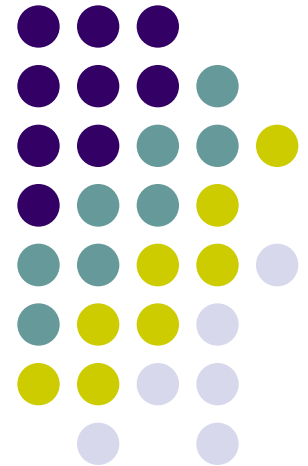
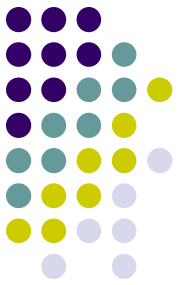


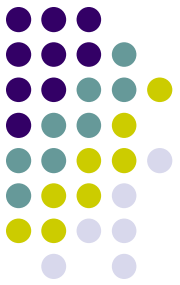
Privileged Communication - Who's Got the Privilege and Why it Matters



Ellen C. Brotman



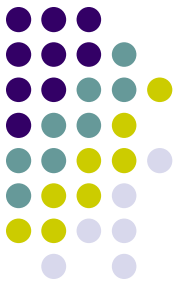
MONTGOMERY
McCRACKEN



Elements of Attorney Client Privilege

- A communication
- Between an attorney and a client
- Made in confidence
- For the purpose of obtaining legal advice
- Protected from discovery
- Protected from use at court

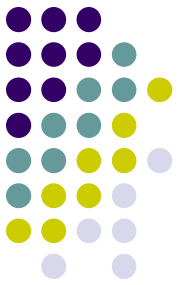




Compared to Confidentiality

- RPC 1.6
- A lawyer must not divulge information relating to the representation without informed consent – some exceptions.
- Not an evidentiary rule: a relationship rule





“communication is not privileged
simply
because it is made by or to a person
who happens to be a lawyer.”

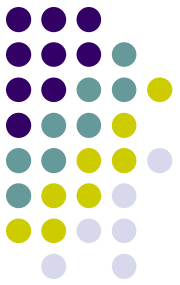
Diversified Industries Inc. v. Meredith, 572 F. 2d 596, 602 (8th
Cir. 1977).

Myth : The Privilege Applies Equally to
Outside and In-House Counsel

Myth: All University Employees Can
Have Privileged Communications With
OGC

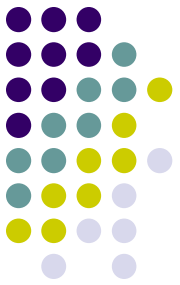
Myth : Including OGC in the
Conversation Creates a Privilege





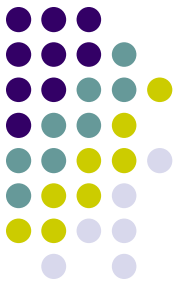
You talk with the Dean about your
need to discipline a STUDENT or
EMPLOYEE.





The Dean says, go to OGC, so
you go, and you talk with her.



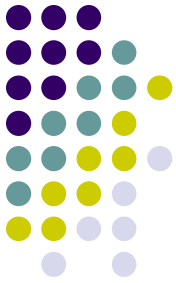


You tell your next door colleague
[who is not involved] about what
is going on, and your two
conversations.



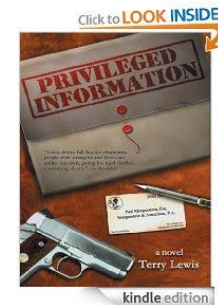
OGC Wears Many Hats

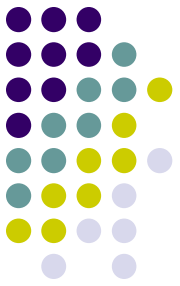




Do's and Don't's

- Don't share lawyer communications outside the organization.
- Inside, share only with those essential to the giving of advice.
- Mark your communications:
 - “Attorney Client Privileged”
 - and keep in a separate folder.





Contact Information

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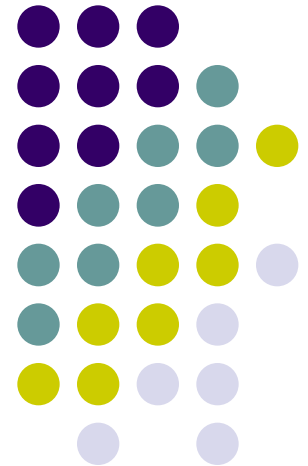
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What Is the Next Step in Clery Compliance? Auditing Your Sexual Assault Policy



Catherine H. Gillespie
Karen M. Ibach

Auditing Your Sexual Assault Policy

Emerging Trends & New Requirements in Higher Education



Catherine Gillespie, Esq.
Karen Ibach, Esq.

A New Level of Scrutiny

- ❑ Students/Families
- ❑ Alumni
- ❑ States
- ❑ Legislature
- ❑ Media/Press
- ❑ Federal agencies/DOE



**Dear Colleague Letter: Sexual Violence
Background, Summary, and Fast Facts
April 4, 2011**

Feds Launch Inquiry Into Sexual Harassment At Yale

by DIANE ORSON

April 06, 2011 2:17 PM



It's Not Just Yale: Are Colleges Doing Enough to Combat Sexual Violence?

By Kayla Webley | Monday, Apr. 18, 2011

Los Angeles Times

Editorial

Occidental, USC and sexual assault

Both schools, which have been under federal investigation in connection with their handling of sexual assault cases, promise to rectify an underreporting problem.

October 10, 2013 | By The Times editorial board

MONDAY, JUL 8, 2013 06:44 PM EDT

UNC faces federal charges over complaint by sexual assault whistle-blower

The university is now facing three federal investigations into its handling of sexual assault



Anti-rape activism surges a year after Amherst case

Cat Zakrzewski, USA TODAY Collegiate Correspondent 6:10 p.m. EDT October 17, 2013

Students around the country are joining together to fight rape on college campuses.

Montgomery McCracken | October 2013

Ripped from the

Headlines

YOUR SCHOOL'S NAME HERE

**Failed To Investigate Sexual Assault
Reports And Protect Victims, Complaint Claims**

Posted: 10/21/2013 4:16 pm EDT | Updated: 10/21/2013 4:51 pm EDT



“When asked to grade their school’s sexual violence policies, 34 percent rated it a C....”

“... Fewer than half – 42 percent – said they were informed about their school’s policy during orientation...”



College Sexual Assault Policies Get Mediocre Grade From Students In Survey

The Huffington Post | By Tyler Kinglake
Posted: 05/10/2013 7:37 pm EDT

Few college students say their school is doing a good job addressing campus sexual assault and harassment, according to a [nationwide survey by the volunteer group Students Active For Ending Rape](#).

When asked to grade their school's sexual violence policies, 9.8 percent of students gave their college an A, 40 percent gave their school a B, and 34 percent rated it with a C. The survey showed half of students gave their school a C or lower. The survey interviewed 528 undergraduate students from 46 states and the District of Columbia.

The survey found that 26 percent of students didn't know if their school has a sexual assault policy. Fewer than half -- 42 percent -- said they were informed about their school's policy during orientation.

The survey "illustrates that while some schools are ahead of the curve and are effectively addressing campus sexual violence, many colleges and universities continue to lag behind, failing to adequately address the issue and often ignoring students' needs," Dr. Emily Greytak, the student group's primary researcher on the study, said in a press release.

California's Postsecondary Educational Institutions

Some Institutions Have Not Fully Complied With Federal Crime Reporting Requirements

October 2012 Report 2012-032

We identified 34 federally mandated disclosures covering a wide range of topics and specific policies that the Clery Act requires be contained in an annual security report. For example, the report should include policies for assisting students who report sexual assaults and for communicating with students and staff during campus emergencies.



The institutions also often failed to provide descriptions of certain programs and processes as the Clery Act requires. In fact, three institutions failed to even partially describe at least one of the eight programs or processes for which the act requires descriptions,

Total Number of Missing or Incomplete Disclosures by Institution

INSTITUTION	QUANTITY
San Diego City College	18
Laney College	13
Academy of Art University	10
San Bernardino Valley College	5
California State University, Northridge	3
University of the Pacific	1

Source: California State Auditor's analysis of the postsecondary educational institutions' annual security reports.

CHRONICLE OF HIGHER EDUCATION

August 23, 2013 by Nick DeSantis

Calif. to Audit Campuses' Policies for Handling Sexual-Assault Complaints

California legislators have approved an audit to determine how certain campuses in the University of California and California State University systems handle complaints of sexual assault, following testimony by students at the state Capitol on Wednesday. The audit will examine the policies of two University of California campuses, one of which is Berkeley, and two in the Cal State system. The Berkeley campus is one of several colleges across the country that are facing complaints filed with the U.S. Department of Education by students who say their institutions have mishandled cases of sexual misconduct.



Tyler Kingkade

tyler.kingkade@huffingtonpost.com

UConn Failed To Investigate Sexual Assault Reports And Protect Victims, Complaint Claims

Posted: 10/21/2013 4:16 pm EDT | Updated: 10/21/2013 4:51 pm EDT

The complaint:

accuses UConn of failing to adjudicate sexual misconduct properly and of failing to stop harassment on campus as required under the federal gender equity law Title IX.

"I just want the school to realize what they've done wrong and fix it," Richi said. "I just really, really want the school to be held accountable and to do something."



Governor and Republican leaders call for hearings on UConn sex assault protocols

By Jacqueline Rabe Thomas Thursday, October 24, 2013

October 24, 2013



State of Connecticut
GENERAL ASSEMBLY
STATE CAPITOL
HARTFORD, CONNECTICUT 06106-1591

Dear chairmen and ranking members of the Higher Education and Employment Advancement Committee and Public Safety and Security Committee:

We are writing in response to the recent federal discrimination suit filed against the University of Connecticut by several current and former female students. The students allege that the university failed to protect them from sexual assault and failed to adequately investigate and respond to numerous reported sexual assaults that occurred on campus.

The facts presented by the women with regard to the university's response to sexual assault and rape complaints raise troubling questions regarding our flagship public university and its commitment to protect and support female students. One student reports being told by a UConn police officer that "women need to stop spreading their legs like peanut butter or rape is going to keep on happening 'til the cows come home." Another woman states that when she reported being raped, the UConn police detective responded that "he did not believe me."

Editorial: UConn President Susan Herbst deeply misguided in response to sexual assault claims

Sunday, October 27, 2013



A former student at Wesleyan University in 2011 filed a federal lawsuit against the school in 2012 to protect her after a sexual assault party two years before.

The suit claimed the school's response to the assault was "inadequate" on campus; the suit also claimed the school's response was "inadequate" on campus.

