Advanced Advising and Advocacy for Nonprofit Entities

Cosponsored by the Nonprofit Organizations Law Section

Thursday, February 6, 2020
9 a.m.–4:30 p.m.

6 General CLE credits
SECTION PLANNERS

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Maria Di Miceli, Oregon Department of Justice, Salem

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OREGON STATE BAR
16037 SW Upper Boones Ferry Road
P.O. Box 231935
Tigard, OR 97281-1935
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8:00 Registration

9:00 Private Foundations: How Do They Work and Does Your Client Want to Be One?

9:15 IRS Rules for Classifying Private Foundations and Public Charities
   ✦ Classification of private foundations and public charities
   ✦ Tests for public support
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   David Atkin, Center for Nonprofit Law, Eugene

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   Michele Wasson, Stoel Rives LLP, Portland

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2:30 Low-Income Housing
   ✦ Case study of Northwest Housing Alternatives campus development
   Trell Anderson, Northwest Housing Alternatives, Milwaukie
   Mark Kantor, Kantor Taylor PC, Portland
3:30 Legislative Update—Oregon’s Nonprofit Corporation Act
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   ✦ Email voting by directors and members
   ✦ Changes to the conflict-of-interest rules
   ✦ Attorney General oversight provisions
   Susan Bower, Oregon Department of Justice Civil Enforcement Division, Portland
   Professor Susan Gary, University of Oregon School of Law, Eugene

4:30 Adjourn
Trell Anderson, *Northwest Housing Alternatives, Milwaukie*. Mr. Anderson is the Executive Director of Northwest Housing Alternatives. Previously, he was Executive Director of Caritas Community Housing Development, the affordable housing arm of Catholic Charities, and before that he was Executive Director of the Housing Authority of Clackamas County and served in various positions at the City of Portland Bureau of Housing and Community Development. Mr. Anderson has extensive knowledge of affordable housing development, asset management, residents’ services, and homelessness intervention services. He recently completed the NeighborWorks Achieving Excellence Executive Education program at the Harvard Kennedy School. He holds a master’s degree in Urban and Regional Planning from Portland State University.

David Atkin, *Center for Nonprofit Law, 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.

Susan Bower, *Oregon Department of Justice Civil Enforcement Division, 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.

Professor Susan Gary, *University of Oregon School of Law, Eugene*. Professor Gary is the Orlando J. and Marian H. Hollis Professor at the University of Oregon School of Law. She teaches trusts and estates, estate planning, nonprofit organizations, and an undergraduate course on law and families. She has written and spoken about the regulation of charities, fiduciary duties including the prudent investor standard, the definition of family for inheritance purposes, donor intent in connection with restricted charitable gifts, and the use of mediation to manage conflict in the estate planning context. She is an Academic Fellow and former Regent of the American College of Trust and Estate Counsel. She is the Reporter for the Uniform Law Commission Electronic Wills Drafting Committee and served as the Reporter for Uniform Prudent Management of Institutional Funds Act (adopted in 49 states) and the Model Protection of Charitable Assets Act. She is a member of the Intentional Endowments Network steering committee. She has held leadership positions in three sections of the Association of American Law Schools. In Oregon, Professor Gary is a member of the Oregon Law Commission and serves as Reporter for its Probate Modernization Work Group. She is a member of the Oregon State Bar Nonprofit Organizations Law Section Executive Committee and is leading a review of Oregon’s nonprofit corporation statutes to develop revisions to the statutes.

Grady Goodall, *Oregon State University Foundation, Corvallis*. Mr. Goodall is Director of Development–College of Liberal Arts. He uses his legal training and experience to serve education and the nonprofit sector. He has advised numerous charities and donors as an attorney and in many areas of advancement for higher education, especially development, alumni relations, and government relations. Mr. Goodall is a frequent presenter and trainer on philanthropy and nonprofit legal topics.
Mark Kantor, *Kantor Taylor PC, Portland*. Mr. Kantor’s legal practice focuses on the representation of nonprofits, for-profits, and public entities in financing and developing multifamily affordable housing projects. He represents clients through all stages of the development process, including site acquisition, due diligence, entity formation, and project financing, with an emphasis in the use of low-income housing tax credits, tax-exempt bonds, and local, state, and federal funding sources. He has provided representation or counsel on over 500 affordable housing projects, the majority of which have been developed by nonprofit housing providers.

G. Kevin Kiely, *Cable Huston LLP, Portland*. Mr. Kiely practices in the fields of complex commercial and business litigation. He has represented clients in trials, arbitrations, and administratively contested cases throughout the United States. In addition, he has conducted numerous confidential investigations of alleged corporate and employee malfeasance in the U.S., Canada, Asia, and Europe. Mr. Kiely is the head of Cable Huston’s litigation and trial practice group and was the firm’s managing partner for more than 12 years. In 2016, he was appointed to be the General Counsel for the Archdiocese of Portland in Oregon. He is a member of the American Bar Association Forum on the Entertainment and Sports Industries, the ABA Business Law Section Director and Officer Liability and Professional Responsibility, the National Diocesan Attorneys Association, the Federal Bar Association Oregon Chapter, and the United States Board of Contract Appeals Bar Association. He is admitted to practice in Oregon and Washington and before the United States Supreme Court.

Kate Kilberg, *Catalyst Law LLC, Portland*. Ms. Kilberg represents tax-exempt organizations, both large and small, including public charities, private foundations, community foundations, and social welfare organizations, advising on matters such as qualification for tax-exempt status, corporate governance, political and lobbying activities, grantmaking, excise taxes, unrelated business income tax, joint ventures and for-profit subsidiaries, social enterprise, mission- and program-related investments, and other impact investing vehicles. In 2015, she volunteered in the effort to secure the approval of new regulations that makes it easier for Oregon businesses to raise startup capital. She has also represented multiple generations of families on wealth transfer planning and estate and trust administration, including both high–net worth clients and those with more modest estates, focusing on both simple and complex estate planning, business succession planning, charitable giving, and related areas of federal and state tax law. In addition, Ms. Kilberg has experience with international estate planning, including cross-border property transfers and pre-immigration planning. She is a member of the Estate Planning Council of Portland and past chair of the Oregon State Bar Nonprofit Organizations Law Section.

Dexter Pearce, *Stoel Rives LLP, Portland*. Mr. Pearce represents employers in matters involving labor and employment–related disputes, including wage and hour, ADA, and discrimination issues. He also assists employers in mitigating risks prior to litigation, frequently resolving complaints at the agency level and regularly conducting anti-discrimination and harassment trainings. He is a frequent contributor to the Stoel Rives World of Employment blog (http://www.stoelrivesworldofemployment.com/) on a variety of cutting-edge employment issues. Mr. Pearce is President of the National Bar Association Oregon Chapter.

Michele Wasson, *Stoel Rives LLP, Portland*. Ms. Wasson assists a variety of nonprofit organizations, including public charities, schools, colleges and universities, private foundations, trade associations, clubs, and other nonprofits, to 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 is chair of the Oregon State Bar Nonprofit Organizations Law Section, chair of the Estate Planning Council Seminar Planning Committee, a member of the Northwest Planned Giving Roundtable, a member of the American Bar Association Taxation Section, and an adjunct faculty member at Lewis and Clark Law School. Ms. Wasson is admitted to practice in Oregon and Washington.
Chapter 1

IRS Tests for Public Charity and Private Foundation Status

DAVID ATKIN
Center for Nonprofit Law
Eugene, Oregon

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I. INTRODUCTION

In this presentation I’m going to discuss the IRS regulations and tests classifying 501(c)(3) organizations as either public charities or private foundations, with a focus on the two tests in IRC Section 509(a)(1) – the “mechanical test” and the “backup facts and circumstances” alternative test that is available for organizations using the test in Section 509(a)(1). I will also briefly summarize the tests in IRC Section 509(a)(2) and 509(a)(3). In addition, I am going to discuss the IRS criteria for designating certain donations as “unusual grants” in the process of calculating an organization’s level of public support. Finally, I am going to explain the IRS tests for being classified as a private operating foundation (POF), instead of being classified as the more common non-operating private foundation.

The IRS classifies every 501(c)(3) organization as either a private foundation or a public charity. The burden of proving an organization qualifies to be classified as a public charity is on the organization itself. There are a number of different tests that can be used to prove an organization qualifies for public charity status, and the organization must select which test it wishes to use.

Certain special organizations are automatically treated as public charities by the IRS: Churches, associations of churches, schools and colleges, hospitals and medical research organizations, governmental units, public safety organizations and supporting organizations defined in IRC Section 509(a)(3). All other organizations that wish to be classified as 501(c)(3) public charities must prove that they qualify for that status by showing that they satisfy either of the two tests in IRC Section 509(a)(1) because they are a publicly supported organization (PSO), or they satisfy the test IRC Section 509(a)(2) because they are a fees and activities supported organization (FSO), or they satisfy the requirements for being one of the three types of supporting organizations described in IRC Section 509(a)(3). If they fail to satisfy one of these tests, then they will be classified as private foundations – either as the more common private non-operating foundation, or if they can qualify for it they can request the less common but generally more favorable status of private operating foundation (POF).

The rationale behind the tests in IRC Section 509(a)(1) and 509(a)(2) is that if an organization receives at least one-third of its revenue from public sources of support, as defined by the IRS, then Congress and the IRS believe it can likely be trusted to operate in the interests of the public. If an organization receives so much money from a wealthy individual, a wealthy family or a business, that it fails the public support tests, then Congress and the IRS are concerned that the founders or major donors could easily use it as a tax shelter, or operate it for their own personal purposes and to pay what would be considered their own personal expenses, or to pursue their personal political and social agendas.
Accordingly, organizations that receive less than one-third of their revenue from public sources may be classified as Private Foundations, for which there are extra rules, restrictions, regulations, reporting requirements, and the possibility of penalties and taxes, and for which certain kinds of transactions are prohibited in order to prevent the misuse of the their tax exempt status by their wealthy founders.

The most commonly used and most favorable test to prove an organization’s public charity status is found in IRC section 509(a)(1) and is called the “One-third Public Support Test.” This test involves calculations of the public nature of the organization’s contributions and grants and membership fees. The organizations that satisfy this test are called “Publicly Supported Organizations” (PSOs). The second most common test is in the next section of the Code, section 509(a)(2), and is called the “One-third and one-third Public Support Test.” This test allows the organization to include income it earns by charging for some of its programs and activities. Organizations that satisfy this test are often called “Fees and Activities Supported Organizations” (FASOs). I will start with the rules and calculations required to prove public charity status in Section 509(a)(1), the “one-third public support test.”

II. THE ONE-THIRD PUBLIC SUPPORT TEST IN IRC SECTION 509(a)(1)

The “one third public support test” (also called the “Mechanical Test”) for public charity status uses a five (5) year period to determine whether an organization “normally” receives at least one-third of its revenue from public sources of support as defined by the IRS. Every year all 501(c)(3) organizations with gross revenue over $50,000 in the previous tax year must file an annual report to the IRS on Form 990 EZ, and those with gross revenue over $200,000 must file on Form 990. They are required to also file Schedule A to Form 990, and Part I of Schedule A is titled “Reason for Public Charity Status.” So each and every year the organization must prove that it still qualifies to be classified as a public charity, using information about the sources of its income during the tax year being reported on and the previous four (4) years.

Note that because this is a five (5) year test, the IRS does not apply the test to newly established organizations until they have completed their first five (5) tax years. This is very helpful for many organizations because newly established organizations often have a higher percentage of their initial support from their founders or other major donors, and could not easily pass this test in the first year or two of their existence. Because the test is not applied by the IRS until they have completed their first five (5) tax years, it gives organizations that wish to be public charities a long period of years to make and implement a plan for fundraising that will allow them to achieve that one-third level of public support by the time the test is applied.
The one-third public support test itself is calculated by putting the “qualified 
public support” in the numerator, on the top of the fraction, and the total 
support in the denominator, on the bottom of the fraction.

**CALCULATING TOTAL SUPPORT:**

The first step in determining if an organization satisfies the one-third public 
support test is to calculate the organization’s total support for the year and the 
preceding four years using the rules in Treas. Reg. §1.170A-9(f)(7)(i). An 
organizations total support is the sum of:

1. Gifts, grants, contributions, or membership fees;
2. Net income from unrelated business activities, whether or not such 
activities are carried on regularly as a trade or business;
3. The sum of the gross amount of interest, dividends, payments with 
respect to securities loans, rents, and royalties, but not including any 
such income to the extent such income was used in computing the 
unrelated business income tax;
4. Tax revenues levied for the benefit of an organization and either paid or 
expended on behalf of such organization;
5. The value of services or facilities furnished by a governmental unit, but 
not including the value of any such services offered to the general public. 
IRC §509(d)-(e) as amended by Treas. Reg. §1.170A-9(f)(7)(i)

Additionally, an organization’s total support does not include any amount 
received by an organization from any activity which is substantially related to 
the furtherance of its exempt purpose, or any amount attributable to the 
contribution of services for which a deduction is not allowed. Treas. Reg. 
1.170A-9(f)(7)(i)(A)-(B). An organization’s total support will then be used as the 
denominator in the calculation of the one-third public support test.

**CALCULATING THE QUALIFIED PUBLIC SUPPORT:**

A Publicly Supported Organization (PSO) is an organization that normally 
receives at least one-third of its financial support from the following sources of 
Qualified Public Support:

1. Grants from a governmental unit: One hundred percent (100%) of the 
contributions that come as grants from a governmental unit are included 
in the numerator. (Unless the funds for the grant came from some other 
party and were earmarked for delivery to the organization, in which case 
it is counted as coming directly from the original donor);
2. Direct Contributions from the public, subject to a two-percent 2% limitation, which is explained below (excluding “unusual grants” which are defined below);

3. Indirect Contributions from the public received in the form of grants or contributions from any other nonprofit organizations that are themselves publicly supported organizations (PSOs), or are classified as public charities and would qualify to be a PSO (such as a church, a school or university, or a hospital that could pass the one-third public support test themselves).

THE TWO-PERCENT (2%) LIMITATION:

Contributions received from individuals, businesses or organizations that are not publicly supported organizations (PSOs) can be included as qualified public support up to a two-percent 2% limit, as follows:

A person or donor (and their related parties if they are a disqualified person) may gift, grant, or contribute as much as they want to, but no more than two percent (2%) of the organization’s total support over the five year “normalcy” period can be counted as qualified public support. However, if a person contributes more than two-percent (2%) of the organization’s total support over the five (5) year period, all of the person’s donations must be combined and the amount that can be counted as qualified public support is the amount of their combined gifts that are not greater than two-percent (2%) of the organization’s total support over that five (5) year “normalcy” period.

When determining the amount of the gifts, grants, contributions, or membership fees that can be included in the numerator and counted as qualified public support, multiply the total support figure in the denominator, which is the total support for the entire five (5) year “normalcy” period, excluding unusual grants, by two percent (2%). The resulting figure is the amount of any gift by a donor and their related parties that can be included as qualified public support. For example, if a donor gives $2,000 per year, in five (5) years they will have given $10,000. If the organization received $20,000 per year in total support, its total support would be $100,000. Two-percent (2%) of $100,000 is $2,000. The first $2,000 from that individual donor would count as qualified public support, and the remaining $8,000 would be included in total support in the denominator but cannot be included in the numerator as qualified public support.

COMBINED TREATMENT OF DONATIONS FROM CERTAIN DISQUALIFIED PERSONS:

A special rule applies, to donations from certain disqualified persons, which requires that their donations must be lumped together with donations from
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their related parties, and then the two-percent (2%) limitation is imposed on all the combined donations from them and their related parties. Disqualified persons for this purpose are defined as:

1. The Foundation Managers of the organization: The disqualified persons include the directors, officers and managers of the organization

2. Family Members of the Managers of the organization: The lineal descendants, lineal ancestors and the spouses of the foundation managers are also treated as disqualified persons

3. Substantial contributors: Disqualified persons also include any person, corporation, trust, estate or association that has given a total of more than $5,000 to the organization, if that total amount of their contributions during the entire existence of the organization is also more than two-percent (2%) of the total contributions and bequests your organization has received during the entire existence of your organization, from the beginning of your organization’s existence to the end of the tax year in which donation was made

4. Twenty-Percent (20%) Owners: Disqualified persons also include any person / entity who is an owner of more than twenty-percent (20%) of the voting power of any corporation which is a substantial contributor, or the owner of twenty-percent (20%) or more of the profits of a partnership which is a substantial contributor, or the owner of more than twenty-percent (20%) of the beneficial interest of a trust or unincorporated association which is a substantial contributor.

5. Thirty-Five Percent (35%) Disqualified persons / entities – defined as any entity, corporation, partnership or estate that made a donation, if any person who is a foundation manager, a family member of a manager, a substantial contributor, or twenty-percent (20%) owner, also owns thirty-five percent (35%) or more of that entity.

III. UNUSUAL GRANTS

The one-third public support test analyzes the past five (5) years of an organization’s gross income to determine if at least one-third of the organization’s support is normally derived from the public. However, if an organization receives an unusually large donation or an unusually large grant from a private foundation, that single donation or grant could cause the organization to fail the test, because only a relatively small percentage of the donation or grant would qualify to be counted as “public support.” When this occurs, the IRS refers to it as a donation that is “tipping” an organization towards private foundation status. To prevent this outcome, the IRS rules allow an organization to designate certain donations and grants as “unusual
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grants” and exclude them from being included in the one-third public support test, thereby protecting their public charity status.

Treas. Reg. §1.509(a)-3(c)(3) allows for “unusual grants” to be removed from the one-third public support test completely and such sums will not be included in either the numerator or the denominator of the test.

“Unusual Grants” are grants or contributions to a public charity which are:
(1) from disinterested parties; (2) attracted by reason of the publicly supported nature of the organization; and (3) are unusual or unexpected in amount; and (4) by reason of their size, would adversely affect the status of the organization under the one-third public support test. Treas. Reg. §1.509(a)-3(c)(3). The determination of whether a specific grant or contribution is “unusual” depends on all of the facts and circumstances and no single factor is dispositive. Treas. Reg. §1.509(a)-3(c)(4). Notwithstanding the foregoing, the regulations list nine non-exclusive factors which tend to show that a grant or contribution is “unusual”:

1. The contribution is not made by a person who created the organization, previously contributed a substantial part of the organization’s support, stands in a position of authority in the organization (officer, director, trustee, or key employees), or by a person related to any of the foregoing persons. Treas. Reg. §1.509(a)-3(c)(4)(i); IRC §4946(a). For the purposes of this factor, a substantial contributor is any person who during a single tax year contributes an aggregate amount of more than $5,000 if such amount is more than two-percent (2%) of the total contributions received by the organization during that tax year. IRC §4946(a)(1)(A). A contribution made by any person described in this paragraph will be given less favorable consideration than contributions made by a person not named in this paragraph. Treas. Reg. §1.509(a)-3(c)(4)(i).

2. The contribution was a bequest and not an inter vivos transfer, as a bequest will ordinarily be given more favorable treatment. Treas. Reg. §1.509(a)-3(c)(4)(ii).

3. The contribution was in the form of cash, readily marketable securities, or assets which further the exempt purposes of the organization. Treas. Reg. §1.509(a)-3(c)(4)(iii).

4. Prior to the contribution, the organization carried on an actual program of public solicitation and exempt activities and has been able to attract a significant amount of public support. Treas. Reg. §1.509(a)-3(c)(4)(iv).

5. Subsequent to the contribution, the organization may reasonably be expected to attract a significant amount of public support and such expectation does not rely on the continued receipt of unusual grants to
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fund the organization’s operating expenses. Treas. Reg. §1.509(a)-3(c)(4)(v).

6. Prior to the year in which the unusual grant was received, the organization met the one-third public support test without the benefit of any exclusions of unusual grants. Treas. Reg. §1.509(a)-3(c)(4)(vi).

7. Neither the contributor nor persons related to the contributor are able to exercise direct or indirect control over the organization. Treas. Reg. §1.509(a)-3(c)(4)(vii).

8. The organization has a representative governing body. Treas. Reg. §1.509(a)-3(c)(4)(viii). An organization has a “representative governing body” if the organization has a governing body which is comprised of public officials or individuals chosen by public officials while acting in their capacity as public officials, persons having special knowledge in the particular field or discipline in which the organization is operating, community leaders such as elected officials, clergymen, or educators, or in the case of a membership organization, individuals elected pursuant to the organization’s bylaws by a broadly based membership. Treas. Reg. §1.509(a)-3(d)(3)(i).

9. Whether material restrictions or conditions (within the meaning of Treas. Reg. §1.507-2(a)(7)) have been imposed by the contributor upon the contributee in connection with the contribution. Treas. Reg. §1.509(a)-3(c)(4)(ix). A contributor will be deemed to have placed material restrictions or conditions on a contribution if the contributor places restrictions or conditions on the contribution which prevents the transferee organization from freely and effectively employing the transferred assets, or the income derived therefrom, in furtherance of the organization’s exempt purposes based on all of the facts and circumstances. Treas. Reg. §1.507-2(a)(7)(i). The regulations go on to list four (4) nonexclusive significant factors to be considered when determining if the contributor imposed material restrictions or conditions which include: (A) whether the public charity is the owner in fee of the assets it receives from the private foundation; (B) whether such assets are to be held and administered by the public charity in a manner consistent with one or more of its tax exempt purposes; (C) whether the governing body of the public charity has the ultimate authority and control over such assets, and the income derived therefrom; and (D) whether, and to what extent, the governing body of the public charity is organized and operated so as to be independent from the transferor. Id. Treasury Regulation §1.507-2(a)(7) goes on to list various factors which will be considered favorable or detrimental to the determination of material restrictions, the most important, however, is set forth in sections (iv)(A)(1) and (iv)(A)(2)(v). Essentially, these two subsections state
the opposite of each other and combine to state the receiving organization must have, and the transfer instrument must specifically state, that the public charity has the ultimate discretion and authority to use the funds or assets in its sole discretion and is not bound by the advice of the donor. Treas. Reg. §§1.507-2(a)(7)(iv)(A)(1), 1.507-2(a)(7)(iv)(A)(2)(v).

IV. THE BACK UP FACTS AND CIRCUMSTANCES TEST

The Internal Revenue Code allows organizations that seek public charity status under the test in Section 509(a)(1) of the Code but that fail the “one-third public support test,” to seek classification as a Publicly Supported Organization (PSO) through an alternate test, known as the “Facts and Circumstances Test.” Under this test, if an organization’s qualified public support equals at least ten-percent (10%) of total revenue, and if the organization is organized and operated in such a way as to attract public support, then it can try to establish that it should be classified as a Publicly Supported Organization rather than a Private Foundation by demonstrating that it satisfies five (5) additional factors.

THE TWO THRESHOLD REQUIREMENTS.

1. Percent of Public Support. An organization must satisfy the threshold requirement of at least ten-percent (10%) public support.

2. A Program to Attract Public Support. In order to satisfy the other threshold requirement, an organization must demonstrate that it has a continuous and genuine program for soliciting funds from qualified public sources. These include systematic efforts to raise funds from membership fees, small public contributions, grants from other nonprofit organizations with PSO status, grants from governmental units, and other sources of direct and indirect public support.

THE FIVE ADDITIONAL FACTORS.

