Nonprofit Formation and Operations: A Primer

Cosponsored by the Nonprofit Organizations Law Section

Friday, September 28, 2018
8:30 a.m.–4:30 p.m.

5.25 General CLE credits and 1 Ethics credit
NONPROFIT FORMATION AND OPERATIONS: A PRIMER

SECTION PLANNERS

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7:30   Registration

8:30   Life Cycle of a Nonprofit—Part I
   ♦ Overview of IRC Section 501(c)
   ♦ Charitable organizational and operational requirements
   ♦ Incorporation and governance documents
   ♦ Application for tax exemption
   Penny Serrurier, *Stoel Rives LLP, Portland*
   Michele Wasson, *Stoel Rives LLP, Portland*

10:00  Break

10:15  Life Cycle of a Nonprofit—Part II
   ♦ State and federal registration and reporting requirements
   ♦ Board duties, responsibilities, and liabilities
   ♦ Charitable solicitations
   ♦ Fighting fraud and internal controls
   ♦ Dissolution
   Susan Bower, *Department of Justice Charitable Activities Section, Portland*
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12:15  Award of Merit, Section Annual Meeting, and Lunch
   The board will present David Atkin with the NOLS Award of Merit for his long service to the section and the nonprofit community, followed by the annual section meeting.

1:30   The Ethical Nonprofit Lawyer
   ♦ Who is the client?
   ♦ Who is in charge and a lawyer’s obligations
   ♦ Conflicts of interest
   Nellie Barnard, *Holland & Knight LLP, Portland*
   Calon Russell, *Holland & Knight LLP, Portland*

2:30   Break

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   ♦ Prudent investing
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3:30   Lobbying and Political Activity
   ♦ IRC 501(h) restrictions on lobbying by 501(c)(3) organizations
   ♦ Lobbying and political activities by 503(c)(4) organizations: IRS rules about “dark money” and its growing role in influencing election campaigns
   ♦ IRC Section 527 political action committees
   ♦ Federal and state lobbying registration and reporting requirements
   David Atkin, *Center for Nonprofit Law PC, Eugene*

4:30   Adjourn
**FACULTY**

**David Atkin,** *Center for Nonprofit Law PC, Eugene.* Mr. Atkin is the founder and director of Nonprofit Support Services. He is a recognized expert on nonprofit law and regularly presents seminars and workshops on nonprofit law topics to a wide variety of audiences. He also regularly gives specialized seminars for CPAs and other professionals who advise or lead nonprofit organizations, including seminars specifically for schools and churches. He was an adjunct professor at the University of Oregon Law School for many years, where he taught Public Land Law, Indian Law, Water Law, and a variety of other courses for the Environment and Natural Resource Law Department. Mr. Atkin also works with many international nonprofit organizations in third-world countries. He frequently works in Outer Mongolia, where he helped the government develop an entire new system of environmental laws following the collapse of their previous Soviet-style government.

**Nellie Barnard,** *Holland & Knight LLP, Portland.* Ms. Barnard’s practice focuses on advising lawyers, law firms, and corporate legal departments on legal ethics and professional responsibility matters. She also maintains a commercial litigation practice. She is a member of the Multnomah Bar Association Professionalism Committee, the Federal Bar Association board, Oregon Women Lawyers, the Multnomah Bar Association, the American Bar Association Young Lawyers Division, the Association of Professional Responsibility Lawyers, and the Campaign for Equal Justice Associates’ Committee. Ms. Barnard is admitted to practice in Oregon and Washington.

**Susan Bower,** *Department of Justice Charitable Activities Section, Portland.* Ms. Bower is an Assistant Attorney General in the Charitable Activities Section at the Oregon Attorney General’s Office. She is past chair of the Oregon State Bar Nonprofit Organizations Law Section.

**Calon Russell,** *Holland & Knight LLP, Portland.* Mr. Russell advises lawyers, law firms, and government and corporate legal departments on legal ethics and professional responsibility matters. His practice involves assisting clients at the organizational level with law firm formation and operations, dissolution, and lateral lawyer moves. He also counsels on regulatory compliance issues such as the unauthorized practice of law, litigation financing, fee splitting, conflicts of interest, and state bar admissions. For the defense of lawyers accused of misconduct, Mr. Russell is experienced in state bar disciplinary defense, sanctions motions, and legal malpractice claims, among other concerns. In addition, he advises on confidentiality duties, steps to avoid criminal liability, and strategies to lessen risk in law firms of all sizes. As part of his practice, Mr. Russell also focuses on civil litigation, primarily at the appellate level, and has a background in constitutional law, labor and employment matters, construction defect litigation, foreclosure proceedings, premises liability, and the representation of public officials. He is a member of the Multnomah Bar Association and is admitted to practice in both Oregon and Washington.

**Penny Serrurier,** *Stoel Rives LLP, Portland.* Ms. Serrurier provides nonprofit organizations with strategic solutions for their individual needs and helps clients navigate the complex laws and regulations in all aspects of governance, compliance, and tax-related matters. She has substantial experience working with higher education institutions, health care organizations, public charities, and private foundations on issues involving fundraising, governance, advocacy, tax status, endowment management, and related matters. Ms. Serrurier is a Fellow of the American College of Trusts and Estates Counsel, member and past chair of the Oregon State Bar Estate Planning and Administration Section, and a member of the Estate Planning Council of Portland, the Northwest Planned Giving Roundtable, the OSB Business Law Section, the OSB and American Bar Association Taxation Sections, the Multnomah Bar Association, and Oregon Women Lawyers. She has written numerous articles and given several presentations on topics related to tax-exempt organizations, nonprofit law, estate planning, charitable planning, estate tax, and estate and trust administration. She serves as an Adjunct Professor of Law teaching nonprofit organizations at Lewis & Clark Law School.
Jeffrey Thede, Thede Culpepper Moore Munro & Silliman LLP, Portland. Mr. Thede’s practice emphasizes estate and trust planning and administration, charitable planning, and tax-exempt organizations. He is a member and past president of the Estate Planning Council of Portland, a Fellow of the American College of Trust and Estate Counsel and a member of its national Charitable Planning Committee, a member of the Council on Foundations’ Committee on Community Foundations Legislative and Legal Affairs Team, and a member of the Northwest Planned Giving Roundtable. He is admitted to practice in Oregon and Washington.

Michele Wasson, Stoel Rives LLP, Portland. Ms. Wasson assists a variety of nonprofit organizations including charitable organizations, educational institutions, private foundations, trade associations, public nonprofit organizations, and trusts in all aspects of federal tax compliance, advocacy and political activity unrelated business income tax, planned giving, governance, endowment, and investment matters. She also provides estate planning advice to individuals with significant philanthropic interests. Ms. Wasson serves as treasurer of the Oregon State Bar Nonprofit Organizations Law Section and chair of the Estate Planning Council Seminar Planning Committee. She is admitted to practice in Oregon and Washington.

Lottie Zorn, Department of Justice Charitable Activities Section, Portland. Ms. Zorn, a CPA, serves as an Audit Coordinator for the Oregon Department of Justice Charitable Activities Section. She conducts financial investigations of charitable organizations, provides analysis of accounting issues relevant to nonprofit entities, and assists with the department’s education and outreach activities. She has served for many years as a nonprofit board member, administrator, adviser, and volunteer.
SECTION 1

OREGON NONPROFIT LAW

I. **Type of Entity.** A charitable organization may be organized as any of the following:

   A. **Nonprofit corporation:** The most common form of organization is a nonprofit organization. Nonprofit corporation state law is found at ORS Chapter 65 (available at [https://www.oregonlegislature.gov/bills_laws/ors/ors065.html](https://www.oregonlegislature.gov/bills_laws/ors/ors065.html)). ORS Chapter 65 establishes the procedure for creating an Oregon nonprofit corporation. Look to these statutes for any questions your bylaws do not answer.

   B. **Association:** Unincorporated associations of individuals without bylaws or some other governing instrument do not qualify as a corporation. However, if an unincorporated association is governed by a set of bylaws or other organizational documents, the IRS treats the organization as a corporation for federal tax purposes. IRC 7701

   C. **Partnership:** It is unclear whether a partnership will qualify as tax exempt. However, recently the IRS has indicated that a limited liability company may qualify for §501(c)(3) status if all members are §501(c)(3) organizations.

   D. **Trust:** A charitable organization may be established in the form of a trust. This form does have the benefit of offering the founders more control over the organization.

II. **Incorporation.** Articles of Incorporation must be filed with the Oregon Secretary of State. Sample Articles are attached in the appendix. You can also find the Oregon Secretary of State forms and online registration at [https://sos.oregon.gov/business/Pages/domestic-nonprofit-corporation-forms.aspx](https://sos.oregon.gov/business/Pages/domestic-nonprofit-corporation-forms.aspx).

   A. Articles must include the name, whether the corporation is a public benefit, mutual benefit or religious corporation, the address of the registered agent, the name and address of the incorporator(s), principal office address (or alternative address to which notices may be mailed), whether the corporation has members, and provisions regarding the distribution of assets upon dissolution.

      1. **Incorporator:** Typically the founder of the organization should be the incorporator. The incorporator must obtain the consent of any directors named in the Articles and sign the Articles of Incorporation under penalty of perjury.

      2. **Public Benefit/Mutual Benefit/Religious Corporation:** Public benefit corporations are defined under ORS 65.047 as a corporation that is recognized as tax exempt under §501(c)(3) of the Internal Revenue Code of 1986 (the “Code”) or is otherwise organized for a public or charitable purpose, is restricted so that on dissolution the corporation must distribute the corporation’s assets to an organization organized for a public or charitable purpose, a religious corporation, the United States, a state or a person that is recognized as exempt under section 501(c)(3) of the Code; and does not come within the definition of “religious corporation.”
3. **Members:** A Member is defined (without regard to what the person is called in the articles or bylaws), as an individual entitled to vote on more than one occasion to elect a director or directors.

   (a) “Member” does not include a person that has only one or more of the following rights:

   (i) As a delegate;

   (ii) To designate or appoint a director or directors;

   (iii) As a director; or

   (iv) a holder of an evidence of indebtedness the corporation has issued or will issue.

   (b) Charitable organizations do not usually have members. However, where a charity is controlled by another organization (such as in the context of a corporate foundation), it is often most efficient to create the controlled organization as a single member nonprofit with the controlling entity as sole member. Where several governmental entities come together to form a charitable organization, those entities may be members.

   (c) The term member is sometimes used by development staff to refer to contributors who have made a donation to the organization in exchange for “membership rights” such as free or discounted admission to the organization’s facilities or events, including parking, and discounts on purchases of goods and services, including goods or services offered by retailers working with the organization. These members do not have the right to vote for the board of directors and are not members for the purposes of ORS Chapter 65.

4. **Dissolution:** Chapter 65 requires that all assets of a public benefit corporation after the payment of creditors be transferred to another public benefit corporation upon dissolution. As discussed below, federal tax law also requires that a charitable organization’s Articles specifically state that upon dissolution, any remaining assets must be distributed to another charitable organization.

5. The articles of incorporation may set forth:

   (a) The names and addresses of the initial directors;

   (b) Provisions regarding:

   (i) the purpose or purposes for which the corporation is organized;

   (ii) managing and regulating the affairs of the corporation;

   (iii) defining, limiting and regulating the powers of the corporation, its board of directors, and members or any class of members;
(iv) the characteristics, qualifications, rights, limitations and obligations attaching to each or any class of members;

(v) provision eliminating or limiting the personal liability of a director or uncompensated officer to the corporation or its members within the limits set forth in ORS 65.047 or other information.

III. **Appointment Directors and Officers.** ORS 65.057 requires that incorporator hold an organizational meeting (or a take action by consent) to appoint directors and complete the organization of the corporation by appointing officers, adopting bylaws and carrying out other corporate business. We have included sample form bylaws and resolutions for initial meeting of the board of directors in the appendix.

A. **Directors and Officers:** The provisions regarding directors and officers are set forth in ORS 65.301 - 65.414.

1. All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, the board of directors, subject to any limitation set forth in the articles of incorporation and except those powers reserved to members.

2. All directors must be individuals.

3. Oregon law requires that public benefit organizations have at least three directors (mutual benefit corporations must have at least one director). Often bylaws provide for a variable range of size of the board of directors by fixing the minimum and maximum allowable. The bylaws should set forth the term, number of consecutive terms permitted, provisions governing resignation, removal and filling vacancies. Most bylaws provide that the initial term of a director may be less than a full term in order to stagger the election of the board of directors.

B. **Board Development:** As a matter of best practices, new organizations should prioritize board development. The organization should make sure that the skill set of board members covers the organization’s needs. Financial literacy, fundraising experience, and substantive knowledge about the organization’s mission are all examples of important skill-sets for board members. Organizations should set out its strategic goals and the skill sets necessary to achieve those goals, and then determine which of those skill sets the board has on hand, and which it should recruit for. Moreover, when building a team, it is important to understand that you are also building a culture. Paying attention to the kind of board culture you want, and interviewing candidates for attributes as well as skills, will ensure that the board is in full alignment with the needs and values of the organization. For more information see: [https://www.bridgespan.org/bridgespan/images/articles/right-from-the-start-what-your-board-needs/RightFromTheStart-WhatYourNonprofitBoardNeeds.pdf?ext=.pdf](https://www.bridgespan.org/bridgespan/images/articles/right-from-the-start-what-your-board-needs/RightFromTheStart-WhatYourNonprofitBoardNeeds.pdf?ext=.pdf)
C. **Approval of Governance Documents.**

D. **Obtain an EIN:** Every nonprofit corporation must obtain a taxpayer identification number. Information and forms to obtain an EIN are available here:


E. **Charitable Registration.** Every charitable organization that has received property for charitable purposes must file with the Attorney General an initial registration, a copy of its articles and bylaws, and an annual report. State law charitable organization registration requirements are found in ORS 128.610-128.750 and available at:


For charitable registration forms see:

https://www.doj.state.or.us/charitable-activities/starting-or-closing-a-charity/registering-a-new-charity/

1. “Charitable purpose” means any purpose to promote the well-being of the public at large, or for the benefit of an indefinite number of persons, including but not limited to educational, literary, or scientific purposes, or for the prevention of cruelty to children or animals, or for the benefit of religion, rehabilitation services, public recreation, civic improvement, or services which lessen the burdens of government. ORS 128.620(3).

2. There are statutory delinquency fee and penalties for failure to file. In addition, the Attorney General can also order a charitable organization to cease soliciting and require the organization to submit additional information or documentation. The Attorney General, Charitable Division has an investigation team to investigate transactions for the purpose of ascertaining whether the organization or a person has engaged in a violation of ORS 128 or has breached a fiduciary duty. ORS 128.760-766.

F. **Charitable Solicitation Registration.** Oregon and Washington both require most charitable organizations to register prior to soliciting any charitable contributions within the state. See https://www.sos.wa.gov/charities/allforms.aspx for information and forms about Washington registration.

IV. **Other State Forms and Useful Resources**

- **Property Tax Exemption:** See the Department of Revenue information available at https://www.oregonlaws.org/ors/307.130. Forms are available at https://www.oregon.gov/DOR/forms_FormsPubs/form-or-ap-rppte_310-088.pdf.

- **Oregon Employer Handbook:** If the organization plans to have employees, this handbook prepared by the Oregon Employment Department is a useful starting place:

SECTION 2
FEDERAL TAX LAW

I. Sources of Tax-Exemption


1. Code §501(c)(3) is the most common form of tax-exempt organizations and provides for tax-exemption for corporations. . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.


2. Code §501(c)(4) exempts nonprofit civic organizations that operate exclusively for the promotion of social welfare. Under the regulations, an organization operates exclusively for the promotion of social welfare if it is primarily engaged in promoting the common good and general welfare of the people of the community. Such an organization is operated primarily for the purpose of bringing about “civic betterments and social improvements.” So long as its primary purpose is not to engage in political campaign activities, a §501(c)(4) organization may engage in political campaign activities. Rev. Rul 81-95, 1981-1 C.B. 332. For more information about 501(c)(4) see https://www.irs.gov/irm/part7/irm_07-025-004 and https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations.

3. Code §501(c)(6) exempts from tax nonprofit business leagues, chambers of commerce, real estate boards, boards of trade and professional football leagues, if no part of the organization's net earnings inures to the benefit of any private or individual shareholder. Such organizations are frequently referred to as “trade associations.” The applicable regulations provide that a business league is: an association of persons having some common business interest, the purpose of which is to promote such common interest and not to engage in a regular business of a kind ordinarily carried on for profit… . [I]ts activities should be directed to the improvement of business conditions of one or more lines of business as distinguished from the performance of particular services for individual persons. The critical inquiry in determining whether an organization qualifies as a business league is whether the organization performs substantial particular services for its members as opposed to promotion of a particular line of
business. Exemption under §501(c)(6) depends upon whether the organization represents a sufficiently large segment of a given industry.

Trade organizations can engage in an unlimited amount of lobbying although to the extent that member dues are used for lobbying, those dues become non-deductible as a business expense for members.

For further materials relating to Code §501(c)(6) organizations see exempt Organizations Determinations Manual, IRM 7.25.6 (10-19-98) available at:


4. **Code §501(c)(7):** Clubs that are organized and operated for pleasure, recreation and other nonprofit purposes, substantially all of whose activities are for such purposes, no part of whose net earnings inures to the benefit of any private shareholder, are exempt from income taxation under §501(c)(7). This provision generally encompasses social and recreation clubs that are supported solely by membership fees, dues and assessments, as well as fees charged to members for the use of facilities. Typical §501(c)(7) organizations include golf and country clubs, amateur sport clubs, hobby clubs, and luncheon and dinner clubs. Exemption as a social club is less desirable than other categories of exemption, because the club's income other than its “exempt function” income (generally, income originating from members and amounts set aside for charitable and similar purposes) will be subject to the unrelated business income tax.

5. **Code §527** was enacted after a long controversy as to the tax treatment of political organizations. The legislative history states that §527 explicitly provides tax exemption for political organizations, because political activity (including its financing) is not a trade or business appropriately subject to tax. The investment income generated by the retention or disposition of assets by such organizations, however, is treated as an item of income subject to tax. For purposes of §527 a “political organization” is defined as a party, committee, association, fund or other organization that is organized and operated primarily to accept contributions and/or make expenditures for an “exempt function.” An “exempt function” is defined, in turn, as influencing or attempting to influence the selection, nomination, election or appointment of any individual to any federal, state, or local public office, or office in a political organization, or the election of Presidential or Vice-Presidential electors. It is sufficient that the organization be operated “primarily” to accept contributions and/or make expenditures for political campaign purposes. Thus, a local political club is permitted to carry on incidental social activities. Similarly, a political organization could support the enactment or defeat of a ballot proposition. Moreover, it is sufficient if the organization only indirectly accepts contributions and/or makes expenditures for political campaign purposes. As a result, a national political organization may receive contributions from local organizations and/or distribute funds for campaign purposes to local organizations. For more information see https://www.irs.gov/charities-non-profits/political-organizations.

6. **Sponsorships:** In some cases, organizations seek to form a “sponsorship” relationship with a charitable organization because the organization has not itself been recognized as a tax-exempt charitable entity by the IRS. There are two primary concerns in crafting fiscal sponsorship arrangements – avoiding an agency relationship and avoiding...
earmarking. Both concerns are aimed at avoiding the circumstance where a tax-exempt organization is being used as a conduit for the transmission of deductible contributions to entities not otherwise eligible to receive them. See Fiscal Sponsorship: 6 Ways To Do It Right, Gregory L. Colvin.

II. Organizational and Operational Requirements for 501(c)(3) Exemption. To qualify for tax-exemption an organization must be both organized and operated for exempt purposes.

A. Organizational Requirements: The organizational test relates to the purposes of the organization as described in the articles of incorporation and governing documents. The Articles must include certain limitations on purpose and activities:

1. Articles must limit activities of organization to one or more exempt purposes and may not expressly authorize it to engage in activities that do not further one or more exempt purposes except to an insubstantial degree; and

2. The Articles must contain an express or implied provision dedicating the organization’s assets to an exempt purpose upon dissolution.

B. Operational Requirements.

1. The regulations provide that the organization is operated exclusively for exempt purposes if it engages “primarily” in activities that further its exempt purpose or purposes. Exempt purposes means one of the eight enumerated purposes of §501(c)(3): religious, charitable, scientific, testing for public safety, literary, educational, fostering national or international amateur sports competition (with certain restrictions), or the prevention of cruelty to children or animals.

2. The regulations state that the term “charitable” includes organizations whose purposes include the following: (a) relief of the poor or underprivileged; (b) advancement of religion; (c) advancement of education or science; (d) erection or maintenance of public buildings, monuments or works; (e) lessening the burdens of government; and (f) the promotion of social welfare by organizations designed to accomplish any of the above purposes; or to (a) reduce neighborhood tensions; (b) eliminate prejudice and discrimination; (c) defend human or civil rights secured by law; or (d) deter juvenile delinquency or community deterioration. The types of charitable organizations that might fall within one or more of these regulatory categories is limited only by the founder's imagination. Nevertheless, several common types of organizations have emerged from this scheme.

C. Non-Exempt Purposes. An organization may engage only to an insubstantial degree in activities that do not further any exempt purpose. Thus, the operational test is satisfied if an organization's primary activities further its exempt purposes and all other activities are merely incidental thereto. There are three general ways to determine whether an activity is incidental to the organization's primary activities:

1. the amount of income derived from the activity in comparison to total income;
2. the amount of expenditures for the activity in comparison to total expenditures; and

3. the amount of time the organization's employees devote to the activity in comparison to total hours worked. In one case, the IRS compared the amount of expenditures for the activity to the organization's total income.

D. Private Inurement/Private Benefit. The prohibition against private benefit by charities is a regulatory and common law concept derived from the regulations' requirement that an organization must operate exclusively to further a public rather than a private interest. The concept of private inurement generally refers to benefits conferred upon insiders, such as officers, directors, or founders, through the use or distribution of the organization's funds. The private inurement prohibition is generally concerned with payments to insiders or other persons other than as reasonable compensation for services actually rendered. It is a narrower concept than the proscription against private benefit, which generally refers to the scope of the class to be served by the organization's activities. An organization's activities may further a public purpose, yet its founders or insiders may nevertheless improperly benefit from its funds. Conversely, where the organization's insiders have “clean hands,” the organization may nevertheless confer excessive benefit upon its members or beneficiaries, thereby failing to operate exclusively in furtherance of a public purpose. The prohibition against private inurement of net earnings is intended to ensure that the organization serves a public rather than a private interest and, thus, to this extent the two doctrines overlap.

