

2018 Nonprofit Compliance Update

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strengthening the organizations that help our communities succeed



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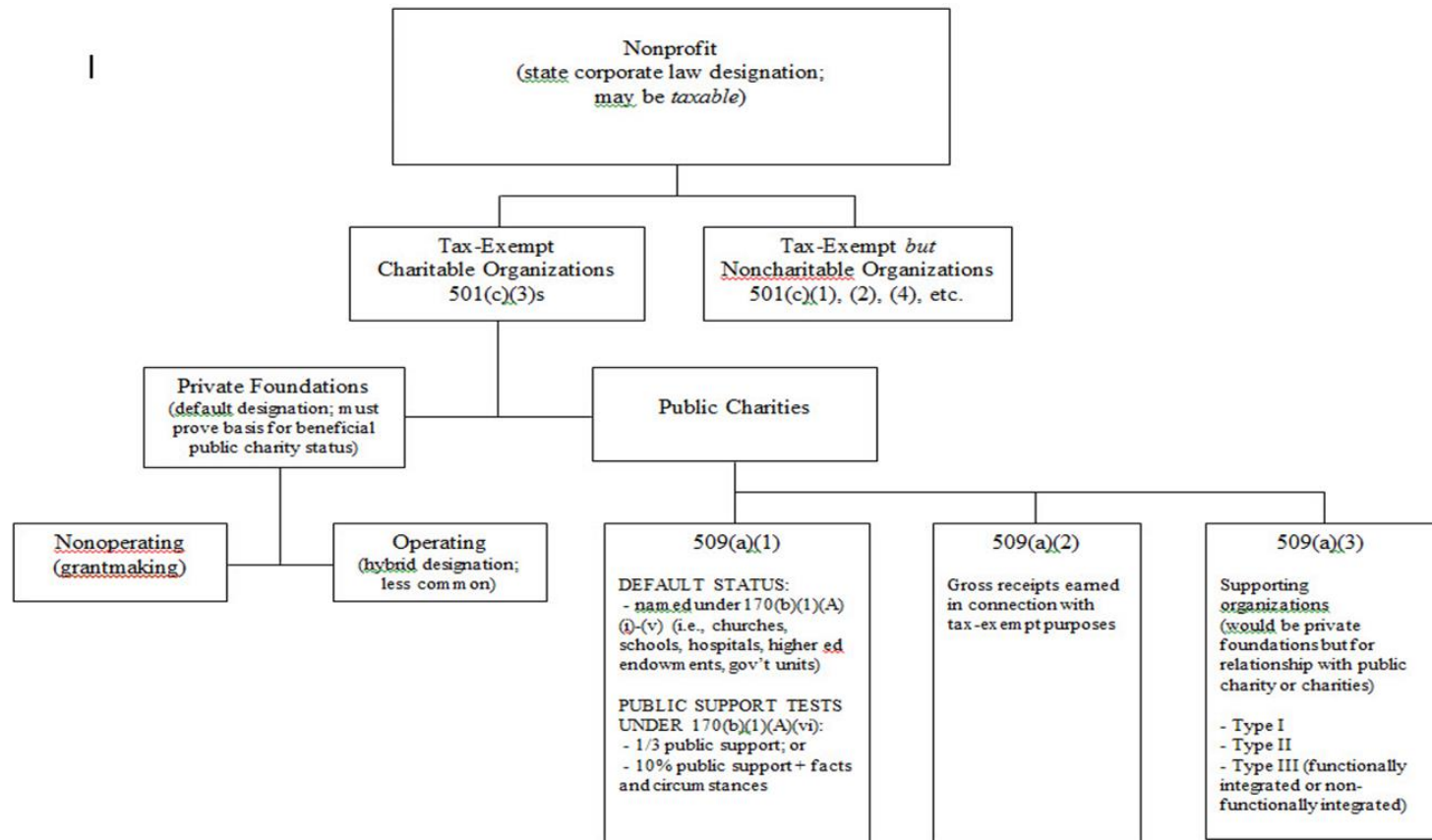
WNC Nonprofit Pathways
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A Few Introductory Thoughts

- Scope of presentation:
 - Public charities
 - Operating in North Carolina
- Necessarily general
- Ask questions
- Consult legal and tax experts, as needed

