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COMMERCE AND TRADE

Charitable Solicitations Act: Require Registration and Provide for Penalties

CODE SECTIONS:	O.C.G.A. §§ 43-17-1 to -23 (amended)
BILL NUMBER:	HB 1324
ACT NUMBER:	1193
SUMMARY:	The Act requires that paid solicitors, fundraisers, and charitable organizations who plan to raise funds within the state of Georgia register with the Secretary of State. The Act provides penalties for failing to register, for filing misleading registrations, and for engaging in deceptive practices.
EFFECTIVE DATE:	July 1, 1988

History

Professional fundraising has been regulated by statute in Georgia since 1962.¹ Within the past twenty-six years, the legislature has passed five amendments designed to make the statute more enforceable by defining terms and provisions precisely and vesting regulatory power in the Secretary of State.² However, these amendments failed to provide a comprehensive statute protecting consumers from unsavory fundraising schemes without burdening legitimate fundraising organizations.³

Legislation regulating charitable organizations and paid solicitors has been considered for at least nine years.⁴ However, many legitimate chari-

1. 1962 Ga. Laws 496.

2. 1963 Ga. Laws 482, 1980 Ga. Laws 335, 1982 Ga. Laws 922, 1986 Ga. Laws 1465, 1987 Ga. Laws 968.

3. Georgia Charitable Solicitations Act of 1988, Secretary of State Release, Apr. 6, 1988 (copy on file at *Georgia State University Law Review* office) [hereinafter Release]. Recently, an organization called Final Wish surrendered its solicitation permit subsequent to charges of improper fundraising practices. The organization solicited funds to give underprivileged and terminally ill children tickets to a play. After two cancellations, the play was finally performed. Final Wish did not supply tickets to any of those children attending the performance. O'Shea, *Founder Dissolves Final Wish; Tactics Prompted Calls for Stronger Controls*, Atlanta J. & Const., Jan. 30, 1988, at 1B, col. 1.

4. Telephone interview with Senator Albert Scott, Senate District No. 2 (May 7, 1988) [hereinafter Scott Interview]. "Charitable organization" is defined at O.C.G.A. § 43-17-2(2) (1988); "paid solicitor" is defined at O.C.G.A. § 43-17-2(10) (1988).

ties have been reticent in agreeing to stringent registration and record-keeping requirements, fearing high administrative costs and deterrence of volunteers. The realization that the public's perception of deceptive solicitation adversely affects all fundraising efforts finally persuaded the major charitable organizations to support the stricter registration and reporting requirements of HB 1324.⁵

HB 1324

The Act replaces Chapter 17 of Title 43, relating to professional fundraisers and charitable organizations. This Act includes portions of the previous Chapter 17, the Georgia Securities Act of 1973,⁶ and the Model Act on regulation of charitable organizations.⁷ The new Act is designed to provide "full disclosure of material facts to the contributing public"⁸ by requiring registration, financial reporting, and record keeping by paid solicitors⁹ and charitable organizations.¹⁰ Under the Act, certain exceptions are made for particular organizations and individuals.¹¹ Commercial coventurers¹² are exempt from the registration requirements of the Act,¹³ but not from record keeping¹⁴ or from penalties for unlawful practices.¹⁵ Those individuals who qualify as "fund raising counsel"¹⁶ are only required to register if they have custody of solicited contributions.¹⁷

Significant aspects of the Act include the registration and record keeping requirements for paid solicitors and charitable organizations and

5. Telephone interview with H. Wayne Howell, Deputy Secretary of State (Apr. 8, 1988) [hereinafter Howell Interview].

6. O.C.G.A. § 10-5-1 (1982).

7. Release, *supra* note 3, at 1. The Model Act was prepared by the National Association of Attorneys General. *Id.*

8. *Id.* at 2.

9. O.C.G.A. § 43-17-3 (1988). The term "paid solicitor" replaces the term "professional fundraiser" to make the language consistent with national usage. Howell Interview, *supra* note 5.

10. O.C.G.A. § 43-17-5 (1988).

11. O.C.G.A. § 43-17-2(2) (1988). Religious organizations are excluded from any type of regulation.

12. A "commercial coventurer" is a person who conducts a charitable sales promotion, but whose primary employment does not involve soliciting funds for charitable organizations. O.C.G.A. § 43-17-2(5) (1988).

