

REGULATION OF CHARITABLE SOLICITATION: A REVIEW AND PROPOSAL

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INTRODUCTION

Since 1980, the Supreme Court has decided three major cases involving charitable solicitation legislation.¹ In each case the Court struck down as unconstitutional legislation which directly and substantially regulated solicitation activity. From the perspective of governmental authorities these cases severely affect their ability to regulate certain aspects of charitable solicitation. Charitable organizations and professional fund raisers, however, breathed a sigh of relief. At the state² and federal³ court level at least four cases have been decided with similar impact. Although both the Supreme Court and state decisions allegedly apply and reaffirm established principles used to test the validity of solicitation regulations and are decided against a backdrop of a number of earlier Supreme Court cases, at least two questions arise. One question is whether these recently decided cases actually extend earlier established principles and case decisions, thus belittling the regulatory approach adopted by the governmental authorities. A second question is whether alternative legislation can be drafted which will allow authorities to directly regulate those aspects of charitable solicitation found to be invalid in these recent cases.

Both of the above questions are subsumed within the larger issue of the state's right to regulate charitable solicitation more aggressively and the effect such aggressive regulation might have on the charitable fund-raising industry. It seems appropriate, therefore, that a review of and proposal for charitable solicitation regulation be presented. This article undertakes to do both. Part I is a summary review of key provisions of current state legislation. Part I does not consider regulation at the federal or municipal level

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1. *Joseph H. Munson Company, Inc. v. Secretary of State of Maryland*, 104 S. Ct. 2839 (1984); *Larson v. Valente*, 456 U.S. 228 (1982); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).
2. *Planned Parenthood League of Massachusetts v. Attorney General*, 391 Mass. 709, 464 N.E.2d 55 (1984); *Joseph H. Munson Company, Inc. v. Secretary of State of Maryland*, 48 Md. App. 273, 426 A.2d 985 (1981), *aff'd*, 294 Md. 134, 448 A.2d 935 (1982); *Heritage Village Church and Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 253 S.E.2d 473 (1979), *aff'd*, 299 N.C. 399, 263 S.E.2d 726 (1980).
3. *Fernandes v. Limmer*, 663 F.2d 619 (5th Cir. 1981) (holding unconstitutional a Dallas/Fort Worth solicitation ordinance provision which created a rebuttable presumption that fund-raising costs in excess of 25% of funds raised was excessive).

although good reasons exist for regulation at the federal level⁴ and, as evidenced by the cases discussed, municipalities have been quite active in regulating charitable solicitation.⁵ Part II is a review of the constitutional limitations affecting regulatory measures and administering authorities focusing on early Supreme Court decisions. Part II is also devoted to a review of various state and federal decisions, as well as subsequent decisions which consider specific aspects of charitable solicitation. Emphasis is given to two special concerns of governmental authorities: regulation of fund-raising cost and regulation of organizations whose members are not the primary target of solicitation activity. Part III contains proposals for charitable solicitation legislation and comments. Draft provisions follow as appendices.

The Nature of Giving, Abuse and Regulation

For many people, charitable giving is based on religious tenets.⁶ For others, a sense of moral obligation or a desire to help others provides a similar driving force for giving. Tax benefits provide yet another reason for the charitable bounty of others.⁷ Whatever the reason, individual and corporate giving to a myriad of causes continues.⁸

Current economic ills have increased dramatically the number of individuals and programs dependant upon the services provided by charitable organizations.⁹ As federal, state, and local governments reduce their spending for social and charitable programs, charitable organizations are finding it more difficult to meet and provide for those needs and programs.¹⁰ In response to this situation, individuals and corporations are being urged to increase their charitable giving.¹¹ To some extent, economic policy is being formulated to reflect the assumption that there will be increased giving.¹²

4. See Hopkins, *A Case for Federal Regulation of Fund Raising for Philanthropy*, PHILANTHROPY MONTHLY, Apr. 1976, at 26; For a general discussion of federal regulation of fund raising, see B. HOPKINS, CHARITY UNDER SIEGE 181-237 (1980).
5. Many of the cases discussed herein involve municipal ordinances. See general discussion of cases in Part II.
6. See, e.g., *Gospel Army v. The City of Los Angeles*, 27 Cal. 2d 232, 163 P.2d 704 (1945).
7. 26 U.S.C. § 170 (1982).
8. According to the American Association of Fund-Raising Council, Inc., approximately \$74.25 billion were given to charitable organizations in 1984. This was in comparison to the \$66.82, \$60.39, \$53.62 and \$47.74 billion given respectively in the years 1983 to 1980, inclusive. The increase in giving from 1983 to 1984 was 11.1%. A similar increase in giving has occurred for each of the years 1980 to 1983. AMERICAN ASSOCIATION OF FUND-RAISING COUNCIL, INC., ANNUAL REPORT, GIVING U.S.A. (1981-1985) [hereinafter cited as GIVING U.S.A.].
9. See generally Schussheim, *The Reagan 1987 Budget and the Homeless*, CONG. RESEARCH SERVICE REV., June 1986, at 3; Belous, Cashell & LeGrande, *What's Happening to the Middle Class and Income Inequality in America?*, CONG. RESEARCH SERVICE REV., Mar. 1986, at 2; Shipp, *Poverty: Trends, Causes, and Cures*, CONG. RESEARCH SERVICE REV., Feb. 1984, at 6; AMERICAN ASSOCIATION OF FUND-RAISING COUNCIL, INC., ANNUAL REPORT, GIVING U.S.A. 64 (1981) (comments of John J. Schwartz).
10. Bogdanich, *It's Hard to Tell Good Charities From the Bad*, Wall St. J., Aug. 25, 1985, at 23, col. 2; *How Budget Cuts Hurt Nonprofit Groups*, Wash. Post, August 18, 1983, at A27, col. 1; Quinn, *The Charities Come Up Short*, NEWSWEEK, January 3, 1983, at 61.
11. Remarks at Breakfast Meeting with Representatives From the Private Sector Engaged in Volunteer Work, 17 WEEKLY COMP. PRES. DOC. 1008 (September 28, 1981); Exec. Order No. 12329 President's Task Force on Private Sector Initiatives, 17 WEEKLY COMP. PRES. DOC. 1129 (October 19, 1981).
12. President Reagan, in formulating his economic recovery program, assumed there would be greater support for various charitable programs:
Historically, the American people have supported by voluntary contributions more artistic

According to the American Association of Fund-Raising Council, Inc.,¹³ donations to charitable organizations have increased.¹⁴ The findings further show that individuals, collectively, gave more in the years 1980 to 1984 than corporations or foundations.¹⁵ This finding is significant in the context of this article because individuals, as opposed to corporations or foundations, are least able or willing to judge the credibility of solicitation campaigns and, therefore, are in need of a greater degree of regulatory protection than corporations or foundations.¹⁶ In short, benefactors are encouraged to give, are predisposed to giving and, in fact, are giving more.

But the very motivation which leads to charitable giving, including the acceptance of the challenge for increased giving, also provides an opportunity for fraud and abuse. Kind-hearted benefactors become easy prey for those whose intentions are not as honorable.¹⁷ Such fraud or abuse includes deception regarding the nature of the charitable cause, fraudulent use of the name of reputable charitable organizations, diversion of substantial amounts of solicited funds into fund-raising cost—usually to professional fund raisers and solicitors who have no connection with the charitable cause other than to serve as fund raisers—and diversion of solicited funds into administrative coffers away from charitable programming and services.¹⁸

Legislators and other governmental authorities attempt under the aegis of police power to protect both the benefactor and the beneficiaries of charitable giving from the fraud and abuses of the unscrupulous. Confining our discussion to state legislation, thirty-six states and the District of Columbia have statutes regulating or pertaining to charitable solicitation.¹⁹ Although these statutes vary in their approach, scope, and application, they are all aimed at promoting responsible charitable giving, fund raising, and fund

and cultural activities than all the other countries in the world put together. I wholeheartedly support this approach and believe that Americans will continue their generosity. Therefore, I'm proposing a savings of \$85 million in the Federal subsidies now going to the arts and humanities.

Address Before a Joint Session of the Congress, 17 WEEKLY COMP. PRES. DOC. 132 (February 18, 1981).

13. The American Association of Fund-Raising Council (hereinafter AAFRC) is a group of professional fund-raising counseling firms organized to create standards for and to clarify standings about and distrust in the fund-raising industry. See *GIVING U.S.A.*, *supra* note 8.
14. See *supra* note 8.
15. Of the \$74.25 billion estimated to have been given in 1984, 82.9% or \$61.55 billion were given by individuals. Since 1980 the percentage of giving by individuals has been between 80% and 83.7%. See *GIVING U.S.A.*, *supra* note 8.
16. See discussion in Part III, Sections D & E.
17. "The very worthiness of such purposes creates a risk that the charitable impulses of people may be taken advantage of by solicitors who would collect funds under false pretenses or retain for themselves a undue percentage of what they collected." *Gospel Army*, 27 Cal. 2d at 245, 163 P.2d at 712, 713. During an interview with a witness in a solicitation fraud case, the witness indicated he had been taught to not ask questions in giving to charity. *William J. Brown v. Hamilton Productions*, No. 78-CV-12-5812 (C.P. Franklin County, Ohio, Oct. 13, 1981). Unfortunately for responsible giving, many people have this principle instilled in them and consequently, make no effort to discern the legitimacy of fund-raising campaigns.
18. See generally B. HOPKINS, *supra* note 4.
19. See *infra* note 31; THE PHILANTHROPY MONTHLY, SURVEY OF STATE LAWS REGULATING CHARITABLE SOLICITATION (1985) [hereinafter cited as SURVEY]. This work contains a summary of state laws regulating charitable solicitations and includes a combined state contract person list and statutes regulating charitable gambling. See also B. HOPKINS, *supra* note 4.

management by reducing the potential for the fraud and abuse associated with charitable solicitation while, at the same time, attempting to avoid imposing an undue burden on charities and the fund-raising industry.

Before moving to Part I, two points, inferred by the above brief discussion, need comment. First, charitable fund raising is a billion dollar industry.²⁰ Notwithstanding what may at first appear to be self-serving assertions by professional fund raisers, these individuals and firms provide a needed and useful service assisting charitable organizations in obtaining the dollars needed to provide important and vital services.²¹ Professional fund-raising associations have been formed and are striving to enhance the credibility and professionalism of professional fund raisers and the fund-raising industry through the adoption of standards for their members.²² It would be a grave mistake not to recognize and encourage a continuation of this service, even though some fund raisers are unscrupulous.

Second, the state has an interest in regulating charitable solicitation, although an articulation of this interest in many of the cases is not usually explored beyond a statement that an interest exists in protecting citizens from fraud and misrepresentation.²³ In addition to protecting citizens from fraud and misrepresentation and making it easier for them to make informed decisions, there is also an interest in assuring efficient acquisition and utilization of charitable dollars.²⁴ This interest results in part from the reduction of the burden on government to provide either the services or the necessary resources for some other entity to replace services currently being handled by charitable organizations with solicited dollars.²⁵ One should not

20. See *supra* notes 8, 15. See also Note, *The Regulation of Charitable Fund-Raising and Spending Activities*, 1975 WIS. L. REV. 1158.

21. Fund-raising is a profession, just as accounting and law, which the nonprofit organization cannot delegate to unqualified practitioners if it hopes to enjoy successful fund-raising results. Experienced fund-raisers have developed expertise in the planning and conduct of fund-raising strategies and techniques that are lacking in inexperienced nonprofessionals. Depending on the size and objectives of the institution, the professional fundraising capability may be met by one manager, a staff with specific expertise in diverse fund-raising techniques (research, writing, direct mail, planned giving, capital campaign, etc.), or by employment of a professional fund-raising consultant or firm to provide counsel or supplemental services.

B. HOPKINS, *supra* note 4, at 28.

22. AAFRC, Inc. and National Society of Fund Raising Executives are two such organizations. See Fair Practice Code of AAFRC, Inc., in AMERICAN ASSOCIATION OF FUND-RAISING COUNCIL, INC., ANNUAL REPORT, GIVING U.S.A. 111 (1985) (a list of other organizations associated with philanthropy is also contained therein). There are also some private watchdog groups concerned with charitable fund-raising; the most noted of which is the Philanthropic Advisory Service of the Council of Better Business Bureau. This organization has also adopted standards for fund raising activity and professional fund raisers.

23. See generally cases and discussion in Part II.

24. "Despite these unresolved problems, there remains substantial unanimity on one goal: The greatest possible portion of the wealth donated to private charity must be conserved and used to further the charitable, public purpose; waste must be minimized and diversion of funds for private gain is intolerable." Karst, *The Efficiency of the Charitable Dollars: An Unfilled State Responsibility*, 73 HARV. L. REV. 433, 434 (1960). See also dissent in *Munson*, 104 S. Ct. at 2859, 2860 & n.2. But see Stevenson, *Regulation in the 80's: A New Approach*, PHILANTHROPY MONTHLY, Jan. 1980, at 34, 35. Because giving is neither "mandatory nor necessary," Stevenson contends that the state has no interest like that involving other consumer legislation. *Id.* at 35.

25. To the extent programs and services which have been provided for by governments can be undertaken by the private sector, the government is free to budget its dollars for other purposes. The expectation is that individual and corporate giving to organizations providing needed and valuable

be misled, however, into thinking that reducing the burden is a benefit belonging solely to the government. The primary benefit is to charitable organizations and the recipients of charitable services. In some cases those services are provided more efficiently by community-based organizations than by the government. The relief provided in the reduction of the burden on government is secondary.

Funds received and held following a solicitation are also in the nature of a charitable trust corpus and evoke applicable trust principles.²⁶ Two such principles—giving effect to the donor's intent and prohibiting the diversion of funds from the trust purposes—have specific application to charitable solicitations. Thus, where the donor is led to believe that the lion's share of contributed funds will be used for the charitable purposes articulated in the solicitation campaign, application of these trust principles operate to prevent the diversion of a substantial portion of those funds to other purposes.²⁷ These principles are applicable even though there is no formal trust or trust document.²⁸ Soliciting funds specifically or ostensibly for charitable purposes creates a charitable trust.²⁹ States have historically served as the monitor and enforcer of charitable trusts.³⁰

social programs and services will increase. President Reagan assumed as much and made it a part of his economic policy. *Supra* notes 11 and 12. While this assumption has proved true, it is recognized that many programs and services will be lost because of the inability of the private sector to pick up the entire slack left open by the withdrawal of government dollars. See GIVING U.S.A., *supra* note 8, at 4-5, 103 (comments by John Grenzebach and John J. Schwartz, Chairperson and President, respectively, of the American Association of Fund-Raising Counsel).

26. As in the case of the making of a contract so in the case of a trust an objective rather than a substantive test is applied. It is the manifestation of intention which controls and not the actual intention where that differs from the manifestation of intention. An express trust may be created even though the parties do not call it a trust, and even though they do not understand precisely what a trust is, it is sufficient if what they appear to have in mind is in its essentials what the courts mean when they speak of a trust.

SCOTT ON TRUSTS § 28 (3rd ed. 1967), *quoted in* William J. Brown v. R.E. Holloway, No. CA 6689, slip op. at 14 (Ct. App. Montgomery County, Ohio, July 15, 1981). The *Holloway* court held that the sales pitches used in connection with the solicitation campaign showed as a matter of law that there was an express charitable trust of the net proceeds of the campaign "[e]ven though the Fireman and Holloway did not mention the words 'trust' or 'charity.'" *Id.* at 14.

The trust theory was alluded to in *Jones v. American Home Finding Association*, 191 Iowa 211, 182 N.W. 191 (1921), where the court held that a fund-raising fee of 50% of gross contributions for a charitable organization was against public policy. The court stated:

The officers of the defendant association have no authority to contract in relation to funds coming into their possession to carry out the purposes of the corporation, whereby private persons would reap the benefits of bequests, as in the instant case. It would be an unwarranted diversion of such funds which would tend to shock the public conscience. A charitable institution must remain true to the purpose of its creation. Trust funds are in its hands, and it is not permitted to divert those funds for private gain on its own behalf or on behalf of those who are in its employ. Public policy does not permit this.

191 Iowa at 214, 182 N.W. at 192. See also *Brown v. Concerned Citizens for Sickle Cell Anemia, Inc.*, 56 Ohio St. 2d 85, 382 N.E.2d 1155 (1978) (holding that funds received in connection with a bingo game operated ostensibly for charitable purposes gave rise to a charitable trust).

27. *Id.*
28. SCOTT ON TRUSTS § 28 (3d ed. 1967); RESTATEMENT (SECOND) OF TRUSTS §§ 24, 351 (1959).
29. See *Brown v. Concerned Citizens*, 56 Ohio St. 2d 85, 382 N.E.2d 1155 (1978); *Jones v. American Home*, 121 Iowa 211, 182 N.W. 191 (1921); *Brown v. Holloway*, No. CA 6689, slip op. at 14 (Ct. App. Montgomery County, Ohio, July 15, 1981).
30. One of the recognized powers held by the attorney general at common law was "to inquire into any abuses of charitable donations." [citations omitted] Clearly, the attorney general's traditional power to protect public donations to charity goes beyond the mere enforcement of express trusts where the formal elements of such trust—manifestation of intent to create a trust, the existence of trust property, and a fiduciary relationship—are essential to its crea-

The question thus becomes to what extent can governmental authorities actively proceed to use their police power to safeguard these interests.

I. STATE STATUTES REGULATING CHARITABLE SOLICITATIONS

Thirty-six states and the District of Columbia have statutes regulating charitable solicitation.³¹ Three of these thirty-six states have enacted or amended statutes since 1980 to regulate charitable solicitation.³² A few additional states have provisions affecting some aspect of charitable solicitation, although these provisions do not rise to the level of a charitable solicitation regulatory scheme.³³ Considerable difference in the regulatory approach is taken among the states with statutes. No attempt is made here to review and present the entire regulatory scheme of all the states. Instead, the more important statutory provisions which relate directly to the issue of prevention of solicitation fraud and abuse will be considered.³⁴

A. Licensing, Registration, Permits, Reporting and Contracts

Most of the statutes require as a precondition to charitable solicitation either the acquisition of a license/permit from the appropriate regulatory agency or, at a minimum, registration with the agency.³⁵ Typical of licens-

tion The attorney general, in seeking to protect the public interest, may also bring suit to impose a constructive trust on funds collected for charitable purposes but subsequently diverted to other purposes. [citations omitted] A constructive trust, although not a formal trust at all, serves as a means to prevent the unjust enrichment of those who would abuse their voluntary roles as public solicitors for charity. [citations omitted] For this court to hold that the attorney general can only enforce express charitable trusts would greatly hamper his ability to carry out his statutory and common law duties.

Brown v. Concerned Citizens, 56 Ohio St. 2d. at 90-91, 382 N.E.2d. at 1158.

31. Arkansas, California, Connecticut, District of Columbia, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Virginia, Washington, West Virginia, and Wisconsin. See generally SURVEY, *supra* note 19.
32. California amended its statute in 1980 to include "solicitation" in the statute regulating sales solicitation for charitable purposes. It now reads "Solicitation or Sales Solicitation for Charitable Purposes." CAL. BUS. & PROF. CODE 17510.3 (West 1964 & Supp. 1985); Louisiana and New Mexico enacted charitable solicitation statutes in 1981 and 1983, respectively. LA. REV. STAT. ANN. § 49.1901 *et seq.* (West 1965 & Supp. 1985) (enacted 1981); N.M. STAT. ANN. § 57-22-1 *et seq.* (1978 & Supp. 1983).
33. Colorado, for example, has a statutory provision prohibiting charitable fraud. A person commits charitable fraud by (a) soliciting or receiving "contributions for a purpose or use which, by affirmative representations or through lack of adequate disclosure, leads the person or persons, to whom the solicitation is made or from whom the contribution is received, reasonably to believe that such contributions will be so used . . . ,," (b) using the name of a person or organization without consent in a charitable solicitation, (c) using names or symbols closely related to those of other charities in a solicitation, or (d) failing to maintain complete records for three years. COLO. REV. STAT. § 18-5-115 (1973 & Supp. 1984) (amended 1984).
34. For a full summary presentation of all state statutes see, SURVEY, *supra* note 19; B. HOPKINS, *supra* note 4. The statutes cited in the following footnotes are provided as examples and do not foreclose other state provisions.
35. The statutes typically require the soliciting organization to submit an application or a registration statement containing information such as: the name and purpose of organization, principal address of organization and officials, the name and address of chapters within the state, the existence of tax-exempt status under the Internal Revenue Code, financial records from preceding years (usually audited by an independent public accountant), specific financial records of prior fund raising

ing statutes is North Carolina's requirement that "[a]ny person who solicits charitable contributions shall apply for and obtain an annual license."³⁶ Pennsylvania's statute is representative of registration statutes requiring charitable organizations intending to solicit "prior to any solicitation, [to] file a registration statement" with the appropriate department.³⁷ Iowa, in a constitutionally suspect statute, requires soliciting organizations to "first [obtain] a permit."³⁸

Upon receipt of the application or registration statement, the action to be taken by the agency varies among the statutes. Some statutes, without clear direction, contemplate that if the requested information is provided, then the organization may proceed with the solicitation.³⁹ Other statutes, however, provide specifically for action to be taken following submission of the requested information.⁴⁰ It is often provided that the agency may make a reasonable investigation to determine the correctness of the information provided in the application or registration, or whether any provision of the law has been or is about to be violated.⁴¹ A license, permit, or registration may be denied not only for the incompleteness or inaccuracy of the application or registration statement, but also for violations of other provisions in the statute.⁴²

activity, intention to use professional fund raisers or solicitors, the general purpose for which the contributions are solicited, the name under which the organization will solicit, copies of contracts between the charitable organization and professional fund raisers or solicitors, a statement as to whether the organization has ever been enjoined from soliciting charitable contributions, and the names of individuals who will have custody of funds or who will be responsible for their distribution. See MINN. STATE ANN. § 309.52 (West 1969 & Supp. 1985); N.Y. EXEC. LAW §§ 172, 173a (McKinney 1982); PA. STAT. ANN. tit. 10, § 160-3(a) (Purdon 1965 & Supp. 1985). Statutes also permit the administrative agency to request additional information. For example, the Minnesota statute provides that the registration statement is to include "such other information as the department may by rule or order require to promote fairness of the solution and to assure full and fair disclosure of all material information . . ." MINN. STAT. ANN. § 309-52(1)(p) (West 1969 & Supp. 1985).

