

MASTERING THE MAZE

A guide to the labyrinth of laws that regulate campus fund raisers

BY RITA A. FUERST

Think you know the laws that apply to fund raising for education? Write down your answers to these four questions:

1. You're at a Canadian college that's preparing to solicit gifts for a new campus theater. You'll be mailing to alumni throughout the United States as well as to nonalumni who've bought your theater tickets in the past three years. Do you need to register as a charitable organization in the states that have such laws? And should your solicitation carry the disclosure statement that some states require?

2. You're the executive director of a state university foundation. A reporter for the local paper walks into your office and requests a copy of the foundation's Internal Revenue Service form 1023,

your original request for exemption, and the IRS 990 forms you've filed for the last three years. Do you have to comply?

3. As the annual fund director at a private college, you decide to hire a telemarketing firm to make your phonathon calls. Do the callers have to identify themselves as paid solicitors? Are they bound by the calling-time restrictions that for-profit telemarketers must follow?

4. You're on the board of an independent school that resides on a large piece of land. The board decides to sell a part of the property—and three trustees offer to buy it. Under the new intermediate sanctions regulations, can the school sell the land to the trustees? Could the school—or the trustees—face any additional taxes or fines?

There's no one book that answers all these questions or one government body that creates the laws and regulations you must follow. In the United States, fund raising falls under the jurisdiction of the IRS, the Federal Trade Commission, and state governments as well as many cities,

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The devil's in the details.

Now that you've read an overview of fund-raising law, get some specifics.

- Visit the Federal Trade Commission's World Wide Web site for information on the Telephone Consumer Protection Act, including a plain-English, consumer-oriented description, at www.ftc.gov/ccb/consumer_news/tcpa.html.
- Read an article by Florida-based attorney Harry Friedman that explains the IRS intermediate sanctions regulations. Contact Susan Berliner, Greenberg Traurig Attorneys-at-Law, 4106 Aurora St., Coral Gables, FL 33146; or (305) 446-2700.

Help is at hand.

Overwhelmed by the number of states in which you should register your development program? Don't panic: The National Association of State Officials has created the Uniform Registration Statement for Charitable Organizations. At least 20 states and the District of Columbia now accept this single, standard form—and two more are considering it. Although some states still require additional information, this is a step in the right direction. For more information, contact the Association of Direct Response Fundraising Counsel at (202) 347-0929.

Questions and answers.

When it comes to fund-raising law, sometimes even knowing the right question is hard. If you're puzzled, turn to *What Fundraisers Need to Know About State and Federal Regulation*, a new book edited by Rita Fuerst, author of the article at right. Written for nonprofit trustees, lawyers, CEOs, CAOs, and development officers, the book explains how regulation can influence all aspects of a fund raiser's work, from accountability to UBIT. Get a copy for \$25 (includes U.S. postage) from the Bill Heim Company, 133 E. College St., Granville, OH 43023.

A plan for planned giving.

Planned giving can be complicated, and some institutions would rather avoid it. But a report by Daniel Turse, senior development officer at Wayne State University School of Medicine, can help you make your case. The report exposes some planned giving misconceptions, such as that it's costly, it takes away from other types of giving, and it's hard to measure. For a copy, send a self-addressed 9-by-12-inch envelope with \$1.24 in postage to Turse at WSU School of Medicine, Gordon Scott Hall, 540 E. Canfield, Room 1128, Detroit, MI 48201.



towns, and counties. These entities regulate charitable solicitation *conducted* in their jurisdictions, whether or not the nonprofit is located there.

Solicitation laws exist to provide information to potential contributors and protect them from deceptive solicitation practices. They also specify prohibited acts and penalties for violations. This article can't tell you everything your campus needs to do to follow every law. But here's a description of four major areas of legal compliance you should be aware of: registration, providing documents on demand, telemarketing and direct mail, and trustees' relationship with your campus.

Registration

Many state and local governments require that soliciting organizations register with the appropriate government office each year. Most often you'll file your registration with secretaries of state or attorneys general, but some states want you to register with offices of consumer protection, commerce, or even agriculture.