E. Prohibition Against Inurement. The statutory language literally prohibits all private inurement. On the other hand, an incidental amount of private benefit is permissible, since all §501(c)(3) and §501(c)(4) organizations may be said to benefit individuals through their activities. The nature and quantum of the private benefit in comparison with the primary exempt purpose served and the manner in which it is served are the key inquiries.

Although §501(c)(3) and 501(c)(4) prohibit only private inurement of net earnings, the IRS interprets the provision quite broadly to encompass nearly any use or distribution of an organization's assets other than as reasonable compensation for goods or services actually furnished or in arm's-length transactions. While certain forms of private inurement or private benefit are relatively obvious, other types are less recognizable:

(a) lending income or corpus without receiving adequate security and reasonable interest;

(b) paying excessive compensation;

(c) making its services available on a preferential basis;

(d) purchasing property for more than an adequate consideration in money or money's worth;

(e) selling property for less than an adequate consideration in money or money's worth; and
(f) engaging in any other transaction resulting in a substantial diversion of its income or corpus.

III. Public Charity/Private Foundation. Corporations exempt from taxation under §501(c)(3) are further classified as either public charities or private foundations. A §501(c)(3) organization will be treated as a private foundation unless it can meet the criteria necessary to be considered a public charity. There are several tests to determine whether an organization will be recognized as a public charity. See §509 available at https://www.law.cornell.edu/uscode/text/26/509.

A. Public Charities. Public charities include:

- Churches
- Schools
- Hospitals and affiliated medical research facilities
- Publicly Supported Organizations.
  1. 509(a)(1) Test: To qualify as a public charity under §170(b)(1)(A)(vi), an organization must normally receive at least one-third of its total support from governmental units, direct or indirect contributions from the general public, or a combination of these sources. The public support is proven through a support fraction – the denominator of which is total support and the numerator of which is eligible public and governmental sources.

  An organization normally receives the requisite amount of public support and meets the 34 percent test for the taxable year and the succeeding taxable year if for that year and the immediate preceding four years the organization meets the 34 percent test on an aggregate basis.

  In calculating the public charity fraction, keep in mind that for the purposes of §170(b)(1)(A)(vi), a gift or grant is counted only to the extent that it does not exceed two percent of the denominator (total support). If a donor’s contribution exceeds two percent of the organization’s total support, the contribution, while it is included in its entirety in the denominator of the fraction, will be ratcheted down to two percent of the denominator when calculating the numerator of the support fraction. Also note that a donor’s contribution is only that portion of the contribution, net of any deduction for gifts or services received by the donor from the organization. The effect of this two percent limitation is to reduce the organization’s percentage of public support.

  There is an important exception to the two percent rule for contributions from other public charities and governmental units. Such contributions are not subject to the two percent limitation for purposes of calculating the numerator of the support fraction. The entire
amount of a grant from the government or a public charity is included in both the denominator and the numerator. Treas Reg § 1.170A-9.¹

A summary of what sources of funds are included in the denominator and numerator follows.

**Numerator:** The numerator includes the following amounts:

(a) Government Support is included in full, unless it is treated as exempt income (for example, contracts for services);

(b) Contributions from public charities are included in full, unless earmarked;

(c) Contributions (net gifts or services received in exchange) from individuals, trusts, and corporations (contributions are aggregated under IRC 4946(a)(A) through (G)) and are included to up to two percent of total support during the relevant period;

The numerator does not include gross receipts received from the performance of exempt activities or any other amount not described in paragraphs a, b and c above.

**Denominator:** For purposes of calculating the denominator, “support” includes the following:

(a) Gifts, grants, contributions, and membership fees (if the membership fees are contributions and not gross receipts from goods or services)²;

(b) Net income from unrelated business activities, whether or not such activity is carried on regularly as a trade or business;

(c) Gross investment income (for example, interest, dividends, rents, royalties);

(d) Tax revenues levied for the benefit of the organization; and

(e) The value of services or facilities furnished by a government unit without charge.

¹ However, the above exemption from the two percent limitation does not apply where the support from the governmental unit or public charity was received from another donor and earmarked for the organization seeking status as a public charity. In addition, funds received from a governmental unit for the performance of the organization’s exempt function are excluded from the support fraction altogether. Treas Reg § 1.170A-9(e)(8)(i).
Facts and Circumstances Test: If an organization does not meet the one-third support test, it still may qualify as a public charity if it meets the “facts and circumstances” test. The test has a number of factors that are designed to determine whether the organization is actually organized and operated to attract “new and additional” public or government support on a continuing basis.

Following is a brief summary of the factors in the facts and circumstances test:

(a) Ten Percent Test: The organization must “normally” receive a substantial part (defined by the treasury regulations to be at least 10 percent) of support from governmental units, the general public or a combination of those sources. It is important to note that the 10 percent support number is a floor, and is only one element of the facts and circumstances test. The treasury regulations state that the higher the percentage of public support, the less the other factors in the facts and circumstances test will matter. If the public support number is just 10 percent or slightly above, the burden of meeting the other factors of the test will be much greater. However, an organization does not necessarily have to satisfy all of the factors listed below to pass the facts and circumstances test.

(b) Attraction of Public Support: The organization must maintain a “continuous and bona fide program” for soliciting funds from “the general public or community.” In determining whether a fund raising program is continuous and bona fide, the IRS will look at whether the organization’s fund raising activities are reasonable in light of its charitable activities. The IRS acknowledges that an organization may rely on limited sources of support in its early years until it can expand its solicitation program. However, to meet this factor, the organization should have a long-term fundraising plan that would include a grant writing program to solicit funding from private foundations, other public charities, and government agencies. The fundraising program should also encompass a plan for soliciting members of the general public for financial support.

(c) Sources of Support: The regulations state that if the sources of support are “directly or indirectly from a representative number of persons” rather than members of a single family the organization is more likely to meet the facts and circumstances test. In applying this factor, the IRS will give consideration to the type of organization and whether it limits its activities to a community or region or to a special cause such that it may only appeal to a limited number of persons.

(d) Governing Body: The organization should have a governing body that is representative of the broad interests of the public and not the personal or private interests of a limited number of donors. An organization that meets this test will have a board of directors that is comprised of public officials, persons having expertise in the charitable field in which the organization operates, and community leaders such as educators, civic and religious leaders,
and “others representing a broad cross-section of the views and interests of the community.”

(e) **Public Facilities or Programs:** An organization that provides services directly to the public such as a museum or orchestra will be more likely to meet the facts and circumstances test as publicly supported. The more publicly-oriented an organization’s purposes are, the less sweeping its fundraising needs to be. For example, if an organization is working to benefit a broad class of individuals (e.g., underprivileged children), it is more likely to meet this factor than if the organization were benefitting only a certain school or neighborhood or somehow otherwise limited the class of persons receiving benefits.

(f) **All Other Facts and Circumstances:** In addition to the above factors, the IRS will take into consideration all other facts and circumstances and determine the weight accorded to any one of them depending upon the nature and purpose of the organization.

2. **509(a)(2) Test:** To qualify as a §509(a)(2) public charity an organization must show that it normally receives more than one-third of its total support from any combination of gifts, grants, contributions, membership fees, and charges and fees from the performance of exempt activities.

**Numerator:** To calculate the numerator of the support fraction, include the following:

(a) **Gifts and Grants and Exempt Income**

   (i) Gifts and grants from 509(a)(1) public charity organizations are included in full.

   (ii) Gifts, grants and membership fees from permitted sources (persons, and governmental entities who are not a disqualified person) are included in full.

   (iii) Gift and grants from other than public charities are excluded completed if made by a disqualified person (any person who has contributed more than $5000 if this amount is more than two percent of all contributions since the organization was established or any other disqualified person as defined under 4946). In general, once a person or entity is a disqualified person (except foundation managers), they remain so.

   (iv) Receipts from exempt activities are excluded to the extent that the total amount received from each person or governmental
bureau\textsuperscript{3} or similar agency exceeds the greater of one percent or $5000 of the organization’s support in that year. Support from foreign government is subject to same rule.

**Denominator**: For purposes of calculating the denominator, “support” includes the following:

(a) Gifts, grants, contributions, and membership fees;
(b) Net income from unrelated business activities;
(c) Gross investment income (e.g., interest, dividends, rents, royalties);
(d) Tax revenues levied for the benefit of the organization;
(e) The value of services or facilities furnished by a government unit without charge;

The denominator does not include capital gains.

3. 509(a)(3) Supporting Organizations. These organizations are organized, and at all times thereafter are operated, exclusively for the benefit of, to perform the functions of, or to carry out the purposes of one or more public charities and is:

(a) is operated, supervised, or controlled by a public charity;
(b) supervised or controlled in connection with one or more such public charity; or
(c) operated in connection with one or more public charities, and
(d) is not controlled directly or indirectly by one or more disqualified persons (as defined in section 4946) other than foundation managers of a public charity.

**B. Private Foundations.** Private foundations typically have a single major source of funding (usually gifts from one family or corporation) and most have as their primary activity the making of grants to other charitable organizations, rather than the direct operation of charitable programs. ([https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities](https://www.irs.gov/charities-non-profits/charitable-organizations/public-charities))

If an organization is classified as a private foundation, in addition to the laws applicable to all § 501(c)(3) organizations, it will also be subject to the rules of Sections 4940 through 4946

\textsuperscript{3} The organization must determine whether the receipts are from more than one “bureau” or not. A bureau is a unit functioning at the operating rather than policy making level and is normally a subdivision of a department. See 1.509(a)-3 for examples.
of the Code. The first excise tax, on net investment income, applies to all private foundations and cannot be avoided. The remaining excise taxes restrict the activities of foundations and are applied as a penalty for engaging in prohibited activities. Violations of these rules can result in the imposition of excise taxes and penalties against the private foundation and, in some cases, its managers, its substantial contributors, and certain related persons.

1. **Tax on Investment Income.** Private foundations must pay a two percent tax on net investment income. Investment income includes dividends, rents, royalties, payments on notes and capital gains, less expenses. With some planning and proper timing of charitable distributions, this tax can be reduced to one percent or less. This excise tax on “net investment income” must be paid quarterly.

2. **Self-Dealing.** In general, the self-dealing rules prohibits financial transactions between the foundation and its creators, funders, insiders and their family members and closely held companies (“disqualified persons”) are prohibited. The prohibition only applies to “disqualified persons,” defined below. Acts of self-dealing include the following:

- Lending money between a disqualified person and the foundation, in either direction.
- The sale or lease of property between a disqualified person and the foundation, in either direction.
- The provision of goods or services between a disqualified person and the foundation, in either direction.
- The transfer or use of the foundations assets or income to a disqualified person.
- Payment of excessive compensation,
- Payment to any government official.

As an extreme example, a private foundation cannot buy for $1 an asset worth $1 million from a disqualified person.

However, there are a few exceptions to the self-dealing prohibition. A disqualified person may make a no-cost, no-interest loan to a private foundation. A disqualified person may also provide space, utilities and administrative support, goods and services without charge, to a private foundation, and a private foundation may pay reasonable compensation to disqualified persons who are employees. However, before paying a disqualified person compensation, you should consult an attorney, as there are certain restrictions.

3. **Disqualified Persons.** Disqualified persons is defined as the following persons:

- Any person who has contributed more than 2 percent of the total gifts made to the Foundation (a “substantial contributor”).
• Owners of more than a 20 percent interest in any company that is a substantial contributor.
• Foundation managers.
• Family members of substantial contributors, 20 percent owners and foundation managers. This includes grandparents, parents, children and other lineal descendants and spouses of these people.
• Corporations, partnerships, trusts and estates in which any disqualified person has more than a 35 percent interest.
• Government officials.

4. **Minimum Charitable Distributions.** A private foundation must use its assets for charitable purposes. In order to ensure that the foundation’s assets are used to further its exempt purpose, the foundation is required to distribute at least five percent of the value of the foundation’s “unrelated” assets for charitable purposes. Unrelated assets are those assets not used directly to carry out charitable activities, including an endowment. If the five percent minimum distribution requirement is not met, a private foundation is subject to a 15 percent excise tax to the extent of the amount required to have been distributed.

5. **Excess Business Holdings.** Private foundations are subject to rules restricting “excess business holdings.” Excess business holdings in a corporation or partnership are defined as any excess over 20 percent (or in some cases 35 percent) of voting interest reduced by the voting interest held by all disqualified persons. In general a private foundation may hold less than two percent of a closely held interest under the de minimus rule. The excess business holdings rule is a fairly complex rule. In the event that the foundation is offered or holds any business assets, other than a marketable security traded on an exchange, the organization should consult with an attorney.

6. **Prohibition against Jeopardizing Investments.** Private foundations are subject to rules prohibiting certain “jeopardy” or high risk investments that jeopardize the charitable purpose of the organization, e.g., puts, calls and straddles.

7. **Taxable Distributions.** In general private foundations may only make grants to U.S. public charities or to a foreign charity. However, a private foundation may make a grant to another private foundation if it exercises “expenditure responsibility” in order to avoid the tax on taxable expenditures. A private foundation may make scholarship or fellowship payments only with prior approval by the Internal Revenue Service.

A private foundation must act for exclusively charitable purposes, therefore, private foundations are prohibited from lobbying and engaging in political activity, including carrying on a voter registration drive.

pdf/i1023.pdf. However, certain small organizations may be eligible to use the streamlined application (the Form 1023-EZ available at https://www.irs.gov/forms-pubs/about-form-1023ez). The eligibility worksheet can be found at: https://www.irs.gov/pub/irs-pdf/i1023ez.pdf. If the organization answers yes to any question, it is not eligible to use the Form 1023-EZ.

Section 6104(d) of the Code requires charitable organizations to retain a Form 990, copy of the determination letter, and Form 1023 (Application for Exemption), with all attachments, and any intervening correspondence with the IRS in its permanent records, and make them available to anyone who asks to see them for inspection at its principal office. Charities are required to provide a copy of these materials to any person who requests one either in person or in writing. A copy must be provided immediately to anyone who asks in person. A copy must be mailed within 30 days to anyone who requests one in writing. For copies, the charitable organization may charge $1.00 for the first page of any document, plus $.15 for each additional page, plus postage if the copies are mailed to the requester.

A. **Section 501(c)(4)**. Code §506 requires §1024 organizations to provide the IRS notice of formation and intent to operate as a §501(c)(4) organization by filing a completed Form 8976, *Notice of Intent to Operate Under Section 501(c)(4)*, no later than 60 days following formation. The completed Form 8976, together with a user fee, must include: (1) the name, address, and taxpayer identification number of the organization; (2) the date of the organization's formation, and the state or other jurisdiction in which it was organized; (3) a statement that the purpose of the organization is to operate either as a social welfare organization/civic league or a local association of employees; (4) the month the organization's annual accounting period ends; and (5) an attestation that the information provided on Form 8976 is correct and that the individual submitting it is authorized to do so on behalf of the organization. A §501(c)(4), organization may also file with the IRS a request for determination using Form 1024-A, *Application for Recognition of Exemption Under Section 501(c)(4)* along with a user fee. Note that the requirement to provide notification by filing Form 8976 is not satisfied by filing Form 1024-A. The content required to complete Form 1024-A generally tracks that required to complete Form 1023, except in a more brief fashion, including organizational structure, a narrative description, specific activities, financial data, and information regarding officers, directors, trustees, employees, and independent contractors. Additionally, the organization must submit a conformed copy of the organizing instrument with the Form 1024-A. The completed Form 1024-A must be signed by an officer, a director, a trustee who is authorized to sign, or a representative authorized by a power of attorney.

B. **Sections 501(c)(6) or 501(c)(7)**. A §501(c)(6) or §501(c)(7) organization may also file with the IRS a request for determination using Form 1024, *Application for Recognition of Exemption Under Section 501(a)* along with a user fee. The content required to complete Form 1024 generally tracks that required to complete Form 1023, except in a more brief fashion, including organizational structure, a narrative description, specific activities, financial data, and information regarding officers, directors, trustees, employees, and independent contractors. Additionally, the organization must submit a conformed copy of the organizing instrument with the Form 1024. The completed Form 1024 must be signed by an officer, a director, a trustee who is authorized to sign, or a representative authorized by a power of attorney.
V. Substantiation

A. Substantiation of Charitable Contributions of Less Than $250. In order for a charitable contribution to be deductible by the donor, donor must have a bank record or a receipt from the charity substantiating the donation. For contributions of non-cash property, the charitable organization must provide the donor a receipt showing (1) name and address of the charitable organization; (2) the date of the contribution; (3) a description of the property detailed enough to ascertain that the described property is the contributed property; and (4) for securities, the name of the issuer, the type of security, and whether the securities are publicly traded securities. See IRC §170

B. Substantiation Requirements for Contributions of $250 or More. In order for any charitable contribution of $250 or more to be deductible by the donor, a charitable organization must provide the donor with a receipt describing (but not valuing) the gift. If a charity provides any goods or services to the donor in exchange for the gift, the receipt must describe the goods or services and contain a good faith estimate of their value. If the charity provided no goods or services in consideration for the gift, the written receipt must so state. The receipt should include the charity’s Employer Identification Number. Generally, separate payments are considered separate contributions for purposes of the $250-or-more threshold unless the payments are made on the same day.

C. Thank You Gifts. If a donor makes a contribution of less than $75 and the charity gives the donor a benefit, the charity must provide the donor with a receipt containing the following information: (1) a statement to the donor that the gift deduction is limited to the excess of any money (and the value of any property other than money) contributed by the donor over the value of the goods or services provided by the charity; and (2) provides the donor with a good faith estimate of the value of the goods or services.

D. Token Gifts. However, both the charity and the donor may generally disregard token benefits given in exchange for a contribution. The IRS has ruled that a charitable gift is fully deductible if it is made in a fundraising campaign in which the charity informs its donors how much of their payment is a deductible contribution and: (1) the donor receives benefits having a fair market value of $106 (as adjusted for inflation) or 2 percent of the payment, whichever is less; or (2) the donor gives the charity at least $53.00 and receives a low-cost or token item (e.g., a bookmark, mug or T-shirt). The item must bear the charity’s name or logo and cost the distributing charity—or the charity on whose behalf the item is distributed—no more than $10.60 (as adjusted for inflation). Donors needn’t reduce their deductions when they receive unsolicited free items that cost the charity—or the charity on whose behalf the item is distributed—no more than $10.60. Those token benefit amounts are for 2016 charitable gifts. The dollar figures are adjusted annually for inflation.
Chapter 1—Life Cycle of a Nonprofit—Part I

[Public Charity/Private Foundation – no members]

NONPROFIT
ARTICLES OF INCORPORATION
OF
[_______________________]

The undersigned individual, acting as incorporator under the Oregon Nonprofit Corporation Act, adopts the following Articles of Incorporation.

ARTICLE I

The name of the corporation is ________________________________.

ARTICLE II

The corporation is a public benefit corporation.

ARTICLE III

The corporation is organized and shall be operated exclusively for charitable, scientific and educational purposes permitted by Section 501(c)(3) of the Internal Revenue Code of 1986, as amended (the “Code”).

ARTICLE IV

The corporation has no members.

ARTICLE V

Notwithstanding any other provision of these Articles of Incorporation, the corporation shall not carry on any activities not permitted to be carried on (a) by a corporation exempt from federal income taxation under IRC Section 501(c)(3) and (b) by a corporation contributions to which are deductible under IRC Sections 170(c)(2), 2055(a)(2) and 2522(a)(2). No part of the net earnings of the corporation shall inure to the benefit of any private shareholder or individual. No substantial part of the activities of the corporation shall be carrying on propaganda, or otherwise attempting to influence legislation, and the corporation shall not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of or in opposition to any candidate for public office.
ARTICLE VI

During any time that the corporation is classified as a “private foundation” as defined in IRC Section 509, the corporation:

(a) shall not engage in any act of self-dealing as defined in IRC Section 4941(d);

(b) shall distribute its income and, when necessary, amounts from principal at such time and in such manner as not to subject the corporation to the taxes on failure to distribute income imposed by IRC Section 4942;

(c) shall not retain any excess business holdings as defined in IRC Section 4943(c);

(d) shall not make any investments in such manner as to subject the corporation to the taxes on investments which jeopardize charitable purpose imposed by IRC Section 4944; and

(e) shall not make any taxable expenditures as defined in IRC Section 4945(d).

ARTICLE VII

Upon dissolution or final liquidation of the corporation, after the payment or provision for payment of all of the liabilities of the corporation, the remaining assets of the corporation shall be distributed to such organization or organizations as are then-described in IRC Sections 501(c)(3) or 170(c)(2) as the board of directors shall determine.

ARTICLE VIII

No director or uncompensated officer shall be personally liable to the corporation for monetary damages for conduct as a director or officer, provided that this Article shall not eliminate or limit the liability of a director or officer for any act or omission for which such elimination of liability is not permitted under the Oregon Nonprofit Corporation Act. No amendment to the Oregon Nonprofit Corporation Act that further limits the acts or omissions for which elimination of liability is permitted shall affect the liability of a director or officer for any act or omission which occurs prior to the effective date of the amendment.

ARTICLE IX

The corporation shall indemnify to the fullest extent permitted by the Oregon Nonprofit Corporation Act any person who is made, or threatened to be made, a party to an action, suit, or proceeding, whether civil, criminal, administrative, investigative, or otherwise (including an action, suit, or proceeding by or in the right of the corporation), by reason of the fact that the person is or was a director, officer, employee or agent of the corporation. The corporation shall pay for or reimburse the reasonable expenses incurred by any such person in any such proceeding in advance of the final disposition after the board of directors has taken such action.
as required by ORS 65.404, including providing notice of the proposed indemnification to the Attorney General. No amendment to this Article that limits the corporation’s obligation to indemnify any person shall have any effect on such obligation for any act or omission that occurs prior to the later of the effective date of the amendment or the date notice of the amendment is given to the person. This Article shall not be deemed exclusive of any other provisions for indemnification or advancement of expenses of directors, officers, employees, agents and fiduciaries that may be allowable under any statute, bylaw, agreement, general or specific action of the board of directors.

