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## **Public Oversight: The Role of the Media and Others\***

By Jonathan Small

### Introduction

The topic of “public oversight” of the nonprofit sector is intriguing for a number of reasons. Its scope is undefined. When we think of the role of the I.R.S. in providing “federal oversight,” we all know generally what that involves. The I.R.S. does its job through enforcement and educational activities. But “public oversight” -- what is it? I’m convinced from a number of discussions that the term means different things to different people.

What are those performing public oversight overseeing? The I.R.S. is overseeing compliance with applicable Internal Revenue Code provisions and the state Attorneys General are overseeing compliance with applicable state laws. But those performing public oversight need not and most often do not focus solely on legal standards.

Who should be thought of as carrying out public oversight? The press and other media, of course. But should boards of nonprofits be considered part of public oversight? Or advisers to donors?

How should one evaluate the effectiveness of public oversight? One can quibble that public oversight isn’t “oversight” at all because those involved generally have no legal power to impose their will. Then, by what mechanism or process does public oversight work?

In short, public oversight is a terrific topic, one open to multiple definitions, perspectives and assessments. So, let’s examine this amorphous topic: what is it? who does it? what do they do? how do they do it? what effect do they have? how do they compare with formal oversight bodies, such as state Attorneys General and the IRS? As we identify answers to these questions, we shall see that while public oversight is the most

difficult type of oversight to define and pin down, it is also the form of oversight that is, I am coming to believe, the most effective in achieving the fundamental purpose of oversight. As Professor Roth, our distinguished commentator, noted in his recent article about the Bishop Estate in the August 2007 ABA Journal (p. 48): “Ultimately, public oversight may be the key to proper management of charitable organizations.”

### What is Oversight?

In order to discuss “public oversight,” we should first explore briefly what we may mean by the term “oversight” when one is focusing on oversight of nonprofits and foundations.

I began my exploration with the most basic definition I could find. Turning to my softcover, abridged Webster’s New World Dictionary and Thesaurus (2d ed. 2002), I found “oversight” defined solely as “a careless mistake or omission,” a rather entertaining irony as we spend two days trying to explain how “oversight” might or should serve to avoid or overcome “a careless mistake or omission.” I then checked the definition of “oversee” and was more helpfully advised that it meant “to supervise, superintend.”

Under this basic definition, “oversight” seems to involve something beyond merely viewing, or looking over, what is going on. The term imports a level of responsibility, some kind of obligation to make sure that what is going on is what should be going on. The term suggests a responsibility not only for legal compliance (which is merely a test of whether an organization is meeting the minimal standards of conduct set forth in applicable law) but also a responsibility for the organization’s overall effectiveness -- to see that it is doing a good job of performing its mission. A secondary definition of oversee, based on the online Oxford English Dictionary, is broader and more helpful. It defines “oversee” as “to look over,” “to examine. . . inspect; to scrutinize in order to criticize or correct. . . .” See item 3 at [http://dictionary.oed.com/cgi/entry/00337758?single=1&query\\_type=word&queryword=oversee&first=1&max\\_to\\_show=10](http://dictionary.oed.com/cgi/entry/00337758?single=1&query_type=word&queryword=oversee&first=1&max_to_show=10). As public oversight is generally performed by those lacking legal authority to enforce their views, it is this secondary, broader definition that is principally relevant to this paper.

What is it that overseers are inspecting and scrutinizing? I see four different areas of scrutiny. First, the most narrow is legal compliance, a term that includes certain financial issues (e.g., private inurement). Is the organization complying with the applicable laws and regulations? Second is financial oversight which, as I use the term here, relates to the financial health of the organization from a non-legal perspective. Next, moving to more subjective issues, is the area of programmatic oversight. By this I mean the question of whether programs to further the mission are being conducted on an appropriate scale, and at an appropriate cost, given the organization’s resources. Finally, there is oversight of the outcomes. This is the question of whether the organization is effective and successful in fulfilling its mission. What is the quality of its programs?

The following chart offers an oversimplified view of the types of overseers and the forms of oversight they perform.

	<u>Legal</u>	<u>Financial</u>	<u>Programmatic</u>	<u>Quality/Outcomes</u>
IRS	✓	some		
A.Gs.	✓	some		
Sector	✓	✓	✓	✓
Public	✓	✓	✓	✓

The I.R.S. and A.Gs. operate in the legal domain, reviewing compliance with the laws they are charged with enforcing. In doing their compliance reviews, they do look at finances but only insofar as finances relate to legal requirements (e.g., excessive compensation). Increasingly, however, the I.R.S. and certain A.G.s are producing informative materials that go beyond their oversight roles as to legal compliance -- e.g., *Pennies for Charity* from the New York A.G. as to fundraising costs and “Good Governance Practices for 501(c)(3) Organizations – Draft” from the I.R.S. (<http://www.irs.gov/charities/charitable/article/0,,id=167626,00.html>). These materials can be seen as a form of oversight (particularly “Pennies for Charity”) but producing them is clearly ancillary to the principal work of these agencies; I think of such materials more as tools for oversight rather than as oversight itself. The checks in the chart for “Sector” oversight reflect my expectation as to how the best sector overseers function; however, I

believe that most nonprofits are not subjected to rigorous sector oversight.

