

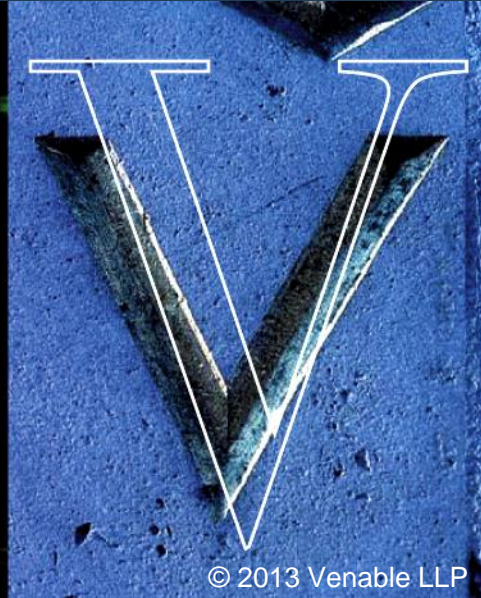
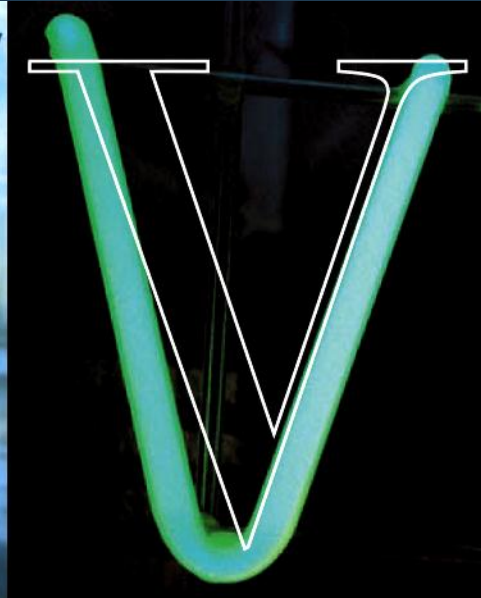
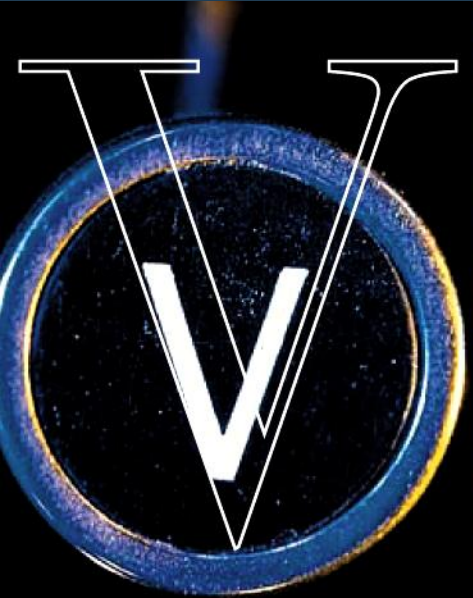
## *Nonprofit Executive Summit:*

Bringing Nonprofit Leaders Together to Discuss Legal,  
Finance, Tax, and Operational Issues Impacting the Sector

Thursday, September 26, 2013

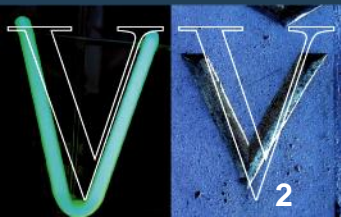
Venable LLP

Washington, DC



# Agenda

- Keynote Address: The Federal Tax Landscape for Nonprofits: View from the Hill
- Risk to Relevance: Protecting Your Nonprofit's Business Model
- In the Wake of the IRS Exempt Organizations Scandal, What Changes Are in Store for the Future and What Does It Mean for Your Nonprofit?
- Effective Governance: Top Ten Tips for Ensuring the Success of Volunteer Leaders
- Building and Protecting Your Nonprofit's Brand in Social Media: Managing the Legal Pitfalls
- International Opportunities and Pitfalls for Nonprofits





***Keynote Introduction:***

**Brian L. Schwalb**  
**Partner and Vice Chairman,**  
**Venable LLP**

*Keynote Address:*

**The Federal Tax Landscape for  
Nonprofits: View from the Hill**

# The Federal Tax Landscape for Nonprofits: View from the Hill

KEYNOTE SPEAKER



*Tiffany P. Smith*

Tax Counsel

U.S. Senate Committee on Finance

Majority Staff



*Panel 1:*

**Risk to Relevance:  
Protecting Your Nonprofit's  
Business Model**

# Risk to Relevance: Protecting Your Nonprofit's Business Model

## PANELISTS



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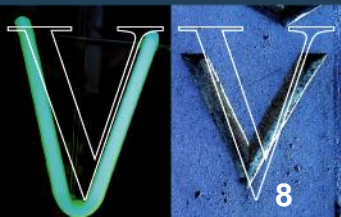


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# Panel Discussion Areas

- Process and timeline for addressing key risks
- Engaging stakeholders in sustainability strategy
- Business model impact of technology/social media
- Government policy role in challenges/opportunities
- Impact of generational shifts in growth plans
- Current and planned strategic collaborations
- Changing methods of working with staff/boards





# Panel Discussion Areas

- Tax exemption: Net benefit or burden?
- International expansion for growth and relevance
- Discounting as a slippery slope
- Accountability of program staff
- Perception of the sector - special interest/taxpayer ROI



*Panel 2:*

**In the Wake of the IRS Exempt Organizations Scandal, What Changes Are in Store for the Future and What Does It Mean for Your Nonprofit?**

# In the Wake of the IRS Exempt Organizations Scandal, What Changes Are in Store for the Future and What Does It Mean for Your Nonprofit?

