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**ONTARIO BAR ASSOCIATION (OBA)**  
Luncheon

**November 13, 2012**

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**Practical Issues Arising from  
the CRA Guidance on Fundraising**

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*By*  
***Terrance S. Carter – Carters Professional Corporation and  
M. Elena Hoffstein – Fasken Martineau DuMoulin LLP***

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**SELECT TOPICS TO BE CONSIDERED**

- Overview of the New CRA Guidance on Fundraising
- Related Business and Fundraising
- Proper Allocation of Fundraising Expenditures
- Fundraising Ratio Considerations
- The Importance of Maintaining Records Relating to Fundraising Activities
- Inclusion of Expanded CRA Policies
- Disclosure of Fundraising Costs and the Gour Decision
- Other Issues (if time permits)



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**A. OVERVIEW OF NEW CRA GUIDANCE ON  
FUNDRAISING**

**1. Introduction**

- From the media's perspective fundraising is the number one compliance issue for charities
- Revised Fundraising Guidance released in April 2012
- The new Guidance is a significant improvement but is still a long document at 32 pages
- Although much improved, the new Guidance is still a complex document and therefore requires careful reading
- The Guidance will have impact on current CRA audits, not just future audits
- The Guidance applies to all registered charities and to both receipted and non-receipted fundraising



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- The Guidance is more directive than previous versions
- Charities must still meet their other obligations, including the 3.5% disbursement quota
- An organization carrying out unacceptable fundraising may face denial of charitable registration or, for registered charities, sanctions or even revocation of charitable status
- The fundraising ratio referenced in this Guidance forms part of a charity's T3010, which is made available to the public on the web
- Failure to correctly record fundraising revenues and expenditures now results in suspension of receipting privileges
- It is therefore important for the board of a charity to review and approve its T3010 before filing it with CRA

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**2. What is Fundraising?**

- In general, fundraising is any activity that includes solicitation of present or future donations of cash or gifts in kind, or the sale of goods or services to raise funds, whether explicit or implied
- For the purpose of the Guidance, fundraising does not include (i.e. to be excluded from revenue and expenses)
  - Seeking grants, gifts, contributions, or other funding from other charities or government
  - Recruiting volunteers (except for fundraising volunteers)
  - Related business activities

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- Examples of fundraising activities
  - The sale of goods or services
  - Donor stewardship
  - Membership programs
  - Cause-related marketing/social marketing ventures
  - Planning or researching fundraising activities
  - Donor recognition

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**3. When is Fundraising not Acceptable?**

- The following conduct will be prohibited and will be grounds for revocation of a registered charity's status, imposition of sanctions or other compliance actions, or denial of charitable registration
  - Fundraising that is a purpose of the charity (a collateral non-charitable purpose)
  - Fundraising that delivers more than an incidental private benefit
  - Fundraising that is illegal or contrary to public policy
  - Fundraising that is deceptive
  - Fundraising that is an unrelated business

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**4. Allocating Fundraising Expenditures**

- Registered charities must report fundraising expenditures (all costs related to any fundraising activity) on their annual T3010
- Where some fundraising activities include content that is not related to fundraising, some of these costs may be able to be allocated to charitable activities, management or administrative activities, or political activities
- Onus is on the charity to explain and justify the allocation
- The following are CRA's guidelines for allocation
  - 100% allocation to fundraising
  - No allocation of costs to fundraising
  - Pro-rated allocation of costs

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**5. Evaluating a Charity's Fundraising**

- The following are examples of some of the indicators that will generally be considered by CRA to be evidence of unacceptable fundraising:
  - Resources devoted to fundraising are disproportionate to resources devoted to charitable activities
  - Fundraising without an identifiable use or need for the proceeds
  - Inappropriate purchasing or staffing practices
  - Fundraising activities where most of the gross revenues go to contracted third parties

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- Commission-based fundraiser remuneration or payment of fundraisers based on amount or number of donations
- Misrepresentations in fundraising solicitations or disclosure about fundraising costs, revenues, or practices
- Fundraising initiatives or arrangements that are not well documented
- High fundraising expense ratio (discussed in detail below)
- Each of the above factors are explained in more detail in the Guidance and must be carefully studied, particularly with regards to suggestions by CRA concerning disclosure discussed below

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**6. Factors That May Influence CRA's Evaluation of a Charity's Fundraising**

