



# Emerging from Lockdown on Solid Footing: How Nonprofits Can Prepare for Whatever Comes Next

May 20, 2020

# Before We Begin...



We will send you  
the recording and  
the slide deck



Submit your  
questions anytime in  
the side panel



Please complete  
the evaluation  
survey

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  - Participants will be asked periodic polling questions
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  - You will receive a CLE completion certificate via email within a week

# Today's Presenters



**Bill Powers**

Government Relations & Regulation  
Partner



**Allison Callaghan**

Employment  
Associate



**Doug Schwartz**

Corporate  
Partner

# Agenda

- Alternative funding sources
- Employment and return to work issues
- Tax and corporate issues

What type of nonprofit organization do you work for or work with most frequently?

# ALTERNATIVE FUNDING SOURCES



**Bill Powers**

# Funding is Fuel for Nonprofits' Mission

- Mixed Messages on Charitable Giving
  - [“As Coronavirus Threat Continues, Experts Tell Nonprofits to Shore Up Reserves,”](#) *Philanthropy Today*, Mar. 10, 2020
  - [“Charity is off the charts amid the coronavirus,”](#) *LA Times*, Apr. 20, 2020
- Which is it?



# Funding is Fuel for Nonprofits' Mission

- The Answer is Both
- Funding for COVID-19 responses is through the roof
  - Per *Candid*, \$10.3 Billion worldwide;
  - \$2 Billion in the United States
- But funding for “normal” nonprofits is subject to great stress
  - Comparison to 2008 Great Recession – 5.7% decline in charitable giving
    - Unemployment in 2008 peaked at 10%
  - Currently, unemployment is at 14.7% (closer to 20% according to experts)

# Alternative Funding Sources

- Unless your operations are related to COVID-19 response, nonprofits can't rely on traditional sources of funding – big donors, grants, individual donations, etc.
- **What are the alternatives?**
  - CARES Act
  - Paycheck Protection Program
  - Diversification?

# CARES Act – Nonprofit Provisions

- CARES Act increased charitable giving limits for both individuals and corporations
- New deduction of up to \$300 for charitable cash contributions for individuals who don't itemize
- Increase for 2020 for individuals who itemize and corporations
- May make the “extra” ask worth it:
  - Individual charitable deduction limit was increased from 60% of Adjusted Gross Income to 100%
  - Business charitable deduction limit was increased from 10% to 25%

# CARES Act – Other Provisions

- Other CARES Act Funding: e.g., Department of Commerce – Economic Development Administration
  - \$30 Million additional funding from CARES Act: <https://noss.law/36fhiRr>
- Other proposals:
  - “Patriotic Millionaires” propose to double threshold that Private Foundations must give to charity and apply same requirement to Donor Advised Funds (projected \$200 billion injection)

# Paycheck Protection Program

- Currently, only 501(c)(3)s may apply for PPP loans through the Small Business Administration (SBA)
- SBA could also adjust eligibility requirements:
  - Faith-based charities were deemed eligible for PPP under CARES Act
  - For-profit subsidiaries of a nonprofit eligible for PPP, subject to conditions

# Paycheck Protection Program

- Benefits of PPP:

- Payroll, Rent and Utilities, Insurance Premiums, Interest on Mortgage and Debt (what about Independent Contractors?)
- Loan is forgivable if certain requirements are met

- Limits of PPP:

- Actually getting the loan
- Limit: \$10 Million or 2.5 times monthly eligible expenses (for 8 weeks)

# HEROES Act

- Passed the U.S. House of Representatives on May 15th
- Three main changes for nonprofits
  - Expand the type of nonprofits eligible (all 501(c)s)
  - Expand the size of nonprofits eligible (even those with more than 500 employees would be eligible)
  - Expand the time that eligible expenses may be incurred (from 8 weeks to all of 2020)
- See Nossaman eAlert: <https://noss.law/2Ly4Eni>

# Diversification of Funding Sources?

- Common perception: diversified revenue = financial stability
- Cost-benefit analysis: what will it take to diversify:
  - Staff time and consulting fees paid to apply for grants, increased donor base, or seek new streams of revenue
  - VS
  - Double down on donor base, consolidating operations with other “white knight” nonprofits, mergers, etc.
- Don't forget regulatory compliance



Aside from the health and safety of your community and employees, what is your biggest concern about “re-opening” your nonprofit?

