



# Federal and State Regulators and Watchdog Groups Are Bearing Down on Charities and Their Professional Fundraisers: How to Prepare for the Regulatory Storm

Thursday, November 10, 2016, 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**

**Anita K. Drummond, Esq.**

Counsel, Nonprofit Organizations Practice, Venable LLP

**Eric S. Berman, Esq.**

Counsel, Nonprofit Organizations Practice, Venable LLP

**Atitaya C. Rok, Esq.**

Associate, Nonprofit Organizations Practice, Venable LLP



## CAE Credit Information

**\*Please note that CAE credit is available only to registered participants in the live program.**

As a CAE Approved Provider educational program related to the CAE exam content outline, this program may be applied for **1.5 credits** toward your CAE application or renewal professional development requirements.

---

*Venable LLP is a CAE Approved Provider. This program meets the requirements for fulfilling the professional development requirements to earn or maintain the Certified Association Executive credential. Every program we offer that qualifies for CAE credit will clearly identify the number of CAE credits granted for full, live participation, and we will maintain records of your participation in accordance with CAE policies. For more information about the CAE credential or Approved Provider program, please visit [www.whatiscae.org](http://www.whatiscae.org).*

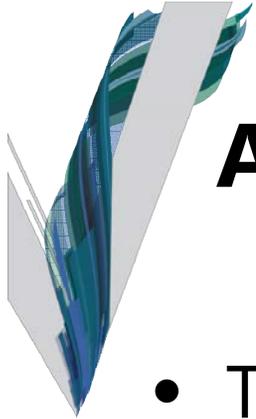
*Note: This program is not endorsed by, accredited by, or affiliated with ASAE or the CAE Program. Applicants may use any program that meets eligibility requirements in the specific time frame toward the exam application or renewal. There are no specific individual courses required as part of the applications—selection of eligible education is up to the applicant based on his/her needs.*



# Upcoming Venable Nonprofit Events

Register Now

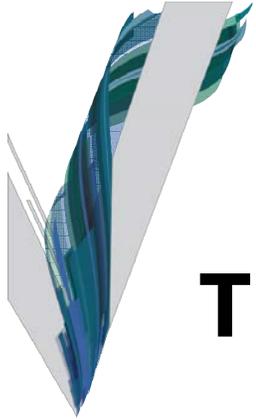
- **December 12, 2016:** [Top Ten Risks Facing Nonprofits Operating Internationally, Co-Sponsored by Venable LLP and BDO](#)



# Agenda

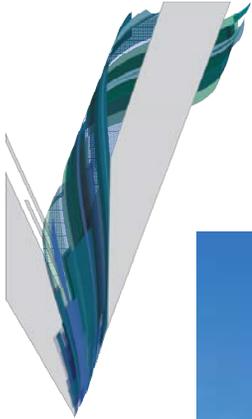
- The Players
- Trends
- Legal Compliance
- Risk Management

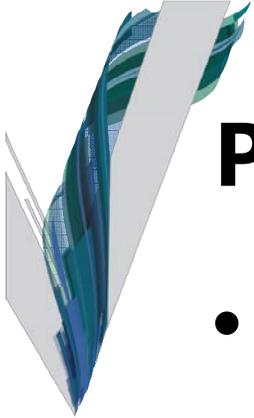




# The Players: Regulators in the Game







# Pitcher

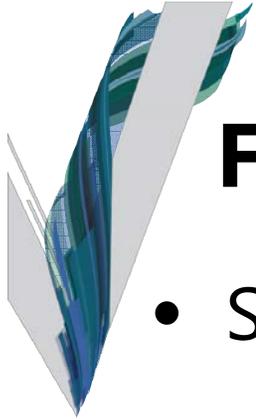
- Internal Revenue Service
  - Basic governance, conflicts always a focus
  - 18 pages of the Internal Revenue Manual for exams focus on fundraising activities
    - Professional fundraisers
    - Events and online fundraising
    - Solicitation and disclosures
    - Cash and noncash gifts
    - Reporting on Form 990 including Schedules G & M
    - Audit procedures for reviewing fundraising



## Catcher

- State Charity Regulators
  - Charity registration, reporting, and solicitation
  - Professional fundraisers and solicitors
  - Professional fundraising counsel
  - Commercial co-venturers

Regulators may be a charity office or within the state attorney general's office.



