Choice of Entity: The Fiscal Sponsorship Alternative to Nonprofit Incorporation

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> For a temporary project or one for which a long-term need is not yet assured, it may be inappropriate, even wasteful, to construct a new nonprofit organization, even though the intended product or service fits the legal definition of 'nonprofit.' In such cases, a fiscal sponsorship arrangement with an existing nonprofit organization may be established to attain an effective base for operations.[2]

I. INTRODUCTION

Imagine having a client with broad and deep connections to the fine and visual arts communities seek your advice on how to legally organize and fund a series of public sculpture installations in an urban center. Or, perhaps, imagine that a client who is a choral music composer asks for your legal counsel in establishing and financing a project that would fund children's causes by producing and selling recordings of a children's choral group singing some of her original works. I had the privilege of working with these two clients on a *pro bono* basis through Boston's Volunteer Lawyers for the Arts of Massachusetts (often referred to as "VLA," which is now part of the Arts & Business Council of Greater Boston).[3]

In many ways, this is a transactional business lawyer's bread and butter – the ordinary, routine, foundational lawyering work of identifying and establishing legal forms of entity through which projects and business ventures are funded and realized. Client expectations (typically expressed as requirements and preferences) are matched to the legal rules applicable

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[2] GREGORY L. COLVIN, FISCAL SPONSORSHIP: 6 WAYS TO DO IT RIGHT xi (Geoffrey Link ed., 2d ed. 2005).

[3] Arts & Business Council of Greater Boston, https://artsandbusinesscouncil.org/ (last visited Sept. 22, 2021).

to the various business entities provided through legislative enactments and related decisional law. This aggregate body of law supports the formation of businesses by giving participants off-the-rack structural, governance, and finance rules that can be adopted and used by business venturers without the need to negotiate and contract specifically for them. Many in and outside the legal profession refer to this aspect of business lawyering as advising on "choice of entity."[4] It is creative, useful, and fulfilling legal work.

That creativity, utility, and fulfillment may be most intensely experienced by a lawyer in advising founders or promoters of ventures that serve society as a primary – but perhaps not exclusive – bottom line. Lawyers and others may label these initiatives or firms as public charities or social enterprises, depending on their specific social purpose and their sources and uses of financial capital.[5] While charities typically organize as not-for-profit entities, social enterprises can be for-profit, nonprofit, or benefit corporations and the like.[6] In earlier work, I offered observations on the choice-of-entity puzzle as it relates to social enterprises, situating

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[4] *See, e.g.*, Robert Anderson IV, *The Delaware Trap: An Empirical Analysis of Incorporation Decisions*, 91 S. CAL. L. REV. 657, 660 (2018) ("The choice of entity decision will determine which provisions of the chosen state's law will apply to the entity, . . . as well as influence the company's tax treatment."); Serge Martinez, *Teaching Transactional Skills in A Clinic*, 2009 TRANSACTIONS: TENN. J. BUS. L. (SPECIAL ISSUE) 203, 211–13 (2009) (mentioning choice of entity in connection with clinical business law teaching); Lawrence J. Trautman *et. al.*, *Some Key Things U.S. Entrepreneurs Need to Know About the Law and Lawyers*, TEX. J. BUS. L., Summer 2016, at 155, 174 ("What is commonly referred to as 'choice of entity' essentially consists of three choices: what basic form of entity is wanted, under what jurisdiction's laws should it be formed, and what tax classification is desired for it for federal and state tax purposes?").

[5] *See generally*, *e.g.*, Alexander C. Campbell, *Social Enterprise for Tax-Exempt Organizations*, 29 TAX'N EXEMPTS, May/June 2018, at 20, 20 ("Social enterprise can take many different forms . . . . A social enterprise can . . . be a tax exempt nonprofit organization that runs a revenue generating activity, such as a cafe or school."); Robert T. Esposito, *Charitable Solicitation Acts: Maslow's Hammer for Regulating Social Enterprise*, 11 N.Y.U. J.L. & BUS. 463 (2015) (exploring the nature and regulation of business firms at the intersection of public charity and social enterprise law); Benjamin M. Leff, *Preventing Private Inurement in Tranched Social Enterprises*, 45 SETON HALL L. REV. 1, 38 (2015) (noting that the "importation of the law of charities into the law of social enterprises occurs only when a social enterprise seeks capital from charitable sources").

