

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

Subject: Comments in Response to Notice of Modifications to
Text of Proposed Regulations dated February 19, 2016

Dear Ms. Cantore:

These comments are submitted in response to your February 19, 2016 Notice of Modifications to Text of Proposed Regulations. The proposed rule suggests amendments to the one issued on December 11, 2015, but, as explained below, the proposed amendments do not cure certain violations by your office of the Internal Revenue Code.

The Office of the California Attorney General (CAG) has been informed by numerous organizations that it is violating the First Amendment when it demands and acquires donor names and addresses on Schedule B of IRS Form 990, the informational tax return filed by charities with the IRS. The CAG is misusing the charitable solicitation registration process to demand and acquire such information, which is collected by the IRS on a confidential basis under the Internal Revenue Code. This letter sets forth several potential serious personal consequences for CAG employees and officials arising from those demands and your office's handling of donor names.

Admissions of the CAG in pending judicial proceedings demonstrate numerous violations of 26 U.S. Code (IRC) section 7213A for (1) willful inspection of confidential federal tax return information, (2) in a manner not authorized by the Internal Revenue Code. The only authorized inspection of Schedule B donor names and addresses by state officials under IRC 7213A for administration of charitable solicitation laws arises after they are

acquired from the Secretary of the Treasury, which can only occur in limited circumstances. Inspection after acquiring the names and addresses through the charitable solicitation registration process is not authorized.

IRC section 7213A states that any violation by state employees carries potential fines and jail sentences. This letter explains the violations in greater detail.¹

Bases of the violations

Charities that seek to solicit contributions from Californians must first register with the CAG's Registry of Charitable Trusts. Charities have long been required to file their federal informational tax return, IRS Form 990, with the Registry as one of the conditions to solicit contributions, but previously the charities have redacted the confidential donor names and addresses on Schedule B.

Like other states that require the filing of IRS Form 990 in their charitable solicitation registration process, California had accepted redacted Schedules B for many years, acknowledging federal law that names and addresses of donors are confidential federal tax return information. At some point, the CAG, on its own initiative and without authorization under the Internal Revenue Code, decided that it would no longer register charities that filed a redacted Schedule B, and is therefore now acquiring donor names and addresses in violation of the Internal Revenue Code's restrictions.

Charitable solicitation is protected by the First Amendment. Three nonprofit organizations filed suits initially seeking preliminary injunctions against the CAG on First Amendment grounds, and these cases are still pending, proceeding to trial.

¹ Emphases in statutory citations in this letter are added.

The purposes for demanding and acquiring donors names and addresses admitted by the CAG in the litigation thus far constitute “inspection” for purposes of IRC 7213A. That inspection is willful and is not authorized under the Internal Revenue Code. It appears the inspection purposes admitted by the CAG and judicially noticed by the Ninth Circuit’s decision cited herein below would make CAG employees and officials subject to the criminal penalties set forth in IRC 7213A, as further explained below.

The penalties at issue

As to the potential serious personal consequences for CAG employees and officials, IRC 7213A(b)(1) states: “**Any violation of subsection (a) shall be punishable upon conviction by a fine in any amount not exceeding \$1,000, or imprisonment of not more than 1 year, or both, together with the costs of prosecution.**”

Who is subject to the criminal penalties?

IRC 7213A(a)(2) applies to state employees, and reads: “It shall be unlawful for **any person** (not described in paragraph (1)) **willfully to inspect, except as authorized in this title**, any return or return information **acquired by such person or another person** under a provision of section 6103 referred to in section 7213(a)(2) **or under section 6104(c).**”

This means that the potential criminal penalties apply to not just senior state officials, but also to rank-and-file employees who inspect donor information collected by the Registry of Charitable Trusts.

What is “inspection”?

IRC 7213A(c) states: “For purposes of this section, the terms “inspect”, “return”, and “return information” have the meanings given such terms by section 6103(b).”

IRC 6103(b) states: “The terms “inspected” and “inspection” mean **any examination of a return or return information.**”

IRC 7602(a), “Examination of books and witnesses,” reads in part: “For the purpose of **ascertaining the correctness of any return**, making a return where none has been made, **determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability**, the Secretary is authorized— (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry.”

What is inspection of donor names not authorized under the Internal Revenue Code?

As stated above, the Internal Revenue Code provides only one method of inspection of donor names by states for administration of charitable solicitation laws. The only inspection authorized is when names are acquired from the Secretary of the Treasury.

