

The logo features the text "Making Waves" in a white, elegant script font. The letter "W" in "Waves" is stylized to resemble a white wave crest. Below this, the words "USCC COMPOST CONFERENCE 2024" are written in a clean, white, sans-serif font. The background of the top half of the image is a teal-tinted photograph of ocean waves crashing on a sandy beach.

Making Waves
USCC COMPOST CONFERENCE 2024



February 6 – 9, 2024 | Daytona Beach, FL

How to Stay Out of Hot Water: Best Practices of Chapter Legal Compliance

Lead Presenter: Nisha Thakker

Session: Legal

Track: Chapter Track

Date: February 8, 2024

Introduction

- Who we are
- Who our clients are
- Major areas of focus

Losing Sight of Your Mission

- Forgetting to fulfill your tax-exempt purposes
- Keeping track of the big picture
- Risk of losing tax-exempt status
- More isn't necessarily better

Staying Focused

- Many nonprofit organizations, including trade associations, attempt to do too much – far more than their tax-exempt purposes allow. Less can be more in your purposes statement!
- Pressure from members, Board members, and others often lead to a nonprofit acting beyond its scope and outside of the legal parameters of a nonprofit.
- Since 2004, many certification organizations that started as 501(c)(3) entities have re-established themselves as 501(c)(6) organizations – or created an affiliated 501(c)(6) entity – to avoid excessive UBIT for certification revenue.
- Having a regular strategic planning session that results in achievable goals can help nonprofits stay focused and work towards their tax-exempt mission and purposes.
- Expansion and growth should be considered under the lens of the main purpose of the organization – refer back to your governing documents.

Cutting Through the Noise

- Conflicts of Interest
- Competing Interests
- Micromanagement of Staff by the Board
- Fiduciary Duties

Acting in the Best Interests of the Organization

- With so many competing voices (Board, staff, members), associations and nonprofits face serious risks that could jeopardize the organization's tax-exempt status.
- Associations need to have a robust conflict of interest policy that Board members should sign on an annual basis. In addition, the procedures for handling conflicts are critical in the event of an IRS audit or litigation.
- Board members and staff must put the interests of the organization first – even if the Board member serves on another board as well.
- The Board is the strategic overseer of the organization. Getting in the weeds or micromanaging the staff is ineffective and inefficient. Organizational staff will lose motivation and become resentful of the Board and senior leadership.

Legal Fiduciary Duties – Overview

- **Duty of Care**
 - Prudent steward of the organization
 - Due diligence in decision-making
 - Exercise good business judgment at all times
- **Duty of Loyalty**
 - Act in the best interests of the (entire) organization
 - Avoid conflicts of interest that are harmful to the organization
 - Includes a duty of confidentiality
- **Duty of Obedience**
 - Faithful to the mission and purposes of the organization
 - Follow the governing documents and external laws and rules

Material breaches of fiduciary duties create liability risk for the Board members, officers, and senior staff who breach them; can be enforced by the association and by the state's Attorney General's office

Duty of Care

- Duty to act with “ordinary and reasonable care” in prudently overseeing the affairs of the chapter; duty to exercise the judgment and common sense that may be reasonably expected of the average person under similar circumstances
- Business judgment rule – bad decisions are more easily defended than ignorance; it is the due diligence process that matters most; no blind approval; ask questions
- Individual Board members, officers, or committee members may be delegated authority to act on behalf of the Board, the Board’s fiduciary duties can be delegated to Board committees (comprised solely of Board members), officers have certain authority to act pursuant to the Bylaws, and the Board can rely on outside experts unless such reliance is not warranted
- Compliance with the duty of care: review all Board materials in advance, ask questions, dig deeper where warranted, actively participate in meetings, ensure that reliance on experts is warranted, exercise sound, prudent judgment
- Fulfilling the duty of care does not mean micro-management; Board = strategic governance and prudent oversight while management = tactics and operations; there needs to be an appropriate balance

Board Financial Responsibilities (Part of the Fiduciary Duty of Care)

- Board reviews and accepts financial reports on a regular basis
- Board approves annual budget
- Board reviews and accepts the audit report and year-end financial statements prepared by outside auditors
- Board views the IRS Form 990 annually prior to submission to the IRS (the IRS Form 990 asks if this has occurred)

