THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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VARIATIONS ON THE CASHLESS SOCIETY TREND — *BloombergBusinessweek* recently reported that homeless magazine vendors in Stockholm, Sweden were having problems because some of their buyers did not carry cash. The publisher outfitted some of its vendors with portable credit card readers so they can accept payments by credit card. Their employer thinks this is a world-first. *Maybe not. Streetwise Magazine sold by homeless street vendors in Chicago carries a full-page back cover explaining how readers can buy the $2.00 publication using a PayPal app on their smartphones. Is your association accepting payments made using smartphone apps?*

ADD THESE TO YOUR LEXICON — With all the publicity of late given to virtual currency Bitcoin, including a FBI criminal investigation seizure worth millions in shutting down a drug channel; comments by Fed Chairman Ben Bernanke predicting the rise of virtual currencies; a huge run-up in Bitcoin's value from $15 last January to $1,000 of late; and some retailers accepting them for payment; it comes as no surprise we are already seeing other virtual currencies cropping up. Are you familiar with the likes of Litecoin, Anoncoin and Zerocoin, as others strive for a similar run-up in value? *Add these terms to your lexicon. If Ben Bernanke thinks they will become real currencies, we all better learn more about them.*

IRS WARNS OF TYPHOON HAIYAN RELIEF SCAMS — The Internal Revenue Service has issued a warning to beware of scammers purporting to raise relief funds for victims of Typhoon Haiyan which hit the central Philippines on November 7-8, leaving millions without shelter, food and water and thousands dead. Legitimate relief efforts are being carried out by the Philippines Red Cross, American Red Cross and Salvation Army, among others. *The IRS and FEMA both offer lists of legitimate charitable relief organizations, and the IRS offers a checklist of suggestions to avoid scams and protect your contributions.*

GOOD READING … See you in January 2014

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ELECTION TO COME UNDER NEW DC NONPROFIT ACT — ***Special Report*** — In 2010, the District of Columbia enacted a new nonprofit corporation act. The act took effect on January 1, 2012. There is a provision in the new act allowing nonprofits which were incorporated in the District prior to January 01, 1963 to remain under the "old" DC nonprofit act, which took effect in 1963.

However, to "opt out" of the new act and remain under the old, nonprofits must make an election before January 01, 2014. Otherwise, they become subject to the new act. If a nonprofit elects to remain under the "old act," it can always change its mind and elect to come under the new act by filing a notice with the DC Office of Consumer and Regulatory Affairs. However, if a nonprofit which is eligible to "opt out" of the new act does not make such an election by December 31, 2013, then it comes under the new act and its coverage becomes irrevocable; it can never elect to "go back" to the "old act" again.

The District of Columbia government does not want nonprofits to "opt out" of the new act; it wants to phase out the "old act." Therefore, the requirements to opt out of the new act are very precise, detailed and stringent, and if the nonprofit fails to comply with them in the least respect, the election will be of no effect and the nonprofit will come under the new act.

In essence, according to final regulations issued by the DC Council implementing the "opt out" provisions of the new act – which apply only to nonprofit corporations formed in the District of Columbia before January 01, 1963 that did not elect to become subject to the District of Columbia Nonprofit Corporation Act of 1962 – in order to exercise this option, the eligible nonprofit must: adopt a resolution expressly electing not to become subject to the act; file a copy of the resolution; file a copy of its articles of incorporation; file a list of the names and addresses of all current officers and directors; and file a designation of a registered agent.

At this time, given that the law is brand new; there is no experience with it; and there are no court decisions interpreting its provisions, it is impossible to say whether a nonprofit which is eligible to "opt out" of the new act should do so or not. The consensus of those intimately involved with drafting the new law and of those who have studied it in depth and detail seems to be that the new act is a vast improvement over the "old" 1962 act.

Perhaps the two most uncertain and unanswerable questions at the present time are these: given that the 1962 act has now been repealed, what does it mean to be governed by the "old act"? Second, and even more puzzling, is a provision in the new act which says that if an "old act" nonprofit wishes to do business in the District of Columbia, then it must file articles of incorporation *and comply with the new act.* So this raises the question: what is the effect an "opt out," if, under the new law, a nonprofit must comply with the new act if it wishes to do business in the District of Columbia?

