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ATTORNEY GENERAL’S FACTUAL FINDINGS, LEGAL CONCLUSIONS, AND RECOMMENDED CHANGES

YOUNG MEN’S CHRISTIAN ASSOCIATION OF TWIN FALLS, INC.

August 29, 2016

INTRODUCTION

In early May 2016, the Attorney General learned from media reports that the YMCA of the United States had investigated the Young Men’s Christian Association of Twin Falls, Inc., (“YMCA-Twin Falls”) for allegedly mismanaging the organization and misappropriating restricted donations. According to the *Magic Valley Times-News*, the YMCA-Twin Falls’s long-time executive director, Gary Ettenger, allegedly provided false financial documentation to the Board of Directors (“the Board”) and used restricted donations to fund the organization’s general operations.

The Attorney General opened an inquiry into the YMCA-Twin Falls on June 10, 2016, and requested operational and financial information and documentation from the organization.¹ The YMCA-Twin Falls responded, in part, to the Attorney General’s request on June 30, 2016.

The Attorney General sent a second request for records to the YMCA-Twin Falls on July 12, 2016. Deputy attorney general Stephanie Guyon met with the organization’s representatives on August 2, 2016. At the meeting the YMCA-Twin Falls provided records in response to the Attorney General July 12th request. The YMCA-Twin Falls submitted additional information and documents to the Attorney General on August 4, 2016, and on August 8, 2016.²

This report summarizes the Attorney General’s factual findings, discusses his legal conclusions, and makes recommendations for how the YMCA-Twin Falls should modify its practices to better comply with Idaho’s applicable charitable trust laws, the Idaho Charitable Solicitations Act,³ and the Uniform Prudent Management of Institutional Funds Act (“UPMIFA”).⁴ Additionally, while

¹ The Attorney General’s request covered 2011 to 2016.

² The Attorney General requested a 2016 profit and loss statement from the YMCA-Twin Falls 2016, but never received it.

³ Title 48, chapter 6, Idaho Code.

⁴ Title 33, chapter 50, Idaho Code.

the Attorney General does not enforce the Idaho Nonprofit Corporation Act, the Attorney General makes a number of recommendations that, pursuant to the Idaho Nonprofit Corporation Act,⁵ the Board should implement.

It is important to note that the YMCA-Twin Falls failed to maintain accurate business records between 2011 and 2016. Discrepancies between internal financial reports and publically available records and inconsistencies within the organization's 2011-2014 IRS Form 990s are rampant. Consequently, it is difficult to form any accurate or substantive conclusions about the YMCA-Twin Falls's charitable solicitation practices or its management of charitable assets.

ATTORNEY GENERAL'S AUTHORITY

The Attorney General has supervisory authority over two types of charitable property: (a) property that is subject to a public or charitable trust ("charitable trust assets"); and (b) property that is given, received, or held by a charitable organization to further its charitable purpose ("charitable assets"). This section provides a cursory understanding of the differences between charitable trust assets and charitable assets and the Attorney General's distinct authorities over them.

Pursuant to Idaho Code § 67-1401(5), the Attorney General enforces public and charitable trusts held by persons, for profit corporations, nonprofit corporations, and other organizations.⁶ Typically a charitable trust is created through a testamentary vehicle, such as a will or a charitable remainder trust. The testator directs how a trustee must direct and manage the testator's charitable gift. A private donor also may establish an endowment for the benefit of a particular charity. The charity preserves the fund's principal and uses the fund's investment income to further the organization's charitable purpose.

Unlike private trusts, public and charitable trusts benefit the public, a community, or a special population, such as animals, children, or seniors. If the trustee fails to use the trust assets according to the testator's charitable intent, the trustee violates his or her fiduciary duties.

The Attorney General, as the state's attorney, is best-positioned to act on behalf of the public when a trustee diverts charitable trust assets from their charitable purpose. At all times, those holding charitable trust assets are subject to the Attorney General's examination, and the Attorney General may file a lawsuit against a trustee to enforce the terms of a charitable trust. Additionally, Idaho's courts have recognized the Attorney General's right to intervene in private lawsuits to protect an alleged charitable trust from an estate's heir.⁷

⁵ Title 30, chapter 30, Idaho Code.

⁶ IDAHO CODE § 67-1405(5) (the Attorney General has supervisory, investigatory, and enforcement authority over charitable trusts); IDAHO CODE § 67-1405(11) (the Attorney General has a duty "to exercise all the common law power and authority usually appertaining to the office and to discharge the other duties prescribed by law."). See also *In re Eggan's Estate*, 86 Idaho 328, 386 P.2d 563 (1963) (the 1963 amendment to Idaho Code § 67-1401 expanded the attorney general's duties to include enforcing charitable trusts).

⁷ See e.g., *Dolan v. Johnson*, 95 Idaho 385, 509 P.2d 1306 (1973) (the Attorney General has supervisory power over charitable trusts to ensure that such trusts are executed according to the settlor's intent). See also Memorandum Decision and Order, *In the Matter of the Estate of Diana K. Tibbets*, CV-2011-278 Factual Findings, Legal Conclusions, & Recommendations - YMCA-Twin Falls - 2

In addition to enforcing charitable trusts, the Attorney General, on behalf of the people of Idaho, has a duty to protect charitable assets⁸ from abuse, waste, or misappropriation.⁹ The Idaho Charitable Solicitation Act¹⁰ prohibits a charitable organization from engaging in unfair, false, misleading, deceptive, or unconscionable acts or practices while planning or conducting charitable solicitations.¹¹ In Idaho, charitable solicitations include oral or written requests for money, property, credit, or other things of value that will be used for a charitable purpose or to benefit a charitable organization.

