

Philanthropic News

A publication of
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**SEPTEMBER 11TH
 DISASTER RELIEF UPDATE**

A REPORT FROM THE HOME FRONT

The charitable giving landscape is being altered in the wake of September 11th as charities ponder which individuals should qualify for relief (aside from those directly impacted) and how to avoid duplicating aid payments to these individuals from multiple sources.

Related developments include:

- A Congressional hearing was held on November 8th on the handling of funds designated for victims of September 11th.
- The IRS testified that charities must distribute donations based upon individual financial need, rather than upon the *affect* the events of September 11th had on individuals. It also said that the public could give a *disinterested* gift directly to particular individuals or to a non-qualified charity on a tax-free basis.
- The IRS is contemplating expanding its definition of charitable class, a tax category that exempts certain recipients of donations from taxation.

It now has a website of September 11th based charities that have been granted expedited tax-exempt status. The web address is:

http://www.irs.gov/bus_info/eo/sep11.html

- The Red Cross has come under Congressional scrutiny amidst allegations that it may have mishandled the Liberty Fund, estimated at \$564 million, and specifically created for victims of September 11th. The charity's President, Dr. Bernadine Healy, has resigned. The Red Cross has now agreed to devote all funds to the intended recipients.

- Congress' recently created September 11th Victim Compensation Fund of 2001 has been criticized because it requires recipients to waive their right to sue airlines, insurance companies, the Port Authority, etc., for their loss, and because the amount of relief granted might be reduced by money received from other sources. The U.S. Department of Justice has been given the task of creating guidelines for disseminating the money. Public comments are due by November 26th.

- New York City's Twin Tower fund may already be in violation of the tax code, according to *The New York Times* (November 12, 2001) for giving money to families of rescuers affected by the September 11th attacks, without consideration of actual need.

- The Association of the Bar of the City of New York Committee on Nonprofit Organizations formed a Subcommittee on Disaster Relief Coordination. Chaired by James Fishman, Professor of Law at Pace University, the subcommittee is working closely with the New York Attorney General's office over issues such as: Defining which individuals and businesses should be entitled to relief funds; Whether grants and low-interest loans issued to businesses affected by September 11th should be treated as gifts under Section 102 of the Internal Revenue Code; and the impact of New York Governor George Pataki's

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recent Executive Order (described below) regarding improper solicitations.

- New York's Attorney General has created two internet databases – one for registered agencies, the other for victims (modeled after the Oklahoma City victims' website), in an attempt to provide comprehensive information to the donating public. The web address is:

<http://www.wtcrelief.info/Charities/Information/pages/home.html>

SUPREME COURT TO HEAR JEHOVA'S WITNESSES' APPEAL ON SOLICITATION RIGHTS

The United States Supreme Court has agreed to decide Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, involving an ordinance in the village of Stratton, Ohio requiring solicitors to obtain permission from the mayor before going door to door. Permits are free, but applicants must provide their names, their addresses for the last five years, and their affiliations. The ordinance also allows residents to seek permission from the village to post signs at their houses stating that solicitors are unwelcome. The form for that request listed Jehovah's Witnesses as one of several organizations that residents could check off as exceptions to the ban on solicitation at their homes.

In the 6th Circuit Court of Appeals, the plaintiff/solicitors argued that the Village ordinance, which applies to canvassers, solicitors, peddlers or hawkers that solicit door to door for the "purposes of advertising, promoting, selling and/or explaining any organization or cause," is facially unconstitutional because it is overly broad and vague and, as applied, the ordinance violates the plaintiffs' rights to free speech and free exercise of religion. The Circuit Court rejected the plaintiffs' arguments, holding that the ordinance was narrowly tailored to promote the Village's interests in preventing fraud and in protecting its residents from unwanted annoyance and was therefore constitutional.

The case is scheduled to be argued early next year.

ACCURACY OF STATE INTERNET REGISTRIES OF CHARITIES

An erroneous statement on New Jersey's Charities Registration website nearly cost one charity an important donor.

The donor, ready to make a donation to the charity, first sought to verify its charitable status. Much to the donor's chagrin, his search of the website revealed the message *Nothing matched your search characters*.

Fortunately, the donor notified the charity, which in turn acted quickly to remedy the situation. The charity requested a letter from the New Jersey Attorney General's office stating that it was, in fact, registered and in good standing.

The moral of the story is, charities cannot merely perform the perfunctory tasks of submitting registration forms and fees. Charities must also be vigilant in ensuring that the Attorneys General in the states where they are registered provide the donating public with accurate and current information.

While most states publish helpful lists of registered charities on their Internet websites, some websites unfortunately contain inaccurate and incomplete information on the status of registered charities.

