

VENABLE

Dealing with Nonprofit Donors: Risks, Restrictions, and When to Say “No Thanks”

Thursday, March 30, 2017, 12:30 pm – 2:00 pm ET

Venable LLP, Washington, DC

Moderator

Jeffrey S. Tenenbaum, Esq.

Partner and Chair of the Nonprofit Organizations Practice,
Venable LLP

Speakers

Robert L. Waldman, Esq.

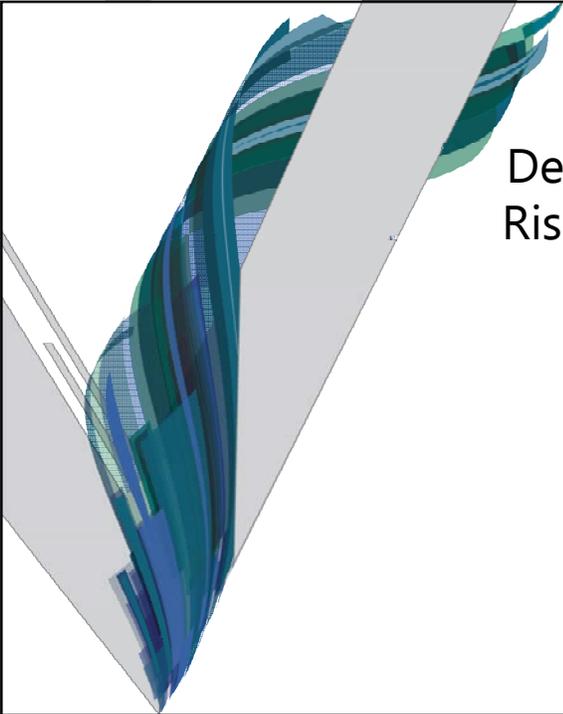
Partner and Chair of the Business Division,
Venable LLP

Rebecca Rothey, CFRE, CAP®

Vice President, Development and Senior Philanthropic Advisor,
The Community Foundation for the National Capital Region



Presentation



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- **May 18, 2017:** [Moving Money Overseas and Back: What Every Nonprofit Operating Internationally Needs to Know](#)
- **June 13, 2017:** [An Independent Contractor, an Employee, and Their Attorney Walk into a Bar: Why This Is No Joke for a Nonprofit](#)



Recent News Stories Highlight Donor Issues

- Presidential foundations
 - Identity of donors
 - “Pay to play”
- Association with donor becomes embarrassing
- Fraudulent conveyance cases – donor hides assets from creditors by transferring to charity
- “Naming” cases



Challenges in Dealing with Donors

- Attracting donors while protecting the institution
- Donor intent (restrictions) versus charity needs and purposes
- Protecting donor privacy versus public accountability
- Impossible to predict future events



Donor Restrictions – Basic Concerns

- Impact of restriction on charitable deduction
- Impact of restriction on nonprofit's tax-exempt status
- Acceptable versus unacceptable restrictions
- Modifying a restriction
- Accounting impact of restriction
- Red flags indicating problems



Common Gift Restrictions

- Restricted purpose of gift
- Investment restrictions
- Holding period: Ability to sell or transfer gift
- Endowment: Invasion of principal
- Naming
- Retained right to use property
- Right to advise on disposition of gift



Some Basic Concerns

- Availability of charitable deduction if restrictions are too severe
 - Has donor really made a gift?
- Accounting issues
 - Unrestricted, temporarily restricted, permanently restricted
- Impact of restriction on tax-exempt status
 - Private inurement
 - Private benefit
- Getting “sideways” with the donor
- Potential embarrassment associated with restriction



Acceptable Restrictions

- Naming
- Specify charitable purpose (consistent with charity's needs)
- Reasonable holding period – important to achievement of charitable purposes
- "Incidental" benefits to donor
- Donor advised fund



Unacceptable Restrictions

- Continued control of the asset by donor
- Retained right to direct distribution
- Transfer of asset subject to excessive liabilities
- Inability of charity to dispose of asset
- Requirement to use gift to benefit donor or relative of donor
- Retained use of asset by donor
- Commercial benefit to donor



Modifying a Restriction – Uniform Prudent Management of Institutional Funds Act (UPMIFA)

- UPMIFA permits deviation (in management, investment, or purpose)
 - With donor consent
 - With court and state Attorney General approval
 - UPMIFA permits prudent “appropriation” of an endowment fund



Some Red Flags

- Restriction is inconsistent with charitable purpose
- Donor benefits from restriction in some way
- “Unknown” donor shows up on December 31
- Inability to dispose of asset
- “Difficult” assets
- Donor is charity shopping/charitable intent questionable



Developments in Donor Privacy

- List of contributors (IRS Form 990 Schedule B) generally does not need to be disclosed publicly
- Exception for gifts to private foundations
- States seeking to force disclosure (e.g., California)
- Judge's order regarding Harvard donor



Techniques for Preserving Donor Privacy

- Require confidentiality agreements for employees of nonprofits
- Use of donor advised funds
- Written and publicly shared donor privacy policies



Gift Acceptance Policies

- Establish prospectively to guide the organization in soliciting, procuring, and “closing” gifts
- Policy should govern both *acceptance* and *disposition* of gifted property
 - In many instances, the true “value” of a gift is in the proceeds that arise upon disposition
- Helps in managing donors
 - Gives way to say “no thanks”



General Comments

- No specific rules or laws directly on point
- Gift policies are not required; rather, part of “best practices”
- Policy should “fit” the organization and reflect a workable and helpful process
- Often used as an aid to saying “no”



Sample Structure of Gift Policy

- Statement of mission, values, guiding principles, and organizational priorities
- Overview of different types of gifts and criteria for acceptance and disposition
- Procedural and administrative matters



Internal Governance

- Gift Acceptance Committee
 - Trigger: Gift amount and types requiring review and approval
 - Composition: Just directors, or other professionals and volunteers too?
 - Authority: Able to take action on behalf of the organization or in an advisory capacity to the Board?
 - Consistent with organization's bylaws?
 - Signature authority?



