

## Nonprofit Organizations Committee Legal Quick Hit:

# Fundraising 201: An Update on Managing the Legal Risks of Nonprofit Fundraising

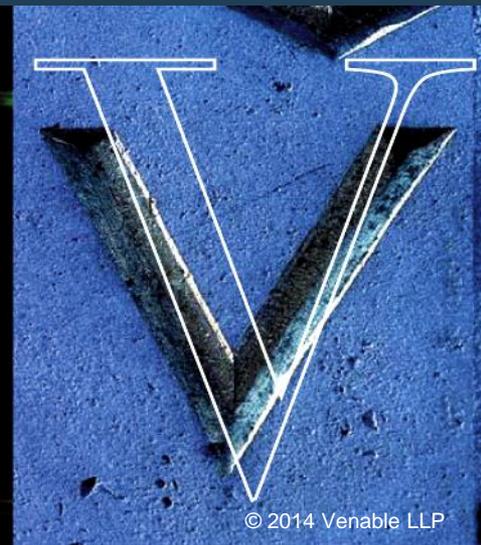
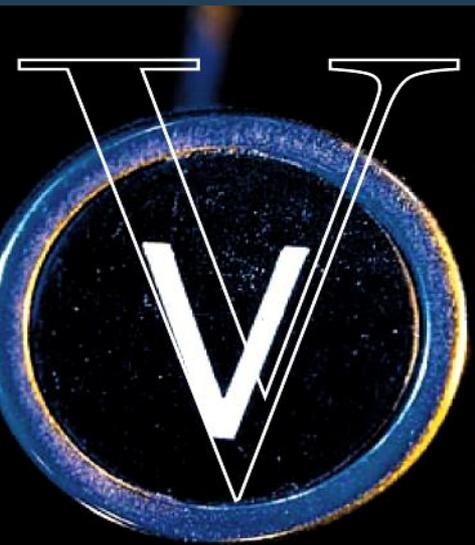
**MODERATOR: JEFFREY S. TENENBAUM, ESQ., VENABLE LLP**

**TUESDAY, NOVEMBER 11, 2014**

**PRESENTERS: JOCELYN STARZAK, ESQ., SPECIAL OLYMPICS**

**3:00 p.m. ET**

**KRISTALYN J. LOSON, ESQ., VENABLE LLP**



# Program Overview

- State Regulation of Fundraising
  - Charitable Organization
  - Professional Fundraiser / Solicitor / Fundraising Consultant
  - Commercial Co-Ventures
- Tax Considerations - UBIT Issues
- Sales of Merchandise
- Online Fundraising Platforms
- Raffles / Sweepstakes





# State Regulation of Fundraising

# State Regulation of Fundraising

- A. Charity / nonprofit organization
- B. Professional solicitor
  - Professional fundraiser
  - Professional fundraising counsel / consultant
- C. Commercial co-venturer



# State Regulation – Charitable Organization

- Currently 40 states require charities to register
- **Triggering definition** – Generally triggered by “solicitation” – affirmative act of asking for a gift (“contribution”) or selling goods/services that will benefit a charitable cause.
- **Common Requirements**
  - Registration and Renewal
  - Disclosures when soliciting
  - Annual financial reports
  - Notification of fundraising relationships



# State Regulation – Charitable Organization

- Recent state updates
  - **Florida** – Chapter 2014-122 (July 1, 2014)
    - Requires conflict of interest policy for organizations registered to conduct solicitations
    - Requires disclosure with Department of Consumer Services contact information on all solicitations (including webpages)
    - Requires fingerprints for professional solicitors
  - **New York** – Nonprofit Revitalization Act (July 1, 2014)
    - New financial reporting thresholds
    - Designated audit committee
  - **Arizona** HB 2457 (Sep. 13, 2013) – Repealed reg.
  - **Nevada** AB 60 (Jan. 1, 2014) – Added reg.



