



Boston Bar
ASSOCIATION

Business Law Section Newsletter

VOLUME 2

FALL 2009

Antitrust
Banking & Financial Services
Commercial Finance
Communications
Corporate Counsel
Corporate Law
Energy & Telecommunications
Immigration Law
Insurance Law
Investment Companies & Advisers
Legal Opinions
Mergers & Acquisitions
Pro Bono
Public Policy
Securities Law
Tax-Exempt Organizations

A PUBLICATION OF THE BOSTON BAR ASSOCIATION BUSINESS LAW SECTION

FALL 2009

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Section Co-Chairs' Corner



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Fall 2009

As the Fall slowly gives way to Winter, we have this opportunity – the first of three in the next nine months – to share with you some of the exciting things happening at the Boston Bar Association and in the BBA's Business Law Section. As you know, the Business Law Section is one of the largest sections of the BBA with over 1,600 members and 16 committees. We are privileged to serve as the section's co-chairs. At the BBA, a wide range of legal specialties, and associated programs and events, are flourishing under the auspices of the Business Law Section. The Business Law Section Newsletter is designed to give you a better sense of the committees, programs, events and other developments across our section.

About a year ago, the Business Law Section Newsletter was re-launched to, among other things, develop a sense of community and shared interest among section members who have diverse interests and legal specialties. In reaction to the overwhelmingly positive response to the newsletter and to the pleasant surprise frequently expressed by members when they learn more about the Business Law Section and its committees, we have made more frequently publishing the newsletter one of our primary goals. This year, we will publish three editions of the newsletter – Fall 2009, Winter 2010 and Spring 2010. Each edition of the Business Law Section Newsletter will showcase selected committees and focus on the activities of those selected committees and developments within the related area of legal specialty. This initiative would not be possible without the co-chairs or our communications committee, Gregory Fryer and Sarah Curtis Richmond, and contributing committee chairs. We want to thank Greg and Sarah for their dedication, energy and hard work and the contributing committee chairs for their cooperation and enthusiasm. The continued success of the Business Law Section Newsletter will depend on its relevance to you. Accordingly, we in-

vite you to share your feedback about the newsletter and encourage you to contribute to upcoming editions.

In this period of uncertainty and change in the legal profession, the members of the BBA and Business Law Section confront new and unprecedented challenges. We will derive our strength to meet these challenges in large part from the support we offer to and receive from each other. Consequently, this year, we are placing even greater emphasis on inclusion and active involvement across the section. We encourage you to introduce a colleague to the Business Law Section and alert her or him to a program or event. Another of our primary goals this year is to involve lawyers in transition regardless of career stage. We ask that you join us in making a special effort to include a lawyer who finds herself or himself in the midst of a career transition (for whatever reason) in Business Law Section programs and events. Finally, please contact your committee co-chairs or either of us if you have any suggestions or if you are interested in becoming more involved in the section or any of its committees.

We look forward to seeing over the coming months and enjoying with you some of the brown bag programs, CLEs, etc. described in this newsletter.

Be well.

Best wishes for a happy, healthy and productive 2010.

Paula K. Andrews

Mark T. Bettencourt

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Gregory Fryer
Sarah Curtis Richmond

Inside this Issue:

Important Message on Budget Crisis in the Courts
Page 3

Upcoming Brown Bag Programs
Page 4

Upcoming CLE Programs
Page 5

Survey on BBA Website
Page 6

Pro-bono Opportunities For Boston-area Lawyers
Page 7

Letter from Immigration Law Committee Co-chairs
Page 10

How to Prepare Your Clients for the Recent Increase in Worksite Visits from USCIS/FDNS
Page 10

Factors For Making Successor-in-interest Determinations In Adjudicating Form I-140 Immigrant Visa Petitions: *Finally A Workable Policy?*
Page 14

The Voluntary Dissolution of a Massachusetts Public Charity
Page 17

Editors
Page 25

Authors
Page 26

Section Leadership
Page 28

Important Message on Budget Crisis in the Courts

Members of the BBA Business Section:

We are writing to the members of the Business Section to request your assistance in supporting the BBA's initiative to address the severe budget crisis facing the courts of the Commonwealth. The funding loss has been significant over the past several years, resulting in diminished staffing, courthouse closures, and delays in access to the judicial system. As business and transactional lawyers, we understand the importance of timely resolution of disputes. Many of our members are involved in pro bono activities which bring us into contact with persons in our society whose most basic needs for shelter and food are threatened by delay in access to justice.

We have been asked to reach out to Business Section members for personal stories about how the effects of the budget crisis are affecting our clients. These stories may include individuals or small businesses, and also may include commercial businesses or institutions who provide jobs needed in any economic times, but especially now. Please send them to us at gryer@verrilldana.com or sarah.richmond@gesmer.com, and we will provide them to the BBA group which is preparing to engage with the legislature on this important issue.

Thank you very much for taking the time to respond to this request.

Best regards,

Greg Fryer and Sarah Curtis Richmond, Editors

Upcoming Brown Bag Lunches

The Massachusetts Clean Energy Center, Past, Present and Future

Air Quality & Climate Change Committee and Energy & Telecommunications Law Committee

Monday, December 7, 2009 - 12:00 PM
Boston Bar Association - 16 Beacon Street
RSVP

Commercial Loan Workouts: Part I

Commercial Finance Committee

Wednesday, December 9, 2009 - 12:30 pm
Nixon Peabody LLP - 100 Summer Street
RSVP

Red Flag: The Status of FACTA Regulations Combating Identity Fraud

Privacy Law Committee and Business Law Section

Thursday, December 10, 2009 - 12:00 pm
Boston Bar Association - 16 Beacon Street
RSVP

The Massachusetts Department of Telecommunications and Cable

Energy & Telecommunications Law Committee

Tuesday, December 15, 2009 - 12:00 pm
Boston Bar Association - 16 Beacon Street
RSVP

Protecting Your Company From H1N1

Corporate Counsel Committee

Wednesday, December 16, 2009 - 12:00 pm
Boston Bar Association - 16 Beacon Street
RSVP

Proof of Loss for Commercial Insurance Claims

Insurance Law Committee

Tuesday, December 22, 2009 - 12:00 PM
Boston Bar Association - 16 Beacon Street
RSVP

Real Estate Finance Committee

Commercial Finance Committee, Real Estate Finance Committee

Tuesday, January 12, 2010 - 12:00 PM
Boston Bar Association - 16 Beacon Street
RSVP

The MEPA Greenhouse Gas Emissions Policy and Protocol

Air Quality & Climate Change Committee
Energy & Telecommunications Committee

Friday, January 15, 2010 - 12:00 pm
Boston Bar Association - 16 Beacon Street
RSVP

For more information or to register: Please contact Christine Cheung at the BBA at ccheung@bostonbar.org.

Upcoming CLE Programs

Update on Federal Financial Regulatory Reform Banking & Financial Services Committee

Tuesday, January 19, 2010

3:00 p.m. – 6:00 p.m.

**Boston Bar Association - 16 Beacon
Street, Boston**

Registration Link

Following the beginning of the current financial crisis (principally in the fall of 2008), the federal government undertook significant efforts to contain the crisis and limit its damage to the U.S. and world economies. The Obama Administration's Financial Regulatory Reform Proposals are now working their way through the U.S. House and Senate. The CLE will examine the current status (as of the day of the seminar) of the proposal.

Expert panelists will discuss the new U.S. Consumer Financial Protection Agency and state regulation and federal preemption. Attendees will also learn about the new Federal Bank Regulatory Structure as well as strategic considerations for community banks. This is a must attend for all professionals interested in financial regulatory matters.

