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## **LEGAL AND TAX ISSUES FOR ACHMM CHAPTERS**

**ACHMM Chapter Development Committee**  
**Minneapolis, Minnesota**  
**September 7, 2008**

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### **I. INTRODUCTION**

#### **A. Purpose**

The purpose of this document is to provide ACHMM Chapter officers with a survey of the legal and tax rules that govern Chapter operations. Although each Chapter is **affiliated** with ACHMM, each Chapter (whether or not incorporated) is also a **separate entity** that is subject to the rules of corporate or association law (governing its internal operations), the Internal Revenue Code, and other laws (governing its external relationships), quite **apart from its relationship with ACHMM**. Understanding these rules and their effect on the Chapter, and compliance with the rules, are key ingredients in the smooth operation of each Chapter.

#### **B. Getting help**

**This survey will not answer all your questions.** Instead, it will help you identify issues that your Chapter needs to address, and help you to know when you need to contact ACHMM's national office or a lawyer or accountant for help. Ensure that any lawyer or accountant you work with is familiar with the rules that apply to tax-exempt organizations. Every metropolitan area has some lawyers and accountants who specialize in working with groups like ACHMM's Chapters. If you can't find one yourself, contact the local or state association of lawyers or certified public accountants and ask for a list of the members of the committee on nonprofit (or tax-exempt) organizations. These people are the experts.

Alternately, contact ACHMM's National Office, who will help you obtain the advice you need.

## II. CHAPTER LEGAL STRUCTURE

### A. Incorporation

The corporate form of organization gives each Chapter the greatest freedom of action with minimum oversight from the state government or court; ensures that the Chapter will be recognized as a separate entity (from ACHMM itself or any other Chapter); and, in the absence of fraud, insulates the directors, officers, and members from personal liability for debts or other liabilities of the corporation. However, these individuals may be liable for their personal actions or guarantees, for breaches of their fiduciary duties to the corporation, or for negligence in their management responsibilities that causes foreseeable harm to third parties.

**Incorporation is a matter of state law.** Most incorporated Chapters are “nonprofit” or “nonstock” corporations, under the state’s nonprofit or nonstock corporation law. (A few states have a “general” corporation law that governs both business (or stock) corporations and nonprofit (nonstock) corporations.) The governance (articles of incorporation, bylaws, policies, etc.) and internal operations (elections, meetings, etc.) of each incorporated Chapter must comply with the requirements of the governing corporation law.

Incorporation is accomplished by filing “**Articles of Incorporation**” or a “Certificate of Incorporation” (depending upon the terminology used by the state), with the Secretary of State of the jurisdiction, along with a small fee. Articles of incorporation must comply with all the requirements of state law; subject to the state nonprofit corporation law, are the highest authority for corporate governance; and should contain all provisions necessary to qualify the Chapter for exemption under §501(c)(3).

Because amendments to the articles of incorporation usually require approval by the membership, and must be filed with the state, the articles should be drafted to include only the minimum information required by state law and the Internal Revenue Code. This minimizes the need for amendments.

**Annual corporate report.** In order to continue to function and to qualify for tax-exempt status, a corporation must remain in good standing in the state of incorporation. The requirements of the states differ, but in most states, the corporation must file an annual report and pay a small fee in order to remain in good standing. The annual report is normally simple to complete but the Chapter should maintain a tickler file reminding it (and the current officers) to prepare and timely file the annual report in order to avoid inadvertent revocation or forfeiture of the corporate charter. A Chapter that believes it is incorporated should periodically check the Secretary of State’s website to ensure that its charter has not been revoked for failure to file an annual report. If the

charter has been revoked, it can usually be reinstated by filing one or more overdue reports, and paying both the fees required with the reports, and a reinstatement fee.

### **B. Unincorporated Chapters**

Some ACHMM Chapters may not be incorporated. These Chapters operate as unincorporated associations under state law. As such, they can establish their governance and internal operating procedures without reference to state laws, and are not required to file any documents with the states, except, in some states, a “fictitious name” registration.

Nevertheless, unincorporated Chapters should have a governing document—“**Articles of Association,**” or a “**Constitution**”—that functions like the Articles of Incorporation, as the organic document of the Chapter. A properly organized Chapter will ordinarily be treated as an entity separate from ACHMM or any other chapter.

One significant disadvantage of remaining unincorporated—whether by design or as a result of revocation of the corporate charter—is that in most states, the elected leaders and/or the members of the Chapter may be personally liable for the Chapter’s debts.

### **C. Bylaws**

A Chapter’s bylaws are the next document in the hierarchy of governance. (For unincorporated Chapters, this may be the constitution and/or bylaws.) The bylaws are, in essence, an operating agreement among the members, and amendments usually must be approved by the members. While articles of incorporation are drafted in a very general form to provide maximum flexibility, the Bylaws contain more detailed rules for the operation of the Chapter, including provisions for amendment of the bylaws, election of officers and directors, and operation of committees.

The Bylaws should not repeat matters addressed in the Articles of Incorporation, e.g., the Chapter’s purposes; and should not include policy matters that are best addressed by the Board without member approval, e.g., when to hold Chapter meetings or whether to have a trade show.

### **D. Chapter Policies**

The final set of documents in the hierarchy of Chapter government is the policies of the Chapter, as approved by the Board of Directors. These may cover a variety of operational issues, and may ordinarily be changed by the Board of Directors without approval by the members.

**E. Board of Directors**

The officers and directors of the Chapter are fiduciaries, who have a very high duty of fidelity in their governance and administration of its activities. These duties are commonly discussed in terms of the duty of care, the duty of loyalty, and the duty of obedience.

1. **The duty of care** generally requires the director or officer to--

(a) **Participate in the direction and oversight of the Chapter** by attending meetings of the board and committees unless prevented by illness or other pressing business, by reviewing information presented to the board, by requesting and reviewing additional information that the officer or director knows or should know is properly required before a decision can reasonably be made, and by keeping generally informed about the plans and activities of the Chapter;

(b) **Exercise the informed judgment, practical wisdom, and common sense** that may reasonably be expected of the average person; and

(c) When acting, consider the size, complexity and other circumstances of the organization, and **use any special knowledge, training, or experience** that he or she may have.

Directors are generally entitled to rely on information prepared or presented to them by officers or outside experts (e.g., a CPA or lawyer), provided the director reasonably believes those persons to be reliable and competent in the matters presented.

