

## **New York State Ethics Commission**

### **Advisory Opinion No. 03-5:**

Whether the Attorney General's Offices' proposal to partner with two not-for-profit organizations who will solicit contributions to fund a modernization project is permissible in light of Public Officers Law §§73 and 74, and prior opinions of the Commission.

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### **INTRODUCTION**

The following advisory opinion is issued in response to a request submitted by Richard Rifkin ("Rifkin"), Deputy Attorney General with the New York State Attorney General's Office ("AG"), who proposes an agreement wherein the AG would partner with two not-for-profit organizations on a project designed to modernize and update a registry that it maintains of not-for-profit corporations, charitable trusts, and fund raising professionals. Part of the agreement will involve the not-for-profit organizations' solicitation of contributions to fund the project from sources that may be regulated by the AG.<sup>1</sup>

Pursuant to its authority under Executive Law §94(15), the New York State Ethics Commission ("Commission") concludes that the AG, through a written service agreement, may partner with not-for-profit corporations to modernize its registry and the not-for-profit corporations may seek funds from entities that the AG may regulate, as the arrangement is part of an agreement for consideration and does not constitute gifts to individual employees or to the agency.

### **BACKGROUND**

New Yorkers donate billions of dollars to charity each year. The AG's Charities Bureau ("Bureau") is responsible for supervising charitable organizations to insure that donors and beneficiaries of those charities are protected from unscrupulous practices in the solicitation and management of charitable assets. Pursuant to State law, the AG has authority to regulate not-for-profit organizations and charitable trusts and to commence law enforcement investigations and legal actions to protect the public interest. As part of its regulatory role, the Bureau is required to maintain a registry of the over 40,000 not-for-profit corporations and over 2,400 fund raising professionals employed by charitable entities active in the State and to provide members of the public with copies of financial reports required to be filed by such organizations.

The Bureau's statutory mandate is derived from Article 7-A of the Executive Law governing charitable entities that solicit contributions from New Yorkers and fund-raising professionals employed by such charitable entities, and Article 8 of the Estates, Powers and Trusts Law ("EPTL") governing entities that administer charitable assets in the State.

Recently, members of the public have made unprecedented contributions to charity and have also become more vigilant in evaluating charitable organizations before making contributions and in monitoring the use of their donations. To enhance the Bureau's ability to enforce the laws regulating the activity of not-for-profit organizations in the State and to provide the public with

current information on charitable organizations, Rifkin advises that the Bureau's registry must be modernized.

The Bureau seeks to transform its registry from a paper-driven process to an on-line repository that is both easily accessible to the public and which will serve as an effective law enforcement tool. With electronic filing, the public will have improved access to registration and filing information, and it will also enhance the Bureau's enforcement capability. It is also essential that the Bureau's registry be compatible with the United States Internal Revenue Service ("IRS") electronic filing for IRS Form 990 by publicly supported charities by the Spring of 2004 and for IRS Forms 990-EZ and 990-PF, thereafter, as these forms must also be filed with the Bureau.

### *The Partnering Proposal*

The estimated cost of the project is approximately \$600,000. Because repeated efforts to obtain State funding have been unsuccessful, the AG has proposed to implement the modernization project by partnering with one or both of the following not-for-profit organizations:

[Not-for-profit A]: New York is one of twelve states participating in an electronic filing pilot project sponsored by [not-for-profit A]. [Not-for-profit A], based in [ ], has a substantial endowment and receives its funding from major foundations. It does not maintain an office or assets in New York, and is not registered under Article 8 of the EPTL. The AG exercises authority over [not-for-profit A] pursuant to Article 7-A of the Executive Law, which covers fraudulent solicitations, and certain accounting requirements. The AG has no complaints, inquiries, investigations or litigation concerning [not-for-profit A] at this time, nor does it have records of any past complaints, inquiries, investigations or litigation. It is registered in the State only because it raises funds from New York institutions.

[Not-for-profit B] is incorporated under the laws of [ ], and operates [ ], a national on-line database of non-profit organizations. Like [not-for-profit A], [not-for-profit B] is registered with the Bureau under Article 7-A of the Executive Law, but not under Article 8 of the EPTL. It, too, has a substantial endowment and receives funding from major foundations. [Not-for-profit B] does not maintain an office or have assets in New York.

