THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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THE LAW FIRM FOR ASSOCIATIONS®

IN THIS ISSUE:

SCAM ALERT FROM THE ILLINOIS SECRETARY OF STATE — The following scam alert currently appears on the Illinois Secretary of State website for business services: "Corporate Scam Alert – A firm called Corporate Records is contacting Illinois businesses in an attempt to collect a $125 fee to fill out a corporation's 'Annual Minutes Record Form.' The Illinois Business Corporation Act does not require corporations to file a 'Minutes Record Form' or pay such a fee with the state or any private entity. Please contact the Illinois Attorney General's Office Consumer Fraud Division at 800-243-0618 to file a complaint regarding this scam solicitation." *Associations with Illinois members might want to pass on this warning. All too often harried business people assume such solicitations are for real, and must be for some new requirement. It's easier to pay than investigate. Well, there's no such form and no such requirement in Illinois, either for businesses or for nonprofits.*

DO THE BUYERS EVER TAKE THIS INTO ACCOUNT? — U.S. consumers are buying about 9.7 billion gallons of bottled water, at a cost of $11.8 billion (not including disposal and recycling), for an average cost of $1.22 per gallon, based on 2012 numbers. That works out to about 300 times the cost of tap water. However, the American Water Works Association (whose members provide tap water) says the real disparity is much greater because most bottled water is sold in 500 ml. bottles, so that works out to about $7.50 a bottle, or close to 2,000 times the cost of tap water. *And those consumption numbers are going up each year. We certainly see this at all association meetings. Pitchers of water on the tables, and lots of bottled water too. We drink more bottled water than any other country in the world, regardless of population. You gotta wonder. Safety? Convenience? Something else?*

LEAST SURPRISING HEADLINE STORY — The Chicago Tribune recently ran an article about traffic speeds in the Chicago and suburban area, noting "95% of Illinois tollway drivers are speeding," typically driving at 66 mph while the posted limit is 55 mph. *These numbers will not come as a surprise to anyone who regularly drives in and around Chicago, and may be low. Drivers may anticipate average speeds will go up when posted limits on some area interstates go to 70 mph as of January 1, 2014.*

GOOD READING … See you in February 2014

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NOT-FOR-PROFIT LAW DEVELOPMENTS

THIS SORT OF HEADLINE IS ALL TOO COMMON — A headline story in the *Detroit Free Press* two days before Christmas is all too common, "Taking A Chunk Out Of Charity Donations." The story was about the Vietnam Veterans of Michigan contracting with Associated Community Services ("ACS") in Southfield, Michigan, a telemarketing firm that raises money for many charities. Back in 2011, the most recent year for which the charity's report is available, the vets' group received slightly less than 10% of the $89,000 ACS's busy telemarketers were able to raise. This came to light during an investigation by the Michigan Attorney General's office of ACS fundraising practices. *This is by no means unusual. Disproportionate amounts spent on fundraising and various expenses such as the all-encompassing "administrative" or "general" categories by fundraisers are all too common but generally not revealed to those being solicited. Public support for those in the military and veterans is high since 2001, so many groups seek to take advantage. But there are numerous reports of frauds, and too few of those charitable dollars actually benefiting those in whose names the funds are raised. In the UK, there is a UK Charity Commission which will intervene when it suspects revenues are being raised in the name of a charity but largely being expended for unrelated purposes, as it did recently in investigating a group soliciting on behalf of Afghan war vets. Maybe we need more of that here.*

OBAMACARE PROVISION ENFORCEMENT TEMPORARILY STAYED — U.S. Supreme Court Justice Sonia Sotomayor entered an order on New Year's Eve temporarily halting enforcement of an Obamacare provision requiring many religious nonprofit organizations to offer employee health insurance covering birth control. The order, coming a day before the federal healthcare law's provisions addressing that requirement would have taken effect, was entered in a suit filed by the Denver-based Little Sisters of the Poor Home for the Aged, which argues that the provision violates the Little Sisters' religious freedom under the First Amendment to the U.S. Constitution. Having since heard further arguments from the Obama Administration and the Little Sisters, Justice Sotomayor will now decide whether to make the order permanent, lift the stay, or defer to the entire U.S. Supreme Court for a decision. *The U.S. Court of Appeals for the District of Columbia has also issued a stay against enforcement of this provision in a separate suit brought by a group of religious nonprofits, and the Supreme Court has agreed to hear arguments in yet another challenge to Obamacare's employer birth control coverage mandate, this one brought by two for-profit businesses. The Supreme Court as a whole will probably get the last word on all of these challenges, one way or another, but not till March or later.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

