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NONPROFIT CHECK-UPS: PLANNING, PREPARING, PROBLEMS

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1 WORKSHOP SUMMARY

How can Christian attorneys effectively help ministry leaders with legal compliance and accompanying best practices? What are key legal compliance areas of interest, for your attentiveness and follow-up steps? This workshop addresses wide-ranging areas affecting Section 501(c)(3) nonprofit organizations, including churches and other ministries. The following sections address this plethora of legal issues for nonprofits and their legal advisors. Section 2 provides questions designed to help identify key legal issues that a nonprofit may be facing. Section 3 elaborates on these topics for appropriate follow-up steps with nonprofit leaders and boards seeking optimal legal compliance and best practices. Note too the many embedded links to other nonprofit legal resources, such as for a [Nonprofit Check-Up](#), to help serve nonprofits with excellence and joy!

2 NONPROFIT REVIEW CHECKLIST

The primary goal of this checklist is aid attorneys involved with nonprofits to evaluate and address key legal areas affecting them, through the listed questions. This checklist is not exhaustive, and certainly other issues may arise depending on the nonprofits structure, programs, and jurisdiction. Yet the checklist provides a solid starting point to begin the conversation with the nonprofit's leaders, distinguish between what the nonprofit is doing well, what could be improved, and what warrants high priority attention. In turn, Section 3 addresses the listed questions in much detail, as referenced below.

2.1 Personal Reflection and Understanding

1. How are nonprofit clients like other clients? (E.g., corporations, individuals, groups)?
2. How are nonprofit clients different from other clients?
3. What is your role as an attorney to nonprofit clients? (E.g. pro bono, fee-based arrangements, overlapping community relationships)
4. What is the Board's role versus that of the staff or others – i.e., oversight vs. management?
5. What are key legal compliance areas of interest, for your attentiveness and follow-up steps?

2.2 Nonprofit Governance and Tax Exemption

Nonprofit Governance Overview (See Section 3.1)

1. Do directors and officers understand their responsibilities as governing leaders, such as for loyalty, confidentiality, due diligence, and oversight?
 2. Do you need to recommend any board training? See.e.g., [Boardsource.org](#). Consider using something like a "[Great Expectations](#)" document, effectively communicating director and officer responsibilities.
 3. Are directors and officers leading effectively, with sufficient guidance to do their work, and evident capability?
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Nonprofit Corporate Legal Matters (See Section 3.2)

1. **Check:** Do directors and officers have specified terms of office, and are they tracked well and accurately?
2. **Bylaws:** Do the bylaws accurately fit the organization's governance, are they internally consistent, are they compliant with applicable state nonprofit and federal tax law, and do they otherwise exemplify best practices? See also our law firm's And does the organization's purpose statement in the bylaw accurate and consistent with other iterations, such as in the articles of incorporation and website information?
3. **Policies:** What governance policies are in place? What policies should be adopted or updated? Do you know where these policies are located?
4. **Conflicts of interest and related issues:** Do board members and key employees need to complete disclosure forms (as should be done annually), and does the board need to address any conflict issues further?
5. Does the nonprofit have complete and well-organized board governance materials?

Federal Tax (See Section 3.3)

1. Does the organization have an IRS determination letter (if legally required), with accurate address information?
2. Has the organization timely filed IRS Form 990s in the past, and if not has the organization's tax-exempt status been revoked and need reinstatement?
3. What is the status of the upcoming Form 990, and are any steps or other action items needed for it?
4. Do the board members receive a copy of the Form 990 each year, as a best practice (and per applicable IRS Form 990 question)?
5. Are the board members aware of additional federal tax requirements, such as for political activities and UBIT?

State Tax Exemptions (See Section 3.4)

1. Does the nonprofit operate in states with additional income tax exemption application or reporting requirements?
2. Does the nonprofit need a state sales tax exemption for retail purchases, to the extent available?
3. Does the nonprofit need to collect any sales taxes for its own sales?

2.3 Other State Reporting Obligations, Including Fundraising/Charitable Solicitations (See Section 3.5)

1. Are state registrations up to date, and do they fit the nonprofit's operations?
2. Does the nonprofit need to file charitable solicitation registrations or reports, based on current operations or recent changes? Any available exemptions?
3. Does the nonprofit's employee census change any state registration or reporting obligations, such as "foreign business" state registrations, state payroll registrations, state fundraising compliance based on specific workers' activities?

