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August 1, 2013

The Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
United States House of Representatives
2347 Rayburn House Office Building
Washington, D.C. 20515-0549

The Honorable Dave Camp, Chairman
Committee on Ways and Means
United States House of Representatives
341 Cannon House Office Building
Washington, D.C. 20515-2204

Re: State Charitable Officials Violating Donor Disclosure Law

Dear Chairmen Issa and Camp:

I submit this information to supplement the July 23 letter sent by the Free Speech Coalition (FSC) about how the California and New York Attorneys General are violating the Internal Revenue Code with respect to the confidentiality of donors to nonprofit organizations (Exhibit 1).

Those violations of law are in fact having a chilling effect on First Amendment rights because certain nonprofit organizations are deciding to not register to solicit contributions in those states in order to protect the confidentiality of their donors. As has come to light, the IRS and states appear to have been unlawfully disclosing confidential tax information in violation of IRC 6103 and perhaps IRC 7213.[1] Lastly, I wish to call to your attention the collaboration between IRS Exempt Organizations official Lois Lerner with state charitable officials, which include the offices of the

[1] For example, "Christine O'Donnell's case of suspected tax data breach is added to IRS investigation," *The Washington Times*, July 21, 2013, http://m.washingtontimes.com/news/2013/jul/21/christine-odonnells-case-of-suspected-tax-data-bre/?page=1

California and New York Attorneys General. Given the apparent violations involved, those ties should be probed.

As the FSC letter indicates, the California and New York Attorneys General are the charitable officials of their states overseeing the charitable solicitation laws of their respective states. Such laws require nonprofit organizations to register in those states as a condition of issuing communications that ask for contributions, with extensive reporting upfront and annually.

As explained below, the illegal demands for donor information reported by FSC should be treated as a knowing and willful infringement of the law and of rights clearly protected by the Constitution and articulated repeatedly by the United States Supreme Court.

Four times since 1980, the United States Supreme Court has declared certain regulatory actions of state charitable officials illegal under the First Amendment.[2] As stated in those decisions:

> Prior authorities, therefore, clearly establish that charitable appeals for funds . . . involve a variety of speech interests—communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes—that are within the protection of the First Amendment. Soliciting financial support is undoubtedly subject to reasonable regulation but the latter must be undertaken with due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views on economic, political, or social issues, and for the ***reality that without solicitation the flow of such information and advocacy would likely cease***. (Emphasis added.)

Charitable solicitation and registration law enforcement therefore must comply with the First Amendment.

Nonprofit organizations critical of government were already fearful of retribution against themselves and their donors. As a result of the states'

[2] See *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988); *Secretary of State v. Munson*, 467 U.S. 947 (1984); and *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980).

demands for donor information, some nonprofit organizations are choosing to not register in California and New York. The demands for donor information that FSC described as illegal on its face are therefore also having a chilling and silencing effect. Not only are certain nonprofits not able to communicate in those states, they are afraid to come forward to denounce the states' unlawful conduct.

Other nonprofit organizations that have concerns are choosing to register because state charitable officials are telling registrants that donor information will be kept confidential. That, however, does not negate the fact that demands for donor names and addresses violate IRC 6103 and 6104, as described by FSC's July 23 letter.

But as has come to light, even federal laws guaranteeing nondisclosure of donor and other tax information have not been an adequate bar to disclosure. "Trust us" has never been an accepted principle in the American rule of law over government, and has certainly proven to have been abused in the matter of confidential tax information.

The demand for donor information in the state charitable solicitation registration process also violates the clear principles articulated in the landmark decision *NAACP v. Alabama*,[3] such as "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech," or "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an effective] restraint on freedom of association," and "[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."

The California and New York Attorneys General lack express authority in their respective state charitable solicitation statutes to demand disclosure of donor information in the registration process. If such information were ever to become needed for a <u>legitimate</u> law enforcement matter, following Fourth Amendment requirements such as probable cause and other protections to narrow investigations, and overcoming the strictures of *NAACP v. Alabama,* state officials could of course obtain such information. But to demand such information as a requirement of a nonprofit organization's exercising its First Amendment rights contravenes the Internal Revenue Code and is an unconstitutional condition.

[3] 357 U.S. 449 (1958).