New Jersey's Charities Registration website claims that its directory reflects *A listing of all charities currently registered in New Jersey as of October 8, 2001*. A search of that registry revealed that this statement is, in fact, both misleading and inaccurate. We tested the registry by attempting to look up three separate charities that had registered with the New Jersey Attorney General's office *months ago*. The results were the same: *Nothing matched your search characters*.

Charities should demand that state Internet registries inform the public that the most current information on registered charities is best obtained over the telephone.

A REPORT FROM THE NAAG/NASCO 2001 CONFERENCE

The National Association of Attorneys General ("NAAG") and the National Association of State Charity Officers ("NASCO") recently held their annual public session conference in Baltimore, Maryland. The primary topic of discussion during the half-day conference was nonprofit accountability, which is a metaphor for public disclosure.

Unfortunately, the disclosures most often discussed were financial, rather than a more revealing disclosure of an organization's programmatic accomplishments and overall activities. Amy Coates Madsen, Director of Standards for Excellence for the Maryland Association of Nonprofits ("MAN"), which recently promulgated its own ethical and accountability code for the nonprofit sector, discussed the new standards. Much of the standards contained within the MAN code mimic those adopted by other watchdog organizations, such as the Better Business Bureau. One notable difference was the requirement that nonprofits should realize charitable contributions from fundraising activities that are at least three times the amount spent on fundraising. For those organizations dependent on

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direct response fundraising as a primary source of revenue, this may be an unrealistic goal.

Keynote speaker Lester Salamon, from the Institute for Public Policy at Johns Hopkins University, presented the ten essential trends, as he perceives them, in the philanthropic sector. Most notable was the continuing growth of the sector, the tendency towards further commercialization, and the sectors' globalization.

Peter Frumkin, of the Kennedy School of Government at Harvard University, presented a paper on the efficiency in management of not-for-profit organizations. Remarkably, Professor Frumkin's study concluded that organizations with greater management efficiency do not appear to be rewarded by increased public contribution or recognized by their own Board of Directors when determining executive compensation. Anyone wishing a copy of "Strategic Positioning and the Financing of Nonprofit Organizations: Is Efficiency Rewarded in the Contributions Market Place?" please feel free to contact our office.

Steve Miller, the new director of Exempt Organizations at the Internal Revenue Service, discussed efforts underway between the IRS and State Charities Regulators to increase the cooperative efforts between the federal and the state regulatory Authorities.

Daniel Moore, the Registrar of charitable organizations for the New Mexico Attorney General's office and President of NASCO, discussed a project coined NASCO/NET, which would act as a centralized registration depository. Conceivably, NASCO/NET could register filing annual reports in the various states. The newly born project is currently bouncing around among the states. He also reported that NASCO is attempting to establish a centralized registry of State enforcement actions, so that actions taken in one state could be referenced by all others.

During the closing comments there were some discussions of increased efforts to identify organizations that act as fronts for money laundering operations for terrorists and other activities. The conversation appeared to be more posturing than substantive discussion. All in all, it was a fairly unremarkable meeting. There is an effort underway to allow for an expanded NAAG/NASCO conference open to the public as was done in prior years.

STATE REGULATION UPDATE

A new Florida point of solicitation law requires that each charitable organization that is required to register shall prominently display certain disclosures on its solicitations, including the percentage of each contribution that is retained by

any professional solicitor that has contracted with the organization and the percentage of each contribution that is received by the organization. These requirements violate the United States Supreme Court's 1988 decision in Riley v. National Federation of the Blind of North Carolina, Inc. In that case, the Supreme Court specifically disallowed a statute that required the same type of disclosures in North Carolina. In Riley, the Supreme Court stated that "the solicitation of charitable contributions is protected speech, and . . . using percentages to decide the legality of the fundraiser's fee is not narrowly tailored to the State's interest in preventing fraud." The legality of the above two sections of this new Florida statute is being challenged in a recently filed lawsuit against the State of Florida. Thus, the percentage-based requirements stated above are not being enforced at this time.

The **New Jersey** state legislature is considering a bill that would raise the threshold amount for which charitable organizations are required to file audited financial statements from \$100,000 to \$150,000 under the "Charitable Registration and Investigation Act."

New York Governor George Pataki, issued Executive Order No. 43, extending Executive Order No. 113 issued on September 11, 2001 relating to enforcement actions to prevent fraudulent solicitations of charitable donations. The modifications generally expand the sanctions that may be levied by the Attorney General against persons who violate §§172-d, 175 and 177 of the Executive Law.

Legislation has been introduced in **Pennsylvania** that would provide taxpayers with a 10% income tax credit on all charitable giving.