2. **The duty of loyalty** requires that an officer or director **act at all times in good faith and in the best interests of the Chapter**. The duty of loyalty prohibits the director or officer from acting to advance his own interests; those of his family, close friends, or business associates; or those of another organization with which he is associated, unless the action is preceded by complete disclosure and a decision by the board to approve the transaction. The duty of loyalty also prohibits a director or officer from appropriating for himself or others an opportunity to engage in an activity or transaction in which that the Chapter would otherwise be interested ("a corporate opportunity").

**Conflicts of interest.** Before a transaction in which an officer or director has an interest may be approved, each interested director or officer must fully disclose the nature and extent of his interest in the transaction to the board or committee that is authorized to approve the transaction. This disclosure must include the identity of the related parties, the structure and all material terms of the transaction, and the extent to which the related parties expect to receive any direct or indirect financial benefit.

In weighing the transaction, the board should assure itself that the terms are fair and reasonable to the Chapter. When all significant factors are considered, the terms should be at least as favorable to the Chapter as could be obtained from an independent third party. The Chapter may wish to solicit competing bids on the transaction in order to have a standard against which to measure the value of the “inside” proposal. Finally, the transaction must be approved by the board or a duly authorized committee, without counting the vote of any interested director or officer. The best practice also indicates that the interested party, after presenting the proposal to the board or committee, should not be present during the discussion.

The resolution approving the transaction should expressly authorize or recognize the interest of the related parties, and should be clearly reported in the minutes.

**Corporate opportunity.** An officer or director appropriates a “corporate opportunity” when he or she becomes aware of an opportunity for the Chapter to engage in an activity that is related to its present or prospective activity, but takes advantage of the opportunity personally or for the benefit of third parties, without obtaining the approval of the board. For example, a Chapter director should not personally conduct a business of presenting seminars on hazardous materials management without consent of the Chapter board.

To obtain approval, a director or officer should follow the same steps that are required for approval of a transaction in which he is an interested party (except that there need be no determination that the transaction is fair and reasonable to the organization).

Because state corporation laws often contain specific rules governing approval of “conflict of interest” transactions, these should be consulted before considering such a transaction. These rules should also be followed by unincorporated Chapters, because they represent the “best practice,” and may protect the officers of an unincorporated Chapter from liability for negligence.

3. **The duty of obedience** requires the directors and officers to carry out the purposes of the organization, to act in accordance with its governing documents, and to assure themselves that the organization is conducting its activities in compliance with applicable federal, state, and local laws. Although the directors and officers are not necessarily personally responsible for the Chapter’s actual compliance with every aspect of the law, they should establish reporting mechanisms to ensure that they are informed about the laws to which the Chapter is subject and about proposed or pending changes to those laws that may affect the Chapters’ activities, as well as about management’s compliance programs.

When one or more members, directors, or officers violate their duties to the corporation, a lawsuit may be brought on behalf of the Chapter by any member.

## **F. Committees**

The last element in the hierarchy of corporate government is committees. Generally, an incorporated Chapter may have two types of committees. The first is a committee composed entirely of directors, which may have authority to act on many matters, except as limited by the bylaws and state law. However, most committees will include Chapter members who are not members of the board of directors. The authority of these committees is generally limited, and they may act only with respect to matters within their scope of authority. For example, such a committee may not unilaterally act to reverse a decision of the board of directors.

These distinctions are not made with respect to committees of unincorporated Chapters. Thus, it is important to carefully spell out the limits of a committee's responsibilities in the authorizing resolution.

## **III. TAX-EXEMPT STATUS**

ACHMM is exempt from Federal income tax under §501(c)(3). Chapters are exempt under either §501(c)(3) or §501(c)(6). If the Chapter has a determination letter from the IRS recognizing its exemption, that letter will state the applicable section number. If the Chapter does not have a determination letter, it is probably exempt under §501(c)(6).

The following pages discuss the characteristics and limitations of both §501(c)(3) and §501(c)(6). Chapters should review these with their current classification in mind.

### **A. Recognition of Exemption**

Whether exempt under §501(c)(3) or §501(c)(6), each Chapter should be certain of the basis for its exempt status. The rules set forth below can be used for this purpose.

1. Determination letter. If the Chapter has applied for and received a determination letter from the IRS that it is exempt under §501(c)(3)(Form 1023) or §501(c)(6)(Form 1024), that letter establishes the Chapter's status. A Chapter that wishes to file Form 1023 or Form 1024 must pay a user fee of \$750 (\$300 if gross receipts are not expected to exceed \$10,000).

2. Small chapters. A Chapter whose average annual gross receipts (3-year rolling average) do not exceed \$5,000 may consider itself to be exempt under §501(c)(3), provided its governing documents limit its exempt purposes to educational and charitable purposes, and limit distributions in the event of dissolution of the Chapter to other §501(c)(3) organizations or for educational and charitable purposes.

3. Other chapters. Other chapters that have failed to affirmatively apply for exemption must consider themselves exempt under §501(c)(6).

4. Group exemption. One method used by many national groups that, like ACHMM, have state or regional chapters, is to apply for a “group” exemption, under which the IRS will recognize the exempt status of each Chapter based on its relationship with ACHMM. ACHMM does not now have a group exemption.

**B. Section 501(c)(3)**

The most common type of tax-exempt organization (“EO”) is described in §501(c)(3), which applies to groups that are organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes; to foster national or international athletic competition; or to prevent cruelty to children or animals. These are referred to as “exempt purposes” or “exempt activities.”

Chapters that are exempt under §501(c)(3) are prohibited from permitting any part of their net earnings to inure to the benefit of private shareholders or individuals, and from participating or intervening in any political campaign on behalf of or against any candidate for public office. Also, a Chapter may not, **as a substantial part of its activities**, disseminate propaganda or otherwise attempt to influence legislation.

On the other hand, chapters that are exempt under §501(c)(3) are eligible to receive tax-deductible charitable contributions, and may be eligible for grants from government agencies or charitable foundations, e.g., corporate or family foundations, that are not otherwise available. In addition, §501(c)(3) EOs most easily qualify for special nonprofit bulk mail rates.

1. Exempt purposes. ACHMM Chapters may generally be regarded as charitable and educational organizations. Their exempt purposes and activities primarily include educating their members in order to enable them (the members) to perform their duties more effectively.