A third question is this: the regulations state that the "opt out" provision is only available to nonprofit corporations formed in the District of Columbia before January 01, 1963 *that did not elect to become subject to* the District of Columbia Nonprofit Corporation Act of 1962. Yet the regulations do not require eligible nonprofits to submit any proof that they did not elect to become subject to the 1962 act, nor do the regulations provide any explanation or guidance as to how a nonprofit incorporated in the District of Columbia prior to January 01, 1963 would prove that it did not elect to be subject to the 1962 act, in the absence of some written record of that election. For example, if a nonprofit never affirmatively elected to be subject to the 1962 act, does that mean it was not subject to the act, or is it the case that by continuing to operate in the District even after January 01, 1963, it automatically did become subject to the 1962 act?

At present there is no answer to this question, so it seems that it is possible – at least theoretically – to follow the “opt out” requirements to the letter, and still at some time in the future be found to be governed by the new statute because it is later determined that the nonprofit could not prove that it never elected to become subject to the 1962 act.

In light of the current situation, therefore, perhaps the safest course for the District of Columbia nonprofit clients eligible to “opt out” of the new act is to exercise the option. The reason for this is this: as noted above, if a nonprofit is eligible to opt out of the new act, but does not exercise that option on or before December 31, 2013, *it can never again exercise the option.* On the other hand, if it does exercise the option, it can always change its mind and “opt in” to the new act in the future.

But admittedly this still does not resolve the “riddle” of what the new law means when it says that if a nonprofit wishes to do business in the District of Columbia, it must nonetheless comply with the new act. The answer may be that while one is not subject to the new act “on paper,” it is practically speaking, subject to the new act.

The District of Columbia has published a list of “old act” corporations that must opt-in or opt-out of the new act before January 01, 2014. Please contact Howe & Hutton, Ltd. if you wish to know whether you are on that list and discuss whether you may wish to exercise your “opt out” option.

Intellectual Property & Computer Law Developments

ANOTHER INTELLECTUAL PROPERTY HAZARD – COPYRIGHT TROLLS — We have become accustomed to reading about “patent trolls,” individuals and companies that neither manufacture products or provide services but nevertheless attempt to collect royalties and license fees or damages from patents utilized by others. Their activities have created enough confusion and consternation in the marketplace that Congress has gotten involved and may ultimately pass legislation to curb the activities of patent trolls. But one lucrative approach begets another, and now commentators are warning about copyright trolls, who acquire copyrights for the purpose of going after alleged violators of the copyright law. Trolls may file thousands of suits with the intention of forcing settlements and collecting whatever damages they can, forcing defendants to defend such claims in faraway jurisdictions and seeking draconian damages. It can be much cheaper to settle, and lucrative for the trolls. *The Internet provides a wealth of opportunities for copyright trolls so be very careful what you download and use. Is it in the public domain? Is your use within the bounds of “fair use?” If sued, get competent legal advice on the merits of the claim asserted because trial courts are beginning to scrutinize such claims with a more jaundiced eye when defendants refuse to buckle under.*

Employment Law Developments

ASKING OLDER EMPLOYEES’ RETIREMENT PLANS CAN BE DICEY — A federal court of appeals panel in Richmond, VA recently overturned summary judgment in favor of the defendant school board and sent the lawsuit back to the district court for a jury trial to hear the claim of a 72-year-old school janitor whose position was allegedly eliminated on the basis of discussions between the janitor and his supervisors regarding his intention to retire. The janitor alleged he planned to return the next school year but told supervisors he would consider retiring if he received certain financial benefits. Instead his position was eliminated on the basis he had announced his retirement. The appellate court said it appeared he had been pressured to retire,

and had not made a firm decision to do so, but let a jury decide. *Employers must tread very carefully when asking older employees their retirement plans. It is permitted to ask their plans but do not pressure them to depart lest you face a Age Discrimination in Employment Act claim which can be very costly in dollars and executive time.*

FEDERAL APPELLATE COURT EXPANDS ADA DUTY TO ACCOMMODATE — A federal appellate court in New Orleans recently overturned a district court decision in favor of an employer and ruled an employer's duty to accommodate an employee's disability could extend to functions not regarded as essential to performance of a job's requirements but could encompass nonessential aspects as well. In this lawsuit the employee had requested a designated parking spot following a knee injury. She claimed after making the request which was denied she was terminated, adding retaliation to her failure to accommodate claim under the Americans With Disabilities Act. The district court concluded the duty to accommodate only extended to essential job functions and a designated parking spot was not related to her job. The appellate court said ADA's duty to accommodate is not so limited in scope, and requires making the place of employment accessible to handicapped persons. *A designated parking place may seem like a frivolous request easily abused, but employers should give serious consideration to any such request in exploring options to accommodate an employee's temporary or permanent need for an accommodation. The ADA imposes a duty to accommodate unless it is an undue burden for the employer. Congress, upset with many federal court decisions rejecting accommodations, expanded the obligation to accommodate back in 2008, and the Equal Employment Opportunity Commission has enthusiastically taken on such claims. Working with the employee to come up with a reasonable accommodation may be much less costly, less time-consuming for management, and lead to a better employment atmosphere than becoming embroiled in litigation.*

