

## Third Time's A Charm?: CA Charitable-Crowdfunding Proposed Regs

12.12.23 | Linda J. Rosenthal, JD



"This legislation impacts every single person who clicks on that 'donate now' button and every single nonprofit that receives funding this way."

That's how, in early October 2021, the head of the California Association of Nonprofits, Jan Masaoka, described the significance of Assembly Bill (AB) 488, the state's landmark new charitable-crowdfunding statute. Governor Gavin Newsom had just signed into law the nation's first significant attempt at reining in a bit the largely uncontrolled and Wild-West-type setting in which internet-powered, pop-up, fundraising appeals have been spreading like wildfire in recent years. The charitable solicitation laws already on the books, in California and elsewhere, are woefully inadequate to address contemporary crowdfunding.

Ordinarily, new laws in California go into effect immediately or – sometimes – on the following New Year's Day. For AB 488, though, lawmakers took an unusual (but presciently necessary) step: delaying the effective date for fifteen months until January 1, 2023. First, the extra time is designed to help the CA Department of Justice draft comprehensive regulations after meaningful input and consultation with interested parties and stakeholders as well as the general public. Second, it gives all regulated parties enough lead time to adapt and adjust to any such new rules and procedures.

But it's been even more challenging than expected.

Here we are now – two years later – with the third attempt at proposed regulations. The effective dates for parts of the statute were moved from January 1, 2023 to the upcoming New Year's Day. Clearly, though, the process will go beyond that amended effective date as well.

This is a novel statutory scheme that applies broadly both within and beyond the nonprofit sector. There are huge amounts of money at stake and the technology that propels crowdfunding is, itself,

evolving at breakneck speed.

Published on November 17, 2023, the [Notice of Proposed Rulemaking](#) and its package of related documents include detailed background about the statute and the attempts to draft workable regulations. Specifically, there is a marked-up document showing the changes from the proposed (but withdrawn) second set of regulations and the new version.

The Notice also includes the standard invitation to submit written public comments. That window, however, is closing quickly: All regular-mail and email submissions are due by 5 pm on January 2, 2024.

### ***Crowdfunding: Not New***

“Simply put, we explained in *Charitable Crowdfunding: Then and Now* (May 5, 2021), “crowdfunding is the practice of funding a project or venture by raising small amounts of money from a large number of people.”

[AB 488](#) was then working its way through the California Legislature. Earlier years’ attempts had failed although the regulators as well as the nonprofit *and* for-profit entities to be regulated had worked hard to draft an acceptable compromise that could pass both legislative chambers and be approved by the governor.

The urgency to act has been growing since those unsuccessful earlier tries. “Appeals by private individuals and campaigns by nonprofit organizations [had] become more and more commonplace, the growth coinciding ...” with the creation of the internet and its rapid development and expansion. “Indeed, the 2020 pandemic – which caused many more people to use and rely on the web than previously – has spurred an exponential burst in online activity throughout American society including in the nonprofit sector.”

The first recorded use of the English term for this special solicitation method – that is, “crowdfunding” – was in 2006. But the “phenomenon of crowdfunding” is not new. To illustrate that point, in our [May 2021 post](#), we featured two fascinating crowdfunding-type campaigns from the nineteenth century. It was long before the internet era but each was wildly successful.

Auguste Comte (1798-1857) was a brilliant French philosopher with major accomplishments including the founding of “positivisme,” a new ideology and movement. A prolific writer, he had carefully cultivated many “English admirers and French disciples.”

Alas, he was “decidedly less successful maintaining steady employment, especially in academia.”

His most ardent followers helped him out with a modest “private subscription” for life, but it wasn’t nearly enough to keep him out of poverty as he churned out multi-volume masterworks in the early 1850’s. “So the great intellectual got creative. He turned to ... crowdfunding,” calling it a “souscription publique.” The purpose was crystal clear in the written appeal: “... destinee a soutenir mon existence materielle.” No one was defrauded or misled in any way. And, under a certain logic, it was *charitable* crowdfunding; he had created a financial spigot to support his favorite charity: himself.

“The money poured in because he had a preexisting worldwide network of supportive friends, colleagues, and devoted fans who corresponded regularly – with him and with each other. Not lightning-speed communications, but it worked.”

A few decades later, in the 1880’s, Joseph Pulitzer – the American rags-to-riches immigrant who became a publishing magnate – pulled off another spectacular crowdfunding-type campaign. This time, the massive communications network he used to spread the word comprised the vast readership of his newspaper, *The New York World*.

France had bestowed a generous gift on the American people: the Statue of Liberty. There was a glitch, though. “The fully paid-for monument arrived on our shores” at New York City “but it was dismantled – in some 350 pieces – and without a base. The United States was on the hook for the \$250,000 – millions in today’s dollars – to design and build a suitable pedestal.”

The government wasn’t interested in providing the money and the Gilded-Age elite committee tasked with raising the needed dollars developed a limp and boring fundraising campaign that fell far short of the goal. (One imagines a refined tea reception in Agnes van Rhijn’s Fifth Avenue drawing room.)

Meanwhile, “... Lady Liberty languished in a warehouse as cities including Philadelphia and San Francisco made (unwelcome) offers to provide the cash in exchange for the statue itself.” Devoted to his newly adopted home town, Pulitzer was thrilled by the French gift but horrified by the prospect of losing the monument to another American city or having to return it to France.

He was also a “fierce believer in the ‘journalism of action,’ and unleashed the “biggest weapon in his arsenal.” Tugging on the heartstrings of patriotic average Americans, he “... wielded his editorial pen extravagantly,” exhorting his readers to properly thank the true donors, the citizens of French. “We must raise the money! The World is the people’s paper, and now it appeals to the people to come forward and raise the money.”