# Internet Solicitations – Charleston Principles

- Set of voluntary principles (except in Tennessee and Colorado) drafted by the National Association of State Charity Officials (NASCO)
- Register when:
  - A. Charitable organization is domiciled in state
  - B. Charitable organization is not domiciled in state, but:
    - **Offline activities** would be enough to assert jurisdiction (*e.g.*, send letter or make phone calls into state)
    - Solicits donations on Internet, and
      - Specifically targets those within that state; OR
      - Receives contributions from the state on a repeated and ongoing basis or a substantial basis through their website



# Other Solicitation Considerations

- Email
  - [Canadian Anti-SPAM Law](#) (effective July 1, 2014)
  
- Fax
  - Requirement for opt-out on all fax communications
    - See CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014)



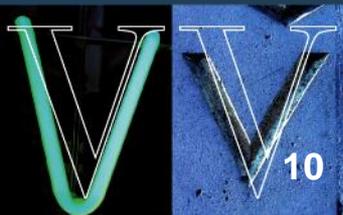
# State Regulation – Professional Solicitor / Professional Fundraising Consultant

- **Professional Solicitor** – For a fee or other compensation, solicits on behalf of a charity, OR has custody and control of funds.
- **Professional Fundraising Counsel** – Manages, advises, plans, produces, or designs a solicitation. Does not directly solicit or hold funds.
- About 41 states require registration and other requirements
  - Registration
  - Bond
  - Filing of contracts
  - Disclosures



# State Regulation – Professional Solicitor / Professional Fundraising Consultant

- Often **mandatory** requirements under state law for **inclusion in contracts**, such as:
  - Charity right to rescind
  - Gross collections delivered to charity
  - Donor list is intellectual property of charity
  - Listing of fee calculation
  - Signature of two charity officials
  
- **Commissions** – to pay or not to pay?



# State Regulation – Commercial Co-Venture

- **Commercial Co-Venture (“CCV”)** – An arrangement between a charity and a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose
  - *“Every time you buy a bottle of Ethos<sup>®</sup> Water, you contribute 5 cents to the Ethos<sup>®</sup> Water Fund, part of the Starbucks Foundation.”*



# CCV Example



## “Champion Warmer”

Help the next generation of Special Olympics athletes reach for the stars with Scentsy’s newest Charitable Cause Warmer. Through February 28, 2013, Scentsy will donate \$8 (USD) from the sale of each *Champion Warmer* to Special Olympics International.



# State Regulation – Commercial Co-Venture

## ■ Current registration states

- Alabama (**bond** and registration)
- California (unless certain requirements are met)
- Illinois (as a charitable trust)
- Massachusetts (**bond** and Form 10B)
- South Carolina (registration and Fundraising Disclosure forms)

## ■ Current notification states

- Arkansas (charity)
- Connecticut (charity)
- Hawaii (CCV)
- Mississippi (CCV)
- New Hampshire (charity)
- New Jersey (charity)
- Utah (charity)



# State Regulation – Commercial Co-Venture

- Developments
  - **Maine** repealed all CCV requirements in 2013
  - **South Carolina** added a registration requirement in 2014
    - CCV Registration Application (CEO and CFO signatures)
    - Notice of Solicitation (registration numbers of CCV and charity)
    - Joint Financial Report with charity no more than 90 days after conclusion of the campaign



# State Regulation – Commercial Co-Venture

- Mandatory contractual provisions
  - Dates of solicitation / dates of campaign
  - Amount to be donated (\$ or % of items)
  - Geographic scope
  - Schedule for donations to be transferred
  - Schedule for reporting
  - Charity ability to cancel



# State Regulation – Commercial Co-Venture

- Types of required advertising disclosures
  - The name of the commercial co-venturer;
  - The name of the charity and contact information for the charity;
  - The percentage or dollar amount that will be donated per consumer action;
  - The purpose for which the donation will be used;
  - *Applicable dates of the promotion; and*
  - *Any minimum or maximum donation amount that the commercial co-venturer has pledged to donate*



# State Regulation – Commercial Co-Venture

- Other CCV Guidelines
  - Better Business Bureau Wise Giving Alliance, [Standard 19](#)
  - [New York Attorney General Best Practices for Transparent Cause Marketing](#)





# Tax Considerations – UBIT

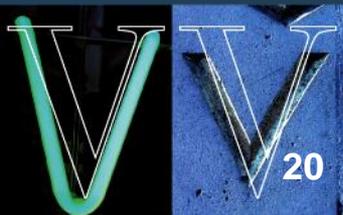
# Tax Considerations – UBIT

- Generally, organizations will be exempt from income received that is related to the tax-exempt mission
  
