



NONPROFIT STANDARDS

Summer 2017 Newsletter

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Three Critical Privacy Issues Every Nonprofit Entity Should Consider

By Deena Coffman, GSEC, CIPP/US, CIPP/E, CIPM, FIP

Most nonprofit organizations collect, use and store “personal information” of donors and staff. There are well over 200 laws, just in the United States, that mandate protections of this information and apply, in whole or in part, to nonprofits. All nonprofit entities should understand the requirements that TCPA, GDPR and U.S. state data breach/protection laws impose upon their organizations.

Just a few years ago, many entities were largely unaware of the impact data privacy and cybersecurity could have on their organization overall. Most categorized these issues as belonging to the IT or HR departments. Now, data-privacy class-action litigation has erupted and data breach announcements dominate the headlines.

Currently, in almost every survey conducted of boards and senior management, data issues rank as one of their three top concerns, if not their single greatest concern. Nonprofit entities would be well advised to tend to this important area which is often overlooked until it becomes a crisis.

TCPA

The Telephone Consumer Protection Act of 1991 (TCPA) was introduced in response to consumer sentiment toward unwanted telephone solicitations. Telemarketers calling during all hours—particularly the dinner hour—became a punchline and an irritant. TCPA has been updated several times over the years, and the most recent update tightens restrictions on calling without written permission, even if a “prior business relationship” existed. Nonprofit organizations are exempt from some, but not all, requirements under TCPA. For example, the “abandonment rules” are an exemption for nonprofits, and requirements for auto-dialers and prerecorded calls are different for nonprofit organizations than for commercial entities. While the requirements are less restrictive, nonprofit organizations still can’t afford to completely ignore TCPA, because some requirements do still apply, and the cost for getting this incorrect can be enormous.

The recent changes give the TCPA “teeth” by providing for a private right of action, effectively inviting consumers, the FCC and states’ attorneys general to join in enforcement efforts. Plaintiffs are able to recover the higher of their actual loss or \$500 for each violation. And, if the court finds that the defendant acted willfully or knowingly, the court has discretion to triple the amount to \$1,500 for each violation.

Organizations that conduct telemarketing should be tuned to recent changes in the TCPA. Professional plaintiffs are causing a rise in TCPA enforcement and there have been no shortage of multimillion dollar settlements. Interline Brands agreed to pay \$40 million to Craftwood Lumber to settle a suit alleging a TCPA violation by sending over 1,500 advertisements via fax. And, Bank of America agreed to pay \$32 million for violating TCPA through its use of auto-dialing technology and prerecorded voice messages without prior written consent.

TCPA has no cap on total damages—making it easy to imagine that an organization with a large roster of donors or potential donors could quickly expose itself to losses in the range of multiple millions of dollars.

How do you protect yourself from this exposure? Simple—get written consent from individuals before marketing to them via phone or fax.

State Data Breach Laws

Almost every U.S. state and territory has enacted laws requiring entities to protect sensitive consumer and employee information in their possession and, if that protection fails, to provide notification to the individuals so she or he is able to be alert to identity theft and fraud. These laws vary, but it is important to note that an entity must be informed of the evolving state laws that apply where their employees, customers and prospects reside and not just where the entity is located. These requirements were initiated in 2003 with California's law with other states following suit. Some states have also already updated their original laws to keep up with current technology standards and consumer expectations. With identity theft continuing to rise and awareness increasing, the trend will certainly continue.

Increasingly, state laws address issues beyond breach notification. Some states require specific security measures such as a written information security plan or encryption. At last count, four states had specific requirements for a written information security plan, three states require a dedicated employee responsible for information security and seven states require security provisions in supplier contracts. Penalties for violations can range up to \$500,000.