2.4 Nonprofit Operations

Risk Management (See Section 3.6.1)

1. Does the nonprofit need to develop a child protection policy, or update it in light of potential grooming issues, potential misconduct allegations, mandated reporter obligations, related clergy privilege issues, or other concerns? Does the child protection policy meet any requirements from the nonprofit's insurance company?
2. Should the nonprofit consider seeking guidance from other ministries, such as the ample resources available through Evangelical Council for Abuse Prevention (ECAP)'s website?
3. Does the nonprofit need to develop a security policy or related safety protocols?
4. Does the nonprofit need to consider more or different insurance coverage? Does the nonprofit have appropriate policies and plans in place to help lower premiums and avoid cancellation?
5. Should the nonprofit develop an "endowment" or consider multi-corporate structuring (e.g., single-member LLC), particularly to avoid alter ego or "piercing the corporate veil" liability?

Employment (See Section 3.6.2)

1. What is the nonprofit's worker census – by number, worker location, worker classification?
2. Does the nonprofit properly classify employees and independent contractors?
3. Does the nonprofit have an employee handbook? Should it?
4. Does the nonprofit effectively use offer letters, other agreements, job reviews, and other supervisory tools?
5. Is the nonprofit properly registered for payroll tax and unemployment?
6. Does the nonprofit responsibly handle payroll, state paid leave obligations, and other state and federal employment obligations well? How do the directors exercise responsible oversight for such matters (e.g., HR manager, outsourcing)?
7. Does the nonprofit pay employees for all work related to their job description or are employees improperly volunteering in similar roles?
8. What priority items should be addressed next, such as a new or updated employee handbook, review of any employee agreements or HR tools, availability of employment-related religious liberty protections?

Real Estate (See Section 3.6.3)

1. What is the nonprofit's physical space needs, ownership, and usage?
2. If the nonprofit owns real estate, is it exempt from property taxes? Any questions or concerns for maintaining exemption?
3. If the nonprofit provides space usage to others, are well-developed and accurate written agreements in place?
4. Do the nonprofit's leaders anticipate any changes in property ownership or usage, warranting further attention?
5. Does the nonprofit have and implement a plan to keep up with the maintenance and repairs for the property?
6. What priority items should be addressed next?

Intellectual Property (See Section 3.6.4)

1. Are the nonprofit's copyrighted materials sufficiently protected, such as created by its employees, independent contractors, and volunteers?
2. Does the nonprofit have licenses and agreements to use any materials from other individuals or organizations? Is it using those materials in alignment with the permission given?
3. Should the nonprofit register any trademarks, such as its name or an organizational or program logo?
4. Are others using similar trademarks in connection with similar goods or services that may warrant further attention to determine who has stronger rights to use the mark?

Data Privacy (See Section 3.6.5)

1. What data does the nonprofit have or expect to obtain that requires additional precautions to protect, either legally or as a best practice? What steps should be taken to best address data privacy issues, given the nonprofit's current and anticipated operations and to optimally mitigate risk?
2. Does the nonprofit have a record retention policy? Are documents being disposed of according to the policy? Should the record retention policy be updated (e.g., to optimally provide for electronic record maintenance)?
3. Does the nonprofit use AI? If so, does the nonprofit prohibit confidential data from being used by the AI or otherwise ensure that the data being provided to the AI is not being used for improper purposes? Does the nonprofit adequately protect confidential data?
4. What priority items should be addressed next?

2.5 Next Steps

Using this Checklist in Section 2, consider a specific nonprofit organization – perhaps a client or involving board leadership – then identify what should be priority areas for next steps. Keep reading to learn more about specific legal areas for priority action, additional understanding, and other follow-up attentiveness.

3 NONPROFIT LEGAL TOPICS

3.1 Nonprofit Governance Overview

A. *Accountability* – To whom is the nonprofit accountable? With no owners (as a legal matter), the organization is accountable to the public at large and specifically to its donors, participants, and other stakeholders. Stewardship matters.

B. *Fiduciary responsibilities*: The term “fiduciary” is based on the Latin word for “trust.” Being a fiduciary means being entrusted with accountability for an organization's well-being. Leaders of not-for-profit organizations serve as stewards of organizations' assets and other interests. Because charitable assets are intended for public benefit, they belong to no private person and thus must be guarded carefully for the public's interest. The generic name for this guardian role is “directors,” but other titles may be used instead (e.g., “trustees, elders, deacons, etc.”). Officers also have specified responsibilities for governing not-for-profit organizations, and their titles may vary similarly. Whatever the title, directors and officers are entrusted with taking care of their nonprofit organization.

