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NOLS Newsletter

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Oregon Attorney General's 2014 List of the 20 Worst Charities

Oregon Department of Justice

Attorney General Ellen Rosenblum issued the Attorney General's 20 Worst Charities list, an annual review of non-profit organizations that spend the majority of their donations on administrative costs and hiring professional fundraisers rather than on the cause they support. All of the charities are based outside of Oregon, but solicit donations in the state. The Firefighters Support Foundation of Massachusetts takes the number one ranking this year, with the organization spending only 6.5 percent of its approximately $3.9 million in annual expenditures to assist firefighters and their families.

A full list of the 20 Worst Charities can be found here.

"There are many Oregon-based charities that do excellent work in our communities," said Attorney General Rosenblum. "Last year, Oregon passed new laws designed to ensure that a charity spends at least 30% of its donations on its charitable mission. As a result, we are starting to see a real impact on the types of charities that are based outside of the state, but solicit in Oregon-and many unscrupulous charities are no longer registering here."

Five organizations not previously in the "top 20" are included on this year's list. The organizations include: Veterans Support Foundation (Silver Spring, MD), National Cancer Assistance Foundation (Sarasota, FL), Defeat Diabetes Foundation, Inc. (Madeira Beach, FL), Car Donation Foundation d/b/a Wheels for Wishes (St. Louis Park, MN), Cancer Support Services, Inc. (Dearborn, MI).

Many of the organizations on this year's list exemplify warning signs that Oregonians should watch for in evaluating charitable solicitations. Consumers should watch for warning signs such as organizations with names that are similar to -- but not the same as --other well-known and reputable charities, or charities that use emotionally appealing-but vague-descriptions of the charities' activities.

More tips for savvy Oregon donors are available online at http://www.doj.state.or.us/charigroup/pdf/wise_giving_guide.pdf.

OFFICE OF FOREIGN ASSET CONTROL AND NONPROFIT ORGANIZATIONS

Jane C. Hanawalt, Florence, Oregon

If a nonprofit organization sends money or goods overseas in fulfillment of its tax-exempt mission, its activities will likely be scrutinized for compliance with the myriad of regulations barring U.S. entities from sending funds or other assets out of the U.S. that may be utilized by or benefit terrorist organizations or drug traffickers. I learned this several years ago during the Form 1023 review process for an Oregon nonprofit whose principals were involved with a European international aid organization. The European organization had been providing food, clothing, shelter, cooking and heating fuel, and other necessities to churches and other charities in eastern bloc countries for many years, including before the fall of the Soviet Union. Their activities had grown to include educational opportunities and job training. While preparing and submitting the initial Form 1023 on behalf of the Oregon client, it never occurred to me that such a program, originally established and conducted through religiously-affiliated persons in eastern Europe would be scrutinized in this way. However, we live in the post-9/11 world. If a U.S. nonprofit will likely be dealing with one or more foreign partners, the nonprofit must become familiar with the rules established by the Office of Foreign Asset Control ("OFAC").

If a client's Form 1023 gives an answer indicating that any funds or in-kind benefits are going overseas, especially to war-torn or politically unstable geographic areas or countries, you should expect to receive follow-up questions requesting information concerning OFAC, whose authorities require detailed oversight of such activities, especially with respect to the use of the financial assets. The good news is that scrutiny of the OFAC requirements will enable you to counsel your clients concerning compliance and to advise them on adopting financial controls over their own foreign activities and those of their foreign partners. There is an abundance of information on the OFAC website. Though the full scope of the OFAC inquiries is beyond the issues addressed in this article, the overall inquiry is one that is familiar to most lawyers in the many contexts in which we are called upon to unravel complicated relationships: "Follow the money."

OFAC administers and enforces economic sanctions programs primarily against countries and groups of individuals, such as terrorists and narcotics traffickers. OFAC began as a unit of the Treasury Department around the time of the War of 1812 when sanctions were imposed against Great Britain for the harassment of American sailors. OFAC was created as an official agency in 1950, during the Korean War, when President Truman blocked all Chinese and North Korean assets subject to U.S. jurisdiction. Pursuant to federal laws and regulations, U.S. persons may not engage in trade, financial transactions, or other dealings unless authorized by OFAC or exempted by statute.

OFAC creates and maintains the Specially Designated Nationals ("SDN") list, as well as the list of specially embargoed countries. Nonprofit organizations and others are required to check the list on a regular basis to ensure that no goods, services, or funds are being disbursed, directly or indirectly, to such persons or entities. The information concerning persons, entities, and countries on the sanctioned lists is updated at least monthly. The compliance requirements apply to: all U.S. persons, including permanent resident aliens,

regardless of where they are located; all persons and entities within the United States; and all U.S. incorporated entities and their foreign branches. The fines and penalties for violation can be substantial.

