

Soliciting for Charity in Washington

The provisions of RCW 19.09

(with notes on the effect of HB 1485 to take effect July 22, 2011)

By Putnam Barber, May 25, 2011

RCW 19.09: Washington's Charitable Solicitations Act appears as chapter 19.09 of the Revised Code of Washington; there are also associated rules in the Washington Administrative Code (WAC 434-120-010 to -280). The Act and the WAC regulate four related kinds of activities:

- The act of solicitation of a charitable contribution.
- The fundraising practices of "charitable organizations".
- The business practices of "commercial fundraisers".
- The content of contracts between "commercial fundraisers" and "charitable organizations".

PURPOSES: The purposes of the Act are to "(1) provide citizens of the state of Washington with information relating to persons and organizations who solicit funds from the public for charitable purposes in order to prevent (a) deceptive and dishonest practices in the conduct of soliciting funds for or in the name of charity; and (b) improper use of contributions intended for charitable purposes;

"(2) Improve the transparency and accountability of organizations that solicit funds from the public for charitable purposes; and

"(3) Develop and operate educational programs or partnerships for charitable organizations, board members, and the general public that help build public confidence and trust in organizations that solicit funds from the public for charitable purposes."

BACKGROUND: The United States Supreme Court ruled, in *Riley v. National Federation of the Blind of North Carolina* (1988), that a state cannot set an upper limit on the percentage of administrative expenses or fundraising costs incurred by a charity; doing so constitutes an infringement on freedom of speech and other protected rights. Donors and state officials nonetheless remain concerned that excessive costs may be incurred in fundraising campaigns in ways that benefit the fundraisers and not the charitable purpose. Washington and several other states accordingly require disclosure by charitable organizations of a ratio calculated on standardized terms between amounts "devoted to charitable purposes" and other expenditures. In 2003, the U.S. Supreme Court (in the *Madigan* decision) upheld the principles of *Riley* and similar decisions while ruling that fundraising firms may be prosecuted for fraud if they mislead potential donors about the amount of their donations that will be used for charitable purposes.

WHAT IS REQUIRED? Most organizations and individuals who solicit support for charitable activities in ways that are directed to Washington citizens are required to be registered with the Charities Program in the Office of the Secretary of State. Registration and subsequent reporting is required whether or not the solicitation originates in Washington State or is on behalf of a Washington organization. Contracts between commercial fundraisers and their clients must be filed with the same office prior to the delivery of any fundraising services. Annual renewals are required from organizations that solicit support, whether for themselves or for others. And changes in the registration information must be reported to the Charities Program as they occur.

The law forbids an individual or organization from raising funds using the name of or on behalf of any other person or organization without the written permission of the named beneficiary.

Detailed information about the requirements of the Act and downloadable versions of the required forms are on the Charities Program website at <http://www.sos.wa.gov/charities/> The mailing address of the Charities Program is:

PO Box 40234
Olympia, WA 98504-0234

WHAT IS EXCLUDED? There are some exemptions and exclusions that limit the application of the Charitable Solicitations Act. The exemptions and exclusions are for the most part narrowly drawn; organizations and individuals not explicitly identified as beyond the scope of the law's requirements should generally assume that they are expected to register and report. There are penalties for failure to do so when it is required.

- “Churches and their integrated auxiliaries” are excluded from the definition of “charitable organization.” They are therefore not included in the registration and reporting requirements of RCW 19.09. They are, nevertheless, covered by the rules prohibiting certain practices when soliciting, as listed in RCW 19.09.100 (see below). Other sorts of religious organizations are not exempt even when they are closely connected to a church.
- Fundraising for a named individual where the entire proceeds are passed on to the beneficiary are exempted from the requirements of the act. (This exemption applies, for example, to a campaign to help a specific child suffering from a rare disease. Such gifts are rarely tax-deductible for the donors and usually do not result in taxable income for the recipients.)
- Fundraising by an entirely volunteer group – i.e., where no-one receives any form of compensation from the group or from the contributions received –raising less than \$50,000 a year is excluded from requirements to register and report.
- Making a request to an organization that regularly makes grants or contributions is not a solicitation.
- Requests for membership renewals addressed to existing members and offers of membership that confer rights and privileges (such as golf-club dues) are not charitable solicitations.
- “Political organizations” as defined in 42.17A RCW or the Federal Elections Campaign Act are exempt from registration and reporting.
- Bingo and other games regulated by the Gambling Commission are not considered fundraising activities in the sense of RCW 19.09.
- Sales by established retailers that include a promise to make a charitable contribution of a portion of the proceeds (“commercial coventuring”) are also not required to register under RCW 19.09.