# EMPLOYMENT AND RETURN TO WORK ISSUES



Allison Callaghan

# Teleworking



# Teleworking Risks

- Ensuring wage and hour compliance
- Protecting confidential, business-sensitive information
- Reimbursing business expenses
- Maintaining a safe and respectful work environment

# Return to Work



# Return to Work

- Develop a plan for returning employees to work
  - Higher-risk employees
  - Employees who are reluctant to return
  - Employees with caretaking obligations

# Return to Work

- Implement workplace safety measures to minimize the risk of exposure
  - Self-monitoring and screening
  - Personal protective equipment
  - Hygiene, cleaning and disinfection protocols
  - Workspace and schedule modifications
  - Plan for responding to infection or suspected infection

# Return to Work

- Keep current
- Remain flexible
- Communicate and focus on worker well-being



# TAX AND CORPORATE ISSUES



**Doug Schwartz**

# Tax Update

- Charitable giving incentives in CARES Act
- IRS has extended deadlines for filing Form 990 series to 07/15/2020 if due date (with or without extensions) would have otherwise fallen between 04/01/2020 and 07/14/2020
  - See IRS Notice 2020-23: <https://noss.law/2y6PPoz>
  - See also Nossaman e-alert: <https://noss.law/3cglq4p>

# Tax Update

- IRS on 04/24/2020 issued proposed regulations (REG-106864-18) addressing Tax Cuts and Jobs Act of 2017 (“TCJA”) requirement that nonprofits separately track unrelated business taxable income (“UBTI”) streams from different sources
  - These regulations take a practical approach, streamline and ease the reporting, and are otherwise very favorable to nonprofits
  - See REG-106864-18: <https://noss.law/2Wz11DB>

# Merger / Sponsorship / Collaboration Issues

- “Public” charity versus private foundation
- Affiliations
  - 501(c)(3)s / (c)(4)s / (c)(6)s / PACs
  - Joint ventures
  - IRC § 414 / common law employer
- Required approvals (directors, members, AG)
- Applying these principles to merger, fiscal sponsorship, “member/subsidiary” or collaboration
- Liquidation / bankruptcy

# “Public” 501(c)(3) vs. Private Foundation

- Basic distinction: “Public” (c)(3) gets substantial support from wide range of contributors / patrons / other public charities / government and therefore deemed responsive and accountable to public
- Private foundation depends on a few persons (individuals, for-profit businesses, other private foundations) for its support and therefore is deemed unresponsive and unaccountable to public
- Private foundations subject to variety of excise taxes (IRC § § 4940-4945) which are N/A to public charities (IRC § 4958 “excess benefit” scrutiny applies to “public” (c)(3) and any (c)(4))

# “Public” 501(c)(3) vs. Private Foundation

- These (c)(3)s usually are “public”:
  - Church; educational institution with regular faculty & students; medical care/ education, and/or research institution (IRC § 170(b)(1)(A)(i), (ii), (iii), 509(a)(1))
  - 501(c)(3) with substantial ( $> 33\frac{1}{3}\%$ ) support from admission and service fees, patronage memberships, and/or “small” contributions (e.g., public broadcasting, symphonies, theaters, museums, zoos / aquariums) (IRC § 509(a)(2))
  - 501(c)(3) with substantial ( $\geq 10\%$ , but  $33\frac{1}{3}\%$  in special cases) from many “small” contributors, “public” charities, and/or government, and with active fundraising program (IRC § 170(b)(1)(A)(vi), 509(a)(1))
  - 501(c)(3) supporting university, hospital, or other public (c)(3) and over which supported (c)(3) exercises meaningful supervision and control (IRC § 509(a)(3))

# “Public” 501(c)(3) vs. Private Foundation

- Because of less favorable charitable contribution rules and other restrictions, private foundation status makes it more difficult to solicit contributions from
  - Individuals
  - Businesses
  - Other private foundations
  - Persons donating art or other in-kind appreciated assets
- Form 990 Schedule B donors are public (not redacted)

# “Public” 501(c)(3) vs. Private Foundation

- Excise taxes (IRC § § 4940-4945) also make it more difficult for private foundations to:
  - Obtain leased space, loans, operating assets, *etc.* from substantial contributors, management, or other “insiders” (even if in foundation’s interest and terms are market);
  - Conserve endowment (as opposed to making regular charitable and other disbursements)
  - Own substantial stake (> 20%) in business
  - Lobby
  - Make grants to individuals for study, research, *etc.*
  - Contribute to other private foundations
  - Promote charities or causes outside US



