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"The Future of State Charities Regulation"

Mapping The Trajectory: The Changing Role Of The State Regulators

Evolving State Regulation: From Index Cards To The Internet

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INTRODUCTION

The contributors to this paper represent over 100 "person years" of service as state charity regulators¹. Although the states' authority to regulate charities began long before they joined their offices, in recent decades the contributors have witnessed changes in the ways that authority has been exercised. Their observations of those changes, influenced significantly by developing technology, the public's growing demand for information about charities' finances, increasing cooperation among regulators and between regulators and the nonprofit sector, and new roles assumed by regulators, are described here.² This paper is intended to address general issues and developments in charities regulation. References to any particular states are intended only as examples. Readers are advised to consult the law of the individual states to understand how each approaches any of the issues discussed.

I. BACKGROUND - FROM COMMON LAW TO STATUTE

The Attorney General's supervisory authority over charitable trusts and corporations had its origins in the English common law. In the 15th century, the courts began to enforce trusts for

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¹ In this paper, the term "state charity regulator" shall be used to mean state agencies and their heads and employees charged with the oversight of charitable organizations, trusts, various nonprofits and/or maintaining a registry of those entities and/or fundraising professionals engaged by them.

² The views expressed in the paper are exclusively those of the authors and do not represent the views or opinions of the offices in which they are employed.

the benefit of the poor and other projects that would benefit the public as an undefined whole; and the Attorney General, representing the King, brought the enforcement actions. Pursuant to the Statute of Charitable Uses, enacted by Parliament in 1601, commissioners were appointed to enforce charitable trusts. It was the Attorney General, however, who was consistently called upon to protect charitable assets through enforcement actions in court.

It is the Preamble of the Statute of Uses that forms the basis for the law of charitable trusts in both England and the United States. In the United States, attorneys general and state legislators found, however, that the common law did not allow attorneys general to carry out their mandate adequately. They needed statutory authority to obtain the investigatory powers necessary to supervise, and address abuses in, the charitable sector. These statutory schemes, first enacted in New Hampshire in 1943, specifically authorize attorneys general to require registration and reporting by charities; investigate the activities of charities, including inspection of books and records and financial data upon request; issue administrative subpoenas; and take legal action to remedy violations. In later years, many states enacted a statutory structure to regulate fundraising for charitable purposes.

Today, most attorneys general have broad statutory authority to oversee the administration of charitable assets, represent the interests of beneficiaries of charitable dispositions and enforce laws governing the conduct of fiduciaries of charitable entities. In exercising this responsibility, they may investigate transactions and the actions of trustees to determine whether property held for charitable purposes has been and is being properly administered, and, depending on the state, bring affirmative actions in the form of administrative and/or court proceedings if it is not.

In addition to the authority to bring enforcement actions against wrong-doers, among the statutory underpinnings of the supervisory authority of attorneys general over charitable assets include provisions that require notice to attorneys general of matters such as changes in corporate structure, sales or transfer of assets, merger with other entities and corporate dissolution.³ In California, for instance, the California Nonprofit Corporation Law requires nonprofit public benefit corporations to give twenty days' written notice prior to merger, sale of "substantially all" assets, and voluntary dissolution.⁴ Conversion to another corporate form requires approval. The role of the attorney general is to assure that the remaining assets of the nonprofit corporation will remain impressed with the charitable trust under which they were received. In a conversion or sale transaction, the remaining assets are transferred to another nonprofit that will use them for the same or a similar purpose.

Although another paper will address healthcare issues in which attorneys general become involved, it is important to note that, in recent decades, the states have become increasingly involved in transactions by health care facilities that result in a sale, merger, transfer of control or closure. In New Hampshire, for instance, a healthcare charitable trust must give notice to the attorney general before transferring control, direct or indirect, of twenty-five percent or more of

³ See, for example, Montana Code Annotated, § 35-2-722 requiring notice to the Attorney General of corporate dissolution; York's Not-for-Profit Corporation Law, Articles 5, 9 and 10; *Oregon Attorney General's advice on Closing /Dissolving a Charity* <http://www.doj.state.or.us/layouts/OID.Web.Doj/Pages/Search.aspx?cx=011726770630315925615:sq9i0hiek8y&cof=FORID%3A10&ie=UTF-8&q=charity&siteurl=http://www.doj.state.or.us&ref=&ss=376j62528j4>.