# First Baseman

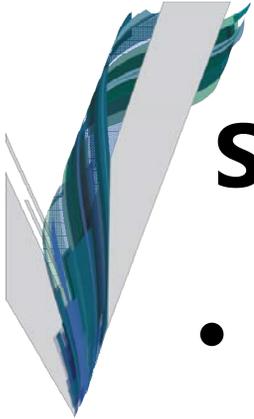
- State Attorneys General





## Third Baseman

- Other state agencies with authority to regulate charities that can stall fundraising
  - Consumer protection
  - Special statutes or enforcement focus on telemarketers
  - Public utility commissions
  - Tax issues
  - Insurance commission and others for charitable gift annuities
  - Others



## Second Baseman

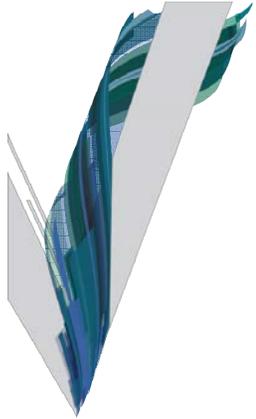
- Local agencies
  - Canvassing permits
  - Event licenses
  - Local registrations





# Outfield

- Federal Trade Commission
  - FTC Act § 5 prohibits deceptive practices
  - Telemarketing Sales Rule
  - Broad ability to get relief in federal court - § 13(b)
- Media
- Whistleblowers
- Charitable ratings/watchdog agencies
  - BBB Wise Giving Alliance, Charity Navigator, Charity Watch, GuideStar

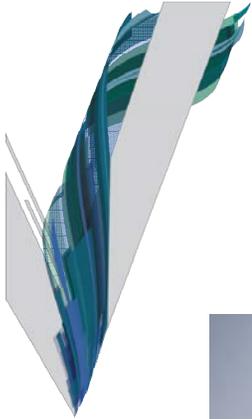


# Trends

Enforcement Collaboration

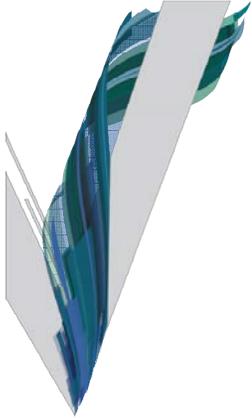
Data

Law



# Trends in Enforcement





# Fundraising Is Focus

**#1 Enforcement area in the sector is fundraising**

*Source: 2015 Report by the Columbia Law School National State Attorneys General Program and the Urban Institute*



# Enforcement Trends

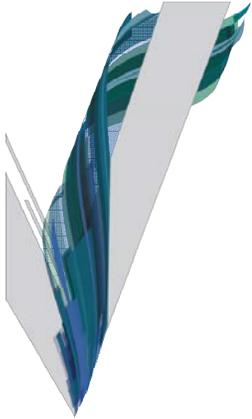
- Regulators are collaborating  
*FTC, 50 States, and D.C. v. Cancer Fund of America, Inc.*

The screenshot shows the top portion of the Federal Trade Commission website. At the top left is the FTC logo, which includes a scale of justice and the text 'FEDERAL TRADE COMMISSION' and 'UNITED STATES DEPARTMENT OF JUSTICE'. To the right of the logo is the text 'FEDERAL TRADE COMMISSION' and 'PROTECTING AMERICA'S CONSUMERS'. In the top right corner, there are links for 'Contact' and 'Stay Connected'. Below this is a navigation bar with five items: 'ABOUT THE FTC', 'NEWS & EVENTS', 'ENFORCEMENT', 'POLICY', and 'TIPS & ADVICE'. The main content area shows a breadcrumb trail: 'Home » News & Events » Press Releases » FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; Order Ban Leader from Working for Non-Profits'. Below the breadcrumb is the title of the press release: 'FTC, States Settle Claims Against Two Entities Claiming to Be Cancer Charities; Orders Require Entities to Be Dissolved and Ban Leader from Working for Non-Profits'. Underneath the title is a sub-headline: 'Concludes Action by FTC, All 50 States and D.C. Against Charities That Bilked More Than \$75 Million from Donors'. There is a blue button that says 'FOR RELEASE' and the date 'March 30, 2016'.