If the organization meets the above two (2) minimum requirements, then the following five (5) additional factors will be considered by the Internal Revenue Service to determine if the nonprofit should be classified as a Publicly Supported Organization. These factors include:

- Financial support percentages
- Support sources
- Representative government board
- Public facilities, services, programs, policies and participation
- Membership relations
1. **Financial Support Percentage.** The IRS gives great weight to the exact amount of public support the organization receives. The closer to one-third the organization’s “qualified” support is, the less public support it has to show through the other additional factors. Conversely, the closer it is to the ten-percent (10%) bottom line, the greater burden it will have with regard to the other factors. It also helps to show the IRS that the organization’s percentage of public support has generally increased each year following the organization’s initial incorporation.

2. **Support Sources.** Favorable consideration is given to organizations that receive financial support from a large number of diverse sources of funding. It is unfavorable if an organization’s financial support comes from a small number of individuals, or from the members of a single family. Factors that can be considered in determining whether the organization receives financial support from an adequately large and diverse set of funders include the following:

- The type of organization (the nature of its purposes and activities)
- Length of time it has existed (has it had time to gather wide support?)
- Whether it limits its activities to a particular community or region (so then it only has to show wide support within that region)
- Whether it limits its activities to a special field which can be expected to appeal to a limited number of persons (then it only has to show wide support from people within that field)

It also helps to show that the number and diversity of the organization’s donors has been increasing as the organization has grown and matured.

3. **Representative Governing Body.** Here the Internal Revenue Service is looking for a large and diverse Board of Directors which represents the interests of the public, rather than the personal or private interests of a limited number of donors or officers. They will be satisfied with a Board made up of:

- Public officials
- Directors selected by public officials
- Experts in the field in which the organization is operating
- Community leaders representing a broad cross-section of the community
- Persons selected by a broadly-based membership according to procedures established in Articles or Bylaws

4. **Public Facilities, Services, Programs, Policies and Participation.** It helps establish the organization’s classification as a Publicly Supported Organization if it can demonstrate to the IRS that the
organization’s activities clearly meet public needs. The IRS will consider factors such as the following:

- Does the organization provide a service or facility for the general public; for example—museums or libraries
- Regular publication of studies that are widely used by colleges or the public
- Participation in or sponsorship of programs by civic or community leaders or experts in the field
- Maintaining a well-defined ongoing program to accomplish charitable work in the community
- Receiving a significant part of the organization’s funds from a public charity or governmental unit to which the organization is held accountable as a condition of the grant or contract

5. Membership Relations. The Internal Revenue Service considers an organization more likely to be “Publicly Supported” if it has a program to attract a large and active membership. Factors the IRS will consider include:

- Whether solicitation for members is designed to enroll a large number of people in the community or area of special interest
- Whether the individual membership charge is affordable by many persons and not what only a few could afford
- Whether the activities of the organization will be likely to appeal to persons having a broad common interest, such as educational activities, musical activities, etc.

It is also helpful to show the IRS that the organization has an active and systematic program designed to attract new members, and that the number of members has consistently been growing since the organization was incorporated.

Note that the organization does not have to show favorable facts under every category, and in each case, the importance of each factor will be different depending on the nature and purpose of the organization and how long it has existed. The ultimate objective is to find out whether the organization is “publicly supported.”

V. Alternate Tests: The 1/3 and 1/3 Public Support Test in IRC 509(a)(2) and the Supporting Organization Tests in IRC Section 509(a)(3).

If an organization is unable to prove they qualify for public charity status as a publicly supported organization using the most common test described above, there are two other options.
1. The “One-Third and One-Third Test” in IRC Section 509(a)(2).

If an organization earns a large amount of its revenue in the form of related income, meaning the gross receipts it earned by carrying out its exempt purposes, then it can use this test and count its related earned income as part of its proof that it is qualified for public charity status. To do so it must prove that at least one-third of its support comes from any combination of its donations, gifts and grants, membership fees AND its gross receipts from its related business activities.

Further, it must be able to show that not more than one third of its support comes from the sum of its gross investment income, plus the amount of its unrelated business taxable income, minus the amount it paid as unrelated UBIT taxes on its unrelated business income.

Organizations that can satisfy this alternate test are known as FASO organizations (Fees and Activities Supported Organizations), instead of PSOs (Publicly Supported Organizations).

There is no backup “Facts and Circumstances Test” available for FASO organizations that opt to prove they qualify for public charity status using this test.

The calculations involved in proving that an organization meets the one-third support test under this section of the Code are similar to those for PSOs in IRC Section 509(a)(1), but with important differences in what can be included as qualified support in the numerator and what must be included in total support in the denominator, and in addition they can only count $5,000 or one percent (1%) of the support from any person or governmental bureau, in calculating qualified support. The rules for these calculations are described in IRC Section 509(a)(2).

2. Supporting Organizations under IRC Section 501(a)(3).

Finally, if an organization wants to be classified and treated as public charity but cannot do so under the rules in IRC Section 509(a)(1) or 509(a)(2), then they can be set up to operate as a “supporting organization” that supports a separate organization that does qualify to be a public charity. There are three different versions of this test, and the organizations using it are called “Type 1 supporting organizations,” Type 2 supporting organizations” or Type 3 supporting organizations.” The rules for proving public charity status as a supporting organization are found in IRC Section 509(a)(3).
VI. PRIVATE OPERATING FOUNDATION STATUS

If an organization has failed to pass any of the above tests for public charity status, it will be classified as a private foundation. However, if it can qualify as a private operating foundation (POF), it will nonetheless very likely still be able to carry out its planned programs and activities and accomplish its exempt mission and purposes in a manner much like how a public charity would operate.

A private operating foundation, described in IRC §4942(j)(3), POF), is an organization which is classified by the IRS as a private foundation but which actively carries on the charitable activities which constitute the basis for its exemption. This contrasts with a private non-operating foundation which gives money in the form of grants to other organizations, who then use those funds to actively carry out their charitable activities.

Private operating foundations are ‘hybrid’ organizations and have some of the advantages ordinarily only available to public charities. These advantages include the following:

- Private operating foundations are not required to make a minimum amount of distributions in the form of grants to grantees, and are not subject to the IRC §4942 excise tax on under-distributions.
- Private operating foundations are qualified to be the grantee for receipt of contributions from private non-operating foundations.
- Donors to a private operating foundation can take deductions up to fifty-percent (50%) of the donor’s adjusted gross income as a charitable deduction, instead of the thirty-percent (30%) limitation on donations applicable to private non-operating foundations.
- A private operating foundation will be able to avoid the excise tax on net investment income under IRC §4940, if they meet the additional requirements of an "exempt operating foundation" under IRC §4940(d)(2).

To qualify for private foundation status an organization must pass a specific IRS test, as follows:

**IRM 4.76.4.15.6.1 (05-30-2010)**

**Private Operating Foundation Tests**

To qualify as an "Operating Foundation" a private foundation must meet the "income test" and one of three additional tests:
- The "assets test,"
- The "endowment test," or
- The "support test."
Chapter 1—IRS Tests for Public Charity and Private Foundation Status

Note:
Per Treas. Reg. §53.4942(b)-3, compliance with the requirements of these four (4) tests is determined on the basis of satisfying such tests for an aggregation of the current taxable year and three (3) immediately preceding years, or satisfying such tests for any three (3) out of four (4) taxable years in such period.

1. **The Income Test** - To satisfy the income test the foundation must make qualifying distributions for the active carrying on of activities constituting the purpose for which it was organized and operated equal to substantially all of the lesser of:
   - Adjusted Net Income (ANI), or
   - Minimum Investment Return

For purposes of this section substantially all means eighty-five (85%) or more.

**Adjusted Net Income** - ANI is the excess of gross income over deductions that would be allowable for a taxable corporation. The following special rules apply:
   - IRC §103 is not applicable. Interest income from tax exempt municipal bonds is includable in ANI.
   - Capital gains and losses included in ANI only to the extent of net short term capital gains.
   - Depreciation is allowable only on a straight line basis, and depletion is allowable only on a cost basis.

**Income Modifications in Computing Adjusted Net Income** - The following income modifications are required:
   - Prior year qualifying distributions, if repaid, must be included in ANI.
   - Proceeds from the sale of property whose purchase was a qualifying distribution, must be included in ANI to the extent the acquisition was taken as a qualifying distribution.
   - Set-asides no longer needed for the purpose set-aside must be included in ANI.

2. **The Assets Test** - To meet the assets test, substantially more than half (defined as 65%) of its assets must be:
   - Devoted directly to active conduct of activities constituting purposes for which it is organized and operated,
   - Functionally-related business assets (Treas Reg. §53.4942(a)-2(c)(3)(iii)),
   - Stock of a corporation controlled by the foundation and substantially all of the assets of which are so devoted,
   - Any combination of the above
3. **The Endowment Test** - A foundation meets the endowment test by making qualifying distributions for the active conduct of its exempt activities equal to at least two-thirds of its minimum investment return.

4. **The Support Test** - To meet the support test a foundation must meet all three (3) tests below:
   - Get substantially all of its support from the general public and five (5) or more exempt organizations which are not disqualified persons with respect to each other, or with respect to the foundation,
   - Get no more than twenty-five (25%) of its support (other than gross investment income) from any one exempt organization, and
   - Receive no more than fifty-percent (50%) of its support from gross investment income

If an organization that has failed to prove its public charity status can pass this test and receive IRS classification as a private operating foundation, then it can generally count on being able to carry on all or most of the programs and activities it had planned to conduct as a public charity.

**VIII. CONCLUSION**

The IRS has some very different sets of rules and requirements for Public Charities and Private Foundations. There are numerous different avenues and tests for an organization to choose between and use if it wishes to prove that it is qualified for public charity status. These rules and tests are somewhat complicated, and the attorneys and professionals who advise nonprofit organizations must learn and understand these different rules in order to help their nonprofit clients navigate these tests and gain the status they wish to have.
Chapter 2

Presentation Slides: Private Foundations: How Do They Work, and Does Your Client Want to Be One?

Kate Kilberg
Catalyst Law LLC
Portland, Oregon
Private Foundations:
How Do They Work And Does Your Client Want to Be One?

Kate M. H. Kilberg
Catalyst Law, LLC
www.catalystlawllc.com

Private Foundation Rules

- Stricter rules than public charities!
- Different definition of DQP
Chapter 2—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

Definition of Disqualified Person (DQP)

Internal Revenue Code Sec. 4946

For purposes of the PF rules, a DQP is

- A substantial contributor to the foundation
- A foundation manager
- An owner of more than 20% of an entity that is a substantial contributor
- A family member of any of the above
- An entity that is more than 35% owned by any of the above

The Six Private Foundation Rules

- Tax on Net Investment Income (Section 4940)
- Self-Dealing (Section 4941)
- 5% Payout (Section 4942)
- Excess Business Holdings (Section 4943)
- Jeopardizing Investments (Section 4944)
- Taxable expenditures (Section 4945)
**Tax on Net Investment Income**  
*(Section 4940)*

- Private foundations usually taxed 2% on net investment income
- Rate can be reduced to 1% in certain circumstances
- Most types of income are taxable, including:
  - Interest, dividends, rents, royalties
  - Net capital gains
- Non-investment income not subject to tax:
  - Income subject to UBIT
  - Fees for goods or services

---

**Self-Dealing** *(Section 4941)*

- Government officials are additional DQPs for purposes of Sec. 4941
- Acts of self-dealing (direct or indirect):
  - Any purchase, sale, exchange, or leasing of property with a DQP
  - Lending money to or from a DQP (see exceptions)
  - Providing goods, services, or facilities to a DQP
  - Paying Compensation to a DQP
  - Transferring foundation assets or income for the benefit of a DQP
  - Payments to government officials
Chapter 2—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

**Exceptions to Self-Dealing Rules (Section 4941)**

- Contributions to the foundation
- Reasonable & necessary compensation to a DQP for personal services necessary to carry out exempt purposes
- Interest free loan to the foundation used for exempt purposes
- Providing goods, services, or facilities to the foundation on a rent-free basis
- Providing goods or services to a DQP on a basis that is no more favorable than to the general public as part of exempt activity (e.g., museum admission)

---

**Self-Dealing Common Pitfalls**

- Paying for travel for spouse or family members of a DQP who is travelling on foundation business
- Fulfilling personal charitable pledges of a DQP
- Buying tickets to fundraising events
- Using credit cards
- Paying rent to a DQP, even at below-market rate (other than $0)
Chapter 2—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

Five-Percent Payout (Section 4942)

Each year, a foundation must pay out a “Distributable Amount” on grants, active programs, and administration to accomplish charitable mission.

\[
\text{Distributable Amount} = \text{Minimum Investment Return} - \text{Excise and Income Tax Paid} + \text{Recoveries of Amounts Previously Treated as Qualifying Distributions}
\]

\[
\text{Minimum Investment Return} = 5\% \text{ of total asset value (less assets designated for programs)}
\]

Five-Percent Payout (Cont.)

- Qualifying Distributions:
  - Foundation administrative expenses (e.g., legal and accounting fees)
  - Purchase of charitable-use fixed assets
  - Program Related Investments
  - Foundation has 12 months after the tax year in question to make the distribution
Chapter 2—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

- **Private Foundation and its DQPs cannot own more than 20% of any business enterprise**

- **Business enterprise = corporation, partnership, joint venture, trust, sole proprietorship**

- **2% safe harbor**

### Exceptions:

<table>
<thead>
<tr>
<th>Business related to exempt purposes</th>
<th>Passive holding companies</th>
<th>Program related investments</th>
</tr>
</thead>
</table>

### Excess Business Holdings (Section 4943)

- **A private foundation and its managers can be penalized for investing in a manner that jeopardizes the foundation's ability to carry out its exempt purpose**

- **Prudent investor rules**

- **Exceptions:**
  - Gratuitous transfers
  - Program Related Investments

### Jeopardizing Investments (Section 4944)
Chapter 2—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

**Private Foundation Penalties**

- Lobbying or electioneering ("advocacy" is ok)
- Grants to individuals for study, travel, etc. without prior IRS approval
- Grants to another foundation, Type III NFI SO, non-(c)(3) exempt org, or for-profit entity with out expenditure responsibility
- Amounts paid for non-charitable purposes

**Private Foundations — Compensation of DQP**

- Subject to self-dealing analysis (4941)

- Compensation to a DQP is OK if:
  - For "personal services", reasonable and necessary for carrying out exempt purposes
  - Not excessive (look to Council on Foundations data)

- Examine Conflicts of Interest Policy!
Chapter 2—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

Private Foundations - Reporting

Federal – Form 990-PF

State of Oregon -
- Secretary of State
- Department of Justice
- Charitable Solicitation (not likely)

Receipts of Contributions (IRS Publication 1771)

SEC filings for very large holdings (over $100 million)

Grantmaking

- Expenditure Responsibility
  - Ensure that foundation grant funds are used solely for the charitable purposes for which they are awarded

- Six steps:
  - Conduct Pre-Grant Inquiry
  - Written Grant Agreement
  - Require the grantee to keep and track grant funds in a separate fund or account
  - Obtain annual reports from the grantee
  - Report the grant on 990-PF
  - Investigate all potential diversions
What is Expenditure Responsibility?
Treas. Reg. Sec. 53.4945-5

- Conduct Pre-Grant Inquiry
- Written Grant Agreement
- Require the grantee to keep and track grant funds in a separate fund or account
- Obtain annual reports from the grantee
- Report the grant on 990-PF
- Investigate all potential diversions

Step 1 – Pre-Grant Inquiry

Must be documented in writing

Assessment of grantee’s ability to use and report on grant funds

"Reasonable person" standard

Due Diligence checklist

- Evidence of legal status of organization
- List of the governing board members, key officers, and key project participants
- Organization chart
- Annual report for the prior year, or a brief description of the organization's history, goals, mission, recent activities, and future plans
- Budget
- Financial statements
- Other grants made to the organization by other foundations or the government
Chapter 2—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

Step 2 – Grant Agreement

- Define specific charitable purposes of the grant
- Prohibit use of grant funds for lobbying, electioneering, re-granting, and non-charitable uses

Step 2 – Grant Agreement (cont.)

Grantee Requirements:

- maintain the funds in a separate account or fund dedicated to charitable purposes
- maintain records of receipts and expenditures
- make records available to foundation for inspection
- repay grant funds if not used for purposes of the grant (even if charitable)
- provide annual reports and a final report on use of grant funds
Step 2 – Grant Agreement (cont.)

- Generally cannot make an ER grant for general operating support
- Grantee cannot spend funds until both foundation and grantee have signed the agreement and it has been returned to the foundation

Step 3 – Separate Fund or Account

- Require a separate bank account or a separate bookkeeping account
- Any interest earned must be used on the project or returned to the foundation
Step 4 – Obtain Annual Reports

- Grant agreement must include reporting deadline
- Final report required
- Review reports for possible diversions of grant funds
- Must receive final report “within a reasonable period of time” after the end of the grantee’s fiscal year – 90 days?
- Must make a reasonable effort to obtain the report, and withhold future payments until the report is furnished.
- Failure to comply could subject foundation to penalty!

Step 5 – Report the Grant to the IRS

- Report on foundation’s Form 990-PF
- The report must include:
  - Grantee’s name and address
  - Date, amount, and purpose of the grant
  - Dates of any reports received by the grantee
  - Amount spent by the grantee based upon the grantee’s most recent report
  - Whether the grantee has diverted funds
  - The dates and results of the verification of any of the grantee’s reports
Step 6 – Investigate Potential Diversions

Diversion = grantee uses all or any portion of the funds for any non-charitable purpose, or for any purpose inconsistent with the purposes specified in the grant agreement.

- Review expenditure responsibility reports soon after receipt.
- Take “all reasonable and appropriate steps” to ensure the grantee either returns the funds to the foundation or restores the amount to the grant account. Withhold future payments until funds restored and precautions against further diversions are in place.

Complicating Issues for Expenditure Responsibility Grants

- Grantee must exercise expenditure responsibility over sub-grant/re-grant.
- Grants to other private foundations – “flow-through”.
- Grants for capital equipment – can only be used for the charitable purpose of the grant.
- Grants that support advocacy – lobbying and electioneering prohibited.
Chapter 2—Private Foundations:  How Do They Work, and Does Your Client Want to Be One?

Special Cases – Grants to Individuals

### Issue: Possible taxable expenditure if for travel, study, or similar purposes

#### OK if...

- Awarded on an objective and nondiscriminatory basis pursuant to a procedure approved in advance by the IRS
- NOT for travel, study, or similar purposes (e.g., literary awards or grants to the poor); important factor is whether grant dependent on grantee’s future actions
- Awarded to school, and the school chooses the recipient (ear-marking not permitted)

Also consider... possible self-dealing if the grantee is a DQP

Special Cases in Grantmaking – Tipping and Unusual Grants

### Issue

Issue: Large grant causes the grantee to fail the public support test(s)

### OK

...if grant expenditure meets criteria for an “unusual grant”

### Consider

If foundation controls the grantee, the foundation could be subject to penalties
Special Cases – International Grants

- Issue: Possible taxable expenditure
- OK if...
  - Exercise ER, or
  - Equivalency determination (IRS Rev. Proc. 2017-53; NGOSource.org)
- Also consider... anti-terrorism rules

Special Cases – Program Related Investments

Instead of a grant, the private foundation gives money to the recipient in another way:

- Loan
- Deposit in a community development bank
- Loan guarantee
- Equity investment
- Fixed income investment

Money comes from the programmatic side of the foundation, not the investment side
**Special Cases — Program Related Investments (Cont.)**

- $\quad$ Expectation that the grantee will repay the PRI dollars in some way
- \[\text{generally below-market returns}\]
- ![Legal requirements:](image)
  - Must further tax-exempt purpose
  - Purpose is not production of income
  - No lobbying or electioneering

---

**Special Cases — Program Related Investments (Cont.)**

- [ ] Treas. Reg. Sec. 53.4944-3(b) - expanded examples of PRIs
- Expenditure responsibility requirements apply to all PRIs
- Due diligence similar as for grants, but also analyze investment repayment
- $\quad$ Benefits: Stretches charitable dollars through re-use/recycling
- "Negative" payout in year of repayment for purposes of the 5% payout requirement
- Investment gains subject to the 2% tax
Special Cases – Fiscal Sponsorships

- **Public charity takes on new organization as a “project.”**
- **Foundation makes grant for purposes of supporting project.**
- **Potential taxable expenditure if project would not otherwise qualify for a non-ER grant.**
- **OK if...**
  - Intermediary charity has ultimate control over disposition of the funds.

Special Cases – Discretionary Grantmaking

- **Discretionary grantmaking = Individual board members can designate grantees of their own choosing.**
- **Issue: Potential taxable expenditure if grants not used for charitable purposes.**
- **OK if...**
  - Board establishes guidelines as to permissible grantees and under what circumstances the Board should have final approval.
- **Also Consider... conflicts of interest.**
Chapter 3

Private Foundations: How Do They Work, and Does Your Client Want to Be One?

GRADY GOODALL
Oregon State University Foundation
Corvallis, Oregon

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I. Private Foundation and Alternatives

Donors have a number of options to accomplish their philanthropic, financial and tax planning goals. A private foundation may be the right vehicle, but attorneys can and should discuss others options with the clients as well. Private foundation alternatives include (but are not limited to) supporting organizations, Donor Advised Funds, and direct giving to charities (including planned giving).

II. Private Foundation Pros and Cons

Classification, operational rules, excise taxes and other ongoing compliance issues were discussed earlier in this CLE. In general, private foundations have the following advantages or disadvantages over alternatives. For any given founder, any of the items below may be positive or negative factors.

Pros

- **Flexibility**: Private foundation structures, documents, management, investment strategies, grantmaking and other aspects can be customized to meet the client’s goals.

- **Legacy**: A private foundation may be a better vehicle for legacy that continues after the donor’s passing.

- **Visibility and prestige**: A private foundation, especially with staff, can be highly visible if desired.

- **Impact**: Arguably, a private foundation can have greater impact with more customization, grant making strategies, program, etc...

Cons

- **Start-up work/cost**: Private foundations can require substantial start-up costs and time. In addition to gifting initial funds, time and resources are needed to incorporate, file for tax exemption and begin operations.

- **Deduction limits**: Private foundations are subject to lower deduction limits: 30% of donor AGI for cash and 20% of donor AGI for property. The alternatives benefit from 60% and 30% limitations as public charities. See IRC §170.

- **Ongoing management**: Private foundations can have substantial ongoing administrative needs including the board of directors, annual filing, accounting work, staff support, investment, grant making and programs.

- **Ongoing Compliance**: As discussed before, ongoing compliance with state and federal laws and rules, and reporting can be laborious.

III. Minimum Amount Needed to Start and Operate a Private Foundation

For some founders, the single biggest factor in choosing a private foundation or an alternative can be the amount they need to contribute. There is no specific amount
that is required by law or universally recommended so the founders should carefully consider, and attorneys may need to discuss with their clients, whether the founders can meet their goals with resulting foundation assets. It should be noted that some private foundations have billions of dollars in assets and some have just hundreds or thousands. Factors to consider:

- IRC § 4966(e) requires private foundations to distribute 5% of their non-charitable-use assets, usually in the form of administration expenses and grants or programs. “Reasonable and necessary administrative expenses” count as qualifying distributions under the 5% rule. See Treas. Reg. § 53.4942(a)-3 (2)(i).

- Assuming a private foundation invests its corpus and uses investments proceeds to fund operations, earning enough for the 5% payout rate and also keeping pace with inflation can be challenging. Some private foundation donors do not want to establish a large endowment in the private foundation and instead make contributions each year.