Earlier this month, the school received a report that a student had assaulted a Quinnipiac University student. A Quinnipiac University study found that 19 percent of students had experienced a sexual assault since entering college.

student. A 2009 report in the Journal of Interpersonal Violence found that undergraduate women experienced sexual assault at a rate of 19 percent.

So sexual assault on campus is by no means limited to big "party schools." Wherever there are unsupervised teens or young adults, abundant alcohol or drugs and (in some places) a macho athletic culture, the danger of sexual assaults will be high. And the handling of such cases will be fraught with perils and complexities of the legal and public relations varieties for institutions.

So sexual assault on campus is by no means limited to big "party schools." Wherever there are unsupervised teens or young adults, abundant alcohol or drugs and (in some places) a macho athletic culture, the danger of sexual assaults will be high. And the handling of such cases will be fraught with perils and complexities of the legal and public relations varieties for institutions.

The New Haven Register (<http://www.nhregister.com>)

Campus Sexual Violence Elimination Act ("SaVE Act")

On March 7, 2013, President Obama signed the Violence Against Women Reauthorization Act of 2013 ("VAWA").

VAWA amended the Clery Act, imposing new requirements related to compiling crime statistics and the contents of the Annual Security Report.

The SaVE Act

- **Expands** the Clery Act's coverage rights to include victims of domestic violence, dating violence and stalking;
- **Updates** prevention guidelines and victim rights, including confidentiality for victims; and
- **Provides** new prevention and awareness programs that must be supplied to new students and employees.

The new amendments are effective March 2014. But...

As noted above, final regulations to implement the statutory changes to the Clery Act will not be effective until after the Department completes the rulemaking process. Until those regulations are issued, we expect institutions to make a good faith effort to comply with the statutory requirements in accordance with the statutory effective date. The Department expects that institutions will exercise their best efforts to include statistics for the new crime categories for calendar year 2013 in the Annual Security Report due in October of 2014. We understand, however, that institutions may not have complete statistics for the year when the statistics must be issued and reported to the Department.

Posted Date: May 29, 2013

Author: Lynn Mahaffie, Senior Director, Policy Coordination, Development and Accreditation Service

Auditing Your Sexual Assault Policy: A Place to Start



SEC. 304. CAMPUS SEXUAL VIOLENCE, DOMESTIC VIOLENCE, DATING VIOLENCE, AND STALKING EDUCATION AND PREVENTION.

S. 47—37

“(8)(A) Each institution of higher education participating in any program under this title and title IV of the Economic Opportunity Act of 1964, other than a foreign institution of higher education, shall develop and distribute as part of the report described in paragraph (1) a statement of policy regarding—

“(i) such institution’s programs to prevent domestic violence, dating violence, sexual assault, and stalking; and

“(ii) the procedures that such institution will follow once an incident of domestic violence, dating violence, sexual assault, or stalking has been reported, including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such a report.

Auditing Your Sexual Assault Policy



- Victim Confidentiality, and Notification of Rights & Procedures
- Procedures for reporting, investigating and adjudicating reports of sexual violence, domestic violence, dating violence and stalking.
- Policies and procedures to address and prevent campus sexual violence, as well as education and awareness programs.
- Procedures related to student discipline proceedings and investigative standards in cases of sexual violence, domestic violence, dating violence and stalking.
- No retaliation/discrimination against any individual for exercising his/her rights or responsibilities under the Clery Act.



Victim Confidentiality

- Institutions must develop a policy for protecting a victim's confidentiality in disclosure of public records. **[New – SaVE Act]**
- With respect to Clery-mandated “timely reports” for crimes considered a threat to other students and employees, victims' names must be withheld. **[New - SaVE Act]**

Written Notification of a Victim's Right to:

- Seek – or not seek – the assistance of campus security or police [**New – SaVE Act**]
- Be informed of available counseling, health services, mental health services, victim advocacy, legal assistance and other victim services **both on-campus and in the community**, and receive contact information [**Existing Clery Act obligation**]

Written Notification of a Victim's Right to:

- To obtain no-contact, restraining and protective orders (as well as information on the institution's responsibilities regarding such orders) [**New – SaVE Act**]
- Have a clear description of the institution's disciplinary process, as well as the sanctions possible [**Existing Clery Act obligation**]

Procedures for Investigating Sexual Violence, Domestic Violence, Dating Violence and Stalking

- Procedures must ensure that the investigation and resolution will be “prompt, fair and impartial.”
- Procedures must include to whom an offense may be reported.
- Victims must be notified of the importance of preserving evidence.
- Procedures should include information on the student’s option to report to law enforcement, what that entails, and that the institution will assist them with notification.

Standards for Investigation & Conduct of Student Disciplinary Proceedings in Cases of Sexual, Domestic, and Dating Violence, and Stalking

Institutional policies and procedures for investigating and conducting student discipline proceedings in domestic violence, dating violence, sexual assault and stalking cases must:

- Include a “statement of the standard of evidence” used. **[New – SaVE Act]**
- Identify “sanctions or protective measures” the institution will impose after final determination that rape, acquaintance rape, domestic violence, dating violence, sexual assault or stalking . **[New – SaVE Act]**
- Address the protection of a victim’s confidentiality, including record-keeping that excludes a victim’s personally-identifiable information. **[New – SaVE Act]**

Standards for Investigation & Conduct of Student Disciplinary Proceedings in Cases of Sexual, Domestic, and Dating Violence, and Stalking

(continued) ... Policy and procedures must:

- Ensure that institutional officials who conduct proceedings are trained on how to investigate and conduct hearings in a manner that “protects the safety of the victims” and “promotes accountability.” **[New – SaVE Act]**
- Afford the accuser and the accused the same opportunity “to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice...” **[New – SaVE Act]**
- Simultaneously notify in writing both the accuser and the accused of the outcome of the proceeding, appeal procedures, any change to the result before it becomes final, and when the result becomes final. **[New – SaVE Act]**

Education and Awareness Programs

Institutions must offer new students and new employees programs that **promote awareness and prevention** of rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking.

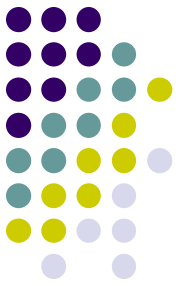
Education and Awareness Programs

These programs must include:

- A statement that the institution prohibits rape, acquaintance rape, domestic violence, dating violence, sexual assault and stalking.
- The definition of these offenses in the applicable jurisdiction.
- The definition of consent, with reference to sexual offenses, in the applicable jurisdiction.
- “Safe and positive” options for bystander intervention an individual may take to “prevent harm or intervene” in risky situations.
- Recognition of signs of abusive behavior and how to avoid potential attacks.
- Ongoing prevention and awareness campaigns for students and faculty.

Food for Thought

- Comprehensive policies should include **clear definitions of sexual assault and consent**. Consider including definitions of consent **related to alcohol**.
- Policies, as well as victims' rights information, should be **distributed widely through an array of sources**, both in print and online, so that students, faculty, and parents can readily access them.
- Offer **multiple reporting options**, including an anonymous reporting option to allow students to report sexual assaults in ways that are most comfortable and safe for them.



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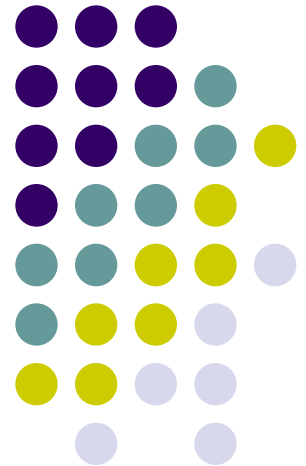
Karen Ibach

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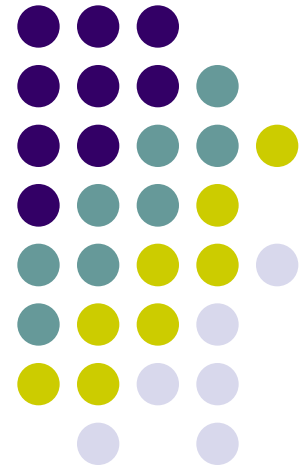
kibach@mmwr.com

Title IX Update

Carmon Harvey



Title IX Update





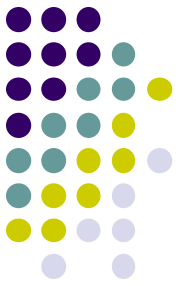
Obama Administration announces focus on enforcing Title IX

April 4, 2011
Dear Colleague
Letter



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Since We Last Met



Title IX Training Violence Against Women Act

Campus Sexual Violence Elimination (SAVE) Act

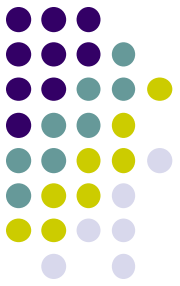
- Reporting
- Transparency
- Accountability
- Education

Montana



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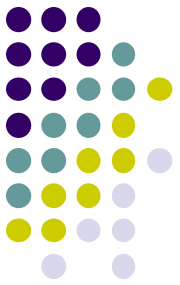
What Does Montana Mean to Us?



- measures to ensure compliance
- Montana's specifics
- not "Dear Colleague"
- no *required* steps
- guidelines



What About Now?



- ongoing DOE/OCR investigations
- elite private colleges and universities
- OCR's harder line
- detailed resolution agreements
- follow-up reporting required





Going Forward



Be vigilant

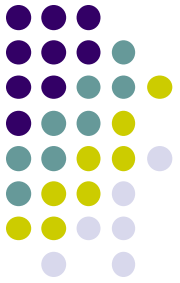
- **Update your policies**
- **Follow them**
- **Take complaints seriously**



- **Respond promptly**
- **Focus on victim remedies**
- **Don't just be reactive**



Contact Information



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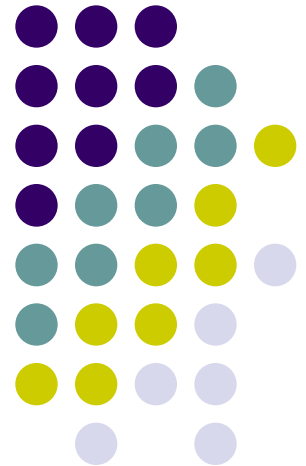
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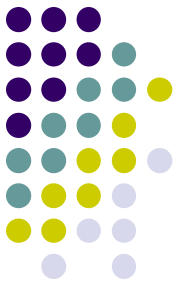
**MONTGOMERY
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Attorneys in the Student Discipline Process

Christa F. High



How the System *SHOULD* Work



- Violation
- Investigation and Report
- Disciplinary Hearing
- Appeal





BUT, Once the Lawyer Arrives...