Traditionally, laws have exempted colleges, universities, and schools from many of these regulations because they solicit from their "family": alumni, students, parents, faculty, and trustees who have an existing tie to the institution. Also, regulators rarely receive complaints about education fund raising—and if they do, they can easily find the campuses for an investigation. (Note that in some states you're not automatically exempt—you must request an exemption and prove that your campus is appropriately accredited.)

Whether you need to register with a particular government agency can de-

MANY STATE GOVERNMENTS REGULATE CHARITABLE SOLICITATION CONDUCTED IN THEIR JURISDICTIONS, WHETHER OR NOT THE NONPROFIT IS LOCATED THERE.

pend on the following factors. (See the map at right for more details.)

- **Solicitation parameters.** If you keep solicitations within the campus family (as previously defined) and use your own staff and volunteers to solicit, it's less likely state and local regulators will be interested in you. But if you solicit businesses, foundations, and community members not connected to your campus, review each law to verify that you're still exempt.

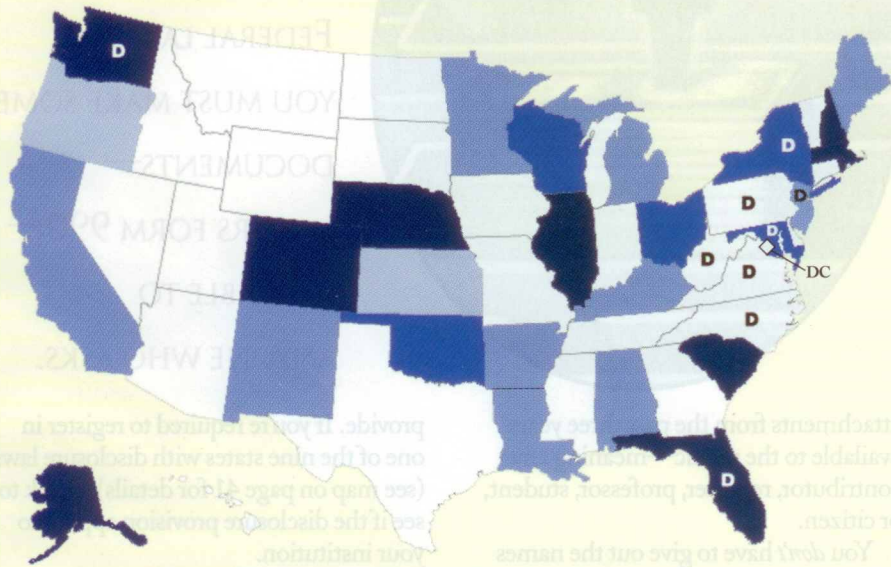
- **Total activity in the jurisdiction.** The more of a presence your institution has within a state, the more it should consider registering. If the only thing you do in a particular state is solicit a handful of alumni each year, you're probably exempt. But if you also do something more high-profile, like hold summer theater workshops there each year, you may have to register regardless of whom you solicit.

- **Type of organization.** Exemptions provided to schools, colleges, and universities don't always apply to their related foundations.

- **Type of solicitation.** States may define solicitation broadly to include direct mail to alumni and nonalumni; telephone calls by students, alumni, or paid solicitors; foundation grant requests; in-person visits with prospective contributors; requests for corporate support; and even online asks. For example, New York state's law defines "solicit" as "to directly or indirectly make a request, whether express or implied, through any medium. A 'solicitation' shall be deemed to have taken place whether or not the solicitor receives a contribution."

Even if the state requires that educational institutions register, your campus

Fund-Raising Registration Requirements For Educational Institutions and Foundations



- Neither campuses nor institutionally related foundations must register.
- Foundations and campuses soliciting outside the campus "family" must register.
- Institutionally related foundations must register.
- Foundations must register. Campuses soliciting outside the campus "family" must register.
- Foundations and campuses must register. Includes states where you must request exemption, register only once, or register when you hire a professional solicitor.
- D** Registered nonprofits must use disclosure statements.