[6] Joan MacLeod Heminway, *Lawyering for Social Enterprise*, 20 TRANSACTIONS: TENN. J. BUS. L. 797, 802–03 (2019) ("Under Tennessee law, for example, a social enterprise desiring to incorporate may choose to organize as a non-profit corporation, a traditional for-profit corporation, or a for-profit benefit corporation.").

this type of business undertaking among various legal forms of business entity and noting that it has the capacity to occupy both for-profit and not-for-profit spaces in the business entity spectrum.[7] This article builds on that earlier work.

Specifically, this article urges that competent, complete legal counsel on choice-of-entity for nonprofit business undertakings should extend beyond advising clients on which form of business entity best fits their needs and wants, if any.[8] For many small business ventures that qualify for federal income tax treatment under Section 501(a) of the U.S. Internal Revenue Code of 1986, as amended ("IRC"), [9] as religious, charitable, scientific, literary, educational, or other eligible organizations under Section 501(c)(3) of the IRC (colloquially known and referred to here as a "501(c)(3) organization" or, when organized as a corporation, a "501(c)(3) corporation"),[10] the time and expense of organizing, qualifying, managing, and maintaining a tax-exempt nonprofit corporation under state law may be daunting (or even prohibitive). Moreover, the structures imposed by business entity law may not be needed or wanted by the founders or promoters of the venture. Yet, there may be distinct advantages to entity formation and federal tax qualification that are not available (or not as easily available) to unincorporated not-for-profit business projects. These advantages may include, for example, exculpation for breaches of performative fiduciary duties by nonprofit corporate directors and other personal liability limitations applicable to various participants in nonprofit corporations under state statutory law.[11]

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[7] *Id.* at 798 ("Social enterprises of these kinds may be either nonprofit or for-profit firms from a state business associations law or federal income tax law perspective.").

[8] The phrasing of this sentence is intended to convey that a lawyer may advise a client seeking choice-of-entity advice that the formation of a legally recognized business entity is not required or appropriate in that client's circumstances. This can be valuable and meet the client's expectations well. However, in those cases, the lawyer must be careful to advise clients that conducting business as a sole proprietor (often referred to as a sole proprietorship—a person in business for themself) has attendant risks as the business grows, including the risk that the venture may later be characterized as a for-profit partnership (because it is an association of two or more co-owners in a for-profit business), implicating legal rules under applicable state partnership law. These legal rules may or may not serve the client well in context.

[9] 26 U.S.C. § 501(a) (2018).

[10] *Id.* § 501(c)(3).

[11] *See, e.g.*, David R. Hodgman, *Designing Private Foundations—Avoid the Cookie-Cutter Approach*, 25 EST. PLAN. 481, 482–83 (1998) ("Directors of not-for-profit corporations

Also, an unincorporated nonprofit association is required to have a written and signed organizing document (which may, for instance, be denominated as a constitution or articles of association) in order to comply with applicable requirements for tax-exempt status under federal income tax law, adding formality and complexity not unlike incorporation to what otherwise would be an informal, simple relationship.[12]

The described conundrum—the prospect that founders or promoters of a charitable or other federal income tax-exempt nonprofit business or undertaking (often simply denominated as a "nonprofit project") may not have the time or financial capital to fully form and maintain a business entity that may offer substantial identifiable advantages—is real. Awareness of this challenge can be disheartening to

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usually are not held to so high a standard of care, and often are held liable only for gross negligence or willful or wanton disregard of their duty. Many states have enacted laws that expressly provide for reduced liability and indemnification of directors of not-for-profit corporations . . . ."); Ellis Carter, *What is an Unincorporated Nonprofit Association?*, CHARITY LAW. BLOG (Nov. 22, 2021), https://charitylawyerblog.com/2021/11/22/unincorporated-nonprofit-association ("The primary disadvantage of operating as an unincorporated nonprofit association is that, in most states, it has no separate legal existence. Therefore, members are personally liable for the unincorporated association's debts and liabilities.").