MANY COPYRIGHTS ARE UP FOR GRABS — The (federal) Copyright Act was amended by Congress to provide individual authors (or their heirs) an irrevocable right to terminate copyright transfers or licenses made on or after January 1, 1978, under 17 U.S.C. Section 203 of the Act, subject to a number of conditions. The right kicks in 35 years after execution of the grant of transfer or license (so, commencing January 1, 2013 at the earliest), or 35 years after publication of the authored work under the grant, or 40 years from the date of execution of the grant, whichever terms ends earlier. The termination must be exercised within five years or it is forfeited. The notice of termination must be filed with the current owners of the copyright, and with the Register of Copyrights in the (U.S.) Copyright Office. The termination applies to U.S. copyrights only and does not affect foreign copyright transfers or licensees. Grants or licenses of less than 35 years are not subject to termination under Section 203. The owners of derivative works may not be deprived of their copyright ownerships, but they may be denied additional derivative works. *This only scratches the surface of the complex subject of copyright terminations. Copyrighted works for hire may not be terminated, but works for hire must*

meet a number of conditions, and include contributions to collective works such as magazines, newspapers, educational texts and instructional materials. If a work has multiple authors, a majority must agree to the termination. There is also a separate section of the Copyright Act with different termination rights for copyright transfers and assignments made before January 1, 1978. See 17 U.S.C. Section 304. Termination may occur even if the original agreement said the grant could not be terminated. There is also an ambiguity, which requires further Copyright Office action or litigation, to cover grants made before January 1, 1978 if the work was not created until after that date. This is a bone of contention for many in the music industry but not limited to that industry. Associations need to be aware of this termination power as grantors of copyrighted works and as grantees. Do you have any copyrighted material that comes within the termination power? If you want to terminate an old grant or license, you have a narrow window to do so. Use it or lose it.

EMPLOYMENT LAW DEVELOPMENTS

EMPLOYER CAN'T FORCE RELIGION ON WORKERS — A South Florida chiropractic office has entered into a consent agreement with the (federal) Equal Employment Opportunity Commission after allegedly trying to force Scientology on its workers. The employer denied allegations made to the EEOC that it was engaging in religious discrimination by trying to dictate its employees' religious beliefs, but nonetheless agreed to pay $170,000 to former workers, establish a policy against discrimination, and require all employees to receive anti-discrimination training. Among other things, the employer was charged with requiring workers to attend church, read books on Scientology, and engage in exercises such as yelling at ashtrays, talking to walls, sitting in a sauna for five hours, taking 20 "vitamin" pills on a daily basis, and sitting perfectly still in a spare office room for an eight-hour staredown with other employees. *Nonprofits and their members have causes, some religious and some not. But they need to be careful in trying to force certain activities on their workers.*

NEW RULES FOR SMALL EMPLOYER HEALTH PLAN CREDITS — A recent IRS notice points out that the maximum amount of the small employer tax credit that will be available for exempt organizations offering qualified health plans for their employees will be increasing from 25% to 35% of premiums paid for tax years beginning after December 31, 2013, while the maximum credit for other small employers will be increasing from 35% to 50% of premiums paid. But the credit will now be available only for employers offering plans through a government Small Business Health Options Program Exchange, except for employers in those areas of Washington and Wisconsin where such plans will not be immediately available through Exchanges in 2014, as some transitional relief from that requirement was recently granted for those employers. *This appears to be beneficial, but also adds some more complexity and changes to current benefit plans. Got to keep those Exchanges busy, or some taxpayers might think the Exchanges aren't all that necessary.*

