



COMMISSION-BASED FUNDRAISING

By Ricardo Wyngaard

ABOUT NPO LEGAL ISSUES:

This is an electronic newsletter published by:
RICARDO WYNGAARD ATTORNEYS which is aimed at updating the non-profit sector on relevant legal issues.

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RICARDO WYNGAARD ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

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I have in recent months received a number of queries on the legality of commission-based fundraising in the South African context and this article is aimed at briefly discussing the relevant legal issues. The legal issues may come from either a contract or from law.

Contractual considerations

The contract with a donor may, for example, expressly prohibit the payment of a percentage-based commission. Paying someone, in such an instance, a percentage-based commission will amount to a breach of contract. A contract may also, by implication, prohibit the payment of a percentage-based commission. For example, the funding contract may stipulate in detail how the funding will be used and by implication exclude the payment of commission to a fundraiser. If such funding is used to pay a percentage-based commission it would violate the contractual terms. The organisation's own founding document and policies may also regulate the issue of commission-based fundraising. For example, if commission-based funding is specifically prohibited by an organisation's founding document or policies, it would be unlawful to pay someone a commission to fundraise.

Legislative considerations

The Companies Act of 2008, the Nonprofit Organisations Act of 1997 and the Trust Property Control Act of 1988 (with reference to trustees) essentially allow for the payment of 'reasonable remuneration'. The key question here is whether commission-based fundraising amounts to reasonable remuneration. The answer depends on the facts of each case. If the percentage paid to a fundraiser is proportionate with the service rendered – it would be consistent with the legislation. For example, if a fundraiser raised R1 000-00 and in terms of the agreement gets paid 30% of the funds raised, the amount of R300-00 is unlikely to be unreasonable remuneration. However, if a fundraiser raises R5m, 30% thereof cannot be considered reasonable remuneration. Although the legislation is not too clear on this issue, it does not support a blanket approval of commission-based fundraising.

The Income Tax Act

Things get clearer for those NPOs that are approved as public benefit organisations. Section 30 of the Income Tax Act provides that PBOs cannot pay any remuneration to any person which is excessive, having regard to, firstly, what is generally considered reasonable in the sector and, secondly, in relation to the service rendered. No one is allowed to economically benefit from the PBO in a manner which is not consistent with the objectives of the PBO. Although the Income Tax Act does not specifically prohibit commission-based fundraising, it does not support excessive payment of remuneration or undue economic benefit to fundraisers.



Legislation Update:

By Ricardo Wyngaard

Companies Act and Consumer Protection Act

The Minister of Trade and Industry has resolved that the Companies Act of 2008 and the Consumer Protection Act of 2008 will come into operation on 01 April 2011. The Minister also published the draft regulations for both pieces of legislation in the Government Gazette on 29 November 2010 for public comment. Comments should be made on or before 31 January 2011. These draft regulations are also available on the website of the Department of Trade and Industry.

Financial Intelligence Centre Amendment Act 2008

The above-mentioned Act came into operation on 1 December 2010. In Volume 6 of [NPO Legal Issues](#) we published an article dealing with the implications of the Financial Intelligence Centre Amendment Act of 2008 on non-profit trusts.

Non-profit trusts will now have to comply with additional registration and reporting requirements or trustees may have to face fines or imprisonment. In terms of Financial Intelligence Centre Act (FICA), any person that invests, keeps in safe custody, controls or administers trust property within the meaning of the Trust Property Control Act of 1998 is considered an accountable institution in terms of FICA.

The new section 43B of FICA, as introduced by the Amendment Act, requires all accountable institutions to register with the Financial Intelligence Centre within a prescribed manner and period. Accountable institutions are also required to report cash transactions above the prescribed threshold in terms of section 28 of FICA.

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Conclusion:

The issue of commission-based fundraising has received more attention by the public and lawmakers in some other parts of the world. It will no doubt become a more prominent issue in South Africa if commission-based fundraising becomes a more prevalent practice amongst South African non-profits.

We recommend that non-profit organisations should not make use of commission-based fundraising and to avoid any confusion, organisations can introduce a policy stating:

“No officer, employee, member or third party shall receive commission-based compensation for fundraising services on behalf of the Organisation. Payment for fundraising services shall, if compensated, take the form of a salary or an agreed flat fee which is not commission-based.”

(see also the article written by David Cuthbert: <http://www.saifundraising.org.za/argumentsagainst.htm>)

Updated Written Undertaking

Organisations that apply for approval as public benefit organisations are required in terms of the Income Tax Act to submit their founding documents containing a list of specified conditions to qualify for such approval. If those conditions are not reflected in the organisation's founding document, it is required to submit a written undertaking (EI 2), signed by three of its board members, which contains such requirements.

The Tax Exemption Unit at SARS requires, contrary to the provisions of the Income Tax Act, all PBO applicants to submit EI 2 Forms – including those applicants that are not required to do so. This EI 2 Form became outdated in recent years and many approved PBOs are accordingly bound (through their founding document or the EI 2 Form), to outdated investment and trading limitations. SARS has recently published an updated EI 2 Form which is now available on their website. Approved PBOs should make sure that they are not bound by outdated tax restrictions.

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