Pursuant to Idaho Code § 48-1204, the Attorney General's enforcement authority under the Idaho Charitable Solicitation Act mirrors his authority under the Idaho Consumer Protection Act. Idaho Code § 48-611 allows the Attorney General to issue investigative demands to persons who are believed to have information or records relevant to the alleged violation. The Attorney General also may issue subpoenas, depose witnesses, and conduct hearings to aid in his investigation. When the Attorney General has reason to believe that a charitable organization or its for profit fundraiser has planned or conducted unfair, false, misleading, or deceptive charitable solicitations, the Attorney General may file a civil action against the organization or its fundraiser and demand injunctive relief, civil penalties, consumer restitution, and attorney's fees and costs.¹²

UPMIFA provides guidance and authority to charitable organizations regarding their proper management and investment of charitable funds.¹³ Under UPMIFA, persons who hold charitable funds have certain duties, which protect both the organization and the donor. Idaho Code § 33-5006 outlines the procedure applicable to releasing or modifying donor restrictions on charitable funds. In most instances where the organization lacks a donor's consent to modify a restriction, the organization must notify the Attorney General before it obtains a modification or release from the court.¹⁴ Notice allows the Attorney General an opportunity to be heard and to object to a proposed modification or release.¹⁵

The YMCA-Twin Falls is an I.R.C. § 501(c)(3) nonprofit corporation that solicits charitable contributions and holds charitable trust assets for the benefit of its charitable mission.

(Wash. Cty. Aug. 30, 2013) (the Attorney General successfully intervened in private litigation involving a charitable trust established under the terms of a holographic will).

⁸ Idaho law does not define the term "charitable asset." The best definition of the term is found in the Model Protection of Charitable Assets Act (2011), which defines "charitable assets" as "property given, received, or held for a charitable purpose. The term [excludes] property acquired or held for a for profit purpose." The organization's "charitable purpose" is defined in its governing documents.

⁹ The Attorney General derives his authority over charitable assets pursuant to the Idaho Charitable Solicitation Act, title 48, chapter 12, Idaho Code, and the Uniform Prudent Management of Institutional Funds (UPMIFA), title 30, chapter 50, Idaho Code.

¹⁰ The Idaho Charitable Solicitation Act, title 48, chapter 12, Idaho Code, is enforced through the Idaho Consumer Protection Act, title 48, chapter 6, Idaho Code.

¹¹ The Attorney General encourages donors, directors, officers, and employees of charitable organizations to file a complaint with his Consumer Protection Division if the charity or its fundraiser is engaged in wrongdoing. Complaint forms are available at www.ag.idaho.gov.

¹² See IDAHO CODE §§ 48-606 & 48-1204(1).

¹³ See *generally* title 33, chapter 50, Idaho Code.

¹⁴ See IDAHO CODE § 33-5006(2)-(3).

¹⁵ See *id.*

Accordingly, the YMCA-Twin Falls is subject to the Attorney General's regulation under Idaho Code § 67-1401(5), the Idaho Charitable Solicitations Act, and UPMIFA.

FACTUAL FINDINGS

The findings in this section originate from the information and documents the Attorney General received from the YMCA-Twin Falls. Media reports, the YMCA-Twin Falls's website, and publically-available records provide further background about the organization's history. If pertinent records are unavailable, particularly scarce, or unreliable, a notation of that fact is included in the footnotes.

A. Organization and Charitable Purposes

The YMCA-Twin Falls is an I.R.C. § 501(c)(3) nonprofit corporation organized in Idaho and located in Twin Falls. The organization established itself in November 25, 1957, as "The Magic Valley Community Young Men's Christian Association, Inc.," ("Magic Valley YMCA"). As stated in Article I, ¶ 2, of its 1957 Articles of Incorporation, the Magic Valley YMCA's charitable purpose was:

[T]o help develop Christian character and to aid in building a Christian society by the maintenance of such activities and services as contribute to the physical, social, mental and spiritual growth of all people, and by such other means as may aid in the accomplishment of this purpose.

The Magic Valley YMCA amended its charitable purpose in 1972 to include the language required for organizations to obtain public charity status under I.R.C. § 501(c)(3).¹⁶ Overall, however, the Magic Valley YMCA's charitable purpose did not change.

Several times after 1972, the Magic Valley YMCA amended its articles to change its name, settling on its present name in 2002.¹⁷ Since the charity's establishment in 1957, however, its charitable purpose—to help build a Christian society through physical, social, mental, and spiritual activities—has endured.

B. Governance

Management of the YMCA-Twin Falls is vested in the 12 to 24-member Board, which exercises all powers necessary to control the organization's properties and policies.¹⁸ Elected officers¹⁹ of the Board include the president-elect, president, vice-president, secretary, and treasurer.²⁰ The

¹⁶ See Amendment of Articles of Incorporation (May 4, 1972).

¹⁷ See Articles of Amendment (Apr. 1, 2002).

¹⁸ See Bylaws of the Young Men's Christian Association of Twin Falls, Inc. (Aug. 21, 2012).

¹⁹ Articles IV and VI of the Bylaws provide conflicting methods for filling the "elected" officer positions. Article IV, section 2 of the Bylaws indicates the Board elects the officers, but article VI, section 2 authorizes the executive committee and CEO to select the president-elect, while section 3 authorizes the president to appoint the vice-president, secretary, and treasurer.

²⁰ Between 2011 and 2015, not all of the officer positions were filled. See Board of Directors 2011-2016 (June 30, 2016).

president assigns the officers their “duties and responsibilities as needed.” The Board, between 2011 and 2015, met sporadically and did not hold (or report holding) any annual meetings during those four years.²¹ In 2011, the Board met in February, but did not meet again until March 2012.²² The Board held meetings between 2013 and 2016 on a sporadic basis.

The organization employed Gary Ettenger as chief executive office for approximately eight years, beginning in August 2008²³ and ending with his resignation in March 2016.²⁴ Mr. Ettenger was hired to manage the YMCA-Twin Falls based on his business and fundraising background, as well as his education in health, wellness, and fitness.²⁵ At the time of his resignation, Mr. Ettenger’s annual salary was \$90,974.²⁶

C. Facilities and Programs

The YMCA-Twin Falls, which has approximately 7,000 members, operates three facilities in the Magic Valley.²⁷ At the Elizabeth Street facility—the YMCA-Twin Falls’s original facility—the organization provides (a) classes for yoga, Pilates, Zumba, circuit training, and, among others, strength training,²⁸ (b) beginning to intermediate tennis clinics,²⁹ and (c) an interactive fitness arcade for children ages six to 12 years.³⁰

In 2009, the YMCA-Twin Falls purchased the Canyon Rim facility on Pole Line Road, which has classes for martial arts, cycling, weight-training, and, among others, Zumba.³¹ The facilities also have over 120 pieces of cardio equipment³² and offer child care for children three months-to six years-old.³³ The YMCA-Twin Falls also manages the Twin Falls City Pool,³⁴ and, in

²¹ See Board meeting minutes (Feb. 2011-July 2016).

