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Engaging Outside Help with Fundraising

While most New York nonprofits understand that they need to register with the New York State Attorney General in order to solicit charitable dollars from within New York, the legal obligations for contracting for outside help with fundraising may be less clear. This legal alert is intended to provide an overview of the registration and contract requirements for engaging outside assistance with fundraising efforts. Ensuring your organization enters into a fair and satisfactory contract can help your organization collect funds due, monitor expenses, avoid unscrupulous parties, and protect its reputation.

New York Regulation of Fundraising

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.

Article 7-A requires Professional Fundraisers (PFR) and Fundraising Counsel (FRC) to register with the Charities Bureau. This document uses the term “fundraising professional” to refer collectively to PFR and FRC. The statute also requires that nonprofits that hire fundraising professionals have a contract that meets statutory requirements.

Registration Requirements for Fundraising Professionals

Individuals paid by your organization to engage in fundraising activities are very likely to be subject to their own set of New York regulations. Fundraising professionals who solicit contributions, handle the donations, or manage fundraising activities or events on behalf of the organization must register as a Professional Fundraiser. In addition, even if your contractor does not handle the proceeds, solicit funds, or have authority to pay the expenses associated with a solicitation or fundraising event, that individual must register as a Fundraising Counsel 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.¹

If a grant writer or fundraising professional is an employee of the organization, he or she need not be registered with the Charities Bureau. However, if he or she 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

¹ Sections 171-a, 173, 173-b of Article 7-A, New York Executive Law.

organization should be careful to document any such independent contractor relationship with a legally-compliant independent contractor agreement.

Volunteers as Fundraisers

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.² A separate question relates to whether it is appropriate to compensate directors and officers for their fundraising services.

Requirements for Contracts with Professional Fundraisers or Fundraising Counsel

Your 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.³

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.⁴

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.

Compensation Arrangements Fundraising Professionals – Percentage Based Compensation

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

² Section 171a of Article 7-A, New York Executive Law.

³ Section 173-a, 174-a of Article 7-A, New York Executive Law.

⁴ Section 174-a of Article 7-A, New York Executive Law.

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.

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. Any such compensation arrangement with a Board member should be reviewed in accordance with the organization's conflict of interest policy.

This alert is meant to provide general information only, not legal advice. Please contact Bee-Seon Keum at 212-219-1800 ext. 240, bkeum@lawyersalliance.org, or visit our website www.lawyersalliance.org for further information.

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