

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

AB 2208 (Irwin)
Version: July 2, 2020
Hearing Date: July 30, 2020
Fiscal: Yes
Urgency: No
AM

SUBJECT

Charitable organizations: charitable fundraising platforms and platform charities

DIGEST

This bill establishes that charitable fundraising platforms and platform charities, as defined, are trustees for purposes of the Supervision of Trustees and Fundraisers for Charitable Purposes Act and subject to the supervision of the Attorney General. The bill creates a regulatory framework that requires charitable fundraising platforms and platform charities, as defined, to register with the Attorney General, submit reports about its activities, and enacts several consumer protections, such as disclosure requirements. The bill allows a charitable fundraising platform or platform charity to solicit donations on behalf of a charitable organization without their prior written consent if certain conditions are met. The bill requires the Attorney General to establish rules and regulations necessary for the administration of these provisions.

EXECUTIVE SUMMARY

The regulatory framework of the Supervision of Trustees and Fundraisers for Charitable Purposes Act (Act) generally contemplates traditional solicitation methods by charitable organizations. However, online charitable fundraising by internet platforms, many of which are not regulated by the Act, has increased and become a popular method of fundraising over the past several years. With the onset of COVID-19 and the inability of many charities to host traditional fundraising events, this form of charitable giving has become even more widely used. The bill seeks to create a regulatory framework under the Act for charitable fundraising platforms and platform charities in order to increase oversight and provide consumer protections.

The bill is sponsored by Attorney General Xavier Becerra and supported by the California Association of Nonprofits and the National Association of State Charities Officials. The bill is opposed by Charity Navigator, the Internet Association, Network for Good, and TechNet.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Establishes the Act under the supervision of the Attorney General. (Gov.C. §§ 12580-12599.8.)
 - a) Provides for regulation of charitable corporations, unincorporated associations, trustees, and other legal entities holding property for charitable purposes, commercial fundraisers for charitable purposes, fundraising counsel for charitable purposes, and commercial covertures. (Gov.C. §§ 12581.)
 - b) Vests the primary responsibility for supervising charitable trusts in California, for ensuring compliance with trusts and articles of incorporation, and for protection of assets held by charitable trusts and public benefit corporations, in the Attorney General, and provides that the Attorney General has broad powers under common law and California statutory law to carry out these charitable trust enforcement responsibilities. (Gov.C. § 12598(a).)
- 2) Requires the Attorney General to maintain a register of charitable corporations, unincorporated associations, and trustees subject to the Act and of the particular trust or other relationship under which they hold property for charitable purposes. (Gov.C. §§ 12584.)
- 3) Requires, generally, every charitable corporation, unincorporated association, and trustee subject to the Act to file with the Attorney General periodic written reports, under oath, setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation, unincorporated association, or trustee, in accordance with rules and regulations of the Attorney General. Requires the Attorney General to make rules and regulations as to the time for filing reports, the contents thereof, and the manner of executing and filing the reports. (Gov. C. § 12586(a)&(b).)
- 4) Prohibits certain acts and practices in the planning, conduct, or execution of any solicitation or charitable sales promotion including:
 - a) misrepresenting or misleading anyone in any manner to believe that any other person sponsors, endorses, or approves a charitable solicitation or charitable sales promotion when that person has not given consent in writing to the use of the person's name for these purposes; and
 - b) representing that any part of the contributions solicited by a charitable organization will be given or donated to any other charitable organization unless that organization has consented in writing to the use of its name prior to the solicitation. The written consent shall be signed by one authorized officer, director, or trustee of the charitable organization. (Gov. C. § 12599.6(f)(5)&(11).)