SOME USEFUL SUGGESTIONS FOR REFERENCE-CHECKING — Checking references is an essential step in the hiring process, but often beset with problems in spotting false references. The following suggestions from a variety of experts may be useful. Check the applicant's and references' connections by reviewing Linked-In or other such employment history websites. Do they mesh? Use a good employment background vetting service for key hires. Check all company references online to see if they actually exist. Demand landline office numbers for references. Ask applicants for past managers, not peers or subordinates, when asking for references. *Bad hires are very expensive to get rid of and replace. Applicants providing false references are really bad candidates. The extra work in reference-checking may save a lot of headaches down the road.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

COURT UPHOLDS SEARCHING AND DETAINING DEVICES AT BORDER — A New York federal district court has upheld the constitutionality of Department of Homeland Security (DHS) directives authorizing border agents to inspect files and images stored on electronic devices that are being brought into the U.S., perform searches on such devices, detain such devices for a reasonable time to perform such searches, and copy stored information to facilitate inspection, all without any reasonable suspicion that devices might contain prohibited materials or information. The court essentially agreed with DHS, and with an earlier U.S. Supreme Court opinion, that "[S]earches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border." *Some other federal courts have indicated that border agents may not have absolute discretion to engage in otherwise unconstitutional conduct involving American citizens just because it occurs at the border, though immigrants to America have long known that U.S. border agents can be pretty arbitrary with them. We believe the first "sovereign" to engage in this sort of "protective" action in America was the British King George III whose butt was kicked out of this country in the 18th Century. But, pending another American Revolution, readers traveling abroad and returning should be aware that their constitutional rights with regard to searches and seizures mean very little when they cross paths with a U.S. border agent. Benjamin Franklin said, "Those who would give up essential liberty to purchase a little temporary safety deserve neither liberty nor safety." Times do change.*

TAX LAW DEVELOPMENTS

IRS ISSUES NEW PROCEDURE FOR REGAINING EXEMPTIONS — The Internal Revenue Service has issued a new Revenue Procedure providing further guidance on how nonprofit organizations can regain tax-exempt status after having their exemptions automatically revoked for failing to file annual returns with the IRS for three straight years. Organizations can file for "streamlined" reinstatement of exempt status retroactive to the date of revocation if they were previously eligible to file Form 990-EZ or Form 990-N for each of the years they failed to file annual returns, they never had exemptions automatically revoked before, and they are filing for retroactive relief within 15 months of the date their exemptions were revoked. Further, such organizations can obtain retroactive reinstatement of exempt status without showing "reasonable cause" for their previous failure to file annual returns. Other organizations not eligible for such retroactive relief may still file for retroactive reinstatement of exempt status under the new Revenue Procedure if they file within 15 months after revocation, but they will have to demonstrate "reasonable cause" for failing to file for at least one of the three consecutive years they failed to file an annual return. Organizations filing for retroactive reinstatement more than 15 months after revocation will have to meet the "reasonable cause" requirement for all three years. Finally, if they aren't asking for retroactive reinstatement, organizations can still apply for reinstatement prospectively from the date of such applications. *Although the IRS is making these types of relief from automatic revocation available, applying for any of this relief will cost money, and, except for years when an organization was eligible to file a Form 990-N, the nonprofit will have to file missing returns along with an application for reinstatement or face tax penalties. But, consider also that any relief an organization gets will probably come after the IRS takes considerable time to process the nonprofit's application for reinstatement, and, in the meantime, the organization has to deal with uncertainty regarding its taxable or exempt status. It surely is better to file those exempt organization annual returns with the IRS and not have exempt status automatically revoked in the first place.*

IRS PROVIDES GUIDANCE FOR "FUNCTIONALLY INTEGRATED" NONPROFITS — The Internal Revenue Service has provided "interim guidance" to those exempt organizations seeking to avoid classification as a private foundation (and the onerous requirements applying to such foundations) because they qualify as "functionally integrated" with a governmental supported organization. It's dubbed "interim guidance" because the IRS is working on final regulations that will govern whether a supporting organization is "functionally integrated." Pending the publication of such final regulations, a supporting organization will be considered "functionally integrated" with a governmental supported organization until the first day of its third taxable year beginning after December 31, 2013, if it:

(1) Supports at least one supported organization that is a governmental entity and to which it is "responsive" because officers, directors or trustees of the supported organization have a significant voice in the operations of the supporting organization, and

(2) Engages in activities for or on behalf of the supported organization that perform the functions of, or carry out the purposes of, that organization and that, but for the involvement of the supporting organization, would normally be engaged in by the supported organization.