Each separate organization must register independently and file the required reports on its own behalf. There is no provision for group registration and reporting.

An organization that is not required to register and report under the Act may nevertheless submit information about itself to the Charities Program so that the organization will appear in the lists used to respond to inquiries by the public and thus avoid the possibility that a potential donor might assume that the absence of a listing implied some defect in the organization or its work. There is no fee for this service. The online form for this purpose is at <http://www.sos.wa.gov/charities/OnlineFilingsareNowAvailable.aspx>

DISCLOSURES: Consistent with its purposes, a major emphasis of the Act is on disclosure, through registration and reporting, of pertinent information by participants in fundraising efforts.

DISCLOSURES BY CHARITABLE ORGANIZATIONS: Most charitable organizations that solicit funds on their own behalf and all who contract with commercial fundraisers to undertake solicitations on their behalf must register with the Secretary of State prior to engaging in fundraising in Washington and annually thereafter. There are some exemptions (listed above). On its website, the Charities Program has a flowchart to help organizations determine whether registration and reporting are required; see <http://www.sos.wa.gov/charities/SelfAssessmentGuide.aspx>. Fees must be paid with these filings and on some other occasions. These fees are specified in RCW 19.09.062. Initial registration is \$60; subsequent renewals are \$40.

DISCLOSURES BY COMMERCIAL FUNDRAISERS: Commercial fundraisers contracting with charitable organizations to conduct campaigns in Washington must register with the Secretary of State prior to engaging in fundraising in the state and annually thereafter. They must also register each fundraising contract with the Secretary of State and provide copies of the contract documents. The fee for initial registration is \$300; for annual renewal, \$225; and for fundraising contract filing, \$20. These fees are also specified in RCW 19.09.062.

DISCLOSURES IN SOLICITATIONS: RCW 19.09.100 specifies elements that are required in any solicitation, whether made by a charitable organization on its own behalf or by a fundraiser under contract.

Charitable organizations: At the point of solicitation, solicitors must give their names, the name of the charitable organization and its principal place of business. The solicitor must also provide the toll-free number of the Secretary of State's charities hotline (800-332-GIVE) upon request. Printed materials must include the name of the organization and the charities hotline number.

Commercial fundraisers: At the point of solicitation, solicitors must give their names, the name of the commercial fundraising entity, and identify the charity which will benefit from their efforts. The caller must also provide the charities hotline toll-free number (800-332-GIVE) upon request and indicate that a notice of solicitation is on file with the Secretary of State.

These requirements apply to telephone solicitations, direct mail appeals, and stationary donation boxes or vending machines conveying any sort of charitable appeal. A sample disclosure statement is posted on the Charities Program website at <http://www.sos.wa.gov/charities/pdf/CharitiesDisclosureSample.pdf>.

The Secretary of State or the Attorney General may issue press releases and publish notices if it is determined that solicitations are being made without compliance with the requirements of RCW 19.09.

REGULATION OF SOLICITATIONS: RCW 19.09.100 regulates solicitations. It forbids telephone solicitations between 9 pm and 8 am and all forms of telephone harassment. It states that "an entity soliciting contributions for a charitable purpose shall not include in any solicitation, or in any advertising material for a solicitation, or in any promotional plan for a solicitation, any statement that is false, misleading, or deceptive." All solicitations, advertising material, and promotional plans must fully and fairly disclose the identity of the entity on whose behalf the solicitation is made. The law specifically forbids misrepresentation of tax-deductible status, of a relationship with veterans, law enforcement or fire-fighting organizations when soliciting support for such causes, and of the status – volunteer, contractor or employee – of the person making the solicitation. It bars from conducting any solicitation anyone who has been found at fault for actions connected to charitable solicitations within ten years by a public body anywhere in the United States.