Directors and officers of not-for-profit organizations are generally held to the same standards of care as directors and officers of business corporations. They are responsible for overseeing programs, finances, employees, and the vision of the not-for-profit organizations they serve. In nonprofits, directors and officers contribute their time, talents, and treasures to worthwhile causes through involvement in meetings, fundraiser events, and special committee work. Nonprofits cannot survive without the sacrificial dedication of these leaders, but the leaders must do their jobs – hopefully well

1. *Duty of care (aka diligence)*: The duty of care requires directors and officers to exercise reasonable diligence and due care in conducting the not-for-profit's affairs. At a minimum, they must stay informed about the activities and finances of the organization by regularly attending corporate meetings, actively examining and evaluating the records made available to them by staff, and understanding how the organization functions under its bylaws. Board members must act in good faith as they make decisions and seek always to avoid the misuse or waste of its assets. When a decision involves complex matters, the board should engage subject matter experts, community representatives, and professional advisors if the directors lack the requisite skills to make an informed decision.

The duty of care is generally evaluated according to the "business judgment rule," under which directors and officers are presumed to make decisions on an informed basis and in good faith. Accordingly, to stay within the business judgment rule's protection, directors and officers must take the same care that an ordinary and prudent person would exercise under similar circumstances. Failure to exercise such care through gross negligence or willful misconduct may result personal liability. For more information particularly regarding specific applications of the duty of care, see our firm's [duty of care article](#).

2. *Duty of loyalty*: When does a nonprofit director or officer owe loyalty to the organization, and just how much loyalty? The general answer is that by serving a nonprofit, directors and officers put on their "hat" (or role) to serve the nonprofit with faithful allegiance, continually, steadfastly, and without interruption except in the event of occasional conflicts that may arise. The fiduciary duty of loyalty, as recognized under both state nonprofit laws and federal tax law, requires directors and officers to faithfully act in the nonprofit's best interests.

Directors and officers must ensure that they do not use their position of trust to confer special benefits on themselves, their families, friends, and others. This is not to say that all transactions with such parties are prohibited. However, whenever personal and business relationships co-exist, primary loyalty must be demonstrated toward the corporation by the decision-makers involved. The most common transactions that risk a breach of this duty involve conflict of interest, misuse of the organization's information or opportunities, and misappropriation of the organization's assets.

For more information addressing these types of transactions and accompanying legal compliance considerations, see our firm's [duty of loyalty article](#). This article features the notable Illinois case of *Mile-o-Mo Fishing Club v. Noble*, 62 Ill.App.2d 50, 210 N.E.2d 12 (1965). The facts involved a former board president who gained knowledge of a real estate transaction while in office, including the proposed financial terms between the club and the potential seller. Ultimately, the club did not purchase the property. However, after the president left office, he used this information in negotiating a sale of the targeted property to himself. The club learned of the transaction and sued him. The Illinois appellate court ruled that the officer had misused the information he obtained as a board member and therefore had breached his duty of loyalty to the club. The court ruled in the club's favor and, as an appropriate equitable remedy, ordered the former director to transfer the property to the club at the same price they had negotiated before his interference. *See also Stern v. Lucy Webb Hayes Nat. Train. Sch. for Deacon. & M.*, 381 F. Supp. 1003 (D.D.C. 1973) (likewise involving

a conflict of interest over management of a nonprofit's funds and holding that the directors breached their fiduciary duty of loyalty but finding no financial harm).

3. *Duty of obedience.* Many nonprofit leaders have a strong sense of mission, while others may stray due to lack of understanding, pressing demands from others, or the pull of funding opportunities. Each director and officer owes a fiduciary duty of obedience to the nonprofit's mission as part of his or her governing leadership. A nonprofit's mission, often known as a "corporate purpose statement" is typically found in a nonprofit's charter documents, such as its articles of incorporation, articles of amendment, and bylaws. Sometimes the purpose statement is updated in the bylaws but not in the articles, which is not ideal. When possible, the articles should contain the most up-to-date purpose statement. Often, a nonprofit will have a mission statement on its website, an advertising tagline, or other PR-related communications about its mission. These statements may be varied to some degree but should be consistent overall, springing from the core purpose statement contained in the nonprofit's corporate documents.

C. *Potential Liability.* Can nonprofit volunteer leaders ever be held personally liable in relation to their work for an organization? Unfortunately, the answer is emphatically yes. Most state nonprofit laws protect directors and officers from personal liability for acts performed in such volunteer capacities, but significant limitations exist. Leaders need to be attentive to applicable legal requirements, to govern their organizations well, and to pursue available protections such as directors' and officers' insurance and other risk management measures. For more information, see our law firm's [article addressing potential volunteer liability](#).

