

3E. Development: Focus on Fundraising Rules

CAPLAW 2011 National Training Conference

Thursday, June 16, 2011
2 p.m. – 3:30 p.m.

Minneapolis, MN

Mr. Joel L. Kaleva, Esq.
Partner
Crowley Fleck
305 S. 4th Street E
Missoula, MT 59801-2701
406-523-3600
jkaleva@crowleyfleck.com



Focus on Fundraising Rules

CAPLAW National Training Conference
June 16, 2011

Joel Kaleva, Esq.
Crowley Fleck, PLLP
305 S. 4th Street E., Suite 100
Missoula, MT 59801-2701
jkaleva@crowleyfleck.com
(406) 523-3600

IRS Circular 230 Disclosure: Any advice (but none is intended) relating to federal taxes that is contained in this presentation is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding penalties under the Internal Revenue Code or (2) promoting, marketing or recommending to another party any plan or arrangement addressed herein.

© 2011 Community Action Program Legal Services, Inc.

Agenda

- How to get your tripartite board involved in fundraising
- How to pay for fundraising
- How to comply with state and IRS rules on fundraising from the public
- Key points about fundraising events and Internet fundraising
- How to report fundraising to the IRS



© 2011 Community Action Program Legal Services, Inc. 2

Getting Your Board Involved in Fundraising

- CSBG Act-mandated tripartite board
- Getting "connected" people on the board
- Consider fundraising committee
- Separate organization?
- LISC Experts Online "Good to Great Governance: Fundraising for Board Members" slides contain useful information, web links and publications on fundraising by boards
www.lisc.org/content/publications/detail/1390



© 2011 Community Action Program Legal Services, Inc. 3

How Do You Pay for Fundraising?

- Generally, use non-federal, unrestricted funds to raise funds from general public, individuals, or businesses
 - Head Start grantees see Head Start Program Instruction, ACYF-PI-HS-06-06, http://eclkc.ohs.acf.hhs.gov/hslc/Head%20Start%20Program/Program%20Design%20and%20Management/Head%20Start%20Requirements/PIs/2006/resour_pri_00106_051706.html
- BUT, nonprofits have some leeway where fundraising activity combined with allowable activity

How Do You Pay for Fundraising?

- 2 C.F.R. Part 230 (OMB A-122): costs of organized fundraising, including financial campaigns, endowment drives and solicitation of gifts and bequests and similar expenses incurred solely to raise capital or obtain contributions are unallowable (Att. B, ¶ 17)
 - For state and local grantees, OMB A-87 omits the word “solely”

How Do You Pay for Fundraising?

- Check if any state rules apply, e.g. Massachusetts regs 808 CMR § 1.05(10), <http://www.mass.gov/Eoaf/docs/osd/policy/808cmr1.doc>
 - If program gets federal and state grant funds, those funds can't be used to pay for activities with fundraising as their primary purpose
 - If program gets state funds only, fundraising expenses can be offset against fundraising revenue, but losses can't be reimbursed out of state funds
- Accounting rules on allocating joint fundraising and program or administration costs

What About Paying For Proposal Writing?

- Nonprofits may use federal grant funds for proposal writing, if reasonable and otherwise complies with 2 C.F.R. Part 230 (OMB A-122)
 - Not currently addressed by 2 C.F.R. Part 230
 - Treat as indirect unless funder gives prior approval for direct
 - HHS grant administration regulations: bid and proposal costs for current accounting period (for both federal and non-federal awards) are allowable as indirect costs 45 CFR § 74.27(b)
 - State and local governments – OMB A-87 permits charging costs of preparing proposals for federal awards

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 7

State Fundraising Rules

- Register with state charity official
 - Check if required, often is
 - Initial registration and annual filings
 - Charity official contact info
 - National Association of State Charity Officials:
www.nasconet.org

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 8

State Fundraising Rules

- Some states require specific disclosures
 - But limits on fundraising expenses have been ruled unconstitutional
 - *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980)
 - *Secretary of State of Md. V. Joseph H. Munson Co.*, 467 U.S. 947 (1984)
 - *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988)

