



THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN

September 12, 2008

Terry de March
Director General
Charities Directorate
Canada Revenue Agency
320 Queen Street, Tower A
Ottawa, ON K1A 0L5

Dear Mr. de March:

Re: Proposed Policy on Fundraising by Registered Charities

On behalf of the National Charities and Not-for-Profit Law Section of the Canadian Bar Association (CBA Section), I am writing regarding the Canada Revenue Agency's proposed policy on fundraising by registered charities (Policy) and the background information on the proposed policy (Background Document). The CBA Section represents lawyers from across Canada who advise or serve on the boards of charitable and non-profit organizations. We have had the opportunity to review both the Policy and the Background Document.

At the outset, we would like to applaud the CRA's initiative in developing guidance for registered charities on what constitutes acceptable fundraising activities. The Policy and the detailed Background Document clearly demonstrate that the CRA has invested considerable effort in developing these documents. The inclusion of many examples in the Background Document is also helpful in assisting the reader to better understand the proposed requirements.

We wish to raise the following issues concerning the proposed requirements in the hope to better improve the draft documents:

1. Use of Grid

Our biggest concern is how the proposed grid is presented in the Policy and might be used by the CRA, charities, donors and the public. The Policy and the Background Document indicate that the grid is only an "initial tool", which is subject to the CRA's assessment of various factors involving the fundraising activities in question – seven types of conduct that may decrease the risk of unacceptable fundraising, ten types of conduct that may increase the risk, and six categories of other circumstances. The Policy also indicates that, given the breadth and range of

fundraising by registered charities, in some circumstances a strict assessment may result in an unfair consequence. In those circumstances, the CRA may permit higher costs or tolerate conduct that would otherwise be unacceptable. As a result, the grid is not a determinative assessment tool. However, this fact does not appear to have been clearly set out in the Policy or the Background Document.

Our concern is that the public, media, and CRA officials might rely exclusively on the grid as a rule-of-thumb to determine whether fundraising activities are appropriate, without regard to the overriding factors and circumstances explained in the Policy and elaborated in the Background Document. Given that the grid is not a determinative test, we question the merits of including it in the Policy. At a meeting in mid-August between the CRA, Imagine Canada, the Association of Fundraising Professionals (AFP) and other sector representatives, senior CRA officials indicated that the grid is an internal tool for audit purposes and the reason for releasing it to the public is transparency and accountability. However, once included in the Policy, the grid will serve as a public tool for assessing fundraising activities conducted by charities. For these reasons, we suggest that the grid be removed from the Policy altogether.

2. Clarify the Grid

Alternatively, if the grid is retained, we suggest that it be a schedule to the Policy, to attenuate its focus. Clear explanation and warning in the Policy should emphasize that the grid is not determinative, should not be relied on as an “indicator” of whether the fundraising activities are appropriate, and that all factors relevant to the conduct of the fundraising activities should be reviewed in each case before coming to a determination.

We also suggest that the language for the grid categories be reviewed. If the grid is a tool for determining whether excesses should be reviewed, the categories could be labelled differently. Use of words such as “acceptable” and “unacceptable” suggest evaluations before a review is commenced. This could be problematic for audits and the public.

It is important that the grid be more refined so that it is not a one-size-fits-all over-simplified “tool”. If maintained, it should reflect the reality faced by the diverse array of charities in Canada, including the size of gift, purpose of a particular fundraising endeavour, duration of a fundraising campaign, size of charity, amount of resources available to the charity, the charity’s experience in fundraising in the past.

The assessment of the various types of conduct and circumstances that apply to the grid appears to be highly subjective. To assist charities in understanding how these are to be applied and to achieve consistency in the CRA’s administration of the Policy (e.g. by CRA examiners when reviewing applications for charitable status, by CRA auditors, etc.), CRA should provide clear guidance on how the overriding factors and circumstances are to be assessed and applied.

The Policy indicates that one circumstance in which the CRA is prepared to accept a higher ratio than in the grid is with charities whose main or major purpose is to make gifts to qualified donees, or to other registered charities and as a result have a different cost structure than charities that carry on their own activities. This implies charitable foundations. However, this has not been made clear in the Policy. We suggest that this issue be clarified at the outset of the Policy, instead of a brief implication close to the end.