Exempt nonprofits supporting governmental entities, which might otherwise be considered private foundations, may want to become familiar with the rules for "functional integration." It may be better for them to be private foundations than taxable entities, but the restrictions on a private foundation usually make it the least desirable classification for an exempt nonprofit.

REGULATORY LAW DEVELOPMENTS

ASSOCIATIONS AND FTC SETTLE CHARGES REGARDING ETHICS CODES — The Federal Trade Commission recently entered into proposed consent orders with two professional associations, requiring them to eliminate provisions in their codes of ethics that limited competition among their members. The Music Teachers National Association, Inc. would be required to stop restricting or declaring it unethical for its members to solicit clients from other members. The California Association of Legal Support Professionals would be required to eliminate code of ethics provisions that make it unethical to cut the rates normally charged when soliciting business from a member firm's client, to speak disparagingly of another member, and to contact an employee of another member to offer employment. *As the FTC noted in a statement accompanying the settlements, "[C]ompeting for customers, cutting prices, and recruiting employees are hallmarks of vigorous competition. Agreements among competitors not to engage in these activities injure consumers by increasing prices and reducing quality and choice. Absent a precompetitive justification, these types of restrictions on competition are precisely the kind of unreasonable restraints of trade that the Sherman Act was designed to combat." Federal antitrust regulators have frequently challenged professional association codes of ethics containing provisions which the FTC regards as anticompetitive.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

A SWITCH IN TIME SAVES… DIA — The Detroit Institute of Arts ("DIA") has received pledges of approximately $330 million from well-heeled foundations, many with connections to Detroit, to buy its highly regarded collection of art to keep it out of the hands of Detroit's appointed financial manager. That manager is being pressed in Detroit's bankruptcy proceedings to collateralize the art collection to pay off creditors, including Detroit's beleaguered pension funds, which are intended to be the only creditors benefiting from the foundation money. Some hurdles remain. Some estimates value the collection at $500 million or more, so additional pledges are being sought. Some creditors may object to the funds going only to the pension funds and try to block the deal. This all still must be worked out in the bankruptcy proceedings. *This is a switch, nonprofit foundations bailing out a government in dire straits instead of the more common other way round. It's not a done deal, but it illustrates some interesting possibilities for other cities trying to get beyond PILOT (payment in lieu of taxes) programs to recoup revenues from their tax-exempt entities, such as universities and religious entities, utilizing municipal services but paying little for them. To be continued ….*

ANOTHER COMMENTARY ON BOARD OF DIRECTORS PERFORMANCE — A recent article in The *Economist* reviewing a book entitled "Boards That Lead" provides some useful insights for serious students of director and CEO relations and how boards of directors can perform better. Lesson #1 was boards should strive to provide strategic advice, and leave their egos at the door. Lesson #2 was better management of the board relationship with the CEO. *This is much too brief a summary of the much more nuanced observations in the article and book. While addressing larger for-profit entities, much of the article's and book's observations apply to the nonprofit world as well. Good strategic insights and good board-CEO working relationships apply to both kinds of entities.*

H & H DEVELOPMENTS

In January . . .

Jonathan Howe presented "Best Practices in Negotiating Meetings & Events Contracts" for the Meetings & Events Institute program for the New York Society of Association Executives. He also presented "Advanced Meetings Contract Legal Issues and Negotiation Strategies" for a Meeting & Incentive Planners Experience offered to planners in Abaco Islands, Bahamas.

Sam Erkonen spoke at the U.S. Chamber Institute. He also traveled to Charlotte, N.C. and Atlanta, GA, where he conducted training sessions for two regional groups for Helms Briscoe.

Naomi R. Angel gave a Legal Trends Report to two trade association meetings of manufacturers – one in Dallas and the other in Fr. Myers, FL.

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Contributors to this issue…
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