

LAW OFFICES
WEBSTER, CHAMBERLAIN & BEAN
1747 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006

ARTHUR L. HEROLD
ALAN P. DYE
FRANK M. NORTHAM
JOHN W. HAZARD, JR.
HUGH K. WEBSTER
DAVID P. GOCH
JAMES S. WILSON, JR.
HEIDI K. ABEGG
SARAH E. MOONEY
CHARLES M. WATKINS
DAVID M. ABRAHAMS
JOHN R. STROUT
ANDREW C. DYE

GEORGE D. WEBSTER (1921 - 1996)
CHARLES E. CHAMBERLAIN (1917 - 2002)

(202) 785-9500
FAX: (202) 835-0243

OF COUNSEL
J. COLEMAN BEAN
KENT MASTERSON BROWN*
EDWARD D. COLEMAN*
DAVID M. REPASS

* NOT ADMITTED TO D.C. BAR

MEMORANDUM

To: Nonprofit Organizations on IM2TO

From: Chip Watkins

Date: April 3, 2014

Re: **State Charitable Solicitation Registration Requirements**

Introduction

For more than 50 years, many states have required charities, fundraising consultants, professional solicitors, and/or commercial co-venturers to register with the state before conducting fundraising campaigns in which money is solicited from state residents. During the past 20 years, these states have become increasingly aggressive and more coordinated in their administration and enforcement of these laws. Currently 38 states and the District of Columbia generally require charities (often including both §501(c)(3) and §501(c)(4) organizations) to register before soliciting funds from state residents. The charity must separately register with each state where it is soliciting, not only with its “home” state. Unfortunately, none of the state laws is the same as any other (there is no uniform law), and although many rules (and exceptions) are generally true, often, specific questions may be resolved only by resort to the language of the particular state law.

The states requiring registration by charities that are soliciting in the state are:

Alabama	Hawaii	Mississippi	Oregon
Alaska	Illinois	Missouri*	Pennsylvania
Arkansas	Kansas	New Hampshire	Rhode Island
California	Kentucky	New Jersey	So. Carolina
Colorado	Louisiana	New Mexico	Tennessee
Connecticut	Maine	New York	Utah
D.C.	Maryland	No. Carolina	Virginia
Florida	Massachusetts	No. Dakota	Washington
Georgia	Michigan	Ohio	West Virginia

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Minnesota

Oklahoma

Wisconsin

*Missouri's registration requirement exempts all organizations that are exempt from federal income tax under §501(c)(3) of the Internal Revenue Code.

States not requiring charities to register include:

Arizona	Iowa	South Dakota
Delaware	Montana	Texas*
Idaho	Nebraska	Vermont
Indiana	Nevada	Wyoming

*Texas requires only charities claiming to benefit public safety personnel and veterans to register.

Other registration requirements: Registration under the charitable solicitation statutes should be distinguished from (1) the requirement that a corporation incorporated in one state obtain a certificate of authority to do business in another state (as a "foreign" corporation); (2) the requirement in some states, e.g., New York, Michigan, and Oregon, that a charity holding property or doing intrastate business in the state register with the Attorney General as a charitable trust, regardless of whether it is soliciting in the state; and (3) the requirement that charities issuing charitable gift annuities to residents of a state be authorized to do so by the state insurance regulator, or satisfy other conditions to be exempt from licensing. Each of these is a separate registration or notice requirement, and beyond the scope of this memo.

Charities

In general, any organization that is exempt from federal income tax under §501(c)(3) (religious, educational, charitable, scientific, etc.) or §501(c)(4) (advocacy or "social welfare" organizations) must register before soliciting contributions in the state, unless the state's law is more narrowly written. Charities must also renew their registration annually, including filing copies of audited financial statements and/or IRS Form 990 for the prior fiscal year.

Solicitation

In most state statutes, the term "solicitation" is very broadly defined to include any request for money or property, including any offer to sell a product or service, as well as more traditional forms of requesting gifts. Pennsylvania's definition, quoted below, is fairly typical. Note paragraph (3), in particular.

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“Solicitation.” Any direct or indirect request for a contribution on the representation that such contribution will be used in whole or in part for a charitable purpose, including, but not limited to, any of the following:

- (1) Any oral request that is made in person, by telephone, radio or television or other advertising or communication media.
- (2) Any written or otherwise recorded or published request that is mailed, sent, delivered, circulated, distributed, posted in a public place or advertised or communicated by press, telegraph, television or any other media.
- (3) Any sale of, offer or attempt to sell any advertisement, advertising space, sponsorship, book, card, chance, coupon, device, food, magazine, merchandise, newspaper, subscription, ticket or other service or tangible good, thing or item of value.
- (4) Any announcement requesting the public to attend an appeal, assemblage, athletic or competitive event, carnival, circus, concert, contest, dance, entertainment, exhibition, exposition, game, lecture, meal, party, show, social gathering or other performance or event of any kind.