⁴ See California Corp. Code § 5110, et seq.

the assets of a charitable entity.⁵ In reviewing these transactions, staff considers a number of criteria that are set forth in statute: the effect of the transaction on healthcare services available in the hospital's "service area;" whether anyone will benefit privately from the sale; whether the sale is at fair market value; and assuring that the remaining charitable assets will continue to be used for the intended charitable purpose(s). In some states, statute requires review by the antitrust division of the office to assure no anti-competitive issue exists.⁶

II. ACTIONS BY ATTORNEYS GENERAL

A. Range of Actions

Although they have statutory authority to do so, Attorneys General do not file litigation or administrative proceedings for all of the instances of misuse and diversion of charitable assets that come to their attention. Regulators have found that many issues can be resolved without litigation. To facilitate early resolution, many have thus adopted a multi-staged approach to supervision and enforcement. When issues needing correction are identified with regard to a regulated entity or individual and those issues do not include egregious conduct or criminal activity, the first step may be to send a letter (usually to the board of directors or fundraising professional, as appropriate) identifying the problem and the action needed to correct it. Depending on the jurisdiction, if cooperation is received at that level, the matter may be resolved by an agreement that memorializes the problems found, the steps required to correct them, and the procedures for monitoring the corrective action. Corrective action may include repayment of misspent funds, reduction of compensation, removal of directors, changes to the makeup of the board of directors, and a requirement that current and future board members receive "board training" to assure they understand their fiduciary duties.

These settlement documents are typically subject to disclosure pursuant to Freedom of Information Laws. In the last century, those documents were housed in paper files in the offices of Attorneys General and unknown to the public; in the 21st Century, many states post them on the Internet.⁷

In some cases, a charity, aware that it may have problems that could result in an investigation by the attorney general, may take the preemptive step of bringing the matter to the attorney general's attention. That was the case when, in 2010, the Beth Israel Deaconess Medical Center ("BIDMC") in Massachusetts received complaints alleging an inappropriate personal relationship between its Chief Executive Officer and an employee. BIDMC conducted an internal investigation of the complaints, fined the CEO \$50,000 and publicly reprimanded him. BIDMC then asked the Massachusetts Attorney General to review its investigation findings. At the conclusion of its review, the Attorney General's office, in an eleven-page letter, criticized the hospital's board of directors for providing inadequate oversight of the chief executive who had maintained the inappropriate relationship, resulting undue damage to the hospital's reputation.⁸

⁵ Add cite to NH law

⁶ See California Corp. Code § 5914, et seq.

⁷ Cite to Hugh Jones' paper.

⁸ See September 1, 2010 letter to BIDMC, <http://www.mass.gov/ago/docs/nonprofit/beth-israel-hospital-review-090110.pdf>

Posting that letter on the Attorney General's website serves as a cautionary note, both to BIDMC and to all nonprofit boards about the appropriate exercise of their fiduciary duties.

The next level of review is implemented if cooperation is not received at an informal level or if violations are more serious, resulting in issuance of an administrative subpoena⁹ that may demand attendance at an oral examination and/or production of documents. If cooperation is received at this level, a frequent outcome is the requirement that the target(s) of the investigation execute a document variously called "Assurance of Voluntary Compliance" or "Assurance of Discontinuance." The remedies set forth in these agreements include payment of restitution, imposition of penalties and injunctive language prohibiting the targets from acting as a fiduciary of charitable assets, fundraising for charity, and serving on a nonprofit board of directors, as appropriate. In some circumstances, the target organization will be required take steps to dissolve the corporation and transfer its assets to an organization conducting activities similar to those for which the dissolving organization was formed. Again, these documents are subject to disclosure pursuant to Freedom of Information Laws and in some states are filed with the court and/or posted on the Internet. Violations of such agreements may also be enforceable in court.

Civil litigation is typically reserved for egregious conduct and cases that require immediate action to preserve remaining assets or prevent additional harm (e.g., diversion of assets by board members or others for their personal use, outright embezzlement, and serious fundraising abuses). Often the filing of these cases is accompanied by a request for an injunction freezing assets, prohibiting specific conduct and/or the appointment of a receiver to take over the management of the entity. When these cases are resolved, either by settlement or court order, included among the remedies imposed are civil penalties, payment of restitution to charity, removal of board members, and/or injunctive provisions prohibiting the defendants from engaging in the conduct which was the subject of the action – either for a period of years or permanently.

In the most egregious cases, criminal prosecution is the appropriate remedy and, depending on the jurisdiction, is handled by the office of the Attorney General or another law enforcement agency.¹⁰ For instance, issuance of search warrants may be the most effective way to assure that evidence is not lost or destroyed, and the conduct may be so egregious that civil enforcement will have no effect. Partnership between the California Attorney General's office and the U.S. Attorneys Office in *U.S. v. Lyons* resulted in stiff prison sentences for the defendants, who operated a sham charity/fundraising scheme. Without the criminal prosecution, the perpetrators would simply have continued to run their scam, continuing to siphon off millions of dollars more from legitimate charitable purposes.¹¹

B. Fundraising abuses

⁹ In some states subpoenas may be issued without filing a civil action although they are enforceable in court.

