

CHARITABLE SOLICITATIONS ACT AMENDMENTS

2001 GENERAL SESSION

STATE OF UTAH

Sponsor: Patrice M. Arent

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This act modifies the Charitable Solicitations Act. The act defines a charitable sales promotion and requires the filing of a notice before a promotion is conducted. The act repeals the bonding requirement for professional fund raisers. The act repeals the requirement to issue an information card. The act amends the exemptions to the Charitable Solicitations Act. The act imposes fiduciary duties upon solicitors. The act makes other technical changes.

This act affects sections of Utah Code Annotated 1953 as follows:

AMENDS:

13-22-2, as last amended by Chapter 187, Laws of Utah 1996

13-22-5, as last amended by Chapter 187, Laws of Utah 1996

13-22-8, as last amended by Chapter 187, Laws of Utah 1996

13-22-9, as last amended by Chapter 187, Laws of Utah 1996

13-22-12, as last amended by Chapter 187, Laws of Utah 1996

13-22-14, as last amended by Chapter 187, Laws of Utah 1996

13-22-15, as last amended by Chapter 187, Laws of Utah 1996

13-22-16, as enacted by Chapter 280, Laws of Utah 1993

ENACTS:

13-22-22, Utah Code Annotated 1953

13-22-23, Utah Code Annotated 1953

REPEALS:

13-22-10, as last amended by Chapter 187, Laws of Utah 1996

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-22-2** is amended to read:

13-22-2. Definitions.

As used in this chapter:

(1) (a) "Charitable organization" or "organization" means any person, joint venture, partnership, limited liability company, corporation, association, group, or other entity~~[-excluding the state and its political subdivisions]~~:

(i) that is or holds itself out to be:

(A) a benevolent, educational, voluntary health, philanthropic, humane, patriotic, religious or eleemosynary, social welfare or advocacy, public health, environmental or conservation, or civic organization;

(B) for the benefit of a public safety, law enforcement, or firefighter fraternal association;

or

(C) established for any charitable purpose;

(ii) who solicits or obtains contributions solicited from the public for a charitable purpose;

or

(iii) in any manner employs a charitable appeal as the basis of any solicitation or employs an appeal that reasonably suggests or implies that there is a charitable purpose to any solicitation.

(b) "Charitable organization" includes a "chapter," "branch," "area," "office," or similar "affiliate" or any person soliciting contributions within the state for a charitable organization that has its principal place of business outside the state.

(2) "Charitable purpose" means any benevolent, educational, philanthropic, humane, patriotic, religious, eleemosynary, social welfare or advocacy, public health, environmental, conservation, civic, or other charitable objective or for the benefit of a public safety, law enforcement, or firefighter fraternal association.

(3) "Charitable solicitation" or "solicitation" means any request, directly or indirectly, for money, credit, property, financial assistance, or any other thing of value on the plea or representation that it will be used for a charitable purpose. A charitable solicitation may be made in any manner, including:

(a) any oral or written request, including any ~~[telephonic]~~ request by telephone, radio or television, or other advertising or communications media;

(b) the distribution, circulation, or posting of any handbill, written advertisement, or publication; or

(c) the sale of, offer or attempt to sell, or request of donations in exchange for any advertisement, book, card, chance, coupon, device, magazine, membership, merchandise, subscription, ticket, flower, flag, button, sticker, ribbon, token, trinket, tag, souvenir, candy, or any other article in connection with which any appeal is made for any charitable purpose, or the use of the name of any charitable organization or movement as an inducement or reason for making any purchase donation, or, in connection with any sale or donation, stating or implying that the whole or any part of the proceeds of any sale or donation will go to or be donated to any charitable purpose.

(4) "Charitable sales promotion" means an advertising or sales campaign, conducted by a commercial co-venturer, which represents that the purchase or use of goods or services offered by the commercial co-venturer will benefit, in whole or in part, a charitable organization or purpose.

(5) "Commercial co-venturer" means a person who for profit is regularly and primarily engaged in trade or commerce other than in connection with soliciting for charitable organizations or purposes.