- BUT, subject to tax on unrelated business income
  - Trade or business
  - Regularly carried on
  - Not substantially related to organization's exempt purpose



# Tax Considerations – UBIT

- Common exceptions to UBIT
  - **Qualified sponsorships** – “Payment...with no arrangement or expectation that such person will receive any substantial return benefit” – Code 513(i)
    - **Substantial Benefits** do not include:
      - Mere “use or acknowledgement” of the sponsor’s name or logo
    - **Substantial Benefits** include:
      - Advertising
      - Endorsements
      - Exclusive provider arrangements
      - Contingency/bonus payments



# Tax Considerations – UBIT

- Common exceptions to UBIT (continued)
  - **Royalty income** – Passive license of intellectual property – Code 512(b)(2)
    - Royalties do not include payments for personal services
  - **Sale of donated goods** – Code 513(a)(1)
  - **Work performed by unpaid volunteers** – Code 513(a)(1)



# Tax Considerations – UBIT

- **Take-away** – Consider tax consequences of charity's activities
  - Use of name and logo v. services / active promotion



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# Sale of Merchandise

# Sale of Merchandise



*Be a fan<sup>®</sup>*

*Special Olympics is a global movement for people with intellectual disabilities that ties us together through the power of sport. By wearing the laces you show that you are a fan of unity.*

*[www.specialolympics.org/wearthelaces](http://www.specialolympics.org/wearthelaces)*

## Sale of Merchandise

- ***Hypothetical*** – Your marketing department is convinced that the best way to generate new dollars for the organization is through the sale of mugs. Your organization in general tries to avoid any UBIT liability. How do you structure the mug sales campaign?



# Sale of Merchandise



- **Example – Selling mugs**
  - **Option #1** – License to vendor
    - Royalty exception to UBIT; no promotion
  - **Option #2** – Charity directly sells
    - Is it substantially related to mission?
    - Is it regularly carried on?
  - **Option #3** – Given as an appreciation gift
    - Does it meet IRS requirements for insubstantial value?
      - 2% of donation or \$104, whichever is less
      - Logo item for donation of at least \$52 (adjusted for inflation) and within “low cost articles” amount (total cost does not exceed \$10.40)





# Online Fundraising Promotions

# Online Promotions – General

- As a general matter, same concepts apply online
  - If charity is soliciting online, consider **Charleston Principles**
  - If advertising online that the purchase or use of a good or service will benefit a charity, this is a **commercial co-venture promotion**
  - If charity gives consideration for a person, company, or platform to solicit or plan solicitations, could be **professional fundraiser or professional fundraising consultant**
  - Consider **UBIT** concerns

 Breast Cancer Care retweeted



**Interflora Flowers** @InterfloraUK · Oct 15

Support @BCCare this October by sending a gift that keeps on giving. We'll donate 20% from every sale > [ow.ly/CmCl3](http://ow.ly/CmCl3)



# Online Promotions – No Purchase

- Question of whether a donation for a Facebook like or tweet, without the requirement that a consumer purchase something, qualifies as a commercial co-venture as there is no “purchase or use of a product or service.”
  
- Even if not technically a commercial co-venture, continue to recommend:
  - Disclosures
  - Contract between charity and for-profit



# Continuous, Multi-Charity CCVs

- *E.g.*, AmazonSmile
- Donations through use of AmazonSmile Foundation; commercial co-venture registered between Amazon and AmazonSmile Foundation
- Tips for participating charities
  - Register if soliciting or promoting participation
  - Consider UBIT (and participation agreement) if promoting
  - Provision of donor list



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# Charitable Raffles / Sweepstakes

# Charitable Raffles / Sweepstakes

- Most states govern charitable raffles as an exception to the prohibition on lotteries
  - Qualified organizations and registration requirements vary on a state-by-state basis
- Some states govern sweepstakes, depending on prize value
- Federal tax issues
- Platforms have separate rules
  - [Facebook](#) – release FB, cannot use personal timelines to administer promotion
  - [Twitter](#) – cannot encourage retweeting
  - [Pinterest](#) – Cannot run a contest in which each pin constitutes an entry



# Questions?

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