As the chart suggests, and given the limited extent of sector oversight, I would argue that it is public oversight that functions most broadly and has the potential to have the most impact on the sector. I base this assertion on the premise that, of these four types of oversight, it is public oversight that is most concerned with outcomes, i.e., with whether the organization is effective and successful in carrying out its mission, and it is public oversight that has the greatest number (ever increasing) of overseers. (As discussed below, I would include in “public oversight,” for purposes of this discussion, the oversight work done by governments in connection with their contracts with, and grants to, nonprofits because their work of this type is closely analogous to the oversight work of private funders of nonprofits. Also, oversight of government contracts and grants, while very important, appears not to be captured by the other oversight topics for this conference and so it seems appropriate to include it under “public oversight”.)

Regarding the importance of oversight of outcomes, it is important to underscore that most of those providing oversight, and particularly the I.R.S. and the A.G.s, tend to give short shrift to the most important question one can ask about a nonprofit: Is it doing a good job? Much “oversight,” does not involve the ultimate question of whether an organization is effective and efficient in carrying out its mission. I.R.S. and Attorney General (and Congressional) oversight is ordinarily unconcerned with effectiveness, as it focuses on the prevention or remedying of “bad acts”. While some evaluators – e.g., Charity Navigator – give out grades, their focus tends to be on financial criteria. A nonprofit may have financial ratios that bring cheer to the hearts of those enamored of financial ratios as an evaluation tool. It may have governance and management policies galore. (The draft Principles for Nonprofit Governance developed for the Panel on the Nonprofit Sector created by Independent Sector refer to eight different such policies. See [www.nonprofitpanel.org](http://www.nonprofitpanel.org).) It may have a board of just the right size – that meets monthly – with superb attendance – and a 100% contribution record. But none of these metrics necessarily means that it is doing a good job, that it is succeeding in its mission.

For those nonprofit organizations that operate with at least one foot in the market economy, public oversight in the guise of the market performs a critical assessment of how

good a job the organizations are doing. Here I am thinking of certain cultural, education and health-related nonprofits, especially those that compete with for-profits, where the “customers” of the entity vote with their feet as to whether the organization is doing a good job. Think of the nonprofit theater group that complies with all regulations, puts on plays, and even charges less than competing organizations, but no one goes. The organization may be meeting its legal, financial and programmatic obligations, but most would say it is failing in its mission, whether for reason of bad acting, no publicity or poor play selection.

With respect to other nonprofits, especially those in the social services, the market of consumers plays a minor or nonexistent role, as discussed below, and so for them the task of evaluating how good a job is being done is much more daunting. As an illustration of the problems of evaluating effectiveness, consider an organization that delivers meals to the homebound elderly. Given the definition above of “oversee” (and thus “oversight,” in this context) as “to supervise, superintend,” it seems clear that “oversight” of this organization should involve an effort to assure that the organization is effective in helping the homebound elderly by delivering good meals to them. This judgment is of course different from a judgment as to whether it is meeting all legal requirements, and while a good record on that front might be taken as a good indicator that it is being effective in serving its mission, there is no necessary link.

Ordinarily, organizations of this type focus on quantitative measures of programmatic assessment, e.g., the number of meals delivered. I’m told, however, that an intern at an organization of this type asked this previously unasked question about qualitative programmatic effectiveness: Did the organization know if people actually ate the meals? Investigation determined that many did not eat the meals, a finding that would inherently be a blot on this nonprofit’s organizational effectiveness escutcheon. Yet, it was also determined that a key part of the meal delivery, from the standpoint of the homebound elderly, was the fact that each delivery involved a visit by someone who spent a few moments chatting with the homebound person. The organization concluded that the visit was extremely beneficial to the morale and well-being of those being visited. In short, the program produced a desirable impact, but not in the manner anticipated, in the

case of many of the meal recipients.

This example is intended to make the point that assessing effectiveness is both the most difficult oversight task but also the most important. As indicated by the chart above, only those engaged in sector oversight and public oversight even attempt this task. (As noted, the rubric of public oversight, as used here, is intended to include the efforts made by some governmental units to evaluate the effectiveness of certain contracts they enter into for the performance of services, e.g., housing the homeless; here they are acting in a manner similar to those private grantmakers who also seek to evaluate effectiveness.) It is mostly out of pressure from a public overseer, namely funders, that the “outcomes measurement” movement is currently gaining momentum. What will be very important to monitor is whether the criteria and standards devised to measure outcomes really measure effectiveness or simply measure aspects of the organization’s activities that are readily quantifiable. In the example of the meals for the elderly, if increased focus is placed on the number of meals delivered as the “most relevant” outcome and the delivery people are encouraged to leave the meals at the door, the mission might be less well served.

In short, it is incredibly hard to determine on some objective level whether an organization is doing a good job. See *Don’t Get Caught in the Evaluation Trap*, William Cotter, *Chronicle of Philanthropy*, Aug. 23, 2007 at 49. To some degree the choice of the criteria to be evaluated is inherently subjective. In the case of the program of meals delivery to the homebound elderly, what is more important? -- offering a good meal or a friendly visit? An organization will, of course, be eager to identify evaluation criteria that serve to compliment its performance. In some instances, that will tend to make it harder for someone seeking to do an objective evaluation. Thus, even where thoughtful oversight is attempted, it is not clear that that oversight will succeed in improving performance of a nonprofit’s mission. As discussed below, the role of “the market,” the key indicator for for-profit entities, often receives little attention in assessing the effectiveness of many nonprofits. (Interestingly, New York City is planning to embark on a market-based evaluation of its performance. See Jill Gardiner, *City Seeks to Gauge ‘Customer Satisfaction,’* N.Y. Sun, July 24, 2007, <http://www.nysun.com/article/59020>. The City already releases an annual *Mayor’s Management Report*; see

[http://www.nyc.gov/html/ops/html/mmr/mmr\\_sub.shtml](http://www.nyc.gov/html/ops/html/mmr/mmr_sub.shtml) for the preliminary report on fiscal year 2007.)

