

## **CHARITABLE SOLICITATION REGULATION: Frequently Asked Questions**

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Many states, including California, have enacted comprehensive statutory schemes regulating charitable solicitations of the public. Those statutes vary from state to state, but in general they require registration by the charity and its fundraising agents and certain disclosures in the course of solicitation, with monetary penalties imposed for noncompliance.

In California, charitable organizations must “establish and exercise control,” not only over their own fundraising activities, but over fundraising activities conducted by others for their benefit. A charity or any person soliciting on a charity’s behalf creates a fiduciary relationship with any person from whom it solicits a charitable contribution, and the charity and fundraiser have a duty to use those contributions for the charitable purposes for which the contribution was sought.

Below are commonly asked questions that we receive regarding state laws governing charitable solicitation. These questions only address state charitable solicitation regulation and not federal or state tax law requirements for claiming an income tax deduction in connection with a charitable gift or the charity’s role in substantiating that gift. Charitable solicitation requirements also vary state-by-state. This document largely covers California law, although a few questions below address what a charity should consider before soliciting in a state other than California.

These questions and answers identify issues that should be considered when engaging in charitable solicitation activity. This document should not be construed as legal advice, however, or as a substitute for consulting with legal counsel.

### **1. What does it mean to solicit for charitable purposes?**

Under California law, a “solicitation for charitable purposes” means any request for a gift of money or property in connection with which (i) any appeal is made for charitable purposes, (ii) the name of a charity is used or referred to in the appeal as an inducement for

making a gift, or (iii) any statement is made that the gift or any part of it will go to or be used for a charitable purpose or organization.

California law also governs a “sales solicitation for charitable purposes”, which is defined as any offer to sell a thing or a service (e.g., merchandise, a membership, a coupon, or an admission ticket) for which any of (i) through (iii) described in the first paragraph above apply with respect to a sale as opposed to a gift (i.e., the name of a charity is used as an inducement for making the sale).

Solicitations and sales solicitations for charitable purposes also include solicitations in which the name of an organization of law enforcement personnel, firefighters, or other persons who protect the public safety is used or referred to as an inducement for giving, with a limited exception (when the only purpose of the solicitation is for the sole benefit of the actual active membership of the organization).

## **2. Do I have to register in California in order to engage in charitable solicitation?**

In most cases, charities formed in California will have no additional registration requirements as a result of conducting charitable solicitation beyond the registration and reporting that are already required by the California Attorney General and Secretary of State. Special rules do apply to raffles and bingo (see Question 13 below).

A charity might have an additional filing requirement with the Attorney General, if the charity collects more than 50 percent of its annual income and more than \$1 million in charitable contributions from donors in California in one calendar year and spends more than 25% of its annual income on “nonprogram activities,” defined as employee salaries, fundraising, travel expenses, and overhead and other expenses. If your organization might fall in this category, we can provide additional information.

Foreign organizations (formed in another state) are required to register with the California Attorney General, if they are doing business in California. Examples of doing business in California by foreign corporations include:

- Soliciting donations in California by mail, by ads in publications, or by any other means from outside of California.
- Holding Board meetings of the charitable corporation in California.
- Maintaining an office in California of the charitable corporation.
- Conducting charitable programs in California or having officers or employees who work here.

“Doing business” in California generally does not include merely making grants to grantees in California or maintaining financial accounts or investments in an office of a financial institution in California.

The Attorney General takes the position that California laws governing fundraising apply to foreign corporations doing business in the state.

### **3. What do I need to disclose when I solicit in California?**

Prior to any solicitation or sales solicitation for charitable purposes in California, the solicitor is required to disclose certain information in writing to the prospective donor or purchaser. This disclosure, which may be in the form of a charity brochure or other printed material, must include the name and address of the organization (or, if there is no charity, then the manner in which the money collected will be used for a charitable purpose); the nontax-exempt status of the organization, if it does not have tax exemption under both federal and state law, and the percentage of the gift or purchase price the donor or purchaser can deduct as a charitable contribution under federal and state law. The disclosure must state if any portion of the contribution is not tax deductible.

The required disclosure varies depending on whether the solicitor is a volunteer or a paid fundraiser. For instance, a volunteer solicitor can satisfy the disclosure requirements by providing the prospective donor with the name and address of the charity and the charitable purposes for which the solicitation is made and by stating that financial information about the charity may be obtained by contacting the organization’s office at the given address. Volunteers who are 18 years old or younger have no disclosure requirements at all under California law.

While the disclosure laws apply to all persons soliciting in California, the California Attorney General primarily is concerned with the activities of paid fundraisers. Paid fundraisers also have an additional disclosure requirement (See Question 7 below.)