- CRA recognizes that the charitable sector is very diverse and fundraising efforts will vary between organizations
- CRA will look at a number of factors to evaluate a charitable fundraising activity that involves high fundraising costs
- Examples of relevant case-specific factors
  - The size of the charity, which may have an impact on fundraising efficiency (i.e. revenues under \$100,000)
  - Causes with limited appeal which could create particular fundraising challenges

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- Donor development programs where fundraising activities could result in financial returns only being realized in future years (long-term investments)
- Gaming activities, such as lotteries or bingos, where it's commonly considered acceptable to have cost to revenue ratios of 70% or higher

- 7. Best Practices for Managing Fundraising**
- Adopting best practices may decrease the risk of CRA finding that a charity is engaging in unacceptable fundraising
  - The Guidance describes the following best practices in further detail
    - Prudent planning processes
    - Adequate evaluation processes

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- Appropriate procurement and staffing processes
- Managing risks associated with hiring contracted (third party) fundraisers
- Ongoing management and supervision of fundraising
- Keeping complete and detailed records relating to fundraising activities
- Providing disclosures about fundraising costs, revenues, practices and arrangements
- Maintain a reserve fund policy and ensuring that fundraising is for an identified use or need

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**B. RELATED BUSINESS AND FUNDRAISING**

- It is important to understand the differences between related business and fundraising and the consequences of each
- CRA's Policy on Related Business recognizes that many fundraising events are in fact business activities, particularly when they involve the sale of goods and services
- Yet, even if fundraising events are business activities, they will not amount to "carrying on" a business if:
  - The fundraising event has a clear "start" and "end" point, as opposed to continuous operations
  - The fundraising event of a particular type does not reoccur with such regularity and frequency that it amounts to "carrying on business"

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- If an activity is a related business then:
  - The Guidance and the fundraising ratio will not apply
  - However, limitations with regards to related business will apply
    - e.g. The activity must be "linked" and "subordinate" to the charitable purpose or carried out by 90% volunteers
- If the activity is not a related business, then if not "linked" it becomes an unrelated business and the charity could face sanctions and possible revocation, or if not "subordinate" then a collateral non-charitable purpose

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- If an activity is fundraising then:
  - The Guidance and the fundraising ratio will apply
  - However, the requirements of related business will not apply
    - e.g. The activities do not have to be “linked” and “subordinate” to the charitable purpose or carried out by 90% volunteers and therefore no risk that CRA will consider the activities to be an unrelated business
- It is therefore important to determine if an activity is fundraising or a related business because depending on the circumstances, it might be better for a charity to have the activity recognized as a related business as opposed to fundraising, or vice versa

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#### C. PROPER ALLOCATION OF FUNDRAISING EXPENDITURES

- It is important to recognize that all expenditures by a charity will fall into one or more of five possible categories for CRA purposes:
  - Charitable
  - Political
  - Management/administration
  - Fundraising
  - Related business

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- Proper categorization of expenditures will be important to assist the charity in understanding the categorization because it will impact how the charity will record its expenditures on its T3010, as well as ensuring compliance with the new CRA Fundraising Guidance
- This will also be a factor in the proper allocation of expenditures between the five categories
- In this regard, registered charities must report fundraising expenditures (all costs related to any fundraising activity) on their annual T3010

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- Where some fundraising activities include content that is not related to fundraising, some of these costs may be able to be allocated to charitable activities, management or administrative activities, political activities or related business
- Onus is on the charity to explain and justify the allocation
- The following are CRA's Guidelines for allocation:
  - 100% allocation to fundraising
  - No allocation of costs to fundraising
  - Pro-rated allocation of costs
- This allocation process can be used with regards to any type of expenditure
- See the following Fundraising Allocation Logic Chart

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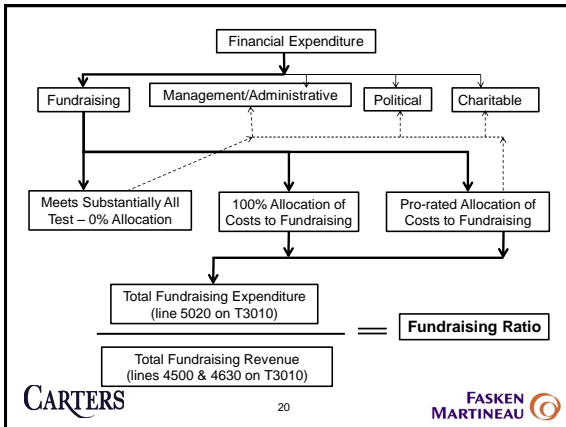
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**100% Allocation to Fundraising**