- Oregon Uniform Prudent Management of Institutional Funds Act (UPMIFA) states that a payout rate of more than 7% creates a rebuttable presumption of imprudence. ORS 128.322 (4).

At a 5% payout rate, a $1 million endowment would create $50,000 of spendable income each year for combined management and grant making activates, without considering investment fees, excise taxes or other similar expenses. Founders and legal counsel and other advisors should carefully consider whether they can meet their goals with their intended contributions to the foundation. The private foundation alternatives discussed below may provide donors with opportunities to meet their goals at lower costs and great efficiency.

Key questions to answer in considering private foundation include:

- What impact does the founder want to make through the private foundation?
- How much could it realistically cost to make that impact?
- How much management or staffing will be required?
- Does that founder and his or her family or other potential board members want to do that management over time?
The answers to these questions will help the founders and their legal counsel and advisors determine whether a private foundation or alternative if the best option.

IV. Supporting Organizations

Supporting organizations are nonprofit organizations that are exempt because they support other exempt organization. See IRC § 509(a)(3) and other materials form this CLE. Supporting Orgs, often under the umbrella of a community foundation, can offer many of the benefits of a private foundation with lower investment, ongoing administration cost and burden. A key consideration is whether the founders feel comfortable with the supported organization which provides these benefits (usually with an associated management fee).

Considerations

- **Higher deduction limit** - Gift to supporting orgs are subject to higher charitable contribution limits of public charities as compared with the lower limits for private foundation. See IRC §170

- **Efficiency** - Shared administration and compliance costs and labor are provided by and shared with the umbrella organization creating greater efficiency

- **Middle ground for management and involvement** - for a founder(s) who still want a fair degree of control, but don’t feel that they can manage the cost or labor required for private foundation, a supporting or may offer “middle ground”. For example, the supporting org can have its own board that may involve the founder, family members, stakeholders or others.

V. Donor Advised Funds

Donor Advised Funds (DAFs) have been a staple of Community Foundations since the 1930s and have grown dramatically since for-profit financial firms began offering DAF options in the 1990s. DAFs were codified in Pension Protection Act of 2006.

- **Donor Advised Fund Defined**... the term “donor advised fund” means a fund or account—
  
  (i) which is separately identified by reference to contributions of a donor or donors,

  (ii) which is owned and controlled by a sponsoring organization, and

  (iii) with respect to which a donor (or any person appointed or designated by such donor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held
Chapter 3—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

in such fund or account by reason of the donor’s status as a donor. IRC § 4966 (d)(2).

DAFs are offered and managed by “Sponsoring Organizations” such as Community Foundations, national charities, and issue-specific charities. Sponsoring organizations are defined as “...[an] organization which... is described in section 170(c) [other than in paragraph (1) thereof, and without regard to paragraph (2)(A) thereof]... is not a private foundation... maintains 1 or more donor advised funds.” IRC § 4966 (d)(1).

According “The 2019 DAF Report”, individuals contributed an estimated $37.12 billion to DAFs in 2018—a 20.1% increase from 2017—and DAFs held $121.42 billion assets as compared to $872 billion in private foundations. In addition,

...the number of donor-advised fund accounts at National Charities exceeds the other two types of charitable sponsors combined. National Charities distribute more grant dollars and have higher aggregate charitable asset values. The average donor-advised fund asset size at Community Foundations is higher than at the other two types of charitable sponsors. Single-Issue Charity sponsors have the highest grant payout rate of the charitable sponsors analyzed in this study.

This report was published by the National Philanthropic Trust, a nonprofit organization which offers DAFs and other service to donors and charities. The report is available at https://www.nptrust.org/reports/daf-report/.

Advantages of DAFs compared to private foundations include the following, although, these may be positive or negative aspects depending on the founder/donor’s goals.

- **Cost**- many sponsoring organizations have very low minimum contributions to start a DAF. For example, Schwab Charitable Fund requires a $5,000 minimum gift and charges fees of 0.6% or less. The Oregon Community Foundation requires $25,000 to start a DAF and has managed of less than 1%. *Note: these are merely examples, the author is not endorsing or recommending any specific DAF sponsor.*

- **No start-up cost**- each DAF is fund management by an existing charity so there is no need to incorporate or manage a new nonprofit organization.

- **Simple administration**- generally, DAFs do not require, offices, staff, boards, reporting or accounting. Grant making is simple.

- **There is no minimum payout requirement**

- **Higher deduction limit** as a public charity (60% / 50% / 30%)

- **Planning opportunities**- DAFs offer an increasingly popular option to give a larger amount in particular year to match the donor’s financial and tax goals. Funds can be paid over multiple years to meet philanthropic goals.
Possible disadvantages of DAFs include:

- **Lack of customization and control** - each DAF is owned and controlled by the sponsor organization. The donors recommend distributions, but those distributions could be disallowed by the sponsoring org and donors have to follow the sponsoring org’s procedure and forms. DAFs may also offer more limited investment options than private foundations.

- **No grants to individuals** - this precludes direct scholarship programs or artist grants for example. *See IRC § 4966 (c). DAFs can make grants public charities that run these programs.*

- **Less visibility** - DAFs can be nearly anonymous which can help donors who do not want publicity for their gifts. Some donors want the benefits of visible philanthropy.

### VI. Direct Giving

Each vehicle above offers founders/donor the opportunity to create an entity or strategy to accomplish their goals. However, they each impose some degree of complexity with organizations or partners as intermediaries. Donors may assume that they need a private foundation or other vehicle when making a series of thoughtful gifts directly charities of their choice could be more efficient. Attorneys can work with their clients to consider multiple giving vehicles to align donor philanthropic, financial, tax and family goals.

Attorneys should encourage clients to execute a written agreement with each charity for each gift to outline the transaction, specifically documents the donor’s restrictions and clarifies the charity’s applicable policies and procedures. Some information about gift agreements, especially related the creation of endowments, is including in Oregon UPMIFA (Uniform Prudent Management of Institutional Funds Act). *See ORS 128.305 et. seq.*

*Note:* gifts to a charity that are restricted in time or purpose by the donor are similar to DAFs in that the donor has some degree of control over the use of the funds. The particulars of restricted gifts are beyond the scope of this CLE, but it is worth noting that the Internal Revenue Code includes short distinction between restricted funds and DAFS in IRC § 4966 (d)(2)(B).

### VII. Additional resources that may be of interest:

- Oregon Community Foundation: [https://oregoncf.org/for-professional-advisors/](https://oregoncf.org/for-professional-advisors/)
• Report on Foundation Expenses & Compensation
  https://www.urban.org/sites/default/files/publication/50481/311281-
  Foundation-Expenses-and-Compensation.PDF

• Giving USA Annual Report on Philanthropy: https://givingusa.org/
PRIVATE FOUNDATIONS: HOW DO THEY WORK AND DOES YOUR CLIENT WANT TO BE ONE?

DAVID ATKIN, CENTER FOR NONPROFIT LAW, EUGENE
KATE KILBERG, CATALYST LAW LLC, PORTLAND
GRADY GOODALL, OREGON STATE UNIVERSITY FOUNDATION, CORVALLIS

PRIVATE FOUNDATION ALTERNATIVES

Supporting Orgs

Donor Advised Funds

Direct Giving
DOES YOUR CLIENT WANT TO BE A PRIVATE FOUNDATION?

**PROS**
- Customization
- Legacy
- Visibility and Prestige
- Impact

**CONS**
- Start-up work/cost
- Deduction Limits
- Ongoing management
- Compliance

PRIVATE FOUNDATION ADMINISTRATION COSTS

<table>
<thead>
<tr>
<th>Foundation FMV</th>
<th>$1,000,000</th>
<th>$5,000,000</th>
</tr>
</thead>
<tbody>
<tr>
<td>10-yr net annualized return*</td>
<td>8.4%</td>
<td>$84,000</td>
</tr>
<tr>
<td>Required payout</td>
<td>5%</td>
<td>$50,000</td>
</tr>
<tr>
<td>Administration</td>
<td>15%(?!?)</td>
<td>$7,500</td>
</tr>
<tr>
<td>Grants</td>
<td>remainder</td>
<td>$42,500</td>
</tr>
</tbody>
</table>

A 2001 study showed staffed foundations have an average ~9-11% admin as a percentage of distributions and range of 0-95% among respondents.

Chapter 3—Private Foundations: How Do They Work, and Does Your Client Want to Be One?

ALTERNATIVES: SUPPORTING ORGS

Nonprofit organizations that are exempt because they support other exempt orgs.

Considerations
- Higher deduction limit (60% / 50% / 30%. See IRC §170)
- Middle ground for management and involvement (board, multi-generation involvement…)
- Shared administration and compliance
- Generally lower cost that a Private Foundation. Oregon Community Foundation minimum = $5M.
DONOR ADVISED FUND DEFINED

- IRC § 4966 (d) … the term “donor advised fund” means a fund or account—
  (i) which is **separately identified** by reference to contributions of a donor or donors,
  (ii) which is **owned and controlled by a sponsoring organization**, and
  (iii) with respect to which a donor (or any person appointed or designated by such donor) **has, or reasonably expects to have, advisory privileges** with respect to the distribution or investment of amounts held in such fund or account by reason of the donor’s status as a donor.

DONOR ADVISED FUNDS

- Sponsoring Orgs: Community Foundations, national charities, issue-specific charities
  - IRC § 4966 (d) …[an] organization which... is described in section 170(c) (other than in paragraph (1) thereof, and without regard to paragraph (2)(A) thereof)... is not a private foundation… maintains 1 or more donor advised funds.
- Community Foundation DAFs started in the 1930s, for-profit affiliated DAFs came around the 1990s
- Codified in Pension Protection Act of 2006.
DAFS BY THE NUMBERS (2018)

- $427.71 billion: Charitable contributions, 68% contributed by individuals
- $37.12 billion: Donor contributions to DAFs, 20.1% increase from 2017
- $121.42 billion: Assets vs $872 billion in PFs

https://www.nptrust.org/reports/daf-report/

DAF ADVANTAGES

- **Cost** ($5,000 min gift, fees of 0.6% or less at Schwab, OCF $25K minimum and fees of less than 1%)
- **No start-up**
- **Simple administration** (no office, no staff, no board, simple accounting, investment services, simple grant making, no payout requirement)
- **Higher deduction limit** (60% / 50% / 30%)
- “Bunching” or frontloading gifts
DAF DISADVANTAGES

- Lack of customization
  - no grants to individuals. IRC § 4966 (c)
- Less visibility (anonymity?)
- No pledge payments
- Lower impact(?)

PF ALTERNATIVES: DIRECT GIVING

- Consider multiple giving vehicles to align donor philanthropic, financial, tax and family goals
- Use written gift agreements, i.e. a "gift instrument" under ORS 128.316(3).
  - DAFS vs donor-restricted funds- IRC § 4966 (d)(2)(B)
    - Advisory function
    - Supporting multiple beneficiaries.
    - Not a “scholarship section committee”.
### ADDITIONAL RESOURCES

- Oregon Community Foundation: [https://oregoncf.org/for-professional-advisors/](https://oregoncf.org/for-professional-advisors/)
- Giving USA Annual Report on Philanthropy: [https://givingusa.org/](https://givingusa.org/)
Chapter 4

Presentation Slides: Religious Organizations

G. KEVIN KIELY
Cable Huston LLP
Portland, Oregon

Dexter Pearce
Stoel Rives LLP
Portland, Oregon

Michele Wasson
Stoel Rives LLP
Portland, Oregon
Federal Taxation of Religious Activity
**TERMS**

• Religious Organizations: Exempt under IRC Section 501(c)(3), but generally subject to charitable rules.
• Churches
• Association and Conventions of Churches
• Religious Order
• Integrated Auxiliary

---

**RELIGIOUS ORGANIZATION**

• Exempt from tax in first income tax code of 1894.
• In *U.S. v. Seeger*, the USSC provided that the question is whether a given belief that is sincere and meaningful occupies the same place in the life of the individual as an orthodox belief in God and whether the belief is the person's ultimate concern. Seeger 380 US 163 (1965)
• In Welsh, another conscientious objector case, the Court held that “if an individual deeply and sincerely holds beliefs which are purely ethical or moral in source and content, but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual a place parallel to that filled by God in traditionally religious persons.” Welsh 398 US 333 (1970)
**Religious Organization**

- Junaluska – Operated exclusively to further religious purposes. If use of property exceeds religious needs, or if the predominant use becomes vacationing or recreation, a different result would obtain. 86 T.C. 1114 (1986)

**Church**

- IRS announced 14 criteria to determine whether an organization qualifies as a church. Exempt organizations examination handbook Text 321.3 (1982).
**Church Con’t**

- distinct legal existence;
- recognized creed and form of worship;
- definite and distinct ecclesiastical government;
- formal code of doctrine and discipline;
- distinct religious history;
- membership not associated with any other church or denomination;
- ordained ministers;
- selection of ministers for ordination after prescribed studies;
- its own literature;
- established places of worship;
- regular congregations;
- regular religious services;
- “Sunday school” for instructing children;
- schools for preparing ministers. And the catch all –
- the organization exhibits evidence of private inurement or benefit.

---

**Church Con’t**

- Tax Court rejected the criteria but found them “helpful.” Using instead the associational test which “defines a church as an organization that includes a body of believers who assemble regularly for communal worship”;
- This test requires that a church must create, as part of its religious activities, the opportunity for members to develop fellowship by worshipping together. The Court of Appeals therefore found that the organization did not satisfy the associational test because the organization did not conduct regular meetings or have a regular congregation. Furthermore, the Court of Appeals found that disseminating religious information through an “electronic ministry” to a “virtual congregation” did not fulfill the associational role required to be classified as a church. Foundation of Human Understanding 88 T.C. 1341.
CHURCH CON’T

- Publication 1828 Statement
- IRS holds to the 14 criteria
- The IRS makes no attempt to evaluate the content of whatever doctrine a particular organization claims is religious, provided the particular beliefs of the organization are truly and sincerely held by those professing them and the practices are not illegal or contrary to public policy.

CHURCH CON’T

- Websites have struggled under the association test.
- Courts are concerned about tax-avoidance schemes with few and/or related members
- Many courts have required that a church perform sacerdotal functions and have suggested that a church be interpreted in its traditional sense.
- Television: Christian Broadcast Network, Trinity Broadcasting Network and Daystar Television for an interesting report on televangelism see:
  https://www.npr.org/2014/04/01/282496855/can-a-television-network-be-a-church-the-irs-says-yes
RELIGIOUS ORDER

- Rev. Proc. 91-20 provides characteristics of a religious order for the purposes of FICA taxes:
  - The organization is described in section 501(c)(3) of the Code.
  - The members of the organization vow to live under a strict set of rules requiring moral and spiritual self-sacrifice and dedication to the goals of the organization at the expense of their material well-being.
  - The members of the organization, after successful completion of the organization’s training program and probationary period, make a long-term commitment to the organization (normally more than two years).
  - The organization is, directly or indirectly, under the control and supervision of a church or convention or association of churches, or is significantly funded by a church or convention or association of churches.
  - The members of the organization normally live together as part of a community and are held to a significantly stricter level of moral and religious discipline than that required of lay church members.
  - The members of the organization work or serve full-time on behalf of the religious, educational, or charitable goals of the organization.
  - The members of the organization participate regularly in activities such as public or private prayer, religious study, teaching, care of the aging, missionary work, or church reform or renewal.

RELIGIOUS ORDER CONT’D

- In determining whether an organization is a religious order, all the facts and circumstances must be considered. Generally, the presence of all the above characteristics is determinative that the organization is a religious order.
- For purposes of IRC Section 170 the term religious order is subsumed under the term church.
INTEGRATED AUXILIARY IRC SECTION 6033

• Reg. 1.6033-2(h) The term integrated auxiliary of a church means an organization that is —
  – Described both in sections 501(c)(3) and 509(a)(1), (2), or (3);
  – Affiliated with a church or a convention or association of churches; and
  – Internally supported.
• Affiliation.
  – The organization is covered by a group exemption letter issued under applicable administrative procedures
  – The organization is operated, supervised, or controlled by or in connection with a church or a convention or association of churches; or
  – Relevant facts and circumstances show that it is so affiliated.

INTEGRATED AUXILIARY IRC SECTION 6033

• Facts and circumstances. Relevant facts and circumstances include the following factors:
  – The organization's enabling instrument or by-laws affirm that the organization shares common religious doctrines, principles, disciplines, or practices with a church or a convention or association of churches;
  – A church or a convention or association of churches has the authority to appoint or remove, or to control the appointment or removal of, at least one of the organization's officers or directors;
  – The corporate name of the organization indicates an institutional relationship with a church or a convention or association;
  – The organization reports at least annually on its financial and general operations to a church or a convention or association of churches;
  – An institutional relationship between the organization and a church or a convention or association of churches is affirmed by the church, or convention or association; and
  – In the event of dissolution, the organization's assets are required to be distributed to a church or a convention or association of churches, or to an affiliate of such church, convention or association.
INTEGRATED AUXILIARY IRC SECTION 6033

- **Internal support.** An organization is internally supported, unless it both
  - Offers admissions, goods, services, or facilities for sale, other than on an incidental basis, to the general public (except goods, services, or facilities sold at a nominal charge or for an insubstantial portion of the cost); and
  - Normally receives more than 50 percent of its support from a combination of governmental sources, public solicitation of contributions, and receipts from the sale of admissions, goods, performance of services, or furnishing of facilities in activities that are not unrelated trades or businesses.
- **Special rule.** Men's and women's organizations, seminaries, mission societies, and youth groups that satisfy the first two requirements are integrated auxiliaries of a church regardless of whether such an organization meets the internal support requirement.

TAX-EXEMPTION

- Organized and operated for exclusively for religious, education, scientific, or other charitable purpose.
- No substantial part of its activity may be attempting to influence legislation.
- The organization may not intervene in political campaigns.
- The organization’s purpose and activities may not be illegal or violate public policy.
- Their net earnings may not inure to any private individual.
- They must not provide substantial benefits to private interests.
PUBLIC CHARITY STATUS

- Organizations that qualify as a church under IRC Section 509 are not subject to the private foundation rules.

RECOGNITION OF TAX-EXEMPTION AND FORM 1023

- IRC Section 508 requires that after October 9, 1969 charitable organizations are required to file Form 1023, but an exception is allowed for churches, their integrated auxiliaries, and conventions or associations of churches. Therefore, these organizations are treated as tax-exempt without formal recognition by the IRS.
  - No determination letter.
- Group Exemption Number (GEN):
- Required Form 1023: Religious organization are required to apply to the IRS for recognition.
INFORMATIONAL RETURNS

- IRC Section 6033
  - Tax Reform Act of 1969;
  - Mandatory exemptions for integrated auxiliaries of a church or convention or association of churches;
  - Discretionary exceptions: any exclusively religious activity of any religious order;
  - A mission society (other than an organization described in section 509(a)(3)) sponsored by or affiliated with one or more churches or church denominations, more than one-half of the activities of which society are conducted in, or directed at persons in foreign countries;
  - An educational organization (below college level) that is described in section 170(b)(1)(A)(ii), that has a program of a general academic nature, and that is affiliated (within the meaning of paragraph (h)(2) of this section) with a church or operated by a religious order.

LIQUIDATION, DISSOLUTION, TERMINATION

- IRC Section 6043 provides that no return for liquidation, dissolution or termination shall be required from churches, their integrated auxiliaries, conventions or associations of churches.
CHARITABLE DEDUCTION

• Generally, churches are subject to the 50 percent public charity deduction rules.
• All of the general substantiation and deduction rules apply to churches and religious organizations.
• Intangible religious benefits are disregarded under the quid pro quo rules.
  – Admission
  – Ceremonies
  – De minimus tangible benefits, such as wine and snacks
  – Not travel, consumer good, tuition, or other items typically for sale

FEDERAL UNEMPLOYMENT TAX

• Wages to employees of churches and religious organizations are subject to FICA (Social Security and Medicare) unless:
  – Wages are paid for services performed by a duly ordained minister of a church in the exercise of her ministry or by a member of a religious order in the exercise of duties required by such order.
  – A church that is opposed to the payment of Social Security and Medicare tax for religious reasons files Form 8274
• A church is not required to withhold income tax from the compensation it pays to its duly ordained ministers for performing services in the exercise of their ministry.
FEDERAL UNEMPLOYMENT TAX CON’T

• Churches and religious organizations are not liable for Federal Unemployment Tax Act tax.
  – Churches or convention or association of churches
  – Organization that is operated primarily for religious purposes and that is operated, supervised, controlled, or principally supported by a church or convention or association of churches.
  – A duly ordained minister of a church in exercise of their ministry or by a member of a religious order in the exercise of duties required by the order.
  – Unincorporated church-controlled elementary or secondary school.

PARSONAGE

• A minister’s gross income does not include the fair rental value (and utilities) of a home provided or a housing allowance paid as part of the minister’s compensation for services performed that are the duties of a minister (and used for such purposes including utilities and repairs).

• The amount is the lesser of
  – Amount actually used to provide a home,
  – The amount designated as a housing allowance
  – The fair rental value

• Reg. 1.107-1(a) provides that ministerial services include sacerdotal functions, conduct of religious worship and the control, conduct, and maintenance of religious organizations under the authority of a church.

• Minister means imam, rabbi, and members of clergy of all religions.
**UNRELATED BUSINESS INCOME TAX AND FORM 990-T**

- Churches and religious organizations may engage in unrelated business activities so long as the activities are not a substantial part of the organization’s activities.
- Net income from such activities is subject to income tax:
  - The activity constitutes a trade or business
  - The trade or business is regularly carried on and
  - The trade or business is not substantially related to the exempt purpose of the organization.
- File Form 990-T

**EXCEPTIONS TO UBIT**

- Substantially all the work is performed by volunteers. St. Joseph Farms v. Commissioner 85 T.C. 9 (1985).
- The activity is conducted by the organization primarily for the convenience of members.
- The trade or business involves the selling of merchandise substantially all of which was donated.
- Parking Fees: Maybe rental
IRC Section 501(h) Election

- Churches must use the substantial part test because they are not eligible to use the 501(h) election.
- Whether a church’s lobbying constitutes a substantial part of its overall activities is determined on the facts and circumstances.
  - Expenditures
  - Time
- Religious organizations are eligible for the 501(h) election.

Audit

- IRC Section 7611: The IRS is limited in its authority to initiate an audit on a church or convention or association of churches.
- To conduct an audit, a high-level Treasury official must reasonably believe based on a written statement of the facts and circumstances the organization may not qualify for tax-exemption or may not be paying unrelated business income tax due.
- Doesn’t apply to
  - Routine request for information
  - Criminal investigations
Questions?

**FEDERAL CIVIL RIGHTS LAWS**

- What are the notable ones?
  - Title VII of the Civil Rights Act of 1964
  - Title VI of the Civil Rights Act of 1964
  - Title IX of the Educational Amendments of 1972
  - Section 504 of the Rehabilitation Act of 1973
  - The Americans with Disabilities Act of 1990
EMPLOYMENT

• Title VII
  – Prohibits employers with 15+ employees from discriminating on the basis of race, color, religion, sex, and national origin
  – What does this mean for religious organizations?