ARTICLE X

All references in these Articles of Incorporation to sections of the Code, the Oregon Revised Statutes, or the Oregon Nonprofit Corporation Act shall be deemed to refer also to the corresponding provisions of any future federal tax or Oregon nonprofit corporation laws.

ARTICLE XI

The address of the corporation’s registered office and the name of its registered agent at that location are:

[Name]
[Address]
[Address]

ARTICLE XII

The name and address of the incorporator are:

[Name]
[Address]
[Address]

ARTICLE XIII

The principal place of business to which notices may be mailed is:

[Name]
[Street Address]
[Address]
I declare, under penalty of perjury, that this document does not fraudulently conceal, fraudulently obscure, fraudulently alter or otherwise misrepresent the identity of the person or any officers, directors, employees or agents of the corporation. This filing has been examined by me and is, to the best of my knowledge and belief, true, correct, and complete. Making false statements in this document is against the law and may be penalized by fines, imprisonment or both.

DATED: ____________________________  ____________________________
                                              ____________________________
                                              ____________________________
                                              ______________________________________
                                              ____________________________, Incorporator
BYLAWS

OF

[PUBLIC BENEFIT CORPORATION]

SECTION 1 MEMBERS

The corporation shall not have any voting members. However, the board of directors from time to time may establish one or more classes of nonvoting members on such terms and conditions as the board in its discretion deems advisable.

SECTION 2 DIRECTORS

2.1 Powers. All corporate powers shall be exercised by or under the authority of, and the affairs of the corporation managed under the direction of, a board of directors.

2.2 Qualifications. All directors must be individuals 18 years of age or older. Directors need not be residents or citizens of the State of Oregon or of the United States of America.

2.3 Number. The board of directors shall consist of not fewer than three nor more than [___] persons. The number of directors may be fixed or changed periodically within the minimum and maximum by the board of directors.

2.4 Election and Tenure of Office. Directors shall serve for terms of [three] years, except that the initial term of any director may be one year, two years, or three years, to the end that in no year will the terms of more than one-third plus one of the directors expire. Directors shall be elected at the annual meeting by vote of a majority of directors whose terms do not expire in that year. Directors may, if reelected, serve any number of consecutive terms. Despite the expiration of a director’s term, the director shall continue to serve until the director’s successor is elected and qualifies, or until there is a decrease in the number of directors.

2.5 Resignation. A director may resign at any time by delivering written notice to the president or the secretary. A resignation is effective when notice is effective under ORS 65.034 unless the notice specifies a later effective date. Once delivered, a notice of resignation is irrevocable unless revocation is permitted by the board of directors.

2.6 Removal. A director may be removed, at any time, with or without cause, by vote of two-thirds of the directors then in office.

2.7 Vacancies. A vacancy in the board of directors shall exist upon the death, resignation, or removal of any director or an increase of the number of directors. A vacancy in the board of directors may be filled by a majority of the board of directors at any meeting. Each
director so elected or appointed shall hold office for the balance of the unexpired term of his or her predecessor. If the board of directors accepts the resignation of a director tendered to take effect at a future time, a successor may be elected to take office when the resignation becomes effective.

2.8 Meetings. An annual meeting of the board of directors shall be held during the month of [________________] at a time and place designated by the board of directors. If the time and place of any other directors’ meeting is regularly scheduled by the board of directors, the meeting is a regular meeting. All other meetings are special meetings. The board of directors may hold annual, regular or special meetings in or out of the State of Oregon.

2.9 Telephonic/Video Participation. The board of directors may permit any or all of the directors to participate in a regular or special meeting by, or conduct the meeting through use of any means of communication by which all directors participating may simultaneously hear each other during the meeting. A director participating in a meeting by this means is deemed to be present in person at the meeting.

2.10 Action Without Meeting. Any action required or permitted to be taken at a board of directors’ meeting may be taken without a meeting if the action is taken by all members of the board of directors. The action shall be evidenced by one or more written consents describing the action taken, signed by each director, and included in the minutes or filed with the corporate records reflecting the action taken. Action taken under this section is effective when the last director signs the consent, unless the consent specifies an earlier or later effective date. For purposes of this Section, an affirmative email sent by a director in response to a written consent is deemed to be a writing by the director. A consent under this section has the effect of a meeting vote and may be described as such in any document.

2.11 Call and Notice of Meetings. The annual meeting must be preceded by at least five days’ notice, if given by first-class mail, or 48 hours’ notice, if delivered personally or given by telephone, email, or fax. Regular meetings of the board of directors may be held without further notice of the date, time, place, or purpose of the meeting. Special meetings of the board of directors must be preceded by at least 24 hours’ notice and must be delivered personally or given by telephone, email, or fax. All notices must give the date, time, and place of the meeting. Except as specifically provided in these bylaws or applicable law, the notice need not describe the purposes of any meeting. The president or one-third of the directors then in office may call and give notice of a meeting of the board.

2.12 Waiver of Notice. A director may at any time waive any notice required by these bylaws. A director’s attendance at or participation in a meeting waives any required notice to the director of the meeting unless the director, at the beginning of the meeting or promptly upon the director’s arrival, objects to holding the meeting or transacting business at the meeting and does not thereafter vote for or assent to any action taken at the meeting. Except as provided in the preceding sentence, any waiver must be in writing, must be signed by the director entitled to the notice, must specify the meeting for which the notice is waived, and must be filed with the minutes or the corporate records.
2.13 Quorum and Voting. A quorum of the board of directors shall consist of a majority of the number of directors in office immediately before the meeting begins. If a quorum is present when a vote is taken, the affirmative vote of a majority of the directors present when the action is taken is the act of the board of directors except to the extent that the articles of incorporation, these bylaws, or applicable law require the vote of a greater number of directors. A director is considered present regardless of whether the director votes or abstains from voting.

2.14 Presumption of Assent. A director who is present at a meeting of the board of directors when corporate action is taken is deemed to have assented to the action taken unless:

   (a) The director objects at the beginning of the meeting, or promptly upon the director’s arrival, to holding the meeting or transacting the business at the meeting;

   (b) The director’s dissent or abstention from the action taken is entered in the minutes of the meeting; or

   (c) The director delivers written notice of dissent or abstention to the presiding officer of the meeting before its adjournment or the corporation immediately after adjournment of the meeting. The right of dissent or abstention is not available to a director who votes in favor of the action taken.

2.15 Board Committees. The board of directors may create one or more committees of the board of directors and appoint members of the board to serve on them or designate the method of selecting committee members. Each committee shall consist of two or more directors who serve at the pleasure of the board of directors. The creation of a committee and the appointment of directors to the committee or designation of a method of selecting committee members must be approved by a majority of all directors in office when the action is taken. The provisions of these bylaws governing meetings, action without meetings, notice and waiver of notice, and quorum and voting requirements of the board of directors shall apply to committees and their members as well. Committees of the board of directors may, to the extent specified by the board of directors, exercise the authority of the board of directors; provided, however, that no committee of the board of directors may:

   (a) Authorize distributions, provided that this restriction does not apply to payment of value for property received or services performed or payment of benefits in furtherance of the corporation’s purposes;

   (b) Approve or recommend dissolution, merger, or the sale, pledge, or transfer of all or substantially all of the corporation’s assets;

   (c) Elect, appoint, or remove directors or fill vacancies on the board or on any of its committees; or

   (d) Adopt, amend, or repeal the articles of incorporation or bylaws.
2.16 Advisory Committees. The board of directors may create one or more advisory committees. Members of these committees need not be members of the board of directors, but at least one director shall serve on each such committee. These committees shall have no power to act on behalf of, or to exercise the authority of, the board of directors, but may make recommendations to the board of directors.

2.17 Compensation. Directors and members of committees may receive reimbursement of such expenses as may be determined by resolution of the board of directors to be just and reasonable. Directors shall not otherwise be compensated for service in their capacity as directors.

2.18 Director Conflict of Interest. A conflict of interest transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect interest, as defined in ORS 65.361. A conflict of interest transaction is not voidable or the basis for imposing liability on the director if the transaction is fair to the corporation at the time it was entered into or is approved either (a) by the vote of the board of directors or a committee of the board of directors by the affirmative vote of a majority of the directors on the board of directors or the committee who have no direct or indirect interest in the transaction if the material facts of the transaction of the directors’ interest are disclosed or known to the board of directors or committee of the board of directors or (b) by obtaining the approval of the Attorney General of Oregon or a Circuit Court of the State of Oregon in an action in which the Attorney General of Oregon is joined as a party. For purposes of this section, a director of the corporation has an indirect interest in a transaction if (a) another entity in which the director has a material interest or in which the director is a general partner is a party to the transaction or (b) another entity in which the director is a director, officer or trustee is a party to the transaction, and the transaction is or should be considered by the board of directors of the corporation. A transaction may not be authorized, approved or ratified under this section by a single director. If a majority of the directors who have no direct or indirect interest in the transaction votes to authorize, approve or ratify the transaction, a quorum is present for the purpose of taking action under this section.

SECTION 3 OFFICERS

3.1 Designation; Appointment. The officers of the corporation shall be a president, a secretary, a treasurer, and such other officers as the board of directors shall from time to time appoint. The officers shall be appointed by, and hold office at the pleasure of, the board of directors. The same individual may simultaneously hold more than one office, except that the offices of president and secretary may not be held simultaneously by the same individual.

3.2 Term of Office.

(a) The term of office of all of the officers of the corporation shall be fixed by the board of directors.

(b) Any officer may be removed, either with or without cause, at any time by action of the board of directors.
An officer may resign at any time by delivering notice to the board of directors, the president, or the secretary. A resignation is effective when the notice is effective under ORS 65.034 unless the notice specifies a later effective date. If a resignation is made effective at a later date and the corporation accepts the later effective date, the board of directors may fill the pending vacancy before the effective date if the board of directors provides that the successor does not take office until the effective date. Once delivered, a notice of resignation is irrevocable unless revocation is permitted by the board of directors.

3.3 President. The president shall preside at meetings of the board of directors, shall assure that the board of directors is advised on all significant matters of the corporation’s business, shall act as a principal spokesperson and representative of the corporation, shall be the chief executive officer of the corporation and have the general powers and duties of management usually vested in a chief executive officer, and shall have such other powers and duties as may be prescribed by the board of directors or the bylaws.

3.4 Vice President. The vice president shall preside at meetings of the board of directors at which the president is absent and in the absence of the president shall have the other powers and perform the other duties of the president. The vice president also shall have such other powers and perform such other duties as may be prescribed by the board of directors.

3.5 Secretary. The secretary shall have responsibility for preparing minutes of meetings of the board of directors and for authenticating records of the corporation. The secretary shall keep or cause to be kept, at the principal office or such other place as the board of directors may order, a book of minutes of all meetings of directors. In the absence of the president, the secretary shall have the powers and perform the duties of the vice president. The secretary also shall have such other powers and perform such other duties as may be prescribed by the board of directors or these bylaws.

3.6 Treasurer. The treasurer shall be the chief financial officer of the corporation and shall keep and maintain, or cause to be kept and maintained, adequate and correct books and records of accounts of the properties and business transactions of the corporation. The treasurer shall deposit, or cause to be deposited, all money and other valuables in the name and to the credit of the corporation with such depositories as may be designated by the board of directors, shall disburse or cause to be disbursed funds of the corporation as may be ordered by the board of directors, and shall have such other powers and perform such other duties as may be prescribed by the board of directors or these bylaws. If required by the board of directors, the treasurer shall give the corporation a bond in such amount and with such surety specified by the board of directors for the faithful performance of the duties of the treasurer’s office and for restoration to the corporation of all of its books, papers, vouchers, money, and other property of every kind in the treasurer’s possession or under the treasurer’s control on the treasurer’s death, resignation, retirement, or removal from office.

3.7 Executive Director. The executive director shall serve at the pleasure of the Board. The executive director shall also be an ex-officio non-voting director of the board of directors, but may be excused from executive sessions in the discretion of the chair. The
executive director shall, subject to the oversight of the board, shall have responsibility for the
day-to-day management of the business and affairs of the corporation.]

3.8 Assistants. The board of directors may appoint or authorize the appointment of assistants to the secretary or treasurer or both. Such assistants may exercise the powers of the secretary or treasurer, as the case may be, and shall perform such duties as are prescribed by the board of directors.

SECTION 4 NONDISCRIMINATION

The corporation shall not discriminate in providing services, hiring employees, or otherwise, upon the basis of gender, race, creed, marital status, sexual orientation, religion, color, age, or national origin.

SECTION 5 GENERAL PROVISIONS

5.1 Amendment of Bylaws. The board of directors may amend or repeal these bylaws or adopt new bylaws by majority vote. Whenever an amendment or new bylaw is adopted, it shall be copied in the minute book with the original bylaws in the appropriate place. If any bylaw is repealed, the fact of repeal and the date on which the repeal occurred shall be stated in such book and place.

5.2 Inspection of Books and Records. All books, records, and accounts of the corporation shall be open to inspection by the directors in the manner and to the extent required by law.

5.3 Checks, Drafts, Etc. All checks, drafts, and other orders for payment of money, notes, or other evidences of indebtedness issued in the name of or payable to the corporation shall be signed or endorsed by such person or persons and in such manner as shall be determined from time to time by resolution of the board of directors.

5.4 Deposits. All funds of the corporation not otherwise employed shall be deposited to the credit of the corporation in those banks, trust companies or other depositories as the board of directors or officers of the corporation designated by the board of directors select, or be invested as authorized by the board of directors.

5.5 Loans or Guarantees. The corporation shall not borrow money and no evidence of indebtedness shall be issued in its name unless authorized by the board of directors. This authority may be general or confined to specific instances. Except as explicitly permitted by ORS 65.364, the corporation shall not make a loan, guarantee an obligation or modify a pre-existing loan or guarantee to or for the benefit of a director or officer of the corporation.
5.6 **Execution of Documents.** The board of directors may, except as otherwise provided in these bylaws, authorize any officer or agent to enter into any contract or execute any instrument in the name of and on behalf of the corporation. Such authority may be general or confined to specific instances. Unless so authorized by the board of directors, no officer, agent, or employee shall have any power or authority to bind the corporation by any contract or engagement, or to pledge its credit, or to render it liable for any purpose or for any amount.

5.7 **Insurance.** The corporation may purchase and maintain insurance on behalf of an individual against liability asserted against or incurred by the individual who is or was a director, officer, employee, or agent of the corporation, or who, while a director, officer, employee, or agent of the corporation, is or was serving at the request of the corporation as a director, officer, partner, trustee, employee, or agent of another foreign or domestic business or nonprofit corporation, partnership, joint venture, trust, employee benefit plan, or other enterprise; provided, however, that the corporation may not purchase or maintain such insurance to indemnify any director, officer, or agent of the corporation in connection with any proceeding charging improper personal benefit to the director, officer, or agent in which the director, officer, or agent was adjudged liable on the basis that personal benefit was improperly received by the director, officer, or agent.

5.8 **Fiscal Year.** The fiscal year of the corporation shall begin on the first day of [__________] and end on the last day of December in each year.

5.9 **Severability.** A determination that any provision of these bylaws is for any reason inapplicable, invalid, illegal or otherwise ineffective shall not affect or invalidate any other provision of these bylaws.

* * * * *

The foregoing bylaws were duly adopted by the board of directors of [_____________________] on [______________________].

______________________________

Secretary
PROPOSED RESOLUTIONS
BY
INITIAL BOARD OF DIRECTORS
OF

[_______________]

1. RESOLVED that all activities and actions taken and documents executed heretofore by an incorporator, director, officer or agent of _____________ (the “Corporation”) in connection with the organization and operation of the Corporation are hereby ratified, confirmed, approved and adopted.

2. RESOLVED that the form of bylaws reviewed and discussed at this meeting are adopted as the bylaws of the Corporation.

3. RESOLVED that the following individuals are elected as the officers of the Corporation to serve until the next annual meeting of the board of directors (in the absence of earlier resignation or removal) or until their successors are elected and assume office:

   Chair
   Vice Chair
   Treasurer
   Secretary

4. RESOLVED that the officers are authorized and directed to file an application with the Internal Revenue Service for recognition of exemption from federal income taxation under Section 501(c)(3) of the Internal Revenue Code of 1986, as amended, and to take all such further action as they, or any of them, may deem necessary or appropriate in connection with such application.

5. RESOLVED that the officers are authorized to open banking accounts for the Corporation at such financial institution or institutions as they, or any of them, may deem necessary or appropriate, for drawing upon the signatures of such officers as they may designate. The standard form of corporate banking resolution furnished by such financial institution or institutions is hereby adopted, and the secretary is authorized to certify such adoption.

6. RESOLVED that the officers of the Corporation are authorized and directed to comply with all filing, registration, and other federal, state, and local requirements applicable to public benefit corporations organized in the State of Washington.

7. RESOLVED that the officers are authorized to pay all expenses incurred in the incorporation and organization of the Corporation, including expenses incurred prior to incorporation and prior to the date of this meeting.

8. RESOLVED that the Conflict of Interest Policy reviewed and discussed at this meeting is adopted as the conflict of interest policy of the Corporation.
9. RESOLVED that the Document Integrity and Retention Policy reviewed and discussed at this meeting is adopted as the document integrity and retention policy of the Corporation.

10. RESOLVED that the officers are authorized to take all such further actions as they, or any of them, may deem necessary or appropriate to complete the organization of the Corporation.
Lifecycle of a Nonprofit – Part I

Presented by
Michele E. Wasson & Penny Serrurier
September 2018

Section I –
Oregon Nonprofit Law
TYPE OF ENTITY

• Nonprofit corporation
• Association
• Partnership
• Trust

INCORPORATION

• Articles of Incorporation
  – Incorporator
  – Type of corporation
  – Members
  – Dissolution
  – Powers
APPOINTING DIRECTORS & OFFICERS

- Corporate Powers Held by Board of Directors
- Board Development
- Term
- Meetings
- Fiduciary Duties
  – To be discussed in Life Cycle Part II

Section II – Federal Tax Law
FEDERAL TAX LAW

• **Code §501(c)(3)** is the most common form of tax-exempt organizations and provides for tax-exemption for corporations. . . organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

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FEDERAL TAX LAW

• **Code §501(c)(4)** exempts nonprofit civic organizations that operate exclusively for the promotion of social welfare.

• **Code §501(c)(6)** exempts from tax nonprofit business leagues, chambers of commerce, real estate boards, and boards of trade.

• **Code §501(c)(7)** generally encompasses social and recreation clubs that are supported solely by membership fees, dues and assessments, as well as fees charged to members for the use of facilities. Typical §501(c)(7) organizations include golf and country clubs, amateur sport clubs, hobby clubs, and luncheon and dinner clubs.
Chapter 1—Life Cycle of a Nonprofit—Part I

REQUIREMENTS FOR 501(C)(3) EXEMPTION

- Organizational
- Operational
- Non-exempt Purposes
- Private Inurement/Private Benefit

PUBLIC CHARITY/PRIVATE FOUNDATION

- Public Charities
  - Churches
  - Schools
  - Hospitals/medical research

Publicly Operated organizations –
  - 509(a)(1) – public support calculation
  - 509(a)(1) – facts and circumstances
  - 509(a)(2) – gross receipts
  - 509(a)(3) – supporting organizations

- Private Foundation/Private Operating Foundation
APPLICATION FOR RECOGNITION OF TAX-EXEMPTION

- Form 1023

- Form 1023-EZ eligibility

SUBSTANTIATION

- Substantiation of Charitable Contributions of Less than $250
- Substantiation Requirements for Contributions of $250 or more
- Thank You Gifts
- Token Gifts
Overview of Topics

- Registration and reporting requirements
- IRS Forms 990
- Charitable solicitations
- Board responsibilities
- Internal controls and fraud prevention
- DOJ investigations
- Dissolution
Scope of AG Oversight

- Supervision of Charitable Entities and Fiduciaries
  - Oversight includes charitable trusts
  - Limited oversight of religious organizations
  - No oversight of mutual benefit entities

- Charitable Solicitation

- Charitable Gaming – raffle, bingo, monte carlo

Registration & Reporting

- Secretary of State
  - Maintain corporate status, registered agent
  - [https://sos.oregon.gov/business/Pages/domestic-nonprofit-corporation-forms.aspx](https://sos.oregon.gov/business/Pages/domestic-nonprofit-corporation-forms.aspx)

- Oregon Department of Justice
  - Registration and annual financial reports, CT-12
  - Broad authority oversight of activities, whatever form or tax-status

- IRS
  - Informational tax returns – Forms 990
  - Maintain tax-exempt status
Registration with DOJ – ORS 128.610 et seq

Registration Required if:

- Nonprofit corporation doing business or holding property for charitable or eleemosynary purposes
- Charitable purpose is any purpose to promote the well-being of the public at large or for the benefit of an indefinite number of persons
- Making grants or donations to Oregon institutions alone is not “doing business” for purposes of registration
- Soliciting for donations in the state qualifies as “doing business”
- Registration is not dependent on tax-exempt status
- Child-caring agencies must now register (previously exempt)
Entities Exempt from Registration – ORS 128.640

- Government agencies and subdivisions
- Cemeteries
- Religious corporation sole (formed before June 8, 2015) or religious corporation, defined as an organized church or group organized for purpose of divine worship or religious teaching

Registration with DOJ

Forms and information available on DOJ's website: [https://www.doj.state.or.us/charitable-activities/](https://www.doj.state.or.us/charitable-activities/)

DOJ obtains lists from Oregon SOS of newly formed public benefit nonprofits and will contact if have not registered. Don’t wait for DOJ contact. Failure to register is a violation of ORS 128.660 and risk civil penalties.

