

THE REGULATION OF PUBLIC CHARITIES AND PRIVATE FOUNDATIONS IN HAWAII

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There are over 5,000 public charities and private foundations in Hawaii according to Internal Revenue Service data. These organizations administer charitable assets having a value in excess of \$11 billion. The Attorney General of the State of Hawaii has robust regulatory oversight authority over Hawaii's nonprofit public charities. This article will review the sources of this authority and the Attorney General's oversight role over Hawaii's charities and its role in regulating charitable fundraising.

Hawaii's Nonprofit Corporation Act

Organizations that are exempt under section 501(c)(3) of the Internal Revenue Code because they are operated for charitable, educational or religious purposes are designated as "public benefit corporations" under Hawaii's Revised Model Nonprofit Corporation Act and are subject to special rules not imposed on other nonprofits and are subject to Attorney General oversight.ⁱⁱ

Mergers

Under Hawaii's nonprofit law, public benefit corporations are generally limited to merging with another public benefit corporation, a wholly owned corporation where a public benefit corporation survives the merger, unless the corporation obtains judicial approval of the mergerⁱⁱⁱ. There is one exception that would allow a merger with a for-profit corporation provided that an amount equal to the fair market value of the assets of the public benefit corporation are transferred to one or more entities that would have received the assets upon the corporation's dissolution.^{iv}

Sale or Lease of Assets

Any public benefit corporation that intends to sell, lease, or convey substantially all of its assets other than in the regular course of its activities must provide notice to the Attorney General twenty days before the transaction unless the Attorney General provides a written waiver.^v

Derivative Actions

Any person who commences a derivative action involving a public benefit corporation must provide notice to the Attorney General within ten days.^{vi}

The Attorney General is allowed to intervene in such a proceeding as of right.

Voluntary Dissolution Restrictions

Public benefit corporations must also provide notice of their intent to voluntarily dissolve to the Attorney General before they deliver articles of dissolution to the Department of Commerce and Consumer Affairs.^{vii} No assets may be transferred by the public benefit corporation until 20 days have elapsed or the Attorney General has consented to the dissolution.^{viii} Following distribution of the corporations' assets, the law requires the corporation to provide the Attorney General with a list of the names and addresses of persons to whom the assets were transferred (other than creditors).^{ix}

If no provisions are made in a public benefit corporation's articles of incorporation concerning the distribution of assets upon dissolution, the corporation must transfer its assets to one or more other public benefit corporations.^x

Judicial Dissolution

Any person who commences a judicial dissolution proceeding involving a public benefit corporation must provide the Attorney General with notice of the proceeding.

The Attorney General is authorized to seek the judicial dissolution of a public benefit corporation if: (1) the corporation has procured its articles by fraud, (2) has abused or exceeded its authority; (3) its assets are being misapplied or wasted; or (4) it is no longer able to carry out its activities.^{xi} This is a power that is used sparingly by the Attorney General's office.

Removal of Directors

A director of a public benefit corporation may be removed in a judicial action brought by the Attorney General where the director has engaged in fraudulent or dishonest conduct, the director has engaged in a gross abuse of authority, or upon a judgment finding that the director violated his or her statutory duties to the corporation.^{xii} Any person commencing a judicial proceeding to remove a director of public benefit corporation must provide written notice to the Attorney General.^{xiii}

Power to Act

The Attorney General may challenge a public benefit corporation's power to act in a proceeding against an incumbent or former director, officer, employee or agent of the corporation.^{xiv}

Approval of Conflict Transactions

Public benefit corporations that are unable to obtain approval of a conflict transaction involving a director because the corporation lacks a quorum of disinterested directors can now seek the approval of the transaction by the Attorney General either before or after the transaction.^{xv}

Private Foundations

Under treasury regulations, private foundations that are incorporated in Hawaii or have their principal office here must provide the Attorney General with copy of their annual 990PF (return of private foundation).^{xvi} These returns are assigned to an attorney to review and the Attorney General frequently seeks clarification of matters reported in the return from reporting foundations. For example, the Attorney General regularly follows up on any self-dealing transactions revealed in these 990PF forms.

Hawaii's nonprofit corporation law forbids a private foundation from engaging in any acts of self-dealing (as defined in section 4941(d) of the Internal Revenue Code), and foundations must adhere to the minimum distribution requirements of section 4942 of the Internal Revenue Code. Foundations are also prohibited from retaining any excess business holdings and from making investments that would subject them to tax under section 4944.

Charitable Fundraising: Registration and Bonding

Hawaii has one of the strongest charitable fundraising registration laws in the Nation and strengthened and modernized the registration requirements before California did so in its heralded Nonprofit Integrity Act of 2004.

Effective July 1, 2005, professional solicitors and professional fundraising counsel must register with the Attorney General, pay an annual registration fee of \$250.00 and file a bond in the amount of \$25,000 for the protection of Hawaii's charitable organizations.^{xvii} A professional solicitor is any person who for financial or other consideration solicits donations on behalf of a charitable organization.^{xviii} The term

includes a bona fide volunteer, salaried officer, or employee of a charitable organization if the bona fide volunteer, salaried officer, or employee of the charitable organization receives percentage compensation.