Internal Governance (cont'd)

- Tax considerations:
 - Any effect on Section 501(c)(3) status?
 - Private foundations: Ensure compliance with Internal Revenue Code Chapter 42 rules
 - Unrelated business income tax (UBIT) implications?
 - Acceptance of interests in LLCs or other pass-through entities
 - S corporation stock



Specific Types of Gifted Property

- Cash
- Securities – marketable versus non-marketable, length of time held by donor
 - UBIT
 - Limitations on disposition
- Real estate
 - Due diligence: Phase I environmental survey; appraisal
 - Consider use of single-member, disregarded LLC to accept donation
- Tangible personal property
 - Expected use
 - Anticipated costs



Specific Types of Gifted Property (cont'd)

- Intellectual property
- Conservation easements and façade easements
- Gifts of property with expected disposition within three years
- Life-income gifts: special asset-type considerations can apply



Protecting the Charity

- Due diligence on donor
 - Newspaper reports
 - Internet research
 - Staff or contracted research firm
 - Gut check
 - Other
- Due diligence on contributed asset



Protecting the Charity (cont'd)

- Assets carrying potential for liability:
 - Real Estate
 - Environmental
 - Mortgage or other lien
 - Operating Businesses – Pending or potential claims
 - Partnership Interests – Know what assets the partnership holds



Liability Protection Techniques

- Environmental surveys
- Insurance
- Indemnification from donor
- Use of subsidiary to hold “risky” assets
 - Single-member, disregarded LLC
 - Supporting organization
 - Title-holding company
- Provide in gift agreement that UBIT will be paid from contributed assets



Steps When Discovering a Problem

- Option 1 – Do nothing. Distance is good.
- Option 2 – Be more proactive:
 - Get a complete explanation
 - Return donation?
- Option 3 – Help craft a solution



Steps When Discovering a Problem (cont'd)

- Address preemptively in donor privacy policy and gift agreements
- Consider getting public relations help
- Have talking points for the press and other inquiries
- Consider going to governmental authorities



Gift Agreement Provisions

- Relationship of Parties
- Confidentiality
- Termination Provision
- Variance Power
- Consider “Bad Boy” Clause



Questions?

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Speaker Biographies



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AREAS OF PRACTICE

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EDUCATION

J.D., Catholic University of America, Columbus School of Law, 1996

B.A., Political Science, University of Pennsylvania, 1990

Jeffrey Tenenbaum chairs Venable's Nonprofit Organizations Practice Group. He is one of the nation's leading nonprofit attorneys, and also is a highly accomplished author, lecturer, and commentator on nonprofit legal matters. Based in the firm's Washington, DC office, Mr. Tenenbaum counsels his clients on the broad array of legal issues affecting charities, foundations, trade and professional associations, think tanks, advocacy groups, and other nonprofit organizations, and regularly represents clients before Congress, federal and state regulatory agencies, and in connection with governmental investigations, enforcement actions, litigation, and in dealing with the media. He also has served as an expert witness in several court cases on nonprofit legal issues.

Mr. Tenenbaum was the 2006 recipient of the American Bar Association's Outstanding Nonprofit Lawyer of the Year Award, and was an inaugural (2004) recipient of the *Washington Business Journal's* Top Washington Lawyers Award. He was only a handful of "Leading Lawyers" in the Not-for-Profit category in the prestigious *Legal 500* rankings for the last five years (2012-16). Mr. Tenenbaum was recognized in 2013 as a Top Rated Lawyer in Tax Law by *The American Lawyer* and *Corporate Counsel*. He was the 2015 recipient of the New York Society of Association Executives' Outstanding Associate Member Award, the 2004 recipient of The Center for Association Leadership's Chairman's Award, and the 1997 recipient of the Greater Washington Society of Association Executives' Chairman's Award. Mr. Tenenbaum was listed in the 2012-17 editions of *The Best Lawyers in America* for Non-Profit/Charities Law, and was selected for inclusion in the 2014-16 editions of *Washington DC Super Lawyers* in the Nonprofit Organizations category. In 2011, he was named as one of Washington, DC's "Legal Elite" by *SmartCEO Magazine*. He was a 2008-09 Fellow of the Bar Association of the District of Columbia and is AV Peer-Review Rated by *Martindale-Hubbell*. Mr. Tenenbaum started his career in the nonprofit community by serving as Legal Section manager at the American Society of Association Executives, following several years working on Capitol Hill as a legislative assistant.

ACTIVITIES

Mr. Tenenbaum is an active participant in the nonprofit community who currently serves on the Editorial Board of *The NonProfit Times*, on the Advisory Panel of Wiley/Jossey-Bass' *Nonprofit Business Advisor* newsletter, and on the American Society of Association Executives' Public Policy Committee. He previously served as Chairman and as a member of the ASAE *Association Law & Policy* Editorial Advisory Board and has served on the ASAE Legal Section Council, the ASAE Association Management Company Accreditation Commission, the GWSAE Foundation Board of Trustees, the GWSAE Government and Public Affairs Advisory Council, the Federal City Club Foundation Board of Directors, and the Editorial Advisory Board of Aspen's *Nonprofit Tax & Financial Strategies* newsletter.

