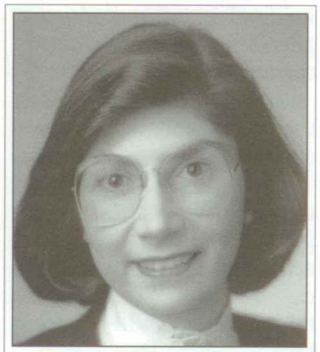
States Step Up Oversight

By Rita A. Fuerst, CFRE



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Colleges, universities, schools, and institutionally related foundations involved in fund raising may be required to register in a growing number of states before soliciting gifts.

The traditional exemption from state charitable solicitation statutes and registration requirements that colleges, universities, and schools have enjoyed is fading.

States that require not-for-profit organizations to register before soliciting gifts may treat foundations related to colleges and universities differently than they treat the educational institutions themselves.

While 15 states now require educational institutions to register, according to a survey we conducted for this article, 24 may require institutionally related foundations to register.

The historic basis for education's exemption has been that colleges, universities, and schools solicit contributions from core constituencies who already know them well: trustees, alumni, students, parents, and faculty. As a practical matter, state regulators rarely receive complaints about educational fund raising, and if questions arise they know where to find the educational institutions.

Since the 1960s, states have become increasingly active in their oversight of charitable organizations and solicitations. They have enacted legislation to inform contributors about charities that solicit them, and to protect these contributors from deception and fraud.

In the last seven years especially, states have been requiring more types of not-for-profit organizations to register and file reports, requiring them to report in greater depth, and stepping up enforcement. Today, 46 states plus the District of Columbia regulate charitable solicitation in some fashion.

During the last four years alone, eight states have limited or removed exemptions they formerly allowed for educational institutions. They are Maryland, Minnesota, Ohio, Oklahoma, Oregon, South Carolina, Virginia, and Wisconsin. The other seven states where educational institutions may have to register are Alaska, Colorado, Florida, Hawaii, Kentucky, Massachusetts, and Wisconsin.

> **Your institution and foundation may have to register as more states extend regulation.**

In Ohio, for example, the Ohio Charitable Solicitation Act exempts educational institutions only when they restrict solicitations to alumni, faculty, trustees, and students and their families. If they solicit beyond these core constituencies, they must register.

Ohio requires foundations related to educational institutions to register when soliciting *anyone* in the state.

Other states that limit educational institutions' exemption to solicitations of core constituencies are Hawaii, Kentucky, Maryland, Oklahoma, Oregon, Virginia, and Wisconsin.

In Oregon, educational institutions based within that state lost their exemption about five years ago, when a university and its foundation used designated contributions for other purposes. Other charitable organizations questioned why they had to register and pay fees for enforcement while educational institutions were exempt and paid nothing. Now Oregon-based institutions as well as their foundations must register.

Another practice that may affect exemptions is contracting with independent professional solicitors. Minnesota, for example, now requires colleges, universities, or schools to register if they contract with solicitors. Educational institutions and their related foundations must register campaigns in Colorado if they contract with solicitors. In Maryland, educational institutions must register if they contract with solicitors to contact any prospects, including core constituents.

Foundations related to educational institutions *may need to register* if they are located or will solicit prospects in any of these 24 states: Alaska, Arkansas, California, Colorado, Florida, Hawaii, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, South Carolina, Virginia, Washington, and Wisconsin.

In nine of these states, foundations may have to register while their educational institutions are exempt from registration no matter whom they solicit. These nine states are Arkansas, California, Louisiana, Maine, Michigan, New Hampshire, New Jersey, New Mexico, and New York.

In contrast, 17 jurisdictions exempt educational institutions *and their related foundations* from registration, no matter whom they solicit. They are Arizona, Connecticut, District of Columbia, Georgia, Illinois, Kansas, Mississippi, Missouri, Nebraska, North Carolina, North Dakota, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, and West Virginia.

Finally, 10 states do not require registration by any charitable organizations: Alabama, Delaware, Idaho, Indiana, Iowa, Montana, Nevada, South Dakota, Vermont, and Wyoming.

Exemption from registration spares time-consuming and sometimes costly paperwork. But it may not mean that educational fund raising is totally exempt from regulation. Even where they don't have to register, educational institutions and related foundations should keep appropriate records and be prepared to submit them to state officials on demand.

In any case, charitable solicitation statutes are just one of the many types of state laws and regulations with which educational institutions and their related foundations may have to comply.

Here are other points to bear in mind:

• States regulate fund raising within their borders regardless of where the fund-raising organization or institution is based. Educational institutions or their foundations soliciting alumni nation-

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wide may be required to register in many states.