RELIGIOUS ORGANIZATION EXEMPTION

• Title VII “shall not apply … to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.”
  – 42 U.S. Code § 2000e–1(a)
RELIGIOUS ORGANIZATION EXEMPTION CONT’D

• In short, religious organizations can legally discriminate on the basis of religion in hiring and firing decisions under federal law.
  – Note state laws may differ (but not Oregon).
• EEOC Guidance: “Under Title VII, religious organizations are permitted to give employment preference to members of their own religion.”
• It does not permit discrimination on the basis of race, color, national origin, sex, age, or disability.

WHAT QUALIFIES AS A “RELIGIOUS ORGANIZATION?”

• Spencer v. World Vision 619 F.3d 1109 (9th Cir. 2010)
  – World Vision terminated employees who held contrary beliefs about the deity of Jesus and the Trinity.
  – World Vision argued they were a religious organization and exempt from Title VII.
  – 9th Circuit agreed, but with three different opinions.
**WHAT Qualifies as a “Religious Organization?” Cont’d**

- **O'Scannlain: Yes because:**
  - nonprofit
  - articles of incorporation state religious purpose
  - activities further religious purpose
  - represents to public it is religious

- **Kleinfeld: Yes because:**
  - Charges a nominal fee for its services (does not require nonprofit status)

- **Berzon: No because:**
  - Only intended for churches and similar entities

---

**Ministerial Exception**

- Bars claims concerning the employment relationship between a religious organization and its ministers.

  - Teacher brought a claim of retaliation under the ADA.
  - Court held that the ministerial exception barred not only claims brought by “ministers” in the traditional sense, but to a broad range of employees who assist religious institutions in carrying out their mission.
MINISTERIAL EXCEPTION CONT’D

• Four Factors:
  – Employee’s Title
  – Substance of the Title
  – Employee’s Own Use of the Title
  – Important Religious Functions the Employee Performs

• The Supreme Court is preparing to weigh in again on the matter of how much “religion” is required.
  – Easy Case: Pastor
  – Hard Case: Exercise Science teacher

EDUCATION

• Title IX
  – Generally prohibits educational institutions that receive federal funds from excluding, separating, denying benefits to, or otherwise treating students differently on the basis of sex.
TITLE IX RELIGIOUS EXEMPTION

• Title IX does not apply when:
  – Educational institution is controlled by a religious organization and,
  – Title IX would be inconsistent with the religious tenets of the organization.
  • 20 U.S.C. § 1681(a)(3)

TITLE IX RELIGIOUS EXEMPTION CONT’D

• An institution will generally be “controlled by a religious organization” if one of the following is true:
  – It is a school specifically to teach students to become ministers of religion, enter a religious vocation, or prepare them to teach theological subjects.
  – It requires a commitment of faith or belief in the religion of the organization that its controlled by, from its faculty, students, or employees.
  – Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

  See U.S. Dept. of Education:
  https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html
TITLE IX RELIGIOUS EXEMPTION CONT’D

- To claim the exemption, submit a written statement identifying which provisions of Title IX conflicts with a specific religious belief.
  - 34 C.F.R. § 106.12
- Can be invoked after a complaint is filed.
- Obama Administration: Published a list of schools that requested an exemption (aka “Shame” list).
- Trump Administration: Reversed policy
  - Additionally, schools do not have to request the exemptions in advance or notify the DOE.

TITLE VI

- Prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance.
- As President Kennedy stated:
  - “Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.”
**TITLE VI CONT’D**

- “Programs or Activities” includes:
  - Admissions, recruitment, financial aid, student services, athletics, housing, etc…
- Notables:
  - It does not prohibit discrimination on the basis of religion.
  - It does not include an exemption for religious organizations.
  - Dec. 11, 2019: Trump issued an Executive Order including discrimination against Jews within Title VI.
    

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**PUBLIC ACCOMMODATIONS**

- What is a place of public accommodation?
  - Examples include: hotels, restaurants, theaters, stores, banks, day care centers, private schools, and museums.
  - Also covers private businesses that offer classes or testing centers, i.e. GED, SAT, LSAT, GRE.
PUBLIC ACCOMMODATIONS AND TITLE III OF THE ADA

- Title III of the ADA does not apply to a “religious entity.”
  - 28 CFR 36.102(e)
- “Religious Entity” is defined as a “religious organization, including place of worship.”
  - 28 CFR 36.104
- The exemption covers all of the activities of a religious entity, whether religious or secular.
  - Ex: Day Care Center need not be handicapped accessible

PUBLIC ACCOMMODATIONS AND SECTION 504 OF THE REHABILITATION ACT

- Don’t forget about the Rehabilitation Act.
- Applies to any organization or business that receives federal funding.
- No religious organization exemption!
- So, if you receive federal funding, for example, you:
  - Must ensure access to goods and services,
  - Make reasonable policy modifications, and
  - Communicate effectively with individuals who have vision, hearing, or speech disabilities.
PUBLIC ACCOMMODATIONS AND TITLE II OF THE CIVIL RIGHTS ACT

• “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination on the ground of race, color, religion, or national origin.”
  – 42 U.S.C. §2000a (a)

• No religious organization exemption.

PUBLIC ACCOMMODATIONS AND BATHROOMS AND BAKERIES

• Bathrooms:
  – Federal law does not cover sex, gender, or gender-identity.
  – So, mandating a church or religious organization’s bathroom policy would have to come from state law.
  – Oregon law exempts churches and religious institutions, ORS 659A.006(3).
  – First Amendment defense
PUBLIC ACCOMMODATIONS AND BATHROOMS AND BAKERIES

• Bakeries
    • Mr. Phillips, bakery owner, argued that to create custom cakes for a same-sex wedding violated his First Amendment right, although he offered to sell other goods.
    • Supreme Court did not answer the question. Instead ruled that the state agency displayed so much animus toward religion that it violated the First Amendment.
    • 7-2 decision for Mr. Phillips.

TRUMP ADMINISTRATION DEVELOPMENTS

• Department of Labor announced a proposed rule to expand the Title VII “religious organization” exemption to all federal contractors, including for-profit organizations.
• Department of Education announced a proposed rule which purports to:
  – create a level playing field between religious and secular organizations for grant programs, and religious and secular student groups on college campuses
  – clarify what it means to be “controlled by a religious organization for Title IX exemptions,” and
  – ensure that public universities are complying with the First Amendment
Chapter 5

Low-Income Housing

TRELL ANDERSON
Northwest Housing Alternatives
Milwaukie, Oregon

MARK KANTOR
Kantor Taylor PC
Seattle, Washington

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ADVANCED ADVISING AND ADVOCACY FOR NONPROFIT ENTITIES

Developing Affordable Housing

Mark Kantor, Shareholder, Kantor Taylor

Trell Anderson, Executive Director, Northwest Housing Alternatives
Here are 10 statistics that outline the U.S. housing crisis:

1. **24.7%**: U.S. renters who spend more than half their income on rent.
2. **49.5%**: Those who spend more than the federal threshold of “affordable” (30% of income).
3. **7,000,000**: Nationwide shortage of affordable homes for low-income renters.
4. **552,830**: People experiencing homelessness on a single night in 2018.
5. **7,400,000**: Americans forced to move in with friends or family.
6. **32%**: Increase in median rent from 2001 to 2015.

7. **97%**: Increase in the number of homes renting for $2,000 or more between 2005 and 2015.

8. **80%**: U.S. markets where home prices are growing faster than wages.

9. **1%**: U.S. counties where a fair-market one-bedroom rental home is affordable for a full-time minimum-wage worker.

10. **103**: Weekly hours worked at minimum wage needed to **afford a one-bedroom** home at national average fair-market rent.

Source: Inthesetimes.com

Regionally:

- Seattle study to end homelessness - $1 Billion to both build units and support people earning less than 30% MFI

- Project Homeless is a Seattle Times initiative that explores and explains the region’s complex, troubling problem of homelessness.

- **A Home for Everyone, Multnomah County** - Since early 2015 alone, rents in our community have risen 20 times faster than the median income, to more than $1,100 a month for a one-bedroom apartment, according to survey data from Multifamily NW. Meanwhile, nearly 20,000 people in Multnomah County rely on federal disability checks that top out at $735 a month.

- Oregon Department of Education reports that **21,000 kids in schools** are homeless across the state.
Northwest Housing Alternatives

Our mission is to provide opportunity through housing.

- Founded in 1982 in Clackamas County to provide shelter for homeless families and develop affordable housing
- Became a statewide housing development organization during the 90’s by acquiring “expiring” properties from private developers who used HUD funds in the 70’s and 80’s to build and operate projects.

Today – Nearly 2,000 units in portfolio in 16 counties across Oregon
  Half for seniors, Half for families
  53 Group homes for people with intellectual/developmental disabilities

500+ units in the production pipeline ranging from leasing and stabilization, to convert to permanent finance, to having securing development subsidy and moving into aggressive predevelopment activities, to close on a construction loan and start actual construction (1 year for pre-dev + 1 year for construction)

Northwest Housing Alternatives Strategic Plan

Six key components:
- **Racial Equity, Diversity, and Inclusion**
  - To eliminate racial inequities in housing outcomes, we center our work on racial justice and commit to becoming an anti-racist organization
- **Environmental Sustainability**
  - To be better environment stewards, we focus our work on developing housing that achieves environmental protections goals and standards, and increasing awareness of energy and resource conservations
- **People**
  - Provide services that create stability and transform lives, offering opportunities in the context and form that people with diverse backgrounds need to thrive
- **Places**
  - Develop and manage exceptional, energy-efficient affordable housing that creates more mission-based housing opportunities statewide
- **Partnerships**
  - Explore and engage in innovative and inclusive partnerships that deepen outcomes for people across the state
- **Process**
  - Support organizational excellence, inclusivity and transparency to achieve equity and diversity outcomes among our people, in our places, and within our partnerships
Northwest Housing Alternatives

Programs and Initiatives

• 500+ units in planning phase: site control and seeking required funding subsidies to develop the projects

• Resident Services – focused on eviction prevention and housing stability (stability rating)
  - Senior Health and Housing
  - Supporting Oregon’s Kids

• Annie Ross House – only full family, full-time shelter in Clackamas County with 8 rooms, on-site around the clock staff, case management to rapidly rehouse families and keep kids in school

Past Projects

Springwater Commons
Family property built in 2004
36 units
Average annual income: $39,658
110 adults
97 children

Alma Gardens
Senior (55+) property built in 2013
44 units
Average annual income: $17,754
45 seniors
NHA Campus
Opened 2019
Milwaukie, OR

New and expanded Annie Ross House – family homeless shelter

Walsh Commons
28 units of affordable housing (9% LIHTC + HOME + PBV + FHLB + OAHTC + NOAH)

NHA Headquarters
New office space for NHA – supporting up to 50 employees
Nonprofits and Housing Development

Case Study of NHA Campus Development

Mark B. Kantor
February 6, 2020

Nonprofit Project List
Sources and Uses

NHA Campus Combined Development Sources

<table>
<thead>
<tr>
<th>Costs/USES</th>
<th>Office</th>
<th>Shelter</th>
<th>Housing</th>
<th>Shelter/Office</th>
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Funding Sources

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<tr>
<th>Total Funding Sources</th>
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<th>5,574,126</th>
<th>14,349,452</th>
<th>6,377,226</th>
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<tr>
<td>LIHTC Equity</td>
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<td>$8,467,118</td>
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<tr>
<td>CDBG Grant</td>
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<td>$245,000</td>
<td>$245,000</td>
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<td>$245,000</td>
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<td>HOME Grant</td>
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<td>$500,000</td>
<td>$500,000</td>
<td>$500,000</td>
<td>$500,000</td>
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<td>Meyer Memorial Trust</td>
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<td>$250,000</td>
<td>$250,000</td>
<td>$250,000</td>
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<tr>
<td>FHLB Shelter</td>
<td>$320,000</td>
<td>$320,000</td>
<td>$320,000</td>
<td>$320,000</td>
<td>$320,000</td>
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<tr>
<td>Permanent Loan NOAH</td>
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<td>$2,850,000</td>
<td>$2,850,000</td>
<td>$2,850,000</td>
<td>$2,850,000</td>
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<tr>
<td>SNAP Loan-Heritage</td>
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<td>$3,529,126</td>
<td>$4,332,226</td>
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<td>NHA Construction Loan</td>
<td>$722,664</td>
<td>$722,664</td>
<td>$722,664</td>
<td>$722,664</td>
<td>$722,664</td>
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<td>Capital Campaign Cash</td>
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<td>$1,480,000</td>
<td>$2,714,670</td>
<td>$2,714,670</td>
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<td>Deferred Developer Fee</td>
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<td>$325,000</td>
<td>$325,000</td>
<td>$325,000</td>
<td>$325,000</td>
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<td>Other Cash into Office from NHA</td>
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<td>$178,000</td>
<td>$178,000</td>
<td>$178,000</td>
<td>$178,000</td>
</tr>
</tbody>
</table>

Financing

- LIHTC ($8,467,115)
- CDBG ($245,000)
- Home ($500,000)
- MMT ($250,000)
- FHLB ($320,000)
- Perm. Loan Housing ($2,856,000)
- Perm. Loan Shelter ($4,332,226)
## Chapter 5—Low-Income Housing

### 2019 -- Income Limits for LIHTC & Tax-Exempt Bonds

**Multnomah County, Oregon**

For more detailed MTSP income limit information, please visit HUDs website:

[http://www.huduser.org/portal/datasets/mtsp.html](http://www.huduser.org/portal/datasets/mtsp.html)

<table>
<thead>
<tr>
<th>Actual 2019 Median</th>
<th>$87,900</th>
<th>(applies to projects in existence before January 1, 2009)</th>
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</thead>
<tbody>
<tr>
<td>2019 HERA Special Median</td>
<td>$88,400</td>
<td></td>
</tr>
</tbody>
</table>

### What Income Limit Should You Use?

#### Is the location considered RURAL by USDA? (If yes, it is eligible to use the Non-Metro Median for 9% projects)

- **Not All**
  - Multnomah County is considered urban within its major cities, to verify your address and accuracy, please visit:
    - [http://eligibility.sc.egov.usda.gov/eligibility/welcomeAction.do?pageAction=sfp&NavKey=property@12](http://eligibility.sc.egov.usda.gov/eligibility/welcomeAction.do?pageAction=sfp&NavKey=property@12)
  - The following income limits indicate the highest income limit allowable--

#### Did the project exist in 2008?

<table>
<thead>
<tr>
<th>If NO, did it exist?</th>
<th>-- 4% Tax Credit Project</th>
<th>-- 9% Tax Credit Project</th>
</tr>
</thead>
<tbody>
<tr>
<td>Between 1/1/09 - 4/23/19</td>
<td>Use: Actual Incomes 2019</td>
<td>Use: Actual Incomes 2019</td>
</tr>
<tr>
<td>On or After 4/24/19</td>
<td>Use: Actual Incomes 2019</td>
<td>Use: Actual Incomes 2019</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>% MFI</th>
<th>1 Pers</th>
<th>2 Pers</th>
<th>3 Pers</th>
<th>4 Pers</th>
<th>5 Pers</th>
<th>6 Pers</th>
<th>7 Pers</th>
<th>8 Pers</th>
</tr>
</thead>
<tbody>
<tr>
<td>30%</td>
<td>$18,480</td>
<td>$21,120</td>
<td>$23,760</td>
<td>$26,370</td>
<td>$28,500</td>
<td>$30,600</td>
<td>$32,700</td>
<td>$34,830</td>
</tr>
<tr>
<td>35%</td>
<td>$21,560</td>
<td>$24,640</td>
<td>$27,720</td>
<td>$30,765</td>
<td>$33,250</td>
<td>$35,700</td>
<td>$38,150</td>
<td>$40,635</td>
</tr>
<tr>
<td>40%</td>
<td>$24,640</td>
<td>$28,160</td>
<td>$31,680</td>
<td>$35,160</td>
<td>$38,000</td>
<td>$40,800</td>
<td>$43,600</td>
<td>$46,440</td>
</tr>
<tr>
<td>45%</td>
<td>$27,720</td>
<td>$31,680</td>
<td>$35,640</td>
<td>$39,555</td>
<td>$42,750</td>
<td>$45,900</td>
<td>$49,050</td>
<td>$52,245</td>
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<tr>
<td>50%</td>
<td>$30,800</td>
<td>$35,200</td>
<td>$39,600</td>
<td>$43,950</td>
<td>$47,500</td>
<td>$51,000</td>
<td>$54,500</td>
<td>$58,050</td>
</tr>
<tr>
<td>55%</td>
<td>$33,880</td>
<td>$38,720</td>
<td>$43,560</td>
<td>$48,345</td>
<td>$52,250</td>
<td>$56,100</td>
<td>$59,950</td>
<td>$63,855</td>
</tr>
<tr>
<td>60%</td>
<td>$36,960</td>
<td>$42,240</td>
<td>$47,520</td>
<td>$52,740</td>
<td>$57,000</td>
<td>$61,200</td>
<td>$65,400</td>
<td>$69,660</td>
</tr>
<tr>
<td>80%</td>
<td>$49,280</td>
<td>$56,320</td>
<td>$63,360</td>
<td>$70,320</td>
<td>$76,000</td>
<td>$81,600</td>
<td>$87,200</td>
<td>$92,880</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>% MFI</th>
<th>1 Pers</th>
<th>2 Pers</th>
<th>3 Pers</th>
<th>4 Pers</th>
<th>5 Pers</th>
<th>6 Pers</th>
<th>7 Pers</th>
<th>8 Pers</th>
</tr>
</thead>
<tbody>
<tr>
<td>30%</td>
<td>$18,570</td>
<td>$21,240</td>
<td>$23,880</td>
<td>$26,520</td>
<td>$28,650</td>
<td>$30,780</td>
<td>$32,910</td>
<td>$35,010</td>
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<tr>
<td>35%</td>
<td>$21,665</td>
<td>$24,780</td>
<td>$28,160</td>
<td>$31,680</td>
<td>$35,160</td>
<td>$38,000</td>
<td>$40,800</td>
<td>$43,600</td>
</tr>
<tr>
<td>40%</td>
<td>$24,760</td>
<td>$28,320</td>
<td>$31,840</td>
<td>$35,360</td>
<td>$38,200</td>
<td>$41,040</td>
<td>$43,880</td>
<td>$46,680</td>
</tr>
<tr>
<td>45%</td>
<td>$27,855</td>
<td>$31,860</td>
<td>$35,820</td>
<td>$39,780</td>
<td>$42,975</td>
<td>$46,170</td>
<td>$49,365</td>
<td>$52,155</td>
</tr>
<tr>
<td>50%</td>
<td>$30,950</td>
<td>$35,400</td>
<td>$39,800</td>
<td>$44,200</td>
<td>$47,750</td>
<td>$51,300</td>
<td>$54,850</td>
<td>$58,350</td>
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<tr>
<td>55%</td>
<td>$34,045</td>
<td>$38,940</td>
<td>$43,780</td>
<td>$48,620</td>
<td>$52,525</td>
<td>$56,430</td>
<td>$60,335</td>
<td>$64,185</td>
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<tr>
<td>60%</td>
<td>$37,140</td>
<td>$42,480</td>
<td>$47,760</td>
<td>$53,040</td>
<td>$57,300</td>
<td>$61,560</td>
<td>$65,820</td>
<td>$70,020</td>
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<tr>
<td>80%</td>
<td>$49,520</td>
<td>$56,640</td>
<td>$63,680</td>
<td>$70,720</td>
<td>$76,400</td>
<td>$82,080</td>
<td>$87,760</td>
<td>$93,360</td>
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</tbody>
</table>

### Notes:

1: Only projects in Rural Areas are able to use the Non-Metro Medians, otherwise use applicable 4% limits. Projects with previous "Rural" designations that are no longer considered to be located in rural areas (by the USDA) are permitted to use the previous year's National Non-Metro income limits should they be higher than the current year's income limits. The National Non-Metro income limits are online here:


2: Exist - defined by OHCS as the project's placed-in-service (PIS) date. Projects consisting of multiple buildings, where each building is being treated as part of a multiple building project (see line 8b on IRS Form 8609), will be considered as being "in existence" provided at least one building was PIS during the affected year.

3: Actual Median Income Limit indicated here is based on income limits though it is not necessarily the HUD Area Median Income

The incomes limits listed above are based on the Multifamily Tax Subsidy Program (MTSP) income limits published by HUD on April 24, 2019. Per Revenue Ruling 94-57, owners will have until June 8, 2019 to implement these new MTSP income limits (45 days from their effective date). Please note that all definitions and explanations herein may be subject to change upon later IRS and/or HUD clarification.

OHCS, 4/29/2019
Chapter 5—Low-Income Housing

2019 -- Rents for LIHTC & Tax-Exempt Bonds

**Multnomah County, Oregon**

For more detailed MTSP income limit information, please visit HUDs website:  
http://www.huduser.org/portal/datasets/mtsp.html

| Actual 2019 Median | $87,900  
|-------------------|---------  
| 2019 HERA Special Median | $88,400 (applies to projects in existence before January 1, 2009) |

Median Incomes calculated based on a 4-person household

**What Rents Should You Use?**

Is the location considered RURAL by USDA? (If yes, it is eligible to use the Ntnl Non-Metro Median for 9% projects)

**Not All**  
Multnomah County is considered urban within it's major cities, to verify your address and accuracy, please visit:  
http://eligibility.sc.egov.usda.gov/eligibility/welcomeAction.do?pageAction=sfp&NavKey=property@12

<table>
<thead>
<tr>
<th>Did the project exist in 2008?</th>
<th>-- The following rent limits indicate the highest rents allowable --</th>
</tr>
</thead>
<tbody>
<tr>
<td>If NO, did it exist:</td>
<td>Use: HERA Special 2019</td>
</tr>
</tbody>
</table>
| Between 1/1/09 - 4/23/19       | -- 4% Tax Credit Project  
| On or After 4/24/19            | -- 9% Tax Credit Project  
| Use: Actual Incomes 2019       | Use: Actual Incomes 2019  
| Use: Actual Incomes 2019       | Use: Actual Incomes 2019  

**Rents based on Actual Income Limits 2019**

<table>
<thead>
<tr>
<th>% MFI</th>
<th>0 Bdrm</th>
<th>1 Bdrm</th>
<th>2 Bdrm</th>
<th>3 Bdrm</th>
<th>4 Bdrm</th>
<th>5 Bdrm</th>
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</thead>
<tbody>
<tr>
<td>30%</td>
<td>$462</td>
<td>$495</td>
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<td>$844</td>
</tr>
<tr>
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<td>$539</td>
<td>$577</td>
<td>$693</td>
<td>$800</td>
<td>$892</td>
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<td>$660</td>
<td>$792</td>
<td>$914</td>
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<td>$1,125</td>
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<tr>
<td>45%</td>
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<td>$891</td>
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<tr>
<td>50%</td>
<td>$770</td>
<td>$825</td>
<td>$990</td>
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<tr>
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<td>$1,089</td>
<td>$1,257</td>
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<td>$1,547</td>
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<tr>
<td>60%</td>
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<td>$990</td>
<td>$1,188</td>
<td>$1,371</td>
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<td>80%</td>
<td>$1,232</td>
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<td>$1,584</td>
<td>$1,829</td>
<td>$2,040</td>
<td>$2,251</td>
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</table>

**Rents based on HERA Special Income Limits 2019**

<table>
<thead>
<tr>
<th>% MFI</th>
<th>0 Bdrm</th>
<th>1 Bdrm</th>
<th>2 Bdrm</th>
<th>3 Bdrm</th>
<th>4 Bdrm</th>
<th>5 Bdrm</th>
</tr>
</thead>
<tbody>
<tr>
<td>30%</td>
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<td>$497</td>
<td>$597</td>
<td>$689</td>
<td>$769</td>
<td>$849</td>
</tr>
<tr>
<td>35%</td>
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<td>$580</td>
<td>$696</td>
<td>$804</td>
<td>$897</td>
<td>$990</td>
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<td>$663</td>
<td>$796</td>
<td>$919</td>
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<td>$1,132</td>
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<tr>
<td>45%</td>
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</tr>
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<td>50%</td>
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<td>$995</td>
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<td>$1,094</td>
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<td>$995</td>
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<td>$1,698</td>
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<tr>
<td>80%</td>
<td>$1,238</td>
<td>$1,327</td>
<td>$1,592</td>
<td>$1,839</td>
<td>$2,052</td>
<td>$2,264</td>
</tr>
</tbody>
</table>

Notes:

1: Only projects in Rural Areas are able to use the Non-Metro Medians, otherwise use applicable 4% limits. Projects with previous “Rural” designations that are no longer considered to be located in rural areas (by the USDA) are permitted to use the previous year's National Non-Metro income limits should they be higher than the current year's income limits. The National Non-Metro income limits are online here:  

2: Exist - defined by OHCS as the project's placed-in-service (PIS) date. Projects consisting of multiple buildings, where each building is being treated as part of a multiple building project (see line 8b on IRS Form 8609), will be considered as being "in existence" provided at least one building was PIS during the affected year.

