

Legal Obligations of ACA Sections

Each Section's affiliation as a part of the American Camp Association is governed by a charter agreement, renewable every three years and subject to the terms and conditions of the charter. In addition, those Sections that are incorporated are governed by state corporation law. All Sections are subject to the requirements of the IRS. Those Sections with their own §501 (c) (3) status with the IRS must report directly to the IRS, with a copy of their 990 to ACA.

Legal Assistance

The following information will help the Section leadership identify issues that need to be addressed, and when it is important to contact the ACA National office for help. When selecting an attorney or accountant be sure they are familiar with the rules that apply to tax-exempt organizations.

Corporate Legal Structure

Articles of Incorporation

Unincorporated Sections

Most Sections in ACA are *unincorporated*. To conduct the affairs of the association and to obtain insurance for your needs, ACA incorporation and tax exempt status with the IRS is sufficient to provide for your protection.

Through ACA's Association Liability insurance, ACA and the Sections have coverage for the actions of Section Board members, visitors, and volunteers while they are acting in the scope of their responsibilities.

Incorporated Sections

Incorporation is a matter of state nonprofit corporation law. The governance (articles of incorporation, By-Laws, policies, etc.) and internal operations (elections, meetings, etc.) of each Section must comply with the requirements of the governing corporation law. The articles of

incorporation is the highest authority for corporate governance; and should contain all provisions necessary to qualify the Section for exemption under §501(c)(3). 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.

This corporate form of organization ensures that the Section will be recognized as a separate entity (from ACA National or any other Section); and, in the absence of fraud, insulates the incorporators, 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.

Bylaws

The Bylaws are an operating agreement among the members, and amendments 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 Section, including provisions for amendment of the By-Laws, election of officers and directors, and operation of committees.

Policies

The final set of documents are the policies of the corporation, as approved by the Board of Directors. These may cover a variety of issues, and may ordinarily be changed by the Board of Directors without approval by the members.

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Fiduciary and Legal Responsibilities of Board Members

The officers and directors have a high duty of fidelity in the governance and administration of the Section. These duties are commonly discussed in terms of the duty of care, the duty of loyalty, and the duty of obedience.

The **duty of care** generally requires the director or officer:

1. Participate in the direction and oversight of the Section 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 as properly required before a decision can reasonably be made, and by keeping generally informed about the plans and activities of the Section;
2. Exercise the informed judgment, practical wisdom, and common sense that may reasonably be expected of the average person; and
3. When acting, consider the size, complexity and other circumstances of the Section, 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.

The **duty of loyalty** generally requires that an officer or director:

1. Act at all times in good faith and in the best interests of the Section.

2. Not engage in a conflict of interest or otherwise act 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 resolution approving the transaction should expressly authorize or recognize the interest of the related parties, and should be clearly reported in the minutes.
3. Not engage in or take advantage of an opportunity personally or for the benefit of third parties, that may be considered a corporate opportunity in which that the Section might be interested without obtaining the approval of the Board.

The **duty of obedience** requires the directors and officers

1. To carry out the purposes of the organization,
2. To act in accordance with its governing documents,
3. To assure themselves that the organization is conducting its activities in compliance with applicable federal, state, and local laws.

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

Section Board Minutes

The minutes of an organization are the official record of all business transacted, activities undertaken, plans projected, general growth, etc. The minutes should contain what is done and not what is said.

Committees or Task Forces

Generally, Section committees or task forces will include Section members who may or may not be on the Board of directors. Committees are

usually standing committees formed to give guidance to the delivery of a program or service. Task forces are usually appointed to address specific issues or tasks and are often short term in nature. The authority of these committees or task forces are 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.

The Section as a Tax-exempt Organization under §501(c)(3)

Classification

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." ACA Sections are generally regarded as charitable and educational organizations whose mission benefits the public. ACA Sections will normally qualify as a public charities under 509(a)(2) as an association substantially supported by membership dues and fees for exempt services.

