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July 23, 2013

The Honorable Max Baucus, Chairman
Committee on Finance
United States Senate
511 Hart Senate Office Building
Washington, D.C. 20510-2602

The Honorable Orrin Hatch
Committee on Finance
United States Senate
104 Hart Senate Office Building
Washington, D.C. 20510-4402

The Honorable Chuck Grassley
Committee on Finance
United States Senate
135 Hart Senate Office Building
Washington, D.C. 20510-1501

Re: Illegal State Collection and Disclosure of Nonprofit Donor Data

Dear Senators Baucus, Hatch, and Grassley:

Currently, your committee is addressing the unlawful disclosure of tax return information by the Internal Revenue Service and some states. The Free Speech Coalition¹ 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

¹ 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.

collection and disclosure of donor data from IRS Form 990 Schedule B, and also prevent the spread of this practice to other states.

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.²

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.

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.

² 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).

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.³ 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 confidentiality requirement under IRC 6103 and 6104, and further demands should constitute willful violations under IRC 7213.

³ 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.

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