

## THE HOWE & HUTTON REPORT

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### TRENDING NOW

**ORGANISTS GROUP SETTLES WITH FTC OVER CODE OF ETHICS** – The American Guild of Organists has settled with the Federal Trade Commission over an antitrust complaint involving the Guild’s code of ethics. The code required customers to pay the previous regular organist at a venue and also pay any other organist whose services the customer wished to use as a replacement. The Guild also developed and published compensation schedules and formulas and urged its members to use them. *Alleging that Guild’s rules restrained competition and harmed consumers, the FTC is requiring the Guild to stop restricting its members from soliciting work as musicians, and stop issuing compensation schedules, guidance or model contract provisions for members to use in determining their compensation. In addition, the Guild is to stop recognizing chapters that fail to certify they will meet similar requirements.*

**BOB JONES UNIVERSITY REORGANIZES AFTER LOSING TAX EXEMPTION** – *H&H Report Update* – Years ago, in a high profile case, Bob Jones University saw its federal income tax exemption revoked because it had a policy prohibiting interracial dating by students. The University dropped that policy and apologized for past discrimination, though it took some time about it. Now, the latest development is that University activities, presumably with no discriminatory prohibition attached, are being transferred to another still-exempt entity, which has previously concentrated on running an elementary school. *Will this reorganization result in the University once more being operated on a tax-exempt basis? There may or may not be further legal developments in this matter, which reminds us of a bygone age many would like to forget.*

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## NOT FOR PROFIT LAW DEVELOPMENTS

**COURT MAINTAINS NONPROFIT HOSPITAL PROPERTY TAX EXEMPTION** – *H&H Report Update* – The Illinois Supreme Court has reversed a lower court decision that declared unconstitutional a 2012 state law exempting nonprofit hospitals from property taxes if the value of their charitable services exceeds the value of property taxes that would otherwise have been collected from them. But the Supreme Court’s decision was based on the lower court’s exceeding its authority by ruling on the law’s constitutionality separate from other issues in the case before it. So, the Supreme Court didn’t squarely address the constitutionality of the exemption. *Likely, this matter will be coming before the state Supreme Court again when the lower court addresses the technical problem that ticked off the Supreme Court this time around.*

**GOVERNORS ESTABLISH NONPROFITS TO RAISE CAMPAIGN FUNDS** – Missouri recently joined the list of states whose governors have established nonprofit groups to raise money for their election campaigns, a list that also includes Georgia, Illinois, Massachusetts, Michigan and New York. These groups are tax-exempt under Section 501(c)(4) of the U.S. Internal Revenue Code for their other principal “social welfare” activities, but they can also raise campaign money, subject to regulation by the Internal Revenue Service. They don’t have to disclose the names of their donors, though, which has made them the subject of some criticism. *The trend for governors to establish these organizations is certain to spread, along with proposed laws to limit their political activities, require disclosure of their contributors, or deny them tax exemptions.*

## MEETING AND TRAVEL DEVELOPMENTS

**NO ROLLBACK OF AIRLINE CELLPHONE BAN** – *H&H Report Update* – Federal regulators have decided that they won’t roll back any of their existing restrictions on air traveler use of cellphones after all. A rollback on those prohibitions was proposed by former Federal Communications Commission Chairman Tom Wheeler, who thought that advances in in-flight communications had eliminated concerns over cellphone use interfering with pilot radios. But Wheeler’s successor, Ajit Pai, has withdrawn the proposal, calling it “ill-conceived” and saying that he does not believe it served the public interest. *Even under Wheeler’s proposal, passengers would still have been prohibited from cellphone use during takeoff and landing, though they could have used phones at higher altitudes. Now, the FCC says travelers must continue to turn phones off or put them on airplane mode throughout their flights.*

## REGULATORY LAW DEVELOPMENTS

**MORE OBAMA-ERA RULES CANCELLED** – President Trump continues to sign bills recently passed by Congress to cancel rules promulgated by the Obama Administration. Rules cancelled in this manner included a federal Bureau of Land Management rule known as “Planning 2.0,” which gave the federal government a bigger role in land-use decisions. Also cancelled were two Education Department regulations on measuring school performance and teacher training, which provided, among other things, that federally funded teacher training programs must be evaluated based on the academic outcomes for students taught. *The bills were passed under the Congressional Review Act, which allows Congress to fast-track legislation to reverse rules recently promulgated by federal departments. The Act was successfully used only once in the first 21 years after it was passed, but has now been utilized seven times by Congress to undo Obama Administration regulations.*

