

Non-Profit Institutions Advisory: Massachusetts Governor Signs Legislation to Increase Penalties against Noncompliant Public Charities, Fundraisers, and their Leaders and to Simplify the Public Charity Dissolution Process

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On July 19, 2010, Massachusetts Governor Deval Patrick signed legislation that increases the penalties against public charities and responsible directors, trustees, officers, and other agents of charities that fail to file an initial registration or annual report to \$50 per day, up to a maximum of \$10,000. Additionally, this new law increases the penalties against charities, fundraisers, and each responsible officer or agent for fundraising violations. The law also simplifies the process by which public charities may dissolve. It appears to us that the purpose of this legislation is to encourage compliance with existing law, generate revenue, and make the dissolution process easier for charities in this difficult economic environment. Be aware that certain portions of the new law, as noted below, take effect immediately, with all other provisions becoming effective on January 1, 2011.

Public Charity Registration

Registration Fee. With certain limited exceptions, a public charity currently must register by filing its organizational documents with the Non-Profit Organizations/Public Charities Division (the “Division”) of the Massachusetts Attorney General’s Office before engaging in charitable work or raising funds from persons located in Massachusetts. The new law increases the filing fee as part of this initial registration process from \$50 to \$100.

Penalties for Failure to Register. If a public charity willfully failed to register with the Division, previous law called for the Attorney General to assess a civil penalty of up to \$500 against every officer and agent who authorized or transacted business on behalf of the charity. The Attorney General, moreover, could sue to restrain a noncompliant charity from transacting business until it registered.

The new law provides potentially greater civil penalties for a charity’s failure to register and codifies a notice process for correcting the charity’s failure to register. The new law expressly requires the Director of the Division (the “Director”) to notify the noncompliant charity or any responsible officer or agent of the charity. If the charity fails to register within 30 days following the date the Division’s notice is mailed, then the Director may assess a civil penalty against the charity unless the charity failed to register for good cause. The penalty imposed may be up to \$50 per day until the charity is properly registered, up to a maximum of \$10,000. The new law also authorizes the Attorney General to commence a civil action to enforce any such penalty.

Under the new law, such a penalty may also be assessed against a responsible officer or agent of the charity (including directors and trustees) if the Director finds the responsible officer or agent had the authority to register the charity, but failed to do so after notice and demand. There is a rebuttable presumption that the president and treasurer of the charity and any person authorized by its organizational documents or by resolution of its governing board to sign documents or filings on the charity's behalf is authorized to register the charity. Individuals involved with public charities should note two important points:

- ***The penalty imposed on a responsible officer or agent (including directors and trustees) may be up to \$50 per day until the charity is properly registered, up to a maximum of \$10,000; and***
- ***A responsible officer or agent assessed a civil penalty is not entitled to indemnification or reimbursement by or from the public charity for such penalty.***

If the responsible officer or agent fails to pay the civil penalty, the Attorney General may initiate a civil action to enforce such penalty.

To protect themselves from these penalties, directors, trustees, officers, and other agents of public charities engaging in charitable work or raising funds in Massachusetts should make sure that the charity has properly filed its initial registration with the Division upon the charity's formation or entry into the Commonwealth.

Annual Reports of Public Charities

In addition to registration, a public charity must file an annual report on Form PC with the Division four-and-a-half months after the close of each fiscal year, regardless of the amount of support and revenue received. The new law increases the filing fees for such annual reports as follows:

Gross Support and Revenue Received During Fiscal Year	Previous Law	New Law
Up to \$100,000	\$35	\$35
More than \$100,000 up to \$250,000	\$70	\$70
More than \$250,000 up to \$500,000	\$125	\$125
More than \$500,000 up to \$1,000,000	\$250	\$250
More than \$1,000,000 up to \$10,000,000	\$250	\$500
More than \$10,000,000 up to \$100,000,000	\$250	\$1,000
More than \$100,000,000	\$250	\$2,000

The new law also codifies the same process and penalties for a public charity's failure to file an annual report as that adopted for a failure to file its initial registration as discussed above. The charity is subject to a penalty of \$50 per day, up to a maximum of \$10,000, for failure to file an

annual report without good cause. ***Such penalty may also be assessed against any responsible officer or agent of the charity (including directors and trustees), up to \$10,000.*** Previous law allowed for a penalty of up to only \$500 against a charity and any responsible officer or agent.

The new law does not change the maximum penalties of \$5,000 or imprisonment for up to one year (or both) of a public charity or officer or agent who willfully makes, executes, or files a report that is false in any material representation.

Directors, trustees, officers, and other agents of public charities should ensure that the charities for which they serve are current in the filing of their annual reports with the Division within four-a-half-months after the close of the charity's fiscal year to avoid potentially greater penalties under the new law.

Updates to Fundraising Law

Annual Fees. The new law also increases the annual fees payable for registration as a professional solicitor, professional fund-raising counsel, or commercial co-venturer.¹ These increases are as follows:

	Previous Amount	New Amount
Professional Solicitor	\$300	\$1,000
Professional Fund-Raising Counsel	\$200	\$400
Commercial Co-Venturer	\$50	\$200

Increase in Bond Required. Further, the amount of the bond that professional solicitors and commercial co-venturers must file with a registration application increases from \$10,000 to \$25,000. The new law, moreover, allows a professional solicitor to conduct solicitations only through persons who are covered either by a consolidated bond under which the professional solicitor is the principal obligor or by a bond under which the person is the principal obligor and independently registered as a professional solicitor.