Each §501(c)(3) Chapter must be organized and operated exclusively for exempt purposes. As such, each Chapter must be engaged principally in activities that serve its exempt purposes, and in other activities only to the extent they do not indicate the Chapter has a substantial non-exempt purposes. Whether a Chapter has a substantial non-exempt purpose depends on all the facts and circumstances, including the nature of the purpose, and the amount and extent to which its income, expenses, and personnel activities are derived from or devoted to activities that promote non-exempt purposes.

2. **Legislative activity**

Although few, if any, ACHMM Chapters engage in any significant lobbying—**attempts to influence legislation**—the following discussion is included to ensure awareness of the rules in the event a Chapter does attempt to influence, e.g., state or local hazmat-related legislation.

(a) **General rules.** Chapters that are exempt under §501(c)(3) may not engage in lobbying or other legislative activity as a “**substantial part**” of their activities. This restriction does not absolutely prohibit a Chapter from lobbying, but generally requires that a Chapter spend less than 15 percent of its budget for direct and grassroots lobbying, and perhaps as little as 5 percent. However, the test is not solely financial, and volunteer activities, as well as contacts with non-legislators as part of a larger lobbying strategy, may be taken into account.

The general rules governing the lobbying restrictions are not clear, but it is probably safe to say that lobbying is any attempt to influence the passage or defeat of legislation, either by contact with legislators (including city or county councilmen) and their staff members, or by publications that communicate the association's position to its members or the public and urge them to communicate with legislators. This definition does not include contacts with administrative officials (except to induce them to influence legislation), and does not include activities such as publishing the results of non-partisan study, analysis, or research about issues, or providing expert testimony (by invitation) before legislative committees.

(b) **Special rule.** Because of the subjective nature of the general rules governing lobbying, Congress has permitted most §501(c)(3) organizations to elect (under §501(h)) to have their lobbying expenditures tested for substantiality against an objective standard, found in §4911 of the Internal Revenue Code. A Chapter that elects to be tested under §4911 is subject to tax on its “excess expenses” for lobbying. Excess expenses are determined by reference to the amounts spent on exempt activities and the expenditures permitted under the law. (Exempt purpose expenditures include lobbying and administrative expenses.)

Under this special rule, an EO whose “exempt purpose expenditures” are not more than \$500,000 can spend up to 20% of its exempt purpose expenditures for lobbying. This is referred to as its “permitted lobbying expenditures.”

A separate “inside” limitation on “grassroots” lobbying is equal to 25% of the permitted lobbying expenditures.

Amounts spent in excess of the permitted lobbying or grassroots lobbying expenditures are subject to a 25% excise tax. Thus, if an electing organization spends \$50,000 on its exempt purposes (including lobbying), of which \$15,000 is spent for lobbying (other than grassroots

lobbying), the tax will be 25% of \$5,000 (the difference between the \$15,000 spent and the \$10,000 permitted).

An electing organization that “normally” spends amounts in excess of 150 percent of the permitted lobbying expenditures or grassroots lobbying expenditures may lose its exempt status. “Normally” refers to a rolling four-year average.

“Lobbying expenditures” are those amounts spent to influence legislation through communication with legislators, staff members, or other government officials who may participate in the formulation of legislation.

“Grassroots lobbying expenditures” are those amounts spent to influence legislation by affecting the opinions of the general public or any segment of the general public.

Lobbying expenditures and grassroots lobbying expenditures include only those amounts spent to communicate with legislators or the public. Amounts spent to research and prepare information are excluded unless the research is solely for lobbying purposes. Amounts spent by members that are not reimbursed by the organization are also excluded.

An electing organization will not be treated as influencing legislation merely because it:

- (1) Makes available the results of nonpartisan analysis, study, or research.
- (2) Provides technical advice or assistance in response to the written request from the legislature or governmental agency.
- (3) Testifies or communicates about legislation that would affect the organization's existence, powers, duties, or tax-exempt status, or the deductibility of contributions to the organization.
- (4) Communicates with its members without urging them to lobby or to urge others to lobby.
- (5) Communicates with government employees on non-legislative matters and without any purpose to influence legislation.

(c) **Electing §4911.** Section 501(h) of the Code permits most §501(c)(3) EOs that engage in legislative advocacy to choose between of being subject to the general rule, or electing to have the “substantiality” of their lobbying tested under the special rule in §4911 of the Code. For ACHMM’s Chapters, the special rule clearly allows more legislative activity than is probably

allowed by the general rule. In addition, the special rule is more precise and relates only to “expenditures.” **Thus, a Chapter electing under the special rule can engage in unlimited lobbying through the use of volunteers**, so long as its other expenditures for lobbying remain within the limits imposed by §4911. A Chapter that is not an electing organization, on the other hand, must include legislative activity on its behalf by volunteers in determining whether it has engaged in substantial lobbying.

A Chapter elects to have its lobbying tested under §4911 by filing IRS Form 5768. Form 5768 must be filed not later than the last day of the first taxable year to which the election will apply. The election remains in effect until revoked, also by filing Form 5768, before the first day of the first taxable year to which the revocation applies.

(d) **Reporting.** Regardless of whether a §501(c)(3) Chapter has elected to have its lobbying tested under §4911, if it is required to file Form 990 or 990-EZ, it must report its lobbying expenditures on Form 990, Schedule A, Part VI-A or Part VI-B (2007) or on Schedule C (2008 *et seq.*).

(e) **Other laws regulating lobbying.** Chapters and individuals that engage in lobbying may also be required to register as a lobbyist and file financial reports under Federal and state laws, including the Federal Lobbying Disclosure Act of 1995. Similar registrations and reporting may be required at the state or local level. **A Chapter planning to engage in lobbying regarding state or local legislation should ensure that it complies with all applicable registration and disclosure requirements. State personnel laws may also restrict the extent to which a public employee may engage in lobbying regarding matters related to his employment.**

3. **Political activities.** Chapters that are exempt under §501(c)(3) are also absolutely prohibited from participating or intervening in political campaigns. This prohibition precludes a Chapter from contributing funds to candidates or political committees, from establishing its own political action committee (PAC), or from publishing statements endorsing or opposing candidates.

Chapters may, however, encourage their members to participate in campaigns of their choice; sponsor unbiased and impartial candidate forums; and publish voting “scorecards,” provided they are regularly published, cover all incumbents, and are published without regard to any campaign, candidate, election, endorsement, or opponent.