## REGULATORY LAW DEVELOPMENTS (cont.)

**NORTH CAROLINA CHANGES BATHROOM POLICY** – *H&H Report Update* – The North Carolina legislature, relenting to pressure from groups advocating for gay and lesbian rights, voted to repeal its controversial House Bill 2, requiring transgender people to use only public bathroom facilities associated with the sex on their birth certificates. Governor Roy Cooper signed the repealing legislation into law, while also signing a new bill that prohibits local governments from regulating access to bathrooms until December 2020. Charlotte has tried to do that with a local ordinance allowing transgender people to use the bathroom associated with their gender identity. *State lawmakers hoped the repeal of House Bill 2 would allow North Carolina venues to be considered by the National Collegiate Athletic Association, the National Basketball Association, and various businesses as sites for their future events and investments. The NCAA and NBA, as well as PayPal Holdings, Inc. and other groups, had cancelled events and investments in North Carolina because they considered House Bill 2 discriminatory. With the repeal of House Bill 2, the NCAA, at least, has announced that it will no longer ban North Carolina from hosting events. Some human rights groups, on the other hand, objected to the new bill, saying it kept local governments from preventing discrimination.*

**OBAMA-ERA LOAN SERVICING PLAN SHELVED** – The new Secretary of the U.S. Department of Education, Betsy DeVos, has announced that her Department is shelving an Obama-era plan to impose stringent new rules on the companies that manage federal student loans, but will come up with a new plan designed to stem the rise in defaulted student loan debt. The Obama-era plan would have established greater federal regulation of servicers, covering everything from their operating hours to the number of times they can call borrower. DeVos has suggested that the rules she tossed would have driven up taxpayer costs while providing limited benefit to borrowers. *Studies show around eight million Americans are at least a year behind on repaying federal student loan debt, which totals around \$137 billion. Experts say a stubbornly high number of defaults could harm the economy. Consumer groups and Obama regulators blame the rise in defaults on servicers who fail to make borrowers aware of options to reduce their payments. Servicers and some experts say the biggest problem is that borrowers can't afford to repay loans or simply refuse to do so despite repeated phone calls, emails and letters from servicers.*

## TAX LAW DEVELOPMENTS

**IRS TARGETS CONSERVATION EASEMENT DONATIONS** – The Internal Revenue Service has issued a notice advising that the Service is aware of certain conservation easement donation transactions that wrongly purport to allow charitable deductions in amounts greatly exceeding the value of actual donations. The transactions take the following form: an entity that owns real estate solicits investments, donates a charitable easement to a tax-exempt entity, and allocates the resulting tax deduction to its investors. But the promoters of these transactions obtain appraisals that greatly inflate the value of the easements based on unreasonable conclusions about the development potential of the underlying property, leaving the investors with deductions that the IRS intends to challenge. *The Service is seeking further information from promoters of these transactions, appraisers and investors. The IRS notes that it generally won't treat nonprofits accepting the easements as participants in these transactions. But if an organization was involved in setting up the transactions, it may be considered as a promoter or material advisor, with resulting potential adverse tax consequences.*

## TAX LAW DEVELOPMENTS (cont.)

**INVESTIGATION REVEALS MISUSE OF IRS FORM 1023-EZ** – Investigations have revealed that some nonprofits using IRS Form 1023-EZ to apply for recognition of tax-exempt status through a streamlined process aren't reading or misunderstand the instructions for use of the form or are simply misrepresenting themselves in seeking an exemption. Reports indicate that many organizations have filed Form 1023-EZ even though they are disqualified from using the form because they are churches. Some organizations using the form have also been much larger than the small entities intended to use the EZ form, who are generally supposed to have annual gross receipts of \$50,000 or less and assets of no more than \$250,000. In addition, some applicants haven't been properly responding to form questions intended to show whether they are a publicly supported organization or a private foundation. *The approval rate for form users drops to 77% when the IRS actually reviews the information submitted by applicants rather than more or less automatically approving them. This is a significant problem that may cause the underfunded and understaffed IRS to eliminate use of the EZ form or find a way to review applications more carefully. But it should have been anticipated because, even though the EZ form is much shorter than the long Form 1023, the choices filers must make in applying on the EZ form aren't that easy to understand. Additionally, the small size of the form tempts people to apply without the assistance of an attorney and/or lie about themselves in order to avoid having to file the longer Form 1023.*

