Report and Q&A with Belinda Johns, Office of the California Attorney General

Belinda Johns reported on 2 items:

Attorney General's Registry of Charitable Trusts - Automated System: The internal system will be coming online in the next couple of weeks, and the publicly available system will follow. The date this system will be available to the public is not yet known, but the information will be posted on the AG website as the date gets closer. When the system becomes available, the entire public file for all charities will be scanned in to the system and available to be seen by the public.

Belinda did a presentation at CompassPoint conference in which she went through the governance section of the new IRS Form 990, and cross-referenced the applicable California law for each item. She will send a copy to Lisa Runquist for posting on the committee's website.

The floor was then opened for questions and answers:

Q: Is there a rule of thumb for fundraisers – a percentage that can be paid as compensation that won't raise issues?

A: The Attorney General's office has "no set standard". There is a model contract, on the website, which shows that the AG office thinks a fee-based payment structure is preferable. However, we understand there are various types of campaigns. If the campaign is for prospect generation, it may not be profitable, An organization should make clear what type of campaign it is. Also, organizations may want to look at other published standards such as the Wise Giving Alliance charity standards.
Like the IRS, the Attorney General's office is interested in issues relating to executive compensation, fraud, fundraising abuse, and breach of fiduciary duty (which often accompanies compensation issues).

Q: Does the Attorney General's office take the position that an organization needs to have a document retention policy, and if so is there a preferred format?

A: Every organization has to have some sort of document retention policy because the IRS has statute of limitations of 6 years and we have a statute of 10 years, so documents must be retained. The question is what documents have to be retained, and that depends on what documents exist to show what funds are coming in and what the organization is doing with it.

Q: Is the Attorney General's office aware of/involved in the NCCUSL (National Conference of Commissioners on Uniform State Laws) efforts to revise the Uniform Unincorporated Nonprofit Association Act?

A: Yes, and we are following those efforts.

Q: Is the AG office interested in the issue of option rate securities as an investment for charities?

A: This is not an issue we know about, but we would be happy to talk to you to learn more. The question would be whether it is a "speculative" investment.

Q: Does the Attorney General's office use a particular database to determine what constitutes "reasonable compensation"?

A: No – the Attorney General does not use a particular source such as one survey or database. We hire a compensation consultant to handle each particular case.

Q: Is there anything the Attorney General's office is working on at this time (such as new compliance guides) that the Nonprofit Committee could help with?

A: The Attorney General's office wants this committee to keep in communication with them about issues arising in the nonprofit area. The office is not working on any new guides at this time, but they are looking for topics to discuss on the listserv.

Q: Are there any ongoing enforcement actions right now you can tell us about?

A: None of the enforcement actions are public. The office is working on drafting scenarios that don't give identifying information but highlight the issues, so they can be posted on the website or listserv.

Q: What should we advise someone to do who wants to complain about problems with a charity – is the best thing to send them to the Attorney General's website?

A: Yes – we want all complaints to be received in writing.

Q: If a charity has no retirement plan in place, but wants to provide some retirement benefits to a long-term employee who is retiring, is there a way to structure this that would be permitted?

A: The Queen of Angels case is on point (the cite to this case is found in the Attorney General's Guide for Charities). In that case, the employee had already retired and the charity then decided to sweeten the retirement. At this point, the work has been done, so any further payment would be a gift of charitable assets. For charities that are thinking about this now, they should not wait until the employee's work is complete. Negotiate retirement pay as a part of the ongoing compensation arrangement. Avoid getting into the situation where the retiree is leaving and then the payment arrangements are made. There should be no bonus paid where no current services are being provided.

Followup Q: What type of evidence of negotiation of the retirement package would satisfy the Attorney General's office? For example, would it be sufficient if the charity showed evidence that for the 10 years before retirement, they'd been talking to retirement benefits experts, had intended to set up a plan, but then couldn't afford it until later?

A: It is a facts and circumstances test. If trying to put a retirement package together, do it while the person is still working, make sure the agreement is arms' length and is negotiated, and make sure to talk to compensation experts about what is a reasonable retirement plan or severance package for that position.

