



2013 State Legislative Considerations on the Charitable Assets Act

Transparency and accountability are critical to maintain the public's confidence in all charities, including land trusts. In the 2013 legislative season, various states may seek to enact a version of the [Model Protection of Charitable Assets Act](#). The Attorney General has a role in oversight of charities and protecting the public from potential abuse, which role may vary from state to state. If your state proposes enactment of the Model Act or a variant, land trusts will want to be sure that the extent and nature of that role is clearly defined. The model act:

- Creates *statutory* oversight of charitable assets by the state Attorney General
- Addresses the oversight role of the Attorney General (or other charity regulator in the state)
- Affects all charities, including land trusts and government easement holders
- Imposes new reporting requirements on charities and certain government entities
- Gives additional authority to states to raise fees to pay for the new regulations.

Potential Implications for Land Trusts

This summary is for informational purposes only and is not legal advice. The Land Trust Alliance has no position on the Model Act. However, if adopted, this Act may have significant consequences for land trusts in your state, depending on its current laws. So the first step is to determine whether there are plans to introduce this legislation in your state, in what form and with what (if any) modifications to the Model Act. States need to look carefully at the Model Act's Commentary too, and understand those provisions that might affect application in a specific state. Then, with the assistance of legal counsel, evaluate your state's existing laws, the proposed changes that adoption of the Model Act would create, and their implications for your land conservation work; they could be either beneficial or burdensome. You may wish to consult with the state association of nonprofits and the state land trust association. You might consider a coordinated response to the Model Act with other charities and easement holders in your state.

Some items worth noting with respect to the Model Act include:

1. The Attorney General in each state throughout the country already has some form of authority to protect charitable assets. The Model Act codifies this authority so that it may have the effect of a statute replacing all case law.
2. The state can, and should, protect charitable assets from mismanagement, diversion or waste on behalf of the public. If your state considers any version of the Model Act, it may want to clarify how best to protect these assets. In clarifying its plans, your state should consider the nature and extent of the Attorney General's role with regard to review of land trusts' and other charities' management and operations, and the role of the courts to provide oversight of charity regulators' activities.
3. The Model Act anticipates some state specific modifications with regard to implementation. The Model Act's comments explain that a state or its Attorney General cannot substitute its own judgment as to how an organization should be managed or who should manage it, and the legislature cannot convert charitable assets to government assets.
4. The Uniform Law Commission stated in its comments that it does not want to overburden charities or the Attorney General with excessive reporting. Charities, academics and government officials are debating what constitutes "overburdening" and how to modify the Model Act to match the capacity and culture of each state.

5. Each state can balance the issues as it wants by modifying the Model Act to fit specific state needs, or state legislatures may decline to consider or adopt the Model Act altogether. Every constituency in every state will have the opportunity to comment. It is up to land trusts and other charities to voice any concerns or suggestions.
6. Land trusts need to look at the Model Act in the context of the entire statutory scheme in their state. If your state considers any version of the Model Act, land trusts will want to be sure that the legislature adapts the Model Act to the laws and culture of your state. States should assess the capacity of the state Attorney General staff to appropriately implement the Model Act if adopted.
7. The Uniform Law Commission developed the Model Act, in part, because of concern about the IRS's increasing role in charitable supervision expressed by some Attorney General offices and that, without more attention to these issues at the state level, federal regulatory activity would increase.
8. The Model Act is a "model" rather than a "uniform" act because many states already have substantial statutory law in this area, although others have little or none. The drafters recognized that there are differences among the states in the resources of Attorney General Offices and attitudes toward legislation.
9. The Model Act contains numerous bracketed and alternative provisions designed to give states options. Consider how these options may affect other statutes and case law.
10. Depending on your state's politics and public opinions, your Attorney General can be a powerful ally or a powerful adversary. Even well-meaning legislation can result in a poorly crafted and poorly understood law that can cause more problems than it addresses. Others believe a more formalized structure could be beneficial. Each state must therefore evaluate the need for and the risks of adopting the Model Act. Land trusts and other charities will also want to consider how best to respond to an Attorney General or other charity regulator who actively wants this legislation enacted.
11. Section 2 of the Act defines a charitable asset as "property that is given, received, or held for a charitable purpose." The comments note that "property" includes "all interests in real property...including...land, and conservation or preservation easements or restrictions." Consult with an attorney about the implications of such language in your state. What other legal doctrines might such a definition subject your land trust to? Would it change how you report to any government entity? Would it change your accounting practices? How does this definition relate to your state conservation easement enabling act definitions of conservation easements and property interests? Definitions of legal terms are critical and have wide-ranging implications.
12. Section 6 requires notice of "an amendment of the record that describes the charitable purposes of the person and the use and administration of charitable assets held by the person ["person" means "charity" in this context]." The comments note, "The Act requires notice to the Attorney General of a limited number of significant events that might occur in the life of a person [read 'charity' here] holding charitable assets." In a Columbia Law School webinar on the Act (link provided below), the presenters, who participated in the drafting of the Act, indicated that this reference is to a charity's organizational documents. Your attorney or state association may also wish to watch the webinar and compare the webinar commentary with the examples noted in the Model Act. Finally, while conservation easement amendments are addressed in detail in the comments, amendments are not specifically listed as notice-required actions. If your state considers adoption of the Model Act, you and your legal counsel may want to determine whether the legislation should address the comments pertaining to conservation easement amendments. Experts disagree about the meaning of various definitions, requirements and scope stated in the Model Act.