- Where 90% or more of the activity was devoted to fundraising, a charity will have to allocate all of the costs to fundraising
- The remaining content is considered to be ancillary and incidental to fundraising
- To determine if an activity is exclusively (or almost exclusively) undertaken to fundraise, separate the fundraising content from the other content and assess proportions, resources devoted to and prominence given to charitable, fundraising, management or administrative, and political content

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- Activities that will be considered to be 100% fundraising expenditures:
  - Activities involving participant-selection or audience targeting on their ability to give
  - Activities related to gaming (lotteries and bingos)
  - Dissemination of information and activities that raise awareness about the charity
  - Infomercials and telemarketing
  - Branding or charity promotion through cause-related or social marketing
  - Activities that involve sports with participants expected to raise pledges
  - Golf tournament and gala dinner fundraising

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**No Allocation of Costs to Fundraising**

- Where it can be demonstrated that an activity would have been undertaken without the fundraising component, then 100% of the costs will be allocated to the other applicable expenditure (ex: charitable, administrative, or political activity)
- To demonstrate this, the charity must be able to satisfy the “substantially all” test
  - If substantially all (90% or more) of the activity advances an objective (or objectives) other than fundraising
  - When completing this test, a charity must separate fundraising content from other content

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**Pro-rated Allocation of Costs**

- In some cases a charity may be able to pro-rate the allocation of costs of an activity between fundraising expenditures and charitable, management or administrative, and political activity expenditures
- But must be able to establish that less than 90% of the total content of the activity advances fundraising
- If more than 90%, then all expenditures must be allocated to fundraising
- To determine if pro-rating is possible, must separate the fundraising content from other content
- The onus is on the charity to produce the necessary accounting records to support the allocation

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- Not clear where to track related business expenses on the T3010, e.g. line 5010 (administration) or line 5040 (other)
- The Guidance explains in considerable detail the characteristics associated with the different types of charitable, fundraising, management /administrative, or political content
- Charitable content of an activity generally:
  - Will directly further the charity’s charitable purposes;
  - Focuses primarily on beneficiaries or potential beneficiaries of the charity’s programs, services, or facilities, not current or prospective donors; and
  - Is not, as a rule, prepared and/or delivered by individuals or organizations whose skills and usual responsibilities are to fundraise

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- Fundraising content of an activity may include, for example:
  - Implied or explicit requests for donations of cash or gifts in kind;
  - Information about how to make a donation, including planned giving;
  - The provision of goods and services that do not directly further the charity’s charitable purpose
  - Activities, such as sports events, where participants are encouraged or expected to raise pledges
  - Advertising to promote events that involve fundraising; and
  - The management and administration of fundraising activities (ex: planning and research for future fundraising)

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- Management and administrative content will tend to relate to:
  - Arranging, holding and reporting on board meetings;
  - Bookkeeping, accounting, auditing, personnel, and other administrative services;
  - Purchasing supplies and equipment and occupancy costs for administrative offices; or
  - Applying for grants or other types of government funding, and/or for gifts from other qualified donees
- Political content
  - An activity that directly or indirectly attempts to retain, change, or oppose a law in Canada or abroad, or sways public opinion on social issues
  - See CRA Policy Statement CPS-022 Political Activities

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**D. FUNDRAISING RATIO CONSIDERATIONS**

- It is important to note that a charity's fundraising ratio is meant to serve as a general self-assessment tool, and therefore not determinative on its own
  - The fundraising ratio is the ratio of fundraising costs to fundraising revenue calculated on an annual basis
  - It is a global calculation for a fiscal period
  - However, a high fundraising ratio for an individual event may be an indicator of unacceptable fundraising



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- It is totally distinct from the 3.5% disbursement quota
- Fundraising revenues, as the denominator, include amounts reported in the T3010
  - On line 4500 (receipted donations, regardless of whether these amounts can be traced to fundraising activity)
  - This means that line 4500 will include all tax receipted donations
  - Line 4630 (all amounts for which a tax receipt was not issued and that were generated as a direct result of fundraising expenses)