²² See Board meeting minutes (Feb. 2011 & Mar. 2012).

²³ See Jared S. Hopkins, *YMCA Hires New CEO in Twin Falls*, MAGIC VALLEY TIMES-NEWS (Aug. 20, 2008).

²⁴ See Julie Wootton, *Report: Twin Falls YMCA at Risk of Losing Charter over Mismanaged Finances*, MAGIC VALLEY TIMES-NEWS (May 25, 2016).

²⁵ See Jared S. Hopkins, *YMCA Hires New CEO in Twin Falls*, MAGIC VALLEY TIMES-NEWS (Aug. 20, 2008).

²⁶ See Board of Directors 2011-2016 (June 30, 2016).

²⁷ The YMCA-Twin Falls reported employing between 122 and 219 individuals from 2011 to 2014. See YMCA-Twin Falls’s 2011-2014 IRS Form 990s at Part I, line 5.

²⁸ See YMCA-Twin Falls, Group Exercise Programs, available at: <http://www.ymcatf.com/cms-view-page.php?page=group-exercise>.

²⁹ See YMCA-Twin Falls, Tennis Programs, available at: <http://ymcatf.com/cms-view-page.php?page=tennis>.

³⁰ See YMCA-Twin Falls, Donate-Strengthening the Community is Our Cause, available at: <http://ymcatf.com/cms-view-page.php?page=donate>.

³¹ See YMCA-Twin Falls, Group Exercise Programs, available at: <http://www.ymcatf.com/cms-view-page.php?page=group-exercise>.

³² See YMCA-Twin Falls, Donate-Strengthening the Community is Our Cause, available at: <http://ymcatf.com/cms-view-page.php?page=donate>.

³³ See YMCA-Twin Falls, Child Watch, available at: <http://ymcatf.com/cms-view-page.php?page=child-care>.

³⁴ The Concession Agreement between the YMCA-Twin Falls and the City of Twin Falls commenced on September 1, 2011, and continues through August 31, 2018. The City pays an annual \$120,000 management fee to the YMCA-Twin Falls, and all admission fees for use of the pool inure to the YMCA-Twin Falls. See City of Twin Falls-YMCA Pool Concession Agreement (Aug. 31, 2011). Throughout the Factual Findings, Legal Conclusions, & Recommendations - YMCA-Twin Falls - 5

partnership with the City of Rupert, plans to open a new facility at a renovated location in Rupert.³⁵

In addition to fitness opportunities, the YMCA-Twin Falls offers youth enrichment programs. These programs help children complete their homework, learn about science, and express themselves artistically.³⁶

D. Financial Management

Based on the YMCA-Twin Falls's IRS Form 990s, between 2011 and 2014, the organization experienced a steady increase in revenue, including its program-related income and its charitable contributions.³⁷ But during that same period, the YMCA-Twin Falls's operational expenses also increased and left the organization with a significant deficit at the end of 2014.³⁸

Internal financial records indicate that, in 2015, the organization's charitable contributions decreased 87% from 2014, leaving the YMCA-Twin Falls with 26% less annual revenue. Despite reducing its expenses in 2015, the organization incurred a \$400,000 deficit.³⁹

1. Revenue

Total annual "revenue" includes program-related income, contributions, and any other miscellaneous income an organization receives during the year. To sustain the YMCA-Twin Falls's operations and programs, the organization primarily relies on revenue from its paid memberships⁴⁰ and its program-related fees. The YMCA-Twin Falls also maintains a donation website⁴¹ and conducts fundraising events, including a St. Patrick's Day 5K race and an annual golf tournament. The organization facilitates annual campaigns to raise capital contributions and to fund the Strong Kids program.⁴² Large charitable contributions from families and individual estates fund special projects that the YMCA-Twin Falls could not otherwise afford.

summer, the Y/City Pool provides swimming lessons, competitive swimming, and aquatics exercise classes, including aqua Zumba, senior and arthritis water fitness, and aqua blast and fit classes. *See* YMCA-Twin Falls, Aquatic Programs, available at: <http://www.ymcatf.com/cms-view-page.php?page=aquatic-programs>.

³⁵ *See* Eric Quitugua, *Rupert's YMCA on Path for Spring 2016 Opening*, MAGIC VALLEY TIMES-NEWS (Jan. 8, 2016).

³⁶ *See* YMCA-Twin Falls, *Donate-Strengthening the Community is Our Cause*, available at: <http://ymcatf.com/cms-view-page.php?page=donate>.

³⁷ Because of the discrepancies between the amounts reported in the IRS Form 990s and the organization's internal financial records, the Attorney General has concerns about the validity of all financial data he received from the YMCA-Twin Falls.

³⁸ *See* YMCA-Twin Falls 2011-2014 IRS 990s, Part I, line 12. The YMCA-Twin Falls obtained an extension to file its 2015 IRS Form 990.