All of ACA's Sections are exempt under §501(c)(3) and therefore **prohibited** from

1. Permitting any part of their net earnings to inure to the benefit of private shareholders or individual.
2. Participating or intervening in any political campaign on behalf of (or against) any candidate for public office.
3. Disseminating propaganda or otherwise attempt to influence legislation as a substantial part of its activities.

Exempt purposes

Each Section must be organized and operated exclusively for exempt purposes. As such, each Section must be engaged in activities that serve its exempt purposes, and only insubstantially

engaged in pursuing non-exempt purposes. This includes such activities such as educating their members in order to enable them to perform their duties more effectively. Whether a Section's non-exempt purposes are substantial 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 non-exempt purposes.

Legislative activity

ACA Sections may not engage in lobbying or other legislative activity to any substantial degree. This restriction does not absolutely prohibit a Section from lobbying, but generally requires that a Section spend less than 20 percent of its budget for direct and grassroots lobbying, and perhaps as little as 5 percent

Private Inurement

Section §501(c)(3) prohibits the net earnings (or assets) of a charity from inuring to the benefit of any private shareholder or individual. This simply means that the Section's 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 Section 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 Section. A Section may also contract with other individuals and with exempt and non-exempt entities, to obtain goods or services.

Group Exemption

Most ACA Sections are recognized as exempt under §501(c)(3) by virtue of ACA's "group exemption." In order to be included in the group exemption (which is an administrative convenience for both ACA and the IRS), each Section has provided ACA with authorization to include the Section in the group exemption. ACA provides the IRS with an annual report of the Sections to be included in the group exemption.

A few Sections (New York, New England, Illinois, Michigan) obtained their own individual

recognition of exemption by filing IRS Form 1023, and have received a separate determination letter concerning their exemption.

Employer Identification Number

Each Section has its own Employer Identification Number. 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.

Sections should never use ACA's national Employer Identification Number. The Section number is secured through the state where the employee will work. If you need information on getting the Section Employer Identification Number call the accounting department at the national office.

Fundraising Issues

Because ACA Sections are exempt from Federal income tax under §501(c)(3), gifts and contributions to them are 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 Section, the deductible amount is limited to the excess of the amount of the payment over the fair market value of the product or service.

State Charitable Solicitation Registration

Sections that solicit contributions may be required to register for that purpose with the state attorney general or consumer protection agency. Because most Sections are soliciting in only one or two states, registration will not be difficult. It typically requires the Section to complete a registration form, and submit its IRS Form 990 and/or audited financial statements.

In many states, an exemption applies for charities that are soliciting only from members. To ascertain whether your Section is required to register, contact your legal counsel. If a Section can take advantage of an exemption, it may be

required to apply or otherwise notify the state it is claiming that exemption.

Tax Information

IRS Annual Information Tax Return

Each Section must file the appropriate IRS form (Form 990 or Form 990-EZ, together with Schedule A). These forms are, in essence, a financial statement, together with additional information about the Section's activities to enable the IRS to ascertain that the Section continues to qualify for exemption

Penalties

Sections that do not timely file a correct and complete Form 990 or 990-EZ are subject to a penalty of \$20 per day, up to the lesser of \$10,000 or 10% of the Sections' gross receipts, per return. This penalty may be abated if the delay was due to good cause and was not willful.

Review by Legal Counsel and ACA

Because Form 990 or 990-EZ requires information pertinent to the Section's tax-exempt status and liability for unrelated business income tax, it should be reviewed by knowledgeable tax counsel before filing. In addition, Sections are required to send a copy of the completed Form 990 or 990-EZ to ACA for its review with their annual report or at least one month before the due date to the IRS (April 15th).

Disclosure

Each Form 990 or 990-EZ filed by a Section must be available at its principal office for public inspection to anyone who requests a copy in person or by mail, for three years after the date it is filed. Any list of donors that may be part of the return need not be disclosed.

Each Section must also disclose or provide a copy of its application for exemption, 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.