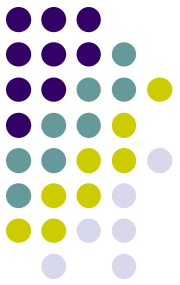
- Student denies responsibility
 - Protracted process
 - Increased cost

North Carolina



- **The Students & Administration Equality Act. [2013]**
 - Public Universities and Colleges
 - Right to a lawyer in a discipline procedure
 - Exceptions
 - Student-Run Proceedings
 - Academic Dishonesty

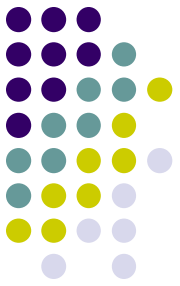




What Does It Mean To Us?

- NOW, generally **no** *court* interference in discipline process.
- Will students and advocacy groups be emboldened?
- Be glad you are private [or rue that you are not].





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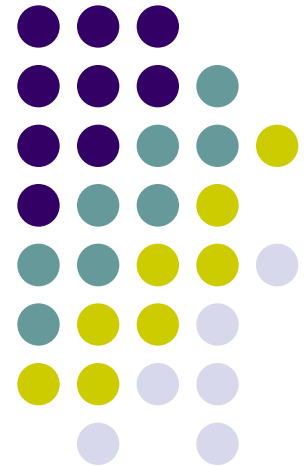
chigh@mmwr.com

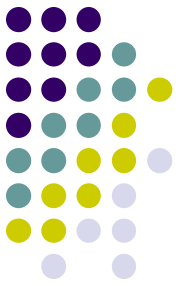


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Updates in Pennsylvania Law

Donald W. Kramer
Virginia P. Sikes





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Business Income and Receipts Tax

Activity not connected with charitable purposes. The ordinance adds language to the portion of the Code that excludes business conducted by a charity from the definition of "business" subject to the business income and receipts tax. According to the Summary, the ordinance clarifies that a nonprofit receiving income from activity outside of its charitable mission will be subject to the business income and receipts tax.

With the inclusion of the new language, taxable "business" excludes "[a]ny business conducted by a nonprofit...organized for religious, charity or education purposes, other than commercial activity that does not directly serve and is not directly connected with the...religious, charitable, or education purposes...."

Examples. The Summary gives as examples of activity subject to tax, the subleasing of property to for-profit entities ("lobby Starbucks", offices, etc.) and ongoing commercial storefront enterprises. The subleasing example highlights an issue that will be confusing for charities. The City's concept of "commercial activity not directly serving and connected to charitable purposes," is similar to the federal income tax concept of "unrelated trade or business" activity. An entity that is exempt from federal income tax is nevertheless subject to tax on its net income from unrelated trades and businesses.

Comparison to federal UBIT. The federal unrelated income tax does not apply to investment income, royalties and income from the rental of real property (unless the investment or real property producing the income is debt-financed). It is not clear what position the City will take with respect to whether the business income and receipts tax applies to investment income and royalties. It may be, and hopefully it will be, that the City will accept the position that the activity producing investment income is not "commercial," and will make it clear that investment income is not subject to the tax.

The example in the Summary takes the position that leasing real property to a for-profit is a commercial activity subject to tax. If the City continues to maintain this position, it will try to subject income from such leasing to tax, even though income from leasing real property is not subject to federal unrelated business income tax. This will be an administrative burden for charities, even if deductions for depreciation and other expenses result in little net income from leasing. And for some charities there could be substantial tax if net income from leasing is subject to tax.

In the Summary, the City refers to *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals*, decided by the Pennsylvania Supreme Court in 2012 ("Bobov"). In *Bobov*, the nonprofit argued that because it met one of the requirements for being a purely public charity under Pennsylvania's Institutions of Purely Public Charity Act ("Act 55"), it also met that requirement under the HUP test (the test for being a purely public charity as set forth in the Pennsylvania Supreme Court's 1985 decision

in the Hospital Utilization Project case). But the Supreme Court in Bobov determined that exemption requires a charity to meet the requirements for being a purely public charity under the HUP test as well as Act 55. The Summary refers to the requirements of the HUP test being "more stringent" than those of Act 55. The City has taken recent Supreme Court decision as an opportunity to clarify its position with respect to the taxation of income from noncharitable activity and real estate used in noncharitable activity.

The Summary makes clear that the City thinks that the "clarifying" amendments to The Pennsylvania Code and the new annual statement will result in additional tax revenues for the City.

[Article Archives](#) >> [Lead Stories](#) >> [April 1-30, 2012](#)

PA Supreme Court Rejects Help From Legislature in Defining Charity

*Case will unsettle status of real estate tax exemptions
throughout the state as taxing authorities challenge rulings*

A 4-3 decision of the Pennsylvania Supreme Court has rejected help from the state Legislature in defining the constitutional contours of an “institution of purely public charity” eligible for state real estate tax exemption and opened the way for local taxing authorities to challenge existing exemptions to generate more local revenue. ([Mesivtah Eitz Chaim of Bobov v. Pike County Board of Assessment Appeals, No. 16 MAP 2011, 4/25/12.](#))

Less than a week after the decision, a representative of the Philadelphia City Solicitor’s office suggested that tax-exempt hospitals and universities come to talk about payments in lieu of taxes in order to prevent challenges to their status, echoing the state-wide efforts of local governments to exploit uncertainty about the definition of charity to obtain PILOTS in the 1990s.

The case was decided on a very narrow question certified to the Supreme Court for consideration: whether the Legislature’s 1997 enactment of criteria for charitable tax-exempt status in Act 55 ([See Ready Reference Page: “Act 55 Defines ‘Charity’ Eligible for Exemption”](#)) is “deserving of deference” in deciding whether an organization qualifies as an institution of “purely public charity” under the state Constitution or has a 1985 decision of the Supreme Court “occupied the constitutional field, leaving no room for legislative influence and input?”

The Court held that its own prior decision was the controlling law. The Legislature could narrow the definition but not expand it.

The Pennsylvania state constitution allows the Legislature to exempt institutions of purely public charity pursuant to conditions set forth in statute. The Legislature has exempted charities from local real estate tax as administered by county boards of assessment and state sales tax as administered by the state Department of Revenue. But the Courts have consistently ruled that the threshold question is whether the organization meets the constitutional requirements to be considered an institution of purely public charity.

The Supreme Court set out the five criteria for charitable tax-exempt status in 1985 in a case involving the Hospital Utilization Project (“HUP”). It said an organization had to (1) advance a charitable purpose, (2) donate or render gratuitously a substantial portion of its services, (3) benefit a substantial and indefinite class of persons who are legitimate subjects of charity, (4) relieve the government of some of its burden, and (5) operate entirely free from private profit motive. Because the contours of those criteria were not precisely drawn, charities and taxing authorities engaged in multiple litigations in the following years attempting to draw the lines. Many municipalities used the uncertainty as leverage to cause organizations to agree to make payments or provide services in lieu of taxes in order to keep their overall exempt status.

In 1997, after many years of lobbying and negotiation, the Legislature passed Act 55, which in some ways was more favorable to charities than some previous court decisions, and in many areas was more precise in

providing criteria for meeting the various tests. Many county assessors accepted Act 55 as the standard. Although the Court had previous opportunities to question the constitutional effect of Act 55, it never faced the question squarely. ([See *Nonprofit Issues*®, Tax Matters, 12/02.](#)) The result was 15 years of relative stability in interpretation.

The current case involves a religious summer camp in Pike County. The county Board of Assessment, the trial court, and the Commonwealth [intermediate appellate] Court, applying the HUP test, concluded that it was not an institution of purely public charity. The camp argued, however, that it met the criteria of Act 55 and did not have to meet the HUP test since Act 55 was enacted after the Court's decision in HUP. The Court rejected the argument.

“While the General Assembly necessarily must attempt to interpret the Constitution in carrying out its duties, the judiciary is not bound to the legislative judgment concerning the proper interpretation of constitutional terms,” the majority opinion said. “The General Assembly cannot displace our interpretation of the Constitution because the ultimate power and authority to interpret the Pennsylvania Constitution rests with the Judiciary, and in particular with this Court.”

“The legislature may certainly determine what exemptions it chooses to grant, but only within the boundaries of the Constitution — the constitutional identification of those boundaries remains the unique province of the judiciary.”

[The dissenting opinion](#) recognized the Court's final authority in deciding the criteria for a purely public charity. But the justice wrote that “I do not believe that this eliminates the Legislature's role entirely. Instead, the Legislature's policy decisions, such as those underlying Act 55, provide the necessary impetus for this Court to review such assessments in light of the ongoing, changeable nature of public policies and their relation to baseline constitutional principles to which the Legislature must adhere.... Indeed, as the majority acknowledges, the *HUP* test itself is subject to change, but the majority does not explain how such change may come about.

“In my view, the catalyst for such alterations in the constitutional standards can only be found in a function served by the Legislature — monitoring policies as they shift with societal changes. In a largely policy-oriented area such as the present context, and where this Court is interpreting a constitutional provision that directly grants certain powers to the General Assembly, I find legislative determinations particularly important.... Therefore, I would uphold the General Assembly's reasonable policy determination that Act 55, with its broader definition of the ways in which an institution can demonstrate [that it qualifies for exemption] serves to advance the morals and ethics of society, so long as the provision at issue is otherwise consistent with the Constitution”

Because the question certified to the Court was only the effect of the statute, it did not consider whether the camp had, in fact, met the criteria for qualification announced in the HUP case.

YOU NEED TO KNOW

The Supreme Court is obviously correct in holding that the Court, not the Legislature, is the arbiter of constitutional qualifications. But it could have been willing to consider the Legislature's input without relinquishing its supremacy as the ultimate decider. Unfortunately, it was unwilling to do so. As a result, every application for exemption is a potential court case based on the common law, without the benefit of the specific rules of the legislation. A lot of public and charitable time and money will be wasted on this litigation. An attempt to avoid that waste was one of the specific purposes of the Act.

Act 55 does not go away as the result of this decision. It only adds another potential hurdle for qualification

if any provision is deemed to be more restrictive than the constitutional standard. But even more important, in order to get the relative certainty of the definitions in Act 55, charities had to agree to a special “unfair competition” clause that I believe is unique within the country. The provision allows a small business to seek to enjoin the funding or operation of certain unrelated business activity in competition with the small business in the community. The provision has not been used extensively, but it has caused other lengthy and expensive litigation. ([See *Nonprofit Issues*®, 1/16/10.](#)) The provision continues as a check on charities while the anticipated benefits of Act 55 to charities are lost.



READY REFERENCE PAGE

NO. 126
FOR YOUR FILE

Revised Uniform Unincorporated Nonprofit Association Act Provides Clarification for Rules of Conduct

Members are protected from individual liability for obligations of the association

For years we have counseled groups of unincorporated individuals carrying on nonprofit activities to incorporate in order to obtain a level of protection from individual liability for the association's obligations. The law was unclear in many states and individual members of unincorporated associations could often end up with personal liability for the obligations of the association as if it were a general partnership.