## **Enforcement Trends – Obvious**

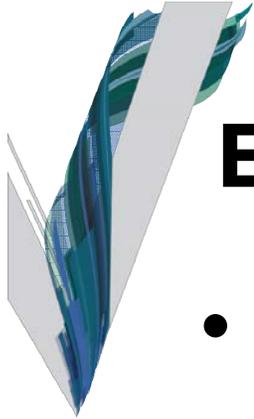
- Using fake names and/or failing to make proper disclosures
- Changing names of charities to sound like other, similar charities
- Misrepresenting charity's program services
- Filing false or incomplete registrations and financial reports with the state



# State Regulators Involving the Public

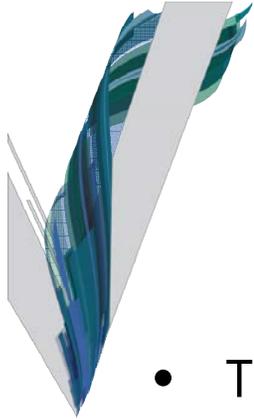
**Half of regulated states have hotlines to report charities**

*Source: 2015 Report by the Columbia Law School National State Attorneys General Program and the Urban Institute*



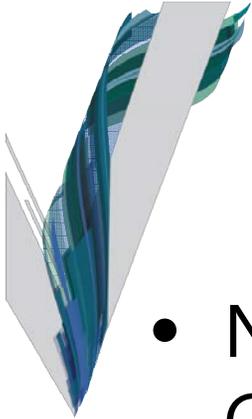
# Enforcement Involving Fundraising

- [2014 - Quadriga](#)
  - \$25 million settlement with New York Attorney General for direct-mail fundraising abuses
- [2014 - Strategic Fundraising, Inc.](#)
  - \$1.054 million fine by South Carolina Secretary of State for failure to make mandatory disclosures, misrepresentation, failure to register individual solicitors



# Lessons from Stipulated Orders with State AGs

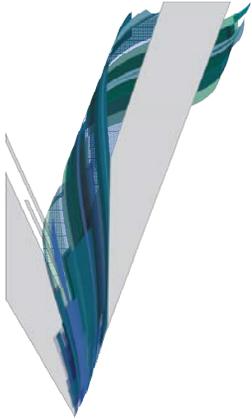
- Truthful language in fundraising (or marketing) language about the purpose
- Control of solicitation messaging and brand by charity
- Unambiguous identification of professional fundraising company
- Truthful about being paid to solicit
- Use caging services
- Deliver pre- and post-solicitation disclosures
- Recordkeeping that includes scripts, recorded calls, and persons contacted
- Records of complaints and process of resolution
- Strong subcontractor controls
- Truthful in identifying charity's headquarters location and avoid using misleading "local" postal addresses



## Enforcement Collaboration

- National Association of Attorneys General's new Charities Committee formed in late 2015

"to promote the development of effective charities registration *and enforcement programs . . .*" [emphasis added]



# Trends in Data





# Collaboration Among States on Data and Information

- Historical
  - National Association of Attorneys General/National Association of State Charity Officials (NAAG/NASCO) annual conference (with one “public day”)
  - Charleston Principles
  - Unified Registration Statement
- New Efforts by NAAG/NASCO
  - **Single Portal Initiative**



# Single Portal Initiative

- 13 pilot states with intention to cover all states with registration requirements
- Charities and professional fundraisers will register
- <http://mrfpinc.org/>





## State Regulator Efforts

- 82% of state regulators update the media on their charity oversight by news releases
- 1 in 3 regulators publish an annual report
- Some states have specialized reports on fundraising





# IRS Form 990 Data Machine Readable

- June 2016 IRS announced machine-readable format of Forms 990 from 2011 until present through Amazon Web Services

