

HOW CAN WE HELP?

*Ethics Issues in Disaster Relief**

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The September 11, 2001, attack brought forth great changes in the United States, some of which we are only now beginning to comprehend. Response to the tragedy served to illustrate the immense capacity of the American people to come to the aid of those who have been affected by the attack. On their own initiative, thousands of people, organizations and businesses donated food, services, money, property and their time and expertise, not only to the victims and their families, but to federal agencies that were affected as well. Donations included everything from food for the disaster relief workers to free concerts to raise money for the victims to free materials to rebuild the Pentagon.

Because many of the donations were offered to federal employees or agencies, acceptance of the donations was regulated primarily by The Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, (the “Standards”) and various statutes that authorize individual agencies to accept gifts. Identifying the appropriate regulations and statutes, and applying them in an emotionally charged atmosphere such as that which followed the September 11th attack, can be difficult and error-prone. This article is based on our (recent) experiences and (even more recent) research in an effort to assist federal ethics officials in the

* *The views expressed in this article are solely those of the authors and do not necessarily reflect the policies of the Department of the Navy or the Department of Defense.*

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future, when they find themselves involved in disaster relief. Our goal is to highlight common issues and suggest how best to resolve them.

SETTING THE STAGE

Perhaps the most unsettling initial aspect of disaster relief is that cool, dispassionate and leisurely research and decision-making is not an option. People are energized, excited, and give great weight to emotion. Some are scared and others feel overwhelming empathy for the victims. Everyone is in the “Do it now!” mode. Ethics officials will quickly find that “no” is not the answer. They will need to find an acceptable “yes” answer. In these circumstances, due to the high level of emotion and urgency, warning that the acceptance of such gifts may violate the Standards may cause agency officials to ignore your advice and challenge your credibility. A far better solution is to assist them in finding a way either to accept the offer, or a way to assist the donor to refashion the offer so that it complies with regulations. To accomplish this goal, we propose the following steps.

#1: Prepare. Start with this outline. Place the regulations cited in one folder marked for disaster relief. Gather any supplemental regulations specific to your agency, and add them to your disaster relief file.

#2: Don’t wait for the phone to start ringing. As soon as the disaster occurs, lay the groundwork. The public affairs staff is the public face of the agency, and offers for donations or inquiries regarding what help is needed will likely come to their offices. Meet with the public affairs professionals to educate them on the possible offers that they are likely to encounter. Explain the options available. Provide them with a checklist summarizing your guidance.

#3: Establish one point of contact. Establish one point of contact within your agency for all offers of assistance. This may be difficult since everyone wants to get into the act. However, establishing this contact is crucial in order to ensure proper coordination, supervision, and handling of gifts and offers.

#4. Prime the pump. The paragraphs below discuss some of the common issues that are likely to arise in a disaster situation.

FUNDRAISING

One of the first questions you are likely to get from within the agency is, "Can we collect money/do a fundraiser to help the victims?" The key approach in fundraising should be: Leave it to the professionals! Fundraising is complex, presents a legal minefield, and offers substantial opportunity for personal liability and criminal mischief. The best advice we can give is to identify those tax-exempt charitable organizations whose charter includes the victims of the disaster, and encourage those organizations to actively support the victims of the disaster. Once those organizations have been identified, direct donors to those organizations. To avoid giving preferential treatment to any particular organization, establish some objective and relevant criteria by which you identify such organizations. An example could be all tax-exempt charitable organizations that have established funds for relief of the victims of the disaster. In this manner, you remove your agency from involvement in the fundraising and distribution process.

Established charitable organizations have the tax-exempt status, manpower, expertise and administrative machinery to collect, distribute and account for donations. In addition, donations to tax-exempt charitable organizations may be deducted from the donor's income tax and are not

subject to the gift tax. Furthermore, the recipients of aid distributed by a tax-exempt charitable organization do not have to recognize such gifts as income for income tax purposes.

If you must conduct fundraising within the agency, consult the Combined Federal Campaign (“CFC”) Office of the Office of Personnel Management (“OPM”). The references pertinent to such fundraising are listed below.

- Executive Order 12404, Charitable Fundraising (February 10, 1983)
- Executive Order 12353, Charitable Fundraising (March 23, 1982)
- 5 C.F.R. Part 950, Solicitation of Federal Personnel for Private Voluntary Charitable Organizations
- 5 C.F.R. §2635.808, Fundraising Activities
- 41 CFR §§101-20.308, Soliciting, vending, and debt collection. (GSA Regulation applicable in GSA owned or controlled buildings)

As a general rule, fundraising in the federal workplace other than the CFC, is prohibited. However, the Director of OPM may approve special solicitations of federal employees in the workplace for emergencies and disaster relief outside of the CFC. If your agency and its personnel are directly involved in a disaster, and a special solicitation is desired, contact OPM's Director at 202-606-2564 to discuss obtaining an approval.