Registration files are public records

Online registration is not available. Must complete and mail registration form and include:
- IRS determination letter, if applicable
- Filed articles of incorporation, date stamped by SOS
- Signed and dated bylaws
Filing Annual Financial Reports with DOJ

- Due 4 months and 15 days after the end of the organization’s fiscal year
  - Example: if year end is December 31st, report due May 15th
- Can request one 6-month extension
- Can submit annual report online
- Annual Financial Reports Include
  - CT-12 for Oregon corporations
  - CT-12F for foreign corporations
  - IRS Form 990, 990EZ, or acknowledgement of filing 990N
  - Not required to obtain audit, but if have done so, must provide copy
  - Amendments to articles or bylaws

Annual Financial Reports – Common Problems

- Delinquency
  - No extension requested
  - Contact information out of date/mailings to organization returned
  - No response to DOJ inquiries
- Incomplete Filings
  - No or insufficient fee paid
  - 990 or schedules not included
- Unusual Information
  - Sudden change in asset value
  - Report revenue, but no assets or no program services
- DOJ Enforcement Options
  - Civil Penalties - $2,000 per violation can be assessed against organization or responsible fiduciary, APA proceeding
  - Open investigation per ORS 128.680
Annual Financial Reports & Disqualification Orders

- ORS 128.760 allows AG to issue order disqualifying charity from receiving donations that are tax-deductible for state income tax purposes
- Issued when charity spends less than 30% of annual functional expenses on program services, averaged over last 3 years
- Order requires charity to disclose to Oregon donors that contributions are not tax-deductible for Oregon income tax purposes
- DOR receives list of charities subject to disqualification orders and DOJ publishes on its website
- Charity subject to disqualification order cannot obtain property tax exemption

Disqualification Orders

- Entities NOT subject to Disqualification Orders
  - Private foundations
  - Community trust or foundation
  - Charitable remainder trust
  - Organization not required to file annual reports with DOJ
  - Small organizations, i.e., those that file 990N or 990EZ
IRS Annual Filings

- Tax-exempt entities must still file an informational tax return, called Form 990
- Failure to file Form 990 for three consecutive years results in automatic revocation of tax-exempt status
- Form 990 is a public document and organization must give copy or access to document to anyone who makes a request
- DOJ obtains lists of Oregon entities that lose tax-exempt status
- IRS database accessible to anyone to verify tax-exempt status: [https://apps.irs.gov/app/eos/](https://apps.irs.gov/app/eos/)
- Can file Form 990 electronically; movement afoot to require electronic filing to enable data mining

Which IRS Form 990 to File

<table>
<thead>
<tr>
<th>Entity Information</th>
<th>Required Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>Gross Receipts ≤ $50,000</td>
<td>990-N</td>
</tr>
<tr>
<td>Note: those eligible to file 990-N may choose to file full 990</td>
<td></td>
</tr>
<tr>
<td>Gross Receipts &lt; $200,000 and Total Assets &lt; $500,000</td>
<td>990-EZ</td>
</tr>
<tr>
<td>Gross Receipts ≥ $200,000 or Total Assets ≥ $500,000</td>
<td>990-PF</td>
</tr>
<tr>
<td>Private Foundation – regardless of receipts or assets</td>
<td>990-PF</td>
</tr>
</tbody>
</table>
IRS Form 990 Common Issues

- Filing the wrong version (year) of the form
- Using the wrong EIN, tax period, or Group Exemption Number
- Authorized signature is missing
- Failure to fully complete the 990 and all required schedules
- Math errors
- OR can require entities that are not tax-exempt to prepare 990 for OR (rather than accept 1120 or 1041) and may require 990EZ when assets over $100,000

IRS Form 990 Common Issues

- Voting members of governing body: Part I response v. Part VII response
- Independence of governing body
- New significant programs: must disclose to IRS and must align with original purpose
- Transactions with interested persons: failure to disclose or lack of proper policies
- General oversight: board failure to perform meaningful review prior to filing
IRS Form 990 Common Issues

- Part VII – ODTKE
  - Improper reporting of compensation
  - Incomplete listing

- Part VIII Revenue
  - Revenue in the wrong column
  - Misreporting or failing to report noncash (in-kind) contributions
  - Miscategorizing service revenue
  - Failing to identify Unrelated Business Income

- Misreporting revenue from fundraisers: earned v. gifts

- Part IX – Functional expenses
  - Incorrect allocation among functional categories
  - Failing to report any fundraising expenses

IRS Form 990 Common Issues

- Sch A: public support test
- Sch B: major contributors
- Sch C: political activity and lobbying
- Sch D: DAFs, endowments, audit reconciliation
- Sch G: gaming and fundraisers
- Sch I: grants
- Sch J: executive compensation
- Sch L: transactions with interested persons
- Sch M: noncash contributions
- Sch R: related entities
- Sch O: overflow – required for all filers
Solicitations

- False or misleading representations in charitable solicitation constitute violations of Unlawful Trade Practices Act, ORS 646.608(d)(d)

- No third party can use name of charity in solicitations without written consent of charity, ORS 128.856

- Presumed breach of fiduciary duty for board to enter into contract with professional fund raiser for period longer than 2 years, unless board obtained at least 2 other bids or if implied purpose is for professional firm to obtain donor list, ORS 128.814

Solicitations – Gift Receipts

- Donors must have bank record or letter/receipt from charity to claim charitable deduction

- Donor must obtain contemporaneous, written acknowledgement for any single donation of $250 or more to include:
  - Name of charity
  - Name of donor and date of gift
  - Amount of cash contribution
  - Description of in-kind contribution (no stated value)
  - Statement that no goods or services were provided in return, if true
  - Description and estimate of value of goods or services charity provided

- Charity must provide written disclosure to donors who receive goods or services for single payment in excess of $75

- See IRS Publication 1771
## Solicitations – Other Considerations

- **Unrelated Business Income**
  - Some fundraisers will constitute unrelated business income, which is taxable income and may have to be reported on IRS Form 990T

- **Crowdfunding**
  - May result in restricted gifts
  - How handle receipts
  - Donor lists

- **Do Not Call List**
  - Under federal law, charitable solicitations are exempt from Do Not Call registry
  - Under Oregon law, people on Do Not Call list cannot be solicited unless they have made a donation or expressed an interest in making a donation to the charity

## Soliciting Out-of-State

- Soliciting in other states may trigger registration requirement in those states (41 states require registration); registration in WA should be considered for most OR charities

- **NASCO Charleston Principles – online fundraising**
  - 1. An entity that is not domiciled within a state must register in accordance with the law of that state if:
    - a. Its non-Internet activities alone would be sufficient to require registration;
    - b. (1) The entity solicits contributions through an interactive Web site; and
      - (2) Either the entity:
        - i. Specifically targets persons physically located in the state for solicitation, or
        - ii. Receives contributions from the state on a repeated and ongoing basis or a substantial basis through its Web site.; or
    - c. (1) The entity solicits contributions through a site that is not interactive, but either specifically invites further offline activity to complete a contribution, or establishes other contacts with that state, such as sending e-mail messages or other communications that promote the Web site; and
      - (2) The entity satisfies Principle III(B)(1)(b)(2).
Professional Fundraisers

COMPENSATION, BONUSES & FINDER'S FEES

Members shall:

21. not accept compensation or enter into a contract that is based on a percentage of contributions; nor shall members accept finder’s fees or contingent fees.

22. be permitted to accept performance-based compensation, such as bonuses, only if such bonuses are in accord with prevailing practices within the members’ own organizations and are not based on a percentage of contributions.

23. neither offer nor accept payments or special considerations for the purpose of influencing the selection of products or services.

24. not pay finder’s fees, commissions or percentage compensation based on contributions.

25. meet the legal requirements for the disbursement of funds if they receive funds on behalf of a donor or client.

Association of Fundraising Professionals, Code of Ethics

Fundraising - Charitable Gaming

• Elements of Gaming
  ○ Consideration – e.g., money, canned food, banquet entry
  ○ Chance – e.g., drawing, bingo card, casino game
  ○ Prize – e.g., cash, car, gift card, travel voucher

• Charitable Gaming Allowed & Licensed
  ○ Bingo
  ○ Raffle
  ○ Monte Carlo
Who Can Engage in Charitable Gaming?

Nonprofit that has federal tax-exempt status and has held tax-exempt status for at least one year

Broader category than that required to register and file annual reports with DOJ

Encompasses fraternal organizations, chambers of commerce, public schools, etc.

Raffles

- License required if handle over $10,000/year

- Required disclosures on ticket or at sale
  - Name of licensee
  - Date and time of drawing
  - Location of drawing
  - Price of ticket (consideration)
  - Total number of tickets available for sale (odds)
  - Description of prize(s)
  - Fair market value of prize
Raffles

- Once ticket sales begin, must hold drawing and award prize, regardless of number of tickets sold.
- Rare circumstance where raffle cannot be held, you must notify ticket purchasers and return all money received within 30 days.
- Postal regulations prevent mailing of any raffle ticket or related matter.
- Safest course of action is to avoid selling tickets via internet, may be required to license in other jurisdictions.

Bingo and Monte Carlo

- Contact Gaming Registrar
- Website: https://www.doj.state.or.us/charitable-activities/charitable-gaming/charitable-gaming-license-applications-and-reports/
Governance – Role of Board

- Define and advance the organization’s mission
- Manage the organization
- Exercise corporate powers

Board of Directors

- Public benefit nonprofits must have at least 3 directors, ORS 65.307
- Mutual benefit and religious nonprofits only required to have 1 director, ORS 65.307
- Directors must be natural persons, cannot be institutions, ORS 65.304
- Bears ultimate responsibility for managing nonprofit
Board Duties & Responsibilities

- Maintain organization’s tax-exempt status
- Financial oversight – fundraising, budgets, investments, restricted funds, endowments
- Administrative oversight – hire and evaluate staff, adopt and enforce policies, records retention
- Program oversight – develop and maintain mission
- Develop and maintain positive communications and relationships with constituencies and public

Directors’ Fiduciary Duties

- Duty of Care
- Duty of Loyalty
- Duty of Obedience
Statutory Standard of Conduct

Directors (and officers) must act:
- In good faith,
- With the care of ordinarily prudent person in a like position, and
- In a manner reasonably believed to be in the best interest of the corporation.

ORS 65.357(1)

Duty of Care

- Requires active participation
- Reasonable inquiry
- Informed decisions
- Use of any special skill or knowledge
Duty of Loyalty

Must act in the best interests of organization

Duty of Loyalty issues:
  Conflict of Interest transactions

  Loans to directors/officers are prohibited for public benefit and religious org, but permitted under some circumstances for mutual benefit orgs

  Corporate opportunity

  Private inurement

  Excessive compensation

  Distributions prohibited (profit share)

Conflict of Interest Transactions

- A conflict of interest transaction is permissible under ORS 65.361 if
  1. Disclosed to full board
  2. Approved by disinterested board, DOJ, or court, and
  3. Fair to corporation

- Possible consequences of improper conflict of interest transaction
  1. Loss of exempt status
  2. Intermediate sanctions
  3. Personal liability

- Note – Disclosure requirements on IRS Form 990
Duty of Obedience

- Mission/Donor Intent
- Compliance with Law
- Governing Documents

Protections for Directors

- Corporate form – not personally liable for corporate debts
- Statutory protection for volunteer directors (ORS 65.369) - volunteer directors not liable for simple negligence, but no immunity for gross negligence or intentional misconduct
- Indemnification rights under law and bylaws
- D & O Insurance – particularly important if there are employees
Maintaining Records is Required – ORS 65.771

- Minutes of board and member meetings
- Actions taken by board or members without meeting
- Accounting records
- Membership list, qualifications, communications
- Articles of Incorporation and amendments
- Bylaws and amendments
- Director and officer contact information
- Financial statements
- Form 990

Minutes Matter

- Minutes are official record of corporate action
- Evidence of whether board fulfilling fiduciary duties
- Useful management tool to keep track of tasks, assignments, deadlines
Minutes Matter

Minutes:

July 12, 2003

Members: Delores Moore, Joseph Holden, and Mary Holden

1. QUITO is subleasing the house for $1.00, and continuing repairs, as a foster home for children who live in the community.
2. Foster boys live in the house.

Present: Delores Moore, Joseph Holden, and Mary Holden

ALFRED YAUN YOUTH CARE CENTER, INC.
Mailing Address: 5038 NE Hood Ave. Portland, Oregon 97211
Executive Director: Joseph Holden
Administration: (503) 635-1554 Fax: (503) 281-7470
Employment Issues

- Complex field of federal and state law – get advice
- Employment issues comprise vast majority of claims/litigation involving nonprofits and D&O insurance coverage issues
- Directors can be personally liable for employment taxes
- Board responsibility to supervise and evaluate Executive Director, set salary and set terms of employment

Employee or Independent Contractor

- Different agencies have different tests – IRS, DOR, BOLI, Workers Compensation
- Some industries (construction) have their own definitions
Intern vs. Employee

- 7-part test, referred to as the “primary beneficiary test”
  - Extent to which training is similar to that which would be given in educational environment
  - Extent to which training is tied to formal education program with integrated coursework and academic credit
  - Extent to which program accommodates academic commitments by corresponding academic calendar
  - Extent to which internship duration is limited to period of beneficial learning
  - Extent to which internship complements rather than displaces work of paid employees while providing significant educational benefits
  - Whether interns are entitled to a job at the end of training period
  - Understanding of employer and intern that intern is not entitled to compensation for time spent in training

Employees as Volunteers

Factors in assessing whether employees are acting as volunteers for their nonprofit employer

- Work must be at employee’s initiative
- Work must be outside normal or regular work hours
- Employee must be performing religious, charitable, or other community service without expectation of payment
- Employee must be performing task outside regular job functions
Membership Issues

- Members are those with some sort of voting rights
- Must have at least one annual meeting
- Must maintain memberships list and members entitled to list
- Members entitled to inspect certain records
- Members have legal recourse

DOJ Investigations

- Investigate complaints received from public, other agencies, and interested parties
- Follow internal leads – delinquent filers, unusual changes or information in annual reports
- Review required notices
- Media inquiries and reports of significant events
DOJ Investigations

- ORS 128.680 – general authority to investigate transactions and relationships of charitable organizations to determine:
  - Whether charitable purposes are being fulfilled
  - Whether there has been a violation of charitable statutes
  - Whether there has been a violation of fiduciary duty

- ORS 128.690 - DOJ can subpoena records and witnesses before filing a lawsuit

Attorney General Oversight

Enforcement Remedies/Options
- Audit/Notice Letters
- Civil Penalties
- Assurances of Voluntary Compliance (solicitations)
- Injunctive Relief, Removal of Directors, Dissolution
- Appointment of Receiver
- Damages for Waste/Loss
- IRS Referrals
- Criminal Referrals
### Common Problems from the DOJ’s Perspective

- Embezzlement
- Mishandling of restricted funds
- Violations of IRS rules for private foundations
- Member disputes, internal conflict
- Inattentive board/lack of oversight
- Operating charity as personal business
- Poor record keeping, lack of internal controls

### Embezzlement/Fraud

- Weak internal controls responsible for nearly 50% of fraud
- Median duration of fraud – 16 months
- Median loss to nonprofit - $75,000
- Tips are most common method of discovering fraud (primarily from employees)
- Majority of victims recover $0

Association of Certified Fraud Examiners, Report to the Nations, 2018 Global Study on Occupational Fraud and Abuse
Chapter 2—Life Cycle of a Nonprofit—Part II

Embezzlement

How could one woman steal $2 million without anyone noticing? As city comptroller of New, E. Rita Snedeker stole $1 million of public funds across 20 years—making her the perpetrator of one of the largest cases of municipal fraud in American history. She used the funds to build one of the nation’s leading quarter horse breeding empires, all while funding staff cars, police budget slashing, and support of public infrastructure. "All The Queen’s Horses" investigates her crime, her lavish lifestyle and the small town she left in her wake.

Embezzlement

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<tr>
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Embezzlement Prevention – Internal Controls

- Someone other than check signer should review and reconcile bank statements
- Limit access to corporate debit/credit cards
- Create and follow procedure for reimbursements
- Establish and track budgets
- Require regular financial reports
- Audits are useful, but not the primary source for discovering fraud
Importance of Budgets

- Always utilize a budget
- Track budget to actual expenditures
- Follow up on unusual variations

<table>
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<th>1st Quarter Budget</th>
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<tr>
<td>Budget</td>
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<tr>
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**Revenues**
- Donor Contributions: $17,250.00
- Grants: $9,500.00
- Fees for Services: $2,525.00
- Special Events Revenue: $0.00
- Subtotal for Revenues: $39,275.00

**Expenses**
- Affiliation/Registration: $4,200.00
- Program/Project Expenses: $12,726.00
- Travel/Meal & Lodging: $780.00
- Office Supplies: $900.00
- Telephone/Video: $750.00
- Data Processing Services: $300.00
- Computer Tech Equip: $500.00
- Program/Project Equipment: $5,000.00
- Professional Services: $1,750.00
- Other Supplies: $250.00
- Facilities Rent: $750.00
- Office Furnitures: $700.00
- Subtotal for Expenses: $33,655.00

Ending Balance: $35,029.00

Discovery of Fraud

- Promptly notify board of directors
- Conduct investigation to determine facts and loss
- Report to police - may be prerequisite for insurance coverage
- Determine what remedies available to recover losses
- Disclosure on Form 990 if exceeds lesser of 5% of gross receipts, 5% of total assets, or $250,000
Merger

- Merging with another charity often good option instead of dissolution

- Public benefit can merge with another public benefit without prior consent of AG, but if merge with for-profit or mutual benefit, then requires prior AG notice/approval, ORS 65.

Dissolution

Mutual benefit orgs may distribute assets to members upon dissolution

Public benefit and religious orgs must file plan of dissolution with DOJ

- No assets should be distributed prior to submission of plan, ORS 65.627
- Remaining assets must be distributed to another charitable organization per ORS 65.001(35)
- Restricted gifts may require special treatment
- "Reimbursements" or payouts to ED, directors, or the like are prohibited distributions
Dissolution Issues

- Creditor claims – can use process under ORS 65.641 and 65.644 to resolve

- Bankruptcy – charities can voluntarily enter into bankruptcy, but unlike for-profit entities, cannot be forced into bankruptcy by creditors

- Reserves may be necessary for employee liabilities

Contact and Resources

Charitable Activities Section
Oregon Department of Justice
100 SW Market St.
Portland, OR 97201
(971) 673-1880

DOJ Website:
https://justice.oregon.gov/charities
A Guide to Nonprofit Board Service in Oregon

Oregon DOJ Financial Control Recommendations for Small Nonprofits
https://www.doj.state.or.us/charitable-activities/laws-guides-for-charities/financial-control-recommendations-small-nonprofits/
Chapter 3

The Ethical Nonprofit Lawyer

Nellie Barnard
Holland & Knight LLP
Portland, Oregon

Calon Russell
Holland & Knight LLP
Portland, Oregon

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The Ethical Nonprofit Lawyer

Nellie Q. Barnard, Holland & Knight LLP
Calon Russell, Holland & Knight LLP

Agenda

» Who is the client?
» Who's in charge around here?
» Conflicts of interest: identification and avoidance.
Ground Rules

» Ask questions
  – we all get more out of an interactive presentation!

» Someone else did this once....
  – If you have a specific question, phrase it in a hypothetical to be on the safe side.

Holland & Knight

Client Identification in Entity Representation

» Important for:
  – Conflicts of interest.
  – Confidentiality.
  – Who has authority to direct your work.

» Best practices:
  – Monitor over time.
  – Correct misimpressions.
  – Make sure it’s in writing (engagement agreements).

Holland & Knight
Chapter 3—The Ethical Nonprofit Lawyer

Who is the Client?

» Attorney-client relationship defined as:
  – A subjective belief that you are his/her lawyer.
  – And that belief must be objectively reasonable.

» Be vigilant to avoid unintended clients:
  – Non-engagement letters/emails.
  – Updated notices when circumstances change.
  – Avoid giving even benign advice to non-client.

Client Identification in Entity Representation

» A lawyer employed or retained by an organization represents the organization acting through its constituents.

» A lawyer employed or retained by an organization owes allegiance to the organization and not to any constituent or other person connected with the organization.

» The constituents of an organization include its owners and its duly authorized officers, directors, trustees, and employees.
Entity Representation – RPC 1.13

f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

So...Who is the Client?

» Closely held corporations
  – Oregon Ethics Opinion 2005-85
  – Reasonable expectations test
» Parent, sub and sibling
  – Look for control and legal decision making
» Successor entities – still your client/former client?
  – Were the liabilities transferred?
  – Was the property an identified asset?
  – Transaction exclusions
**RPC 1.13(b) – Organization as Client**

» Up the ladder reporting obligation:

– If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization.

– Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, referral to the highest authority that can act on behalf of the organization as determined by applicable law.

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**Who is in charge around here?**

» Managing internal strife:

– Do not take sides.

– Take direction from authorized actor only;
  • seek confirmation of authority if need be.

– If there is an impasse, that is the company’s problem to resolve. Do not act without authority.

– Occasionally the impasse creates a conflict and the lawyer must withdraw. This is better than being named in a later member dispute.
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» You represent a not-for-profit entity with a six member board of directors. You have historically taken direction from the Executive Director (ED), who is also on the board. The ED wants to put on a fundraiser with a number of activities that may or may not violate gambling laws. The rest of the board has made clear that they do not want to take that approach and want to do a simple auction. In order to sway the board’s thinking, the ED asks you to write a memo with the best arguments for why the ED’s idea would be legal.

» What do you do?

Holland & Knight

Why Should You Care About Conflicts?

» Discipline

» Disqualification

» The leading cause of legal malpractice claims

“Al all along I thought our level of corruption was consistent with community standards.”
Conflicts (RPC 1.7)

» RPC 1.7

» 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:

1. the representation of one client will be directly adverse to another client;
2. there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
Current Client Conflict of Interest

» Representation of one client in any matter adverse to another client of the firm
» Relationship between the matters is irrelevant
» Imputation (the mutual conflict of interests conflict rule)
» Often, though not always, waivable
» Business and ethical considerations

Former Client Conflicts (RPC 1.9)

A lawyer who has formerly represented a client in a matter must not afterwards:

A. represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent;

B. use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client or when the information has become generally known; or

C. reveal information relating to the representation except as these rules would permit or require with respect to a client.
**Former Client Conflict of Interest**

» Representation of one client in any matter adverse to former client of the firm

» 2 critical points in the analysis
  – Substantially related matter?
  – Use information to disadvantage former client?
  – Reveal confidential information?