These restrictions and protections apply to all entities soliciting contributions for charitable purposes, whether or not the solicitations are made by organizations or individuals required by the Act to register and report. Violations are a misdemeanors as defined in RCW 9A.20.021(3) and punishable by jail sentences of up to 90 days and fines of up to \$1,000.

Because churches, their integrated auxiliaries, and political organizations are specifically excluded from the definition of charitable organizations, they are exempt from the registration requirements. However, four subsections of RCW 19.09.100 are specifically mentioned as applying to churches along with all charitable organizations: (15) – which bars deceptive solicitations; (16) – which says solicitations may not be made after 9 pm and before 8 am; (17) – which forbids harassment of donors and potential donors; and (18) – which forbids the use of couriers to pick up donations unless the request is made in person or is for a gift in kind. Such organizations are also exempt (of course) from requirements to disclose that registration information is on file with the Secretary of State.

REPORTING FINANCIAL INFORMATION: Under 19.09 charitable organizations must report financial information related to their operations and fundraising efforts in registration and annual renewal forms.

For charitable organizations, the annual registration or report must be signed by an officer of the organization. The board (or a board committee) must review and accept any financial report that the organization files with the Charities Program. The law also states that “Charitable organizations must also ensure that the financial information included in the filing fairly represents, in all material respects, the financial condition and results of operations of the organization as of, and for, the periods presented to the secretary for filing. If the financial information submitted to the secretary is incorrect in any material way, the charitable organization may be subject to penalties as provided under RCW 19.09.279.” (That section of the RCW allows the secretary to assess civil penalties of up to \$1,000, which can be appealed at a hearing and in court.)

The secretary is authorized “to adopt rules, in accordance with chapter 34.05 RCW [the Administrative Procedures Act], that establish a set of tiered independent financial reporting requirements.” WAC 434-120-107 has been adopted to implement this tiered reporting system.

The requirement to file an annual solicitation report is considered Tier One and applies to all reporting organizations.

Tier Two includes organizations with annual gross revenue exceeding an average of \$1 million for the preceding three years. They are required to have at least one of the following documents accessible to the public on the Internet or available to the public on request: (a) a copy of the organization’s most recent Form 990 as filed with the IRS which must be prepared by a CPA or other professional who normally prepares such forms in the ordinary course of their business; or (b) an audited financial statement for the most recent accounting year prepared by an independent CPA.

Tier Three includes organizations with annual gross revenue exceeding an average of \$3 million for the preceding three years. They are required secure an audited financial statement prepared by an independent certified public accountant and to make it available to the public on the Internet, or in a paper form on request.

The rules (WAC) also provide that an organization receiving an unusually large gift may request exemption from these requirements.

Also, an organization whose average annual gross revenue exceeds the \$3 million floor but includes less than \$500,000 in actual cash (i.e., after excluding in-kind gifts, food, building materials, rent forgone and other non-cash support) is considered to be in Tier Two as described above and hence are not required to secure an audit of its financial statements.

The act emphasizes in several ways that “‘gross revenue’ or ‘annual gross revenue’ means, for any accounting period, the total value of revenue, excluding unrealized capital gains, but including noncash contributions of tangible, personal property received by or on behalf of a charitable organization from all sources, without subtracting any costs or expenses.”

Note that RCW 19.09 does not require filing a paper copy of the Form 990 or the audited financial statement with the Office of the Secretary of State (so long as the document is available to the public on the Internet or in a paper form on request).

Commercial fundraisers must report financial information relating to work performed for their clients annually at the time of renewal of registration under the Act.

Commercial fundraisers must also report all contracts entered into with other commercial fundraisers (whether or not those contracts are also reported by the other parties involved).

All contracts between commercial fundraisers and charitable organizations must be filed with the secretary before any work begins.

REQUIRED CONTRACT PROVISIONS: Safeguards for charitable organizations contracting with commercial fundraisers are provided by a requirement that contracts between commercial fundraisers and their clients contain certain terms and conditions. An outline of these terms and conditions, along with other suggestions about contracting for commercial fundraising services, can be found on the Charities Program website at <http://www.sos.wa.gov/documentvault/RequiredContentsforFundraisingServiceContractAgreements-1486.pdf>. The Act also requires that commercial fundraisers obtain a \$15,000 surety bond prior to engaging in fundraising work in the state.