[www.aws.amazon.com/public-datasets/irs-990/](http://www.aws.amazon.com/public-datasets/irs-990/)

The screenshot shows the AWS website navigation bar with the Amazon Web Services logo on the left and links for AWS re:Invent, Products, Solutions, Pricing, Software, Support, and More. Below the navigation bar, a 'RESOURCES' section is visible on the left, listing 'Large Datasets Repository | Public Datasets with AWS' and 'IRS 990 Filings on AWS'. The 'IRS 990 Filings on AWS' link is highlighted in orange. To the right of this link, the main content area displays the title 'IRS 990 Filings on AWS' in orange, followed by the text: 'Machine-readable data from certain electronic 990 forms file for anyone to use via Amazon S3.'



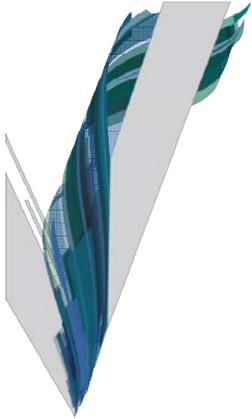
## More Information in 2016

- GuideStar Nonprofit Profiles and Charity Check
  - Watch lists and automated email alerts
- Charity Navigator Advisory system
  - Three levels of concern:
    - “**Low**” – Media stories, third-party evaluations, affiliate issues
    - “**Moderate**” – Allegations of fraud, incomplete or inaccurate Forms 990, charities that “do not complete the schedule of expenses for fundraising,” audit issues, AG initial investigation
    - “**High**” – Fake charity claims, confirmed fraud or improper activity



## More Data

- Cause IQ
  - Markets to large companies “intelligence on everything and everyone in the nonprofit sector”
- Citizenaudit.org
  - Keyword searches of full text of nonprofit IRS Forms 990



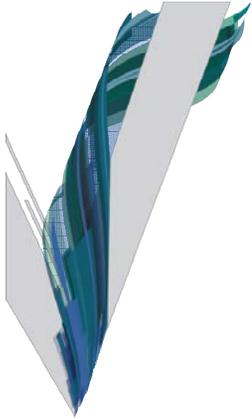
# Trends in Law





# Increasing Nuances in State Legislation, Regulation, and Forms

- Directors personally liable for losses or failure to control
- Paperwork violations for “incomplete financial report” for charitable registration with serious consequences
- Enhanced focus on conflicts with directors, officers, and key employees
- Higher expectations for audit oversight
- More triggers for imposing state income tax or corporate excise taxes
- Property tax exemption laws at state and local levels becoming more difficult to maintain or obtain
- Localized interest in charity rules



# Legal Compliance





# Acknowledge Complexity

- IRS
- States agencies
- Local governments
- Federal Trade Commission
- Consumer Financial Protection Bureau
- Other federal agencies





## IRS Form 990

- Reporting on organizational finances, purpose, management, conflicts, and other information
- Reporting fundraising
  - Overall fundraising expenses
  - Professional fundraising expenses and revenue
  - Fundraising events performance
  - Cash and noncash contribution
  - State charitable solicitation registration



**SCHEDULE G  
(Form 990 or 990-EZ)**

Department of the Treasury  
Internal Revenue Service

**Supplemental Information Regarding Fundraising or Gaming Activities**

Complete if the organization answered "Yes" on Form 990, Part IV, line 17, 18, or 19, or if the organization entered more than \$15,000 on Form 990-EZ, line 6a.

▶ Attach to Form 990 or Form 990-EZ.

▶ Information about Schedule G (Form 990 or 990-EZ) and its instructions is at [www.irs.gov/form990](http://www.irs.gov/form990).

OMB No. 1545-0047

**2016**

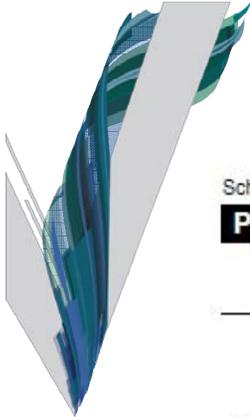
**Open to Public Inspection**

Name of the organization	Employer identification number

**Part I Fundraising Activities.** Complete if the organization answered "Yes" on Form 990, Part IV, line 17. Form 990-EZ filers are not required to complete this part.

