



Honest, Not Onerous: The “New” Accountability Environment

by Ruth McCambridge

AS THE IMPLICATIONS OF THE RESULTS OF the nation’s 2006 mid-term elections settle in, some of our friends are spending part of their time thinking about what it will mean for the further regulation of nonprofits. While recent legislation and regulation have been implemented through a number of legislative and administrative bodies, the Senate Finance Committee has championed reform efforts at the national level. Its chair, Republican Senator Charles Grassley, will soon be giving up leadership of this body and will likely be succeeded by Democratic Senator Max Baucus. The transition makes this a moment to pause and reflect on the changes that have occurred and to project a bit about

what is likely to occur over the next two years.

For this article, we interviewed two lawyers who specialize in nonprofits. Bruce Hopkins is in private practice in Kansas City and has been representing nonprofit organizations for almost 40 years. Beth Kingsley practices at the the D.C. firm Harmon, Curran, Speilberg & Eisenberg, LLP, and writes charity regulation updates for its *Nonprofit Navigator* newsletter.

Kingsley feels that the most recent changes have not been substantively significant for most nonprofits—focusing instead on clarifying laws that already exist or increasing penalties for situations that may involve or lead to self-dealing. While she declined to make any firm predictions, she suggested that given the tenor and focus of

Recent legislation and regulation have been implemented through a number of legislative and administrative bodies.

Future legislation
will likely focus
on situations
where people
use nonprofits
to further their
own private
interests.

the committee in the past and the recent *Baucus Report* about Jack Abramoff's misuse of charitable vehicles, future legislation will likely focus on situations where people use nonprofits to further their own private interests. This, she suggested, will probably include attention to compensation practices relative both to boards and senior staff (see the article by Linda Lampkin on page 44).

Bruce Hopkins, who began practicing law immediately before the Tax Reform Act of 1969 when Congress created a statutory framework for nonprofits, suggests that the pressure to regulate and enforce regulations in the sector is not likely to abate. "I have never seen a time when so many audits of charities have been launched," he said of the Senate Finance Committee's investigations in the past few years, "Some of these inquiries are still unfolding and there does not seem to be any let-up in sight. This push for further regulation seems to transcend politics." He believes that regulation has increased and will continue to grow with the size and scope of the sector.

The largest proportion of nonprofits will experience few legal changes; and these are not particularly onerous and indeed may be useful in helping small to mid-size organizations stay out of hot water.

Kingsley, however, suggests that nonprofits understand the message underlying the continuing pressure for regulation. She believes that there is a significant likelihood of further scrutiny over the next few years and that this can be traced to the failures of governance that end up on the front pages. "The problem is that some boards do not attend as they should to the organizations they govern. When they do get in the mix, it's too little too late and they are responding to an existing or developing public scandal. This creates a tempting target for legislators."

"Boards need to focus on preventive measures," she suggests. "I believe that the provisions of the California Non-Profit Integrity Act (ag.ca.gov/charities/publications/nonprofit_integrity_act_nov04.pdf) are worth looking at for guidance. A good board would already be observing a lot of the measures laid out in that law." Among other things, the Act requires boards of directors to review the compensation packages of their CEOs and CFOs to ensure that

they are just and fair. It requires audits for nonprofits with budgets of more than \$2 million and an audit committee to oversee the relationship with the auditor.

Hopkins does not share Kingsley's view about the relative lack of intrusiveness of recent federal nonprofit law. While agreeing that there is little in the new law that will interfere unreasonably with nonprofit governance, he is concerned about some of the tightening of law in the areas of donor-advised funds and Type III supporting organizations and about the new requirement to make public the 990T, which reports unrelated business income.

Both Hopkins and Kingsley suggest that donors that give and nonprofits that receive large non-cash donations will be affected by the substantial new provisions on such things as appraisals of non-cash gifts, vehicle donations, conservation easements, and partial interest gifts, but their views on the need for and legitimacy of such measures predictably differ.

As Kingsley observes, the IRS and the Senate Finance Committee appear to have an ongoing interest in the general topic of the use of nonprofits for personal gain and enrichment. There seems to be a great deal of creativity among the unethically inclined, and so this presents a diverse field of potential targets for further regulation. Staff and board compensation practices, contractual arrangements that are less than arm's length, unsavory fundraising partners, relationships with corporations or with politicians, sweetheart deals, and the offer of unreasonable tax benefits for donors will all continue to be high on regulators' agenda. A good board will go the extra mile to examine every nook and cranny for questionable practices and to reinforce ethical screens.

The course that reform will follow is not clear, but the media's appetite for charity-related scandals is whetted and media attention attracts legislative attention. So the scandal you risk not only contains a dangerous double whammy that can threaten your organization's future, but it may also result in more laws and restrictions for all nonprofits, where simple prevention and enforcement might have been the answer.

Reprints of this article may be ordered from store.nonprofitquarterly.org, using code 130407.