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Raising Funds, Not Eyebrows: Legal Considerations in Fundraising

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Agenda

- What Is Fundraising?
- State Regulation of Fundraising
- Federal Tax Considerations
- Raffles / Sweepstakes
- Mobile Giving
- Social Media



Current State Regulation

- A. Charity / Nonprofit Organization
- B. Professional Solicitor
 - Professional Fundraiser
 - Professional Fundraising Counsel / Consultant
- C. Commercial Co-venturer



Current State Regulation – Charitable Organization

- About 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**.
 - broad – “by any means”
 - may include grant solicitation
- **Typical Exemptions**
 - Religious organizations
 - Organizations that do not raise more than a specified amount from public (all states) if fundraising **conducted by volunteers**
 - Organization soliciting only within membership
 - Hospitals
 - Named individual
- **Uniform Registration Statement** –currently accepted by 38 states (not CO, FL, OK)
 - <http://www.multistatefiling.org/>



Current State Regulation – Charitable Organization

- Common Requirements
 - *Registration and renewal*
 - *Disclosures when soliciting (i.e. identification)*
 - *Annual reporting requirements*



Internet Solicitations – Do I Need to Register Everywhere?!?

- **Charleston Principles** - set of voluntary principles drafted by the National Association of State Charity Officials (NASCO).
 - Adopted into statute by only a couple of states
 - Requires registration of:
 - (A) Charitable organizations domiciled in state
 - (B) Charitable organizations not domiciled in state that:
 - **offline activities** would be enough to assert jurisdiction (e.g. – send letter or make phone calls into state)
 - solicit donations on internet and (1) specifically target those within that state OR (2) receive contributions from the state on a repeated and ongoing basis or a substantial basis through their website



Charleston Principles - Application

- *Example* – a nonprofit, the Southwest Animal Charity, is headquartered in, has its principal office in, and holds all physical events within Texas. The organization provides funding to individuals throughout the US (or grants to organizations throughout the US). The organization has a website through which it accepts donations from throughout the US. Some of the individuals on the mailing list for emails and for US mail are located outside of Texas.
- **Technically must register in:**
 - Texas
 - States where sending US mail / email messages
 - States from which receive “substantial” or “repeated and ongoing” contributions
- **Consequences for not-registering**
 - Most of the time states will be lenient for first offense
 - BUT non-registration could be felony with fine of up to \$10,000
 - Reputational harm – consent orders



Current State Regulation – Professional Solicitor / Professional Fundraising Consultant

- Professional Solicitor - for a fee, solicits the general public on behalf of a charity OR has custody and control of funds
- Professional Fundraising Counsel – manages, advises, plans, produces or designs a solicitation, no direct solicitation and not holding funds
- About 41 states require registration and other requirements
 - *Registration*
 - *Bond*
 - *Filing of Contracts*
 - *Disclosures*



Current State Regulation – Professional Solicitor / Professional Fundraising Consultant

- Often mandatory requirements from states for **inclusion in contracts:**
 - 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



Current 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® Water, you contribute 5 cents to the Ethos® Water Fund, part of the Starbucks Foundation”*
- About 20 states have laws that specifically regulate CCVs
 - *Registration*
 - *Bonding*
 - *Written Contract*
 - *Advertising Disclosures*
 - *Accounting & Recordkeeping*



Current State Regulation – Commercial Co-Venture

- Commercial Co-Venturer – “**must have**” for contracts
 - Branding & Intellectual Property Terms
 - Term & Termination
 - Reps and Warrants Re: Compliance With Laws
 - Advance Approvals
 - Clear Tax Treatment & Description of Activities
 - Bifurcate Activities with Differing Tax Treatment or Enter into Separate Agreements
 - Indemnity & Insurance
 - Conflict of Interest & Confidentiality



Federal Tax Treatment – Gift Rules

- General Rule – charitable contributions to 501(c)(3) organizations can be taken as deductions on donor's federal income taxes if (1) donative intent and (2) exceed fair market value of benefits in return
- Requirements
 - A. Recordkeeping – any amount - donor responsibility
 - B. Substantiation – more than \$250 – donor responsibility
 - C. Quid Pro Quo Disclosure Statement – goods or services provided and donor contribution more than \$75 – charity responsibility
- For more information see **IRS Publication 1771**



Federal Tax Treatment – Capital Campaign Projects

- When carrying out a **capital campaign project**, be sure to avoid sufficiently direct nexus with amount pledged and any capital facilities for which tax-exempt financing sought
 - **Solicitation materials** should be broad in scope – avoid designating specific project funded
 - Avoid **general publicity** that suggests connection between fundraising activities and financing of project.



Federal Tax Treatment – UBIT & Corporate Sponsorship

- Generally, organization must be exclusively organized and operated for tax-exempt mission, taken to mean substantial part of activities must be for tax-exempt purpose.
- More than insubstantial amount – could lose exemption, even if “insubstantial” could pay UBIT (regularly carried on trade or business not substantially related to tax-exempt purpose)
- **Exception for Qualified Sponsorships** - “*any payment made by any person engaged in a trade or business with respect to which there is no arrangement or expectation that such person will receive any substantial return benefit other than the use or acknowledgement of the name or logo...*” IRS Code 513(i)
 - Less than 2% fair market value of contribution
 - Acknowledgment vs. advertising



Other Forms of Fundraising – Raffles / Sweepstakes

- Most states govern raffles – defined differently by states
- If permit or application required, allow lots of time (weeks or months)
- Federal Tax Issues
 - May be considered UBIT – exclusion for income and gaming events staffed by volunteers and bingo
 - Code sections 513(a)(1) / 513(f)
 - File Schedule G with IRS Form 990 if raise more than \$15,000 in gaming events
 - Private Benefit Concerns



Other Forms of Fundraising – Mobile Giving

- Area where the technology is ahead of the law
- **Telephone Consumer Protection Act** – prohibits using automatic dialing systems to make calls to wireless devices without express prior consent
 - Text messages included in “calls”
 - *Satterfield v. Simon & Schuster* – must have prior consent from the consumer to receive messages from that specific entity (not affiliate)
 - Prior donor or membership doesn’t count as consent
 - **FCC Rulemaking** – text messaging could require express written authorization
- **Carrier Rules and Regulations** have additional requirements for engaging in mobile giving campaigns – size of charity, years in existence, etc.



Other Forms of Fundraising – Social Media

- Social Networking sites – Facebook, Twitter, LinkedIn – have their own rules for promotions that may apply to nonprofits.
 - ***E.g., Facebook’s Promotion Guidelines:*** Restrictions are different for administering vs. publicizing a promotion:
 - **Administering a promotion on Facebook:** Promotion may not be administered directly on the site, must be administered through a Facebook Platform (until 12/1/10, needed consent). Cannot condition entry to the promotion upon taking any other action on Facebook, for example, liking a status update or photo, commenting on a Wall, or uploading a photo, or directly or indirectly indicating that Facebook is a sponsor or administrator of, or in any way associated with, the promotion
 - **Publicizing a promotion on Facebook:** Requirements less restrictive to *publicize* a promotion on Facebook
 - The guidelines’ other requirements and restrictions include specific disclosures regarding Facebook’s non-affiliation with the promotion and the promotion sponsor’s collection of data from entrants
 - ***E.g., Sweepstakes and Contests on Twitter:*** Cannot structure a sweepstakes so it requires/encourages “retweeting”
- Must also consider state **registration for sweepstakes, charitable registrations,** and how any **income treated for federal tax purposes.**



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