



Legal Risks and Considerations for
Online Fundraising

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Today's Discussion

- Fundraising Law Fundamentals
 - Introduction to online fundraising legal risks and considerations
 - Distinguishing charitable and non-charitable fundraising
 - IRS required notices and disclosures
 - Communications laws governing solicitations
 - Privacy and data collection
 - Tax considerations (UBIT; Sales and Use Taxes)



Today's Discussion

- State Charitable Fundraising Regulations
 - Registration and reporting requirements
 - Online solicitations
- Special Considerations for Specific Fundraising Activities
 - Raffles / Sweepstakes
 - Auctions
 - Other online fundraising platforms
 - PAC Fundraising





Fundraising Law Fundamentals

Online Fundraising Legal Risks and Considerations

- **New tools, old rules!**
 - Most applicable laws not written with specific reference to online activities, but they still apply
 - Federal and state tax laws
 - State laws regulating charitable fundraising, gaming, advertising and marketing
- **Online presence means potential compliance burdens under multiple states' laws**
- **Online communications are readily accessible to regulators**



Who is Fundraising? For What Purpose?

- **Charitable v. Non-charitable Fundraising**
- **501(c)(3) Fundraising**
 - Tax-exempt purpose—educational, scientific or charitable
 - Contributions tax-deductible by donors as charitable contributions (minus value of benefits received in return)
- **501(c)(6) Fundraising**
 - Tax-exempt purpose—improvement of business conditions of industry or profession
 - Contributions are NOT tax-deductible by donors as charitable contributions
 - Contributions may be deductible by donors as ordinary and necessary business expenses to the extent not attributable to the recipient organization's lobbying or political campaign activities



Who is Fundraising? For What Purpose?

- Typical 501(c)(3) Fundraising Activities
 - Solicitations from individual donors for tax-deductible contributions
 - Annual giving campaigns (email, website, mail, etc.)
 - Fundraising events (galas, auctions, raffles, etc.)
 - Planned giving
 - Grant solicitations
 - Corporate sponsorship solicitations
 - Merchandise sales
 - Conference/program registration fees
 - Journal/periodical advertising sales
 - Membership dues solicitations (if there are members)



Who is Fundraising? For What Purpose?

- Typical 501(c)(6) Fundraising Activities
 - Membership dues solicitations
 - Conference/program registration fees
 - Journal/periodical advertising sales
 - Corporate sponsorship solicitations
 - PAC solicitations



IRS Solicitation Notice

- Notice of Non-deductibility (IRC 6113)
 - 501(c)(6) and other organizations that are not eligible to receive tax deductible charitable contributions must include with all fundraising solicitations an express statement, in a conspicuous and easily recognizable format, that contributions to the organization are not deductible for federal income tax purposes as charitable contributions.
 - A *fundraising solicitation* is any solicitation of contributions or gifts made in written or printed form or by television, radio, or telephone. It does not include any letter or telephone call that is not part of a coordinated campaign soliciting more than 10 persons during a calendar year.
 - See IRS [Notice 88-120](#) for specific safe harbors for meeting the requirements of section 6113.



IRS Charitable Contribution Substantiation and Disclosure Requirements

- 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 for Deductibility:
 - Recordkeeping
 - Donor must maintain a bank record or written communication from the charity to claim a tax deduction
 - Substantiation
 - Donor must obtain a contemporaneous, written acknowledgement from the charity for any single contribution of \$250 or more to claim a tax deduction
 - Quid Pro Quo Disclosure Statement
 - Charity must provide, at the time of solicitation or receipt of the contribution, a written disclosure to a donor who receives goods or services in exchange for a payment exceeding \$75 regarding the value of goods or services provided and the amount of the contribution that is deductible

For more information, see [IRS Publication 1771](#)



Communications Laws Restricting Solicitations

- Email
 - CAN Spam Act
- Telephone/Texts
 - TCPA; State laws
- Faxes
 - Requirement for opt-out on all fax communications;
 - see CG Docket Nos. 02-278, 05-338, Order, FCC 14-164 (rel October 30, 2014)



Privacy and Data Collection

- Basic principles when collecting donor data:
 - Adhere to the promises made to donors regarding privacy and data protection (privacy policies/other statements)
 - Implement reasonable and appropriate measures to protect personal data against theft
 - Disclose whether the organization will sell or share data



Tax Considerations – UBIT

- Generally, income received from activities that are related to the organization's tax-exempt mission will not be subject to federal (and state) income tax
- BUT, organizations are subject to tax on unrelated business income
 - Trade or business
 - Regularly carried on
 - Not substantially related to organization's exempt purpose



Tax Considerations – UBIT

- Fundraising activities are NOT per se related
 - Revenue-generating activity itself must be related to exempt purposes; using the proceeds for good works is not enough to avoid UBIT
- Examples of UBIT concerns
 - Advertising
 - Sale of goods or performance of services unrelated to mission