36. N.C. GEN. STAT. § 131C-4 (1981 & Supp. 1983).

37. PA. STAT. ANN. tit. 10, § 160-3(a) (Purdon 1965 & Supp. 1985).

38. The Iowa statute first requires the organization to be incorporated under Iowa law or authorized to do business in Iowa. It then requires that the organization obtain a permit from the secretary of state conditioned upon the application of all donations "directly to the purpose stated and for which the donations were given." The secretary of state is vested with "full discretion as to whom he will issue permits, and shall satisfy himself before issuing any such permit that the *applicant is reputable* and that the *purposes for which donations from the public are to be solicited are legitimate and worthy*." IOWA CODE ANN. § 122.1 (West 1984) (emphasis added). This statute would seemingly be unconstitutional as being vague and vesting too much discretion in an official. See *infra* Part II and discussion of *Hynes, infra* notes 143-53.

39. E.g., OHIO REV. CODE ANN. § 1716.02 (Baldwin 1982).

40. For example, Florida provides that each application is to be examined and if it is in conformity "with the requirement of . . . [the] chapter and all relevant rules and regulations" it shall be approved. FLA. STAT. ANN. § 496.05 (West 1972 & Supp. 1985). See also the District of Columbia statute requiring the issuance of a certificate of registration within ten days after an application has been filed provided the required information has been disclosed. D.C. CODE ANN. § 704(c) (1981). In North Carolina an organization is free to solicit charitable contributions until notified that the application has been denied. N.C. GEN. STAT. § 131C-4(b) (1981 & Supp. 1983). At an extreme is the Iowa statute which allows the agency issuing permits to "satisfy . . . [itself] before issuing . . . any permits that the applicant is reputable and that the purposes for which donations from the public are to be solicited are legitimate and worthy. IOWA CODE ANN. § 122.1 (West 1984).

41. See, e.g., CONN. GEN. STAT. ANN. § 21a-187(a) (West 1985); N.C. GEN. STAT. § 131C-18 (Supp. 1985).

42. For example, the North Carolina statute permits the denial of a license if "charitable contributions have or are not being applied for the purpose or purposes stated in the application." N.C. GEN. STAT. § 131C-11(a)(4) (Supp. 1985). The Connecticut and Hawaii statutes permit denial where the

Updating of information on the application or registration form is also a significant aspect of the application or registration process. Most statutes require an annual or periodic updating of information along with the filing of financial data.⁴³ The required financial data typically includes information on gross contributions pledged and collected, distribution of gross receipts, identification of professional fund raisers or solicitors, any contracts between fund raisers, and financial records.⁴⁴ Financial reports often must be certified by an independent public accountant.⁴⁵ Annual reporting, as well as agency investigation, is facilitated by a requirement in some statutes that the organization must maintain specified financial and non-financial records.⁴⁶

B. Exemption from Registration or Licensing

Charitable solicitation statutes typically exempt certain organizations from their licensing or registration requirements. Exemptions vary from statute to statute, but generally include churches,⁴⁷ religious organizations,⁴⁸ educational organizations,⁴⁹ and membership organizations.⁵⁰ Small solicitations are exempted under most statutes, although the ceiling amount varies from statute to statute.⁵¹ Other exemptions include libraries, museums, hospitals, health care institutions, solicitation for specified individuals, and veterans organizations.⁵² An organization, otherwise exempt, may lose

proceeds of a solicitation are used for fund-raising cost which exceed a statutory maximum. CONN. GEN. STAT. ANN. §§ 21a-179, -187(d) (West 1985); HAWAII REV. STAT. §§ 467B-7, -10(b) (1976 & Supp. 1984).

43. MD. ANN. CODE art. 41, § 103B (1957 & Supp. 1984); N.Y. EXEC. LAW § 172-b (McKinney 1982 & Supp. 1986); OHIO REV. CODE ANN. § 1716.04 (Baldwin 1982).
44. MD. ANN. CODE art. 41, § 103B (1957 & Supp. 1984); N.Y. EXEC. LAW § 172-b (McKinney 1982 & Supp. 1986); OHIO REV. CODE ANN. § 1716.04 (Baldwin 1982).
45. CONN. GEN. STAT. ANN. § 21a-179 (West 1985); OHIO REV. CODE ANN. § 1716.04 (Baldwin 1982); VA. CODE § 57-49(a) (1980 & Supp. 1985).
46. CONN. GEN. STATE ANN. § 21a-183 (West 1985); OHIO REV. CODE ANN. § 1716.04 (Baldwin 1982); VA. CODE § 57-53 (1981); W. VA. CODE § 29-19-11 (1980 & Supp. 1985).
47. Under the Florida statute, religious institutions are not considered charitable organizations. Only charitable organizations not specifically falling within an exemption must register prior to soliciting. Churches are included within the definition of religious institutions. FLA. STAT. ANN. §§ 496.02(1)(a)-(b), 496.04 (West 1972 & Supp. 1985).
48. MINN. STAT. ANN. § 309.515(1)(b) (Supp. 1985); N.Y. EXEC. LAW § 172-a(1) (McKinney 1982) (exempts from entire act); N.C. GEN. STAT. § 131C-5(b) (Supp. 1985) (exempts only from registration provision). The former Minnesota statute exempting only religious organizations receiving more than half of their contributions in the preceding accounting year from members of the organization, parent organizations of affiliates or some combination of members and affiliate groups was held unconstitutional in 1982 in *Valente v. Larson*. See discussion *infra* Part II Section (B)(2)(b).
49. ILL. ANN. STAT. ch. 23, § 5103(b) (1) (Smith-Hurd 1968 & Supp. 1985) (solicitation limited to constituency); MINN. STAT. ANN. § 309.515(1)(c) (Supp. 1985); N.C. GEN. STAT. § 131C-5(d) (Supp. 1985); VA. CODE § 57-60(a)(1) (Supp. 1985) (solicitation limited to constituency).
50. MICH. COMP. LAWS ANN. § 400.283(c) (West 1976 & Supp. 1985); PA. STAT. ANN. tit. 10, § 160-4(b)(3) (Purdon 1965 & Supp. 1985); VA. CODE § 57-60(a)(4) (1981 & Supp. 1985). Membership is defined in some statutes to exclude individuals who become members after making a contribution. *E.g.*, PA. STAT. ANN. tit. 10, § 160-4(b)(3) (Purdon 1965 & Supp. 1985). Michigan provides an exemption to any organization that "does not invite the general public to become a member of the organization and confines solicitation activities . . . among its members." MICH. COMP. LAWS ANN. § 40.283 (West 1976 & Supp. 1985).
51. ME. REV. STAT. ANN. tit. 9, § 5006(1)(D) (1980) (\$10,000); MD. ANN. CODE art. 41, § 103C(a)(B) (1957 & Supp. 1984) (\$5,000); N.Y. EXEC. LAW § 172(a)(2)(d) (McKinney 1982) (\$10,000); PA. STAT. ANN. tit. 10, § 160-4(b)(2) (Purdon Supp. 1985) (requires short form registration for solicitations under \$15,000).
52. See generally B. HOPKINS, *supra* note 4, at 93; SURVEY, *supra* note 19.

that exemption if it employs a professional fund raiser or pays solicitors.⁵³

At least three valid reasons exist for exempting some organizations from the licensing or registration requirements of a statute. First, if the solicitation is confined to an organization's membership or to a defined constituency of the organization, therefore not involving a public solicitation,⁵⁴ the interest of the state in protecting the general public from fraud and abuse is not furthered by requiring these organizations to comply with the statute.⁵⁵ Second, if the amount of money to be solicited is small, the state may want to concentrate its administrative resources and attention on organizations which affect the general public to a greater extent.⁵⁶ Additionally, organizations which get a relatively small amount of financial support from the public are more likely to be small organizations. Requiring these organizations to comply with registration or licensing provisions may be cost prohibitive and may effectively put them out of operation. Third, if a separate governmental or quasi-governmental agency already exercises a regulatory function over the organization similar to that which the charitable solicitation regulatory agency would perform, little additional benefit would be gained by requiring compliance with the licensing or registration provisions.⁵⁷ Moreover, the organization would suffer a double burden and government resources would be wasted. The exemptions for educational organizations and hospitals are two good examples of unnecessary double regulation.⁵⁸

C. Licensing or Registration of Professional Fund Raisers

Most states regulating charitable solicitation require the registration or licensing of professional fund raisers⁵⁹ and solicitors⁶⁰ and prohibit a person

53. Minnesota exempts religious organizations, small solicitations, and certain organizations soliciting from its members unless a professional fund raiser is employed to solicit or assist in the solicitation. MINN. STAT. ANN. § 309.515(1)-(2) (West Supp. 1985). See also MD. ANN. CODE art. 41, § 103C(a)(3) (1957 & Supp. 1984); W. VA. CODE § 29-19-6(a)(3) (1980 & Supp. 1985).

54. As used throughout this article a "public" solicitation or solicitation of the "general public" means a solicitation of individuals or organizations who are neither members of the organization nor invited to become members following a donation as a result of the solicitation. See *supra* note 50. It would serve no useful purpose to try an attempt to establish a minimum number of non-member targets of a solicitation campaign, whether specific or stated as a percentage, at which all persons would readily agree that there is public solicitation. Under this definition, the solicitation of one non-member involves a public solicitation. However, authorities regulating charitable solicitation will hardly direct money and people resources to regulate a solicitation involving only one person. As the number of non-member donors targeted for solicitation request increases, the solicitation becomes "more public." It is asserted throughout this article, and particularly in Part II, Section (B)(2)(b), *infra*, that the state's interest and willingness to become involved in "actively" regulating public solicitations is directly related to the number of non-members targeted in solicitation campaigns among other factors. Under most circumstances, the need to resort to a definition of public solicitation will be of no moment since the solicitation will be directed at the general public in the ordinary sense.

55. B. HOPKINS, *supra* note 4, at 90.

56. *Id.*

57. *Streich v. Pennsylvania Commission on Charitable Organizations*, 579 F. Supp. 172, 179 (M.D. Pa. 1984).

58. Educational organizations are typically exempted if they are accredited by regional or state accrediting associations or are under the supervision of a state board of education. This exemption usually includes foundations or departments directly associated with the educational institution (see *supra* note 49). See also WASH. REV. CODE ANN. § 19.09.030(7) (1980 & Supp. 1985) which exempts "volunteer hospital organizations affiliated with nonprofit hospitals where budgets are subject to review by" the Washington hospital commission.

59. See CONN. GEN. STAT. ANN. § 21a-181 (West 1985); MINN. STAT. ANN. § 309.531 (West Supp.

from acting as such unless registered or licensed.⁶¹ Like the charitable organization itself, the professional fund raiser or solicitor must apply or file a registration statement with the agency disclosing information such as name, names and addresses of employees, and prior activity including any outstanding injunctions prohibiting solicitations or criminal convictions for embezzlement.⁶² A bond is generally required to be filed by the fund raiser or solicitor.⁶³

D. Regulation of Fund-Raising Costs⁶⁴

A number of states impose limitations on the percentage of solicited dollars which may be used for fund raising as part of their regulatory scheme.⁶⁵ A typical statute imposes a percentage limitation upon the amount a professional fund raiser or solicitor may receive as compensation.⁶⁶ While imposing a limitation, many of the statutes permit charitable organizations exceeding the limitation to solicit if the organization can demonstrate that the higher costs are nonetheless reasonable or that special circumstances exist necessitating higher costs.⁶⁷

E. Disclosure and Solicitor Information Cards

A few states make disclosure a part of any charitable solicitation.⁶⁸ Maine requires disclosure at the time of the solicitation only if less than seventy percent of the total contributed dollars will be used for program services.⁶⁹ In that event, "the estimated percentage of each dollar contrib-

1985); N.Y. EXEC. LAW § 173 (McKinney 1982); N.C. GEN. STAT. § 131C-6 (1981 & Supp. 1983). For definition of professional fund raiser, see *infra* note 278.

60. N.Y. EXEC. LAW § 173-b (McKinney 1982); N.C. GEN. STAT. § 131-C (1981 and Supp. 1983). For definition of professional solicitor, see *infra* note 279.

61. MINN. STAT. ANN. § 309.531 (West Supp. 1985). See also *supra* note 59.

62. See *supra* note 59.

63. N.C. GEN. STAT. § 131C-10 (Supp. 1985); OHIO REV. CODE ANN. § 1716.05 (Baldwin 1982).

64. See *infra* Part II, Section B(2)(a) for discussion of the constitutionality of percentage limitations or fund-raising costs.

65. CONN. GEN. STAT. ANN. § 21a-179 (West 1985); HAWAII REV. STAT. § 467B-7 (1976 & Supp. 1984); ILL. ANN. STAT. ch. 23, § 5109(c) (Smith-Hurd 1968 & Supp. 1985); MASS. GEN. LAWS ANN. ch. 68, §§ 21-22 (West 1969 & Supp. 1985); MINN. STAT. ANN. § 309-555 (West 1969 & Supp. 1985); PA. STAT. ANN. tit. 10, § 160-6 (Purdon 1965 & Supp. 1985).

66. HAWAII REV. STAT. § 467B-7 (1976 & Supp. 1984); MASS. GEN. LAWS ANN. ch. 68, § 21 (West 1969 & Supp. 1985); MINN. STAT. ANN. § 309.5555 (West 1969 & Supp. 1985); PA. STAT. ANN. tit. 10, § 160-6 (Purdon 1965 & Supp. 1985).

67. MINN. STAT. ANN. § 309-555(5) (West 1969 & Supp. 1985); PA. STAT. ANN. tit. 10, § 160-6 (Purdon 1965 & Supp. 1985). See also MD. ANN. CODE art. 41, § 103D(a) (1957 & Supp. 1984) (declared unconstitutional in *Munson*, 104 S. Ct. 2839 (1984)).

68. CAL. BUS. & PROF. CODE § 17510.3-.4 (West 1964 & Supp. 1985); D.C. CODE ANN. § 2-705 (1981 & Supp. 1985); ME. REV. STAT. ANN. tit. 9, § 5012 (1980); VA. CODE §§ 57-55.1, -56 (1981 & Supp. 1985).

69. It shall be a violation of this chapter for a professional fund-raising counsel, professional solicitor, commercial co-venturer or any other person to solicit contributions from a prospective donor in this State without fully disclosing to the prospective donor at the time of solicitation the estimated percentage of each dollar contributed which will be expended for program services, fund raising and management when less than 70% of the amount contributed will be expended for program services. In addition, any person required to register under section 5008, or any of his agents, who solicits contributions shall disclose to the prospective donor at the time of the solicitation the percentage of the gross contribution which will constitute his compensation and all fund-raising expenses connected with that particular contract.

uted which will be expended for program services, fund raising and management" must be disclosed.⁷⁰ If the person soliciting is a professional fund raiser or solicitor, that individual must disclose his compensation and all fund-raising expenses as a percentage of gross contributions.⁷¹

California and the District of Columbia achieve disclosure by requiring the individual soliciting to exhibit a "solicitor information card" or other printed material containing information required on the card.⁷² The card must contain information regarding the name and address of the organization on whose behalf the solicitation is made, the amount—as a percentage of total receipts—that will be used for fund-raising expenses, whether and to what extent the contribution is tax deductible, and the tax exempt status of the organization.⁷³ If radio, television, or telephone is used instead of personal contact, a solicitor is nevertheless required to give essentially the same information by tendering the card prior to any actual acceptance of the contribution.⁷⁴

F. Enforcement and Penalties

The statutes contain provisions prohibiting certain actions in connection with a charitable solicitation. It is apparent in reviewing these provisions that they are aimed at preventing fraud, misrepresentation, and confusion. The prohibitions may include the following: prohibition against the unauthorized use of the name of another person (including charitable organizations); prohibition against the use of related or similar names, symbols, or statements of another person which tend to confuse or mislead; prohibition against the use of fraud, misrepresentations, misleading statements, or deceptive practices with intent to confuse or mislead a person to believe that a charitable organization is involved or that the funds will be used for charitable purposes and programs; and prohibition against using the fact of registration or licensing as an endorsement of the solicitation campaign by another organization or governmental agency.⁷⁵ Other prohibited acts include: employing solicitors wearing uniforms of local, state, or federal governmental agencies or departments;⁷⁶ soliciting on behalf of charitable organizations by professional solicitors without written authorization from the organization;⁷⁷ selling of lists of contributors by one charitable organization to one another;⁷⁸ accepting more than a specified sum of money without providing a receipt if requested by the donor;⁷⁹ and soliciting by a

ME. REV. STAT. ANN. tit. 9, § 5012 (1980).

70. *Id.*

71. *Id.*

72. CAL. BUS. & PROF. CODE §§ 17510.3-17510.4 (West 1964 & Supp. 1985); D.C. CODE ANN. § 2-705 (1981 & Supp. 1985).

73. See CAL. BUS. & PROF. CODE § 17510.3 (West 1964 & Supp. 1985).

74. *Id.*; D.C. CODE ANN. § 2-705(b) (1981 & Supp. 1985).

75. See, e.g., MINN. STAT. ANN. § 309.55 (West 1976 & Supp. 1985); PA. STAT. ANN. tit. 10, § 160-12 (Purdon 1965); VA. CODE § 57-57 (1981 & Supp. 1985); B. HOPKINS, *supra* note 4, at 101-02.

76. MINN. STAT. ANN. § 309.55(4) (West 1976 & Supp. 1985).

77. PA. STAT. ANN. tit. 10, § 160-12(e) (Purdon 1965); MD. ANN. CODE art. 41, § 103J(e) (1957 & Supp. 1984).

78. MINN. STAT. ANN. § 309.55(6) (West 1976 & Supp. 1985).

79. VA. CODE § 57.57(g) (1981 & Supp. 1985).

person who has been convicted of embezzlement, larceny, or previously enjoined by a court from soliciting.⁸⁰

Penalties for contravening any of the prohibited acts, as well as other provisions of the statutory scheme, include revocation, cancellation, or denial of a registration, license, or permit.⁸¹ Statutes also provide for fines⁸² and criminal penalties⁸³ and the availability of injunctive relief.⁸⁴ Georgia statutorily provides individuals, injured as a result of a violation of the solution statute, with a private cause of action.⁸⁵ Furthermore, specific authority to investigate organizations is provided in some statutes.⁸⁶ This authority may be vested in the secretary of state, the agency, the attorney general, or all of these simultaneously.⁸⁷

II. CONSTITUTIONAL LIMITATIONS ON CHARITABLE SOLICITATION REGULATION

A. Solicitation and the First Amendment—Early Decisions

Any state or local government wishing to enact legislation regulating charitable solicitations must be cognizant of the federal constitutional limitations imposed upon such legislation by the United States Constitution as interpreted by the Supreme Court⁸⁸ and other federal and state court decisions. A review and analysis of those decisions is necessary to both a critique of current legislation and the development of proposed legislation.

The first amendment as made applicable to state and local governments by the fourteenth amendment is the most significant constitutional limitation affecting the validity of charitable solicitation legislation. Inasmuch as many religious organizations solicit funds in order to carry out their charitable and religious purposes, the first amendment's prohibition of laws which prevent the free exercise of religion and the establishment of religion becomes significant in judicial challenges to such legislation.⁸⁹ Similarly, because charitable solicitation may be entwined with the communication of

80. *Id.* § 57.57(n)(j). An organization may be prohibited from soliciting if an officer, professional fund raiser, or solicitor of the organization would be prevented from soliciting under this type of provision. *Id.*

81. FLA. STAT. ANN. § 496.13(2) (West 1972 & Supp. 1985); MINN. STAT. ANN. § 309.532(1) (West 1969 & Supp. 1985); PA. STAT. ANN. tit. 10, § 160-14(a) (Purdon 1965).

82. CONN. GEN. STAT. ANN. § 21a-187(d) (West 1985); MASS. GEN. LAWS ANN. ch. 68, § 32(d) (West Supp. 1986); OHIO REV. CODE ANN. § 1716.99 (Baldwin 1982).

83. CONN. GEN. STAT. ANN. § 21a-187(d) (West 1985); MASS. GEN. LAWS ANN. ch. 68, § 32(d) (West Supp. 1986); OHIO REV. CODE ANN. § 1716.99 (Baldwin 1982).

84. MD. ANN. CODE art. 41, § 103L(c) (1957 & Supp. 1984); N.C. GEN. STAT. § 131C-21 (Supp. 1985); PA. STAT. ANN. tit. 10, § 160-14(f) (Purdon 1965 & Supp. 1985).

85. GA. CODE ANN. § 43-17-15(a) (1984). In the alternative, a class action may be instituted by the attorney general on behalf of injured individuals. *Id.* § 43-17-15(b). Exemplary damages and attorney fees may also be awarded in addition to general damages under the statute if it is found that the violations of the statute were intentional. *Id.* § 43-17-15(a).

86. CONN. GEN. STAT. ANN. § 187 (West 1985); FLA. STAT. ANN. § 496.13 (West 1972 & Supp. 1985); GA. CODE ANN. § 43-17-13 (1984); W. VA. CODE § 29-19-15(b) (1980 & Supp. 1985).