MEMBERSHIPS

American Society of Association Executives

REPRESENTATIVE CLIENTS

AARP
Academy of Television Arts & Sciences
Air Conditioning Contractors of America
Air Force Association
Airlines for America
American Academy of Physician Assistants
American Alliance of Museums
American Association for Marriage and Family Therapy
American Association for the Advancement of Science
American Bar Association
American Cancer Society
American College of Cardiology
American College of Radiology
American Council of Education
American Institute of Architects
American Nurses Association
American Red Cross
American Society for Microbiology
American Society of Anesthesiologists
American Society of Association Executives
American Thyroid Association
America's Health Insurance Plans
Anti-Defamation League
Association for Healthcare Philanthropy
Association for Talent Development
Association of Clinical Research Professionals
Association of Corporate Counsel
Association of Fundraising Professionals
Association of Global Automakers
Auto Care Association
Better Business Bureau Institute for Marketplace Trust
Biotechnology Innovation Organization
Brookings Institution
Carbon War Room
Career Education Colleges & Universities
Catholic Relief Services
CFA Institute
The College Board
CompTIA
Council on Foundations
CropLife America
Cruise Lines International Association
Cystic Fibrosis Foundation
Democratic Attorneys General Association
Design-Build Institute of America
Entertainment Industry Foundation
Entertainment Software Association
Erin Brockovich Foundation
Ethics Resource Center
Foundation for the Malcolm Baldrige National Quality Award
Gerontological Society of America
Global Impact
Good360
Goodwill Industries International
Graduate Management Admission Council
Homeownership Preservation Foundation
Human Rights Campaign
Independent Insurance Agents and Brokers of America
InsideNGO
Institute of Management Accountants
International Association of Fire Chiefs
International Rescue Committee
International Sleep Products Association
Jazz at Lincoln Center

LeadingAge
The Leukemia & Lymphoma Society
Lincoln Center for the Performing Arts
Lions Club International
March of Dimes
ment'or BKB Foundation
National Air Traffic Controllers Association
National Association for the Education of Young Children
National Association of Chain Drug Stores
National Association of College and University Attorneys
National Association of College Auxiliary Services
National Association of County and City Health Officials
National Association of Manufacturers
National Association of Music Merchants
National Athletic Trainers' Association
National Board of Medical Examiners
National Coalition for Cancer Survivorship
National Coffee Association
National Council of Architectural Registration Boards
National Council of La Raza
National Fallen Firefighters Foundation
National Fish and Wildlife Foundation
National Propane Gas Association
National Quality Forum
National Retail Federation
National Student Clearinghouse
The Nature Conservancy
NeighborWorks America
New Venture Fund
NTCA - The Rural Broadband Association
Nuclear Energy Institute
Pact
Patient-Centered Outcomes Research Institute
Peterson Institute for International Economics
Professional Liability Underwriting Society
Project Management Institute
Public Health Accreditation Board
Public Relations Society of America
Romance Writers of America
Telecommunications Industry Association
The Tyra Banks TZONE Foundation
U.S. Chamber of Commerce
United States Tennis Association
Volunteers of America
Water Environment Federation
Water For People
WestEd
Whitman-Walker Health

HONORS

Recipient, New York Society of Association Executives' Outstanding Associate Member Award, 2015

Recognized as "Leading Lawyer" in *Legal 500*, Not-For-Profit, 2012-16

Listed in *The Best Lawyers in America* for Non-Profit/Charities Law (Woodward/White, Inc.), 2012-17

Selected for inclusion in *Washington DC Super Lawyers*, Nonprofit Organizations, 2014-16

Served as member of the selection panel for the *CEO Update* Association Leadership Awards, 2014-16

Recognized as a Top Rated Lawyer in Taxation Law in *The American Lawyer* and *Corporate Counsel*, 2013

Washington DC's Legal Elite, *SmartCEO Magazine*, 2011

Fellow, Bar Association of the District of Columbia, 2008-09

Recipient, American Bar Association Outstanding Nonprofit Lawyer of the Year Award, 2006

Recipient, *Washington Business Journal* Top Washington Lawyers Award, 2004

Recipient, The Center for Association Leadership Chairman's Award, 2004

Recipient, Greater Washington Society of Association Executives Chairman's Award, 1997

Legal Section Manager / Government Affairs Issues Analyst, American Society of Association Executives, 1993-95

AV® Peer-Review Rated by *Martindale-Hubbell*

Listed in *Who's Who in American Law* and *Who's Who in America*, 2005-present editions

PUBLICATIONS

Mr. Tenenbaum is the author of the book, *Association Tax Compliance Guide*, now in its second edition, published by the American Society of Association Executives. He also is a contributor to numerous ASAE books, including *Professional Practices in Association Management*, *Association Law Compendium*, *The Power of Partnership*, *Essentials of the Profession Learning System*, *Generating and Managing Nondues Revenue in Associations*, and several Information Background Kits. In addition, he is a contributor to *Exposed: A Legal Field Guide for Nonprofit Executives*, published by the Nonprofit Risk Management Center. Mr. Tenenbaum is a frequent author on nonprofit legal topics, having written or co-written more than 1,000 articles.

SPEAKING ENGAGEMENTS

Mr. Tenenbaum is a frequent lecturer on nonprofit legal topics, having delivered over 850 speaking presentations. He served on the faculty of the ASAE Virtual Law School, and is a regular commentator on nonprofit legal issues for *NBC News*, *The New York Times*, *The Wall Street Journal*, *The Washington Post*, *Los Angeles Times*, *The Washington Times*, *The Baltimore Sun*, *ESPN.com*, *Washington Business Journal*, *Legal Times*, *Association Trends*, *CEO Update*, *Forbes Magazine*, *The Chronicle of Philanthropy*, *The NonProfit Times*, *Politico*, *Bloomberg Business*, *Bloomberg BNA*, *EO Tax Journal*, and other periodicals. He also has been interviewed on nonprofit legal topics on Washington, DC CBS-TV affiliate, the Washington, DC Fox-TV affiliate's morning new program, Voice of America Business Radio, Nonprofit Spark Radio, The Inner Loop Radio, and Through the Noise podcasts.



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 Healthcare Transactions
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BAR ADMISSIONS

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 Pennsylvania

EDUCATION

J.D., Stanford Law School, 1981
 B.A., Haverford College, 1978

Bob Waldman, Chair of the firm's Business Division, leads the firm's national representation of tax-exempt organizations. Mr. Waldman's practice includes general representation of numerous foundations, hospitals, educational institutions, trade associations and other charitable entities. Mr. Waldman also practices extensively in the areas of philanthropic and estate planning, employee benefits and taxation. Mr. Waldman is the Vice President of the Venable Foundation. Mr. Waldman is included in *The Best Lawyers in America* in the fields of Employee Benefits Law, Non-Profit/Charities Law and Tax Law.