## PANELISTS



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# Topics

- Recap of IRS Developments
- Review of Changes to Exempt Organizations as a Result
- What does this mean for you?
  - Short Term
  - Long Term
- Ongoing IRS Enforcement Initiatives
- Conclusion/Q&A



# Recent IRS Developments

- May 10, 2013 — Lois Lerner before ABA
- May 14, 2013 — TIGTA Report Released
- May 17, 2013 — Ways and Means Hearing
- May 21, 2013 — Senate Finance Committee Hearing
- Numerous ongoing hearings and high-level departures follow



# “Scandal” Summary

- Inappropriate criteria for scrutinizing applications (“tea party”)
- Substantial delay in processing applications
- Issued inappropriate information requests
- Much debate over the political aspects
  - Were only conservative groups targeted?
  - How high up the chain did this go?
- Political aspects not our focus today
- Findings of report indicative of larger, ongoing IRS issues about responsiveness, resources



# Who Is in Charge?

IRS Commissioner	
<u>Out</u>	<u>In</u>
Steven Miller	Joe Grant
Joe Grant	Danny Werfel
Danny Werfel	John Koskinen (Nominated)

OE/GE Commissioner/Director	
<u>Out</u>	<u>In</u>
?	Michael Julianelle
Lois Lerner (Suspended)	Kevin Corbin



# Short-term Impact—Opportunities for Nonprofits

- New regime; renewed focus on timeliness
  - What about cases from the “old” regime?
  - What about other areas of exempt organizations (e.g., examinations)?
- Processes for expedited treatment and avoiding delay
  - 501(c)(4) special process
  - Declaratory judgment
- Self-certification — (c)(4), (c)(6)
- Opportunities for existing exempt organizations to take advantage of current disarray





# Long-term Impact—From the Ashes

- Possible longer-term ramifications:
  - Streamlined application approval process
  - Interactive web-based Form 1023
  - More compliance projects to focus enforcement
  - Increased IRS and state coordination
  - Greater interest in self-determination (c)(4), (c)(6)
  - Potential increase in pursuit of declaratory judgment for delayed applications
- Impact of House and Senate tax reform initiatives



# Areas of Scrutiny Not Changing

- UBI sources, income and expense allocation methods, and substantiation of related NOL's
- Executive Compensation approval and benchmarking
- Self-determination compliance (c)(4), (c)(6)
- Large Private Foundation compliance/excise tax
- Employment Taxes (NRP program)
- International Activities (discretion and control)
- Group Rulings/Exemptions/Filings
- Mortgage Foreclosure Assistance Groups
- Political Activities 1120-POL filing requirements



# Reference Materials

- TIGTA Report and related article “Tools for bypassing IRS Delays”
- IRS Initial Assessment and Plan of Action 6.24.13
- IRS Colleges and Universities Report and related article “A Wealth of Information”
- IRS TE/GE 2013 Work Plan



*Panel 3:*

**Effective Governance:  
Top Ten Tips for Ensuring the  
Success of Volunteer Leaders**

# Effective Governance: Top Ten Tips for Ensuring the Success of Volunteer Leaders

## PANELISTS



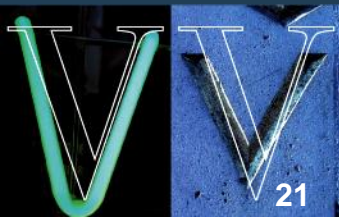
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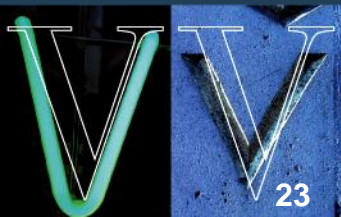
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# 10 Pervasive Governance Myths

## 10 Governance Myths

1. You won't have to do anything when you get on the board.
2. We are non profit, our meetings and records are open to the public.
3. We can't make or save any money as an exempt organization.
4. Because we are volunteers they wouldn't evaluate our performance (or fire us.)
5. Micromanagement or supervision is our job.



## 10 Governance Myths

6. Working on a board is volunteer work—not corporate governance.
7. We should be a “working” board not a policy board right now.
8. I serve on a fundraising board, so governance rules don’t really apply to my work.
9. Some members are micromanaging. I need more from the board—but not managers.
10. My board is not engaged.





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# And 10 Tips for Ensuring Success

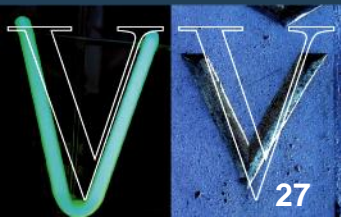
# 10 Tips for Successful Governance

1. Assemble an appropriate board
2. Understand and talk about expectations
3. Focus on board chair/executive leader relationship



# 10 Tips for Successful Governance

4. Engender oversight, insight, and foresight
5. Seek ownership, not just stewardship
6. Conduct board and committee self-evaluations\*



# BOARD EVALUATION

Board evaluation is an approach to improving *governance* --- with the intent to maintain a high performing board. The chief elected officer (not staff) leads the process. Input will be treated with confidence.

Indicate your understanding of and offer recommendations for these governance aspects.	Very Comfortable	Somewhat Comfortable	Somewhat Uncomfortable	Very Uncomfortable	Not Sure N/A
<b>Mission and Strategic Direction</b>					
1. Board efforts advance the mission, vision, values and goals.					
2. The strategic plan portrays an image of the organization in 3, 5 or 10 years.					
3. Meetings and agendas are organized to achieve the mission and goals (and avoid operating matters.)					
Comments:					
<b>Governing Documents</b>					
4. Board understands and upholds all governing documents.					
5. Policies are adopted and followed to guide current and future leaders.					
Comments:					
<b>Leadership, Succession and Transparency<sup>1</sup></b>					
6. Board selection process is transparent and ensures leadership succession.					
7. Board orientation and self-assessment is sufficient.					
8. New ideas and people are respected.					
Comments:					
<b>Budgeting, Finances and Infrastructure</b>					
9. Board adopts annual budget and is engaged in monitoring finances.					
10. Reserves/savings and investment strategies are appropriate.					
11. Financial reports are clear, accurate and timely.					
12. Annual audit and auditor's recommendations are reviewed.					



## 10 Tips for Successful Governance

7. Follow the governing documents (Duty of Obedience) – policies, bylaws, articles.
8. Avoid mission creep.\*
9. Conduct an annual orientation.\*
10. Teach risk management.



## BOARD RESPONSIBILITIES

Serving on the Board of Directors is a rewarding and important responsibility. This guide informs volunteer leaders of the unique aspects associated with governing a not-for-profit organization.

*"The board governs ...  
... the staff manages."*

**Leadership:** Volunteer leaders are responsible for the direction of the organization. The board governs, develops policy and sets a course for the future. Maintain focus on the mission and strategic goals --- avoid micro-managing the organization and staff. Functions (4):

- Governance
- Policy & Position Development
- Visionary - Future Focus
- Fiduciary

**Management:** Paid staff and contractors are responsible for the administration of the organization. Staff act as partners to the board, advancing the goals and strategies, while taking care of the daily administrative needs unique to nonprofit organizations.

### Unique Terminology

**Not-for-Profit** refers to the legal corporate status of the organization. (It does not imply an exemption from paying or collecting *state sales tax*.) **Nonprofit** is the casual reference to Not-for-Profit

**Exempt Organization** is a reference to the IRS designation exempting the organization from paying most federal income tax (with exception of **UBIT - Unrelated Business Income Tax**.)