- Solicitation includes everything from direct mail, student phonathons, and planned-giving officers' personal visits with prospects to submitting grant proposals to foundations or contacts with businesses.
- Registration is an annual process. It entails completing a multi- page form, paying an annual fee of $20 to $450, and disclosing financial information on the state's own form or, in some cases, by a copy of the registrant's IRS Form 990.
- Often other forms must be filed during the year. Such forms summarize the organization's charitable solicitations or campaigns. At least two states charge a fee for these filings, too.
- Various states require registrations with various offices: secretaries of state, attorneys general, departments of commerce or agriculture, or offices of consumer protection or charitable trusts.
- In addition to state registrations, counties and cities are also beginning to regulate charitable solicitations and requiring their own registrations and fees.
- Registration forms and other information filed with states, counties, and cities are public record. Anyone may ask to view the files and information.
- Increased enforcement usually includes penalties. The person responsible for maintaining registration may be subject to a personal fine of $1,000. A state also may take an offending organization to court for non-compliance to enjoin it from soliciting.

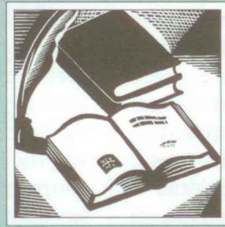
Some law firms and others can help with the hurdles of having to register and file reports with numerous states as well as with determining whether your institution or related foundation has to register at all.

A basic resource for state laws regulating charitable solicitations is the annual survey "Giving USA Update" published by the American Association of Fund-Raising Counsel, Inc., 25 West 43rd Street, New York, New York 10036, (212) 354-5799. This report provides many helpful details, including state regulatory agencies' addresses and telephone numbers, although it doesn't specify whether or not educational institutions and related foundations are required to register.

Remember: exemptions from charitable solicitation statutes do not necessarily provide exemptions from other state and local requirements. Please confer with your institution's legal counsel about statutes and regulations with which educational institutions and their related foundations may have to comply, including those regulating corporations, trusts, and foreign corporations.

Information in this article is not to be interpreted as providing legal counsel.

READING MATTER



Informative Book for New Trustees

Welcome to the Board: Your Guide to Effective Participation, by Fisher Howe—a veteran board member, consultant for nonprofit organizations, and former development professional—offers a concise, useful look at the roles and responsibilities of individual nonprofit board members. Publisher is Jossey-Bass, San Francisco. 138 Pages. $19.95.

CASE STUDY

Who Will Have the Last Gasp?

By G. Jeremiah Ryan

This is one in a series of case studies addressing ethical and management issues that may arise in the operations of institutionally related foundations. We invite your responses .

Ever since you became executive director of the Atlamonte Community College Foundation two years ago, you have been impressed with Betsy Browning, one of your board members, and with the exciting potential of her brainchild.

Dr. Browning is a professor of environmental health at a nearby university medical center, where her husband is associate dean. She is bright and enthusiastic, a generous donor, a persuasive solicitor, and a strong supporter.

Betsy's brainchild is an electronic system to help summertime allergy and asthma sufferers by displaying color-coded air quality alerts on local TV weather reports. The display features a cartoon figure nicknamed "Gasper". Two faculty members have been developing her idea in the college's electronics lab.

A private foundation that has supported Betsy's research at the medical center has been funding development of Gasper. Your foundation has received these grant funds in periodic checks written by Betsy, serving as the project's principal investigator, and has disbursed them to the college for the two faculty members.

Now after months of lab testing, it's close to rollout time, and WHIF (the major local TV station) has just agreed to give Gasper a trial run. If all goes well, other TV stations across the country will sign up to use Gasper. He could become a national icon and a source of great pride to the college.

Far more important, licensing Gasper nationally would generate substantial royalty income. College President Sam Dawkins is well aware of this prospect.

You have assumed, from all you have been told since arriving, that the foundation will be in charge of licensing Gasper and will receive all these royalty payments. So you're shocked when Betsy Browning tells you that her lawyer has drawn up an agreement under which she will take one-third of the royalties for herself, and the two faculty members—"They've worked hard on this!"—will split another third.

This will leave the foundation the remaining third for marketing Gasper and managing the licensing—which Betsy assures you could mean "a right smart sum " if the project takes off as everyone expects. "Just think," she says excitedly, "a third of what could be $1 millon a year—simply for marketing and licensing!"

Dumbfounded, you ask, "Are you really doing this?"

"Definitely," she replies. "My attorney will have the agreement ready for everyone to sign next week. I think we should get this settled before WHIF starts the trial run."

After she leaves, you call Charlie Wade, the college business officer. Neither of you can find anything in the files to clarify who has what rights, if any, concerning Gasper. You have no paperwork relating to the private foundation's original grants to Betsy as principal investigator. There is nothing in writing from Betsy assigning all royalty income to your foundation or to the college. Neither foundation nor college holds other intellectual property, and there is no written policy.

What will you recommend to President Dawkins.?

We hope you'll share your responses. Please contact Eric Wentworth by mail at CASE, Suite 400, 11 Dupont Circle, Washington, DC 20036, or by fax at (202) 387-4973.

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