Taxonomy of Nonprofits



Tax Cuts and Jobs Act of 2017 – Tax Incentives for Charitable Giving

Private Foundation	Public Charity/Community Foundation	Donor-Advised Fund
<p>Individuals = 30% AGI cash max, 20% AGI capital gain max **Subject to increased standard deductions & Pease limitation suspension!**</p> <p>Corporations = 10% taxable income max</p>	<p>Individuals = 60% AGI cash max, 20% AGI capital gain max **Subject to increased standard deductions & Pease Limitation suspension!**</p> <p>Corporations = 10% taxable income max</p>	<p>Individuals = 60% AGI cash max, 20% AGI capital gain max **Subject to increased standard deductions & Pease Limitation suspension!**</p> <p>Corporations = 10% taxable income max</p>
<p>What's next?</p> <ul style="list-style-type: none"> • “Bunching” charitable contributions <ul style="list-style-type: none"> • Repeal estate tax??? <p>**Exemption already doubled to ~\$11M/\$22M**</p>		

1 – Articles of Incorporation

- Filed with North Carolina Secretary of State and available to the *public* on its website
- Retain in corporate record book with bylaws and key governance policies
- State law required provisions
 - *Optional* limitation of liability for directors
- IRS required provisions
- *Distinguish* – unincorporated nonprofit associations

2 – IRS Form 1023 or 1023-EZ

- Filed to obtain IRS determination of tax-exempt status as a IRC Section 501(c)(3) public charity
 - Form 1023-EZ if <\$50,000 gross receipts and <\$250,000 total assets
- Exceptions for:
 - Small organizations (gross receipts less than \$5,000)
 - Churches
- Check determination letter for IRC Section (509(a)(1), (2) or (3))
- NEW lower filing fees!

3 – State Corporate Income and Franchise Tax Exemption

- Provide articles of incorporation, certified copy of bylaws, and IRS determination letter to NC Department of Revenue
- Brief description of charitable purposes and dissolution provision
- Granted liberally

4 – Unrelated Business Income Tax

- When receive “unrelated business taxable income” (UBTI) of \$1,000 or more:
 - IRS Form 990-T
 - NC Form CD-405
- Use UBTI to diversify funding BUT:
 - Avoid mission dilution, and
 - Protect tax-exempt status (may be in jeopardy if as little as 15% of income is UBTI)

4 – UBTI Three Part Test

- Not substantially related, and
- Trade or business, and
- Regularly carried on

4 – UBTI is Net Income Only

- First, exclusions and modifications!
- Gross income
- Minus expenses
 - NEW “net” calculation now by each business activity

4 – Examples of UBTI Exclusions

- Donated work or merchandise
- Convenience rules
- Dividends
- Interest
- Rents (real property and incidental personal property; watch debt-financed property rules)
- Royalties

4 – NEW UBIT on Employee Fringe Benefits

- Payment of qualified transportation fringe benefits
- Costs associated with any parking facility used to provide employee parking
- Costs associated with any on-premises athletic facility

NEW 21% tax payable by the nonprofit

5 – Who Files a Form 990 and When?

Form	Gross Receipts	Total Assets
990	\$200,000+	\$500,000+
990-EZ	<\$200,000	<\$500,000
990-N	<\$50,000	N/A

Either test triggers filing requirement
DUE on the 15th day of the 5th month after your fiscal year ends

5 – Who Does Not File the IRS Form 990?

- Certain religious organizations
- Private foundations (Form 990-PF)
- Governmental units and certain governmental affiliates (Rev. Proc. 95-48)

5 – Revocation of Tax-Exempt Status for Failure to File IRS Forms 990

- Failure to timely file for 3 consecutive years
- Automatic revocation of tax-exempt status
- Revocation date vs. posting date
- Consequences:
 - Tax liability for nonprofit
 - Loss of charitable deduction for donor
- Retroactive reinstatement for “reasonable cause” possible (see Rev. Proc. 2014-11)

2, 4 & 5 – Mandatory Public Disclosure of IRS Forms 1023, 990 and 990-T

- “Widely available” by posting on own website or a third party website (such as www.guidestar.org)
- Alternatively, available for public inspection at the principal place of business and provide copies upon request within 30 days