Tennessee Senate Bill number 1983 specifies that telephone requests for charitable contributions must be made by a bona fide member, volunteer or direct employee of the non-profit organization. If enacted, professional fundraisers in Tennessee would be excluded from making telephone requests for donations for charities.

**REGULATIONS ON INTERMEDIATE
SANCTIONS FOR CHARITIES: PART I**

The New York Times recently reported that "William V. Aramony, the longtime president of United Way of America, ... is expected to be released from prison late next month." NYT, 8/8/01. The highly publicized criminal prosecution of Mr. Aramony in the early 1990's, who "was living a lavish lifestyle and embezzling money," coupled with revelations that his salary and benefits were close to \$500,000 per year, contributed to the

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passage in 1996 of legislation permitting the Internal Revenue Service to impose "intermediate sanctions," in the form of excise taxes on insiders at charities (denominated "qualified persons") who were deemed to receive excessive compensation or benefits. The following two-part series outlines the pertinent provisions. Sanctions may also be imposed on individuals such as board members who approve the excess benefits.

Taxes on Excess Benefit Transactions

An excess benefit transaction is one in which the benefit provided to a disqualified person "exceeds the value of the consideration (including the performance of services) received for providing the benefit."

Insiders may be penalized an amount equal to 25% of the excess benefit (the first tier tax) and, if they fail to correct the problem, an additional 200% (the second tier tax). Organization managers (such as directors, trustees, or officers) may be penalized an amount equal to 10% of the excess benefit. The 200 percent tax will not be assessed, or will be abated, if the correction is made within 90 days after the mailing of a notice of deficiency.

The 10 percent tax on an organization manager may not be imposed if the participation in the excess benefit transaction "was not willful and was due to reasonable cause." If an organization manager properly relies on the advice of an "appropriate professional" (such as a qualified attorney, certified public accountant, or independent valuation expert) in participating in an excess benefit transaction, participation in such transaction will ordinarily not be considered knowing or willful.

Definition of Applicable Tax-Exempt Organization

An applicable tax-exempt organization is generally any organization that is tax exempt pursuant to Code Sections 501(c)(3) or (4). It does not include private foundations, which were already governed by extensive excise taxes.

Definition of Disqualified Person

A disqualified person is, in essence, an insider with meaningful power or authority within the organization. The key consideration is the person's actual powers and responsibilities, and not his or her title.

Rebuttable Presumption that Transaction is Not an Excess Benefit Transaction

The Temporary Regulations elaborate on the three requirements which must be satisfied in order for there to be a rebuttable presumption that payments under a compensation arrangement between a charitable organization and a disqualified person are reasonable. These requirements will be discussed in our next newsletter.

ANNOUNCEMENTS

Website

Perlman and Perlman will be launching its revamped website, perlmanandperlman.com, on January 1, 2002. The website will contain [Philanthropic Alerts](#), a condensed version of this newsletter featuring up-to-the-minute news, a list of services offered and useful links.

Staff

Perlman & Perlman takes great pleasure in announcing that David G. Samuels has become a member of the firm. David is a graduate of Harvard Law School and is an adjunct professor at New York Law School. He is a former partner of Butler, Fitzgerald and Potter and was the Deputy Chief of the Charities Bureau of the New York State Department of Law. David specializes in corporate and commercial litigation, employment and compensation law, and the law of tax exempt organizations.

Sonia V. Heuer has also joined the firm. Sonia has experience in the non-profit and legal sectors, having worked for organizations such as the American Cancer Society, the Risk and Insurance Management Society, Inc., Baker & McKenzie, and Fross Zelnick & Zissu. Sonia is a graduate of New York University and Benjamin N. Cardozo School of Law.

Seminars

Attorneys from Perlman & Perlman will be speaking at two continuing education seminars on public charities in December, aimed at attorneys, accountants, executive directors, and other professionals. David G. Samuels and Daniel R. Alcott will participate in a program on December 6 in White Plains, New York, and Seth and Cliff Perlman are featured in a program in Garden City, New York on December 12. The seminars are sponsored by Lorman Education Services. Information and reservations can be obtained by calling this office 212 889-0575.

News Flash!!!

A **Florida** federal district court has just granted summary judgment to plaintiffs, represented by Perlman & Perlman and other counsel, holding that Pinellas County's ordinance requiring out of state fund raising counsel to register in Pinellas County is unconstitutional as applied to certain fund raising counsel. The plaintiff's only contact with Pinellas County involved mail sent to Pinellas County by out-of-state charitable clients. The Court held that such a registration requirement violated plaintiffs' due process rights, as the county has no jurisdiction over these out-of-state parties. The decision was handed down on November 13 and just received by our office. Details will follow in our next newsletter.