Thus, offers to sell books, or tapes of a radio program, or inviting participation in a conference for which attendees pay a fee, would constitute solicitations, even though the charity is not requesting a “gift,” as such.

In addition, the registration requirement is not dependent upon actually receiving a gift or other payment from the person being solicited. Finally, although the statutes are presumably justified by consumer protection concerns, in nearly all states, they apply to any solicitation, even if the solicitation is limited to businesses, or to company or family foundations.

Exemptions

Every state’s registration statute includes exemptions for various classes of charities. Among these are religious organizations; schools, colleges, and universities (and in many states, affiliates such as fundraising foundations and alumni associations); hospitals; and small charities that use only volunteers to solicit and whose gross receipts are relatively small. (The definition of each of these classes of exempt organizations, and the *de minimis* threshold varies in each state.)

Charities that believe they are generally exempt from registration should confirm (on a one-time basis) their exemption in each state, particularly if the organization expects to contract with a professional fundraising counsel or consultant, or a professional solicitor, *e.g.*, a telephone solicitation firm. This is because many states also require registration of fundraising consultants and professional solicitors, and will deny registration to a consultant or solicitor if the state has no record that the charity is either properly registered or recognized by the state as

exempt from registration. Confirming the exemption in advance is often required by reputable consultants or solicitors, and will usually avoid problems that could otherwise cause the early termination of a telephone or mail campaign.

Contract requirements

Many states require contracts between charities and fundraising consultants or professional solicitors to include specific provisions. For example, contracts with non-religious charities, which are required to be registered in New York, must include *verbatim* text regarding the client's ability to terminate the contract. Pennsylvania and Kentucky (among others) require a contract (and an amendment of a contract) between a charity and a fundraising consultant or solicitor to be signed by two officials of the charity, including one who is a member of the governing board.

Aside from the content of the contract, Arkansas, Kentucky, and Pennsylvania require such a contract to be filed with the state at least 15 days, 14 days, and 10 *working* days, respectively, before any services are performed under the contract.

To ensure that a charity's contracts with fundraising consultants or solicitors satisfy state law and can be timely filed, all such contracts should be carefully reviewed by the charity's lawyer who is familiar with the rules, and the contract should be signed at least 15 *working* days before *work* (not just solicitations) under the contract is to begin. (Pennsylvania routinely imposes a \$250 penalty for failure to timely file a contract.)

Fundraising consultants

More than 25 states require fundraising consultants to register before providing fundraising consulting services to charities that are soliciting in those states. Although the names and definitions vary from state to state, in general, a fundraising consultant (or fundraising counsel) is an individual (other than an employee) or business that provides creative, planning, or management services to charities in connection with fundraising, but that does not actually solicit, *i.e.*, directly contact the donor, on behalf of the charity, and that does not have custody or control (including via an escrow account) of contributions to the charity. Again, Pennsylvania's definition is representative:

"Professional fundraising counsel." Any person who is retained by a charitable organization for a fixed fee or rate under a written agreement to plan, manage, advise, consult or prepare material for or with respect to the solicitation in this Commonwealth of contributions for a charitable organization, but who does not solicit contributions or employ, procure or engage any compensated person to solicit contributions and who does not have custody or control of contributions. A bona fide salaried officer or

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regular, nontemporary employee of a charitable organization shall not be deemed to be a professional fundraising counsel provided that the individual is not employed or engaged as professional fundraising counsel or as a professional solicitor by any other person.

Work performed by fundraising consultants includes preparing copy for fundraising letters, managing the preparation, printing, and mailing of direct mail appeals, and providing high-level strategic planning, thematic ideas, and program direction for fundraising campaigns.

Professional solicitors

More than 40 states also require professional solicitors to register. Professional solicitors (sometimes called “paid solicitors” or “paid fundraisers”) are businesses or individuals who actually contact the donor and solicit contributions on behalf of charities, or have custody or control of contributions to the charity. These typically include telemarketing firms, but may also include other consultants (particularly with respect to high dollar donors) who may directly contact a donor and request a gift).

