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March 7, 2016

Jami L. Cantore
Deputy Attorney General
California Department of Justice
Charitable Trusts Section
300 S. Spring St., Suite 1702
Los Angeles, CA 90013

Dear Ms. Cantore:

These comments are submitted in response to your February 19, 2016 Notice of Modifications to Text of Proposed Regulations, and address the "disclosure" protocols and protections under Internal Revenue Code section 6104 expressly dedicated to the administration of state charitable solicitation laws.

The Office of the California Attorney General ("CAG") decided to demand and acquire Form 990 Schedule B donor names and addresses using the charitable solicitation registration process. Names and addresses of donors filed with the IRS on Schedule B are confidential federal tax return information. The initially proposed rule issued on December 11 was purportedly intended to limit disclosure of donor names and addresses beyond the CAG, i.e., to third parties. The proposed rule was issued after -- and with a considerable if not irresponsibly long gap in time -- the decision by the CAG to acquire Schedule B information in dragnet fashion using the registration process. By a nearly two-to-one ratio, prior comments filed with your office urged the CAG to cease making its demands for Schedule B donor names and addresses. The proposed rule, which lacks both meaningful protocols and remedies to address unlawful disclosure, was roundly criticized in the prior comments.

The revised proposed rule issued on February 19 fails to cure the CAG's violations of federal law regulating disclosure and inspection of confidential tax return information for the administration of state charitable solicitation laws, and suffers from other problems.

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As stated in comments filed separately today addressing willful, unauthorized inspection under IRC 7213A, inspection and disclosure of confidential tax return information for the administration of state charitable solicitation laws is regulated under IRC 6104(c)(3).[1] Disclosure by the IRS to the CAG for the administration of state charitable solicitation laws may be authorized after a written request by the CAG to the IRS. IRC 6104(c)(3) clearly establishes that the IRS may deny such requests, and the IRS may set conditions when it grants access to Schedule B. Acquisition of Schedule B donor names and addresses using the charitable solicitation registration process is unauthorized by the Code, hence, is unlawful under the explicit and rigid regime created by Congress for inspection and disclosure of federal tax return information in the administration of state charitable solicitation laws.

Pursuant to the exclusive authority Congress gave it under IRC 6104 in this federal regime, the IRS has issued guidelines and details for "Information Disclosure to State Officials Under IRC 6104(c)."[2] Pursuant to IRC 6104, the IRS requires a Disclosure Agreement between state attorneys general and the IRS,[3] a Safeguard Security Report (SSR),[4] and

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[1] IRC 6104(c)(3) reads:

> **Upon written request by an appropriate State officer, the Secretary may make available for inspection or disclosure returns and return information** of any organization described in section 501(c) (other than organizations described in paragraph (1) or (3) thereof) **for the purpose of, and only to the extent necessary in, the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations**. Such information may only be inspected by or disclosed to a person other than the appropriate State officer if such person is an officer or employee of the State and is designated by the appropriate State officer to receive the returns or return information under this paragraph on behalf of the appropriate State officer." (Emphasis added.)

[2] https://www.irs.gov/irm/part7/irm_07-028-002.html#d0e125.

[3] *Id.* 7.28.2.7 (09-22-2015), "Procedures for the Disclosure of Return Information of Organizations Described in IRC 501(c) Other than IRC 501(c)(3)" reads:

> Upon an ASO's [Appropriate State Officer's] written request, the IRS may disclose return and return information of IRC 501(c) organizations that are

other protocols and security measures not found in the CAG's proposed rule.

As demonstrated by its model Disclosure Agreement, the IRS interprets "disclosure" for purposes of IRC 6104 as applicable even to disclosure to down-the-chain employees within the CAG's office for administration of charitable solicitation laws, i.e., intra-office disclosure by state charity regulators.[5] Thus, under the IRS's interpretation, the issue is not merely protections against disclosure of Schedule B by the CAG to third parties, but disclosure to and access by CAG employees.

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not IRC 501(c)(3) organizations for the purpose of, and only to the extent necessary for, the administration of state laws regulating the solicitation or administration of charitable funds or charitable assets.

The Disclosure Agreement constitutes the written request required by this provision. The TEGE Liaison may make disclosures in individual instances based on an ASO's or their designee's oral requests.

The TEGE Liaison keeps the appropriate records of these disclosures.

