



November 2009

Board Talking Points: Working With Fundraising Professionals

During this season of annual appeals and year-end giving, charitable organizations often turn to board members, staff, volunteers and hired fundraisers to assist with their fundraising efforts. In doing so, organizations should be aware of the rules regarding fundraising and charitable solicitations so they can take steps to have a positive fundraising experience while complying with the applicable laws.

Questions for Charities about Fundraising Professionals

1. What are the primary laws and legal issues that charitable organizations and their board members should consider when engaging a fundraising professional?
2. If our organization hires an individual or entity to solicit contributions or to help plan our annual appeal or fundraising event, must this individual or entity be registered with the Charities Bureau?
3. Are staff members, officers and directors, and/or outside grant-writers paid by the organization to help with fundraising covered by the statute requiring fundraising professionals to register? What about individual volunteers?
4. Must our organization have a written contract with a fundraising professional?
5. May our organization cancel its contract with a fundraising professional, and if so when and how?
6. May our organization compensate its fundraisers with a percentage of the funds raised, a finder's fee, or a bonus at the end of the fundraising campaign? May we provide such payments to our staff or board members?
7. How can I find out more about a particular fundraising professional and about fundraising regulation in New York State?

More Detailed Information:

- 1. What are the primary laws and legal issues that charitable organizations should consider when engaging a fundraising professional?**

In New York State, Article 7-A of the Executive Law ("Article 7-A") is the primary statute governing charitable solicitation and fundraising. The Charities Bureau of the Attorney General of New York (the "Charities Bureau") is charged with oversight and enforcement of this statute and its regulations. Three important considerations are: registration with the Charities Bureau, contract terms, and anti-fraud activities.

First, Article 7-A requires Professional Fundraisers (“PFR”) and Fundraising Counsel (“FRC”) to register with the Charities Bureau. Question 2 addresses who is a PFR or FRC. This document uses the term “fundraising professional” to refer collectively to PFR and FRC. Under New York law, prior to soliciting, most nonprofit organizations not only must be registered as charities but they must obtain written confirmation from any PFR or FRC that they hire that such fundraising professional is in compliance with fundraiser registration and filing requirements before the PFR or FRC engages in fundraising on their behalf.

Second, negotiating and following a fair and satisfactory contract can help your organization collect funds due, monitor expenses, and protect its reputation. While most contract provisions are negotiable and enforced by common law, Article 7-A contains certain statutory requirements, which are discussed in Question 3. We encourage organizations to have an attorney review contracts before they sign them.

Third, nonprofit organizations should review solicitation materials created by fundraising professionals because they generally are responsible for the accuracy of such materials even if prepared by a PFR or FRC. Article 7-A prohibits organizations and their fundraisers from making deceptive and misleading charitable solicitations. Intent to deceive is not required for the Attorney General to bring a lawsuit against an organization for solicitation fraud.

2. If our organization hires an individual or entity to solicit contributions or to help plan our annual appeal or fundraising event, must this individual or entity be registered with the Charities Bureau?

Yes, those who engage in fundraising activities for compensation most likely are a PFR or a FRC. Fundraising professionals who solicit contributions, handle the donations, or manage fundraising activities or events on behalf of the organization must register as a PFR. Even if they do not handle the proceeds, solicit funds or have authority to pay the expenses associated with a solicitation or fundraising event, they must register as a FRC if they receive compensation from the organization to consult, advise, manage, or assist with the fundraising solicitation or event. Fundraising professionals must register annually, although the specific filing requirements and fees are greater for PFRs than for FRCs. Individual employees of a PFR who solicit contributions are known as “Professional Solicitors” and also must register annually. *Sections 171-a, 173, 173-b of Article 7-A, New York Executive Law.*

3. Must directors, staff members or grant writers paid by the organization to help with fundraising register with the Charities Bureau as fundraisers? What about individual volunteers?

An officer, board member or employee who is acting on behalf of the organization is not a PFR or FRC within the meaning of the statute and does not need to be registered with the Charities Bureau, even if they are compensated for such activities. Uncompensated volunteers do not need to be registered with the Charities Bureau. *Section 171a of Article 7-A, New York Executive Law.* A separate question relates to whether it is appropriate to compensate directors and officers for their fundraising services (see Question 6).

If a grant writer is an employee of the organization, the grant writer need not be registered with the Charities Bureau. However, if a grant writer is not an employee but rather contracts for compensation as a “consultant” or independent contractor to prepare or submit a grant

application, the grant writer may fall within the definition of a “fundraising counsel” and be required under the law to register as a FRC with the Charities Bureau. Your organization should be careful to document any such independent contractor relationship with a legally-compliant independent contractor agreement.