3.2 Nonprofit Corporate Legal Matters

A. *Corporate Documents–Bylaws.* Another key area for periodic review is an organization's charter documents – its articles of incorporation, any articles of amendment, and bylaws. Does the purpose statement in the bylaws match the purpose statement in the articles? Is the purpose statement current (e.g., is it consistent with what is listed on the organization's website and in its brochures)? Does it accurately reflect the organization's current scope? If the answer to any of these questions is no, then some updating is likely in order. Ideally, a nonprofit's purpose statement should serve as an organization's guiding compass, not only operationally but also so that it can qualify for available legal exemptions consistent with such self-identification.

With respect to the [bylaws](#), it is critical that board members have a working understanding of its provisions. For example, the directors and officers should be elected, appointed, and removed in strict accordance with its requirements, including compliance with any specified terms of office. Meetings should likewise be called and conducted in compliance with applicable provisions, particularly with regard to notice, quorum, and voting. In addition, the board should understand how their committees are to be constituted and utilized. Membership, such as for churches, may be a key issue to accurately address in bylaws, such as for joining, leaving, meeting together, and voting.

To the extent that board governance does not match the bylaw provisions, then either the bylaws or board practice should be changed. Many bylaw provisions also may warrant updating, such as to provide expressly for meeting notices via email, confidentiality, financial practices, and committee structures.

Bottom line: a nonprofit's bylaws should be a helpful, accurate, and current reference tool for all board members, for clear understanding, effective governance, and avoidance of potential problems later in actual practice. If they are not, then the nonprofit leaders should follow up with corporate governance work, perhaps through a governance committee or other group tasked to address such matters in the coming year. Additionally, the bylaws should be easily

accessible by every director, officer, and the executive director/CEO to confirm compliance and inform the governance of the nonprofit.

B. *Policies.* As with a nonprofit's purpose statement and bylaws, it is critical that the organization have effective board policies in place that are accurate, appropriate, and legally compliant. Accordingly, the board may want to schedule specific times to review such policies. To ease the burden, it may be helpful to delegate responsibility for policy review to committee members and then have the board exercise oversight.

Legally compliant policies should fit each organization well, particularly with respect to evolving needs and legal developments. For example, leaders of an organization with increasing financial resources may decide that an investment policy is now warranted. A [gift acceptance and restriction](#) policy may be advisable to clarify what types of donations are acceptable (e.g., cash, non-cash, stocks, international funds, [bitcoin](#)) and the extent to which any donations may be restricted (e.g., not at all, subject only to preferences).

A conflict of [interest policy](#) is a must-have for any nonprofit, and a dispute resolution policy is highly recommended too. Likewise, a [whistleblower policy](#) is important, especially given the recent legal trend involving enhanced legal protections for whistleblowers. Note too that the IRS Form 990 asks whether the organization has a conflict of interest policy and a whistleblower policy, as marks of good governance and management

3.3 Federal Tax

A. *Form 990 reporting obligations.* Most nonprofits owe [IRS Form 990 filings](#) each year through one of several form variations in the series: Forms 990, 990-EZ, 990-N, or 990-PF. Nonprofits excluded from 990 filing requirements are generally churches and other houses of worship, as well as integrated auxiliaries and associations of churches. Accountants regularly work with nonprofits on this very important legal compliance requirement. Attorneys can assist clients with Form 990 compliance, such as to complete the IRS Form 990-N ("e-postcard") online filing (for eligible organizations) and with certain aspects of the much more extensive Form 990 (e.g., descriptive program information, ongoing satisfaction of the public support test, related organizations, compensation disclosures, and other sensitive disclosures as required per specific questions).

The IRS 990 filing deadline is four and a half months after the organization's fiscal year end. As a common example, an organization with a December 31 fiscal year end has an IRS 990 filing deadline of May 15 each year. Organizations filing IRS Form 990, 990-EZ, 990-PF, or 990-T may obtain an automatic six-month extension of time to file, through IRS Form 8868 filed prior to the initial deadline. Timely filing of these reports is critical since late filing penalties may accrue at a daily rate. If an organization is eligible to file the 990-N "e-postcard," however, it may be filed anytime in the year following its fiscal year end and with no late-filing penalty.

Significantly, failure to file 990 reports for three consecutive years will result in auto-revocation of the organization's tax-exempt status. It is thus critical that the organization's internal records of filing obligations are well communicated, especially through any leadership transitions, to ensure such filing requirements are met. [Reinstatement of tax-exempt status is possible](#), with retroactive treatment in many cases, but not without a new IRS application, additional expense, potential uncertainty with donors, and possible penalties too.

Due to the detailed nature of IRS Form 990 filings, nonprofits may prepare financials early either internally or through the help of an accounting firm well in advance of the IRS filing deadline. If an organization is required to file the full 990 version, detailed financials take time to prepare and review before filing. Nonprofit leaders can help proactively schedule for this work in advance of the filing deadline.

