



November 28, 2022

*Submitted via email [pra.comments@irs.gov](mailto:pra.comments@irs.gov)*

Andres Garcia  
Internal Revenue Service, Room 6526  
1111 Constitution Avenue NW  
Washington, D.C. 20224

RE: NASCO Comments regarding OMB Control No. 1545-0047

Dear Andres Garcia:

The Board of Directors of the National Association of State Charity Officials (“NASCO”) respectfully submits this letter in response to the Internal Revenue Service (“IRS”) Notice and Request for Comments on Tax-Exempt Organization Forms. As described more fully below, we recommend that the IRS: (1) address the timely availability of Forms 990 and (2) revisit the use of the abbreviated Form 1023-EZ.

NASCO is an association of state charity officials, including state Attorneys General offices, Secretaries of State offices, and other state offices charged with preventing the misuse of charitable assets, ensuring that trustees of charitable trusts fulfill their fiduciary duties, and enabling donors to make informed choices about which charitable causes to support.<sup>1</sup> State charity regulators have been working together toward shared goals through NASCO for over 40 years. One of those key goals is to uphold the integrity of the charitable sector through ensuring transparency and accountability.

In order to do so, state regulators frequently use and rely on the valuable information contained in the IRS tax-exempt organization forms, including but not limited to, the long form IRS Form 990 and 990-EZ, the IRS Form 990-PF, and the long form IRS Form 1023. We know that donors and the public also use and view these forms as educational tools to inform their decision-making.

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<sup>1</sup> This letter reflects the views of the NASCO board of directors. It does not necessarily reflect the views of any individual Attorney General, Secretary of State, or other state official.

Based on our experience, we respectfully recommend the following with respect to IRS Tax-Exempt Organization Forms:

(1) Timely Availability of Forms 990

The NASCO board strongly supports the public availability of information nonprofits report through the Form 990 series and urges the IRS to address delays in the timely availability of these forms.

The Form 990 series is a critical tool for charity regulators, donors, grantors, and the public. For charity regulators, the Form 990 series not only helps ensure transparency and accountability, but also provides vital information for state investigations into potential fraud and misuse of charitable resources. For discerning donors, the Form 990 is an important source of information to support wise giving practices. For responsible grantors, the Form 990 can be an important tool to examine the financial health of potential grantees and ensure they are in compliance with regulatory obligations.

Lags in the availability of the critical data contained in the Form 990 adversely affect regulators, the public, and most importantly, the nonprofit. Because many NASCO member offices rely on the publicly available versions of Forms 990 submitted to the IRS rather than requiring submission of the Forms 990 to their state offices, it is critical that the availability of that data be timely. We are aware of and have observed significant lags in the amount of time between when charities submit Forms 990 to the IRS and when the IRS posts them. This creates an incomplete picture of a charitable organization when a NASCO office undertakes an investigation of a charity and can lead to confusion for potential charitable donors and others.

(2) Revisit the Use of the Abbreviated Form 1023-EZ

We reiterate our prior recommendation that the IRS revisit the abbreviated Form 1023-EZ, which certain organizations may file with the IRS to qualify for tax-exempt status under section 501(c)(3).<sup>2</sup> As described in several prior letters from NASCO, we believe that the longer Form 1023 serves important governmental and societal purposes, effectively serving as both a gate keeper and educational tool for newly formed organizations. In particular, the Form 1023 is often the first exposure a newly formed organization has to the financial, operations, fundraising and investment responsibilities of newly established nonprofits and their officers and directors.

The longer Form 1023 also provides information that can be useful for state regulators in our compliance and enforcement efforts. For example (and without limitation), representations regarding compensation and other financial arrangements with officers, directors, and key employees are useful when investigating related party transactions, and disclosures regarding prior

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<sup>2</sup> See May 26, 2021, letter from NASCO Board to Treasury Department and IRS, attached hereto as Exhibit 1 and enclosing April 6, 2018 letter from former NASCO President Hugh Jones to The Honorable Lynn Jenkins and The Honorable John Lewis, which attached two 2014 letters from then-NASCO President Alissa Hecht Gardenswartz.

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history can be used to identify repeat bad actors. We also continue to be concerned that the ability to use the Form 1023-EZ in place of the Form 1023 has made it easier for “scam” charities to obtain 501(c)(3) status.<sup>3</sup> While we understand the desire to simplify 1023 requirements for certain organizations, we believe it would best serve the public’s interest in nonprofit organizations to reinstate certain requirements for those organizations that serve as the educational tool that many of those organizations need – whether that reinstatement is accomplished through the elimination or revision of the 1023-EZ.<sup>4</sup>

We extend our appreciation to the IRS for this opportunity to convey comments regarding its tax-exempt organization forms. We respectfully urge you to consider the issues outlined above and detailed in the attached correspondence. Please feel free to reach out if you would like to discuss these matters.

Sincerely,

*/s/ Leslie Friedlander*

Leslie Friedlander  
President, National Association of State  
Charities Officials (NASCO) on behalf of  
the NASCO Board of Directors

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<sup>3</sup> See Treasury Inspector General for Tax Administration “More Information is Needed to Make Informed Decisions on Streamlined Applications for Tax Exemption,” Report No. 2023-10-001, pp.11-14 (October 3, 2022).

<sup>4</sup> See May 23, 2014 letter from the then-NASCO President Alissa Hecht Gardenswartz offering several suggested additions to the 1023-EZ, included in Exhibit 1.

Exhibit 1  
to November 28, 2022 Letter  
from NASCO Board to IRS



May 28, 2021

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2021-28) Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

RE: NASCO Recommendations for 2021-2022 Priority Guidance Plan Notice 2021-28

To Whom It May Concern:

The Board of Directors of the National Association of State Charities Officials (“NASCO”) respectfully submits this letter in response to the Notice 2021-28 invitation to submit recommendations for items to be included on the 2021-2022 Priority Guidance Plan. As described more fully below, we recommend that the Department of Treasury (“Treasury Department”) and the Internal Revenue Service (“IRS”) include the following issues in the 2021-2022 Priority Guidance Plan: (1) Revisit the Use of the Abbreviated Form 1023-EZ; (2) Reinstate Schedule B requirements for 501(c)(4) exempt organizations; and (3) Enhance IRS Information Sharing with State Charities Regulators.

NASCO is an association of state charities officials, including state Attorneys General offices, Secretaries of State offices, and other state offices charged with preventing the misuse of charitable assets, ensuring that trustees of charitable trusts fulfill their fiduciary duties, and enabling donors to make informed choices about which charitable causes to support.<sup>1</sup> NASCO regulators work toward the goal of upholding the integrity of the charitable sector through ensuring transparency and accountability. Based on our experience, we recognize the importance of the Treasury Department and the IRS addressing the following:

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<sup>1</sup> This letter reflects the views of the NASCO board. It does not necessarily reflect the views of any individual Attorney General, Secretary of State, or other state official.

