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COUNSEL TO GREAT COMPANIES

National Capital Region – Association of Corporate Counsel

ACC NCR Nonprofit Year in Review & 2022 Forecast

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Agenda

- 2022 trends and updates
- Cryptocurrency issues
- State issues
- Political issues

2022 Trends

- Increased use of technology
- Increased level of advocacy
- Increased interest on impact investing and program investments
- Continued focus on employee wellness and social justice issues

2022 Updates

- **Current state of the IRS**
- **Priority Guidance Plan**
 - Final regulations on § 509(a)(3) supporting organizations (proposed regulations were issued in 2016)
 - Guidance under § 4941 regarding a private foundation's investment in a partnership in which disqualified persons are also partners
 - Regulations regarding the excise taxes on DAFs and fund management
 - Regulations under § 6104(c) (process for states to obtain and inspect returns and return information from the IRS)

2022 Updates

- **LLC guidance**

- An LLC may qualify for 501(c)(3) status if each member of the LLC is a section 501(c)(3) entity or a governmental unit / instrumentality. See IRS Notice 2021-56
- Nonprofit LLCs must include appropriate provisions to address what happens if one or more members cease to qualify for exempt status
- IRS has requested comments on whether an LLC with individuals or non-exempt entities should be able to qualify for (c)(3) status and whether allowing LLCs to qualify has unintended consequences

2022 Updates

- **Management agreements**
 - IRS revoked Announcement 2001-33, which allowed tax-exempt organizations to report the name of a management company they hired, rather than the person who directly provided services
 - Exempt organization retains management company to perform various services and company employs management team at exempt organization
 - Announcement requires organizations to follow Form 990 instructions and abolishes reasonable cause exemptions

2022 Updates

- **New “no rule area”**
 - IRS will not issue rulings on whether an act of self-dealing occurs when a private foundation (or other organization subject to § 4941) owns or receives an interest in a LLC or other entity that owns a promissory note issued by a disqualified person

2022 Updates

- **ABA request for guidance**
 - ABA Tax Section proposed that the IRS consider issuing guidance providing that “charitable purpose” includes aid or assistance to individual representatives of groups that have been impacted by structural or institutional racism, regardless of whether the individuals are themselves impoverished, underprivileged, or similarly distressed
 - Some IRS guidance (e.g., Revenue Ruling 77-111) suggests that assistance to ameliorate discrimination is not charitable unless the beneficiaries also suffer financial distress

2022 Updates

- Mission-related investments and program-related investments
- What is the difference?
 - Program-related investments are those investments which qualify for the exemption to the jeopardy investment rules and constitute qualifying contributions under the 5% distribution requirements
 - Mission-related investments are treated for tax purposes like any other investments and are subject to the prudent investor standards

2022 Updates

- **Employee-related programs: increased focus on employees and wellness during the pandemic**
 - Economic hardship programs
 - Can only be offered by public charities
 - Private foundations are limited to providing disaster relief in connection with presidentially-declared disasters
 - (COVID-19 was treated as such a disaster)
 - Scholarship programs
 - Both private foundations and public charities can offer such programs, but private foundation programs must be approved in advance by IRS
 - Private foundation programs are governed by IRS guidance
 - Avoidance of taxable compensation to employees or their families
- **Example from practice**

Cryptocurrency: Background

- **Increased donor interest, both in contributing crypto assets and investing in crypto assets**
 - Donor advised fund sponsoring organizations (i.e., Fidelity Charitable)
 - University of Pennsylvania (Wharton) received \$5,000,000 crypto donation, but had to agree to hold part in crypto
- **Huge valuations and fluctuations**

Cryptocurrency: Rules

- According to IRS, cryptocurrency is defined as “digital representations of value that functions as a medium of exchange, a unit of account, and/or a store of value”
- Treated as property, and general tax principles apply
 - Long-term capital gain property
 - Short-term capital gain property

Cryptocurrency: Rules

- **Charitable organizations filing requirements**
 - **Form 8282:** charity must file if it disposes of any portion of the crypto within three years of receipt
 - **Form 8283:** required when a donor seeks a charitable deduction of more than \$500
 - Donations valued at more than \$5,000 require a qualified appraisal
 - Valuation issues
 - Charity only confirms receipt, not value

Cryptocurrency: Examples from Practice

- **Prudent Investor Rule/ Uniform Prudent Management of Institutional Funds Act**
 - Diversification
 - Donor direction
 - Portfolio approach
 - Broad investment authority

Cryptocurrency: Examples from Practice

- **Investing nonprofits' funds in crypto assets**
 - Diversification issues – how much crypto is too much?
 - Types of investments – which cryptocurrencies?
 - Oversight issues – how often review investments?

