

MEMORANDUM

FROM: Karen E. Boxx, Reporter

TO: Terry Care, Chair
Members, Advisors and Observers
Drafting Committee for an Act on Management of Funds Raised Through
Crowdfunding Efforts

RE: Initial Issues

DATE: February 27, 2018

This memo provides an overview of threshold issues for discussion. The hope is that we can get enough of a sense of the committee's opinions on these issues in order to have a preliminary draft prepared for our first meeting on April 13, 2018.

1. Scope of Act. First, we should clarify that the Act will address crowdfunding for humanitarian purposes rather than commercial purposes. For example, the Act could exclude crowdfunding that offers benefits to the persons solicited. We have also discussed limiting the Act to crowdfunding for individuals rather than charitable organizations, because if the funds are going to existing charitable organizations there is less ambiguity about the ultimate use of the funds. There is a Canadian Uniform Act, the Uniform Informal Public Appeals Act, a copy of which is attached, that excludes fundraising that is permanent or continuing and excludes fundraising conducted by a registered charity. The committee will also need to consider whether the Act's scope would be limited to campaigns for certain purposes or to campaigns with ascertainable beneficiaries. For example, the fundraising in the aftermath of the Florida shooting ranges from a fund for the victims and their families to a specific fund to pay for the students to travel to Washington, D.C. to bring their message to Congress. Another issue is whether the Act applies only to funds raised through web-based platforms such as GoFundMe, or whether it also applies to more traditional fundraising such as public appeals to make donations directly to dedicated bank accounts.
2. Control of Funds. The critical issue to be addressed is who controls the funds once they are raised, and what limits if any are placed on the use of the funds. The Canadian act provides that all funds raised under this method are considered trusts. The trustee of the trust is whoever has the authority to manage and disburse the fund. Presumably that

would be the organizer of the campaign, because sites such as GoFundMe give control of the funds to whomever set up the campaign. The trustee has the authority to execute a trust agreement governing the trust, and if no agreement is created, the Act provides a default trust agreement that will govern the trust.

The committee will therefore need to consider whether every fund should be treated as a trust. If the funds are being collected by an individual for his or her own needs, or if a group is raising money for a short-term purpose, such as financing a trip, then imposing a trust may be unnecessary. The Canadian Act allows a donor or the Attorney General (as well as the trustee and the beneficiary of the campaign) to ask a court to enforce the terms of a trust. If the intended use of the funds is relatively open-ended, this type of oversight may be overly intrusive.

Certainly many of the campaigns should be treated as a trust, particularly those that are set up for the benefit of minors or incapacitated persons. The Act should most likely require a trust at least in some circumstances, and provide a template for the trust. Availability of the annual exclusion from the gift tax would need to be preserved so the trust terms should be drafted to accommodate that issue. Also, if the beneficiary of the funds may be otherwise eligible for government benefits, the trust should be drafted to preserve such eligibility. Specific provisions that allow special needs trusts should be included, as well as provisions that protect the eligibility of the intended recipient even if the campaign is initially set up without consideration of those issues. The committee will need to determine what templates will be provided in the Act, and how changes in either tax or government benefits laws would be accommodated.

Oklahoma has a “statutory support trust” in its banking code to be used by a bank or trust company when receiving funds “donated by any person as a public service to assist the beneficiary of the trust or account in the payment of medical, financial, education, humanitarian or other similar means.” Okla. Stat. Ann. tit. 6 § 3010. The terms of the model trust include a spendthrift provision, accounting requirements and provisions for distributions of the fund after the death of the beneficiary or the termination of the need that was the purpose of the trust. The statute sets forth the trust form as a model but does not mandate use. The statute was enacted in 1995. This provision could also be used as a model.

The committee will also have to consider whether there are any mandatory provisions for these trusts. For example, trusts set up for minors who are entitled to funds from litigation settlements generally have minimum requirements, such as requiring at least one nonfamily trustee. See, e.g., WA Court Rule SPR 98.16W. Minor settlement

requirements could be a model for the Act's requirements whenever funds are collected for a minor. Also, limits on trustee discretion may be dictated by the act.

Fundraising campaigns vary from fundraising for just one person or one family's needs to the needs of a group of people affected by a tragic circumstance. Any trust template would have to take the number and varying needs of the intended beneficiaries under consideration.

The Canadian Act gives very little guidance on identifying the trustees and identifying any constraints on the use of the funds, other than that there is a trust. This is an area where the committee should give substantial consideration.