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**Current or Former Client?**

» Check the scope of engagement

» Hope your partners are better at drafting closing letters than you are

» Time since last time entry and closed invoices

» Natural end of matter

» Administrative closing
Mixing business with pleasure...

» Ok to sit on the board of a client nonprofit?

Conflicts – The High Points

» Representation of one client in any matter adverse to another client of the firm
  – Relationship between the matters is irrelevant
» The Three Musketeers rule
» Former clients always, waivable
» Business and ethical considerations
Conflicts – Charity and Donor

» Non-waivable vs. waivable conflicts
» Oregon Formal Ethics opinion 2005-116
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Calon Russell, Holland & Knight LLP
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» Oregon Formal Ethics Opinion 2005-116

Holland & Knight
Chapter 3—The Ethical Nonprofit Lawyer

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Holland & Knight
FORMAL OPINION NO 2005-85

Identifying the Client:
Corporations and Partnerships

Facts:

Corporation has two shareholders, A and B, who are not members of the same family. Partnership has two owners, C and D, who are not members of the same family.

Questions:

1. Does representation of Corporation automatically constitute representation of A and B?
2. Does representation of Partnership automatically constitute representation of C and D?
3. Does representation of A or B automatically constitute representation of Corporation?
4. Does representation of C or D automatically constitute representation of Partnership?

Conclusions:

1. No.
2. No.
3. No.
4. No.

Discussion:

Identifying the client is essential to a proper determination of matters such as to whom the lawyer owes a duty of confidentiality under ORS 9.460(3) and Oregon RPC 1.6 and whether a current- or former-client conflict exists under Oregon RPC 1.7, Oregon RPC 1.8, and Oregon RPC 1.9. Cf. OSB Formal Ethics Op No 2005-62; OSB Formal
A lawyer who represents an entity, such as a corporation or partnership, generally represents that entity only and not its employees, shareholders, or owners. See Oregon RPC 1.13(a), which provides that “[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” See also In re Weidner, 310 Or 757, 801 P2d 828 (1990), and OSB Formal Ethics Op No 2005-46, in which we noted that the modern test for the presence or absence of a lawyer-client relationship is, in essence, the reasonable-expectations test.

In In re Banks, 283 Or 459, 584 P2d 284 (1978), the court observed that, in general, representation of an entity, such as a corporation, does not automatically constitute representation of its shareholders. Nevertheless, the court held that representation of a corporation whose stock was owned by a single person or by a single person and member of the person’s family constituted representation of the person when, at the time of the legal work in question, the person “was the corporation” and had “no real reason . . . to differentiate in his mind between his own and corporate interests.” In re Banks, 283 Or at 472, 474 (emphasis in original). On the other hand, the court in In re Kinsey, 294 Or 544, 562 n 10, 660 P2d 660 (1983), noted that the normal entity theory applied when a corporation was owned by shareholders who were not members of the same family. The opinions in both Banks and Kinsey represent applications of the reasonable-expectations test.1

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1 The Banks rule should not apply, for example, when the sole shareholder is a major corporation and its subsidiary is itself a major corporation that is independently run and is in an altogether different line of business. Hartford Acc. & Indem. Co. v. RJR Nabisco, Inc., 721 F Supp 534, 540 (SDNY 1989); Am. Special Risk Ins. Co. v. Delta Am. Re Ins. Co., 634 F Supp 112, 120 n 14 (SDNY 1986); Pennwalt Corp. v. Plough, Inc., 85 FRD 264, 268–69 (D Del 1980). The Banks rule also may not apply if the “family” of shareholders is an extended and fractious family rather than a family whose interests are aligned, as was the case in Banks.
On the facts presented, and based on the foregoing discussion, representation of a corporation or partnership with two shareholders or owners who are not family members does not automatically constitute representation of the shareholders or owners. A contrary rule could well require the lawyer to withdraw whenever the two shareholders disagreed on a matter. Cf. OSB Formal Ethics Op No 2005-40; DC Bar Ethics Op No 216 (1991). If, however, a lawyer tells the shareholders or owners that they are individual clients or otherwise leads the shareholders or owners reasonably to believe that they are also the lawyer’s clients, they will be held to be clients.2

Similarly, there is no reason for a reverse imputation. In other words, representation of one of two unrelated shareholders or owners should not be deemed as a matter of law to constitute representation of Corporation or Partnership. Once again, however, a lawyer who reasonably leads Corporation or Partnership (or the other shareholder or owner) to believe that they are clients will be held to have additional clients.

Approved by Board of Governors, August 2005.

2 A lawyer who wishes to negate any possible application of the Banks outcome would be well advised to send the shareholders or owners a letter to the effect that they are not the lawyer’s clients.

COMMENT: For additional information on this general topic and other related subjects, see The Ethical Oregon Lawyer § 5.1 to § 5.3-2 (client identification) (OSB Legal Pubs 2015); Restatement (Third) of the Law Governing Lawyers § 14 (2000) (supplemented periodically); and ABA Model RPC 1.7–1.8.
FORMAL OPINION NO 2005-116
Conflicts of Interest, Current Clients:
Charity and Donor

Facts:

Lawyer represents Charity on a continuing basis and is also a member of its board of directors.

Donor asks Lawyer to represent Donor in making a sizable gift to Charity. Donor also asks Lawyer to prepare Donor’s will in which Charity would be a named beneficiary.

Questions:

1. May Lawyer represent both Charity and Donor in the charitable gift transaction?
2. May Lawyer represent only Donor in the charitable gift transaction?
3. May Lawyer prepare Donor’s will naming Charity as a beneficiary?

Conclusions:

1. No.
2. Yes, qualified.
3. Yes, qualified.

Discussion:

1. The Charitable Gift.

Oregon RPC 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:

(1) the representation of one client will be directly adverse to another client;
(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or

(3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(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.

See also Oregon RPC 1.0(b) and (g):

(b) “Confirmed in writing,” when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. . . . If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

. . . .

(g) “Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When informed consent is required by these Rules to be confirmed in writing or to be given in a writing signed by the client, the lawyer shall give and the writing shall reflect a recommendation that the client seek independent legal advice to determine if consent should be given.
If undertaking or continuing a representation would give rise to a nonwaivable conflict of interest under Oregon RPC 1.7(a)(1) and (b)(3), Lawyer may not proceed, even with informed consent from all concerned. A nonwaivable conflict of interest will ordinarily exist when a lawyer undertakes simultaneously to represent both sides of a buyer-seller, lender-borrower, or similar transaction. Cf. In re Claussen, 322 Or 466, 909 P2d 862 (1996); In re Jordan, 300 Or 430, 712 P2d 97 (1985); In re Renn, 299 Or 559, 704 P2d 109 (1985); In re Johnson, 300 Or 52, 707 P2d 573 (1985). Because of the potential for differing interests or positions between Charity and Donor concerning the terms of the transaction, representation of both Charity and Donor in the transaction would similarly constitute a prohibited, nonwaivable conflict of interest under Oregon RPC 1.7(a)(1) and (b)(3). See, e.g., OSB Formal Ethics Op No 2005-72; OSB Formal Ethics Op No 2005-40.

It appears, however, that only a waivable conflict of interest under Oregon RPC 1.7(a)(2) would be present if Lawyer represented only Donor in the charitable-gift transaction while continuing to represent Charity in other matters and to serve on its board.1 When, as here, there is a significant risk that Lawyer’s representation of Donor would be materially limited by Lawyer’s obligations to Charity, the representation is permissible with the informed consent of all clients, confirmed in

1 Care must be taken to determine what is a nonwaivable conflict of interest rather than a waivable conflict of interest. For example, a nonwaivable conflict of interest can result from a lawyer’s involvement in more than one specific proceeding or transaction. In In re Bristow, 301 Or 194, 721 P2d 437 (1986), for example, the court found that a nonwaivable conflict existed when a lawyer sought to uphold the validity of a particular franchising system on behalf of one client in one case while simultaneously seeking to overturn the validity of the same franchising system on behalf of other clients in another case. The Bristow case was decided under the former Oregon Disciplinary Rules; however, the result would be the same under the Oregon Rules of Professional Conduct and the representation would not be permissible pursuant to Oregon RPC 1.7(b)(3). If Lawyer’s representation of Donor in the unitrust transaction gave rise to a similar situation, a nonwaivable conflict of interest, rather than a waivable conflict of interest, would be present, and the representation would not be permissible.

2016 Revision

2. The Will.

Oregon RPC 1.7(a)(2) also would apply to Lawyer’s efforts to draft Donor’s will if Charity is to be a beneficiary. As discussed above, there is a significant risk, in that situation, that Lawyer’s representation of Donor will be materially limited by Lawyer’s obligations to Charity. Lawyer would therefore have to obtain informed consent, confirmed in writing pursuant to Oregon RPC 1.7(b) from both Donor and Charity before undertaking the work. Cf. In re Harrington, 301 Or 18, 718 P2d 725 (1986).

By contrast, however, the fact that Lawyer is counsel for Charity does not mean that Oregon RPC 1.7(a)(1) applies to the will transaction. This is because the interests of Donor and Charity are not adverse, within the meaning of Oregon RPC 1.7, at the time that the will would be drafted. Cf. In re Johnson, 300 Or 52.2

Approved by Board of Governors, August 2005.

2 If, in order to draft the will, Lawyer needed to disclose Charity’s confidential information to Donor, Lawyer would also need Charity’s informed consent pursuant to Oregon RPC 1.6 and ORS 9.460(3). Cf. OSB Formal Ethics Op No 2005-96 (rev 2014); OSB Formal Ethics Op No 2005-81 (rev 2014); OSB Formal Ethics Op No 2005-23 (rev 2014).

COMMENT: For additional information on this general topic and other related subjects, see The Ethical Oregon Lawyer § 9.6 (informed consent), § 10.2 (multiple-client conflicts rules), § 10.2-2 to § 10.2-2(c) (conflicts between current clients), § 10.2-3 (issue conflicts), chapter 20 (conflicts-waiver letters) (OSB Legal Pubs 2015); Restatement (Third) of the Law Governing Lawyers §§ 121–122, 125, 130 (2000) (supplemented periodically); ABA Model RPC 1.0(b), (e); and ABA Model RPC 1.6–1.7. See also Washington Advisory Op No 943 (1985); and Washington Advisory Op No 1568 (1994). (Washington advisory opinions are available at <www.wsba.org/resources-and-services/ethics/advisory-opinions>.)

2016 Revision
Chapter 4

Donor Restrictions and UPMIFA: Preventative Maintenance for Endowment Funds

JEFFREY THEDE
Theede Culpepper Moore Munro & Silliman LLP
Portland, Oregon

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I. BACKGROUND AND SCOPE OF UPMIFA

The Uniform Management of Institutional Funds Act ("UMIFA") was adopted by the National Conference of Commissioners on Uniform State Laws (the "Uniform Law Commission") in 1972 and enacted in Oregon in 1975. The stated purposes of UMIFA were to guide charities on the management and investment of funds, provide rules on spending from endowment funds, and permit the release of restrictions on the use and management of charitable funds. Recognizing that UMIFA was incomplete and somewhat out of date, the Uniform Law Commission adopted the Uniform Prudent Management of Institutional Funds Act ("UPMIFA") in 2006. (The addition of the word "prudent" might insinuate that the original law was the Uniform Imprudent Management of Institutional Funds Act.) UPMIFA was enacted in Oregon in 2007 (ORS 128.301 to 128.336) and has to date been enacted in 49 states (the only holdout being Pennsylvania).

UPMIFA modernizes many of the general rules of UMIFA, but the overall purpose remains largely unchanged. In a nutshell, UPMIFA (1) provides a modern prudence standard applicable to the management and investment of charitable funds, (2) modernizes and expands the authority of a nonprofit board of directors to make expenditures from endowment funds, and (3) provides added flexibility in the release or modification of applicable donor restrictions.

UPMIFA applies to "institutional funds," defined as funds held by an institution exclusively for charitable purposes. ORS 128.316(5). It applies to charitable organizations organized as either nonprofit corporations or trusts (but only charitable trusts having a charity as trustee).

UPMIFA does not apply to "program-related assets" ("assets held by an institution primarily to accomplish a charitable purpose of the institution, and not primarily for investment"), such as a building used by a charitable organization as office space. As explained by the UPMIFA Drafting Committee:
The Drafting Committee decided that applying the prudent investor rules of UPMIFA to the buildings a charity uses to carry out its charitable purposes might be confusing, and for that reason decided to exclude a category of assets called "program-related assets." For example, a university may own classrooms, laboratories, and dormitories. Decisions about buying new buildings, renovating existing buildings, and managing those buildings will be governed by standards of prudence, but saying that the university should approach decision making with respect to those buildings as a "prudent investor" might seem puzzling to an administrator. The land might be more valuable if used for another purpose, but the university would need to keep the buildings for use by its faculty and students.

II. DONOR RESTRICTIONS

Donors frequently impose restrictions on charitable gifts relating to the investment of the funds, the purpose or purposes for which the funds may or may not be used, the duration of the fund, or the amount that may be distributed. Donor restrictions are enforceable against a charitable organization under a variety of theories, including charitable trust law and contract law. Even in the case of an unrestricted charitable gift, the donor likely is relying on the assumption that the charity will use the gift for its current charitable purposes. An unrestricted gift to the University of Portland, for example, likely would be implicitly restricted to purposes relating to Catholic higher education.

The question of who has standing to enforce charitable restrictions is unsettled in Oregon. Some cases from other states have treated restricted charitable gifts as contracts enforceable by the donor, other cases have upheld the traditional rule that charitable restrictions may be enforced only by the Attorney General, and in many states there is no case law at all. For an excellent article on these and other theories for the enforcement of charitable restrictions, see William P. Sullivan, The Restricted Charitable Gift as Third-Party-Beneficiary Contract, 52 Real Property, Trust & Estate Law Journal 79 (2017).

In my experience, the Oregon Attorney General (through the Charitable Activities Section) generally requires strict compliance with any and all applicable charitable restrictions, based in part on its right to notice in connection with "charitable trusts" under the Oregon Uniform Trust Code (ORS 130.170), certain mergers under the Oregon
Nonprofit Corporation Act (ORS 65.484), and the dissolution of Oregon nonprofit corporations (ORS 65.627).

UPMIFA expressly recognizes the paramount importance of donor restrictions, which generally "trump" the default provisions. An institution's investment responsibilities and ability to make expenditures from endowment funds are specifically subject to "the intent of a donor expressed in the gift instrument" (ORS 128.318(1) and ORS 128.322(1)), a board's authority to delegate management and investment functions is subject to "any specific limitation set forth in a gift instrument" (ORS 128.326), and any release or modification of restrictions requires the consent of the donor or notice to the Attorney General (ORS 128.328).

III. PRUDENT INVESTING

UPMIFA Section 3 (ORS 128.318) governs the standard of conduct in a board of directors' management and investment of institutional funds. It adopts a modern "prudence" standard, generally following the language of the revised Model Nonprofit Corporation Act and the Uniform Principal and Income Act, and requires generally that managers make investment decisions "in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances." ORS 128.318(2). It also adopts modern portfolio theory, under which prudence is based upon the investment performance of the portfolio as a whole, rather than any single investment. It also implicitly recognizes that prudent investing is process driven, rather than product driven, that some risk is necessary (just not uncompensated risk), and that the principal investment responsibility is to protect the real value of the portfolio, adjusted for inflation. UPMIFA specifically directs fund managers to take into account general economic conditions, the possible effect of inflation or deflation, the expected tax consequences, if any, of investment decisions or strategies, the role of each investment within the overall investment portfolio, the expected total return, the other resources of the institution, and the needs of the institution to make distributions and to preserve capital. ORS 128.318(5). It also specifically recognizes that, in some unusual
circumstances, the purposes of an institution might be better served without the usual diversification of assets. ORS 128.318(5)(d).

UPMIFA Section 5 (ORS 128.326) specifically permits (and in my view generally requires) a nonprofit board of directors to delegate the management and investment of funds to qualified "external agents." ORS 128.326(1). In delegating investment and management responsibilities, the institutional board is required to select agents with prudence and in good faith, and to periodically review the agent's performance. ORS 128.326(1). Somewhat interestingly, by accepting a delegation of management or investment authority, an agent "submits to the jurisdiction" of the Oregon courts. (ORS 128.326(4). A nonprofit board is also specifically authorized to delegate management and investment functions to "its committees, officers, or employees." ORS 128.326(5).

IV. ENDOWMENT SPENDING

Perhaps the biggest change under UPMIFA relates to the rules for spending from endowment funds. Under the traditional (pre-UMIFA) rules, typically an endowment fund created by a donor would permit the institution to spend or withdraw the "net income" of the fund for the designated purposes, with no access to corpus. Although this approach might be reasonable in times of high interest rates and dividend yields, in more modern times current income yield on a prudently diversified investment portfolio became relatively small in comparison to the overall investment yield. UMIFA permitted an institution to expend the "net appreciation" in the value of an endowment fund over its "historic dollar value," subject to the usual principles of prudence. That permitted the institution to invest the endowment fund to maximize the overall investment yield, without regard to current income and realized appreciation. It was also the basis for permitting modern "percentage payout" policies, under which the institution withdraws from the fund each year a fixed percentage of the value of the fund (usually calculated over a period of time, such as three years), determined by the board of directors as a reasonable rate of return, taking into account the cash needs of the institution, the expected total return on assets of the fund, and the desirability of maintaining the real value of the fund assets adjusted for inflation. In times of recession, a significant
problem with the UMIFA "historic dollar value" floor was that it was unclear whether and to what extent distributions could be made from an "underwater" fund, i.e., an endowment fund with assets having a total fair market value that is less than the historic dollar value. Some commentators took the position that no distributions whatsoever could be made from an upside down fund, while others took the position that "net income" should be distributable in any case. It was also recognized that, after an endowment fund has been in existence for a number of years, the historic dollar value would become increasingly meaningless.

UPMIFA Section 4 authorizes an institution to "appropriate for expenditure" (or accumulate) as much of the assets of the fund as the institution determines to be prudent, taking into account the duration of the fund, the purposes of the institution and the endowment fund, general economic conditions, the possible effect of inflation or deflation, the expected total return from income and appreciation, the other resources available to the institution, and the investment policies of the institution.

ORS 128.322(1). For purposes of these rules, an "endowment fund" is a fund that, under the terms of the gift instrument, is not wholly expendable by the institution on a current basis. ORS 128.316(2). It does not include unrestricted assets designated by the institution as an endowment fund (a so-called "quasi endowment").

The appropriation for expenditure rules apply even in the case of a gift instrument designating a fund as "endowment," or including a direction to use only "income," "interest," or "dividends." ORS 128.322(3). UPMIFA thus implicitly includes a retroactive rule of construction, applicable to prior gifts from donors using words like "income" or "endowment" without specific direction. The stated rationale of the Uniform Law Commission was as follows:

Non-retroactivity would produce serious practical problems: If the Act were not retroactive, a charity would need to keep two sets of books for each endowment fund created before the enactment of UPMIFA, if new funds were added after the enactment. The burden that such a rule would impose is out of proportion to the benefit sought. UPMIFA § 4 (2006), Comment (c).
Of course, a donor may direct to the contrary, but the restriction would need to be very specific (for example, by permitting an institution to expend only "the net income earned on the assets of the fund, but in no event any portion of principal").

In part because of concerns expressed by some commentators about the removal of the "historic dollar value" floor of UMIFA, UPMIFA includes an "optional" provision creating a "rebuttable presumption of imprudence" if an institution expends more than 7 percent of the value of an endowment fund in any single year. This rebuttable presumption of imprudence was vigorously promoted by the Oregon Attorney General when UPMIFA was enacted in Oregon in 2007, and appears at ORS 128.322(4).

(Note that the presumption of imprudence for withdrawals of more than 7 percent does not create an automatic safe harbor for withdrawals of less than that amount. Depending on the circumstances, expenditures of less than 7 percent could be deemed to be imprudent.)

V. RELEASE OR MODIFICATION OF RESTRICTIONS

According to the comments of the Uniform Law Commission, one goal of UPMIFA was to "clarify" that the common law doctrines of *cy pres* and deviation apply to funds held by nonprofit corporations as well as to funds held by charitable trusts. The view of the Uniform Law Commission was that UPMIFA should require an institution to pursue modifications that are "in accordance with the donor's probable intention" for deviation and "in a manner consistent with the charitable purposes expressed in the gift instrument" for *cy pres*. In addition, UMIFA permitted only the "release" of restrictions, whereas UPMIFA permits the "release or modification" of restrictions.

The new rules are contained in UPMIFA Section 6, which provides in its entirety as follows:

**SECTION 6. RELEASE OR MODIFICATION OF RESTRICTIONS ON MANAGEMENT, INVESTMENT, OR PURPOSE.**

(a) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund. A
release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(b) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor's probable intention.

(c) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve, or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the [Attorney General] of the application, and the [Attorney General] must be given an opportunity to be heard.

(d) If an institution determines that a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund is unlawful, impracticable, impossible to achieve, or wasteful, the institution, [60 days] after notification to the [Attorney General], may release or modify the restriction, in whole or part, if:

   (1) the institutional fund subject to the restriction has a total value of less than [$25,000];

   (2) more than [20] years have elapsed since the fund was established; and

   (3) the institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

Subsection 6(a) (codified in Oregon as ORS 138.328(1)) permits the release or modification or restriction with the written consent of the donor.

Subsection 6(b) (ORS 128.328(2)) applies the common law rule of equitable deviation to permit an institution to petition the court to modify a restriction regarding the management or investment of an institutional fund "if the restriction has become impracticable or wasteful, if it impairs the management or investment of the fund, or if,
because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund." Notice must be given to the Attorney General.

