

Fundraising Fundamentals--Relations with State Regulators,
Donors, and Fundraising Counsel

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I. Introduction: A charitable organization must serve a public rather than a private interest. Treas. Re. § 1.501(c)(3)-1(d)(ii). It cannot operate in the manner of a private business. "An organization which does not extend some of its benefits to individuals financially unable to make the required payments reflects a commercial activity rather than a charitable one." Federation Pharmacy Services, Inc. v. Commissioner, 72 T.C. 687, 691 (1979), aff'd 625 F. 2d 804 (8th Cir. 1980). This has often been interpreted to mean that a charitable organization must provide its services at or below their cost. This can only be done if the organization raises a portion of its costs from charitable contributions.

II. State Charitable Solicitation Regulation

A. Purposes

1. They enable donors to obtain basic information about organizations asking for contributions. GuideStar, with almost 2 ½ million 990s available on the site, could serve

this function. A recent study asserts that 37% of organizations with contributions of \$50,000 or more report no fundraising costs on their Forms 990.

2. They help protect donors from charitable solicitation fraud and misrepresentations.
 - a. The Supreme Court has held however that charitable solicitation is protected speech.
 - b. In the seminal case, the issue was whether a village ordinance restricting door-to-door and other public solicitation by charitable organizations applying less than 75% of the money raised to charitable purposes was in violation of the First Amendment. Citizens for a Better Environment (CBE) was a nonprofit environmental organization which conducted door-to-door charitable solicitation in the Schaumburg, Illinois. A Schaumburg ordinance required every charitable organization intending to solicit funds either door-to-door or upon the public streets of the village to obtain a permit to do so. To obtain a permit, an organization was required to demonstrate that at least 75% of all donations received would be used directly for the organizations' charitable purposes, and not for salaries or commissions paid to solicitors, or administrative expenses such as rent, telephone, advertising expenses, and salaries. In overturning the municipal regulation, the Court held that: "Prior authorities . . . clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests -- communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes -- that are within the protection of the First

Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease. Canvassers in such contexts are necessarily more than solicitors for money. Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 632 (1980).

B. Overview of Registration Requirements

1. A charitable organization that solicits nationally must typically register in thirty-nine different states and the District of Columbia before it starts to solicit unless it is excluded or exempt. Registration usually involves submitting an annual registration statement, reviewed or audited financial statements, a copy of the Form 990, and, in most cases, a registration fee.
2. For the initial registration, the entity must typically also submit copies of its articles of incorporation, by-laws, IRS determination letter, and other organizational documents.
3. In 1997, the National Association of State Charity Officials (NASCO) developed a Unified Registration Statement, commonly referred to as the URS. Thirty-five states accept this registration statement in lieu of their state form. These include DC, Maryland, and Virginia. Because of the need to incorporate the information required by each state, the form is more voluminous than that of the individual states.

It is available online at the URS website www.multistatefiling.org and on the web sites of many states. The URS website and the NASCO website, www.nasconet.org detail most of the various state requirements and provides links to the websites of the state regulatory agencies.

C. Registration Requirements in Area Jurisdictions

1. District of Columbia

a. Most nonprofit organizations raising money in the District of Columbia are required to obtain a Charitable Solicitation endorsement. The D.C. statute, however, does allow exceptions to this filing requirement:

- (1) Organizations that raise less than \$1,500 per year;
- (2) Religious groups;
- (3) Organizations soliciting donations from members.
- (4) Solicitations for educational purposes, meaning, in the view of D.C. officials, that the organization has an IRS 501(c)(3) determination letter that identifies it as an educational organization (such an additional notation is unusual) or the organization submits an affidavit signed by an officer stating that it is an educational organization.

b. Once approved, the registration is granted in the form

of a Charitable Solicitation endorsement on a D.C. Basic Business License. Since the demise of the original Master Business License scheme, to apply for Charitable Solicitation Registration, an organization must:

- (1) Obtain and complete the registration form, called the Basic Business License Uniform Registration Statement for Charitable Organizations (D.C. Dept. of Consumer and Regulatory Affairs, 202/442-4311), or <http://mblr.dc.gov/>
- (2) Attach its D.C. Certificate of Tax Exemption available by filing Form FR-164 with the D.C. Office of Tax and Revenue (727-4829 or http://www.cfo.dc.gov/otr/frames.asp?doc=/otr/lib/otr/tax/forms/tax_forms/pdf/2004_FR-164.pdf&group=1679&open=|33280|33288|)
- (3) Provide a copy of the Certificate of Occupancy or the Certificate of Occupancy number for the commercial site where the organization is located (Information about this is available from 202/442-4567).
- (4) Include a D.C. Financial Report (BRA-BC-3) or (perhaps more easily) just attach a copy of its most recent Form 990.
- (5) Have an officer or someone else empowered by the organization sign the Resolution authorizing the charitable registration application (use the form available at <http://mblr.dc.gov/>

- (6) Attach a current copy of the Bylaws.
 - (7) Attach the most recent 501(c)(3) determination letter from the IRS.
 - (8) Complete the Clean Hands Self-Certification Form (available at <http://mblr.dc.gov/>)
 - (9) List any professional fundraisers and solicitors that it is using.
 - (10) Make sure the organization is in good standing with D.C. (that it is current with its bi-annual reports).
 - (11) File the Basic Business License Uniform Registration Statement and all the attachments at the Business License Center, 941 North Capitol Street, NE, Suite 7211, Washington, DC 20002 (Contact: Christopher Roh, (202/442-4513; <http://mblr.dc.gov/>). The fees have increased (to \$253 for new registrations and \$238 for registration renewals), but registrations are good for two years. To renew a registration, all that is required is the Uniform Registration Statement and the applicable fee.
2. Virginia: Virginia's charitable registration fees are based on the level of contributions received. Nonprofits must register before engaging in charitable solicitation. There are some exceptions including church groups and organizations that solicit funds solely from their members. For more information, forms and instructions contact: Office of Consumer Affairs, Virginia Department of

Agriculture and Consumer Services, P.O. Box 1163,
Richmond, VA 23218, (J. Michael Wright, (804/786-1343)
<http://www.vdacs.virginia.gov/allforms.html> (See
Consumer Affairs, Charitable Solicitation.

3. Maryland Charitable Registration Requirements

- a. Organizations must file before engaging in charitable solicitation in Maryland, except for religious organizations, organizations that only receive contributions from other charities (including private foundations), and organizations that only solicit contributions from their members.
- b. The membership exemption is available by application upon demonstrating that the only people being solicited receive some benefit and have the right to hold office or vote for office in the organization.
- c. Nonprofits with more than \$25,000 in contributed and fundraising revenue for the previous fiscal year must complete a full Registration. Those with less must complete an Exempt Organization Fund-Raising Notice
- d. For more information contact: Charitable Organizations Division, Maryland Secretary of State, State House, Annapolis, MD 21401, (410/974-5534), <http://www.sos.state.md.us/Charity/Forms.htm>.

D. Internet Solicitations

1. The potential is huge. The American Red Cross raised \$2.5 million online in 1999. Two years later, charities raised

over \$215 million online for the victims of terrorism.

2. Some online shopping malls, where shoppers can make purchases from among hundreds of retailers, encourage business by offering to donate a portion of the price of purchases to charity or even to the charitable organization of the shopper's choice.
3. A strict reading of most state charitable solicitation statutes suggests that registration is required in the states from which the donations are being made. To address the administrative burden this would impose on every charity soliciting contributions over a website, the NASCO Board in 2001 adopted the so-called Charleston Principles as guidance to the states. Under these principles, a charity that only passively solicited donations and did not target donors resident in a particular state did not need to register under the theory that in such a circumstance it was the donee who sought out the donor. This represents little practical help since, once a donor contributes, he is likely to be targeted for additional contributions and this targeting would subject the charity to the need to register.