“Professional solicitor.” Any person who is retained for financial or other consideration by a charitable organization to solicit in this Commonwealth contributions for charitable purposes directly or in the form of payment for goods, services or admission to fundraising events, whether such solicitation is performed personally or through his agents, servants or employees or through agents, servants or employees especially employed by or for a charitable organization who are engaged in the solicitation of contributions, the sale of goods or services or the production of fundraising events under the direction of such person, or a person who plans, conducts, manages, carries on, advises, consults, whether directly or indirectly, in connection with the solicitation of contributions, sale of goods or services or the production of fundraising events for or on behalf of any charitable organization, but does not qualify as a professional fundraising counsel within the meaning of this act. A person who is otherwise a professional fundraising counsel shall be deemed a professional solicitor if his compensation is related to the amount of contributions received. A bona fide salaried officer or regular, nontemporary employee of a charitable organization shall not be deemed to be a professional solicitor provided that the individual is not employed or engaged as professional fundraising counsel or as a professional solicitor by any other person.

Cross checking

Many of the states that require charities, fundraising consultants, or solicitors to register also require the registrant to provide a list of the charities, consultants, or solicitors (as the case may be) with which the registrant has a contract in connection with solicitations in the state. When a charity is listed that is not registered in the state, the state will usually contact both the consultant or solicitor and the charity. The consultant or solicitor may be reminded that it is illegal to provide services with respect to solicitations in a state by a charity that is not registered, and the charity will be asked to register before any solicitations are sent into the

state. If the charity fails to register after being asked to do so, it may be subject to penalties, and the consultant or solicitor will be informed that it may not perform services for the charity with respect to solicitations in that state. In such a case, a fundraising consultant or solicitor may be required to stop performing services, or to halt mailings or telephone calls into a state, pending resolution of the issue between the charity and the state.

For this reason, charities that plan to engage a fundraising consultant or professional solicitor should ensure that (1) the consultant or solicitor is properly registered (if required) in all states where solicitations will be made and that require the consultant or solicitor to be registered, and (2) the charity is registered or recognized as exempt from registration in all states when solicitations will be made.

Registration by charities

Charities may facilitate their own registration process by using the Unified Registration Statement (developed by the Multi-State Filer Project, a consortium of national charities), which can be accessed through the website of the National Association of State Charity Officials (“NASCO”), <http://www.nasconet.org>. This form is accepted by all states except Alaska, Colorado, Florida, Hawaii, New Mexico, and Ohio. All but Alaska and Florida require on-line filing.

Using the URS simplifies the job of collecting and reporting information. However, a separate form must be filed with each state, and each state’s fee must be paid. Several states also require addenda to the URS that must be filed in order to satisfy particular state requirements. One disadvantage to using the URS is that, because it is simply a compendium of the information required by all of the states, it provides some states with much more information than they request on their own particular forms.

The states, supported by the National Center for Charitable Statistics, a part of the Urban Institute, are also beginning to implement an electronic filing process. They are also in the early stage of developing a website that would be a single point of filing for most or all states. However, a working website is probably 4-5 years in the future.

Once a registration statement is filed, the state may follow up with specific questions, or it will send a certificate of registration.

To date, although every state registration statute includes penalties for failing to register before soliciting, few states are actually assessing those penalties, unless they believe the charity is not acting in good faith, or there is some other, more significant problem—e.g.,

misleading solicitations. Pennsylvania, Mississippi, and Utah are the principal exceptions. Otherwise, the states are more interested in getting charities into the registration “system.”

Registration renewal

Every state that requires a charity to register, also requires the charity to renew its registration annually, usually by filing another registration form, or a “renewal” registration form or “annual report,” paying a fee, and filing audited financial statements and/or a copy of Form 990 for the year just ended. Renewals are typically due at the same time as Form 990 is required to be filed—4-1/2 months after the end of the charity’s fiscal year, although some states allow for 6 or 7 months, and a few states have an arbitrary annual filing due date. Most states liberally grant one extension of the renewal deadline. Connecticut’s deadline is now 11 months after the end of the fiscal year. One or two states take the position that they are not authorized to grant extensions, regardless of how good the reason.

An increasing number of states are imposing penalties for late renewal of registration—some charge \$25 per month, others a flat fee, e.g., \$50, in addition to the normal renewal fee.

In light of these renewal requirements, charities should review their engagement letters with their auditors, and ensure that the letter provides a firm deadline for completing the audit (and the Form 990, if applicable), and that the auditor will reimburse the charity for any penalties incurred on account of the auditor’s failure to timely complete the audit or Form 990.

To date, most states still require charities to renew registration using a state-specific form. Some states permit the URS to be used for renewal, as well as initial registration.

Form 990

Most states that require charities to register also require registrants to file the most recent Form 990, including all schedules and attachments. Although most of these states do not review the Form 990, several states do, and if the Form 990 has not been properly completed in accordance with its instructions, will require that it be amended before it will be accepted by the state. To avoid unnecessary delays in the registration process, charities should ensure that their audit is completed and the Form 990 prepared well before the filing deadlines for both the Form 990 and state registrations. This will allow time for review and corrections before the filing deadlines.