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 9

State Fundraising Rules

- Honesty in solicitation
 - No intentionally misleading statements about how much charity will receive and purposes for which it will be used (*Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003))
- Comply with donor restrictions – need to have systems in place to track

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 10

If Outsiders Will Be Fundraising

- Authorization to use charity's name
- Advance approval of:
 - Message
 - Donor acknowledgments
 - Disclosures

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 11

Fundraising Solicitors, Fundraising Counsel, Commercial Co-Venturers

- Check if state requirements re: registration, insurance or bonding, specific contract terms or filing of contract, financial reports etc.
- Due diligence – check reputation, adherence to ethical and professional standards (e.g., standards of Association of Fundraising Professionals)
- Agency agreement subjecting solicitors and co-venturers to charity's oversight

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 12

Fundraising Solicitors, Fundraising Counsel, Commercial Co-Venturers

- Key contract terms
 - Financial benefit to charity
 - Fundraising expenses are justifiable from a PR perspective
 - Timing and manner of payments to charity
 - Protection of donor list, no use for unauthorized purposes
 - Recordkeeping and reporting to charity, access by charity to info on campaign's financial results
 - Other party responsible for making relevant filings on a timely basis with all appropriate jurisdictions (with copy to charity)

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 13

IRS Fundraising Rules – Donor Receipts (Acknowledgments)

- Receipt (written acknowledgment) for donations of \$250 or more that includes:
 - Name of organization
 - Amount of cash and/or description (but not value) of property donated
 - Whether charity provided goods and/or services in return
 - If goods/services provided, must give description and good faith estimate of value
 - Disregard goods/services with only "insubstantial value"
- Donations of < \$250 – donors need bank record (e.g. cancelled check) or acknowledgment from charity

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 14

IRS Fundraising Rules – Quid Pro Quo Disclosure

- Must provide written statement to donees who give over \$75 and get goods/services in return stating:
 - Amount of contribution deductible for federal income tax purposes is limited to the amount by which any money (plus value of any property other than money) contributed by the donor exceeds the fair market value (FMV) of goods/services provided by the charity to the donor
 - Good faith estimate of FMV of goods/services donor received

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 15

**IRS Fundraising Rules –
Quid Pro Quo Disclosure**

- Doesn't apply if goods/services provided have only "insubstantial value"
- For more info on acknowledgments and disclosures, see IRS Publication 1771 available at www.irs.gov/pub/irs-pdf/p1771.pdf

**IRS Fundraising Rules –
In-Kind Gifts**

- If donor gives property (other than cash or publicly traded securities) valued at more than \$5,000, donor must get an appraisal
 - Charity must sign appraisal summary (on IRS Form 8283) stating that it received the gift (but not making any representation re: value)
 - If charity signs 8283, it must file IRS Form 8282 if it sells, exchanges, consumes or otherwise disposes of the in-kind contribution within 3 years
 - No 8282 needed where charity distributes donated property for free or consumes it in furtherance of its charitable purposes

**IRS Fundraising Rules –
Vehicle Donations**

- For donated vehicle with claimed value of more than \$500, amount of charitable donation deduction depends on charity's use of vehicle
- Donors' charitable deductions are generally limited to amount charity receives when it sells the vehicle

**IRS Fundraising Rules –
Vehicle Donations**

- Exception – donor can claim deduction for vehicle’s FMV where charity certifies that it will either:
 - Make “material improvement” to vehicle;
 - Make “significant intervening use” of vehicle to further its regularly conducted activities; or
 - Give or sell vehicle to a needy individual for a price significantly below FMV in direct furtherance of its charitable purposes

**IRS Fundraising Rules –
Vehicle Donations**

- Special requirements re: content and timing of written acknowledgments charities must provide to vehicle donors
- Charity must file information contained in acknowledgments with IRS
- Penalties on charity for failure to comply, for providing fraudulent acknowledgments