¹⁰ See *A.G. Schneiderman Secures Guilty Pleas from Sham Breast Cancer Charity Organizers* <http://www.ag.ny.gov/press-release/ag-schneiderman-secures-guilty-pleas-sham-breast-cancer-charity-organizers>

¹¹ 569 F. 3d 995 (9th Cir. 2009). Federal investigators were able to trace \$11 million in donations received but knew that was a fraction of what the defendants raised.

The purpose of many of the cases brought by state charity regulators is to remedy false or misleading solicitation. Over 40 years ago, state legislatures recognized the existence of a substantial and growing problem with fraud and deception in charitable solicitation. In response, many states and local governments enacted statutes and ordinances to regulate charitable solicitation. Some imposed blanket prohibitions against charitable solicitation by organizations that failed to meet statutorily imposed minimum expenditure levels for their charitable programs. Others restricted payments for fundraising expenses above statutorily-imposed limits, or mandated point-of-solicitation disclosure of fundraising costs.

Each of these statutory solutions was stricken by the United States Supreme Court as an impermissible restriction on the First Amendment rights of charities and their agents.¹² In *Schaumburg v. Citizens for a Better Environment*, the court recognized the state interest in protecting citizens from fraudulent misrepresentations and promoting the disclosure of fundraising expense, but found existing statutes constitutionally overbroad. In *Maryland v. Munson*, the court emphasized that the appropriate way for states to address solicitation abuses was “through disclosure and registration requirements and penalties for fraudulent conduct.”¹³

Finally, in *Riley v. National Federation of the Blind*, the Court held that charitable solicitation, when combined with commercial and advocacy elements, is protected speech, as distinguished from commercial speech.¹⁴ The *Riley* court also spelled out in detail the constitutionally permissible approach that states might take to remedy problems in this area: enforcement of anti-fraud statutes to prohibit false and misleading statements, publication of financial disclosure forms that commercial fundraisers are required to file, and mandatorily imposed point-of-solicitation disclosure of the name of the solicitor’s name making the “pitch,” the identity of the professional fundraiser for which the solicitor works, and disclosure that the solicitor is being paid to solicit contributions.¹⁵

Following the *Riley* trilogy, some states accepted the Court’s invitation by enacting statutes requiring those point-of-solicitation disclosures¹⁶ and began to issue public reports compiled from the data filed by fundraisers.¹⁷ Both of those approaches were designed to give the public access to the constitutionally permissible disclosures endorsed by the Court.

After those remedies were implemented, however, it became clear to regulators that prosecutorial enforcement actions would be required in order to effectively address fraud. States began to prosecute misrepresentations and false representations using existing statutes, both in multi-state actions and separately, imposing remedies such as injunctive relief, restitution, penalties, and involuntary dissolution. Where actual fraud and misrepresentation is shown, the

¹² See *Schaumburg v. Citizens for a Better Environment* (1980) 444 U.S. 620; *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.* (1984) 467 U.S. 947; and *Randolph Riley v. Nat’l Federation of the Blind of No. Carolina, Inc.* (1988) 487 U.S. 781 [hereafter “the *Riley* trilogy”].

¹³ *Munson, supra*, at 968.

¹⁴ *Riley, supra*, at 796.

¹⁵ “Solicitors” as used in this paper are individuals employed by for-profit fundraising professionals that are variously referred to as “commercial fundraisers” and “professional solicitors.”

¹⁶ See, for example, NY Exec. Law § 174-b(3) - ADD OTHER CITES

¹⁷ See, for example, *Pennies for Charity*, Office of the New York State Attorney General - <http://www.charitiesnys.com/pfcmap/index.jsp>; *Summary of Results of Charitable Solicitation Campaigns Conducted by Commercial Fundraisers in Calendar Year 2011*, Office of the California Attorney General, <http://oag.ca.gov/sites/all/files/pdfs/charities/publications/2011cfr/cfr2011.pdf?>

enforcement task is relatively simple and constitutional arguments raised in opposition gain little sympathy from the courts, which have long recognized a compelling state interest to protect citizens from fraud.¹⁸

In 1989, ten states joined forces to do just that when they brought suit against the Watson and Hughey Company (“W & H”), a for-profit charitable fundraiser, and its client charities. Using existing anti-fraud statutes and unfair business practices laws, the complaints alleged that the solicitation materials used to solicit contributions on behalf of the charities they represented failed to disclose significant information and those omissions misled members of the public.

Specifically, the states argued that the solicitations by W & H, primarily as part of sweepstakes promotions, offered contributors a chance to win prizes. The fraud allegations included claims that the solicitation materials misled prospective donors into believing they had won substantial prizes when, in fact, most had already “won” prizes of a few pennies. In most cases the “prize” was less than the cost of the postage stamp needed to claim the prize. The states also alleged that W & H, fabricated or exaggerated the nature and extent of the charitable programs and that the financial reports they filed grossly exaggerated the amount of money that remained for the charities' use after payment of fundraising expenses.