~~[(4)]~~ (6) (a) "Contribution" means the pledge or grant for a charitable purpose of any money or property of any kind, including any of the following:

- (i) a gift, subscription, loan, advance, or deposit of money or anything of value;
- (ii) a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make a contribution for charitable purposes; and
- (iii) fees, dues, or assessments paid by members, when membership is conferred solely as consideration for making a contribution.

(b) "Contribution" does not include:

- (i) money loaned to a charitable organization by a financial institution in the ordinary course of business; or
- (ii) fees, dues, or assessments paid by members when membership is not conferred solely as consideration for making a contribution.

~~[(5)]~~ (7) "Contributor" means any donor, pledgor, purchaser, or other person who makes a

contribution.

~~[(6)]~~ (8) "Director" means the director of the Division of Consumer Protection.

~~[(7)]~~ (9) "Division" means the Division of Consumer Protection of the Department of Commerce.

~~[(8)]~~ (10) "Material fact" means information that a person of ordinary intelligence and prudence would consider relevant in deciding whether or not to make a contribution in response to a charitable solicitation.

~~[(9)]~~ (a) "~~Paid solicitor~~" means any person who, for financial or other consideration:]

~~[(i)]~~ solicits contribution for charitable purposes; or]

~~[(ii)]~~ acts as an employee or agent for any charitable organization or professional fund raiser to solicit contributions for charitable purposes.];

~~[(b)]~~ "Paid solicitor" does not include any clerical employee who is not primarily involved with soliciting.];

~~[(10)]~~ (11) (a) "Professional fund raiser," except as provided in Subsection ~~[(10)]~~ (11)(b), means any person who:

(i) for compensation or any other consideration solicits contributions for charitable purposes, or plans or manages the solicitation of contributions for or on behalf of any charitable organization or any other person;

(ii) engages in, or who holds himself out to persons in this state as being independently engaged in, the business of soliciting contributions for a charitable organization;

(iii) manages, supervises, or trains any ~~[paid]~~ solicitor whether as an employee or otherwise;

or

(iv) uses a vending device or vending device decal for financial or other consideration that implies a solicitation of contributions or donations for any charitable organization or charitable purposes.

(b) "Professional fund raiser" does not include a bona fide officer, director, volunteer, or full-time employee of a charitable organization.

~~[(11)]~~ (12) (a) "Professional fund raising counsel or consultant" or other comparable

designation or title means a person who:

(i) for compensation plans, manages, advises, counsels, consults, or prepares material for, or with respect to, the solicitation in this state of contributions for a charitable organization, whether or not at any time the person has custody of contributions from a solicitation;

(ii) does not solicit contributions; and

(iii) does not employ, procure, or engage any compensated person to solicit or receive contributions.

(b) "Professional fund raising counsel or consultant" does not include an attorney, investment counselor, or banker who in the conduct of that person's profession advises a client when actually engaged in the giving of legal, investment, or financial advice.

~~[(12)]~~ (13) "Vending device" means a container used by a charitable organization~~[, paid solicitor,]~~ or professional fund raiser, for the purpose of collecting a charitable solicitation, contribution, or donation whether or not the device offers a product or item in return for the contribution or donation. "Vending device" includes machines, boxes, jars, wishing wells, barrels, or any other container.

~~[(13)]~~ (14) "Vending device decal" means any decal, tag, or similar designation material that is attached to a vending device, whether or not used or placed by a charitable organization~~[, paid solicitor,]~~ or professional fund raiser, that would indicate that all or a portion of the proceeds from the purchase of items from the vending device will go to a specific charitable organization.

Section 2. Section **13-22-5** is amended to read:

13-22-5. Registration required.

(1) It is unlawful for any organization that is not exempt under Section 13-22-8 to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable purpose, unless the organization is registered with the division.

(2) Subsection (1) does not prohibit an organization from receiving an unsolicited contribution.

(3) It is unlawful for any professional fund raiser to knowingly solicit, request, promote, advertise, or sponsor the solicitation in this state of any contribution for a charitable organization,

whether or not the charitable organization is exempt under Section 13-22-8, unless the professional fund raiser [~~is~~] and any nonexempt charitable organization that is benefitted are registered with the division.