IRS 501(c)(3) designation most often is referring to organizations with a religious, charitable, scientific or educational purpose.

IRS 501(c)(6) designation refers to trade associations, business leagues and professional societies.



7-09 © RCH

### Board Responsibilities

1. Determine and advance the organization's mission and purposes.
2. Select the chief paid executive (*not staff*) as well as CPA and attorney.
3. Support the chief executive and assess performance periodically - usually measured against the strategic plan.
4. Ensure effective organizational planning.
5. Ensure adequate resources (funds, time, volunteers, staff, technology, etc.)
6. Resource and financial oversight.
7. Determine, monitor and enhance programs and services.
8. Promote the organization's image.
9. Ensure legal and ethical integrity and maintain accountability.
10. Recruit and orient new board members, and assess board performance.

*(Adapted from Ten Responsibilities of Nonprofit Boards [www.BoardSource.org](http://www.BoardSource.org))*

### Scrutiny of Nonprofits

In response to corporate scandals, government has increased scrutiny of boards of directors. Sarbanes Oxley (SOX) was adopted in 2002. In 2008 the SOX requirements were applied to nonprofits. Boards are expected to maintain their accountability, independence and transparency while governing. Policy questions in IRS Form 990 include:

- Audit and Audit Committee
- Whistleblower
- Compensation
- Document Destruction
- Conflict of Interest
- Public Records

### Insurance and Volunteer Immunity

State and federal governments afford certain protection to volunteer leaders. While the volunteer may have some protection, the organization is still open for legal suits. Insurance coverages add further protection for volunteers and organization.

**Directors and Officers (D&O) Liability** may cover legal defense for employment, copyright, and antitrust claims, for instance.

**General Liability** insurance covers property damages and injuries relating to the organization.

**Fidelity Bond** covers losses resulting from fraudulent or dishonest acts committed by an employee.

**Meeting Cancellation** covers the loss of revenue due to a cancellation, curtailment, postponement because of weather, strikes, etc.

*(Contact legal and insurance counselors for assistance.)*

### Legal Principles

**Duty of Care** requires leaders to use reasonable care and good judgement in making their decisions on behalf of the interests of the organization.

**Duty of Loyalty** requires leaders to be faithful to the organization, avoiding conflicts of interest.

**Duty of Obedience** requires leaders to comply with governing documents (i.e. bylaws, articles of incorporation, policies, etc.)

### Board Tools

Documents available to leaders (often in a **Leadership Manual**.)

- Statement of Purpose (Mission)
- Articles of Incorporation
- Bylaws
- Policy Manual
- Strategic Plan
- Financial Statement - Budget
- Meeting Minutes
- Organizational Charts
- IRS Forms
- Frequently Asked Questions

Treat all information with *confidentiality*.

**#1 lie --- "You won't have to do anything when you get on the board!"**

appointed annually, on-going committee work.

**Ad Hoc** - formed for specific or immediate needs and disbanded upon completion of work (a.k.a. Task Force)



### High Performing Boards

**"Mission Driven - Member Focused"**

- **Accountable** and follow through for your commitments.
- Uphold *governing documents* and expectations.
- **Determine to be successful** - ENVISION success.
- Work as a **team** - no individual has an agenda more important than the whole.
- Value and **build relationships** and respect diversity.
- Focus on **outcomes** and the impact the organization can have.

### Common Sense

- a) **Prepare** for meetings; read, read, read!
- b) Respect the chairperson, **agenda** and **rules of order**.
- c) Bring a calendar, start and end on **time**.
- d) Know the **mission and goals**.
- e) **Listen** more than you speak.
- f) Check **personal** and political agendas at the door.
- g) Respect **confidentiality**.
- h) You don't **speak** for the organization **without authority**.
- i) **Support** the board; don't bad-mouth any action or person. (Dissenting votes may be noted in the minutes - not outside the meeting.)

### Strategic Planning

A strategic plan focuses the board on mission and goals for 3 to 5 years. It serves as a roadmap. **Great board members can think beyond their term of office and outside their area of expertise.**

**Environmental Scan** - review of external and internal influences on the organization, as well as strengths, weaknesses, opportunities and threats (**SWOT**).

**Mission** - statement about what the organization is; whom it serves; and the services it provides; short with PR value.

**Vision** - inspiring, long-term desired outcome; image of success.

**Values** - guiding principles of board and staff.

**Goals** - broad competencies to advance the mission. Usually just 3 to 7 so as not to exhaust resources, volunteers, staff.

**Strategies** - advance the goals; creative efforts to achieve the mission and serve stakeholders/members.

**Action Steps** - fit within the strategies; the actions, assignments, deadlines, etc. AKA annual "operating plan" or "business plan."

**Plan Champion** - the person (staff and/or volunteer) who keeps focus on the plan.

### Risk Management

Protect the organization. Be aware of fiduciary responsibility, contracts, audit results, insurance, IRS requirements, values and ethics, apparent authority, antitrust, etc.

**Public Records** requests for the organization's annual federal tax return (Form 990, 990-EZ) must be made available for the last three years. Significant fines occur for noncompliance.

**Antitrust Violations** occur when two or more persons from the same industry or profession discuss supplies, processes, prices or operations. Remove yourself from any conversation that would change how business is conducted because of an agreement among competitors.

**Apparent Authority** arises when a board chair, though *not* granting actual authority, permits a committee or chapter to behave as if it had authority. Authority rests with the chairman and **may not be assumed** by others.

**Financial Audits** annually to protect board and staff, relying on an audit committee to select, oversee and report on the process.

**Conflicts of Interest** disclosed at the start of the term and throughout the year.

**Board Responsibilities - Laminated** \$12 ea. or \$9 ea. for 3 or more + \$4 Order by e-mail [bob@rchcae.com](mailto:bob@rchcae.com) Phone 850/570-6000 [www.nonprofitcenter.com](http://www.nonprofitcenter.com) 335 Beard St., Tallahassee, FL 32303

**Publications and Seminars**  
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*Building an Association Mgmt. Co.* - \$39  
*How to Write a Policy Manual* - \$39  
*The Perfect Board* by Cal Clemons - \$17

- Strategic Planning
- Board Development, Orientation
- Operational Audits, Systems
- Best Practices, Mgmt. Seminars

Bob Harris, CAE 7-09 © RCH

# Plan on a Business Card



## TMA2015

Adopted by the TMA Board of Trustees  
September 2008

### Vision

To improve the health of all Texans.

### Mission

TMA supports Texas physicians  
by providing distinctive solutions  
to the challenges they encounter  
in the care of their patients.