Sources: "1998 Giving USA Update: Annual Survey of State Laws Regulating Charitable Solicitations," AAFRC Trust for Philanthropy, and "Survey of State Laws Regulating Charitable Solicitations," Philanthropy Monthly. Note: There are law firms that register and file appropriate campaign and financial reports for educational institutions and their related foundations. This information is not to be interpreted as providing legal counsel.

may still qualify for an exemption if your campaign is conducted solely by volunteers, you raise less than a certain amount of money annually (usually in the range of \$5,000 to \$25,000), or you're a state institution soliciting in-state.

Registration is usually an annual process that entails completing a multi-page form, paying an annual fee that ranges from \$20 to \$450, and disclosing financial information either on a form provided by the state or by furnishing a copy of IRS form 990.

Anything you file with a government agency becomes part of the public record. That's why it's important to file only what's requested, nothing more. For instance, when filing IRS form 990, don't include the list of contributors or the 990-T tax return for unrelated-business income unless the agencies request those attachments specifically.

To renew your registration, you may need to file additional forms during the year that summarize your solicitations or campaigns. You also may need to register each time you hire a professional solicitor. Some states are now charging a fee for filing these forms, too.

Although it's difficult to keep up with these registrations, don't let them slide. Governments are increasing their en-

forcement of charitable solicitation laws and establishing penalties for noncompliance. If you're the responsible party, you could be subject to a personal fine of \$1,000 for not filing, and the state may enjoin your campus or foundation from soliciting in it.

Providing documents on demand

Even if you determine that your campus or foundation doesn't need to register in a particular state, you may still need to comply with other parts of the charitable solicitation law, such as maintaining appropriate records and submitting them on demand.

The attorney general in your state—or in states where you're soliciting or doing business—may request certain papers regardless of whether you register there.

Consider keeping five years' worth of these documents:

- **IRS form 990**, with all parts and schedules excluding the contributors list;
- **IRS form 1023**, your original application for recognition of tax-exempt status;
- the **IRS ruling letter** stating your tax-exempt status and ability to accept tax-deductible contributions;
- **governing documents**, such as your mission statement, codes of conduct and similar documents signed by the trustees

and staff, conflict of interest policies and other policies and procedures, board meeting minutes, and notices of changes in your bylaws and articles of incorporation;

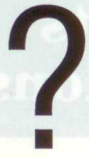
- **financial documents**, such as annual reports, audited financial statements, lists of contributors, and contracts for fund-raising services (such as counsel, direct mail services, or telemarketing);

- **copies of registrations and reports** filed with the appropriate states, counties, cities, and towns; and

- **records of restricted gifts**. If the gifts are permanently restricted, always keep the original gift instruments (wills, trusts, letters). If the gifts are temporarily restricted, keep the gift instruments for five years after the restriction has been satisfied.

If you get a document request from an attorney general, write down the items he or she is requesting. Be polite. Ask how much time you have to respond. Then call your attorney and auditor right away. You probably must comply with the request, it's just a matter of how much information you should provide.

Attorneys general are not the only people who can request information from you. Under the 1996 Taxpayer Bill of Rights 2, charitable and philanthropic organizations must make their IRS forms 990 and 1023 and certain schedules and



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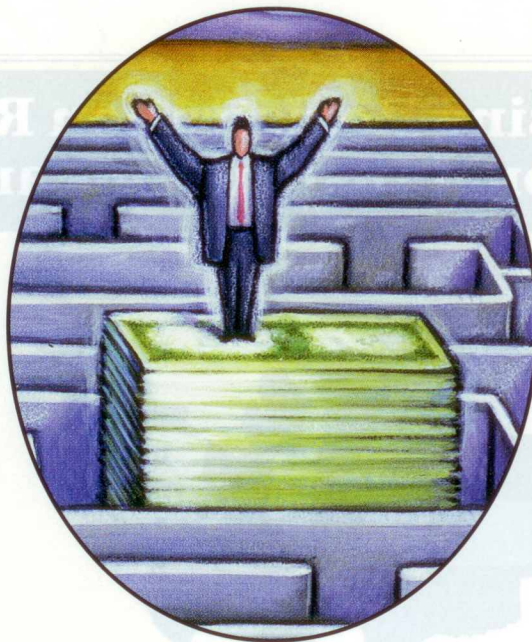
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attachments from the past three years available to the public—meaning any contributor, reporter, professor, student, or citizen.