Some states require privacy policies to be posted. For example, since 2003 the California Online Privacy Protection Act (CalOPPA) has required that all websites that collect personal information about state residents post an online privacy policy if the information is collected for the purpose of providing goods or services for personal, family or household purposes. Most websites, even if not required, post privacy policies. Ensuring the privacy policy complies with applicable laws is a critical first step. It is important then to align technology and operations with the public-facing statements and to maintain that alignment as new systems and processes are adopted and the business grows. Some state laws even address internal privacy policies. In 2005, Michigan began requiring employers to publish internal privacy policies to address the proper handling of employee sensitive information. New York has adopted a similar statute as has Connecticut, Massachusetts, and Texas. As mentioned, states are working to keep pace with technology changes and evolving standards, which makes it important for entities to remain alert to developments.

General Data Protection Regulation (GDPR)

U.S. entities may, understandably, not be aware of developments in European privacy law. But, Europe recently made dramatic changes to its data privacy laws which will impact the way many U.S. entities do business. U.S. entities doing business with or within Europe (EU) or marketing goods and services (even if unpaid) to EU residents must update how they collect, handle and secure information that identifies a natural person, such as name, address or email address, or they risk facing heavy fines and penalties. Even entities that are not located in the EU may be impacted as their EU clients and suppliers may require compliance as a condition of continued business. This new regulation goes into effect on May 25, 2018, and contains important new operational requirements concerning data minimization, accuracy, accountability, purpose and storage limitations, and administrative and data protection that will require impacted organizations to begin making technology and administrative changes far in advance of the deadline.

The regulation also mandates that entities demonstrate compliance, which will require the creation of policies, procedures and documentation mechanisms. If your entity possesses data on EU residents, you are positioned to be impacted by this new regulation. If you market to or solicit donations from the EU market, you'll want to stay tuned to updates to the ePrivacy Directive (this is also called the "Cookie" Directive) which is expected to create as much disruption for U.S. entities.

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The GDPR authorizes regulators to levy remarkably steep fines in amounts exceeding €20 million or 4 percent of annual global revenue, whichever is higher. Germany and Spain have stated openly that they may move against U.S. entities quickly. France has mentioned codifying parts of GDPR earlier than 2018. Some example requirements likely to be of interest to nonprofit entities include the following:

- Consent must be "freely given, specific, informed and unambiguous." Silence, pre-ticked boxes or inactivity is not sufficient to provide consent. Much of the data currently in use was collected using "opt out" mechanisms. This will need to be remediated if the information is going to continue to be retained and used.
- If the data is being used because consent has been given, then that consent must be able to be withdrawn at any time and withdrawn "as easily as it was given." This will necessitate changes in processes and quite possibly technology in order to accommodate. This also means that the data belonging to that individual not only cannot be used going forward but must be erased.
- For data being used based on consent, the data subject has the right to request an inventory of all of the information an entity possesses on that individual. Accommodating these requests will require entities to establish mechanisms for receiving the requests, verifying the identity of the requestor, accurately and completely finding all relevant information to respond to requests and a documentation mechanism.
- A new "accountability principle" makes those that collect and use data responsible for demonstrating compliance with the general principles outlined in the regulation. (Demonstrating compliance is in the form of policies, procedures, impact assessments, documentation of consent, inquiry handling, responses and decisions, etc.)

Interpreting GDPR requirements strictly is likely to lead entities to incorrect conclusions. Special provisions for nonprofit organizations are present in the GDPR, but they are limited, so most of the regulation still applies to nonprofit entities just as it does for for-profit companies. Privacy rights are not absolute, and a balancing decision must be made by legal counsel familiar with EU privacy laws. The GDPR contains many different requirements and the requirements may or may not apply to all entities depending on various factors. To make correct decisions, counsel must know details on what data is processed, the circumstances around the original collection, what is done during processing, retention/disposition, access, security controls and onward transfers.

Data privacy is increasingly important and can, if ignored, have tremendous impact on a nonprofit. An annual privacy assessment is recommended to see that your technology, policies and operations are aligned with current applicable requirements.