NUMEROUS STATES HAVE RAISED THEIR MINIMUM WAGE RATES — Associations and other not-for-profit employers should be aware that 13 states have approved raises in their minimum wage rates for 2014 above the federal minimum wage rate of $7.25 an hour. In addition cities such as San Francisco and Albuquerque have raised their minimum wage rates above their respective state minimum rates. Federal legislation to raise the minimum wage rate is bogged down in the House of Representatives. *President Obama recently stated the remainder of his term in office will be devoted to addressing income inequality in the United States. We are already seeing fast food workers staging protests and one-day strikes in support of a national minimum wage of $15 per hour, a rate recently approved by voters in SeaTac, Washington, a community surrounding the Seattle-Tacoma Airport. Many smaller not-for-profit organizations are faced with declining revenues, more requests for services, and relying on low-paid workers and volunteers. We must all be aware of the minimum wage rates already approved and proposed around the nation.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

WILL THIS BUSINESS TRAVEL INNOVATION SPREAD? — *USA Today* recently reported a business travel innovation that may appeal to the many women 'road warriors' at not-for-profit organizations (and their members) — hotels that set floors aside, or at least a number of rooms, for women travelers, with amenities favored by women such as hair care products and devices, women's emergency kits, even special tables useful for dining in alone. The concept illustrates the factors that contribute to what one university professor's research indicated women travelers want when they travel: safety, empowerment and pampering. *While this is relatively new and not widespread to date, the concept seems popular among women travelers where it has been tried. One reason: the amenities allow them to leave bulky devices such as curling irons and even yoga mats at home. Will this spread? New and repeat business may tell the tale.*

AIRLINE AND OTHER TRAVEL ASSOCIATIONS OPPOSE TSA FEE JUMP — Airlines For America and numerous other air travel-related groups such as the Air Lines Pilots Association, International Air, and Regional Airline Association, to name just a few, have predictably condemned the doubling of the $2.50 security tax on airline tickets to $5.00 which was one of the many fees hiked as part of the budget deal being worked out in Congress between the Democrats and Republicans to avoid another government shutdown. They are particularly incensed that the fee increase will not be used for air travel-related government activities but will instead go into the government's general funds. The associations argue this is unfair, passengers are already paying more than their share in taxes and fees, this will reduce air travel due to higher prices, etc. *Whatever success these arguments had last spring during the sequestration fight, it could be a tougher sell this time. Airline profits are up; passenger traffic is steady; most passengers will be unaware whether the TSA security tax is $2.50 or $5.00 when they are looking at a myriad of changing fares, and fees for luggage, wider seats, seats on the aisle, food, and so on. But even more basic is that Congressional Republicans are dead set against raising taxes and the Democrats are demanding more revenues, and neither party wants another shutdown, so fees are where the added revenues are coming from. Will the associations ultimately prevail? Wait and see.*

Tax Law Developments

IRS WARNS OF NEW SCAM — The Internal Revenue Service has issued a press release warning of a sophisticated new telephone scam that is taking place throughout the country, involving fake phone calls purported to be from the IRS. The caller demands immediate payment of taxes said to be owed, either through a credit or debit card or a wire transfer, and may request a great deal of personal confidential information, such as PINs and passwords. If the victim refuses to pay, the caller threatens arrest, loss of a business or driver's license and, for recent immigrants who seem to be especially targeted by the scam, deportation. The caller may also spoof the IRS toll-free number on caller ID and send bogus IRS emails as a follow-up, or the caller may later phone back pretending to be the local police or other enforcement authorities, and the caller ID for those calls supports that claim. It all seems very official, except for the fact that the IRS doesn't make initial collection contacts with taxpayers by telephone or electronic communication (preferring to send snail-mail notices), and, while the IRS can sometimes be unpleasant or difficult to deal with, making such threats if payment isn't made immediately and asking for confidential information to expedite payment isn't their style. *What do you do if contacted by these crooks? Like a member of Congress who is told to pass a massive new health care law or other legislation without reading it, you should just say "no." Don't open any attachments to their emails or open any links. Additionally, you can report the scammers to the Treasury Inspector General for Tax Administration at 1-800-366-4484 and the Federal Trade Commission "Complaint Assistant" at www.FTC.gov.*