You *don't* have to give out the names and addresses of contributors or form 990-T, but you *do* have to make available Schedule A, which lists the compensation of campus and foundation officials.

The law is very specific on how quickly you must reply to information requests: mail requests, within 30 days; in-person requests, the same day. You're allowed to charge \$1 for the first page and 15 cents for each additional page of each copy, plus postage. Your institution also may make these forms available through e-mail or the World Wide Web, but you still have to honor in-person requests.

Penalties for failure to allow public inspection range from \$20 to \$100 per day up to a maximum of \$10,000 to \$50,000. The "willful failure to comply" penalty is \$5,000 per return.

Telemarketing and direct mail regulations

In addition to registration and open record requirements, some state and local laws add restrictions or requirements to mail and phone solicitation.

• **Disclosure statements.** If your campus or foundation is exempt from registering in a state, it's probably also excused from printing a disclosure statement on its mail solicitations.

The statements generally tell potential donors how to contact the government for information on the organization. If you don't register, though, the government wouldn't have any information to

provide. If you're required to register in one of the nine states with disclosure laws (see map on page 41 for details), check to see if the disclosure provision applies to your institution.

If you use professional telemarketers in your phonathon, they may be required to make certain disclosure statements on each call. Typically, the solicitor must state the name of the telemarketing company and that the caller is a paid solicitor.

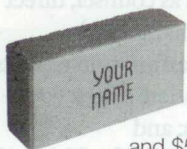
• **Calling-time restrictions.** FTC regulations issued in 1995 that restrict telemarketing calls to between 8 a.m. and 9 p.m. *may* apply to your calling program. In general, schools, colleges, universities, and institutionally related foundations are exempt if the calls are made by your students, faculty, staff, and alumni—volunteer or paid.

The calling-hour regulations *do* apply when your campus hires a telemarketing firm to sell something for you. If the goods or services you provide in return for the gift or purchase have an actual or claimed market value greater than or equal to the value of the contributor's payment, the telemarketing firm must abide by the calling-hour restrictions.

Let's say you hire a firm to sell tickets to your dinner dance. The firm is asking \$100 per ticket, but the fair market value for the dance is \$55. Because the firm is working for your campus and soliciting a gift, it would be exempt from the calling-hour restrictions. But if that dinner dance has a fair market value of \$150 and you're charging \$100, the firm has to follow the calling restrictions.

The FTC regulates businesses, not non-profits, so it doesn't have the jurisdiction to

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file suit against you for violating these laws—but a state's attorney general might.

Trustees' relationship with your campus

One more area of regulation is that of the relationship between the trustee and the institution.

Trustees have a legal and ethical duty to protect the best interests of their institutions and to conduct the services and programs of their institutions in the best interest of the public good. More specifically, directors and trustees must be reasonably informed about the institution and participate in decisions in good faith and with the care of an ordinary, prudent person. They also must avoid conflicts of interest between the campus and themselves and their family members, breaches of confidentiality, and taking advantage of certain corporate opportunities.

Both state attorneys general and the IRS are increasingly concerned about trustee conduct. The issues they're most interested in are trustee selection, executive compensation, conflicts of interest, related-party transactions, and oversight. Most often the state attorney general has the responsibility to take corrective action. Until recently, the only penalty the federal government could impose on a nonprofit for trustee conduct was to revoke its tax-exempt status. But IRS intermediate-sanctions regulations included in the 1996 Taxpayer Bill of Rights 2 give the IRS the authority to impose excise taxes—potentially significant personal tax liabilities—on people who have a substantial influence over a charitable or philanthropic organization's transactions if they have improperly benefited from the relationship.