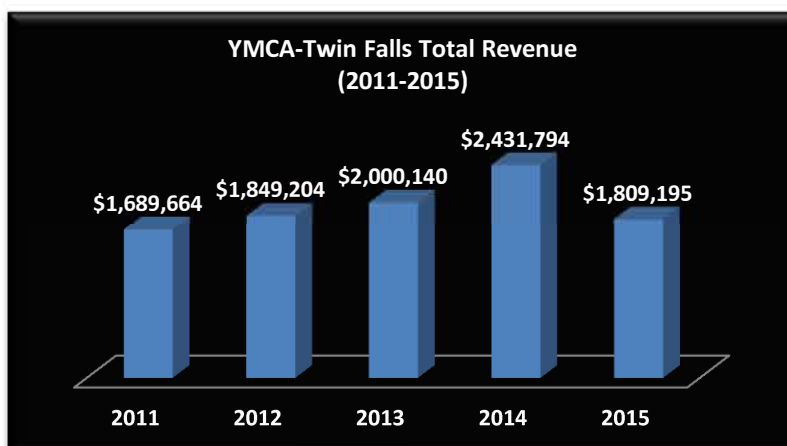
³⁹ All 2015 financial data derives from a 2010-2015 Profit & Loss statement, which contains unaudited and potentially inaccurate figures. Consequently, comparable data for 2015 is unavailable.

⁴⁰ The YMCA-Twin Falls membership rates, excluding taxes and joiner fees, range from \$20 (youth) to \$67.90 (family). *See* YMCA-Twin Falls, *Membership Information*, available at: <http://ymcatf.com/cms-view-page.php?page=membership>.

⁴¹ *See* YMCA-Twin Falls, *Donate-Strengthening the Community is Our Cause*, available at: <http://ymcatf.com/cms-view-page.php?page=donate>.

⁴² *See* YMCA-Twin Falls, *Donate-Strengthening the Community is Our Cause*, available at: <http://ymcatf.com/cms-view-page.php?page=donate>. The annual Strong Kids Campaign raises Factual Findings, Legal Conclusions, & Recommendations - YMCA-Twin Falls - 6

As illustrated in the following chart, the YMCA-Twin Falls’s revenue increased 31% between 2011 and 2014, but dropped 26% in 2015:⁴³



a. Program Service Revenue

“Program service revenue,” the money an organization receives for performing its tax-exempt functions, includes funds the organization receives from its program-related investments, unrelated trade or business activities, and government fees and contracts. The YMCA-Twin Falls breaks its program service revenue into five categories: (1) membership dues, (2) Y/City pool fees, (3) club and group fees, (4) tennis court fees, and (5) physical education program fees. As demonstrated in the following table, between 2011 and 2015, the YMCA-Twin Falls’s program services revenue remained consistent.

Program Service Revenue (2011-2014)⁴⁴

Fee Source	2011	2012	2013	2014	2015 ⁴⁵
Membership Dues	\$1,207,167	\$1,272,576	\$1,137,183	\$1,061,684	\$1,174,200
Y/City Pool	\$ 225,212	\$ 264,253	\$ 271,659	\$ 319,651	\$ 314,842
Clubs & Groups	\$ 126,318	\$ 87,325	\$ 83,475	\$ 104,017	unknown
Tennis Courts	\$ 36,831	\$ 40,618	\$ 39,501	\$ 49,468	unknown
Physical Education	\$ 12,071	\$ 17,166	\$ 32,676	\$ 38,941	unknown
Annual Totals:	\$1,607,599	\$1,681,938	\$1,564,494	\$1,573,761	\$1,695,960

b. Contributions

“Contributions” include all revenue an organization receives through its fundraising efforts or solicitation campaigns. The exact amount of charitable contributions the YMCA-Twin Falls

scholarship money to help families afford memberships. See YMCA-Twin Falls, Membership Information, available at: <http://ymcatf.com/cms-view-page.php?page=membership>.

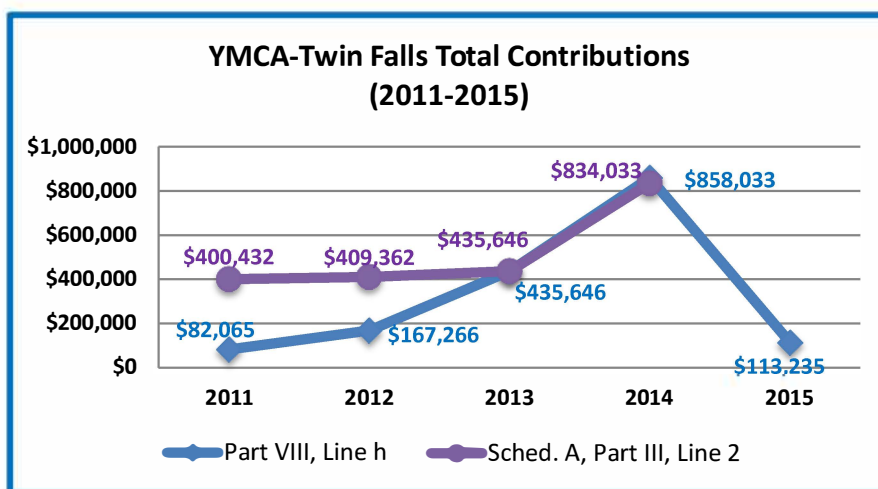
⁴³ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part I, line 12. For 2015 data, see *supra* fn. 39.

⁴⁴ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part VIII, lines 2a-e. In the 2011 and 2012 IRS Form 990s, the total amounts provided in Part VIII, line 2g, differ from the total amounts listed in 2011 and 2012 IRS Form 990s, Schedule A, Part III, Line 2. The reasons for these discrepancies are unknown.

⁴⁵ See *supra* fn. 39.

received between 2012 and 2015 is unclear because the organization did not maintain adequate contribution records.⁴⁶ It appears that most of the income came from a few donors who made large contributions each year to support particular projects. Other contributions were made in response to campaigns the YMCA-Twin Falls facilitated to fund specific programs, including the Strong Kids program.