In the nonprofit arena, concern centers upon the actual relationships between U.S. operations and their foreign counterparts. Upon receipt of the Form 1023, if the IRS believes that it needs more information to determine awareness of and compliance with the OFAC requirements, e.g., have you adequately demonstrated that the applicant organization's money or assets will not be diverted to terrorists, a letter is sent to the applicant or the applicant's representative requesting additional information. Such reply must be made under penalty of perjury and signed by an officer of the applicant or other authorized person. Questions posed could include the following:

1. In the aftermath of September 11, 2001, what practices has you organization formed to ensure that foreign expenditures or asset transfers are not diverted to support terrorism or other non-charitable activities? If you are operating in or making expenditures to a sanctioned country, will you comply with the appropriate OFAC registration and license requirements? When you conduct foreign activities or make foreign expenditures, will you check the OFAC list for the names of persons with whom you are dealing who may reside in the sanctioned or non-sanctioned countries in which you will be operating? If not this method, then you must explain in detail how you will ensure that you are not dealing with, or making expenditures to a person or organization listed on the OFAC list.
2. Please explain how the organization maintains proper control and discretion of the funds of the organization, as all funding of the 501(c)(3) organization must be used strictly for 501(c)(3) activities and purposes. If the organization is giving funding strictly to 501(c)(3) entities, please indicate this and no further documentation is needed, if funding will be provided to individuals or non-501(c)(3) entities, please explain how you assure that any funding, supplies, or other outlay provided by the organization is used strictly for 501(c)(3) purposes and activities. The response provided by the organization should include details relating to how the organization will recover amounts given that were not found to be used for 501(c)(3) purposes or activities.

In representing an organization which is conducting foreign activities directly, or partnering with foreign organizations, consideration should be given to these questions before the Form 1023 is submitted, especially considering the long wait times for approval of exemption.[1] OFAC publishes a Risk Matrix for the Charitable Sector that is of great assistance in analyzing these issues in your particular circumstance, and which can provide guidance as how a relationship with a foreign enterprise may be formalized so that it meets the concerns of OFAC.

In responding to a request from the IRS for further information, such as that described above, be prepared to address the following:

1 Current information with the newly-activated Form 1023 EZ is that follow-up questions often are not received by applicants, even when foreign activities or destinations for funds are indicated. The opinion of the author is that wise, up-front counseling regarding the OFAC concerns and requirements is all the more important.

1. The history and reputation of the recipient organizations within the humanitarian, charitable, educational, and scientific communities, as applicable.
2. Access to and utilization of the international banking system for the handling of funds.
3. Formal nature of contractual and grant agreements, and their inclusion of regular and binding oversight mechanisms.
4. Systematic vigilance and rigid control of the persons and networks of persons actually implementing program tasks is built into the procedures of all organizations involved.
5. Independent analysis of the information requested and received from partnering organizations before any financial awards are made.
6. Existence of clearly articulated needs and objectives within the recipient local affiliates, and demonstration of the 501(c)(3) purposes for which funds will be applied.
7. Detailed budgeting and staffing plans, including that transactions in currency are carefully tracked, and utilized as a last resort.

In my case, the responses and utilization of the matrix actually helped my U.S. client see clearly the types of procedures that needed to the set up and verified in order to carry out its programs in a truly transparent manner. The fact that my client's affiliated European organization had long-standing relationships with partners from former Soviet bloc countries was of great assistance, because it had already navigated for some years the transition of old banking systems to new, and old handshake practices to more formalized dealings and annual accountings and reports. If your client is in a situation where it or its foreign partners are starting from scratch, the process will be more difficult and time-consuming, in practical and analytical terms.

Standard Setting Organizations: 501(c)(6) Nonprofits Essential to Our Plug-and-Play World

Nancy Chafin, Portland, Oregon

Standard setting organizations (SSOs), also referred to as standard development organizations, trade alliances, and consortia, are entities that are often organized to qualify as 501(c)(6) nonprofits under the Internal Revenue Code. Although SSOs are specialized entities that fly under the radar of consumer awareness, their activities have far-reaching impact in our increasingly global and interconnected world. Modern communication technology products can work only if they can reliably connect to and operate with equipment, devices and components made by a variety of manufacturers. Examples of equipment reliant on standards are computer hardware, computer chips, software, printers, scanners, modems, and Internet networks.

SSOs are formed to develop voluntary market-driven standards or specifications in a variety of areas. SSOs may be formed to develop and promote a particular specification or a family of specifications, or to

develop and publish best practices documents or design guidelines. New entertainment, communication and other technologies requiring interoperability increasingly rely on standards and specifications developed by groups that encompass a variety of industry players. Despite being an integral part of many modern products and businesses, standards are largely created out of the public's eye. Privately developed standards are of growing importance in the global market because unlike government regulations, private standards can be applied internationally. With the proliferation of standards, there is increased competitiveness around which standards will succeed in the marketplace.