[12] *See* I.R.S., INSTRUCTIONS FOR FORM 1023 (2020), https://www.irs.gov/pub/irs-pdf/i1023.pdf. Specifically, the U.S. Internal Revenue Service highlights the following requirements in this regard:

> An **unincorporated association** formed under state law must have at least two members who have signed a written document that creates an entity with a specifically defined purpose.
>
> ***Copy of organizing document (articles of association or constitution and any amendments).***
> Your organizing document must include the name of the organization, its purpose, the date the document was adopted, and the signatures of at least two individuals. If your copy doesn't contain the proper signatures and date of adoption, you may submit a written declaration that states your copy is a complete and accurate copy of the signed and dated original. Your declaration should clearly indicate the original date of adoption.
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> ***Bylaws*** *may be considered an organizing document only if they include the required elements listed above.*

Id. at 7 (emphasis in original).

lawyer and client alike. Fortunately, at least for some of these nonprofit projects, there is a third option—fiscal sponsorship—that may have contextual benefits. Fiscal sponsorships allow for projects to receive tax-advantaged funding and operating support without the need for time-consuming, costly legal entity formation. This brief article offers food for thought on the uses for and benefits of fiscal sponsorship, especially (but not exclusively) for creative endeavors.

This exploration of fiscal sponsorships proceeds in three additional substantive parts. First, fiscal sponsorships are defined and described in more detail. Then, the attributes of fiscal sponsorships are compared with the attributes of nonprofit § 501(c)(3) corporations to identify important bases for advice and decision making. Finally, before briefly concluding, the article processes the definition, description, and comparative information about fiscal sponsorships offered *infra* Parts II and III, synthesizing this information for use in applied legal advising and offering an example of a nonprofit project that found fiscal sponsorship both desirable and efficacious.

II. FISCAL SPONSORSHIP DEFINED AND DESCRIBED

A fiscal sponsorship arrangement consists of a valid, legally binding, enforceable obligation between the founders or promoters of the project, on the one hand, and an existing 501(c)(3) organization (the "fiscal sponsor"), on the other.[13] More specifically, "[f]iscal sponsorship is a contractual relationship that allows a person or organization that is not tax-exempt to advance charitable or otherwise exempt activities with the benefit of the tax-exempt status of a sponsor organization that is exempt from federal income tax under Internal Revenue Code (IRC) Section

[13] Michael P. Mosher & Alexander C. Campbell, *Crowdfunding in the Tax-Exempt Sector—Legal and Practical Considerations*, 26 TAX'N EXEMPTS 36, 39 n.8 (May/June 2015) ("A fiscal sponsorship is an arrangement in which a qualified public charity 'sponsors' a stand-alone organization or project without exempt status of its own (the 'sponsored project'), meaning that the charity receives and expends funds on behalf of the sponsored project while retaining discretion and control over those funds."); Barbara A. Rosen & Gene Takagi, *Group Exemptions Demystified*, 19 TAX'N EXEMPTS 28, 34 (Jan./Feb. 2008) ("A fiscal sponsorship is an arrangement in which one tax-exempt organization (the fiscal sponsor) supports another non-exempt entity (the project), allowing grants and tax-deductible contributions to be made in furtherance of the project's purposes.").

501(c)(3)."[14] The project may be (but, in this author's experience, typically is not) organized separately as a legally recognized form of business entity.[15]

For many (if not most) entrepreneurs and business principals desiring to engage in a nonprofit project, a fiscal sponsorship is primarily a solution to a funding concern—a matter of nonprofit business finance.

> Fiscal sponsorship arrangements typically arise when a person or group . . . wants to get support from a private foundation, a government entity, or tax-deductible donations from individual or corporate donors. By law or by preference, the funding source will make payments only to organizations with 501(c)(3) tax status. So the project looks for a 501(c)(3) **sponsor** to receive the funds and pass them on to the project.[16]

There are other ways to finance nonprofit projects (including, for example, through institutional and personal lending, grant funding, and crowdfunding).[17] However, tax-deductible donations to tax-exempt entities continue to be preferred by many nonprofit project originators

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[14] Erin Bradrick, *Fiscal Sponsorship: What You Should Know and Why You Should Know It*, BUS. L. TODAY. May 21, 2015, at 1.