**Federal election law and many state election laws also prohibit corporate contributions to political committees, and otherwise regulate participation in election**

**campaign activities. Any chapter considering sponsoring an election-related event should first consult with knowledgeable legal counsel.**

4. **Private inurement.** Both §501(c)(3) and §501(c)(6) prohibit the net earnings (or assets) of a chapter from inuring to the benefit of any private shareholder or individual. This simply means that the Chapters' assets and earnings may not be paid to any "insider," other than in exchange for fair value in goods or services, unless the "insider" is itself entitled to tax-exempt status. Thus, a Chapter may not pay a dividend to a member, but may pay any employee a reasonable salary and benefits, and may reimburse the expenses incurred by its employees and volunteer leaders in serving the Chapter. A Chapter may also contract with other individuals and with exempt and non-exempt entities, to obtain goods or services.

5. **"Intermediate sanctions."** A "disqualified person" who engages in an "excess benefit transaction" with a §501(c)(3) EO is subject to a requirement that he or she repay the amount of the "excess benefit," and pay the IRS a 25% excise tax on the amount of the excess benefit. A "disqualified person" includes (current and within the past 5 years) officers, directors, other leaders, and their family members. An "excess benefit transaction" is a transaction in which the disqualified person receives a benefit whose fair market value exceeds the fair market value of the consideration provided to the §501(c)(3) EO. The amount of the excess benefit is the difference between the fair market values. Numerous complex special rules apply. I.R.C. §4958. These rules are discussed in detail in the instructions to IRS Form 990, pages 11-13.

Generally, the IRS will impose the excise tax, and not revoke the EO's exemption, except in egregious cases (when, typically, there would be a substantial non-exempt purpose in any event).

6. **Dissolution.** The articles of incorporation (or constitution, if unincorporated) of a §501(c)(3) EO must provide that when it is dissolved, its assets remaining after payment of all of its debts will be distributed for its exempt purposes, to another §501(c)(3) EO, or to a governmental entity exclusively for public purposes.

### **C. Public Charities and Private Foundations**

Chapters that are exempt under §501(c)(3) are classified as "public charities" or "private foundations." In general, public charities are those that are (1) substantially supported by gifts from many private donors and from governments (described in §509(a)(1)); (2) **substantially supported by membership dues and fees for exempt services (described in §509(a)(2))**; or (3) controlled by public charities, social welfare organizations, or professional associations (described in §509(a)(3)). **ACHMM's Chapters will normally qualify as public charities under**

**§509(a)(2)**, because at least 1/3 of their support comes from dues and program service revenue, and less than 1/3 of their support comes from investment income.

Newly-organized Chapters that obtain a determination letter from the IRS with an “advance ruling” that they can expect not to be a private foundation will be asked by the IRS to complete and file Form 8734 at the end of a 5-year “advance ruling period.” The “advance ruling period” provides a new organization with 5 years to demonstrate that its funding sources are broad enough to enable it to be classified as a public charity. **Whether the Chapter is a public charity (and all Chapters can be expected to be a public charity) or a private foundation does not affect its exemption under §501(c)(3).**

Other organizations are private foundations. Private foundations typically rely on large contributions from one donor, or a small group of donors, and receive a relatively large proportion of their continuing income from investments. These are typically controlled by one family or a corporation, e.g., the Bill and Melinda Gates Foundation, or the Verizon Foundation. Chapters qualifying for exemption under §501(c)(3) should avoid classification as private foundations, because private foundations must file considerably more detailed information returns (Form 990-PF), are subject to a 1 or 2 percent tax on their investment income, and are subject to a series of complex rules restricting transactions with managers and donors, requiring minimum levels of expenditures for exempt purposes, restricting ownership of taxable businesses, and restricting or prohibiting certain investments and expenditures. A private foundation is also absolutely prohibited from lobbying.

#### **D. Section 501(c)(6)**

Section 501(c)(6) exempts from Federal income tax chambers of commerce and other “business leagues” whose purpose is to **"promote the common business interests"** of participants in a profession or line of business.

ACHMM’s Chapters may qualify for exemption under §501(c)(6) if they primarily promote the **common business interests of hazardous materials managers**. In fact, the line between primarily “educating” hazmat managers on one hand, and “promoting the common business interests” of hazmat managers is quite thin indeed, and the determination may be more a matter of how the purposes and activities are described, than how the activities are actually conducted. However, if a Chapter wishes to expend significant resources explicitly promoting the “CHMM” certification, then it would be exempt under §501(c)(6), not §501(c)(3).

In contrast to a §501(c)(3) EO, a Chapter that is exempt under §501(c)(6) may engage in unlimited amounts of lobbying, and may engage in limited amounts of political activity (subject to applicable federal and state election and lobbying laws).

1. **Exempt purposes.** Chapters that are exempt under §501(c)(6) must engage primarily in activities designed to “promote the common business interests” of participants in a line of business or profession. These typically include educational meetings and conferences, publications, trade shows, and networking opportunities. In contrast, a consulting activity, which applies the general principles to a particular client, usually on a proprietary basis, is a “particular service” that is not an exempt activity of a §501(c)(6) EO.

2. **Legislative and political activity.** **Subject to applicable registration and reporting laws,** a Chapter that is exempt under §501(c)(6) may engage in unlimited legislative activity--attempts to influence the enactment (or defeat) of legislation. However, unless at least 90% of the Chapter's dues income is received from governmental agencies (as opposed to individuals), the Chapter must report to its members the percentage of its dues and other similar amounts that it spends on lobbying activity, informing its members of the portion of their dues is not deductible. Alternately, the Chapter may simply report the amount it spends on lobbying on IRS Form 990-T, and pay a 35% “proxy tax” in lieu of telling its members how much of their dues is nondeductible. *See* I.R.C. §162(e), §6033(e).

If at least 90% of the dues received by the Chapter are paid by one or more government agencies, then no reporting (or payment of taxes) is required. Rev. Proc. 95-35, 1995-2 C.B. 391, §4.03.