The YMCA-Twin Falls's 2011-2014 IRS Form 990s include inconsistent data concerning the amount of contributions it received in 2011, 2012, and 2014, and documentation received from the YMCA-Twin Falls is insufficient to reconcile the differing amounts.⁴⁷ The following chart compares data contained in Part VIII, line h, of the YMCA-Twin Falls's 2011-2104 with data provided in Schedule A, Part III, lines 1-2. Contribution data for 2015 comes from the YMCA-Twin Falls's 2010-2015 Profit and Loss, which includes 2011-2014 data that matches the data in Part VIII, line h.



c. Real Property Assets

The YMCA-Twin Falls owns developed property and equipment that, as of 2014, had a combined book value of \$1.6 million.⁴⁸ The Elizabeth Blvd. property is pledged as collateral for two loans, and the Pole Line property is pledged as collateral for one loan. In May 2007, the YMCA-Twin Falls executed a promissory note for the original principal amount of \$670,565.⁴⁹

⁴⁶ The YMCA-Twin Falls produced (a) four letters identifying contributions from donors between 2011 and 2015, (b) a list identifying individual contributions during 2012 to the Strong Kids program, and (c) documents concerning a 2016 testamentary gift. It is unclear what data the YMCA-Twin Falls's outside accountants used to prepare the organization's IRS Form 990s. Even within the individual forms, the information is contradictory.

⁴⁷ The total contribution amount identified in the YMCA-Twin Falls 2014 IRS Form 990 is inconsistent with the contribution amounts reported by the Times-News. According to the media, in June 2014, the YMCA received \$500,000 in May 2014 from Dr. George Adrian Dean, which included a 3,000-square-foot building on Falls Avenue, and a \$600,000 donation from a local family in June 2014.

⁴⁸ See YMCA-Twin Falls 2014 IRS Form 990, Schedule D, Part VI, line 1a-e.

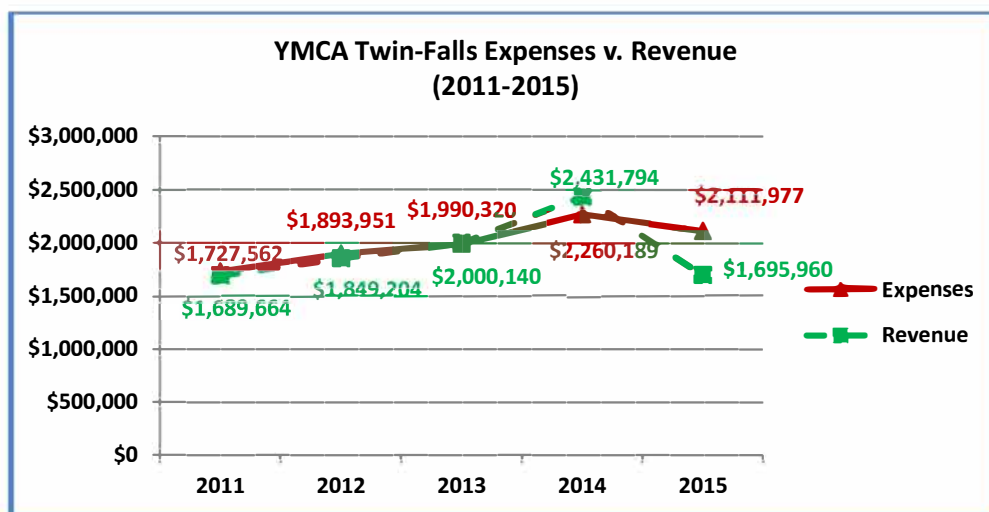
⁴⁹ See DL Evans Promissory Note (Nov. 5, 2010).

Three years later, the organization executed a new promissory note for \$876,274.⁵⁰ Both properties secure the 2010 promissory note. In April 2009, the YMCA-Twin Falls executed a debt consolidation loan for \$429,327, securing it with the Elizabeth Blvd. property.⁵¹

The organization also has an interest in a 3,700 square-foot office building located at 390 Falls Avenue West. According to media reports, Dr. George Adrian Dean gifted the property to the YMCA-Twin Falls in May 2014.⁵² At the time of his death in 2016, however, the property remained with his estate.⁵³ In his will, which is subject to probate, Dr. Dean leaves the property to the YMCA-Twin Falls.⁵⁴ Currently, the property (valued at \$329,521) is listed for sale at \$459,000.⁵⁵

2. Expenses

According to the YMCA-Twin Falls’s records, the organization’s expenses exceeded its program-service revenue in 2011, 2012, 2013, and 2014. Contributions—made primarily to support special projects—covered the excess expenses every year except in 2015 when contributions funded only \$113,235 of the YMCA-Twin Falls’s \$416,017 in excess expenses.⁵⁶ The following chart provides a year-to-year comparison of the YMCA-Twin Falls’s total functional expenses versus its total revenue for 2011 through 2015.⁵⁷



⁵⁰ See DL Evans Promissory Note (Nov. 5, 2010). In March 2016 the lender agreed to defer the YMCA-Twin Falls’s March and April 2016 payments. See DL Evans Extension/Modification Agreement (March 4, 2016).

⁵¹ See FNB Commercial Variable Rate Revolving or Draw Note (April 6, 2009).

⁵² See *supra* fn. 47.

⁵³ See Application for Informal Appointment of Personal Representative and Informal Probate of Will, Twin Falls County Case No. CV42-16-1415 (April 27, 2016).