(1) Revisit the Use of the Abbreviated Form 1023EZ

We recommend revisiting the abbreviated Form 1023EZ, which certain organizations may file with the IRS to qualify for tax exempt status under section 501(c)(3). As described in several prior letters from NASCO,<sup>2</sup> we believe that the longer Form 1023 serves important governmental and societal purposes, effectively serving as both a gate keeper and educational tool for newly formed organizations. In particular, the Form 1023 is often the first exposure a newly formed organization has to the financial, operations, fundraising and investment responsibilities of newly established nonprofits and their officers and directors. Further, the longer Form 1023 provides information that can be useful for state regulators in our compliance and enforcement efforts. For example (and without limitation), representations regarding compensation are useful when investigating related party transactions, and disclosures regarding prior history can be used to identify repeat bad actors. We also continue to be concerned that the ability to use the Form 1023EZ in place of the Form 1023 has made it easier for “scam” charities to obtain 501(c)(3) status. Please see the attached May 23, 2014 letter from the then-NASCO President offering a number of suggested additions to the 1023-EZ, including, among other items, requiring submission of articles and by-laws, provisions for distribution of assets upon dissolution, and detailed information regarding compensation and other financial information with officers, directors and key employees. While we understand the desire to simplify 1023 requirements for certain organizations, we believe it would best serve the public’s interest in nonprofit organizations to reinstate certain requirements for those organizations that serve as the educational tool that many of those organizations need – whether that reinstatement is accomplished through the elimination or revision of the 1023-EZ.<sup>3</sup>

(2) Reinstate Schedule B Filing Requirements

We recommend withdrawing the IRS guidance published in 2020 at 85 FR 31959, and reinstating the requirement that 501(c)(4) organizations submit the “names and addresses” of substantial contributors through Form 990, Schedule B, as access to that information is critical to the IRS’s enforcement of the Code and state enforcement of complementary state laws regulating certain charitable 501(c)(4) organizations.<sup>4</sup> As we had predicted in our December 5, 2019

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<sup>2</sup> See April 6, 2018 Letter from Former NASCO President Hugh Jones to The Honorable Lynn Jenkins and The Honorable John Lewis, which attached two 2014 letters from then-NASCO President Alissa Hecht Gardenswartz, all of which are attached hereto as Attachment A.

<sup>3</sup> In response to prior reviews (e.g., from the Taxpayer Advocate Service) suggesting that a significant percentage of 1023-EZ approved applicants were not in fact eligible for 1023-EZ, the IRS has articulated an intent to conduct audits of approved 1023-EZ applicants, and has discussed its “pre-determination reviews” of a sample of 1023-EZ filers (about 3%). We would appreciate the opportunity to discuss with you the results of these audits and pre-determination reviews.

<sup>4</sup> Many state charities regulators oversee 501(c)(4) organizations, which may be public charities under state law if their primary purpose is not political advocacy. See MODEL PROTECTION OF CHARITABLE ASSETS (2011) at 13, available at <https://www.uniformlaws.org/committees/community-home?CommunityKey=ad5a0384-9d0e-41c0-a00f-4c3794962946> (“Nor does the Act apply to organizations whose primary purpose is political advocacy.

comment letter to the IRS on REG-102508-16, by relieving 501(c)(4) organizations of the obligation to submit Schedule B, the IRS signaled that it abdicated enforcement with respect to those organizations and provided increased opportunity to abuse 501(c)(4) status. We also expect that should the Schedule B requirement not be reinstated promptly, the enforcement burden shouldered by state charities regulators will substantially increase.<sup>5</sup> As a result, the IRS and state charities regulators have been deprived of the important tool we once had to question 501(c)(4) organizations about, among other things, potential undue influence of disqualified persons under 4958. We have also been hindered in investigating illicit “dark money” spent by 501(c)(4) organizations to influence elections, excess benefit transactions, sham charities, and fundraising fraud. For more details regarding why we believe it is vital for the IRS to collect Schedule Bs from 501(c)(4) organizations, please see the attached December 5, 2019 letter NASCO wrote to the IRS.<sup>6</sup>

### (3) Enhance IRS Information Sharing with State Charities Regulators

We believe that enhancing the ability of our agencies to share information would support collective goals, which include promoting transparency and accountability in the charitable sector and ensuring against private inurement, waste, fraud, conflicts of interest, excess compensation and other abusive practices. While the Pension Protection Act of 2006 (the “PPA”) permitted some level of information sharing, to-date we believe the applicable requirements have largely proven unworkable for state charities regulators. Until the PPA can be amended to ease some burdens, such as subjecting state charity officials to criminal penalty provisions of IRC Sec. 7213, we urge the Treasury Department and IRS to revisit the information sharing procedures, consider how new technologies may facilitate secure sharing of information, and renew IRS attempts to facilitate the states’ ability to use shared information. For more information on state charities regulator concerns and challenges with respect to current IRS information sharing policies, please see the attached 2011 letter from 43 Attorneys General<sup>7</sup> and the 2013 Report of Recommendations from the IRS Advisory Committee on Tax Exempt and Government Entities.<sup>8</sup>

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*Workmen's Circle Educational Center of Springfield v. Board of Assessors*, 314 Mass. 616, 619, 51 N.E.2d 313, 316 (1943”).

<sup>5</sup> While California’s regulatory compliance requirement that charities confidentially submit Schedule Bs as part of annual filing requirements is before the Supreme Court in *Americans for Prosperity Foundation v. Bonta*, No. 19-251 and *Thomas More Law Center v. Bonta*, No. 19-255, this letter speaks to the separate issue of the IRS’s longstanding requirement that 501(c)(4) organizations submit Schedule Bs to the IRS, which was rolled back in 2020.

<sup>6</sup> See December 5, 2019 Letter from NASCO to IRS regarding IRS REG-102508-16, attached hereto as Attachment B.

<sup>7</sup> See October 28, 2011 Letter from 43 Attorneys General to The Honorable Max Baucus and The Honorable Orrin Hatch, attached hereto as Attachment C.

<sup>8</sup> See Publication 4344 (Rev. 6-2013), Advisory Committee on Tax Exempt and Government Entities, “Exempt Organizations: Leveraging Limited IRS Resources in the Tax Administration of Small Tax-Exempt Organizations,” p. 11-16, available at [https://www.irs.gov/pub/irs-tege/tege\\_act\\_rpt\\_12.pdf](https://www.irs.gov/pub/irs-tege/tege_act_rpt_12.pdf).

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We appreciate the opportunity to convey recommendations for items to be included on the 2021-2022 Priority Guidance Plan. We respectfully urge you to consider the issues outlined above and detailed in the attached correspondence for inclusion in the Plan. Please feel free to reach out if you would like to discuss.

Sincerely,

*Yael Fuchs /s/*

Yael Fuchs  
President, National Association of State  
Charities Officials (NASCO)



# Attachment A



April 6, 2018

*Via Email*

[irsreform@mail.house.gov](mailto:irsreform@mail.house.gov)

Chairman Lynn Jenkins  
Ranking Member John Lewis  
House Ways and Means Oversight Subcommittee  
United States House of Representatives  
United States Congress  
Washington D.C.

Dear Chairman Jenkins and Ranking Member Lewis

Re: Discussion Draft: The Taxpayer First Act, H.R. No. \_\_\_\_ (March 26, 2018)

I am writing on behalf of nine other former presidents<sup>1</sup> of the National Association of State Charity Officials (NASCO). I held the office of president of NASCO during the years 2007-2008 and remain very active in its programs, committees, activities and initiatives. NASCO is an association made up of state Attorneys General and Secretaries of State, and other agencies having state oversight of charitable organizations, and their fundraising and governance practices. These include nonprofit corporations of many kinds, and charitable trusts.

We are writing to strongly suggest that the Taxpayer First Act include provisions that require the Internal Revenue Service (IRS) to revisit the use of the abbreviated Form 1023EZ, which currently allows certain organizations to qualify for tax exempt status under section 501(c)(3) for charitable, educational and religious purposes. We join with the comments submitted separately by the National Council of Nonprofits<sup>2</sup>

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<sup>1</sup> Former NASCO presidents Terry M. Knowles (NH) Chris Cash and Alissa Hecht Gardenswartz (Colo.), Karin Kunstler Goldman (NY), Elizabeth Grant (OR), Belinda Johns (Calif.), Janet Kleinfelter (TN), Mark Pacella (PA), Therese Harris (IL) and others have authorized me to communicate that they join with me, and I am virtually certain that many others would too, time permitting. I am a Senior Deputy Attorney General, with the Tax & Charities Division of the Hawaii Attorney General's office.