3. Coordination with other Uniform Acts. To the extent the Act will require a trust to hold the funds, the committee will need to consider the extent to which general trust law, as codified in other uniform acts, will apply. For example, the Canadian Act has a specific provision loosening the general duties of a trustee to invest prudently. The Canadian Act also creates a high threshold for trustee liability, providing that the trustee is only liable for dishonesty or willful misconduct. The committee should review the Uniform Trust Code and related acts, and consider a provision that would apply the state's general trust law except where inconsistent with specific provisions in this Act.
4. Enforcement of the Trust. The Canadian Act allows the trustee and the intended beneficiary to petition the court to enforce the trust, and also allows any donor and the Attorney General to do so. Allowing a grantor of a charitable trust to enforce its terms is consistent with the Uniform Trust Code, but the number of potential donors may make it impractical to give this power to crowdfunding donors. The states' attorney generals are currently looking at crowdfunding and should be consulted about their preferred role.
5. Dealing with Surplus Funds. A major concern of the Canadian drafters was resolution of surplus funds distribution, because of an infamous English case, *Re Gillingham Bus Disaster Fund*, where funds raised after a number of children were killed or seriously injured and not distributed were held by the court for decades. The general approach of the Canadian Act is to eliminate any refunds to donors except where the donation exceeds a certain amount and the donor requests a refund of unused funds at the time the donation is made. A key reason for eliminating the potential for refunds in the Act is the U.S. gift tax. Donations to the campaigns are unlikely to be eligible for charitable deductions from income tax (see below) but the donors would want the gifts to be eligible for the annual exclusion, and if refunds are possible the gifts may not be considered gifts of a present interest. The Canadian approach should preserve the annual exclusion, but if we include

the potential for gifts of a certain size to be refunded if the donor imposes such a condition, the tax consequences should be addressed.

As for disposition of excess funds, the Canadian act allows the initial request to set a plan for use of surplus funds. If the initial solicitation did not include a plan for surplus, the Canadian Act directs the trustees to petition a court for authority to distribute surplus funds. If funds are below a certain amount, the trustees can distribute the funds in a manner consistent with the original purpose. This seems like a reasonable approach but the committee should consider the role of the court in such circumstances.

6. Tax issues. It is unlikely that the Act can be drafted so that donors receive a federal income tax charitable deduction. However, care needs to be taken to avoid adverse tax consequences for the donor or the beneficiary of the fund. The Act should support classification of contributions as gifts, so that distributions from the fund to the beneficiary are not considered taxable income. Also, the Act should be structured so that gifts to the fund will be eligible for the annual exclusion from gift tax, to avoid any filing requirements imposed on the donors.
7. Guidance to Campaign Organizers. A major difficulty with these campaigns is that they are often set up on short notice by relatively unsophisticated individuals without advance advice. One purpose of the Act could be to serve as a gap-filler and provide the structure lacking in the initial campaign. There may be additional provisions in the Act that require advance direction or notifications to organizers and donors, in addition to the gap-filling provisions.

Summary.

The Canadian Act is a good starting point for discussion, and the committee can use the Canadian model to determine the appropriate positions for the Uniform Act with respect to the topics it covers. However, it gives little guidance on control and management of the funds, and leaves enforcement of the trusts to the courts. As a preliminary matter, the committee should determine what issues it thinks the Act can and should address with respect to crowdfunding. Once scope is determined, the committee should consider whether the trust structure should be imposed on all crowdfunding campaigns within the scope of the Act or whether some campaigns should be exempt. Finally, the mandatory provisions for campaigns that require a trust need to be identified, and variations depending on the purpose and the intended beneficiary also need to be identified.

The initial draft of the Act can address the issues covered in the Canadian Act, together with more robust provisions identifying who would control the funds, what constraints would be placed on use of the funds to protect the donors, the organizers and the

beneficiaries of the fund, and what deviations from traditional trust law would be required. The overarching questions addressed in this memo should be kept in mind as the committee goes through any specific provisions. In our preliminary call, one central issue to be discussed is the use of a trust structure: Should all funds be treated as trusts, with a template provided? If not, should trusts be mandated for a certain class of campaigns, and how should those be described? Should the trust be optional in all cases, such as the Oklahoma statute approach? These issues are structural and some sense of preliminary direction would be helpful in preparing the first draft.