Reviewing the Director of OPM's authorizations for disaster relief over the last several years is instructive. The solicitation authorization from the Director of OPM on September 12, 2001, is narrowly drafted and requires further implementation by each Agency Head. It did not authorize unfettered fundraising in the workplace, but instead approved only a "one-time special solicitation."

When OPM issues an authorization, you must be prepared to brief your agency officials on the limits of such an authorization. These may include the requirement for the Agency Head to issue a decision memorandum authorizing the solicitation within the agency, the ability of the Agency Head and other agency employees to endorse the solicitation officially, and limitations on use of Government resources in support of the fundraising effort. An important resource document in preparing such a brief is the Department of Justice memo from Stuart Frisch, "Use of Appropriated Funds to Purchase Combined Federal Campaign Incentive Awards and Event Items" of December 10, 1996. The memo outlines the limits of official support for the CFC, but is instructive in disaster relief fundraising as well.

Particular care should be given to 5 C.F.R. §905.108 to avoid coercive solicitation. In the superheated emotional environment after a disaster, pressures to ensure financial participation by all employees of an agency can be formidable. Another addition to your disaster relief file should be OGE's discussion of 5 C.F.R. §2635.808(b), Fundraising in an Official Capacity, found in OGE Opinion 93x19.

The one significant exception to the applicability of the general restrictions on fundraising and solicitation in the workplace is the leeway given in 5 C.F.R. §950.102(d) for fundraising for organizations "composed of civilian employees or members of the uniform services *among their own members* for organizational support or for the benefit of welfare funds for their members." (Emphasis added). These efforts are exempted from OPM oversight and regulation, provided the head of the department or agency has established policies and procedures applicable to such solicitations, for example, Department of Defense Regulation 5500.7-R (Joint Ethics Regulation), Secretary of the Navy Instruction 5340.1, Active Duty Fund

Drive in Support of the Navy-Marine Corps Relief Society. This can be an important avenue to permit your agency personnel to come to the aid of victims closely connected to the agency.

While fundraising in the workplace in a purely personal capacity is prohibited by 5 C.F.R. §950.102, collection of gifts-in-kind (for example, food, toys or clothing) is not prohibited. That said, some practical considerations might impact the authorization decision. You should establish how the gathered items will be removed from the government workplace to the intended beneficiary (organization or individual victims), as well as guard against preferential treatment issues, as there may be numerous similarly situated organizations that could request comparable support.

Fundraising efforts also will occur in the community. Senior officials of the affected agency or other employees, who become publicly identified with the disaster, may receive invitations to attend dinners, auctions or concerts, and to address the fundraising crowd. The senior officials often are the "draw" for the fundraising event. Such support to private fundraising events is generally prohibited by 5 C.F.R. §2635.808, except for the purpose of giving official speeches. Government personnel have enthusiastically participated in their personal capacity in these events in the past.

Ethics counselors should highlight that knowing solicitation of subordinates and prohibited sources even for disaster relief is prohibited by 5 C.F.R. §2635.808(c). (However, these prohibitions do not apply to family members of federal employees, assuming the family members are not themselves federal employees.)

While official endorsement of fundraising events outside CFC is generally prohibited, using agency communications channels to make announcements about events of general interest to the agency community may be permissible. Central management of such announcements is

key to avoiding preferential treatment and avoiding the appearance of endorsement. Ensure that your agency has an articulated policy limiting use of agency intranet resources to send a universal announcement, and a screening process before release of an announcement that includes your review. We advocate a "just the facts, Ma'am" approach to the announcements to prevent inadvertent endorsement. Drawing a bright line defining what language constitutes an endorsement is difficult, as it is very contextually driven, but to paraphrase Justice Potter, "We know it when we see it!"

ACCEPTANCE OF GIFTS

In addition to the surge of fundraising activity, a disaster evokes an outpouring of generosity. Many gifts are offered directly to victims and rescue personnel. The following points are important regarding gifts.

#1: The rules in 5 C.F.R. §2635 subpart B (Gifts from Outside Sources) only apply to federal employees. They do not apply to employees of other jurisdictions (such as local firefighters) or families of deceased federal employees.

#2: For gifts offered to federal employees, use the guidance in 5 C.F.R. §2635 subpart B. Several exceptions often apply. Gifts under \$20 (such as free food offered at the disaster site), and benefits offered by a donor who is not a prohibited source to a group that is not defined by official responsibility or rank (such as all victims or relief workers) (5 C.F.R. §2635.204(c)(2)(iii)) may be accepted.

#3: If a donor is a prohibited source (defined in 5 C.F.R. §2635.203(d)), some gifts may be difficult to accept pursuant to the regulations. An alternative is for the donor to give them to a

relief society or charity, who then passes them on to the intended recipients. Usually, such charities are not prohibited sources.

#4: You can look hard, but there is no “Disaster Relief Exception” to the regulations on acceptance of gifts from outside sources.