(4) It is unlawful for any professional fund raising counsel or consultant to knowingly plan, manage, advise, counsel, consult, or prepare material for, or with respect to, the solicitation in this state of a contribution for a charitable organization, whether or not the charitable organization is exempt under Section 13-22-8, unless the professional fund raising counsel or consultant [~~is~~] and any nonexempt charitable organization that is benefitted are registered with the division.

Section 3. Section **13-22-8** is amended to read:

13-22-8. Exemptions.

(1) Section 13-22-5 does not apply to:

(a) a solicitation that an organization conducts among its own established and bona fide membership exclusively through the voluntarily donated efforts of other members or officers of the organization;

(b) a bona fide religious, ecclesiastical, or denominational organization if:

(i) the solicitation is made for a church, missionary, religious, or humanitarian purpose; and

(ii) the organization is either:

(A) a lawfully organized corporation, institution, society, church, or established physical place of worship, at which nonprofit religious services and activities are regularly conducted and carried on;

(B) a bona fide religious group:

(I) that does not maintain specific places of worship;

(II) that is not subject to federal income tax; and

(III) not required to file an IRS Form 990 under any circumstance; [~~and~~] or

(C) a separate group or corporation that is an integral part of an institution that is an income tax exempt organization under 26 U.S.C. Sec. 501(c)(3) and is not primarily supported by funds solicited outside its own membership or congregation;

(c) a solicitation by a broadcast media owned or operated by an educational institution or

governmental entity, or any entity organized solely for the support of that broadcast media;

(d) except as provided in Subsection 13-22-21(1), a solicitation for the relief of any person sustaining a life-threatening illness or injury specified by name at the time of solicitation if the entire amount collected without any deduction is turned over to the named person;

(e) a political party authorized to transact its affairs within this state and any candidate and campaign worker of the party if the content and manner of any solicitation make clear that the solicitation is for the benefit of the political party or candidate;

(f) a political action committee or group soliciting funds relating to issues or candidates on the ballot if the committee or group is [~~registered with the lieutenant governor's office under:~~] required to file financial information with a federal or state election commission;

~~[(i) Title 20A, Chapter 11, Part 6, Political Action Committee Registration and Financial Reporting Requirements; or]~~

~~[(ii) Title 20A, Chapter 11, Part 8, Political Issues Committees - Registration and Financial Reporting;]~~

(g) any school accredited by the state, any accredited institution of higher learning, or club or parent, teacher, or student organization within and authorized by the school in support of the operations or extracurricular activities of the school;

(h) a public or higher education foundation established under Title 53A or 53B;

(i) a television station, radio station, or newspaper of general circulation that donates air time or print space for no consideration as part of a cooperative solicitation effort on behalf of a charitable organization, whether or not that organization is required to register under this chapter; [~~and~~]

(j) a volunteer fire department, rescue squad, or local civil defense organization whose financial oversight is under the control of a local governmental entity[~~:~~]; and

(k) any governmental unit of any state or the United States.

(2) Any organization claiming an exemption under this section bears the burden of proving its eligibility for, or the applicability of, the exemption claimed.

(3) Each organization exempt from registration pursuant to this section that makes a material change in its legal status, officers, address, or similar changes shall file a report informing the

division of its current legal status, business address, business phone, officers, and primary contact person within 30 days of the change.

(4) The division may by rule:

(a) require organizations exempt from registration pursuant to this section to file a notice of claim of exemption;

(b) prescribe the contents of the notice of claim; and

(c) require a filing fee for the notice, as determined under Section 63-38-3.2.

Section 4. Section **13-22-9** is amended to read:

13-22-9. Professional fund raiser's or fund raising counsel's or consultant's permit.