Those rules are slowly changing as more states adopt the Uniform Unincorporated Nonprofit Association Law, first promulgated by the National Conference of Commissioners on Uniform State Laws in 1996, and now the Revised Uniform Unincorporated Nonprofit Association Law issued in 2008. The Uniform Act was adopted in about eight states, and the Revised Act has now been adopted in five jurisdictions, including most recently in Pennsylvania (part of [Act 67 of 2013](#)). (The other jurisdictions adopting the Revised Act are Arkansas, Iowa, Nevada and the District of Columbia.) Under the Act, a member of an unincorporated association is not liable for such obligations solely by virtue of being a member.

The Uniform Act made clear that an unincorporated nonprofit association should be treated as a separate legal entity that can own and hold property, often a question under state law, and can sue and be sued as an association. The Revised Act adds provisions that allow the Association to function more like a nonprofit corporation.

The Pennsylvania Act (the "Act"), which closely follows but is not identical to the Revised Act, is very flexible, permitting the members of the nonprofit association to structure their operations as

they wish. Many of the rules are written as permissions (i.e., "a nonprofit association may"). Many others are caveated by reference to the nonprofit association's own governing rules (i.e., "unless otherwise provided in the governing principles").

Under the Act, a "nonprofit association" is an unincorporated organization consisting of two or more members joined together under an agreement that is oral, in record form or implied from conduct for one or more common, nonprofit purposes. The term "nonprofit association" does not include: a trust, a marriage, domestic partnership, common law domestic relationship, civil union or other domestic living arrangement; an organization formed under any other statute that governs the organization and operation of unincorporated associations; a joint tenancy, tenancy in common or tenancy by the entireties, even if the co-owners share use of the property for a nonprofit purpose.

A "member" is a person that, under the governing principles, may participate in the selection of persons authorized to manage the affairs of the nonprofit association or in the development of policies and activities of the nonprofit association.

The "governing principles" are the agreements, whether oral, in record form or implied from its established practices, that govern the purpose or operation of a nonprofit association and the rights and obligations of its members and managers.

A "manager" is a person that is responsible, alone or in concert with others, for the manage-

ment of a nonprofit association. “Established practices” are the practices used by a nonprofit association without material change during: (1) the most recent five years of its existence; or (2) if it has existed for less than five years, its entire existence.

A. When Does Pennsylvania Law Apply to a Nonprofit Association?

The law of Pennsylvania, including the Act, governs the operation in Pennsylvania of a nonprofit association formed or operating in Pennsylvania, unless its main place of activities is in another jurisdiction. Unless the governing principles specify a different jurisdiction, the law of the jurisdiction in which a nonprofit association has its main place of activities governs its internal affairs.

B. What Provisions of the Act Provide Protections to Members of a Nonprofit Association?

1. Separate legal entity. The Act establishes that a nonprofit association is a legal entity distinct from its members and managers. It affords the nonprofit association the same powers as an individual to do all things necessary or convenient to carry on its purposes.

2. No personal liability. As mentioned above, a member or manager is not personally liable, directly or indirectly, for a debt, obligation or other liability of a nonprofit association solely by reason of being a member or manager. The Act states that status as a member or manager does not prevent or restrict other law from imposing liability on the person or the nonprofit association because of the person’s conduct.

3. Formalities not required. The Act states that the nonprofit association’s failure to observe formalities relating to the exercise of its powers or the management of its activities and affairs is not a ground for imposing liability on a member or manager for a debt, obligation or other liability of the nonprofit association.

4. Judgments do not reach members or managers. The Act states that a judgment or order against a nonprofit association is not by itself a judgment or order against a member or manager.

C. Indemnification

The Act provides that a nonprofit association is subject to the provisions of the state Nonprofit Corporation Law of 1988 relating to indemnification. The Act states that for purposes of applying those provisions, references to the “articles,” “bylaws,” “directors” and “members” mean the “governing principles,” “managers” and “members”.

D. Ability to Earn Profits

A nonprofit association may engage in profit-making activities, but profits from any activities must be used or set aside for its nonprofit purposes.

E. Nondistribution constraint

Except for “permitted payments,” a nonprofit association may not pay dividends or make distributions to a member or manager. Under the provision defining “permitted payments,” a nonprofit association may: (1) pay reasonable compensation or reimburse reasonable expenses to a member or manager for services rendered; (2) confer benefits on or make contributions to a member or manager in conformity with its nonprofit purposes; (3) repurchase a membership and repay a capital contribution made by a member to the extent authorized by its governing principles; (4) repay indebtedness to a member or manager; and (5) make distributions of property to members upon winding up and termination to the extent permitted by the Act.

F. Selection of Manager(s); Scope of Manager’s Authority

Except as provided in the governing principles, the following rules apply under the Act. Only the

members may select a manager, who may be a member or a nonmember. If there is no manager selected and serving, all members are managers. All matters relating to the activities of the nonprofit association are decided by its managers except for matters reserved for approval by the members in the Act. Each manager has equal rights in the management and conduct of the nonprofit association's activities, and a difference among managers is decided by a majority of the managers.

G. Admission, Suspension, Dismissal and Expulsion of Members

Except as provided in the governing principles, a person becomes a member and may be suspended, dismissed or expelled, in accordance with the governing principles. Also except as provided in the governing principles, the suspension, dismissal or expulsion of a member does not relieve the member from any unpaid capital contribution, dues, assessments, fees or other obligation incurred or commitment made by the member before the suspension, dismissal or expulsion.

If there are no applicable governing principles, a person may become a member or be suspended, dismissed or expelled only with the approval of the members.

H. Resignation of Members

A member may resign in accordance with the governing principles. In the absence of applicable governing principles, a member may resign at any time. Except as provided in the governing principles, resignation does not relieve the member from any unpaid capital contribution, dues, assessments, fees or other obligation incurred or commitment made before resignation.

I. Matters Requiring Approval by Members

Except as provided in the governing principles, a nonprofit association must have the approval of its members to: (1) admit, suspend, dismiss, or

expel a member; (2) select or dismiss a manager; (3) adopt, amend or repeal the governing principles; (4) transfer all, or substantially all, of its property, with or without its goodwill, outside the ordinary course of its activities; (5) dissolve; (6) undertake any other act outside the ordinary course of its activities; (7) determine its policy and purposes; or (8) do any other act or exercise a right that the governing principles require to be approved by members.

J. Action by Members

Except as provided in the governing principles, approval of a matter by the members requires the affirmative vote of a least a majority of the votes cast at a meeting, and each member is entitled to one vote on each matter submitted for approval.

The governing principles may provide for the: (1) calling, location and timing of member meetings; (2) notice and quorum requirements for member meetings; (3) conduct of member meetings; (4) taking of action by the members by consent without a meeting or by ballot; and (6) taking of action by members by proxy. If the governing principles do not provide for one of these matters, customary usages and principles of parliamentary law and procedure apply.

K. Duties of Members

A member does not have a fiduciary duty to the nonprofit association or to another member solely by being a member. The member must discharge duties under the governing principles to the nonprofit association and the other members and exercise any rights under the governing principles and the Act, in a manner consistent with the governing principles and the contractual obligation of good faith and fair dealing.

L. Action by Managers

Except as otherwise provided in the governing principles, approval of a matter by the managers requires the affirmative vote of at least a majority of the votes cast at a meeting of managers, and

each manager is entitled to one vote on each matter submitted for approval by the managers.

The governing principles may provide for the: (1) delegation to a manager of authority to act without a meeting of the managers; (2) creation and authority of committees of the managers; (3) calling, location and timing of meeting of the managers or a committee of the managers; (4) notice and quorum requirements for meetings of the managers or a committee of the managers; (5) conduct of meetings of the managers or a committee of the managers; (7) participation by managers in a meeting of the managers or a committee of the managers by telephone or other means of electronic communication; and (8) taking of action by a manager by proxy.

M. Duties of Managers; Limitation of Liability

1. Duty of care. A manager's duty of care to the nonprofit association is the same as that of a nonprofit director to the nonprofit corporation. The manager shall manage the nonprofit association: in good faith; in a manner the manager reasonably believes to be in the best interests of the nonprofit association; and with such care, including reasonable inquiry, as a prudent person would reasonably exercise in a similar position and under similar circumstances. A manager may rely in good faith on any opinion, report, statement or other information provided by another person that the manager reasonably believes is a competent and reliable source for the information.

2. Duty of loyalty. A manager owes a fiduciary duty of loyalty to the nonprofit association with respect to the responsibilities of the manager. After full disclosure of all material facts, a specific act or transaction that would otherwise violate the duty of loyalty may be authorized or ratified by a majority of the members that are not interested directly or indirectly in the act or transaction.

3. Presumption. A manager that makes a judgment in good faith satisfies the du-

ties of care and loyalty if the manager: (1) is not interested, directly or indirectly, in the subject of the judgment and is otherwise able to exercise independent judgment; (2) is informed with respect to the subject of the judgment to the extent the manager reasonably believes to be appropriate under the circumstances; and (3) believes that the judgment is in, or not opposed to, the best interests of the nonprofit association.

4. Limitation of liability. The governing principles in record form may provide that a manager shall not be personally liable, as a manager, for monetary damages for any action taken unless: (1) the manager has breached or failed to perform the manager's duties under the Act; and (2) the breach or failure to perform constitutes self-dealing, willful misconduct or recklessness. The limitation of liability does not apply to: (1) the responsibility or liability of a manager under a criminal statute; or (2) the liability of the manager for the payment of taxes under federal, state or local law.

The Act also addresses: (1) conditions under which a member's interest or any right under the governing principles may be transferable; (2) the right of a member or manager, or former member or manager, to information; (3) the ability of a nonprofit association to deliver to the Department of State a statement appointing an agent to receive service of process; and (4) procedures for the transfer of real property held in the name of a nonprofit association.

—Virginia P. Sikes
Montgomery, McCracken, Walker & Rhoads, LLP
Philadelphia, PA



Changes to the Pennsylvania Nonprofit Corporation Law of 1988

Legislation signed into law on July 9, 2013, and effective 60 days after that date, makes significant changes to the Pennsylvania Nonprofit Corporation Law of 1988 (the “Act”). The legislature’s summary of the amendments to the Act, states that they are largely intended to update the Act and make it consistent with Pennsylvania’s business corporation law. Two of the more significant changes are the change in who has standing to challenge a nonprofit corporation’s actions and the new rules permitting use of electronic technology for giving notices and, for members, participating in meetings.