[15] Rosen & Takagi, *supra* note 13, at 34 ("The project, which may or may not have separate legal existence apart from its sponsor, lacks its own tax-exempt status and cannot be the recipient of contributions eligible for a charitable deduction without a fiscal sponsor.").

[16] COLVIN, *supra* note 2, at 3 (emphasis in original).

[17] *See generally*, Brian L. Frye, *Solving Charity Failures*, 93 OR. L. REV. 155 (2014) (suggesting the use of crowdfunding for charitable ventures); Stanley S. Jutkowitz et al., *Main Street Money for Nonprofits*, 32 TAX'N EXEMPTS 19 (Nov./Dec. 2020) (describing the Main Street Lending Program, a Federal Reserve initiative that "provide[s] access to credit for nonprofit organizations"); Mosher & Campbell, *supra* note 13, at 42 (outlining crowdfunding for tax-exempt entities, concluding that, "[a]s is the case with many complex fundraising and marketing tools, the benefits of a well-executed crowdfunding campaign can be quite significant, but a poorly executed campaign may end up doing more harm than good."); Dean Spade, *Keynote Address: Trans Law Reform Strategies, Co-Optation, and the Potential for Transformative Change*, 30 WOMEN'S RTS. L. REP. 288, 301 (2009) (remarking on "[t]he process of successfully applying for funding, including . . . researching applicable grants, writing formal funding requests using specific jargon, having an awareness of current trends in funding, and having personal relationships with philanthropic professionals.").

and their funders.[18] "Essentially, fiscal sponsorship is a legal fiction that enables donors to claim a deduction for a contribution to an individual."[19]

In addition to the possible tax-exempt funding benefits, there also often are operational advantages to a fiscal sponsorship. The contractual arrangement between the founders or promoters and the fiscal sponsor may allow the project to use the structure, governance, and administrative (including promotional and fundraising) services of the nonprofit to operate.[20] In this way, nonprofit project entrepreneurs and promoters can devote their attention to the development of the project without the burden of bookkeeping or ministerial duties.[21] This can be of especial benefit to nonprofit projects involving a single individual or a small group.

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[18] COLVIN, *supra* note 2, at xii ("[F]ew funding organizations and individual contributors will donate finds to worthy public projects that lack tax-exempt status"); Rosemary E. Fei, *A Private Foundation's Guide to Fiscal Sponsorships*, 13 TAX'N EXEMPTS, May/June 2002, 290, 290 ("Individual donors almost always expect a charitable contribution income tax deduction for their charitable gifts.").

[19] Brian L. Frye, *Copyright as Charity*, 39 NOVA L. REV. 343, 358 (2015) (footnote omitted); *see also id.* at 359 ("The primary purpose of fiscal sponsorship is to ensure that donors can claim a charitable contribution deduction for their donation." (footnote omitted)); *cf.* 26 U.S.C. § 170 (2018) (covering the deductibility of charitable contributions for federal income tax purposes).

[20] *See* Michael Haber, *COVID-19 Mutual Aid, Anti-Authoritarian Activism, and the Law*, 67 LOY. L. REV. 61, 108 (2020). Specifically, in defining fiscal sponsorship, Professor Haber notes that:

> [f]iscal sponsorship is commonplace in the non-profit sector, but the term does not have a precise legal definition and can describe a few different types of relationships between a group with tax exemption (the "fiscal sponsor") and a "project," any other incorporated or unincorporated group that agrees to comply with the rules imposed by the fiscal sponsor in a contract. In such a contract, the fiscal sponsor agrees to receive donations and grants on behalf of the project, which allows the project to take advantage of the sponsor's tax-exempt status. Fiscal sponsors may also provide some amount of support in bookkeeping, legal compliance, or other areas.

Id. (footnotes omitted); *see also* COLVIN, *supra* note 2, at xii ("Oftentimes, the sponsor provides accounting, payroll, employee benefits, office space, equipment, publicity and fund-raising assistance free or at cost.").