PUBLIC INFORMATION: The Secretary of State’s office operates a “charities hotline” – 800-332-GIVE – which may be called by members of the public to determine whether or not a given charity or fundraiser is registered with the state.

When a fundraiser’s registration is on file, the staff of the Charities Program will provide information regarding the registered entity, including the address of its principal office and the “percent of total revenue applied to charitable purpose” as reported in the required registration. When a commercial fundraiser serves several clients, the financial report is for the aggregate of all fundraising work done during the reporting year, not for each client separately.

Similar information is available on the secretary’s website – www.sos.wa.gov/charities – and is compiled into a report issued annually by the office.

EDUCATIONAL ACTIVITIES; ADVISORY COUNCIL

The Secretary of State offers, “in conjunction with the attorney general...an education program for charitable organizations, their board members, and the general public. To the extent practicable, the secretary shall consult with the nonprofit and charitable sector and the charitable advisory council...to develop curriculum and other materials intended to educate charitable organizations, their board members, and the general public.” Announcements of upcoming educational programs offered by the Charities Program are made on the Secretary of State’s website at <http://www.sos.wa.gov/charities>.

The Charities Advisory Council consists of representatives of nonprofit organizations from across the state. It meets several times a year. The current members of the council are listed at http://www.sos.wa.gov/charities/advisory_council.aspx.

OUT-OF-STATE FUNDRAISING: The focus of any Washington-based organization will naturally be on the requirements of the Washington Charitable Solicitations Act. When programs expand to include significant activities in other states, the provisions of those states' laws and regulations pertaining to charitable solicitations will appropriately be of concern. Most states require, as does Washington, registration and reporting by any charitable organization seeking charitable contributions within their boundaries; some states require registration and reporting by fundraising consultants and contractors as well. Under Washington's Charitable Solicitations Act, the Secretary of State may enter into reciprocal agreements with other state charities regulators covering organizations that operate primarily outside Washington and accept filings with charities officials of those states in lieu of registration and reporting in Washington. Further information about other jurisdictions' requirements can be found at <http://www.multistatefiling.org> and <http://www.nasconet.org>.

DEFINITIONS:

CHARITABLE ORGANIZATION: "means any entity that solicits or collects contributions from the general public where the contribution is or is purported to be used to support a charitable purpose, but does not include any commercial fundraiser, commercial fund-raising entity, commercial coventurer, or any fund-raising counsel. Churches and their integrated auxiliaries and political organizations are not charitable organizations, but are subject to RCW 19.09.100 (12), (15), and (18)." The phrase "public charity" is often used to describe one type of tax-exempt organization as defined in the Internal Revenue Code for federal tax purposes. The definition of a charitable organization used in RCW 19.09 is quite different and, importantly, whether or not an organization has been recognized as exempt from federal corporate income taxes (such organizations are often described by the shorthand term 501(c)(3)) has no effect on whether or not the provisions of RCW 19.09 will apply to its fundraising activities in Washington state.

CHARITABLE PURPOSES: The law defines charitable solicitation inclusively. A charitable solicitation is any request including a reference to any charitable purpose. "Charitable purpose" means any religious, charitable, scientific, testing for public safety, literary, or educational purpose or any other purpose that is beneficial to the community, including environmental, humanitarian, patriotic, or civic purposes, the support of national or international amateur sports competition, the prevention of cruelty to children or animals, the advancement of social welfare, or the benefit of law enforcement personnel, firefighters, and other persons who protect public safety. The term 'charitable' is used in its generally accepted legal sense and includes relief of the poor, the distressed, or the underprivileged; advancement of religion; advancement of education or science; erecting or maintaining public buildings, monuments, or works; lessening the burdens of government; lessening neighborhood tensions; eliminating prejudice and discrimination; defending human and civil rights secured by law; and combating community deterioration and juvenile delinquency." (This language borrows and extends the language used for a similar purpose in the Internal Revenue Code and IRS regulations.)