Board Governance: A Board Member's Perspective

By Laurie De Armond, CPA

A nonprofit's governing body is integral to the success and effectiveness of the organization. Boards play an instrumental role in setting strategy and overseeing the use of an organization's assets to carry out its mission. The overall strength of a nonprofit board depends on the contributions of each individual board and committee member. That said, what exactly does it take to excel as a board member?

In a recent BDO KNOWLEDGE Nonprofit & Education webinar, I moderated a discussion on board governance with panelists Michael Forster, CFO of The Woodrow Wilson International Center for Scholars, and Thomas Waite, CFO of The Humane Society of the United States. Over the course of our conversation, Mike and Tom drew upon their in-depth experiences with nonprofit boards—serving as board members themselves and as liaisons in a management role.

This article highlights insights from the panelists into board member responsibilities and how nonprofits can position their boards for success.

First Timers: Preparing Board Members for Success

Nonprofit boards are often comprised of professionals from diverse career backgrounds and varying levels of experience in the nonprofit sector. When individuals first join the board, there is a dual responsibility for both the organization and the individual to bridge the initial knowledge gap and get board members quickly acquainted with their new role. What should organizations do to prepare incoming board members?

It's critical to create a formal onboarding process that all new board members follow:

- **Distribute a strategic plan.** Developing a clear strategy for your organization and providing an up-to-date document to all current and incoming board members will give the board a clear sense of where you're headed as an organization, what defines success for your programs and what goals you've outlined for the future.
- **Hold your organization accountable.** Once a clear strategy is established, it's important to execute on that strategy and track your organization's progress. Developing a "scorecard" and making that information available to your board will help individual board members stay in tune with the organization and identify how they can best calibrate their skills to benefit the organization.
- **Provide a holistic view.** Committee chairs should make sure all board members are well-versed in all the key issues impacting the organization, regardless of their specific expertise. Providing regular updates on the activities of each committee will help board members make fully informed decisions.

Off Script: Navigating a Crisis

Preparing for a Crisis

Whether it's a breakdown of mission, a financial squeeze or alleged fraud, crises carry serious implications for board members. When nonprofits find themselves in the midst of a crisis, it's often too late to implement a management and response program.

How can incoming board members prepare for surprises that may not have been readily disclosed by the board?

- ***Do your homework.*** Before making the decision to join a board, individuals need to perform a thorough due diligence to get a deep understanding of the organization's mission, finances and core challenges. Incoming board members should review all publicly available materials, such as the organization's Form 990, website, mission statement and chartering information. Oftentimes, any financial challenges the organization is experiencing would be evident on the Form 990.
- ***Take a deep dive.*** When individuals are invited to join a nonprofit's board, in many instances they already have some level of familiarity with the organization and its mission. But once they accept a board seat, they take on a fiduciary responsibility that requires a much deeper dive into the organization. It's imperative that incoming board members take the time to thoroughly research the role and identify how they can add value.
- ***Ask for resources.*** If an organization does not readily provide preparatory materials or have a formal onboarding process, incoming board members should ask for minutes from recent board meetings and standing committee meetings, as well as any formal reports on operations and outcomes. These documents will provide valuable insights into any large issues the organization is dealing with, and what steps the management team is taking to resolve them.

This article touches on only a few vital considerations for nonprofit organizations and board members.



Aligning Your People Strategy with your Organization Strategy = Results

Who Are You, as an Organization?

By Donna Bernardi Paul, SPHR, SHRM-SCP

Knowing who you are as an organization is paramount. What is your culture? What is your philosophy? What do you stand for? Why do your members, contributors, or users of your services choose your organization over another? What is it about your people that they like?

Aligning your Human Resource (HR) strategy with your business/operational strategy is key. See the article entitled, "Rising to the Challenge of Nonprofit Recruiting" that discusses this topic in the Spring 2016 issue of the Nonprofit Standard.

Knowing how to find the right people and get them to want to work for you and stay is the secret to a competitive advantage and includes the following:

Hiring the right people

Knowing what you want the individual to DO before you begin your search and determining if they fit within your culture is the formula for performance.

