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Charitable Solicitation Regulation

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Charitable Solicitation Regulation

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1. What Activity is Regulated?

a) A "solicitation" is any direct or indirect request for a contribution of money or property, whether express or implied, through any medium.[1] A solicitation is deemed to have taken place whether or not a contribution is made.

b) Solicitations include any advertising which represents that the purchase or use of goods, services, entertainment or any other thing of value will benefit a charitable organization (often called "commercial co-ventures").[2]

c) Solicitation laws do not apply to unsolicited donations or other types of charitable activities such as the operation of charitable programs. In other words – a solicitation is the affirmative act of asking for a gift or selling goods or services that are advertised or marketed as benefiting a charitable organization or charitable purpose.

d) However, states' charitable trust laws may separately require registration for anyone holding property (e.g., money) for charitable purposes.

2. Constitutional Framework for Fundraising Regulation

a) The solicitation of charitable contributions is fully protected activity under the First Amendment of the United States Constitution. "'[O]ur cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money *New York Times Co. v. Sullivan,* [376 U. S. 254 (1964)].'" *Village of Schaumburg v. Citizens for a Better Environment et al.,* 444 U.S. 620, 633 (1980) *citing Bates v. State Bar of Arizona,* 433 U. S. 350, 363 (1977). This is true even when conducted by a professional fundraiser with a profit motive. *Riley v. National Federation of the Blind,* 487 U.S. 781 (1988).

b) The First Amendment protections do not prevent states from imposing

[1] *See, e.g., Cal Gov Code § 12581.2; NY Executive Law § 171-a(10).* Texas has limited laws specifically governing charitable solicitations, which focus on solicitations by veterans and public safety organizations. *See, e.g., Tex. Occ. Code § 1803.051* (requiring public safety organizations to register before soliciting); *Tex. Occ. Code § 1804.051* (requiring veterans organizations to register before using a veterans organization solicitor).

[2] *See, e.g., ALM GL ch. 68, § 18; NY Executive Law § 171-a(10).*

appropriately tailored registration requirements. *See Schaumburg* at 637-38. Registration statutes must provide that the reviewing office "'will, within a specified brief period, either issue a license or go to court.'" *Riley* at 802, *citing Freedman v. Maryland*, 380 U. S. 51, 59 (1965).

c) The First Amendment is also at issue in determining the enforceability of states' antifraud laws. *See Riley*, 487 U.S. at 800 ("the State may vigorously enforce its antifraud laws to prohibit professional fundraisers from obtaining money on false pretenses or by making false statements"). Essential to enforcement of a states' antifraud law is the element of intent. "In a properly tailored fraud action the State bears the full burden of proof [and] the gravamen of the fraud action … is particular representations made with *intent to mislead*." *Madigan v. Telemarketing Assocs., Inc*., 538 U.S. 600, 620-621 (2003) (emphasis added).

d) The tension between federal constitutional protections on the one hand, and the state's legitimate interest in preventing fraud on potential donors the other hand, continues to be a central issue in the state regulation of charitable solicitation.

3. Overview of State Fundraising Regulation

a) **Registration & Reporting**: Approximately 45 states have adopted statutory schemes to regulate charitable solicitation activity within their state. *See attached chart of registration requirements.* The regulatory schemes vary broadly and may include imposing annual registration requirements, and requiring filing of periodic financial reports on charities, fundraising counsels, professional fundraisers, and commercial co-venturers.

i) **Charitable Organizations**

(1) Organizations that solicit charitable contributions and are subject to the registration requirements typically include 501(c)(3) and 501(c)(4) organizations, but many state statutes do not limit the scope of oversight to entities based on federal tax-exempt status or classification.[3] As such, individuals, for-profit entities, unincorporated associations, and other entities soliciting contributions in support of charitable causes could potentially be subject to the registration requirements.

(2) While state regulatory frameworks are diverse, most provide that certain types of organizations are exempt from the registration and reporting requirements. Typical exemptions include religious organizations, governmental agencies/instrumentalities, educational institutions, organizations that raise a minimal amount of funds each year (e.g., less than $25,000 in gross annual revenues). Because the exemption categories

[3] *See, e.g.,* New York's definition: "Any benevolent, philanthropic, patriotic, or eleemosynary person or one purporting to be such…." *NY Executive Law § 171-a(1); Cal. Gov. Code § 12581* ("This article applies to all charitable corporations, unincorporated associations, trustees, and other legal entities holding property for charitable purposes…").

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