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

Re: December 11, 2015 Notice of Proposed Rulemaking on Donor Confidentiality Purportedly Under Title 11, Division 1, Chapter 4

Dear Ms. Cantore:

The ___ undersigned nonprofit organizations, entities, lawyers, and other interested parties collectively representing millions of donors and millions more potential donors across the country, and having many decades of experience in informing citizens of causes that are important for Americans and their communities,[1] as well as having decades of experience developing relationships and private associations with citizen donors, submit these comments in response to the above-captioned proposed rulemaking about confidentiality of donor names now demanded

[1] The causes of America's nonprofit organizations cover many issues -- controversial and not -- such as medicine and science, religion and politics, social welfare, public policy and private actions, cures for diseases, feeding the poor, housing the homeless, caring for wounded veterans and their families, providing care for abused and abandoned animals, and promoting safety in our communities. Cumulatively, they touch on every major aspect of society. Some inform citizens about civil liberties, the Constitution, and other law. Many criticize actions taken by the legislative, executive and judicial branches of government, and are independent checks on government. Some even attempt to hold law enforcement officials such as the Attorney General accountable. They are used to criticize large private institutions and even other nonprofit entities. Nonprofits are independent of the government's officious views, and collectively are commonly referred to as the "Independent Sector." Donations to nonprofits are a valuable and irreplaceable means of **private association** integral to non-governmental, Tocquevillian democracy in American society, and for the benefit of people, animals, the environment, government accountability, and the security of our freedoms.

by the Attorney General as part of the charitable solicitation registration process.

As an initial matter, the demands by the California Attorney General for names and addresses of donors to charities and other nonprofit organizations violate the privacy and private right of association of donors to tens of thousands of worthy causes. Secondly, we reject the notion that the demands are legal: They are (1) unconstitutional (despite recent decisions by the Ninth Circuit denying injunctive relief, but ignoring fundamental Supreme Court precedent such as *NAACP v. Alabama*[2]), (2) illegal under post-Watergate reforms to federal taxpayer information privacy laws, and (3) neither required or contemplated by California's charitable solicitation statute, nor needed for California's law enforcement purposes. Thirdly, the proposed rulemaking fails to provide safeguards and adequately guarantee protections of confidential taxpayer information and privacy of donors to charitable, educational and other philanthropic causes from unauthorized disclosure to government officials, and even as to disclosure to the general public. Moreover, the provision of the proposed rule that the Attorney General will provide other state agencies, bureaus or departments confidential tax information pursuant to administrative subpoenas would make the Attorney General's office a hub for further violations of privacy and federal law, cloaked from any obligation of notice for due process, and depriving charities or donors opportunity to seek court relief to block violations of federal law and privacy rights.

I. <u>The AG's demands for names and addresses of donors are unconstitutional</u>.

While there are still several court challenges on constitutional grounds pending, the demands for names and addresses of donors violate the holding in *NAACP v. Alabama*, and are unconstitutional trespasses on

[2] 357 U.S. 449 (1958).

the right and security of private association.[3] The disclosure and inspection of donor names are susceptible to politically motivated abuses regardless of the political party of the current or future AGs – or members of their staffs. Also, it is well settled that charitable solicitations are protected by the First Amendment, so the AG's threats to deny this right to charities wishing to protect the privacy of their donors is extortionate and abusive, and compounds the AG's constitutional violations.

II. The AG's demands for names and addresses on IRS Form 990 Schedule B violate federal law. Civil and criminal penalties apply to state officials.

Donor names and addresses on Schedule B of Form 990 filed with the Internal Revenue Service are deemed confidential by federal law. See, generally, IRC sections 6103 and 6104 governing confidential taxpayer information. Following post-Watergate reforms, federal law protects against unauthorized (1) **disclosure** to[4] and (2) **inspection** by state

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[3] "We thus reach petitioner's claim that the production order in the state litigation trespasses upon fundamental freedoms protected by the Due Process Clause of the Fourteenth Amendment." *Id*. 357 U.S. at 460. "It 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. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." *Id*. at 460 - 461. "It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved. This Court has recognized the vital relationship between freedom to associate and **privacy in one's associations**." *Id.* at 462. Cites omitted and emphasis added.