Performance = competence x energy²

Competence: Do they have the skills to do the job?

Energy: Do they have the traits necessary to fit with the culture (e.g., self-motivation, customer service, work ethic, sense of urgency, ability to get along with others, etc.)

Surround yourself with self-motivated people who care and keep them motivated. If you do not hire self-motivated people, you will never be able to motivate them without the carrot and stick approach.

Training and Development

Once you spend time and money hiring the right people, make sure that they have the training, development, tools and resources they need to be as productive as possible as quickly as possible.

Leadership

Employees want good leaders/bosses. Ensure that anyone who is responsible for managing others has been trained and is good at it. Resist the urge to promote people into positions where they are leaders/bosses if they are not good at these types of roles. You will lose employees because people join organizations but they quit leaders/bosses.

Career Development

Employees want growth and established career paths. If they cannot grow within your organization, they will leave in order to grow somewhere else. Do not spend resources training people only to lose them to another employer who will reap the advantages of your hard work.

Rewards & Recognition

Employees want to be recognized for their accomplishments and contributions. Do not punish good performers by giving them more work or reward poor performers by taking work away, continuing to give them raises and bonuses and allowing them to stay with you. It is demotivating for your good performers. Employees want to be part of the team. They want their ideas taken into consideration. They want to feel valued.

In the end, your organization's people strategy should align with the organization's overall strategy, including the organization's culture. Ideally, every people-related initiative should result in something that your members, contributors and users of your services value. A consultative and strategic HR approach can provide insights as well as subject matter expertise to help organizations leverage their employees to achieve the organization's goals and stay competitive.



IRS Focused on Charitable Donation Substantiation Compliance

By Jeffrey Schragg, J.D., CPA

Recent Tax Court cases have demonstrated the Internal Revenue Service's (IRS) increase in strict compliance with the substantiation requirements for charitable donations. For example, a \$64.5 million charitable contribution was recently disallowed because there was no written acknowledgment from the recipient at the time the return was filed. After the donation was made and prior to the return filing, the charity sent the taxpayer a letter acknowledging receipt of a donated facade easement. Unfortunately, this letter did not state whether the charity had provided any goods or services to the taxpayer, or whether the charity had otherwise given the taxpayer anything of value, in exchange for the easement. The taxpayer did include a copy of the appraisal report for the amount of the donation, a copy of the charity's letter, and Form 8283, Noncash Charitable Contributions, executed by the appraiser and by a representative of the charity with the return. The only item missing was the statement "No goods or services were provided in exchange for your donation" on the acknowledgement letter. (*15 West 17th Street LLC v. Commissioner*, 147 T.C. No 19, December 22, 2016). These eleven missing words caused the disallowance of the \$64.5 million contribution. Only \$5.8 million per missing word.

A similar result was recently provided in the donation of an aircraft on an amended return. Notably, the taxpayer didn't attach a Form 1098-C, Schedule B to his return. And while he did include a copy of a "potential" acknowledgement letter, that letter didn't acknowledge his gift and omitted the other mandatory information required. He did include a Form 8283, Noncash Charitable Contributions, executed by the appraiser and by a representative of the charity along with a copy of the appraisal.

The taxpayer also included a copy of a donation agreement that contained some required information, but it didn't include his and the other partner/donor's signature, his TIN, or certification of the organization's intended use for the aircraft, and so couldn't serve as de facto contemporaneous written acknowledgement. (*Joe A. Izen v. Commissioner*, 148 T.C. No. 5, March 1, 2017)

As these cases illustrate, it is important for nonprofit organizations to ensure that written acknowledgement letters they provide contain all the necessary requirements to substantiate a charitable donation. The contemporaneous written acknowledgment required to substantiate a charitable contribution of \$250 or more must contain the following information:

- Name of the organization;
- Amount of cash contribution;
- Description (but not value) of non-cash contributions;
- Statement that no goods or services were provided by the organization, if that is the case;
- Description and good faith estimate of the value of goods or services, if any, that the organization provided in return for the contribution; and
- Statement that goods or services, if any, that the organization provided in return for the contribution consisted entirely of intangible religious benefits, if that was the case.

