORPCs") only govern lawyer conduct in the context of an attorney-client relationship, and therefore could apply to actions taken as a lawyer, but not to actions taken as a director.[3] Similarly, actions taken as a lawyer are often protected by the attorney-client privilege and/or work product doctrine, whereas actions taken as a director will generally not be subject to such privilege/protection.

If the lawyer fails to clearly set out how her dual role will function, she may risk, for example, the client assuming she is giving legal advice while she presumes to be acting as a board member. In such situations it is probable that the client's presumption will control, and the attorney's conduct will be viewed through the lens of the ORPCs (not to mention the attorney standard of care) even though she did not intend for her conduct to be subject to such standards.

Conflicts of Interest:

Regarding conflicts of interest, ORPC 1.7 provides:

> "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if:
>
> "* * * * *
>
> "(2) there is a significant risk that the representation of one or more clients will be materially limited by * * * a personal interest of the lawyer.
>
> "* * * * *

"(b) Notwithstanding the existence of a current conflict of interest under paragraph (a), a lawyer may represent a client if:

"(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

"(2) the representation is not prohibited by law;

"(3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and

"(4) each affected client gives informed consent, confirmed in writing."

There are many potential scenarios where the lawyer's personal interests could interfere with her legal representation of the entity. Opinion 2005-91 offers two such examples: (1) the entity is considering whether to continue to employ the lawyer's firm, and (2) the firm is representing the entity and its directors in defending a third party's claim for damages. In addition to presenting conflict issues from the lawyer perspective, the former scenario may also require the recusal from the corporate decision-making process.

ABA Formal Opinion No. 98-410 (Feb. 27, 1998) offers additional examples,[4] including where the lawyer "is asked to represent the corporation in an undertaking that she, as a director, has unsuccessfully opposed." In that situation, the opinion notes, the lawyer's representation may be materially limited by her personal interest in opposing the course of action. Opinion 98-410 also notes that a potential conflict exists when the lawyer is asked to opine on the legality of board actions in which the lawyer participated as a director.[5]

If and when such scenarios arise, the lawyer must consider whether continued representation is possible, and, if so, whether a waiver under ORPC 1.7(b) is called for. Further, waivers (along with formal engagements or recusals) should be documented in the board minutes.

Attorney-Client Privilege:

ABA Formal Opinion No. 98-410 also notes that some courts have limited application of the privilege in the dual-role context because it is often unclear when lawyer/directors are offering legal advice as opposed to business advice. The opinion therefore suggests taking special precautions by making clear when the lawyer is acting as a lawyer and giving legal advice, and making sure to avoid commingling legal advice with business advice. The opinion also notes that while waiver of the privilege is normally the province of the client alone, a lawyer/director is essentially wearing the client hat in her role as a director and therefore may waive privilege (whether advertently or inadvertently).

Conclusion

Serving as a board member creates unique ethical risks for lawyers. The foremost risk management step lawyers can take in this situation is to be cognizant of when they may be taking on a dual role of lawyer and director for the entity. In dual-role situations it is important to make sure the entity knows which hat the lawyer is wearing at any given time. The lawyer should also stay alert to potential conflicts and take extra precautions to ensure that privilege attaches to communications where privilege is desired.

These steps will not eliminate all ethical risk,[6] but will hopefully help avoid some of the more common issues that can arise, and will give you more time to pursue your passion for doughnut art.

Endnotes

1 *This principle should not be relied upon too heavily as ethical issues can appear from non-obvious angles. For example, at least one authority has opined that when a lawyer sits on the board of a company, which she does not represent, her fiduciary duties to the organization nonetheless create a conflict preventing both her and the other lawyers in her firm from representing another client against the organization. See Supreme Court of Ohio Bd. of Commissioners on Grievances and Discipline Op 2008-2 (2008).*

2 Oregon Legal Ethics Opinions are not binding, but they are generally afforded significant weight in Oregon.

3 Many ORPCs apply to lawyers at all times, regardless of whether they are acting in the capacity of a lawyer, but some come into play only when a lawyer is representing a client.

4 ABA Ethics Opinions are not binding in Oregon.

5 Although it is unlikely to arise in the context of a small non-profit, another issue to be aware of is the fact that paid board positions present conflict issues under ORPC 1.8(a) (business transactions with a client).

6 For additional authorities and insights, see Legal Ethics Opinion No. 2005-116; Helen Hierschbiel, *Managing Dual Roles: The Ethics of Serving on Corporate Boards*, OSB Bulletin (Aug./Sept. 2008).