The Daily Record, the newspaper serving Baltimore's business and legal communities, honored Mr. Waldman with its "Leadership in Law" award. The award recognizes those individuals whose leadership, both in the legal profession and in the community, has made a positive impact on Maryland, and who have demonstrated outstanding achievement in the practice of law; involvement in the profession, and support of the community. Mr. Waldman was also recognized in the 2012 edition of *Legal 500* and was selected for inclusion in *Maryland Super Lawyers*, 2010 - 2013 editions. Mr. Waldman is an Elected Fellow of the Baltimore City Bar Foundation.

HONORS

Named "Lawyer of the Year" for Baltimore Employee Benefits (ERISA) Law in *The Best Lawyers in America*, 2017

Named "Lawyer of the Year" for Baltimore Non-Profit/Charities Law in *The Best Lawyers in America*, 2014

Listed in *The Best Lawyers in America* for Employee Benefits (ERISA) Law, Non-Profit/Charities Law, and Tax Law (Woodward/White, Inc.), 2007 - 2017

Recognized in *Legal 500*, Not-For-Profit, 2012 - 2015

Selected for inclusion in *Maryland Super Lawyers*, 2010 - 2013

AV® Peer-Review Rated by *Martindale-Hubbell*, selected as a 2013 Top Rated Lawyer in Healthcare

Recipient, Spirit of Partnership Award, Sodexo Foundation

The Daily Record, the newspaper serving Baltimore's business and legal communities, honored Mr. Waldman with its "Leadership in Law" award. The award recognizes those individuals whose leadership, both in the legal profession and in the community, has made a positive impact on Maryland, and who have demonstrated outstanding achievement in the practice of law; involvement in the profession, and support of the community.

Elected Fellow of the Baltimore City Bar Foundation

MEMBERSHIPS

American Bar Association
Maryland State Bar Association

ACTIVITIES

Mr. Waldman is a member of the Board of the Association of Baltimore Area Grantmakers (past Chairman) and serves on the Boards of the Enoch Pratt Free Library and the Downtown Partnership of Baltimore. He has also served on the Board of the Maryland Association of Nonprofit Organizations and is a member of the Best Lawyers Advisory Board.

Mr. Waldman is a member of the American Bar Association Committee on Tax-Exempt Organizations and former chair of the Employee Benefits Subcommittee of the Maryland State Bar Association.

PUBLICATIONS

- August 5, 2015, Employee Engagement - Legal Issues and Pitfalls
- October 2, 2014, Nonprofit Tax Issues: Where the IRS Is Today, and Where Congress Is Headed
- November 14, 2013, Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies
- October 8, 2013, Complying (or Deviating) from Donor Intent: Recent Developments for Nonprofits
- May 29, 2013, Legal Issues in International Philanthropy
- March 2013, Tax Considerations of International Grantmaking in Today's World
- March 2013, The FCPA and Anti-Corruption Enforcement: What Does It Mean for Charitable Contributions?
- March 12, 2013, Charity Boards – Ethical Considerations under the Microscope
- February 5, 2013, Tax Considerations of Grantmaking in Today's World
- November 2011, California Transparency in Supply Chains Act of 2010 (SB 657), Client Alerts
- Spring 2011, Taking Advantage of Low Interest Rates with a Charitable Lead Annuity Trust, *The BCF Edge*
- November-December 2010, Use of a Line of Credit by a Private Foundation, *Family Foundation Advisor*
- May 6, 2009, Legal Issues of Not-for-Profit Organizations
- February 24, 2009, Practical Due Diligence Considerations for Nonprofit and Other Investment Fiduciaries, Nonprofit Alert
- October 30, 2008, Navigating Philanthropy's Legal Issues
- November 2006, Pension Protection Act of 2006: Provisions of Interest to Exempt Organizations
- September / October 2006, Circular 230 Regulations Raise Questions for Tax-Exempt Organizations
- November 9, 2004, Summit on Nonprofit Governance: The Other Governance
- June 2004, Not-for-Profit Governance Reform: A Long Hot Summer?
- August 2003, Legal Issues of Not-for-Profit Organizations
- The IRS Clarification of Parking Income is a Roadblock for Tax-Exempts

SPEAKING ENGAGEMENTS

- March 30, 2017, Dealing with Nonprofit Donors: Risks, Restrictions, and When to Say "No Thanks"
- March 14, 2017, Association of Corporate Contribution Professionals (ACCP) Annual Conference
- May 24, 2016, "Donor Exposure: Dealing with a Charity in Trouble," a webcast hosted by the Association of Corporate Contributions Professionals (ACCP)
- October 21, 2015, "Revitalizing Our Cities – How Foundations and Grantmakers Can Invest in a Better Economic Future" hosted by Venable and the Forum of Regional Associations of Grantmakers

- August 5, 2015, "Employee Engagement - Legal Issues and Pitfalls" for Association of Corporate Contribution Professionals
- October 2, 2014, Second Annual Nonprofit Executive Summit: Bringing Nonprofit Leaders Together to Discuss Legal, Finance, Tax, and Operational Issues Impacting the Sector
- November 14, 2013, Managing Donated Funds: Donor Intent, Restricted Funds, and Gift Acceptance Policies
- October 8, 2013, Legal Quick Hit: "Complying (or Deviating) from Donor Intent: Recent Developments for Nonprofits" for the Association of Corporate Counsel's Nonprofit Organizations Committee
- May 29, 2013, Association of Corporate Counsel Webcast: "Legal Issues in International Philanthropy"
- March 12, 2013, "Charity Boards – Ethical Considerations Under the Microscope" at the Bank of America Merrill Lynch Strategic Governance and Leadership Summit
- March 11, 2013, "The FCPA and Anti-Corruption Enforcement: What Does It Mean for Charitable Contributions?" at the Annual Conference of the Association of Corporate Contributions Professionals
- February 5, 2013, "Tax Considerations of Grantmaking in Today's World" at the CliftonLarsonAllen National Foundation Conference
- November 26, 2012, Bank of America Market Presidents Presentation
- April 28, 2011, "Legal Issues of Not-for-Profit Organizations" at the Weinberg Fellows Board Presidents' Day
- May 5, 2010, "Legal Issues of Not-for-Profit Organizations" at the Harry and Jeanette Weinberg Fellows Program
- June 17, 2009, Entertainment Industry Conference
- October 30, 2008, Navigating Philanthropy's Legal Issues
- November 9, 2004, Summit on Nonprofit Governance: The Other Governance
- "Private and Family Foundation Issues," delivered as part of the Institute on Nonprofit Organizations
- "Charity Boards - Ethical Considerations Under the Microscope," sponsored by Suburban Hospital and the United Jewish Endowment Fund
- "Legal Issues Affecting Nonprofit Organizations," sponsored by the Harry and Jeanette Weinberg Foundation