COMMERCIAL FUNDRAISERS: "Commercial fund raiser" means any entity that for compensation or other consideration directly or indirectly solicits or receives contributions within this state for or on behalf of any charitable organization or charitable purpose, or that is engaged in the business of or represents to persons in [Washington] as independently engaged in the business of soliciting or receiving contributions for such purposes."

The definitions also make clear that merchants who occasionally advertise products by saying that a portion of the purchase price will go to charity (called "commercial coventurers" in the act) and firms or

individuals who provide advice about fundraising but do not conduct fundraising campaigns (“fundraising counsel”) are not a commercial fundraisers, and hence are not required to register.

CONTRIBUTIONS: Contributions are defined inclusively. For the purposes of the Act, a contribution is a transfer of something of value which is wholly or partly induced by a charitable solicitation. Purchases of items which are directly related to an organization’s charitable purpose, though – tickets to theatrical performances or school registration fees, for example – are not considered contributions.

In reports covering the proceeds of fundraising campaigns, the amounts reported must include the total of all receipts, including any costs incurred in connection with making it and any expenses (such as meals, space rentals or greens fees) paid to create the event or campaign. This total (the “gross amount received”) must be reported whether or not some part of the proceeds was retained as a fee by the fundraiser or paid by some other party on a charitable organization’s behalf.

FUNDRAISING COUNSEL or FUNDRAISING CONSULTANT means people or organizations who assist charitable organizations in the design of fundraising campaigns. Fees to fundraising counsel may not be computed on a percentage of funds raised or to be raised. Fundraising counsel may plan, advise, consult or prepare materials for a solicitation of contributions in this state, but may not manage, conduct, or carry on a fundraising campaign nor solicit contributions themselves or through employees or third parties with whom the counsel contracts. Also, they may not at any time have custody or control of contributions received. Individuals and organizations that meet all the terms of the definition are not required to register or report on contracts related to fundraising activities.

Volunteers, employees and compensated officers of charitable organizations maintaining a permanent office in Washington cannot be identified as fundraising counsel by the organization they work for. And attorneys, investment counselors and bankers who advise an individual, corporation, or association about charitable contributions are not acting as fundraising counsel when they do so.

GROSS REVENUE: “‘Gross revenue or ‘annual gross revenue’ means, for any accounting period, the total value of revenue, excluding unrealized capital gains, but including noncash contributions of tangible, personal property received by or on behalf of a charitable organization from all sources, without subtracting any costs or expenses.”

MEMBERSHIPS: Membership dues are not contributions when they convey an exclusive right to services or other privileges (for example, access to the organization’s facilities), professional standing or honors. This exclusion does not apply to the use of the term “member” to describe donors, as is done by many museums and other groups; this distinction is parallel to the one used by the department of revenue to determine whether the recipient organizations owes gross receipts (B&O) taxes on the resulting revenue. When an organization routinely calls its contributors “members,” campaigns to expand the number of members of the organization are solicitations as regulated by the Act.

SOLICITATION: An offer or appeal which uses the name of a charitable organization or a recognized charity is a solicitation. An offer of anything for sale which includes a suggestion that completing the transaction will benefit any charitable organization or further any charitable purpose is also a solicitation (unless the offer is made by a commercial coventurer). It does not matter whether the suggestion is true or not. It also does not matter whether the offer is accepted or not; the provisions of the Act apply even when the prospective donor declines. Special rules apply to campaigns which include offering to donate event tickets to third parties.

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- The text of RCW 19.09 is available online at – <http://apps.leg.wa.gov/RCW/default.aspx?cite=19.09>
 - The text of WAC 434-120 is available online at – <http://apps.leg.wa.gov/wac/default.aspx?cite=434-120>

- An explanatory text prepared by the Office of the Secretary of State is at – <http://sos.wa.gov/charities/>
- The text and legislative history of HB 1485 is available online at – <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1485&year=2011>

This note was first prepared 11/95; descriptions of the effect of 2007 legislation added 4/23/07; the text has been updated to reflect the regulations adopted 1/17/09 and in September 2009; the current revision notes the effect of HB 1485 as passed by the 2011 Legislature.