Ten states¹⁹ entered into settlements with W & H and its clients, recouping \$2.1 million - at the time the largest settlement of a fundraising case ever. Most of the recovery was distributed to charity by the settling states.²⁰

In the years since the W & H case, the states have continued to prosecute fraudulent solicitation, both individually and in multi-state actions²¹. These cases have focused on multiple types of fraud: organizations representing – or claiming to represent – veterans or law enforcement officers;²² sham charities whose only benefit is to their founders;²³ and fundraising professionals that engage in solicitation abuses;²⁴ Other cases seek damages from nonprofits that, while performing some charitable purpose, unjustifiably enrich their board members and managers. Since the goal of this paper is not to catalogue the many cases brought by attorneys general throughout the country, only a few examples are identified here. The internet sites of most of those prosecutors tell a fuller story by routinely posting press releases, complaints, orders, judgments, and settlements concerning cases brought by their agencies.

¹⁸ See *Schneider v. State* (1939) 308 U.S. 147.

¹⁹ Several other states also brought suit but settled separately.

²⁰ See AP report of the settlement at [http://www.apnewsarchive.com/1991/10-States-to-Benefit-From-\\$2-1-Million-Charity-Fraud-Settlement/id-b97fa41567b5674cb8913410831c0a5b](http://www.apnewsarchive.com/1991/10-States-to-Benefit-From-$2-1-Million-Charity-Fraud-Settlement/id-b97fa41567b5674cb8913410831c0a5b)

²¹ See page ____, NASCO.....

²² See Oregon Attorney General's announcement *Agreement Resolves Actions Against Veterans Charity and Telemarketer*, <http://www.doj.state.or.us/releases/pages/2011/rel102711.aspx>

²³ See http://ago.mo.gov/newsreleases/2010/Attorney_General_Koster_wins_suit_against_charity_scam_artists/ reporting on the Missouri Attorney General's successful litigation against individuals who raised money on behalf of sham charities and were ordered to pay \$544,933 in restitution and penalties and permanently barred from soliciting in Missouri.

²⁴ See announcement by Massachusetts' Attorney General of a judgment against a charity and its fundraiser for deceptive fundraising, <http://www.mass.gov/ago/docs/nonprofit/disabled-police-officers-counseling-center.pdf> ; See announcement by Wisconsin Attorney General announcing a judgment in the case of individuals conducting fraudulent solicitations allegedly on behalf of missing children, http://www.doj.state.wi.us/absolutenm/templates/template_share.aspx?articleid=2900&zoneid=1

III. MULTI-AGENCY OVERSIGHT

Although supervisory authority over charitable trusts and corporations resides with attorneys general under the common law, pursuant to some state laws, administration of registration and reporting by charities and the fundraising professionals is handled by another state agency. Twenty-two of the forty states with registration and reporting statutes require charities to register and file reports with an agency other than the attorney general, generally the Secretary of State's office.²⁵

One of the primary purposes of registration and reporting is to provide states with the information necessary to effectively supervise the charitable assets intended to benefit their citizens. Review of filings is instrumental in the development of information for both compliance and enforcement purposes. When oversight is split between two agencies, it is extremely important for them to work cooperatively. For instance, in the course of reviewing filings for a charity, a Secretary of State's office may identify issues that only the Attorney General has authority to enforce. If those issues are not referred to the Attorney General, the ability to protect charitable assets can be seriously compromised.

Attorneys general routinely work, and cooperate with multiple state and federal agencies in other ways to effectively regulate the charitable sector. Taskforces can be very effective as a way to maximize use of any single agency's limited resources. They are often issue-specific (e.g., telemarketing) and are composed of representatives from both state and federal revenue and law enforcement agencies. The Federal Trade Commission is also a strong partner in the investigation and prosecution of charitable solicitation abuses.

State-specific cooperation is effective as well – working with a state Department of Labor, for instance, when a target charity is suspected of violating Labor Law provisions or with the Department of Health if the target is a nonprofit that provides health-related services and may be violating the state's Health Code.

In all of these partnerships, the goal is to maximize the capability to address the harm by assessing the enforcement powers of each participating agency to determine which can most effectively and swiftly take action. Efforts to work jointly with the Internal Revenue Service, however, have been hampered by federal legislation that severely restricts the authority of the IRS to share information with state charity regulators. In 2012, NASCO urged Congress to amend legislation to ease those restrictions²⁶ and, in the meantime, NASCO is working with IRS staff to explore ways in which information-sharing may be improved within the current structure.

IV. PUBLIC EDUCATION

While charity regulators recognize the importance of taking legal action to curtail mismanagement of charitable assets and fraudulent solicitation, many regulators also recognize

²⁵ AZ, DC, GA, KS, ME, MD, MS, NJ, NC, ND, PA, RI, SC, TN, UT, VA, WA, WV, WI, CO, FL and OK.