Using PRIs and MRIs to Leverage Foundation Assets

by Kate M. H. Kilberg

According to Giving USA, the economic downturn of 2008 has given rise to one of the longest-lasting declines in charitable giving since the 1960s. Total giving in 2008 fell seven percent, followed by an additional 6.2 percent decline in 2009. Giving began to increase starting in 2010, but Giving USA estimates that it will be 2022 before charitable giving reaches 2007 levels.[1]

At the same time, many private foundations are evaluating whether their investment and grantmaking strategies are fully aligned, or at the very least, not working at cross-purposes. For example, a private foundation interested in slowing global warming may choose to make grants to environmental non-profit organizations while investing in clean-tech companies.

Against this backdrop, many in the philanthropic community have become interested in “impact investing” as a way to stretch charitable dollars and achieve coherence between a private foundation’s investment and grantmaking functions. The term “impact investing” was first used in 2007 by the Rockefeller Foundation. The Global Impact Investing Network (“GIIN”) defines impact investing as “investments made into companies, organizations and funds with the intention to generate measurable social and environmental impact alongside a financial return.”[2] Impact investments span most of the traditional asset classes.[3]

Proponents of impact investing have argued that private foundations, in particular, are uniquely positioned to engage in impact investing given that they have access to pools of capital that are by law earmarked for social purposes. Typically, private foundations structure impact investments as program-related investments (“PRIs”) or mission-related investments (“MRIs”), and the use of these types of investments has steadily grown over the last several years.[4]

Nevertheless, at least one commentator has argued that PRIs and MRIs remain “overlooked and underutilized.”[5] In 2004, which was the peak year of PRI activity in terms of the total number of PRIs made, only 137 foundations made PRIs, totaling $312.6 million, which accounts for only a small portion of the country’s over 66,000 foundations with $510.5 billion in assets and $31.8 billion in grant dollars each year.[6] A study of PRI activity by the Lilly Family School of Philanthropy at Indiana University posits that the relative lack of PRI activity is due to the following factors:

- Lack of information or knowledge of PRIs;
- Lack of expertise in PRI management, and disconnection between the program and financial teams;
- Potential transaction costs associated with making PRIs; and
- Lack of appropriate opportunities.

However, the Indiana University study does cite collaboration among foundations using or interested in PRIs as a way to expand the use of PRIs.[7]

Indeed, PRIs and MRIs can complement private foundation grantmaking in important ways. From the perspective of the foundation, PRIs and MRIs have the potential to increase funds available to make grants while growing the foundation’s endowment. In addition, PRIs and MRIs offer the foundation an opportunity to address social and environmental issues with strategies that go beyond grantmaking, including the deployment of investment assets in the service of the foundation’s charitable mission. From the perspective of the recipient organization, PRIs and MRIs can help develop organizational capacity by providing growth capital, an opportunity to establish a credit history, and a reason to develop the organization’s financial and management capacity. In addition, PRIs and MRIs can help recipient organizations attract additional investors.

Comparing PRIs and MRIs

Despite the fact that PRIs and MRIs are both “impact investments” used by private foundations to achieve social, environmental, and financial goals, there are some important differences between them. For example, PRIs are formally defined in the Internal Revenue Code (the “Code”), and there are several legal requirements for qualification as a PRI, which are described below. In contrast, “there is no legal definition of an MRI and no legal requirements to qualify for, or prohibitions resulting from, this status.”[8] In addition, PRIs typically have a below-market rate of return, whereas MRIs, as commercial investments, are subject to the same fiduciary and investment standards as other types of investments, and usually offer a market rate of return. On the other hand, MRIs do not need to meet the charitable standards that PRIs must meet. Finally, while PRIs can be made from either program funds (the funds that a private foundation designates for making qualifying distributions) or endowment funds (the “other 95 percent” of a foundation’s assets), MRIs must be made from investment assets rather than program assets.

The following sections will describe in more detail the legal and tax rules applicable to PRIs and MRIs.

PRIs Defined

PRIs are closely akin to private foundation grants. Traditionally, the development of low-cost housing and community development programs have attracted the greatest number of PRIs. Recently, however, there has been greater use of PRIs in areas such as education, arts and culture, social and health programs, and environmental sustainability.[9] Foundations usually make PRIs in the form of deposits, loans, or equity investments; however, PRIs can involve more diverse financial methods, such as subordinated loans, revolving funds, loan guarantees, and linked deposits.[10]

Investments must meet a specific charitable standard to qualify as a PRI.[11] That standard is set forth in Section 4944(c) of the Code and related regulations. To qualify as a PRI, an investment must meet the following three requirements:

- The primary purpose of the investment must be to further one or more exempt purposes of the foundation;
- The production of income or appreciation of property may not be a significant purpose of the investment; and
- No electioneering and only very limited lobbying purposes may be served by the investment.