Tax Considerations – UBIT

- Common exceptions to UBIT
 - **Qualified sponsorships** – Sponsor neither gets nor expects any return benefit in exchange for sponsor's payment other than:
 - Goods, services or other benefits, the total value of which does not exceed **two percent** of the sponsorship payment; or
 - **Recognition**, i.e., use or acknowledgement of the sponsor's name, logo, or product lines in connection with the nonprofit's activities– Code 513(f)
 - **Royalty income** – Passive license of intellectual property – Code 512(b)(2)
 - **Sale of donated goods** – Code 513(a)(1)
 - **Work performed by unpaid volunteers** – Code 513(a)(1)



Tax Considerations – Sales Taxes

- Nonprofits are generally NOT exempt from collecting state sales tax on merchandise sold by the organization
- Register, collect, and remit sales tax on sales to customers:
 - within the organization's home state
 - in any state where the organization has nexus



State Charitable Fundraising Regulations



State Regulation of Fundraising

- Charity / nonprofit organization
- Professional fundraiser
 - Professional solicitor
 - Professional fundraising counsel / consultant
- Commercial co-venturer



State Regulation – Charitable Organization

- Currently 40 states require charities to register
- **Triggering definition** – Generally triggered by "solicitation" – affirmative act of asking for a gift ("contribution") or selling goods/services that will benefit a charitable cause.
 - 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
 - Organizations soliciting only within membership
 - Hospitals
 - Named individual



State Regulation – Charitable Organization

- **Common Requirements**
 - Registration and Renewal
 - Disclosures when soliciting
 - Annual financial reports
 - Notification of fundraising relationships
- **Uniform Registration Statement**
 - Currently accepted by 38 states
 - <http://www.multistatefiling.org/>



Internet Solicitations – Charleston Principles

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



Charleston Principles – Application

- *Example – 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 or organizations throughout the U.S. The organization also has a website through which it accepts donations from throughout the U.S. Some of the individuals on the mailing list for emails and for U.S. mail are located outside of Texas.*
- Technically must register in:
 - Texas
 - States where sending U.S. mail / email messages
 - States from which “substantial” or “repeated and ongoing” contributions are received
- Consequences for failing to register:
 - 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



State Regulation – Professional

Solicitor/Professional Fundraising Consultant

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



State Regulation – Professional

Solicitor/Professional Fundraising Consultant

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



State Regulation – Commercial Co-Venture

- **Commercial Co-Venture (“CCV”)** – An arrangement between a charity and a commercial entity under which the commercial entity advertises in a sales or marketing campaign that the purchase or use of its goods or services will benefit a charity or charitable purpose

– *“Every time you buy a bottle of Ethos® Water, you contribute 5 cents to the Ethos® Water Fund, part of the Starbucks Foundation.”*



State Regulation – Commercial Co-Venture

- **Current registration states**

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

- **Current notification states**

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



State Regulation – Commercial Co-Venture

- **Mandatory contractual provisions**

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



State Regulation – Commercial Co-Venture

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



State Regulation – Commercial Co-Venture

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



Special Considerations for Specific Fundraising Activities



Online Fundraising Platforms

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



Online Fundraising Platforms

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



Fundraising Raffles / Sweepstakes

- Most states regulate fundraising raffles as an exception to the prohibition on lotteries
 - Qualified organizations and registration requirements vary on a state-by-state basis
 - Residency and registration/permit requirements limit ability to offer fundraising gaming via the Internet
- Some states regulate sweepstakes depending on the prize value
- 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



Charitable Promotions on Social Media

- Social Networking sites – Facebook, Twitter, LinkedIn – have their own rules for promotions that apply to nonprofits.
 - **Facebook:**
 - Include release of FB by each participant
 - Acknowledge promotion is not sponsored, endorsed, or administered by FB
 - Cannot use personal timeline to administer promotion
 - **Twitter:** Cannot structure a sweepstakes so it requires/encourages “retweeting”
 - **Pinterest:** Cannot run a contest where each pin, board, like or follow constitutes an entry
 - Cole Haan FTC Closing Letter – disclose material connection
 - **Instagram:** Don’t encourage inaccurate tagging; include release of Instagram



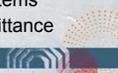
Auctions

- UBIT
 - Auction likely an unrelated trade or business, but:
 - Is it regularly carried on?
 - Is substantially all the merchandise sold donated to the organization?
 - Is substantially all the work carried out by volunteers?
- Charitable contribution deductions
 - Donors of items to be auctioned and acquirers of items at auction potentially eligible
 - Consider quid pro quo and substantiation rules
- Sales tax
 - Every auction transaction is in whole or part a purchase of goods or services, which can trigger state sales tax laws



Auctions

- Live, online, or both?
- Online auction tools
 - Manual
 - e.g., website, blog, Facebook
 - Online auction services/platforms
 - e.g., eBay Giving Works; BiddingForGood
 - Options for auctioning donated v. purchased items
 - Services may include sales tax collection/remittance



PAC Fundraising

- Campaign finance laws (federal/state/local) govern:
 - Restrictions on who may be solicited
 - May need to use password-protected section of website to ensure solicitations are not available to the general public
 - Contribution limits
 - Are corporate contributions prohibited?
 - Can a corporation pay for costs of administering an affiliated PAC?
 - Disclaimers
 - "Paid for by..."
 - Notice of tax non-deductibility



Questions?

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