Unrelated Business Income Tax

Although ACA and its Sections 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 ACA or the Section itself were not exempt. The unrelated business income tax ("UBIT") is imposed on the net income received by an otherwise exempt organization from any trade or business that is not related to its exempt purposes and 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.

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 magazine or newsletter is treated as an unrelated trade or business, even though the editorial content of the publication is related to the EO's exempt purposes.

A trade or business is "related" to ACA's or a Section'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 ACA and its Sections, 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. However, income from consulting services, in which ACA or the Section, (e.g., provides consulting services to individual camps) would be considered "unrelated" and subject to tax. Income from Section 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 it meets the following exceptions. The unrelated business income tax does not apply to the sale of donated goods or services, to income from activities substantially run by volunteers, to income from annual fundraising events, or to investment income such as dividends, interest, rent, and royalties.

Referral Services

With few exceptions, the IRS has taken the position that operation of a referral service is an unrelated trade or business. Thus, operation of a camper or staff referral service, separately paid for by the users, is an unrelated trade or business.

Member Dues

In addition, the IRS has recently argued that dues received from certain classes of members may be taxable if their principal purpose in joining is a non-exempt purpose. However, we do not believe that ACA has, at this time, a class of member that fits this circumstance.

Royalties

Sometimes an association wishes to become involved with a third party in promoting the marketing of the third parties' products or services to its members. Sections should establish a royalty license agreement, rather than directly conducting the activity itself. By entering into a license agreement, under which the vendor pays a royalty (either a flat fee per unit or a percentage of gross sales) for the use of the Section's name, an association is able to avoid paying tax that would be due if it conducted the activity itself, or as a partner in a joint venture. Any other services provided by the Section are separately reimbursed.

Sections should seek experienced and competent legal assistance in negotiating and drafting license agreements. Commercial vendors are all too ready to take advantage of associations, and agreements prepared by them are usually heedless of the importance (for associations) of the distinction between tax-free royalties and taxable service fees.

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 5 months after the end of the Section's fiscal year. A Section that expects to owe at least \$500 in UBIT must report and pay quarterly estimated income taxes using IRS Form 990-W. In most states, Sections that are subject to UBIT must also pay state corporate income taxes on the same revenue.

Employment , Excise and State Taxes

ACA Sections, although exempt from Federal income tax, remain subject to Federal, state and local employment taxes, income tax withholding, Social Security withholding and taxes, and state unemployment taxes on "wages" paid to "employees." The national office provides a service for Sections to handle employees' payroll and benefits. Organizations exempt under §501(c)(3) are exempt from Federal Unemployment Tax (FUTA).

Employees

An employee is anyone whose activities on behalf of the association are subject to its right of direction and control as to both the tasks to be accomplished and the details and means of accomplishment. 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 income.

A Section's paid workers should generally be considered employees of the Section unless they are contracting for a service with an independent contractor. Certain taxes and benefits can be avoided when contracting for services. However, the Section loses the right of direction and control. Whether a person is an independent contractor or an employee depends on the facts and circumstances of the way the job is proposed to be carried out. There are 20 factors that help determine the status of a worker.

A person may be presumed to be an employee if the organization plans to:

1. Specify the time, place, method, and person who is to do the job.
 2. Trains the person to do the job.
 3. Requires the person to do the job himself or herself.
 4. Hires others to assist the person doing the job.
 5. Integrates a person into its staff.
 6. Has a long-standing work relationship with that person even though it may be irregular.
 7. Sets the hours of work for the person.
 8. Requires the person to work full time.
 9. Requires or permits the person to work on its premises.
 10. Determines the sequence of work the person does.
 11. Requires oral or written reports from the person.
 12. Pays the person on a regular and periodic basis, for example, weekly.
 13. Pays the person's business or travel expenses.
 14. Furnishes the person tools, equipment or materials.
 15. Maintains the right to fire, assign, or discharge the person.
 16. Has the right to terminate the contract without liability for breach,
- and if the person:**
17. Has no other customers.
 18. Makes no attempt to get other customers.
 19. Makes no profit or losses.
 20. Has no investment in himself or herself as a business.