Note too, the IRS references a nonprofit's fiscal year end as reported with their office, often first through an organization's IRS Form 1023 application for recognition of tax-exempt status. Changes to a nonprofit's fiscal year end operationally must also go on record with the IRS. Organizations may do so through the filing of a short fiscal year 990, followed by annual filings based on the new fiscal year end.

B. *UBIT*. Form 990-T may be required, though less common, to report unrelated business income – known as “UBIT.” As a general rule, tax-exempt nonprofits are exempt from paying federal income taxes on their net revenues, but they may nevertheless owe taxes on income generated from unrelated business activities. The term “tax-exempt” thus can be misleading. When does a nonprofit become subject to income taxes? The answer depends on whether a nonprofit's activity is (1) a trade or business, (2) regularly carried on, *and* (3) not substantially related to the organization's tax-exempt purpose. The key reason for UBIT liability is to avoid giving tax-exempt organizations an unequal competitive advantage over for-profit organizations that pay taxes on income generated from similar business activities. Given this underlying tax policy rationale, several exceptions may come into play. For more information about this complex legal area, see our law firm's [UBIT article](#).

C. *Political Activities*. A common issue that arises for nonprofits is whether, and the extent to which, they may engage in politically related activities such as political campaign activities, lobbying, and educational issue advocacy. The answer depends in part on the type of nonprofit involved. Section 501(c)(3) organizations may engage in unlimited educational issue advocacy (e.g., “Abortion stops a beating heart.”), limited lobbying (e.g., “Call your legislator today about _____ pending bill.”), and ZERO political campaign activity (e.g., “Vote for _____”). These issues can quickly get complicated, and often clients are seeking to move quickly forward. Be attentive to applicable legal requirements for all types of activities, whether grassroots or direct [lobbying](#), [political campaign activities](#), or legally permissible [educational issue advocacy](#).

D. *Other Federal Tax Issues*. Other federal tax issues that may arise periodically may include questions about the public support test, required disclosures of information, financial reporting, and related party transactions. Competent and knowledgeable accountants are essential for proper Form 990 reporting, and legal counsel can be helpful too.

3.4 State Tax Exemptions

A. *Income Tax*. In addition to the federal tax issues addressed above, certain states require that nonprofits apply for [exemption from franchise or income tax](#), and to complete related annual reporting. Particularly if an organization is registered in California, Hawaii, Texas, D.C., or other states with related requirements by law, it is important to not let these compliance filings slip through the cracks. For example, if an organization fails to file its California Form 199 annual information returns with the Franchise Tax Board for several years, statutory revocation of an organization's tax-exempt status is enforced, for which reinstatement can be a lengthy process.

B. *Buying*. Does your nonprofit organization purchase tangible goods at retail, like office supplies, furniture, or computers? If so, it may qualify for [exemption from state sales tax](#) on such purchases, with substantial resulting savings. That's great news! Keep in mind though that sales tax exemption is state-specific. Each state has its own exemption qualification requirements, application process, and renewal aspects. So if a nonprofit buys goods elsewhere, such as for out-of-state conferences or a new program office, it may need to apply for sales tax exemptions in other states.

Not all state sales tax exemptions are created equal. Many state sales tax exemptions are available only to Section 501(c)(3) tax-exempt organizations (e.g., churches, charities, schools, social service organizations), but other qualification requirements may apply. In addition,

many states exclude certain purchases like hotel occupancy. Some states provide no sales tax exemption for nonprofits; a few states don't impose sales tax at all.

C. *Selling.* But what happens when a nonprofit organization sells goods, through a website, at periodic conferences, or as part of its program activities? Must the nonprofit collect sales tax too on its sales of T-shirts, books, or other items made available to others, just like a store? Aren't nonprofits exempt from taxes? If a nonprofit's sales are not exempt, under which state sales tax law will it owe sales tax?

A nonprofit indeed may owe sales tax to state taxing authorities arising from such sales, unless a specific exemption exists under applicable state law. Such liability may be owed to more than one state, depending on the nonprofit's activities across state lines. If the sales revenue constitutes "unrelated business income," additional tax liability may arise notwithstanding a nonprofit's Section 501(c)(3) income tax-exempt status. Most basically, legal compliance depends on state law, and states can vary in terms of potential liability and available exemptions.

A key related legal question arises with a nonprofit's sales to purchasers outside of a particular state, such through online sales. Using Illinois as an example, a nonprofit's sales tax liability clearly arises (absent an applicable exemption) on sales made within Illinois, such as sales made physically in Illinois or sales made online to Illinois residents. But to the extent sales are made to persons or organizations outside of Illinois (including online sales), sales tax liability arises if a "substantial nexus" exists between the nonprofit and the outside state (or states) sufficient to trigger the outside state's taxing authority over the nonprofit. Such "substantial nexus" is determined according to the extent of the nonprofit's physical presence in the outside state, such as by the existence of an office, employees, programs, or other regular activities there.