<sup>2</sup> The National Council of Nonprofits is an advocate for an effective, robust, ethical and transparent charitable sector and the Council and NASCO frequently collaborate together in our work to promote

which has stood firmly with NASCO on this issue to protect the public trust in the nonprofit sector. I share many of the National Council of Nonprofits' concerns about the Form 1023EZ. I and other former NASCO presidents believe that the IRS should resume using the much more robust Form 1023, although we understand, and in fact support efforts to simplify the prior form, yet make an effective tool for qualifying and educating newly formed charitable organizations.

NASCO is on record in opposition to the use of form 1023EZ and that opposition remains so today. Attached are copies of former NASCO president Alissa Hecht Gardenswartz's April 30 and May 23, 2014 letters that explain in considerable depth, why a longer Form 1023 served important governmental and societal purposes and should not be truncated to the point that it becomes ineffective in performing a gate keeping and educational function for newly formed organizations. The Form 1023 is often the first exposure a newly formed organization has to the myriad of financial, operational, fundraising and investment issues faced by a newly established nonprofit organization. As stated in the 2012 Report of the Tax Advisory Committee (ACT):

Form 1023 serves an important educational purpose for applying organizations . . . and forces the applying organization to think somewhat deeply about its activities, finances, and management . . . [The Form] also signals to the organization that it is entering into a (probably unfamiliar) comprehensive regulatory scheme, and working through the questions on the form provides the organization with a great deal of information about compliance with this regime.

The concerns of NASCO, the National Council of Nonprofits and the ACT are echoed by those of the Taxpayer Advocate Service. The Taxpayer Advocate Service recently found that exempt status was erroneously granted to up to 42 percent of applicants using the 1023EZ<sup>3</sup>. I, and my colleagues strongly agree with the Taxpayer Advocate Service's statement that Form 1023EZ's "new procedures do not require applicants to submit their articles of incorporation or bylaws to ensure they are properly organized and have adopted the appropriate charitable purpose clause as well as protections against misuse of funds."

Aside from the fact that Form 1023EZ has allowed simply "unqualified" organizations to qualify for tax exempt status, I am concerned that it has been an invitation to possibly "sham" charities to apply for and obtain tax exempt status and use that special tax status as a tool to convince donors to contribute money given the apparent IRS "stamp of approval." In at least one egregious example, a for-profit entity applied for and was granted tax exempt status using Form 1023EZ<sup>4</sup>. There may be others like this example.

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public confidence in the nonprofit sector. Because the Council represents the regulated sector, NASCO listens carefully to the Council's suggestions on a wide range of issues.

<sup>3</sup> <https://taxpayeradvocate.irs.gov/reports/2017-annual-report-to-congress/MSP-1023-EZ>

<sup>4</sup> See [https://www5.sos.state.oh.us/ords/f?p=100:7:::NO:7:P7\\_CHARTER\\_NUM:4019295](https://www5.sos.state.oh.us/ords/f?p=100:7:::NO:7:P7_CHARTER_NUM:4019295)

In Hawaii, nonprofit organizations may use "form" articles of incorporation to simplify the incorporation process, but those "form" articles do not satisfy the section 501(c)(3)'s requirement that a charity's organizational documents limit their activities to one or more exempt purposes, and require that the assets be distributed to other qualifying tax exempt charities. As a result we have seen several Hawaii nonprofit organizations that obtained tax exempt status using Form 1023EZ, representing their organizational documents met stringent IRS requirements, when in fact they did not. I am sure other states that provide "form" articles of incorporation have experienced similar situations. When such organizations' articles of incorporation do not confine the organizations activities to charitable purposes, it invites abuse and makes it very difficult for state charity regulators to protect and safeguard what should be charitable assets.

We recommend that this is a suitable time to require the IRS to re-examine use of the truncated IRS Form 1023EZ. The IRS should give full consideration to the suggestions made by the National Council of Nonprofits, and in the 2012 Final Report of the Act. Based on the foregoing, we again recommend that the Taxpayer First Act include provisions which require the IRS to revisit the use of the abbreviated Form 1023EZ to ensure that it performs an effective gate keeping and educational function that it once did.

Thank you for listening to our concerns.

Respectfully submitted,

  
Hugh R. Jones

NASCO President 2007-2008

Attachments (2)



May 23, 2014

**Via Electronic Mail**

Ms. Sunita Lough  
Commissioner, Tax Exempt and Government Entities Division  
Ms. Tamera Ripperda  
Director, Exempt Organizations  
United States Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

**RE: Proposed Internal Revenue Service Form 1023-EZ, OMB Number 1545-0056**

Dear Sunita and Tammy:

I am writing to follow up on our May 6 conversation addressing NASCO's concerns about the IRS's implementation of the 1023-EZ. As we mentioned during the call and in our April 30 comments to the OMB and Treasury, NASCO does not oppose the idea of a more streamlined "core form" 1023. We are concerned, however, that the most recent draft of the 1023-EZ fails to obtain the minimum amount of information necessary to identify organizations that should not be approved or should be monitored closely in back-end compliance. Accordingly, we strongly recommend that the following information be requested in the 1023-EZ:

- Provision of articles and by-laws as well as Part III of the current 1023 that requires organizations to state where their purpose is in

- organizing documents and greater specifics (beyond mere attestation) on provisions for distribution of assets upon dissolution.
- Detailed information regarding compensation and other financial arrangements with officers, directors, and key employees of the organization. Information provided here could be a source for red flags (for example, the organization will be all volunteer, the executive director's salary will be 70% of total revenue, organization will receive goods/services from an organization associated with an officer or director, etc.) – the vast majority of questions in the current Part V should be required.
  - Some financial reporting should be required – at minimum revenues and expenses.
  - Part VI is also a source for potential concerns and serves a valuable educational purpose for the many well-meaning organizations that do not realize they cannot form a tax-exempt charity to raise funds for a single individual.
  - Organizational history, i.e., whether the organization is a successor organization or has submitted an application more than 27 months after formation.
  - Part VIII (specific activities) could be somewhat limited as proposed in the current 1023-EZ, but should also include questions on fundraising activities and contracts, whether the organization is affiliated with a governmental entity, and planned activities with other organizations (joint ventures, loans, etc.).

Other items that could be included on a 1023 application that would be helpful to state regulators and the IRS alike would be questions regarding relationships to previously revoked (c)(3)s, criminal backgrounds of officers and directors, and/or affiliations of the applicant charity with other charities that have been subject to legal action. Even if bad actors are inclined to not answer these questions truthfully, the sheer fact that the questions are asked may deter some people from using tax-exempt status for nefarious purposes, and untruthful responses could provide a basis for state enforcement actions for fraud or impermissible private benefit.

NASCO very much appreciates the opportunity to provide the IRS with feedback regarding its rollout of the 1023-EZ, and we hope that you seriously

consider our suggested modifications to the current form. We look forward to continuing to work with you as you implement these changes.

Sincerely,



Alissa Hecht Gardenswartz  
NASCO President (2013-2014)  
First Assistant Attorney General  
Office of the Colorado Attorney General  
Ralph L. Carr Judicial Center  
1300 Broadway, 7<sup>th</sup> Floor  
Denver, CO 80203  
(720) 508-6204  
(720) 508-6040 (fax)  
Alissa.gardenswartz@state.co.us

cc: Ruth Madrigal, Attorney Advisor  
Office of Tax Policy, U.S. Dept. of the Treasury (via email)



April 30, 2014

Office of Information and Regulatory Affairs  
Office of Management and Budget  
Attention: Desk Officer for Treasury  
New Executive Office Building, Room 10235  
Washington, DC 20503  
Via email at [OIRA\\_Submission@OMB.EOP.gov](mailto:OIRA_Submission@OMB.EOP.gov)

Treasury PRA Clearance Officer  
1750 Pennsylvania Avenue NW, Suite 8140  
Washington, DC 20220  
Via email at [PRA@treasury.gov](mailto:PRA@treasury.gov)

**RE: Proposed Internal Revenue Service Form 1023-EZ, OMB Number 1545-0056**

Thank you for the opportunity to comment on the proposed Form 1023-EZ as drafted on April 23, 2014. I am the current president of the National Association of State Charity Officials (NASCO) and write on behalf of NASCO to reiterate state charity regulator concerns regarding an abbreviated Form 1023 tax exempt application. A survey of state charities regulators conducted prior to the 2012 report of the Internal Revenue Service's Advisory Committee on Taxation (ACT) found that state regulators uniformly believed that collecting less information in the initial application for tax exemption on an assumption that an organization that begins small will remain small invites abuse and results in overall regulatory inefficiency. The ACT recommended against development of a Form 1023-EZ.