Physicians Caring for Texans

### Goal 1: Practice Viability

Protect, improve, and strengthen  
the viability of medical practices  
in Texas.

### Goal 2: Healthy Environment

Ensure continued success in  
legislative, regulatory, and legal  
interventions to enhance the  
environment in which Texas  
physicians practice medicine.

### Goal 3: Trusted Leader

Strengthen physicians' trusted  
leadership role within their  
communities.

### Goal 4: One Voice

Enhance the powerful,  
effective, and unified voice  
of Texas medicine.





*Panel 4:*

**Building and Protecting Your  
Nonprofit's Brand in Social Media:  
Managing the Legal Pitfalls**

# Building and Protecting Your Nonprofit's Brand in Social Media: Managing the Legal Pitfalls

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# Social Media – Everywhere



# How Does Social Media Work for You?

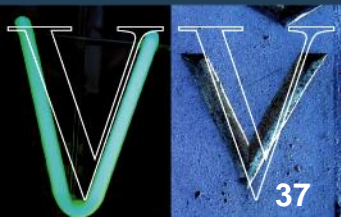
- Promotion + advertising
- Cultivate a brand
- Community building
- Fundraising
- Recruitment

The best returns appear to come from diversifying across networks rather than focusing solely on the latest “it” platform?



# When Social Media Works Against You

- Defamation
- Others' intellectual property rights
  - Copyright
  - Trademark
  - Right of publicity/privacy
- Your intellectual property
  - Monitoring/enforcement
  - Contractors and work-for-hire
- Advertising/disclosures



# Laws – Evolving



# Defamation

## ■ Restatement (Second) of Torts Sec. 559

- Act of harming reputation of another through false statements to a third party.
- Occurs when you have (a) false or defamatory statement concerning another person, (b) communication or publication to a third party, and (c) harm to third party

## ■ When might this arise?

- Offensive, negative user comments
- Criticism, outlandish insults
- Companies injured by anonymous speakers online can use discovery to learn the identities.

## ■ Possible with social media publication, display, or posting

- “Publisher Liability”: Party who publishes the defamatory statement
- “Distributor Liability”: Party who repeats the defamatory statement with knowledge or reason to know its contents

## ■ Comments made by others can be attributed to the organization

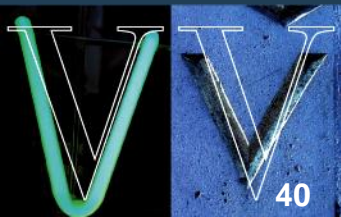


# Defamation



## ■ How to Avoid?

- Federal Communications Decency Act of 1996 - § 230
  - Pattern behavior. Essentially, there is different treatment online
  - Only possible with information or content published or provided by another person
  - Immunity for interactive computer service if (a) voluntary, good faith action to restrict access or (b) enablement of technical means to restrict access. Won't be treated as publisher or distributor
- Beware of informal nature of social media networks
- Utilize disclaimers and terms of use
- Enforce a takedown policy
- Refrain from commenting on third-party posts
- Remain mindful of trade secrets and confidentiality
- Consider available screening capabilities for third-party hosts





# Promotions and Contests

- Sweepstakes and contests are popular but heavily regulated
  - Including Terms and Conditions of social media sites
    - Facebook – may Promote, but cannot administer (collecting entries, notifying winners) without prior approval
- Requiring a donation to enter = Lottery under most state laws
  - Payment, chance, and prize
  - Registration is required
- Take away:
  - Many contests governed by state law
  - Control through Use Terms and limits on participation



# Intellectual Property: The Basics



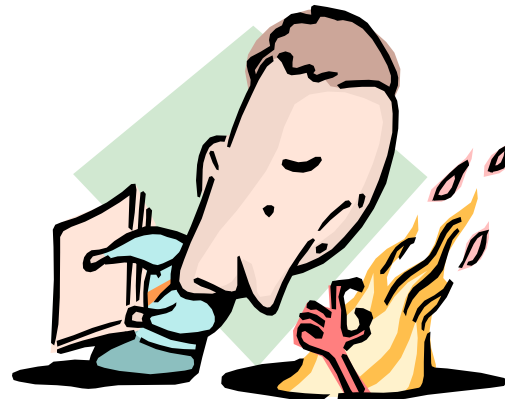
- Copyright
  - Protects creative expression fixed in any tangible or electronic medium, e.g., words, designs, audio-visual content, music
- Trademark
  - Trademarks protect against consumer confusion by protecting indicators of source, including company name, any logos, brands, product names, trade dress
- Patent
  - Protects inventive concepts



# Why Does IP Ownership Matter?

- Only an IP owner intrinsically has the right to stop others' unauthorized use of that IP
- Only an IP owner has the right to profit from others' authorized use of that IP
- In some cases, others' unauthorized use of your IP may dilute the strength of your IP, e.g., trademarks

*Even the best intentions can be spoiled!!*



# Trademarks

- Trademark issues are always possible when using third-party marks
- Safest course: Seek permission
- Don't be an imposter
- Fair use in trademark context is limited: Descriptive, nominative, and parody
- Be especially careful in commercial context. Commercial activities can include advertising, donation, membership, event, and program planning. (All social media?)
- Don't assume "Fair Use" because of non-profit or tax-exempt status
- Avoid using others' trademarks or in search terms, domain names, or user names
  - No DMCA-like immunity for trademark use, but many implement similar policies



# Copyrights

- **Social media is essentially about the content and further communication and interaction between persons online**
- **Know the network operator rules of the road on re-posting, tweeting, pinning, etc., content created by another**
- **Legal framework**
  - Possible low level of creativity for copyright protection. What about a tweet?
  - Copyright protection is automatic upon creation
  - Exclusive rights: reproduction, distribution, public display, and public performance
- **Be mindful of copyright ownership**
  - Who owns work on social media?
  - Work-made-for-hire doctrine, written assignments of rights
- **Will the Digital Millennium Copyright Act protect you? Pattern behavior to take advantage of Sec. 512(c) Safe Harbor Provision**
  - Optional “safe harbor” for online service providers engaged in ... storage at the direction of a user
  - Must have: repeat infringer policy, no actual or “red flag” knowledge, or if knowledge, expeditious removal; no direct financial benefit + right and ability to control; takedown response; registered DMCA agent



# The Pinterest Question: “But, What about Fair Use?”



- (1) The purpose and nature of the use;**
- (2) The nature of the copyrighted work;**
- (3) The amount and substantiality of the portion used; and**
- (4) The effect of the use upon the potential market for or value of the copyrighted work.**

“Our goal at Pinterest is to help people discover the things they love. Driving traffic to original content sources is fundamental to that goal.”