[21] *See* COLVIN, *supra* note 2, at xii ("Providing these [administrative] services spares projects the necessity of developing their own administrative expertise and resource, thereby freeing them to focus more on programming and financial efficiency than otherwise would be possible.").

The fiscal sponsor typically (but not always) charges the nonprofit project founders or promoters an administrative services fee. Commonly, the amount of that fee represents a percentage of the donative funds raised.[22] The fee may be justified fully or partially by services and resources provided to the nonprofit project by the fiscal sponsor.

> [P]roper administration of a fiscal sponsorship relationship can be costly and the cost savings for sponsored project in the form of avoided administrative and startup fees can be significant. When viewed in this light, a reasonable sponsorship fee that serves to cover the sponsor's expenses in a proper fiscal sponsorship relationship is often appropriate.[23]

The nonprofit project may raise funds from other sources that are not subject to the deduction of the administrative services fee to the extent that opportunity is available, suitable, and consistent with the project's fiscal sponsorship agreement.[24]

Fiscal sponsorships are not expressly authorized under the IRC. As a result, they are not all uniformly blessed as lawful arrangements from a federal income tax perspective.

When done correctly, fiscal sponsorship can be a great tool for fulfilling a client's charitable goals without necessarily requiring the formation a new nonprofit entity, application for tax-exempt status, or compliance with ongoing filing and registration requirements. However, when fiscal sponsorship is done incorrectly, the Internal Revenue Service (IRS) can view it as a mere conduit relationship. This can lead to problems

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[22] *See*, *e.g.*, Bradrick, *supra* note 14, at 2 ("[M]ost fiscal sponsors will charge a percentage (often around 5-15 percent) of funds that are raised to support the project as an administrative sponsorship fee."); Frye, *supra* note 17, at 187 ("The charity receives an administrative fee up to ten percent for this service."); Daniel M. Satorius & Stu Pollard, *Crowd Funding What Independent Producers Should Know About the Legal Pitfalls*, ENT. & SPORTS LAW. 15, 17 (2010) ("The fiscal sponsor accepts contributions and provides support for the project in the amount of the contribution, less a sponsorship fee (usually 5 to 10 percent)."). "Anecdotal evidence indicates a very wide range of fees charged for fiscal sponsorship, and a fair degree of price competition in some areas." COLVIN, *supra* note 2, at 81.

[23] Bradrick, *supra* note 14, at 2.

[24] *See* Frye, *supra* note 17, at 188 ("[M]any crowdfunded projects allow donors to decide whether they wish to donate through the crowdfunding platform and take a reward or donate through a fiscal sponsor and take a deduction.").

for both the sponsor organization and the sponsored project, as well as for donors.[25]

Having said that, it seems more than fair to note that the U.S. Internal Revenue Service ("IRS") is not hostile to fiscal sponsorships.[26] In addition, thorough due diligence and careful, precise drafting will help ensure that any questions raised by the IRS are easily answered. Moreover, helpful resources exist that offer not only planning and drafting tips, but also exemplar models of fiscal sponsorships for use in specific situations.[27]

III. FISCAL SPONSORSHIP IN CONTEXT

This part compares, in a simple chart format, aspects of the two principal options available to co-venturers who desire to fund a qualified project with tax-exempt donor funds: (1) the organization of a nonprofit corporation qualified as tax-exempt under IRC § 501(a) because it meets the requirements of IRC § 501(c)(3)[28] and (2) the establishment of a fiscal

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[25] Bradrick, *supra* note 14, at 1; *see also* COLVIN, *supra* note 2, at 3, (noting that "the IRS has a strict policy against 'conduit' arrangements"); *id.* at 65-67 (describing IRS commentary and decisional law addressing conduit organizations).

[26] *See* COLVIN, *supra* note 2, at 81 ("Despite the fact that fiscal sponsorship is not a term defined by federal tax statutes or regulations, IRS officials have made helpful comments about it.").