The Background Document indicates that the CRA may accept higher fundraising costs for these charities, “provided these costs can be shown to be reasonable given the charity’s mandate, and that it can demonstrate costs are being adequately controlled.” Again, the application of such criteria is highly subjective and no guidance is provided in the Background Document on what would be involved to meet these criteria. If the CRA is prepared to accept a higher ratio for foundations, perhaps another grid with a higher ratio should be developed that would apply to foundations.

The grid uses the ratio of fundraising costs to fundraising revenue on an *annual* basis. However, the ratio does not take into account the wide variation in the nature of fundraising activities, depending on the charities’ objects, structure, resources, etc. A ratio that takes into account an averaging of the fundraising costs over a number of years may be more appropriate. The ratio does not take into account the ratio of fundraising costs or fundraising revenue versus the total operating cost or total revenue of the charity. We suggest that the ratio also take this factor into account. Finally, the meaning of “fundraising revenue” is not clear. The Policy also does not provide any explanation or basis upon which the ratio is used by the grid. For example, why is a ratio of 35.1% to 49.9% potentially not acceptable, but a ratio of 20% to 35% is generally acceptable?

3. Define Concepts

Numerous concepts are not properly defined and could cause audit problems. Many of the determinative factors and criteria in the Policy are highly subjective and at times vague. Inconsistencies might occur in the administration of the Policy by the CRA. For example, in several places the charity is required to determine how much of its resources are allocated to fundraising and how much to programs, but there is a lack of clarity in the Policy as to *how* to make this determination. We suggest that more guidance be included in the Policy on how these factors are to be administered or interpreted, e.g. by including more examples on how the factors are to be applied.

4. Simplify Background Document

Although the Proposed Policy is only eight pages, the Background Document is a 30-page document with which charities must also comply. While the Policy is generally easy to read, the Background Document contains complicated legal concepts and requirements that may be difficult for registered charities to understand, let alone comply with. For example, part 1 of the Four Part Test involves four assessment criteria, and the second criterion in turn involves four further criteria. Although larger charities may have the resources to engage professional advisors to guide them through these documents, volunteers or staff of charities that lack the resources to engage knowledgeable advisors may not be able to fully comprehend the complexities and intricacies. We suggest that the Background Document be simplified so it is easy for all charities, regardless of size and resources, to comprehend and comply with.

5. Policy Implementation

With the complexities of this Policy, we anticipate that charities would need time to comply with its requirements. For example, the board, staff and volunteers of charities would first need to understand the Policy, then put in place new procedures and policies to implement it, train staff, renegotiate fundraising contracts if necessary, complete current fundraising campaigns that fall outside the requirements in the Policy before launching new ones, etc. We suggest that the CRA

consider a reasonable grace period before the Policy takes effect, with a wide education campaign to help charities understand the requirements of the Policy, and for CRA staff and auditors on how the Policy is to be implemented.

6. Basis of Policy Requirements

Although the Policy indicates that it deals with issues of the federal regulation of fundraising by registered charities under the *Income Tax Act*, some of the requirements are not based on any provisions in this Act, but instead reflect the common law requirements on charities in relation to fundraising. Examples include prudent planning of fundraising activities, appropriate procurement process for fundraising activities, good staff processes for fundraising activities, and no misrepresentations in fundraising solicitations or disclosures. Although directors of charities should address these factors to conduct fundraising activities appropriately in discharging their fiduciary duties to manage and oversee the operation of charities, these criteria are by no means requirements under the Act. As such, it is unclear on what basis the CRA can exercise oversight on compliance of these requirements in relation to fundraising activities.

We trust that the CRA will find the above comments to be helpful in its review and revision of the Policy. If you have any questions or concerns, please do not hesitate to contact me.

Yours truly,

(Original signed by Stéphanie Vig for Susan Manwaring)

Susan Manwaring
Chair, National Charities and Not-for-Profit Law Section