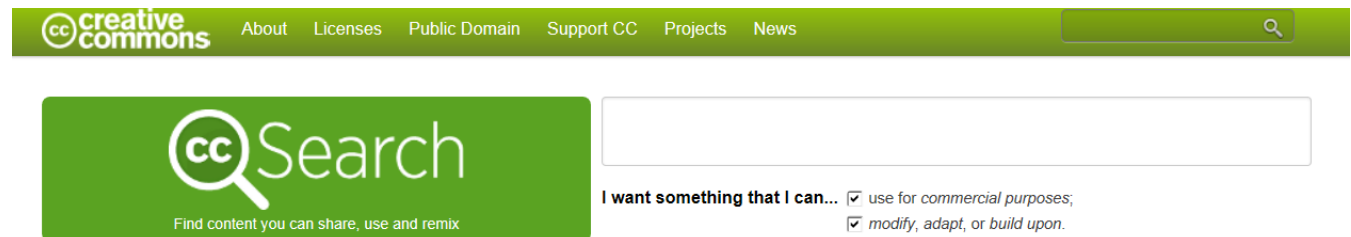
– Pinterest.com



# Argh, so many Copyright Rules.

(Nope. Just 3.)

- Establish a DMCA policy that provides an e-mail address for complaints
  - Make sure someone checks it regularly
- If you did not draw it, film it, shoot it, or write it, do not post it without permission
- Find great, licensed content at Creative Commons!
  - Stop using Google Images to create content. Please.



# The Quiet Rights: Publicity and Invasion of Privacy

- Publicity: celebrities/privacy: the “hoi polloi”
- Triggered by commercial use, broadly interpreted
- Applies to uses on social media
- Layered underneath copyright protection
- Always get written releases from photo subjects, even if you have copyright permission to use the photo
- (We’ll talk about personal privacy and related trade practice later)





# Protecting Your IP on Social Media

- Register, register, register (IP, Search, and Account)
- Monitor use by others and enforce rights via policy statements, DMCA, demand letters, and legal proceedings
  - BUT, be mindful that on social media, cease and desists go VIRAL! [World Nutella Day vs. Jack Daniels cover]



- Balance IP protection with reputation protection. Many times, it's an innocent infringer
- Appropriate use of symbols – ©, ®, ™
- And, perhaps most importantly...



# Obtaining Ownership of IP

- General rule: organizations own IP created by their employees, but not their contractors
  - BUT, employment status is not always clear and must be within the scope of employment
- Fix: all independent contractors and volunteers should sign a written work-made-for-hire agreement and copyright assignment
- A “work made for hire” is a work [that fits into one of nine enumerated categories and] . . . “if the parties expressly agree in . . . [writing] that the work shall be considered a work made for hire”



# Limit Apparent Authority and Protect Corporate Identity



- Limit individuals who have authority to speak on entity's behalf and then prohibit all others from claiming or implying authorization to speak on entity's behalf
  - Create process for gaining authorization to speak on entity's behalf
- Prohibit unauthorized individuals from using entity's intellectual property, logos, trademarks, and copyrights in any way or manner
- Prohibit employees and members from using entity's name in any online identity (e.g., username, screen name)



# Considerations for Developing a Social Media Policy

- Be clear
- Tailor to fit; don't use generic template
- Focus on planned online activities, both do's and don'ts. How will entity manage its presence (internally and externally). Try to maintain consistent approach across platforms and networks
- Distinguish between business use and personal use
- Don't ignore third-party social media network operator policies. Network operator policies provide limited protection, although they offer some enforcement mechanisms
- Involve multi-disciplinary team (HR, legal, marketing, and executive)
- Be consistent with other organizational policies and procedures (and require compliance with them)
- Consider level of monitoring
- Consider shelf-life of archived content
- Use appropriate disclaimers
- Communicate policy (notice and training)



## Catch-all Disclaimer

- Nothing in this policy is intended to interfere with or restrain any employee's exercise of his or her rights under Section 7 of the National Labor Relations Act.



# Information Security – the “Dark Side” of Social Media

- Over 1.2 billion Facebook users
- Creates a “target-rich environment” for hackers



# Malware

- Primary attack vector is malware injection
- Multiple different injection methods
  - Rogue links
  - Compromised ad sites
  - Ransomware
- McAfee: Koobface trojan up 3X in Q1 2013



# Malware Intent

- Steal passwords
- Log keystrokes
- Access company info
  - PFI
  - IP
- Corporate bank account takeover
  - ACH
  - Wires





# Key Defensive Measures

- User awareness
- AV meticulously updated
- Server/workstation patches meticulously updated
- Belt and suspenders approach



