

RECENT LEGISLATIVE CHANGES TO THE FLORIDA SOLICITATION OF CONTRIBUTIONS ACT INCREASE THE OVERSIGHT AND COMPLIANCE OBLIGATIONS OF FLORIDA CHARITIES

July 15, 2014

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The Florida Solicitation of Contributions Act (the “Act”) requires, with certain exceptions, anyone who solicits donations from Floridians to register with the Florida Department of Agriculture and Consumer Affairs (the “DACA”) and to renew their registration statements annually. These requirements apply to charitable organizations, sponsors, and professional solicitors or fundraising consultants. This article will focus on the applicability of the Act to charitable organizations, and recent legislative amendments to the Act, contained in House Bill 629, that became effective July 1, 2014 (the “Amendment”), that effect charitable organizations.

Organizations Excluded from the Act Now Include Blood Banks

Certain charitable organizations are exempt from the Act, including bona fide religious organizations, educational institutions, and charitable organizations that limit the solicitation of contributions to their members. Organizations with less than \$25,000 in total revenue during a fiscal year are also exempt if their fundraising activities are performed by volunteers, members, or officers who are not compensated. The Amendment adds blood banks to the list of organizations excluded from the Act and its requirements.

Reporting Changes to DACA Registration Statements

In general, charitable organizations must register with the DACA prior to engaging in solicitation activities in Florida. Charitable organizations that have not yet obtained their tax exemption determination letter from the Internal Revenue Service (the “IRS”) - a process that typically takes at least several months - can still proceed with registering with DACA, but must supply a copy of the determination letter with their renewal.

Once a charitable organization files its initial registration statement with the DACA, a renewal statement must be filed annually thereafter. Prior to enactment of the Amendment, any changes to the information reported on a registration or renewal

statement could be reported on the next renewal statement. However, the Amendment requires charitable organizations to report changes to the information in their statement related to their activities in other states, including criminal, administrative, or other actions against the charitable organization, within 10 days of the change occurring. Failure to timely disclose information regarding criminal, administrative, or other actions against the charitable organization will result in automatic suspension, and therefore solicitation is not permitted, until the information is submitted to the DACA.

Required Conflict of Interest Transaction Policy for Officers, Directors, and Trustees

Under the Amendment, charitable organizations subject to the Act must adopt a conflict of interest transaction policy, and each of the charitable organization's officers, directors, and trustees must annually certify that they are in compliance with the policy. The annual certification must be submitted to the DACA with the charitable organization's annual registration statement.

The conflict of interest policy is intended to cover transactions between a charitable organization and another party in which an officer, director, or trustee has a direct or indirect financial interest. The Amendment provides that examples of transactions subject to the conflict of interest transaction policy include the (a) sale, lease, or exchange of property to or from the charitable organization; (b) lending of money to or borrowing of money from the charitable organization; and (c) payment of compensation for services provided to or from the charitable organization.

Although not addressed in the Amendment, compliance with the conflict of interest transaction policy presumably does not mean a blanket prohibition on any transactions between the charitable organization and its officer, director, or trustee. Instead, as with most conflict of interest policies, compliance would presumably require disclosure of the conflict and approval of the transaction by the disinterested directors or trustees.

Annual Financial Statements and Reports

Charitable organizations subject to the Act must file an annual financial statement with the DACA for the immediately preceding fiscal year or provide certain federal tax forms. The annual financial statement must include, among other information, a (i) balance sheet; (ii) statement of support, revenue and expenses and change in the fund balance; and (iii) statement of functional expenses, including program service costs, management and general costs, and fundraising costs.

The Amendment defines "program service costs" to mean all expenses incurred primarily to accomplish the stated purposes of the charitable organization. The term does not include fundraising costs. The term "management and general costs" is defined to include all costs of the charitable organization that are not identifiable with a single program or fundraising activity, but which are indispensable to the conduct of

the charitable organization's programs and activities and to the charitable organization's existence.

Prior to enactment of the Amendment, charitable organizations could elect to include a financial report that had been audited by an independent certified public accounting firm. Under the Amendment, different levels of attestation of the annual financial statement are required depending upon the amount of annual contributions received by the charitable organization. If annual contributions are less than \$500,000, then an audit, review, or compilation of the financial statement is optional. If annual contributions are at least \$500,000 but less than \$1 million, the financial statement must be audited or reviewed by an independent certified public accounting firm. If annual contributions are \$1 million or more, the financial statement must be audited by an independent certified public accounting firm.

In lieu of filing an annual financial statement with the DACA, a charitable organization may submit a copy of its IRS Form 990 and all attached schedules filed for the preceding fiscal year. For smaller charitable organizations that file IRS Form 990-EZ, submitting a copy of that form and Schedule O for the preceding fiscal year is sufficient. For charitable organizations with annual contributions of at least \$500,000, these tax forms must be prepared by a certified public accountant or another professional who prepares such forms in the ordinary course of his or her business.