Form 990 was revised for all taxable years beginning on or after January 1, 2008. Because the IRS is moving toward more uniform filing and reporting standards, it is very important that the form and all required schedules be properly completed, that all required

information be reported only on the Form 990 and proper schedule (including Schedule O), and that only those non-standard attachments permitted by the instructions be included. Permitted non-standard attachments include only—

(a) name change amendment to organizing document required by Item B under *Heading*; (b) list of subordinate organizations included in a group return required by Item H under *Heading*; (c) articles of merger or dissolution, resolutions, and plans of liquidation or merger required by Schedule N (Form 990 or 990-EZ); (d) reasonable cause explanation for a late-filed return; and (e) for hospital organizations only, a copy of the most recent audited financial statements.

Do not attach materials not authorized in the instructions or not otherwise authorized by the IRS.

In addition, the revised Form 990 also includes many more requirements for explanations that may have legal consequences.

Unfortunately, we have found that many Forms 990 prepared by CPAs are not properly completed. This may be due to unfamiliarity with the form or with the reporting requirements for nonprofit organizations, or simply sloppiness in the preparation process.¹ Thus, even if Form 990 has been prepared by the charity's auditor, we recommend that it be reviewed by legal counsel familiar with the Form 990, to ensure that it has been completed in accordance with the instructions. This review should focus not on the accuracy of the numbers, but on whether revenue and expenses have been properly characterized (a legal judgment) and reported in the proper places, and whether all required schedules have been completed. (Of course, if revenue and expenses have not been reported in the proper places, some numbers may change, although the aggregate totals may not change.)

Among the more common errors that we have found are failure to properly report fees paid to professional fundraising consultants or solicitors, failure to properly report revenue and expenses in Parts VIII and IX, failure to provide required explanations, or poorly worded explanations that could raise questions and lead to an unnecessary audit. **In two instances, information about contributions from large donors was not presented on Schedule B, but in a different format. As a result, information identifying large donors and the amounts they gave was inadvertently disclosed by the IRS when it released copies of the Forms 990 to such publishers as Guidestar and the Foundation Center.**

For these reasons we strongly recommend that Form 990 be reviewed by legal counsel familiar with the tax law governing charities before it is signed and filed with the IRS or any states.

¹ Accounting, auditing, and reporting requirements for non-for-profit organizations are substantially different from those applicable to businesses. Charities should ensure that their auditor is familiar with the accounting and auditing standards that apply to not-for-profit organizations, and with the Form 990.

Fees and costs

Regardless of how a charity chooses to respond to the registration and reporting requirements, it can expect to spend about \$3,000 for registration fees payable to the states. Because some states charge a fee based on the amount of contributions received (usually nationwide, not just from that state), this amount may be less for smaller charities.

A charity will also incur expenses to copy and send the various states its IRS Form 990 (with all attachments) and/or its audited financial statements.

A charity that chooses to prepare and file the registrations itself should give the work to someone with an eye for detail and a facility for understanding the bureaucratic mind, and expect them to need 5-10 days each year, principally concentrated between 4-1/2 and 7 months after the end of its fiscal year (assuming no extensions), in order to file all of the annual reports. It is best if the work can be done by the same person each year, as the forms are complex, and the processes sometimes unique to each state.

A charity that chooses to have the work performed by an outside firm can expect to pay \$8,000 - \$12,000 in professional fees each year, unless it is exempt from registration in a substantial number of states. A charity that is generally exempt from registration, and that decides to obtain confirmation of its exemption from all states, would probably incur the higher fees only in the first year. Subsequently, the fees will be proportionately lower, depending on the number of states in which the charity is exempt.

Disclosure requirements

Section 6104(d) of the Internal Revenue Code requires all tax-exempt organizations to permit inspection, or to provide copies, of their application for federal income tax exemption (IRS Form 1023 or 1024) and the last three Forms 990, upon request, made in person or by mail. Section 501(c)(3) organizations must also make the last three copies of any Form 990-T they have filed to report and pay any tax due on income from the conduct of unrelated trade or business activities. However, this requirement applies only to Forms 990-T filed after August 17, 2006. A reasonable fee may be charged. Details of these requirements are described in IRS Publication 557, *Tax-Exempt Status for Your Organization*, and in the instructions to IRS Form 990.

Charities required to be registered in California, and whose gross receipts are at least \$2 million must also permit inspection or provide copies of their audited financial statements. California law provides that the disclosure process rules in I.R.C. §6104(d) (e.g., time requirements, allowable charges) also apply to this requirement.