*Panel 5:*

**International Opportunities and  
Pitfalls for Nonprofits**

# International Opportunities and Pitfalls for Nonprofits

## PANELISTS



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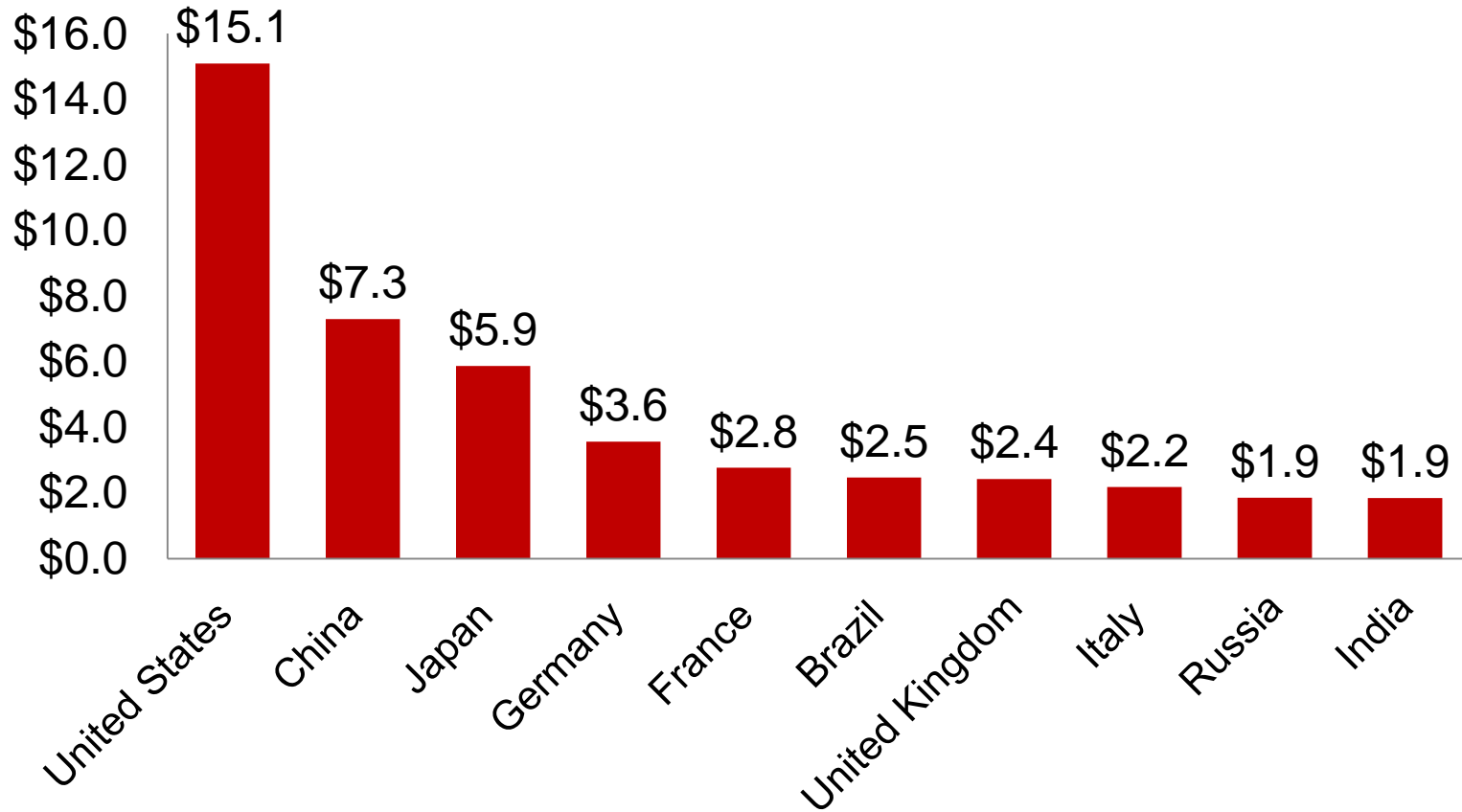


# Why are we concerned about international opportunities anyway?

A quick overview of a couple trends...