3: Actual Median Income Limit indicated here is based on income limits though it is not necessarily the HUD Area Median Income

The rent limits listed above are based on the Multifamily Tax Subsidy Program (MTSP) income limits published by HUD on April 24, 2019. Per Revenue Ruling 94-57, owners will have until June 8, 2019 to implement these new MTSP rent limits (45 days from their effective date). If the gross rent floors (established at credit allocation or the project's PIS date; refer to Revenue Procedure 94-57) are higher than the current rent limits, the gross rent floors may be used. However, income limits are still based on the current applicable rate. Utility allowances must continue to be deducted from rents to achieve the maximum tenant rents allowed. Please note that all definitions and explanations herein may be subject to change upon later IRS and/or OHCS clarification.
Chapter 5—Low-Income Housing

2019 -- Income Limits for LIHTC & Tax-Exempt Bonds

Baker County, Oregon

For more detailed MTSP income limit information, please visit HUDs website:
http://www.huduser.org/portal/datasets/mtsp.html

<table>
<thead>
<tr>
<th></th>
<th>Actual 2019 Median 1</th>
<th>Ntrl Non-Metro 2019 Median</th>
<th>2019 HERA Special Median</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$57,500</td>
<td>$60,600</td>
<td>$61,800</td>
</tr>
<tr>
<td>(applies to 9% credits only in non-metro areas)</td>
<td>(applies to projects in existence before January 1, 2009)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Median incomes calculated based on a 4-person household

What Income Limit Should You Use?

Is the location considered RURAL by USDA? (If yes, it is eligible to use the Ntrl Non-Metro Median for 9% projects)

YES

Baker County is considered Rural. To verify current accuracy, please visit:

--The following income limits indicate the highest income limit allowable--

Did the project exist¹ in 2008?

Use: HERA Special 2019

If NO, did it exist²:

Between 1/1/09 - 4/23/19

-- 4% Tax Credit Project

Use: Actual Incomes 2019

-- 9% Tax Credit Project

Use: Ntrl Non-Metro 2019 ³

On or After 4/24/19

Use: Actual Incomes 2019

Use: Ntrl Non-Metro 2019 ³

<table>
<thead>
<tr>
<th>Actual Income Limits 2019</th>
</tr>
</thead>
<tbody>
<tr>
<td>% MFI</td>
</tr>
<tr>
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<thead>
<tr>
<th>HERA Special Income Limits 2019</th>
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<tbody>
<tr>
<td>% MFI</td>
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Notes:

1: Only projects in Rural Areas are able to use the Non-Metro Medians, otherwise use applicable 4% limits. Projects with previous “Rural” designations that are no longer considered to be located in rural areas (by the USDA) are permitted to use the previous year’s National Non-Metro income limits should they be higher than the current year’s income limits. The National Non-Metro income limits are online here:

2: Exist - defined by OHCS as the project's placed-in-service (PIS) date. Projects consisting of multiple buildings, where each building is being treated as part of a multiple building project (see line 8b on IRS Form 8609), will be considered as being “in existence” provided at least one building was PIS during the affected year.

3: Actual Median Income Limit indicated here is based on income limits though it is not necessarily the HUD Area Median Income

The income limits listed above are based on the Multifamily Tax Subsidy Program (MTSP) income limits published by HUD on April 24, 2019. Per Revenue Ruling 94-57, owners will have until June 8, 2019 to implement these new MTSP income limits (45 days from their effective date). Please note that all definitions and explanations herein may be subject to change upon later IRS and/or HUD clarification.

OHCS, 4/29/2019
2019 -- Rents for LIHTC & Tax-Exempt Bonds

Baker County, Oregon

For more detailed MTSP income limit information, please visit HUDs website:
http://www.huduser.org/portal/datasets/mtsp.html

<table>
<thead>
<tr>
<th>Actual 2019 Median</th>
<th>$57,500</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ntrl Non-Metro 2019 Median</td>
<td>$60,600 (applies to 9% credits only in non-metro areas)</td>
</tr>
<tr>
<td>2019 HERA Special Median</td>
<td>$61,800 (applies to projects in existence before January 1, 2009)</td>
</tr>
</tbody>
</table>

Median Incomes calculated based on a 4-person household

What Rents Should You Use?

Is the location considered RURAL by USDA? (if yes, it is eligible to use the Ntrl Non-Metro Median for 9% projects)

YES

Baker County is considered Rural. To verify current accuracy, please visit:
http://eligibility.scegov.usda.gov/eligibility/welcomeAction.do?pageAction=sfcNavKey=property@12

--The following rent limits indicate the highest rents allowable--

Did the project exist in 2008?

If NO, did it exist between 1/1/09 - 4/23/19

-- 4% Tax Credit Project

Use: Actual Incomes 2019

-- 9% Tax Credit Project

Use: Ntrl Non-Metro 2019

On or After 4/24/19

Use: Actual Incomes 2019

Use: Ntrl Non-Metro 2019

<table>
<thead>
<tr>
<th>Rents based on Actual Income Limits 2019</th>
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<tbody>
<tr>
<td>% MFI</td>
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<td>-------</td>
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<tr>
<td>30%</td>
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<tr>
<th>Rents based on HERA Special Income Limits 2019</th>
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<tr>
<td>% MFI</td>
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Notes:

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3: Actual Median Income Limit indicated here is based on income limits though it is not necessarily the HUD Area Median Income

The rent limits listed above are based on the Multifamily Tax Subsidy Program (MTSP) income limits published by HUD on April 24, 2019. Per Revenue Ruling 94-57, owners will have until June 8, 2019 to implement these new MTSP rent limits (45 days from their effective date). If the gross rent floors (established at credit allocation or the project's PIS date; refer to Revenue Procedure 94-57) are higher than the current rent limits, the gross rent floors may be used. However, income limits are still based on the current applicable rate. Utility allowances must continue to be deducted from rents to achieve the maximum tenant rents allowed. Please note that all definitions and explanations herein may be subject to change upon later IRS and/or HUD clarification.

OHCS, 4/29/2019
CLOSING INDEX

PROJECT: Development and construction of a mixed use development comprised of 28-units of affordable housing located at 2316 SE Willard Street, Milwaukie, OR 97222. Northwest Housing Alternatives owns the real estate comprised of ten individual parcels located at the site.

BORROWER: NHA Campus Redevelopment Limited Partnership, an Oregon limited partnership

GENERAL PARTNER: Willard Street Redevelopment LLC, an Oregon limited liability company

MANAGER: Northwest Housing Alternatives, Inc., an Oregon nonprofit public benefit corporation

FUNDERS:

- **Equity Investment** – Wells Fargo Community Lending and Investment
  - $8,467,118
- **Construction Loan** – Wells Fargo Community Lending and Investment
  - $8,900,000
- **Permanent Loan** – Network for Oregon Affordable Housing
  - $2,787,297
- **County HOME Loan** – Clackamas County Housing and Community Development Division
  - $500,000
- **Grant** – The Meyer Memorial Trust
  - $250,000
- **Sponsor Re-Loan** – Northwest Housing Alternatives, Inc.
  - $250,000

A. ORGANIZATIONAL DOCUMENTS

**NHA Campus Redevelopment Limited Partnership**
1. Certificate of Limited Partnership
2. Agreement of Limited Partnership
3. Proof of EIN
4. Certificate of Existence

**Willard Street Redevelopment LLC**
5. Articles of Organization
6. Operating Agreement
7. Certificate of Existence
Northwest Housing Alternatives, Inc.
8. Restated Articles of Incorporation
9. Revised Bylaws
10. Incumbency Certificate
11. IRS 501c3 Determination Letter
12. Omnibus Resolution
13. Certificate of Existence

B. CONSTRUCTION DOCUMENTS
1. A101 Construction Contract
2. Assignment of Architect Agreement
3. Assignment of Construction Contract

C. HAP DOCUMENTS
1. PBV Agreement to Enter Into Housing Assistance Payments Contract
2. HUD Approval of Subsidy Layering Review for Northwest Housing Alternatives Campus Redevelopment
3. Housing Authority of Clackamas County Letter Regarding Conditional Award of 7 Project Based Vouchers at Campus Redevelopment Project
4. Housing Authority of Clackamas County Letter Regarding Project Based Vouchers at NHA Campus Redevelopment

D. INVESTOR DOCUMENTS
1. Amended and Restated Limited Partnership Agreement
2. Guaranty
3. Asset Management Fee Agreement
4. GP Asset Management Fee Agreement
5. Development Agreement
6. Reimbursement and Assignment Agreement
7. Right of First Refusal Agreement
8. Construction Contract Rider
9. Security Agreement
10. Letter of Intent

E. LEASE DOCUMENTS
1. Ground Lease – Housing Project

F. CONSTRUCTION LOAN DOCUMENTS
1. Loan Agreement
2. Promissory Note
3. RECORDED Leasehold Deed of Trust
4. NHA Repayment Guaranty
5. Completion Guaranty
6. Hazardous Materials Indemnity Agreement
7. Pledge and Security Agreement
8. Borrowing Resolution
9. Certificate Evidencing the Authorization of the Execution of Guaranty and Indemnity and Endorsement and Hypothecation of Property (General Partner)
10. Certificate Evidencing the Authorization of the Execution of Guaranty and Indemnity and Endorsement and Hypothecation of Property (Northwest Housing Alternatives)
11. Collateral Assignment of Contract (Housing Assistance Payments Contract)
Chapter 5—Low-Income Housing

12. Assignment of Architectural Agreements and Plans and Specifications
13. Assignment of Construction Agreements
14. Assignment and Subordination of Development Fee Agreement
15. Assignment of Property Management Agreement
16. Disbursement Instruction Agreement
17. Letter of Intent
18. UCC Financing Statement

G. PERMANENT LOAN DOCUMENTS (NOAH)
1. Loan Purchase Agreement
2. Commitment Letter
3. Form of Assignment of Deed of Trust by Beneficiary
4. Form of Assignment of Loan and Loan Documents
5. Form of Release and Termination Agreement
6. Form of Loan Underwriting Documents
7. Form of OTIRO Endorsement
8. Form of Certificate of Borrower
9. Form of Amendment to Promissory Note
10. Form of Amendment to Line of Credit Instrument (Construction and Permanent Leasehold Deed of Trust with Absolute Assignment of Leases and Rents, Security Agreement and Fixture Filing)
11. Form of Pledge and Security Agreement
12. Form of Certificate and Indemnity Regarding Hazardous Substances (with Sponsor)
13. Form of Additional Loan Documents
14. Form of Certification and Estoppel (Borrower)
15. Form of Certification and Estoppel (Lessor)
16. Form of Guaranty Agreement

H. COUNTY HOME LOAN DOCUMENTS
1. HOME Loan Agreement
2. Promissory Note
3. RECORDED Trust Deed, Assignment of Rents, Security Agreement and Fixture Filing
4. RECORDED Declaration of Land Use and Restrictive Covenants
5. Commitment Letter

I. OHCS LOAN DOCUMENTS
1. RECORDED Consent to Assignment, Transfer, Assumption and Modification Agreement, Declaration of Land Use Restrictive Covenants
2. RECORDED Consent to Assignment, Transfer, Assumption and Modification Agreement, Declaration of Land Use Restrictive Covenants (Housing PLUS)

J. SPONSOR RE-LOAN DOCUMENTS
1. MMT Grant Award Promissory Note
2. RECORDED Leasehold Deed of Trust

K. OPINIONS
1. Investor Opinion
2. Lender Opinion
3. Reliance Certificate
L. **REAL ESTATE DOCUMENTS**
   1. RECORDED Shared Use Agreement
   2. RECORDED Restrictive Covenants and Easement Agreement
   3. RECORDED PGE Quit Claim Deed
   4. RECORDED PGE Utility Easement
   5. RECORDED License Agreement (Webers)
   6. RECORDED License Agreement (Town Lakes Estates)

M. **TAX CREDIT DOCUMENTS**
   1. 9% Low-Income Housing Tax Credit Declaration of Land Use Restrictive Covenants
   2. 9% Indemnity and Hold Harmless Agreement
   3. RECORDED Tripartite Agreement, Subordination, and Declaration of Restrictive Covenants
   5. Notice of Fund Availability – Reservation Letter Amendment

N. **TITLE DOCUMENTS**
   1. Owners Policy
   2. Loan Policy
   3. Request for Full Reconveyance Without Extinguishment of Debt (County)
   4. RECORDED Full Release of Declaration of Land Use Restrictive Covenants (County)
   5. RECORDED Substitution of Trustee (County)
   6. Kantor Taylor Escrow Instructions
   7. Estimated Settlement Statement
   8. Final Settlement Statement

O. **MISCELLANEOUS DOCUMENTS**
   1. RECORDED Priority and Subordination Agreement
   2. ALTA Survey
NHA Campus (SNAP Bond)
Closing Date: August 31, 2018
Matter: 447.25

CLOSING INDEX

<table>
<thead>
<tr>
<th>PROJECT:</th>
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<tbody>
<tr>
<td>Development and construction of a family shelter and new office space building located within a mixed use development comprised located at 2316 SE Willard Street, Milwaukie, OR 97222. Northwest Housing Alternatives owns the real estate comprised of ten individual parcels located at the site.</td>
</tr>
</tbody>
</table>

| BORROWER: |
| Ever Onward Campus 2018 LLC, an Oregon limited liability company |

| SOLE MEMBER AND MANAGER: |
| Northwest Housing Alternatives, Inc., an Oregon nonprofit public benefit corporation |

| FUNDERS: |
| Bank – Heritage Bank |
| Bond Issuer – State of Oregon Facilities Authority |

A. ORGANIZATIONAL DOCUMENTS

**Ever Onward Campus 2018 LLC**
1. Articles of Organization
2. Operating Agreement
3. Certificate of Existence

**Northwest Housing Alternatives, Inc.**
4. Restated Articles of Incorporation
5. Revised Bylaws
6. Incumbency Certificate
7. IRS 501c3 Determination Letter
8. Omnibus Resolution
9. Certificate of Existence

B. BOND DOCUMENTS

1. Financing Agreement
2. Preliminary Agreement
3. Tax Compliance Agreement
4. SNAP Revenue Note
5. **RECORDED Assignment of Deed of Trust, Promissory Note, and Other Note Documents**
6. **RECORDED Assignment of Promissory Note and Deed of Trust (for Security Purposes)**
7. Qualified Lender Certification
8. Certificate of Lender
9. Treasurer’s Certificate
10. Certificate #1
11. Form 8038
12. OFA Resolution No. 2018-1
13. OFA Resolution No. 2018-9
14. Bond Opinion
Chapter 5—Low-Income Housing

C. **OPINIONS**
   1. Lender Opinion
   2. Reliance Certificate

D. **TITLE DOCUMENTS**
   1. Estimated Settlement Statement
   2. Final Settlement Statement
Low-Income Housing Tax Credits

I. LIHTC PROJECT ELIGIBILITY

A. MINIMUM SET-ASIDE AND EXTENDED USE REQUIREMENTS

☐ In order for a residential rental project to constitute a qualified low-income housing project, the project must irrevocably elect to meet one of the following minimum set-aside requirements:

(1) at least 20% of the residential units must be made available to tenants with incomes at or below 50% of the area median income,

(2) at least 40% of the residential units must be made available to tenants with incomes at or below 60% of the area median income, or

(3) a portion of the residential units may be available to tenants with incomes at or below 80% provided that the average income limitations for all residential units does not exceed 60%.

☐ The minimum set-aside requirement must be met within 12 months of the date the project is placed in service and must be complied with continuously for 15 years from the start of the first taxable year in which the LIHTC is claimed.

☐ Projects are subject to a 30-year extended low-income use agreement which restricts the transferability or operation of the project for other than continued low-income use after the initial 15-year compliance period. The restrictions must be recorded as restrictive covenants binding on all subsequent transferees, except through foreclosures or transfers in lieu of foreclosure.

☐ Under the extended low-income use agreement, the property may be transferred after the expiration of the initial 15-year compliance period for continued low-income use, but the property may be converted to market rate use and disposed of only after the state housing credit agency has tried and failed to find an eligible purchaser for the property at a price based on a formula during the one-year period after receiving written notice of the owner’s intent to dispose of the property. The project owner may give notice anytime after the 14th year of the compliance period. If no purchaser is located by the housing agency and the property is converted to market rate use, a three-year transition period must be observed whereby existing low-income tenants may not be evicted and rent restrictions will continue to apply to such tenants.

☐ Project owners may allow certain rights of refusal to purchase low-income units at the expiration of the 15-year compliance period to the individual tenants, tenant cooperatives, resident management corporations, qualified nonprofit organizations, and governmental
agencies without jeopardizing the availability of the tax benefits associated with the LIHTC program.

- The project must not be a hospital, nursing home, sanitarium, life care facility, retirement home, or trailer park. However, in certain circumstances, a retirement-type facility may qualify as residential rental property notwithstanding that significant services other than housing are furnished to tenants.

- In order to qualify for LIHTC in connection with the acquisition of an existing building, such building must not have been placed in service during the preceding 10-year period. Exceptions to the 10-year placed-in-service rule exist for certain non-taxable transfers and for buildings that are substantially financed, assisted or operated under HUD, USDA or similar state housing programs.

**B. QUALIFIED LOW-INCOME HOUSING UNITS**

- The LIHTC is available only with respect to units that meet the definition of a qualified low-income housing unit.

- A qualified low-income housing unit is a unit that is:
  1. leased to an income eligible tenant (as defined below);
  2. rent-restricted (as defined below);
  3. suitable for occupancy under state and local health or building rules and regulations (although violations may be cured within a specified period of time);
  4. used on a nontransient basis, which is defined as being subject to a lease with a minimum term of 6 months, except with respect to single room occupancy (SRO) units which may be leased on a month-to-month basis;
  5. not leased to an all-student household (although dwelling units occupied by students receiving AFDC payments do not fail to qualify); and
  6. available to the general public, i.e., does not discriminate in favor of or against special populations except as allowed under HUD guidelines (e.g., preferences to certain classes of tenants such as the elderly, homeless, disabled and/or handicapped, does not violate the general public use requirement). A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants with special needs, who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group, or those who are involved in artistic or literary activities.

**C. AREA MEDIAN INCOME AND TENANT INCOME ELIGIBILITY**

- Area median incomes are published annually (as of February) by HUD.
Median income standards are adjusted for family (household) size.

The following table reflects the adjustments for one- to four-person households:

<table>
<thead>
<tr>
<th>Family Size</th>
<th>Percentage of Area Median Income 50% Standard</th>
<th>Percentage of Area Median Income 60% Standard</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>50%</td>
<td>60%</td>
</tr>
<tr>
<td>3</td>
<td>45%</td>
<td>54%</td>
</tr>
<tr>
<td>2</td>
<td>40%</td>
<td>48%</td>
</tr>
<tr>
<td>1</td>
<td>35%</td>
<td>42%</td>
</tr>
</tbody>
</table>

Each year the project owner must certify the level of low-income occupancy.

Income is defined broadly in the same manner as under HUD guidelines and is not limited to taxable income. For example, imputed interest income on below-market rate deposits in qualified continuing care facilities is to be taken into account in determining tenant income.

Tenants will still be considered to be low-income tenants provided that their income does not exceed 140% of the applicable qualifying income standard (i.e., 50%, 60% or 80% of the area median income for the current year, adjusted for family size).

When the income of a tenant exceeds 140% of the qualifying income standard, that tenant’s unit ceases to be a qualified low-income unit unless the project owner continues to rent units of comparable or smaller size that subsequently become vacant to tenants with qualifying income. Similarly, rent restrictions continue to apply to the unit until the tenant vacates the unit.

Vacated low-income units are still considered to be qualified low-income housing units (unless rented to non-eligible tenants) assuming reasonable attempts are made to rent the units and no comparable or smaller units are rented to non-eligible tenants.

D. RENT RESTRICTION AND DEFINITION OF GROSS RENT

Residential units do not constitute qualified low-income housing units unless they are rent restricted.

The gross rent paid by a tenant may not exceed 30% of the qualifying income standard (i.e., 50%, 60% or 80% of area median income for the current year, adjusted for family size).

The maximum gross rent allowable in the initial year serves as the minimum rental floor in subsequent years; therefore, a subsequent decrease in area median income will not result in a decrease in gross rent.

Gross rent is defined as the total rental or occupancy charges for a unit including all utilities except telephone. If utilities are paid directly by the tenants, a utility allowance must be provided which reduces the maximum rent that can be charged to tenants. The source of utility allowances depends on the nature of the building and the existence of any government regulation or rental assistance. Utility allowances must be updated whenever
rents are revised. An interested party may challenge a utility allowance under a designated procedure.

- Gross rent does not include any payments to third parties for the provision of meals, laundry, housekeeping and other services. However, payments for such services to the project owner would be includable in the definition of gross rent if such services are a condition of occupancy. If continual nursing, medical, or psychiatric care is provided, it will be presumed that such services are mandatory. For projects receiving credit allocations after 1991, meals provided in a common dining facility will be presumed to be mandatory if no practical alternative exists for tenants to obtain meals other than at the common dining facility.

- Project owners must determine whether or not tenants satisfy the income limitations based on actual family size, but must use unit size rather than family size as the basis for determining rent restrictions. For single room occupancy units or studios (units with no separate bedroom), the number of occupants is assumed to be one (1). For all other units, the number of occupants is assumed to be 1.5 times the number of separate bedrooms. The following table illustrates this:

<table>
<thead>
<tr>
<th>Number of Separate Bedrooms</th>
<th>Deemed Number of Occupants</th>
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</thead>
<tbody>
<tr>
<td>0–BR</td>
<td>1</td>
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<tr>
<td>1–BR</td>
<td>1-1/2</td>
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<tr>
<td>2–BR</td>
<td>3</td>
</tr>
<tr>
<td>3–BR</td>
<td>4-1/2</td>
</tr>
<tr>
<td>4–BR</td>
<td>6</td>
</tr>
</tbody>
</table>

II. DETERMINATION OF ANNUAL LIHTC

- The annual LIHTC amount during the 10-year credit period is based on a formula which consists of multiplying the “qualified basis” of each low-income building in the project (determined as of December 31 of each year during the credit period) by the annual “credit percentage”.