### **4. What about local registration? Do towns or cities have their own rules?**

Charities that engage in fundraising also must comply with any local charitable solicitation laws, and these requirements vary a great deal from location to location. A charity can check on city and county requirements with either the appropriate city or county office. In some cases, the charity may need to obtain a permit or license; in others, particular disclosures or filings are required.

### **5. What is a prohibited fundraising act or practice in California?**

The California Government Code sets forth specific prohibited acts and practices in the planning, conduct, or execution of any charitable solicitation or sales promotion. In general, charities and their fundraisers may not misrepresent the purpose of the charity or the

nature, purpose, or beneficiary of a solicitation. Misrepresentation may be established by word, by conduct, or by failure to disclose a material fact, and the prohibitions apply “regardless of injury.”

In certain cases, the consent of a third party may be required. In particular, if you are going to represent that any other person sponsors, endorses, or approves a charitable solicitation or charitable sales promotion, then that person must provide written consent to the use of the person’s name for these purposes.

In addition, it is prohibited in California to represent that any part of the contributions solicited by a charity will be given to any other charity unless that organization has provided written consent to the use of its name prior to the solicitation. The written consent must be signed by an authorized officer, director, or trustee of the charity.

**6. What if we pay someone to fundraise on our behalf or to advise us on our fundraising activities?**

A **commercial fundraiser** for charitable purposes is defined as any individual, corporation, or other legal entity that for compensation does any of the following:

- Solicits funds, assets, or property in California for charitable purposes.
- As a result of a solicitation of funds, assets, or property in this state for charitable purposes, receives or controls the funds, assets, or property solicited for charitable purposes.
- Employs, procures, or engages any compensated person to solicit, receive, or control funds, assets, or property for charitable purposes.
- Plans, manages, advises, counsels, consults, or prepares material for, or with respect to, a solicitation in California, who would qualify as fundraising counsel (see first bullet point on next page) but is disqualified because compensation is based on a percentage of funds, assets, or property received as a result of a solicitation campaign.

A commercial fundraiser for charitable purposes does not include a federally insured financial institution that holds, as a depository, funds received as a result of a solicitation for charitable purposes, or an escrow agent or caging company that receives or controls funds received as a result of a solicitation. A “caging company” is defined as a business that receives contributions, processes donor mail, and deposits all contributions to an account under the sole control of the charity.

A **fundraising counsel** for charitable purposes is defined as any person who is described by all of the following:

- For compensation, *other than* as a percentage of the funds, assets, or property received as a result of a solicitation campaign, plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in California of funds, assets or property for charitable purposes.
- Does not solicit funds, assets, or property for charitable purposes.
- Does not receive or control funds, assets, or property solicited for charitable purposes in this state.
- Does not employ, procure, or engage any compensated person to solicit, receive, or control funds, assets, or property for charitable purposes.

Certain exceptions to the definition of fundraising counsel apply. For instance, registration is not required if the total annual gross compensation for performing fundraising counsel activities does not exceed \$25,000. Attorneys, investment counselors, and bankers who in the conduct of their profession provide legal, investment, or financial advice also do not qualify.

In addition, a charity and employees of a charity do not qualify as either commercial fundraisers or fundraising counsel.

#### **7. What should I be aware of if my organization does engage a commercial fundraiser or fundraising counsel?**

California law requires that a commercial fundraiser or a fundraising counsel and a charitable organization must enter into a written contract for each solicitation campaign, event, or service, and that the contract contain certain mandatory provisions. The contract must be signed by an authorized contracting officer for the commercial fundraiser and by an official authorized to sign by the charitable organization's governing body.

A charity may not contract with any commercial fundraiser or fundraising counsel unless that fundraiser has registered as required with the Attorney General's Registry of Charitable Trusts. Charitable organizations may void contracts with commercial fundraisers or fundraising counsel if the fundraiser or counsel is not properly registered.

Before beginning any charitable solicitation, a commercial fundraiser must also file a notice with the Registry setting forth information identifying the fundraiser and the charitable organization, the fundraising methods to be used, the dates when fundraising will begin and end under the contract, and identifying information about the person responsible for

directing and supervising the work of the fundraiser. The notice must be filed not less than ten days before the beginning of each solicitation campaign, event, or service, except for solicitations to aid victims of emergency hardship or disasters, in which case the notice must be filed not later than when the solicitation begins. Similar requirements apply to fundraising counsel.

Paid fundraisers also must disclose prior to an oral solicitation or sales solicitation made by direct personal contact, radio, television, telephone, or over the Internet, or at the same time as a written solicitation or sales solicitation: (a) that the solicitation or sales solicitation is being conducted by a commercial fundraiser for charitable purposes, and (b) the name of the commercial fundraiser for charitable purposes as registered with the Attorney General.

#### **8. What is a commercial coventurer arrangement?**

A commercial coventurer arrangement exists when a business represents to the public that the purchase or use of any goods, services, entertainment, or any other thing of value will benefit a charity or will be used for a charitable purpose.