Specific topics will include Pending Financial Reform Legislation in the U.S. House and Senate, such as:

1. The Consumer Financial Protection Act
2. Amendments to the Bank Holding Company Act
3. The Home Owners Loan Act
4. The National Bank Act
5. The Federal Deposit Insurance Act
6. Other Federal Financial Regulatory Legislation

Panelists:

Kevin Handy, Esq.
Pierce Atwood LLP

Lecturer, Boston University Law School, Morin Center
of Banking and Financial Law

Richard P. Hackett, Esq.
Pierce Atwood LLP

Lecturer, Boston University Law School, Morin Center
of Banking and Financial Law

Stefan L. Jouret, Esq.
Jouret & Samito LLP

Save the Date: Bankruptcy Bench Meets Bar Conference Bankruptcy Section

Thursday, May 13, 2010

2:00 pm - 6:00 pm

**The Colonnade Hotel - 120 Huntington Ave,
Boston**

Join us as bankruptcy judges and practitioners in the District of Massachusetts share insights, observations and analysis on key issues for 2009. Stay tuned for a list of panelists and topics.

For more information: To register for any of the foregoing Brown Bag Lunches or CLEs, please contact Christine Cheung at the BBA at ccheung@bostonbar.org.

Survey on BBA Web Site

Members of the BBA Business Section:

The BBA has requested that each Section poll its members for ideas on how the BBA can develop a comprehensive improved communications strategy that includes the building of a new website. To optimize the BBA's efforts, it would be very helpful if you could provide feedback on the following questions:

- If you could convey one thing about the BBA through the BBA website, what would it be?
- Please share the first three adjectives that come to mind when asked to describe the BBA.
- Do you use the BBA's web site? Why or why not?

If you currently use the site, which content or feature is most helpful? Which is least helpful?

- What information and features would you like to add or change on the BBA site to increase its utility?
- What type of information would make you regularly visit the site?
- Looking quickly at the site, what do you think the BBA's mission is?
- What services does it provide?
- In the past six months, what website have you visited that you found particularly interesting or innovative?

Please send any responses or feedback you have to me at jouret@jouretsamito.com.
Thank you.

Stefan L. Jouret
Communications Study Group

Pro-bono Opportunities For Boston-area Lawyers

By Julia Conn Espitia and William Wise

There are many exciting pro bono opportunities for Boston-area business attorneys. A number of local organizations have programs designed to benefit target populations in need of legal representation and education, but without the resources to pay for such expertise. However, many of these organizations are overburdened and understaffed and, as such, are frequently unable to effectively communicate their need for additional assistance to local attorneys. Likewise, socially-minded attorneys - hoping to lend their services to help better their communities - often do not have the time to assist organizations and individuals who could benefit from their skills, but are unaware of the opportunities. As a result, needs on both ends are unfulfilled: potential deserving clients are turned away for lack of resources, while willing attorneys are uninformed about worthy pro bono opportunities that could benefit from their services.

The BBA Business Law Pro Bono Committee seeks to bridge this gap - identifying Boston-area organizations that can use additional legal assistance, and communicating such organizations' specific needs to business attorneys at the BBA. We do this by (i) working with affiliated organizations to communicate existing opportunities to BBA attorneys and develop new programs, and (ii) inviting local attorneys with significant pro bono experience to speak at BBA meetings about their past experiences and ways to get involved with similar matters.

The following is a brief overview of the three affiliated programs with whom we primarily work: The Lawyers Clearinghouse on Affordable Housing and Homelessness, the Belin Economic Justice Project and Shelter Legal Services' Veterans Program. Each of these organizations has an array of exciting and relevant programs for Boston-area business attorneys, some of which are listed below. For further information on these programs, as well as other business-related pro bono opportunities in the Boston area, please contact the designated points of contact listed below, or BBA Business Law Pro Bono Committee co-chairs Julia Conn Espitia and William Wise.

I. Lawyers Clearinghouse on Affordable Housing and Homelessness (the "Lawyers Clearinghouse")

Overview. The Lawyers Clearinghouse was founded in 1988 by the Boston and Massachusetts Bar Associations. Governed by an eighteen-member board of directors, its mission is to promote the development of affordable housing, reduce homelessness and strengthen communities by providing pro bono legal services to nonprofit organizations and individuals who are homeless or at risk of becoming homeless.

The Lawyers Clearinghouse has enjoyed great success. In 2008 alone, it coordinated the delivery of \$2 million in pro bono legal services to the community - and did so with a budget of only \$180,000. That is more than a tenfold return on investment! These legal services helped to create affordable housing, prevent homelessness, sustain and improve the operations of nonprofit organizations and strengthen local communities. And, due to increased demand for its services, the Lawyers Clearinghouse is on track to do even more in 2009.

Services. The Lawyers Clearinghouse achieves its mission by performing the following services:

- *Pro Bono Referrals.* The Lawyers Clearinghouse matches volunteer lawyers with nonprofit groups that develop or sponsor affordable housing, promote economic development, or operate as homeless shelters, tenant organizations, and housing and homeless advocacy groups. Last year, 51 of these matters were placed with attorneys - resulting in the delivery of pro bono legal services with an estimated value of \$1,020,000.

- *Nonprofit Assistance.* The Lawyers Clearinghouse matches volunteer lawyers with other nonprofit organizations in need of assistance with corporate or business related legal needs. These nonprofits serve the community in all areas including health care, the environment, education, and social services. Last year, 57 of these matters were placed with attorneys - resulting in the delivery of pro bono legal services with an estimated value of \$570,000.

- *On-Site Services.* The Lawyers Clearinghouse provides on-site legal services to the guests of the Pine Street Inn, St. Francis House, Medeiros Center and HopeFound (formerly known as the Shattuck Shelter). Through a collaborative of nine of the state's largest law firms, volunteer lawyers meet with those in need to resolve a variety of legal issues. Last year, 181 homeless men and women received pro bono legal services at 16 clinics. Participating firms were: Brown Rudnick; Choate, Hall & Stewart; DLA Piper; Edwards Angell Palmer & Dodge; Goulston & Storrs; Mintz Levin; Nixon Peabody; Ropes & Gray and WilmerHale. These clinics resulted in the delivery of pro bono legal services with an estimated value of \$450,000.

- *Seminars.* The Lawyers Clearinghouse leads monthly seminars for nonprofit representatives seeking assistance with incorporating in Massachusetts and/or filing for federal tax-exempt status. It also collaborates with several community partners to provide workshops on other legal issues for nonprofits and various legal trainings for pro bono lawyers.

How to Get Involved. The Lawyers Clearinghouse has many exciting events planned for the upcoming year. The following is a list of some of these programs. For further information about these events or how to get involved with the Lawyers Clearinghouse, please contact **Machiko Sano Hewitt at: 617-778-1954.**

New Massachusetts Act on Campaign Finance, Ethics and Lobbying

Tuesday, December 15, 2009

(9:00 – 10:30 am; 8:30 am breakfast / networking), at Boston Private Bank & Trust Company, 10 Post Office Square, Boston.

Register at cra@bostonprivatebank.com

Nonprofit Incorporation Workshop Tuesday, December 15, 2009

(4:30 – 6:30 pm); at Goodwin Procter, 53 State Street, Boston

Register at

msanohe Witt@lawyersclearinghouse.org.

An Overview of Federal Tax Credits for Real Estate Development (tentative title)

Wednesday, December 16, 2009 (9:00 – 11:00 am; 8:30 am breakfast / networking), at Boston Private Bank & Trust Company, 10 Post Office Square, Boston.