- Qualified basis is the fraction of a project’s eligible basis attributable to the acquisition and rehabilitation or construction of qualified low-income housing units. The low-income fraction for a project is based on the lesser of the ratio of the number of qualified low-income housing units to the number of total residential units in the project or the ratio of the total floor area of the qualified low-income housing units to the total floor area of all residential units in the project.

- Eligible basis consists of (i) the properly capitalized and depreciable costs of new construction, (ii) the properly capitalized and depreciable costs of a substantial rehabilitation, and (iii) the cost of acquisition of certain existing buildings if a substantial rehabilitation is performed, and is determined at the end of the first taxable year of the credit period.
In certain qualified census tracts, difficult to develop areas designated by HUD or State Housing Credit Agency designated areas, the eligible basis of new construction or substantial rehabilitation expenditures will be deemed to be equal to 130% of the amount that the eligible basis would otherwise be. This effectively increases the maximum potential annual credit allocation, although the final allocation will be subject to the state housing credit agency’s project evaluation and equity gap analysis. This “basis boost” does not apply to projects financed with tax exempt bonds.

In connection with certain transitional housing for the homeless, eligible basis may include any portion of a building used to provide supportive service.

The annual “credit percentage” which is used to determine the annual LIHTC amount depends on several factors, including the nature of the project (i.e., new construction, rehabilitation or acquisition), the nature of the financing (i.e., with or without a federal subsidy), and the date the project is placed in service or the date which a reservation contract is entered into.

A 70% present value credit (commonly referred to as the “9% credit”) is allowed in connection with the new construction or substantial rehabilitation of qualified low-income housing units provided they are not financed with tax-exempt bonds.

A 30% present value credit ((commonly referred to as the “4% credit”) is allowed in connection with the new construction or substantial rehabilitation of qualified low-income housing units financed with tax-exempt bonds or the acquisition of existing qualified low-income housing units meeting the 10-year hold period provided such units are to be substantially rehabilitated. A substantial rehabilitation is a rehabilitation in which the rehabilitation expenditures during a given 24-month period equal or exceed the greater of $6,000 per low-income unit or 20% of the unadjusted basis of the building as of the beginning of the applicable 24-month period. The $6,000 threshold will increase annually for inflation after 2008.

The 30% present value credit percentages are published monthly by the Treasury Department based on a formula. The 30% present value credit for January 2020 is 3.18%.

III. TREATMENT OF OTHER SUBSIDIES

The amount of any federal grant received prior to the start of the Compliance Period must be excluded from eligible basis. Non-federal grants arguably are not excluded from eligible basis, although the IRS has raised concerns regarding this result. Accordingly, most non-federal grants have been restructured as deferred loans.

Eligible basis is not reduced for rental, operating or interest reduction payments supporting the operations of the project.
Grants whether federal, state or local will result in taxable income to the investor.

Forgivable loans will be treated as grants.

State or local below-market rate loans do not reduce the amount of the LIHTC.

IV. PARTNERSHIP ALLOCATIONS

It is not possible to transfer or sell low-income housing tax credits separate and apart from the LIHTC project. The credits are available only to the owner or owners of the LIHTC project.

LIHTC projects are owned and operated in a partnership or limited liability.

For federal income tax purposes, a partnership is treated pass-through entity whereby all partnership tax items are taxed to the individual partners and are allocable among the partners pursuant to a partnership agreement.

A limited liability company is treated as a partnership for federal income tax purposes. All references to partners includes members of a limited liability company and references to partnerships include limited liability companies.

A typical LIHTC partnership or limited liability company will often provide that 99.99% of all tax credits and taxable losses will be allocable to the investor(s) and .01% to the sponsor, and 20% of all cash flow from operations and proceeds from sale or refinancing of the project will be allocable to the investor(s) and 80% to the sponsor. Note that such an allocation of cash flow from operations and proceeds from sale or refinancing of the project may not be available to a nonprofit general partner without lengthening the depreciation schedule for the Project.
Chapter 5—Low-Income Housing

LOW-INCOME HOUSING GUIDELINES

Released: May 1, 1996
Published: May 13, 1996

26 CFR 601.201: Rulings and determination letters.

Low-income housing guidelines. Guidance on qualification for tax-exemption under section 501(c)(3) is provided for organizations that provide low-income housing. The guidance includes a safe-harbor procedure to determine qualification.

SECTION 1. PURPOSE

.01 This revenue procedure sets forth a safe harbor under which organizations that provide low-income housing will be considered charitable as described in § 501(c)(3) of the Internal Revenue Code because they relieve the poor and distressed as described in § 1.501(c)(3)-1(d)(2) of the Income Tax Regulations. This revenue procedure also describes the facts and circumstances test that will apply to determine whether organizations that fall outside the safe harbor relieve the poor and distressed such that they will be considered charitable organizations described in § 501(c)(3). It also clarifies that housing organizations may rely on other charitable purposes to qualify for recognition of exemption from federal income tax as organizations described in § 501(c)(3). These other charitable purposes are described in § 1.501(c)(3)-1(d)(2). This revenue procedure supersedes the application referral described in Notice 93-1, 1993-1 C.B. 290.

.02 This revenue procedure does not alter the standards that have long been applied to determine whether low-income housing organizations qualify for tax-exempt status under § 501(c)(3). Rather, it is intended to expedite the consideration of applications for tax-exempt status filed by such organizations by providing a safe harbor and by accumulating relevant information on the existing standards for exemption in a single document. Low-income housing organizations that have ruling or determination letters and have not materially changed their organizations or operations from how they were described in their applications can continue to rely on those letters.

SEC. 2. BACKGROUND OF SAFE HARBOR

.01 Rev. Rul. 67-138, 1967-1 C.B. 129, Rev. Rul. 70-585, 1970-2 C.B. 115, and Rev. Rul. 76-408, 1976-2 C.B. 145, hold that the provision of housing for low-income persons accomplishes charitable purposes by relieving the poor and distressed. The Service has long held that poor and distressed beneficiaries must be needy in the sense that they cannot afford the necessities of life. Rev. Ruls. 67-138, 70-585, and 76-408 refer to the needs of housing recipients and to their inability to secure adequate housing under all the facts and circumstances to determine whether they are poor and distressed.

.02 The existence of a national housing policy to maintain a commitment to provide decent, safe, and sanitary housing for every American family is reflected in several federal housing acts. See, for example, § 2 of the United States Housing Act of 1937, 42 U.S.C. § 1437; § 2 of the Housing Act of 1949, 42 U.S.C. § 1441; § 2 of the Housing and Urban Development Act of 1968. 12 U.S.C. § 1701t; and §§ 101, 102, and 202 of the Cranston-Gonzalez National Affordable Housing Act, 42 U.S.C. §§ 12701, 12702, and 12721. Not all beneficiaries of these housing acts, however, are necessarily poor and distressed within the meaning of § 1.501(c)(3)-1(d)(2).

.03 In order to support national housing policy, the safe harbor contained in this revenue procedure identifies those low-income housing organizations that will, with certainty, be considered to relieve the poor and distressed. The safe harbor permits a limited number of units occupied by residents with
incomes above the low-income limits in order to assist in the social and economic integration of the poorer residents and, thereby, further the organization’s charitable purposes. To avoid giving undue assistance to those who can otherwise afford safe, decent, and sanitary housing, the safe harbor requires occupancy by significant levels of both very low-income and low-income families.

.04 Low-income housing organizations that fall outside the safe harbor may still be considered organizations that offer relief to the poor and distressed based on all the surrounding facts and circumstances. Some of the facts and circumstances that will be taken into consideration in determining whether a low-income housing organization will be so considered are set forth in section 4.

.05 Low-income housing organizations may also qualify for tax-exempt status because they serve a charitable purpose described in § 501(c)(3) other than relief of the poor and distressed. Exempt purposes other than relief of the poor and distressed are discussed in section 6.

.06 To be recognized as exempt from income tax under § 501(c)(3), a low-income housing organization must not only serve a charitable purpose but also meet the other requirements of that section, including the prohibitions against inurement and private benefit. Specific concerns with respect to these prohibitions are set forth in section 7.

SEC. 3. SAFE HARBOR FOR RELIEVING THE POOR AND DISTRESSED

.01 An organization will be considered charitable as described in § 501(c)(3) if it satisfies the following requirements:

(1) The organization establishes for each project that (a) at least 75 percent of the units are occupied by residents that qualify as low-income: and (b) either at least 20 percent of the units are occupied by residents that also meet the very low-income limit for the area or 40 percent of the units are occupied by residents that also do not exceed 120 percent of the area's very low-income limit. Up to 25 percent of the units may be provided at market rates to persons who have incomes in excess of the low-income limit.

(2) The project is actually occupied by poor and distressed residents. For projects requiring construction or rehabilitation, a reasonable transition period is allowed for an organization to place the project in service. Whether an organization’s transition period is reasonable is determined by reference to all relevant facts and circumstances. For projects that do not require substantial construction or substantial rehabilitation, a one-year transition period to satisfy the actual occupancy requirement will generally be considered to be reasonable. If a project operates under a government program that allows a longer transition period, this longer period will be used to determine reasonableness.

(3) The housing is affordable to the charitable beneficiaries. In the case of rental housing, this requirement will ordinarily be satisfied by the adoption of a rental policy that complies with government-imposed rental restrictions or otherwise provides for the limitation of the tenant's portion of the rent charged to ensure that the housing is affordable to low-income and very low-income residents. In the case of homeownership programs, this requirement will ordinarily be satisfied by the adoption of a mortgage policy that complies with government-imposed mortgage limitations or otherwise makes the initial and continuing costs of purchasing a home affordable to low and very low-income residents.

(4) If a project consists of multiple buildings and each building does not separately meet the requirements of sections 3.01(1), (2), and (3), then the buildings must share the same grounds. This requirement does not apply to organizations that provide individual homes or individual apartment units located at scattered sites in the community exclusively to families with incomes at or below 80 percent of the area’s median income.

.02 In applying this safe harbor, the Service will follow the provisions listed below:

(1) Low-income families and very low-income families will be identified in accordance with the income limits computed and published by the Department of Housing and Urban Development ("HUD") in Income Limits for Low and Very Low-Income Families Under the Housing Act of 1937. The term "very low-
“low-income” is defined by the same statute as 80 percent of an area's median income. However, these income limits may be adjusted by HUD to reflect economic differences, such as high housing costs, in each area. The income limits are then tailored to reflect different family sizes. If HUD's program terminates, the Service will use income limits computed under such program as is in effect immediately before such termination. Copies of all or part of HUD's publication may be obtained by calling HUD at (800) 245-2691 (HUD charges a small fee to cover costs of reproduction).

(2) The retention of the right to evict tenants for failure to pay rent or other misconduct, or the right to foreclose on homeowners for defaulting on loans will not, in and of itself, cause the organization to fail to meet the safe harbor.

(3) An organization originally meeting the safe harbor will continue to satisfy the requirements of the safe harbor if a resident's income increases and causes the organization to fail the safe harbor, provided that the resident's income does not exceed 140 percent of the applicable income limit under the safe harbor. If the resident's income exceeds 140 percent of the qualifying income limit, the organization will not fail to meet the safe harbor if it rents the next comparable non-qualifying unit to someone under the income limits.

(4) To be considered charitable, an organization that provides assistance to the aged or physically handicapped who are not poor must satisfy the requirements set forth in Rev. Rul. 72-124, 1972-1 C.B. 145, Rev. Rul. 79-18, 1979-1 C.B. 194, and Rev. Rul. 79-19, 1979-1 C.B. 195. If an organization meets the safe harbor, then it does not need to meet the requirements of these rulings even if all of its residents are elderly or handicapped residents. However, an organization may not use a combination of elderly or handicapped persons and low-income persons to establish the 75-percent occupancy requirement of the safe harbor. An organization with a mix of elderly or handicapped residents and low-income residents may still qualify for tax-exempt status under the facts and circumstances test set forth in section 4.

SEC. 4. FACTS AND CIRCUMSTANCES TEST FOR RELIEVING THE POOR AND DISTRESSED

.01 If the safe harbor contained in section 3 is not satisfied, an organization may demonstrate that it relieves the poor and distressed by reference to all the surrounding facts and circumstances.

.02 Facts and circumstances that demonstrate relief of the poor may include, but are not limited to, the following:

(1) A substantially greater percentage of residents than required by the safe harbor with incomes up to 120 percent of the area's very low-income limit.

(2) Limited degree of deviation from the safe harbor percentages.

(3) Limitation of a resident's portion of rent or mortgage payment to ensure that the housing is affordable to low-income and very low-income residents.

(4) Participation in a government housing program designed to provide affordable housing.

(5) Operation through a community-based board of directors, particularly if the selection process demonstrates that community groups have input into the organization's operations.

(6) The provision of additional social services affordable to the poor residents.

(7) Relationship with an existing 501(c)(3) organization active in low-income housing for at least five years if the existing organization demonstrates control.

(8) Acceptance of residents who, when considered individually, have unusual burdens such as extremely high medical costs which cause them to be in a condition similar to persons within the qualifying income limits in spite of their higher incomes.
(9) Participation in a homeownership program designed to provide homeownership opportunities for families that cannot otherwise afford to purchase safe and decent housing.

(10) Existence of affordability covenants or restrictions running with the property.

SEC. 5. EXAMPLES

.01 Application of the safe harbor and the facts and circumstances test is illustrated by the following examples:

(1) Organization N operates pursuant to a government program to provide low and moderate income housing projects. Seventy percent of N's residents have incomes that do not exceed the area's low-income limit. Fifty percent of N's residents have incomes that are at or below the area's very low-income limit. Under the program, N restricts rents charged to residents below the income limits to no more than 30 percent of the applicable low or very low-income limits for N's area. N is close to meeting the safe harbor. N has a substantially greater percentage of very low-income residents than required by the safe harbor; it participates in a federal housing program; and it restricts its rents pursuant to an established government program. Although N does not meet the safe harbor, the facts and circumstances demonstrate that N relieves the poor and distressed.

(2) Organization O will finance a housing project using tax-exempt bonds pursuant to § 145(d). O will meet the 20-50 test under § 142(d)(1)(A). Another 45 percent of the residents will have incomes at or below 80 percent of the area's median income. The final 35 percent of the residents will have incomes above 80 percent of the area's median income. O will restrict rents charged to residents below the income limits to no more than 30 percent of the residents' incomes. O will provide social services to project residents and to other low-income residents in the neighborhood. Also, O will purchase its project through a government program designed to retain low-income housing stock. O does not meet the safe harbor. However, the facts and circumstances demonstrate that O relieves the poor and distressed.

(3) Organization R provides affordable homeownership opportunities to purchasers determined to be low-income under a federal housing program. The homes are scattered throughout a section of R's community. Beneficiaries under the program cannot afford to purchase housing without assistance. R's program makes the initial and continuing costs of mortgages affordable to the home buyers by providing assistance with down payments and closing costs. Homeowners assisted by R will have the following composition: 40 percent will not exceed 140 percent of the very low-income limit for the area, 25 percent will not exceed the low-income limit, and 35 percent will exceed the low-income limit but will not exceed 115 percent of the area's median income. R does not satisfy the safe harbor. However, the facts and circumstances demonstrate that R relieves the poor and distressed.

(4) Organization U will purchase existing residential rental housing financed using tax-exempt bonds issued in accordance with § 145(d). U will meet the minimum requirements of the 40-60 test of § 142(d)(1)(B). It will provide the balance of its units to residents with incomes at or above area median income levels. U has a community-based board of directors. U does not satisfy the safe harbor. Moreover, the facts and circumstances do not demonstrate that U relieves the poor and distressed.

(5) Organization V provides rental housing in a section of the city where income levels are well below the other parts of the city. All of V's residents are below the very low-income limits for the area, yet they pay rents that are above 50 percent of the area's very low-income limits. V has not otherwise demonstrated that the housing is affordable to its residents. Although the residents are all considered poor and distressed under the safe harbor, V does not relieve the poverty of the residents.

(6) Organization W provides homeownership opportunities to purchasers with incomes up to 115 percent of the area's median income. W does not meet the income levels required under the safe harbor. W's board of directors is representative of community interests, and W provides classes and counseling services for its residents. The facts and circumstances do not demonstrate that W relieves the poor and distressed.
SEC. 6. EXEMPT PURPOSES OTHER THAN RELIEVING THE POOR AND DISTRESSED

.01 Relief of the poor and distressed, whether demonstrated by satisfaction of the safe harbor described in section 3 of this Revenue Procedure or by reference to the facts and circumstances test described in section 4, does not constitute the only exempt purpose that a housing organization may have. Such organizations may qualify for exemption without having to satisfy the standards for relief of the poor and distressed by providing housing in a way that accomplishes any of the purposes set forth in § 501(c)(3) or § 1.501(c)(3)-1(d)(2). Those purposes include, but are not limited to, the following:

(1) Combatting community deterioration is an exempt purpose, as illustrated by Rev. Rul. 68-17, 1968-1 C.B. 247, Rev. Rul. 68-655, 1968-2 C.B. 213, Rev. Rul. 70-585, 1970-2 C.B. 115 (Situation 3), and Rev. Rul. 76-147, 1976-1 C.B. 151. An organization that combats community deterioration must (1) operate in an area with actual or potential deterioration, and (2) directly prevent or relieve that deterioration. Constructing or rehabilitating housing has the potential to combat community deterioration.

(2) Lessening the burdens of government is an exempt purpose, as illustrated by Rev. Ruls. 85-1 and 85-2, 1985-1 C.B. 178. An organization lessens the burdens of government if (a) there is an objective manifestation by the governmental unit that it considers the activities of the organization to be the government's burdens, and (b) the organization actually lessens the government's burdens.

(3) Elimination of discrimination and prejudice is an exempt purpose, as illustrated by Rev. Rul. 68-655, 1968-2 C.B. 213, and Rev.Rul. 70-585, 1970-2 C.B. 115 (Situation 2). These rulings describe organizations that further charitable purposes by assisting persons in specific racial groups to acquire housing for the purpose of stabilizing neighborhoods or reducing racial imbalances.

(4) Lessening neighborhood tensions is an exempt purpose, as illustrated by Rev. Rul. 68-655, 1968-2 C.B. 213, and Rev. Rul. 70-585, 1970-2 C.B. 115 (Situation 2). It is generally identified as an additional charitable purpose by organizations that fight poverty and community deterioration associated with overcrowding in lower income areas in which ethnic or racial tensions are high.

(5) Relief of the distress of the elderly or physically handicapped is an exempt purpose, as illustrated by Rev. Rul. 72-124, 1972-1 C.B. 145, Rev. Rul. 79-18, 1979-1 C.B. 194, and Rev. Rul. 79-19, 1979-1 C.B. 195. An organization may further a charitable purpose by meeting the special needs of the elderly or physically handicapped.

SEC. 7. OTHER CONSIDERATIONS

If an organization furthers a charitable purpose such as relieving the poor and distressed, it nevertheless may fail to qualify for exemption because private interests of individuals with a financial stake in the project are furthered. For example, the role of a private developer or management company in the organization's activities must be carefully scrutinized to ensure the absence of inurement or impermissible private benefit resulting from real property sales, development fees, or management contracts.

SEC. 8. EFFECT ON OTHER DOCUMENTS

Notice 93-1 is superseded.

SEC. 9. EFFECTIVE DATE

This revenue procedure is effective on [date of publication].

DRAFTING INFORMATION

The principal authors of this revenue procedure are Lynn Kawecki and Marvin Friedlander. For further information regarding this revenue procedure, contact Mr. Kawecki at (202) 622-7305 (not a toll free number).
Chapter 6

2019 Legislative Update: Oregon Nonprofit Corporation Act

SUSAN BOWER
Oregon Department of Justice Civil Enforcement Division
Portland, Oregon

PROFESSOR SUSAN GARY
University of Oregon School of Law
Eugene, Oregon

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2019 Legislative Update: Oregon Nonprofit Corporation Act

Susan A. Bower, Oregon Department of Justice
Susan N. Gary, University of Oregon School of Law

SB 360

- Effective January 1, 2020
- Bill sponsored by Oregon State Bar, Nonprofit Organizations Law Section, with input from academics, practitioners, and Oregon Department of Justice
- SB 360 sought to modernize and clarify provisions of the Oregon Nonprofit Corporation Act, ORS Chapter 65, without making any significant policy changes
- Was originally submitted as legislative proposal HB 2609 in 2017; SB 360 has minor changes from HB 2609
Nonprofit Corporations - Overview

- 3 Types under Oregon law, ORS Chapter 65
  - Public Benefit
  - Mutual Benefit
  - Religious

- Many of provisions of ORS Chapter 65 are default provisions and organization can opt to have different provisions. There are a few statutory provisions that organizations cannot alter or avoid. Goal was to give nonprofits flexibility to manage themselves.

- Majority of changes affect only public benefit nonprofits.

New Provisions

- Shell corporation provisions
- Process for voting by email – directors and members
- Process for changing from member organization to nonprofit without members
- Ability to petition court to appoint directors at the request of the Attorney General if no directors or members in position to do so
- Process for directors to dissolve even if no longer have statutory minimum or number required by articles or bylaws
Chapter 6—2019 Legislative Update: Oregon Nonprofit Corporation Act

Definitions

“Contact address” changed to “Contact Information” and now includes email address, in addition to street or mailing address. Enables directors and members to provide an email address as means for communicating, including as means receiving notice.

“Director” more fully described and separate definitions provided for appointed and designated directors. New definition of director:

- “individual who acts as a member the board of directors, who has a right to vote on questions concerning the management and regulation of a corporation’s affairs and who is: (a) An appointed director; (b) A designated director; or (c) A director elected by the incorporators, directors or members.”

Definitions (cont.)

- Appointed Director – now defined and means a director appointed by someone other than the board of directors.

- Designated Director – now separately defined and means a director that the articles of incorporation or bylaws designate as a director in a manner that identifies a specific individual or a group of individuals.

- Document now defined. Information in tangible form, including writings, and information in an electronic medium that can be retained, retrieved, and reproduced in tangible form or otherwise.
Definitions (cont.)

- Member definition updated – individual with any of the voting rights set forth in ORS 65.144.

- Mutual benefit definition changed. Previously was catchall if entity was not public benefit or religious. Now defined as “organized to serve and operates primarily to serve the mutual interests of a group of persons but is not a public benefit corporation or religious corporation.”

- Shell entity. New definition and provisions incorporated from ORS Chapter 60 and aimed at dealing with fraud issues.

Filings with Secretary of State – ORS 65.004

- Document must be a type that this chapter or other law requires or permits to be filed.

- Person signing document must declare, under penalty of perjury, that the document does not fraudulently conceal, alter or otherwise misrepresent the identity of the person or any of the directors, officers, employees or agents of the corporation.
General Notice – ORS 65.034

- Added provisions for notice by electronic means
  - Effective at earlier of when received or two days after sent, if correctly addressed

- Nonprofit may have more stringent notice provisions, but not less so

- Notice to Attorney General – must be given notice of certain proceedings and given the opportunity to intervene. List expanded to include derivative suits under ORS 65.174.