13. One of the concerns expressed about the Model Act is that it is vague on important points and, therefore, political opponents of conservation could misuse it to attack land trusts in some states. Those expressing this concern point to the fact that in 2012, three state legislatures tried to ban permanent easements and these challenges persist into 2013 and are spreading. Others express support for the Model Act proposed oversight by Attorneys General for protection of charitable assets and preservation of public confidence. These commentators see the Attorney General as a powerful ally to land conservationists.
14. Remember that land trusts should evaluate the Model Act in the context of the laws, politics and culture of your state.
15. Section 7 of the Model Act requires that a charity notify the state Attorney General of court proceedings and requires that the notice “include a copy of the initial pleading” (see §§ 7(a) and (b)). Many states already have somewhat similar requirements regarding charitable asset litigation.
16. Some states are testing a single-point electronic filing system to lessen the burdens on both charities and the Attorney General with regard to multiple state filings. The Model Act requires that the charity file Form 990 with the Attorney General, plus a two-page annual report containing basic information relevant to the role of the Attorney General in protecting charitable assets and a new filing fee.

Resources

A quick check of the Internet shows that nonprofit groups, media and lawyers are all actively commenting on the Model Act. Here are a few resources and links:

- The Reporter for the Act published the following article describing the Act and its purpose: Susan N. Gary, *A Model Act to Protect Charitable Assets Will Benefit Charities*, 23 TAXATION OF EXEMPTS 26 (2012).
- For a 96-minute webinar featuring a panel of three state charities regulators and the ABA’s nonprofit sector liaison to the Act’s drafting committee, see http://www.law.columbia.edu/center_program/ag/policy/CharitiesProj/resources/webinars/m_pcaawebinar. The webinar details the historical context, the perceived need for and goals of the Act, the drafting process, the Act’s substantive content and some of the debated aspects of the Act.
- http://www.blueandco.com/nfp_08182011.html
- <http://coloradoopenlands.org/blog/?p=30>.
- <http://www.thenonprofittimes.com/article/detail/commission-adopts-model-protection-of-charitable-assets-act-3969>
- <http://www.ecfa.org/Content/Model-Protection-of-Charitable-Assets-Act>
- <http://www.venable.com/protection-of-charitable-assets-act-what-the-new-uniform-law-would-mean-for-nonprofits-04-18-2011/>
- As of this writing, the National Association of Charity Regulators and the National Association of Attorneys General websites had no information about the Model Act.
- “Lack of Serious Oversight of Charities Undermines Public Trust,” Suzanne Perry, *Chronicle of Philanthropy*, 1040676X, 11/1/2012, Vol. 25, Issue 2. <http://philanthropy.com/article/Lack-of-Charity-Oversight/135346/>
- <http://charitylawyerblog.com/2011/05/03/get-ready-for-the-protection-of-charitable-assets-act/>