The AG has engaged in discussions with [not-for-profit A] and [not-for-profit B] to determine whether it would be possible for [not-for-profit A] and [not-for-profit B], which have the necessary expertise in this area, to develop the AG's technological capacity to implement the electronic filing component and all other aspects of the modernization project. They are willing to do so, and have provided a plan to the AG, with cost estimates.

Both [not-for-profit A] and [not-for-profit B] are, according to Rifkin, "interested and eager" for New York to complete its modernization project, for reasons of their own. [Not-for-profit A] desires to compile a national statistical database and cannot effectively do so without New York's participation. [Not-for-profit A] views the project as an opportunity to assist an important partner in the creation of infrastructure capable of capturing research data on the non-profit sector, and for linking to the data that will be generated by the [not-for-profit A] electronic filing

pilot project. [Not-for-profit A] would like to work in conjunction with the Bureau to manage the project so that the completed system meets the needs of the Bureau as well as the needs of the pilot project. Rifkin advises that [not-for-profit B] is interested in the project because it will further promote its charitable mission of providing the public with easy access to relevant information about charities.<sup>2</sup>

The AG proposes to enter into a service agreement with [not-for-profit A] and [not-for-profit B] which would detail the responsibilities of each party with respect to the project. Under such a partnering agreement, the AG would not hire [not-for-profit A] or [not-for-profit B], nor would it compensate either for this project. Rather, [not-for-profit A] or [not-for-profit B] would seek special funding from charities, some of which are likely to be subject to regulation by the AG. Prior to soliciting any potential contributor, [not-for-profit A] or [not-for-profit B] would advise the Bureau. It would be understood that the AG would not permit [not-for-profit A] or [not-for-profit B] to solicit funds from any entity which was the subject of a complaint, inquiry or investigation or is in litigation with the AG. Under this plan, neither the AG nor any of its employees would directly solicit funds.

Rifkin asks whether the agency's indirect solicitation of contributions to fund the modernization project is permissible in light of Public Officers Law §§73 and 74 and existing opinions addressing gifts to State agencies.

### **APPLICABLE STATUTES**

Public Officers Law §73(5) provides as follows:

*No . . . state officer or employee . . . shall, directly or indirectly, solicit, accept or receive any gift having a value of seventy-five dollars or more whether in the form of money, service, loan, travel, entertainment, hospitality, thing or promise, or in any other form, under circumstances in which it could reasonably be inferred that the gift was intended to influence him, or could reasonably be expected to influence him, in the performance of his official duties or was intended as a reward for any official action on his part. No person shall, directly or indirectly, offer or make any such gift to . . . any state officer or employee . . . under such circumstances.*

Public Officers Law §74(2) contains the rule with respect to conflicts of interest:

*No officer or employee of a state agency, member of the legislature or legislative employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity or incur any obligation of any nature, which is in substantial conflict with the proper discharge of his duties in the public interest.*

### **DISCUSSION**

*Whether the AG may enter into a partnering agreement with [not-for-profit A] and [not-for-profit B].*

Both Public Officers Law §§73 and 74 are specifically applicable to gifts made to individual State employees. They are not, however, enforceable against agencies with respect to gifts. The Commission has, however, considered the question of whether and under what circumstances an

agency may accept gifts. In Advisory Opinion No. 92-1, the Commission first applied Public Officers Law §73(5) and §74(2) to the receipt of gifts by State agencies. The Commission permitted the agency to accept contributions from regulated individuals or entities, but determined that it was inappropriate for any State agency to accept contributions from persons and entities under investigation by or in litigation against the agency. The Commission further held that for all other donations, it was necessary to consider the source, timing and value of any gift prior to acceptance. This position has been reiterated throughout subsequent Commission opinions governing gifts to State agencies. (See, Advisory Opinion No. 97-6, where the Commission stated that the Consumer Protection Board may accept donations from private sector sources to underwrite certain activities in connection with Consumer Week, but the source, timing and amount of each donation must be carefully considered; see also, Advisory Opinion No. 95-38, where the Commission determined that it may be appropriate for the Department of Environmental Conservation ("DEC") to accept donations from people, businesses or organizations whose activities are subject to its jurisdiction.)