Bylaws

- ORS 65.061(3) - new provision makes it explicit that articles of incorporation control over bylaws if they are in conflict
In most instances, where the statutory default rule required a supermajority vote, that has been changed to a simple majority, but only for public benefit nonprofits. Any supermajority default rules for mutual benefit nonprofits were maintained.

For example, now default rule is majority vote required for:
- Amending articles
- Merger
- Dissolution

Articles/bylaws can still have different voting requirements.
## Overview of Changes

- Contact Information – membership lists and notice
- Voting by Email
- Termination for Failure to Pay Dues
- Eliminating Membership

## Member Nonprofits

- Default rule changed – nonprofit will NOT have members unless articles state that it has members.

- Default rights of Members – ORS 65.144(1)
  - Elect directors
  - Remove directors
  - Vote on changes to number of directors
  - Vote to sell, transfer, convey or otherwise dispose of organization’s assets or merge with another entity
  - Vote to dissolve
  - Approve conflict-of-interest transaction (mutual benefit organizations)
  - Vote on amendment that reduces or eliminates member’s voting rights*
  - Inspect and copy corporate records*

* These member rights cannot be eliminated by articles/bylaws
Contact Information

- Requirements for membership lists now reference “contact information.” Because contact information includes email, membership lists can use email instead of street address.

- Notice of meetings, etc., can be done through email

Email Voting by Members

- Ways to vote – at meeting, action without a meeting (unanimous), action by written ballot, email vote

- Membership can vote by email on matters. Email voting process:
  - All members must have email address
  - Email announcement must describe matter being voted on
  - Must give deadline for vote, at least 48 hours, and members can change vote anytime before deadline
  - Majority vote prevails, unless bylaws require greater vote
  - Maintain email notice and vote in minutes
  - Default provision – organization can limit or prohibit the procedure
Termination of Membership

- Nonpayment of dues is a basis for terminating membership without a hearing (new), otherwise fair and reasonable process required (same) – ORS 65.154

Changing from Membership Org

- Issue – formed as member nonprofit but never acted as one or lost track of membership over time. Ordinarily would require vote of membership to change articles to eliminate membership, but nonprofit cannot identify members.

- New provision allows organization to change legal structure to nonmember as follows:
  - Organization has not had member meetings or member participation for at least three years
  - Notify any known members and post notice on website or equivalent giving notice to public/members of proposed amendment to articles
  - If no objections from member received in 30 days, board can proceed with filing articles of amendment
Chapter 6—2019 Legislative Update: Oregon Nonprofit Corporation Act

Overview of Major Changes Affecting Boards

- Officer Requirements
- Quorum Rules
- Email Voting
- Board Committees
- Conflict of Interest Rules
- Right to Inspect Records
- Notice
Officer Requirements

- Currently, only required to have President and Secretary
- New provision requires President, Secretary, and Treasurer; applies to all nonprofits
- Public benefit corporations – positions must be filled by at least two different people, i.e., same person cannot hold all three positions
- Clarifies that officers may or may not be directors

Quorum Rules

- Default rule – majority of directors. Articles or bylaws can establish different rule, but cannot set quorum below 1/3 of the directors.
- Fixed Number of Directors - number of directors fixed by Articles or bylaws
  - Current Law - quorum is based on the fixed number no matter how many directors are actually in office. For example, if bylaws set number of directors at 7, must have 4 directors to conduct business, even if only have 5 directors in office.
  - New Law - quorum is based on number of directors in office immediately before meeting. So, if only 5 directors in office, quorum is 3.
- Variable Number of Directors - Articles or bylaws provide for range, e.g., at least 5, no more than 9. No change in law. Quorum determined by number of directors in office immediately before meeting.
Voting by Directors

Currently, voting by email not permitted. Board can take action in 2 ways –

- Vote at meeting. Meeting requires simultaneous communication. ORS 65.337.
- If no meeting, action without a meeting – requires written unanimous consent signed by all directors in office. ORS 65.341.

New law permits voting by email, but articles or bylaws can prohibit email voting.

New law makes it clear that directors cannot vote by proxy.

Directors Voting by Email

Under new law, directors can vote by email as follows:

- All directors must have and provide email address
- Email notice to directors must describe proposed action and when it will be effective
- Must give directors at least 48 hours to vote
- Director can change vote anytime up to deadline
- Affirmative vote of majority of directors in office is needed to pass the proposed action, unless articles or bylaws requires greater number
- Record of notice and email vote must be kept in minutes

Default rule – organization’s articles/bylaws can prohibit or limit use
Board Committees

- Some organizations allow people who are not board members to be members of committees.

- Still okay, however, if committee is authorized to take board action, any voting member of the committee must also be board member.

Conflicts of interest

- Procedure for authorizing conflict-of-interest transaction set forth in ORS 65.361:
  - Disclosure of conflict
  - Approved by disinterested board members, but cannot be approved by single director
  - Must be fair to organization

- New law clarifies that following proper procedure creates presumption transaction is fair, but only presumption. Transaction must in fact be fair and so could be subject to further review.

- New law expands nature/scope of director’s interest in transaction requiring disclosure.
What constitutes conflict of interest that requires disclosure?

- Director has direct or indirect interest in transaction with nonprofit

New provisions expand definition of “indirect” interest

- Prior law – director has indirect interest if director has material interest or is a general partner in the entity transacting with the charity or director is officer, director, trustee of the entity transacting with the charity

- New law – director also has indirect interest if person who is related to or a business associate of a director is transacting with the nonprofit

ORS 65.361 does not define “related” or “business associate.” However, goal was to be consistent with IRS rules regarding conflicts of interests.

IRS Form 990 Instructions includes following definition:

Family member, family relationship:

Unless specified otherwise, the family of an individual includes only his or her spouse (see Rev. Rul. 2013-17 regarding same-sex marriage), ancestors, brothers and sisters (whether whole or half blood), children (whether natural or adopted), grandchildren, great-grandchildren, and spouses of brothers, sisters, children, grandchildren, and great-grandchildren.
IRS Form 990 Instructions:

Business relationship - For purposes of Part VI, line 2, business relationships between two persons include the following.

1. One person is employed by the other in a sole proprietorship or by an organization with which the other is associated as a trustee, director, officer, or greater-than-35% owner.

2. One person is transacting business with the other (other than in the ordinary course of either party's business on the same terms as are generally offered to the public), directly or indirectly, in one or more contracts of sale, lease, license, loan, performance of services, or other transaction involving transfers of cash or property valued in excess of $10,000 in the aggregate during the organization's tax year. Indirect transactions are transactions with an organization with which the one person is associated as a trustee, director, officer, or greater-than-35% owner. Such transactions don't include charitable contributions to tax-exempt organizations.

3. The two persons are each a director, trustee, officer, or greater-than-10% owner in the same business or investment entity (but not in the same tax-exempt organization). Ownership is measured by stock ownership (either voting power or value) of a corporation, profits or capital interest in a partnership or limited liability company, membership interest in a nonprofit organization, or beneficial interest in a trust. Ownership includes indirect ownership (for example, ownership in an entity that has ownership in the entity in question); there can be ownership through multiple tiers of entities.

The Attorney General has always taken the position that directors are entitled to review whatever organizational records are necessary for the director to fulfill the director’s fiduciary duties.

New provision makes it explicit that directors have the right to inspect records maintained pursuant to ORS 65.771.
Dissolution – No Board Quorum

- Issue arises when organization needs to formally dissolve, but board directors have died or resigned and board does not have quorum. It is difficult to obtain directors solely for the purpose of dissolving an entity, but we want an orderly dissolution process.

- ORS 65624(2) now provides that board of directors may approve dissolution, even if does not have a quorum.

Attorney General Oversight
### Notice to AG

- Notice to AG for dissolution of public benefit corporation and religious corporation – changed to 30 days (from 20 days)

- Notice to AG of sale, exchange, or conveyance of substantially all of public benefit or religious corporation assets changed to 30 days (from 20 days)

- Notice provision under ORS 65.040 – now includes derivative actions

### Dissolution

- The AG can bring action in Multnomah County or where principal office located; anyone else bringing dissolution action must do so in the county where principal office located

- Basis for AG seeking dissolution of public benefit corporation includes loss of tax-exempt status by public benefit corporation

- After distribution of assets per dissolution plan, public benefit and religious corporations must give AG a list of everyone who received assets, now including creditors
Statute makes it explicit that AG can request appointment of receiver for nonprofit, even outside dissolution proceeding (ORS 65.667)

If nonprofit does not have directors or members who can elect directors, the AG can request circuit court to appoint directors. Analogous to provisions for trusts.

Shell entity – corporation used or incorporated for illegal purpose, to defraud or deceive a person or government agency, or to fraudulently conceal any business activity from another or government agency

AG can make prima facie showing that corporation is a shell entity with affidavit showing:

- Corporation did not provide name or address required by SOS or name/address given was false, fraudulent, or inadequate
- Public body attempted to serve or communicate with corporation at address provided and no response
Legislative History


Prepared by Susan N. Gary, Reporter February 27, 2019

https://olis.oregonlegislature.gov/liz/2019R1/Downloads/CommitteeMeetingDocument/166423

SB 359: Ratification of Defective Corporate Acts
SB 359

- Proposal from Business Law Section of OSB
- Directed at for-profit corporations, but during legislative process, amended to include nonprofits
- Provides for validation or ratification of defective corporate acts, e.g., issuance of stock/shares in excess of that authorized by articles.
- Effective January 1, 2020

New Definitions

- “Defective corporate action” – an action that, but for a failure of authorization, is within the corporation’s power to take and would have been within the corporation’s power to take at the time the corporation took the action.

- “Failure of authorization” – failure to authorize, approve or otherwise effect a corporate action in compliance with this chapter, the corporation’s articles of incorporation or bylaws, a resolution or any plan or agreement to which the corporation is a party if, and to the extent that, the failure renders the corporate action void or voidable.”
Overview

- Statute provides that defective corporate act is not void or voidable if ratified through notice provisions or filing of articles of validation.

- No clear line between void and voidable acts under common law. Law provides for ratification or validation of both void and voidable acts.

- Appears to be modeled on Delaware corporate laws. Delaware does not have separate nonprofit corporation statute.

Failure of Authorization- Examples

- Failure of incorporator to elect initial board.

- Failure to the valid board action due to lack of quorum.

- Failure to have valid board action due to less than unanimous board consent in lieu of meeting.

- Failure to obtain requisite membership vote/consent.
### Ratification by Board

- Notice must be given that includes:
  - Identifies defective corporate act
  - Identifies date of defective act
  - Describe nature of failure of authorization rendering act defective
  - State board intends to ratify defective act

- Quorum and voting rules that applied at time of defective act, apply to ratification vote

- If defective act relates to election of initial board of directors, additional notice provisions required

### Ratification by Members

- If member approval required, notice to members to include:
  - Statement that one of the purposes of meeting is to ratify defective act
  - Provide copy of action board took to ratify act
  - Conspicuous statement of date by which person wishing to challenge the ratification must bring an action in court – must be within 120 days after the later of the effective date of validation or date of the notice OR if corporation cannot provide date, provide contact information and invite person to contact corporation

- Majority vote of members at a meeting is sufficient to approve (statute does not provide for other voting mechanisms such as written ballot or email vote)
Articles of Validation

- If required by statute (not clear applicable to nonprofits), must file Articles of Validation

- Articles of Validation must include:
  - Description of defective corporation action
  - Date of defective corporate act
  - Nature of the failure of authorization
  - Statement that board of directors ratified the defective act and, if necessary, members approved
  - List date of ratification

- Secretary of State form -

SB 361 – Prudent Investor

- ORS 130.755 directs fiduciary to consider a list of factors in making investment decisions, including the purposes of the trust; statute amended to add two new factors:
  - Intent, desire and personal values of settlor, including desire to engage in sustainable or socially responsible investment strategies
  - Needs of beneficiaries (mission of nonprofit), including sustainable or socially responsible investing strategies

- UPMIFA not amended – nonprofit corporation can consider mission in making investment decisions under UPMIFA
I. Introductory Summary

Chapter 65 of the Oregon Revised Statutes – the Nonprofit Corporation Code – was enacted in 1989 and has remained largely unchanged since then. In the years since enactment, the lawyers who assist and advise nonprofit corporations as well as the lawyers who provide oversight for charities through the Attorney General’s office have found situations for which the statutory language is ambiguous or unhelpful. In addition, changes relating to the use of electronic resources for notice and meetings have left some sections of the Nonprofit Corporation Code in need of modernization.

II. History of the Project

In early 2014 the Executive Committee of Nonprofit Organizations Law Section (NOLS) of the Oregon State Bar appointed a Work Group to review Chapter 65. The goal was to identify any provisions that need clarification or modernization. The Work Group began by gathering comments and suggestions from lawyers who work with nonprofits, and the Committee also reached out to the Nonprofit Association of Oregon for input. The Work Group considered developments in other states, but started with the existing Oregon statutes and did not use another set of statutes or model act as a basis for the proposal.

Susan Gary, Professor of Law at the University of Oregon, served as the Chair of the Work Group and Reporter for the project. Initial Work Group members were David Atkin, Susan Bower, Cindy Cumfer, Elizabeth Grant, Kate Kilberg, Marisa Meltebeke, Nancy Murray, Anne O’Malley, and Jim White. Warren Binford joined the Work Group in 2017. The Work Group includes representatives from small and large law firms, the Charities Section of the office of the Attorney General, and the Nonprofit Association of Oregon.

The Work Group approached its work with two guiding principles. First, changes should clarify or improve the functioning of the statutory framework, but not make major
policy changes to the legal structure for nonprofit corporations in Oregon. Second, a nonprofit corporation should, with limited exceptions, be able to draft its own governance rules through its Articles and Bylaws. Certain rules will be mandatory and will be clearly identified as such in the statutes. Most rules will be default rules and will apply if the Articles and Bylaws of a nonprofit corporation are silent on the issue.

The Work Group developed a proposal that was introduced in the 2017 legislative session as HB 2609. During discussions on that bill a number of concerns were raised, and the bill did not move forward. During the interim the Work Group developed a revised proposal that addressed those concerns. SB 360 reflects the changes made to HB 2609 to address the issues raised. SB 360 clarifies and modernizes Oregon’s nonprofit corporation code, improving the law for Oregon’s nonprofit organizations. In addition, SB 360 includes several provisions that track similar provisions added to ORS Chapter 61 to combat abuses by anonymous shell corporations. The new provisions require more transparency and provide the state additional enforcement tools to combat fraud and other illicit activities.

In drafting SB 360, Legislative Counsel took the opportunity to modernize language in Chapter 65, updating language to conform to current style conventions for Oregon statutes. This Report indicates sections that improve language in that way without further explanation.

III. Senate Bill 360

Sections 1 and 2: Section 1 incorporates a new provision, set forth in Section 2, into Chapter 65. The new provision creates personal liability for an officer, director, employee or agent of a nonprofit corporation who causes a loss of money or property through a shell entity.

Sections 3 and 4: Section 3 incorporates a new provision, set forth in Section 4, into Chapter 65. The new provision creates a process for a board of directors to take action using electronic mail (email). Members of the Work Group noted that boards already take action in this way even though current law does not recognize the validity of such action. The new section also states that directors can also use email to discuss matters that come before the board, without following the requirements for taking board action. With this proposed addition, there will be three ways for boards to take action: a meeting at which the board votes, a unanimous written consent signed by all directors under ORS 65.341, or a vote by email.

Under the new provision, a board can take action by email only if the corporation has an email address for every director. If all directors can be contacted by email, then the corporation must follow the requirements in the new section for the action to be effective. First, an email announcing that a vote will be taken must be sent to each director. The email must include a description of the matter and a deadline for the vote, which must be at least 48 hours from the time of the email. The directors can then vote by email, and a director can change the director’s vote at any time before the deadline. An affirmative
vote of a majority of directors in office is effective as an act of the board, with the same
effect of as a vote taken at a meeting. The effective date will be the deadline specified in
the announcement, or such other date provided in the announcement.

If the board of directors uses electronic mail to take action, under ORS 65.771(1), the
results of the vote must be kept, and under ORS 65.774(2)(a) excerpts may be inspected
by members. The Work Group discussed making available any discussion of the issue
being voted on, so that a member who would have chosen to attend a meeting of the
directors would not be disadvantaged by the taking of the action by email. However, a
determination of which emails relate to the issue voted on would be difficult and unduly
burdensome, and the Work Group concluded that the record keeping and disclosure
required by ORS 65.771 and 65.774 are adequate.

Sections 5 and 6: Section 5 incorporates a new provision, set forth in Section 6, into
Chapter 65. The Work Group sought to address the not infrequent problem of a nonprofit
corporation that was set up to have voting members but no longer has a record of
members, has not had member action for some years, and has no way to determine who
members are. The bill makes it easier for a corporation to convert to a corporation with
no voting members, while still protecting the rights of any members that exist. The
proposal adds two new mechanisms, the provision in Section 6 of the bill and an
amendment to ORS 65.038, which appears in Section 11.

Section 6 provides that if a nonprofit corporation has voting members, but for at least
three years no meeting of the members has been held and no members have actively
participated in the corporation, then the directors can amend the Articles to convert the
corporation to one without voting members. The corporation must provide notice to
known members and post notice on its website. The corporation cannot proceed using
this process if a member objects within 30 days of the date of the notice.

Section 7: This section updates 65.001, the definitions section. A number of definitions
are amended or added. In addition, the language in many definitions is amended to use
more modern language or to be consistent with the current legislative drafting style for
the Oregon statutes. These comments will not address changes that clean up the language
but do not make substantive changes.

Appointed director. A new definition of appointed director provides for a director who
is appointed by someone other than the board. This definition and a definition of a
designated director were created so that the provisions on the election of directions could
be written more clearly.

Articles of merger. A new definition is created for articles of merger, tying the
definition to the rules in ORS 65.491.

Bylaws. Bylaws provide a corporation’s rules for managing and regulating its affairs.
Changes in the definition emphasize this role for the bylaws, providing better guidance
for those managing or advising nonprofit corporations.
Contact information. The term contact address is changed to contact information and has been updated to reflect the ways a member or director can receive notice from the corporation. A member or director can choose to provide the corporation with a street address, a mailing address, or an email address. Thus, a person can choose to use an electronic or physical address for notice. The statute leaves the decision to the member or director so that a person concerned about personal safety need not disclose a physical address.

Designated director. This new definition describes a director who serves by virtue of being named in the articles or bylaws, or because the person holds a position that is named in the articles or bylaws. For example, the articles of a nonprofit corporation created to help at-risk youth might designate the person serving as the principal of the local high school as a director. Whoever serves as principal would also serve as a designated director of the corporation, and when a new principal comes into that position, the new principal will replace the outgoing principal as a director.

Director. Director is defined more clearly, using the new terms appointed director and designated director to include those directors with elected directors.

Distribution. The term distribution is important in the context of a nonprofit corporation, because a key element of being a nonprofit corporation is that the corporation cannot make distributions to a person for a private purpose. Called the non-distribution constraint, this requirement means that a nonprofit corporation cannot distribute profits to its members or directors. However, a nonprofit corporation can pay reasonable compensation for services or goods and can make payments to individuals when carrying out its nonprofit purposes. The definition is rewritten to clarify this important meaning of distribution.


Gift instrument. The new definition of gift instrument comes from the Uniform Prudent Management of Institutional Funds Act. See ORS 128.316(3).

Member. The definition of member is changed. Under current law, a member is someone who can vote for a director. Under the bill, a member is someone entitled to exercise any of the rights identified in ORS 65.144. These rights are the list of rights members have unless the articles or bylaws remove any of those rights. Because the rights are default rights, a member is defined as someone who has at least one of those rights. Thus, under the amended definition a corporation could, for example, decide to give its members the right to vote to dissolve the corporation, but not to elect directors.

The definition also lists a number of rights that, by themselves, will not make a person a member. These exclusions exist in current law; the language is clarified.
Mutual benefit corporation. The definition has been changed to clarify the distinctions between the three types of nonprofit corporations and to facilitate selection of the type of nonprofit corporation that corresponds to the corporation’s purposes.

Shell entity. The definition of shell entity refers to ORS 65.661, which is amended to add a description of a shell entity.

Sign. The bill adds a definition of sign that encompasses electronic signatures.

Vote. The term vote is expanded to include any method a corporation specifies as an authorization.

Written. A new definition explains that written means embodied as a document. The term document includes electronic documents, so this new definition can be used to clarify that a requirement that something be written can be met using an electronic writing.

Section 8. ORS 65.004 sets forth requirements for documents filed by the Secretary of State. In another of the changes addressing abuse by shell entities, the bill adds a requirement that the person signing a document to be filed must declare under penalty of perjury that the document does not fraudulently conceal or misrepresent the identity of the person signing or of someone connected with the corporation.

Sections 9-14. These sections improve language in ORS 65.014, 65.017, 65.021, 65.024, 65.027, and 65.031.

Section 15. This section amends ORS 65.034, the notice provision. The amendments provide the rules for effective notice that apply throughout Chapter 65. The bill updates the notice provision to include the types of notice currently used. For example, the reference to notice by “telegraph or teletype” is deleted, and more specificity concerning electronic notice is added.

Notice may be delivered orally (in person or by telephone) or in writing (electronically, by mail or by private carrier). The statute includes effective date rules for each type of notice: (1) oral notice is effective when communicated; (2) electronic notice is effective on the earlier of when it is received or two days after it is sent; and (3) written notice delivered by mail or private carrier is effective on the earlier of five days after it is mailed or the date of receipt if sent by certified or registered mail. Notice will be correctly addressed if addressed to the address shown on the records of the corporation for the director or member. The corporation can provide in the Articles and Bylaws for alternative notice rules for members or directors, if the alternative notice provisions are more stringent than the rules required by ORS 65.034.

Section 16. As explained in connection with Section 6, a corporation may have begun as a member organization but after some period of time may find itself unable to identify its members. Section 6 provides one method for converting to an organization without
voting members, and Section 16 amends ORS 65.038 to provide another method. ORS 65.038 currently provides that a court can call a meeting of the members, delegates, or directors of a corporation and that authority remains, but is expanded.

If the corporation cannot identify its members, delegates, or directors or is unable to call a meeting of members, delegates, or directors or otherwise obtain consent from any of them for actions on behalf of the corporation, a director, officer, delegate, member or the Attorney General can petition the court for relief. The court can direct the corporation to call a meeting of the members, delegates, or directors, as under current law, and in addition the court can determine who the members or the directors are, or the court can amend the articles to state that the corporation does not have members.

Section 17. This section updates ORS 65.040, the notice provisions to the Attorney General, to include notice of the commencement of a proceeding under ORS 65.174, under which a proceeding is brought on behalf of the corporation to procure a judgment for the corporation.

Sections 18-19. These sections improve language in ORS 65.047 and 65.057.

Section 20. A new subsection is added to ORS 65.061, clarifying that with respect to managing or regulating the affairs of the corporation, the Articles control over the Bylaws, and the Bylaws control over any other document. The Work Group was aware of some confusion on the issue of the hierarchy of authority, and although the Work Group does not view the new subsection as changing existing law, the Work Group thought the new subsection would be helpful to those who manage or advise nonprofit corporations.

Section 21. This section improves language in ORS 65.064.

Section 22. This section amends ORS 65.074 to add that a person may not incorporate for an illegal purpose or to fraudulently conceal a business activity from a person or governmental agency. This change is one of the changes related to shell entities.

