

LAND CONSERVATION LEGAL SERVICES

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MEMORANDUM

TO: _____ Board of Directors
FROM: Rob Levin
RE: Charitable Solicitation Registration Requirements
DATE: March 1, 2013
CC: _____, Executive Director

Background

_____ contacted me to request guidance on _____'s charitable solicitation registration requirements, especially with respect to states other than Maine. _____ currently has many members who use non-Maine contact information, and are presumably residents of various different states. _____ is currently registered to solicit in Maine and in Connecticut.

The particular question on which _____ seeks guidance is whether it must file charitable solicitation registrations in these other states. The purpose of this Memorandum is to help you answer that question. Please let me know if you have any follow-up questions or comments.

Analysis

The matter of charitable solicitation registration in multiple states is one that has confounded thousands of charitable organizations over the past decade or two. Unfortunately, the various state laws on the subject are quite unclear, and there is little guidance. In part because of this lack of clarity, there is widespread noncompliance throughout the nonprofit sector.

As the internet arrived on the scene in the 1990's, fundraising across state lines became virtually unavoidable. The National Association of State Charity Officials (NASCO) addressed the issue in a position paper entitled *The Charleston Principles, Guidelines on Charitable Solicitations Using the Internet*, adopted in 2001. Although the situation _____ faces of having handfuls of donors from different states is not exactly the same as internet fundraising, I believe that the Charleston Principles (attached to this

memo if anyone wants to become more familiar with the issues) can serve as useful guidance. Furthermore, although the Charleston Principles do not have the force of law (except in the two states of Tennessee and Colorado, as noted below), they are the closest thing we have to guidance on the law, as they were drafted by the very regulators who enforce the charitable solicitation laws.

What the Charleston Principles state is that for an organization soliciting contributions through an interactive website (i.e., a website that processes online donations), registration in a particular state is required if the organization either: “(i) *Specifically targets* persons physically located in the state for solicitation, or (ii) *Receives* contributions from the state on a *repeated and ongoing basis or a substantial basis* through its Web site.”

As for the first part of the test, barring any unusual circumstances, I assume that ____ is not specifically targeting individuals in any state other than Maine. In Subsection III.B.2.b, the Charleston Principles do elaborate on the term “specifically target,” and I invite you to read that language if you have any doubts.

Assuming the “specifically target” test is not operative, the determinative question becomes whether ____ receives “repeated and ongoing” or “substantial” contributions from any state other than Maine. Unfortunately, the Charleston Principles do not give specific guidance on what these terms mean. However, allow me to show you the entirety of Subsection III.B.2.c, for it is instructive in certain respects. This subsection provides:

To receive contributions from the state on a repeated and ongoing basis or a substantial basis means receiving contributions within the entity’s fiscal year, or relevant portion of a fiscal year, that are of sufficient volume to establish the regular or significant (as opposed to rare, isolated, or insubstantial) nature of those contributions. States should set, and communicate to the regulated entities, numerical levels at which it will regard this criterion as satisfied. Such numerical levels should define “repeated and ongoing” in terms of a number of contributors and “substantial” in terms of a total dollar amount of contributions or percentage of total contributions received by or on behalf of the charity. Meeting any threshold would give rise to a registration requirement but would not limit an enforcement action for deceptive solicitations. For example, a state might explain that an entity receives contributions on a repeated and ongoing basis if it receives at least one hundred online contributions at any time in a year and that it receives substantial contributions if it receives \$25,000, or a stated percentage of its total contributions, in online contributions in a year.

In particular, note that states are encouraged to give substance to these terms by establishing and communicating “numerical levels” in terms of number of donors and dollar amounts. However, based on my research, only two states have taken this

important step. In 2007, Tennessee passed regulations providing contributions are “regular and ongoing” if there are at least 100 online contributions in a year. Similarly, contributions are “substantial” if they total \$25,000 in a year. In effect, Tennessee simply adopted the example provided in the Charleston Principles. Colorado, in turn, set a “regular and ongoing” standard of at least 50 online contributions in a year, and a “substantial” threshold of \$25,000 or 1% of its total contributions, whichever is less. In the remaining 40 or so states with charitable solicitation laws, it is really anyone’s guess as to what level of contributions would be considered “regular and ongoing” or “substantial.” In light of these states’ failure to follow through on their own recommendations on establishing numerical levels, it would appear to be up to each charity to make its own good-faith interpretation of these terms.