**IRS Fundraising Rules –
Vehicle Donations**

- For more info, visit www.irs.gov, search for “Charitable Donations of Vehicles” and read “guidance” and “IRS Publications”
 - Be sure to read IRS Publication 4302, “A Charity’s Guide to Vehicle Donations”; IRS Notice 2006-1; IRS Notice 2005-44; and Form 1098-C and Instructions.
 - Donors should read IRS Publication 4303, “A Donor’s Guide to Car Donations”
- Different rules apply to corporate donors and to donations of inventory

Fundraising Events

- IRS quid pro quo disclosure
- Proper Form 990 reporting (more on this shortly)
- Oversight/internal controls
- Federally funded staff members may volunteer *only* during non-work time
 - Head Start grantees see Head Start Program Instruction, ACYF-PI-HS-06-06
http://eclkc.ohs.acf.hhs.gov/hslc/Head%20Start%20Program/Program%20Design%20and%20Management/Head%20Start%20Requirements/PIs/2006/resour_pri_00106_051706.html
- Fair Labor Standards Act (FLSA) issues if employees “volunteering”

Fundraising Event – Employee Volunteers

- FLSA issues: *Safest approach* – don’t let nonexempt employees volunteer
 - Not always practical
- If nonexempt employees volunteer, best if they:
 - Are involved in tasks completely different from their regular, paid jobs
 - Volunteer outside regular work hours, in different locations from regular work and for different supervisors
 - Volunteer for an amount of time that is minimal in comparison to their usual working hours

Fundraising Event – Employee Volunteers

- If nonexempt employees volunteer they should:
 - Not be pressured to volunteer or rewarded for volunteering
 - Sign a sign statement describing services they’ll perform and indicating they understand that CAA doesn’t expect them to volunteer and that they won’t be paid for volunteering
- Best if all decisions about whether nonexempt employees volunteer are made and documented by one department or person

Fundraising Events – Resources

- Federally funded resources (e.g., facilities, equipment, etc.) should not be used for fundraising
 - *Head Start grantee exception:* Head Start funded resources may be used on an *occasional* basis during the time the Head Start program is closed
 - Ex., A grantee may allow the use of one of its centers on the weekend or in the evening to provide assistance to the fundraising effort, but may not use the center during the time it is being used to provide Head Start services to enrolled children and families
 - See examples of permissible Head Start fundraising in Head Start Program Instruction, ACYF-PI-HS-06-06, http://eclkc.ohs.acf.hhs.gov/hslc/Head%20Start%20Program/Program%20Design%20and%20Management/Head%20Start%20Requirements/Pls/2006/resour_pri_00106_051706.html

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 25

Fundraising Events – Program Income

- Generally, money raised from fundraising events supported by non-federal funds is not program income
 - Exception, if fundraising event uses Head Start's name as part of the fundraising effort, funds generated must be treated as program income
 - See Head Start Program Instruction, ACYF-PI-HS-06-06, http://eclkc.ohs.acf.hhs.gov/hslc/Head%20Start%20Program/Program%20Design%20and%20Management/Head%20Start%20Requirements/Pls/2006/resour_pri_00106_051706.html
 - Presumably, if pay for fundraising efforts with non-federal funds and do not use the Head Start name but say that the funds raised will support CAA's child care or early childhood programs, the revenue raised would not be program income

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 26

Fundraising Events – UBIT

- Unrelated business income tax (UBIT) issues – apply where charity gets income from regularly carried on trade or business that is not substantially related to its charitable purposes
 - Some UBIT exceptions: selling donated merchandise, work done by volunteers, annual event exception, corporate sponsorship
 - Corporate sponsorship vs. advertising

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 27

Fundraising Events – Corporate Sponsorship v. Advertising

- Payments received for advertising=UBI
- IRS Web View: As its position on web advertising develops, the IRS anticipates that the position will remain consistent with its position as to advertising in the off-line world. (2000 EO CPE Text)
- Characteristics of advertisements include:
 - Comparative or qualitative language
 - Price, savings or value information
 - Endorsements
 - Inducement to buy