Chapters exempt under §501(c)(6) may also engage in limited political activity--*i.e.*, activities designed to advance or defeat the nomination, election, or confirmation of an individual for public office. However, if the Chapter spends money for this purpose it will be subject to a 35% excise tax (imposed by §527(f) of the Internal Revenue Code) on the lesser of its investment income or its political expenditures. **In addition, before engaging in any political activity the Chapter should ensure that its actions will be in compliance with Federal and state election law, and that all required reports will be filed.**

#### **E. Employer Identification Number**

Each Chapter must have its own Employer Identification Number (“EIN”). The Employer Identification Number is simply a unique identifier in the IRS files, and is not a “tax-exempt number” for Federal income tax purposes. Some states do issue tax-exemption registration numbers for sales tax purposes, but these have nothing to do with Federal income tax exemption. A Chapter that does not have its own EIN must obtain one by filing IRS Form SS-4. This can be done on paper, or online at <http://www.irs.gov/businesses/small/article/0,,id=102767,00.html>.

**Because each Chapter is considered to be a separate legal entity, Chapters should never use ACHMM’s Employer Identification Number.**

**F. Fundraising Issues**

When Chapters are exempt from Federal income tax under §501(c)(3), gifts and contributions to them are normally deductible for Federal income, gift, and estate tax purposes. However, to the extent that a payment is partly a contribution and partly a payment for a product or service to be provided to the donor by (or on behalf of) the Chapter, the deductible amount is limited to the excess of the amount of the payment over the fair market value of the product or service. For example, if a Chapter holds a fundraising dinner for which those attending pay \$100 per plate, and the fair market value of a similar dinner at a restaurant is \$30, only the excess, \$70 per plate, is deductible as a charitable contribution. Such payments are known as “quid pro quo contributions.” Of course, the amount that is not deductible as a charitable contribution may be deductible as a business expense if it is an ordinary and necessary expense incurred in the conduct of the payor’s trade or business.

**Restricted gifts.** If a Chapter raises money for a specific purpose, it is contractually obligated to spend all of the funds raised for that specific purpose, unless the donors consent to some other use. To avoid unintended restrictions, use general purpose solicitations, or indicates that excess funds received will be used for other Chapter activities.

1. **Substantiation.** The Internal Revenue Code imposes several substantiation requirements with respect to charitable contributions. All cash gifts must be substantiated by a receipt or other financial record. Gifts of at least \$250, and “quid pro contributions” of at least \$75, must be substantiated by a receipt from the charity. These requirements are more fully described in IRS Publication 1771.

Additional substantiation requirements apply with respect to non-cash gifts of property whose value is at least \$500. In this case, as a condition of claiming a deduction, the donor is required to submit IRS Form 8283 with respect to the gift. Fulfilling these requirements is generally the responsibility of the donor. However, in certain cases, the cooperation of the Chapter will be required, *e.g.*, to acknowledge receipt of the gift on IRS Form 8283.

If the gift of noncash property is worth at least \$5,000, and is sold by the Chapter within three years of its receipt, the Chapter must file IRS Form 8282 and provide a copy to the donor.

**If you have questions about these requirements, please contact your legal counsel or the ACHMM staff.**

2. **State charitable solicitation registration.** Section 501(c)(3) Chapters that solicit contributions (including offering to sell goods or services) may be required to register for that purpose with the secretary of state, attorney general, or consumer protection agency in their state.

Because most Chapters would be soliciting in only one or two states, registration should not be difficult. It typically requires the Chapter to complete a registration form, and to annually submit its IRS Form 990 and/or audited financial statements. Smaller chapters can submit less formal financial statements, or may be exempt from registration.

In some states, an exemption applies for charities that are soliciting only from members. To ascertain whether your Chapter is required to register, contact your legal counsel or the ACHMM staff. If a Chapter can take advantage of an exemption, it may be required to apply or otherwise notify the state it is claiming that exemption. In some states, a different exemption may apply if fundraising is conducted only volunteers, and the amount raised is a relatively small amount.

Additional information about registration requirements for your state may be found at the website of the National Association of State Charity Officials, <http://www.nasconet.org>. (Click on "US Charity Offices," then on the state abbreviation, and then you can link to the state regulator's website.)

#### **G. Annual Information Return**

Each Chapter whose "**average annual gross receipts**" for the current and two preceding fiscal years exceeds \$25,000 must file **IRS Form 990 or Form 990-EZ**, and (only if it is exempt under §501(c)(3)) Form 990 (Schedule A). These forms are, in essence, a financial statement, together with additional information about the Chapter's activities to enable the IRS to ascertain that the Chapter continues to qualify for exemption. If any donor gave at least \$5,000, Schedule B should also be filed.

**Chapters whose gross receipts in a year are less than \$100,000 and that have less than \$250,000 in total assets at the end of the year may file Form 990-EZ. All others must file Form 990.**

**Beginning in 2008, Chapters whose average annual gross receipts do not exceed \$25,000 must file Form 990-N electronically.**

**New Chapters.** Chapters that have been in existence for only one fiscal year must file Form 990 or 990-EZ only if their gross receipts in the first year exceed \$37,500. Chapters in existence for only two fiscal years need to file Form 990 or 990-EZ only if their average annual gross receipts exceed \$30,000.

**Revised Form 990.** The IRS is redesigning Form 990, and chapters that must file Form 990 (instead of Form 990-EZ or 990-N) will find a longer form (10 pages vs. 8), and more

schedules to be completed. Most Chapters that are required to file Form 990 will need to complete only the Form 990 and the 3-page Schedule A (Public Charity Status). Additional information is at <http://www.irs.gov/charities/article/0,,id=171216,00.html>. The new Form 990 will be required to be filed in 2009, for taxable years beginning in 2008.

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**Receipts not more than \$25,000—Form 990-N.** Chapters whose average annual gross receipts do not exceed \$25,000 *must* file Form 990-N, *Electronic Notice (e-Postcard) for Tax-Exempt Organizations not Required to File Form 990 or 990-EZ*. Form 990-N will be filed electronically *only*, from the IRS website. Additional information is at <http://www.irs.gov/charities/article/0,,id=169250,00.html>. **This requirement is effective in 2008, with respect to taxable years beginning in 2007.**

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**Due date.** Form 990, 990-EZ, or 990-N must be filed not later than 4½ months after the end of the Chapter's fiscal year. An automatic 90-day extension of time may be obtained by filing Form 8868 before the due date. One additional 90-day extension may be obtained (for good cause) by filing another Form 8868 before the due date of the initial extension.