# Affiliations: (c)(3) / (c)(4) / (c)(6) / PAC



**501(c)(3)  
grant-  
making**

**501(c)(3)  
public  
interest law**

**501(c)(4)  
lobbying**

**PAC**

# Affiliations: (c)(3) / (c)(4) / (c)(6) / PAC

- Not prohibited but take care that (c)(4)'s, (c)(6)'s, or PAC's activities do not get attributed to (c)(3) (e.g., excess lobbying, or ANY electioneering, can kill exemption)
- Helpful resources:
  - IRS 2000 EO CPE Text on “Affiliations Among Political, Lobbying and Educational Organizations” (See <https://noss.law/3bAokS2>)
  - IRS Technical Advice Memorandum 200908050 (Feb. 20, 2009) on shared websites (See <https://noss.law/2WZximp>)
  - American Bar Association, “Comments on IRS Announcement 2000-84 on the Need for Guidance Clarifying the Application of Internal Revenue Code Provisions to Use of the Internet by Exempt Organizations” (Feb. 27, 2001) (See <https://noss.law/2TaIICL>)

# Affiliations: (c)(3) / (c)(4) / (c)(6) / PAC

- Considerations for maintaining “separateness”
  - Minimize cross-over between director and officer slates
  - Strong conflict-of-interest policy
  - No commingling of bank accounts, assets, liabilities, *etc.*
  - Observe corporate formalities
  - Keep separate office space/facilities, or monitor shared facilities, I/P and staff (written cost-sharing arrangements, *etc.*)
  - Avoid inter-entity financial arrangements (loans, grants, *etc.*), or at least make sure they are documented and reflect arm’s-length terms
  - Maintain separate web sites, fundraising, promotional/solicitation materials and events, and membership lists

# Affiliations: Joint Ventures

- In general, an exempt organization wants to avoid a joint venture relationship with another entity (exempt or not) because
  - 1) Other entity's attributes (operation of business, lobbying, electioneering, private benefit/inurement. *etc.*) can get attributed to exempt organization, and
  - 2) Mutual agency under state law (*i.e.*, *one* joint venturer can be subject to liabilities and defaults of the other)
- ***Labels do not matter.*** Two parties can “back into” joint venture relationship based on facts and circumstances
  - See, e.g., *Plumstead Theatre Society, Inc. v. Commissioner*, 675 F.2d 244 (9th Cir. 1982), *aff'g* 74 T.C. 1324 (<https://noss.law/2Tq6Rpd>)

# Affiliations: IRC § 414 / Common Law Employer

- Issues:

- Avoid situation where one party's employees become employees of other party
  - 1) Under common law or
  - 2) Based on technical tests under IRC § 414(c), (m)

- Consequences:

- 1) One party can become liable for other employee's actions or for overtime, benefits, harassment, *etc.*;
- 2) Party with "rich" pension or other retirement / benefit plan may be required to cover employees of other party with no or "poor" plan

# Affiliations: IRC § 414 / Common Law Employer

- Common-law employer status based on facts and circumstances – fundamentally, which party exercises control over the employees as a practical matter
- § 414(c), (m) affiliation most likely to arise where
  - 1) Common directors or other control,
  - 2) “Farmed out” management functions, and/or
  - 3) Close coordination in providing charitable services or facilities to public

# Affiliations: IRC § 414 / Common Law Employer

- Helpful resources:
  - “Employer Beware: Affiliated Service Group Is a Single Employer for Benefit and Health Care Coverage Testing,” *The Tax Adviser*, Aug. 1, 2016 (See <https://noss.law/364b1ba>)
  - Treas. Reg. § 1.414(c)-5 (affiliation rules for tax-exempt organizations) (See <https://noss.law/3bwjXY0>)
  - “Exempt Organizations: Who Is a Common Law Employee?” (See IRS website at <https://noss.law/2WBooN6>)
  - “Classifying Employees Correctly,” National Council of Nonprofits (See <https://noss.law/2WzHFhE>)

# Required Approvals (Directors, Members, AG)

- Time to dust off and review articles, bylaws, *etc.* to:
  - 1) Ensure that proposed actions are consistent with mission, and
  - 2) Compliance with meeting and consent procedures
- Director approval always required
  - **Opportunity to “make your case” through detailed resolutions**
- State statutes may require voting member approval for combinations, dissolution, or asset sales
- State statutes may also require AG consent to same



When is the last time your organization reviewed its bylaws?