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 28

Fundraising Events – Corporate Sponsorship v. Advertising

- Soliciting and receiving qualified corporate sponsorship ≠ UBI
- A “qualified sponsorship payment” is a payment in exchange for which the corporate sponsor neither gets nor expects any return benefit other than:
 - Goods or services, or other benefits, the total value of which does not exceed two percent of the sponsorship payment; or
 - Recognition, i.e., use or acknowledgment of the sponsor’s name, logo, or product lines in connection with the nonprofit’s activities

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 29

Fundraising Events – Corporate Sponsorship Acknowledgement

- Mere presence of a banner or web link to a corporate sponsor’s website does not constitute taxable advertising as long as the restrictions for sponsorship acknowledgement are followed
 - Must not contain language or link to a webpage that endorses or induces site visitors to purchase, sell or use product services
- 26 C.F.R. 1.509(a)-3(f) (1), (3)

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 30

Fundraising Events – Auctions

- Not subject to UBIT if substantially all items donated, if all work done by volunteers, or if not regularly carried on
- Be sure to give acknowledgments and disclosures to purchasers and to item donors
 - Purchasers can only deduct amount by which purchase price exceeds item's FMV

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 31

Fundraising Events – Auctions

- Donors of appreciated property items can't deduct the items' FMV, only their tax basis in the item
- Check in your state whether license needed for auction or auctioneer, whether sales tax applies

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 32

Fundraising Events – Raffles

- Check state and local law requirements
 - Is charity eligible to hold raffle?
 - If so, what are requirements, e.g.:
 - State/local permit, taxes
 - Whether prize can be money
 - How proceeds can be used
 - Who can sell tickets, restrictions on who can buy tickets
 - How many raffles per year
 - Required disclosures, recordkeeping etc.

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 33

Fundraising Events – Raffles

- Notify potential purchasers that ticket price not deductible
- Check gaming box when reporting on Form 990 if reporting more than \$15,000 of gross income from gaming activities (see 990 instructions)

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 34

Fundraising Events – Other Gaming Events

- Check state and local law requirements
- Check gaming box on Form 990 if reporting more than \$15,000 of gross income from gaming activities
- Use Form W-2G to report gambling winnings to U.S. residents
- Wagering tax and occupational tax – report and pay to IRS
- Potential UBIT issues if regularly carried on
- See IRS Publication 3079, “Gaming Publication for Tax-Exempt Organizations”
www.irs.gov/pub/irs-pdf/p3079.pdf

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 35

Internet Fundraising

- Need to register in more than one state?
- Secure website for donees' credit card and other personal info
- Links to for-profit sites, Internet shopping malls
- Internet auctions

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 36

How Do You Report Fundraising to the IRS?

- Form 990 requires reporting of fundraising expenses on Part I (Summary), Part IV (Checklist of Required Schedules), and Part IX (Statement of Functional Expenses)
 - Form: www.irs.gov/pub/irs-pdf/f990.pdf
 - Instructions: <http://www.irs.gov/pub/irs-pdf/i990.pdf>
- IRS scrutiny of inaccurate fundraising reporting
 - Letters to nonprofits (including CAAs)
 - Penalties

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 37

How Do You Report It?

- On 990, must report as fundraising expenses all expenses, including allocable overhead costs, incurred in:
 - Publicizing and conducting fundraising campaigns;
 - Soliciting bequests and grants from foundations or other organizations, or **government grants reportable as contributions**;
 - Participating in federated fundraising campaigns;
 - Preparing and distributing fundraising manuals; and
 - Conducting special events that generate contributions

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 38

How Do You Report It?

- Includes proposal writing IF resulting revenue is classified on Part VIII (Statement of Revenue) as contributions, rather than service revenue
- Instructions imply most gov't grants are contributions

CAPLAW

© 2011 Community Action Program Legal Services, Inc. 39

How Do You Report It?

- Watch out for special events reporting
 - Distinguish marketing expenses (fundraising) from event expenses, such as catering (which can be subtracted from event revenue)
 - Distinguish contributions from revenue
- Individual amounts and types of contributions reported on Schedule B and open to public disclosure; names and addresses not disclosed