6 – Solicitation Licensing

- Required by 40 states, including North Carolina, and the District of Columbia
- Exemption in North Carolina if annually raise less than \$25,000 *and* do not compensate officers, directors or professional fundraisers
- Other exemptions for certain religious institutions, schools, hospitals and hospital foundations
- North Carolina Secretary of State Licensing Division (<http://www.secretary.state.nc.us/csl/Licensing.aspx>)

6 – Solicitation License Renewals

- DUE 15th day of 5th month after end of fiscal year
- Automatic 2 month extension in North Carolina
- Annually renew *exemption*

6 – Online Solicitation and Licensing

- Charleston Principles (*nonbinding* policy statement of the National Association of State Charity Officials)
- Recommend licensing when (1) solicit contributions on website and regularly receive contributions from a particular state on a basis *or* (2) send email solicitations to individuals residing within that state
- “Unified” Registration Statement (www.multistatefiling.org) → NEW Single Portal Multi-State Registration TBD

6 – Solicitation Disclosures

- Name of organization
- Address of organization
- Purposes for which contributions will be used

6 – Solicitation Disclosures (cont.)

“Financial information about this organization and a copy of its license are available from the State Solicitation Licensing Section at (919) 807-2214. The license is not an endorsement by the State.”

- *This statement must be in at least nine-point type and be made conspicuous by being in bold, underlined or otherwise set apart from the other text*

6 – Solicitation Disclosures (cont.)

“The amount of the contribution which is deductible for federal income tax purposes is limited to the excess over the value of the goods or services provided by [insert full name of organization]. The tax-deductible portion of your gift is \$_____.”

- *When solicit “quid pro quo” contributions of \$75 or more for which valuable benefits are provided*

6 – Solicitation Disclosures (cont.)

- Optional: “[insert full name of organization] is qualified as a charitable organization under Section 501(c)(3) of the Internal Revenue Code. Contributions to [insert name of organization] are tax-deductible to the extent permitted by law.”
 - *It is important not to state that contributions are “fully” deductible as various federal and state rules may limit individual donor’s ability to claim a deduction*

7 – Solicitation Acknowledgement

- Acknowledgement *required* when receive:
 - Any gift of \$250+, and/or
 - “quid pro quo” gifts of \$75+ for which you provide valuable goods or services
- Best practice to send contemporaneous written acknowledgment of each and every gift received
- NEW alternative gift substantiation eliminated

7 – Solicitation Acknowledgement (cont.)

- *All acknowledgements must include the following statement:* “Financial information about this organization and a copy of its license are available from the State Solicitation Licensing Section at (919) 807-2214. The license is not an endorsement by the State.”
 - *This statement must be in at least nine-point type and be made conspicuous by being in bold, underlined or otherwise set apart from the other text*

7 – Acknowledgment of Gifts of \$250+

- “Qualifying contemporaneous written substantiation” should include the following:
 - o Name and Address of Donor:
 - o Name and Address of Donee:
 - o Description of Contribution: Cash Contribution: _____
Charitable Portion: _____
 - o Description of Personal or Real Property Contributed: [*do not provide valuation*]
 - o Date Donee Received Contribution: _____
 - o **[Description and Good Faith Estimate of Value of Goods or Services Provided to Donor in Consideration of the Contribution:] or [Insert the following statement: “The estimated value of the item given is insubstantial, and the full amount of the donor’s gift is tax-deductible to the extent permitted by law.”] - **THIS IS IMPORTANT!!!****
 - o Signature (optional); Name and Title of Representative of Donee
 - o Date of Acknowledgment:

7 – Acknowledgment of Gifts of \$250+ (cont.)

- Donor must receive acknowledgement on or before the donor's tax filing deadline for the calendar year in which the contribution is made (“contemporaneous”)
- \$250 threshold includes the deductible and nondeductible portions of the contribution
- Multiple gifts of less than \$250 made in a single taxable year by the same donor are not aggregated for purposes of this rule (but best practice to acknowledge all gifts)

7 – Acknowledgment of “Quid Pro Quo” Gifts of \$75+

- Good faith estimate of the value of the goods or services provided to the donor by the organization
 - *Required to include value of items donated to the organization*

7 – Acknowledgment of “Quid Pro Quo” Gifts of \$75+ (cont.)

