NONPROFITS: LEGISLATION

A New Crowdfunding Law - At Last!

09.28.21 | Linda J. Rosenthal, JD

"Is California where crowdfunding bills go to die?"

That was a fair question in early 2018 when JD Alois of *Crowdfund Insider* wrote that, once again, the California legislature would have a charitable crowdfunding-regulation proposal to consider. See *Is California the State Where Crowdfunding Goes to Die? Maybe Not, as Intrastate Legislation Resurfaces* (January 24, 2018).

We reported on that unsuccessful 2018 attempt … as well as the next one (2019): here and here. There likely would have been crowdfunding legislation in 2020, but other priorities popped up.

The year 2021 has been different.

The California Legislature, working from a compromise effort behind the scenes, passed AB-488, "*Charitable organizations: charitable fundraising platforms and platform charities*" (2021-2022). Both the Assembly and Senate (each overwhelmingly blue) approved the measure by a wide margin in early September 2021. It was sent to the Governor on September 10, 2021, the last day of this year's legislative session.

The deadline for (an unlikely) veto having passed, AB-488 is now law, although it does not take effect until January 1, 2023. That's an intentional delay beyond the usual start date: either immediate (if designated as "urgency" legislation) or on January 1st of the next calendar year.

See full text here at the helpful website, "California Legislative Tracker," that includes tabs with official analysis, bill history, and version comparisons.

Old Idea; New Challenges

Crowdfunding, as a concept, is *not* new.

In *Crowdfunding Then and Now* (May 5, 2021), (as AB 488 was making its way through the California legislature), we took our readers on a journey back in time to when two nineteenth century titans – French philosopher Auguste Comte and American publishing powerhouse Joseph Pulitzer – devised ingenious and wildly successful crowdfunding schemes in that pre-internet era.

What has changed recently is the medium through which the crowdfunding appeals are made. The internet supercharges the *method* of communicating the appeals and responding to them. Charitable fundraising + the internet + crowdfunding is sometimes described as a "marriage made in heaven." It has exploded in popularity in the last few years and the COVID-19 pandemic has exponentially increased that presence and potential.

The bottom line, though, is that fundraising via crowdfunding is still fundraising – pure and simple. And the states, generally through the attorneys general, have jurisdiction to protect the public by regulating any and all appeals for charitable funds and support.

The problem, of course, is that existing charitable-solicitations laws were adopted with traditional, non-online, appeals in mind. As such, they are woefully inadequate to meet the challenges of today. Exacerbating this problem are the revolutionary changes in technology that far outpace legislators' and policymakers' best efforts to create effective but not oppressive regulatory schemes.

Proposed AB 488

That was the challenge as California entered the 2021 legislative year. There had been continued discussions over the winter among all stakeholders including industry representatives.

Assemblymember Jacqui Irwin (D-44th Dist, Camarillo), a key ally of the nonprofit community, introduced Assembly Bill 488 in early February 2021. See *Fact Sheet AB 488 (Irwin) Online Charitable Giving* (March 4, 2021). She agreed to a few changes without which the California Association of Nonprofits would have withheld its support. See correspondence dated March 31, 2021 and June 22, 2021.

Subsequently, the newly appointed California Attorney General Rob Bonta (replacing new HHS Secretary Xavier Becerra) signaled his office's support and sponsorship of AB 488. See *Attorney General Bonta Announces Sponsorship of Legislation to Provide Oversight of Charitable Giving on Online Platforms* (June 23, 2021) Press Release, Office of the Attorney General.

Assemblymember Irwin successfully shepherded the bill all the way down the legislative road. That's no small task even in this state with a trifecta of single-party rule.

There are generally intra-party squabbles along the way, and it's not unheard of for the same-party governor to veto a bill that had garnered wide legislative support. See our reporting of Governor Newsom's veto – in his first year in office – of a bill that would have changed accounting rules for gifts-in-kind. See *Gifts in Kind: CA Bill Vetoed* (December 10, 2019) ["An old Sacramento adage uses baseball imagery to explain the power of California's chief executive at the end of the legislative process: 'The governor bats last.'"]

In any event, the sausage-making process of churning out legislation in Sacramento is complex and quite unlike what you learned as a kid in "How a Bill Becomes a Law" or perhaps re-learned in Poly Sci 301. See for example, *The 'Suspense File' Process Used in Considering Fiscal Legislation* (March 9, 2020) Chris Micheli, californiaglobe.com.; *Overview of Legislative Process*, leginfo.ca.gov.

The New Law

Assembly Bill 488, as amended, was the product of "… years of discussions and developments with stakeholders, …" said Jacqui Irwin, commenting on its passage. See *California State Senate Advances AG-Sponsored Bill to Provide Oversight and Protection of Online Charitable Donations* (September 1, 2021) Press Release, Office of the California Attorney General.

As previously written, California's solicitation laws did not specifically reach the online platforms, "resulting in instances of deceit and mistreatment of charitable donations that the Attorney General's Office [was] not able to address through enforcement of existing charity oversight laws.

The new law "will ensure critical oversight by the California Department of Justice over charitable fundraising that occurs on internet platforms," according to California Attorney General Bonta. "Over the years," he adds, "charitable giving through internet platforms has increased exponentially, requiring an update to California's charitable giving laws. AB 488 will protect both donors and charities from deceptive or misleading solicitations by creating a framework that specifically defines online platform entities and requires them to register and report to the Attorney General's Registry of Charitable Trusts." See *California State Senate Advances AG-Sponsored Bill to Provide Oversight and Protection of Online Charitable Donations* (September 1, 2021) Press Release, Office of the California Attorney General.

Specifically, AB 488 does the following:

- "Create[s] a level playing field for all charitable giving platforms, regardless of business model, by defining two new groups of entities, 'charitable fundraising platforms' and 'platform charities' that are subject to the Attorney General's supervision;
- Require[s] covered entities to provide meaningful and transparent disclosures on their internet platforms, promptly distribute donations, and prohibit solicitations for charities not in good standing with the Attorney General's Registry of Charitable Trusts;
- Permit[s] some instances of soliciting for a charity without prior consent if certain criteria that safeguard against harm to charities and the public are met; and
- Authorize[s] the Attorney General's Office to implement regulations to require donor notification and reporting requirements, and to encourage transparency and accountability."

Conclusion

California's new and first-of-its-kind legislation for oversight of charitable crowdfunding will undoubtedly serve as a starting point for consideration of action by other legislatures.

Though thoughtfully developed with widespread input, it nevertheless is a compromise measure adopted amid fast-moving technology developments that can and likely will overtake it sooner rather than later. We look forward to hearing from experts on observations about this California law and where to go from here in this state and elsewhere around the nation.

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