

THE NONPROFIT TIMES™

The Leading Business Publication For Nonprofit Management • www.nptimes.com • \$6.00 U.S. March 15, 2008

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.

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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 of any charity is its organizational integrity and credibility, the most important asset of 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*

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