- Not required to deduct value of certain items: (1) the fair market value of the benefit provided to the donor is not more than 2% of the total amount of the gift, or \$106.00, whichever is less, or (2) the amount contributed is \$53.00 or more and the only benefits received in connection with the gift are token items that bear the organization’s logo and have an aggregate value of less than \$10.60
 - *Adjusted annually for inflation; amounts included here are for 2018*
 - *May disregard value of items donated to the organization*

8 – Uniform Prudent Management of Institutional Funds Act (UPMIFA)

- “Prudence” in spending from and investing endowments
- Terminology:
 - Endowed
 - Quasi-endowed
 - Non-endowed or current use
- Donor intent = KEY
- Reasonably prudent person standard (unless compensated for “special skills and expertise”)
- Cy pres exception for funds 10+ yrs & ≤ \$100,000

8 – UPMIFA (cont.)

- Factors for prudence in spending:
 - Duration and preservation of the fund
 - Purposes of the organization and the fund
 - General economic conditions
 - Possible effect of inflation or deflation
 - Expected total return from investing
 - Other resources of the organization
 - The organization's investment policy
- Permanent duration assumed
- 7% rebuttable presumption of *imprudence* not adopted in NC

8 – UPMIFA (cont.)

- Factors for prudence in investing:
 - General economic conditions
 - Possible effect of inflation or deflation
 - Expected total return from investing
 - Other resources of the organization
 - Expected tax consequences of investment decisions
 - Role of each asset within overall investment portfolio
 - Needs of the organization and the endowment fund to make distributions and to preserve capital
 - An asset's special relationship or value to the organization
- Diversification generally required
- Pooling expressly permitted

9 – Fundraising Consultants and Solicitors

- Are yours licensed?
 - Exceptions for employees and volunteers
- Does the contract conform to state law?
 - Two signatures (inc one board member)
 - Bonds for solicitors
 - Filed with Secretary of State; posted on-line
- Are YOU licensed?

10 – North Carolina Secretary of State Updates

- Principal office
- Registered office
- Registered agent
- No annual report required ...
 - S 114 proposed NEW annual report requirement for NC nonprofits:
 - Online filing by November 15
 - No fee
 - Failure to file, then administrative dissolution and no sales/use tax refunds

11 – “Required” Governance Policies

- **Conflict of interest**
- Gift acceptance
- Form 990 review
- *Whistleblower*
- *Document retention and destruction*

11 – Conflict of Interest Policy

- Financial transactions between nonprofit and its insiders
- Also insiders' family and “closely associated” businesses
- Avoid excess benefit transactions and associated penalties

11 – Conflict of Interest Policy (cont.)

- Manage conflicts to create safe harbor (“rebuttable presumption of reasonableness”)
 - Disclosure
 - Independent board or committee studies comparability data
 - Recusal
 - Advance approval
 - Contemporaneous documentation
- Advance disclosure of potential conflicts – limit for knowledge and materiality
- Monitor and enforce compliance

11 – Gift Acceptance Policy

- When to accept vs. decline gifts
- Consider:
 - Exposure to liability
 - Carrying costs
 - Ability to liquidate
- Valuation
- IRS Forms 8283 (>\$5,000, filed by donor) and 8282 (property sold with 3 years, filed by nonprofit, exceptions apply for <\$500 and charitable use)
 - N/A to publicly traded securities

11 – Form 990 Review Policy

- Revocation for failure to file
- Full board review vs. disclosure
- Independent audit committee

11 – Whistleblower Policy

- Credible information only
- Illegal practices or violations of policy
- *No retaliation*
- Compliance officer

11 – Document Retention and Destruction Policy

- Paper and electronic records
- Retention periods
- Appropriate flexibility
- *When to cease destruction*
- Compliance officer

12 – Collecting Sales and Use Tax

- Sales and use tax must be collected and remitted to North Carolina Department of Revenue
- Unless one of three exceptions applies:
 - Occasional and isolated sales
 - Annual sales drives (all products delivered within 60 days of solicitation)
 - Proceeds to state entities (e.g., public schools)