Professional fundraising counsel must also register. A fundraising counsel is any person who, for a fee, plans, conducts, manages, carries on, advises, or acts as a consultant, whether directly or indirectly, in connection with soliciting contributions for or on behalf of any charitable organization, but who actually solicits no contributions as a part of the person's services.^{xix}

Hawaii's new law requires that ten days before any professional solicitor or professional fundraising counsel provides any services, that they file a copy of their contract with the charitable organization with the Attorney General.^{xx} Every contract must include certain information, including; (a) the name and address of the charity; (b) a description of the charitable purpose for which the campaign is being conducted; (c) A statement of the guaranteed minimum percentage of the gross receipts from contributions that will be remitted to or retained by the charitable organization, if any, or, if the solicitation involves the sale of goods, services, or tickets to a fundraising event, the percentage of the purchase price that will be remitted to the charitable organization, if any and (d) other information concerning the compensation of professional solicitors who are not paid on a percentage basis.^{xxi}

End of Campaign Financial Report

One of the centerpieces of Hawaii's new fundraising law is a requirement that within ninety days after the end of any fundraising campaign, or on its anniversary date for campaigns lasting more than a year, every professional solicitor must file a financial

report with the Attorney General that accounts for the amounts raised and all expenses. The report must contain: (1) the amount of each contribution received and the name and address of each contributor; (2) The name and residence of each employee, agent, or other person involved in the solicitation; (3) Records of all revenue received and expenses incurred in the course of the solicitation campaign; and (4) The location and account number of each bank or other financial institution account in which the professional solicitor has deposited revenue from the solicitation campaign.

The Attorney General intends to compile this information and make available to the public and to donors information about how much each fundraiser raised for the charities with whom they have contracted. The public will be able to search these reports by the name of either the charity or the professional solicitor as well as determine what percentage of the public's donations actually benefit the charities.

Control of Funds Raised

Hawaii law requires that each contribution in the control or custody of the professional solicitor, in its entirety and within five days of its receipt, shall be deposited in an account at a bank or other federally insured financial institution, which shall be in the name of the charitable organization.^{xxii} The charitable organization shall maintain and administer the account.

Enforcement of Registration Requirements

The Attorney General is given administrative enforcement powers to suspend, revoke or to refuse registration of any registrant who is operating in violation of the

chapter or who has refused to furnish information required to be disclosed to the Attorney General, or who has made a false statement in applications or reports filed with the office.^{xxiii} The Attorney General may also seek injunctive relief where a person is operating in violation of the registration laws.^{xxiv} Intentional or knowing violations of the registration are subject to fines and possible imprisonment.^{xxv}

Charitable Gift Annuities: Certification Process

Hawaii's Insurance Code restricts the issuance of charitable gift annuities as a fundraising device by Hawaii charities. To issue charitable gift annuities, a charity must: (1) have conducted business in Hawaii continuously for ten years in the form of program services or fundraising activities; (2) have at least \$200,000 in assets, exclusive of any assets funding an annuity, (3) certify compliance with the Attorney General's office, and (4) maintain segregated assets equal to the sum of its reserves on its outstanding charitable gift annuity agreements calculated in accordance with actuarial tables and discount rates determined by the Insurance Commissioner, plus a surplus of \$100,000 or ten percent, which ever is greater.^{xxvi} The charity must manage the investment as a prudent investor, and its annuity contracts must prominently state that the annuity is not insurance or regulated by the State or guaranteed by any insurance fund.^{xxvii}

Conclusion

The Attorney General provides important regulatory oversight over Hawaii charities and private foundations, and the professional solicitors and fundraising counsel that contract to raise funds for these organizations.

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ⁱⁱ Haw. Rev. Stat. § 414D-1

ⁱⁱⁱ Haw. Rev. Stat. § 414D-211(a)

^{iv} Haw. Rev. Stat. § 414D-211(a)(4)

^v Haw. Rev. Stat. § 414D-222(i)

^{vi} Haw. Rev. Stat. § 414D-90(f)

^{vii} Haw. Rev. Stat. § 414D-233.

^{viii} Haw. Rev. Stat. § 414D-233(b).

^{ix} Haw. Rev. Stat. § 414D-233

^x Haw. Rev. Stat. § 414D-245(6).

^{xi} Haw. Rev. Stat. § 414D-252(a)

^{xii} Haw. Rev. Stat. § 414D-140.

^{xiii} Haw. Rev. Stat. § 414D-140(f).

^{xiv} Haw. Rev. Stat. § 414D-54.

^{xv} Haw. Rev. Stat. § 414D-150(b)

^{xvi} Treas. Reg. § 1.6033-3(c)(1).

^{xvii} Haw. Rev. Stat. § 467B-12.

^{xviii} Haw. Rev. Stat. § 467B-1

^{xix} Haw. Rev. Stat. § 467B-1.

^{xx} Haw. Rev. Stat. § 467B-12.5.

^{xxi} Haw. Rev. Stat. § 467B-12.5

^{xxii} Haw. Rev. Stat. § 467B-2.5(c).

^{xxiii} Haw. Rev. Stat. § 467B-9.7.

^{xxiv} Haw. Rev. Stat. § 467B-9.6.

^{xxv} Haw. Rev. Stat. § 467B-10.

^{xxvi} Haw. Rev. Stat. § 431:1-204

^{xxvii} Haw. Rev. Stat. § 431:1-204(c)(3) and (4).