Standing

The general rule has been that only the Attorney General, or a person whose status as, or rights or duties as, a member, director, member of an other body, officer or otherwise, are or may be affected, had standing to sue a Pennsylvania nonprofit corporation. Under the amendments, the court may hear and determine the validity of any corporate action on the application of any person aggrieved by any corporate action may bring suit. [?]

Participation in Meetings

The rule has been that, except as otherwise provided in the bylaws, one or more persons could participate in a meeting of the incorporators, the board of directors or an other body, or the members by means of conference telephone or similar communications equipment by means of which all persons participating could hear each other. Under the amendments, the rule is clarified for participation in meetings of the incorporators, the board or an other body, to include participation by means of conference telephone or other electronic technology by means of which all persons participating in the meeting can hear each other.

For participation in meetings of members the rule is expanded to include participation by means of the Internet or other electronic means. The new rule for member participation states that, except as otherwise provided in the bylaws, the presence or participation, including voting and taking other action, at a meeting of members, or the expression of consent or dissent to corporate action, by a member by conference telephone or other electronic means, including, without limitation, the Internet, shall constitute the presence of, or vote or action by, or consent or dissent of the member for the purposes of the Act. Under this new provision, it is not necessary for the members to hear each other. This means that members can take action at a meeting by chat room or Facebook.

The provisions dealing with the place of meetings of members are amended to reflect the ability to hold a meeting other than at a geographic location. The amendment states that if a meeting of members is held by means of the Internet or other electronic

communications technology in a fashion pursuant to which the members have the opportunity to read or hear the proceedings substantially concurrently with their occurrence, vote on matters submitted to the members, pose questions to the directors and members of any other body, make appropriate motions and comment on the business of the meeting, the meeting need not be held at a particular geographic location.

Notice; Waiver of Notice

Under the amendments, any notice required to be given under the provisions of the Act, or by the nonprofit corporation's articles or bylaws may be given, in addition to by first class or express mail to the address in the corporation's records, by facsimile transmission, e-mail or other electronic communication to the person's facsimile number or address for e-mail or other electronic communications supplied by the person for the purpose of notice. Notice by facsimile, e-mail or other electronic communication shall be deemed to have been given when sent.

Notice is to be given in "record form". Notice is given in record form if it is inscribed on a tangible medium or stored in an electronic or other medium and retrievable in perceivable form.

A waiver of notice filed with the secretary of the corporation in record form, signed by the person entitled to the notice is deemed equivalent to the giving of notice. "Sign" means, with present intent to authenticate or adopt information in record form: (1) to sign manually or adopt a tangible symbol; or (2) to attach to, or logically associate with, information in record form, an electronic sound, symbol or process.

Written or In Writing

References to a document in writing or to a written provision of an agreement or other document shall be deemed to include and be satisfied by a document or provision of an agreement or document in record form. So a document retrievable from the Internet in perceivable form is "written".

Action by Consent

Under the amendments, action by the directors may be approved if consents to the action in record form are signed, before, on or after the effective date of the action, by all of the directors in office. The action is approved on the date the last consent is signed.

Members may also act by unanimous consent if consents to the action in record form are signed before, on or after the effective date of the action by all members entitled to vote and filed with the minutes of the proceedings of the members.

Under the amendments, however, if the bylaws so provide, members may take action by partial consent. The new rule states that any action required or permitted to be taken at a meeting of the members or of a class of members may be taken without a meeting upon the signed consent of members who would have been entitled to cast the minimum number of votes that would be necessary to authorize the action at a meeting at which all members entitled to vote thereon were present and voting. An action by partial consent of the members shall not become effective until after at least ten days' notice of the action has been given to each member entitled to vote thereon who has not consented.

Action by Directors

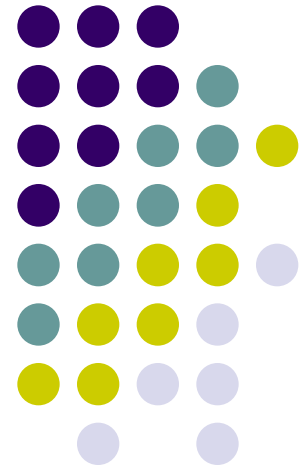
Under the existing statute law, unless otherwise provided by the bylaws, a majority of the directors in office are necessary to constitute a quorum, and the acts of a majority of the directors present at a meeting at which a quorum is present are acts of the directors. Under the amendments, the acts of a majority of the directors present and voting at a meeting at which a quorum is present are the acts of the directors. This means that directors who are present and abstain are not treated as casting negative votes.

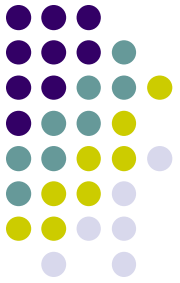
Sales of Real Estate

The amendments remove from the Act the requirement that the purchase, sale, mortgage, lease or other disposition of real property be authorized by two-thirds of the members of the board of directors or other body, unless the board has 21 or more members, in which case by a majority of the members of the board. Under the amendments, unless otherwise required by the bylaws, the vote required for actions with respect to real property is the same as that required for other actions.

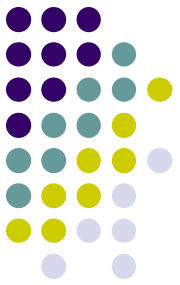
Nobody Expects the Spanish Inquisition

Enterprise Risk Assessments in
Higher Education





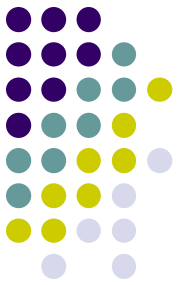
?



You may have heard of this:

Report of the Special Investigative Counsel
Regarding the Actions of The
Pennsylvania State University Related to
the Child Sexual Abuse Committed by
Gerald A. Sandusky

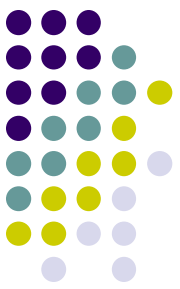
Freeh Sporkin & Sullivan, LLP
July 12, 2012



Key portion

CHAPTER 10 RECOMMENDATIONS FOR UNIVERSITY GOVERNANCE, ADMINISTRATION, AND THE PROTECTION OF CHILDREN IN UNIVERSITY FACILITIES AND PROGRAMS



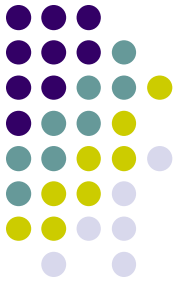


Specifically, risk

4.0 – Compliance: Risk and Reporting Misconduct

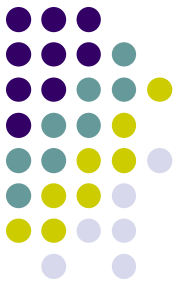
The University's incomplete implementation of the Clery Act was a contributing factor in the failure to report the 2001 child sexual abuse committed by Sandusky. A strong compliance function, much like exists in the University's financial area, should encourage individuals to report misconduct more readily in the future. A regularized risk identification and management system is as prudent and consistent with best business practices.





How to **identify** risks?

- Enterprise Risk Assessment



Not a new thing anymore

URMIA White Paper

ERM in Higher Education

September 2007

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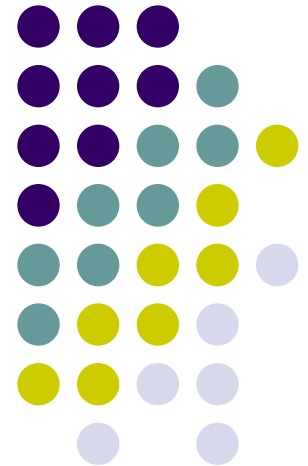
Editor:
Vincent E. Morris,
CPCU, ARM, AIC, CRM, CIC
Wheaton College

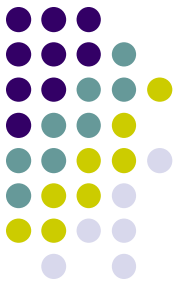


**MONTGOMERY
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Plenty of Resources

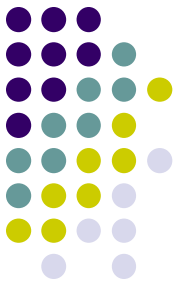
(see handout)





Sample process flow chart



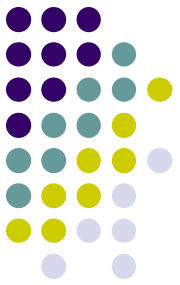


Sample questionnaire

<u>Academic Affairs</u>	<u>Urgency Rating</u>				<u>Person to Assess</u> (If rated “1”)
	<u>1</u>	<u>2</u>	<u>3</u>	<u>NA</u>	
<u>Academic freedom</u>					
<u>Academic quality</u>					
<u>Accreditation</u>					
<u>Joint programs</u>					
<u>Distance learning</u>					
<u>Faculty conflict of interest</u>					
<u>Graduation rates/ student learning outcomes</u>					
<u>Grievance procedures</u>					
<u>Promotion and tenure</u>					
<u>Recruitment/competition</u>					

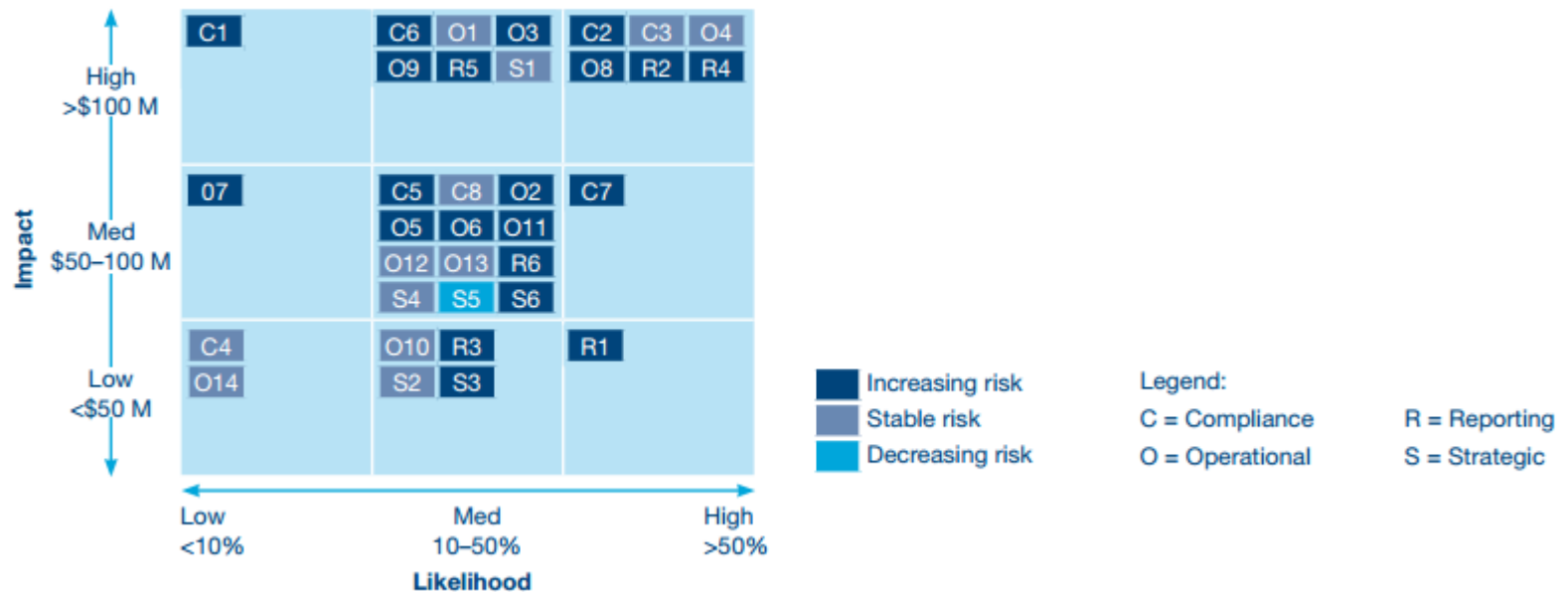
Additional Academic Affairs Risk Areas:

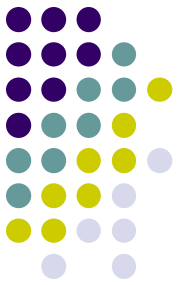




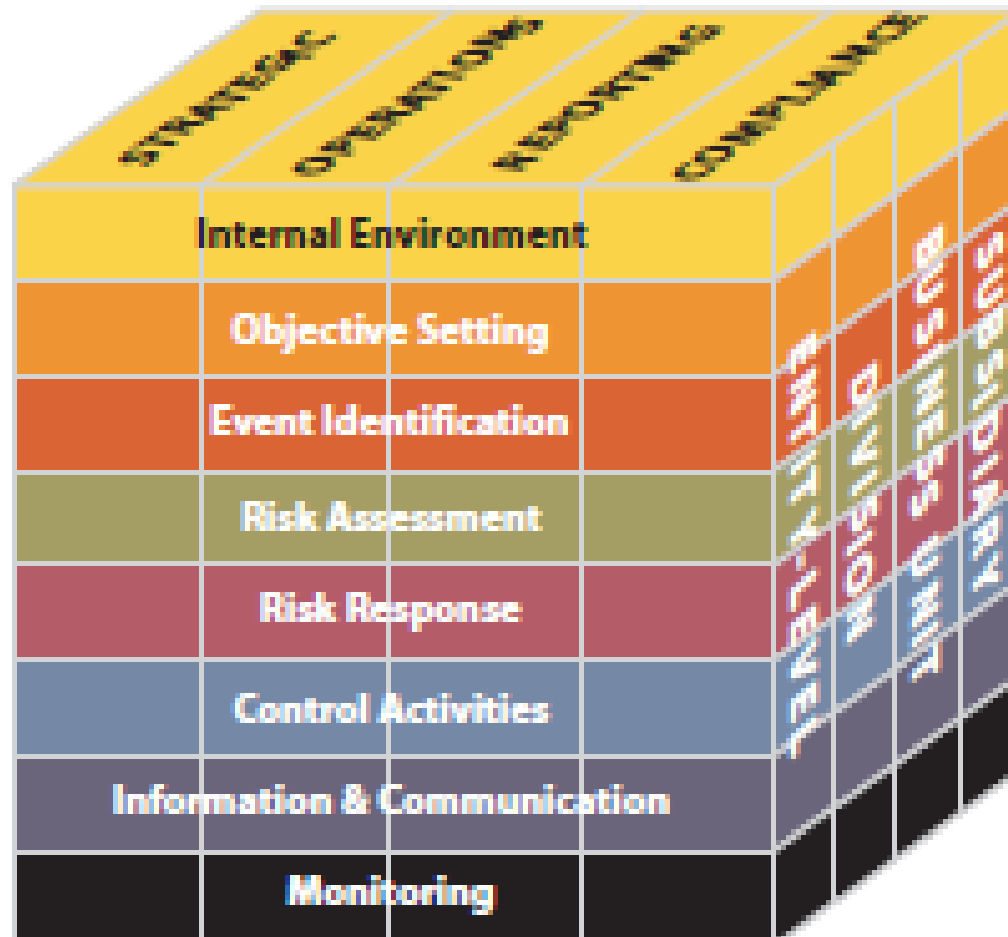
Developing a “risk map”

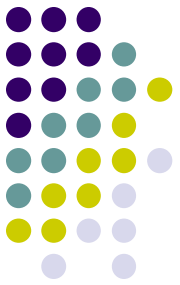
Figure 5. Risk map





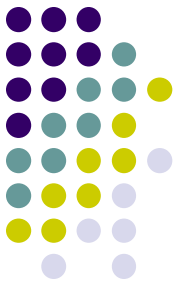
End Result:





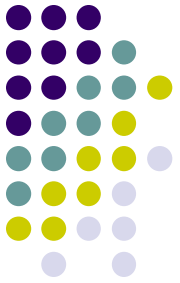
Things to watch for

- Are you touching all the bases?
 - Avoiding problem people/areas is not a solution



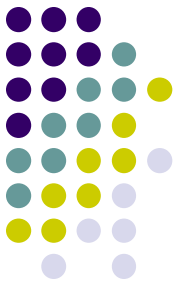
Things to watch for

- Participant warning flags
 - People who don't know what they're talking about
 - People with an ax to grind



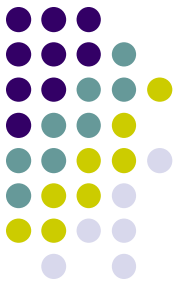
Things to watch for

- Creating unnecessary records
 - Plan ahead
 - Begin with the end in mind



Things to watch for

- Creating a written record
- Creating an **inaccurate** written record



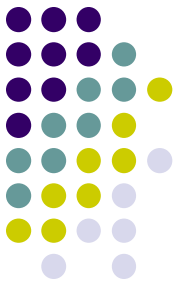
Documentation is good

if

Documentation is good

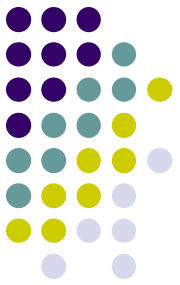


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Suggestion:

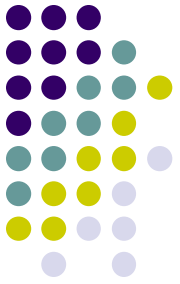
Make documentation a part of the process



Is it privileged?

- “Privileges” differ state-by-state
 - Self-critical analysis
 - Peer review
 - Attorney-client
- Your mileage may vary

Contact Information



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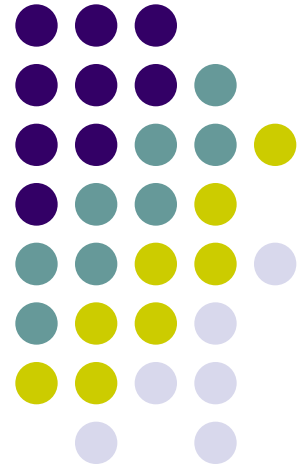
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Resources regarding Enterprise Risk Assessments

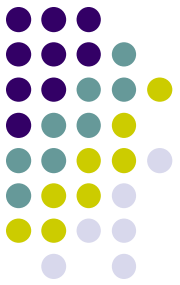
1. NACUBO: http://www.nacubo.org/Business_and_Policy_Areas/Risk_Management/Enterprise_Risk_Management.html
2. AGB: http://agb.org/sites/agb.civicaactions.net/files/u3/AGBUE_FINAL.pdf
3. COSO: http://www.coso.org/documents/coso_erm_executivesummary.pdf
4. PWC: http://www.pwc.com/en_US/us/issues/enterprise-risk-management/assets/risk_assessment_guide.pdf
5. Protiviti: http://www.ucop.edu/enterprise-risk-management/files/protiviti_faiguide.pdf
6. AICPA: <http://www.aicpa.org/interestareas/businessindustryandgovernment/resources/erm/pages/default.aspx> and http://www.aicpa.org/InterestAreas/BusinessIndustryAndGovernment/Resources/NotForProfitResourceCenter/DownloadableDocuments/Increasing_Risk_Awareness_NFP_Brief_3_21_11.pdf

Update on Charitable Registration

Karl E. Emerson



Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions

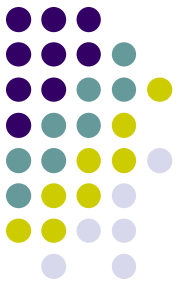


-1-

- Determine whether educational institutions are required to register under the charitable solicitation statute of your home state, if any.
 - 38 state charitable solicitation statutes typically require organizations to register *prior to* soliciting contributions unless they are a type that is specifically exempted or excluded. Educational institutions are exempt in many states, but not all.
 - Significant fines and penalties can be imposed for unregistered solicitation.



Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions

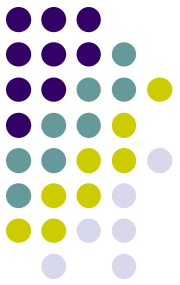


-2-

- Make sure your educational institution is in compliance with applicable state charitable solicitation statutes in all states where it solicits contributions.
 - If your educational institution is not exempt or excluded from registration in a state where it is soliciting contributions, register as soon as possible.
 - Don't wait for one or more states to "catch you."



Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions

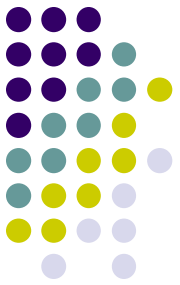


-3-

- Make sure your educational institution's IRS 990 Returns and other registration materials filed with the IRS and/or state registration offices are:
 - Accurate
 - Complete
 - Free of material falsifications, misrepresentations, and omissions



Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions

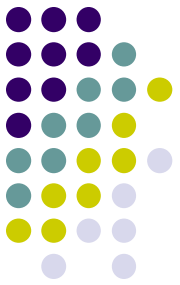


-4-

- Once properly registered, be sure to maintain your registration by:
 - Filing timely extension requests each year
 - Renewing your registrations by the required due dates each year



Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions

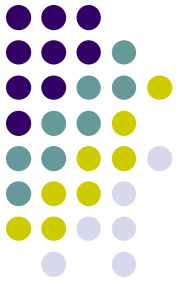


-5-

- Make sure all your educational institution's professional fundraisers (both professional fundraising counsels and professional solicitors) are:
 - Properly registered where required and
 - Have filed copies of their contracts with state oversight agencies as required



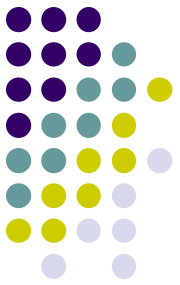
Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions



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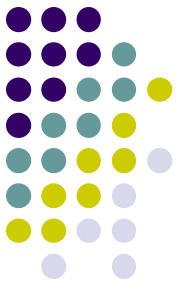
- Make sure all your educational institution's solicitation materials contain any required disclosure statements

Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions



- Make sure any commercial co-venturers that are conducting charitable sales promotions for your educational institution are:
 - Properly registered
 - Have the required bonds
 - Have filed copies of your contracts and other required forms with all states where commercial co-venturers are required to register

Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions

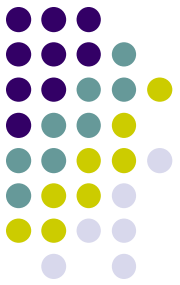


-8-

- Make sure your educational institution's solicitation materials are:
 - Truthful
 - Free of material false statements, misrepresentations, and/or omissions

Note: Make sure your educational institution doesn't engage in any conduct prohibited by any state charitable solicitation statute

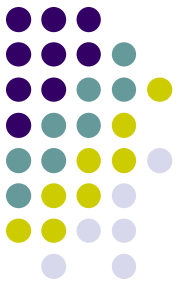
Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions



-9-

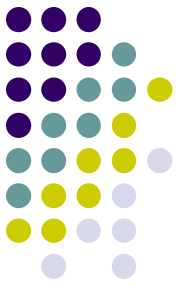
- Make sure your educational institution is keeping true and accurate fiscal records -----
even if it is exempt from state registration requirements.

Ten Basic Things Every Educational Institution Needs To Know About Soliciting Contributions



-10-

- Make sure your educational institution is:
 - Paying all your key executives only “reasonable compensation” and not “excessive compensation”



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REGULATION

KARL E. EMERSON

Big Brother Is Watching

Resolve to promote accountability, transparency, and compliance

■ Editor's Note: This is Part Two of a two-part series. Part One ran in the February 15 issue of *The NonProfit Times*.

It was suggested in the last column that, because of significantly heightened Congressional and media scrutiny of the sector, perhaps the most important thing an organization can do to start the new year out right would be to have a comprehensive compliance assessment performed by experienced, knowledgeable professionals.

Five of the many areas that should be covered during the course of such a compliance assessment were discussed briefly. Here are five additional areas. A comprehensive compliance assessment can help your organization discover actual or potential problems that, if not addressed in an appropriate and timely manner, could lead to damaging media stories and/or state or federal prosecutions that could seriously impair your organization's integrity and credibility and, therefore, its overall effectiveness and viability.

NUMBER 1

Are the Form 990 returns and other registration materials your organization files with the Internal Revenue Service (IRS) and/or state registration offices accurate, complete, and free of material falsifications, misrepresentations, and omissions?

Both the states and the IRS are increasingly calling charities to account for making material false statements in registration materials and IRS Form 990 returns -- both of which are signed under penalty of perjury.

For example, in Pennsylvania charities can be fined up to \$1,000 for each false statement or omission. They can be prosecuted criminally for each intentional, material false statement or omission. And, perhaps most importantly, they can receive huge amounts of damaging, negative publicity that can seriously hinder their ability to raise contributions in the future and, therefore, threaten their very viability.

Several years ago, the Pennsylvania Bureau of Charitable Organizations col-



lected a \$41,000 administrative fine from a national charity that was found guilty of making 41 intentional, material false statements in its Form 990 that totaled \$1.2 million. Three years ago, the bureau's prosecuting attorney filed a 1,289-count Order To Show Cause against four related charities, their officers, and their CPA in connection with a series of allegedly falsified Form 990s submitted to the bureau. As a result, these four charities, their officers, and/or their CPA were potentially on the hook for fines and penalties in excess of \$1.3 million.

The case was just settled a few months ago after the organizations in question agreed to pay \$150,000 to Pennsylvania and to permanently stop soliciting contributions in the state. The organizations claim that, in addition to the \$150,000 they paid to Pennsylvania, they spent hundreds of thousands of dollars on legal fees to get the case resolved -- all in all a pretty hefty price to pay because the organizations submitted inaccurate Form 990s.

The bottom line is that charities need to make sure these key public documents signed under penalty of perjury are filled out accurately and completely so they can avoid these and other serious problems.

NUMBER 2

Make sure your organization doesn't ignore correspondence and/or subpoenas from state or federal oversight authorities.

For example, when a charity ignores document requests and subpoenas issued by Pennsylvania, cease and desist orders are issued prohibiting the charity from soliciting contributions and the matter is referred to the bureau's prosecuting attorney. Once that happens, the charity will typically be on the hook for much more significant fines and will, in all likelihood, have to sign a formal Consent Agreement to avoid further legal proceedings.

YOU NEED TO MAKE SURE YOUR ORGANIZATION IS PAYING YOUR KEY EXECUTIVES ONLY "REASONABLE COMPENSATION" & NOT "EXCESSIVE COMPENSATION"

In addition, both cease and desist orders and consent agreements are routinely posted on Pennsylvania's Web site for all the world to see. This fact alone should make a charity do everything it can to keep from securing such a permanent and negative place on a state's official Web site. The donating public and reporters regularly, and increasingly, access the various state Web sites and it's really much better for

both to see that a charity is in compliance rather than having been caught violating the law.

NUMBER 3

Is your organization improperly treating certain individuals as "independent contractors" when they're really "employees"?

When you're treated as an independent contractor, federal taxes aren't withheld from your pay and you necessarily take home more money. Most of us would prefer to take home more money each payday rather than have a major portion of it forwarded on to the state and federal governments.

However, if your organization is treating individuals as independent contractors who really aren't, it could be on the hook for significant fines and penalties because of this improper classification and your organization's failure to properly withhold required payroll taxes and remit them to the IRS.

NUMBER 4

Is your organization properly forwarding required withholding taxes to the IRS and state taxing authorities?

You'd be surprised at how many organizations withhold the appropriate taxes from their employees' pay and then don't forward the taxes on to the IRS as required. In fact, failure to do so is one of the most common violations found by the IRS when it audits charities. The General Accounting Office (GAO) recently documented that more than 55,000 charities had failed to remit more than \$1 billion of withholding taxes to the IRS.

NUMBER 5

Finally, you need to make sure your organization is paying your key executives only "reasonable compensation" and not "excessive compensation."

As we all know, you don't have to take a vow of poverty when you work for a charity. You're allowed to be paid reasonable compensation, which is what similarly-situated individuals running functionally equivalent organizations are paid.

continued on next page

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However, anything more than reasonable compensation is considered to be excessive and isn't permitted. If it's subsequently determined that your organization has paid one or more employees excessive compensation, both your organization as well as the employees in question can be liable for significant fines and penalties. The IRS recently assessed more than \$20 million in penalties against 41 individuals and organizations for excess compensation. The IRS has indicated it will routinely include excess compensation analyses in every future audit it conducts.

These are just a small sampling of

the types of inquiries that experienced, knowledgeable professionals should make during a comprehensive charity compliance assessment. It will minimize the chances that your organization will become the subject of a federal or state investigation and/or get featured in one or more negative media stories that could seriously damage your organization's integrity and credibility and, therefore, its overall effectiveness and viability.

In light of recently enhanced enforcement efforts by both the IRS and various state charity regulators, does your organization really want to take the chance that either the IRS or

state charity regulators will uncover and prosecute your organization for any material irregularities they find?

Just as our most important asset as individuals is our personal integrity and credibility, the most important asset of any charity is its organizational integrity and credibility. Once these two valuable assets are called into question, a charity's ability to raise funds, function effectively, and accomplish its purposes is severely hindered.

Therefore, seriously consider having a comprehensive compliance assessment performed for your organization in the new year so your donors can continue to give with confidence and your vol-

unteers can be assured that they're giving their time to an organization that's accountable, transparent, and values its organizational integrity and credibility.

By doing so, you'll help protect not just your own organization's integrity and credibility, but that of the entire sector as well. *NPT*

Karl Emerson, after a 25-year career with the Commonwealth of Pennsylvania, retired in June 2007 as director of the Pennsylvania Bureau of Charitable Organizations. He now practices law with Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia, Pa. His email is KEmerison@mmwr.com

REGULATION

KARL E. EMERSON

'Always Do Right'

Follow Mark Twain's still timely advice in 2008

Attorneys often use hypothetical situations because they're such an effective way of communicating and learning important legal issues and concepts. So, to see whether you picked up on one of the key points made in the regulation columns that ran in these pages during February and March, here's a hypothetical for you to consider.

You recently graduated from law school and found out last month that you passed the Bar exam. Two weeks ago you started your new dream job as General Counsel of a large Pennsylvania-based charity that's solicited contributions nationally for the past 20 or more years. You just finished reading some back issues of *The NonProfit Times* that were in your office when you arrived, including a couple of columns by the former director of the Pennsylvania Bureau of Charitable Organizations who recently retired and is now in private practice. Among other things, the columns addressed the legal requirements for charities that solicit contributions nationally to register in 39 states and the District of Columbia, as well as the potential fines, negative publicity, and other legal sanctions that could result from non-compliance.

Eager to impress your new boss, and somewhat anxious to see whether your new employer is in compliance with these laws, you stop by the executive director's office to discuss these issues. After you inform him about your newfound knowledge, he tells you that he's actually known about these legal requirements for years and that the organization is registered to solicit contributions in Pennsylvania because that's where the organization is located and because Pennsylvania has a reputation for zealously enforcing its solicitation law.

However, he then proceeds to tell you that, after looking into the legal requirements to register with the 38 other states and the District of Columbia several years ago, he concluded that it was simply too cumbersome and costly to do so. Besides, he'd heard that most states have very limited resources to pursue violations of these laws. As a result, many years ago he decided to only register with Pennsylvania because that's where the organization is



located and simply wait to see whether any other state oversight agencies ever contact the organization about its unregistered solicitations in their states.

Your new boss tells you that if any other state were to ever discover that the organization was soliciting there, he would simply plead "ignorance of the law," offer to promptly submit the required registration materials, and ask that any possible fines or penalties be waived. He further tells you that he knows for a fact that many other organizations in exactly the same situation have adopted a similar strategy – wait to comply if, and only if, their noncompliance is eventually discovered by one or more states.

The executive director proudly tells you that he figures he's saved the organization thousands of dollars in registration fees alone as a result of this strategy. Your new boss then turns to you and asks what you think of his cost-saving strategy.

After you carefully and respectfully express your concerns that this might not be the most prudent or appropriate course to take in light of the potential fines, potential negative publicity, and the possibility of other legal sanctions, your new boss tells you that he certainly understands your concerns and, therefore, would like you to recommend which states the organization should "consider" registering with and which states the organization can "take its chances with" and not register with unless contacted by those states.