A nonprofit that engages in multi-state sales activities thus should do the following: (a) evaluate whether its physical activities are sufficient to trigger the nexus requirement in other states; (b) if so, determine the availability of sales tax exemptions in other states (as per above for Illinois); (c) if no exemptions are available, register with other states' Departments of Revenue; and (d) collect and pay resulting sales taxes arising from such non-exempt sales to other states' taxing authorities. This legal area can get complicated quickly, with legal compliance traps for the unwary, administrative headaches in evaluating "nexus" sufficiency, and additional complications arising from online sales. See our law firm's articles on [sales tax liability](#), including the U.S. Supreme Court's landmark *South Dakota v. Wayfair* 2018 decision, for further guidance.

3.5 Other State Reporting Obligations, Including Fundraising/Charitable Solicitations

A. *Overview.* Most nonprofits must file compliance reports with state agencies, ranging from annual (or other periodic) reports owed the Secretary of State, to franchise tax exemption returns, and state charitable solicitation renewals too. Specific requirements can vary widely, depending on each organization's particular operations and applicable state law. Organizational leaders should periodically evaluate whether the nonprofit needs to either register or de-register state business registrations or state charitable solicitation registrations. These decisions are often informed by reviewing dynamic program activities, updated operations (including employment and remote work), and evolving fundraising efforts that may change registration obligations.

Through sound leadership, nonprofit board members should be aware of the organization's filing requirements and exercise oversight to ensure they are satisfied. A key way to do so is through capable accountants, legal counsel, and internal staff. In particular, leaders can help identify filing deadlines, provide related reminders, and help ensure that the filings are timely made. Of note, the following filing requirements are common but vary by state and

may only apply in certain situations. Depending on the organization's span of operations, it may be helpful to utilize a chart or other internal calendaring system to ensure the organization stays compliant with all state-level filings

B. *State Corporate Annual Reports.* Most states require annual, or otherwise regular, updates of corporate information to the state agency in which the organization has registered to do business (often the Secretary of State). This includes not only the "domestic" state of incorporation but also other "foreign" states where business activities are conducted (for example, through "foreign business registration" or an "authority to transact business"). Within [corporate annual reports](#), state agencies typically request the organization's current mailing address and list of officers and directors. If these filings lapse, an organization's nonprofit corporate registration or foreign business registration may be subject to dissolution or other adverse action. Compliance is key!

C. *Charitable Solicitation Registrations and Renewals.* Organizations registered for charitable solicitation through a state's Attorney General's office or akin regulatory agency must complete renewal filings to keep their registration active. While reporting requirements vary state to state, failure to comply typically mean that the organization is not permitted to solicit contributions from donors within the state until such compliance reporting is satisfied. Notably, some states do not impose any registration requirement, and certain states provide for religious exemptions. [Multi-state legal compliance](#) issues may arise too with fundraising across state lines, such as through online activities, donor meetings, and program activities carried out physically in multiple locations.

3.6 Legal Compliance and Risk Management in Nonprofit Operations

3.6.1 Risk Management

A. *Overall.* Consider the importance of child protection policies, other abuse issues and related risk management, the advisability of assimilating sex offenders, security issues, insurance coverage, and potential multi-entity structuring (including LLCs and endowment development).

B. *Insurance.* As an organization grows, its insurance coverage needs will likely change. Periodically checking for sufficient liability, property, and other insurance coverage areas will help a nonprofit in the event of any incidents. As a starting point, nonprofit leaders may reference our law firm's blog article regarding [liability insurance coverage](#). Related considerations include whether directors' and officers' insurance should be obtained, whether the organization has "EPL" coverage (employee practices liability), and whether any coverages should be dropped in light of changed property ownership or program activity. With societal shifts, an increased need has developed for cyber liability policies, abuse and molestation coverage, and crime policies that cover employee embezzlement or fraud. Many of these specialized coverages are excluded from general policies and must be added either as a rider or a separate policy.

Note too that insurance companies reportedly are increasingly unwilling to insure certain risks or to do so without charging steep premiums. Wise nonprofit leaders thus may need to focus on other risk mitigation measures, such as improved [safety protocols](#) and other [measures](#) as well as routine facility and vehicle maintenance that demonstrates to the insurance company proactive risk management, keeps the cost of claims lower, and thus increases the chances of lower insurance premiums and continued coverage.