12 – Admissions Tax

- Tax on admission fees for entertainment (generally NOT educational, recreational or fundraising)
- Exceptions:
 - K-12 events
 - Volunteer-only events

13 – Local Real Property Tax Exemption

- Available for real property owned by a nonprofit and used for charitable purposes
- Different requirements in each locality
- Exemptions for certain organizations may be available (i.e., YMCA and Humane Society)
- If no exemption, an application (and often an appeal) is required
- Litigation ongoing

14 –Sales and Use Tax Refunds

- Refunds of sales and use taxes paid in North Carolina *may* be available
- NOT NTEE Codes for:
 - Community improvement/capacity building,
 - Public and societal benefit, and
 - Mutual/membership benefit
- Semi-annual refunds (NC Form E-585)
- Exemption certificates coming soon???

15 – Lobbying

Two kinds of Lobbying:

- (1) Direct Lobbying for or against *specific* legislation or ballot measure, and
- (2) Grassroots or Indirect Lobbying for or against *specific* legislation or ballot measure (“call to action”)

15 – Definition of Lobbying

What is NOT Lobbying:

- Public policy, social advocacy and educational activities
- Executive, administrative or judicial communication
- Action in personal capacity
- Responses to written requests for assistance

15 – Lobbying Alternate Tests

- **Insubstantial Part Test**
 - Facts and circumstances
 - Violation = 5% excise taxes on all lobbying expenditures and *revocation* of tax-exempt status
- **501(h) Expenditure Test**
 - Elect by filing Form 5768
 - Violation = 25% excise tax on excess expenditures (revocation only if exceed limit by 50% averaged over four-year period)

15 – 501(h) Expenditure Test

- Overall limit based on “exempt purpose expenditures”
 - 20% of first \$500,000
 - +15% of next \$500,000
 - +10% of next \$500,000
 - +5% of remaining
- \$1 million overall cap
- 25% grassroots lobbying sublimit
- N/A to churches and affiliates

16 – No Partisan Politics

- Nonprofits may not advocate for election or defeat of candidates
 - ***Johnson Amendment SURVIVES!!! Rejoice!***
- Voter registration drives and GOTV
- Nonpartisan candidate questionnaires and forums
- Use of facilities
- Staff and board individual political activities

17 – North Carolina Lobbying Registrations

- Three key categories:
 - Lobbyist principals
 - Lobbyist
 - Solicitors
- Registration, fees, quarterly reports

17 – Safe Harbor to Avoid Registration as Lobbyist in North Carolina

- <5% of working hours in any 30-day period
- Only when communicating with officials
- NOT study, analysis, etc.

17 – Safe Harbor to Avoid Registration as Solicitor in North Carolina

- Communicate only with members (not general public), or
- Spend less than \$3,000 in any 90-day period encouraging the general public to lobby

18 – Worker's Compensation Insurance

- Applies if 3+ employees
 - occupational injury or illness
 - no fault standard
 - wages, medical benefits and death benefits
 - private insurance
- *Prior law* = applied even if only 3+ uncompensated corporate officers

19 – Unemployment Tax

- Applies if 4+ employees during any 20 weeks in current or prior calendar year
- Tax based on experience rating
- Tax ceases if no claims made
- Possible election to reimburse claims rather than paying tax (contact North Carolina Center for Nonprofits)
- Benefits do not apply if discharged for cause or resignation

20 – Classification as an Employee (NOT Independent Contractor)

- Employer's right to direct and control the workers
- Training provided to worker by employer
- All business expenses are reimbursed by employer
- Use of employer's facilities and supplies
- Single employer, no other clients
- No profit or loss for worker
- Benefits provided to worker by employer
- Worker's services are key to business

20 – Employee Payroll Taxes

- Withhold and pay payroll taxes
- Disclose independent contractors on IRS Form 990
- Board penalties for willful misclassification of employee as independent contractor
- Facts and circumstances test

21 – Exempt vs. Non-Exempt Employees

- Various exemptions (\$455 weekly salary, plus job duties) including:
 - Executive
 - Administrative
 - Professional
- Overtime of 1.5 times usual hourly pay rate when exceed 40 hours/work week
 - Define work week
 - Not waivable
- DOL Overtime “Final Rule” increasing weekly salary to \$913 is *on hold* pending appeal