Nowhere in the Internal Revenue Code is authorization found for state charity officials to acquire and then inspect donor names on Schedule B through the charitable solicitation registration process. The CAG’s acquisition using the charitable solicitation registration process for purposes of subsequent inspection is in fact not authorized. Inspections of such donor names and addresses through the method used by the CAG therefore appear to constitute a prohibited act subject to the criminal penalties under IRC 7213A.

IRC 6104(c), expressly referenced in IRC 7213A(a)(2) as noted above, applies to inspection for “the administration of State laws regulating the solicitation or administration of the charitable funds or charitable assets.” Clearly, as admitted by the CAG in the pending litigation, its inspection is for those purposes.

However, the **only** authorized method of acquiring donor names for inspection purposes in the administration of charitable solicitation laws is provided in IRC section 6104(c)(3), which states in relevant part:

“[u]pon written request by an appropriate State officer, the Secretary [of the Treasury] 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.”²

Since the acquisition of donor names for purposes of inspection by the CAG is not authorized under the Internal Revenue Code, and in fact the acquisition is compelled under duress of losing First Amendment rights to communicate with donors and others in California and threat of fines, the inspection by CAG could therefore not be authorized.

Note also that the Secretary of the Treasury is not obligated to provide donor names of a charity to states requesting them for inspection purposes, but merely “may make them available,” which statutory protocol is a check on states that request names for those purposes. This charity-specific method of access is completely unlike the dragnet method used by the CAG requiring **all** charities to provide Schedule B names and addresses.

CAG’s employees inspecting donor names acquired in the charitable solicitation registration process (the “administration” of a state charitable solicitation law), but outside the only authorized (lawful) method of

² The IRS interpretation is that it may disclose confidential tax return information to state charity regulators on its own accord under certain conditions, such as denial of an application for tax-exempt status. See, https://www.irs.gov/irm/part7/irm_07-028-002.html. However, the dragnet method employed by the CAG is unauthorized.

acquisition under IRC 6104(c), are subject to the penalties IRC 7213A(b)(1) if willful.³

The inspection of donor names by the CAG is clearly “willful”

It hardly needs stating that inspection of donor names by your office is willful, meeting another element of violations of IRC 7213A subject to the criminal penalties under subsection (b)(1).

However, to remove any doubt, in the *Center for Competitive Politics v. Harris* decision,⁴ the Ninth Circuit notes that among the purposes for which your office demands and uses Schedule B donor names and addresses is to "determine whether a charity is actually engaged in a charitable purpose," "to determine when an organization has inflated its revenue by overestimating the value of in-kind donations," and to "increase[] her investigative efficiency and obviate[] the need for expensive and burdensome audits."⁵

These statements constitute clear admissions of the CAG's inspection of the confidential donor information that the CAG unlawfully acquired, which as explained herein above, is not authorized by Title 26, the Internal Revenue Code and meets the “willful” element of a violation subject to IRC 7213A.

The CAG's purposes are also admissions of willful inspection (“examination”) under IRC 7602(a) for “**ascertaining the correctness of**

³ Adding emphasis to the point, IRC section 6103(a) states: “Returns and return information shall be confidential, and **except as authorized** [under Title 26] **no officer or employee of any state . . . shall disclose any return or return information.**” IRC section 6103(b)(8) states: “The term ‘disclosure’ means the **making known to any person in any manner whatever** a return or return information.” The inspection by officials or employees in the Office of the California Attorney General is done under authorization of the Attorney General, and is therefore “making [donor names] known to any person in any manner whatever.”

⁴ 784 F.3d 1307 (9th Cir. 2015).

⁵ *Id.* at ____.

any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability.”

Conclusion

Your office and its employees appear to have met all the elements of acts constituting violation of law, subjecting various officials and employees in your office to fines and imprisonment, together with the costs of prosecution under IRC 7213A. Since tens of thousands of registrants are subject to the CAG’s demands, the quantity of victims of your office’s acts makes the potential consequences even more severe.

Had Congress wished to authorize state inspection in the dragnet fashion used by the CAG, which violates the principles articulated in *NAACP v. Alabama*,⁶ it would have done so. Instead, Congress required states to work through the Secretary of the Treasury on a case-by-case basis to limit inspection of donor names.

The CAG has needlessly put its employees at risk of jail and fines. The CAG should immediately cease and desist in compelling the filing of unredacted Schedules B. Taking that one simple action would obviate the need of proceeding further with the proposed rulemaking.

Respectfully,

Mark J. Fitzgibbons, Esq.

Michael Boos, Esq.

Jeremiah Morgan, Esq.

⁶ 357 U.S. 449 (1958).

William J. Olson, Esq.

Mark Weinberg, Esq. (retired)