### What is Public Oversight?

As noted, when we speak of “federal oversight,” we tend to think principally of the role of the I.R.S. as expressed, for example, in the name of our third session: “Federal Oversight: The Role of the I.R.S.” (Of course, the Treasury Department and Congress conduct federal oversight to a lesser degree, as do federal agencies contracting with, or making grants to, nonprofits.) The parameters of “state oversight” are also understood -- mainly the State Attorneys General (or some other executive department, such as the Secretary of State, in some cases), plus the legislature and the governor to some extent, as well as state agencies providing funding to nonprofits.

“Sector oversight” ordinarily involves a review by an outside, nongovernmental party created by a group of organizations having a common mission. The Middle States Association of Colleges and Schools, for example, periodically reviews in depth the performance of Mid-Atlantic private schools participating in its program. This work might be thought of as more in the nature of evaluation, rather than “oversight,” but evaluation certainly is akin to oversight in this context. The goal of that work is primarily to give the school guidance. But there is a presumption that the guidance will be listened to. In terms of its potential scope and effectiveness, sector oversight, where it is conducted, is akin to public oversight, but likely to be more focused on particular concerns of the sector in question.

While federal and state oversight are carried out by particular governmental agencies charged by law with that task, sector oversight, like public oversight, may arise from a number of players, either nonprofits joining together for mutual evaluation, or professional firms, such as consultants, hired to compare and contrast similar organizations. Also, a form of sector oversight may be largely an internal function in which a charity reviews its own performance by reference to various standards and goals, established by some outside group, that it may have adopted. But for any one nonprofit, the number of sector overseers is finite and the mechanism of oversight and feedback is

defined. (See [www.law.nyu.edu/ncpl/libframe.html](http://www.law.nyu.edu/ncpl/libframe.html) for the “Self-Regulation Report,” a “Study on Models of Self-Regulation in the Nonprofit Sector” prepared by the National Center on Philanthropy and the Law of NYU.)

Public oversight, in contrast, is quite different from federal, state or sector oversight. Unlike the terms “government oversight” and “sector oversight”, the term “public oversight” is relatively little used and seems to me to be inherently vague. The definition of public oversight I offer for your consideration is: comments by any member of the public, usually, but not always, to a member of the public regarding any aspect of the functioning of any nonprofit. This broad definition functions as a catch-all; in terms of our conference program, one could also refer to the topic of this paper as “Other Oversight.”

Another delineation of what public oversight is comes from a comparison with the other forms of oversight.

First, anyone can play. Public oversight includes, without limitation, newspaper and TV coverage, commentary by individuals offered on-line in the form of blogs, articles and books, and any other public comment on the functioning of nonprofits. It also includes donors (individual, institutional and governmental), donor advisers, nonprofit boards (at least for purposes of this paper, as discussed below) and, perhaps most importantly, recipients of the services or goods being provided. In many cases, people in this recipient group will be conveying their views directly or indirectly to a nonprofit, often in the form of a market-type decision to patronize it or not (e.g., choosing a college to attend). Compared to the relative handful of people directly and regularly involved in governmental oversight, maybe a thousand or so at most (excluding government contracting agencies), the “public” represents hundreds of millions of potential commentators. How many are actually involved is hard to estimate – but with blogs and the internet, barriers to entry into this field are minimal; taking grantmakers into account adds thousands more actively engaged in evaluation.

Second, the essence of public oversight is that those doing it have no legal authority to act. The position of these self-appointed overseers is quite different from that of federal and state authorities. The exceptions to this characterization are (a) those in the tiny

group that enjoy “donor standing” as a legal matter (see, e.g., *Smithers v. St. Luke’s-Roosevelt Hospital Center*, 281 App. Div. 2d 127, 723 NYS 2d 426 (N.Y. App. Div., 2001), (b) a nonprofit’s board, which can be viewed as representing the public, and (c) those having a contractual relationship with a nonprofit (e.g., government agencies), whose legal authority is limited to enforcing the contracts in question.

A third important distinction between I.R.S. and Attorneys General oversight, on the one hand, and public oversight, on the other hand, is that, as noted, the former is focused on “don’ts.” The laws administered by the I.R.S. and Attorneys General basically set forth prohibitions on actions that may be undertaken by a nonprofit: no private inurement, no lying in solicitation materials, no excessive compensation, no electioneering, etc. But no law requires a nonprofit to do a good job in carrying out its mission. (Governmental agencies may, however, take a nonprofit to task for doing virtually nothing to attempt to carry out its mission.)

Public oversight, in contrast, is unfettered by statutory rules and regulations interpreting them. The public, through whatever means of communication are being employed -- newspapers, blogs, periodicals, TV, radio, etc., -- is free to comment on whatever aspect of nonprofit performance, or nonperformance, it wishes.