22 – Federal and State Employment Laws

- Varied and complex
- I-9, W-4, W-2, 1099
- Withholding tax
- Employment taxes
- Minimum wage
- Overtime pay

22 – Federal and State Employment Laws (cont)

- Family and Medical Leave
- Anti-discrimination
 - Age
 - Gender
- Wall posters

23 –State Grant Reporting Requirements

Form	Funding Level		
	<\$25,000	\$25,000 - <\$500,000	\$500,000+
	Due 6 months after entity's fiscal year end		Due 9 months after entity's fiscal year end
State Grant Certification	✓	✓	✓
State Grants Compliance Reporting: Receipt of < \$25,000	✓		
State Grant Compliance Reporting: Receipt of \$25,000 or More		✓	✓
Program Activities and Accomplishments Report		✓	✓
Schedule of Receipts and Expenditures		✓	
GAGAS Audit (including Schedule of Federal and State Awards)			✓

23 – Government Funding Disclosures

- Nonprofits with federal, state, or local grants or loans:
 - Must make available applicable IRS Form 990 to the public, upon request
 - Posting on Guidestar or on nonprofit website is sufficient
 - Must make basic financial statements available to the public, upon request
 - These financial statements must say how government funding was used

24 – OMB Uniform Guidance

- Nonprofits with federal grants or contracts
- 10% *de minimus* modified total indirect cost rate option for most nonprofits
- \$750,000 increased audit threshold
- Audit requirement includes internal controls review
- Procurement process documentation mandated

25 – Raffles and Bingo

- Raffles:
 - Two per year
 - Aggregate prize value \$125,000 max
 - Except real estate up to \$500,000 max
 - 90% proceeds for charitable purposes
 - No payments to rent facility or pay person to conduct raffle
 - National rules vary dramatically
- Bingo:
 - License required
 - Two per week
 - No alcohol
 - No raffles during bingo

26 – Executive Compensation

- See #11 above (Conflict of Interest Policy – safe harbor)
- NEW 21% excise tax when pay \$1M or more to any of 5 highest paid employees
- Sources of comparability data:
 - Forms 990
 - NC Center *for* Nonprofits salary survey
 - Competing offers
 - Prior salary and benefits
 - Occasionally, for-profit equivalents
- Apples to apples!

27 – Employee Retirement Plan

- ERISA plans inc 403(b) plans
- Written plan document for 403(b)
- IRS Form 5500
 - DUE 7 months after plan year-end
 - Signatories register with US Department of Labor

28 – Director Fiduciary Duties

- Good Faith
- Due Care
 - Reasonably prudent person
 - Higher standards for persons with special skills and expertise?
- Loyalty
 - Conflicts of interest
 - Confidentiality
 - Obedience

→ Federal Investigation and Litigation – Cautionary Tales!

28 – Director Fiduciary Duties – Who?

- Governing board
- Not advisory board or program committees
- Hybrid – proceed with caution!
- Distinguish for-profit boards

28 – Director Fiduciary Duties – What?

- Employing the chief executive officer
- Strategic planning
- Managing finances
- Developing financial and other resources
- Managing risk (inc. legal compliance)

28 – Director Fiduciary Duties & Risk Management

- *Protect organization and leadership!*
- Legal entity
- Statutory immunity
- Limitation of liability
- Indemnification
- D&O insurance

29 – Assumed Name Certificate

- Today:
 - County-by-county filings
- July 1, 2017:
 - One county filing
 - NC Secretary of State database
 - Refiling deadline is July 1, 2022

More on the Horizon ...

- New state and local taxes & PILOTS?
- Private foundations and donor-advised funds next?
- Blurring of the lines between for-profit and nonprofit?
 - Socially conscious business
 - For-profit philanthropy
 - Crowdfunding
- And, what about the watchdogs?
 - IRS
 - Attorneys General
 - Secretaries of State
 - “The Media”



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DIANNE CHIPPS BAILEY

Dianne's practice is dedicated to the representation of nonprofit organizations, their senior management and volunteer leaders. She has extensive experience advising a diverse group of nonprofits in all aspects of their organization, administration and management.