# Merger



**"Struggling" Nonprofit merges into  
"White Knight" Nonprofit under state law  
with "White Knight" Nonprofit surviving**

# Merger

- Cross-hybrid basically impossible – *e.g.*, a 501(c)(3) can only merge with another 501(c)(3), etc.
- Requires director, member and AG consent
- Surviving entity “inherits” all liabilities, assets, operational history, other traits of merged entity
- Employees combined for purposes of retirement/benefit plans, *etc.*

# Financial Sponsorship



**“White Knight” Nonprofit funds  
“Struggling” Nonprofit**

# Financial Sponsorship

- Can be done with (c)(3), (4), or (6)
  - However, if (c)(3) sponsors, need to ensure that counter-party is not using funds for lobbying or electioneering
- Director approval needed; Member and AG consent usually not
- If sponsoring nonprofit is not a publicly-supported (c)(3), then sponsored organization if a (c)(3) may fall into private foundation status
- IRC § 414 / common employer affiliation can be avoided if you are careful

# “Member/ Subsidiary”

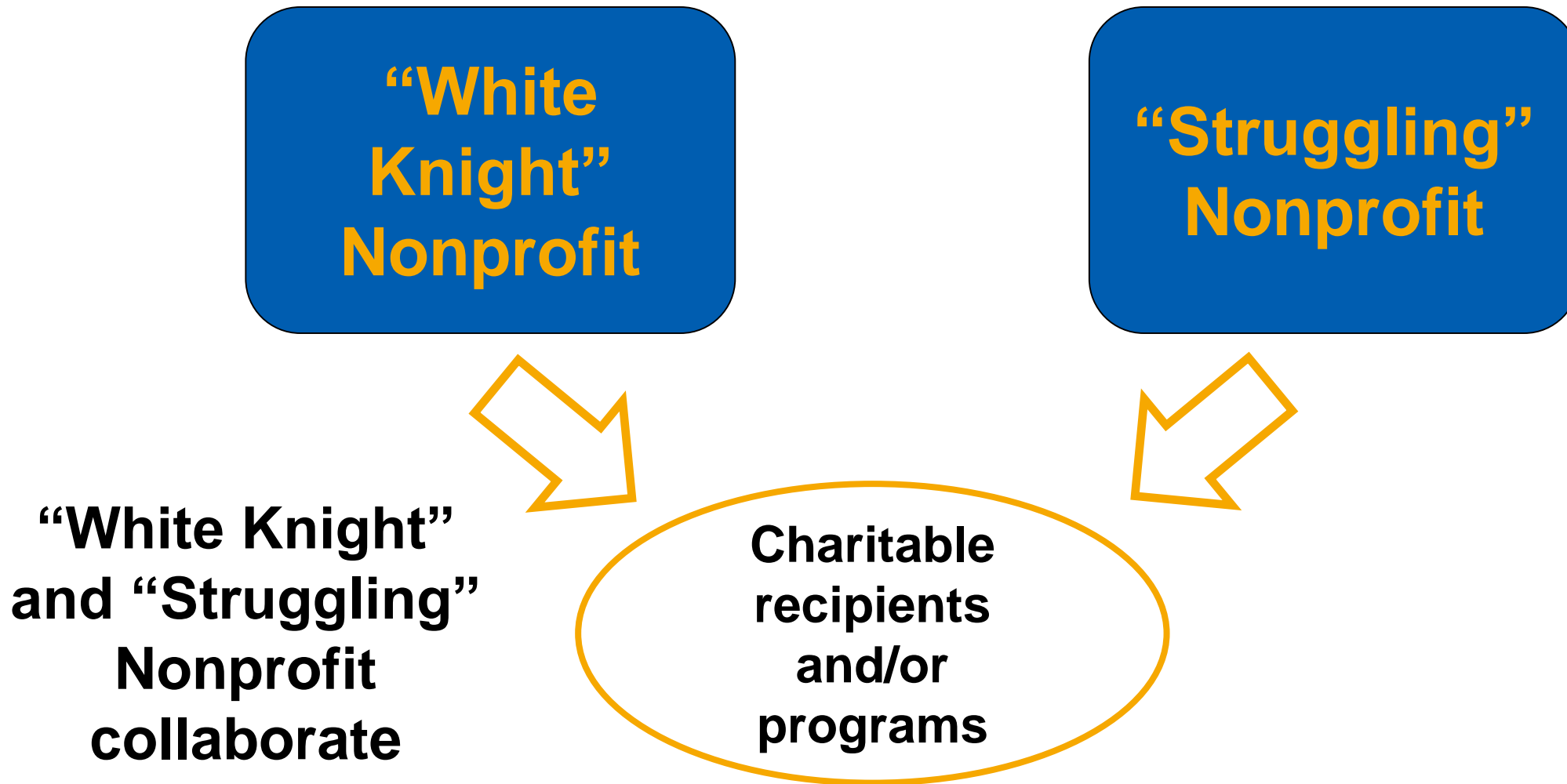


**“White Knight” Nonprofit  
becomes sole member in  
“Struggling” Nonprofit**

# “Member/ Subsidiary”

- Can be done with (c)(3), (4), or (6)
- Maintaining “separateness” still possible