Subsection 6(c) (ORS 128.328(3)) applies the common law rule of *cy pres* to permit the court to modify the purpose of the fund or an applicable restriction that becomes "unlawful, impracticable, impossible to achieve, or wasteful." Notice must be given to the Attorney General.

UPMIFA also includes a helpful "small, old fund" provision. Under Section 6(d) (ORS 128.328(4)(c)), in the case of a fund that is both small (no more than $25,000) and old (at least 20 years), the institution may release or modify the restriction and use the property "in a manner consistent with the charitable purposes expressed in the instrument." At least 60-days' notice must be given to the Attorney General.
OREGON UNIFORM PRUDENT MANAGEMENT OF INSTITUTIONAL FUNDS ACT

128.305 Short title. ORS 128.305 to 128.336 may be cited as the Uniform Prudent Management of Institutional Funds Act. [2007 c.554 §10]

128.316 Definitions for ORS 128.305 to 128.336. As used in ORS 128.305 to 128.336:
(1) “Charitable purpose” means the relief of poverty, the advancement of education or religion, the promotion of health, the promotion of a governmental purpose or any other purpose the achievement of which is beneficial to the community.

(2) “Endowment fund” means an institutional fund or part of an institutional fund that, under the terms of a gift instrument, is not wholly expendable by the institution on a current basis. “Endowment fund” does not include assets that an institution designates as an endowment fund for the institution’s own use.

(3) “Gift instrument” means a record or records, including an institutional solicitation, under which property is granted to, transferred to or held by an institution as an institutional fund.

(4) “Institution” means:
(a) A person, other than an individual, organized and operated exclusively for charitable purposes;
(b) A government or governmental subdivision, agency or instrumentality, to the extent that it holds funds exclusively for a charitable purpose; and
(c) A trust that had both charitable and noncharitable interests, after all noncharitable interests have terminated.

(5) “Institutional fund” means a fund held by an institution exclusively for charitable purposes. “Institutional fund” does not include:
(a) Program-related assets;
(b) A fund held for an institution by a trustee that is not an institution;
(c) A fund in which a beneficiary that is not an institution has an interest, other than an interest that could arise upon violation or failure of the purposes of the fund; or
(d) A fund managed by the State Treasurer, moneys held by the State Treasurer for investment or moneys managed or held for investment by or on behalf of the State Treasurer under ORS chapter 293 or 348.

(6) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(7) “Program-related asset” means an asset held by an institution primarily to accomplish a charitable purpose of the institution and not primarily for investment.

(8) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form. [2007 c.554 §1]

128.318 Standard of conduct in managing and investing institutional fund. (1) Subject to the intent of a donor expressed in a gift instrument, an institution, in managing and investing an institutional fund, shall consider the charitable purposes of the institution and the purposes of the institutional fund.

(2) In addition to complying with the duty of loyalty imposed by law other than ORS 128.305 to 128.336, each person responsible for managing and investing an institutional fund shall manage and invest the fund in good faith and with the care an ordinarily prudent person in a like position would exercise under similar circumstances.

(3) In managing and investing an institutional fund, an institution:
(a) May incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the institution and the skills available to the institution; and
(b) Shall make a reasonable effort to verify facts relevant to the management and investment of the fund.
An institution may pool two or more institutional funds for purposes of management and investment.

Except as otherwise provided by a gift instrument, the following rules apply:

(a) In managing and investing an institutional fund, the following factors, if relevant, must be considered:

(A) General economic conditions;
(B) The possible effect of inflation or deflation;
(C) The expected tax consequences, if any, of investment decisions or strategies;
(D) The role that each investment or course of action plays within the overall investment portfolio of the fund;
(E) The expected total return from income and the appreciation of investments;
(F) Other resources of the institution;
(G) The needs of the institution and the fund to make distributions and to preserve capital; and
(H) An asset’s special relationship or special value, if any, to the charitable purposes of the institution.

(b) Management and investment decisions about an individual asset must be made not in isolation, but instead in the context of the institutional fund’s portfolio of investments as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fund and to the institution.

(c) Except as otherwise provided by law other than ORS 128.305 to 128.336, an institution may invest in any kind of property or type of investment consistent with this section.

(d) An institution shall diversify the investments of an institutional fund unless the institution reasonably determines that, because of special circumstances, the purposes of the fund are better served without diversification.

(e) Within a reasonable time after receiving property, an institution shall make and carry out decisions concerning the retention or disposition of the property or to rebalance a portfolio, in order to bring the institutional fund into compliance with the purposes, terms and distribution requirements of the institution as necessary to meet other circumstances of the institution and the requirements of ORS 128.305 to 128.336.

(f) A person that has special skills or expertise, or is selected in reliance upon the person’s representation that the person has special skills or expertise, has a duty to use those skills or that expertise in managing and investing institutional funds. [2007 c.554 §2]

128.322 Appropriation for expenditure or accumulation of endowment fund; rules of construction. (1) Subject to subsection (4) of this section and the intent of a donor expressed in the gift instrument, an institution may appropriate for expenditure or accumulate so much of an endowment fund as the institution determines is prudent for the uses, benefits, purposes and duration for which the endowment fund is established. Unless stated otherwise in the gift instrument, the assets in an endowment fund are donor-restricted assets until appropriated for expenditure by the institution. In making a determination to appropriate or accumulate, the institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, and shall consider, if relevant, the following factors:

(a) The duration and preservation of the endowment fund;
(b) The purposes of the institution and the endowment fund;
(c) General economic conditions;
(d) The possible effect of inflation or deflation;
(e) The expected total return from income and the appreciation of investments;
(f) Other resources of the institution; and
(g) The investment policy of the institution.

(2) To limit the authority to appropriate for expenditure or accumulate under subsection (1) of this section, a gift instrument must specifically state the limitation.
(3) Terms in a gift instrument designating a gift as an endowment, or a direction or authorization in the gift instrument to use only “income,” “interest,” “dividends” or “rents, issues or profits,” or “to preserve the principal intact,” or words of similar import:

(a) Create an endowment fund of permanent duration unless other language in the gift instrument limits the duration or purpose of the fund; and

(b) Do not otherwise limit the authority to appropriate for expenditure or accumulate under subsection (1) of this section.

(4) The appropriation for expenditure in any year of an amount greater than seven percent of the fair market value of an endowment fund, calculated on the basis of market values determined at least quarterly and averaged over a period of not less than three years immediately preceding the year in which the appropriation for expenditure was made, creates a rebuttable presumption of imprudence. For an endowment fund in existence for fewer than three years, the fair market value of the endowment fund must be calculated for the period the endowment fund has been in existence. This subsection does not:

(a) Apply to an appropriation for expenditure permitted under law other than ORS 128.305 to 128.336 or by the gift instrument; or

(b) Create a presumption of prudence for an appropriation for expenditure of an amount less than or equal to seven percent of the fair market value of the endowment fund. [2007 c.554 §3]

128.326 Delegation of management and investment functions. (1) Subject to any specific limitation set forth in a gift instrument or in law other than ORS 128.305 to 128.336, an institution may delegate to an external agent the management and investment of an institutional fund to the extent that an institution could prudently delegate under the circumstances. An institution shall act in good faith, with the care that an ordinarily prudent person in a like position would exercise under similar circumstances, in:

(a) Selecting an agent;

(b) Establishing the scope and terms of the delegation, consistent with the purposes of the institution and the institutional fund; and

(c) Periodically reviewing the agent’s actions in order to monitor the agent’s performance and compliance with the scope and terms of the delegation.

(2) In performing a delegated function, an agent owes a duty to the institution to exercise reasonable care to comply with the scope and terms of the delegation.

(3) An institution that complies with subsection (1) of this section is not liable for the decisions or actions of an agent to which the function was delegated.

(4) By accepting delegation of a management or investment function from an institution that is subject to the laws of this state, an agent submits to the jurisdiction of the courts of this state in all proceedings arising from or related to the delegation or the performance of the delegated function.

(5) An institution may delegate management and investment functions to its committees, officers or employees as authorized by law of this state other than ORS 128.305 to 128.336. [2007 c.554 §4]

128.328 Release or modification of restrictions on management, investment or purpose. (1) If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment or purpose of an institutional fund. A release or modification may not allow a fund to be used for a purpose other than a charitable purpose of the institution.

(2) The court, upon application of an institution, may modify a restriction contained in a gift instrument regarding the management or investment of an institutional fund if the restriction has become impracticable or wasteful, the restriction impairs the management or investment of the fund or, because of circumstances not anticipated by the donor, a modification of a restriction will further the purposes of the fund. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard. To the extent practicable, any modification must be made in accordance with the donor’s probable intention.
(3) If a particular charitable purpose or a restriction contained in a gift instrument on the use of an institutional fund becomes unlawful, impracticable, impossible to achieve or wasteful, the court, upon application of an institution, may modify the purpose of the fund or the restriction on the use of the fund in a manner consistent with the charitable purposes expressed in the gift instrument. The institution shall notify the Attorney General of the application, and the Attorney General must be given an opportunity to be heard.

(4) If an institution determines that a restriction contained in a gift instrument on the management, investment or purpose of an institutional fund is unlawful, impracticable, impossible to achieve or wasteful, the institution, within 60 days after notification to the Attorney General, may release or modify the restriction, in whole or part, if:
   (a) The institutional fund subject to the restriction has a total value of less than $25,000;
   (b) More than 20 years have elapsed since the fund was established; and
   (c) The institution uses the property in a manner consistent with the charitable purposes expressed in the gift instrument.

(5) The provisions of this section apply to property and other interests given by private donors as a gift to a public body, as defined by ORS 174.109, or to any instrumentality of a public body. This subsection does not limit any other authority that a public body or an instrumentality of a public body may have to release or modify a restriction contained in a gift instrument on the management, investment or purpose of funds. [2007 c.554 §5]

128.332 Reviewing compliance. Compliance with ORS 128.305 to 128.336 is determined in light of the facts and circumstances existing at the time a decision is made or action is taken, and not by hindsight. [2007 c.554 §6]


128.336 Uniformity of application and construction. In applying and construing ORS 128.305 to 128.336, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact the Uniform Prudent Management of Institutional Funds Act. [2007 c.554 §9]
Comparison of UMIFA and UPMIFA  
*(From Uniform Law Commission Website)*

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### UMIFA

**Release or Modification of Restrictions:**
- Court release if restriction obsolete, inappropriate, or impracticable
- Notice to Attorney General required
- Cy pres (modification of purpose) not limited or addressed

### UPMIFA

**Release or Modification of Restrictions:**
- Restriction
  - Court may release or modify if restriction is:
    - Impracticable or wasteful
    - Impairs management or investment
    - Meets unanticipated circumstances that allow release or modification furthering purposes of the fund
  - Notice to Attorney General required
- Purpose
  - Court may release or modify if purpose is:
    - Unlawful to retain
    - Impracticable
    - Impossible to achieve
    - Wasteful
  - Must be consistent with donor's intent
  - Notice to Attorney General required

**Small Old Fund**
- Institution may institute release or modification without court approval
- Notice to Attorney General required
# Chapter 5

**How Tax-Exempt Organizations Can Lobby and Influence Elections Without Violating the Law**

**David Atkin**  
Center for Nonprofit Law PC  
Eugene, Oregon

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How Tax-Exempt Organizations Can Lobby and Influence Elections Without Violating the Law (September 2018 Update on Dark Money Spending)
I. 501(C)(3) LOBBYING AND POLITICAL ACTIVITY

Political activities and legislative activities are two different things and are subject to two different sets of rules.

A. IRS RESTRICTIONS ON LOBBYING BY 501(C)(3) ORGANIZATIONS

Lobbying Activity
In general, no organization may qualify for section 501(c)(3) status if a substantial part of its activities consist of attempting to influence legislation (commonly known as lobbying). 26 C.F.R. 1.501(c)(3)-1(b)(3)(i). A 501(c)(3) organization may engage in some lobbying, but too much lobbying activity risks loss of tax-exempt status.

The lobbying restrictions only apply to attempting to influence legislation; “legislation” includes action by Congress, any state legislature, any local council or any similar governing body with respect to acts, bills, resolutions, or similar items, or by the public in referendum, ballot initiative, constitutional amendment or similar procedure. It does not include actions by executive, judicial or administrative bodies.

An organization will be regarded as attempting to influence legislation if it contacts, or urges the public to contact, members or employees of a legislative body for the purpose of proposing, supporting or opposing legislation, or if the organization advocates the adoption or rejection of legislation.

Organizations may, however, involve themselves in issues of public policy without the activity being considered as lobbying. For example, organizations may conduct educational meetings, prepare and distribute educational materials or otherwise consider public policy issues in an educational manner without jeopardizing their tax-exempt status.

501(h) Lobbying Rules
In the past, the IRS regulation restricting lobbying for 501(c)(3) organizations were unclear as to how much lobbying activity is too much, making it difficult for organizations who do attempt to influence legislation to know if they are in compliance with the law or not. Because of this, and at the request of nonprofit organizations, Congress enacted a provision of the Internal Revenue Code, section 501(h), which allows an organization to elect to be governed by a different, much more concrete test to determine whether or not they are within the allowable limits for lobbying activity. This test, called the lobbying “expenditure test,” gives organizations certainty as to whether or not they are complying with the law.

However, only certain types of 501(c)(3) organizations are allowed to elect to be covered by the lobbying limits in Section 501(h). For example, churches and all Private Foundations are not allowed to do so, and so must make sure that their lobbying activities comply with the older, more restrictive and more uncertain regulation.

In order to be governed by the expenditure test laid out in section 501(h), an organization must elect to do so by filing Form 5768 with the IRS.
The 501(h) expenditure test limits lobbying by limiting the amount of money that 501(c)(3) organizations can spend on lobbying activities. There are two separate expenditure limits: one for total lobbying expenses and a second limit for “indirect” or “grassroots” lobbying expenses.

**Limits on Total Lobbying Expenditures**
An organization’s total lobbying expenditures are limited to:

- 20% of the organization’s first $500,000 in exempt purpose expenditures
- + 15% of the organization’s next $500,000 in exempt purpose expenditures
- + 10% of the organization’s third $500,000 in exempt purpose expenditures
- + 5% of the organization’s remaining exempt purpose expenditures

Also, an organization’s total lobbying expenditures may not exceed $1 million, no matter how large the organization’s total annual expenditures are.

**Limits on Indirect / Grass Roots Lobbying Expenditures**
An organization’s indirect lobbying expenditures are limited to 25% of its total allowable lobbying expenditures. Note that an organization can engage in indirect lobbying and spend up to 25% of its allowable total lobbying expenditures, regardless of how much is spent on direct lobbying, even if the organization did not actually spend the full amount allowed for its total lobbying expenditures.

“Exempt Purpose Expenditures” simply means all expenditures the organization makes in furtherance of its exempt purposes, including expenditures for program expenses, administrative expenses, depreciation, lobbying expenses and most in-house fundraising expenses. Exempt Purpose Expenditures do not include expenditures made to earn “Unrelated Business Income” (UBI) or taxes paid on Unrelated Business Income; capital improvement or acquisition expenses, such as money paid to purchase or improve the value of real property; or expenses for a separate fundraising unit or an outside fundraising consultant.

Note that the section 501(h) rules do not limit lobbying activities which do not cost money. Accordingly, an organization that has elected to be governed by the section 501(h)’s expenditure test can utilize unpaid volunteers to engage in as much lobbying as it desires, and it has no duty to track or report those activities, so long as no other expenditures are involved.

**Tracking And Reporting of Lobbying Expenditures**
The IRS requires 501(c)(3) nonprofit organizations to carefully track and record their lobbying expenditures, including the costs of all staff time spent on lobbying activities, the costs of travel and phone calls, the costs of television or radio ads, the cost of preparing and mailing literature and action alerts, and the cost of any portions of newsletters or other materials that involve lobbying. Organizations are required to have a reasonable and accurate system for tracking these costs and should ask a CPA or other accounting professional for help in setting up a system that will track and account for their lobbying expenditures.
Sanctions and Penalties
Under the 501(h) rules, if an electing 501(c)(3) organization exceeds either of its lobbying limits, then instead of potentially losing its nonprofit status, it simply has to pay a 25% excise tax on its excess lobbying expenditures. However, if the organization exceeds its lobbying limits by expending 150% or more of its annual allowable lobbying expenditures, averaged over a period of four years, then it could lose its tax-exempt status.

B. IRS PROHIBITION ON POLITICAL ACTIVITIES BY 501(C)(3) ORGANIZATIONS

Under the Internal Revenue Code, all section 501(c)(3) organizations are absolutely prohibited from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elected public office. Contributions to political campaign funds or public statements of position (verbal or written) made on behalf of the organization in favor of or in opposition to any candidate for public office clearly violate the prohibition against political campaign activity. Violation of this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise tax.

Certain activities or expenditures may not be prohibited depending on the facts and circumstances. For example, certain voter education activities (including the presentation of public forums and the publication of voter education guides) conducted in a non-partisan manner do not constitute prohibited political campaign activity. In addition, other activities intended to encourage people to participate in the electoral process are allowed if conducted correctly (see below on voter registration, voter education, and get-out-the-vote, below).

Individual Activity by Organization Leaders
The political campaign activity prohibition is not intended to restrict free expression on political matters by leaders of organizations speaking for themselves as individuals. Nor are leaders prohibited from speaking about important issues of public policy. However, for their organizations to remain tax-exempt under section 501(c)(3), leaders cannot make partisan comments in official organization publications or at official functions.

To avoid potential attribution of their comments outside of organization functions and publications, organization leaders who speak or write in their individual capacity are encouraged to clearly indicate that their comments are personal and not intended to represent the views of the organization.

II. THE RULES FOR VOTER REGISTRATION, VOTER EDUCATION, AND GET-OUT-THE-VOTE CAMPAIGNS

Tax-exempt, 501(c)(3) organizations are allowed to conduct unbiased, non-partisan, even-handed voter registration, voter education, and get-out-the-vote activities. Such activities do not constitute prohibited political campaign activity if conducted in a non-partisan manner. On the other hand, voter education, registration, or get-out-the-vote activities with evidence of bias that (a) would favor one candidate over another; (b) oppose a candidate in some manner; or (c) have the effect of favoring a candidate or group of candidates, will constitute prohibited participation or intervention.
Voter Registration and Get-Out-the-Vote
If conducted in a non-partisan manner that does not promote any candidate or political party over another, voter registration and get-out-the-vote activities are permitted for 501(c)(3) organizations. The IRS uses the following example as a permissible version of voter registration activities:

B, a section 501(c)(3) organization that promotes community involvement, sets up a booth at the state fair where citizens can register to vote. The signs and banners in and around the booth give only the name of the organization, the date of the next upcoming statewide election, and notice of the opportunity to register. No reference to any candidate or political party is made by the volunteers staffing the booth or in the materials available at the booth, other than the official voter registration forms which allow registrants to select a party affiliation. B is not engaged in political campaign intervention when it operates this voter registration booth.


However, the following example demonstrates the IRS’s requirement that such activities not favor any particular candidate:

C is a section 501(c)(3) organization that educates the public on environmental issues. Candidate G is running for the state legislature and an important element of her platform is challenging the environmental policies of the incumbent. Shortly before the election, C sets up a telephone bank to call registered voters in the district in which Candidate G is seeking election. In the phone conversations, C’s representative tells the voter about the importance of environmental issues and asks questions about the voter’s views on these issues. If the voter appears to agree with the incumbent’s position, C’s representative thanks the voter and ends the call. If the voter appears to agree with Candidate G’s position, C’s representative reminds the voter about the upcoming election, stresses the importance of voting in the election and offers to provide transportation to the polls. C is engaged in political campaign intervention when it conducts this get-out-the-vote drive.

Id.

Voter Education
The IRS rules for voter education activities are very detailed and strict, and 501(c)(3) organizations must be careful not to show any bias for or against any party or candidate. However, they are allowed to distribute accurate, fair, balanced and educational information, if they give the same kind and amount of information about all of the candidates for any given office. In addition, they may hold public forums and invite candidates to speak, either as candidates or in their individual capacity. Any such appearance, however, must be fair and nonpartisan.

When a 501(c)(3) organization invites a candidate to speak as a candidate, the organization must ensure that:

(1) “It provides an equal opportunity to political candidates seeking the same office;
(2) It does not indicate any support for or opposition to the candidate (this should be stated explicitly when the candidate is introduced and in communications concerning the candidate’s attendance); and
(3) No political fundraising occurs.”
IRS, Fact Sheet 2006-17.

In ensuring an equal opportunity to participate, an organization should make sure that if it invites candidates to different forums, the forums or events are similar in attendance, importance, venue, manner of presentation, time, and other factors. For example, if one candidate speaks at the organization’s annual, well-attended gala, and the other candidate speaks at a sparsely-attended, last-minute meeting, that will constitute prohibited political campaign activity. IRS, Fact Sheet 2006-17.

If several candidates speak at the same public forum, the organization must ensure no bias is shown. In doing so, the IRS encourages organizations to consider the following factors:

1. “Whether questions for the candidate are prepared and presented by an independent nonpartisan panel;
2. Whether the topics discussed by the candidates cover a broad range of issues that the candidates would address if elected to the office sought and are of interest to the public;
3. Whether each candidate is given an equal opportunity to present his or her view on the issues discussed;
4. Whether the candidates are asked to agree or disagree with positions, agendas, platforms or statements of the organization: and
5. Whether a moderator comments on the questions or otherwise implies approval or disapproval of the candidates.”
IRS, Fact Sheet 2006-17.

A 501(c)(3) organization may also invite a candidate to speak or participate in his or her individual capacity (not as a candidate) without violating political campaign activity rules if the organization ensures the following:

1. “The individual is chosen to speak solely for reasons other than candidacy for public office;
2. The individual speaks only in a non-candidate capacity;
3. Neither the individual nor any representative of the organization makes any mention of his or her candidacy or the election;
4. No campaign activity occurs in connection with the candidate’s attendance; and
5. The organization maintains a nonpartisan atmosphere on the premises or at the event where the candidate is present.”
IRS, Fact Sheet 2006-17.