**Penalties.** A Chapter that does not timely file a correct and complete Form 990 or 990-EZ is subject to a penalty of \$20 per day, up to the lesser of \$10,000 or 10% of the Chapter's gross receipts, per return. (There is no monetary penalty for failing to file Form 990-N.) This penalty may be abated if the delay was due to good cause and was not willful. **Failure to file Form 990, 990-EZ, or 990-N for 3 consecutive years results in automatic revocation of exemption, and the Chapter must re-apply for exemption.**

**Review by legal counsel.** Because Form 990 and 990-EZ require information pertinent to the Chapter's tax-exempt status and liability for unrelated business income tax, and because the IRS and states are increasing their scrutiny of Form 990s, they should be reviewed by a knowledgeable tax lawyer before filing.

**Disclosure.** Each Form 990, 990-EZ, or 990-N filed by a Chapter must be available for public inspection at its principal office (this could be the President's office), and at any other office having at least three employees, for three years after the date it is required to be filed. Any list of donors that may be part of the return need not be disclosed.

Each Form 990, 990-EZ, or 990-N filed by a Chapter must be provided to anyone who requests a copy in person or by mail, for three years after the date it is filed. If the request is made

in person, the copy must be provided immediately. If the request is made by mail, the copy must be provided within 30 days. The Chapter may make a reasonable charge for copying and postage.

Each Chapter must also disclose or provide a copy of its application for exemption (form 1023 or Form 1024), all correspondence with the IRS regarding the application, and the IRS determination letter recognizing its exemption, under the same circumstances as described above for Form 990, except that the three-year rule does not apply.

**Special rules apply to Chapters without permanent offices. For details on these disclosure requirements, see the instructions for Form 990, General Instruction M, pages 12-15 (2007).**

#### **H. Business expense deductions**

A member's dues payments, or a payment to attend an educational program (which may include a meal) will ordinarily be deductible as a business expense if it is not reimbursed by the member's employer. If the program includes a meal, only 50% of the portion allocable to the meal is not deductible.

#### **IV. UNRELATED BUSINESS INCOME TAX**

Although ACHMM and its Chapters are generally exempt from federal and state income taxes, this exemption does not extend to income from regularly conducted business activities that are not related to their exempt purposes. Income from these "non-exempt" activities is subject to tax as if ACHMM or the Chapter itself were not exempt. **The unrelated business income tax ("UBIT") is imposed on the net income received by an otherwise exempt organization from (1) any trade or business (2) that is not related to its exempt purposes and (3) that is regularly carried on.** The purpose of the UBIT is to prevent exempt organizations ("EOs") from using their tax-exemption to compete unfairly with taxable businesses through activities that do not advance the exempt purposes (other than through the production of income) for which the charity exists. For example, a Chapter that sells advertising in a newsletter must pay tax on the net profits unless one of the "Exceptions" discussed below applies, *e.g.*, substantially all of the work in conducting the business is performed by volunteers.

**A. Trade or business.** Nearly any activity involving the provision of goods and services that an EO carries on for profit will be treated as a separate trade or business, even if it is only part of a larger, exempt activity. Thus, for example, the sale of commercial advertising in a newsletter is treated as an unrelated trade or business, even though the editorial content is related to the EO's exempt purposes.

**B. A trade or business is “related”** to ACHMM’s or a Chapter’s exempt purposes, only if the activity contributes importantly to the accomplishment of its exempt purposes (aside from the need for the income produced). In the case of ACHMM and its Chapters, the conduct of educational seminars and the sale of educational books and manuals contribute importantly to the accomplishment of exempt purposes, and the income from these activities is not subject to UBIT.

Income from Chapter meetings, sponsorships at meetings or conventions, and exhibitor fees at trade shows is generally treated as income from a “related” trade or business.

On the other hand, income from advertising and gambling activities, *e.g.*, raffles, will generally be taxable, unless one of the exceptions set forth below applies.

**Referral services.** With few exceptions, the IRS has taken the position that operation of a referral service in which users pay a separate fee is an unrelated trade or business.

**Associate member dues.** In addition, the IRS has recently argued that dues received from associate members may be taxable if their principal purpose in joining is a non-exempt purpose, *e.g.*, to obtain access to group insurance programs. The IRS has said it will examine whether the associate members pay higher dues, have no voting rights, cannot hold office, join primarily for access to potential customers, or fail to substantially participate in the association’s exempt functions, *e.g.*, conventions and other educational meetings. However, we do not recommend that Chapters treat associate member dues as taxable without a careful examination of the particular circumstances in question.

**C. Exceptions.** The unrelated business income tax does not apply to income from (1) the sale of donated goods or services, (2) activities substantially conducted by volunteers, (3) annual fundraising or other events, or (4) investments. For this purpose, investment income includes dividends, interest, rent, royalties, and capital gains

**D. Sponsorship—“gifts” vs. advertising revenue.** Many Chapters solicit payments from “sponsors”—businesses interested in marketing products or services to their members—in connection with meetings and trade shows. When doing so, a potential issue arises regarding the tax treatment of the money paid. If the “sponsor” receives a “substantial benefit” in exchange for the revenue—often, a benefit that is considered advertising by the IRS—then some or all of the money paid by the sponsor is considered to be a payment for advertising instead of a gift, and is reportable as “unrelated business income” by the Chapter, and the net income is subject to corporate income tax.

The IRS has published the following guidelines to distinguish non-taxable “sponsorship” payments from taxable payments for advertising or other substantial benefits.

*(iv) Use or acknowledgment.* For purposes of this section, a substantial return benefit does not include the use or acknowledgment of the name or logo (or product lines) of the payor's trade or business in connection with the activities of the exempt organization. Use or acknowledgment does not include advertising as described in paragraph (c)(2)(v) of this section, but may include the following: exclusive sponsorship arrangements; logos and slogans that do not contain qualitative or comparative descriptions of the payor's products, services, facilities or company; a list of the payor's locations, telephone numbers, or Internet address; value-neutral descriptions, including displays or visual depictions, of the payor's product-line or services; and the payor's brand or trade names and product or service listings. Logos or slogans that are an established part of a payor's identity are not considered to contain qualitative or comparative descriptions. Mere display or distribution, whether for free or remuneration, of a payor's product by the payor or the exempt organization to the general public at the sponsored activity is not considered an inducement to purchase, sell or use the payor's product for purposes of this section and, thus, will not affect the determination of whether a payment is a qualified sponsorship payment.