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- Sponsorship funds can be included under line 4630 even though they are not receiptable, which will thereby improve the overall fundraising ratio
- As well, income from cause related campaigns can also be reported under line 4630 to improve the ratio
- It is important to include gross fundraising revenue on line 4630 instead of net fundraising revenue
- Fundraising expenditures, as the numerator, will include all amounts reported on line 5020 as fundraising expenses in accordance with the Guidance, including administration costs associated with fundraising



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- The fundraising ratio will place a charity into one of three categories:
  - Under 35%: unlikely to generate questions or concerns by CRA
  - 35% and above: CRA will examine the average ratio over recent years to determine if there is a trend of high fundraising costs requiring a more detailed assessment of expenditures
  - Above 70%: this level will raise concerns with CRA. The charity must be able to provide an explanation and rationale for this level of expenditure, otherwise it will not be acceptable
- The initial threshold of 35% is generous since it does not take into account management and administrative costs

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- What to do if the Fundraising Ratio is excessive:
  - Look to see if CRA recognized mitigating factors in the Guidance will apply specifically:
    - Size of the charity
    - Cause with limited appeal
    - Long term donor development investment
    - Gaming activities
  - If so, document these factors for future audits
  - Review calculation of T3010 to see if fundraising ratio has been calculated incorrectly, i.e. Sponsorship expense not included on line 4630
  - Consider rectifying previous year's T3010 by filing a T1240
  - If fundraising ratio is particularly high but there is a game plan to reduce the ratio and there are mitigating factors, then there may be justification to consider a voluntary disclosure to CRA

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**E. THE IMPORTANCE OF MAINTAINING RECORDS RELATING TO FUNDRAISING ACTIVITIES**

- The onus is on the charity to prove that the charity has been compliant with CRA Fundraising Guidance requirements
- Specifically, the charity will also need to justify its allocation of expenditures
- It is therefore essential for the charity to keep complete and detailed records related to fundraising activities and specifically
  - Minutes of board or committee meetings where decisions on fundraising are made
  - Records of research to determine costs
  - Document all processes undertaken before entering into contracts
  - Written copies of fundraising contracts

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**F. INCLUSION OF EXPANDED CRA POLICIES**

- The Guidance also provides clarification on, or additions to, existing CRA policies
- The Guidance defines “acceptable private benefit”, which expands upon CPS-024 *Guidelines for Registering a Charity: Meeting the Public Benefit Test*
- The Guidance also provides criteria concerning activities that “provide information” to the public not contained in any other guidance
- Both of these expansions of CRA policies have been relied upon by auditors in audits where the issue arising from the audit do not relate to fundraising



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**Acceptable Private Benefit**

- An acceptable private benefit is one that is incidental to the achievement of a charitable purpose
- A private benefit will usually be incidental where it is necessary, reasonable, and proportionate to the public benefit achieved
- Necessary means legitimately and justifiably resulting from
  - An action **directly** contributing to charitable purpose
  - A required step or action taken **only** to achieve a charitable purpose
  - A consequence or by-product of the above two points
  - The operation of a related business



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- Reasonable means
  - Related to the need and **no more than is necessary to achieve the purpose**; and
  - Fairly and rationally incurred (objectively defensible/fair market value)
- Proportionate to the public benefit achieved means
  - Public benefit is predominant
  - In context of fundraising, reasonable to expect such costs to be proportionate to the funds expected to be raised
- The Guidance states that all three criteria need to be established or it will be assumed charity is providing an unacceptable private benefit



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**Provision of Information**

- “Provision of information” can directly further a charitable purpose where:
  - Content enables the audience to take specific actions or adopt specific behaviors that will directly further a charitable purpose;
  - Content is reasonably unbiased, factual, and sufficiently detailed
  - encourages the audience to take the specific actions or adopt the specific behaviors described;
  - Target audience an reasonably be expected to take action to directly further the purpose; and
  - Information is **actively disseminated** and can reasonably be expected to reach a target audience




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- Not clear what the case law basis is for the criteria required for the “provision of information”
- These requirements may be included in a future Guidance to be prepared by CRA
- It is not clear what is meant by “active dissemination” i.e., is information that is available on a charities website being actively disseminated?




