



## Some Nonprofits Unaware of New Donor Protection Provisions Ministries bound by two provisions of Sarbanes-Oxley

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Though the American Competitiveness and Corporate Accountability Act of 2002 (commonly known as the Sarbanes-Oxley Act) has been in force for nearly three years, at least some nonprofits covered by key provisions of it remain unaware that they are bound by the law. In doing inquiries for other articles, MinistryWatch.com researchers have received responses from at least two ministries – well known and well-staffed – that have claimed that none of the law's provisions apply to nonprofits.

Actually, the opposite is true. Noted nonprofit tax attorney Barnaby Zall, in an article written for CCH Incorporated, reports, "Many people mistakenly believe that Sarbanes-Oxley only applies to large, publicly-traded, for-profit companies. In fact, Sarbanes-Oxley has immediate direct effects on tax-exempt organizations, with indications that many more indirect effects are imminent."

### Whistleblower Protection and Document Destruction Policy

The law – which was signed by President Bush on July 30, 2002 – was written in response to the highly visible corporate scandals of the last few years. Indeed, in a nod to the scandal that helped lead to the law, Zall's essay was entitled, "But I'm not Enron!" – New Federal Criminal Penalties Apply to Exempt Organizations." Still, Zall notes that two of its provisions apply to nonprofit entities. "Sarbanes-Oxley created two new criminal offenses that affect tax-exempt organizations – prohibitions against document destruction and manipulation, and 'whistleblower' protection."

Zall is not alone in his understanding of the law. In a report they co-published, BoardSource and the Independent Sector assert, "Two provisions of the Sarbanes-Oxley Act apply to all corporations be they nonprofit or profit. Thus, all nonprofit organizations need to understand these two provisions and comply with them."

According to BoardSource, "The Act protects whistleblowers who risk their careers by reporting suspected illegal activities in the organization." It is illegal for the nonprofit to punish the whistleblower in any way, even if the allegations are later discovered to be unfounded. The employee need only have "a reasonable belief or suspicion that a fraud exists," reports BoardSource. It is not up to the employee to demonstrate misconduct, and he or she is afforded protected status under the law.

Under certain circumstances, the law also prevents the destruction of a variety of documents. BoardSource notes, "The law makes it a crime to alter, cover up, falsify, or destroy any document (or persuade someone else to do so) to prevent its use in an official proceeding (e.g., federal investigation or bankruptcy)."

### Real policies or real penalties

Zall reports, "These two new criminal provisions contain hefty pen-

alties, including up to 10 years in prison." Angela Sakell, a vice president at BoardSource, says, "Since penalties for these provisions fall under the criminal law, the provisions apply to everyone." Zall advises, "Organizations should review both document management and retention policies, and employment and supervisory policies to insure that these laws are not violated. Managers, in particular, ought to be trained to understand the scope of the new laws."

To comply with the whistleblower provisions, Sakell says that BoardSource recommends that nonprofits "Develop, adopt and disclose a formal process to deal with complaints and prevent retaliation" and "investigate employee complaints and correct any problems or explain why corrections are not necessary." To ensure adherence to the document destruction provisions, BoardSource recommends that non-profits "Have a written, mandatory document retention and periodic destruction policy, which includes guidelines for electronic files and voice-mail." It also cautions, "If an official investigation is underway or even suspected, stop any document purging in order to avoid criminal obstruction."

### Compliance and future applications

Zall reports, "Many organizations, including the American Bar Association Tax Section's Tax-Exempt Organizations Committee, are suggesting that tax-exempt organizations adopt certain 'best practices,' similar to those used by for-profit corporations subject to Sarbanes-Oxley." Some of those suggestions include creating independent audit committees, attesting publicly to the accuracy of financial statements, adopting a Code of Ethics, and reviewing related-party financial transactions.

Zall anticipates that Congress will eventually broaden the requirements for nonprofits, as will state governments. BoardSource does as well and offers specific recommendations for compliance for all provision of the law. To read the full report, log on to: <http://www.boardsource.org/clientfiles/Sarbanes-Oxley.pdf>.

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