*(v) Advertising.* For purposes of this section, the term advertising means any message or other programming material which is broadcast or otherwise transmitted, published, displayed or distributed, and which promotes or markets any trade or business, or any service, facility or product. Advertising includes messages containing qualitative or comparative language, price information or other indications of savings or value, an endorsement, or an inducement to purchase, sell, or use any company, service, facility or product. A single message that contains both advertising and an acknowledgment is advertising. This section does not apply to activities conducted by a payor on its own. For example, if a payor purchases broadcast time from a television station to advertise its product during commercial breaks in a sponsored program, the exempt organization's activities are not thereby converted to advertising.

**Chapters that obtain “sponsorship” payments should ensure that donors are not inadvertently given a substantial “return benefit” in exchange for the sponsorship payment.**

**Form 990-T** is used to report and pay unrelated business income tax. It must be filed if the annual gross revenue from unrelated trade or business is at least \$1,000, and is due 4½ months after the end of the Chapter's fiscal year. An automatic 90-day extension of time to file Form 990-T may be obtained by filing IRS Form 8868 not later than the due date for the Form 990-T. One additional extension of up to 90 days may be obtained (for good cause) by filing IRS Form 8868

before the initial extension expires. **The last three Forms 990-T filed by a §501(c)(3) EO are subject to public disclosure under the same rules that apply to Form 990. This disclosure requirement applies only to Forms 990-T filed after August 17, 2006, but does not apply to a Form 990-T filed solely to obtain a refund of telephone excise tax.**

**Estimated income taxes.** A Chapter that expects to owe at least \$500 in UBIT must report and pay quarterly estimated income taxes. Chapters determine their estimated tax by using IRS Form 990-W. Estimated taxes for each taxable year must be deposited quarterly, using IRS Form 8109, not later than the 15th day of the 4th, 6th, 9th, and 12th months of the Chapter's fiscal year.

**State income taxes.** In most states, Chapters that are subject to UBIT must also pay state corporate income tax on the same revenue. Chapters should file a corporate income tax return, reporting only the income and expenses attributable to the unrelated trade or business.

## V. **EMPLOYMENT, EXCISE, AND STATE TAXES**

### A. **Employment Taxes**

Chapters, although exempt from Federal income tax, remain subject to Federal, state, and local employment taxes--income tax withholding, Social Security withholding and taxes, unemployment taxes on "wages" paid to "employees," and in some states, disability insurance.

### **Definitions**

**Employees.** An employee is anyone whose activities on behalf of the chapter are subject to its right of direction and control as to both the tasks to be accomplished and the details and means of accomplishment. The chapter need not actually exercise control, so long as it has the right to do so. Although whether an individual is an employee is a factual question, a Chapter's paid workers should generally be considered its employees, especially if they are officers. However, when a professional association manager manages several associations as an independent businessman, he is probably not an employee of the association. A Chapter that has questions about the employment status of a worker should review the factors set forth by the IRS on its website at <http://www.irs.gov/businesses/small/article/0,,id=99921,00.html>. If the Chapter still can't decide, contact legal counsel or ACHMM.

**Wages.** For employment tax purposes, the "wages" subject to tax includes all salaries, bonuses, and other cash payments. Most other fringe benefits, such as health and life insurance, are exempt from employment tax, provided that their value is also excluded from the employee's income.

### **Federal taxes**

**Income tax withholding.** All employers must withhold income tax from the wages paid to their employees. The amount to be withheld is based on the frequency and amount of payment, and on the number of withholding allowances claimed by the employee on IRS Form W-4. Each employee must file Form W-4 upon employment, and should review the number of withholding allowances at least annually thereafter. If an employee claims more than 10 withholding allowances, or claims exemption from withholding, the employer must send the Form W-4 to the IRS with its next quarterly employment tax return (IRS Form 941). The IRS may then notify the employer to use a lower number of allowances (or no allowances) to calculate the income tax to be withheld. Any applicable state income tax must also be withheld.

The Chapter ordinarily must use the withholding tables in IRS Publication 15, Employers' Tax Guide, to determine the proper amount to withhold.

**Social Security ("FICA") taxes.** Chapters are also required to withhold Social Security ("FICA") tax from their employees' wages, and to pay the withheld amounts, together with an additional "matching" employer tax to the IRS. The rate of tax is 6.2% for each (employee and employer). The "wages" on which FICA taxes are levied are limited to the "annual wage base," \$102,000 in 2008. The annual wage base is indexed to wage inflation, and the new amount is announced each year by the Social Security Administration.

**Medicare taxes.** Chapters with employees are also subject to Medicare taxes, at the rate of 1.45% on both the employer and employee. No wage base limitation applies to Medicare taxes.

**Unemployment taxes.** If they are exempt from Federal income tax under §501(c)(3), ACHMM Chapters are not subject to Federal unemployment taxes. Otherwise, a Chapter must deposit unemployment tax payments quarterly. These are usually limited to \$56 per year per employee.

**Depositing employment taxes.** Employment taxes must be periodically deposited to the IRS' credit in a bank. The frequency of required deposits of income and FICA/Medicare taxes varies, depending on the amount of taxes deposited by the employer during the preceding calendar year. Details of these rules can be found in IRS Publication 15. Interest and penalties are assessed for late deposits.

**Employment tax returns.** Chapters having employees must file IRS Form 941, Employer's Quarterly Employment Tax Return, not later than the last day of April, July, October, and January, to report wages paid and taxes withheld and due for the prior calendar quarter. Form

941 may be filed 10 days later if the employer timely made all tax deposits during the quarter. Form 940 must be filed annually to report unemployment taxes due and paid.

### **State employment taxes**

Chapters located in states and municipalities that levy income taxes are also required to withhold state and local income taxes from their employees' wages. For this purpose, an employer must ordinarily establish an account with the state revenue or taxation department by "registering" with the department. (Most states have one registration form that may also be used to establish an account for paying state unemployment tax, establishing exemption from state sales tax on purchases or sales by the association, and establishing an account to collect and remit state sales tax on taxable sales by the Chapter.)

Chapters are usually subject to state unemployment taxes, and, if they are exempt under §501(c)(3), may elect to pay the statutory rate, or to reimburse the state for chargeable benefits.