As is obvious, that freedom poses both dangers and opportunities for effective oversight. A public overseer who is a reporter might be very helpful, for example, in comparing job training programs in a feature story, thereby helping those running the programs to learn what has worked elsewhere and what hasn’t in preparing people to get, and keep, jobs. The I.R.S. and state Attorneys General would not produce such a comparison. Of course, a reporter lacks explicit power to cause a nonprofit to change its ways, in this case to adopt the job training techniques that have worked the best. But the fact is that that overseer, if she or he has a broad audience, may have significant implicit power to effect change -- thereby performing an oversight function of great importance -- one that promotes good performance as well as stopping bad performance. Similarly, public oversight can focus on best practices and how to implement them. Often those data also convey implicitly, or otherwise, various “don’ts” but also some “do’s.” An example would be information comparing fundraising or overhead costs for nonprofits engaged in

similar activities (certain Attorneys General compile comparative data on fundraising costs -- e.g., “Pennies for Charity” from the New York A.G.). (Thus, an organization like Guidestar ([www.guidestar.org](http://www.guidestar.org)), focused on providing information, can be thought of as providing oversight as well by reason of providing data readily usable by the public for oversight.)

Fourth, unlike government oversight, which engages the nonprofit directly in the regulatory process, public oversight operates indirectly. Indeed, the mere existence of public oversight is extremely important as a source of self-oversight by the nonprofit sector. Fear of bad publicity plays a key role in promoting good behavior by countless nonprofits -- a somewhat odd situation in which the actual public oversight of most nonprofits is insignificant but the prospect or fear of public oversight is extremely significant. Lawyers for nonprofits routinely use the attention-grabber of asking a nonprofit E.D. proposing some misguided action whether the E.D. “would like to read about it in the paper.” Generally, the answer is “No.” Thus, Stephanie Strom can take a day off, secure in the knowledge that her mere presence on the nonprofit sector beat for The New York Times has deterred all sorts of misdeeds. (Regarding newspaper coverage, see Pablo Eisenberg, *Newspaper Cuts Are a Threat to Charities’ Accountability*, Chronicle of Philanthropy, August 23, 2007 at 50.) By contrast, the impact of I.R.S. and A.G. oversight in promoting good behavior in the nonprofit sector is reduced by reason of applicable confidentiality rules. Some bad acts by nonprofits that are investigated by the I.R.S. or A.G.s receive publicity but many are resolved secretly -- thus totally preventing the impact disclosure might have had in promoting improved conduct by other nonprofits. Of course, for those enjoying nearly complete privacy (secrecy), most particularly churches, the potential for oversight of any kind is greatly reduced.

Who is Engaged in Public Oversight? What do They Do, How Do They Do it and  
Are They Effective?

The following chart summarizes (and thus oversimplifies) the different oversight roles played by different public overseers.

	<u>Legal</u>	<u>Financial</u>	<u>Programmatic</u>	<u>Quality/Outcomes</u>
Press/Blogs/ Other Media	✓	✓	✓	✓
Charity Evaluators		✓	✓	
Donors/Donor Advisors		✓	✓	✓
Beneficiaries/ Consumers				✓
Board	✓	✓	✓	✓

### The Press, Bloggers and Other Media

Most people would think first of the press and other media forms in naming those involved in public oversight. Most commonly, a news story details misdeeds or allegations thereof. Scandal is usually the focus. As David Cay Johnston of the New York Times commented at a workshop on “Nonprofits and the Press” held at the Nonprofit Coordinating Committee of New York a few years ago: “Nonprofit does its job is not a news story.” Thus, it is rare indeed to find a story such as: “Local museum follows proper procedure in setting pay of its top executives,” or: “Homeless shelter provides wholesome lunch to 100.”

Occasional “feature stories” in the media do, however, focus on outstanding programs and on offering explanations as to why the programs are outstanding. These stories are inherently useful in educating -- and thus in promoting effectiveness for -- those nonprofits in the same field as the nonprofits featured, assuming the stories are read by staff and board members of those nonprofits. The extensive favorable publicity describing the operations of the Harlem Children’s Zone, headed by Geoffrey Canada, is a good example of how the media can serve to improve nonprofits. Of course, favorable media coverage also helps to attract financial support.

In short, the focus of the press and other media is on “news,” and they are free to define “news” as they wish. In general, the media views a juicy misdeed as the most delectable news about a nonprofit because that is a story that will get the attention of its readers/viewers/listeners. Thus, “E.D. of homeless shelter uses baby food money for Las Vegas trysts with mistress” is a possible example. “Museum lacks effective internal controls for inventorying pre-historic fossils” would be less of a grabber and thus much less likely to make the papers, even though the problem might be perceived by some as more important than the pilfering of baby food funds. The point here is that oversight by the press and other media is inherently focused on the business of selling newspapers (or their on-line, radio or TV equivalents). Overseeing the nonprofit sector – to cause it to function effectively – is not a focus of media coverage, even though there may often be considerable congruence between the interests of the newspaper business and effective oversight of the nonprofit sector. (I have raised with several reporters -- somewhat naively and wistfully -- this question of their interest in improving the functioning of nonprofits. This topic was simply not a matter of professional interest to any of them, though some noted that their work sometimes produced desirable changes. In the same wishful thinking vein, see Robert Egger, *Newspapers Must Be Taught to Cover Charities*, *Chronicle of Philanthropy*, Dec. 7, 2006 at 49.)

Nonetheless, while the media has no interest in seeing that the problem it has reported is fixed, and no interest in devising a solution, once the media has publicized a problem, the governmental oversight bodies can, and often do, step in to investigate and devise a remedy of some kind. Accordingly, I view the media as probably the most effective source of oversight -- its work prompts enforcement actions and serves as a reminder to nonprofits generally of the importance of proper conduct. Also, it offers education by way of feature stories about how and why certain nonprofits are performing well. From a legal standpoint, while the media generally has no “standing” as a potential plaintiff in a lawsuit, this role of publicizing a problem inherently gives the media a form of indirect standing. Its “standing” as to publicizing, and thus promoting, good behavior stems from the respect and visibility it enjoys in the community it serves. See Rick Cohen, *Almost Crimes: The Boston Globe’s Foundation Exposés Revisited*, *The Nonprofit*

Quarterly, Summer 2007 at 57, regarding the response to the Globe's exposés that this magazine describes as "underwhelming."