Lastly, I wish to bring to your attention the collaboration between IRS official Lois Lerner and state charitable officials under the umbrella group called the National Association of State Charitable Officials (NASCO).

In her Exempt Organizations 2011 Annual Report, Ms. Lerner touts a proposed rulemaking as follows:

> Notice of Proposed Rulemaking (Prop. Reg. §301.6104(c)-1), which revised the rules on disclosure to state charity regulators, reflecting changes made to section 6104(c) by the PPA. ***EO coordinated extensively with the National Association of State Charity Officials to reduce barriers to states' participation in the information-sharing program***.[4] (Emphasis added.)

In her 2010 IRS Exempt Organizations Report,[5] Ms. Lerner writes:

> Beginning in FY 2011, we are increasing our focus on section 501(c)(4), (5) and (6) organizations. With the additional information available on the new Form 990, we will look at issues including political activity, inurement and the extent of compliance with the requirements for tax exemption by organizations that self-identified themselves as a section 501(c)(4), (5) or (6) organization.

But Ms. Lerner's collaboration with NASCO precedes 2010. As reported by *The NonProfit Times* in 2009:

> Overall, the Form 900 is going to provide state charity regulators with a lot more information, "particularly in the areas of governance and also compensation issues because although the states and the IRS have two different jurisdictions, many of the things that we are looking at are important to the states for different reasons because of their areas of charitable

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[4] IRS Exempt Organizations 2011 Annual Report, page 4, http://www.irs.gov/pub/irs-tege/fy2012_eo_work_plan_2011_annrpt.pdf. The Proposed Rulemaking is "Disclosure of Information to State Officials Regarding Tax-Exempt Organizations," Internal Revenue Bulletin 2011-13, March 28, 2011, http://www.irs.gov/irb/2011-13_IRB/ar09.html.

[5] http://www.irs.gov/pub/irs-tege/fy2011_eo_workplan.pdf

> oversight," said Lois G. Lerner, director of the Exempt Organizations (EO) Division of the IRS. "When you look at the facts we look at to determine whether an organization meets the requirements for tax-exemption, those same facts can also give rise to some of the violations at the state level."
>
> ***Lerner explained that the IRS expected to have regular interaction with NASCO about the new filing and monitor trends that arise with the new Form 990 and hoped the feedback would help shape future adjustments. The 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***. In 2008, EO disclosed nearly 200 enforcement activities to state agencies, including terminations and revocations, and state officials made 83 referrals to EO, including political activities, employment tax and failures in operating within designated exemption status.[6] (Emphasis added.)

Ms. Lerner's questionable if not unlawful collaboration outside the IRS was reported just recently. She and the Federal Election Commission's general counsel's "twice colluded to influence the record before the FEC's vote in a case of a conservative non-profit organization," where it appeared that Ms. Lerner may have disclosed information in violation of IRC 6103.[7]

Demands for donor information are unlawful under federal law, and are not authorized under state charitable solicitations statutes. This latter fact raises further issues, since charitable solicitation licensors do not have discretion to demand information not required under their statutes.[8]

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[6] "Attorney General Focusing On Fiduciary Responsibilities," February 1, 2009, http://www.thenonprofittimes.com/news-articles/attorney-general-focusing-on-fiduciary-responsibilities/.

[7] "E-mails Suggest Collusion Between FEC, IRS to Target Conservative Groups," National Review Online, July 31, 2013, http://nationalreview.com/node/354801/print.

[8] "The state may not condition protected speech 'upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official.' *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958). '[A] law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority.' *Forsyth County v. Nationalist Movement*, 505

The demands for donor information by the California and New York Attorneys General, and whether Ms. Lerner's collaboration with state charitable officials influenced their decisions, merit investigation, especially in this atmosphere of fear caused by unlawful government conduct.

Respectfully,

Mark J. Fitzgibbons
President of Corporate Affairs
American Target Advertising, Inc.

U.S. 123, 131 (1992)." *American Target Advertising v. Giani*, 199 F.3d 1241, 1252 (10th Cir. 00).