[4] *Id.* 7.28.2.2 (09-22-2015), "Disclosure Agreements" reads: "Per IRM 7.28.2.1 (3), the IRS will only make disclosures under IRC 6104(c) to those state agencies that have submitted their Safeguard Security Report (SSR) to PGLD and have entered into a disclosure agreement with the IRS regarding IRC 6104(c)."

[5] *See, Id.* 7.28.2.4 (09-22-2015) 3. "Appropriate state officer" (under IRC 6104(c)(6)(B)) means . . . D. The head of an agency designated by the state attorney general as having primary responsibility for overseeing the solicitation of funds for charitable purposes (for IRC 501(c) organizations other than IRC 501(c)(1) or IRC 501(c)(3))." The administration of charitable solicitation laws is the CAG's admitted purpose in demanding, acquiring, and inspecting Schedule B. As stated in the model Disclosure Agreement at SECTION 6. Use and Redisclosure of Returns and Return Information Disclosed to the Attorney General under this Agreement:

> 6.1 The Attorney General or any designee to whom a return or return information has been disclosed may thereafter disclose such return or return information:
>
> A. to another employee of [insert State name] for the purpose of and only to the extent necessary in the administration of the laws described above [which includes IRC 6104(c)].

The CAG's proposed rule seems designed to enable the CAG to evade all such protocols and security measures. It ignores the statutorily mandated role of the IRS in authorizing, supervising, and monitoring disclosure of Schedule B information to attorneys general, and subsequent inspection by employees in their offices. It appears designed to let state officials and employees believe they are not subject to sanctions for violations of the federal law and its rigid regime protecting donor privacy.

On their face, the CAG's dragnet demands to acquire Schedule B information evade the regime created by Congress, a regime that expressly applies to state officials and employees as well as the IRS. The CAG's demands and acquisition method violate the express requirements of IRC 6104(c) for case-by-case authorization from the IRS for disclosure to the offices of state attorneys general for purposes of inspection in the administration of charitable solicitation laws.

In the Internal Revenue Code's disclosure and inspection regime created by IRC 6104, and the related enforcement and penalty provisions of the Code, the onus is as much on state officials and employees as on the IRS to comply.[6] Civil and criminal -- even felony -- sanctions apply to state officials and employees under this regime, reflecting that state charity regulators are capable of doing damage on par with the IRS when it comes to abuse of confidential tax return information of charities.[7]

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[6] The dragnet acquisition of donor names and addresses protected under IRC 6104 is both factually and legally different from the allegations of violations of IRC 6103 for disclosure of the information "obtained directly from plaintiff in the course of a search of his work space" in *Stokwitz v. U.S.*, 831 F2d 893 (9th Cir. 1987). IRC 6104 clearly limits acquisition, access, internal and external disclosure, and inspection by state attorneys general and their staff, not just the IRS. IRC 6104(c) is unique regulation of disclosure and inspection of confidential federal tax return information by state officials for the administration of state charitable solicitation laws. The reasoning and holding in *Stokwitz*, therefore, are inapposite to the CAG's extortionate demands, and its acquisition and uses of Schedule B. Additionally, the Ninth Circuit's *Stokwitz* ruling conflicts with how other circuits have construed IRC 6103 for disclosure purposes, and has otherwise been criticized as inconsistent with IRC 6103. *See, I.R.C. 6103: Let's Get to the Source of the Problem*, 74 Chi-Kent L. Rev 825 (1999).

[7] IRC 7213(a)(2) reads in relevant part: "Any violation of this paragraph shall be a felony punishable by a fine in any amount not exceeding $5,000, or imprisonment of not more than 5 years, or both, together with the costs of prosecution." *See also*, Footnote 10 below.

The CAG was fully aware of the restrictions governing acquisition of and access to confidential tax return information under IRC 6104, and intra-office disclosure of it.[8] As I stated in a February 18 letter to you, former Senior Assistant Attorney General Belinda Johns acknowledged in published writing the "severe" legal restrictions prohibiting what the CAG now has put into motion. She and her colleagues at the National Association of State Charity Officials ("NASCO") even collaborated with IRS officials to seek legislation to loosen the rules, but failed. In a deposition, Ms. Johns described the legal protocols required, supervised, and monitored by the IRS regulating the internal disclosure of and access to confidential tax return information by CAG officials and employees.[9]

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[8] IRS Publication 1075 describes unauthorized access (which it calls "UNAX") rules and protocols applicable under both IRC 6103 and IRC 6104.