State-mandated disclosures

In addition, several states require specific disclosures by charities in connection with each solicitation. To avoid interrupting print runs for state-specific disclosures, many charities use a “Uniform Disclosure Statement” that includes the text of all required by the states to which the solicitation is being sent. If the solicitation is being sent to California, Georgia, and/or Minnesota, the disclosures required by those states must be included regardless of whether the charity is registered in those states. For all other states, the disclosures are required only if the charity is registered in the state. The disclosure language for any state in which a charity is *not* registered because it is exempt from registration should be omitted from that charity’s version of the Uniform Disclosure Statement.

The exact text and format of the disclosures is usually mandated by law, and neither the text, nor the type size, nor the **boldface** type may be altered.

These disclosures may be printed at the end of a solicitation letter, on the back of a reply device, or on a separate piece of paper included in the mailing package. The disclosures should also be included on the charity’s website, in a manner that conspicuously brings them to the attention of a prospective donor, such as on the way to a “donations” page.

Separate disclosure requirements also apply to solicitations by professional solicitors. Charities that contract with professional solicitors should ensure that the firm is familiar with each state’s disclosure requirements, and that it makes all required disclosures to prospective donors.

Receipt disclosures

The Internal Revenue Code requires certain disclosures to donors when they make a contribution to a charity **in exchange for** a benefit, such as a premium item, e.g., a book, tape, or CD, or tickets to an event. These are addressed in IRS Publication 1771. In general, when a donor gives at least \$250 in a single contribution, or when a donor gives at least \$75 in exchange for a benefit, the charity must give the donor a receipt that (1) informs the donor that the amount of the deduction for the contribution is limited to the excess of the amount of the payment over the fair market value of the benefit, and (2) provides the donor with a reasonable estimate of the fair market value (generally, the retail value) of the benefit.

Other disclosure requirements apply when the benefit is of “insubstantial” value, and the charity wishes to enable a donor to claim a deduction for the full amount paid, even though some benefit has been received by the donor in exchange for the contribution.

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01 Benefits received in connection with a payment to a charity will be considered to have insubstantial fair market value for purposes of advising patrons if the requirements of paragraphs 1 and 2 are met:

1. The payment occurs in the context of a fund-raising campaign in which the charity informs patrons how much of their payment is a deductible contribution, and either

2. (a) The fair market value of all of the benefits received in connection with the payment, is not more than 2 percent of the payment, or \$50, whichever is less, or

(b) The payment is \$25 (adjusted for inflation . . .) or more and the only benefits received in connection with the payment are token items (bookmarks, calendars, key chains, mugs, posters, tee shirts, etc.) bearing the organization's name or logo. The cost (as opposed to fair market value) of all of the benefits received by a donor must, in the aggregate, be within the limits established for "low cost articles" under section 513(h)(2) of the Code. (Generally, under section 170, the deductible amount of a contribution is determined by taking into account the fair market value, not the cost to the charity, of any benefits received in return. For administrative reasons, however, in the limited circumstances of this subparagraph, the cost to the charity may be used in determining whether the benefits are insubstantial.); or

(c) The fund-raising campaign meets the following two requirements: (1) The charity mails or otherwise distributes free, unordered items to patrons. To meet this requirement, any item received by a patron must not have been distributed at the patron's request or with the express consent of the patron. Any item distributed must be accompanied by a request for a charitable contribution and by a statement that the patron may retain the item whether or not the patron makes a contribution, [and] (2) The cost (as opposed to fair market value) of all such items, in the aggregate, distributed by or on behalf of the organization to a single patron in a calendar year is within the limits established for "low cost articles" in section 513(h)(2) of the Code.

Rev. Proc. 90-12, 1990-1 C.B. 471, *as modified* by Rev. Proc. 92-49, 1992-1 C.B. 987.

All of the values in Rev. Proc. 90-12 are adjusted annually for inflation. The IRS has announced that for 2014, the \$50 value is \$104, the \$25 value is \$52, and the \$5 value is \$10.40. Rev. Proc. 2013-35, §3.28(2).

Additional information

Additional information about these requirements can be obtained from Charles M. (Chip) Watkins, at Webster, Chamberlain & Bean, LLP, Suite 1000, 1747 Pennsylvania Avenue, N.W. 20006. Webster, Chamberlain & Bean manages charitable solicitation registrations for more than 100 charities, and several professional fundraising consultants. If you have questions about charitable solicitation registration requirements that apply to your organization, please contact Mr. Watkins at (202) 785-9500, ext. 134, or at cwatkins@wc-b.com.