NASCO continues to support the ACT's recommendation against a Form 1023-EZ and the Committee's reasoning as stated in the 2012 ACT report:

a. Rationale for Not Developing a Form 1023-EZ – One of our stated goals for the Form 1023 is that it be simple, and a shorter Form 1023 would almost certainly be simpler for small organizations. But we believe that the value of this increased simplicity would be outweighed by the loss of educational value to the applying organization and the loss of effectiveness to the IRS.

Before discussing the rationale for our recommendation regarding the Form 1023-EZ, we first address a consideration that was *not* a basis for our recommendation—that the Form 1023 should deter small organizations that are more likely to be formed without the necessary funding and infrastructure in place to survive long term from applying for recognition of exemption. We do not believe that the Form 1023 should be a barrier to exemption for these organizations and we frankly suspect that the current form, with its complexity, has that effect. We hold this view while fully acknowledging that there are sometimes beneficial effects when the form does act as a barrier. But as a policy matter, we believe that the Form 1023 should address the legal requirements for exemption in an effective, consistent, simple, and educational manner—nothing more, nothing less.

The primary reason we do not recommend the development of a Form 1023-EZ is because the Form 1023 serves an important educational purpose for applying organizations. Through its questions, the form forces the applying organization to think somewhat deeply about its activities, finances, and management. The form also signals to the organization that it is entering into a (probably unfamiliar) comprehensive regulatory regime, and working through the questions on the form provides the organization with a great deal of information about compliance with this regime. We agree with the many practitioners we spoke with who believe that the educational benefits of the Form 1023 are especially important for small organizations. And we do not believe that a significantly shorter Form 1023 could provide a comparable level of these benefits.

In addition, we think that it would be difficult to design a significantly shorter Form 1023-EZ that would still be effective from the IRS's perspective, i.e., that it would still provide the IRS with all the essential information it needs to make a determination on a small organization's exempt status. While the current Form 1023 clearly

needs to be redesigned and streamlined, in the end many of the questions on the current form will still need to be asked (in some form or another) of all organizations, both large and small, although reformatting will reduce the need for smaller organizations to respond to certain questions. It should also be noted that many small exempt organizations will be Form 990-N (e-Postcard) filers. Hence, the Form 1023 will be the only opportunity for the IRS to receive any substantive information about such organizations. Thus, it is even more important that the Forms 1023 filed by small organizations request all the information the IRS needs because there will not be a “second chance” to obtain this information later from a (full) Form 990 or 990-EZ.

While there is certainly abuse in both large and small charities, some practitioners and state charity regulators we spoke with noted that some types of small charities are particularly susceptible to abuse. In their view, some small charities seemingly do little more than pay salaries to their founders and insiders. It may also be easier to embezzle from a small charity because it has few or no staff and financial controls are perhaps not as strong as they should be. Moreover, small organizations often lack sufficient reserves to withstand such losses of resources. All these considerations are relevant to the application process for small organizations. The information an organization provides on its Form 1023 can sometimes signal to the IRS a potential for possible abuse, and the IRS can then “flag” that organization for later follow-up. Our concern is that a shorter Form 1023-EZ may be less capable of providing these warning signals.

State charity regulators uniformly oppose a Form 1023-EZ, noting that such a form would make it easier for “scam” charities to obtain Section 501(c)(3) status. They also believe that there is no way at the outset to justify a rationale of exempting small charities from the Form 1023 filing burden, because all applicants, other than perhaps private foundations, begin their existence as small organizations. As one state charity regulator noted: “The application process should be the same for everyone -- no one knows how large and successful a particular organization or cause may be at its earliest beginnings, even if they pledge to ‘stay small.’”

Another objection to a Form 1023-EZ for small organizations is the difficulty in determining an appropriate standard for what “small” should mean for this purpose. If, for example, annual gross receipts are used as the threshold requirement for using the shorter Form 1023-EZ,

this could frustrate the rationale for having the shorter form. An organization's projected gross receipts on the Form 1023 could be substantially smaller than what it actually receives in its first few years. But because its projections were small, the organization would qualify to file the shorter Form 1023-EZ, and thus avoid providing the IRS, on a (full) Form 1023, with a more comprehensive view of this now "un-small" organization. More generally, if projected annual gross receipts were used as the threshold for the Form 1023-EZ, there would be a natural inclination for organizations to understate those projections.

2012 ACT Report of Recommendations. "Exempt Organizations: Form 1023- Updating It for the Future," pages 31-33, located at [http://www.irs.gov/pub/irs-tege/tege\\_act\\_rpt11.pdf](http://www.irs.gov/pub/irs-tege/tege_act_rpt11.pdf).

State charities regulators use the same vital information collected on Forms 1023 to ensure compliance with federal tax regulations to carry out our respective state regulatory duties to protect charitable assets from fraud and abuse, and to ensure that charitable assets are used for the purposes represented to the public. We believe that the Form 1023-EZ will increase opportunity for fraud and heighten the burden on state regulators to compensate for the reduced standards that will be required of the organization to meet federal tax exemption requirements. While we appreciate that the IRS will be committing more resources to back-end compliance examinations to address the potential for malfeasance, our concern is that the current 17% of all applicants for which the Form 1023-EZ would apply could grow exponentially if the process for obtaining tax-exempt status was significantly simplified. Both IRS and state charities regulator enforcement capabilities are already stretched thin. While use of the Form 1023-EZ may result in somewhat of a short-term reduced burden in processing applications, the long-term effect certainly will be a greatly increased burden on already overburdened state and federal regulators.

We submit that there are alternate and more effective ways to foster "accountability, transparency, and openness in Government and society" consistent with the spirit and purpose of the Paperwork Reduction Act. NASCO is taking a leadership role in trying to create substantive efficiencies for charitable organizations in meeting state and federal regulatory requirements. We are working with the Multistate Registration and Filing Project ("MFRP, Inc.") to develop a unified multistate charities registration website that will enable tax-exempt organizations to meet state regulatory registration requirements for every

state and, at the same time, file their annual Forms 990 at one convenient, easy to use website, without duplication of data entry. Making electronic filing uniform and convenient will result in significant cost savings for charities. It will significantly decrease processing time for the IRS and state regulators, making government more efficient. It will heighten transparency by enabling effective data sharing among federal and state regulators, legislators, and the general public. We believe that working together to achieve these efficiencies will ultimately alleviate burdens on charitable organizations and government more effectively than reducing the standard for acquiring tax exempt status by enabling some organizations to obtain tax exemption with an abbreviated Form 1023-EZ.

In conclusion, NASCO agrees that a reconsideration of the Form 1023 is appropriate in the context of reducing the burden on charities and the government, but believes the discussion should involve input from all stakeholders with an eye towards reduced burden overall and not just in the application process.