(1) It is unlawful for any person or entity to act as a professional fund raiser or professional fund raising counsel or consultant, whether or not representing an organization exempt from registration under Section 13-22-8, without first obtaining a permit from the division by complying with all of the following application requirements:

(a) pay an application fee as determined under Section 63-38-3.2; and

(b) submit a written application, verified under oath, on a form approved by the division that includes:

(i) the applicant's name, address, telephone number, facsimile number, if any;

(ii) the name and address of any organization or person controlled by, controlling, or affiliated with the applicant;

(iii) the applicant's business, occupation, or employment for the three-year period immediately preceding the date of the application;

(iv) whether it is an individual, joint venture, partnership, limited liability company, corporation, association, or other entity;

(v) the names and residence addresses of any officer or director of the applicant;

(vi) the name and address of the registered agent for service of process and a consent to service of process;

(vii) if a professional fund raiser:

(A) the purpose of the solicitation and use of the contributions to be solicited;

(B) the method by which the solicitation will be conducted and the projected length of time it is to be conducted;

(C) the anticipated expenses of the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of what percentage of the contributions collected as a result of the solicitation are projected to remain available to the charitable organization declared in the application, including a satisfactory statement of the factual basis for the projected percentage and projected anticipated revenues provided to the charitable organization, and if a flat fee is charged, documentation to support the reasonableness of the flat fee; and

(E) a statement of total contributions collected or received by the professional fund raiser within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use made of the contributions;

(viii) if a professional fund raising counsel or consultant:

(A) the purpose of the plan, management, advise, counsel or preparation of materials for, or respect to the solicitation and use of the contributions solicited;

(B) the method by which the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation will be organized or coordinated and the projected length of time of the solicitation;

(C) the anticipated expenses of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation, including all commissions, costs of collection, salaries, and any other items;

(D) a statement of total fees to be earned or received from the charitable organization declared in the application, and what percentage of the contributions collected as a result of the plan, management, advise, counsel, or preparation of materials for, or respect to the solicitation are projected after deducting the total fees to be earned or received remain available to the charitable organization declared in the application, including a satisfactory statement of the factual basis for the projected percentage and projected anticipated revenues provided to the charitable organization, and if a flat fee is charged, documentation to support the reasonableness of such flat fee; and

(E) a statement of total net fees earned or received within the calendar year immediately preceding the date of the application, including a description of the expenditures made from or the use of the net earned or received fees in the planning, management, advising, counseling, or preparation of materials for, or respect to the solicitation and use of the contributions solicited for the charitable organization;

(ix) disclosure of any injunction, judgment, or administrative order against the applicant or the applicant's conviction of any crime involving moral turpitude;

(x) a copy of any written agreements with any charitable organization;

(xi) the disclosure of any injunction, judgment, or administrative order or conviction of any crime involving moral turpitude with respect to any officer, director, manager, operator, or principal of the applicant;

(xii) a copy of all agreements to which the applicant is, or proposes to be, a party regarding the use of proceeds;

(xiii) an acknowledgment that fund raising in the state will not commence until both the professional fund raiser or professional fund raising counsel or consultant and the charity, its parent foundation, if any, are registered and in compliance with this chapter; and

(xiv) any additional information the division may require by rule.

(2) If any information contained in the application for a permit becomes incorrect or incomplete, the applicant or registrant shall, within 30 days after the information becomes incorrect or incomplete, correct the application or file the complete information required by the division.

(3) In addition to the permit fee, an applicant failing to file a permit application or renewal by the due date or filing an incomplete permit application or renewal shall pay an additional fee of \$25 for each month or part of a month after the date on which the permit application or renewal were due to be filed.

~~[(4)(a) Each applicant shall provide proof that the applicant is either bonded or provide a letter of credit in the amount of at least \$25,000.]~~

~~[(b) The bond or letter or credit shall be payable to the state for the benefit of parties who may be damaged by any violation of this chapter.]~~

~~[(c) (i) The issuer of a bond shall be a surety authorized to transact surety business in this state.]~~

~~[(ii) The letter of credit shall be from a federally insured depository institution.]~~

~~[(d) The applicant shall maintain the bond or letter of credit for the entire duration of the permit and for a period of not less than one year after the division received notice in writing from the professional fund raiser or professional fund raising counsel or consultant that all activities in the state have ceased.]~~

~~[(e) The division may prescribe rules under which parties may recover on the bond or letter of credit.]~~

Section 5. Section **13-22-12** is amended to read:

13-22-12. Grounds for denial, suspension, or revocation.