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Rebecca is a philanthropic advisor to donors and their professional advisors. She has more than thirty years of experience fund raising, and fifteen years in gift planning. She has exceptional donor relationship-building skills through process of identification, cultivation, solicitation and stewardship. She also designed and managed planned giving marketing programs, creating unique brands. Rebecca is a creative self-starter with a passion for the nonprofit sector and for encouraging donors' philanthropy.



Additional Information

ARTICLES

March 28, 2017

HIGHLIGHTS OF THE FTC AND NASCO CONFERENCE—GIVE AND TAKE: CONSUMERS, CONTRIBUTIONS, AND CHARITY

Last week, the Federal Trade Commission (FTC) and the National Association of State Charity Officials (NASCO) hosted **Give & Take: Consumers, Contributions, and Charity**, a conference exploring consumer protection issues in the changing landscape of charitable giving. The conference featured panelists from the FTC, state attorney general offices, academic and research institutions, and private sector representatives and advisors.

Two key takeaways for charitable organizations and their fundraisers emerged:

- Law enforcement against perceived charitable solicitations fraud using traditional telemarketing and direct mail methods remains top of mind for the FTC and state attorneys general. These regulators still consider the FTC and multi-state action against Cancer Fund of America, which we have reported on [previously](#), to be the crown jewel of cooperative law enforcement in this sector, and are building on that effort.
- Regulators acknowledge the emergence of newer forms of charitable solicitations, such as Internet appeals, social media campaigns, and crowdfunding. Users of these newer platforms are less formally regulated right now, but the gap between regulation of traditional and that of newer methods of fundraising appears to be closing.

Regulation Struggles to Keep Pace with Emerging Fundraising Platforms

As we noted last fall, charity regulators have observed the increasing popularity of nontraditional methods of philanthropy. Moreover, they continue to grapple with how to apply existing laws and regulations (or whether to implement new ones) to the constantly evolving fundraising landscape.

While the regulatory aims of protecting donors and preventing fraud are the same regardless of the solicitation methodology, newer forms of fundraising present unique challenges. Panelists addressed several examples—viral social media fundraising campaigns (which often lack the participation of a professional fundraiser or other third party with custody or control over the funds), crowdfunding scandals (e.g., the creation of a fraudulent GoFundMe webpage that raises money under false pretenses), and hybrid businesses that market their social mission to attract customers—and left open the question of whether and how consumer protection and charitable solicitations laws reach these types of conduct.

Encouraging Donors to Make Smart Contributions

As regulators attempt to adapt existing policies to new fundraising methods, they are at the same time encouraging prospective donors to engage in "self-help" by conducting research on the charities that seek donations. The conference panelists offered several suggested resources that donors can consult to educate themselves and guard against fraud:

- **Charity's Website.** A charity's website can offer a wealth of information to donors about its mission, programmatic activities and achievements, financial performance, governance structure, and policies, knowledge of which will help donors to make more confident and informed donation decisions.
- **IRS Form 990.** A charity's Internal Revenue Service (IRS) Form 990 continues to be a great source of information for both donors and regulators, but it is important to remember that the data therein has certain limitations. For example, IRS Form 990 data depicting that a charity spends a large amount

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of revenue on administrative or fundraising overhead might pique regulators' interest (some regulators believe high fundraising expenses to be indicative of fraud, even though the courts disagree), but this same information may not accurately portray the overall quality of a charity to a potential donor. To that end, websites such as [GuideStar](#) and [Charity Navigator](#) can be helpful in distilling the information from those forms.

- **BBB Wise Giving Alliance.** The Better Business Bureau [Wise Giving Alliance](#) (BBB WGA) has developed [Standards for Charity Accountability](#), which not only look to a charity's IRS Form 990, but also consider a host of additional qualitative factors in order to gauge philanthropic organizations' overall performance, effectiveness, finances, and fundraising efforts. In looking beyond numerical metrics, the BBB WGA is able to compile reports that provide potential donors with easily digestible information meant to inform their giving.
- **BBB Scam Tracker.** To the extent that third-party charity-reviewing entities (such as those named above) have not yet issued a review for a donor's charity of choice, the [BBB's Scam Tracker](#) provides a backstop. This tool alerts prospective donors to disreputable schemes that have been reported by others (whether related to charitable solicitations or generally fraudulent endeavors).

Oversight Is Increasing as Regulators Maximize Resources

Historically, charity officials' oversight of charitable organizations and for-profit charity fundraisers have suffered from a dearth of resources and difficulty in coordinating enforcement across state lines. This is clearly changing. As mentioned above, the Cancer Fund of America multi-state litigation continues to be placed on a regulatory pedestal as evidence that law enforcers can coordinate a massive investigation of alleged charity fraud, using both state and federal resources.

As charities engage with their donor bases through online, mobile, and even virtual interactions, state charity regulators also are considering new ways to partner for multi-state actions and push their efforts into the twenty-first century. That effort may involve the much anticipated single-portal charity registration system, greater sharing of information through informal communications or more formal task forces, utilization of searchable IRS Form 990 filings, or simply more frequent regulator conferences, such as this one. It is now more important than ever that charities and their fundraisers compel compliance with state charitable solicitation laws, state consumer protection laws, and applicable federal laws (e.g., the FTC's Telemarketing Sales Rule or Section 5 of the FTC Act) by ensuring that representations made during telemarketing pitches, during social media campaigns, on websites, and in regulatory filings are accurate and not misleading.