## EMPLOYMENT LAW DEVELOPMENTS

**BIG GUYS HAVE WHISTLEBLOWER PROBLEMS TOO** – The Chief Executive of Barclays PLC bank in London, as well as the bank itself, are under government investigation in the U.S. and U.K. because the CEO tried to discover the identity of someone who, in anonymous letters to the bank's board, criticized the CEO's hiring of a long-time associate for a top job. Barclays cut the CEO's bonus, and he apologized for what government officials say was an attempt at violating whistleblower laws preventing retaliation against those who report wrongdoing by employers and others. *If government can get after a bank for violating whistleblower laws, they are even more likely to target nonprofits doing the same thing. Apart from government-initiated action, injured parties can sue employers for discharging or taking any adverse employment action against workers who report on employer activities to appropriate authorities.*

**TRUMP ANNOUNCES NEW H-1B ORDER** – President Trump has announced that he is issuing an executive order directing more H-1B visas to the most highly skilled and highest paid foreign workers seeking to find employment in the U.S. Foreign workers are now eligible for 85,000 such visas per year, and the number cannot be changed without Congressional approval. Around 200,000 applications for H-1B visas were received this year, and, under current law, many such visas are distributed by lottery to eligible applicants. *If the method of distributing H-1B visas is changed as Trump has directed, the President's order is expected to benefit tech firms that tend to pay visa recipients at higher wage levels. Outsourcing companies, on the other hand, would be hurt, because they pay many workers around \$60,000 per year, the minimum salary required by law for H-1B visa recipients.*

## INTELLECTUAL PROPERTY LAW DEVELOPMENTS

**DESIGN OF CHEERLEADER UNIFORMS CAN BE COPYRIGHTED** – You have produced a useful item, and you wonder if the design of it can be protected under copyright law as an artistic work. Courts have long held that utilitarian aspects of useful articles can't be protected under copyright law. But the U.S. Supreme Court considered in March whether, and under what circumstances, an artistic design incorporated into a useful article - in this case, the two-dimensional designs appearing on a cheerleader's uniform – could be copyrighted. Finding such a design copyrightable, the Court held that a feature incorporated into the design of a useful article can be granted copyright protection if (1) it can be perceived as a work of art separate from the useful article, and (2) it would qualify for copyright protection on its own if it were imagined separately from the useful article. *The Supreme Court's test for copyright protection as applied to designs incorporated into useful articles is considerably less strict than tests some other courts have looked to in such cases. As a result, those who come up with artistic designs for incorporation into the useful articles they manufacture should find it much easier now to keep others from imitating those designs.*

## OTHER ISSUES

**FLORIDA COURT PROTECTS CAR “BLACK BOX” DATA** – A Florida appeals court has ruled that police can't pull data from the “black box” of a vehicle without a judge-issued warrant. The boxes, installed in most newer vehicles, track vehicle speed, turning velocity and brake positions, among other things. The ruling came in a case that involved an alleged DUI manslaughter and vehicular homicide in connection with a high-speed crash that killed the driver's front-seat passenger. *The judge writing for the majority of the court in this case compared black boxes to cell phones and noted that they were able to record information for which drivers should have an expectation of privacy, especially in view of how difficult it is to extract information from the boxes. The lawyer for the driver in the case called the decision a groundbreaking recognition of a car owner's privacy rights.*

**TRUMP ORDERS TARGET UNFAIR TRADE** – President Trump has signed a pair of executive orders aimed at curbing what he considers unfair trade practices by other countries that have damaged the U.S. economy and employment. One requires a study of past trade agreements to determine whether they delivered on promised benefits, as well as a country-by-country tally of various practices putting U.S. trade at a disadvantage. The other seeks improvement in the collection of financial penalties levied by the U.S. against countries dumping products here at below production cost and subsidizing exports to the U.S. *The two orders are expected to produce results as soon as this summer. After criticizing unfair trade practices by other countries throughout his election campaign, Trump is making a start at targeting “cheaters.”*

## HOWE & HUTTON NEWS AND EVENTS

**Lee Badger** presented guidance on compliance with directors' fiduciary duties at recent not-for-profit standards-related product certification organization meetings in Naples, Florida. Lee also discussed the first FTC antitrust consent order just issued under the Trump Administration against a not-for-profit professional society, which settled FTC claims alleging anti-competitive price-fixing conduct and anti-competitive professional society ethics code provisions, and which required the professional society to institute an antitrust compliance program subject to FTC oversight.

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**Naomi Angel** will discuss current legal developments and trends at a manufacturers' trade association Board of Directors meeting in Denver, CO on May 23; an Engineering Symposium in Atlanta, GA on June 6; and a manufacturers' trade association mid-year meeting in Chicago, IL June 7-8.

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Editor — James F. Gossett  
Contributors — Christina M. Pannos and Nathan J. Breen  
Staff — Susan L. Colter