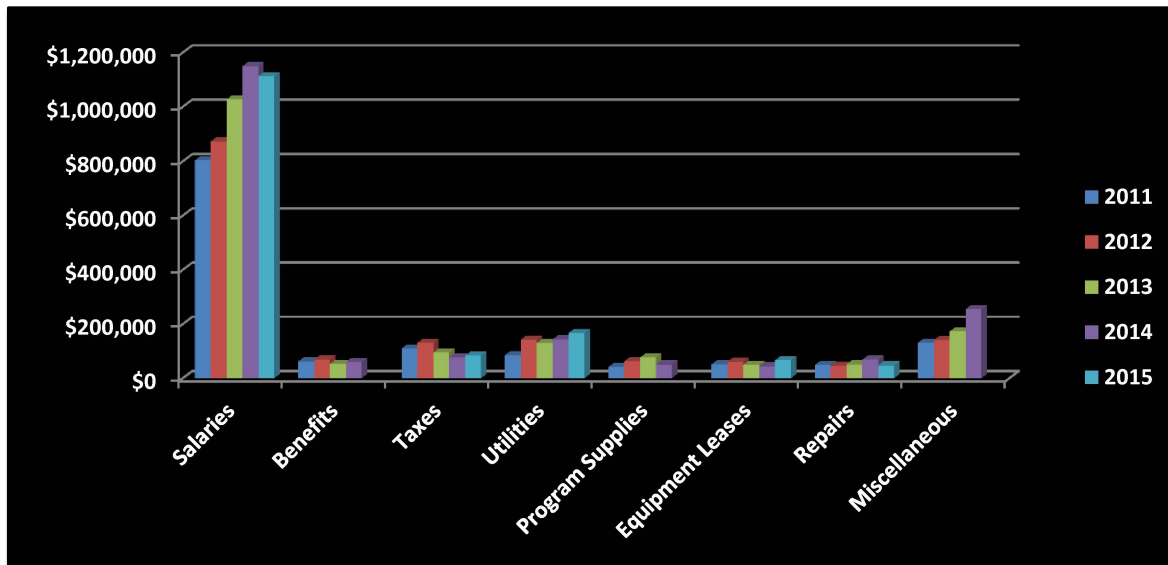
⁵⁴ See Last Will and Testament of George Adrian Dean (Sept. 20, 2012). Dr. Dean left the residuary of his estate, including real property and cash, to the YMCA-Twin Falls.

⁵⁵ See Idaho MLS # 98613469 (Aug. 2016).

⁵⁶ See *supra* fn. 39.

⁵⁷ For years 2011 through 2014, see YMCA-Twin Falls 2011-2014 IRS Form 990s. For 2015, see *supra* fn. 39.

Employee salaries and wages,⁵⁸ along with benefit costs⁵⁹ and payroll taxes,⁶⁰ consume most of the YMCA-Twin Falls’s annual revenue. Other large expenses include utility fees,⁶¹ program supplies,⁶² equipment leases,⁶³ repairs and maintenance,⁶⁴ and miscellaneous, but unidentified, expenses.⁶⁵ The following chart compares the YMCA-Twin Falls’s largest expenses between 2011 and 2015:



3. Fundraising

The YMCA-Twin Falls receives solicited and unsolicited contributions from donors. The organization provided the Attorney General with copies of its fundraising materials,⁶⁶ including its 2015 “Here for Good” capital campaign brochure.⁶⁷ On its website, the YMCA-Twin Falls

⁵⁸ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 7. For 2015, see supra fn. 39.

⁵⁹ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 9. Data for 2015 is unavailable.

⁶⁰ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 10. For 2015, see supra fn. 39.

⁶¹ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 24a. For 2015, see supra fn. 39.

⁶² See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 24b. Data for 2015 is unavailable.

⁶³ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 24c. For 2015, see supra fn. 39.

⁶⁴ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 24d. For 2015, see supra fn. 39.

⁶⁵ See YMCA-Twin Falls 2011-2014 IRS Form 990s, Part IX, line 24e. Data for 2015 is unavailable.

⁶⁶ The Attorney General requested copies of materials related to various fundraising matters between 2011 and 2015, but the YMCA-Twin Falls was able to locate and provide only two brochures.

⁶⁷ The brochure is undated, but the Board represented to the Attorney General that it was distributed in 2015. The brochure provides no information about the campaign, but the phrase “Here for Good Capital Campaign” appears at the top of the donation form attached to the brochure. The YMCA-Twin Falls provided an undated “Capital Campaign Needs List” that lists three project phases. The total cost to complete the building and repair projects included in each phase is \$2,412,000. The document indicates the organization received \$862,000 to complete the Phase I projects and received \$100,000 for one Phase II project.

has a dedicated “Donate” page⁶⁸ that explains the organization’s charitable programs and links to an online donation form.⁶⁹

Mr. Ettenger handled the bulk of the YMCA-Twin Falls’s fundraising efforts between 2011 and his separation in 2016. He failed, however, to maintain contemporaneous records to document donors’ contributions. The few donor letters provided to the Attorney General reveal large contributions to the YMCA-Twin Falls from three sources. The only other contribution record provided is a list of persons and businesses that donated to the YMCA-Twin Falls’s 2012 Healthy Kids campaign.⁷⁰ These documents and others show that the bulk of the contributions received between 2012 and 2015 were earmarked for specific projects, including an indoor water park.⁷¹ Mr. Ettenger used most of the contributions to cover the YMCA-Twin Falls’s general operational expenses. The Board represents to the Attorney General that it was unaware of Mr. Ettenger’s misapplication of the funds.

The YMCA-Twin Falls produced records concerning the donations it received for the YMCA-Rupert.⁷² The Board represents to the Attorney General that all funds dedicated to the YMCA-Rupert are accounted for and maintained in a trust account.

The records produced to the Attorney General do not reveal any personal use of charitable assets. The Board acknowledges that most of the project-specific contributions paid for the YMCA-Twin Falls’s operational expenses, but the Board denies any knowledge of Mr. Ettenger or other persons using contributions or other charitable trust assets for private purposes.

LEGAL CONCLUSIONS

Based on his factual findings, the Attorney General has reason to believe that the YMCA-Twin Falls violated Idaho’s charitable trust laws. This section discusses the relevant facts and law that support the Attorney General’s allegations.

Organizations generally receive two types of contributions—(1) solicited contributions, and (2) unsolicited contributions. In most instances, a solicited contribution has a restricted use because the organization solicited the contributions for a specific purpose (e.g., to pay for a special program, help build a new structure, or endow a scholarship fund). Unsolicited contributions fall into two categories—restricted and unrestricted, and restricted contributions are categorized according to their type of restriction (e.g., use, time, or use and time).

The Idaho Charitable Solicitations Act prohibits persons from engaging in unfair, false, deceptive, misleading, or unconscionable charitable solicitation acts or practices.⁷³ The term “charitable solicitation” means:

⁶⁸ See YMCA-Twin Falls, *Donate-Strengthening the Community is our Cause!* (available at: <http://www.ymcatf.com/cms-view-page.php?page=donate>.)

⁶⁹ See YMCA-Twin Falls, *Donate Now* (available at: <https://www.trinexum.com/TXDonateNow/Default.aspx>).