Videos from the conference are available on the [FTC website](#).

ARTICLES

November 29, 2016

IT'S NEVER TOO LATE: ENHANCING CHARITY FUNDRAISING TRANSPARENCY AND LEGAL COMPLIANCE AT YEAR-END

As Giving Tuesday launches across the United States today, public charities are making a final push to meet their year-end fundraising goals. Whether a charity is using traditional or innovative fundraising tools (or both), transparency and legal compliance should be the hallmarks of any solicitation campaign.

Charitable fundraising must comply with both charitable solicitation and consumer protection laws. If a charity has not laid out a structured approach to fundraising compliance, it risks attracting scrutiny from state and federal regulators, who are increasingly collaborating on enforcement, as discussed at [Venable's November 10, 2016 program](#). There is no time like the present: now is the time to plan for compliance.

Transparency in Solicitations

A strong multi-state and Federal Trade Commission (FTC) collaboration continues to emerge – the FTC and the National Association of State Charities Officials (NASCO) have announced plans to co-host a [conference next March](#) with a focus on "how consumers evaluate and respond to various charitable solicitation practices and the role for consumer protection." While this conference will undoubtedly provide useful guidance to the industry in the near future, charities can take steps today to enhance the transparency of their solicitations:

- Evaluate solicitations in all platforms across the organization, including mail, website, emails, scripts, volunteer talking points, brochures, and reminder letters for accuracy and consistency;
- Ensure that truthful statements are made about the use of funds, including whether the funds are restricted or unrestricted, used in a particular location or for a particular purpose (e.g., nationwide or local community program), applied to the project promised, or limited to covering overhead costs;
- Accurately reflect any conditions for matching gifts in solicitations, and make clear if there is a cap on any matching program;
- Ensure that written and oral solicitations include disclosures that are required by state charitable solicitation laws as well as federal law (e.g., the FTC's Telemarketing Sales Rule);
- Provide complete information about the charity's name, physical location, and contact information; and
- Provide easy access to additional information about the charity, such as annual reports, board members, and financial information.

Regulatory Compliance

Regulators commonly advise donors to research any charity to which they are considering donating, and advise charities to perform due diligence on fundraisers with whom they may contract. Checking off the list of *all* applicable registration and reporting requirements goes a long way in protecting a charity's fundraising efforts. A charity should adhere to these baseline requirements:

- Engage leadership to emphasize to the organization's staff and volunteers the importance of full legal compliance;
- Confirm that a reliable system is in place to track fundraising expenses and donations and manage the contractors the charity uses to meet the charity's legal reporting requirements;

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- Remember that even the passive solicitation of contributions (e.g., via the use of a "Donate Now" button on the organization's website) requires written disclosures under some states' laws;
- Confirm that state charitable registrations are current in the District of Columbia and all of the 39 states that require registration and reporting; include states where the charity is domiciled, donors are specifically targeted, or donations are received or solicited on a repeated or substantial basis;
- Confirm that federal tax acknowledgment letters are sent for contributions of \$250 or more, and for quid pro quo contributions of more than \$75; and
- Confirm that the IRS Form 990 information discloses the fundraising expenses of the charity, including the details required in **Schedule G** for fundraising events and fundraising professionals if reporting thresholds are met.

Donor Intent

Well-functioning charities understand that donor relations are their lifeblood, and take special care to honor a donor's intent. Unfortunately, sometimes donors' intended use of their contribution becomes disconnected from the charity's actual application of the donated funds. While donors are often the party most likely to complain about the perceived misuse of their contribution, state attorneys general and the FTC are broadly empowered to protect consumers' interests. Most state attorneys general are specifically authorized to protect charitable assets. A charity should take the following steps to ensure that gifts received are used for the charitable purpose(s) that the donor intended:

- Confirm that donations are tracked and allocated to specific budgets that are aligned with the donor's intent;
- Adopt a process to evaluate and report on the use of funds—broadly to the public or to a donor specifically—in accordance with the stated intention in the solicitation;
- Confirm that conditions are met for any donor-matching program;
- Work with independent auditors to evaluate systemic compliance with donor intent;
- Review any promises made by the charity to protect donor "rights" to ensure that they are reasonable and do not endanger charitable assets—and then abide by them;
- Evaluate post-solicitation communications to ensure that they reflect donor intent and do not conflict with the original solicitation messages;
- Utilize well-drafted gift agreements where appropriate for larger gifts; and
- Establish a procedure for addressing donor complaints that is sensitive to donor relations while including appropriate measures to protect charitable assets in cases where a demand is made to return a gift.