With the advent of internet blogging, virtually any individual can also potentially spur government oversight action or publicize effective performance. Once apparently untoward conduct by a nonprofit has been publicly reported, it is usually hard for the relevant governmental oversight organization to ignore looking into that conduct. Before the advent of blogging, only the institutional media (the press, radio and TV) were ordinarily in a position to make information public in a manner likely to prod an otherwise reluctant government oversight agency into action. Now, every blogger, especially those with a significant following, such as Jack Siegal ([www.charitygovernance.blogs.com](http://www.charitygovernance.blogs.com)) or Inside Philanthropy ([www.philanthropyjournal.blogspot.com](http://www.philanthropyjournal.blogspot.com)), potentially has the power of the media. (See [www.philanthropy.com/giveandtake/](http://www.philanthropy.com/giveandtake/) for a listing of nonprofit blogs from The Chronicle of Philanthropy and see Thomas Friedman, *The Whole World Is Watching*, N.Y. Times, June 28, 2007, at A23, regarding the impact of the internet: ". . . so many people can now see into what you do and tell so many other people about it . . . ." See also Peter Panepento, *Blogs on the Rise*, Chronicle of Philanthropy, December 7, 2006 at 35.)

I note that whistleblowers could also be considered to be providing public oversight, as whistleblowers often function by providing information to the media, which then publicizes it. I have viewed them as an important aspect of the oversight provided by the media. Of course, many whistleblowers proceed, at least initially, by providing information to a government agency. At any rate, whistleblowers are clearly performing a key role of a public oversight nature.

Another point to note about the role of the media in oversight is that its selection of the organizations it comments on has no systematic basis. Leads come to the media from many sources. Reporters follow up, or not, based on their judgments as to potential newsworthiness. Once reporters start checking out an organization, they will likely look to comparable organizations to get a sense of how those organizations deal with the issue under scrutiny. That effort is presumably somewhat systematic.

Stephanie Strom, who reports on nonprofits for The New York Times, was kind

enough to talk with me about how her stories evolve. As noted, there is no system for focusing on a particular nonprofit. Ordinarily, she will receive a tip, generally from some kind of whistleblower. She would usually begin her investigation by looking at public information about the nonprofit -- its website, its Forms 990<sup>1</sup> and perhaps information about it on a site like Charity Navigator. As she proceeds, she is making an ongoing assessment as to whether the potential “story” would be of interest to New York Times’ readers. After reviewing the published data, she would proceed to contact those who might help her develop the facts and understand any applicable law. She noted that the dollars involved play a big role in determining a potential story’s newsworthiness.

Federal and state regulators, on the other hand, are charged with oversight of the organizations within their respective jurisdictions and so are, to some degree (how much varies a lot by state) keeping an eye on areas of potential concern -- e.g., executive compensation -- by reviewing data from a large number of organizations. Thus it seems more likely, or it should be more likely, that federal and state oversight would do a better job than the media of systematically selecting those organizations needing further scrutiny.

### Charity Evaluators

The internet has spawned a number of charity evaluators. Charity Navigator ([www.charitynavigator.org](http://www.charitynavigator.org)) is a prominent example.<sup>2</sup> This organization describes itself succinctly as follows:

“Charity Navigator, America’s premier independent charity evaluator, works to advance a more efficient and responsive

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<sup>1</sup> The ready availability of Forms 990 on Guidestar ([www.guidestar.org](http://www.guidestar.org)) has of course had a major impact in promoting public oversight. The pending revisions to Form 990 will serve to enhance its usefulness to those performing public oversight. See Stephanie Strom, “*IRS Seeks More Charity Transparency*,” N.Y. Times, June 15, 2007, at A21.

<sup>2</sup> Another evaluator, similar to Charity Navigator, is the American Institute of Philanthropy which publishes the “Charity Rating Guide and Watchdog Report” ([www.charitywatch.org](http://www.charitywatch.org)). Others include the BBB Wise Giving Alliance ([www.Give.org](http://www.Give.org)). While Guidestar is the leading source of Form 990 information, it does not present itself as an evaluator; its tagline is “connecting people with nonprofit information.” See also “*On the Newsstand: New Publications About Philanthropy*,” describing new publications performing a form of public oversight, The Chronicle of Philanthropy, August 5, 2007 at 26.

philanthropic marketplace by evaluating the financial health of America's largest charities.”

Like the media, Charity Navigator has no official role and does its evaluations on a self-appointed basis. But, as noted, that is true of almost all public oversight. (“Donor standing” plaintiffs, boards of nonprofits and those pursuing contract rights against a nonprofit are the only exceptions I have identified, i.e., those who have legal rights they can assert against a nonprofit.) Charity Navigator has extensive materials on its website about its “Methodology.” While unofficial, it certainly expects to be taken seriously and takes great pains to develop meaningful metrics to measure the factors it seeks to measure.

The first point to note about its evaluations is that they are focused on “financial health.” Charity Navigator explains that it assesses “financial health” by evaluating “organizational efficiency” and “organizational capacity” based on data contained in an organization’s Forms 990. It does this by using “a set of financial ratios or performance categories” and then issues an “overall rating” that is intended to “show how efficiently [it believes] a charity will use [donors’] support today, and to what extent the charity is growing its programs and services over time.” Charity Navigator’s stated goal is to help donors “make intelligent giving decisions” and to help “the philanthropic community . . . more effectively monitor itself.” Thus, Charity Navigator seeks to give evaluation tools to those who seek to provide public oversight.