This bill:

- 1) Establishes that charitable fundraising platforms and platform charities are trustees for purposes of the Act and subject to the supervision of the Attorney General.
 - a) Defines a charitable fundraising platform to mean any person, corporation, unincorporated association, or other legal entity that uses the internet to provide an internet website, service, or other platform to persons in this state, and performs, permits, or otherwise enables acts of solicitation to occur, which includes the following and any similar activity:
 - i. lists one or more recipient charitable organizations to receive donations or grants of recommended donations made by donors who use the platform;
 - ii. permits persons who use the platform to solicit donations for or recommend donations to be granted to one or more recipient charitable organizations through peer-to-peer charitable fundraising;
 - iii. permits persons who use the platform to select one or more recipient charitable organizations to receive donations or grants of recommended donations made by a platform, platform charity, or other third party person, based on purchases made or other activity performed by persons who use the platform;
 - iv. lists one or more recipient charitable organizations to receive donations or grants of recommended donations made by the platform based on purchases made or other activity performed by persons who use the platform; and
 - v. provides to charitable organizations a customizable internet-based website, software as a service, or other platform that allows charitable organizations to solicit or receive donations on or through the platform, including through peer-to-peer charitable fundraising. The customizable platform provided by the charitable fundraising platform does not include the charitable organization's own platform, but may integrate with the charitable organization's platform.
 - b) "Charitable fundraising platform" does not include any of the following:
 - i. a charitable organization's own platform that solicits donations only for itself;
 - ii. a vendor that solely provides technical or supportive services to a charitable fundraising platform so that the charitable fundraising platform can function and operate, including vendors used for hosting or domain services, security certificates, internet access, internet application development, or digital payment processing; however, if that vendor also performs, permits, or otherwise enables acts of solicitation on its own platform to persons in this state, it is a charitable fundraising platform for its own platform; or

- iii. a sponsoring organization of donor-advised funds, as defined in subdivision (d) of Section 4966 of the Internal Revenue Code, that solicits donors to formally open donor-advised fund accounts or similar accounts, receives recommendations from donors on charitable organizations that may receive grants of funds previously deposited in a donor's donor-advised fund account, and the sponsoring organization does not list one or more recipient charitable organizations for solicitation purposes on its platform for persons who are not already donor-advised fund account holders.
 - c) Defines platform charity to mean a trustee or a charitable corporation that facilitates acts of solicitation on a charitable fundraising platform, which includes either of the following and any similar activity:
 - i. solicits donations through a charitable fundraising platform for itself from donors who use the charitable fundraising platform with the implied or express representation that the platform charity may grant donations to recipient charitable organizations; and
 - ii. grants funds to recipient charitable organizations based on purchases made or other activity performed by persons who use a charitable fundraising platform.
 - d) A platform charity does not include a sponsoring organization of donor-advised funds, as defined in subdivision (d) of Section 4966 of the Internal Revenue Code, that solicits donors to formally open donor-advised fund accounts or similar accounts, receives recommendations from donors on charitable organizations that may receive grants of funds previously deposited in a donor's donor-advised fund account, and the sponsoring organization does not list one or more recipient charitable organizations for solicitation purposes on its platform for persons who are not already donor-advised fund account holders.
- 2) Requires a charitable fundraising platform to register with the Attorney General before soliciting, permitting, or otherwise enabling solicitations, as specified.
- 3) Requires a charitable fundraising platform to file annual reports, under oath, with the Attorney General's Registry of Charitable Trusts on a form provided by the Attorney General that is to include specified information.
- 4) Requires a charitable fundraising platform and platform charity to only solicit, permit, or otherwise enable or receive, control, or distribute funds from donations for recipient charitable organizations or other charitable organizations in good standing.
- 5) Requires a charitable fundraising platform or platform charity to make certain disclosures before a person can complete a donation or select or change a recipient charitable organization, and provide conspicuous disclosures that prevent a likelihood of deception, confusion, or misunderstanding.