²⁶ See page ____

that public education and outreach to both the nonprofit sector and the donating public can be an effective tool in fulfilling their responsibility to protect charitable assets. And, in the 21st Century, most of this information is available on attorneys general websites. In addition to enhanced websites, this nontraditional role – which is becoming more and more traditional - includes in-person educational programs, dissemination of guidance for nonprofit boards and members of the public, and collaboration with associations of nonprofits and professional associations of attorneys and accountants. Those programs assist nonprofits, protect their contributors and promote compliance with the laws enforced by the regulators.

As discussed on page ____, in the 1980s when the Supreme Court held that limitations on the amount, and mandated disclosure of fundraising costs did not pass constitutional muster, some states accepted the Court's invitation to disseminate to the public reports compiled from filings submitted by fundraising professionals. Those reports, initially in paper form, now appear on regulators' websites are a popular and effective means of arming the public and charities with information about campaigns conducted by for-profit fundraisers.²⁷ Many states also publish guides to assist the public in making wise giving decisions. That guidance, which includes tips and advice for would-be contributors to assist them in selecting the charities they will support, comes in various forms: the South Carolina Secretary of State's annual "Angels and Scrooges" list of charities,²⁸ the Oregon Attorney General's list of the Oregon's 20 worst charities,²⁹ general tips on charitable giving,³⁰ advice on how to respond to telemarketing calls³¹ and guidance when solicited by law enforcement organizations.³²

In the wake of natural or man-made disasters, such as Hurricanes Katrina and Sandy and the shootings in Newtown, Connecticut, many states have made an extra effort to quickly provide information to donors who want to aid the victims in an effort to assure donations are used as intended.³³

After Hurricane Sandy devastated communities on the Atlantic coast, many relief charities received vast sums of money from people desiring to help the hurricane's victims. Shortly after the storm, New York's Attorney General sent letters to those organizations asking them questions about their fundraising and relief efforts relating to Hurricane Sandy and posted

²⁷ See Washington Secretary of State, *Commercial Fundraiser Activity Report*, <http://www.sos.wa.gov/assets/charities/CFAR%20Nov%2026%202012.pdf>

California Attorney General <http://oag.ca.gov/sites/all/files/pdfs/charities/publications/2011cfr/cfr2011.pdf?>

²⁸ See 2012 "Angels and Scrooges, *Summary of Results of Charitable Solicitation Conduct by Commercial Fundraisers in Calendar Year 2011*, <http://www2.counton2.com/news/2012/nov/15/sc-secretary-state-announces-2012-angels-and-scroo-ar-4979371/>

²⁹ See "Attorney General Rosenblum Announces Oregon's 20 Worst Charities for 2012," <http://www.doj.state.or.us/releases/Pages/2012/rel121312.aspx>

³⁰ See Louisiana "Make Your Donation Count - Tips on Charitable Giving," <http://www.ag.state.la.us/ViewDoc.aspx?Type=3&Doc=211Shared>

See Alaska Attorney General, *Before You Donate: Tips for Consumers* <http://www.law.alaska.gov/department/civil/consumer/charities.html>

See California Attorney General, *Guide to Charitable Giving for Donors*, <http://oag.ca.gov/charities/publications>

³¹ See Texas Attorney General, *Telemarketers and Junk Mail*, <https://www.oag.state.tx.us/consumer/telemarketers.shtml>

See Alaska Attorney General, *Warning Signs*,

³² See Michigan Attorney General, *Police and File Solicitations - What you Should Know*, http://www.michigan.gov/ag/0,4534,7-164-17337_18095-44607--,00.html

³³ See Connecticut Attorney General, *State Cautions Resident on Charitable Giving: Beware of Potential Scams*, <http://www.ct.gov/ag/cwp/view.asp?Q=515702&A=2341>

the responses to those questions on the Attorney General's website - www.charitiesnys.com - so that members of the public can identify the organizations that are doing relief work, how much they have raised and how donations are being used. While most of those charities are required to register and file financial reports with the Attorney General's office,³⁴ the postings concerning Hurricane Sandy relief efforts give the public information that is closer to "real time" and provides a level of transparency not typically available unless distributed by the charities themselves.