[27] *See*, *e.g.*, COLVIN, *supra* note 2, at 6–58 (offering six models of fiscal sponsorship and applying them to three hypotheticals); Bradrick, *supra* note 14, at 1-4 (offering planning, drafting, and overall compliance guidance).

[28] This essay focuses on the nonprofit corporation, the most widely available and typically used form of legal entity for a nonprofit venture. Although it is also possible to form a nonprofit limited liability company ("LLC") in some jurisdictions, the LLC's highly contractual nature may make nonprofit formation and maintenance more complex. *See*, *e.g.*, Cassady V. (Cass) Brewer et. al., *Nonprofit LLCs*, BUS. L. TODAY, March 2017, at 1, 2 ("Virtually all states allow an LLC to be organized for any lawful purpose—unlike for-profit corporation statutes which typically require a 'business' purpose. Moreover, as noted above, four states authorize nonprofit LLCs."); Robert R. Keatinge, *LLCs and Nonprofit Organizations-for-Profits, Nonprofits, and Hybrids*, 42 SUFFOLK U. L. REV. 553, 570-78 (2009) (noting that "there is now no question that an LLC may be treated as a nonprofit organization, including as a charitable organization" and summarizing the state corporate law and federal tax law analysis of tax-exempt LLCs); James M. McCarten & Kevin N. Perkey, *Tennessee Nonprofit LLCs-A New Option for Tax-Exempt Organizations*, 3 TRANSACTIONS: TENN. J. BUS. L. 15, 17 (2001) ("Few states recognize LLCs as nonprofit entities. Thus, if there is no such creature under state law, the advantages to the parent tax-exempt organization as discussed above are all but lost."); Kenya JH Smith, *Purposeful Ambiguity: A Case for Greater Clarity in State Law*

sponsorship with a tax-exempt nonprofit corporation. Unless otherwise indicated, the described aspects of each option reflect the application of default rules under the corporate law of organization for the nonprofit corporation or sponsor. It should be noted that a corporation's organic documents, corporate board resolutions, agency relationships, and agreements or instruments outside the scope of any fiscal sponsorship may alter applicable default rules.

	Nonprofit § 501(c)(3) Corporation	**Fiscal Sponsorship**
Cost of Formation and Maintenance	Borne by project founders/promoters	Borne by project founders/promoters and sponsor, subject to the assessment of an administrative services fee
Management/ Governance	Undertaken by project founders/promoters or their designees	Undertaken by sponsor's elected/appointed management personnel or project founders/promoters or their designees, as allocated by agreement between the sponsor and the founders/promoters (subject to IRC)
Transactional Authority	Held by project founders/promoters or their designees	Held by sponsor or project founders/promoters, as allocated by agreement between the sponsor and the founders/promoters (subject to IRC)
Personal Liability of Founders/ Promoters to Third Parties for Business Obligations	Limited to contributed capital	Limited (if at all) only by valid agreement between the project founders/promoters and the applicable third party
Duration	Perpetual	Defined by agreement between the sponsor and the project founders/promoters
Limitations on nonprofit project	State nonprofit corporate law under which project corporation is organized; organic documents drafted for the corporation by or under the direction of the project founders/promoters; IRC	State nonprofit corporate law under which sponsor is organized; pre-existing terms of the organic documents of sponsor; IRC

Treatment of the Nonprofit Limited Liability Company (As Viewed Through Permitted Purpose Provisions), 95 TUL. L. REV. 601 (2021) (expounding on the varied treatment of LLCs under state law).

Taken together with the description of fiscal sponsorships *supra* Part II, this summary illustrates the bounded flexibility of both nonprofit § 501(c)(3) incorporation and fiscal sponsorship arrangements as ways of organizing a nonprofit project.

From the perspective of nonprofit project founders and promoters, the flexibility of a nonprofit § 501(c)(3) corporation includes the ability of those founders and promoters to wholly define the corporation's purpose, structure, and management and transactional authority, including any legally permitted private ordering in and through the drafting of the corporation's organic documents and any attendant board resolutions, agreements, or instruments. The positive elements of this flexibility are offset by the costs of formation and maintenance of the corporation (which may include financial and human capital outflows), state corporate law, and the IRC.

