



MEMORANDUM

TO: Clients and Friends
FROM: Lawyers Alliance for New York
RE: Legal Guidance for New York Nonprofits in the Wake of Katrina
DATE: September 15, 2005

In response to the devastation of Hurricane Katrina, many nonprofits in the New York City area are seeking to aid victims of the disaster. In many instances, these victims have been relocated to other areas all over the U.S. – including New York – far from the communities in which they lived prior to this disaster. This memorandum identifies some of the legal issues that not-for-profit corporations should consider when undertaking disaster relief efforts, and provides an update on relevant actions and guidance by the Internal Revenue Service (IRS).

1. Does our existing organization need to take any special legal steps to establish a disaster relief program, either generally or for Hurricane Katrina victims?

Check the organization's certificate of incorporation to ensure that the planned activities fall within the organization's current corporate purposes – in terms of geography, types of services offered, population served, and other possible limitations. For example, for an organization that seeks to aid Katrina victims in the Gulf region, one question is whether the organization's certificate of incorporation restricts its activities to New York City or New York State. For organizations seeking to aid Katrina victims in New York, it is important to check that the purposes clause is broad enough to encompass the planned disaster relief work. The organization may need to amend its certificate, which requires Board action and court approval upon notice to the state Attorney General (and sometimes a consent or waiver of particular New York state agencies), in order to change or add to the corporate purposes.

The Board may also seek to establish resolutions authorizing disaster-related activity. If the organization plans to collect and distribute funds for disaster relief, the Board should adopt resolutions establishing such a disaster relief program, an appropriate mission statement for the program, and guidelines for distributing the funds.

2. What should my organization consider before devoting funds to aiding victims of Hurricane Katrina?

It is a violation of New York law “to fail to apply [charitable] contributions in a manner substantially consistent with the solicitation for charitable purposes.” Therefore, donations

must be used in furtherance of the charitable purpose for which the funds were originally provided, unless the courts have authorized a different use under the legal concept of *cy pres* relief (“as near as possible.”) Check grant letters, contracts, solicitation materials, and any other documents pursuant to which you received charitable contributions and other revenues to ensure that you are spending the funds in accordance with the donor’s wishes and in compliance with any applicable contract terms. If your organization seeks to use restricted funds for a different purpose, you must obtain the donor’s written consent or court permission.

3. What does my organization need to keep in mind in soliciting donations to aid victims of Hurricane Katrina?

Given the importance of honoring donors’ restrictions, you must ensure that your solicitation materials are clear with respect to the intended uses of monies collected. If an organization seeks to apply funds to serve immediate needs and *also* to provide long-term assistance to victims of Hurricane Katrina, then its solicitations for such a program must make that clear. It may be to the organization’s advantage to describe the proposed use of funds as broadly as possible, as it gives the organization more flexibility. Similarly, if an organization is raising money for victims of Hurricane Katrina and would like to apply the funds for future disasters, that, too, should be clear in the applicable solicitations. Organizations should also keep in mind that in New York, as in most other states, organizations that solicit funds for charitable purposes must be registered with and report to the New York State Charities Bureau and can only work with professional fundraisers and fundraising counsel who are similarly registered.

4. Can my organization accept a donation designated for a particular family or certain individuals who are affected by Hurricane Katrina?

Personal donations to benefit pre-selected individuals are not “charitable” gifts because they benefit private individuals, and it is improper for a 501(c)(3) organization to engage in such “earmarking.” Organizations are well advised to decline donations restricted to benefit named persons. One option is to encourage the donor to give an unearmarked grant to an existing, established disaster relief organization, such as the American Red Cross. Another option, if the organization has established its own disaster relief program that benefits a broad “charitable class,” is to accept the donation without any earmarking. Organizations with disaster relief programs should note that a sufficiently broad charitable class would include a disaster relief program that benefits victims of Hurricane Katrina and other hurricanes. The IRS has issued guidance on this issue, and organizations with questions about the breadth of their disaster relief program should consult legal counsel.