Exhibit 1

Free Speech
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July 23, 2013

The Honorable Darrell Issa, Chairman
Committee on Oversight and Government Reform
United States House of Representatives
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Washington, D.C. 20515-0549

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Re: Illegal State Collection and Disclosure of Nonprofit Donor Data

Dear Chairmen Issa and Camp:

Currently, your committees are addressing the unlawful disclosure of tax return information by the Internal Revenue Service and some states. The Free Speech Coalition[9] now brings to your attention violations of the federal law governing confidentiality of tax return information by two states. We ask you to help us stop their illegal practices regarding collection and disclosure of donor data from IRS Form 990 Schedule B, and also prevent the spread of this practice to other states.

[9] The Free Speech Coalition (FSC) is an IRS section 501(c)(4) organization formed in 1993 to advocate for the First Amendment and other constitutional rights of nonprofit organizations. Because many FSC members and supporters obtain licenses to communicate and raise funds in California and New York, FSC does not list other organizations in this letter to protect them from retribution or any other unlawful or unfair treatment by state or other government officials.

The California and New York Attorneys General oversee their states' charitable solicitation statutes, and are those states' charitable officials overseeing nonprofit organizations that register to solicit charitable contributions.[10]

The California and New York Attorneys General now violate Internal Revenue Code sections 6103 and 6104 by demanding that charitable registrants file with their offices, and thereby disclose, names and addresses of their donors as set forth on Schedule B of Form 990.

Congress is investigating how the IRS and some states have unlawfully disclosed not only Social Security Numbers, but also other confidential tax return information including the names and addresses of donors to certain nonprofit organizations. Such disclosures are a violation of federal law on their face.

IRC 6103 and 6104 provide the express and limited circumstances under which states may obtain tax returns and return information. It makes no difference whether unlawful disclosure is made by the IRS or by any state official. IRC 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."

That the California and New York Attorneys General are demanding that nonprofits file their donor lists is itself an unlawful form of disclosure. "The term 'disclosure' means the making known to any person in any manner whatever a return or return information." IRC 6103(b)(8). "For a disclosure of any return or return information to be authorized by the Code, there must be an affirmative authorization because section 6103(a) otherwise prohibits the disclosure of any return or return information by any person covered by section 7213(a)(1)." Disclosure & Privacy Law Reference Guide, IRS Publication 4639, 1-49.

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[10] Some 42 states have charitable solicitation laws that require some form of registration. But it is well settled that charitable solicitations are protected by the First Amendment. See *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600 (2003); *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988); *Secretary of State v. Munson*, 467 U.S. 947 (1984); and *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980).

Under the broad definition of "disclosure" in IRC 6103(a), the demand for donor names and addresses by these states constitutes disclosure, and is therefore unlawful no matter what claims the states may make that the information will be kept confidential.

States are not authorized to demand that nonprofit organizations file and disclose their donors even under IRC 6104. Only "[u]pon 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." IRC 6104(c)(3).

That provision clearly means that there may be only very narrow disclosures for purposes of state charitable solicitation laws and each of those disclosures must be authorized only by the Secretary of the Treasury. Although IRC Section 6104 expressly makes the tax returns of nonprofits open to inspection, IRC 6104(d)(3) makes names and addresses of donors are exempt from disclosure.

The demands by the California and New York Attorneys General for such donor information are clearly not related to the purpose of the states' charitable solicitation statute.[11] Their charitable solicitation statutes do not authorize the Attorneys General to demand donor information. Indeed, the confidentiality of donor information has been so well understood that no state charitable solicitation statute in the country requires disclosure of donors.

Therefore, the demands of these two Attorneys General for disclosure of donors are certainly not truly "necessary" to the administration of their state's charitable solicitation statutes.

The demands by the California and New York Attorneys General pervert their duties under their charitable solicitation laws, and it would appear for the purposes of discouraging and intimidating nonprofit registrations. Their demands for donor names and addresses breach the

[11] The requirements for registration under the respective state charitable solicitation statutes are found at California Government Code Section 12580 – 12599.7, and New York Article 7-A, Executive Law, section 172-b.

confidentiality requirement under IRC 6103 and 6104, and further demands should constitute willful violations under IRC 7213.

We respectfully request that your committees subpoena the California Attorney General and New York Attorney General to testify and be held to account for their recent violations of the law.

Respectfully submitted,

Richard B. Dingman
Executive Director