- Director approval needed; member approval needed if existing members; AG consent usually not
- May need to amend articles/ bylaws to provide for members
- “Struggling” organization can avoid private foundation status but needs to maintain its own fundraising
- IRC § 414 affiliation results because one nonprofit controls the other (see IRC § 414(c))

# Collaboration

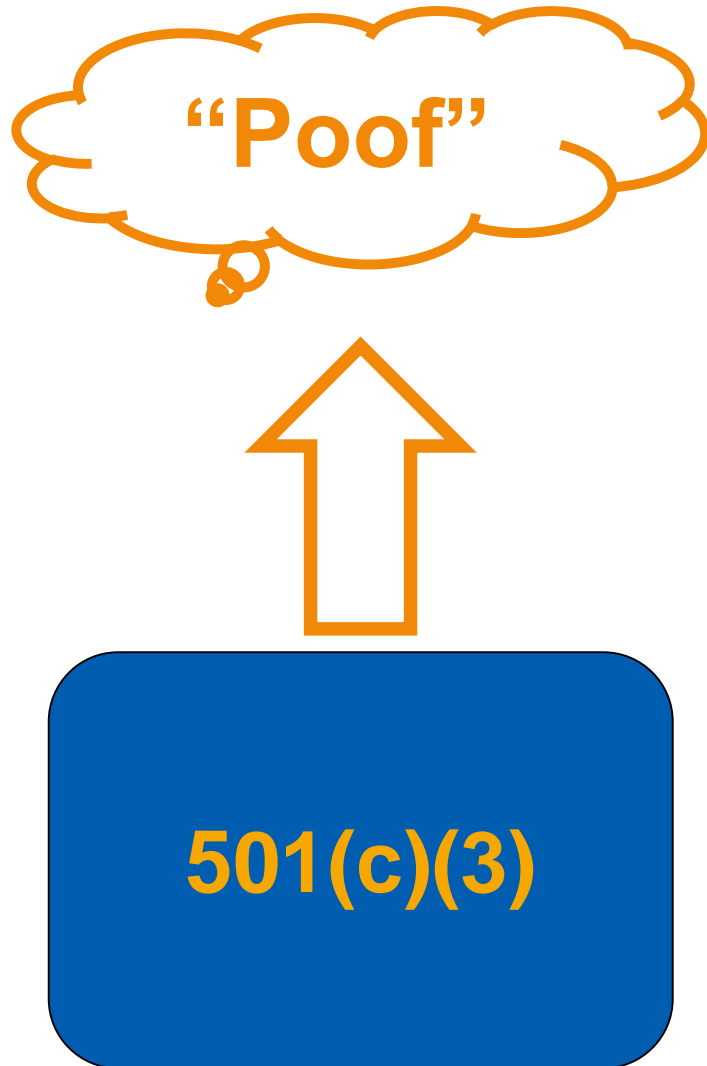




# Collaboration

- Can be done with (c)(3), (4), or (6)
  - However, need to avoid joint venture
- Director approval needed; Member and AG consent usually not
- “Struggling” organization can avoid private foundation status but needs to maintain its own fundraising
- IRC § 414 / common employer affiliation can be avoided if you are careful

# Liquidation



- Requires approval of board, voting members (if any), and state AG
- Notice to creditors and provisions for their payment and/or reserves for the same
- Articles, IRC and/or state statutes governing charitable trusts may place limits on disposition of residual assets (e.g., must go to another nonprofit generally or to a 501(c)(3) specifically)
- Final Form 990 and other returns
- Final termination filing with Secretary of State or comparable state agency