5. What type of assessment, if any must, my organization make before providing disaster relief services or financial assistance to an individual affected by Hurricane Katrina?

The IRS has long held – and its Publication 3833 reaffirms – that charitable organizations may provide charitable assistance to those who are either financially needy *or* in distress. Disaster relief services are intended to help those suffering from a disaster irrespective of their economic circumstances, and so an organization offering charitable

services to a victim of a disaster need not conduct a financial needs assessment. Because of the unique outpouring of charitable donations after the September 11th tragedy, an issue arose as to whether relief in the form of *cash* assistance to victims of a disaster requires a financial needs analysis. The IRS clarified in Publication 3833 that an organization must conduct a financial needs assessment before distributing cash assistance but also indicated that an individual need not be totally destitute to be financially needy, but may instead lack resources to obtain basic necessities. The IRS offers examples of permissible aid in Publication 3833, such as assistance with rent or mortgage payments and travel costs for family members to attend funerals.¹

Victoria Bjorklund, a practitioner who played a significant role in shaping tax law in the wake of September 11, offers the following useful illustration of the above concepts:

“If Ted Turner is racing his yacht in the Bermuda Triangle and becomes endangered, he is ‘distressed’ at that moment and is thus worthy of charitable rescue assistance, despite his neither being ‘poor’ nor ‘underprivileged.’ Once safely back on shore after his rescue, Mr. Turner remains eligible for mental-health charitable services (*e.g.*, counseling services) if his ordeal has left him ‘distressed.’ But he is not eligible to receive cash from charities because he is not poor or underprivileged.”²

6. Other Guidance on IRS Website

The IRS has posted a number of helpful documents and announcements on its website for charities: <http://www.irs.gov/charities/index.html>. We encourage you to visit this website because, in the wake of Hurricane Katrina, the IRS has continuously been updating the website’s information on tax relief in disaster situations.

- The IRS offers Publication 3833, “Disaster Relief: Providing Assistance Through Charitable Organizations,” first issued after the September 11 terrorist attacks, which explains how the public can use charities to help disaster victims and how new organizations may obtain federal tax-exempt status.
- The IRS is expediting processing of Applications for Tax Exemption on Form 1023 for newly forming charities aiding Katrina victims. Those seeking expedited processing should write “Disaster Relief, Hurricane Katrina” across the top of their applications.
- As it did after September 11, the IRS is encouraging people to provide disaster relief through existing charities rather than form new ones. As the IRS points out, such organizations are frequently able to administer relief programs more efficiently than

¹ Although Congress passed legislation after September 11 that permitted charities to provide charitable aid, including cash assistance, to individuals without undertaking an individual, financial need-based analysis, this exception was only applicable to aid given to victims of September 11 and not other disasters. Organizations should consult the IRS website, which will undoubtedly alert charities if Congress passes similar legislation for victims of Hurricane Katrina.

² Victoria Bjorklund, “Personal Reflections on 9/11 Legal Developments,” in *September 11: Perspectives from the Field of Philanthropy*, The Foundation Center, 2002, at 16.

newly formed organizations, because they already have fund-raising and distribution infrastructures in place.

- The IRS urges donors to give money to charities that are “qualified” to receive tax-deductible contributions under Section 501(c)(3) of the Internal Revenue Code. People who have a specific charity in mind can make sure that it is a qualified charity by searching IRS Publication 78 on the IRS website.
- The IRS is extending the deadlines to file certain tax returns and pay certain taxes for individuals and businesses in affected counties in Louisiana, Mississippi, Alabama, Florida and other designated areas.

Further information

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Our staff and volunteer attorneys are available to provide guidance on nonprofit legal issues relating to Hurricane Katrina disaster relief efforts. For further information, contact Staff Attorney Sunita Subramanian at 212-219-1800 x232, Program Associate for Client Relations Angela Cheng at x278, or Legal Director Elizabeth Guggenheimer at x231.