- 6) Requires a charitable fundraising platform or platform charity that solicits, permits, or otherwise enables solicitations to obtain the written consent of a recipient charitable organization before using its name in a solicitation. Written consent is not required if all of the following are met:
 - a) the charitable fundraising platform or platform charity only lists the recipient charitable organization's name, address information, employer identification number, corporation or organization number, or registration number with the Attorney General's Registry of Charitable Trusts;
 - b) the charitable fundraising platform or platform charity conspicuously discloses before persons can complete a donation, or select or change a recipient charitable organization, that the recipient charitable organization has not provided consent or permission for the solicitation, and has not reviewed or approved the content generated by persons engaging in peer-to-peer charitable fundraising, when applicable;
 - c) no fees can be deducted from the donation or a grant of the recommended donation that are charged by the charitable fundraising platform, platform charity, or any other partnering vendor, other than digital payment processing fees; however, fees added to the donation or a grant of the recommended donation are not prohibited by this subparagraph;
 - d) the charitable fundraising platform or platform charity shall remove any recipient charitable organization from its list or any solicitation regarding the recipient charitable organization upon written request by the recipient charitable organization, and verification that the request is legitimate. Requests shall be promptly verified and it shall take no longer than three business days for removal to occur; and
 - e) the charitable fundraising platform or platform charity shall not require that a recipient charitable organization consent to any solicitations as a condition for accepting a donation or grant of a recommended donation.
- 7) Requires charitable fundraising platforms and platform charities to promptly provide a tax donation receipt, as provided.
- 8) Prohibits a charitable fundraising platform or platform charity from diverting or otherwise misusing the donations received through solicitation on the charitable fundraising platform.
 - a) Donations must be held in a separate bank account from other funds belonging to the charitable fundraising platform or platform charity.
 - b) The charitable fundraising platform or platform charity is required to promptly ensure donations and grants of recommended donations are sent to recipient charitable organizations with an accounting of any fees imposed for processing the funds, and in accordance with any rules and regulations established by the Attorney General.
- 9) Requires the contracts of a charitable fundraising platform or platform charity that contracts with vendors to solicit, receive, control, process, distribute, and otherwise

account for donations on the charitable fundraising platform to be available for inspection by the Attorney General.

- 10) Requires the Attorney General to establish rules and regulations necessary for the administration of these provisions, including, but not limited, to the following.
 - a) The additional acts of solicitation that meet the definition of a charitable fundraising platform or platform charity, as needed, in order to address changes in technology and charitable fundraising through platforms;
 - b) The content of the form and other information to be provided by a charitable fundraising platform for registration with the Attorney General's Registry of Charitable Trusts, including all of the following:
 - i. the manner and timing of the filing of registration;
 - ii. the handling of confidential trade secrets or personal information provided as part of registration; and
 - iii. the circumstances when additional registration as a commercial fundraiser for charitable purposes, a fundraising counsel for charitable purposes, or a commercial coventurer may be unnecessary as acts of solicitation other than those described under the definition of a charitable fundraising platform.
 - c) The content of the form and other information to be provided by a charitable fundraising platform or platform charity in annual reports filed with the Attorney General's Registry of Charitable Trusts, including all of the following:
 - i. the manner and timing of the filing of the reports;
 - ii. the circumstances under which partnering charitable fundraising platforms or platform charities may submit an annual report on behalf of other charitable fundraising platforms, if any; and
 - iii. the payment of fees to cover the reasonable costs to administer and enforce these provisions.
 - d) The requirements for any written agreement between a recipient charitable organization and a charitable fundraising platform or a platform charity that provides consent for or otherwise applies to solicitations for donations, including permitting those agreements to be entered into electronically.
 - e) The requirements for holding donations or distributing donations and grants of recommended donations, including all of the following:
 - i. the maximum length of times it takes to send the donated funds, taking into consideration the acts of solicitation described in the definition of charitable fundraising platform, the number of donations made through a charitable fundraising platform or platform charity, whether donations are made to the charitable fundraising platform, platform charity, recipient charitable organizations, other charitable organizations, or persons engaging in peer-to-peer charitable fundraising, whether the recipient charitable organization has provided consent for a solicitation, and

- whether donations are sent to alternate recipient charitable organizations;
- ii. the circumstances under which donors or persons may be contacted to provide alternate recipient charitable organizations or notified when the donated funds are sent; and
 - iii. the circumstances when donor or personal information may be provided to recipient charitable organizations.

COMMENTS

1. Stated need for the bill

The author writes:

AB 2208 provides a necessary update to California's charitable fundraising laws to ensure donors, non-profits, and online charitable fundraising platforms can continue their philanthropic work in our state. Californians embrace technology in many aspects of their lives, and over the past few years technology has dramatically changed the ways in which donors can provide critical funds to the non-profit sector. By creating new definitions, requirements, and transparency measures that fit with new online methods of giving, Californians can donate with renewed confidence that their support of these important causes are having an impact.