Contractor Management

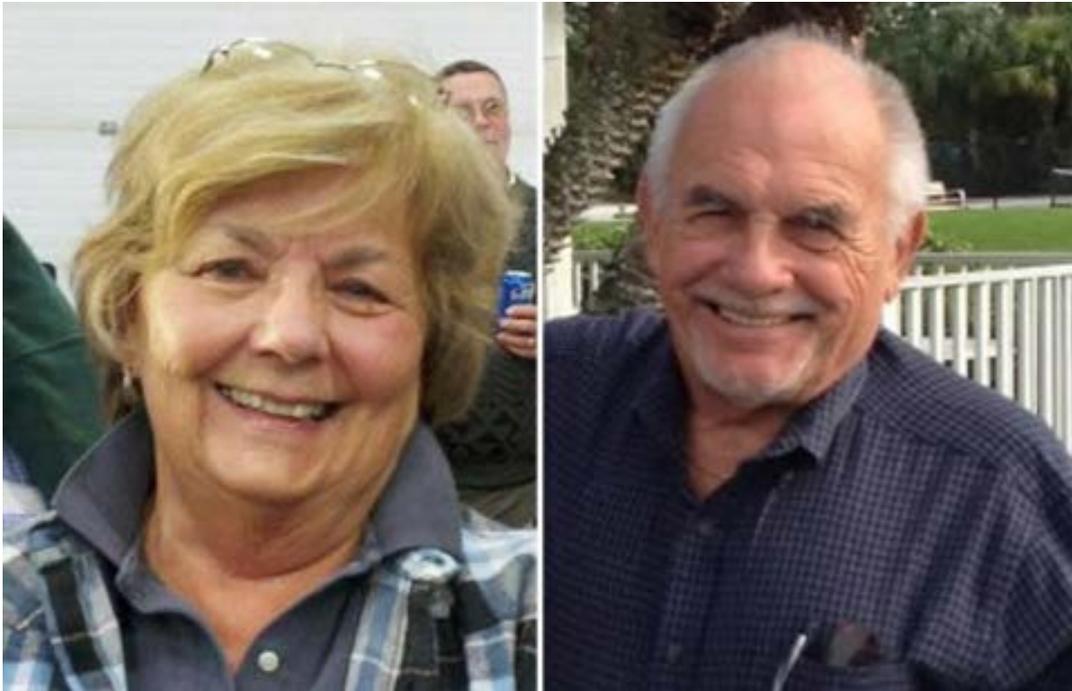
Charities must be vigilant when contracting with other parties for fundraising services, such as professional fundraising firms, online "crowdfunding" platforms, and companies that act as commercial co-venturers by promoting the message that the sale of goods and services will benefit a charity or a charitable purpose. By controlling these activities, the charity is protecting itself, its mission, and its donors. Old and new forms of solicitations need equal attention. A charity can adopt the following safeguards to ensure sound management of its charitable assets:

- Conduct due diligence on contractors, including interviewing references, confirming state registration (where required), and reviewing public enforcement announcements issued by federal and state regulators;
- Comply with the charity's conflict of interest policy by vetting potential contractors against interested parties;
- Enter into strong written contracts that protect the charity's brand, messages, money, and termination rights and comply with all state law requirements;

- Require any subcontract to have flow-down obligations from the primary contract;
- Ensure that fundraising professionals engaged by the charity are registered as required by state law and that all reporting is monitored by the charity;
- Engage caging services or similar controls over any funds received by a third party to ensure that funds are delivered in a timely manner to the charity;
- Adopt a compliance process to reconcile contractors' records with the charity's records, including regular evaluation of contractors' electronic and paper accounts of revenue, interviews of staff, and visits to the facilities;
- Adopt internal management processes for review and approval of all solicitation materials, including scripts and other written content;
- Incorporate instructions to fundraising professionals to use unambiguous information for donors or prospective donors about the identity of the fundraising professional, and to avoid conflating the professional fundraiser's identity with that of the charity;
- Mandate that any online "crowdfunding" agreement requires disclosure to the public of all fees and percentages going to the crowdfunding company and the amount, if any, that is tax deductible as a charitable contribution; and
- Require a contract that ensures legal compliance with the 26 state laws for commercial co-ventures (CCVs), that includes accounting and other safeguards, that requires charity pre-approval of clear and conspicuous promotional language, and that includes other requirements designed to avoid deceptive or misleading fundraising (e.g., if there is a cap on how much the commercial co-venturer will donate to the charity, that needs to be clearly disclosed to consumers).

The FTC and NASCO emphasized in their announcement of the March 2017 conference that "Americans contribute a lot of their hard earned money to charity—more than \$373 billion in 2015, which averaged about \$1,100 per adult and more than \$2,100 per household." Now, more than ever, charities — including their leadership—need to embrace key practices to bring themselves into full compliance with the federal and state laws and regulations governing charitable fundraising.

A charitable gift, a divorce, an angry ex-wife: WPI faces lawsuit over donation



Janet Foisie (left) and Robert A. Foisie.

By [Sacha Pfeiffer](#) GLOBE STAFF

MARCH 16, 2017

Before his ex-wife discovered his offshore account in Switzerland, Bob Foisie was Worcester Polytechnic Institute's dream donor.

He graduated in 1956 and went on to become a prosperous businessman who shared his wealth generously with his alma mater: to date, Foisie, 82, has given the school \$63 million, making him its single largest benefactor.

Reflecting that munificence, his name is everywhere on campus: the Robert A. Foisie Business School, the Foisie Scholars Program, and, currently under construction, the Foisie Innovation Studio.

Now there is also the Foisie lawsuit.

This month, Foisie's 81-year-old former wife, Janet, sued Worcester Polytech, alleging that his donations include assets he hid from her during their divorce and gave to the school after their breakup was final in 2011. Comparing his actions to criminal money laundering, she has asked a judge to stop the college from using any money it has received from him since then.

Bob Foisie has acknowledged that during his divorce he failed to disclose a \$4.5 million Swiss trust, which he later transferred to Worcester Polytech. It is unclear from the lawsuit whether he intentionally concealed that money.

Whatever the case, the school has been dragged into an ugly postmarital dispute involving its biggest donor and must navigate the public relations fallout. Meanwhile, other nonprofits are wondering if Worcester Polytech's misfortune is a cautionary tale in charitable giving, or an unforeseeable turn of events that ensnared an innocent victim.

In the opinion of Rick Cohen, a spokesman for the National Council of Nonprofits in Washington, D.C., "there's very little a nonprofit could do to avoid being in such a situation."

When negotiating a gift, "it can't ask a donor, 'Are you going through a divorce or anything that might potentially lock up these assets?'" he said, "because it's very much about decorum and what's appropriate to ask, and you don't want to offend a potential donor or an ongoing donor."

As a consequence, Cohen added, the Foisie lawsuit may "come down to lawyers needing to look at what's been put in writing to know how vulnerable the school will be in this situation" and whether it must return any of the donation.

Most charitable contributions are accompanied by a so-called gift agreement that spells out its conditions, such as how the money will be used and over what time period it will be paid.

The Foisie case is “a reminder to make sure those gift agreements are airtight,” said Stacy Palmer, editor of the Chronicle of Philanthropy, “because if they’re not ironclad, there could be an issue of someone trying to claw back the money.”