You really love your new job and obviously want to keep it – not to mention stay on good terms with your new boss. You and your wife just purchased your first home because you're expecting your first child in three months and next month you have to start making payments on the \$110,000 student loan you took out to go to law school and the \$52,000 student loan your wife took out to obtain her undergraduate degree. What should be your response to the request?

Well, per Bruce Hopkins, the nationally-known nonprofit expert in this area, "[t]he problem for the lawyer [in this situation] is that he or she ought not to counsel flouting or breaking the law. Thus, the lawyer should advise the charitable organization client that it must adhere to the law of every state in which it is soliciting contributions and not wait for some informal notice or otherwise wait 'until caught.' The lawyer ought not advise the charitable organization client to comply in the 'rigorous regulatory' states and 'wait to see what happens' in the others."

Given the widespread noncompliance with most state solicitation laws, it's essential that attorneys follow Hopkins' advice and remember they should not be advising their charitable organization clients, or anyone for that matter, to knowingly violate the law.

Furthermore, especially in this age of heightened media and Congressional scrutiny, it's simply unwise for organizations to knowingly violate these laws. Not

only do organizations that do so risk the imposition of significant fines and penalties, they also risk negative media coverage that can often be even more harmful to the organizations' bottom lines than any fines or penalties that might be imposed.

Therefore, if you find that your organization is not properly registered to solicit contributions in every state where it is soliciting that has a registration requirement, you should really take steps to remedy that situation as soon as possible. Even if you're aware of other organizations that are willing to continue taking their chances and flout the law in this area, you should resolve to follow Mark Twain's still timely advice: "Always do right. That will gratify some of the people, and astonish the rest." This will obviously cost your organization additional money, however, that's usually the case with doing what is right.

Nonetheless, it will be worth it because, as was stated in the earlier columns, you'll sleep better and will be able to pick up the paper each morning knowing that, should your organization be featured in an article on the paper's front page, it will be for all the good it's been accomplishing rather than because it was caught violating the law. *NPT*

Karl E. Emerson, the former director of the Pennsylvania Bureau of Charitable Organizations, practices law with Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia, Pa.

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REGULATION

KARL E. EMERSON

It's A New Year

It's time to get in compliance with state rules

If you're one of those who thought Congressional scrutiny of the nonprofit sector was going to end just because Sen. Charles Grassley (R-Iowa) is no longer chairman of the Senate Finance Committee, think again. Not only has the senator continued to expend considerable effort investigating actual and perceived abuses in the sector, his colleagues at the House Oversight and Government Reform Committee recently joined his efforts by holding a lengthy hearing on sector abuses.

Committee members expressed outrage at the conduct of certain charities detailed at the hearing and indicated that they plan to hold additional hearings early this year. Of course, this heightened Congressional scrutiny has been fueled by the steady stream of stories about actual and alleged abuses in the sector that has regularly appeared in news media across the country on an almost daily basis for many years now.

Because of this heightened Congressional and media scrutiny, perhaps the single most important thing a charity can do to start the new year out right is to have a comprehensive compliance assessment performed to determine whether it has any actual or potential problems that, if not addressed in an appropriate and timely manner, could lead to damaging media stories and/or state or federal prosecutions. If your organization has one or more actual or potential problems, it would be far better to uncover the problems yourself and take appropriate action to correct them rather than having the problems discovered by a state or federal regulator, an inquisitive investigative reporter, or, worse still, by Grassley or one of his Congressional colleagues.

So, here are just five of the many items that should be reviewed during a comprehensive compliance assessment. In future columns, other, equally important, items will be covered.

First, is your organization in compliance with all applicable state charitable solicitation statutes?

At least 39 states and the District of Columbia have statutes governing the solicitation of charitable contributions. Is your organization properly registered in all states where it solicits that have registration requirements? For charities that aren't excluded or exempt from registering, this can be a time-consuming and costly

process. However, it's the law and a charity that solicits in a state with a registration requirement without being properly registered risks having significant fines imposed against it if caught.

For example, Section 17(b)(3) of Pennsylvania's solicitation law authorizes fines of up to \$1,000 per violation and additional penalties of up to \$100 per day for every day a violation takes place.

If a charity isn't registered and should be, technology is increasingly enabling regulators to document this fact. For example, Pennsylvania has obtained information in electronic format on all Pennsylvania-based charities that reported to the Internal Revenue Service on their federal Form 990 that they had contributions. Pennsylvania has run this information against its database

sional fundraisers the charities hire must also register and file copies of their contracts too. Failure to do so can again result in the unregistered entities being subjected to significant fines and penalties as well as other legal sanctions. In Pennsylvania, an unregistered fundraiser that failed to file hundreds of contracts was fined \$45,000.

Third, are all your organization's solicitation materials truthful and free of material false statements, misrepresentations, and/or omissions?

For example, Pennsylvania recently settled a case with a prominent regional charity that regularly represented to the public in promotional materials and otherwise that it had given significantly more to a medical research center than it actually had. Some years the charity's founder would even hold

clearly and conspicuously state that "The official registration and financial information concerning the soliciting charity is available by calling [Pennsylvania's] toll-free number and that registration . . . does not imply endorsement."

Failure to include this statutorily-required disclosure statement is a fairly common violation and each solicitation, written confirmation, receipt, and reminder of a contribution made without the required disclosure statement could result in up to a \$1,000 fine being imposed for each violation.

Fifth, and finally, is your organization keeping true and accurate fiscal records?

This is a fairly uniform and commonsense requirement and, yet, unfortunately, it's also a very common violation for charities of all sizes - whether they're run completely by volunteers or by full-time paid professional staff. All charities soliciting contributions have to be able to clearly show exactly how much money they've collected and how they've spent it - even if they're exempt from the annual registration requirements.

Therefore, a charity needs to make sure it can clearly account for every dollar collected and show it spent every dollar for purposes consistent with its charitable purposes. In fact, the failure to keep "true and accurate" fiscal records is itself a violation in many states.

So, how do you feel right now? "Good" because your organization is in compliance in all these areas, or "somewhat concerned" because it isn't? If it's the latter, resolve to start the new year right by getting your organization into compliance in all these areas as soon as possible.

You'll sleep a lot better and will look forward to picking up the morning paper because you'll know that, should your organization be featured in an article on the front page, it will be for all the good work it's been doing rather than because it was found to not be in compliance in one or more of the above areas. **NPT**

Karl Emerson, after a 25-year career with the Commonwealth of Pennsylvania, retired in June 2007 as director of the Pennsylvania Bureau of Charitable Organizations. He now practices law with Montgomery, McCracken, Walker & Rhoads, LLP in Philadelphia, Pa. His email is KEmerson@mmwr.com



Do your organization's solicitation materials contain all statutorily-required disclosure statements?

of registered charities and has started to follow up with each organization that needs to get registered based on the information reported on the organization's Form 990.

In Pennsylvania, like in most states, it's always better for a charity to register "voluntarily" rather than wait until it gets "caught" because the fines and penalties for voluntary registrants are typically far less than for those the states have to have their investigators and attorneys follow up on. So, if a charity is supposed to be registered and isn't, its number one priority should be to get into compliance in every state where registration is required.

Second, are all your organization's professional fundraisers properly registered and have they filed copies of their contracts with the appropriate state oversight agencies?

Not only do charities that aren't specifically exempt or excluded have to typically register with the states before they solicit contributions, any private, for-profit profes-

sional fundraiser the charities hire must also register and file copies of their contracts too. Failure to do so can again result in the unregistered entities being subjected to significant fines and penalties as well as other legal sanctions. In Pennsylvania, an unregistered fundraiser that failed to file hundreds of contracts was fined \$45,000. Third, are all your organization's solicitation materials truthful and free of material false statements, misrepresentations, and/or omissions? For example, Pennsylvania recently settled a case with a prominent regional charity that regularly represented to the public in promotional materials and otherwise that it had given significantly more to a medical research center than it actually had. Some years the charity's founder would even hold

Fourth, do your organization's solicitation materials contain all statutorily-required disclosure statements?

Many states have disclosure statement requirements. For example, Section 9(k) of Pennsylvania's solicitation law requires that every solicitation, written confirmation, receipt, and reminder of a contribution



Educational Institutions Are Not Totally Exempt From State Charitable Solicitation Registration Requirements

An organization that solicits charitable contributions nationally must typically register in 39 states and the District of Columbia before it starts to solicit unless it is a type that is specifically excluded or exempt under a state's charitable solicitation registration statute. Educational institutions and their related foundations are exempt from registration under many state laws. But they are not exempt from all.

Educational institutions are required to register in about a dozen states and are required to formally apply for exemption in approximately 10 others in order to legally solicit contributions in those states. Educational institution foundations are required to register in approximately 18 states and formally apply for exemption in about 8 others. Because states are increasing their enforcement efforts to ensure that organizations are complying with their initial and annual registration requirements, it is important for educational institutions, their related foundations, and other charitable organizations to ensure that they are in compliance with these statutes —especially since noncompliance can result in the imposition of significant fines and penalties.

Registering usually involves submitting an annual registration statement, audited financial statements, a copy of the organization's IRS Form 990, and, in most cases, a registration fee. For an initial registration, an organization is also typically required to submit copies of its articles of incorporation, by-laws, IRS determination letter, and other documents. In addition, the for-profit professional fundraisers that charitable organizations often hire to assist them with their fundraising efforts are also required to register and file their contracts and other documentation with many states. Some states have refused to allow an organization to solicit contributions if its professional fundraiser has failed to register, and have gone after unregistered organizations when their fundraisers register.

Most individual state registration requirements, in and of themselves, are not overly complicated. However, cumulatively, the various requirements, with their frequently inconsistent due dates and state-specific variations, unquestionably require significant amounts of time, money, and attention to comply — whether an organization handles the process in-house or hires a law firm or other entity to file all the required paperwork and forms within the required timeframes.

Montgomery McCracken has developed an efficient, cost-effective system to prepare and file the voluminous paperwork and forms that must be filed by educational institutions, their related foundations, and other charitable organizations each year. Organizations that are currently handling this burdensome function in-house, or who are paying more than Montgomery McCracken's flat fee charge for these services, should contact Karl Emerson, former Director of the Pennsylvania Bureau of Charitable

Organizations and former President of the National Association of State Charity Officials, at (215) 772-7314 or at kemerson@mmwr.com to discuss how Montgomery McCracken can help them more cost- effectively comply with these often complicated and confusing statutes. Those organizations that have been, or are, soliciting contributions in violation of these state solicitation statutes should contact Karl to discuss the most appropriate strategy for getting the organizations into compliance with these statutes as soon as possible.