The Connecticut Attorney General took a similar approach after the shootings at Sandy Hook Elementary School in Newtown, Connecticut by surveying Sandy Hook-related charities to gather information concerning the funds they have raised and how those funds are being expended. The surveys were sent to the charities as "an initial step to provide information to the public, Newtown community and other charitable organizations trying to meet the needs of those affected by this tragedy," and the responses are posted on the Attorney General's website.³⁵

V. OUTREACH TO THE NONPROFIT SECTOR

In allocating their limited resources, many states also recognize that, in addition to taking legal actions and providing information to donors, they can play a role in promoting legal compliance by the officers, directors and managers of nonprofits who are entrusted with charitable assets and, through their positions, must ensure those assets are used for their intended purposes. Regulators post guidance on their website that includes basic information board members need to know about compliance, tutorials, FAQs, and forms and instructions for compliance with registration and reporting statutes.³⁶ Most of those sites also link to other resources, such as organizations that provide educational programs and free or low cost assistance.³⁷

Last year, during Breast Cancer Awareness Month, the New York Attorney General issued best practices for charitable cause-marketing campaigns.³⁸ Those best practices are designed both to protect consumers and to ensure that charities receive the advertised benefit and had the support of major breast cancer charities.³⁹

³⁴ Some organizations, such as religious charities, are exempt from registration.

³⁵ See <http://www.ct.gov/ag/cwp/view.asp?Q=522908&A=2341>

³⁶ See Pennsylvania Attorney General's guidance for nonprofit directors, <http://www.attorneygeneral.gov/uploadedFiles/Consumers/nonprofitbooklet.pdf>; New York Attorney General's Best practices for Cause Marketing http://www.charitiesnys.com/cause_marketing.jsp

³⁷ <http://www.coloradononprofits.org/help-desk-resources/principles-practices/>

³⁸ Cause-marketing campaigns are conducted by commercial entities that advertise that the purchase of their products will result in a benefit to charity.

³⁹ See NY Attorney General's announcement, <http://www.ag.ny.gov/press-release/ag-schneiderman-issues-best-practices-breast-cancer-%E2%80%9Cpink-ribbon%E2%80%9D-campaigns>

Other initiatives in New York the Leadership Committee for Nonprofit Revitalization⁴⁰ and his partnership with the New York State Bar Association to launch Charity Corps, a program that matches nonprofits with volunteer lawyers.⁴¹

VI. NATIONAL ASSOCIATION OF STATE CHARITY OFFICIALS

Until the late 1970s, state charity regulators primarily worked independently, with little communication among them. In 1973, William J. Brown, the Attorney General of the State of Ohio, planted the seed for communication and cooperation among the states when he recommended in a letter to Patton Wheeler, the Executive Director of the National Association of Attorneys General “that a committee of the National Association of Attorneys General be created to deal with the area of charitable foundations and solicitations.” General Brown went on to state “The activities of charitable foundations and charitable solicitors rarely involve a single state. Hence, it is necessary that the lines of communications be open for exchange of information concerning the activities of the various organizations between the states involved.”

In 1977, New York's Board of Social Welfare⁴² convened a meeting of representatives of Massachusetts, Connecticut, New York, New Jersey, and Pennsylvania to discuss the development of a uniform annual financial report form and the concept of communication. By the next year, those states and ten others had agreed to accept New York's annual report form in lieu of their own from any charity wishing to file it.

Since membership in the National Associations of Attorneys General ("NAAG") is limited to Attorneys General, attendees at the 1977 meeting, seeing the advantage of cooperative efforts, spearheaded the formation of the National Association of State Charity Officials (NASCO) to include all state charity regulators regardless of the agency they represent.⁴³

To this day, NASCO is the only professional association of state charity regulators. Over the years it has played an important role in connecting regulators with each other and the nonprofit section, training both novice and experience state regulators and acting a liaison between state regulatory agencies and federal agencies, including the IRS, the Federal Trade Commission (FTC), and the United States Postal Inspection Service (USPIS). NASCO has always been a virtual organization – even before the cyber space age – with no office, no employees and minimal revenue. Nevertheless, NASCO is now recognized nation-wide by the

⁴⁰ The Leadership Committee on Nonprofit Revitalization will be discussed in another paper for this conference and is not discussed here. The committees report may be accessed at <http://www.ag.ny.gov/sites/default/files/NP%20Leadership%20Committee%20Report%20%282-16-12%29.pdf>

⁴¹ Information about Charity Corps is posted at http://www.nysba.org/Content/NavigationMenu/ForAttorneys/CharityCorpsResources/Charity_Corps.htm

⁴² Prior to the transfer of New York's charities registration function to the Attorney General, the Board of Social Welfare and later the Department of State maintained the registry.