Internal Revenue Code 501(c)(6) provides for exemption of business leagues, chambers of commerce, real estate boards, boards of trade, and professional football leagues that are not organized for profit. Unlike 501(c)(3) organizations with a charitable purpose, 501(c)(6) organizations are formed to promote a common business interest and are not eligible to receive deductible contributions. Despite the business focus, no part of the net earnings of a 501(c)(6) can inure to the benefit of any individual member. The activities of a 501(c)(6) nonprofit should not be the kind ordinarily carried on by a for profit business.

Many SSOs are incorporated under state non-profit corporation statutes and intended to qualify under Section 501(c)(6) of the IRC. Although it is not mandatory for 501(c)(6) nonprofits to file for IRS recognition for their tax exemption, SSOs using 501(c)(6) will typically file for IRS recognition of exemption using Form 1024 to provide greater certainty for SSO participants.

501(c)(6) nonprofits must be membership organizations and have a meaningful extent of membership support. Membership support may be both in the form of dues and involvement in the organization's activities. Some SSOs may include individuals as members, but it is more typical that members are entities. SSOs often have different membership levels with a variety of rights and obligations which may be targeted at various interested parties. Typically the higher level memberships (also the most expensive) will be filled by manufacturers or other significant stakeholders with a direct interest in the development of the standard in question.

Depending on the SSO and its state of formation, its members may or may not be statutory members with default or mandatory rights under state law. In the typical "pay to play" format of SSOs, usually only members of the highest membership class (or a subset of those members) are entitled to representation on the board of directors. Although individuals serve as board members, they are designated by the various entities that are members at the requisite level, and serve at the pleasure of those members. Typically the board designees will be employees of the member entity.

SSOs use binding multilateral contracts with their members. These membership agreements, which are a condition of membership, require the SSO members to abide by the obligations set forth in the SSO's bylaws and other policies in exchange for membership benefits, which typically include access to the specifications and the benefits of the reciprocal licensing commitments.

Legal counsel for SSOs routinely encounter a wide range of legal issues, including antitrust issues given the cooperation of industry players in SSOs, governance issues, intellectual property issues involving patents, copyrights, trademarks and/or certification marks, and trade secrets and general contract law issues.

From a business perspective, setting technology and interoperability standards is a complex process. The difficulty of balancing the different intellectual property interests of various stakeholders is an inherent issue with standards development. When SSOs develop a standard, they face the risk that its implementation will infringe upon patent rights held by other parties. The issue of potential blocking patents is particularly challenging because of the large number of patent rights held by multiple patent owners that are increasingly involved in interoperable and compatible devices and other information technologies.

Because of concerns about potential blocking patents and other IP issues, SSOs generally negotiate and adopt a policy, often called an Intellectual Property Right Policy (IPR Policy), which is binding on all members and attempts to address, among other issues, certain concerns about potential blocking patents owned or otherwise controlled by SSO members. Many IPR Policies require some form of reciprocal licensing commitments by all members, even those that were not actively involved in development of the particular standard. Wide participation by industry players in an SSO will therefore contribute to creation of a viable standard. But SSOs have no ability to impose licensing obligations on parties who are not members of the SSO. Consequently, the IPR Policy cannot solve the problem of potential blocking patents owned or controlled by a nonparticipant.

Violations of SSO policies by an SSO member may lead to enforcement action by the U.S. Federal Trade Commission. For example, in In re Dell Computer (FTC Decision and Order, May 20, 1996, Docket No. C-3658), Dell was precluded from enforcing its patents covering implementation of a standard based on its alleged intentional violation of an SSO policy.

SSOs own and license trademarks associated with the group's specifications. They also administer compliance and certification programs associated with use of the SSO trademark with compliant or certified products of its members.

SSOs may employ an executive director and other skeleton staff or they may use the services of one of several specialty consulting firms providing contract management and other alliance services to SSO groups. Most of the substantive work of the SSO will be accomplished by members of technical work groups formed by the SSO and staffed on an as-needed basis by representatives of the SSO stakeholders. SSOs may also form liaison or consulting relationships with various academic and other institutional groups in areas of shared interests.

NOLS Brown Bag Lunch Discussions

The Nonprofit Organization Law Section is pleased to offer 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 next brown bag lunch discussion will be held:

Wednesday, February 11, 2015
Noon – 1:00 p.m.
Offices of Tonkon Torp, LLP
888 SW 5th Ave., Suite 1600
Portland, Oregon 97204

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

Additional dates for 2015 to be announced. A conference call number will be provided for those who cannot attend in person and would like to participate by phone. Please contact Susan Bower at susan.a.bower@doj.state.or.us for the conference call information.

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