87. CONN. GEN. STAT. ANN. § 187 (West 1985); FLA. STAT. ANN. § 496.13 (West 1972 & Supp. 1985); GA. CODE ANN. § 43-17-13 (1984); W. VA. CODE § 29-19-15(b) (1980 & Supp. 1985).

88. The thrust of this article is on federal constitutional limitations on charitable solicitation regulation, but state constitutional provisions may play a significant role in defining limits on such regulation.

89. *Larson v. Valente*, 456 U.S. 228 (1982); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

ideas or positions, the first amendment's protection of free speech plays a significant role in establishing limitations for charitable solicitation legislation.⁹⁰ Accordingly, governments are faced with the very difficult task of regulating charitable solicitation activity without unnecessarily and unduly infringing upon these protected rights.

The landmark decision setting the initial permissible limitations of charitable solicitation regulation is *Cantwell v. Connecticut*.⁹¹ A Connecticut statute prohibited the solicitation of money, services, or anything of value for any alleged charitable or religious cause unless an issuing authority had given its approval and had issued a certificate to that effect.⁹² The official issuing the certificate had the authority to determine whether there existed a religious cause or "an object of charity or philanthropy" and whether the cause "conform[ed] to reasonable standards of efficiency and integrity."⁹³ Conducting a solicitation without a certificate was punishable by fine or imprisonment.⁹⁴

Appellants in *Cantwell*, Jehovah's Witnesses, were arrested as a result of their activity of going from house to house presenting information about Jehovah's Witnesses and soliciting contributions for the publication of their pamphlets.⁹⁵ The Supreme Court held that the statute, on its face and as applied, denied appellants' freedom of speech and prohibited their free exercise of religion.⁹⁶ Recognizing the first amendment's prohibition against legislation which, on one hand, would compel individuals to accept a particular creed or to practice a form of worship and, on the other hand, would deny individuals the free exercise of their chosen form of religion, the Court established that states may regulate the "times, places and manner" of soliciting funds upon the street as well as safeguarding the "peace, good order and comfort of the community."⁹⁷ Even in this statement of permissible regulation, however, the Court cautioned that "in attaining a permissible end," the government must be careful not to "unduly infringe [upon]

90. See *Secretary of State of Maryland v. Joseph H. Munson Company, Inc.*, 104 S. Ct. 2839 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980).

91. 310 U.S. 296 (1940).

92. No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect . . . Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both.

Id. at 301, 302.

93. *Id.* at 302.

94. *Id.*

95. *Id.* at 301.

96. *Id.* at 300.

97. It is equally clear that a state may by general and non-discriminatory legislation regulate the times, the places and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment.

Id. at 304.

the protected freedom."⁹⁸

No one would contend that a state is without authority to protect its citizens from fraud or abuse perpetrated under the cloak of religion. The question, however, is to what extent may the state proceed to protect its citizens when constitutional rights are affected. In *Cantwell*, the statute permitted the issuing authority to determine whether a cause for which there was to be a solicitation was a religious one, and the issuance of a certificate depended upon the official's decision. In the context of freedom of religion, the authority to determine what is a religious cause denies the protection guaranteed by the first amendment.⁹⁹ *Cantwell* provides that a legislative enactment which does not involve a religious test or "unreasonably obstruct or delay the collection of funds is permissible."¹⁰⁰

If legislation is directly aimed at religion or religious beliefs, then it will most certainly fall to the precepts of the Constitution.¹⁰¹ Problems arise when the statute is directed at regulating legitimate secular activity which also may impose burdens on the exercise of religious freedom. The state has a fundamental interest in the regulation of purely secular conduct for the preservation of peace and order¹⁰² and the prevention of practices harmful to society.¹⁰³ Testing the validity of solicitation legislation directed at these permissible objectives by simply asking whether the legislation "unduly" infringes upon religious freedom lacks guidance for both legislatures or the individuals and organizations involved in charitable solicitation.

Cantwell was the seminal case and discussed charitable solicitation regulation under the free exercise clause of the first amendment. Prior to and following that decision, the Court looked at solicitation legislation in the context of free speech and press.¹⁰⁴ Legislation prohibiting on-the-street and door-to-door solicitation has been successfully assailed as violative of free speech and press in several cases.¹⁰⁵ These cases provide helpful guidelines in determining the permissible scope of charitable solicitation regulation in

98. *Id.* In other words, encompassed within the first amendment is the "freedom to believe and the freedom to act," and in regulating conduct it is not permissible to regulate the freedom to believe or to unduly infringe upon that freedom. *Id.* at 303-04. See also *Reynolds v. United States*, 98 U.S. 145 (1878).

99. A good argument can be made that the delegation of discretion to the secretary of public welfare to determine whether such cause is a "bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity" was unconstitutional in that unfettered discretion is placed in the secretary. While the case does not appear to be decided on this point, it is touched upon lightly by the parties and the Court. 310 U.S. at 306. See *infra* note 147 and accompanying text.

100. 310 U.S. at 305, 307.

101. 310 U.S. 296.

102. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

103. *Reynolds v. United States*, 98 U.S. 145 (1878).

104. See *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980); *Hynes v. Mayor and Council of Borough of Oradell*, 425 U.S. 610 (1976); *Martin v. Struthers*, 319 U.S. 141 (1943); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938).

105. *Martin v. Struther*, 319 U.S. 141 (1943); *Valentine v. Chrestensen*, 316 U.S. 52 (1942); *Schneider v. State*, 308 U.S. 147 (1939); *Lovell v. Griffin*, 303 U.S. 444 (1938). See also *Thomas v. Collins*, 323 U.S. 516 (1945) (declaring unconstitutional on first amendment grounds a statute requiring a permit prior to any solicitation of memberships into a labor union). But see *Broderick v. Oklahoma*, 413 U.S. 601 (1973) (upholding as not unconstitutional on its face a statute which prohibited civil service workers from soliciting or receiving contributions on behalf of political organizations, persons or purposes).

light of free speech and press although they do not all involve charitable solicitation.

In *Lovell v. City of Griffin*,¹⁰⁶ the Supreme Court held invalid on its face an ordinance which prevented the distribution of "literature of any kind . . . without first obtaining written permission . . ."¹⁰⁷ The Court found that the statute was not specifically aimed at literature which was "obscene or offensive to public morals or that advocate[d] unlawful conduct."¹⁰⁸ The ordinance contained no restrictions respecting littering, conducting of a nuisance on a public street, or maintaining order, which, assuming reasonableness, would have been proper "times, places or manner" restrictions.¹⁰⁹ The ordinance as written, however, was fatally overbroad with respect to free speech rights, sweeping within its prohibition every type of distribution and every type of literature, including the distribution of religious pamphlets.

Four ordinances considered by the Court in *Schneider v. State*¹¹⁰ also failed to satisfy first amendment guarantees, in spite of findings by the respective state courts that the ordinances were reasonable times, places, or manner restrictions, and thus were distinguishable from the *Lovell* ordinance.¹¹¹ The Supreme Court noted that although municipal authorities may enact regulations to protect public safety, health and welfare, or convenience, such regulation cannot abridge constitutional rights, particularly where alternative means to achieving the same result are available.¹¹² While these alternative means may be less efficient or convenient, efficiency and convenience cannot alone support an abridgment of constitutional rights.¹¹³ Similarly, the prevention of fraud cannot be the basis for broadly and indis-

106. 303 U.S. 444 (1938).

107. *Id.* at 447-48.

108. *Id.* at 451.

109. *Id.*

110. 308 U.S. 147 (1939). The case involved ordinances from Los Angeles, California; Milwaukee, Wisconsin; Worcester, Massachusetts; and Irvington, New Jersey.

111. The state court determined a Los Angeles ordinance to be a reasonable regulation because its prohibition permitted distribution in designated places, unlike the ordinance in *Lovell* which prohibited distribution anywhere in the city. A Milwaukee ordinance was distinguished by its state court because its purpose was "to prevent an unsightly, untidy, and offensive condition of the sidewalks." *Id.* at 156. *Lovell* was held inapplicable as the ordinance in that case was not aimed at the prevention of littering. *Id.* The court held Worcester's ordinance, which pertained to distributions on the public streets and ways and left all other places, both public and private, open for distributions, a valid regulation of the use of the streets. *Id.* at 157. The ordinance in *Lovell* was also distinguished from an Irvington ordinance, the latter held valid by the state court as a permissible regulation against fraudulent activity. *Id.* at 159.

112. In every case, therefore, where legislative abridgment of the rights (freedom of speech and press) is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.

Id. at 161.

113. Justice Murphy, concurring in *Martin v. Struthers*, writes, "Prohibition may be more convenient to the law maker and easier to fashion than a regulatory measure which adequately protects the peace and privacy of the home without suppressing legitimate religious activities. But that does not justify a repressive enactment like the one now before us." *Martin*, 319 U.S. at 151 (Murphy, J., concurring).

criminally prohibiting the exercise of first amendment rights of free speech and free press. Instead, authorities may enact laws prohibiting and punishing fraud or trespass,¹¹⁴ thereby directly regulating harmful and prohibited activity.¹¹⁵

In *Martin v. Struthers*,¹¹⁶ an ordinance prohibiting the distribution of handbills, the ringing of door bells, or otherwise summoning occupants to the door for receiving handbills, circulars, or advertisements was declared unconstitutional.¹¹⁷ In rejecting the city's argument that the ordinance protected its residents from intrusion during rest hours or from burglars posing as canvassers, the Court held that the ordinance denied canvassers their right to freedom of speech and free press by denying them the ability to transmit information door-to-door.¹¹⁸

For the most part, the legislation at issue in these cases concerned non-commercial speech, recognized as protected by the Constitution. Commercial speech was thought to be outside constitutional protection.¹¹⁹

In *Virginia State Board of Pharmacy v. Virginia Citizen's Consumer Counsel, Inc.*,¹²⁰ however, the Supreme Court held that commercial speech was protected by the first amendment. The Court recognized that commercial speech, in and of itself, is not so removed from any "exposition of ideas" or "truth, science, morality, and the arts in general, in its diffusion of liberal sentiments on the administration of Government" as to be without constitutional protection.¹²¹ Commercial speech may in fact be tied to the free flow of information,¹²² as well as religion, political speech, or speech communicating ideas or positions, all of which are protected.¹²³ Therefore, commercial speech entitled to protection is protected because of its nature and content.¹²⁴ Similarly, if commercial speech is unprotected, it is because

114. *Cantwell*, *supra* note 91; *Schneider*, *supra* note 110.

115. The ordinances failed due to indirectness in regulating legitimate concerns and also due to overbreadth. The ordinances simply prevented all distributions in designated areas.

116. 319 U.S. 141 (1943).

117. *Id.* at 142.

118. The Court determined that this type of legislation substituted the will and judgment of the community or authorities for the will and judgment of the individual householder. *Id.* at 144, 148. A general trespass ordinance or statute which allows individual householders to decide whether they are willing to receive literature was an alternative more closely aimed at protecting householders from the evils identified.

119. In *Schneider*, the court intimated that commercial solicitation and canvassing may be subject to regulation: "We are not to be taken as holding that commercial soliciting and canvassing may not be subjected to such regulation as the ordinance requires." 308 U.S. at 165. Reaffirming this dicta, the Court in *Valentine v. Chrestensen*, 316 U.S. 52 (1942) upheld an ordinance similar in many respects to those discussed above but which was applicable only to commercial and business advertising. *Id.* at 53 n.1. The Court stated:

[W]e are clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment.

Id. at 54.

120. 425 U.S. 748 (1976).

121. *Id.* at 762.

122. *Id.* at 765.

123. *Schaumburg*, 444 U.S. 620 (1980).

124. It is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another. Speech likewise is protected even though it carried in a form that is "sold" for profit, . . . and even though it may involve a solicitation to purchase or otherwise pay or contribute money.

of its nature and content.

The Supreme Court gave additional impetus to the *Virginia State Board of Pharmacy* decision in *Village of Schaumburg v. Citizens for a Better Environment*,¹²⁵ a case specifically involving a charitable solicitation ordinance. The ordinance required every charitable organization, which used or intended to use door-to-door solicitation within the village to apply for a permit.¹²⁶ Additionally, the ordinance required "[s]atisfactory proof that at least seventy-five percent of the proceeds of such solicitation will be used directly for the charitable purpose of the organization."¹²⁷ Respondent, a not-for-profit corporation advocating environmental concerns, was denied a permit to solicit when it could not demonstrate that seventy-five percent of its receipts would be used for charitable purposes.¹²⁸

The Court held that the Village of Schaumburg's seventy-five per cent requirement violated the first amendment. Two important conclusions of *Schaumburg* were the Supreme Court's reiteration that commercial speech enjoys some protection under the first amendment¹²⁹ and its statement to the effect that if there is to be effective and permissible regulation of commercial speech, the component of such speech not deserving of protection—solicitation of funds—must be identified and separated. As so ably demonstrated by the facts of *Schaumburg*, however, it is not easy to separate solic-

Id. at 761 (citations omitted). See generally *Bigelow v. Virginia*, 421 U.S. 809 (1975) (rejecting the notion that a publication was unprotected because it was commercial); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973) (upholding an ordinance which prohibited listing employment advertisements in such a way that promoted discriminatory hirings even though the newspaper ads were commercial speech). For an earlier case holding that the act of selling made a transaction a commercial one and distinguishing *Martin v. Struthers*, see *Breard v. Alexandria*, 341 U.S. 622 (1951).

125. 444 U.S. 620 (1980).

126. *Id.* at 623. The Village of Schaumburg (Illinois) adopted an ordinance in 1974 regulating charitable solicitations and requiring organizations soliciting or intending to solicit from the public to obtain a permit and to submit an application containing information about the organization, the times and places of the intended solicitation and whether the organization was tax exempt under the Internal Revenue Code. *Id.* at 623-24 & n.3; VILLAGE OF SCHAUMBURG CODE, art. III, §§ 22-19 to -24 (1975) [hereinafter cited as SCHAUMBURG CODE].

127. The relevant provision of the Schaumburg Code requires:

Satisfactory proof that at least seventy-five per cent of the proceeds of such solicitation will be used directly for the charitable purpose of the organization. For such purposes, the following items shall not be deemed to be used for the charitable purposes of the organization, to wit:

(1) Salaries or commissions paid to solicitors;

(2) Administrative expenses of the organization, including, but not limited to, salaries, attorneys' fees, rents, telephone, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items.

SCHAUMBURG CODE, art. III, §§ 22-20(g). See *Citizens for a Better Environment v. Village of Schaumburg*, 590 F.2d 220, 221 n.1 (7th Cir. 1978).

128. 444 U.S. at 625.

129. Prior authorities, therefore, clearly establish that charitable appeals for funds, on the street or door to door, involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the reality that without solicitation the flow of such information and advocacy would likely cease.

Id. at 632.

itation of funds from the communication of ideas or positions and religion—all traditionally protected activity.¹³⁰ The Seventh Circuit Court of Appeals recognized this conclusion when it indicated that the seventy-five percent limitation of the ordinance might be enforceable against more “traditional charitable organizations”¹³¹ or those situations in which the “solicitors represent themselves as mere conduits for the contributions.”¹³² The obvious rationale of the court was that whatever those more “traditional charitable organizations” might be,¹³³ their activity did not involve communicating or advocating an element of religious belief or the communication of political views or ideas protected by the first amendment.¹³⁴ Non-traditional organizations, however, solicit funds from the public, but combine with their solicitation the “functions of dissemination, discussion, and advocacy of public issues.”¹³⁵ This latter group’s activities are deserving of first amendment protection from the restrictions of overly-broad legislation.¹³⁶ The inability to separate the functions therefore affords constitutional protection to the solicitation activity.

While the relevant factor in determining whether speech is protected is the nature and content of the speech activity rather than its characterization as commercial or non-commercial, such a distinction is nevertheless important in determining the permissible scope of regulation within the context of “times, places and manner” restrictions. The Court noted that commercial speech, being of a different nature than non-commercial speech, may be subject to a different degree of protection.¹³⁷ The distinction is also important in applying the overbreadth doctrine.¹³⁸ The difference in the de-

130. See *infra* notes 195-210 and accompanying text for a full discussion of *Schaumburg*.

131. *Schaumburg*, 590 F.2d at 225-26.

132. *Id.* at 226.

133. The concept of the more “traditional charitable organization” was not directly defined by the court of appeals. The Supreme Court indirectly defines non-traditional organizations as those “whose primary purpose is not to provide money or services for the poor, the needy or other worthy objects of charity, but to gather and disseminate information about and advocate positions on matters of public concern.” *Schaumburg*, 444 U.S. at 635. Conversely, those organizations whose purposes *are* to provide money or services to the poor, the needy, or other worthy objects of charity, and which serve as conduits for contributions, and do not gather and disseminate information about and advocate positions on matters of public concern are traditional type organizations for which the *Schaumburg* ordinance might be constitutionally applied.

134. See *Breard v. Alexandria*, 341 U.S. 622 (1951), where the Supreme Court upheld an ordinance prohibiting solicitors and peddlers from entering private property without permission distinguishing commercial activity from informational activity. Soliciting magazine subscriptions is a commercial activity although the magazines may in fact have matters in them which would be entitled to first amendment protection. *Martin v. Struthers* was distinguished.

135. *Schaumburg*, 444 U.S. at 635 (quoting *Schaumburg*, 590 F.2d 220 (7th Cir. 1978)).

136. Justice Rehnquist, dissenting, accused the Court of creating a new category of activity and solicitors which, when combined with commercial advocacy, is entitled to first amendment protection. This new category includes organizations “primarily engaged in research, advocacy, or public education and that use their own paid staff to carry out their functions as well as to solicit financial support.” *Id.* at 641-42 (quoting the majority opinion). Justice Rehnquist argued that the majority in effect invites regulatory agencies to distinguish between matters of public concern and commercial advocacy, an invitation which conflicts with the Court’s ruling in *Virginia Pharmacy Board*. Justice Rehnquist observed, “no line between publicly ‘interesting’ or ‘important’ commercial advertising and the opposite kind could ever be drawn.” *Id.* at 642 (quoting *Virginia Pharmacy Board*, 425 U.S. at 764). Objecting further, Rehnquist noted that no guidance was given by the Court to help the agency make the decision, and discretion left to administering officials is constitutionally impermissible. *Id.* at 642, 643.

137. 425 U.S. at 770-71, 771 n.24.

138. 444. U.S. at 632 n.7.

gree of protection afforded and the application of the overbreadth doctrine are important in the context of charitable solicitation regulation.¹³⁹

What then may be gleaned from these cases about the scope of the "times, places and manner" test established by the Supreme Court? Collectively, the cases recognize that governmental authorities have an interest in protecting residents from fraud and fraudulent practices, keeping streets and public ways safe and clean, protecting residents from the annoyance of intruders or would be burglars, and protecting the health and morals of residents. The extent to which authorities may enact legislation to achieve these goals when competing first amendment rights were involved, however, was the issue in each case. Consequently, if the articulated state concern is the cleanliness of the streets or public ways, proscribing littering and punishing those who litter attain that end with little inhibiting affect upon speech or religious rights. If the articulated concern is to shield residents from the annoyance of solicitors or the threat of would-be burglars, enacting penalties for violating trespass statutes attain that end with little consequent restriction on the exercise of first amendment rights. If the concern is preventing fraud or fraudulent activity, the state may make fraud punishable. Certain fraudulent activity is readily identifiable and definable and may, therefore, be proscribed with specificity in the legislation.¹⁴⁰ While these types of regulation may not be the most convenient or efficient from the government's view, neither the Constitution nor the Court's decisions permit convenience or efficiency to prevail over first amendment rights.

The central theme of the cases, although decided in the context of first amendment rights, rests upon the resultant constitutional prohibition against the enactment of laws that are overbroad. Since it is generally accepted that certain aspects, namely the conduct element of first amendment rights, may be regulated, each case hinges upon the extent to which the permissibly regulated conduct also impermissibly regulates the protected right. Once the conduct to be regulated is identified, the Constitution and the cases demand that the legislation be tailor-made to regulate that conduct with a negligible inhibiting effect upon first amendment rights. Moreover, the cases demand that the legislation have a secular purpose and not involve a religious test or unduly infringe upon religious freedoms.¹⁴¹ Finally, cases require that the administering official be aided in his exercise of discretion to grant or deny permission to solicit by well-defined legislative guidelines. In essence, the "times, places, and manner" test reduces itself to the question of whether the legislation, aimed at permissible governmental interest, is so far reaching in its operation that its negative effect upon first amendment rights can not be justified or tolerated. This is especially the case when other means, if adopted, would achieve the desired result.

139. See, e.g., *Munson*, 104 S. Ct. 2839 (1984).

140. See *supra* note 75 and accompanying text.

141. See *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

B. A Continuing Look at Regulation and Specific Problems

1. Subsequent Judicial Decisions

Since deciding these cases, the Supreme Court has had occasion to review legislation involving varying aspects of charitable solicitation.¹⁴² In *Hynes v. Mayor and Council of Borough of Oradell*,¹⁴³ the court considered a municipal ordinance which required advance written notice to the local police department by "[a]ny person . . . desiring to canvass, solicit or call from house to house for a recognized charitable cause"¹⁴⁴ The purpose of the ordinance on its face was only to identify, prior to any activity, those groups or persons who would be involved in the solicitation or canvassing. If the alleged activity was for a "recognized charitable cause or political campaign,"¹⁴⁵ then notice was sufficient. If, however, neither a recognized charitable cause or a political campaign was involved, the ordinance required the soliciting person to secure a permit.¹⁴⁶

The Supreme Court reversed the finding of the New Jersey court that the ordinance was a valid exercise of the city's police power. It held the ordinance vague and said that it vested too much discretion in the police department.¹⁴⁷ Specifically, the Court held the ordinance in question failed to meet due process requirements in that "men of common intelligence must necessarily guess at its meaning."¹⁴⁸ The ordinance did not in any way indicate what was a "recognized charitable cause" or "Federal, State, County or municipal cause."¹⁴⁹ The ordinance also failed to indicate what must be included in the notification and how such notice was to be given.¹⁵⁰

Justices Brennan and Marshall, concurring, were concerned that notification, which required identification of the person or the organization, would result in a chilling effect upon first amendment freedoms.¹⁵¹ Justice Brennan wrote that identification requirements impose restrictions on free speech beyond those permissible by "times, places and manner" restrictions.¹⁵² But the Court did not foreclose the possibility that certain ordinances requiring identification might be constitutionally permissible.¹⁵³

Following the landmark decision in *Cantwell*, the California Supreme

142. *Munson, Schaumburg, and Larson* are discussed in Section B(2)(a) and (b) of this part, *infra*.