[4] IRC section 6103(a) is clear that "return information shall be confidential, and except as authorized by this title . . . no officer or employee of any state . . . shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer of employee or otherwise under the provisions of this section." "The term 'disclosure' means the making known **to any person in any**

officials. There are both **civil and criminal penalties** for state officials who **disclose or inspect** confidential taxpayer information without authorization under federal law. See IRC sections 7213 and 7213A. These penalties indicate the seriousness of the intended protections of taxpayer confidentiality that the AG is now violating.

The federal statutes are clear that confidential taxpayer information may be obtained only in limited circumstances, and with statutory checks on **disclosure to and inspection by state officers and employees**. IRC sections 6103 and 6104 foreclose the AG's dragnet licensing demands for private donor information because they are not expressly authorized.[5]

III. The AG's demands using charitable solicitation registration are not authorized by California's charitable solicitation statute, and are not needed for law enforcement purposes.

The AG's demands creating disclosure to, and inspection by, herself and other state employees of confidential taxpayer information are not required or expressly authorized by California's charitable solicitation statute, and certainly are not "necessary" -- a condition required by IRC section 6104(c)(3) -- to the licensing of charitable solicitation. If ever relevant to an investigation of a particular nonprofit, this federally protected

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manner whatever a return or return information." IRC section 6103(b)(8) (emphasis added). This law therefore clearly applies to disclosure to and by state officials and employees. As interpreted by the IRS, the federal statutes' ban on disclosure except as authorized by the statutes themselves is clear: "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 (emphasis added).

[5] Only "[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." IRC section 6104(c)(3) (emphasis added).

confidential information may be obtained from the IRS under the lawful conditions of the controlling federal statutes, or by investigative methods consistent with the Fourth Amendment and particularized suspicion rather than through an unnecessary dragnet licensing process affecting all registrants and their donors.

IV. The proposed rule fails to provide safeguards and adequate protections of the confidentiality of donor names and addresses.

The proposed rule is striking in how it utterly lacks description of any safeguards, processes, protocols, or accountability to maintain confidentiality of donor information.[6] It fails to adequately state how the AG will maintain and protect the confidentiality of donor information, and prevent accidental, reckless, and even willful disclosure and inspection in violation of federal law. It fails to state which employees in the AG's office may and may not access this confidential information.[7] It fails to provide notice to victims of breaches, fails to provide remedies, and fails to provide penalties or discipline for employees of the AG's office who breach the confidentiality of donor names and addresses.

As stated above, the AG's office will be a hub for further unlawful disclosures to other state agencies, bureaus or departments that themselves may have no safeguards. The proposed regulation's failure to acknowledge the restrictions of disclosure to, or inspection by, certain state agencies as set forth in IRC sections 6103 and 6104 leaves open further violations of federal law, compounding the AG's violations of IRC section 6103, yet cloaked from notice to victims. Since the AG has ignored and transgressed the federal law of confidentiality as if it did not apply to her, it

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[6] When, for example, the IRS **lawfully** discloses private tax information under the defined and limited exceptions in IRC section 6103, the recipient government agency must "(1) establish a system of records to keep track of all disclosure requests, the date of the request, and the reason for the request; (2) establish a secure area in which to store the information; and (3) restrict access of persons to that information." *Johnson v. Sawyer*, 120 F.3d 1307, 1320 (5th Cir. 1997).

[7] *Id.*

is likely she will raise claims of defenses for breaches not contemplated by the federal statutes such as state sovereign immunity. And, the provision that other government offices merely agree "to maintain the confidentiality of the information received consistent with this regulation" without express safeguards not only risks further violations of federal law, but is an irresponsible extension of this regulation that is irresponsible on its face.

The proposed rule is not a serious effort. The unlawful demands for confidential taxpayer information by the AG are only further compounded by the proposed rule. The better course is for the AG to retract her demands for names and addresses of donors, or face the prospect of civil and even criminal challenges for her intentional acts.

Respectfully submitted,

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