In addition, a donor may claim a deduction for contributions of cash, check or other monetary gifts only if the donor maintains certain written records.



What the White House Tax Plans Means for Charitable Giving

By Laura Kalick, JD, LLM in Taxation

The White House's preliminary tax plan, released in late April 2017, keeps the itemized deduction for charitable contributions while eliminating most other itemized deductions. The plan, however, also proposes raising the standard deduction, which could impact taxpayers who itemize their taxes—and who are responsible for a significant portion of charitable giving. While the Internal Revenue Code (IRC) hasn't seen a major overhaul since 1986, the tax law as we know it today may not be the tax law even a few months in the future.

If and when tax legislation is passed, it is an unknown as to the effective dates of the new rules. Effective dates can range from the date of enactment, to tax years beginning after the date of enactment, or even to years in the future or retroactively (but tax legislation usually does not have a retroactive effective date, but that can happen). And different provisions will have different effective dates. Regardless of how tax code changes shape up, encouraging giving now—while the outcome is predictable—is imperative.

Below are some of the details of tax changes proposed in the White House's preliminary tax plan:

Lowering the number of tax brackets from seven to three: at 10 percent, 25 percent and 35 percent. It hasn't been specified which levels of income would be affected.

Elimination of many itemized deductions and increasing the standard deduction:

- Trump's plan proposes eliminating most itemized deductions outside of the charitable deduction and itemized deduction for mortgage interest. In particular, the elimination of the state and local tax deduction could significantly decrease the number of taxpayers who itemize their deductions.
- The Trump plan would also increase the standard deduction from the current \$6,350 for individuals and \$12,700 for joint filers to \$12,700 and \$25,400, respectively. This means fewer people may be itemizing, and therefore may not be as concerned about generating deductions through charitable contributions.

Estate tax:

- Trump has also proposed eliminating the federal estate tax, currently at 40 percent. Charitable contributions from an estate reduce the overall taxable value of the estate. If there is no estate tax, charitable bequests may be significantly reduced.

What does this mean for America's charities? Our advice remains the same as it did when we discussed tax reform in the Winter 2016 issue of the Nonprofit Standard—charities should encourage donors to contribute now to take advantage of deductions while they're still available to maximize their fundraising potential.



Meet SASB: Why Sustainability Metrics Are Smart for Nonprofits

By Lewis Sharpstone, CPA

I want to tell you about a relatively new standard-setting body that is shaking up the way entities communicate with their stakeholders called the Sustainability Accounting Standards Board (SASB). There are several lessons from the SASB that the nonprofit sector can use to deepen and improve the way they tell their stories.

What is SASB?

SASB's mission is "to develop and disseminate sustainability accounting standards that help public corporations disclose material, decision-useful information to investors." SASB takes an interesting approach by developing a specific set of sustainability metrics for each industry by collaborating and engaging in discussion with many companies and stakeholders.

The chair of the SASB Board is Michael Bloomberg, and the governing board consists of notable professionals, including former chairman of the Securities and Exchange Commission (SEC) Mary Schapiro and the former chairman of the Financial Accounting Standards Board (FASB) Bob Herz. The board members, without exception, are highly successful visionaries in their fields, many of whom have also dedicated large portions of their lives to public service.

To illustrate SASB's work and mission, consider the two primary documents GE publishes each year to demonstrate accountability to stakeholders: Its annual Form 10-K and its Integrated Summary Report. In contrast to the 10-K, which is required by the SEC to publicize annual financial results and aims to demonstrate profitability, the GE Integrated Summary Report is voluntary. In the first 24 hours after it was published, the GE Integrated Summary Report was downloaded more than 2,400 times. So, what is it? In GE's own words, it "links strategy, performance, board oversight, compensation and sustainability in a single document." Sustainability is such a driver of value at GE that it has its own website. Again, in its own words, "Sustainability at GE means aligning our business strategy to meet societal needs, while minimizing environmental impact and advancing social development."