(1) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to deny, suspend, or revoke an application, registration, permit, or information card, upon a finding that the order is in the public interest and that:

(a) the application for registration or renewal is incomplete or misleading in any material respect;

(b) the applicant or registrant or any officer, director, agent, or employee of the applicant or registrant has:

(i) violated this chapter or committed any of the prohibited acts and practices described in this chapter;

(ii) been enjoined by any court, or is the subject of an administrative order issued in this or another state, if the injunction or order includes a finding or admission of fraud, breach of fiduciary duty, material misrepresentation, or if the injunction or order was based on a finding of lack of integrity, truthfulness, or mental competence of the applicant;

(iii) been convicted of a crime involving moral turpitude;

(iv) obtained or attempted to obtain a registration or a permit by misrepresentation;

(v) materially misrepresented or caused to be misrepresented the purpose and manner in which contributed funds and property will be used in connection with any solicitation;

(vi) caused or allowed any paid solicitor to violate any rule made or order issued under this chapter by the division;

(vii) failed [~~reasonably to supervise his agents, employees, paid solicitors or, in the case of an organization, its professional fund raisers or professional fund raising counsels or consultants~~] to take corrective action with its solicitors who have violated this chapter or committed any of the prohibited acts and practices of this chapter;

(viii) used, or attempted to use a name that either is deceptively similar to a name used by an existing registered or exempt charitable organization, or appears reasonably likely to cause confusion of names;

(ix) failed to timely file with the division any report required in this chapter or by rules made under this chapter; or

(x) failed to pay a fine imposed by the division in accordance with Section 13-22-3; or [~~(c) a professional fund raiser or professional fund raising counselor or consultant does not have a bond or letter of credit in force as required by Subsection 13-22-9(4); or~~]

~~[(d)]~~ (c) the applicant for registration or renewal has no charitable purpose.

(2) The director may, in accordance with Title 63, Chapter 46b, Administrative Procedures Act, issue an order to revoke or suspend a claim of exemption filed under Subsection 13-22-8(4), upon a finding that the order is in the public interest and that:

(a) the notice of claim of exemption is incomplete or false or misleading in any material respect; or

(b) any provision of this chapter, or any rule made or order issued by the division under this chapter has been violated in connection with a charitable solicitation by any exempt organization.

Section 6. Section **13-22-14** is amended to read:

13-22-14. Accuracy not guaranteed.

(1) By issuing a permit [~~or by providing forms for an information card~~], the state does not guarantee the accuracy of any representation contained in the permit [~~or information card~~], nor does it warrant that any statement made by the holder of the permit [~~or information card~~] is truthful. The state makes no certification as to the charitable worthiness of any organization on whose behalf a

solicitation is made nor as to the moral character of the holder of the permit [~~or information card~~].

(2) The following statement shall appear on each permit [~~and information card in uppercase letters, in close proximity to the seal or acknowledgment required under Subsection 13-22-10(3)(b):~~ "~~THE STATE OF UTAH DOES NOT WARRANT THAT THE INFORMATION CONTAINED ON THIS CARD IS TRUE.~~"; "THE STATE OF UTAH MAKES NO CERTIFICATION AS TO THE CHARITABLE WORTHINESS OF ANY ORGANIZATION ON WHOSE BEHALF A SOLICITATION IS MADE NOR AS TO THE MORAL CHARACTER OF THE HOLDER OF THE PERMIT."

(3) No solicitation for charitable purposes shall use the fact or requirement of registration or of the filing of any report with the division pursuant to this chapter with the intent to cause or in a manner tending to cause any person to believe that the solicitation, the manner in which it is conducted, its purposes, any use to which the proceeds will be applied or the person or organization conducting it has been or will be in any way endorsed, sanctioned, or approved by the division or any governmental agency or office.

Section 7. Section **13-22-15** is amended to read:

13-22-15. Financial reports required.