IRS RELEASES 2014 STANDARD MILEAGE RATES — The Internal Revenue Service has released the optional standard mileage rate that can be used to calculate the deductible cost of operating an automobile (including a van or truck) for charitable purposes during 2014. The rate to be used remains at 14 cents per mile driven in service to charitable organizations, unchanged in recent years. *This optional rate compares with 56 cents per mile as the optional standard mileage rate for general business (including nonprofit organization business) miles driven, and the 23.5 cents per mile rate that can be used by taxpayers driving for medical or moving purposes. The latter two categories are down half a cent from 2013, reflecting lower operating costs and depreciation, according to the IRS.*

INFLATION-ADJUSTED TAX ITEMS FOR 2014 RELEASED — The Internal Revenue Service has issued Revenue Procedure 2013-35, which addresses inflation adjustments that have been made by the IRS for many tax items effective for the 2014 tax year. In addition to provisions of general interest, such as the Tax Rate Tables, standard deductions and personal exemptions to be used by filers for their 2014 returns, the Procedure contains adjustments applicable to some more obscure tax provisions, such as the tax on arrow shafts under Internal Revenue Code Section 4161 (did you know there was one?). Also, it makes a couple of adjustments of special note to nonprofits, setting at $10.40 or less the value of a "low cost article" that would not be taxed as being involved in an unrelated trade or business, and setting at $110 or less the level of dues that permits certain exempt organizations to avoid reporting nondeductible lobbying expenditures to members. *By their nature, these amounts change every year. Increases can be expected regularly, unless inflation becomes deflation and prices for everything start going down, a development we are unlikely to see again in the U.S.*

COURT STRIKES DOWN MINISTRY HOUSING EXEMPTION — *H&H Report Update* — A federal district court in Wisconsin has struck down the provision of the Internal Revenue Code granting an exemption from federal income tax for a minister's "rental allowance paid to him as part of his compensation." The court, ruling in a suit brought by the nonprofit Freedom From Religion Foundation, Inc., concluded the exemption violates the clause of the U.S. Constitution that prohibits Congress from making any law "respecting an establishment of religion." *At the Foundation's urging, this same court previously concluded that a National Day of Prayer presidential proclamation violated the "establishment clause," only to be reversed on appeal because the appellate court found that the Foundation lacked proper "standing" to challenge the proclamation's constitutionality. For now this new decision stands as law pending an appeal to the appellate court in Chicago that reversed the district court's earlier ruling. The ruling by the district court has nationwide implications for those benefitting from this income tax exemption.*

REGULATORY LAW DEVELOPMENTS

FTC SEEKS TO SHUT DOWN SCAMMING OPERATION — The Federal Trade Commission has asked a federal judge in Chicago to freeze the assets of a scamming operation out of Montreal, Quebec, that targeted small businesses and churches, billing them for nonexistent online directory services. The scammers, using some 15 different companies, would call the targets, ask them to cinfirm the information in their "listings" or tell them they were expiring, and then bill $500 and up. If the targets refused to pay, the scammers would threaten them with collection efforts, bad credit reports, etc. The underlying tactic was to convince their targets someone in their business or church had authorized the listing. Were the scammers successful? Yep, over $14 million collected, and more than 13,000 complaints were received by the FTC. Canadian authorities assisted the FTC in shutting down this scam. *We have said it before, be very careful when dealing with purveyors of so-called directory services, especially online directories, or for claims of office supplies, or advertising, etc. This is not a new scam; it has been used numerous times with success. The scammers can be very persuasive. Just say no, or even better, collect whatever information you can during the calls and pass it on to the FTC's online Complaint Assistant, at http://www.ftc.gov/ or call 1-877-FTC-HELP (1-877-382-4357) to file a complaint.*

TRADE ASSOCIATIONS SUE CFTC FOR FAILING TO FOLLOW APA AND CEA — Three trade associations recently sued the Commodity Futures Trading Commission for failing to follow the requirements of the Administrative Procedure Act ("APA") and the Commodity Exchange Act ("CEA") when it issued its Interpretive Guidance and Policy Statement Regarding Compliance With Certain Swap Regulations ("Guidance"). The gist of the complaint is that the Guidance operates as a rule, even though it is not labeled as such, because it imposes mandatory requirements on swap market participants. The complaint also alleges that a number of CFTC rules adopted in connection with the Dodd-Frank Wall Street Reform and Consumer Protection Act were adopted in violation of the APA and CEA because the CFTC improperly failed to address the extraterritorial scope of those rulemakings. *Readers should remember that an association has standing to sue on behalf of its members only if the following conditions are met: (1) the association's members would otherwise have standing in their own right, (2) the interest the association is seeking to protect is germane to the association's purpose, and (3) neither the claim asserted, nor the relief requested, requires participation of individual members in the lawsuit.*