- 1** Indicate whether the organization raised funds through any of the following activities. Check all that apply.
- |  |   |
|--|---|
| <b>a</b> <input type="checkbox"/> Mail solicitations               | <b>e</b> <input type="checkbox"/> Solicitation of non-government grants |
| <b>b</b> <input type="checkbox"/> Internet and email solicitations | <b>f</b> <input type="checkbox"/> Solicitation of government grants     |
| <b>c</b> <input type="checkbox"/> Phone solicitations              | <b>g</b> <input type="checkbox"/> Special fundraising events            |
| <b>d</b> <input type="checkbox"/> In-person solicitations          |   |
- 2a** Did the organization have a written or oral agreement with any individual (including officers, directors, trustees, or key employees listed in Form 990, Part VII) or entity in connection with professional fundraising services?  Yes  No
- b** If "Yes," list the 10 highest paid individuals or entities (fundraisers) pursuant to agreements under which the fundraiser is to be compensated at least \$5,000 by the organization.

(i) Name and address of individual or entity (fundraiser)	(ii) Activity	(iii) Did fundraiser have custody or control of contributions?		(iv) Gross receipts from activity	(v) Amount paid to (or retained by) fundraiser listed in col. (i)	(vi) Amount paid to (or retained by) organization
		Yes	No			
<b>1</b>		<input type="checkbox"/>	<input type="checkbox"/>			



**Part II Fundraising Events.** Complete if the organization answered "Yes" on Form 990, Part IV, line 18, or reported more than \$15,000 of fundraising event contributions and gross income on Form 990-EZ, lines 1 and 6b. List events with gross receipts greater than \$5,000.

		(a) Event #1 <small>(event type)</small>	(b) Event #2 <small>(event type)</small>	(c) Other events <small>(total number)</small>	(d) Total events <small>(add col. (a) through col. (c))</small>
Revenue	<b>1</b> Gross receipts . . . . .				
	<b>2</b> Less: Contributions . . . . .				
	<b>3</b> Gross income (line 1 minus line 2) . . . . .				
Direct Expenses	<b>4</b> Cash prizes . . . . .				
	<b>5</b> Noncash prizes . . . . .				
	<b>6</b> Rent/facility costs . . . . .				
	<b>7</b> Food and beverages . . . . .				
	<b>8</b> Entertainment . . . . .				
	<b>9</b> Other direct expenses . . . . .				
<b>10</b> Direct expense summary. Add lines 4 through 9 in column (d) . . . . . ▶					
<b>11</b> Net income summary. Subtract line 10 from line 3, column (d) . . . . . ▶					



# State Compliance – Charitable Organization

- Currently, 39 states and DC require charities to register when conducting solicitations
- Common registration requirements
  - Registration and renewal annually
  - Disclosures when soliciting (e.g., identification of state office where financial reports filed, verbatim written disclosures)
  - Annual financial reporting
  - Notification and reporting on professional fundraiser, fundraising consultant, or commercial co-venture relationships



## State Solicitation Notices: 11 states

Florida: A COPY OF THE OFFICIAL REGISTRATION AND FINANCIAL INFORMATION MAY BE OBTAINED FROM THE DIVISION OF CONSUMER SERVICES BY CALLING TOLL-FREE, 1-800-HELP-FLA WITHIN THE STATE OR VIA THE INTERNET [WWW.800HELPFLA.COM](http://WWW.800HELPFLA.COM). REGISTRATION DOES NOT IMPLY ENDORSEMENT, APPROVAL, OR RECOMMENDATION BY THE STATE. FL REGISTRATION # \_\_\_\_.