⁷⁰ The Board believes that the YMCA-Twin Falls used some of the contributions from the 2012 Healthy Kids campaign to pay operational expenses.

⁷¹ These contributions likely constitute temporarily restricted or designated donations.

⁷² See YMCA-Rupert Contributions (2012).

any oral or written request, directly or indirectly, for money, credit, property, financial assistance or other thing of value on the plea or representation that such money, credit, property, financial assistance or other thing of value or any portion thereof, will be used for a charitable purpose or benefit a charitable organization.⁷⁴

Organizations use a variety of methods to obtain contributions, including mail, telephone, or email campaigns, website appeals, and donation boxes. Such solicitations must contain accurate and truthful information about how the organization will use the contributions. A contribution received in response to a solicitation for a specific purpose is a restricted contribution and must be used according to the donor's intent.

Most unsolicited contributions are received without attached restrictions, and the organization is free to use the donation for any purpose that furthers the organization's charitable mission. But organizations also receive contributions that are subject to the terms and conditions outlined in the accompanying gift instruments. The organization has a fiduciary duty to use the contribution according to the gift instrument's instructions. Gift instruments⁷⁵ come in various forms and need not be a formal document, such as a charitable trust or will.

Once an organization accepts a restricted contribution (solicited or unsolicited) it may not—in most instances—unilaterally modify the restriction. For contributions over \$25,000 and held for less than 10 years,⁷⁶ the organization must obtain the donor's consent to release the restriction.⁷⁷ If the donor is unavailable or the organization is unable to obtain the donor's consent, the organization may apply to the court for permission to release the restriction.⁷⁸ The Attorney General must receive notice of the application and be given an opportunity to object to the proposed modification.⁷⁹

To support its application, the organization needs to demonstrate that the restricted purpose (a) has become unlawful, impracticable, wasteful, or impossible to achieve; (b) impairs the management or investment of the fund; or (c) must be modified to further the charitable purposes of the fund because of unanticipated and changed circumstances.⁸⁰

⁷³ See Idaho Code § 48-1203(1).

⁷⁴ IDAHO CODE § 48-1202(3).

⁷⁵ An organization usually has the benefit of a gift instrument to guide it in determining the donor's intent. A "gift instrument" is a record, including a solicitation, under which property is given to an organization. See IDAHO CODE § 33-5002(3).

⁷⁶ A simplified modification process applies to funds that are less than \$25,000 and that the organization has held for 10 or more years. See IDAHO CODE § 33-5006(4)(a)-(b). Pursuant to Idaho Code § 33-5006(4), the organization must notify the donor (if available) and the Attorney General of its intentions. Assuming the organization receives no objections within 60 days, it may modify the restriction. See *id.* Any use of the fund, however, must be in a manner that is consistent with the charitable purpose expressed in the gift instrument. See IDAHO CODE § 33-5006(4)(c).

⁷⁷ See IDAHO CODE § 33-5006(1).

⁷⁸ See IDAHO CODE § 33-5006(2). To avoid donor conflicts, as well as expensive court proceedings, an organization should decline any restricted contribution that the organization is unable or unwilling to fulfill.

⁷⁹ See IDAHO CODE § 33-5006 (2)-(3).

⁸⁰ See *id.*

Assuming the court agrees with the organization's proposed modification and the Attorney General does not object, the court may modify the restriction. The organization then may use the funds for any purpose that is consistent with the donor's intent or that complies with the charitable purpose expressed in the gift instrument.⁸¹

The YMCA-Twin Falls's minimal contribution records indicate that, between 2011 and 2015, Mr. Ettenger, acting on behalf of the YMCA-Twin Falls, accepted contributions from donors who wanted their gifts used to fund specific programs. According to the Board and as evidenced in the records produced, the YMCA-Twin Falls deposited the contributions into the organization's general business account(s) rather than placing the contributions into segregated trust accounts.

The Board reported that the YMCA-Twin Falls likely used some of the contributions to the 2012 Healthy Kids campaign to pay operational expenses, and, in 2015, the YMCA-Twin Falls failed to use all capital campaign contributions for the designated programs. Nothing in the documents produced to the Attorney General show the YMCA-Twin Falls obtained a donor's consent or the court's approval to modify a restriction.⁸²

Because of poor record-keeping the following details remain unknown: (a) the total amount of contributions the YMCA-Twin Falls received between 2011 and 2015; (b) the amount of restricted contributions the YMCA-Twin Falls dedicated to designated projects or purposes; and (c) the amount of restricted contributions the YMCA-Twin Falls used to fund its operational expenses.

RECOMMENDATIONS

The Attorney General recommends that the YMCA-Twin Falls take specific actions to improve how it manages and uses its charitable trust assets. These recommended changes are based on the problems the Attorney General identified during his inquiry and reflect best business practices.

Recommendation No. 1.

The Board should increase its level of competency regarding fiscal administration, executive oversight, effective organizational planning, donor accountability, and regulatory compliance.

- i. Board members should educate themselves about their responsibilities and duties and obtain training concerning the management of an exempt

⁸¹ See *id.*

⁸² A December 14, 2015, letter to a donor's accountant explained the YMCA-Twin Falls used a portion of the donor's contributions according to the donor's restricted purpose, but "a large percentage" of the contribution was used to cover operational expenses. While the letter states the donor is "aware" of how the YMCA-Twin Falls used the donor's contribution, the letter does not indicate the YMCA-Twin Falls obtained the donor's consent before it modified the terms of the restricted contribution.