Disclosure of Names and Compensation for Top Employees and Other Supplemental Financial Information

The Amendment requires that charitable organizations with more than \$1 million in total revenue and that spent less than 25% of total annual functional expenses on program service costs must file supplemental information with the DACA. The required supplemental information, which must be filed on a prescribed form, includes the names and specific sums paid to all (a) employees or consultants that were paid more than \$100,000 during the preceding fiscal year, and (b) services providers that were paid more than \$100,000 during the preceding fiscal year, including a description of the services provided. In addition, the dollar amount, percentage of total revenue, and charitable contributions allocated to the funding of programs and to each of the following administrative functions:

- total salaries of all persons employed by the charitable organization;
- fundraising, including the names of any professional solicitors, amounts paid to professional solicitors, and contributions received from the campaigns of professional solicitors;
- travel expenses; and
- overhead and other expenses related to managing and administering the charitable organization.

Further, the charitable organization must provide details on any economic or business transaction between the organization and any of its officers, directors, or trustees (including any immediate family members or related entities of any of the foregoing). A charitable organization must file the supplemental financial information with the DACA within 30 days after receiving a request for such information.

Increased Scrutiny of Disaster Relief Solicitations

In response to a number of disaster relief scams in recent years, the Amendment increases the scrutiny of charitable organizations making disaster relief solicitations that have not been registered with the DACA for at least 4 consecutive years. Specifically, quarterly disaster relief financial statements must be filed with the DACA by charitable organizations that solicit contributions in Florida for a specific disaster or crises and that receive at least \$50,000 of contributions in response to such solicitations. These quarterly financial statements must detail the contributions received as a result of the solicitations and the manner in which such contributions were spent.

Under the Amendment, a “disaster” includes any natural, technological, or civil event that affects one or more countries and causes damage of sufficient severity and magnitude to result in either an official declaration of a state of emergency or an official request for international assistance. Examples include explosions, chemical spills, earthquakes, tsunamis, landslides, volcanic activity, avalanches, wildfires, tornadoes, hurricanes, droughts, and floods. A “crises” similarly includes any event that garners widespread national and global media coverage due to an actual or perceived threat of harm. The DACA is required to post a notice on its website of each disaster or crises triggering the quarterly reporting requirements within 10 days.

Certain Criminals are Prohibited from Soliciting Activities

The Amendment provides that individuals that have been convicted or plead guilty within the last 10 years to (a) a felony involving fraud, theft, larceny, embezzlement, fraudulent conversion, or misappropriation of property, or (b) any crime arising from the conduct of a solicitation for a charitable organization, are prohibited from soliciting contributions on behalf of a charitable organization and from being employed by or acting as a professional fundraising consultant or solicitor. This prohibition also applies to individuals that have been enjoined from violating any law relating to a charitable solicitation. These prohibitions apply whether the violations occurred in Florida or other states.

Required Signage for Collection Receptacles

Charitable organizations that are registered with the DACA and use collection receptacles for donated items (such as clothing and other goods) for resale are required under the Amendment to display a permanent sign or label on each side of the receptacle that discloses specific information about the organization. Such information

includes the name, business address, telephone number, and the DACA registration number for the charitable organization. This information must be printed in letters that are at least 3 inches in height and no less than one-half inch in width, and in a color that contrasts with the color of the collection receptacle.

Required Language for Solicitations, Receipts, and Similar Materials

A long standing requirement of the Act, and one that is tweaked by the Amendment, is the mandatory statement to be included in each and every printed solicitation, written confirmation, receipt, and reminder of a contribution. That statement, reprinted below, must be conspicuously displayed in all capital letters:

A COPY OF THE OFFICIAL REGISTRATION AND FINANCIAL INFORMATION MAY BE OBTAINED FROM THE DIVISION OF CONSUMER SERVICES BY CALLING TOLL-FREE WITHIN THE STATE. REGISTRATION DOES NOT IMPLY ENDORSEMENT, APPROVAL, OR RECOMMENDATION BY THE STATE.

The statement must also include a toll-free number for the DACA and as added by the Amendment, the website for the DACA that can be used to obtain the charitable organization's registration statement.

If the solicitation occurs on the website of a charitable organization, the Amendment requires that the foregoing statement be conspicuously displayed on the website. The website must also provide the mailing address where contributions are to be sent, provide the telephone number to call to process contributions, or provide for online processing of contributions.

Additional DACA Enforcement Powers

The Amendment provides the DACA with the power to invoke immediate suspension of a charitable organization, thereby prohibiting the organization from solicitation activities, if an officer or director is formally charged with either (a) a crime involving fraud, theft, larceny, embezzlement, or fraudulent conversion or misappropriation of property, or (b) a crime arising from the conduct of a solicitation for a charitable organization. The suspension will remain until the final disposition of the case or the removal or resignation of the particular officer or director.

The Amendment also provides the DACA with the power to issue an order disqualifying a charitable organization from being exempt from Florida sales and use tax. This power includes revoking a charitable organization's sales tax exemption certificate received from the Florida Department of Revenue.

Conclusion

The Amendment increases the scrutiny and compliance obligations of charitable organizations. In order for charitable organizations to be able to engage in solicitation

activities, and therefore further their mission, compliance with the Act and its Amendment are crucial. Action that should be taken immediately by charitable organizations include (a) drafting and adopting a conflict of interest transaction policy; (b) obtaining certification from officers, directors, and trustee of compliance with such policy; (c) examining the financial performance of the charitable organization to assess whether a required disclosure of supplemental financial information is reasonably likely; and (d) updating mandatory disclosure language on the charitable organizations website and other materials.

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