13. *See* O.C.G.A. § 43-17-6(a) (1988).

14. O.C.G.A. § 43-17-6(b) (1988).

15. *See* O.C.G.A. §§ 43-17-12, -13 (1988).

16. "Fund raising counsel" is defined to include persons acting as consultants and managers who also solicit contributions for a charitable organization. O.C.G.A. § 43-17-2(8) (1988).

17. O.C.G.A. § 43-17-3(b) (1988); *see also* O.C.G.A. § 43-17-2(8) (1988). "A lawyer, accountant, investment counselor, or banker who, solely incidental to his or her profession, . . . advises a person to make a contribution or holds charitable funds subject to an escrow or trust agreement shall not be deemed, as result of such actions, to be a fund raising counsel." *Id.*

sanctions available for any violations of the Act. The Act also regulates organizations which are based, but not soliciting, in Georgia.¹⁸

A paid solicitor is required to register with the Secretary of State.¹⁹ The solicitor must pay registration fees²⁰ and provide a bond to satisfy any claims against him.²¹ In addition, a paid solicitor must comply with record keeping requirements, and these records must be kept for three years.²²

Charitable organizations are also required to register with the Secretary of State.²³ The Act increases the initial registration fee²⁴ and requires the organizations to make and retain certain records for three years. These records must include the name and address of the contributor and the date of the contribution for any direct contribution of twenty-five dollars or more.²⁵

Initially, the bill required records to be kept, regardless of the amount of the contribution.²⁶ The House Committee on Industry apparently was concerned that requiring record keeping for small contributions would place an unreasonable administrative burden on charitable organizations. The committee offered a substitute which required record keeping for

18. Paid solicitors or charitable organizations must register if any solicitation is made either within the state or from the state to out-of-state individuals. O.C.G.A. § 43-17-2(10) (1988). The Code previously required organizations that intended to solicit contributions from persons within the state to register. 1980 Ga. Laws 335.

19. O.C.G.A. § 43-17-3(c)(1) (1988); see O.C.G.A. §§ 43-17-10 to -11 (1988) (authorizing the Secretary of State to administer and enforce this chapter). Registration consists of providing the Secretary of State with detailed personal and professional information, annual financial statements, annual registration renewal, a notice for each charitable solicitation, and amendments for changes in the registration information, including a copy of all solicitation contracts. O.C.G.A. § 43-17-3(c)(2)(A)—(H) (1988).

20. O.C.G.A. § 43-17-3(d) (1988).

21. O.C.G.A. § 43-17-4 (1988). The Secretary of State may waive the bond in certain circumstances. The exceptions include a letter of credit with a financial institution payable to applicant and assigned to the Secretary of State; an irrevocable letter of credit addressed to the Secretary of State, conditioned upon a court order; and obligations of the United States or State of Georgia, maturing within two years. All must have a value of at least \$10,000. O.C.G.A. § 43-17-4(b)(1)—(3) (1988).

22. O.C.G.A. § 43-17-3(j)(1)(A)—(F) (1988). Records must include each contributor's name and address, the amount and date of each contributor's pledge, the name and address of each of the solicitor's employees, and an accounting of solicitation income and expenses. *Id.*

23. O.C.G.A. § 43-17-5(a)(1) (1988). Registration requires submitting an application disclosing information about the organization and its purpose, the duration of and method of solicitation, annual financial statements, annual registration renewal, and amendments of material changes in the registration information. O.C.G.A. § 43-17-5(b)(2)(A)—(H), (b)(4) (1988).