Sincerely,



Alissa Hecht Gardenswartz  
NASCO President (2013-2014)  
First Assistant Attorney General  
Office of the Colorado Attorney General  
Ralph L. Carr Judicial Center  
1300 Broadway, 7<sup>th</sup> Floor  
Denver, CO 80203  
(720) 508-6204  
(720) 508-6040 (fax)  
Alissa.gardenswartz@state.co.us

# Attachment B



December 5, 2019

Internal Revenue Service  
CC:PA:LPD:PR (REG-102508-16)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

**Re: IRS REG-102508-16 – Comments on the Proposed Regulation Eliminating a Schedule B Requirement for Tax-Exempt Organizations to Submit the Names and Addresses of Substantial Contributors**

Dear Sir or Madam:

The National Association of State Charity Officials (“NASCO”)<sup>1</sup> respectfully submits this comment letter in response to the request for comments in REG-102508-16, issued by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (“IRS”) on September 6, 2019 under section 6033 of the Internal Revenue Code (“Code”). The preamble to the proposed rulemaking asserts that submission of the “names and addresses” of substantial contributors to tax-exempt organizations (other than IRC 501(c)(3) organizations) is not necessary for the efficient administration of the Code. On the contrary, as detailed below, IRS collection of the “names and addresses” of substantial contributors through Form 990, Schedule B is critical to the enforcement of the Code and state enforcement of complementary state laws regulating certain 501(c)(4)s that are public charities.<sup>2</sup> If the IRS moves forward in relieving 501(c)(4)s of the obligation to submit Schedule B, it will effectively abdicate enforcement with respect to those organizations, signal increased opportunity to abuse 501(c)(4) status and substantially increase the enforcement burden shouldered by state charity regulators. Therefore, and

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<sup>1</sup> NASCO is affiliated with the National Association of Attorneys General (“NAAG”) and serves as a forum for state charity officials to exchange views and experiences related to the regulation of public charities as well as to foster interstate cooperation regarding charitable enforcement efforts. NASCO members include representatives from state attorney generals’ offices furthering their exclusive common law role to represent the public interest in preventing the misuse of charitable assets, breaches of fiduciary duty in the administration of public charities, and fraudulent and deceptive charitable solicitation.

<sup>2</sup> Many state charity regulators oversee 501(c)(4)s, which may be public charities under state law if their primary purpose is not political advocacy. See MODEL PROTECTION OF CHARITABLE ASSETS ACT (2011) at 13, available at <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=55198f6f-6c9d-feb0-6115-481d8c29cbee&forceDialog=0> (“Nor does the Act apply to organizations whose primary purpose is political advocacy. *Workmen’s Circle Educational Center of Springfield v. Board of Assessors*, 314 Mass. 616, 619, 51 N.E.2d 313, 316 (1943)”).

for the following reasons, NASCO urges the IRS to withdraw the proposed regulation or, at a minimum, to maintain the requirement to submit Schedule B for 501(c)(4) organizations.

**I. The IRS Needs Schedule B Contributor Information to Spot “Red Flags” that can Alert the IRS to Examine an Organization for Code Violations**

IRS commentary in the preamble to the proposed rulemaking asserts that the IRS can fulfill its enforcement functions without Schedule B because tax-exempt organizations will still be required to substantiate the number of contributors and amounts of their contributions. However, that information, without details identifying specific donors and their specific contributions, is not sufficient to guard against many kinds of fraud and illegal activity, as described more fully below. Nor is the IRS correct in asserting that it can obtain adequate compliance information from Form 990, Schedule L reporting of contributor loans, transactions and excess benefit transactions. Schedule L requires reporting only about transactions *between* contributors and the exempt organization – not information about all substantial contributors.<sup>3</sup>

Moreover, contributor information found in Schedule B can provide a “red flag” to alert the IRS (and state charity officials) to examine certain tax-exempt organizations. The IRS claims that it can request contributor information when it conducts an examination of a particular tax-exempt organization. But often it is the contributor information itself, cross-checked with other information contained in the Form 990 schedules, that creates a road map that helps “obtain a complete picture of [the] charities’ operations” and “flag suspicious activity, simply by using information already available to the IRS.” *Citizens United v. Schneiderman*, 882 F.3d 374, 382 (2d Cir. 2018).<sup>4</sup> As noted by the Supreme Court, fraud, by its nature, is often revealed not by a single smoking gun but by a pattern of suspicious behavior that “[l]ike a jigsaw puzzle” must be pieced together from “many pieces of evidence that, taken singly would show comparatively little.” *Andresen v. Maryland*, 427 US 463, 482 (1976).

**a. The Schedule B Road Map Can Identify Excess Benefit Transactions**

By requiring disclosure of the names and addresses of substantial contributors and cross-checking this information with information contained in other Form 990 schedules, the IRS (and state charity officials) can observe patterns of suspicious behavior. This “road map” of behavior is essential to protecting the public from self-dealing and other excess benefit transactions. In conjunction with other information contained in Form 990 schedules, the Schedule B enables the discovery of the following types of illegal conduct, among others: (1) diversion of contributed and ostensibly charitable assets to either personal use or an improper use through or by the charity; (2) “self-dealing” by passing money through the charity to family members (who may not be “interested persons” who would appear in other schedules such as Schedule L); and (3) funding of enterprises that are created for the donor’s own benefit

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<sup>3</sup> Moreover, Schedule L also relies on honest and informed self-reporting, which is presumably in short supply for tax-exempt organizations that are seeking to skirt their legal obligations.

<sup>4</sup> While the court opinions in *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000 (9th Cir. 2018) (*petition for cert. filed*, Aug. 6, 2019) and *Schneiderman*, 882 F.3d 374 (2d Cir. 2018) dealt with First Amendment issues regarding mandatory Schedule B reporting by 501(c)(3) and 501(c)(4) organizations to California and New York, both courts’ constitutional analyses incorporated fact-finding about the necessity of the Schedule B reporting to those states’ effective law enforcement. Such fact-finding about the necessity of Schedule B reporting for law enforcement is directly pertinent to IRS assertions about the need for Schedule B reporting for effective IRS enforcement of the Code.

A third state, New Jersey, also requires mandatory Schedule B reporting. N.J.A.C. 13:48-4.3, -5. Other states which do not compel filing of the Schedule B have subpoenaed the Schedule B directly from tax-exempt organizations as part of law enforcement investigations.

and not for a public charitable purpose. Accordingly, “[k]nowing the source and amount of large donations can reveal whether a charity is . . . doing business with an entity associated with a major donor.” *Schneiderman*, 882 F.3d at 382.

For example, the Attorney General of California relied on Schedule B “road maps” in investigating several instances of violation of California charity laws including: the identification of self-dealing in a charity serving animals after Hurricane Katrina; the identification of “a charity’s founder as its principal contributor, indicating he was using the research charity as a pass-through;” and the tracking of “a for-profit’s use of a non-profit organization as an improper vessel for gain.” *Americans for Prosperity Foundation v. Becerra*, 903 F.3d 1000, 1011 (9th Cir. 2018) (*petition for cert. filed*, Aug. 6, 2019).

***b. The Schedule B Road Map Can Identify Sham Tax Exempt Organizations***

The Schedule B “road map” also enables the identification of businesses that are operating as tax-exempt organizations, but in reality are reporting service payments as “contributions.” The proposed rule inhibits the IRS’s ability to identify such sham tax-exempt organizations. For example, a business organized under the guise of a tax-exempt organization might receive income by means of “contributions.” If the IRS had access to the names and addresses of the organization’s “contributors,” it could determine whether those persons in fact paid a fee for the business’s services rather than making charitable contributions. The IRS could thereby conclude that tax-exempt status is inappropriate.