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**G. DISCLOSURE OF FUNDRAISING COSTS AND THE GOUR DECISION**

- On November 2, 2012, Adam Gour was sentenced to 15 months in jail and nearly \$300,000 in fines after he was found guilty on June 28, 2012 for defrauding the public while operating a charity fundraiser scheme
- Gour’s organization solicited funds under the guise of helping sick children, often using pictures of sick children from Ontario without consent from their parents
- He paid his employees commissions ranging from 14-35% and instructed them to keep their commission secret
- The decision is expected to be appealed




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**Decision**

- Mclsaac J. held that, when potential donors asked Gour’s employees about their remuneration, most of the employees lied as instructed
- This misinformation was material, in that it would have affected the decision of a reasonable person
- However, there was no donor to testify to having been actively deceived and Mclsaac J. concluded that most donors probably did not ask the solicitors whether they were paid and thus were not actively deceived
- Therefore, in finding Gour guilty, Mclsaac J. was required to determine whether failure to disclose a commission of 14-35% constitutes fraud in Canadian criminal law – he decided that it was

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**Quote from paragraph 20 of the Gour Decision**

- “That drives me to the ultimate conclusion that the vast majority of contributions were general in circumstance where there was not-disclosure as opposed to incidents of active deceit. Does the failure to disclose a commission arrangement of between 14-35% constitute fraud in Canadian criminal law? My conclusion is that it does”

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**Commentary**

- The severity of this decision is likely attributable to its egregious facts
- Not clear if this decision will have broader application
- However, the outcome raises concerns regarding charities’ disclosure obligations when fundraising:
  - CRA’s position under the Guidance is that charities are recommended to disclose all their fundraising costs. However, if a charity agrees to pay above 70% commission, those costs are expected to be disclosed, otherwise it would be contrary to public policy and/or misrepresentation
  - This is based on the *Aids Society for Children* decision (2001) and the *National Society for Abused Women and Children* decision (2002)
- Mclsaac J.’s decision that charities must disclose commission rates of 14-35% muddies an already complicated area

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**Points of Information from the Gour Decision**

- Mclsaac J. emphasized that this does not prohibit charities from contracting third party fundraisers, irrespective of the commission rate, so long as the public is informed
- Mclsaac J. refuted the argument that because CRA has stated that a fundraising ratio below 35% is unlikely to generate questions or concerns, fundraisers are not obliged to disclose important circumstances, such as “handsome fundraiser commissions”
- Mclsaac J. also stated that it was the Crown’s choice to proceed under the *Criminal Code* as opposed to the *Charities Accounting Act* and that he did not find the choice inappropriate




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**CRA Fundraising Guidance on Disclosure**

- Important to review what the CRA Fundraising Guidance says about disclosing fundraising costs in light of Gour
  - CRA recommends charities provide complete public disclosure for all fundraising costs, revenue, practices and arrangements
  - Disclosure must be accurate, accessible, and timely
  - Some evidence of a charity’s commitment to disclosure:
    - Public disclosure of fundraising costs and revenues in financial information released
    - Adopts disclosure policies
    - Train staff/volunteers making solicitations and pre-approve soliciting scripts and materials that will be used by them




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- A charity may need to consider disclosing information before, during and after a fundraising initiative, which information might include:
  - Estimated fundraising costs and revenues in its annual budget
  - Whether fundraisers are receiving commission or other payment based on the number or amount of donations
  - General terms of the fundraising contract, including the method of compensation and anticipated costs and revenues




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- How internal fundraisers are assessed and compensated
- The costs and revenues for specific types of fundraising or campaigns within a fiscal period (after completion)
- Charities need to ensure that there is sufficient disclosure so that fundraising is not contrary to public policy
- Cause-related marketing ventures are not subject to the best practices relating to disclosure outlined above, provided that more than 90% of the costs are borne by a non-charitable partner and all costs and revenues are adequately disclosed (excluding costs of intellectual property)

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- Not clear from CRA Guidance whether there needs to be disclosure of fundraising expenses for a single fundraising event but best to do so
- Not clear whether there should be a year-by-year comparison
- Not clear what “timely disclosure” means
- Not clear what types of communication will be appropriate
- The CRA Guidance has not been modified as a result of the Gour decision
- However, CRA will likely be monitoring the Gour decision and the outcome of any appeal

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**H. OTHER ISSUES (IF TIME PERMITS)**

- What are the practical implications of “Resources devoted to fundraising are disproportionate to resources devoted to charitable activities”?
- What are the practical implications of “Fundraising without an identifiable use or need for the proceeds”?
- How does the Fundraising Guidance apply to foundations or other charities that fund qualified donees?

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