

RECENT DEVELOPMENTS IN NON-PROFIT LAW

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In an uncertain economy, non-profit organizations face many business challenges - fiscal responsibility, decreasing revenue and contributions, greater competition, effectiveness, and keeping pace with technology. Legal and regulatory challenges facing non-profit organizations are increasing as well. New Hampshire non-profits must be able to respond to these legal challenges and ensure regulatory compliance. This brief executive summary discusses several developments in non-profit law which occurred this year.

New Hampshire Secretary of State Reports Due By December 31st

New Hampshire non-profit organizations are required to file a report with the New Hampshire Secretary of State's office once every five years in order to renew their charter as a New Hampshire voluntary corporation. The five year filing requirement began in 1990, with returns due for each successive five year period thereafter. This is a separate reporting requirement from the financial annual reports which are required by the New Hampshire Charitable Trusts Unit each year under RSA § 7:28.

The Secretary of State's office has mailed the report form to the principal addresses of all non-profits corporations required to file, so if you haven't received a report form, we encourage you to contact the Secretary of State to ensure that the notice was mailed to the correct address. The report must state the non-profit organization's current principal address, the names and addresses of its officers and governing board members, and it must be signed by the president or another duly authorized officer. Failure to file a report can result in the loss of the organization's charter, loss of the right to use its name, and

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ultimately the loss of its corporate assets as a result of an action by the Charitable Trust Unit. See RSA § 292:25; RSA § 292:29, IV.

Renewals must be filed this year *no later than December 31, 2010*. For more information on filing, refer to the Secretary of State's website at <http://www.sos.nh.gov/corporate/index.html>.

Changes to Non-profit Statute Affecting Members

The New Hampshire Voluntary Corporations and Associations Act, RSA 292, has been ambiguous about the rights and obligations of members. New Hampshire non-profits have been required to have members since 1991, even if members were not needed in their corporate structure.

Senate Bill 307, *An Act Relative to Voting by Members of Voluntary Corporations and Associations* (the "Act"), was signed into law on May 26, 2010 and became effective on July 25, 2010. Under this new law, a non-profit can continue to have members so long as the Articles of Agreement include provisions establishing the "criteria and procedures for" membership and participation in the corporation. In addition, the Act includes a new subsection in the statute which permits an organization to have different classes of members and clarifies the voting rights and obligations of members. The Act also makes clear that absent provisions for membership in the organization's articles or bylaws, a voluntary corporation will be deemed to have no members.

Since the new law permits an organization to have no members, we recommend that non-profit organizations to assess whether their current members are necessary. If the Board of Directors is also serving as the members, or if the membership requirements are broad and expansive as to make management of the members impractical, consider making changes to the Articles of Agreement and Bylaws to remove provisions for membership. If members are necessary, then review the Articles of Agreement and Bylaws to assess whether additional provisions are required to meet the new statutory requirements. Failure to do so may result in ambiguity, confusion in the organization, or loss of member voting rights.

New Hampshire Attorney General To Investigate Non-Profit Executive Compensation

The amount of compensation paid to executives of non-profits has been a focus of the Internal Revenue Service ("IRS") for years. Recently, there have been clear indications that New Hampshire may be taking a closer look at this issue as well. During a press conference on May 25, 2010, the Attorney General announced that under statutory and common law powers, his office was beginning an investigation and review of non-profit executive compensation. The scope and targets of the Attorney General office's investigation

remain unclear at this point. This is an area, however, in which being proactive can make all the difference.

Under relevant state and federal law, compensation paid by a non-profit to its executives must be reasonable. While the standards for state and federal purposes differ slightly, investigation by either regulator involves a very fact-intensive inquiry into the process and reasoning governing boards use to make compensation decisions. Advance planning is important because of the potential severity of financial penalties that could be imposed on the non-profit organization and its board. If executive compensation is not considered reasonable, the IRS can revoke an organization's tax exemption or impose intermediate sanctions that result in significant financial penalties.

A thorough and well-documented process for determining executive compensation will help protect an organization's tax-exempt status and assist a board ensuring that they have met their fiduciary duties and complied with federal and state law. The IRS has published regulations describing a compensation approval process.

Response to New IRS 990 Tax Return - Adopting Best Practices

By now, most non-profit organizations have been through or are going through their first initial filing with the new version of IRS Form 990, *Annual Information Return*. There has been an overall shift in philosophy that the IRS has taken in the form by asking certain questions that do not pertain directly to "tax information" but require additional detail about the organization and its operations and requiring further explanation to the answers of certain questions on the tax form. These efforts reflect the IRS' intention to encourage non-profit boards to improve supervision of management and adopt "best practices".

For example, in the new governance section, organizations are required to have several policies in place in order to answer "yes" to many questions on the form. These policies include a conflicts of interest policy (already required under New Hampshire law), a whistleblower policy, a record retention and destruction policy, a joint venture policy, and a non-standard gift acceptance policy. Other policies that are not referenced in the tax form but are considered best practices include employee handbooks defining employment policies and procedures, technology use policies, and privacy policies - particularly if an organization works in areas such as healthcare or health and human services. Various requirements and standards apply to these policies that should be considered. In most cases, the governing board is required to approve these policies before implementation.

Cash-Strapped Towns and Cities Looking to Non-Profits for Revenue

New Hampshire non-profit organizations that own real property in the state may attract the interest of cash-strapped local governments. According to a recent media report, towns and cities have begun looking toward non-profits as a source of additional revenue to close budget gaps. Towns and cities may seek to derive additional revenue from increased property taxes. There will be greater scrutiny over property tax exemptions and renewed efforts to seek 'voluntary payments' or payments in lieu of taxes from non-profit organizations.

If contacted by your town or city, before responding, ascertain the law in this area and your rights as a non-profit organization. As a tax-exempt organization that relies upon the public for support, the effect that any response may have on your organization's public reputation must also be considered. It is important for management of non-profits to understand applicable law before they are contacted by municipal taxing authorities. The non-profits response may affect the outcome and its well-being, and ultimately its reputation and support of the community.

Devine Millimet Can Help

With one of the largest and most diverse non-profit practices in the State, Devine Millimet has the experience and expertise to guide you, your organization and your governing board these issues. We can help ensure your compliance with the technical requirements in each of these areas and assist in developing sound and reasonable solutions in line with your strategic goals. If you have any questions with respect to these issues, need assistance with your reporting or corporate governance, document review and drafting, or would like counsel in response to an inquiry from a federal, state or municipal regulatory agency, please give us a call. We look forward to speaking with you.

The Devine, Millimet & Branch Non-Profit Practice offers this free periodic E-Mail Alert service to provide recent New Hampshire non-profit law developments and best practices. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at firm-info@devinemillimet.com. Issues of this newsletter, may also be found on our website at: <http://devinemillimet.com/newsletters>.

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