Register at cra@bostonprivatebank.com

Nonprofit Incorporation Workshop Tuesday, January 26, 2010

(4:30 – 6:30 pm); at Goodwin Procter, 53 State Street, Boston

Register at

msanohe Witt@lawyersclearinghouse.org.

II. The Belin Economic Justice Project (“EJP”)

Overview. Formed in 2001 under the auspices of the Lawyers' Committee for Civil Rights, EJP strives to further the economic growth and self-sufficiency of communities in Massachusetts. Through collaborations with area law firms, EJP provides business legal assistance and education to entrepreneurs who are starting or operating community businesses located in under-served areas in Massachusetts and who cannot afford legal counsel.

EJP's current outreach includes the Dorchester, Roxbury, East Boston, and Jamaica Plain neighborhoods of Boston, as well as Chelsea and Brockton. Currently, these areas serve as the focal point of EJP's mission while it looks to impact other communities. Since its inception, this impact has included the participation of dozens of community organizations, hundreds of attorneys and countless entrepreneurs.

Services. EJP's core programs typically include:

- *Workshops.* An EJP workshop is an intensive overview of several of the most common legal issues that small businesses face, including issues such as contract formation, employment law, business entity formation and intellectual property rights.

- *Clinics.* At EJP clinics, entrepreneurs have the opportunity to sit down with business attorneys for one-on-one legal counseling sessions. Attendees register for the clinic in advance, and provide the Lawyers' Committee with information about their businesses so that participating attorneys may prepare answers to likely legal questions in advance.

- *Pro Bono Representation.* When appropriate, EJP attorneys may enter into a pro bono representation agreement with entrepreneurs to provide them with ongoing legal services.

How to Get Involved. Currently, EJP has a number of areas of immediate need. One such area is the need for Spanish-speaking attorneys, since several of the communities most in need of EJP's efforts are predominately Spanish-speak-

ing. The importance and technicality of legal advice requires a high level of language skills, but the impact of such skills would be immediate through EJP's community outreach and programming. If you are an area business attorney with Spanish language skills, and would like to contribute these skills and your time to EJP's efforts, please contact Jessica Sommer at the number listed below.

EJP is also currently seeking legal assistance in forming a new enterprise for a local business owner. Chris Maxwell, having successfully developed a proprietary Spanish-language networking website platform, wants to use the platform to launch a for-profit site that marries holistic medicine with social networking. Mr. Maxwell requires a new service agreement to protect himself from potential liabilities, as well as assistance with entity formation, corporate structuring and employment agreements for his sales representatives. If you are an area business attorney and would like to contribute these skills and your time to this project or others efforts, please contact Jessica Sommer at: 617-988-0605.

III. Shelter Legal Services ("Shelter") - Veterans Program

Overview. Shelter's mission is to promote self-sufficiency, financial security and stability through accessible and comprehensive legal services to the homeless and low-income. By providing legal clinics at homeless shelters and service centers, Shelter reaches underserved and neglected members of the Boston area community who are often reluctant to seek legal help. Shelter serves over 400 clients per year at legal clinics located in homeless shelters and service centers. It represents homeless clients in Cambridge, indigent women in Boston and veterans at the New England Shelter for Homeless Veterans and Chelsea Soldiers' Home.

Services. Boston-area attorneys provide pro bono services to these clients in a number of ways, including:

- *On-Site Clinics.* Shelter provides legal clinics at homeless shelters and service centers making it easier for clients to access available services on-site. Volunteer attorneys may attend such clinics and directly consult with clients.

- *Pro Bono Representation.* Shelter matches volunteer attorneys with pro bono referrals. Attorneys may choose to provide clients with full representation by taking on a case, or they may provide Shelter with advice on a particular matter.

- *Mentoring.* Law students perform much of the needed work at Shelter, allowing attorneys to fulfill their commitment to providing pro bono services in an efficient way. At Shelter, student volunteers from all area law schools learning how to effectively practice law while using their new legal skills to give back to their community. Volunteer attorneys oversee the work of such law services, while developing mentoring relationships with the students.

- *Presentations.* Shelter provides informational seminars about relevant areas of law to clients at shelters and service centers. Volunteer attorneys may help by developing and presenting at such seminars.

How to Get Involved. Shelter's Veterans Program is in desperate need of additional legal assistance. Specifically, Shelter has indicated that it could greatly benefit from the expertise of Boston-area business attorneys in matters related to bankruptcy, consumer credit, breach of contract, insurance, consumer fraud and general small business assistance. As a result, the BBA's Business Law Pro Bono Committee has recently launched a program to assist Shelter by (i) alerting by email qualified BBA attorneys of pro bono opportunities in their area of expertise; and (ii) organizing occasional educational seminars for veterans at the New England Shelter for Homeless Veterans and Chelsea Soldiers' Home. Some suggested topics for educational programs are small business formation, contract principles, basic credit counseling and debtor education, and consumer fraud. If you would like to contribute your skills and time to assisting with a pro bono matter at Shelter, please contact **Lisa LeFera at: 617-552-0623**. If you are interested in participating in an educational seminar for veterans, please contact **Julia Conn Espitia at: 617-895-8069**.

Featured Committee: Immigration Law Committee

Letter from Immigration Law Committee Co-chairs

This year the Immigration Law Committee is co-chaired by Paul M. Glickman, Partner at Glickman Turley, LLP, and Mary E. Walsh, Associate at Flynn & Clark, P.C. Our committee will host programs aimed at covering a wide range of immigration topics from business and family immigration to representing a client in immigration court to educating BBA members about immigration-related pro bono activities. Our ambitious agenda for 2009 and 2010 includes chairing six brown bag lunch seminars, the Immigration Judge's Panel and reception, and a CLE program. The Immigration Law Committee plans to co-chair many programs with other sections to appeal to a wider audience and bring attention to the intersection of immigration law with other areas of law such as labor and employment, criminal and family law.

Our first Brown Bag program was held on November 13, 2009 and was entitled, "Why is the Department of Homeland Security visiting U.S. employers? Worksite visits to H and L employers by the USCIS's Division of Fraud Detection and National Security (FDNS)". The program was a "How To" program for practitioners to best warn and prepare their clients; see article below for a further explanation of this topic.

Our second event was held on December 1, 2009. Back again by popular demand, we were privileged to have several of Boston's federal immigration judges join us for an intimate panel discussion and reception. The judges discussed several case hypotheticals, their preferences when handling different elements of cases (direct, cross, experts, evidence, etc.), and the latest court processes and procedures.

In addition to expanding the knowledge of our BBA members, our other major goal this year is to promote pro bono activities and the participation of non-BBA members, including law students from local universities and minority groups. We will continue to reach out to these organizations so that our committee continues to grow.

We look forward to an exciting year and meeting many BBA members at our future events.

Sincerely,

Paul M. Glickman & Mary E. Walsh

How to Prepare Your Clients for the Recent Increase in Worksite Visits from USCIS/FDNS

By Steven A. Clark and Mary E. Walsh

No attorney wants to receive a phone call from one of their corporate clients in a panic saying that U.S. Citizenship and Immigration Services ("USCIS") is at their office asking questions about a foreign national employee. Unfortunately, this has been happening more and more over the last few months. USCIS has started conducting random and unannounced worksite visits of U.S. companies employing foreign workers who are currently in H-1B or L-1 status. This is a dramatic departure from USCIS relying exclusively on paper

submissions of evidence, with no face-to-face contact in the course of most business visas. Since this is a recent development in our field and new information is emerging daily, what follows is a collection of information from colleagues and the American Immigration Lawyers Association ("AILA") to help explain why these visits are occurring and assist practitioners in preparing their clients in advance. If you warn and prepare your clients in advance, they will be equipped to handle unannounced visits effectively.