Through a commercial coventurer arrangement, a company can associate itself with a charity both to support a good cause and to increase its sales or otherwise enhance its business. Regulators typically want to ensure that the promised charitable contributions occur and that no misrepresentations or misleading statements were made in connection with the promotion. Approximately 22 states regulate commercial coventurer arrangements and approximately 11 states require some form of registration.

State requirements vary. These requirements include registration with the state prior to the promotion; payment of a registration fee and in some cases posting a bond; a written contract between the commercial coventurer and the charity, in some cases including certain mandatory terms; record keeping requirements; submission of financial reports following the promotion; and mandatory disclosures to the public in connection with the promotion. Some states also require a charity to report its commercial coventurer arrangements and to register in the state where the promotion is being held.

A charity should familiarize itself with commercial coventurer requirements in the applicable state(s) before agreeing to participate in a promotion. In addition, any contract with a commercial coventurer should be reviewed to make sure that the charity is adequately protected and to avoid any unintentional joint venture relationship or unrelated business income as a result of the charity's participation.

#### **9. What if my organization is soliciting for charitable purposes in other states?**

Approximately 40 states and the District of Columbia require a charity to register before engaging in charitable solicitation in that jurisdiction. Each state has its own registration

requirements and laws governing charitable solicitation and may have the right to impose fines and penalties on those who solicit without registering in their state. A state may also revoke the right of an organization to solicit contributions in the state.

You should first determine if your organization's activity in another state will rise to the level of requiring registration in that state. For instance, holding a fundraising event, having employees or paid representatives physically present, or actively targeting prospective donors in a state (e.g., through an email distribution list) may be sufficient.

If a charity is actively soliciting in a state, it should consider the following questions:

- Is the organization required to register with the Attorney General?
- Must the organization qualify to do business in that state by registering with the Secretary of State?
- Does the organization have sufficient contact with the state to require filing for state tax exemption?
- Are there any other requirements that the state might impose on the organization? For instance, specific disclosures required with any charitable solicitation, or requirements for contracting with commercial fundraisers or fundraising counsel in that state.

**10. How does an organization register to conduct charitable solicitations in other states?**

Registering in each state requires review of that state's filing requirements and also possible exemptions that may be available (e.g., for some religious or educational organizations in certain states, or if the amount raised is below a certain threshold).

In lieu of completing independent registration forms in each applicable state, a Unified Registration Statement (URS) exists that attempts to standardize and consolidate the information and data requirements of each state that requires registration. The URS may be useful to organizations soliciting on a broad scale and subject to the registration laws of many states. Some states, however, do require state-specific information or attachments with the URS.

**11. We have a "donate now" page on our website. Are we now subject to registration in every state from where a donor may view our website or from where a donor gives us money?**

It is not clear when Internet activity will result in jurisdiction in a particular state. If a charity is passive and donors visit its web site, a state may not impose its charitable

solicitation requirements. On the other hand, a state may exert jurisdiction in cases where a charity actively reaches out to donors in that state. A strict reading of many states' solicitation laws would require that a charity maintaining a web site that includes a request for contributions register in that state.

The Charleston Principles reflect the nonbinding advice of the Board of Directors of the National Association of Attorneys General/National Association of State Charity Officials. In response to the proliferation of web site solicitations, state charity officials developed guidelines addressing when and where a charity needs to register for online charitable solicitations. For instance, under the Principles, either (i) an organization's specific targeting of persons located in a state for solicitation or (ii) the receipt of contributions from residents of a state on "a repeated and ongoing basis or a substantial basis" (neither of which is defined) through the organization's web site is sufficient to require registration in that state for a charity that is not otherwise located there.

## **12. What if I apply to foundations for grants? Am I soliciting for charitable purposes?**

A charitable solicitation often is defined broadly. As a result, applying to a foundation or corporation in another state for grant funds arguably could qualify as a solicitation in that state. In addition, an independent grant writer may qualify as a commercial fundraiser or fundraising counsel. Each state's law would need to be considered. Some states may exclude solicitations to foundations or corporations.

## **13. What about bingo or raffles?**

California generally prohibits games of chance, but makes certain exceptions for charitable bingo and raffles, subject to specific requirements. In California, holding a raffle requires separate registration and reporting obligations with the Registry of Charitable Trusts. If a game of chance is conducted over the Internet, other states may also seek to impose jurisdiction. We can provide information on raffles and bingo upon request.

## **14. What about social media?**

The Charleston Principles described in Question 11 above for internet solicitation were established before Facebook, Twitter, and other crowd-sourced fundraising websites changed the landscape for soliciting money on a broad scale. State regulation largely has not yet caught up with technology; we will continue to monitor how state regulators decide to tackle networks that solicit and raise money through social media.