E. Prohibited Solicitation Activity

1. Some of the prohibitions include applying a charitable contribution in a way substantially inconsistent with the charitable solicitation, use false or materially misleading advertising in connection with a charitable solicitation, or represent without consent that another person sponsors or approves of a charitable solicitation.
2. The penalties are strict. A director or officer of a charity that causes the charity to violate the statute even if only through gross negligence is liable to the state for criminal

penalties and to a donor for actual damages (up to treble damages if the breach is wilful) and attorneys' fees.

III. Relations with Donors

- A. Availability of Forms. As of June 8, 1999, charities have to provide copies of their 3 most recent IRS 990s and their tax exemption applications to any individual who requests them. In person requests have to be honored immediately. Written requests have to be filled within 30 days. Alternatively, these can be made available on the organization's website. If the charity fails to comply, the responsible charitable official himself can be fined \$20 per day.

- B. Receipts.
 - 1. A charity that solicits quid pro quo gifts of \$75 or more must provide a written statement as part of the solicitation that informs the donor that his deduction is limited to the excess of any money or the value of the property given over the value of the goods or services and that provides the donor with a good faith estimate of the value of the goods and services.
 - 2. A donor will not be allowed a deduction for a gift of \$250 or more unless he has a written contemporaneous acknowledgement from the charity,
 - 3. Tax-exempt organizations that are ineligible to receive tax deductible charitable contributions must disclose, in "an express statement (in a conspicuous and easily recognizable format)," the nondeductibility of contributions during fundraising solicitations. Organizations whose annual gross receipts do not normally exceed \$100,000 are excepted from this disclosure requirement.

IV. Relations with Fundraising Counsel

- A. The laws of most states, and good practice, impose requirements upon any agreement between a charitable organization and a fund-raising counsel or professional solicitor. The Maryland statutory requirements include the following:
1. The agreement must be in writing.
 2. A copy of the agreement must be submitted to the Secretary of State on or before the earlier of the 10th day following the making of the agreement or the start of the charitable solicitation.
 3. The text of the solicitation must be attached to the agreement and must include:
 - a. The name of the organization.
 - b. The specific charitable purposes being advanced.
 - c. A statement that the solicitor is a paid fund-raiser and on request will furnish a copy of the organization's financial statement.
 4. The agreement cannot preclude the charitable organization from using the contributions until some or all of the fund-raising expenses have been paid.
- B. Consideration in hiring fund raising counsel.
1. Get referrals from other organizations. Ask about the counsel's interpersonal skills, creativity, strategic planning abilities.

2. Interview several organizations. Interviews routinely can be conducted without cost.
3. Get written proposals from all candidates.
4. Review state records for any complaints. Complaint records in New York, for example, can be accessed through a call to 518-474-3820.
5. The written agreement minimally contain the following provisions:
 - a. Services: What services will be provided? When and how often will the organization receive reports, and what will they contain?
 - b. Schedule: If the period is expressed in days, how many hours is the day? If it is a planning or feasibility study, when will it start, and when will it be finished?
 - c. Fees: What specific professional fees will be billed? What is the billing schedule? What additional expenses will be reimbursed by the client, up to what amount? Fees will likely be based upon services rendered. Fees based upon the goal of the campaign are uncommon among premier firms and discouraged by the industry.
 - d. Custody of Funds: All funds raised for your organization should go directly to the organization. Fundraising counsel should not maintain custody of funds.

- e. Termination Clauses: Under what conditions may the agreement be terminated by either party?
- f. Personnel: Which people from the firm will provide direct services, and what other professionals may be called upon to support them?
- g. Fiscal Responsibility: Who in the organization is responsible for contractual decisions, and who is responsible for rendering payment?
- h. Location: Where will the services be rendered, on-site or off-site?