What is FDNS?

USCIS created the Fraud Detection and National Security (“FDNS”) unit in 2004 with a “mission to detect, deter, and combat immigration benefit fraud and to strengthen USCIS’ efforts ensuring benefits are not granted to persons who threaten national security or public safety.”¹ FDNS is not an enforcement agency and can only refer suspect cases to Immigration and Customs Enforcement (“ICE”). By February 2005, FDNS had implemented what is now called the Benefit Fraud and Compliance Assessment (“BFCA”) Program to evaluate the integrity of various nonimmigrant and immigrant benefit programs to verify information entered on applications and petitions, as well as supporting documentation.² The BFCA Program conducts investigations on a random sampling of pending and approved applications and petitions. Investigations consist of internal and open source systems queries, work site visits to U.S. companies, and overseas verifications to verify claimed relationships, employment, and qualifications.³

Shortly after the BFCA Program was initiated, FDNS conducted preliminary investigations on a small sampling of 246 cases over a six-month period. USCIS issued a report on their findings which was published in September 2008 entitled “U.S. Citizenship and Immigration Services H-1B Benefit Fraud & Compliance Assessment.”⁴ The report breaks down the 51 fraud or technical violations discovered during these investigations which included the beneficiary not receiving the prevailing wage, fraudulent or forged documents, job duties significantly different from the position description in the Form I-129 petition, and payment of the Department of Labor training fee by the employee rather than by the employer as required by statute.⁵ According to this report, the results will serve as a basis for proposed changes to regulations, policies, procedures, and potential legislation.⁶

Due to the significant fraud and technical violations found in the preliminary round of investigations, FDNS seems to have received the backing to significantly increase their efforts and launch a more expansive program. FDNS currently em-

loys approximately 650 Immigration Officers, Intelligence Research Specialists, and Analysts located across the U.S.⁷ More importantly, they have hired contract employees to conduct worksite visits on behalf of FDNS. Currently, in Massachusetts there appear to be two contract investigators with the mission to visit at least 300 companies per month. In just one month, more investigations will take place in Massachusetts alone than were conducted for the entire 2008 report. The USCIS Vermont Service Center has indicated to AILA that it has transferred approximately 20,000 cases to the FDNS and it is assumed the California Service Center has sent a similar amount. Based on these numbers at least one, if not more, of your clients will be the subject of these investigations and being proactive versus reactive will allow your clients to better control the scope and manner of the investigation.

Where does FDNS Get its Authority?

FDNS is funded by the Anti-Fraud filing fee (\$500) which every H-1B and L-1 employer must pay when initially filing a petition for a new foreign worker. The employer is required to sign a Form I-129, Petition for Nonimmigrant Worker, and in doing so consents to allowing USCIS to verify any information in the petition at any time through various methods. On the last page of the Instructions for Form I-129, in the section entitled USCIS Compliance Review and Monitoring, it states:

“The Department of Homeland Security has the right to verify any information you submit to establish eligibility for the immigration benefit you are seeking at any time. Our legal right to verify this information is in 8 U.S.C. 1103, 1155, 1184, and 8 CFR parts 103, 204, 205, and 214 ... USCIS may verify information before or after your case has been decided. Agency verification methods may include, but are not limited to: review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews ...”

According to Form I-129, the visits may occur at the employer’s principal place of business and/or the H-1B’s work location.

1 Practice Pointer: USCIS’ FDNS Commences Audit of H-1B Program, Including Unannounced Site Visits to H-1B Employers and Their Clients, AILA InfoNet Doc. 09100123 (Posted 10/01/2009).

2 U.S. Citizenship and Immigration Services, H-1B Benefit Fraud & Compliance Assessment (September 2008), AILA InfoNet Doc. No. 08100965 (Posted 10/09/2008).

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 Practice Pointer: USCIS’ FDNS Commences Audit of H-1B Program, Including Unannounced Site Visits to H-1B Employers and Their Clients, AILA InfoNet Doc. 09100123 (Posted 10/01/2009).

Are Clients Required to Comply?

Since these site visits do not require a warrant, your clients may ask to reschedule if the announced visit comes at an inconvenient time or in order to have their lawyers present. Although guidance given to the investigators instructs them to terminate the visit when counsel is requested but not immediately available,⁸ the investigators are not always so compliant. If the designated contact and/or the foreign worker is not in the office or it is an inconvenient time for the visit, your client may politely request that the investigator return at another time and even suggest a day and time that might be better suited. If this occurs, you may wish to represent your client at the scheduled time. If all the requested parties are in the office and the timing is not inconvenient, the best practice is for your client to comply with the investigation at that time and, if desired, to request to have their attorney on the phone throughout the process.

Who is Being Targeted?

The worksite visits appear to be random. The size and industries of visited companies do not indicate a pattern. The FDNS investigators are given a specific list of employers and employees who they must interview based on pending and approved petitions. They are not investigating the company as a whole but rather have a very specific agenda related to a particular employee.

What Happens During an FDNS Visit?

When the FDNS investigator arrives, he will request to meet with the company representative (typically HR or the individual who signed the Form I-129) and possibly the H-1/L-1 foreign national and his supervisor/manager. The investigator may request a tour of the company's premises and the foreign national's work area. Be sure to warn clients that any tour of the premises should be accompanied by the company representative at all times. A worksite visit can last 5 minutes up to 90 minutes.

Generally, the FDNS investigators have a copy of the petition and are verifying the information, including information about the petitioner (i.e., number of employees, annual revenue); relationship between the petitioner and beneficiary; what the beneficiary's job duties are to ensure he is working in the same capacity described in the petition; worksite

location(s) specified in the petition; and whether the beneficiary has the required qualifications. The following is a small sampling of the types of questions asked during the FDNS investigation:

Questions for the Petitioner:

- How many employees do they have in the United States and worldwide (if any) and how many are foreign workers?
- What is the employer's ownership structure?
- Did the employer conduct layoffs recently?
- What is the employer's annual revenue?
- Does the employer regularly file I-129 and I-140 petitions?
- Do foreign nationals pay for their visas?
- Did the employer file this petition and did the signatory have authority to sign on behalf of the company?
- Has the company representative met the foreign national worker?
- What are the foreign national's job title and job duties?
- When was the foreign national's start date?
- Is the foreign national on U.S. payroll?
- What is his salary and does the company have documents to prove it (i.e., W-2's)?

Questions for the Foreign National:

- What are the foreign national's job title and job duties?
- When was the foreign national's start date?
- Where is the foreign national's job located?
- Where did the foreign national go to school?
- What are the foreign national's education level, degree, and prior work experience?
- Does the foreign national work part-time or full-time?

Top Ten Practice Pointers to Prepare Your Clients:

1. Before an investigator pays your clients a visit, send out an email or memo as soon as possible warning them of the recent developments including: What is FDNS? How will this affect them? What to prepare before an investigator shows up? What questions will be asked during an investigation?
2. Prepare material to send to clients including a list of possible questions, checklist for the company representative to use when recording the details of the

⁸ U.S. Citizenship and Immigration Services, Compliance Review Report (Job Aid for Employment H-1B – Based) Dec. 5, 2008, AILA InfoNet Doc. No. 09101461 (Posted 10/14/09).

visit, and a set of guidelines for what they should and should not do during a visit.