143. 425 U.S. 610 (1976).

144. *Id.* at 611 n.1.

145. *Id.* at 613 n.2.

146. *Id.*

147. Although the appellants argued that the ordinance was overbroad, this case was decided solely on the basis of vagueness under the due process clause of the fourteenth amendment. *Id.* at 620, 621 nn.4-5.

148. *Id.* at 620 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

149. *Id.*

150. The Supreme Court was unwilling to accept the lower court's construction that would have permitted compliance with the ordinance by mailing the notification to the police department.

151. *Id.* at 623.

152. *Id.*

153. See Justice Brennan's query regarding the validity of Justice Black's observation in *Martin v. Struthers* that "[a] city can . . . by identification devices control the abuse of criminals posing as canvassers." *Id.* at 628 n.4. Justice Black relies upon a statement in *Cantwell*: "Without doubt a State may protect its citizens from fraudulent solicitation by requiring a stranger in the community, before permitting him publicly to solicit funds for any purpose, to establish his identity and his authority to act for the cause which he purports to represent." 319 U.S. at 148, n.14 (citing *Cantwell*, 310 U.S. at 306). Compare to *Buckley v. Valeo*, 424 U.S. 1 (1976) (where the Court

Court held a Los Angeles solicitation ordinance valid in *Gospel Army v. City of Los Angeles*¹⁵⁴ and *Rescue Army v. Municipal Court of the City of Los Angeles*.¹⁵⁵ In *Gospel Army*, the ordinance required any person who solicited funds for charity to file a notice of intent to solicit with the regulatory agency¹⁵⁶ containing certain required information¹⁵⁷ and to receive from the agency an information card containing information deemed to "be of assistance to the public in determining the nature and worthiness of the solicitation."¹⁵⁸ The card was issued automatically upon filing the required information and the payment of four cents per card.¹⁵⁹ The ordinance required the solicitor to show the information card to prospective donors and to make no misstatements about the solicitation.¹⁶⁰ The solicitor also had to carry written authorization from the organization represented.

A promoter was required to submit an application for a license which indicated his qualifications and showed that he was of good character and reputation.¹⁶¹ The regulatory agency granted the license if it was satisfied that the applicant was of good character and reputation, had financial responsibility incident to the proposed solicitation, and intended to conduct his business as promoter fairly and honestly.¹⁶²

Solicitations from organizational members and upon premises owned or occupied by the organization were exempt from the regulatory provisions. The same was true for solicitations for religious purposes. Plaintiff in *Gospel Army* claimed an exemption as a religious organization, arguing that charity was part of its religious duties and that to regulate solicitations for charity would abridge its constitutional rights.¹⁶³ Recognizing that charity, while viewed as a religious duty by many, is not exclusively a religious activity, the Court held the organization subject to the ordinance.¹⁶⁴

A second question raised in *Gospel Army* was the validity of the provision in the ordinance which permitted the regulatory agency to deny a license if the promoter was not of good character and reputation. The court upheld this provision, finding that it neither discriminated against plaintiff,

upheld the Federal Election Campaign Act which required disclosure prior to soliciting campaign contributions). See also *supra* note 119.

154. 27 Cal. 2d 232, 163 P.2d 704 (1945), *appeal dismissed*, 331 U.S. 543 (1947).

155. 28 Cal. 2d 460, 171 P.2d 8 (1946), *appeal dismissed*, 331 U.S. 549 (1947). In *Rescue Army* the California Supreme Court had before it *Gospel Army* but did not decide the ultimate issue regarding the constitutionality of the Los Angeles ordinances noting that the precise question had neither been decided nor properly established in the state court proceeding.

156. 27 Cal. 2d at 237, 238, 163 P.2d at 708 n.1; 28 Cal. 2d at 468, 171 P.2d at 13, 14 n.1.

157. *Id.*

158. 27 Cal. 2d at 237-41, 163 P.2d. at 708-10; 28 Cal. 2d at 468-69, 171 P.2d at 13, 14.

159. 27 Cal. 2d at 238-39, 163 P.2d at 709; 28 Cal. 2d at 470-71, 171 P.2d at 15.

160. 27 Cal. 2d at 239, 163 P.2d at 709; 28 Cal. 2d at 468-69, 171 P.2d at 13, 14.

161. 27 Cal. 2d at 241, 163 P.2d at 710.

162. 27 Cal. 2d at 242, 163 P.2d at 710.

163. *Id.*

164. 27 Cal. 2d 232, 163 P.2d 704. The court distinguished *Cantwell* by noting that in *Cantwell* funds were solicited for the organization, Jehovah's Witnesses, and not for charitable purposes, and the regulatory agency had the right to determine if the organization was a religious one. In *Gospel Army*, the court determined that since the ordinance regulated charitable activity without a religious test, the same was permissible. The court and the statute drew a distinction between soliciting solely for religious purposes by a religious organization and soliciting for charitable purposes by a religious organization. In the former the organization was exempt from the ordinance's requirement.

religion or religious beliefs, nor delegated arbitrary authority to the agency. The court noted that such requirements were common in regulating admission to professions and occupations.¹⁶⁵

In *Rescue Army*, the California Supreme Court again considered the Los Angeles ordinance,¹⁶⁶ specifically considering the validity of a provision which required persons soliciting charitable contributions through use of receptacles placed in specified publicly owned or controlled places to obtain prior written permission from a regulatory agency.¹⁶⁷ The court found that solicitations by receptacles differed from face-to-face solicitations because persons solicited by these means had no opportunity to determine if the solicitation was fraudulent.¹⁶⁸ In the face-to-face solicitation, the solicitor is required to present to each person a card containing certain information, thus allowing potential donors to determine for themselves the validity of the cause. For this reason, the court held that the agency could deny permission to solicit by receptacle if it found fraud on the solicitor's information card, although it could not in the first place have refused to issue the card.¹⁶⁹

Hynes, Gospel Army, and *Rescue Army*, while reiterating many of the limitations previously outlined under the "times, places and manner" test, adds an additional limitation to our analysis—a due process proscription against legislation that is vague.¹⁷⁰ At the same time these cases indicate that requiring solicitors to identify themselves and to disclose specified information to potential donors lies within the permissible limits of the "time, places and manner" test. *Rescue Army* further demonstrates that as the methods for soliciting increase the risk of harm to the public, the authorities

165. 27 Cal. 2d at 248, 163 P.2d at 714. *Cantwell* was again distinguished in that the ordinance there permitted a determination of what was a religious cause or an object of charity or philanthropy. The ordinance in *Schneider v. State*, 308 U.S. 147 (1939), which permitted the regulatory agency to determine the good character of an applicant prior to the granting of a solicitation permit, was distinguished. The business of promoting and soliciting for compensation when one is not a member of the organization is a business, a profession, which can be legitimately licensed and regulated.

166. The court reaffirmed its prior holding that the first amendment freedom to believe did not include the freedom to act. Since charity and charitable activity could be distinguished from matters purely religious in character, the former could be regulated even if carried on by a religious organization. Additionally, the court reiterated the validity of the requirement that solicitors be required to exhibit an information card.

167. 28 Cal. 2d at 469-70, 171 P.2d at 14 n.4.

168. 171 P.2d at 15-16.

169. This was the court's interpretation of the ordinance. A less abusive way to protect the public from fraud would be to require a similar information card to be conspicuously placed appropriately on the receptacle so that it would be in plain view. Placed in such a manner, a potential donor has the same information that a donor solicited in a face-to-face transaction would have, assuming that the information was presented to the donor and no questions were asked. This method is not entirely satisfactory since the opportunity to ask for additional information in a face-to-face transaction would not be available.

As in *Gospel Army*, *Cantwell* was distinguished. The Los Angeles ordinance did not permit the agency to determine whether a cause was a religious one and therefore did not affect religious freedoms. If the solicitation by receptacle was for a charitable purpose, then compliance with the ordinance was required.

170. See *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5th Cir. 1979) and *International Society for Krishna Consciousness, Inc. v. Rochford*, 585 F.2d 263 (7th Cir. 1978) (discussing the vagueness issue in the context of legislation regulating charitable solicitation at airports). See also *People v. Moyer*, 670 P.2d 785 (Colo. 1983) (holding the phrase "primarily for the benefit" as used in an earlier Colorado statute unconstitutionally vague and violative of due process). See COLO. REV. STAT. § 18-5-115 (1973 & Supp. 1984).

have greater flexibility in regulating the same. Requiring charitable organizations to register prior to soliciting, even though registration is in effect an identification, is also permissible within the limits of the test. Finally, authorities have a greater ability to constitutionally regulate professional fund raisers and solicitors since they are engaged in a commercial business endeavor.

2. *Specific Problems*

a. *Regulation of Fund Raising Costs*

One major concern of states and municipalities is the diversion of substantial sums of solicited dollars from the charitable purposes of the soliciting organizations. This concern results in part from funds being diverted contractually to professional fund raisers and solicitors.¹⁷¹ Several municipalities and states have attempted to control such activity by imposing limitations upon the compensation which a fund raiser may charge or a charitable organization may pay to a fund raiser, or by imposing limitations upon fundraising or administrative expenses of the organization.¹⁷² These enactments have drawn the fire of constitutional challenges as well as criticism by members of the fund-raising industry.¹⁷³

In *National Foundation v. City of Fort Worth*,¹⁷⁴ an ordinance¹⁷⁵ limiting the cost of soliciting for charitable contributions to twenty percent withstood a due process and first amendment attack. After holding that the city could reasonably require the soliciting organization to provide information regarding past and expected receipts and costs of soliciting funds, the Fifth Circuit held that the city could also "deny permission to solicit if the cost of collection was excessive."¹⁷⁶ The court, however, warned that "a fixed percentage limitation on the costs of solicitation might be undesirable and inapplicable if applied to all types of charitable organizations. What may be proper in one situation may not be so in other situations."¹⁷⁷ The court did not expand upon this statement except to recognize that the ordinance did

171. See *William J. Brown v. Hamilton Productions*, Case No. 78-CV-12-5812 (C.P. Franklin County, Ohio, October 13, 1981) (of \$31,694 contributed by the public generally, only about \$4,000, 12.6% of gross receipts, were received by the charitable organization involved); *William J. Brown v. R. E. Holloway*, Case No. CA 6689 (Ct. App. Montgomery County, Ohio, July 15, 1981) (challenging the receipt by a fireman's organization of \$6,120, 11.6% of gross receipts totalling more than \$53,000). See also *People ex rel. Scott v. Police Hall of Fame*, 60 Ill. App. 3d 331, 376 N.E.2d 665 (1978).

172. See *supra* Part I, Section D.

173. See discussion in Part III, Sections D & E.

174. 415 F.2d 41 (5th Cir. 1969), *cert. denied*, 296 U.S. 1040 (1970).

175. Following receipt of an application for a solicitation permit and any investigation necessary, the commission was to certify to the city secretary its approval to issue a permit if the ordinance had been complied with in all respects and none of the following conditions existed:

(f) That the cost of solicitation for a charitable purpose in the city during any of the three years immediately preceding the date of application has been excessive in relation to the gross amount raised.

(g) That the expected cost of solicitation will be excessive in relation to the expected gross amount to be raised. Any such cost in excess of twenty per cent of the amount collected shall be deemed to be unreasonable unless special facts or circumstances are presented showing that a cost higher than twenty per cent is not unreasonable.

Id. at 43 n.2.

176. *Id.* at 46.

177. *Id.*

not create a fixed percentage.¹⁷⁸ In each case a "determination of the reasonableness of the ratio between the cost of solicitation and the amount collected"¹⁷⁹ was to be made. The twenty percent provided in the ordinance created a threshold above which the solicitor must show that any higher ratio was not unreasonable.¹⁸⁰

Enactments such as that in *National Foundation* have also been attacked as arbitrary, vague, and lacking in definite and ascertainable standards.¹⁸¹ The use of the term "excessive" was held not to be vague when read *in pari materia* with the twenty percent limitation in the Fort Worth ordinance.¹⁸² Similarly, the words "legitimate and reasonable" used in a statute which required at least seventy-five percent of gross receipts to be used for charitable purposes were held to be terms which persons of common intelligence could understand.¹⁸³ Construing these words *in pari materia*, the court held that they further "clarify the meaning of gross receipts and afford sufficient notice to those designated by the statute as specifically within its purview."¹⁸⁴

The United States Supreme Court first spoke to the issue of percentage limitations on charitable solicitation cost in *Village of Schaumburg v. Citizens for a Better Environment*,¹⁸⁵ where the ordinance required that applications for permits contain "satisfactory proof that at least seventy-five percent of the proceeds of such solicitations will be used directly for the charitable purposes of the organization."¹⁸⁶ The ordinance specifically provided that salaries or commissions paid to solicitors and administrative expenses of the organization were not to be considered use of funds for charitable purposes.¹⁸⁷

Citizens for a Better Environment (CBE), a not-for-profit corporation organized to promote environmental protection, was denied a charitable solicitation permit because it could not demonstrate that seventy-five percent of its receipts would be used for charitable purposes as required by the ordinance.¹⁸⁸ CBE employed canvassers to engage in door-to-door activity, which included distributing literature on environmental topics, answering questions, soliciting contributions for financial support, and receiving grievances and complaints from residents.¹⁸⁹ The court of appeals found the ordinance unreasonable on its face "when applied to an organization which by its nature allegedly devotes a large portion of its efforts to gathering information and promotion of its objectives, and where its paid solicitors neces-

178. See *supra* note 133 and accompanying text.

179. 415 F.2d at 46.

180. *Id.*

181. See *National Foundation*, 415 F.2d 41; *People ex rel. Scott v. Police Hall of Fame*, 60 Ill. App. 3d 331, 376 N.E.2d 665 (1978).

182. 415 F.2d at 47.

183. *People ex rel. Scott v. Police Hall of Fame*, 60 Ill. App. 3d 331, 376 N.E.2d 665 (1978).

184. 60 Ill. App. 3d at 340, 376 N.E.2d at 673.

185. 444 U.S. 620 (1980).

186. See *supra* note 127.

187. *Id.* "Administrative expenses" included but were not limited to salaries, attorneys' fees, rents, telephone expenses, advertising expenses, contributions to other organizations and persons, except as a charitable contribution and related expenses incurred as administrative or overhead items. *Id.*

188. 444 U.S. at 625.

189. *Id.*

sarily combine solicitation with other primary activities of the organization.”¹⁹⁰ The court of appeals distinguished “the traditional concept of charitable organizations” and organizations like CBE “which serve . . . information gathering and dissemination function[s]” as well as working routinely to “promote legislation or other government action.”¹⁹¹ Often the paid solicitors in the latter group perform the primary functions of the organization, that is, “dissemination, discussion, and advocacy of public issues.”¹⁹² For these types of organizations, the court of appeals believed that the seventy-five percent requirement unconstitutionally infringed upon first amendment rights.¹⁹³ Notwithstanding the legitimate interest of the city in protecting its citizens from fraud, as well as identifying organizations whose administrative and fund raising costs are so high, that “the organization is actually a for profit venture,”¹⁹⁴ the ordinance in question was not narrowly drawn to obtain those legitimate ends without unduly imposing on protected freedoms.

The Supreme Court agreed with the court of appeals in that the seventy-five percent limitation had a direct and substantial effect upon protected activity which could not be sustained for the reasons provided by the village.¹⁹⁵ It does not follow that an organization which expends more than twenty-five percent of solicited funds for administrative costs is a commercial for profit organization rather than a charitable organization. As the court of appeals recognized and the Supreme Court affirmed, organizations like CBE that engage in the dissemination of information with their paid staff, and other types of research, advocacy, or public education organizations who use their own paid staff to perform the organization’s functions, as well as to solicit funds for support, are no less charitable in nature than “traditional” charities, simply because their fund-raising expenses exceed certain limits.¹⁹⁶ The ordinance lumped all organizations whose fund raising costs exceeded an established maximum together without considering the nature of the organization or its activities.¹⁹⁷

In his dissent, Justice Rehnquist stated that “a simple request for money lies far from the core protections of the First Amendment.”¹⁹⁸ This statement fails to consider the situation where the solicitation is tied to information gathering and dissemination, and therefore not just a simple request for money. It is not an easy task to separate the two functions—requesting charitable donations and providing or gathering information.¹⁹⁹ A determi-

190. 590 F.2d at 225.

191. *Id.*

192. *Id.*

193. The appeals court, as has the Supreme Court, expressly left open the question of whether such a percentage requirement would be constitutionally permissible for the more traditional organization.

194. *Id.* at 226.

195. 444 U.S. at 636.

196. *Id.* at 636-37.

197. The 25% limitation also failed to regulate in a less intrusive way legitimate concerns of the city or, in some cases, to even relate to those concerns. The Court noted those interests to be prevention of fraud, public safety and residential privacy. *Id.* at 636, 638-39. Nowhere is the state’s interest in encouraging efficient acquisition and utilization of charitable dollars discussed.

198. *Id.* at 644. See also *supra* note 136.

199. For example, veterans organizations, as part of their public education programs, disseminate information in the mail and at the same time request funds to promote their programs, one of which is

nation of what constitutes fund-raising costs, administrative costs, and program costs is often not easily or nicely made. Consequently, legislation like that in *Schaumburg* would seriously affect the fund raising and program activities of such an organization. Public education and the dissemination of information, protected rights, would also be seriously affected by an ordinance or statute absolute in its operation.²⁰⁰

An important question left unanswered by the Supreme Court's decision in *Schaumburg* is whether a statute is constitutional if it prescribed a percentage limitation on charitable solicitation fund raising cost, but permitted exceptions based on specific guidelines contained in a statute and regulations promulgated pursuant to statute.²⁰¹ The question was answered negatively in *Joseph H. Munson Company, Inc. v. Secretary of State of Maryland*.²⁰²

Joseph H. Munson Company, Inc., a professional fund raiser, brought an action challenging the constitutionality of a Maryland statute which prohibited charitable organizations from paying or agreeing to pay as expenses for fund raising more than twenty-five percent of the gross receipts.²⁰³ Pursuant to statute, the Secretary of State was directed to promulgate regulations permitting a charitable organization to pay or agree to pay more than twenty-five percent of its gross income as expenses if the percentage limitation would "effectively prevent the charitable organization from raising contributions."²⁰⁴ The Court of Appeals of Maryland,²⁰⁵ reversing the Court of Special Appeals of Maryland, held the statute unconstitutional as an impermissible infringement on free speech, relying principally upon the Supreme Court's opinion in *Schaumburg*.²⁰⁶

In affirming the Maryland Court of Appeals' decision, the Supreme

public education on the problems of veterans. The same may be said about an organization trying to educate the public about diseases while soliciting funds for continuing research.

200. Justice Rehnquist interestingly pointed out that the ordinance did not grant to municipal authorities discretion in the granting or denying of licenses to solicit. If the prior year's solicitation expenses exceeded the 25% limit, the organization was precluded from soliciting. He suggested that the seemingly approving reference by the majority of the Court to the ordinance considered in *National Foundation* would permit a municipal authority to exercise discretion by allowing applicants to show that costs of solicitation are not unreasonable. He noted that earlier Supreme Court rulings invalidated legislation which granted such unfettered discretion. See *supra* note 136. Justice Rehnquist's concern that there may be actual or a potential for abuse of discretion could be substantially guarded against by the promulgation of regulations by a governmental agency pursuant to articulated legislative standards. See *infra* notes 312-13 and accompanying text (where suggested guidelines are provided) and Appendix F. Abuse of discretion cases like *Cantwell* found that few or no guidelines for exercising discretion were provided to the agency. Once regulations are promulgated which are indeed neutral and legitimate, bearing a reasonable relationship to legitimate governmental interest, any abuse or potential for abuse should be challenged on their application.

201. This question arises as a result of the Supreme Court's reference to the ordinance in *National Foundation* and the Supreme Court's attempt to distinguish between charitable organizations which include advocacy and dissemination of information as part of their solicitation and charitable organizations of the more "traditional" type. In making this distinction, the Court voided the ordinance because its absolute application to all types of organizations failed to consider important factors which might necessitate higher fees. Failure to consider these factors penalized some organizations in the exercise of first amendment rights.

202. 104 S. Ct. 2839 (1984), *aff'g* 294 Md. 160, 448 A.2d 935 (1982).

203. Md. ANN. CODE art. 41, § 103D (1957).

204. *Id.*

205. The Maryland Court of Appeals is the state's highest court.

206. 294 Md. at 173-82, 448 A.2d at 942-47.