In Advisory Opinion No. 96-22, the Commission determined that DEC may accept tuition waivers by public and private universities in return for the agency's support for intern programs, as the waivers do not constitute gifts to employees or to the agency, but rather are part of an agreement for consideration. The Commission reasoned that the tuition waivers were an attempt by the schools to encourage DEC to continue internship programs, despite the additional burden placed upon DEC in training and supervising the interns. As such, the waivers were bargained for consideration, whereby the school gave DEC the benefit of the tuition waiver in exchange for its assuming the supervision and training of an intern. The Commission concluded that the arrangement fell outside the parameters of standard gift analysis. The Commission further opined that such tuition waivers could, under different circumstances, constitute an acceptable gift to an agency as long as the school had no ability to direct the waiver to any particular employee, and did not offer the waiver with the intent to influence or reward a particular individual.

Looking first at the nature of the proposed transaction, the Commission views the proposal as essentially an agreement for consideration between two parties rather than as a traditional gift.<sup>3</sup> Through the service agreement, the AG receives a complete, modern, and updated registry for its registrants and the public, and, in return, [not-for-profit A] and [not-for-profit B] receive timely access to data enabling them to compile a comprehensive national statistical database, which would not be possible without New York's participation.

The Commission notes that any funds raised will be earmarked for the modernization project, and will not be available for unconditional use by the agency, unlike a traditional gift. Furthermore, the contract can be structured in a way as to allay any concern that the AG's regulatory role will be undermined by receiving an inappropriate contribution. The terms and conditions of the contract should specify that funds may not be collected from an entity that is the subject of a complaint, inquiry or that is in litigation against the AG. Such an arrangement, particularly when introducing the element of bargained for consideration, does not run afoul of the Public Officer Law.<sup>4</sup>

The Commission, therefore, concludes that the AG, in accordance with a duly executed partnering agreement, may accept contributions from entities that may be subject to regulation, provided the above terms and conditions are strictly adhered to. The Commission suggests that the solicitation of funds should be targeted to a wide audience rather than a select group of entities or individuals, and that the amount of monies sought from each donor should be the same.<sup>5</sup> The Commission is available to work with the AG in establishing further guidelines for these fundraising efforts.

## CONCLUSION

The Commission concludes that the AG, through a written service agreement, may partner with [not-for-profit A] and [not-for-profit B] to modernize its registry as the arrangement is part of an agreement for consideration and does not constitute gifts to individual employees or to the agency.

This opinion, unless and until amended or revoked, is binding on the Commission in any subsequent proceeding concerning the person who requested it and who acted in good faith, unless material facts were omitted or misstated by the person in the request for opinion or related supporting documentation.

All Concur:  
Paul Shechtman, Chair  
Robert J. Giuffra, Jr.  
Carl H. Loewenson, Jr.  
O. Peter Sherwood, Members

Dated: May 29, 2003

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### End notes

- 1. If this plan is unsuccessful, Rifkin asks, in the alternative, whether employees of the AG may directly solicit funds from not-for-profit organizations and for-profit organizations. As this question is speculative at the time, the Commission will consider this issue should the need arise.*
- 2. Presently, the Bureau has no capability of identifying unregistered or delinquent filers. The modernization project will address this deficit, thereby capturing more data concerning not-for-profit organizations and other charities.*
- 3. Black's Law Dictionary defines a gift as a voluntary transfer of property to another made gratuitously and without consideration.*

*4. Even if a gift-to-agency analysis was applied, the conditions expressed in Commission precedents have been met. Rifkin advises that neither [not-for-profit A] nor [not-for-profit B] have been under investigation or have been in litigation against the AG, and that steps will be taken that the not-for-profit organizations will not solicit funds from entities that are the subject of a complaint, inquiry or that are in litigation against the AG.*

*5. In his request letter, Rifkin states that the AG may write a letter supporting the modernization project undertaken by [not-for-profit A] and [not-for-profit B]. He is cautioned that any letter of support should not be used to influence prospective donors or give the appearance that any donor will receive preferential treatment from the AG, or that a failure to contribute could result in adverse treatment by the AG.*