In addition, a recent U.S. Tax Court decision gives the IRS the right to examine contracts that educational institutions or their foundations hold with fundraising counsel or other service providers to look for improper control by the firms over the nonprofit's operations.

To be sure that your trustee and contractual relationships are in good shape, your campus or foundation should document decisions about compensation and transactions with people who have a substantial influence on your organization. By documenting the process, you put the IRS in the position of having to prove personal benefit.

Start by confirming that your conflict-of-interest policy is up to date—and use

it. Have trustees or other influential people sign a statement affirming that they've read the policy and will abide by it.

Then, when you're deciding on compensation or entering into a business relationship with a person of substantial influence, follow these steps to document your decisions:

1. Appoint a committee of people who are not affected by the compensation or transaction to recommend action to the board.
2. Gather information that provides appropriate comparisons.
3. Document the reason for the decision.
4. Record the final decision, including the date the decision was made; the terms of the decision; the names of the committee members who debated, deliberated, and decided; the information they used and how they obtained it; and how the organization handled the decision in regards to people who had substantial influence and a conflict of interest in it.

The answers

Now that you've reviewed the laws governing registration, providing documents on demand, telemarketing and direct mail, and trustees' relationship with the campus, take another look at the questions at the beginning of this article. Would you like to change your responses? Here are the correct answers:

1. When you send direct mail from Canada into the United States, you must register in the states in which you are not exempt. If you must register in a state with a disclosure requirement, you probably must use the disclosure statement on your mailings.
2. You should give the reporter the documents he's requesting: forms 990 and 1023. You're probably legally required to comply, and even if you're not, turning him down might create a public-relations problem that you don't want.
3. Depending upon the states you're calling from and to, your telemarketers may need to disclose that they're paid solicitors. If the firm is soliciting a sale of goods or services, it also may need to follow the calling hour restrictions. When you hire the telemarketing firm, you're responsible for ensuring that it follows all applicable laws.
4. Even with the intermediate sanctions regulations, the school can sell the land to any of the three trustees. To prove

For More Information

To learn more about the charitable solicitation laws that apply to your institution or foundation, consult these resources, which were used to prepare this article and its accompanying graphics.

- "Annual Survey of State Laws Regulating Charitable Solicitations, As of January 1, 1998," *1998 Giving USA Update*. AAFRC Trust for Philanthropy, 25 W. 43rd St., New York, NY 10036; (212) 354-5799.

- *Exemptions for Educational Institutions*. Copilevitz & Canter, attorneys-at-law, Suite 400, 423 W. Eighth St., Kansas City, MO 64105; (816) 472-9000.

- "Survey of State Laws Regulating Charitable Solicitations," *Philanthropy Monthly*. Two Bennett St., PO Box 989, New Milford, CT 06776; (203) 354-7132.

- *Tax Economics of Charitable Giving*, 13th edition, Arthur Andersen & Co., (800) 546-3209.

- *The Law of Fund Raising*, Bruce R. Hopkins. John Wiley and Sons Inc., 1991.—RAF

that the transaction is in the best interests of the school, document the decision to sell and that the sales agreement complies with the school's conflict-of-interest policy. If the IRS challenges the sale and proves the trustees unreasonably benefited, the trustees may be liable for personal excise taxes. And the IRS still could revoke the school's tax-exempt status.

Even if you got all four correct, don't think you know everything. Although Virginia recently amended its Charitable Solicitations Act to prohibit its cities, towns, or counties from further regulating education fund raising, the trend is definitely in the opposite direction.

To keep current, get the advice of an attorney and an accountant who specialize in charitable and philanthropic organizations. Also, keep on hand some of the resources listed above in "For More Information." That way, even if you can't recite every law that applies to campus fund raising, you know where to get the right answer *before* you get into trouble. **□**