Court rejected the Secretary's argument that the Maryland statute significantly differed from the ordinance considered in *Schaumburg* in that the statute did not involve a prior restraint.²⁰⁷ The Supreme Court agreed with the Maryland Court's determination that the statute was a more sweeping prior restraint than the *Schaumburg* ordinance.²⁰⁸ The Court also rejected the Secretary's second argument that the statute differed from the ordinance because the statute provided an administrative waiver to the operation of the percentage limitation. Since the Secretary was directed to promulgate regulations that would allow organizations to agree to pay more than twenty-five percent of gross income to professional fund raisers if not to do so would "effectively prevent the charitable organization from raising contributions,"²⁰⁹ she argued that the statute was more flexible, thereby minimizing any encroachment of first amendment rights.²¹⁰ The Maryland Court of Appeals found this waiver to be extremely narrow, however, focusing only on organizations that might be prevented from collecting funds because of the limitation.²¹¹ The waiver did not address the concern of *Schaumburg* that organizations engaging in public education, dissemination of information, or advocacy of public issues remain barred by statute, thereby unduly infringing their first amendment freedoms.²¹² In the opinion of the majority of the Supreme Court, the provision did not relate directly to the state's interest in preventing fraud or mismanagement.²¹³

Justice Rehnquist, dissenting in *Schaumburg*, also dissented in *Munson* and was joined by three other Justices.²¹⁴ Essentially, he wrote that application of the overbreadth doctrine was inappropriate in this case and that the Maryland statute was markedly different from the *Schaumburg* ordi-

207. 294 Md. at 176, 448 A.2d at 944.

208. The court of appeals noted that the statute required all charitable organizations or professional fund raisers engaging in any solicitation activity to submit an application whether they were soliciting door-to-door, on the streets, or in any other manner. The *Schaumburg* ordinance only pertained to solicitations door-to-door or on public streets. Continuing, the court noted that approval of the professional fund raiser's registration was required prior to any solicitation, every contract between a professional fund raiser and organization had to be submitted to the Secretary and approved if the promised compensation exceeded the percentage limitation, and the Secretary could cancel a registration if the organization or fund raiser violated any provision of the statute. 294 Md. at 176-79, 448 A.2d at 944-45. See also 104 S. Ct. at 2853-54. The four dissenting Supreme Court Justices opined that the statute differed from the *Schaumburg* ordinance and further characterized the statute as being "primarily directed at controlling the external, economic relations between charities and professional fund raisers." 104 S. Ct. at 2859. See *infra* notes 215-18 and accompanying text for additional distinctions made by dissent.

209. MD. ANN. CODE art. 41, § 103D

210. 294 Md. at 180, 448 A.2d at 946.

211. *Id.*

212. 104 S. Ct. 2850.

213. *Id.* at 2852.

The majority writes: The state legislature's announced purpose in enacting the 1976 revision of the charitable organization provisions . . . was to "assure that contributions will be used to benefit the intended purpose." [citation omitted] The State's justification therefore may be read as an interest in preventing mismanagement as well as fraud. The flaw in the statute, however, remains. The percentage limitation is *too imprecise* a tool to achieve that purpose.

Id. at 2852 n.14 (emphasis added).

214. Chief Justice Burger and Justices Powell and O'Connor joined Justice Rehnquist's dissent. In *Schaumburg*, Justice Rehnquist was the lone dissenting justice. Chief Justice Burger and Justice Powell had joined in the majority decision in *Schaumburg* while Justice O'Connor was not on the Court at that time.

nance.²¹⁵ Rehnquist characterized the statute "as an economic regulation setting a limit on the fees charged by professional fund raisers,"²¹⁶ which was not "directed at controlling the nature and internal working of charitable organizations seeking to solicit in the Village."²¹⁷ Munson and other professional fund raisers were not engaged in speech activities in the eyes of the dissent and the statute merely controlled the fees the licensed firm was permitted to charge.²¹⁸

The dissent identified as a legitimate and substantial governmental interest the regulation of not only fraud as defined in common law, but also fraud as found in excessive costs of charitable solicitation when such costs have not been fully disclosed to both the contributor and the charity. Charities are protected "from being overcharged by unscrupulous professional fund raisers."²¹⁹ In the opinion of the dissent, "[r]ates charged by professional fund raisers are . . . easily identifiable [and] constitutionally prosecutable."²²⁰ Furthermore, even though solicitation expenses other than those spent on professional fund raisers were regulated, the dissent believed the statute continued to serve the "legitimate objectives of regulating fund raising costs not attributable to public education or advocacy."²²¹

The Maryland statute had several faults which may have led the Maryland Court of Appeals and the Supreme Court to conclude that the statute was not better than the ordinance in *Schaumburg*. First, the legislature, and consequently the statute, failed to provide guidelines to the Secretary in the promulgation of regulations.²²² One of the regulations promulgated included costs associated with advocacy and public education as well as fund-raising expenses.²²³ The failure to specifically provide for an allocation formula to separate fund-raising costs from informational dissemination costs strikes a dissonant chord with protected first amendment rights.²²⁴ On its face, the statute also limited the application of the waiver provision to organizations that would be prohibited from raising funds by the operation

215. The dissent noted the following distinctions between the Maryland statute and the *Schaumburg* ordinance: (1) administrative and overhead costs of the charitable organization were not included as fund raising costs; (2) many costs associated with solicitations were excluded from the definition of fund raising cost; (3) the statute allowed for an administrative waiver from the operation of the 25% limitation which was sufficient to protect unpopular charities; (4) actual cost and the allocation of expenses were to be reported in accordance with the standard of accounting and fiscal reporting for voluntary health and welfare organizations; the statute seemed to require a pro rata allocation of expenses between fund raising activity and advocacy or information dissemination; and (5) the statute excluded from the definition of professional fund raiser bona fide salaried officers or employees of the charitable organization. *Id.* at 2860-62.

216. *Id.*

217. *Id.*

218. *Id.* The dissent compared the Maryland statute to a regulation governing the fees charged by employment agencies, citing *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 460 (1978), and *William v. Lee Optical Co.*, 348 U.S. 438 (1955).

219. "The concern is not that someone may abscond to South America with the funds collected. Rather, a high fund-raising fee itself betrays the expectations of the donor who thinks that his money will be used to benefit the charitable purpose in the name of which the money was solicited." *Munson*, 104 S. Ct. at 2860 n.2.

220. *Id.* at 2860.

221. *Id.*

222. See *id.* at 2851 n.12.

223. 104 S. Ct. at 2850, 2851 nn.11, 12.

224. The dissent noted that this regulation may not be consistent with the statute. *Id.* at 2862 n.5.

of the statute, but provided no relief for organizations that would be prohibited from raising funds although their fund-raising expenses, while exceeding the limit, were nevertheless reasonable. These faults, in and of themselves, may be sufficient to void the statute.

But, even if the discretion to grant exemptions from the statute was broad, yet well-defined, and even if the statute and regulations contained allocation formulas with respect to different kinds of expenses, the Supreme Court still concluded that requiring a "license for the dissemination of ideas is inherently suspect."²²⁵ Moreover, the Court stated that preventing the mismanagement of solicited dollars with a statute like Maryland's could not withstand the constitutional challenge that it was too imprecisely drawn.²²⁶ In this regard the court extends the "times, places and manner" test beyond the principles established in the line of cases discussed earlier. The Court dismissed the state's interest in promoting and regulating efficient acquisition and utilization of charitable dollars with a statute that does not presume that high fund-raising costs equal fraud, but that high costs may, in fact, mean unreasonable, excessive, and inefficient fund raising, as well as signaling the presence of an unscrupulous fund raiser, professional or otherwise. This is the real distinction between the Maryland statute, even with its shortcomings, and the *Schaumburg* ordinance. Because of the faults in the Maryland statute, a question remains whether a better drafted statute can withstand a constitutional challenge. *Munson* does not appear to foreclose such a statute, notwithstanding the Court's dicta regarding the efficacy of fund-raising percentages. Such a statute is proposed in Part III.

b. *Exemption From Compliance—Religious Organizations*

As previously noted in Part I, states exempt some organizations from compliance with statutory registration requirements for many reasons. One type of exemption—one based on the extent to which funds are received from individuals who are not members of the organization—has recently been challenged as violative of the first amendment establishment clause and the fourteenth amendment equal protection clause.²²⁷ In *Heritage Village Church and Missionary Fellowship, Inc. v. State*,²²⁸ the North Carolina Supreme Court held unconstitutional a North Carolina statute, which exempted religious organizations from the licensing requirement,²²⁹ provided that the organization's financial support was derived *primarily* from contributions solicited from its members. In addition to the religious exemption, the statute exempted organizations soliciting *only* within their member-

225. *Id.* at 2850 n.12.

226. *See supra* note 213.

227. *Larson v. Valente*, 456 U.S. 228 (1982); *Heritage Village Church and Missionary Fellowship, Inc. v. State*, 290 N.C. 399, 263 S.E.2d 726, *aff'g* 40 N.C. App. 429, 253 S.E.2d 473 (1980). *See also National Foundation* (denial of equal protection challenge of a city ordinance which exempted from the regulatory requirements religious organizations which solicit funds for its own use and solely from its own members, as well as fraternal, social, patriotic, cultural and educational organizations soliciting from their own membership (discussed *supra* notes 174-82 and accompanying text)).

228. 299 N.C. 399, 263 S.E.2d 726, *aff'g* 40 N.C. App. 429, 253 S.E.2d 473 (1980).

229. N.C. GEN. STAT. § 108-75.7(a)(1) (1978).

ship.²³⁰ Other exemptions were provided, but were not predicated upon the extent to which funds were collected from members or non-members.²³¹ In effect, the exemption drew a distinction between religious organizations that received *most* of their support outside of its membership and those that did not. Non-traditional religious organizations—those that receive most of their funds by soliciting the public—must satisfy the requirements while traditional religious organizations—those that use the collection plate—escape the burdens of registering. No similar distinction was made for non-religious organizations.

The purpose of the statute, as stated therein, was to protect the general public by requiring full disclosure of facts about the persons and organizations soliciting and the purposes for which the solicited funds would be used.²³² The North Carolina Supreme Court determined, based upon the purpose clause and the exemption scheme, that the legislature believed organizations soliciting within their own membership, using non-paid members as solicitors or reporting regularly to its membership posed less risk of harm to the general public than organizations not meeting one or more of those conditions.²³³ In striking down the statute, North Carolina's court of appeals and its supreme court rejected the underlying assumption that funds solicited primarily within the organization would not be raised or used in a fraudulent manner, whereas funds solicited primarily outside the organization would be subject to fraud.²³⁴ The North Carolina Supreme Court also rejected the notion that the membership would keep closer tabs on organizational officials, thereby building in a regulatory safeguard not found in organizations soliciting primarily outside their memberships.²³⁵

In *Larson v. Valente*,²³⁶ the Supreme Court held a Minnesota statute, similar to the North Carolina statute, unconstitutional as violative of the establishment clause of the first amendment.²³⁷ The statute exempted religious organizations from registering if more than half of their contributions were received from members, a parent or affiliated organization, or a combination of the two.²³⁸ Appellants, the Minnesota Attorney General and the Commissioner of Securities, argued that absent the safeguard of membership

230. *Id.* § 108-75.7(a)(5).

231. An exemption was provided for veterans organizations; volunteer firemen, ambulance and rescue squads; and fraternal beneficiary societies, orders, and associations under a lodge system so long as the fund-raising activity was conducted by the members without compensation. *Id.* § 108-75.7(a)(7). Non-profit community clubs and civic groups meeting specified conditions were also exempt if all funds collected, less reasonable expenses, were distributed at the direction of the board of directors; and full reports were given to the membership at least once a year. *Id.* § 108-75(a)(8) (1978).

232. *Id.* § 108-75.2 (1978).

233. 299 N.C. at 411-12, 263 S.E.2d at 733.

234. The court of appeals noted that a religious organization which solicits in excess of \$2,000 primarily from non-members, the total of which exceeds 50% of all solicitations, is required to acquire a license, while a larger religious organization could solicit \$1,000,000 and not be required to get a license if 50% of the contributions came from its membership. 40 N.C. App. at 448, 253 S.E.2d at 484. *See also* 299 N.C. at 411, 412, 263 S.E.2d at 733 (opinion of the North Carolina Supreme Court).

235. 299 N.C. at 412, 253 S.E.2d at 733.

236. 456 U.S. 228.

237. 456 U.S. at 255.

238. MINN. STAT. ANN. § 309.515-1(6) (1978).

funding, there was an obvious need for public disclosure.²³⁹ They urged that members have significant control over the solicitation and expenditure of contributions collected from themselves by their organizations, a situation not existing when funds come primarily from non-members.

The Court identified and rejected, summarily, three underlying premises of the appellants' argument: (1) "that members of a religious organization can and will exercise supervision and control over the organization's solicitations" when the membership contributes more than fifty percent of the funds; (2) "that membership control . . . is an adequate safeguard against abusive solicitations of the public;" and (3) "that the need for public disclosure rises in proportion with the percentage of non-member contributions."²⁴⁰ The Court was of the opinion that although the premises might be correct in some cases, it did not believe the correctness of the premises could be demonstrated as a general proposition. With respect to the first premise, appellants failed to provide evidence supporting the proposition that members of religious organizations would in fact supervise and control effectively their organizations simply because they contribute more than half of its financial support.²⁴¹ The second premise was contrary to the "central thesis" of the entire statutory scheme which assumed that "charitable organizations soliciting from the public cannot be relied upon to regulate themselves,"²⁴² thereby necessitating state regulation. With respect to the third premise, the Court believed that the need for public disclosure was more directly related to the amount of funds raised from the public rather than the percentage raised from non-member contributions.²⁴³

The statutes in *Heritage* and *Larson* presented an additional problem. Both statutes applied only to religious organizations, the effect of which was to exempt some religious organizations from the burdens of the ordinance while requiring other religious organizations to comply. Less traditional religious organizations, that is, those which gained their support outside of their membership as compared to the traditional collection plate, were required to meet the requirements of the statutes. Such a disparate and dis-

239. Where the safeguards of membership funding do not exist, the need for public disclosure is obvious

As public contributions increase as a percentage of total contributions, the need for public disclosure increases The particular point at which public disclosure should be required . . . is a determination for the legislature [T]he Act's "majority" distinction is a compelling point, since it is at this point that the organization becomes predominantly public funded.

456 U.S. at 248.

240. *Id.* at 248-49.

241. *Id.* at 249.

242. *Id.* at 250. See also *id.* at 243 n.26.

243. The Supreme Court constructed a hypothetical. Church *A* raises \$10 million, 20% from non-members. Church *B* raises \$50,000, 60% from non-members. The third premise provides that with respect to the \$2 million raised by church *A* there is a lesser need for public disclosure than with respect to the \$30,000 raised by church *B*. The distinction being based solely on the percentage of non-membership contribution. The Supreme Court observed that the need for disclosure rises directly in proportion to the total amount of non-member contributions. Obviously, there is more concern for the \$2 million raised simply because of the amount. More importantly, however, the very enactment of solicitation regulations strongly indicates that there is a concern for fraudulent solicitation, misuse, and misappropriation of charitable dollars where such has been solicited from the general public.

criminatory result among religious organizations could not withstand the secular neutrality toward religion required under the establishment clause of the first amendment.²⁴⁴

If a statute is to withstand an establishment clause attack, it must satisfy the test articulated in *Lemon v. Kurtzman*:²⁴⁵ 1) the statute must have a secular legislative purpose; 2) its principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive governmental entanglement with religion.²⁴⁶ Neither the North Carolina or Minnesota statutes could satisfy all three prongs of the *Lemon* test. Although the North Carolina statute was found to have a valid secular purpose,²⁴⁷ it could not satisfy the second prong of the test. The exemption scheme and its disparate effect among religious organizations advanced the cause of orthodox religions while inhibiting the cause of evangelical religions.²⁴⁸ The North Carolina Supreme Court determined that the statute also fostered excessive governmental entanglement with religion in conflict with the third prong of the test.²⁴⁹ The Eighth Circuit Court of Appeals determined that the Minnesota statute transgressed the first two prongs of the test.²⁵⁰ Relying principally on the third prong of the test as articulated in *Walz v. Tax Commissioner*,²⁵¹ the United States Supreme Court stated that the Minnesota statute "engendered a risk of politicizing religion"²⁵² The legislative history of the Minnesota statute lent a great deal of support to the Court's fear that politicization of religion would occur.²⁵³

Problematic in both *Heritage* and *Larson* was the apparent lack of evidence offered to substantiate a claim that an exemption based on the percentage of membership versus non-membership solicitation has merit. Both courts attacked the underlying assumptions as if no proof could be offered to support the rationality of the exemption. An issue is, therefore, raised as to whether there exists a plausible and rational basis for granting an exemp-

244. It is not the purpose of this article to explore problems of religious solicitation regulation. Only a brief mention of the specific problem is included here. See generally Rakay & Sugarman, *A Reconsideration of the Religion Exemption: The Need for Financial Disclosure of Religious Fund Raising and Solicitation Practices*, 9 LOY. U. CHI. L.J. 863 (1978).

245. 403 U.S. 602 (1971). See also the Supreme Court's requirement of religious neutrality set forth in *Cantwell* (discussed *supra* notes 99-100 and accompanying text).

246. *Id.* at 612-13.

247. 299 N.C. at 408, 263 S.E.2d at 731.

248. 299 N.C. at 410-14, 263 S.E.2d at 732-35.

249. 299 N.C. at 414-16, 263 S.E.2d at 735-36.

250. 637 F.2d 562, 567-69 (8th Cir. 1981).

251. 397 U.S. 664 (1970).

[G]overnmental involvement in programs concerning religion "may be so direct or in such degree as to engender a risk of politicizing religion [R]eligious groups inevitably represent certain points of view and not infrequently assert them in the political arena, as evidenced by the continuing debate respecting birth control and abortion laws. Yet history cautions that political fragmentation on sectarian lines must be guarded against [G]overnment participation in certain programs, whose very nature is apt to entangle the state in details of administration and planning, may escalate to the point of inviting undue fragmentation."

456 U.S. at 252-53 (quoting *Walz*, 397 U.S. at 695).

252. 456 U.S. at 253.

253. The Minnesota legislative history and debate revealed an intent to specifically regulate religious organizations who solicit on the street, such as members of Reverend Moon's Unification Church. *Id.* at 254-55.

tion to one organization and not another based upon the source of the solicited funds to the organizations. If, as has been suggested, the state's interest is in protecting the *general public* from fraud and abuses associated with solicitations, the state has little interest in regulating organizations when the solicitation is confined to the organization's members.²⁵⁴ This does not mean that the state has no interest or that it may not institute investigations or take action where it learns of fraud in such organizations. It also does not mean that there is no fraud or abuse present. What it does mean, however, is that given the opportunity to allocate limited resources, the state will most likely focus on public solicitations and the larger ones at that. Where membership is defined to exclude those who become members as a result of the contribution, an organization cannot convert an otherwise public solicitation into a membership solicitation.

The issue becomes more complicated when considering where the line is to be drawn in determining the point at which the state is willing to become actively involved in regulating certain soliciting organizations through a formalized monitoring process. As the percentage of non-organizational members targeted by or contributors to fund-raising campaigns increase, the more public²⁵⁵ the solicitation becomes. The level of the state's interest in regulating solicitation activity is directly related to that percentage. Similarly, as the percentage of the organization's funds coming from non-members increases, the public becomes more involved in the financial support of the organization and the solicitation is consequently more public. The state's interest under such circumstances is correspondingly heightened. Although the state's interest in regulating solicitation is also dependent on the actual amount of funds collected from the public and not just the percentage relationship of those funds to funds attributable to member contributions, this is only one additional factor to be considered. This factor need not be the predominant factor that the state considers in drafting legislative exemptions from the registration process. The Supreme Court in *Larson* effectively makes the amount of funds received from non-members the predominant factor to be considered by the state in drafting an exemption based on membership versus non-membership solicitation.²⁵⁶

A number of exemptive provisions may be drafted which consider one or more of the factors previously listed. One type of provision might grant an exemption so long as the solicitation is confined to the membership. Under this type of provision, a soliciting organization is required to register and file periodic reports if one non-member is the target of a solicitation campaign. A variation on this provision might look to the number of non-members solicited. Another provision might grant an exemption to small solicitations. Under such a provision, if an organization expects to exceed or does exceed the statutorily prescribed amount, the exemption is not available. An exemptive provision might look solely to the actual amount of funds received from non-members as a variation to the small solicitation

254. See *National Foundation*, 415 F.2d at 48.

255. See *supra* note 54.

256. See *supra* note 243.

exemption. Under this type of provision, the state would be saying that if the organization does not expect to receive or does not receive more than \$15,000 (hypothetically) from non-members, then it is exempted from the registration and reporting requirements of the statute. The Supreme Court considered this possibility in *Larson v. Valente* but refused to comment on whether such a provision would survive a constitutional challenge under the facts of that case.²⁵⁷ An exemptive provision might be drafted which looks to the percentage of financial support provided by non-members (the Minnesota and North Carolina approach). Another set of approaches might include some combination of the previously mentioned provisions. For example, an exemption might be provided if financial support is expected to come or is actually received from individuals, more than seventy percent (hypothetically) of whom are members, but the exemption is lost if the amount of funds contributed by non-members exceeds \$15,000 (hypothetically). A combination approach might grant an exemption if seventy percent (hypothetically) of the funds received are from members; provided that the amount contributed by non-members does not exceed a specified amount or the exemption is lost. Under these provisions, the state's premise would be that the nature of the solicitation is not sufficiently public for regulatory purposes until more of the public is involved, more of the funds received by the organization are public funds or the public contribution exceeds a specified amount. None of the exemptive provisions, however, shield the exempted organization from the investigative power of the authorities where fraud or abuse is suspected.

Constructing variations for exemptive provisions is, in many respects, a ridiculous exercise. These variations are provided, however, to stress a point. Each of the provisions directly relate to the state's valid concern in deciding the point at which the solicitation is sufficiently public, or stated differently, has a substantially greater potential for harm to the public, such that registration and reporting is important to the monitoring function of the state. While it may be difficult to determine where this line lies, the better question is who should have the responsibility in making that determination and deciding on the exemptive provision to be utilized. Absent some compelling reason to the contrary, the decision ought to rest with the sound discretion of the legislature and not the courts.