State withholding, deposit, and return filing rules (similar to the Federal rules) apply to state income and unemployment taxes. These are usually due monthly or quarterly.

### **Information returns**

**Form W-2** must be provided to each employee not later than January 31st, and filed (using Form W-3) with the Social Security Administration not later than the end of February, to report wages and tax withholding for the prior year.

**Form 1099-MISC** must be provided to all individuals or partnerships who provided services to the Chapter as independent contractors, e.g., speakers to whom honoraria were paid, and other payees by January 31, and filed (using Form 1096) with the IRS by the end of February, to report payments for goods or services totaling at least \$600 during the preceding year.

Penalties are charged for late returns, and for incorrect or missing information returns.

#### **D. Other State Taxes**

**Income taxes.** Chapters that are exempt from federal income tax will also ordinarily be exempt from any state corporate income, gross receipts, or franchise taxes. In some jurisdictions, such as California or Indiana, a separate application for exemption must be filed. Others, however, will recognize the federal exemption without further application. Each Chapter should determine the requirements of its state through its attorney or accountant, or by contacting the state revenue

or taxation department. Some states, *e.g.*, California, also require exempt organizations to file Form 990 or a similar state form, *e.g.*, CA Form 199, with the state.

**Sales taxes.** Some Chapters are exempt from sales tax on their *purchases*; others are not. A Chapter's eligibility for exemption is determined under state law. Chapters that want to be exempt from state sales taxes must apply to the state revenue or taxation department.

In some states, *sales* of books, etc., by a Chapter to its members or others may be exempt from sales tax. Again, this must be determined separately for each state. When an exemption is not available for a Chapter, various exemptions may apply to the type or circumstances of particular transactions. If no exemption applies, the Chapter must register with the state to collect and remit sales taxes on sales of tangible personal property.

**Business license taxes.** Some local jurisdictions impose business license taxes on corporations, usually based on the business' gross receipts. Exemptions may be available for §501(c)(3) and/or §501(c)(6) EOs, but local law must be consulted.

**Property taxes.** Chapters may also be subject to state or local personal property taxes levied on business property. The availability of an exemption from these taxes depends entirely on state or local law.

## **VI. GENERAL LEGAL ISSUES**

### **A. Contracts**

Chapters should have clear policies concerning who is authorized to sign contracts on behalf of the Chapter, and the procedures that must be followed before a contract may be signed. Most contracts used by Chapters will be for events such as an annual meeting, convention, trade show, or social event. These contracts, *e.g.*, with a hotel or resort, should be reviewed by counsel before execution. Most of these contracts are unduly favorable to the facility, and some changes may be negotiated in order to reduce the Chapter's potential liability.

Even if no changes can be made, legal counsel should review the contract to ensure that the Chapter has the insurance coverage required by the contract and fully understands its obligations.

## **B. Insurance**

**General Liability.** Each Chapter should have general liability insurance. This coverage provides important protections from potential liability, and also provides for the payment of defense costs, even if the Chapter is found not to be liable (as is often the case).

Additional coverage for special events (other than ordinary Chapter meetings held in a hotel, restaurant, or other office facility) should be purchased for, *e.g.*, golf and tennis tournaments, and other events involving unusual exposures, *e.g.*, an outing on a member's boat.

In the case of certain events, *e.g.*, a sporting or other event posing some risk of physical injury to participants, Chapters should also obtain an "informed consent," or other similar agreement, indicating that participants are aware of the risks of participating, and agree to assume those risks in the absence of negligence or other misconduct by the Chapter. This document should be customized for each event.

**Directors and Officers.** When marketed to nonprofit organizations, D&O insurance is often called "Association Professional Liability" insurance. This protects against claims that the directors or officers have been negligent in carrying out their responsibilities, claims for slander and libel (*e.g.*, in publications), and, with an appropriate rider, employment-related claims. It does not cover claims for breach of contract. Some larger Chapters may need this coverage; however, for most Chapters, the risk of a claim in these areas is small, and purchase of the coverage can be deferred. (A stand-alone policy currently costs about \$5,000 for \$2 million coverage. One association provides coverage to chapters for about \$700 per chapter for \$1 million coverage.)

## **C. Americans With Disabilities Act**

The Americans With Disabilities Act of 1990 requires that all Chapter events be accessible to individuals with disabilities. Thus, Chapters should hold their meetings in accessible facilities, and should be prepared to provide an interpreter or other similar type of assistance to individuals with disabilities. Event announcements should require RSVPs and information regarding accommodation for disabilities that may be needed, *e.g.*, a sign language translator. In addition, contracts with hotels and other facilities should make the facility responsible for its own compliance with the Americans With Disabilities Act. Most facilities will readily agree to this.

## **VII. RESOURCES**

### **A. Internal Revenue Service**

All IRS forms, instructions, and publications (except Form 990-N) are available on the IRS website at: <http://www.irs.gov/formspubs/index.html>

IRS Publication 557, *Tax-Exempt Status for Your Organization*

IRS Publication 598, *Tax on Unrelated Business Income of Exempt Organizations*

Additional information for tax-exempt organizations is at:

<http://www.irs.gov/charities/index.html>

## **B. Accountants**

Chapters would do well to have a relationship with a local accountant who specializes in working with small nonprofit organizations. While few chapters are of a size that justifies an audit, you may wish to have an accountant perform a “review” of your financial statements, or a “compilation.” Ask your state or local “institute [or “society”] of certified public accountants” for a list of the accountants who serve on its committee on nonprofit organizations. Or ask for recommendations from other small nonprofit organizations.

## **C. Attorneys**

Likewise, access to an attorney to review contracts or answer occasional questions is well worth the money spent. (It’s always cheaper to ask in advance than to clean up a mess: “An ounce of prevention . . .”) Your state or local bar association also has a committee on nonprofit or tax-exempt organizations. Again, ask for referrals, too.

## **VIII. CONCLUSION**

Accomplishing the program goals of an ACHMM Chapter is a significant undertaking. Add to that the task of understanding the applicable legal and tax rules, and the job may seem monumental. This survey describes the basic legal and tax rules and identifies issues that may confront each Chapter's leadership. Although few Chapter leaders find it necessary (or desirable!) to know every twist and turn of the Internal Revenue Code, knowing the basic rules helps smooth the way and avoid numerous traps, and enables the Chapter to successfully accomplish its purposes.