As mentioned above, the Charleston Principles were established specifically to deal with internet fundraising, and ____ is trying to figure out what to do about non-internet fundraising. However, many of the same ideas behind the Charleston Principles apply equally, if not more so, to ____’s situation. First of all, it is likely the case that the vast majority of the donors with out-of-state mailing addresses also own (or rent) property in Maine. In other words, these donors don’t live in Montana, or New York, or Massachusetts, and just happen to be interested in the local work of _____. Rather, they support the work of _____ because of their seasonal residences in Maine. Second, _____’s work is entirely local. It is not conducting work outside of Maine, and it is not actively seeking donors from outside of Maine. Thus, both the donor’s and _____’s situations are very different from the problems presented of out-of-state donors giving to an organization with a nationally-focused mission and fundraising program.

Furthermore, several lawsuits have been brought that challenge the constitutionality of various aspects of charitable solicitation statutes. Based on my reading of this case law, I believe that there is a considerable chance that a strict interpretation of these statutes, requiring registration for very minimal out-of-state contacts between the donors and the charities, especially in light of the substantial in-state contacts, would not pass constitutional muster. In other words, if a state went after _____ for failing to register when it sends an annual appeal to a handful or a couple dozen donors who also have Maine residences or other substantial Maine connections, I think _____ would have a solid, credible argument that such enforcement would “offend traditional notions of fair play and substantial justice,” the standard set by the U.S. Supreme Court for determining when a state has jurisdiction over an out-of-state person.

Given the constitutional ambiguity and the lack of reasonable guidance from the states, I think that a practical approach for _____ to take is to follow the lead of the Charleston Principles and to make a good-faith determination of what amount of giving rises to the level of “regular and ongoing” or “substantial.” Clearly, a single donor making a donation of \$5 would not cross either of these thresholds. But where should you draw the lines? I think there are three reasonable approaches: First, you could follow the example of the Charleston Principles and the Tennessee regulations, and set your threshold at 100 contributions or \$25,000 in a given year. A somewhat more conservative option is to follow the Colorado standards of 50 contributions or the lesser

of \$25,000 or 1% of total contributions. A third, most conservative option is to use an even lower threshold, perhaps 25 contributors or \$15,000. It is my view that adopting any of these three sets of standards would meet the Board's responsibility for making a good faith determination.

According to contribution numbers sent from _____, _____ has 29 donors from Connecticut who contribute more than \$25,000 in total. Based on this combination of number of donors and the dollar amount, you have decided to register in that state. _____ also has 67 donors with a Massachusetts mailing addresses, although the dollar amount is below \$25,000. Of the 33 other states with _____ donor mailing addresses, no state is higher than 45, and many are in the single digits.

If you adopt the Tennessee/Charleston Principles example, then you would continue to register in Maine and Connecticut. If you followed the Colorado example and set the threshold at 50 donors, then you would also register in Massachusetts.

Ultimately, the decision of where to register is a question of risk tolerance for each land trust to consider, given the above-stated uncertainties. As part of the risk matrix, it is sensible to consider the repercussions of being found in violation of a state's statute. First off, let me say that I have conducted extensive research on the internet and spoken with an attorney who specializes in charitable solicitation law nationwide, as well as several land trust and nonprofit attorneys, and I have yet to find a single example of a state going after an out-of-state local land trust (or any charity that conducts business only in its home state) solely for failure to register. Nevertheless, it is always possible that a state regulator could take an unreasonable and arguably unconstitutional approach and find _____ in violation of that statute's solicitation statute simply for failing to register. If this were to occur, I believe that the most likely consequence would be to require registration proactively. At that point, _____ could decide to either challenge the interpretation of the statute (with the outside possibility of assistance from a third party group, such as the American Charities for Reasonable Fundraising Regulation – see www.charityreg.org), or it could yield and register in that particular state. I think it is very unlikely that any regulator would assess a monetary penalty or prohibit _____ from soliciting in that state once it registers.

As I stated at the outset, please let me know if you have any follow-up questions or comments.