3. Update your own in-house materials to continually remind clients of these potential visits including case launch materials, signature packets before the case is filed, and approval packages once the petition is approved.
4. Assist your clients in establishing their own in-house practices on how to effectively respond to work site visits including selecting a primary and an alternate point of contact to respond to the FDNS investigator and notifying anyone who might be involved during a site visit (i.e., Receptionist, HR Manager, President/CEO, Supervisor/Manager).
5. Before any petition is filed, obtain written confirmation that the signatory has reviewed the petition and confirmed that all the information is accurate to the best of their knowledge including wage, place of employment, job duties, etc. The person signing the forms is the most likely to be interviewed by FDNS so he should be aware of what he is attesting to.
6. Be sure the foreign national is furnished a copy of the petition. The reasoning is twofold: 1) so the foreign national may review what has been described as his job duties, job location, and compensation so he can report any discrepancies and corrective action may be taken; and 2) so he can be prepared to answer any investigator questions.
7. Have the company representative and any manager/supervisor of a foreign national employee review the petitions and verify the information in order to be prepared for any work site visits.
8. Advise your clients to record the investigator's name, title, agency, and contact information and keep detailed notes of all questions asked and documents requested at any site visit.
9. Imposters may pose as FDNS investigators, so be sure to have clients check their credentials by contacting their offices. In addition, have the company representative accompany the investigators around the premises at all times, and do not allow them into secure areas that are normally off limits to visitors.
10. Use this as an opportunity to conduct Form I-9 and Public Access File audits of all your clients. This will ensure they are in full compliance if ever asked to produce them.

Factors For Making Successor-in-interest Determinations In Adjudicating Form I-140 Immigrant Visa Petitions: Finally A Workable Policy?

By Jason M. Gerrol

The employment-based permanent residency process for foreign-national workers in the U.S. generally begins with a U.S. employer filing a labor certification with the U.S. Department of Labor (DOL), followed by the filing of an I-140 Immigrant Visa Petition with U.S. Citizenship and Immigration Services (USCIS), and finally, either the issuance of an immigrant visa abroad or the foreign-national worker's adjustment of status to lawful permanent resident while in the U.S. A labor certification is both employer specific and job opportunity specific,¹ thus potentially requiring the permanent residency process to begin anew in the event of an employee's job change or change in employer. However, a corporate restructuring as a result of a merger or acquisition need not result in a new labor certification if it is determined that a valid successor-in-interest relationship exists between the predecessor and successor entities. While prior USCIS standards for classification as a successor-in-interest may not have reflected the realities of corporate restructuring, an August 6, 2009 USCIS memorandum provides revised guidance on factors for making successor-in-interest determinations in the adjudication of Form I-140 petitions.

Background

In a 1993 memorandum, the legacy Immigration and Naturalization Service (INS), now USCIS, indicated that an entity may qualify as a successor-in-interest by filing a new I-140 petition and submitting documentation to establish that the successor entity has assumed the rights, duties, obligations and assets of the original employer and that it continues to operate the same type of business.² Two years later, INS proposed a rule that a successor employer must assume "substantially all of the assets and liabilities of the predecessor" employer,³ which was again modified in October 2001 as follows: "INS has taken the position that a company is a successor-in-interest when it has taken on all of the im-

migration-related liabilities of the company it has acquired, merged, etc."⁴

While the October 2001 immigration-related liabilities standard was widely accepted as USCIS policy, immigration practitioners and employers later began receiving I-140 petition denials based upon the successor employer's inability to demonstrate that all assets and liabilities had been assumed. When questioned by the American Immigration Lawyers Association (AILA) about this unexpected shift in policy, the USCIS Texas Service Center responded by stating that the October 2001 guidance was non-binding and that I-140 successor-in-interest determinations would be based upon a 1981 Board of Immigration Appeals decision, *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm. 1981). According to the Texas Service Center, the ruling in *Matter of Dial Auto* requires a successor employer "to establish that it has assumed all of the rights, duties, obligations, and assets of the original employer."⁵ This restrictive policy would unfortunately leave many restructured companies, such as those resulting from strategic asset only sales, unable to qualify as a successor-in-interest.

USCIS August 2009 Memorandum: Revised Successor-in-Interest Adjudication Standards

The policy announced by the Texas Service Center would not last long. In explaining the need for revised adjudication standards, USCIS indicated in the August 2009 memorandum that it is "cognizant that business entities do not always wholly assume the assets and liabilities of entities they acquire or merge with and that businesses may assume certain assets or liabilities in connection with a perfectly legitimate transaction. This updated guidance is intended to allow flexibility for the adjudication of I-140 petitions that present novel yet substantial and legitimate successor in

1 See 20 C.F.R. § 656.30(c)(2)

2 Memorandum from James A. Puleo, Acting Exec. Assoc. Comm., reprinted in 70 Interpreter Releases 1692-93 (Dec. 20, 1993)

3 60 Fed. Reg. 29711 (June 6, 1995); The "substantially all" requirement can also be found in Memorandum from Michael Aytes, Acting Assoc. Dir., HQPRD 70/23.12 (Sept. 12, 2006), posted on AILA InfoNet at Doc. No. 06101910 (Oct. 19, 2006)

4 Letter of Efrén Hernández III, Director, Business and Trade Services, HQ 70/6.1.3 (Oct. 17, 2001), posted on AILA InfoNet at Doc. No. 01101939 (Oct. 19, 2001)

5 AILA/TSC Liaison Meeting, December 3, 2007; posted on AILA InfoNet at Doc. No. 08010365 (Jan. 3, 2008)

interest scenarios.”⁶ USCIS also acknowledged that their prior reading of Matter of Dial Auto may have been overly restrictive, and that the decision does not state that a valid successor relationship could only exist with the assumption of all of a predecessor entity’s rights, duties, obligations, and assets. Rather, “there can be instances where a valid successor relationship exists even though the successor entity has not assumed all of the assets, rights, obligations, and liabilities of the predecessor entity.”⁷

The August 2009 memorandum instructs USCIS officers to focus on the following three factors in determining whether a valid successor-in-interest relationship exists:

1. The job opportunity offered by the successor must be the same as the job opportunity originally offered on the labor certification.

The August 2009 memorandum reminds USCIS Field Leadership, as well as immigration practitioners and employers, that a DOL certified labor certification is valid only as to the specific job opportunity indicated, as defined by job location, job description, job requirements, as well as rate of pay. In addition, the job opportunity must have remained valid and available from the time of filing of the labor certification with the DOL until either the issuance of an immigrant visa abroad or the approval of the foreign-national worker’s adjustment of status to lawful permanent resident. If at any time prior to the transfer of ownership or after the transfer of ownership the job opportunity ceases to exist, a new labor certification may be required by the predecessor employer.

2. The successor bears the burden of proof to establish eligibility in all respects, including the provision of required evidence from the predecessor entity, such as evidence of the predecessor’s ability to pay the proffered wage, as of the date of filing of the labor certification with the DOL.

A successor employer must continue to demonstrate that all criteria for the visa classification have been met, including: (1) the predecessor employer’s ability to pay the proffered wage from the date of filing the labor certification with the DOL until the date business ownership transferred from the predecessor to the successor employer; (2) the succes-

or employer’s ability to pay the proffered wage as of the date of transfer of ownership and until either the issuance of an immigrant visa or the approval of the foreign-national worker’s adjustment of status to lawful permanent resident;⁸ and (3) the successor employer’s satisfaction of the definition of “employer.”

3. For a valid successor-in-interest relationship to exist between the successor and the predecessor that filed the labor certification, the petitioner must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor.