(1) Each charitable organization registered under this chapter shall [~~, during its first year of registration, provide quarterly financial reports to]~~ file each year of registration an annual financial report or an IRS Form 990, 990EZ, or 990PF. The financial report or IRS Form 990, 990EZ, or 990PF shall be filed with the division within 30 days after the end of the [quarter] year reported. [~~Each]~~ If an annual financial report or IRS Form 990, 990EZ, or 990PF are not available during its first year of registration, the charitable organization shall provide quarterly financial reports to the division within 30 days after the end of the quarter reported.

(2) Each financial report shall disclose:

- (a) the gross amount of contributions received;
- (b) the amount of contributions disbursed or to be disbursed to each charitable organization or charitable purpose represented;
- (c) aggregate amounts paid to any professional fund raiser;

(d) amounts spent for overhead, expenses, commissions, and similar purposes; and

(e) the name and address of any ~~[paid solicitor]~~ professional fund raiser used by the organization.

~~[(2) After the first year of continuous registration, a charitable organization shall file an annual financial report or IRS Form 990 on an annual basis within 30 days after the end of the year reported.]~~

(3) Each report required under this section shall be signed under oath by an officer or principal of the organization.

(4) The registration of any organization that fails to file a timely report or IRS Form 990, 990EZ, or 990PF as required in this section or files an incomplete report or IRS Form 990, 990EZ, or 990PF is automatically suspended pending a final order of the division under Section 13-22-12.

The division may reinstate the registration after receiving:

(a) a report or IRS Form 990, 990EZ, or 990PF fulfilling the requirements of this section;

(b) an application for renewed registration; and

(c) a penalty of \$25 for each month or part of a month after the date on which the quarterly report or IRS Form 990 was due to be filed.

Section 8. Section **13-22-16** is amended to read:

13-22-16. Separate accounts and receipts required.

(1) Each organization required to be registered under this chapter and each professional fund raiser ~~[and paid solicitor]~~ shall segregate and maintain all contributed funds in an account held separately from its operating account. ~~[The account shall be held in Utah at a depository institution regulated by the Department of Financial Institutions.]~~ Each contribution in the control or custody of the professional solicitor shall, in its entirety and within ten days of its receipt, be deposited in an account at a bank or other federally insured financial institution which shall be in the name of the charitable organization. The charitable organization shall maintain and administer the account and shall have sole control of all withdrawals.

(2) Each organization required to be registered under this chapter and each professional fund raiser ~~[and paid solicitor]~~ shall maintain and use duplicate receipts for contributions of money,

securities, and cash equivalents so that one receipt is issued to each contributor and one is maintained by the charitable organization.

Section 9. Section **13-22-22** is enacted to read:

13-22-22. Charitable sales promotions.

(1) Every charitable organization which agrees to permit a charitable sales promotion to be conducted by a commercial co-venturer on its behalf shall file with the division a notice of the promotion prior to its commencement within this state. The notice shall state:

(a) the names of the charitable organization and commercial co-venturer;

(b) that the charitable organization and the commercial co-venturer will conduct a charitable sales promotion; and

(c) the date the charitable sales promotion is expected to commence.

(2) Prior to the commencement of a charitable sales promotion within this state, every charitable organization which agrees to permit a charitable sales promotion to be conducted in its behalf, shall obtain a written agreement, containing such terms as may be required by rule of the division, from the commercial co-venturer which shall be available to the division upon request.

(3) A commercial co-venturer shall keep the final accounting for each charitable sales promotion conducted in this state for three years after the final accounting date and make the accounting available to the division upon request.

(4) The commercial co-venturer shall disclose in each advertisement for a charitable sales promotion the dollar amount or percent per unit of goods or services purchased or used that will benefit the charitable organization or purpose.

Section 10. Section **13-22-23** is enacted to read:

13-22-23. Fiduciary capacity.

Every person soliciting, collecting, or expending contributions for charitable purposes, and every officer, director, trustee, or employee of any person concerned with the solicitation, collection, or expenditure of those contributions, shall be considered to be a fiduciary and acting in a fiduciary capacity.

Section 11. **Repealer.**

This act repeals:

Section **13-22-10, Obtaining, use and display of permits and information cards.**