A key point to note is that Charity Navigator is not evaluating overall effectiveness. It is taking public financial data and applying formulas it has devised to assess organizational “efficiency” and “capacity.” As I understand Charity Navigator’s materials, spending on “programs” is “good,” without regard to whether the programs work well. Thus, I believe that a soup kitchen that employs 5 people to make 100 bowls of watery soup may fare as well in the Charity Navigator rating system as a soup kitchen that employs one person to make 100 bowls of highly nutritious soup, assuming both spend the same amount on “program expenses.” In both cases, the cost of the soup maker(s) and soup makings is a “program expense” and thus a Good Thing in the Charity Navigator system. I believe that a job training program can, for example, get a top rating from

Charity Navigator even though those trained have a terrible record of being able to keep the jobs they are placed in after the training. The Charity Navigator evaluation system illustrates the limitations of such a “charity rater” from the perspective of “oversight.” Charity Navigator is not purporting to evaluate overall effectiveness and so its role as to oversight relates only to the metrics it compiles. The reader is free to decide how much weight to give to the data presented. (Charity Navigator is very clear as to how it evaluates charities and so I do not mean to suggest deception on its part.)

The “But” in the foregoing is the fact that Charity Navigator “rates” charities and is therefore generally perceived, I believe, as guiding donors to the “best” charities. While its Home Page is very clear that it is evaluating only “financial health,” its Home Page also has had a “Top Ten Lists” section featuring, for example, “10 Slam-Dunk Charities” and “10 of the Best Charities Everyone’s Heard Of” (from its website of April 5, 2007 -- the listing changes from time to time and some listings avoid the kind of overall evaluation suggested by the “Top Ten” listings noted above). Despite the caveats given for its assessments, some of its lists give the impression to readers not paying close attention that the charities named are those that do the best job -- overall -- of carrying out their respective missions. Presumably that would matter to most prospective donors much more than a formulaic measurement of “financial efficiency.”

It is important to note, however, that Charity Navigator’s focus on growth of program expenditures over time is, in my view, a reasonable indirect measurement of the success of a charity’s programs. Even if Charity Navigator is not itself evaluating whether, for example, a job training program is excellent in preparing people to get, and keep, jobs, the fact that funders of the program -- government, foundations or individuals -- are increasing or continuing their funding may be a good indication that these funding sources are evaluating overall effectiveness and are giving the job training program high marks. For a critical review of Charity Navigator’s rating system, see the Netsquared.org blog at <http://www.netsquared.org/blog/holden/ever-taken-good-look-charity-navigator>. As part of its discussion, the blog notes: “To its credit, Charity Navigator is completely transparent with its methodology . . . . Unfortunately, this methodology is completely useless in separating the good from the better.”

As the outcome measurement movement gains traction, and there is improvement in the metrics used to measure outcomes, the relevance of Charity Navigator's focus on growth should be an increasingly valid indicator of program effectiveness because, presumably, the "market" for funding should give increasing support to the more effective organizations. To the extent that is happening, Charity Navigator's use of growth as an implicit measurement of, and proxy for, effectiveness makes sense. (For an evaluation of Charity Navigator and other "raters," see Stephanie Lovell, Brian Trelstad and Bill Meehan, *The Ratings Game*, *Stanford Social Innovation Review*, Summer 2005 at 39 and *Rating the Raters*, National Council of Nonprofit Associations and the National Human Services Assembly, 2005. For a discussion of *How Charities Handle Good -- and Bad -- Reviews from Nonprofit Watchdogs*, see Eman Quotah, *Chronicle of Philanthropy*, <http://philanthropy.com/jobs/2005/09/29/20050929-29170.htm>, September 21, 2005.)

The U.S. News and World Report ranking of educational institutions is another form of charity evaluation. Interestingly, it measures "inputs" in great detail -- SAT scores, books in the library, etc. -- but does not deal with the effectiveness of an institution in educating its students. Thus, for example, there is no information as to what those students are doing 10 years after graduation. Similarly, the focus is on factors that can be quantified, such as numbers of students per class, not on whether the teaching is good. This form of public oversight is, however, starting to produce some constructive responses. Various educational institutions, after years of complaining about the shortcomings of the U.S. News ranking system, are starting to compile their own evaluation systems, using what they presumably believe to be more meaningful criteria for measuring effectiveness. See *An Alternative to the U.S. News and World Report College Survey*, Gerhard Casper at <http://www.stanford.edu/dept/pres-provost/president/speeches/970418rankings.html> and *Momentum Against U.S. News Rankings Builds: Colleges to Develop New System for Providing Data to Prospective Students*, <http://www.collegenews.org/x7182.xml>.

## Donors

The term "public oversight" clearly encompasses donors. Donors fall into two

main categories -- (a) individuals and (b) institutions, principally foundations and corporate giving programs, and governmental units contracting with nonprofits (a predominant source of funding for many nonprofits).

Individuals. It is hard to assess the extent of oversight provided by individual donors. Presumably, very few individual donors engage in oversight at all, beyond skimming a nonprofit's solicitation materials. Some individual donors do check out information/rating websites such as Charity Navigator, the BBB Wise Giving Alliance and the American Institute of Philanthropy, but one can readily argue that this kind of ad hoc, informal scrutiny hardly amounts to "oversight" because it is not ordinarily communicated beyond, perhaps, a small circle of acquaintances.