The August 2009 memorandum states:

The evidence provided must show that the successor not only purchased the predecessor’s assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. The successor must continue to operate the same type of business as the predecessor, and the manner in which the business is controlled and carried on by the successor must remain substantially the same as it was before the ownership transfer. (emphasis added).⁹

Essential rights and obligations do not include liabilities unrelated to the original job opportunity, such as unrelated tort obligations or litigation unrelated to the job opportunity.

For cases involving the acquisition of a discrete operational division or unit (i.e. a “spin off”), the August 2009 memorandum provides that the three successor-in-interest factors listed above must be met and “the operational division or unit of the business entity that is being transferred to the successor must be a clearly defined unit within the predecessor entity and that unit must be transferred as a whole to the successor.”¹⁰ In addition, the “job offered to the alien beneficiary in the successor petition must have been, and must continue to be, located within the operational division or unit of the business entity that it transferred from the predecessor to the successor.”¹¹

⁶ Memorandum from Donald Neufeld, Acting Assoc. Dir, HQ 70/6.2 AD09-37 (Aug. 6, 2009), posted on AILA InfoNet at Doc No. 09090362 (Sept. 3, 2009) (hereafter, “August 2009 memorandum”); The revised adjudication standards can also be found at Chapter 22.2(b)(5) of the Adjudicator’s Field Manual

⁷ *Id.*

⁸ In cases involving the sale of discrete divisions or units, the August 2009 memorandum indicates that the financial data of the predecessor entity, and not just the particular business unit, should be considered in determining the predecessor’s ability to pay the proffered wage.

⁹ August 2009 memorandum

¹⁰ *Id.*

¹¹ *Id.*

Conclusion

For foreign-national workers seeking lawful permanent residency based upon a preference category requiring a labor certification, and otherwise unable to take advantage of the job “portability” provisions of INA § 204(j), the inability of an employer to qualify as successor-in-interest does not merely result in the additional expense and hassle of filing a new labor certification. Rather, such a requirement may have devastating and irreversible effects upon a foreign-national worker’s immigration status, possibly including the inability to extend non-immigrant status (e.g. H-1B). While it remains to be seen how USCIS will apply the three factors described above, and how “essential rights and obligations” will be defined, the revised successor-in-interest guidance is commendable for recognizing the myriad of ways in which a corporate restructuring may take place, including the sale of discrete divisions or units, and providing flexibility in the adjudication of successor-in-interest I-140 petitions.

Featured Committee: Tax-Exempt Organizations Committee

A part of the Business Law Section and the Tax Section, the Tax-Exempt Organizations Committee provides a forum for practitioners interested in the law of nonprofit organizations. In addition to featured education topics, the monthly lunch meetings present an opportunity for an exchange of information and ideas about current practice issues and developments. The Committee also presents continuing legal education seminars and, as appropriate, initiates or participates in legislative and regulatory advocacy efforts of interest to Exempt Organization practitioners.

The Voluntary Dissolution of a Massachusetts Public Charity

By Regina S. Rockefeller and Tamara L. Sturges

I. Introduction

With the U.S. economy still far from full recovery, endowment values holding at historically low levels and many major charitably inclined donors hard hit by shady con artists and by anemic stock market valuations and lowered real estate appraisals, many charitable organizations are finding that their previously generous donors are no longer able to support the organization's mission. For some organizations, this confluence of adverse factors has led boards of trustees/directors reluctantly to consider their organization's dissolution or, if possible, merger with another charity. In Massachusetts, at present, a public charity can voluntarily dissolve only with the close involvement of the Massachusetts Attorney General's office and the approval of the Massachusetts Supreme Judicial Court.

This article discusses the basic process and practical legal issues for the voluntary dissolution of public charitable corporations in Massachusetts. This outline presents: (1) when a charity should consider corporate dissolution; (2) a step-by-step guide to the voluntary dissolution process and (3) some practical legal issues that are likely to arise during the dissolution of a large public charity.

A. Voluntary versus involuntary dissolution

In Massachusetts, a public charitable corporation can be dissolved voluntarily or involuntarily. M.G.L. c. 180 §§ 11A (voluntary), 11B (involuntary).

1. Voluntary dissolution

A charitable corporation may seek voluntary dissolution after an affirmative vote by a majority of the board of directors. The charity can then file a petition for dissolution with the Supreme Judicial Court making the Attorney General a party to the petition. This is the sole method by which a charity may voluntarily dissolve in Massachusetts. M.G.L. c. 180, § 11A.

2. Involuntary dissolution

Involuntary dissolutions are rare. To involuntarily dissolve a public charity, the attorney general must petition the Supreme Judicial Court under M.G.L. c. 180, § 11B for the dissolution of such charitable corporation based on one of the following permissible causes: failure to submit required annual filings for two consecutive years or inactivity of the charity and its dissolution would be in the public interest.

B. Application of *cy pres* doctrine

The application of the equitable doctrine of *cy pres* allows for the allocation of funds that have been designated for a specific use or are otherwise limited by their nature as a charitable contribution. M.G.L. c. 12, § 8K. *Cy pres* allows for the distribu-

tion of assets from one charity to another so as to best fulfill the donor's intended purpose of the charitable contributions. When a charity is dissolved, any remaining funds must be redistributed to other charities with "similar public charitable purposes." M.G.L. c. 180 §§ 11A, 11B.

The doctrine of *cy pres* is an equitable remedy that allows for restricted charitable funds to be applied to similar charitable purposes when the original purpose has become impossible or impracticable to fulfill. The doctrine of *cy pres* is codified in M.G.L. c. 214, § 10B. See also *New England Hospital v. Attorney General*, 362 Mass. 401, 404 (1972), quoting *American Academy of Arts & Sciences v. Harvard College*, 12 Gray 582, 596 (Mass. 1832) ("It is now a settled rule in equity that a liberal construction is to be given to charitable donations, with a view to promote and accomplish the general charitable intent of the donor, and that such intent ought to be observed, and when this cannot be strictly and literally done . . .").

Applying *cy pres* is an integral part of the dissolution of a charitable corporation. When a charity dissolves, any remaining funds must be re-appropriated to similar charitable purposes. This process is done through a complaint for dissolution filed with the Supreme Judicial Court. The complaint will set forth the grounds for dissolution and a request for authorization to transfer funds to other charitable organizations, which have similar charitable purposes. The selection of these recipient charities is an important decision to be initially made by the trustees or directors of the dissolving charity. Some boards will invite other organizations to make presentations about what those potential recipients would do with the dissolving charity's remaining unrestricted assets and, for restricted assets, how the potential recipient organizations would carry out the original donor's intent for his or her donation.

The Attorney General must be made party to the complaint for dissolution. M.G.L. c. 12, §§ 8, 8G. All recipient organizations nominated to receive funds from the dissolving charities will also be made parties to the complaint for dissolution. Assuming that the Attorney General assents to the complaint and there are no other objections, the Court will enter judgment allowing dissolution of the charity and the transfer of the remaining charitable funds to the identified recipients.

II. When A Charity Should Consider Voluntary Dissolution

Voluntary dissolution is usually a sad and irrevocable decision for a board of trustees/directors and often represents the death of a hope. The board of trustees/directors of a Massachusetts public charity should appropriately consider voluntary dissolution and its alternatives when facing:

1. A lack of interest/support from volunteers and donors;
2. Inadequate financial resources to fund properly the organization's mission; and
3. An inability to accomplish the organization's mission in a cost-effective manner in the future.