The flexibility of a fiscal sponsorship for nonprofit project founders and promoters exists through the contractual nature of the arrangement. The benefits inherent in the freedom to contract are counterweighted by effort spent in identifying a suitable fiscal sponsor, the potential lack of negotiating leverage of the project founders and promoters as to price (in the form of any administrative services fee) and terms, and overarching constraints provided by state corporate law, the IRC, and the authorized corporate purpose and federal income tax status of the sponsor.

IV. FISCAL SPONSORSHIP OPTIMIZED

Based on the contextual benefits and detriments of a fiscal sponsorship arrangement arising out of the definition and description of fiscal sponsorships *supra* Part II and the comparison of nonprofit § 501(c)(3) corporations and fiscal sponsorship arrangements *supra* Part III, for what kinds of nonprofit projects may fiscal sponsorships be most efficient and effective? This part offers several general observations. The reflections shared in this part assume that the founders and promoters of the nonprofit project have determined that the project is best funded as a nonprofit meeting the requirements of IRC § 501(c)(3) and that external funders are both readily available and desire a federal income tax deduction for their funding contributions.

In thinking through the characteristics of a nonprofit project that may be best suited to a fiscal sponsorship arrangement based on the foregoing, the list of attributes set forth below seems most salient (and potentially helpful):

- Available financial and human capital are better spent on developing and implementing the nonprofit project than on organizing and maintaining a separate nonprofit corporation;
- A formal governing body and other legal entity structures (relating to management, governance, and transactional authority) may not be needed or may be undesirable;
- Doctrinal limited liability may not be a driving concern for the project founders and promoters because of the nature of the project or their positions, roles, or status;
- Targeted, capable, administrative services (especially those for managing donor solicitations and contributions) could be useful and are not otherwise readily available at an affordable cost;
- The nonprofit project is discrete—short-term or otherwise relatively limited in scope; and
- Existing § 501(c)(3) nonprofits can be identified that have a corporate purpose that includes the nonprofit project.

Truthfully, many different types of nonprofit projects may have all or most of these attributes.

A compelling example that comes to mind, however, is one of the two former clients I mentioned at the outset of this article—specifically, the one who wanted to organize and fund a series of public sculpture installations in an urban center. Initially, as I recall, that project was pitched to me as a limited-term, one-shot exhibition coordinated and managed by the client as a single individual. The client knew that she could fund the project with donations if they were tax-deductible, and because of her connections with the local art community, I knew to trust her in that assessment. Her connections also led to a decent list of possible nonprofit § 501(c)(3) organizations that might agree to serve as a fiscal sponsor. Given all of this, the process of organizing a nonprofit corporation for the project and applying for tax-exempt status seemed to be too time consuming and expensive, drawing the client away from her

work in designing the project and securing its funding. Moreover, it was clear that she did not need a board of directors or a management team; but she did desire support in promoting the project, handling the donations, and creating and preserving related paperwork. Finally, while a lawyer can always envision liability concerns (even in public art displays!), we concluded that insurance policies would likely be available to cover any residual risk to the client and others she might hire.

The client was able to work out a fiscal sponsorship with a local art museum. The nonprofit project became a series of urban public sculpture installations lasting ten years. And the client later became the director of the sponsoring art museum. The nonprofit project was Vita Brevis; the museum was Boston's Institute of Contemporary Art; and the client was Jill Medvedow.[29] A Master of Arts thesis was written about the project by a degree candidate in the City College of the City University of New York in 2010.[30]

In fact, limited duration or limited scope nonprofit projects involving creative enterprises founded and promoted by a single individual or small group may be among the more ideal candidates for fiscal sponsorships for many of the same reasons why Vita Brevis was successfully accomplished through a fiscal sponsorship. In the second edition of his pathbreaking book, *Fiscal Sponsorship: 6 Ways To Do It Right*, Gregory Colvin calls out facts relating to two overlapping nonprofit artistic projects—one involving dance and the other involving film production.[31] He offers and assesses (under six fiscal sponsorship models) this pair of hypothetical nonprofit projects (which he labels "The Artists"), along with two other nonprofit project examples ("The Human Services Project" and "The Environmental Group").[32] The three hypothetical scenarios are offered "to provide concrete examples of how a proper fiscal

[29] *See* JILL MEDVEDOW ET AL., VITA BREVIS: HISTORY, LANDSCAPE, AND ART, 1998–2003 (1st ed. 2004); Francine Koslow Miller, *Boston Direct*, ARTNET, http://www.artnet.com/magazine/features/miller/miller12-5-00.asp (last visited March 2, 2022).

