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IRS Executive Compensation Compliance Project

The Internal Revenue Service issued a report in March of 2007 on the executive compensation initiative commenced by its Exempt Organizations Office ("EO") in 2004 to examine non-profit tax returns for tax years commencing in 2002. "Some 600 charities and foundations have had to file amended tax forms after [the IRS] study found flaws in the way they reported payments to executives and other employees." (NY Times ("NYT") 3/1/07, by Stephanie Strom) Proposed excise tax assessments (intermediate sanctions) of over $21 million were assessed against 40 disqualified persons or organization managers. The IRS determined that "[c]hanges in the Form 990 series are necessary to reduce errors in reporting and provide sufficient information to enable the IRS to identify compensation issues." At the same time, although high compensation amounts were found in many cases, the IRS determined that "generally they were substantiated based on appropriate comparability data." The New York Times quoted Steven T. Miller, the commissioner in charge of the EO division, as follows: "We found some problems. Whether they were due to confusion, poor design of the tax forms used by these organizations or something more nefarious, I can't tell you."

Victory For Grasso On First Appeal

Richard Grasso, the former head of the New York Stock Exchange, prevailed in his first appeal from a series of adverse rulings in a case filed by the New York Attorney General citing him for receipt of excessive compensation. In a 3-2 decision issued on May 8, 2007 by the Appellate Division, First Department, four of the six claims filed against him by the AG's office were dismissed as outside the scope of the AG's authority under the New York nonprofit law. This decision did not address a 2006 trial court ruling granting partial summary judgment to the AG's office (requiring Grasso to return as much as $100 million); that ruling is the subject of a separate appeal.

Record Giving By Private Foundations In 2006

The Foundation Center has estimated that giving by foundations increased past $40 billion in 2006, breaking the record of $36.4 billion set the prior year. The New York Times reported that the Center "attributed the increase to a strong stock market but also to the establishment of a new breed of foundations whose contributions are greater than those of many older counterparts." (NYT 4/3/07, p. A15, by Stephanie Strom) The Times quoted Sara L. Engelhardt, the Center's president, as follows: "The new foundations being created today are much bigger, and much more money is moving through them at a faster pace than through older foundations." It was reported that many newer foundations are controlled by living donors who are willing to spend more than the 5% minimum distribution requirement established in the Internal Revenue Code, so that the benefits of charitable giving can be realized more quickly.

Head of IRS Named To Lead American Red Cross

Mark W. Everson, the commissioner of the IRS, has been named the next president and CEO of the Red Cross, effective May 29, 2007. In a press release dated April 18, 2007, the Red Cross quoted Bonnie McElveen-Hunter, Chairman of the Red Cross, as follows: "On behalf of the entire Board, the Red Cross is delighted to welcome such a capable and compassionate leader whose proven experience and leadership skills will bring valuable expertise to better prepare the American Red Cross to prevent, prepare and respond to the nation's critical needs. We know Mark will bring new energy and drive terrific results when his tenure officially begins next month." Mr. Everson had served as the IRS

Commissioner since May 5, 2003. The New York Times pointed out that one of the IRS' priorities in the nonprofit area during Mr. Everson's tenure was examining nonprofit compensation. There is therefore curiosity as to the extent to which Mr. Everson's current compensation will increase after he joins the Red Cross. His current salary at the IRS is $154,600, whereas the last president of the Red Cross (Marsha J. Evans) was paid $505,795 in salary and expenses in 2005. (NYT 4/19/07, p. A14, by Stephanie Strom)

Self Regulation For Charities

In our prior The Plain & Simple, we summarized the first six of the 29 principles of self-regulation contained in the draft report of Independent Sector's Advisory Committee on Self Regulation (which were in the area of "Facilitating Legal Compliance.") The second set of principles (in the Advisory Committee's revised draft) with respect to the Effective Governance of charitable organizations are as follows:

7. The board must meet regularly enough to conduct its business and fulfill its duties.
8. The board should establish and review periodically its size and structure to ensure effective governance and to meet the organization's goals and objectives. The board should have a minimum of five members.
9. The board should include members with the diverse skills, background, expertise, and experience necessary to advance the organization's ability to fulfill its mission. The board should include some individuals with financial literacy.
10. A substantial majority of the board of a public charity should be independent.
11. The board should hire, supervise, and annually evaluate the performance of the CEO, as well as approve annually and in advance the compensation.
12. The board of an organization with paid staff should ensure that the positions of CEO, chair, and treasurer are held by separate individuals. Where there is no paid staff, the positions of board chair and treasurer should be held by separate individuals.
13. The board should establish an effective process for educating and communicating with board members to insure that board members carry out their oversight functions and understand their responsibilities, as well as the work of the organization.
14. Board members should evaluate their own performance as a group and as individuals at least every 3 years.
15. The board should review organizational and governing instruments at least every 5 years.
16. The board should establish and review goals for implementing the organization's mission on an annual basis, and evaluate programs, goals, and activities at least every 3 years.
17. Board members are generally expected to serve without compensation, except for reimbursement for expenses incurred. Any compensation to board members should be reviewed by an external, independent source.

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