An investment will satisfy the primary exempt purpose test (1) if it significantly furthers the accomplishment of the foundation's exempt activities, and (2) if the investment would not have been made but for its relationship to the foundation's exempt activities.[12] Of necessity, this determination will require a consideration of facts specific to the foundation, its mission, and the particular investment. Notably, there is no requirement that the investment be made in charitable, exempt organizations. Rather, the investment can be in a for-profit organization so long as the purpose of the investment is charitable.[13]

The second requirement, that no significant purpose of the investment was the production of income or appreciation of property, is more fully set forth in Treasury Regulation §53.4944(a)(2)(iii). That regulation states that the IRS will consider whether investors solely engaged in investment for profit would be likely to make the investment on the same terms as the private foundation. The fact that an investment produces a significant financial return, however, will not be conclusive as to the no significant investment purpose test. This requirement will be easiest to meet in the case of a below-market loan or similar investment, where the foundation could easily have made more money investing the funds elsewhere at a market rate.

The third prong is that the investment not be used to attempt to influence legislation, or to participate or intervene in campaigns for public office. Typically, the transaction documents will contain a prohibition against the investment recipient using the PRI funds for such purposes.

Federal Tax Rules for PRIs and MRIs

Generally, PRIs are treated similarly to grants for purposes of the federal tax rules relating to private foundations, while MRIs are not. The following is a summary of how certain Code sections apply to PRIs and MRIs.

Section 4940 Excise Tax on Net Investment Income

Section 4940 of the Code imposes an excise tax on the net investment income of a private foundation. Under current law, the rate of tax is two percent, but it is reduced to one percent in some circumstances. This annual tax on private foundation income applies to income generated by both PRIs and MRIs.

Section 4941 Prohibition on Self-Dealing

Private foundations are subject to strict prohibitions on self-dealing under Section 4941 of the Code. Under the self-dealing prohibitions, a private foundation will be subject to severe sanctions if it enters into any of a number of transactions with a "disqualified person." The Code defines a disqualified person as any person, whether an individual, entity, trust, or estate, that is related to a foundation as a substantial contributor or foundation manager; persons owning a certain amount of a substantial contributor; certain family members of any of the above; and persons that are owned to a certain extent by disqualified persons. Prohibited transactions include the sale, exchange, or leasing of property between a foundation and a disqualified person; loans or other extensions of credit between a foundation and a disqualified person; the furnishing of goods, services, or facilities between a foundation and a disqualified person; the payment of compensation to any disqualified person; and the transfer to a disqualified person of any of the assets or income of a private foundation.

These prohibitions apply to both PRIs and MRIs.

One area where self-dealing issues commonly arise is when a foundation and a disqualified person mutually participate in an investment opportunity, whether the investment is an MRI or a PRI. The main concern is whether the co-investment constitutes the use of private foundation assets for the benefit of disqualified persons. The IRS has issued several rulings that identify various ways that a foundation's investment could impermissibly benefit its disqualified person co-investors (for example, by resulting in lower fees, smaller minimum investment amounts, or greater access to investments).[14]

Section 4942 Required Distributions

Under Section 4942 of the Code, a private foundation is required to distribute annually an amount equivalent to five percent of the fair market value of the foundation's investment assets. For purposes of Section 4942, PRIs count toward the required five percent payout amount. In addition, PRIs are excluded from the foundation's investment assets upon which the required distribution amounts are calculated. Because PRIs count toward meeting a foundation's mandatory distributions, repayment of a PRI in a future year will increase the required distribution amount in that year. A foundation's annual distribution requirement is increased to the extent a foundation receives a repayment of principal or a return of capital from a PRI previously used to meet the required distribution amount in the tax year following the year in which the repayment is received.

MRIs, in contrast, do not count toward the foundation's required five percent payout amount, and are not excluded from the foundation's assets upon which the distribution amounts are calculated.

Section 4943 Excess Business Holdings

Section 4943 of the Code states that a private foundation and its disqualified persons together may own no more than 20 percent (and in some cases 35 percent) of the voting or ownership interest in a business entity. This restriction applies to MRIs, but not to PRIs. Accordingly, an ownership interest acquired as part of an equity PRI is not subject to the excess business holdings rule.

Section 4944 Jeopardizing Investments

Section4944 of the Code imposes an excise tax on private foundation investments that are deemed to “jeopardize the carrying out of any of its exempt purposes.” MRIs are subject to this rule, but PRIs exist specifically as an exception to the rule.