# Liquidation: Helpful resources

- “Guide for the Dissolution of California Nonprofit Public Benefit Corporations” (Public Counsel Jan. 2017)  
<https://noss.law/2y5pmaL>
- “General Guide for Dissolving a California Nonprofit Corporation” (Cal. Att’y General’s Office)  
<https://noss.law/3661hNu>
- “Dissolving a Nonprofit Corporation” (Nat’l Council of Nonprofits)  
<https://noss.law/2XeTh9h>

# Bankruptcy



**501(c)(3)**

- Chapter 11 (reorganization) versus Chapter 7 (liquidation)
- Voluntary only; creditors cannot force nonprofit into B/K
- Effects of automatic stay
- Effects of avoidance
- Fiduciary duties of board
- Role of state AG
- Treatment of restricted donations/contributions and endowments (whether they're available to creditors)
- Specific provisions in bankruptcy law limiting the sale or use of nonprofit assets in accordance with non-bankruptcy law (e.g., IRC, state laws governing charitable trusts)

# Bankruptcy: Helpful resources

- “Navigating a Nonprofit Corporation through Bankruptcy,” Nonprofit Quarterly, Apr. 29, 2014  
<https://noss.law/2AvGpUh>
- “Bankruptcy Issues Concerning California Nonprofits Affected by the Economic Downturn,” Public Counsel Law Center, Aug. 2009  
<https://noss.law/3fTsac7>
- “A Guide for Nonprofit Organizations: Bankruptcy Issues,” The Law Project, Aug. 2014  
<https://noss.law/3cC8F5H>

# Resources and Further Reading

- Continuing Public Education (CPE) training materials for its Exempt Organization (EO) staff  
<https://noss.law/3fSQTNE>
- IRS “Charities and Nonprofits”  
<https://noss.law/3cCLhFs>
- Internal Revenue Code (“IRC”)  
<https://noss.law/3cCE6gj>
- Treasury Regulations  
<https://noss.law/3fW0TWo>

# Resources and Further Reading

- Coronavirus Aid, Relief, and Economic Security (“CARES”) Act  
<https://noss.law/3dVQXL3>
- “CARES Act – Summary of Insolvency-Related Provisions” (Cal. Lawyers Ass’n 04/17/2020)  
<https://noss.law/3cA1TO8>
- Families First Coronavirus Response Act (“FFCRA”)   
<https://noss.law/2Zf09FU>

# Nossaman Resources

- Nossaman's COVID-19 Response Team  
<https://noss.law/COVID-Response>
- “Financial Aid Expected for Struggling Nonprofits: The HEROES Act and Accessing PPP Loans,” May 15, 2020  
<https://noss.law/2Ly4Eni>
- “SBA Extends PPP Loan Safe Harbor Deadline to May 14, 2020 and Issues Other Guidance,” May 8, 2020  
<https://noss.law/3fwDACv>
- “Lobbying in the Era of COVID-19: What to Expect,” May 4, 2020  
<https://noss.law/2Wxo4xk>



# Nossaman Resources

- “Recent Coronavirus-Related Developments Affecting Employers,”  
May 4, 2020  
<https://noss.law/2SHMP9g>
- “What You Need to Know About the Latest Updates to the  
Paycheck Protection Program (PPP),” Apr. 23, 2020  
<https://noss.law/2x4Nji7>
- “UPDATE 3 | COVID-19 Federal and California Tax Extensions,”  
Apr. 13, 2020  
<https://noss.law/3cglq4p>

# Nossaman Resources

- “Finding the Right Fit Under CARES: Understanding the SBA Loan Programs Available Under the CARES Act and Determining Eligibility and Business Need,” Apr. 3, 2020  
<https://noss.law/2X2Mels>
- “Protecting Your Business Operations During a Global Pandemic,” Mar. 27, 2020  
<https://noss.law/2UHbbQH>
- “PAC Operations in the Wake of COVID-19,” Mar. 18, 2020  
<https://noss.law/33u6TzQ>

# Questions?



# Thank You



**Bill Powers**

Government Relations & Regulations

Partner

[wpowers@nossaman.com](mailto:wpowers@nossaman.com)

[FULL BIO](#)



**Allison Callaghan**

Employment

Associate

[acallaghan@nossaman.com](mailto:acallaghan@nossaman.com)

[FULL BIO](#)



**Doug Schwartz**

Corporate

Partner

[dschwartz@nossaman.com](mailto:dschwartz@nossaman.com)

[FULL BIO](#)