Sections 23-27. These sections improve language in ORS 65.094, 65.097, 65.101, 65.114, and 65.117.

Section 28. A new provision added to ORS 65.131 states that a nonprofit corporation cannot give a document to an unidentified individual or entity, creating membership rights in the person holding the document. This change relates to shell entities.

Section 29. This section improves language in ORS 65.134.

Section 30. This section changes ORS 65.137 to reverse the default rule for whether a nonprofit corporation has members. The Work Group discussed the common misunderstanding about membership in nonprofit corporations. A new nonprofit corporation may decide it wants to have members so that the members will pay dues,
without realizing the role voting members play in an organization. Alternatively, a corporation may intend to have members who actively participate as voting members but over the years may find it cumbersome to have voting members and may stop having member meetings and votes. If a corporation’s articles state that it has members, but the nonprofit operates as if it does not have members, the legal functioning of the nonprofit is at risk. If the members do not elect the directors, then the directors may be acting without authority.

Under current law, the default rule is that a nonprofit corporation has members unless the articles provide otherwise. The Work Group concluded that the better default rule—the rule that will apply if the articles do not provide otherwise—is that a corporation will not have members unless the articles state that the corporation does have members.

Section 31. The Work Group sought to make the voting rights of members easier to understand. In current law, provisions regarding voting rights are spread throughout Chapter 65. Section 31 amends ORS 65.144 to create a list of voting rights of members. The list is non-exclusive, but captures most of the rights members have, unless the corporation provides otherwise in its articles or bylaws.

Amended ORS 65.001(30) (Section 7 of the bill) ties the definition of member to ORS 65.144, stating that a member is someone who has one or more of the rights enumerated in this section. Two rights are mandatory and cannot be changed by the articles and bylaws: (1) the right to vote on an action that would reduce or eliminate the member’s right to vote, and (2) the right to inspect and copy the corporation’s records, as provided (and limited) in ORS 65.774. Other than those two rights, amended ORS 65.144 gives each nonprofit corporation control over its structure and the rights of members. The Work Group concluded that each corporation should be able to make its own determinations about what is best.

The rights enumerated in ORS 65.144 will apply to all members, unless the articles or bylaws of a corporation provide otherwise. These are rights members have under current Chapter 65, modified in some cases by this bill, so an existing corporation that wants to limit any of these rights would need to do so with a vote of the members, as provided in ORS 65.144(2).

The rights listed in ORS 65.144(1) will be default rights, the rights members have if the articles and bylaws do not provide otherwise. The rights listed are the rights to (1) elect directors, (2) remove directors, (3) vote on any change to the number of directors, (4) vote to dispose of, through sale or otherwise, the corporation’s assets or to merge with another entity, (5) vote to dissolve the corporation, and (6) approve a conflict of interest transaction (for a mutual benefit corporation).

Section 32. This section improves language in ORS 65.147.
Section 33. Current ORS 65.154 provides that membership can be terminated for failure to pay dues. Section 33 adds language clarifying that a decision to suspend or terminate membership for failure to pay dues can be made without a hearing.

Section 34. This section clarifies language in ORS 65.167 that provides procedural rules for removing members. Any procedure must be fair and reasonable, and the statute provides two ways of structuring a procedure to be fair and reasonable.

Section 35. This section improves language in ORS 65.171.

Section 36. This section adds a subsection to ORS 65.174, clarifying that the Attorney General is also authorized to bring a derivative proceeding to procure a judgment for a public benefit corporation or a religious corporation.

Section 37. This section improves language in ORS 65.177.

Section 38. ORS 65.204 permits members to call a special meeting. The statute currently provides that if notice is not given within 30 days of the demand for a special meeting, the members demanding the meeting may set it themselves. A new provision also gives them that right if the date of the special meeting is not set within 30 days of the notice. The organization should set the meeting within 60 days of the request for a meeting.

Section 39. This section improves language in ORS 65.207.

Section 40. ORS 65.211 provides for action without a meeting and requires unanimous consent for an action taken without a meeting. Changes in the language clarify that the articles or bylaws can provide that an organization can take a vote without a meeting but cannot provide for a less-than-unanimous vote. This section includes a cross-reference to Section 4 of the Act, which creates a new method of taking action. If the corporation complies with the requirements for taking action using a vote by email, as set forth in Section 4, the decision need not be unanimous.

Section 41. This section removes a requirement in ORS 65.214 that notice to members of meetings be given “no fewer than 30 days nor more than 60 days” if notice is mailed “by other than first class or registered mail.” Instead, notice must be made in accordance with the notice provision in ORS 65.034, which includes electronic notice, and notice must be given no fewer than seven days before a meeting.

Section 42. This section improves language in ORS 65.217.

Section 43. ORS 65.222 provides the process for voting by written ballot. Because “written” is defined to include electronic writings, ballots may be submitted electronically. The current statute provides that approval is valid only if the number of votes cast equals or exceeds the quorum required to be present at a meeting. This leaves ambiguous the situation in which the number of members who attend a meeting
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constitutes a quorum. Section 43 adds a subsection to 65.222 clarifying that the number of votes cast by ballot constitutes a quorum if the number of members present at a meeting constitutes a quorum.

Section 44. Under ORS 65.224 a nonprofit corporation must maintain a list of its members, and each member has the right to inspect the list. Due to concerns that a member might need to keep the member’s physical address secret for personal safety reasons, Section 44 amends ORS 65.224 to provide that the list must contain “contact information” for each member, rather than an address. Contact information is defined in ORS 65.001 and includes an email address. Section 44 also removes the requirement that the list of members be alphabetical.

Section 45. This section improves language in ORS 65.227. It deletes the statement that a person who cannot vote to elect directors is not a member, to conform to changes in the definition of member in ORS 65.001(30).

Section 46-48. These sections improve language in ORS 65.231, 65.241, and 65.244.

Section 49. This section rewrites ORS 65.247(3), the subsection that explains removal of a director elected by cumulative voting, for clarity.

Section 50. This section improves language in ORS 65.251.

Section 51. This section amends ORS 65.301, clarifying that the board of directors can delegate corporate powers but retains authority over an exercise of power the board delegates or authorizes.

Section 52. ORS 65.311 provides rules for the election of directors. Section 52 adds a new subsection clarifying that if a corporation has no directors and no members who can elect directors, the Attorney General can ask a court to appoint one or more directors. Occasionally a nonprofit corporation will have assets or liabilities remaining but all directors will have resigned or are facing removal. Rather than require dissolution of a nonprofit in those circumstances, it would be beneficial to have the option of authorizing the court to appoint a new board of directors at the request of the Attorney General. An analogous provision for charitable trusts can be found at ORS 130.615(4).

Sections 53-54. These sections improve language in ORS 65.314 and 65.317.

Section 55. This section makes a number of changes to the provisions in ORS 65.324 regarding the removal of directors. The rules for removal of member-elected directors by members are made subject to the articles and bylaws of the corporation.

The number of votes required for removal by members is amended to be a majority of votes cast. Removal by directors is changed to a majority of directors in office or by a greater number set forth in the articles or bylaws.
The articles or bylaws can provide that a director can be removed for specified reasons, and Section 55 clarifies that one reason can be missing more than a specified number of meetings. Unchanged is the requirement that any specified reason will apply to a director only if the articles or bylaws provide for removal on that ground at the time the director’s term began.

**Section 56.** ORS 65.327 provides rules for removal of a director by a court, at the request of the corporation, at least 10% of the members, or the Attorney General. Section 56 adds a violation of ORS 65.377 (standards of conduct for officers) as a reason for removal.

**Section 57-59.** This section improves language in ORS 65.331, 65.334, and 65.335.

**Section 60.** This section clarifies the meaning of a regularly scheduled meeting, which does not require additional notice to directors. Under ORS 65.337, a nonprofit corporation can permit a director to participate through a form of communication if all directors can simultaneously communicate with each other. The Work Group did not change the requirement that directors be able to simultaneously communicate, because in connection with a meeting, simultaneous communication is critical. The Work Group is aware that technology will continue to change, so the statute can simply provide for “simultaneous communication” and that will cover changes in technology. Under current technology, a director can participate by conference call or Skype, but not by email, because email does not permit simultaneous communication.

**Section 61.** This section improves language in ORS 65.341. The definitions of electronic, sign, and written have been moved from ORS 65.341 to the definitions section, ORS 65.001, because they now apply to additional sections.

**Section 62.** This section improves language in ORS 65.344 and clarifies the notice requirements for regular and special meetings of the board of directors.

**Section 63.** This section clarifies that in ORS 65.347 a director’s waiver of notice of a meeting may be transmitted electronically.

**Section 64.** This section amends ORS 65.351 to provide that a quorum consists of a majority of directors in office immediately before the meeting begins. The articles or bylaws can provide otherwise, but cannot provide for a quorum of less than one-third of the directors in office immediately before the meeting. The current statute sets the default rule for a corporation with a fixed number of board members at a majority of the fixed number, rather than a majority of those in office. The language for a corporation with a variable range for its board is confusing and is clarified to set the quorum at a majority of the directors in office. This section also adds a statement clarifying that each director has one vote and may not vote by proxy.

**Section 65.** This section modifies ORS 65.354 to clarify that all voting members of committees exercising the authority of the board must be directors. A new subsection
provides that the board can create committees that do not exercise the authority of the board and these committees can have members who are not directors or members of the corporation. The current statute seems to assume the use of these other committees, but clarification will improve understanding.

Section 66. Directors are fiduciaries who are bound by the common law duties of care, loyalty, and obedience. ORS 65.357 describes the duties of care and loyalty. These duties require a director to act in good faith, with the care an ordinarily prudent person in a like position would exercise under similar circumstances, and in a manner the director reasonably believes to be in the best interests of the corporation. These duties have been described as applying a corporate rather than a trust standard to the directors, although the duties should be understood in the context of a nonprofit corporation rather than a for-profit corporation.

At the time the Revised Model Nonprofit Corporation Act (RMNCA), which formed the basis for Chapter 65, was developed, there was concern that courts would apply trust law standards to directors of charities formed as nonprofit corporation. For that reason, the RMNCA included a subsection stating that a director would not be deemed to be a trustee. This proposal deletes that subsection because the understanding that a nonprofit corporate standard applies to directors is now well accepted and because some directors have used the subsection being deleted to argue that fiduciary standards do not apply to them. Moreover, though the RMNCA recognized that a nonprofit corporation acting as trustee of a trust would still have all the rights and responsibilities of a trustee, some have attempted to use this provision to argue otherwise. Because nonprofit corporations do sometimes serve as trustees, the corporation as a whole may be liable for a breach of trust, though the corporation cannot seek contribution or indemnification from an individual director. The deletion is not intended to suggest that a trust standard applies to individual directors of nonprofit corporations. The standards continue to be the same as under the current statutes.

Section 67. A corporation can enter into a conflict of interest transaction with a director, without risk that the transaction will be voidable or the director will be liable, if the transaction is fair to the nonprofit corporation. The statute creates a presumption of fairness if the corporation follows a procedure that involves disclosure of the material facts of the transaction and the director’s interest. Approval by the Attorney General or a court also creates a presumption of fairness. Section 67 amends ORS 65.361 to clarify that to avoid liability the transaction must be fair to the nonprofit corporation, and that the process outlined in the statute creates a presumption of fairness, but not a safe harbor.

Section 67 adds a new subsection that clarifies that a director has an indirect interest in a transaction involving a person related to a director or a business associate of a director.

Section 68. This section improves language in ORS 65.364.

Section 69. This section amends ORS 65.371 to require that each nonprofit corporation have a treasurer in addition to a president and secretary. Section 69 does not change the
rule in the current statute that the same individual may simultaneously hold more than one office, but Section 69 adds a requirement that the same individual may not serve simultaneously as the president, secretary and treasurer. Section 69 also clarifies that an officer need not be a director.

Sections 70-73. These sections improve language in ORS 65.377, 65.381, and 65.431.

Section 73. Under ORS 65.434, if a corporation does not have members entitled to vote on amendments to the articles of incorporation, the directors can adopt amendments. Section 73 changes the requirement of a majority vote of directors in office to a majority vote of the directors who attend the meeting.

Section 74. Under current law, several actions by members required action by the lesser of two-thirds of the votes cast or a majority of the voting power. For mutual benefit corporations, the two-thirds requirement makes sense because changes by members can affect members’ rights, and the super-majority requirement protects those rights. However, many public benefit and religious corporations have a large number of inactive members whose personal interests are not affected by votes of members. For those corporations, meeting this requirement can be difficult. ORS 65.437 provides rules for amending articles of incorporation, and Section 74 reduces the requirement for member voting for public benefit and religious corporations to a majority of the votes cast. The super-majority rule continues to apply to mutual benefit corporations.

Section 75. ORS 65.441 provides rules for members of a class entitled to amend articles of incorporation, and Section 75 reduces the requirement for voting for public benefit and religious corporations to a majority of the votes cast.

Sections 76-77. These sections improve language in ORS 65.447 and 65.451.

Section 78. Section 78 removes the restriction that a proceeding brought by the Attorney General under ORS 65.454 to correct the articles of incorporation be commenced in Marion County.

Section 79. ORS 65.461 provides the rules for amendments to bylaws by directors when a corporation has no members with the power to vote on bylaws. Section 79 removes the possibility that the articles or bylaws could provide different rules, making the rules in ORS 65.461 mandatory.

Section 80. This section adds to ORS 65.464 a reference to ORS 65.241 and 65.244, which limit the ability of the board of directors to change the bylaws in ways that affect members’ rights, if the members have voting authority under those sections.

Section 81. This section improves language in ORS 65.467.

Section 82. This section clarifies ORS 65.484 with respect to the merger of a public benefit corporation or a religious corporation. This section changes the time the
corporation must notify the Attorney General from at least 20 days before consummation of the merger to at least 20 days before the corporation files articles of merger. The current statute requires notice to the Attorney General only when a public benefit or religious corporation merges with a business corporation or mutual benefit corporation. Section 46 removes that limitation, so notice is required for any merger involving a public benefit or religious corporation.

Section 83. ORS 65.487 provides the rules for voting on mergers. Current law for action by members requires the lesser of two-thirds of the votes cast or a majority of the voting power. Section 47 changes that requirement for public benefit and religious corporations to a majority of the votes cast, and makes the same change if voting by a class of members is required. The super-majority requirement for mutual benefit corporations remains the same. Current law for action by directors requires a majority of the directors in office. Section 47 changes that requirement to the voting requirements that otherwise apply to action by the board, typically a majority of the directors present, unless the articles, bylaws, directors or members require a greater vote.

Section 84. ORS 65.491 requires that after a merger has been approved, the surviving corporation must deliver articles of merger and several declarations to the Secretary of State for filing. The merger takes effect when the Secretary of State files the articles, so the merger will not be effective until all the declarations are delivered to the Secretary of State. Section 84 adds a requirement that the surviving corporation file a written declaration that states that the Attorney General approved the plan, if the plan required approval.

Section 85. This section adds a new subsection to ORS 65.494, stating that in a merger, the surviving corporation remains subject to any restriction that a gift instrument imposes on assets held by any party to the merger. This provision was moved from ORS 65.501.

Section 86. ORS 65.534 provides the voting rules for the sale or disposition of all or substantially all of a corporation’s property. Current law for action by members requires the lesser of two-thirds of the votes cast or a majority of the voting power. Section 86 changes that requirement for public benefit and religious corporations to a majority of the votes cast. The super-majority rule for mutual benefit corporations remains unchanged. Current law for action by directors requires a majority of the directors in office. Section 86 changes that requirement to the voting requirements that otherwise apply to action by the board. Section 86 also changes the requirement of notice to the Attorney General by public benefit and religious corporations from 20 days to 30 days. The Work Group concluded that this change would give the Attorney General a little more time to investigate and take action if necessary and would not pose a significant hardship to a corporation disposing of its assets. The Attorney General can waive the notice requirement, so if a corporation needs to sell property quickly, the corporation can request a waiver.

Sections 87-88. These sections improve language in ORS 65.554 and 65.621.
Section 89. The same voting changes discussed in connection with Section 86 are made by Section 89 to ORS 65.624, which provides for voting in connection with dissolution. Section 89 also authorizes the board of directors to approve a dissolution even if the board does not have a quorum. Sometimes a corporation that needs to dissolve no longer has the number of directors required by its articles and there has been concern about whether the remaining director(s) have the legal authority to proceed with dissolution process. The Work Group felt that it was appropriate that the remaining director(s) should be allowed to wind-up the corporate operations in an orderly fashion without fear of reprisal or liability in such circumstances.

Section 90. When a public benefit corporation dissolves the assets that had been held by the corporation must be used to pay creditors and then must be distributed to another public benefit corporation. The Attorney General is responsible for protecting charitable assets, and Section 90 amends ORS 65.627 to strengthen the ability of the Attorney General to protect charitable assets.

Section 90 moves the requirement regarding the transfer of assets to the beginning of ORS 65.627, to emphasize that assets cannot be transferred until a period of time has elapsed after notice to the Attorney General or the Attorney General has, in writing, consented to the transfer or indicated that the Attorney General would not take action. The time period is increased from 20 days to 30 days.

At the end of the dissolution process, after the corporation has transferred its assets, the corporation must provide the Attorney General with a list showing the names and addresses of the persons who received property from the corporation. Current law does not require that creditors be included on that list, and Section 90 amends ORS 65.627(3) to remove the exclusion of creditors. The intention is that creditors as well as donee organizations be listed when a corporation dissolves. The Attorney General has seen corporations attempt to disguise transfers to private persons for private benefit as payments to creditors. It is hoped that by requiring that all transfers be listed, such improper transfers and loss of charitable assets into private hands will be reduced.

Sections 91-93. These sections improve language in ORS 65.631, 65.634, and 65.637.

Section 94. ORS 65.644 provides that if a dissolved nonprofit corporation publishes notice about how to present claims to the corporation, claims will be barred after five years. Section 94 adds a new subsection that permits a corporation to publish the notice on its website or in another location where the corporation maintains an electronic presence. The website must remain accessible to the public for at least 30 days.

Section 95. ORS 65.661(1)(a) lists the findings that can lead a court to dissolve a corporation in a proceeding brought by the Attorney General. Section 95 adds new reasons a court can dissolve a corporation: fraudulent intent or the use of fraudulent information in filing articles (this change is a clarification); for public benefit corporations, a finding that the Internal Revenue Service revoked the corporation’s tax-
exempt status; and a finding that the corporation is a shell entity. ORS 65.661(1)(F) provides the definition of shell entity that applies here and throughout Chapter 65.

ORS 65.661(3) adds as consequences to a finding that a corporation was a shell entity the ability for the Attorney General to get fees and costs, and authorization for a public body to enjoin a director or other person connected with the shell entity from organizing another corporation in the state. ORS 65.661(4) provides a process for a corporation to defend against an allegation that it is a shell entity.

Section 96. Current ORS 65.664 provides that venue for a proceeding brought by the Attorney General lies in Marion County. Section 96 adds Multnomah County, the county where a corporation’s principal office is located or, if the principal office is not in this state, where its registered office is or was last located. The Charitable Activities Section is located in Multnomah County, as are the majority of nonprofits, and updating this venue provision is consistent with other civil proceedings.

Section 97. This section clarifies in ORS 65.667 that the Attorney General can request the appointment of a receiver for a nonprofit corporation outside the context of a dissolution proceeding. The Oregon Rules of Civil Procedure and common law provide for the appointment of a receiver in other contexts and this change better reflects the Attorney General’s and court’s authority with respect to nonprofit corporations.

Sections 98-104. These sections improve language in ORS 65.671, 65.707, 65.711, 65.717, 65.724, 65.727, and 65.734.

Section 105. ORS 65.751 lists the findings that can lead a court to revoke the authority of a foreign corporation to transact business in the state. Section 105 makes the same changes to this section that Section 95 of the bill makes to ORS 65.661(1)(a), which lists the findings that can lead a court to dissolve a domestic corporation.

Section 106. This section improves language in ORS 65.757.

Section 107. Under ORS 65.771, a nonprofit corporation with members must maintain a list of its members. Current law requires a name and address for each member. Section 107 changes the requirement to a name and contact information. The reason for the change is to permit a person to provide an electronic address rather than a physical address so that a person concerned about personal safety need not disclose a physical address. Section 107 also removes the requirement that the list of names be in alphabetical order because that requirement has been a burden for some corporations with limited financial resources and large membership and has been a source of technical challenges to corporate compliance by members.

ORS 65.771 also changes the requirement to maintain a list of the names and addresses of directors and officers to a requirement to maintain a list of names and contact information. A new subsection in ORS 65.771 confirms the right of a director to inspect the records of a corporation.
Sections 108 - 112. These sections improve language in ORS 65.774, 65.782, 65.787
65.990, and 271.330.

Section 113. This section repeals ORS 65.501, because that provision was moved.

Section 114. The Act becomes operative on January 1, 2020. The Secretary of State and
Attorney General may adopt rules and take other actions prior to the operative date to be
ready to exercise their powers provided under this Act on and after the effective date.

Section 115. The effective date for the Act is the date it is passed. After the effective
date, the Secretary of State and the Attorney General may take necessary actions, but the
provisions of the Act will not be operative until January 1, 2020.
Articles of Validation – Nonprofit/Corporation

SECRETARY OF STATE - CORPORATION DIVISION - 255 CAPITOL ST. NE, SUITE 151 - SALEM, OR 97310 - https://sos.oregon.gov/Pages/index.aspx - PHONE: (503) 986-2200

REGISTRY NUMBER: ______________________________

In accordance with Oregon Revised Statute 192.410-192.490, the information on this application is public record. We must release this information to all parties upon request and it will be posted on our website. For office use only

Please type or print legibly in Black ink. Attach additional sheet if necessary.

1) NAME OF CORPORATION: ________________________________________________________________

2) DESCRIPTION OF THE DEFECTIVE CORPORATE ACTION:

____________________________________________________________________________________

____________________________________________________________________________________

____________________________________________________________________________________

3) LIST THE NUMBER, CLASS, SERIES AND DATE OF SHARES CLAIMED AS PART OF THE DEFECTIVE CORPORATE ACTION:

____________________________________________________________________________________

4) DATE OF THE DEFECTIVE ACTION: ______________________________________________________

5) NATURE OF THE FAILURE OF AUTHORIZATION/OVERISSUE: ________________________________

6) NAME AND DATE OF PREVIOUSLY FILED DOCUMENT RELATING TO THE DEFECTIVE CORPORATE ACTION (IF APPLICABLE) Include copy of the document:

____________________________________________________________________________________

7) CHECK ALL APPROPRIATE STATEMENTS:

☐ The board of directors ratified the defective corporate action.

☐ The shareholders approve the dates of ratification and approval.

8) EXECUTION:

I declare as an authorized signer, under penalty of perjury, that this document does not fraudulently conceal, obscure, alter, or otherwise misrepresent the identity of any person including officers, directors, employees, members, managers or agents. 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.

Signature: ___________________________ Printed Name: ___________________________ Title: ___________________________

CONTACT NAME: (To resolve questions with this filing.)

PHONE NUMBER: (Include area code.)

CONTACT NAME: ________________________________________________________________________

FEES

Nonprofit Required Processing Fee $50
Domestic Required Processing Fee $100

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Free copies are available at sos.oregon.gov/business using the Business Name Search program.