If the Section can not decide on the status, contact legal counsel or ACA's accounting department.

Federal Taxes

New Hire Reporting

Under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, employers were required to comply with a federal new hire reporting requirement beginning October 1, 1997. For each newly

hired employee, and in some state independent contractors, the employer must provide the following information to the state directory:

1. The employee's name, address, social security number (and in some states, the date of birth).
2. The employer's name, address, and federal employer identification number (FEIN),

Contact your state unemployment office for the form and filing requirements or call ACA's Accounting Department for assistance.

Income Tax

All employers must withhold income tax from the wages paid 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. The Section ordinarily must use the withholding tables in IRS Circular E, Employers' Tax Guide (Publication 15), to determine the proper amount to withhold.

Social Security ("FICA") Taxes

Sections are also required to withhold Social Security ("FICA") tax from their employees' wages, and to pay the withheld amounts, together with an additional "matching" (6.2%) employer tax to the IRS.

Medicare Taxes

Sections with employees are also subject to Medicare taxes, at the rate of 1.45% on both the employer and employee.

Federal Unemployment Taxes

Because they are exempt from Federal income tax under §501(c)(3), ACA Sections are not subject to Federal unemployment taxes (FUTA).

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 the IRS' Employers' Tax Guide.

Employment Tax Returns

Sections 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.

Information Returns

Form W-2 must be provided to each employee not later than January 31st, and Form W-3 filed 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 independent contractors and other payees by January 31, and Form 1096 filed with the IRS by the end of February, to report payments for goods or services totaling at least \$600 during the preceding year. Interest and penalties are charged for late deposits or returns, and for incorrect or missing information returns. (Form W-9 should be received from all independent contractors prior to making payment.)

State Taxes

State Income Taxes

Sections 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.

ACA's Sections are subject to state unemployment taxes, and usually 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.

Sections 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 Section 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 ACA Sections are exempt from sales tax on their purchases; others are not. A Section's eligibility for exemption can be determined by consulting legal counsel or applying to the state revenue or taxation department.

In some states, sales by a Section 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 Section, various exemptions may apply to the type or circumstances of particular transactions. If no exemption applies, the Section must register with the state to collect and remit sales taxes.

Property Taxes

Sections may 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.

General Legal Issues

Contracts

Sections should have clear policies concerning who is authorized to sign contracts on behalf of the Section, and the procedures that must be followed before a contract may be signed. Most contracts used by Sections will be for events such as an annual meeting, convention, or fundraising event. These contracts, (*e.g.*, with a hotel or resort location) 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 Section's potential liability.

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

Insurance

Each Section has both general liability and association liability – which includes directors' and officers' insurance. This is provided on a group basis through the ACA Accounting Department and its insurance broker. This coverage provides important protections from potential liability, and also provides for the payment of defense costs, even if the Section is found not to be liable (as is often the case).

Additional spot coverage for special events (other than ordinary Section meetings held in a hotel, restaurant, or other office facility) is available with ACA's coverage. Sections needing such coverage should call the ACA Accounting Department. This department also has information on how to obtain certificates of insurance that may be required by the site of a Section Event.

Liability Releases

When a Section sponsors or co-sponsors an event that contains activity-based, physically challenging programs such as ropes courses, aquatics programs, OLS etc., Sections should also obtain an "informed consent," or liability release, 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 Section. Additional information on these releases is in the Section Administration section and in the Section Education manual. The documents have been reviewed by ACA's legal counsel and are available from the ACA Professional Development Department. After the event these forms should be sent to the above department.

Americans With Disabilities Act

The Americans With Disabilities Act of 1990 requires that all Section events be accessible to individuals with disabilities. Thus, Sections 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 RSVP's 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 assure the facility is in compliance with the Americans With Disabilities Act. Most facilities will readily agree to this.