[9] In my February 18 letter I wrote:

> The attached portion of a transcript of a deposition of former Senior Assistant Attorney General Belinda Johns shows that the CAG was very much aware of what was authorized versus unauthorized under federal law, and that the CAG knows that confidential tax return information is to be obtained from the Secretary of the Treasury with certain firewalls and protocols required once that information is obtained. Ms. Johns also describes unsuccessful efforts of state regulators to overcome the existing legislated barriers to their obtaining confidential tax return information.
>
> Ms. Johns also co-authored a paper in 2013 on "The Future of State Charities Regulation" in which she and her co-author write:
>
> > Efforts to work jointly with the Internal Revenue Service, however, have been hampered by federal legislation that severely restricts the authority of the IRS to share information with state charity regulators. In 2012, NASCO urged Congress to amend legislation to ease those restrictions and, in the meantime, NASCO is working with IRS staff to explore ways in which information-sharing may be improved within the current structure.
>
> There are other articles and documents available to the public about the efforts of state charity regulators to remove those legislated barriers, and how they collaborate with the Exempt Organizations division of the IRS (one state official even claiming former EO official Lois Lerner was "partner in the regulation of charities" with charity regulators). For

In recent litigation against the CAG, Judge Real called it "laziness," but the CAG's decision to bypass IRC 6104 and the legal protocols protecting donor names and addresses appears more like purposeful evasion of IRC 6104. This "laziness," because it actually appears to be purposeful or willful evasion, potentially moves disclosure and inspection violations from being subject solely to IRC 7431 ("Civil damages for unauthorized inspection or disclosure of returns and return information") into those subject to IRC 7213 ("Unauthorized disclosure of information")[10], and as stated in comments filed separately today, IRC 7213A.

The CAG's demands for Schedule B donor names and addresses are a bold, brash, and startling statement that the Attorney General believes she is not bound by or beholden to IRC 6104(c). The demands are made using duress and threats of penalties in the charitable solicitation registration process, and are therefore an extortionate and tortious violation of the First Amendment rights of those who wish merely to protect rights of association and privacy -- in addition to the statutory violations.

They also appear to be a poorly disguised substitute for general warrants barred by the Fourth Amendment, trespassing indiscriminately without individualized suspicion and without probable cause on private

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example, the February 1, 2009 *NonProfit Times* noted that "[t]he IRS and state regulators already have a compliance relationship — the IRS can give some information to state regulators about enforcement activities under the Pension Protection Act of 2006, while the state regulators can lead the IRS to potential tax violations."

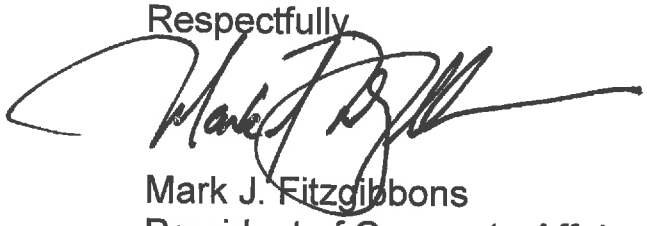
One may reasonably believe that the CAG, frustrated by the impasse of federal law, decided to take a short cut.

[10] IRC 7213(a)(2) reads in relevant part: "It shall be unlawful for any [state or other employee] willfully to disclose to any person, **except as authorized in this title**, any return or return information (as defined in section 6103(b)) acquired by him or another person under . . . section 6104(c)." (Emphasis added.) Acquisition for "the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets of such organizations" is regulated exclusively under IRC 6104(c)(3).

information of all charities.[11] The demands may subject the CAG to actions in tort as well as actions seeking statutory remedies.[12] Many if not most victims of these violations are located outside California and the Ninth Circuit.

The proposed rule furthers unlawful acts of the CAG, and the better and legal course is for the CAG to cease making demands for Schedule B donor names and addresses.

Respectfully



Mark J. Fitzgibbons
President of Corporate Affairs

cc: The National Association of State Charity Officials

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[11] The only reason charities disclose donor names and addresses to the IRS on Schedule B is that they are required to by federal law. Since this disclosure is coerced by federal law, that private information would appear not subject to the controversial "third-party doctrine" courts have applied in construing the Fourth Amendment applicable to voluntary disclosure to third parties.

[12] As the Ninth Circuit wrote in *Stokwitz*, "This is not to say that appellant has no remedy for the alleged unlawful seizure and subsequent use of his tax information. Those issues can be addressed in Stokwitz's Bivens action, or through any other applicable tort action. The confidentiality of tax information may also be preserved in civil proceedings through protective orders." *Stokwitz*, 831 F2d at ___.