2. Regulating currently unregulated internet platforms soliciting charitable donations

The bill seeks to address the current lack of oversight over internet websites, services and, platforms that perform, permit, or otherwise enable acts of charitable solicitation to occur in this state. The bill accomplishes this by creating a regulatory framework under the Act that requires charitable fundraising platforms and platform charities to register with the Attorney General before soliciting charitable donations and submit reports about their activities. Further, the bill defines the types of acts that make an entity a charitable fundraising platform or platform charity and enacts several consumer protections, such as specific disclosure requirements to donors, only allowing charitable fundraising platforms and platform charities to solicit for charities in good standing, and that funds solicited on behalf of a charitable organization must be kept separate from funds of the charitable fundraising platform or platform charity. "Good standing" means that a platform charity, recipient charitable organization, or other charitable organization's tax-exempt status has not been revoked by the Internal Revenue Service, or the Franchise Tax Board, or has not prohibited from soliciting or operating in the state by the Attorney General.

Generally, a charitable fundraising platform is the consumer facing internet website or platform that is soliciting donations for charitable organizations. This can be done through several methods: providing donors a database or list of one or more charitable organizations to receive donations; crowdfunding or peer-to-peer campaigns where a

person is encouraged to use their social network or other connections to solicit donations; or supporting charities through purchases, whether by adding a donation at the end of a purchase or having a donation made by an entity itself based on how much a person purchases on the entity's platform or website. Examples of charitable fundraising platforms include Amazon, Benevity, Charity Navigator, CrowdRise, eBay, Facebook, GoFundMe, Google, GuideStar (Candid), Lyft, Overstock, and PayPal.

Some of these companies are not charities themselves and therefore partner with fundraising platforms whose purpose is to facilitate online charitable giving. For example, a donation made through a charitable fundraising platform may actually be made to a partner platform charity that generally is a registered 501(c)(3) organization and not directly to the charity chosen. The platform charity then facilitates getting the donation to the chosen charity; however, it can take several weeks to months for the actual donation to be paid out to the charity chosen by the donor. Some charitable fundraising platforms do partner with charities and collect donations on their behalf and do not use a partner platform charity, while others have a hybrid model where they collect for some charities directly and use partner platform charities for other donations. Because many platform charities are registered 501(c)(3)s, the bill only requires platform charities to register with the Attorney General if they are not otherwise already registered. The bill additionally requires a platform charity to have good standing in order to facilitate acts of solicitation.

The bill also allows a charitable fundraising platform or platform charity to solicit donations on behalf of a charitable organization without their prior written consent if certain conditions are met. These conditions include that only certain information for the charitable organization is listed, that a conspicuous disclosure is placed before donations can be completed that states the charitable organization has not provided consent or permission for the solicitation, and that no fees can be deducted from the donation or grant other than digital processing fees. However, fees added to the donation or grant are allowed. Some charitable fundraising platforms create a database of charities from electronic lists periodically published by the Internal Revenue Service or other governmental entities and do not seek written consent from every charity on the list prior to uploading a charity to their databases. The bill provides a mechanism for a charitable organization to contact the charitable fundraising platform or platform charity to remove their organization from the platform and requires verification that the request is legitimate and for the name of the charitable organization to be removed within three business days of verification.

Due to the complicated and varied nature of how these online donations are being solicited and made, it is important for there to be appropriate oversight mechanisms to ensure consumers are aware of how their donations are being handled and that the funds being collected for charities are actually being received by them.

3. Concerns from stakeholders

The provisions of the bill are the result of negotiations between the author's office and sponsor's office with numerous stakeholders, including internet websites and platforms and organizations representing charities. The Assembly Committee on Judiciary analysis highlighted several concerns raised by various stakeholders. The bill has been amended since it was heard in the Assembly to address several of those concerns. Nevertheless, TechNet and the Internet Association remain in opposition unless the bill is amended further to address several issues. These issues include the definitions of charitable fundraising platform and platform charity, which they believe are overlapping, duplicative and overbroad, and the definition of good standing, which they claim could be potentially onerous. It is unclear how the definition of good standing is onerous as it merely requires that a platform charity, recipient charitable organization, or other charitable organization's tax-exempt status not be revoked by the Internal Revenue Service, or the Franchise Tax Board, or has not been prohibited from soliciting or operating in the state by the Attorney General. This seems like a common sense consumer protection to prevent money going to organizations that are not qualified charitable organizations.