Q: If a person is working for free for a nonprofit, with an agreement to pay the person later if the charity can afford it – does this fall within Queen of Angels?

A: Make sure to document the agreement well, and the board should do the compensation study to be sure the agreed upon compensation is fair and reasonable. There must be a contractual agreement to pay. The worst scenario is that money is going out, and there is no contractual agreement, no record of work having been done and no record of any promise to pay. While the person is working for free under such an arrangement, the charity should treat it like regular employment, justify the hours, and have an employment contract to defer payment. **[Note:** Others in the meeting cautioned that if a charity does any kind of deferred compensation arrangement, great care should be taken to comply with other laws too, such as Section 409 on deferred compensation and ERISA. The charity should be sure to consult an employee benefits expert, and also consider wage/hour laws if this person would not be an 'exempt' employee. There can be massive penalties on doing this wrong.**]**

Q: Is the Attorney General's office aware of companies such as "Compliance Center" and other businesses who send notices to new nonprofits, making it look like a government filing, that charge fees to create corporate minutes?

A: The Charitable Trusts section has referred these companies to the consumer law section. One thing we can do if we have clients who have been misled by such mailings is to have these clients contact Belinda or make a complaint. The way the Attorney General's office can prove an unfair competition case is to show there are individuals who have been misled. A case would have to be filed with individual declarations. The tendency to mislead is enough for a case, so the client can complain even if instead of paying the fee, they called a lawyer to ask about the form and therefore didn't actually have monetary damages. The client has to make the complaint, not the attorney.

Q: What is your contact information?

A: Belinda Johns: Belinda.Johns@doj.ca.gov 415-703-1120.
She also referred members of the committee to call:
For issues relating to Northern California charities: Kelvin Gong
Kelvin.Gong@doj.ca.gov. 415-703-5510,
For issues relating to Southern California charities: Jim Cordi
James.Cordi@doj.ca.gov. 213-897-2180.

Report and Q&A with David Isaac, Franchise Tax Board.

David Isaac reported on the following items:

The new Form 3500A has been working well. A public notice is up on the FTB website explaining the form. Controller John Chiang has just approved a letter that will be mailed to all counties to notify them of the effect of the exemption acknowledgment letter. The FTB believes this form is working well as a streamlined process to obtain California exemption. Approximately 400 charities have received the acknowledgment letter.

Currently the regular applications on Form 3500 are no longer backlogged 6 months, and are back to a 30-45 day period before an application is assigned to an examiner. Turnaround time for these applications is approximately 30-90 days. If the application is complete, it is generally handled within 30-45 days, and if incomplete will get a letter within 90 days requesting additional information.

For the Form 3500A, once the form is received it is generally a 30-day turnaround period to get the acknowledgment letter.

He also reported that there will be a call about proposed amendments to Revenue & Taxation Code §§ 23701a1 and 23772: July 22 at 1:30 pm. The proposed changes are cleanup changes only. Lisa then requested that the committee be notified of future items like this.

The floor was then opened for questions and answers:

Q: Is a letter about the Form 3500A going to the municipalities as well as the counties? Would the FTB be willing to send it to at least those municipalities that are listed in Appendix C in CEB book (posted on the Attorney General's website) that shows cities that require charitable solicitation filings?

A: The Franchise Tax Board's legal department believed that posting the notification on our website should be sufficient to notify all of the local jurisdictions, and we had not been planning to do this. David agreed to check on whether this could be done.

Q: Did the Franchise Tax Board send acknowledgement letters retroactively for all Form 3500As that had originally received just a postcard acknowledging receipt?

A: Yes. We went back and mailed a letter to anyone who had originally received just the postcard.

Q: Is there anything our committee can do to help the Franchise Tax Board?

A: If your clients receive a notice seeking a Form 199, please always have clients reply to this notice. Even if the client has less than $25,000 in revenues and therefore is not required to file the Form, please have the client send the notice back indicating that no filing is required because revenues are below the

threshold. This will help the Franchise Tax Board to close the inquiry rather than suspending the corporation or continuing to send notices.

Q: What is your Contact information?
David Isaac: 916-845-4913.
Vivian Tham 916-845-4284 Yin.Tham@ftb.ca.gov.