24. The registration fee is increased from \$10 to \$25. Compare O.C.G.A. § 43-17-5(c) (1988) with 1986 Ga. Laws 335.

25. O.C.G.A. § 43-17-5(d) (1988).

26. HB 1324, as introduced, 1988 Ga. Gen. Assem.

contributions of twenty-five dollars or more.²⁷ The Senate Committee on Consumer Affairs considered raising the minimum contribution for required record keeping to fifty dollars.²⁸ The committee determined, however, that raising the minimum would allow paid solicitors and charitable organizations to avoid keeping records, thereby circumventing the intent of the legislature to prevent fraudulent practices.²⁹

The Act requires registered paid solicitors and charitable organizations to disclose, at the point of solicitation, the name and location of the paid solicitor and the charitable organization for which the solicitation is being made.³⁰ A description of the charitable program and its financial statement also must be made available to the contributor upon request.³¹

Certain entities are exempt from registration and bond requirements and from making point of solicitation disclosures. These exempt entities include educational institutions, fraternal organizations, business groups, political parties and candidates, and groups whose parent organizations have already registered with the Secretary of State.³² Initially, HB 1324 provided that registration of the state organization exempted the national parent and its local subsidiary from registration.³³ In an effort to be more specific, the House Committee on Industry substitute was adopted to provide exemptions for state and local organizations when the national organization is registered with the Secretary of State and for national organizations when the state organization is registered with the Secretary of State.³⁴

The Act also protects against fraudulent activity in solicitation by specifying certain unlawful practices.³⁵ Proscribed deceptive practices include the unauthorized or confusingly similar use of another charitable organization's name or emblem or the use of an unauthorized endorsement.³⁶ The Act also prohibits fraud, deceit, misrepresentation, and misuse of proceeds.³⁷

Administrative, civil, and criminal sanctions are available to the Secretary of State when a violation occurs.³⁸ The administrative sanctions in-

27. HB 1324 (HCS), 1988 Ga. Gen. Assem.

28. Scott Interview, *supra* note 4.

29. *Id.* The Senate Committee on Consumer Affairs offered a committee substitute which made the language consistent throughout the bill, and made minor grammatical corrections. HB 1324 (SCS), 1988 Ga. Gen. Assem.

30. O.C.G.A. § 43-17-8(1)—(2) (1988).

31. O.C.G.A. § 43-17-8(3) (1988).

32. O.C.G.A. § 43-17-9(a)(1)—(7) (1988).

33. HB 1324, as introduced, 1988 Ga. Gen. Assem.

34. HB 1324 (HCS), 1988 Ga. Gen. Assem.; O.C.G.A. § 43-17-9(b) (1988).

35. O.C.G.A. § 43-17-12(a) (1988).

36. O.C.G.A. § 43-17-12(c)(1)—(3) (1988). The Act also specifically forbids representing that tickets to events will be donated unless there is a written commitment. O.C.G.A. § 43-17-12(c)(6) (1988).

37. O.C.G.A. § 43-17-12(d) (1988).

38. O.C.G.A. § 43-17-13 (1988).

clude ordering violators to cease and desist,³⁹ censuring the violator,⁴⁰ suspending or barring the violator from registration,⁴¹ or imposing penalties of \$2,500 per occurrence, for a maximum fine of \$25,000.⁴² If the Secretary of State opts for the monetary penalty, then the other penalties are precluded.⁴³ The Secretary of State may also seek civil sanctions, including a restraining order, an injunction, penalties, a declaratory judgment, and restitution to contributors.⁴⁴ Finally, the Secretary of State may turn the matter over to the District Attorney for criminal prosecution.⁴⁵ In addition to the sanctions available to the Secretary of State, private actions, including class actions, are permitted under the Act.⁴⁶

J. Shirley

39. O.C.G.A. § 43-17-13(a)(1)(A)(i) (1988).

40. O.C.G.A. § 43-17-13(a)(1)(A)(ii) (1988).

41. O.C.G.A. § 43-17-13(a)(1)(A)(iii) (1988).

42. O.C.G.A. § 43-17-13(a)(1)(A)(iv) (1988).

43. O.C.G.A. § 43-17-13(a)(1)(B)(i) (1988).

44. O.C.G.A. § 43-17-13(a)(2)(A)(i), (ii) (1988).

45. O.C.G.A. § 43-17-13(a)(3) (1988). A violation of any part of the Act is a misdemeanor, and a willful violation of the fraud provision is a felony punishable by a fine of \$5,000 and a prison term of up to five years. O.C.G.A. § 43-17-23 (1988).

46. O.C.G.A. § 43-17-14 (1988).