4. Must our organization have a written contract with a fundraising professional?

Yes, an organization must have a written contract with any PFR or FRC that it engages. The PFR or FRC is required by law to file this contract with the Charities Bureau within ten days of signing. The contract must contain specific provisions, including, but not limited to, (i) specified start and end dates for the engagement of services; (ii) a clear narrative description of the services to be performed, (iii) a clear statement of the financial arrangement between the parties; and (iv) a provision referencing the requirements of the organization’s statutory right to cancel the contract without cost (see Question 5 below). *Section 173-a, 174-a of Article 7-A, New York Executive Law.*

Additional provisions are negotiable and may be contained in the contract. For example, to ensure that the organization receives periodic and sufficiently detailed accountings of the funds collected and expenses paid by a fundraiser, you may want to focus on contract terms that specifically address the nature and timing of financial reports.

5. May our organization cancel its contract with a fundraising professional, and if so, when and how?

The charitable organization has a statutory right to cancel its contract with a PFR or FRC without cost, penalty or liability, within 15 days following the filing of the contract with the Charities Bureau. The 15 day cancellation period begins only upon the filing of the contract with the Charities Bureau, regardless of the date of execution of the contract. Organizations are entitled to this statutory right of cancellation regardless of whether or not the contract contains a provision on the right of cancellation, and the statutory right cannot be waived by contract. To effectuate the statutory right to cancel the contract, the organization need only provide timely, written notice of its intention not to be bound by the terms of the contract to the correct address of the fundraiser. *Section 174-a of Article 7-A, New York Executive Law.*

6. May our organization compensate its fundraisers with a percentage of the funds raised, a finder’s fee, or a bonus at the end of the fundraising campaign? May we provide such payments to our staff or board members?

Percentage-based compensation arrangements, finder’s fees, and contingent fees are not expressly prohibited under New York law. However, the Association of Fundraising Professionals (“AFP”) takes the position that fundraising professionals should not receive these types of compensation because such compensation arrangements may encourage abuse and undermine the philanthropic values upon which the charitable sector is based. For members of the AFP, finder’s fees, commissions or compensation based on a percentage of contributions are a violation of the AFP Code of Ethical Principles and Standards of Professional Practices. Bonuses may be acceptable if based on performance, provided they are not a percentage, if consistent with the organization’s overall bonus system. *For more information, see the AFP website: <http://www.afpnet.org>.*

Compensation for board members is not expressly prohibited under New York law. However, many nonprofits choose not to compensate directors for their fundraising or other board activities in order to avoid questions about the organization's financial integrity and avoid potential conflicts of interest.

If an organization decides to compensate a board member for fundraising services, the compensation arrangement must be in compliance with the New York State conflict of interest rules and the IRS regulations on "excess benefit transactions." Percentage compensation arrangements with staff or board members present similar concerns to those applied to outside fundraisers. The board should vote on the compensation arrangement without the interested director being present during or participating in the vote, and such compensation must be reasonable. For more information on conflicts of interest rules and "excess benefit transactions", please see the Lawyers Alliance Legal Alert on Sound Board Governance on our website and the IRS website at www.irs.gov/charities.

7. How can I find out more about a particular fundraising professional or about fundraising regulation in New York State?

On November 23, 2009 the New York Attorney General launched a new website, www.charitiesnys.com, with online resources for charities, donors, fundraisers and members of the public involved in charitable giving. Among other features, the website contains two Charities Bureau publications that suggest questions for charities to consider before and after signing a contract with a fundraising professional: *Right from the Start* and *Tips for Charities Raising Funds in New York State*. The Charities Bureau also produces an annual report *Pennies for Charity*, which uses PFR interim and closing statements to report on how much of the funds from each telemarketing campaign went to the charity and the state statute and regulations governing fundraising. You can also contact the Charities Bureau at (518) 486-9797 or charities.fundraising@oag.state.ny.us to inquire about the registration status of a PFR or FRC and for questions about fundraising.

Lawyers Alliance staff attorneys are available to provide general information about fundraising law and regulation and also offer semi-annual workshops for nonprofits on this subject. See www.lawyersalliance.org/workshops.php for a workshop schedule.

This alert is meant to provide general information only, not legal advice. Please contact Lindsey Jones at 212-219-1800 ext. 228, ljones@lawyersalliance.org, or visit our website www.lawyersalliance.org for further information.