⁴³ Though most states' registries are housed in the office of the Attorney General, in some states they are maintained by other agencies, such as the Department of State or the Department of Consumer Affairs.

nonprofit sector, practitioners, federal agencies and legislative bodies as the collective voice of the state regulatory agencies.⁴⁴

In its early years, NASCO was almost exclusively focused on issues of concern to registrars of charities, such as registration, financial reporting and fundraising associated with charities that solicit contributions from the public. In 1980, NASCO began efforts to create a uniform financial report that would be accepted by all registries nationwide and, in 1981, began working with the IRS on revisions to IRS form 990 and its instructions. As a result, the 990 is now accepted by almost all of the state agencies that require annual reporting by charities. The collaboration with IRS continues to this day through conference calls and an annual meeting, hosted by the Urban Institute.⁴⁵ Representatives of the nonprofit sector participate during part of that annual meeting to facilitate discussion between regulators and the sector of issues of concern. Later, NASCO developed the Unified Registration Form (URF) in cooperation with the Multi-State Filer Project,⁴⁶ a joint project of charities regulators and the private sector. The URS is now accepted by a majority of the state registries, simplifying the registration process for charities

When NASCO began to focus on coordinated litigation to remedy fraud, within the parameters set by the *Riley* trilogy, the result was the unprecedented NASCO-coordinated multi-state actions filed against the Watson and Hughey Company (discussed above at p.6).⁴⁷ That positive experience, facilitated by individual telephone calls, snail mail and the occasional fax,⁴⁸ has led to other multi-agency actions, including the 2009 “Operation False Charity,” coordinated by FTC, against telemarketers that allegedly made false claims in solicitation on behalf of police, firefighters and veterans' organizations. Some participating states filed legal actions and other engaged in educational efforts to help consumers avoid becoming victims of fraud.⁴⁹ Participation in multi-state action such as "Operation False Charity," allows states with limited resources to reach out to their citizens by conducting educational programs even if they are not able to bring court action.⁵⁰

NASCO also coordinated members' collaboration on an *amicus* brief filed with the United States Supreme Court in *Madigan v. Telemarketing*.⁵¹ By that time, the “new” technology was available and the veteran charity regulators who had participated in the Watson and Hughey case realized that the ability to communicate and exchange documents instantaneously and "meet" via the Internet would allow for increasing opportunities for cooperation that could only have been a dream in NASCO's early days.

When regulators were beginning to become aware of burgeoning charitable solicitation on the Internet, NASCO members devoted part of the 1999 annual conference in Charleston,

⁴⁴ Although NASCO leadership does not speak for or on behalf of any particular office, NASCO has participated in congressional hearings, supported legislative efforts, spearheaded cooperative projects and drafted amicus briefs in litigation.

⁴⁵ The 2012 “990 Meeting” was the 25th [CHECK] such meeting to be hosted by the Urban Institute.

⁴⁶ <http://www.multistatefiling.org>

⁴⁷ See section__ (or page __)

⁴⁸ In 1989, most state regulators did not have fax machined or access to conference calls.

⁴⁹ See press announcement at <http://www.ftc.gov/opa/2009/05/phonycharity.shtm>

⁵⁰ See press announcement at <http://www.ftc.gov/opa/2009/05/phonycharity.shtm>

⁵¹ *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.* 538 U.S. 600 (2003)

South Carolina, to a discussion of the jurisdictional principles applicable to such solicitation. They asked: What actions subject those charities to the registration, reporting and anti-fraud provisions of state laws. Out of that discussion, the 2001 “Charleston Principles”⁵² were developed. Although they do not have the force of law, the Principles were designed to provide guidance to both regulators and the regulated as this new form of solicitation developed. In the years since the Charleston conference, Internet and various “social media” solicitation have become widespread and NASCO members again started a discussion of the issues they faced in 1999 to jointly address the regulatory issues associated with the ever-changing landscape of charitable solicitation.

Since NASCO’s early days, it has conducted an annual conference, now attended by representatives from most state charity offices, the IRS, the FTC and the USPIS. Part of the conference is devoted to closed sessions at which the regulators learn from each other and from invited experts who give presentations on law and other issues of interest to the regulators. Attendees, especially those from states in which only one or two people are assigned to charities matters find the conference indispensable to their ability to enforce the laws of their jurisdictions.

At the public session at the NASCO annual conference, regulators are joined by representatives of the nonprofit sector, attorneys and accountants in private practice, academics and members of the press. That session is the foremost annual event at which a critical mass of regulators and the regulated community are in the same room and able to discuss issues of common interest. The agenda is robust and open exchanges between NASCO members and nonprofit practitioners and others take place throughout the day.⁵³

The Singlepoint Filer Project,⁵⁴ the latest NASCO-coordinated project, is a response to the new era of electronic filing and our continuing goal of reducing the filing burden for registrants. Today, although 40 states require registration and filing of annual reports, and the IRS has already implemented electronic filing, only a handful of states are equipped to accept filings electronically.⁵⁵ Most states still process mounds of paper filings from which, if recorded at all, data must be manually entered. Handling that paper and entering the data consumes the time of countless staff members and uses countless resources.

The Singlepoint Filer Project will create a portal through which each charity and fundraiser will be able to register and file annual reports simultaneously to the IRS and to all states in which they are required to register. All state regulators will have access to the filings and the data they contain. The cost and labor savings to the regulators and the charities will be enormous, and the quality of the data available to regulators and the public will be vastly improved,⁵⁶ allowing the regulators to focus on their primary role - regulating.