## State Compliance – Fundraising Professionals Defined

- **Professional solicitor** – for a fee or other compensation, solicits on behalf of a charity or has custody and control of funds
- **Fundraising consultant** – for a fee or other compensation, manages, advises, plans, produces, or designs a solicitation, but does not directly solicit or hold funds



# State Compliance – Fundraising Professionals

- Approximately 42 states require registration and other requirements for professional solicitors and fundraising consultants
  - Registration
  - Bond
  - Filing of contracts
  - Disclosures
  - Regular reporting on performance



# State Compliance – Fundraising Professionals

- Often mandatory contractual provisions
  - Statement of charitable purpose
  - Charity right to rescind
  - Campaign dates
  - Percentage of contributions to charity vs. fundraising professional
  - Script and solicitation content control by charity
  - Funds delivered within 48 hours
  - Signed by board member



# Commercial Co-Ventures (CCVs)

- 26 states *regulate* CCVs
- A **charitable sales promotion** is an arrangement between a charity and a commercial entity, called a **commercial co-venture**, under which the commercial entity advertises that the purchase or use of its goods or services will benefit a charity or charitable purpose

*“Every time you buy a bottle of ECO between June 1 and December 31, 2016, 5 cents will go to the Earth Foundation, up to a maximum of \$25,000.”*

- Not charitable giving, but generally a “royalty” payment that is scrutinized as a fundraising activity by states
- Many states require filing the contract, forms submitted by both the charity and the commercial co-venturer



# State Compliance - Commercial Co-Ventures

- Registration and Notification
  - **CCV Responsibility** – Alabama (bond), California, Hawaii, Illinois, Massachusetts (bond), Mississippi and South Carolina
  - **Charity Responsibility** - Arkansas, Connecticut, New Hampshire, New Jersey, and Utah
- Mandatory Contractual Provisions
  - Dates of solicitation, amount to be donated, geographic scope, charity ability to cancel
- Disclosure Requirements
- Campaign Financial Reports



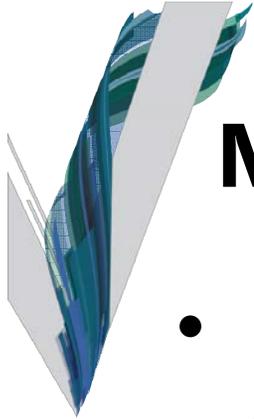
# Federal Trade Commission (FTC)

- Section 5 of the Federal Trade Commission Act prohibits “unfair or deceptive acts or practices in or affecting commerce . . . .”
  - Truthful marketing
  - Substantiation
  - Material Relationships
- FTC’s Telemarketing Sales Rule 16 CFR Part 310
- Broad ability to get injunctive relief in federal court under Section 13(b) of FTC Act to remedy “any provision of law enforced by the Federal Trade Commission.
- The FTC does not have jurisdiction over *bona fide* charities, but...



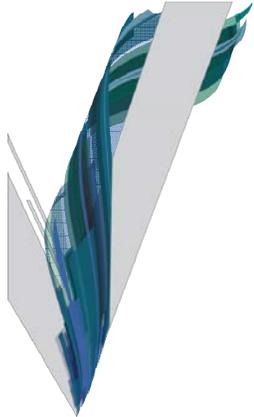
## Mitigate Risk: Solicitation Hazards

- Misrepresenting the nature of the charity's purpose or activities
- Misrepresenting that donations will benefit persons or organizations in the donor's state or local community **unless** a substantial portion goes to that state or local community
- Misrepresenting that donations will go to a specific purpose or program **unless** a minimum amount of donations will actually be used for the purpose or program



## Mitigate Risk: Solicitation Hazards

- Promising a cap on overhead expenses or as a part of the donation without substantiation
- Using script or printed materials that have not been vetted and/or substantiated
- Harassing or intimidating solicitation conduct
- Implying or indicating that a charity or fundraising professional is “endorsed” by regulators
- Misrepresenting a portion of the donations that will be retained by charity and the professional fundraiser or commercial co-venturer



# Stay Alert to Federal Trade Commission Trends

FEDERAL TRADE COMMISSION ESPAÑOL

CONSUMER INFORMATION

**MONEY & CREDIT**

**HOMES & MORTGAGES**

**HEALTH & FITNESS**

**JOBS & MAKING MONEY**

**FTC examines crowdfunding**

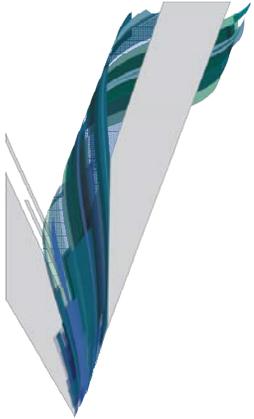
October 26, 2016  
by Colleen Tressler  
Consumer Education Specialist, FTC

Crowdfunding is the use of online platforms to fund a project or cause by raising money from a large number of people.