The counterargument would be that the broad availability to individual donors of information about a nonprofit -- whether or not that information is looked at by many and whether or not the views of those looking at it are communicated to anyone -- IS important because the nonprofit knows that the information is available to the public and that knowledge prompts the nonprofit to engage in improved management -- a form of self-oversight. This is presumably true for some nonprofits, but certainly not for all.

The main exception to these generalizations about relatively passive individual donors is the major donor, who may well play a significant oversight role. See, e.g., *Exacting Donors Reshape College Giving*, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/03/AR2007090301435.html?hpid=topnews>. A major donor presumably spends more time considering where and why to make a gift and more time following the organization once the gift is made. In addition, money talks and so the receiving institution is eager to supply the major donor with information that can form the basis for effective oversight. The oversight role of the major donor is enhanced further when a major gift is focused on a particular program or activity, as distinguished from a "general support" gift. Whether the oversight provided in these situations is constructive in helping a nonprofit fulfill its mission is debatable and undoubtedly varies from situation to situation. Disgruntled donors presumably believe that their views of how their gifts should be utilized are better than the donee organizations' views, in terms of fulfilling the organizations' missions. One can also comment that many big, special purpose gifts are

focused less on a nonprofit's view of its mission than on the donor's view of the mission that she/he would like to see promoted by the nonprofit. In these cases, some large gifts by individuals effectively involve hiring the nonprofit donee to carry out the mission the donor has defined. The role of the nonprofit is to conclude that the donor's mission is consistent with the nonprofit's overall mission -- even though the specific mission to be promoted by the donor may not be at the top of the nonprofit's priorities. Further, after making the gift, the donor of a large gift may remain so involved in how the money is spent that this oversight starts to border on management -- not a happy situation for the nonprofit donee. (For articles on donor-charity post-gift relations, see *Giver's Remorse*, Fortune, March 12, 2007,

[http://money.cnn.com/magazines/fortune/fortune\\_archive/2007/03/19/8402367/index.htm](http://money.cnn.com/magazines/fortune/fortune_archive/2007/03/19/8402367/index.htm)

and see Ben Gose, *Princeton University Returns Small Part of Donation Ensnared in Court Battle*, Chronicle of Philanthropy, March 22, 2007,

<http://www.philanthropy.com/premium/articles/v19/i11/11001401.htm>

Institutions, Including Government Agencies. One would expect that government funders and foundations are the donor group best positioned to provide clear and constructive oversight for the nonprofits on which they focus, particularly as to evaluating program effectiveness. How many realize this potential is unclear. In the course of my five years as a grant-seeking Executive Director for a small nonprofit, I got no sense of the extent to which all of the information we submitted with grant requests and grant reports was actually reviewed and analyzed. The only comment our nonprofit ever received on a grant report during that period was a letter acknowledging that we had fulfilled the terms of the grant, and this for a nonprofit generally perceived in the funder community as extremely effective and efficient. I did find that some foundations would focus on particular criteria of interest to them -- e.g., the percentage of the board members who contributed to the organization. Those specifically articulated concerns did have a big effect: If X foundation wants to see 100% board giving, then most nonprofits seeking funding from it will achieve that goal (even if doing so may not be, in any analytical sense, a good use of staff time relative to the dollars raised). Accordingly, it is 100% clear to me that grantmakers can have a profound impact in terms of oversight, to the extent they

elect to do so.

I also believe that the impact of institutional donors on oversight arises to a significant degree from the concern by grant seekers that institutional donors will be overseeing the nonprofit's performance, regardless of whether that is actually occurring. Institutional donors are thus analogous to the media in this regard.

Thus, compared to the focus of the I.R.S. and State Attorney Generals almost exclusively on "bad acts," institutional funders are, and are perceived to be, focused on good acts as well as the absence of bad acts. This focus on a nonprofit's upside performance is an important incentive to the nonprofit's management and board to achieve commendable performance. To date, this "upside" oversight by institutional donors has ordinarily been implemented by applying performance criteria of often uncertain relevance. As the "outcomes measurement" movement gains insights, credibility and momentum, nonprofits will be asked increasingly by institutional donors to demonstrate constructive outcomes for the grants the nonprofits receive, through the application of increasingly sophisticated evaluation criteria.

Two points about government agencies as institutional funders should be noted. First, they generally "contract" with nonprofits, rather than making grants. This distinction between a contract and a grant is often a fuzzy one and is not, I believe, of great importance in considering the topic of public oversight, although a "contract" may involve more control by the funder than a grant. As noted, one can readily think of government contracting oversight as not being "public oversight," but I am covering it here because (a) I believe it is closely analogous to foundation-type oversight, (b) given the extent of government contracting with nonprofits, it is a very important form of oversight, and (c) I am not aware as I write this paper that it is covered by the other oversight topics being presented. Government funders, in particular, complement the I.R.S. and state Attorneys General in performing "downside oversight." While the extent to which government funders pursue upside oversight varies widely, most are ordinarily assiduous in checking to see that their funding has been spent as promised in the grant or contract documents.