Colleges occasionally have unhappy donors who want refunds, although those cases typically involve donors who feel their gifts were misused.

Princeton, for example, was sued by heirs to the A&P grocery fortune, Charles and Marie Robertson, who claimed it misspent their \$35 million donation. They wanted the money used to educate students for government careers, but complained it was spent on a wider array of training. Princeton settled the case and was able to keep the bulk of the money.

Yale took the unusual step of returning a \$20 million gift from Texas financier Lee Bass after he criticized the school for not using the money as directed: on a Western civilization curriculum.

But several nonprofit executives contacted by the Globe said they have never heard of a case involving a gift challenged by an ex-spouse.

Complicating matters for Worcester Polytech is the fact that the school broke ground last May on a \$49 million academic facility heavily funded by Foisie and scheduled to open next year. A college spokeswoman told the Globe that construction will continue despite the lawsuit.

Worcester Polytech declined to comment on the Foisie lawsuit, filed in US District Court in Worcester, but issued a statement saying: “The Foisies have been generous donors to WPI, and hundreds of students have benefited from their philanthropy over the years. We have no knowledge of any of the improper conduct alleged in the lawsuit. We hope the Foisies are able to work out their differences.”

Janet Foisie, who lives in Long Boat Key, Fla., and also has property in Connecticut, did not return calls. Her Hartford lawyer, Megan Youngling Carannante, said she and Foisie decline to comment.

When asked about the lawsuit, a woman answering a phone number for Bob Foisie, who lives in Carson City, Nev., and also has property in Florida, said, “I’m sorry, he’s not taking any calls or making any public announcements about that.”

A first-generation college student, Foisie earned a master’s degree at Cornell after graduating from Worcester Polytech, then worked as an engineer at aerospace manufacturers Hamilton Standard Co. and Pratt & Whitney. He later became president of Hartford-based Matik Inc., a distributor for European manufacturers, and owned a Swiss packaging company.

As part of their divorce, the Foisies, who were married for about 50 years, equally divided their assets. That entailed divvying up numerous properties and getting \$20 million apiece in various investments.

Legal filings do not explain how Janet Foisie learned about Bob Foisie’s \$4.5 million Swiss trust, which he acknowledged in an August 2016 legal proceeding. But in her suit, Janet Foisie said his “lies and omitted disclosures” resulted in her accepting a smaller settlement “than she would have agreed to had she known the truth.”

Bob Foisie transferred the trust to Worcester Polytech — which enrolls about 6,000 students and has a \$480 million endowment — as part of a \$40 million gift he gave to the school in 2014, its largest one-time contribution.

In her lawsuit, his ex-wife alleges that “like one laundering the proceeds of a criminal enterprise, Robert sought to dispose of the funds for a purpose of his personal preference and choosing, rather than giving it to his legitimate creditor Janet.”

Janet Foisie has asked the court to prevent Worcester Polytech from spending any of that \$40 million donation until the litigation is resolved. Her lawsuit does not say whether she made that request because she believes her former husband failed to disclose additional assets as well.

Robert Waldman, a partner at the Washington, D.C., law firm Venable who leads the firm's representation of tax-exempt organizations, called the Foisie case "really tricky."

Most states, he said, have laws aimed at preventing people from hiding money by transferring assets. That's intended to avoid a situation in which "someone gets divorced or goes bankrupt, creditors come knocking on his door, and he says, 'Sorry, I gave it to charity,' " or, as in this case, donated it to his alma mater, Waldman explained.

If that were to happen, a judge could order the nonprofit to return the money.

But "if courts start holding innocent charities responsible for something that happens to the donor down the road, or something they didn't know about the donor," Waldman said, "then charities would be afraid to take the gift in the first place out of fear that it might be taken back later."



A rendering of the Foisie Innovation Studio on Worcester Polytechnic Institute campus.

The building is set to open early Fall 2018.

Sacha Pfeiffer can be reached at pfeiffer@globe.com. Follow her on Twitter at [@SachaPfeiffer](https://twitter.com/SachaPfeiffer).

Resources and Related Articles:

Demand for Information on Harvard Gift Raises Thorny Issues for Fundraisers:

<https://www.philanthropy.com/article/Demand-for-Information-About/239444>

On Second Thought: Changing of Yesterday's Gifts by Barbara Rhonberg:

<https://s3.amazonaws.com/ppp-sales/wp-content/uploads/2017/Papers/On+Second+Thought+-+Changing+the+Purpose+of+Yesterday%27s+Gifts.pdf>

Charities Deal With a Stream of Lawsuits From Disenchanted Donors

<https://www.philanthropy.com/article/Charities-Deal-With-a-Stream/155003>

When Donors Commit Fraud

<https://www.philanthropy.com/article/When-Donors-Commit-Fraud/158861>

Jeffrey Epstein – subject of a plea deal now under public scrutiny

<http://www.thecrimson.com/article/2006/9/13/harvard-to-keep-epstein-gift-after/>

<https://www.theguardian.com/us-news/2015/feb/01/jeffrey-epstein-charities-refuse-money-financier-sex-case>

Privacy Policy Example:

<http://www.nationalww2museum.org/give/donor-privacy-policy.html>

Blackbaud Survey:

https://www.blackbaud.com/files/resources/downloads/Research_SONI_NorthAmericanResults.pdf

California legal case:

<http://www.wagenmakerlaw.com/blog/schedule-b-disclosures-donor-victory-against-california-ag-and-new-congressional-bill-providing>

Council of Nonprofits' Ethics and Accountability's Guidelines:

<https://www.councilofnonprofits.org/tools-resources/ethics-and-accountability-nonprofits>

CASE Ethics and Accountability

http://www.case.org/Browse_by_Professional_Interest/Ethics_and_Accountability.html

Books:

Protecting Donor Intent, Jeffrey J. Cain

The Nonprofit Challenge: Integrating Ethics into the Purpose and Promise of Our Nation's Charities, Doug White

Charity on Trial: What You Need to Know Before You Contribute, Doug White