3.6.2 Employment

A. *Overall.* Nonprofit workers can be the organization's greatest assets as well as its greatest liability. Correct worker classification is essential for the employees, independent contractors, interns, and volunteers who may work for the nonprofit. Additionally, careful attentiveness should be given to exempt/non-exempt worker distinctions, particularly for accompanying overtime/minimum wage obligations. To what extent may a nonprofit benefit from religious liberty protections, such as for ministerial exemptions? It all depends on the specific workers and accompanying context. Should a nonprofit have an employee/personnel handbook? Probably, and one that complies with potential multi-jurisdictional requirements and rapidly evolving paid leave rights, hybrid work arrangements, and other trends. Are religious employees eligible for ministerial housing allowances and similar tax benefits? Again, the answer depends on the specific workers and accompanying context. What about potential unemployment benefits, nonprofit exemptions, and the advisability of severance pay upon employment termination? All are important to consider and address as warranted.

B. *Caution.* Employment law issues for nonprofits can keep legal counsel very busy! Beware of potential pitfalls involving special requirements, benefits, and other nuances for nonprofits, and make sure that any employment guidance is up to date with recent developments. These legal issues may warrant outside counsel especially (1) to make sure workers are well cared for, and (2) to make sure the nonprofit is well protected from potential liability that can arise from noncompliance.

3.6.3 Real Estate

A. *Overall.* Nonprofits can be involved with real estate matters in a wide variety of ways, such as by owning and using property, providing it to third-party users, renting as well as leasing property, and buying and selling it. Perhaps the two most regularly prevalent areas for nonprofits are (1) property tax exemption issues and (2) third-party facility usage.

B. *Property Tax Exemption.* In the iconic Blues Brothers movie, Sister Mary recruits Jake and Elwood to help raise money for delinquent property taxes on the Catholic orphanage in which they grew up. The music is legendary, and the Sweet Home Chicago-area scenes are memorable – Maxwell Street, Lower Wacker, the Daley Center, and the destruction of the Dixie Square Mall. But wait: did they really need to pay those property taxes, or could they have avoided the Illinois Troopers and Jail House Rock all together? The best legal strategy surely would have made for a dull movie. Cruising around in a '74 Dodge with cop tires and cop suspension beats paperwork after all! But no road shenanigans were actually necessary, as explained in our firm's property tax exemption article.

Property tax exemption is generally available for charitable, religious, or educational ownership and usage. But many nuances apply, with significant traps for the unwary along with important public policy aspects. Consequently, while it may be appropriate for a real estate attorney to assist with purchases, sales, and leases, an attorney well versed in nonprofit property tax exemption issues should be engaged for any exemption-related issues such as to prepare and file property tax exemption applications and to maintain such exemption qualification safely. Remember too that one cannot change the past. Once an exemption is lost, not even a very clever and creative attorney can prove exemption based on defective facts such as non-qualified exempt ownership or problematic property usage with a prohibited "view to profit."

C. *Third-Party Facility Usage.* Does the nonprofit own real estate that could be used by others? Perhaps its building or other property is currently occupied in whole or in part by other occupants? While the nonprofit sector has occupants, usage fees, and related agreements, a parallel dynamic exists in the commercial world where occupants are known

as tenants, usage fees are known as rent, and related agreements are comparable to leases. Oftentimes, the key driver for such an arrangement is financial, which is fully appropriate for a commercial setting. But in the nonprofit context, real estate may be exempt from property taxes, revenues preferably remain tax-exempt, and additional non-commercial considerations may warrant a different approach for third-party space usage.

At its core, the potential provision of a nonprofit's physical space to others amounts to a stewardship question – that is, whether it is a good idea overall to allow others into the nonprofit's space. This overarching stewardship inquiry encompasses several related matters such as how such provision advances the nonprofit's mission, risk management, insurance coverage, staffing, consequent building repairs and wear and tear, revenue opportunities, and impact on the nonprofit's property tax exemption.

To help an organization stay the course, such considerations may best be addressed through a written “[facility usage policy](#)” that an organization's board thoughtfully develops and approves. What should be included in a third-party facility usage policy? The specific provisions may depend on the nonprofit's goals, particular property attributes, and decisions about permissible uses. [Facility usage agreements](#) are likely advisable too, particularly to promote the parties' mutual understanding and respective expectations, as well to protect [property tax exemption](#). Consider potential [UBIT issues](#) too (per above).

3.6.4 Intellectual Property

A. *Overall.* Nonprofits should similarly be attentive to intellectual property matters as intellectual property is a charitable asset of the nonprofit that must be properly steward for charitable or other exempt purposes.