Section 4945 Taxable Expenditures

Under Section 4945 of the Code, a private foundation will be subject to penalties for taxable expenditures. Taxable expenditures include expenditures for electioneering or lobbying, grants to individuals who do not meet certain requirements for acceptable scholarships, payments to non-charitable organizations without the exercise of expenditure responsibility, and any other expenditure for a non-charitable purpose. MRIs are not subject to the taxable expenditure rules, but PRIs are. Accordingly, if a foundation makes a grant or PRI to a non-charitable entity, the foundation must exercise expenditure responsibility or be subject to penalties under Section 4945.

Under the expenditure responsibility rules, the private foundation “is responsible to exert all reasonable efforts and to establish adequate procedures (1) to see that the grant [or PRI] is spent solely for the purpose for which it is made, (2) to obtain full and complete reports from the grantee on how the funds are spent, and (3) to make full and detailed reports [to the IRS].”[15] Treasury Regulations enumerate further requirements for the exercise of expenditure responsibility.

Unrelated Business Income Tax

Both PRIs and MRIs are subject to the federal rules regarding unrelated business income tax (“UBIT”); however, PRIs generally avoid UBIT by being “substantially related” to the foundation’s exempt purposes.

Reporting

A private foundation is required to report its PRIs made in the filing year in Part IX-B of the Form 990-PF. MRIs, on the other hand, are reported along with the foundation’s other investments – no special reporting is required.

Prudent Investment Standards

The main purpose of a PRI is to allow a private foundation to make investments that promote its charitable mission without satisfying a prudent investment standard, as would be necessary for a permissible business investment. MRIs, in contrast, are treated as commercial investments of the foundation, and are subject to prudent investment standards. A foundation considering making an MRI should consider the prudent investment rules found in Section 4944 of the Code, state corporate or trust law, and the Uniform Prudent Management of Institutional Funds Act. Further, the foundation should evaluate whether the MRI is consistent with its own investment policy and any donor restrictions on donated funds.

Conclusion

In the last few years, there has been a growing recognition that non-profit resources are scarce relative to society's needs. As a complement to grantmaking, PRIs and MRIs present opportunities for private foundations to mobilize a greater share of their assets in furtherance of their charitable missions. Nevertheless, barriers to the use of PRIs and MRIs remain. One important way that foundations can learn about PRIs and MRIs is through collaboration, peer learning, and support from foundations experienced in the use of PRIs and MRIs. As the use of PRIs and MRIs continues to expand, private foundations and their advisors will need to become familiar with the applicable legal and tax rules, but these types of impact investments present an exciting opportunity for stretching charitable dollars.

Endnotes

1 *Giving USA: The Annual Report on Philanthropy for the year 2011 (2012).* Chicago: Giving USA Foundation.

2 GIIN, *About Impact Investing,* http://www.thegiin.org/cgi-bin/iowa/resources/about/index.html.

3 Northern Trust, *Line of Sight: Impact Investing,* http://www.northerntrust.com/documents/white-papers/wealth-management/impact_investing.pdf.

4 *See* Foundation Center, *Doing Good with Foundation Assets: An Updated Look at Program-related Investments*, 2010.

5 Stephanie Gripne, *Forward to Leveraging the Power of Foundations: An Analysis of Program-Related Investing*, Lilly Family School of Philanthropy, Indiana University.

6 *See* Foundation Center, *Doing Good with Foundation Assets: An Updated Look at Program-related Investments*, 2010.

7 *Leveraging the Power of Foundations: An Analysis of Program-Related Investing*, Lilly Family School of Philanthropy, Indiana University.

8 Levitt, "Investing In The Future: Mission-Related and Program-Related Investments for Private Foundations," *The Practical Tax Lawyer, Spring: 33-43.*

9 Foundation Center, *Doing Good with Foundation Assets: An Updated Look at Program-related Investments*, 2010.

10 *Mission Investors Exchange, Frequently Asked Questions About Program-Related Investments.*

11 Some non-foundation charities, such as community foundations and donor advised funds, also make impact investments and may even use the term "PRI," but these entities are not subject to the rules of Section 4944.

12 Treas. Reg. §53.4944-3(a)(2)(i).

13 *See* Treas. Reg. §53.4944-3(b), Ex. 1-10.

14 *See,* e.g., PLR 9726006.

15 Code Section 4945(h).

Resources for Nonprofit Organizations and Practitioners

The follow list contains brief descriptions and links to some of the commonly used resources for nonprofit organizations and practitioners.