- organization. Training should include mandatory attendance at live presentations, review of training manuals and other written materials, and completion of IRS Stay Exempt Webinars.
- ii. Board members should increase their knowledge concerning fiscal administration matters through comprehensive training. Training should include mandatory attendance at live presentations, review of training manuals and other written materials, and completion of IRS Stay Exempt Webinars.
 - iii. The Board should include members who have the necessary expertise in financial management and who are interested in the process of setting fiscal policy.
 - iv. The Board should establish a standing Education Committee to foster Board members' ongoing development and training.
 - v. The Board should adopt a transparency policy to ensure that information about the YMCA-Twin Falls's mission, activities, finances, and governance is readily available to the public on the YMCA-Twin Falls's website. At a minimum, the YMCA-Twin Falls should post the following documents on its website:
 - a) Articles of Incorporation
 - b) Bylaws
 - c) Names of all Board members (directors & officers)
 - d) Conflict of Interest and Ethics Policies
 - e) Board-approved board meeting minutes
 - f) Board approved financial reports
 - g) IRS 990 filings and worksheets
 - vi. The Board should adopt a document retention policy to ensure its records are organized and maintained for a sufficient period of time.

Recommendation No. 2.

The Board should implement standards, policies, and procedures to guard the YMCA-Twin Falls's charitable assets and to ensure that the YMCA-Twin Falls's contributions are used to further its charitable mission.

- i. The Board should maintain separate financial accounts for the YMCA-Twin Falls's unrestricted, permanently restricted, and temporarily restricted charitable assets.
- ii. The Board should review the organization's charitable trust instruments, if any, and consult with an attorney if it has reason to believe that the YMCA-

Twin Falls's actions or inactions violated the terms or conditions of any charitable trusts.

- iii. The Board should inform the applicable YMCA-Twin Falls's donors that the YMCA-Twin Falls used their restricted contributions for operational expenses.
- iv. The Board should document each contribution the YMCA-Twin Falls receives and provide a donation receipt to the donor for tax purposes.
- v. The Board should provide project progress reports to donors who contribute funds for specific projects.
- vi. The Board should seek a donor's consent before the YMCA-Twin Falls modifies the terms of a restricted contribution.
- vii. The Board should establish a standing Fundraising Committee to develop policies and procedures related to the YMCA-Twin Falls's fundraising practices and to oversee all fundraising activities.
- viii. The Fundraising Committee should ensure that all material terms and conditions concerning a fundraising campaign are clearly and conspicuously disclosed to potential donors.
- ix. The Fundraising Committee should ensure the YMCA-Twin Falls complies with IRS substantiation and disclosure rules applicable to charitable contributions.
- x. The Board should adopt a reimbursement policy that includes requirements for obtaining reimbursement for business-related expenses. Reimbursements should be allowed only with an invoice, bill, or other document that identifies and confirms the charge was incurred for business purposes.

Recommendation No. 3.

The Board should appoint and effectively supervise an Executive Director who has the education and experience to manage the YMCA-Twin Falls.

- i. The Board should establish a standing Personnel Committee to develop a job description, performance standards, performance review process, and all other employment terms and conditions related to employment, evaluation, and supervision of the Executive Director.
- ii. Before setting the Executive Director's compensation and benefits, the Board should obtain comparable compensation information and studies, document its

analysis, and vote on the Executive Director's compensation and benefits package.

- iii. The Board should enter into an employment contract with the Executive Director. The contract should include a trial period, a job description, performance standards, performance review process, and all terms and conditions related to compensation and benefits.

Standard No. 4.

The Board should retain a certified public accountant to organize the YMCA-Twin Falls's financial records, maintain the YMCA-Twin Falls's financial accounts, prepare monthly financial reports for the Board's review and approval, and prepare its annual IRS filings.

- i. The Treasurer should meet regularly with the accountant and report to the Board that the YMCA-Twin Falls's accounting procedures and internal controls are being followed.
- ii. The Treasurer should review on a monthly, quarterly, or yearly basis (as applicable) all financial statements required by the United States GAAP, including, but not limited to, the YMCA-Twin Falls's:
 - a) Statement of Financial Position
 - b) Statement of Activities
 - c) Statement of Functional Expenses
 - d) Statement of Cash Flows
 - e) Notes to Financial Statements
- iii. The Board should receive a written financial report from the Treasurer at each Board meeting. The Board should dedicate sufficient time to discussing how the YMCA-Twin Falls's budget is being met and what additional resources are necessary to meet the needs of the organization.

Recommendation No. 5.

The quorum of the Board should assemble, at a minimum, once each month to (a) review minutes, reports, and other documents; (b) discuss and address any new or continuing issues; (c) assess the YMCA-Twin Falls's progress; (d) vote on any required business; and (e) complete any other tasks before the Board.

- i. The Board should establish a standard day of the week and a standard time to hold its monthly meetings.

- ii. The Board should hold its meetings in a quiet, private, professional environment that allows Board members to comfortably discuss confidential matters.
- iii. The Secretary (or his/her appointed substitute) should record each Board meeting or take detailed notes concerning all discussions, activities, and votes that occur at each Board meeting.
- iv. The Secretary, at least one week before the Board meeting, should distribute via email to the Board members a meeting agenda and solicit additions or changes to the agenda.
- v. The Secretary, at least one week before the Board meeting, should distribute via email to the Board members the prior meeting minutes and solicit additions or changes to the minutes.
- vi. The Board, at the meeting, should review the prior meeting minutes—including any additions or changes—and vote to approve or disprove them.
- vii. The Board should review the Treasurer's financial report.

CONCLUSION

The YMCA-Twin Falls's current Board provided the Attorney General with assurances that it is addressing the problems discussed in this report. A financial professional is compiling, organizing, and reviewing the YMCA-Twin Falls's records to help the Board better understand and stabilize the organization's financial status. Additionally, the Board is reviewing its obligations, programs, and fundraising practices to determine how the organization can lower its costs and increase its revenues. Overall the Board is committed to improving every aspect of the YMCA-Twin Falls.

However, the Attorney General's oversight of the YMCA-Twin Falls and its Board does not end with this report. The Board is aware that it needs to inform the Attorney General's Office about any financial discrepancies it uncovers during its independent audit. Specifically, the Board must alert the Attorney General's Office if the audit reveals any personal use of the YMCA-Twin Falls's charitable assets.

The YMCA-Twin Falls is an asset to the Magic Valley community, providing adults and children with dozens of fitness, nutrition, and life-improving programs. An active, informed, and principled Board, as well as enthusiastic public support, will ensure the YMCA-Twin Falls's 60-year charitable mission continues.