One compelling reason for having the court step in is represented by *Heritage* and *Larson*. Where the statute singles out religious organizations, creating a distinction that in reality is a distinction between traditional and non-traditional religious organizations, first amendment rights are affronted in a way totally unacceptable absent compelling state interest and a less intrusive alternative for obtaining the legitimate objective. Even a statute that is applicable to all religious and non-religious organizations alike could not withstand a challenge that the exemption is void as applied to religious organizations because of the profound and disparate effect it would have on

257. 456 U.S. at 251 n.27. If this type of distinction was applied to religious organizations, arguably it may violate the establishment clause of the first amendment. An exemption from registration benefits the exempted organization, while non-exempted religious organizations suffer the burden of registration. See *infra* note 258 and accompanying text.

non-traditional religious organizations. In this respect the exemption could not pass the second and third prongs of the *Lemon* test.²⁵⁸

III. MODEL LEGISLATIVE PROVISIONS REGULATING CHARITABLE SOLICITATIONS

The ultimate goal of a charitable solicitation regulatory scheme is the substantial reduction, if not the complete elimination, of charitable solicitation fraud and abuse. Simultaneously, the ability of a charitable organization to raise needed charitable dollars for its programs must not be unduly stifled by any regulatory scheme. Moreover, a scheme must not restrict constitutionally protected rights and freedoms. This Part discusses provisions which should be included within a statute and proposes model provisions. These provisions, attached in an appendix, consider provisions which may be found in some state statutes as well as ideas of others. As in Part I, the provisions considered here are those most directly related to the prevention of solicitation fraud and abuse. No attempt is made herein to propose an entire regulatory scheme.

A. Registration, Exemption, and Financial Reporting—Initial Steps to Regulation

The key to the successful regulation of charitable solicitation fraud and abuse is the enactment of a statute which is “pro-active” rather than “reactive” or “passive” in its approach to regulation.²⁵⁹ The “pro-active” characteristic of the statute must be triggered the moment an individual or organization intends to solicit expressly or ostensibly on behalf of a charitable cause or organization. Therefore, it is basic that a “pro-active” statute provide, as a precondition to solicitation, that the individual or organization receive approval to conduct solicitation activity following a registration process.²⁶⁰ The registration process must be designed to acquire information about the organization, the nature of the solicitation, and the persons who will be soliciting.²⁶¹ The obvious benefit to this registration process is the ability to gain information and to make appropriate investigations about the organizations and the solicitation campaign prior to any solicitation.

A statutory scheme that requires only a post-solicitation informational filing encourages only after-the-fact review, evaluation, and investigation of the solicitation activity.²⁶² This is not to suggest that post-solicitation infor-

258. See *supra* notes 244-53 and accompanying text.

259. As used herein, the term “pro-active” relates to a statutory scheme which is direct and affirmative in the steps used to regulate charitable solicitations. It attempts to control and set the permissible limits of solicitation activity from the outset rather than an after-the-fact review of that activity. Affirmative acts are required of the soliciting organization whether or not the potential donor has requested some action from the solicitor. Principles developed in equity or at common law do not serve as the sole criteria by which the activity is judged.

260. Whether the registrant receives something called a permit or license is not important. It is important that the organization file an application or registration statement containing information helpful to an agency regulating solicitations and that the same be subject to approval by the agency.

261. See Appendix A, § 1.2-1.7.

262. The author's experience is that oftentimes this *ex post facto* effort comes too late. The solicitor has departed and may not be reachable by the agency or the funds have been so dissipated that recovery is not possible.

mational filings are without value as a means of discovering and correcting fraudulent practices. Such filings may have a deterrent effect upon fraudulent and abusive conduct. Moreover, such filings are important and necessary to effective regulation when used in conjunction with registration. The post-solicitation filing provides a report for the benefit of the authorities and the public.²⁶³

Like the registration process, the post-solicitation informational filing²⁶⁴ should be standardized and accompanied by a report of an independent public accountant.²⁶⁵ Information regarding financial data and the updating of information should be required as part of the filing.²⁶⁶ Alternatives or exemptions to filing audited financial reports may be provided for cases in which the requirement may prove to be financially burdensome to smaller charitable organizations or where solicitations do not exceed a statutorily established monetary limit.²⁶⁷ Post-informational filings and investigation by the agency will be facilitated by the further requirement that the organization maintain correct and adequate records.²⁶⁸

The point urged is that the *ex post facto* filing of information alone is inadequate to promote effective charitable solicitation regulation because an important time for beginning a monitoring function is lost. If the registration statement conforms with the statutory requirements, agency approval is to be given. Thus, no undue burden is imposed upon the organization or any first amendment rights.

The statute should also provide exemptions from complying with the registration process and post-informational filing requirements where appropriate.²⁶⁹ Exemptions should apply only to the registration and informational filings under the statute and not relieve the organization from complying with the statute's anti-fraud provisions and the need to maintain complete and accurate records. Moreover, exemptions should not shield organizations from any investigative procedures the authorities may deem necessary. Factors which should be considered in deciding whether an exemption ought to be granted include: (1) the existence of another supervisory board, department, or agency that is either governmental or quasi-governmental and performs a regulatory function; (2) the size of the solicitation; (3) the employment of a professional fund raiser or paid solicitors; and (4) whether solicitations are confined to the current membership or a defined constituency of the organization.

Distinctions between organizations which receive more than an established percentage of their charitable contributions from non-members and those which do not may no longer be a permissible basis for granting or

263. See *infra* note 285.

264. See Appendix A, § 2.1-2.5.

265. Audited financial reports enhance the credibility of financial reports. They should also be audited by certified public accountants. See Gross, *Full Disclosure—A Better Answer*, PHILANTHROPY MONTHLY, Mar. 1977, at 12, 18.

266. See *supra* note 43 and accompanying text.

267. Gross, *supra* note 265; Appendix A, § 2.4.

268. Appendix A, § 3.1-3.2.

269. See Appendix B. But see Stevenson, *supra* note 24, at 37 (providing no exemptions in his model act).

denying an exemption in the face of the Supreme Court's rationale in *Larson v. Valente*.²⁷⁰ Although the case involved a statute which applied only to religious organizations, the Court questioned the validity of the premises which support the distinctions.²⁷¹ Exempting organizations which solicit *primarily* within their own membership would seem justifiable since it is not *primarily* a solicitation of the general public. In attempting to define "primarily", it is inevitable that one will be led back to the concerns raised by the Court in *Larson v. Valente*.

B. Registration and the Administrative Process²⁷²

To insure the integrity of the registration process, the agency must have authority to seek additional information and to investigate the persons, information, or circumstances surrounding the request for permission to solicit, prior to any grant, denial, or revocation of the request.²⁷³ The authority to deny, suspend, or revoke registration, as well as the authority to request additional information or to investigate an organization should be sufficiently defined or related to the legislative grant of authority so as not to vest unfettered discretion in the agency or constitute an unconstitutional delegation of legislative authority.²⁷⁴ For example, denial or revocation of permission to solicit because the information is incomplete, inaccurate, or the organization has violated other provisions of the statute do not present problems, if the statutory provisions are not ambiguous and a standard for their application is provided.²⁷⁵ Permitting the agency to satisfy itself that a soliciting organization, other than a professional fund raiser or solicitor, is reputable or that the cause is worthy presents severe problems. Such grants of authority are unlikely to withstand constitutional challenge.²⁷⁶ A statute should therefore include specific reference to the time in which the agency should act, enunciate with particularity the powers of the agency, provide for the procedural steps to be followed by an organization which has been denied permission to solicit or has had such permission suspended or revoked, and set forth the reasons for which an approval to solicit would be denied, suspended, or revoked.²⁷⁷

C. Registration of Professional Fund Raisers

Professional fund raisers²⁷⁸ and professional solicitors²⁷⁹ should also be

270. See discussion in Part II, Section B(2)(b).

271. See *supra* note 237 and accompanying text.

272. See Appendix C.

273. Appendix C, § 5.4-5.5.

274. See discussion *supra* Part II.

275. See Appendix C, § 5.2.

276. See discussion *supra* Part II. See also *American Cancer Society v. City of Dayton*, 160 Ohio St. 114, 114 N.E.2d 219, 224 (1953); *City of Fort Worth v. Craik*, 411 S.W.2d 541, 542 (1967).

277. The issuance, denial, suspension, or revocation of registration should be consistent with the state's administrative procedural statutes. Appendix C, § 5.2-5.3; Appendices F and G.

278. "Professional fund raiser" has been generally defined to include [a]ny person who, for compensation or other consideration, plans, conducts, manages or advises concerning any drive or campaign in this state for the purpose of soliciting contributions for or on behalf of any charitable organization of charitable purpose, or who engages in the business of or holds himself out to persons in this state as independently engaged in the business of soliciting contributions for such purposes, or the business of planning, con-

required to register when consulting, advising, or soliciting on behalf of an organization which is required to register under the statute.²⁸⁰ Information regarding the identity of and persons employed by the registrant, as well as previous activity of the registrant, should be disclosed on the registration form. Specifically, the registration statement or application should contain information relative to the name and address of the professional fund-raising counsel²⁸¹ or professional solicitor; the names and addresses of all employees, agents, members, or officers of the professional fund-raising organization; previous activity of the registrant; whether the professional fund raiser is authorized by other governmental authorities to act as a professional fund raiser; whether the professional or any officer, member, agent, or employee is or has been enjoined by any court or otherwise prohibited from serving as a professional fund raiser in any jurisdiction; and the manner in which the solicitation will be conducted. Bonding should be required to indemnify the state or any person who is injured as a result of solicitation activities.²⁸² Denial, suspension, and revocation of registration should be done in a manner consistent with the state's administrative procedure act in general and any procedure for denying, suspending, and revoking charitable solicitation registration in particular.²⁸³ Because the professional fund raiser or solicitor is seen as engaging in a business, the state has considerable leeway in regulating this profession.²⁸⁴

D. Solicitor Information Cards and Disclosure

Information disclosure is a paramount feature of charitable solicitation regulation.²⁸⁵ Most state statutes provide that the annual reports, financial

ducting, managing, or carrying on any drive or campaign in this state for such solicitations

WASH. REV. CODE ANN. § 19.09.020(10) (Supp. 1986); *see also* GA. CODE ANN. § 43-17-1(8) (1982). The term "professional fund-raising counsel" is used in some statutes and is defined to include "any person who . . . for compensation or other consideration plans, conducts, manages, carries on, advises or acts as a consultant whether directly or indirectly in connection with soliciting contributions in this state for or on behalf of any charitable organization *but who actually solicits no contributions as a part of such services*." CONN. GEN. STAT. ANN. § 21a-176(6) (West 1985) (emphasis added). *See also* HAWAII REV. STAT. § 467B-1(10) (1976 & Supp. 1984).

279. "Professional solicitor" is defined to include

any person who, for a financial or other consideration, solicits contributions for, or on behalf of a charitable organization, whether such solicitation is performed personally or through his agents, servants or employees specially employed by, or for a charitable organization . . . in connection with the solicitation of contributions *but does not qualify as a "professional fund-raising counsel . . ."*

HAWAII REV. STAT. § 467B-1(11) (West 1976).

280. *See* Appendix D.

281. *See supra* note 278 for definition of fund-raising counsel.

282. In most jurisdictions, enforcement of the charitable solicitations statutes is by the state acting through the agency or department and the state attorney general. The statutes presumably would not prevent an injured individual from bringing a common law action for damages. But the cost of litigation as compared to the injury sustained by an individual foreclose in any real sense an individual action. A class action might have a better chance. This does not mean that an individual or group of individuals will never have an interest. A bond issued to the benefit of the state and injured individuals recognizes this possibility. Georgia specifically provides for a private right of action by individuals. *See supra* note 85 and accompanying text.

283. *See* Appendix C, § 5.2-5.3.

284. *See Gospel Army* (discussed *supra* note 165 and accompanying text).

285. Commentators generally agree that disclosure is important in solicitation regulation. *See* Gross, *Full Disclosure—A Better Answer*, *supra* note 265, at 16; Stevenson, *supra* note 24, at 35.

reports, and other information required by statute as post-solicitation filings become public records available for public inspection.²⁸⁶ One issue, however, has been not whether there should be disclosure, but at what time the disclosure should be required and what information should be disclosed.²⁸⁷

The debate centers on whether there should be a required disclosure of information at the time of solicitation, "point-of-solicitation" disclosure, or whether disclosure should be predicated upon a request by the potential donor, "disclosure-on-demand."²⁸⁸ Substantial disagreement exists as to the efficacy of "point-of-solicitation" disclosure. Proponents argue that disclosure at this stage is needed to insure that potential donors have information at the time they are deciding whether to contribute.²⁸⁹ The California legislature found that fraud and deceit associated with the siphoning of substantial amounts of charitable dollars into fund raising costs could be minimized by requiring disclosure at the point-of-solicitation, a practice that leads to a more informed decision on the part of the donor.²⁹⁰ It is not enough that potential donors can write for information or avail themselves of public records. Most people simply will not bother to seek information in this manner.²⁹¹

Opponents of "point-of-solicitation" disclosure argue that "meaningful and balanced information cannot be presented as a part of the solicitation process."²⁹² They argue that this objection is particularly true with respect to mandatory disclosure of fund-raising costs, administrative costs, and program costs as a percentage of contributed dollars.²⁹³ Opponents further assert that requiring complete information disclosure would make the solicitation activity a burdensome and costly one to the soliciting organizations, most likely resulting in a loss of contributions; on the other hand, requiring less than complete information may make such disclosures misleading.²⁹⁴

The need to have some information available to potential donors outweighs the objections that the information presented may not be entirely

286. MD. ANN. CODE art. 41, § 103G (1957 & Supp. 1984); OHIO REV. CODE ANN. § 1716.04 (Baldwin 1985).

287. B. HOPKINS, *supra* note 4, at 109.

288. "Point-of-solicitation" requires certain information to be provided as part of the solicitation materials. "Disclosure-on-demand" requires the providing of information upon request of the potential donor. *Id.*

289. *Id.*

290. The Legislature declares that the purpose of this article is to safeguard the public against fraud, deceit and imposition, and to foster and encourage fair *solicitation and sales* solicitations for charitable purposes, wherein the *person* from whom the money is being solicited will know what portion of the money will actually be utilized for charitable purposes. This article will promote legitimate *solicitations and sales* solicitation for charitable purposes and restrict harmful solicitation methods, thus the people of this state will not be misled into giving solicitors a substantial amount of money which may not in fact be used for charitable purposes.

CAL. BUS. & PROF. CODE § 17510 (West Supp. 1986).

291. B. HOPKINS, *supra* note 4, at 109; Gross, *supra* note 265, at 17; Stevenson, *supra* note 24, at 40 (arguing that states ought to encourage responsible giving).

292. B. HOPKINS, *supra* note 4, at 109.

293. The problems associated with regulation of fund-raising cost are discussed *infra* in Part III, Section E.

294. B. HOPKINS, *supra* note 4, at 109.

meaningful or balanced. An initial disclosure of certain specified information in a standardized form (to the extent possible) coupled with a statement that more detailed information will be furnished upon request serves the principal objective of enabling the potential donor to make a reasonably informed decision whether to contribute or to request additional information before making a contribution. The solicitor who feels that the information is incomplete may encourage the hesitant donor to seek the additional information. The solicitor may even provide additional information voluntarily. This approach reconciles to some extent the objections of both the proponents and opponents to "point-of-solicitation" disclosure and "disclosure-on-demand."

Information regarding the name and purpose of the charitable organization or charitable cause, the purpose of the solicitation, the amount of gross proceeds which will be devoted to fund-raising costs expressed as a percentage of the gross, the availability of additional information and how it may be obtained, and the existence of professional fund raisers or paid solicitors needs to be disclosed at the time the potential donor is solicited.²⁹⁵ Where professional fund raisers or paid solicitors are not utilized in the solicitation or an organization is exempt from registering with the agency, disclosure may be excused.²⁹⁶ An organization which solicits totally from within its membership is another situation where an exemption from disclosure requirements is appropriate. Also, the requirement for "point-of-solicitation" disclosure could be waived if a charitable organization's fund-raising costs are projected to be equal to or less than a statutorily established amount.²⁹⁷

E. Regulation of Fund-Raising Costs

Regulation of fund-raising costs by statutorily imposing limits on such costs, expressed as a percentage of gross receipts, is criticized on several grounds. Critics argue that there is lacking a "universal standard for computing fund-raising costs" and that "a single percentage is a misleading [and meaningless] factor to use in evaluating an organization's fund-raising practices."²⁹⁸ They also argue that expressing fund-raising costs as a percentage of gross receipts fails to consider and reflect the many factors making up such costs.²⁹⁹ These factors include: the fund-raising method used and the variation in costs from one method to another, the nature of the organization and its constituency,³⁰⁰ the purpose or cause of the organization or solicitation campaign,³⁰¹ and the accounting method employed by

295. See Appendix E; Ballow, *The New California Charitable Solicitation Disclosure Law: Application and Needed Amendments*, 12 PAC. L.J. 871 (1981).

296. Fund-raising costs substantially increase where professional fund raisers or paid solicitors are employed. This is not to suggest, however, that the costs are unreasonable or excessive. In fact, a good argument can be made that all organizations should be made to disclose information so that the general public can make comparisons among them. Stevenson, *supra* note 269, at 34.

297. Maine follows this approach. See *supra* notes 69-71.

298. B. HOPKINS, *supra* note 4, at 111; Gross, *supra* note 265, at 14.

299. Gross, *supra* note 298.

300. This was an articulated concern in *Schaumburg* and *Munson*. See discussion *supra* Part II, Section (B)(2)(a).

301. *Id.*

the organization.³⁰² Additionally, the utilization of percentage limitations as preventative of fraud is questionable. High fund-raising costs are not necessarily indicative of fraud or unreasonable costs, just as low costs are not indicative of efficient or reasonable costs.³⁰³ Absolute limitations also infringe upon the first amendment rights of some organizations and are therefore unconstitutional.³⁰⁴ Fund-raising costs studies³⁰⁵ lend support to the proposition that fund-raising costs cannot be reduced to a single percentage figure, fairly and reasonably applicable to all types of organizations and their fund-raising activity.³⁰⁶

Employing a percentage limitation to regulate fund-raising costs is not totally without merit when the percentage has flexible application. The use of the percentage can serve two goals not inconsistent with the state's interest in curtailing inefficiency in the acquisition and utilization of charitable dollars. First, the percentage established by the statute no longer becomes a limitation on fund-raising costs. Instead, it becomes a threshold prompting the authorities to make further inquiry and investigation into the costs of the organization in light of all relevant factors if the costs exceed the established percent. No presumption needs to be raised that the organization's fund-raising costs are unreasonable or excessive simply because they are greater than the established percentage. Similarly, the authorities are not foreclosed from questioning the reasonableness of an organization's fund-raising costs which are equal to or less than the established percentage. Second, an organization is put on notice that further inquiry and investigation into the reasonableness of its costs may be forthcoming if costs exceed the established percentage. Thus, authorities are given a starting point and charitable organizations are given notice. An assumption is made that the state will consider relevant information and studies in setting the initial cost's percentage.³⁰⁷

Before preceding further, it is appropriate to mention the utilization of percentages in the context of disclosure. Although the development of accounting and reporting standards and the availability of financial reports will be helpful for authorities and corporate or foundation donors, these standards or reports will provide little help to the unsophisticated donor.

302. B. HOPKINS, *supra* note 4, at 110-13, 137 n.24; Solomon, *Twelve Factors in Determining "Reasonable" Fund-Raising Costs*, PHILANTHROPY MONTHLY, Nov. 1979, at 30 (listing 12 factors which should be considered in determining the reasonableness of fund-raising costs); Gross, *Fund Raising and Program Cost Ratios, Some Hard Data on the Arbitrary Ratios*, PHILANTHROPY MONTHLY, June 1975, at 28 (recognizing that organizations have different objectives or purposes necessitating different fund-raising methods leading to different cost).

303. *See Munson*, 104 S. Ct. 2839 (1984); *Schaumburg*, 444 U.S. 620 (1980); B. HOPKINS, *supra* note 4, at 112.

304. *Schaumburg*, 444 U.S. 620 (1980).

305. The National Society of Fund-Raising Executives, Inc. (NSFRE) undertook a study of fund-raising costs. *See NSFRE, Fund-Raising Costs, A Progress Report*, PHILANTHROPY MONTHLY, Oct. 1979, at 19. *See also* Boyle & Jacobs, *Fund-Raising Costs*, PHILANTHROPY MONTHLY, Apr. 1979, at 5 (an economic analysis of fund-raising costs).

306. These studies also provide regulators with valuable information about average fund-raising costs and the relative weight to be accorded factors of cost. These studies should be considered by legislatures in enacting legislation more in tune with the realities of fund-raising. *See* Boyle & Jacobs, *supra* note 305; Gross, *supra* note 302; McLenithan, *Public Disclosure Requirements of Charitable Organizations*, PHILANTHROPY MONTHLY, Sept. 1976, at 26.

307. McLenithan, *supra* note 306; Gross, *supra* note 306.

AAFRC surveys on giving indicate that the majority of giving in the United States between 1980 and 1984 was by individuals.³⁰⁸ While corporate and foundation donors possess the skill and resources to evaluate information reported and filed with the authorities, unsophisticated donors have neither the expertise, resources, or inclination to do so. Requiring disclosure of fund-raising costs, expressed as a percentage of gross receipts, shifts the burden to the soliciting organization to provide whatever additional information is necessary to explain its costs, instead of requiring unsophisticated donors to ferret out and interpret the information. This is not to say that donors do not have some responsibility to become responsible givers, but that information in audit reports is difficult to read and understand for those not trained to do so. Soliciting organizations should not be able to fortuitously capitalize on this inability. This does not place an undue burden on the soliciting organization.