Notice and Penalties for Noncompliance. In addition to the remedies currently available to the Division for fundraising violations, the new law expressly requires the Director of the Division to notify the delinquent charitable organization, professional fund-raising counsel, commercial co-venturer, professional solicitor, or any responsible officer or agent of any fundraising violation. If the violation is not corrected within 30 days after the notice is mailed, the Director may assess a civil penalty against the charitable organization, professional fund-raising counsel, commercial co-venturer, or professional solicitor. For charitable organizations, that penalty is \$50 per day, up to \$10,000. For any professional fund-raising counsel, commercial co-venturer, or professional solicitor, that penalty is \$500 per day, up to \$25,000.

Under the new law, any such penalty may be assessed against any responsible officer or agent of the charitable organization, professional fund-raising counsel, commercial co-venturer, or professional solicitor, if the Director finds the responsible officer or agent had the authority to comply with fundraising laws, but without good cause failed to do so after notice and demand. Again, there is a rebuttable presumption that the president and treasurer of the organization and any person authorized by its organizational documents or by resolution of its governing board to sign documents or filings on the organization's behalf is authorized to cause the organization to comply. Any penalty that may be assessed against the organization may also be assessed against any responsible officer or agent, which means:

- \$50 per day, up to \$10,000 against a responsible officer or agent of a charitable organization (including directors and trustees);
- \$500 per day, up to \$25,000 against a responsible officer or agent of a professional fund-raising counsel, commercial co-venturer, or professional solicitor; and
- A responsible officer or agent of a charitable organization is not entitled to indemnification or reimbursement by or from the charitable organization for such penalty.

If the responsible officer or agent fails to pay the civil penalty, the Attorney General may initiate a civil action to enforce such penalty.

Removal of Limit on Compensation. Previous law limited the amount of compensation that professional solicitors or commercial co-venturers, or their agents, servants or employees could receive for solicitation activities or campaigns, including reimbursement for all expenses incurred in the solicitation. That limit was 25% of the aggregate net amount raised. *The new law removes this limitation effective immediately.*

Change in Required Solicitation Disclosure. The new law continues to require that all solicitations by professional solicitors or commercial co-venturers contain disclosure identifying the charity (or professional solicitor or commercial co-venturer if there is no charity), its contact information, how the contributions raised by the solicitation will be used, that the solicitation is being conducted by a "paid fund-raiser," and any other disclosures that the Director requires by regulation. The new law, however, eliminates the requirement that solicitations disclose the guaranteed minimum percentage of gross receipts from fund-raising that will be used exclusively for the charitable purposes described in the solicitation. *This provision takes immediate effect.*

A Streamlined Process for the Voluntary Dissolution of a Public Charity

Massachusetts non-profit corporations that are public charities contemplating dissolution should take note of the changes in the law, *which became effective on July, 19, 2010.*² The previous dissolution process was often long and expensive. These changes apparently are designed to

streamline the dissolution process in light of the increased number of dissolutions due to the difficult economic environment.

Specifically, the new law authorizes the Division to approve a charity's dissolution without the need for the charity to file a petition with the Massachusetts Supreme Judicial Court (the "SJC") in certain circumstances. The Division's approval is sufficient for a charity that authorized its dissolution and has no remaining assets if:

- The charity files a petition for dissolution with the Division; and
- The Division is satisfied that the corporation has or will become inactive and that its dissolution would be in the public interest.

The new law also states that the SJC may, by rule or order, provide that the filing of a petition and court authorization are not required for dissolutions approved by the Division upon the Division's receipt of such forms, affidavits and information as the Division may require if the corporation has net assets no greater than an amount that the SJC may determine, or in other situations as the SJC may so provide. We will continue to closely monitor steps the SJC may take in the future to fully implement this provision of the new law.

With respect to the public charity's internal approval, the new law restates previous law inasmuch as the board of directors possesses the authority to voluntarily dissolve the charity by vote of a majority of the directors entitled to vote. The board of a public charity that has members holds this authority unless the charity's articles of organization or bylaws assign such authority to the members or that the board's ability to take such action is subject to approval by the members.

Endnotes

¹ A "commercial co-venturer" means any person who for profit or other commercial consideration, conducts, produces, promotes, underwrites, arranges or sponsors a performance, event, or sale to the public of a good or service which is advertised in conjunction with the name of any charitable organization or as benefiting to any extent any charitable purpose. Any such person who will benefit in good will only shall not be deemed a commercial co-venturer if the collection and distribution of the proceeds of the performance, event or sale are supervised and controlled by the benefiting charitable organization.

² Massachusetts non-profit corporations that are not public charities will not benefit from the new law because those corporations may be voluntarily dissolved under a different statute than the one applicable to charities. See MASS GEN. LAWS ch. 180, § 11 (2006).

If you have any questions about the new law, or other questions about your charitable organization, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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