The organization must also clearly state in what capacity the candidate is appearing and should be careful to avoid any mention of the individual’s candidacy or the election in any publicity materials. Id.
Combination of Activities

Note that, even if an organization’s individual activities do not constitute prohibited political campaign activity, if all of the organization’s activities, when looked at as a whole, create a bias for one candidate, the combination of activities will result in a violation of the political activities prohibition.

III. IRS RULES FOR LOBBYING AND POLITICAL ACTIVITIES BY 501(c)(4) ORGANIZATIONS

Organizations with 501(c)(4) tax-exempt status may engage in unlimited lobbying, as long as the lobbying activity is related to the organization’s tax-exempt purpose. See Rev. Rul. 61-177, 1961-1 C.B. 117 (allowing unlimited lobbying for (c)(6) organizations); see also Rev. Rul. 61-177 (applying the rule in Rev. Rul. 61-177 to 501(c)(4) and (c)(5) organizations as well). In addition, 501(c)(4) organizations may engage in political campaign activities, either promoting or opposing candidates for public office, as long as that activity does not constitute the organization’s primary activity. Note that participating or intervening in political campaigns does not fall within the definition of “promotion of social welfare” in the regulations under I.R.C. § 501(c)(4). Reg. 1.501(c)(4)-1(a)(2)(ii).

Generally, a 501(c)(4) organization may also make expenditures for political campaign activities, provided that doing so does not constitute its primary activity. See, e.g., Rev. Rul. 81-95, 1981-1 C.B. 332.

Under I.R.C. § 162, dues or contributions to 501(c)(4) organizations may be deductible as business expenses under I.R.C. § 162. Note, however, that amounts paid to support political campaign activity may not be deducted as a business expense. I.R.C. § 162(e)(2)(A). In addition, amounts paid for direct legislative lobbying expenses at both the federal and state level, but not the local level, also may not be deducted as a business expense. IRS, Political Campaign and Lobbying Activities of I.R.C. 501(c)(4), (c)(5), and (c)(6) Organizations L-3 (2003), available at https://www.irs.gov/pub/irs-tege/eotopicl03.pdf. This is also true for grass roots lobbying expenditures and amounts paid for contact with certain federal officials. Id. If a substantial part of a 501(c)(4) organization’s activities consist substantially of political campaign activities or lobbying, the only portion of a payment to the organization that may be deducted under I.R.C. 162 are the dues or other payments that the taxpayer can show were not used for political campaign or lobbying activities. Reg. 1.162-20(c)(3). For more information on deduction rules donations to 501(c)(4) organizations for lobbying or political campaign activities, see IRS, Political Campaign and Lobbying Activities of I.R.C. 501(c)(4), (c)(5), and (c)(6) Organizations L-3 (2003), available at https://www.irs.gov/pub/irs-tege/eotopicl03.pdf.

IV. “DARK MONEY” – ITS GROWING ROLE IN INFLUENCING ELECTION CAMPAIGN BY 501(C)(4) ORGANIZATIONS

Reporting donors has become an increasingly controversial issue in recent years, as Supreme Court rulings and IRS Revenue Procedures, among other things, have opened the way for a dramatic rise in political “dark money.” The phrase “dark money” refers to funds given to certain nonprofit organizations that are allowed to receive unlimited donations from individuals,
other corporations, and unions and can use that money to influence political elections but are not required to disclose those donors to the public. See Ctr. Responsive Politics, *Dark Money Basics*, https://www.opensecrets.org/dark-money/basics. This includes money given to 501(c)(4), (c)(5), and (c)(6) organizations.

In the past, donor reporting requirements generally applied to all 501(c) organizations as part of their annual Form 990. All 501(c) tax-exempt entities must file a Form 990 with the IRS each year. Historically, part of that form has required (with some exceptions) tax-exempt entities to disclose on Schedule B (“Schedule of Contributors”) the name, address, and donation amount for any donor who contributed $5,000 or more (in money or property) to the organization that tax year. See IRS, *Instructions for Form 990 Return of Organization Exempt From Income Tax* 12–13 (2017), available at https://www.irs.gov/pub/irs-pdf/i990.pdf. In the past, this applied to 501(c)(4) organizations just as it does to 501(c)(3) organizations. See id. at 13. In addition, filed 990s are generally available for public inspection, whether requested from the IRS or directly from the filing entity. Id. at 77–81. However, the names and addresses of any contributors listed on Schedule B of that return may be redacted from the released form for all organizations except section 527 organizations. Id. at 77. This meant that 501(c)(4) organizations were required to report their donors but were allowed to keep information about those donors out of the public eye.

Earlier this year, the IRS expanded the ability of 501(c)(4) organizations to keep their donor information private by relieving them of the requirement to reveal their substantial donors on their 990 Forms. This revenue procedure, issued in July 2018, exempts all tax-exempt entities, other than 501(c)(3) and section 527 organizations, from revealing donor information on their 990 Forms. Rev. Proc. 2018-38 1 (2018), available at https://www.irs.gov/pub/irs-drop/rp-18-38.pdf. These groups are still required to keep internal records of this information and make it available to the IRS upon request, “when needed for tax administration.” Id.

This Revenue Procedure culminates a decade-long reduction in campaign finance reporting requirements that have expanded the potential for dark money to influence elections and politics in general.

This shift has been largely effectuated by a few key Supreme Court rulings that have struck down reporting requirements in an effort to protect First Amendment free speech rights. Perhaps a starting point for this expansion can be found much farther back, however, in *Buckley v. Valeo*, 424 U.S. 1 (1976). That case arose from opposition to the Federal Election Campaign Act of 1971, passed in the aftermath of Watergate, which limited the amount of money an individual could contribute to a single campaign and required reporting of contributions above a certain amount. Id. at 1-2. Although the court upheld the individual restrictions on contributions to candidates and campaigns, it narrowed the permissible scope of campaign finance laws going forward, in part by limiting them to speech that “expressly advocated” election or defeat of candidates. Id. at 43–44. To illustrate what type of speech constituted express advocacy, the Court provided eight examples, often called the “Eight Magic Words”: “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for Congress,” “vote against,” “defeat,” “reject.” Id. at 44 n. 52.
Then, in 2007, the Supreme Court applied *Buckley* to corporate speech. In *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449 (2007), the Court upheld a challenge brought by a 501(c)(4) organization to the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which made it a federal crime for corporations to use general funds to pay for issue ads in a specified period preceding elections. 551 U.S. at 449, 458. The Court found that because the ban was not limited to ads that used the “Eight Magic Words” identified in *Buckley*, it applied to speech beyond “express advocacy,” and thus unconstitutionally restricted free speech. *Id.* at 453–54.


Following these cases, it appears that the use of dark money has in fact dramatically increased. The Center for Responsive Politics, for instance, found that spending by organizations not required to disclose their donors “increased from less than $5.2 million in 2006 to well over $300 million in the 2012 presidential cycle and more than $174 million in the 2014 midterms.” *Political Nonprofits (Dark Money)*, Ctr. for Responsive Politics website, (Aug. 6, 2018), https://www.opensecrets.org/outsidespending/nonprof_summ.php.

This causes further concern, as evidence suggests federal agencies have been unable to sufficiently enforce reporting requirements in the dark money surge that followed *Citizens United*. The Court’s decision in that case retained the disclosure requirements in BCRA. 558 U.S. at 315–16. BCRA requires that “electioneering communications” (basically, ads that refer to a candidate for federal office by name) funded by non-candidates must include a disclaimer that “________ is responsible for the content of this advertising.” 52 U.S.C. § 30120(d)(2) (2018). Among other things, this statement must also include the name and address (or website address) of the person or entity funding the ad. *Id.* § 30120(a)(3). In addition, individuals or entities who spend more than $10,000 on electioneering communications within a calendar year, are required to file with the Federal Election Commission (“FEC”) a statement disclosing their name and place of business, among other things, within 24 hours of making a disbursement for that purpose. *Id.* § 30104(f). Despite these requirements, some commentators argue that the FEC was unprepared to monitor and enforce disclosure rules in the dark money surge that followed *Citizens United*. See, e.g., Leah McGrath Goodman, *As Dark Money Floods U.S. Elections, Regulators Turn a Blind Eye*, Newsweek, Sept. 30, 2014, available at https://www.newsweek.com/2014/10/10/dark-money-floods-us-elections-regulators-turn-blind-eye-273951.html. At the same time, the IRS failed to step in to fill the void, and now has actively declined to do so, as evidenced by Revenue Procedure 2018-38. *See id.* This was likely in part a reaction to the IRS attempt to investigate the political spending of various 501(c)(4) organizations in 2013, leading to claims that its attempts to do so had partisan motivation, aimed at shutting down right-wing groups. *See id.*
Dark money is concerning because the spenders behind the money “often hold direct economic interests in election outcomes.” Chisun Lee at al., Brennan Ctr. for Justice, Secret Spending in the States 10 (2016). Indeed, those who support broad donor disclosure requirements argue that dark money facilitates a system where the wealthy, through both personal expenditures and those of the corporate entities they control, have far louder “voices” than those with smaller incomes. Research supports this theory; a recent Princeton study analyzing the policy preferences of low, median and high-income Americans, as well those of mass-based interest groups and businesses, found that only high-income Americans and business interests have any substantial impact on U.S. government policy. Martin Gilens & Benjamin I. Page, Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens, 12 Am. Pol. Sci. Ass’n 564, 564 (2014). In fact, policies with low support among America’s economically elite, are “adopted only about 18 percent of the time, while a proposed change with high support . . . is adopted about 45 percent of the time.” Id. at 572.

The decrease in disclosure requirements for 501(c)(4) organizations has also allowed groups to circumvent the intent of Super PAC disclosure requirements. This is because, although Super PACs are required to disclose their donors to the FEC, if their funding comes from shell corporations or 501(c)(4) organizations, the names of individual donors will now ultimately remain a secret. See Dark Money Basics, Ctr. Responsive Politics website, https://www.opensecrets.org/dark-money/basics.

In response to this, a group of Washington lawmakers has repeatedly introduced legislation aimed at increasing donor disclosure requirements. The Democracy Is Strengthened by Casting Light On Spending in Elections Act (“DISCLOSE”) has been introduced a number of times, starting in 2010. On June 27, 2018, Senator Sheldon Whitehouse (D-RI) and Representative David Cicilline (D-RI) introduced the most recent iterations as S.B. 135 and H.R. 6239. If passed, the DISCLOSE Act would require that “covered organizations” disclose donors who have given $10,000 or more during an election cycle. They would also be required to report all campaign-related disbursements of $10,000 or more within 24 hours by filing a statement with the FEC, including disclosing to whom the disbursement was made. H.R. 6239 § 6239(201(b)(1)(a)(1)–(2) (2018). “Covered organizations” include all tax-exempt organizations—including 501(c)(4) and section 527 organizations—other than those with 501(c)(3) status. Id. at § 6239(201(b)(1)(a)(4).

V. I.R.C. SECTION 527 POLITICAL ACTION COMMITTEES

An I.R.C. § 527 Political Action Committee (a “PAC”) is a non-profit organization which operates as political party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function. PACs operate at the federal, state, and/or local levels and are not necessarily restricted from operating at all three levels. PACs actively influence elections and policy debates but do not advocate explicitly for the election or defeat of candidates. Depending on the activity of the PAC it may have to register with the IRS, the FEC, and/or the Oregon Secretary of State Elections Division (“Elections Division”).
I.R.C. § 527 Overview

“Exempt Function” for the purposes of I.R.C. § 527 means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any federal, state, or local public office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. I.R.C. § 527(e)(2).

A PAC does not have to pay taxes on its exempt function income but must pay taxes on any unrelated income (such as investment income or income from a trade or business). The exempt function income of a PAC is income that the organization uses for its exempt function and which was received as one of the following four types of income:

1. A contribution of money or other property;
2. Membership dues, fees, or assessments from a member of the political organization;
3. Proceeds from a political fundraising or entertainment event or from the sale of political campaign materials, which are not received in the ordinary course of any trade or business; or
4. Proceeds from conducting bingo games that are defined in I.R.C. § 513(f)(2).

I.R.C. § 527(b)(3).

While a PAC does not pay taxes on its exempt function income, donations made to a PAC are not tax deductible to the donating taxpayer. As such, I.R.C. § 6113 provides that such organizations must disclose in any fundraising solicitation an express statement (in a conspicuous and easily recognizable format) that contributions to the organization are not deductible for federal income tax purposes as charitable contributions.

IRS Registration and Disclosure

Unless the PAC is required to register with the FEC or meets any exception set forth in I.R.C. § 527(i)(5), the PAC must file a statement of organization with the IRS (Form 8871) to receive tax-exempt status. I.R.C. § 527(i)(1). The statement of organization must be filed within twenty-four hours after the date on which the organization is established, or in the case of any material change in the information contained in the statement of organization, within thirty days after such material change. I.R.C. § 527(i)(2). Failure to file the statement of organization or the reporting of a material change in the statement of organization will subject the PAC to tax on all of its income, whether or not such income is exempt, for the period of time corresponding with the PAC’s failure to so file. I.R.C. § 527(i)(4).

A PAC who registers with the IRS must make certain disclosures informing the IRS of all contributions and expenditures the PAC makes in connection with an exempt function. However, a PAC may elect the frequency of disclosures by choosing one of two alternatives as set forth in I.R.C. § 527(j)(2).

FEC Registration and Disclosure

If a PAC is required to register with the FEC, it does not have to file the statement of organization with the IRS or any IRS required disclosures but will still be exempt from tax under I.R.C. § 527. I.R.C. § 527(i)(6); I.R.C. § 527(j)(5).
The FEC registration and disclosure requirements depend on whether the PAC is a separate segregated fund (“SSF”) or a nonconnected committee. 52 U.S.C. § 30103(a). Basically, SSF’s are political committees established and administered by corporations, labor unions, membership organizations, or trade associations which may only solicit contributions from individuals associated with the connected sponsoring organization. 52 U.S.C. § 30118(b). SSF’s must file a statement of organization with the FEC no later than ten days after establishment unless the fund was established solely for the purpose of financing political activity in connection with a state or local election. 52 U.S.C. § 30103(a); 11 C.F.R. § 102.1(c).

By contrast, nonconnected committees are not sponsored by or connected to any of the aforementioned entities and are free to solicit contributions from the general public. Nonconnected organizations, other than political parties, must file a statement of organization with the FEC within ten days after receiving contributions or making expenditures in connection with a federal election aggregating in excess of $1,000. 52 U.S.C. § 30103(a), 52 U.S.C. § 30101(4)(A).

The FEC disclosure requirements vary depending on the type and purpose of the PAC. To determine a PAC’s disclosure requirements, please consult 52 U.S.C. § 30104 and 11 C.F.R § 104.

**Elections Division Registration and Disclosure**
ORS § 260.005(18) defines a “political committee” as “two or more individuals, or a person other than an individual, that has: (a) received a contribution for the purpose of supporting or opposing a candidate, measure, or political party; or (b) made an expenditure for the purpose of supporting or opposing a candidate, measure, or political party.” A political committee must file a statement of organization with the Elections Division within three business days after receiving any contribution or making any expenditure. O.R.S. § 260.035(1). Any change in information required in the statement of organization must be indicated in an amended certification and filed with the Elections Division within ten days after the change in information. O.R.S. § 260.035(4). Generally, political committees must account for and disclose to the Elections Division all contributions accepted and expenditures made on a monthly basis. O.R.S. § 260.057(1), O.R.S. § 260.057(2). However, ORS chapter 260 contains many other disclosures that may be required.

**VI. COMPLEX ORGANIZATIONS / LINKED CORPORATIONS – CONNECTING 501(C)(3)S TO 501(C)(4)S AND 527 PACS TO ACCOMPLISH AMBITIOUS POLITICAL AGENDAS**

**A. COMMON PURPOSES FOR CREATING LINKED 501(C)(3) AND 501(C)(4) ORGANIZATIONS.**

The motivation for creating linked organizations is generally to allow a tax-exempt organization to conduct certain activities through a subsidiary organization which it could not conduct on its own without endangering its tax-exempt status. 501(c)(3) and 501(c)(4) organizations are commonly linked to allow more flexibility in lobbying and political campaign activities.
Chapter 5—How Tax-Exempt Organizations Can Lobby and Influence Elections Without Violating the Law

**Lobbying**
The courts have recognized that a 501(c)(3) organization's constitutional right to speech includes the right to establish an affiliated Section 501(c)(4) organization to protect the parent from the consequences of excessive lobbying. The 501(c)(3) organization cannot subsidize the 501(c)(4) subsidiary. The IRS requires only that the two organizations be incorporated and operated separately as distinct organizations, and that adequate records be kept to demonstrate that lobbying is not being done with money from tax-deductible contributions.

**Political Campaign Activities**
The IRS has stated in its own training materials that: "[a] number of I.R.C. 501(c)(3) organizations have created I.R.C. 501(c)(4) organizations that conduct political campaign activities, usually through a PAC (an I.R.C. 527(f) separate segregated fund). So long as the organizations are kept separate (with appropriate record keeping and fair market reimbursement for facilities and services), the activities of the I.R.C. 501(c)(4) organization or of the PAC will not jeopardize the I.R.C. 501(c)(3) organization's exempt status. However, the political campaign activities of the affiliated I.R.C. 501(c)(4) organization, or of the PAC it establishes, should not be an attempt to accomplish indirectly what the I.R.C. 501(c)(3) organization could not do directly. Fact and circumstances prevail here also."

As discussed above, the main issue tested is the level of operational control exercised or held by the 501(c)(3) organization. If the organizations cooperate but the 501(c)(3) organization does not control the others, then the IRS and the Courts will probably respect the separate corporate identities of the different entities.

**B. ISSUES OF SEPARATE IDENTITY AND CONTROL BETWEEN LINKED ORGANIZATIONS**

**Affiliation versus Attribution**
The IRS and the courts have consistently upheld the separate entity principle for properly and separately incorporated tax-exempt subsidiary organizations. Many forms of linkage and control between parent and subsidiary organizations do lead to a conclusion that the organizations are affiliated, but that alone will not support attribution of the activities of one organization to the other.

**Elements Leading to Attribution**

1. Operational Control of one Organization by the Other: The most significant element leading to the attribution of the actions of one organization to the other, is substantial evidence that parent organization exerts control over the decisions and operations of the subsidiary organization.

2. Overlapping Boards of Directors: The IRS has repeatedly held that overlapping Boards of Directors is an indication of affiliation, but by itself will not cause the actions of the subsidiary to be attributed to the parent organization. If the shared directors of two organizations constitute less than a majority of the subsidiary organization's board, this will not support attribution. Even where all of the members of the parent board are also on the subsidiary's board, it takes substantial evidence of actual operational control to justify attributing the actions of the subsidiary to the parent organization.
(3) Shared Officers: Because Officers are more involved in the daily operations and decisions of a corporation, sharing Officers is treated as a more significant indication of control by the parent organization over operations of the subsidiary, and thus more likely to lead to attribution.

(4) Shared Employees, Facilities and Services: Sharing employees, facilities or services will not significantly increase the possibility that the actions of the subsidiary organization will be attributed to the parent, so long as the necessary records are kept and each organization pays its own share of the expenses, using fair market prices.

(5) Financial and Decision-Making Control: Maintaining control over a small number of the subsidiary’s most significant financial decisions will not in itself lead to attribution.

C. RULES FOR LOBBYING BY LINKED ORGANIZATIONS

Under the "No Substantial Part" rules, the expenditures and activities of each organization are viewed as separate unless substantial evidence of operational control supports attribution.

Special Rules for 501(h) Organizations: The IRS treats all of the expenditures for affiliated organizations which have elected for coverage under the 501(h) rules, as one aggregated expenditure, which must comply with the limits set in Section 501(h). There are very specific and clear rules for determining when organizations are affiliated for the purpose of calculating allowable expenditures under the Section 501(h) rules.

VII. OREGON LOBBYING REGISTRATION AND REQUIREMENTS

A. DEFINITIONS OF LOBBYING AND LOBBYIST UNDER OREGON LAW

“Lobbying” means influencing, or attempting to influence, legislative action through oral or written communication with legislative officials, solicitation of executive officials or other persons to influence or attempt to influence legislative action or attempting to obtain the goodwill of legislative officials. O.R.S. § 171.725(8).

“Legislative action” means introduction, sponsorship, testimony, debate, voting or any other official action on any measure, resolution, amendment, nomination, appointment, or report, or any matter that may be the subject of action by either house of the Legislative Assembly, or any committee of the Legislative Assembly, or the approval or veto thereof by the Governor. O.R.S. § 171.725(6).

“Legislative official” means any member or member-elect of the Legislative Assembly, any member of an agency, board or committee that is part of the legislative branch, and any staff person, assistant or employee thereof. O.R.S. § 171.725(7).

“Lobbyist” means:

(a) Any individual who agrees to provide personal services for money or any other consideration for the purpose of lobbying.
(b) Any person not otherwise subject to paragraph (a) of this subsection who provides personal services as a representative of a corporation, association, organization or other group, for the purpose of lobbying.

(c) Any public official who lobbies. O.R.S. § 171.725(9)

B. LOBBYIST REGISTRATION REQUIREMENTS

A person does not have to register as a lobbyist if they do not receive compensation or reimbursement of expenses for lobbying, limits lobbying activities solely to formal appearances to give testimony before public sessions of committees of the Legislative Assembly, or public hearings of state agencies, and who, when testifying, registers an appearance in the records of the committees or agencies. O.R.S. § 171.435(3).

Any person meeting the definition of “Lobbyist” must register with the Oregon Government Ethics Commission when:

1. They agree to provide personal services for money or any other consideration for the purpose of lobbying;
2. Spend more than an aggregate amount of twenty-four (24) hours during any calendar quarter lobbying; or
3. Spend an aggregate amount in excess of one hundred dollars ($100) lobbying during any calendar quarter.

(ORS § 171.735(4) requires all three of the elements above to be exempted from registration, therefore if any single element is present the person must register as a lobbyist.)

A person required to register as a lobbyist must do so within three (3) business days after satisfying any of the elements listed above. O.R.S. § 171.740(1). Additionally, a person who is required to register as a lobbyist, must file separate registrations for each employer of the lobbyist whose interests the lobbyist will represent. O.R.S. § 171.740(3). Lastly, within ten (10) days after the lobbyist files a registration, the designation of official authorization to lobby shall be signed by each of the lobbyist’s employers whose interests the lobbyist will represent. O.R.S. § 171.740(2). There are no fees to register as a lobbyist. O.R.S. § 171.772(4).