The question and focus, then, should not be whether a percentage approach is adopted as a regulatory measure, but what is the consequence of reporting fund-raising costs in excess of the established percentage. If the consequence is a denial of an opportunity to solicit, then the statute not only violates the Constitution,³⁰⁹ but fails to consider realistically the nature of fund-raising costs. An irrebutable presumption of unreasonableness or excessiveness is created.

The thrust of a statutory provision regulating fund-raising costs should be the determination that solicited dollars are being acquired and utilized efficiently. To this end a provision prohibiting the utilization of an unreasonable or excessive portion of money or pledges received in a solicitation campaign for fund-raising costs is the first step.³¹⁰ The next step is determining what is or is not unreasonable or excessive. A standard for determining reasonableness must be provided as guidance for soliciting organizations and the authorities. A percentage serves this purpose initially, but is not to be the determinative standard.³¹¹ Stephen Solomon³¹² and Bruce Hopkins³¹³ provide the following list of factors which should be considered by the authorities:

1. The organization's cause;
2. The organization's purposes;
3. The organization's programs;
4. The public awareness of the organization;
5. The public awareness of the problems dealt with by the organization;
6. The visibility of the problem dealt with by the organization;
7. The public acceptance of the problem dealt with by the organization;
8. The extent of the volunteers which the organization can utilize in its fund-raising efforts;
9. The fund-raising techniques available to the organization;
10. The size of the average donation contributed to the organization;

308. See *supra* note 15.

309. See *Schaumburg*, 444 U.S. 620 (1980).

310. See Appendix F, § 9.1-9.2.

311. *Id.*

312. Solomon, *supra* note 302.

313. B. HOPKINS, *supra* note 4, at 131.

11. The number of years the organization has been in existence and the number of years the organization has been soliciting from the public; and
12. Act of God and other unforeseen circumstances.
13. The efforts being made to reduce fund-raising costs.³¹⁴

In addition to these factors, attention should be given to the accounting practices for allocating costs among fund-raising, administrative, and program activities. To this end, consideration should also be given to adopting accounting guidelines which take into account the dual aspects of fund-raising and information dissemination or public advocacy campaigns.

These factors and standards take into account the concerns raised by the Supreme Court in *Munson* and *Schaumburg*. The presumption that high fund-raising costs are *ipso facto* fraudulent or unreasonable is replaced by a provision that requires careful consideration of costs based upon relevant and articulated standards. There is substantially less risk that first amendment rights will be offended since the nature of the organization and its purposes or programs are all to be considered in determining reasonableness.

Hopkins, an opponent of the use of fund-raising percentages,³¹⁵ argues that even if an organization's fund-raising costs are determined to be unreasonable, a statute still overreaches if it prohibits solicitation by that organization.³¹⁶ He proposes that the organization be given the choice of foregoing solicitation activity or disclosing "sufficient information to the public about its fund-raising expenses at the point of solicitation."³¹⁷ Under his proposal, the choice is to be exercised after the costs have been evaluated under the flexible provisions, but determined to be unreasonable or excessive nonetheless.

J. John Stevenson, in his proposed legislation, adopts a regulatory scheme in which the level of fund-raising costs, expressed as a percentage of gross receipts, determines the frequency of mandatory reporting by the organization.³¹⁸ Biennial reporting with the authorities is required if fund-raising costs are less than thirty-five percent; annual reporting if costs are between thirty-five and fifty percent; and semi-annual reporting if costs exceed fifty percent.³¹⁹ Under this approach organizations with lower fund-raising costs are rewarded with infrequent reporting requirements but organizations with higher costs are not penalized. He suggests that a disclosure requirement could be added for organizations whose expenses exceed fifty percent.³²⁰ In effect, this proposal does not greatly differ from Hopkin's proposal, except that the authorities never make a determination of reasonableness under Stevenson's proposal.

The troubling aspect of these proposals is that they do not fully consider

314. See Appendix F.

315. Hopkins believes that percentage limitations have inherent unfairness and pose serious constitutional problems, whether they operate conclusively or are irrebuttable. B. HOPKINS *supra* note 4, at 126-39.

316. *Id.* at 132.

317. *Id.*; Appendix F, Alternative Provision.

318. Stevenson, *supra* note 24.

319. *Id.* at 38, 39.

320. *Id.*

the interest of the state in preventing the diversion of charitable dollars to non-charitable purposes where it has been determined that fund-raising costs are unreasonable or excessive. Both of these proposals would grant organizations the right to solicit irrespective of unreasonable or excessive costs. The proposals effectively negate the interest and concerns of the state in promoting and assuring efficient acquisition and utilization of charitable dollars. The troubling aspect of these proposals is not cured by the assertion that the state should not substitute its judgment for that of the donor. Public disclosure achieves part of the state's objective by encouraging informed giving by the donor.³²¹ Nothing, however, prevents the adoption of measures which more directly effectuate the state's purpose and interest. The Supreme Court did not say in either *Munson* or *Schaumburg* that a state is powerless to prohibit charitable organizations from soliciting if it is found that fund-raising costs are unreasonable. The Court struck down the legislation designed to determine unreasonableness and fraud because the legislation was constitutionally defective and not because the the goals of the authorities were impermissible. Moreover, it is fallacious to assert that the state is acting as judge and jury, determining the worthiness of a particular cause or organization.³²² The determination is one of the reasonableness of expenses and is to be made using objective factors.

A risk inherent in the application of these factors is the determination by an agency that certain fund-raising methods are per se unreasonable or fraudulent because of the costs they engender. In *Brown v. R.E. Holloway*,³²³ a volunteer fireman's organization received about eleven and six-tenths percent of the proceeds of a fund raising campaign conducted on its behalf by a professional fund raiser. The contract between the fund raiser and the organization provided that the fund raiser was to receive sixty percent of the receipts of solicitations as a sales commission out of which he paid workers and office expenses.³²⁴ From the remaining forty percent, other expenses were to be paid, after which any balance would be shared equally between the fund raiser and the organization.³²⁵ Similar facts were found in a Common Pleas court decision³²⁶ where a Kiwanis club received twelve and six-tenths percent of all solicited funds.³²⁷

In those two cases, if there were no expenses except sales commissions, approximately eighty percent of the gross receipts would inure to the benefit of the fund raiser.³²⁸ As expenses not covered by the fund raiser were incurred, the receipts to the organizations were further reduced. The very

321. See *id.* at 35, 40; B. HOPKINS, *supra* note 4.

322. See Stevenson, *supra* note 24, at 40; B. HOPKINS, *supra* note 4, at 123.

323. *Holloway*, Case No. CA-6698 (Ct. App. Montgomery County, Ohio, July 15, 1981).

324. *Id.*

325. *Id.*

326. *Hamilton Productions*, Case No. 78-CU-12-5812 (C.P. Franklin County, Ohio, October 13, 1981).

327. The contract between the fund raiser and organization provided that the fund raiser would receive 60% of family ticket sales and 50% of business ticket sales and gate sales as commissions. *Id.* The contract also provided that after the payment of other expenses from the remaining 40% and 50%, respectively, any balance was to be shared equally between the fund raiser and the organization. *Id.*

328. In *Holloway*, 60% plus 50% of the remaining 40% (totaling 80%) of gross sales would go to the fund raiser. In *Hamilton*, 60% plus 50% of the remaining 40% (totaling 80%) of gross family ticket sales and 50% plus 50% of the remaining 50% (totaling 75%) of gross business ticket sales would go to the fund raiser.

nature of the fund-raising contract caused solicitation costs to be excessive and unreasonable. In both *Holloway* and *Hamilton*, the courts found fraud and misrepresentation upon the general public, who were led to believe that a substantial part of the funds would be used for charitable programs.

An agency exercising discretion pursuant to legislation like that in *National Foundation* or the provision proposed in Appendix F would probably label such fund-raising costs unreasonable. Does this mean that the contract is unreasonable per se? It is the contract terms which result in substantial funds being diverted away from charitable purposes. These contracts are typically used in a boiler room telephone solicitation.³²⁹ One might therefore conclude that this method of solicitation is unreasonable per se since it will invariably have associated with it a high fund-raising cost.³³⁰ One of the factors to be considered in determining reasonableness is the nature of the fund-raising method used, whether alternatives exist, and whether such a fund-raising method is appropriate for certain organizations. Another alternative might be to prohibit the payment of compensation when solicitations are made by telephone.³³¹

In short, a statutory provision regulating fund-raising costs by means of a percentage, if it is to withstand a constitutional challenge, must not operate conclusively. Factors and standards which are to be considered in arriving at a determination of reasonableness should be set forth in the statute in order to provide guidance to the authorities and the soliciting organizations.

F. Enforcement and Penalties³³²

The need for an enforcement mechanism and penalties in a charitable solicitation statute is obvious. Generally, the statute should grant the authorities the power to conduct investigations of organizations and their solicitation activities.³³³ A wider range of penalties should also be available where violators are found, including but not limited to:³³⁴ denial, suspension, and revocation of a registration statement;³³⁵ civil and criminal remedies;³³⁶ and injunctive relief.³³⁷ The statute may want to expressly provide

329. The "boiler-room" operation in both *Hamilton* and *Holloway* involved the establishment of a telephone bank staffed by many individuals. The individuals call prospective donors from either a telephone book or, most often, from a prepared donor list reading a solicitation pitch usually prepared in advance. If a donor agrees to give, a notation is made by the donor's name and arrangements are made to collect the donations. Usually the callers are not volunteers. See *Holloway*, Case No. CA 6689 (Ct. App. Montgomery County, Ohio, July 15, 1981) at 3-4.

330. While these two cases represent an extreme, it is possible that an organization could be negatively affected if the legislation, even if flexible, did not consider the appropriateness and availability of fund-raising methods to the organization. See Gross, *supra* note 265, at 32; Solomon, *supra* note 302, at 32.

331. The District of Columbia prohibits persons from conducting or making for charitable purposes a solicitation by telephone for pecuniary compensation. D.C. CODE ANN. § 2-708 (Michie 1981 & Supp. 1985). But see *Planned Parenthood League of Massachusetts, Inc. v. Attorney General*, 391 Mass. 709, 464 N.E.2d 55 (1984) (holding a similar provision in the Massachusetts statute unconstitutional as unnecessary infringement on private speech).

332. Appendix H.

333. Appendix C, § 5.4-5.5.

334. See generally *supra* notes 81-85 and accompanying text.

335. Appendix C, § 5.2-5.3.

336. Appendix H, § 10.1.

for a private cause of action for individuals harmed as a result of solicitation activity.³³⁸

CONCLUSION

Two facts regarding fund raising and the fund-raising industry may be stated with relative certainty. First, there will be a continuing need for the public to financially support, through charitable giving, organizations providing charitable programs and services. Second, in all probability, fraud and other abuses associated with the quest for public dollars, including inefficient acquisition and utilization of those dollars, will also continue. Accordingly, the focus and goal of the state in regulating charitable solicitation should be the significant curtailment, if not elimination, of that fraud and abuse without imposing an undue burden on fund-raising activity.

The obvious first step in controlling solicitation fraud and abuse is the willingness of the state to enact legislation "pro-active" rather than "re-active" in its regulation of charitable solicitation. The United States Constitution does not prohibit states from legislatively regulating charitable solicitation, but sets the framework for that legislation. Such legislation must be considered and drafted in the context of that constitutional framework. The above provisions are both "pro-active" and within the bounds of the Constitution.

Several additional components of active regulation also need to be mentioned.³³⁹ States need to work together to develop uniform laws respecting charitable solicitation regulation. At the very minimum, effort needs to be made to establish uniform registration and reporting provisions. Professional fund-raising organizations, interested fund-raising associations, private watchdog organizations, and soliciting organizations must have input in the preparation of this legislation. Relevant data should be considered, and, when appropriate, studies conducted so that legislation is not drafted in a vacuum but is in tune with the realities and practical necessities of fund raising. A cooperative atmosphere needs to be fostered and mechanisms established among states (administering agencies, attorneys general, or secretaries of state), professional fund-raising organizations, interested fund-raising associations, and private watchdog organizations to facilitate the communication and sharing of information. States must also be willing to provide administering agencies with adequate personnel and financial resources sufficient to enforce the statutes and regulations.

The role of education in the "pro-active" regulation of charitable solicitation is not to be slighted. Concerted effort ought to be made to educate the public on the importance and necessity of its role in responsible charitable giving. Equally important and needed is an educational program directed at

337. *Id.* § 10.3.

338. See Georgia statute, *supra* note 85.

339. See R. Abrams, *Regulating Charity—The State's Role*, REC. A.B. CITY N.Y. 481 (1980); Quandt, *The Regulation of Charitable Fund Raising and Spending Activities*, 1975 WIS. L. REV. 1158, 1185-87.

charitable organizations and professional fund raisers concerning their responsibility in promoting efficient fund raising and fund management. The education process should not be relegated to the state but should involve every segment of the fund-raising community.

Finally, the state must look for ways to reduce the regulatory burden on soliciting organizations without emasculating the effectiveness of legislation. Exemptions from registration and reporting already provide appropriate relief to some organizations. Uniform legislation and standardization of registration and reporting formats among the states will help immensely. Coordinating the role and regulatory effects of municipalities and other regulators will also relieve some of the burden on charities. "Pro-active" legislation coupled with the above as well as other suggestions should not only deal a decisive blow to solicitation fraud and abuse, but strengthen the fund-raising industry to the benefit of all.

APPENDIX A REGISTRATION, REPORTING, RECORDS

Section 1 Registration Statement

Section 1.1 Every charitable organization which intends to solicit charitable contributions within this state, or have funds solicited on its behalf, shall, prior to any solicitation, file a registration statement with the agency upon forms prescribed by it and obtain a certificate of registration.

Section 1.2 The registration statement shall contain the following information:

- a. The name of the organization;
- b. The address of the organization;
- c. The names and addresses of any chapters, branches, or affiliates and other persons which will share in the charitable contributions received from persons in this state;
- d. The place and date the organization was legally established, if applicable, and a reference to any determination of its tax-exempt status under the Internal Revenue Code. (In the initial application, true copies shall be submitted of any articles of incorporation or constitution, any bylaws, any tax exempt status letter from the Internal Revenue Service including any letter of determination status and any agreements of affiliation. Subsequent applications shall contain only any change or revocation of these documents);
- e. The names, addresses, and occupations of the officers, directors, trustees, persons who are directly in charge of the fund-raising activities, and persons who have custody of the financial records or custody of the contributions and a statement whether any such person has been convicted of a felony;
- f. A copy of a financial statement in a consolidated report audited by an independent public accountant for the organization's immediately preceding fiscal year or, if none, for the present fiscal year or part thereof; the information reported shall be that provided for in section 2.3 of this chapter. (The information to be reported shall be filed in conformity with sections 2.1-2.4 of this chapter);
- g. A statement indicating whether the organization is authorized by any other governmental authority to solicit contributions and whether it, or any officer, professional fund-raising counsel, or professional solicitor thereof, is or has ever been enjoined by any court or otherwise prohibited from soliciting contributions in any jurisdiction;
- h. A statement indicating whether the organization solicits contributions from the public directly or has such done on its behalf by others;
- i. The location of the person's financial records;
- j. The method by which the solicitation is made, including a statement as to whether such solicitation is conducted by voluntary unpaid solicitors, by professional solicitors, or both; a narrative description of the promotional plan together with copies of all advertising material which has been prepared for public distribution by any means of communication and the location of all telephone solicitation facilities;
- k. The names and addresses of any professional fund-raising counsel or professional solicitors who are acting or who have agreed to act on behalf of the organization together with copies of contracts between the organization and professional fund-raising counsel or professional solicitors relating to financial compensation or profit to be derived by the professional fund-raising counsel or professional solicitors. (Where any such contract is executed after filing of the registration statement, a copy thereof shall be filed within days of execution);
- l. The period of time during which the solicitations are made and, if less than statewide, the area, or areas, in which such solicitation generally takes place;
- m. The purposes for which contributions to be solicited are used, the total amount of funds proposed to be raised thereby, and the use or disposition made of the charitable contributions received;
- n. The name or names under which the organization solicits contributions;
- o. A sample copy of the authorization issued to individuals soliciting by means of personal contact in its behalf;
- p. The name and address of an agent authorized to accept service of process in this state;
- q. A statement indicating whether an agreement exists which permits another to use its name in a charitable solicitation and a copy of any accounting of the solicitation promotion;

r. Such other information as may be reasonably required by the agency for the public interest or for the protection of contributors.

Section 1.3 The agency shall be notified in writing, accompanied by any appropriate document, of any change in the information contained in the registration statement within __ days after the change occurs.

Section 1.4 Except as otherwise herein provided, the registration forms and any other documents prescribed by the agency shall be signed by an authorized officer and by the chief fiscal officer of the charitable organization, and such forms and documents shall be verified under oath and shall be accompanied by the registration fee.

Section 1.5 A chapter, branch, or affiliate, except an independent member, of a federated fund-raising organization upon mutual agreement may report all of the required information to its parent organization with which it is affiliated, which shall then transmit such information as to its affiliates, branches, chapters, to the agency along with its own statement, except as provided in section 2.5. An independent member of a federated fund-raising organization shall comply with the provisions of this section independently.

Section 1.6 Any organization, chapter, branch, affiliate, or member organization contracting with a professional fund-raiser or solicitor shall report the agreement in writing, with a copy of the contract, to the agency within __ days of the contract agreement and shall have the approval of the agency prior to making any solicitations. In addition, any chapter, branch, affiliate, or member organization of a parent organization or federated fund-raising organization shall file for renewal separately from the parent organization or federated fund-raising organization when contracting with a professional solicitor. The affiliate shall also pay a separate registration fee and file a financial statement or audit with opinion as prescribed herein.

Section 1.7 It shall be the duty of every charitable organization to ensure that persons who solicit contributions from the public on behalf of the charitable organization have proper identification. Professional solicitors and their employees shall be required to have and produce or display, on demand, identification indicating that the said solicitor has been duly authorized by the organization for which he is soliciting. Such identification shall include but not be limited to, the name of the holder of the identification and the name and number of the certificate of the charitable organization, if applicable, and the information which may be required by section 7.3 of this article.

[See FLA. STAT. ANN. § 496.03 (West 1972 & Supp. 1985); MINN. STAT. ANN. § 309.52 (West 1976 & Supp. 1985); N.C. GEN. STAT. § 131C-7 (1981 & Supp. 1983).]

Section 2 Annual Reports

Section 2.1 Every charitable organization required to file a registration statement pursuant to section 1.1 shall file an annual report with the agency upon forms prescribed by it on or before __. For cause shown the agency may extend the time for filing the annual report.

Section 2.2 The annual report shall include a financial statement covering the immediately preceding 12 months period of operation, and shall be executed by any authorized officer and by the chief fiscal officer of the charitable organization, who shall acknowledge that it was executed pursuant to resolution of the board of directors or trustees, or if there be no such board, then by its managing group which has approved the content of the annual report.

Section 2.3 The financial statement shall include a balance sheet, statement of income and expense, and statement of functional expenses, shall be consistent with forms furnished by the agency, and shall be prepared in accordance with generally accepted accounting principles and accounting reporting procedures established by the agency so as to make a full disclosure of the following, including necessary allocations between each item and the basis of such allocation:

- a. Total receipts and total income from all sources;
- b. Cost of management and general;
- c. Cost of fund raising;
- d. Cost of public education;
- e. Funds or properties transferred out of state, with explanation as to recipient and purpose;

f. Total net amount disbursed or dedicated within this state, broken down into total amounts disbursed or dedicated for each major purpose, charitable or otherwise;

g. Names of professional fund-raising counsel or professional solicitors used during the accounting year and the financial compensation or profit resulting to each.

h. The report shall be accompanied by an opinion signed by an independent public accountant that such statement fairly represents the financial operations of the charitable organization; provided that if total support and revenue exceeds __ for the fiscal year or part thereof, the report shall be audited by a certified public accountant.

Section 2.4 The agency shall adopt rules for simplified reporting by organizations whose total support and revenue is __ or less.

Section 2.5 Where a registration statement has been filed by a parent organization, the registered parent organization may file the annual report required under this section on behalf of the chapter, branch, or affiliate in addition to or as part of its own report or the registered affiliate may file the annual report required under this section on behalf of the parent organization in addition to or as part of its own report. The accounting information required under this section shall be set forth separately and not in consolidated form with respect to every chapter, branch, area office, similar affiliate or person within the state which raises or expends more than __. The agency may permit any chapter, branch, or affiliate to file a consolidated statement with any other chapter, branch, affiliate, or parent organization if it is determined that the interests of the charitable beneficiaries will not be prejudiced thereby and that separate accounting information is not required for proper supervision.

[See MINN. STAT. ANN. § 309.53 (West 1976 & Supp. 1985).]

Section 3 Books, Records & Contracts—Record Keeping

Section 3.1 Charitable organizations and professional fund-raising counsel or professional solicitors, required to be registered under this chapter, shall maintain accurate, current, and readily available books and records at their usual business locations, as designated in the registration statement filed with the agency, until at least three years shall have elapsed following the effective period to which they relate.

Section 3.2 All contracts between professional fund-raising counsel or professional solicitors and charitable organizations shall be in writing and true and correct copies of such contracts or records thereof shall be kept on file in the various offices of the charitable organization and/or professional fund-raising counsel or professional solicitor for a three-year period as provided in this section. Such records and contracts shall be available for inspection and examination by the agency.