***c. The Schedule B Road Map Can Identify Impermissible Practices in Connection with Political Activities and Donations Involving 501(c)(4)s***

The proposed rule will further degrade transparency around so-called “dark money” 501(c)(4) organizations that spend money to influence elections. 501(c)(4) status is appropriate for organizations whose purposes and activities are designed to promote social welfare causes, including political activities, but only so long as those organizations’ primary purposes are not political.<sup>5</sup> Enforcement issues can arise when 501(c)(4) organizations contribute to other 501(c)(4) organizations. For example, if a 501(c)(4) spends less than 50 percent of its resources on political activities, but it donates its remaining funds to another 501(c)(4) organization to support that second organization’s political activities, then essentially all of the first organization’s funding would be used for political activities—which would exceed the legal limits for complying with its 501(c)(4) status. Therefore, IRS knowledge of the donor organization’s identity (from the second organization’s Schedule B, under current rules) would be essential in determining whether it was complying with tax law, or whether it was instead abusing tax exemption and 501(c)(4) status. The proposed rule change would seriously diminish the IRS’s ability to identify this kind of impermissible conduct.

The IRS commentary asserts that Schedule L of the Form 990 provides sufficient contributor information, making Schedule B information unnecessary. However, Schedule L provides significantly less information than currently required in Schedule B. Schedule L requires organizations to provide information on certain financial transactions or arrangements *between* the organization and disqualified person(s) (such as substantial contributors) or other interested persons. Schedule L could therefore only provide red flags that result from a tax-exempt organization *giving* money (or some other benefit) to a donor. For example, Schedule L might report a situation where a CEO allows a 501(c)(4) to rent an

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<sup>5</sup> See Lindsey McPherson, *EO Training Materials Suggest 51 Percent Threshold for Social Welfare Activity*, 2014 TAX NOTES TODAY 13–15 (Jan. 21, 2014) (suggesting that, while the 501(c)(4) “primary purpose” test is ambiguous, IRS staff calculate the meaning of “primary” as requiring that 51% of a 501(c)(4)’s expenditures be for exempt, non-political activities).



office space from a donor-founder for well above fair market value. However, Schedule L would not catch the red flag in the example described above, where a 501(c)(4) involved in politics receives a donation from another 501(c)(4) involved in politics, because that transaction does not involve a financial benefit to the donor organization and therefore would not be reported on Schedule L.

***d. The Schedule B Road Map Can Identify Fundraising Fraud***

The Schedule B “road map” also facilitates the identification of organizations that misstate their purposes to the public. The Schedule B serves the government’s interest in preventing tax-exempt organizations “from using donations for purposes other than those they represent to their donors and the public.” *Schneiderman*, 882 F. 3d at 382. It achieves this by helping trace funds used for improper purposes. For instance, the California Attorney General’s Office used the Schedule B to trace funds used for improper purposes in connection with a charity serving animals after Hurricane Katrina. *Americans for Prosperity*, 903 F. 3d at 1011.

***e. Schedule B Can Identify Inflated In-Kind Donations***

The Form 990 requires disclosure of the type and value of any in-kind gifts. This information, read in conjunction with the “road map” created by Schedule B, allows detection of schemes commonly referred to as “gift-in-kind scams,” which are an organization’s “intentional [ ] overstate[ment of] the value of noncash donations in order to justify excessive salaries or perquisites for its own executives.” *Schneiderman*, 882 F.3d at 382. Further, by inflating the value of goods donated to it, an organization can distort its financial success or the size and scope of its operations and mask high fundraising and administrative costs that appear to be a smaller percent of overall expenses than they actually are. As a result, 501(c)(4) tax-exempt organizations are more likely to avoid scrutiny from the IRS and state charity regulators for excessive compensation and other inurement. Eliminating the Schedule B donor information will make identification of this kind of scheme more difficult.

**II. Having Access to Donor Information Makes the IRS More Efficient**

By requiring the routine disclosure of the names and addresses of substantial contributors, the IRS maintains the records of possibly suspicious activity on hand, which, during any ensuing investigation of a 501(c)(4) tax-exempt organization, avoids potentially harmful delays in obtaining pertinent contributor information. As noted above, this quick access to Schedule B filings increases regulators’ “investigative efficiency” and allows them to “flag suspicious activity.” Nor could the IRS effectively wait and request a Schedule B from a regulated entity after an investigation began, as the IRS would want to look at the Schedule B the moment an issue arose. *Americans for Prosperity*, 903 F.3d at 1009. Furthermore, the IRS’s subpoenaing or sending a request letter to a suspect tax-exempt organization would “tip them off” to an investigation, which would allow the suspect organization to potentially dissipate or hide assets and destroy documents. *Id.*

IRS commentary in support of the proposed regulation also states that the Schedule B requirement of annual reporting increases compliance costs for affected organizations and consumes IRS resources. Yet, even under the proposed rule, 501(c)(4) tax-exempt organizations will still be required to incur costs to comply with IRS record-keeping requirements; they will avoid only the comparatively minor costs of recording names and addresses, from those records, in Schedule B. Further, the investigational inefficiencies created by the proposed changes will result in increased investigation costs for the IRS (and state charity officials) when they investigate an organization and are forced to request and process the same information that otherwise would have been reported on Schedule B.

### III. Regulatory History Shows that Congress and the IRS Have Long Considered Contributor Information Necessary for Enforcement of the Code

The IRS, by asserting that there is no longer a need to disclose the identities of substantial contributors to tax-exempt organizations, seeks to countermand a regulatory requirement that has been in effect since 1971. The proposed regulation also flies in the face of the legislative history of the Code and the IRS's implementing regulations.

The legislative history of the Code shows that the drafters considered contributor information necessary to enforce the Code. Through the enactment of the Tax Reform Act of 1969, the IRS began requiring that all organizations exempt under IRC 501(c)(3) report the names and addresses of "substantial contributors," who are disqualified persons under self-dealing rules. In reviewing the bill for enactment, the Committee on Ways and Means explained that the new reporting requirement was "intended to facilitate meaningful enforcement of the limitations imposed by the bill." H.R. REP. NO. 91-413, pt. 1, at 224 (1969).

This same enforcement rationale also applied to the IRS's promulgation of a 1971 regulation that required all other tax-exempt organizations to report the names and addresses of their contributors. That regulation states that 501(a) tax-exempt organizations "shall provide the names and addresses of all persons who contributed, bequeathed, or devised \$5,000 or more." 36 Fed Reg 11025 (Jun. 8, 1971); see T.D. 7122, 488 Treas. Dec. Int. Rev. 137 (1971) (amending 1.6033-2(ii)(f)).

Moreover, the significance of contributor reporting requirements was underscored by 1996 Intermediate Sanctions legislation, 26 U.S.C. § 4958 (1996), and its IRS implementing regulations. That legislation imposes penalty excise taxes where organizations exempt from tax under IRC Sections 501(c)(3) or 501(c)(4) (other than private foundations) engage in an "excess benefit transaction." In such cases, Intermediate Sanctions may be imposed on certain disqualified persons who improperly benefit from an excess benefit transaction and on organization managers who participate in such a transaction knowing that it is improper.

The IRS's Intermediate Sanctions regulations define "disqualified persons" as those "in a position to exercise substantial influence over the affairs of [the] tax-exempt organization." Among the facts and circumstances that, per the IRS regulation, tend to show that a person has substantial influence – and thus is a "disqualified person" – is whether the person has been a "substantial contributor" within the five years preceding the transaction in question. See 26 C.F.R. § 53.4958-3(e)(2) (2002).

