

SUMMARY OF ISSUES FOR AFFILIATED ORGANIZATIONS

Most exempt organization practitioners understand the basic tasks of creating and operating two or more affiliated tax-exempt organizations: Separate incorporation for each, governance by separate boards of directors, separate applications for recognition of tax-exempt status, separate bank accounts and financial records, separate Forms 990, etc. Behind these relatively straightforward issues of corporate and tax law, however, lurk a host of other legal issues, not all of them immediately apparent. The following checklist summarizes some of the key concerns to help practitioners spot the issues and resolve them.

Subsidy Issues

Affiliation of one organization with another frequently involves common use of certain resources – employees, offices space, the services of vendors, etc. – which creates the risk that one organization may subsidize the other. If that subsidy supports activities the organization providing the subsidy is not permitted to support – a particular issue when the subsidy is coming from a 501(c)(3) with its ban on electioneering and restrictions on other activities – then such a subsidy creates problems. For example, 501(c)(3) subsidy of an affiliated 501(c)(4) engaged in activities that would be deemed political campaign intervention could jeopardize the 501(c)(3)'s tax-exempt status, or a 501(c)(3)'s significant subsidy of an affiliate could be an improper private benefit. Avoiding such problems typically involves careful valuation of the transactions between the organizations in an effort to achieve a fair-market-value exchange.

Here are a few particular problems in this area that frequently arise

- *Mailing and other contact lists:* Affiliated organizations need to understand that lists of members, donors, clients, voters, activists, etc. must be treated as assets, and their ownership, license to use, and allocation of costs to maintain must be addressed to avoid any improper subsidy. A 501(c)(4) that sends a fundraising appeal or a partisan political message to a list of donors owned by an affiliated 501(c)(3) must compensate the 501(c)(3) for the value of that list based on the fair-market value of the list. (Even with such compensation, there is a question about whether an organization is subsidizing its affiliated organization if it gives the affiliate access to a list while denying access to other organizations.)
- *Membership:* If both organizations have dues-paying members, there is often a desire to require or encourage individuals to join both organizations. The risk of subsidy occurs if there are significant advantages to joining one organization that therefore creates an incentive to join the other. For example, if only members of a 501(c)(3) organization are eligible for services offered by the 501(c)(3), favorably priced insurance, discounts from local merchants, etc., then requiring individuals to join an affiliated 501(c)(4) as a condition for joining the 501(c)(3) could be a 501(c)(3) subsidy of the 501(c)(4) unless the 501(c)(4) compensates the 501(c)(3) for the value of that incentive to join the 501(c)(4).
- *Marks and Goodwill:* A tax-exempt organization's name, logo, etc. are potentially valuable assets (whether or not the service marks have been registered) and there may be

significant goodwill associated with the organization. When one or more new affiliated organizations are created with a clear connection to this history (e.g. the well-respected 501(c)(3) “Good Works Education Project” creating the 501(c)(4) “Good Works Action Fund,” which creates, in turn the 527 “Good Works PAC”) the 501(c)(3) has arguably subsidized the new entities. Fortunately, the IRS has suggested (albeit in a non-precedential document) that such a group of affiliated entities may have similar names. Ward L. Thomas and Judith E. Kindell, “Affiliations among Political, Lobbying, and Educational Organizations,” *IRS Exempt Organizations Continuing Professional Education Technical Instruction Program 2000* at 262.

Attribution Issues

Affiliated organizations that have similar names, pursue closely related missions, and share common resources will often face the problem that communications or other activities of one organization are mistakenly attributed to the other. Mistaken attribution is a particular problem when the activity in question is one that puts the organization’s tax-exempt status at risk, such as a when the endorsement of a candidate for public office by a 501(c)(6) is mistakenly attributed to an affiliated 501(c)(3). Some common situations in which this problem occurs include:

- *Websites and social media:* The Internet has made it much easier for the public to be confused about the lines between affiliated organizations.

Affiliated organizations that share a single website must be careful to avoid posting content that would put either of the organizations at risk or, at least, build the site in such a way that the distinction between the organizations is clear. (See, e.g., TAM 200908050, in which the IRS found that the organizations had failed to make the distinction clear.)

While separate websites are preferred, especially when a 501(c)(3) is affiliated with another organization engaged in political activities, affiliated organizations must likewise be careful not to link to the affiliate’s website in a way that suggests adoption of the problematic content. (See Rev. Rul. 2007-41 for a discussion of attribution and hyperlinks; see also the July 28, 2008 IRS Field Service Directive describing IRS enforcement policy not to pursue allegations of political campaign intervention based solely on a 501(c)(3)’s link to the home page of an affiliated entity even if the affiliate is engaged in political activity.)

Sometimes only one organization has a website, while the affiliate does not. In those cases, make sure that the organization without a website does not list the other organization’s website as its own on its Form 1023, 1024 or 1024-A; Form 990; letterhead; business cards; etc. (unless, as sometimes makes sense, the organizations create joint business cards for shared staff to use).

- *Media:* When affiliated organizations have similar names, the press is sometimes going to get it wrong. For example, when a 501(c)(4) associated with a prominent 501(c)(3) organization issues a press release endorsing a candidate for public office, it is possible that some of the media reporting the fact are going to attribute the endorsement to the

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