If downloads are any indication, the public and potential investors care deeply about sustainability metrics in addition to the company's bottom line. The old notion that the job of corporate management is solely to maximize shareholder profits is already dead. Historically, little else drove company value beyond profits, and balance sheets comprised mainly tangible assets. To increase company value today, management teams are also focused on corporate social responsibility and reputation, which in turn is tied to how a company treats the environment, its employees and the community. SASB aims both to encourage companies to expand their disclosures beyond the limited story told by financial metrics and to standardize such metrics. Because stakeholders care about a variety of sustainability metrics, disclosing that information voluntarily gives investors and consumers better comparability among companies. For entities, measuring and reporting against the standards helps management gain alignment on the sustainability factors that are most likely to drive value.

The SASB standards call for each company that wishes to adopt the sustainability disclosures and standards to do so in a thoughtful and methodical manner, and SASB has developed numerous resources to assist. Companies will go through a process to select applicable and relevant sustainability topics, assess the current state of their disclosure and develop processes to gather the data they need. From there, they typically embed SASB standards into their reporting model and then present the information.

Across 12 broad industry categories, SASB has conducted an evidence-based standard-setting process for 78 subsectors. For example, restaurants are encouraged to disclose more than a dozen key sustainability metrics including, among others, energy consumed per customer, percentage of energy consumed that is renewable energy, water consumed per customer, percentage of food waste, percentage of food purchased meeting social sourcing standards and percentage of eggs purchased from cage-free sources.

What does this mean for nonprofits?

First, it's important to understand that SASB's mission is very narrow: to assist public companies with sustainability reporting. While assisting nonprofits is not in its mission, there are important takeaways in our view. Nonprofits can—and should—engage in the same thoughtful and methodical process to figure out what their stakeholders really want to know about them, and then report accordingly. Just as investors in the for-profit world are placing more emphasis on intangible assets, donors value more than pure financial measures of success when evaluating and comparing nonprofits. For example, returning to SASB's standards for restaurants: nonprofits that provide meals to the homeless or to seniors may find donors and stakeholders to be interested in sustainable food sourcing practices or cage-free egg use and might benefit from adding such disclosure. By taking their disclosures beyond purely financial measures, nonprofits might be able to better communicate their unique story.

The emergence of SASB is also indicative of a much broader trend around the shrinking divide between nonprofit and for-profit organizations. Some for-profit businesses now describe themselves as “mission-driven” or “values-driven.” Simultaneously, nonprofits have come to accept that they need to focus more on having profits or surpluses to remain viable. The historic lines between for-profits and nonprofits are blurring and may even be gone soon. Like the term “charity” before it, many have argued the term “nonprofit” could become a dinosaur.

SASB's use of the term “sustainability” straddles the nonprofit/for-profit line in a new, out-of-the-box-way. First, it evokes the notion of reporting the broader effects of an organization's activities on our planet. Nonprofits and for-profits alike could benefit by considering which sustainability disclosures their stakeholders want to see. Second, it evokes the notion of reporting the potential longer-term effects of an organization's decisions on its own sustainability. Going back to the sustainable food sourcing example, a nonprofit providing meals for the homeless that has the thoughtfulness and foresight to use sustainable sourcing and cage-free eggs is likely to have greater long term prospects for self-sustainability than another organization that doesn't consider those things.

Inspired by SASB, I'd suggest it's time to start the ball rolling and encourage the nonprofit sector to develop some sustainability metrics. Nonprofits would be wise to stay ahead of this trend by measuring and showcasing their sustainable practices and the positive impact of their activities, or they could be left behind. Mission is, and always has been, the backbone of nearly every nonprofit organization, and just like in the for-profit world, adopting sustainable values can be a differentiator for nonprofits, regardless of their area of focus.