[See HAWAII REV. STAT. § 467B-5 (1976 & Supp. 1984).]

APPENDIX B

Section 4 Exemption

Section 4.1 The following charitable organizations shall not be required to file an annual registration statement with the agency.

a. Any religious corporation, trust, or organization incorporated or established for religious purposes, or any agency or organization incorporated or established for charitable, hospital, or educational purposes, and engaged in effectuating one or more of such purposes, which is affiliated with, operated by, or supervised or controlled by a corporation sole or other religious corporation, trust, or organization incorporated or established for religious purposes, or any other religious agency or organization which serves religion by the the preservation of religious rights and freedom from persecution or prejudice or by fostering religion, including the moral and ethical aspects of a particular religious faith;

b. Any educational institution, the curriculum of which in whole or in part, is registered or approved by the state board of education, either directly or by acceptance of accreditation by an accrediting body recognized by the state board of education and any foundation or department having as established identity with any of the aforementioned educational institutions;

c. Any charitable organization when the solicitation of contributions is confined to the

membership of the organization and when the solicitation is managed and conducted solely by officers and members of such organization. (The term "membership" shall not include those persons who are granted a membership upon making a contribution as a result of the solicitation);

d. Any persons requesting contributions for the relief of named individuals when the solicitation is managed and conducted solely by persons who are unpaid for such services; and when all of the contributions collected, without any deductions whatsoever except for the actual cost of a banquet, dance, or similar social gathering, are turned over to the named beneficiary or beneficiaries;

e. Any charitable organization which does not intend to solicit and receive and does not actually raise or receive contributions from the public in excess of __ during a calendar year or does not receive contributions from more than __ persons during a calendar year, if all of their functions, including fund-raising activities, are carried on by persons who are unpaid for their services and if no part of their assets or income inures to the benefit of or is paid to any officer or member. Nevertheless, if the contributions raised from the public, whether all of such is or is not received by any charitable organization during any calendar year, shall be in excess of __, it shall, within thirty days after the date it shall have received total contributions in excess of __, register with and report to the agency as required by this article;

f. A local post, camp, or chapter of a bona fide veterans' organization which issues charters to such local post, camp, or chapter throughout this state, a bona fide organization of volunteer firemen, a bona fide ambulance or rescue squad association or a bona fide auxiliary or affiliate of any such organization, provided all its fund-raising activities are carried on by members of such an organization or an affiliate thereof, and such members receive no compensation directly or indirectly therefor;

g. Hospitals which are non-profit and charitable and whose budgets are subject to review by "hospital commission."

[See MASS. GEN. LAWS ANN. ch. 68, § 20 (West 1969); N.C. GEN. STAT. § 131C-5 (1981 & Supp. 1983); W. VA. CODE. § 29-19-6 (1980 & Supp. 1985); WASH. REV. CODE ANN. § 19.09.030 (1978 & Supp. 1985).]

APPENDIX C

Section 5 Grant, Denial, Suspension, or Revocation of Registration

Section 5.1 Within __ days from the receipt of a registration statement the agency shall review and examine the same, and if it finds the statement to be in conformity with the requirements of this chapter and all relevant rules and regulations, it shall enter an order approving the registration and issue a certificate of registration.

Section 5.2 By order, the agency may deny, suspend, or revoke registration if it finds that the organization:

a. has filed a registration statement which is incomplete in any material respect or contains any statement which in light of the circumstances under which it is made, is false or misleading with respect to any material fact;

b. has engaged in a fraudulent, deceptive, or dishonest practice;

c. is permanently or temporarily enjoined by any court of competent jurisdiction from engaging in or continuing any conduct or practice involving any aspect of charitable solicitation;

d. has used charitable contributions for purposes not stated in the registration statement; or

e. has violated or failed to comply with any provision of this chapter or any rule or regulation under this chapter.

Section 5.3 If the agency intends to deny, suspend, or revoke the registration of an organization it shall notify the organization of its intent to deny, suspend, or revoke the registration. The notification shall contain the reasons for the action and shall inform the organization of its right to correct the matter or request an administrative hearing within __ days of the receipt of the notification. The denial, suspension, or revocation shall become effective __ days after the receipt of the notification unless the matter is corrected or a request for an administrative hearing is received by the agency before the expiration of such time. If a

hearing is requested and the denial, suspension, or revocation is upheld, the denial, suspension, or revocation shall become effective upon the service of the final order of the agency.

Section 5.4 The agency is authorized and empowered:

- a. to make public or private investigations within or outside the state as it deems necessary to determine whether any organization has violated or is about to violate any provision of this chapter or any rule or regulation or order thereunder, or to aid in the enforcement of this chapter in the prescribing of rules and forms thereunder, and to publish information, concerning the violation of this chapter or any rule, or regulation or order thereunder;
- b. to require or permit any person to file a statement in writing, under oath or otherwise as the agency determines, as to all facts and circumstances concerning the matter being investigated.

Section 5.5 For the purpose of any investigation or proceeding under this chapter, the agency or any person designated may administer oaths and affirmations, subpoena witnesses and compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, agreements, or other documents of records which the agency deems relevant or material to the inquiry.

[See FLA. STAT. ANN. § 496.13 (West 1972 & Supp. 1985); MINN. STAT. ANN. § 309.533, .58 (West 1976 & Supp. 1985); N.C. GEN. STAT. § 131C-11, -18 (1981 & Supp. 1983).]

APPENDIX D

Section 6 Registration of Professional Fund Raisers; Bond Requirement

Section 6.1 No person shall act as a professional solicitor for a charitable organization subject to the provisions of this chapter unless registered with the agency.

Section 6.2 The registration statement shall be in writing, under oath, and in a form prescribed by the agency. The statement shall require information as to the identity and previous related activities of the registrant as may be necessary or appropriate for the public interest or for the protection of contributors and such other information as the agency may require. The registration statement shall be accompanied by an annual fee in the sum of _____. A partnership, corporation, or sole proprietorship which is a professional fund-raising counsel or professional solicitor may register for and pay a single fee on behalf of all its members, officers, agents, servants, and employees. However, the names and addresses of all members, officers, agents, servants, and employees of professional fund-raising counsel or professional solicitors shall be listed in the registration statement.

Section 6.3 At the time of filing the registration statement the applicant shall file with and have approved by the agency a bond in which applicant shall be the principal obligor in the sum of ____ dollars issued by a surety company authorized to do business in the state and which shall remain in effect so long as a registration is in effect. The bond shall issue to the benefit of the state and any person who may have a cause of action for the reimbursement of any losses resulting from malfeasance, nonfeasance, or misfeasance in the conduct of solicitation activities. A partnership, corporation, or sole proprietorship which is a professional fund-raising counsel or professional solicitor may file a consolidated bond on behalf of its members, officers, agents, servants, and employees.

Section 6.4 Each registration shall be valid for a period of one year and may be renewed for additional one-year periods upon written application under oath in a form prescribed by the agency, payment of the renewal fee, and proof that the required bond is and will remain in effect.

Section 6.5 The granting, denying, suspension, or revocation of registration shall be in conformity with sections 5.1-5.5 of this chapter (Appendix C).

[See CONN. GEN. STAT. ANN. § 21a-181 (West 1985); MD. ANN. CODE art. 41, § 103F (1957 & Supp. 1984); WASH. REV. CODE ANN. § 19.09.190 (1978 & Supp. 1985).]

APPENDIX E

Section 7 Solicitation Disclosure Requirements

Section 7.1 No individual shall solicit in this state unless the solicitor exhibits to the prospective contributor a solicitor information card or a copy thereof, produced and authenticated

as provided by the agency. The card shall be signed and dated by an individual who is a principal, staff member, or officer of the soliciting organization. In lieu of exhibiting the card, the solicitor may distribute during the course of the solicitation any printed material provided such material complies with the provisions provided in section 7.3 and provided that the solicitor informs the prospective contributor that such information as required by section 7.3 is contained in the printed material.

Section 7.2 If the initial solicitation is made by radio, television, letter, telephone, or by any other means not involving a direct personal contact with the potential contributor, the solicitation shall clearly disclose the information required by section 7.3. In a solicitation covered by this subsection, other than telephone solicitations, if a contribution is subsequently made, a solicitor information card or other printed material as provided in section 7.1 shall be mailed to or otherwise delivered to the contributor. If the solicitation is made by telephone by a solicitor and a potential contributor consents or agrees to make a contribution, a solicitor information card or other material as provided in section 7.1 shall be mailed to or otherwise delivered to the contributor prior to accepting the contribution.

Section 7.3 The information on the solicitor information card shall include the following:

- a. The name and address of the organization, or in the case of a combined campaign, the name of each organization or fund on behalf of which all or any part of the money collected will be utilized for charitable purposes;
- b. The manner in which the money collected will be used for charitable purposes if there is no organization or fund;
- c. Stated as a percentage of the total gift, the amount that will be used for charitable purposes;
- d. The total cost that is estimated will be used for direct fund-raising expenses if professional fund-raising counsel or professional solicitors are paid a set fee rather than a percentage of the total of the gross receipts raised;
- e. A statement to the effect that an audited financial statement of the organization may be obtained by contacting the organization at the address disclosed;
- f. The nontax-exempt status of the organization or fund, if the organization or fund for which the money or funds are being solicited does not have a charitable tax exemption under both federal and state law;
- g. The percentage of the total gift or purchase price which may be deducted as a charitable contribution under both federal and state law. If no portion is so deductible the card shall state, "This contribution is not tax deductible."

Section 7.4 Any person who solicits on behalf of an organization exempt from complying with sections 1.1-1.7 of this Article (registration requirements) and who is not a professional fund-raising counsel or professional solicitor may satisfy the disclosure provisions by providing the name and address of the organization on behalf of which all or part of the money collected will be utilized for charitable purposes, the charitable purposes for which the solicitation is made, and by stating to the person solicited that information about revenues and expenses of such organization, including administration and fund-raising costs, may be obtained by contacting the organization's office at the address disclosed. The organization shall provide such information to the person solicited within ___ days after receipt of the request. [See CAL. BUS. & PROF. CODE § 17510.3-.4 (West 1964 & Supp. 1985); D.C. CODE ANN. § 2-705 (1981 & Supp. 1985).]

APPENDIX F*

Section 8 Regulation of Fund-raising Costs

Section 8.1 No charitable organization, except as provided herein, shall pay or incur, or enter into an agreement to pay or incur in connection with any fund-raising activity, fund-raising expenses, as defined herein, that constitute an unreasonable and excessive portion of the total moneys, pledges, and/or property raised or received by reason of any fund-raising activity. Except as provided in section 8.2 and section 8.3, expenses paid or incurred, or agreed to be paid or incurred by a charitable organization in connection with fund-raising

* Appendix F is the proposed provision of Bruce Hopkins, paraphrased.

activity in excess of ___ percent of total moneys, pledges, or property raised or received by reason of any fund-raising activity is an unreasonable and excessive portion of such total gross receipts.

Section 8.2 For purposes of this section, the total gross receipts raised or received shall be adjusted so as not to include contributions received equal to the actual cost to the charitable organization of

- a. goods, food, entertainment, drink, or services sold or provided to the public, or
- b. the actual postage paid to the United States Postal Service and printing expense in connection with soliciting contributions. (These costs shall not be included as fund-raising costs.)

Section 8.3 Expenses paid or incurred or agreed to be paid or incurred which exceed ___ percent shall be permitted if, after consideration of special facts and circumstances, it is determined that such higher expenses are reasonable. The requirements and factors to be considered in determining the reasonableness of fund-raising expenses of charitable organization include the following:

- a. The length of time the charitable organization has been in existence or has engaged in public solicitation of funds;
- b. The nature of the charitable organizations programs and purposes;
- c. Whether the charitable organization advocates causes or disseminates substantive information to the public as part of the same process by which the organization solicits contributions;
- d. The nature of and extent of the charitable organization's constituency;
- e. The method of fund-raising selected or available to the charitable organization;
- f. The average size of contributions received by the charitable organization;
- g. The estimate by a charitable organization of fund-raising expenses and any plans for future reduction of fund-raising expenses;
- h. The extent to which fund-raising expenses have been affected by unforeseen circumstances.

A charitable organization is not generally required to satisfy all of the factors in (a) through (h). The factors relevant in the case of an organization and the weight accorded to any one or more of them may differ depending upon the pertinent facts and circumstances. The agency shall promulgate rules or regulations for the implementation of this subsection.

Section 8.4 A charitable organization, the annual fund-raising expenses of which are determined to constitute an unreasonable and excessive portion of the total moneys, pledges, and/or property raised or received by reason of any solicitation activity, following an application of the requirements and factors enumerated in section 8.3 shall be prohibited from soliciting contributions in the state for a period of at least twelve months from the date of such determination.

Alternative Provision

Section 8.4 A charitable organization, the fund-raising expenses of which are determined to constitute an unreasonable and excessive portion of the total moneys, pledges, and/or property raised or received by reason of any solicitation activity, following an application of the requirements and factors enumerated in section 8.3 shall include, in a conspicuous place on all solicitation material required pursuant to sections 7.1-7.4, the additional statement: **THE FUND-RAISING EXPENSES IN CONNECTION WITH THIS SOLICITATION ACTIVITY HAVE BEEN DETERMINED BY THE AGENCY TO BE UNREASONABLE.**

APPENDIX G

Section 9 Prohibited Acts

Section 9.1 No charitable organization, professional fund-raising counsel, or professional solicitor shall use or exploit the fact of registration under this chapter so as to lead the public to believe that such registration in any manner constitutes an endorsement or approval by this state, provided, however, that the use of the following statement shall not be deemed a prohibited exploitation, "Registered with the Agency as required by law. Registration does not imply endorsement of a public solicitation for contributions."

Section 9.2 No person shall, in connection with the solicitation of contributions or the sale of tangible personal property or services represent, or lead anyone by any manner, means, practice or device whatsoever to believe, that the person on whose behalf such solicitation or sale is being conducted is a bona fide charitable organization or that the proceeds of such solicitation or sale will be used for charitable purposes, if he has reason to believe such not to be the fact.

Section 9.3 No person shall in connection with the solicitation of contributions or the sale of tangible personal property or services for charitable purposes represent, or lead anyone by any manner, means, practice, or device whatsoever to believe, that any other person sponsors or endorses such solicitation of contributions, sale of tangible personal property, or services for charitable purposes or approves of such charitable purposes or a charitable organization connected therewith when such other person has not given written consent to the use of his name for these purposes.

Any member of the board of directors or trustees of a charitable organization or any other person who has agreed either to serve or to participate in any voluntary capacity in the campaign shall be deemed thereby to have given his consent to the use of his name in said campaign. Nothing contained in this section shall prevent the publication of names of contributors without their written consents, in an annual or other periodic report issued by a charitable organization for the purpose of reporting on its operations and affairs to its membership or for the purpose of reporting contributions to contributors.

Section 9.4 No person shall make any representation that he is soliciting contributions for or on behalf of a charitable organization or shall use or display any emblem, device, or printed matter belonging to or associated with a charitable organization for the purpose of soliciting or inducing contributions from the public without first being authorized to do so by the charitable organization.

Section 9.5 No charitable organization soliciting contributions shall use a name, symbol, or statement so closely related or similar to that used by another charitable organization or governmental agency that the use thereof would tend to confuse or mislead the public.

Section 9.6 No charitable organization and no person acting on behalf of a charitable organization shall use any uniformed personnel of any local, state, or federal agency or department to solicit contributions. This subdivision shall not apply to firemen who solicit contributions in uniform.

Section 9.7 No charitable organization and no person acting on behalf of a charitable organization shall use or employ any fraud, false pretense, false promise, misrepresentation, misleading statement, misleading name, mark, or identification, or deceptive practice, method, or device, with the intent that others should rely thereon in connection with any charitable solicitation, including any such actions or omissions designed to confuse or mislead a person to believe that such organization is another organization having the same or like purposes; or to believe that the funds being solicited are or will be used for purposes and programs conducted within or for persons located within this state when such is not the case; or to otherwise present purposes and uses of the funds which are not as provided within the purposes and use filed upon registration of said organization under this chapter, or if no such registration has been filed, then as provided under the exemption of said organization from federal and state income taxes as a organization formed and operating for charitable purposes as defined herein.

Section 9.8 No professional solicitor or his agent, servant, or employee, or any other person shall solicit in the name of or on behalf of any charitable organization unless:

a. Such solicitor has first obtained written authorization of two officers of such organization on a form approved by the agency, a copy of which authorization shall be filed with the agency. Such written authorization shall bear the signature of the solicitor and shall expressly state on its face the period for which it is valid, which shall not exceed one year from the date issued.

b. Such solicitor or his agent, servant, or employee carries such authorization with him when making solicitation and exhibits the same on request to persons solicited or police officers or other law enforcement officials or agents of the agency, or, if such solicitations are made by telephone, such solicitor has, in his application for registration required pursuant to section 1.2(j), expressly stated his intention to make telephone solicitations and has attached

to the application the proposed text of any such telephone solicitations and all such solicitations are made substantially in accordance with the proposed text. Professional solicitors shall also submit a copy of any literature or written material used in solicitation.

c. Prior to beginning any solicitation, such professional solicitor has filed with the agency a copy of any written agreement or contract which may have been entered into between a charitable organization and the professional solicitor. If the agreement or contract is not in writing, a written statement of the agreement setting forth the terms and conditions of the agreement, including the solicitor's compensation, shall be filed with the agency within __ days after the contract agreement and prior to beginning any solicitation. Within __ days after any change, modification, or termination of any agreement, notice of such change, modification or termination shall be filed with the agency along with a true copy of any written change or modification or a statement in writing setting forth the terms and conditions of any change or modification not in writing.

Section 9.9 No charitable organization shall accept any contribution exceeding five dollars in cash or tangible property without providing on request of the donor a written receipt acknowledging such contribution and personally signed by the person accepting such contribution.

Section 9.10 No person, and no organization of which such person is an officer, professional fund-raising counsel, or professional solicitor, shall solicit within this state if:

a. Such person has been convicted in any jurisdiction of embezzlement, larceny, or other crime involving the obtaining of money or property by false pretenses or the misapplication of funds impressed with a trust, unless such person has received a pardon for such offense or the public is informed of such conviction in a manner approved in writing by the agency before any solicitation occurs; or

b. Such person has ever been enjoined by any court or otherwise prohibited from soliciting in any jurisdiction, unless the agency shall first determine in writing that such person is entitled to solicit in such jurisdiction at the time of soliciting within this state or that the reason for such injunction or prohibition does not involve moral turpitude.

Section 9.11 No charitable organization shall employ any professional fund-raising counsel or professional solicitor unless and until such fund-raising counsel or professional solicitor has registered pursuant to this chapter.

Section 9.12 No professional fund-raising counsel or professional solicitor shall enter into any contract or raise any funds for any organization required to be registered pursuant to this chapter unless such charitable organization has registered.

Section 9.13 No professional fund-raising counsel or professional solicitor required to be registered under this chapter shall employ any professional solicitor who is not registered in accordance with this chapter.

[See FLA. STAT. ANN. § 496.11 (West 1972 & Supp. 1985); MD. ANN. CODE art. 41, § 103J (1957 & Supp. 1984); MINN. STAT. ANN. § 309.55 (West 1976 & Supp. 1985); N.Y. EXEC. LAW § 174-a (McKinney 1982); VA. CODE. § 57-57 (1980 & Supp. 1985).]

APPENDIX H

Section 10 Enforcement and Penalties

Section 10.1 A charitable organization, professional fund-raising counsel, or professional solicitor which wilfully fails to file a registration statement, report, or other information with the agency or wilfully files such a statement, report, or other information which is materially false, or otherwise wilfully violates the requirements of this subtitle, is guilty of a misdemeanor, and, upon conviction, shall be fined not more than __ or sentenced to imprisonment for not more than __, or be both fined and imprisoned. An officer, director, partner, or trustee of a charitable organization, professional fund-raising counsel, or professional solicitor which is organized in corporate, partnership, or other organizational form who causes the entity to commit a willful violation of this subtitle is also guilty of a misdemeanor, and, upon conviction, is subject to the same penalties as the entity.

Section 10.2 The agency, upon its own motion or upon complaint of any person, may investigate any charitable organization, professional fund-raising counsel, or professional solicitor to determine whether such charitable organization, professional fund-raising counsel, or pro-

professional solicitor has violated the provisions of this chapter or has filed any application or other information required under this chapter which contains false or misleading statements. Section 10.3 Whenever the Attorney General shall have reason to believe that any charitable organization, professional fund-raising counsel, or professional solicitor is operating in violation of the provisions of this chapter or has knowingly and willfully made any false statement in any registration application or statement, report, or other information required by this chapter, or that a charitable organization, professional fund-raising counsel, or professional solicitor has refused or failed to file a registration statement required by this chapter, or that there is about to be employed in any solicitation or collection of contributions for a charitable organization any device, scheme, or artifice to defraud or obtain money or property by means of any false pretense, representation, or promise, or that the officers or representatives of any charitable organization, professional fund-raising counsel, or professional solicitor have refused or failed after notice to produce any records of such organization, or that the funds raised by solicitation activities are not devoted or will not be devoted to the charitable purposes of the charitable organization, in addition to all other actions authorized by law, the Attorney General may bring an action in the name of the state against such charitable organization, professional fund-raising counsel, or professional solicitor and any other person who has participated or is about to participate in such solicitation to enjoin such charitable organization, professional fund-raising counsel, professional solicitor, or other person from continuing such violation, solicitation, or collection, or engaging therein, or doing any acts in furtherance thereof and for such other relief as the court deems appropriate.

[See MD. ANN. CODE art. 41, § 103L (1957 & Supp. 1984); N.Y. EXEC. LAW § 175 (McKinney 1982); VA. CODE. § 57-59 (1980 & Supp. 1985).]