B. *Copyright Ownership.* As a general legal principle, a nonprofit owns the copyright to the written and online materials it has created. Keep in mind too that the “default” legal rule for [copyright ownership](#) involving employees is that the employer owns the materials created by the employee within the scope of employment. In contrast, the “default” legal rule for copyright ownership involving independent contractors and volunteers is that they own such materials – not the nonprofit! Proactively addressing such matters, such as through a written agreement modifying such result may thus prove critical.

C. *Copyright Infringement.* Nonprofits must be cognizant of how they use the written materials, photos, designs, and other such items created by others. Too often nonprofits save photos from Google to use on their website without obtaining a license or other permission to use the photo. Additionally, the nonprofit may receive materials from an individual or another organization and use that material in its programs or in its print or online media, with or without any alterations. Confirm the nonprofit has a license or agreements with the author of these works outlining the nonprofit's ability to use the material and involving such matters including [derivative works](#).

C. *Trademark and Brand Protection.* The nonprofit's name, logo, and other source-identifiers are key components to the nonprofit's brand and its reputation with donors, participants, and other stakeholders. These items may be protected under common law or through state or federal trademark registration in connection with the goods and services provided by the nonprofit. Identify what marks the nonprofit is currently using and determine whether registration may be beneficial for the nonprofit's overall strategic goals.

Similarly, the nonprofit should be aware of the use of similar marks by others, both to police others from infringing on the nonprofit's trademark and to ensure the nonprofit is non infringing on the mark of others.

3.6.5 Data Privacy Issues

A. *Overall.* Data privacy issues are HUGE, with rapidly developing requirements and other legal considerations squarely applicable to nonprofits, especially to the extent they may engage in international activities (e.g., missions), seek and receive donations with accompanying donor personal and financial information, and handle sensitive medical information too with potential HIPAA-related implications. Remember too that nonprofits are not spared from potential data breaches and confidentiality obligations. Nonprofit leaders therefore need to understand applicable data privacy regulations, such as the Consumer Privacy Act or the Children’s Online Privacy Protection Rule. Further, nonprofit leaders should ensure that the organization’s policies and processes appropriately comply with any legal requirements, as they continue to evolve among states, nationally, and internationally. These considerations are especially critical if the nonprofit allows donations through its website or otherwise collects personally identifiable information (“PII”), for which many legal guardrails may be warranted. Attentiveness to such matters will help set up the organization for success in this area, mitigating risk in a proactive way. The governing board need not wade into the weeds of such matters, but the leaders should make sure that they are being addressed.

B. *Record Retention Policy.* As a corresponding component for data privacy, nonprofits should consider adopting and using a well-developed, organization-specific written record retention policy. Record retention and proper disposal should be carried out in a way that helps a nonprofit operate efficiently, meet potential document furnishing requirements by law, and to protect persons involved with the organization (i.e. donors, volunteers, participants, etc.). Organizational leaders thus may want to revisit or create a records retention policy that specifically outlines how the organization handles retention and disposal of paper and electronic records, as well as video records. Note too that the Form 990 asks whether the organization has a written document retention policy – and the answer should be yes!

3.7 The End: Further Up and Further In!

A. *Nonprofit structural changes.* Nonprofits can go through a variety of operational seasons over their existence. Occasionally, an opportunity to merge with another organization arises, and that may warrant careful evaluation of respective pro’s and con’s for whether to proceed. Other times, nonprofit leaders may wish to form a related organization, such as for general risk management (e.g., to separate valuable assets from higher-risk operations), to develop an endowment entity, to promote a new spin-off related entity, or to silo a specific for-profit activity such as through a separately formed LLC subsidiary. Still other times, the question may arise of whether it is time to end the nonprofit. All such matters should be addressed through careful strategic planning and, ideally, never in a rush. It’s good to periodically consider whether any of these circumstances may appear on the horizon, whether near or far, and then plan accordingly for the future.

B. *Nonprofit legal representation.* This workshop showcases a wide range of legal compliance and accompanying operational matters for nonprofit leaders’ attention. Certain areas may be well suited for an attorney seeking to support the nonprofit, whether through paid or pro bono legal services. Other areas may warrant engaging an attorney who regularly handles such matters. All legal areas call for careful attentiveness to accompanying ethical considerations such as competence, confidentiality, and loyalty, as addressed through applicable attorney ethics rules. Correspondingly, it is important to attend to attorney-client relationship issues, such as board authorizations and communications as well as potential board conflicts.

*In conclusion, may these materials - including the extensive linked and referenced resources - prove helpful for every attorney who reads them and seeks to help nonprofits through the exercise of their legal skills, knowledge, and Christian sense of calling. Consistent with 1 Corinthians 10:31 and 15:57-58: **To God be the glory, as we strive to give ourselves fully to the work of the Lord, because we know that our labor in the Lord is never in vain!***