[30] Sierra Rooney, *Vita Brevis: A Public Art Initiative at Boston's Institute of Contemporary Art*, CUNY (Spring 2010) https://academicworks.cuny.edu/cgi/viewcontent.cgi?article=1002&context=cc_etds_theses, (last visited March 2, 2022).

[31] COLVIN, *supra* note 2, at 6.

[32] *Id.* at 6–58.

sponsorship program can be constructed."[33] Although not every analysis of The Artists as potential candidates for fiscal sponsorship yielded wholly positive results under each of the six fiscal sponsorship models, evaluations of a number of the models showed promise for each of the two projects.

Yet, not all artistic endeavors are made alike. Not all nonprofit projects of this kind are suitable for fiscal sponsorship. Individualized appraisals are necessary.

> The process for deciding between fiscal sponsorship and independent incorporation is far from clear-cut. There are distinct advantages to each and the scales may tip in favor of one structure or the other based on many factors, including a project's development stage, objectives, and revenue streams . . . . At different stages of development, a project's immediate need for tax-exempt donations, capacity for risk management, or need for more direct and guided governance may influence that project's decision.[34]

Certainly, these three factors—immediate need for tax-exempt donations, risk management capacity, and need for direct or guided governance—are core areas for inquiry when engaging in choice of entity decision making for nonprofit projects.

V. CONCLUSION

This short article explores the potential use of fiscal sponsorships as a means of incentivizing and systematizing the activities of nonprofit projects without the need to form a separate legal entity. The appeal of attracting funders who desire a federal income tax deduction for their contributions and the desire to conduct operations that are tax-exempt under U.S federal law may be core reasons for conducting a nonprofit project through a nonprofit corporation. Yet, nonprofit corporations may be a less than appealing choice of entity for certain nonprofit projects after considering other factors.

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[33] *Id.* at 4.

[34] *Trust for Conservation Innovation*, FISCAL SPONSORSHIP: A 360 DEGREE PERSPECTIVE at slide 12, https://www.mission.earth/wp-content/uploads/2016/01/218243020-Fiscal-Sponsorship-A-360-Degree-Perspective-March-2014.pdf (March 2014).

Specifically, the time and expense involved in both entity formation and maintenance and federal income tax compliance activities may make nonprofit incorporation under state law a suboptimal choice for certain nonprofit projects. Moreover, many nonprofit project founders and promoters do not need the structural and governance attributes that nonprofit corporate law provides. This may be especially true for discrete or one-off nonprofit projects that involve a single founder or promoter (or a small number of founders and promoters)—which often is the case for creative enterprises (like the Vita Brevis project in Boston). If

- the founders or promoters of this kind of nonprofit project can identify a §501(c)(3) organization with a corporate purpose that incorporates the substance of the nonprofit project and
- that §501(c)(3) organization is willing to serve as a fiscal sponsor for the nonprofit project under terms satisfactory to the founders and promoters of the nonprofit project,

then incorporation as a nonprofit corporation may not be necessary for the nonprofit project to secure federal income tax deductibility for funders and a federal income tax exemption for its income.

Fiscal sponsorship may not only be possible in these circumstances; it may be efficient and offer collateral benefits. As one online resource on fiscal sponsorships notes, "not only does fiscal sponsorship offer a simple operational alternative to independent incorporation, it also offers a partnership opportunity through which projects can increase the impact of their funding by reducing administrative costs."[35] Knowing about the fiscal sponsorship alternative and the circumstances in which it may be valued by a client therefore adds an important advisory instrument to the transactional business lawyer's choice-of-entity tool kit.

[35] *Id.* at slide 23.