The stroke of genius, though, was his promise to potential individual contributors to print the names of each one in *The New York World*, “whether they had contributed a dime or a dollar.”

“Remarkably, it worked,....” Over 125,000 small donors “sent in an astonishing \$102,000 (about \$2.7 million currently)” that secured the “monument’s future in New York.” The icing on the cake: The working classes were able to show up the snooty millionaires.

### ***Enter: The World Wide Web***

Of course, the development and spread of the internet has been the catalyst sparking our modern-day explosion of “...funding a project or venture by raising small amounts of money from a large number of people,” including for the benefit of deserving charitable causes and beneficiaries.

“Crowdfunding” is an absurdly easy *modern* way to fundraise on a global scale, generating – sometimes in the first 24 hours alone – a mind-boggling downpour of money. In their wildest dreams, Auguste Comte and Joseph Pulitzer likely couldn’t have imagined anything like this. But nowadays it doesn’t take a genius or an entrepreneurial superstar to upload a charitable campaign that goes viral. Almost anyone who knows how to click on a computer mouse may be able to do it.

And that's where the rub comes in. To unprincipled or careless people, it can become a devastating instrument of harm; quite literally, almost a license to steal. This Wild-West atmosphere is so open to unbridled abuse that the charitable community and government regulators at all levels have wanted to take action to rein in actual and possible wrongdoing.

So, over the last several years, the challenge for the government is, on the one hand, to regulate heavily enough to avert abuses and catch bad actors; on the other hand, to intervene or supervise with a light enough touch to avoid squelching unnecessarily this exciting new way to bring money into the charitable sector for the common good. See, for instance, the continuing advice of Professor Lloyd Hitoshi Mayer of Notre Dame Law School in *Regulating Charitable Crowdfunding* (2020, 2022; last updated February 1, 2023) *Stanford Social Innovation Review*.

With California's first-of-its-kind new law, supplemented in the near future with thoughtful final administrative regulations, some of the confusion and chaos should subside along with the opportunities for wrongdoing.

### ***The California Law and Regs***

The diligent efforts of the key players in the charitable-crowdfunding universe have been encouraging but not always entirely successful. After years of failed attempts at a workable compromise – (resulting in the unfortunate characterization of California in 2018 as the place “...where crowdfunding regulation goes to die”) – the stakeholders finally achieved a compromise bill, AB 488, that made it through to – and beyond – the governor's desk.

The next stop has been the regulatory purgatory since October 7, 2021, that has included extended statutory effective dates and, so far, three sets of proposed regulations .

Getting to this point has been “... several years and many stakeholder meetings in the making.” CalNonprofits has played a continuing and key role notwithstanding a few unsuccessful attempts at reaching agreement on a package of acceptable oversight measures. Throughout the process, the goal has been “to protect donors and charities from deceptive or misleading solicitations” in the uncharted waters of online fundraising.

We've covered this story extensively over several years and now fall back on those posts as an offer of more details to anyone interested. See, including the May 2021 post already mentioned:

- [Charitable Crowdfunding: Then and Now](#) (May 5, 2021)
- [A New Crowdfunding Law – At Last!](#) (September 28, 2021)
- [CA Charitable Crowdfunding: New Proposed Regs](#) (May 31, 2022)
- [CA Crowdfunding Regulations: Last Chance to Comment](#) (November 23, 2022)
- [Twists and Turns in 2022's Nonprofit News](#) (December 31, 2022)

### ***To Comment or Not To Comment***

The matter currently before us is the latest “Notice of Proposed Rulemaking concerning Charitable Fundraising Platforms and Platform Charities regulations.” The California Department of Justice published it on November 17, 2023. The links to the Notice and all related documents are [here](#).

The government includes in-depth discussions of the reasons why, last December, it withdrew the second set of proposed regulations as well as the explanation of the changes included in the revised proposed regulations. See, for instance, the [“Initial Statement of Reasons,”](#) a 43 pp. PDF document.

This large package of materials is “deep-in-the-weeds”-level detailed and complex, which you may (or may not) want or need to skim or read carefully. For the people inclined to submit a public comment – or tasked to do so – a helpful road map is: [New Year, New California Regulations? California Issues, for the Third Time, Proposed Regulations to Implement AB 488](#) (December 1, 2023), Ashleigh Allione, Esq., et al, *Venable LLP*

There, Ms. Allione explains: “Though the framework is largely the same, the proposed regulations add a significant level of additional specificity.” And, despite the government’s best efforts to deal with delayed compliance deadlines especially for reporting duties, “the regulated community may (yet) face challenges....” Those are “matters about which they may want to offer written comments and suggestions.”

The [Notice of Proposed Rulemaking package](#) offers instructions on how to submit the comments “by mail or email.” A caveat: “[w]ritten and oral comments, attachments, and associated contact information (e.g., address, phone, email, etc.) become part of the public record and can be released to the public upon request.”

If you’re wondering whether anyone pays attention to these submitted comments, turn to the [“Initial Statement of Reasons.”](#) There, on page 38, officials list the authors and affiliations of the earlier-round public comments on which they relied to make changes in the third revision. It includes a number of familiar names including FPLG friend and colleague, Gene Takagi, Esq. of NEO Law in San Francisco.

### ***Conclusion***

We’ll follow, and report on, these developments including the fate of the pending third set of proposed regulations.

– *Linda J. Rosenthal, J.D., FPLG Information & Research Director*