Duty of Loyalty

- Duty to act in the best interests of chapter (not self, employer, other organizations, etc.) and to avoid conflicts of interest that are harmful to chapter
- Duty to disclose all actual and potential conflicts of interest (both annually and when they arise), to recuse yourself from decision-making that relates to the conflict(s), and allow a group of disinterested decision-makers to decide what is in the best interest of chapter
- If, in the rare situation, the conflict is pervasive and persistent, you must remove yourself from the conflicting position; disclosure and recusal are not sufficient here
- Duty is applicable to all classes of directors, no matter their role on the Board; the duty is to what is in the best interests of the *entire* organization
- It is not just financial transactions with chapter, such as being hired by chapter to provide services to chapter; also includes situational conflicts, such as serving on the Board of a competing organization or competing for the same grant/donor/member/sponsor/advertiser/exhibitor funds
- Each chapter should adopt a conflict of interest policy which spells out the process for how conflicts are disclosed and “managed”; it is important to have such a policy and always follow it
- **Includes a duty of confidentiality**

Duty of Obedience

- Duty to comply with all external laws and regulations that apply to the chapter, with all internal chapter Bylaws, policies, and rules, and to ensure adherence to the chapter's mission and purposes

Artificial Intelligence

- **Data Privacy**
 - Compliance with federal, state, and international privacy laws
 - Disclose how data will be collected, used, protected
 - Obtain consent
- **Intellectual Property**
 - AI creates new works based, in part, on work that already exists
 - Ensure you have all necessary permissions to use any copyrighted work
 - Don't claim ownership of any AI-created work without obtaining any required licenses
 - Do not use protected or confidential information when inputting data
- **Discrimination**
 - Potential for discrimination in hiring, membership recruitment, leadership opportunities
- **Tort Liability**
 - Association can be held liable for inaccurate, negligent, or biased results that harm members or other end users
 - Carefully vet and ensure accuracy of any AI-generated information

Antitrust Concerns

- There are a number of off-limit topics where discussions in various settings could lead to illegal agreements:
 - Pricing, including any discussions of methods, strategies, timing, discounts, advertising, or what constitutes a fair or reasonable price
 - Whether to do business with suppliers/vendors, customers or competitors
 - Whether to admit a member to the association
 - Complaints about business practices of other companies
 - Confidential business plans regarding output decisions, employee compensation, marketing plans, or decisions regarding future product/service offerings

Antitrust Concerns (continued)

- Concern that competitors can use online platforms/communities to violate the antitrust laws in the same way they could at meetings
 - Rules regarding off-limit discussions – and other acceptable and non-acceptable behavior/discussions – on the forum should be clearly laid out, agreed to (click-and-accept) by each participant prior to joining, and sent out to all forum participants each year
 - Inappropriate posts can give rise to potential antitrust liability (e.g., price fixing, group boycotts) as well as liability for defamation, tortious interference, copyright or trademark infringement, etc.
 - The boards should be monitored by well-trained and responsible association staff
 - The staff should be able to (and should) promptly take corrective action when inappropriate messages are posted

Stale Voices and Perspectives

- Ensure regular turnover on the Board
- Keep focus on diversity in Board and other leadership representation
- Have a defined role for former leadership

That's The Way We've Always Done It

- Many nonprofits and associations fall into the trap of lifetime appointments (“Founders Syndrome”) or lengthy terms for Board members which can put the organization into a programmatic rut.
- New voices representing diverse perspectives are important to ensure an association’s continued success.
- Extended participation for past chairs or other Board leaders can hamstring the organization’s forward progression and get stuck in the “that’s the way we’ve always done it” mentality.
- Many prospective members and sponsors will now look to the diversity of the Board to find a connection.

Don't Forget About Governance!

- All nonprofit organizations are required to abide by state and federal laws and their own governing documents.
- It's important to look in the right places and follow the recipe for good governance.
- Order of hierarchy: IRS statutes and rules/state nonprofit corporate law → Articles of Incorporation → Bylaws → Policies and Procedures.

And Of Course, The Law

- Tax-exempt organizations are guided by their own mission and purposes, but first and foremost comes the law.
- Failure to follow IRS rules and state nonprofit corporate law can put an organization at serious risk.
- Bylaws and policies and procedures should govern the day-to-day operations of an association.
- Regular governance reviews are strongly recommended as many nonprofit statutes undergo revisions on an annual basis.

Questions?

T E N E N B A U M

L A W G R O U P P L L C



Nisha G. Thakker, Esq.
Partner

Tenenbaum Law Group PLLC
1101 K Street, NW, Suite 700
Washington, DC 20005
202-221-8004
nthakker@TenenbaumLegal.com
www.TenenbaumLegal.com



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