ONE MORE THING TO KEEP IN MIND ABOUT PPACA WEBSITE — A professor at Northwestern University offers another reason many people might be expected to have problems with the PPACA website in addition to all the software glitches the Obama Administration is striving to address in crisis mode. Professor Hargittai, who teaches communications studies at Northwestern, says based on past research involving Medicare Part D participation dating back seven years, it should have been recognized that many people are not Internet-savvy, and would be expected to have trouble finding health coverage even if the website worked perfectly. About 15% of adults don't use the Internet. And many of those most in need of health coverage are also among those less likely to be Internet-savvy and computer-skilled. *So in addition to fixing the software, some thought must go into how less Internet-savvy persons are going to be helped to use the PPACA website when it is working properly. That may require more changes to the website or a whole lot more coaches to help people navigate the website.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

CONGRESS.GOV WEBSITE GOES LIVE — The Library of Congress' Thomas (Jefferson) website was launched in 1995 for the purpose of making federal legislative information freely available to the public. The initial scope has been greatly expanded beyond legislative information over the years. All that information can now be accessed at: http://www.congress.gov, the successor to www.THOMAS.gov. The new website is an even more valuable resource to associations engaged in U.S. government relations, lobbying, and public affairs activities. The new website expands platform mobility, comprehensive information retrieval and user-friendly presentations. You can find legislative information including roll call votes, the Congressional Record, congressional schedules and calendars, government resources, and much other information. Some data is still being retrieved from the old THOMAS.gov site, including treaties and presidential nominations, so the transition to the new site will be a work in progress during 2014. *The website remains excellent once you get used to it, and anyone can find Members of Congress. Start your government-related information searches here. It's a treasure trove.*

NECESSITY CAN MAKE FOR STRANGE BEDFELLOWS — Amazon has announced a plan to have the U.S. Postal Service deliver orders to customers on Sundays. Amazon's plan calls for Sunday delivery initially in New York City and Los Angeles, and then expanding the service to much of the nation in 2014. *This is an interesting collaboration between erstwhile competitors. The USPS can use the revenues, and its employees facing potential layoffs due to declining revenues from first-class mail volumes can use the work. Amazon is responding to the expansion of same-day and next-day delivery service by major online retailer competitors including eBay and Google. There goes another advantage of bricks and mortar retailers, buy it and take it with you. What services is your association offering that may be eroded unexpectedly?*

IBD, YBD — That's the abbreviation for one of the most cynical statements of modern politics, used often in connection with voting for unaffordable and unpaid public pension funding obligations. Why worry? "I'll be dead, you'll be dead," when all those pension obligations come due years from now. The due day is fast approaching. Ask Detroit and the other cities that have filed for bankruptcy, ask Chicago, ask Illinois with their plunging credit ratings. But many of those who voted for the pension obligations but also voted not to fund them are not dead. Keep that in mind when you head for the polls next year. *How is your city, county, state doing with its pension obligations? They are and will continue to affect the services local and state governments can provide. Think education, highways and other infrastructure, airports, police, fire, and whether your local and state governments make where you are an attractive place to live and do business. Associations can and do move away from cities headed down.*

IT'S NOT A TECHNICAL ISSUE, IT'S A SOCIAL ISSUE – To allow cell phone calls on airplanes or continue the ban, that is the question. The Federal Aviation Administration is lifting its ban if planes are properly equipped with equipment that will allow cell phones calls without interfering with navigation or other plane radio traffic. The FAA says it is up to the airlines to decide if they will permit cell phone calls. But the Department of Transportation is weighing in on the issue, and is prepared to keep the ban in place. *The flying public, by and large, is opposed to lifting the ban. Flight attendants unions are also opposed because they fear having to deal with unhappy seatmates over calls. Flight regulators and airlines outside the U.S. have allowed cell phone calls in recent years without much trouble, at least as far as what is reported here. Experience on Chicago's public transit listening to others yammering away is not pleasant.*

H & H DEVELOPMENTS

In December . . .

Jonathan Howe presented "Advanced Meetings Contract Legal Issues and Negotiation Strategies" for a combined seasonal spectacular meeting for meeting professionals and association executives alike held at the Sacramento Convention Center. He also presented "The Lawyer Is In," an educational familiarization session relative to legal considerations involving the planning of international programs and events.

Naomi R. Angel gave a report on legal trends and developments at a meeting of manufacturers in Phoenix.

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