Another concern raised by TechNet and the Internet Association was the dual registration requirement for charitable fundraising platforms and platform charities. The current version of the bill only requires a platform charity to register with the Attorney General if it is not already registered under the Act. TechNet and the Internet Association also have concerns with the open-ended nature of what information would be required in annual reports, the limitation on publicly available information about a charity that can be shared without getting prior written consent from the charity, a disclosure that they argue could discourage donations, the limitation on fees in certain circumstances, the timeline for implementing the provisions (they are seeking a delay in operation of the bill in order to align their current processes with the bills' requirements and potential regulations), and the broad authority given to the Attorney General's office to adopt regulations through the rulemaking process. PayPal, Inc. and PayPal Charitable Giving Fund write saying they are in support of the bill if it is amended to address many of the same concerns raised by TechNet and the Internet Association.

Also in opposition are Charity Navigator and Network for Good which have several concerns including duplicative reporting requirements, requirements they claim threaten essential sources of revenue, and provisions that disadvantage peer-to-peer fundraisers and nonprofits that do not have resources to build compliant digital programs. Charity Navigator and Network for Good function as both charities and charitable fundraising platforms and are concerned about dual registration and having to submit duplicative financial reporting requirements, which they claim is burdensome and will be unlikely to provide any more useful information than they already provide to the Attorney General. They also have issues with the prohibition on deducting fees from donations if they do not have the advance written consent of a charity claiming it is burdensome and immaterial if a donor knows that fees are being deducted. It is

unclear why this is a major issue as the bill allows for fees to be added to the cost of making the donation, so an entity can still collect fees to cover their administrative costs, they just have to add them to the donation not deduct them from the donation if they do not have prior written consent. Lastly, they feel that the disclosure language required to be made if a platform does not have prior written consent of a charity is “menacing” and could cause donors to choose to not donate funds, and would prefer a more generic statement that a designated charity may be unaware of their inclusion on the platform.

This Committee was also approached by Omaze, which has not officially registered opposition to the bill, regarding a concern it has related to dual registration for commercial fundraisers already registered under the Act. Omaze is a commercial fundraiser registered with the Attorney General under the Act that is an online fundraising platform that offers merchandise and campaigns in support of charitable causes – many of the campaigns involve buying entries for the chance to win an experience with a celebrity, such as a set visit, dinner, or tickets to a premiere. Omaze is a for profit company that states on its website that for every \$10 contributed for the chance to win an experience \$6 is donated to charity, \$2.50 on average is used for marketing expenses and credit card fees, and the remaining \$1.50 is remitted to Omaze. The bill provides various carve-outs for other already registered entities, such as sponsoring organizations of donor advised funds and a charitable organization’s own platform that solicits donations for itself. The bill also does not require a platform charity to register with the Attorney General if it is already registered under the Act. The bill provides that the Attorney General is to issue various regulations to implement the bill’s provisions, including regulations regarding the circumstances when additional registration as a commercial fundraiser for charitable purposes may be unnecessary; however, no guidance is given on how the Attorney General is to make that determination. In light of the carve outs for other already registered entities under the Act and the stated purposes of the bill, the author and sponsor may wish to consider whether dual registration for commercial fundraisers already registered under the act should be explicitly not required under the provisions of the bill.

4. Statements in support

Attorney General Xavier Becerra, the sponsor of the bill, writes:

AB 2208 (Irwin) provides the Attorney General’s Office (AGO) much needed oversight of charitable fundraising on Internet platforms. The bill seeks to ensure transparency and protect California donors from deceptive or misleading charitable solicitations.

In recent years, Internet companies have developed new methods for individuals to support charities through websites and phone applications that serve as “charitable fundraising platforms” in ways that current solicitation laws, adopted before the

Internet age, do not specifically reach. In short, existing law has been ineffective at curtailing certain problems because it is simply outdated.