Cryptocurrency: Case Study

- **Charitable organization that funds new artists with blockchain technology**
 - Any member of the community can submit proposals
 - The community votes on the projects with digital tokens

Cryptocurrency: Case Study

- **Charitable organization that uses blockchain technology to make grants to individuals abroad**
 - Donors contribute crypto to the organization, and the organization distributes special digital tokens to international grantees
 - Grantees may redeem the tokens for food, agricultural products, and goods for income-generating activities from designated vendors.
 - The vendors then redeem the tokens for payment

Cryptocurrency: Gift Acceptance Policy

- Framework and mechanisms
- Importance of gift acceptance policy
- Dealing with unusual gifts
- Ability to decline a gift

State Issues

- **State AG enforcement**
 - IRS has been the leading investigative body, but we are seeing state AGs take leading positions on the oversight and enforcement of charities
 - IRS began to focus on governance issues; Form 990 was revised to include governance questions, and governance questions are included in the Form 1023
 - Disclosure has become an important part of enforcement
- **Example from practice**

State Issues

- *Americans for Prosperity Foundation v. Bonta*
 - **Background**
 - Rise of so-called “dark money” and lack of federal response spurs state action
 - In 2011-12, California AG requires 501(c)’s to file IRS Form 990 Schedule B, as part of state solicitation requirements
 - Two 501(c)(3)s – Americans for Prosperity Foundation and Thomas More Law Center – sue

State Issues

- *Americans for Prosperity Foundation v. Bonta*
 - **Background (cont'd)**
 - Plaintiffs win in C.D. Cal.
 - Ninth Circuit reverses and denies rehearing en banc
 - Supreme Court grants cert, hears case in April 2021

State Issues

- *Americans for Prosperity Foundation v. Bonta*
 - **Supreme Court, 6-3, reverses and remands**
 - Roberts, Thomas, Alito, Gorsuch, Kavanaugh & Barrett invalidate requirement
 - Roberts, joined by Kavanaugh & Barrett, writes principal opinion
 - Thomas, Alito, Gorsuch concur in part, disagreeing over standard of review
 - Sotomayor, joined by Breyer and Kagan, dissents
 - Plaintiffs win in C.D. Cal.
 - Ninth Circuit reverses and denies rehearing en banc
 - Supreme Court grants cert, hears case in April 2021

State Issues

- *Americans for Prosperity Foundation v. Bonta*
 - **Effects**
 - California AG suspends requirement, as do states with similar requirements: Hawaii, New Jersey, New York
 - But First Circuit upholds campaign finance disclosure requirement in *Gaspee Project v. Mederos*, distinguishing Bonta
 - Application of Bonta in other spheres – state exemption, campaign finance – remains uncertain
 - **Example from practice**

State Issues

- **Online fundraising: background**
 - Increased technology and donor outreach
 - Increased online/ mobile giving
 - Mirrors online retail trends
 - 13% of all fundraising from online donations in 2020
 - 28% of all online gifts made from a mobile device
- **Example from practice**

State Issues

- **Online fundraising: compliance**
 - Registration/ reporting requirements
 - Revisiting the Charleston Principles, which hold that a charity with a website must register in its principal place of business, as well as in any state in which the charity specifically targets donors or receives contributions from residents on a repeated and ongoing or a substantial basis and either (a) has a website through which donors can give; (b) has an informational website that invites offline giving; or (c) communicates with residents via email or other communication that promotes the website
 - The Charleston Principles are still on the books but are necessarily obsolete today
- **Example from practice**

State Issues

- **Online fundraising: tax issues**
 - There must be charitable recipient unless entity is acting as the “agent” of the nonprofit
 - Pass-through/ conduit issues
 - Acknowledgement required for contributions that exceed \$250

State Issues

- **Hot button online fundraising**
 - April 2021: N.Y. Times spotlights recurring donations through WinRed, ActBlue
 - Connecticut, Maryland, Minnesota, New York AGs initiate inquiries
- **Texting and autodialing**
 - State restrictions, TCPA remain threats
- **Online fundraising techniques**
- **Example from practice**

State Issues

- *Washington v. Grocery Manufacturers Association*
 - Washington Supreme Court upheld campaign-finance penalty levied against Grocery Manufacturers Associations
 - Issue: whether a 501(c)(6)'s fundraising in connection with a state ballot issue triggered political committee registration, anti-concealment laws
 - \$18 million penalty may be largest in history of campaign finance

Political Issues

- **Increased polarization, attacks on 501(c)s**
 - From the left: e.g., post-election challenges
 - From the right: e.g., private election support
- **Growing role of 501(c)s**
- **Federal election reform legislation**
 - “For the People Act” has potential effects
 - History of McCain-Feingold indicates ongoing debate

Political Issues

- *CIC Services, LLC v. IRS*
 - Supreme Court held that suit to enjoin IRS Notice 2016–66 does not trigger the Anti-Injunction Act even though a violation of the notice may result in a tax penalty.
 - Relevant to IRS effective restrictions on political, other First Amendment activity

Conclusions / Takeaways

- **Not just federal issues; state issues**
 - States are the battleground, and penalties raise the stakes
- **Technology integration (in solicitations and otherwise)**
 - Unpredictable applications
- **Polarization and cross-competitor conduct**

Thank you!



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