#5: If the employees may not accept certain gifts, review your agency gift-acceptance authority. It is possible that the agency may accept the offer and use it in a manner that will suite the donor’s purpose.

TANGENTIAL MATTERS (THINGS YOU PROBABLY DIDN’T THINK ABOUT)

Privacy Act: Donors or charitable organizations may request names, phone numbers, and home addresses of victims. However, ensure any release of information complies with the Privacy Act (5 U.S.C. §552(a)). If your agency has personnel assigned as liaisons to families of deceased members, consider drafting a release document for use by the families authorizing the agency to provide that information to legitimate organizations. This will help you to streamline the process of connecting eligible beneficiaries with appropriate non-federal organizations.

Federal Claims Procedures: Personnel who lose personal property while performing official duties may be eligible for compensation pursuant to various claims authorizations.

New charities: People often become enthused about establishing a new charity specifically for the victims of the disaster. We reiterate the advice to stick to the professionals. Usually, there are many worthy existing organizations, whose defined beneficiary group includes the victims of the disaster. These organizations offer efficient administration and, most importantly, experience in the identification of eligible beneficiaries and appropriate distribution. Creating a new organization and gaining recognition under both state law and from the Internal

Revenue Service as a charitable organization can be intricate and time-consuming. Distribution of charitable relief may have unintended tax consequences to the beneficiaries. A full discussion of tax considerations is beyond the scope of both this article and our expertise. Fortunately, the Internal Revenue Service has provided an invaluable resource, a publication entitled, "Disaster Relief: Providing Assistance Through Charitable Organizations," available electronically at the IRS Web site, <http://www.irs.gov>.

Legitimate charities? Unfortunately, every disaster also brings out some people looking to capitalize on others' misfortune. As noted in the discussion above on the Privacy Act, many organizations will come forward making generous offers. While most organizations are legitimate, scrutiny of unknown organizations is appropriate. You can also assist your agency personnel by educating them on avoiding fraudulent solicitations. Most states have statutory and regulatory requirements for charitable solicitation, and may have a particular office to handle both registration and complaints. A good resource document on examining charities is "Avoiding Charity Fraud and Misinformation from Non-Profits on the Internet. (Directory)," found at http://www.findarticles.com/cf_dls/m0DPC/7_8/63993325/print.jhtml.

There are additional Web sites for more information on checking on charities involved in current relief efforts:

- <http://www.ftc.gov/bcp/online/pubs/tmarkg/charity.htm>
- <http://www.bbb.org/alerts/terror.asp>
- <http://www.give.org/artwgggregchar.cfm>

GIFTS TO AGENCIES

In addition to gifts to individual employees, donors also may offer gifts to the agency itself, such as assistance in rebuilding public buildings or replacement of destroyed public property. Because these are gifts to the government, they may be accepted only in accordance with specific statutory authority for the agency to accept gifts. The statutes define what gifts the agency may receive, from whom they may accept gifts, and how the gifts will be administered. Be sure to include this guidance in your disaster relief file.

Offers of free services, such as offers to reprogram computers or to repair damaged equipment, also require statutory acceptance authority. Generally, 31 U.S.C. §1342 bars the acceptance of voluntary services. Some agencies have limited statutory authority to accept voluntary services. If your agency has such authority, be sure to include it in your disaster relief file.

A secondary issue that often accompanies the acceptance of a gift is the expectation by the donor that the agency will appropriately recognize the donor for its generosity. While such recognition may be appropriate, beware that it doesn't constitute an endorsement, prohibited by 5 C.F.R. §2635.702. Generally, statements thanking the donor for its contribution, even identifying the gift and how it will be used by the agency, will not be an endorsement.

Other likely gift offers include proffers of free tickets from airlines, free lodging from hotel chains, free car rentals from rental companies, and free meals from restaurants. The agency may be able to use the authority to accept gifts of travel and travel-related expenses contained in 31 U.S.C. §1353 to utilize these gifts for the benefit of victims and family members, as long as such benefits involve persons conducting official travel. The aftermath of a disaster frequently requires meetings and conferences between those affected and the agency.

COMMEMORATIVE ACTIVITIES

Afterwards, there may be numerous public and private events to commemorate and honor the deceased, the injured and rescue workers. If the event is an official ceremony, appropriated funds may be used where authorized. If the event is sponsored by a private organization, additional scrutiny is necessary to ensure that government funding and resources are only used for authorized purposes. The most common expense is for transportation of agency personnel to these events. For guidance on providing transportation to attend a funeral or memorial, *see* Matter of: Danny H. Breuninger - Travel Allowances - Attending Funeral as Agency Representative, B-239887 Comptroller General of the United States, 70 Comp. Gen. 200; 1991 U.S. Comp. Gen. LEXIS 119, January 25, 1991.

BOTTOM LINE

Disasters are difficult enough for everyone involved without having disaster relief turn into a catastrophe. To avoid this, we recommend that you prepare now, keep a cool head, and use the professionals. We also sincerely hope that you never have to use your disaster relief file.

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