Alternatives to dissolution to be considered include:

1. A merger or consolidation with a like-minded charity to achieve economies of scale and attract new clients, volunteers and donors.
2. Sale of assets in accordance with M.G.L. c. 180, § 8A to a more financially capable charitable organization having a similar mission and the seller's contributing the sale proceeds to that organization or to a local foundation to fund the mission previously accomplished by the dissolving corporation. In these circumstances, dissolution by the Supreme Judicial Court would ultimately occur.
3. Voluntary reorganization.

III. Possible Cast of Characters in a Voluntary Dissolution of a Large Public Charitable Corporation, M.G.L. c. 180 8A(d)

The Massachusetts Attorney General's office in a typical year assents to the dissolution of approximately 100 charitable organizations. The dissolution of larger charities with remaining assets can involve a large cast of characters including (a) the Board of Trustees/Directors of the charity, (b) the management of the charity, (c) the communities served by the charity,

(d) the Medical Staff if the charity is a hospital, (e) the faculty and alumni if the charity is a school, college or university, (f) the Massachusetts Attorney General, (g) the Massachusetts Supreme Judicial Court, (h) the Internal Revenue Service, (i) the Massachusetts Department of Revenue, (j) the Massachusetts Secretary of State, (k) any state licensing authority, e.g. the Department of Public Health for hospitals or clinics, (l) donors of charitable funds and their lawful issue, (m) other 501(c)(3) organizations who may potentially receive the remaining funds of the dissolving charity, (n) competitors of the dissolving corporation who may carry on a portion of the dissolving charity's former mission, (o) employees of the dissolving charity, (p) accountants, lawyers and business consultants of the charity, (q) purchasers and donees, both domestic and international, of useful assets from the dissolving charity, (r) creditors of the dissolving charity, (s) local law enforcement officials if the charity is involved in public safety activities, (t) organizations holding real estate leases from the charity, (u) organizations that have been allowed to use the charity's space for little or no charge for the benefit of the public, such as Alcoholics Anonymous, Meals on Wheels, Girl Scouts, Boy Scouts, and still others.

IV. Process Of Voluntary Corporate Dissolution Where The Corporation Has Assets

- **Step 1:** Make sure all required financial report filings are current. M.G.L. c. 12, § 8F. File the last Form PC. If any annual reports are missing, file them with the Attorney General's Office: Division of Non-profit Organizations/Public Charities.
 - If the charity is exempt from filing under M.G.L. c. 12, 8F as a religious organization, file a financial affidavit summarizing financial activities for the past four years.
- **Step 2:** Prepare initial pleadings for submission to the Massachusetts Supreme Judicial Court:
 - Complaint for Dissolution must contain:
 - The authorization for dissolution by a majority vote of the board of directors/trustees.
 - The grounds for dissolution.
 - The most recent Form PC.
 - If there are funds remaining after payment of the charity's debts and expenses, a request for authorization to transfer funds to one or more other organizations for similar charitable purposes is made.
 - The complaint should include the charitable purposes of the dissolving charity and how the charitable purposes of the recipient organizations are similar.
 - Motion for Entry of Interlocutory Order
 - Interlocutory Order
 - The Supreme Judicial Court orders the dissolving charity to transfer funds to the recipient charities.
- **Step 3:** Forward pleading to the Attorney General's Office: Division of Public Charities for review and assent:
 - Enclose originals and one copy. If everything is in order, the Attorney General's office will assent and return the originals to you.
- **Step 4:** File pleadings with the Supreme Judicial Court:
 - Submit the filing fee made payable to the Commonwealth of Massachusetts or seek a waiver of the filing fee from the Supreme Judicial Court.
 - The assented documents (the Complaint for Dissolution, Motion of Entry of Interlocutory Order, and Interlocutory Order) should be filed with the Supreme Judicial Court. The Supreme Judicial Court will review the pleadings and, if those pleadings are acceptable, issue the Interlocutory Order.

- **Step 5:** After the payment of all legitimate debts and expenses of the dissolving charity, transfer the funds to recipient charities pursuant to the Interlocutory Order of the Court and prepare the following affidavits:
 - Affidavits of Receipt, signed by the recipient organizations, indicating that the funds have been received.
 - An Affidavit of Compliance, signed by an officer of the dissolving organization, indicating compliance with the Court's Interlocutory Order.
- **Step 6:** Prepare final documents:
 - Motion for Entry of Judgment
 - Judgment naming a recipient organization as the successor to any funds, property, assets or interest of the dissolved charity.
- **Step 7:** Forward documents to the Attorney General's Office: Division of Non-Profit Organizations/ Public Charities:
 - Enclose originals and one copy of each affidavit, Motion for Entry of Judgment, and the Judgment. If everything is in order, the Attorney General's office will assent and return the originals.
- **Step 8:** File the documents with the Supreme Judicial Court and, as needed with the Secretary of State's Office.
- **Step 9:** Notify the Internal Revenue Service of the dissolution by sending a letter to: Internal Revenue Service, Exempt Organizations Determinations, P.O. Box 2508, Cincinnati, OH 45201. with the following information:
 - One of the following:
 - Articles of Dissolution filed with state officials.
 - Minutes of the meeting where the vote was taken to dissolve (signed and dated by an officer of the charity).
 - For section 501(c)(3) organizations: a statement signed by an officer giving details on final distribution of assets.

V. Practical Legal Issues

- Preparing for the Costs of Business Wind Down/Dissolution for Larger Charities such as Hospitals, Colleges, Schools:
 - Substantial costs are often incurred in dissolving a major charity. In deciding whether or not and when to dissolve, the officers and Trustees/Directors of the charity must consider how much money will be needed to dissolve the corporation in an orderly manner. An organization facing dissolution should reserve sufficient (and often substantial) funds for that purpose and not spend its last few dollars operating prior to dissolution. For Trustees/Directors who are passionately committed to the organization's mission, making this judgment can be extremely difficult. Unjustified optimism that some miraculous intervention will come if the charity just keeps functioning day-to-day can cloud more realistic decision making.
 - Once the decision to dissolve is made, the charity or its qualified agents and consultants should:
 - Perform an audit to determine which funds are restricted and what those restrictions are. This process will allow the charity to determine what funds are available for paying the costs of dissolution and what remaining funds will be available to be distributed with court approval through the *cy pres* process to charities with similar charitable purposes. This audit can often be most efficiently performed by an independent auditing firm.

- Permanently Restricted Funds:
 - Contributions and other inflows with donor stipulations that do not expire and cannot be fulfilled by the dissolving charity.
 - Temporarily Restricted Funds:
 - Contributions and other inflows with donor stipulations that will expire or can be fulfilled by the dissolving corporation.
 - Examples may include assets received in a charity drive to fund a specific purpose.
 - Unrestricted Funds:
 - Neither permanently nor temporarily restricted by donor.
 - Assets with self-imposed limits, including voluntary restrictions on funds for specific purposes.
 - Board-designated funds: self-imposed limitations on otherwise unrestricted funds by trustees are a revocable internal designation that does not give rise to restricted assets.
 - M.G.L. c.180A § 2: Appropriations for expenditures from endowment funds authorized; presumption of imprudence.
 - Rebuttable presumption that using over 7% of specific purpose and endowment funds is imprudent.
 - Pay all legitimate debts:
 - Terminate contracts and leases of the organization including contracts for equipment rentals.
 - Negotiate accounts payable: The charity should negotiate with vendors to reach a compromise for the payment of legitimate debts.
 - Severance: Offer severance to employees to keep employees from leaving their employment prior to the closure of operations. Without an adequate workforce, the charity may have to cease operations earlier than planned for safety reasons.
 - Provide for employment benefits for terminated employees. M.G.L. c. 151A, § 14A.
 - Provide for worker's compensation for injured or disabled employees whose entitlement may continue beyond the dissolution.
 - Address pension and other retirement issues, including records retention.
 - Purchase tail coverage if professional liability insurance has been maintained on a claims-made basis.
 - Arrange for continued protection under various liability insurance policies including any existing Directors and Officers Liability insurance.
- Required Notices for Closure of a Charitable Hospital
 - Corporate Notices:

- By laws: Determine the procedure for voting to dissolve. A majority vote of the board of directors/trustees can authorize a petition for dissolution to be filed with the Supreme Judicial Court. M.G.L. c. 180, § 11A.
- 90 day notice to the Massachusetts Department of Public Health of intent to discontinue services. 105 CMR 130.122 (C); M.G.L. c. 111, § 51G(4).
 - Notice to discontinue services must contain:
 - Current utilization rates for services being discontinued.
 - Anticipated impact of discontinuance on individuals in the hospital's service area.
 - The date set for discontinuation.
 - Names and addresses of any organized health care coalitions and community groups that are known to the hospital when the notice is issued to the Department.
- 90 day notice to Attorney General's Office and the Commissioner of Public Health prior to a disposition of substantial amount of property of an acute-care hospital to an entity other than a public charity. M.G.L. c. 180, § 8A (d)(1).
- 30 day notice to Attorney General's Office prior to a disposition of all or a substantial portion of a public charity's assets. M.G.L. c. 180, § 8A (c).
- Public hearings regarding disposition of property. M.G.L. c. 180A, § 8A(d)(3); 105 CMR 130.122(C).
 - The attorney general will hold one or more public hearings regarding the disposition of a substantial amount of property of the charity.
 - 21 days prior to the public hearing, the charity must publish notice of the hearing in a local newspaper of general circulation.
- Federal Worker Adjustment and Retraining Notification (WARN) Act.
 - Circumstances that trigger WARN:
 - A number of circumstances trigger the WARN Act. Generally, if an employer is laying off a significant number of its work force, it is vital to determine whether the employer and the types of layoffs fall under WARN (Please find further information on WARN at <http://www.doleta.gov/layoff/warn.cfm>).
 - The WARN Act requires 60 day notice to workers in order to mitigate long periods of unemployment. How will the charity's workforce react to this notice? Will they immediately leave their current employment?
 - Employers in Massachusetts must provide 60 days written notice where there are:
 - 100 or more full-time employees and employers are laying off at least (i) 50 employees at a single site of employment, or (ii) 100 or more employees who work at least a combined 4,000 hours per week.

- The employer is a private for-profit, private non-profit organization, or a quasi-public entity separately organized from regular government.
- The notice must be in writing, in clear and specific language.
- The notice must contain the following information:
 - A statement as to whether the planned action is expected to be permanent or temporary and, if the entire plant is to be closed, a statement to that effect.
 - The expected date when the plant closing or mass layoff will commence and the expected date when the individual employee will be separated.
 - An indication as to whether or not bumping rights exist.
 - The name and telephone number of a company official to contact for further information.
- The issuance of a WARN notice triggers the State Rapid Response Dislocated Worker Unit, which will work with an employer to provide on-site job fairs.
- 48 hour notice to the Division of Unemployment Assistance (617-727-8221) of mass separation of employees (10 or more) prior to lay off.
- Additional Practical Issues (This list is not exhaustive):
 - Retention of accounting firm to pay payables and to collect receivables during the dissolution process after all the charity's employees have left for other jobs.
 - Retention of law firm to handle corporate dissolution and all legal needs of the organization during the dissolution process.
 - Requests received by the charity after closure of its operations but prior to corporate dissolution by the Supreme Judicial Court must be considered.
 - Requests that come to fruition after dissolution of the charity will need to be addressed.
 - Final tax filings such as Forms 990 must be submitted.
 - Pending tax refund claims should be pursued. Which charity will receive tax refunds if the refund is paid after the charity's corporate dissolution? Who will pursue the refund after the dissolution of the charity that is entitled to the refund?
 - Collection of abandoned property (e.g. checks received but not cashed by the organization) owed to the dissolving corporation.
 - Job Fairs for employees or referring employees to regional job fairs will be needed. Some major employers invite their competitors to conduct job fairs on site so that employees of the dissolving corporation can conveniently attend. The dissolving charity's interest is best served by affording its own workforce a smooth transition to their next position at another company.
 - Disposition and storage of medical records for 30 years, in the case of hospitals, and storage of administrative files of the dissolving charity. Will former competitors and other record storage facilities help for a one-time lump sum fee?

- Disposition (sale or donation) of equipment, personal property, drugs, and radioactive materials.
- Return of leased equipment and personal property to lessors and negotiation of accelerated lease terminations.
- Selection by the Trustees/Directors of similar charitable institutions for *cy pres* funds. Do the Trustees want to attach new restrictions on future use of transferred assets, e.g. so that those funds are used only within the local community previously served by the dissolving corporation?
- Internal and external communication plan regarding the closure of operations and the corporate dissolution. When will ambulances stop coming? When will patients stop coming? What signage needs to be removed and when?
- Provision for defense/pursuit/resolution of ongoing litigation, e.g. pending MCAD actions, pending medical malpractice actions, and any other pending litigation.

VI. Conclusion

The decision of dedicated Trustees or Directors of a public charity voluntarily to dissolve the charity as a corporation is often an anguishing one. Each major charity has a wide network of constituents, including the communities served by the charity, faithful donors, hard-working employees, dedicated volunteers, and neighboring businesses who may have been dependent on the nearby major public charity for their daily livelihood. In the cases of colleges, independent schools and hospitals, these charities are often the single largest employer in their locale. Cities and towns can be justly apprehensive about the closure of a major charity within its borders and the future of the charity's campus after closure.

Legislation has been filed to amend M.G.L. c. 180, Section 11A to simplify the voluntary dissolution process for those corporations without remaining assets and those with assets below a yet-to-be set dollar threshold. Massachusetts Senate Bill 2117 of the 2009-2010 Session, sponsored primarily by Senator Michael W. Morrissey, would permit a charitable corporation having no remaining assets to submit a petition for dissolution to the Division of Public Charities of the office of the attorney general. If the Division is satisfied that the corporation has or will become inactive and that its dissolution would be in the public interest, then the Division may approve the dissolution without need for the involvement of the Supreme Judicial Court.

Senate Bill 2117 would afford the Supreme Judicial Court the option to remain involved in the dissolution of a corporation with remaining assets. In that case, the petition for dissolution would still be filed in the Supreme Judicial Court. The Court would, as it does now, authorize the administration of the dissolving charity's funds for such similar charitable purposes as the Court may determine. However, this bill permits the Court by rule or order to provide that such petition and court authorization would not be required for dissolutions approved by the Division of Public Charities if the corporation has net assets not greater than whatever amount the Court may so provide. Since the close scrutiny of voluntary dissolutions is even today accomplished at the Division of Public Charities, the Court would do well to choose a high dollar threshold. Even if this legislative simplification becomes law, the closure of a major public charity will still take time, substantial funds and detailed legal attention.

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William Wise's practice focuses on compliance and ethics issues where he assists general counsels and legal departments in establishing compliance programs, ethics programs and instruction, and identifying "risks". In addition, he advises the White Collar Defense Team on matters involving civil and criminal fraud investigations, corporate governance, anti-money laundering, design and implementation of compliance programs, and administrative litigation with an added emphasis on emerging Compliance & Ethics issues.

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