In addition, according to House Report 104-506 (104th Cong., 2d Sess. 58 (1996)), which introduced the Intermediate Sanctions legislation, changes to the then-current IRC Sections 501(c)(3) and 501(c)(4) were necessary to: (1) ensure that the advantages of tax-exempt status ultimately benefit the community and not private individuals; and (2) "*enhance the oversight and public accountability of nonprofit organizations through additional reporting of information by nonprofit organizations to the Internal Revenue Service (IRS) and increased public access to documents filed by such organizations with the IRS.*" H.R. REP. NO. 104-506, at 1179 (emphasis added). Specifically, 501(c)(3)s and 501(c)(4)s are required to disclose on their Form 990 "such information with respect to disqualified persons as the Secretary of the Treasury may prescribe." *Id.* at 1183.<sup>6</sup>

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<sup>6</sup> This includes information required by the Treasury not only with respect to "excess benefit transactions," but also any other excise tax penalties paid during the year through excess lobbying expenditures, disqualifying lobbying

The position the IRS takes in the preamble and in putting forth this proposed rule – that it has no need for identifying information about substantial contributors – flies in the face of this legislative history compelling additional reporting about disqualified persons, the IRS’s Intermediate Sanctions regulations defining “substantial contributors” as disqualified persons, and the IRS’s prior, lengthy regulatory history requiring the reporting of substantial contributors.

In light of the foregoing, NASCO respectfully urges the IRS to withdraw the proposed regulation eliminating the Schedule B requirement for non-501(c)(3) tax-exempt organizations, and, at a minimum, to maintain the Schedule B reporting requirement for 501(c)(4) organizations. We appreciate your consideration of these comments and look forward to responding to whatever questions you may have.

Respectfully submitted,



Michael T. Foerster, President  
National Association of State Charity Officials

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expenditures, or political expenditures—“including the amount of the excise tax penalties paid with respect to such transactions, the nature of the activity, and the parties involved.” H.R. REP. NO. 104-506, at 1183.

# Attachment C



National Association  
of Attorneys General

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October 28, 2011

The Honorable Max Baucus  
Chairman  
Committee on Finance  
United States Senate

The Honorable Orrin Hatch  
Ranking Member  
Committee on Finance  
United States Senate

*via fax*

Dear Chairman Baucus and Ranking Member Hatch:

Re: Pension Protection Act of 2006 Provisions Regarding Information

Sharing Between the Internal Revenue Service (IRS) and State Charity  
Regulators (Attorneys General)

#### I. INTRODUCTION

We write to express our collective desire that Congress amend the provisions of sections 6103, 6104 and 7213 of the Internal Revenue Code (IRC). This request is intended to enhance the effectiveness of state charity regulators as well as the IRS by enabling state regulators to more freely use information shared by the IRS.

#### II. BACKGROUND INFORMATION

State attorneys general typically have both common law and statutory oversight responsibilities over the charitable assets administered in their respective states including, but not limited to, testamentary and inter vivos trusts and foundations, individual and corporate fiduciaries, unincorporated associations, nonprofit corporations and their professional fundraisers and fundraising consultants. See Ex. A. There is a continuum of common law and statutory authorities that provide state attorneys general with broad regulatory responsibilities over the charitable sector.<sup>1</sup> Indeed, the common law authority vesting state attorneys general with these oversight authorities dates back to the Statute of Charitable Uses in 1601, predating by centuries our own federal tax code. Similarly, secretaries of state and state charity officials in other agencies responsible for consumer protection, licensing, or securities oversight in their respective states are vested with statutory authority over the activities of charitable organizations and their professional fundraising consultants and solicitors.

2030 M Street, NW  
Eighth Floor  
Washington, DC 20036  
Phone: (202) 326-6000  
<http://www.naag.org/>

<sup>1</sup> See STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES (Emily Myers & Lynne Ross, eds., 2007).

Although the specific functions of the IRS and state charity officials are distinct, they share a number of important objectives. While the IRS accomplishes its mission through the enforcement of our federal tax laws and state attorneys general apply state trust, nonprofit corporation, consumer protection, and charitable solicitations laws, the goals of these state and federal regulatory schemes often intersect—both state and federal regulators have material concerns about ensuring against excess compensation, private inurement, waste, fraud, conflicts of interest and other abusive practices. Despite these shared interests, however, a variety of constraints discussed more fully below on the IRS’s ability to share “tax return information” with state charity officials frustrate the synergies that would otherwise enhance the effectiveness of the limited enforcement resources available at both the state and federal levels.

It is commonly known that the IRS audits or examines less than one-half of one percent of all charitable organizations exempt under section 501(c)(3) of the Internal Revenue Code. It is also widely accepted that the IRS suffers limited resources to police the sector, in which, according to the National Center for Charitable Statistics, there are 1,127,287 tax exempt 501(c)(3) charities and private foundations administering over \$2,495,197,897,281 in charitable assets. Although federal law requires such organizations to make their informational returns (IRS Forms 990,990EZ or 990 PF) available for public inspection and to state charity officials upon request,<sup>2</sup> prior to the Pension Protection Act of 2006, the IRS was precluded from sharing any other tax return information with state charity officials, including any instances in which the IRS may have discovered or received information or complaints concerning violations of state law. Widespread public access to the income, expenses and governance information of the charitable sector already allows the public and state charity officials to be the “eyes and ears” of the IRS by reporting abuses. In truth, the 50 state attorneys general and other state charity officials are on the “front lines” in regulating charities and annually refer many significant cases of abusive practices to the IRS Exempt Organizations Division.

The National Association of State Charity Officials (“NASCO”), which is affiliated with the National Association of Attorneys General (“NAAG”), has long advocated liberalizing the provisions of IRC §§ 6103 and 6104 to allow the IRS to freely share what is considered protected “tax return information” relating to charitable organizations. Such information-sharing would allow state attorneys general and other state charity officials to pursue cases that the IRS may lack the resources or authority to undertake, including the diversion of charitable assets by organizations in their respective jurisdictions where charitable assets are required to be deployed for the benefit of the public-at-large. In June 2004, NASCO testified to this effect before the Senate Finance Committee. See <http://finance.senate.gov/imo/media/doc/062204mptest.pdf>

### III. THE PENSION PROTECTION ACT OF 2006

The Pension Protection Act of 2006 (the “Act”)<sup>3</sup> was intended to respond to the circumstances described above and allowed the IRS to unilaterally share tax return information with state charity officials and share other such information upon request. Regrettably, section 1224(b)(5) and (6) amended IRC §7213(a)(2) to make it a criminal offense for any state official to disclose

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<sup>2</sup> Federal treasury regulations also require private foundations to provide their IRS Forms 990PF to state attorneys general in their state of domicile or registration.

<sup>3</sup> Public Law No. 109-280 (Aug. 17, 2006).

information shared by the IRS under IRC §6104(c)(2). Despite the good faith efforts of the IRS Exempt Organizations Division to implement these amendments,<sup>4</sup> what was intended to facilitate the rigorous oversight of the charitable sector by state charity officials has failed to achieve its intended purpose.

#### IV. EXPLANATION OF THE PROBLEM

As a result of the Act subjecting information sharing between the IRS and state charity officials to IRC §7213's criminal penalties, the IRS has had to subject state charity officials, including state attorneys general, to the same informational safeguards imposed on the tax and revenue agencies of the 50 states. A copy of the 106-page IRS Publication No. 1075 that describes the multitude of safeguard procedures to which state charity officials must adhere may be found at the following URL: <http://www.irs.gov/pub/irs-pdf/p1075.pdf>.

These procedures not only create the ethical and legal conflicts described below, they are simply unworkable given the limited resources of state charity officials and should not apply to information regarding the revenue, expenses and governance data of charitable organizations already required to publicly report their financial and operational data. The IRS's understandable safeguards for the protection of confidential federal income tax information should be inapplicable.<sup>5</sup> These safe guards, for example, do not permit state charity officials to enter any shared data through a word processing program on any networked computer for inclusion in a civil complaint without complying with a myriad of security requirements that state charity officials do not have the resources to implement. Consequently, despite years of diligent efforts by state attorneys general to obtain information from the IRS, only three state Attorney General offices—New York, California and Hawaii—have entered into information-sharing agreements with the IRS since the adoption of the Act nearly five years ago.