# Largest Global Economies in 2011

GDP in Trillions US \$

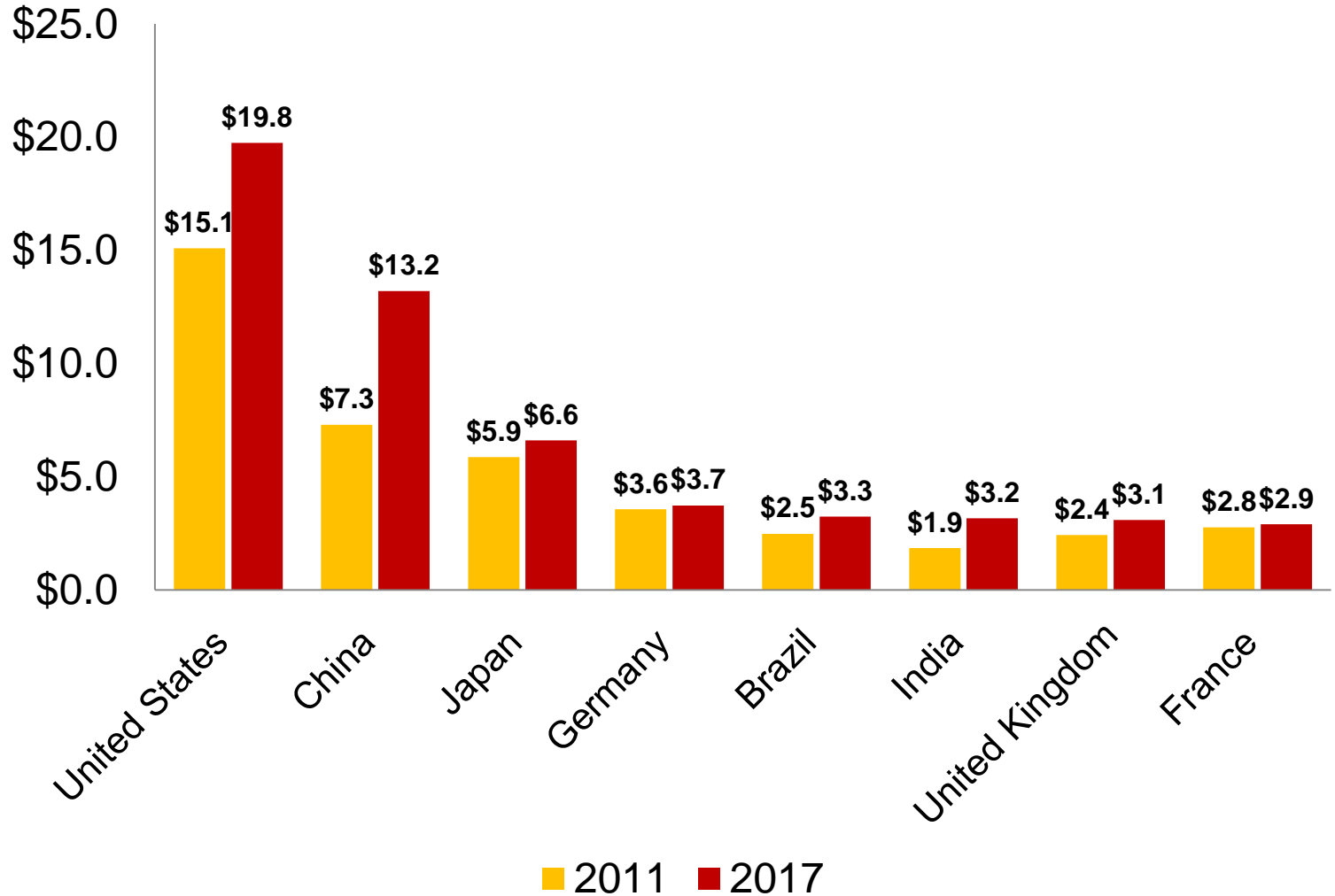


Total Global GDP – 2011

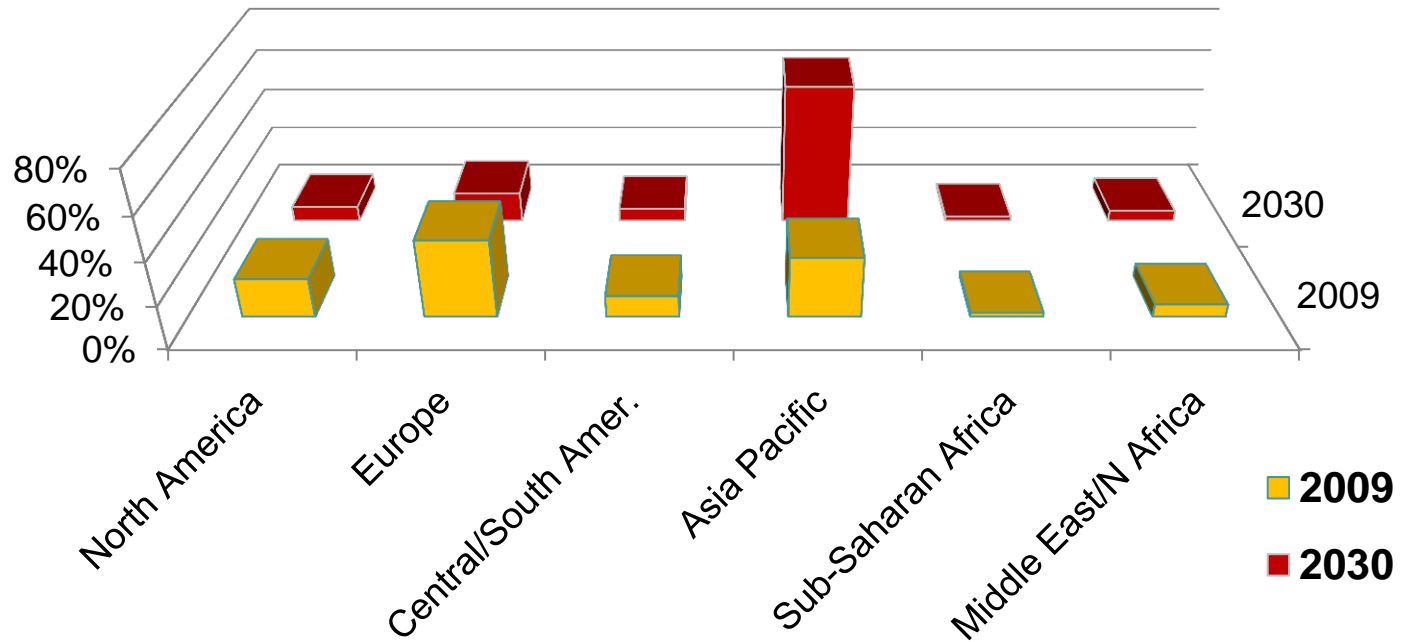
**\$69.98**



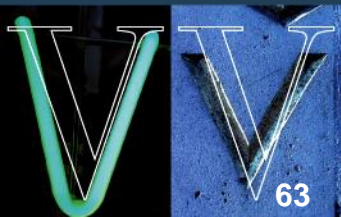
# 2011 and Projected 2017 GDP



# Global Middle Class by Region



Major shift in world middle class – and the disparity between classes



# Organization and legal considerations in a global environment

And a few lessons learned...



# Road Map to Successful and Compliant International Operations

- **Identify Goals in the Foreign Market:** What's next?  
Considerations in entering foreign market
- **Form of Entity:** What type of operation best meets your goals?
- **Foreign Jurisdictions:** What locale works for activities?
- **Contracts:** Essential provisions for protecting your interests
- How best to protect your **Intellectual Property**
- **Insurance and Employment** Issues
- **U.S. and Foreign Tax and Informational Filings**
- **Accounting** Issues
- **Compliance:** Anti-Corruption Laws and U.S. Export Controls and Economic Sanctions



# Goals in the Foreign Market

- Questions to ask?
  - **What is your goal in the foreign jurisdiction?**  
Identifying what you'd like to accomplish is the first priority. It will dictate almost all of the decisions that follow.
    - EXAMPLES: Trade fair; educational event; networking; formalize already ongoing work; partner with a similar org. to increase membership; gain access to market
  - **Long term/Short term?** Host of a one-time event or Establish a presence
  - **Partner or independent?**
  - **Activities?** Education; sales; fairs; membership dues; distribution of materials
- Answers will direct considerations as to type of organization or entity to establish abroad, if any



# Phased Approach

- **Recommend:** If you are starting out, may be wise to ‘dip your toe in the water’ first!
- **Specific/Isolated Event v. Ongoing Presence**
  - If your organization does not yet have an international presence:
    - Host a one-time conference
    - Use of Association Management Company or “Trade Fair Organizer”
  - Affiliation with a similarly-situated association (i.e., partner with a local association entity)
  - Joint Venture
  - Local office of a US nonprofit
  - Establish an “In-country Branch” (or Chapter)
  - Establish a nonprofit entity under local law



# Form of Entity: Organizational Options

**Least Control**      **Least Risk**

## Considerations:

Host Conference w/o Contracting w/ Local Entity

1

## Association Management Companies:

- Careful agreement review: Know what and with whom you are contracting
- Revenue-producing event?
- Logistics
- Specific registration requirements? (e.g., bank accounts)

2

## Affiliation with Similarly-Situated Entity

- Due Diligence re: Organization/Association
- Agreement negotiations
- Under local laws, are you “Doing Business”?
- Use of IP

3



# Organizational Options (cont'd.)

## Considerations (cont'd.):

### Joint Venture

- Due diligence re: Organization/Association
- Agreement negotiations
- Under local laws, are you “Doing Business”?
- Use of IP
- Compliance with FCPA and other national anti-bribery legislation

4

### In-Country Branch v. Independently Incorporated Affiliate

- “Doing Business” under local laws
- Local employment and tax considerations
- Variation in nonprofit treatment under local law
- “Tax Exempt” registration requirements
- Foreign recordation of IP recommended

5

**Greatest Control**      **Greatest Risk**



# What Geographic Location Makes the Most Sense for Your Nonprofit?

- **Factors to Consider in Choosing a Locale:**
  - One-time event or establishing a presence? *Always the threshold question.*
  - Any onerous “registration” requirements?
  - Is it difficult, time-consuming, or expensive to set up a tax-exempt entity?
  - Repatriation or fundraising restrictions?
  - Any U.S. Tax Treaty with that country?
  - Any U.S. export controls or economic sanctions prohibiting transactions by U.S. persons in the country or with “nationals” of the country?
  - Is country high on Transparency International’s “Corruption Index”?
  - Any U.S. national export initiatives? (e.g., green technology, energy projects, etc.)