NASCO also maintains a website – managed by NASCO member volunteers – that includes links to state charity regulators’ offices and the laws they enforce, links to federal agencies and statutes, papers presented at its conferences, and proposed legislation. Although it

⁵² See <http://www.nasconet.org/wp-content/uploads/2011/05/Charleston-Principles-Final.pdf>

⁵³ See presentations from the 2012 NASCO conference at <http://www.nasconet.org/naagnasco-conference-to-discuss-emerging-trends>.

⁵⁴ See *NASCO Singlepoint Website Overview* at <http://www.nasconet.org/>; a collaboration of NASCO, the Urban Institute, the Columbia University National Attorney General Project and NAAG [right????]

⁵⁵ CA, CO, HI MI, NY

⁵⁶ See Hugh Jones paper *The Importance Of Transparency In the Governmental Regulation Of The Nonprofit Sector: Room For Improvement?*

contains extensive information for regulators and the regulated alike, staffing and funding would make it an even more valuable resource.

As NASCO has evolved and its reputation widened, members of NASCO have testified before Congress,⁵⁷ been invited to speak at major national conferences held by, among others, Independent Sector, Georgetown University Law School, Harvard University's Hauser Center, New York University's National Center on Philanthropy and the Law, the American Institute of Certified Public Accountants and the Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA). NASCO members are also frequent speakers at the local bar associations, CPA societies, nonprofits associations and universities.

As discussed above, NASCO members have supported the passage of nonprofit legislation in their sister states and amendments to the Pension Protection Act of 2006 ("PPA"). When the PPA provisions did not provide the anticipated ease of information sharing by the IRS, NASCO helped to coordinate the drafting of a letter to the Senate Finance Committee urging additional amendments to the PPA. Forty-three Attorneys General signed that letter urging statutory revisions to simplify the information sharing procedures.⁵⁸

All of NASCO's activities are conducted on a shoestring. Its only revenue is derived from registration fees from attendance at its annual conference. In recent years, most state agencies have cut down or seriously limited or eliminated their travel budgets, making it impossible for state charity regulators to attend the conference without financial aid. Fortunately, NASCO's partnership with the Columbia University's National State Attorney General's Project has resulted in the availability of some additional scholarships and, in some years, a small NASCO surplus has allowed for others.

While NASCO has existed for over three decades with minimal revenue and no staff, other funding sources must be identified if it is to grow and continue to provide support to its members and information to the nonprofit sector.

VII. WHAT IS THE TRAJECTORY?

Below are some suggestions as we move along the trajectory.

A. Technology

First and foremost is technology. In many offices, attorneys, accountants and investigators currently pour over financial reports creating spreadsheets, identifying board members, analyzing expenses, and preparing reports. Think of how their time and energy could be re-directed if that data were sitting on their computer screens when they arrive at their desks. The Singlepoint Filer Project will do just that and, at the same time, simplify reporting by charities, allowing them, too, to devote additional time and resources to their missions.

B. NASCO

⁵⁷ See <http://www.finance.senate.gov/hearings/hearing/?id=48ca4cce-afe1-db95-0fcb-8ff9255e780a>

⁵⁸ See Hugh Jones paper *The Importance Of Transparency In the Governmental Regulation Of The Nonprofit Sector: Room For Improvement?*

Funding sources for NASCO should be explored so it may expand its role as a convener of and resource for charity regulators. Though NASCO should not be solely an online organization - the benefits of in-person conferences cannot be overstated - support for periodic, targeted online training during the year is crucial since most existing Continuing Legal Education Courses around the country do not address the issues faced by and often unique to state charity regulators.

C. Increased Cooperation Between the States and the IRS Funding

As with other state agencies, many state charity regulators are faced with challenges in fulfilling their regulatory mandates while experiencing, at best, little or no increase in funding and, in many cases, decreased funding. In order for the states to effectively regulate charities and their fundraisers, they must have adequate funding.

Some obvious cost-saving comes with electronic filing which will allow resources currently used to process paper to be devoted to enforcement actions and increased outreach to the sector to aid in and encourage compliance. Ways to increase the revenues stream must also be explored. The possibility of using foundation excise taxes to support state charity regulators should be reconsidered again.

D. Collaboration/Education/Regulation - A Joint Effort for the Future

Given the realities of today's state and national economic situation it is doubtful resources for state charity officials will be increased sufficiently, if at all. It is therefore essential for regulators at both the state and national level continue to meet, collaborate, and exchange information with each other and those they regulate to develop efficiencies of enforcement and educational programs designed to insure to the extent possible that nonprofit organizations are well governed and manage their assets in a responsible manner. A combination of effective education and regulation of the nonprofit sector will help to protect the donating public from fraud and misuse of their donations by unscrupulous individuals and protect the charitable assets that benefit us all.