## Beneficiaries/Consumers of the Goods and Services Provided by Nonprofits

In the case of a for-profit organization, the consumers of the goods/services it provides are the most important overseers of its work -- they make the purchases and so are constantly evaluating the effectiveness of its work. In making their decisions, consumers are armed with considerable knowledge attained through word of mouth, their own experiences, media, and evaluators such as Consumer Reports. In overseeing the performance of GM, the consumer is king. For a consumer considering a purchase from a for-profit, the ratio of management costs (“administration”) to production costs (“program expenditures”) is irrelevant in assessing the quality of the product or service provided and in making the ultimate decision to purchase. The cost of capital (level of fundraising expenses) is also not compared to production costs (“program services”) when a consumer considers a purchase. Of course, a lower cost of capital and lower management costs for a given level and quality of output are a “good thing,” perhaps affecting price to some degree, but they are clearly secondary in determining whether GM is doing a good job in fulfilling its mission. That determination is best made by focusing on whether GM products are in demand in the marketplace at a price such that GM can make sufficient profits to enable it to pay its labor force (and retirement obligations), raise capital, make good products and develop new products.

This highlighting of the role of consumers in the case of for-profits brings home the contrast between the paramount role consumers play in evaluating for-profits and the relatively minor role given to consumer satisfaction in evaluating many nonprofits, particularly social service organizations. While a prospective purchaser of a car presumably is aware of many makes and models and has the ability to check them out by test drives, talking to friends, reading Consumer Reports, etc., a person frequenting a soup kitchen probably has only a very limited choice – if any choice at all – as to which soup kitchen to “choose.” The soup kitchen market is clearly not remotely as developed as the market for cars. This is why some students of nonprofits think of funders/donors as “the consumer” because, as to certain types of nonprofits, they are the principal evaluators of the goods/services being provided and they are the purchasers as well -- effectively buying

the goods/services and seeing that they are given away to appropriate beneficiaries. Nonetheless, as Ronna Brown, now head of the New York Regional Association of Grantmakers, noted to me: true consumers of a product “experience” it; funders/donors ordinarily do not, except perhaps to a limited degree through “site visits.” Thus, thinking of them as analogous to true consumers is something of a reach.

As noted, the major exception to this lack of focus on the consumer of the goods and services provided by nonprofits is those nonprofits that are selling goods and services (rather than giving them away) -- performing arts groups, colleges and universities, and, increasingly, hospitals, to pick a few examples. They are functioning in a consumer driven environment. To survive they have to listen to their customers, i.e., “the market.” And “the market” serves as a satisfactory guide to their effectiveness in most cases. For them, the customer is an effective source of oversight. (See, e.g., Broken Trust by Samuel P. King and Randall W. Roth (Univ. of Hawaii Press, 2006) about the all-important role played by students and alumni in overcoming the “broken trust” of the Bishop Estate in Hawaii.)

### The Board

I have saved for last the role of the Board in oversight. I had initially focused on the Board as performing a vital internal management oversight function, and it does. But the fact is that a section 501(c)(3) nonprofit is a type of “public institution” by reason of the special benefits it is accorded (especially the deductibility of contributions to it and the tax exemption generally applicable to its income). Thus, in my view, the Board is inherently charged with the public oversight function of representing the public (the role with which the state Attorneys Generals are also charged). However, unlike the others described above who perform public oversight, the board has legal standing. As a fiduciary of the nonprofit, a board member is obligated to work to assure that the nonprofit is fulfilling the public purposes for which it has been granted section 501(c)(3) status, an outward-looking perspective. (Interestingly, the new New York Attorney General’s website uses the term “public institutions” as the link to information about “charities.”) Professor Roth’s suggestion (in the August 2007 ABA Journal piece referred

to above) that attorneys representing nonprofits should have an obligation to report “out” in certain circumstances, as well as an obligation to report “up,” is, of course, consistent with viewing a section 501(c)(3) organization as a public institution.

Also, in terms of “oversight,” the board has the broadest mandate of any person or body. While the I.R.S. and state Attorneys General are charged only with overseeing and enforcing compliance with the laws in their respective jurisdictions, boards are charged not only with legal compliance responsibility but also with responsibility for seeing that the nonprofit is doing a good job – is effective – in carrying out its mission. To my knowledge, no other public oversight body is burdened with that responsibility. Watchdogs, blogs and the press, for example, may seek to promote effectiveness but, unlike boards, they have no legal responsibility or power to do so. (For a recent study of nonprofit boards, see Francie Ostrower, *Nonprofit Governance in the United States: Findings on Performance Accountability*, Urban Institute, June 25, 2007, <http://www.urban.org/publications/411479.html>.)

### Conclusions

Following the overview above, what succinct conclusions can we draw about public oversight? I offer the following, confident that others at this conference will add their own or offer proposed revisions to those listed below.

1. Public oversight is the broadest form of oversight -- both as to who performs it and as to what they review.

2. Public oversight has, I believe, the greatest impact on the nonprofit sector -- in part because much oversight by the I.R.S. and Attorneys General is not public by reason of confidentiality rules.

3. Public oversight is the least systematic -- the most ad hoc -- of the forms of oversight being discussed at this conference. Thus, it cannot generally be thought to be comprehensive. However, when all the different sources of public oversight are added together, the amount of public oversight probably exceeds that of other oversight.

4. Public oversight has, in my view, the greatest potential -- along with sector

oversight -- for prompting improvements in the nonprofit sector's ultimate effectiveness in performing the myriad tasks it undertakes.

5. The trend toward increasing measurement of “outcomes” and the improvement one can expect in outcomes measurement methodology both suggest that the impact of public oversight in improving the ultimate effectiveness of nonprofits will increase over time.

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The topic of “Public Oversight” is intriguing and largely unexplored. I suspect that different attendees at this conference might have taken very different approaches had they been assigned this topic. I hope that I have at least identified most of the relevant players, given a sense of how they play their roles and made an initial assessment of their effectiveness.