# Make Your Contract Work for YOU

- Essential provisions for protecting your interests:
    - Careful review of any agreement or contract between your U.S.-based nonprofit and a foreign entity is key
  - A few “sticky” provisions:
    - Dispute resolution: forum, place, and type (e.g., mediation, arbitration, litigation)
    - Governing law: *excluding a “conflicts of law provision”*
    - Language
    - Agency v. “Independent Contractor”
    - IP: Firm IP and copyright language
    - Termination provisions (always in writing)
- ***Always a country- and fact-specific analysis.***



# Intellectual Property and “Confidential Information”

- **Protecting your intellectual property:**
  - IP includes: Logos, Trademarks, Copyrights, Patents
  - Depending on target country, IP rights and protection may be a high-risk issue
  - Is target country signatory to any International IP Conventions?
  
- **Is your IP registered and recorded in the U.S.?**
  - Consider registration of IP (or “international” version of IP) under local laws in target country
  - Differentiating between IP and “Confidential Information,” i.e., business proprietary info (also requires contractual protections)





# Practical, real world financial and tax reporting

And a few lessons learned...

# Define Success (and Failure)

- Know what you want to get out of a foreign expansion (why are you really doing this?)
- Clearly define success for the organization and its stakeholders
- Understand stakeholder expectations, know what they will want to do if objectives are not met, or if timelines are delayed



# Consider Funding

- Educate stakeholders on the potential risks and rewards of expansion
- Determine cash needs for organizing, activities, and operating expenses
- Determine the timing of cash needs — all at once or over time
- Find out if there are minimum capitalization requirements and other local business start-up issues
- Identify primary and back-up funding sources (i.e., cash reserves, grants, donations, etc.)



# Take a Realistic Look at People and Resources

- Analyze current employees and resources to determine if you have the depth to commit to an expansion
- Be realistic about the commitment of time
- Hire the people and acquire the resources you need
- Consider how outside stakeholders will figure into the picture
- No “Mickey Mouse” ears!!!



## Determine Local Leadership

- Decide who will call the day-to-day shots in the local operation, what calls they can make, and which the U.S. organization retains
- Determine if leadership is available within the parent organization to relocate – integrate cultures
- Check out leadership resources in the local market
- Beware of differences in employment regulations – typically easy to hire and hard to fire
- Seek advice on important cultural differences and business customs
- Be cautious of communication barriers – again, no “Mickey Mouse” ears!!



# Don't Forget Foreign Reporting and Potential Taxes

- Is a *local* financial audit required:
  - U.S. GAAP?
  - Local GAAP?
  - IFRS?
- Should you require one anyway?
- Is a statutory audit required in the foreign jurisdiction?
- Can you get access to supporting documents, or do you need local representation for the parent organization?
- Who is the “client” of the foreign auditor?
- Understand the U.S. and foreign tax implications of your decisions – tax exemption requirements and restrictions apply to your non-U.S. operations as well



# Measure Performance

- Set financial targets for six months, one year, two years, and five years
- Have a plan if funding falls short and/or costs are higher than expected – typically costs 2-3X more than plan, and can take even more in time
- Determine who will measure results and how it will be done
- Develop processes and controls to ensure accuracy and completeness of information
- Determine your level of involvement with the local management team – you now OWN the outcomes, good and BAD!!!



# U.S. and Foreign Anti-Corruption Legislation

- **U.S. Foreign Corrupt Practices Act (“FCPA”):** U.S. law enacted by Congress in 1977 to halt rampant bribery of foreign government officials
- **Anti-Bribery Provisions:**
  - Prohibits paying of, offering, promising to pay (authorizing to pay or offering) money or “anything of value,”
  - With corrupt intent, directly or indirectly,
  - To a “foreign government official” or political party official,
  - For the purpose of (i) influencing an official act or decision; (ii) causing the official to fail to perform his lawful duty; or (iii) obtaining or retaining business or to secure any improper advantage.
- Certain limited exceptions and affirmative defenses exist





# U.S. and Foreign Anti-Corruption Legislation

- **Applicability of the FCPA:**
  - Current “red flag” countries
  - Nonprofits not exempt
  - Who is a “foreign official”?
  - “Agency” relationship with partners abroad → U.S.-based nonprofit or association can be held liable for the acts of partners abroad under FCPA
  - Provision of “samples” or other incentives
- **Other national and international anti-bribery laws**
  - Local laws
  - UK Bribery Act
  - OECD



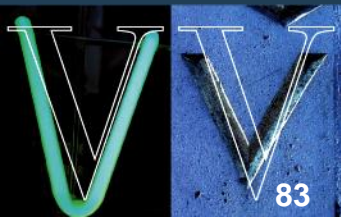
# Other U.S. Law Considerations

- **U.S. export controls and economic sanctions**
  - Controls on “exports” or releases of U.S.-origin goods, technology, and services to certain destinations, entities, and end users
  - Are you exporting computers, technology or other goods in support of your overseas venture? (Materials for a trade show; hand-carry items can be subject to controls)
- **US Economic Sanctions (“OFAC”)**
  - U.S. sanctions are constantly changing and may affect ability to do business in certain countries and with nationals or entities based in those countries
    - Iran; Syria; Cuba; Sudan; North Korea
    - Other “targeted” sanctions
  - Comprehensive sanctions prohibit most transactions with entities, persons, or governmental entities in those countries
  - “Targeted” Sanctions: Specially Designated Persons
  - “Informational Materials” exemption
  - Transactional prohibitions



# It can sound daunting...so a few suggestions

- Start early
- Be pragmatic – seek **legal guidance** where appropriate
- Have a **plan** that supports the “vision” – the devil is truly in the details
- Set up an **advisory team**, including advisors from outside the management of the organization, *with experience*
- Look to **local counsel** in the jurisdiction
- No substitute for trusted, local contacts – but a word of caution – “**trust but verify**”
- Assertive **oversight**
- Don’t lose sight of the **core mission**



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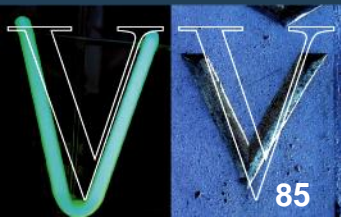
# Upcoming Venable Nonprofit Legal Events

*October 7, 2013* – [Association-Sponsored Market Research Programs: Common Pitfalls, Antitrust Risks, and Opportunities](#)

*October 24, 2013* – [The IRS Final Report on Nonprofit Colleges and Universities: Lessons for All Tax-Exempt Organizations](#)

*November 14, 2013* – [Donor Intent, Restricted Funds, and Gift Acceptance Policies: What Every Nonprofit Needs to Know to Effectively Accept and Utilize Contributions](#)

*December 5, 2013* – [Work & Family: What Nonprofit Employers Should Know about Family-Oriented Employment Laws](#)



# Thank You!

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