As part of its FinTech series, the FTC will take a closer look at crowdfunding during a [half-day forum](#) today, October 26. We're bringing together industry participants, consumer groups

**Recent Blog Posts**

- [Finding Midwestern Common Ground](#)  
November 4, 2016
- [FTC helps teach teachers about financial literacy](#)  
November 2, 2016
- [FTC sues phone scammers](#)



# Risk Mitigation





# Basics of Compliance in Your Operations

- Consistent and accurate system for tracking fundraising expenses and revenue
- Leadership tone (consider compliance officer)
- Train and educate staff, including fundraisers, finance, management, etc., on legal compliance
- Standard contracts that reflect the law, audit rights, and exit terms, among other provisions
- Registration and reporting controls
- Solicitation content approval processes
- Audits for financial and reporting compliance



# Charitable Organization's Risk Management

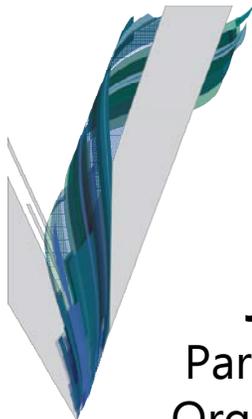
- Management and staff understand legal complexities and investment in compliance
- Board role in contract commitments and oversight
- Regulate every use of your name and brand
- Contractor vetting procedures:
  - References
  - Review public records on current registration and reporting (or enforcement actions)
  - Review data and financial controls
  - Controls for subcontractors



# Fundraising Professional's Risk Management

- Evaluate the charity
  - Purpose, size, and scope of program services
  - Geographic reach (national vs. local)
  - Review IRS Form 990, website, social media
- Confirm states' registration name and numbers
- Contract terms to include warranties that charity is using funds for represented purposes, etc.
- Review scripts frequently to substantiate claims
- Monitor solicitation activity of fundraiser's staff
- Vet subcontractors and require additional registrations





# Questions?

**Jeffrey S. Tenenbaum, Esq.**

Partner and Chair of the Nonprofit Organizations Practice, Venable LLP

[JSTenenbaum@Venable.com](mailto:JSTenenbaum@Venable.com)

202.344.8138

**Anita K. Drummond, Esq.**

Counsel, Nonprofit Organizations Practice, Venable LLP

[ADrummond@Venable.com](mailto:ADrummond@Venable.com)

202.344.4450

**Eric S. Berman, Esq.**

Counsel, Nonprofit Organizations Practice, Venable LLP

[ESBerman@Venable.com](mailto:ESBerman@Venable.com)

202.344.4661

**Atitaya C. Rok, Esq.**

Associate, Nonprofit Organizations Practice, Venable LLP

[ACRok@Venable.com](mailto:ACRok@Venable.com)

202.344.4601

To view an index of Venable's articles and presentations or upcoming programs on nonprofit legal topics, see [www.Venable.com/nonprofits/publications](http://www.Venable.com/nonprofits/publications) or [www.Venable.com/nonprofits/events](http://www.Venable.com/nonprofits/events).

To view recordings of Venable's nonprofit programs on our YouTube channel, see [www.YouTube.com/VenableNonprofits](http://www.YouTube.com/VenableNonprofits) or [www.Venable.com/nonprofits/recordings](http://www.Venable.com/nonprofits/recordings).

Follow [@NonprofitLaw](https://twitter.com/NonprofitLaw) on Twitter for timely posts with nonprofit legal articles, alerts, upcoming and recorded speaking presentations, and relevant nonprofit news and commentary.