OREGON RESOURCES

Center for Nonprofit Stewardship (formerly Financial Stewardship Resources, Inc.) provides education and training to nonprofit board members to support and encourage sound financial, administrative and organizational stewardship.

Grantmakers of Oregon and SW Washington is a member organization providing support and resources to funders and promoting ethical and responsible charitable giving.

Nonprofit Association of Oregon (formerly TACS) is a nonprofit support organization and membership association with the mission to strengthen the collective voice, leadership, and capacity of Oregon nonprofits.

Nonprofit Network Southwest Washington serves the nonprofit community in SW Washington and collaborates frequently with Oregon entities, provides information, training, resources to nonprofit staff and boards and engages in advocacy for the nonprofit sector.

Oregon Department of Justice, Charitable Activities Section supervises and regulates the activities of charitable organizations in Oregon, maintains a registry of Oregon charities, professional fundraisers, and undertakes investigations.

The Oregon Nonprofit Handbook (for purchase) is a frequently cited resource manual that covers the legal, accounting, management and tax-exempt aspects of starting and running an Oregon nonprofit corporation.

The Oregon Nonprofit Sector Report (2011) is the product of the collaborative efforts of the Nonprofit Association of Oregon and Portland State University's Institute of Nonprofit Management, examines the sector as a whole, and provides data and descriptions of the Oregon nonprofit landscape.

IRS RESOURCES

Income limits for 990 Forms:

Financial Activity/Status	Form to File
Gross receipts normally ≤ $50,000	
Organizations eligible to file the e-Postcard may choose to file a 990EZ or 990	990N
Gross receipts < $200,000 and total assets < $500,000	(e-Postcard)
Gross receipts ≥ $200,000 or total assets ≥ $500,000	990EZ or 990
Private foundation - regardless of gross receipts or total assets	990

(from **http://www.irs.gov/Charities-&-Non-Profits/Form-990-Series-Which-Forms-Do-Exempt-Organizations-File%3F-(Filing-Phase-In)**)

Chart of types of tax exempt organizations and IRS filing requirements

IRS Products and Resources for Exempt Organizations

PUBLICATIONS, ARTICLES, BLOGS, AND MISCELLANY

BoardSource

The Chronicle of Philanthropy

Independent Sector

Nonprofit Law Prof Blog

The Nonprofit Quarterly

Annual Meeting of the
NONPROFIT ORGANIZATIONS LAW SECTION

The annual business meeting of the Nonprofit Organizations Law Section will take place from 11:45 a.m. - noon on September 26, 2014 at the offices of the Oregon State Bar Center, 16037 SW Upper Boones Ferry Rd, Tigard, OR 97224 during lunch break of the NOLS annual CLE. The agenda will include electing officers and members of the NOLS Executive Committee for the 2015 year.

Advising Nonprofit Organizations

Friday, September 26, 2014 • Oregon State Bar Center, Tigard

MCLE credits pending

Register online now at osbar.inreachce.com (search for NP14)

8:25 Introductory Remarks

8:30 Nonprofit Entity Formation - Tips for Practitioners

- Selecting the appropriate tax exempt classification
- Optimum organizational structure
- Gaining tax exempt status

David Atkin, Atkins & Associates Center for Nonprofit Law, Eugene

9:30 – 10:30 Nonprofit Governance

- The role of policies and bylaws in governance
- Different governing styles for different organizations
- Limitations in the traditional approach for board governance

Cindy Cumfer, Attorney at Law, Portland

10:30 Break

10:45 State and Federal Legal Updates in Nonprofit Law

- New Oregon case law regarding property tax exemption
- Changes in IRS regulations and procedures

Marisa Meltebeke, Davis Wright Tremaine LLP, Portland

11:45 Nonprofit Organizations Law Section Annual Business Meeting

12:00 Lunch

1:00 IRS Restrictions on Lobbying and Election Campaigns

- IRS Section 501(h) regulations – why nonprofits should use them
- IRS elections law regulations – what is and is not allowed

Margaret Olney, Bennett Hartman Morris & Kaplan LLP, Portland

2:00 For-Profit Activities by Nonprofit Organizations

- Subsidiary for-profit corporations
- Selecting the proper entity for subsidiary corporations
- Social entrepreneurial activities

Kate Kilberg, Thede Culpepper Moore Munro & Silliman LLP, Portland

3:00 Break

3:15 Ethical Issues in Advising Nonprofit Organizations

- Real life ethical situations attorneys will face

David Elkanich, Holland & Knight LLP, Portland

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, 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.

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Anne O'Malley
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