In order to ensure the AGO's ability to protect the public, our office needs to be able to oversee charitable fundraising practices that occur on Internet platforms and to respond nimbly to new concerns wherever they arise. However, the AGO cannot effectively do so unless there is a framework that specifically defines these new platform entities and requires them to register with our office – something that other charities, trustees, and commercial fundraisers must already do under existing law.

AB 2208 establishes this framework by:

- Defining two new entities (“charitable fundraising platforms” and “platform charities”) that are subject to requirements under this bill.
- Requiring covered entities to provide meaningful and conspicuous disclosures on the platforms, and to promptly distribute donations.
- Prohibiting solicitations for any charity not in good standing with the Attorney General's Registry of Charitable Trusts.
- Permitting some instances of soliciting for a charity without prior consent if certain criteria that safeguard against harm to charities and the public are met.
- Authorizing the AGO to promulgate regulations to address additional issues.

Attorney General Becerra is proud to sponsor AB 2208, and reaffirms his commitment to promote transparency, guard the public from fraud or misrepresentation, and ensure a level playing field.

The National Association of State Charities Officials write in support, stating:

The National Association of State Charities Officials (NASCO) is an association of state offices (attorneys general, secretaries of state and other offices) charged with the regulation and oversight of charitable organizations and charitable solicitation in the United States. As state regulators, we have witnessed the impact of the internet on charitable fundraising over the past 20 years. Charitable fundraising is no longer limited to solicitations through telephone, direct mail, or even a charity's own website. Fundraising through third party websites, social media apps, and live video streaming have become the norm. The sheer volume of charitable solicitations made through online fundraising has exploded; most recently, for solicitations concerning the COVID-19 and the civil rights crises. This issue is so important that NASCO has formed a working group to look at the breadth of charitable giving through the internet, the regulatory and enforcement challenges this presents, and the need for states to address it [...]

NASCO believes that these issues require a legislative solution to protect of charities and the public, and to provide the platforms with a regulatory scheme that fit their

business model. Assembly Bill 2208 represents a thoughtful and comprehensive approach to address these problems.

5. Statements in Opposition

TechNet and the Internet Association write in opposition unless the bill is amended to address the concerns described in Comment 3 above, stating:

Our member companies work with their customers and partners to raise and process billions of dollars in donations for nonprofits. Now, more than ever, this has been especially highlighted during the COVID-19 crisis and the recent civil rights movement when nonprofits are raising money to support those on the frontlines and in local communities. We want to ensure that the provisions on AB 2208 do not negatively impact the successful fundraising efforts that have been realized through platforms [...]

Overall, our goal is to ensure that AB 2208 enhances online charitable fundraising efforts that benefit platforms, donors, and charities alike. We believe the requirements set forth in this bill as written would have a chilling effect on charitable giving, overburden platforms, and force them to reevaluate the viability of their successful charitable structures.

SUPPORT

Attorney General Xavier Becerra (sponsor)
California Association of Nonprofits
National Association of State Charities Officials

OPPOSITION

Charity Navigator
Internet Association
Network for Good
TechNet

RELATED LEGISLATION

Pending Legislation:

None known

Prior Legislation:

AB 1539 (Irwin, 2019) would have required a charitable organization to obtain the written consent of another charitable organization before using its name in a solicitation through means of the internet, unless the soliciting organization meets specified

requirements, and would have required a charitable organization soliciting pursuant to these provisions to file an annual report, under oath, that contains specified information with the Attorney General's Registry of Charitable Trusts. The bill was held in the Assembly Committee on Privacy and Consumer Protection.

AB 2556 (Irwin, 2018) would have authorized under the Act the ability to engage in charitable crowdfunding solicitations by a new category of persons raising money for charitable purposes called crowdfunding solicitors for charitable purposes, subject to various registration and reporting requirements. The bill died in the Assembly Appropriations Committee.

PRIOR VOTES:

Assembly Floor (Ayes 62, Noes 13)

Assembly Appropriations Committee (Ayes 14, Noes 4)

Assembly Judiciary Committee (Ayes 8, Noes 2)