A lobbyist must notify the Oregon Government Ethics Commission within three (3) business days if the lobbyist ceases to represent a person for whom the lobbyist is registered by updating the appropriate registration. O.R.S. § 171.740(4)(b). A lobbyist must also revise the registration within thirty (30) days of any other change in information. O.R.S. § 171.740(a).

C. QUARTERLY EXPENDITURE REPORT

All registered lobbyists must file the Lobbyist Quarterly Expenditure Report with the Commission each quarter (January 15, April 15, July 15, and October 15) even if there are no expenditures for the reporting period. O.R.S. § 171.745; O.R.S. § 171.752. Additionally, any employer of the lobbyist for whose interest the lobbyist represents must also file a quarterly lobbying expenditure report even if there are no expenditures for the reporting period. (Note:
employers do not register, the commission will get the employer’s information from the lobbyist registration). O.R.S. § 171.750; O.R.S. § 171.752; O.R.S. § 171.740.

When being a lobbyist is only a portion of an employee’s duties, the lobbyist’s employer may pro rate the portion of the lobbyist’s salary and other expenses attributable to lobbying. If the amount of any expenditure required to be included in a statement is not accurately known at the time the statement is required to be filed, an estimate of the expenditure shall be submitted in the statement and designated as an estimate. O.R.S. § 171.745(3). However, the exact amount expended for which a previous estimate was made shall be submitted in a subsequent report when the information is available. O.R.S. § 171.745(3).

Failure to complete and file the required expenditure reports by the final date for filing may result in an automatic civil penalty of ten dollars ($10) for each of the first fourteen (14) days after the date due, and fifty dollars ($50) for each day thereafter, until the penalty accrues to a maximum of five thousand dollars ($5,000). O.R.S. § 171.992.

D. LOBBYING RESTRICTIONS AND PROHIBITIONS

(1) A lobbyist may not instigate the introduction of any legislative action for the purpose of obtaining employment to lobby in opposition to the legislative action. O.R.S. § 171.756(1).
(2) A lobbyist may not attempt to influence the vote of any member of the Legislative Assembly by the promise of financial support of the candidacy of the member, or by threat of financing opposition to the candidacy of the member, at any future election. O.R.S. § 171.756(2).
(3) A person may not lobby or offer to lobby for consideration any part of which is contingent upon the success of any lobbying activity. O.R.S. § 171.756(3).
(4) A legislative or executive official may not receive consideration other than from the State of Oregon for acting as a lobbyist in Oregon. O.R.S. § 171.756(4).
(5) No person may submit any registration forms, lobbying expenditure reports, or other documents to the Oregon Government Ethics Commission containing information the person does not believe to be true and correct. O.R.S. § 171.762(2).
(6) No lobbyist or public official may make any false statements or misrepresentations to any legislative or executive official. O.R.S. § 171.764(1).
(7) No lobbyist or public official may cause a copy of a document which the person knows contains a false statement to be received by a legislative or executive official without notifying such official in writing of the truth or inaccuracy of the known false statement. O.R.S. § 171.764(1).
(8) Any person who violates any provision of lobbying regulation shall be subject to a civil penalty of not more than five thousand dollars ($5,000) for each violation.

VIII. FEDERAL LOBBYING REGISTRATION AND REQUIREMENTS

The Lobbying Disclosure Act, as amended and codified in 2 U.S.C. § 1601 et. seq. (the “LDA”), sets forth the laws regarding lobbying activities at the federal level.
A. DEFINITIONS OF LOBBYING AND LOBBYIST UNDER FEDERAL LAW

“Actively Participates” means an organization (or an employee of the organization in their capacity as an employee) participates in the planning, supervision, or control of lobbying activities of a client or registrant when that organization engages directly in planning, supervising, or controlling at least some of the lobbying activities. Organizations that, though members of or affiliated with a client, have only a passive role in the lobbying activities of the client (or of the registrant on behalf of the client), are not considered active participants in the planning, supervision, or control of such lobbying activities.

“Affiliated Organization” means any entity other than the client that contributes in excess of five thousand dollars ($5,000) toward the registrant’s lobbying activities in a quarterly period, and actively participates in the planning, supervision, or control of such lobbying activities.

“Client” means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. A person or entity whose employees act as lobbyists on its own behalf is both client and an employer of such employees. In the case of a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association that employs or retains other person to conduct lobbying activities. The client is the coalition or association and not its individual members. 2 U.S.C. § 1602(2).

“Covered Executive Branch Official” means:
(A) The President;
(B) The Vice President
(C) Any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
(D) Any officer or employee serving in a position in level I-V of the Executive Schedule, as designated by statute or Executive order;
(E) Any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37 (O-7 is the lowest rank of Military General or Admiral); and
(F) Any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2)(B) of title 5.
2 U.S.C. § 1602(3).

“Covered Legislative Branch Official” means:
(A) A Member of Congress;
(B) An elected officer of either House of Congress;
(C) Any employee of, or any other individual functioning in the capacity of an employee:
   (i) A Member of Congress;
   (ii) A committee of either House of Congress;
   (iii) The leadership staff of the House of Representatives or the Senate;
   (iv) A joint committee of Congress; and
   (v) A working group or caucus organized to provide legislative services or other assistance to Members of Congress; and
“Influencing Legislation” means:
(A) Any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof.
   a. A communication between an organization and any bona fide member of such organization to directly encourage such member to urge persons other than members to communicate as provided in (A) above or (B) below shall be treated as a communication described in (A).
(B) Any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formation of the legislation.
   a. A communication between an organization and any bona fide member of such organization to directly encourage such member to communicate as provided in (B) above shall be treated as a communication described in (B).

The term “Influencing Legislation” does not include:
(A) Making available the results of nonpartisan analysis, study, or research;
(B) Providing of technical advice or assistance (where such advice would otherwise constitute the Influencing of Legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;
(C) Appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization;
(D) Communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than described above; and
(E) Any communication with a governmental official or employee, other than:
   a. A communication with a member or employee of a legislative body (where such communication would otherwise constitute the Influencing of Legislation), or
   b. A communication the principal purpose of which is to Influence Legislation.

26 U.S.C. 4911(d).

“Lobbying Activities” means lobbying contacts and any efforts in support of such contacts, including preparation and planning activities, research, and other background work that is intended, at the time of its preparation, for use in contacts, and coordination with the lobbying activities of others. 2 U.S.C. § 1602(7).

“Lobbying Contact” means any oral, written, or electronic communication to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to:
(i) The formulation, modification, or adoption of Federal legislation (including legislative proposals);
(ii) The formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
(iii) The administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
(iv) The nomination or confirmation of a person for a position subject to confirmation by the Senate.

The term “Lobbying Contact” does not include a communication that properly falls into one of the nineteen enumerated exceptions in 2 U.S.C. § 1602(8)(B). 2 U.S.C. § 1602(8).

“Lobbying Firm” means a person or entity that has one (1) or more employees who are lobbyists on behalf of a client other than that person or entity. The term also includes a self-employed individual who is a lobbyist. 2 U.S.C. § 1602(9).

“Lobbyist” means any individual who is:
(1) employed or retained by a client for financial or other compensation
(2) for services that include more than one lobbying contact,
(3) whose lobbying activities constitute twenty percent (20%) or more of their time engaged in services provided to that client over a three (3) month period.

B. SPECIAL RULE FOR 501(C)(3) ORGANIZATIONS MAKING A 501(H) ELECTION

501(c)(3) organizations that have taken the 501(h) election for a tax year must use the definition of “Lobby Contacts” and “Lobbying Activities” when lobbying “Covered Legislative Branch Officials,” as those terms are defined in 2 U.S.C. § 1602, and any lobbying activities supporting such lobbying. 2 U.S.C. § 1610(a).

When a 501(c)(3) organization that has taken the 501(h) election lobbies a “Covered Executive Branch Official” it must use the definition of “Influencing Legislation” as defined in 26 U.S.C. § 4911(d). Id.

C. APPLICABILITY OF THE LDA

To determine the applicability of the LDA, one must first look at the definition of “Lobbyist” under 2 U.S.C. § 1602(10). Under this definition, an individual is a “Lobbyist” with respect to a particular Client if they make more than one lobbying contact and their Lobbying Activities constitute at least twenty percent (20%) of the individual’s time in services for that Client over any three (3) month period.

“More than one Lobbying Contact” means more than one communication to a covered official over the course of services provided to a particular Client, even if the second contact occurs in a
The LDA excepts from the definition of “Lobbying Contact” communications “required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of Congress or an agency.” 2 U.S.C. § 1602(8)(B)(ix). Communications that are compelled by the action of a Federal agency include communications that are required by a Federal agency contract, grant, loan, permit, or license. 2 U.S.C. § 1602(8)(B)(vix). Note, however, that this exception would not encompass an attempt to influence covered officials regarding either matters of policy, or an award of a new contract or grant, since such communications would not be required by the existing contract or grant. Lastly, if a communication is limited to routine information gathering questions, and there is not an attempt to influence a covered official, the exception for “any other similar administrative request” would apply. 2 U.S.C. § 1602(8)(B)(v).

D. CHURCH EXCEPTION TO DEFINITION OF LOBBYING CONTACT

2 U.S.C. § 1602(8)(xviii) excepts communications made by a church, its integrated auxiliary, a convention or association of churches and religious orders from the definition of “Lobbying Contact.” However, this exception only applies if the contact is made directly by the church or its employees and does not apply if the church hires an outside firm that conducts Lobbying Activity on behalf of the church. Outside Lobbying Firms are required to register regardless of the fact their Client is a church, its integrated auxiliary, a convention or association of churches, or a religious order.

E. LOBBYING REGISTRATION REQUIREMENTS

Under the LDA, only Lobbying Firms or Organizations employing in-house Lobbyists are required to register (each a “Registrant”), unless the Lobbyist is self-employed, in which case the Lobbyist is treated as their own Lobbying firm. 2 U.S.C. § 1603. Unlike under Oregon law, only the Lobbyist’s employer is required to file a registration; each individual Lobbyist is not required to file a registration unless that individual is self-employed. Each Registrant who represents multiple clients must file a separate registration for each client. 2 U.S.C. § 1603(c).

A Lobbying Firm is not required to file a registration for a particular Client if its total income from that Client for Lobbying Activities does not exceed and is not expected to exceed three thousand dollars ($3,000) during a quarterly period. 2 U.S.C. § 1603(a)(3)(A)(i) (adjusted for inflation).

An organization whose employees engage in Lobbying Activities on the organization’s behalf is not required to file a registration if its total expenses in connection with Lobbying Activities does not exceed and is not expected to exceed thirteen thousand dollars ($13,000) during a quarterly period. 2 U.S.C. § 1603(a)(3)(A)(ii) (adjusted for inflation).

Note that the monetary thresholds set forth above do not reference only the activities of Lobbyists. The monetary thresholds are to be computed based on the Lobbying Activities of the Registrant or potential Registrant as a whole for a particular Client in question.
The registration requirement of potential Registrants is triggered either: (1) on the date their employee/Lobbyist is employed or retained to make more than one Lobbying Contact on behalf of the Client (and meets the twenty percent (20%) of time threshold), or (2) on the date their employee/Lobbyist (who meets the twenty percent (20%) of time threshold) in fact makes a second Lobbying Contact, whichever is earlier. In either case, registration is required within forty-five (45) days. 2 U.S.C. § 1603(a)(1); 2 U.S.C. § 1602(10).

Registration Timing Example:
Lobbying Firm “A” is retained to monitor an issue, but whether or not Lobbying Contacts will be made depends on future legislative developments. In another case, Corporation “B,” which employs an in-house Lobbyist, knows that its Lobbyist will make contacts but reasonably expects its lobbying expenditures will not amount to $13,000 in a quarterly period. However, issues of interest to “B” turn out to be more controversial than expected, and the $13,000 threshold is in fact met a month later.

Lobbying Firm “A” has no registration requirement at the present time. The requirement to register is triggered if and when the firm makes contacts, or reasonably expects to make contacts. Corporation “B’s” registration requirement arose as soon as it knew, or reasonably expected, that its lobbying expenditures would exceed $13,000.

F. IDENTIFICATION OF CLIENT AND COVERED OFFICIALS

Any person making an oral Lobbying Contact with a covered official shall disclose, on the request of the covered official at the time of the Lobbying Contact: (a) whether that person is registered under the LDA; (b) the name of the Client represented; (c) whether that Client is a foreign entity; and (d) the name of any foreign entity that has a direct interest in the outcome of the Lobbying Activity who contributes more than five thousand dollars ($5,000) to the Lobbying Activities of the Client and either holds at least twenty percent (20%) equitable ownership of the Client or Actively Participates in the planning, supervision, or control of such Lobbying Activities. 2 U.S.C. § 1609(a).

Any person making a written Lobbying Contact with a covered official (including electronic communication) must disclose: (a) if the Client on whose behalf the Lobbying Contact was made is a foreign entity and, if so, the name of the Client represented and whether the writer is a Registrant under the LDA; and (b) any foreign entity that has a direct interest in the outcome of the Lobbying Activities of the Client and either holds at least twenty percent (20%) equitable ownership of the Client or Actively Participates in the planning, supervision, or control of such Lobbying Activities. 2 U.S.C. § 1609(b).

Upon request by a person making a Lobbying Contact, the individual being contacted, or their employing office, must indicate whether the individual is a covered official as defined by the LDA. 2 U.S.C. § 1609(c).
G. QUARTERLY REPORTING OF LOBBYING ACTIVITIES

Each Registrant must file a quarterly activity report for each Client no later than twenty (20) days after the end of the quarterly period beginning on the first day of January, April, July, and October of each year in which the Registrant is registered. 2 U.S.C. § 1604(a). An organization which employs an in-house Lobbyist is its own Client and thus is only required to file a single report which covers all of its Lobbying Activities.

So long as a registration is on file and has not been terminated, a Registrant must report its Lobbying Activities even if those activities during a particular quarterly period would not trigger a registration requirement in the first instance (e.g., a Lobbying Firm’s income from a Client amounted to less than $3,000 during a particular quarterly period, or an organization spent less than $13,000 during the quarterly period). A Registrant with no Lobbying Activity during a quarterly period still has to file indicating that they had no activity during the quarterly period.

In addition to the financial information required to be disclosed in the quarterly report, the LDA contemplates disclosures that are adequate to inform the public of the lobbying Client’s specific issues from a review of the quarterly report. The disclosures on the quarterly report must include bill numbers, where applicable, and contain information that is adequate, standing alone, to inform the public of the specific lobbying issues. An appropriate disclosure of a specific lobbying issue would read as follows: “H.R. 3610, Department of Defense Appropriations Act for 2016, Title II, all provisions relating to environmental restoration.”

All quarterly reports must be filed electronically. 2 U.S.C. § 1604(e).

H. SEMIANNUAL REPORTING OF CERTAIN CONTRIBUTIONS

Registrants and Lobbyists must file a semiannual contribution report by July 30 and January 30 for each semiannual period in which a Registrant or Lobbyist remains active (and regardless of whether they make any reportable contributions. 2 U.S.C. § 1604(d). An active Registrant is one that has not filed a valid termination report for all Clients. An active Lobbyist is an individual who has been listed on any registration or quarterly activity report and who has not been terminated/delisted by the Registrant (regardless of whether the individual was required to be listed as a Lobbyist when the Registrant so listed the individual).

The core information required by the LDA and incorporated into the semiannual contribution report is: (1) certain contributions that are not disclosed in the quarterly activity report; and (2) a certification that the filer has read and understands the gift and travel provisions in the Rules of both the House and Senate, and that the filer has not knowingly violated the aforementioned rules. The semiannual report also requires specific information regarding certain contributions and payments made by the filer, as well as any political committee established or controlled by the filer. See 2 U.S.C. § 1604(d)(1) for the specific categories of contributions to be reported.
I. TERMINATION OF REGISTRATION AND DELISTING OF LOBBYISTS

Under the LDA, a Lobbying Firm may terminate a registration for a particular Client when it is no longer employed or retained by that Client to conduct Lobbying Activities and anticipates no further Lobbying Activities for that Client. 2 U.S.C. § 1603(d). An organization employing in-house Lobbyists may terminate its registration when in-house Lobbying Activities have ceased and are not expected to resume. 2 U.S.C. § 1603(d).

A Registrant may terminate a Lobbyist by delisting the name only when: (1) that individual’s Lobbying Activities on behalf of the Client did not constitute twenty percent (20%) of the time the employee is engaged in total activities for the Client at the end of the quarter, and are not reasonably expected to constitute twenty percent (20%) of the employee’s time in future quarters; or (2) the individual does not reasonably expect to make further Lobbying Contacts. The Registrant must formally delist an individual as simply omitting their name from a quarterly activity report is not sufficient.

J. PROHIBITIONS ON THE USE OF FEDERAL FUNDS FOR LOBBYING

The LDA does not itself regulate lobbying by federal grantees, or contractors, though other laws, as well as contractual prohibitions, may apply. Questions concerning Lobbying Activities of federal grantees or contractors should be directed to the appropriate agency or office administering the contract or grant. Note, however, that 2 U.S.C. § 1611 prohibits 501(c)(4) organizations which engage in Lobbying Activities from receiving federal Funds though an award, grant, or loan.

K. FALSE STATEMENTS AND PENALTIES

The False Statements Accountability Act of 1996, amending 18 U.S.C. § 1001, makes it a crime knowingly and willfully: (1) to falsify, conceal, or cover up a material fact by trick, scheme, or devices; (2) to make any materially false, fictitious, or fraudulent statement or representation; or (3) to make or use any false writing or document knowing it to contain any materially false, fictitious, or fraudulent statement or entry. Whoever knowingly fails: (1) to correct a defective filing within sixty (60) days after notice of such defect; or (2) to comply with any other provision of the LDA, may be subject to a civil fine of not more than two hundred thousand dollars ($200,000), and whoever knowingly or corruptly fails to comply with any provision of the LDA may be imprisoned for not more than five (5) years, or fined, or both.
HOW TAX-EXEMPT ORGANIZATIONS CAN LOBBY AND INFLUENCE ELECTIONS WITHOUT VIOLATING THE LAW

September 2018 Update on Dark Money Spending

By David Atkin, Center for Nonprofit Law

Since the publication of the materials for this CLE, an important development has occurred affecting the ability of 501(c)(4) organizations to keep dark money donors a secret. This alters some of the information contained in the CLE materials provided for this presentation. Please keep this insert with your materials as the most up-to-date information on this issue as of the date of this presentation.

As of September 18, 2018, any group that runs an “independent expenditure,” meaning an election ad calling expressly for a candidate’s election or defeat, that costs more than $250, will be required to disclose all political donors who made donations above $200. This will have a dramatic affect on dark money spending in the 2018 midterms.


Based on those reports, CREW filed an administrative complaint with the FEC, arguing that GPS failed to report those contributions in violation of the Federal Elections Campaign Act. Based on its regulation in 11 C.F.R. § 109.10(e)(1)(vi) applying the Act, the Commission deadlocked in its decision. Citizens for Responsibility and Ethics in Washington, supra, at *15. CREW appealed the decision to the D.C. District Court, and the Court granted CREW’s motion for summary judgment, finding the FEC’s dismissal “contrary to the law” and vacating 11 C.F.R. § 109.10(e)(1)(vi). Id. at 4. The Court stayed the vacature for 45 days to allow the FEC to issue interim regulations that comply with 52 U.S.C. § 30104(c). Id. at 4.

GPS sought an emergency stay of the District Court’s decision with the D.C. Court of Appeals, but the Court of Appeals denied GPS’s motion. Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm’n, No. 18-5261(BAH), at *1 (D.C. Cir., Sept. 15, 2018) [hereinafter CREW v. FEC]. Chief Justice John Roberts then approved a temporary emergency motion by GPS to stop the decision, but shortly after that, the Supreme Court unanimously denied the emergency motion, allowing the District Court’s decision to go into effect on September 18, 2018.

The Federal Election Campaign Act requires that all persons who are not political committees (called “independent committees” by the D.C. Court of Appeals in its opinion) must file quarterly reports that identify “each person who made a contribution in excess of $200” to the
person or organization “for the purpose of furthering an independent expenditure.” 52 U.S.C. § 30104(c). Beyond that, Section 30104(c)(1) requires that “[e]very [independent committee] who makes independent expenditures in an aggregate amount or value in excess of $250 during a calendar year shall file a statement containing the information required under [§ 30104](b)(3)(A) for all contributions received by such person.” Id. § 30104(c)(1). Subsection (b)(3)(A) requires the disclosure of anyone who makes a contribution, and contributions are defined broadly to include donations intended to “influence[e] any election for Federal office” or funds “earmarked for political purposes.” Id. § 30101(8)(A)(i); CREW v. FEC, supra, at *2.

Conversely, the FEC regulation at issue, 11 C.F.R. § 109.10(e)(1)(vi), required disclosure only when a contribution “was made for the purpose of furthering the reported independent expenditure.” 11 C.F.R. § 109.10(e)(1)(vi) (emphasis added).

The regulation only required independent committees to report donors who contribute more than $200 if that donor made the contribution for the purpose of furthering the specific independent expenditure. CREW v. FEC, supra, at *3. Under that regulation, donations expressly given to support a number of unidentified advertisements expressly for or against a specific candidate would not need to be reported. Id. Only those that not only earmarked the donation for a particular candidate or cause with the purpose of influencing the outcome of that election and that actually selected the script for the independent expenditure ad would fall under the reporting requirements. Id. at *4.

The D.C. Court of Appeals dismissed this argument and upheld the District Court ruling in favor of CREW, finding that the regulation “squeeze[d] the Act’s explicit disclosure obligation beyond what the plain statutory text can bear.” CREW v. FEC, supra, at *3. As such, the Court relied on the plain text of the statute, requiring that independent committees must report each person who makes a contribution in excess of $200 for the purpose of furthering any independent expenditure. This will close a major dark money loophole as we approach the 2018 midterms.