Even the three states that have entered into information-sharing agreements have had to construct an uncomfortable “fiction” to use the data:

1. When the IRS makes a disclosure to the state charity office, an official reviews the data, logs the receipt of the information, and must place the data in a file secured by a least two barriers (doors, cabinets, etc).
2. In order to take investigatory or enforcement action, however, the state charity official must then rely upon an independent source, such as a telephone directory or advertisement, as the ostensible basis for contacting the subject charitable organization and requesting any recent communication to or from the IRS. Following this sort of procedure does not violate the safeguard provisions at issue because

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<sup>4</sup> State attorneys general acknowledge and commend the IRS's earnest efforts to administer these changes, educate state charity officials about the new requirements and make information sharing a reality. The IRS and state charity officials continue to enjoy an open dialogue about ways to improve charitable oversight. The comments expressed herein are in no way intended to criticize the IRS's implementation of the Act. The failure of this experiment is not the IRS's doing.

<sup>5</sup> Other than on unrelated business income, charities are exempt from income tax under IRC § 501(c)(3).

information provided directly by the charitable organization is not subject to IRC §§ 6103, 6104 and 7213.

3. If asked, a state charity official is prohibited from disclosing that the inquiry was premised on the information received from the IRS and must hope that the organization voluntarily produces all relevant information and, if not, issue a subpoena for the information.

In addition to the above, the rules of discovery are generally very broad and require disclosure of the tax return information in many, if not most, state jurisdictions. Although discovery rules are only applicable whenever civil or criminal proceedings are instituted, the fact that such disclosure may be required warrants careful consideration about the propriety of states withholding section 6104 tax return information and/or the fact of an IRS referral. The requirement that states must withhold disclosure of section 6104 tax return information will be especially sensitive whenever that information has prompted the state's inquiry. Most well-represented defendants demand to know all of the details underlying a state's enforcement action and are quick to exploit any suggestion of selective prosecution or prejudice due to a lack of candor concerning the identity, timing, or source of a complaint or the basis for the commencement of the action. Although state attorneys general are permitted to disclose and utilize section 6104 tax return information in judicial and administrative proceedings, discovery often occurs well in advance of such proceedings and the prejudicial effect of withholding such information from defendants until the time of trial is likely to risk court-imposed sanctions prohibiting the use of the information. From a practical standpoint, the discovery process will also result in the disclosure of information to third parties beyond the state's control (witnesses, court reporters, etc.).

Moreover, the security requirements create problems even when the shared information is not used to pursue an investigation or enforcement action. Some states have record retention laws that govern the return or destruction of state records which are likely to conflict with the provisions of section 6103(p)(4). Many states have their own versions of the federal Freedom of Information Act (FOIA) which may be sufficiently broad in scope to encompass the shared section 6104 return information. To the extent that return information under section 6104 is included within the scope of such statutes, states may be obliged to produce the information when requested.

In light of all of the above, states receiving section 6104 tax return information that cannot be used more straightforwardly are confronted with both ethical and legal dilemmas.

We see no reason why IRC notices of refusals to grant tax-exempt status, proposed revocations of exempt status, or proposed deficiency taxes for prohibited transactions under chapters 41 or 42, such as intermediate sanctions, taxes on self-dealing transactions and similar matters involving public charities and foundations, should be subject to the same criminal penalties and security procedures applicable to individual and corporate income tax return information. This is all extremely valuable and important information that allows state charity officials to fulfill their statutory mandate. The safeguard requirements have proven unsuccessful and unworkable,




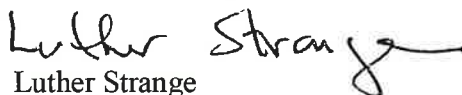
however, and even the three states that have attempted to “play by the rules” feel as if the information obtained directly from the affected charity is akin to fruit of a poison tree.<sup>6</sup>


As officials that represent state revenue and taxation agencies, we fully appreciate the fundamental public policy reason for the protection of confidential taxpayer return information—to encourage taxpayers to freely and voluntarily report their income and pay their fair share of taxes. Similar considerations should not apply to organizations that are exempt from income tax, that operate with the public subsidy of tax-exempt status, and who must already publicly report their income, expenses, governance data, disqualified person transactions, excess benefit transactions, changes in exempt purpose and governing documents, embezzlements and losses of funds, etc.—information that is then publicly available online at <http://www2.guidestar.org>.


We urge Congress to remedy this situation by amending the federal laws to allow state attorneys general and other state charity officials to more freely obtain and use information possessed by the IRS to protect and promote the public interest we all share – that is, to ensure that charitable assets are lawfully administered at all levels of government.

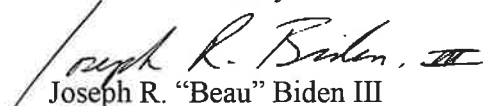
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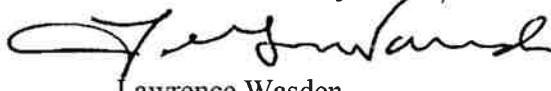
  
John W. Suthers  
Colorado Attorney General


  
Luther Strange  
Alabama Attorney General

  
Tom Horne  
Arizona Attorney General

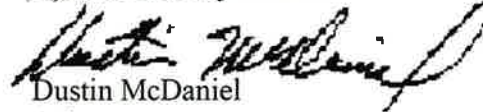
  
Kamala Harris  
California Attorney General


  
Joseph R. “Beau” Biden III  
Delaware Attorney General


  
Lawrence Wasden  
Idaho Attorney General

  
David Louie  
Hawaii Attorney General

  
John J. Burns  
Alaska Attorney General

  
Dustin McDaniel  
Arkansas Attorney General

  
George Jepsen  
Connecticut Attorney General

  
Lenny Rapadas  
Guam Attorney General

  
Lisa Madigan  
Illinois Attorney General

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<sup>6</sup> Recently proposed IRS regulations (IRS REG-140108-08) will not address any of the substantive issues presented.

Tom Miller  
Iowa Attorney General

Jack Conway  
Kentucky Attorney General

Douglas F. Gansler  
Maryland Attorney General

Bill Schuette  
Michigan Attorney General

Jim Hood  
Mississippi Attorney General

Steve Bullock  
Montana Attorney General

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Nevada Attorney General

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Eric Schneiderman  
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North Dakota Attorney General

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Kansas Attorney General

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Maine Attorney General

Martha Coakley  
Massachusetts Attorney General

Lori Swanson  
Minnesota Attorney General

Chris Koster  
Missouri Attorney General

Jon Bruning  
Nebraska Attorney General

Michael Delaney  
New Hampshire Attorney General

Gary King  
New Mexico Attorney General

Roy Cooper  
North Carolina Attorney General

Mike Dewine  
Ohio Attorney General

Linda L. Kelly  
Pennsylvania Attorney General

\*No Signature Available\*

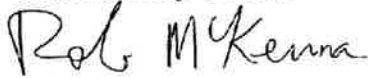
Guillermo Somoza-Colombani  
Puerto Rico Attorney General



Marty J. Jackley  
South Dakota Attorney General



Mark Shurtleff  
Utah Attorney General



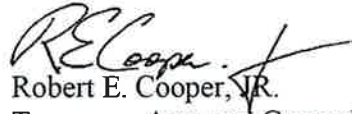
Rob McKenna  
Washington Attorney General



Greg Phillips  
Wyoming Attorney General



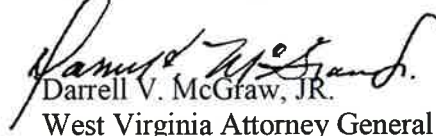
Alan Wilson  
South Carolina Attorney General



Robert E. Cooper, JR.  
Tennessee Attorney General



William H. Sorrell  
Vermont Attorney General



Darrell V. McGraw, JR.  
West Virginia Attorney General